VICTIMS OF CRIME: RESTORATION AND LEGAL CARE UNDER INDIAN CRIMINAL JURISPRUDENCE

THESIS SUBMITTED TO

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DOCTOR OF PHILOSOPHY

BY

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CERTIFICATE

I do hereby declare that this thesis entitled **"Victims of Crime: Restoration and Legal Care under Indian Criminal Jurisprudence"** for the award of the degree of Doctor of Philosophy is the record of the original research work carried out by me under the guidance and supervision of Dr. Balakrishnan K, Associate Professor, National University of Advanced Legal Studies. I further declare that this work has not previously formed the basis for the award of any degree, diploma, associateship, fellowship or any other title or recognition from any University/Institution.

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This is to certify that all the corrections and modifications suggested by the Research Committee in Pre-submission Seminar have been incorporated in this thesis entitled **"Victims of Crime: Restoration and Legal Care under Indian Criminal Jurisprudence"** submitted by Sathiyamurthy L.S. for the award of the Degree of Doctor of Philosophy.

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PREFACE

The civilized society from time immemorial has described certain acts harmful to society as crimes and sanctioned punishments. The quality of a civil society depends upon its criminal justice system, because it provides possible protection to every citizen and serves as a mechanism to prevent, control and punish crimes. The society in which there is less criminal activities will develop socially, economically and culturally and its people will meaningfully be in pursuit the happiness. Further, peace will also prevail among the citizens of the said human community. The Criminal Justice System (CJS) is primarily intended to create an orderly society and tranquility. The effective functioning of CJS reflects on the peace and development in the society. The Kings have exercised the powers to arrest the suspect, conduct trial and punish the perpetrator, among other penal measures to prevent and control the criminal activities. After the spread of democracy and adoption of Constitutional governance, States administered by the elected representatives have been dispensing criminal justice through its organs. The institutions and functionaries of criminal justice system, including police or other investigating agency, have been vested with powers to apprehend the accused, the court is conferred with the jurisdiction to determine the guilt and sentence the offender if convicted. The other side of such coercive measures, like arrest or sentencing process, is that they directly cause interference into the human rights of the individual. Therefore, such powers are vested only with the sovereign authorities and the higher or Constitutional courts have the powers to judicially review them.

In the olden days, the society was not structured as orderly as today and laws were not properly framed or sometimes framed but not implemented. So, the victim himself had to respond to a crime against him with, probably, another crime. If it was not possible due to lack of opportunity or strength, he tolerated it and resorted to forgiveness as a response. At a later stage, a person affected by the consequences of crime had to bring a civil or other legal action so as to claim relief from established authority. Still later, with considerable development in political, economic and social spheres, a welfare State took the responsibility to deal with a crime and, thus, the victim became dependent on the State for realizing his rights and consequential reliefs.

The criminal laws are framed to maintain balance between the rights of the individual and powers of the State. They facilitate a party affected by a crime to seek justice and make the offenders face penal censures. In modern justice systems, adopted by many jurisdictions in the world, especially the Common Law system, the process of criminal justice starts from information or registering of a crime till the final phase of its adjudication and follow up including imprisonment, parole, remission etc. The CJS consists of many functionaries like the police, prosecutor, courts, prison, probation authorities and it also involves many stakeholders. Among them, primary and indispensible are the following three stakeholders:

1. A person who is accused of having committed the crime - Accused / Offender
2. A person who directly bears the consequences of crime - Victim

3. A group of persons who are indirectly affected by the crime – Society

Justice rendered through pronouncements after an inquiry or trial in a criminal case should directly address the three stakeholders, who have interest and concern, without fail. If any stakeholder is left unheard or unconsidered and without being provided with possible minimum reliefs where appropriate, the adjudication and justice process would be incomplete and incomprehensive, and, therefore, it is not complete justice.

Traditionally, the adversarial criminal justice system responded to a crime with punishment, which was specifically addressed to the offender. The punishment makes an offender to suffer and expects to deter others. It is originally intended to rehabilitate the perpetrator of crime, but no specific policies or schemes were introduced to rehabilitate the sufferer of crime. The imposition of punishment does not serve as a measure to restore the victims so as to repair the harm, alleviate the pain or plight is the question raised by some of the jurists and academicians. Resultantly, a renewed thought that the victims are essential to address a crime comprehensively has led to steps to rediscover the victim within the domain of criminology and in the criminal justice system. The victim is also reclaiming his status as a stakeholder in the judicial adjudicatory process. The General Assembly of United Nations, by its Resolution 40/34 in 1989, recognizes the victim as a stakeholder and determines the rights entitled to and reliefs to be provided by the justice institutions. India, as a signatory to the UN Declaration, 1989 has also introduced amendments in the criminal laws to provide rights and reliefs.

This doctrinal study on victims of crime and their rights and reliefs focuses on the major criminal laws that constitute the framework of Criminal Justice Administration (CJA) in India. This is a research with a theoretical analysis about the concept of victim in comparison to the accused, as the other stakeholder, and comparative study of victim within Indian law and policies and with other jurisdictions. This study does not claim to cater to areas or make any inferences that may have any need for empirical data. In this research work the words ‘victims of crime’ and ‘crime victims’ are used interchangeably to be understood as the one and the same in all contexts.

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(Indian Journal of Criminology, Vol 48(1), 2020 pp1-14, ISSN: 0974-7249, www.isc70.org, Listed in the UGC Care List)

2. *Plea Bargaining: A non-trial Adjudication to Enhance Justice for Victims of Crime- Trends and Issues*

(Chapter of a book, Dr. Ananth Kumar Tripathi, (ed.) '*Criminal Justice System in India: Need for Systemic Changes*', ISBN: 978-81-89128-71-5, SSB, New Delhi (2016)

Abbreviations

ACJ	-	Accident Claims Journal
AIR	-	All India Reporter
Art	-	Article
CJA	-	Criminal Justice Administration
CJS	-	Criminal Justice System
CTC	-	Current Tamil Nadu Cases
Crl A	-	Criminal Appeal
Cr.P.C.	-	Code of Criminal Procedure, 1973
CVFC	-	Central Victim Compensation Fund
Dept	-	Department
DLSA	-	District Legal Services Authority
EIC	-	East India Company
Gov.	-	Government
HC	-	High Court
ICC	-	International Criminal Court
IEA	-	Indian Evidence Act, 1872
IPC	-	Indian Penal Code, 1860
JJ Act	-	The Juvenile Justice (Care and Protection of Children) Act, 2015
KLT	-	Kerala Law Times
LCI	-	Law Commission of India
LW	-	Law Weekly
Misc	-	Miscellaneous
MLJ	-	Madras Law Journal
NALSA	-	National Legal Services Authority
NCRB	-	National Crime Records Bureau

POSCO	-	Protection of Children from Sexual Offences Act, 2012
RJ	-	Restorative Justice
SAR	-	Supreme Appeal Reporter
SC&ST Act	-	The Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act 1989
SCC	-	Supreme Court Cases
Sec	-	Section
SLSA	-	State Legal Services Authority
SLP	-	Special Leave Petition
UN	-	United Nations
VCS	-	Victim Compensation Scheme
W A	-	Writ Appeal
W P	-	Writ Petition

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CHAPTER I

INTRODUCTION

'The only friend who follows men even after death is justice, for everything else is lost at the same time when the body perishes.'[1]

JUSTICE, a quality of being just and fair is the foundation of the universe. Pursuit of justice has been considered as the purpose and the sole aim of life by philosophers, religious heads, priests and creators of didactic literature. The texts and verses acknowledged as holy by religions around the world teach justice as a supreme and lofty goal of life, and causing injustice to others is treated as a sin, forbidden by God. In addition to the religious texts, great thinkers and reformers have also advocated for justice. Even before the codification of modern law, justice has been put on the highest pedestal of human life. People, irrespective of their faith, beliefs and political ideologies, have accepted justice as a core virtue and value of life. The wealth or pleasures opposed to justice and righteousness have always been disapproved of by the people.

As described by Daniel Webster,

> "Justice, Sir, is the greatest interest of man on earth. It is the ligament which holds civilised beings and civilised nations together. Wherever her temple stands, and so long as it is duly honoured, there is a foundation for social security, general happiness and the improvement and progress of our race. And whoever labours on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome

[1] MANU, Chapter VIII, Verse 17

> still higher in the skies, connects himself in name and fame and character with that which is and must be as durable as the frame of human society."[2]

Justice reflects civilization, culture and the quality or living standard of people. Therefore, in the ancient world, the King who was supposed to govern the land and its citizens retained the task of administering justice. The dispensation of justice to the deserving subjects and those whose justiciable rights were infringed or claims were denied, was given the highest priority. The longing for justice is a man's eternal happiness, one that man cannot find alone, as an isolated individual, and hence seeks it in society. Justice is social happiness. It is happiness guaranteed by a social order.[3] The concept of justice has been viewed according to the perspectives of an individual and the ideology he follows. It has been basically understood on three different approaches. They are:

1) Justice means maximising utility or welfare – or the greatest happiness of the greatest numbers;
2) Justice means respecting freedom of choice – either the actual choices people make in free markets or the hypothetical choices people would make in an original position of equality;
3) Justice involves cultivating virtues and reasoning about the common good.[4]

The revolutions of the 18 - 19th Centuries in the West, the independence movements for freedom from colonialism in the Asian countries, the other

[2] Talk delivered by Daniel Webster, an American Statesman on Mr. Justice Story an American lawyer and Jurist, See *Judiciary, Judges and the Administration of Justice* by Justice R Banumathi, Thomson Reuters (2020) P 3
[3] Hans Kelsen, Berkeley, *What Is Justice?,* University of California Press, 1957
[4] Michael J Sandel, *Justice What's the Right Thing to Do?* Penguin Books (2009) P 260

movements' and initiatives against racial discriminations reflect that human civilization have made a long journey to secure justice, which is an inalienable concept, according to their respective political thoughts or social philosophies.

In a study about the victims of crime and their rights, it is a pre-requisite to know the concept of justice and the system that is required to dispense the same, people who deserve to avail themselves of it, and what could be understood as appropriate, comprehensive, and complete justice to such seekers of it. This chapter, *inter alia*, gives an introduction to justice, including criminal, its administration and the stakeholders in it. In addition, the chapter also consists of the framework of the thesis, purposes of the study, research methodology, and hypothesis. It briefly introduces the content of the all other chapters of this research.

1.1 Justice: Indian Perspective

Justice can be viewed from various standpoints. It has been regarded as a religious and social value. It has also been conceived as a legal ideal. The American philosopher John Rawls, who rediscovered the theory of justice as fairness, stated thus:

> The concept of justice I take to be defined by the role of its principles in assuming rights and duties in defining the appropriate division of social advantages. A conception of justice is an interpretation of this role.[5]

Understanding the basic concept of justice in accordance with Indian tradition would help to study criminal justice and laws in India, and the position or status of the victim in the criminal justice dispensation.

[5] John Rawls, *A Theory of Justice*, Oxford (1972) P 10

In India, the concept of justice is wide and it covers practically the whole span of human life and activity. Life is regulated by *Dharma* and consists of a bundle of duties. The *Dharmasatras* declare some acts as sin, which is purely individual in character, *e.g.* forgetting the *Vedas* studied by a person and not tending to the *Vedic* fire consecrated by him, studying bad books, learning the *Vedas* from a paid teacher, sleeping beyond sunrise and at sunset, etc. These acts are not punishable by the King. Inclusion of such acts into the category of blamable acts indicates that those who wrote the *Dharmasastra* took care to see that the development of the individual was properly regulated so that he would become a useful member of the society. The individual was not free with regard to his education and other disciplines of life. The concept of *Dharma* was so comprehensive that it governed the whole life of the individual.

The Supreme Court quoted the former President of India, Dr. Shankar Dayal Sharma, who observed that the concept of *Dharma* has been in the Indian society from time immemorial.[6] It has been explained as follows:

> "*Dharma* is for the stability of the society, the maintenance of social order and the general well-being and progress of humankind. Whatever conduces to the fulfilment of these objects is *Dharma*; that is definite."

In ancient India people identified *Dharma* with truth. There is nothing higher than *Dharma*. Even a weak man hopes to prevail over a strong man on the strength of *Dharma*, just as (he prevails over a wrong-doer) with the help of the King. Therefore, a man who declares the truth is said to be declaring

[6] *A.S. Narayana Deekshitulu* v.. *State of Andhra Pradesh & others* 1765 AIR 1996 SC

Dharma, and one who declares *Dharma* is said to be speaking the truth.[7] In India, justice has been considered as an eternal value, and justice dispensation was recognised as a sovereign function of the King. Justice is also viewed as *Dharma* and it is the only value that a human can possess even after death. The *Vedas* were the primary source for governing public order and justice in the ancient India. The *Rig*, *Yajur*, *Sama* and *Atharva* are the four Vedas preserved by Hindus as a guiding text for life and governance of the kingdom.

Dr Amartya Sen, in his great work, *The Idea of justice,* has explained about justice and its uniqueness in the Indian perspectives. He also warned against justice which may be prevailed upon by muscle power or any other mighty position. He observed that all the legal systems that were in force in ancient India, and prevails in the present 21st century, are oriented towards justice, which is the only purpose and object. Human history has been described as a tale of the search of mankind for absolute justice, and its failure. In understanding the contrast between an 'arrangement – focused' and a 'realisation – focused' view of justice, it is useful to invoke an old distinction from Sanskrit literature on ethics and jurisprudence. Sen tries to distinguish two different words – *niti* and *nyaya* – both of which stand for justice in classical Sanskrit. Among the principal uses of the term *niti* are organisational propriety and behavioural correctness. In contrast with *niti,* the term *nyaya* stands for a comprehensive concept of realised justice. In that line of vision, the roles of institutions, rules and organisation, important as they are, have to

[7] *Ibid*.

be assessed in the broader and more inclusive perspective of *nyaya*, which is inescapably linked with the world that actually emerges, not just the institutions or rules we happen to have. To consider a particular application, early Indian legal theorists spoke disparagingly of what they called *matsyanaya*, "justice in the world of fish," where a big fish can freely devour a small fish. We are warned that avoiding *matsyanaya* must be an essential part of justice, and it is crucial to ensure that the 'justice of fish' is not allowed to invade the world of human beings.[8]

Justice has been viewed in its multi-dimensions by Sri K Parasaran, former Attorney General of India and a Sanskrit scholar. Justice is a promise for the innocent, while it is a moral redemption for the perpetrator of crime. Justice is emotive for the stakeholder, while it is psychological for the victim. Sufferance is the cry for justice, while victimisation is the cry towards justice. Justice is cosmic for scripture, other-worldly for the ignorant, and pragmatic for post-enlightenment reasoning. Justice is the spark in the powder keg of the human law; it is the cascade of empowering ideas, and the deliverance for the dead letter of misdeed. It is oceanic embrace for the realisation of natural order, and the top spot in the hierarchy of socio-legal principles. Its appeal is everyday and is an utterance and hope. The lamp of justice flickers in the minds of every human being, and it becomes a conflagration when it is tossed like a top in the direction of vice. Virtue is on the obverse of justice and on its reverse is Law. Sometimes, poetic and *karmic* justice wins over the tide of

[8] Amartya Sen, *The Idea of Justice*. Penguin Books (2009) P 20. See also the essay *Amartya Sen*, What Should Keep Us Awake At Night *from the book* The Country of First Boys, OUP, 2015

time. Flanked by reason and conscience, the giants of millennial thought, it is held together by collective memory and the charm of the conscious intellect. Its heart beats with the tone and tenor of all creation, and its spine is the flag staff of all the moral ascendancy of human civilisation. Indeed it is the highest of all human traditions, the diadem in the brow of cosmic sovereignty and is ably ministered by just punishment and penalty. The various traditions of the common law, civil law, *lex* scripts and non scripts are worshippers in its Hall of audience, where judges and lawyers act as priests officiating in the daily rituals of rendering just opinion and decision.[9]

The Kings and executives adjudicated upon the legal disputes and administered justice before the separation of judiciary from the executive. The Constitutions of modern democracies have provisions for the separation of judiciary from the executive, and the framers of the Indian Constitution, realising the significance of an independent judiciary, have made it the duty of the State to separate the judiciary from the State.[10]

After the codification of law and adoption of the Constitution, the concept of justice has been transformed, and it is shaped by the tenets of constitutional values. How justice has to be rendered in modern India has been explained by the Supreme Court in *Supreme Court Advocates-on-Record Association* v. *Union of India,*[11] after referring the dictums laid down in the decision in a previous case in *Subash Sharma* v. *Union of India.*[12] As per the

[9] K. Parasaran, *Law and Dharma*, Sastra University Publication, (2016) P 236
[10] Article 50, Constitution of India
[11] (1993) 4 SCC 441
[12] (1991) Supp 1 SCC 574

decisions, justice has to be administered through the courts, and such administration relates to social, economic and political aspects of justice as stipulated in the preamble of the Constitution of India. Justice is a core principle and supreme goal, and as observed by Michael J Sandel, it is inescapably judgmental. In a knowledge based society it is also a subject for criticism and interpretation.[13]

1.2 Law and Justice

Law consists of a set of moral principles, valid rules, commands, and it is fundamentally an instrument to secure justice. It is generally said that laws are linguistic matters but governed by logic. Prior to codification of laws, they were in existence in the form of religious commands, rules of sovereign authorities, preaching of the heads of the clans or groups and custom. Further, law making was considered an important task and it was assigned to wise and unbiased men with ethical values. A striking example of early law-making may be found in the laws of the Athenian statesman Solon in 6th century BC. Regarded by the ancient Greeks as one of the Seven Wise Men, he was granted the authority to legislate to assist Athens in overcoming its social and economic crisis. His laws were extensive, including significant reforms to the economy, politics, marriage, and crime and punishment. He divided Athenian society into five classes based on financial standing. One's obligations (including tax liability) depended on one's class. He cancelled debts for which the peasants had pledged their land or their bodies, thereby terminating the institution of

[13] Michael J Sandel, *Justice What's the Right thing to Do?* Penguin Books (2009) P 261

serfdom.[14] Law organises and controls the power of the authorities and protects the rights of the individual, maintains equality and serves as a binding force. The proximity between law and justice is explained by Antony D' Amato as follows:

> 'LAW — officially promulgated rules of conduct, backed by State-enforced penalties for their transgression.
> JUSTICE — rendering to each person what he or she deserves.'[15]

The makers of law were wise men of integrity possessing good knowledge of the customs, and moral values. The rules framed for the welfare of society became a law with the approval of the King or ruler of the land, and becomes a binding force that the subjects were made liable to follow and adhere to.

After the introduction of Constitutional laws, the Constitution occupies a supreme position among the laws enacted by the representatives of people. Any statute or rule inconsistent with or in derogation of the constitutional law is declared as *ultra vires*. The State or any other authority cannot make any law contrary to the provisions of the Constitution, and laws or regulations which take away or abridge the right conferred by the Constitution are void. This principle has been accepted by all constitutions and it is also embedded in the Indian Constitution.[16] As it is universally recognised that law paves the way for justice, which is the ultimate goal, the courts, after understanding the

[14] Raymond Wacks, *Law A Very Short Introduction*, Oxford (2008) P 5
[15] https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/2, visited on 11 April, 2021
[16] Article 13, Constitution of India

necessity to reach out to the people, have made efforts to render justice through law. The European Court of Human Rights has held that the law must be adequately accessible.[17] The protection guarded to the individual and society by justice can be extended only through law. Therefore, law is regarded as the highest standard, and all persons and authorities are bound by it. The basic idea that laws are created for the pursuit of justice has been continuously regarded as the highest principle, more so, after the advent of modern democracy. In a welfare State, law is the system of State-enforced rules by which relatively large civil societies and political entities operate. This programmed social functioning is backed up by the exercise of power by a politically - sovereign body.[18] Justice is the object of all laws, and the purpose of justice is the security of life, liberty and the pursuit of happiness. Justice and law are two parallel and interlinked factors in a welfare State. Further, laws pave the way and create access to secure justice. Therefore, it is generally accepted that justice is a goal that can be achieved by the law.

1.3 Law of Wrongs: Crimes and Tort or *Delict*

Crime does not have a universal definition. However, it is defined appropriately by each country according to their laws. Crime, has, as its ingredient generally, a mental element *(mens rea)* and the action (*actus reus*). Tort may overlap or be a part of crime *i.e.* crime may constitute tort as a part. Crime may also be considered as the extended form of tort, followed by sentence being awarded on being convicted. The only remedy available for tort

[17] *Sunday Times* v. *United Kingdom* (1979) 2 EHRR 245
[18] Norman F Cantor, *Imagining the Law,* Macmillan, (2000) P 1

is compensation in the form of money, regardless of its nature. Compensation is scaled with the severity of the harm inflicted. In general, tort law necessitates harm to be a pre-requisite. Criminal law need not have such pre-requisite and instead it may penalise acts which are harmful, immoral, the acts which are dangerous in nature, but may not necessarily cause a harm, etc. For a crime, the punishment is severe as it is in the form of sentences, while tort has compensation as a remedy. As torts fall under civil wrong, its proceedings are heard in a civil court, in contrast to crimes that are tried in a criminal court.[19]

Tort means a conduct that harms other people or their property. Unlike a contract, which has its principal goal as the keeping of promises, tort law protects a range of interests. The law provides remedies, pre-emptive and compensatory, for conduct that causes harm either intentionally or negligently. The latter has become the principal focus of modern tort law. Accidents will happen, but where they are the consequence of other's negligence, one may be able to recover damages to recompense one's loss.[20] The tort laws are called "delicts" (Latin *delictum*) in the Continental Legal system. A *delict* is a civil wrong which includes injury to property, reputation, privacy etc., and the injured party can claim compensation in civil proceedings under the said system.

Torts are classified under three types – Intentional, Negligent and Strict Liability torts. Intentional torts include acts which are done intentionally

[19] Paranjape N V, *Crime and Punishment Trends and Reflections*, Lexis Nexis (2016) P 17

[20] So, for example, if I am run over by your car, and I can prove that you were driving negligently; I may be awarded damages to cover the cost of my hospital treatment, the money I lost through being away from work, and my suffering. Raymond Wacks, *Law A Very Short Introduction*, Oxford (2008) P 44

causing damage to the person. An example would be defamation, where it is done with the intention of damaging the reputation of an individual. Person who act without care or are careless fall under the category of torts on the ground of negligence. Strict liability torts are the ones that cause harm or damage to society; an example would be a chemical manufacturing company releasing toxic gas that can pose a serious health hazard to the people residing around the locality. Criminal law and tort law are distinct in perspective. Criminal law functions in a way that the punishment imposed should fit the type of crime committed and compensation may also be awarded according to the degree of harm inflicted. But in tort law, compensation will be the only resolution, where it is granted by measuring the injury caused to the plaintiff.

1.4 Tort - A Private Wrong

Both in common and legal parlance, a wrong is anything done or omitted, contrary to a legal duty, and gives rise to liability. If a violation is non-criminal, such as breach of contract, deficiency in performing a duty, it is a civil wrong. Whereas, an act prohibited or an omission from legal duty or obligation which affects the individual or the community at large, and deals with a proceedings in which the State itself is a party, is considered as public wrong. The civil wrongs are often private in nature, and compensation is the remedy in most of the jurisdictions. Among wrongs, the civil wrongs for which pecuniary damages may be awarded as a remedy are considered as a tort. In the beginning a crime and tort were not properly distinguished by society. The theory of public wrong was not known, and every crime was considered a

private wrong; the structured differences between private wrong and public wrong were also not properly understood, and consequently every crime was viewed as harm caused to an individual.

William Blackstone had introduced the idea that crimes are public wrongs. According to Blackstone, an infringement or privation of civil rights, which belong to individuals, was considered merely as individual harm, while public wrong refers to breach and violation of public rights.[21] The public wrong not only affects the individual expressly, but also affects the community. Therefore, society viewed it more seriously than the private wrong or tort, and the concept that the public wrong as a crime gained strength after its recognition in the Common Law jurisdiction. As per the Common Law, a victim is entitled to seek redressal for grievances and pursue justice for the harm caused to him, either through criminal law or tort law. However, tort law was considered inadequate as the victim's concurrence to sue the offender was necessary. It was left to the victim to decide whether to bring a claim or not. Further, harm was a pre-requisite to a remedy under tort law. It is also an important factor that compensation was the only remedy for the victim. Crime carries the intention to inflict harm on a person or society. Tort occurs predominantly due to negligence, and it is rarely intentional. Considering the relief of compensation for the acts comes within the purview of tort, Sir Henry Maine commented that the penal law of ancient communities is not the law of crimes, it is the law of wrongs or to use the English technical word, of 'tort'.[22]

[21] William Blackstone, *Commentaries on Law of England* Oxford, (1765) P 5
[22] See Sir Henry Maine, *Ancient Law,* Oxford University Press (1946)

Under the circumstances noted above, the theory of public wrong gained momentum and the criminal law, which makes the State bound to take action against the wrongdoer, was given priority over tort law. The criminal law was also considered as a convenient and comprehensive mechanism because it punishes the acts that are harmful to society, and sanctions strict legal censure against the offender.

1.5 Criminal Law

Crime is inevitable in a world, more so bounded by revolutionary developments, including technology. As crime will be a part of futuristic society also, it certainly brings about anxiety and turmoil in terms of pointing to the right direction. So, it is of utmost importance to analyse the reason behind each crime and to penalise the accused. Crime is a wrong prohibited by law. It primarily harms an individual by a serious invasion of rights and liberties guaranteed to him/her. Similarly, it also causes harm and damage to society. There is a legal fiction that crimes disturb the peace of the sovereign. Under the Common Law, crime has been considered as an act against social order. The Supreme Court in India has observed that the purpose of criminal justice is to protect the rights of individuals and the State against the intentional invasion of criminals who violate the basic norms of society. In a modern welfare State, this protection is sought to be achieved and ensured by punishing the accused in accordance with the provisions of law. To ensure that innocent persons are not victimised, the accused has been granted certain basic rights and privileges to defend himself before he is condemned. In case the accused is

found guilty he is punished and kept in prison, including with an object of reforming him. The Courts have, from time to time, directed the State authorities to provide all the necessary facilities and ensure that the human rights of criminals are not violated.[23] Therefore, criminal law addresses the concerns of the individual person who is the perpetrator, and the sufferer of crime, and the common people to whom harm is caused by the disturbance of tranquillity and breach of law.

Criminal law is a symbol of civilization, because it concerns itself with the human in all aspects, including the body, property, safety, security and many other factors relating to life and society. In a society where there were no ethics and values, "an eye for an eye and a tooth for a tooth" was the rule. The revenge theory, which by today's standards is an uncivilised process, was in practice during the primitive days. The doctrine of 'Eye for an Eye' deeply embedded in the culture as an idea that those people who do bad things deserve to suffer.[24] Before the institutionalisation of Criminal Justice Administration (CJA) victims were forced to take blood revenge against the offender. A person who breaks the law by an intentional overt act or omission that can be punished is an accused. The accused person should have breached a law in force, and his action or omission also should have caused damage or destruction to the property or caused harm, or at least conspired to injure someone else. In the human rights perspective, a crime violates the basic human right granted to a human kind.

[23] *D. K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416

[24] Raoul Martinez, *Creating Freedom, Power, Control and the Fight For Our Future*, Canon gate Books, Edinburgh,2017 P 30

Criminal law is absolutely inevitable in a welfare State to maintain law and order. Therefore, jurists expect criminal law to be strong and specific in content to be implemented without any deviations. Criminal laws are basically framed to protect the individuals from loss or harm and to safeguard the State from the intentional invasion by enemies to disturb the tranquillity.

The special feature of criminal law is the prescription and formulation of procedure for determination of the guilt. The body of rules which defines an act or omission or behaviours harmful to the individual and to all righteous members of society is called substantive law. The definition for the Crime and the Punishment to be imposed upon the offender are suggested by the said substantive law. The investigation and the way and procedure to be followed while determining the guilt or innocence, are prescribed in the procedural law also known as adjective law. The criminal law is a blend of both substantive and adjective laws.

One patent purpose of criminal law is to control the conduct of persons. More specifically, criminal law tends to be concerned, to prevent any conduct which directly or indirectly causes substantial harm, trouble or annoyance to other members of society where such conduct lacks justification. Criminal law might be understood then as one institution which constructs outer limits of permissible behaviour in society, and polices those limits by imposing painful sanctions and social stigma on those who cross them. It ensures that people stay within certain outer limits. Criminal law is not really interested in how members of society live their everyday lives. That is to say, criminal law is not

in general the sort of institution that tends to regulate the tiny details of everyday behaviour.[25] But still it closely touches and concerns man in the all major affairs in his life. The concept of law in ancient Indian Jurisprudence was predominantly of comprehensive nature.[26] In the ancient criminal laws, among the offences, assault, theft, robbery, false evidence, slander, criminal breach of trust, cheating, adultery and rape were recognised as grievous offences. The King protected his subjects who in turn owed him allegiance and paid him revenue. If a criminal was fined, the fine went to the King's treasury, and was not given as compensation to the injured party.[27] The criminal laws are framed and have been in existence to protect the basic and inalienable rights of human beings. The operation of the criminal law required definition with explanation to make a particular act an offence to fix the criminal liability upon a person and to sanction formal legal condemnation. The criminal law reflects the values of society.

Before the advent of writings and literature, laws existed in the form of customs. The jurists from the Western world have acknowledged the *Code of Hammurabi,* created by the Sixth King of Babylon in about 1760 BC, as a first written code.[28] The Code contains provisions relating to punishments for murder, perjury, causing damage to house etc., The Western countries, thoughmany have followed the Common Law System that originated from the

[25] Jerry Johnstone & Tony Ward, *Law and Crime Key approaches to Criminology,* Sage (2010) p 7

[26] S D Sharma, *Administration of Justice in Ancient India*, Mohan Law House, New Delhi (2019) P 58

[27] Ratanlal & Dhirajlal, *The Indian Penal Code,* Volume I, LexisNexis 2016, P. 1

[28] The Code of Hammurabi, engraved in the black stone slab in *Akkadian* language. It was discovered by the archaeologists in 1901and being preserved in the Louvre Museum, Paris, France.

United Kingdom, have revamped their criminal justice administration by introducing suitable amendments in the criminal laws and also enacting necessary new laws to provide relief to the person who suffered because of the crime.

1.6 Criminal Justice Administration (CJA)

Criminal Justice Administration (CJA) is to enforce the standards of human conduct necessary for the welfare of society. It protects the weak from the invasion against their basic rights, liberty, privacy and other legal or constitutional guarantees. It works by apprehending, prosecuting, convicting and sentencing the lawbreakers, and thereby safeguards the interest of society. The CJA dispels fear of the people and restores conducive social living conditions. Therefore, it lies at the heart of any society. The well-defined rights of people and the State prescribed rules of conduct, punishment against the violations of laws and penal initiatives are implemented through the CJA. The main aim of the administration of criminal justice is to create a harmless society so that people may live in peace and harmony. Every society is inclined to enforce minimum standards of human conduct which protects the individual and the community. The methods which are applied to fulfil this goal are prosecution, conviction and sentence. These measures are directed upon such persons who violate the rules and laws made by society and the State. The administration of criminal justice system creates a peaceful atmosphere in society and State. It creates an atmosphere where the offender who goes on to commit crimes will be removed from society and sent to jail.[29]

[29] A K Vishwakarma, *Criminal Justice Administration and Victims of Crime,* New Royal Book Company, Lucknow (2015) P 22

The administration of justice is a device and a scale adopted by society to measure the civilisation and standard of life. Since CJA particularly touches upon every aspect of human life, it has been considered as a sovereign function, and the Court which is the organ of the State, is empowered to render justice. The Criminal Court is the core of the CJA, as it is bestowed with, takes on and is conferred with powers to inquire, conduct trial, determine the guilt and impose punishment upon the wrong-doers. The Criminal Courts, in their task of administering justice, have the powers to supervise the process of investigation, detention in prison, and are also conferred with jurisdiction to supervise the investigating agencies for the purpose of safeguarding the interest of society.

The criminal justice as administered by the institution by applying the criminal laws considers punishment as the sole and important object. Accordingly, the penal laws are drafted, and the courts after trial, convict the guilty with imprisonment or fine, which are prescribed as panacea for the prevention and control of crime, and restoration of public peace. The punishment makes the offender suffer physically and mentally for the offence committed by him. But the conviction and sentence imposed upon the convict would only convince the sufferer as to the extent of the prevalence of rule of law, and society in general about the existence of a mechanism in maintaining the peace or law and order. Except for these general aspects, punishments would not help in the process of restoring the victim to pre-crime stage or compensate the victim in any way. The punishments also do not specifically

make the victim feel secure or heal the wounds caused by the crime. Under the circumstances, the jurisprudence of penology has repeatedly faced the question whether the criminal justice rendered by the institutions are comprehensive or complete, and whether they addresses the needs of both the accused and victim. It has also mooted a debate for bringing about comprehensive and complete justice to both society and the victim. This modern approach has created the need to re-look the concept of criminal justice, and imperative need for it to be comprehensive, fulfilling the needs of the stakeholders, particularly the victim, who has directly suffered loss, injury and agony caused by the crime.

1.7 Stakeholders of CJA

As stated above, in a developed modern democracy, criminal justice system is a creation of State, and its primary objects are prevention and control of crime for maintaining public tranquillity. CJA has been functioning with the inter-disciplinary approaches and collaborating with many stakeholders. Under the Common Law, in the CJA, it may appear that there are only two parties, the State and the accused. But, there are multiple stakeholders involved in the justice administration. The 11th Edition of Black's Law Dictionary defines the term stakeholder as a person who has interest or concern in the success or failure of an organisation of system, strategy or who is affected by a course of action.[30] In the process of pursuing criminal justice, right from informing the police about the occurrence of a crime to lodging the offender in prison after conviction on imposition of a sentence, there are as many as seven key and indispensable stakeholders playing their respective roles. They are:

[30] Black's Law Dictionary, 11th Edition, Thomson Reuters (1995)

1. Investigating Agency (Police)
2. Prosecutor
3. Defence Lawyer
4. Court
5. Prison
6. Accused
7. Victim.

Among these stakeholders, the court and prison are institutions and form part of the CJA. The judicial process, from the receipt of First Information Report (FIR), remand of accused to judicial custody, enlargement on bail, supervision of investigation, recording of confession, trial for the purpose of determining the guilt or innocence of the accused, imposing punishment on conviction and, post – conviction, judicial review of arbitrary remission or commutation of sentence granted by executive, are the duties of the court.

The prison is yet another institution involved in the correctional process which includes the reformation and rehabilitation of offenders. Both the institutions have been playing pivotal roles in crime control, maintenance of law and order, protection of rights and liberty of individuals and the dignity of prisoners.

It is observed that the victim of crime, one of the stakeholders of the CJA, has been the "forgotten man" of the Criminal Justice System.[31] The lack of recognition or systemic ignorance about the victims among the jurists and

[31] Ofori-Dua, Kwadwo & Nachinaab, John & Nimako, Richard, *Victims Forgotten Party in Criminal Justice System: The Perceptions and Experience of Crime Victims in Kumasi Metropolis in Ghana*, Journal of Victimology and Victim Justice (2019) Vol 2, P 109-128. DOI: 10.1177/2516606919885516.

criminologists is astonishing, given that the criminal justice system, as we know it today, would collapse if their cooperation was not forthcoming. The victim's experiences with the professionals operating the system, police, lawyers, court officials and the judges/magistrates who decide the case are rarely considered, although they would affect the formation of definite attitudes on the part of the victim towards that system. If victims come to regard their treatment as too stressful, demeaning, unfair, distorting of reality, too remote or too little concerned with their own rights, feelings, and interests or if decisions are made which are unsatisfactory, it is possible that this "secondary victimisation" by the system may lead to disenchantment, disinterest and future non-cooperation, not only by the victim, but also by his friends and relatives.[32]

The present study is an endeavour to establish that the victim is an integral part of criminal justice dispensation and he/she has to be listened to by the institutions dealing with crime and justice.

The experts in Criminology Bloy and Parry's in their masterpiece, *'Principles of Criminal Law'* have opined that the law that provides relief to all parties including victims and witnesses will be the criminal law for the new millennium:

> "What can be reasonably expected from the criminal law at the start of the new millennium? It is a system that is under the microscope at various levels and for a number of well documented reasons. In December 1999, the Lord Chancellor announced a Criminal Courts Review to be undertaken by Auld LJ. Its purpose is to:

[32] Bharat B. Das, *Victims in the Criminal Justice System,* APH Publishing Corporation, New Delhi, (1997) P.121.

> ... review ... the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law."[33]

They have observed that the future of the criminal laws and justice to be rendered by the Criminal Justice Institutions would not only be the imposing of penal sanction upon the offender, but also providing a sigh of relief to all its stakeholders particularly the victim and that would be efficient and comprehensive justice.

1.8 Need of the study about victim

There are volumes of written texts, and research theses and findings by researchers and scholars from the faculties of law, sociology, criminology, penology and other inter-disciplinary researches on the role of the police, defence and the rights of the accused person, with valuable suggestions. But there is inadequate attention paid to the victim, who is a by-product of crime. As observed by Gerald R. Ford, the former President of the United States (1975),

> '… for too long, the law has centred its attention more on the rights of criminals than on the victims of crimes. It is high time to reverse this trend and put the highest priority on the victims.'[34]

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[33] Mike Molan, Denis Lanser and Duncan Bloy, *Bloy and Parry's Principles of Criminal Law,* Cavendish Publishing Ltd (2000) P1.

[34] A Special Message to the Congress on Crime, by Gerald R. Ford delivered on 19 June, 1975, quoted by Ahmad Siddique, *Criminology : Problem and Perspective*, Eastern Book

Victims are the ones who upkeep the criminal justice system, as they begin the cycle by filing a complaint about the crime perpetrated on them, and later being a witness to lend support to the police.

> 'The time has come to rethink our attitudes towards victims and all that the State should have but has not done for them, a time that reminds us that we are forgetting the millennia old rule that the victim should never become the judge. For if this happens, the victim may cause more injustice than he has suffered himself.'[35]

Therefore, excluding the victims would not bring the crime or its consequences into full attention. A research study on how to accommodate the victim without being detrimental to the existing criminal justice rendering mechanism would be extremely useful to comprehensively understand crime and address the concern of its primary stakeholders. In this context, research on victims of crime is imperative in the domain of legal research.

A research is an active, diligent and systematic process of enquiry in order to discover, interpret or revise facts, events, behaviours or theories as well as to make practical applications of these theories.[36] It is a systematic process of inquiry, or a scholarly investigation carried out by applying the body of rules. It is a diligent process to discover a fact or revise an existing fact. The research in law is an important component of the process of law reform.[37] Legal research about any specific legislation touching upon the definition of

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Co., Lucknow (1999) P 504

[35] D Petrovec, *Resurrection of Victims*, 4 Eur. J. Crime, Crim L. & Crim Just. 381 (1996) contents downloaded from *Hein online* on 14 May, 2018

[36] Rattan Singh, *Legal Research Methodology,* Lexis Nexis India, (2013) Pp 5-6

[37] Bakshi, P.M., *Legal Research and Law Reform,* in Verma, S.K. and Afzalwani, M. (ed.), *Legal Research and Methodology,* Indian Law Institute, New Delhi, 2001, P. 111 .

the term victim, or judicial pronouncement on the victims' rights to participation, entitlement of reliefs, or any other relevant areas would help to prevent the abuse and ensure proper application of law, many a times similar to laws existing in other jurisdictions. The result or suggestions of the research on law often help the courts in the task of proper interpretation according to the aims and objectives of the legislation. Further, research may provide guidance to the legislatures and draftsmen for framing laws and policies to cater to the legal and social requirements of the people.

In the above context, research about the victims of crime, who are the sufferers and stakeholders of Justice has emerged as an imperative need in the present scenario. The study would help to ascertain whether the concept of victim and definition of victim are properly incorporated or adopted in the CJA in India for promoting internationally recognised rights of victims of crime. Further, the study will propose and suggest areas where the criminal justice institutions could address the plight of the victims better.

1.9 Purpose of the Study

Victims have broadly been classified into two categories (1) Criminological victims and (2) Non-criminological victims. In common parlance, any person harmed by a crime or tort or civil or natural disaster is considered as a victim. The passenger or pedestrian who is injured in a road crash is a victim, and any workman sustaining physical injuries or succumbing to injuries is also a victim. But they are not victims of crime, as their sufferings are the result of negligent or civil wrongs. For the purpose of this study, a

person suffering physical injuries or mental agony or other disablements by another person's commission or omission of an act prohibited and declared as a crime by the penal law, is considered a victim of crime.

Among the stakeholders of the CJA, the present research will confine only to criminological victims, and the purpose is to bring out ways whereby the victim's needs and rights could be addressed without disturbing the rights of the accused, and without causing any deviations from the existing framework of the criminal justice system vis-à-vis other stakeholders.

1.10 Review of Literature

The present study on victims of crime is a doctrinal research. As is a theoretical research, the Central Acts, State Laws, Schemes, legal texts, commentaries are used as sources to collect facts and thoughts. Though several books and online materials have been carefully examined by the researcher, extremely important books and their features are given in brief in this review.

The following three books have been useful to the researcher to understand the basic concepts of justice, and how justice being approached by the jurisprudents belongs to various schools of law

(1) John Rawls, *The Theory of Justice*, Harvard University (1990)
(2) John Rawls, *Justice as Fairness*, Cambridge (2001)
(3) Amartya Sen, *The Idea of Justice*, Penguin Books, 2010

The above works give an idea about the justice, its stakeholders and the persons deserving to avail themselves of justice. Two basic thoughts are relevant to refer in a research study on the victims of crime. They are

(1) *Remediable injustice*

(2) *Enhancing Justice*

A victim of a crime is a by-product of a breach of law. The sufferings and harm he/she experiences is immeasurable, and this can have several adverse consequences. Therefore, the lawlessness or infringements of rights which cause pain, suffering and agony to the victim can be brought under the purview of *'injustice'*, and it could be responded to with *'remediable injustice*'. The remedy provided by law and courts would enhance the core values of justice.

Law and Crime authored by Gerry Johnstone and Tony Ward is a book on key approaches to criminology.[38] How does the law define crime, and the complex legal and philosophical debates that shape the understanding of crime, and criminal justice are the subject matter of this book. It also deals with features of criminal law. Further, proving criminal guilt and the modernisation of criminal justice are important areas covered in the book. The glossary of words frequently used by criminal justice policy makers also finds a place in it.

Administration of Justice in Ancient India by S.D. Sharma[39] is a compilation of important texts and verses in *Srutis, Upanisads, Yajnavalkya* and *Dharmasastras* relating to crime, disputes, adjudication and justice. It depicts the ancient system of justice administration in India. It has also explained that the *Dharmasastras* were held in high esteem by the people of ancient India. It is believed that ‘for that man who obeys the law prescribed in

[38] SAGE Publications (2010)
[39] Mohan Law House , New Delhi (2019)

the revealed texts and in the sacred tradition, gains fame in this (world) and after death unsurpassable bliss.'[40]

The author has stated that the biggest problem in today's jurisprudence in India is the lack of an Indian perspective, rooted deeply in the Indian soil. The idea of justice that guided social life in ancient India is not found in a piece at one place; it forms the web and woof of all the metaphysical texts, and has become a part of the whole thinking process of our people. The administration of justice and composition of courts, and procedure in the dispensation of justice in ancient India are clearly explained.

Victim Justice: A Paradigm Shift in Criminal Justice System in India by G S Bajpai and Shriya Gauba[41] analyses the historical reasons and massive violation of human rights after the First World War followed by the Second World War, and the journey of rights of the accused to rights of the victim. The re-thinking of the criminal judicial process and the necessity to bring the victim to the mainstream are discussed with reasoning and comparisons. The victim orientation policies in various Criminal Justice Systems are explained with provisions and pronouncements.

The *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985,* is a material to understand the international organisation's views on victims of crime.[42] It was adopted in 1985 by the General Assembly of United Nations. The Declaration recommended training

[40] *Manu,* II 9 Quoted by S.D. Sharma in the *Administration of Justice in Ancient India*
[41] Thomson Reuters (2016)
[42] Resolution No 30/44 annexe https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf

of police officials so that they could provide the basic awareness about how a victim has to be treated. The salient features of the UN Declaration are:

i) the victim deserves to be treated with compassion and respect for his/her dignity;
ii) the victim is entitled to access the courts of justice for prompt redressal from the harm suffered; and
iii) the victim is entitled to express/present his/her views, and concerns and for the same to be considered at appropriate stages particularly when personal interests are involved, though, of course, without causing prejudice to the accused.

The book '*Victims Assistance in India Suggesting Legislative Reform A Comprehensive Comparative Policy Review*,' edited by Sanjeev R Sahni, Astha Dhanda, Manjushree Palit opens with the quote "Criminology is a Cinderella among social sciences and Victimology is a Cinderella of Criminology," and argues that no modern student of criminal jurisprudence in its holistic perspective and compassionate dimension can ignore the burgeoning branch of Victimology. In this book the data on Victimisation in India and a critique of Victim Compensation Scheme and policies for victims of crime, both domestic and international, are analysed by the scholars of behavioural sciences, and the need for a comprehensive Victims Legislation in India is explained by its authors.

The work *General Principle of Criminal Law* by K.N. Chandrasekharan Pillai is a hand book for researchers of criminal law who want to understand the basic principles of criminal law.[43] There are 12 chapters that explain the

[43] Eastern Book Company, Lucknow (2011)

criminal law and its principles with the decisions of the Supreme Court and High Courts. The case laws are given with details of facts, and the important paragraphs of the judgments are reproduced in the book. This work is a compilation of landmark judgments that illustrate the fundamental principles of criminal law.

K. I. Vibhute edited an anthology of selected papers on criminal law, justice, sentencing policy and other incidental matters and presented a book titled "*Criminal Justice : A Human Rights Perspective of the Criminal Justice Process in India*'.[44] There are 26 scholars who have contributed papers and the 'Justice to Victim of Crime emerging trends and legislative models in India' raises a question about the purpose of criminal justice and the necessity to protect the rights of the victims. The papers were written by the contributors on the discussion and debates that arose after the submission of the Justice Malimath Committee Report in 2003.[45] The authors of the papers have suggested the idea of fair, efficient and humane administration of criminal justice.

The book *Criminal Law, Criminology and Administration of Criminal Justice* edited by K.D. Gaur is a compilation of speeches delivered by great jurists, judges and papers of academicians from India and abroad.[46] It has been divided into five chapters. Chapter I entitled 'Goals of constitution and administration of criminal justice' consists of articles relating to social,

[44] Eastern Book Compnay, Lucknow (2004)
[45] Report of the Committee on Reforms of Criminal Justice System, March, 2003

[46] Universal Law Publishers (Lexis Nexis) (2015)

economic, political justice as enshrined in the Constitution. The conceptual and theoretical aspects of criminal law including the sentencing process are the subject matter of Chapter II entitled 'Crime and criminal law'. Chapter III deals with the 'Human Rights and the Criminal Law'. The dignity of human beings and deprivation of freedom rights of the accused person in India and other countries are compared and critically analysed in this chapter. Social justice and relevance of punishment, methodology sentencing are examined by the authors in Chapter IV titled 'Criminal Jurisprudence and Social Defence'. Computer - related crime and law which is a modern development is the focus of Chapter V. Victim assistance is also discussed in detail. All the 71 papers in the book are relevant to understand criminal justice institutions and its stakeholders in India.

The book *Ahmad Siddique's Criminology Penology and Victimology* edited by S.M. Afzal Qadri consists of three parts namely Criminology, Penology and Victimology.[47] The first part exclusively deals with crime and its social and legal definitions. Further, the nature and scope of Criminology and its various schools, trends and new patterns, new conflict theories, nature and definition of white collar crimes, cybercrimes, cyber terrorism, cyber pornography and judicial response to these new types of crimes are explained with case laws. The third part of the book focuses on victims of crime, nature and development of Victimology and the special victims namely the elderly, children who need special attention, and the emerging trends in the victim

[47] Eastern Book Company, Lucknow (2016)

compensation programme, and Indian position are analytically studied. This part of the book serves an important guide to know about the developments taking place in Victimology.

The Book "*Victims of Crime Their Rights and Human Rights'* by Chandra Sen Pratap Singh is on the Victims of Crime in India.[48] It consists of seven chapters, with the first chapter opening with a prologue that the victim's rights were secured as a private enterprise at an early age when it was settled as a private dispute. But the State machinery snatched away the rights and a role for the victim and the system has become accused – centric, with no relief provided to the victim after the trial. The worldwide trend towards realisation of the Victims' Right has emerged and the Victimological perspective is also being considered by the justice rendering authorities, and with that the victim is again gaining a strong position within the Criminal Justice Administration.

The book edited by N. Prabha Unnithan entitled '*Crime and Justice in India*' is a collection of 19 papers written by scholars from India and abroad.[49] India has a socio-legal tradition that defines human behaviour and sanctions against violation dating back to the ancient civilisation, centuries before the birth of Christ. Crime and prohibited behaviours are historically analysed and of how coercion was used as a tool in governance. The criminal law and its course in India, their roles in preventing and controlling crime, are the subject matter of the papers.

[48] Deep & Deep Publications Pvt. Ltd. New Delhi (2010)
[49] SAGE Publications (2013)

The book '*Victims in the Criminal Justice System*' by Bharat B. Das has eight chapters.[50] The author has studied the victims of crime. He has stated that for too long the victims of crime have been the forgotten, and are a forsaken lot of the criminal justice system. Rarely do we give victims the help they need or the attention they deserve. Yet the protection of citizens to guard them from becoming victims is the primary purpose of the penal laws. Thus, each new victim in his person represents an instance in which our system has failed to protect individuals or at least to save him and his/her family from serious consequences. A lack of concern for the victim compounds that failure, shocking the conscience of society and wrecking the very moral foundation of the system.

Victimology in India Perspectives Beyond Frontiers by V.N. Rajan is the work about a branch of social science which deals with victims and their needs.[51] The word 'victimology' was coined in 1947 by French lawyer, Benjamin Mendelsohn, later a citizen of Israel, by deriving from a Latin work 'victima' and a Greek work 'logos'. Victimology is basically a study of crime from the point of view of the victim, of the persons suffering from injury or destruction by the action of another person or a group of persons. This book argues the need for development of a separate faculty for victim studies in India, as the western world is far ahead in considering the victim as a stakeholder and providing relief, and thus, making justice a comprehensive one serving both the accused and victim, the primary stakeholders.

[50] APH Publishing Corporation, New Delhi (1997)
[51] APH Publishing Corporation, New Delhi (2012)

Crime Victims and Justice, an Introduction to Restorative Principles edited by P. Madhava Soma Sundaram, K. Jaishankar, S. Ramdass is a collection of 30 research papers by the criminologists and victimologists.[52] This book revolves around the notion of justice and the need to provide justice to the victim is emphasized here. The developments in the criminal justice system, which adopted restorative methods in the West, and the imperative to extend those new techniques for crime prevention and control in India, are canvassed by the authors. The primary purpose of restorative justice is to repair the damage caused by the offence to the victim and society, and to return the offender to a productive place in a community. The restorative approaches adaptable by the Indian Justice System are the argument advanced by the authors.

The book, '*Legal Research Methodology*' edited by Rattan Singh is an anthology of 36 papers on various aspects of research and particularly the legal research. It deals with jurisprudence of research, evolution of research, current trends in socio-legal research, research ethics, doctrinal and non-doctrinal methods of research and their features. This book gives a clear idea about the legal research and it is divided in to nine parts. The issues like current trends in legal research, ethical issues and challenges, selection and formulation of legal research problem, identification, and formulation of a research problem, empirical and doctrinal research, methods of collection, research design, relevancy of hypothesis in research, plagiarism, role of judges and jurists in

[52] Serials Publications, New Delhi (2008)

legal research and new dimensions in legal research etc., are highlighted. It enables to understand the basics, to identify the underlying technology, to summarise their knowledge on concepts, ideas, principles and various paradigms of research. Therefore, aspects in terms of basics, design process, practice, techniques, performances, platforms, applications, and experimental results have been presented in a proper order. Fundamental methods, initiatives, significant research results, as well as references for further study have also been provided. Comparison of different design and development approaches are described at the appropriate places so that new researchers as well as advanced practitioners can work on such a roadmap. The scholars have contributed and expressed his/her ideas on research methodology and it helped in understanding of different research methods and areas of study in the field of socio-legal research.

The research focuses on the victims of crime, and addresses their plights and rights to be granted for better understanding of crime and its consequences. Therefore, in addition to the hard copies of the legal commentaries, bare Acts of laws governing the criminal justice system, Victim Compensation Schemes framed by the Union, States and Union Territories, the websites of the Supreme Court and High Courts, , e-resources available on the websites, Online Legal Resources in the National University of Advanced Legal Studies NUALS Kochi, library are used as sources to access the materials, legal instruments, research papers, journals, drafts, bills, policies touching the criminal law and victims of crime and their rights and reliefs.

'The Hand Book on Justice for Victims'[53] is an extremely important resource prepared by a group of experts from over forty countries at a series of meetings supported by the office for Victims of Crime in the United States Department of Justice and Ministry of Justice in the Netherlands. Here the impact of victimisation, victim assistance programme and the role of judiciary are dealt with.

In traditional justice systems, victims of aggression have usually found support and assistance from their family, village or tribe. The informal social network softens the impact of victimisation and assists the victim in recovery. The same network often assists in the resolution of the conflict, and in ensuring that any decisions made are actually implemented. Within this context, it is taken for granted that the victim (and his or her kin), the victimiser (and his or her kin) and the entire social group will share the burden of dealing with the conflict.

1.11 Research Questions

This is a research on victims of crime, their rights and legal care in the Indian Criminal Jurisprudence. The following research questions are raised, and the answers to these questions that are to be arrived at, would help in testing the hypothesis framed.

1) to identify the victims of crime and examine the concept of victims, the contemporary position and status in the Indian Criminal Justice Administration and also to examine whether the definition of the term 'Victim' in the laws and schemes in force in India are comprehensive

[53] Hand Book on Justice for Victims, United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention, New York, 1999.

enough to cover all victims of crime and to grant relief as provided in the benevolent provisions of law;

2) to critically examine the rights of the victims of crime including the participatory and other rights in the Criminal Justice Administration (CJA) process, and suggest the imperative reforms to be introduced to safeguard the welfare victims of crime;
3) to explore the means by which the 36 Victim Compensation Schemes (VCS) framed under Section 357 A Cr.P.C. by the Union, States and Union Territories and in force in India can be made more effective and victim- friendly; and
4) to suggest legislative amendments and Schemes for the restoration of victims to pre-crime stage

1.12 Research hypothesis

In the light of the introduction given above and the focal areas mentioned thereon, the following hypothesis will be tested through this research:

> *The existing Framework of Criminal Law in India, which includes the Indian Penal Code 1860, (IPC) Code of Criminal Procedure 1974 (Cr. P.C.), Indian Evidence Act, 1872, among other instruments, read with the Victim Compensation Schemes (VCS) framed pursuant to Section 357A Cr.P.C. is adequate to deal with the victims of crime comprehensively and provide necessary reliefs.*

1.13 Research Methodology

This is a doctrinal study. The basic sources are the major Criminal Acts including the India Penal code 1860, The Code of Criminal Procedure 1974 and the Indian Evidence Act, 1872, which constitutes a Criminal Legal Frame Work and are primarily applicable for all phases of and all process of criminal

justice administration from lodging of the information by an informant, to the execution of sentence imposed on conviction, or acquittal, appeal, revision and other adjudicatory process.

The purpose of the study is to ascertain whether the Victim has been properly defined and comprehensively identified for the purpose of extending the benevolent provisions of law in the justice dispensation. Legislative texts on criminal law including domestic enactments and international legal instruments, Declaration of United Nations, Victim charters, Schemes on victim compensation (VCS) framed by the States and UTs have been analysed. The Law Commission Reports, Judicial pronouncements of the Supreme Court India and High Courts in India, the opinions delivered by the courts of other countries, the orders of the International Criminal Court (ICC) have been used as primary tools for this study. The text books, academic and juristic writings, the valuable data available in the reliable websites and newspapers, reports of the National Crime Record Bureau (NCRB) are used as secondary sources.

1.14 Structure of the thesis

The present research on victims of crime has been conveniently divided twelve chapters. As a study about a crime victim touches the basic idea of criminal justice and its process, this Chapter begins with the concept of justice and how society has treated its pursuit as a core value of life. The aspects of human life is covered by the criminal justice and the criminal laws serve as instruments to achieve the justice are discussed. Further, the components and primary or indispensible stakeholders of the CJA are also the subject for study

in this chapter. In addition to them, the purpose of the study, review of literature, research methodology, research questions and hypothesis to be tested are discussed in Chapter I.

Chapter II deals with the theoretical framework of the CJA. The criminal justice dispensation, its principles and the role of punishment are analysed. Further, certain key terms in the criminal justice domain and its usage in victim studies, crime and victim relationship, victimless crime or the crimes without victim, are also studied in this chapter. The foundation for the research on victims of crime has to begin with the analysis on how the concept of victims are dealt with in criminal laws. The person injured or affected by a crime is to be properly identified for the purpose of further studies relating to their rights, relief available in the existing laws, and also to make suggestions, if any, in this regard to enhance the judicial care and grant adequate remedies. In Chapter II of this study, the concept of victims of crime and the definitions provided under the laws are chronologically traced. The difference between the terms 'crime' and 'offence' and the legal proximity among the terms crime - offence and victim are also studied.

Chapter III is about the CJA and victims of crime from the ancient days to the contemporary justice system. In the primitive days when there were no properly framed laws, how the crime was approached and in ancient India, how the crime, punishment and victims were dealt by the institutions that rendered justice are narrated. Further, the perspectives of crime and victim under Muhammendan Laws, the reforms introduced by the British Administration

codifications and institutionalisation of justice and the developments that have taken place in the administration of criminal justice are studied in this chapter.

Chapter IV discusses the imperative need to identify the victim of crime and is a study on its conceptual analysis. The etymological explanations and literary meaning are analysed and as to which is a preferable term to address the person harmed by a crime, whether survivor is a comprehensive substitute for the word victim of crime is also examined. The classification of victims on the basis of the magnitude of crime and the perpetrator or victim's personal identifications such as gender, age *etc*., and how the classification of victims of crime have been extended on the basis of various factors are discussed in the light of the domestic and international legal instruments.

The foundation of Criminal Justice System (CJS) is laid in the Constitution. How the Criminal Justice Administration was viewed by the framers of the Constitution and victim's position in the present legal landscape in India are critically analysed in Chapter V of this thesis. The Indian Penal Code 1860, the Code of Criminal Procedure 1973 and the Indian Evidence Act 1872, the three major Acts together constitute the Framework of Criminal Law (FCL) and how the victims of crime defined and the victim-oriented amendments that paved a way for granting of right to victims are discussed and critically analyzed in this Chapter. Further, the consequences of amendments introduced and developments that have taken place in the dispensation of criminal justice are studied in this Chapter.

Chapter VI is a critical study of judicial approach and judicial intervention in the recognition of victims and extending of legal care by the Supreme Court and High Courts. The trial and appellate courts, including the constitutional courts, have been dealing with crime and the pleas of its 'by product', the victim, even prior to the legislative initiatives such as introduction of the word victim. The judiciary, by some of its pronouncements, provided protection from secondary victimisation to the victims of crime. Some rights were also created in favour of victim and the protection extended by the higher courts are examined analytically in this Chapter.

The victims and their participatory rights in the criminal dispute adjudicatory process are the subject for study in Chapter VII. The purpose of victims' representation and the rights and privileges enjoyed by the victim and victimiser, as two stakeholders of a same adjudicatory process, are comparatively analysed, and how the rights are granted to perpetrator and sufferer of crime are discussed with the provisions of law and in the light of victim judgments of the higher courts.

Chapter VIII is a study about the international perspectives of rights and reliefs to the victims of crime. The adversarial system has been adopted as mode for the criminal disputes resolutions in many erstwhile colonies. Among them Australia, Canada, New Zealand, United State of America (USA) and the recently emerged Republic the South Africa, other than the UK and the International Criminal Court (ICC) have provided reliefs and remedies after defining the term victim. Therefore, with the aforesaid six countries and ICC,

contribution from the institution of the United Nation like the Declaration on Basic Principles of Justice for Victims of Crime, 1989 are studied and the method adopted for determining and disbursal of the compensation as a restorative measure to the victims of crime in various jurisdictions are comparatively analysed in this Chapter.

Chapter IX deals with the restoration of victims of crime. In the justice dispensation, Restorative Justice (RJ) has been viewed as justice for the decades ahead. Restorative justice and how it is internationally emerging as a renewed concept, and its applicability to the existing framework of Criminal Justice Administration in India are examined in this Chapter.

Chapter X is a study of laws and schemes for victim assistance in India. The victim assistance prior to introduction of Section 357 A in Cr.P.C. in the year 2009 and after the framing of Schemes by the State and Union Territories are the areas for the critical study this Chapter. Out of 28 States and eight Union Territories (except the Union Territory of Andaman and Nicobar Island), others have framed their own Schemes to grant compensation to the victims of crime. Many of the Schemes have their own definition for the term victim and the procedure also differs from one State to another. The multiple definitions and conflicting procedure are examined with a view to provide comprehensive remedies and reliefs as expeditiously by adopting simple procedures.

Chapter XI is an analysis about the trends set by the higher courts in granting, determining, disbursing compensation to the victims of crime. This Chapter deals with the foundation laid for the compensatory jurisprudence by

the judiciary in India and its evolution by the pronouncements. Before the introduction of Section 357 A Cr.P.C., by an interpretation of Section 357 Cr.P.C. and invoking of Articles 32 and 226 Constitution, compensation were awarded to the victims of crime. Further, distinction has also been drawn among the compensation, damages and cost compensatory damages. After the framing of Schemes, the higher courts have been continuously issuing directions for providing interim reliefs to the victims of heinous offences, particularly the survivors of acid attacks. The decisions relating to entitlement of the victims, post-disbursement monitoring of compensation and matters incidental thereto are critically examined in this chapter.

The conclusion drawn from the study and the suggestions are provided in Chapter XII.

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CHAPTER II
THEORETICAL FRAMEWORK OF CRIMINAL JUSTICE ADMINISTRATION (CJA)

"Criminal justice touches on all aspects of our lives and in ways that most people might not think about. Criminal justice is important because it is a system that includes law enforcement, courts, prisons, counselling services, and a number of other organizations and agencies that people come into contact with on a daily basis."[1]

2.1 Introduction

The Criminal Justice Administration (CJA) is a supreme function of a sovereign as it has the power and jurisdiction to declare a person guilty, convict him and visit him with punishment. A State administration may have its own political philosophy, but it is duty-bound to protect its citizen from crimes and provide him with a conducive atmosphere to lead a peaceful life. A State, whatever might be its ideology or form of government, in order to be designated as a State, is expected to have an efficient system of penal laws to maintain law and order in the land so that its subjects can lead a peaceful life, with no fear of injury to their lives, loss of limb or property. The penal law is perceived as an effective instrument of social control, and does it by prohibiting "undesired" and "harmful" human conduct and "punishing" the perpetrators thereof, or posing threat of punishments to the prospective

[1] *Ask an Expert: Why Criminal Justice is Important? A statement,* https://www.nu.edu/resources/ask-an-xpert-why-is-criminal-justice-important/ visited on 17 January, 2022

violators. It, therefore, defines and punishes "acts" or "omissions" that are perceived as assault on public order, internal or external, persons or individuals or rights annexed thereto; property of individuals or rights connected therewith; abuse of, or obstruction to, public authority, or injuries to the public in general and its rights.[2]

Criminal Justice is the core of the Justice System. It starts from the setting in motion of State machinery in registering the information of the informant, and goes up to the correctional or rehabilitatory response upon the offender, post-conviction. The Criminal Justice System (CJS) has multiple roles, and multiple stakeholders to claim and act for rendering justice to the deserving parties. The CJA has to deal with crime, its perpetrator, the person who has directly suffered as a result of the crime and society which bears the general consequences of the crime. Crime is an exclusive subject for criminal justice administration in the modern democratic system and the term 'crime' has been understood in various perspectives. The words 'crime' and 'offence' are often used and applied interchangeably. This chapter is a study on the CJA and its theoretical framework and the incidental areas touching it.

2.2 Criminal Justice

The concept of Justice cannot be confined to a word or term, or be assigned a single or an exact meaning by referring to a dictionary or analysing linguistic texts. It is a concept that differs from person-to-person according to their beliefs, faith and social or political ideologies. Lord Denning defines

[2] Sir James Fitzjames Stephen, *A History of the Criminal Law of England, Vol I,* Burt Franklin, New York, 1883 pp 2-3

justice as what right thinking members of the community believe to be fair.[3] Justice can be viewed as a poetic concept. It combines intellectual and emotional elements. William Shakespeare has said that 'Justice, most gracious Duke, O, grant me Justice.'[4] Therefore, what is justice is a question with many answers. It is a relative term. To understand "justice" one needs to understand what construes "injustice". Injustice is painful as we want to live in a just society.[5] It perturbs, annoys and creates dissatisfaction. Therefore, understanding the meaning of the term injustice would be helpful to know the meaning and to understand the concept of justice. The concept of justice, as understood by the scholars, is that it creates a society with well established values and norms.

There are numerous definitions and interpretations available in the legal literature. There are expressions encompassing the term justice which convey specific meanings based on the nature and character of justice administered by the institutions. The methods by which civil wrongs are redressed are called as Civil Justice. The treatment of crimes and offenders is known as Criminal Justice. In jurisprudence there are other terms like 'social justice', 'distributive justice' and 'transitional justice' used by the academicians and jurists, according to its quality and mode of delivery to the parties concerned. As

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[3] Quoted by Tapash Gan Choudhury, in *Penumbra of Natural Justice,* Eastern Law House, (2016) P 2 (*Constitutional Developments in Britain* by Lord Denning as published in The Fourteenth Amendment, A Century in American Law and Life, Centennial Volume, Edited by Bernard Schwartz)

[4] William Shakespeare, *The Comedy of Errors*

[5] See Foreword by Uri Vanay, in the *Crime Victims and Justice, An Introduction to Restorative Principles,* P. Madhava Soma Sundaram, K. Jaishankar, S. Ramdass (eds.), Serials Publications, New Delhi (2008)

stated above, Criminal Justice is a branch that deals with crime and its consequences. It directly touches the lives of human beings and relates to the body, mind, reputation or property of an individual, and safety of society. Therefore, Criminal Justice dispensation has to be considered as the most important task of a welfare State and it is placed on the highest pedestal of human values. In the task of rendering justice after adjudicating upon a criminal dispute, a shift came into the criminal justice system due to the emergence 'adversarial' system. It underwent transformation from a victim oriented to accused-oriented approach. Many legal rights of accused also came into existence in this era. Whereas, the victim's role was only confined to initiate the criminal proceedings. Afterwards, he does not play any significant role except to provide certain evidence and assist prosecution machinery.[6]

2.3 Criminal Justice and Punishments

At the end of the criminal trial, if the guilt is proved, the court has the power to impose punishment upon the offender. A person who has caused loss or injury to both the individual and society has to experience pain in the form of imprisonment, fine or forfeiture of property or some other forms of restrictions or disapproval. The concept of punishment, as explained in Halsbury's Laws of England, is as follows:

> "The aims of punishment are now considered to be retribution, justice, deterrence, reformation and protection, and modern sentencing policy reflects a combination of several or all of these aims. The retributive

[6] Gurpreet Singh Randhawa, *Victimology and Compensatory Jurisprudence*, Central Law Publications (2015) P 26

> element is intended to show public revulsion to the offence and to punish the offender for his wrong conduct. The punishment should fit the offence and also like offences should receive similar punishments. An increasingly important aspect of punishment is deterrence and sentences are aimed at deterring not only the actual offender from further offences but also potential offenders from breaking the law. The main aim of punishment in judicial thought, however, is still the protection of society and other objects frequently receive only secondary consideration when sentences are being decided."[7]

Punishments are imposed upon the accused persons as prescribed by the penal laws and wide discretionary powers are conferred upon the courts. Chapter III, Sections 53 to 75 of the Indian Penal Code, 1860 (IPC) lays down general principles relating to punishment. However, there is no uniform sentencing policy framed or laws enacted in India. In the absence of any guiding principles, the punishments are often criticised as 'Judge Centric'.[8] Against these legal backgrounds, the sentencing, though suggested as a penal measure against the offender, it may be argued that it is not causing a desirable impact and is creating a feeling of justice being rendered in the minds of the sufferer of crime. As a matter of penal policy, an offender is sent to prison so that he may convert himself into a law abiding citizen and develop revulsion against crime and criminality because of experiences in prison-life. But practically, it is the other way around, and instead of reforming himself, the

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[7] Halsbury's Laws of England, (1987) Vol. 11, P. 248

[8] Dr. Anju Vali Tikoo, *Individualisation of Punishment, Just Desert And Indian Supreme Court Decisions: Some Reflection*s, ILI Law Review, Winter Issue, 2017 Vol, 2, P 20

offender comes out harder and shrewder in terms of criminality.[9] Modern penologists view imprisonment, which is an important mode of punishment imposed upon majority of offenders, as undesirable, as reflected in the legal instrument published by the United Nations. According to UN Experts the imprisonment imposed upon the offenders disproportionately affects individuals and families living in poverty. When an income - generating member of the family is imprisoned the rest of the family must adjust to this loss of income. The impact can be especially severe in poor, developing countries where the State does not provide financial assistance to the indigent and where it is not unusual for one breadwinner to financially support an extended family network. Thus, the family experiences financial losses as a result of the imprisonment of one of its members, exacerbated by the new expenses that must be met - such as the cost of a lawyer, transport to prison for visits and so on. When released, often with no prospects of employment, former prisoners are generally subject to socio-economic exclusion and are thus vulnerable to an endless cycle of poverty, marginalisation, criminality and imprisonment. Thus, imprisonment contributes directly to the impoverishment of the prisoner, of his family (with a significant cross-generational effect) and of society by creating future victims and reducing future potential economic performance.'[10] Therefore, a need to search alternatives to imprisonment has been considered as a need of the hour in the dispensation of criminal justice.

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[9] Girish Kathpalia: *Criminology and Prison Reforms,* 2014, P.76

[10] https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html

The Criminal Justice System (CJS) operates on this aspect focussing mainly on punishing the accused rather than restoring the victim to his pre-crime stage or providing any relief to him. But justice would only be comprehensive if it concerns the basic requirements of the sufferer of the crime. The criminal justice system should not only address the needs of the accused and safeguard his rights and interests, but also consider the victim and his rights and extend relief considering that both the accused and the victim are the two primary stakeholders. The policy makers and jurists have paid great attention, and conducted research on the crime and offender nexus, cause for criminality, reformation, rehabilitation of offenders and prison reforms. All these are focussed on crime and offender. Sufficient attention has not been paid even during the sentencing process, to the victim, the one who has become distressed by the crime. Of course, sentencing is a sovereign function and it relates to the power of the court, but the absolute exclusion of the victim not only makes the sentencing process questionable, it also raises incidental questions as to the purpose of punishment, particularly from the point of justice to victims of crime.

After the advent of institutionalised criminal justice dispensation, private vengeance and the retaliation by the victim against the offender are prohibited. The era of State-sponsored investigating machineries, prosecuting agencies and punishments prescribed by penal laws have come into existence. Ultimately, punishment, which is a penal censure, became the sole object of criminal law. The criminal justice system has to respond to all stakeholders. It

has to be continuously assessed as to whether the punishment meted out as of now serves as a factor to fulfil social objects, such as prevention of crime, reduction of re-offending and other legitimate stakeholder expectations. The courts have begun to observe the need to re-look at the criminal law from the point of view of the victim also, along with that of the accused. The Supreme Court, in its decision in *State of Gujarat* v. *Hon'ble High Court of Gujarat*[11] observed that the victim is certainly entitled to reparation, restitution and safeguard of his rights. Criminal justice would look hollow if justice is not done to the victim of the crime. It has also directed that the State should make a law for setting apart a portion of wages earned by prisoners to be paid as compensation to deserving victims of the offence, the commission of which entailed the sentence of imprisonment to the prisoner, either directly or through a common fund to be created for this purpose or in any other feasible mode. The relevant portion of the judgment is reproduced hereunder:

> "One area which is totally overlooked in the above practice is the plight of the victims. It is a recent trend in the sentencing policy to listen to the wailings of the victims. Rehabilitation of the prisoner need not be by closing the eyes towards the suffering victims of the offence. A glimpse at the field of victimology reveals two types of victims. The first type consists of direct victims i.e. those who are alive and suffering on account of the harm inflicted by the prisoner while committing the crime. The second type comprises indirect victims who are dependents

[11] (1998) 7SCC 392

> of the direct victims of crimes who undergo sufferings due to deprivation of their breadwinner."[12]

Subsequently, in *Dayal* Singh v. *State of Uttaranchal*[13] the Supreme Court held that the criminal trial is meant for doing justice to all – the accused, society and the victim. Then alone can law and order be maintained. The Courts do not merely discharge the function to ensure that no innocent man is punished, but also that the guilty does not escape. Thus, victim orientation in the sentencing process is slowly gaining ground within the criminal justice dispensation.

2.4 Principles of Criminal Law

The State or a sovereign authority cannot impose any punishment upon any of its subjects without a specific criminal law. Therefore, every State requires enacting or adopting criminal laws. The criminal law of any country, to be effective, must have the four important characteristics namely:

1. Politicality;
2. Specificity;
3. Uniformity; and
4. Penal sanction

> *Politicality* presupposes that only the violation of rules of criminal law made by the State are treated as crimes punishable under the law.
>
> *Specificity* of criminal law implies that acts that are to be treated as crime should be defined in specific terms.

[12] *Id.* para 15
[13] (2012) 8 SCC 263

> *Uniformity* of criminal law connotes that it should be uniformly applicable throughout the country without any discrimination so as to ensure even-handed justice to all alike. In other words, uniformity in application of criminal law seeks to eliminate discrimination in sentencing of offenders as a far as possible.
>
> *Penal sanction* is also an essential element of criminal law, as it has a deterrent effect not only on the criminals, but also on the society as a whole. It acts as a warning to everyone that indulging in criminal acts does not pay, as it is fraught with pain in the form of punishment. No criminal law can possibly be effective, unless it is attended with penal sanctions.[14]

The purpose of criminal law is explained by the Court in *Balasaheb Rangnath Khade* v. *The State of Maharashtra*[15] thus:

> "The criminal justice system has been designed with the State at the center-stage. Law and order is the prime duty of the State. It fosters peace and prosperity. The rule of law is to prevail for a welfare State to prosper. The citizens in a welfare State are expected to have their basic human rights. These rights are often violated. The law and order is breached. A citizen is harmed, injured or even killed as a result of the crime. He / she is a victim of an act termed an 'offence' in the criminal justice system. He / she seeks recourse to law and justice. Justice is given to him / her upon upholding the rule of law. It is denied to him/her upon any breach by the perpetrator of the violation or even by the defender of his rights - the State."

Therefore, the laws framed for rendering criminal justice are the tools and they have to accommodate certain established principles of natural justice

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[14] Paranjape N.V., *Crime and Punishment Trends and Reflections*, Lexis Nexis (2016) P 49
[15] (2012) Bom CR (Crl.) 632

to provide opportunities to the parties and fair treatment in the process of adjudication.

An example would be how the Rome Statute of International Criminal Court (ICC) recognises the principle of criminal jurisprudence, reflected in Article 22, which not only incorporates the maxim *nullum crimen sine lege* but also gives it wide meaning to eliminate the chances of guess and conjecture.[16] It has also acknowledged the principle of *nulla poena sine lege.* The Law Commission of India, in its 47th Report, also acknowledged this principle as the principle of legality in the Indian Criminal jurisprudence.[17] Under modern criminal law, the following major principles govern the framing of criminal laws:

i. *Nullum crimen sine lege* – A conduct that the law specifically prohibits in a crime;
ii. *Nullum poena sine lege* – The law must prescribe punishments for crimes;
iii. Prohibition of *ex post facto* laws – A rule that forbids the making of conduct criminal retrospectively.

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[16] Rome Statute of International Criminal Court,adopted 17 July, 1988 and came into force on 1 July, 2002 Article 22, *Nullum crimen sine lege*

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterisation of any conduct as criminal under international law independently of this Statute.

[17] Law commission of India Report on The Trial and punishment of Social and Economic Offences, p.11, Para 3.10 (1972), available at: <http:// lawcommissionofindianic/1.50/report47.pdf>accessed on March 3, 2017.

Therefore, the provisions of criminal law, to make a commission or omission as a crime, should prohibit it by a law in force without retrospective effect and should also result in punishment.[18] Peace and development, considered to be two sides of the same coin in human life, has to be guaranteed by the criminal laws. Criminal law has to focus on other aspects such as prevention of crime, deterrence, rehabilitation, restitution *etc*., to fulfil human rights and humanitarian norms.

While explaining the principles of criminal law, Bloy and Parrys have referred to Richard Buxton's observation and insisted that the certainty in using of terms are important in criminal laws. In their view, there are two reasons why certainty is desirable in criminal laws. First, the citizen is entitled to know what he can or cannot do and as such, is entitled to be protected from the arbitrariness in its operation. Secondly, uncertainty in, or difficulty of access to the criminal justice system leads to unpredictability in the outcome of criminal trials, which in turn extends the length of trials and increases expenses.[19] In the light of the above, it would be appropriate to critically view the terms 'crime and offence' used frequently in criminal laws, to understand them in appropriate contexts.

2.5 Crime or Offence – Use of Appropriate Term

The laws dealing with crime are classified as criminal laws. But in legal domain, crime is an alternative term for the term offence. Many a times both

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[18] Chandrasekharan Pillai, K.N, *General Principles of Criminal Law*, Eastern Book Company, Lucknow (2011) P 14

[19] Mike Molen, Denis Lanser and Ducan Bloyt I (ed.) '*Bloy and Parry's Principal of Criminal Law'* (2000)

are used interchangeably. In a study about criminal laws, whether an act, against which penal measures are sanctioned, should be called an offence or a crime, is an incidental point for consideration. As everyone is entitled to know about an act/omission that is prohibited by law, it has to be understood in its proper perspective and called by the appropriate term.

In one of its decisions, the Supreme Court has defined a crime as a legal wrong, for which criminal proceedings may be initiated against the doer, which may result in punishment.[20] In another case, the Supreme Court has said that every criminal act is an offence against society and a crime is a wrong done more to society than to an individual. It involves a serious invasion of rights and liberties of some other person or persons.[21] A crime is frequently a moral wrong in that it amounts to conduct which is inimical to the general morals of the community. There are, however, many crimes which exhibit neither of these characteristics. An act or its omission may be made a crime by the Parliament simply because it is a criminal process, rather than civil, which offers the more effective means of controlling the conduct in question.[22]

Crime has been commonly understood in that its consequences affect the State or a community. Black's Law Dictionary observes as a curious fact that all the minor acts enumerated in the Penal Code of a State like, say, New York, are in law called crimes, including both murder and over parking. It is a strong term to use for the latter, and of course the law has for centuries recognised that

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[20] *Kartar Singh* v. *State of Punjab* (1994) 3 SCC 569.
[21] *Mohd. Shahabuddin* v. *State of Bihar,* (2010) 4 SCC 653.
[22] Halsbury's Law of England Vol:25, Criminal Law, Lexis Nexis, Butterworth 2010 page 9

there are more serious and less serious crimes. However, common law recognised only two classes, serious crimes or felonies, and minor crimes or misdemeanours.[23] The distinction between crime and offence has been drawn as follows by an author:

> "The expression "crime" and "offence" are synonymous and therefore, they are interchangeable. What in common parlance is called 'crime' in legal terminology is known as 'offence'. Though both words carry the same meaning there is indeed a fine distinction between the two, though it may be only of an academic interest. The act of crime carries with it an essential element of immorality such as theft, dacoity, rape, murder, kidnapping *etc*. On the other hand, the element of morality does not seem to be an essential requirement for an offence. For instance, a person driving a car without a valid licence is said to have committed an offence and not a crime. However, strictly from the legal point of view, the term used is 'offence' and not crime." [24]

This explanation offered above is convincing and acceptable. In the light of the above, the often interchangeable terms 'offence' and 'crime' can be employed with similar import for the purpose of victim studies.

Crime has been defined by many jurists, philosophers and criminologists according to the school of thought they belonged to. Etymologically, the word 'crime' has been derived from the Latin word *'Krimos'* which means 'to accuse'. Generally, the term crime conveys an act against the well recognised social norms. The concept of crime differs not only according to belief or faith

[23] Black's Law Dictionary, 9th Edition, (2009) page 427
[24] N V Paranjape, *Crime and Punishments Trends and Reflections*, Lexis Nexis (2016) P 12.

of a particular group, religious attitudes, political ideology, economic structure, policy of the government, but a number of other factors and reasons too.

In the Black's Law Dictionary the word crime is defined as an act that the law makes punishable, the breach of legal duty treated as the subject matter of a criminal proceeding is also termed as criminal wrong.[25] The *Wharton's Law Lexicon,* quoting leading case laws and legislation, has described that the interpretation for the word "crime" has varied with the philosophic bias of the writer.[26] In common parlance, it has been understood as a violation of cherished norms of a civilised society. In the Halsbury's Law of India it is explained that 'Crime and Criminal' are the words of ordinary English usage. Any conduct which a powerful section of any given community feels to be destructive to its interest, as endangering its safety, stability or comfort is generally regarded as heinous and is sought to be repressed with severity. The sovereign power is utilised to prevent the mischief and to punish anyone who is guilty of it. Very often, crimes are creations of government policies, and the government in power prohibits a person from bringing about results which are against its policies.[27]

2.6 Use of the words Crime / Offence in the Indian Constitution

India adopted a written Constitution in 1949, and its framers have preferred the word 'offence' in Article 20.[28] It reads as follows:

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[25] Black's Law Dictionary, Eighth Edition, 2000
[26] Wharton's Law Lexicon, Seventh Edition (1883)
[27] Halsbury's Law of India, Part 5(1) (Definition Criminal Law), Lexis Nexis, New Delhi
[28] The Constitution of India enacted and adopted on 26 January 1949 and majority of its provisions came into effect on 26 January, 1950

Protection in respect of conviction for offences:

(1) No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged 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.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3)No person accused of any offence shall be compelled to be a witness against himself.[29]

In the marginal note and in the text of the provision of the above article, the term "offence" has been used four times. But there is no definition provided for it. The word offence employed in Article 20 of the Constitution came up for interpretation before the Allahabad High Court in a case in *Raj Narain Singh* v. *Atmaram Govind*.[30] The High Court has held that the word "offence" in Article 20 of the Constitution of India, means something which is a violation of the law in force, and for the violation of which law prescribes a penalty. The provisions of the Constitution of India are to be interpreted as per the guidelines laid down in Article 367, which provides that the General Clause Act, 1897, with suitable adaptations and modifications applies to the interpretation of constitutional provisions. As such the word "offence" employed in the Constitution shall be understood in the light of the meaning given in General Clause Act, 1897.

[29] Article 20, Constitution of India
[30] AIR 1954 All 319

In the General Clause Act, 1897 the definition provided for the word offence reads as follows:

> *"Offence" shall mean any act or omission made punishable by any law for time being in force.*[31]

It is an important aspect to note that in the GCA, 1897 also there is no definition provided for the term crime. In the absence of legislative definition in the primary documents of penal laws, the term "crime" has to be understood as brought out through judicial interpretation and illustrations. The word crime has been commonly understood as the breach of penal law and violation of norms of society. It takes a physical, financial, mental and emotional toll on a person or a group of persons, both directly and indirectly. The person (or group of persons) who has suffered or is harmed by the crime is a victim. Every crime begets at least one victim. The victim is a by-product of crime.

2.7 Crime / Offence- in Indian Penal Code, 1860

In India, the Indian Penal Code, 1860 (IPC) and the Code of Criminal Procedure, 1973, are the two primary and basic texts governing the CJA. They do not carry any definition for the term crime.[32] The IPC is one of the most comprehensive penal codes anywhere in the world. The statute, though of colonial vintage, has shown its resilience in the fact that even 145 years after it was originally passed, the entire statute remains largely unaltered.[33] The

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[31] Sub Section (38) of Section 3, General Clauses Act, 1897

[32] The Code of Criminal Procedure, 1898 has been in force for about six decades. The present Code (Act 2 of 1974) came in to force on 1 April, 1974 is a suitably adapted and modified old code.

[33] V Suresh & D Nagasila (ed.*) PSA Pillai's Criminal Law* (2000) P 327

framers of the IPC have not used the term 'crime' in the definition clause, but in Chapter II, which deals with General Explanations, there have been definitions provided for 45 important terms such as Gender, Number, Man, Woman, Person, Judge, Court of Justice, Public Servant, Act, Omission, Injury, Death, and for some other important terms used in the Penal Code.[34] Chapter II in the IPC can be said to be a legislative dictionary, because key terms are defined and explained by the framers of the Code. However, there has been no general explanation given for the word "crime" in the said legislative dictionary also.

In Section 40, IPC the word 'offence' has been defined.[35]

This definition for the term offence conveys three different meanings as given in IPC.

(a) The general definition is that the word 'offence' denotes a thing punishable only under IPC.

(b) In chapters IV and V and in Sections 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 118, 119 and 120, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388,

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[34] Indian Penal Code, Sections 6 – 52A

[35] *"Offence" – Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.*

In Chapter IV, Chapter V-A and in the following sections, namely, Sections, 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 118, 119 and 120, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this code, or under any special or local law as hereinafter defined.

And in Sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine".

389 and 445, the word 'offence' denotes a thing punishable under 1) IPC and other laws namely 2) Special Laws or 3) Local Laws.[36]

(c) In Sections 147 176, 177, 201, 202, 212, 216 and 441, 'offence' means a thing punishable under Special law or Local law but punishable with imprisonment for a term of six months or upwards with fine or without fine.

In the IPC the framers have preferred the term 'offence' to 'crime'. The Law Commission has opined that the whole chapter dealing with General Explanations are required to be rearranged as it lacks a systematic arrangement and recommended omission of Section 6, which requires that every definition of an offence should be understood, subject to general exceptions contained in Chapter IV. The Law Commission has also proposed an amendment in Section 6 IPC as the General Clause Act, 1897 shall apply for the interpretation of IPC. [37] The amendment has not yet been accepted by the Parliament.

2.8 Offence - Definition in the Code of Criminal Procedure, 1973

The Code of Criminal Procedure, 1973 (Cr.P.C.), an adjective law, governs the procedures for investigation, inquiry, trial, appeal, judgment and other phases of criminal justice administration. The Supreme Court, in the decision in *William Slaney* v. *State of M.P.*[38] has observed that the Code (Cr.P.C.) is a code of procedure and like all other procedural laws is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities.

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[36] Chapter IV deals with General Exceptions and Chapter V deals with Criminal conspiracy in IPC. The Special law and Local laws are defined in Sections 41 & 42 of IPC

[37] The Forty second Report of the Law Commission of India, June 1971

[38] AIR 1956 SC 116

Cr.P.C. carries a definition for the term 'offence'. Section 2 (n) is as follows:

> "offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under Section 20 of the Cattle Trespass Act, 1871 (1 of 1871)

The definition for the term offence is wide enough to enable the police to investigate offences under the other enactments also, apart from those under the IPC.[39] There is a special definition provided in Section 39 Cr.P.C. that imposes a duty upon every person, aware of commission of certain offences or the intention of any other person to commit such offences, to give information to the nearest magistrate or police officer. Sub-section (2) of Section 39 reads as follows:

> "…the term "offence" includes any act committed at any place out of India which would constitute an offence, if committed in India"

In addition to the definition in Sections 2 (n) and 39, classifications of offences are also provided in the Code of Criminal Procedure.[40] The following diagram illustrates the classifications of offences and their definitions.

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[39] *Dharma Reddy* v. *State* 1991 Cri.L.J. 1476

[40] Section 2(a) "bailable offence" means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence;

Section 2(c) "cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant;

Section 2(l) "non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant;

Offence Section 2 (n)

Bailable Offence Section 2(a)	Non-Bailable offence Section 2(a)	Cognizable offence Section 2(c)	Non-cognizable offence Section 2 (l)

In the old Code V of 1898, Schedule II dealt with classification of offences. Similarly, in the present Code of Criminal Procedure, 1973 the First Schedule deals with classification of offences under IPC. As per the definitions and the classification of offences under IPC, out of 403 offences, approximately 221 are classified as bailable, and 182 offences are brought under the category of non-bailable.[41] Further, in the cognizable cases the police can arrest the alleged perpetrator without a warrant. Part II of first Schedule deals with the classification of offences against other laws under which the offences punishable with imprisonment for less than three years or with fine only are classified as bailable. The offences defined in the laws other than IPC and punishable with imprisonment for three years or upwards are made as non-bailable and cognizable.[42] There are definitions provided for the terms bailable offences, non-bailable offences, cognizable offences and non-cognizable offences, which are the classifications based on the nature of the offence. It is pertinent to note that even though the different types of offences are explained, the word offence has not been defined in the Code of Criminal Procedure, 1973 and nowhere has the word crime been employed by the framers.

[41] IPC consist of 511 Sections and Sections 109 to 511 deal with offences and their punishments.

[42] Classification of offences against other laws - Part II of first Schedule in Cr P C

2.9 Crime / Offence in the Juvenile Jurisprudence – another example of classification sans definition

The Juvenile Jurisprudence aims at providing a system for juveniles in conflict with law and children in need of care and protection, by adopting a child-friendly approach in the adjudication and disposition of matters in the best interests of children, and for their rehabilitation, keeping in view the developmental needs of the children. The Juvenile Justice (Care and Protection of Children) Act, 2015 (JJA) is a consolidated and amended law relating to children alleged and found to be in conflict with law.[43] It also consists of provisions regarding the constitution of Juvenile Justice Boards, responsibilities of the care homes and other institutions, and, *inter alia*, provides definitions for about 61 important expressions used in the Act. In Section 2, there is no definition given for the words 'crime' or 'offence', but offences are divided into three types as follows:

1) Heinous offences[44]
   They include offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more;
2) Petty offences [45]
   They include the offences for which the maximum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment up to three years; and
3) Serious offences[46]

[43] Act No. 2 of 20016 received the assent of the President of India on 31 December, 2015
[44] Section 2 (33) Juvenile Justice Act, 2015
[45] Section 2 (45) Juvenile Justice Act, 2015.
[46] Section 2 (54), Juvenile Justice Act, 2015.

> They include the offences for which the punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force, is imprisonment between three and seven years;

These are the three expressions for which definitions are provided for the purpose of interpretation. The Juvenile Justice Law in India prefers the term 'offence' rather than 'crime'. But the term 'offence' is left undefined by the framers of the Juvenile Justice Act.

2.10 Crime – Offence in the Schemes formulated pursuant to introduction of section 357 A

In addition to the statutory provisions governing the criminal justice system, the Schemes framed by the States and Union Territories as required under section 357 A of the Code of Criminal Procedure, 1973 for providing compensation to victims carries definitions for the terms 'crimes' and 'offences'. Interestingly, the term 'Crime' also finds a place in a Scheme framed by Haryana for the first time, in the Haryana Victim Compensation Scheme, 2013.[47] Section 2(b) reads as follows:

> "Crime" means illegal act of omission or commission or an offence committed against the human body of the victim.

Subsequently, in the Telangana Victim Compensation Scheme, 2015 the above definition has been reproduced without any modification.[48] A definition for crime has also been incorporated for the purpose of determination of compensation for the victims under the Tamil Nadu Victim Compensation

[47]Section 2(45) Juvenile Justice Act, 2015
[48]Section 2(45) Juvenile Justice Act, 2015

Scheme, 2013. In the schemes the term ‘crime’ is confined to only the crime against the human body. They are:

a) Offences affecting life
b) Offences causing bodily injury
c) Abetment or attempt to suicide
d) Criminal Force and assault
e) Thug and,
f) Sexual or unnatural offences.

The above six acts come within the scope of the term ‘crime’ and it has been used in a narrow context. From a careful analysis of lexicons and legislation, it is clear that the terms ‘crime’ and ‘offence’ convey the same meaning. But, the word ‘offence’ is used as a *genus*, comprehending every crime and misdemeanour or as a *species*, signifying a crime not indictable, but punishable summarily, or by the forfeiture as the penalty.[49] Thus, the word ‘offence’ is wide enough to include ‘crime’. However, both are interchangeable to denote an occurrence prohibited by law.

The meaning, definition and interpretation for the terms ‘crime and offence’ have been discussed and analysed to elicit the fact that there has been no reference made about the person who has been harmed, injured or has suffered by the act of crime or offence. The great philosophers and founding fathers of the various schools of law have also not brought the victim within the ambit, or its purview, while defining any of these legal terms. It is only the person who commits the offence who has been duly considered while defining

[49] Section 2 (45) Juvenile Justice Act, 2015

the crime or offence; but the person who suffers due to the crime has been excluded by criminologists and framers of the primary codes that govern CJA.

Crime has many components - offender, society and victim of crime. The victim of a crime is a "forgotten man" not only in the administration of criminal justice but in the framing of laws and rules also. The entire focus of the criminal justice system has been based on the offender, to punish him or on his reformation and rehabilitation with all resources and goodwill available through the agencies of administration of justice – the courts and governmental and non-governmental agencies.[50]

2.11 Stakeholders of CJA

As stated in the earlier Chapter, CJA involves multiple stakeholders. In a welfare State, the CJA deals with crime control, prevention, investigation, prosecution, punishment and correction. In the adjudicatory process the courts have to protect the interest of the accused by providing a fair and unbiased trial and appropriate sentence upon the proved guilt and also make correctional services in some instances. As discussed above, crime consists of three extremely important components,

1) Perpetrator, who committed the crime;
2) Sufferer, whose right was directly infringed or whose property or reputation are lost or physically or mentally harmed; and
3) Society, which faces the direct and indirect consequences of the crime.

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[50] Dipa Dube, *Victim Compensation Schemes in India: An Analysis,* International Journal of Criminal Justice Sciences ,Vol 13 Issue 2, July – December 2018, Retrieved from http://www.sascv.org/ijcjs/pdfs/DubeVol13Issue2IJCJS.pdf

2.11.1 Police or Investigating Agency

The police or investigation agencies function with some important tasks relating to crime control, apprehension of the accused, investigation, production of the evidence and proving it before the adjudicatory machinery. The police and other agencies involved in the investigation of crime are the stakeholders, who receive the firsthand information from the victim or any other person acquainted with the crime. Therefore, after the commission of a crime, the police plays a decisive role in setting the criminal law in action. The investigation, which involves collection of materials from the scene of crime and recording the statements of ocular witnesses, helps the courts to find the truth and establish the guilt before a Court of Law. The role of the police or other investigating agencies makes them indispensable stakeholders of the CJA.

2.11.2 The Court

The Court exercises the powers conferred upon it for the purpose of justice dispensation. It is a forum, where the investigation made by the police and the statements of victim and witnesses undergo the acid test in the process of trial. The Magistrate receives the First Information Report (FIR) after its registration by the police, remands the accused person to judicial custody, and in some cases records the confession or statements of witnesses, and sets the ground for trial after empowering the accused with information by furnishing copies of case records. The Trial Courts and Appellate Courts scrutinize the evidence, their admissibility and follow the procedures and guidelines

prescribed in the codes and pronouncement of higher courts, in inquiry or trial to determine guilt and impose punishment. The other two stakeholders, namely the prosecutor and the defence counsel represent their respective parties namely the State and accused, who are themselves the stakeholders of the CJA. In some cases, the courts play the supervisory role and monitor the investigation for the cause of transparency and also to build confidence in the minds of the accused and the victim. Therefore, the power and role of the court which is a prominent stakeholder of the CJA extends to the pre-trial, trial and post-trial stages of justice dispensation.

2.11.3 Prison

After the guilt has been proved, the inevitable legal sanction will be imposed upon the offender. The Penal Code has suggested imprisonment as punishment for a majority of the offences. Prison occupies the final phase of the CJA. It is expected to be a correctional institution to reform and rehabilitate the offender who has committed the crime. Imprisonments are provided for the offences, and for some of the offences, a minimum mandatory sentence is provided. There are two types of imprisonments *viz*., rigorous imprisonment, which is accompanied by compulsory hard labour, and simple imprisonment without any such labour as prescribed by the penal laws.

In the era of human rights, criminologists and sociologists have created awareness among the policy makers and the public that prison inmates are an integral part of society, and the rights of prisoners are also to be considered on par with the human rights of the members of the civil society. The courts have

issued directions for surprise checks on the conditions of the inmates in the prison, and Law Commissions have made recommendations to improve the basic amenities and infrastructure in prisons. An offender, on conviction and imprisonment, will not lose his fundamental rights in the prison, especially after the enhanced monitoring and supervision of prisons by the judiciary. The accused, who has been bestowed with certain privileges from the time of arrest to the final determination of guilt, continues to enjoy the basic right in the prison houses also, even after the guilt has been proved.

2.11.4 Accused

The word accused is not defined in any major statute governing CJA in India. However, the Allahabad High Court, in *State* v. *Padma Kant Malaviya*,[51] has observed that the term contemnor or a person who has disobeyed the order of a court and faces the proceedings for criminal contempt would not come within the meaning and purview of the term "accused of an offence" referred to Article 20 (3) of Constitution of India, criminal laws including the Oaths Act. The court has held that a person who allegedly commits an act defined as an offence in the Penal Code or any other local laws can be called as accused, and others including the contemnor should not be referred to as an accused in the eye of law. Therefore, by implication, the accused can only be a person who is alleged to have committed an offence.

[51] AIR 1954 All 523

The accused is one of the key players and he is also a privileged stakeholder in the CJA. The constitutional law and the common law principles grants many privileges, including the right to remain silent, right against self-incrimination, availing of the benefits of doubt *etc*. The courts and laws are accused-centric, continuously extending rights and benefits to the accused, since a mighty State prosecutes an ordinary person who has lesser capacity to counter the State institution.

2.11.5 Victim

After the development of the concept of public wrong and treatment of crime as a violation of public duty, criminal law prevailed upon the law of tort. Consequently, crime has been viewed as an act against the interest of State, and that has paved the way for State-sponsored prosecution. The impact and magnitude of crime on society is so great that a large number of crime victims suffer physical, social, financial or emotional injury or harm which requires prompt redressal through easy access to justice. The vulnerable social groups such as older persons, women, children and persons with disabilities are the worst sufferers of crimes. In the process of this transformation of torts to crimes, the attention of the system shifted from the real victim who suffered the injury (arguably as a result of the failure of the State) to the offender and as to how he is dealt with by the State. Criminal justice came to encompass all about crime, the criminal, the way he is dealt with in the process of proving his guilt and the ultimate punishment given to him. The civil law was supposed to take care of the monetary and other losses suffered by the victim. Victims were

marginalised and the State replaced the victim to prosecute and punish the accused. It may be wondered as to what happens to the right of the victim to get justice for the harm suffered? Well, he may be partly satisfied if the State successfully gets the criminal to be convicted and punished to death, a prison sentence or a fine.[52] Therefore, as recommended by the Report by Justice Malimath Committee, a victim of crime became dependent on the State for his reliefs and remedies.

The concept of victim and the classification of victims, definitions available in the statutes and polices are analytically studied in a separate chapter of this study.

2.12 Crime and Victim Relationship

The occurrence of crime causes physical injury, mental agony, damage to property or reputation of an individual, and also disturbs the peace in society. Ultimately, the individual who suffers as a result of the crime, and society at large, become victims. While the former can be identified, the latter cannot be easily identified.

Every crime should consist of the following ingredients.

1. There is an act or omission *(actus reus*) prohibited by law.
2. The person who commits a crime has an intention *(mens rea*) to commit the crime.
3. It should cause harm, injury or mental agony to the individual.
4. There must be disturbance to peace and public tranquillity.
5. There must be a punishment prescribed by the law.

[52] Report of the Committee on Reforms of Criminal Justice System, Vol I, March, 2003, P 76

There cannot be a commission of crime without a victim, identified or not. A crime and its victim are two co-travellers. A victim, where identifiable, may face and be able to claim at least any one of the unpleasant eventualities such as bodily injury, loss of property, trauma, fear, mental agony, stigma, insult or humiliation as a consequence of crime. The concept that every crime produces, at least, either a primary victim or a secondary victim, is also agreed to by criminologists.[53] The nexus between the crime and victim are inevitable.

The crime and its victim are inseparable twins. In certain cases the victim himself/herself becomes part of the crime. Sometimes, the element of the state of mind or consent of the victim may also be a factor or ingredient to constitute an offence. In offences relating to religion (Sections 295-298, IPC), or where rape is committed when consent has been obtained by putting the victim (or any person in whom she is interested) in fear of death or of hurt (Section 375, *thirdly*, IPC), or with her consent when she believes that she is lawfully married to him (Section 375, *fourthly*, IPC), the *actus reus* is with reference to the state of mind of the victim.[54]

2.13 Crime with Faceless Victims, or Victimless Crime

While dealing with the concept of victim, an incidental question that arises is whether there are any crimes without victims, or is victimless crime acceptable in criminology. Traditionally, "victimless crimes" have been the legislative embodiment of society's moral evaluation of certain conduct. The

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[53] Leverick, F. Counting the ways of becoming a primary victim: *Anderson* v. *Christian Salvesen*, Edinburgh Law Review, (2007)11 (2). pp. 258- 264. ISSN 1364-9809 http://eprints.gla.ac.uk/view/author/5231.html

[54] K I Vibhute, *PSA Pillai's Criminal Law,* Lexis Nexis, India (2019) P 31

conservative objects of such legislation have been prostitution, sexual relations, gambling, public drunkenness, and drug abuse. Thus, victimless crimes were distinguished from other classes of *malum prohibitum* conduct by the degree to which they involve an element of legislated morality.[55] Lately, the concept of victimless crimes have been expanded to include harms without specific victims, like environmental crimes. There could be no second opinion that every offence leaves at least one person as a victim and there would be no crime without a victim. However, some of the crimes do not have any direct or immediate victim. These may be acts like drunkenness and related offences, sale and use of prohibited substances, vagrancy, begging, soliciting, bestiality, etc. A victimless crime may also be an illegal act that is consensual, and lacks a complaining participant, and includes such activities as drug use, gambling, pornography, and prostitution. No one is harmed, or if harm occurs, it is negated by the informed consent of the willing participants. It has been suggested that harm can take on various forms, but that since the harmed individual has consented to participate in one of these acts, the attribution of victimization is nullified. In order to determine whether this position coincided with the sentiment of the public, a questionnaire was administered in which 944 respondents were asked to rate how much harm, if any, exists for participants engaging in four acts (drug abuse, gambling, prostitution, pornography) termed as traditional victimless crimes along the dimensions of

[55] Joseph F. Winterscheid, *Victimless Crimes: The Threshold Question and Beyond*, 52 NOTRE DAME L. REV. 995 (1977).
Available at: https://scholarship.law.nd.edu/ndlr/vol52/iss5/9

frequency, extent, and nature of involvement. The results indicated that a majority of the respondents felt that these acts were harmful.[56] Therefore, it can be inferred that victimless crimes are also seen, though as measurably less serious than most offences, with victims.[57]

The idea of victimless crime is controversial and debates have continued in many dimensions for the past several centuries. The participants of certain abnormal acts express their consent for various considerations *i.e.*, an exchange of money or goods or favour or some services. Criminologists have traditionally brought three specific behaviours as victimless. They are:

1) Gambling
2) Voluntary sexual practices and
3) Drug or alcohol abuse

Gambling is undertaking a risk action for a desired valuable result. It is usually played for the consideration of money or other kinds of valuable items. Governments have imposed restrictions on gambling in public places, but have allowed it in some specified areas. The person gambles for quick and instant enrichment, but frequently, loses his valuables and assets.

Consensual sex or voluntary sex practices may appear to have no victims, but it sometimes breaks up the family, and other legal relationships. The mushrooming growth of gay bars for homosexuals and some abnormal

[56] See K I Vibhute, *PSA Pillai's Criminal Law,* LexisNexis, India (2019) P 31
[57] *Journal of Contemporary Criminal Justice* Volume: 9 Issue: 1 Dated: (March 1993) Pages: 1-14 https://www.ojp.gov/ncjrs/virtual-library/abstracts/are-victimless-crimes-actually-harmful

behaviour among the youths may be considered as the right of the minorities, but a section of society may still view this negatively, as immoral behaviour.

There are no such prohibited acts or crimes without victims. For example, drinking alcohol or use of drugs for reasons other than medical would certainly cause injuries to the body of its consumers. The person addicted to drugs or alcohols often loses his health. However, they do not come forward as affected persons, and they cannot blame anyone, as they are responsible for their own behaviour and its consequences. A welfare States may impose prohibition on liquor vending, as a matter of policy, and the special penal statutes relating to prohibition may be invoked against the manufacturers or vendors of prohibited liquors. In some states, consuming liquor may not be an offence, but driving a vehicle after consumption of alcohol is an offence under the Motor Vehicle Act, 1989, suggesting that it may bring about undesirable consequences amounting to crimes.

Some acts like gambling, alcohol abuse etc., might not have been prohibited by the laws, but religious texts have banned them as sin. Despite moral turpitude or stigma, the consensual acts are considered as victimless crimes. Despite this, these acts still have harmful, adverse and negative effects. Unrestricted gambling or abusive consensual sex or addiction to alcohol affects the health of the individual, and the family and society in general. They are not only injurious to willing partners or voluntary consumers, but also affect their dependents that are not present at the time of such not so normal acts. The illegal transport of alcohol and dealing of drugs for voluntary consumers

challenge the economy of the country, and also paves the way for other forms of crime like trafficking.

Indeed, some sociologists have claimed that it is the legal censure of an act which defines a given behaviour as a crime.[58] While dealing with victimless crime, it is only the punishment which may have to be considered as a primary factor. Further, the other basic ingredients of the crime, which are mental element, conduct and injury, may also have to be taken into consideration while determining victimless crime.

Though social harm may not be the only primary element, punishment is the important defining characteristic of a crime. The question of imposing punishment will arise only after the person who is victimised or who is legally entitled to bring a penal action, sets the law into motion, by a manner known to law. Since there is a lack of feeling of victimisation in the minds of the consensual partner of such acts, no obvious or apparent victim is also identified, though certain acts are not permitted by society, and by the law prohibited expressly. Therefore, victimless crime is a different kind of classification in the victim studies.

As suggested earlier, every crime produces at least one victim but some of the socially or religiously prohibited acts have not been defined by penal statutes as crimes. As a result there are no punishments prescribed for such behaviour. Under the circumstance, even persons really affected do not come forward to get legal relief. Therefore, certain behaviours or anti-social acts,

[58] K I Vibhute, *PSA Pillai's Criminal Law,* LexisNexis, India (2019) P 31

though seriously affecting the health of individuals, and though society has treated them as undesirable acts, the legislatures have not declared those acts as offences, and are allowed to continue as moral wrong and not as legally prohibited offences.

Law as an instrument of justice should not only be used to provide peace and order in society but also used as an important means of protection of rights of victims of crime, ensuring their social rehabilitation.

The term "victimless crime" refers to behaviour that is proscribed by law but does not lead to a claim of violation of the rights of any particular person. The term is used mainly in Anglo-American political and criminal justice literature and is of fairly recent origin. It entered the academic and public discourse in the 1950s, with the birth of victimology, a branch of criminology focusing on the victims and the interaction between victims and perpetrators.[59] With the victimological developments in recent decades, criminal law jurisdictions around the world are now focusing on the impact of victimisation on persons affected by the crime, and need to treat them with compassion and protect their dignity and fundamental rights.[60]

The State has slowly grabbed the space of the victim in the CJA, and the victim has become another subject at the hands of the prosecuting machinery. The opportunity for the victim to appear or participate in the proceedings under Criminal Law are denied, and only at the behest of the State

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[59] Bergelson Vera, *Victimless Crimes* (2013) 10.1002/9781444367072.wbiee094 https://www. researchgate.net/publication/313919853_Victimless_Crimes/

[60] N V Paranjape, *Crime and Punishment Trends and Reflections*, LexisNexis(2016) P 181

is the victim allowed to play the role of witness in the important process of determining the guilt. Many a times the victims are unable to present their case and assist the court properly in the justice- rendering process. The victim has to be included in the broader purview of criminal justice, and the laws and the judicial mechanism should recognise the victim as a major stakeholder and allow his meaningful participation in the adjudicatory process.[61] This changing scenario creates the necessity to re-look at criminology and criminal justice institutions to include the victim, for the purpose of providing comprehensive justice to all its stakeholders.

As discussed above, maintaining peace and prevention of crime and reducing recidivism are viewed as the purposes of criminal justice, rendered on application of the penal laws. Further, the observation of Prof. K N Chandrasekharan Pillai that prevention of crime is best assured by deterring offenders and people with a proclivity to commit crimes, by way of the threat of or imposition of punishments, is germane to quote here, to emphasise that though there are multiple stakeholders, criminal justice has confined its focus on the perpetrator of crime.[62] Traditionally, the criminal law process, in its quest for a fair and just trial, at almost every stage, accords certain safeguards to those suspected or accused of crime. Administrations of penal justice, is visibly dominated by the humanitarian and therapeutic approach to criminality, reform and treating a convict for his better reformation and re-socialisation, and

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[61] K I Vibhute, *PSA Pillai's Criminal Law,* LexisNexis, India (2019) P 31

[62] K N Chandrasekharan Pillai, *General Principles of Criminal Law,* Eastern Book Company, (2011) Introduction, P 1

thereby to re-assimilate him in the mainstream. However, the Criminal Justice Delivery System does not, unfortunately, exhibit similar sensitivity and concern for a victim of crime, the second partner of the so-called penal couple - and to his injury, pain, and suffering at the hands of the offender. It almost overlooks his interests. Such a Criminal Justice System (CJS), obviously, turns out not only to be accused-offender oriented but also to be unfair, unjust and inequitable. The Criminal Justice Delivery System, traditionally, perceives a victim of crime as merely a source of information and evidence. It assumes that the claims of a crime victim are sufficiently satisfied by conviction of the perpetrator. This traditionally- accepted assumption, though right, however, seems to be incomplete, unjust, and inequitable to the victim, when society and the State which are resorting to every possible measure to reform and rehabilitate an offender, are not displaying equal concern for compensating victims of crime.'[63]

2.14 Conclusion

As discussed, whether the CJA in India has considered the victim as an important stakeholder or not is also an important question that arises for the research. Therefore, it is imperative to look into the past on how the CJA functioned, and how the justice dispensing mechanism had treated its stakeholders. A study on the historical perspective on criminal justice and the treatment of the victim would also help to understand the pros and cons of

[63] K I Vibhute, *Criminal Justice,* Eastern Book Company (2004) P 370

contemporary CJA and the reforms to be introduced to it, for the cause of enhancing justice for the victim.

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CHAPTER III
VICTIMS OF CRIME - FROM ANCIENT INDIA TO THE CONTEMPORARY JUSTICE SYSTEM

"Our barbarian ancestors were wiser and more just than we are today for they adopted the theory of restitution to the injured, whereas we have abandoned this practice to the detriment of all concerned"[1]

Barnes and Tweeters

3.1 Introduction

Crime and criminals have existed throughout history. The wrongdoers were considered to have violated established social norms and having breached the law of the State. Such commissions and omissions directly affected individuals by causing physical pain, mental agony and loss of property and posed challenges to the tranquillity of the society. A system to render criminal justice also existed since ancient times as a crime prevention and control, maintenance of law and order mechanism. It continues to be in force, adapting changes and modifications as justified and necessitated by the development of political and social ideologies. The basic foundation of the justice dispensing system is to render justice to the person who is directly affected by the crime, and to society. If so, whether delivery of justice to the victim of crime is to be restricted to the imposition of punishment on the wrongdoer or should it include reparation to the victim to ensure restoration, is a point for research in the succeeding chapters. Before taking up the study relating to victims of crime

[1] Barnes and Tweeters, *New Horizons of Criminology,* Prentice Hall (1944) P 288

and present status of their rights as recognised by the criminal justice system, it would be appropriate to study Criminal Justice Administration (CJA) from ancient days to the present modern justice system. As observed by Romila Thapar, an Indian historian, 'history (perceptions of the past) was pivotal, since there was always curiosity in comparing the past with the present.'[2]

The evolution of criminal justice perspectives and legal concepts depends upon the awareness created by knowledge acquired by society out of experience and education. The society and its justice dispensing institutions have treated crime and the victim from various perspectives according to the changes and upheavals that have occurred in the world and the developments that have taken place in the fields of science, technology and other areas touching the day-to-day affairs of human life, especially on the aspects of criminal justices and victims. It was only at a later stage of 12th and 13th centuries that a distinction was made of different kinds of wrongs on the basis of gravity and its impact on the individual and society at large.[3]

Further, scholars have observed that the role, importance and visibility of the victim varied greatly in human societies. These variations reflect the historical evolution of legal concepts, as well as diverse approaches to the interpretation of notions such as that of individual responsibility. It is observed that at one time in history, the victim of crime enjoyed the central position in

[2] Romila Thappar, *The Penguin History of Early India from the Origins to AD 1300,* Penguin Books (2002) P I

[3] K I Vibhute, *Criminal Justice – A Human Rights Perspective of the Criminal Justice Process in India*(2004) P 351

the administration of the criminal justice. Over the centuries, however, the victims have evolved as mere witnesses in the criminal proceedings.[4]

This study on the historical perspectives would be helpful to ascertain the concept of victim and how it is understood by jurists and justice-delivering institutions, both organised and unorganised, and how far it may be relevant to the contemporary criminal justice dispensing mechanism.

3.2 Primitive Laws and Victims

In early times, society was not well organised but restitution to the victims of crime was the practice. In the absence of well-organised political institutions to deal with criminals by enforcing law and punishing them, the right to deal with criminals and to punish them was exercised by the victims themselves, or by the victim's near relations.

