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READING MATERIAL

Volume - 4

TRAINING OF EMPANELLED LAYERS IN JHARKHAND ON VIOLENCE AGAINST WOMEN & VIOLENCE AGAINST CHILD

19th & 20th September, 2015 (Saturday & Sunday)
at Jamshedpur

Organized by
Jharkhand State Legal Services Authority (JHALSA)
in association with
Lawyer's Collective Women's Rights Initiative, (LCWRI)
&
District Legal Services Authority, Jamshedpur

This Reading Material is also available on official website of JHALSA **"www.jhalsa.org"**

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AMICUS BRIEF

IN THE SUPREME COURT OF INDIA

WRIT PETITION (CIVIL) NO. 562 of 2012 (Under Article 32 of the Constitution of India) AND WRIT PETITION (CIVIL) NO. 568 OF 2012 (Under Article 32 of the Constitution of India) AND WRIT PETITION (CRIMINAL) NO. 1 OF 2013 (Under Article 32 of the Constitution of India) AND WRIT PETITION (CIVIL) NO. 22 OF 2013 (Under Article 32 of the Constitution of India) AND WRIT PETITION (CIVIL) NO. 148 OF 2013 (Under Article 32 of the Constitution of India)

Nipun Saxena & Anr Etc ....Petitioners
Versus
Union of India & Ors ...Respondent

Preliminary Amicus Brief

SUMBITTED BY INDIRA JAISING, SENIOR ADVOCATE APPOINTED BY THIS HON'BLE COURT IN THE ABOVE MENTIONED PETITIONS

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EXECUTIVE SUMMARY

This amicus brief is in connection with a group of petitions filed before this Hon'ble Court following the Nirbhaya incident of 16.12.2012, where a young woman in New Delhi was gang raped and killed in a moving bus purporting to be a means of public transport. Raising interconnected and mutually reinforcing issues, the petitions invoke the right to life and liberty of women, in the public and the private spheres, and the protection of these rights by the State.

In the aftermath of *Tukaram v. State of Mahashtra*[1], an open letter to the Chief Justice of India, written by legal academics, Dr. Upendra Baxi, the late Dr. Lotika Sarkar, the late Dr. Vasuda Dhagamwar and others pointing out the problems with the judgment, led to legislative reforms in the law relating to rape, some of which are documented herein. This brief is an attempt to document the journey from Mathura to Nirbhaya to the aftermath, spanning over four decades of law and policy reform, which also witnessed the Courts recognising and deepening in particular, the rights of survivors within the criminal justice system. It may be noted that much has been accomplished during this time, as is borne witness by more illustrious predecessors such as the Law Commission Reports on related issues, the Usha Mehra Commission Report, and the Justice Verma Committee Report, as well as reforms that were the direct result of these Reports. However, as this brief will show, there is scope for accomplishing much more. In fact, it is this amicus' submission that the past developments have provided the appropriate platform to undertake focused and strategic initiatives that bring the survivor closer to accessing 'justice'. In this sense, this brief is a forward looking document.

The analytical framework used here is to review State action against its constitutional and "due diligence" obligations. Under international human rights law, the State is required *to prevent, to protect, and to fulfill*, women's right to violence free space, in public and in private spheres. Using this

1 AIR 1979 SC 185

framework, an analysis of the key stages/strategies towards addressing violence against women (VAW) in its entirety – prevention through strengthening infrastructure and human resources, and education and awareness generation; registration and investigation; prosecution and punishment (including victim & witness protection); rehabilitation and reparation. The analysis also maps related components, particularly, data collection, coordinated service delivery, and accountability of functionaries & institutions that provide the bulwark on which the justice system rests. The amicus also recognises that wellintentioned policies and initiatives cannot succeed unless there are adequate and matching budgetary commitments, and a system of monitoring & evaluation in place.

In preparing this brief, the amicus attempted to follow a consultative and participatory process, within the limited time and resources. Inputs were received from relevant Ministries/Departments on the key initiatives, through the Ministry of Women and Child Development acting as the nodal agency. Additionally, key organisations and domain experts on VAW issues were consulted, and their inputs are reflected in the brief. Past reports of the Law Commission of India, the Usha Mehra Commission and the Justice Verma Committee are some of the references that proved indispensable.

The analysis undertaken in this brief validates that the law reform undertaken in the post Justice Verma Committee phase has brought the survivor's voice at the centrestage of the criminal justice system, which is one of the most remarkable developments towards facilitating women's access to justice. This is reflected in the changes in evidentiary standards and the incorporation of a definition of 'consent' as an Explanation to Section 375 IPC that provides much needed clarity to how rape is understood in our law. The addition of a host of new offences has strengthened the normative framework on VAW. Another significant development has been the recognition and express provision of compensation for survivors in the law, which also includes rehabilitation. Although their performance needs careful assessment in the near future, many States have formulated specific Victim Compensation Schemes, which is a step in the right direction.

The brief discusses some other key initiatives undertaken in the aftermath of Nirbhaya incident two years ago, which have seen mixed results – the announcement of the dedicated 'Nirbhaya Fund' did not translate into immediate action till recently, except in so far as it addressed installing of CCTVs in certain public transport vehicles; intensive recruitment drives by the police to increase women's representation in key cities such as Delhi and Mumbai can only meet temporary and limited success unless planned in a sustainable manner. The proposed Crime & Criminal Tracking Network System (CCTNS) made rapid progress but currently appears to be facing some uncertainty in terms of funding. However, on a positive note, the amicus notes and lauds the announcement of the 'One Stop Centre' Scheme by the Central Government. At the same time, the brief also examines the issue of supporting women who do not want to report to the police.

Through the mapping and analysis of laws, policies and initiatives, the amicus identifies the key issues that continue to act as barriers to the survivor's access to justice. That despite judicial pronouncements on the issue as well as the Law Commission's extensive work, lack of comprehensive victim/witness protection regime for providing physical protection to witnesses and complainants at all stages, deters women from reporting and continuing support to the prosecution.

Although the changes in substantive law brought in by the Criminal Law (Amendment) Act, 2013 have provided a more nuanced normative framework on rape and sexual violence, concerns still remain. Sexual violence in marriage continues to be exempted from the definition of 'rape', although a significant progress has been in that section 375B IPC now criminalises nonconsensual intercourse by the husband when the couple is separated, either defacto or dejure, whereas earlier, this was applicable only in case of de jure separation. The only other recourse in criminal law is

under section 377 IPC, which is a cause for concern since it is violative of Articles 14, 15 and of the Constitution.

The other issue is that of increase in the age of consent under Section 375 IPC sixthly, from the earlier 16 years to 18 years, and the age of consent prescribed under the POCSO Act. By raising the age of consent to 18 years, all consensual sexual activity too, particularly amongst young adolescents, is categorised as rape. This points to the dichotomy between the policy of the law and the increased recognition that sex/sexuality education amongst young adolescents is the key towards encouraging responsible sexual behaviour, during adolescence and adulthood. Most importantly though, the current position of the law is clearly discriminatory against young adolescent/young adult males who are criminalised for consensual sexual relationships, and hence, this provision must be deemed bad in law and contrary to public interest. Some judges have tired to mitigate the damage done by this law , but treating consent as a mitigating factor ad grant bail liberally if that is consent to the sexual intercource between the parties. This however does not solve the problem and if a person below the age of 18 but above 16 has consensual sex, he is liable to be convicted for rape. If he is dealt with as a juvenile, he goes to a correction home for detention. If he is tried as an adult under the proposed new amendment to the Juvenile Justice Act, he will have a criminal record for the rest of his life even though the sexual intercource may be consensual.

On procedural aspects, while some States have issued guidance for police and prosecution, there is lack of uniformity and standardisation which leads to inconsistent and ineffective investigation and prosecution of cases. In particular, there is very little understanding amongst the police and prosecution, of forensic medical evidence. Attention is invited to the Guidelines and Protocols Medicolegal Care for Survivors/Victims of Sexual Violence issued by the Ministry of Health and Family Welfare in 2014 giving detailed guidance to care givers and providing a proforma for medicolegal examination of survivors of sexual abuse. Trial Courts also encounter challenges, particularly in appreciation of medical evidence in accordance with the changes in the law. The need for uniform guidelines on sentencing (or sentencing policy) for sexual offences cannot be overemphasised; although there are some guidelines that have been evolved by the Hon'ble Supreme Court, the quantum of discretion vested in the trial court is considerable. An important issue highlighted in the brief is the impact of the introduction of Section 164 (5A) Code of Criminal Procedure, 1973 (CrPC) on madatory recording of survivor's statement before the Magistrate in cases of rape and other forms of sexual offences. The amicus notes with concern that the survivor may be revictimized due to multiple statements and the possibility that trivial inconsistencies in such statements can be exploited by the defence to her detriment.

This exploitation of the survivor's statement with the express objective of impeaching her credibility is part of the overall scheme of bias that is reflected in the language used in rape trials. Research shows that defence lawyers, during examination and cross examination, go against the express provisions of the Indian Evidence Act, 1872 (IEA), without being restrained by the courts.

Addressing attitudinal bias and perceptions, amongst justice system actors as well as within the society as a whole, is a key goal that prevention efforts must aim at. The amicus notes the initiatives taken in the sphere of sensitization and training, awareness generation (including by Legal Services Authorities), and reforms in education to address gender bias, and finds that a holistic prevention strategy must employ different tools and involve multiple actors, including men and boys as well as local community actors. The amicus also highlights with concern, the lack of a uniform model regulatory framework for public carriage buses, radio taxis and webbased taxi aggregators.

The amicus lauds the deletion of requirement of prior sanction for prosecution of public servants under Section 197(1) CrPC but also notes that rape by the Armed forces in border areas is a know phenomenon and it need to be addressed in the same manner as rape by any other public servant.

That the Justice Verma Committee, the UN Special Rapporteur on VAW, and recently, the UN CEDAW Committee have recommended review of the application of the Armed Forces Special Powers Act and its amendment or repeal. The issue of police accountability must form part of the holistic review and undertaking of police reforms. It is suggested in this regard that an Independent Complaints Committee wing be established in the Police departments to entertain complaints against the police in relation to investigation of crime in specific cases.

Since allocation of adequate budget is recognized as a key sign of political commitment and successful implementation of a stated policy, the amicus notes with concern the declining trend of budgetary allocation for women, and particularly, the Ministry of Women & Child Development, which as the national women's machinery remains seriously underfunded. Utilization of budgets continues to be an equally important concern. That a major challenge that deters formulation of policies supported by on the ground evidence is the lack of reliable, comprehensive and gender-disaggregated data.

Thus, the focus of this brief is clearly the survivor and her sense of 'justice' – it is the lens through which this brief raises certain questions and attempts to present some recommendations/ suggestions on how they may likely be addressed.

While the brief consolidates and presents the suggestions/recommendations in the last Chapter titled 'Conclusions and Recommendations', the key suggestions/recommendations are reiterated below:

The major concern facing efforts to address VAW today is that of nonimplementation. While non-implementation is the sum of many factors, the key certainly lies in strengthening capacities, strengthening/building an evidencebase through data collection and monitoring & evaluating implementation of laws/policies/programmes in an effective manner. Thus, it is recommended that

- The State should undertake largescale data collection exercise that increases the evidence-base on VAW that goes beyond the current FIR/complaints centric official data collection; ensure that data/information from the courts are integrated and is publicly available; and ensure better coordination between different Ministries and components of the justice system currently mandated to collect data relating to VAW.
- Evaluation of laws/policies/programmes relating to women should be a statutory function of statutory bodies such as the National Commission for Women, National Commission for Protection of Child Rights, and the National Human Rights Commission. This may be implemented through appointment of independent Rapporteurs on VAW attached to these bodies; and most importantly, strengthening the statutory institutions such as the NCW. Social audits is another important tool to demand and enforce accountability of implementing agencies.

Universally applicable and statutorily binding 'Standard Operating Procedures' for key functionaries such as the police,forensics, prosecution, and judiciary should be developed, adopted and implemented. This will ensure uniformity in application and interpretation of the law/policy as well as standardisation in capacity development of the functionaries. Finally, to operationalise the aforementioned, the amicus recommends enacting an overarching Gender Equality Law that will bring together the rights and support services available to women as well as lay down mandatory duties/functions of the State agencies, including the duty to undertake data collection, capacity building, and to effectively monitor and evaluate. This will also ensure specific budgetary commitments on the issue of VAW and women's rights in general.

INTRODUCTION

This group of petitions raises issues of the right to life and liberty of women both in the public sphere and in the private sphere and the protection of these rights by the State. These petitions was filed before the Hon'ble Court following the Nirbhaya incident of 16.12.2012 where a young woman in New Delhi was gang raped and killed in a moving bus purporting to be a means of public transport. The case stirred the conscience of a nation and received international attention compelling the State to examine closely and address the causes and consequence of violence against women in the public domain. .

The prayers in the petition overlap to a large extent. Annexed in Chart A is a summary of the prayers in each petition. For the sake of convenience, the prayers are collapsed and categorized issue wise. These Petitions address the issue of women,but in this brief, I have referred to the law relating to children as well, since the two law represent a legislative scheme which needs to be read together.

It may be noted that on 2nd April 2013, the Union of India enacted the Criminal Law (Amendment) Act, 2013, which addressed several inadequacies in the substantive and procedural laws dealing with sexual abuse of women and children, and these provisions will be referred to under the appropriate headings. The said amendment was made following the Justice Verma Committee Report to which a reference will also be made as and when necessary. Changes were also made in policy relating to registration of crime and investigation. A dedicated fund known as the Nirbhaya Fund was also created to strengthen law enforcement and policy. To a large extent therefore, the prayers in this petition are covered by the said changes and reference will be made to these changes as and when required.

While the track record of the Union of India and its authorized agencies might look impressive on paper, the key issue is *non implementation of provisions of law and policy*. Traditionally laws in India especially the Criminal Procedure Code, 1973, the Indian Penal Code 1860 and the Indian Evidence Act 1872 are all pre-constitutional laws enacted during a colonial regime and remain uninfluenced by subsequent developments worldwide except insofar as they have been amended from time to time in response to the demands of society. Criminal procedure focuses of the rights of the accused and the protections required during prosecution to the accused to prevent a miscarriage of justice. This is due to the importance given by our Constitution the right to life and personal liberty. However, in recent times, due to the increase in crime against women, there has been an increasing emphasis on the rights of survivors of violence with a view to ensure that they are not revictimized during the course of trial and are empowered and enabled to access justice. This Hon'ble Court has, through its judgments expanded and deepened these rights, some of which now find a place in statutes. These changes include the need for witness protection and the need for rehabilitation and for compensation and pshycosocial support.

The approach adopted in this brief will be to focus of the rights of the survivor of gendered violence and thereby to focus on the obligations of the State towards survivors of sexual abuse in the Criminal Justice System. It is now universally accepted that access to justice does not end with filing a case in court but includes rehabilitation and restitution to a survivor of crime. References will be made in this brief to these issues as appropriate.

Reference will also be made to the duty of the State to prevent crime against women. The only sure way to prevent crimes against women is to sensitize law enforcement agencies and the community to change the patriarchal, biased and stereotypical notions of women and their subordinate role in society.

No system of justice delivery can work without being adequately funded by the State. Hence reference will be made to gender budgeting with a view of indicating the need for adequate funding of access to justice for women.

Finally, the best of systems can fail if they are not periodically monitored and evaluated with a view to law and policy reform to meet the felt needs of the survivors. This has now been accepted statutorily in the Right of Children to Free and Compulsory Education Act 2009, which required the National Commission for Protection of Child Rights to monitor compliance with the law[2]. Socioeconomic legislation has gone beyond monitoring by the State and puts in place a system of social audit by the people directly and places on functionaries of the State an obligation to conduct social audits of the performance of schemes meant for the people. This brief will suggest that an obligation be placed on all State authorities to monitor and evaluate the functioning of laws relating to women to see if they achieve the desired aim of protection women from violence.

Any system of monitoring needs accurate data from different agencies of the State. While the National Crime Records Bureau (NCRB) does collect statistical data on crime, and this date is disaggregated on the basis of sex, there are several gaps in the data which hampers proper analysis. Moreover, there is no linkage of the different players in the criminal justice system namely, police, the courts and the jails. Efforts are being made in that direction, of which this court is fully aware.

This brief will also suggest the appointment of Independent Rapporteurs for Violence against Women who will present independent reports to statutory bodies such as the National Commission for Women, the National Commission for Protection of Child Rights and the National Human Rights Commission, and strengthening the bodies themselves.

Another challenge facing law enforcement agencies in the country is the fact that many of the issues that are required to be addressed are either in the State List or under the Concurrent List. For example, "public order" falls under the State List and this has led to the existence of multiple models of administration of justice across states. Entry 1 of the Concurrent list also deals with the issue. Fortunately, since criminal law falls in the Concurrent List, it is possible to have Standard Operating Procedures which are uniform across all States in relation to investigation and prosecution of crimes of violence against women. The relevant entries in List III of the Seventh Schedule of the Constitution are reproduced below:

> *"1. Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of naval, military or air forces or any other armed forces of the Union in aid of the civil power (Entry 1, List III of the Seventh Schedule)*
>
> *2. Criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution." (Entry 2, List III of the Seventh Schedule)*

Hence, it is not only possible to have uniform Standard Operating Procedures but also eminently necessary.

Finally, I would like to point out that addressing violence against women will always remain a work in progress. I wish to acknowledge the work done by the Justice Verma Committee, the Usha Mehra Committee and previous Law Commission reports relating to the subject matter. Others who contributed to this amicus brief will be acknowledged in this report.

2 Section 31, Right of Children to Free and Compulsory Education Act 2009

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Several officials who do not wish to be named have also contributed their understanding to this brief.

LIST OF ABBREVIATIONS

1. AFSPA Armed Force (Special Powers) Act, 1958
2. AIDS Acquired Immune Deficiency Syndrome
3. AIR All India Reporter
4. AWPS All Women Police Stations
5. BEAP Brain Electrical Activation Profile
6. BPR&D Bureau of Police and Research Development
7. CAPFs Central Armed Police Forces
8. CAW Crimes Against Women
9. CCTNS Crime and Criminal Tracking Network Systems

10. CCTV Closed Circuit Television
11. CEDAW Commission on Elimination of Discrimination Against Women, 1979
12. CIC Central Information Commission
13. CID Criminal Investigation Department
14. CLPR Centre for Law and Policy Research
15. CPOs Central Police Organizations
16. CrPC Criminal Procedure Code, 1973
17. CSR Child Sex Ratio
18. CSW Commission on Status of Women
19. DCP Deputy Commissioner of Police
20. DCW Delhi Commission for Women
21. DIG Deputy Inspector General of Police
22. DLSA District Legal Services Authority
23. DSLSA Delhi State Legal Service Authority
24. DSP Deputy Superintendent of Police
25. DTC Delhi Transport Corporation
26. FBI Federal Bureau of Investigation
27. FIRs – First Information Reports
28. FTCs Fast Track Courts
29. GPS Global Position Systems
30. GRB Gender Responsive Budgeting
31. HIV Human Immunodeficiency Virus
32. HRD Human Resource Development
33. IAY Indira AwaasYojana
34. ICC International Criminal Court
35. ICCPR International Covenant on Civil and Political Rights
36. ICDS Integrated Child Development Services
37. ICJS – Interoperable Criminal Justice System
38. ICRW International Centre for Research on Women
39. IEA Indian Evidence Act, 1872
40. IG Inspector General of Police
41. IPCC Independent Police Complaint Commission
42. IUCAW Investigative Units for Crimes against Women
43. JVC Justice Verma Committee
44. M & E Monitoring and Evaluation
45. MHA Ministry of Home Affairs
46. MLC Medicolegal Cases
47. MoHFW Ministry of Health and Family Welfare
48. MoU Memorandum of Understanding
49. MV Act Motor Vehicles Act, 1988
50. MWCDMinistry of Women and Child Development
51. NCF National Curriculum Framework
52. NCPCR National Commission for Protection of Child Rights
53. NCRB National Crime Records Bureau
54. NCT National Capital Territory
55. NCW National Commission for Women
56. NFHS National Family Health Survey
57. NREGA National Rural Employment Guarantee Act, 2005
58. NRHM National Rural Health Mission
59. NSOPW National Sex Offender Public Website
60. OSC One Stop Centre

61. OSCC One Stop Crisis Centre
62. PC&PNDT Act Pre Conception and Pre Natal Diagnostic Techniques Act, 1994
63. PCEW Parliamentary Committee on Empowerment of Women
64. PLVs Para Legal Volunteers
65. PMD Performance Management Division
66. PMES Performance Monitoring Evaluation Systems
67. POSCO, Act The Protection of Children from Sexual Offences Act, 2012
68. PSAs Public Service Agreements Systems
69. PV Examination Per Vaginal Examination
70. RCC Rape Crisis Cells
71. RFD Results Framework Mechanisms
72. SAFE Kit Sexual Assault Forensic Evidence Kit
73. SARC Sexual Assault Referral Programme
74. SHO Station House Officer
75. SHW Sexual Harassment at Workplace
76. SI Sub Inspector
77. SLSA State Legal Service Authority
78. STA State Transport Authority
79. STDs Sexually Transmitted Disease
80. TISS Tata Institute of Social Sciences
81. UGC University Grants Commission
82. UNESCO United Nations Educational, Cultural and Scientific Organization
83. UNFPA United Nations Fund for Population Activities (United Nations Population Fund)
84. UNHCR United Nations High Commission for Refugees
85. VAW Violence Against Women
86. VAWA Violence against Women's Act
87. VPS Victim Protection Services
88. WHO- World Health Organization

PROCESS OF DRAFTING THE AMICUS BRIEF

In order to present a true picture of the existing framework, amicus requested the nodal ministry of Ministry of Women and Child Development to elicit information from all other Nodal Ministries including Ministry of Home Affairs, Ministry of Human Resources Development, Ministry of Law and Justice, Ministry of Information and Broadcasting, Ministry of Health and Family Welfare, and Ministry of Road Transport and Highways. The Ministry Women and Child Development kindly undertook the task and forwarded to me responses received from the various Ministries.

A meeting was also convened of the other petitioners before this Hon'ble Court to get their feedback on the issues that they wanted placed before the Court.

Nipun Saxena and representatives from CEHAT attended the meeting. They also submitted their responses in writing.

Violence against women and children: Fundamental Rights

Violence against women

1. Violence against women is defined as *"any act of genderbased violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including*

threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[3]

2. Violence against women takes many forms, and takes place both in the private and public realm. Women experience physical violence, sexual violence, psychological abuse and economic abuse. Violence against women manifests itself in acts of rape, sexual assault, sexual harassment, acid attack, domestic violence, marital rape, sexselective abortion, voyeurism, cyber harassment, stalking and "honor killing". Gender based violence is an outcome of systemic discrimination and inequality between the sexes, and is a violation of fundamental rights of the victim.

