



RAPE: THE (UN)JUSTIFIED HINDRANCES SERVING (IN)JUSTICE IN INDIA

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“...when a woman is ravished, what is inflicted is not merely physical injury, but the deepest sense of some deathless shame...”

– Justice A.M. Ahmadi

What happens when a governmental machinery designed to support you during adverse times, turns down and becomes pillars of hardships in the path of justice? What happens when the series of institutions dutybound to address grievances actively takes charge to oppress you? ‘You’ here signifies none other than, what we call as ‘the easiest victim of the most heinous crime – Rape!’ The offence that suffocates breath of the sufferer. An untold misery is inflicted upon her when she paddles through various agencies – Law enforcement - ‘Police’, ‘Medical services’, and the epitome of justice- ‘Judiciary’. Lastly, the agony of unsilenced crowd waiting for her when she is redirected back to habitat again in the society. This entire article will unveil the unseen side of these three institutions and cumulative role played by them to administer (in)justice. However, few questions that remains

unanswered since ages as to why our system is lagging when it comes to women bodily offences? Why the system lacks women sensitivity? These questions will lead us to identify existing vacuum within the system that demands to be fulfilled.

Primarily starting with first body approached by the sufferer i.e. Police – have immense powers blended with legal and moral duties. Above all, this body have the supreme charge to set criminal justice system into motion. It is an undisputed fact that higher representation of police officers in a state contributes to flexible redressal mechanism. However, what seems frightful are the figures reflecting weakened side of police system. Across India, police department consists of 13 lakh civil police officers¹, making it to 96 civil police-officers per lakh population. As a result, Indian police system has managed to attain position amongst the most understaffed police system across the world. Ironically, United Nations standards prescribe to have 222 police officials per lakh population² to which India seems way behind. Integration of women police officers in the male dominated police system is highly demanded. How many of you would have an instinct of a ‘Women in uniform’ after hearing the word- ‘Police’. Surely none of you! This is because police culture is inherently known for its patriarchal blunt image and there is continuous poor representation of women in this service. Female officers are needed not just for the sake of representation but for escorting female victims, recording statements of females. Women police

¹ Bureau of Police Research and Development, *Data on Police Organizations*, Ministry of Home Affairs, (Jan 2019), <https://bprd.nic.in/WriteReadData/userfiles/file/202001301028101694907BPRDDData2019-19forweb-2.pdf>

² Anviti Chaturvedi, *Police reforms in India*, PRS LEGISLATIVE RESEARCH (June 2017), https://www.prsindia.org/sites/default/files/parliament_or_policy_pdfs/Police%20Reforms%20in%20India.pdf



personnel comprises of only 8.98%³ of the total police force in the country concluding it to 3391 women per policewomen. Research shows poor representation of women in police leads to dissatisfaction with police among women. States like Himachal Pradesh, Maharashtra and Tamil Nadu have highest representation of women police officials thereby highest satisfaction level whereas Uttar Pradesh, Assam, Bihar, and Telangana vice versa.⁴ The unproportionate ratio of men and women in police system forces rape victims to approach male officers where police starts preying on victims- the crime that every day goes unreported. Though, no data is available on secondary victimization by police. But Police apathy against women is the third highest category under which complaints have been registered at National Commission for Women.⁵ From telling victims to come after rape happens to police themselves becoming rapists. It is a common norm among police fraternity in rather providing legal and psychological assistance to the complainant, they warn the victim that they will investigate the sexual histories, that she will be exposed to the public and would become dishonour to the family. Cases are being rejected on the grounds that they do not believed rape

occurred even though “reliability, genuineness and credibility of the information”⁶ are not condition precedent to register F.I.R. 19% of the people approaching police for the registration of FIR were asked to resolve the matter or to compromise and 9% people were asked to pay bribe.⁷ “*The police asked me to take some money from the accused and to just let it go. When I refused to compromise, they scolded me and said, we will put you in lock-up if you don’t compromise*”⁸- says rape victim Malini (name changed to protect identity). Since, 2001 to 2013, from all the rape cases reported, 90% of the times the rapist was known to the victim⁹ and therefore oppressed by society and police pushing her to enter into a compromise by referring to it as a ‘private’ matter. It is one of the rudimentary approaches where police instead of channelizing the path of justice pressurises her to drop rape charges and opt as so-called easier route- ‘marital compromise’ even though it lacks legal permissibility. Out of court settlement or mediation is illegal in rape cases as it is against the honour of victim.¹⁰ Non-registration of FIR (First Information Report) on the part of police-in-charge is a punishable offence with an imprisonment of two years.¹¹ Subsequently after successful

³ Supra Note 1.

