

TREATMENT OF RAPE VICTIM BY THE CRIMINAL JUSTICE ADMINISTRATION- CRITICAL ANALYSIS OF LAWS AND MECHANISMS FOR HER EMPOWERMENT

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Abstract : The escalating rate of the offence of rape in all the parts of the country is proof of the fact that there is total failure of governance by the State. In this scheme of things, needless to say, the victim is worst affected and the least protected. Therefore, it is necessary to examine the position and treatment of a rape victim by the Criminal Justice System where she is a survivor rather than a victim. In this article the existing laws and their enforcement mechanisms with regard to tackling of rape cases at every stage, starting with the preventive measures provided by the State, Victims protection and immunity through legal guarantees and then focusing on reporting of rape cases, attitude of the police, medical examination of the victim, Investigation, trial, will be highlighted with special focus on the changes brought forth by Criminal Law (Amendment) Act 2013.

Key words: Criminal Justice System, Rape, Victims,

Introduction: The offence of rape in India has reached a chronic stage, with an escalating rate of 50.6% over the year since 2001 and the Delhi gang rapes of a para-medical student in a moving bus and the recent Rohtak gang rape incident and similar gruesome incidents in all corners of the country raises a serious question on the inefficacy of the mechanism of governance specially with respect to safety of women and protection of the victims of rape. The new rape laws have been brought in by the Criminal Law (Amendment) Act 2013 but can it ensure effective mechanism to tackle the growing menace of rape? The governance mechanism of the State through which crime control is done encompasses within itself the preventive measures for safety of women, formulation of laws defining rape and providing for sentences, immunity and assistance to the victim, accountability of Law Enforcement Agency, reporting of rape cases, investigation, collection and preservation of evidence, conducting and reporting of medical examination of the victim, trial. But the rape victim is failed at each of these steps. This article reviews the laws and their enforcement mechanisms from a victim's perspective.

Preventive Measures: The Verma Committee constituted after the Delhi gang rape reports [1] on the incapability of the Government of India and of the various State Governments to implement even the most basic safety measures with any amount of efficacy. For example, the Ministry of Home Affairs, Government of India, issued an Office Memorandum in 2009 in respect of steps to be taken for prevention of crimes and violence against women. The said Memorandum observes as follows: "These advisories, inter-alia, include

1. gender sensitization of the police personnel,
2. salutary punishment to public servants found guilty of custodial violence against women, minimizing delays in investigations of murder,

rape and torture of women and improving its quality,

3. setting up a 'crime against women cell' in districts where they do not exist,
4. providing adequate counseling centers and shelter homes for women who have been victimized,
5. setting up of special women courts,
6. rehabilitation of women who are victimized .

The said Memorandum also recommends for improving the safety conditions on road, the concerned departments of the State Government must take following suitable steps to:

- a. Increase the no. of beat constables, especially on the sensitive roads;
- c. Increase police patrolling, especially during the night;
- d. Increase the number of women police officers in the mobile police vans;
- e. Set-up telephone booths for easy access to police;
- f. Install people friendly street lights on all roads, lonely stretches and alleys; and

However, the memorandum remained a dead letter and finally, it took a gruesome gang rape for some States and the Centre to announce safety measures for women. For instance the Home Minister announced some quick safety measures, such as- There would be more police night patrols, and all bus drivers and their assistants would be subject to checks.

- Private buses, when not in use, must be parked with their owners and the photo identification of the driver and staff of every bus would have to be displayed, and the police would enforce this.
- Buses with dark windows and curtains would be impounded. [2]
- Authorities to crack down on drunk driving and on loitering gangs of drunken youths.

