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EVOLVING JUDICIAL STANDARDS IN STRENGTHENING PUNISHMENTS AND ENSURING JUSTICE FOR RAPE SURVIVORS

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INTRODUCTION

Justice Krishna lyer has said that "Mine are the tears that froze with the pain, mine is the pain that has no name." This is the real story of Indian women which Justice Krishna lyer has portrayed beautifully in few words.[2]

The greatest tragedy has been the grave injustice done to half of the humanity. i.e Women. Even at present, men are under the impression that their position is much stronger than the women in society. Women struggle for equality in the society is backed by the law and to some extend by the right-thinking people in the society.[3]The problem of violence, especially, violence against women is not a new one and evidence of such violations can be found throughout in the historical records of any culture.[4]By reaching twenty first century women have become more independent and therefore, not willing to submit to the domination by males. Although, a new phase has entered in the women's position, still, her exploitation continues, whether it is rigid societal norm or it is psychologically by the male dominated society. Still she is beaten, tortured, kidnapped, burnt, murdered and raped. Her position is not better one.[5]

The basic reason for violence against women is their inferior status educationally, economically, politically, and sociallyin a male dominated society. Other factors responsible

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[2] Justice Krishna lyer, "Human Right to be Women" in*Women March towards Dignity, Social and Legal Perspectives* (1993), p.1.
[3] Subhash Chandra Singh (ed.), "Women and Law" in *Gender Justice*(New Delhi: Serials Publication, 2009) 223.
[4]Prof. Rattan Singh, "Violence Against Women: Some Protective Measures,"*LJ*, Vol. 20, No. 0972-382X, (2012).
[5]Id at 30.

for increasing criminalization of society, media images, inadequate means to address the cause and consequences of violence, poor enforcement of legal provisions, unabashed consumerism and erosion of family values have all added to it.[6]There are cries for harshest penalties, but often times such cries eclipse the real plight of the victim. Rape is an experience which shakes the foundations of the lives of the victims. For many, its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating endless fear. In addition to the trauma of the rape itself, victims have had to suffer further agony during legal proceedings.[7]

Thus, conceptualizing violence against women as a human rights violation typically means demanding changes in local cultural practices concerning sexuality, marriage, and the family. Women's vulnerability to violence depends on entrenched sociocultural practices involving marriage, work and religious and secular ideologies of masculinity and femininity. Conventions on the rights of women typically require states that ratify them to change cultural practices that subordinate women. The 1992 Declaration on the Elimination of Violence against Women issued by the CEDAW committee says that "States should condemn violence against women, and should not invoke any custom, tradition, or religion or other consideration to avoid their obligation with respect to its elimination".[8]

CURRENT LEGAL FRAMEWORK

The role of Judicial interpretation in shaping legal responses to rape has evolved significantly, reflecting shifts in societal attitudes, human rights principles, and legal frameworks. Before analysing the juridical response in this area, a study of present legal framework is necessary.

The “Nirbhaya Act”, also known as “the Criminal Law (Amendment) Act of 2013”, was approved by Parliament to alter Section 375. [9] This was done to remove uncertainty in the former law and provide for strong punishment in situations of the rarest incidents of sexual violence.New offences like, acid attack, sexual harassment, voyeurism, stalking had been

[6] Subhash Chandra Singh. (ed.), “Violence Against Women with Special Reference to Sexual Harassment at the Work Place in India” in *Gender Justice* (New Delhi: Serials Publication, 2009) 223.
[7]Delhi Domestic Working Women’s forum v. Union of India (1995)1 SCC 14.

[8] Sally Engle Merry,“Women, Violence, and the Human Rights System” Marjorie Agosin. (ed.), (Jaipur and New Delhi: Rawat Publications,2003) p.90.
[9]Indian Penal Code. S. 375.

incorporated into the Indian Penal Code. Also, provisions of Indian Evidence Act, Crpc were amended so far it related to sexual offences.