⁴ *Status of Policing in India Report, 2018, A study of Performance and Perceptions*, Common Cause & Lokniti - Centre for the Study Developing Societies, (2018) <https://www.tatatrusters.org/upload/pdf/spir-2018-common-cause.pdf>.

⁵ National Commission for Women, *Annual Report 2018-19*, http://ncw.nic.in/sites/default/files/FINAL%20NCW%20ENGLISH%20ANNUAL%20REPORT%202018-19_0.pdf.

⁶ *Lalita Kumari v Government of Uttar Pradesh*, (2014) 2 SCC 1.

⁷ Supra Note 4.

⁸ Humans Rights Watch, *Everyone Blames Me- Barriers to Justice and Support Services for sexual assault survivors in India*, 2017, https://www.hrw.org/sites/default/files/report_pdf/india1117_web.pdf.

⁹ Nithya Nagarathinam, *Enabling Reporting of Rape in India: An Exploratory Study*, Policy Report No. 15, The Hindu Centre for Politics & Public Policy (2015), https://www.thehinducentre.com/multimedia/archive/02675/Policy_Report_No_1_2675192a.pdf

¹⁰ *State of Madhya Pradesh v Madanlal* (2015) 7 SCC 681.

¹¹ Section 154 Code of Criminal Procedure, 1973.



F.I.R. registration, the woman on whom rape has been committed, shall be sent 'immediately' for medical examination mandatorily free of cost within 24 hours after receiving complaint.¹² to 'any government or private hospital'.¹³ Rape victim should be able to access 24 hours medical services a day and upon call basis as guided by World Health Organization.¹⁴ It is also the right of the woman to approach directly for medical examination and no doctor/hospital could delay examination for want of police recognition.¹⁵ The court termed it as a 'medico-legal emergency' where delay in examination could result into loss of therapeutic opportunities and evidences such as semen and blood samples could be washed away by the complainant herself or otherwise. However, if the survivor does not wish to go for police investigation it will not result into denial for treatment of sexual violence. But how far the laws are implemented is a serious issue. Victims are even denied medical examination on the ground of non-availability of doctor or the doctor avoid putting themselves in legal procedures in fear of getting embroiled in criminal cases even though this action is an offence 'punishable up-to 1 year of imprisonment or with fine'. Doctors have the fundamental duty as well as an ethical obligation to use their skill and knowledge in such a manner that the doing and giving must

be rightful in treatment of rape survivor/victim. But what happens at ground level is disturbing. Despite prohibition by the Supreme Court in 2013¹⁶ the 'Two-Finger test' or The *Pre-vaginal (P.V.)* is still operational in medical fraternity. Doctors perform this test to determine the laxity and sexual activity of the victim and to know whether the hymen is broken or not by inserting two-fingers into the vagina. Easy insertion of fingers suggests sexual intercourse and vice versa. Scientifically the presumption of '*Intact hymen-No rape*' is false. This test is not scientific and lacks scientific evidence. "*Scientific evidence is that which is objective, and when the test is repeated by anyone, then the same results will be achieved. The two-finger test is a subjective test. There are many variables—the test results will be different depending on the size of the doctor's fingers*"¹⁷ -- Dr. Harish Pathak, Professor of Forensic Medicine. Therefore, it was held unconstitutional on the grounds of violation of Human Rights and Right to Privacy under Article 21 of Indian Constitution. Research states that the test is still in practice in various parts of India despite being illegal. Internationally the test is still spamming within 20 countries of all regions in the world.¹⁸ It took 6 years for Maharashtra based Medical University to ban a full-fledged chapter on two finger test.¹⁹ In

¹² Section 164A Code of Criminal Procedure, 1973.

¹³ Section 357C Code of Criminal Procedure, 1973.

¹⁴ World Health Organization, *Guidelines for Medico-Legal care for victims of Sexual Violence*, (2003), <https://apps.who.int/iris/bitstream/handle/10665/42788/924154628X.pdf;sequence=1>.