The other new measures include: an increase in phone help lines, school bus drivers to receive police checks, government buses be fitted with CCTV and

GPS, clubs to shut at 1am, police to identify and patrol unsafe areas, a female-manned help desk for women at all police stations, a recruitment drive for female officers, with two to be present at each station at night, and changes to how complaints are registered with police to make it easier for women. [3] **How to Empower the Rape Victim?:**The Supreme Court in *Delhi Domestic working Women's Forum V. Union of India (1995) 1SCC 14*, a Bench of three Judges observed at Para 14: "Complaints are handled roughly and are not given attention as is warranted. The victims, more often than not, are humiliated by the police. The victims have invariably found rape trials a traumatic experience. The experience of giving evidence in Court has been negative and destructive. The victims often say, they considered the ordeal to be even worse than the rape itself. Undoubtedly, the Court proceedings added to and prolonged the psychological stress they had had to suffer as a result of rape itself. [4]

The bench highlighted the broad parameters in assisting the victims of rape:

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

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

The Malimath committee, Volume 1, Committee on Reforms of Criminal Justice System, 2003[5] has also recommended that a victim has a right to be represented by an advocate of his choice and that an advocate shall be provided at the expense of the State if the victim is not in a position to afford a lawyer.

3. The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

4. A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

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

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

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

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

Procedural Safeguards for the Women Victim:It is indicated that women victims of violence face a number of problems during investigations. [6]. Most of these problems could be attributed to how the law enforcement agency handles complaints of rape cases and investigate them. Some of these problems may be attributed to a "lack of expertise, motivation and interest in collecting evidence, and examining witnesses"; police misplacing evidence of rape or unnatural death resulting in proof that has been destroyed and delayed court proceedings; delays in receiving forensic reports; delays in charges, which result in the perpetrator's acquittal; regular police officers conducting their "law and order" duties as well as investigating cases, which often results in insufficient time on investigations; in many cases, "ill-equipped" or "biased" investigating officers, which results in no justice. It is necessary to examine the treatment accorded to the rape victim at each of these stages and how the new Amendment can be effective in empowering her.

Reporting of Rape Cases:The statistics revealed in the "Crime in India" data released by the National Crime Records Bureau in 2013, there were 33,707 reported Rape cases in the country, equivalent of one rape every 20 minutes, but even that is thought to be a minority of the number of such attacks across the country. Some estimate that only 1 in 4 rapes are reported, largely because of the deep-rooted conservatism of Indian society, in which many victims are scared to come forward for fear of being "shamed" by their family and community.[7] Those brave enough to go to the police face numerous challenges in getting their attacker put behind bars -- reporting the rape to hostile police, unsympathetic forensic examinations, a lack of counseling, shoddy

police investigations and weak prosecutions in the courts. Disillusionment with the authorities, and the shame Indian society often attaches to women who have been raped, has led many rape victims to commit suicide, drinking pesticide, dousing themselves in kerosene and setting themselves alight, or slashing their wrists. "Police apathy" was the number one complaint submitted to the National Commission for Women in 2009-2010 and to the Ministry of Women and Child Development in 2010-2011, according to their annual reports for those years. However, this apathy of the police in some cases reach to a level of harassment and this is one of the primary reasons deterring victims and their families from reporting the crime.

To facilitate such victims and their families a number of amendments have been affected. The 2013 Amendment has modified Section 154 Code of Criminal Procedure in case of offences of rape and other violence against women if the information is given by the woman against whom the offence is alleged to have been committed or attempted, such information shall be recorded, by a woman police officer or any woman officer. The proviso to the section further provides that in case the woman against whom the 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. The above provision of law makes it clear that recording of statement of the rape victim shall not be done by a male police officer at any time and since most of the times the victim after such instance of violence are in a physically as well as mentally vulnerable the benefit of the proviso can be extended to such cases.