REPEAL OF INDIAN PENAL CODE:

In India, the offence of rape was governed under the provisions of the Indian Penal Code, 1860 (IPC). This colonial-era criminal law somehow failed in certain scenarios because society had evolved in various aspects; therefore, to improve India's overall criminal justice delivery landscape as well as to protect women from sexual offences, Bharatiya Nyaya SanhitaAct (BNS, 2023) was proposed. This law was introduced to replace the long-standing law IPC, 1860. Under BNS Act: Sec. 63 defines the term Rape, and Sec. 64 deals with punishment for rape. Sections 65-71 highlights punishment for rape in certain cases.

EXAMINING THE ROLE OF SUPREME COURT JUDGMENTS IN STRENGTHENING RAPE PUNISHMENT

The Judiciary in India is considered as the third branch of the government and guardian of the Constitution. Being so, it is bound to ensure justice. It has devised many ways and changed its role from merely being an arbiter to an activist court. Judicial activism is one such invention. It means to operate outside the bounds of the law and make independent decisions to uphold the rule of law. Numerous victims of crime have physical, social, financial, or emotional pain or injury, which must be swiftly remedied by granting them access to justice. "Public Interest Litigation (PIL) or Social Action Litigation (SAL)" is the primary mechanism via which Judicial activism has grown in India. The judiciary, which has hitherto been limited to handling matters that are presented before it, started taking many cases into consideration based only on newspaper reports complaints through mail. As a result, the phrase "Judicial Activism" has gained increased currency in describing the judiciary's function.[10]The Supreme Court has explained the socio-legal implications of rape which according to it, "is not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. Rape is, therefore, the most hated crime. It is a crime against basic

[10]Tisha Pattnaik, "The Significance of Judiciary During Rape Case Verdicts"*IJALR*, Vol 2, No. 2582-7340 (2023).

human rights and is also violative of the victim's most cherished fundamental right, namely, the right to life as contained in Art. 21 of the Constitution."[11]

In Narender Kumar v. State (NCT of Delhi), the Supreme Court held that even if a woman is of easy virtue or used to sexual intercourse, it cannot be a licence for any person to commit rape on her. The victim of rape being an unchaste woman by itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.

USE OF PLENARY POWER BY THE JUDICIARY IN RAPE CASES

In a recent case of Bilkis bano the Apex court quashed the remission it had granted to 11 convicts in the high-profile gang-rape case and the killing of her seven family members. It also slammed the state for being "complicit" with an accused and abusing its discretion. Supreme Court, while refusing to accept the plea of protection of the liberty of the convicts in the Bilkis Bano case, enforced theRule of law. The top court said the faith of people in the efficacy of law is the saviour and succour for the sustenance of the Rule of law.Observing that justice is Supreme and ought to be beneficial for the society, the bench said law courts exist for society and ought to rise to the occasion to do the needful in the matter. They added: "In complying with the principles of Rule of Law which encompasses the principle of equal protection of law as enshrined in Article 14 of the Constitution, we hold that 'deprivation of liberty' herein is justified in as much as the accused have erroneously and contrary to law been set at liberty.Compassion and sympathy have no role to play where Rule of Law is required to be enforced. If the Rule of Law has to be preserved as the essence of democracy, it is the duty of the courts to enforce the same without fear or favour, affection or ill-will. The manner of functioning of the court in accord with the Rule of Law has to be dispassionate, objective and analytical. Thus, everyone within the framework of it must accept the system, render due obedience to orders made and in the event of failure of compliance, the rod of justice must descend down to punish".[12]

- INVOKING ARTICLE 142 TO BRING JUSTICE TO THE VICTIM:

  In a recent case, the division bench comprising Dr. DY Chandrachud and JB Pardiwala, while keeping in mind the provisions of the Medical Termination of

[11]Bodhisattwa Gautam v. Miss Subhra Chakraborty A.I.R. (1996 S.C. 922).

