

INDIAN CRIMINAL JUSTICE SYSTEM AND RAPE VICTIM: A CRITICAL ANALYSIS

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ABSTRACT

Rape is malum in se. In modern India the institution of rape has flourished immensely in recent times, and presently it is a national problem. It is a challenge to the contemporary thinking. Gender equality is enshrined in the Indian constitution. In ancient times rape existed in Europe while women in India had divine personification as Shakti and in modern times millions of Indians visit Shakti temples with liberal offerings. The traditional view of rape regarded women as the property of men, and any act of sexual violence committed against her was considered to be the defilement of the property of another man. This is the root cause of the thousands of incidents of sexual violence that go unreported. Such a perspective to rape carries with it countless social stigmas, mainly because the worth of a woman is measured by her “sexual purity”. Feminist thought and activism over the decades have worked towards changing and widening the definition of rape in all spheres and have challenged the stereotypical conceptions of the crime that have origins in the traditional patriarchal definition of rape. It is important to identify rape as an assault on individual autonomy and pave the way for gender-neutral laws and legal procedures. We believe it is absolutely necessary for the legal system to identify and abolish the discriminatory rules and procedures in a rape trial, those which associate societal standards of character with the integrity of a witness, so that rape in this country, is only looked at as a crime and not an issue of shame. This paper addresses dynamics of rape with particular reference to India. Rape is a multidimensional and dynamic phenomenon. This article revolves around the law established for rape in India. Taking section 375 and section 376 of Indian Penal Code as the base, the article moves towards numerous aspects indicating the areas which need attention.

Keywords: Rape Victim, Indian Penal code, Survivors, Gender equality, Analysis

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INTRODUCTION

The patriarchal set of laws, male dominated profession and closed outlook of majority of judges add to the woes of the Indian 'Rape Survivors' (read as 'rape victims'). The archaic procedure practiced by our courts in a bid to ensure justice to 'rape survivors' and also to do justice to the accused, in practice turns out to be an ordeal for the 'rape survivors'. Prominent lawyers, professors, women's advocates and even some judges share the view that one of the biggest hurdles to justice in a rape case is India's judicial system, is the inherent penchant to do justice to the accused. It is no doubt a constitutional obligation of the State which flows straight from the dictates of Article 21 of the Constitution. But the anxiety of the courts to oversee that no one should be unfairly punished, no matter how many go unpunished, is often abused by the accused. It is true that in the case of 'rape accusation' the degree of scrutiny should be more. In sexual assault cases, the 'accusation' itself becomes a sort of punishment. Thus, the rigor of test which a 'survivor' is bound to pass through ends up as a public trial of the 'survivor'. The procedural safeguards conferred on the accused often tend to be procedural persecution of survivors. It is one of the most controversial issues, and is a challenge to the contemporary thinking. It is perhaps the most under-reported crime. However it is on the increase despite changes in the legislation, practice and procedure in the investigation, high profile coverage in the media, and support available to the victims. However only a small number of perpetrators are brought to justice, and victims are routinely blamed for the crime. Dealing with rape is much more complex than dealing with most other crimes. In India rape is horrific fact of life, a common occurrence that makes everyday news. The paper describes dynamics of rape in the modern Indian society, and possible reasons for the crime. The history of rape law was traced, and current law with amendment was examined.

HISTORICAL PERSPECTIVE

Historically, "*Raptus*," the generic term of rape was to imply violent theft, applied to both property and person in the Roman culture. It was synonymous with abduction and a woman's abduction or sexual assault, was merely the theft of a woman against the consent of her guardian or those with legal power over her. The harm, ironically, was treated as a wrong against her father or husband, women being wholly owned subsidiaries.² Although Roman law in the historical period recognized rape as a crime, the rape of women is a pervasive theme in the myths and legends of early Rome.³ Rape in the English sense of "forced sex" was more often expressed as *stuprum*, a sex crime committed through violence or coercion (*cum vi or per vim*).⁴

² Gillian C. Vol. 3. Oxford: Oxford University Press; 1993. Women in Late Antiquity: Pagan and Christian Life-styles.

³ Moses DC. Dunbarton: Dunbarton Oaks; 1993. Livy's Lucretia and the Validity of Coerced Consent in Roman Law, (in) Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies; p. 50.