In primitive societies criminal-victim relationship was the reflection of existence for survival and power struggle and it was not based on the idea of responsibility on the theory of survival. So the idea of prevention of future crime guided the victim to ruthless retaliation and aggressively acquired compensation. Attack was the defence against the attack. During the primitive times, social control, restitution and revenge were handled by individuals who took the law into their own hands and, in effect, made the law and carried out the punishment in the form of revenge. The earliest form of social control was victim retaliation and personal reparation.[5]

[4] Bharat B Das, *Victims in the Criminal Justice System,* APH Publishing Corporation, New Delhi (1997) P 35

[5] Nourhan Alla, *Victims in Historical Perspectives*, available at https://cairo.academia.edu/nalaa

The early primitive groups controlled criminal activities by treating the crime as an attack against individuals or an assault against their clan or family. The primitive groups indulged in the task of countering the crime by revenge or repatriation. So, it can be inferred that in the beginning crime was considered as a matter between two parties, namely offender and the victim. It was that the victim was forced to respond to the offender on his own and make him answerable. It can be further drawn that in those days crime had only two stakeholders, the offender and the victim.

After the King assumed the role of the administrator of criminal justice, either directly or through his agents, the perception of the administration of criminal justice changed from individualistic to collective response. The investigation and inquiry, which are the modes to prove the guilt, were taken over by the King's administration. Consequently, the victim took a back seat and the King's administration took the responsibility to prosecute, determine the guilt and punish the offenders or to award compensation, if any, to the victims.

3.3 Appropriate Response to a Crime - Revenge or Forgiveness

The civilisation of the race or nation is measured by the justice system it adopts and practises for the purpose of upholding values. The criminal justice system is a special yardstick to measure human development and culture. It is an accepted theory that in ancient days there was no distinction between the wrongs, either as private or as public harm. It is also an interesting aspect of law that there was no clear distinction between the crime and tort. In ancient

days a crime was not understood or construed as a public wrong, and it was dealt as a serious attack on an individual rather than a society or humanity. Reparation was the foundation of primitive law. When there was no institution to deal with crime or redress the grievances of the sufferer of crime, it was the victim and his men who took it up and responded to the crime directly. It was the befitting physical attack against the offender or damage to his paraphernalia that was considered as a justifiable response to the crime, and compensation was considered as an alternative response to the crime. It was the valour and might of the man that responded against the crime by commission of another crime. Therefore, a physically capable victim attacked the wrongdoer, and the crime begetting another crime was the order in those early days. There was no criminal law in uncivilized society. Every man was liable to be attacked on his person or property at any time by any one. The person attacked either succumbed or over-powered his opponent. "A tooth for a tooth, an eye for an eye, a life for a life" was the forerunner of criminal justice. As time advanced, the injured person agreed to accept compensation, instead of killing his adversary. Subsequently, a sliding scale of satisfying ordinary offences came into existence. Such a system gave birth to the archaic criminal law.[6]

From the above observation, it can be inferred that weak victim or a disabled sufferer of crime who did not possess adequate men or muscle power to encounter the offender instead of indulging in the retributive response against the crime, might have resorted to forgiveness in ancient days. The term

[6] Report of the Committee on Reforms of Criminal Justice System, Vol 1, Part I, Fundamental Principles (2003) P 10

forgiveness means willingness to abandon resentment. The Chambers Dictionary defines it as 'to pardon, to pardon a debt or offence, to show mercy or compassion.'[7] It is argued that forgiveness is one the best method to prevent and re-offending of crime. The process leading to forgiveness is an important social ritual. Family members, friends, and colleagues routinely express remorse, apologize, and seek forgiveness from those whom they have wronged. Forgiveness, while acknowledging the wrongfulness of the act, separates that act from the actor and paves the way for the offender to return to the moral fold. Having forgiven, victims can heal, move on with their lives, and go back to living and working with the offender more normally.[8] When the major interest was to respond to the wrongdoer with the strongest violent act, forgiveness was also adopted as an alternative response to the crime by weak and incapable victims in the early days. Forgiveness was also viewed as a religious norm. The clan or community who had no belief in the act of revenge practised forgiveness as a proactive response to crime. Therefore, crime was responded to, with equally violent acts or to some extent with forgiveness in the early days, where there was no structure or institutionalised framework for justice dispensation to the persons affected by crimes.

Later, with the more structured primitive groups, criminal activities became part of social control and the offences against the individuals came to be considered as offences against the clan or tribe. Control of crime was taken

[7] The Chambers Dictionary (first published as Chambers Twentieth Century Dictionary in 1901) 1993 edition.

[8] Bibas, Stephanos, *Forgiveness in Criminal Procedure* (2007), Faculty Scholarship at Penn Law. 920. https://scholarship.law.upenn.edu/faculty_scholarship/920

over by the clan or tribe leaving the individual aside. Since there was no codified law, some form of restitution and compensation was always involved in the inter-relationship between the victim and the offender. Taking over the responsibility of social control of offences may be regarded as the emergence of the concept of collective liability.[9]

3.4 Victims of Crime in Ancient India

Like other parts of the world in the early days, in ancient India too reparation and compensation were the appropriate response to crimes. The ancient Hindu lawgivers recognised the necessity of directly compensating the victim of crime for the loss and injuries caused by such occurrences.[10] The Sanskrit term *Sahasa* was used to describe the English word offence. A wide definition was employed to cover all kinds of crime including defamation, assault, theft, robbery, adultery and murder. The expression *Sahasa*, in its fold, means the use of force without which crime could not be established. Therefore, any act coupled with the *malafide* use of force would qualify as a crime, according to the ancient lawgivers. Interestingly, contrasting opinions are given by the sage-jurists as to whether theft qualifies as '*sahasa'* or whether it is to be governed by custom or special usages of communities. The difference carved out lies in the fact that theft involves the deprivation of wealth with dishonest intention.[11]

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[9] Schafer, Stephen, *Victimology: The Victim and His Criminal,* Reston Virginia (1977) P 11

[10] Chandra Sen Pratap Singh, *Victims of Crimes their Rights and Human Rights,* Deep & Deep Publication Private Ltd. (2010) P 20

[11] P.V. Kane, *History of the Dharmasastras*, Volume III, Third edition, Bhandarkar Oriental Research Institute. P 226

The ancient law of crimes is embodied in *Smritis*, the Codes of *Manu* and *Yajnavalkya.* There was a distinction drawn between the civil wrongs and crimes. There was no right provided for private vengeance or retaliation.[12] The King was responsible and it was his duty to administer justice. As per the practice that prevailed in ancient India, any person could bring a crime to the notice of the King. The investigation team for detection of commission and nature of crime was appointed by the King. The principle of modern criminal law that any person can set the criminal law into motion by lodging a complaint was practised in India. But, an action for civil remedies could be brought only by the person who suffered by civil wrong or breach of contractual obligation.[13] Though the quantum of punishment differed from one kingdom to another within the territory of India, King was considered the sole guardian of all citizens and protector of his subjects from all crimes and other subjects who may disturb the tranquillity of the society. To discourage crime and to punish the criminals, Indians, from very early times, gave special powers to rulers of the state. But it is impossible to infer such tendencies absolutely, and for various reasons social, economic and political, people challenged the norms of society. The ancient Hindu lawgivers laid down that punishment must be regulated by considering the motive and nature of the offence, the time and place, the strength, age, conduct, education and economic position of the offender, and above all, by the fact whether the offence was repeated. *Dharamshastra* and *Arthshastra* point out that there were established systems

[12] Manu Smriti, Chapter VIII P241.
[13] N.V. Paranjape, *Crime and Punishment Trends and Reflections*, Lexis Nexis (2016) P 27

of dispute resolution, including deciding on crimes. *Dharamshastra* and *Nitishastra* recognise the King as a fountain of justice.[14]

The Kings and their courts followed the principles and penal sanctions prescribed by Manu and the *Smritis* to render criminal justice. There were also institutions in ancient India to render justice to the deserving parties. The ancient Indian judicature that adjudicated upon the disputes and determined the guilt has been portrayed in the Law Commission Report as follows:

> "Though ancient writers have outlined a hierarchy of courts as having existed in the remote past, the structure that obtained cannot be ascertained with any definiteness; but later works of writers like Narada, Brihaspathi and others seem to suggest that regular courts must have existed on a considerable scale, if the evolution of a complex system of procedural rules and of evidence can be any guide. Popular tribunals, particularly the village courts, survived for a long time and existed even at the time of the commencement of the British rule in India. Their continuance was favoured by their antiquity and the absence of any other effective tribunals within easy reach of the structure of the village society in those days, the nature of the principal function which these tribunals discharged were conciliatory; and the non-interference by local rulers with the working of these tribunals."[15]

Further, the basic concept of administration of justice in ancient Indian Jurisprudence was the welfare of the individual and society. Thus, the Western retributive theory, which looks wholly to the past and rejects as unessential all utilitarian considerations, did not find favour with *Dharmastrakars.* These

[14] Dr K P Verma and Dr Ramesh Chandra Chhajta, ' *Human Rights of Arrested person in Ancient India: An Appraisal*' https://www.iosrjournals.org/iosr-jhss/papers/Vol19-issue12/Version-1/N0191218591.pdf

[15] Fourteenth Report of Law Commission, (1958) P 27

jurists, while recognising the retributive or expiatory theory, also, had a utilitarian aspect in mind, since in the Indian view of life, punishment, if justly imposed, must have as its aim the realization of some future good.[16]

Before the adoption of the Constitution by the welfare States, crime had been considered as closely related to religion. Every religion forbids certain acts as sins. When religious sanctions could not work or give expected result, the concept of legal prohibition came into effect. The King, who is a sovereign authority, imposed penal sanction against the offenders. Due importance was given to the damage that was suffered by the victim, and, restoring the position of the victim to the pre-crime stage as much as possible was an integral part of the criminal justice delivered to the victim. Manu says about *danda* as follows:

> *Sa raja puruso dandah sa neta sa sitacasah*
> *Catur namasramanam ca dharmasya pratibhuhsmrath*
> *Dandah sasti prajah sarva danda eva bhiraksati*
> *Dandah suptsu jagarti dandam dharmam vidurbudhah.*[17]

Punishment is (in reality) the King and the male, the manager of affairs, the ruler, and that is called the surety, for those four order obedience to the law and punishment alone governs all created beings, punishment alone protects them, punishment watches over them while they sleep; the wise declare punishment (to be identical with) the law.[18]

[16] S D Sharma, *Administration of Justice in Ancient India*, Mohan Law House, New Delhi (2019) P 62
[17] Manu VII-17-18 Quoted in the book by S D Sharma, *Administration of Justice in Ancient India*, Mohan Law House, New Delhi (2019) P 84
[18] S D Sharma, *Administration of Justice in Ancient India*, Mohan Law House, New Delhi (2019) P 62

Dr. Sen has opined that in ancient India, both punishment and compensation were awarded against offenders by the King and his institutions. He observes:

> "In the ancient days punishments of crimes occupied an important place and the payment of compensation to the individual injured was in addition to and not in substitution for the penalty. It was conceived that the King was under a duty to indemnify the individual who has suffered due to a crime."[19]

All offences falling under the category of *Sahasa*, acts of violence, are of public nature and, therefore, all fall into the category of crimes. A wide definition was employed to cover all kinds of crimes including defamation, assault, theft, robbery, adultery and murder. *Sahasa* in its fold comprehends the use of force without which crime could not be established. The expression '*Sahas'* itself denotes 'force'. Therefore any act coupled with the use of force would qualify as crime according to the ancient law givers. Theft and robbery, adultery and murder are acts which are wrongs against society and ancient Indian law does not condone them on mere payment of compensation like the Roman and Germanic Law, upon which Maine based his conclusions.[20] Therefore, compensation for the loss caused to the victim was also sanctioned against the offenders, in addition to the punishments.

During the *Mauryan* period, the *Arthashastra* authored by *Kautilya,* also known as *Chanakya,* was referred to as a guide for good governance. It

[19] Sen Dr, *General Principles of Hindu Jurisprudence*, (Tagore Law Lectures) Allahabad Law Agency, (1984) P 388

[20] PV Kane, *History of the Dharmashatras*, Vol III, Third edition, Bhandarkar Oriental Research Institute P 226

considered the prevention of crime as an aspect of maintenance of law and order. It is not separately spelt out but is referred to in a number of places in the text. Clandestine agents working under the Chancellor were responsible for collecting information about various crimes. They kept a look-out for treacherous activities, cheating on taxes, and fraud by merchants, dishonesty of officials and movement of thieves.[21] It is considered as a code for maintenance of law and order. In the criminal justice system advocated by *Arthasathra* it has been made mandatory to treat the victims of crime as direct sufferers of crime and provide adequate compensation with penal sanctions without bias or impartiality. The English version of relevant verses read that a King who observes his duty of protecting his people justly and in accordance with law will go to heaven, whereas one who does not protect them or inflicts unjust punishment will not. It is the power of punishment alone, when exercised impartially in proportion to the guilt, and irrespective of whether the person punished is the King's son or an enemy, that protects this world and the next.[22]

3.5 Crime and Victim in the Code of Hammurabi

The Code of Hammurabi was a compilation of almost 300 rules on every aspect of life. Much can be learnt about Mesopotamian life and ideals through these rules. However, one cannot be sure how well enforced these rules were, but it is safe to say that a powerful king in ancient Mesopotamia thought

[21] Popularly known as Chanakya, he is maligned and often ridiculed as a teacher of unethical, not to say immoral, practices and as an advocate of the theory that 'the ends justify the means and 'Chanakyan' has entered Indian vocabulary as the equivalent of 'Machiavellian'. See Kautilya, *The Arthasasthra,* edited and translated by L N Rangarajan, Penguin (1987) Chap. VIII

[22] L N Rangarajan, *The Arthasasthra,* (ed. & translated in English) Penguin (1987) P 377

these were the rules that would guide a just society. This Code was not an entirely new set of laws, but a compilation and revision of earlier law codes of the Sumerians and Akkadians.[23] It was instituted by the King of ancient Babylonia and was considered as one the oldest legal code.[24]

Crime was considered as an unpleasant incident and restoration to the victim was given importance, and the State was also placed with the burden of restoring the victim. Rules 22 and 23 Code of Hammurabi dealt with the punishment for robbery. In the aftermath of a robbery, if the person who committed the robbery was secured, he should be put to death. If the robber is not caught, the man who lost the valuables in the robbery shall make a declaration before God about loss caused to him. The city mayor or a head of the territory in whose territory the robbery was committed shall replace the goods robbed from the victim.[25] Therefore, every victim was avenged or compensated.

In the medieval period changes took place in the justice administration. After the Middle Ages, restitution, as a concept separate from punishment, seemed to be on the wane. Little as we know of crime today, even less was known then. No other possible aspect of the victim's role was taken into

[23] http://www.wright.edu/~christopher.oldstone-moore/Hamm.htm

[24] Hammurabi's empire fell apart after his death and Babylon was ransacked repeatedly over the years. Around 1150 BCE, Shutruk Nakhunte, King of Elam, sacked the city of Sippar, near Babylon, and is thought to have taken the Code of Hammurabi along with the statue of the god Marduk back to Elam as spoils of war. It was discovered in 1901, in the ruins of the Elamite city of Susa, and today is on display at the Louvre Museum, Paris, France. https://www.worldhistory.org/Code_of_Hammurabi/

[25] Rule 22. If a man practises robbery and is captured, that man shall be put to death. Rule 23. If the robber is not captured, the man who has been robbed shall, in the presence of god, make and itemized statement of his loss, and the city and the governor in whose jurisdiction the robbery was committed shall compensate him for whatever was lost.

consideration, and the victim became the 'poor relation' of the criminal law. The decline of the restitution as a criminal sanction has been traced to several developments in the criminal justice system.[26]

3.6 Muhammedan Criminal Jurisprudence

In India, before the advent of the British, the Muslim rulers administered justice on the basis of the Quran, their religious text. The Muhammedan law was prevailing in major parts of India when the British started the colonial regime. From the time of the conquest of India by the Muslims, the victors imposed their own criminal law on those whom they conquered. The primary basis of the Muhammedan criminal law was the *Quran* which was believed to be of Divine origin.[27] The Muslim criminal law was not modified and was left untouched by the British for a considerable period until the First *Sepoy* Mutiny in 1857.

The Muhammedan Criminal Jurisprudence demonstrates the nexus between the religion and crimes. Though there are many dogmas and doctrines, the laws of *Quran* were inadequate to meet the entire requirement to administer the criminal justice. Therefore, certain Rules of Conduct called *Sunna,* which were deduced from the oral precepts, actions and decisions of the Prophet, were introduced to fulfil those areas of criminal jurisprudence not covered by *Quran.* These authentic traditions were taken to be the second authority of Muhammedan law and were regarded as conclusive in cases which were not

[26] Bharat B das, *Victims in the Criminal Justice System,* APH Publishing Corporation, (1997) P 45

[27] K.N Chandrasekharan Pillai and Shabisthan Aqui (ed), *Essays on the Indian Penal Code,* The Indian Law Institute, New Delhi (2008) P 4.

expressly determined by the *Quran*. Muslim law recognised many other sources also.[28] The concept of sin and religious sanctions has a close relationship in the Mohammedan law of crimes. The Muhammedan criminal jurisprudence had four broad principles. They were:

1) *Kisas* or *Diyut* - blood-money
2) *Hadd* - or fixed punishment,
3) *Tazeer* - or discretionary punishment and
4) *Siyasa* - or exemplary punishments.

Kisas applied especially to offences against a person wilfully killing or causing grave injury, and the injured party had a right to inflict similar injury on the offender. In certain cases, where no retaliation was allowed, the injured party had the right to demand only blood money, known as *Diyut.* In case of theft, hands were cut off, and for dacoity and robbery the maximum punishment was death.

Diyut meant the fine or compensation for blood in cases of homicide. The punishment of *Kisas* in all cases of wilful homicide was exchangeable with that of *Diyut,* if the person having the right of retaliation wished, the end being relief and satisfaction to the mind. So, practically, the punishment of *Diyut* was an alternative to the punishment of *Kisas.* Again, all illegal homicides, excepting wilful homicide of the kind for which retaliation could not be claimed, would be visited with *Diyut* or the fine of blood payable by the *Aqila* of the offender as well as by the offender himself. The reason stated in the *Hedaya* for involving others in the fine was that the offender (who not being

[28] Mulla, *Muhammedan Law,* (1961) P.27

convicted of wilful homicide, would also be severely punished if personally made answerable for the whole fine) was supposed to have committed his offence with the aid, or through the neglect, of his associates; for although they may not have supported him, they might, if vigilant, have retrained him.

Another principle of punishment under the Muhammedan law was called *Hadd* which was defined in the *Hedaya* to comprise the specific penalties fixed with reference to the right of God, or in other words, to public justice. The punishment of *Hadd* extended to the crimes of adultery, of illicit sexual intercourse *(Zina)* between married or unmarried persons, of false accusation of incontinence (*Qadbf)* of drinking wine (*Sburb),* of theft[29] (*Sariqa)* and of highway robbery (*Sariqa-i-Kubra*).

3.7 Victim Orientation in Discretionary or Exemplary Punishments

The principles of *Tazeer* and *Siyasa* which meant discretionary punishment and exemplary punishment, respectively – were that the kind and amount of punishment rested entirely on the discretion of the judge. Under *Tazeer*, the punishment could be anything from imprisonment to banishment, to public exposure. *Tazeer* was legally defined as 'an infliction undetermined in its degree by the law, on account of the right either of God, or of the individual'; or, in other words, for the ends of public, as well as private justice. The penalties of *Tazeer* were of two kinds; one of a private nature, being in satisfaction of individual right; the other was public and considered to be the right of God. The first one might be excused by the person to whom the right

[29] See also David F. Forte, Islamic Law and the Crime of Theft: An Introduction, 34 Clev. St. L. Rev. 47 (1985-1986)

appertained; but in the second case the sovereign or his delegate were exclusively competent to remit the punishment of the criminal, provided the offender had repented for his crime before the infliction of the punishment.[30]

In the criminal justice dispensation under the Muhammedan law, the crime was responded to based on the loss and sufferings caused to the victim. The term victim had been properly understood as the real sufferer of crime. Therefore, compensation was also considered as an inevitable aspect of justice in the Muhammedan criminal jurisprudence.

3.8 Criminal Justice Administration (CJA) during British India

The East India Company (EIC) of United Kingdom established its office in the three major Presidencies in India. They were Bombay, Calcutta and Madras and its trade activities began from these headquarters. After the Battle of Plassey the Nawab of Bengal surrendered his dominions to the Company in 1765.[31] The company acquired the right to collect tax or revenue in Bengal and Bihar immediately after its establishment in Calcutta. The first Governor – General Warren Hastings indulged in the governance, and after the rebellion (*Sepoy* Mutiny) in 1857 and consequent to the Government of India Act, 1858, Britain assumed the task of directly administering India.[32] Thus, began the

[30] Mark Cammack, *Islamic Law and Crime in Contemporary Courts*, Berkeley Journal of Middle Eastern & Islamic Law, (2011) available at https://escholarship.org/ content/ qt8gk0b12q/qt8gk0b12q.pdf?t=ph3uo1

[31] The battle, in which the 39th Foot (later the Dorset Regiment) played such a prominent part, was fought on the 23rd June 1757 and effectively marked the beginning of 200 years' British rule in India, known as Plassey, after the village near which the action took place, the battlefield is located north of Calcutta in the region known as Bengal and is now near the north eastern border of India with Bangladesh. Retrieved from the website https://www.devondorsetregiment.co.uk/uploaded_images/files/Contributions/20110623_THE%20BATTLE%20OF%20PLASSEY.pdf

[32] Indian Mutiny, also called Sepoy Mutiny or First War of Independence**,** was widespread but

'British Raj' in India. The EIC, a business establishment had indulged in governing the people and their lands, and collecting revenue from Indians. Incidentally, it required laws to make the Indians their subjects, and to maintain tranquillity, uniformity and institutions for resolution of disputes and adjudication. Therefore, the British administration started to administer justice as a crime control measure. Earlier in 1790, the EIC assumed responsibility for criminal justice dispensation when Governor General Cornwallis, after three years of consultation with judges and magistrates, declared the need to correct the shocking abuses and wretched administration of justice in the *Foujdary* department. From 1790, until the enactment of Macaulay's Penal Code in 1860, the Company proclaimed the Muslim criminal law to be the law of the land, except in Bombay where Hindu Criminal law was reserved for the Hindus. However, with each passing year in this period, the Islamic criminal law became more of a façade, parallel with the political fiction that the company was governing as a vassal of the Moghul emperor. Remarkable innovations were initiated by the company with the result that a corpus Anglo-Indian law emerged in the form of the Company Regulations which were generally considered to be more humane than both the English criminal law of the times and the Islamic law.[33]

unsuccessful rebellion against British rule in India in 1857–59. Begun in Meerut by Indian troops in the service of the British East India Company, it spread to Delhi, Agra, Kanpur, and Lucknow Retrieved from https://ignca.gov.in/Asi_data/6048.pdf

[33] Nancy Gardner Cassels, *Social Legislation of the East India Company: Public Justice vs Public Instruction* Sage Publications (2010) P 16

3.9 Delivery of Criminal Justice and its Institutionalisation

After the establishment of colonial administration in India, the Judicial Plan of 1772 was introduced with an aim to preserve indigenous laws. It created two Chief Courts for Bengal in Calcutta, a *Diwani Sadar Adalat* (Chief Civil Court) and a *Nizamat Sadar Adalat* (Chief Criminal Court), and both Courts were supposed to act as courts of appeal for lower civil and criminal courts sitting in the districts of Bengal. In addition, each district was to have two courts, a *mofussil diwani adalat, for* the cognisance of civil causes, and a *faujdari adalat* for the trial of all crimes and misdemeanours. As stated above, in the sphere of criminal law, the EIC continued with the Islamic law, with the exception of the Bombay Presidency where the Hindu law came into force – that was in practice in pre-colonial India.

The EIC was issued with a *Royal Charter of 1683* that authorised the company to establish Admiralty Courts (also known as Maritime Courts, exercising jurisdiction over all maritime contracts, torts, injuries and offences) to check illegal traffic and punish piracy which had become common.[34] Thereafter, in 1688, the Mayor's Court was started at Madras. The Court sat only once in a fortnight and tried criminal cases with the help of a jury. Appeals from the Mayor's Court were referred to the Admiralty Court. In Madras, the process of administration was very slow.[35] In 1718, a new Court of judicature was established in Bombay. This Court of Judicature consisted of

[34] B.S. Sinha, *Legal History of India, Central Law Agency*, Allahabad (1976), p. 12.

[35] The bulk of the Court's work was in deciding criminal cases. Punishments imposed were severe and barbarous. Punishments were prescribed for swearing the name of God in vain, drunkenness, adultery, theft or robbery, housebreaking, assault, cheating, forgery and so on.

nine judges including the Chief Justice. Three English judges constituted the quorum and the native judges played only a subsidiary role of acting as assessors. The bulk of the Court's work was in deciding criminal cases. The Charter of 1726 appointed a Governor and five senior members of the council as Justices of Peace in each Presidency for the administration of criminal justice.[36] The concept of criminal justice during that time was that it should serve as a deterrent to others so as to prevent commission of offences in future.[37]

The EIC was never authorised to set up any Court till the Mayor's Court came up in 1728. Accordingly, one of the Council who occupied the office of Receiver of Revenues was not only the Collector but also a Magistrate. In the capacity of a Magistrate, he held a *Zamindari* Court which took cognisance of both civil and criminal jurisdiction. In all criminal cases the court proceeded to punish and sentence immediately after the hearing, except where the crime was murder, which required lashes to be inflicted until death. In such cases the execution of the sentence was suspended until the facts and evidence were laid before the President and his confirmation of the sentence was obtained.

Subsequently, on 15 August 1772, a new plan was adopted which provided for a Court of Criminal Judicature in each district presided over by a *Qazi* and a *Mufti*, who were to be assessed by the *Maulavies* to expound the law and determine the degree of criminality. In 1773, a Superior Court of

[36] Monica David, *India Legal and Constitutional History*, Allahabad Law Agency, Allahabad (1981), p. 9.
[37] *Ibid.*, p. 11.

Criminal Judicature, the *Sadr Nizamat Adalat* was established at Calcutta.[38] The new plan of Cornwallis was adopted on 3 December 1790. It made substantial changes in the administration and introduced institutes for CJA. For the administration of criminal law, it was ordained that the judges of the four Courts of Appeal should proceed on circuit, from *zillah* to *zillah*, within their respective circles. The Mohammedan law, divested of some of its most revolting precepts, was the criminal code of the courts, and the Mohammedan law officer, on the completion of the trial at which he had been present, was required to declare the sentence prescribed by that code, which was carried into execution if the judge concurred with it, and if he did not, it was referred to the *Sadar* Court, which was also constituted as Court of Appeal in criminal cases. The *zillah* judges were likewise invested with the powers of a magistrate and authorised to pass and execute sentences in trivial offences, and, in other cases, to apprehend the delinquent and commit him for trial before the judges of circuit. Each *zillah* was divided into districts of about twenty square miles, to each of which an officer called a *daroga* was appointed, with authority to arrest offenders on a written charge, and when the offence was bailable, to take security for appearance before the magistrate. Of all the provisions of the new system, this proved to be the most baneful.[39] The collectors were divested of judicial powers and the administration of justice was the sole duty of the judges.

[38] Wahid Husain, *Administration of Justice during the Muslim Rule in India*, Delhi Publishers (1977), pp. 166-167

[39] John Clark Marshman, *The History of India from the Earliest Period to the Close of Dalhousie's Administration, Vol II*, Reproduced by Sani H Panwahr (2020) P 24 Retrieved from http://www.sanipanhwar.com/ The%20History%20of% 20India% 20Volume %202% 20by%20John%20Clark%20Marshman%201867.pdf

These provisions with minor modifications and amendments were retained in *Regulation IX of 1793*. The alterations were that under the old scheme, collectors were to act as magistrates and they had some judicial authority also. Their judicial and magisterial powers were taken away and the judges of the Courts of *Diwani Adalat* were to hold the office of magistrates. In 1793, four Provincial Courts of Appeal were established with civil appellate jurisdiction, and their functions were executed by the same persons as were the judges of the Courts of circuit.

In addition to the constitution of courts for adjudication of disputes and rendering justice to the deserving litigants, some efforts to deter were introduced as penal sanctions. The different modes of punishment, public display of pain and ignominy, public executions, gibbeting, flogging, and labour on roads was considered an essential deterrent against crime, though the courts always took account of rank and status before inflicting such punishments. However, gradually, objections began to creep in against public punishment. The cruel spectacles evoked sympathy for the offender and associated law with torture, undercutting its legitimacy. Thus, these utilitarian calculations led to a gradual obsolescence of public punishment. [40] Further, the lawyers from United Kingdom were also brought to practise in the courts in India. The Indians were also trained with basic nuances of court functioning, practices and procedures. Thus, the establishment of courts, as justice-

[40] Piyush Kumar Tiwari, *The East India Company and Criminal Justice: The Role of Orientalists*, Indian Journal of Humanities and Social science Invention, Vol 3, Issue 4, PP 59-62

dispensing institutions had laid a strong foundation for institutionalisation of criminal justice delivery in India.

3.10 Codification of Laws

The codification of criminal laws in India is a landmark achievement of the British administration. Criminal law codification was never realised in England, despite its central place in 19th century law reform debates there. Codes were developed in other British jurisdictions and the first of it was in India.[41] There was no uniform law in India, and the need for a uniform law was felt by the administration of EIC. The Muhammedan law, which was applied in major parts of India other than the Bombay Presidency, consisted of set laws which were considered non-suitable for strict implementation. In particular, crimes like drunkenness and adultery were considered to be against God, so worthy of public vengeance, while others like murder and robbery were regarded as private injury to be taken care of by the injured party. It is true that in all cases the State had to first pronounce the judgment before punishment could be inflicted, but still the defect lay in the emphasis given to the retaliatory aspect of punishments in cases which were regarded to be offences against an individual, *e.g.* murder. In such cases importance was attached to the private satisfaction of the individual, rather than to the deterrence of others, by example, from committing the same crime. This was not in line with the English approach to crimes. Further, the Muhammedan law, according to the English, confused between 'sin' and 'crime.' It punished the violation of moral

[41] Wright B., *Macaulay's Indian Penal Code: Historical Context and Originating Principles* (2016) P 1,available in *https://carleton.ca/history/wp-content/uploads/Extract-from-Wright - for-Mar-11-talk.pdf*

or religious principles which were injuries neither to the individuals nor to the public, whereas it left other acts, which were detrimental to the public interest to be punished in the other world.[42] Therefore, the imperative need for a comprehensive and non-religious penal statute arose. Consequently, in 1833, the British appointed the India Law Commission that studied the then existing laws. The First Law Commission headed by Lord Macaulay drafted the Indian Penal Code, 1860. Subsequently, the Codes of Criminal Procedure, 1861, 1872, 1882 and 1898, The Indian Evidence Act, 1872, the important laws codified and introduced by the British created uniformity and also dispelled the unnecessary disputes relating to the powers and jurisdiction among the Indian authorities who adjudicated upon disputes and tried criminal cases. The codification and creation of courts, which are institutions with permanent offices, have facilitated the sufferers of crime to approach an authority for the remedies and reliefs. The uniform procedures based on the principles of natural justice for the purposes of inquiry and trial had considerably prevented secondary victimisation. Though there were no specific provisions for victims of crime, the institutionalisation of criminal justice administration itself is a milestone in the justice dispensation in India.

3.11 Crime Prevention Measures

The British introduced strong penal measures to prevent offences like dacoity, theft and other property related crimes. The Criminal Tribes Act, 1871 introduced severe punishments against any tribe, gang or class of persons

[42] K.N. Chandrasekharan Pillai & Shabistan Aquil, '*Essays on the Indian Penal Code'* Indian Law Institute, New Delhi, (2008) P 14

addicted to, or systemically habituated to commission of such offences. The British administration viewed that these types of property offences not only caused loss but created hurdles in the imposition and collection of tax from Indian citizens. Therefore, extraordinary penal measures were introduced to control those offences. A group of people or any clan indulging in these types of property crimes were punished with imprisonment or whipping, and their movements restricted with a passport system. The crimes these tribes were said to commit ranged from dacoity down to the pilfering of livestock and miscellaneous forms of petty property offences. Taken as a whole, the tribes so affected tended to be those on the margins of Indian society, yet their behaviour was most often put down, not to poverty and the precariousness of life, but to malign character, hereditary disposition to dishonesty and a loose amalgam of ideas about caste-sanctioned religious duty.

The English Common Law was also introduced and imposed in India, like in other colonies under the control of the British administrators. As a first step in the administration of justice, the Mayor's Courts were established in Madras, Bombay and Calcutta, and were conferred with testamentary jurisdiction to safeguard the interest of the heirs of Englishmen dying intestate in India. In each Presidency town, the Governor and five senior councillors were empowered to act individually as Justices of Peace with the same powers as the Justices of Peace of England during the period. They had the authority to punish every criminal wrong except high treason. The trial was conducted with

the help of a grand or petty jury and criminal justice was administered in accordance with the English law.[43]

In the beginning the highest authority of EIC struggled to introduce changes in the then existing penal sanctions against offenders. Lord Cornwallis proposed substantial reforms to the criminal justice that had prevailed in India. The Cornwallis Reform specifically removed the retributive aspects of Muslim law involving punishments by mutilation and prosecution to be initiated only by the victim or the victim's family, and introduced the celebrated concept that any person can set a criminal law into motion. Dr. Nancy Gardener Cassels, a history professor has narrated the developments that took place in the codification of laws and institutionalisation of rendering criminal justice as follows:

> "Prior to Judicial Regulation XXXIV 1791, and Bengal Regulation LIII 1803, offenders convicted of robbery without murder according to Muslim law were to be punished by having two limbs amputated. Thus, in 1789, Jonarthan Duncan, as Resident at Benares, presided over a court case in which the *maulvi* or law officer ruled that the defendant was 'deserving of losing his hand because he took the Bale from under the head of the traveller and carried it off'. Because the owner of the stolen property did not appear in court to prosecute, the defendant was 'not to have his hand cut off' but was 'deserving of greater punishment' at the discretion of the judge. Duncan took the opportunity to order the defendant to be imprisoned for one year and then released.[44]

[43] The Brief History of Law in India, Bar Council of India, available on the website of the Bar Council of India, http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom/

[44] Nancy Gardner Cassels (ed), *Social Legislation of the East India Company*, Sage (2010) P 40

The above incident would illustrate how instances of rational sentencing was introduced during the British period. Further, to make the investigation an expeditious process and to avoid the culprits going unpunished in the heinous offences like dacoity, the procedure to make a co-accused as an approver and treating his testimonies as admissible evidence of accomplice in the process of determining guilt, are also major reforms introduced in the CJA. This helped the victims of dacoity to a considerable extent in regaining the properties lost in the occurrences of crime, and also tranquillity was guaranteed in society.

There were many Asian and European countries that were under the colonial regime of the British. The Indian sub-continent was considered as unique because neither did it possess the European tradition nor a single culture or language. The multi-linguistic tradition and cultural diversity were the main reasons to enforce uniformity in the administration of justice. Therefore, the British administration in India introduced institutions to render Civil or Criminal Justice, codified the penal laws and also brought into force the principles of Common Law, with a uniform procedure for adjudication. The jury system, which was in force for about a decade after Independence, was the contribution of the British in the administration of Criminal Justice in India.[45] But, the adversarial system of the British brought to and introduced in India has taken away the role and direct participation of victims in the criminal dispute adjudication process and the State had become the only entity to represent on behalf of the victims before the courts.

[45] The jury trial system came to an end in India with the case in *KM Nanavati vs State of Maharashtra* AIR 1962 SC 605

3.12 Rediscovery of Victims of Crime

As stated above, among the codified laws on crimes and punishments, the Hammurabi Code, a collection of 282 rules inscribed on an upright stone pillar is considered to be the one of the earliest codes.[46] This code had recognised the status of a person who suffered a crime and provided compensatory relief to him. Further, as discussed above, ancient Indian criminal justice system, had recognised the victim and provided compensation as a relief to the sufferings of crime. Therefore, victim was included within the process of CJA. But after a few centuries the victim has been slowly eliminated from the crime adjudication process, and criminal justice administration has been confined to dealing with the offender. The victim, after occupying the position of obscurity for centuries, has now emerged as a recognised stakeholder, in the criminal justice dispensation.

After World War II, the political philosophies adopted by many countries underwent changes, and reforms have also been introduced in the civil administration. Voices rose against slavery, political imposition, and denial of justice, and demanded safeguarding of human rights. In line with humane treatment of victims and compensation, new ideas such as restitution have been suggested by the criminologists. Miss Margery Fry, a British prison reformer, for the first time in 1957, proposed that there should be some form of State Compensation, on the lines of insurance to the victims of violent crimes.[47]

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[46] https://www.ushistory.org/civ/4c.asp#:~:text=The%20code%20was%20found%20by,Empire%20from%201792%2D50%20B.C.E.https://www.ushistory.org/civ/4c.asp#:~:text=The%20code%20was%20found%20by,Empire%20from%201792%2D50%20B.C.E.

[47] Miss Margery Fry, was a first woman magistrate in England, and a prison reformer. Her

Her suggestions aroused interest and controversy also. Despite such voices, criminology continued to be concerned with the criminal behaviour and the personality of the criminal or the law breaker.

Benjamin Mendelson, an attorney-at-law, coined the word 'Victimology' deriving the term *victim* from Latin and *Logos* from Greek, and introduced it in 1957 through a paper that appeared in the Belgium Criminology Journal 1937 and *Von Hentig* floated a theory that '*if there are born criminals, it is evident that there are born victims, self-harming and self-destroying through a medium of the pliable outsider'*.[48] Thus, the study of science of victims took birth.

The Supreme Court, in *Ankush Shivaji Gaikwad* v. *State of Maharashtra*,[49] noted the historical perspective of victim renaissance. It referred to a piece from the Harvard Law Review (1984) to note that after the greater awareness about victim of a crime, the theory of retribution may be considered to be outdated and changes in sentencing policies have advanced the theory of restitution. The Court quoted as the follows:

> "… Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken. As the State gradually

article on Victims, 'Justice For Victims' appeared in *The Observer,* on July 7, 1957

[48] *American Journal of Criminal Law & Criminology, Vol 31,* (1941) pp 303-309

[49] (2013) 6 SCC 770. See also decisions referred to in *Manohar Singh* v. *State of Rajasthan* AIR 2015 SC 1124

> established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim's right to compensation was incorporated into civil law."[50]

The Apex Court also discussed the shift from retribution to restitution that began in the mid-1960 and gained momentum in the subsequent decades, and emphasised that the historical perspectives are important to understand developments and changes in the criminal justice dispensation.

3.13 Entry of Victim to the Judicial Domain

The word victim entered the judicial domain for the first time in 1860, and a trial court in California gave it in a contextual meaning to refer to a person killed in an occurrence of crime. But, later, the Supreme Court of California discouraged and cautioned against the use of the word victim in the judgment. In *People* v. *Williams*[51] the California Supreme Court opined as follows:

> "The word victim in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was to the character of killing. We are not disposed to criticize language very closely in order to reverse a judgment of this sort, but it is apparent that in a case of conflicting proof even an equivocal expression coming from the judgment may be fatal to the prisoner. When the deceased is referred to as 'a victim', the impression is naturally created that some unlawful power or dominion had been exerted over his person and it was nearly equivalent, in effect, to an expression characterizing the defendant as criminal. The court

[50] *Id.*, para 33

[51] *People* v. *Williams* 17Cal. 142, [Cr No. 21477. Supreme Court of California, June 1, 1981.], available at https://law.justia.com/cases/california/supreme-court/3d/29/392.html

should not, directly or indirectly assume the guilt of the accused, nor employ equivocal phrase which may leave such an impression."

In the United States there was a proposal to amend the Constitution to guarantee certain rights and protect the victims of crime from persistent perils after the crime. It was opposed on the ground that it would be unwise to recognise the right of an undefined party in the Constitution.[52] In this attempt to amend and introduce the victims of crime to the constitutional landscape of the U.S., there was no clarity and consistency in defining the victim of crime in the penal statutes. It is an important legal impediment caused in the history of victim justice and taught the victimologists that unless there is a clear definition in a statute, a victim cannot get a constitutional status. According to *Bajpai,* a professor of criminology and victimology,'…in the criminology and criminal law, victim of a crime can be identified as a person who has been harmed individually and directly by the perpetrator rather than by society as a whole.'[53]

On a similar line, for the purpose of this research it would be appropriate to treat only a person who has suffered as a result of a crime committed by another person, to be considered as a victim.

3.14 Victim in the Contemporary Criminal Justice System in India

As analysed, in India, before the invasion of the Muslims, criminal laws were not uniform and consistent. Customs and usages were prevalent in the criminal justice administration, and after their conquest of India, the Muslim rulers had imposed the Muhammedan Jurisprudence. It was a religious code.

[52] For a detailed discussion see, Andrew Nash, *Victim by definition*, 85 Wash U.L Rev 1419 (2008)

[53] Bajpai G.S. (ed.) Ramneek Kapur, *Evolving Victimological Jurisprudence*, Journal of National Law University vol.3 (2015 -2016) p 33

The East India Company also, for a considerable period, followed the Muslim criminal laws with some modifications. In their colonial administration, the British introduced the common laws of England and India adopted the Anglo-Saxon method of justice administration, except in the matters of marriage, succession and inheritance. In the adversarial system of Anglo-Saxon method, the State became the only party to prosecute the perpetrator. The State considered that the punishment is the only remedy, and mere slapping of fine and imprisonment, which are penal censures against the offenders, is the purpose of criminal law. Adequate attention was not given to the plight of the victims.

The Indian Jurisprudence consists of exclusive criminal laws which is absolutely different from the law of torts. While drafting a Penal Code for India it was observed as follows:

> "We cannot admit that a Penal Code is by any means to be considered as a body of ethics; that the legislature ought to punish acts merely because those acts are immoral. Many things, which are not punishable, are morally worse than many things which are punishable. The man who treats a generous benefactor with gross ingratitude and insolence deserves more severe reprehension than the man who aims a blow in passion, or breaks a window in a frolic, yet we have punishments for assault and mischief, and none for ingratitude. The rich man who refuses a mouthful of rice to save a fellow-creature from death may be far worse than the starving wretch who snatches and devours the rice; yet we punish the latter for theft, and we do not punish the former for hard-heartedness."[54]

[54] Macaulay, Macleod, Anderson and Millett, *A Penal Code prepared by the Indian Law Commissioners*, Pelham Richardson (1838) P 174.

The present criminal laws in force are properly codified and adequately distinguished from the tort laws (except a few personal harms like defamation etc.) and both the substantive laws and adjective laws have been in force without any major changes for the past 150 years.

The Criminal Legal Framework consisting of The Indian Penal Code, 1860 (IPC), Code of Criminal Procedure, 1898 (Cr P C), The Indian Evidence Act, 1872 are the three legal texts framed by the British for the purpose of Criminal Justice Administration.[55] The colonial penal texts continue to be applied for purposes ranging from informing the crime occurrence to police authorities, investigation and all processes of adjudication, even after Independence and the adoption of the Constitution. IPC, the substantive criminal law, Cr.P.C., the adjective law and the law of Evidence, a *lex fori*, which were drafted by the British, have been in force without substantial changes and amendments, and do not carry any benevolent provisions for the victims of crime.

As observed earlier, the necessity to frame or enact the Criminal Legal Framework after the embarrassing defeat in the belligerent *Sepo*y Mutiny in 1857, a necessity and compulsion arose to the British to introduce a mechanism to force acquiescence and compliance of the people to the provisions of the colonial rule. Indeed, the legal codes were created primarily to deter the people who resisted the colonial State.[56] The continuing application of those provisions of Criminal Legal Framework in India has ensured that the role

[55] The Code of Criminal Procedure, 1898 had undergone many amendments and was replaced by Act 2 0f 1974 and has been in force till now.
[56] Prabha Unnithan N., (ed.) *Crime and Justice in India*, Sage Publications, 2013, P 9

played by the victim in the course of investigation, trial and other adjudicatory processes in the system is not duly recognised. As observed by the legal scholars and criminologists, *the Victim is often a forgotten person in our criminal justice system.*[57]

The twentieth century is especially hailed as the 'age of human rights,' as no preceding century in human history has witnessed such a profusion of human rights enunciation on a global scale, never before has the language of human rights sought to supplant all other ethical languages, the rights and privileges of the perpetrator of crime discussed and provided by the courts and legislators.[58] The increase in granting protective privileges to the accused person such as right to maintain silence and protection accorded in the trial, have not been correspondingly extended to protect the interests of the victims of crime. The victims and victimisers, being the two stakeholders, are not provided with equal rights and relief. Often, the victims face inequitable and unmatched status and position in all phases of criminal justice dispensation.

3.15 Victim Renaissance in Twentieth Century

In the twentieth century, many rights of people have been recognised by the authorities. Laws are introduced to prohibit discrimination based on gender, caste, religion, race, colour, creed, and other factors. These factors that were used as a strategy to create inequality have been identified and laws are passed against them, especially in a welfare State. The United Nations, an

[57] R. Cleroux, *Sweeping Reforms proposed in payments To Crime Victims*, The Toronto Globe and Mail, 2(1987 November, 6) as cited in *The Role of Victims in the Criminal Process, A Literature Review – 1989 -1999,* by Alan N Young, Victims of Crime Research Series, 1 August, 2001

[58] Upendra Baxi, *The Future of Human Rights*, Oxford India, (2012) P 1

intergovernmental organisation established with the aims and objectives, among others, to promote universal respect for and observance of human rights and fundamental freedoms for all, played an extremely important role in safeguarding the rights of the deserving groups, and individuals too.

The '*Handbook of Death Penalty and the Victims,*'[59] published by the United Nations, emphasised that 'in the debate of abolition of death penalty, the victims should be at the centre'.[60] The States shall exercise its sovereignty against the perpetrators by imposing penal sanctions, and it need not reduce the prescribed punishment, but may also consider the legal heirs of death convicts, is the idea of the said handbook. The handbook has endorsed the views of the World Society of Victimology (WSV) that by being supportive of legitimate victims' rights, one need not be considered to have adopted an anti-offender attitude. That is because the views of the WSV stem from the conviction that reform of criminal justice is not a zero-sum-game.[61] The rights to be granted to victims can never compromise the offender's right to a fair trial, or to be immune from cruel or unusual punishment. The State plays a central role in both upholding the rights of the victims and the rights of the victimisers.

The United Nations has even suggested that the concept of the victim has to be expanded, and the family members of death convicts are to be

[59] *Hand Book on Death Penalty and the victims*, Office of the High Commissioner, Human Rights, United Nations, New York, 2016. Electronic version of this publication is available at: www.ohchr.org/EN/NewYork/Pages/Resources.aspx

[60] Ban Ki-moon, U.N. Secretary General, in the preface of the Handbook on Death Penalty and the victims.

[61] Groenhuijsen, Marc, *Does victimology have a theoretical leg to stand on? Victimology as an academic discipline in its own right?* In Frans Willem Winkel, Paul Friday, Gerd Kirchhoff & Rianne Letschert, (eds.), Victimization in a multi-disciplinary key: recent advances in victimology Nijmegen: Wolf Legal Publishers (2009) https://pingpdf.com/pdf-death-penalty-and-the-victims-ohchr.html

included in the ambit and scope of victim. It has also identified a group of "*Hidden Victims*" who are the children and family members of the convicts facing capital sentence. The pain that death row families endure in their daily lives, and the stigma their relatives face and the deep sense of shame they undergo are creating third party victims, who are invisible to the State machineries and the common public. The perspectives of the victims on the death penalty reflected in the Handbook published by the United Nations is sure to cause an impact in the criminal jurisprudence in a near future.[62]

The foundation laid for the renaissance of the victim has been evolving to a considerable level, and any person, including the alleged perpetrator, comes within the purview of victim, while expanding the scope for the purposes relief and remedies in case of any violations of guaranteed rights. Custodial violence, the worst form of human rights violation, is a case in point. Unnatural deaths have been occurring in many institutions in the country. There is no specific data available about the number of deaths in police custody in India. The Supreme Court, while dealing with unnatural deaths in prison, has noted the circumstances when an accused can be treated as a victim. In the Public Interest Litigation (PIL) relating to prison and its conditions the question 'when an accused can be treated as victim' was also discussed by the Supreme Court in *Inhuman Conditions in 1382 Prisons, In Re*.[63] It has held as follows:

> "It is important for the Central Government and the State Governments to realise that persons who suffer an unnatural death in a prison are also

Death Penalty and the victims, Ivan Simonovic, Office of the High Commissioner, Human Rights, United Nations, New York, 2016.

[63] (2017) 10 SCC 658 at para 55

> victims – sometimes of a crime and sometimes of negligence and apathy or both. There is no reason at all to exclude their next of kin from receiving compensation only because the victim of an unnatural death is a criminal. Human rights are not dependent on the status of a person but are universal in nature. Once the issue is looked at from this perspective, it will be appreciated that merely because a person is accused of a crime or is the perpetrator of a crime and in prison custody, that person could nevertheless be a victim of an unnatural death."

Therefore, the concept of victim is expanding even to the cases of treatment of the perpetrator by the State, brutally and violently using third degree methods to extract the information relating to the commission of offence during interrogation or in detention. A perpetrator who dies in the unexplained circumstances when he/she is in the police custody or prison will transform as a victim, and his heirs or dependants are entitled for *ex-gratia* payments from the government. This is one of the important aspects in the expansion of the concept of victim. However, there are no legislation in India providing mandatory compensation or other benefits for those categories of victims of custodial deaths.

3.16 Conclusion

The long history reveals that crime was responded to by another crime when might and muscle power were considered as right in the society, and the clan or group took up the responsibility to reimburse a person who suffered because of a crime. Thereafter, the CJA underwent changes in the line of rules imposed by the King and administrators. The codification and institutionalisation of justice governance, the political and social developments

following the enhancement of literacy rate and consequential awareness about rights in the twentieth century, have geared up many reforms in the spheres of legal system and justice administration. It has not left criminal justice untouched. The criminal justice landscape has been revisited and reviewed in different dimensions. The stakeholders are recognised and the changes are incorporated in the laws. Thus, the development of criminal justice system does involve the creation of new concepts or reintroduction of old concepts. The concept of victims of crime may be considered as a rediscovery of a fact that was forgotten while accepting the new principles of criminal law.

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CHAPTER IV
THE CONCEPT OF VICTIMS OF CRIME

"Victim is the core of any crime made punishable by the organised society or polity within whose jurisdiction it occurs. It is the pain of deprivation suffered by him which provides the cause for criminal action."[1]

4.1 Introduction

In the early days, the concept of victim was understood to a considerable extent in the criminal dispute resolution process and placed at the centre of justice dispensation, but no victim studies originated as a separate branch in the social science arena till recently. Crime was considered as a separate branch for study, namely Criminology and it is a developed faculty. Just as criminology is the study of crime, the study of victims is known as victimology. It is an academic scientific discipline for the study of victims of crimes, and relates to consequences of the crime, victimisation, and how the criminal justice recognises and accommodates the victim. It is also defined that victimology is the scientific study of victims of crimes, a sub-discipline of criminology. It seeks to study the relationship between victims and offenders; the persons especially vulnerable to crimes and the victim's placement in the criminal justice system.[2] Further, it is often said that Criminology is a Cinderella among social sciences and Victimology is Cinderella of Criminology.[3] Immediately, after the origin of the new branch Victimology, the question that arose was who

[1] G S Bajpai & Shriya Gauba, *Victim Justice A paradigm shift in the Criminal Justice System in India*, Thompson Reuters, (2016) P 1

[2] Ahmed Siddique, *Criminology Problems and Perspectives*,(1993) P 505

[3] Justice V R Krishna Iyer, in his Foreword in '*Readings in Victimology'*, Dr K Chockalingam,(ed.) Raviraj Publications, Chennai (1985)

a victim is and how would he/she be identified, or how would the term be defined for the purposes of victim studies. As observed by Bharat B. Das:

> 'The first problem encountered in victimology is to define, who is a victim? The term victim is often one of moral approbation lacking descriptive precision in respect to actual human behaviour. It implies more than the existence of an injured party, in that innocence or blamelessness is suggested as well as moral claim to a compassionate response from others.'[4]

Criminologists treated the victim as an outsider to their study. It was described as a 'victim-free phase of criminology', and in the Common Law jurisdictions, until 1970, victims were almost wholly neglected in the criminal laws, and studies were confined to crimes and the accused person.[5] The idea to recognise the sufferer of a crime who sustains injuries, loss of limb or suffers mental agonies, fear, coercion etc., as a stakeholder and also to provide legal relief for his rehabilitation, is of a recent origin in the arena of criminal justice. Since the mid-twentieth century, CJA has been undergoing substantial changes around the world, and modern criminologists and penologists have suggested proposals based on their experience and studies that punishment, which though is an ultimate judicial censure upon the offender, is not a panacea and should not be the sole purpose or aim of CJA. The victim who bears the dangerous consequences of crime is also to be restored to his/her pre-crime stage, as much

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[4] Edward A Ziegenhagen, *Victims of crimes and Social Control*, Praeger, New York (1977) P 1 as quoted by Bharat B Das in *Victims in the Criminal Justice System,* APH Publishing Corporation, New Delhi (1977) P 26

[5] Claire Ferguson and Brent E. Turvey, *Victimology: A Brief History with an Introduction to Forensic Victimology,* available at*https://booksite.elsevier.com/samplechapters/9780123740892/Sample_Chapters/02~Chapter_1.pdf*

as possible. To achieve this purpose of CJA, criminal laws enacted by sovereign authorities known as 'the will of the legislature' must consist of clear terms and convey a definite meaning to include the victim, who has suffered and has been traumatized by the crime.[6] Further, criminal justice institutions, policy makers, law-enacting authorities and law-interpreting bodies must understand the concept of victim to enforce the victim redressal laws.

This chapter is a study of the necessity for clear terms with consistent meaning in the victim redressal laws, and how the concept of victim has originated and is evolving in the legal and human rights arenas, and tries to suggest further requirements in the victim- based policies and laws.

4.2 Necessity to Identify the Victim

In the modern CJA, the accused is alone, but the prosecuting and law-enforcing machineries are running against him. Therefore, criminal jurisprudence across the world, especially the adversarial system, has been focused on the rights of the accused and not those of the victim.[7] This position of accused- oriented perspectives in the criminal jurisprudence was explained and justified in the *Queen* v. *Carroll*[8] by the High Court of Australia, as follows:

> "A criminal trial is an accusatorial process in which the power of the State is deployed against an individual accused of crime. Many of the rules that have been developed for the conduct of criminal trials

[6] Sir Peter Benson Maxwell, *Maxwell's Interpretation of Statutes,* Indian edition (1969)
[7] Blondel, Erin C. "*Victims' Rights in an Adversary System*." *Duke Law Journal*, vol. 58, no. 2, Duke University School of Law, 2008, pp. 237–74, http://www. jstor. org/ stable/ 40040652.
[8] (2002) 213 CLR 635 at 643

> therefore reflect two obvious propositions: that the power and resources of the State as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious. Blackstone's precept 'that it is better that ten guilty persons escape, than that one innocent suffer', may find its roots in these considerations."

As discussed in the previous chapter, in early years, the victim alone could set the law into motion or initiate action for the harm caused to him. Therefore, the victim was easily recognised and understood by all. Recently, after the advent of victim-related researches and the introduction of the term 'victim' into the major criminal laws, courts have been empowered to consider him as a sufferer of crime and to be recognised as a major stakeholder of CJA being entitled to reliefs. Therefore, the task to clearly identify the victim of a crime arises. The identification of the victim with a proper legal definition would help, among other uses, to:

1. gather information about crime, its victims and assess the damage, loss *etc*.;
2. reduce the percentage of under-reporting of occurrences of crime;
3. assess the damage caused to the public properties;
4. make the legal system more effective;
5. enact and implement prevention and prohibition measures;
6. restore the victim to the pre-crime stage as much as possible; and
7. impose proper sentences on offenders.

It is an important task in the victim studies that a clear, exact and specific meaning of the legal terms are put in place, to be understood by the interpreters so as to apply the beneficial laws in favour of the victims. There is a common perception that the crime means and includes only the accused who

committed it. It is the legitimate argument of the victimologists that the term 'crime' should include not just its perpetrator but also 'the victim', who is a by-product of the crime.[9]

The criminal laws in India and many countries have roots in the United Kingdom. The Criminal Law of England has been reproduced in various forms in nearly all the thirty-eight States of the United States. It had also been introduced in most of the forty-five colonies in Asia and Europe which formed part of the British Empire. There are, thus, around eighty versions of the English criminal law. In some cases the law has been codified while in others it remains as it was at the time of its introduction, subject to such modifications as it has received by local legislation.[10] Each word used in the laws governing the prevention and control of crime, and the process relating to investigation, inquiry or adjudication has to be specific. Vague words are void under the criminal laws.

4.3 Consequences of Void or Vague terms

Vague or uncertain terms and phrases in the statutes would only create confusion and, often, conflicts of opinion among the courts or benches with the similar powers and jurisdictions. The courts, in the process of meting out justice, are empowered only to rely on the specific and meaningful terms. They have been conferred with the powers to declare the vague terms in statutes as void. It has originated from the maxim 'void for vagueness' doctrine. Under

[9] Ashok Kumar IPS, *Need for victim-oriented criminal justice system,* Times of India, May 7, 2021, Retrieved from https://timesofindia.indiatimes.com/blogs/voices/need-for-victim-oriented-criminal-justice-system/

[10] Bharat B Das, '*Victims in the Criminal Justice System',* APH Publishing Corporation, New Delhi (1997) P 35

the void-for-vagueness doctrine, a vague law is a violation of due process because the law does not provide fair warning of a prohibition and fails to set standards for enforcement that would govern the exercise of the police power.[11]

Indian criminal courts have pronounced many such decisions and there are a number of illustrations, where this principle has been applied. In *State of Madhya Pradesh* v. *Baldeo Prasad,*[12] a Constitution Bench held that the Central Provinces and Berar Goondas Act, 1946[13] was void for uncertainty. The State, through a police official, filed an application under Sections 4 and 4A of the said Act and prayed that an accused, who had several criminal cases against him, to be declared as a *goonda.*[14] But the definition of *goonda* in the Act indicated no tests for deciding which person fell within the definition. The provisions were, therefore, held to be uncertain and vague.

The Constitution Bench of the Supreme Court, in its judgment in *Kartar Singh*[15] case, has observed:

> 'It is the basic principle of legal jurisprudence that *an enactment is void for vagueness if its prohibitions are not clearly defined.* Vague laws offend several important values. It is insisted or emphasised that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.' (*Emphasis added).*

[11] 'Void-for-vagueness doctrine' *Merriam-Webster.com* Legal Dictionary Merriam-Webster, https://www.merriam-webster.com/legal/void-for-vagueness%20doctrine, Accessed 13 Feb, 2022

[12] AIR 1961 SC 293,

[13] Act X of 1946 as amended by Madhya Pradesh Act, Act XLIX of 1950

[14] The term 'Goonda' used in the Indian laws to denote a habitual offender hired for criminal intimidation

[15] Manu/SC/1597/1994

Another recent case is *Shreya Singhal*[16] in which Section 66A of the Information Technology Act, 2000 (IT Act, 2000) was extensively discussed and it was held that the provision is completely open-ended and undefined. A batch of writ petitions filed under Article 32 of the Constitution of India raised important and far-reaching questions relatable primarily to the fundamental right of free speech and expression guaranteed by Article 19 (1) (a) of the Constitution of India. Section 66 A IT Act, 2000 was not originally drafted or incorporated in the Act by its framers, but it was inserted by an amendment.[17] It was a penal provision that made the act of sending messages through a computer resource or communication device an offence punishable with imprisonment for a term up to three years and with fine.[18] The Apex Court referred to the reasons assigned in the decision in *Grayned* v. *City of Rockford*:[19]

> 'It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to

[16] *Shreya Singhal* v. *Union of India*, (2013) 12 SCC 73

[17] Amendment Act of 2009 with effect from 27 October, 2009

[18] 66-A. Punishment for sending offensive messages through communication service, etc. — Any person who sends, by means of a computer resource or a communication device, (a) any information that is grossly offensive or has menacing character; or (b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or (c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages, shall be punishable with imprisonment for a term which may extend to three years and with fine.
Explanation.— For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

[19] 33 L.Ed., 2d, 222 Quoted in the *Shreya Singhal* Case

> steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute upon sensitive areas of basic First Amendment freedoms, it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.'

Further, the Supreme Court has stated its own reasoning that there is no manageable standard by which to book a person for an offence under Section 66 A and invoked *vagueness principle* to declare Section 66 A, IT Act, 2000 as void and unconstitutional. The highest Court of the land has held that it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.

The decisions cited and discussed above would make it clear that the words and phrases in the criminal law should not only be certain but should also convey specific and unambiguous meaning. In case of ambiguity or multiple meanings the courts cannot act on those ambiguous words and expressions, resulting in the purpose of enactment being defeated.

4.4 Clear expressions and Certain Definitions

There is authority for saying that 'the language of statutes is peculiar'[20] and even a casual inspection of the law reports is likely to reveal that the courts do not invariably display a deep reverence for every product of the art of parliamentary counsel. In a sense, the scales are heavily weighed against the draftsman; if he has made himself plain, there is likely to be no litigation, and so none to praise him, whereas if he has fallen into confusion or obscurity, the reports will probably record the results of the fierce and critical intellects of both Bar and Bench being brought to bear on his work. Yet the debt owed to him by the legal profession is incalculable. He has been pictured as happily singing to himself

> "I'm the Parliamentary Draftsman,
> I compose the country's laws,
> And of half the litigation,
> I'm undoubtedly the cause."[21]

It is the precise and candid expression of unambiguous words in the statutes that would reduce multiplicity of proceedings in courts and conflict of opinions among the judges.

The extensive adoption of English criminal law around the world consists of clear and certain definitions of common law offences. Sir James Fitzjames Stephen opined that perfect clarity is the basic quality of the penal law. According to him, the Indian Penal Code, 1860 (IPC) is the best code and

[20] *Lyons v. Tucker (1881)* 6 Q.B.D. 660 at 664, per Grove J. (reversed, 7 Q.B.D. 523) - the quotation continues "... and not always that which a rigid grammarian would use; we must do what we can to construe them."

[21] The Parliamentary Draftsman that appeared in "*Poetic Justice*," by J.P.C. (James Comyn), London: Stevens & Sons Ltd., 1947, Pp 31-32.

that it survives without any hurdles as there is no obscurity or ambiguity in the definition of the various kinds of crime. The legislative expressions are the features of IPC. He has appreciated the usage of words and phrases. The type in which the Indian Penal Code is written is remarkable in many ways. From a literary point of view, parts of it have much in common with Lord Macaulay's more popular compositions, though parts of it, as it now stands, could never have come from his pen, the love of direct explicit statement, the taste for expressing distinctions by the juxtaposition of sentences similarly constructed but with different leading words.[22]

As cited above, it is the clear and meaningful definitions in the IPC, a prime penal statute that made it the longest surviving penal code in the world. Every statute relating to criminal law should be framed with clear expressions through understandable terms. It is extremely important that the provisions relating to definitions in criminal laws should be easy to perceive and understand for the purpose of application and interpretation. Ambiguity leads to conflict of opinions among the courts, and also causes multiplicity of proceedings. Therefore, victim- oriented laws which have been introduced after 1970 in the legal texts and legislative domain coming up for interpretation before the courts, should consist of comprehensive and unambiguous terms. In this context, it is imperative to study the meaning of the word victim in general and in legal parlance with special reference to crimes.

[22] Edward Phillips, *The Codification Enterprise: Principled Law Reform and the Indian Penal Code*, The Jersey & Guernsey Law Review, (2017) P 167, https://www. jerseylaw. je/ publications/ jglr/Pages/JLR1702_Phillips.aspx

In the arena of victim studies the key terms that define the offence, crime and victim have inseparable proximity and nexus, because victim, in our use of the word, is a result of crime. There cannot be a victim without a shadow or semblance of crime. The gravity or magnitude of the offence is also an important factor in identifying the victim and assessing the damage or sufferings caused to him/her, by the crime. The nature of the crime is an important factor to determine the quantum of compensation, if any, to restore the victim to the pre-crime stage. As per the basic principles of interpretation of laws, the criminal statutes that impose punishments or other penalties should be construed narrowly in favour of the person who is liable to the penalty, and if there are two reasonable constructions, the lenient view is to be adopted in favour of the accused. If there is any ambiguity in the words which set out the elements of an act or omission declared to be an offence, such ambiguity should be resolved in favour of the person charged.[23] The judges, while interpreting the penal statutes, have to give meaning to the words that is in favour of the accused. This has been the rule of interpretation followed by the criminal courts in the U.K., the U.S and India.

As stated above, if a provision of penal law is ambiguous or vague, the court can declare it illegal, and when there are two ways of reasonable constructions or interpretation, the one which is in favour of the offender is to be given effect to. The Supreme Court in *Tolaram* v. *State of Bombay*[24] has held that if two possible and reasonable constructions can be put upon a penal

[23] Langan, *Maxwell on The Interpretation of Statutes*, Lexis Nexis (2016) P.238-40
[24] AIR 1954 SC 496 at p. 498

provision, the court must lean towards that which exempts the subject from penalty, rather than the one which imposes penalty. The court is considered not competent to stretch the meaning of an expression used by the legislature in order to carry out the intention of the legislature.

Further, the text and context in the penal laws should be clear to avoid misinterpretation by the courts. The Supreme Court, in the decision in *Pratap Singh* v. *State of Jharkand*,[25] has made it clear that interpretation of a statute depends upon the text and context thereof, having regard to the object with which the statute was made.

In the paper in the book on 'Criminology Theory' it is argued that judges in criminal cases have no right to interpret the penal laws, because they are not legislators. They have not received the laws from our ancestors as a domestic tradition, or as the will of a testator, which his heirs and executors are to obey; but have received them from a society actually existing, or from the sovereign, its representative. When the code of laws is once fixed, it should be observed in the literal sense, and nothing more is left to the judge than to determine whether an action is or is not conformable to the written law.[26] Therefore, it further requires that the terms and words used in criminal law should be appropriate, clear and specific.

[25] (2005) 3 SCC 551

[26] Cesare Bonesana, Marques Beccaria, *An Essay on Crimes and Punishments*, Frank P. Williams III Marilyn L. McShane (eds.) *Criminology Theory Selected Classic Readings*, Routledge, London (2015) pp 12-13

4.5 Etymological Explanations and Court Interpretations

In a decision, the Maryland Supreme Court in the United States had noted that the definition of victim provided in Black's Law Dictionary and Webster's ninth new collegiate dictionary was varying in meaning and scope, and the term was ambiguous. It has been observed that the 'victimhood' is a slippery concept'.[27] The relevant portion reads as follows:

> 'The appellant gives the definition of 'victim' from the Oxford English Dictionary (1933) as 'a living creature killed and offered as a sacrifice to some deity of supernatural power,' or 'a person who is put to death or subject to torture by another; one who suffers severely in body or property through cruel or oppressive treatment.'...On the other hand, the State relies on the definition of 'victim' in Webster's New International Dictionary, as 'a person or living creature injured, destroyed or sacrificed, in pursuit of an object, in the gratification of a passion, at the hands of another person, from disease, accident or the like'.

To appreciate the developing concept of victim, proper and clear definition for the legal terms like 'Victims of Crime' are to be provided in the statutes. If not, the Courts' interpretation may differ according to the nature and circumstances of each case and may also pave way for its own creative interpretation. The term victim has not yet attained a definite meaning in USA and it was observed by an author that despite the widespread appearance of victims in federal criminal law, victimhood has yet to obtain a fixed, salient

[27] See *United States* v. *Terry*, 142 F.3d 702, 711 (4th Cir. 1998) (noting that the definitions of "victim" provided in Black's Law Dictionary and Webster's Ninth New Collegiate Dictionary vary in scope and that "the term 'victim' standing alone is ambiguous").

legal meaning.[28] The formal literal meaning and clear legal definition for the terms of crime or offence and victim-related terms are extremely important to identify the victims and to invoke the benevolent and remedial measures available to them. The courts can also expeditiously identify the victim without indulging in the interpretation of words and phrases for the purpose of providing the right remedies. Above all, to maintain consistency in administration of criminal justice, an unambiguous and certain legal definition is an important requirement.

The plain and literal meaning for the term victim is a person harmed by a crime, tort or other wrong.[29] The Black's Law Dictionary, provides the following meaning:

> 'A person killed or tortured by another; a person subjected to cruelty, oppression, or other harsh or unfair treatment, or suffering death, injury, ruin, *etc*., as a result of an event, circumstance, or oppressive or adverse impersonal agency.'[30]

Before the introduction of the concept of victim and its further development, only the literary meaning was accepted and used for all purposes to refer to a person harmed by a wrong and if the person died, his/her heirs were considered as victims.

4.6 Survivor or Victim?

In the modern world, many people who have thwarted, confronted or faced crimes, may not be willing to identify or claim themselves as victims.

[28] Andrew Nash, Victims by Definition, 85 WASH. U. L. REV. 1419 (2008). Available at: https://openscholarship.wustl.edu/law_lawreview/vol85/iss6/5
[29] The New Shorten Oxford English dictionary,7th edition P 156,
[30] The Black Law Dictionary, St Paul Min, West Publishing Co (1968)

Instead, they prefer the term 'Survivor' to avoid the negative perceptions that encompass the word victim. The term survivor also has multiple meanings. Victim is a broad term, which includes the deceased, but survivor denotes only the person surviving the crime or other disasters.

According to *Paul Rock,* the word victim conveys stigmatised meanings of weakness, loss and pain. Therefore, most people in everyday life would not willingly or eagerly build an identity upon them. Other people might eschew the designation of victim or refrain from reflecting upon it. There are alternative frames which could enable a potential victim to be defined, say, as a disabled person, a claimant, survivor, patient, invalid or plaintiff instead. Indeed, as early as in July 2001, at the Annual Conference of Victim Support, a succession of speakers from the floor and the platform proposed that the organisation be renamed because the very term 'victim' was considered less desirable and apposite than, say, 'survivor'.[31]

4.7 Victims of Crime – Need for a Comprehensive Concept

The term victim is wide and broad, and conveys many meanings. Often it denotes a person weak and affected by an undesirable act. To the word 'victim' five distinct fundamental factors may be attributed – namely – nature, society, energy supply, motorisation and criminality. Nature causes disasters such as earthquakes, flood, droughts and famine. Society holds a collective potential for starting mass conflict that may generate genocide, terrorism and abuse of power. Among other aspects of socially-determined victimisation are

[31] For further Details see : Paul Rock, *On becoming a Victim,* Carolyn Hoyle and Richard young, (ed) *New vision of crime victims,* Hart Publishing, Oxford (2002) p.14.

the consequences of over population, poverty, illiteracy, alcoholism, drug addiction, prostitution and occupational disease. Motorisation and energy resources are causing innumerable traffic accidents on land, at sea, and in the air, apart from industrial and domestic accidents. Last, but not the least, the most important categories of victims is the crime victims.[32] The victims of crime are to be properly identified for their better treatment by extending legal rights that provide compensatory relief. It would also help in gathering evidence during investigation and at trial which may lead to conviction and punishing the culprit and thereby serving the cause of justice.

To study the legal care available to the victims of crime in India, to propose to expand the ambit and scope of Indian Criminal jurisprudence so as to accommodate the victims and to provide more remedies to restore to them for their loss within the framework, and without any major re-structuring in the system, it is necessary to identify and re-discover the victim. The meaning and definition expressed in the statutes and judicial pronouncements for victims of crime have to be carefully examined.

The image of a victim of crime has been understood in common parlance that she or he as a sufferer or one who has been injured by a commission or omission of acts that are prohibited by law. The concept of an ideal victim is an innocent, defenceless person who has no complicity in the crime. The ideal victim may be a young or old, female or male but he / she should have experienced pain and suffering. According to the Norwegian

[32] Bharat B. Das, *Victims in the Criminal Justice System*, APH Publishing Corporation, New Delhi (1997) P: 26

criminologist Nils Christie, an ideal victim has at least the following characteristics:[33]

a) is weak;
b) is involved in a respectable activity;
c) the perpetrator is dominant to the victim, and can be described in negative terms;
d) the perpetrator is unknown to the victim and has no relation to the victim; and
e) the victim has enough influence to assert 'victim status.

A victim is voluntarily or involuntarily, directly or indirectly, abruptly or gradually, consequentially or inconsequentially, affected by the proven or alleged criminal or crime-like actions of another. 'Victim', in other words, is an identity, a social artefact, dependent, at the outset, on an alleged transgression and transgressor and then, directly or indirectly, on an array of witnesses, Police, prosecutors, defence counsel, jurors, the mass media and others who may not always deal with the individual case, but who will nevertheless shape the larger interpretative environment in which it is lodged.[34] In the study of victims of crime, the victims produced by the offences made as punishable by law alone can be considered, and the rest of the persons injured by their self-inflicting or anti-social behaviours, which are socially treated as immoral, are not being looked into.

[33] Magnus Lindgren - Vesna Nikolic Ristanovic, *Crime Victims International and Serbian Perspective, Organization for Security and Cooperation in Europe, Mission to Serbia*, Law Enforcement Department (2011) p.21.

[34] Paul Rock, *On Becoming a Victim,* Carolyn Hoyl and Richard Young (ed.), *New Visions of Crime Victims,* Hart Publishing, Oxford (2002) P 13,

4.8 The Evolution of Concept of Victim

Whether the term 'victim' would include the complainant or not is also a point to be determined while analysing its scope and ambit. A plain reading of Section 2 (wa) Cr.P.C., conveys a clear meaning that any person who suffers any loss, injury by a crime occurrence and his/her legal heirs come within the purview of the expression victim.[35] Whether the person who opted to prefer a complaint to the magistrate, without lodging a formal petition to the Station House Officer (SHO) is a victim in the line with the benevolent provisions of the Code was a question that came up recently.[36]

By expanding the scope of the term victim, the courts have paved the way for evolution of the concept of victim of crime in criminal cases to include cases instituted otherwise than on a police report under Section 200 Cr.P.C. A Full Bench of the Madras High Court in *S. Ganapathy* v. *N. Senthilvel*[37] considered the important issue whether, in the private complaint cases, instituted otherwise than on police report under Section 200 Cr.P.C., by a private person, has any right to prefer appeal as provided in proviso to Section 372 Cr.P.C. The Bench interpreted the scope of Section 2 (wa) Cr.P.C. and held that the complainant, who has suffered loss also comes under the purview of Section 2(wa) Cr.P.C. Further, a victim of crime, who has prosecuted an accused by way of a private complaint, has the statutory right of appeal within the limits prescribed under Section 372 of Cr.P.C.

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[35] Section 2(wa) Code of Criminal Procedure, 197

[36] Chapter XV Code of Criminal Procedure, 1973 empowers the magistrates to take cognizance of an offence on complaint directly from the affected person and on examination upon oath. It dispenses with the lodging of FIR, investigation by the police and other agencies and filing of final report, which is also known as charge sheet.

[37] 2016 (4) CTC 119

The concept of victim has been evolving, and it not only denotes or includes a person who suffers by a crime and prosecutes through the organs of the State, but he may also be a person seeking legal remedy independently by way of a private complaint.

4.9 Classification on the Basis of Characteristics of Victim

The father of the victimology Benjamin Mendelssohn, an attorney, conducted a study on the relationship between the victim and the offender.[38] He conducted interviews with the victims and witnesses in the course of his study. He classified the victims based on their culpability, or the degree of the victim's blame. According to his study, there are six kinds of victims as follows:

1. *completely innocent victim:* a victim who bears no responsibility at all for victimisation; victimised simply because of his or her nature, such as being a child; this victim may be a completely unconscious person;
2. *victim with minor guilt:* a victim who is victimised due to ignorance; a victim who inadvertently places himself or herself in harm's way, *e.g*. the victim might be a woman who induces a miscarriage and dies as a result;
3. *victim as guilty as offender / voluntary victim:* a victim who bears as much responsibility as the offender, a person who, for example, enters into a suicide pact; this victim is also one who assists others in committing crimes;

[38] Mendelsohn, B. (1976), Victimology and contemporary society's trends. *Victimology,* (1), 8-28 as referred to in Shanell Sanchez, *Victims and Victims Typologies*, https://openoregon.pressbooks.pub/ccj230/chapter/1-14-victims-in-the-cj-system/

4. *victim guiltier than offender:* a victim who instigates or provokes his or her own victimisation; this victim person provokes others to commit a crime;
5. *most guilty victim:* a victim who is victimised during the perpetration of a crime or as a result of crime; this occurs when the perpetrator (victim) acts aggressively and is killed by another person who is acting in self-defence; and
6. *simulating or imaginary victim:* A victim, who is not victimised at all but, instead, fabricates a victimisation event; these persons suffer from mental disorder, believing themselves as victims.

Criminologists have endeavoured to define and classify victims on the basis of several factors relating to crime and the persons who suffered by crime. Criminologist *Ezzat Abidel Fazzat* has argued for the need to get an official status for victim. He has divided the victims to five types on the basis of their possible contributions and roles in the commission of crime. In his book he explains the interaction he had with the perpetrators of crime.[39] The classification made by Ezzat is as follows:

1. *Participating victim* - participates in the act itself, *e.g*. the defrauded fraudster. Crimes such as prostitution, *Sati*, pornography on internet, *etc*., are some of the examples of participating victims where the victim actively takes part in the crime against him;
2. *Non-participating Victim* - innocent victims - these are those victims who are completely innocent. For instance, foeticide, a crime against being born, miscarriage, kidnapping, etc. are some of the crimes which fall under this category. Geronticide, which is the killing of

[39] Fattah E A, *Towards a Critical Victimology,* St. Martin's Press, New York (1992) see the Aron Blesch, *Overview of Victimology* (2020) https://www.researchgate.net/publication/344122656_Overview_of_Victimology/citation/download

the aged to get rid of them because of their old-age, is also a crime having non-participating victims;

3. *Latent or Predisposed Victim* - *e.g*. through gullibility, naivety, superstition, isolation, weakness, these are those victims who have fallen a prey to a crime but do not know that they are in any way affected thereby, *for example,* white collar crimes like blackmailing affects several victims but they do not feel the impact of evil effect on them;
4. *Provocative Victim* - *e.g*. 'actively provocative,' 'passively provocative,' through carelessness or aggressiveness, victims of dowry death who are provoked by the offender to commit suicide is an example of crime having provocative victims;
5. *Retaliating Victim* – some crimes by their very nature are such that the victim does not readily yield to the offence and retaliates to the extent possible to restrain the perpetrator from committing the offence against him, but eventually fails in his/her efforts to avoid the occurrence of crime. For instance, rape, robbery, dacoity, cruelty against women, domestic violence, dowry demand, *etc.* involve retaliating victims who are defiant to avert the occurrence, but fail to prevent it.

The above classification by the scholars of criminology and victimology are based on extensive interviews with victims, witnesses and perpetrators, and mostly related to the degrees of innocence and guilt.

4.10 Classification of Victims on the Basis of Crimes

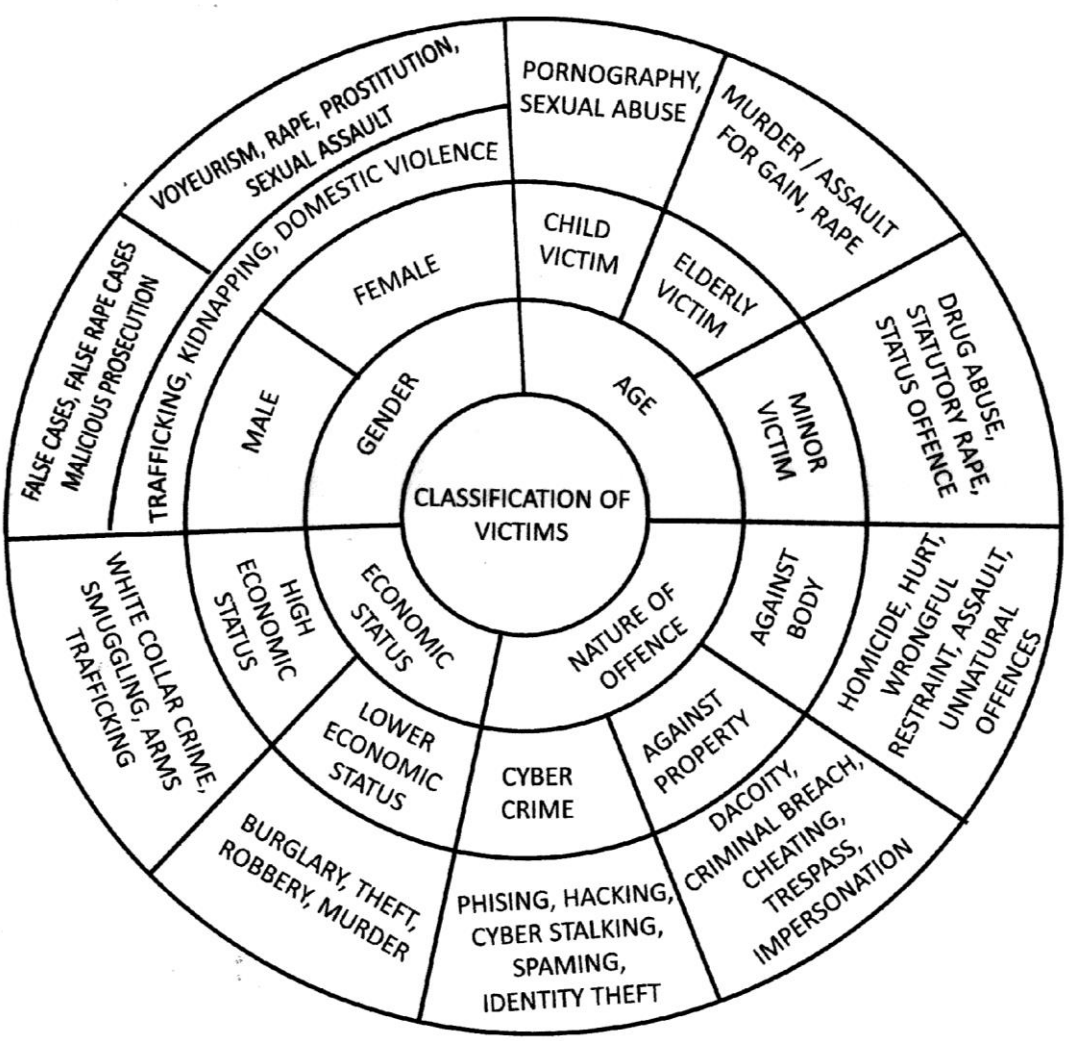
The National Crime Records Bureau, (NCRB) maintains a databank of crime, collected and maintained by the Ministry of Home Affairs. Since 1953 it has been publishing the crime statistics every year. This is the authentic source of information on crime and victim widely used by researchers and

policymakers in India. The data and reports placed in the public domain and uploaded on the official websites are maintained by the NCRB.[40] In the NCRB Annual Reports, crimes have been classified as (1) Violent Crimes; (2) Crimes against women; (3) Crimes against Children; (4) Crimes against Senior Citizens; (5) Juveniles in conflict with law; (6) Crimes / Atrocities against Scheduled Caste and Scheduled Tribe; (7) Economic Offences; (8) Corruption Offences; (9) Cyber Crimes; (10) Offences against State; (11) Environment-related offences; (12) Crimes against Foreigners; and (13) Offences of Human Trafficking.

As per the classification of the crimes, the victims are also classified in the same or relevant names and nomenclatures.

Sl. No.	**Nature / Magnitude of the Crime / Offence**	**Victims**
1.	Violent Crimes	Victims of violent crime
2.	Crimes against women	Women victims
3.	Crimes against Children	Children victims
4.	Crimes against Senior Citizen	Victims of offence against senior citizen
5.	Juvenile in conflict with law	Juvenile victims or victims of Juvenile cases
6.	Crimes / Atrocities against Scheduled Caste and Scheduled Tribe	Victims of the cases relating to SC/ST offences
7.	Economic Offences	Victims of Economic offences
8.	Corruption Offences	Victims of Corruption Offences
9.	Cyber Crimes	Victims of Cyber crimes
10.	Offences against State	Victims of the offences against State
11.	Environment- related offences	Victims of Environment-related offences
12.	Crimes against Foreigners	Foreigner victims
13.	Offences of Human Trafficking	Victims of Human Trafficking

[40] www.https://ncrb.nic.in


CLASSIFICATION OF VICTIMS
GENDER
AGE
NATURE OF OFFENCE
FEMALE
MALE
CHILD VICTIM
ELDERLY VICTIM
MINOR VICTIM
ECONOMIC STATUS
AGAINST BODY
AGAINST PROPERTY
CYBER CRIME
HIGH ECONOMIC STATUS
LOWER ECONOMIC STATUS
TRAFFICKING, KIDNAPPING, DOMESTIC VIOLENCE
PORNOGRAPHY, SEXUAL ABUSE
MURDER / ASSAULT FOR GAIN, RAPE
DRUG ABUSE, STATUTORY RAPE, STATUS OFFENCE
VOYEURISM, RAPE, PROSTITUTION, SEXUAL ASSAULT
FALSE CASES, FALSE RAPE CASES MALICIOUS PROSECUTION
HOMICIDE, HURT, WRONGFUL RESTRAINT, ASSAULT, UNNATURAL OFFENCES
DACOITY, CRIMINAL BREACH, CHEATING, TRESPASS, IMPERSONATION
PHISING, HACKING, CYBER STALKING, SPAMING, IDENTITY THEFT
BURGLARY, THEFT, ROBBERY, MURDER
WHITE COLLAR CRIME, SMUGGLING, ARMS TRAFFICKING

Elsewhere, the victims of crime may have been classified according to the nature of crime, often for the purpose of research, or on the basis of penal statutes *e.g*. the person who has consumes adulterated food or prohibited edible items and has suffered illness may be called a victim of food adulteration. Therefore, the classifications are broadly on the basis of convenience and the nature of crime and its consequences.

In one of the classifications (1997) made by a criminologist, before the introduction of the definition for the word victim in the Code, the victims of crime by individual, untoward incident and abuse of power by State authorities have been classified into 12 categories as follows:[41]

1. Victims of War
2. Victims of accidents that occurred on (a) Road,
   (b) Railways,
   (c) Aircraft,
   (d) Sea, and
   (e) at the workplace.
3. Victim of abuse of power by lawful authority:
   (a) Custodial death,
   (b) Death due to firing,
   (c) Groundless arrest and detention, and
   (d) Unnecessary harassment
4. Victim of rape
5. The victim of criminal conspiracy, offences of giving or fabricating false evidence, fabricating false documents or forgery of records, valuable documents, certificates or causing disappearance of evidence by way of destruction or concealment

[41] B.N. Pattnaik, *Compensation of the Victim of Crime, India Law and U.N. Resolutions,* Cr L J 1997, Vol. 103, Part 165, P 3.

of the documents, fraudulent acts with the intention of causing bodily or mental harm to a person, murder, miscarriage, hurt, wrongful restraint and wrongful confinement, assault, use of criminal force, kidnapping, abduction, forced labour, unnatural offence, theft, extortion, robbery and dacoity, cheating, mischief, arson, criminal trespass, adultery, bigamy, fraudulent marriage, dowry, torture death, defamation and criminal intimidation.

6. Victims of offences relating to the manufacture and sale of adulterated, substandard and prohibited drugs, liquor and food.
7. Victims of offences of smuggling, black-marketing unfair trade practice and evasion of tax.
8. Victims of offences committed by public servants, such as negligence and inefficiency in discharging the duties, corruption, bribery and misappropriation of public funds.
9. Victims of environmental pollution and wanton destruction of flora and fauna, and public nuisance.
10. Victims of offences pertaining to election.
11. Victim who are also offenders as perpetrators of crimes such as drunkenness, consumption of narcotic drugs, gambling, attempt to commit suicide and prostitution, which are otherwise known as ‘victimless crimes’.
12. Victims who create a compelling situation in which the offender reacts violently by committing a criminal act. Sometimes the victims provoke the offender to commit the crime. Victims of affray, free fight and rioting may also be included in the category.

4.11 Acid Attack Survivors

Some tragedies or heart- rending events may also cause a separate classification of victims. The crime that took place on the fateful morning of 24 May, 2005 in Khan Market, New Delhi brought the attention of media and

courts on to the victim. Acid was poured on *Laxmi Agarwal,* a 15-year old school girl, following her refusal to marry a 32-year old man. The acid burn injuries deformed her arms and other parts of the body. Her face was severely disfigured. She filed a writ petition in the Supreme Court in which the Law Commission was also made a Respondent.[42] As per the direction of the Apex Court, the Law Commission submitted a report for the inclusion of Acid Attacks as Specific Offence in the Indian Penal Code and a law for Compensation for Victims of Crime.[43]

The Acid Attack cases were being registered only under Section 326 IPC till the amendment was brought into effect. The decision in *Omanakuttan* v. *The State of Kerala*[44] is a classic instance of how an offence of grievous hurt due to the effect of acid poured on a person on 26 November, 1997 in *Idukki*, Kerala was dealt only under Section 326 IPC by the Supreme Court, as the crime had occurred prior to the Law Commission Report No. 226 and the consequent amendment to IPC introduced by Act 13 of 2013. No additional legal care was provided to the victim of acid attack in the said case, as it was registered under Section 326 IPC, the relevant provision in force at the time of occurrence.

But after the *Laxmi* case,[45] and consequent to the recommendations in the Law Commission Report, two new sections 326 A and 326 B have been inserted in the Indian Penal Code to deal with offences of voluntarily causing

[42] *Laxmi* v. *Union of India and Other* (2014) SCC 427
[43] Law Commission of India, Report No.226, July 2009.
[44] (2019) 6 SCC 262
[45] (2014) SCC 427

grievous hurt by using acid and voluntarily throwing or attempting to throw acid.[46] The amendment introduced in IPC has enhanced the punishment and the courts are directed to impose reasonable amount of fine to meet the medical expenses of the treatment of the victim. The provisions relating to acid attack cases in the IPC, and the ban imposed on the sale of acid in the regular market are achievements made in the journey of victim justice by the pronouncement of progressive judgments by the Supreme Court.[47] Further, the Supreme Court has been constantly monitoring the compensatory jurisprudence of acid attack cases, and the National Legal Services Authority has also framed a scheme in 2016 to provide legal services to the victims of acid attack.[48]

The victims injured, disfigured and/or disabled by acid attack or the legal representatives of the person who succumbed to acid burn injuries are known as victims of acid attack cases. This classification originated from the pro-active pronouncements of the Supreme Court. Thus, the court judgments can also create a class of victims for the purposes of sensitising the legislature, courts and other stakeholders on the grave nature of the crime and the care to be given to the victims. The State of Jharkhand has framed the special compensation scheme for the victims of acid attack cases, and the Scheme known as the Jharkhand Acid Attack Victim Compensation Scheme, 2012 provides legal care, medical aid and restorative measures to the survivors of acid violence.

[46] Section 326 A and 326 B, inserted by Act 13 of 2013 with effect from 3.2.2013.
[47] *Parivartan Kendra and Anr.* v. *Union of India,* (2016) 3 SCC 571
[48] NALSA (Legal Services to Victims of Acid Attacks), Scheme 2016

4.12 Victims of Terrorism

Terrorism is the illegitimate use of force to gain political or tactical advantage targeting the life and property of innocent people. It violates the basic and fundamental rights guaranteed to people. Terrorism creates a level of insecurity among the common people. The Supreme Court, in 1994, described the term 'terrorism' as use of violence when its most important result is not merely the physical and mental damage of the victim, but the prolonged psychological effect it produces or has the potential of producing on society as a whole. There may be death, injury, or destruction of property or even deprivation of individual liberty in the process. The extent and reach of the intended terrorist activity travels beyond the effect of an ordinary crime capable of being punished under the ordinary penal law of the land. Its main objective is to overawe the government, to disturb harmony of society or 'terrorise' people and society. A 'terrorist' activity does not merely arise by causing disturbance of law and order or of public order. The fallout of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law. Experience has shown us that 'terrorism' is generally an attempt to acquire or maintain power or control by intimidation and causing fear and helplessness in the minds of the people at large or any section thereof, and is a totally abnormal phenomenon. What distinguishes 'terrorism' from other forms of violence appears to be the deliberate and systematic use of coercive intimidation.[49]

[49] *Hitendra Vishnu Kumar* v. *State of Maharashtra (*1994) 4 SCC 602

Later, in 2004, terrorism was once again defined by the Supreme Court as follows:

> 'Terrorism is one of the manifestations of increased lawlessness and cult of violence. Violence and crime constitute a threat to an established order and are a revolt against a civilized and orderly society. "Terrorism" though has not been separately defined under the TADA Act, there is sufficient indication in S.3 itself to identify what it is by an all-inclusive and comprehensive phraseology adopted in engrafting the said provision, which serves a double purpose as a definition and punishing provision, nor is it possible to give a precise definition of 'terrorism' or lay down what constitutes 'terrorism'. It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim, but the prolonged psychological effect it produces or has the potential of producing on society as a whole.'[50]

Terrorist activities not merely cause disturbance to the law and order but also challenge the human rights enjoyed by everyone. The victims of terrorism are innocent people and require special legal care, psychological counselling, financial aid and assistance for restoration to the pre-crime stage. Terrorism transcends the political and geographical boundaries, and it has been considered as a menace to humanity. In the words of UN Secretary General:

> 'Terrorism can affect anyone, anywhere and it attacks humanity itself. And it is for the sake of humanity that we must create a global forum for your voice and listen to you, the victims. Your stories of how terrorism has affected your lives are our strongest argument why it can never be justified. By giving a human face to the painful consequences of

[50] *Madan Singh* v. *State of Bihar* (2004) 4 SCC 622

> terrorism, you help build a global culture against it. You are the real heroes in the global struggle against terrorism. You humble the world by your strength and courage. You deserve support and solidarity. You deserve social recognition, respect and dignity. You deserve to have your needs addressed. You deserve to have your human rights defended. And you deserve justice.'[51]

The above statement of the then Secretary-General of the United Nations reflects the plight of the victims of terrorism and the solidarity and assistance to be extended to those poor and innocent victims. The Global Terrorism Index, prepared by the National Consortium for the study of terrorism and responses to terrorism, furnishes the details that despite the overall fall in the impact of terrorism across the world, it remains a significant and serious problem in many countries. There were 63 countries in 2019 that recorded at least one death from a terrorist attack and seventeen countries that recorded over 100 deaths from terrorism.[52] Terrorism has created a new class of victims referred to as 'victims of terrorism.' The Government of India has implemented a scheme to assist the families of victims of terrorist, communal and naxal violence.[53] Global terrorism has created a new type of victim, and many countries have also been forced to enact new laws and welfare schemes to help the victims and their families.[54] The civilians or the armed personnel serving in the peace keeping forces of the

[51] Ban Ki-Moon, Secretary-General of the United Nations, in the preface to the Criminal Justice Response Support Victims of Acts of Terrorism, U.N., New York, 2011.

[52] Institute for Economics & Peace. Global Terrorism Index 2020: Measuring the Impact of Terrorism, Sydney, November 2020. Available from: http://visionofhumanity.org/reports (accessed on 17 April, 2022).

[53] The Central Scheme for Assistance to Civilians Victims / family of victims of terrorist, communal and Naxal violence, started on 1.4.2008. The details are available in the http://www.un.org/victims of terrorism/en visited on 20.05.2019.

[54] Central Scheme for Assistance to Civilians Victims / Family of Victims of Terrorist, Communal and Naxal Violence, 2010 framed by the Union government in India.

United Nations who suffer by the act of terrorism are classified as victims of terrorism, and thus another classification has emerged.

There are other instances where the victims are classified according to the type of crime. Advent of science, internet and electronic gadgets have given scope for commission of cybercrimes, resultantly the use of the class victims of pornography or victims of cybercrimes, a sect of victims classified with the name or nature of the crime. Similarly, political or religious outfits indulging in the violent activities for their sake of ideology have victimised the innocent common public. These innocent victims may be termed as victims of violence. The sufferers of crime are conveniently being identified according to the grave nature and magnitude of the crime. In future, the classes of victims may be added on to bring it on par with the increasing nature of or modes in or purposes for which crimes are committed.

The Central Government has framed a Scheme, namely the Central Scheme for Assistance to Civilian Victims of Terrorist, Communal and Naxal Violence, with a broad aim to assist the civilians who sustain or succumb to injuries in the terrorists' attacks.[55] The Central Government, vide letter dated 21.6.2012, issued guidelines with effect from 22 June 2009, wherein provision has been made for payment of Rs.3,00,000/- in case of death / permanent incapacitation (50% and above) as compensation to the affected family under the scheme, and the said amount of compensation would be paid by the Central Government.[56] As per the circular, in case employment is given to any family

[55] W.e.f. 1 April, 2008.
[56] Letter No:11044/11/2011-VTV, dated 21.6.2012, Government of India.

member of a victim of terrorism/naxal violence, the dependent will not be entitled to the assistance under the scheme. It further provides that in case employment has already been given after release of the assistance under the scheme, the assistance amount will not be withdrawn from the victims of naxal violence /terrorism.

As per the guidelines, provision has been made to constitute a District Level Committee under the chairmanship of District Magistrate / Collector / Deputy Commissioner / District Superintendent of Police / District Medical Officer / District Welfare Officer / District Child and Women Development Officer, and the officer who may be nominated by the State Government as its member, and the said Committee is to identify beneficiaries and verify eligibility of the beneficiaries for assistance under the scheme. Provision has also been made that for examining the eligibility claims of the beneficiaries; the District Committee has to see the police report / FIR / death-cum-post-mortem certificate in case of permanent incapacitation, birth certificate of the claimant (if minor) and any other documents as may be considered necessary for determining the rightful beneficiaries / claimants. The guidelines provides that the District Committee shall send its recommendation to the Joint Secretary, Ministry of Home Affairs, New Delhi, in the prescribed form, with a copy to the Home Department of the State Government. One of the important features of this Scheme is that the non-resident Indian (NRI) and foreign nationals are also eligible to claim pecuniary benefits as victims. The permanently disabled

or incapacitated survivors of attacks are also entitled for the medical treatment under the special categories.[57]

In the circulars and guidelines cited above, the word victim has not been defined. But the key terms, 'Terrorism', 'Communal Violence,' 'Naxal Violence', 'Next of kin' are defined.[58] Further the person who sustains injuries in the above types of violence and suffers more than 50 per cent disability is entitled to compensation. The words used in Rule 3(d) do refer to the 'victim', for the purpose of availing of benefits:

> Section 3(d) Permanent incapacitation: means a disability of 50% and above suffered by the victim which is of permanent nature, and there are no chances of variation in the degree of disability and the injury/disability renders the victim unfit for normal life for the rest of his life.

The above rules would make it clear that a person who sustained grievous injuries in the attacks by terrorists, or in the communal violence or naxal violence and suffers disability to the tune of 50 per cent or above will be treated as victim. Further, the relatives of the deceased, who was killed in any of the above mentioned nature of attacks, are also to be considered as victims, by implication. The officials, namely the District Collector, District Magistrate, and Deputy Commissioner are empowered to determine the relationship

[57] Rule 4 (vi) and (vii).of the Revised guidelines dated 29.6.2012.

[58] Rule 3 (a) defines the term Terrorism which includes militancy and insurgency related violence acts, Section 3(c) explained the naxal violence as a planed and organized acts of violence by members of the Maoists and Terrorist Organisations banned under the Unlawful Activities (Prevention Act 1967). As per Rule 3(b) Communal Violence is a planed and organized acts of violence by members of one community against another community with the intent to create ill-will or hatred and leading to loss of life and injuries to people.

between the person killed and their claimants. A clear definition about the heirs or legal representatives would avoid chaos and multiplicity of claims by the relatives. The surviving spouse is entitled to the benefits under this Central Scheme.[59]

The Jharkhand High Court, in a Public Interest Litigation filed on the basis of a newspaper report published in the Hindustan Times dated 24 January 2011 about the delay in settling the claims of compensation and Government employment as per the Central Scheme for Assistance to Civilians Victim / Family of Victims of Terrorist, Communal and Naxal Violence, for civilian deaths that occurred in the course of violence between the State Security Forces and the Naxalites, has elaborately discussed the scope and features of the Central Scheme. Further, it has directed the State Government to distribute the financial assistance and settle the compensation claims in respect of the pending applications in various districts within a period of six months, and not later than one year. The High Court has also framed a time limit of six months for consideration and disposal of a claim application.[60]

4.13 Minor Victims

The phrase ‘minor victim’ has been introduced as a recent concept into the Victim Jurisprudence. The National Legal Services Authority (NALSA), as

[59] Rule 4, Central Scheme for Assistance to Civilians Victim / Family of Victims of Terrorist, Communal and Naxal Violence.(The revised guidelines in respect of terrorist and communal violence will be effective from 1st April 2008 and from 22nd June, 2009, in respect of the cases of naxal violence)

[60] *Gopi Nath Ghosh* v. *State of Jharkhand and Anr.* W.P. (PIL) No. 2584 of 2011, dated 10 January, 2014 High Court of Jharkhand at MANU/JH/0200/2014

per the directions of the Supreme Court in *Nipun Saxena* v. *Union of India*,[61] has recognised the class of minors as victims. The Court observed as follows:

> 'A minor who is subjected to sexual abuse needs to be protected even more than a major victim because a major victim being an adult may still be able to withstand the social ostracization and mental harassment meted out by society, but a minor victim will find it difficult to do so. Most crimes against minor victims are not even reported as very often, the perpetrator of the crime is a member of the family of the victim or a close friend. Efforts are made to hush up the crime. It is now recognised that a child needs extra protection.'

Further, the court has prepared a Model Rules for Victim Compensation for Sexual Offences and Acid Attacks. The said Model Rule namely Compensation Scheme for Women Victims / Survivors of Sexual Assault / Other Crimes, 2018 is a new Scheme to be added in the VCS of the States and Union Territories. It was drafted by a Committee consisting of the Additional Solicitor General, Joint Secretary of National Commission for Women, Member Secretary (NALSA) Ms. Indira Jaisingh, senior advocate and five other officials and experts. The draft of the NALSA's Scheme, 2018 was placed before the Supreme Court of India, and submissions made by the stakeholders during the hearing were also incorporated, and final Scheme was filed. The Supreme Court accepted the Scheme framed by the NALSA and directed all the State Governments / UT Administrations to implement the same in their respective States / UTs. It was further observed that while nothing

[61] (2019) 2 SCC 703 @ para 29

should be taken away from this Scheme, it does not preclude the State Governments / UT Administrations from adding to the Scheme.

The NALSA's Compensation Scheme for Women Victims / Survivors of Sexual Assault / or Other Crimes, 2018 (WV/SSA 2018), shall apply to the victims and their dependent(s) who have suffered loss, injury, as the case may be, as a result of the offence committed and may cover those who require rehabilitation.[62] There are two key expressions defined. They are:

(1) Sexual Assault Victims[63]

(2) Woman Victim / Survivor.[64]

> *'Sexual Assault Victims' means female who has suffered mental or physical injury or both as a result of sexual offence including Sections 376(A) to (E), Section 354 (A) to (DF), Section 509 IPC.*
>
> *'Woman Victim/Survivor of other crime' means a woman who has suffered physical or mental injury as a result of any offence mentioned in the attached Schedule including Section 304(B), Section 326(A), Section 498(A) IPC (in case of physical injury of the nature specified in the schedule) including the attempts and abetment.*

There is a specific reference about the minor victim who has no biological parent or guardian, in Rule 15 of the NALSA's Scheme for WV/SSA-2018.

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[62] As per the decision in W.P. (c) No.365/2012 dated 05.09.2018, by the Supreme Court, this Scheme and the guidelines will be operated from 2nd October 2018.

[66] Rule 2(o) NALSA's Compensation Scheme for Women victims/ Survivors of Sexual Assault/Other Crimes,2008

[64] Rule 2(p) *Ibid*

Rule 15 deals with the Minor Victims' right to claim compensation. It reads:

> That in case the victim is an orphaned minor without any parent or legal guardian the immediate relief or the interim compensation shall be disbursed to the Bank Account of the child, opened under the guardianship of the Superintendent, Child Care Institution where the child is lodged or in absence thereof, DDO/SDM, as the case may be.

Therefore, even as per the age, the victims are classified and that has been duly recognised in the Schemes drafted by the NALSA. In the *Nipun Saxena* case cited above judgement a gender neutral term, 'Minor Victim' was used by the Apex Court but the term was confined only in respect of the victims of sexual offences.

4.14 Victims of Abuse of Power of State

In a welfare State, the citizen and their rights have to be protected and the life and property of every individual is to be safeguarded, from both individual attack and by the State Administrators. The person affected by the offences committed by another person is a victim of crime. But, the person who suffers the violation of human rights or loss of life or property by the abuse of power by the State itself is known as the victim of abuse of power. The executive, an organ of the State, or its agencies conferred with the powers, may abuse their official position and power attached with them, to harm the individual, forgetting their duty to safeguard the life and personal liberty of the citizen. Illegal arrests, torture by the police, custodial death, and unlawful detention are instances of abuse of power. Coercion is a common characteristic

of all States, including democratic ones; it is used to suppress the challenges to the authority of the State. However, the exercise of coercive power erodes the legitimacy of a democratic State that has a different nature than a State beholden to a dictator or founded by force.[65]

The State authorities, at the time of arresting or apprehending an alleged perpetrator of crime, may exceed their power and mistreat the accused. The Supreme Court, in *Joginder Kumar* v. *State of Uttar Pradesh*,[66] has discussed the balance between individual liberty and abuse of powers of arrest by the police. It has referred the National Police Commission Report and observed that 60 per cent of arrests were either unnecessary or unjustified, and that such unjustified arrests made by the police accounted for 43.2 percent of expenditure of the jails. Therefore, to avoid such breach of fundamental rights and liberties of the individual by the executives, it had issued guidelines regarding the procedure to be followed at the time of arrest and interrogation.[67]

In some cases, there is criminal negligence by the agent of the State which claims life or damage to the property of the people. The victims of abuse of power by lawful authority constitute a separate and important class among the victims. The law and courts not only safeguard the people from crimes committed by individual, but also from the victimisation at the hands of the functionaries of State. The victims of abuse of power have been defined and dealt within the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power thus:

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[65] N. Prabha Unnithan (Ed.) *Crime and Justice in India*, Sage Publication, (2013) P 6.
[66] AIR 1994 SC P 1349.
[67] *D.K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416

> 'Victims' mean persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognised norms relating to human rights.[68]

There are also guidelines issued to provide relief to the victims of abuse of power of State. The UN Declaration consists of such benevolent provisions to victims, and they make the States liable for its own exceeds and failures to maintain the rule of law. The States are required to consider incorporating them into the national law norms prescribing abuses of power, and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical psychological and social assistance and support.[69]

Further, the States should consider negotiating multilateral international treaties relating to victims, as defined in paragraph 18 of the Declaration.[70] States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the

[68] Rule 18, U N Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
[69] Rule 19, U N Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
[70] Rule 20, U N Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.[71]

Therefore, unjustified and illegal arrest by the police, torture during interrogation, custodial death, rape in police lock-up, unlawful detention and inhuman treatment of prisoners come within the purview of abuse of powers by the State. The persons victimised by those State-sponsored illegal activities are the 'victims of abuse of powers' a new classification that has entered the victim legal literature.

4.15 New Types of Crimes and Victims

As observed by a scholar, in early age crimes were far and few, society being simple. The use of violence against one person or the abduction of one's woman was probably the earliest known crimes.[72] Recently, advent of the internet technology has paved way for new types of crimes and novel kind of perpetrators, and has produced a new class of sufferers of crime. It has created a new space known as 'Cyber Space' - a notional environment, in which communication over computer networks occurs. The term 'Cyber Space' was coined by William Gibson, in his (1982) short story 'Burning Chrome,' and later in his novel (1984) 'Neuro Mancer'. The Cyber Space has been described as the largest unregulated and uncontrolled domain. There are no brick and mortar structures, yet millions of documents, data and many other materials are stored in this space. India is the second largest online user market, and there are

[71] Rule 21, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

[72] Gour Hari Singh, , *Penal Law of India*, Vol I, Law Publishers India Pvt Ltd (1972)

250 million active social media users as on January 2018.[73] It throws up numerous challenges in crime prevention and investigation. Due to its global reach and accessibility, the internet is the hotspot for one of the most advanced forms of crime.

For the commission of crime, if a computer or internet is used, such crimes may be called Cyber Crimes. In India, the Information Technology Act, 2000 (IT Act) is the first legislation enacted to provide legal recognition for transaction carried out by means of electronic communication and also to deal with the computer and internet- related crimes. The provisions in Chapter XI of the said IT Act, 2000 deals with the offences and punishments to be imposed upon the offenders. But, there is no definition provided for the term 'Cyber Crimes'. The term 'Cyber Terrorism' finds a place with a definition in it, for which the punishment may extend to imprisonment for life.[74]

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[73] https://www.statista.com. Visited on 23rd September 2018

[74] Section 66(F) Punishment for cyber terrorism

"1**)**Whoever,

A)with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people by

i) denying or cause denial of access to any person authorised to access computer resource; or

ii) attempting to penetrate or access a computer resource without authorisation or exceeding authorised access; or

iii) introducing or causing to introduce any computer contaminant, and by means of such conduct cause or is likely to cause death or injuries to persons or damage to or destruction of property or disrupts or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affect the critical information infrastructure specified under Section 70; or

(B) knowingly or intentionally penetrates or accesses a computer resource without authorisation or exceeding authorised access, and by means of such conduct obtains access to information, data or computer database that is restricted for reasons of the security of the State or foreign relations; or any restricted information, data or computer database, with reasons to believe that such information, data or computer database to be obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relation to_contempt of court, defamation or incitement to an offence, or to the advantage of any foreign nation, group of individuals or otherwise, commits the offence of cyber terrorism.

In addition to the cyber terrorism, offences committed with the use of computer or internet or other electronic devices are also dealt within IT Act, 2000. There are eleven acts done with the use of computer and its accessories or electronic devices that have been recognized by the law as cyber crimes. Computer crimes are different from the usual crimes, *vis-à-vis* investigations. There are no usual evidentiary clues, no documentary evidences. Even the computer misused may have only erased data which may be beyond the comprehension of a usual investigator or even an expert. Computer crimes are difficult to investigate because they are hi-tech crimes. Information technology is changing fast. A computer crime may be committed in one country while the resultant fallout may be in another country. Besides, jurisdictional problems may arise. The computer-satellite-computer link can be from anywhere. A debit or credit card can do the trick anywhere, sale terminals, ATMs, EFT *etc*., are good enough for the purpose. The criminal has just to drum a keyboard and drums of money are taken away, without personal exposure, no written documents, no signatures, no finger prints, or voice. The criminal is truly faceless. The commission of computer crimes is done with lightning speed, without leaving any trace relating to the time element. It may take days, weeks, even months and years before the crime is discovered. Computer crimes are of varied nature.[75] The by-products of cyber offences are conveniently classified as victims of cyber crimes. It is a new name in the class of victims.

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2) Whoever commits or conspires to commit cyber terrorism shall be punishable with imprisonment which may extend to imprisonment for life."

[75] V.D. Dudeja *Information Technology & Cyber Laws*, New Delhi, 2000

4.16 Traditional Offences and Modern Nomenclatures

As observed by *Henry W. Mannle and J. David Hirschel*, crime is not absolute and it varies with time and place.[76] After the codification of penal laws, crimes have been specified with certain definition, and with specific punishment to be imposed upon the offender. On the basis of the damage caused to life, property and the disturbance to the public tranquillity, several definitions of crimes have been emerging from legal texts and court judgments. The advent of modern inventions and the use of technology have also paved the way for a new mode of commission of crimes. For *e.g*. in olden days stones, swords and other traditional tools were used to commit a murder, but later rifles, guns and such other arms were being used to commit murders. In olden days the belongings of a person were stolen, and in the modern era sky-jacking, sending virus to computer and such other crimes are committed to damage or cause loss to property and life. Therefore, the manner, mode and purpose of commission of crime may also create new types of crimes.

Organised crime is one such. It is considered to be a changing and flexible phenomenon. Many of the benefits of globalization such as easier and faster communication, movement of finances and international travel, have also created opportunities for transnational organized criminal groups to flourish, diversify and expand their activities. Traditional, territorial-based criminal groups have evolved or have been partially replaced by smaller and more flexible networks with branches across several jurisdictions. In the course of an

[76] Henry W. Mannle and J. David Hirschel, *Fundamentals of Criminology*, Prentice Hall, London, 1988 P. 3.

investigation, victims, suspects, organized criminal groups and proceeds of crime may be located in many States. Moreover, organized crime affects all States, whether as countries of supply, transit or demand. As such, modern organized crime constitutes a global challenge that must be met with a concerted, global response.[77] Another classification crime known as 'hate crime' which is motivated by prejudice on the basis of religion and sexual orientation and political crimes are also serious crimes. It targets a victim because of his membership or perceived membership in a certain social group or clan race. It is defined any criminal offence which is perceived by the victim or any other person, to be motivated by hostility or prejudice, based on a person's disability or perceived disability; race or perceived race; or religion or perceived religion; or sexual orientation or perceived sexual orientation or transgender identity or perceived transgender identity.[78]

As stated above, the killing of a human being and damaging properties in the name of religion and on the basis of colour, creed, race *etc*. always cause immeasurable loss to humanity. The sufferers of these crimes are known as victims of hate crimes. In this way, the classifications of victims go on, for the purpose of identifying, and also providing relief and rehabilitative measures.

4.17 Victims classified for the purpose of study

The crimes classified in the Rome Statute of the International Court is one of the classic instances for classification of victims according to the nature, magnitude, gravity of the sufferings, and damage caused by the crime. The

[77] https://www.unodc.org/unodc/en/organized-crime/intro.html
[78] https://commonslibrary.parliament.uk/research-briefings/cbp-8791/

official records prepared to assist the International Criminal Court (ICC) in the interpretation of the most serious crimes upon which the ICC has jurisdiction, has been classified under 96 kinds of offences.[79] For our convenience of collecting data, conducting survey or research and victims of crime may be conveniently classified on the basis of two important factors:

1. The gender and description of the perpetrator or victim; and
2. nature and magnitude of the crime.

E.g. If a person below the 18 years commits an offence the person will be identified as a juvenile in conflict with law, or if the victim is a female then it will be treated as an offence against a woman.