[12]Article 142 can't be invoked in favour of Bilkis Bano case convicts to allow them get out of jail: Supreme Court - The Economic Times

Pregnancy Act, 1971, exercised its powers under Article 142 of the Constitution allowing abortion of a14-year-old rape survivorwhich was alleged to be an emanation from a sexual assault.[13]

- PROTECTING PUBLIC INTEREST THROUGH SUO MOTO ACTION:

Instances of sexual assault and gender-based violence shake us to our core, forcing us to reconsider whether any real progress has been made. In 1997, the Supreme Court's Visakha[14] verdict had set out guidelines to prevent sexual harassment in the workplace.Vishakha guidelines were treated as the law declared by the Supreme Court under Art 141to provide for effective enforcement of the basic human right of gender equality and guarantee against sexual harassment. Notwithstanding the judgement, sexual harassment continues to characterize the working condition of many women in the both public and private sector. Even after 27 years the country is once again faced with the horrific reality of a young doctor's brutal rape and murder at workplace (RG Kar Medical College rape case).While the judgement and The Sexual Harassment of Women at Workplace (Prevention, Prohibition and redressal) Act, 2013 were necessary but it proved to be insufficient to reduce sexual pestering of women at the place of work and elsewhere.

The Supreme Court heard the Suo Motu case registered by it in connection with the rape and murder of a 31-year-old resident doctor in Kolkata's RG Kar Medical College.The matter was heard by a Bench of Chief Justice of India DY Chandrachud with Justices JB Pardiwala and Manoj Misra which "emphasized that while the case is being handled by the High Court, it underscores a broader systemic concern regarding the safety of doctors across the country,"[15]The Supreme Court stated "systemic issue about safety of doctors across India" as the reason for undertaking Suo Motu cognisance of the recent horrific rape and murder of a 31-year-old doctor in Kolkata's RG Kar Hospital.The Supreme Court's decision to appoint a National Taskforce to ensure safety protocols nationwide and to have the CBI report of its investigations directly to it signifies a stand against atrocities, need of equality and a

[13](Mother of X) v. State of Maharashtra (2024) SCC OnLine SC 608retrieved from: https://www.scconline.com/blog/post/2024/04/23/supreme-court-allows-abortion-of-14-year-old-rape-survivor/

[14]Vishaka & Ors v. State of Rajasthan & Ors.(AIR 1997 SC 3011).

[15]ETLegalWorld, Updated On Aug 22, 2024retrieved from: https://legal.economictimes.indiatimes.com/news/litigation/suo-moto-powers-protects-public-interest-upholds-rule-of-law-say-legal-experts/112688890

commitment to justice to uphold the principles of our Constitution.This proactive approach adopted by the judiciary has evolved from the procedural flexibility introduced in Public Interest Litigation (PIL).[16]

- ISSUING ESSENCIAL DIRECTIONS TO POLICE AUTHORITIES:

The recent Hathras rape and murder case not only highlights our ongoing struggle with gender-based violence but also caste-based discrimination and violence (victim being dalit) prevalent in India since ages. It has gained global concerns leading to widespread outrage worldwide, representing a significant human rights issue causing us to question the position of marginalized communities in the Indian criminal justice system. The verdict reignites discussions about the role of law enforcement agencies and the need for accountability in handling sensitive cases and impartiality within law enforcement agencies. Taking view of the hasty action taken by the state officials, illegality conducted by police, the case acts as a reminder that accountability is a cornerstone of human rights protection. Secondly, the judgment underscores the importance of dying declarations in rape trials. It reaffirms the significance of the victim's statements as powerful evidence in such cases. Dying declarations serve as a testament to the victim's last wishes, providing crucial insights into the circumstances of their assault.[17]

Taking cognizance of the serious issue of child sexual abuse cases and exploitation in various orphanages in the state of Tamil Nadu, the Apex court in Re Exploitation of Children in Orphanages[18], issued directions for the protection of rights and welfare of children.In another case, the SC laid down broad parameters for assisting the rape victims. It pointed out the defects in the police administration and the rape trials itself. The court said, undoubtedly, court proceeding added to and prolonged the psychological stress that victims had to suffer as a result of the rape.[19]

- INTERPRETING CONSENT IN SEXUAL OFFENCES:

[16]Ibid.
[17] Hasi Jain, "Hathras Verdict: Justice not Delivered", *News Click*(14 Sep 2023)retrieved from: https://www.newsclick.in/hathras-verdict-justice-not-delivered

[18](2017)7 SCC 578.
[19]Delhi Domestic Working Women's forum v. Union of India (1995)1 SCC 14.