Rape as an adjunct to warfare, dates back to antiquity when mass rape of women as a punitive measure committed by the armies after forcibly entering a town was taken by Greek, Persian, or Roman troops.⁵ Rape, as an adjunct to warfare, was prohibited by the military codices of subsequent rulers and this prohibition formed the basis for convicting and executing rapists during the Hundred Years' War (1337-1453).⁶

In some cultures, rape was seen less as a crime against a particular woman than as a crime against the head of the household or against chastity. As a consequence, the rape of a virgin was often a more serious crime than of a nonvirgin, even a wife or widow, and the rape of a prostitute or other unchaste woman was, in some laws, not a crime because her chastity was not harmed. Furthermore, the woman's consent was under many legal systems not a defense. In 17th-century France, even marriage without parental consent was classified as rape.⁷ The penalty for rape was often a fine, payable to the father or the husband whose "goods" were "damaged."⁸

In Islamic criminal jurisprudence, the majority of Muslim scholars believe that there is no punishment for a woman forced to have sex.⁹ According to a Sunnahadith, the punishment for committing rape is death, there is no sin on the victim, nor is there any worldly punishment ascribed to her.¹⁰

In some laws the woman might marry the rapist instead of his receiving the legal penalty.¹¹ This was especially prevalent in laws where the crime of rape did not include, as a necessary part, that it be against the woman's will, thus dividing the crime in the current meaning of rape, and a means for a couple to force their families to permit marriage.¹²

INDIAN LEGISLATION AGAINST RAPE WITH AMENDMENT

The history of Rape laws in India begins with the enactment of the Indian Penal Code (IPC) in 1860 (45 of 1860)¹³ covered under Section 375 and 376. According to the original provision as in Section 375, a man is said to have committed rape who, except in the case hereinafter excepted, has sexual intercourse with a

⁴ Gordon P. Baltimore: Johns Hopkins University Press; 2002. *Some Unseen Monster: Rereading Lucretius on Sex*, (in) *the Roman Gaze: Vision, Power, And The Body*; p. 105.

⁵ Phang SE. Cambridge: Cambridge University Press; 2008. *Roman Military Service: Ideologies of Discipline in the Late Republic and Early Principate*; p. 244. 253-4, 267-8.

⁶ Odahl CM. London: Routledge; 2004. *Constantine and the Christian Empire*; p. 179.

⁷ Sedney M. Scholastic Library Publishing House; 2006. 'Rape (Crime)' Grolier Multimedia Encyclopedia. Available from: <http://gme.grolier.com> .

⁸ Barnes TD. Cambridge: Harvard University Press; 1981. *Constantine and Eusebius*; p. 220.

⁹ Vol. 10. Beirut: Dar al-Kitab al-'Arabi n.d; [Last accessed on 2013 May 4]. Qudamah M al-Din Ibn, al-Mughni; p. 159. Available from: http://www.geo.tv/zs/Zina_article_Final.pdf .

¹⁰ Lucas SC. Leiden: Brill Publishers; 2004. *Constructive Critics, Hadīth Literature, and the Articulation of Sunnī Islam*; p. 106.

¹¹ Aquilia L, McGinn TA. Oxford: Oxford University Press; 1998. *Prostitution, Sexuality and the Law in Ancient Rome*.

¹² Gardner JF. Bloomington: Indiana University Press; 1991. *Women in roman law and society*; p. 118.

¹³ Tandon MP, Tandon R. 15th ed. Allahabad: Allahbad Law Agency; 1982. *The Indian Penal Code*; pp. 300-4.

woman under circumstances falling under any of the five following descriptions: (1) Against her will, (2) Without her consent, (3) With her consent, when her consent has been obtained by putting her in fear of death or of hurt, (4) With her consent when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married, and (5) With or without her consent when she is under 16 years of age.