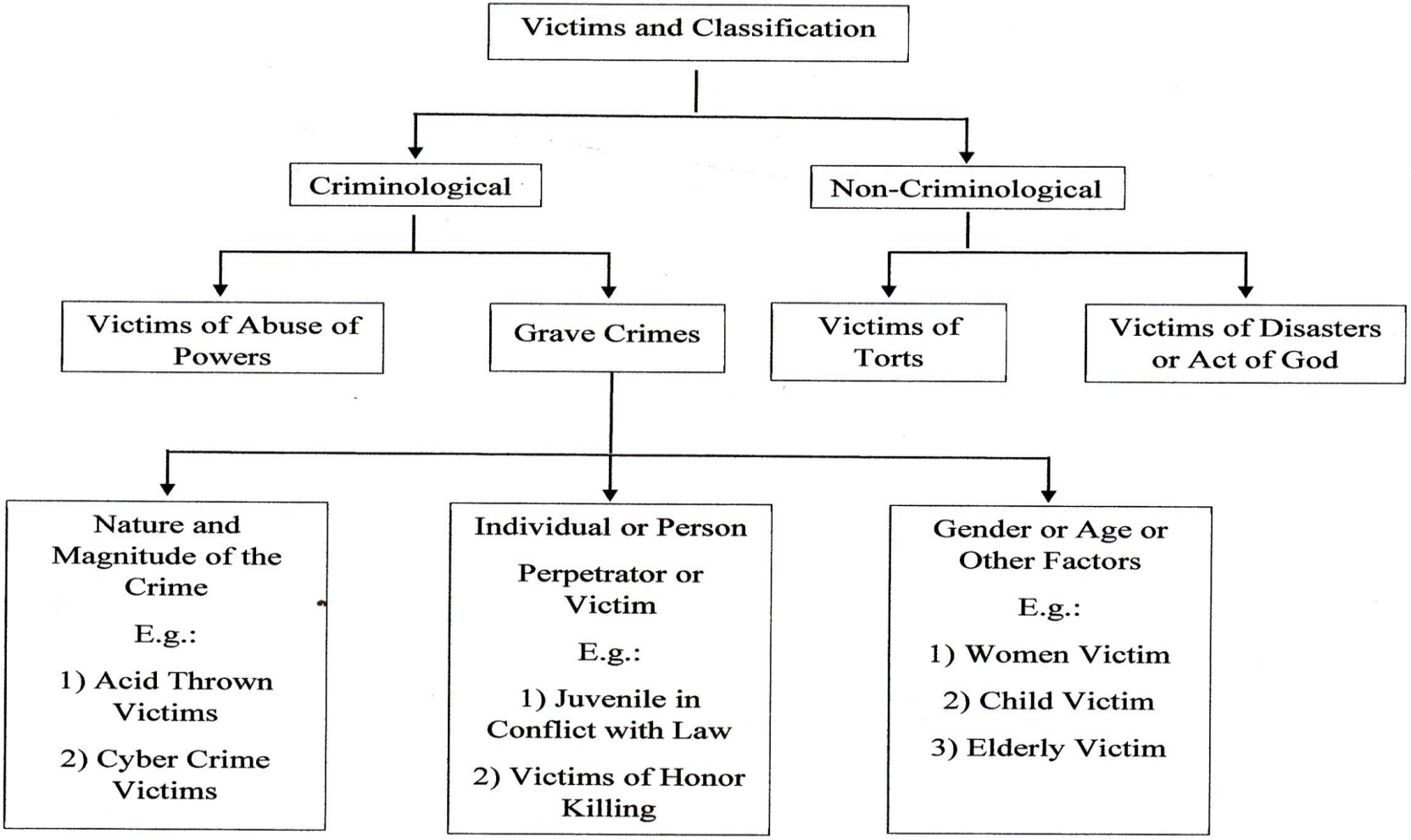
Though the victims may be conveniently classified on the basis of many factors, as discussed above, for the purpose of studies relating to victims of crime and their rights and the rights entitled to, the general classification of victims is based on two factors:

1) The gravity and magnitude of the offence

2) The person involved in the offence (victim or perpetrator)

The following representations depict the general classification of crimes and victims for the purpose of study.

[79] Elements of Crime, adopted at the 2010 Review Conference of the Rome Statute of the International Criminal Court, Kampala. 31 may-11 June 2010


Victims and Classification
Criminological
Non-Criminological
Victims of Abuse of Powers
Grave Crimes
Victims of Torts
Victims of Disasters or Act of God
Nature and Magnitude of the Crime
E.g.:
1) Acid Thrown Victims
2) Cyber Crime Victims
Individual or Person
Perpetrator or Victim
E.g.:
1) Juvenile in Conflict with Law
2) Victims of Honor Killing
Gender or Age or Other Factors
E.g.:
1) Women Victim
2) Child Victim
3) Elderly Victim

4.18 Primary and Secondary Victims

Thus, the ambit and scope of the term victim has been wide enough to accommodate persons harmed by the crime, and is also on par with the emerging trends in crimes. It is also evolving according to the nature, magnitude, gravity of the crime, occurrence and damage or loss caused by it. They are the primary factors to identify the victim and the basic needs of the victim. For the purpose of research, the crime victims can be identified as

1) Primary Victim and
2) Secondary Victim.

The primary victim is a person who has directly suffered or was injured or harmed as a result of crime committed against him. He is a direct victim and a person alive. In a case of rape, the woman raped has directly suffered and she is the primary victim. Her parents or child born out of such rape are secondary victims. But in homicide cases, the legal representatives or dependents of the deceased are the direct victims. A secondary victim is a legal heir or dependent of the direct victim of crime, and undergoes sufferings as heir of dependants.

4.19 Conclusion

As the concept of victim is of recent origin in the adversarial system of criminal justice dispensation, its proper understanding and rational classification of victims on the two factors, namely gravity of the offence and the person (both offender and victim) concerned with it, would be useful to collect relevant materials for research and suggest concrete proposals to frame policies to extend care and relief to the victims.

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CHAPTER V
VICTIMS OF CRIME
IN THE INDIAN LEGAL LANDSCAPE

5.1 Introduction

In a study relating to victims and the need to render complete justice to them, it is imperative to ascertain how the Constitution and laws governing criminal justice have regarded the victim and where has the victim been accommodated in the provisions of major laws governing the field. This is an extremely important aspect in the victim studies. What is to be done particularly, what kind of legal provisions are to be incorporated through amendments for the victim welfare in the arena of law-making and framing of policies may be identified. This chapter critically examines the introduction of victim in the Indian laws, particularly the place occupied by the victim in the criminal laws and the various legal definitions provided for the term victim in general, and with reference to crime and compensation. The Schemes framed by the States are also analysed to ascertain whether the term victim is comprehensive enough for the purposes of advancing reliefs and remedies in the victim justice initiatives. The three major criminal laws *viz*., Indian Penal Code, 1860, Code of Criminal Procedure, 1898/1973 and the Indian Evidence Act, 1872, which together constitute the Criminal Law Framework, and how the amendments introduced to them facilitated the term victim to resurface in the legal structure are discussed in the subsequent paragraphs of this chapter.

The Constitution is a codified document which constitutes the Nation and prescribes rules for the governance. It consists of the definition for a State and provisions that confer powers upon the State. Similarly, the provisions relating to individual liberty also find a place in it. The Constitution is a blend of two diametrically opposite concepts, namely the State's power or its use for the public safety and protecting individual rights and liberty from abuse of such powers. Both the State powers and individual liberty are derived from the Constitution and it draws a line between the uses of power by State against the guaranteed rights of the individual.

The criminal law is set into motion by an aggrieved person or victim. The police, an organ of the State, collect evidence and apprehend the suspects in the pre-trial process of investigation. A set of criminal laws strongly protects the fundamental rights of a person apprehended from the State's arbitrariness or coercion. The basic and fundamental rights of the accused person are embedded in the Constitution by its framers. Therefore, criminal laws have close proximity with the constitutional laws in such matters. The Constitution defines the State and its organs and the structure of administration and also confers powers upon the judiciary and other institutions dispensing criminal justice and safeguarding rights. Under the circumstances, in a study relating to criminal justice dispensation and victims, it is necessary to ascertain whether the Constitution has paved the road to victim related rights and remedies in the administration of justice. The first part of this chapter specifically deals with the basic principles of criminal justice enshrined in the Indian Constitution.

Whether they are adequate or not are also critically examined to study and suggest what could be done to enhance justice to victims in the present constitutional framework in India. The second part of this chapter analyses statutory criminal laws and status of victims and incidental aspects.

5.2 Supremacy of the Constitution

The Constitution of India (1950) is a comprehensive document drafted the Constituent Assembly consisting of intellectuals representing diverse perspectives and regions with a lofty goal of peace and development. Like other written constitutions, the Indian Constitution also serves as a guiding document and it contains principles for governance and justice administration. It is regarded as the supreme law of the land and operates as a fundamental, basic law for governance and justice administration. The doctrine of supremacy of Constitution was recognized by the Supreme Court in *Golak Nath* v. *State of Punjab.*[1] The Parliament, State legislatures and other organs must act within the limits laid down by the Constitution. Accordingly, the Constitution is supreme and no authority created under the Constitution is supreme. Further, in *Union of India* v. *Naveen Jindal*[2] the Apex Court has explained the need of the supremacy of the Constitution. It has held that the Constitution being a living organ, its ongoing interpretation is permissible. The supremacy of the Constitution is essential to bring social changes in the national polity evolved with the passage of time.

[1] AIR 1967 SC 1643
[2] (2004) 2 SCC 476

India, the largest democratic country in the world, gave itself and adopted the largest written Constitution drafted in English, a non-Indian language (Foreign) with a Preamble, Articles and Schedules.[3] There are justiciable, non-justiciable rights and fundamental duties incorporated in it. [4] The Constitution of the Indian Republic is the product, not of a political revolution but of the research and deliberation of a body of eminent representatives of the people who sought to improve upon the existing system of administration.[5] The framers actively participated in the freedom movement and they had a basic vision for self-governance (*swaraj*) and protection of fundamental rights. The articles dealing with equality, right to constitutional remedies and the articles on the Union and State Legislatures would reflect the noble vision of the framers. The Constitution provides a set of rights to its citizen. The Supreme Court has observed that the Constitution is not to be construed as a mere law, but as machinery by which laws are made.[6] The Indian Constitution has an important feature of being the lengthy written instrument and many of its articles are borrowed from the Constitutions of the Western Countries. It is first and foremost a social document and majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by

[3] Among the written Constitutions in the world, Indian Constitution was written in the English language, which is not a native language of Indian soil and is not recognised in its eighth schedule.

[4] The rights guaranteed in Part-III of the Indian Constitution are enforceable before a court of law, the Directive Principles of Sate Policy in Part IV are unenforceable by the courts but are guiding principles in making laws. Fundamental Duties are inserted in part IV –A, through an amendment

[5] Durga Das Basu Dr, *Introduction to the Constitution of India*, Lexis Nexis, (2009) Reprint, P 3

[6] *Good Year India* v. *State of Haryana* (1990) 2 SCC 712

establishing the conditions necessary for its achievement. Yet, despite the permeation of the entire Constitution by the aim of national renaissance, the core of the commitment to the social revolution lies in Parts III and IV, *i.e*., in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution. Both Chapters III and IV had their roots deep in the struggle for independence and they were included in the Constitution in the hope and expectation that one day the tree of true liberty would bloom in India.[7] The Constitution of India also consists of the basic tenets of criminal laws and criminal justice administration. Justice, basic principles of criminal justice and criminal justice institutions, are both expressly and impliedly dealt with in the following provisions:

1) The Preamble
2) Part III
3) Part IV
4) The entries in the Schedules

An analysis relating to the provisions of the Constitution and institutions of criminal justice identified in its Seventh Schedule would be useful to understand the constitutional framework in the CJA in India.

5.3 Justice: A Preambular Mandate

The Preamble is an introductory statement to the Constitution of India. It sets out the aim and aspirations of the people of India. It also introduces the People as the source of the Constitution, nature of the Indian State, date of adoption and other basic ideas enshrined in it. The Preamble of the Indian

[7] Granville Austin, *The Indian Constitution Corner Stone of a Nation*, Oxford, (2012) P 63.

Constitution sets out the ideals and goals which the makers of the Constitution intended to achieve and which is to guide the people of the country. It demonstrates the principles of the Constitution and indicates the source from which the document derives its authority and meaning. Moreover, the hopes and aspirations of the people are described in it. It can be treated as the preface which highlights the entire Constitution. The Preamble was adopted by the Constituent Assembly after the draft Constitution has been approved.[8] In *Kesavananda Bharati* case[9] the Apex Court has held that the Preamble is a part of the Constitution. It is a key to open the mind of the makers as held in *Berubari Union and Exchange of Enclaves, Re*[10] and it contains in itself the ideals and its aspirations, as observed in *Golaknath* v. *State of Punjab.*[11] The basic idea, vision and goal of the Constitution that reflects in the Preamble and the justice has been metamorphosed as follows:

"JUSTICE, social, economic and political"[12]

A plain reading of the above statement in the Preamble would make it clear that the object of the Constitution in rendering justice is an indispensable task of the organs of the State. The term JUSTICE in capital letters appeared in the Preamble itself shows that justice administration has been recognised as a prime and paramount duty of the State. The term justice has been used in the Preamble with a comprehensive contour. It includes social, economic and

[8] Constituent Assembly Debates, Vol 10, Pp 423-24
[9] (1973) 4 SCC 225
[10] AIR 1960 SC 845
[11] AIR 1967 SC 1643
[12] Constitution of India, Preamble

political perspectives.[13] Therefore, the justice being administered by the courts or through the organs of the State has to be comprehensive, equitable and easily accessible by all the stakeholders, is the idea of the Constitution reflected in the Preamble. The ultimate goal of criminal justice system must be rendering justice to the accused and the victim.

5.4 Criminal Justice Dispensation under Indian Constitution

The Constitution of India has provided legitimacy to all the three primary pre-constitutional laws relating to crime and justice namely, Indian Penal Code, 1860, Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1898, governing criminal justice institutions and consists of guiding principles for all phases of criminal justice dispensation, including investigation, inquiry, trial, appeal, revision. The Indian Constitution, during its adoption, had to provide confidence in the minds of thirty million people and to unite them, among whom diversity of language, culture, religion, and custom has existed. The framers had led the independence movement and many of them were imprisoned by the colonial administration. Therefore, they had personal experience with the State's power to detain, arrest and criminal trial as they were detained as prisoners under various preventive and punitive penal provisions of law. Some of the drafting committee members, who were lawyers by profession had defended the political prisoners in the legal battle and opposed the draconian laws, enacted and imposed by the British. Thus, they consciously made the judiciary, a criminal case resolving body, as an

[13] Mahanesh G S, Social and Economic Justice under Constitution of India: A Critical Analysis, IJLMH, 2018 Volume 2, Issue 1, available at https://www.ijlmh.com

independent organ. The members of the Constituent Assembly brought to the framing of the judicial provisions of the Constitution an idealism equaled only by that shown towards the fundamental rights. Indeed, the judiciary was seen as extension of the rights, for it was the courts that would give, the rights force. The judiciary was to be an arm of social revolution, upholding the equality that Indians had longed for during the colonial and repressive rule. The British had feared that social change would endanger their rule[14] as observed by Granville Austin. The Judiciary has been created as an extremely important and independent organ not only to adjudicate the disputes or resolve them, but to serve as an arm of social revolution. Therefore, it would not be inappropriate to state that the right, which could not be expressly guaranteed in the Part III of the Constitution, may have to be guaranteed by the judiciary in India. The Apex Court and High Courts in the every State have been conferred with powers of judicial review, writ jurisdiction and to take *suo moto* cognizance of the executive inaction or overreach which may be invoked to protect the rights of the victims and also to award compensation.[15]

5.5 Fundamental Rights

The Constitution often, though not always, incorporates a set of rights. The Indian Constitution does so in Part III of the document, the chapter on 'Fundamental Rights'[16] Articles 12 to 35 deals with fundamental rights. As

[14] Granville Austin, *The Indian Constitution Cornerstone of a Nation*, Oxford (1996) P 204

[15] The compensatory jurisprudence has been expanded in the realm of criminal justice by the Supreme Court in *Nilabati Behara* v. *State of Orissa* (AIR 1993 SC 1960) and *Rudul Sah* v. *State of Bihar,* (1983) 4 SCC 141

[16] Madhav Khosala, *The Indian Constitution,* Oxford (2012) P 87

observed in *Javed* v. *State of Haryana*[17] the provisions in Part III must not be read in isolation but along with Part IV. The Directive Principles of State Policy, the unenforceable but indispensible part and Part IV A, a profound part that bestowed fundamental duties upon the citizens have also to be taken note of.

The fundamental rights in the Constitution are conveniently classified into two kinds. The citizens can enjoy all rights guaranteed but only some of them can be claimed by non-citizens. The rights guaranteed in Part III are binding on the legislatures and executives. The fundamental rights which form part of the basic structure of the Constitution cannot be taken away or abridged by an amendment. Article 13 has made it clear that any laws inconsistent with the provisions of Part III are void and the States are prohibited from making any law which takes away or abridges the rights conferred by Part III.[18] Articles 20, 21 and 22 are directly concerned with criminal laws and justice administration. Among the fundamental rights guaranteed by the Constitution, the right to life and personal liberty in Article 21, which can be claimed even by non-citizens, has been expanded in many directions by the Courts, particularly in the arena of criminal justice. Resultantly, the extremely important facets of criminal laws including right to speedy trial,[19] right to legal aid of the person charged with offences,[20] rights of prisoners and home inmates,[21] which touch the CJA, are brought under ambit and purview of the Article 21. Therefore, the stakeholders of criminal justice and their rights have

[17] AIR 2003 SC 3057
[18] Article 13, Constitution of India
[19] *K Anbalagan* v. *Supt of Police* (2004) 3 SCC 767
[20] *M H Hoskat* v. *State of Maharashtra* (1978) 3 SCC 544
[21] *Upendra* Baxi v. *State of U P* (1983) 2 SCC 308

been brought within the constitutional framework by the pronouncements of Courts. The Supreme Court in *Siddharam Satlingappa* v. *State of Maharashtra*[22] observed that,

> '…the Fundamental Rights represent the basic values enriched by the people of this country. The aim behind having elementary right of the individuals such as the Right to Life and Liberty is not fulfilled as desired by the framers of the Constitution. It is to preserve and protect certain basic human rights against interference by the state. The inclusion of a Chapter in Constitution is in accordance with the trends of modern democratic thought. The object is to ensure the inviolability of certain essential rights against political vicissitudes.'

The fundamental rights are guaranteed in Part III. The provisions relating to fundamental rights are to be jointly read with the fundamental duties and Directive Principles of State Policy. An author of commentaries of Constitutional Law observes that Part III, Part IV and Part IV A of the Constitution, though separate units, carry the common theme, human rights.[23] The whole object of Part III (Articles 12 – 35) of the Constitution is to provide protection for the freedom and rights mentioned therein against arbitrary invasion by the State.[24] The fundamental rights granted in the Constitution are basic rights of the citizen and they impose duties and obligation upon the State not to encroach upon individual liberty and freedom. Among the fundamental rights listed in Part III, three articles have been crafted to protect an individual

[22] AIR 1978 SC 597

[23] For the details see, M P. Singh, The Statics and the Dynamics of the fundamental rights and the directive principles. *A human rights perspective* in S.P. Sathe and Sathya Narayan (eds) "Liberty, Equality and Justi*ce"* Eastern Book Company, Lucknow, *(2003) PP-45-58.*

[24] *State of W.B.* v. *Subodh Gopal Bose* AIR 1954 SC 92

against the action of another individual.[25]

The important features of Part III of the Constitution that touches the criminal laws and justice are analysed in the following paragraphs.

5.6 *Ex-post facto* Laws

The first and foremost aspect of criminal law incorporated in the Constitution of India is the doctrine of *ex-post facto* laws. It prohibits declaring a commission or omission as an offence after it was committed. In the United Kingdom, the Parliament can pass any law even enhancing the punishment to the offence already committed, but the courts are empowered to declare those retroactive laws as void. In India, Article 20 (1) of Constitution expressly prohibits convictions and penalties under *ex-post facto* laws. An *ex-post facto* law is seen as 'highly inequitable and unjust' because it does not give a fair warning to an individual that her conduct is proscribed and punishes her for an act that she was otherwise free to do.[26] Article 20 (1), which deals with retrospective laws on crimes, runs as follows:

[25] Article 17 provides for 'Abolition of Untouchability, a caste based indiscrimination prevailing in India. Further, practicing of untouchability made as an offence and a special penal law, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 also enacted prescribing punishments against preaching and practising untouchability. Under the Act, enforcement of any disability arising out untouchability shall be treated as a punishable offence. Article 17 liberates the society from blind adherence to traditional superstitious beliefs bereft of reason and rational basis. Article 15(2) lays down that no citizen shall, on grounds of religion, race, caste, sex, place of birth, be subject to any disability in the use of shops, public restaurants and other public premises. Article 23 prohibits human trafficking and forced labour. The Supreme Court has held that non-payment of minimum wage by private parties is forced labour and punishable in accordance with law. These rights are providing constitutional protections to all and restore social harmony, which prevents social tension or breach of rights and also maintain peace and public tranquility in the society. They may also touch the basic concept of prevention of crime by maintaining the law and order.

[26] *Rao Shiv Bahadur Singh* v. *Vindhya Pradesh,* AIR 1953 SC 394

> "Protection in respect of conviction for offence**:** No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged 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."

In India, the guarantee against *ex-post facto* laws comprises two distinct parts. The first prohibits conviction for an act that was not an offence at the time of its commission. The second proscribes retrospective enhancement of penalty. Article 20(1) deal with ex-post-facto laws though that expression has not been used in the Article. Usually, a law prescribes a rule of conduct by which persons ought to be governed in respect of their civil rights. Certain penalties are also imposed under the criminal law for breach of any law. Though a sovereign legislature has power to legislate retrospectively, creation of an offence for an act which at the time of its commission was not an offence or imposition of a penalty greater than that which was under the law provided violates Article 20(1). In the Constitution, Article 20(1) is designed to prevent a person being punished for an act or omission which was considered not a crime when done.[27]

Soni Devrajbhai Babubhai v. *State of Gujarat*[28] exemplifies the impact of the first safeguard under Article 20(1). It was the argument advanced that Section 304 B of the Indian Penal Code 1860, which had been inserted in November 1986, should apply to an alleged incident that had occurred in August 1986. The Supreme Court rejected this contention and held that Article

[27] *G P. Nayyar* v. *State (Delhi Admn)*1979 2 SCC 593
[28] (1991) 4 SCC 298

20(1) when applied meant that Section 304 B could not be given any retrospective effect.

On the question of retrospective enhancement of punishment, the decision of the Apex court in *Kedar Nath Bajoria* v. *State of West Bengal*[29] is a classic example. It was a case, in which the offence was committed in 1947, but the State sought to apply a law enacted in 1949, which provided that, upon conviction for certain types of offences, the court would impose a special fine on the convict. The Supreme Court held that the special fine could not be imposed as it was hit by the prohibition against retrospective enhancement of punishment under Article 20(1). The second part of Article 20(1) prohibits subjecting a person 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 court has refused to read the words 'penalty' and 'offence' expansively to include retrospective application of non-criminal liabilities within the scope of this part. It has held that *ex-post facto* imposition of civil liability, even when the failure to discharge such liability could lead to imprisonment, is not barred by Article 20(1).[30] Similarly, while upholding a law which authorised the *ex-post* levy of penalties for the failure to discharge tax liability, the court held that Article 20(1) provides protections only to persons who are charged with a crime before a criminal court and, therefore, does not bar the retrospective levy of penalties for failure to comply with tax laws.[31] So also the court has held that

[29] AIR 1953 SC 404
[30] *Hathising Manufacturing Co Ltd* v. *Union of India* AIR 1960 Sc 923.
[31] *Shiv Dutt Rai Fateh Chand* v.*Union of India* (1983) 3 SCC 529.

ex-post levy of charges for unauthorised use of canal water,[32] retrospective application of a law authorising forfeiture of properties.[33] The *ex-post facto* application of a law that permits restraining a person from associating with any corporate body in accessing the securities market, and prohibiting such person from buying, selling, or dealing in securities, since these impose non-criminal liabilities and are hence not protected by Article 20(1).[34] The court reasoned that the second part of Article 20(1) only prohibits retrospective imposition or enhancement of imprisonment or fine levied as result of conviction in a criminal case.

5.7 Constitutional Status to the Defence of Double Jeopardy

Modern criminal justice systems prohibit two or more prosecutions or multiple convictions for the same crime. It operates as a proscription against re-trial for the same offence following a trial on the merits by a court. This procedural defence has been known as 'Double Jeopardy' and is recognised as a fundamental right of the accused under Common Law. It is based on the legal maxim *Nemo debet bis vexari,* which means a man shall be not brought into danger for one and the same offence more than once. The International Covenant on Civil and Political Rights (ICCPR) has also recognised that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.[35]

[32] *Jwala Ram* v. *State of Pepsu* AIR 1962 SC 1246
[33] *State of West Bengal* v. *SK Ghosh* AIR 1963 SC 255
[34] *SEBI* v. *Ajay Agarwal* (2010) 3 SCC 765.
[35] Article 14(7) International Covenant on Civil and Political Rights (ICCPR)

The Code of Criminal Procedure, by Section 300, has adopted the principle that a person once convicted or acquitted cannot be tried for the same offence.[36] If the first trial was conducted before a competent court the accused cannot be tried by any other court for the same offence and the finding of the first court is conclusive and binding on all the stakeholders. The ingredients that are to be fulfilled to apply Section 300 Cr.P.C. are that 1) he has been tried by a competent court for the same offence or one for which he might have been charged or convicted at that trial, on the same facts; 2) he has been convicted or acquitted at the trial; and 3) such conviction or acquittal is in force. Where an accused after trial has been acquitted so long as the acquittal is in force he cannot be tried again for the same offence by a different Court.

[36] S. 300 - Person once convicted or acquitted not to be tried for same offence.
(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub- section (1) of section 221, or for which he might have been convicted under sub- section (2) thereof.
(2) A person acquitted or convicted of any offence may be afterwards tried, with the consent of the State Government, for any distinct offence for which a separate charge might have been made against him at the former trial under sub- section (1) of section 220.
(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such the last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was convicted.
(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.
(5) A person discharged under Section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first- mentioned Court is subordinate.
(6) Nothing in this section shall affect the provisions of Section 26 of the General Clauses Act, 1897, (10 of 1897) or of Section 188 of this Code.
Explanation - The dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section

The defence of Double Jeopardy in Article 20(2) has been given a constitutional status to guarantee that no persons shall be prosecuted and punished for the same offence more than once. Article 20(2) incorporates within its scope the plea of "*autrefois acquit / convict*" as is known to British jurisprudence or the plea of double jeopardy as is known to American Constitution but circumscribes it by providing that there should be not only a prosecution but also punishment in the first instance in order for it to operate as a bar to a second prosecution and punishment for the same offence.[37]

The Supreme Court in *Raja Narayanlal Bansilal* v. *M P Mistry*[38] has explained that the constitutional right guaranteed by Article 20(2) on the ground of double jeopardy can be successfully invoked only where the prior proceedings on which reliance is placed are of a criminal nature instituted or continued in a court of law or a tribunal in accordance with the procedure prescribed in the statutes which creates the offence and regulates the procedure. The UK and the US courts have interpreted the guarantee of double jeopardy to protect against a second trial regardless of whether the first ended in conviction or acquittal.[39] The Supreme Court however, refused to read the phrase

[37] *Maqbool Hussain* v. *State of Bombay,* AIR 1953 SC 325. The statutory right under s. 300 (1) Cr PC which reads that "*a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221, or for which he might have been convicted under sub-section (2) thereof*", is considered to be wider in protection to the accused.

[38] AIR 1961 SC 29

[39] MP Singh, VN Shukla's *Constitution of India* (12th edn, Eastern Book Company 2013) 195-96.

'prosecuted and punished' disjunctively, that is as 'prosecuted or punished'.[40] Instead, it has interpreted Article 20(2) as only barring a second trial for an offence for which a person has already been punished once. An acquittal in the first prosecution does not bar another prosecution. It does not bar a civil trial, administrative proceedings, or any other non-criminal proceeding arising out of the same transaction for which a person has been prosecuted and punished in a criminal proceeding.[41] Proceedings before quasi-judicial bodies are also not barred by, and do not further bar, a prosecution before a criminal court.[42] Similarly, the Court has interpreted the phrase 'for the same offence' to refer only to cases where the prosecution and punishment in the first and subsequent instances are for offences whose ingredients are the same. Where the ingredients of two offences are non-identical, then, although the prosecution for both is based upon the same allegations, a person can be prosecuted and punished for both offences.[43] The constitutional status provided to the double jeopardy has strengthened the foundation of fairness and avoided multiplicity of proceedings and possibility of conflicting of opinions among the courts for the same offence in the criminal justice dispensation.

5.8 Right against Self-Incrimination

The right against self-incrimination finds its earliest embodiment in the medieval law of the Roman church and it gradually evolved in common law through protests against the inquisitorial and manifestly unjust methods of

[40] *SA Venkatraman* v.*Union of India* AIR 1954 SC 375 (5).
[41] *See also Union of India* v.*Sunil Kumar* (2001) 3 SCC 414.
[42] *Thomas Dana* v. *State of Punjab* AIR 1959 SC 375.
[43] *Sangeetaben Patel* v. *State of Gujarat* (2012) 7 SCC 621.

interrogation of accused persons, back in the middles ages in England.[44] The Indian criminal law has recognised the privilege against testimonial compulsion. This is a basic concept which originated from a legal maxim *i.e.* '*Nemo Tenetur Seipsum Accusare*' which means that no man, not even the accused himself, can be compelled to answer any question, which may tend to prove him guilty of a crime, which he has been alleged against or in exact sense, no one is required to incriminate himself. This provision was borrowed by the Indian Constitution from the Fifth Amendment of American Constitution, which can be traced back to the British System of Criminal Jurisprudence. This privilege was first recognised in the mid-18th century along with other doctrines such as burden of proof being upon the prosecution and the requirement to prove the guilt beyond any reasonable doubt. This equipped the accused with some tools to defend himself against the State, minimising the disadvantages faced by the defendants.[45] In Article 20 (3), embodies the principle of protection against compulsion of self- incrimination, but the word self-incrimination is not used by the framers.[46]

The Supreme Court in the decision in *Selvi* v. *State of Karnataka*[47] has defined the phrase 'self-incrimination' and its scope. The fundamental right

[44] 180th Report of the Law Commission of India, Article 20(3) the Constitution of India and the Right to Silence, 3, (2002)) Shivani Mittal, *The Right Against Self-Incrimination and State of Bombay* v. *Kathi Kalu Oghad: A Critique*, 2(1) NLUJ Law Review 75 (2013)

[45] Akash Mittal & Aakarsh Mishra, *Right against Self-Incrimination: A Detailed Study & Analysis of Laws Prevailing in India,* International Journal of Law Management & Humanities, Vol 4, Issue 2 (2021),https://www.ijlmh.com/paper/right-against-self-incrimination-a-detailed-study-analysis-of-laws-prevailing-in-india/ visited on 03 August 2021

[46] Article 20(3): No person accused of any offence shall be compelled to be a witness against himself.

[47] (2010) 7 SCC 263

guaranteed under Article 20 (3) is protective umbrella against testimonial compulsion in respect of persons accused of an offence to be witness against themselves. This protection, as the language goes, is not confined to evidence before Court but would even cover stage prior to it like investigation subsequent to becoming accused of an offence.[48]

This protection is not confined to evidence before the Court but would even cover the stage prior to it like investigation, subsequent to becoming accused of an offence. An eleven judges Bench of the Supreme Court in *State of Bombay v. Kathi Kalu Oghad*[49] held that the specimen signatures obtained from the accused in police custody by the Investigating Officer is against the rights guaranteed against the self-incrimination.

The constitutional recognition of the right against the self incrimination and the nexus with the principles adopted in the Indian criminal justice dispensation are well explained in the decision in *M P Sharma* v. *Sathish Chandra*[50] by the Supreme Court. It was one of the first judgments of the Supreme Court relating to the right of privacy in India. An eight Judge Bench of the Court, while discussing the constitutionality of the search and seizure provisions of the Code of Criminal Procedure, 1898 (Cr.P.C.), also briefly discussed the right to privacy and its interplay with Article 20(3). In this judgment, the Court held that search and seizure of documents did not amount

[48] Justice U.C. Srivastava, Immunity From Self Incrimination Under Article 20 (3) of The Constitution of India, available at http://ijtr.nic.in/articles/art19.pdf
[49] AIR 1961 SC 1808
[50] AIR 1954 SC 300

to "compelled testimony" and is thus not violative of Article 20(3).[51] The accused has a right against self-incrimination and testimonial compulsion or right to maintain silence are adopted as core principles of fair investigation and trial in many jurisdictions and these are accepted norms of Indian criminal jurisprudence also. The Constitution of India has elevated them to a strong status of fundamental rights. Consequently, the right of an accused got a constitutional protection under Article 20(3) of Constitution of India.

5.9 Equality before the Law and Equal Protection of Law

Article 14 of the Constitution guarantees to every person the right to equality before the law or the equal protection of the laws. The right to equality enshrined in Article 14 carries the words that the State shall not deny to any person equality before the law and equal protection of the laws.[52] It has been recognised as one of the basic features of the Constitution. In the Constituent Assembly, the drafting committee member Alladi Krishnasamy Ayyar believed that the right to equality before law could hamper reform. He opined that it might prevent the passage of laws differentiating between men and women factory-workers, thereby denying women special protection. It might also prevent treating children and adults differently in criminal courts.[53]

There was a proposal to treat the weaker parties with some special rights and privileges before the court of law. The Constituent Assembly discussions show that among the parties before the court of law, women, factory workers,

[51] Privacy Library, https://privacylibrary.ccgnlud.org

[52] Constitution of India, Article 14 *Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*

[53] Granville Austin, *The Indian Constitution - Cornerstone of a Nation*, Oxford, P-81

children, who are already suffering from financial inability, illiteracy and lack of awareness, are to be provided with some legal privileges. The drafters were not averse to granting certain privileges to identified section requiring support of law which would be, in a sense, negating the equal protection principle. Though the Constitution has provided equal protection of law, the victims of crimes are not even being treated on par with the accused, privileges would be a far demand. The Supreme Court has explained that the greatness of Article 14 is equality of treatment.[54] The accused person, who is brought before the court to answer to the charges, and the victim, who is forced to approach the court as an affected person, are not given equal legal care nor treated equally, by the system.

A Constitution can be judged only by its adequacy to situations it was designed to meet and by the extent to which the situations it might reasonably be expected to meet were foreseen.[55] The framers have incorporated an important provision in the Constitution to deal with the life of every person, which is Article 21.[56] It is considered by the Supreme Court as 'heart of the Constitution.'[57] By its creative interpretation, the Supreme Court has expanded Article 21 and guaranteed many rights through its pronouncements. Though words in Article 21 have been couched in negative language, it confers on every person the fundamental right to life and personal liberty which has

[54] *M. Nagaraj* v.*Union of India* (2006) 8 SCC 212.
[55] Granville Austin, *The Indian Constitution Corner Stone of a Nation, Oxford,1996, page 385*
[56] Article 21: No person shall be deprived of his life and personal liberty except according to procedure established by law.
[57] *I R Coelho* v. *State of Tamil Nadu* (2007) 2 SCC 1

become an inexhaustible source of many other rights.[58] The term life used in Article 21 has been defined by the Supreme Court in *Kharak Singh* v. *State of Uttar Pradesh*[59] as follows:

> By the term 'life' as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by amputation of an armored leg or the pulling out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.

This was quoted in *D.K. Basu* v. *State of West Bengal*[60] to recognise the rights of the arrested and a person in police custody. There are many other landmark verdicts of the courts that pro-actively interpreted the constitutional provisions and extended the right to life while widening the scope and ambit of Article 21, and rights relating to expeditious dispensation of justice to the seekers of justice in the criminal cases (speedy trial) rights of detunues, prison reforms and many other aspects also brought within its purview. The drafting process of the Indian Constitution started during British colonial administration and it was adopted after Partition and Independence. In those days the impunity of the State and coercive and other methods of imposition of law against the accused person were the norm, as applied by the British authorities. These were carefully considered by the framers of the Constitution and some safeguards incorporated into the criminal justice dispensation. While the Anglo-Saxon system did not expressly recognise the victim by express

[58] *Maneka Gandhi* v. *Union of India* (1978) 1 SCC 248
[59] AIR 1963 SC 1295
[60] 1997 (1) SCC 414

provisions of law, no necessity was recognized to insert any specific provision to protect the interest of victims of crime. In the absence of express or specific provision in order to provide relief, the Supreme Court and High Courts have invoked provisions relating to life and liberty and their inherent and constitutional powers. However, in most of the cases such compensatory reliefs and constitutional remedies were limited to the victims of custodial death, prison torture and police excesses. A sufferer of crime ordinarily cannot avail of such remedies by invoking constitutional law before the highest court of law. Later still, the creative interpretation of the benevolent provisions of Constitution of India have paved the way for laws, policies and schemes to extend justice to victims.

5.10 Institutions of Criminal Justice Administration and their Entries in the Constitution

The framers of the Constitution have made justice as the first and foremost objective and every citizen has been guaranteed free and easy access to it.[61] In Part XI, Articles 245 to 255 and Seventh Schedule deal with the distribution of Legislative Powers. The major institutions relating to the criminal justice administration such as police, investigating agency, authorities empowered to pass preventive detention orders, courts, prisons, Borstal Institutions and laws relating to criminal justice have been touched by the Seventh Schedule of the Constitution. The subjects in the Seventh Schedule are divided into three categories. They are (1) Union List, (2) State List, and (3) Concurrent List.

[61] Preamble, Constitution of India.

The Parliament and the State Legislatures have exclusive powers to make laws on the subjects under the Union List and the State List, respectively. As regards the Concurrent List, both Parliament as well as the State Legislatures have concurrent jurisdiction to enact laws. However, in case of conflict between the laws made by Parliament and the State Legislatures on any subject under the Concurrent List, the laws made by Parliament shall prevail upon the others.[62] The Constitution also empowers the President under Article 123, and the Governor under Article 213 to promulgate ordinances to deal with the extraordinary situations, when Parliament or the State Legislature, as the case may be, is not in session. However, the ordinance shall have the effect of law for a limited period of six months only. The Parliament has exclusive powers to make any law with respect to any matter not enumerated in the Concurrent List or State List.[63] There are as many as 23 entries governing the criminal justice system in the Seventh Schedule. The subjects relating to the criminal justice system as included in the Seventh Schedule of the Constitution of India are given below.

5.10.1 Union List

The framers of the Constitution have followed the Government of India Act, 1935.[64] Accordingly the Parliament has exclusive power of legislation with respect to 97 items in List-I. The State Legislation has exclusive power with respect to 66 items entered in List-II. There are 47 items enumerated in

[62] The Constitution of India, Article 254.
[63] The Constitution of India, Article 248.
[64] Mahendra P Singh, *V N Shukla's Constitution of India*, Eastern Book Company, Lucknow,(2008) P 732

List-III in which both the Parliament and State Legislature can make Laws of the subject included in List- III.

The Union List, which is a legislative domain of the Central Government, consists of nine entries relating to Criminal Justice Administration.

i. Central Bureau of Intelligence and Investigation.[65]
ii. Preventive detention for reasons connected with Defence, Foreign Affairs or the security of India; persons subjected to such detention.[66]
iii. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court) and fees taken therein; persons entitled to practise before the Supreme Court.[67]
iv. Constitution and organisation including vacations of the High Courts except provisions as to the officers and servants of High Courts; persons entitled to practise before the High Courts.[68]
v. Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union Territory.[69]
vi. Extension of the powers and jurisdiction of members of a police force belonging to any state to any area outside that state, but not so as to enable the police of one state to exercise powers and jurisdiction in any area outside that state without the consent of the government of the state.
vii. In which such area is situated; extension of the powers and jurisdiction of members of a police force belonging to any state to railway areas outside that state.[70]

[65] Seventh Schedule, List I, Entry 8.
[66] *Ibid*. Entry 9.
[67] Ibid. entry 77.
[68] Ibid. - entry 78.
[69] Ibid. entry 79.
[70] Ibid. entry 80.

viii. Offences against laws with respect to any of the matters in this List.[71]

ix. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this list; admiralty jurisdiction.[72]

5.10.2 State List

There are six subjects and machineries connected to the criminal justice administration entered in the State List of the Seventh Schedule of the Constitution.

i. Public order but not including the use of any naval, military or air force or any other Armed Force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in aid of the civil power.[73]

ii. Police including railway and village police subject to the provisions of entry 2A of List-I.[74]

iii. Officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court.[75]

iv. Prisons, reformatories, Borstal institutions and institutions of a like nature and persons detained therein; arrangements with other states for the use of prisons and other institutions.[76]

v. Offences against laws with respect to any of the matters in this List.[77]

vi. Jurisdiction and powers of all courts, except the Supreme Court with respect to any of the matters in this List.[78]

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[71] Ibid. entry 93.
[72] Ibid. entry 95.
[73] Ibid. List II, entry 1.
[74] Ibid. entry 2.
[75] Ibid. entry 3.
[76] Ibid. entry 4.
[77] Ibid. entry 64.
[78] Ibid. entry 65.

5.10.3 Concurrent List

The List III, known as Concurrent List, reflects the federal nature of the Constitution. There are eight entries in it. Both the Union and State governments have powers to legislate on the said domain touching the criminal justice administration.

i. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power.[79]
ii. Criminal procedure, including all matters included in the Code of Criminal procedure at the commencement of this Constitution.[80]
iii. Preventive detention for reasons connected with the security of a state, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.[81]
iv. Removal from one state to another state of prisoners, accused persons and persons subjected to preventive detention for reasons specified in entry 3 of this List.[82]
v. Administration of justice; Constitution and organisation of all courts, except the Supreme Court and the High Courts.[83]
vi. Evidence and oaths; recognition of laws, public acts and records and judicial proceedings.[84]
vii. Legal, medical and other professions.[85]

[79] Ibid. List III, entry 1.
[80] Ibid. entry 2.
[81] Ibid. entry 3.
[82] Ibid. entry 4.
[83] Ibid. entry 11A.
[84] Ibid. entry 12.
[85] Ibid. entry 26.

viii. Jurisdiction and powers of all courts, except the Supreme Court with respect to any of the matters in this List.[86]

Therefore, in all the three Lists, out of 210 entries, there are as many as 23 entries governing the Criminal Justice Administration. All three Lists and the entries found in them, however, do not exhaust all the legislative subjects. Apart from the residuary subjects covered in Article 248 and Entry 97 of List I, legislative subjects and powers can be found in other provisions of the Constitution also such as Articles 119, 209 and 262.[87] In case of conflicts or overlap among such powers, an entry of the three Lists, the subjects enumerated in the Union List shall prevail.[88]

5.11 Directive Principles of State Policy

Part IV of the Constitution of India (Articles 36 to 51) is known as Directive Principles of State Policy. It is an anthology of fundamental rules for governance of the country and these principles are to be applied in making laws. The Chairman of the Constitution Drafting Committee explained it as follows:

> *"*It is no use giving a fixed, rigid form to something which is not rigid, which is fundamentally changing and must, having regard to the circumstances and the times, keep on changing. It is, therefore, no use saying that the directive principles have no value. In my judgment, the directive principles have a great value; for they lay down that our ideal is economic democracy. Because we did not want merely a parliamentary form of government to be instituted through the various

[86] Ibid. entry 46.
[87] See *State of Punjab* v. *Satyapal*, AIR 1969 SC 903, 914;
[88] *Cauvery Water Disputes Tribunal, Re*, AIR 1992 SC 522

> mechanisms provided in the Constitution, without any direction as to what our economic ideal or as to what our social order ought to be, we deliberately included the directive principles in our Constitution."[89]

Though the provisions in Part IV of the Constitution are unenforceable in any court of law, it has been regarded as an essential feature of the Constitution and the conceptual relationship between fundamental rights and Directive Principles of State Policy in the background of the Preamble has also been explained by the Supreme Court.[90] Three unique qualities of the Directive Principles of State Policy are: -

1. Directives in the nature of Ideals of the State
2. Directives shaping the Policy of the State
3. Non-justiciable Rights of Citizen

It has been universally recognized as an instrument to achievement of equality before law and provide access to justice, which is also introduced as a non-justiciable right in Article 39 A. The legal services to avail justice or free legal aid, as a concept of dispensation of justice, is of recent origin and has taken birth from the womb of 'Welfare State', where the proper growth and development of all individuals and their groups, in the free climate of a democracy, without any impediments and handicaps are ensured by the State. And hindrances and obstructions of economic and social strengths and others are swept and removed by the state herself to make visible that equality, the most fundamental and pivotal ingredient of a democracy exists amongst all

[89] Constituent Assembly Debates, Vol. VII pp. 494-95.
[90] *Kesavananda Bharathi* v. *State of Kerala* (1973) 4 SCC 225.

citizens.[91] It has been universally recognised as an instrument to achieve equality before law and provide access to justice made as a non-justiciable right in Article 39 A.[92] The Constitution has bestowed an obligation upon the State to promote justice on the basis of equal opportunity by providing free legal aid.

In addition to the legal services, public assistance is to be provided by the State for persons suffering from sickness and disablement, as envisaged in Article 41, and the victim may be brought under this provision and declared as entitled to public assistance, after having suffered from the crime.[93] In a welfare State every person is entitled to public assistance and more particularly the disabled and under-privileged.

Article 38 deals with the obligations of the State to secure a social order for the promotion of welfare of the people.[94] Its scope to introduce crime victim benefit schemes and policies has been identified by the Supreme Court to constitute a Crime Injuries Compensation Board in India. Article 38 (1) of the Constitution incorporates Part of the Preamble within it. The Words 'Justice', 'Social', 'economic' and 'Political' from the Preamble have been embedded in

[91] Sujan Singh, *Legal Aid Human Right to Equality,* Deep & Deep Publications, New Delhi, 1998 pp. 13-14.

[92] Equal justice and free legal aid; 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.

[93] Art 41 Right to work, to education and to public assistance in certain cases: The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.

[94] Art 38 : State to secure a social order for the promotion of welfare of the people. [(1)] The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. [(2) The State shall, in particular, strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations]

this article. This clause has often been relied upon to sustain and demand social welfare measures and remind the State about the kind of society the Constitution expects it to create.[95] In a Public Interest Litigation (PIL) filed aftermath gruesome rape of domestic workers who travelled in the train on 10 February 1993, the Supreme Court initiated the idea of constitution of Criminal Injuries Board (CIB) in India.[96] It was a case wherein six women, all domestic servants travelling from Ranchi to Delhi, were subjected to indecent sexual assault by seven army personnel. The Police constables who were on guard duty in the train at the time of incident failed to provide necessary protection to the victims. The Supreme Court has observed that it is rather unfortunate that in recent times, there has been an increase in violence against women causing serious concern. Rape, indeed poses a serious of problem 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 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 Court has also referred the following passage from The Oxford Handbook of Criminology, (1994 Edition), at pages 1237-38, as to the position in England:

> ‘Compensation payable by the offender was introduced in the Criminal Justice Act, 1972 which gave the courts powers to make an ancillary

[95] Mahendra P Singh, *V N Shukla's Constitution of India*, Eastern Book Company, (2008) P 347

[96] *Delhi Domestic Working Women's Forum* v. *Union of India* (1995) 1 SCC 14

> order for compensation in addition to the main penalty in cases where injury, loss, or damage had resulted. The Criminal Justice Act, 1982 made it possible for the first time to make a compensation order as the sole penalty. It also required that in cases where fines and compensation orders were given together, the payment of compensation should take priority over the fine. These developments signified a major shift in penological thinking, reflecting the growing importance attached to restitution and reparation over the more narrowly retributive aims of conventional punishment. The Criminal Justice Act, 1988 furthered this shift. It required courts to consider the making of a compensation order in every case of death, injury, loss or damage and, where such an order was not given, impose a duty on the court to give reasons for not doing so. It also extended the range of injuries eligible for compensation. These new requirements mean that if the court fails to make a compensation order it must furnish reasons. Where reasons are given, the victim may apply for these to be subject to judicial review.'

When the courts were not adequately invoking provisions relating to compensation in the Code of Criminal Procedure, 1973 and prior to introduction of Victim Compensation Scheme, the Supreme Court and High Courts have exercised their constitutional jurisdictions and awarded compensatory reliefs to the victims. The Constitution confers vast powers and wide jurisdictions upon the Apex Court to do complete justice and the High Courts have superintending and powers of revision. The judgment in *Palaniappa Gounder* v. *State of Tamil Nadu*[97] (delivered by the Madras High Court) which was modified by the Supreme Court is considered as a first case

[97] AIR 1977 SC 1323

wherein compensation was awarded to the heirs of the person murdered in the occurrence of a crime. It is a classic instance to show how the Supreme Court and High Courts have invoked the powers derived from the Constitution to provide reliefs to the sufferer of crime, in the absence of specific laws. Thus, the tenets of criminal jurisprudence, including compensation to victims, have to be considered as having been embedded in the Constitution of India.

The rights and privileges guaranteed to the accused person by the Constitution of India can be summed up as follows:

1) Privilege against *Ex-post Facto* Laws (Art 20 (1))
2) Right of the accused against double jeopardy (Art 20(2))
3) Right of the accused not to be compelled as witness against himself. (Art 20(3))
4) No deprivation of accuser's life or personal liberty as per law, due procedure which is just, fair and reasonable. (Art 21).
5) Right of the accused to fair and speedy trial (Art 21).
6) Right of the accused to assistance of a Counsel (Art 22 (1))
7) Right of the accused to be produced before the Magistrate 24 hours of arrest excluding the time of travel (Art 22(2)
8) Right of the accused not to be detained in custody more than 24 hours (Art.22 (2).

Though there are no such express provisions to provide any reliefs to the victims of crime either to seek remedies or reliefs from the criminal law institutions, the basic principles of human rights and natural justice should operate as the safety and benevolent measures for victims too.

5.12 Basic Framework of Criminal Law (BFCL) and Victims

Criminal justice dispensation concerns everyone in a society and closely

touches upon all phases of life. In India, courts are constitutional creations and as an institution it derives powers from the Constitution. The primary functions of the courts are adjudication, conflict resolution, awarding punishments to the wrong doer and providing compensation. Every aspect of criminal justice, from the registration of information to the final adjudication, are governed by the values and principles enshrined in provisions contemplated in the three major enactments. They are

1) Indian Penal Code, 1860 (IPC)
   It is a substantive law of crimes in India and the primary penal law regarded as a masterly legislation on crimes and punishments.
2) The Code of Criminal Procedure, 1973 (Cr. P.C.)
   It is not a penal enactment but an adjective law on procedures. It provides machinery for punishment of offenders for violations of the substantive criminal law.
3) The Indian Evidence Act, 1872 (IEA)
   It is a guide book consisting of rules relating to evidence mandatory to be followed by the adjudicating authorities.

All the three statutes may be considered to be covered in the Concurrent List of the Seventh Schedule of the Constitution. For the purpose of this study, the term “Basic Framework of Criminal Law” (BFCL) consists of the above three major Acts. These laws define crime, prescribe punishments and contemplate procedure for investigation, inquiry, trial, appeal and other process of adjudication. They are applicable to all States and Union Territories. Some of the provisions in these statutes are suitably amended by the States to fit the territorial requirements and cater to their regional needs.

Criminal law helps to maintain tranquility and also prevent crimes. An occurrence of crime disturbs peace in society and causes harm to the individual. The BFCL and its institutions have to fulfill the legitimate expectations of three stakeholders, the individuals, who are the 1) perpetrator and 2) sufferer of crime, and also 3) society in general. By this section it is proposed to analyse as to how justice is rendered to the victim in India, and for that it is necessary to study as to where the victim of crime is placed and how he/she is treated by the laws in force as part of the BFCL.

As stated in the introduction of this chapter, the Indian Penal Code, 1860 the longest surviving penal statute in the world, the Code of Criminal Procedure, 1973, which is a suitable reproduction and adaptation of the old Code of the year 1898 and the Indian Evidence Act, 1872, are the three major laws which together play pivotal role in the criminal justice dispensation. While the Penal Code defines crimes and prescribes punishments, the Criminal Procedure Code consist of all provisions suggesting procedures from the receipt of complaint or petition, registration of crime occurrence, collection of evidence. The Evidence Act governs the relevancy and the admissibility of oral or documentary evidence, process of enquiry, trial, appeal, revision and all other modes of adjudications including the powers and jurisdiction of courts, sentencing process, disposal of material objects and the properties used for the commission of crime, are primarily governed by the provisions of BFCL.

The foundation for institutionalised criminal justice administration system in India was laid after the British almost lost their colonial empire in the

First War of Independence in 1857. The imperative need then was a coercive system that would brook no further challenge to the task of ruling the people of India and keeping a strict surveillance over subversive activities. The creation of new legal concepts defined by the Indian Penal Code (IPC), 1860; Criminal Procedural Codes (Cr.P.C.), 1898 and replaced in 1972; Evidence Act, 1872; and the Police Act, 1861 shaped the coercive criminal justice model for the country. The British introduced hitherto unknown legal concepts that deterred resistance against the colonial state. These provided a mechanism to force the acquiescence and compliance of the people to provisions protecting the colonial rule. Indeed, the Indian Penal Code is a classic example of a legal instrument of hegemony. The Code consists of 23 chapters of which ten are devoted to maintaining order and protecting the (colonial) state. The Criminal Procedural Code and other legal provisions provided the police with powers to intrude into the private domains of citizens and watch for any dissidence.[98] There are a variety of comments and criticisms placed by the jurists and academicians against the present legal texts governing the criminal justice system. However, even after independence these colonial laws serve as major and indispensible statutes in the domain of criminal laws.

5.13 Victims and the Indian Penal Code, 1860

The Indian Penal Code (IPC**),** a penal statute, which is the first interference of the British administration to make substantive changes to the largely inconsistent penal laws in existence in India. The then existing conflicts

[98] Prabha Unnithan N (ed.), *Crime and justice in India,* Sage Publications, (2013) P 9

and lack of uniformity in the laws, created the need for a penal statute with clear definition of offences and uniformity in sentences. As per the Charter Act of 1833, the Governor General was the sole authority for promulgation of laws for all persons.[99] The First Indian Law Commission constituted with T.B. Macaulay, J.M. Macleod, G.W. Anderson and F Millet as members, took up the task of drafting a penal code for India, in 1835. The printed draft Penal Code with 488 clauses by the first Law Commission was submitted to the Government on 14 October 1837, and after several amendments and revisions the IPC emerged in 1860 and came into force from 1 January 1862.[100]

The Preamble of the IPC states that the object of the Code is to provide a 'general penal code for India'. The substantive law of crimes in India is thus what is contained in the IPC. It consolidates the whole of the law on the subject and is exhaustive on the matters in respect of which it declares the law. No courts of law are at liberty to go outside the Code and stretch its provisions by referring to those prior to the Code coming into force. The title 'Indian Penal Code' aptly describes its contents. The word 'penal' emphasises the concept of punishing those who transgress the law and commit offences. Punishment and threat are the chief methods known to the State for maintaining public order, peace and tranquility.[101] There are as many as 36 Amendment Acts, which have been introduced since 1948 through which amendments were incorporated in the IPC to cater to the needs that arise following the changes and developments

[99] Section 39, Charter Act, 1833
[100] See K N Chandrasekharan Pillai and Shabistan Aquil, *Essays on the Indian Penal Code*, (The history of IPC) Indian Law Institute, New Delhi, (2008)
[101] Law Commission's Forty-second Report, Para I.2.

occurring in society.[102]

The present Code consists of sections numbered till 511 with the general principles of jurisdiction, basic principles of criminal law such as those including conspiracy, abetment, exemption, definition of offences and the punishments. It is one of the most comprehensive penal codes anywhere in the world and though of colonial vintage, has shown resilience in the fact that even after more than a century and half years after it was originally passed, the entire statute remains substantially unaltered.[103]

5.13.1 IPC and a Demand for Creation of New Offences

The IPC, the longest surviving penal code, often could not cope with the later developments occurring in relation to the commission of what could be classified as crimes. Therefore, a prayer was made before a court of law for creation of new offences to deal with victims of rape and sexual harassment. As per the law of interpretation, whether the court can create any offence by purposive or creative judicial interpretation was a question before the Supreme Court in *Sakshi* v. *Union of India*.[104] In this case *Sakshi*, an organisation providing help to the victims of sexual harassment or rape contended that Section 375 IPC is to be interpreted in the light of the current scenario which required consideration whether by a process of judicial interpretation the provisions of section 375 I.P.C. could be so altered so as to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/anal penetration and

[102] C K Takwani, *Indian Penal Code*, Eastern Book Company, Lucknow (2014) P 3
[103] Suresh V and Nagasila D (ed.) *PSA Pillai's Criminal Law* (2000) P 327
[104] AIR 2004 SC 3566

object/vaginal penetration within its ambit? The Supreme Court, rejecting the prayer, held that it is a 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 to what has been said as also to what has not been said. As a consequence, construction which requires for its support, addition or substitution of words or which result 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 as a penal provision is in itself a reason for hesitating before ascribing to phrases used in it, a meaning broader than that they would ordinarily bear. Thus, the Apex Court held that by a judicial interpretation no penal section can be created and it is the domain of the legislature to make an act or omission as an offence.

There are many amendments introduced in IPC in the 150 years of its application, but with absolutely no victim orientation in them till the end of the year 2009. However, the legislature took initiatives for substantial amendments which provided a ray of hope to the victims in Criminal Law Framework following a nationwide protest in the wake of horrific gang rape and murder in December, 2012, known as *Nirbhaya* incident.[105] The Criminal Law (Amendment) Act, 2013 which was enacted and pursuant to the

[105] *Mukesh & Another* v. *State for NCT of Delhi & Another* (2017) 6 SCC 1.

recommendations of the Justice J S Verma Committee, has expanded the definition for rape and created new offences in the IPC as follows:

Section in Indian Penal Code, 1860.	Details of Amendment
100	Clause '*Seventhly' was added* *Seventhly* - An act of throwing or administering acid or an attempt to throw or administer acid which may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such act.
166 A	Where a public servant knowingly disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or any other matter, or does the same to the prejudice of any person, any other direction of the law regulating the manner in which he shall conduct such investigation. or there is a failure to record any information given to him under sub section (1) of Section 154 of the Code of Criminal Procedure, 1973, in relation to cognizable offence punishable under Section 326 A, Section 326 B, Section 34, Section 354 B, Section 370, Section 370 A, Section 376, Section 376 A, Section 376 B, Section 376 C, Section 376 D, Section 376 E or Section 509, the act shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to two years, and shall also be liable to fine.
166 B	Whoever being in charge of a hospital, public or private, whether run by the Central Government, the State Government, local bodies or any other person, contravenes the provisions of Section 357 C of the Code of Criminal Procedure, 1973, shall

	be punished with imprisonment of a term which may extend to one year or with fine or with both.
326 A	Causing of permanent or partial damage or deformity to or burns or maintaining or disfiguring or disabling any part(s) of the body of a person or causing grievous hurt by throwing or administering acid on/to a person or by any other means with the intention or knowledge of the likelihood of causing such injury or hurt, has been made punishable with imprisonment of either description for a term not less than ten years extendable to life and with fine. The fine however shall be just and reasonable to meet medical expenses of the treatment of the victim and the fine imposed has been made payable to the victim under the second proviso.
326 B	Throwing of acid or attempting the same on any person or attempting to do the same or use any other means with the intention of causing permanent or partial damage or deformity or burns or maiming of disfiguring or causing disability or grievous hurt to that person has been made punishable with not less than five years imprisonment extendable to seven years and also with fine.
354	The minimum sentence of one year's imprisonment of either description extendable to five years and along with fine has been introduced.
354 A	Sexual harassment as a new offence stands introduced under this Section. Acts such as physical contact and advances involving unwelcome and explicit sexual overtures; demand or request for sexual favours; showing pornography against the will of a woman or making sexually coloured remarks have been made punishable as offences. The first three of the

	aforementioned acts would attract punishment of rigorous imprisonment for a term extending to three years or fine or both; while the fourth mentioned act would attract imprisonment extendable to one year or fine or both.
354 B	Assaulting or usage of criminal force to any woman or abetment of such act with intention of disrobing or compelling her to be naked, has been made punishable with imprisonment of either description not less than three years extendable to seven years and fine.
354 C	Watching or capturing the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminating such image shall be punished with imprisonment of either description not less than a year extendable to three years and fine and upon second conviction with imprisonment which shall not be less than three years but may extend to seven years and fine.
354 D	Following a woman and contacting or attempting to contact a woman to foster personal interaction repeatedly despite a clear indication of disinterest by such a woman or monitoring the use by a woman of internet, email or any other form of electronic communication, would amount to the commission of the offence of stalking. Upon first conviction imprisonment of either description for a term up to three years and fine and upon second conviction imprisonment for a term extendable to five years and fine.
375	A man is said to commit rape if he penetrates his penis to any extent into the vagina, mouth, urethra or anus of a woman or

	inserts to any extent any object or part of the body into such orifices (other than mouth) or manipulates any part of the body of a woman to cause such a penetration or applies his mouth to the orifices or makes her to do any of these with any other person. Provided the same is done under any of the circumstances (viz., against her will / without her consent / with her consent, where the same had been obtained by putting her to any other person in whom she is interested in fear of death or hurt etc.) as where there under the provision prior to the amendment and also additionally 'when she is unable to communicate consent'. Explanation 2 has been appended to the section which defines 'consent' as 'an unequivocal voluntary agreement when the woman by words, gestures, or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. The proviso to the explanation further states that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact be regarded as consenting to the sexual activity.
376	The punishment for rape (except in the aggravated circumstances enunciated under sub section (2) shall be rigorous imprisonment for not less than seven years but which may extend to life. In aggravated circumstances (with further amends to how the sub-section stood prior to this overhaul), the punishment prescribed now is rigorous imprisonment for a term not less than ten years extendable to life (the remainder of the natural life of the individual) and also fine.
376 A	Punishment of rigorous imprisonment for a term of not less than twenty years extendable to life (remainder of the person's natural life or with death) for the act of causing death or rendering the victim in a persistent vegetative state.

376 B	Sexual intercourse by husband upon his wife during separation under a decree of separation or otherwise, without her consent has been made punishable with imprisonment of either description for a term not less than two years which may extend to seven years and also fine.
376 C	Whoever being in a position of authority or in fiduciary relationship or a public servant or superintendent or manager of a jail or remand home or other places of custody or a women's or children's institution or on the management of a hospital or a staff thereof abuses such position or fiduciary relationship to induce or seduce any women in such custody or charge to have sexual intercourse, the same not amounting to rape, shall be punished with rigorous imprisonment for a term not less than five years extendable to ten years and fine.
376 D	Punishment of rigorous imprisonment for a term of not less than twenty years extendable to life (remainder of the person's natural life) and fine has been provided for the offence of gang rape. The fine should be just and reasonable to meet the medical expenses and rehabilitation. The fine imposed shall be paid to the victim.

The above amendments introduced in IPC, which, *inter alia*, provides for enhanced punishments-

(a) Punishment for the offence of rape from the minimum imprisonment of seven years to ten years, which is extendable to imprisonment for life;

(b) Punishment for the offence of rape on a women under sixteen years of age shall be rigorous imprisonment for a term not less than twenty years but may extend to imprisonment for life and shall also be liable to fine;

(c) Punishment for the offence of rape on a woman under twelve years of age shall be rigorous imprisonment for a term for a term not less than twenty years but may extend to imprisonment for the remainder of that person's natural life and with fine or with death;

(d) Punishment for the offence of gang rape on a woman less than sixteen years of age shall be imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and with fine.

(e) Punishment for the offence of gang rape on a woman under twelve years of age shall be imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life and with fine or with death;

With the enhancement of punishment for rape, these amendments have sensitised the courts also. As detailed above, victim orientation in IPC emerged only after the introduction of Criminal Law (Amendments) Act 13 of 2013 and 2018 and thus what was demanded before the Supreme Court in the *Sakshi* case[106], cited *supra*, is addressed with the expansion of the definition of rape and also the creation of nine offences related to rape, sexual harassment and offence against women. The act of voyeurism and stalking are made offences in the IPC and it is a step forward in the journey of justice for women victims.[107]

The above amendments have created deterrence in the matter of offences against women. The alarming increase of crimes of rape of minor girls and gender based offences against girl children created public outcry. Therefore, once again the laws containing in the Basic Framework Criminal Law in India

[106] AIR 2004 SC 3566

[107] Sections 354 C and 354 D in the Indian Penal Code, 1860 inserted by Act 13 of 2013.

have been amended by the Criminal Law (Amendment) Bill, 2018.[108] The purpose and necessity are reflected in its statements of objects. According to it, the recent incidents of rape and gang rape on women under the age of sixteen and twelve years have shaken the conscience of the entire nation. Therefore, the offences of rape and gang rape on women under the age of sixteen and twelve required effective deterrence through legal provisions of more stringent punishment. Some of the incidents in recent years have been marked by increased brutality and violence perpetrated on minor girls. This has fuelled demands from various sections of society to make the penal provisions more stringent and effective. Further, the public demanded immediate arrest of the accused and to ensure speedy trial in such cases. In this regard, in additions to the necessary amendments in the Indian Penal Code, amendments relating to arrest, bail, and speedy trial are also brought into effect in the Code of Criminal Procedure, 1973, Indian Evidence Act, 1872. The Protection of Children from Sexual Offences Act, 2012 was introduced earlier to cater to some concerns.

5.14 Victims and the Code of Criminal Procedure, 1973

As discussed in the previous paragraphs, after establishing of the East India Company, the British had introduced the Code of Criminal Procedure in the year 1852 (XVI) of 1852 (Cr.P.C.) and thereafter several amendments were introduced and the Cr.P.C. was modified about five times till 1898. The Law Commission, in its report under the Chairmanship of Sri. J.L. Kapur, made a suggestion for the drastic amendments in the Cr.P.C. (Act V of 1898).

[108] Criminal Law Amendment Act 22 0f 2018, https://www.mha.gov.in/sites/default/files/CSdivTheCriminalLawAct_14082018.pdf

Thereafter, the 41st report of the Law Commission made recommendation for a new procedural code for fair trial in concurrence with the established principles of natural justice. The present Cr.P.C., 1973 is mainly an adjective law and its object is to provide fair procedure for investigation, trial and it provides machinery for punishment of offence under the IPC and other acts. As described by the Madras High Court, the Cr.P.C. is not a penal enactment. It lays down the procedure to be followed, not only in punitive trials but also confers certain powers on Courts, Executive Authorities and Police Officers, to take certain types of action to meet certain situations in the larger interests of the general public.[109] The primary law of procedure from the registering of complaints to all process of investigation, adjudication which includes inquiry, trial, appeal, revision, review etc., is covered in the Cr.P.C. It is an adjective law prescribing procedure, flowing from the Concurrent List of the Constitution of India.[110] The State Legislature has requisite power to make laws to amend the provision of Code of Criminal Procedure, 1973 subject to the compliance of other provisions of the Constitution. The Code is not only primary, but supreme too, as all the Rules of Practice framed by the High Courts and Manuals of Central Bureau of Investigation (CBI) or Central Vigilance Commission (CVC) are subject to the provisions of Cr.P.C. Therefore, in case of conflict it will prevail over the Rules of Practice and Manuals.

[109] *Parthasarathy* v. *Banumathy,* 1988 Mad L W (Crl) 333
[110] The Constitution of India, Schedule VII, List III, Entry 2

The sanctity of the Cr.P.C. emanates from its relation to Article 21 of the Constitution of India which guarantees that no person shall be deprived of his life and personal liberty except through a "procedure established by law". Over the years, this has been read by Indian Courts as a "due process of law" meaning thereby that the procedure established by law must conform to the test of reasonableness.[111] The Supreme Court, in *Iqbal Ismail Sodawala* v. *State of Maharashtra*,[112] explained that the Code of Criminal Procedure is essentially a Code of procedure and like all procedural law, is designed to further the ends of justice and not frustrate them by the introduction of endless technicalities. The object of the Code is to ensure for the accused a full and fair trial, in accordance with the principles of natural justice. The Madras High Court observed that it professes to deal exhaustively with the law of procedure and provides the minutest detail of the procedure to be followed in every matter pertaining to the general administration of criminal law. It must be borne in mind that criminal procedure is devised on behalf of the prosecution or on behalf of the accused and anything that derogates from the proper claims of justice is inherently absurd.[113]

5.14.1 Introduction of Victim in Cr.P.C.

Both in the old Code of Criminal Procedure, 1898 and in the present Code, 1973 the term 'victim' was not used by its framers. However, the

[111] See preface to Ttwentieth edition of Ratanlal & Dhirajlal, *The Code of Criminal Procedure*, Lexis Nexis, (2018)
[112] AIR 1974 SC 1880
[113] *In Re Kalesha*, AIR 1932 Mad 779

expressions 'injured' found a place in three of the provisions.[114] There was no direct reference about the sufferer of crime as victim in the Cr.P.C.

As stated above, the present Code was drafted on the recommendations of the Law Commission by it 41st Report, which *inter alia* made following recommendations.[115]

> *"*An accused person should get a fair trial in accordance with the accepted principles of natural justice."[116]

Therefore, the fundamental reason for revamping the old procedural code and introduction of new provisions for procedures was that an accused should get a fair trial and his rights should be protected. It made the Cr.P.C. an 'accused centric' law. Of course it is an important principle and no one can oppose that the rights have to be guaranteed to an accused by the Code, but the importance given to the perpetrator of crime has not been extended to the other stakeholder, the victim. The victim has not even been considered as inclusive to the criminal justice system by the framers of the Code. The legislative changes made by the Criminal Law Amendment Act 5 of 2009 in the Criminal law Framework, particularly in Cr.P.C. is a milestone in victim orientation in India. The prefatory note, statements of objects and reasons of the said amendment are extremely important and are extracted hereunder:

> 'At present victims are the worst sufferers in a crime and they don't have much role in the court proceedings. They need to be given certain rights and compensation, so that there is no distortion of the criminal justice

[114] In section 532 the term 'injured' refers to committal of a case and in section 533 and in the illustration of section 403 the expression 'injured' refers to double jeopardy and confession
[115] The Forty-first Law Commission Report submitted in September, 1969
[116] Statements of Objects and easons, Gazette of India Ex Part to 11 section 2

> system. Further, there is an urgent need to provide relief to women, particularly victims of sexual offences and provide fair trial to persons of unsound mind, who are not able to defend themselves.'[117]

This is the probably for first time in the legal history of India that jurists or legislature have concurred in admitting that the victims are the worst sufferers in a crime. In pursuance of the above observation legislative action followed. Consequently, the word 'victim' was introduced in Cr.P.C. by insertion of a new Sub-Section in Section 2. The provision, which carries the definitions of the words and phrases of the Code, introduced the word 'victim" to the Indian criminal law. The new sub-section 2 (wa) reads as follows:

> 'victim' means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir.[118]

By the introduction of the word victim in Cr P C, a new avenue has opened in the criminal justice dispensation. The definition of the term 'victim' includes a person who suffers any loss or injury by commission or omission of an act which has been described as a crime and the term 'victim' is expanded to the guardian and legal heirs.

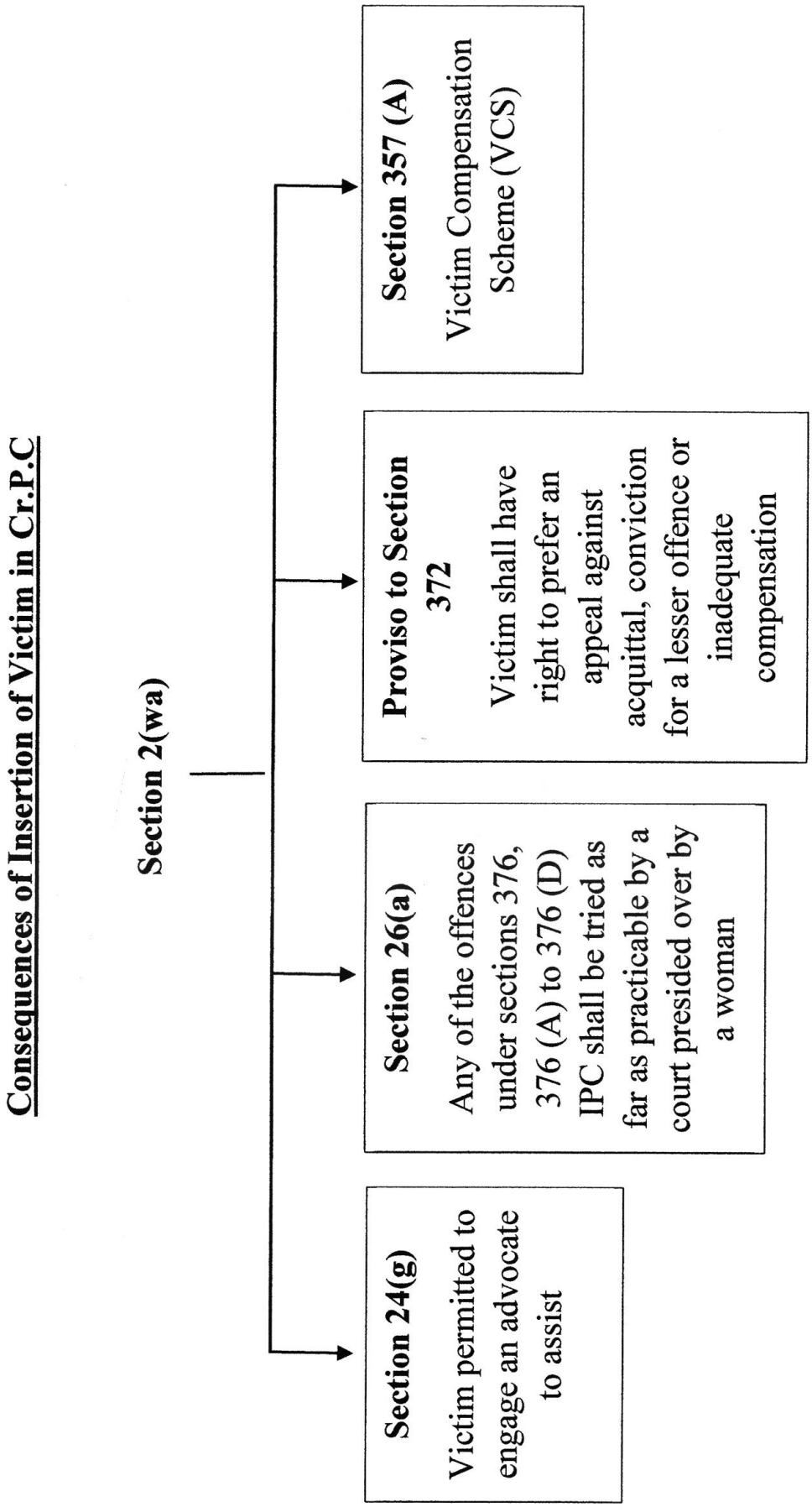
A Division Bench of Andhra Pradesh High Court has interpreted the word legal heir in the light of personal laws. In the case it has held that since the parties are Hindus the wife of the deceased is a class I legal heir, the brother who preferred on appeal is a class II heir of the deceased and when the class I

[117] Prefatory Note to the Code of Criminal Procedure Amendment Act 5 of 2009
[118] Section 2(wa) Code of Criminal Procedure, 1973

legal heir was alive, the class II legal heir cannot prefer an appeal as he cannot be brought within the scope of the expression 'legal heir' in the definition of the section 2(wa).[119]

The new sub section introduced in Section 2 in Cr.P.C. has conferred certain rights on the guardians and legal heirs of the victim. The division bench of Allahabad High Court has held that the victim has been transformed from the position of silent spectator to the active participant by the introduction of the word victim and consequential amendments. In the decision in *Suneel Kumar Singh* v. *State of UP*[120] it has observed that when an offence is committed it is certainly committed against society but the sufferer is called victim. Victim has direct nexus with the damage caused to him but society may have a remote effect. The legislatures for the first time inserted provision for protection of the right of victim in the Criminal Procedure Code specially keeping in view that they are worst sufferer of crime. Thus, the victim should not be kept aloof from the judicial process in which the wrongdoer is undergoing the process of ascertainment of his guilt for wrong committed by him.

[119] *D Sudhakar* v. *Panapu Srinivasalu* 2013 C.R.L.J. 2764 (A.P)
[120] Order in Criminal Appeal No: 724 of 2017 dated 18 February, 2019


Consequences of Insertion of Victim in Cr.P.C
Section 2(wa)
Section 24(g)
Victim permitted to engage an advocate to assist
Section 26(a)
Any of the offences under sections 376, 376 (A) to 376 (D) IPC shall be tried as far as practicable by a court presided over by a woman
Proviso to Section 372
Victim shall have right to prefer an appeal against acquittal, conviction for a lesser offence or inadequate compensation
Section 357 (A)
Victim Compensation Scheme (VCS)

5.14.2 Changing Roles and Rights of a victim after 2009 under the Cr.P.C.

The introduction of the term victim in the Code signals a positive change in the criminal jurisprudence in India. The extremely important changes that have taken place in the criminal justice system based on the introduction of victim is the incorporation of provisions relating to rights and entitlements of the victim of crime in the Code. The changes can be conveniently classified into three types,

1) Amendment introduced in the Pre-Trial Stage (Bail, Anticipatory Bail *etc*.), during Investigation:

The Criminal Law (Amendment) Act, 2018 has amended Section 173 Cr.P.C. to provide that the investigation in relation to an offence under sections 376, 376A, 376AB, 376B, 376Cm 376D, 376DB or 376E of the Indian Penal Code shall be completed within two months from the date on which the information was recorded by the officer in charge of the police station.

Bail / Anticipatory bail:

On application of Section 24 (8) Cr.P.C., the victims have been permitted to file applications known as intervening applications during the course of hearing of bail or anticipatory bail. This entitlement of victims of crime to intervene in the bail or anticipatory bail proceedings has undergone a judicial scrutiny before the division bench of Allahabad High Court, in *Suneel Kumar Singh* v. *State of U.P.*[121] In the said case, the complainant/informant was the father of the deceased. The High Court held that:

"…thus, as per the definition of victim, the informant of this case is a

[121] Order in Criminal Appeal No: 724 0f 2017 dated 18 February, 2019

> victim. In that view of the matter, he will be highly prejudiced if we ultimately decide to grant bail to the appellant, who has been convicted and sentenced by the trial court for committing murder of his son. In that view of the matter, it is in the interest of justice to hear the counsel for the informant after conclusion of the argument made by the Public Prosecutor. Thus, we find no merit in the objection raised by the counsel for the appellant.[122]

The High Court permitted the father of the person murdered in the crime occurrence to engage a private counsel and submit his objections in the bail proceedings after submission made by the public prosecutor.

The amendment has added a new sub-section (4) to Section 438 of the Code of Criminal Procedure. Sub-section (4) lays down that nothing in Section 438 shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or section 376 AB or Section 376 DA or Section 376 DB of the Indian Penal Code. Therefore, an application for anticipatory bail filed by the accused shall not be entertained in any case where the accusation against a person is of having committed an offence under Section 376 (3) or Section 376 AB or Section 376 DA or Section 376 DB of the Indian Penal Code.

The Presence of informant/authorised person at the hearing of bail application - The new sub-section (1A) in Section 439 which provides that the presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under sub section (3) of section 376 or section 376 AB or Section 376 DA or Section 376 DB of

[122] Para 20, Order in Criminal Appeal No: 724 0f 2017 dated 18 February, 2019

the Indian Penal Code. The time limit prescribed for the investigation not only expedites the probing process but also helps the investigating agency to collect all incriminating material before they disappear or screened and the statements of witnesses are also brought on record when their memories are green. The right provided to the victim of crime or his/her legal heir during the bail hearing is an inalienable substantial right that paves a way for their participation in the judicial process.

The denial of anticipatory bail to some offences creates pre-trial incarceration as a deterrent measure and the time limit for disposal of appeal guarantees speedy justice to all stakeholders, especially the victims of crime.

2) Amendment introduced in the Trial stage (Engaging a private counsel)

In pursuance of the definition of victim in the Code, a proviso has been inserted in sub clause 8 of Section 24 Cr.P.C. The amendment empowers the court to permit a victim to engage an advocate of his choice to assist the prosecution. The amendment runs as follows:

> 'Provided that the court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.'[123]

Accordingly, the victim's right to represent before a judicial forum through a counsel of his/her choice is recognised by the Code. The prosecutors or special prosecutors usually represent the State and its prosecuting agency. If the victim feels that he/she could be represented through a counsel of his/her choice, there is an avenue provided now. In case of any conflict of opinion between the prosecutor appointed by the State and the counsel of victim's

[123] Inserted by Act 5 of 2009, Section 3, with effect from 31.12.2009.

choice, the opinion of Prosecutor of the State shall prevail. The right to engage a counsel of the choice of victim is a landmark development in victim representation, before the courts. This right of the victim to nominate a competent counsel of his choice and convenience can be exercised both in the pre trial stage and during trial.

3) Amendment introduced in the Post-Trial stage (Appeal)

One among the important rights created in favour of the victim is the right to prefer appeal. Prior to the introduction of Section 2(wa) in Cr.P.C., the State alone was the competent and proper party to prefer an appeal. But, a proviso added in Section 372 Cr.P.C. confers upon the victim a right to prefer an appeal, if aggrieved against the order and judgment of the court. The provision gives the victim the right to prefer an appeal against any adverse order passed by the trial Court. It reads as follows:

> No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force. Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.[124]

The right of appeal is a creature of statute. It has been conferred upon the victim under proviso of Section 372 Cr.P.C. After the amendment, the Division Bench of the Patna High Court, in *Parameshwar Mandal* v. *State of Bihar*[125] has examined various aspects of the right to appeal conferred upon the victim and

[124] The proviso introduced by Act 5 of 2009 with effect from 31 December 2009.
[125] 2014 Cri.L.J. 1046

explained that the status of the victim has been enhanced and put on a high pedestal on par with the State and other prosecuting agencies. Therefore, introduction of victim in Cr.P.C. under the amendment 5 of 2009 has assigned an active role to the victim in the judicial process.

Further, the Supreme Court in *Roopendra Singh* v. *State of Tripura*[126] has explained the scope of Section 372 Cr.P.C. It has conferred upon a victim a substantive and independent right to maintain an appeal against the acquittal. It has also made it clear that the widow of the deceased comes within the definition of Section 2(wa) Cr. P.C. Under such circumstances merely because leave to appeal was not granted to the State to prefer an appeal against the acquittal, the appeal preferred by the victim/informant cannot be rejected summarily. Therefore, in the appeals preferred by the victim whether the leave to prefer such appeal was granted to the State or not is not an aspect to be considered. The victim can independently exercise the right of appeal under Section 372 Cr.P.C.

Disposal of appeal in rape cases: - The amended Sections 374 and 377 Cr.P.C. provide that when an appeal is filed against a sentence passed under section 376, section 376 A, Section 376 AB, Section 377 C, Section 376 D, Section 376 DA, Section 376 DB or section 376 E of the Indian Penal Code, the appeal shall be disposed of within a period of six months from the date of filing of such appeal. There are as many as 12 consequential amendments inserted in Cr.P.C. that have paved a way for victim orientation in the major adjective law applicable to all phases of justice dispensation in India. The

[126] 2017 (4) SCALE 468

victim has been recognized as a party by insertion of Section 2(wa) Cr.P.C. and the right to engage a counsel has elevated to the status of victim to a party to be heard by the courts in the justice rendering process. The other consequential amendments also contributed for the advancement of victim friendly environment in the investigation and juridical process that takes place after crime. The amendments incorporated in Cr.P.C. are given in the table below:

Section Nos.	**Amendments**
	CODE OF CRIMINAL PROCEDURE, 1973
24	*(Proviso added in Sub-section 8)* Provided that the court may permit the victim to engage an advocate of his choice to assist the prosecution
154	*(Proviso added)* If the information is given by the woman against whom an offence under Section 326A, 326B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E or Section 509 of the Indian Penal Code is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer.

154	Provided further that - a) in the event the person against whom such an offence is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be; b) the recording of such information shall be videographed. c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of sub-section (5A) of Section 164 as soon as possible.
154A	*(Proviso added)* If the person identifying the person arrested is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that the person is comfortable with: Also if the person identifying the arrested person is mentally or physically disabled, the identification process shall be video graphed.
161	*(Proviso added)* The statement of a woman against whom an offence under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E or Section 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.
164	*(Sub Section (5A)(a)* In cases punishable under Section 354, Section 354A, Section 354B, Section 354C, Section 354D, sub section (1) or sub-section

	(2) of Section 376, Section 376A, Section 376B, Section 376C, Section 376D, Section 376E or Section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in sub-section (5) as soon as the commission of the offence is brought to the notice of the police: Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement: Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be video graphed. (b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination in chief, as specified in Section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be cross examined on such statement, without the need for recording the same at the time of the trial.
197	*Explanation was appended to the Section.* Explanation: For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under Section 166A, Section 166B, Section 354, Section 354A, Section 354B, Section 354C, Section 354D, Section 370, Section 375, Section 376, Section 376A, Section 376B, Section 376C, Section 376D or Section 509 of the Indian Penal Code.
198B	No Court shall take cognizance of an offence punishable under Section 376B of the Indian Penal Code where the persons are in a

	marital relationship, except upon prima facie satisfaction of the facts which constitute the offence upon a complaint having been filed or made by the wife against the husband.
273	*Proviso added* Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is confronted by the accused while at the same time ensuring the right of cross examination of the accused.
309	*Sub-section (1)* In every inquiry or trial, the proceedings shall be continued on day-to-day basis until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded: Provided that when the inquiry or trial relates to an offence under Section 376, Section 376A, Section 376B, Section 376C, or Section 376D of the Indian Penal Code, the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of filing of the charge sheet.
372	*Proviso added* Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.
357 B	The compensation payable by the State Government under Section 357A shall be in addition to the payment of fine to the victim under Section 326A or Section 376D of the Indian Penal Code.

357 C	All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person shall immediately 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 Indian Penal Code, and shall immediately inform the police of such incident.

As stated supra, the introduction of the term victim in Cr.P.C. creates substantial changes in the adjudicatory process in India. Consequential amendments have been introduced to the Indian Penal Code, 1860, the Indian Evidence Act, 1872 and the Protection of Children for Sexual Offences Act, 2002 relating to the cases of rape, gang rape of woman below the age of sixteen years, twelve years, repeat offenders, to extend the applicability of compulsory registration of FIRs, fine imposed to be paid to victim, facilitate better recording of evidence and protect the dignity of rape survivor and treatment free of cost in hospitals. These amendments and the substantial changes introduced in the other major laws governing criminal justice dispensation in India are discussed hereunder

5.15 Victim and the Indian Evidence Act, 1872

The Law of Evidence is a *lex fori* and an important branch of adjudicative law applicable to all proceedings in or before any court. It is a codification of rules of English law of evidence with some modifications that were considered necessary by the peculiar social, economic conditions and other circumstances of India. As observed, the Indian Evidence Act is not

exhaustive and cases do arise for the solution of which principles of common law are resorted to. The Code, though chiefly drawn upon the lines of the English laws of evidence, was not intended to be a servile copy of it.[127] The Indian Evidence Act, 1872 (IEA) was prepared by James Fitzjames Stephen and is generally acclaimed as a great example of craftsmanship in draftsmanship.[128] It consists of three parts, eleven chapters and 167 Sections. The tenets of adversarial system are duly incorporated in it, especially that no confessions made to a police officer shall be proved as against a person accused of any offence.[129] The burden of proof being upon the prosecution and other provisions relating to the evidence to prove the guilt have also put heavy burden upon the victims as part of the prosecution.[130] The presumptions are also created in favour of the accused and the victim is expected to help prosecution rebut them by adducing the contrary evidence. It is the victim, who suffers immediately and directly by the act of crime, but has to discharge the legal obligation by adducing evidence before the court, because the prosecution has the burden to prove the charges against the accused beyond all reasonable doubts.[131] There is no bar for the accused to become a witness, and an accomplice is also a competent witness under the law of evidence.[132] But in the legal domain, many a times questions are raised and doubts also created whether the victim of certain offences could be competent witnesses to let

[127] Ratanlal & Dhirajal, *The Law of Evidence,* LexisNexis (2017) P 3.
[128] Dr. V Nageswara Rao, *The Indian Evidence Act, A Critical Commentary Covering Emerging Issues and International Developments,* Lexis Nexis (2015) P 4.
[129] Section 25 Indian Evidence Act, 1872
[130] Section 27, Indian Evidence Act, 1872
[131] Section 118, Indian Evidence act, 1872
[132] Section 133 Indian Evidence Act, 1872

evidence against the accused. The Apex Court has made it clear that a victim of rape is undoubtedly a competent witness under the relevant Section and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must be attached to the evaluation of her evidence as in the case of an injured complainant or witness and no more.[133] Further, a victim of rape is not an accomplice in a sex offence and there is no provision in the Evidence Act requiring corroboration in material particulars of the evidence of the prosecutrix as it is in the case of an accomplice.[134] These verdicts of the highest court have dispelled the unnecessary confusions in the arena of examination of victim as a witness in the process of proving the guilt before court of law.

Two important amendments, inserted after 141 years into the Evidence Act, 1872 have ensured a women victim centric approach, which is a substantial help in the proving of rape. It protects the women victims from facing unwanted eventualities of secondary victimisation in the trial before the court of law. The following table details the nature of the amendment.

Section	**Details of Amendment**
53A	In prosecution for offences under Section 354, 354A, 354B, 354, 354D, 376, 376A, 376B, 376C, 376D or 376E of the IPC or for an attempt thereof, where the question of consent is an issue, evidence of the character of the victim or such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

[133] *Mohd. Imran Khan* v. *State Government (NCT of Delhi*), (2011) 10 SCC 192 (para 22): 2011 (11) SCALE 376.
[134] *Ganga Singh* v. *State of M.P.,* AIR 2013 SC 3008 (para 10): (2013) 7 SCC 278.

146	(*Proviso appended)* In prosecution for an offence under Section 376, 376A, 376B, 376C, 376D or 376E or attempt thereof, where the question of consent is an issue, it shall not be permissible to adduce evidence or put questions in cross examination of the victim as to the general immoral character or previous sexual experience, of such victim with any person for proving such consent or the quality of the consent.

Though the Amendment Act 5 of 2009 did not introduce any substantial changes to the Indian Evidence Act, those amendments introduced in 2013 and 2018 have brought some incidental changes to it. As explained in the table above, Sections 53A and Section 146 have been amended. The amendments introduced in Section 53 A of IEA is sought to protect the womanhood from facing embarrassment in the court. It is often observed that the counsels appearing for the accused project the theory of immoral life led by the victim. The introduction of Section 53 A has made the previous sexual encounters of the victim with any person irrelevant while determining the issue of consent or the quality of her consent.

Further, there is a fear among the victim and the question put to them during the course of cross examination not only humiliates them but also create an unsafe and hostile atmosphere in the court. The bar to adducing evidence or putting question in the cross examination of the victim as to the general immoral character of the previous sexual experience is sought to rescue the victim from the unnecessary institutional harassment and secondary victimization.

5.16 Victim under the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act, 2015 (SC/ST Act)

India is a multi-religious and multi lingual country and the caste system prevailing in Indian Society is a discriminative factor prevalent in the society over a period of time. The inequality caused by the caste system has been described as a hurdle to the development of the country. The framers of the Constitution of India have specifically incorporated provisions prohibiting caste discrimination and promoting the right to equality. Even after the adoption of the Constitution, persecution of the people belong to SC & ST has not totally been eradicated. In *Balkeshwar Maurya* v. *State of Uttar Pradesh*,[135] the Allahabad High Court has painfully observed:

> "that the caste system is a curse on Indian society and because of this our nation has not been able to progress much. We are Indians today; rather we are Brahmans, Thakurs, Yadhavas, Muslims, Harijans *etc.*, *i.e.* divided on caste and communal lines. Unless the caste system is destroyed we cannot unite and our nation cannot progress. Hence, the caste system is an enemy of our nation."

Despite various measures to improve the socio-economic conditions of persons within Scheduled Castes and Scheduled Tribes, they remain vulnerable. They are denied a number of civil rights. They are subjected to various offences, indignities, humiliations and harassment. They have, in several brutal incidents, been deprived of their life and property, serious crimes are committed against them for various historical, social and economic reasons. Under the circumstances, the existing laws like Protection of Civil Rights Act,

[135] 2002 Cri.L.J. 4565 (All)

1955 and the normal provisions of the Indian Penal Code have been found to be inadequate to check these crimes. A special legislation to check and deter crimes against them committed by person from Non Scheduled Castes and Non Scheduled Tribes, therefore became necessary and to achieve these objects the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 was enacted by the Parliament.[136] It is an Act to prevent the commission of offences of atrocities against the members of the Scheduled Castes and Scheduled Tribes, to provide for Special Courts and exclusive Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences and for matters connected therewith are incidental thereto.[137]

The SC & ST Act, 1989 has carried the word 'Victim of offences' and relief and rehabilitation to victims of such offences. It is the first law amended with insertion of a separate chapter titled, Rights of Victims and Witnesses.[138] There is a specific definition provided for the term victim in Section 3 (ec) and it runs as follows:

> Section 3(ec) – 'victim' means any individual who falls within the definition of the 'Scheduled Castes and Scheduled Tribes' under clause (c) sub-Section (1) of Section 2, and who has suffered or experienced physical, mental, psychological, emotional or monetary harm or harm to his property as a result of the commission of any offence under this Act and includes his relatives, legal guardian and legal heirs.

[136] Objective of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 as referred to in *Rajendra Shrivastava* vs *State of Maharashtra* (2010) 2 Mah LJ 198 (FB) https://rajasthanjudicialacademy.nic.in/docs/studyMaterial19072020.pdf

[137] Statement of objects and reasons and the preamble of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

[138] Chapter IV A, inserted by Act 1 of 2016 with effect from 26 January, 2016

As stated in *K. K .Thomas* v. *State of Kerala*[139] the provisions of special statute SC & ST Act 1989 are given overriding effect over the provisions of other laws. Therefore, the definition for the word victim in Section 3 (ec) of SC & ST Act, 1989 will prevail upon the general definition provided in Section 2(wa) Cr.P.C. The unique characteristics of the term victim used in SC & ST Act, are

1) based on the Caste and Tribes as per the meaning assigned under Clause 24 and Clause 25 of Article 366 of the Constitution;
2) It denotes only the individual upon whom the SC & ST Act are applicable;
3) It will not cover the non SC & ST sufferers of crime.

While dealing with the victims of crime and the legal care available to them or the possibility of restoration under law, the above definition in Section 3 (ec) of the SC & ST Act become relevant and have to be taken into consideration to indicate the position of victims as envisaged by at least some laws. The term victim defined in Section 3(ec) is confined to the offences of atrocities, externment as defined and dealt with in Chapters II and III of the SC & ST Act 1989, and any reliefs under the said Act is available only to those victims of caste atrocities.

5.16 Victims in the Juvenile Justice Administration

The Juvenile Justice Administration (JJA) is an important branch of Criminal Justice Administration (CJA) dealing with the penal violations by the young persons below eighteen years of age. This is a unique system of justice

[139] 2015 Cr L J 1782 (Kerala).

for the children devised and developed for the purpose of social rehabilitation and control of children. The Juvenile Justice approach accords high priority to reduce the need for legal interventions in children's cases to avoid the devastating ill effects of criminalisation, penalization and instiutionalisation followed by stigmatisation. The observation of the Supreme Court on juvenile justice system in India is that the penal pharmacopoeia of India, in tune with the reformatory strategy currently prevalent in civilized criminology, has to approach the child offender not as a target of harassment or punishment, but of humane nourishment. This is the central problem of the sentencing policy when juveniles are found guilty of delinquency.[140]

The United Nations Convention on the Rights of Children, ratified by India on 11th December, 1992, requires the State parties to undertake all appropriate measures in case of a child alleged as, or accused of, violating any penal law, including (a) treatment of the child in a manner consistent with the promotion of the child's sense of dignity and worth; (b) reinforcing the child's respect for the human rights and fundamental freedoms of others (c) taking into account the child's age and the desirability of promoting the child's reintegration and assuming a constructive role in society.

The Juvenile Justice Administration in India has Constitutional roots in Articles 15(3) and 39 (e) of the Constitution of India. Article 15 of the Constitution, *inter alia*, confers upon the State power to make special provision for children. Articles 39(e) and (f), 45 and 47 further make the State responsible

[140] *Satto* v. *State of U.P,* AIR 1979 (SC) 1519

for ensuring that all needs of children are met and their basic human rights are protected. The Juvenile Justice (Care and Protection of Children) Act was enacted in 2000 to provide for the protection of children. The Act was amended twice in 2006 and 2011 to address gaps in its implementation and make the law more child-friendly. During the course of the implementation of the Act, several issues arose as the increasing incidents of abuse of children in institutions, inadequate facilities, quality of care and rehabilitation measures in observation homes, high pendency of cases, delays in adoption due to faulty and incomplete processing, lack of clarity regarding roles, responsibilities and accountability of institutions and inadequate provisions to counter offences against children such as corporal punishment, sale of children for adoption purposes, etc., have highlighted the need to review the existing law.[141]

The Juvenile Justice (Care and Protection of Children) Act, 2015 (Act 2 of 2016) (JJ Act) is a special Act that repealed the previous Act 56 of 2000 and many provisions of previous laws on juvenile justice administration were suitably revised to deal with the children alleged and found to be in conflict with law and their apprehension detention, prosecution, penalty or imprisonment, rehabilitation and social re-integration. The need of constitution of special courts to achieve the object of Juvenile Justice was emphasized by the Supreme Court in *Abdul Mannan* v. *State of West Bengal*.[142] The essence of the Juvenile Justice Act and the rules framed thereon is restorative not retributive providing for rehabilitation and reintegration of the children in

[141] Aims and Objectives of the Juvenile Justice (Care and Protection of Children) Act, 2015 published in the gazette of India dated 1 January, 2016
[142] 1996 SCC (1) 665

conflict with law into mainstream society.[143] It consists of provisions regarding Constitution of Juvenile Justice Boards, responsibilities of the care homes and other institutions. The Madras High Court has described the Juvenile Justice Act, 2015 as a non-penal, reformatory piece of legislation enacted to care for the interest of the children in conflict with law. It consists of many provisions to safeguard the perpetrator of the crime.[144] The Juvenile wing sleuths cannot arrest the child in conflict with law as the legislature has not empowered the police to arrest, but empowered it simply to apprehend and immediately produce before Juvenile Justice Board.[145] After the guilt is proved in heinous offences as defined in Section 2(33) Juvenile Justice Act, the Juvenile Justice Board cannot impose life imprisonment or death sentence, howsoever cruel the crime is. In such a 'humane' Act there is no provision relating to the definition of person who has suffered or is injured by the wrong act of a child in conflict with law.

In *Satto* v. *State of U.P.*[146] three boys between the ages of ten and fourteen raped an eleven-year-old girl tending cattle in a village. They advanced aggressively towards the hapless victim, tied up and forcibly went through the exercise of rape. The trial court and the High Court concurrently held that the three boys aged between10–14 years found guilty of an offence under Section 376 IPC. The offenders being children, the Supreme Court ordered to release them on probation of good conduct and committed to the

[143] *Salil Bali* v.*Union of India*, 2013(2) LW (Crl.) 525; 2013(7) SCC 705
[144] *K. Vignesh* v. *State of Tamil Nadu,* Criminal O.P. No. 22361/2015 order dated 27.4.20-17, High Court, Madras.
[145] *Ajith Kumar* v. *State of Tamil Nadu* 2016 (2) CTC 63.
[146] AIR 1979 SC 1519

care of their respective parents. The court observed that the 'victim is a pathetic child', because in this case both the offenders and the victim are children and below the age of 14 years. However, it is pertinent to mention that the court provided relief to the children in conflict with law (offenders), but, no relief was provided to the victim, except an observation as follows:

> *'Rape is horrific. True. The victim is a pathetic child and deserves not merely commiseration but also compensation, an aspect which State will take note when a proper application is made to it'*

The statement of objects and reasons of the Juvenile Justice Act, and its benevolent provisions primarily concern the treatment, rights, re-integration, and rehabilitation of the child violating penal laws. There is no express provision to provide compensatory or other reliefs to the victim who suffered by the act of a juvenile in conflict with law. In certain cases of physical harm, to restore the victim to pre-crime stage, or to meet the medical expenses or to compensate for the academic prospects that was disturbed during the period of treatment or immobility of the victim, financial support in terms of compensation from the parent / guardian of the child in conflict with may be considered to be made as mandatory in Juvenile Justice Act.

In its decision in *Sampurna Behura*,[147] the Supreme Court has extensively dealt with child rights and measures to be adopted to strengthen and the Juvenile Justice Administration (JJA). It was a PIL filed by *Smt. Sampurna Behura*, who pursued doctoral thesis in Sociology and was handling the cases of child sexual abuse, street children, working children and also had

[147] *Sampurna Behura* v. *Union of India* (2018) 4 SCC 433

undertaken studies of child rights. The Supreme Court, in a lengthy 97 paragraphs judgment, expressed deep concern over the non-implementation and tardy implementation of laws beneficial to children, who are voiceless and sometimes silenced. The Apex court issued necessary directions to the important stakeholders of JJA, including the police, National and State Commissions of Protection of Child rights, Juvenile Justice Boards, Child Welfare Committees, District Child Protection Units, child care institutions etc. This judgment of the Supreme Court is Juvenile centric and treats the Juveniles in conflict with law as victims.

The Court has come forward to alleviate the plights of the juveniles. But the minor girls or boys, or even adults who suffer by the legally proscribed act of the juveniles in conflict with law have not been considered in this judgment. The victims harmed by the acts have to be given recognition by the courts. They are also voiceless and silent stakeholders with all fundamental and human rights and their grievances also need to be redressed by the courts, including JJA.

5.18 Victims and Protection of Children from Sexual Offences Act, 2012

While the Juvenile Justice Act deals with a child as a wrongdoer entitled to a different treatment, the recent enactment to protect the child as a victim is a good start for initiatives where the statutes may be oriented towards the victim as the centre of focus. The Constitution of India emphatically prohibits discrimination on any grounds including on the basis of gender, race, caste, sex

or place of birth.[148] The States may enact laws and introduce welfare measures for the best interest of children.[149]

In addition to this Constitutional mandate, India has acceded, on 11th December, 1992, to the Convention on the Rights of the Child, commonly abbreviated as the CRC or UNCRC, a Treaty which sets out the civil, political, economic, social, health, cultural and other rights of the children. It is recognised as a global framework for ensuring justice to children. The UNCRC is a legally-binding international agreement consisting of 54 Articles that sets out children's rights and how governments should work together to make them available to all children, life-survival, development, protection from violence, abuse *etc*. It is also the only international human rights treaty to give Non-Governmental Organisations (NGOs) a direct role in overseeing its implementation.[150]

The Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012) has been enacted to safeguard children from offences of sexual assault, sexual harassment and pornography. The Preamble of the Act also provides for the establishment of Special Courts for the trial of sexual offences against children and for matters connected therewith or incidental thereto.[151]

The POCSO Act, 2012 has been enacted to provide proper development of children and to protect their privacy and confidentiality through all stages of

[148] Article 15 (3), Constitution of India
[149] Article 45, Constitution of India
[150] Convention on the Rights of the Child, United Nations Resolution 44/25, adopted on 22 November, 1989, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child
[151] The Protection of Children from Sexual Offences Act, 2012 enacted on 19th June 2012 and came into effect from 14.11.2012.

the judicial process involving child victims. It is also intended to effectively address the heinous crimes of sexual exploitation and sexual abuse of children.[152] As noted in the Preamble, this Act is a special legislation to cover two categories.

1) Age[153]
2) Nature and gravity of the offence

It is applicable only if the victim is a child who should have suffered sexual exploitation or sexual assault. There are only five types of offences relating sexual assault covered and dealt with the Act. Section 2 defines the offences for which the Act are applicable. They are -

1) Aggravated penetrative sexual assault[154]
2) Aggravated sexual assault[155]
3) Penetrative sexual assault[156]
4) Sexual assault[157]
5) Sexual harassment[158]

The procedure for reporting of the cases under the Act is simple and easy. The statement of report is to be in a language understood by the child victim. Any apprehension that an offence is likely to be committed or has been committed shall be informed to the Special Juvenile Police Unit or the local police. The report from the informant is to be recorded in writing and ascribed an entry number. If the report is obtained from a child or given by a child, the same is to be recorded with due care and adhering to the mandatory guidelines.

[152] Preamble, POCSO Act, 2012
[153] Section 2(d) Child means any person below the age of eighteen years.
[154] Section 2(a) and 5, POCSO Act, 2012
[155] Section 2(b) and 9 , POCSO Act, 2012
[156] Section 2(f) and 3 , POCSO Act, 2012
[157] Section 2(i) and 7, POCSO Act, 2012
[158] Section 2(j) and 11, POCSO Act, 2012

Section 19 (3) deals with the procedure to be adopted while reporting of offences by a child victim.[159]

This provision is a relatively new one in the procedure adopted and followed in India. Under the general laws, the officer in charge of the police station is duty bound to record any information relating to the commission of a cognizable offence. If given orally, it shall be reduced into writing and entered in a book kept in the police station. A copy of the information recorded under Section 154 (1) Cr. P.C. shall be given forthwith, free of cost to the informant. A comparison of Section 19 of POCSO Act, 2012 and Section 154 Cr. P.C. would make it clear that the former one is specially drafted as a child-victim friendly provision. The evidentiary value that may be attached to the first recorded information differs, giving a different sanctity to the information given by the child victim.

5.19 Victims in the Schemes framed by the States and Union Territories

Victim Compensation Scheme (VCS) introduced pursuant to introduction of Section 357 A, Cr.P.C. have paved a way for framing of schemes by the States and Union Territories, in India. As on March, 2021, after the bifurcation of Jammu and Kashmir and the creation of new State, there are 28 States and 8 Union Territories but only 27 States and seven Union

[159] Section 19(3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.
(4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.

Territories have framed Victim Compensation Schemes (VCS) for their respective States and Union Territories. Many of the States in their Victim Compensation Scheme have adopted the definition provided in Section 2 (wa) Cr.P.C. But, some of the States have, without assigning any valid reasons, given a different definition for the term victim to suit their convenience in the VCS framed. It is pertinent to note that there is no definition for the expression victim in the Tamil Nadu Victim Compensation Scheme. A careful analysis of the definitions in the VCS would reflect how the word victim has been absorbed and understood for the purpose of providing compensation. The details of the definitions are given in a table at **Annexure A**.

While the Schemes are applied by the authorities concerned, or when any matter comes up for consideration before a court with respect to the definition of a victim in the Schemes, they may be interpreted in favour of the victim. It is another fact that some States and Union Territories have attempted to provide new definitions to the word victim deviating from the definition already provided in Section 2 (wa) CrPC. While the reasons for doing so are not made known in the Schemes framed by the States and Union Territories, it would be advisable to have a common definition across all Schemes to avoid multiplicity of interpretation. Further, when there are two definitions, one in Cr.P.C. and the other in VCS, which would prevail or which has to be taken to be applied may create confusion when the courts try to interpret or apply them for the purposes of granting relief and remedies The choice may be further complicated if the scope of the definitions are different, one broad and the other

narrow. The victim may also be at a loss to decide the forum to be approached to seek compensation.

5.19.1 Multiple Definition for the term victim in the VCSs – A Critical Analysis

In the Andhra Pradhesh VCS, 2015 the definition already available in Section 2(wa) of Cr.P.C. has been adopted without any substantial change and, in addition to that, as many as three types of victims, are included. They are,

1. Sexually exploited for commercial purposes,
2. Victims of trafficking and
3. Sufferer of acid attack and the dependent who require rehabilitation or who are relying upon the income of such victims.

In the Arunachala Pradesh VCS, 2011, the terms victim and dependent are defined in Section 3 (d) and (e) respectively. The definition is precise and clear. The person, who himself or herself has suffered loss or injury as a result of crime and also requires rehabilitation, has been brought under the definition of victim. Further the spouse or natural parent or children are also included in the ambit of dependent.

In the Assam VCS, 2012 the definition for victim in Section 2 (wa) of Cr.P.C. has been adopted without any change or modification. Further, in Section 2(i), it is made clear that the words and expressions used herein are not defined and the definitions found in the Indian Penal Code (IPC), Code of Criminal Procedure (Cr.P.C.) and the Indian Evidence Act shall have the meanings respectively assigned to them in these Acts.

In the Bihar VCS, 2011 a wide definition has been given for the word

victim. In Section 2(d) there are certain conditions prescribed to avail the benefits and under VCS.

> 'The injury or loss suffered as a result of Crime should cause substantial loss to the income of the family and it should also make difficult to meet both the ends without the financial aid or has to spend beyond his means on medical treatment and require rehabilitation.'

A plain reading of this provision would go to show that the injured person should be a potential wage earner or the bread winner of the family. If the injured is a non-earning member of the family or a homemaker whose income cannot be ascertained, or is physically immobilised or wheelchair bound or disabled person who cannot contribute any income to the family but survives as a dependent, they are excluded from the definition of victim. Further, if the injured is capable of spending for medical treatment within his means, he/she is also put beyond the scope of the definition of victim. Resultantly, as an example, a school or college going student who obviously cannot act as a earning member or financial contributor of the family will have to be treated as having been excluded from the definition of victim.

The term 'dependent' is also explained in Section 2(e) of Bihar VCS, 2011. It includes the family members of the victim, namely husband, wife, mother, father, brother, sister, son, daughter, grandfather, grandmother, mother-in-law, father-in-law or any other person who is living on the income of the victim. The scope of the term 'dependent' has been widened to include the immediate and extended family members and those who are financially

dependent upon the victim.

In the Chhatisgarh VCS, 2011 a single line definition for the key words ‘victim’ and ‘dependent’ are provided. The victim is a person who has suffered loss or injury as a result of crime and requires rehabilitation.

In Rule 2(k) of Goa VCS, Victim has been defined as a sufferer of loss or injury as a result of crime and requires rehabilitation. The term dependent has not been defined. This definition brings only the injured person as beneficiary of the victim compensation fund. For instance in a case of murder, the dependents of the deceased may not be able to claim any reliefs, as there is no definition provided for the expression dependant.

In the Gujarat VCS, 2013 the word victim defined in Rule 2(d) denotes a person who has suffered loss or injury as a result of crime and requires rehabilitation. There is no clear mention about who are included in the expression dependent.

In the Haryana VCS, 2013, and T.N. VCS, 2013, while the expression crime has been defined in Section 2(b). But the term victim has been omitted and no definition is provided. Under Rule 2(c) of Haryana VCS, 2013 the District Legal Services Authority (DLSA) is empowered to decide upon careful consideration of sufficient proof produced by the claimant as to who is entitled to receive the benefits of compensation. The wife, husband, father, mother, unmarried daughter, minor children and other legal heir of the victim are included in the expression dependent. But, the DLSA shall decide the eligible person for compensation.

It is germane to make a note that the key term victim in the Haryana VCS has been omitted to be defined by the framers but they have chosen to explain the word dependent. In addition to the term dependent, in Rule 2(d) 'family' has been defined as follows:

> *"family" means parents, children and includes all blood relations living in the same household.*

In the Himachal Pradesh VCS, 2012, the definition in Section 2(wa) of Cr.P.C. has been reproduced without modification. That the accused person has to be charged is a condition precedent to bring a sufferer within the scope of victim

In the Jammu & Kashmir VCS, 2013 any person who has suffered loss or injury as a result of crime and requires rehabilitation and the dependent family members are included in the expression for victim in Rule 2(d). There is no other expression such as dependent or family members that are provided in it.

In Manipur, VCS, 2011, Rule 2(d) has got the same words as that of the J & K VCS, 2013.

The Rajasthan VCS, 2012 also uses the same words to define the expression victim, Rule 2(d) without any changes.

The Union Territory of Sikkim, had framed the VCS as early as on 2011. It is named as Sikkim Compensation to Victim or his Dependent Schemes, 2011. The definition in Rule 2(d) for the word victim is similar to that of Rajasthan, Manipur and J & K VCSs.

The Uttar Pradesh VCS, 2014 defines the term victim in Rule 2(d) with the same words used in the Rajasthan VCS.

In the Jharkhand VCS, 2013 the definition given in Rule 2(d) of J & K VCS, 2013 has been reproduced.

In the Karnataka VCS, 2011 the definition in Section 2(wa) of Cr.P.C. has been accepted for the purpose of providing compensation.

The Maharashtra VCS, 2014 adopted the definition Clause (wa) of Section 2 of Cr.P.C. Further, the District Legal Services Authority has been bestowed with the task of determining the dependents who are entitled to receive compensation and other benefits.

The Kerala VCS, 2014 has three key expressions relating to compensation to the victim of crime. They are, Applicant, Victim and Dependent. The word applicant includes both the victim and dependent of a victim who applies for compensation under this scheme. The term victim has been explained with the words and phrases used in Section 2(wa) of Cr.P.C. The dependents that are entitled to receive the compensation can be determined by the authority empowered to issue dependency certificate or any other authority authorised by the government in this regard. The father, mother, wife, husband, an unmarried daughter and minor children of victim are brought within the expression dependent. However, the son or unmarried son of the victim has been conspicuously missing in the list of beneficiaries under VCS of the State of Kerala.

The Mizoram government had notified a scheme for providing funds for the purpose of compensation to the victims of crime involving acid attack. Later, victims or their dependents who have suffered loss or injury as a result of any crime and who require rehabilitation was also covered from 2011. The scheme is called as Mizoram Victims of Crime Compensation Scheme, 2011 (MVCCS) The definition for the victim in Rule 2(i) includes a person who has himself suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and

1. Causing burns
2. Maiming
3. Disfiguring or Disabling
4. Causing grievous hurt as a result of acid attacks

In addition to the term crime which denotes the crime occurrences in general, the heinous crime of acid attack which cause disfigurement, disablement, burn injuries and maiming are incorporated in the definition of victim. The person, who has suffered the crime and particularly acid attacks are made as beneficiaries under the Scheme.