Constitutional Rights

3. Gender equality, justice and the principle of nondiscrimination against women are firmly enshrined in the Constitution of India, in the Preamble, Fundamental Rights, and Directive Principles. The Preamble to our Constitution guarantees social, economic and political justice, and equality of status and opportunity, and fraternity, which assures the dignity of the individual.

4. Article 14 ensures to women the right to equality before the law and equal protection of the law; Article 15(1) prohibits State discrimination against any citizen on grounds of sex. Article 15(3), implicitly recognizing the social, economic, political and cultural barriers which impair women's enjoyment of their rights, provides for affirmative action by the State by making special provisions for women and children. Article 16 provides for equality of opportunity to all in matters of public employment or appointment to any office under the State, and prohibits discrimination on the grounds of sex; and Article 21 protects the life and personal liberty of women.

5. The Directive Principles of State Policy, contained in Part IV of the Constitution, are to be harmoniously read with the fundamental rights and are fundamental in the governance of the country. Article 38, Article 39 and Article 39A enjoin the State to secure and protect a social order where socioeconomic and political justice informs all institutions of national life; and to promote policies that secure for men and women equal opportunities.

International law

6. India is also a signatory to a number of international treaties and conventions, which recognize certain fundamental rights of women. Equality between men and women is one of the fundamental human rights, as recognized in the Charter of the United Nations 1945. The Universal Declaration of Human Rights, 1948, was adopted by the General Assembly of the United Nations as a common standard of achievement for all people and nations. Article 1 and 2 establish that all human beings are born free and equal and everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction on the basis of sex, race, colour, country of birth etc. The International Covenant on Civil and Political Rights 1966 (India acceded to the Convention on 10th April 1979) obliges States to ensure the equal right of men and women to all civil and political rights set forth in the Covenant.[4] The Covenant sets out such fundamental rights such as right of self determination, right to life, right to freedom from torture and slavery, right to liberty and security, right to equality before law and right to freedom of thought, conscience and religion.

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3 UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104. India is a Party.

4 Article 2, International Covenant on Civil and Political Rights 1966

The International Covenant on Economic, Social and Cultural Rights (to which India acceded on 10th April 1979) places an obligation on States to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights, including the right to work, right to equal remuneration for work of equal value without distinction on the grounds of sex and right to enjoyment of highest attainable standard of physical and mental health.

The Convention on the Elimination of All Forms of Discrimination against Women, 1979 (ratified by India on 9th July 1993) requires States to pursue a policy of eliminating discrimination against women, to establish legal protection of the rights of women on an equal basis with men, and to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation[5]. Article 1 defines discrimination against women as *"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*

Violence against Women and Children: State Obligation

Violation of Rights

1. Crimes like rape, sexual assault and sexual harassment are crimes against the fundamental human rights of life and liberty, which includes right to live with human dignity contained in Article 21.[6] Violence against women is a human rights violation, and significantly impairs the enjoyment of rights of the victim. The rights guaranteed to women and children by the Constitution and under international law are meaningless without the right to be protected from violence, and the corresponding State obligation to protect women from violence.

State Obligation

2. The State is responsible for protecting the right to life, dignity and equality of women and children, and for providing a safe environment for women to live and work freely in the country, and the State is liable for the failure to uphold this duty. The duty of the State extends to prevention of crimes, and not merely punishing the perpetrators of the offence. It was held in *Vishakha and Ors v. State of Rajasthan and Ors*[7] that *"The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse."*

3. In the case of a gang rape of a young woman on the orders of the village panchayat as punishment for having an affair with a man from another community, the Supreme Court considered the question *"[...] whether the State Police Machinery could have possibly prevented the said occurrence."* The Court answered in the positive and observed that *"The State is duty bound to protect the Fundamental Rights of its citizens; and an inherent aspect of Article 21*

5 Article 2, Convention on the Elimination of All Forms of Discrimination against Women 1979

6 BodhisattwaGautam v SubhraChakraborty AIR1996 SC 922; Vishakha and Ors v State of Rajasthan and Ors (1997) 6 SCC 241; Chairman Railway Board v Chandrima Das (2000) 2 SCC 465; State of Punjab v Ramdev Singh AIR 2004 SC 1290 ;Lillu @ Rajesh v State of Haryana (2013) 6 SCALE 17

7 AIR(1997) SC 3011

of the Constitution would be the freedom of choice in marriage. Such offences are resultant of the States incapacity or inability to protect the Fundamental Rights of its citizens." The Court also further reasoned that *"The crimes, as noted above, are not only in contravention of domestic laws, but are also a direct breach of the obligations under the International law. India has ratified various international conventions and treaties, which oblige the protection of women from any kind of discrimination. However, women of all classes are still suffering from discrimination even in this contemporary society. It will be wrong to blame only on the attitude of the people. Such crimes can certainly be prevented if the state police machinery work in a more organized and dedicated manner."*[8]

Due Diligence: State Responsibility under International Law

4. A State, by acceding to or ratifying an international human rights treaty, assumes a legal obligation to implement the rights recognized in the treaty.[9] In international law, State obligation towards human rights of individuals is broadly of three types: to respect, protect and fulfill the rights.[10] The obligation to respect is a negative obligation and requires that State parties do not interfere with the enjoyment of rights; the obligation to protect requires States to protect individuals and groups against human rights abuses by third parties; while the obligation to fulfill is a positive obligation that requires States to take action to facilitate enjoyment of fundamental human rights. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations, and failure to do so would constitute a violation of the obligation.[11]

5. It is now well recognized that as violence against women is a human rights violation under international law, States' obligation to respect, protect and fulfill human rights include the binding obligation to prevent, investigate and punish violence against women and to provide redressal for such acts of violence wherever they take place.[12] It is also considered a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence.[13]

6. The due diligence obligation of States was then applied to discriminationand violence faced by women, in 1992 in CEDAW'S General Recommendation no. 19. It expanded the scope of the duty of due diligence to responsibility for acts perpetrated by private parties. It emphasized that States parties have to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise, and under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.

7. The United Nations General Assembly in 1993 adopted the Declaration on the Elimination of Violence against Women, which was the first international instrument that directly addressed

8 In re: Indian woman says gang raped on orders of Village Court published in Business and Financial News (2014) 4 SCC 786

9 United Nations International Human Rights Instruments, Report on indicators for monitoring compliance with international human rights instruments, 6 June 2008, HRI/MC/2008/3

10 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4

11 UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 24: Article 12 of the Convention (Women and Health), 1999, A/54/38/Rev.1, chap. I

12 CarinBenningerBudel, Due Diligence and its Application to Protect Women from Violence (2008)

13 Yakin Erturk, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Integration Of The Human Rights Of Women And The Gender Perspective: Violence Against Women The Due Diligence Standard As A Tool For The Elimination Of Violence Against Women, 2006

violence against women. As per Article 4(c) States should pursue by all appropriate means and without delay, a policy of eliminating violence against women and, to this end, should exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

8. The due diligence standard acts as an accountability tool to determine if States have effectively met their obligations towards combating violence against women and upholding their rights. In exercising due diligence to effectively implement human rights law with regard to violence against women, States and other relevant actors must use multiple approaches in intervening at different levels: the individual, community, State and the transnational arena[14].

9. In this amicus brief, I will outline the steps taken by the State "to prevent, investigate and, in accordance with national legislation, punish acts of violence against women", and indicate the tasks achieved and yet to be achieved.

EXTENT OF PROBLEM

1. To get a sense of the extent and scope of the issue, one only needs to look at the statistics on violence against women in India. The National Crime Records Bureau (NCRB)'s annually compiled data on 'Crime in India' shows that the incidence of reporting of crimes against women (CAW) in the country is increasing. A total of 3,09,546 cases were reported in the year 2013, which is an increase of 26.7% from 2012. In the fiveyear period (20092012), this increase is a startling 51.9%.[15] The NCRB data for 2014, released recently, also supports this increasing trend with a total of 3,37,922 registered cases of CAW.

2. A brief analysis of the 2014 NCRB data shows a significant rise in the reported cases of IPC crimes over the last one decade with a high Quinquennial average (QA – 20092013), particularly for rape (101% increase over 2004 and QA being 45.3%), and for assault on women with intent to outrage her modesty under Section 354 IPC (137.9% over 2004 and QA of 72.5%). However, in case of insulting modesty of a woman under Section 509 IPC there has been a negative percentage share in the incidence of reported cases.

3. Children and young adolescent girls are particularly vulnerable to sexual violence. According to NCRB 2014 data, 33% of all victims of rape are children in the age group of 1218 years; it increases to almost 40% if victims in the age group of 312 years are added. The NCRB 2013 analysis also found that on an average, 3 children out of one lakh children population are victims of rape.

4. It is most likely that the overall increase in reporting is a result of enhanced awareness amongst women and their family/support systems combined with directions of Hon'ble Supreme Court in LalitaKumariv. Government of Uttar Pradesh[16]regarding mandatory registration of FIR in cognizable cases and the introduction of Section166A of Cr.P.C which makes its breach, punishable. This issue has been analyzed in a subsequent section of this brief. However, it can definitely be said that the official NCRB data, presenting statistics

14 Yakin Erturk, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Integration Of The Human Rights Of Women And The Gender Perspective: Violence Against Women The Due Diligence Standard As A Tool For The Elimination Of Violence Against Women, 2006

15 NCRB Data: Crime in India 2013. Accessed from: http://ncrb.gov.in/

16 (2014) 2 SCC 1

related only to reports filed with the police, provide a mere glimpse of the true nature and pervasiveness of the problem that is violence against women.

In a recent study on intimate partner violence and sonpreference by ICRW and UNFPA,17 52%[17] of the women surveyed reported that they had experienced some form of violence during their lifetime; and 60% of men said that they had acted violently against their wife/ partner at some point in their lives. The National Family Health Survey (NFHS) – III too, in 2009, highlighted that one out of every three evermarried woman has experienced spousal violence.[18]

EXISTING REGULATORY FRAMEWORK

a. Legislative Framework

While certain provisions contained in the Indian Penal Code provide for punishment for various offences against women, special legislations have been enacted to address specific offences. A number of legislations have been put in place for the protection of women:

Provisions in Indian Penal Code, 1860

The Indian Penal Code 1860 provides punishment for various offences against women. Prior to the amendment in 2013, sexual offences against women were contained in S.376 (punishment for rape, where rape was defined as sexual intercourse with a woman without her consent and against her will), S.354 (assault or criminal force to woman with intent to outrage her modesty), S.509 (word, gesture or act intended to insult the modesty of a woman) and S.294 (obscene acts and songs). Other provisions addressing violence against women were S.363373 (kidnapping and abduction for various purposes, including trafficking and selling minor for purposes of prostitution), S. 304B (dowry death) and S.498A (husband or relative of husband of a woman subjecting her to cruelty).

After the enactment of the Criminal Law (Amendment) Act, 2013 the Indian Penal Code has undergone significant expansion and change with regard to offences against women.

Some of the significant changes are given below:

- The definition of rape in S.375 was widened to include acts other than forcible "sexual intercourse". The amended S.375 includes forcible penetration by the man of his penis, any part of his body or any object into the vagina, mouth, urethra or anus of a woman or making her do so with him or any other person; manipulation of any part of the body of a woman so as to cause penetration into the vagina, urethra or anus of a woman or making her do so with him or any other person; and applying his mouth to the vagina, anus or urethra of a woman or making her to do so with him or any other person.
- Age of consent was raised to eighteen years (S.375).
- By way of Explanation 2 in S.375, consent was clarified to be an "unequivocal voluntary agreement" signifying willingness by the woman by "words, gestures or any form of verbal or nonverbal communications" to participate in the sexual act. Under this standard, the silence or absence of a "no" from the woman cannot be construed as

17 Nanda Priya, GautamAbhishek, Verma Ravi, KhannaAarushi, Khan Nizamuddin, BrahmeDhanashri, Boyle Shobhana and Kumar Sanjay (2014). "Study on Masculinity, Intimate Partner Violence and Son Preference in India". New Delhi, International Center for Research on Women.

18 NFHS – 3. Accessed from: http://www.rchiips.org/nfhs/pdf/India.pdf

a"yes" to participate in the sexual act. Hence, the explanation makes it clear that the man initiating sexual activity with the woman must have her voluntary affirmative and clear consent to participate in the sexual act, for the act not to be considered rape.

- The offence of gang rape was made a separate offence, with a higher punishment. As per S.376D, where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine.
- There are now stricter punishments for those convicted of rape who have caused death or persistent vegetative state of the victim (S.376A) and for repeat offenders (S.376E).
- Expansion of S.376C to include the abusing of a position of authority or fiduciary relationship by certain persons to induce or seduce any woman in his custody or charge to have sexual intercourse with him.
- Earlier, S.376A (intercourse by a man with his wife) provided for a punishment of imprisonment of either description for a term, which may extend to two years. After the 2013 amendment, punishment for sexual intercourse by a husband upon his wife during separation without her consent (S.376B, substituting S.376A) was increased to seven years, with a minimum punishment of two years.
- The Criminal (Amendment) Act 2013 also defines and provides for punishment for offences, which were earlier, not included in the Indian Penal Code. Offences of acid attack (S.326A and S.326B); sexual harassment (S.354A); assault or use of criminal force to woman with intent to disrobe (S.354B); voyeurism (S.354C); stalking (S.354D) have now been included as offences.
- Section 370 was substituted with Section 370 and 370A which provide for comprehensive measures to counter the menace of human trafficking including trafficking of children for exploitation in any form including physical exploitation or any form of sexual exploitation, slavery, servitude, or the forced removal of organs with very stringent punishment.
- The amendment also introduced a provision for punishing public servants who refuse to record a FIR in cases of specified crimes against women (S.166A) and punishment of those in charge of a public or private hospital for refusal to provide free medical treatment for victims of rape and acid attacks (S.166B).
- An Explanation was added to Section 197(1) Criminal Procedure Code, 1973 to the effect that it would not be necessary to seek prior sanction from the Appropriate Government for prosecution a public servant for any of the offences of sexual abuse. This is for the obvious reason that the Section 197 is intended to protect public servants from malicious prosecution for acts done in the discharge of duties. It cannot be argued by any stretch of imagination that sexual abuse happened as a part of public duties,hence the said amendment was made to enable expeditious prosecution of public servants for rape and other forms of sexual abuse.

Provisions in Code of Criminal Procedure, 1973

Some of the salient provisions of the CrPC relating to crimes against women are given below:

1. **Recording of FIR**: S.154(1) [inserted by the Criminal (Amendment) Act 2013] provides that in certain offences against women, the FIR has to be recorded by a woman police officer or any woman officer. It also provides that a woman who is temporarily or permanently mentally or physically disabled, and who alleges commission or attempt of an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator; recording of such information shall be videographed and the police officer shall get the statement of the person recorded by a Judicial Magistrate under S.164(5A)(a) as soon as possible.

2. **Inquiry by Magistrate in certain cases**: Introduced by the Code of Criminal Procedure (Amendment) Act 2005, S.176(1A) provides that where any person dies or disappears or rape is alleged to have been committed on any woman while such person was in the custody of the police or in any other custody authorized by the Magistrate or court, then in such cases, in addition to the investigation held by the police, an enquiry shall be held by the concerned Magistrate.

3. **Recording of statement before Magistrate:** The Criminal (Amendment) Act, 2013 introduced S.164(5A), which makes it mandatory for recording of statement of the victim/survivor by the Judicial Magistrate, as soon as the commission of the offence is brought to the notice of the police.

4. **Duties and responsibilities of medical practitioners:** Introduced by the Code of Criminal Procedure (Amendment) Act 2005, S.164A provides that when the offence of rape in under investigation, then within twentyfour hours of receiving information relating to the commission of such offence, such woman alleging the offence shall be sent to a registered medical practitioner with the consent of the woman. It also provides for the particulars to be recorded by the medical practitioner. Further, S.375C [inserted by the Criminal (Amendment) Act 2013] makes it mandatory for all public and private hospitals to immediately provide free first aid or medical treatment to victims of acid attack and rape, and to immediately inform the police of such incident.

5. **Medical examination of person accused of rape:** S.53A [introduced by The Code of Criminal Procedure (Amendment) Act 2005] provides for a detailed medical examination of a person accused of an offence of rape or an attempt to commit rape by the registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner by any other registered medical practitioner.

6. **Provisions relating to investigation:** S.173(1A) provides that investigation in relation to rape of a child may be completed within three months from date of recording FIR. Proviso to S.157(1) provides that in an offence of rape, the recording of the statement of the victim shall be conducted at the residence of the victim or in place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality.

7. **Provisions relating to trial:** Proviso to S.26 provides that in cases of rape, the offence shall be tried by a court presided over by a woman as far as practicable. S.327(2) provides that inquiry into and trial of rape shall be conducted in camera and by a woman Judge or Magistrate as far as practicable, and S.327(3) prohibits printing or

publishing any matter in relation to any such proceedings except with the previous permission of the court.

Proviso to S.309(1) provides that the inquiry or trial of the offence of rape shall, as far as possible, be completed within two months from the date of filing of chargesheet.

Proviso to S.273 states that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross examination of the accused.

Further, under the proviso to S.24(8), the Court may permit the victim to engage an advocate of his choice to assist the prosecution.

8. **Compensation:** Section 357A has been inserted in the Code of Criminal Procedure 1973 through the Code of Criminal Procedure (Amendment) Act, 2008 and it says that

"Every State Government in coordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or dependents who have suffered loss or injury as a result of the crime and who requires rehabilitation."

357B states that the compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 376D of the Indian Penal Code.

Provisions in Indian Evidence Act, 1872

1. **Evidence of character or previous sexual experience not relevant:** As per S.53A, in a prosecution for an offence under S.354, S. 354A, S.354B, S.354C, S.354C, S.354D, S.376, S.376A, S.376B, S.376C, S.376D or S.376E of the IPC or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the question of such consent or quality of consent.

2. **Presumption as to absence of consent in certain cases:** As per S.114A, in a prosecution for rape under clauses (a)(n) of S.376(2) IPC, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and such woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

3. **Questions lawful in cross-examination:** As per proviso to S.146, in a prosecution for rape, it shall not be permissible to adduce evidence or to put questions in the cross examination of the victim as to the general immoral character or previous sexual experience of such person with any person for proving such consent or quality of consent.

A chart depicting the various amendments to the provisions of the IPC, CrPC and IEA dealing with offences against women has been annexed.

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act)

The Government of India has specifically formulated 'The Protection of Children from Sexual Offences Act, 2012' (POCSO Act) in order to effectively address the heinous crimes of sexual abuse and sexual exploitation of children.

The Act is genderneutral and defines a child as any person below the age of eighteen years. It provides precise definitions for different forms of sexual abuse, including penetrative and nonpenetrative sexual assault, sexual harassment and pornography. The Act provides for

stringent punishment graded as per the gravity of the offence, with a maximum term of rigorous imprisonment for life for certain offences, and fine.

The Act provides for childfriendly procedures for reporting of offences, recording of evidence, investigation and trial. It defines different forms of sexual abuse, including penetrative and non penetrative assault, as under certain circumstances, such as when the abused child is mentally ill or when the abuse is committed by a person in a position of trust or authority visa relating to abetment in the Act. The Act prescribes stringent punishment graded as per the gravity vis the child, like a family member, police officer, teacher, or doctor. People who traffic children for sexual purposes are also punishable under the provisions of the offence, with a maximum term of rigorous imprisonment for life, and fine.

Information Technology Act, 2000:

The Information Technology Act provides for punishment of certain offences against women. These are reproduced below:

1. **S.66A Punishment for sending offensive messages through communication service, etc.:**

   Any person who sends, by means of a computer resource or a communication device, a) any information that is grossly offensive or has menacing character; or b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, or ill will, persistently makes by making use of such computer resource or a communication device, c) any electronic mail or electronic mail message for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such messages shall be punishable with imprisonment for a term which may extend to two three years and with fine.

   Explanation: For the purposes of this section, terms "Electronic mail" and "Electronic Mail Message" means a message or information created or transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.

2. **S. 66E. Punishment for violation of privacy:**

   Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both

   Explanation. For the purposes of this section— (a) —transmit means to electronically send a visual image with the intent that it be viewed by a person or persons; (b) —capture, with respect to an image, means to videotape, photograph, film or record by any means; (c) —private area means the naked or undergarment clad genitals, pubic area, buttocks or female breast; (d) —publishes means reproduction in the printed or electronic form and making it available for public; (e) —under circumstances violating privacy means circumstances in which a person can have a reasonable expectation that— (i) he or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or (ii) any part of his or her private area would not be visible to the public, regardless of whether that person is in a public or private place.

3. **S. 67 Punishment for publishing or transmitting obscene material in electronic form:**

Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to two three years and with fine which may extend to five lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.

4. **S. 67 A Punishment for publishing or transmitting of material containing sexually explicit act, etc. in electronic form:**

Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.

Exception: This section and section 67 does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art, or learning or other objects of general concern; or (ii) which is kept or used bona fide for religious purposes.

5. **S. 67 B Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc. in electronic form:**

Whoever, (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct or (b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner or (c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource or (d) facilitates abusing children online or (e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with a fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that the provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting, representation or figure in electronic form (i) The publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or (ii) which is kept or used for bonafide heritage or religious purposes.

Explanation: For the purposes of this section, "children" means a person who has not completed the age of 18 years.

b. Statutory Bodies

These statutory bodies have been charged with the duty of overseeing implementation of laws relating to women and children.

National Commission for Women (NCW): The National Commission for Women was set up by an Act of Parliament in 1990 to safeguard the rights and legal entitlements of women. The NCW takes up the matter with the concerned authorities including State Governments. NCW also constitutes Inquiry Committees on some specific incidences of grave injustice or deprivation of women's rights including on the reported cases of alleged rape/gang rape. The recommendations of the Inquiry Committees after approval of the Commission are then forwarded to the concerned Central Ministries and State Governments to take appropriate action and follow up in the matter.

State Commission For Women: All States have established State Commission of Women, although there are issues regarding vacancies and quality of people appointed.

Parliamentary Committee on Empowerment of Women (PCEW) : It is an important monitoring machinery set up to oversee women's empowerment in India. The Committee consists of 30 members, 20 from amongst the members of Lok Sabha, nominated by the Speaker and 10 nominated amongst the members of the Rajya Sabha, nominated by the Chairperson of Rajya Sabha. The term of the Committee is of one year.[19] The Committee has been primarily mandated with the task of reviewing and monitoring the measures taken by the Union Government in the direction of securing equality, status and dignity of women in all matters. The Committee also suggests necessary correctives for improving the status/ condition of women in respect of matters within the purview of the Union Government and also considers the reports of the National Commission for Women and examines such other matters as may deem fit to them or are specifically referred to them by the Lok Sabha or Speaker and the Rajya Sabha or the Chairman.