BharwadaBhoginbhaiHirjibhai v State of Gujarat[20]

In this case, the court settled the legal position on conviction in rape cases based on the sole testimony of the victim. The court held that in Indian society considering the value placed on a woman's chastity, it is difficult to fathom a woman who would lie about the offence of rape. Moreover, unlike in cases of physical assault, it is not reasonable to expect eyewitnesses in rape cases, which occur in private spheres. Therefore, there is no need for corroborating a victim's testimony in a rape case unless it suffers from basic infirmity and the probability factor renders her testimony unworthy of credence. The Bharwada decision was a positive development for rape victims as convictions could now be based on their sole testimonies.[21]

- DIRECTIONS TO FAST TRACK RAPE CASES:

A bench comprising J. Aftab Alam and RM Lodha in a case held that "it is imperative that the criminal case relating to domestic violence, dowry death, sexual assault and cyber crimes are fast tracked and decided in a fixed time frame, preferably of 3 years including appeal provisions."[22]

The court in State of Karnataka v. Shivanna[23] observed that there must be amendments made in the CRPC for fast tracking of rape cases and gave various directions so that the investigation is done effectively and statements recorded properly. The order was directed to be sent to all police commissioners for effective implementation.

- 2 FINGER TEST HELD VOID:

The court in its previous judgements have held that the two-finger test violates the rape victim's right to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto be presumed as consent. The court further held that medical procedures should not be carried out in a manner that constitutes cruel, inhuman or degrading treatment and health should be paramount consideration while dealing with

[20][1983] 3 S.C.R. 280.
[21] N.Kulshreshtha, "A critical analysis of the standard of consent in rape law in India," *OSL Series*, Vol.13 No. 4, (2023) 1428–1456.
[22]State of U.P v. Chhoteyal (2011) 2 SCC 550.
[23](2014) 8 SCC 913.

gender-based violence. The state is under an obligation to make such services available to rape survivors.[24]

In *Sunshine Kharpan v. State of Meghalaya & Ors.*[25] The court while referring to the ban imposed on the practice through precedents of the Apex Court itself, expressed concern that despite these rulings, the practice continued in some parts of the country. The Supreme Court held that the two-finger test as "regressive and invasive in nature", upholding what it has explained in previous judgments as well.The court emphasised that this practice violates the dignity and rights of sexual assault survivors. It directed the state of Meghalaya to issue appropriate orders to ensure compliance with previous judgments banning the test. It is imperative to note the proactive approach of the Court in this case, as despite dismissing the SLP, the Supreme Court took this opportunity to address the larger issue of the two-finger test. Further, the comprehensive circular by the Meghalaya government sets a precedent of implementation as circular goes beyond just banning the test. It also mandates compassionate care and psychological support for survivors, indicating a more holistic approach to addressing the needs of sexual assault survivors. [26]

- MARITAL RAPE AGE INCREASED:

In *Independent Thought vs Union of India*[27] It was held that Sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. Exception carved out in the Penal Code creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any clear objective sought lo be achieved. The artificial distinction is arbitrary, discriminatory and not in the interest of girl child and contrary to the Arts.15(3), 21 of the Constitution and commitments made in international conventions and Human Rights.[28]

- CHALLENGE TO MARITAL RAPE EXCEPTION:

[24]Prof. N.V. Paranjape. *Criminology and penology* (Prayagraj: Central Law Publications, 2021) 243.
[25]SLPR 1481/ 2024.
[26]"Doctors Directed to Stop 'Two-Finger Test' on Rape Victims, Violators Will Be Punished: Meghalaya Government Tells Supreme Court". – Child Rights Clinic – Every Child Counts
[27][2017] 13 S.C.R. 821
[28]https://digiscr.sci.gov.in/view_judgment?id=MTk5Mzk=

In *Hrishikesh Sahoo v State of Karnataka*[29] Justice M. Nagaprasanna rejected the petitioner's plea of invoking the 'marital rape exception' in the IPC. The High Court relied on the Justice J.S. Verma Committee report (2013) which recommended deleting the marital rape exception. It held that the exception was regressive and violated the right to equality by treating the wife as subordinate to her husband. The High Court held, "no exception under law can be so absolute that it becomes a license for the commission of a crime against society."