¹⁵ Karnataka v Manjanna 2000 (6) SCC 188.

¹⁶ Lilu@Rajesh and Anr v State of Haryana, (2013) 14 SCC 643.

¹⁷ Human Rights Watch, *Dignity on Trial, India's Need for Sound standards for Conducting and*

interpreting Forensic Examinations of Rape survivors, (2010)

<https://www.hrw.org/sites/default/files/reports/india0910webwcover.pdf>

¹⁸ *United Nations Agencies call for ban on virginity testing*, World Health Organization (Oct 17, 2018) <https://www.who.int/news-room/detail/17-10-2018-united-nations-agencies-call-for-ban-on-virginity-testing>

¹⁹ *Two fingers virginity test banned from textbooks in Maharashtra*, E-TIMES (Oct, 10 2019)



August 2019, 1500²⁰ rape survivors on whom two finger tests had been conducted, have written to Supreme Court demanding cancellation of license of doctors practicing two finger tests through N.G.O 'Rashtriya Garima Abhiyan' stating that the test mimics the original act of sexual violence making her re-experience the traumatization and victimization. Additionally, the medical fraternity does not have sufficient knowledge to handle routine medico-legal case. "At best, doctors will have some half-an-hour or one-hour lecture on medical evidence every year. No training. Nothing at all for medical examination in rape cases".²¹ In a research conducted by Department of Forensic Medicine and Toxicology at S.V.S Medical College, upon 200 medical students 70% of interns and 40% of post graduates had no proper knowledge in handling medico-legal case independently.²² The medical evidences in rape cases are of outmost importance as 90% of times there is no eye witness to testify. The case is entirely dependent upon medical evidence which is bound to be collected in proper and systematic manner. The evidence includes 'vaginal secretion, foreign hairs and fibres present on the victim, semen strains, fingernail scrapping carrying

fibres or swabs for semen'. Error in collection of evidence contributes to injustice by weakening the case of the prosecutor. Therefore, the medical fraternity which ought to be the strongest agency to serve justice becomes the providers of injustice due to improper evidence collection training during their medicine program. There is also weak implementation of guidelines and protocols by government and medical institutions. Additionally, there is no uniform systematic procedure to collect medical evidence. Every medical practitioner prior conducting medical examination must obtain 'Informed Consent'²³ from the lady on whom offence has been committed or by parent/guardian on whom victim reposes trust. Informed consent here means that the doctor conducting medical examination is bound to give a detailed, structured and procedures ought to be carried out on her and acknowledge her about the importance and relevance of the evidence in legal proceedings.²⁴ Consent can be challenged on the ground that no adequate and requisite information was not revealed in order to take knowledgeable decision.²⁵ It is very rare that women on whom the test has been conducted has refused to take test or asked for time to get onto a decision. The

<https://timesofindia.indiatimes.com/life-style/health-fitness/health-news/good-news-two-finger-virginity-test-banned-from-textbooks-in-maharashtra/articleshow/69252774.cms>

²⁰ *Rape survivors demand cancellation of license of doctors who still conduct two finger tests*, *OUTLOOK INDIA* (Aug 9, 2019) 04:19 PM <https://www.outlookindia.com/newscroll/rape-survivors-demand-cancellation-of-license-of-doctors-who-still-conduct-two-finger-test/1593621>

²¹ Supra Note 18

²² G Venkat Rao & N Hari, *Medico-legal knowledge assessment of interns and post graduate students in a medical institution*, Department of Forensic Medicine and Toxicology (2016) https://iaimjournal.com/wp-content/uploads/2016/10/iaim_2016_0310_17.pdf

²³ Ministry of Health and Family Welfare, *Guidelines & Protocols Medico-legal care for survivors/victims of Sexual Violence*, Government of India (2014) <https://main.mohfw.gov.in/reports/guidelines-and-protocols-medico-legal-care-survivors-victims-sexual-violence>.

²⁴ Department of Health Research, *Forensic Medical Care for Victims of Sexual Assault*, Ministry of Health and Family Welfare (2013), <https://dignitymarch.org/wp-content/uploads/2018/11/DHR-Forensic-Medical-Manual-Sexual-Assault.pdf>.