Apart from the term ‘victim’, four other important key words, namely, 1. Crime, 2 Injury, 3. Loss 4 Rehabilitation is also defined in Rule 3 of MVCCS, 2011. The term crime as defined in Rule 2 (d) would confine this Scheme only to the injuries sustained under the Indian Penal Code, 1860. It reads:

> ‘Crime’ for the purpose of the scheme, the term denotes an unlawful act which is an offence against the public and renders the person guilty of the act or default liable to legal punishment under Indian Penal Code (45 of 1860).

If a person suffered by an act, made as an offence other than IPC such as special Acts in force, has been excluded from the purview of this Scheme. It makes the MVCCS, 2011 as a codicil or appendix to IPC.

The amount paid to the victims or dependent family members from the Victim Compensation Fund (VCS) has been termed as Rehabilitation. For the purpose of MVCCS, 2011 the loss has been viewed as a damage caused for the property to its owner through the act of violence or coercion. The physical wrong is burn or maiming or disfigurement and mental illness caused to the victim, are defined as injury.

The Odisha VCS, 2012 includes both the surviving sufferer and the dependent of the deceased as victim.

The Punjab VCS, 2011 does not contain any definition for the words like victim, dependent, injury etc.

Tripura VCS, 2012 was introduced for the purpose of providing financial assistance to a person or his dependents (in case of death), who have suffered loss or injury as a result of the crime. It adopted the same meaning for the expression of victim with that of the Rajasthan and J & K. However, children only up to the age of 21 years can be treated as dependent for the purpose of getting compensation. The word children expressly made ‘son of the deceased’ also a beneficiary under the scheme. The dependent is confined only the immediate family of the victim. The terms ‘in-laws’ and ‘relatives’ are expressly excluded from the scope of dependent. Under the Tripura VCS, 2012 compensation may be paid to the victim or claimant even if the offender is not

traced or identified.

In the definition for victim in Rule 2(d) of Uttarakhand VCS, 2013, it includes a person who suffered loss or injury as a result of a Crime; Acid attack; Human trafficking; or Serious accident. Therefore, the VCS is very specific on the injuries suffered by serious crimes such as acid attack, human trafficking, including serious accidents. This definition has widened the definition provided in sec 2(wa) Cr P C.

Rules 2(b) and (e) define who the dependents and victims are under the West Bengal VCS, 2012. For the term victim, the same definition as in Rajasthan and J&K VCSs are adopted. All the persons fully dependent on the earnings of the victim are entitled to claim compensation.

5.20 Conclusion

In the Indian legal landscape victim of crime entered in the Cr.P.C. in the year 2009 and consequent amendments in the relevant laws governing criminal justice dispensation have started recognizing the victim as a stakeholder, but considerable developments have to be made in the line of victim-rights emerging in the contemporary jurisdictions around the world. In this context, it has to be noted with concern that the multiple definitions are provided for the expression victim in the laws and Schemes existing in India. Victim is a person who has suffered by the crime and requires rehabilitation and support from the State and its organs. More than one meaning, scope and definition for the expression ‘victim’ would create inconsistency in understanding the concept and may cause chaos in victim support policies and schemes. It may also lead

to a conflict of opinions among the judicial institutions. Without a clear and proper understanding of the definition for the term victim, applying it in the victim justice process may dilute the victim orientation in laws and system.

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CHAPTER VI

JUDICIAL APPROACH IN THE RECOGNITION OF VICTIM RIGHTS AND EXTENDING LEGAL CARE

'Victims are unfortunately the forgotten people in the criminal justice delivery system. Our criminal justice, like all such systems, stemming from the Anglo-Saxon pattern, tends to takes the victim for granted and is more concerned with the offender, his activities, his rights and his correctional needs.'[1]

Dr. Justice A S Anand

6.1 Introduction

Legal care is an extremely important assistance required for the victims of crimes because it safeguards them from the sufferings of secondary victimization in the complex task of cooperating with the police or other investigating agencies for the purpose of collection of evidence and also in the trial before the courts. If any care or assistance can be extended by the investigating agencies or courts to the victim of crimes, it would not only console them and create confidence on the system about the justice to be rendered at the end of the adjudicatory process. The courts, especially the Supreme Court, have been exhibiting concern for the victims of crime. While acknowledging the importance of their role in investigation and trial, the Apex Court has been trying to redefine the status of victims and the approach the system as a whole must take to ensure their participation in the process and address their concerns.

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[1] A S Anand, Dr Justice, *Victims of Crime – The Unseen Side*, 1998 (1) SCC Journal P 3

After the crime, the victim experiences trauma in the unpleasant situation and feels hapless and insecure. Counselors or other mental health service providers, if any, are rarely available to heal the pain and sufferings caused by the crime. But, at this crucial juncture the victim has to encounter the institutions involved in the probing the crime and trial. As observed by the Supreme Court in a sexual offence case, the victim's first brush with justice is an unpleasant one where she is made to feel that she is at fault or that she is the cause of the crime.[2] In this adverse and hostile environment, a victim should not suffer and the presiding judge has to instill confidence and facilitate deposition without fear and hesitation. In *State of Punjab* v. *Gurumit Singh*[3] a note of caution was raised to treat the victims with sensitivity during the investigation and trial. While dealing with an appeal against acquittal in a case wherein a sixteen year minor girl was raped, the Apex Court observed thus:

> "… the judgment impugned in this appeal, presents a rather disquieting and a disturbing feature. It demonstrates lack of sensitivity on the part of the court by casting unjustified stigmas on a prosecutrix aged below 16 years in a rape case, by overlooking human psychology and behavioral probabilities. An intrinsically wrong approach while appreciating the testimonial potency of the evidence of the prosecutrix has resulted in miscarriage of justice."

Trial courts were alerted to conduct rape cases *in camera* to protect the victims from humiliation and embarrassment. In the case *State of Maharashtra*

[2] *Nipun Saxena* v. *Union of India*, (2019) 2 SCC 703
[3] (1996) 2 SCC 384

v. *Chandraprakash Kewalchand Jain*,[4] the Apex Court issued guidelines as to the treatment of victims in the trial. The direction runs as follows:

> 'A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her.'

The above lines of the judgment have clarified an important aspect that a victim of crime is not be treated as an accomplice to crime and her evidence should not be viewed with doubt and corroboration is not a mandatory requirement in all cases. Both the decisions cited *supra* are classic instances to show humane and rational approach on the sufferers of crime, by the highest judicial institutions and the judiciary is pioneering the advancement of victim justice.

The courts in India have proactively interfered and extended judicial care to victims for the cause of justice in the judicial probe and adjudicatory process. The treatment of victims of crime by the justice rendering institutions, their victim-friendly approach and victim justice initiatives, both in the

[4] (1990 (1) SCC 550

domestic judicial institutions and international fora, are critically analysed in this chapter. In India, the judiciary's initiatives towards victim justice are important area for research. Those initiatives started when there were no specific and proper laws to render help to the sufferers of crime. Under the circumstances, how the judiciary, a justice dispensing institution, viewed crime and how the powers are exercised for the welfare of victim, are relevant to the present study.

6.2 Indian Judiciary

India adopted a written constitution with the doctrine of separation of powers. It made the judiciary as an independent organ divested from the executive and legislative wings of the government administration. The Supreme Court has also held that the independence of the judiciary is a basic feature of the Constitution and any attempt to curtail it directly or indirectly even by an amendment of the Constitution is invalid.[5] The Constitution has proposed a single integrated system of courts for Union and States with powers to deal with both Union and State laws. The Supreme Court, the apex judicial institution, the High Courts in every State with district and Subordinate Courts, make the Indian Judiciary as the largest Judiciary. As on 01 January, 2022 70,239 cases were pending in the Supreme Court.[6] There are 59,15,121 cases including 16,15121 criminal cases pending in the principal seats of twenty five High Courts and their fourteen Regional branches/benches.[7] The National

[5] *M Nagaraj* v. *Union of India* (2006) 8 SCC 212
[6] Deatils of the cases pending in the Supreme Court available https://main.sci.gov.in/statistics
[7] https://doj.gov.in/about-department/introduction/

Judicial Data Grid web portal reveals that three are 1,07,08,429 civil cases and 2,99,63,72.93 criminal cases (Total number of cases 4,06,72,366) are pending for adjudication on the files of the district and subordinate courts in taluk level.[8] The criminal cases are adjudicated following the accusatorial method introduced by the British when India was under colonial regime. The Constitution of India has not recognized the Jury system for determination of guilt in the criminal cases, but it was in force for about a decade after independence.[9] The magistrates and judges try the cases in open courts strictly adhering to the principles of natural justice.

The Supreme Court and High Courts in India are conferred with the powers to interpret the Constitution. Their creative and innovative interpretations of the constitutional provisions have begotten good judicial pronouncements. When discussing the Indian Constitution, the drafters emphasized that the upper judiciary should be accessible to ordinary Indian, especially to enforce constitutional claims. They also wrote in safeguards to protect the judiciary's independence, giving Supreme Court and High Courts judges' prominent role in court administration and the appointment of judges. After Independence, both access and self-management of the upper judiciary have been further reinforced and strengthened through legislative action and

[8] Source: Union Law Ministry publication referred to in https://www.barandbench.com/columns/debriefed-touching-5-crores-thats-what-the-pendency-of-cases-looks-like-in-india-statistics

[9] *K M Nanavati* v. *State of Maharashtra,* AIR 1962 SC 605, is generally considered as the last jury trial held in India, at the Sessions Court in Mumbai.

judicial interpretations.[10] The judgments delivered by the Supreme Court are binding on all the courts in India as law of the land.[11]

With these powers and jurisdiction, the Supreme Court and High Courts in India have pioneered in providing relief to the sufferers of crimes even before the initiatives of the legislature. The judiciary has also played a pivotal role in recognizing the victim of crime as a stakeholder of the justice dispensing process and also granted reliefs including restorative measures through compensation. The role of the judiciary as to how it considered the sufferer of crime as a stakeholder and how it recognized the victim as a right holder within the framework of criminal laws in India can be analysed by a critical study of the pronouncements of High Courts and Supreme Court.

6.3 Sensitization about Victim's Hapless and Helpless Situation

An appeal was placed before the apex judiciary by non-parties to a *lis,* to consider the plight of the victim of custodial rape and to avoid hyper technicalities while scrutinizing the version of the woman victim. The acquittal of the accused person by the Apex Court in a custodial rape case in *Tukaram* v. *State*[12] disturbed some jurists and law teachers. It was a case of alleged rape of a minor girl aged 16 years in the police station by police constables in which activists had contended that though there was adequate evidence, the Supreme Court discarded the version of the victim and acquitted the accused person. The reasons for the acquittal assigned in the judgment drew the criticism from many

[10] Sujit Choudhry, Madha V Khosla &Pratap Bhanu Mehta (ed) *The Oxford handbook of the Indian Constitution*, (2017) P 331
[11] Article 141, Indian Constitution
[12] AIR 1979 SC 185

corners and with a *bona fide* view to change the approach of the courts in understanding of plights of the rape victims, four law teachers led by professor Upendra Baxi sent an open letter to the Chief Justice of Supreme Court on 16 September, 1979.[13] The following submission and questions raised in the said open letter brought to the fore the bias in dealing with the versions of the victim. The averments in the said letter, *inter alia*, requested for humane appreciation of evidence of a victim taking into account the helpless, hapless condition while the victim is caught in the grip of forces. The appeal runs as follows:

> 'Your Lordship, this is an extraordinary decision sacrificing human rights of women under the law and the Constitution. The Court has provided no cogent analysis as to why the factors which weighed with the High Court were insufficient to justify conviction for rape. She was in the police station in the "dead hour of night". The High Court found it impossible to believe that she might have taken initiative for intercourse. The fact remains that she was asked to remain in the police station even after her statement was recorded and her friends and relatives were asked to leave. Why? The fact remains that Tukaram did nothing whatsoever to rescue the girl from Ganpat. Why? The Court says in its narration of facts, presumably based on the trial Court records, that Tukaram was intoxicated. But this is not considered material either. Why? Why were the lights put off and doors shut?'

The above practice of writing open letter may not be an appreciable mode of inviting notice to the lapses or defects of the system. Yet, it was at the relevant point of time, not viewed otherwise by the Court and no contempt

[13]See the full text of the letter published in (1979) 4 SCC (Jour) 17

notice was issued. The judiciary took it in a right spirit of courageous guidance from concerned legal scholars. The said open letter was considered by the apex judiciary as a public spirited experts' opinion without binding effect as to the aspects of sufferings of the victim and her/his unarmed position and hostile situation while scrutinizing the evidence of rape and similar victims.

Therefore, when it was felt that the justice institution had not properly approached the poor condition of the minor girl, a victim of rape, and appreciated her evidence inappropriately, the jurists in India have also played a role in alerting the judiciary in matter relating to victims of crime and their helplessness in encountering the system.

6.4 Victims in the Courtroom

The court is a forum for adjudication of disputes and it scrutinizes the oral versions and documentary testimonies of the stakeholders. As observed by the Supreme Court, in *Lalu Manjhi* v. *State of Jharkhand*,[14] the appreciation of evidence becomes very difficult, almost impossible, to sift the grains of truth from out of the mass of chaff of falsehood and exaggerations. After the crime, courtroom is the only place legally recognized where the offender and victim have to appear or meet involuntarily on summons or notice from the authorities. The courtroom, where a victim prays for justice was pictured by Malcolm M. Feeley as a battleground. He depicted it as a battleground of conflicting and competing interests and demands. It is an arena where different players, such as lawyers, prosecutors, judges, and police officers, each pursue

[14] (2003) 2 SCC 401

their own strategies in line with their respective goals and different audiences in mind.[15]

As observed by Thomas Schneider, which is relevant even today for courts in India, the judicial adjudicatory process once again made the victim to suffer:

> 'Witnesses and victim experienced long, tedious waits in dim, dirty courthouse corridors, only to find that the case had been adjourned yet again. Victims faced anxiety and confusion about what had happened and what was going to happen in court and frustration over their inability to have any say in the outcome.'[16]

This observation by a criminologist is suffice to understand how the floors of the justice dispensing institutions are designed without considering the needs of victims and witnesses while deposing and identifying the accused or the weapons, documents *etc*., during the trial. The brick and mortar structure of justice far often serve no purpose in the examination or recording of statements of witnesses and they are unfriendly to the victims of crime. These hurdles faced by the victims in the justice availing process can be viewed through the words of Dr. Amartya Sen, a Nobel Laureate's perspectives. In his book, '*Idea of Justice'* he quotes Charles Dickens and coins a new phrase 'remedial injustice'. His observation is thus:

> 'In the little world in which children have their existence, says Pip in Charles Dickens's Great Expectations, 'there is nothing so finely

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[15] Malcolm M. Feeley, *Court Reform on Trial: Why simple solutions fail*, Quid Pro Books (2013) P 19.

[16] See the Foreword, Robert C Davis (ed.), *Victims of Crime*, Sage Publications (1997) P viii

> perceived and finely felt, as injustice'. I expect Pip is right: he vividly recollects after his humiliating encounter with Estella the 'capricious and violent coercion' he suffered as a child at the hands of his own sister. But the strong perception of manifest injustice applies to adult human beings as well. What moves us, reasonably enough, is not the realization that the world falls short of being completely just – which few of us expect – but that there are clearly remediable injustices around us which we want to eliminate.'[17]

The sufferings of a victim of crime could be brought under the phrase '*remediable injustice*' as coined by Amartya Sen. This remedial injustice being faced by the victims in the criminal case adjudicatory process is to be rectified and a conducive atmosphere provided by the judiciary. The Supreme Court has observed that the atmosphere and environment of the court are hostile to the victim who steps in into court with hope and fear. The difficulties faced by the victim in the courtroom are explained in *Nipun Saxena* v.*Union of India.*[18] The Division Bench observed that any litigant who enters the court feels intimidated by the atmosphere of the court. Children and women, especially those who have been subjected to sexual assault, are virtually overwhelmed by the atmosphere in the courts. They are scared. They are so nervous that they, sometimes, are not even able to describe the nature of the crime accurately. When they are cross-examined in a hostile and intimidatory manner then the nervousness increases and the truth does not come out.

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[17] Amartya Sen, *The Idea of Justice*, Penguin (2010) Preface
[18] (2019) 2 SCC 703

The Supreme Court, in the decisions in *State of Punjab* v. *Gurmit Singh*[19] and in *Sakshi* v. *Union of India*,[20] expressed its concern over the hostile environment of courtrooms in India and it was directed to make it suitable for the vulnerable victims to appear and depose without any inconvenience. The Apex Court has, *inter alia,* made following 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, also apply in inquiry or trial of 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, insofar as they relate directly to the incident, should be given in writing to the presiding officer of the court who may put them to the victim or witnesses in a language which is clear and is not embarrassing;
    iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

Even after decades, there is no considerable development in the transformation of courts from the house of intimidation to a kind place towards victim. Again, in *State of Maharashtra* v. *Bandu*[21] the Supreme Court issued directions for setting up of special centers for vulnerable witnesses consistent with the directions given in the decision in *State of Punjab* v. *Gurmit Singh*[22] and

[19] (1996) 2 SCC 384
[20] (2004) 5 SCC 518
[21] (2018) 11 SCC 163
[22] (1996) 2 SCC 384

supplements the same. Further, the Apex Court viewed that all High Courts should adopt guidelines for setting up of at least one centre for vulnerable witnesses in every district in the country. But, the directions have not been complied with by the State authorities till October, 2021. When this was brought to notice in *Smruti Tukaram Badade* v. *State of Maharashtra,*[23] the Supreme Court took the issue seriously and issued further directions for strict compliance of the previous directions.

The victim had surfaced in the Indian judicial arena as early as in 1974 itself. The Supreme Court, in the decision in *Banarjee* v. *Anita Pan*,[24] described the landlord as a victim in the realm of civil jurisprudence, whose rights to enhance the rent and evict the tenants were taken away by a law passed by the West Bengal legislature. Therefore, the word victim has been interpreted even to denote to a person who suffers by the legal provisions which unjustly deprived him of his rights, though not directly relevant to the studies on crime victims.

However, the word victim was first used in proper context as a sufferer of crime occurrence, in 1981, by the Supreme Court in the case testing the powers of the State governments to commute the sentences imposed upon the convicts. In *Maru Ram* v. *Union of India*[25] it was held that the government cannot reduce or commute sentence of life imprisonment to less than fourteen years. While disposing off the case, the Constitution Bench, consisting of five

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[23] Order in Miscellaneous Application No:1852 of 2019 in Crl A 1101/20219 dated 15 11 2021, reported in (2022) LiveLaw SC (80)
[24] AIR 1975 SC 146
[25] (1981) 1 SCC 107

judges, raised the voice for the victims of crime. On behalf of the Bench, Justice V R Krishna Iyer, observed as follows:

> 'One area which is totally overlooked in the above practice is the plight of the victim. It is a recent trend in the sentencing policy to listen to the wailings of the victims. Rehabilitation of the prisoner need not be by closing the eyes towards the suffering victims of the offence. A glimpse at the field of victimology reveals two types of victims. The first type consists of direct victim, *i.e.*, those who are alive suffering on account of the harm inflicted by the prisoner while committing the crime. The second type comprises of indirect victim who are dependents of the direct victims of crimes who undergo suffering due to deprivation of their breadwinner…
>
> …. In our effort to look and protect the human right of the convict, we cannot forget the victim of his family in case of his death or who is otherwise incapacitated to earn his livelihood because of the criminal act of the convict. The victim is certainly entitled to reparation, restitution and safeguard of his rights. Criminal justice would look hollow if justice is not done to the victim of the crime. The subject of victimology is gaining ground while we are also concerned with the rights of the prisoners and prison reforms. A victim of crime cannot be a "forgotten man" in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injury.'

This is the first pronouncement of the Apex Court, in which the victim of crime finds place in the judicial discourse, about 28 years prior to the introduction of the word victim in the Code of Criminal Procedure.[26] The

[26] The definition of word victim introduced in Cr.P.C., by insertion of Section 2(wa) w.e.f 31 December 2009

judiciary's approach towards victim may be conveniently divided into an era before the amendment that introduced the definition for the victims in the Cr.P.C. and after it. Prior to 2009, the Court took the role of granting rights and reliefs. After the insertion of the word victim to Cr.P.C., the courts, by their creative interpretation in favour of the victim of crime, have been laying foundation for victim orientation in the criminal justice dispensation. The Kerala High Court described the said amendment as a significant development of victimology in criminal jurisprudence and administration of criminal justice.[27]

6.5 Victim's right to Protest – The first Right conferred by Court

In the year 1985, the Apex Court conferred an important right to victims of crime and impliedly recognized them as an indispensible party for due consideration in the criminal justice process. The criminal law is set into motion on information received or registration of a complaint. The investigation officers who probe the case are required to file the final report under Section 173(2) Cr.P.C. after completion of the investigation. In some cases, the investigating agency may file a report stating that there was no such occurrence that took place as alleged in the complaint or there may be a mistake of fact. Consequently, they request for dropping of further proceedings as there is no necessity to proceed with the investigation. In some cases, after investigation, the final report may suggest penal provision of a lighter offence than that of the crime mentioned in the FIR or the complaint. Under those

[27] *Kalimuthu* v. *State* 2014 (4) KLT 909

circumstances, the *de facto* complainant can file a protest petition against the final report and seek intervention of the court. As observed by the Madras High Court, there is no pro**v**ision in the Code to file a protest petition by the informant who lodged the First Information Report (FIR). In the absence of a pro**v**ision in the Code relating to filing of a protest petition, it was considered by the court as the imperative need of such right to the crime victims.[28] The right to file a protest petition is not conferred upon the informant/complainant under Cr.P.C. This is a right conferred by a judicial decision and granted in favour of the *de facto* complainant/ victim, by the Supreme Court in the case of *Bhagwant Singh* v. *Commissioner of Police*.[29] The necessity to confer such a right is explained as follows:

> 'We cannot spell out either from the provisions of the Code of Criminal Procedure, 1973 or from the principles of natural justice, any obligation on the Magistrate to issue notice to the injured person or to a relative of the deceased for providing such person an opportunity to be heard at the time of consideration of the report, unless such person is the informant who has lodged the First Information Report. But even if such person is not entitled to notice from the Magistrate, he can appear before the Magistrate and make his submissions when the report is considered by the Magistrate for the purpose of deciding what action he should take on the report. The injured person or any relative of the deceased, though not entitled to notice from the Magistrate, has locus to appear before the Magistrate at that time of consideration of the report, if he otherwise comes to know that the report is going to be considered by the Magistrate and if he wants to make his submissions in regard to the

[28] *R Dharmalingam* v. *State*, Crl.RC.No.967 of 2019 dated 13.11.2019, High Court, Madras
[29] AIR 1985 SC 1285

> report, the Magistrate is bound to hear him. We may also observe that even though the Magistrate is not bound to give notice of the hearing fixed for consideration of the report to the injured person or to any relative of the deceased, he may, in the exercise of his discretion, if he so thinks fit, give such notice to the injured person or to any particular relative of or relatives the deceased, but not giving of such notice will not have any invalidating effect on the order which may be made by the Magistrate on a consideration of the report.'[30]

In the absence of provisions of law, the Supreme Court has exercised its power to interpret the law and conferred a right in favour of the victim/informant on the basis of the principles of natural justice. Subsequently, the Apex court has once again made it clear that the court should not consider a closure report filed by the prosecution without issuing notice and hearing the informant.[31] The trial courts and magistrates have been directed not to take the closure report of the prosecution without hearing the victim or informant. The relevant portion of the judgment runs as follows:

> 'We are accordingly of the view that in a case where the Magistrate to whom the report is forwarded under sub section (2) (i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of the consideration of this report.'

[30] AIR 1985 SC 1285
[31] *UPSC* v. *Papiah* (1997) 7 SCC 614

The principle that recognized that a victim or an informant who set the criminal law in motion should not been put in darkness by the investigating agency was laid down by the judiciary in *J.K. International* v. *State Government of NCT.*[32] It was held that a person at whose behest an investigation is launched by the police is not altogether wiped out of the scenario of the trial merely because the investigation was taken over by the police and the charge sheet was laid by them. In pursuance of it, before taking the closure report filed by the Investigating Officer, the courts and magistrates are required to provide an opportunity and hear the *de facto* complainant complying with the *audi alterm patrem,* an elementary facet of natural justice. This has become a mandatory requirement to be followed by the courts and the Supreme Court has again made it clear that prior to taking a final decision on such a 'closure' report, the court is to mandatorily issue notice to the complainant and make available the copies of the statements of the witnesses, other related documents and the investigation report strictly as permissible under the law.[33]

In *Bormoty Panggeng* v. *The State of Arunachal Pradesh*[34] it is observed that it needs to be particularly borne in mind that the criminal law can be set in motion by any person and that the 'informant' does not necessarily have to be the victim. Thus, in the cases where victims and informant are not the same individual, law does not recognize the need for keeping the victim updated

[32] (2001) 3 SCC 462
[33] *Jakia Nasim Ahesan* v. *State* (2011) 12 SCC 302

[34] Crl.A. 205 of 2018, High Court of Gauhati, Decided on 27 January, 2021

about such decisions of proceeding with the cause at all. In fact, the notice to the informant seems unnecessary, if were to be given the same, as the informant's role is primarily concerned with bringing the commission to the Court's/police's notice. If the police come to the conclusion after the investigation that the nature of the crime is not grievous as described by the victim in his/her complaint, such fact has to be brought to the notice of the victim is the principle behind the information to the informant. It empowers the victim with information of the outcome of investigation. Moreover, if there is any flaw in investigation or there is bias of Investigating Officer that cause prejudice the victim's case, it will be known to him/her and the informed victim can avail alternative remedies through appropriate legal actions.

6.6 Recognition of Victim as a Stakeholder by the Judiciary

As stated above, the judiciary has been making observations about the sufferings of the victims. The Madras High Court, in *Sampath* v. *State*,[35] has observed the plight of the victim referring to such peculiar state of affairs that we are living in where more than the accused it is the victim who fears getting exposed to the outside world consequent to the dastardly crime of rape

A victim of crime has been recognized as a stakeholder of the criminal justice system by the Kerala High Court in 2017. The judge observed as follows:

> '….that our system often views victims as outsiders in the criminal proceedings. However, it is ineluctable that victims are world over being now considered as equal stakeholders in the criminal justice system. I

[35] 2018 2 LW (Crl) 175

> believe, they are owed a right to exercise an effective voice in decision making processes like investigation, prosecution, reparation, etc. However, time has now come to give them sufficient latitude in determining how their concern is identified and how they will be taken into account.'[36]

These observations from the judiciary has set a new trend in the criminal justice dispensation and raised hope in the minds of the victims of crime. The Supreme Court, in *Dinubhai Boghabhai Solanki* v. *State of Gujarat*,[37] a case of murder of an activist who was complaining against illegal sand mining, had recognized the concept of victim justice and the victim as a stakeholder in criminal justice and welfare policies. The Court observed as follows:

> "…realisation is now dawning that other side of the crime, namely, victim is also an important stakeholder in the criminal justice and welfare policies. The victim has, till recently, remained forgotten actor in the crime scenario. It is for this reason that victim justice has become equally important, namely, to convict the person responsible for a crime. This not only ensures justice to the victim, but to the society at large as well. Therefore, traditional criminology coupled with deviance theory, which had ignored the victim and was offender focussed, has received significant dent with focus shared by the discipline by victimology as well (*sic*). An interest in the victims of the crime is more than evident now. Researchers point out at least three reasons for this trend. First, lack of evidence that different sentences had differing impact on offenders led policy-makers to consider the possibility that crime might be reduced, or at least constrained, through situational measures. This, in turn, led to an emphasis on the immediate circumstances surrounding

[36] Order in WP (C) No: 27902 of 2008(V) dated 05 April, 2017 Kerala High Court.
[37] (2018) 11 SCC 129

> the offence, of necessity incorporating the role of the victim, best illustrated in a number of studies carried out by the Home Office (Clarke and Mayhew 1980). Second, and in complete contrast, the developing impact of feminism in sociology, and latterly (*sic*) criminology, has encouraged a greater emphasis on women as victims, notably of rape and domestic violence, and has more widely stimulated an interest in the fear of crime. Finally, and perhaps most significantly, criticism of official statistics has resulted in a spawn of victim surveys, where sample surveys of individuals or households have enabled considerable data to be collated on the extent of crime and the characteristics of victims, irrespective of whether or not crimes become known to the police. It is for this reason that in many recent judgments rendered by this Court, there is an emphasis on the need to streamline the issues relating to crime victims.
>
> 32. There is a discernible paradigm shift in the criminal justice system in India which keeps in mind the interests of victims as well. Victim oriented policies are introduced giving better role to the victims of crime in criminal trials. It has led to adopting two pronged strategy. On the one hand, law now recognises, with the insertion of necessary statutory provisions, expanding role of victim in the procedural justice. On the other hand, substantive justice is also done to these victims by putting an obligation on the State (and even the culprit of crime) by providing adequate compensation to the victims.'

The above decisions would demonstrate that the struggles of a hapless victim in the process are consciously felt by the courts. Further, it has recognized the victims as stakeholders and suggested compensation as a measure to help them recover from the consequences of crime.

6.7 Right to Apply for Cancellation of Bail

One of the important rights granted to the victims of crime in the pre-trial stage is the intervention in the bail proceedings. In this line, whether a victim has a right to apply for cancellation of bail granted to an accused was a seminal question before the judiciary after the amendment of and insertion of Section 2(wa) in Cr P C. There is a difference between seeking cancellation of bail and challenging the sustainability of the order granting bail to the accused. The distinction has been drawn in *Lachhman Dass* v. *Resham Chand Kaler and Another.*[38]

After the introduction of the amendments in Cr.P.C. and insertion of a definition for the term 'victim,' a Division Bench of the Madhya Pradesh High Court, in *Mahesh Pahade* v. *State of Madhya Pradesh*,[39] had an occasion to deal with the question whether the victim can approach a court for cancellation of bail granted to the offender. It was a case where the accused had exploited the prosecutrix of 14-1/2 years of age for about 3 years. The trial court, after full trial, came to a conclusion that the charges framed against the accused was proved beyond all reasonable doubts and convicted the offender for the offences punishable under Section 376(2) (n) IPC, 1860 and Section 6 of the Protection of Children from Sexual Offences Act, 2012. Consequently, the offender was sentenced to imprisonment for life for an offence under Section 376(2)(n) IPC and a fine of Rs.20,000/-, in default of payment of fine, to undergo imprisonment for two years. The offender had filed consecutive

[38] (2018) 3 SCC 187
[39] Criminal Appeal No.933 of 2014, Order in I.A. No.6367/2017, dated 18.07.2018.

applications for suspension of sentence. The third application was allowed and the offender was ordered to be enlarged on bail. It was challenged by the victim who sought for cancellation of bail. The High Court, after considering the various questions, held that the right to prefer an appeal would cover the right to seek cancellation of bail in view of the public prosecutor's right to prefer appeal under Section 372 and 378(3) of Cr.P.C. It read as follows:

> 'Once right to appeal has been given to a victim, it shall include all ancillary rights which are attached with the right to appeal. Such right to appeal will include right to seek cancellation of bail if the victim is aggrieved against such an order.
>
> In view of the above, we find that the victim has a right to seek cancellation of bail and of suspension of sentence, as it is her rights and honour, which is in issue apart from the crime against humanity to be protected by the State.'

The right to seek cancellation of bail, conferred upon the victim, is an extended conferment of a substantial right upon the victims by the judiciary and a major development in victim jurisprudence.

6.8 Damages to Victims under Public Law

The peculiar intervention by the Apex Court in a case of an unlawful assembly of 15 accused persons who committed three murders in the year 1992 and the prosecution having miserably failed to prove the charges with reasonable facts and circumstances, is noteworthy.[40] The trial Court had allowed humongous cross-examination of the witnesses by the defence. The trial court judgment was singularly silent regarding the post-mortem

[40] *Vinu Bhai Ranchhod Bhai Patel* v. *Rajivbhai Dudabhai Patel* (2018) 7 SCC 743

examination report of one of the three deceased and the evidence of the doctor who conducted the post-mortem examination. There was also gross dereliction of duties by the investigating agency and public prosecutor. These aspects disturbed the Supreme Court. It was observed that to remand the case for fresh trial if ordered as a course of action after a lapse 26 years of the occurrence of the crime, would not serve any useful purpose because some of the accused died in the interregnum. In such circumstances, the Supreme Court opined that the only course of action available to the Court is that the victims of the crime are required to be compensated, in light of the principles laid down in *Nilabati Behera*.[41] The observation of the Supreme Court reads as follows:

> 'We are of the opinion that the only course of action available to this court is that the victims of the crime in this case are required to be compensated by the award of public law damages in light of the principles laid down by this Court in *Nilabati Behera* case. In the circumstances, we are of the opinion that the families of each of the deceased should be paid by the State an amount of Rs. 25,00,000/− (Rupees Twenty Five Lacs Only) each and the injured witnesses, if still surviving, otherwise their families, are required to be paid an amount of Rs.10,00,000/− (Rupees Ten Lacs Only) each. The said amount shall be deposited within a period of eight weeks from today in the Trial Court, and on such deposit the said amounts shall be distributed by the Sessions Judge, after an enquiry and satisfying himself regarding the genuineness of the entitlement of the claimants.'

In the above case, the inefficiency of the prosecuting mechanism caused miscarriage of justice and victims of crime were once again victimized by the

[41] (1993) 2 SCC 746

justice dispensing institutions. The court has suggested pecuniary relief as the only remedy to the victims and the compensatory initiative under public law. It may be a contribution by the judiciary in the victim justice process.

6.9 Victims' Special Needs in certain crimes

The basic requirements of a victim after a crime involving acid attack have been assessed by the judiciary and immediate needs that may have to be addressed are listed in the *Piyali Dutta* v. *State of West Bengal*:[42]

> 'The victim of the crime may require support, monetary and otherwise to mitigate the loss and injury suffered as a result of the crime. The victim may require rehabilitation. Acid attack victims require reconstruction of personal self by reason of the very nature of the crime. The victim will require medical attention. The victim may require counseling. The victim must be assisted in rehabilitating and integrating herself/ himself into the society. All of these processes are time and money consuming. The victim and his/ her family members may not be economically or financially favorably placed to undertake discharge of such onerous responsibilities.'

The above observation reveals that the Calcutta High Court has duly taken into account the harm and helpless condition of the victim of such a crime and what needs to be done to heal the harm, repair the damage that would make the victim to survive and escape from the clutches of financial inabilities. The requirements of the victims are recognized by the judiciary and it is an important gesture in the fulfilling of the needs of the victims.

[42] 2017 Cri.L.J. 4041

In the *Mallikarjuna Kodagil* v. *State of Karnataka*[43] the Supreme Court motivated the High Courts and trial courts to try to fulfill the needs of the victims in addition to the payment of compensation. The plights of the victims in every stage of judicial processes are analysed and the Apex Court observed thus:

1) The travails and tribulations of victims of crime begin with the trauma of the crime itself and, unfortunately, continue with the difficulties they face in something as simple as the registration of a First Information Report (FIR).
2) What follows in a trial is often secondary victimization through repeated appearances in Court in a hostile or a semi-hostile environment in the courtroom.

After observing the difficulties encountered by the sufferer of crime, the Apex Court has underlined the need to draw the attention of the Parliament to enact laws to protect victims from such secondary victimizations. The Apex Court observed thus:

> '… that the right of victims of crime is a subject that has, unfortunately, only drawn sporadic attention of Parliament, the judiciary and civil society. Yet, it has made great progress over the years. It is our evolving and developing jurisprudence that has made this possible. But we still have a long way to go to bring the rights of victims of crime to the centre stage and to recognize them as human rights and an important component of social justice and the rule of law.'

[43] (2019) 2 SCC 752

It has noted that there are victim compensation schemes in force due to the mandate of Section 357 A of the Code of Criminal Procedural, 1973 (CrPC) though implemented in several parts of the country, but even that is not enough. The Apex Court recognizes that that the judiciary is obliged to go and has gone beyond merely awarding compensation and has taken into consideration the larger picture from the perspective of the victim of an offence and has recommended and implemented some recommendation such as the construction of child friendly court and courts that address the concerns of vulnerable witnesses. The court has done and is continuing to do their best for the victim of crimes.

6.10 Protection from Disclosure of Victim's Identity

The protection from disclosure of identity of victims of sexual offences is expected to encourage them to prefer complaints against the assaulters without having to face public glare, which may also lead to humiliation. In the United Kingdom, the Sexual Offences Amendment Act, 1976 guarantees anonymity to women who prefer complaints of rape. Child sexual abuse is a global problem and some international studies report that between 8 to 31 percent of girls and 3 to 17 percent of boys experience childhood sexual abuse.[44] The identities of those children, if revealed to public or media, would not only cause embarrassment to the victims but also insecurity to their peers and friends. The judiciary in India has taken steps to protect the victims,

[44] Dr. Catherine Esposito, *Child Sexual Abuse and Disclosure, what does the research tell us?*www.community.nsw.au>pdf_file, visited on 21.08.2018.

particularly from such unwanted embarrassments. The names and identity of the have been referred to in the cases by fictitious names.

In India, a gruesome rape and murder of an eight year old girl at *Rasana* village of *Kathua* district in *Jammu and Kashmir* shocked the entire nation. The identity of the child needs to be concealed and her privacy should be protected, though she was not alive. But, the social media published the photos of the said child. The Division Bench of the Delhi High Court took *suo motu* cognizance of the publication of the photographs and the name of the said eight year old child who was allegedly gang raped and murdered. It observed that the nature and manner of the reportage was in absolute violation of the specific provision of law and disrespecting the privacy of the victim. The High Court also issued notice to the leading newspapers of English language and also electronic media. In its inquiry, the Bench referred to provisions in the protection of Children from Sexual Offences Act, 2012 and Indian Penal Code which specifically bars the media from revealing the identity of the victims of sexual offences. The Judges said they were pained that none of the authorities including the National Commission for Women (NCW), The Delhi Commission for Women (DCW) and the National Commission for protection of Child Rights (NCPCR) reacted to the terrible development. In the order, the Delhi High Court imposed a penalty of Rs.10 Lakhs each on 12 media houses for disclosing the name and other details of the said *Kathua* gang rape victim. The fine so collected was ordered to be deposited in the Jammu and Kashmir Victim Compensation Scheme. The media houses which revealed the identity

appeared and apologised with a plea of ignorance of the requirement of law and on a misconception that the reporting would facilitate the prosecution of the persons in right earnest.[45]

The disclosure of the name or other descriptions which make known the identity of the victims of the offences rape, rape of minor *etc*., are legally prohibited and made an offence under Section 228 A of IPC.[46] The Supreme Court, in *Nipun Saxena* case,[47] has recognized as just the reason for not disclosing the identity of victim. It has opined that a victim of rape will face hostile discrimination and social ostracisation in society. Such a victim will find it difficult to get married and will also find it difficult to get integrated in

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[45] W.P (C) 3725 of 2008, dated 18.4.2018, High Court of Delhi

[46] Section 228 A, introduced in IPC vide amendment Act No 43 of 1983 with effect from 25-12-1983 *Disclosure of identity of the victim of certain offences etc.— Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.*

1. Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is—

a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

b) by, or with the authorisation in writing of, the victim; or

c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim: Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation. Explanation.—for the purposes of this sub-section, "recognised welfare institution or organisation" means a social welfare institution or organization recognised in this behalf by the Central or State Government.

Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in sub-section (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. Explanation.—the printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.

[47] (2009) 2 SCC 703

society like a normal human being. Neither the IPC nor the Cr.P.C. defines the phrase 'identity of any person'. Section 228 A IPC clearly prohibits the printing or publishing of the name or any matter which may make known the identity of the person. It is obvious that not only the publication of the name of the victim is prohibited but also the disclosure of any other matter which may make known the identity of such victim. The Judges observed that the phrase 'matter which may make known the identity of the person' does not solely mean that only the name of the victim should not be disclosed but it also means that the identity of the victim should not be discernible from any matter published in the media. The intention of the law makers was that the victim of such offences should not be identifiable so that they do not face any hostile discrimination or harassment in the future.[48] In the following offences, disclosure of the identity, name, photo and other descriptions of the victim are made punishable offence.

1. Rape (Section 376 IPC)
2. Causing death or resulting in persistent vegetative state of victim (Section 376-A IPC)
3. Sexual intercourse by husband upon his wife during separation (Section 376-B IPC)
4. Sexual intercourse by a person in authority (Section 376-C IPC)
5. Gang rape (Section 376-D IPC)
6. Repeated offences under Section 376 or 376-A or 376-D IPC (Section 376-E IPC)

[48] *Nipun Saxena* v. *Union of India* (2009) 2 SCC 703

The prohibition of printing and publication of name or any matter making public the identity of victim of certain offences against body, particularly victim of the sexual offence, was inserted by Criminal Law Amendment Act, 1983. The Court has also laid a guideline that though Section 228 A IPC does not relate to printing and publication of judgment, keeping in view the social object of preventing social victimisation and ostracism of victim of social offence, the name of the victim should not be indicated in the judgment of the trial Courts or High Courts or Supreme Court.[49] In another decision, the Supreme Court gave instructions to High Courts and Trial Courts that if the trial was conducted *in camera* it would not be appropriate to publish the name of the victim and anonymity is to be maintained.[50] The Kerala High Court, in a case of disclosure of victim's identity in the Facebook account by a person without malice, has discussed the rigour of Section 228 A IPC and held that it is a strict provision to be complied with as it is based on the predominant social reason.[51]

The special provision available in the penal statutes in India is a remarkable progress in the protection of privacy and dignity of victims of crime in general, and particularly the victims of sexual violence. The private details of the victims of sexual offences which may include the pregnancy exposure *etc*., may not only directly affect the life of the survivor but also the future of an unborn baby.

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[49] *Dinesh Alias Buddha* v. *State of Rajasthan* AIR 2006 SC 1267
[50] *State of Punjab* v. *Gurmit Singh* (1996) 2 SCC 384
[51] (2018) 4 KLJ 518

6.11 Non-Disclosure of Victim's Identity in the Media under POCSO Act, 2012 and JJ Act, 2015

The Protection of Children from Sexual offences Act, 2012 (POCSO Act, 2012) has bestowed a duty upon the media not to report the photograph or pornographic material, obscene representation of a child or children. Publication of pictures of child victim and child in conflict with law are also prohibited under Section 74 of the Juvenile Justice (Care and Protection of Children) 2015.[52]

Similarly, under Section 20 of POSCO Act, 2012 a duty is imposed upon media, hotel, lodge, hospital, club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, that it shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, provide such information to the Special Juvenile Police Unit, or to the local police. If any person fails to report commission of an offence relating to child or children sexual abuse, he shall be punished with imprisonment of either

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[52] Section 74 Prohibition on disclosure of identity of children:

(1) No report in any newspaper, magazine, news-sheet or audio-visual media or other forms of communication regarding any inquiry or investigation or judicial procedure, shall disclose the name, address or school or any other particular, which may lead to the identification of a childin conflict with law or a child in need of care and protection or a child victim or witness of a crime, involved in such matter, under any other law for the time being in force, nor shall the picture of any such child be published:

Provided that for reasons to be recorded in writing, the Board or Committee, as the case may be, holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the best interest of the child.

(2) The Police shall not disclose any record of the child for the purpose of character certificate or otherwise in cases where the case has been closed or disposed of.

(3) Any person contravening the provisions of sub-section (1) shall be punishable with imprisonment for a term which may extend to six months or fine which may extend to two lakh rupees or both.

description which may extend to six months or with fine or with both. If the person who failed to report heads any company or is in charge of an institution, he shall be punished with imprisonment for a term which may extend to one year and with fine.[53] This provision would not only make the individual and the head of the institution responsible for reporting crimes against children and also prevent the illegal and surreptitious circulation or use of prohibited pornographic or obscene representation of a child or children through the use of any media or medium. Further, this provision is expected to substantially reduce the un-reporting or failure to report crimes against children.

After the advent of internet, social media and 24x7 live telecasts of news by channels, both the print and electronic media, are reporting the court proceedings elaborately and also arrange debates and discussions on crime occurrences. It is often said that the media runs a parallel trial or 'media trial', which impacts the trial proceedings conducted in the courts. While making narrative reports of the court proceedings in the media, wittingly or unwittingly, the media person reveals the identity or photos but it is prohibited by law to maintain bodily integrity of the human being and also to uphold privacy.

The Calcutta High Court, in *Bijoy* v. *State of West Bengal*,[54] has explained the need to use a fictitious name and not disclosing the name of the victim. In the said case, a girl aged 11 years had gone to fetch water from a tube well, the accused caught the victim from the rear and dragged her behind

[53] Sections 20 & 21 POCSO Act, 2012
[54] (2017) SCC Online Cal 417

the school building and touched her private parts. When the victim raised objection and started screaming, the appellant threatened her with dire consequences and fled away. On the written complaint of the mother of the victim, a case was registered and after investigation the final report was filed. The trial court, in its judgment, without following Section 33 (7) of POCSO Act, 2012, described the victim by her name, age, address and other features. The media also reported the victim's identity.[55] The High Court vehemently condemned it and reminded the courts to act as a guardian of minor victims. The Calcutta High Court issued directions:

> '… I also notice with utmost displeasure that the identity of the victim has been disclosed in the judgment delivered by the trial Judge. The scheme of the Act, *inter alia*, lays down adequate safeguards to ensure that the identity of a victim is not disclosed during investigation or trial. The privacy of child victim has been sought to be protected in the course of investigation and trial of cases under the various provisions of the Act. Section 23 of the Act lays down an embargo on any report or comment made or photograph published in any media disclosing the identity of the child including his/her name, address, photograph, family details, school, neighbourhood or any other particulars in relation thereto. Contravention of the said provision is made punishable under subsection (4) thereof. Section 24(5) of the Act, inter alia, provides that police officer shall ensure that the identity of the victim shall be protected from public media. Section 33(7) enjoins the Special Court to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial unless for reasons recorded in writing the Court permits such disclosure in the interest of the child. For the

[55] Section 33(7) The Special Court shall ensure that the identity of the child is not disclosed at anytime during the course of investigation and trial

> purpose of the said section, identity of the child is defined to include "the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed." Section 36 of the said Act permits the child to give evidence in such manner that he or she is not exposed to the accused at the time of recording evidence and permits such child to record statement through video conferencing or by utilizing single visibility mirror or curtain to achieve such purpose. Section 37 of the Act mandates that trial in cases under the Act shall be held in camera in the presence of the parents of the child or any other person in whom the child has trust or confidence. Evidence of the child may also be recorded by way of commission under section 284 of the Code of Criminal Procedure, if necessary. The aforesaid provisions, therefore, make it clear that the functionaries under the Act, namely, the investigating agency, the prosecutors and the court must take appropriate measures to ensure that the identity of the child is not disclosed to his/her prejudice in the course of investigation and trial. Trial of a case concludes by delivery of judgment, hence, disclosure of identity of child in the judgment delivered by the Special Court would amount to breach of the aforesaid statutory mandate.'

The role of the higher judiciary in protecting the interests and rights of the victims are well demonstrated in the above decision, because though there are well defined laws and procedures for the advancement of victim justice, many a times either the investigation agencies or trial courts, without knowing the consequences or due to ignorance and often inadvertently, disclose the identities of the victims. In such circumstances the higher fora of law steps in with directions to avoid such instances in the future.

6.12 Pseudonymous Name in the Cause Title

The Courts, in their judicial documents, like orders or judgments, should protect the privacy of victims without disclosing their identity. But, if a victim wants to prefer an appeal or other proceedings before higher fora of law, aggrieved against the order of the court, is she required to reveal her name and other identifying descriptions in the short and long cause title was an incidental question that arose while dealing with Sec 228 A IPC. The Apex Court has clarified on the same as follows:[56]

> 'We would like to deal with a situation not envisaged by the law makers. As we have held above, Section 228 A IPC imposes a clear cut bar on the name or identity of the victim being disclosed. What happens if the accused is acquitted and the victim of the offence wants to file an appeal under Section 372 Cr.P.C.? Is she bound to disclose her name in the memo of appeal? We are clearly of the view that such a victim can move an application to the Court praying that she may be permitted to file a petition under a pseudonymous name *e.g.* X or Y or any other such coded identity that she may choose. However, she may not be permitted to give some other name which may indirectly harm another person. There may be certain documents in which her name will have to be disclosed; *e.g.*, the power of attorney and affidavit(s) which may have to be filed as per the Rules of the Court. They should normally allow such applicant to file the petition/appeal in a pseudonymous name. Where a victim files an appeal, we direct that such victim can file such an appeal by showing her name as X or Y along with an application for non-disclosure of the name of the victim. In a sealed envelope to be filed with the appeal she can enclose the document(s), in which she can reveal her identity as required by the Rules of the appellate court. The

[56] *Nipun Saxena* v. *Union of India* WP (Civil) 565 of 2012 dated 11 December 2018

court can verify the details but in the material which is placed in the public domain the name of the victim shall not be disclosed. Such an application should be heard by the Court in chambers and the name should not be reflected even in the cause list till such matter is decided. Any documents disclosing the name and identity of the victim should not be in the public domain.'

This guideline laid down by the Supreme Court is expected to further strengthen the protection of victim identity in all proceedings. This may be considered as a judicial care extended to the victims by the highest court of the land in India.

6.13 Medical Treatment for Victims of crime

The first and immediate need of a person who sustains injury in a crime occurrence is medical treatment. It may save the life of the grievously injured victim and also prevent him from going into further critical condition. He may be able to report the crime without any delay after getting preliminary treatment. Many hospitals and private medical practitioners conveniently avoid providing treatment to persons injured in the crime occurrences or road crash. These situations have been taken into consideration and to address them a provision, Section 357 C, is inserted in the Cr.P.C.[57]

By the said provision, providing first-aid or medical treatment to the victims and immediately informing the police about the incident, are the two important duties bestowed upon the hospitals. It imposes a positive and

[57] 357 C. Treatment of victims: All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under Section 326 A, 376 A, 376 B, 376 C, 376 D or Section 376 E of the Indian Penal Code (45 of 1860), and shall immediately inform the police of such incident.

mandatory duty upon all hospitals run either by the Central Government, or the State Government, or local bodies or any other person, to provide immediate first-aid or medical treatment to victims of the offences defined under section 326 A, 376, 376 A, 376 B, 376 C, 376 D or 376 E, as soon as the victim reaches there. In addition, a duty has been imposed upon the hospital to immediately inform the police of such incident.[58] Section 357 C has to be read along with 116 B, IPC. This is the new substantive provision creating an offence, of which the analogous procedural provision has been inserted by way of Section 357 C, Cr.P.C. It is meant to ensure that a victim of acid attack and sexual assault get first aid or medical treatment from the hospital. These provisions have been necessitated because of repeated complaints that the hospital insists on the victim to either get a case registered by police or await the arrival of police, before starting even first aid. With the insertion of this new provision read with Section 375 C of the Code of Criminal Procedure 1973, if a hospital either refuses to give immediate first-aid or medical treatment to a victim of the specified offences, for any reason whatsoever, or fails to immediately inform the police of such incident, they will become liable for punishment under this new penal provision.[59] The amendments introduced in Cr.P.C. by insertion of Section 357 C and Section 166 B in IPC have contributed to victim orientation in the criminal law in India.

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[58] Ratanlal & Dhirajlal, The Code of Criminal Procedure, 21st edition, Lexis Nexis (2018) P 1631

[59] Ratanlal & Dhirajlal, *The Indian Penal Code*, 33rd edition Lexis nexis (2017) P 987

6.14 Reliefs to Victims of Crime

In the absence of specific laws for compensation to the victims of crime, the higher judiciary in India exercised its jurisdiction to grant reliefs, especially the compensatory reliefs.

In the Government of India Act 1935, which was a parent legal instrument to govern India prior to adoption of Constitution, there was expression "compensation" in Section 299. It was used in the context of amount paid to the land owner in the cases of acquisition by the government, the Supreme Court has explained it as 'Just equivalent' of what the owner has been deprived of.[60] In Indian Constitution the term compensation is not defined and the right to compensation is also not guaranteed by any express provisions. At the inception of the Constitution, Article 31, which dealt with the right to property, had guaranteed a fundamental right to the citizens against the deprivation of their property, but it was repealed.[61] There was no word as 'compensation' used by the framers, instead they used the word amount fixed by law for such acquisition. But, the right to move the Supreme Court[62] and High Courts[63] by an appropriate proceeding, the enforcement of fundamental rights conferred by part III of the constitution is guaranteed. The right

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[60] *N.B. Jeejeebhoy* v. *Assistant Collector* AIR 1965 SC 1096

[61] Article 31 was repealed by the Forty-fourth amendment with effect from June 20, 1979 and the abridged text of this article has been incorporated in Article 300-A, which is outside of Part III. Article 300-A, reads that no person shall be deprived of his property save by authority of law.

[62] Article 32, Indian Constitution envisaged the right to move the Supreme Court by appropriate proceedings for the enforcement of rights conferred in Part III is guaranteed.

[63] Article 226, Indian Constitution dealt with powers of the High Court to pass orders or writs in appropriate proceedings for the enforcement of rights conferred in Part III.

conferred in Article 32 cannot be abrogated or abridged or taken away by an Act of the legislature.

The Supreme Court has laid a strong foundation in 1983, by a direction to the State, for disbursement of compensation against the unlawful incarceration of a mentally challenged person.[64] One Rudul Shah, a convict was released from prison on acquittal, after incarceration of about fourteen years. It came to light that he was a lunatic when the court passed an order of detention in August 1968. Further, though he was acquitted by the Court of Session, Muzaffarpur, Bihar, on June 3, 1968, he was released from the jail on October 16, 1982, that is to say, more than 14 years after he was acquitted. The Apex Court has held that the detention not only illegal but also an infringement of a fundamental right guaranteed by the Constitution. In such case of violation of rights caused due to dereliction of duties of executives, it was required to be compensated by the State. In this decision, the Supreme Court has made it clear that under Article 32 of the Constitution a claim for compensation by a sufferer, due to the excess of the authorities, is maintainable and also held that the State has to pay damages for the loss or expenses incurred to the citizen. It awarded interim compensation of Rupees 35,000 towards medical expenses and granted leave to file a civil suit for recovery of damages from the State. This is the first decision of the Supreme Court for the payment of interim compensation to the victim of abuse of powers in the Indian legal history.

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[64] *Rudul Shah* v. *State of Bihar* (1983) 4 SCC 141

Subsequently, a three-Judge Bench of the Supreme Court in *Nilabati Behera (Smt) alias Lalita Behera* v. *State of Orissa*[65] which was the case of torture and custodial death, followed its decision in *Rudul Shah*, cited *supra*, and upheld that the claim of compensation by the victims is maintainable, as the right to life under Article 21 of the Constitution guaranteed life with dignity. One *Suman Behra*, a youth aged about 22 years was taken from his home in police custody on December 1, 1987. Next day his body was found on the railway track with multiple injuries and it was found that his death was unnatural. His mother filed a writ petition under Article 32 of the Constitution claiming compensation for custodial death of her son. The Supreme Court had relied upon its earlier decision in *Khatri* (II) v. *State of Bihar*[66] and *Khatri* (IV) v. *State of Bihar*[67] and indorsed the view that the Court is not helpless to grant relief in a case of violation of the right to life and personal liberty and it should be prepared to forge new tools and device new remedies for the purpose of vindicating these precious fundamental rights.

Subsequently, after the advent of Schemes in 2009, the higher judiciary provides reliefs in the cases where the prosecution could not prove the guilt due to technical reasons or errors in the investigation. The Delhi High Court, in 2015 itself, had observed that the criminal justice system should think about the rights of the victims too. In *Chaman* v. *The State (NCT Delhi)*,[68] the accused was found guilty by the trial court for an offence under Section 376 (2) (f) IPC.

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[65] (1993) 2 SCC 746
[66] (1981) 1 SCC 627
[67] (1981) 2 SCC 493
[68] (Crl A No 153 of 2010 dt20, March 2015 Delhi High Court)

Aggrieved against the order of the conviction and sentence the offender preferred an appeal, in which the observation on crime victims runs as follows:

> 'Victims are unfortunately the forgotten people in the criminal justice delivery system. The criminal justice delivery system tends to think more of the rights of the offender than that of relief to the victims. The Court has to take into consideration the effect of the offence on the victim. No term of months or years imposed on the offender can reconcile the agony suffered by the victim but then monetary compensation will at least provide some solace.'

The High Court not only dismissed the appeal but held that the compensation awarded under Section 357 Cr.P.C. which forms part of a fine was inadequate. Further, the court sent the appeal judgment to the DLSA, Delhi for determination and awarding of compensation under the Victim Compensation Scheme.

6.15 Apex Court's Initiatives to make relevant Victim Impact Statement (VIS)

The Apex Court in India has been dealing with the relevance of Victim Impact Statement taking cues from some foreign jurisdictions. In 1991, the United States Supreme Court in *Payne* v. *Tennessee*,[69] decided a case of brutal murder of a twenty eight year old woman and her two year old daughter. Payne under intoxication, brutally attacked with a butcher's knife and murdered two persons. A three year old boy, survived with grievous injuries. At trial, Payne was found guilty of two counts of murder and one count of attempt murder. While sentencing, the court heard the parties and the issue was centered around

[69] *Payne* v. *Tennessee*, 111 S. Ct. 2597, 2604 (1991)

the admission of oral testimony of the mother of Charisse Christopher. The court held that such a statement concerning effect of murder can be admitted for the purpose of deciding the sentence on the offender. It has defined the victim impact evidence in the following words:

> 'Victim impact evidence is that evidence in a criminal matter relating to the victim's personal characteristics and the emotional impact of the crime on the victim's family.'

The above definition and the finding of the court in *Payne* case, overruled its previous decisions on the inadmissibility of victim impact evidence in *Booth* v. *Maryland*[70] and in *South Carolina* v. *Gathers.*[71] In both the cases, courts concerned held that the victim impact evidence is inadmissible at the sentence phase of a trial as it violates the rights guaranteed under the Eighth Amendment of the US Constitution.[72] The Tennessee Supreme Court opined that the Eighth Amendment of US Constitution does not erect a *per se* bar to the victim impact statement in a capital sentencing hearing, after the guilt is proved beyond all reasonable doubts, as per law.

This principle, laid down by the US Supreme Court in 1991, has been borrowed and endorsed for its application in the appropriate cases. A three Judges Bench of the Supreme Court in *Mallikarjun Kodagali (Dead) Represented through Legal Representatives* v. *State of Karnataka*[73] clarified that a considerable amount has been achieved in giving life to the rights of

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[70] *Booth* v. *Maryland*, 482 U.S. 496, 107 S. Ct. 2529 (1987)
[71] 490 U.S. 805, 109 S. Ct. 2207 (1989)
[72] U.S. Constitution Amendment Eighth: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted
[73] (2019) 2 SCC 752

victims of crime, despite the absence of a cohesive policy. But, as mentioned above, a lot more still needs to be done. The relevant portion of the judgment is reproduced hereunder:

> 'Among the steps that need to be taken to provide meaningful rights to the victims of an offence, it is necessary to seriously consider giving a hearing to the victim while awarding the sentence to a convict. A victim impact statement or a victim impact assessment must be given due recognition so that an appropriate punishment is awarded to the convict. In addition, the need for psycho-social support and counseling to a victim may also become necessary, depending upon the nature of the offence. It is possible that in a given case the husband of young married woman gets killed in a fight or a violent dispute. How is the young widow expected to look after herself in such circumstances, which could be even more traumatic if she had a young child? It is true that a victim impact statement or assessment might result in an appropriate sentence being awarded to the convict, but that would not necessarily result in "justice" to the young widow – perhaps rehabilitation is more important to her than merely ensuring that the criminal is awarded a life sentence. There is now a need, therefore, to discuss these issues in the context of social justice and take them forward in the direction suggested by some significant reports that we have had occasion to look into and the direction given by Parliament and judicial pronouncements.'

The Supreme Court expressed its view requiring due consideration of victim impact assessment or statement of the victim as to the pain and suffering undergone by him, after the crime. Such statement may not be allowed to be placed at the time of trial but can be relied upon after the guilt is proved at the phase of sentence hearing. A statement about the consequences of crime which

took a financial toll, loss of earning capacity or partial job loss, pain experienced during medical treatment *etc*., would help the court to approach sentencing comprehensively. In the absence of law on these aspects, the Apex Court's judgment becomes a pioneering effort in the CJA in advancement of justice to victims of crime.

In *Rattan Singh* v. *State of Punjab,*[74] the Supreme Court considered the plight of the legal heirs of the convict prisoners and held that it is a weakness of our jurisprudence that the victims of the crime do not attract the attention of law. It will be useful to reproduce the relevant portion of the judgment as hereunder:

> 'The victimisation of the family of the convict may well be a reality and is regrettable. It is a weakness of our jurisprudence that the victims of the crime, and the distress of the dependants of the prisoner, do not attract the attention of the law. Indeed, victim reparation is still the vanishing point of our criminal law! This is a deficiency in the system which must be rectified by the legislature. We can only draw attention to this matter. Hopefully, the welfare State will bestow better thought and action to traffic justice in the light of the observations we have made.'

It is an important aspect that the Supreme Court and High Courts in India have been dealing with the victims of crime even before introduction of the term victim and conferment of rights by the legislature. In the absence of

[74] (1979) 4 SCC 719, The Supreme Court in this matter, as early as in 1979, also observed that even the legal heirs of the death row convicts may be treated as victims. Such progressive thoughts did emanate from the judiciary in India.

specific laws and provisions to deal with it, judicial intervention did create awareness about victims of crime.

6.16 'One Stop Centers' (OSC) for Victims of crime – Direction of the Court

Some States came up with a new initiative of setting up One Stop Centers (OSCs) to support all women, including girls below 18 years of age, affected by violence and to provide integrated support and assistance to those affected victims. The OSC initiative was launched for the first time in Hyderabad in Telangana State. As it has been successfully functioning and extending multilevel aid to victims, the Government of India, taking cue from the same, published implementation guidelines for State Governments and Union Territory Administrations.[75] The OSCs are intended to support women affected by violence in private and public spaces, within the family, community and at the workplace. Women facing physical, sexual, emotional, psychological and economic abuse, irrespective of age, class, caste, education status, marital status, race and culture will be facilitated with support and redressal. Aggrieved women facing any kind of violence due to attempted sexual harassment, sexual assault, domestic violence, trafficking, honour related crimes, acid attacks or witch-hunt, who have reached out to or been referred to the OSC, will be provided with specialized services.

The BHAROSA – Support Centre for women and children launched in Hyderabad in 2014, to Support Center Women & Children for women in

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[75]' *Towards a New Dawn'* One Stop Centers (OSCs) Implementation Guidelines, Ministry of Women and Child Development (GOI) December, 2017

distress is being set up to provide integrated assistance through Police, Medical, Legal, and Prosecution Services along with Psycho therapeutic counselling, apart from relief and rehabilitation as per her requirements. The Supreme Court has issued direction in *Nipun Saxena* v. *Union of India*[76] for setting up of One Stop Centres (OSC) for women victims, following the Telangana State's initiative. This step of the judiciary is an important milestone in victim assistance as it is envisaged as follows:

> 'In fact, it would be in the interest of children and women, and in the interest of justice if one stop centers are also set up in all the districts of the country as early as possible. These one stop centers can be used as a central police station where all crimes against women and children in the town/city are registered. They should have well trained staff who are sensitive to the needs of children and women who have undergone sexual abuse. This staff should be given adequate training to ensure that they talk to the victims in a compassionate and sensitive manner. Counsellors and psychiatrists should also be available on call at these centers so that if necessary the victims are counseled and in some cases it would be appropriate if the counselors question the victim in a manner in which they have been trained to handle the victims of such offences. These one stop centers should also have adequate medical facilities to provide immediate medical aid to the victims and the medical examination of the victims can be conducted at the centre itself. These one stop centers should also have video conferencing facility available where the statement of the victims to be mandatorily recorded under Section 164 Cr.P.C. can be recorded using video conferencing facilities and the victims need not be produced in the court of the magistrate. There should be court room(s) in these one stop centers which can be

[76] W P No: 565 of 2012 dated 11 December, 2018

> used for trial of such cases. As far as possible these centers should not be situated within the court complex but should be situated near the court complex so that the lawyers are also not inconvenienced. Resultantly, the victims of such offences will never have to go to a court complex which would result in a victim friendly trial. Once such centre which has already been set up is BHAROSA in Hyderabad, this can be used as a model for other one stop centers in the country.'

Subsequently, the High Court Kerala, in a judgment in *Abishek KA @ Bhanu* v. *State of Kerala*,[77] has directed to establish OSC in Kerala. It directed the State as follows:

> 'The State Government shall take immediate steps to make the One-Stop Support Centers directed to be established by the Apex Court in *NipunSaxena*, operational. The State Government shall thereafter establish in a time bound manner as many One-Stop Support Centers needed in the State, so that victims of cases arising under the POCSO Act need not go anywhere else for the purposes of the POCSO Act…. The State Government shall appoint a Nodal Officer at the appropriate level, within two months from the date of receipt of a copy of the judgment, to coordinate the activities of the various Government Departments towards implementation of the provisions of the POCSO Act.'

In the absence of specific laws to safeguard the victims' rights and extend assistance or welfare measures, the Judiciary in India takes the role of guardian of rights and plays a pivotal role within its powers for the victims cause.

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[77] Crl A No: 1087 of 2019 dated 9 September 2020

6.17 Law Commission's Initiatives

The Law Commission of India (LCI), of course, is neither a constitutional nor a statutory body but an executive body of legal experts constituted by the union government to suggest legal reforms. The First Law Commission was established in 1834 by the Charter Act of 1833. It was presided over by Lord Macaulay, which contributed the Indian Penal Code. The First Law Commission of independent India was established in 1955 for a three-year term. Since then, twenty one Commissions have been constituted. The main function of the Law Commission is to conduct legal research and review existing laws with the aim of bringing in reforms. There are 277 Reports (including the Repots in Hindi language) submitted by the LCI till 2020 and many of their recommendations are given effect to and the obsolete laws are reviewed to cater the contemporary needs of the society and those which are not applicable are repealed by the government. The 42nd Report on Indian Penal Code[78] is considered as an important work of the LCI in revamping the criminal justice system.

6.17.1 Law Commission Report on Victims of Crime

Among the reports submitted by the LCI, the 154th Report is the first report that consists of a separate chapter for victimlogy.[79] It has suggested insertion of new provisions recognizing the developments in victimology and for compensating the victims of crimes. The impact of crime on the victims and

[78] Report submitted on June, 1971 by the Law Commission of India
[79] Volume I of the 154th Report of Law Commission of India, submitted on 1996

their families ranges from serious physical and psychological injuries to mild disturbances, described as follows:

> 'Crimes often entail substantive harms to people and not merely symbolic harm to the social order. Consequently, the needs and rights of victims of crime should receive priority attention in the total response to crime.'[80]

The report suggested that the principles of compensation to victims of crime need to be reviewed and expanded to cover all cases. The compensation should not be limited only to fines, penalties and forfeitures realized. It is necessary to incorporate a new section 357 A in the Code to provide for a comprehensive scheme of payment of compensation for all victims fairly and adequately by the courts. The major amendments, including introduction of the term victim and consequential rights provided in the Code of Criminal Procedure are in the spirit of the recommendations made in 154th Report of LCI.

6.17.2 Justice Malimath Committee Report (2003)

The Ministry of Home Affairs, Government of India, by its order dated 24 November, 2000, constituted a Committee under the chairmanship of Dr. Justice V.S. Malimath, *inter alia* to examine the fundamental principles of criminal jurisprudence and to suggest ways and means of developing such synergy among the judiciary, the prosecution and the police as to restore the confidence of the common man in the Criminal Justice System by protecting

[80] Law Commission 154th Report Chapter XV

the innocent and the victim and by punishing unsparingly the guilty and the criminal. This was the first time that the State had constituted such a Committee for a thorough and comprehensive review of the entire Criminal Justice System so that necessary and effective systemic reforms can be made to improve the health of the system. Prison administration is one of the functions of the Criminal Justice System. However, it did not fall within the mandate of the Committee. All the earlier initiatives were of a limited character to bring about reforms in the relevant laws, substantive and procedural laws, judicial reforms or police reforms. The Committee was required to take into account the recommendations made by the Law Commission of India, the Conference of Chief Ministers on Internal Security, the Report of Task Force on Internal security and Padmanabhaiah Committee Report on Police Reforms.[81] The committee considered the need for reform of the present adversarial criminal justice system in India, rights of the accused and also the justice to be rendered to victims of crime. It viewed the victim as a sufferer of disorderly behavior, violent acts or fraudulent deeds and a person in need of protection against lawlessness. The Committee was also of the opinion that liberty cannot exist without protection of basic rights of the citizens (victim) by the government.

The report consists of a separate chapter, 'Justice to Victims' in which a careful study of victims under the existing criminal justice system and need for providing legal, financial and other aids on par with the well recognised rights of the victim in the European jurisdictions. The need of the victim to be put at the heart of the Criminal Justice system and Justice to victim is to be rendered quickly, is the core

[81] Report of the Committee on Reforms of Criminal Justice System, Vol I (March 2013) P 5

issue projected by the Malimath Committee. It observed that unless justice to the victim is put as one of the focal points of criminal proceedings, the system is unlikely to restore the balance as a fair procedure in the pursuit of truth and suggested, *inter alia*, following reforms:

(a) legislate to entitle victims with information about release and management of the offenders and progress of their cases;
(b) enable victims to submit a "victim personal statement" to the courts and other criminal justice agencies setting out the effect of the crime on their lives;
(c) introduce measures for vulnerable and intimidated witnesses, such as screens, pre-recorded video evidence and TV links;
(d) extend specialized support for victims of road traffic incidents and their families;
(e) establish a Victim's Commissioner (Ombudsman)
(f) enable victims to report minor crime online and to track the progress of their case online; legislate to produce a Victims' Code of Practice setting out what protection, practical support and information every victim of a crime has as a right to expect from the criminal justice agencies.[82]

These strategies suggested by the Malimath Committee, which are similar to the ones that have been successfully enforced in United Kingdom, may require suitable modification and adaptation as required within the Indian Justice delivery system for effective implementation. Among the recommendations, only a few have been given effect to. As observed by the Supreme Court, the courts have done and continue to do their level best for the victims of crime.[83] Enhanced judicial care has to be extended to victims in

[82] Committee on the Reforms of Criminal Justice System, (Justice Malimath Committee Report) Vol I, March 2003, P 7 5 @ Para 6.2
[83] *Mallikarjun Kodagil* v. *State of Karnataka*, (2019) 2 SCC 752

India and that would be a comprehensive justice to both the offender and the victims, who are the two indispensible stakeholders of crime.

6.18 Report of the Committee to draft a National Policy Paper on Criminal Justice

A Draft of the National Policy on Criminal Justice was submitted by its Chairman, Dr. N R Madhava Menon, to the Ministry of Home Affairs in July 2007. The Committee has considered the need for victim orientation in the criminal justice system in India. The Report suggested that there is justifiable criticism that the present criminal justice system is totally centered around the accused, ignoring the victim for whom the system purportedly exists and is supposedly operating. The United Nations has also acknowledged this indifference to victims of crime and called upon Member States to amend their laws, giving special rights to victims to participate in criminal proceedings and to claim compensation irrespective of the outcome of the criminal case. Further, the Report emphasized the necessity to implementation of Justice Malimath Committee recommendations. It reads as follows:

> ‘The Committee on Criminal Justice Reforms recommended (2003) empowering of the victims of serious offences with the right to implead themselves as a party, right to be represented by counsel, right to produce independent evidence and cross-examine witnesses with leave of the court, right to be heard in the matter of bail, right to continue with the case if the prosecution sought withdrawal, and the right to advance arguments and to prefer an appeal against an adverse order. There may also be need for victim protection schemes in certain situations. The

State should also ensure rehabilitation of hapless victims of crime and violence.'[84]

Subsequently, in March 2014, the department of health and family welfare, hospital division, issued guidelines and protocols for the medico legal care for survivors/ victims of sexual violence.[85]

6.19 Conclusion

When there were no specific laws to recognize the victim as a stakeholder, the judiciary, being an independent organ, initiated a friendly approach and extended humanitarian gestures towards crime victim. It moved with an object to do complete justice to both the accused and the sufferer of crime. The need to amend the criminal law to fulfill the legitimate expectations of the victim is also often recommended by the courts. The courts played a pioneering role in victim justice even before the insertion of victim oriented provisions in the criminal laws and, after amendments, the courts have been liberally interpreting them to advance easy and expeditious justice to victims. The Law Commissions and other Special Commissions in their reports have laid the foundation for victim justice.

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[84] https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf
[85] Guidelines For Medico-Legal Care for Survivors/Victims of Sexual Violence https://main.mohfw.gov.in/sites/default/files/953522324.pdf

CHAPTER VII
VICTIMS AND THEIR PARTICIPATORY RIGHTS IN THE INDIAN CRIMINAL JURISPRUDENCE

7.1 Introduction

Justice, though due to the accused, is due to the accuser also.[1]

Justice Benjamin N. Cardozo

As a seeker of justice, the victim anticipates fairness from the judicial institutions, expects the decision makers to hear his pleas and requests and consider them in the light of the sufferings undergone by him due to a crime. The justification for such anticipation is that the ultimate result of adjudication or pronouncement in a criminal case has a direct consequence on the victim and implied or indirect consequences on the society. In the process of determination of guilt in a criminal case, the victim and offender are two sides of the same coin. Though the prosecuting task is taken over by the State, in the perspective of the common man, the perpetrator of a crime and its sufferer are considered as two direct parties before the justice seeking process. In the legal perspective also, both the accused and the victim are two inseparable and indispensible entities.

In the adversarial system of criminal justice, a victim's role has been narrowly confined to be that of a witnesses rather than a party and is forced to be dependent on the State or its prosecuting machineries. He is deeply concerned with the result of the determination of guilt, observation, and orders

[1] *Synder* v. *Massachusetts* 291 U S 97 (1934)

etc., delivered by the courts. Some of the legal instruments recently enacted by the legislature, but, have paved a path for victim's participation in the Courts.

This chapter is an analysis about the necessity of the victims to be able to participate in the adjudicatory and justice rendering process.

7.2 Victim Justice (VJ)

Crime occurs when someone violates a law and after the crime, the victims may be experience confusion fear, frustration or anger. They would like to know why this happened, and why it happened to them. Victims often have no knowledge of who or where to turn after the crime. They may feel insecure and may not know who to trust or rely upon for support, understanding, and help. Not only do they suffer physically, emotionally, psychologically and financially from their victimization, they are also often burdened by the complexity of the criminal justice system.[2] As the victim is personally bearing the effects of crime, and suffers pain and agony, his/her legitimate expectation from the legislatures and justice administering machineries is that justice is to be done after hearing and, more importantly, listening to his/her version, because only a victim can make the justice dispensing authorities realise physical pain and mental agony suffered after the crime. It would enable the judicial institutions to be aware of the consequences of the crime upon the victim. Further, for ensuring justice to victims, some of the rights of the victims may have to be considered as inalienable. Every victim may wish and is entitled to know the

[2] *The Impact of Victimization*, The Canadian Resource Centre for Victims of Crime https://www.crcvc.ca/docs/victimization.pdf

1) actual reason or motive or cause for the crime;
2) real culprit or offender and the abettors or conspirators, if any; and
3) reliefs under law and restoration to the pre-crime stage.

The above legitimate expectations of a sufferer of a crime are now universally accepted without any reservation. As such, a sufferer of crime who participates in the criminal justice dispensation process, is not a mute legal entity or a *de facto* party, but a real seeker of justice. Before indulging in the task of finding how a victim can be considered as a seeker of justice, it is appropriate to understand the concept of justice, particularly the justice being administered in criminal cases.

The term justice, in the victim's perspective, includes fair treatment, adequate opportunity for representation, presentation, legal censure against the offender, rehabilitation and restoration, to the extent possible, to pre-crime stage. Dr. Gerd Ferdinand Kirchhof has argued that for a better understanding of victim justice, one has to understand the reality of secondary victimization. The whole process of criminal investigation and trial may cause secondary victimization, from investigation through decision to prosecute or not, the trial itself and the sentencing to the possible release. It is not so much that there are difficulties to balance the rights of the victim with the rights of the offenders, it is more so that personnel are unaware of the possibility that their decisions may victimize, and they act without taking into account the perspective of the victim.[3] In this context, the first question that arises is whether the victim is recognised by the

[3] Dr. Gerd Ferdinand Kirchhof, *Justice for Victims of Crime, https://www.unafei.or.jp/publications/pdf/RS_No93/No93_VE_Kirchhof.pdf*

criminal justice institutions in the process of investigation and adjudication as an area for study, for which a comparative analysis of both the victim and victimiser with respect to their status, rights and duties in the justice administering process is an inevitable area for research. Further, while making a comparative study of the accused and victim, how some of the basic principles, which later evolved as a right, such as right to speedy trial and right to avail legal aid, have been presumed by the court and the criminal law institutions, are also analysed in this chapter. It is interesting to note that the very same principles, through interpretation, may be argued on either side.

7.3 Right to Participation or Legal Representation

As discussed in the above paragraphs, justice has been recognised as an ultimate and lofty goal. After the advent of institutional dispensation of justice, the sufferer cannot punish the guilty and claim justice on his own. The sovereign authority alone is vested with such powers. Criminal jurisprudence, in many of the countries, have recognised the principle that an offence against individual or property is not only against the individual but also an offence against the society and the State. Therefore, State bears the responsibility to investigate, prosecute and try the perpetrator. The Delhi High Court, in 2004 observed thus:

> '… the criminal commits the crime. The State apprehends the accused and brings him to trial. If (the accused) is found guilty, he is convicted and sentenced to undergo punishment. Does this complete the wheel of criminal justice? What about the crime victims? Traditionally, it may have been sufficient that the criminal is caught and punished. But, the modern approach is to also focus on the victims of crime. It is all well that the accused is given a fair and just trial, that the guilty are punished, that the convicts and prisoners are given a humane treatment, that jail conditions are improved and the erstwhile criminals are rehabilitated, but, what about the crime victim?'[4]

Modern criminologist raise question and suggests that in the judicial process, in addition to the punishment of the accused, relief is to be provided to the person traumatised by the crime occurrence, recognising him/her as a stakeholder in the CJA. In the process of justice, the first and foremost step in the access to justice is the participation or representation in the justice dispensing process. The Supreme Court, in *Dayal Singh* v. *State of Uttaranchal*,[5] has held that a criminal trial is meant for justice to all, the accused, society and the victim. Common Law jurisdictions have encouraged legal representation for the accused, many a times at the State's cost. On the other hand, it has grossly ignored such a right and necessity of the victim, who is another stakeholder of the same proceedings. The victim participation in the judicial process enforces the basic concept of fair trial and also strengthens the legal doctrine that the justice should not only be done, must also be seen to be done. The victim participation would:

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[4] *Kamla Devi* v. *Government of NCT of Delhi* 2005 ACJ 216
[5] (2012) 8 SCC 263

1) create equal access to all stakeholders;
2) enhance the assistant to the court in its judicial probe;
3) increase the accuracy of facts in the judicial pronouncements;
4) reduce the chance of tempering or winning over of the victims or witnesses;
5) ensure better treatment of victim and witnesses in the judicial process; and
6) provide an opportunity to be adequately represented to comprehensively place the victim's case before the court.

The purpose of providing an opportunity to the victim to have legal representation in the judicial proceedings is to adhere to one of the fundamental quality of fairness, fulfilling the basic principles of natural justice. The concept of natural justice that is traditionally viewed as hearing a person before condemnation, but this well recognised principle of *audi alterm partem* should not be confined as applicable only before passing a censure against a person, and has to be extended to all parties of the proceedings, including the victim, is what a modern jurist expects.

7.4 Principles of Natural Justice and Victims of Crime

Hearing a party of a proceeding has many facets, of which two aspects deserve special mention, and they are:

(i) notice of the facts in brief is to be sent to the party to prepare his defence; and
(ii) opportunity to be afforded to the party to explain his case.[6]

[6] B.C. Sarma, *Fair Hearing and Access to Justice*, Eastern Law House (2012) P 48

The concept of opportunity to the parties evolved into 'reasonable opportunity.' The concept of 'reasonable opportunity' is an elastic one and is not susceptible to easy and precise definition. What is reasonable opportunity under one set of circumstances need not be reasonable under different circumstances. It is the duty of the Court to ascertain in each case, having regard to the overall picture before it, to come to a conclusion whether reasonable opportunity is given to a person or not.[7]

Further, the International Covenant on Civil and Political Rights declares the right of an individual to a fair hearing in matters concerning any determination of his rights and obligations. It confers right to be heard and the relevant provision states that all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal, established by law.[8]

The victim could not exercise his valuable right to be heard before a court of law, because the traditional criminal litigation did not recognise him. When the old Cr.P.C 1898 was in force, the Supreme Court, in *Thakur Ram* v. *State of Bihar*,[9] clearly held that a victim has no *locus standi* to challenge the order of a Magistrate. It was an application by the Public Prosecutor to add and alter charges framed against the accused, and to commit the case for trial before

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[7] *Mineral Development Ltd* v. *State of Bihar,* AIR 1960 SC 468

[8] The International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December, 1966.

[9] AIR 1966 SC 911

the Court of Sessions. The Magistrate dismissed the application. Aggrieved by the said order, the victim preferred an appeal, and it was allowed by the Sessions Court. However, the Apex Court set aside the order of the Sessions Judge on the ground that the victim is not a real party and has no such right to prefer an appeal.

Subsequently, under the new Cr.P.C. things were not very different. In *A K Subbaiah* v. *State of Karnataka,*[10] under Section 500 IPC, the Chief Minister (CM) and Director General of Police (DGP) were cited as accused persons. The trial court issued summons to them, against which they took the matter on Revision and the High Court was of the view that the complaint suffered lack of material to sustain prosecution against the CM and DGP. As a result, the High Court ordered exoneration of both from the proceedings. The complainant approached the Supreme Court against the exoneration of the accused persons, where the Apex Court reasoned as follows:

> 'It is not in dispute that these two respondents 2 and 3 were not parties before the court below. Learned counsel for the appellants contended that the proceedings have been launched by the State Government on behalf of the respondent no 2 and, therefore, indirectly respondent no 2 being the complainant is a party to the proceedings. That is too tall a proposition. The prosecution is launched by the State Government and before the Court below *i.e.* the trial Court; the only parties are the petitioners, who are accused persons, and the State Government which stands in the place of a complainant. There are prosecution witnesses and there may even be defendant witnesses. But, the witnesses are not parties to the proceedings, and admittedly these two respondents, who

[10] (1987) 4 SCC 577

> have been deleted by the impugned order of the High Court, were not parties.'

The victim was not recognised even as a stakeholder or a party at all by justice rendering mechanism, and it was held that the victim has no right to participate in the proceedings.

7.5 Victim and Victimiser: *De facto* and *De Jure* Parties

A prosecutor in the United States, who handled many sensational cases, in hindsight, stated that the victim is a direct and first stakeholder of judgment in the criminal cases -

> 'As I said, in the judgment phase, there are many stakeholders, the prosecutor, the defendant, the court and the public. One constituency sometimes gets short shrift – the victim. Not all crimes and bad deeds have identifiable victims. But when they do, an important question to ask is, what treatment do they deserve? What degree of solicitousness, care, protection, empathy, is owed by the prosecutor and by the court? How do we make sure a credible victim, who is nonetheless disbelieved and powerless, gets her day in court?'[11]

In CJA, the victim and the victimiser are two indivisible, inevitable and inseparable stakeholders. Both are parallel or rival parties. They have their own identity and their respective roles to play, and rights to exercise, duties to perform as contemplated in laws governing criminal justice dispensation in India. The accused is always a *de jure* party, who can defend himself. But, the victim is, mostly, only a *de facto* party. The victim ought to be considered as a

[11] Preet Bharara, *Doing Justice- A prosecutors thoughts on Crime, Punishments and the law* Bloomsbury Publishing, New Delhi, (2019) P 217

natural party as she may have suffered harm including physical, mental, or financial. The State, which is a legal entity, usurps the role of the victim, conducts investigation and tries the matter for proving guilt.

The accused has been bestowed with strong and inalienable constitutional rights. Unlike the accused, there is no constitutional guarantee provided to the victim. In fact, the victim was not extended even with humanitarian gestures, such as medical aid or psychological counseling or other basic requirements for survival after the crime. The laws governing justice dispensation have not allowed the victim to distinctly play any role. Once he reports the crime to police, it becomes the public cause of action. It is treated as an offence against the State which gets investigated by its agency, it decides whether the offender should be prosecuted or punished, and if it decides on prosecution, it can move the court for trial of the offender in a court of law. His injury becomes the occasion for a public cause of action, but he has no 'standing' to compel prosecution of the crime against him, or to contest decisions to dismiss or reduce the charge or to challenge the sentence imposed on the offender who has injured him, or to press for hearing on restitution.'[12] It is the common scenario of the criminal justice system in India also.

7.6 'Ten' guilty People and one 'Victim': Comparison and Proportionality

There have been ideas of criminal laws comparing the accused and the victim. A popular phrase says, 'it is better that ten guilty escape than make one innocent suffer.' This is a maxim often quoted in the process of determination

[12] Bharat B Das, *Victims in the Criminal Justice System*, APH Publishing Corporation, New Delhi (1997) P 16

of the guilt in criminal cases. The meaning, as understood by the legal fraternity is that, it is better to let the guilty person go unpunished than to condemn the innocent. It is based on the old concept that innocence should be protected even at the danger of letting the offender escape from the clutches of law. This doctrine had been in existence in ancient Rome in the old saying. It became the foundation of criminal justice in many jurisdictions that follow the common law. William Blackstone, in his commentaries, wrote thus:

> '… the doctrine of evidence upon pleas of the Crown is, in most respects, the same as that upon civil actions. There are, however a few leading points, where, by several statutes and resolutions, a difference is made between civil and criminal evidence. . .. All presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer. And Sir Matthew Hale in particular, lays down two rules, most prudent and necessary to be observed:
>
> 1) never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods: and,
>
> 2) never to convict any person of murder or manslaughter, till at least the body be found dead; on account of two instances he mentions, where persons were executed for the murder of others, who were then alive, but missing.'[13]

After it appeared in the book *Commentaries on the Laws of England* in 1765, it gained momentum and was indoctrinated into the criminal justice system. The principle that convicting an innocent person is a morally more

[13] See William Blackstone, *Commentaries on the Laws of England,* (Vol 4) published in 1760.

serious error than acquitting a guilty person has been adopted in the Anglo-Saxon criminal jurisprudence.

Jurists have emphasised that it cannot be strictly absorbed in arithmetic ratio, yet the debates continue in the academic arena as to the justification of acquittals in the criminal cases. Richard Fallon explains that the errors that result in the conviction of the innocent are more morally disturbing than the errors that result in acquittals of the guilty. In the light of that assessment, we have adopted a system that minimises the most morally grievous errors, even if that system leads to more of the less grievous errors, and indeed to more total errors, than would an alternative.[14] Many of the countries in their criminal laws have informally recognised Blackstone's idea that it is better that ten guilty persons escape than that one innocent suffer. In the process of justice dispensation, for want of concrete or clear evidence or for technical or other reasons, the accused persons are acquitted by extending the benefit of doubt. In such circumstances the sufferer of crime is forced to face ridicule from society and is left helpless by the justice system. Therefore, application of the above doctrine and viewing the victim with lesser significance, and considering the accused as a privileged person, creates a bias in the institutional framework.

The comparison of the victim with the accused in the perspective of William Blackstone is now being criticised by the courts. In the decision in

[14] Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1706(2008). https://dash.harvard.edu/bitstream/handle/1/11222677/fallon_judicialreview.pdf?sequence=1&isAllowed=y

Vinu Bhai Ranchhodbhai Patel v. *Rajivbhai Dudabhai Patel*,[15] the Apex Court anguished over the acquittal of the accused person in spite of the gravity of the offence of the murder of three persons, and the evidence of five injured witnesses. It observed that every trial court should be sensitised with the famous phrase 'hundred accused acquittal and one innocent conviction'. The following prophetic words of V R. Krishna Iyer deserve to be etched on the walls of every criminal court in this country:

> 'The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless…..'[16]

[15] (2018) 7 SCC 743
[16] *Shivaji Sahabrao Bobde* v. *State of Maharashtra* (1973) SCC 793.

The Supreme Court has held that the time to re-consider the dictum that ten criminals may go on punished, but one innocent should not be convicted, has arisen.

In *Dinubhai Bogabhai Solanki* v. *State Of Gujarat,*[17] the Supreme Court makes it clear that the criminal justice system has to not only consider the rights of the accused but also the plights of the sufferer of crimes. This observation is fresh and pragmatic. It observed thus:

> '… it is in the larger interest of society that the actual perpetrator of the crime gets convicted and is suitably punished. Those persons, who have committed the crime, if allowed to go unpunished, also leads to weakening of the criminal justice system and the society starts losing faith therein. Therefore, the first part of the celebrated dictum "ten criminals may go unpunished but one innocent should not be convicted" has not to be taken routinely. No doubt, the latter part of the aforesaid phrase *i.e.* "innocent person should not be convicted" still remains valid. However, that does not mean that in the process "ten persons may go unpunished" and law becomes a mute spectator to this scenario, showing its helplessness. In order to ensure that the criminal justice system is vibrant and effective, perpetrators of the crime should not go unpunished and all efforts are to be made to plug the loopholes which may give rise to the aforesaid situation.'

The position which emerges is that in a criminal trial, on the one hand, there are certain fundamental presumptions in favour of the accused which are aimed at ensuring that innocent persons are not convicted. And, on the other hand, it is also recognised that the criminal justice system has to function

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[17] (2018) 11 SCC 129 at Paragraph33

effectively by ensuring that the criminal should not go unpunished. Simultaneously, the victims of crimes are also to be looked after well by the laws governing and the system rendering criminal justice. After all, the basic aim of any good legal system is to do justice, which is to ensure that injustice is not meted out to any citizen. This calls for balancing the interests of the accused as well as victims, which, in turn, depends on fair trial. For achieving this fair trial objective, which is the solemn function of the court, the role of the witnesses assumes great significance. A fair trial is possible only when the witnesses are truthful as 'they are the eyes and ears' of the court.

Further, the Supreme Court has observed that the acquittal of a guilty person for want of evidence or on technical grounds is a miscarriage of justice. It was held in *Bijender @ Mandar* v. *State of Haryana*[18] thus:

> 'Incontrovertibly, where the prosecution fails to inspire confidence in the manner and/or contents of the recovery with regard to its nexus to the alleged offence, the Court ought to stretch the benefit of doubt to the accused. Its nearly three centuries old cardinal principle of criminal jurisprudence that "*it is better that ten guilty persons escape, than that one innocent suffer*". The doctrine of extending benefit of doubt to an accused, notwithstanding the proof of a strong suspicion, holds its fort on the premise that "*the acquittal of a guilty person constitutes a miscarriage of justice just as much as the conviction of the innocent*".

[18] *Bijender @ Mandar* v. *State Of Haryana,* Crl Appeal No: 2438 of 2010 dated 8 November, 2021

Though there are many doctrines supporting the accused - centric criminal justice system, Blackstone's ratio is the most important one that extremely tilts the balance in favour of the accused. In administering criminal justice, two kinds of errors are possible; wrong acquittals and erroneous convictions. Blackstone prefers to give more weightage to avoid the first over the second. 10:1 ratio, as laid down in 'Blackstone Ratio' expresses the classic Anglo – American idea of 'presumption of innocence', that prevails in criminal law. This means that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to the law. The maxim was widely adopted in the English courts during the middle Ages and it became a part of Common Law by 1802. By 1823, it became a maxim of English Law and was cited in judicial opinions. When Blackstone voted for 10:1, many other thinkers applied their own numbers to this ratio. Justice Benjamin Cardozo favoured 5:1, Benjamin Franklin believed that it is better that a hundred guilty persons escape than one innocent person being made to suffer.[19]

The Supreme Court, in *Kaliram* v. *State of H.P.*,[20] has referred to the observation of Sir Carleton Allen quoted in 'The Proof of Guilt' (by Glanville Williams, page 157 of Second Edition)

> 'I dare say some sentimentalists would assent to the proposition that it is better that a thousand or even a million guilty persons should escape than that one innocent person should suffer, but no responsible and

[19] Nirmala R Umanath, *Nameless and Faceless: Victims in the Criminal Justice System*, Universal Law Publishing (2016) P 5
[20] (1973) 2 SCC 808

> practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos.'

As observed and cautioned by the Supreme Court in *Mallikarjuna Kodagil* v. *State of Karnataka*,[21] the comparison of the accused to the victim is not appropriate because imbalances prevail and there needs to be some balancing of the concerns and equalizing of their rights in so many aspects. The travails and tribulations of the victims of crime begin with the trauma of the crime itself, and unfortunately, continue with the difficulties they face in something as simple as the registration of a First Information Report. The ordeal continues, quite frequently, in the investigation that may not necessarily be unbiased, particularly in respect of crimes against women and children. Access to justice in terms of affordability, effective legal aid and advice as well as adequate and equal representation, are also problems that the victim has to contend with, and which impacts society, the rule of law and justice delivery.

7.7 Legal heirs as perpetrators and interest of victims that any gain to them is denied

The universally accepted general rule that 'no man should profit from his own wrong' is applicable to the victimiser. This principle reflects the consequence of crime in the realm of civil jurisprudence. A person who commits a murder or abets the commission of such crimes shall be disqualified from inheriting the property of the murdered. This principle of disqualification from inheritance or succession has been accepted by many countries as a rule

[21] (2019) 2 SCC 752

of inheritance. The perpetrator should not benefit from the assets left by the deceased victim. The Hindu Law of Succession recognises this principle of 'murderer being disqualified' and this has also been upheld by the courts in India.[22]

The Madras High Court in *Saravanabhava* v. *Salemmal*[23] has held that almost all systems of law have recognised that a person guilty of homicide cannot claim the property of the victim and the murderer is denied the properties of a victim. A person who participated in the attack on his father along with others was convicted of murder, but the son was given the benefit of doubt from the charge of murder of his father. Nonetheless, he was convicted under Section 324 read with Section 34 IPC for causing injuries to other witnesses. The High Court treated the son, who was only punished for a lesser offence of simple injury, as a person disqualified to inherit his father's property, even though he was not found guilty under section 302 IPC.[24] Therefore, in cases of victims who were murdered by their direct heirs who may be entitled to claim succession, the murderer is disentitled from making such a claim over the properties left behind by the victims. This is a victim benevolent provision in the law of succession which respects the intention or will about the disposal of estate and properties after the person murdered and turns as victim in a crime occurrence.

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[22] Section 25, Hindu Succession Act, 1956
[23] 1972 (2) MLJ 49
[24] *Sitaramaiah* v. *Ramakrishnaih* AIR 1970 AP 407

7.8 Procedural Laws vis-*à-vis* the accused and victim

In India, the Code of Criminal Procedure, 1973 prescribes the procedures and powers for administration of justice in criminal cases. The Courts have made it clear that the criminal procedure is not devised on behalf of the prosecution or on behalf of the accused, and anything that derogates from the proper claims of justice is inherently absurd.[25] The Cr.P.C. is required to be a neutral procedural law for both stakeholders. But, many of the procedures are accused-friendly and often unilateral too. The first and foremost aspect is the right to know the substantial developments in the investigation process, such as making known the arrest of the accused person, collection of documents or material objects or weapons etc.. As per Section 50 Cr. P. C., the accused is entitled to know the grounds of his/her arrest, and the police officer or any other person arresting him/her shall communicate the grounds of arrest to the accused. Further, if a person is arrested, other than for a non-bailable offence, he shall be informed about entitlement to be released on bail.[26]

The rights of the accused person, to know and to be informed about the grounds of his arrest and entitlement to bail, is justified in the human rights perspective. However, there is no such duty bestowed upon the person arresting the accused to inform the *de facto* complainant or the victim about the

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[25] *In Re Kalesha* AIR 1931 Mad 779

[26] S. 50 Person arrested to be informed of grounds of arrest and of right to bail. *(1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other grounds for such arrest.*

(2)Where a police officer arrests without warrant any person other than a person accused of a non-bailable offence, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf.

person's arrest, which may be a significant step in cause of investigation after the law was set in motion by the victim or his dependants.

Under Section 50 A of Cr.P.C., the person making the arrest is duty bound to inform about the arrest, and the right to be released on bail in case of bailable offence, not only to the arrested person but also to the relatives, friends or the person disclosed or nominated by the accused. It is also the duty of the Magistrate to verify the compliance with Section 50, 50A of Cr.P.C. by the police or the person arresting the accused. In *D K Basu* v. *State of West* Bengal[27] to avoid infringement of fundamental rights of arrested person there are ten mandatory conditions identified to be complied with the police and judicial magistrates in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures. They are:

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name togs with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest a memo shall be attested by atleast one witness. who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

[27] (1997) 1 SCC 416

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of he next friend of the person who has been informed of the arrest an the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned Stare or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well. (9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation. (11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

There is no express provision in Cr.P.C. obligating the State or its agencies to let the victim know the details of arrest or the fact that entitles the arrested to bail or the bail granted, if any. Under Article 22(2) Constitution of India, the person arrested and detained in police custody is to be produced before the nearest Magistrate without delay, and within a period of 24 hours. This constitutional protection is also reflected in Section 76 of Cr.P.C.[28] Prior to the remand process or before sending the accused to judicial custody, under Sections 53 and 54 of Cr.P.C., the arrested person shall be examined by a medical practitioner, both for the purpose of investigation and also to ascertain the injuries or marks of violence on the body of the arrested person.[29] Further, the arrested person or his relatives are also entitled to a copy of a report of such examination.

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[28] Person arrested to be brought before Court without delay. The police officer or other person executing a warrant of arrest shall (subject to the provisions of Section 71 as to security) without unnecessary delay to bring the person arrested before the Court before which he is required by law to produce such person:
Provided that such delay shall not, in any case, exceed 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

[29] Section 53 empowers a police officer not below the rank of Sub-Inspector to make a request for examination of the person arrested by a medical practitioner. Section 54 contemplates the procedure of examination of arrested person by medical officer.

If an accused is arrested on information of having committed a cognizable case, the State becomes duty bound to take care of the medical needs of the arrested. But there is no such express provision in Cr.P.C. to immediately refer the injured victim for medical treatment. The victim will have to suffer and avail of medical treatment on his own and try to survive. Neither any organ of the State is obligated nor is any court empowered to issue directions by any specific provisions of Cr.P.C to provide medical aid to the victims of crime.

The Code of Criminal Procedure, 1973 has expressly recognised only one right of the victim *i.e.*, the copy of the information to be given to the informant free of cost under Section 154(2).[30] Therefore, the victim or informant is entitled to a copy of First Information Report (FIR) registered on the basis of the information relating to the commission of cognizable offence by an officer in charge of the police station. After the completion of investigation, the officer who investigated that crime is to forward a report in the form prescribed by the State Government stating the names and details of parties, nature of crime, names and description of the person who appeared to be acquainted with the circumstances of the case, and all other materials collected during the investigation, to a Magistrate empowered to take cognizance of the offence on a police report. The said report, filed by the investigation officer, is known as charge sheet in common parlance, and is termed as final report in the legal parlance. Before the framing of charges and

[30] Section 154 (2): A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.

commencement of trial, the court shall furnish the copies of the police report and other documents to the accused under Sections 207 and 208 Cr.P.C. This is a mandatory requirement and the court shall comply with it. Accordingly, the accused person is entitled to the copies of statements and documents.[31]

It is an important aspect of criminal law that one of the stakeholders has been empowered with information, made aware of all facts of the case, including statements, confessions and the contents of documents before the trial begins. But, the other stakeholder, who is the victim, is not entitled to any copies of such statements and documents. It shows that the law empowers one of the parties who has to defend a criminal case with information, but the other party, who mostly has to supplement the case of the prosecution, is not adequately informed about the details of the investigation. It may create inequality between two parties in presentation of their sides in the adjudicatory process. The victim is mostly an indispensible key witness, who furnishes statements, and often produces documents from his/her custody to assist the investigating agency, but faces the trial in darkness.

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[31] Section 208: Supply of copies of statements and documents to accused in other cases triable by Court of Session. Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following: -

(i) the statements recorded under section 200 or section 202, of all persons examined by the Magistrate

(ii) the statements and confessions, if any, recorded under section 161 or section 164

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court.

A victim is not guaranteed the right to receive such materials that are supplied by the prosecution to the accused or placed before the courts for the purpose of determination of guilt or deciding the quantum of sentence. After all, the victim has to appear as a witness and depose oral evidence in the trial or may have to interpret the contents of documents relied upon by the prosecution or the defence. A victim may feel being treated as an outsider in the proceedings relating to the crime committed against him and that may make makes him regard criminal law as unresponsive to his concerns. He may feel that he is not a party but a mere witness.[32]

7.9 Entitlement to copies of CCTV Footage

The latest developments in science and technology have transformed investigation of crimes and have considerably reduced the burden of examination of ocular witnesses and recording of oral evidence, especially after the advent of Closed Circuit Television (CCTV). The recorded images help crime investigation in the identification of facts relevant to crime. In some cities CCTV surveillance is made mandatory for the gated community residences, malls or shopping complexes. The audio, video and other recordings made in the electronic gadgets now play an important role in investigation and other process. The Kerala High Court, in *Jisal Rasak* v. *The State of Kerala*,[33] pointed out how electronic evidence may help to secure the accused person in sensational cases. The court noted that the production of

[32] Bharat B Das, *Victims in the Criminal Justice System*, APH Publishing Corporation, New Delhi (1997) P 16

[33] 2018 (3) KHC 725

scientific and electronic evidence in court as contemplated under Section 65 B of the Evidence Act is of great help to the investigating agency and to the prosecution.

The relevance of electronic evidence came to light in *Mohd. Ajmal Mohammad Amir Kasab* v. *State of Maharashtra*[34] wherein the production of transcripts of internet transaction helped the prosecution case a great deal in proving the guilt of the accused. Similarly, in the case of *State (NCT of Delhi)* v. *Navjot Sandhu @ Afsan Guru*[35] the links between the slain terrorists and the masterminds of the attack were established only through phone call transcripts obtained from the mobile service providers. When the recorded images of the CCTV surveillance is produced as a piece of evidence in trial, is an accused entitled to a copy of such footage? This question was raised in the *Jisal Rasak* Case before the Kerala High Court. The CCTV system consists of video camera, display monitors and recording devices. The High Court held that CCTV footage collected during the course of the investigation falls within the category of documents, and the accused is entitled to a copy of it, as per Section 207 Cr.P.C. The concept followed by the Kerala High Court is that, whatever may be the documents or materials collected or obtained by the investigating agency during the course of investigation, the accused has a right to seek a copy of them as he has to defend himself in the trial. The Kerala High Court followed the decision of the Supreme Court in the *Sidhartha*

[34] (2012) 9 SCC 1
[35] (2005) 11 SCC 600

Vashisht v. *State (NCT of Delhi).*[36] Both the judgments have made it clear that the accused, who is defending the case, is to be furnished with the copies of all documents and be well informed about the case against him.

The victim, for presenting the case on his behalf and on behalf of the prosecution or helping in substantiating the charges against the accused, is not entitled to such material documents which are collected during the investigation. Consequently, the victims are often forced to depose without being adequately informed about the materials placed before the court to prove the case by the prosecution. Therefore, he cannot face the cross examination as an informed witness.

The evident disparities in the entitlements between the accused and the victim, when they step into court for criminal dispute resolution, can be summed up in a tabular column as follows:

[36] (2010) 6 SCC 1

ENTITLEMENT OF	
ACCUSED	**VICTIM**
Copies of FIR U/s 154(2) Cr.P.C with final report U/s 173(2) Cr.P.C free of cost	Not entitled for Final Report
Copies of Statements recorded U/s 200 (or) 202 of Cr.P.C.	Not entitled free of cost.
Statements and Confession U/s 161 (or) 164 of Cr.P.C.	Not entitled free of cost
Any document produced by the Prosecution.	Not entitled free of cost
Inspection of Voluminous documents U/s 208 Cr.P.C.	Benefits of Section 208 not extended.
Copies of Judgments U/s 363 (2) Cr PC free of cost.	Cannot claim it as a matter of right.
C.C.TV footage	Not mandatory to furnish

These inequities would reflect how the system treats a victim when the criminal case comes up for trial.

7.10 Victim: A Party with limited Participation

The word trial is not defined in the Code of Criminal Procedure, 1973. The process of trial has been understood as a judicial examination and determination of issues, whether of fact or of law, between parties to action. A cause of action means a ground for legal action. Fair trial for a criminal offence consists not only in technical observance of frame and forms of law but also in recognition and just application of its principles in substance to find out the truth and prevent miscarriage of justice.[37]

[37] B.C. Sarma, *Fair Hearing and Access to Justice*, Eastern Law House, (2012) P 14

The determination of guilt, imposition of appropriate sentence and providing some other reliefs in a few cases, are the basic purposes of trial in the criminal case. Therefore, all the parties to the trial have to be given opportunities to represent and make their pleas to be heard by the decision making authority. In the adversarial system, the victim's action to set the law in motion opens the door to State to usurp the role of victim and start the investigation. Ultimately, whatever be the materials collected by the State and its prosecuting agency, they would be placed before the court of law for the important process of adjudication. After the reporting of crime, the State apprehends the perpetrator of crime; and it is the judiciary that decides whether to put the accused behind bar or to enlarge him on bail. From the initial process of considering bail to the ultimate stage of sentencing, the victim has no right to actively and directly participate, or to be heard as an indispensible party. Participation in the adjudicatory proceedings by the parties is a significant facet of principles of natural justice. It paves the way for the stakeholders to access justice. The victims of crime have been made as non-entities by the procedures and practices before the court of law. They play a pivotal role in both the collection of evidence, and proving of guilt. It is paradoxical that the victims harmed by the crime are not only grossly ignored by the adversarial criminal justice rendering mechanism, but they also have no say in any of the stages of trial and other incidental claims. The participation in the proceedings before the court of law is cardinal to the delivery of justice. But refusal to guarantee absolute participatory rights to the victims who are the

sufferers and by product of crimes, challenges the universally-accepted principles of fair trial. The fair trial under criminal justice administration primarily concerns the rights of the accused, punishing the guilty and their rehabilitation. The law and practices are biased towards the accused, the inequality in treating two stakeholders in the same adjudicatory process has been prevailing as an unfair factor. A fair trial is a natural and human right of a party, be it a perpetrator of crime or the victim.

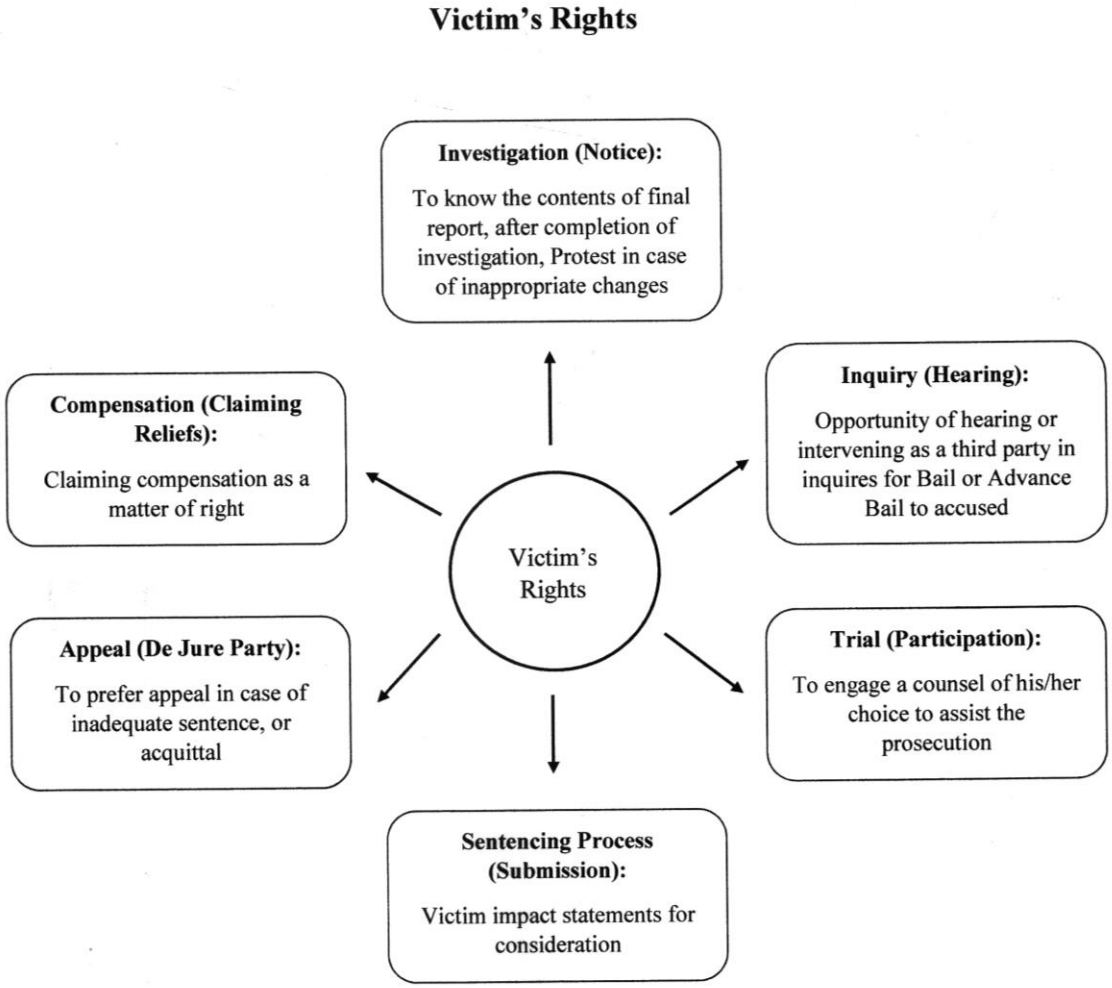
In *R.* v. *Chancellor of Cambridge University,*[38] the Court in England relied upon a text from the Bible and held that even God himself did not pass sentence upon Adam before he was called upon to make his defence. The concept of providing an opportunity before imposing legal censure upon a person is a salutory principle of law and it has to be strictly followed without any deviation. But the person harmed by crime also has to be heard while dealing with the crime and its perpetrator. It would be a comprehensive approach to crime, and would be helpful in the task of its prevention, and re-offending and restoring tranquility in society.

The concept of providing an opportunity to the accused at every phase and stage of crime became strong and inalienable after the introduction of human rights laws and constitutional laws with provisions of fundamental rights. Simultaneously, the concept that a victim also has to be extended the basic rights, at least to represent in the judicial proceedings, for the cause of justice, has been gaining ground in criminal jurisprudence. The courts have

[38] [1723] 1 STRA 557

expanded the concept of fair hearing and extended it to victims in the criminal trial. The Supreme Court has made it clear that an impartial and uninfluenced trial is the fundamental requirement of a fair trial, the first and foremost imperative of a criminal justice delivery system. If a criminal trial is not free or fair, the criminal justice system would be at stake, eroding the confidence of the people in the system.[39]

The following representation would elucidate the same:



[39] *Nahar Singh* v. *Union of India* (2011) 1 SCC 307

7.11 Right to Speedy Trial

The criminal laws are designed to protect life and property, and to preserve peace in civilised communities. In order accomplish those results, an organised government imposes punishment on those who violate criminal laws. It appears, therefore, that if we wish to enjoy the benefits of protection of life and the preservation of property, for which government was primarily organised, it is imperative that cases arising under the criminal laws be speedily disposed of.[40]

Every litigant, be it an accused or victim, legitimately expects expeditious adjudication of disputes. Delay in dispensation of justice causes unnecessary mental agony and financial loss to its stakeholders. In criminal cases, ocular witnesses' memory may fade and they may not recollect certain technical details relating to the place of occurrence, size or description of the weapons used in the crime etc., if the trial comes up before the courts after a long delay, potentially fatal to prosecution. Timely resolution of disputes creates confidence in the minds of common public about the judiciary. Speedy trial is the essence of the criminal justice and there can be no doubt that delays in the trial, by itself, constitute denial of justice.[41] Delay has been a global phenomenon in justice governance. In the United States, the right to speedy trial is one of the constitutionally guaranteed rights.[42] The Sixth Amendment to the Constitution provides:

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[40] Edwin W. Sims, *Speedy Justice in Criminal Cases,* 7A.B.A.J.598(1921)
[41] A.I.R. 1981 S.C. 1675
[42] *Glenn Martin Harrington* v. *State of California*, 1970, U.S.S.C. 15

> "In all criminal prosecutions the accused shall enjoy the right to speedy and public trial by an impartial jury of the State and District, wherein the crime shall have been committed."

The judicial system of developed countries, where speedy trial has been guaranteed as a constitutional right, also suffers from this menace of delay in dispensation of justice.

However, the Supreme Court of the United States decided a case relating to speedy trial in *Brandon Thomas Betterman* v. *Montana.*[43] It was a case wherein an offender of domestic assault incident faced parole jumping charges, pleaded guilty before the trial court, but was made to wait for about 14 months before the pronouncement of conviction and sentence. The institutional delay of setting a sentencing hearing was challenged by the offender on the ground that it violated the Sixth Amendment's Speedy Trial Clause. The US Supreme Court traced the genesis of speedy trial and stated that 'our reading comports with the historical understanding that the speedy trial we observed "has its roots at the very foundation of our English law heritage." Its first articulation appears to have been made in *Magna Carta* (1215). The Court also held that the in understanding of the Sixth Amendment language, an 'accused' is to be distinguished from 'convicted', and trial as separate from 'sentencing'. It went on to hold that the petitioner cannot bring a claim under the Speedy Trial Clause for a delay between his guilty plea and sentencing.

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[43] 578 U.S_(2016) May 19, 2016 available at https://www.supremecourt.gov/opinions/15pdf/14-1457_21o2.pdf

Consequently, the benefit of the Sixth Amendment, the speedy trial right, was not extended to a convict who suffered institutional delay in sentencing. This case is a classic instance of how delay has been occurring at various stages of dispensation of justice, particularly in the criminal cases.