Other Institutional Mechanisms: The Support Services, in place for victims of violence are Short Stay Homes, Swadhar Homes, Helplines for women in distress, Ujjwala homes, Legal Literacy and Legal Awareness Camps by National and State Legal Services Authorities, earmarking of one Fast Track Court in a district, (where there are two) to deal exclusively with cases of violence against women,Women's Cells in Police Stations, Family Courts, Mahila Courts, Counselling Centers, Legal Aid Centers and Nyaya Panchayats

National Commission for Protection of Child Rights: The National Commission for Protection of Child Rights (NCPCR) was set up in March 2007 under the Commission for Protection of Child Rights Act, 2005, an Act of Parliament (December 2005). The Commission's Mandate is to ensure that all Laws, Policies, Programmes, and Administrative Mechanisms are in consonance with the Child Rights perspective as enshrined in the Constitution of India and also the UN Convention on the Rights of the Child. The Child is defined as a person in the 0 to 18 years age group. The Commission is also monitoring implementation of Right to Education Act. Nearly All State/ UTs have established State Commission for Protection of Child Rights. Special Juvenile Police Units have also been established in nearly all police districts of the Country along with child welfare officers in police stations.

It is noted that significant steps have been taken by Union and State governments in establishing institutions and mechanism and by and large they have come into existence throughout the length and breadth of the country but challenge lies in their capacities to deliver as they face issues in the form of quality and number of Human Resources and

19 http://parliamentofindia.nic.in/ls/intro/committee_on_empowerment.htm on 15th May 2015.

financial resources. Staffs suffer inadequacies such as lack of right knowledge, skills, training and attitudes. Serious interventions are need for these institutions to make their mark in protection of women and children human rights.

Legal Services Authorities: After the enactment of the Legal Services Authorities Act 1987, Legal Services Authorities have been set up at the national, state, district and taluka level. Legal Services Committees have been set up at the Supreme Court, High Court, District Court and Taluka level. As per Section 12 of the Act, a woman or a child shall be entitled to legal services under the Act for both filing and defending a case. Legal services have been given a wide definition under Section 1(c), and include *"the rendering of any service in the conduct any case or other legal proceeding before any court or other Authority or tribunal and the giving of advice on any legal matter."* After determining the eligibility criteria of the applicant and if there is a prima facie case, then the legal services authorities provide a Legal Aid Counsel to the applicant. All expenses relating to the fee of the counsel and court fees is borne by the legal services authorities.

Legal services authorities also play an important role in creating awareness of laws and legal remedies. The legal services authorities conduct Lok Adalats for the settlement of disputes.

PREVENTION OF VIOLENCE AGAINST WOMEN

Abstract:

Given the devastating effects of VAW on the individual, interventions, both State and nonState, have primarily focused on responding to and providing immediate & emergency services for the survivor. Within this framework, prevention of violence has, only recently, started receiving attention in India and elsewhere.

The National Policy for Empowerment of Women, 2001, which is the only holistic policy relating to women's empowerment but remains on paper in the absence of Action Plans to implement it, has as one of its goals:

"Changing societal attitudes and community practices by active participation and involvement of both men and women"

It is now well established that prevention is the most strategic approach to ending violence against women and girls. It is the underlying causes of violence that need to be addressed and eliminated for us to come closer to what is clearly acknowledged as a collective goal, that of, ending violence against women. These root causes include patriarchal culture, sociocultural practices and discriminatory attitudes, unequal distribution of power between women and men, and women's financial dependence on men, among others.

While legal and policy frameworks should definitely be a starting point for tackling root causes for the role they play in laying down norms and facilitating systemic change, these can only have limited impact on reducing violence itself unless accompanied by fundamental changes in attitude and behavior, of individuals and of the community as a whole.

Over the longer run, successful primary prevention efforts also play an important role in improving the social, economic, and health status of women and the broader societal well being, while at the same time, reducing costs to the nation including through lower need for medical care, mental health services, criminal justice, incarceration and expensive perpetrator programmes, diminished educational performance and lost productivity of women[20].

20 UN Women's Virtual Knowledge Centre to End Violence against Women.http://www.endvawnow.org/en/articles/318promotingprimaryprevention.html

To be effective, a holistic prevention strategy must target different groups of people such as community leaders, students, young adolescents, men & boys, employers; be reinforced across a range of settings such educational institutions, training institutions, workplace, media; and use wide ranging tools including gender sensitive education, trainings of key actors, and public awareness.[21]

In this section, I will focus on some of these key tools that form part of a holistic prevention strategy.

Infrastructure

1. Safe Cities

Infrastructure in a city plays a major role in the safety and security of women in public spaces.

In Delhi, cases of assault on women with the intent of outraging her modesty increased from 639 reported cases in 2012 to 3069 cases in 2013.[22] Sexual harassment of women and girls in public places may range from 'accidentally' brushing against a woman's body, lewd comments, staring, indecent exposure, stalking, unwanted physical contact with sexual intent or sexual attacks such as grabbing of breasts or buttocks.

Inadequate and insufficient infrastructure compromises the right to life and liberty, and restricts the mobility of women.

From 2009 – 2012, a non-government organization, Jagori, conducted a survey in Delhi of 6010 girls, women and men. Jagori held interviews and focus group discussions with the respondents on women's safety and access to essential services. The respondents came from all classes and occupations, such as, unorganized sector, the middle class, homemakers, journalists and men and women working in call centers.

The result of this study is as follows:[23]

1. Almost 2 out of every 3 women, including girls reported facing incidents of sexual harassment between 2-5 times in the past year;
2. Harassment occurs during day and night, in all kinds of public spaces, both secluded and crowded. Dimly lit areas or deserted areas are more unsafe;
3. School and college girl students in the 16-19 age-group are most vulnerable;
4. Almost 9 out of 10 respondents witnessed incidents of sexual harassment;
5. 70% men, 55% women preferred not to intervene/get involved;
6. Public transport, buses and roadsides reported as most vulnerable spaces;
7. Around 68 % women/girls reported that they did react to harassment in some form, confiding in family/friends, shouting back, breaking the silence;
8. However, less than 1% approached the police.

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21 "Handbook for National Action Plans on Violence Against Women" UN Women, New York, 2012 at page 19.

22 NCRB 'Crime in India' 2012 and 2013

23 Delhi Development Authority supported by Jagori 'Safety, Freedom and Respect for Women in Delhi' (December 2012)

Jagori rightly suggests that the strategic areas of intervention are public transport, civic awareness, urban planning and design of public places, provision and maintenance of public infrastructure and services, access to justice and support for survivors and their families, communications and advocacy. This brief will later document the steps taken in this direction.

2. Women in policing

Several commission reports have suggested that an increase in the number of women police will facilitate the reduction of sexual crime against women. It is also considered a strategy toward gender sensitivity in the police forces. Statutory changes introduced in the CrPC, some of which have been documented above establish that certain functions of policing have been remitted to women police officers alone. These include: The Proviso to S. 46(1), Section 51(2), Section 154 Code of Criminal Procedure, 1973, Sections 24 and 26 of the Protection of Children from Sexual Offences Act 2012, etc.

Statistics published by the Bureau of Police Research and Development since 2005 have been mentioned below: As on 1/1/2014, the total strength of police in India stands at 1,722,786.[24] For a population of 1.22 billion, this leaves a ratio of approximately one police officer for every 708 people.

Coming to women, there are 105,325 female police officers in India, making up a national average of 6.11% of the police.

Table 1: StateWise Strength of Women Police as Percentage of Total Police Force[25]

State/UT	Total Police Force	Total Woman Police (numbers)	Total women police as % of police	Rank (1-35, highest lowest)
Chandigarh		1017	14.16	
Tamil Nadu			12.42	
Andaman & Nicobar (A & N) Islands			11.27	
Himachal Pradesh			11.07	
Maharashtra			10.48	
D&N Haveli			9.96	
Daman & Diu			9.12	
Odisha			8.52	
Uttarakhand			8.4	9
Manipur			8.22	
Sikkim			7.78	
Delhi	75704	5413	7.15	12
Rajasthan	92330	6568	7.11	13
Haryana	41112	2734	6.65	14
Punjab	73782	4761	6.44	15
Kerala	47782	3067	6.42	16

24 Bureau of Police Research and Development, Ministry of Home Affairs, Government of India (2014) "Data on Police Organizations in India as on January 1 2014", p.32: http://www.bprd.nic.in/showfile.asp?lid=1291

25 25CHRI (2015) 'Rough Roads to Equality: Women Police in South Asia', page 47

State/UT	Total Police Force	Total Woman Police (numbers)	Total women police as % of police	Rank (1-35, highest lowest)
Goa	5924	366	6.18	17
Lakshadweep	264	16	6.06	17
Mizoram	9895	568	5.74	19
Puducherry	3143	165	5.25	20
Arunachal Pradesh	11247	582	5.17	21
Jharkhand	56439	2906	5.15	22
Karnataka	72011	3682	5.11	23
Madhya Pradesh	86946	4190	4.82	24
West Bengal	79476	3791	4.77	25
Andhra Pradesh	106635	4622	4.33	26
Chhattisgarh	54693	2348	4.29	27
Uttar Pradesh	168851	7238	4.29	27
Gujarat	74023	2691	3.64	29
Bihar	68819	2341	3.4	30
Tripura	23619	777	3.29	31
Jammu & Kashmir	72196	2252	3.12	32
Meghalaya	11453	329	2.87	33
Nagaland	24030	253	1.05	34
Assam	55033	510	0.93	35
All India	**1722786**	**105325**	**6.11**	

As CHRI noted, overall, taken year on year, the numbers and representation of women in the police has grown, albeit slowly at 6.11% in 2014, the national average is still far from the target of 33% set by the Ministry of Home Affairs. The Government of India has taken several initiatives to encourage states to increase the number of women in their police forces. The target of 33% representation of women in police set by the Ministry of Home Affairs in 2009 (reiterated in 2013) has since become the main policy thrust of the Central Government; successive governments have been pushing states to take affirmative action to this effect.[26]

Many states have acted on the MHA's advisories to adopt a reservation policy for women in police forces. To date, 12 states – Maharashtra, Rajasthan, Tamil Nadu, Odisha, Bihar, Sikkim, Gujarat, Madhya Pradesh, Jharkhand, Tripura, Telangana, and Uttarakhand and the Centre (for all 7 Union Territories) have a reservation policy of 30 percent or more for women in their police forces.

There is a live controversy on whether to increase the number of women police generally across the board, or whether to have All Women Police Stations (AWPS). A similar controversy exists on whether trials relating to sexual abuse should be handled by women judges or judges generally. Tamil Nadu leads with 198 allwomen police stations at present.

26 Ministry of Home Affairs, Government of India, Advisory (2009), F. NO.15011/48/2009SC/STW: http://mha.nic.in/sites/upload_files/mha/files/pdf/AdCrimeAgnstWomen170909. pdf, and Ministry of Home Affairs, Government of India, Advisory dated (2013), D.O. No. 15011/21/2013 – SC/ST – W: http://mha.nic.in/sites/upload_files/mha/files/AdvisoryWomenPolice290513. pdf.

Responding to the difference in opinion across states, both the Parliamentary Committee and the National Police Mission have intervened with suggestions. The conflict in opinions is yet to be resolved.

3. Setting up Help lines

As per the reply of the Ministry of Women and Child Development, the Ministry in 201516 launched a Scheme called "Universalization of Women Helpline" with the aim to provide toll free 24 hours emergency and nonemergency response to women affected by violence both in public and private sphere of life. The Scheme envisages universalization of 181 across the country as dedicated women helpline number. This Helpline will be integrated with hospital/police/shelter homes/ ambulance services etc. It will serve as a referral point for various State agencies such as District Legal Services Authority's, Protection Officers, police etc. The scheme is being funded from the Nirbhaya Fund. Help lines can be both preventive and have a therapeutic value.

4. Safety in road transportation

The State Transport Authority (S.T.A.) is the nodal authority, which is statutorily entrusted with the responsibility of ensuring the safety, and security of the citizens travelling by buses and taxis. In pursuance to the statutory mandate envisioned under the Motor Vehicles Act, 1988 (MV Act), the Central Motor Vehicles Rules as well as the Delhi Motor Vehicle Rules, the State Transport Authority has been authorized to grant registration certificates, issue permits, prepare routes, and to supervise the effective and safe functioning of the buses in the Capital.

The Motor Vehicles Act, 1988 (MV Act) which defines the term "public service vehicle" underSection 2(35) as under:

> *(35) "public service vehicle" means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage;*

A "permit" is further defined under Section 2(31) to mean a permit issued by a State or Regional Transport Authority prescribed under the MV Act authorizing the use of a Motor Vehicle as a Transport Vehicle.

A "Stage Carriage Permit" is further defined under Section 2(40), a "Contract Carriage" under Section 2(7), a "Tourist Vehicle" is defined under Section 2(43), an "Educational Institutional Bus" is defined under Section 2(11) and the "State Transport Authority" has been defined under Rule 2(r) of the Delhi Motor Vehicle Rules Reference is being made in this brief to the situation in Delhi but the situation in most States is similar. On a liberal estimate,the number of buses running in Delhi is seven thousand excluding tourist buses, which exceed this number. These buses include those that have been granted a Stage Carriage Permit (mostly owned by the Delhi Transport Corporation and are allowed to only ply at the bus stops especially ear marked for them), those that have been granted the Contract Carriage permit (those buses that operate from one point to another point, hence the term point to point buses, whereby the bus operates under a Contract entered into between the owner of the bus, and the agency/institution/company which wishes to engage the bus for picking up and dropping its members, and the conditions of the permit expressly precludes the bus from picking or dropping any other passenger, other than the ones specified), those that have been plying under an already existing scheme of the Delhi Government (such as the erstwhile Blue Line Buses, and the new Orange Line buses, plying under the Multi – Modal Scheme of the Delhi Government) and those buses which operate under an already

existing All India Tourist Permit, or the State Tourist Permit to travel between two locations. The State Transport Authority has the sole and exclusive prerogative to issue licenses, issue permits and to regulate the conditions as well as grant of such permits or licenses.

As the *Nirbhaya case*, indicates, it was the failure of the State Transport Authorities to comply with their statutory duties which led to the horrific gang rape of *Nirbhaya* in a moving bus on the night of 16th December 2012. The Usha Mehra Committee Report has extensively documented these failures and they need not be repeated here. Some of the gross failure include allowing the bus to ply with dark tinted glasses making any surveillance impossible, allowing a Contract Carriage bus to stop at unscheduled stops and pass itself off as a Stage carriage bus, allowing busses without a valid permit to ply, allowing unauthorized persons to ply the bus. Each of these failures represent a failure of the regulatory framework of public transport representing a grave threat to the safety and security of women in the country. It is not known whether any action has been taken against the erring officials and with what outcome.

The *Nirbhaya* case illustrates that one of the biggest threats to the security of women comes from the breakdown of regulatory systems in the country due to the absence of good governance and any form of accountability to the people on these issues. There is no periodic monitoring of the implementation of laws in the country, nor any system of data collection. There is no grievance procedure is place which could function as an early warning system to prevent disaster from happening. As will be recommended in the course of this brief, such systems need to be put in place is the lessons of *Nirbhaya* need to be learnt. Apart from failure to exercise their regulatory powers under the Motor Vehicles Act, the Authorities have also failed to implement judgments of this Hon'ble Court.

Violation of Judicial Orders by the State Transport Authority:

The State Transport Authority has on numerous occasions; openly flouted the orders and directions passed by this Hon'ble Court as well as the Hon'ble High Courts on repeated basis. A list of the cases where orders passed have been violated has been mentioned as under:

a. M.C. Mehta v. Union of India &Ors.[27]

"1) No heavy and medium transport vehicles, and light goods vehicles being four wheelers would be permitted to operate on the roads of the NCR and NCT, Delhi, unless they are fitted with suitable speed control devices to ensure that they do not exceed the speed limit of 40 KMPH. This will not apply to transport vehicles operating on InterState permits and national goods permits.

2) They will also ensure that wherever it exists, buses shall be confined to the bus lane and equally no other motorized vehicle is permitted to enter upon the bus lane.

3) They will ensure that buses halt only at bus stops designated for the purpose and within the marked area.

4) The inaction on the part of the executive, however, impelled this Court to issue certain directions from time to time in this writ petition, but precious little appears to have been done despite those directions."

b. Chandigarh Administration & Others. v. Namit Kumar &Ors.[28]

"One of the directions which has been assailed by several appellants relates to direction no.14 regarding use of helmets. The exemption has only been extended

27 (1999) 1 SCC 413

28 (2004) 8 SCC 446

to Sikh women while driving. All others including women are required to wear helmets. Stand of the appellants is that such direction is contrary to several statutory prescriptions. Particular reference has been made to Section 85A of the Motor Vehicles Act, 1939 (in short the 'Old Act') and Section 129 of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'New Act'). It appears that Clause 3 of the Motor Vehicles (Protective Headgears) Rules, 1980 exempts Sikh women from wearing helmets."

c. *M.C. Mehta v. Union of India &Ors. (2006) 3 SCC 399*

"MCD shall within 10 days give wide publicity in the leading newspapers directing major violations on main roads (some instances of such violators and roads have been noted hereinbefore) to stop misuse on their own, within the period of 30 days.In case misuser is not stopped in the premises involved in the civil appeals and special leave petitions, subject to what is stated in this judgment, the MCD will take immediate steps to seal those premises soon after expiry of 30 days."

d. *Court on Its Own Motion v. Union of India*[29]

"1)The Licensing authority shall ensure conducting of stringent and rigour test in accordance with the provisions of the Act and the Rules for issuance of driving license. It shall ensure that the applicant to whom the license is sought to be issued is fully competent, understands and is capable of safe driving in accordance with Rules.

2)The drivers should be kept on probation for a period of two years and their mannerism and driving skills should be closely watched by the Supervisory staff of DTC/STA/concerned officers.

3) No vehicle to whomsoever it may belong, would have the black films on the glass/screen of the car, unless it has specific permission of the concerned authority, bearing the car number as well.

4) The STA shall ensure that the buses running under its permit do not have any person other than a conductor and a driver in a bus and this shall also be a condition of the permit. It shall also ensure that no person including the conductor shall be on the stairs of a bus or hang outside the door of a bus.

5) All the vehicles whether light/heavy/two wheelers etc. on the road will not have any other horn except an electric horn in accordance with the prescribed standards aforenoticed

6) The competent authorities including STA's officers, enforcing agencies and police, particularly the traffic police, are directed to ensure lane driving, no overtaking in prohibited zones and to fix bars in the central lane so as to prevent the drivers driving in the middle lane to suddenly shift to the extreme right lane near the crossing or where the right turn is permissible."

e. *Maninderjit Singh Bitta v. Union of India &Ors.*[30]

"Disobedience of Court orders, more so persistent disobedience, has been viewed very seriously by the concerned Courts. It is not only desirable but an essential requirement of law that the concerned authorities/executive should carry out their statutory functions and comply with the orders of the Court within the stipulated time. Such course attains greater significance where the statutory law

29 W. P. (C) No. 16565 of 2006, (Hon'ble Delhi High Court) 139 (2007) DLT 244

30 (2012) 1 SCC 707

is coupled with the directions issued by a Court of law in relation to attainment of a public purpose and public interest. In the present days, safety of the citizens is of paramount concern for the State and all its authorities. The directions issued by this Court for implementation of High Security Registration Plates scheme sought to achieve such interest as well as it would be a step forward even in the field of investigation in case a vehicle is used in commitment of an offence or a crime. As already noticed, there are large number of States who have not taken any action in furtherance to judgments and directions of this Court and their statutory obligations. This conduct of the States compels us at least to begin with direction for the presence of the senior officers in charge of such affairs in the respective State Governments before this Court."

f. AvishekGoenka v. Union of India &Ors.[31]

"All the Director Generals of Police/Commissioners of Police are hereby again directed to ensure complete compliance of the judgment of this Court in its true spirit and substance. They shall not permit pasting of any material, including films of any VLT, on the safety glasses of any vehicle

They will ensure that buses halt only at bus stops designated for the purpose and within the marked area…"

g. Deputy Inspector General of Police v. S. Samuthiram[32]

"Where any incident of eveteasing is committed in a public service vehicle either by the passengers or the persons in charge of the vehicle, the crew of such vehicle shall, on a complaint made by the aggrieved person, take such vehicle to the nearest police station and give information to the police. Failure to do so should lead to cancellation of the permit to ply."

It is to be noted that a new Act has been proposed to replace the existing legislative framework on road safety. The draft titled Road Transport and Safety Bill, 2014 was placed on the website of the Ministry of Transport and Highways on September 13th, 2014[33] seeking feedback from the public.

5. Regulation of radio and web based taxi providers

Present regime

1. All transport providers are regulated under the Motor Vehicles Act, 1988 ("MV Act"). In particular Section 2(7), Section 73 and 74 of the MV Act applies to contract carriage. Section 2 (7) of the MV Act defines contract carriage as follows:

""contract carriage" means a motor vehicle which carries apassenger or passengers for hire or reward and is engaged under a contract, whether expressed or implied, for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person with a holder of a permit in relation to such vehicle or any person authorized by him in this behalf on a fixed or an agreed rate or sum-

(a) on a time basis, whether or not with reference to any route or distance; or

31 (2012) 5 SCC321

32 (2013) 1 SCC 598

33 http://indiatoday.intoday.in/story/motorinsurancefinesincrease/1/394379.html, last accessed on 17.08.2015

(b) from one point to another, and in either case, without stopping to pick up or set down passengers not included in the contract anywhere during the journey, and includes-

(i)a maxicab; and (ii) a motorcar notwithstanding the separate fares are charged for its passengers;"

2. An application for a contract carriage permit has to be made under Section 73 of the MV Act and the Regional Transport Authority under Section 74 of the MV Act grants the permit, subject to additional conditions as may be prescribed. Therefore, all taxi service providers are required to register under the MV Act.

3. In the last few years there has been a surge in the business of "radio taxis", that is, taxis provided through a radio service – whereby one can book a cab through a radio service like a phone.

4. In light of this, some states have introduced schemes/regulations to govern the registration and plying of such taxis. These include:

   (i) City Taxi Service Scheme, 1998, by the Government of Karnataka; (ii) Radio Cab Scheme, by the Government of Haryana; (iii) Radio Taxi Scheme, 2012, by Government of Assam; (iv) Rule 176B of the Andhra Pradesh Motor Vehicles Rules, 1989, by the Government of Andhra Pradesh; (v) Fleet Taxi Scheme, 2006, by the Government of Maharashtra; (vi) Operation of Radio Taxi Scheme, 2012, by the Government of Jammu and Kashmir; (vii) Uttar Pradesh Motor Vehicles (Fourteenth Amendment) Rules, 2013, by the Government of Uttar Pradesh; (viii) Himachal Pradesh Transport Service Providers Scheme, 2013, by the Government of Himachal Pradesh; and (ix) the Radio Taxi Scheme 2006 and the Economy Radio Taxi Scheme, 2010 by the Govt. of NCT of Delhi.