In view of the recommendations of the Law Commission and the growing protest from the general public in response to gang-rape of a Delhi girl in December 2012,¹⁴ the Indian Parliament introduced the Criminal Law (Amendment) Bill, 2013, which was passed by both the houses in March and received President's assent in April 2013.¹⁵ It provides for amendment of IPC, IEA, and Code of Criminal Procedure, 1973 on laws related to sexual offences. The offence of rape under Section 375 of IPC, have made both penile and nonpenile insertion into bodily orifices of a woman by a man an offence. The definition is broadly explained in some aspect, with acts like penetration of penis, or any object or any part of body to any extent, into the vagina, mouth, urethra, or anus of a woman or making her to do so with another person or applying of mouth to sexual organs (Cunnilingus or fellatio) without the consent or will of the woman constitutes the offence of rape.¹⁶

The section has also clarified that penetration means "*penetration to any extent,*" and lack of physical resistance is immaterial for constituting an offence. Except in certain aggravated situations, the punishment will be imprisonment for not less than 7 years but which may extend to imprisonment for life, and shall also be liable to fine. In aggravated situations, punishment will be rigorous imprisonment for a term, which shall not be less than 10 years but which may extend to imprisonment for life, and shall also be liable to fine.

A new section, 376A has been added which states that if a person committing the offence of sexual assault, inflicts an injury, which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term, which shall not be less than 20 years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death. In case of gang rape, persons involved regardless of their gender shall be punished with rigorous imprisonment for a term, which shall not be less than 20 years, but which may extend to life and shall pay compensation to the victim, which shall be reasonable to meet the medical expenses and rehabilitation of the victim.

¹⁴ Mandhana N, Trivedi A. The New York Times: Archived from the original on December; 2012. [Last accessed on 2012 Dec 30]. Indians outraged by account of gang rape on a bus.

¹⁵ President signs ordinance to effect changes in laws against sexual crimes. India Today. [3 February 2013].

¹⁶ Section 8, Criminal Law (Amendment) Act. 2013

Certain changes have been introduced in the CrPC, 1973 and IEA, like the recording of statement of the victim has been made more friendly and easy, character of the victim is irrelevant for consideration, presumption of no consent where sexual intercourse is proved and the victim states in the court that there has been no consent, etc.

The age of consent has been increased to 18 years, which means any sexual activity irrespective of presence of consent with a woman below the age of 18 will constitute statutory rape.

The Criminal Law (Amendment) Ordinance, 2013 has been strongly criticized by several human rights and women's rights organizations for not including certain suggestions recommended by the Law Committee¹⁷ Report like, marital rape, reduction of age of consent, amending Armed Forces (Special Powers) Act so that no sanction is needed for prosecuting an armed force personnel accused of a crime against woman.¹⁸

SOCIAL IMPACT ON RAPE VICTIM

Sexual assault is not like any other crime. Unlike other violent crimes, most incidents go unreported despite evidence suggesting that the rate of sexual assault is on the increase. And despite the physical nature of the act constituting the crime, much of the harm is psychological or emotional in nature. The prosecution of sexual assault is unlike the prosecution of any other criminal offence. There is an intense focus on the character and motivation of the complainant. Traditionally, this focus has translated into a preoccupation with aspects of the complainant's behavior, which is not immediately related to the circumstances of the offence. The complainant is subjected to marked humiliation which adds insult to the injury.

Rape is especially stigmatizing, a rape victim (especially one who was previously a virgin) may be viewed by society as being “damaged.” Victims may suffer isolation, be disowned by friends and family, be prohibited from marrying, be divorced if already married, or even killed. This phenomenon is known as secondary victimization.¹⁹

PROBLEMS FACED BY RAPE VICTIMS

- Deprivation of right to life and personal liberty
- Forced to undergo uncomfortable procedures and inquiries both inside the court as well as from the people outside.
- Ostracized by the society and at times, prohibited from right to education as well.

¹⁷ Women groups protest anti-rape ordinance. DNA. 4 February 2013. [Last accessed on 2013 Feb 5].

¹⁸ Despite protest, ordinance on sexual offences promulgated. The Hindu. 3 February 2013. [Last accessed on 2013 Feb 5].

¹⁹ Campbell R, Raja S. Secondary victimization of rape victims: Insights from mental health professionals who treat survivors of violence. *Violence Vict.* 1999;4:261–75.

- Exploitation by media and the people concerned by making her a public figure.
- Interference of various political parties into the matter or changing it as a political issue.
- Deprivation of the victim from certain rehabilitative and aftercare treatment.
- Delay in the trail proceedings which results in delay in delivering justice.
- Delay on the part of investigating agency in finding out the real culprits.