In some cases, the accused persons adopt delaying tactics to defeat the claim of the victims or to cause annoyance to the injured or witnesses. The Indian Supreme Court has pointed out that:

> '… it is one of the sad and distressing features of our criminal justice system that an accused who is determined to delay the day of reckoning, may quite conveniently and comfortably do so, if he can afford the cost involved, by journeying back and forth between the court at the first instance, and the superior courts, at frequent interlocutory stages. Applications abound to quash investigations, complaints and charges on all imaginable grounds, depending on the ingenuity of client and counsel, so as a court takes cognisance of a case requiring sanction or consent to prosecute, the sanction or consent is questioned as improperly accorded, as soon as a witness is examined or a document produced, the evidence is challenged as illegally received and many of them are taken to the High Court and some of them reach this court too, on the theory that "it goes to the root of the matter." There are always petitions alleging "assuming the entire prosecution case to be true, no offence is made out." And inevitably proceedings are stayed and trials delayed. Delay is a known defence tactic. With the passage of the time, witnesses cease to be available and memories cease to be fresh. Vanishing witnesses and fading memories render the onus on the prosecution even more burdensome and makes a welter weight task a heavy weight one.'[44]

[44] *State of Maharashtra* v. *Champalal Punjaji Shah*, AIR 1981 SC 1675

These types of institutional delays produce novel kind of victims, who have suffered at the hands of the criminal justice institutions and their procedural delays.

While the Constitution of the US guarantees the right to speedy trial to the accused person, many States and Federal governments have enacted legislation to protect the interest of victims to avail of the benefits of speedy trial in 2004. The Crime Victims Right's Act,[45] is a milestone in the journey of recognising the victims' rights. It is a part of United States Justice for All Act, 2004.

The right to expeditious trial has been recognised in the International Charters and Conventions. The International Convention on Civil and Political Rights (ICCPR) explicitly provides for the right to speedy trial.[46] Article 19(1) declares that everyone has the right to liberty and security of person, and that no one shall be subject to arbitrary arrest or detention. Article 9(3) declares further that anyone arrested or detained on a criminal charge shall be brought promptly before a Judge or other officer authorised by law to exercise judicial power, and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that the persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial at any stage of the judicial proceedings and should occasion arise, for execution of the judgment. Article 10(1) provides that all persons deprived of their liberty shall

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[45] 18 U. S C $ 3771

[46] The International Convention on Civil and Political Rights (ICCPR) Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December, 1966 entry into force 23 March, 1976

be treated with humanity and with respect for the inherent dignity of the human person. Article 17 declares that the primary honour and reputation of an individual shall not be interfered with unlawfully. Article 2(2) creates an obligation upon the ratifying States to enact domestic legislation to give effect to the rights guaranteed by the Covenant. Article 3 creates a further obligation upon such States to ensure that the rights guaranteed by the Covenant are made available to all their citizens.

The Supreme Court in *People's Union of Civil Liberties* v. *Union of India*,[47] has observed that the provisions of the Covenant, which elucidate and go to effectuate the fundamental rights guaranteed by our Constitution, can certainly be relied upon by courts as facets of those fundamental rights, and hence enforceable as such. Further, in *Vishaka* case[48] the Supreme Court has held that the International Conventions and norms are to be read into them in the absence of enacted domestic law occupying the fields when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be given to International Conventions and norms for construing domestic law when there is no inconsistency between them.

7.12 Right to Speedy Trial in India

It is a generally accepted principle that 'justice delayed is justice buried'. Every litigant expects that his dispute be expeditiously adjudicated and the verdicts of the court be delivered within a reasonable time frame. The higher courts in India introduced many innovative methods to avoid delay, but

[47] (1997) 1 SCC 301
[48] *Vishaka and others* v. *State of Rajasthan and others* 1997 (6) SCC 241

delay in disposal of cases still lingers as a menace in justice dispensation. In *Machander* v. *The State of Hyderabad*,[49] setting aside the order of conviction under Section 302 Indian Penal Code, the Supreme Court laid down that:

> 'No doubt every reasonable latitude must be given to those concerned with the detection of crime and entrusted with the administration of justice, but the limits must be placed on the lengths to which they may go. As, we are not prepared to keep persons who are on trials for their lives under indefinite suspense, because trial judges omit to do their duty. Justice is not one- sided. It has many facets and we have to draw a nice balance between conflicting rights and duties. While it is incumbent on us to see that the guilty do not escape, it is even more necessary to see that the persons accused of crime are not indefinitely harassed.'

The Supreme Court, in *Hussainara Khatoon*'s[50] case, where the under-trial prisoners were in jail for periods longer than the periods for which they would have been sentenced, if convicted, held their detention in jail to be totally unjustified and in violation of the fundamental right to the personal liberty under Article 21 of the Constitution. The Apex court observed that continuation of such detentions as clearly illegal and in violation of the basic guarantees enshrined in the Constitution. It expressed its displeasure in the following strong terms:

> 'It is a crying shame on the judicial system, which permits incarceration of men and women for such long periods of time, without trial. We are shouting from the house tops, about the protection and enforcement of human rights. We are talking passionately and eloquently about the

[49] A.I.R. 1955, S.C. 792.
[50] A.I.R. 1979, S.C.

> maintenance and preservation of basic freedom. But, are we not denying human rights to these nameless persons who are languishing in jails for years for offences which perhaps they might ultimately be found not have committed? Are we not withholding basic freedoms from these neglected and helpless human beings, who have been condemned to life of imprisonment and degraded for years on end? Are expeditious trial and freedom from detention not part of human rights and basic freedoms? Many of these unfortunate men and women must not even be remembering when they entered the jail and for what offence? They have over the years ceased to be human beings, they are mere ticket numbers.'

In *State of West Bengal* v. *Anwar Ali Sarkar*,[51] a Bench of seven Judges held that the necessity of a speedy trial is too vague and uncertain to form the basis of a valid and reasonable classification. It is too indefinite as there can hardly be any definite objective test to determine it. It is no classification at all in the real sense of the term as it is not based on any characteristics which are peculiar to persons or to cases which are to be subject to the special procedure prescribed by the Act.

In *Kadra Pahadiya* v. *State of Bihar*[52] the Supreme Court held that speedy trial is a fundamental right implicit in the guarantee of life and personal liberty enshrined in Article 21 and any accused who is denied this right of speedy trial is entitled to approach the Supreme Court for the purpose of enforcing such right, and the Court, in discharge of its constitutional obligation,

[51] AIR 1952 SC 75 12952 SCR 284: 7 DLR SC 188: 1952 Crl.JLK 510
[52] (1983) 2 SCC 104, 1983 SCC (Cri) 361

has the power to give the necessary directions to the State Government and other appropriate authorities for securing this right to the accused.

In *Madhu Mehta* v. *Union of India*[53] it was held that Article 21 is relevant in all stages. Speedy trial in criminal cases, though may not be a fundamental right, is implicit in the broad sweep and content of Article 21 and speedy trial is part of one's fundamental right to life and liberty.

From the careful reading of the catena of decisions, domestic statutes and International Human Rights Instruments, it comes to light that the speedy trial or expeditious resolution of criminal case is not expressly guaranteed as a fundamental right in the Constitution of India. However, the courts, by their interpretation of the expression right to life in Article 21, have made it as a right. At the initial stages of the consideration of speedy trial as a right, it was viewed and considered as an exclusive right of the accused. Now, the right to speedy trial has become a right of both stakeholders of crime justice. This has facilitated the victim to effectively represent his case through the State machineries and get remedies as expeditiously as possible.

7.13 Protection in the Judicial Process

Access to justice has been universally accepted as an inalienable right of every person. Therefore, persons approaching a court of law for their rights or seeking remedies for the harm caused to them due to occurrence of crime, are many a times forced to encounter the perpetrators who have the power to influence the government machineries. The victim has to appear and depose

[53] (1989) 4 SCC 62

before the judicial authorities and face cross examination, at times even criticism from the other side. In some cases, poor and weak victims, who cannot face such scenarios in the court, give up their claim and plea and at last change or are forced to change their earlier version about the occurrence given before the investigating authorities and ultimately may turn hostile. The Supreme Court, in *Sakshi* v. *Union of India*,[54] has observed that the mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witness and leave them in a state of shock. In such situations the victim may not be able to give full details of the incident which may result in miscarriage of justice. They may even be forced to turn hostile. The evidence of a hostile victim may not be useful to determine the guilt or to punish the accused.

The Supreme Court, in *Krishna Mochi* v. *The State of Bihar*[55] has analysed the reasons for witnesses turning hostile, and its consequences. The court has held that even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons.

In *Ramesh* v. *State of Haryana*[56] the Apex Court has explained that one of the reasons may be that they do not have the courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government, or close to powers, which may be political, economic or other powers including muscle power. Likewise, in

[54] (2004) 5 SCC 518
[55] (2002) 6 SCC 81
[56] Crl. Appeal No. 2526 of 2014 dated 22 November, 2016

Zahira Habibullah v. *State of Gujarat*,[57] the Court highlighted the problem with the following observations:

> 'Witnesses, as Bentham said, are the eyes and ears of justice. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control, to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to the surface. Broader public and social interest require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their presenting agencies do not suffer and there comes the need for protecting the witnesses. Time has come when serious and undiluted thoughts are to be bestowed for protecting the witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to mockery.

The adversarial system of trial, dominated by the lawyers, forced victims to face embarrassments and encounters during trials. In a trial in a case where charges were framed under the Prevention of Corruption Act, 1988, some irrelevant and inadmissible questions were put to a prosecution witness but it was objected to by the court and aggrieved against it, the accused

[57] (2006) 3 SCC 374

preferred a revision before the High Court. After perusal of the depositions of the witnesses, the Delhi High Court observed that it has experienced that sometimes cross examination becomes rambling and assumes unnecessary lengths and is directed to harass, humiliate or oppress the witnesses. It is also seen that the courts often, either due to timidity or the desire not to become unpopular or at times, not knowing its responsibilities and powers, allow the reckless, scandalous and irrelevant cross examinations of witnesses.[58] The victims and their family members or the witnesses, who initially came forward to assist in the justice seeking process, later do not assist the prosecution before the fora of law, and turn hostile or deviate from their earlier statements. The reasons for such deviations are highlighted by the Supreme Court in *Mahendar Chawla* v. *Union of India*.[59] It has once again quoted Jeremy Bentham's famous phrase that the witnesses are the eyes and ears of the justice and also analysed and held that from various cases, the following reasons can be discerned which make witnesses retract their statements before the court and turn hostile:

(i) Threat / Intimidation
(ii) Inducement by various means.
(iii) Use of muscle and money power by the accused.
(iv) Use of stock witnesses.
(v) Protracted trials.
(vi) Hassles faced by the witnesses during investigation and trial.
(vii) Non-existence of any clear-cut legislation to check hostility of witness.

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[58] *RK Chandolia* v. *CBI* order in WP (Crl.) 212 of 2012 dated 11 April 2012, Delhi High Court
[59] 2018 SCC OnLine 2679

Further, other reasons such as unreasonable adjournments and delay are also considered as causes for the victim's deviation from the previous statements. The witnesses are sometimes subjected to a lot of harassment. They come from distant places and see that the case is adjourned. They have to attend the court many times on their own. It has become routine that a case is adjourned till the witness is tired and will stop coming to court. In this process, the lawyers also play an important role. Sometimes the witness is threatened, maimed, or even bribed.[60] The trial is an important phase in the justice- seeking processes of the victim whose testimony undergoes a litmus test, and who is also burdened to help the prosecution prove the case beyond all reasonable doubts. It is a tremendous task of the unarmed victim, who has to place his case against a perpetrator who is armed with privileges of 'presumption of innocent' and 'right to maintain silence'. Therefore, trial has often become an inequitable legal battle between two parties. The Apex Court has candidly said that if the witnesses get threatened or are forced to give false evidence, it would also not result in a fair trial."[61]

All States, especially a welfare State, has not only a duty to extend medical aid and financial assistance to the victim for the purpose of restoration, in the result of crime, it has an important task to protect the victim and witnesses from threat and intimidation. The victim and witness protection has been recognised as an imperative need. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was

[60] *Swaran Singh* v. *State of Punjab* (2000) 5 SCC 668
[61] *Zahira Habibulla H. Shiekh* v. *State of Gujarat* 2004 (4) SCC 158

adopted by the General Assembly through a resolution 40/34 of 29 November, 1985. Articles 4 and 5 categorically states thus:

> '4. Victims should be treated with compassion and respect for their dignity. They are entitled access to the mechanisms of justice, and for prompt redressal, as provided for by national legislation, for the harm that they have suffered.
> 5. Judicial and administrative mechanisms should be established and strengthened wherever necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.'

The person who suffers by a crime or the legal heirs of the deceased victim, by lodging information regarding the occurrence to the police or with the law enforcement authorities, sets the law into motion. After the registration of the case, the victim discharges his/her duty in the capacity as a witness in a trial before the court of law. It is an extremely important role of a victim in the justice seeking process. A victim has to undergo chief examination, cross examination or re-examination and also answer questions from the presiding Judges.[62] Therefore, both the accused and the victim, being the parties of the judicial process, are not only to be treated equally but the judicial institutions should extend their support and protection to the victims, making it mandatory for a fair trial. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power Adopted by General Assembly resolution 40/34 of

[62] Sections 137 -139 & 165 of Indian Evidence Act, 1872

29 November 1985 a premier legal instrument on victims of the United Nations and ratified by many member States reads as follows:

> 'A fair, effective and efficient criminal justice system is a system that respects the fundamental rights of victim as well as those of suspect and offenders. It focuses on the need to prevent victimisation, to protect and assist victims, and to treat them with compassion and respect for their dignity. Victims should also have access to judicial and other mechanism to seek remedy for the harm they suffered and obtain prompt redress.'[63]

The U.N Declaration for Victims, 1985 is referred to by the Supreme Court, and in the light of the said Declaration, it is noted that the need of the hour is to treat the victim as a stakeholder on par with the accused. The Declaration is sometimes referred to as the Magna Carta of the rights of victims. One of the significant declarations made is in relation to access to justice for the victim of an offence through the justice delivery mechanisms, both formal and informal. In the Declaration it is stated as follows:

> 'Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

[63] Cross-Cutting Issues, Victim and Witness. Criminal Justice Assessment Toolkit, United Nation Office on Drugs And Crime, Vienna, United Nation, New York,(2006) P 1

> The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:
>
> Informing the victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved, and where they have requested such information;
>
> Allowing the views and concerns of the victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
>
> Providing proper assistance to the victims throughout the legal process;
>
> Taking measures to minimise inconvenience to the victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, form intimidation and retaliation.Avoiding unnecessary delay in the disposition of cases and the execution of order or decrees granting awards to victims.'

The Supreme Court has relied upon the UN Declaration 1985 and put it into practice for the purpose of recognising the victim of an offence as a stakeholder and providing a variety of rights, including access to mechanism of justice.

7.14 Extension of Benefit of Legal Aid

The Legal Services Authorities Act 1987(Act 39 of 1987) was enacted to provide free and competent legal services to the weaker sections of the society to ensure to them opportunities for securing justice. Section 12 prescribes the criteria for giving legal services to the eligible persons.[64] A plain reading of Section 12, in which the eligibility to get legal services is expressed,

[64] Section 12 A, Legal Services Act, 1987 analysed in the previous chapter.

it would make clear that a victim of crime as defined in Section 2(wa) Cr.P.C. has not been included as a beneficiary to avail of the free legal services. In the proceedings before magistrates or criminal courts, the right to defend is the guaranteed right of an accused under Section 303 Cr.P.C.[65] Further, legal aid at the State expense to the accused in a trial before Court of Session has been made mandatory.[66] No such provision recognising the entitlement to free legal aid was there in the old Cr.P.C., 1898 and it has been inserted in Code as per the recommendations of the 41st Report of the Law Commission. The Delhi High Court observed that the entitlement to free legal aid is not dependent on the accused making an application to that effect, and the court is obliged to inform the accused of his right to obtain free legal aid.[67] The statute enacted for the purpose of providing legal assistance and Cr.P..C have clear provisions of law to extend legal care to the accused who is a stakeholder of crime. But there is no provision to provide such institutional legal care free of cost to the victims of crime. It may not be inappropriate to compare the provisions in

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[65] Section 303: Right of person against whom proceedings are instituted to be defended. Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this code, may of right be defended by a pleader of his choice.

[66] Section 304: Legal aid to accused at State expense in certain cases. (1) Where, in a trial before the Court of Session, the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expensed of the State.

(2) The High Court may, with the previous approval of the State Government, make rules providing for

a) the mode of selecting pleaders for defence under sub-section

b) the facilities to be allowed to such pleaders by the Courts

c) the fees payable to such pleaders by the Government, and generally, for carrying out the purpose of sub-section

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other courts they apply in relation to trials before courts of Session.

[67] *Matloob* v. *State (Delhi Admn)* (1997) 3 Crimes 989 (Del)

Order XXXIII of Code of Civil Procedure, 1908 which enables the indigent persons to institute and prosecute suits without payment of court fees. Such legal care is the immediate need for crime victims, from the stage of registering a complaint or resorting to Section 200 Cr.P.C., till the completion of the adjudication process.

Justice V.R. Krishna Iyer, in the *Report on Expert Committee on Legal Aid*, has stated that the legal aid is an entitlement of those eligible for it, rather than a charitable gift.[68] In common parlance, legal aid means the legal assistance provided to the weaker sections who cannot afford the cost of litigation. It is a special assistance and help to the weaker section to enable them to enforce their legal rights in the adjudication and other legal processes. It is an instrument to achieve equality before law, guaranteed in the Article 14 of the Constitution. Justice P.N. Bhagwathi, a pioneer in introducing free legal aid, has defined legal aid as providing an arrangement in society so that the machinery of administration of justice becomes easily accessible and is not out of reach of those who have to resort to it for enforcement of the rights given to them by law.[69] The Fourteenth Report of Law Commission reads that equality is the basis of all systems of jurisprudence and administration of justice. In so far as a person is unable to obtain access to a court of law for having his wrongs redressed or for defending himself against a criminal charge, justice becomes unequal and the laws, which are meant for his protection, have no

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[68] *Processual Justice to the people*, Report on the Expert Committee on Legal Aid, prepared and submitted by Justice V.R. Krishna Iyer on 27 May 1973

[69] Quoted in Sujan Singh, *Legal Aid: Human Right to Equality*, Deep & Deep Publications New Delhi (1998) P 3

meaning, and to that extent, fail in their purpose. Unless some provision is made for assisting the poor man for the payment of court fee and lawyer's fees and other incidental costs of litigation, he is denied equality in the opportunity to seek justice.[70]

In India, after the submission of the Reports of the Legal Aid Committee (1971) and the Expert Committee on Legal Aid (1973) based on the Swaran Singh Committee recommendations, by an Act of the Forty-Second Amendment, the provision for Legal Aid has been inserted in the Constitution, through Article 39 A in Part IV of the Constitution of India. It reads as follows:

> Article 39 - A : Equal Justice and Free legal Aid: 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.

It provides for 'equal justice and free legal aid' which has been inserted in Part IV of the constitutional text, which is a scheme titled as Directive Principles of State Policy. The articles in Part IV possess no legal significance and they are mere political exhortations.[71] They are framed as a set of obligations upon the State. There is a clear introduction about Directive Principles of State Policy (DPSP) given in Article 37 of the Constitution of India that the provisions contained in Part IV are not enforceable by any court

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[70] Law Commission of India, Fourteenth Report (1988) Chapter 27

[71] H.M. Seervai, Constitutional Law of India, Volume 2, Universal Law Publishing (2002), P 40

of law.[72] It is the creative interpretation of provisions of the Constitution by the judiciary which make the DPSP in Part IV as guiding values for interpretation of Part III of the Constitution.

The Supreme Court, in *Kishore Chand* v. *State of H.P*,[73] held that legal aid in Article 39 A may be treated as a part of the right created under Article 21 of the Constitution. It was a case where the accused faced a charge under section 302 of IPC, but he could not afford to engage a competent senior lawyer, to defend the charges, on his behalf. A young lawyer who represented the accused was not able to suitably defend him. The court found gross lacunae in presenting the defence of the accused and observed that though Article 39 A of the Constitution provides fundamental rights to equal justice and free legal aid, and though the State provides *amicus curiae* to defend the indigent accused, he would be meted with unequal defence. It is common knowledge that youngsters from the Bar who have either a little experience or no experience are assigned to defend the accused. It is high time that senior counsel practising in the court concerned, volunteer to defend such indigent accused as a part of their professional duty. If these remedial steps are taken and an honest and objective investigation is done, it will enhance a sense of confidence of the public in the investigating agency.

From the above decision and points referred to in it, the concept of legal aid in Article 39 A of the Constitution may be considered to have been

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[72] Article 37 states that the provisions contained in this part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

[73] (1991) 1 SCC 286

narrowly viewed and interpreted by the courts as if it were an exclusive right created and granted only to the accused person. Article 39 A is the fertile area to be creatively interpreted by the courts, expanding its horizon to expressly include the victims of crime. There has been absolutely no decision reported in the light of the Article 39 A to extend legal aid to the sufferers of crime. 'Legal aid' has always been viewed from the point of the accused.

The Supreme Court has emphasised the necessity to extend the legal aid to the victims of crime, and it has held that access to justice in terms of affordability, effective legal aid and advice as well as adequate and equal representation are also problems that the victim has to contend with, and which will impact society, the rule of law and justice delivery.[74] The victim is also a stakeholder and needs assistance and justice from the institutions. The observation of courts on public prosecutors is squarely applicable in the victim justice process in India, that for doing justice sometimes requires more than diligence and dedication. It requires on occasion, a spark of creativity or innovation, a novel approach or rethinking of business as usual.[75]

7.15 Transforming Victim from an Outsider to being the pivot of CJA

The judicial system is undergoing transformation, and the old concept that the victim is outsider, is changing rapidly. The Kerala High Court in *T E Thomas* v. *State of Kerala*,[76] pointed out that:

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[74] *Mallikarjun Kodagil* v. *State of Karnataka* (2019) 2 SCC 752
[75] Preet Bharara, *'Doing Justice- A prosecutors thoughts on Crime, Punishments and the law'* Bloomsbury publishing, New Delhi, (2019) P 122
[76] 2017) 3 KLT (SN) 23, W P (C) 27902 0f 2008 dated 05 April, 2017

> '… the changing scenario and has explained that our system often views victims as outsiders in the criminal proceedings. However, it is ineluctable that victims world over, are being now considered as equal stakeholders in the criminal justice system. I believe, they are owed a right to exercise an effective voice in the decision- making processes like investigation, prosecution, reparation, etc. The victims are generally placed in a subservient position by the collective interests of society in prosecuting the crime. However, time has now come to give them sufficient latitude in determining how their concerns are identified, and how they will be taken into account. In this process, the victims' needs, concerns, fears and apprehensions need to be acknowledged and accommodated. The victims deserve to be treated with respect by the investigatory and prosecuting services, and to help them in their recovery process to be kept informed about the progress of all these proceedings.'

The adversarial system adopted by Common Law Countries and embedded in the Indian Criminal Jurisprudence empowers the Judge or Jury to decide the guilt. It has granted two inalienable prerogatives. They are 1) presumption of innocence in favour of the accused and 2) burden of proving the crime beyond all reasonable doubts by the prosecution. These basic principles impliedly create an unexplained bias in the minds of the Jury or Judge about the genuineness of the crime occurrence, and credibility of the statements made by the victim.

7.16 Conclusion

The victims of crime no longer remain mute or unspeakable or a party without any rights to represent or present his cause before the adjudicatory fora of law. The views of the victim would help the courts to comprehensively approach a crime and impose befitting sentence upon the accused, and provide

adequate compensation to the harmed victim. If the draft Witness Protection Scheme, 2018 introduced as suggested in *Mahender Chawla* v. *Union of India*[77] is given effect to or a similar law put in force, it would help the victims to appear without fear and assist the investigating agency or the court in the justice- rendering process.

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[77] 2018 SCC Online SC 2678

CHAPTER VIII
INTERNATIONAL PERSPECTIVES ON RIGHTS AND RELEIFS TO VICTIMS OF CRIME

8.1 Introduction

Criminologists who revisit crime and its consequences from the traditional to an innovative approach introduce the idea that the criminal justice authorities, in the course of their proceedings, should treat the victims as stakeholders of Criminal Justice Administration. Consequently, the idea of resurrection of victims and recognition of their rights in the criminal justice process have been initiated. Studies undertaken by the scholars on crimes and its victims transform the idea of criminology and provide victim orientation in every phase, from investigation to final adjudication and disbursement of compensation to the victims, up to restoration. European countries have laid statutory foundation to the victim's rights and relief, and remedies like compensation. In almost all new legislation relating to criminal law and justice, enacted after the victim renaissance movement, the victim features as an absolutely necessary party.

A study relating to international perspectives and an analysis about the position of the victims in the statutes of other jurisdictions would be useful to check and adapt on the matter of treating the victims as a stakeholder without causing any prejudice to the existing rights and privileges of the accused in India. This chapter examines the status, rights, or entitlement to the victims of crime in a few other countries, European Council Recommendations and other

policy documents relating to crime victim welfare schemes. This chapter also examines the possibility to revise the structure of the criminal justice system to accommodate victims of crime, without being detrimental to the rights and protection guaranteed to the perpetrator of crime. Moreover, how the International Criminal Court (ICC) has recognises victims and provides representation and participation in its proceedings are also discussed.

8.2 Australia

"Australia is one country in which victim's rights to restitution have seen tremendous growth. Every State in Australia has guaranteed victims their right to restitution."[1]

Australia, officially the Commonwealth of Australia, adopted the Constitution in July 1900.[2] It was originally given legal force by an Act of Parliament of the United Kingdom, but by the Australia Act, 1986 the role of the United Kingdom was removed. There are six States, namely, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia and three self-governing territories Australian Capital Territory, Northern Territory and Norfolk Island, that have jointly established the federal system of government. The common law system was inherited from the U.K. during colonisation and it has been followed in all the States and National Capital Territories. Unlike the United States, there is only one law of Australia rather than different laws for each of the several jurisdictions of the States and

[1] For a comprehensive look at Australian victim compensation schemes, see Iyla Therese Davies, *Compensation for Criminal Injuries in Australia: A Proposal for Change in Queensland*, 3 BOND L.R. 1 (1991).

[2] It came into force in July, 1901

Territories. The High Court is the highest court in the Australian judicial system. The Australian Government recognised the right of victims by adopting the United Nations Declarations on the Right of Victims, 1985.[3]

8.2.1. Description of Victim in the Australian Laws

The laws relating to victims in Australia either use the words 'victim', 'aggrieved person' or 'person aggrieved', to describe a person who has suffered injury in a crime. The New South Wales Scheme, which came into operation in 1988, introduced different terminology to describe victims of crime.[4] It retained the term 'aggrieved person' but specified that it only applies in relation to compensation awards by a court against convicted offenders.[5] The term is not used throughout the Act, and claims may be made to the Tribunal by a 'primary victim', 'secondary victim' or 'law enforcement victim'. The 'primary victims' are persons who sustain injury as a direct result of an act of violence.[6] This category of victim is recognised by all of the Australian schemes and is generally referred to as the 'aggrieved person' or the 'victim'. The use of the terms to address victims of crime introduces change in terminology.

A 'secondary victim' is defined as 'a person who has sustained injury as a direct result of witnessing, or otherwise becoming aware of, injury sustained by a primary victim, or injury or death sustained by a deceased victim, of the

[3] The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf

[4] Victims Compensation Act, 1987 New South Wales, (VCA, NSW) available athttps://legislation.nsw.gov.au/view/pdf/asmade/act-1987-237

[5] Section 52 VCA 1987 (NSW).

[6] Section 10 VCA 1987 (NSW)

act.[7] It was not entirely clear, prior to the introduction of the new scheme, whether the scheme applied only to immediate victims of criminal conduct or to a wider class of persons who may have suffered injury.[8] The inclusion of the category of 'secondary victim' provides specific statutory recognition to the wider category of victim.

8.2.2 Reliefs to Victims of Crime under Australian laws

There are eight statutes governing the victim welfare in Australia. They are enacted to reimburse the victim who suffers loss and damage by crime. The law and its territorial jurisdiction are given in the table below:

Legislation	Jurisdiction
Criminal Offence Victims Regulations, 1995 (Qld.)	Queensland
Victims of Crime Assistance Act, 1996 (Vic.)	Victoria
Victims Compensation Act, 1996 (NSW)	New South Wales
Criminal Injuries Compensation Act, 1978	South Australia (SA)
Criminal Injuries Compensation Act, 1983 (ACT)	Australian Capital Territory (ACT)
Crimes (Victims Assistance) Act, 1996	Northern Territory (NT)
Criminal Injuries Compensation Act, 1985 (WA)	Western Australia (WT)
Criminal Injuries Compensation Act, 1976	Tasmania

In New South Wales and Victoria, applications made by the victims of crime for compensation for criminal injuries are to be decided by the Tribunals

[7] Section 10 VCA 1987 (NSW)
[8] Mc Cafferty (No.2) (1974) 1 NMSWLR 475 https://nswlr.com.au/view/1974-1-NSWLR-475

established and known as the 'Victims Compensation Tribunal.'[9] It has been functioning since 1988. The Victims Compensation Tribunal in New South Wales is presided over by a Magistrate.[10]

The Victorian Tribunal, known as the 'Crimes Compensation Tribunal',[11] has been established pursuant to the provisions of the Criminal Injuries Compensation Act, 1972 and continues to operate under the present scheme.[12] This Tribunal is constituted of a barrister or solicitor of not less than seven years standing.[13]

The victim compensation proceedings in Tasmania are conducted by the Master of the Supreme Court[14] who may delegate this function to either the Registrar or Deputy Registrar of the Supreme Court.[15] The Criminal Injuries Compensation Act, 1976 (Tas.), which created the Scheme, consists of only thirteen provisions, and does not make specific provision for the evidentiary and procedural requirements of compensation proceedings. The Act does provide, however, that proceedings must be held in private, and the publication or reporting of proceedings is prohibited.[16] Compensation schemes elsewhere in Australia make provision for closed (*in camera*) proceedings in particular

[9] Section 4 Victims Compensation Act, 1987 (NSW) (hereinafter referred to as the VCA 1987 (NDW).
[10] Section 4 VCA 19878 (NSW)
[11] Section 4 CICA 1983 (VIC)
[12] Part II Criminal Injuries Compensation Act 1983 (Vic.) (hereafter referred to as the CICA 1983 (Vic.).
[13] Section I CICA 1983 (Vic.)
[14] Section 5 Criminal Injuries Compensation Act, 1976 (Tas) (hereafter referred to as the CICA 1976 (Tas).
[15] Section 3 CICA 1976 (Tas).
[16] Section 8 CICA 1976 (Tas.)

cases,[17] but the total restriction upon public hearings and publication in Tasmania is unique in Australia.

In Western Australia, compensation orders were first made by the 'Office of Assessor' in 1982.[18] The Office has continued to operate even though the 1982 Act was repealed in 1985 and replaced by a new scheme.[19] The Assessor is a legal practitioner, appointed by the Governor and is required to be of not less than eight years' standing and practice.[20] Like the New South Wales and Victorian Tribunals, the Assessor is required to determine applications expeditiously and informally, having regard to the requirements of justice.[21] Also like the Tribunal awards, an Assessor's award of compensation is automatically paid by the State's Consolidated Revenue Fund,[22] and the scheme ensures that the Crown's right of subrogation against an offender is retained.[23]

In South Australia, the Northern Territory, the Australian Capital Territory and Queensland, jurisdiction over compensation proceedings has remained with the criminal trial courts. In South Australia, compensation orders are made by the District Court,[24] although ex-gratia payments of compensation may be made by the Attorney-General in cases where an

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[17] For *e.g.* Section 31 VCA 1987 (NSW)
[18] Part II Criminal Injuries Compensation Act, 1982 (WA) (hereafter referred to as the CICA, 1982 (WA).
[19] Section 5 Criminal Injuries Compensation Act, 1985 (WA) (hereafter referred to as the CICA 1985 (WA).
[20] Section 5 CICA 1985 (WA).
[21] Section 28 CICA 1985 (WA).
[22] Section 37 CICA 1985 (WA)
[23] Section 39 CICA 1985 (WA).
[24] Section 4 and 7 Criminal Injuries Compensation Act, 1978 (SA) (hereafter referred to as the CICA, 1978 (SA).

offender is acquitted of an offence.[25] In the Northern Territory, any 'Local Court of Full Jurisdiction' is empowered to make awards.[26]

In the Australian Capital Territory, the determination of applications for compensation is made by the Supreme Court, the Court of Petty Sessions and the Registrar of the Supreme Court.[27] If proceedings have been instituted in a particular court, then that court has jurisdiction to determine a compensation application arising from the offence charged.[28] The Registrar of the Supreme Court has the power to determine applications for compensation in circumstances where criminal proceedings have not been instituted in respect of an offence.[29]

In Queensland, the District Court and Supreme Court are empowered to make awards of state-funded compensation in cases where offenders are convicted.[30] Ex-gratia payments by the State are available in other specific circumstances but may be made only by the relevant Minister.[31] The significant differences between the court-based schemes become more evident when one examines the procedures relating to the payment of the awards made by the courts. In South Australia, the Attorney-General must, within 28 days of an order, pay the amount of compensation from the Criminal Injuries

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[25] Section 11(3)(b) C ICA 1978 (SA).
[26] Section 4 and 5 Crimes Compensation Act, 1982 (NT) (hereafter referred to as the CCA 1982 (NT).
[27] Section 11 Criminal Injuries Compensation Ordinance 1987 (ACT) (hereafter referred to as the CICO 1983 (ACT).
[28] Section 11(1) & (2) CICO 1983 (ACT)
[29] Section 11(3) CICO 1983 (ACT).
[30] Section 663 Criminal Code (Qld.)
[31] Minister for Justice and Attorney-General or other Minister of the Crown; Section 663 Criminal Code (Qld)

Compensation Fund.[32] The Attorney-General may only decline to satisfy the order or reduce the payment on the basis of other compensation being payable to the victim.[33] In the Australian Capital Territory, the Judge, Magistrate or Registrar hearing the application is obliged to forward a certified copy of the order to the Secretary of the Attorney-General's Department.[34] The Secretary is then required to pay an amount equal to the sum awarded from Commonwealth revenue.[35]

In Queensland, where a compensation order is made by a court or an application has been made for an ex-gratia payment, the Minister charged with the administration of the Criminal Code must seek the approval of the Governor in Council.[36] The nature of the payment from the state is '*ex-gratia*', and accordingly, the Governor in Council is under no legal obligation to consider or approve the application. The Queensland scheme also allows for an indefinite deferment of the consideration by the Minister before submission of a report to the Governor in Council.[37]

In addition to the above statutes for the compensation to the victims of crime, the National Redress Scheme (NRS) is a completely voluntary compensation plan, and the institutions like churches and charities and academic institutions have joined in implementation of this Scheme. The establishment of a NRS was recommended by the Royal Commission into

[32] Section 11(1) CICA 1978 (SA).
[33] Section 11(2) CICA 1978 (SA).
[34] Section 30 CICO 1983 (ACT) (although the Magistrate's order is in fact forwarded by the Clerk of the Court of Petty Sessions and the Judge's order is forwarded by the Registrar).
[35] Section 30(3) & s 27 CICO 1983 (ACT)
[36] Section 663D & C Criminal Code (Qld)
[37] Section 663C (3) and 663D (3) Criminal Code (Qld)

Institutional Responses to Child Sexual Abuse. The Scheme started on 1 July, 2018 and is to run for 10 years. It is a temporary and *ad hoc* scheme for a decade. The NRS acknowledges that many children were sexually abused in Australian institutions and it recognises the harm caused by such abuses. The Scheme holds institutions accountable for the abuses, and helps people who have experienced institutional child sexual abuse gain access to counselling and psychological services, a direct personal response, and a monetary payment.

8.3 Canada

Canada is a country of ten provinces and three territories. Both the common law and civil law traditions co-exist in the process of justice administration. Criminal offences are considered as offences against society and the Crown prosecutes accused person under a public law. Therefore, fundamentally a crime prosecution is only between the State and the perpetrator of crime. However, the increasing demand for recognition of victims and their rights in CJA have resulted in changes in the justice dispensation in Canada.

8.3.1 Victim's Bill of Rights

Recently, the Canadian Victims Bill of Rights was brought into force on 23 July, 2015. As per the new Act, a victim is an individual who suffers physical or emotional harm, property damage or economic loss as a result of the commission or alleged commission of an offence.[38] The concept of victim in Canada recognises the legal representatives or a person who had a live-in

[38] Section 2, Canadian Victims Bill of Rights

relationship with the deceased victim to act on behalf of the victim. Accordingly, if the victim is dead or incapable of acting on his own behalf, the victim's spouse or the individual who was, at the time of the victim's death, his spouse or a relative or dependent of the victim or the individual who is or was at the time of the victim's death, cohabiting with them in a conjugal relationship, having so cohabited for a period of at least one year.[39]

The Canadian Victims Bill of Rights is a consolidation of the recognition of Victims' Rights. Its preamble states that the crime has harmful impact on victims and on society. The victims of crime and their family deserve to be treated with courtesy, compassion and respect, including respect for their dignity. The terms 'offence' and 'victims' are defined, and rights, protection, restitution, remedies are provided to the crime victim. Under the Bill of Rights, every victim, whose rights have been infringed or denied by a provincial or territorial department, agency or body can file a complaint. However, no cause of action or right to damages arise from an infringement or denial of a right under this Bill. Further, no right to appeal is provided to the victims solely on the ground that a right under this Bill has been infringed or denied.[40]

The right to know the stage of investigation on request by the victim, including the outcome of the investigation into the offence and location of proceedings and its progress or result of the case is guaranteed to the victim. Moreover, the victims can also get information regarding corrections and

[39] Section 3, Canadian Victims Bill of Rights
[40] Sections 27 & 29 Canadian Victims Bill of Rights.

conditional releases of the perpetrators of crime.[41] The Canadian Victims Bill of Rights is a pioneering legal instrument in victim jurisprudence.

8.3.2 Compensatory Reliefs

In Canada, compensation programme was first initiated in Ontario in 1967, under The Law Enforcement Compensation Act. It was re-enacted in 1971 and further amended in 1973. The Ontario programme granted compensation, both, for injuries and death resulting from crimes of violence. Compensation is also granted for injuries sustained while preventing or attempting to prevent an offence and for lawful arrest.[42] The provisions that govern compensation were amended in 1996, when compensation order provisions were replaced with provisions for order of restitution. Earlier it was available only for loss, destruction, or damage of property, the introduction of restitution order provisions allowed awards for fiscal damages, such as loss of income or support as a result of bodily harm due to an offence, or relocation expenses. Further, orders of restitution were no longer required to be initiated by the victim but could also be ordered by the sentencing court.[43]

The Law Reform Commission of Canada endorsed restitution in 1974. Restitution involves acceptance of the offence as a responsible person with the capacity to undertake constructive and socially approved acts. It challenges the offender to see the conflict in values between himself, the victim and society.

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[41] Sections 7 & 8 Canadian Victims Bill of Rights.

[42] *Compensation for victims of crime in Ontario*, The Law Society of Upper Canada Gazette, Vol. IX No.I (1975)

[43] Understanding Restitution," Victims of Crime Digest, Issue No.2, Department of Justice Canada (2004),
Available online: http:/www.justice.gc.ca/eng/pi/rep-rap/rd-rr/rd09p_2rr09_2/p2.html.

In particular, restitution invites the offender to see his conduct in terms of the damage it has done to the victim's rights and expectations. It contemplates that the offender has the capacity to accept his full or partial responsibility for the alleged offence, and that, in many cases, be willing to discharge that responsibility by making amends.[44]

8.4 New Zealand

New Zealand is the first country that recognised the victim of crime and introduced State funded scheme to reimburse personal injuries caused in the crime occurrence.

It is an island country in the South Western Pacific Ocean and its Constitution recognizes a number of Conventions and Common Law practices. The common law system has been followed in the criminal justice dispensation and the criminal trials are primarily adversarial in nature. The present CJA in New Zealand has its foundation in the British colonisation. The criminal proceedings were designed to be reparative in nature, and compensation becomes an inevitable measure to address the same. Under the laws in New Zealand, a victim has no role to address the court but the Victim Impact Statements (VIS) prepared by the prosecutor guide the courts to impose appropriate sentences upon the offenders.

[44] Law Reform Commissioner Working Paper# 5, 7-8, Restitution and Compensation (1974), https://rdo-olr.org/wp-content/uploads/2018/02/olr_7.1_gold.pdf

8.4.1 Treatment of Victims

The Criminal Justice Act, 1985 set a new trend in the Criminal Justice dispensation, in New Zealand.[45] It contains provisions which made the criminal justice institutions, including the courts, to invoke a presumption in favour of the victim. It also contains a procedure to be followed for determination of the quantum of reparation, which the offender has to pay to the victim. Further, the Victims of Offences Act, 1987 has made it mandatory that the other stakeholders of the criminal justice system, namely the court, police and forensic laboratory are required to treat victims with compassion and courtesy. Victim assistance agencies are also recognised by the CJA in New Zealand and those agencies can extend legal other services to the victims. Some of the agencies are running women refuge centres to provide temporary accommodation and support for battered women and those at risk of domestic violence and abuse.

8.4.2 Remedial Measures

As stated above, New Zealand emerged as the first country to have established a programme of compensation to victims of crime. A great deal has been done as advancement in the CJA by enacting the Criminal Injuries Act, 1963. In 1964, a Criminal Injuries Compensation Board was established to manage schemes of compensation to victims of crime. The power of the Tribunal to award compensation is discretionary, not only as to the amount of

[45] Available at https://www.legislation.govt.nz/act/public/1985/0120/latest/whole.html

compensation but also to the making of an order of compensation.[46] The Victims of Offences Act, 1987, which was repealed by Victim's Rights Act 2002, also gave many rights to victims.[47]

The Victim's Rights Act 2002[48] consists of comprehensive provisions recognizing the rights of victims. Victims of crime have also been given recognition as key participants in the criminal justice process. This Act was framed to improve provisions for the treatment and rights of victims of offences and an exhaustive definition of the term is provided. In the said Act, victim means –

> "… a person against whom an offence is committed by another person and suffers physical injury, or loss of, or damage to, property and a parent or legal guardian of a child, or of a young person, unless that parent or guardian is charged with the commission of, or convicted or found guilty of, or pleads to the offence concerned and a member of the immediate family of a person who, as a result of an offence committed by another person, dies or is incapable, unless that member is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned."[49]

A number of rights, including the rights to information and the ability to give inputs to sentencing decisions through victim impact statements, are the important rights provided under the Act of 2002. Further, the privacy and dignity

[46] Compensation for the victim of crime: The New Zealand Experiment, 365 Journal of Public Law Vol. 12 No.1 (1963).
[47] Section54 provides that the Victims of Offences Act, 1987 (1987 No.173) is repealed.
[48] Victims' Rights Act, 2002
[49] Section 4, Victims' Rights Act, 2002

of the victim and courtesy from the authorities dealing with crime are also guaranteed in the said Act.[50]

In New Zealand, the Sentencing Act, 2002 and the Victim's Rights Act, 2002 are two of the important victim oriented legislation. The crime victims, like other accident victims, are compensated for personal injury under the accident compensation scheme. As a result, losses from personal injury are shared by the community as a whole. In contrast, other losses, including property loss and damage and emotional harm, which are not covered by the accident compensation scheme, are not shared in this way. Victims may recover compensation from offenders who are convicted or sued. If they choose, potential victims may also distribute the risk of loss or damage as a result of offending through private insurance, leaving the insurer to shift the distributed loss to the offender to the extent that this is practicable. In this respect, the position of crime victims does not differ from any other person who suffers loss or damage to property, whether as a result of their own negligence or the actions of others.[51] In addition to the financial aid through compensation the other kinds of victim support, New Zealand administers many government funded schemes that provide counseling for families of homicide victims, and discretionary emergency grants for families of homicide

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[50] Sec.7 Treatment: Any person who deals with a victim (for example, a judicial officer, lawyer, member of court staff, Police employee, or other official) should (a) treat the victim with courtesy and compassion; and (b) respect the victim's dignity and privacy. Sec.8 Access to services: A. victim or member of a victim's family who has welfare, health, counseling, medical, or legal needs arising from the offence should have access to services that are responsive to those needs.

[51] www.lawcom.govt.nz, *Compensating Crime Victims* October 2008, Wellington, New Zealand/ Issues Paper 11 last visited on 21 October 2018.

victims, and travel funds to the victims of serious crime for child care and to attend the court hearings.

8.5 United States of America

In the United States of America, the federal criminal justice system adopted a common law for administration of criminal justice. The enactment of the Victims and Witnesses Protection Act of 1982 in the United States, replaced the notion of the "Forgotten Victim" with the idea of "Victim's Rights.[52] The Victims' issues captured the attention of the White House in 1981, with President Ronald Reagan announcing the first "National Crime Victims' Rights Week," to honour victims and their surviving family members. A year later, President Reagan established a Task Force on Victims of Crime. The Task Force held six hearings nationwide and made numerous recommendations for improving the treatment of victims and witnesses within the criminal justice system. After considering all suggestions and demands received from the various stakeholders, it recommended the passage of a legislation to require victim impact statements at sentencing and protection for victims and witnesses from intimidation. The first proposal to create a Crime Victims' Rights amendment to the United States Constitution was introduced in 1996. The "Crime Victims' Rights Act, (CVRA) recognises eight rights for victims of federal crimes, and includes provisions enabling victims to enforce their rights both at the trial and appellate levels. Under the CVRA, a "victim,"

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[52] See David L. Roland in Progress in the Victim Reform Movement: No longer the "Forgotten Victim." 17 PEPP, L.Rev. 35 (1990) Quoted in Jon Allyn Soderberg, *Son of Sam Laws: A Victim of The First Amendment?,* 49 Wash. & Lee L. Rev. 629 (1992), https://scholarlycommons.law.wlu.edu/wlulr/vol49/iss2/17

is defined as a person directly and proximately harmed as a result of the commission of a Federal offence or an offence in the District of Columbia. The rights afforded to federal crime victims by the CVRA are as follows:

1. the right to be reasonably protected from the accused;
2 the right to reasonable, accurate, and timely notice of any public court proceeding, any parole proceeding, involving the crime or of any release or escape of the accused;
3. the right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim could be materially altered if the victim heard other testimony at that proceeding;
4. the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding;
5. the reasonable right to confer with the attorney for the Government in the case;
6. the right to full and timely restitution as provided in law;
7. the right to proceedings free from unreasonable delay; and
8. the right to be treated with fairness and with respect for the victim's dignity and privacy.'[53]

The above rights are duly recognised by the federal Laws in the US and the restorative justice practices introduced since the mid-twentieth century has become a well-founded mode of delivery of justice to the victim without causing disturbance to the harmony between the victim and the offender.

[53] Kim Herd, History and Overview of Rights and Services for Federal Crime Victims within the United States, https://www.unafei.or.jp/english/publications/index.html, visited on 08 May, 2021

8.5.1 Pecuniary Reliefs to Crime Victims

In the US, the compensation programmes are the oldest form of victim assistance. First established in California in 1965, programmes currently exist in each State, plus the Districts of Columbia, Virgin Islands, and Puerto Rico.[54] States are responsible for virtually all the administrative costs required to operate their compensation programmes. A few States fund them by appropriating tax dollars via legislation. However, most require offenders to pay criminal penalties, thereby subsidising compensation programmes without using taxes.[55] Usually this is accomplished in one of three ways; offenders pay fine according to the severity of their crime, a percentage of an offender's fine goes towards victim compensation, or wages owed to inmates working in the prison industry are withheld.[56] Additionally, the Victims of Crime Act of 1984 (VOCA) provides up to 25 per cent of programme budgets through assistance grants and federal monies via its Crime Victims' Fund (CVF).[57]

The Compensation for victims of crime in the United States was an idea of the courts. In 1976, the New Jersey Supreme Court in *State* v. *Harris*,[58] held that restitution is not only an appropriate but frequently a salutary technique in the criminal process, and in the purpose of the probation system contemplated by the statute. In the said case, the offender was ordered to make restitution as a condition for probation upon conviction for welfare fraud. On appeal, the

[54] National Association of Crime Victim Compensation Boards (NACVCB), "*Crime Victim Compensation: An Overview*," nacvcb, http://www.nacvcb/articles/ overview_prn.html.
[55] Karmen, Andrew, *Crime victims: An introduction to Victimology*, (2014), P 314
[56] NACVCB, Crime Victim Compensation
[57] *Ibid*.
[58] *State* v. *Harris*, 362 A 2d 32 (N.J. 1976)
https://law.justia.com/cases/new-jersey/supreme-court/1976/70-n-j-586-0.html

Supreme Court of New Jersey held that imposition of restitution in substantive criminal proceedings was preferable to a subsequent civil trial for damages. The court found that ordering the defendant to make restitution had a significant rehabilitative purpose. It stated that restitution in a proper case may often be a compelling reminder of the wrong done and meaningfully contribute to the rehabilitation process. It further stated -*"A fine is punitive. A jail sentence is retributive. But restitution makes sense*."

Another decision of the Supreme Court in 1978, in *State* v. *Huggett*,[59] held that restitution was a reasonable and appropriate condition of probation. It was a case where the court, after examination of evidence, came to a conclusion that the accused was guilty of offence of fraud.

Within two weeks of the September 11 terrorist attacks, a statute was enacted as the September 11th Victim Compensation Fund. This unique instrument, unprecedented in American history, created a legislative no-fault alternative to the traditional litigation system. It provided generous compensation to those families and surviving victims who voluntarily elected to forgo their right to sue in favor of entering the new Fund.[60] Mr. Kenneth R. Feinberg was the Administrator of the September 11 Victim Compensation Fund (9/11 VCF) for about 32 months with unfettered discretion to design and implement the programme for the benefit of the victims who suffered in the

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[59] *State* v. *Huggett*, 266 N.W. 2d 403, 405 (Wis. 1978) https://law.justia.com/cases/wisconsin/supreme-court/1978/76-115-c-7.html

[60] Kenneth R. Feinberg, Litigation Winter 2006 Volume 32 P.14 https://heinonline.org/HOL/LandingPage?handle=hein.journals/gguelr5&div=7&id=&page=

September 11 attacks. The special 9/11 VCF was so successful, as it was a Tax-free compensation, that almost 97 per cent of the eligible claimants ultimately availed of the compensatory relief from the United States. The fund was created within a short span of a fortnight of the terror attack. The September 11 Victim Compensation Fund should be viewed for what it was: a unique emotional response by the American people to an unprecedented foreign terrorist attack on America's shores.[61] The American experience shows that the personal injury, mental agony, wrongful death and property loss caused by crime can be compensated through pecuniary relief.

8.6 United Kingdom

In England, compensation has been recognised as a remedy under common law. The concept of statutory compensation for criminal injuries reaches as far back as 1964 in the UK. The Powers of the Criminal Court (Sentencing) Act, 2000 provides for the making of compensation orders against convicted offenders. In addition to that, a State-funded Criminal Injuries Compensation Scheme, provided by the Criminal Injuries Compensation Act, 1995, has been in force to support crime victims. The payment of compensation helps restore equilibrium, if not the *status quo ante.*[62] The public authorities who exceed or abuse their powers are liable like any other individuals. For

[61] Kenneth R. Feinberg, Litigation Winter 2006 Volume 32 Pg.17 https://heinonline.org/HOL/LandingPage?handle=hein.journals/gguelr5&div=7&id=&page=

[62] P. Ishwara Bhat, *Fundamental Rights, A Study of Their Interrelationship*, Eastern Law House, (2004) p. 255.

instance, in *White* v. *Metropolitan Police Commissioner*,[63] for the 'monstrously wicked' police behaviour of dragging a couple out of bed in the early morning and beating them in a brutal and inhuman way and unlawfully detaining them upon fabricated charges, the Court of Appeals awarded damages. The United Kingdom has introduced an effective rehabilitation mechanism through the Criminal Injuries Compensation Act, 1995 redressing the needs of victims of crime. The Criminal Injuries Compensation Scheme is a rapidly growing government initiative. It was conceived by the Home Secretary in 1995, and later approved by Parliament. The establishment of the Criminal Injuries Compensation Authority (CICA) is a milestone in the restoration of victim. The UK is the first country to have established a scheme of criminal injuries compensation.[64]

In *Baker* v. *Willoughby*,[65] it has been considered that a man is not compensated for the physical injury, he is compensated for the loss, which he suffers as a result of that injury or inabilities to lead a full life, and inability to enjoy those amenities, which depends on freedom of movement and inability to earn as much as he used to earn or could have earned.

8.6.1 Criminal Injuries Compensation Scheme

As stated above, in the United Kingdom, the first Criminal Injuries Compensation Scheme was introduced in 1964. It was a non-statutory Scheme

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[63] Geoffrey Robertson, Freedom, the Individual and the State, 6th Ed., 1989, Report, (1991) P 52 referred to by Ishwara Bhat, *Fundamental Rights, A Study of Their Interrelationship*, Eastern Law House, 2004, P. 256

[64] Criminal Injuries Compensation Scheme available at: http:www.compensationculture.co.uk.criminal-injuries-compensation-scheme.html.

[65] (1969) 3 All ER.1528 ; [1970] AC 467

which made *ex-gratia* payments to victims. Four further non-statutory schemes followed, in 1966, 1969, 1979 and 1990. The rules which apply to an individual's case are the ones which were in force when the Criminal Injuries Compensation Authority received his or her application. The different schemes are:

The Criminal Injuries Compensation Scheme 1996 (for application received on or after 1 April, 1996)

The Criminal Injuries Compensation Scheme 2001 (for applications received on or after 1 April, 2001)

The Criminal Injuries Compensation Scheme 2008 (for application received on or after 3 November, 2008)

The Criminal Injuries Compensation Scheme 2012 (For applications received on or after 27 November, 2012).[66]

The 2012 Scheme was introduced following a consultation on the government plans to cut costs by reducing compensation payments to victims of crime, as part of a 'rebalancing' exercise which saw increased spending in other areas of victims' services.[67] The Home Secretary also has the power to make grants to assist victims of crime under some of the schemes. The Criminal Injuries Compensation Scheme is a State scheme to compensate people who have been physically or mentally injured because they were the

[66] https://www.legislation.gov.uk/ukpga/1995/53/The shall introduce of LIC given in Para 32 in *Ankush Shivaji Gaikwad* vs *State Of Maharashtra,* (2013) 6 SCC 770

[67] www.parliament.uk/commons-library/briefing paper number 07498, last visited on November 21, 2018

'blameless' victim of violent crime. It covers England, Scotland and the Wales.[68] A Criminal Injuries Compensation Board was also constituted.

The Criminal Justice Act, 1988 transformed the Criminal Injuries Compensation Board (CICB), from a body created and supported by administrative fiat to a statutory body. A specialised legislation called 'The Code of Practice for Victims of Crime' sets out the services that the Victim can expect to receive from each of the criminal justice agencies, like the police and the Crown Prosecution Service.[69]

8.7 Republic of South Africa

The Republic of South Africa (RSA), is a developing country. It suffered by discriminations that were caused by apartheid, and after a long freedom struggle and anti- apartheid movements, all discriminatory laws were repealed and now it has blossomed into a rainbow nation. The Constitution of the Republic of South Africa was approved in 1996 and it came into effect in February, 1997. It adopted an adversarial system for CJA. Like the Indian Constitution, there are special provisions which provide for rights of the arrested and accused persons, but there is no specific provision that talks about the rights of the victims of crime. A victim charter, known as Service Charter for Victims of Crimes in South Africa, 1996 was drafted in the spirit of South African Constitution and in compliance with the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985. The Ministry of Justice and Constitutional Development, South Africa has

[68] Section 13, Criminal Cases Compensation Act, 1995
[69] Victims' rights available at: http://www.justice.gov.uk/about/vc.rights/html

declared it as a Charter adopted in consonance with the provisions of Section 234 of the Constitution. It recognises the serious impact of crime on victims and its potential for undermining the victims' human rights. It consolidates the legal framework to the rights of and services provided to the victims of crime and eliminate the secondary victimisation in the Criminal Justice Process. The victim charter, *inter alia*, guarantees rights to be treated with fairness, and with respect for dignity and privacy, and the right to get assistance and compensation by the victims who suffers as a result of crime committed against him.

8.7.1 Victims in the Criminal Justice Policies of RSA

The South African Law Commission defines a 'victim' as a biological person who has suffered harm at the hands of another person in the course of a crime of violence. Harm or suffering, which can be physical or psychological or both, must have resulted in a material loss for the victim and/or had a negative, quantifiable impact on her or his current and/or future capacity to earn an income. A person may be considered a victim regardless of whether the offender has been identified, apprehended, charged, prosecuted or convicted. People can be deemed to be victims regardless of the familial relationship between the offenders and themselves, and the category can include people who were injured while intervening or assisting other victims, or the police during activities aimed at law enforcement. Further, a person is a victim regardless of whether the crime is reported to the police, regardless of whether a perpetrator is identified, apprehended, prosecuted or convicted and regardless

of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependents of the direct victims and persons who have suffered in intervening to assist victims in distress or to prevent victimisation.[70]

The Criminal Justice System in South Africa has adopted the Restorative Justice Approach as a more participative and reconciliatory practice. The victim, offender and a dialogue between them through the community or a third party has been approved to respond the harms, needs and obligations.[71]

8.8 International Criminal Court (ICC) and Victims

> *"When the International Criminals Court (ICC) was created in 1998, its founders hailed it as a "victims' court", one that would give survivors of mass atrocity an influential voice in the administration of justice*".[72]

The idea that there is some common denominator of behaviour, even in the most extreme circumstances of brutal armed conflict, confirms beliefs drawn from philosophy and religion about some of the fundamental values of the human spirit. The early laws and customs of war can be found in the writings of classical authors and historians. The international community has been debating the establishment of a permanent international criminal court

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[70] Notice 936 of 2001, Discussion Paper on a Compensation Scheme for Victims of Crime, available at https://www.gov.za/sites/default/files/gcis_document/201409/22281b.pdf

[71] See Julena Jumbe Gabagambi, *A Comparative Analysis of Restorative Justice Practices in Africa,* https://www.nyulawglobal.org/globalex/Restorative_Justice_Africa.html

[72] The Victims' Court? (A Study of 622 Victim participants at the International Criminal Court), Human Rights Centre, UC Berkeley School of Law, (2015) page 1.

since the 1950s, after the atrocities committed during World War II shocked the world. Since the 1990s, several international criminal tribunals have been set up, but all of these were temporary and established to deal with crimes committed in specific situations. These included the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone. The Security Council of the United Nations, in its resolution for the establishment of ICTY, permitted the victims to play an active role in the proceedings. The ICTY was instructed to carry out its adjudicatory proceedings without prejudice to the rights of the victims who seek compensation for damage incurred as a result of violation of international humanitarian law.[73] It shows the United Nations' concern on the victims' rights and reliefs to be provided to them, even in the proceedings before the special or *ad hoc* tribunals.

8.8.1 Victims in the Preamble of Rome Statute

The Rome Statute of the International Criminal Court was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court on 17 July, 1998. The International Law Commission was assigned the task of drafting the Rules of Procedure and Evidence to be followed in the proceedings before ICC. It came into force on 1 July, 2002. It consists of 128 Articles divided into XIII Parts. As of October 2017, 123 States have accepted the jurisdiction of the ICC by becoming State Parties to the Rome Statute, but 31 countries have not ratified

[73] UN Doc. S/RES/827 (1993), Annex. Security Council Resolution 808, which launched the process leading to establishment of the Tribunal.

it. The Rome Statute recognises that 'during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'.[74] It may be noted that victims have occupied a centre place in the preamble itself. The Statute has guaranteed an enforceable right to compensation to the victims of unlawful arrest or detention.[75] It also provides for creation of a Trust Fund which will hold fines and assets, and dispose them of. The Trust Fund is to be used for the benefit of victims of crimes within the jurisdiction of the Court and of the families of such victims. The Trust Fund was established by a decision of the Assembly of States Parties at its first session in September 2002. The Trust Fund is managed by a five-person Board of Directors who serve in a voluntary capacity. There were far more ambitious proposals for compensation of victims, but these fell by the wayside during the negotiations.[76] The concept of international compensation is seductive, but it is not without many practical obstacles. Experience of the *ad hoc* tribunals suggests that, by and large, most defendants succeed in claiming indigence. For example, they are almost invariably represented by tribunal funded counsel after making perfunctory demonstrations that they are without means to pay for their own defence. The irony is that these are the very people who are widely believed to have looted the countries they once ruled. It may simply be unrealistic to expect the new

[74] Preamble, Rome Statute of the International Criminal Court
[75] Article 85, Rome Statute of the International Criminal Court
[76] International Criminal Court, Trust Fund for Victims (TFV) Background Summary, available at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV_Background_Summary_Eng.pdf

court to be able to locate and seize substantial assets of its prisoners. Scholars have hailed the provisions for the benefits of the crime victims inserted in the Rome Statute as great innovation. It has been described that one of the great innovations in the Rome Statute is the place it creates for victims to participate in the proceedings.[77]

8.8.2 International Criminal Court (ICC) and Victims of Crime

By Article 1 of Rome Statute of the International Criminal Court (RSICC), the International Criminal Court (ICC) emerged in the early twenty-first century as an ambitious and permanent institution with power to exercise jurisdiction and to address crimes such as genocide and crimes against humanity.[78] ICC is an independent international organisation, and it is not part of the United Nations System. It is located in The Hague, The Netherlands. It is a permanent institution and has the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in the Statute, and is complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court is governed by the provisions of this Statute.[79] The Court is brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to the Statute.[80] The jurisdiction of the ICC is limited to the most serious crimes of

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[77] William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University press, (2017)

[78] In C. De Vos, S. Kendall, & C. Stahn (Eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*. Cambridge: Cambridge University Press.(2015), (pp. I-Ii) Downloaded from https://www.cambridge.org/core.NUALS, on 30 Jul 2018 at 10:54:28

[79] Article 1, Rome Statute of the International Criminal Court

[80] Article 2, Rome Statute of the International Criminal Court

concern to the international community as a whole. The Court has jurisdiction with respect to the following crimes:

a) The crime of genocide[81]

b) Crimes against humanity[82]

c) War crimes[83]

d) The crime of aggression[84]

In addition to the said four types of crimes, there are 96 crimes where their victims are permitted to participate in the adjudicatory proceedings before the ICC. The elements of crime, consisting of the Official Records of the Assembly of States parties to the RSICC, published by ICC has crimes under the relevant Articles from the Rome Statute.[85] There ninety five crimes are recognised by the Statute of Rome and the victims who suffer by these crimes are entitled to redress their grievances through the mechanism provided by the Rules in the said statute.[86]

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[81] Article 6, Rome Statute of the International Criminal Court
[82] Article 7, Rome Statute of the International Criminal Court
[83] Article 8, Rome Statute of the International Criminal Court
[84] Article 1(d) & 8 amended by 31May - 11 June, 2010,Rome Statute of the International Criminal Court
[85] International Criminal Court Publication RC/11
[86] Genocide by killing, Article 6(a), Rome Statute of the International Criminal Court, Elements of Crime, International Criminal Court Publication RC/11,
Genocide by causing serious bodily or mental harm, Article 6(b), Ibid
Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction, Article 6(c), Ibid
Genocide by imposing measures intended to prevent births, Article 6(d), Ibid
Genocide by forcibly transferring children, Article 6(e), Ibid
Crime against humanity of murder, Article 7(1)(a), Ibid
Crime against humanity of extermination, Article 7(1)(b), Ibid
Crime against humanity of enslavement, Article 7(1)(c), Ibid
Crime against humanity of deportation or forcible transfer of population, Article 7(1)(d) Ibid
Crime against humanity imprisonment or other severe deprivation of physical liberty, Article 7(1)(e), Ibid
Crime against humanity of torture, Article 7(1)(f), Ibid

Crime against humanity of rape, Article 7(1)(g), Ibid
Crime against humanity of sexual slavery, Article 7(1)(g), Ibid
Crime against humanity of enforced prostitution, Article 7(1)(g), Ibid
Crime against humanity of forced pregnancy, Article 7(1)(g), Ibid
Crime against humanity of enforced sterilization, Article 7(1)(g),Ibid
Crime against humanity of sexual violence, Article 7(1)(g) -, Ibid
Crime against humanity of persecution, Article 7(1)(h), Ibid
Crime against humanity of enforced disappearance of persons, Article 7(1)(i), Ibid
Crime against humanity of apartheid, Article 7(1)(j), Ibid
Crime against humanity of other inhumane acts, Article 7(1)(k), Ibid
War crime of willful killing, Article8(2)(a)(i), Ibid
War crime of torture, Article8(2)(a)(ii)-1, Ibid
War crime against inhuman treatment, Article8(2)(a)(ii)-2, Ibid
War crime against biological experiments, Article8(2)(a)(ii)-3, Ibid
War crime of willfully causing great suffering, Article8(2)(a)(iii), Ibid War crime of destruction and appropriation of property, Article8(2)(a)(iv), Ibid
War crime of compelling service in hostile forces, Article8(2)(a)(v), Ibid
War crime of denying a fair trial, Article8(2)(a)(vi), Ibid
War crime of unlawful deportation and transfer, Article8(2)(a)(v ii)-1, Ibid
War crime of unlawful confinement, Article8(2)(a)(v ii)-2 Ibid
War crime of taking hostages, Article8(2)(a)(viii), Ibid
War crime of attacking civilians, Article8(2)(b)(i), Ibid
War crime of attacking civilian objects, Article8(2)(b)(ii), Ibid
War crime of attacking personnel of objects involved in a humanitarian assistance or peacekeeping mission, Article8(2)(b)(iii), Ibid
War crime of excessive incidental death, injury, of damage, Article8(2)(b)(iv), Ibid
War crime of attacking undefended places, Article8(2)(b)(v), Ibid
War crime of killing or wounding a person *hors de combat*, Article8(2)(b)(vi), Ibid War crime of improper use of flag of truce, Article8(2)(b)(vii)-1, Ibid
War crime of improper use of a flag, insignia or uniform of the hostile party, Article8(2)(b)(vii)-2, Ibid
War crime of improper use of flag, insignia or uniform of the United Nations, Article8(2)(b)(vii)-3, Ibid
War crime of improper use of the distinctive emblems of the Geneva Convention, Article8(2)(b)(vii)-4, Ibid
The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, Article8(2)(b)(viii), Ibid War crime of attacking protected objects, Article8(2)(b)(xi), Ibid
War crime of mutilation, Article8(2)(b)(x)-1, Ibid War crime of medical or scientific experiments, Article8(2)(b)(x)-2, Ibid
War crime of treacherously killing or wounding, Article8(2)(b)(xi), Ibid
War crime of denying quarter, Article8(2)(b)(xii), Ibid
War crime of destroying or seizing the enemy's property, Article8(2)(b)(xiii), Ibid War crime of depriving the nationals of the hostile power of the right or actions article8(2)(b)(xiv),Ibid War crime of compelling participation in military operations, Article8(2)(b)(xv), Ibid
War crime of pillaging, Article8(2)(b)(xvi), Ibid
War crime of employing poison or poisoned weapons, Article8(2)(b)(xvii), Ibid
War crime of employing prohibited gases, liquids, materials or devices, Article8(2)(b)(xviii),Ibid
War crime of employing prohibited bullets, Article8(2)(b)(xix), Ibid
War crime of employing weapons, projectiles or materials or methods of warfare listed in the in the annex to the statue, Article8(2)(b)(xx), Ibid

War crime of outrages upon personal dignity, Article8(2)(b)(xxi), Ibid
War crime of rape, Article8(2)(b)(xxii)-1, Ibid
War crime of sexual slavery, Article8(2)(b)(xxii)-2, Ibid
War crime of enforced prostitution, Article8(2)(b)(xxii)-3, Ibid
War crime forced pregnancy, Article8(2)(b)(xxii)-4, Ibid
War crime of enforced sterilization, Article8(2)(b)(xxii)-5, Ibid
War crime of sexual violence, Article8(2)(b)(xxii)-6, Ibid
War crime of using protected persons as shields, Article8(2)(b)(xxiii), Ibid
War crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions, Article8(2)(b)(xxiv), Ibid
War crime of starvation as a method of warfare, Article8(2)(b)(xxv), Ibid
War crime of using, conscripting or enlisting children, Article8(2)(b)(xxvi), Ibid
War crime of murder, Article8(2)(c)(i)-1, Ibid
War crime of mutilation, Article8(2)(c)(i)-2, Ibid
War crime of cruel treatment, Article8(2)(c)(i)-3, Ibid
War crime of torture, Article8(2)(c)(i)-4, Ibid
War crime of outrages upon personal dignity, Article8(2)(c)(ii), Ibid
War crime of taking hostages, Article8(2)(c)(iii), Ibid
War crime of sentencing or execution without due process, Article8(2)(c)(iv), Ibid
War crime of attacking civilians, Article8(2)(e)(i), Ibid
War crime of attacking objects or persons using the distinctive emblems of the Geneva Convention, Article8(2)(e)(ii), Ibid
War crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission, Article8(2)(e)(iii), Ibid
War crime of attacking protected objects, Article8(2)(e)(iv), Ibid
War crime of pillaging, Article8(2)(e)(v), Ibid
War crime of rape, Article8(2)(e)(vi)-1, Ibid
War crime of sexual slavery, Article8(2)(e)(vi)-2, Ibid
War crime of enforced prostitution, Article8(2)(e)(vi)-3, Ibid
War crime of forced pregnancy, Article8(2)(e)(vi)-4, Ibid
War crime of sterilization, Article8(2)(e)(vi)-5, Ibid
War crime of sexual violence, Article8(2)(e)(vi)-6, Ibid
War crime of using, conscripting and enlisting children, Article8(2)(e)(vii), Ibid
War crime of displacing civilians, Article8(2)(e)(viii), Ibid
War crime of treacherously killing or wounding, Article8(2)(e)(ix), Ibid
War crime of denying quarter, Article8(2)(e)(x), Ibid
War crime of mutilation, Article8(2)(e)(xi), Ibid
War crime of medical or scientific experiments, Article8(2)(e)(xi)-1, Ibid
War crime of destroying or seizing the enemy's property, Article8(2)(e)(xii)-1, Ibid
War crime of employing poison or poisoned weapons, Article8(2)(e)(xiii), Ibid
War crime of employing prohibited gases, liquids, materials or devices, Article8(2)(e)(xiv), Ibid
War crime of employing prohibited bullets, Article8(2)(e)(xv), Ibid

It can investigate and prosecute to try and punish individuals accused of crimes if committed after the 1 July, 2002. The ICC does not prosecute persons who are under the age of 18 years at the time the crime was allegedly committed. Therefore, juveniles in conflict with law are outside the scope and purview of the Rome Statute. It is intended to be a court of last resort, and is not to replace national criminal justice systems, which have the primary duty to deal with these crimes. The Court will only step in if a State is not willing to deal with crimes when they occur, or is not able to do so. In the proceeding before the ICC, no person has immunity because of his or her status. The gubernatorial nominees, including the Presidents, Members of Parliament, government officials and leaders of rebel movements, can all be tried. Under certain circumstances, a person in authority may be held responsible for the crimes committed by those who work under his or her command or order. Therefore, as many as 99 kinds of victims are entitled to get support from the ICC and the laws governing the judicial process in the international crimes. However, for the purpose of participation, the ICC has a separate definition and classification for the victims.

8.8.3 Definitions on Victim in ICC

The ICC recognises two types of victims, for the purposes of participation in its proceedings, - 1) individuals and 2) organizations. It reads as follows:

(a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; and

(b) victims may include organisations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other place and objects for humanitarian purposes.[87]

The individuals are those who have suffered harm as a result of one of the crimes identified by ICC. Individual victims should apply by completing the Application Form for Individuals. Organisations or institutions, may do so when their property dedicated to certain purposes (religion, education, art, science or charitable and humanitarian purposes, or historic monuments or hospitals) are harmed as a result of one of the ICC identified crimes. Organizations and institutions should apply for participation by using a separate form, namely the Application Form for Organisations. Only duly authorised representatives of an organisation or institution may complete the application form. Victims may include victims of sexual violence, children, persons with disabilities, or elderly persons. A victim can also be a person who suffers harm as a result of a crime targeted at another person, such as a family member of someone who has been killed.

8.8.4 Participation in the Proceedings

In the Rome Statute, the rights of the accused persons and the protection of the victims have been properly defined and codified.[88] The ICC has been empowered, and it is its mandatory duty to take appropriate measures

[87] Section III, Rules of Evidence and Procedure, Rule 85, available at, https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf#page=32

[88] Article 67 dealing with Rights of the Accused. Article 68 provides the protection of victims and witnesses.

to protect the safety, physical and psychological well-being, dignity and privacy of the victims. The measures initiated for the protection of the victims should not be prejudicial to or inconsistent with the rights of the accused for a fair and impartial trial. The Rome Statute has created rights for the victims and it has been hailed as a great innovation. The ICC is also empowered to determine the quantum of damage or loss caused to the victims. The Court can make an order against the convicted person for payment for reparations. In *Lubanga*, the Trial Chamber, explained the purpose of the reparations as fulfilling two important ones. It obliges those responsible for serious crimes to repair the harm they have caused to the victims and enable the Chamber to ensure that offenders account for their acts.[89]

The Rome Statute has created three institutions within the ICC for the welfare of victims. They are, a) Trust Fund for Victims; b) the Victims and Witnesses Section; and c) the Office of Public Counsel for Victims. The Rome Statute provides that the Trust Fund is to be used 'for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims'.[90]

[89] *Lubanga* (ICC-01/04-01/06), Decision establishing the principles and procedures to be applied to reparations, 7 August, 2012.
[90] Ibid, Article 79, Rules of Procedure and Evidence, Rule 98.

8.8.5 The Victims and Witnesses Section

The Victims and Witnesses Unit, now known as the Victims and Witnesses Section,[91] is also a creation of the Rome Statute.[92] The Section is to provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by them. Precise instructions concerning the responsibilities of the victims and witnesses Section appear in the Rules of Procedure and evidence. With respect to all witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by witnesses, the Unit is charged with:

(i) providing them with adequate protective and security measures and formulating long and short term plans for their protection;
(ii) recommending to the organs of the Court the adoption of protection measures and also advising relevant States of such measures;
(iii) assisting them in obtaining medical, psychological and other appropriate assistance;
(iv) making available to the Court and the parties training in issues of trauma, sexual violence, security and confidentiality;
(v) recommending, in consultation with the Office of the Prosecutor, the elaboration of a code of conduct, emphasising the vital nature of security and confidentiality for investigators of the Court and of the defence and all intergovernmental and non-governmental organisations acting at the request of the Court, as appropriate; and

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[91] It was renamed the Victims and Witnesses Section in 2015; Report on activities and programme performance of the International Criminal Court for 2014, ICC -ASP/14/8, para 172.

[92] Rome Statute, Article 43(6). This summary provision is supplemented by very detailed provisions in other instruments; Rules of Procedure and evidence, Rule 16-=19, Regulations of the Court, ICC-BD/01-01-04, Regulation 41; Regulations of the Registry, Regulations 54-118.

(vi) co-operating with States, where necessary, in providing any of the measures described above.[93]

The Section also has specific duties concerning witnesses:

(i) advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;

(ii) assisting them when they are called to testify before the Court;

(iii) taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings.[94]

8.8.6 The Office of Public Counsel for Victims

The Office of Public Counsel for Victims is the principal means by which the Registry fulfills its general mandate to assist victims in obtaining legal advice, organising their legal representation, and providing their legal representatives with adequate support, assistance and information.[95] It is a requirement of the Regulations of the Court.[96] Its existence is without precedent, no similar body having been established by other international tribunals. The Office is designed to ensure the effective participation of victims in proceedings before the Court. Its role is to provide support and assistance to the legal representative for victims and to victims, including, where appropriate, legal research and advice and appearance before a Chamber in respect of specific issues. This may involve producing factual background

[93] Rules of Procedure and Evidence, Rule 17(2)(a)
[94] *Ibid*. Rule 17(2)(b)
[95] Rules of Procedure and Evidence, Rule 16(1)(b) and (c)
[96] Regulations of the Court, Regulation 81, Also Regulations of the Registry, Regulations 114-17

documents on situations before the Court, and preparing research papers, legal opinions and bibliographies on aspects of international criminal law, especially those that are relevant to the rights of victims. The Office is fully independent of the other institutions of the Court.[97]

The ICC proceedings are adversarial, rather than judge-led (even if judges are more involved in the proceedings than in national common law jurisdictions), and the testimony is not given in the narrative form. Thus, for the ICC to successfully incorporate an active victim participation scheme, it must carefully balance victim participation with the right of the accused to a fair trial.

In addition, while the international criminal tribunals' paradigm shift from passive to active victim participation has great potential to contribute to restorative justice goals, these tribunals must at the same time guard themselves against the hazards involved in a flood of victims demanding unrealistic resources that may threaten to paralyse the judicial proceedings (and thereby impede their retributive goals).

The ICC judges are developing, through the case law, prerequisites and modalities for victim participation that aim to resolve some of the tensions arising from the participation of large numbers of victims in cases of mass atrocities before a court with adversarial proceedings. As the judges continue to face new challenges relating to victim participation issues, this case law will continue to develop. The International Criminal Court emerged in the early

[97] Regulations of the Registry, Regulation 115; Report on the Activities of the Court, ASP/5/15, para 77.

twenty-first century as an ambitious and permanent institution with a mandate to address mass atrocity crimes such as genocide and crimes against humanity.[98]

8.9 The Council of Europe and Recommendation No. (85) 11

The Council of Europe was established by ten States with the signing of its Statute in London on 5 May, 1949, and it came into force on 3 August, 1949. It is an inter-Governmental European Organisation to pursue peace, based upon Justice and International Cooperation. Since 1949, many countries have joined the Council of Europe. Every State in the Council of Europe must accept the principles of Rule of Law, and that all persons within their jurisdiction must enjoy human rights and fundamental freedom. The Protection and promotion of the individual, his liberties and rights are the primary concern of member States. The Committee of Ministers of the Council of Europe adopted Recommendation (85) 11, on 28 June, 1985. It is a landmark Resolution in the journey of victim justice, in Europe. The object of the said Resolution is to improve the treatment of victims of crime and reduce instances of secondary victimisation. The Recommendation (85) 11 of the Committee of Ministers to Member States on the position of the victim in the Framework of Criminal Law and Procedure is a clear exponent of the grand underlying aim of the activities of the Council of Europe: the Consolidation of Human Rights. It should be placed in the larger framework of attention given to crime and

[98] In C. De Vos, S. Kendall, & C. Stahn (Eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*. Cambridge: Cambridge University Press. (2015), (pp. I-Ii) Downloaded from https://www.cambridge.org/core.NUALS, on 30 July 2018

victims by the Council of Europe over the years.[99] The Recommendation (85) 11 was adopted about five months prior to the UN Declaration, 1989. It is argued that the said Recommendation might have influenced the UN Declaration, which contained a common standard of treatment of victims of crime.

8.9.1 Features of Recommendation (85) 11

The Committee of Ministers of the Council of Europe considered the objectives of the Criminal Justice System which are traditionally expressed in terms primarily concerning the relationship between the State and the offender. The further objectives of the Recommendations are given hereunder:

> "Considering that consequently the operation of this system has sometimes tended to add to rather than to diminish the problems of the victim;
>
> Considering that it must be a fundamental function of criminal justice to meet the needs and to safeguard the interests of the victim;
>
> Considering that it is also important to enhance the confidence of the victim in criminal justice to meet the needs and to safeguard the interests of the victim;
>
> Considering that, to these ends, it is necessary to have more regard in the criminal justice system to be physical, psychological, material and social harm suffered by the victim, and to consider what steps are desirable to satisfy his needs in these respects;
>
> Considering that measures to this end need not necessarily conflict with other objectives of criminal law and procedure, such as the reinforcement of social norms and the rehabilitation of offenders, but

[99] Ernestine Hoegen & Marion Brienen, Victims of Crime in 22 Criminal Justice Systems, Wolf Legal Productions (2000) P 9

may in fact assist in their achievement, and in an eventual reconciliation between the victim and the offender;

Considering that the needs of the victim should be taken into account to a greater degree, throughout all stages of the criminal justice process."[100]

The Member States of European Council is directed to review the laws relating to CJA in accordance with seven stages or factors relating to investigation, prosecution, interrogation of victim, court proceedings, implementation of court orders, protection of privacy of the victim and special protection to the victims of crime against intimidation and the risk of retaliation by the offender. The Recommendation specifically requests to revisit the Criminal Justice System and laws encompassing the guidelines targeting the elements from the different stages of the criminal proceedings – from the pre-trial stage to the enforcement stage – as well as the treatment of victims by the criminal justice authorities and in particular by the police, the questioning of victims, and their protection.

In pursuance of the adoption of the above said Recommendation, the European Committee on Crime Problems constituted a select committee of experts on the victims and criminal and social policy. It studied the victim's position in the framework of criminal law and suggested that a Criminal Justice System should do justice to the victim without undermining the other objectives, which includes the rights and the rehabilitation of the offenders. Therefore, Recommendation (85) 11 has introduced great measures to safeguard the rights and interests of both the accused and the victim. It has

[100] Recommendation (85) 11, Council of Europe, 28 June 1985

been serving as a guiding factor for improvement of national legislation relating to crime and punishment, and created a CJA that responds to the pleas and entitlement of perpetrator and sufferer of crime, who are the two important stakeholders.

8.10 UN Declaration, 1985

The General Assembly of United Nations, on 29 November 1985, adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. The Resolution is based on the conviction that victims should be treated with compassion and respect for their dignity, and that they are entitled to prompt redress for the harm that they have suffered, through access to the criminal justice system, reparation and services to assist their recovery.[101] It consists of two parts. Part A of the Declaration deals with the victims of crime and access to justice and fair treatment, restitution, compensation and assistance. The provisions in Part B, deal with victims of abuse of power. Sections 1 – 3 of Part A defines the victims of crime, which reads as follows:

1. "Victims" means person who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power;
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the

[101] Foreword, *Handbook on Justice for Victims*, UNODCCP, New York, 1999

perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization;

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

As suggested by Ian Freckelton, the important characteristic of any working definition should be that it recognises that people are both somatically and psychologically affected by crime, and that the effects of criminal conduct radiate out well beyond the actual criminal act or omission, impacting upon people adversely at secondary, tertiary and even quaternary levels. Moreover, the effects of crime are profound at both a social and economic level, for the persons immediately concerned and within the general community.[102] The United Nations Office for Drug Control and Crime Prevention, Centre for International Crime Prevention has published a handbook titled as '*Handbook on Justice for Victims'*. It was prepared by a group of experts from more than 40 countries at a series of meetings supported by the Office for Victims of Crime in the United States Department of Justice and the Ministry of Justice in The Netherlands. It is on the use and application of the Basic Principles of Justice for Victims of Crime and Abuse of Power.[103]

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[102] Ian Freckelton, *Criminal Injuries Compensation: Law, Practice and Policy,* LBC Information Services, Pyrmont, NSW (2011) P.11

[103] General Assembly resolution 40/34, annex on 29 November, 1985.

In the event of a crime, victim is a person who suffers from physical and financial impact of victimization. The psychological injury and social cost, secondary victimisation from the criminal justice system and society, experienced by the victim is also carefully taken into consideration, and the Handbook has been prepared to serve as a manual and guidance for the frontline professionals and others who are involved in the policy making, victim assistance, and legal aid to the victims of crime.

8.11 Constitutional Status to Crime Victims

There are many laws to address the needs of the victims now in force in various jurisdictions, which includes the Schemes to provide financial assistance through restitution or restoration from State sponsored fund. But Florida and Connecticut are the two States in the United States which have, in their Federal Constitutions, constitutionally guaranteed rights to victims of crime.[104] Thus, the crime victims occupy an elevated constitutional status in the legal domain in such jurisdictions, and paves a way to strengthen victim orientation in CJA and new laws to correct, by higher degrees, a perceived imbalance in the criminal justice system, a system which affords the accused a wide range of constitutional safeguards.[105]

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[104] Florida, a State located in the Southeastern region in the United States of America and Connecticut, a US State in the Southern New England, https://www.infoplease.com/us/states

[105] Patrick B. Calcutti, *The Victims' Rights Act of 1988, the Florida Constitution, and the New Struggle for Victims' Rights,* 16 Fla. St. U. L. Rev. 811 (1988) https://ir.law.fsu.edu/lr/vol16/iss3/11,

8.11.1 Constitutional Protection in the State of Florida

There were fifty six delegates from Florida's twenty counties who assembled in the Panhandle town of Saint Joseph and framed the 1838 Constitution.[106] It was revised in 1968 and amended on several occasions to meet political and social developments.[107] A referendum was conducted in the State of Florida to introduce an amendment to the Constitution and insert a provision to guarantee the rights of the victims on 8th November, 1988, and the voters overwhelmingly displayed their approval of the proposed constitutional amendment. 3,629,963 people voted for the amendment while 394,617 voted against it.[108] As per the will of the majority, the Constitution of the State of Florida has been amended with incorporation of a new provision, which defines the victims of crime as follows:

> "… a 'victim' is a person who suffers direct or threatened physical, psychological, or financial harm as a result of the commission or attempted commission of a crime or delinquent act or against whom the crime or delinquent act is committed. The term 'victim' includes the victim's lawful representative, the parent or guardian of a minor, or the next of kin of a homicide victim, except upon a showing that the interest of such individual would be in actual or potential conflict with the interests of the victim. The term 'victim' does not include the accused.

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[106] florida-constitution.pdf (floridados.gov)

[107] The Constitution of the State of Florida, as revised in 1968 consisted of certain revised articles as proposed by three joint resolutions which were adopted during the special session of June 24-July 3, 1968, and ratified by the electorate on November 5, 1968, together with one article carried forward from the Constitution of 1885, as amended. florida-constitution.pdf (floridados.gov)

[108] Ch. 88-96, 1988 Fla. Laws 444 (codified at scattered sections of FLA. STAT.) Untitled handout reporting official results of the Nov. 1988 Gen. Election (on file, Fla. Dep't of State, Div. of Elections)

> The terms 'crime' and 'criminal' include delinquent acts and conduct."[109]

The above definition, inserted into the Constitution, is a noteworthy achievement in the victim justice process as it has widened the scope of the definition of crime with the inclusion of delinquent acts and brings, any person who suffers directly or is threatened with physical, psychological, or financial harm due to crime or an attempt to commission of such crimes, under the definition and purview of the term victim. Consequential to the constitutional definition for the term victim, rights are also guaranteed by an amendment. The rights are extremely relevant and they have elevated the victim from the status of a "witness" to that of a "party". The rights guaranteed are explained in Section 19 and they are, *inter alia*, the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings and they are aimed to preserve and protect the right of crime victims to achieve justice, ensure a meaningful role throughout the criminal and juvenile justice systems for crime victims, and ensure that crime victims' rights and interests are respected and protected by law in a manner no less vigorous than protection afforded to criminal defendants and juvenile delinquents. Every victim is entitled to the rights, beginning at the time of his or her victimisation.[110] The

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[109] Amendment proposed by Constitution Revision Commission, Revision No. 13, 1998, filed with the Secretary of State May 5, 1998; adopted 1998.

[110] Constitution of the State of the Florida,
Section 16 Rights of the accused and Victims:
(1)The right to due process and to be treated with fairness and respect for the victim's dignity.
(2)The right to be free from intimidation, harassment, and abuse.
(3)The right, within the judicial process, to be reasonably protected from the accused and

rights extend till the completion of trial, appeal, post-conviction and parole process. It has recognised the crime victim not only as a stakeholder but as a rights holder.[111]

8.11.2 Constitution of the Connecticut State and Victims

The Connecticut State is known as the "Constitution State", the "Nutmeg State", the "Provisions State", and the "Land of Steady Habits". In the State of Connecticut, in 1818, a convention was assembled which agreed upon a Constitution. It was submitted to the people, and approved by a vote of 13,918 in its favour and 12,364 against.[112] The first Article declares the rights and Section 8 deals with criminal prosecution. The amended text of the provision reads:

> 'In all criminal prosecutions, a victim, as the general assembly may define by law, shall have the following rights: (1) the right to be treated with fairness and respect throughout the criminal justice process; (2) the right to timely disposition of the case following arrest of the accused, provided no right of the accused is abridged; (3) the right to be reasonably protected from the accused throughout the criminal justice

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any person acting on behalf of the accused. However, nothing contained herein is intended to create a special relationship between the crime victim and any law enforcement agency or office absent a special relationship or duty as defined by Florida law. 4)The right to have the safety and welfare of the victim and the victim's family considered when setting bail, including setting pretrial release conditions that protect the safety and welfare of the victim and the victim's family. (5)The right to prevent the disclosure of information or records that could be used to locate or harass the victim or the victim's family, or which could disclose confidential or privileged information of the victim

[111] Patrick B. Calcutti, *The Victims' Rights Act of 1988, the Florida Constitution, and the New Struggle for Victims' Rights*, 16 Fla. St. U. L. Rev. 811 (1988) . https://ir.law.fsu.edu/lr/vol16/iss3/11

[112] On 12 October, 1818, Governor Wolcott issued his proclamation, at the request of the General Assembly, declaring that the Constitution was thenceforth to be observed by all persons, as the Supreme Law of the State Connecticuthttps://www.cga.ct.gov/asp/Content/constitutions/1818Constitution.htm

process; (4) the right to notification of court proceedings; (5) the right to attend the trial and all other court proceedings the accused has the right to attend, unless such a person is to testify and the court determines that such person's testimony would be materially affected if such person hears other testimony; (6) the right to communicate with the prosecution; (7) the right to object to or support any plea agreement entered into by the accused and the prosecution and to make a statement to the court prior to the acceptance by the court of the plea of guilty or *nolo contendere* by the accused; (8) the right to make a statement to the court at sentencing; (9) the right to restitution which shall be enforceable in the same manner as any other cause of action or as otherwise provided by law; and (10) the right to information about the arrest, conviction, sentence, imprisonment and release of the accused. The general assembly shall provide by law for the enforcement of this subsection. Nothing in this subsection or in any law enacted pursuant to this subsection shall be construed as creating a basis for vacating a conviction or ground for appellate relief in any criminal case.'[113]

As many as ten rights are introduced in the Constitution. The rights include fair treatment of victim in all proceedings, adherence of the principles of natural justice in case of any pleas or petition presented by the accused, the right to object such inappropriate pleas or unsustainable reliefs claimed by the accused *etc*. In the State of Connecticut the status of the victim has been elevated to be at par with the accused, by the insertion of the said amendment adopted in November 1996.

[113] Sec. 8(b) amended in 1982 as per Art. XVII of Amendments to the Constitution of the State of Connecticut adopted November 27, 1996.

In the United States, the issue of federal constitutional protection of victims' rights was first raised in the landmark President's Task Force on Victims of Crime Final Report, published in 1982. Its authors proposed augmenting the Sixth Amendment of the U.S. Constitution to provide that -

> ". . . the victim, in every criminal prosecution, shall have the right to be present and to be heard at all critical stages of judicial proceedings."[114]

Subsequently, President William Jefferson Clinton remarked thus:

> "… when someone is a victim, he or she should be at the centre of the criminal justice process, not on the outside looking in. Participation in all forms of government is the essence of democracy. Victims should be guaranteed the right to participate in proceedings related to crimes committed against them. People accused of crimes have explicit constitutional rights. Ordinary citizens have a constitutional right to participate in criminal trials by serving on a jury. The press has a constitutional right to attend trials. All of this is as it should be. It is only the victims of crime who have no constitutional right to participate, and that is not the way it should be."[115]

The demand to provide Federal Constitutional protection to victims of crime has been continuously raised since 1982 and if it is realized, the victim would find a place in the US Constitution.

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[114] Sixth Amendment of the US Constitution

[115] Announcement of Victim's Rights to Constitutional Amendment, June 25, 1996, https://millercenter.org/the-presidency/presidential-speeches/june-25-1996-victims-rights-announcement

8.12. Conclusion

The study of Criminal Justice Systems in the Australia, Canada, New Zealand, United Kingdom, United States of America, South Africa, where adversarial approach has been followed in their CJA, shows that there is a trend towards victim orientation. The victim charters and victim welfare policies are brought into force to provide minimum standard of treatment with dignity and compassion to the person harmed by the crime occurrence. The United Nations and European Council have adopted Declaration and Recommendation. The Republic of South Africa has introduced a victim charter in consonance with the said U.N. Declaration 1989. Many of the countries introduced victim beneficial schemes and statutes even prior to the said Declaration. The U.N. Declaration has been serving as a guiding factor to enhance fair treatment to the victims, and also to guarantee various rights and reliefs to them.

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CHAPTER IX
RESTORATION TO THE VICTIMS OF CRIME

> "Restorative Justice is a process to involve to the extent possible those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations in order to heal and put things as right as possible.'[1]
>
> Howard Zehr

9.1 Introduction

Criminal Justice Administration (CJA) in India faces many problems such as delay, hostile witnesses, poor investigation, inefficient representation in prosecution *etc*., and these issues cause dissatisfaction to all its stakeholders. The offender and victim are uncertain about the duration and outcome of justice process. The society also does not feel that justice is rendered by the courts nor is it benefitted by them immediately. Unavailability of time bound justice, cumbersome procedures, cost of litigation and hidden cost make the people to suffer from lack of access to justice. It is estimated that that around 5.1 billion people today, two-thirds of the world's population, lack meaningful access to justice.[2] Under the circumstances, an alternative method of justice dispensation to the punitive system has become the need of the hour. Further, CJA and its process do not adequately consider providing opportunities to the victim for active participation in the justice dispensing process and heal their

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[1] Howard Zehr, *Changing Lenses, A New Focus for Crime and Justice*, Herald Press (1990) P 130

[2] UN Taskforce on Justice, *Justice for All: the Report of the Task Force on Justice*, April 2019, P 12, https://www.justice.sdg16.plus/report.

wounds caused by the crime. The present system and laws primarily provide punishment as a panacea for prevention, control of crime and reformation of offender. In these circumstances, how restoration of the victims of crime to the pre-crime stage can be realized within the existing frame work of criminal laws in India, is the subject for study in this chapter.

9.2 Alternative to Punitive Justice

Imprisonment either simple or rigorous is recognised as penal sanctions in most of the cases against the offender. Several social objectives are claimed for imprisonment. It keeps persons (under trial prisoner) suspected of having committed a crime under secure control until a court determines their culpability. Equally importantly, it punishes convicted offenders by depriving them of their liberty after they have been convicted of an offence, keeps them from committing further crime while they are in prison, and, in theory, allows them to be rehabilitated during their period of imprisonment. Finally, imprisonment may be thought to be acceptable for detaining people who are not suspected or convicted of having committed a crime, but whose detention is justified for some other reason.[3] Though the imprisonment is justifiable for many reasons, still it is costly, expensive and causes financial burden to the State exchequer. Therefore, debate for alternatives to imprisonment has gained ground in legal discourse.

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[3] *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, United Nations Office on Drugs And Crime Vienna, United Nations, New York, (2007) P 6 Available at https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf

When society considers alternative justice system that accommodates personal relationship between the accused and victim and tries to prevent re-offending, the idea of Restorative Justice becomes an inevitable alternative to the traditional justice system. Albert Eglash (1908- 1993), a psychologist who dealt with the prisoners in Russia, suggested an innovative mode. He argued that the offenders should be made aware of the consequences of their crimes on the victim. In his paper he suggested that the perpetrators of crime should understand the gravity of the crime they committed and realise the suffering of the victims. Further, there must be a contribution from the accused towards the restitution to the sufferer of crime. He introduced the term Restorative Justice to legal literature.[4] He has observed that Restorative justice finds its roots in 'Creative Restitution'. Further, he suggested three types of adjudicatory process in the criminal justice: 1) Retributive Justice; 2) Distributive Justice; and 3) Restorative Justice.

9.3 Retributive Justice

Retributive punishment is sanctioned by most penal systems. It is one of the oldest and the most basic justification for punishment and involves the principles of revenge and retribution. Retributive justice theory is understood as a form of justice committed to the following three principles:

(1) that those who commit certain kinds of wrongful acts, paradigmatically serious crimes, morally deserve to suffer a proportionate punishment;

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[4] Albert Eglash, *Beyond Restitution: Creative Restitution in Criminal Justice"* Joe Hudson and Burt Galaway (eds) Lexington, (1977) P 91-92

(2) that it is intrinsically morally good, without reference to any other good that might arise, if some legitimate punisher gives them the punishment they deserve; and

(3) that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.[5]

This equation of punishment with the gravity of the offence is embedded in the Judeo-Christian tradition in the Mosaic laws of the Old Testament that emphasise the idea of "an eye for an eye" which was neither constrained by questions of offender culpability nor directed at preventing future wrong doing, and believed that offenders under a retributive philosophy simply got what they deserve. Punishment is justified on its own grounds, a general principle that has remained popular throughout the Western history, in both law and widespread public beliefs, about how justice should be dispensed in democratic societies.[6] It is heavily focused on punishment and does not seek to rehabilitate the offenders. Stringent punishment would only estrange the relationship between offender and victim and there is no scope for restoration of relationship between them. The primary purpose of retributive justice is to restore balance in the social order by imposing punishments proportionate to the crime. As the punishment is regarded befitting censure against the perpetrator, retributive justice has greater support than other modes of criminal

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[5] Walen, A. (*Retributive Justice. The Stanford Encyclopedia of Philosophy*, 2016), referred to in Yuliandri, *Retributive Justice Theory and the Application of the Principle of Sentencing Proportionality In Indonesia*, Journal of Legal, Ethical and Regulatory Issues Volume 21, Issue 4, 2018, Available at *https://www.abacademies.org/articles/Retributive-justice-theory-and-the-application-of-the-principle-of-sentencing-proportionality-in-Indonesia-1544-0044-21-4-240.pdf*

[6] Dr. Ivneet Walia, *Crime, Punishment and Sentencing in India,* Thomson Reuters (2019) P 61

justice dispensation. Although retributive justice may appear to be victim-focused, its underlying goal is actually to take the focus away from the victim. This is accomplished by shifting attention toward the State, which is ultimately responsible for upholding the rule of law. The State is motivated to seek 'just deserts' in order to decrease the likelihood of vigilantism. As a result, retributive justice can be thought of as vengeance curbed by the intervention of someone other than the victim and by principles of proportionality and individual rights. Consistent with this philosophy, retributive justice does not take into account victims 'desire' to forgive perpetrators or extend mercy, although victim impact statements are sometimes used in the sentencing phase of criminal trials.[7]

9.4 Distributive Justice

The term Distributive Justice relates to fair distribution of benefits and burdens among all layers of the society. It is based on therapeutic treatment of offenders. It is a developing concept and not yet recognized or legally ratified by any jurisdiction in the world. It is concerned with the distribution and allocation of common goods and common burdens. The term distributive justice refers to theories that address the fairness of allocation of economic resources and social welfare within a society. Such theories both criticize and prescribe basic arrangements in society. The term distributive justice refers to fairness in the way things are distributed, caring more about how it is decided who gets what, rather than what is distributed. In modern society, this is an

[7] Inanet K Wilson, *The Prager handbook of Victimology*, Greenwood Publishing Group, (2009) P 229

important principle, as it is generally expected that all goods will be distributed throughout society in some manner. In a society with a limited amount of resources and wealth, the question of fair allocation is often a source of debate and contention. This is called distributive justice.[8]

The Supreme Court, in *Gurbax Singh* v. *Financial Commissioner*[9] has explained that distributive justice as the prototype of justice. It observes that in it, we have found the idea of justice, towards which the concept of law must be originated. Law offers and protects the conditions necessary for the life of man and his perfections. It quotes the words of Cardozo that what we are seeking is not merely the justice that one receives when his rights and status are determined by the law as it is: what we are seeking is a justice to which law must conform. The sense of justice will be stable when it is firmly guided by 'pragma' objectives and subjective interests.

9.5 Restorative Justice

Among the three modes of response to crimes, restorative justice is considered to be the best mode as it permits victim participation in the process. It is based on restitution and the intent is to enhance justice to the stakeholders and prevent reoffending and some of the other disappointing aspects of the modern criminal justice administration such as delay, procedural complexity that have led to demand for reforms in the criminal justice system. In some of the common law jurisdictions, restoration has been adopted as a new theory of

[8] Distributive Justice & Its Relevance in Contemporary Times, available at https://lexforti.com/legal-news/wp-content/uploads/2020/09/3-distributive-justice-fina_.pdf
[9] AIR 1991 SC 435

justice. In many countries, dissatisfaction and frustration with the formal justice system or a resurging interest in preserving and strengthening customary law and traditional justice practices have led to calls for alternative responses to crime and social disorder. Many of these alternatives provide the parties involved, and often also the surrounding community, an opportunity to participate in resolving conflict and addressing its consequences. Restorative justice programmes are based on the belief that parties to a conflict ought to be actively involved in resolving it and mitigating its negative consequences. [10]

'Restorative justice' is the term coined to describe justice approaches that focus on reparation rather than retribution. Restorative justice is a guiding philosophy broader than any one specific practice or program. Punishment, in its common retribution focused sense, is secondary to the goals of reparation and reintegration under a restorative approach. Retribution focused frameworks emphasize punishment-oriented concerns such as what precise crimes were committed and what level of punishment is deserved or statutorily prescribed for that specific offense. Restorative justice focuses on distinctively different questions such as what harm has occurred, what must be done to repair this harm, and who is responsible for this repair. These latter questions demonstrate restorative justice's goal of identifying ways the crime has impacted specific victims, offenders, and communities, and discovering ways to remedy these harms and mend damaged relationships. To this end, restorative justice is often

[10] Hand book on Restorative Justice Programmes, United Nations, New York, 2006 https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

referred to as a peacemaking process.[11] It emphasises repairing harm caused by the act of crime and makes the stakeholders as participants. The restorative process would also allow third party mediation and offender-victim dialogue to arrive at peace between them. Since 1974, more than 34 countries have adopted restorative justice as a process and a policy in their jurisdiction. Legislative framework is also revisited by those countries and new schemes and law adopted.[12]

9.6 Restoration and Restitution – need to distinguish

Restoration and restitution are two separate kinds of victim healing mechanisms being practiced around the world. Both practices are founded on two important principles, that crime causes harm, justice should focus on repairing that harm and the person affected by the crime should be provided adequate opportunities to participate in the resolution. Victims are central in restorative process.

The Praeger Handbook of Victimology insists that fundamental to restorative justice is the principle that key stakeholders include both primary and secondary victims. Primary victims, sometimes called 'direct victims', are those who are directly harmed by an offender's criminal behavior and often suffer physical injury, monetary loss, and emotional anguish. Although the effect of victimisation varies, two common needs that victims encounter are the

[11] Hand book on Restorative Justice Programmes, United Nations, New York, 2006 https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

[12] See the details in https://www.penalreform.org/blog/developing-restorative-justice-in-law-policy-and-practice/

need to reclaim an appropriate sense of control of their lives, because victimisation is in itself an experience of helplessness, and the need to have their rights justified. Secondary victims are 'indirect victims', who are indirectly harmed by the offender's actions. This category can include both the victim's and offender's family members and the community at large.[13] Restorative justice is a response to crime that seeks to balance the needs of victims of crime, criminal offenders and the communities to which they belong. This justice perspective is unique in that it respects victims, traditionally the forgotten component of the criminal justice system. The restorative frameworks hold offenders accountable to their victims, and it often allows the community to take an active role in the justice process.

Restitution is thought of as a form of monetary payment that an offender is ordered to pay to a victim for a crime that has been committed against that victim. However, restitution can include both monetary reimbursements and in-kind services.[14] Beyond the simple monetary payment for damages incurred by the victim, other restitution models include the community service model, the victim-offender mediation model, and the victim-reparation model.[15] It is explained that the restitution is not an altogether new form of punishment. It has existed since time immemorial. However, with the classification of acts and omissions committed against the generally accepted societal behavior into

[13] Janet K Wilson, *The Preager Handbook of Victimology,* Greenwood Publishing Groups, (2009) P 228

[14] Christopher Bright, "Restitution," Prison Fellowship International, http;//www.restorativejustice.org/intro/tutorial-introduction-to-restorative-justice/outcomes/restitution.

[15] See Dean J. Champion, *Probation, Parole, and community corrections,* Prentice Hall, (2002).

categories of crimes and wrongs, restitution was saved for civil wrongs and crimes were meted out with punishment.[16]

It is understood as an offender's personal accountability to the victim. The concept of restitution holds offenders partially or fully accountable for the financial losses suffered by the victims of their crimes. It is typically ordered in both juvenile and criminal courts to compensate victims for out-of-pocket expenses that are the direct result of a crime. Most often, it is ordered in cases of property crime such as a home burglary involving stolen or damaged property or the theft of goods from a retail store. It may also be applied to reimburse victims of violent crimes for current and future expenses related to their physical and mental health recovery and to make up for loss of support for survivors of homicide victims. Other types of cases in which restitution is commonly ordered are theft of services (e.g. cab or restaurant bills), fraud, forgery, and violation of vehicle and traffic laws. Restitution is not a punishment or an alternative to fines, sanctions, or interventions with the offender. It is a debt owed to the victim.[17]

Restorative justice is based on the principles of re-integration. In this process the offenders take personal responsibility for the offence committed by them and the damage caused due to it. In some cases, the offender directly accepts the loss that has occurred to the victim and voluntarily offers financial

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[16] Luara Mirsky, *Albert Eglash and Creative Restitution: A Precursor to Restorative Practices*, IIRP News, (Dec. 3, 2003), available at: https://www.iirp.edu/news/albert-eglash-and-creative-restitution-a-precursor-torestorative-practices

[17] Handbook of Restitution by National Crime Justice Reference Service, USA (NCJRS) P 315 available at https://www.ncjrs.gov/ovc_archives/directions/pdftxt/chap15.pdf

restitution or community service to compensate the victim. The community mediation groups or public volunteers who wish to help both the victim and offender are also primary stakeholders of crime in the Restorative Justice process. The Restorative Justice Practices are gaining ground in the western jurisdictions.

The United Nations has issued a handbook with guidelines titled, 'Basic Principle of United Nations on the use of Restorative Programmes.'[18] It carries the definition that 'Restorative Justice programme' means any programme that uses restorative processes or aims to achieve restorative outcomes. The definition is only about the Restorative process and not Restorative Justice. There is no single definition of restorative justice, nor any exhaustive narrative of its foundational principles or constituent elements.[19]

9.7 Restorative Justice (RJ) in an Adversarial System

It is the basic principle that, in an adversarial practice, crime is viewed as a breach of law and an act against the State. Most of the present Criminal Justice Systems are concerned with providing of punishment as a sole and only response to the crimes. Therefore, once the fact of crime is established, the next priority is to punish the offender. It is generally argued that contemporary criminal laws and justice delivery institutions concentrate on proving of guilt and proposing adequate sentence upon the guilty. But, in this process of sentencing the offender two important facets are grossly ignored. They are:

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[18] Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, ECOSOC Res 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).

[19] Cunneen, C. & Goldson, B (eds.) *'Restorative Justice? A Critical Analysis*' Youth, Crime and Justice Sage, London. (2015) pp 137 -138

1) To ensure that the offender is fully aware of the damage or pain caused to the victim;

2) The victim's needs.

Modern penologists argue that it is the need of the hour to introduce an alternative to imprisonment and the United Nations Office on Drugs and Crimes has published a hand book on Alternatives to Imprisonment.[20] Imprisonment is an important mode of punishment and an offender is sent to prison so that he may convert himself into a law - abiding citizen and develop revulsion against crime and criminality because of experiences in prison-life. But in practical terms, it is other way around. Instead of reforming himself the offender comes out graduated with harder and shrewder criminality. As of now probation of offender is suggested as the only alternative to 'prisonisation'.[21] The System of Probation of offenders is based on reformative theory of punishment. The suspension or postponement of sentence serves both as a deterrence to and reformation of the offender. In India, it has not been viewed and applied in practice as a usual alternative to incarceration and there is no possibility of invoking probation to all offenders. Therefore, whether probation would serve any purpose in advancing the victim justice is also looked into in this chapter.

In the meanwhile, a paradigm shift in the approach has been emerging in many Western jurisdictions viewing a crime as a violation of relationship

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[20] *Handbook of basic principles and promising practices on Alternatives to Imprisonmen*t (Criminal Justice Handbook Series) United Nations, New York, 2007

[21] The word 'prisonisation' was coined by E.H. Sutherland in his work *Principles of Criminology* (Oxford) P 529.

between two individuals or among the people. This new approach is gaining momentum among modern criminologists. In such circumstances, a shift from judicial punishment to addressing victim's needs and restoration to the pre-crime stage, sometimes with the intervention of a representative of the community, has emerged as an effective alternative response to crime. Approaching a crime away from a retributive manner towards a restorative response has been recognized as a passive object of criminal justice dispensation. The laws governing criminal justice dispensation, the courts and other judicial decision making institutions should not partially address justice to the offender only with response like censure, punishment, fine etc. The incarceration or imprisonment might be a pain for the offender but the punishment imposed upon the perpetrator of crime is in no way helps the victim in the process of restoration to the pre-crime stage, nor does it repair the harm. Therefore, the necessity for the restoration arises.

The principles of restorative justice are being practiced in Europe since 1980s and its policies and regulations are properly documented. Non-governmental Organisations (NGO) play a major role in the initiation and development of restorative justice. The Council of Europe has supported restorative justice developments and networks. The member States are recommended to examine the possible advantages of mediation and conciliation schemes.[22]

[22] See Article 11.1 of Recommendation R(85), Restorative Justice through Networking: A Report from Europe(2007),

As a major initiative in Canada, sentencing principles were amended in 1996. Consequently, the Department of Justice of Canada published a Statement of Principles and Values of Restorative Justice and the funding for the restorative justice programmes.[23] In USA, the victim-offender mediation, which is an important practice, has been well received by the community and the States have also amended laws providing scope and space for the restorative programmes.[24] The Western countries are framing policies for resolution of crimes and also to restore the victim-offender relationship as much as possible.

9.8 Indian Judiciary on Restorative Justice (RJ)

Restorative Justice has not been expressly recognised by the Indian judiciary. However, the Supreme Court, in *Babu Singh* v. *State of Uttar Pradesh*,[25] made an observation about restorative justice practices. It was a case of murder wherein the trial court acquitted all the accused. The State preferred an appeal against the acquittal and the High Court, after five years, on appreciation of facts, evidence and circumstances of the case, reversed the judgment of the trial court. After a long span of five years the accused persons against whom the guilt was proved were lodged in the prison. When their bail application came up for hearing, the Supreme Court observed as follows:

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[23] Arlene Gaudreault, *Limits of Restorative Justice*, available at http://www.victimsweek.gc.ca/pub/pdfs/restorative justice.pdf visited on 13 July 2019.

[24] Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, Justice Policy Journal, Vol 2, Number 13 (Fall), http://www.cjcj.org/uploads/cjcj/documents/jpj_restorative_justice_in_the_states.pdf, visited on 26 July, 2020

[25] AIR 1978 SC 527

> 'Restorative devices to redeem the man, even through community service, meditative drill, study classes or other resources should be innovated, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned free enterprise, should be provided against. No seeker of justice shall play confidence tricks on the court or community. Thus, conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our constitution.'

Though such an observation was made in 1978, no considerable development has taken place in the criminal justice dispensation for introduction of Restorative Justice or its practices. In the civil jurisprudence Alternative Disputes Resolution (ADR), which includes arbitration mediation, conciliation and negotiation, has been appreciated for granting refund of court fee and other legal benefits to the parties as a mode to reduce the arrears of backlog in the civil justice system.[26] But third party or community intervention in the adjudicatory process of a criminal dispute is alien to the present criminal justice system. Therefore Restorative Justice Practices are not yet rooted in the criminal justice dispensation n India.

The Delhi High court, while considering a matrimonial dispute, referred to RJ and held as follows:

'As the criminal system groans under weight of cases filed, alternative solutions are being found world over. Compounding of offences, plea

[26] Section 89 Civil Procedure Code, 1908 and full refund of court fee for the disputes settled out of court is permitted to encourage the ADR practices under the Legal Services Act, 1987

bargaining etc. are found in the criminal justice delivery system in a large number of countries including India.

> '…Restorative justice' may be used as a synonym for mediation. The object and nature of restorative justice aims at restoring the interest of the victim. Involvement of the victim in the settlement process is welcome in the process of restorative justice. It is a process of voluntary negotiation and concentration, directly or indirectly between the offender and the victim.'[27]

What are discussed above are only a few observations which are in the nature of *obiter dictum* made by the courts in India. There are, however, some other recommendations which are made for advancing RJ in the existing CJA.

The Supreme Court, in *State of U P* v. *Sanjay Kumar*,[28] commented that Restorative Justice is person centric and creates undue sympathy upon the offender. It has described that RJ practices as laying emphasis on individualised justice, and shaping the result of the crime to the circumstances of the offender and the needs of the victim and community, restorative justice eschews uniformity of sentencing. Undue sympathy to impose inadequate sentence would do more harm to the public system so as to undermine the public confidence in the efficacy of law and society cannot endure for long under serious threats.

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[27] *Anupam Sharma* v. *NCT of Delhi*, 146 (2008) DLT 497
[28] (2012) 6 SCC 107

9.9 Restorative Justice and Probation

Probation is a type of sentence disposition in the criminal justice system defined as the supervision of offenders in the community by probation officers. It differs from incarceration (*i.e.*, jails and prisons) in that offenders continue to live in the community rather than in confinement in a correctional facility. It differs from parole in that it is a sentence in itself that is served *in lieu* of a prison or jail term, whereas parole is the term of community supervision served during or after the completion of a prison term. As such, probation may be conceptualized as a form of diversion from more serious criminal justice sanctions.[29] The aim of the criminal justice must be to reform the criminals rather than imposing rigorous punishment upon them. These best principles are embedded in the probation practices.