5. While these schemes govern taxis booked through a radio (over the phone by speaking to the call center/company directly), they do not expressly govern taxis provided by a "web aggregator". That is, certain companies such as Uber B.V., Ani Technologies Pvt. Ltd., On Time Technologies Pvt. Ltd., Serendipity Infolabs Pvt. Ltd. and VLink Automotive Services Pvt. Ltd. provide taxis under brand names like Uber, Ola, Taxi For Sure Genie, etc. These taxis are booked through mobile based applications using the internet. Therefore, while the above mentioned schemes regulate taxis which are availed through over radio or through call centers, they do not address the issue of applicability of the said schemes to 'web aggregators', that is internet based taxi service providers and therefore are not expressly recognized by such schemes. They remain unregulated and are operating illegally as taxi services all over the country without any registration under the MV Act.

6. This lack of regulation of "web aggregator" taxi companies has given rise to serious concerns about passenger safety and especially of women, who use these services based on the promise of "safety" and convenience, as widely advertised by such companies.

7. The lack of regulation has caused or at least heavily contributed towards various incidents of sexual harassment of women. Specifically, On December 5, 2014, a young woman was allegedly raped by one Shiv Kumar Yadav, the driver of a taxi provided by Uber B.V., a web aggregator taxi provider. On investigation it was found that no proper background verification had been done on the driver and the character certificate issued to Shiv Kumar Yadav by the DCP, South East Delhi Police, in August 2014, was unreliable and false since it failed to check and disclose the fact that he was a

sex offender and had even been convicted earlier. After the incident, Uber B.V. gave statements in the press disclosing that they were not the employers of the driver but only a technology platform connecting customers to the drivers and therefore owed no liability towards the passenger.

8. Pursuant to this incident, the Ministry of Home Affairs issued a notice bearing no. 14036/69/2014UTP dated December 8, 2014 ("MHA Ban Order") to all Home Secretaries of all States/UTs apprising them of the incident and advising them to prohibit operation of such services till proper licenses are obtained by these companies in the relevant State/UT.

9. The Government of Delhi NCT through its State Transport Department also issued a public notice dated December 8, 2014 blacklisting Uber B.V. and other companies for violating the MV Act and the rules framed thereunder ("Delhi Ban Order").

9. Further, the Govt. of NCT Delhi on December 26, 2014 introduced the amended Radio Taxi Scheme of 2006 No. F./ DC / TU / TPT. 804 / 0214 / 1721 ("2014 Modified Scheme") which brought within its purview "web aggregators" along with radio taxis. Some of the more important regulations introduced by this scheme are: (i) that the radio taxi has to be fitted with global position system (GPS) based tracking devise which shall be in constant communication with the central control room of the licensee, (ii) a panic button has to be installed in the taxi and in case of any distress the same may be pressed to transmit a signal to the nearest police station/police control room, (iii) the driver shall be of good moral character without any criminal record, and (iv) that if the licensee causes or allows a taxi to be used in unauthorised manner the licensee and the driver shall be jointly and severally responsible for any injury, harm, offence or crime committed by any person, including the driver.

10. However, on the other hand, in West Bengal, the Office of the Commissioner of Police, Bidhannagar, Government of West Bengal, by an order under Section 144 of the CrPC introduced regulations to regulate taxi operators and aggregators. This allows taxi aggregators to operate as an intermediary under Section 79 of the Information Technology Act, 2000 without a registration under the MV Act. This is contrary to the provisions of the MV Act, in particular Sections 73 and 74.

11. However, most other states have not yet introduced any schemes to regulate such taxi companies who claim to be web aggregators.

    There is no scheme/regulation mandating proper emergency control systems which ensures women safety or even a basic background check on the drivers being employed by these companies. Therefore, most states are currently allowing web based taxi service providers to ply without any registration under the MV Act.

12. It is very pertinent to note that though these companies brand themselves as a taxi provider by using brands such as "Ola", "Uber", etc. the fine print of their terms of use exclude any liability towards their passengers. Further, these companies have capped their aggregate liability to insignificant amounts at about Rs.2000 to Rs.5000 (as provided in their terms of use). This results in these companies luring passengers to use their services with the promise of safe and secure transportation services and at the same time clandestinely excluding any liability. For example, Uber B.V.'s terms of use includes the following clauses:

    "Uber shall not be liable for any damages resulting from the use of (or inability to use) the Website or Application (but to the exclusion of death or personal injury), including damages caused by malware, viruses or any incorrectness or

incompleteness of the Information or the Website or Application, unless such damage is the result of any wilful misconduct or from gross negligence on the part of Uber.

Without prejudice to the foregoing, and insofar as allowed under mandatory applicable law, Uber's aggregate liability shall in no event exceed an amount of EUR 500 or, where applicable, the equivalent of that amount in the currency used by you for the payment of the transportation services to the Transportation Provider.

The quality of the transportation services requested through the use of the Application or the Service is entirely the responsibility of the Transportation Provider who ultimately provides such transportation services to you. Uber under no circumstance accepts liability in connection with and/or arising from the transportation services provided by the Transportation Provider or any acts, actions, behaviour, conduct, and/or negligence on the part of the Transportation Provider. Any complaints about the transportation services provided by the Transportation Provider should therefore be submitted to the Transportation Provider."

13. Similar clauses for exclusion of liability are included in the terms of use of all web aggregator.

14. In April 2015, Shri Radhakrishnan, in a written reply in the Rajya Sabha, stated that the Ministry of Road Transport & Highways had reportedly finalized a draft advisory for the State Governments in consultation with stakeholders with regard to taxihailing services. The taxi hailing services or the on demand transport aggregating services in question were considered to be covered under Section 93 of the Motor Vehicles Act, 1988 and the State Governments have the power to regulate such service providers.

15. Section 93 of the MV Act regulates – licensing of agent or canvasser who is engaged in the sale of tickets for travel by public service vehicles. However, no such advisory has been made available publicly yet.

Issues Unaddressed:

16. Due to exemption from any regulation, these taxi service providers do not follow any rules as such and most importantly do not follow a proper verification system to check the criminal background of drivers of privately owned taxis in order to ensure a minimum level of safety of women, which is crucial as evident from the case of the driver provided by Uber B.V. on December 5, 2014, which led to the commission of an offence of rape, who was a repeat sex offender and was still given a character certificate by the DCP, South East Delhi Police. Further, this was not one isolated incident, and since then there have been multiple reports of drivers sexually harassing women.

17. Further, such companies misleadingly advertise and brand their services as that of a cab company and are branding all their cabs collectively and regularly refer to the vehicles as "our cabs" thereby creating an impression that they are a cab service company but at the same time have shifted the onus of safety of the passenger onto the driver and have disclaimed any liability whatsoever.

18. The Ministry of Transport and Highways which is entrusted with the responsibility of formulating and administering, in consultation with other Central Ministries/ Departments, State Governments/UT Administrations, organizations and individuals, policies for, inter alia, road transport, have not provided any clarity on this.

19. The State Governments/U.Ts should frame appropriate schemes under Section 74 of the MV, Act to regulate cab aggregators, who are in fact contract carriage providers.

20. Lack of regulation of safe public transport and privately owned public transport service providers deters women from carrying on their work efficiently thereby, violating their Article 19 (1)(g) right. A lot of women however, have no choice but to take public transport thereby remaining fearful of their safety, security and under the constant threat to their life.

21. There are certain petitions regarding this issue filed before the Delhi High Court regarding the applicability of taxi schemes to web based aggregators under the Radio Taxi Scheme, 2014 introduced by the Govt. of NCT of Delhi. The Delhi High Court in W.P. (C) 6668/2015 in the matter of ANI Technologies Pvt. Ltd. v. Government of NCT of Delhi & Ors. dated 29.07.2015, has decided not to stay the Ban Order of the Govt. of NCT of Delhi (dated December 8, 2015) however, this was on the grounds of whether such All India Permit cabs have to abide by the CNG norms applicable in Delhi. The issue of applicability of the 2014 Modified Scheme to such companies is still to be decided.

22. However, other State Transport Departments have not taken steps towards introduction of such schemes. It is imperative that all State Transport Departments address this issue immediately. Further, it must be noted that the MHA Ban Order was not revoked and there has been no further action taken by the Ministry of Home Affairs on this issue.

23. Further, the Ministry of Transport and Highway should ensure thata basic scheme is formulated to govern such taxi companies, in the absence of which, various states (like West Bengal and NCT of Delhi) are introducing schemes at complete variance to each other leading to the same companies being governed in two absolutely contrasting ways.

24. The Government of West Bengal has already recognized companies such as web based aggregators as intermediaries who can have in built safety mechanism in the mobile application and do not require to install a GPS system in the vehicle and therefore are exempt from obtaining licenses under the MV Act. This is contrary to Section 74 of the MV Act, as clearly laid down in the Transport Department Orders and also results in contradictory treatment of companies in different states. Such anomalous laws and orders should not be allowed to govern web based taxi aggregators.

25. A proper regulatory regime cab companies is the immediate need of the hour since they are currently unregulated and are thereby able to expand their business in Indian cities at an alarming rate.

26. The web based and radio taxi schemes should be declared as “contract carriage” within the meaning of Section 2(7) of the Motor Vehicles Act 1988 to ensure inclusion of the following regulations (i) all vehicles have a GPS system installed in the vehicle as opposed to in the mobile phone application; (ii) that proper background checks of drivers are conducted; (iii) that the company have its own verification process and a reference system in place to further bolster this; (iv) have a panic button system (as introduced by the Govt. of NCT of Delhi in its Radio Taxi Scheme, 2014); (v) that cab companies have a minimum net worth in order to ensure that they are bona fide companies and not fly by night operators; (vi) requirement to furnish a substantial sum as bank guarantee to ensure that the company has substantial assets so that in case of an adversarial situation such bank guarantee can be invoked against the

company; (vii) prohibit exclusion of liability arising out of threat to safety and security of passengers and capping of liability.

27. The cab companies claim that drivers provided by them hold 'All India Tourist Permits' operate their cabs. Issuance of All India Tourist Permits is governed by Section 88 (9) of the MV Act. However, this does not work to the exclusion of Section 74 in cases of radio taxi and web aggregators since Section 88 (9) expressly states that Section 73 and Section 74 shall apply to such permits.

28. Further, All India Tourist Permits are not uniformly regulated, some States in India do not require police verification to be conducted for granting All India Tourist Permits to drivers and vehicles and therefore cab companies should additionally be required to do a mandatory police and background verification under regulations under the MV Act.

29. Para 13, Chapter X, Provision of Adequate Safety Measures and Amenities in respect of Women of the Justice Verma Committee report, 2012 had also recommended:

"that the identities of drivers and other personnel who work in public transport vehicles be vetted by the local Road Transport Authority and there must be a certification of their good character by at least two known persons in the city where they are operating. The local police should have a complete database of information regarding such personnel."

30. Section 79 of the Information Technology Act, 2000, an intermediary is exempt from liability only if it does not initiate the transmission, select the receiver of the transmission and select or modify the information contained in the transmission, whereas web based aggregators select the receiver of the transmission in as much as it chooses the vehicle type for the user. Therefore, they are not a gobetween, which merely connects the customer and the driver but also chooses the driver and vehicle type and cannot claim exemption from the MV Act on that basis.

31. Taxi transport service providers by radio or mobile based applications are directly liable for the violation of the fundamental rights of the commuters to life and personal liberty under Article 21 of the Constitution of India by not installing GPS systems in the vehicle and not conducting proper background checks of the drivers employed by them. Therefore, basic guidelines should be framed to govern such companies in order to ensure that there is some uniformity in regulation of these companies across India which will to some extent ensure the safety and security of women.

6. Sex offenders Registry

1) One of the resources suggested to prevent crimes against women has been the creation of sex offender registry. Sex offender registry is a system that allows government authorities to track the movement and activities of convicted sex offenders following their release into the community. More than 18 countries in the world have enacted sex offender registration laws, including Argentina, Australia, France, Canada, United Kingdom, United States of America and South Africa.

2) **Purpose of Sex Offenders Registry:** Sex offender registry have been set up by countries with the objectives of crime prevention and public safety. In some countries the sex offender registry serves as a general investigative tool. It is used for providing accurate, reliable and current information to investigating agencies for proper investigation of crimes of a sexual nature. France maintains a National Computerized Genetic Information Bank under the supervision of a judge, where the

genetic fingerprints of offenders convicted of sexual offences and other offences like crimes against humanity, torture and drug trafficking, are maintained. The purpose is to facilitate identification and search of the perpetrators of the offence. Police officers also have access to the database. Other countries have set up sex offender registers specifically as a public safety measure. In South Africa, public safety concerns are the reason for establishment of the National Register for Sex Offenders, which is a record of names of those found guilty of sexual offences against children and mentally disabled people. The register gives employers in the public or private sectors such as schools, crèches and hospitals the right to check that the person being hired is fit to work with children or mentally disabled people. However, the register is confidential and not open to the public.

3) **Access to Registry:** Most countries restrict access to the registry and keep the information available to only law enforcement authorities. Currently, only United States of America requires public disclosure of offender information and indeed some states actively disseminate such information, while in countries like Australia and Canada, only certain states/provinces allow public disclosure of offender information. In the United Kingdom, under the child sex offender disclosure scheme, anyone can formally ask the police if someone with access to a child has a record for child sexual offences, if they think it is in the child's interests.

4) **Sex offender registration in the United States:** In the United States the first national level sex offender registration and notification system in the world was set up in 1994. In 1996, compulsory community notification, i.e., the public dissemination of information from states' sex offender registries, was introduced. A national database for tracking certain sex offenders by the Federal Bureau of Investigation (FBI) was also established.

   Broadly, sex offences include criminal offenses that have an element involving a sexual act or sexual contact with another; specified offenses against minors including kidnapping, video voyeurism and any conduct that is a sex offense against a minor; specified federal offenses like sex trafficking, sexual abuse, aggravated sexual abuse; sex offenses under the Uniform Code of Military Justice; and attempts and conspiracies to commit these sex offences.

   Sex offender registries in the states now include not only persons who committed sexually violent offenses or crimes such as kidnapping or false imprisonment of a minor, but also people who have committed offenses like indecent exposure (such as streaking across a college campus), and other more relatively innocuous offenses. 29 states required registration for teenagers who had consensual sex with another teenager. At least 13 states required individuals to register for urinating in public (in two states, only if a child was present).[34]

Types of National Databases

Two types of sex offenders registries are maintained

- The Federal Bureau of Investigation's National Sex Offender Registry; and
- National Sex Offender Public Website (NSOPW) managed by Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (a part of Department of Justice)

34 Human Rights Watch, Raised on the Registry : The Irreparable Harm of Placing Children on Sex Offender Registries in the US, May 2013

While the FBI's National Sex Offender Registry is available only to law enforcement, the NSOPW is a public access national search site that links public state, territorial, and tribal sex offender registries. Its purpose is public safety, and members of the public can use the website to identify location information on sex offenders residing, working, and attending school their own neighborhoods and in other nearby states and communities.

Information available through the public website : The public sex offenders website must include information on the sex offense for which the offender is currently required to register and any other sex offense for which the sex offender has been convicted; employer address; photograph; physical description; residence address and vehicle license plate number and description. The public website however does not provide the offender's Social Security number, details of the victim of the offense or reference to arrests of the sex offender that did not result in conviction.

5) **Status in India**

In 2009, the then Union Home Minister Mr. P. Chidambaram had commented,

"The police stations in the country are, today, virtually unconnected islands. Thanks to telephones and wireless, and especially thanks to mobile telephones, there is voice connectivity between the police station and senior police officers, but that is about all. There is no system of data storage, data sharing and accessing data. There is no system under which one police station can talk to another directly. There is no record of crimes or criminals that can be accessed by a Station House Officer, except the manual records relating to that police station."[35]

In this regard, the CCTNS is a necessary and important way forward. However, it is concerning to note recent media reports that NCRB, the implementing agency for CCTNS, will not receive any funding for this year for CCTNS[36].

As per the response sent by Ministry of Home Affairs, the details pertaining to convicted sex offenders such as name, contact and address details, previous criminal history, crime number, court case number, detail of associates, detail of diseases, etc. are currently captured and updated in the Crime and Criminal Tracking Network System (CCTNS) application locally in police station level. The Ministry also noted that in order to compile the National Register of Convicted Sex Offenders and others heinous crimes, this data residing at Police Station has to migrate from Police Station to State Data Centre and then to National Data Centre which is under Implementation. Post compilation, the data can be then shared with the concerned authorities, as required.

According to a recent news report[37], Ministry of Home Affairs is planning to,

"have India's own 'Sex Offenders Registry', an online database of charge-sheeted sexual offenders nationwide, to be accessible to the public through a Citizen Portal in the upcoming Crime and Criminal Tracking Network and Systems (CCTNS) project." It further notes that, "All police stations will populate their respective state citizen portal which will link to the central Registry. "This would be a consolidated national registry of charge-sheeted offenders in cases specific

35 http://ncrb.gov.in/cctns.htm

36 Indian Express ,"No funding this year for network to track crime", June 1 2015 available at http://indianexpress.com/article/india/indiaothers/nofundingthisyearfornetworktotrack crime2/99/

37 The Economic Times, Modi government plans online database of chargesheeted sexual offenders, Aug 5, 2015, http://articles.economictimes.indiatimes.com/20150805/news/65243581_1_offendersregistrypolicestations

to crime against women Sec 375 (rape), Sec 376 A, Sec 376 B and other sexual offences. The individual's name will be removed from the list if acquitted," a home ministry official told ET."

This development is extremely disturbing. Details of suspected sex offenders, who have been charge-sheeted, will be made public. This is a clear violation of the right to privacy of the accused, as his details as a possible sex offender will be made public without a judicial determination of his guilt. This executive decision, without any legislative backing or safeguard, has the potential of far reaching negative consequences for the public at large.

6) **Recommendations**

It is submitted that the provision of community notification has been found to be extremely counterproductive and has caused public mischief. Community notification stigmatizes sex offenders and makes reintegration into society impossible.

A 2007 report by Human Rights Watch[38], which studies the US system, makes an important point that there is no convincing evidence of public safety gains from sex offenders registration, community notification and residency restriction laws. The report underlines several problem within the system, including the over broad scope of the registration, the overly lengthy duration for which names remain on the registers and the vulnerability of those registered to harassment, intimidation and even violence.

The deterrent value of sex offenders registries is far from well established. What these registries have contributed to is the creation of a class in society that can be hated.

Given the unaccountability of the policing system in India and the absence of police reform, there is a great danger that the sex offenders registry will end up being a tool of harassment in the hands of the police.

The amicus does not recommend the creation of a sex offenders registry.

HUMAN RESOURCES

1. Awareness and education

Despite a plethora of laws which cover multiple forms, incidence of violence against women seems to be increasing. The question then arises why have these laws failed to act as any real deterrent to violence perpetrated against women and girls? Along with lack of effective implementation and accountability mechanisms for those responsible for implementation, the reason can be found in patriarchal and discriminatory attitudes and perceptions against women, which create an environment of 'impunity'.

Valuing the girl child: As mentioned in the Justice Usha Mehra Commission Report, in India, discrimination against the girl child begins even before she is born. Gender biased sex selection is a specific and gendered form of discrimination that is a result of entrenched son preference and access to and misuse of technology.

The most telling proof of this is India's declining child sex ratio (CSR). The CSR has declined sharply from 976 girls to 1000 boys in 1961 to 919 as per the 2011 census.[39] According to global trends, the normal child sex ratio should be above 950. However, in certain parts of

38 Human Rights Watch, US: Sex Offender Laws may do more Harm than Good, September 11 2007

39 Census 2011.

Punjab, Haryana, UP, MP, Maharashtra and even Delhi, there are less than 850 girls for every 1000 boys. The UNFPA in India estimates that the practice of sex selection has resulted in the loss of approximately 5.7 lakh girls annually during the period 20012008. This results in an estimated 45 lakh girls missing over this eight year period (200108).[40]

Institutional 'Bias': Very often, attitudinal 'bias' against women is manifestation in how she is perceived and treated by the law and legal process. In the context of racism within the police in the UK, the Macpherson Report[41] defines institutional racism as follows:

> *"The collective failure of an organization to provide an appropriate and professional service to people because of their color, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behavior which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and stereotyping which disadvantage minority ethnic people."*

This might well be true of the police in India in relation to bias on the issue of gender and needs to be addressed.

Within this framework, although a victim, she becomes the object of blame – for what happened to her, and how she was treated, in the aftermath.

A significant amount of the public discourse on sexual assault and sexual harassment – which are nothing but unequivocal violations of a woman's dignity and bodily integrity – continues to centre around what kind of clothes the woman was wearing, whether she was alone and whether the incident took place at night. Thus, narratives are created around her behaviour, and from this, whether she was deserving or non-deserving, of the violence and of the law's protection. From the case of Mathura, Bhanwari Devi to the recent Park Street rape case, and Nirbhaya, this has often been the trajectory that brings to focus how attitudes and perceptions can play a role in cases of VAW. As Justice Usha Mehra observed in her report, the primary causes of VAW need to be addressed namely, the absence of de-facto equality for women in India. She goes on to point out that laws have failed to prove a deterrent against such crimes. In the final analysis Justice Usha Mehra points out that there is a need for a sea change in peoples mindset. She refers to the son preference syndrome, which leads to sex selective abortions, the low aspirational threshold inculcated into the girl child, the portrayal of women in the media assex objects, and the prevalence of the myths mentioned above that women are to blame for sexual violence against them[42].

Similarly, the issue of consensual versus non-consensual sexual intercourse in cases of rape. In cases that are categorized as "breach of promise of marriage", despite the victim/ survivor categorically claiming that she did not consent, the courts find in favour of the accused. While there exists jurisprudence on deciding whether a case falls into the category of "breach of promise of marriage", in many cases, it is the deep-rooted bias against sexual behaviour and "immorality" that contributes to determine the trial. In a study conducted by Lawyers Collective in 2014 (unpublished), respondents from law enforcement and judiciary had the following to say:

> *"In our country, sex before marriage is a sin. It is termed as "illicit relations". Though the girl and the boy are having affair, their love should not go beyond their eyes. There are restrictions for both of them, not to touch each other. If the*

40 UNFPA India Country Office. 2013. http://countryoffice.unfpa.org/india/drive/PolicyBrief_GenderBiasedSexSelection_UNFPAFinal_July2013.pdf

41 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf, last accessed on 21stAugust, 2015.