On 21 December 2023, Parliament passed the Bharatiya Nyaya Sanhita, 2023. Section 63 of the Act which deals with the act of "Rape" also includes the same marital rape exception as found under Section 375 of the IPC.

- CALLING FOR GENDER NEUTRAL RAPE LAWS:

The Justice Verma Committee, set up in the aftermath of the horrific 2012 Delhi gang rape, initially recommended gender-neutral laws. However, the Committee ultimately rejected this proposal, fearing that gender-neutral laws might be misused against women, given the existing patriarchal setup of Indian society.

In a case, the Delhi High Court observed that male victims of sexual assault should also be afforded the same protection as female victims. It suggested that Parliament should consider amending the law to ensure that male victims of sexual offences get adequate protection. This judgement rekindled the debate around gender-neutral rape laws.[30]

The Bharatiya Nyaya Sanhita, which has replaced the Indian Penal Code and completely removed the provisions under Section 377 which means that protection for men against rape has been removed in the new Act. The offence of 'rape' is covered under Section 63 of the Bharatiya Nyaya Sanhita, which does not provide any protection to a male against sexual assault. Section 63 defines it in a way where only women can be the victim and only a man can be a perpetrator. This move under the newly enacted Act goes completely against the principles of gender neutrality and contradicting the objective which was proposed by the government while presenting the bills in the Parliament of India.

[29] SLP(Cr.) 4063-4064 of 2022.
[30] Ankur Mittal v. State (2018).

In *XXX v. State of Madhya Pradesh*[31] Supreme Court stated that there should be a clear differentiation between consensual relationship and rape.If one is a partner in relation has a clear intention that he/she will not marry the other partner from the very first day only then it will be considered rape and fake marriage promises. The Court relied on *Naim Ahamed v. State (NCT of Delhi)*[32] and *Prashant Bharti v. State (NCT of Delhi)*[33] which held that mature individuals engaging in consensual relationships cannot claim rape based on a false promise of marriage.

CONCLUSION

Of late, there is an increased awareness in the society of the injustice done to the women in the past and the rights and position of the women. Media, rightly considered as the fourth column of democracy has played significant role in exposing and highlighting many cases of atrocities on women. Investigative journalism, exposure of crimes through radio, TV, magazines has gone a long way in shaking up the enforcement agencies into action and inspired them to work towards more effective implementation of the laws meant to ameliorate the condition of women. The judicial approach on various issues concerning women has, by the large, been progressive and liberal. Worldwide movement for women's freedom has not left India untouched even though the form which the movement assumed in India may not be identical which it is elsewhere.[34]

Judiciary being the third pillar of the Constitution has played a vital role in finding the proper solution in rape cases. Sometimes through wide interpretations of the various provisions of legislation and sometimes by laying down landmark judgments where there were no specific laws, the judiciary has tried to strike a balance and equilibrium in the society. The judiciary has tried to fulfil the gap between fast changing society and rigid laws. [35]Role of the judiciary in combating rape crimes, giving women the equal status that they deserve and protecting them from the vicissitude of socio- economic and political inequality in status is appreciable.

[31][2024] 3 S.C.R. 309.
[32] [2023] 1 S.C.R. 1061.
[33] [2013] 1 S.C.R. 504.
[34]Sumanlata. (ed.), *Women and the Rule of Law* (India: Akansha Publishing House, 2005).
[35]Bhavana Sharma,"Role of Judiciary in Rape Cases" (November 2015) retrieved from: https://www.lawctopus.com/academike/rape/