During Investigation: According to the proviso to section 160 Code of Criminal Procedure no woman shall be required to attend the police station as an witness and she may not be compelled to give her statements at any place other than the place in which such woman resides. Therefore, it is a statutory right of the woman rape victim not to appear in police station in connection with the investigation. Invigorating the provision of law, the Apex Court by a Bench of 3 Judges in a case as reported in *Nandini Satpathy V. P.L. Dan, A.I.R. 1978 S.C. 1025*, at Head Note D held that act of directing a woman to appear in police station is violative of Section 160 (1) of Code of Criminal Procedure and held that such deviances must be visited with prompt punishment since policemen may not be a law unto themselves expecting others to obey the law. There is public policy, not complimentary to the police personnel behind this legislative proscription which

keeps juveniles and females from Police Company except at the former's safe residence. May be, in later years, community confidence and consciousness will regard police force as entitled to better trust and soften the stigmatizing or suspicious provisions now writ across the code. The new sub-section (1A) of Section 173 Code of Criminal Procedure enjoins upon the investigating officer investigating a case in relation to rape of a child to complete the investigation within 3 months from the date on which the information was recorded by the officer-in-charge of the police station. *Medical Examination of the victim*[8]

The Criminal Procedure Code (Code of Criminal Procedure) contains a special provision, Section 164A, to ensure that the victim is medically examined within 24 hours of the receipt of the information of the rape. Though it is meant for collecting evidence, the law stipulates that the examination cannot be done without her consent. This gives the victim the option of not being subjected to tests, for whatever reason.

However, a 2010 Human Rights Watch report[7] called "Dignity on Trial" cited cases where victims were made to go from one government hospital to another for medical examinations, or subjected to many uncomfortable tests. Others have been forced to sit for hours in bloodied clothes, even after an examination, without being allowed to change or shower. Some are publicly identified as "rape victims" in hospital corridors. There is often no medical care available such as treatment for injuries or infections, or to address the possibility that the victim has contracted HIV/AIDS or become pregnant. In most cases, no trauma counseling is given. The so-called "Two finger test" -- an archaic practice, banned in many countries, which involves a doctor inserting fingers into a victim's vagina to determine if she is "habituated to sex" -- is widely used in India, despite an order by the Director General of Health Services in 2011 to discontinue it. The test is irrelevant and unscientific and it amounts to the "re-rape" of the victim. A landmark judgment by the Delhi High Court in *Delhi Commission for Women v. Delhi Police (W.P (CRL)696/2008)* pronounced its judgment specifically mandating that a SAFE Kit (Sexual Assault Forensic Evidence collection kit) be used by all medical personnel for gathering and preserving physical evidence following sexual assault. This is the first time that the court mandated for having the requisite infrastructure for a proper examination and also the extent of examination, insisting on detailed documentation of history and findings. Special rooms are to be set up for rape victims to be examined in privacy at every hospital where such cases are received. All hospitals are required to cooperate with the police and preserve the samples (that are

otherwise likely to putrefy) in refrigerators or cold chambers till such time that the police are able to complete their paperwork for dispatch to a forensic laboratory for tests, including DNA test. This is to ensure proper and safe storage of evidence. The Verma Committee also made similar recommendations for the medical examination of the victim of sexual violence, however, neither the judgment nor the Committee's recommendations have yet been operationalised. *Medical Report* Among the most contested evidence during rape investigation and trial is the medical examination report of the victim. This report can have a crucial impact on the case's outcome, by providing corroboration of the victim's claims by documenting injuries and other evidence of rape. Poorly written or interpreted, it can undermine a victim's credibility. India has no uniform format for compiling medical reports. This allows doctors in different parts to conduct examinations using differing or no standards; wrongly conclude that the complaint is unsupported by medical evidence when the evidence in many cases is inconclusive; reach damaging conclusions unsupported by the evidence; or even rely on outdated stereotypes about rape. [9] Although, section 164 (A) mandates that a medical examination must be carried out within 24 hours of the police receiving information, thus recognizing this as a medico legal emergency and putting a timeframe for the investigating officer. Also, it should be forwarded without delay to the investigating officer who, in turn, shall forward it to the magistrate concerned. [10] Prior to this landmark judgment in the year 2000 delivered by the Supreme Court in *State of Karnataka V Manjanna, 2000(6) SCC 188*, doctors would examine victims of rape only after they received a request from the police. For this to happen, the victim had to muster the courage to register a complaint against the accused in a police station of the correct jurisdiction. There could be inordinate delays in this, considering the social obstacles that women face in coming out in the open against the accused. Only after this delayed registering of a complaint against the accused would the police investigation be initiated and a requisition forwarded to a doctor at the government hospital asking for medical examination of the victim of rape. By the time the police requisition could be arranged there was substantial delay and much of the medical evidence was lost or could not be collected. This would result in acquittal of the accused in many cases, due to the lack of evidence to implicate the accused or link him to the offence. The benefit of doubt was awarded to the accused, denying justice to the already traumatized victim. Therefore, it is of utmost importance to have forensic training of the doctors to understand the value of different samples