The concept of probation, in its initial form, developed in the United States when a cobbler in Boston named John Augustus persuaded a Judge in Boston Police Court in the year 1841 to give him the custody of convicted alcoholic offender for a short period and then helped the delinquent by rehabilitating him by providing him job and lodging. Then he started taking custody of the offenders who were not totally depraved and showed signs of reformation and arranged for their schooling, job, living, etc. and successfully rehabilitated them. Taking inspiration for John Augustus' noble efforts, father Cook of Boston also started rehabilitation of young offenders. He drew

[29] Robin L. Cautin and Scott O. Lilienfel, *The Encyclopedia of Clinical Psychology*, John Wiley & Sons, Inc, (2015) available at https://www.researchgate.net/publication/313965586_Probation

attention of the courts to the fact that these delinquents were mostly the victims of their circumstances were corrigible, if placed under supervision and guidance. This provided a blue-print for development of probation as a corrective device in modern penology.[30]

Probation of offenders, as an alternative to incarceration, was adopted in United Kingdom with the enactment of Probation of Offenders Act, 1907. Under the Act, an offender could be discharged on probation after being sentenced, or even without pronouncing the sentence against him, and his release on probation could either be absolute or conditional depending on his antecedents, age, character, physical and mental conditions and the circumstances under which the offence was committed.[31] However, before extending the benefits of probation to offenders, the sufferers of crime are neither allowed to represent nor be heard in the process by the courts.

In India, probation is a part of the reformative options. Many offenders are not criminals but circumstances make them criminals and through misfortunes they end up at the receiving end of the operation of judicial system. By extending the benefits of probation, as per Section 360 Cr.P.C., courts encourage their own sense of responsibility for future of the accused and save him from the stigma and possible development of criminal propensities. It is, thus, in tune with the reformative trend of modern criminal justice to rehabilitate the young offenders as useful citizen.[32] It is a legally recognized

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[30] See Barnes and Teeters*: New Horizons in Criminology*,
[31] N V Paranjape, *Crime and Punishment Trends and Reflections*, LexisNexis (2016) P 336
[32] *Panchu* v. *State*, 1993 Cr L J 953 (Ori)

benefit to the offenders convicted of an offence, categorized as above and below 21 years of age with differing benefits. However, the offenders cannot claim it as a matter of right as probation is governed by the Probation of Offenders Act, 1958 (PoO Act) and Section 360 Cr.P.C.

Different modes of dealing with youthful and other offenders in lieu of sentence, subject to certain conditions, are prescribed under the Probation of Offenders Act, 1958, these modes are:

1) Release after admonition;[33]
2) Release on entering a bond on probation of good conduct with or without supervision and on payment by the offender, the compensation and costs to the victims of his crime, the courts are empowered to vary the conditions of bond and to sentence and impose fine if the offender failed to observe the conditions of the bond.[34]

The Probation of Offenders Act, 1958 further prescribes a special treatment for the persons less than 21 years of age. They are not to be sentenced to imprisonment unless the court calls for a report from the probation official or records reasons to the contrary in writing.[35] The person released on probation does not suffer a disqualification attached to a conviction under any other law.[36]

[33] Section 3, The Probation of Offenders Act, 1958
[34] Section 4, The Probation of Offenders Act, 1958
[35] Section 4, The Probation of Offenders Act, 1958
[36] Section 12, The Probation of Offenders Act, 1958

The Supreme Court, in *Chandreswar Sharma* v. *State of Bihar*,[37] has noted that the court is obliged to look into both the provisions of Probation of Offenders Act, 1958 and Section 360 Cr.P.C. while dealing with conviction of the accused person. It also made clear that Section 360 Cr.P.C. is wider than the provisions of PoO Act, 1958. Section 360 Cr.P.C. prescribes procedure for the release of an accused on probation for good conduct or after admonition.[38]

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[37] (2000) 9 SCC 245

[38] Section 360: Order to release on probation of good conduct or after admonition:(1) When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and of good behavior; Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose off the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

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

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass

It is mandatory for the court that dealt with an accused under Section 360, to state the reasons for granting probation and special reason are to be assigned for not having done so, in the judgment.[39] The PoO Act, 1958 is a milestone in the progress of the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of the criminal law is more to reform the individual offender than to punish him.[40] The Supreme Court, in *Jugal Kishore Prasad* v. *State of Bihar*,[41] observed thus:

> 'The object of the Act is to prevent the conversion of youthful offenders into obdurate criminals as a result of their association with hardened criminals of mature age in case the youthful offenders are sentenced to undergo imprisonment in jail. The above object is in consonance with the present trend in the field of penology, according to which effort should be made to bring about correction and reformation of the individual offenders and not to resort to retributive justice. Modern criminal jurisprudence recognises that no one is a born criminal and that

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sentence on such offender according to law; Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7)The Court, before directing the release of an offender under sub-section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

39 Section 361 Code of Criminal Procedure, 1973

40 Ratanlal and Dhirajlal, *The Indian Penal Code*, (2017) P 333.

41 (1972) 2 SCC 633

> good many crimes are the product of socioeconomic milieu. Although net much can be done for hardened criminals, considerable stress has been laid on bringing about reform of young offenders not guilty of very serious offences and of preventing their association with hardened criminals. The Act gives statutory recognition to the above objective. It is, therefore provided that youthful offenders should not be sent to jail, except in certain circumstances. Before, however, the benefit of the Act can be invoked, it has to be shown that the convicted person even though less than 21 years of age, is not guilty of an offence punishable with imprisonment for life.'

In *Gulzar* v. *State of Madhya Pradesh,*[42] the court held that the benefit of release on probation under Section 5 of the Probation of Offenders Act, 1958 and Section 360 of Cr.P.C. cannot co-exist at one and same time.

It is made clear in *Sanjay Dutt* v. *State of Maharashtra*,[43] that Section 8 (1) of the General Clauses Act, provides that where the provisions of the Probation of Offenders Act, 1958 are applicable, the provisions of Section 360 of Cr.P.C. shall not be applicable. A careful reading of the 19 provisions in PoO Act, 1958 and Section 360 Cr.P.C. makes it clear that the concept of probation of offenders is embedded in India as a reformative treatment of offenders. But, they have neither considered the victim as a stakeholder in the process of dealing with the criminal, nor provide any relief such as compensation, as a matter of right, while extending the benefits to offenders. It is not in question that the benefits of probation are conferred on the accused only after guilt is proved beyond all reasonable doubts. The trauma undergone

[42](2007) 1 SCC 619
[43]AIR 2013 SC 2687

by the victim can be considered to be impliedly acknowledged by the justice institutions only if compensation is ordered in all cases as a matter of right. But considering the question of probation without giving the victim an opportunity or ignoring victim while extending the benevolent provisions of probation is an area to be revisited and a more inclusive RJ practice adopted, without disturbing the existing frame work of criminal justice.

9.10 Traditional Justice and Restorative Justice

After the crime, the victim, a direct bearer of pain and trauma of the crime, may have to strive for justice. From the side of the victim, justice cannot be confined only to a punishment imposed upon the offender, after guilt is proved in the judicial process. As observed by Professor John Braithwaite, 'punishments of a negative nature do not ensure that the offender realizes his mistakes and makes the necessary rehabilitations in his life and behavior and do the needful to redress the harm caused to the victim by him after acknowledging his mistake to the victim.'[44] A new approach to crime that duly recognises how and how much adverse impact it caused upon the victim needs to be the focal point in the Restorative Justice process. The report of the United Nations depicts the sordid picture of the existing criminal justice administration and the necessity that has arisen for the Restorative justice as follows:

> 'In many countries, dissatisfaction and frustration with the formal justice system or a resurging interest in preserving and strengthening customary

[44] John Braithwaite, *Crime, Shame and Reintegration*, Cambridge University Press (1989) P 46

> law and traditional justice practices have led to calls for alternative responses to crime and social disorder. Many of these alternatives provide the parties involved and often also the surrounding community, an opportunity to participate in resolving conflict and addressing its consequences. Restorative justice programmes are based on the belief that parties to conflict ought to be actively involved in resolving it and mitigating its negative consequences.'[45]

In many developing countries, restorative justice practices are applied through traditional practices and customary law. In doing so, these approaches may serve to strengthen the capacity of the existing justice system. A fundamental challenge for participatory justice is, however, to find ways to effectively mobilize the involvement of civil society, while at the same time protecting the rights and interests of victims and offenders.[46]

The CJA, under the adversarial system as in the US, consists of a plethora of pleas. An accused pleads for anticipatory bail prior to his arrest. He files a plea for bail in the event of arrest, resorts to Plea Bargaining, a pre-trial guilty plea as a measure to receive a lesser punishment, makes pleas to invoke sympathy during the sentencing process and then, a plea for suspension of sentence to prefer appeal and makes many more incidental pleas that are available. Thus, the procedure prescribed for adjudication of a criminal case by the Common Law and drafted codes are primarily facilitative of raising pleas by the person against whom charges are levelled. It is in this context that the

[45] Hand book on Restorative Justice Programmes, United Nations, New York, 2006, P 11 https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

[46] Handbook on Restorative Justice Programmes, United Nations Office on Drugs and Crime (2006) P 5-6, Ibid

US Supreme Court, in *Lafler* v. *Cooper*,[47] observed that '*the criminal justice today is for the most part of pleas, not a system of trials'*.

Academicians have opined that many – if not most – disputes are resolved, not at the hearing itself, but rather through the presentment report process. Criminal justice is far more commonly negotiated than adjudicated.[48] In the criminal case adjudication in the United States, trial has almost been replaced by guilty plea and plea bargaining.

The Indian Law Commission (ILC), in its Report on Concessional Treatment for offenders who on their own initiative choose to plead guilty without any bargaining, traces genesis of the application of the plea bargaining model. The report notes that entertaining a guilty plea is greatly prevalent in many American States. In 1839, in New York State, one out of every four criminal cases ended with a guilty plea. By the middle of the century, there were guilty pleas in half the cases. In Alameda County, one out of three felony defendants pleaded guilty. In 1920s guilty pleas accounted for 88 out of 100 convictions in New York City, 85 out of 100 in Chicago, 70 out of 100 in Dallas and 79 out of 100 in Des Moines, Iowa. It has kept its dominance ever since.[49]

The Indian criminal jurisdiction has not accepted a third party intervention, including to facilitate an offender-victim dialogue. The adversarial system adopted by India also has not expressly recognised the

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[47] 566 U.S. 156 (2012) , available at https://supreme.justia.com/cases/federal/us/566/156/

[48] N. Demleitner, D. Berman, M. Miller, & R. Wright, *Sentencing Law and Policy* (2013) P 443

[49] 142nd Law Commission Report, submitted on 22 August,1991

victim as a distinct entity. The time has ripened to revisit the existing criminal jurisprudence and, in the absence of specific polices or laws on restoration, reassess the modes to be adopted for enhancing justice to both the victim and the offender without making any substantial amendments in the laws or changes in the criminal justice system.

9.11 Restoration in Indian Criminal Jurisprudence

The purpose of embedding the restorative values in the existing criminal justice system is explained in the prefatory note of the amendment introduced to Cr.P.C., in the year 2005, thus:

> 'It is widely felt that the criminal cases in the courts fail because statements by witness(es) are reneged either out of fear or allurement. To prevent the evil of witness turning hostile it is proposed to amend Sections 161, 162 and 344 of, and to insert new Ss. 164 A and 344 A in the Code of Criminal Procedure, 1973. The amendment of the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 *inter alia* provides that (i) statement made to Police by any person during investigation, if reduced to writing, is to be signed and quickly transmitted to the Magistrate; (ii) recording of evidence of material witness by Magistrate in all offences punishable with death or imprisonment for Seven years or more during investigation; (iii) statement of the witness duly recorded before Magistrate under oath, in the discretion of the Court, be treated as evidence; and (iv) summary trial for perjury and enhance punishment awarded consequent to such summary trial. The disposal of criminal trials in the Courts takes considerable time and that in many cases trials do not commence for as long a period as 3 to 5 years after the accused was remitted to judicial custody. Large number of persons accused of criminal offence are unable to secure bail, for one reason or the other, and have to languish in

> jail as under-trial prisoners for years. Though not recognised so far by criminal jurisprudence, it is seen as an alternative method to deal with huge arrears of criminal cases. To reduce the delay in the disposal of criminal trials and appeals as also to alleviate the suffering of under trial prisoners, it is proposed to introduce the concept of plea-bargaining as recommended by the Law commission of India in its 154th Report on the Code of Criminal procedure. The committee on Criminal Justice System Reforms under the chairmanship of Dr. (Justice) V.S. Malimath, formerly Chief Justice of the Kerala High Court, has also endorsed the Commission's recommendations. It means pre-trial negotiations between defendant and prosecution during which the accused agrees to plead guilty in exchange for certain concessions by the prosecutor. The benefit of plea-bargaining would, however, not be admissible to habitual offenders. A Chapter on this is being incorporated in the Code of Criminal Procedure, 1973.'[50]

The above reasons stated while introducing Criminal Law (Amendment) Act, 2005 reflect that the continuous threat and unknown apprehension most of the victims and witnesses are under. If threats or coercive atmosphere continues in the court proceedings, even the person suffered by the crime will not come forward to be a witness in the lingering trials. In such circumstances Restorative Justice is considered as repair to above reprimand by the modern jurists of western jurisdictions.[51] But in Indian Criminal Jurisprudence, in the absence of specific provisions, two modes of alternative disputes resolutions

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[50] Prefatory Note-Statement of Objects and Reasons the Criminal Law (Amendment) Act, 2005,
Available at, https://www.casemine.com/act/in/5a979dae4a93263ca60b725c

[51] Raymond Wacks, Understanding Jurisprudence – An introduction to Legal Theory, Oxford, (2019) P 336

and peacemaking with restorative values are permitted under the Cr.P.C. They are:

1. Compounding of offences under Section 320
2. Plea Bargaining under Sections 265 A to 265 L.

The former has been permitted since the inception of the Code, but the latter option was incorporated in the year 2005. How these practices recognise victims, their rights and the restorative practices embedded are analyzed in the following paragraphs,

9.12 Restorative Justice Element in Compounding of Offences

Compounding of offence signifies that the person against whom the offence has been committed has received some gratification, not necessarily of pecuniary character to act as an inducement for his desiring to abstain from a prosecution.[52] Therefore, a gesture or nod from the person who put the law into motion or a sufferer of crime is a pre-requisite for compounding of an offence before a court of law. Section 320 of the Cr.P.C. consists of both the offences compoundable and the offences which are compoundable only with the permission of the Court. The Kerala High Court, in *Mathew* v. *State of Kerala*,[53] held that even a unilateral petition submitted by the victim of the offence is operative towards compounding of the offences and as soon as the offence is compounded by the victim with the accused, it operates as an

[52] *Murray* v. *Queen Emperor* (1893) 21 Cal 103
[53] 1986 (2) crimes 398 (Ker)

acquittal even without a formal order acquitting the accused person.[54] The section provides that if the offence is compoundable, the verdict that comes after compounding shall have the effect of an acquittal.[55] Compounding avoids trial and provides resolution to the dispute between the offender and victim. Further, as the affected person is the competent person to move for compounding process, it allows the victim to actively participate in the process of the justice dispensation.

In *Reg* v. *Burgess*,[56] the court has held that compounding a felony is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon an agreement not to prosecute. Thus, compounding means arranging or coming to terms of settlement in a criminal case. In India, compounding is recognised as a mode of disposal of a criminal case.

In the Code of Criminal Procedure, 1973, Section 320 consists of lists of offences which can be compounded and the person by whom the compounding process shall be initiated, in the proceedings before the court of law. There are 43 offences in the Table I which can be compounded for which the permission of the Court is not mandatory. But there are 13 offences listed in Table II that can be compounded only with the permission of the court before which the criminal case is pending.[57] Defamation, for which both civil remedies and

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[54] *Mathew* v. *State of Kerala*,1986 (2) crimes 393,396 (Ker)
[55] *Yesudas* v. *Sub-inspector of Police, Kalamassery*, 2008 Cri.L.J. 1290 (1293)
[56] (1885) 16 QBD 141
[57] See Section 320 IPC and its Table I - offences under Sections 298, 323, 334, 335, 341, 342, 343, 344, 346, 352, 355, 358, 379, 403, 407, 411, 414, 417, 419, 421, 422, 423, 424,

penal sanction provided under law, has found a place both in Table I and Table II. Defamation against the President or the Vice President or the Governor of a State or the Administrator of a Union territory or a Minister in respect of his public functions when instituted upon a complaint made by the Public Prosecutor, is compoundable only with the permission of the court. Defamation against other persons is compoundable without the permission of the court. When an offence is compoundable under Section 320 Cr.P.C., abetment of such offence or an attempt to commit such an offence and the other accused liable to be dealt by reading with Sections 34 or 149 IPC, can be compounded in the same manner provided for the commission of offence.

In cases where there are two injured persons, in which only one of the injured victims desires to compromise but the other injured person has declined to enter into an agreement to compound the offence, the court cannot invoke Section 320 Cr.P.C. to terminate the case. Section 320 Cr.P.C. is confined to the offences punishable under the IPC. The other offences in IPC not finding place in the lists or offences under other penal statutes are not compoundable.

An agreement, in accordance with Section 320 Cr.P.C. for compounding of offences cannot be opposed on the ground that it was against public policy, because compounding of about 56 offences under IPC has been legally permitted and any agreement to terminate the criminal proceeding otherwise than in accordance with the Section 320 Cr.P.C. would fall within the mischief

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426, 427, 428, 429, 430, 447, 448, 451, 482, 483, 486, 491, 497, 498, 500, 501, 502, 504, 506, 508 are compoundable.

Table II - offences under Sections 312, 325, 337, 338, 357, 381, 406, 408, 418, 420, 494, 500, 509 are compoundable only with the permission of the Court.

of Section 23 of Indian Contract Act, 1872.[58] Therefore, an agreement between the victim and victimizer for the offences listed in Tables I and II of Section 320 Cr.P.C. provides an opportunity for the victim to participate in the adjudicatory process otherwise than as a witness. Further, it also accommodates for the first time the victim to say a word to the offender on the consequences of the offence.

The Law Commission of India, in its 237th Report on compounding of (IPC) offences, has considered the measures necessary to check the misuse of Section 498 A IPC.[59] It has suggested that, in addition to the offence of cruelty by husband or his relatives, which is an offence under Section 498 A IPC, the offence of rioting,[60] theft in dwelling house in case of value of stolen property is not more than Rupees Fifty Thousand[61] and other offences for which the punishment of imprisonment up to two years or fine or both, be added to those that can be compounded with the permission of the court, if a victim prefers an application jointly along with the accused. The parties, who include the victims to an act of cruelty and demand of dowry by husband and/or relatives, after the conviction by the trial Court, if they have real desire to bury the hatchet in the interest of peace arrived at a compromise, can make a plea for

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[58] Section 23: What considerations and objects are lawful, and what not.—The consideration or object of an agreement is lawful, unless— it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies, injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[59] Law Commission of India, Report No.237, dated 30.12.2011

[60] Section 147 IPC.

[61] Section 380 IPC

reduction of sentence of imprisonment. This is the law laid down by the Supreme Court for facilitating the parties to settle their disputes of criminal nature and non-compoundable as per Section 320 Cr.P.C.[62]

The Madras High Court has held that an offence which involves Section 498 A IPC and Section 4 of the Dowry Prohibition Act, arises out of a matrimonial dispute. These offences were brought into force by the Parliament taking into consideration the phenomenal rise in crime against women and to ensure protection to women guaranteed by the Constitution of India. These provisions reflect the anxiety to extend protection to the weaker spouse. On the one hand the Court has to keep in mind the reasons behind this enactment and at the same time the Court must also be sensitive to preserve the marital relationship between the parties. The Court must strike a fine balance in cases involving matrimonial disputes. A settlement or a compromise arrived at between the wife and husband and in-laws at the stage of FIR or Final Report or during the pendency of the Criminal Proceedings, can straightaway be taken into consideration by the Court and, in exercise of its inherent jurisdiction under Section 482 Cr.P.C., it can quash the FIR or Final Report or pending Criminal Proceedings, in the interest of justice and in order to preserve the matrimonial relationship even though the offence concerned is non compoundable in nature.[63]

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[62] *Manohar Singh* v. *State of Madhya Pradesh*, AIR 2014 SC 3649
[63] *Paramasivam* v. *State by Inspector of Police, AWPS, Namakkal* (2018) 3 MLJ (Crl.) 492

In the decision reported in *Ram Gopal* v. *State of Madhya Pradesh*[64] the offenders and victims in a case under Sections 294, 323, 326 read with 34 IPC and 3 of the Prevention of Atrocities (Scheduled Castes and Scheduled Tribes) Act, 1989 entered into a compromise and filed a petition to compound the offences as per Section 320 Cr.P.C before the trial court. As they were non-compoundable offences, the trial judge allowed the petition in part and imposed punishment for the offences for which Section 320 cannot be invoked. The offenders, who were convicted by the court, took the matter to the Apex Court. The compromise entered into between the offenders and victims was appreciated and it was clarified that there is no embargo for the High Court under Section 482 Cr.P.C. to deal with such cases and that the Supreme Court can entertain such compromises in criminal cases under Article 142 Constitution of India. The Chief Judicial Magistrate was directed to record the compromise and dispose of the criminal case as per its terms after ascertaining the genuineness and voluntariness. It reflects that, in criminal cases, without causing prejudice to the interest of the common public and State, the accused and victim can enter into a compromise even in the non-compoundable offences. The higher courts are conferred with inherent powers while the exercise of which, it can appreciate such genuine compromise which gives quietus in criminal cases.

[64] 2021(6) CTC 240

9.13 Victim Orientation in *Lok Adalats*

The term *Lok Adalat* conveys the meaning that it is a People's Court (*Lok* means people and *Adalat* means Court). Post independence, the *panchayat* or Peoples' Court (not institutionalised) had served as unorganized fora for settlement of disputes in India. In 1959, the then Law Minister, made the following statement in the Parliament:

> 'There is no doubt that the system of justice which obtained today is too expensive for the common man. The small disputes must necessarily be left to be decided by a system of panchayat justice call it people's Court, call it popular Court call it anything but it would be certainly subject to such safeguards as we may desire in the village level that the common man can be assured of a system of judicial administration which would not be too expensive for him and which would not be too dilatory for him.'[65]

After the introduction of the Legal Services Act, 1987 (LSA, 1987) People's Court was recognised as it received a statutory foundation. The Preamble of LSA, 1987 states that the aim of organising *Lok Adalat* is to secure the operation of the legal system that promotes justice on a basis of equal opportunity. The huge pendency of cases, expensive cost of litigation, delay and other such difficulties have forced people to resort to the people's court process for pursuing justice.

The Supreme Court, in *P.T. Thomas* v. *Thomas Job*[66] described that *Lok Adalat* is an old form of adjudicating system that prevailed in ancient India and

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[65] Rajya Sabha Debates, 1959 Vol. 27, No. 3, Col 388, p.71 - 72
[66] AIR 2005 SC 3575

its validity has not been taken away even in the modern days too. This system is based on Gandhian Principles. It is one of the components of ADR system. As the Indian courts are over burdened with the backlog of cases and the regular courts are to decide the cases that involve a lengthy, expensive and tedious procedure. The Court takes years to settle even petty cases. *Lok Adalat,* provides alternative resolution or devise for expeditious and inexpensive justice. In *Lok Adalat* proceedings there are no victors and vanquished and, thus, no rancour.

Under Chapter VI, people's courts is envisaged to be organised from the grass root level of trial judiciary to the national level in the Supreme Court for settlement of disputes among the parties. While deciding a dispute on merits, the *Lok Adalats* are guided by the principles of natural justice, objectivity, fair play, equity and other principles of justice.[67] Disputes which can be settled in the *Lok Adalats* are clearly explained in Section 19 (5) LSA, 1987. It reads as follows:

> "A *Lok Adalat* shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of -
> (i) any case pending before; or
> (ii) any matter which falls within the jurisdiction of, and is not brought before, any Court for which the *Lok Adalat* is organised
> Provided that the *Lok Adalat* shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law."[68]

[67] Section 22(D) Legal Services Authorities Act, 1987
[68] Section 19(5), Legal Services Authorities Act, 1987

A plain reading of the above provision would make it clear that the concept of *Lok Adalat* has been extended to adjudication of crime also with a condition that the offences which are compoundable only can be the subject matter. Therefore, as analysed in the previous paragraphs, the 56 kinds of offences listed in Section 320 Cr.P.C., as open to be compounded can be settled in the people's court. *Lok Adalats* are usually put in place primarily for amicable settlement of civil disputes and claim petitions of the victims of road crashes under Law of Torts. The scope of *Lok Adalats* being widened to cover criminal cases by the framers of law is a landmark development in the victim justice process. The victim or the complainant in a criminal case that is referred to the *Lok Adalat*, may be able to enjoy certain benefits.

Time and Cost of Litigation

The formal court proceedings may consume enormous time since it has to follow the procedural aspects for adjudication of disputes, and particularly the examination of witnesses including medical officers and investigating officers. But, in the *Lok Adalat* proceedings, the presence and examination of such witnesses are dispensed with and settlement can be arrived expeditiously resulting in a less expensive redressal of grievance.

9.13.1 Victim Participation in the *Lok Adalat* Proceedings

The *Lok Adalat* proceedings are not conducted in a formal court room set up, which has witness box, accused dock and other paraphernalia. Therefore, the parties would feel a friendly atmosphere in the process of adjudication. But the proceedings before a *Lok Adalat* under Section 19 or the

Permanent *Lok Adalat* under Section 22 B of LSA, 1987 are judicial proceedings and, while adjudicating a criminal case, such proceedings shall be deemed to be the proceedings within the meaning of sections 193, 219 and 228 of Indian Penal Code, 1860.[69] This ensures that the *Lok Adalats* enjoy the powers to control the proceedings without the interference of false statements, perjury and unwarranted interruptions.[70] The victims or *de facto* complainants can represent either through their counsels or on their own. It is easier for the victim to put forth the facts, grievances and also to explain the trauma undergone before the *Lok Adalat*. The parties are at liberty to make statements, if any, on oath. These facilities make the accused and victim to feel free and submit their pleas unhesitatingly.

9.13.2 Finality and other Benefits

The award passed by the *Lok Adalat*, either on merits or on settlement agreement, is final and no appeal shall lie against it. Further, it cannot be challenged in any proceedings. It is binding on all the parties and it is equivalent to a decree of a civil court for the purpose of recovery of monetary relief.[71] The provision for refund of court expenses enables a victim or complainant to get justice and rescues the party from the expense of litigation.[72]

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[69] Section 22 (3), Legal Services Authority Act, 1987
[70] Sections 193, 219 and 228 IPC are dealing with judicial proceedings and declare the unnecessary interferences as offences.
[71] Sections 19 (5) & 22(E) Legal Services Authorities Act, 1987
[72] Section 22(D) Legal Services Authorities Act, 1987

It is preferred to be a good mode of settlement of criminal cases rather than resorting to a formal compounding procedure in a regular court, as the parties are entitled to refund of court expenses and other benefits. Professor Upendra Baxi is of the view that the serious offences, such as attempt to murder and grievous injury should also be referred to *Lok Adalat* if there is an agreement between the conflicting parties. He also suggested expanding the scope of *Lok Adalat* and using convincing terminology in its proceedings and avoiding the strong terms used in the penal laws and court room battles.[73]

9.14 Plea Bargaining

In a criminal case in India, till recently, an accused could plead for anticipatory bail prior to his arrest. In the event of arrest, he may move a plea for bail. While framing charges, he could make a plea for discharge, if not may make a pre-trial guilty plea as a measure to receive a lesser punishment. He may make pleas to invoke the sympathy of the court during the sentencing process, if the guilt is proved. A plea for suspension of sentence to prefer appeal and many other incidental pleas that are available in the law are often resorted to by the accused person. The relatively new plea in India is Plea bargaining, which literally means 'do not wish to contend'.[74] It is a peremptory plea made by the accused in return for a promised leniency in sentence. The

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[73] Sarah Leah Whitson, *Neither Fish, Nor Flesh, Nor Good Red Herring Lok Adalats: An Experiment in Informal Dispute Resolution in India*, 15 Hastings Int'l & Comp. L. Rev. 391 (1992).
Available at: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol15/iss3/2

[74] Dr Suman Rai, *Law Relating to Plea Bargaining (International & National Scenario)* Orient Publishing Company, (2014) P 43

plea bargaining process contemplated in Chapter XXI A of Cr.P.C., has prescribed issuing a mandatory notice to the prosecution or the complainant. [75] This accommodative provision which allows the victim to participate in the process may be considered as a milestone in victim jurisprudence. Further, hearing the parties, including the victim, on the quantum of punishment (before disposal of case) to be imposed upon the accused is a due recognition of some of the victim's right. As the right to be heard is the first principle of Natural Justice (*audi alteram partem*) guaranteed in the Code itself, its application in the plea bargaining process cannot be whittled down by any authority. The principles of plea bargaining are not applicable to offences affecting the socio-economic condition of the country. The union government has notified that the offences defined under nineteen Acts are excluded from the scope and applicability of Chapter XXI A, Cr.P.C.[76]

Plea bargaining is an attempt to substantially enhance the judicial care and relief to the victims of crime. The compensatory relief is mandatory under Section 265 E Cr.P.C.[77] The Court shall award compensation to the victim in accordance with the mutually satisfactory disposition of the case. There is no minimum or maximum pecuniary limit prescribed by the Code. Therefore,

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[75] Inserted by Act 2 of 2006 w.e.f. 05-07-2006

[76] Notification No: S. O. 1042 (E), dated 11-07-2006, issued by Ministry of Home Affairs.

[77] Section 265 E (a) in The Criminal Law (Amendment) Act, 2005 :(a) the Court shall award the compensation to the victim in accordance with the disposition under section 265D and hear the parties on the quantum of the punishment, releasing of the accused on probation of good conduct or after admonition under section 360 or for dealing with the accused under the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or any other law for the time being in force and follow the procedure specified in the succeeding clauses for imposing the punishment on the accused.

every trial court can hear the victim and assess the quantum of compensation on careful consideration of injuries sustained, and the mental agony undergone, including loss of income caused by partial or permanent disability due to the crime. This relief may help the victim being restored to his/her pre-crime position. Further, a financial support from the offender may put an end to the bitterness and revenge. The financial burden of the State also would be reduced to a considerable extent.

9.14.1 Restorative Values in the Plea bargaining

Restorative justice is based upon an old, commonsense understanding of wrongdoing. Although it would be expressed differently in different cultures, this approach is probably common to most traditional societies. For those from a European background, it is the way many of their ancestors understood wrongdoing:

- Crime is a violation of people and of interpersonal relationships.
- Violations create obligations.
- The central obligation is to put right the wrongs.[78]

It is considered as a sign of hope and represents the direction of a futuristic CJA. Since 1970, many countries have adopted Restorative Justice process as a choice within or alongside the existing legal system. It expands the circle of stakeholders; more particularly it provides an opportunity to the victim for participating in the adjudicatory process. Therefore, many western countries

[78] Howard Zher, *The Little Book of Restorative Justice*, Good books, Intercourse, Pennsylvania, USA (2003) P 19

have invoked Restorative justice process as a mode to facilitate conflict resolution and peace–making, along with providing some substantial relief to the sufferer of crime for restoring his/her pre-crime impact position. In the existing legal system, a victim of crime is a neglected stakeholder. The plight of the victims of crime is not considered and there are no specific ameliorative provisions in the statutes and codes for restitution or restoration. Of special concern to restorative justice are the needs of crime victims that are not being adequately met by the criminal justice system. Victims often feel ignored, neglected, or even abused by the justice process. This results in part from the legal definition of crime, which does not include victims; crime is defined as one against the state, so the state takes the place of the victim. Yet victims often have a number of specific needs from a justice process.[79]

The theory and practice of Plea Bargaining in India has been profoundly shaped by an effort to take the needs of the victim seriously. The neutral language in Section 265 E of the Criminal Procedure Code, 1973, would accommodate the victim within the system and the adjudicatory process of criminal justice dispensation. The practice of plea bargaining in India has recognised the victim of crime and has also granted and guaranteed participatory rights. The Cr.P.C. does not contemplate any procedure for hearing the victim before imposing conviction and sentence upon the perpetrators. But, in the plea bargaining mode of disposal of cases, hearing the parties on quantum of sentence is an indispensable requirement. Therefore, plea

[79] Howard Zher, *The Little Book of Restorative Justice*, Good books, Intercourse, Pennsylvania, USA (2003) P4

bargaining in India may turn out to be the harbinger of relief to the sufferers of crime.

9.15 United Nation's Initiatives for Restorative Justice

The United Nations has been initiating Restorative Justice (RJ) programme as a complement to the present Criminal Justice system functioning in many countries. A discussion on Restorative Justice during the *Vienna Declaration on crime and justice: Meeting the* Challenges *of the Twenty-first Century (2000)* encouraged the 'development of restorative justice policies, procedure and programmes that are respectful of the right, needs and interest of victim, offender, communities and all other parties'.[80] In August 2002, the United Nations Economic and Social Council adopted a resolution calling upon Member States that are implementing restorative justice programmes to draw on a set of *Basic Principles on the Use of Restorative Justice programmes in Criminal Matters* (hereinafter: the *Basic Principles*) by an Expert Group. The Declaration of the Eleventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (2005) urged Member States to recognize the importance of further developing restorative justice policies, procedures and programmes that include alternatives to prosecution.[81]

In India, Justice Malimath Committee, in its report, after analysing the sufferings undergone by crime victims and various aspects on justice to

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[80] The *Vienna Declaration on crime and justice: Meeting the* Challenges *of the Twenty-first*, 10th United Nation congress on the prevention of crime and the Treatment of Offenders, Vienna 10-17 April 2000,A/CONF. 184/4/ Rev. 3 para. 29.

[81] *The Bangkok Declaration-Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice*, 11th United nations Congress on the Prevention of Crime and the Treatment of Offenders, Bangkok, 18-25 April 2005, para.32

victims, has observed that the constitutional jurisdiction of the Supreme Court and High Courts are often invoked to restore to the pre-crime stage as much as possible.[82] In the report it is suggested that sympathising with the plight of victims under Criminal Justice administration and taking advantage of the obligation to do complete justice under the Indian Constitution in defense of human rights, the Supreme Court and High Courts in India have, of late, evolved the practice of awarding compensatory remedies not only in terms of money but also in terms of other appropriate reliefs and remedies. Medical justice for the Bhagalpur blinding victims, rehabilitative justice to the victims of communal violence and compensatory justice to the Union Carbide victims are examples of this liberal package of reliefs and remedies forged by the apex Court.[83]

As observed, the Supreme Court, with the passage of time, has laid emphasis on victimology which fundamentally is a perception of a trial from the viewpoint of the convict as well as the victim. Both are viewed in the social context. It is the duty of the Court to see that the victim's right is protected.[84] The courts and other institutions involved in criminal justice administration have now started to view crime from the victim's point of view also and questions are also being raised about the purpose of punishment imposed upon the offender and the benefits, if any, to the victims. The argument advanced by

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[82] Committee on Reforms of Criminal Justice, Vol I (March, 2013) P 81

[83] M.J. Peterson, *Bhopal Plant Disaster – Situation Summary*, International Dimensions of Ethics Education in Science and Engineering Case Study Series March, 2009.Available at, https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1004&context=edethicsinscience

[84] *Rattiram* v. *State of M.P.*(2012) 4 SCC 516.

the modern penologists is that judicial punishments prescribe no solution to victims for the injuries sustained in the crime. A restorative justice process does not necessarily rule out all forms of punishment (*e.g*. fine, incarceration, probation), but its focus remains firmly on restorative, forward-looking outcomes. The restorative outcome that is being pursued is the repair, as far as possible, of the harm caused by the crime by providing the offender with an opportunity to make meaningful reparation. Restorative justice is relationship based and strives for outcomes that satisfy a wide group of stakeholders.[85] When necessity arises to go beyond punishments, the restoration of victims to the pre-crime stage would be an appropriate mode and a valid area.

Restorative justice has become a global phenomenon in juvenile and criminal justice systems. Resonating with, and in some cases drawing from, indigenous conceptions of justice, it offers both an alternative understanding of crime and new ways of responding to it. Restorative processes include victim-offender mediation, conferencing and circles; restorative outcomes include apology, amends to the victim and amends to the community. Research shows that restorative programmes meet a number of important criteria, such as victim and offender satisfaction, fear reduction for victims, development of empathy in offenders, increased completion of agreements, and lowered recidivism.[86]

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[85] Handbook on Restorative Justice Programmes, P 11, https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf

[86] Daniel W. Van Ness, *An Overview of Restorative Justice Around The World,* Eleventh United Nations Congress on Crime Prevention and Criminal Justice Bangkok, Thailand, 18-25 April 2005, Avilable at https://nacrj.org/index.php?option=com_easyfolderlistingpro&view=download&format=raw&data=eNptkE1rwzAMhv-

The Indian Criminal Laws have recognise the monetary compensation as a mode of restoration and do not allow the community or any third parties intervention. Professor Uri Vanay has argued that -

> "India has a history of peace. Despite its ever-growing population and over-crowded cities, for many readers, India has a unique image of a non-violent, peaceful country. Perhaps it was the non-violent approach of Lord Buddha and Mahatma Gandhi that gave India this image. Gandhi's noble saying, "*Non-violence is infinitely superior to violence; forgiveness is more manly than punishment",* encapsulates but only part of his philosophy and the foundation of restorative justice.[87]

Modern criminologists, as discussed earlier, raise plea in support of restorative justice. Their contention is that the India can adopt a restorative justice process suitable and feasible to its juridical and social practices to enhance the justice to the deserving victims.

9.16 Conclusion

From the victim point of view RJ creates an environment for victim representation and provides an opportunity to express the consequences of crime. Despite of the request from the United Nations to include RJ in the criminal justice system, steps have not been taken for inclusion of RJ practices in the Indian CJA. At present, some initiatives fulfill the object of restoration of victim to pre-crime stage as much as possible. With these developments, criminal justice in India has to address the concerns of all stakeholders. Criminal justice institutions have, historically, preferred punitive response to

[87] See the Foreword by Uri Vanay, in Madhava Somasundaram P & Jaishankar K & Ramadoss S (eds.) *Crime Victims and Justice: An Introduction to Restorative Principles'* Serials Publications, New Delhi (2008)

crime as the only befitting response. The penal laws are framed to impose fine, imprisonment and such other legal censures against the offender. After a considerable span of time, the theory of rehabilitation of offender surfaced in the arena of criminal justice. Since 1970, victim rehabilitation has also gained momentum and the words restitution and restoration have been brought into the legal texts. Restitution in the form of pecuniary reimbursements and in-kind services are recognised in some of the western jurisdictions. Restorative justice practices authorise third parties or communities to facilitate victim-offender dialogue to settle the crime. But, in the Indian perspectives, restoration may have to be approached without any such third party intervention between the victim, Prosecuting State and the defending accused.

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CHAPTER X
SCHEMES FOR ASSISTANCE TO VICTIMS OF CRIMES IN INDIA

10.1 Introduction

As discussed in the last chapter, any third party intervention to facilitate an offender – victim dialogue, or for restoration through community representatives, are unknown to the present Indian criminal jurisprudence. The higher courts have also not suggested any such community intervention or mediation through victim – offender dialogue within the criminal justice system. Further, restitution from the offender may not be possible or may be inadequate due to lack of financial sources, impecunious situation or other inabilities of the offender. Under the circumstances, a State – sponsored scheme should come into play for victim assistance. The idea that criminal justice would be complete only if it awards adequate compensation as a relief to the victim, has been gaining strength from the judicial pronouncements and writings of victimologists and it justifies compensation as an assistance and relief to the victims.

The United Nations has recommended that, when compensation is not fully available from the offender or other sources, the States should make endeavours to give compensation to victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious

crimes.[1] India, a welfare State, has ratified the UN Declaration, 1989 and has introduced victim welfare provisions in the criminal laws and Schemes to serve as a rehabilitative measure. In this Chapter, the 35 Victim Compensation Schemes of the States and Union Territories of India relating to victim welfare have been taken up for the purposes of this research and are critically analysed.

10.2 Victim Compensation Scheme (VCS): A Substantive Law

In India, there was no law to award compensation to the victims of crime if the guilt was not proved before the court of law or the accused was not traced by the investigation agencies.[2] Further, compensation was also to come from as a part of the fine amount wherever fine was to be imposed.[3] A substantial development took place in the first decade of 21st century, namely the mandate to frame a scheme for compensation by the States, as directed in the Cr.P.C. The States' liability to pay compensation is a landmark achievement in the pursuit of victim justice. The statutory recognition of compensation to the victim is a significant development in the arena of restoration. Section 357 A, inserted by the Code of Criminal Procedure (Amendment) Act, 2008, paved the way for pre-trial compensation to the victims of crime.[4] It reads as follows:

> Section 357 A. (1) Every State Government, in co-ordination with the Central Government, shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have

[1] Rule 12, Declaration of basic principles of Justice for Victims of Crime and Abuse of Powers, UN General Assembly resolution 40/34
[2] The Fatal Accident Act, 1885
[3] Section 357 Cr.P.C.
[4] Section 28 (Act V of 2008)

suffered loss or injury as a result of the crime and who require rehabilitation.

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

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

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependants may make an application to the State or the District Legal Services Authority for award of compensation.

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

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

The insertion of the above provision paved the way for introduction of Schemes by the States and Union Territories in India providing compensation to victims of crimes. It has created a significant recognition of State liability.

While sub section (1) is an enabling provision, sub-sections (2) to (6) prescribe the modalities for giving effect to the Victim Compensation Scheme (hereafter VCS).

In *State of Rajasthan* v. *Sanyam Lodha*[5], while interpreting Section 357 A of Cr.P.C., the Supreme Court observed that it requires every State Government, in coordination with the Central Government, to prepare a scheme for providing funds for the purpose of payment of compensation to the victims who require rehabilitation (or who have suffered loss or injury as a result of the crime). This section does not provide that the compensation should be an identical amount. The victim may also sue the offender for compensation in a civil proceeding. There also, the quantum may depend upon the facts of each case. In the context of the case, it was observed that the inference that the monetary relief awarded under the Relief Fund should be identical for all victims of rape under the age of twelve years is illogical and cannot be accepted. Holding that whenever the discretion is exercised for making a payment out of the Relief Fund, the Court will assume that it was done in public interest and for public good, for just and proper reasons.

After the introduction of the need for VCS in Cr.P.C., a new Section 357 B was subsequently introduced in 2013 to dispel the doubts in the entitlement and determination of compensation for the sufferer of crime.[6] While

[5] (2011) 13 SCC 262

[6] Section 357 B: The Compensation payable by the State Government under section 357 A shall be in addition to the payment of fine to the victim under section 326 A or section 376 D of the Indian Penal Code (45 of 1860) (Inserted by the Criminal Law (Amendment) Act XIII of 2013 w.e.f. 03.02.2013)

determining the quantum of compensation for the victims of offences under Sections 326 A and 376 D IPC, which deal with voluntarily causing grievous hurt by acid and gang rape, respectively.

The Supreme Court has also considered the necessity of rehabilitation of victims who suffered by the grave offences and held that the newly introduced section 357 B makes it clear that compensation payable by the State Government under section 357 A shall be in addition to the payment of fine to the victim under section 326 A or section 376 D of the IPC. Thus, in the cases relating to rape and murder in the communal riot that erupted on 07 September 2013 in Muzaffarnagar, Shamli and its adjoining rural areas Uttar Pradesh after a Mahapanchayat, the Supreme Court directed the State government to pay compensation of Rs.5 lakhs each for the rehabilitation of the victims.[7]

As noted earlier, Section 357 A Cr.P.C. came into effect from 31 December, 2009. While so, whether a victim of a crime that occurred prior to the said date is entitled to claim compensation and, if so, whether the provision relating to VCS has got retrospective effect, was a question raised before the Kerala High Court. It was decided that the benefits of VCS should be available to the victims who suffered injury and loss even if the crime took place prior to 31 December 2009. The statutory provision of 357 A, Cr.P.C. was given prospective benefits based on an antecedent fact. The High Court held that it is

[7] *Mohd. Haroon* v. *Union of India* (2014) 5 SCC 252

not a provision prescribing procedure, but possesses a substantive character.[8] It observed as follows:

> 'A reading of Sections 357A (1), (4) & (5) Cr.P.C. will make it explicit that the said sub-clauses create a right upon the victim to obtain an award of compensation on satisfying the conditions stipulated therein. There was no statutory provisions akin to Section 357 A (4) Cr.P.C. earlier. There was neither any remedy available to a victim to claim compensation against the State nor was there any obligation for the State to pay compensation towards a victim, especially when the accused had not been identified or traced and the trial had not taken place. This court is mindful of the occasions when the High Courts and Supreme Court have ordered payment of compensation victims.'

Section 357A (1) (4) & (5) Cr.P.C., has, thus, created a right upon a victim even in cases where the offender is not traced or identified or the trial has not taken place, to obtain compensation from the State Government for rehabilitation. It has created and defined rights for a victim, and a duty upon the State Government to pay compensation. Thus, Section 357 A (1) (4) & (5) Cr.P.C., is a substantive law provision in the Procedure Code.

10.3 Legal Framework of Victim Assistance in India

The Kerala High Court, in the decision in *District Collector, Alapuzha* v. *District Legal Services Authority, Alapuzha,*[9] traced the constitutional roots of victimology and explained that the principles of victimology have their foundation in Indian constitutional jurisprudence. The Fundamental Rights

[8] *District Collector, Alappuzha* v. *District Legal Services Authority, Alappuzha* 2020 SCC Online Ker 8292
[9] *Ibid*.

under Part III and the Directive Principles of State Policy in Part IV of the Constitution form the bulwark for a new social order. The social and economic justice provided in Article 38 and Article 41, mandates the State to secure the right to public assistance in case of disablement and undeserved want while Article 51A makes it a fundamental duty to have compassion for living creatures and to develop humanism. According to the Law Commission of India, if the above Constitutional provisions are expanded and interpreted imaginatively, they could form the constitutional underpinnings for victomology in India. Therefore, compensatory jurisprudence has been constitutionally recognised in India as a gesture to the victim from a welfare State.

In the pre-VCS era, the Supreme Court observed that the only provision (Section 357) which provides compensation under the Code of Criminal Procedure is to be expanded to cater to the basic needs of a person harmed by a crime. In *Hari Singh* v. *Sukhbir Singh,*[10] the Supreme Court opined that the principles of awarding compensation to the crime victim needs to be reviewed and expanded to cover all cases. Further, the court suggested that compensation should not be limited only to fine or penalty if realised, but should cover even a case of acquittal or where the offender is not traceable or identifiable. Subsequently, in *Tekan alias Tekram* v. *The State of Madhya Pradesh (Later Chhattisgarh),*[11] the Supreme Court directed the States to ensure uniformity in compensation to the victims of rape. It was the case of a blind and illiterate girl

[10] (1988) 4 SCC 551
[11] 2016 SCC Online 131

being subjected to sexual intercourse on the promise of marriage and the trial court convicting the accused for the offence under section 376 IPC. The offender, aggrieved by the order of conviction, preferred an appeal and the High Court, re-appreciated the evidence and recorded different reasons while affirming the judgment of conviction passed by the trial court. When its further proceedings came up before the Supreme Court, it confirmed the conviction and upheld the judgment of the trial court and High Court, but it considered the plight of the victim of rape who was an unmarried and visually challenged girl living alone below the poverty line. The Apex Court also considered the financial status of the accused, who later got married and had four children and was living in a house with all amenities the same village. He had also inherited two acres of land from his ancestors. The Court considered 25 Schemes framed for the compensation to the victims of crime and found that there is a lack of uniformity in arriving at the quantum of compensation. The observation and suggestion made by the Supreme Court are extracted hereunder:

> ‘Perusal of the aforesaid victim compensation schemes of different States and the Union Territories, it is clear that no uniform practice is being followed in providing compensation to the rape victim for the offence and for her rehabilitation. This practice of giving different amount ranging from Rs.20,000/- to Rs.10,00,000/- as compensation for the offence of rape under section 357 A needs to be introspected by all the States and the Union Territories. They should consider and formulate a uniform scheme specially for the rape victims in the light of the scheme framed in the State of Goa which has decided to give compensation up to Rs.10,00,000/-.’

Awarding a small or inadequate amount towards compensation to a victim would not serve the purpose of this scheme of victim compensation. The Court observed that the compensation amount to be helpful to the victim for her life and considering the vulnerable condition that no one was with the victim to take care, the Supreme Court felt that she is not in a position to keep and manage any lump sum amount. Therefore, it directed the State to pay a sum of Rs.8,000/- per month during her life time.

The observation of the Supreme Court about the lack of uniformity among the VCSs framed by the States is a matter of concern and it is endorsed by others, that while the VCSs are more or less uniform on broad parameters, there are certain variances as well.[12] It is identified that – there is absence of clearly laid down criteria for determination of compensation, absence of scope of duties for the authority, absence of monitoring authority to oversee the functioning of the scheme and grossly inappropriate amounts of compensation – as some of the drawbacks in the VCSs as operational in the various states. The burden imposed on the victim to report a crime promptly, to cooperate with the investigation and court, to provide reasonable assistance in furnishing materials in support of the claim for compensation, to obtain certificates etc. from police or magistrate to avail of facilities under the scheme may prove to be barriers in the way of smooth operation of the scheme.

[12] Dipa Dube, *Victim Compensation Schemes in India: An Analysis* International Journal of Criminal Justice Sciences Vol 13 Issue 2 July – December 2018, Available at http://www.sascv.org/ijcjs/pdfs/DubeVol13Issue2IJCJS.pdf

In this backdrop, the VCSs framed by the States and Union Territories in India can be studied for the purpose of how they are beneficial to the victims of crime. In compliance with Section 357 A Cr.P.C., the governments administering the States and Union Territories have framed the Schemes. Among the 28 States and eight Union Territories, excepting for the Andaman and Nicobar islands, all governments have framed their respective schemes for victim compensation.[13]

10.4 Nature and Effect of VCS

The objects or purposes of the various Schemes framed by the States and Union Territories and the procedures prescribed for applying and disbursement of compensation to the victims, limitation to make an application or to appeal against the inadequacy of award or denial, person to claim and several other aspects of those Schemes are analysed hereunder. The Schemes are discussed in their alphabetical order.

10. 4.1 Andhra Pradesh Victim Compensation Scheme, 2015

The Andhra Pradesh Victim Compensation Scheme, 2015, was published in the official gazette of the State on April 2015. Apart from adopting the meaning for the term victim from Section 2 (wa) of Code of Criminal Procedure, 1973, the term has been widened by including those victims who have been sexually exploited for commercial purposes, of trafficking and of acid attacks. The dependents who are living on the income of the victim and require rehabilitation are also brought within the purview of the

[13]As on August, 2020

term victim. The State is to allocate funds under its budgetary allocation. Receipts of amount of fines imposed under section 357 of the Cr.P.C. and ordered to be deposited by the courts in the fund, and the funds received by or on behalf of the victim compensation from any sources, whatsoever, are the financial sources of VCS in Andhra Pradesh. The funds are to be managed by the Member Secretary of the State Legal Service Authority or the Secretary of the District Legal Services Authority, as the case may be.[14]

Under APVCS, the State Government may allocate such amount, as it thinks proper, out of the Victim Compensation Fund, to constitute an Emergency Fund to be operated by the Commissioner of Police / District Superintendent of Police / Superintendent of Railway Police concerned for providing quick and immediate Medical Assistance to the victim of serious injuries. Such fund is to be released on the report of the Station House Officer concerned.[15]

10.4.2 Interim Relief to Acid Attack Victim

The APVCS, 2015 considers the plight and pain of the acid attack victims. Under this Scheme, the State or the District Legal Service Authority is to award relief to the acid attack victims under sub-section (6) of section 357 A as rehabilitation cost on the certificate of the officer-in- charge of the Police Station or the Magistrate of the area concerned, as mentioned in the schedule appended to this scheme. The special compensation in respect of Victims of Acid Attack and sexual exploitation for commercial purposes is Rs.10 lakhs for

[14] Rule 3 and 3(6), APVCS, 2015
[15] Rule 3(7) APVCS, 2015.

the loss of life. In addition to the said compensation a sum of Rs.10,000/- has been marked for funeral expenses and Rs.50,000/- towards medical expenses incurred before death or on account of injuries.

10.4. 3 Arunachal Pradesh Victim Compensation Scheme, 2011

Arunachal Pradesh framed the Victim Compensation Scheme, 2011 for the purpose of compensating the victim who suffered loss or injury as a result of the crime and requires rehabilitation.[16] Both the key terms, victim and dependent, are defined. The victim is a person who has suffered injury or loss as a result of crime and dependent can be either the spouse, or a natural parent or a child born to the deceased who was killed in the crime occurrence.

The fund is to consist of the grants and allocations on the recommendation of the Arunachal Pradesh State Legal Services Authority, for which a separate provision is to be made every year in the State budget.

The victim or dependent who have not received any compensation from any government authorities are to file a declaration to that effect to receive the compensation. Further, the loss or injury sustained by the victim or his dependent should have caused substantial loss to the income of the family. Though the offender of the crime may be untraceable or cannot be identified, if the victim is identifiable, may apply for grant of compensation. If the trial court comes to a conclusion at the end of the trial that the compensation awarded under Section 357 Cr.P.C. is not adequate for rehabilitation, it can recommend

[16] Notified on 24th January 2012

for compensation even if the case ends in acquittal or discharge.[17] Like other schemes, a one-year time limit has been prescribed to apply for compensation, but the DLSA, for the reasons to be recorded in writing, can condone the delay and entertain the application. The victims, aggrieved by the denial of compensation, may file an appeal before the State Legal Services Authority, within a period of 90 days. The SLSA may also condone the delay, if satisfied, by an order in writing and consider the appeals preferred after the lapse of 90 days.

10.4.4 Assam Victim Compensation Scheme, 2012

The Assam Victim Compensation Scheme, 2012 is notified as required by Section 357 A Cr.P.C.[18] This scheme (AVCS) has a definition for the key term victim and it includes his / her guardian or legal heir. Therefore, a person who has suffered any loss or injury by reason of the act or omission for which an accused person has been charged, is a victim, as per the definition given in the AVCS.[19] Only the guardian and legal heir are brought within the expression victim. The dependents may have to be treated as excluded by implication.

The AVCS fund is to be operated by the Member Secretary, State Legal Services Authority and he has to place the fund at the disposal of the DLSA. Cash payment has been strictly prohibited and the transfers can be done only through the bank.[20] Like other schemes, the eligibility to apply for compensation are also given in this scheme. Accordingly, the loss or injury

[17] Rule 5, Arunachal Pradesh VCS
[18] Notified on 18th October 2012
[19] Rule 2(f) AVCS.
[20] Rule 3(7) AVCS.

should have caused substantial loss to income of the family making it difficult to meet their both ends without the financial aid for medical treatment. The victim is to cooperate with the police and prosecution during the investigation and trial of the case. A victim can apply for grant of compensation, though the perpetrator of heinous crime is not traceable or goes unpunished after trial.[21]

The compensation received by the victim from the Central or State government, insurance companies or any other institutions in relation to the crime are to be considered as part of the compensation under AVCS. The DLSA are to fix the quantum of compensation following the guidelines given in the schedule to Motor Vehicles Act, 1988, within a period of two months on receipt of the application from the victim.

The amount paid as compensation under AVCS, is subject to the condition that if the trial court, while passing judgment at a later date, orders the accused persons to pay any amount by way of compensation under sub-section (1) (b) of Section 357 of the Code, the victim shall remit the amount of compensation, or the amount ordered equal to the amount of compensation, or the amount ordered to be paid under sub-section (3) of Section 357 of the Code, whichever is less. An undertaking to this effect is to be given by the victim before the disbursal of the compensation amount. The State or DLSA, in addition to the passing of award for compensation, may order for immediate first aid facility or medical benefits free of cost. It is an additional power conferred upon the State and DLSA under the AVCS. This is a special feature

[21] Rule 4 AVCS.

of AVCS.[22] A six month time limit is prescribed to file an application, and the victim can prefer an appeal against the denial of compensation by DLSA before the SLSA, for which the period of limitation is fixed as ninety days. In both the cases, DLSA or SLSA, as the case may be, may condone the delay for sufficient cause shown by the victim.

10.4.5 Bihar Victim Compensation Scheme, 2011

The State of Bihar notified the Victim Compensation Scheme, 2011 (BVCS) for the purpose of providing compensation to the victims of crime or their dependents.[23] The expression victim is defined as a person who himself has suffered loss or injury as a result of crime causing substantial loss to the income of the family and making it difficult to meet the expenses for medical treatment of mental or physical injury and require rehabilitation. The spouse, father, mother, brother, sister, son, daughter, grandfather, grandmother, father-in-law, mother-in-law and any person who is living on the income of the victim, are included as dependents of the victim.[24] The funds to the BVCS are to be allocated in the State budget, every year. The State government may also allocate such amounts, at the police station level, for providing quick and immediate medical assistance to the victim of road accident and other cases of grievous hurt. It is the peculiar feature of BVCS that the victims of road accidents are also brought as beneficiaries.[25]

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[22] Rule 5(7) AVCS.
[23] Notified on 28 July, 2011
[24] Rule 2(d) & (e) of BVCS
[25] Rule 2(4) BVCS.

The victim is eligible for grant of compensation even if the offender is not traced or identified, and where no trial takes place. The victim should have reported the crime to the police station or judicial magistrate or before the DLSA without any delay. The claimant is also to cooperate with the police during the investigation and prosecution for the trial of the case. The quantum of compensation can be fixed on the basis of the minimum wages and with reference to the schedule to the Motor Vehicles Act, 1988. The claimant should make an application for compensation within six months of the crime occurrence, and the aggrieved victim for denial of the compensation may prefer an appeal before SLSA within the period of ninety days. However, the delay can be condoned by the respective authorities on valid reasons, by an order in writing. The compensation under BVCS shall be paid, subject to the conditions that if the trial court while passing judgment at later date, orders the accused persons to pay any amount by way of compensation under sub-section (3) of Section 357 of the Act, victim/claimant shall remit an amount ordered equal to the amount of compensation, or the amount ordered to be paid under the said sub-section (3) of Section 357 of the Act, whichever is less. An undertaking to this effect is to be given by the victim/claimant before the disbursal of the compensation amount.

The District Legal Service Authority is to decide the quantum of compensation to be awarded to the victim or his dependents on the basis of loss caused to the victim, medical expenses to be incurred on treatment, minimum sustenance amount required for rehabilitation, including such incidental

charges as funeral expenses etc. The compensation may vary from case to case depending on facts of each case.

According to the schedule of this scheme, the quantum of compensation to be awarded under the Scheme is to be disbursed from the fund to the victim or his dependents, as the case may be. Compensation received by the victim from the Central / State Govt., Insurance Company or any other institution in relation to the crime in question, namely, insurance, *ex-gratia* and / or payment received under any other Act or State-run Scheme, is to be considered as part of the compensation amount under these schemes.

10.4.6 Chhattisgarh Victim Compensation Scheme, 2011

The State of Chhattisgarh has framed the Victim Compensation Scheme, 2011 (CHVCS) for the purpose of granting compensation to the victims or their dependents.[26] The primary term victim has been defined as a person who himself has suffered loss or injury as a result of crime. Though there is no definition for the term 'dependents' in this scheme, the expression victim includes the dependent family members.[27] The State government, in its budget of Home Department, is to allocate funds and the District Collectors are empowered to maintain the accounts and manage the funds. Every district has to submit quarterly return of expenditure to the Home Department.[28]

Conditions are imposed upon the victim to avail of the benefits under this Scheme. The injuries sustained should have caused substantial loss

[26] Notified on 3rd August 2011
[27] Rule 2(4) CHVCS.
[28] Rule 3(3) CHVCS.

to the income of the family and it may also lead to difficulties in spending of the amount for medical treatment, for both mental and physical injuries. The occurrence of crime should have been reported without undue delay to the authorities concerned, and there should be cooperation from the victim's side for the investigation and prosecution of the case. The District Legal Services Authority cannot independently decide or award compensation to the victims. It is to conduct an enquiry and consult with the Superintendent of Police before passing an award under CHVCS. The victim is also to give an undertaking that if the trial court orders to pay any amount by way of compensation under Section 357 (3) Cr.P.C., the same may be adjusted against the compensation granted under CHVCS.[29] The factors such as medical expenses incurred on treatment, minimum sustenance amounts required for rehabilitation and incidental charges as funeral expenses *etc*., are to be taken into consideration while determining the quantum of compensation. The State Legal Services Authority has the power to institute proceeding before a competent court of law, after consultation with the office of the district prosecution, for recovery of the compensation granted to the victim from the person responsible and caused loss or injury. The amount so recovered is to be deposited in the CHVCS. One-year period of limitation is prescribed to make an application for compensation, and the aggrieved victim may file an appeal before the SLSA within ninety days. The SLSA can condone the delay on sufficient reasons

[29] Rule 5 CHVCS.

shown by the victim, and such order shall be in writing, and thus the delay can be excused.

10.4.7 Goa Victim Compensation Scheme, 2012

The Goa Victim Compensation Scheme, 2012 (GVCS) was notified in December, 2012 in the official gazette.[30] The fund is also constituted by an allocation of amount through budgetary provision, and SLSA for the State of Goa has been authorised to operate the fund.[31] In addition to the definition for the expression 'victim', the term 'offence' has also been defined. The offences mentioned in the IPC or in any other law for time being in force are brought within the purview of the term offence. The victim has to make an application to DLSA or SLSA and whether the offender is traced or not, identified or not and even if there is no trial, the compensation is to be granted under GVCS. The SLSA or DLSA can reject the application if the victim fails to cooperate with the police or the court to bring the accused to justice. Further, a victim or his dependent is to render reasonable assistance to the SLSA or DLSA. The victim willfully turning hostile in the trial or failing to support the case of the prosecution, are the grounds to reject the claim of compensation.[32] Therefore, wide powers and discretion are vested with the SLSA / DLSA, under this Scheme, to examine the nature of the claim and verify the actual loss or injury caused to the victim as a result of crime.

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[30] Notified on 14 December 2012
[31] Rule 3 GVCS, 2012.
[32] Rule 7 GVCS, 2012

Any other compensation amount received by the victim from the insurance company or from the government is to be treated as the compensation awarded under GVCS. The victim is also to undertake to refund the amount of compensation granted under this Scheme, if later at the trial, court orders payment of any amount by way of compensation under Section 357 (3) Cr.P.C. The State or the District Legal Service Authority, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer-in-charge of the police station or a Magistrate of the area concerned, or any other interim relief as it may deem fit. The claim for compensation under GVCS is to be made within 180 days from the date of commission of crime, but the DLSA or SLSA can condone the delay by an order in writing. The aggrieved claimant can prefer an appeal to the SLSA within the period of 90 days. The decision of the SLSA shall be final and conclusive. The DLSA can award compensation within two months, after due enquiry.

10.4.8 Gujarat Victim Compensation Scheme 2013

The State of Gujarat has framed the scheme for providing funds for compensation to the victims or their dependents who have suffered loss or injury on account of offence against anybody and who requires rehabilitation. The Scheme called Gujarat Victim Compensation Scheme, 2013 (GUVCS) has noted in its aims and objectives that it is applicable for the offences against

anybody.[33] It is also specifically mentioned that the words and expressions used in the GUVCS have the same meanings as defined in IPC and General Clauses Act, 1955. However, the key term 'victim' has been defined as a person who suffered loss or injury as a result of crime and requires rehabilitation. It also includes the dependents.[34] The fund constituted under this Scheme has been placed at the disposal of the Secretary, Legal Department. There are eligibility factors prescribed for the victim to get benefits under the GUVCS. These include: (a) where the perpetrator of a heinous crime is not traceable or goes unpunished after trial, but the victim is identifiable and has to incur expenses on physical and mental rehabilitation,; or (b) where the offender is not traced or identified, but the victim is identified, and where no trial takes place - such victim may apply for grant of compensation under sub-section (4) of Section 357A of the Code; and (c) where the victim / claimant reports the crime without unreasonable delay to the Judicial Magistrate of the area, provided, if there is delay, that the State Legal Services Authority or the District Legal Services Authority if satisfied, for the reasons to be recorded in writing, may condone the delay.

The amounts of compensation to be paid have been given in the Schedule, and the DLSA or SLSA can examine each case and verify the contents of the claim and consider recommendations made by the court if any, for the compensation under GUVCS. While determining the quantum of compensation, the medical expenses incurred on treatment and the amount

[33]Notified on 5 January 2013
[34]Rule 2 (d) & (2) GUVCS, 2013

required for rehabilitation, funeral expenses, if any, can be considered by the DLSA or SLSA. The victim has to give an undertaking to the effect that the amount of compensation received, if any, under Section 357 (3) Cr.P.C. shall be adjusted in the quantum of amount paid under the VCS. The cases covered under the Motor Vehicles Act, 1988 are specifically excluded, and no victim of road crash can avail of the benefit under GUVCS. The DLSA or SLSA are empowered to initiate proceedings against the wrong-doer for recovery of the compensation granted to the victim, if deem fit, after consultation with the office of the Public Prosecutor.

10.4.9 Haryana Victim Compensation Scheme 2013

The Haryana Victim Compensation Scheme, 2013 (HVCS) does not include the definition for the term 'victim', but it has defined the term 'crime' as an illegal act of omission or commission or an offence committed against human body of the victim.[35] Under the HVCS, the fund created consists of budgetary allocation and fine amount imposed by the courts under Section 357 Cr.P.C., the amount of compensation recovered from the wrong-doer and the donations received from the individuals and organisations. The upper limit for the quantum of compensation is also fixed. Unlike other VCS, the age of the victim is also made a factor for the purpose of determination of the quantum of compensation amount. The offences of human trafficking, kidnapping, molestation, *etc*. are included in the schedule.

[35] Notified on 3rd April, 2013, See Rule 2 (b) HVCS, 2013

The DLSA is to ensure that all provisions of the Scheme are strictly complied with by the stakeholders. The genuineness of the claim is to be verified with the relevant information and after due enquiry, the DLSA may award compensation within two months. The compensation received by the victim from the state in relation to the crime in question, namely insurance, ex-gratia or any other amount received under any Act or the *Rajiv Gandhi Pariwar Bima Yojana* or any other State sponsored scheme, is to be considered as part of the compensation. Like most other Schemes, the cases covered under Motor Vehicles Act, 1988 is not to be covered under HVCS.[36]

The DLSA has been empowered to order for immediate first aid facilities or medical benefits to the victim free of cost on the certificate of the police officer not below the rank of Officer in-charge of the police station or Magistrate. The period of limitation is six months for making a claim before the DLSA, and ninety days to prefer an appeal by the victim aggrieved of the denial of the compensation by the DLSA.[37]

10.4.10 Himachal Pradesh Victim Compensation Scheme, 2012

The State of Himachal Pradesh has the Himachal Pradesh (Victim of Crime) Compensation Scheme, 2012 (HPVCS) framed to provide funds for the purpose of compensation to the victim or his dependents affected by a crime.[38] There are eight key terms, including victim and applicant, which are defined.

[36] Rule 5 (6) & (7) HVCS
[37] Rule 5(8) & (9) HVCS
[38] Notified on 06.09.2012

The victim includes his or her guardian or legal heir.[39] The State Government allocates funds every year, and the HPLSA is empowered to operate the fund. The victim or dependents can make an application within ninety days of recording the FIR and they are to co-operate with the police and prosecuting agency during the investigation and trial.

In the HPVCS, the jurisdiction of the DLSA is also clarified for the purpose of determination of compensation. Accordingly, where the crime is committed partly in one local area and partly in another, or where it consists of several acts done in different local areas, the DLSA having jurisdiction over any such local area can proceed under Section 357 A Cr.P.C. Further, a victim is eligible for grant of compensation even if the offender is not traced or identified, and where no trial takes place.[40] The compensation under HPVCS can be considered only on reporting of crime. The DLSA may call for any relevant information necessary in order to determine genuineness of the claim and award of compensation within sixty days, if the application is filed within a period of ninety days of the crime. The person aggrieved by the denial of compensation can prefer an appeal within ninety days. If the victim fails to cooperate with the police or prosecution or gives false evidence at any stage of judicial proceeding or disappears with the intention of screening the offender from legal punishment, after the receipt of compensation amount, the DLSA and SLSA has the power to issue show cause notices as to why the compensation cannot be asked to be refunded to the State. The victim is liable

[39] Rule 2 HPVCS
[40] Rule 4 (2)(a) & (3) HPVCS.

to respond and the compensation amount may be recovered from the victim as arrears of land revenue, if the explanation is not valid and sufficient. The recovery procedure is also explained in HPVCS, 2012.

10.4.11 Jammu & Kashmir Victim Compensation Scheme, 2013

The State of Jammu & Kashmir was the only State in India that had a separate Constitution. It was adopted in 1957, but the State of Jammu and Kashmir was re-organised by the introduction of the Jammu and Kashmir Reorganisation Act, 2019.[41] Accordingly, there is the formation of the Union Territory of Ladakh without legislature and Jammu and Kashmir with legislature.

Jammu & Kashmir had adopted the Victim Compensation Scheme, contemplated in Section 357 A Cr.P.C. and framed the Victim Compensation Scheme, 2013 (J&KVCS), which continues to be relevant.[42] A person who himself has suffered loss or injury as a result of crime and requires rehabilitation, is to be referred to as victim. It also includes the dependent family members. The fund for compensation have to be allotted by the State Government in its budget every year and J&K SLSA is empowered to operate it. Under this Scheme, a victim has to make an application within a period of six months of the commission of crime. But the compensation is to be provided only after filing of the final report before the competent court of law. A victim who has availed of the benefits under the Central or State government schemes or insurance company or any other institutions is not entitled to apply for the

[41] Act 34 of 2019 published in the Gazette of India on 9 August, 2019
[42] Notified on 23 April, 2013

grant of compensation under J&KVCS, 2013.[43] The DLSA is to decide the quantum of compensation to be awarded to the victim or his dependents on the basis of losses caused to the victim, medical expenses to be incurred on treatment, minimum sustenance amount required for rehabilitation, including such incidental charges as funeral expenses etc. The compensation may vary from case to case depending on the facts of each case. The quantum of compensation is not to exceed the amount mentioned in the Schedule. The compensation under this scheme is to be paid to the victim / claimant subject to the condition that if the trial court, while passing judgment at a later date, orders the accused persons to pay any amount by way of compensation under sub-section (3) of Section 545 of the Act,[44] the victim/claimant shall remit an amount ordered equal to the amount of compensation, or the amount ordered to be paid under the said sub-section (3), whichever is less. An undertaking to this effect is to be given by the victim/claimant before the disbursal of the compensation amount.

10.4.12 Jharkhand Victim Compensation Act, 2012

Jharkhand was carved out of the southern part of Bihar. The Jharkhand Victim Compensation Scheme, 2012 was notified on 3 August 2012. Rules are also framed under the JVCS, 2012. As per the Jharkhand Victim Welfare Fund Rules, 2014, the Offenders lodged in the prison are asked to do work and their salary is to be utilized to augment the Victim Welfare Fund. In the prisons at Jharkhand, the prisoners are paid remuneration for the work in jails at the rate

[43] Rule 2 J&KVCS.
[44] The Code of Criminal Procedure Samvat, 1989(Act No XXIII of 1989)

of Rs.14 for unskilled, Rs. 20 for semi-skilled and Rs. 46 for skilled labour. The Jharkhand Victim Welfare Fund Rules, 2014 provides for deduction of one-third remuneration of the prisoner towards the Victim Welfare Fund Recommendation Committee. The committee is to be constituted at the district level for deciding payment of the compensation to the victim or his/her successors.[45] The said district level committee is to meet once in three months to identify victims or their successors, for payment of compensation from the JVWF. If there is more than one victim or survivors, the amount is to be divided equally by the district level committee. The District level Committee is to have representations from the departments of police, prison, probation and judiciary. The committee comprises of the following officials: -

(i) Deputy Commissioner - Chairman
(ii) Superintendent of Police – Member
(iii) Secretary, District Legal Service Authority – Spl. Invitee Member
(iv) Concerned Jail Superintendent – Member-Secretary
(v) Concerned Principal Probation Officer – Member

The JVCS has prescribed conditions for the victim or claimant to get the benefits under Section 357 A, Cr.P.C. Accordingly, the Victim or Claimant is to report the crime to the officer-in-charge of a police station or any senior police officer or Executive Magistrate or Judicial Magistrate within 48 hours of the occurrence. If there is any delay in reporting the crime occurrence by the victim or claimant, the District Legal Services Authority, if satisfied, may record the reasons in writing and condone the delay in reporting. Further, it can

[45] Jharkhand Victim Welfare Fund Rules, 2014

also recommend disbursement of compensation amount. The Victim or Claimant is required to cooperate with the police and prosecuting agencies during the investigation and trial of the case. The conditions laid down in the JVCS may create hurdles in claiming of compensation by the illiterate and victims from villages in a State like Jharkhand, who normally report the crime after consultation with the elders and heads of the village. The victim is entitled to receive the compensation even if the offenders are not traced or identified. The commencement of the trial of the case is not relevant, and the victim can apply for grant of compensation under sub-section (4) of Section 357 A of Cr.P.C. In this Scheme, DLSA has been empowered to conduct an enquiry within two months and pass the award of compensation. The quantum of compensation may vary from case to case depending on the fact and loss caused to the victim. The medical expenses incurred on treatment, minimum sustenance amount required for rehabilitation, including such incidental charges as funeral expenses etc., shall be the basis for the compensation. The compensation under JVCS is only subject to the condition that if the trial court, while passing judgment at later date, orders the accused persons to pay any amount by way of compensation under sub-section (3) of Section 357, the victim or claimant shall remit an amount ordered equal to the amount of compensation, or the amount order to be paid under the said sub-section (3) of section 357, whichever is less. An undertaking to this effect is to be given by the victim or claimant before the disbursal of the compensation amount.[46] The

[46] Rule 5, Jharkhand Victim Compensation Scheme, 2012

Victim or Claimant shall make a claim for compensation before the DLSA within a period of six months of the crime. If there is any delay, the DLSA may condone it on reasonable grounds, and pass an order in writing to that effect. The aggrieved claimant, on the denial of compensation by DLSA, has a right to prefer an appeal within ninety days before the State Committee. If there is a sufficient cause or reason, the State Committee may condone the delay and entertain the appeal, filed after the period of ninety days.[47] The award passed by the DLSA has to be placed before the trial court for consideration while passing an order under Section 357 (3) of Cr.P.C.

It is an important fact on the matter of Central Scheme for assistance to civilian victims / family of victims of terrorist, communal and naxal violence; it was brought to the notice of the Jharkhand High Court that the officials in the committee to implement the said compensation scheme, failed to perform the function and no amount of compensation was disbursed till 2011.[48] In the Public Interest Litigation (PIL) that came up before the Division Bench of the Jharkhand High Court, the court ordered for the strict observance of the payment of compensation as per the Central Scheme, and also as per the applicable State Schemes. The State of Jharkhand was directed to settle the compensation claims in respect of the pending applications in various districts and dispose of the same within a period of six months, and not later than one year. Further, in future, as and when application was to be received claiming

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[47] Rules 7 & 8 Jharkhand Victim Compensation Scheme, 2012

[48] *Gopi Nath Ghosh* v. *The State of Jharkhand & Another*, W.P.(PIL) No.2584 of 2011, dated 10.01.2014. Jharkhand High Court at Ranchi

compensation / benefits of the Scheme, it was directed to ensure that the application is considered and disposed of within a period of six months from the date of its receipt by the respective District Magistrate / Deputy Commissioner / District Committee.

10.4.13 Karnataka Victim Compensation Scheme, 2011

The State of Karnataka framed the Karnataka Victim Compensation Scheme, 2011 (KVCS) and constituted a fund with all grants, donation, gifts made by the Central Government or State Government, any local authority or any person. It is designated for the purpose of providing compensation to the victims of crime or their dependents who suffered loss or injury and require rehabilitation.[49] It consists of the definition for the key expression 'victim'. The victim is eligible for grant of compensation even if the offender is not traceable or identified, and where no trial takes place, but the crime ought to have been reported to the officer in-charge of the police station within 48 hours of the occurrence. However, the DLSA for reasons to be recorded in writing may condone the delay in reporting. The victim is to cooperate with the police during investigation and with the prosecution at the time of trial. One year is the limitation prescribed for the claimant to make an application, and ninety days for the victim aggrieved by denial of compensation. The DLSA and SLSA have powers to condone the delay.

The compensation received by the victim from the State, or any insurance company, State or National Human Rights Commission is to be

[49] Notified on 22 February 2012

considered as part of the compensation under the KVCS. No representation by a legal practitioner or any other person or institution or Non-Governmental Organisation on behalf of the victim / claimant is to be entertained. The victims are to appear as party-in-person. If a victim or his dependents have obtained an order sanctioning compensation under this scheme based on false / vexatious / fabricated complaint, which is so held by the trial court, the compensation awarded is to be recovered with 15 per cent interest per annum. The loss suffered by the victim and the expenses met for medical expenses are the basic factors for determination of the quantum of compensation. The Karnataka Victim Compensation Scheme, 2011 is analysed as not very victim–friendly. It is claimed that the Karnataka Victim Compensation Scheme is mechanical and does not have its central focus on the victim. It is more of a directive to the judges on the compensation to be awarded and the process to be followed during adjudication.[50] There is also a need to issue guidelines on the quantum of compensation as well as interim compensation to be granted, especially in cases where there is a need for immediate compensation to be given for medical treatment etc.

10.4.14 Kerala Victim Compensation Scheme, 2014

The State of Kerala framed the Kerala Victim Compensation Scheme, 2014 (KEVCS), and the fund is also to be constituted through budgetary allocation, fine imposed under Section 357 Cr.P.C. and donations received

[50] Sanjeev P. Sahni, Astha Dhanda and Manjushree Palit (eds), *Victims' Assistance in India*, Ane Books Pvt. Ltd., (2017), p.143.

from individuals and organisations.[51] The amount is to be held in public account and to be operated by the Member–Secretary, Kerala State Legal Services Authority. The State Legal Services Authority is made accountable for its function and has to furnish periodic returns through the nodal department.[52] The terms 'victim' and 'dependents' are clearly defined in it. The dependent includes wife, husband, father, mother, unmarried daughter and minor children of victim. The competent authority of the government can issue dependency certificate for the purpose of availing of the benefits under the KEVCS.[53] The other expressions used in the KEVCS are to have the same meaning as defined in IPC, Cr.P.C. and Kerala General Clauses Act.

The income limit has been made as primary criteria to get the benefits under KEVCS. The employees working in the Central or State governments offices, Board, Corporation and Public Sectors undertakings, whose family income exceeds the creamy layer limit fixed by the respective governments, may not be entitled to make applications for compensation.[54] Under KEVCS, the victims or their dependents can avail of the benefits in two circumstances:

(1) If the offender is not traced or identified and where no trial takes place, the victims or the dependents may make an application to the District Legal Services Authority; (2) if the offender is traced and trial does take place, on recommendation made by the court under Section 357 A (2) or (3) Cr.P.C. or at the conclusion of the trial the

[51] Notified on 25 February 2014
[52] Rule 3 KEVCS, 2014.
[53] Rule 2 (I) & (j) KEVCS, 2014
[54] Rule 4 (d) KEVCS, 2014

court, if satisfied that the compensation awarded under Section 357 Cr. P.C. is adequate for such rehabilitation or where the case ends in acquittal or discharge and the victim has been rehabilitated, can forward the claim of the victim for compensation.[55] The procedure for grant of compensation is similar to that of the VCS framed by the other States. The SLSA and DLSA are empowered to conduct enquiry and award adequate compensation by completing the enquiry within two months. Both the authorities can also order for immediate first aid facilities or medical treatment free of cost, on the certificate of the police officer. The quantum of compensation is to be based on the loss caused to the victim, medical expenses incurred on treatment, minimum sustenance amount required for the rehabilitation and other incidental charges like funeral expenses. The amount of compensation is determined under KEVCS to be disbursed to the victim as a single lump sum or in two installments, as decided by the DLSA. Any other amount received by the victim from the insurance companies, *ex-gratia* or any other amount from the State or Central government scheme is to be adjusted as part of the compensation under KEVCS.

It is the only Indian State which has made *Aadhar* linked bank account mandatory for every victim or dependent for the purpose of disbursement of

[55] Rule (b) & (c) KEVCS, 2014

compensation under VCS.[56] The Acid attack cases are given due importance and the victim is to be paid Rs.1,00,000/-, within fifteen days of such incident. Further, the KEVCS contains a special provision for the minor victims. In case of a victim who is a minor, the amount of compensation awarded is to be deposited in the account of the minor as fixed deposit, to be withdrawn only on attainment of his majority. In exceptional cases, the amount of compensation can be withdrawn for educational or medical needs of the beneficiary by the competent person as decided by the District Legal Services Authority / Appellate Authorities. This is the only VCS in India providing second appeal against the decision of the first appeal. As per the Rules of KEVCS, the application for compensation is to be made by the victims or their dependents within 180 days from the date of crime occurrence. The victims or dependents, aggrieved by the rejection of claim by the DLSA, can prefer an appeal before the SLSA within 90 days. Thereafter, if the victims or dependents feel further aggrieved they may also prefer a second appeal against the order of the first appellate authority, viz., the State Legal Services Authority, Kerala. Such appeal is to be preferred before the Home Department, Government of Kerala. The time to prefer second appeal is 30 days from the date of decision of the first appeal.[57]

The claimants under the KEVCS are directed to get a Dependency Certificate from the Tahsildar or the authority designated as a competent

[56] Rule 6 KEVCS, 2014.
[57] Rule 9 & 10 KEVCS, 2014

authority by the State government.[58] Further, such certificates are to be produced within fifteen days of application. The SLSA/ DLSA have the discretion to reject, withhold or reduce the award of compensation. Such decisions of DLSA/SLSA are normally final and binding upon the parties, but the SLSA or the State government may, subsequently, re-open a case where there have been material changes or where the victim dies as a consequence of the injury.

10.4.15 Madhya Pradesh Crime Victim Compensation Scheme, 2015

The Madhya Pradesh Crime Victim Compensation Scheme, 2015 (MPVCS) is a scheme that provides for funds for the purpose of compensation according to the financial status of the victims of crime who have suffered loss or injury as a result of any crime and require rehabilitation.[59] As explained in the preamble of MPCVS, the financial status of the victim is also a factor in granting compensation to the victim of crime. If the annual income of the victim, from all the sources together exceeds Rupees Five Lakh (Rupees 5 Lakh) then, the compensation payable would be upto 50 per cent (Fifty Percent only) of the amount given against different categories in the Schedule.[60] There are as many as 12 key expressions used in this Scheme.[61] The terms 'injury' and 'loss' are distinguished by explanations. Loss includes the damage to the property as a result of an injury caused by a criminal act. The definition for the word "offence" is adopted from the definition provided in Section 2 (o) Cr.

[58] Rule 8 KEVCS, 2014.
[59] Notified on 31.03.2015
[60] Rule 6(12), MPCVS, 2015
[61] Rule 2, MPCVS, 2015

P.C. Similarly, for the expression "victim" the definition available in Section 2 (wa) Cr. P.C. is adapted with a slight modification. The person who is responsible for the injury to the victim has been excluded from the ambit and definition of the term 'victim'. The wife, husband, father, mother, unmarried daughter and minor children of victim are brought under the definition of dependents. The probation officer appointed under the Probation of Offenders Act, 1958 has been authorised to make effective rehabilitation and continuous evaluation in the case of compensation to the victim of rape. It is the only compensation scheme in India which envisages the availing of the services of Probation Officers appointed under Probation of Offenders Act, 1958.[62]

The victim compensation fund constituted under MPCVS, 2015 consists of the budgetary allocation made by the State, fine imposed under Section 357 Cr.P.C. and donations and contributions that may be received from charitable institutions and individuals. The Member Secretary of SLSA is empowered to operate the fund and the Home Department is the nodal department for regulating, administering and monitoring of the Scheme. A State-level Committee under the chairmanship of the Principal Secretary, Home Department and district level committee under the chairmanship of District and Sessions Judge are constituted for the purpose of monitoring the Scheme, and they have to review quarterly the pendency of applications and appeals. The

[62] Rule 6(8), MPCVS, 2015

SLSA is to collect the data from every district and the district level committee is to review the cases in the first week of every month.[63]

The victim or the dependent can make a claim for compensation for the crime that occurred within the State or crime that started in the State. The DLSA or SLSA can decide the quantum of compensation and it can reject, withhold or reduce the award of compensation in case of failure to inform the crime to the police officer without reasonable delay or where the victim fails to cooperate with the police officer or other authority to bring the accused before justice.[64] The quantum of compensation to be decided is primarily based on the annual income and the financial status. Whether the victim is an earning member of the family or not is also an important factor in deciding the quantum of compensation.

10.4.16 Maharashtra Victim Compensation Scheme, 2014

The Maharashtra Victim Compensation Scheme, 2014 (MVCS) has the regular provision for compensation to the crime victim who suffered loss or injury and requires rehabilitation.[65] It has adopted the definition provided in Section 2(wa) of Cr.P.C. for term 'victim'. The wife, husband, father, mother, unmarried daughter, minor children are to be considered as dependents under MVCS, 2014. However, the DLSA is to determine the dependents on sufficient proof from the claimants.[66]

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[63] Rule 4, MPCVS, 2015
[64] Rule 8, MPCVS, 2015
[65] Notified on 11th April 2014
[66] Rule 2 MVCS, 2014.

The Secretary, Maharashtra State Legal Services Authority is authorised to operate the fund and the Home Department is to be the Nodal Department for regulating, administering and monitoring it. The Maharashtra State Legal Services Authority is accountable for the functions under this Scheme, and for furnishing periodic returns of the amount distributed by the State government through Nodal Department. The mobilisation of fund for the MVCS is similar to that of the other States. It is through the budget allocation by the State government, compensation received or recovered from the wrongdoer under MVCS and the donations received from the individuals and organisations.[67]

The victims or dependents are eligible to get compensation only if their income is below the Income-Tax ceiling. The income-tax payees are not eligible for compensation under MVCS. Further, the employees of the Central or State officers, Boards, Corporation and public undertakings are also not eligible to get compensatory benefits under the MVCS. Victims or dependents may apply for compensation, even if the perpetrator of crime is not traceable or goes unpunished after trial. The applicant is to cooperate with the police and prosecution during the investigation and trial of the case. The loss or injuries sustained by the victims or their dependents should have caused substantial loss of income to the family. The courts can also recommend for compensation to the sufferers of crime under MVCS.[68] The other regular procedures such as the victim being required to cooperate with the investigation and prosecution and the factors that are to be considered while deciding the quantum of

[67] Rule 3 MVCS, 2014.
[68] Rule 4 MVCS, 2014.

compensation are also given in this Scheme. Six months' time limit has been prescribed to make an application, and ninety days time limit to prefer an appeal against the denial of compensation.[69] If the claim is based on false or vexatious or fabricated documents, the compensation amount awarded is to be recovered with interest at 15 percent per annum.

10.4.17 Manipur Victim Compensation Scheme, 2011

The Manipur Victim Compensation Scheme, 2011 (MRVCS) consist of only nine Rules and a Schedule.[70] A person who has suffered loss or injury as a result of crime and requires rehabilitation has been termed as a "victim". The family members of the victim are included as dependents to avail of the pecuniary benefits under MRVCS.[71] The fund for the MRVCS is to be allocated by the State government in a separate budget every year. The Secretary of the State Legal Services Authority, Manipur is authorised to operate the fund.[72] A victim is eligible for grant of compensation even if the offender is not traced or identified, but the victim is identified and where no trial takes place. The victim is to cooperate with the police and prosecution. The crime occurrence ought to have been reported without any unreasonable delay. If any delay occurs in reporting the crime, it is for the DLSA to condone the delay by an order in writing, for the purpose of granting compensation under the MRVCS.[73]

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[69] Rule 9 MVCS. 2014.
[70] Notified on 5th August 2011
[71] Rule 2(d) MRVCS, 2011
[72] Rule 3 MRVCS, 2011
[73] Rule 4 MRVCS, 2011

As usual, the six months' time limit to make a claim and ninety days to prefer an appeal are prescribed as limitation. The compensation under MRVCS is to be paid, subject to the condition that, if the court while passing judgment at a later date, orders the accused persons to pay any amount by way of compensation under sub-section (3) of Section 357, the victim/claimant shall remit an amount ordered equal to the amount of compensation, or the amount ordered to be paid under the said sub-section (3) of Section 357, whichever is less. An undertaking to this effect shall be given by the victim/claimant before the disbursal of the compensation amount. The material facts and circumstances to be considered for determination of quantum of compensation are also listed in the Scheme.

10.4.18 Meghalaya Victim Compensation Scheme, 2014

The Meghalaya Victim Compensation Scheme, 2014 (MEVCS) is instituted for the purposes of awarding compensation to victim or his dependents who have suffered loss or injury are required rehabilitation as a result of an offence.[74] There was a Scheme referred to as the Meghalaya Victim Compensation Scheme, 2011 in force which was repealed in 2014.[75] The new Scheme aims to provide financial assistance to the victim and support services such as shelter, counseling, medical aid, legal assistance, education and vocational training, depending upon the needs of the victim. This scheme applies to the victims and their dependents. The MEVCS is to cover the victim,

[74] Notified on 25.09.2014

[75] The Meghalaya Victim Compensation Scheme, 2011 notified wide Notification No. POL 191/2004/pt/135, dated 20th March 2012.

and in case of death of the victim, his dependent or the members of the family of the victim who have suffered resulting from the crime. In addition to the objectives of the Scheme, the beneficiaries are also identified and the injured person, and in case of death, his dependent are recognized as the beneficiaries under the Scheme.[76]

The important terms 'victim', 'victim compensation' and 'loss or injury' are defined in the MEVCS, 2014. Victim compensation means the amount payable to the victim and, in the case of the death of the victim, to the dependents or legal heirs of the victim. There are six kinds of loss or injury given in the Schedule. For the term 'victim', the definition provided in Section 2 (wa) Cr.P.C. has been adopted without any change or modification.[77] The Victim Compensation Fund (VCF) is constituted to pay the amount of compensation decided by the DLSA or SLSA. The Secretary, SLSA is empowered to operate the fund out of the grants from the Central or State governments or any local authority or donations and contributions received from philanthropist, charitable institutions or organizations. The main source is the budgetary allocation made by the government, the money received in compliance of any court order and amounts recovered from the wrong-doer or accused.[78] The DLSA and SLSA have to maintain accounts for receipt and expenditure as per the financial procedure of the Meghalaya State government.

[76] Rule 3, MEVCS, 2014
[77] Rules 2(e) & (h) & (j), MEVCS, 2014
[78]Rule 5, MEVCS, 2014

The accounts are subject to the audit by the local audit and by the Accountant General.[79]

Restorative Support Services is the term used by the framers of MEVCS, 2014 and the restoration of victims to the pre-crime stage is one of the aims of the Scheme.[80] A victim is entitled to the compensation under the MEVCS, even if the offender is not traced or identified, provided that the crime must be one in which the victim sustains mental or bodily injury or dies. However, the death or permanent incapacitation of the victim should not be as a result of suicide or self-infliction of bodily or mental injury or a result of the victim's own wrong doing. The claimant must report the crime to the police authority or to the Magistrate. Unlike other schemes, the time limit to make a complaint has not been made as a mandatory requirement under MEVCS, 2014. The cooperation from the victim to the police for investigation and prosecution of trial are the conditions to be complied with by the victim, and turning hostile or refusing to depose or failure to appear during the trial would make the victim disentitled to claim the compensation. Further, receipt of any amount towards compensation, compensation under any other schemes of the Central or State government or insurance company or any other institutions will also bar the victims from claiming compensation under MEVCS.

The compensation under MEVCS, 2014 is to be paid subject to the condition that, if the trial court while passing judgment at a later date orders the accused persons to pay any amount by way of compensation under sub-section

[79] Rule 15 & 16, MEVCS, 2014
[80] Rule 6 (ii), MEVCS, 2014

(3) of Section 357 of the Cr.P.C., the victim or claimant (in the case of death of victim) shall remit an amount ordered equal to the amount of compensation, or the amount ordered to be paid under the said sub-section (3) of Section 357 of the Code, whichever is less. An undertaking to this effect is to be given by the victim or claimant (in the case of death of victim) before the disbursement of the compensation amount.[81] The quantum of compensation is to be determined on the basis of the loss caused to the victim, medical expenses, minimum sustenance amount required for rehabilitation and other incidental charges

The compensation amount is required to be paid in two phases, the first half - any time during the inquiry or investigation, or before commencement of the trial and the balance on conclusion of the trial.[82] The SLSA has been authorised to institute proceedings before the court of law for recovery of compensation granted to the victim or the dependents from the person responsible for causing loss or injury as a result of crime committed by him.[83] Therefore, the offender is made liable to pay the compensation amount to the government under MEVCS, 2014.

A period of 12 months from the date of occurrence of the crime is the limit for making a claim and there is no powers conferred with the DLSA to condone the delay, if any. But the SLSA is empowered to excuse the delay in filing the appeal after the period of 90 days, for reasons to be recorded in writing.[84]

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[81] Rule 8, MEVCS, 2014
[82] Rule 12, MEVCS, 2014.
[83] Rule 16, MEVCS, 2014.
[84] Rules 17 & 18, MEVCS, 2014

10.4.19 Mizoram Victims of Crime Compensation Scheme, 2011

The Government of Mizoram has framed the Mizoram Victims of Crime Compensation Scheme, 2011 (MZVCS) for the purpose of providing funds to grant compensation to the victims of crime, in particular acid attack victims or their dependents who have suffered loss or injury as a result of crime and who require rehabilitation.[85] As introduced in the preamble of this Scheme, the broad aim of MZVCS is to make fund provision for the purpose of compensation to the victims of crime or their dependents. The victims of acid attack and their dependents have been incorporated in the preamble itself. It shows that MZVCS has a special provision for treatment of acid attack victims. Out of 11 expressions defined in this Scheme, the terms such as "crime", "injury", "loss", "victim", "rehabilitation" are primary and the meaning assigned in MZVCS are specific for the purpose of compensating the victims of crime. The definitions as given in MZVCS for the following terms are necessary for the purpose of study. Therefore, they are given hereunder:[86]

(1) "Crime" for the purpose of the scheme, connotes any unlawful act which is an offence against the public and renders the persons guilty of the act or default liable to punishment under Indian Penal Code (45 of 1860).
(2) "Injury" for the purpose of this scheme, means physical wrong or burns or maiming or disfiguring or mental illness caused to the victim.
(3) "Loss" property with which the owner involuntarily has parted through an act of violence, coercion, etc.

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[85] Notified on 5th December 2011
[86] Rules 2(d), (f), (g) and (i) MZVCS, 2011

(4) "Victim" means a person who himself has suffered any loss or injury caused by reasons of the act or omission for which the accused person has been charged; and causing burns or maiming or disfiguring or disabling or causing grievous hurt as a result of acid attacks and requires rehabilitation, and the expression "victim" includes dependent family members.

The victim compensation fund under MZVCS is to be allotted by the State government every year.[87] There are other head of accounts also provided according to the nature of the expenditure such as legal fee, other charges etc. The victims or dependents are eligible for grant of compensation only if they come within the purview of Below Poverty Line (BPL) family. However, the income ceiling for BPL has not been explained in MZVCS, 2011. Yet another restriction to avail of the compensation as dependents' children, is the age limit. The children up to the age of 21 years are eligible to get the pecuniary benefits, but the age restriction is not be applicable to physically or mentally challenged children. The other regular conditions, that the crime should have been reported without any delay and the victim should cooperate with the police and prosecution, are duly incorporated in MZVCS.[88] In a situation where the victims or dependents suffer a loss of property worth more than Rs.1,00,000/- and in the event of death or permanent incapacitation of the victim who was the sole breadwinner of the family, the dependents are entitled to compensation. The death/permanent incapacitation of either the husband or wife, irrespective of the fact whether one or both are earning members of the

[87] Rule 4 MZVCS,2011
[88] Rule 5 MZVCS, 2011.

family, the dependents are entitled to compensation. The period of limitation is six months to make an application, and two years for an appeal. The appellate authority has no powers to condone the delay.

In case employment is given to any family member of a victim of crime, the family would not be entitled to assistance under the scheme. However, in case such employment is given after the release of assistance under the scheme, the assistance would not be withdrawn. The perpetrators of crime or his/her dependants will not be entitled to any compensation under the scheme.[89] The rate of compensation for disability are given in a separate Schedule and the quantum should not to exceed the limit prescribed.[90]

10.4.20 Nagaland Victim Compensation Scheme, 2012

The State of Nagaland framed a scheme for the purpose of compensating the victims of crime and their dependents, called the Nagaland Victim Compensation Scheme, 2012 (NVCS).[91] A victim has been given the meaning as a person who himself has suffered loss or injury as a result of crime and requires rehabilitation. A fund constituted from the allocation in the annual budget is prepared by the State. The Secretary, Relief and Rehabilitation in the Home Department has been authorised to operate the fund.[92] Even if the offender is traced or not, the victim is entitled for compensation, if the crime is reported to the officer-in-charge of the police station or judicial magistrate

[89] Rule 7 MZVCS, 2011.
[90] Rule 6 MZVCS, 2011.
[91] Notified on 18th December 2012
[92] Rule 3, NVCS, 2012

without any delay. Further, the victim has to cooperate with the police and prosecution during the investigation and trial of the case.

The victim can directly apply to the DLSA for compensation or the court may recommend for compensation to the victims or dependents. The DLSA is to examine the case of the claimant and verify the contents of the claim with regard to the loss or injury caused to the victims. The medical expenses incurred, and the actual loss caused to the victims, including funeral expenses, can be taken into account for the purpose of determining the quantum of compensation.[93] Compensation received by the victim from the State in relation to the crime in question, namely, insurance, ex-gratia amounts, cash relief and / or payment received under any other Act or State-run Scheme, is to be considered as part of the compensation amount under these Schemes and if the eligible compensation amount exceeds the payments received by the victim from collateral sources mentioned above, the balance amount is to be paid out of the fund.

The SLSA has been empowered to institute proceedings for the recovery of the compensation awarded to the victims from the persons responsible for the crime. The victims have been given a period of three years from the date of crime to make an application to the DLSA, and delay, if any, can be condoned by an order in writing. The victim who was denied compensation by DLSA

[93] Rule 5, NVCS, 2012

may prefer an appeal within ninety days, and if satisfied, the SLSA, for the reasons to be recorded in writing, may excuse the delay in filing the appeal.[94]

10.4.21 Odhisa Victim Compensation Scheme, 2012

The Odisha Victim Compensation Scheme, 2012 (OVCS) has been framed in pursuance of Section 357 A Cr.P.C., for providing funds for the purpose of compensation to the crime victims.[95] In Rule 2, there are seven key terms defined. 'Loss' or 'injury' and 'victim' are the important expressions defined in this Scheme. As per Rule 2(f) there are six kinds of loss and injuries that are explained. Further, victim means a person who has suffered a loss or injury as a result of crime and requires rehabilitation. In case of death, the dependents are included within the purview of victim. If a victim is a minor, the parents would be treated as dependents.[96] Under OVCS, 2012, the loss or injuries is to be compensated as per the maximum limit prescribed in the Schedule.

The OVCS, 2012 aims at providing financial assistance to the victim and support services such as shelter, counseling, medical-aid, legal assistance, education and vocational training depending upon the needs of the victim.[97] It is the salient feature of the OVCS, 2012, because no other Scheme in India has included as a Rule the aims and objectives of the Scheme, making it an integral part of the Rule. The purpose of the Scheme also makes it clear that cases covered under The Scheduled Castes and the Scheduled Tribes (Prevention Of

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[94] Rules 8 & 9, NVCS, 2012
[95] Notified in the Gazette on 12.07.2012
[96] Rule 2(g) OVCS, 2012.
[97] Rule 3, OVCS, 2012

Atrocities) Act, 1989 Act No: 33 OF 1989 and the Protection of Civil Rights Act, 1955, and cases covered under the Scheme of Financial Assistance and Support Services to Victims of Rape operated by Women and Child Development Department, Government of Odisha are not covered under the OVCS, 2012.

The Victim Compensation fund under OVCS, 2012 is to be operated by the Secretary of the State Legal Services Authority, and the fund is to be credited in the fund by budget allocation of the State government every year. The fund includes grants, subscriptions, donations by the individuals and organisations, and the sums received from the court in compliance of any directions etc. The injured victims and the dependents of the victims, in the case of death, are the beneficiaries under this Scheme. The victim or dependents are entitled to financial assistance and restorative support services in the cases where FIR is lodged.[98] The victim who has applied under the Scheme is to cooperate with the police and prosecution from the stage of investigation till the conclusion of trial of the case. Further, the victim should not have received compensation under any other Schemes of the Central or the State government or insurance company. The victim or his family should have suffered substantial loss to the income, which makes it difficult to live as at the stage prior to the crime.[99]

The VCS of many States have been vested with the police department and revenue department, and the Commissioner of Police or District Collector

[98] Rules 5 & 6 OVCS, 2012
[99] Rule 7, OVCS, 2012

have been authorized to operate the fund. But OVCS, 2012 has made it clear that the DLSA in every district will have the exclusive jurisdiction to deal with the application for assistance received from the claimants, and it is also empowered to provide financial assistance and support services, which include psychological, medical and legal assistance to the affected persons. It can also issue directions to the appropriate authorities to provide protection to the affected persons whenever deemed necessary. The educational or vocational / professional training for the affected woman for the purpose of rehabilitation can be provided by the DLSA.

Whenever a recommendation is made by the court or an application is made by any victim under sub-section 4 of section 357 A of the Code to the District Legal Service Authority, it is to examine the case and verify the contents of the claim with regard to the loss or injury caused to the claimant, and also may call for any other relevant information necessary for consideration of the claim from the concerned. After verifying the claim, the DLSA is to make recommendations for compensation within two months.

The SLSA is to decide the quantum of compensation to be awarded to the victim on the basis of loss caused to the victim, medical expenses to be incurred on treatment, minimum sustenance amount required for rehabilitation including such incidental charges as funeral expenses etc. The compensation may vary from case to case depending on the facts of each case. The compensation awarded is to be paid in two phases, the first half being any time

before commencement of trial, and the other half on conclusion of the trial.[100] Under Rule 10 of OVCS, 2012 the claim by a victim cannot be entertained after a period of 12 months from the date of reporting of crime. The aggrieved victim, on denial of compensation by the DLSA, may file an appeal before the SLSA within a period of 90 days. The SLSA, if satisfied, may condone the delay in filing the appeal, for the reasons to be recorded in writing.

10.4.22 Punjab Victim or their Dependents Compensation Scheme, 2011

The State of Punjab framed a Scheme for providing funds for the purpose of compensation to the crime victims called The Punjab Victim or their Dependents Compensation Scheme, 2011 (PVDCS).[101] In this Scheme there is no definition provided for the terms victim, loss or injury or any other key expressions. There are three terms defined. 'Act' means the Cr.P.C., 1973, 'Fund' means the victim compensation fund and 'Schedule' means a Schedule added as appendix to the PVDCS.[102] Except these three definitions, there are no other terms defined in this Scheme. This is an important feature that the PVDCS, 2011 does not consist of the definition for victim of crime or dependent. The Victim Compensation Fund constituted under PVDCS, 2011 receives the fund under a separate budget earmarked every year to the Department of Legal and Legislative Affairs through the Department of Home Affairs and Justice, being the Nodal Department for regulating, administering and monitoring this Scheme. The DLSA or SLSA have to maintain accounts

[100] Rule 9, OVCS, 2012
[101] Notified on 08.12.2011
[102] Rule 2 PVDCS, 2011.

and other relevant records. Both the authorities are to furnish the sums distributed annually, and the norms applied in determining the quantum of compensation.[103] The victim or his dependent should not have been compensated for the loss or injury under any other Scheme of the Central / Punjab government, or insurance company or any other institutions, to get the compensation under PVDCS, 2011. Further, the loss or injury sustained should have caused substantial loss to the income of the family.[104]

The claimant has to apply for compensation within a period of six months of the commission of crime. If there is any delay the DLSA or SLSA may condone it by an order in writing.[105] In addition to the application, the courts can also make recommendations under Section 357 A (4) to the DLSA or SLSA. The Authorities have to verify the contents of the claim with regard to the loss or injury caused, and conduct an enquiry within the period of two months and pass an award for compensation. The quantum of compensation is to be based on medical expenses, minimum sustenance amount required for rehabilitation and other incidental charges, including the funeral expenses etc. The compensation may vary from case to case depending on the facts of each case. Under PVDCS, 2011 the Department of Legal and Legislative Affairs can institute proceedings before a court of law for recovery of the compensation

[103] Rule 3 PVDCS, 2011.
[104] Rule 4, PVDCS, 2011
[105] Rule 7, PVDCS, 2011

awarded to the victim from the person responsible for causing loss or injury as a result of the crime.[106]

Notably, the victim is not guaranteed any right to prefer an appeal in case of denial of compensation or for enhancement of compensation.

10.4.23 Rajasthan Victim Compensation Scheme, 2011

The State of Rajasthan has framed the Rajasthan Victim Compensation Scheme, 2011 (RVCS) for providing funds for the compensation to the victims or their dependents who suffered loss or injury as a result of crime.[107] In its definitions in Rule 2, it is clarified that the words and expression used in IPC, 1860, General Clauses Act, 1955 have the same meaning in the RVCS also. However, for the term 'victim', the definition in Section 2 (wa) Cr. P.C. has not been adopted in RVCS, 2011, but it has been defined as a person who has suffered loss or injury as a result of crime and requires rehabilitation. The expression 'victim' includes the dependents, in case of death of a victim.[108] The fund constituted in RVCS, 2011 is to be operated by the Secretary of the SLSA and the government has to allocate the budget for this Scheme every year.[109]

There are certain conditions to be fulfilled to claim compensation by a victim or his dependents under RVCS, 2011. Accordingly, the victim should not have been compensated for the loss or injury under any other schemes of the Central or State government or any other institutions. The loss or injury

[106] Rule 6, PVDCS, 2011
[107] Notified on January 5, 2012
[108] Rule 2, RVCS, 2011
[109] Rule 3, RVCS, 2011

sustained in the crime occurrence should have caused loss of income to the family making it difficult to make both ends meet without the financial aid or has to spend beyond his means on medical treatment of mental agony or physical injury. If the offender is not traced or identified, but the victim is identified, and where no trial takes place, such victim may also apply for grant of compensation under sub-section (4) of Section 357 A, Cr.P.C. The victim/claimant is to report the crime without unreasonable delay to the Judicial Magistrate of the area. The District Legal Service Authority, if satisfied, for the reasons to be recorded in writing, may condone the delay, if any in making the claim. And the victim / claimant is to cooperate with the police and prosecution during the investigation and trial of the case.[110]

The DLSA or SLSA is to examine the claim and verify its contents in order to determine the genuineness and award the compensation within two months. The compensation may vary from case to case depending on the facts of each case. The other interim reliefs, such as immediate first aid facility or medical benefits, are available free of cost to the victim on production of a certificate from Police Officer or Magistrate. The claim by a victim cannot be entertained after a period of one year from the date of commission of the crime. The SLSA, if satisfied, for the reasons to be record in writing, may condone the delay in filing the claim.[111] The quantum of compensation to be awarded is to be within the maximum limit as per the Schedule.

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[110] Rule 4, RVCS, 2011
[111] Rule 7, RVCS, 2011

The DLSA or the SLSA, if deems fit, may institute proceedings before the competent court of law in consultation with the office of the public prosecutor concerned, for recovery of the compensation granted to the victim or his dependents from the person responsible for causing loss or injury as a result of the crime committed by them. The amounts, so recovered, are to be deposited in the Victim Compensation Fund.[112]

10.4.24 Sikkim Compensation to Victims or his Dependents Schemes, 2011

Sikkim is the 22nd State of India, bordered by Bhutan, Tibet and Nepal. The Government of Sikkim has framed the Sikkim Compensation to Victims or his Dependents Schemes, 2011 (SVCS).[113] It is a small instrument consisting of only seven Rules. As per the definition 'victim or his dependents' means a person who himself has suffered loss or injury as a result of crime, and requires rehabilitation and includes dependent and family members. In addition to the general definition available in VCSs of other States the term 'family members' is included in this definition.[114] Under the SVCS, 2011 the SLSA is made the authority to operate and disburse the victim compensation fund. The amount for the compensation is to be allocated every year in the State budget. As prescribed in the other VCS, the SVCS, 2011 also consists of eligibility criteria for the grant of compensation. According to the Rules, the applicant should not have been compensated for the loss or injury under any other schemes of the Central, State, insurance company or institutions. The loss or injury should

[112] Rule 8, RVCS, 2011
[113] Notified on 24th June 2011
[114] Rule 2, SVCS, 2011

have caused substantial deprivation to the income of the family. Further, a victim can maintain an application under the Scheme even if the perpetrator of a heinous crime is not traceable or goes without being punished after trial.[115]

Under SVCS, 2011, the DLSA, on recommendation from a court or an application by any victim or dependents, can verify the claim and make a recommendation for compensation. The SLSA is empowered to decide the quantum of compensation on the basis of the loss caused to the victim, medical expenses incurred on treatment, minimum sustenance amount required for rehabilitation, including the funeral expenses or other incidental charges. The SLSA is the competent authority under SVCS, 2011 to institute proceedings for recovery of the compensation granted to the victim from the person responsible for causing loss or injury as a result of the crime committed by him. The proceeding for recovery will have to be initiated only after consultation with the Public Prosecutor concerned. The maximum period of time limit to make a claim is three years from the date of crime. There is no power conferred upon any authorities to condone the delay in making the claim under SVCS, 2011.

10.4.25 Tamil Nadu Victim Compensation Scheme, 2013

The State of Tamil Nadu has formulated the Victim Compensation Scheme, 2013 under Section 357 A Cr.P.C.[116] The scheme constitutes the Victim Compensation fund which comes from the budgetary allocation, fine imposed under Section 357 Cr.P.C. and ordered to be deposited by the court in the fund, amount of compensation recovered under Clause 8 of the T.N. VCS

[115] Rule 4 SVCS, 2011.
[116] G.O.Ms.No.1055 Home (Police XII), 30th November 2013.

and donations, contribution received from the individuals and organisations. The Director General of Police (DGP), TN has been empowered to operate the fund. The District Collectors in the Districts and the Commissioners of Police in cities are to disburse the compensation amount awarded by the DLSA or trial courts to the victims within one month from the date of receipt of award. Though the T.N. VCS has carried definitions for the terms 'crime' and 'dependents', the definition for the term 'victim' is conspicuous by its absence.

There are certain specific conditions to be complied with by the victim to avail of the benefits under T.N. VCS. Accordingly, the victims or the dependents are eligible for the grant of compensation only on the reporting of the crime to the police station, or executive magistrate or judicial magistrate of the area concerned, within 48 hours of the occurrence of the crime. However, the State or District Legal Services Authority can condone any delay in reporting of the crime, for the purpose of getting compensation under this scheme. Another important condition is that the offender should be traced or identified, and the trial should take place. The victim should have cooperated with the police and the prosecuting agency during the investigation and trial.[117] The period of limitation prescribed for making the application by the victims or dependents is six months, the SLSA or DLSA can entertain the application after this period, if satisfied, and for the reasons to be recorded in writing.[118]

The SLSA or DLSA can determine the quantum of the compensation and it should not exceed the schedule given in the scheme. The victims or

[117] Rule 4 TNVCS, 2013.
[118] Rule 5(4) TNVCS, 2013.

dependents, aggrieved by the denial of compensation by the DLSA, may file an appeal before the SLSA within a period of 90 days from the date of receipt of the order of such denial of compensation. The TNVCS has no provisions to prefer an appeal in the case of denial of compensation by the SLSA. Similarly, there is no provision or scope available to the victim to prefer an appeal against the quantum of compensation awarded by SLSA or DLSA.[119]

10.4.26 Telangana Victim Compensation Scheme, 2015

The State of Telangana, is the twelfth largest State born on 2 June 2014 on separation of the area from the North western part of Andhra Pradesh. It is the newly formed 29th State in the Indian Union by the Andhra Pradesh Re-Organisation Act, 2014. Within a year of its creation, the Telangana Victim Compensation Scheme, 2015 was framed and came into effect from 1st April 2015 (TEVCS).[120] The TEVCS is the only legal Scheme which consists of a provision for the exact date on which it come into force.[121] The Scheme defines eleven key terms. The word 'crime' is defined as an act of commission or omission or an offence committed against the human body of the victim. The general definition from the other VCS has been adopted for the term victim, and it includes the guardian or other legal heirs of such a person. The parents, children and all blood relations living in the same household are included in definition of family. Similarly, the wife, husband, father, mother, unmarried daughter are included in the term dependent, and the minor children of victim,

[119] Rule 11, TNVCS, 2013.
[120] Notified on 07.03.2015
[121] Rule 1(3), TEVCS, 2015

who has been certified by relevant authority of the government as dependent of the victim, has also been brought within the meaning of dependent.[122]

The fund for the TEVCS is to be credited by a separate budget allocation by the government every year, and includes all grants, donations, subventions, contributions etc. by the Central or State government or any other sums received on behalf of the victim compensation fund from any other source whatsoever. The fund shall be operated by the Member-Secretary of the Telangana SLSA and it is accountable for its functions and furnishing periodic returns to the government.[123] Under the TEVCS, the employees of the State or Central government, Boards, Corporations and Public Undertakings and income tax payees are not entitled to avail of the compensatory benefits. The head of the family's income exceeds Rs. 4,50,000/- per annum, are not eligible for the compensation under the Scheme. The crime should have been reported by the victim or his dependents to the officer-in-charge of the Police Station or any senior police officer or executive Magistrate or Judicial Magistrate of the area, within 48 hours of its occurrence. In some cases, the delay in reporting of the crime can be condoned by Legal Services Authority by an order in writing.[124] The compensation can be obtained on recommendation made by a court under Section 357 A (2) Cr.P.C. and if the compensation awarded under Section 357 Cr.P.C. is not adequate for rehabilitation, by making an application to Legal Services Authority. The applicant should cooperate with the police

[122] Rules 2(c) & (d) & (e) & (k), TEVCS, 2015
[123] Rule 4, TEVCS, 2015
[124] Rule 5, TEVCS, 2015

during investigation and prosecution of the trial of the case.[125] The DLSA is to verify the genuineness of the claim and determine the quantum of compensation and pass an award within two months.