42 Usha Mehra Committee Report, pp.59-69

> *girl gave consent under the promise of marriage, then she is responsible for the consequences. It cannot be termed as "rape" and boy should not be punished for his act in love."*

Another way in which institutional bias against women manifests is in the argument that women misuse the law. The issue of misuse has primarily been raised in the context of Section 498A, IPC relating to cruelty against married woman but is gradually being used in the context of sexual harassment at the workplace, and even rape.

The bias regarding the issue of "breach of promise of marriage" is intertwined with the perception that a woman who indulges in sexual intercourse before marriage can "misuse" the law i.e. file "false complaints", either as an act of revenge or to save herself from public shame. Women are also believed to have filed a "false complaint" of rape to settle a family dispute over property or such other issues.

The pervasive 'bias' over women 'misusing the law' has been institutionalized in Section 14 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, which penalizes the aggrieved woman or any other person making the complaint, for making false or malicious complaint. Seen in the context of the spirit of Hon'ble Supreme Court's judgment in *Vishaka v. State of Rajasthan & Ors.*[43], and that women risk losing their employment for making a complaint of SHW, this kind of provision reinforces discriminatory attitudes and perceptions.

Role of Men and Boys: The role of men and boys in the prevention of violence against women cannot be overemphasized. The Commission on Status of Women in the Agreed Conclusions from its 57th Session called for States to highlight the role of men & boys:

> *Engage, educate, encourage and support men and boys to take responsibility for their behaviour, to ensure that men and adolescent boys take responsibility for their sexual and reproductive behaviour, and to refrain from all forms of discrimination and violence against women and girls; develop, invest in and implement policies, strategies and programmes, including comprehensive education programmes to increase their understanding of the harmful effects of violence and how it undermines gender equality and human dignity, promote respectful relationships, provide positive role models for gender e quality and encourage men and boys to take an active part and become strategic partners and allies in the prevention and elimination of all forms of discrimination and violence against women and girls;*[44]

Working with men and boys as a key prevention strategy is also highlighted by several studies, domestic and international, that point to the importance of changing attitudes at an early age and what impact a positive and gender sensitive attitude within this key category is likely to have on reducing & addressing VAW.

A 2013 United Nations (Partners for Prevention) multicountry study on Men & Boys and their perpetration of violence found that overall, half (49 percent) of the men who reported having raped a woman did so for the first time when they were teenagers, varying from 25 percent (Chinaurban/rural) to 64 percent (Papua New Guinea Bougainville). Linking rape perpetration to gender attitudes, the same study also found that the most common motivation that men reported for rape perpetration was related to sexual entitlement—men's belief that they have the right to sex, regardless of consent. Both partner violence

43 JT 1997 (7) SC 384

44 Commission on Status of Women. 57th Session Agreed Conclusions (2014). http://www.unwomen.org/~/media/headquarters/attachments/sections/csw/57/csw57 agreedconclusionsa4en.pdf.

and non-partner rape were found to be fundamentally related to unequal gender norms, power inequalities and dominant ideals of manhood that support violence and control over women.[45]

Reference has already been made to the ICRWUNFPA study conducted in India to map intimate partner violence and son preference. The study found that,

> *Education certainly provides a higher level of exposure to new gender norms, and educated men may be more likely to have educated spouses. Education and economic status may also create less pressure for men to conform to dominant societal expectations to behave in a rigidly masculine manner. If the spouse is educated then she may likely have more autonomy and will be more resistant to her husband's control over her.*[46]

This therefore, builds a strong case for large-scale and targeted awareness programmes/ campaigns as well as working with men & boys, at school and within communities. The methods must be diverse and varied, depending on the site and the target group, including use of digital and social media as well as community-oriented methods such as nukkadnataks, puppet shows etc. What the international and domestic experience clearly suggests is that there is no 'one fits all' approach to prevention, particularly awareness generation, and the Government must take such multi-sectoral approach, which is based on evidence and good practices.

Some of the interventions which have been adopted are discussed in detail below.

Existing Policies on Education, Awareness and Training relating to VAW and Sex Education

The Ministry of Human Resource Development (HRD) submitted its response in relation to the prayer of Respondent 3 for promotion of awareness and education relating to importance of women in society and the offences relating to sexual crimes against women.

The existing international commitment for education and awareness relating to VAW necessitate change in perception and attitudes towards gender relations:

Article 4 (j) of The Declaration on Elimination of Violence Against Women, 1993:

> *"States should adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women."*

India is obliged under the CEDAW Convention to provide education to women and girls on family planning. The obligation to provide education and awareness on family planning would necessarily entail sex education.

Article 10 (h) of the CEDAW Convention observes that State Parties

> *"...shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women...Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."*

45 Partners for Prevention.Un MultiCountry Study on Men and Violence in Asia and The Pacific. 2013. http://www.partners4prevention.org/sites/default/files/resources/p4preport.pdf

46 See http://www.icrw.org/sites/default/files/publications/Masculinity%20Book_Inside_final_6th%20N ov.pdf

Article 12 of the CEDAW Convention states that:

1. *States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.*

General Recommendation 21 (1994) on Article 16 (1) (e) of the

CEDAW Convention states:

> *"In order to make an informed decision about safe and reliable contraceptive measures, women must have information about contraceptive measures and their use, and guaranteed access to sex education and family planning services, as provided in Article 10 (h) of the Convention."*

General Recommendation 24 (1999) to the CEDAW Convention in relation to Article 12 states that State Parties should:

> *"…prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion."*

The Commission on the Status of Women (CSW) 55th report on "access and participation of women and girls in education, training equal access to full employment and decent work" urges Governments to:

> *"….Ensure women's and girls' right to education at all levels as well as access to life skills and sex education based on full and accurate information and, with respect to girls and boys, in a manner consistent with their evolving capacities, and with appropriate direction and guidance from parents and legal guardians, in order to help women and girls, men and boys, to develop knowledge to enable them to make informed and responsible decisions to reduce early childbearing and maternal mortality, to promote access to pre and postnatal care and to combat sexual harassment and gender-based violence." (E/2011/27).*

The Ministry of HRD has submitted responses from the Department of School Education and Literacy and the Department of Higher Education.

Some of the initiatives taken by the Ministry of HRD are as follows:

The National Curriculum Framework (NCF) 2005 prioritizes gender as an important guiding principle in all curricular area and stipulates that gender be an integral part of all disciplines offered to children at school stage. Gender concerns have been integrated in the curriculum and textbooks of NCERT. The SCERT's have redesigned school textbooks to make them gender positive.

The recommendations of the NCF 2005 are in accordance with India's obligation under CEDAW to change mindsets regarding gender, for example:

> *"Gender concerns need to be addressed in terms of making the perspectives of women integral to the discussion of any historical event and contemporary concerns. This requires an epistemic shift from the patriarchal preconceptions that inform much of the social studies at present."(page 51, NCF2005)*

Training to women and girls in self-defense and martial arts is promoted by the University Grants Commission (UGC), and all Vice Chancellors of all Universities have been advised by the UGC on 28.8.2014 to set up a road map of action which may include self defense classes.

Under the Sarva Shiksha Abhiyan schemes, States are asked to send quarterly updates on progress of physical education and selfdefense for girls at upper primary level.

The Ministry of HRD issued a circular to all the Universities for implementation of the recommendations of the Saksham report on 26th November, 2014.The Saksham report entitled "Measures for Ensuring the Safety of Women and Programmes for Gender Sensitization on Campus' (UGC, 2013) contains recommendations for safety policies which ensure that freedom of women is not curtailed, gender sensitization for members of higher educational institutions – students, faculty and support staff, infrastructural facilities including adequate lighting, reliable transport and toilet facilities and women's study centers.

Sex Education

Sex education is not addressed by any of the initiatives undertaken by the HRD Ministry. In 2009, the 135th Rajya Sabha Parliamentary Standing Committee recommended there should be no sex education in schools. According to the Rajya Sabha Parliamentary Standing Committee:

> *"Message should appropriately be given to school children that there should be no sex before marriage which is immoral, unethical and unhealthy. Student should be made aware of marriageable age which is 21 years in case of boys and 18 years in case of girls and that indulging in sex outside the institution of marriage was against the social ethos of our country. Students should also be made aware that child marriage is illegal and is injurious to the health of girl child. They should also be educated that consensual sex below 16 years of age amounts to rape."*[47]

It is submitted that during the age of puberty, it is natural and normal for all human beings to become curious about sex and their own sexuality. This is a period of great turbulence in the lives of children when they notice changes in their own bodies. They need to prepare for this phase of their life and learn how to act responsibly. To deny them this knowledge would be to drive them to sources of information that might be illegal or unsafe.

It is respectfully submitted that in the absence of sex education provided to young people in schools and colleges, many learn about sex from watching pornography. Pornography is now a flourishing industry in India. Google Trends shows that in 2012, New Delhi recorded the highest percentage worldwide for the number of times the word 'porn' was searched online. And National Crime Records Bureau (NCRB) data for the same year show that 706 rapes were reported in Delhi, the highest in the last decade and more than double the number for 2002.[48]

The UNESCO Guide for Sexuality Education (2009) provides research showing that sex education does not lead to early sex, but rather later and more responsible sexual behavior. Hence, sex education delays the onset of sexual behavior. Sex education is an entitlement for all children and young people.

According to the Justice Verma Committee (JVC) Report,

> *"Sexuality education is the process of assisting young people in their physical, social, emotional and moral development as they prepare for adulthood, marriage, parenthood and ageing, as well as their social relationships in the context of family and society. The need to impart appropriate education on sexuality is an important issue that parents and teachers must acknowledge and address if they*

47 Cited in RajyaSabha Committees – A Profile (2009) available at www.rajyasabha.nic.in, page 19.

48 Cited in The Hindu 'Freedom that must have limits' (April 29, 2013)

want to make sure that their children are well adjusted and safe, and will grow up to be mature and balanced individuals."(pg 400401 of JVC Report)

The JVC Report recommended that there should be an introduction of sex introduction in a clinical manner in schools since the processes of growing up as well as absorption of knowledge has increased.

Sexuality Education

Non Government Organisations such as Nirantar promote 'sexuality' education rather than 'sex' education. Sexuality encompasses biological, psychological, and social dimensions.

According to Nirantar, Sexuality education can help understand violence. Boy's and men's sexuality is not 'naturally' aggressive or hormonally violent. This violence is a product of the way they were conditioned to exert power over women; if it were a 'natural' phenomenon then all boys and men would be physically and sexually abusive. Sexuality education programs can create an opportunity to engage with boys and girls about sexual violence through discussions around gender, sexuality, power and relationships, and change their perspectives and behavior through it.[49]

National Policy for Empowerment of Women, 2001

The National Policy for Empowerment of Women, 2001 highlighted the significance of awareness generation through targeted programmes, dissemination of information, and outreach. In 2001, it recommended:

1. Widespread dissemination of information on all aspects of legal rights, human rights and other entitlements of women, through specially designed legal literacy programmes and rights information programmes will be done.
2. Promoting societal awareness to gender issues and women's human rights.
3. Use of different forms of mass media to communicate social messages relating to women's equality and empowerment.

Recommendations

1. Textbooks should be revised to include informative and critical thinking about sex and gender, and not reinforce gender stereotypes.
2. Sex education in schools should be a mandatory part of training of children.
3. All schools, whether public or private, must comply with the NCF 2005 recommendations in relation to gender mainstreaming in the curriculum. A suitable amendment to the Right of Children to Free and Compulsory Education Act, 2009 may be made in this regard.

2. LEGAL AWARENESS

As recommended by the National Policy on Empowerment of Women 2001, it is crucial to widely disseminate information on legal rights and entitlements of women. Knowledge of one's rights and the remedies for the violation of those rights is an important component of access to justice. Legal Services Authorities have a vital role to play in creating legal awareness amongst the public.

Under the Legal Services Authorities Act 1987, legal services authorities have an important role in creating and sustaining public awareness of laws and the legal system. As per Section

49 Nirantar 'Sexuality Education for Young People', page 25

4 of the Act, one of the primary functions of the central authority is spreading legal literacy and legal awareness amongst people, and to "educate weaker sections of the society about the rights, benefits and privileges guaranteed by social welfare legislations and other enactments as well as administrative programmes and measures." One of the functions of the State Authority is to undertake preventive and strategic legal aid programmes.

National Legal Services Authority has launched a Scheme for Para Legal Volunteers (PLVs). PLVs are to be recruited at the District and Taluk level and undergo a training program. One of the duties of the PLVs is to spread awareness of laws, rights guaranteed by the Constitution and other statutes and also the obligations under the law, to people in the community especially weaker sections of the society.

As a part of their mandate, legal services authorities must create awareness campaigns on the specific issue of violence against women and children. These dedicated campaigns must focus on fundamental rights of women, the statutory regime in place, the procedure for filing a case, duties of police officers and other functionaries and availability of support services.

One such dedicated campaign on rights of women is the My Delhi, Safe Delhi campaign which was started in October 2014, and is an initiative of Delhi State Legal Services Authority, Delhi Police and Mission Convergence, Government of NCT of Delhi. The purpose of the campaign was to make women and girls feel safe in the public areas of Delhi, and it covered forty-four red flagged police stations in eight districts in Delhi. Some of the programs under the campaign include organizing awareness and sensitization campaigns in schools, colleges, RWAs; conduct legal literacy campaigns in schools and colleges; deputing plain clothed female police officers in public places like markets, bus stations, schools, colleges; leading a mass publicity campaign through television, newspapers, handbills; opening Legal Service Clinics in project areas; and ensuring that there is police presence at large office complexes and schools.

3. MEDIA REPORTING OF CRIMES AGAINST WOMEN

In India the freedom of press has been upheld as a fundamental right under Article 19(1)(a) of the Constitution of India time and again by the Supreme Court through its various rulings on the subject.

However, this right is not absolute as it is governed by Article 19(2), which imposes reasonable restrictions upon the same. The freedom of press is thus subject to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence[50].

Violence against women is often in the news. It's prevalence in society and complexity makes it a tough and interesting choice for reporting journalists. While this may win them many an accolades, it is also a ground that needs to be tread very carefully. Sometimes, even the best meaning journalists can misrepresent cases and convey blatant apathy and in some cases, insensitivity towards the subject.

"There is much debate about whether the media shapes societal views or simply mirrors them – and in terms of violence against women, whether the media sometimes over simplifies stories because the public is not ready to accept the scale or complexity of the problem; or whether in fact the public takes its cues from the news it reads, hears and listens to every day. One thing is for sure – violence against women is a hugely prevalent and complex social

50 Article 19(2) of the Constitution of India

problem, and the media can play a key role in ensuring the public knows and understands that.[51]"

In light of the enormous role the media plays in shaping public opinion and creating awareness and also keeping in mind the burgeoning reach of the media in today's age of internet and instant communication, it of concern to note that in India at present, there are no rules guiding journalism and media ethics in relation to reporting of crimes against women.

Reporting of court proceedings is governed by The Contempt of Courts Act 1971. Section 4 of the Act read with Section 7 permits accurate and fair reporting of judicial proceedings before any court sitting in chambers or in camera except in the following cases: where the publication is contrary to the provisions of any enactment for the time being in force; where the court, on grounds of public policy or in exercise of any power vested in it, expressly prohibits the publication of all information relating to the proceeding or of information of the description which is published; the publication of information relating to those proceedings where the court sits in chambers or in camera for reason connected with public order or the security of the State; and where the information relates to a secret process, discovery or invention which is an issue in the proceedings. Similar exceptions apply to the publishing of the text or a fair and accurate summary of the whole, or any part, of an order made by a court sitting in chambers or in camera.

S.228A(1) of the Indian Penal Code makes it an offence to print or publish the name or any other information which may make known the identity of any person against whom an offence under Section376, section 376A, section 376B, section 376C or section 376D is alleged or found to have been committed. As per S.228A(3), whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in subsection (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Thus, it clear that while reporting cases of rape, the media cannot make known the identity of the victim and also cannot report on the court proceedings without prior permission of the court.

The High Court of Delhi in ABC v Commissioner of Police[52] was heavily critical of a television channel which broadcast such information relating to a victim of rape that made her identity easily discernable. The judgment of the High Court has been discussed in detail later.

The controversial documentary India's Daughter on the Nirbhaya rape case, which contained interviews with the accused, was banned by a trial court from being screened in India, as the matter was sub-judice before the Supreme Court. The High Court of Delhi also refused to lift the ban.

While there are provisions protecting the right to privacy and confidentiality of survivors of rape, there are however no binding rules on the media to report sensitively on violence against women. Often, facts are distorted in a bid to make the story more sensational and "attractive" to viewers. The media must take great care not to legitimize and echo prevailing myths and stereotypes relating to women, and must eschew victim blaming in

51 Handle with Care: A Guide to Responsible Media Reporting of Violence Against Women, http://www.zerotolerance.org.uk/sites/www.zerotolerance.org.uk/files/files/HWC_V5(1).pdf

52 W.P. (C) No. 12730/2005, judgment delivered on 05.02.2013

all circumstances. The Press Council of India in its Norms of Journalistic Conduct, 2010[53] Edition prescribes certain relevant norms regulating journalistic conduct. Relevant extracts are reproduced below:

> ***"6.Right to Privacy***
>
> *i) The Press shall not intrude or invade the privacy of an individual, unless outweighed by genuine overriding public interest, not being a* prurient or morbid curiosity. So, however, that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by the Press and the media, among others. Special caution is essential in reports likely to stigmatise women. Explanation: Things concerning a person's home, family, religion, health, sexuality, personal life and private affairs are covered by the concept of privacy excepting where any of these impinges upon the public or public interest.
>
> *ii) Caution against Identification: While reporting crime involving rape, abduction or kidnap of women/females or sexual assault on children, or raising doubts and questions touching the chastity, personal character and privacy of women, the names, photographs of the victims or other particulars leading to their identity shall not be published.*
>
> *iii) Minor children and infants who are the offspring of sexual abuse or 'forcible marriage' or illicit sexual union shall not be identified or photographed.*
>
> *iv) Intrusion through photography into moments of personal grief shall be avoided. However, photography of victims of accidents or natural calamity may be in larger public interest.*
>
> ***9. Conjecture, comment and fact***
>
> *ii) Newspapers shall not display advertisements which are vulgar or which, through depiction of a woman in nude or lewd posture, provoke lecherous attention of males as if she herself was a commercial commodity for sale.*
>
> *iii) Whether a picture is obscene or not, is to be judged in relation to three tests; namely*
>
> *a) Is it vulgar and indecent?*
>
> *b) Is it a piece of mere pornography?*
>
> *c) Is its publication meant merely to make money by titillating the sex feelings of adolescents and among whom it is intended to circulate?*
>
> *Other relevant considerations are whether the picture is relevant to the subject matter of the magazine. That is to say, whether its publication serves any preponderating social or public purpose, in relation to art, painting, medicine, research or reform of sex.*
>
> *(ix) The newspaper may expose the instances of immoral activities in pubic places through its writings but with proper caution of restrained presentation of news or photographic evidence.*
>
> *x) Newspaper should not pass on or elevate conjecture, speculation or comment as a statement of fact. All these categories should be distinctly identified.*

53 Press Council of India, Norms of Journalistic Conduct, 2010 Edition, http://www.caluniv.ac.in/globalmdia-journal/DOCGMJDEC2014/DOCUMENTPCI GUIDELINES.pdf, last accessed on 1st August, 2015

17. Obscenity and vulgarity to be eschewed

i) Newspapers/journalists shall not publish anything which is obscene, vulgar or offensive to public good taste.

18. Glorification/encouragement of social evils to be eschewed Newspapers shall not allow their columns to be misused for writings which have a tendency to encourage or glorify social evils like Sati Pratha or ostentatious celebrations.

19. Violence not to be glorified

ii) Newspapers/journalists shall avoid presenting acts of violence, armed robberies and terrorist activities in a manner that glorifies the perpetrators on their acts, declarations or death in the eyes of the public. Publication of interviews of anti-social elements by the newspapers glorifying the criminals and their activities with the resultant effects are to be avoided.

21. Headings not to be sensational/provocative and must justify the matter printed under them

i) In general and particularly in the context of communal disputes or clashes a. Provocative and sensational headlines are to be avoided; b. Headings must reflect and justify the matter printed under them; c.

Headings containing allegations made in statements should either identify the body or the source making it or at least carry quotation marks.

26. Investigative journalism, its norms and parameters

Investigative reporting has three basic elements.

a. It has to be the work of the reporter, not of others he is reporting; b. The subject should be of public importance for the reader to know; c. An attempt is being made to hide the truth from the people.

The first norm follows as a necessary corollary from

(a) That the investigative reporter should, as a rule, base his story on facts investigated, detected and verified by himself and not on hearsay or on derivative evidence collected by a third party, not checked up from direct, authentic sources by the reporter himself.

(b) There being a conflict between the factors which require openness and those which necessitate secrecy, the investigative journalist should strike and maintain in his report a proper balance between

openness on the one hand and secrecy on the other, placing the public good above everything.

(c) The investigative journalist should resist the temptation of quickies or quick gains conjured up from halfbaked incomplete, doubtful

facts, not fully checked up and verified from authentic sources by the reporter himself.

(d) Imaginary facts, or ferreting out or conjecturing the nonexistent should be scrupulously avoided. Facts, facts and yet more facts are vital and they should be checked and crosschecked whenever possible until the moment the paper goes to Press.

(e) The newspaper must adopt strict standards of fairness and accuracy of facts. Findings should be presented in an objective manner, without exaggerating or distorting, that would stand up in a court of law, if necessary.

(f) The reporter must not approach the matter or the issue under investigation, in a manner as though he were the prosecutor or counsel for the prosecution. The reporter's approach should be fair, accurate and balanced.

All facts properly checked up, both for and against the core issues, should be distinctly and separately stated, free from any one sided inferences or unfair comments. The tone and tenor of the report and

its language should be sober, decent and dignified, and not needlessly offensive, barbed, derisive or castigatory, particularly while commenting on the version of the person whose alleged activity or misconduct is being investigated. Nor should the investigative

reporter conduct the proceedings and pronounce his verdict of guilt or innocence against the person whose alleged criminal acts and conduct were investigated, in a manner as if he were a court trying the accused.

(g) In all proceedings including the investigation, presentation and publication of the report, the investigative journalist newspaper should be guided by the paramount principle of criminal jurisprudence, that a person is innocent unless the offence alleged

against him is proved beyond doubt by independent, reliable evidence. (h) The private life, even of a public figure, is his own. Exposition or invasion of his personal privacy or private life is not permissible

unless there is clear evidence that the wrong doings in question have a reasonable nexus with the misuse of his public position or power and has an adverse impact on public interest.

(i) Though the legal provisions of Criminal Procedure do not in terms, apply to investigating proceedings by a journalist, the fundamental principles underlying them can be adopted as a guide on grounds of equity, ethics and good conscience.

j) To say that the press should not publish any information, till it is officially released would militate against the spirit of investigative journalism and even to an extent the purpose of journalism."