retrieved from the victim, like, blood, semen, nails, hair etc for proper medical and forensic examination and thereafter a uniform reporting system, so that the valuable evidence can be put to good use during trial.

During Trial: With regard to a separate legal representation by a victim of crime, a proviso has been added to Section 24(8) Code of Criminal Procedure after the 2008 amendment whereby the victim is enabled to engage an advocate of his choice to assist the public prosecutor. Before amendment, it was the Central Government or the State Government who may appoint a Special Public Prosecutor for any case or class of cases. However, it is worth mentioning that though in many cases the victim generally and specifically a woman victim of sexual violence is in no position to appoint an advocate by herself, the said Criminal Law Amendment Act failed to provide for the provision of legal aid support for such victims, although ironically the accused has been bestowed with such a right under section 304 of the Code of Criminal Procedure 1973.

Though the Criminal Law Amendment of 1983 to section 327 Code of Criminal Procedure itself mandated in-camera inquiry and trial for rape of an offence under section 376, 376A, 376B, 376C or 376D Indian Penal Code, victims of rape were still not comfortable in court proceedings. For making the trial procedure further victim-friendly, a proviso has been inserted in clause (a) of Section 26 of Code of Criminal Procedure, which provides that any offence under Section 376 and Sections 376 A to 376 D of the Indian Penal Code, 1860 shall be tried as far as practicable by a Court presided over by a woman keeping in view of the provisions of the above law, it can be concluded that the rape victim may approach the authority to conduct the trial of the rape case by a Court presided over by a woman.

The decision of *Tukaram v. State of Maharashtra, (1979) 2 SCC 143* is a relevant case to show how public opinion and various organisations have espoused the rights of women. Accordingly the Criminal Law Amendment Act, 1983 was passed which included situation of "aggravated rape" under section 376A to D. Further, the India Evidence Act, 1872 was also amended by the Criminal Law Amendment Act, 1983 and section 114A was incorporated which imposed the burden of proving "consent" upon the accused in the aforesaid cases of aggravated rape. This was an exception of the general rule of presumption of innocence of the accused and it has been further strengthened to the advantage of the victim in the Criminal Law Amendment Act 2013 by inserting Explanation 2 to Section 375, which provides that Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to

participate in the specific sexual act. It is further provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Therefore, the new amendment makes the burden on the defence to prove the consent on the part of the woman quite heavy. A new proviso to Section 309 of the Code of Criminal Procedure has been incorporated that provides for completing the trial of offence under Sections 376 to 376D within a period of two months. A new proviso has been inserted in Section 372 of the Code of Criminal Procedure, in 2008 whereby the victim shall have the right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation. A new Section 357A was also incorporated in the Code of Criminal Procedure in order to provide for the State Government to prepare, in co-ordination with the Central Government, a Scheme called "Victim Compensation Scheme" for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime. With the introduction of this scheme the victim has been assured of a compensation amount.