The quantum of compensation is based on the age of the victim. The victims are classified as below 40, above 40 and above 60 years. The DLSA is empowered to alleviate the suffering of the victim by passing orders for immediate first aid facility or medical treatment free of cost. The compensation amount can be disbursed only through a Scheduled Bank.

The compensation amount to the minors is to be deposited in the account of the minor as fixed deposit, withdrawable only on attainment of his majority. However, in exceptional cases the amount may be withdrawn for educational or medical needs of the beneficiary by the competent person as decided by the DLSA or appellate authority.[126]

In the TEVCS, 2015, the power and procedure to recover the compensation amount with interest at 12 per cent per annum are specifically given. The DLSA is empowered to initiate proceedings before the competent court of law for recovery of compensation paid to the victim from the person responsible for obtaining an order based on false, vexatious, fabricated complaint, which is so held by the court. The District Collector is the authority to implement and execute the award as arrears of land revenue. The recovered

[125] Rule 6, TEVCS, 2015
[126] Rule 8, TEVCS, 2015.

amount is to be credited in the victim compensation fund account of the respective DLSA.[127]

Like other VCS, the period to make a claim is 12 months from the date of commission of crime, and the aggrieved victim may prefer an appeal within 90 days for denial of compensation or insufficiency of the award amount. However, both the DLSA and SLSA have the powers to condone the delay, if sufficient cause is shown by the parties.[128]

10.4.27 Tripura Victim Compensation Scheme, 2012

Tripura is the third smallest State in India, situated in the North-East of Indian sub-continent. It has framed the Tripura Victim Compensation Scheme, 2012 (TVCS) that came into effect from 15 August, 2012.[129] The State of Tripura is a pioneer State in providing victim justice and assistance. Even before the insertion of Section 357 A Cr.P.C., financial aid in the form of compensation to the victims of the crime was brought into force and implemented. The Tripura Victim Compensation Fund Rules 2007 (Tripura VCF) was the first legal instrument in India which was introduced for the purpose of providing financial assistance to the person or dependents who have suffered loss or injury as a result of a crime.

Among the five important expressions defined in the new TVCS, 2012 the word ‘victim’ means a person who has suffered any loss or injury caused by

[127] Rule 9, TEVCS, 2015.
[128] Rules 12 and 13, TEVCS, 2015
[129] Notified on 15th August 2012

reason of the act or omission for which the accused person has been charged, and the expression 'victim' includes his or her guardian or legal heir.[130]

Prior to TVCS, 2012 there was a compensation fund in Tripura to provide financial assistance to the victims of heinous crime. The previous Scheme for victims was called the Tripura Victim Compensation Fund Rules, 2007. The present TVCS, 2012 has been framed in compliance of the direction of the Honorable Supreme Court and as per Section 357 A Cr.P.C. The Tripura Victim Compensation Fund Rules, 2007 was repealed. The balance fund that was available in the Victim Compensation Fund, created under Tripura VCR, 2007 was considered as an initial corpus under the present TVCS, 2012.[131] There are six types of loss or injury classified in the TVCS, 2012.

A claimant under TVCS, 2012 shall make an application within a period of six months to the DLSA. If there are valid reasons stated by the claimant for making such claim after the period of six months, the DLSA can condone the delay by an order in writing and then entertain the application for compensation. A victim can maintain a claim for compensation even if the offender is not traced or identified, but the victim should have to be identified. The crime must have sustained mental or bodily injury or death. It should have been reported to the local police station. The victim should cooperate with the police for investigation and prosecution for trial. Refusing to depose or turning hostile is to be considered as non-cooperation on the part of the claimant. Further, the death or permanent incapacitation of the victim should not have

[130] Rule 2(e), TVCS, 2012
[131] Rule 3(iii), TVCS, 2012.

been the 'result of the victim's own wrong doing or own substantial provocation'. The victim should have suffered substantial loss of income as a result of the crime or should be unable to take care of expenses of medical treatment for injury caused on account of crime. If there is death of the victim as a result of the crime, dependents may claim compensation if the family becomes destitute and there is no earning member in the family who will support the dependents. The compensation would be admissible to the victim in the event of loss of property worth Rs.1.0 lakhs or more, and in the event of death or permanent incapacitation of the victim because of the act of crime.[132]

The DLSA, for the purpose of determination of compensation should examine the claim made by the claimant and the contents of the claim application, FIR and other related papers. The process is to be completed within two months by the DLSA, and the award to be forwarded to the Inspector of General, Prison for payment. Any victim aggrieved of the denial of compensation by the DLSA may file an appeal before the SLSA within a period of 90 days. In case of sufficient cause being shown by the appellant, the SLSA can pass an order to condone the delay.[133] The cases covered under the Motor Vehicle Act, 1988 or any other Schemes or facilities *e.g*. Extremist Violence Schemes, Die-in-Harness Scheme *etc*. are excluded from the coverage of the TVCS, 2012.

[132] Rule 4, TVCS, 2012
[133] Rule 9, TVCS, 2012

10.4.28 Uttarkhand Victim from Crime Assistance Scheme, 2013

The Governor of the State of Uttarakhand under, Article 348 (3) of the Constitution of India, and in exercise of the powers conferred by Section 357 A Cr .P .C. framed the Uttarakhand Victim from Crime Assistance Scheme, 2013 (UVCAS) for the purpose of assistance, and to provide funds for the rehabilitation of the victims of crime or their dependents.[134]

In the UVCAS, 2013 the word 'victim' is the only key term defined. It is specific that victim means a person who himself has suffered loss or injury as a result of crime, acid attack, human trafficking, serious accident etc. and requires rehabilitation. As usual, the expression 'victim' includes the dependent family members.[135] This is the only Scheme under 357 A Cr.P.C. in India which includes the victims of "Serious Accident". However, the framers of the Scheme have not defined the term serious accident. The purpose of UVCAS is to provide assistance to the victim from the fund constituted as the victims from the crime assistance fund. The State government has to allocate a separate amount for this scheme which is to be deposited in a corpus fund in a fixed deposit scheme / account of any nationalised bank. Any grant or donation from the government or non-government organisation are the sources for the fund. The Director General of Police (DGP) is empowered to operate the fund.[136]

A victim is eligible for grant of assistance on reporting of the crime without any delay, and any such delay can be excused by the DLSA for the

[134] Notified on 16.07.2013
[135] Rule 2(d), UVCAS, 2013.
[136] Rule 3 UVCAS, 2013.

reasons to be recorded in writing. The victim or claimant should cooperate with the police and prosecution during the investigation and trial of the case. If the offender is not traced or identified, but the victim is identified and where no trial takes place, even then the victim can apply for grant of compensation under 357 A (4) of Cr.P.C.[137]

Under UVCAS, 2013 a claim for compensation can be made on a recommendation from a court or by an application from the victim or dependents. The DLSA has to examine the case and verify the contents of the claim with regard to the loss or injury caused to the victim. In such enquiry, the DLSA is empowered to call for any relevant information to determine the genuineness of the claim. The time limit to decide the amount of assistance is two months. Assistance under this Scheme is to be paid subject to the condition that, if the trial court, while passing judgment at a later date, orders the accused persons to pay any amount by way of assistance under sub-section (3) of Section 357, the victim / claimant shall remit an amount ordered equal to the amount of assistance, or the amount ordered to be paid under the said sub-section (3) of Section 357, whichever is less, an undertaking to this effect is to be given by the victim / claimant before the disbursal of the assistance amount. Assistance received by the victim from the State in relation to the crime in question, namely, insurance, ex-gratia and / or payment received under any other Act or State-run scheme, is to be considered as part of the assistance amount under these rules, and if the eligible assistance amount exceeds or is

[137] Rule 4 UVCAS, 2013.

equivalent to the payments received by the victim from collateral sources mentioned above, then no assistance amount is claimable under this Scheme.[138] The award copy is to be placed before the trial court to enable it to pass an order of assistance under 357 (3) Cr.P.C.

The period of limitation is six months to make a claim before the DLSA. Similarly, to prefer an appeal or for denial of assistance by any aggrieved victim is 90 days. The delay, if any, can be condoned for the reasons to be recorded in writing by the DLSA or SLSA.[139]

10.4.29 Uttar Pradesh Victim Compensation Scheme, 2014

The State of Uttar Pradesh framed the Uttar Pradesh Victim Compensation Scheme, 2014 (UPVCS), in exercise of the powers conferred by Section 357 A Cr.P.C.[140] Like other schemes for victim compensation, it consists of a schedule with six kinds of loss or injury with the maximum limit of compensation to be paid to the victims or dependents. The term 'victim' has been explained as a person who himself suffered loss or injury as a result of the crime and requires rehabilitation. The word victim also includes the dependent family members.[141] The fund known as Victim Compensation Fund from which the amount of compensation under UPVCS is to be paid to the victims or dependents is constituted from the allocation made by a separate budget every

[138] Rules 5 (2) & (5), UVCAS, 2013
[139] Rules 7 & 8 UVCAS, 2013
[140] Notified on 09.04.2014
[141] Rule 2(d), UPVCS, 2014.

year. The Secretary of the SLSA is conferred with the powers to operate the funds.[142]

The identification of the victim is sufficient to provide compensation under UPVCS, 2014. Where the offender is not traced or identified, and where no trial takes place, such victim can apply and avail of compensation under 357 A (4) Cr.P.C. The other conditions are that the crime should have been reported to the officer-in-charge of the police station within 48 hours of the occurrence or any senior police officer or Executive Magistrate or Judicial Magistrate of the area. In a case of delay in reporting the crime, such delay can be condoned by the DLSA for reasons to be recorded in writing. Yet another important condition imposed upon the victim or claimant is the requirement of cooperation for the investigation and trial.[143]

The procedure to be adopted and the principles governing the determination of assistance to the affected person are given in detail in UPVCS. Accordingly, a victim or dependent can avail of the benefits of compensation on a recommendation made by the court or an application to the DLSA. The contents of the claim are to be verified, and after due enquiry, the DLSA shall pass an award of compensation within two months from the date of application or receipt of a recommendation from the court of law. While awarding compensation, any amount of compensation paid under Section 357 (3) Cr.P.C. is to be adjusted and an undertaking to this effect is to be given by the claimant. The DLSA, subject to the maximum limit of compensation

[142] Rule 3, UPVCS, 2014
[143] Rule 4, UPVCS, 2014

prescribed in the Schedule, is to decide the quantum after considering the medical expenses and other charges incurred by the claimants. If the victim is a minor or mentally challenged person requiring specialised treatment and care, the compensation amount may be enhanced with additional assistance of Rs. 25,000/- subject to a maximum of Rs.1,00,000/-. The quantum of compensation to be awarded is not to exceed the maximum limit as per the Schedule. The compensation received by the victim from the State-run schemes or insurance is to be taken into account, and only the balance amount out of the maximum amount as given in the schedule above is to be provided to the victim. It may also include the injuries, non-pecuniary loss and expenses incurred for accommodation, in cases where the affected person resides in a place other than where the offences are committed and FIR has been recorded.

A claim application under UPVCS, 2014 is to be made within six months and the aggrieved victim can file an appeal within a period of 90 days. The DLSA or SLSA, as the case may be, have the powers to condone the delay by an order in writing.

10.4.30 West Bengal Victim Compensation Scheme, 2012

The State of West Bengal has framed a scheme for providing compensation to the victims of crime called the West Bengal Victim Compensation Scheme, 2012 (WBVCS)[144] and it came into force in November 2012. In this Scheme both terms 'dependents' and 'victims' have been defined clearly and any person fully dependent upon the earnings of the victim is the

[144] Notified on 08.11.2012

dependent.[145] Victim is a person who himself has suffered loss or injury as a result of crime and requires rehabilitation. The term 'victim' also includes the dependent.[146] While dealing with the eligibility for compensation, the terms victim of acid attack, sexual offences including rape and human trafficking are included in the wider connotation of victim.[147]

The fund for compensation under this Scheme is to be allocated by the State Government in a separate budget every year and it is to be operated by the Secretary, SLSA or DLSA, as the case may be.[148]

A trial court can make a recommendation for rehabilitation either under Section 357 A (2) or (3) of Cr.P.C. If the offender is not traced or identified, but the victim is identified and where no trial that takes place, such victim or his dependent may apply for award of compensation under sub-section (4) of Section 357 A. They should not have been compensated for the loss or injury under any other scheme of the Central or State Government, Insurance Company or any other institutions. The DLSA is the competent body to receive the applications from the claimants, verify the contents of the claim and consider the nature of the loss or injury and expenses incurred on treatment and rehabilitation *etc*.

However, the DLSA or SLSA can order for immediate first aid facility or medical benefit free of cost on the certificate of the police officer not below the rank of Officer in-charge of the Police Station or Magistrate of the area.

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[145] Rule 2(b), WBVCS, 2012
[146] Rule 2(e), WBVCS, 2012
[147] Rule 4, WBVCS, 2012
[148] Rule 3, WBVCS. 2012

There is no right to prefer an appeal provided to the victims under WBVCS, 2012. Any claim by the victim is to be made within six months of the crime. But, the DLSA, if satisfied, for the reasons to be recorded in writing, may condone the delay in filing the claim.

10.4.31 Union Territory of Chandigarh

The Home Department of Chandigarh Administration has framed a Scheme for the purpose of providing funds to the victims or dependents for the purpose of assistance. Called Union Territory of Chandigarh Victim Assistance Scheme, 2012 (UTCVAS), it is a Scheme applicable to crime victim who requires rehabilitation.[149] In this Scheme the meaning for the word 'victim' has been adopted from Section 2 (wa) Cr.P.C. and 'dependent' means wife or husband, father, mother, unmarried daughter and minor children of the victim who have been determined by the authority empowered to issue the dependency certificate.[150]

The fund for the UTCVAS, 2012 is to be provided from the consolidated fund of India, as per requirements of this Scheme. The amount recovered from the wrong doer or fine imposed under Section 357 A, Cr.P.C. may also be the source for the fund. The Collector/ Deputy Commissioner of UT of Chandigarh is authorised to operate the fund.[151]

The only eligibility to get the assistance under this Scheme is that the victim should not have received any assistance under any Scheme of the

[149] Notified on 03.09.2012
[150] Rule 2, UTCVAS, 2012
[151] Rule 3, UTCVAS, 2012

Central Government for UT administration of similar nature.[152] The DLSA or UTLSA, on receipt of a recommendation by the court for assistance under Section 357 A (2), may verify the contents of the claim and determine the quantum of compensation and pass an award within sixty days from the date of receipt of the recommendation or application from the claimant. The quantum of assistance cannot be less than the minimum or more than the maximum limit of the amount provided in the Schedule. If the compensation awarded by the court, if any, is more than maximum limit, the amount of assistance already paid has to be adjusted.[153]

The amount of assistance so awarded is to be deposited in a nationalised or a scheduled bank, where a nationalised bank is not available, in the single or joint name of the victim or dependent(s). Out of the amount so deposited, 75 per cent is to be in fixed deposit for a minimum period of three years and the remaining 25 per cent is to be available for the utilisation and initial expenses for the victim or the dependent(s) as the case may be. In exceptional circumstances, District or Union Territory Legal Services Authority, on being satisfied, may allow withdrawal of upto 50 per cent for the welfare of the victim or the dependent(s). In the case of a minor, 80 per cent of the amount of assistance so awarded is to be deposited in the fixed deposit account and is withdrawable only on attainment of the age of majority. However, exceptions can be made for educational or medical needs of the beneficiary at the discretion of UTLSA or the DLSA. The interest on the amount of fixed deposit

[152] Rule 4, UTCVAS, 2012
[153] Rule 6, UTCVAS, 2012

is to be credited directly by the bank in the saving account of the victim or the dependent(s) on monthly basis.[154]

The DLSA/UTLSA, in addition to the passing of the award for compensation, can pass an order for immediate first aid medical facility or medical aid. They can also decide who the dependents are, if the authorities fail to issue a dependency certificate. UTCVAS, 2012 has provided the period of limitation for application as three years. The UTLSA can excuse the delay if there is sufficient cause. The victim has been guaranteed a right to prefer an appeal before the UTLSA against the denial of assistance by the DLSA, within 90 days. The UTLSA can condone the delay in filing the appeal, for the reasons to be recorded in writing.[155]

10.4.32 Union Territory Dadra and Nagar Haveli (D&H VSC, 2012)

The Union Territory of Dadra and Nagar Haveli has a Scheme called the Union Territory of Dadra & Nagar Haveli Victim Assistance Scheme, 2012 (UTDNHVAS).[156] In this Scheme, the definition given in Section 2 (wa) of Cr.P.C. for the term 'victim' has been adopted without any modification. For the term 'dependent,' the persons such as wife or husband, father, mother, unmarried daughter, and minor children of the victim are included. The Collector of the Union territory of Dadra and Nagar Haveli is empowered to operate the fund under the Scheme.[157] The Scheme has provided medical aid in addition to the financial aid to the victims and the amount if any, spent for

[154] Rule 7, UTCVAS, 2012
[155] Rule 11, UTCVAS, 2012
[156] Notified on 22.10.2012
[157] Rule 3(4) the Union territory of Dadra & Nagar Haveli .Victim Assistance Scheme, 2012

medical aid by the State cannot be adjusted in the compensation disbursed.[158] The time limit to claim compensation is three years and the Legal Services Authority has the powers to condone the delay.[159]

The amount of Assistance so awarded is to be deposited in a nationalized bank or in the Scheduled bank where the branch of Nationalized bank is not available, in the joint name of the victim or the dependents and out of the amount so deposited, 75% of the, same shall be put in a fixed deposit for a minimum period, of three years and the remaining 25% shall be available for the utilization and initial expenses by the victim or the dependents or petitioners as the case may be and in exceptional circumstances, District or Union Territory Legal Authority after being satisfied may allow withdrawal upto 50 % for welfare of the victim or the dependents or petitioners. In the case of a minor, 80% of the amount of Assistance so awarded shall be deposited in the fixed deposit account and shall be withdrawn only on attainment of the age of majority, however, exception can be made for educational or medical needs of the beneficiary at the discretion of Union Territory Legal Service Authority or District Legal Services Authority. The interest on the amount of fixed deposit shall be credited directly by the bank in the saving account of the victim or the dependents on monthly basis.[160] The mode of disbursement of awarded amount may create difficulties in its immediate use and enjoyment by the victims.

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[158] Rule 8 the Union territory of Dadra & Nagar Haveli. Victim Assistance Scheme, 2012
[159] Rule 10 the Union territory of Dadra & Nagar Haveli .Victim Assistance Scheme, 2012
[160] Rule 7, the Union territory of Dadra & Nagar Haveli .Victim Assistance Scheme, 2012

10.4.33 Union Territory of Daman and Diu (D&DVAS, 2012)

The Union Territory of Daman and Diu Victim Assistance Scheme, 2012 (UTDDVAS) is framed for providing funds for assistance to crime victim or his dependent who have suffered loss or injury or both as a result of a crime.[161] The key expression "victim" is adopted from Section 2 (wa) Cr.P.C. without any change. However, in the term "dependent" the wife or husband, father, mother, unmarried daughter and minor children of the victim, and the deserving relatives, as determined by the DLSA /UTLSA, are included.

The fund for the UTDDVAS is to come from the consolidated funds of India, as the main source, and the fine imposed under Section 357 Cr. P C. by the courts. The cost of assistance recovered from the wrongdoer or accused are the ancillary sources for the fund.[162] The victims who have not received any assistance for the loss or injury under any other scheme of the Central government of the Union Territory are entitled to receive the compensation from this scheme.[163] The court, while deciding the criminal case, can make a recommendation for assistance to the victim under Section 357 A (2) Cr.P.C. or the victim or dependent can make an application under Section 357 A (4) Cr.P.C. The UTLSA/ DLSA are to examine the case and verify the contents of the claim, within a period of 60 days from the date of receipt of recommendation or application, and determine the compensation. The quantum

[161] Notified on 05.10.2012
[162] Rule 3, UTDDVAS, 2012
[163] Rule 4, UTDDVAS, 2012

of award is to be based on the loss or injury, or both, and the amount required for rehabilitation, medical expenses and incidental charges.

The amount of assistance so awarded is to be deposited in a nationalised bank or in the Scheduled commercial bank, nationalised banks is not available, in the joint or single name of the victim or the dependents. Out of the amount so deposited, 75 per cent is to be plced in a fixed deposit for a minimum period of three years and the remaining 25 per cent is to be available for the utilisation and initial expenses by the victim or the dependents. But on exceptional circumstances, District or Union Territory Legal Service Authority, can allow withdrawal up to 50 per cent for welfare of victim or dependents. In the case of a minor, 80 per cent of the amount of assistance so awarded is to be deposited in a fixed deposit account and is withdrawable only on attainment of the age of majority. However, exception can be made for educational or medical needs of the beneficiary at the discretion of UTLSA or DSLSA. The interest on the amount of fixed deposit is to be credited directly by the bank in the saving account of the victim or dependents, on monthly basis.[164]

A period of three years from the date of commission of crime is prescribed to bring a claim for assistance by a victim or dependent. Further, any victim aggrieved of the denial of assistance by DLSA, may file an appeal before the UTLSA within a period of ninety days. In both the cases the DLSA and UTLSA, respectively, have powers to condone the delay by an order, with the reasons recorded in writing.[165]

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[164] Rule 7 UTDDVAS, 2012.
[165] Rules 10 & 11, UTDDVAS, 2012

10.4.34 National Capital Territory of Delhi

The National Capital Territory of Delhi, in coordination with the Central Government, has framed the scheme called the Delhi Victim Compensation Scheme, 2015. The previous Scheme of 2011 was repealed by the new Scheme, 2015.[166] The Delhi State Legal Services Authority has reserved its rights to institute proceedings before the court of law for recovery of compensation granted to the victim from the person responsible for loss or injury, as a result of the crime committed by him.[167] This is the salient feature of the scheme and no other scheme contains such provisions. The Victim Compensation Fund under the Delhi VCS comprises the budgetary allocation and the fine amount imposed under Section 357 Cr.P.C. by the court. A specific clause has been inserted for deposit of fine amount, with or without a specific order for compensation, by the court in the victim compensation fund. It may be considered as a better practice and reduces the financial burden of the State to contribute to the VCS fund.

The dependent is clearly defined and the Delhi State and District Legal Services Authorities is also empowered to determine it on the basis of the materials placed by the dependent.

The claimant under this scheme should not have received any compensation from the Central Government or the Govt. of NCT Delhi. There are as many as 12 factors that are to be taken into consideration relating to the

[166] Rule 17 of the Delhi VCS, 2015
[167] Rule 14 of the Delhi VCS, 2015

loss or injury suffered by the victim, while awarding compensation.[168] They are:

1) gravity of the offence and severity of mental or physical harm or injury suffered by the victim;
2) expenditure incurred or likely to be incurred on the medical treatment for physical and /or mental health of the victim, funeral, travelling during investigation / inquiry / trial;
3) loss of educational opportunity as a consequence of the offence, including absence from school/college due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;
4) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;
5) the relationship of the victim to the offender, if any;
6) whether the abuse was a single, or whether the abuse took place over a period of time;
7) whether victim became pregnant as a result of the offence;
8) whether the victim contracted a sexually transmitted disease (STD) as a result of the offence;
9) whether the victim contracted human immunodeficiency virus (HIV) as a result of the offence;
10) any disability suffered by the victim as a result of the offence;
11) financial condition of the victim against whom the offence has been committed so as to determine his/her need for rehabilitation; and
12) in case of death, the age of the deceased, his monthly income, number of dependents, life expectancy, future promotional / growth prospects etc.

[168] Rule 8 of the Delhi VCS, 2015

In an interesting case, a Writ Petition was filed seeking a writ of mandamus to direct the Delhi State Legal Services Authority to award the maximum suitable compensation with interest under the Delhi Victim Compensation Scheme decided by the Delhi High Court in a hit and run case.[169] A victim, who lost her husband in the incident, was paid a sum of Rs.25,000/- towards compensation by the Special Divisional Magistrate, Delhi. But, she applied for compensation of Rs. 5 lakhs under the Delhi Victim Compensation Scheme, 2011. Her application was originally dismissed, stating that already a sum of Rs.25,000/- was sanctioned to her and hence in terms of Section 4 of the DVCS, 2011, she was ineligible for grant of compensation. Clause 4 of the DVCS, 2011 reads that the victim or his dependent(s) is eligible for the grant of compensation after satisfying the criteria that he/she should not have been compensated for the loss or injury under any other scheme of the Central Government or the Government of National Capital Territory of Delhi.

The DLSA was of the view that the petitioner had already compensated under a government scheme and she is ineligible to claim again and rejected the application.[170] The Delhi High Court held that Clause 4 of the DVCS, 2011

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[169] *Mohini* v. *The State* (Govt. of NCT of Delhi and others W.P.(C) 3754/2015, dated 14 September 2015.

[170] Clause 4. ELIGIBILITY FOR COMPENSATION — The victim or his/her dependent(s), as the case may be, shall be eligible for the grant of compensation after satisfying the criteria that he/she should not have been compensated for the loss or injury under any other scheme of the Central Government or the Government: Provided that an affidavit of victim or his/her dependent(s), as the case may be, shall be sufficient unless the State or District Legal Services Authority, as the case may be, directs otherwise for the reasons to be recorded.

should be interpreted so as not to defeat the object of the Scheme.[171] It observed thus:

> 'Clause 4 has to be read conjointly and would have to take its colour from Section 357 A Cr.P.C. read with Clause 5 and Schedule to the Scheme. Reading Clause 4 of the Scheme in this manner would mean that the victim can be said to 'have been compensated for the loss and injury' from some other scheme when he has received compensation equivalent to or more than what is the minimum stipulated in the Schedule to the Scheme. Such an applicant would not be entitled to receive any compensation under the present Scheme. However, where the amount received is less than the minimum stipulated under the Schedule, it cannot be said that he has been compensated for the loss and injury and the concerned authority shall grant appropriate compensation under the Scheme but taking into account the amount of compensation already received by the victim/dependent.'

Under the Delhi VCS, the DSLSA or DLSA may decline compensation for adequate reasons reduced into writing.[172] But there is no remedy such as to prefer appeal or revision provided in the Scheme. Interim compensation, not more than Rs. 50,000/-, for immediate first aid facilities or medical benefits and other interim reliefs, are the important features of this Scheme.

In a case of sexual assault on an eight-month old female infant, the Supreme Court directed the State to provide all medical care, and after surgery regular aseptic dressings. It ordered that the child be shifted to AIIMS under the care of the Pediatrics Surgery, Pediatrics & Obstetric Department with

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[171] *Mohini* vs *The State of NCT Delhi,* Delhi High Court, dated 14 September 2015
[172] Rule 9 of the Delhi VCS, 2015

support from Psychiatry. The decision in *Alakh Alok Srivastava* v. *Union of India*[173] is a landmark case under the Delhi State Victim Compensation Scheme, 2015 as the interim compensation of Rs. 75,000/- was awarded and directed to be disbursed immediately to the victim's parents to meet the medical and other expenses.

10.4.35 Lakshadweep (Union Territory)

The Lakshadweep Victim Assistance Scheme, 2012 (LVAS) was framed by the Administrator of The Union Territory of Lakshadweep for providing funds for assistance to the victims or his dependents who have suffered loss or injury, or both, as a result of crime, and who require rehabilitation.[174] The definitions provided in this Scheme are similar to that of the UTDDVAS, 2012. The definition given in Section 2 (wa) Cr.P.C. for the term 'victim' has been adopted, and there is no other key expressions except the word 'dependent' that finds a place in this Scheme.[175]

The fund allotted by way of grant under Grant No. 55 from the Consolidated Fund of India is the primary source for the corpus under this Scheme. The fine amount imposed under Section 357 Cr.P.C. by the courts and deposited into the Consolidated Fund of India and the damages recovered from the wrong doer / accused, are secondary sources. The Collector / Deputy Commissioner of UT of Lakshadweep is empowered to operate the fund.[176]

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[173] (2018) 5 SCC 651
[174] Notified on 16.11.2012
[175] Rule 2 LVAS, 2012
[176] Rule 3, LVAS, 2012

The victims, who have not received any assistance for the loss or injury under any other scheme of the Central government of the Union Territory, are entitled to receive the compensation from the scheme.[177] The court, while deciding the criminal case, can make a recommendation for assistance to the victim under Section 357 A (2) Cr.P.C. or the victim or dependent can make an application under Section 357 A (4) Cr.P.C. In such cases, the UTLSA / DLSA are to examine the case, verify the contents of the claim within a period of 60 days from the date of receipt of recommendation or application and determine the compensation. The quantum of award shall be based on the loss or injury, or both, and the amount required for rehabilitation, medical expenses and incidental charges.

The amount of assistance so awarded is to be deposited in a nationalised bank or in a Scheduled bank, where a nationalised bank is not available, in the single or joint name of the victim or the dependents. Out of the amount so deposited, 75 per cent is to be in fixed deposit for a minimum period of three years and the remaining 25 per cent is to be available for utilisation and initial expenses by the victim or dependents, as the case may be. In exceptional circumstances, District or Union Territory Legal Services Authority, on being satisfied, may allow withdrawal up to 50 percent for the welfare of the victim. In the case of a minor, 80 per cent of the amount of assistance so awarded is to be deposited in a fixed deposit account and withdrawable only on attainment of the age of majority. However, exception can be made for educational or

[177] Rule 4, LVAS, 2012

medical needs of the beneficiary at the discretion of UTLSA or DLSA. The interest on the amount of fixed deposit is to be credited directly by the bank in the saving account of the victim or the dependents, on a monthly basis.[178]

The period of limitation to make a claim for assistance under LVAS, 2012 is three years from the date of commission of crime. But, the UTLSA or DLSA may entertain a claim after the said period of three years on reasons to be recorded in writing. The UTLSA is also empowered to entertain an appeal from any victim aggrieved of the denial of assistance by the DLSA, even after 90 days, if satisfied, for the reasons to be recorded in writing.[179]

10.4.36 Union Territory of Puducherry

The Lieutenant-Governor of the Union Territory of Puducherry framed a Scheme in compliance with Section 357 A Cr.P.C., called UT of Puducherry Victim Assistance Scheme, 2012 (UTPVAS).[180] This Scheme has the same characteristics as the Lakshadweep Victim Assistance Scheme, 2012 and the Union Territory of Daman and Diu Victim Assistance Scheme, 2012. Like both the Victim Assistance Schemes, the definition in Section 2 (wa) Cr. P.C. for the term 'victim' has been adopted. The other terms such as 'dependent', 'Collector' etc. are of the same as that of the above two schemes.

The consolidated fund of India, amount of fine recovered under Section 357 Cr.P.C., the cost of assistance recovered from wrongdoers are the three

[178] Rule 7, LVAS, 2012
[179] Rule 10 & 11, LVAS, 2012
[180] Notified on 04.02.2013

sources for victim fund under UTPVAS, 2012.[181] Any victim aggrieved of the denial of Assistance by District Legal Services Authority for Puducheny Region or the Taluk Legal Services Committee, Karaikal / Mahe / Yanam may file an appeal before the Union territory of Puducherry State Legal Services Authority within a period of ninety days.[182] The compensation amount is to be deposited in the bank and the victims are permitted to withdraw the interest.[183]

10.5 Central Victim Compensation Fund (CVCF)

It has been set up to support and supplement the existing Victim Compensation Schemes notified by States / UT Administrations.[184] The other objectives of the CVCF include the need to reduce the disparity in the quantum of compensation amount notified by different States / UTs for victims of similar crimes. The primary aim of CVCF is to encourage States / UTs to effectively implement the Victim Compensation Schemes (VCS) notified by

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[181] Rule 3, UTPVAS, 2012

[182] Rule 11, UTPVAS, 2012

[183] Rule 7: Method of disbursement of Assistance:- (1) The amount of Assistance so awarded shall be deposited in a nationalized bank or in Scheduled bank where the branch of Nationalized bank is not available in the single or joint name of the victim or the dependents and out of the amount so deposited, 75% of the same shall be in fixed deposit for a minimum period of three years and the remaining 25% shall be available for the utilization and irrtial expenses by the victim or the dependents or petitioners, as the case may be, and in exceptional • circumstances, the Union territory of Illuchidienv State Legal Services Authority or District Legal Services Authority for Puducherry Region or the Taluk Legal Services Committees Karaikal/ Mahe/Yanam after being satisfied may allow withdrawal upto 50% for the welfare of the victim or the dependents or petitioners.

(2) In the case of a minor, 80% of the amount of Assistance so awarded shall be deposited in the fixed deposit account and shall be withdrawn only on attainment of the age of majority, however, exception can be made for educational or medical needs of the beneficiary at the discretion of Union territory of Puducheny Legal Services Authority or the District Legal Services Authority for Puducherry Regiob or the Taluk Legal Services Committees Karaikal/Mahe/Yanam. (3) The interest on the amount of fixed deposit shall be credited directly by the bank in the saving account of the victim or the dependents on monthly basis.

[184] Ministry of Home Affairs, Govt. of India revised CVCF guidelines and came into effect from July 6, 2016. Available on the website: www.mha.nic.in.

them under the provisions of Section 357 A of Cr.P.C., and continue financial support to the victims of various crimes, especially sexual offences including rape, acid attacks, crime against children, human trafficking etc. The size of CVCF, as of now is Rs. 200 crores and the source of Corpus Funds for CVCF is the "*Nirbhaya* Fund" which is meant for tackling crime/violence against women.

The CVCF is to be administered by an Empowered Committee chaired by the Additional Secretary (CS), Ministry of Home Affairs and seven members in the cadre of Joint Secretary from the Ministries of Finance, Women and Child Development, Social Justice Empowerment, Chief Controller of Accounts, (Home), from the department of Home Affairs. Under this Central Government Scheme to provide special financial assistance, upto Rs. 5 lakhs can be made available to the victims of Acid attack to meet treatment expenses over and above the compensation paid by the respective States / UT Administrations. Using this provision, a cashless treatment mechanism for victims of Acid Attack are to be formulated by respective States / UTs.

The minimum amount of compensation is to be increased by 50 per cent over the amount specified, if the victim is less than 14 years of age. Therefore, the child victim of crime are given separate recognition in the CVCF.

10.6 *Nirbhaya* Fund and Victim Empowerment

The Ministry of Child Development, Government of India issued guidelines for proposals from the Central Government Ministries and States

and Union Territories regarding the fund and its allocation under the *Nirbhaya* Fund. The central government, in its Budget 2013, announced the allocation of Rs. 3,000 crores. Rs.1,000 crores each was allocated to the fund over a period of three years. The Ministry of Women and Child Development is the nodal ministry to appraise schemes under the *Nirbhaya* fund.[185] The fund has been constituted for the purpose of women's safety and it can be utilised only for the project for women safety and security. The empowered committee is constituted with higher officials' cadre from the Women and Child Development, Home Affairs and other departments.[186] The purpose of the constitution of *Nirbhaya* Fund has been clearly given in the introduction that the women safety issues cut across sectors, and can range from domestic to public sphere as well as the workplace. Violence in public spaces is an everyday occurrence for women and girls around the world, both in urban and rural areas. Women and girls experience various types of violence in public spaces from harassment to assault including stalking, molestation, rape etc. Women face violence on streets, public transport and parks, in and around schools and workplaces, in public sanitation facilities and water and food distribution sites, or in their own neighborhoods. This reality reduces women's and girls' freedom of movement. It reduces their ability to participate in school, work and in public life. It limits their access to essential services, and enjoyment of cultural and recreational opportunities. It also negatively impacts

[185] O.M.No.15(26)/B(D)/2013-DEA, Ministry of Finance dated 6.01.2016
[186] O.M.No.15(26)/B(D)/2013 Part II-DEA, Ministry of Finance dated 26.10.2015

their health and wellbeing. Violence against women and girls in public spaces impedes women's empowerment by restricting their mobility and is therefore recognised as women rights violation.[187]

As per the guidelines issued by the Ministry of Women and Child Development, the State and Union Territories is to formulate proposals factoring in women safety issues in the public sphere, send them to the nodal department for appraisal, and recommend the allocation of funds under *Nirbhaya* Fund.[188]

10.7 Special Legislation for Victims of Naxalite and Other Terrorism Attacks

A Bill to provide for one-time compensation or monthly financial assistance and rehabilitation through employment and other means for the dependents of the victims of Naxalite, Maoist and other form of terrorism, who are killed in various parts of the country, and an act called "the Dependents of Victims of Naxalite and other Terrorism (Compensation, Rehabilitation and Miscellaneous Provisions) Act, 2005, was introduced in the Parliament.[189] The statement of objects and reasons for this Bill is that the State of Jharkhand, Andhra Pradesh, Chhattisgarh, Bihar, Orissa, Maharashtra, Uttar Pradesh, Madhya Pradesh, West Bengal, Karnataka and Tamil Nadu are grappling with Naxalite violence being spearheaded by groups who identify themselves under different nomenclatures such as Naxalites Peoples War Group, Maoists,

[187] Available at : www.wcd.nic.in/acts/nirbhaya-fund-guidelines,visited on 17.12.2018
[188] Available at : https://wcd.nic.in/sites/default/files/nirbhayatoupload_0.pdf
[189] Bill No. LXIII of 2005 introduced in the Rajya Sabha on 29.07.2005

Leninist-Maoist and such other movements. Jammu and Kashmir is affected by cross border terrorism. These terrorists' groups kill thousands of innocent men, women and children every year, houses and shops are torched or blown up and crops are destroyed or damaged. Innocent persons are kidnapped for ransom, girls and women are raped at gun point, and illegal tax is collected from the people. People do not venture out of their houses after evening. In many areas the terrorist outfits virtually run parallel Governments. Though thousands of people are killed in Naxal and other types of violence, the victims are either not compensated at all or, even if they are given compensation, it is too little. There are three kinds of benefits envisaged for the dependents of the persons killed by Naxalites or Terrorists.[190]

(1) An ex-gratia grant in the form of compensation of such amount not less than Rupees three lakhs.
(2) Financial assistance of Rs. 3000/- a month.
(3) Suitable employment to one eligible dependent member of the family, if the deceased was the sole earning member of the family.

Where a person survives the Naxalites, Maoists or any other terrorists attack on him, but is permanently incapacitated, he is to be provided the full cost of medical treatment and ex-gratia grant of compensation not less than Rupees one lakh.[191] The family which loses a dwelling unit due to torching or bombing by the terrorists, a unit for such family is to be provided by the government. If livestock is eliminated or crop or business establishment are

[190] Rule 3 of the Bill, 2005
[191] Rule 5 Bill No LXIII of 2005

destroyed or damaged, compensation to the owner is to be provided. The fund for the compensation under this Bill is to be provided from time to time to the States affected by Naxalites, Maoists and other terrorists.

A careful examination of the Victim Compensation Schemes framed by the States and Union Territories and the special or *ad hoc* Schemes brought into force by the States with a bona fide intention to help the victims of crimes, terrorism, violent attacks consists of benevolent provisions but the procedures and processes are cumbersome. They may be tuned in the line of extending benefits and assistance to the deserving victims.

10.8 Role of National Legal Services Authority (NALSA) in the Victim Assistance

The Legal Services Authorities Act, 1987[192] was enacted to constitute legal services authorities to provide free and competent legal service to the weaker sections of society and ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize *Lok Adalats* to secure that the operation of the legal system promotes justice on a basis of equal opportunity.

In legislations in the Indian legal domain, the term victim was first used in the LSA, 1987. While prescribing the criteria for giving legal services, every person who has to file or defend a case, particularly, a victim of

[192] Act 39 of 1987 notified on 11.10.1987. Except Chapter III, all other provisions came into effect 19.11.1995.

trafficking in human beings, and a person under circumstances of undeserved want, such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster, are made eligible by the Act.[193]

NALSA has framed as many as 11 Schemes for the welfare of victims and people, children, senior citizens, women and other weaker section of society. They are:

1. Scheme for Legal Services to Disaster Victims through Legal Services Authorities.
2. NALSA (Victim of Trafficking and Commercial Sexual Exploitation) Scheme, 2015.
3. NALSA (Legal Services to the Workers in the Unorganised Sector) Scheme, 2015.
4. NALSA (Child-Friendly Legal Services to Children and their Protection) Scheme, 2015.
5. NALSA (Legal Services to the Mentally Ill and Disabled Persons) Scheme, 2015.
6. NALSA (Effective Implementation of Poverty Alleviation Schemes) Scheme, 2015.
7. NALSA (Protection and Enforcement of Tribal Rights) Scheme, 2015.
8. NALSA (Legal Services to the Victims of Drug Abuse and Eradication of Drug Menace) Scheme, 2015.
9. NALSA (Legal Services to Senior Citizens) Scheme, 2016.
10. NALSA (Legal Services to Victims of Acid Attacks) Scheme, 2016.

[193] Section 12 (b) & (e) The Legal Services Authorities Act, 1987.

11. Compensation Scheme for Women Victims / Survivors of Sexual Assault / other Crimes – 2018

The Supreme Court of India in *Nipun Saxena* v. *Union of India*[194] opined that it would be appropriate if NALSA sets up a Committee of about 4 or 5 persons who can prepare Model Rules for Victim Compensation for sexual offences and acid attacks. In view of the direction, NALSA set up a committee consisting of the nine members.

The Committee finalised the Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes and submitted the same before the Supreme Court of India on 24 April, 2018. The Court observed that while nothing should be taken away from this Scheme, it does not preclude the State Government / UT Administrations from adding to the Scheme.

Therefore, as per the direction of the Supreme Court, the compensation Scheme for Women Victims / Survivors of Sexual Assault / other Crimes, 2018 has been framed by the said committee constituted by the NALSA. It is applicable to the victims and their dependent(s) who have suffered loss, injury as the case may be, as a result of the offence committed, and who require rehabilitation.[195] It has suggested a gender friendly compensation scheme for women only, and will be known as the Women Victim Compensation Fund (WVCF). It shall be a fund segregated for disbursement for women victims out of State Victim Compensation Fund and Central Fund. For the purpose of

[194] (2019) 2 SCC 703

[195] Section 3 Compensation Scheme for Women Victims / Survivors of Sexual Assault / other Crimes, 2018.The date of coming into force will be ordered by Supreme Court of India

WVCF, a separate Bank Account shall be maintained as a portion of that larger fund which shall contain the funds contributed under CVCF Scheme by MHA, GOI contributed from *Nirbhaya* Fund apart from funds received from the Station Victim Compensation Fund which shall be utilised only for victims covered under the WVCF.[196] In case the victim is an orphaned minor without any parent or legal guardian, the immediate relief or the interim compensation shall be disbursed to the Bank Account of the child, opened under the guardianship of the Superintendent, Child Care Institutions where the child is lodged or in absence thereof, DDO/SDM, as the case may be.[197]

This Scheme has been specifically created for women victims and the WVCF would comprise the contribution received from CVCF Scheme, 2015, budgetary allocation in the shape of grants-in-aid to State Legal Services Authority, any cost amount ordered by courts or tribunals and to be deposited in this fund, compensation recovered Clause 14 of the Scheme, donations and contributions from individuals and organisations and from the companies under Corporate Social Responsibility (CSR). This fund should be operated by the State Legal Services Authority.

The CSWVSSA, 2018 is a special scheme of victim compensation under which women victims and their dependents only are eligible for grant of compensation. Therefore, it is a women welfare scheme and the State Legal Services Authority or District Legal Services Authority has been empowered to consider the applications from the victims of crime. A woman victim or her

[196] Section 2 (f) Ibid
[197] Section 15 Ibid

dependent can apply for compensation to the DLSA or SLSA. The Station House Officer of the police station / Superintendent of Police / Deputy Commissioner of Police shall immediately after the registration of FIR, on receipt of information, share the soft or hard copy of FIR with the DLSA or SLSA. Under this scheme, the cases registered for the commission of following offences shall be immediately informed to the DLSA or SLSA:[198]

1. Section 326 A (voluntarily causing grievous hurt by use of acid, etc.) In case of acid attack victim the deciding authority shall be the Criminal Injury Compensation Board as directed by Supreme Court in *Laxmi* v. *Union of India* W.P.CRML.129/2006 order dated 10 April, 2015 which includes Ld. District & Sessions Judge, DM, SP, Civil Surgeon / CMO of the district.
2. Sections 354 A to 354 D (Sexual Harassment, use of criminal force to woman with intent to disrobe, Voyeurism, Stalking).
3. Sections 376 A to 376 E (Causing death or resulting in persistent vegetative state of victim, Sexual intercourse by husband upon his wife during separation, Sexual intercourse by a person in authority, Gang rape, repeating such offences).
4. Section 304 B (Dowry death)
5. Section 498 A (subjecting a woman to cruelty by husband or relative of husband).

The application can be filed online on a portal to be created by DLSA or SLSA. While awarding compensation the SLSA or DLSA shall consider the gravity of the offence and severity of mental or physical harm or injury suffered by the victim. Further, the expenditure incurred or likely to be

[198] Rule 5 Ibid

incurred for the medical treatment including counseling of the victim, if the victim was a student, her loss of educational opportunity as a consequence of the offence including absence from the school and loss of employment, are also to be taken into consideration. In case of death, the age of the deceased, her monthly income, number of dependents, life expectancy, future promotional / growth prospects etc., are to be taken into account to determine the quantum of compensation. The SLSA / DLSA are empowered to grant interim relief in all acid attack cases and they may also conduct *suo moto* preliminary verification of fact of the occurrence. A copy of the order of interim or final compensation, is to be placed on record of the trial court, and a copy is to be provided to the investigating officer. If the victim was a minor 80 per cent of the amount of compensation, so awarded shall be deposited in the fixed deposit scheme and the minor after attainment of age of majority can avail of it.

The SLSA has been authorised to institute proceedings before the competent court of law for recovery of the compensation granted to the victim, from the person responsible for causing injury as a result of crime.[199] This benevolent scheme will not preclude a victim or her dependents from claiming or instituting any civil suit or claim against the perpetrator of offence.

There is special provision for minor victims in this scheme. In case of victim being an orphaned minor without any parent or legal guardian, the immediate relief or the interim compensation shall be disbursed to the Bank Account of the child, opened under the guardianship of the Superintendent,

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[199] Rule *13 Ibid*

Child Care Institutions where the child is lodged or in absence thereof, DDO/SDM, as the case may be. Moreover this Chapter does not apply to minor victims under POCSO Act, 2012 in so far as their compensation issues are to be dealt with only by the Special Courts under Section 33(8) of POCSO Act, 2012 and Rules (7) of the POCSO Rules, 2012.[200]

10.9 Many Schemes and Multiple procedures

As per the First Schedule of the Constitution of India, the territory of the India comprises 29 States and seven Union Territories. Among them, the Union Territory of Chandigarh, Dadra and Nagar Haveli, Daman and Diu, Delhi, Lakshadweep and Puducherry have notified their respective Victim Compensation Schemes.[201] There are 36 VCSs of States and UTs are in existence in India. In addition to them, there are Central government schemes and victim assistance projects.

A careful study of the VCSs of the States and Union Territories brings to light the fact that there is no uniformity in the identification victims of crime to extend the financial assistance and medical aid. Many VCSs have adopted its own definition for the term Victim and his/her dependants. Multiple definitions lead to confusion and uncertainty.

There are various conditions and different mode of disbursements and creating fixed deposits in the names of victims in the nationaliased banks are prescribed in the Schemes. Such terms and may cause unnecessary difficulties

[200] Rules 15 & 18 *Ibid*

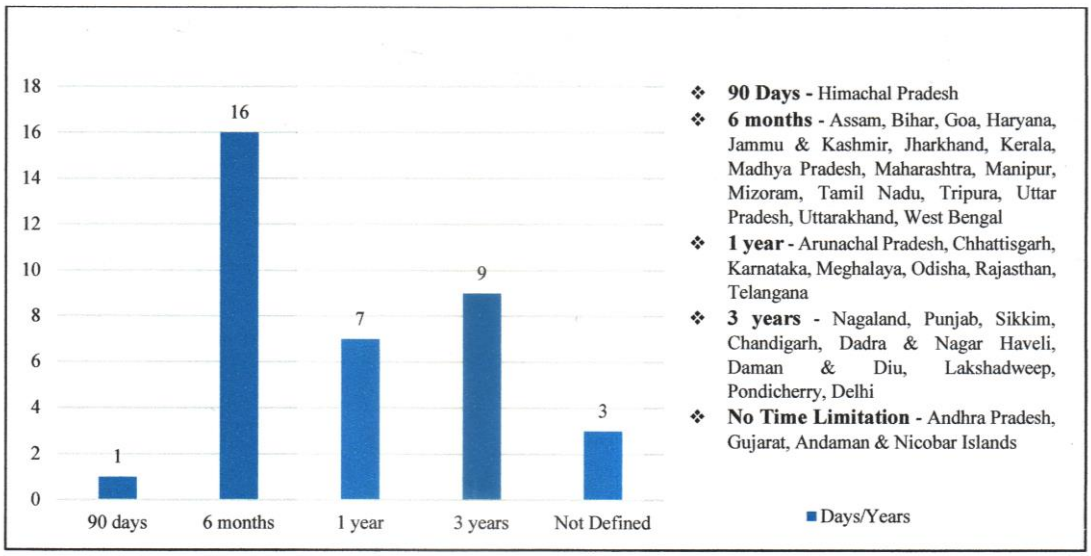
[201] The UT of Andaman and Nicobar Island has not published any Victim Compensation Scheme and researcher could not any other similar legal instrument applicable for it.

to the victims of crime to avail the financial assistance. In some State *Aadhar* card issued by the Unique Identification Authority of India is a statutory authority established under the provisions of *Aadhaar* Act 2016 by the Govt. of India under the Ministry of Electronics & Information Technology, is made as a mandatory document. The poor or illiterate people residing in the inaccessible rustic and desolate places may not produce such documents to claim assistance under the Schemes.

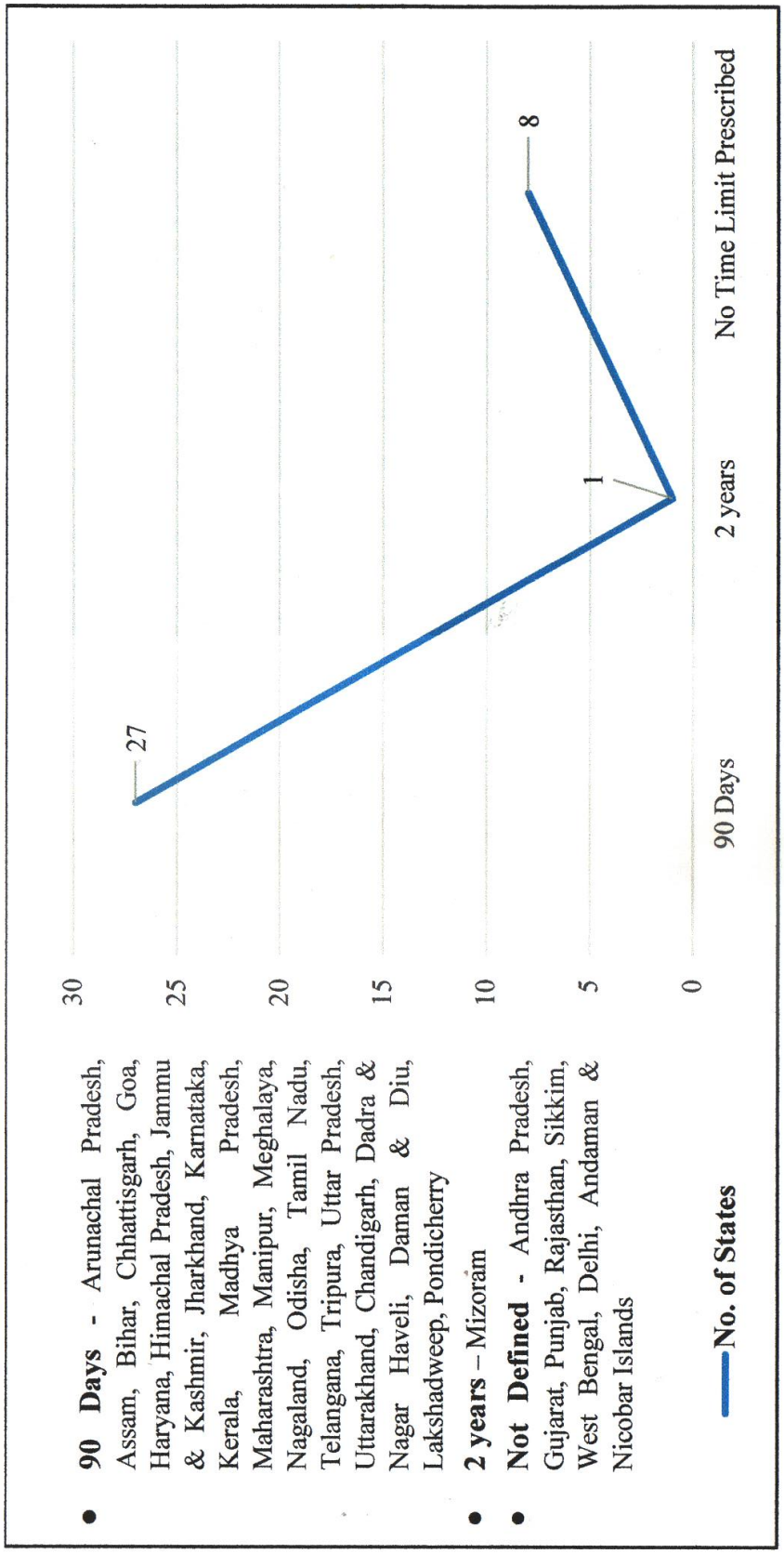
The different time limit to make a claim of compensation by the victims of crime is not uniform. There are huge gaps from ninety days to three years from the date of registration of FIR. Similar is the case with time limit for appeals as evident from the following figures.

The following representation depicts the challenges of having multiple schemes and their inequity:

To Make a Claim for Compensation Before DLSA:



To Prefer Appeal to SLSA Against The Order of DLSA:



- **90 Days** - Arunachal Pradesh, Assam, Bihar, Chhattisgarh, Goa, Haryana, Himachal Pradesh, Jammu & Kashmir, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Manipur, Meghalaya, Nagaland, Odisha, Tamil Nadu, Telangana, Tripura, Uttar Pradesh, Uttarakhand, Chandigarh, Dadra & Nagar Haveli, Daman & Diu, Lakshadweep, Pondicherry
- **2 years** – Mizoram
- **Not Defined** - Andhra Pradesh, Gujarat, Punjab, Rajasthan, Sikkim, West Bengal, Delhi, Andaman & Nicobar Islands

The Supreme Court in a landmark decision in *Tekan alias Tekran* v. *State of Madhya Pradesh*[202] has observed that all the States and Union Territories shall make all efforts to formulate a uniform scheme for providing the victim compensation in respect of rape or sexual exploitation of physically handicapped women as required under the law, taking into consideration the scheme framed by the State of Goa for compensation to the rape victim, and the state was directed to pay a sum of Rs. 8,000/- per month as victim compensation to the victim, who was visually challenged for life .

10.10 Conclusion

In India, barring the Union Territory of Andaman and Nicobar Islands, all the States and erstwhile State of Jammu and Kashmir have framed separate Schemes of their own for providing compensation to the victims. As of now 34 Victim Compensation Schemes are in force to serve as a victim- rebuilding and rehabilitative measure. The allocation of funds periodically to the States and Union Territories and augmenting the corpus of the fund to financially assist the deserving victim, would make them taste the fruits of criminal justice.

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[202] (2016) 4 SCC 461

CHAPTER XI
COMPENSATORY JURISPRUDENCE AND TRENDS IN COURTS

11.1 Introduction

The basic foundation for compensation to the victims of crime are laid on two important principles - that the offender is responsible for having caused injury or loss of property to the victims and a welfare State has a greater responsibility to address the consequences of its failure to protect the life and liberty of the citizen. It is viewed that the science of compensation law known as compensatory jurisprudence, has emerged for the welfare of the victims of crime. Compensatory jurisprudence, as a comparatively new part of modern criminal law, is fast developing as it serves two purposes - first, a victim is not lost sight of in the criminal justice system and second, an accused convicted is made to realize that he has a duty towards those injured by his actions.[1]

The general principles of compensation, the origin and development of compensatory jurisprudence, its Indian perspective and how the compensatory mechanism had worked prior to and after the introduction of Victim Compensation Schemes under Section 357 A, is being examined. The founding laws on compensation in India, their application and interpretation by the Courts for the benefit of crime victims, cases of refusal to receive compensation by any person or victim and their consequences are incidental

[1] Dr. Preeti Misra, *Compensatory Justice Jurisprudence in India With Reference To Criminal Law: An Evaluation*, Available at https://www.bbau.ac.in/ dept/HR/TM/LL.M. 203% 20Unit%204.Compensatory%20Justice%20Juris.Preeti%20Misra.pdf

aspects for analysis in this study on victim assistance and compensation in India.

11.2 Courts on Compensation in Criminal Cases

In the absence specific laws for grant of compensation to the victims affected by the crimes and State's failure to protect right of the people, the Supreme Court, in *Rudul Shah* v. *State of Bihar,*[2] introduced the compensatory jurisprudence by its pronouncement. While awarding compensation in a case of infringement of fundamental rights due to illegal detention, a failure of State machineries, the Supreme Court observed that the petitioner may have to be relegated to the ordinary remedy of suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. As the court had already found in the case that petitioner's prolonged detention, after his acquittal, in prison was wholly unjustified and illegal, it laboured no doubt that if the petitioner files a suit in a civil court to recover damages for his illegal detention, a decree for damages would have to be passed in that suit.[3]

The trial courts were sensitized by the higher judiciary for award of compensation to the persons who suffered by the act of crime and the Supreme Court noted with despair that Section 357 Cr.P.C. had been consistently ignored by courts despite series of pronouncements.[4] The Courts have emphasised on award of compensation to the victims of crime and victims of State excesses. In many cases, the apex court, while exercising its powers

[2] AIR 1983 SC 1086
[3] *Rudul Shah* v. *State of Bihar*, AIR 1983 SC 1086
[4] *Ankush Shivaji Gaikwad* v. *State of Maharashtra* (2013) 6 SCC 770

under Article 32 of the Constitution of India, awarded compensation to the victims of crime, thereby paving a way for strengthening the compensatory jurisprudence in India.[5]

The Supreme Court, while dealing with the aspect of social justice, has viewed reservation as a compensatory measure to introduce the term 'Compensatory Discrimination' into the legal discourse in *Indra Sawhney* v. *Union of India.*[6] Though it was used in terms of upliftment of socially and economically backwards class of people, it has been observed that 'one of the aims of preferential treatment might be compensatory justice.' The aim of compensatory justice is to provide counterbalancing benefits to those individuals who have been wrongfully injured in the past so that they could be brought up to the level of wealth and welfare that they would now have had if they had not been disadvantaged.[7]

Apart from the specific provisions of the statutes, through the interpretation of which compensation may be ordered by civil and criminal courts, the Public Law Courts in India have developed a new compensatory jurisprudence under which compensation is many times even though there is no specific provision contained in the Constitution enabling the same. The policy thus evolved by the courts, however, is a significant development in the field of compensatory jurisprudence.

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[5] *Sebastian M. Hongray* v. *Union of India,* (1984)3 SCR 544 and *Nilabati Behera* v. *State of Orissa,* AIR 1993 SC 1960

[6] AIR 1993 SC 477

[7] Rai, Sheela, *Reservation / Set-Asides in Services in India and USA*, (2004) PL WebJour 19 available at https://www.ebc-india.com/lawyer/articles/832.htm

It is considered that the compensatory jurisprudence took birth in *Rudul Shah* case when the Supreme Court of India broke one more link in the shackles of restrictive interpretation and added another feather in the cap of Article 21 Constitution of India to crown the personal life and liberty of people.[8] But there are many changes that occurred post *Rudul Shah.* Laws have been incorporated to address the needs of victims of crime and schemes have been framed by the Union and States to provide compensatory reliefs to them. In such circumstances, how the present march of law on compensation to victims of crime is moving and in which direction, is an important arena for research. This chapter analyses how the Courts in India have laid the foundation for compensatory jurisprudence, its development, and the present trends in determination, disbursement and other incidental matters.

11.3 Compensation: Defined and Explained by the Courts

The word 'compensation' is a wide and varied expression used in many contexts to convey a meaning according to the subject under consideration and the perspectives of the interpreter. In general legal parlance, compensation means payment made for benefit received. The term compensation is also used to refer to any amount granted as a just value for the property acquired by the State for the public purpose.

Compensation has been understood as a pecuniary relief to a person who may have lost his movable or immovable properties, assets *etc*. or has suffered

[8] Singh, Vijay Kumar, *Compensatory Justice Jurisprudence in Indian Public Law – An Analysis*, NLUA Law and Policy Review, Vol 3 No. II (2018)
Available at SSRN: https://ssrn.com/abstract=3507604

by a civil wrong or crime. It is sometimes considered as a symbolic social response to the person who suffers the loss or injuries. As it is in the form of financial aid, it provides a sigh of relief to the sufferer and helps the persons to reconstruct their lives or reimburses them for the loss caused to them, to a reasonable extent.

In Black's Law Dictionary, 'compensation' is defined as an indemnification; payment of damages; making amends; that which is necessary to restore an injured party to his former position; an act which a court orders to be done, or money which a court orders to be paid, by a person whose acts or omissions have caused loss or injury to another, in order that thereby the person damnified may receive equal value for his loss or be made whole in respect of his injury.[9]

The apex court, in *Rustom Cavasjee Cooper* v. *Union of India*,[10] has referred to the dictionary meaning and defined that compensation means anything given to make things equal in value or anything given as an equivalent, to make amends for loss or damage. Further, it was observed that in all States where the rule of law prevails, the right to compensation is guaranteed by the Constitution or regarded as inexplicably involved in the right to property.

The Supreme Court, in *Ghaziabad Development Authority* v. *Balbir Singh*,[11] has referred to the dictionary meaning for the word compensation, and explained it in the legal context such that the word compensation may

[9] Black's Law Dictionary, Second Edition, (1968) St. Paul, Minn. West Publishing Co, (1968)
[10] AIR1970 SC 564
[11] (2004) 5 SCC 65 at 75

constitute actual loss or expected loss and may extend to physical, mental or even emotional suffering, insult or injury or loss.

Though there are multiple definitions and explanations provided by the courts, a careful and conjoint reading of all of them would make it clear that it is a pecuniary substitute for the damage or sufferings caused by an act. In *K.S.R.T.C.* v. *Mahadeva Shetty*[12] the Supreme Court explained the determination of compensation for loss of limb or life as follows:

> 'The damages for vehicular accidents are in the nature of compensation in money for loss of any kind caused to any person. The main principles of law on compensation for injuries were worked out in the 19th century, where railway accidents were becoming common and all actions were tried by the jury. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. Bodily injury is nothing but a deprivation which entitles the claimant to damages. The quantum of damages fixed should be in accordance with the injury. An injury may bring about many consequences like loss of earning capacity, loss of mental pleasure and many such consequential losses. A person becomes entitled to damages for mental and physical loss, his or her life may have been shortened or that he or she cannot enjoy life, which has been curtailed because of physical handicap. The normal expectation of life is impaired. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be 'just' and it cannot be a bonanza; not a source of profit but the same should not be a pittance. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be 'just' compensation is a vexed question. There can be no

[12] (2003) 7 SCC 197

> golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of 'just' compensation which is the pivotal consideration. Though by use of the expression 'which appears to it to be just', a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness.'

In the context of criminal law, compensation has been viewed under various dimensions. According to Packer, compensation is a sanction that involves the exaction of money or performance to re-compensate an identifiable beneficiary or class of beneficiaries for 'damage done or threatened' by the action of another.[13] The compensation ordered in some jurisdictions at times blurs the line between civil and criminal liability. In United Kingdom, criminal courts can make a 'compensation order,' which is essentially civil in nature and civil courts can order 'punitive damages', which are intended to punish the defendant. Traditionally, the focus of criminal law has been on avoiding risk creation than on healing actual harm. But, recognition of victim's rights has realigned the focus on the harm caused, thereby raising questions on the actual domain of criminal law.[14]

[13] Emphasis supplied Herbert L Packer, *The Limit of the Criminal Sanction*, (1968), p.251. (He further states that the purest form of compensation is seen when a money judgment is passed in a civil court).

[14] Sridip S. Nambiar, *Some Insights on Formulation of a Victim Compensation Scheme in India*, 2011 NUALS.L.J. Vol. 5, P 128

11.4 Compensation and Punishment: Distinction

Compensation can be distinguished from the other sanction called punishment, which has prevention of undesired conduct and retribution for perceived wrongdoing as its justificatory aims – the focus is on the offending conduct.[15] The Supreme Court took a serious note of various instances where there was large scale destruction of public and private properties in the name of agitations, bandhs, hartals *etc*., in a *suo motu* proceedings in *In Re*: *Destruction of Public & Private Properties* v. *State of Andhra Pradesh*,[16] two Committees were constituted to suggest amendments to the Prevention of Damage to Public Property Act, 1984. One of the Committee opined thus:

> '…the purpose of the criminal law is to protect the public interest and punish wrongdoers, the purpose of tort law is to vindicate the rights of the individual and compensate the victim for loss, injury or damage suffered by him: however the distinction in purpose between criminal law and the law of tort is not entirely crystal clear, and it has been developed from case-to-case. The availability of exemplary damages in certain torts (for instance) suggests an overtly punitive function - but one thing is clear: tort and criminal law have always shared a deterrent function in relation to wrongdoing.'

The Supreme Court, in *Suresh* v. *State of Haryana*,[17] has described compensation as a right of the victims of crime. It observed that the victims have right to get justice, to remedy the harm suffered as a result of crime. This right is different from and independent of the right to retribution, responsibility

[15] *Ibid*
[16] (2009) 5 SCC 512
[17] (2015) 2 SCC 227

of which has been assumed by the State in a society governed by Rule of Law. But, if the State fails in discharging this responsibility, the State must still provide a mechanism to ensure that the victim's right to be compensated for his injury is not ignored or defeated.

11.5 Compensation and Damages as distinguished by the Courts

Compensation can also be distinguished from 'damages', which is a pecuniary recompense awarded by a process of law to a person for the actionable wrong that has been done to him. In common parlance 'damage' and 'damages' are used without drawing the thin distinction. However, these two terms are significantly distinct. While 'damages' refer to the compensation awarded or sought for, 'damage' refers to the injury or loss which such compensation is claimed for or being awarded. 'Damage' could be monetary or non-monetary (loss of reputation, physical or mental pain or suffering) while 'damages' refer to pecuniary compensation.[18]

Similarly, 'compensation' and 'damages' are frequently used interchangeably by the legal fraternity. Both the words convey and connote different meanings. In the Fatal Accidents Act, 1855 the word 'damages' is used in Section 1 A. But, the Motor Vehicles Act, 1988 preferred the term compensation. The distinction between the terms was drawn in the decision in *M. Ayappan* v. *Moktar Singh*.[19] By the legal connotation, the term 'compensation' as stated in the Oxford Dictionary, signifies, that which is

[18] Law of Damages in India, Nishith Desai Associates, (2002) available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Law_of_Damages_in_India.pdf

[19] 1969 ACJ 439

given in recompense, an equivalent rendered, and that 'damages, on the other hand, constitute the sum of money claimed or adjudged to be paid in compensation for loss or injury sustained, the value estimated in money, or something lost or withheld. The term 'compensation' etymologically suggests the image of balancing one thing against another; its primary significance is equivalence, and the secondary and more common meaning is something given or obtained as an equivalent. Thus, it is clear that the word 'compensation' is a more comprehensive term and the claim for compensation includes a claim for damages also. The difference between the expression 'damages and compensation' was also explained by the Delhi High Court in *Amarjit Kaur* v. *Vanguard Insurance Co. Ltd*,[20] as follows:

> 'The Motor Vehicles Act does not use the expression 'damages' but 'compensation'. This is because there is a difference in connotation of these two terms, though it is not commonly understood and may be called somewhat subtle difference. Nevertheless there is a distinction between compensation to be awarded and a claim for damages being granted. Damages are given for an injury suffered. Compensation is by way of atonement for the injury caused with intent to put either the injured party or those who may suffer on account of injury in a position as if injury was not caused by making pecuniary atonement.'

The Supreme Court, in *Common Cause* v. *Union of India*,[21] has described damages as referring to a form of compensation due to a breach, loss or injury. Damages can also be distinguished from compensation, in general. Compensation is a broader concept which encompasses payments made to a

[20] AIR 1982 Delhi, P 1
[21] (1999) 6 SCC 667

person in respect of some kind of loss or damage suffered due to reasons like acquisition of property by another party, statutory violations, termination of employments, requiring the aggrieved party to be compensated; however, damages emanate from actionable wrongs. In common parlance, compensation is often used to refer to damages as well. The Indian Contact Act 1872 refers to the term 'compensation' in the context of liquidated and unliquidated damages.

11.6 Compensatory Damages

Compensatory damages are the sum of money awarded by a civil court to a plaintiff-victim to remedy or 'compensate' for actual losses, or damages, suffered. Claimants must provide evidence that they experienced an identifiable harm that can be recompensed by a specific sum of money, which can be objectively determined by a judge or jury. Though similar to judge-ordered 'restitution' stemming from criminal conduct, compensatory damages are the result of a civil action for a tort, often overlapping a crime. Unlike punitive damages that seek to punish the defendant for illegal conduct as a future deterrent, compensatory damages are designed specifically to provide the claimant in a civil action with the money to replace what he has lost, but nothing more. Compensatory damages seek to make the claimant 'whole' again, restoring the economic standing that existed before the illegal act.

Compensatory damages become complicated when the identifiable harm of the victim is not easily quantifiable, such as determining the value of threat to life; emotional distress; pain and suffering; and loss of consortium, reputation, mental capacity, enjoyment of life, etc. Calculations can be very

subjective and often vary tremendously based on judge and jury perceptions and conflicting testimony by both claimants and experts. More easily quantifiable harms include economic losses resulting from medical expenses, lost profits in a business, lost income and potential earning, repair or replacement of damaged or destroyed property, and legal costs. Perhaps most difficult to calculate are those losses that appear quantifiable, but also involve a claimant's emotional loss of something physical or psychological; the death of a loved one; lost limbs, eyesight, or fertility; physical scarring or crippling; or post-traumatic stress disorder. Compensatory damages are most challenging when long-term impact on the claimant is considered. Judgments about whether the life of a healthy child is more valuable than an octogenarian's, whether a supermodel's scar deserves more compensation than a roughneck's, or whether a runner's leg is more valuable than a typist's – all raise complex issues in assigning compensatory damages to victims.[22]

11.7 Compensation: Pre – Constitutional Position

In India, prior to 1885, there was no provision for claiming compensation from the wrongdoer for the injuries or death caused by a wrongful act. The Fatal Accidents Act, 1855 is the first codified law on compensation. It was enacted by U.K. Parliament for the whole of British India.[23] This small Act consists of only four sections and has been in force for more than 165 years without any amendment. As stated in its preamble, it is an Act to provide compensation to families for loss occasioned by the death of a

[22] Janet K. Wilson (ed), '*The Praeger Handbook of Victimology*' Oxford, England 2009, pp 49-50.

[23] Act 13 of 1855 published in the official gazette on 27th March 1855.

person, caused by actionable wrong. There were no action or suit maintainable in any court against a person who, by his wrongful act, neglect or default, may have caused the death of another person. The framers thought that it is often times right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him.[24] Under the Act, every suit is to be for the benefit of the wife, husband, parent and child, if any, of the person whose death has been caused, and is to be brought by and in the name of the executor, administrator, or representative of the person deceased. In every such action, the Court may give such damages as it may think proportional to the loss resulting from such death to the parties, for whom and for whose benefit such action is brought. The amount so recovered, after deducting all costs and expenses, including the costs not recovered from the defendant, is to be divided amongst the parties, or any of them, in such shares as the Court, by its judgment or decree, shall direct.[25]

In a claim under the Fatal Accidents Act, 1855 one can recover any pecuniary loss to the estate of the deceased occasioned by wrongful act, neglect or default. The sum so recovered is to be deemed as the part of the assets of the estate of the deceased.[26]

The general criticism against the Fatal Accidents Act, 185 is that a separate civil suit has to be filed to claim damages for the loss that has occurred, paying court fee in a civil court. Further, the burden is heavy upon the claimants as the full particulars of the nature of the claim and the details of

[24] Preamble, The Fatal Accidents Act, 1855.
[25] Section 1, The Fatal Accidents Act, 1855.
[26] Section 3 The Fatal Accidents Act, 1855.

the defendants are to be delivered by them.[27] There is no provision in this Act enabling a Magistrate or Sessions Court to decide the claim of compensation by the parties, if any, while determining the guilt in a criminal proceedings. It has been held that the State Governments cannot constitute alternative forum, like a Tribunal, for adjudicating any suit under the Fatal Accidents Act, 1855 and the civil court is the only competent forum of law.[28] An ordinary civil suit, which involves cumbersome procedures, consume enormous time and cause delay may often dissuade the claimants.

The Fatal Accidents Act, 1855 is an old law with restricted application and is not suited to meet the present need for compensation in such cases. Thus was the observation of the Supreme Court in the *Bhopal Gas Tragedy* case.[29] On the intervening night of December 2–3, 1984, as a result of a leak at the pesticide plant in Bhopal, Madhya Pradesh, over 5 lakhs people were exposed to Methyl Isocyanate (MIC) gas.

A government affidavit before the Supreme Court stated that the leak caused 5,58,125 injuries, including temporary, partial injuries and severely and permanently disabling injuries. Other estimate is that 8,000 people died within two weeks, and another 8,000 people or more have died later from gas related diseases. It was considered as one of the world's worst industrial disasters. The victims filed a writ petition, in which the Apex Court has stated that the Fatal Accidents Act, 1855 was inadequate and is to be amended drastically. It is observed as follows:

[27] Section 3 The Fatal Accidents Act, 1855.
[28] *State of Tripura* v. *Sridhan Choudhary* A.I.R. 2003 Gau. 66
[29] *Charan Lal Sahu* v. *Union of India* (1990) 1 SCC 613

> 'While it may be a matter for scientists and technicians to find solutions to avoid such large-scale disasters, the law must provide an effective and speedy remedy to the victims of such torts. The Fatal Accidents Act, on account of its limited and restrictive application, is hardly suited to meet such a challenge. We are, therefore, of the opinion that the old antiquated Act should be drastically amended, or fresh legislation should be enacted which should, inter alia, contain appropriate provisions in regard to the following matters:
>
> (i) The payment of a fixed minimum compensation on a 'no-fault liability' basis (as under the Motor Vehicles Act), pending final adjudication of the claims by a prescribed forum;
>
> (ii) The creation of a special forum with specific power to grant interim relief in appropriate cases;
>
> (iii) The evolution of a procedure to be followed by such forum which will be conducive to the expeditious determination of claims and avoid the high degree of formalism that attaches to proceedings in regular courts; and
>
> (iv) A provision requiring industries and concerns engaged in hazardous activities to take out compulsory insurance against third party risks.'[30]

The above observation of the Supreme Court has reflected the necessity of the enactment of a new law on compensation with specific provision to cater to the needs of the victims even in the tort jurisprudence in India. Subsequently, in 2011, the Supreme Court in *Suba Singh & Another* v. *Davinder Kaur & Another*,[31] while deciding a case under the Fatal Accidents Act, 1855, has observed as follows:

[30] *Charan Lal Sahu* v. *Union of India* (1990) 1 SCC 613
[31] (2012) 1 MLJ 824 (SC)

> 'It is a matter of grave concern that such sensitive matters like payment of compensation and damages for death resulting from a wrongful or negligent act are governed by a law which is more than one and a half centuries old.'

Further, the court directed that a copy of the judgment be brought to the notice of the Attorney General for India and to the Law Commission of India to bring a contemporaneous and comprehensive legislation on compensation.

In *Kamala Devi* v. *Government of NCT Delhi*,[32] a division bench of Delhi High Court reiterated the views of the Supreme Court in *Charan Lal Sahu* case on the necessity to compensate the victims. Their observation runs as follows:

> "In our efforts to look after and protect the human rights of the convict, we cannot forget the victim or his family in case of his death or who is otherwise incapacitated to earn his livelihood because of the criminal act of the convict. The victims certainly entitled to reparation, restitution and safeguard of his rights (*sic*). Criminal justice would look hollow if justice is not done to the victim of the crime. The subject of victimology is gaining ground while we are also concerned with the rights of the prisoners and prison reforms. A victim of crime cannot be a ''forgotten man'' in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injury. This is apart from the factors like loss of reputation, humiliation, etc. An honour which is lost or life which is snuffed out cannot be recompensed but then monetary compensation will at least provide some solace. Keeping this in mind, it needs to be examined as to what are the avenues available to the crime victims and their families for seeking compensation. The tort law remedy made possible under the Fatal

[32] (2005) ACJ 216

> Accidents Act, 1855 is one such avenue. But that is a civil law remedy where the victim is relegated to the rigours of a full-blown civil action against identified defendants (wrong-doers). In the context of the Bhopal gas tragedy, the Supreme Court found the 1855 Act grossly inadequate.'

The above observation would suffice to understand the outdated and obsolete status of the Fatal Accidents Act, 1885.

11.8 Attempt to introduce compensation in Indian Penal Code, 1860

The Indian Penal Code, 1860 was drafted by the First Law Commission constituted in the British India.[33] Lord T.B. Macaulay, in his report, had expressed the opinion of the framers of the first substantial penal law, which stated thus:

> 'We are decidedly of opinion that every person who is injured by an offence ought to be legally entitled to a compensation for the injury. That the offence is a very serious one, far from being a reason for thinking that he ought to have no compensation, is *prima facie* a reason for thinking that the compensation ought to be very large. Entertaining this opinion, we are desirous that the law of criminal procedure should be framed in such a manner as to facilitate the obtaining of reparation by the sufferer. We are inclined to think that an arrangement might be adopted under which one trial would do the work of two.'[34]

It was the original idea of the framers of the Indian Penal Code even during the colonial regime that a criminal trial for the offences under the Indian Penal Code may be a comprehensive one and it may provide compensatory

[33] Act 45 of 1860 was drafted by the first Indian Law Commission consist of T.B. Macaulay,(President) J.M. Macleod, G.W. Anderson and F. Millett.

[34] Introductory Report upon the Indian Penal Code, (Notes on the Chapter of Punishments) by Indian Law Commission, October 14, 1837, pp.p237 – 238.

relief to the victim along with sanctioning of penal measures upon the perpetrator.

The First Law Commission was also of the view that, when a breach of promise can be compensated under common law, how suffering of the heinous offence could be left without compensation. The notes on the chapter of punishment regarding compensation runs as follows:

> 'A woman is entitled to reparation for the breach of promise of marriage, but to none for a rape. To us it appears that of two sufferers he who has suffered the greater harm has, *ceteris paribus*, the stronger claim to compensation; and that of two offences that which produces the greater harm ought, *ceteris paribus*, to be visited with the heavier punishment. Hence it follows that in general the strongest claims to compensations will be the claims of persons who have been injured by highly penal acts; and that to refuse reparation to all sufferers who have been injured by highly penal acts is to refuse reparation to that very class of sufferers who have the strongest claim to it.'[35]

There was also a proposal to make the States liable for compensation in cases where the offender could not pay compensation for reparation, due to impecunious conditions or poverty. The logic was that, the State, being the sole and absolute recipient of fine amount from the offender, is liable to indemnify the injured and the one who suffered by an act of crime. The Report went further thus:

> 'It is most unjust to the man who has been disabled by a wound, or ruined by a forgery, that the government should stake, under the name of fine, so large a portion of the offender's property as to leave nothing to

[35] *Ibid.*

> the sufferer. In general, the greater the injury the greater ought to be the fine. On the other hand, the greater the injury the greater ought to be the compensation. If, therefore, the government keeps whatever it can raise in the way of fine, it follows that the sufferer who has the greatest claim to compensation will be least likely to obtain it. By empowering the courts to grant damages out of the fine and by making the fine after it has reached the treasury of the government answerable for the damages which the sufferer may recover in a civil court, we avoid this injustice.'[36]

The old Code of Criminal Procedure, 1898 provided for compensation to the victims of crime. But, the provision, contained in section 545 of the Code, was narrow in approach and could not be applied well by the courts. It was realised that there should be a substantive provision for payment of compensation to the victim of crime. The Law Commission of India, in its 42nd Report, recommended an amendment to the Indian Penal Code itself to incorporate compensation as a kind of punishment. Chapter III, Para 19 of the Report read as follows:

> 'We think, however, that the Penal Code should give prominence to this aspect of compensating the victims of the offence out of the fine imposed on the offender. At present the legal provision in this regard is tucked away in the last miscellaneous chapter of the Code of Criminal Procedure. It seems to us that, as substantive power of the trial court, it deserves to be mentioned specifically in the Penal Code chapter on punishments along with the provisions relating to fine.'[37]

[36] *Id*, p. 238 – 239
[37] 42nd Report, Law Commission of India.

Accepting the Report of the Law Commission of India, the Indian Penal Code Amendment Bill, 1972 was introduced in Rajya Sabha suggesting an amendment to Section 53 of the Indian Penal Code so as to include '*order for payment of compensation'* as one of the kinds of punishment. The Amendment Bill, 1972 stated, in notes on clauses, thus:

> 'The new provision is intended to provide for some kind of reparation of compensation to victims of crimes the need for which has been receiving attention in recent times. The existing provisions in section 545 of the Code of Criminal Procedure, 1898 are limited in scope and so a general power is being conferred on the convicting court to pass an order directing that the accused shall make compensation, restitution to any person aggrieved or injured or for the actual loss or damage arising from the commission of the offence, in such manner and to such extent as may be appropriate to the cases. The actual relief may take any form depending on the facts of the particular case and the court is expected to determine this question in a summary way without any elaborate inquiry. The direction for the compensation, restitution or reparation may be in addition to or in lieu of any other sentence, which the court may pass for the offence. It is considered that a provision of this bill be particularly beneficial to the poor section of the people where the accused is in a position to make amends.'

The Law Commission of India, in its 42nd Report, had also suggested payment of compensation to the victim of an offence out of fine imposed on the offender. It suggested insertion of Section 62 in the Indian Penal Code, 1860. The proposed section reads thus:[38]

[38] Law Commission Report No: 42, Chapter III, June, 1971

> *"Section 62: Order to pay compensation out of fine to victim of offence*: Whenever a person is convicted of an offence punishable under chapter 16 (which deals with offences affecting the human body) or chapter 17 (offences against property) or chapter 21 (dealing with offence of defamation) of this Code or an abetment of such offence or a criminal conspiracy to commit such offence and is sentenced to a fine, whether with or without imprisonment and the court is of the opinion that compensation is recoverable by civil suit by any person for loss or injury caused to him by that offence, it shall be competent to the court to direct by the sentence that the whole or any part of the fine realized from the offender shall be paid by way of compensation to such person for the said loss or injury.
>
> *Explanation:* Expenses properly incurred by such person in the prosecution of the case shall be deemed part of the loss caused to him by the offence.'

The recommendation of the Law Commission to allow restitution / compensation while sentencing the offender has not yet materialized.

11.9 Compensatory Reliefs under the Code of Criminal Procedure, 1973 Guidelines set by the Judiciary

Prior to the Code of Criminal Procedure, 1973, which came into effect on 1 April, 1974, the Code of 1898 was in force for a long period and served as a guide to the legal profession and the criminal justice institutions. Section 545 of the Cr.P.C, 1898 provided for compensation to the victims of crime.[39] While

[39] Section.545. Power of Court to pay expenses or compensation out of fine – (1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied –
(a) in defraying expenses properly incurred in the prosecution;

compensation is incorporated in the present Code, 1973 the word 'substantial' was deleted in comparison to the old Code. In the present Code, Section 357 has conferred powers on the court to grant compensation. As observed by the Apex Court, it is intended to do something to reassure the victim that he or she is not forgotten by the criminal justice system. It is a measure to respond appropriately to crime, to some extent, a constructive approach in responding to a crime. The section in the 1973 Cr.P.C. has been noted as indeed a step forward in our criminal justice system.[40] The section reads as follows:

> Section 357- Order to Pay Compensation: (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied:
>
> (a) in defraying the expenses properly incurred in the prosecution;
>
> (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
>
> (c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such

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

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

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

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented, before the decision of the appeal.

[40] *Dr. Jacob George* v. *State of Kerala* (1994) SCC (Cri) 774

an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

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

(2) If the fine is imposed in a case which is subject to appeal, no such payment be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

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

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

Compensation can be recovered even if the offender undergoes the default sentence. It has to be treated as if it were fine, for the purpose of recovery.[41]

The Supreme Court has held that the power to award compensation to victims of crime conferred on the court is coupled with a duty. Courts are bound to consider the issue of award of compensation in every case. Therefore, they ought to record reasons for awarding or refusing compensation. Courts can hold an enquiry to identify the capacity of the accused to pay. Further, it has held that the victim would remain forgotten in a criminal justice system, if despite legislature having gone so far as to enact specific provisions relating to victim compensation, the Courts choose to ignore the provisions altogether and do not even apply their mind to the question of compensation. It follows that, unless Section 357 is read to confer an obligation on Courts to apply their mind to the question of compensation, it would defeat the very object behind the introduction of the provision.[42] The Delhi High Court, in *Karan* v. *State,*[43] after analysing the catena of previous pronouncements of the Supreme Court and High Courts, has explained the ambit and scope of Section 357 Cr.P.C. as follows:

> "The object of the Section 357 (3) Cr.P.C. is to provide compensation to the victims who have suffered loss or injury by reason of the act of the accused. Mere punishment of the offender cannot give much solace to the family of the victim – civil action for damages is a long drawn and

[41] Power and procedure for recovery are dealt with in Ss. 421 and 431 Code of Criminal Procedure, 1973

[42] *Ankush Shivaji Gaikwad* v. *State of Maharashtra,* AIR 2013 SC 2454

[43] 277 (2021) DLT 195 (FB) Delhi High Court

> cumbersome judicial process. Monetary compensation for redressal by the court finding the infringement of the indefeasible right to life of the citizen is, therefore, useful and at times perhaps the only effective remedy to apply a balm to the wounds of the family members of the deceased victim, who may have been the bread earner of the family.
>
> Section 357 Cr.P.C. is intended to reassure the victim that he/she is not forgotten in the criminal justice system. It is a constructive approach to crimes. It is indeed a step forward in our criminal justice system. The power under Section 357 Cr.P.C. is not ancillary to other sentences but in addition thereto. It is to be exercised liberally to meet the ends of justice in a better way. It confers a duty on the Court to apply its mind on the question of compensation in every criminal case. The word *may* in Section 357 (3) Cr.P.C. means *shall* and therefore, Section 357 Cr.P.C. is mandatory.'

The above clarification made by the High Court would make it clear that the Compensation under Section 357 Cr.P.C. is a monetary assistance to the victim from the offender and it shall be made available to the victim at the end of the trial. It does not envisage a situation for award of interim compensation.

11.10 Fine and its connect to Compensation

Fine and compensation are generally imposed upon the wrongdoers as legal sanctions. Both result in forfeiture of money. The former is payable to the State and the latter is awarded to the victim or dependants. The criminal justice system in India recognises both fine and compensation. In IPC fine has been prescribed as one of the penal sanctions.[44] The section does not recognize compensation payable by the convict as a type of punishment. Some offences,

[44] Section 53 IPC prescribes fine as a punishment.

such as causing danger or obstruction in public way or line of navigation, making or using the documents resembling currency notes and bank notes, are punishable only with fine.[45] The quantum of fine and the consequences of non-payment of fine are also clearly stated in IPC.[46] Compensation has been suggested in Cr.P.C. as an award to 'the person who has suffered any loss or injury by reason of the act for which the accused person is sentenced' and the courts dealing with the criminal cases are empowered to pass orders for payment of compensation.

In *Giridhar Lal* v. *State of Punjab*[47] the High Court directed the accused to pay the State a sum of Rs. 3000 towards costs without imposing fine. The Apex Court, in the context of the case, has made it clear that fine is a *sine qua non* for awarding compensation:

> 'It is obvious that for sustaining an order directing expenses to be paid to the State under this provision, there must be a substantive sentence of fine. In the absence of such a sentence of fine, no direction under Clause (a) can be made. In the present case, the High Court, while maintaining the conviction, has set aside the imprisonment imposed by the trial court and has not imposed any fine on the accused. On the other hand, the appellant has been given the benefit of probation. There cannot be a

[45] Sections 283, 489 E IPC respectively

[46] Section 63: Amount of fine.—where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.
Section 64: Sentence of imprisonment for non-payment of fine.In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of a sentence.

[47] (1982) 1 SCC 608

direction for compensation under Section 357 (1) (a) where there is no sentence of fine, and where the convict has been let off on probation.'

Factors to be considered while awarding compensation to the accused are explained by the Supreme Court in *Swaran Singh* v. *State of Punjab.*[48] They include the nature of the crime, the injury suffered and the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of fine or compensation. It refers to the decision in *Palaniappa Gounder* v. *State of Tamil Nadu*[49] and cautions that the Court should not first consider what compensation ought to be awarded to the heirs of the deceased and then impose a fine which is higher than the compensation.

11.11 Compensation even to Accused under certain circumstances

The scheme of Cr.P.C. not only provides for power to order compensation to victims of crime but it also provides power to grant compensation to the accused person in the cases of accusation without reasonable cause. The framers of the Code inserted the provision for compensation to accused who faces charge or accusation without *prima facie* or substantial evidence, either in warrant or summon cases.[50] Section 250

[48] (1978) 4 SCC 111
[49] (1977) 2 SCC 634
[50] Section 250: Compensation for accusation without reasonable cause.—(1) If, in any case instituted upon complaint or upon information given to a police officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate by whom the case is heard discharges or acquits all or any of the accused, and is of opinion that there was no reasonable ground for making the accusation against them or any of them, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one; or, if such person

comes at the same stage, albeit it applies where an accused is discharged or acquitted, to award compensation if the Court is satisfied that there was no reasonable ground for making the accusation against him.[51] It was in existence in the old Code, 1898 also and it has been adopted in the new Code without any substantial amendments.[52] After recording of discharge or acquittal, if the Magistrate is of the opinion that there was no reasonable ground for making the accusation, he can issue a show cause notice and hear the complainant as to why the complainant should not be asked to pay compensation to the accused. The maximum limit is the amount of fine that the Magistrate can impose. The necessary requirements of Section 250 Cr.P.C., are that the Magistrate should arrive at an independent finding irrespective of what he had held about it in his

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is not present, direct the issue of a summons to him to appear and show cause as aforesaid. (2) The Magistrate shall record and consider any cause which such complainant or informant may show, and if he is satisfied that there was no reasonable ground for making the accusation, may, for reasons to be recorded make an order that compensation to such amount, not exceeding the amount of fine he is empowered to impose, as he may determine, be paid by such complainant or informant to the accused or to each or any of them. (3) The Magistrate may, by the order directing payment of the compensation under sub-section (2), further order that, in default of payment, the person ordered to pay such compensation shall undergo simple imprisonment for a period not exceeding thirty days. (4) When any person is imprisoned under sub-section (3), the provisions of sections 68 and 69 of the Indian Penal Code (45 of 1860) shall, so far as may be, apply. (5) No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him: Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter. (6) A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second class to pay compensation exceeding one hundred rupees, may appeal from the order, as if such complainant or informant had been convicted on a trial held by such Magistrate. (7) When an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (6), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed, or, if an appeal is presented, before the appeal has been decided; and where such order is made in a case which is not so subject to appeal the compensation shall not be paid before the expiration of one month from the date of the order. (8) The provisions of this section apply to summons-cases as well as to warrant-cases.

[51] *Dharmesh @ Dharmendra @ DhamoJagdishbhai @ JagabhaiBhagubhaiRatadia* v. State of Gujarat, 2021 SCC Online SC 458

[52] Section 250 of Act V of 1898

judgment while acquitting the accused. The law casts a duty on a Magistrate to once again satisfy himself before awarding compensation that the complaint was false and either frivolous or vexatious and this duty has to be discharged in strict compliance with the mandate of the law as the provision under which he is to discharge this duty is mandatory in nature.[53]

However, interestingly, in *Jamna Prasad Sarju Tiwari* v. *Saban K Thone*,[54] the Bombay High Court straightaway passed an order of costs without issuing a show cause notice and recording the objections of the informant, if any. It has held that even though the appellant before it is not the accused but a complainant before the Court, in exercise of inherent powers, the High Court is not powerless to set right this state of affairs. Under the circumstances, the appeal was dismissed, the original complainant was directed to pay compensatory costs to each of the four accused personally in the sum of Rs. 1,000/- and to the Bombay Municipal Corporation in the sum of Rs. 5,000/-, for having instituted the prosecution and for having followed it up in the appeal and expended much of judicial time.

11.12 Compensation to Person Arrested Groundlessly

A person arbitrarily arrested or incarcerated without any valid reasons or legal basis and often as abuse of powers by the State authorities, is considered as a victim. A provision was there in the old Code of Criminal Procedure, 1898 to provide for compensation to persons groundlessly arrested.[55] In the new

[53] *Rameshwar Dangi* v. *State of Bihar* 1974 SCC OnLine Pat 178
[54] MANU/MH/0160/1991
[55] Section 553 of Act V of 1898

Code also, a similar provision has been inserted.[56] Before making an order for compensation under the provision, an opportunity to show cause must be given to the complainant. A plain reading of this provision would make it clear that the court has to satisfy that the *de facto* complainant or informant did cause arrest of the accused by misleading the police when there was no substantial cause or sufficient ground. There must be direct and proximate nexus between the complaint and the arrest for making an award under Section 358 Cr.P.C. Further, the complainant must be heard and the maximum amount awardable is Rs.1000, a meager sum by the present economic standard. The law digest reveals that this provision has not been applied in many cases, and remains in the texts untouched and obsolete.

It may be noted that, while introducing the term victim in S. 2 (wa), a person groundlessly arrested or incarcerated arbitrarily is not included within its scope.

[56] Section 358: 1) Whenever any person causes a police officer to arrest another person, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding (one thousand rupees), to be paid by the person so causing the arrest to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.
2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding (one thousand rupees), as such Magistrate thinks fit.
3) All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.
This clause seeks to amend Section 358 of the Code to enhance the limit to fine of one hundred rupees to one thousand rupees so as to make this provision more effective.

11.13 Costs to compensate

In a judicial proceeding awarding costs is both deterrent and in appreciation to the fair and just claim of the party. It is a censure against the wrongdoer for the unjustifiable plea or defence made by him. Cr.P.C. envisages payment of costs to the complainant in non-cognizable cases. Under Section 359, the trial courts as well as appellate courts are empowered to order payment of the entire costs, including the expenses incurred for payment of processes, court fee and allowances paid to the witnesses and fee paid to the counsel.[57] This is useful to the complainants who resort to the proceedings under Section 200 Cr.P.C., generally referred to as private complaint. But, the courts rarely invoke these provisions and are reluctant in extending the benefits to the victims/complainants.

Hazari Choubey Giridhar Lal v. *State of Punjab State of Bihar*,[58] was a case of a mob consisting of several people with firearms and other deadly weapons committing dacoity and fleeing away. The Sessions Court did not examine the investigating officer and the defence was not provided with an opportunity to test the veracity of the prosecution case. It was decided by a Division Bench of the Patna High Court that a re-trial would be a miscarriage of justice. In the circumstances, however, it found it appropriate to award a

[57] Section 359: 1)Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him, order him to pay to the complainant, in whole or in part, the cost incurred by him in the prosecution, and may further order that in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days and such costs may include any expenses incurred in respect of process-fees, witnesses and pleader's fees which the court may consider reasonable.2)An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

[58] 1987 SCC Online PAT 117

sum of Rs 20,000 as costs to the informant while setting aside the conviction. It is to be noted that the Code of Criminal Procedure, 1973 confers power under Section 359 to make an order of compensation but only up to the amount not exceeding the amount of fine that the court is empowered to impose and the same is to be paid by the convict. In the above case, the High Court awarded Rupees 20,000 towards compensation to the informant to be paid by the State.

11.14 Default Sentence of Imprisonment for Non-payment of Compensation

After recognizing the fine as one of the modes of punishments, the framers of the IPC have empowered the courts to award default imprisonment as a coercive measure to encourage payment of it by the offender. This default sentence of imprisonment is to run consecutively, after the substantial term of punishment. The provisions of IPC further makes it clear that the 'default imprisonment' shall not exceed one fourth of the term of substantive imprisonment and it will terminate on payment of fine amount.[59] In the cases where fine only is prescribed as a punishment, how long shall be the period of simple imprisonment in case of its non-payment is also prescribed in the IPC.[60]

[59] Section 65: Limit to imprisonment for non-payment of fine, when imprisonment and fine awardable.— The term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

Section 66: Description of imprisonment for non-payment of fine.—The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

[60] Section 67 : Imprisonment for non-payment of fine, when offence punishable with fine only.—If the offence be punishable with fine only, 1 [the imprisonment which the Court imposes in default of payment of the fine shall be simple, and] the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of

The Code of Criminal Procedure, 1973 consist of provisions for mode and procedure for the recovery of fine levied upon the offender.[61] Though it provides for the payment of compensation to be ordered, there is no specific procedure for its recovery that is contemplated. In the absence of such specific provisions for recovery of compensation, the Apex Court, in *Vijayan* v. *Sadanandan K.,*[62] a case of dishonour of cheque, held that even in such cases, compensation can be recovered as money due to the State under criminal law by invoking Section 431 Cr.P.C. and paid to the complainant.[63] The Supreme Court went on further to hold that the provisions of Sections 357 (3) and 431 Cr.P.C, can be read with Section 64 IPC, which empowers the Court while making an order for payment of compensation to also include a default sentence in case of non-payment of the same. Therefore, the above decision equates the compensation ordered as 'money' as used in Section 431 and empowers the court to impose default sentence and resort to the procedure prescribed for recovery of fine.

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the fine shall not exceed fifty rupees, and for any term not exceeding four months when the amount shall not exceed one hundred rupees, and for any term not exceeding six months in any other case.

[61] Chapter XXXII –C dealing with levy of fine.

[62] (2009) 6 SCC 652

[63] Section 431: Money ordered to be paid recoverable as fine. Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for, shall be recoverable as if it were a fine: Provided that section 421 shall, in its application to an order under section 359, by virtue of this section, be construed as if in the proviso to sub-section (1) of section 421, after the words and figures "under section 357", the words and figures "or an order for payment of costs under section 359" had been inserted.

11.15 Impermissibility of Sentence bargaining with Enhanced Compensation

While it is understandable that the convicts are given every opportunity to raise grounds for seeking reduced punishment, especially in the context of pre-sentence hearings, that the convicts at times try offering enhanced compensation as a bargain while seeking a lesser punishment, is another matter of concern in the contemporary developments of criminal jurisprudence. The compensation provided under section 357 A Cr.P.C. and the Schemes framed in its pursuance, are sought to bring reliefs to the victims of crime. They should not be treated as an element to bargain for a reduced sentence to be imposed upon the guilty. In *Pritam Chauhan* v. *Govt. of NCT of Delhi*,[64] a person convicted for an offence under section 326 IPC by the trial court was aggrieved by the quantum of sentence and a fine of Rs. Fifty thousand slapped by the High Court. In the appeal before the Supreme Court, he argued that he was willing to pay enhanced compensation and prayed for reduction of quantum of sentence. The curious plea of sentence bargain by the convicted offender was rejected by the Supreme Court with an observation that the court is required to sentence the offender independent of the penal provision. The Apex Court further held that the provisions for compensation and punishment in the Cr.P.C. are two separate and independent provisions and the statutory or mandatory punishment cannot be reduced by substituting pecuniary compensation. It clarified that the 'principles of just punishment',[65] the bedrock of sentencing in

[64] (2014) 9 SCC 637
[65] Emphasised in *Gopal Singh* v. *State of Uttarakhand* (2013) 7 SCC 545

criminal offences, is not a factor for compromise in the event of offender's willingness to pay compensation at a higher rate.

Under the VCSs, most often, the DLSA or SLSA are the authorities to decide the eligibility of the person to apply for compensation and their entitlement. These fora are empowered to fix quantum and grant other incidental reliefs to the victims. But, in some cases compensation is fixed by the courts while adjudicating criminal cases in appeals. The Division Bench of the Bombay High Court, in *State of Maharashtra* v. *Mohammad Aabed Mohammad Ajmir Shaikh*,[66] confirmed the conviction under section 302 IPC but commuted death to life sentence for a murder of a girl child. The victim was already granted a sum of Rs. Three lakhs under a *Manodhairya Scheme* introduced by the State. However, in addition to the same, the Court directed the Registrar (Judicial) to send the copy of the judgment to the District Legal Services Authority, Thane with a direction to pay a sum of Rs. Five Lakhs within 6 months. Such directions, though benevolent to the victims of crime, would result in the statutory requirements to grant compensation under Section 357 A Cr.P.C. to become redundant.

11.16 Relevance of Financial Capacity of the Accused and Compensation

When a court grants compensation under Section 357 Cr.P.C., it has to take into account the financial capacity of the accused to pay the fine amount and the compensation. The Punjab and Haryana High Court was of the view that Section 357 hardly meets the needs of the victim. It observed thus:,

[66] 2022 SCC Online Bom 269

> 'Though a provision has been made for compensation to victims under Section 357 Cr.P.C., there are several inherent limitations. The said provision can be invoked only upon conviction, that too at the discretion of the judge and subject to financial capacity to pay by the accused. The long time taken in disposal of the criminal case is another handicap for bringing justice to the victims who need immediate relief, and cannot wait for conviction, which could take decades. The grant of compensation under the said provision depends upon financial capacity of the accused to compensate, for which, the evidence is rarely collected. Further, victims are often unable to make a representation before the Court for want of legal aid or otherwise. This is perhaps why even on conviction this provision is rarely pressed into service by the courts. Rate of conviction being quite low, inter-alia, for competence of investigation, apathy of witnesses or strict standard of proof required to ensure that innocent is not punished, the said provision is hardly adequate to address to need of victims.'

As Section 357 Cr.P.C. may be unable to address even the basic needs of victims of crime, the idea of State sponsored compensation in welfare State has been introduced through VCS under Section 357 A Cr.P.C. The Punjab and Haryana High Court, in *Rohtash @ Pappu* v. *State of Haryana*,[67]asserted that the victims have right to get justice to remedy the harm suffered as a result of crime. This right is different from and independent of the right to retribution, responsibility of which has been assumed by the State in a society governed by Rule of Law.

[67] Crl.A. No. 250 of 1999 decided on 1.4.2008, by the Division Bench of the Punjab & Haryana High

11.17 Compensation in vitiated trial leading to acquittal

Compensation becomes available to be ordered at a trial when it leads to conviction and sentencing. But where the Supreme Court found after a couple of decades that a trial was vitiated and ordered acquittal, it found a way to ensure compensation to victims to be paid by the State, purportedly on the ground of its failure. The Court expressed its concern about the omnibus accusation, erroneous or irregular framing of charges and failure to record appropriate findings with respect to various offences alleged to have been committed by the accused person.[68] On completion of investigation a charge sheet can to be filed against 15 accused and the two accused were absconding who were later apprehended and put to a separate trial for the offences punishable under sections 147, 148, 120B, 302 and 307 read with section 149 of IPC and under Section 25(1) (A) of the Arms Act and under Section135 of Bombay Police Act in Sessions Case. Out of the 15 accused, 4 were convicted who preferred an appeal to the Gujarat High Court challenging conviction and sentence. The criminal appeal finally came up before the Supreme Court after 26 years of the occurrence and the court has observed as follows:

> 'For all the above mentioned reasons, we should have recorded a conclusion that there is a failure of justice in the case on hand looked at from the point of view of either the victims or even from the point of view of the convicted accused. The most normal consequence thereafter should have been to order a fresh trial, but such a course of action after a lapse of 26 years of the occurrence of the crime, in our opinion, would not serve any useful purpose because as already indicated some of the

[68] *Vinubhai Ranchhodbhai Patel* v. *Rajivbhai Dudabhai Patel* (2018) 7 SCC 743

> accused have died in the interregnum. We are not sure of the availability of the witnesses at this point of time. Even if all the witnesses are available, how safe it would be to record their evidence after a quarter century and place reliance on the same for coming to a just conclusion regarding the culpability of the accused?
>
> We are of the opinion that the only course of action available to this Court is that the victims of the crime in this case are required to be compensated by the award of public law damages in light of the principles laid down by this Court in *Nilabati Behera.* In the circumstances, we are of the opinion that the families of each of the deceased should be paid by the State an amount of Rs. 25,00,000/- (Rupees Twenty-five lakhs only) each and the injured witnesses, if still surviving, otherwise their families, are required to be paid an amount of Rs.10,00,000/- (Rupees Ten lakhs only) each. The said amount shall be deposited within a period of eight weeks from today in the trial court, and on such deposit the said amounts shall be distributed by the Sessions Judge, after an enquiry and satisfying himself regarding the genuineness of the entitlement of the claimants.'

The Supreme Court seems to be of the view that the compensation by the State would be an option to grant relief to the victims of crime in cases of failure of the State in properly and effectively prosecuting the same and for institutional derelictions.

11.18 Compensation and Inherent Powers of the High Courts

The inherent powers are conferred upon the High Court by Cr.P.C. The purpose for which those powers are conferred upon the court is based upon the legal maxim *ex debito justitiae,* which means a person is entitled to as of right. The Supreme Court has applied this principle in *Rupa Ashok Hura* v. *Ashok*

Hura.[69] It was a writ petition under Article 32 that came before a three Judge Bench and dismissed by the Court in an earlier judgment. *A. R. Antulay*[70] had held that a final Supreme Court judgment cannot be assailed *via* writ petitions under Article 32. However, more related writ petitions were again filed before the same three judge Bench. This prompted the three judge Bench to refer these writ petitions to a Constitutional Bench seeking its opinion as to whether an aggrieved person is entitled to any relief against a final judgment/order of the Supreme Court, after dismissal of a review petition, either under Article 32 of the Constitution or otherwise.[71]

It is an aid for the courts to do real and substantial justice to the parties where the statutory provisions do not provide for a relief that is just. The Supreme Court observed in *Raja Bhadur Ras Raja* v. *Seth Siralal*,[72] that the inherent power is a power inherent in the court by virtue of its duty to do justice between the parties before it. In India, the Civil Courts are conferred with the inherent powers under Section 151 Code of Civil Procedure, 1908. Accordingly, a Civil Court's power is not limited or otherwise affected while making orders as may be necessary for meeting the ends of justice or to prevent the abuse the process of court. Similarly, under Section 482 Cr.P.C., the High Court has been conferred with inherent powers. Section 482 Cr.P.C. reads as follows:

[69] (2002) 4 SCC 388
[70] *A. R. Antulay* v. *R. S. Nayak* (1988) 2 SCC 60
[71] Muteti Mutisya Mwamis, *The Indian Supreme Court and Curative Actions*, available at, http://www.commonlii.org/in/journals/INJlConLaw/2007/10.pdf
[72] AIR 1962 SC 527

> 482. Saving of inherent powers of High Court: - Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

A close reading and comparison between both the Sections 151 CPC and 482 Cr. P .C. would show that the framers have used same words and phrases to define and detail the grounds for invoking such powers by the courts. The foundation for compensatory justice to victims of crime was laid when the legal heirs of a person, who was murdered, approached the Court, in *Palaniappa Gounder* v. *State of Tamil Nadu*.[73] In the trial, the convict was found guilty for an offence under Section 302 IPC and sentenced to death by the District Judge, Salem. Aggrieved by the conviction and sentence, the offender preferred an appeal before the High Court, Madras. In the appeal, the High Court upheld the conviction but reduced the sentence from death to imprisonment for life. However, it enhanced the fine to Rs. 20,000/- against the appellant and directed that, out of the fine of Rs.20,000/-, a sum of Rs.15,000/- should be paid to the sons and daughters of the deceased under Section 357 (1) (c) Cr.P.C. The legal heirs of the deceased filed a separate application under Section 482 Cr.P.C. before the High Court, Madras praying for Rs.40,000/-, instead of Rs. 15,000/-, towards compensation for the loss that occurred due to the death of the eldest male member and breadwinner of the family. The petition under Section 482 Cr.P.C. was considered on merits by

[73] AIR 1977 SC 1323

the High Court which awarded compensation of Rs.20,000/-, including Rs. 15,000/- ordered in the appeal. The amount was not awarded under Section 482 Cr.P.C., but under Section 357 (1). The offender who was made liable to pay the compensation took the matter to the Supreme Court.

The Supreme Court compared and elaborated upon the scope of Section 482 Cr.P.C. with Section 561 A of the Code of Criminal Procedure, 1898.[74] It considered the question of awarding compensation to the legal heirs of the person murdered in a crime. The Supreme Court has also discussed the powers of the court to award compensation to the victims or survivors of crime. It observed that Section 482 Cr.P.C., the provision which saves the inherent powers of the court, cannot override any express provision contained in the statute which saves that power. Further, if there is any express provision in a statute governing a particular subject matter, there is no scope for invoking or exercising the inherent powers of the court because the court ought to apply the provisions of the statute which are made advisedly to govern the particular subject matter. Therefore, it has clarified the legal position that the sufferers of crime cannot directly invoke Section 482 Cr.P.C. for seeking compensation. But, the parties have to apply under Section 357 Cr.P.C. for compensation. This was a clarification given by the Supreme Court before the insertion of the Section 357 A Cr. P .C. (leading to VCSs). It has further held that in a case of murder under Section 302 IPC, the compensation which could be paid as a

[74] Section 561 A- Saving Inherent Power of the High Court Division: Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court Division to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

portion of the fine amount from and out of the said fine imposed upon the guilty, under the penal section itself, because, under Section 302 IPC, along with the death sentence or imprisonment, fine has been made as an mandatory penal censure. The Supreme Court did not concur with the quantum of fine and compensation of Rs. 20,000/- awarded by the High Court, Madras and it held that it is unduly excessive and reduced it to Rs.3,000/- to be paid to the sons and daughters of the deceased. This is probably, to the best of the knowledge, the first and only attempt to seek compensation under Section 482 Cr.P.C. by the legal heirs of the deceased from an offender in the Pre-Victim Compensation Scheme (VCS) era that reached the Supreme Court.

Though the compensation amount of Rs. 3,000/- was a meager sum to the victims/legal heirs of the person murdered and that too within the scope of section 357 Cr.P.C., it brought a renewed focus to enable victims and dependents to claim compensation under the provisions of Cr.P.C. meant specifically to grant compensation. The rights of victims of crime to independently approach the court for compensation was impliedly recognised by the Supreme Court.

11.19 Refusal by the victim to accept compensation

Every victim who suffers by an act of crime may be entitled to claim compensation. But no law or scheme framed to compensate a victim can compel him/her to receive the amount. Such a piquant situation arose before the Supreme Court in the case of *Kanwar Pal Singh Gill* v. *State*.[75] At a dinner

[75] (2005) 6 SCC 161

held at the residence of the then Director General of Police, Punjab, the accused sat near the prosecutrix and by his word and deeds embarrassed her. Despite by her resistance, the DGP behaved in an objectionable manner and also slapped on the posterior of the prosecutrix. She reported it to the higher officials and preferred a complaint to the Chief Judicial Magistrate, which took cognizance under Sections 354, 341, 342, 355 and 509 of IPC. After a full-fledged trial, the accused was found guilty and sentenced to undergo imprisonment for three months with fine. On appeal before the Session Court, the fine was enhanced to Rs. 50,000/- with a direction to pay half of the amount of fine as compensation to the prosecutrix. The accused preferred a revision on the file of the High Court which upheld the judgment of the Session Court and directed the accused to make a deposit of Rs 2 lakh towards compensation. The accused filed a criminal appeal before the Supreme Court where the same was confirmed. But the victim did not come forward to receive the compensation. She clearly expressed her unwillingness to claim the amount deposited by the accused. The Supreme Court left it to the discretion of the Chief Justice of the High Court of Punjab and Haryana, where the deposit was lying, to use it for the cause of legal services to women.

11.20 Interim Compensation

With the advent of VCS, the award of compensation is not necessarily to be dealt with after the guilt is proved at a trial or at the time of pronouncing judgment. Compensation at this stage has become supplementary, as the question starts getting addressed independently by the DLSA or SLSA at an

earlier stage. The trial courts are also directed by the Apex court to grant interim compensation to the victims of crime. In *Suresh* v. *State of Haryana*,[76] the Supreme Court opined as follows:

> 'We are of the view that it is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.'

Interim compensation serves the purpose of fulfilling the immediate requirements of the victim. After the crime, the victim has to spend for medical treatment and many a times face losses of pay in the job. In such circumstances interim compensation may be helpful to the victims of crime.

11.21 Compensation for Rehabilitation

Crimes against women are underreported due to various reasons including stigma, loss of privacy and negative responses from the offender,

[76] (2015) 2 SCC 227

when they decide to respond the crime. A rape victim may decide not to report if the benefit from non-reporting may outweigh the benefit from reporting. Offences like rape have been increasing every year.[77] Despite such under reporting, it is revealed from the 2019 National Crime Records Bureau Report that, in the Pre-Covid days, a total of 4,05,861 cases of crime against women were registered during 2019, showing an increase of 7.3% over 2018.[78]

In *Tekan @ Tikaram* v. *State of Madhya Pradesh*[79] special compensation, in addition to the compensation awarded under VCS, was recommended by the Supreme Court. In this case (discussed in the previous chapter), after considering the physically challenged and socially disadvantaged position of the rape victim and the special facts of this case, it directed the State to pay Rs.8,000/- per month during her life time, treating the same to be an interest fetched on a fixed deposit of Rs.10,00,000/-. By this formula, the State was not required to pay any lump sum amount to the victim and was in the interest of the victim. In this case, the Apex Court examined 25 VCSs, framed by the States and Union Territories, and observed thus:

> 'Perusal of the aforesaid victim compensation schemes of different States and the Union Territories, it is clear that no uniform practice is being followed in providing compensation to the rape victim for the offence and for her rehabilitation. This practice of giving different amounts ranging from Rs.20,000/- to Rs.10,00,000/-, as compensation for the offence of rape under Section 357 A, needs to be introspected by all the States and the Union Territories. They should consider and

[77] Refer the discussion on NCRB Data in G S Bajpai, *Living on the Edge A Study of women Victimization and Legal Control*, Mohan law House, (2019) P 8
[78] Crime in India – 2019, Volume I, National Crime Record Bureau, New Delhi
[79] (2016) 4 SCC 461

> formulate a uniform scheme especially for the rape victims in the light of the scheme framed in the State of Goa which has decided to give compensation up to Rs. Ten lakhs.'[80]

These inequalities in the quantum of compensation was described as a concern in the VCS and was accompanied by a recommendation to the States and Union Territories to make all endeavour to formulate a uniform scheme for providing victim compensation in respect of rape/sexual exploitation of physically handicapped women, as required under the law.