IMPACT ON PSYCHOLOGY OF THE RAPE VICTIM

Childhood and adulthood victims of rape are more likely to attempt or commit suicide.²⁰ The association remains, even after controlling for sex, age, education, symptoms of posttraumatic stress disorder, and the presence of psychiatric disorders.²¹ The experience of being raped can lead to suicidal behavior as early as adolescence. In a study of raped school girls, 6% reported having attempted suicide. Rape-victims feel embarrassed to talk about what had happened to them.²² A study of adolescents found prior sexual abuse to be a leading factor predicting several health risk behaviors, including suicidal thoughts and attempts.²³

Rape and other forms of sexual assault on a child can result in both short-term and long-term harm, including psychopathology in later life.²⁴ Psychological, emotional, physical, and social effects include depression,²⁵ posttraumatic stress disorder,²⁶ anxiety,²⁷ eating disorders, poor self-esteem, dissociative, and anxiety disorders; general psychological distress and disorders such as somatization, neurosis, chronic pain,²⁸ sexualized behavior,²⁹ school/learning problems; and behavior problems including substance abuse,³⁰ destructive behavior, criminality, and suicide.³¹

²⁰ Davidson JR, Hughes DC, George LK, Blazer DG. The association of sexual assault and attempted suicide within the community. *Arch Gen Psychiatry*. 1996;53:550–5.

²¹ Nagy SI, Adcock AG, Nagy MC. A comparison of risky health behaviors of sexually active, sexually abused and abstaining adolescents. *Pediatrics*. 1994;93:570–5.

²² Mulugeta E, Kassaye M, Berhane Y. Prevalence and outcomes of sexual violence among high school students. *Ethiop Med J*. 1998;36:167–74.

²³ Anteghini M, Fonseca H, Ireland M, Blum RW. Health risk behaviors and associated risk and protective factors among Brazilian adolescents in Santos, Brazil. *J Adolesc Health*. 1999;28:295–302.

²⁴ Nelson EC, Heath AC, Madden PA, Cooper ML, Dinwiddie SH, et al. Association between self-reported childhood sexual abuse and adverse psychosocial outcomes: Results from a twin study. *Arch Gen Psychiatry*. 1998;59:139–45.

²⁵ Widom S, Dumont K, Czaja S. A prospective investigation of major depressive disorder and comorbidity in abused and neglected children grown up. *Arch Gen Psychiatry*. 2007;64:49–56.

²⁶ Joan arehart-treichel dissociation often precedes ptsd in sexually abused children. *Psychiatric News (American Psychiatric Association)* 2005;40:34.

²⁷ Faller KC. Vol. 6. Philadelphia: Diane Publishing; 1993. *Child Sexual Abuse: Intervention and Treatment Issues*.

²⁸ Polusny M, Polusny MA, Follette VM. Long-term correlates of child sexual abuse: Theory and review of the empirical literature. *Appl Prev Psychol*. 1995;4:143–66.

²⁹ Childhood sex abuse increases risk for drug dependence in adult women. *National Institute of Drug Abuse (National Institutes of Health)* 2002:17.

³⁰ Freyd JJ, Putnam FW, Lyon TD, Becker-Blease KA, Cheit RE, Siegel NB, et al. Psychology. The science of child sexual abuse. *Science*. 2005;308:501.

The risk of lasting psychological harm is greater if the perpetrator of the sexual assault is a relative (i.e., incest), or if threats or force are used.³² Incestual rape has been shown to be one of the most extreme forms of childhood trauma, a trauma that often does serious and long-term psychological damage, especially in the case of parental incest.³³

Apart from judicial awakening; what is primarily required is generation of awareness. 'Educating people to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's human rights'. Men have the economic, moral, political, religious, and social responsibility to combat all forms of gender discrimination.

In a country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the letter of law.