Rape Shield Laws : Under the "rape shield" law [10], evidence with regard to previous sexual history to the victim is considered irrelevant and inadmissible, as there is no basis for the assumption that a virgin is more truthful than those who indulged in sexual activity. Prior sexual activity is thus shut out in rape shield law unless defendant asserts that the source of semen was someone else [11]. Section 155(4) Indian Evidence Act earlier allowed the defence lawyer to discredit the victim's testimony by arguing that she was of "immoral character". This attack on her in the name of a legally allowed cross examination, questioning her past sexual acts, her personal life and other private matters, deterred many victims of rape from registering complaints. The Indian Evidence (Amendment) Act of 2002, which came into force on January 1, 2003, deleted section 155(4) Indian Evidence Act and added a provision, section 146 Indian Evidence Act. According to the new provision, it is not be permissible to put questions in cross examination of the prosecutrix about her general moral character. This paved the way for an end to unwarranted attacks on the past sexual acts of the victim of rape. In *State of Punjab vs. Gurmit Singh*, 1996 AIR 1393, the Supreme Court has advised the lower judiciary, that even if the victim girl is shown to be habituated to sex, the Court should not describe her to be of loose character. The Supreme Court has in the case of *State of Maharashtra Vs. Madhukar N. Gardikar*, AIR 1991 SC 207, held that "the unchastity of a woman does not make her open to any and every person to violate her person as and when he wishes.

She is entitled to protect her person if there is an attempt to violate her person against her wish. She is equally entitled to the protection of law. Therefore merely because she is of easy virtue, her evidence cannot be thrown overboard."

Anonymity of the victim: According to 228A of Indian Penal Code, No person can disclose the name of the rape victim and if anybody discloses the name, he shall be punished with either description for a term which may extend to two years and shall also be liable for fine. Even if it happens to be mentioned in the FIR, anybody publicizing her name is liable to be punished with imprisonment up to two years.

Although in *State of Punjab v. Ramdev Singh*, AIR 2004 SC 1290, it was observed by the Supreme that:

"...True it is, the restriction (disclosure of identity of the victim), does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court, High Court or lower Court, the name of the victim should not be indicated. We have chosen to describe her as 'victim' in the judgment." However, it is disappointing to note that many of the judgments (which are public documents having wide readership) pronounced by the Apex Court mentions the name of the victim, for instance in *Bavo @ Manubhai Ambalal Thakore V. State of Gujarat*, (2012)2SCC 684, *Rajendra Pralhadrao Wasnik vs. State of Maharashtra*, (2012)4 SCC 37 and there are many more.

Conclusion and Last Thoughts

Following the Recommendations of the Verma committee, Criminal Laws (Amendment) Bill, 2013 the amendments that have been brought about in the Criminal Procedure Code and the Indian Evidence Act may have a positive impact in enabling more reporting, better handling and effective restitution of the victim and damage control has been aimed at but these laws will remain hollow words without proper implementation at every step by those who are responsible for the same. In addition to the legal guarantees some other measures can be suggested, which may be as follows-

1. Sex-education, gender equality and self defense mechanisms should be included in the school curriculum; so that the upcoming generation is modulated towards an unbiased society, which is better equipped to handle future challenges.
2. The benefit of the presumption under section 114A of the Indian Evidence Act should be extended to all types of rapes, so that the onus to prove that consent was present shifts totally on the accused.

3. The payment of compensation to the victim under section 357 A and 357 B of the code of Criminal Procedure should be mandatorily invoked in all rape cases and all States shall mandatorily constitute Comprehensive Victim Assistance Fund.

4. With regard to police reforms that are required to tackle offences against women generally and rape particularly, it is suggested that a separate wing of the police machinery should be constituted dedicated to deal with the vast number of offences committed against and by women (36% of the total crimes committed in 2011 were against women). Under this wing there should be police stations manned by women police officers only, lock up meant to keep women offenders only, victim crisis cell for providing legal assistance and psychological counseling, empanelled lady doctors for conducting medical examination of the victim through standard

uniform procedure and reporting the same in standard form.

5. There should be a separate investigative branch, distinct from maintenance of law and order of the police who have the appropriate scientific equipment and training to be able to conduct the highest standards of investigation including collection of forensic, medical and written evidence and preservation and investigation of crime scenes.

6. In order to realize the above steps there should be maximization of recruitment of women police force and women judges, which will in turn send a message of women empowerment in the society.

Therefore, effective governance is the only answer to reduce the uncontrolled chain reaction of rape cases all over the country, so that women are empowered and they can feel safe and have the confidence to pursue their dreams and lead a life without fear.

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