11.22 Presumption of Death and Award of Compensation

The unexplained absence of a person from his or her last and usual place of residence, without having been heard for a period of seven years, raises a presumption of death, both at common law and other statutes declaratory of the common law.[81] This presumption has also been accepted in the Indian jurisprudence and the courts are enabled to draw the statutory presumption that a man is not alive if he has not been heard of for seven years as embodied in the Indian Evidence Act, 1872.[82] The Full Bench of the Kerala High Court has compared both the laws of presumption of death and held that the Indian law is no way different from the English law.[83] The Supreme Court made it clear in

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[80] *Id*., Para 13

[81] *Jacobs* v. *Town Clerk of Arlington* 525 N.E. 2d 658 (1988)

[82] Section 107:burden of proving death of person known to have been alive within thirty years When the question is whether a man is alive or dead and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

Section 108: burden of proving that a person is alive who has not been heard of for seven years.

Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the nurden of proving that he is aoive is shifted to the person who affirms it.

[83] *A V Narayana Vadhyar* v. *Venkateshwara* AIR 1971 Ker 85 FB

LIC of India v. *Anuradha*,[84] that the presumption as to death by reference to section 108 Indian Evidence Act, 1872 would arise only on lapse of seven years and would not, by applying any logic or reasoning, be permitted to be raised on expiry of 6 years and 364 days or at any time short of it. An occasion for raising the presumption would arise only when the question is raised in a Court, Tribunal or before an authority that is called upon to decide as to whether a person is alive or dead. So long as the dispute is not raised before any forum and in any legal proceedings, the occasion for raising the presumption does not arise.

Whether a person, whose family member has been absent for a period of seven years, can be treated as a victim for extending the benefits u/s 357 A Cr.P.C. through writ jurisdiction was the question in *Tara Banu Bivi* v. *State of Assam.*[85] It is a peculiar case wherein the husband of the Writ Petitioner was alleged to be kidnapped by a group of person. There were indications that he gone out from the village on 20.07.2012 and did not return till 2018. An FIR was lodged on 28.7.2012. The petitioner pleaded that her husband was not traced for the past ten years and his whereabouts are also not known. On these facts the High Court noted as follows:

> 'In the present case, petitioner's husband has not been heard of since 20/07/2012. No one has come forward to say that he has heard of him during this period. As a matter of fact, filing of final report by the police stating that they could not recover the victim is a testimony to the fact that the husband was not heard of from the date of kidnapping till the

[84] AIR 2004 SC 2070
[85] 2022 SCC Online Gau 601

> date of submission of final report on 31/10/2020. Ordinarily, such a declaration is required to be obtained from a civil court of competent jurisdiction, but in a case of this nature and considering the attending facts and circumstances, a presumption can be drawn that petitioner's husband is no longer alive.
>
> 8. From the narration of facts as above, what is evident is that a crime was committed in which there was a victim. The victim could not be recovered and now a legal presumption has been drawn that he is dead. In the course of police investigation no assailant could be apprehended. Investigation reached a dead end and resulted in filing of final report. Consequently, there was no trial. Matter ended thus.'

The High Court went on to discuss the context and scope of Section 357 A. Since the petitioner's husband was not heard of since 2012 her application under section 357 A Cr.P.C. was directed to be considered and compensation granted under the Victim Compensation Scheme framed by the State of Assam.

This decision could set an altogether different trend in the application of provisions of VCS. The power and jurisdiction of statutory declaration of death of a person is conferred upon the civil courts. Without such a declaration or adherence of other legal formalities, if the members of the family of any person unheard of seven years, are treated at par with victims, the propriety of the same may have to examined as the same would be outside the scope of the definition for victims provided under section 2 (wa) Cr. P. C. or as given under the VCSs.

11.23 Compensation under the Juvenile Justice Administration

The Supreme Court, in *State of Haryana* v. *Sukhbir Singh*,[86] held that for the award or refusal of compensation in a particular case, though within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording of reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion.

In a case of a rape, the Juvenile Justice Board had imposed necessary non-penal sanction against the juvenile in conflict with law and had not made any specific award of compensation. A victim filed a writ petition seeking the same.[87] The Chhattisgarh High Court, on a conjoint reading of Section 33 (8) of POCSO Act read with R. 9 of POCSO Rules, 2020, held that it would show that Special Judge is empowered to direct payment of compensation to victim/child for loss or pain which he/she has suffered. Quantum of compensation is to be calculated taking into consideration loss or injury suffered by victim and other related factors as laid down in Rule 7(3) of POCSO Rules, 2012 substituted by POCSO Rules, 2020 and is not to be restricted to a minimum compensation amount as prescribed by State Government in the Victim Compensation Scheme.

[86] (1988) 4 SCC 551
[87] *XYZ* v. *State of Chhattisgarh* 2020 SCC OnLine Chh 161

11.24 Post disbursement Control over utilization of Compensation

Two victims of human trafficking to whom compensation were awarded by the Secretary of DLSA, approached the High Court against direction of the Member Secretary, SLSA that 75 percent of the awarded amount was to be deposited by the victim girl with a nationalised bank in a monthly income scheme in the name of the victim for a period of ten years, with auto renewal option in *Achiya Bibi* v. *State of West Bengal*.[88] It was argued that the State Legal Services Authority has power to prevent the misuse of fund granted under VCS, but the Calcutta High Court rejected the contention of the SLSA and held that the Legal Services Authority cannot monitor the amount of compensation after disbursement. It observed as follows:

> 'The SLSA has no authority to control and monitor the amount of compensation disbursed to a victim who has attained majority. She or he has every right and the liberty to choose the mode of expending the compensation amount, as she/he feels appropriate for her rehabilitation after the trauma of the offence. As it is, the quantum of compensation is meager and ought not to be further fettered. The SLSA can at best offer post-disbursal schemes to the victim to safeguard her/his best interests, but that has to be optional, chosen by the victim only in the event she/he opts for it, and not mandatory. That would be a far better option than imposing the restriction on the victim and subsequently leaving it to the discretion of the SLSA to dictate the mode of expenditure and savings. Such a method is counterproductive to the scheme of Section 357 A of the Code of Criminal Procedure and would be an illegal fetter on the personal liberty of the victim.'

[88] 2020 SCC OnLine Cal 583

The State and District Legal Services Authority may have powers to determine the entitlement of the victims to receive compensation and even determine the quantum of it. But dictating further terms such as to how it should be saved or spent or how long it has to be kept in the deposit is considered as directly interfering with the right of the victims of crime to use the compensation. The court further observed that Section 357 A Cr.P.C. only provides for the preparation of a scheme for providing funds for the purpose of compensation. Thus, the scheme does not and cannot extend to monitoring the amount of compensation from the point of disbursal onwards. The scheme has to be framed by the State government in co-ordination with the Central Government for the sole purpose of providing the funds for compensation, and cannot touch the mode of distribution or disbursal of the compensation to the victim even as per the language of the parent provision, that is, S. 357 A. District Legal Services Authority (DLSA) or the SLSA, under sub-section (2) of S. 357 A, can only decide the quantum of compensation to be awarded "under the scheme" referred to in sub-section (1) and award adequate compensation as per sub-section (5) thereof, upon completing the enquiry contemplated therein. Neither the DLSA nor the SLSA can monitor or fetter the amount disbursed as compensation under S. 357 A, as their jurisdiction ends with awarding the amount.

Conclusion

The compensatory jurisprudence had limited statutory foundation at its inception but was enlarged under the public law remedy principle. After the statutory foundation has been revisited recently, it has been developing in many dimensions. Even after adoption of Schemes and provisions in statutory law, writ jurisdiction has also been liberally exercised to award compensation to the victims of crime in many cases, arguably bypassing the basic requirements to consider the eligibility of the person, quantum to be awarded *etc*. This area is still in its fledgling stage and it may be expected that the scope, procedure, recognition of rights and other matters would get crystallized over a period of time bringing succor to the deserving class of persons, the victims of crime.

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Chapter XII
CONCLUSION AND SUGGESTIONS

It is a common perception that the crime is as old as mankind. While dealing with the crime, the victim, its by-product, is also to be considered as a stakeholder, entitled to seek justice on par with accused. Thinking about victim requires a comprehensive approach to crime and its consequences. Modern criminal laws have started paying attention to the victim since the second half of the twentieth century. The relationship between victim and crime has become a subject for judicial pronouncements and research in the academic arena only a few decades ago. The criminal justice professional and criminologists have started focusing on victims of crime, their plights and needs. Consequently, the crime victims have emerged from the status of a 'forgotten party' to a position of 'stakeholder' and now the concept of victim has matured from progeny of criminal justice system. Courts and legislators have came forward to understand the concept of victim beyond the traditional approach and have started considering the physical pain, mental agony and irreparable harm caused to the individual and comparing them to the loss suffered by the State, a legal entity. The victim support services are extended through statutes and policies. A sensitized judiciary renders judgements in the form of 'Judge made laws,' particularly what is referred to as the compensatory jurisprudence, to restore the harmed individual. The awareness about victims of crime among the policy makers and justice practitioners have created a conducive atmosphere for emerging victim orientation in laws enacted by the

legislature and the verdicts of the courts. These initiatives have to be continued to ensure justice to the victims of crime and achieve the object of prevention and control of crimes and rehabilitation both victims and offenders.

Change in the Perception but Not in the FrameWork

A victim comes forward to lodge a complaint with the law enforcing agency and sets the law into motion with the hope and legitimate expectation that the justice would be done. A paradigm shift in the perception is the requirement in approaching the CJA and its institutions that a victim is also a party and is directly concerned with the occurrence of crime, though not expressly recognised by an adversarial system. The present CJA has to be recalibrated so that a person affected and harmed by the crime is recognised as a party, a stakeholder as well as a rights holder. Therefore, fulfilling the victim's legitimate expectation and entitlement is the duty of the justice dispensing institutions.

Victim, a Service Provider to Justice Institutions

All the institutions involved in the crime investigation, adjudication and other incidental processes consider the victim as a service provider and avails from him services such as clues for investigation and rendition of oral or documentary evidence in the trial. The courts treat them as witnesses and consider their testimonies to determine whether the charges stand proved or not. Victim plays multiple roles from informant to witness and becomes stakeholder to claim reliefs and rights in the criminal justice system.

Multiple Definitions and removal of inconsistency

As discussed and analysed in chapters III and IV, the amendments introduced in the year 2009 to the major criminal laws, more particularly the insertion of definition for an expression "victim" in Section 2 (wa) in the Code of Criminal Procedure, 1973, is a milestone in the journey victim justice. The introduction of victim in the legal landscape in India confers certain statutory rights upon the victim, including the right to appeal. However, at present, apart from the definition in Section 2 (wa) Cr.P.C., there are more than 33 definitions for the term victim introduced in the Schemes for Victim Compensation framed by the States. Add to them the definition provided in some other statutes like in Section 3 (ec) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989. Multiple definitions may lead to multiplicity of opinions in the legal landscape at the task of interpretation for purpose of victim representation, participation and in the extension of benevolent provisions of law in favour of the victims of crime. To avoid confusion and possible chaos in identifying a victim of crime in the juridical process, a comprehensive definition, in the light of the UN Declaration 1985, needs to be introduced by amending Section 2(wa) Cr.P.C., the procedural law of general application. This would pave a road for consistency in the victim welfare laws, policies, schemes and also help in judicial pronouncements.

Need to insert Guardian and Guardian Ad-litem in Section 2 (wa) Cr.P.C.

In the definition under 2 (wa) Cr.P.C. introduced in 2009, the legal heir has been incorporated in case of victim who is not alive, to claim the

compensation. The words legal heir may not include the term guardian or next friend-guardian or *ad-litem*. Therefore, if a minor, whose natural parents have predeceased (killed in a crime occurrence) him/her, or not alive to make a claim of compensation, a question may arise as to whether the court appointed guardian or the guardian under whose care the minor is, can be brought within the meaning of the word legal heir or not? To address such circumstances the words "guardian", "*Ad-litem* Guardian" and "next friend" may also be incorporated along with the word legal heir in Section 2(wa) Cr.P.C.

A sub section or a provision is to be inserted in Section 2(wa) for widening the scope of VCS to include the deserving victims who have chosen to institute a case otherwise than on a police report.

Legal Services to Victims of Crime

As discussed and inferences made in Chapters II to IV of this thesis, the term Victim finds a place for the first time in any legislation in India only in 1987. The Legal Services Authorities Act, 1987, refers to 'victims', in Section 12 (b), as a victim of trafficking in human beings or begar as referred to in article 23 of the Constitution and in Section 12 (e) as a person under circumstances of underserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster, who has to file or defend a case. The term victim employed in the Act is very narrow and is confined only trafficking or beggar and to the victims of disaster, flood, drought or industrial disaster, which are accidental in nature or act beyond the control of the human beings. Ethnic violence or caste atrocity are

the only crimes recognised in that provision and the victims of these two crimes are entitled to avail the legal services under the Act. It excludes victims who have suffered by other crimes from the entitlement to receive the legal assistance. The Legal Services Authorities Act, 1987 is the central enactment governing the legal services to the weaker sections of the society to ensure that access to justice is not denied to any citizen as a result of economic or other disabilities. Under the circumstances, use of the term victim with very narrow scope may amount to denial of opportunities to the other victims of crime from getting legal services of a statutory authority created under the Act. Therefore, it would be appropriate to amend Section 12 of the Legal Services Authorities Act, 1987 to widen and expand the scope and ambit so as to include the victims of crime.

Empowerment of victim with Facts and information

In the present legal system a victim can get a copy of the First Information Report (FIR) free of cost from the police station under Section 154 (2) Cr.P.C. After the completion of investigation a final report is prepared and filed by the investigating agency. It is supposed to be an anthology of materials collected during investigation and an indispensible document upon which a court has to take cognizance. The victim and/or witnesses who are summoned for examination need not be aware of the contents of this record. Whereas, an accused is entitled for the Final Report under Section 207 Cr.P.C. Among the two important stakeholders, the accused is empowered with facts and other particulars of investigation to defend his case, but there is no provision to make

the victim aware of the details of investigation. It makes a victim to be put in a dark room and unaware of the investigation particulars and at the same time be required to present crucial evidence in the case and withstand cross examination. Providing a free copy of the final report filed under section 173 (2), Cr.P.C. (charge sheet) empowering the victim with the details of information collected in the investigation is the entitlement of the victim. Therefore, Section 207 Cr.P.C. may be amended giving copies of the Final Report to both the parties free of cost to make it a 'stakeholder neutral' provision and facilitate both the stakeholders to present and defend the case equitably and after knowing well the basic facts of the case brought out in the investigation.

Copies of Judgement to Victims

The judgement or a final adjudication of a competent court at the end of the judicial process addresses only the person charged with the commission of a crime. It either finds the accused guilty and convicts him or acquits him due to the failure of the prosecuting agency in proving his guilt beyond all reasonable doubts. Generally, it is the ultimate result of the long and cumbersome judicial process. Under section 353 (4) Cr.P.C., the judgement shall be made available for perusal of the parties. But, if its copy is required by the victim, an application is to be made and necessary copying charges are also to be paid. A copy of a judgment may be furnished to the victim, on the date of judgement itself, free of cost. It would neither be a burden nor cause any

prejudice to the accused/convict. Instead, it would inform the victim, a stakeholder, about the judicial process.

Victim Participation

The experiences from the functioning of International Criminal Court (ICC) and the practice of considering Victim Impact Statement (VIS) at the sentencing process in some of the Western jurisdictions have proved the fact that the inclusion of victim through the adjudicatory process a role more than that of a witness would not cause any detriment to existing framework of Criminal Justice Administration. It would rather enhance the value of justice of the process. Victim, therefore, ought to be allowed to participate in the adjudicatory process with limited rights to make pleas and statements, under the control of prosecuting agency representing the State. Of course, in case of any conflict, the opinion of the State will have to prevail upon the victim's version.

Further, draft Victim and Witness Protection Scheme, 2018 suggested by the Supreme Court in the case in W.P. (Criminal) No. 156 of 2016 on 05 December, 2018 should be given effect to till a comprehensive statute on Victim and Witness protection is enacted by the legislature to address the fear in the minds of the victims witnesses to encourage them to approach the law enforcing authorities with their grievances, cooperate with the investigating agencies and appear before the justice institutions.

Admissibility of Victim Impact Assessment or Victim Impact Statement of Victims of Heinous Offences in the Sentencing Hearing

The statement of the surviving victims of crimes of serious nature or the legal heir of the person murdered in hate crimes, honour killings or such offences of grievous nature, recorded by the Secretary of the District or Taluk Legal Services Authority under the Legal Services Authority Act, 1987 or the Victim Liaison Officer (VLO) nominated by the State, can be made admissible for the limited purpose of sentencing the offender. It should be relied upon only after the guilt is proved. This would help the trial court understand the gravity of the crime, the actual consequences of crime and impose adequate and befitting punishment upon the offender.

Sentencing and Listening* to the *Victim

In India, there are no structured sentencing guidelines framed to reduce the punitive dilemmas of the judge after the guilt is proved, while enormous discretionary powers are conferred upon them. In such a scenario, before imposing sentence after conviction, allowing the victim to make his plea on the question of appropriate sentence at that stage would not only comply with the *'audi alterm partem'* (hear the other side also), a golden rule of principles of natural justice, but the court can also consider the plea and submissions, if any, and award a just desert. Consequently, preferring of appeal on the ground of inadequacy of sentence would be considerably reduced. Moreover, the duty bestowed upon the justice dispensing authorities for compliance of a basic rule that *'justice should not only be done but it must also be seen to be done*' would be complied with.

Listening to the Victim while exercising powers under the Probation of Offenders Act

As the courts arrive at the finding of guilt after accepting the testimonies and evidence of the witnesses and victims, an opportunity to the victim to state the impact of crime before exercising the discretionary powers to extend the benefits of probation in favour of the first offender would make proceedings logic and rational. Outright avoidance of the victim and considering the accused alone in the process of admonition or probation needs to be amended with a mandatory provision to hear the victim. It would make the sentencing process and probationary practices more effective and also amounts to compliance of principles of natural justice.

Appreciation and application of Plea Bargaining Practices

The process of Plea Bargaining reflects restorative values and its procedures contemplated in Chapter XXI A of the Code of Criminal Procedure, 1973 duly recognises the victim as a stakeholder and indeed, it does attempt to transform the status of victim from *de facto* to *de jure* in the CJA. Further, it is mandatory for the court to award pecuniary reliefs to the victim as a measure to repair the harm caused due to crime. But the provisions of Plea Bargaining have not attracted any of the stakeholders nor are they invoked by courts as they remain redundant in the legal texts. This practice has not yet geared up in the criminal justice system in India, because there is inadequate awareness created among the litigants and the Bar is not coming forward to articulate or promote it. Equally, the Bench is hesitating to adopt or invoke the Plea

Bargaining even in the deserving cases. One among the reasons is that the time consuming process of such practices have not yet been appreciated on the administrative side on par with the cases disposed of on merits, after full trial. The disposal numbers is also a yardstick for the magistrates and judicial officers to assess their performance. If, while assessing the work done / performance of a judicial officer, the cases disposed of under Chapter XXI A, Cr.P.C. is also factored in for award of grade or point on par with the cases decided on merits greater attention from the Bench can be expected towards this option. In the criminal justice system the Plea Bargaining has to be promoted like the Alternative Disputes Resolutions (ADR) is appreciated in the civil justice system.

Restoration Enhances the Justice

It is not a mere punishment to the offender that recompenses the sufferer of a crime occurrence, but an effective restoration to a pre-crime stage, as much as possible. The recovery of property lost or damaged in a crime occurrence or pecuniary damages that helps to reimburse the medical expenses that had to be spent for treatment or loss of livelihood is the minimum anticipation of redressal by the victim. Criminal justice would only be considered comprehensive, if it includes the avenue for a lawful demand and satisfaction of the victim, who is a stakeholder and justice seeker.

Need to avoid Dual Fora and Separate Proceedings

In the present criminal legal system, a victim is to approach the court of law to get justice, to determine the guilt and slap the offender with punishments

as prescribed by the penal statutes. At the same time, for compensation under Victim Compensation Schemes framed by the States, a victim has to apply, appear and adduce evidence (if necessary) before the District Legal Services Authority (DLSA) or State Legal Services Authority (SLSA) in the enquiry conducted for the purpose deciding the eligibility and determination of quantum of compensation. It forces the victim to approach two different fora and to be part of two separate processes of adjudication for one crime occurrence. These dual fora processes may be made a single comprehensive process in the court which takes cognizance of the offence.

Execution of Awards under VCS

In the VCSs framed by the States/UTs there is no provision incorporated for execution and enforcement of the awards for compensation passed in favour of the victim by the District or State Legal Services Authority. In the absence of implementing mechanism and its particulars and without an authority for execution, in the case non-payment of compensation even after the order from DLSA or SLSA, no remedy open to the victim is provided for in any of the Victim Compensation Schemes. The VCSs are silent as to the officer/authority before whom the execution proceedings will lie. There is no authority prescribed for execution if the District Collector or Superintendent of Police or Commissioner of police, as the case may be, does not come forward to honour the award. A provision facilitating procedure for execution prescribing the authority/ Officer before whom it shall be initiated, is to be incorporated in the VCSs.

Benefits of compensation to Complainants/Victims under Section 200 Cr.P.C.

All the VCS have made FIR a compulsory document before making an application. There is an alternative legal option available to the victims to set the criminal law in motion, resort to the private complaint under Chapter XV Section 200 Cr.P.C. But in the VCS there is no express provision to extend its benevolent provisions to cases instituted otherwise than on a police report.

Judicial Trend in Victim Assistance

After the introduction of 357 A in the Code of Criminal Procedure, 1973 the States and Union Territories have framed victim assistance Schemes. As discussed in Chapter XI of this thesis, at least in some cases, the victims have availed compensation bypassing the Schemes and by invoking the writ jurisdiction of the High Court. It would encourage 'forum shopping' among the claimants. Further, granting compensation without applying the rules and tables of the Scheme would create inconsistency and inequity. As pointed out earlier as an example, treating a complainant of an alleged man missing or being unheard of for a period of seven years forming the basis for award of compensation, that too the only basis, may dilute the real purpose of victim compensation. Equally post-disbursal monitoring of compensation amount would prevent the victims of crime from using it at time of their imperative needs. Similarly, compensation cannot be treated as a criteria for mitigating the punishment statutorily to be imposed upon the offender or for any other reasons. In the process of rendering justice to victims, sentencing the

wrongdoer cannot be diluted or substituted for by reason of compensation being paid to the victims of these crimes.

Need to Augment the Victim Compensation Scheme (VCS) Fund

In every crime occurrence the State need not shoulder the financial burden to reimburse victim. Instead, in deserving cases, the State can reserve its rights to recover the amount paid to the victims under VCS through Revenue Recovery Act, 1890 from offender. The wage earning prison inmates, who were slapped with rigorous imprisonment, may be directed to contribute a portion, *e.g.* one third, of their prison income to the VCS Fund which would reduce the burden on the State exchequer. It would also make the offender personally liable in the Restorative Justice process.

In the light of the study and understanding and appreciating the developments till now and further required to cater to the needs of the vulnerable class referred to as victims of crime, a Model set of provisions are suggested to be considered to be adopted by the authorities.

FOLLOWING MODEL VICTIM COMPENSATION SCHEME IS SUGGESTED FOR CERTAINTY, CONSISTENCY AND EQUITABLE CONSIDERATION OF VICTIMS OF CRIME ACROSS THE COUNTRY IT CATERS TO ALL CATEGORIES OF VICTIMS OF CRIME INCLUDING SURVIVORS OF ACID ATTACK, SEXUAL ASSAULT, CHILD VICTIMS AND PHYSICALLY/MENTALLY CHALLENGED OR DIFFERENTLY ABLED PERSONS

THE MODEL VICTIM COMPENSATION SCHEME

Becoming a victim of any crime is a traumatic experience where a person suffers a serious physical or mental injury as a result, the impact can often be even more profound and long-lasting than what can be expected. Laws have now recognised the victims of crime as stakeholders and provided them with rights. The aim and objective of the Compensation is that it should act as a restorative support to the sufferers of crime to restore them to the pre-crime stage.

The cases covered under the Motor Vehicle Act, 1988 (59 of 1988) wherein compensation is to be awarded by the Motor Accident Claims Tribunal and cases covered under existing schemes/facilities is not expected to be covered under this Scheme.

This Model Victim Compensation, *inter alia*, suggests a comprehensive definition for the term victim, covering all categories of victims of crime including of survivors of acid attack, sexual assault, child victims and physically/mentally challenged victims of crime, minor victims, seeking uniform scale to quantify compensation amount and simplify procedure for determination and disbursement.

MODEL VICTIM COMPENSATION SCHEME

Chapter I

Short Title and Commencement

Section 1: This Scheme may be called the Model Victim Compensation Scheme to be used as a guideline by the States and Union Territories.

DEFINITIONS

1) In this Chapter, unless the context otherwise requires:—

'Code' means the Code of Criminal Procedure, 1973 (2 of 1974);

'Dependent' includes husband, father, mother, grandparents, unmarried daughter and minor children of the victim as determined by the State Legal Services Authority or District Legal Services Authority on the basis of a report of the Sub-Divisional Magistrate of the area/Station House Officer/ Investigating Officer concerned or on the basis of material placed on record by the dependents by way of affidavit or on its own enquiry.

'Damage' means the loss caused to the movable and/or immovable property (excluding intellectual property, reputation and similar assets or possessions of a person) as a result of the crime.

"District Legal Services Authority" means the District Legal Services Authority (DLSA) constituted under section 9 of the Legal Services Authorities Act, 1987(Act 39 of 1987) for a District

'Fund' means State fund i.e. victim compensation fund constituted under the State Victim Compensation Scheme.

'Government' means 'State Government' wherever the State Victim Compensation Scheme or the State Victim Compensation Fund is in context

and 'Central Government' wherever Central Government Victim Compensation Fund Scheme is in context and includes UTs.

'Injury' means any harm caused to property, body or mind of a person.

'Minor' means a girl or boy child who has not completed the age of 18 years.

'Offence' means offence committed against a human and is punishable under IPC or any other law in force.

'Penal Code' means Indian Penal Code, 1860 (45 of 1860);

'Victim' means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.

The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim.

'Acid attack victim/ survivor' means and includes the person who suffers burn or other injuries in a crime wherein acid or any other corrosive substance is used by the perpetrator of crime.

'Disabled victim' means a person physically challenged / mentally challenged who suffers by a crime.

'Minor victim' means a person who has not attained 18 years of age.

In case of death of their parents, guardian or any person appointed by the court may be treated as aggrieved for a minor or disabled victim.

The victims of crime may also be substituted by the term 'Survivor and the term 'he' and its derivatives as used in this Scheme includes person of any gender.

'Sexual Assault Victims' means female who has suffered mental or physical injury or both types of injury as a result of sexual offence, including offences under Sections 376 (A) to (E), Section 354 (A) to (D), and Section 509 IPC and more fully defined in Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes - 2018

'Woman Victim/ survivor of other crime' means a woman who has suffered physical or mental injury as a result of any offence mentioned in the attached Schedule including Sections 304 B, Section 326 A, Section 498A IPC (in case of physical injury of the nature specified in the schedule) including the attempts and abetment and more fully defined in Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes – 2018.

Chapter II
VICTIM COMPENSATION FUND

(1) There shall be a Fund, namely, the Victim Compensation Fund from which the amount of compensation, as decided by the State / Union Territory Legal Services Authority, shall be paid to the victims and their dependent(s) who have suffered loss or injury or require rehabilitation as a result of the crime.

(2) The 'Victim Compensation Fund' may comprise the following:-

(a) Budgetary allocation for which necessary provision shall be made in the Annual Budget by the Government.

(b) Receipt of amount of fines imposed under the respective penal provision or ordered to be deposited by the courts in the Victim Compensation Fund.

(c) Amount of compensation recovered from the wrongdoer/accused

(d) Donations / contributions from International / National / Philanthropist / Charitable Institutions / Organizations and individuals.

(e) One third of the salary of the prisoners he contributes to his family, if no contribution is made to his family 2/3rd of total wage / earning of the prisoner

COMPOSITION OF COMMITTEE OF VICTIM COMPENSATION FUND

The Fund shall be operated by the State Legal Services Authority of the State or the Union Territory.

The mobilization, augmentation and administration of the Victim Compensation Fund shall be by a Committee under the Chairman of the State Legal Services Authority of the State or the Union Territory. The Committee of shall consist of the

1) Director General of Police
2) Commissioner or a Police Officer not below the cadre of Superintendent of Police nominated by the Government of National Capital Territory of Delhi/ Union territory.
3) Secretary to Ministry of the Social welfare /women empowerment.
4) Secretary to Ministry of the Home Department
5) Secretary to Ministry of the Prison Department or Probation
6) Secretary to Ministry of the Child welfare

The committee shall meet once in six months and, after deliberations, submit its report/proposal to the Chief Secretary of the State / Union Territory and copies to the Supreme Court and High Court of the State. The report/proposal may relate to augmenting the fund, enhancement of compensation, factors to be taken in to consideration, if any, and other issues involved in the determination and disbursement of compensation to the victims of crime.

ELIGIBILITY TO RECEIVE COMPENSATION

Victim shall be eligible for the grant of compensation if ordered by the Court. Under this Scheme, the victim or guardian or legal heir, as the case may be, shall be entitled to financial assistance and restorative support services if one of the following conditions are satisfactorily fulfilled:

(1) If the offender is not traced or identified, the victim may also apply for grant of ·compensation under sub-section (4) of section 357 A of the Act to meet expenses for physical and mental rehabilitation.

(2) The victim or claimant must report the crime to the officer-in-charge of the local Police Station or to the Magistrate having jurisdiction before making claim for compensation or the police under whose jurisdiction the offence was committed shall have taken *suo moto* cognizance of the crime.

(3) The victim or claimant (in the case of death of victim) shall fully cooperate with the police and prosecution from the stage of investigation till conclusion of trial of the case. Turning hostile or refusing to depose or failure to appear during trial shall be considered to be non cooperation.

(4) The crime must be one in which the victim sustains mental or bodily injury or death.

(5) The death or permanent incapacitation of the victim was not the result of suicide or self-infliction of bodily or mental injury or a result of the victim's own wrong doing.

(6) The victim has not been compensated for the loss or injury under any other scheme of the Central or the State Government or Insurance Company or any other institutions where payment is made *ex-gratia*.

(7) Perpetrators of the crime or his dependent will not be eligible to any compensation under the scheme

Explanation: The victim shall inform the authority the details of claims for compensation made under any other scheme or from any other source. The victim may exercise option to choose another scheme of Government, if the same is more beneficial to him. The victim will not be entitled to lay claim to both benefits and part benefit from one scheme and part from another.

The payments so received by the victim on account of insurance claim, *ex-gratia* etc. under any other Act or Scheme(s), shall be considered as part of the compensation amount under this Scheme and if the eligible compensation amount exceeds the payments so received by the victim from collateral sources mentioned above, only the balance amount shall be payable out of the Fund

INTERIM RELIEF TO THE VICTIM IN CERTAIN CASES

The State Legal Services Authority or District Legal Services Authority, as the case may be, may order for immediate first-aid facility or medical benefits to be made available free of cost, or any other interim relief (including interim monetary compensation) as deemed appropriate, to alleviate the

suffering of the victim on the certificate of a police officer, not below the rank of the officer-in-charge of the police station, or a Magistrate of the area concerned or on the application of the victim/ dependents with supporting materials.

Provided that the, interim relief so granted shall not be less than 25 per cent of the maximum compensation awardable as per schedule applicable to this Chapter, which shall be paid to the victim in totality.

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

EXECUTION OF AWARD OF COMPENSATION

The award of compensation passed by the SLSA/DLSA shall be treated as a Decree of a Civil Court for the purpose of execution, the Principal Civil Court of original jurisdiction in the territorial limit wherein the award is made or the place the victim resides or undergoes treatment or counseling shall be the competent forum.

DISBURSEMENT OF COMPENSATION TO CERTAIN VICTIMS

In case the victim is an orphaned minor without any parent or legal guardian the relief or the compensation shall be disbursed to the Bank Account of the child, opened under the guardianship of the Superintendent, Child Care Institutions where the child is lodged.

Annexure A

Multiple Definitions for the term Victim of Crime
in the Victim Compensation Schemes

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S.No	State / VCS / Rule	Definition
1	Andhra Pradesh Victim Compensation Scheme, 2015, Section 2(i)	*"Victim" means as defined u/s 2(wa) of Code of Criminal Procedure, 1973, including victim who is sexually exploited for commercial purposes, trafficking, sufferer of acid attack and also a dependent who is leading life on the income of the victim, and who require rehabilitation.*
2	Arunachal Pradesh Victim Compensation Scheme, 2011 Section 2(d) and (e)	'*Victim' means any person who himself or herself has suffered loss or injury as a result of crime and requires rehabilitation.* *'Dependent' means and includes those who at the time of the deceased's death was either the spouse or a natural parent or a child of the deceased.*
3	Assam State Victim Compensation Scheme, 2012 , Section 2 (f) (Definition in Section 2(wa) Cr P C verbatim reproduced)	*"Victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir*.
4	Bihar State Victim Compensation Scheme, 2011 , Section 2 (d)	*"Victim" means a person who himself has suffered loss or injury as a result of crime causing substantial loss to the income of the family making it difficult to meet their both ends without the financial aid and/or has to spend beyond his means on medical treatment of mental/physical injury and require rehabilitation.*
5	Chhattisgarh State Victim Compensation Scheme, 2011 ,	*"Victim" means a person who himself has suffered loss or injury as a result of crime and requires*

	Section 2 (4)	*rehabilitation and this includes dependent family members also.*
6	Goa State Victim Compensation Scheme, 2012 , Section 2 (k)	*"Victim" means a person who has suffered loss or injury as a result of the crime and who requires rehabilitation.*
7	Gujarat State Victim Compensation Scheme, 2013, Section 2 (d)	*"Victim" means a person who has suffered loss or injury as a result of the crime and require rehabilitation and the expression victim includes his/her dependents.*
8	State Haryana Victim Compensation Scheme, 2013	*"Crime" means illegal Act of omission or commission or an offence committed against the human body of the victim.* *"Dependents" means wife or husband, father – mother, unmarried daughter, minor, children and include other legal heirs of the victim who, on providing sufficient proof, is found fully dependent on the victim by the District Legal Service Authority;* *"Family" means parents, children, and includes all blood relations living in the same household.* (Victim – not defined)
9	State Himachal Pradesh Victim Compensation Scheme 2012, Section 2(h)	*"Victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir.*
10	State Jammu & Kashmir Victim Compensation Scheme 2013,	*"Victim" means a person who himself has suffered loss or injury as a result of crime and require*

	Section 2(d)	*rehabilitation and includes dependent family members.*
11	State Jharkhand Victim Compensation Scheme, 2012, Section 2 (d)	"Victim" means a person who himself has suffered loss or injury as a result of crime and require rehabilitation and includes dependent family members.
12	State Karnataka Victim Compensation Scheme, 2011, Section 2 (e)	"Victim" means a person who himself has suffered loss or injury as a result of crime and require rehabilitation and includes his dependents who had suffered loss or injury as a result of the crime and who require rehabilitation.
13	State Kerala Victim Compensation Scheme, 2014, Section 2 (i)	"Victim" means a person who has suffered any loss or injury caused by reason of the act or omission on the part of the accused and who requires rehabilitation under this scheme and includes the guardian or legal heir of such person, but does not include a person who is responsible for injury to such person;
14	Madhya Pradesh Crime Victim Compensation Scheme, 2015, Section	Victim means a person who has suffered loss or injury caused by reason of the Criminal act or omission on the part of the accused and who require rehabilitation under this scheme and includes the guardian and legal heir of such person, but does not include a person who is responsible for injury to such person.
15	State Maharashtra Victim Compensation Scheme, 2014, Section 2 (d)	"Victim" means a person as defined in clause (wa) of section 2 of the Code of Criminal Procedure, 1973 (II of 1974).

16	Manipur State Victim Compensation Scheme. 2011, Section 2(d)	"Victim" means a person who himself has suffered loss or injury as a result of crime and require rehabilitation and includes dependent family members.
17	Meghalaya Victim Compensation Scheme, 2014, Section 4(j)	Victim means a person who has suffered loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression victim includes in case of death of the victim, the guardian or legal heir.
18	Mizoram Victim Compensation Scheme. 2011, Section 3(i)	"Victim" means a person who himself has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged; and causing burns are maiming disfiguring or disabling or causing grievous hurt as a result of acid attacks and require rehabilitation and the expression "victim" includes dependent family members.
19	State Nagaland Victims Compensation Scheme, 2012, Section 2(4)	"Victim" means a person who himself has suffered loss or injury as a result of crime and requires rehabilitation and includes dependent family members.
20	Odisha State Victim Compensation Scheme – 2012, Section 2 (g)	"Victim " means a person who himself/herself suffered loss or injury as a result of crime and requires rehabilitation and in case of his/her death also his/her dependents.
21	Punjab Victim or their Dependents Compensation Scheme, 2011	No definition provided.

22	Rajasthan Victim Compensation Scheme – 2011, Section 2 (d)	"Victim" means a person who had suffered loss or injury as a result of crime and requires rehabilitation and the expression victim includes his dependents.
23	Sikkim Victim Compensation Scheme– 2011, Section 2 (d)	"Victim" means a person who himself has suffered loss or injury as a result of crime and require rehabilitation and includes dependent family members.
24	Tamil Nadu Victim Compensation Scheme,2013	No definition
25	Telengana State Victim Compensation Scheme, 2015, Section 2(k)	'Victim' means a person who has suffered any loss or injury caused by reason of the act or omission on the part of the accused and who requires rehabilitation under this Scheme and includes the guardian or legal heir of such person.
26	Tripura State Victim Compensation Scheme – 2012, section 2 (e)	"Victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression `victim' includes his or her guardian or legal heir.
27	Uttar Pradesh State Victim Compensation Scheme, 2014, section 2 (d)	"Victim" means a person who himself has suffered loss or injury as a result of the crime and requires rehabilitation, and includes his dependent family members.
28	Uttarkhand State Victim from Crime Assistance Scheme, 2013, Section 2 (d)	"Victim" means a person, who himself has suffered loss or injury as a result of crime, Acid attack, Human trafficking, Serious accident etc. and

		require rehabilitation and includes dependent family members.
29	State West Bengal Victim Compensation Scheme, 2012, section 2 (e)	"Victim" means a person who himself has suffered loss or injury as a result of crime and requires rehabilitation and includes dependent.
30	Union Territory of Andaman & Nicobar Islands	The researcher could find the allotment of fund to Andaman & Nicobar Islands for Victim Compensation, under Central Victim Compensation Fund (CVCF) guidelines. But could not search and get the Rules framed under VCS of A & N Islands.
31	Union Territory Chandigarh Victim Assistance Scheme – 2012, Section 2 (a)	"Victim" means as defined in clause (wa) of section 2 of the Code of Criminal Procedure 1973.
32	Union Territory Dadra & Nagar Haveli Victim Assistance Scheme - 2012, section 2 (a)	"Victim" means as defined in clause (wa) of section 2 of the Code of Criminal Procedure 1973.
33	Union Territory Daman & Diu Victim Assistance Scheme, 2012, Section 2 (i)	"Victim" as defined in clause (wa) of section 2 of the Code of Criminal Procedure, 1973.
34	Union Territory Delhi Victims Compensation Scheme – 2015, section 2 (k)	"Victim" means a person who has suffered loss or injury as a result of the offence and in the case of his death, the expression `victim' shall mean to include his or her guardian or legal heir; Words and expressions used in this Scheme and not defined shall have the same meaning as assigned to them in the Code of Criminal Procedure, 1973 and the Indian Penal Code, 1860.

35	Union Territory Lakshadweep Victim Assistance Scheme - 2012, section 2 (a)	“Victim” means as defined in clause (wa) of section 2 of the Code of Criminal Procedure, 1973.
36	Union Territory Puducherry Victim Assistance Scheme – 2012, Section 2 (h)	“Victim” means as defined in clause (wa) of section 2 of the Code of Criminal Procedure, 1973.

Annexure B

Published Papers

Judicial Interventions in Combating of Acid Violence and Rehabilitation of Victims in India

(Indian Journal of Criminology, Vol 48(1), 2020 ppl-14, ISSN: 0974-7249, www.isc70.org, Listed in the UGC Care List)

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Plea Bargaining: A non-trial Adjudication to Enhance Justice for Victims of Crime- Trends and Issues

(Chapter of a book, Dr Ananth Kumar Tripathi, (ed) 'Criminal Justice System in India: Need for Systemic Changes', ISBN: 978-81-89128-71-5, SSB, New Delhi (2016)

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The Indian Journal of Criminology is a joint publication of Indian Society of Criminology (ISC), K.L. Arora Chair in Criminal Law and Centre for Criminology and Victimology at National Law University Delhi. The Journal is published twice in a year (January and July). The scope of the Journal covers all aspects of criminology, penology and victimology including all such issues bordering sociology, psychology, law, social work and ICT applications. Empirical research based papers in the broader domain of criminal justice administration are specially encouraged. Comparative studies from the international contributors focusing on the substantive and applied aspects of criminology and criminal justice are highly solicited. We also welcome papers from the University Departments/ institutions, Correctional Services, Social Welfare Organisation, forensic Sciences Laboratories etc.

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Articles

JUDICIAL INTERVENTIONS IN COMBATING OF ACID VIOLENCE AND REHABILITATION OF VICTIMS IN INDIA

Sathiyamurthy L S*

ABSTRACT

The intentional use of corrosive substance as a weapon against the person, who rejects the diktats has been recognised as acid violence. It causes debilitating burn injuries and permanent scars upon the victims. This heinous crime rate has been alarmingly increasing all over the world, and more particularly against women. The victims of such acid violence occurrences are not only suffering from immediate physical pain and financial constraints but a long time psychological consequences, trauma and negative attitudes from their peers and family members. The Courts in India often intervened to provide immediate and necessary reliefs to the sufferers of acid injuries and also endeavoured in the task of combating acid violence by strengthening the legal framework and imposing restrictions on easy availability of acid. This paper critically examines the 'judicial interventions' in India in the criminalisation of non-accidental acid pouring incidents and its prevention, treatment of victim and granting of compensatory reliefs.

KEY WORDS

Acid violence, Burn injuries disability, Judicial intervention, Victims of acid attack, Vitriol.

Introduction

"You hold the acid that charred my dreams
Your heart bore no love.
It had the venom stored
There was never any love in your eyes
They burn me with caustic glance
I am sad that your corrosive name will always be part of my identity that I carry with this face.
Time will not come to my rescue
Every surgery will remind me of you
You will hear and you will be told that the face
You burned is the face I love now.
You will hear about me in the darkness of confinement
The time will be burdened for you
Then you will know that I am alive
Free and thriving and living my dreams".[1]

This poem by a valiant victim of vitriol would depict the physical pain, mental agony, social neglect, stigma and other sufferings perpetually experienced by her, aftermath the acid attack occurrence. The intentional acid pouring, a grave crime that causes perennial scars on the body of the victims and make them to suffer with agony. It has been recognised by the jurists, medical professionals and people from all walks of life as a vicious act of attack.[2] The Supreme Court has described that an act of causing grievous hurt by use of acid, by its very nature, is a gruesome and horrendous one, which, apart from causing severe bodily

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[1]*Ms Laxmi, a survivor of acid attack reads out this poem while receiving the honour from the first lady USA Michelle Obama at the International Women of Courage Award in Washington D.C on March 5, 2014. She pioneered for grant of mandatory compensation to acid attack victims, by filing a Writ Petition before the Supreme Court of India. Details available in https://www.buzzfeednews.com visited on October 8, 2019.*

[2]*The terms "acid attacks" and "acid violence" are used interchangeably. The former refers to specific crime occurrence and the latter refers to a broader context. The word "vitriol" used refers to the attack in which sulfuric acid used as a weapon.*

pain, leaves the scars and untold permanent miseries for the victim.[3] The burn injuries caused by the non-accidental throwing of acid is a major cause of mortality, morbidity and disability. This gruesome crime puts the victim in a miserable living condition or even it results in death. In most of the cases, the victims are women. The dreadful act of attacking women with acid has been taking place across different parts of the world. In India, the legislature has responded only after the geared-up measures initiated through Public Interest Litigation (PIL) and directions given by the judiciary in cases pertains to acid crimes. This paper demonstrates the judicial interventions and its effects in the treatment of acid attacks victims, combating the acid violence and introduction of victim redressal mechanisms in India.

I) 'SURVIVOR' - A PREFERRED PSEUDONYM

The person suffering with scars or burn injuries caused by acid attack prefers to claim or identify by a pseudonym 'survivor' rather than victim. Both in English and non-English speaking countries they have avoided use of the term "victim" to denote a person injured by acid violence. The Non–Governmental Organizations (NGO) that extend humanitarian aid to the sufferers of acid attack have also been functioning in the name and style of '*Acid attack Survivors*' in United Kingdom, Bangladesh, Pakistan and India. A cursory view of the painful narratives of the women suffered by acid attack injuries hosted in the websites of the volunteers and Non-Governmental Organizations (NGO) serving to help the acid attack victims in India, United Kingdom, Bangladesh reveals that it is like a 'phoenix bird' the victims of acid attacks take rebirth as it were and rebuilding their life aftermath acid violence without adequate support from peers and relatives.[4] Further, they demand love from the society and expect justice from the institutions. *Per contra,* in the pragmatic contexts the victims of vitriol are forced to encounter with hostilities from their relatives, neglect from the society or community they belong to and poor response from the government machineries.[5] As narrated in a compilation, unlike other victims the acid violence victims are forced to face psychological damage, negative or unsympathetic behaviour from family which leads to breakdown of familial relationship, loss of economic surety and sense of remoteness which leads to stigmatization.[6] Despite of all these adverse factors after the tragedy of acid attack they attempt to survive and succeed in the life and that makes the victims often preferred to be identified as survivors rather than victims. The nomenclature 'survivor' opted by the acid burned victims reflects the wish and endeavours to survive with scars and fight for justice but not expecting undue sympathy or mercy from their peers and society.

II) ACID: THE LETHAL LIQUID

The acid attack is an act of intentionally pouring, spraying, throwing of chemical substances such as hydrochloric, sulfuric or nitric acids on the person to maim, disfigure or to make blind. The corrosive chemical substances being used for cleaning purposes dissolve skin tissues, fat and muscle when they come into contact with the body when handled carelessly in day-to-day life. Whereas in the acid violence occurrences the perpetrators throw, or pour acid onto the victims' faces and

[3]Omanakuttan vs State of Kerala (Criminal Appeal No: 873 of 2019) Judgement dated 9 May, 2019, Supreme Court of India.
[4]https://www.thebetterindia.com/114606/acid-attack-survivor-resham-khan-india/
https://www.asti.org.uk/ and
https://acidsurvivors.org/ in these websites the word victim has been conveniently avoided but the term survivor is opted by the organisations.
[5]The word 'community' is synonymous to mean social group, sharing common characteristics or interests and not refer to a caste or other discriminating factors in Indian context.
[6]Kerry McBroom & Salina Wilson, Burning Injuries, Human Rights Law Network, New Delhi, (2014) P 29.

bodies which quickly burns through the flesh and bone. The basic intention is not to kill but permanently disfigure and cause extreme physical and mental suffering to the victims. It causes devastating health consequences for victims and short-term effects which includes immense physical pain, while long-term effects can include blindness, loss of facial features and severe mental agony. At first contact, acid feels like water on the body, but within seconds, it causes a burning sensation that quickly becomes increasingly intense.[7] If not washed off immediately with water, acid can melt away a victim's skin and flesh, going as deep as to dissolving bones.[8] When thrown at the face, acid quickly burns and destroys victim's eyes, eyelids, ears, lips, nose, and mouth.[9] It takes five seconds of contact to cause superficial burns and 30 seconds to result in full-thickness burns. After the attacks, victims are at risk of breathing failure due to the inhalation of acid vapors which cause either a poisonous reaction or swelling in the lungs. In the weeks or even months after the attack, acid burn victims may suffer from infections, which can also cause death if not treated with proper cleaning techniques and antibiotics.[10]

Victims must endure painful surgical procedures just to prevent further harm and suffering. As mentioned, if not washed off immediately, acid continues to burn the skin, and may eventually cause skeletal damage and organ failure.[11] If the dead skin is not removed from an acid violence victim's body within four or five days, the new skin may grow together with the old to cause further facial deformities. Therefore, acid is considered as a highly dangerous weapon of crime.

III) ACID CRIMES AND CLEMENCY

In India, offenders who have committed grave and heinous crimes and languishing in prisons as death row convicts or life convicts can avail the benefits of clemency from the powers vested with the executives. The President has the power to grant pardons, reprieves, respites or remission of punishments or commute the sentence of any person convicted of any offence.[12] The Governor of the State can also exercise such powers in the State.[13] The Code of Criminal Procedure, 1973 also conferred power upon the State to commute the sentence of death or any other imprisonment awarded by the competent courts.[14] But the Supreme Court was of the opinion that the acid attack cases have to be exempted from the domain of such post-sentencing pardons and remissions. In *Ravada Sasikala vs State of Andhra Pradesh*[15] it had an opportunity to dealt with a victim of acid attack and set a new trend for the treatment of the convicted person without leniency even in the post-conviction stage. In this case the Supreme Court made a humane approach towards the young woman victim whose family refused the marriage alliance

[7]See Md. Shahidul Bari & Md. Iqbal Mahmud Choudhury, Acid Burns in Bangladesh, 14 ANNALS OF BURNS & FIRE DISASTERS 115, (2001).

[8]Sital Kalantry & Jocelyn Getgen Kestenbaum, Combating acid violence in Bangladesh, India and Cambodia, (2011), https://www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/AvonGlobalCenterforWomenandJustice.pdf. visited on 13 January, 2020

[9] See Law Commission of India, Report Submitted to The Hon'ble Supreme Court of India for Its Consideration in The Pending Proceedings Filed by One Laxmi in W.P (Crl.) No. 129 of 2006 On "The Inclusion of Acid Attacks as Special Offenses in The Indian Penal Code and A Law for Compensation for Victims of Crime" 10 (2009) (No. 226), available at http://lawcommissionofindia.nic.in/reports/report226.pdf.

[10]Ibid.

[11]See, e.g., Acid Attack Victim Succumbs to Burns, THE HINDU, April. 12, 2010, http://www.hindu.com/2010/04/12/stories/2010041262981000.htm (last visited July 3, 2018).

[12] Article 72, Constitution of India.

[13] Article 161, Constitution of India.

[14]Section 433, Code of Criminal Procedure, 1973.

[15](2017) 4 SCC 546.

proposal, was attacked with acid by the accused. He trespassed into her house and poured acid on her head; it has been observed by the Supreme Court that it is individually as well as collectively intolerable. The pain and sufferings undergone by the victim also reflected in the judgment as follows:

"Indeed, it cannot be ruled out that in the present case the victim had suffered an uncivilized and heartless crime committed by the respondents and there is no room for leniency which can be conceived. A crime of this nature does not deserve any kind of clemency. This Court cannot be oblivious of the situation that the victim must have suffered an emotional distress which cannot be compensated either by sentencing the accused or by grant of any compensation."

The Supreme Court has approached this case in the victimological perspectives and the pain and sufferings undergone by the girl was duly understood by the court and it reflected in the observation made in the judgment. In addition to upholding of the conviction and sentence awarded against the accused person, the court has opined that the acid attack offences have to be exempted from clemency jurisdiction. This observation would sensitize the executives and serves like an eye opener to the State or prison authorities while exercising their powers to commute the sentence.

IV) ACID ATTACK - AN ATTEMPT TO MURDER

Prior to the amendment and insertion of Sections 326A and 326B IPC (amendments introduced in 2013 in IPC and Cr P C analyzed separately in this study) the acid attacks were registered as an offence under Section 326 IPC, which dealt with voluntarily causing grievous hurt by dangerous weapon. The Supreme Court felt that using of acid as a weapon and causing grievous injury is a most endangering act to the life of a human and it can be seriously viewed for imposing stringent punishment upon the accused. In *Sachin Jana vs State of West Bengal*[16] which was decided by the Supreme Court in the 2008, the accused had used acid to attack the victim which caused disfigurement. The Supreme Court considered the gravity and magnitude of the crime and it applied Section 307 IPC instead of 326 IPC read with Section 34 IPC. It has held that to justify a conviction under Section 307 it was not essential that 'bodily injury capable of causing death was inflicted'. It was further clarified that the penal section made a distinction between the act of the accused and its result. Therefore, it was not necessary that the injury actually caused to the victim should be sufficient under ordinary circumstances to result in death. The court is only required to see whether the act, irrespective of its result, was done with the intention or knowledge mentioned in Section 307 IPC. It was sufficient if there was intent coupled with an overt act in execution thereof. The views expressed by the Supreme Court would show that the apex judiciary sensitized itself and dealt the acid attack cases with iron hands to impose severe and appropriate punishments to the offenders, when there were no specific penal sections for acid attacks cases in India. This judgement served as a judge made law and filled the lacunae in the penal law prior to amendments inserted in 2013.

V) ACID ATTACK VICTIMS: THE INDIAN SCENARIO

The acid violence has become a global phenomenon and occurs in many countries, including Uganda, Ethiopia,[17] UK and the United States.[18] However, a significant

[16] *(2008) 3 SCC 390.*

[17] *See Amber Henshaw, Acid Attack on Woman Shocks Ethiopia, BBC NEWS, Mar. 28, 2007, available at http://news.bbc.co.uk/2/hi/africa/6498641.stm*

[18] *Gaillan Jarocki, Four Acid Attacks in Chicago This Year, EXAMINER, June 16, 2010, available at http://wwww.examiner.com/x-19453-Cook-County-Nonpartisan-Examiner~y2010m6d16-Four-acid-attacks-inChicago-this-year*

number of attacks occur in South and Southeast Asian countries, where the cheap and easy availability of acid gives access to this dangerous weapon. In India, a liter of hydrochloric acid costs between Rs.16 and Rs.25. The acids used by perpetrators to commit attacks include hydrochloric, sulfuric, and nitric acids and are the same substances used in industrial applications by many businesses. Moreover, many Indians use acid at home as a common cleaning agent. The sulfuric acid and nitric acid are easily available in Asian Countries. A bottle of sulfuric acid sells in Dhaka, Bangladesh for as little as TK.15 ($0.15 USD). A liter of the same in Phnom Penh, Cambodia sells for about 3,000 Riles ($0.72 USD), and battery acid costs only 500 Riles ($0.12 USD). In India, a liter of hydrochloric acid costs between Rs.16 and Rs.25 ($0.37 to $0.57 USD).[19]

In India acid attacks are occurring in open places and the data on reported cases reveal that at least an attack takes place every alternate day. The following Quinquennial Report of (2011–2015) of acid violence cases registered in India would show that it has been a perpetual crime and depict a dismal trend.

States	*2011*	*2012*	*2013*	*2014*	*2015*	*Total*
Andhra Pradesh	8	6	4	6	14	38
Arunachal Pradesh	0	0	0	0	0	0
Assam	0	1	13	0	3	17
Bihar	3	10	1	4	19	37
Chhattisgarh	0	0	0	1	0	1
Goa	0	1	0	0	0	1
Gujarat	2	4	5	6	0	17
Haryana	8	6	6	13	12	45
Himachal Pradesh	0	0	1	1	1	3
Jammu and Kashmir	2	3	2	2	2	11
Jharkhand	0	1	0	3	0	4
Karnataka	3	2	4	3	2	14
Kerala	1	2	0	4	10	17
Madhya Pradesh	5	6	11	20	19	61
Maharashtra	6	3	9	5	8	31
Manipur	0	0	0	0	1	1
Meghalaya	0	1	0	0	0	1
Mizoram	0	0	0	0	0	0
Nagaland	0	0	1	0	0	1
Odisha	1	2	3	10	8	24
Punjab	9	4	5	17	7	42
Rajasthan	0	6	0	6	1	13

[19]*Combating Acid Violence in Bangladesh, India, and Cambodia, A Report by the Avon Global Center for Women and Justice at Cornell Law School and the New York city Bar Association, 2011, P12 (The price of the acid of the year 2010 & 2011 are referred to).*

States	*2011*	*2012*	*2013*	*2014*	*2015*	*Total*
Sikkim	0	0	0	2	0	2
Tamil Nadu	0	1	6	13	10	30
Telangana	0	0	0	1	1	2
Tripura	0	1	0	4	4	9
Uttar Pradesh	14	11	18	43	61	147
Uttarakhand	2	3	0	0	0	5
West Bengal	13	22	8	41	41	125
Andaman and Nicobar Island	0	0	0	0	0	0
Chandigarh	1	0	1	0	0	2
Dadra and Nagar Haveli	0	0	0	0	0	0
Daman and Diu	0	0	0	0	0	0
Delhi UT	28	9	18	20	21	96
Lakshadweep	0	0	0	0	0	0
Puducherry	0	1	0	0	0	1
Total	106	106	116	225	249	798

Source: Acid Survivors Foundation of India (2015).

The Crime Report of the National Crime Records Bureau (NCRB) published in 2018 reveals that there are 223 acid attacks and 60 attempts to acid attacks reported in 2016. Further, the reported cases are 244 acid attacks – 65 attempts to acid attacks and 228 acid attacks - 55 attempts to acid attacks respectively in the year 2017 and 2018.[20] Every such attack begot at least one victim, in some cases two persons suffered with burn injuries.

There are many causes cited for acid attacks and they differ from region to region and also differ on factors including political and religious ideologies. The attack in USA in 2019, a white man threw acid on a Hispanic man's face was charged hate crime and causing reckless injury.[21] In November, 2008, men on motorcycles squirted the acid from water bottles on the school going girls and teachers to prevent them from getting access to education, as per the reason revealed later in the media.[22] The corrosive substances were used as a weapon in the matrimonial disputes, dowry demands and for other trivial issues also, as per the report of the Cornell Law School proves it.[23] The Bangladeshi men throw acid on women's faces as a mark of their masculinity and superiority, to keep women in their place.[24]

In India many reasons such as gender, economic, and class inequalities, the culture of

[20]*Crime in India, 2018 published by the National Crime Records Bureau available in https://ncrb.gov.in visited on 07 April, 2020.*
[21]*https://www.cnn.com visited on 01 April, 2020.*
[22]*See the Report by the Avon Global Center for Women and Justice at Cornell Law School, the Committee on International Human Rights of the New York City Bar Association, the Cornell Law School International Human Rights Clinic, and the Virtue Foundation, 2011 for further details of Taliban attack in Afghanistan against the women education.*
[23]*Ibid*
[24]*Supra note 17.*

revenge and silence misogyny.[25] Further, there are family disputes, dowry, education levels and emotional level of people. The mentality of the people is one such big reason for such offence. If for instance a person is rejected by a girl, he instead of accepting the refusal, takes it as an opportunity to take revenge for not accepting him.[26] Therefore, the acid attacks occur at high rates in India, Bangladesh, Pakistan, and Cambodia and the victims are sufferings with many disadvantages.

VI) GENDER PERSPECTIVES TO ACID ATTACKS

The financial dependence of women on men can cause problems and resentment in times of financial stress. Deteriorating economic conditions, high unemployment rates among men, the increasing number of landless households and the lack of agricultural work for male labourers,[27] are all reasons for their frustration.[28] Thus, women who are burdened with the onus of earning for the family are often victimized by their husbands when they fail to live up to their expectations as homemakers in their conventional gender roles.[29] About 80% of all acid attack victims in the Indian subcontinent are women. In light of this fact, it would be foolhardy to suggest that acid attacks are not gender-related.[30] This analysis applying to India as well, as there is a strong patriarchal culture running through the veins of Indian society too. The Law Commission of India has stated that the majority of acid attack victims are women:

"Though acid attack is a crime which can be committed against any man or woman, it has a specific gender dimension in India. Most of the reported acid attacks have been committed on women, particularly young women for spurning suitors, for rejecting proposals of marriage, for denying dowry etc. The attacker cannot bear the fact that he has been rejected and seeks to destroy the body of the woman who has dared to stand up to him".[31]

The 226th Report of the Law Commission of India adds that acid attacks "are used as a weapon to silence and control women by destroying what is constructed as the primary constituent of her identity."[32] The overemphasis on the physical appearance of the fairer sex in patriarchal societies is responsible for the increased incidence of acid attacks. Families of young women are very concerned with the preservation of their daughters' marriageability.[33] Vindictive lovers, on being turned down for marriage by women or their families, resort to acid attacks to destroy the woman's appearance and relegate her to a terrible fate.[34] In a case decided by the Calcutta High Court in 2007, the accused had thrown a bottle of acid over the victim outside her house.[35] The victim succumbed to the extensive acid burns that the victim received. The motive for the attack was a personal grudge held by the accused against the victim, as the latter had snubbed the proposals of the accused. Property disputes are another cause of acid attack on women.

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[25] *Siddharth Baskar, "A Summary of the report on Acid Attacks in India", The World Journal on Juristic Polity, March, 2018, http://jurip.org/wp-content/uploads/2018/03/Siddharth-Baskar-1.pdf.*
[26] *Ibid.*
[27] *Afroza Anwary, Acid Violence And Medical Care In Bangladesh: Women's Activism as Carework, 17 Gender & Society 305–313 (2003), http://journals.sagepub.com/doi/10.1177/0891243202250851 (last visited Jul 12, 2018).*
[28] *Nehaluddin Ahmad, Weak Laws against Acid Attacks on Women: an Indian Perspective, 80 Medico-Legal Journal 110–120 (2012), http://journals.sagepub.com/doi/10.1258/mlj.2012.012020 (last visited Jul 6, 2018).*
[29] *Ibid.*
[30] *Ibid.*
[31] *Law Commission of India, 226th Report, Proposal for the inclusion of acid attacks as specific offences in the Indian Penal Code and a law for compensation for victims of crime, July 2009.*
[32] *Ibid.*
[33] *Supra note 16.*
[34] *Supra note 17.*
[35] *Ramesh Dey v. State of West Bengal, 2007 (3) CHN 775.*

The acid attacks can be described as one of the grossest violations of human rights of women in Indian society today. Women have the right under International Human Rights Law, specifically the Convention on the Elimination of All Forms of Discrimination against Women 1980 (CEDAW), to be free from such violent attacks. Moreover, the United Nations General Assembly passed the Declaration on the Elimination of Violence against Women in 1993. Furthermore, numerous rights guaranteed under the Indian Constitution are violated when acid attacks are perpetrated against women. Article 14, equal protection of the law, is routinely violated when police fail to conduct a timely investigation and harass the victims instead of investigating the crime. Article 15(3) obliges the state to make special provisions for protection of women and children but the Indian government has failed to do so by not making any provisions or arrangements for the welfare of acid attack victims and their children.

VII) PARADIGM SHIFT IN GENDER PERSPECTIVES

While dealing with the gender perspectives in the acid violence, a development that has taken place in 2019 has to be taken into consideration. A PIL by a male survivor of acid burn injuries alleging that the discriminations against male survivors came up before the Supreme Court.[36] The petitioner claimed relying upon the National Crime Records Bureau (NCRB) that 30-40 percent of victims are male. On September 8, 2011, *Mishra*, a Meerut resident, was attacked with a bucket full of acid by his landlord's son, whom he allegedly prevented from molesting a woman a day before. Therefore, acid was poured on his face and he suffered nearly 40 per cent burns with his head, face and hands worst affected. As a small-time businessman, with financial difficulties, he spent thirty lakhs Rupees and underwent several surgeries and also treatment for reconstructing his face through plastic surgery. Though Supreme Court had ordered a compensation of Rs 3 lakh for all victims, the reading of the state government authorities was that only woman victims are entitled to it. The Apex Court took cognizance of the gender biased interpretation and agreed to probe it.[37] Therefore, the NCRB data regarding male victims of acid attack occurrences relied upon in the aforesaid PIL, before the Apex Court and the refusal to pay compensation to the victim citing the gender as a reason has opened a new dimension more particularly the gender perspectives for research and sensitization.

VIII) LAWS DEALING WITH ACID ATTACK

The Laws dealing with acid attacks may be conveniently classified into Laws enacted before and after the passing of the Criminal Amendment Act, 2013. Prior to amendment, the acid attacks were governed by the provisions of Indian Penal Code (IPC) and treated as either simple hurt or grievous hurt.[38] The persons accused of acid attack were not punished with imprisonment for one year in case of simple hurt. Moreover, they were also released on bail easily as the provisions of law simplified the offence as a mere hurt. Adequate compensation was also not paid to the victims. The following decisions would highlight how the laws and courts had dealt with the crimes committed by using acid and other corrosive substances.

In *Ravinder Singh vs. State of Haryana*,[39] acid was poured on a woman, who had extra-marital affair and he wanted to dissolve the marriage, but lawfully wedded wife, refused to give her consent for divorce, from the court

[36]*https://www.indiatoday.in/mail-today/story/supreme-court-to-look-into-male-acid-attack-victims-woe-1166957-2018-02-11 visited on 25 January, 2020.*
[37]*Ibid.*
[38]*Sections 319 and 320 IPC are dealing with the offences of hurt and grievous hurt, respectively.*
[39]*Ravinder Singh v. State of Haryana, AIR 1975 SC 856*

of law. The husband used acid as a weapon and attacked the victim. She suffered multiple acid burn injuries on her body, which later led to her death. The accused was charged under Section 307 of the IPC. However, life imprisonment was not imposed even though the victim succumbed to acid burn injuries.

In *Syed Shafique Ahmed vs. State of Maharashtra*,[40] a personal enmity with his wife was the reason behind a gruesome acid attack by the husband. It caused disfiguration of the face of both the wife as well as that of the other person and loss of vision of right eye of the wife. The accused was charged under Sections 326 and 324 of the IPC and was awarded Rs.5000 as fine and 3 years' imprisonment. This case again shows that the punishment that is often awarded does not take into account the deliberate and gruesome nature of the attack and rests on the technicalities of injuries.

On 16 December 2012, a 23-year-old female physiotherapist intern *'Nirbhaya'* was gang raped in Delhi and the victim succumbed to injuries on 29 December, 2012. Aftermath, in response to the public-outcry of civil society a committee was constituted by the government of India under the chairmanship if Justice J S Verma, former judge of the Supreme Court of India, to look into possible amendments in the criminal law to suggest ways and means for quicker trial and enhance punishments for offenders committing sexual assault of extreme nature against women.[41] In the Report, Verma Committee has dealt with the acid attacks and recommended as follows:

"We recommend that acid attacks be specifically defined as an offence in the IPC, and that the victim be compensated by the accused. However, in relation to crimes against women, the Central and State governments must contribute substantial corpus to frame a compensation fund. We note that the existing Criminal Law (Amendment) Bill, 2012, does include a definition of acid attack."

In view of the recommendation the amendments were brought in the Indian Penal Code (IPC) and Sections 326A and 326B inserted with a definition for the term acid attack and punishment also enhanced which shall not be less than ten years and may extend to imprisonment for life with fine. The amendment also made it a mandatory that the fine amount shall be just and reasonable to meet the medical expenses of the treatment of the victim. It is an important aspect on victim-oriented Justice that the fine imposed under Section 326A shall be paid to the victim.[42] Previously, the eighteenth Law Commission of India proposed a new section 326A and 326B in the India Penal Code and section 114B in the Indian Evidence Act. The Criminal Law (Amendment) Act, 2013 resulted in insertion of sections 326A and 326B for specifically dealing with acid violence. The new Sections 326A and 326B read as follows:

326A. *Whoever causes permanent or partial damage or deformity to, or burns or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person, or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine;*

Provided that such fine shall be just and reasonable to meet the medical expenses of the treatment of the victim: Provided further that any fine imposed under this section shall be paid to the victim."

326B. *Whoever throws or attempts to throw acid on any person or attempts to administer*

[40] *Syed Shafique Ahmed vs. State of Maharashtra,CriLJ 1403 (2002).*
[41] *Justice Leila Seith and Mr Gopal Subramanian senior advocate of Supreme Court are the other members of Justice J S Verma Committee. It has submitted its report on 23 January, 2013 within 30 days of its constitution.*
[42] *Sections 326A and 326B in IPC inserted by Act 13 of 2013 (w.e.f. 03 February 2013).*

acid to any person, or attempts to use any other means, with the intention of causing permanent or partial damage or deformity or burns or maiming or disfigurement or disability or grievous hurt to that person, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

After insertion of Section 326A IPC, the offence of acid attack has been considered as a separate kind of grievous hurt by the investigating and law enforcing agencies. The investigation agencies are guided to focus on the magnitude of the acid attack and collect pertinent materials to prove the short term and long-term consequences of the crime, upon the victim's life and career.

In addition to these efforts, enhancement of punishment by prescribing minimum sentence of imprisonment for term not less than ten years is a deterring effect on the sentencing side. Further, fine has been made as a mandatory penal sanction against the offender. One of the victim restorative measure introduced in Section 326 A IPC is that the entire amount to be paid to the victim only and the court need not deposit in the State exchequer. But in other cases if the guilty is proved and fine is imposed as a part of punishment, only a portion of fine amount can be ordered to be paid to the victim.[43] Consequent to insertion of Sections 326A and 326B in the penal statue two special benevolent provisions have been correspondingly incorporated in the Code of Criminal Procedure, 1973. Accordingly the acid attack victim is entitled to claim compensation under section 357A CrPC in addition to the fine under section 326-A IPC.[44] This is an important development in the victim compensation jurisprudence The amendment has impliedly paved a way for offender to bear the cost or at least a portion of the medical expenses incurred by the victim. It also makes the offender to realizes the gravity and consequences of the crimes committed by him. The 226th Law Commission Report stated that compensation to victims of acid attacks is of vital importance as huge medical costs are often involved. The victims of acid attacks need both short term as well as long term specialized medical treatments and plastic surgeries. The provisions in the Indian law for giving compensation to the victims are very insufficient.[45] The National Commission for Women (NCW) has also suggested the inclusion of Section 357A in the Code of Criminal Procedure 1973 for the purpose of defraying of expenses, in order to deal with the matter of compensation better. Section 357B has been newly inserted in Criminal Procedure Code, 1973 which reads as follows:

"The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code."

Therefore, the trail court cannot show any leniency in imposing the fine against the offender as it shall be reasonable to meet the medical expenses. The plea of impecunious often resorted to by the offender would be of no use under Section 326A IPC. Further, victim is entitled to claim compensation under the Victim Compensation Scheme (VCS) framed by the States in consonance with the amendment introduced in the Code of Criminal Procedure, 1973. The pecuniary compensation may be helpful to the victim to escape from the clutches of financial hurdles and constraints in the process of getting medical treatment.

Another salient feature of the above mentioned amendment is that it has defined that the acid includes any substance which

[43] *Section 357 Code of Criminal Procedure, 1973.*
[44] *Section 357 B Cr P C- The compensation payable by the state government under Section 357-A CrPC shall be in addition to the payment of fine to the victim under Section 326-A or 376-D of the Indian Penal Code.*
[45] *Supra note 20.*

has acidic or corrosive character or burning nature that is capable of causing bodily injury leading scars or disfigurement or temporary or permanent disability.[46] This definition about acid avoids unnecessary confusion in the interpretation before the court of in the trial and other justice dispensing process.

IX) ACID BURN INJURIES AND DISABILITIES: TOWARDS VICTIMS EMPOWERMENT

In most cases, acid attacks cause perennial disfigurement and many such attacks cause permanent disability too. India signed and ratified the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in 2007, the process of enacting a new legislation in place of the Persons with Disabilities Act, 1995 (PWD Act, 1995) began in 2010 and after series of consultations and drafting process, the Rights of Person with Disabilities Act, 2016 (RPWD Act, 2016) was passed by both the houses of the Parliament in India. In its Schedule the disfigurement caused by acid violence is recognized as a disability.[47] As per section 2(zc) of the RPWD Act, 2016 a person disfigured due to violent assaults by throwing acid or similar corrosive substance is a person suffering from locomotor disability and entitled to the benefits extended by the government. The right to equality, life with dignity and respect equally with others, protection from cruelty, inhuman treatment, abuse, violence and exploitation are also guaranteed under the said Act, to the victims of acid violence. The acid victims can claim reservation in the government jobs and other institutions and it is made mandatory for the State to create such equality measures. It is an important facet of social empowerment of neglected acid attacks victims.

X) VICTIM ASSISTANCE – A CONSEQUENCE OF JUDICIAL INTERVENTION

In the *Parivartan Kendra* case[48] there are other directions regarding treatment of acid burn injuries also issued for acid attack injuries. The private hospitals are also brought under the direction. As per the said decision cited supra, private hospitals should not refuse treatment to victim of acid attack and that full treatment should be provided to such victims including medicines, food, bedding and reconstructive surgeries. The hospital, where the victim of an acid is first treated, should give a certificate that the individual is a victim of acid attack. This certificate may be utilized by the victim for treatment and reconstructive surgeries or any other scheme that the victim may be entitled to with the State Government or Union Territory as the case may be, in the event of any specific complaint against any private hospitals or government hospital, the acid victim will, of course, be at liberty to take further action. The direction of Supreme Court is an important step towards the journey of victim assistance. The mandatory direction to both public and private hospitals to provide first-aid or medical treatment for free of costs to the victims of acid attack is a substantial development in the victim assistance.[49] Further, a pilot programme was initiated in the year 2010 by the Ministry of Health and Family Welfare for Prevention of Burns Injuries in three Medical Colleges and six Districts Hospitals of three states. During the 12th Five Year Plan, this programme is continued with the name 'National Programme for Prevention and Management of Burns Injuries (NPPMBI)' for establishing burns units in 67 State Government Medical Colleges and 19 District Hospitals. Under this

[46] *Explanation 1 in Section 326B IPC*
[47] *Schedule of Specified Disability in Clause (zc) of Section 2, The Rights of Persons with Disability, Act, 2016.*
[48] *Ibid*
[49] *Section 357-C Cr P C, Treatment of Victims- All hospitals, public or private, whether run by the Central Government, the State Government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment , free of cost, to the victims of any offence covered under section 326-A,376,376-A,376-B,376-C,376-D or Section 376-E of the Indian Penal Code (45 of 1860), and shall immediately informed the police of such incident.*

programme, the burns units are strengthened for managing burns injury cases including management of acid burns.

After a span of six years the Supreme Court geared up a follow up action as to whether this amendment introduced in 2013 have really caused impact and the Criminal Justice system was improved to cater to the basic needs of the sufferers of crime particularly after the *Nirbhaya* case and the amendments introduced as per the recommendations of Justice J.S.Verma Commission.[50] The *Suo motu review* of criminal justice system made by the Supreme Court in 2019 is a classic instance for the judicial intervention. It took stock of the situation prevailing in the criminal justice system in India expressed its concern as to whether the investigation agencies, prosecution, medico-forensics, rehabilitation, legal aid agencies and also courts are catering to the needs of the victim or not and further direction also issued for proper implementation of the victim welfare measures.

XI) BAN OF ACID SALE IN INDIA - A JUDICIAL INITIATIVE

One of the important reasons for use of the acid as a weapon by the perpetrator of crime is that the cost affordability and easy availability in the open markets. The reports of Acid Attacks Survivors in many countries also cited it as major causes for acid attack. The price of hundred milliliters is cheaper than a steel knife, as discussed in the previous paragraphs of this paper. The Supreme Court in a PIL was filed by a NGO to seek the intervention of the Supreme Court, to enhance the compensation to the two poor girls suffered by acid attack.[51] It was a case in which both the girls were sisters and while sleeping in their home, two assailants climbed upon the roof and one of them held the legs of the girl, another assailant poured acid on her body and face. The acid also fell on her sister's body and she also got burn injuries. The compensation of Rs. Three lakhs were not sufficient to meet the medical expenses. Therefore, enhancement of compensation was sought for, through a PIL. The Supreme Court took serious view of the delay in making the sale of acid as cognizable offence under the Poison Act, 1919 and to ensure the compliance of the following directions with immediate effect.

(i) Sale of acid is completely prohibited unless the seller maintains a log/register recording of acid which contains the details of the persons to whom acid 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 after the purchaser 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 stock 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, to confiscate the stock and impose fine on such seller up to Rs. 50,000/-

As discussed in the previous paragraphs the researchers have cited that the easy availability of acid to anyone without any control is one of the reasons for using it as a dangerous weapon to commit gravest crimes. Under the circumstances the control of sale of acid and ban of sale in some shops is an important step towards combating the acid violence and it is a consequence of judicial intervention.

[50] *In Re: Assessment of the Criminal Justice System in Response to sexual offences CDJ 2019 SC 1454.*
[51] *Parivartan Kendra vs Union of India CDJ 2015 SC 942.*

CONCLUSION

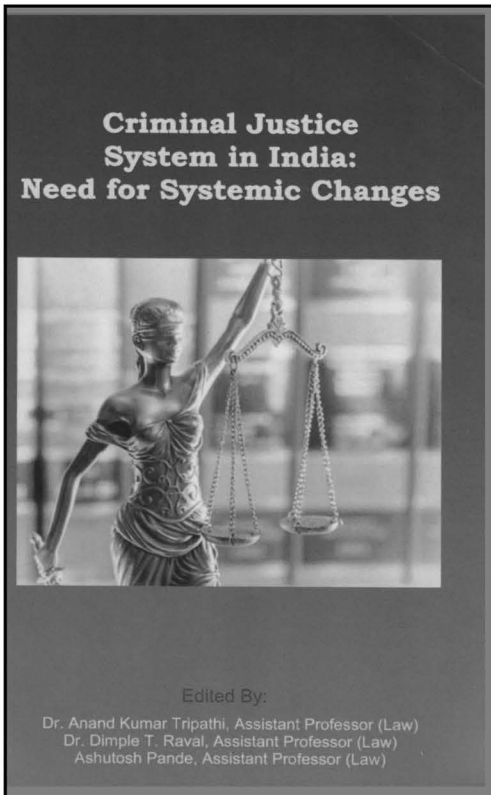
From the catena of decisions of the Supreme Court and High Courts it is clear that the acid attack cases have been comprehensively dealt within four important dimensions. They are:—

1) Severe punishments to the perpetrators with a suggestion to deny the pardon,
2) Compensation to the victims which includes enhancement to meet the medical expenses,
3) Treating the disfigurement as a permanent disability for social welfare and other benefits and
4) Restriction and ban on sale of acid

These are the tremendous achievements in combating the acid crime and treating the victims by providing judicial care. The PILs filed by NGO, aftermath attack on *Laxmi*, has opened an new era. The enhancement of punishments and compensation to the victims and ban on sale of acid are the extremely important developments in the acid violence jurisprudence that took place in India after the judicial intervention by the High Courts and Supreme Court. Further, presumption as to the statement of the victim as suggested by the 226th Law Commission to be inserted in the Indian Evidence Act and it would shift the burden upon the accused the task of proving of innocence.[52] A careful analysis of cases of acid attacks decided by the Apex court would suffice to conclude and hold that the judiciary sensitively dealt them and its integrated approach has started a journey in the victim justice.

The continued monitoring and issuance and further direction of the Supreme Court or appointment of a nodal agency under the supervision of apex judiciary would make India, a zero-acid attack country.

[52]*Amendment proposed in the Evidence Act, 1872 for insertion of Section 114B – Presumption as to acid attack: If a person has thrown acid on, or administered acid to, another person the Court shall presume that such an act has been done with the intention of causing, or with the knowledge that such an act is likely to cause such hurt or injury as is mentioned in Section 326A of the Indian Penal Code. When the question is whether a person has committed the act of throwing acid on the women the Court shall presume, having regard to the circumstance of the case the statement of the victim, that such person had thrown acid on the women.*



PLEA BARGAINING

A Non-Trial Adjudication to Enhance the Justice for Victims of Crime – Trends and Issues

By:
L.S.Sathiyamurthy

Plea Bargaining: A Non-Trial Adjudication to Enhance the Justice for Victims of Crime - Trends and Issues

L S Sathiyamurthy

Introduction

The Criminal Justice Administration (CJA) under the adversarial system consists of a plethora of pleas. An accused pleads for anticipatory bail prior to his arrest. He casts a plea for bail aftermath arrest, resorts to a pre-trial guilty plea as a measure to receive a lesser punishment, makes pleas to invoke sympathy during the sentencing process and then, a plea for suspension of sentence to prefer appeal and makes many more incidental pleas that are available. Thus, the procedure prescribed for adjudication of a criminal case, by the Common Law and drafted codes are primarily facilitative of raising pleas by the person against whom charges are leveled. Therefore, the US Supreme Court in *Lafler v Cooper*[1] has observed that *'the criminal justice today is the most part of pleas, not a system of trials'*.

The academicians have opined that many — if not most — disputes are resolved, not at the hearing itself, but rather through the pre sentence-report process. Criminal justice is far more commonly negotiated than adjudicated[2]. In the criminal case adjudication at the United States, the trial has almost been replaced by guilty plea and plea bargaining. It has started a century ago and the Indian Law Commission (ILC) in its Report on Concessional Treatment for offenders who on their own initiative choose to plead guilty without any bargaining has traced genesis of the application of the plea bargaining model. The report reads that 'entering a guilty plea is greatly prevalent in many American States. In 1839, in New York State, one out of every four criminal cases ended with a guilty plea. By the middle of the century there were guilty pleas in half the cases. In Alameda Country, one out of three felony

[1] 566 US (2012)
[2] N. Demleitner, D. Berman, M. Miller, & R. Wright, Sentencing Law and policy, 3rd edition, 2013 p 443

defendants pleaded guilty. In 1920s guilty pleas accounted for 88 out of 100 convictions in New York City, 85 out of 100 in Chicago, 70 out of 100 in Dallas and 79 out of 100 in Dallas and 79 out of 100 in Des Moines, Iowa. It has kept its dominance ever since[3].

Waiving the Rights and Privileges

The Criminal jurisprudence around the world has recognised rights such as right to be heard, right to defend and other privileges of presumption of innocence. In the Common Law of United Kingdom the presumption of innocence has been considered as a privilege of the accused person. In the decision in *Woolminghton vs Director of Prosecution*[4] it has been lucidly stated as follows:

> *'Throughout the web of English Criminal Law, one golden thread in always to be seen that it is the duty of the Prosecution to prove the prisoners' guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exemption. If at, the end of, and on the whole of the case, there is reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with malicious intention the prosecution has not made out the case, and the prisoner is entitled to acquittal.'*

Though there are many rights granted by the law, it is seen that the accused, in both US and India often waive their inalienable right to speedy trial guaranteed in the sixth Amendment of US constitution and in Article 21 of Indian Constitution respectively, and other rights as well, as the adjudicating delay has become ubiquitous and an inevitable factor injustice governance all over the world.

The facts and circumstances encompassed in Brandon Thomas *Betterman Vs Montana*[5] decided on May 19, 2016 is a classic instance for the

[3] 142nd Law Commission Report, submitted on 22nd August, 1991
[4] 1935 AC 462
[5] 578 US-2016

'court caused enormous delay' in dispensation of justice to the litigant. The defendant who was charged with bail jumping after failing to appear in court on domestic assault charges pleaded guilty at the opening of the case. He was then jailed for over fourteen months awaiting sentence, in large part due to institutional delay. The US Supreme Court rejected the argument that the enormous delay of one year and two months, which is a gap between his plea of guilty and the sentence imposed is not hit by the speedy trial clause, as it is not applicable to pre-sentencing delay. The decision in B. T. Betterman (cited supra) would make it crystal clear that institutional delay is a common and global phenomenon in criminal justice dispensation.

The delay and uncertainties are the major reasons for the waiver of the right to defend the case by the accused. The Indian scenario of CJA is severely criticized by both jurists and academicians. 'It does not deter criminals because of the delay and uncertainty involved in its processes and ridiculously ineffective punishments it imposes on those few who get convicted. It ignores the real victim, often compelling him/her to find extra-legal methods of getting Justice[6].

An accused is daunted due to delayed hearings and procedural complexities rather than the proposed sentence to be imposed upon him. Therefore, the charged person may choose to avail the provisions that are available, instead of rebutting the indictment. Resultantly, in India also Criminal Justice is far more commonly negotiated than adjudicated. Among the pleas, plea Bargaining introduced in the Code with a vision to play a pivotal role in CJA. The salience of these systemic observations is highlighted and compared with US by Dr Madhava Meneon[7] in an article that the US adopted plea bargaining as a radical alternative and in India on the recommendation of the Committee on Reforms of Criminal Justice System (2003), under chapter XXIA of the Code of Criminal Procedure, 1973 to take

[6] Dr. N.R. Madhava Menon, http://www.thehindu.com/opinion/lead/towards- restorative-criminal-justice/article8433634.ece

[7] http://www.thehindu.com/2004/01/24/stories/2004012401641000.htm Accessed on July 4th, Ibid

out from the system, cases punishable up to seven years for negotiated settlement without trial.

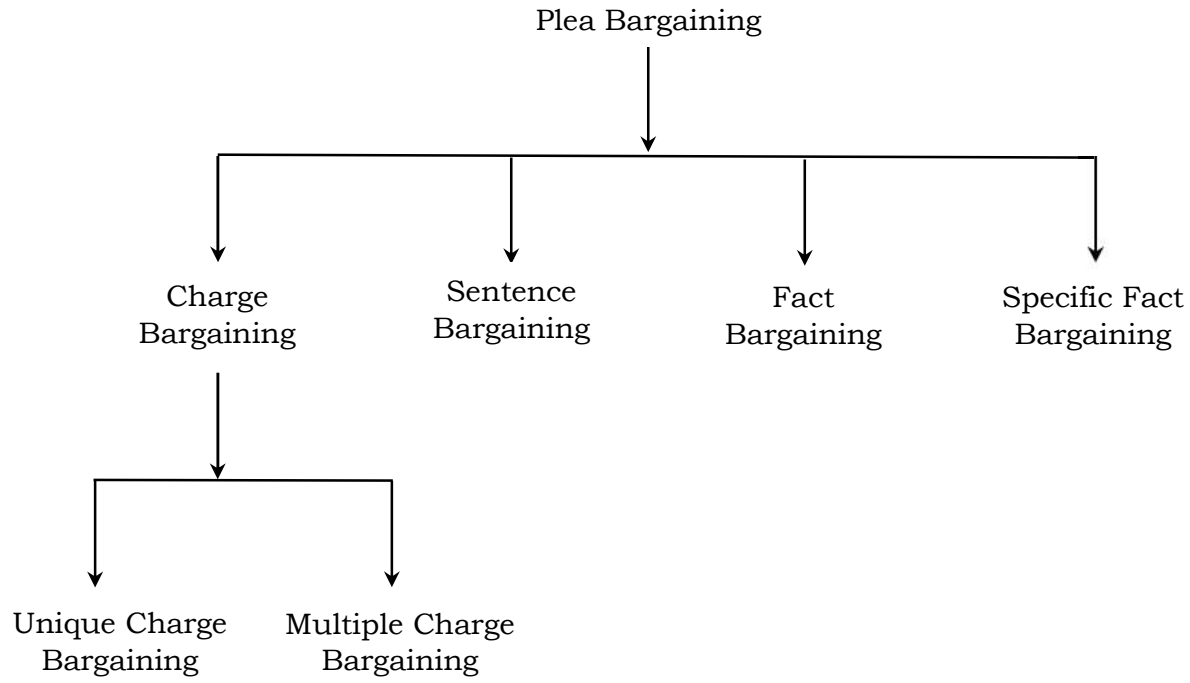
Essential Features and Kinds of Plea Bargaining

Plea Bargaining has been derived from the principle *'Nolo Contendere'* which literally means 'do not wish to contend'. It is a peremptory plea made by the accused in return for a promised leniency in sentence. By his plea the accused relinquishes the precious right to remain silent, to be defended in trial and other ancillary rights guaranteed by the Constitution and the statutes. This pre-trial negotiation sans trial in the criminal cases. Though it is an initiative by the accused works as a cooperative venture. Unlike other mediations offender-victim dialogue it is facilitated by the court.

The formal statement by an accused person in response to the charges made against him can either be vertical or horizontal. A vertical plea is based on the seriousness of charge and its reduction, but a horizontal plea is about the counts/numbers of offences.

Criminal Jurisprudence has generally accepted two kinds of Plea Bargaining. They are 1) Express Bargaining and 2) Implied Bargaining. The former relates to direct bargaining of lesser sentence that would be imposed in pursuance of the entry of the plea of guilty. But, the latter occurs without any direct dialogue or negotiation and the court would treat the accused leniently vis-a-vis a person who defends himself against the charges in the trial.

A closer scrutiny of the legal literature available on plea Bargaining would divide it in to four kinds according to the nature of pleas and their rewards:



A Simple Plea Bargaining is a process to negotiate the resolution of a criminal case without a trial.

In charge bargaining, if there are multiple charges, some charges are dropped by pleading guilty. Whereas, in the case of a unique charge, bargaining dropping is a serious charge in exchange for a guilty plea relating to a less serious charge.

In the case of Fact Bargaining, there is an agreement with the prosecution for a selective presentation of facts in return for pleading guilty. Compared to that, specific bargaining is the acceptance of sanction without pleading guilty. In the case of sentence bargaining, the accused person can opt for a lesser sentence in view of his admission of guilt.

Restorative values in Plea Bargaining

'Restorative Justice' is considered as a sign of hope and represents the direction of futuristic CJA. Since 1970, many countries have adopted the Restorative justice process as a choice within or alongside the existing legal system. It expands the circle of stakeholders; more particularly it provides an opportunity to the victim for participating in the adjudicatory process.

Therefore, many western countries have invoked the Restorative justice process as a mode to facilitate conflict resolution and peace-making, along with providing some substantial relief to the sufferer of crime for restoring his/her pre-crime position. In the existing legal system, a victim of crime is a neglected stakeholder. The plight of the victims of crime is not considered and there are no specific amelioratory provisions in the statutes and codes for restitution or restoration. 'Of special concern to restorative justice are the needs of crime victims that are not being adequately met by the criminal justice system. Victims often feel ignored, neglected, or even abused by the justice process. This results in part from the legal definition of crime, which does not include victims: crime is defined as against the state, so the state takes the place of the victim. Yet victims often have a number of specific needs from a justice process[8].

The theory and practice of Plea Bargaining in India has been profoundly shaped by an effort to take the needs of the victim seriously. The neutral language in Section 265 E of the Criminal Procedure Code, 1973, would accommodate the victim within the system and the adjudicatory process of criminal justice dispensation. The practice of Plea bargaining in India has recognized the victim of crime and it has also granted and guaranteed participatory rights. Further, the Cr.P.C. does not contemplate any procedure for hearing the victim before imposing conviction and sentence upon the perpetrators. But, in the Plea Bargaining mode of disposal of cases, hearing the parties on quantum of sentence is an indispensable requirement. Therefore, the Plea Bargaining in India is the harbinger of relief to the sufferers of crime.

Philosophy of Plea Bargaining: Resistance and Reception in India

The history and treatment of Plea Bargaining in India is an interesting episode. Before it was introduced in the Cr.P.C. the trial judiciary had invoked the idea of Plea Bargaining as a technique to dispose the criminal case

[8] Howard Zher wutg Ali Goher, The Little Book of Restorative Justice, Good books, Intercourse, Pennsylvania; USA (2003) Page 12

expeditiously. But the higher judiciary opposed it. The popular Judges of the Supreme Court of India, Justice V.R. Krishna lyer and Justice P.N. Bhagwati who have made progressive pronouncements also raised their dissenting voice against the idea of Plea Bargaining. In an appeal relating to economic offence, reported as *Muralidhar Meghraj Loya Vs. State of Maharastra*[9] the Bench consisting of V.R. Krishna lyer and Goswami JJ rejected the idea of Plea Bargaining. They observed that-

> *"Many economic offenders resort to practices the Americans 'call' plea-bargaining', 'plea negotiation', 'trading out' and 'compromise in criminal cases ' and the trial magistrate drayed by a docket burden nods assent to the sub rosa ante room settlement. The businessman culprit, confronted by a sure prospect of the agony and ignominy of tenancy of a prison cell, 'trades but' of the situation, the bargain being a plea of guilty, coupled with a promised of 'no jail'. It is idle to speculate on the virtue of negotiated settlements of criminal cases, as obtains in the United States but in our jurisdiction, especially in the area of dangerous economic crimes and food offences, this practice includes on society's interests by opposing society's decision expressed through pre-determined legislative fixation of minimum sentences and by subtly subverting the mandate of the law. The jurists across the Atlantic partly condemn the bad odour of purchased pleas of guilty and partly justify if philosophically as a sentence concession to a defendant who has by his plea aided in ensuring the prompt and certain application of correctional measures to him."*

Subsequently, in 1980 *Karambhai Abdul rehman bhai Sheik Vs. State of Gujarat*[10], the Apex court has held that convicting an accused based on plea bargaining is opposed to public policy as it induces him to resort such a plea on the promise of 'flee bite sentence'

[9] AIR 1976 SC 1929 @ Para 13
[10] AIR 1980 SC 854

Plea Bargaining was strongly disapproved in *Kachhia Patel Shanthilal Koderlal Vs. State of Gujarat*[11] wherein it was held that any negotiation between the wrongdoer and the aggrieved party and with the State was unconstitutional and illegal. The long catena of decisions of the Supreme Court has discouraged the practice of Plea Bargaining in India.

Within a decade changes occurred, and jurists have recommended the Plea Bargaining as a measure to revamp the protracting trial adjudicatory process in CJA. The Law Commission of India in its 142, 154 and 177th reports have suggested Plea Bargaining as an alternative mechanism to deal with the Himalayan arrears of cases. The report of the committee on Reforms of Criminal Justice System, 2003[12] stated that the experience of the US was evidence of plea bargaining as an effective devise for disposal of accumulated cases and expediting the delivery of Criminal Justice. It is interesting to note that what was resisted as an American Practice in 1976 by the Supreme Court in *Muralidhar Meghraj Loya*'s case, cited supra, been endorsed as an 'experience of US' in 2003 and incorporated in the Code of Criminal Procedure, 1974 by an amendment Act 2 of 2006 (with effect from 05.07.2006)

However, a close scrutiny of the application of provisions of Chapter XXIA, Cr.P.C. would make it clear that the caveat lodged by *Justice V.R. Krishna lyer* in *Muralidhar Meghraj Loya*'s decision has been duly considered by the framers and legislators. His apprehension was that the economic offenders will receive a light sentence and thus, the interests of society and the victim will be jeopardized. This reason was assigned for non-applicability of such a trade out model in the Indian context, and it was actually constituted the basis for the rejection of Plea Bargaining in 1979. In 2003, the

[11] 1980 (3) SCC 121
[12] Dr. Justice VS Malimath Committee Report, submitted in March, 2003: http://www.mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice system.pdf

Central Government in a notification[13] classified nineteen minor/special penal Acts as they affecting the socio-economic conditions of the country and the persons accused of those offences were held not entitled to invoke the benevolent provisions of Plea Bargaining in Cr.P.C .Further, Plea bargaining is not applicable to any juvenile or child as defined in clause (k) of the Juvenile Justice (Care and Protection of Children) Act, 2000.

Is it adverse to the Adversarial System?

The adversarial system is of colonial provenance and 'is our forensic heritage but, in an in egalitarian milieu, is fraught with processual injustice'[14]. In fact, the adversarial model has been critiqued for its flawed imperatives in the Indian criminal justice narrative and reconstructive thoughts have infiltrated the puritanical discourse on its operability in the

[13] The Central Government has, by S.O. 1042(e), dated 11th July, 2006, determined the offences under the following laws for the time being in force which shall be the offences affecting the socio-economic condition of the country for the purposes of sub-section (1) of section 265A, namely:-

(i) Dowry Prohibition Act, 1961.
(ii) The Commission of Sati Prevention Act, 1987.
(iii) The Indecent Representation of Women (Prohibition) Act, 1986.
(iv) The Immoral Traffic (Prevention) Act, 1956.
(v) The protection of Women from Domestic Violence Act, 2005.
(vi) The Infant Milk substitutes, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992.
(vii) Provisions of Fruit Products Order, 1955 (issued under the Essential Services Commodities Act, 1955).
(viii) Provisions of Meat Food Products Orders, 1973 (issued under the Essential Commodities Act, 1955).
(ix) Offences with respect to animals that find place in Schedule I and Part II of the Schedule II as well as offences related to altering of boundaries of protected areas under the Wildlife (Protection) Act, 1972.
(x) The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
(xi) Offences mentioned in the Protection of Civil Rights Act, 1955.
(xii) Offences listed in sections 23 to 28 of the Juvenile Justice (Care and Protection of Children) Act, 2000.
(xiii) The Army Act, 1950.
(xiv) The Air Force Act, 1950.
(xv) The Navy Act, 1957.
(xvi) Offences specified in sections 59 to 81 and 83 of the Delhi Metro Railway Operation and Maintenance) Act, 2002.
(xvii) The Explosives Act, 1884.
(xviii) Offences specified in sections 11 to 18 of the Cable Television Networks (Regulation) Act, 1995.
(xix) The Cinematograph Act, 1952.

[14] Justice V.R.Krishna Iyer, 'Social Justice: Sunset or Dawn', Eastern Book Company, Reprint 2008, pp.13

Indian scenario. Plea bargaining, on a prime facie analysis, is adaptive of the needs of the system and empowers the path to justice. In fact, the rights of the accused are not affected in any way and instead it facilitates a friendlier approach and atmosphere for its operation. The dust and din of the criminal court is replaced by the candor of the inter party parley and the emotive aspects of social back clash is prevented. The plea bargaining procedure is not a statutory holy grail of inherited infallibility, but a flexible tool for interactive paradigms in the delivery of fairness. The import of plea bargaining is deeper; it relates to the localization of remedial justice and enhances its quality and legitimacy. The distant call of the court induced process and its alienating overtures are an endemic issue in India's burdensome culture of litigative maladies. Plea Bargaining is the promise for reform, a relief in symbolic importance and an innovation in timely development. The classification of offences, human rights sensitivities, procedural safeguards and judicial scrutiny in the finer aspects of its case to case application is the daunting challenge for its co-equal existence in the model of adversarial jurisprudence. Models are man-made and are susceptible to human change. The contours of the time honored adversarial jurisprudence is not compromised in the plea bargaining procedure and it is a need of the hour that court culture should be responsive to social crime-related spill over of the puritanical approaches of scholasticism, where even the judges may fear to tread.

Recognition of plea bargaining in western and Asian Judicial System

In 1971, Plea Bargaining was endorsed as an efficient idea for expeditious dispensation of Criminal Justice in United States. In *Santobello v New York*[15] the Plea Bargaining has been described as an essential component of the administration of Justice. The Court also assigned a reason that 'the Plea Bargaining is to be encouraged because if every criminal charge were

[15] 404 US 257, 260 – 1971

subjected to a full scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities.

The process of Plea Bargaining is being practiced in different jurisdictions of the world for different reasons. Pakistan has followed Hong Kong's anti-corruption model of Plea Bargaining, where, both the countries applied it for the recovery of disproportionate wealth accumulated by corruption and sources unknown to law. The National Accountability Bureau (NAB) in Pakistan is a statutory body to prove and recover the looted money from buccaneers who bolted away by using corrupt intellect. It has appreciated the request of Plea Bargaining from the accused charged under the anti-corruption laws. This has enables the recovery of a huge sum, of about 99% of the disproportionate wealth acquired by ill-legal ways and means.

The bureau receives a number of complaints on a daily basis. According to its Annual Report of 2013, NAB received 18,607 complaints in 2013. With an additional backlog of 1,464 cases, the number rose to a total of 20,071 complaints. Out of these, 18,892 complaints were processed (converted into complaints verifications, inquiries, linked with cases, referred to other departments, etc.) and 1,179 complaints remained pending as a December 31, 2013. A total of 284 fresh inquiries were authorized during the year 2013, raised to 873 including the backlog of 589 inquiries. A total of 243 inquiries were finalized, whereas 630 inquiries remained under process. Some 463 individuals entered into VR and plea bargaining during the year 2013. Out of an agreed amount of Rs.3,149.985 million, Rs.3, 125.088 million (99.2 percent) have been recovered[16].

In England and Wales the principles of Plea Bargaining is governed by the decision in *Turner's Case*[17] according to which the Judge should never indicate the sentence he has decided to impose. Therefore, the accused who

[16] The Plea Bargain reality Hafiz Muhammad Irfan https://dailytimes.com.pk/104000/the-plea-bargain-reality/ visited on 18th June, 2016
[17] 1970 54 Cr Appr R 352

could not certainly be aware of the reduction in sentence is often hesitant to resort to plea bargaining. The Royal Commission in 1993 has recommended that the judges should indicate to the defense counsel the highest sentence they would impose in respect of such a guilty plea[18]. The concept of Plea Bargaining has been legally recognized as a pre-trial resolution of a criminal case without trial, irrespective of the process adopted for the CJA.

Participatory process through hearing of the victim

Fair hearing is of paramount importance and is cardinal to the delivery of Justice. It is a basic and indispensable component of natural justice. In *R Vs. Chancellor of Cambridge University*[19] it was observed that even God himself did not pass sentence upon Adam before he was called upon to his defense. In India, the Supreme Court has imported the doctrine of due process and expanded the scope of fair hearing as a mandatory requirement in administrative and legislative actions as held in *Maneka Gandhi Vs. Union of India*[20]. Though there are decisions and statutes for mandatory hearing before condemning a person, there is no duty bestowed upon the adjudicatory machinery to hear the victim, who was injured, lost his/her limb, and suffered physically and mentally.

The adversary adjudicatory mechanism in India, has usurped the important right to participation in trial, of the victim. A harmed sufferer once again suffer as witness in the traumatized trial. After the victim's right movement of 1970s, the idea of victim participation in adjudicatory process has gained importance in USA, UK, Canada and some other European Countries. It has caused considerable impact on the international forums also. The International Criminal Court (ICC) set a new trend by granting victims an active role in the International Criminal Proceedings Established in July 2002, it was the first international criminal tribunal that allowed victims to participate actively in criminal proceedings, in particular, by

[18] Report of the Royal Commission. England (2336) London 1993
[19] 1723) 1 STRA 557
[20] AIR 1978 SC 597

allowing them to present their views and concerns during the proceedings. This victim-centred approach is considered one of the ICC's greatest innovations compared to other international criminal tribunals. As of the end of October 2011, almost 10,000 victims applied to participate in ICC proceedings. Of these, over 3,500 victims applied to participate in connection with the Central African Republic situation and over 2,500 applied in connection with the Kenyan situation[21].

Despite of these developments in adjudication of criminal cases around the western countries, Indian criminal jurisprudence has not adequately accommodated the sufferer of crime.

But, the Plea Bargaining process (Section 265-B Cr.P.C) has prescribed a mandatory notice to the prosecution or the complainant. This accommodative provision which allows the victim to participate in the process is a milestone in victim jurisprudence. Further, hearing the parties, including the victim, on the quantum of punishment (before disposal of case), to be imposed upon the accused is a due recognition of victim's right. As the right to be heard is a first-principle of natural Justice (*Audi alteram partem)* guaranteed in the code itself, its application in the plea bargaining process, cannot be whittled down by any authority.

Clearly, the victim has no right in the sentencing process in other process of criminal case adjudicatory in India. It is in the system of Plea Bargaining, only that the victim has been empowered with an extremely important right to be heard on the quantum of punishment to be imposed at the end of the negotiated justice. It is an important development apropos the victim's participation in the CJA.

That the statement of facts given by an accused in an application for plea bargaining shall not be used for any other purpose other than for plea bargaining is also another factor that safeguards the rights of the accused.

[21] (International Criminal Procedure, (The interface of Civil Law and Common Law Legal (1935 AC 462)System) Linda carter & Fausto Pocur (ed), The role of victims, Sigalt Horovitz, Edward Elgar, Cheltenham, UK, 2013, P 171)

Therefore, the benefits and rights conferred upon the victim and accused are balanced and mutually protective of the interest of each other.

Promised pecuniary relief

In India, both the penal and Procedure Codes have primarily suggested punishment as a panacea. In a pragmatic context, punishment imposed may be a correctional measure to the offender concerned. The sufferer of the crime who played a supportive role in the collection of evidence and proving of guilt during the trial is left without any remedy or relief. Also, the compensation to be paid under section 357 Cr.P.C. would arise only after the guilt is proved. If the case ends in acquittal for lapses in investigation or technical reasons the victim would not get any compensation. If an accused is let off on probation, there can be no direction for compensation can be granted Under Section 357(a) Cr.P.C.

The amendment in 2008, which incorporated the Victim Compensation Scheme (VCS) in the Code, has still not practically come into effect as the State has not allotted funds under the VCS. Therefore, the victim of crime is left to languish in the lurch, without remedies.

In such circumstances the Indian Practice of Plea Bargaining has substantially enhanced the judicial care and relief to the victims of crime. The compensatory relief is a mandatory under Section 265 E Cr.P.C. The court shall award compensation to the suffered victim in accordance with the mutually satisfactory disposition of the case. There is no minimum or maximum pecuniary limit prescribed by the code. Therefore, every trial court can hear the victim and assess the quantum of compensation on careful consideration of injuries sustained, and the mental agony, undergone, including loss of income caused by partial or permanent disability, due to the occurrence. This relief would help the victim being restored to his/her pre-crime position. Further, a financial support from the offender would put an end to the bitterness and revenge. The financial burden of the State also would be reduced to a considerable extent.

The compensatory reliefs under section 357, & 357(A) to the victims of crime have not been properly and efficiently invoked by the courts in India. The trial courts have grossly ignored the relief to be provided to the victims Under Section 357 Cr.P.C. Therefore, the Supreme Court in 2013[22] has directed the subordinate judiciary to apply its mind to the question of awarding compensation to the victim. Despite the directions by the Apex Court, the Judgments of the trial courts either end with acquittals or conviction and sentence with fine. Victim's plight and rights seldom finds a place in the decisions of the Courts. Ignored stakeholders rights can be duly recognized with benevolent provisions to provide for pecuniary relief, in Plea Bargaining.

The benefits of Plea Bargaining cannot be availed by the offender whose acts affect the socio-economic condition of the country, in the cases of offences against a woman, or a child of below fourteen years. The framers have consciously incorporated Plea Bargaining in the Code and thereby precluded the heinous offender. Therefore, Indian Plea Bargaining practice is a good alternative mechanism to reduce the docket explosions and to grant adequate reliefs as remedies to the victims of crime.

The advice of the court

The Delhi High Court in *Rajinder Kumar Vs. another*[23], perhaps for the first time in the country has advised litigant to resort to Plea Bargaining. It was a case relating to a cheque being enchased through opening a fake account. The Court held that the charges cannot be quashed, owing to proof of criminal intention and also recommended that the affected parties may resort to plea bargaining, with adding emphasis on the social impact of such

[22] Ankush Shivaji Gaikwad Vs. State of Maharashtra (2013) 6 SCC 770
[23] Crl.MC 1216 – 17 of 2006 decided on 26.02.2007

crimes. It is significant that in this case, the Court refused to quash the FIR as that would have been illegal and unjustified.

Finality and expeditious dispensation

The Indian adjudicatory process is suffering from multi-tier processes of appeals, revisions, review and other incidental process. These procedures cause complex, chaos, delay and render the adjudication expensive. Consequently, the poor Justice seeker could not indulge in this multi-level legal battle to receive the final judgment. But under the Plea Bargaining process the judgment pronounced under section 265 G shall be final, conclusive and binding upon the parties and no appeal shall lie in any court. This would reduce considerable accumulation of arrears in the appellate forums.

Conviction Certain, but with reduced sentence

One of the extremely important features of Plea Bargaining, in India is that it would not provide any clean chit or blemish less acquittal or simply 'let off' the accused. The court after hearing the parties on quantum of punishment may

1) release the accused an probation of good conduct or after admonition under section 360 C.P.C. or
2) impose half of the minimum sentenced, if prescribed in law or
3) if not one fourth of the sentence.

Therefore, the court has discretion to impose appropriate sentence according to the magnitude of the offence and other circumstances encompassed in the case.

Conclusion

The idea of Plea Bargaining was introduced in Indian Criminal Jurisprudence in 2006. 'However, the Bar and the Bench seen to be allergic to plea bargained settlement, with the result that even after a decade of its

introduction, it remains a dead letter not invoked by those caught in the system'[24]. This statement would reflect the present status of the provisions of Plea Bargaining in India. A chapter in the Cr.P.C. has not been invoked even in one percent of the criminal cases, when this author made a survey at Salem district in Tamil Nadu (2014), it was brought to notice that 98 percent of the accused person have claimed ignorance about such a benevolent procedure. Therefore, the immediate need of the hour is to create awareness about the practice by Plea Bargaining, available in the code. The Legal Services Authority (LSA) can disseminate it among the litigants waiting in the corridors of the court for adjudications.

A section of Lawyers opined that the voluntary move by the accused pleading the guilty for lesser sentence might prejudice the Judge, and the Plea Bargaining Process would fail from its purpose. There is also a fear that the Plea Bargaining Practice would affect their remunerative prospects. Therefore, the lack of understanding about the concept, idea, application and use of Plea Bargaining is prevailing among the legal fraternity itself.

Delay, pendency, backlog and arrears are the four words that are often used to criticize the Indian Judiciary. The survey report of the National Judicial Data Grid (NJDG) reveals that there are 1,46,52,992[25] Criminal Cases pending in the courts of India, as on 04.07.2016. Therefore, if the Plea Bargaining is practiced in its letter and spirit the trial judiciary can ensure timely justice without multiplicity of further proceedings and with reliefs to the victim, which would enhance the quality of justice. The invocation of provisions 265 A to 265 L in the deserving criminal cases would considerably reduce the arrears of cases and help the courts render justice as expeditiously as possible.

The vitality of Criminal Justice Administration in the forensic analysis of penal law and its tool, the law of procedure is the key to the varied

[24] Dr. N.R. Madhava Menon, Towards Restorative Criminal Justice, The Hindu dated 05.04.2016

[25] Figures Obtained from the National Judicial Data Grid Website, dedicated portal: http://164.100.78.168/njdg_public/main.php#

understandings of the relationship between law, society, crime and punishment. The core of penology and its association with the law of criminal procedure is justice, as a fundamental theme in all steps of the layered processual jurisprudence. The troubled situs of victim's rights in the age old penal system of India and its judicial machinery is the quest for reform and the fulfilment of a democratic cause. Plea Bargaining can be a procedural innovation with tailor made changes for the Indian context, where access to justice is of top priority. The constitutional mandate of justice as a preambular promise for fairness and openness is in the nature of a tribute to the penal structures and its human rights heritage. Sentencing in sum is law with justice combined for victim's requiem and systemic peace. This is the beginnings of a beginning, the beginning of a dynamic dawn in the chapter of criminal law reform. The committed activism of the subordinate judiciary with active support from the appellate judiciary can transform the Indian penal plane from its current decadence to a model for victims' participation in the comity of nations.

The idea of Plea Bargaining has been suggested as a modern devise for comprehensive justice to both the victim and accused. Nonetheless, it remains redundant in procedural texts in India. *Per contra*, Section 89[26] a similar provision in the Code of Criminal Procedure 1908, (CPC) for settlement of disputes outside the court through arbitration, conciliation mediation and judicial settlement through *Lok Adalath* has been introduced in 2002, just four years prior to the insertion of Plea Bargaining in Cr.P.C. The provision for settlement of civil disputes outside the court, in CPC also based on the recommendations made by Law Commission of India and Dr.Malimath Committee.

Whereas, the civil jurisprudence relating to arbitration, mediation, settlement through *Lok Adalath* have considerably developed in India. Consequently, a considerable quantum of civil cases disposed of, through

[26] Section 89 was introduced in CPC came in to effect from 1-7-2002. It made the court mandatory to formulate the terms of settlement and give them to the parties for observation, if there exist elements of settlement, in a case came up before it.

arbitration. The arbitration and mediation are now became an alternative disputes resolving mechanism in civil jurisprudence in India. On the other hand, the Plea Bargaining has not gained momentum. Therefore, on par with Section 89 CPC, a new provision to be introduced in Cr.P.C. with discretionary powers for mandatory reference of criminal cases, for resolution through Plea Bargaining, before the commencement of trial, with an option to the accused to accept or decline it. If not settled within a reasonable time the court can begin the trial. This would pave a way for disposal of cases on application of Plea Bargaining and the victim would also receive a remedy within the existing frame work of law.

Well trained arbitrators, professionally equipped negotiators and skilled mediators including the retired judges are playing pivotal role for amicable settlement of civil disputes. Consequently, arbitration has developed as a modern branch of law in civil jurisprudence. But, there are no services of trained counsellors and prosecutors are available to a person of accused facing charges before a criminal court. Trained criminal justice personnel to be employed to provide legal services through District Legal Services Authority to the accused who wish to make Plea Bargaining. Above all, awareness to be created among the lay and law person about the plea bargaining and its legal benefits, which could be made through Legal Services Authority.

The judiciary in India has not only doing adjudicatory works but it has also doing service to solve the political and social crisis and often guiding the nation in governance. 'It is largest in the world bestowed with wide- ranging powers of judicial review and rigidly protected from executive interference in the Constitution, cannot be seen to succumb under the weight of its responsibility'[27]. Therefore, the time has come to apply the Plea bargaining as modern devise to reduce the voluminous load of criminal cases and enhance the justice to victims of crime.

[27] Front line, National magazine of The Hindu Newspaper, *Crisis of Justice (cover story)* May 27, 2016 P11 N