CURRENT CRIMINAL JUDICIAL SYSTEM OVER RAPE VICTIM

It is heartening to know that there is a greater gender sensitivity and new awakening in the recent years while appreciating evidence in rape cases. It is a matter of concern that the shameful 'Two Finger Test' (TFT), a primitive clinical procedure where the Doctor tests the laxity of vaginal muscles with his two fingers, was earlier permitted. The Doctor, for reasons unwanted, declares the virtues and gives a character certificate to 'the wronged', testifying that she is habituated to sex or not. As late as in 2011 the Director General of Health Services issued an order to discontinue this practice. In fact this practice has been banned in many countries. Pages and pages of judgments have been written over long years without condemning this medieval procedural practice, rampantly followed by the Investigators. Barring few, judicial minds never sulked about the absurdity of the test, or the procedural persecution of the wronged. Thankfully, the new judgments condemn this practice showing the right direction to the investigators. In her entire history India would not have witnessed the kind of upsurge we witnessed in the aftermath of December 16 gang-rape in a moving bus and killing of a 23-year-old woman in New Delhi. The unfortunate incident gave a platform for an inclusive debate for better laws and greater gender sensitivity. Rape as an offence has grown beyond mere 'law and order' situation. It can no longer be just another offending act in Indian Penal Code and lookout of law makers and judiciary. Post the Delhi gang-rape, rape penalties have been toughened and promises have been made to police better. But, the trend of assault continues unabated, with brutal attacks on women everywhere in the country. Despite the hue and cry and the government amending the Criminal

³¹ Kendall-Tackett KA, Williams LM, Finkelhor D. Impact of sexual abuse on children: A review and synthesis of recent empirical studies. *Psychol Bull.* 1993;113:164–80.

³² Bulick CM, Prescott CA, Kendler KS. Features of childhood sexual abuse and the development of psychiatric and substance use disorders. *Br J Psychiatry.* 2001;179:444–9.

³³ Courtois CA. New York: W. W. Norton and Company; 1988. *Healing the Incest Wound: Adult Survivors in Therapy*; p. 208.

Law (Amendment) Act, 2013, which amended Indian Penal Code, Indian Evidence Act and Code of Criminal Procedure, there is no decline in sexual assaults. Contrary to popular perception of delayed trials, we have proved that quicker justice is possible within our system. A special fast-track court took just seven months to pronounce the verdict in the Delhi gang rape case. According to human rights lawyers', the reason for this exception to the rule of a protracted criminal justice system that fails thousands of rape victims in India, is the public outrage. Legal system should not be the one which get charged only on public demand. As Rebecca Mammen John, a Supreme Court lawyer, points out "There are so many survivors out there who are neither getting any kind of media attention, nor getting any kind of judicial attention, which results in languishment of their cases in courts with no signs of justice being done". So, what is the reason for this delayed justice and denial of it? According to legal experts, one of the biggest hurdles in achieving justice for rape survivors is the protracted trials. For a population of 1.2 billion, India does not have the sufficient number of courts, judges and prosecutors which leads to a backlog of millions of pending before the High Courts. Since the conviction, in many cases, depends on testimony of victims, the accused make of use lengthy trial period to win over the prosecutrix. Apart from coercive methods there are many instances where the witness is forced to accept illegal "out-of-court" settlements on consideration. There exist ingenious methods to earn judicial sympathy or to 'resolve' the 'dispute' in the community by pressurising the victim's family into marrying their daughter to the accused. A compromise entered into between the parties cannot be construed as a leading factor based on which lesser punishment can be awarded. Rape is a non-compoundable offence, an offence against the society and is not a matter to be left for the parties to compromise and settle. The accused may use all his influence to pressurize the victim for a compromise. So, in the interest of justice and to avoid unnecessary pressure/harassment to the victim, it would not be safe to consider the compromise arrived at between the parties in rape cases as a ground for the Court to exercise the discretionary power under the proviso of Section 376(2) of IPC

CONCLUSION

At this point of time, it has to be stated that we are responsible for the current situation in which a girl is not even safe in her home. Police, government, and media have to look into the matter in a much more serious way so that apart from benefitting themselves, such machinery must look into the matters of the common people so that people need not gather at streets for protests. It is the responsibility of the government and law enforcing agencies to make sure that each and every citizen is safe in this country, and it is up to the media to look after the cases involving infringement of the rights of the people rather than building controversies. There must be a change in the attitude of the society so that when a girl is alone, it must not be an

opportunity to others but rather a responsibility of others to look after her safety. Changes must be made not only in the laws but also in the mindset of the people so that rape victims will no longer be victimized.