There are various organizations that have formed guidelines for the same. Zero Tolerance, Scotland[54] has made the following recommendations for journalistic reporting of violence against women:

1. *Journalists should make good use of case study information and statistical evidence when reporting on sexual exploitation issues (such as prostitution or lap-dancing), to highlight the harms and violence inherent in the sex industry.*
2. *Journalists should refer to national and international statistics where possible to place individual incidents in a wider social context and provide the 'bigger picture' that readers, viewers and listeners need to make sense of the story.*

54 A guide to responsible media reporting of violence against women, www.zerotolerance.org.uk/download/563 last accessed on 21st August, 2015

3. *Journalists should carefully choose language when reporting on violence against women and always avoid implying the survivor is to blame; portray perpetrators as real men; and portray survivors of violence as real women.*
4. *Journalists should conduct all contact with survivors of abuse or violence with respect for their experience, dignity and safety.*
5. *Journalists should highlight the gendered nature and root causes of violence against women in all reporting.*
6. *Journalists should be mindful of the lack of convincing evidence for a 'cycle of violence' and avoid making simplistic connections between men's violence against women and their childhood experiences of violence.*
7. *Journalists should report on rape and sexual violence using data and evidence about the current pattern of victimization and avoiding myths and stereotypes.*
8. *Journalists should make careful use of images in reporting on violence against women and ensure the images chosen do not distort the story, contribute to the problem or objectify women.*
9. *Journalists should avoid implying that alcohol use is a cause of violence against women and instead name the real causes and challenge misconceptions about the links between violence against women and alcohol.*
10. *Journalists should respect the privacy and dignity of abuse survivors at all times.*
11. *Journalists should tell the real story and be careful about selecting a narrative when reporting on violence against women as part of another social issue.*
12. *Journalists should treat violence against women as a serious concern and use an appropriate tone in all reporting.*

Similarly, the Ethical Journalism Initiative[55] prescribes the following guidelines on the matter:

"1. Identify violence against women accurately through the internationally accepted definition in the 1993 UN Declaration on the Elimination of Violence Against Women

2. Use accurate, nonjudgmental language. For instance, rape or sexual assault is not in any way to be associated with normal sexual activity; and trafficking in women is not to be confused with prostitution. Good journalists will strike a balance when deciding how much graphic detail to include. Too much may be sensationalist and can be gratuitous; too little can weaken the victim's case. At all times, the language of reporting should avoid suggestions that the survivors may be to blame, or were otherwise responsible for the attack or acts of violence against them.

3. People who suffer in such an ordeal will not wish to be described as a 'victim' unless they use the word themselves. The use of labels can be harmful. A term that more accurately describes the reality of a person who has suffered in this way is 'survivor.'

4. Sensitive reporting means ensuring that contact for media interview meets the needs of the survivor. A female interviewer should be on hand and the setting must always be secure and private, recognising that there may be a social stigma attached. Media must do everything they can to avoid exposing the interviewee to further abuse. This

55 http://ethicaljournalisminitiative.org/en/contents/ifjguidelinesforreportingonviolenceagainstwomen

includes avoiding actions that may undermine their quality of life or their standing in the community.

5. Treat the survivor with respect. For journalists this means respecting privacy, providing detailed and complete information about the topics to be covered in any interview, as well as how it will be reported. Survivors have the right to refuse to answer any questions or not to divulge more than they are comfortable with. Journalists should make themselves available for later contact; providing contact details to interviewee will ensure they are able to keep in contact if they wish or need to do so.

6. Use statistics and social background information to place the incident within the context of violence in the community, or conflict. Readers and the media audience need to be informed of the bigger picture. The opinion of experts on violence against women such as the DART centre will always increase the depth of understanding by providing relevant and useful information. This will also ensure that media never give the impression that violence against women has an inexplicable tragedy that cannot be solved.

7. Tell the whole story: sometimes media identify specific incidents and focus on the tragic aspects of it, but reporters do well to understand that abuse might be part of a long-standing social problem, armed conflict, or part of a community history.

8. Maintain confidentiality: as part of their duty of care media and journalists have an ethical responsibility not to publish or broadcast names or identify places that in any way might further compromise the safety and security of survivors or witnesses. This is particularly important when those responsible for violence are the police, or troops in a conflict, or agents of the state or government, or people connected with other large and powerful organizations.

9. Use local resources: Media who take contact with experts, women groups and organizations on the ground about proper interviewing techniques, questions and places will always do good work and avoid situations – such as where it is unacceptable for male camera workers or reporters to enter a secluded place – which can cause embarrassment or hostility. There is always virtue in reporters educating themselves on the specific cultural contexts and respect them.

10. Provide Useful Information: reports that include details of sources and the contact details of local support organizations and services will provide vital and helpful information for survivors/witnesses and their families and others who may be affected."

It is submitted that these are matters covered by Article 19(1)(a) and 19(2); there is a regulatory framework in place, ample laws and judgments on the subject, the latest judgment of this Court on the subject being ShreyaSinghal v. Union of India[56]. This Court is already seized of a public interest petition on Pornography, i.e. KamleshVaswani v. Union of India[57].

56 (2015) 5 SCC 1

57 Writ Petition No. 177 of 2013

4. GENDER SENSITIZATION TRAINING OF LAW ENFORCEMENT, JUDICIARY AND PROSECUTION

Police

1. Training is most critical intervention to improve the quality of human resources as it enhances knowledge; awareness, key competence and can act as a catalyst in changing mind sets and attitudes. Despite recommendations by various committees and reports, training of police personnel has been accorded low priority by most State governments for two reasons: (i) the available staff are so stretched that there is no time for police personnel to be sent for training ii) lack of quality training infrastructure in most States. Consequences of inadequate training are lack of knowledge about various legislative and administrative provisions put into place for women safety and protection by Government, lack of adequate investigative skills and lack of sensitive attitudes and ultimately poor justice delivery and inability to protect the poor and vulnerable like women and children.

2. The police imbibe regressive and biased attitudes from the society, which become barrier towards realization of social justice. In National Police Academy, State Academies, and even in district training institutes, gender sensitization training is now being imparted but the issues are the inadequate training capacity and quality of training (course curriculum and training methodology). Poorly designed and implemented training programs are unlikely to result in attitudinal change. In the current training program, training inputs on gender issues including women specific legislation are inadequate in terms of duration and content. The Parliamentary Standing Committee on empowerment of women in its report in 2013 commented as: "the concept of gender sensitization is now being recognized by all the police organizations and, gender sensitization has been made an integral part of basic training imparted to various ranks as well as in all in service courses. Training on this aspect is also being imparted to the trainers so that they could efficiently disseminate the inherent principles of gender equality to the trainees in various States/ CPOs/ CAPFs on gender sensitization and crime against women. Bureau of Police and Research Development (BPR&D) has also sponsored such trainings during the year(s) 201213 and 201314. During the examination of the subject by the Committee, it has also come out that the Ministry has constituted a Committee to review the training manuals of police personnel with a view to analyzing the entire gamut of gender sensitization with a new perspective. The Parliamentary Committee did recognize that gender sensitization goes way beyond few workshops and training programs. The Committee suggested that government does need to go beyond superficial gender sensitization measures and initiate more structural reforms. The Committee would like to be kept abreast of the steps taken by the Government to gender sensitize the police organizations in close coordination with the State Governments.

3. Thirteenth Finance Commission (20102015) made a very substantial grant of approximately 2300crores to States for establishing Police Academies, creating regional and district training schools, and for augmenting and strengthening existing training capacities of training Schools. How judiciously these funds have been utilized needs to be evaluated. As per report of MHA (2013) in reference to review meeting with States, it is mentioned that at present, States are spending only 1.64% of their police project funds on training which is totally inadequate. Bureau of Police and Research Development (BPR&D) and recently established, Central Academy of Police Training at Bhopal must take lead in preparing and implementing HRD plans for the Police Force.

Similar training interventions are must for public prosecutors, judiciary and functionaries of Panchayati Raj Institutions. Training Institutes must be audited and carry out impact evaluation of their training programs.

The Delhi High Court in *Delhi Commission for Women v Delhi Police* directed that periodic training should be provided to police officers, juvenile police officers, Welfare Officers, Probationary Officer and support persons to deal with rape cases, and that a training module is to be prepared in consultation with the Delhi Judicial Academy.

'Police' is State subject under the Seventh Schedule to the Constitution of India and, therefore, the State Governments and UT administrations are primarily responsible for implementing gender sensitization programme in Police forces.

Initiative at the Union Level

Gender sensitization programme is an integral part of training modules of:

- Sardar Vallabhbhai National Police Academy (SVPNPA) Hyderabad[58]
- North Eastern Police Academy (NEPA) Shillong[59]
- Bureau of Police Research and Development (BPR&D) New Delhi[60]
- Central Detective Training Schools (CDTS)[61] and
- Central Armed Police Forces (CAPFs) etc.

BPR&D has also issued an advisory to all States/UTs/CAPFs in order to include Gender Sensitization Modules in all of the curriculums of basic and refresher training courses for all ranks of trainees.

BPR&D has requested States/UTs/CPOs/CAPFs to organize workshops at State and District levels on "Gender Sensitization" & "Investigation of Crime against Women". BPR&D has also prepared a syllabus for workshop on Gender Sensitization and Crime against Women. This has been uploaded on the BPR&D website for the information and guidance of all Training Institutions.[62]

Gender Sensitization Training by Center for Social Research:

The Centre for Social Research, in partnership with UN Women, National Human Rights Commission and the state police training academies, is carrying out a massive gender sensitization drive to integrate gender as an integral element of the police training curricula

58 The National Police Academy (NPA) trains officers of the Indian Police Service. In India, recruitment to the Police is made at 4 levels viz., the constables, Sub Inspectors (SI), Deputy Superintendent of Police (DSP) and Assistant Superintendent of Police (ASP). The training programmes now conducted at the Academy are the Basic Course for I.P.S. Officers; three Inservice Management Development Programmes for officers of S.P., D.I.G. and I.G. levels of the Indian Police Service; Training of Trainers' Courses for the trainers of various police training institutions in the country; IPS Induction Training Course for State Police Service Officers; and short specialised thematic Courses, Seminars and Workshops on professional subjects for all levels of police officers. See, for the course structure: http://www.svpnpa.gov.in/Innerpage.aspx?st=In-service%20Courses&cat=Training

59 http://www.nepa.gov.in/files/CC2015.pdf

60 http://bprd.nic.in/showfile.asp?lid=1355

61 http://cdtsgzb.gov.in/anualcalender.html

62 Ministry of Home Affairs, Rajya Sabha Unstarred Question no. 2704, February 2014, available at http://mha1.nic.in/par2013/par2014pdfs/rs190214/2704.pdf

across India. Under this initiative, trainers of police academies in Uttar Pradesh, Haryana, Andhra Pradesh, Karnataka and Madhya Pradesh will undergo yearlong training in gender sensitization. The training targets gazetted officers at the subinspector level, apart from providing tailor made training programs for NGOs, Panchayats and Urban Government (elected) bodies, Teachers, administrators etc. [63]

Initiative at the State Level:

There are three Levels of Induction according to which the policy and programs are implemented: 1. Constables 2. A.S.I/S.I(Sub-inspectors), 3. Dy.S.P/A.S.P(Dy. Superintendent of Police).

No holistic or systematic efforts have been in place for the enforcement of Gender sensitization training by the State Police Organizations. And, even those State police organizations that have made systematic efforts to impart gender sensitization training, have provided it for the senior officials or Inspectors/ Sub inspectors. As a result, the program leaves out constabulary from its ambit, which constitutes nearly 80% of the work force.

New Delhi

The Delhi Police has been making efforts to impart gender sensitization training to Inspectors/ Sub-Inspectors with the help of Gender Training Institute, New Delhi. Workshops on gender Sensitization for Police Personnel is also organised by Delhi Commission of Women. [64]

Maharashtra

Training courses are being organized for Inspectors/SubInspectors in Maharashtra on the basis of a gender sensitization training module developed by a team comprising Shri S. Chakravarty, IG of Police, Maharasthra, Shri Sridhar Joshi of YashwantaRaoChavan Academy of Development Administration, Shri K.K. Maheshwari, formerly Asst. Director, National Police Academy, Miss. Anjali Dave of Tata Institute of Social Sciences, and Miss PoornimaChikarmane of SNDT W omen's University, Pune.[65]

Madhya Pradesh

The module developed by the above team is also being used for conducting gendertraining courses by Madhya Pradesh Police.

Uttar Pradesh

One training module for Training of Trainers developed by a Uttar Pradesh Team (3rd GPTP) comprising Shri S.K. Bhagat, Shri Rajnikanth Mishra (both police officers from UP), Shri Vijay Ranjan of TISS, Dr. Kamali Gajendran from Mother Teresa W omen's University, Kodaikanal, Miss Rashmi Pande of U.P. Academy of Administration is being used to train police officers as gender sensitization trainers. In addition, the U.P. Police MahilaSammanPrakoshth formed

63 http://www.csrindia.org/gendersensitisationtraining

64 Government of Delhi, Delhi Commission for Women, Training Workshop for Police Personnel available at http://delhi.gov.in/wps/portal/!ut/p/c0/04_SB8K8xLLM9MSSzPy8xBz9CP0os3hvdxMXExdTEwMDXzNzA09_YyOPEHcnAwMLQ_2CbEdFAIa72s0!/?WCM_PORTLET=PC_7_KG4D4D5400M670IO32HTGB0046_WCM&WCM_GLOBAL_CONTEXT=/wps/wcm/connect/lib_dcw/DCW /Home/Workshops/Workshop+or+Seminar(2000_2001)/Training+Workshop+for+Police+Personn el

65 http://mpanashik.gov.in/?event=inservicetrainingprogramme49

in September, 2004 have organized 5 Gender sensitization Training/Workshops named 'NavChetana'.[66]

Tamil Nadu

Tamil Nadu Police academy has also developed 'Gender sensitization' module and introduced in to their curriculum in the methodology of training.[67]

Goa

In December, 2014 Inspector General of Goa Sunil Garg announced that the Goa police have decided to make human rights and gender sensitization a part of permanent training for State police, both at the recruitment level as well as existing police at all levels.

Recommendations of National Commission for Women

National Commission for Women in its report on 'Course Curriculum on Gender Sensitization of Police Officers' at Workshop held at NPA on 21st 22nd July, 2000 recommended gender sensitization at each level of Police organization: during induction to the police service as well as for inservice Police Personnel. NCW collaborated with SVP National Police Academy, Hyderabad to provide a model curriculum for Gender Sensitization of Police Personnel. The report, while discussing many case studies conducted on the Police officers behavior towards victim of crime against women, presses the need for urgent training programs to sensitize Police Personnel:

> *"In order to remove the prejudices and biases of police officers towards women in general and women victims as well as women colleagues in particular and to develop in them the required professionalism (in terms of knowledge, skills and attitudes) for dealing with cases of violence against women more effectively, it is imperative that all State police organizations undertake suitable initiatives, including organizing of training programmes to sensitize the police personnel at all levels."*

In In Re: Indian Woman says gangraped on orders of Village Court published in Business and Financial News[68] the Court concluded that lackadaisical response on part of State police machinery led to the heinous gangrape of 20 year old girl, which was staged by the Panchayat, and commented:

> *"As a long term measure to curb such crimes, a larger societal change is required via education and awareness. Government will have to formulate and implement policies in order to uplift the socio economic condition of women, sensitization of the Police and other concerned parties towards the need for gender equality and it must be done with focus in areas where statistically there is higher percentage of crimes against women."*

JUDICIARY

National Judicial Academy conducts comprehensive training facilities for Judicial Officers and has imbibed 'Gender sensitization' in their training module. Judicial academy

66 https://uppolice.gov.in/writereaddata/uploadedcontent/Web_Page/1_7_2015_14_13_55_ACHIEVEMENTS.pdf

67 http://www.tnpolice.gov.in/tnpa/Training_methodology.html

68 (2014) 4 SCC 786

has introduced topics like workshop on personal laws, family disputes and prevention of domestic violence law to raise greater gender sensitivity especially for those courts dealing with matrimonial cases from this academic session of 201151016. These training are conducted mainly by High Court.[69]

Many State judicial academies provide for such training facilities periodically, like Andhra Pradesh Judicial Academy, Maharashtra Judicial Academy etc.

Necessity for Gender sensitization:

In In Re: SuoMotu Cognizance[70], the Chief Justice of Delhi High court taking suomoto cognizance of certain gender insensitive observations made by Ld. Judge, the Special Fast Track Court who delved in character assassination of the victim of rape, warned against the gender bias approach in judiciary:

> *"The point which needs to be highlighted is that judicial pronouncements which are gender biased may be used as a standard by the police personnel and prosecutors in making decisions how they should investigate and prosecute cases."*

The Court directed for the counseling of the Judge while also instructed the State Judicial academy to nominate the Judge as a participant in sessions of gender sensitization.

5. LANGUAGE USED IN COURTS

Courtroom talk in rape trials

The language used by any person indicates their mindset and attitude towards an issue. The language used in courtrooms by lawyers and Judges with regard to rape survivors is unfortunately often biased against the survivor. The language used by lawyers and Judges in courtrooms can intimidate a survivor of sexual violence and lead her to drop out of the criminal justice system.

Rape victims face a harrowing crossexamination since lawyers whether male or female play by these male adversarial rules. It is argued that in America, trial Judges fail to:

> *"... see that the fundamental assumption of the adversary system that opponents are equally matched does not hold in rape trials. Victims are usually not practiced in the adversarial machismo of our system. Business as usual in the courtroom aids patriarchy, not justice."[Taslitz, Andrew E. (1999), Rape and the Culture of the Courtroom, New York: New York University Press].*

In India, prosecutions of rape or other sexual offences, conviction can be founded on the uncorroborated testimony of a survivor unless there are compelling reasons for seeking corroboration [Kamalanantha and Ors vs. State of T.N[71], Sudhansu Sekhar Sahoo vs. State

69 See, National Judicial Academy, Academic Calendar 201516, available at http://www.nja.nic.in/Academic%20Calendar%20by%20month%20201516.pdf

70 2014(1)RCR(Criminal)510

71 (2005) 5 SCC 194 Para 34

of Orissa[72], State of Punjab vs. Gurmit Singh and Ors[73], Vijay @ Chinee vs. State of Madhya Pradesh[74]].

Specific provisions of the Indian Evidence Act relating to examination in trial provide that:

- There would be presumption as to the absence of consent in a prosecution of rape under clauses (a) – (n) of subsection (2)Section 376, IPC (Section 114A).
- In a prosecution of an offence under Section 354, 354A, 354B, 354C, 376, 376A, 376B, 376C, 376D or 376E, IPC, or attempt to commit any of the offences, when the consent of a survivor is an issue, her previous sexual experience shall not be relevant to decide whether she had consented (Section 53A).
- In a prosecution for an offence under Section 376, 376A, 376B, 376C, 376D or 376D, IPC, or an attempt to commit such offences, when the consent of the woman is an issue, the general immoral character or previous sexual experience of her with any person cannot be proved, either through cross examination or leading evidence in rebuttal (proviso, section 146).
- In 2013, Section 53A was added to the IEA. When the question of consent is an issue in a prosecution for sexual assault, Section 53A provides that evidence of character of the survivor or of such persons previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent Judges should be able to prevent questioning that humiliates the survivor and is in violation of the Indian Evidence Act. However defence lawyers during examination and cross examination go against the provisions of the IEA without being restrained by the courts.[75]

The following illustrations taken from Baxi P Public Secrets of Law – Rape Trials in India (2014), show how spoken law is used to humiliate a survivor and how pleasure is derived by asking questions which have no or little evidentiary value:

Illustration 1

Ejaculation is not necessary to establish rape, yet cross examination on ejaculation expected and often conducted

In June 2011, the Bombay High Court observed that the accused 'inserted his penis in her vagina 4 to 5 times' but noted that the victim 'has not stated where the semen was discharged. She has not stated when the sexual act was completed. She is not crossexamined on this aspect at all despite her otherwise lengthy cross–examination. This is the most material sentence in her evidence.'[76] The court speculates that 'if the Appellant No.1 had penetrated her 4 to 5 times it would mean that there was no discharge of his semen except on the last occasion. On the last occasion he could have ejaculated either inside her vagina or after withdrawal, outside it'.[77]However, the court held *'..that makes no difference to the act of*

72 (2002) 10 SCC 743 Para 11

73 (1996) 2 SCC 384 Para 8

74 (2010) 8 SCC 191 Para 914

75 See for example Baxi, Pratiksha 'Public Secrets of Law – Rape Trials in India' OUP (2014)

76 SatishSayajiGaikwad and Kanchya Nepali @ MahendrasinghBharatsinghDadhiyal v State of Maharashtra, High Court of Bombay, Criminal Appeal no. 1235 of 2009

77 As above, para 26

penetration. Even slight penetration is sufficient to constitute rape. Ejaculation in the vagina is wholly irrelevant to the offence of rape'.[78]

Finally after observing once more that the defence lawyer did not gather material information about where the semen fell, the court held *'the fact that the penetration took place not once, but 4 to 5 times makes it more dastardly act, which constitutes a gross violation of human rights. It matters not whether the semen of Appellant No.1 was discharged'.*[79]Yet the court speculated on where the ejaculation fell and suggested that the defence lawyer should have asked 'when the sexual act was completed', even though it is irrelevant.

Illustration 2

Posture

During the cross–examination in a trial court in Jaipur district, the victim 'was asked as to in what posture she was raped. She was made to lie on the bench available in the trial Court to demonstrate her posture'.[80] Such a performance, classified as a feature of cross–examination, rests on techniques of defence lawyering, which feign ignorance about the posture in which women are raped.

Illustration 3

Acquittal based on no marks of resistance.

Proving lack of consent is not dependent upon injuries on the person of the woman. The absence of injuries does not indicate consent. [Rajinder vs. State of Himachal Pradesh[81], B.C Deva vs. State of Karnataka[82], Devinder Singh and Ors. vs State of Himachal Pradesh[83], State of H.P vs. Mango Ram[84], State of Rajasthan vs. N.K[85], State of Punjab vs. Ramdev Singh[86], State of Maharashtra vs. ChandraprakashKewalchand Jain[87]].