²⁵ Satyanarayana Rao, *Informed consent: An Ethical Obligation or Legal Compulsion* 1 J.C.A.S., 33-35 (2008).



reason being the doctors takes 'consent' instead of 'informed consent'. "It is very rare that women can say, "I don't want this part of the examination," or ask questions about what is being done. Even with social workers present, it is difficult."²⁶ Women before undergoing medical examination were not acknowledged about the body parts on which the doctors would conduct medical examination.

It is also here to be noted that whether rape has occurred or not is a legal issue and not a medical issue. Therefore, it is not the right of doctors to conclude whether rape has occurred or not.²⁷ "Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether rape has occurred or not is a legal conclusion, not a medical one."²⁸ But the practice to mention 'rape' in the medical report is still prevalent in medical fraternity. The norm to mention past sexual practices is still operation even after abolishing it.

The struggle and battle of the sufferer continues when she reaches the last stage in the road to justice. Judiciary has the paramount duty to provide justice. The quality of justice rendered is not up to the mark. The whole judicial system collapses in

securing the rights of rape sufferer. Witness turning hostile is not new in criminal cases especially rape and murder. The victim turns hostile owing to the threats of the accused. Though India enacted Victim Protection Scheme²⁹ in 2018 but the question on its successful implementation is still needed to be answered. The prosecutors have no training to present forensic evidence before the court. Prosecutors jumps to find legal conclusion by asking "was the victim raped?" as opposed to findings of fact that would support or refute the legal conclusions.³⁰ The prosecutrix virtually have no right in criminal proceedings whereby the state is the prosecutor and victim is just a witness in eyes of law. Shift in approach is needed from the trial being 'accused centric' to 'victim centric'. Indian system equates reparation with retribution and thus misses in administering quality justice. reparation includes "restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition".³¹ It is a weakness of our jurisprudence that victims of crime and the dependents of the victims do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our law. This is the deficiency in the system, which must be

²⁶ Supra Note 18.

²⁷ Lok Nayak Jai Prakash Narayan National Institute of Criminology and Forensic Science, *Protocols And Proformae For Medico-Legal Examination Of Survivors Of Sexual Violence & Evidence Collection Kit*, Ministry of Home Affairs (2014), <http://nicfs.gov.in/wp-content/uploads/2018/09/protocol-bluebook.pdf>

²⁸ State of Tamil Nadu v Raju@Nehru (2006) 10 SCC 534.

²⁹ Victim Protection Scheme, 2018

³⁰ A Windley Brown, *Obstacles to Women Accessing Forensic Medical Exams in Cases of Sexual Violence*, Human Rights Watch, <https://www.hrw.org/legacy/backgrounder/wrd/who-bck.pdf>.

³¹ United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2006), <https://www.un.org/ruleoflaw/files/BASICP~1.PDF>



rectified by the legislature.³² The lack of proper training in handling medico-legal cases administers injustice. Out of the 17313 completed trial conviction happened in 4708 cases making the conviction rate only 27.2%.³³ One of the reasons for the low conviction rate is lack of specialized prosecutors to deal with rape trials. The Indian Judicial system is in the need of highly trained prosecutors assigned special for rape trials. The overburdened judicial system also contributes to denial of justice. The country has 15 judges for every 1 million people.³⁴ The overburdened judiciary is one of the reasons in delay of trials. In 2018, 1,56,327 were on trial. However, the defence counsel never believes in the idea of speedy trials. The defence works on the principle: “*More delay-More fees*”. Though it is highly unethical but is a ground reality.

Conclusion

Rape one of the most heinous crime against the victim as well as society. The entire system which is supposed to be at the side of rape survivor unfortunately, active takes charge to oppress her. The machinery suppresses her at every point. The three pillars of the system namely Police, Medical and Judiciary lacks sensitivity while dealing with rape cases. The major loophole in the system is found out to be ‘improper training’, lack of women sensitivity and biasness. The loopholes are so deep rooted in the system that the system itself has accepted it. These issues are embedded within the system that nobody knows about it. The major drawback is that there no criticism at the end of media which has the power to bring loopholes into limelight.

³² Rattan Singh v. State of Punjab, A.I.R. 1980 S.C. 84.

³³ National Crime Records Bureau, 2018.

³⁴ Divya Shukla, *An analytical study of decreasing rate of conviction in India*, 4 I.J.L 91, 93 (2018).