In an appeal heard in July 2012, it is evident that the victim had been asked irrelevant and humiliating questions about the duration of rape,whether or not the accused ejaculated, where did he ejaculate, whether she bit the accused, grab his hair, or kick him.[88]

In the end result, however, the Gujarat High Court disbelieved the victim since there were no marks of resistance.[89] One of the other grounds on which the rape survivor was disbelieved was that she had typed her complaint and had gone from police station to police station to

78 As above.

79 As above.

80 Yad Ram v. State of Rajasthan RLW 2008 (2) Raj 1659 at para 7

81 (2009) 16 SCC 69 Para 19

82 (2007) 12 SCC 122 Para 18

83 AIR (2003) SC 3365, Para 56

84 (2000) 7 SCC 224 Para 13

85 3 (2000) 5 SCC 30 Para 9

86 (2004) 1 SCC 421Para 12

87 (1990) 1 SCC 550, Para 26

88 Conclusion Baxi, Pratiksha 'Public Secrets of Law – Rape Trials in India' OUP (2014)

89 89State of Gujarat v. Jumma Husain Sindhi, Judgment dated 9 July, 2012, CR.A/361/1994 6/ 6, The High Court of Gujarat at Ahmedabad

file her complaint. Rather poignantly, women's awareness of their rights or the legal process is constructed as a sign of immorality.

REGISTRATION AND INVESTIGATION OF OFFENCES

Immediately after the crime

The Code of Criminal Procedure governs the registration and investigation of sexual offences against women. Investigation of crimes against women is primarily by the state police. However, having regard to the gravity of the crime, investigation can be transferred to the Central Bureau of Investigation by the state or by the appropriate court. A proper investigation is critical to the outcome of the case. The law has been amended from time to time to ensure that the needs of the women who are victims of crimes are taken care of. However, it is equally important that law enforcement personnel are not biased and investigate the crime in a fair and transparent manner.

The brief outline of the process involved in the registration of a complaint of an offence, investigation and till the trial is as follows:

1. Registration of complaint

1. **FIR under Section 154:** The First Information Report is the written report prepared by the police when they receive information about the commission of a cognizable offence. In the event that the person against whom an offence under sections 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code, is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator. The recording of such information is to be video-graphed.

   Further, the police officer shall get the statement of the person recorded by a Judicial Magistrate under Section 164 (5A) clause (a) as soon as possible. A delay in lodging the FIR cannot be a ground by itself for dismissing the prosecution case[90].

2. "Zero" FIR: The Supreme Court in Satvinder Kaur v. State (Govt. of NCT of Delhi)[91] has held that in case if the investigating officer arrives at the conclusion that the crime was not committed within the territorial jurisdiction of his police station, then the FIR can be registered and then forwarded to the police stating having the necessary jurisdiction, however, the police cannot refuse to record the FIR or investigate cases which require investigation.

3. On May 10, 2013, the Ministry of Home Affairs, taking note of this judgment, issued a circular to the Additional Chief Secretary/Principal Secretary (Home) to further direct Home Departments of the States/UTs to issue instructions regarding registration of FIR irrespective of territorial jurisdiction. The circular noted that the police was not registering FIRs in a timely manner because they suspected it of being outside the jurisdiction of the police station concerned. The circular reiterated the legal position that the police shall register a FIR upon receipt of information of the commission

90 State of Rajasthan v N.K. (2000) 5 SCC 30

91 (1999) 8 SCC 728

of a cognizable offence. Further, if after registration of FIR, upon investigation, it is found that the subject matter relates to the jurisdiction of some other police station, the FIR may be appropriately transferred to the police station in which the case falls. Moreover, if at the time of registration of FIR, it becomes apparent that the crime was committed outside the jurisdiction of the police station, the police should be appropriately instructed to register a 'Zero' FIR, ensure that the FIR is transferred to the concerned police station u/Section 170 of the CrPC. This should be done to avoid the delay caused by the determination of the jurisdiction. Further, the failure to comply with the instruction of registering an FIR on receipt of information about the cognizable offence will invite prosecution of the police officer under Section 166A of the IPC for an offence specified u/s166A or departmental action or both.

4. Mandatory registration of FIR: The Supreme Court in LalitaKumari v. Govt. of U.P.[92] held that it is mandatory to register all complaints regarding commission of cognizable offence and no preliminary enquiry is permissible at this state. However, if the information received does not disclose a cognizable offence then a preliminary enquiry for a period not exceeding 7 days may be conducted only to ascertain whether any cognizable offence is disclosed, pursuant to which a FIR or closure report may be filed. The Supreme Court also held that reasonableness or creditability of the information is not a condition precedent for registration of a case.

5. On February 5, 2014, the Ministry of Home Affairs taking note of this judgment of the Supreme Court in LalitaKumari v. Govt. of U.P. issued a circular bearing no. 15011/91/2013 – SC/ST–W on "Compulsory Registration of FIR u/s 154 CrPC when the information makes out a cognizable offence" to the Additional Chief Secretary/ Principal Secretary (Home Department) to direct the Home Departments of the States/UTs to issue necessary instructions so that all police officers are made aware of the judgment and the contents are also incorporated in the training curriculum of the police personnel.

2. Medico legal care for survivors of Rape

1. Current practice amongst health professionals is to overemphasize forensic examination and evidence collection, ignoring psychological support / first aid, treatment for injuries, administering prophylaxis to prevent STDs, HIV, possible pregnancy, and provision of tetanus toxoid. There is a need to incorporate not just forensic responsibility but also therapeutic responsibility in the health care response to rape survivors.

2. The Supreme Court in Lillu @ Rajesh v State of Haryana[93] held that

"In view of International Covenant on Economic, Social, and Cultural Rights 1966; United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with genderbased violence. The State is under an obligation to make such services available to survivors of sexual violence.

92 (2014) 2 SCC 1

93 (2013) 14 SCC 643

Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with this privacy."

3. The right of the survivor to report to the hospital before going to the police station is recognized in S.357C CrPC. Section 357C of the Criminal Law Amendment Act, 2013 mandates hospitals, both public and private, to provide immediate firstaid or medical treatment, free of cost, to survivors of sexual assault. This cannot be denied for the want of a police requisition. Private hospitals should be duly notified about the same. Private hospitals like public hospitals should provide medico legal care free of cost to survivors of sexual violence.

4. Section 357C of the Criminal Law Amendment Act 2013 mandates hospitals, both public and private, to provide immediate firstaid or medical treatment, free of cost, to survivors of sexual assault. This cannot be denied for the want of a police requisition. Often hospitals insist on the registration of a FIR as a precondition to first aid. Refusal to provide treatment and medico legal examination is a punishable offence under Section 166B of the Indian Penal Code.

5. As per S.164A, Cr.P.C, the police are required to take the survivor to the hospital for medical examination/treatment and evidence collection within 24 hours of registration of FIR. The collected evidence is then sent for forensic analysis. Consent of the survivor is required for the examination. Sec 27(2) of POCSO Act states that a lady medical practitioner should conduct medico legal examination in case of a girl child. However it must be borne in mind that lady medical practitioners may not be available in small towns and villages. Therefore hospitals must have a directory so that they can contact women doctors in order to ensure that they reach hospital when a girl child survivor has to be examined.

6. On 19.3.2014, the Central Ministry of Health and Family Welfare, Government of India released "Guidelines and Protocols: Medico legal care for survivors / victims of Sexual Violence". The Ministry of Health and Family Welfare set up a National Committee of experts in April 2013 for formulating uniform guidelines and protocols under the leadership of the Secretary, MoHFW. These published guidelines are extremely comprehensive and are on par with international standards set by WHO for sexual assault health care.

7. The MoHFW protocol recognizes dual role of doctors therapeutic and medico legal and provides specific directions to health professionals for responding to not just women and children but also transgender and other marginalized communities. It equips health professionals to understand the scope of medical evidence and steps in interpreting medical evidence .

8. The MoHFW provides a list of essential materials required by each health facility to carry out medico legal care for survivors of rape. This could be developed into a kit. It is submitted that there is an overemphasis on SAFE kit (sexual assault forensic evidence) kit and there is a concern that if hospitals do not have these kits they may turn away the survivor . Hence the list provided by the MOHFW protocol allows each hospital to develop its own kit which can act as a ready reckoner when a survivor of rape reaches the hospital

9. POCSO Act 2012 and Criminal law (Amendment) Act 2013 have both expanded the definition of sexual violence, bringing in its ambit forced oral, anal, vaginal acts which may be penetrative or non penetrative in nature. Such acts may also comprise of use of objects and instruments and may manipulate any part of the survivor (child/ adults body) such as vagina, urethra, mouth and anus. The MoHFW guidelines and protocols

clearly presents the definition of Rape and sexual assault as per POCSCO and CLA 2013 in a tabular manner stating the forms of sexual assault and the punishment for it

10. Awareness on different survivors of sexual violence – MOHFW equips health professionals with information about a range of people who may be subjected to sexual abuse. These are women and children intersexpeople, transgender people and the like. The guidelines recognize that current response of the Health systems is inadequate survivors often face ridicule and humiliation. The Guidelines equip health professionals to communicate in a sensitive manner with a woman, child, transgender person, intersex person, people in sex work, those from minority communities and castes and ensure that they are treated with dignity at the hospital. The MoHFW proforma guides health professionals to record sexual violence against transgender/ intersex people, children, women, those with psycho social and intellectual disabilities.

11. Ensuring gender sensitive medico legal examination and care – MoHFW guidelines enable health professionals to carry out forensic examination in a gender sensitive manner.

    - ❖ It cautions health professionals against making references to the past sexual conduct of the survivor and steers away from unscientific aspects such as recording height weight, status of hymen, old tears to the hymen and finger test results.
    - ❖ Comments such as "old tears of the hymen" are irrelevant, and are intended to comment on the past sexual history of the survivor.
    - ❖ Further, comments on the height and weight of the survivor are immaterial to medicolegal examination, as they are only intended to indicate whether or not the woman resisted.
    - ❖ The finger test is a forensic test performed to assess elasticity of vagina. It is an unscientific test as women even congenitally are born with variations in size of the vagina. That is the also the reason that the two finger test lacks objectivity. This applies to all age groups of women.
    - ❖ While clarifying the rationale for not conducting such unscientific tests, MOHFW guidelines rely on legal sections such as Section 114 of the Indian Evidence Act (IEA), 1872 read with Explanation to Section 376 IPC.

Medico legal examination and evidence collection

Medico – legal evidence comprises of

- ❖ Trace evidence in the form of Semen, Spermatozoa, Blood, Hair, cells, Dust, Paint, Grass, Lubricant, Fecal matter, Body fluids, Saliva.
- ❖ It could be Injuries either on the Body / Genitals
- ❖ It could also be sexually transmitted infection that the perpetrator has passed to the survivor in the form of HIV, Hepatitis, Gonorrhea and unwanted pregnancies.
- ❖ Forensic evidence is likely to be found only upto 96 hours after the incident. The extent of medical evidence found within 96 hours is subject to activities undertaken by the survivor in the form of bathing, urinating, gargling, defecating etc. a survivor may also not report rape immediately, this delay in reporting can also lead to finding no forensic evidence. These activities must be recorded by the doctors to explain lack of medical evidence.

12. **Abolition of Twofinger test:** The twofinger test is used to determine the elasticity of the vagina, and thus comment on the victim's past sexual experience. In Lillu @ Rajesh v State of Haryana, it was held that "the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent." The twofinger test is however still being conducted, in clear violation of the survivor's right to privacy and bodily integrity.

13. **PV examination:** PV examination is done with the purpose of identifying clinical causes underlying a specific medical condition. This is followed up with a treatment plan. A woman/girl may require such an examination depending upon the nature of sexual violence and whether she is experiencing bleeding, vaginal pain, discharge etc. after which treatment would be offered for these conditions.

14. Clarification about pervagina examination and finger test – Health professionals should be aware of the differences in per vaginal examination and 2finger test, as elaborated above. MOHFW clarifies these differences and guides the health professional to conduct a per vaginal examination based on clinical indicators.

15. The MoHFW proforma goes beyond mere genital injuries and records possible sites on the body that may get harmed. It brings in aspects such as tenderness, oedema, pain in urination, defecation etc related to sexual assault. The proforma enables health professionals to record circumstances of sexual violence and therefore does not overemphasize genital and physical injuries.

16. Limitations of medical evidence – MOHFW equips health professionals to appreciate limitations of medical evidence and caution them from essentialising the presence of medical evidence. This is also inkeeping with changes in the law as the Criminal Law (Amendment) Act 2013, Sec 375 Explanation 2 clarifies

    "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".

    Explanation clarifies that injuries either to the body or to the genitals need not be present in order to prove sexual violence.

17. Medical opinion - The MOHFW guidelines enable health professionals to formulate a medical opinion and provides a step by step guidance on various scenarios when survivors appear to the hospital . Support is sought from Sec 164 A (3) CrPC where in health professionals are expected to prepare a report based on the examination conducted and conclusions arrived at.

3. FORENSIC INTERVIEWING OF CHILDREN

18. Forensic interviewing in case of children is a specialized interview to be conducted by a trained professional. It is used to enable the child to speak about abuse using appropriate techniques. Specific indications are provided for conducting forensic interviews with children. It has to be used in situations where children is unable to verbalize sexual abuse due to trauma or threat:

    - When there is a complaint of sexual abuse reported in an institution (such as a school, hostel, or child welfare institution) and the child is unable to talk about the incident either due to trauma or fear of retribution, recurrence of abuse or not being believed.

- ❖ When there are clear physical signs suggestive of sexual abuse such as a pregnancy or a sexually transmitted infection, but the child is not opening up about the abuse.
- ❖ When the abuser/ offender is a family member and the child is unable to disclose about the incident out of fear of retribution or fear that no one will believe him/ her.
- ❖ When there are reasons to suspect that the child may have been sexually abused, such as drop in scholastic performance, sexualized behaviour or any other.

19. It is submitted that forensic interviewing should be used in only these situations and not as a routine tool in every case. Very often, the interviewer approaches the procedure with a preconceived notion of disbelief about the sexual abuse and uses this tool with the purpose of detecting whether the child is lying. Such a use of forensic interviewing defeats the very purpose, which is enabling a child to speak without fear and inhibition about the underlying abuse.

Mandatory Reporting

20. S.357C Cr.P.C mandates reporting by all hospitals in cases of sexual offences. The MoHFW guidelines appreciate that survivors may reach the hospital purely for health care, but may not be prepared for filing a police case. The proforma offers a clear direction of documenting "informed refusal " in instances where survivors do not wish to record a police complaint immediately but can avail of health care services.

21. Documentation of informed refusal allows survivors to seek health care without the fear of police complaint looming upon them. As per the Guidelines,

> *"If a person has come on his/her own without FIR, s/he may or may not want to lodge a Complaint but requires a medical examination and treatment. Even in such cases the doctor is bound to inform the police as per law. However neither court nor police can force the survivor to undergo medical examination. It has to be with the informed consent of the survivor/ parent/ guardian (depending on the age). In case the survivor does not want to pursue a police case, a MLC must be made and she must be informed that she has the right to refuse to file FIR. An informed refusal must be documented in such cases."*

22. The Guidelines further note that

> *"In case there is informed refusal for police intimation, then that should be documented. At the time of MLC intimation being sent to the police, a clear note stating "informed refusal for police intimation" should be made."*

Such a practice would ensure compliance with S.357C IPC, and also respect the privacy and autonomy of the victim/survivor.

23. There is a lack of uniform and gender sensitive protocol for medico legal care of rape survivors. The MoHFW protocols have been notified to all the states. But except a few states such as Karnataka, Tamil Nadu, Sikkim and Uttar Pradesh, others have not adopted it. Health is considered as a state subject and therefore the Government of India protocol is not being implemented. It is submitted that though Health is a state subject, medico legal examination of sexual violence covered under section 164A of Cr.P.C and is in the concurrent list. Hence it is recommended that the Hon'ble Court direct that Government of India protocol for medico legal care in rape is implemented across India

24. The response from the MoHFW to the action taken since the issuance of the directives for implementation of their protocol is inadequate as even the central government hospitals are not implementing their own protocol . There is a need for MoHFW to engage with their hospitals and ensure that the protocol is implemented at earliest.

Recommendations:

- ❖ This Hon'ble Court may direct all States to adopt the Ministry of Health and Family Welfare's Guidelines and Protocols for Medico Legal Care for Survivors/Victims of Sexual Violence, so that there are uniform protocols and guidelines for the sensitive medicolegal examination of the rape victims.
- ❖ State Governments should be directed to ensure that private hospitals and nursing homes must have all the necessary infrastructure as mentioned in the MoHFW guidelines and must also ensure that they provide comprehensive medico legal care when survivors approach private hospitals or are brought to such hospitals by police.

4. RECORDING OF STATEMENT BY THE MAGISTRATE IN CASE OF CERTAIN OFFENCES AGAINST WOMEN

1. Section 164(5A) CrPC was inserted by the Criminal Law (Amendment) Act, 2013, and provides that:

   (a) In cases punishable under section 354, section 354A, section 354B, section 354C, section 354D, subsection (1) or subsection (2) of section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner prescribed in subsection (5), as soon as the commission of the offence is brought to the notice of the police:

   Provided that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

   Provided further that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be videographed.

   (b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examinationinchief, as specified in section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be crossexamined on such statement, without the need for recording the same at the time of trial.

2. The section also facilitates the access of a person who is temporarily or permanently physically or mentally disabled, by providing for assistance of special educator or interpreter, and most importantly, that such statement shall be considered in lieu of examination-in-chief under section 137 of Indian Evidence Act, 1872.

3. S.164(5A) IPC was introduced ostensibly to benefit the victim by authenticating her statement and lending an assurance to the investigator that a case for investigation is made out. However, as a result of this provision, the possibility of revicitimization of the victim/survivor has increased manifold. Now, a woman must recount the sexual assault thrice first before the police, then the Magistrate and lastly during the trial

in the Sessions Court. Most importantly, minor discrepancies in the narration under S.164(5A) and the statement made in court can be highlighted by the defense to question her credibility. What is more, the survivor must be put at ease and out of trauma before she can be asked to make a statement on oath. It can also lead to delays in the trial.

4. In State of Karnataka by Nonavinakere Police vs. Shivanna @ TarkariShivanna[94] in an order dated 30.08.2013 delivered by Justice GyanSudha Mishra and Justice V. GopalaGowdha, the Supreme Court has made an attempt to fast track the procedure in cases of rape and gang rape. The court said that it has been seen that though there are fasttrack courts for the disposal of cases also including the cases of rape but yet there is no fast track procedure established and followed with regard to the same resulting in regular repeated heinous offences. It observed that there is a vital need to introduce drastic amendments into the CrPC in the nature of the fast court procedures for Fast Track Courts especially in the cases involving trial for charge of rape. In regard to this, the court issued the following interim direction to all police stations in the country:

   (i) Upon receipt of information relating to the commission of offence of rape, the Investigating Officer shall make immediate steps to take the victim to any Metropolitan/preferably Judicial Magistrate for the purpose of recording her statement Under Section164 Code of Criminal Procedure A copy of the statement Under Section164 Code of Criminal Procedure should be handed over to the Investigating Officer immediately with a specific direction that the contents of such statement Under Section164 Code of Criminal Procedure should not be disclosed to any person till charge sheet/report Under Section173 Code of Criminal Procedure is filed.

   (ii) The Investigating Officer shall as far as possible take the victim to the nearest Lady Metropolitan/preferably Lady Judicial Magistrate.

   (iii) The Investigating Officer shall record specifically the date and the time at which he learnt about the commission of the offence of rape and the date and time at which he took the victim to the Metropolitan/preferably Lady Judicial Magistrate as aforesaid.

   (iv) If there is any delay exceeding 24 hours in taking the victim to the Magistrate, the Investigating Officer should record the reasons for the same in the case diary and hand over a copy of the same to the Magistrate.

   (v) Medical Examination of the victim: Section164A Code of Criminal Procedure inserted by Act 25 of 2005 in Code of Criminal Procedure imposes an obligation on the part of Investigating Officer to get the victim of the rape immediately medically examined. A copy of the report of such medical examination should be immediately handed over to the Magistrate who records the statement of the victim Under Section164 Code of Criminal Procedure.

5. The court was of the view,

   "that the statement of victim should as far as possible be recorded preferably before the Lady Judicial Magistrate under Section 164 Code of Criminal Procedure skipping over the recording of statement by the Police Under Section 161 Code of Criminal Procedure to be kept in sealed cover and thereafter the same be treated as evidence at the stage of trial which may be put to test by subjecting it to cross-examination. We are further of the view that the statement of victim should as

94 (2014) 8 SCC 913

far as possible be recorded preferably before the Lady Judicial Magistrate Under Section 164 Code of Criminal Procedure skipping over the recording of statement by the police Under Section 161 Code of Criminal Procedure which is any case is inadmissible except for contradiction so that the statement of the accused thereafter be recorded Under Section 313 Code of Criminal Procedure The accused then can be committed to the appropriate Court for trial whereby the trial court can straightway allow cross examination of the witnesses whose evidence were recorded earlier before the Judicial Magistrate."

6. The bench emphasized that,

"the recording of evidence of the victim and other witnesses multiple times ought to be put to an end which is the primary reason for delay of the trial. We are of the view that if the evidence is recorded for the first time itself before the Judicial Magistrate Under Section 164 Code of Criminal Procedure and the same be kept in sealed cover to be produced and treated as deposition of the witnesses and hence admissible at the stage of trial with liberty to the defence to crossexamine them with further liberty to the accused to lead his defence witness and other evidence with a right to crossexamination by the prosecution, it can surely cut short and curtail the protracted trial if it is introduced at least for trial of rape cases which is bound to reduce the duration of trial and thus offer a speedy remedy by way of a fast track procedure to the Fast Track Court to resort to."

Recommendations

1. Recording of statement at hospital: In cases of offences under section 354, section 354A, section 354B, section 354C, section 354D, subsection (1) or subsection (2) of section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code, where the woman has been taken by the police to a hospital for treatment of injuries or trauma counselling, the Magistrate having jurisdiction over the police station where the complaint is registered may be called to the hospital for recording of the statement under S.164(5A). However, if the Magistrate is of the opinion that the survivor is not in a position to make a clear and cogent statement due to physical or mental trauma, then the Magistrate may postpone the recording of the statement. If the Magistrate is of the opinion that the survivor is in need of safe accommodation, she may ensure that the survivor is kept in a place of safety until such time as she is ready to have her statement recorded. Reasons for postponing the recording of the statement u/s 164(5A) must be recorded in writing by the concerned Magistrate.
2. Extension of the enabling clause under section 164(5A)(b) to all cases of violence against women: S.164(5A)(b) provides that the statement given under oath to the Judicial Magistrate, of a temporarily or permanently mentally or physically disabled survivor of VAW shall be considered in lieu of examination inchief. The maker of the statement can be crossexamined on the S.164 statement itself and there would be no need to record the testimony again at the time of trial. This is a very beneficial and important provision and protects the disabled survivor from retraumatization, aids in faster trial and also ensures that the problem of inadvertent discrepancies in the S.164 statement and the later testimony of the survivor does not arise. This provision must be extended to all women covered under S.164(5A) and should not be restricted to disabled women alone.
3. Videographing of statement: The second proviso to S.164(5A)(a) makes videographing of statements made by a temporarily or permanently mentally or physically disabled

survivor of VAW mandatory. It also mandates that the Magistrate shall take assistance of an interpreter or a special educator in recording the statement. It is suggested that this provision should also be extended to all survivors of VAW covered under S.164(5A). This audiovideo recording must also be certified by the Magistrate as authentic and should be made available at the time of trial. However, the consent of the woman in question must be sought before videographing her statement. If the woman refuses to have her statement videographed, then her statement must be recorded by the Magistrate and transcribed in her own hand; or dictated to her stenographer and authenticated by the Magistrate.

4. It is submitted that the statement of the survivor under Section 164(5A) must be done with the consent of the woman in question, for the reason that at that stage she may be too traumatised to make a statement without some psycho socialcounselling. Such counseling will be made available through the proposed One Stop Centers. The Ministry of Women & Child Development has launched the 'One Stop Centres' Scheme, to be piloted with one Centre in each State. The objective of the OSCs is to provide an integrated range of services including medical, legal and psychological support under one roof to women and girls who face violence. The Scheme also envisages that a lawyer and police facilitation officer associated with the OSC will support the woman during recording of her statement under section 164 (5A) CrPC.

5. Hence, with the OSCs providing immediate psychological and legal counseling, women survivors must be present with the support person, where available, while recording statement under oath to the Magistrate, which shall then be considered in lieu of examinationinchief under section 137 CrPC.

6. The following safeguards are suggested for recording of statement under S.164(5A):.

   i. Firstly, a survivor of sexual violence may be too traumatised to give a comprehensive and faithful account of the incident, under oath, immediately after the incident. Hence, before she is asked to depose before the Magistrate, she must be provided emotional and trauma counseling through the One Stop Centers (OSCs). In places where the OSCs are not located, or in cases where the survivor has not been taken for counseling prior to production before the Magistrate, the Magistrate must ensure that the survivor is in a fit mental and physical state to record her statement. The Magistrate may choose to record the statement at a later date or time to allow for the survivor to recuperate.
   Reasons for postponing the recording of the statement u/s 164(5A) must be recorded in writing by the concerned Magistrate.

   ii. It is further suggested/recommended that recording of statement under section 164 (5A)(a) be made optional, at the instance of person against whom the offence has been committed. This will ensure that every survivor has the option to choose whether she wants to give her statement under this section which will be admissible as evidence instead of a statement under S.161, CrPC. Thus, in cases where the survivor feels equipped and confident enough to give a statement before the Judicial Magistrate under the said section, the same shall be considered as her examinationinchief under section 137 CrPC.

   It is essential, however, that she should be made aware of the procedure relating to CrPC and the consequences of giving her statement to the Judicial Magistrate. The Caseworker and lawyer associated with the OSCs as well as the police must be enjoined to provide this information to her.

iii. Lastly, to protect the survivor from further victimization, in the course of her crossexamination, the law should include a safeguard against prosecution for any inaccuracies in the statement given by her under S.164(5A), unless these are material contradictions. A survivor of sexual violence goes through immense trauma and it takes a lot of courage and determination to initiate criminal prosecution and recount the incident to a third party. This is made more difficult by the multiple recitations, which therefore, cannot be verbatim and can lead to trivial inconsistencies. These inconsistencies cannot be used to revictimize her, particularly where the outcome is not favourable to the prosecution.

5. INVESTIGATION OF OFFENCES

Right to fair and impartial investigation: In State of West Bengal and Ors v Committee for Protection of Democratic Rights[95], where the respondent had asked for transfer of investigation to Central Bureau of Investigation, because of ineffective investigation by the State police, it was held that the *"Article 21 of the Constitution in its broad perspective seeks to protect the persons of their lives and personal liberties except according to the procedure established by law. The said Article in its broad application not only takes within its fold enforcement of the rights of an accused but also the rights of the victim. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State."*

A proper investigation into crime is one of the essentials of the criminal justice system and an integral facet of rule of law. The investigation by the police under the Code has to be fair, impartial and uninfluenced by external influences[96].

When it comes to crimes against women, the Criminal Procedure Code, 1973 is sensitive to the needs of the survivor of the crime. However, these safeguards in the CrPC are never implemented. Hence this Hon'ble Court should issue binding directions on all Police Commissioners all over the country to issue uniform Standard Operating Procedures for the investigation of crimes against women. These Standard Operating Procedures must reflect the new developments in the law and incorporate the judgments of this Hon'ble Court. Reference is invited to the judgment of the High Court of Delhi in Virender v State of NCT[97] where the High Court has referred to previous judgments of the Court and laid down important guidelines for investigation of child sexual abuse cases. The guidelines for investigation, recording of statement before the Magistrate and medical examination are reproduced below:

"POLICE

(i) On a complaint of a cognisable offence involving a child victim being made, concerned police officer shall record the complaint promptly and accurately.(Ref: Court On Its Own Motion vs. State & Anr.)

(ii) Upon receipt of a complaint or registration of FIR for any of the aforesaid offences, immediate steps shall be taken to associate a scientist from Forensic Science Laboratory or some other Laboratory or department in the investigations. The Investigating Officer shall conduct investigations on the points suggested by

95 (2010) 3 SCC 571

96 ManoharLal Sharma v Principal Secretary and Ors (2014) 2 SCC 532

97 Crl. A. no. 121/08, judgment dated 29th September 2009

him also under his guidance and advice.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(iii) The investigation of the case shall be referred to an officer not below the rank of SubInspector, preferably a lady officer, sensitized by imparting appropriate training to deal with child victims of sexual crime.(Ref: Court On Its Own Motion vs. State & Anr.)

(iv) The statement of the victim shall be recorded verbatim.(Ref: Court On Its Own Motion vs. State & Anr.)

(v) The officer recording the statement of the child victim should not be in police uniform.(Ref: Court On Its Own Motion vs. State & Anr.)

(vi) The statement of the child victim shall be recorded at the residence of the victim or at any other place where the victim can make a statement freely without fear.(Ref: Court On Its Own Motion vs. State & Anr.)

(vii) The statement should be recorded promptly without any loss of time.(Ref: Court On Its Own Motion vs. State & Anr.)

(viii) The parents of the child or any other person in whom the child reposes trust and confidence will be allowed to remain present.(Ref: Court On Its Own Motion vs. State & Anr.)

(ix) The Investigating Officer to ensure that at no point should the child victim come in contact with the accused.(Ref: Court On Its Own Motion vs. State & Anr.)

(x) The child victim shall not be kept in the police station overnight on any pretext, whatsoever, including medical examination.(Ref: Court On Its Own Motion vs. State & Anr.)

(xi) The Investigating Officer recording the statement of the child victim shall ensure that the victim is made comfortable before proceeding to record the statement and that the statement carries accurate narration of the incident covering all relevant aspects of the case.(Ref: Court On Its Own Motion vs. State & Anr.)

(xii) In the event the Investigating Officer should so feel the necessity, he may take the assistance of a psychiatrist.(Ref: Court On Its Own Motion vs. State & Anr.)

(xiii) The Investigating Officer shall ensure that the child victim is medically examined at the earliest preferably within twenty four hours (in accordance with Section 164A Cr.P.C) at the nearest government hospital or hospital recognized by the government.(Ref: Court On Its Own Motion vs. State & Anr.)

(xiv) The Investigating Officer shall ensure that the investigating team visits the site of the crime at the earliest to secure and collect all incriminating evidence available.(Ref: Court On Its Own Motion vs. State & Anr.)

(xv) The Investigating Officer shall promptly refer for forensic examination clothings and articles necessary to be examined, to the forensic laboratory which shall deal with such cases on priority basis to make its report available at an early date.(Ref: Court On Its Own Motion vs. State & Anr.)

(xvi) The investigation of the cases involving sexually abused child may be investigated on a priority basis and completed preferably within ninety days of the registration of the case. The investigation shall be periodically supervised by senior officers.(Ref: Court On Its Own Motion vs. State & Anr.)

(xvii) The Investigating Officer shall ensure that the identity of the child victim is protected from publicity.(Ref: Court On Its Own Motion vs. State & Anr.)

(xviii)To ensure that the complainant or victim of crime does not remain in dark about the investigations regarding his complaint/FIR, the complainant or victim shall be kept informed about the progress of investigations. In case the complainant gives anything in writing and requests the I.O., for investigations on any particular aspect of the matter, the same shall be adverted to by the I.O. Proper entries shall be made by I.O. in case diaries in regard to the steps taken on the basis of the request made by the complainant. The complainant, however, shall not be entitled to know the confidential matters, if any, the disclosure of which may jeopardize the investigations.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xix) Whenever the SDM/Magistrate is requested to record a dying declaration, video recording also shall be done with a view to obviate subsequent objections to the genuineness of the dying declaration.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xx) The investigations for the aforesaid offences shall be personally supervised by the ACP of the area. The concerned DCP shall also undertake fortnightly review thereof. (Ref :Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xxi) The material prosecution witnesses cited in any of the aforesaid offences shall be ensured safety and protection by the SHO concerned, who shall personally attend to their complaints, if any. (Ref :Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(xxii) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion vs. State & Anr.)

II RECORDING OF STATEMENT BEFORE MAGISTRATE

(i) The statement of the child victim shall be recorded promptly and at the earliest by the concerned Magistrate and any adjournment shall be avoided and in case the same is unavoidable, reasons to be recorded in writing.(Ref: Court On Its Own Motion vs. State & Anr.)

(ii) In the event of the child victim being in the hospital, the concerned Magistrate shall record the statement of the victim in the hospital.(Ref: Court On Its Own Motion vs. State & Anr.)

(iii) To create a child friendly environment separate rooms be provided within the Court precincts where the statement of the child victim can be recorded.(Ref: Court On Its Own Motion vs. State & Anr.)

(iv) The child victim shall not be separated from his/her parents/guardians nor taken out from his/her environment on the ground of "Ascertaining voluntary nature of statement" unless the parents/guardian is reported to be abusive or the Magistrate thinks it appropriate in the interest of justice.(Ref: Court On Its Own Motion vs. State & Anr.)

(v) Wherever possible, the IO shall ensure that the statement of the child victim is also video recorded.(Ref: Court On Its Own Motion vs. State & Anr.)

(vi) No Court shall detain a child in an institution meant for adults.(Ref: Court On Its Own Motion vs. State & Anr.)

III MEDICAL EXAMINATION

(i) Orientation be given to the Doctors, who prepare MLCs or conduct post mortems to ensure that the MLCs as well as post mortem reports are up to the mark and stand judicial scrutiny in Courts.(Ref : Mahender Singh Chhabra vs. State of N.C.T. Of Delhi & Ors.)

(ii) While conducting medical examination, child victim should be first made comfortable as it is difficult to make her understand as to why she is being subjected to a medical examination.

(iii) In case of a girl child victim the medical examination shall be conducted preferably by a female doctor.(Ref: Court On Its Own Motion vs. State & Anr.)

(iv) In so far as it may be practical, psychiatrist help be made available to the child victim before medical examination at the hospital itself.(Ref: Court On Its Own Motion vs. State & Anr.)

(v) The report should be prepared expeditiously and signed by the doctor conducting the examination and a copy of medical report be provided to the parents/guardian of the child victim.(Ref: Court On Its Own Motion vs. State & Anr.)

(vi) In the event results of examination are likely to be delayed, the same should be clearly mentioned in the medical report.(Ref: Court On Its Own Motion vs. State & Anr.)

(vii) The parents/guardian/person in whom child have trust should be allowed to be present during the medical examination.(Ref: Court On Its Own Motion vs. State & Anr.)

(viii) Emergency medical treatment wherever necessary should be provided to the child victim.(Ref: Court On Its Own Motion vs. State & Anr.)

(ix) The child victim shall be afforded prophylactic medical treatment against STDs.(Ref: Court On Its Own Motion vs. State & Anr.)

(x) In the event the child victim is brought to a private/nursing home, the child shall be afforded immediate medical attention and the matter be reported to the nearest police station.(Ref: Court On Its Own Motion vs. State & Anr.)

The amicus makes the following recommendations for inclusion in the Standard Operating Procedure:

1. Online registration of FIR as Zero FIR: As recommended by the Justice Verma Committee, proper systems should be put in place to enable online registration and tracking of FIR. The Delhi Police has currently introduced a complaint filing system for loss of article/document in Delhi, however this has not yet been extended to offences relating to sexual offences. The Justice Verma Committee had also recommended a national database of FIRs for ready accessibility of the complainant[98]. However, online registration of FIR has not been implemented as a formal process. The online registration of FIR may be implemented in accordance with the Zero FIR system.
2. Legal representation at the time of registration and investigation

98 The Justice Verma Committee Report, page 332-333

2.1 In Delhi Domestic Working Women's Forum v Union of India[99] the Supreme Court recognized the importance of legal representation to survivors of sexual violence at the investigation stage. It directed that:

a. "The complainants of sexual assault cases should be provided with legal representation, and that it is important to have someone who would be well acquainted with the criminal justice system. The role of 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 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 complainant's interests in the police station represents her till the end of the case.

b. 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 that stage and while she was being questioned would be of great assistance to her.

c. 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.

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

e. The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victim was questioned without undue delay, advocates would be authorized to act at the police station before leave of the court was sought or obtained."

2.2 The Supreme Court again reiterated these directions in Dilip v State of Madhya Pradesh[100] and further stated that that in addition to those guidelines the State authorities and particularly, the Director General of Police and Home Ministry of the State had an obligation to issue proper guidelines and instructions to the other authorities as how to deal with such cases and what kind of treatment is to be given to the prosecutrix, "as a victim of sexual assault requires a totally different kind of treatment not only from the society but also from the State authorities."

2.3 **Practice in Delhi must be adopted nationwide:** The High Court of Delhi in Khem Chand and Ors v State of Delhi[101], recognizing the right to representation of victims of sexual assault, passed guidelines directing that the concerned Station House Officer (SHO) of the police station receiving the complaint of rape shall inform the Delhi State Legal Services Authority immediately of the complaint. DSLSA shall then depute a social worker/paralegal worker for the victim and her family, for the purpose of providing moral support and legal advice. This practice has the additional advantage of activating the District Legal Services Authority to grant compensation at the stage of filing an FIR, as mentioned below.

99 (1995) 1 SCC 14

100 ILR (2008) Supp. (5) Delhi 92

101 W.P. (Crl) 696/2008, order dt. 23.04.2009

The High Court of Delhi in Delhi Commission for Women v Delhi Police[102] again passed comprehensive guidelines to be followed by police, hospitals, prosecutors, Child Welfare Committee and other functionaries for cases of sexual violence, including child sexual abuse. As per the order, Crisis Intervention Centers shall be set up in jointly by the Delhi Police and Delhi Commission for Women (DCW) to respond to calls of sexual violence at the police station and provide services of counseling and support services. DCW will also set up Rape Crisis Cells (RCC) to provide legal assistance in cases of sexual assault. The police, on receiving information of complaints of sexual complaints, immediately inform the RCC. Lawyers in the RCC then coordinate with the CIC and provide legal support to the victim and family. The Court also ensured that the survivor was kept informed of the proceedings, by directing that police should also provide information to the RCC regarding the case including the arrest and bail application of the accused and the date of filing the charge sheet/final report before the Magistrate.

Delhi Police then subsequently issued Standing Order 303/2010 which reiterated the above guidelines and also the guidelines issued by the Supreme Court in Delhi Domestic Working Women's Forum v Union of India. Further, by a circular dated May 25, 2012 bearing no. 42/2012, the Special Commissioner of Police (Law & Order), Delhi, directed that whenever a bail matter is listed for a rape accused, the lawyer of the Delhi Commission for Women should be immediately informed through the Rape Crisis Cell (RCC)of the Delhi Commission who shall send the concerned lawyer for opposing the bail.

In a very important initiative, the DSLSA is planning to set up legal services clinics in all police stations in Delhi for the purpose of providing legal support to women at the time of lodging of complaints. This is a salutary scheme and embodies the spirit and intent of the directives given in Delhi Domestic Working Women's Forum v Union of India. Once operationalized, this scheme in conjunction with the aboveenumeratedschemes would ensure continuous support to survivors of violence through the stages of the criminal justice system.

3. Coordination with Forensic Science Laboratory: As directed by the High Court of Delhi in Virender v State of NCT[103] upon receipt of a complaint or registration of FIR for any crimes against children, immediate steps have to be taken to associate a scientist from FSL or any other laboratory or department in the investigations. The Investigating Officer shall conduct investigations on the point suggested by him and also carry out investigation under his guidance. Such a procedure will help in the best collection of evidence and efficient investigation. Such a process should be extended to cases of violence against women and taken up nationally.

4. Non disclosure of identity of victim of rape by police officer: Introduced in 1983, Section 228A of the Indian Penal Code makes it a punishable offence to make known the identity of a victim of rape, except in certain cases. It is reproduced below:

228A. Disclosure of identity of the victim of certain offences etc.—

(1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an offence under section 376, section 376A, section 376B, section 376C or section 376D is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished

102 W.P. (Crl) 696/2008, order dt. 23.04.2009

103 Crl. A. no. 121/2008, judgment dated 29th September 2009

with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in subsection (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is—

(a) by or under the order in writing of the officerincharge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) by, or with the authorisation in writing of, the victim; or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorisation in writing of, the next of kin of the victim: Provided that no such authorisation shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any recognised welfare institution or organisation. Explanation.—For the purposes of this subsection, "recognised welfare institution or organisation" means a social welfare institution or organisationrecognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in subsection (1) without the previous permission of such Court shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine. Explanation.—The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.

The High Court of Delhi in ABC v Commissioner of Police[104] has clarified which acts would lead to disclosure of identity of a victim of rape, held that disclosure of identity is a violation of the fundamental right to privacy of the victim, and has also awarded compensation to the victim for having her identity exposed.

The facts leading to the case were that the petitioner ABC's minor daughter had registered a FIR alleging a case of sexual abuse against her father in 2005. The police (Respondent no. 1) leaked the contents of the FIR to news agencies (Respondent no. 2 Hindustan Times House and Respondent no. 3 AajTak). The details were then quoted and published in a newspaper article by Hindustan Times House and aired in a television program by Respondent no. 3. The newspaper article revealed the age of the petitioner's daughter, the area where she stayed, the class in which she studied and her father's occupation. Respondent no.3's television crew approached the petitioner and her daughter at their home, and attempted to interview them. The petitioner refused to open the door and give the interview. The footage was then telecast, along with details of the name, designation and office of the accused father; they showed images of the colony and also images of the door of the house; and also aired the voice of the petitioner refusing entry to the crew. Due to this intrusion, the petitioner and her daughter were forced to move cities and change schools.

The petitioner then filed a writ petition in the High Court of Delhi, alleging violation of the right to privacy and confidentiality of her daughter under Article 21 of the Constitution and claiming compensation.

The Court held that the writ was maintainable against Respondent 2 and 3 as they perform a public function and discharge a public duty of disseminating news, views and information. It held that even though the right to privacy was subject to the exception where the matter

104 ABC v Commissioner of Police, W.P. (C) No. 12730/2005, judgment delivered on 05.02.2013

becomes part of a public record, *"the fundamental right of the victim to be safeguarded from further disclosure of identity and consequent subjection to social indignity does not come to an end. Therefore, an act which violates the said right gives cause of action to, inter alia, stake a claim of damages."*

While not going into the submission of the petitioner that there was an offence under S.228A as such a claim had to be decided upon by a Criminal Court, the High Court held Respondent 1 and 3 responsible for disclosure of the identity of the victim. It also awarded compensation as a "palliative measure" and left it to the petitioner to seek further damages from the respondents in appropriate civil proceedings.

It criticized the action of Respondent 1 of disclosing the content of the FIR to the press as "gross negligence and dereliction of duty which has, consequently, resulted in breach of the very basic right of privacy and confidentiality of the petitioner's daughter" and directed it to pay Rs.1 lakh as compensation to the petitioner.

The Court noted that Respondent no.3 had disclosed the name of the accused father, his place of work and designation; the age of the victim; visual shots of the display board of the colony containing particulars regarding Sector and Pocket of the colony; visual shots of the staircase leading to the house and shots of the doorstep of the house; and voice of the Petitioner. By these acts, Respondent no.3 displayed "a prurient or morbid curiosity" and violated the petitioner's daughter's right to privacy and confidentiality and also disregarded its duty of maintaining utmost secrecy in the matter of the victim's identity as laid down in the Press Council of India's Norms of Journalistic Conduct. It directed Respondent no.3 to pay Rs.5 lakhs as compensation to the victim.

The Court did not find Respondent no.2 guilty of negligence and breach of fundamental right of the petitioner's daughter, and noted that it had exercised discretion in quoting from the FIR. Respondent no.2 had referred to the age, academic standard and residential district of the victim, and these were "too general for anyone to identify the petitioner or her daughter as the locality is very large and there could be hundreds of children in the locality who could meet the description given by respondent no.2."

Recommendation: It is suggested that this Hon'ble Court direct all police officers not to disclose the contents of the FIR that might lead to identification of the victim/survivor to the press. The privacy and confidentiality of the victim/survivor and her family must be respected at all times, and any disclosure of information by the police officers must be done with the consent of the victim/survivor.

5. Statement under S.161, CrPC: Where a survivor gives information to a police officer in the police station of the commission of a cognizable offence under sections 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code, and records a FIR, then there should be no requirement of recording the statement of the survivor under S.161 CrPC.

6. Transmission of FIR to Magistrate: Every FIR recorded under sections 326A, section 326B, section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section509 must be transmitted to the nearest Magistrate having jurisdiction over the police station, to enable the Magistrate to monitor progress of investigation and also assess witness protection needs and interim compensation requirements.

7. Police not to be in uniform during investigation process: Section 24 (2) of the POCSO states that a police officer shall not be in uniform while recording the statement of

a child. However, the Act does not specify when an officer may be in uniform. For example, POCSO does not state whether the officer should be in uniform when he/she is escorting the child for medical examination, or before the Child Welfare Committee, or before the Magistrate for recording statement under section 164 of the CrPC. It is advised that a police officer should not be in uniform except whenever required to promote dignified treatment of a child and except when it is in dereliction of duty. Rule 75 of the Delhi Juvenile Justice (Care and Protection of Children) Rules, 2009, reads: "While dealing with a juvenile or a child under the provisions of the Act and the rules made there under, except at the time of arrest, the Police Officer shall wear plain clothes and not the police uniform." All the concerned officials should be directed by the officer in charge of police station to keep a set of civil dress ready in the police station.

8. Responsibility of the police under the POSCO Act: Under the POCSO Act the responsibility of the police towards a child is continuous and ends only after the conclusion of trial by the Special Court. It must be ensured by the police that:

   (a) The identity of the child is not made public and also protected from media throughout till directed otherwise by the Special Judge;

   (b) Samples for forensic tests are sent to concerned laboratory at the earliest and without delay; and

   (c) The child and its parent or guardian or other person having it's trust shall be given following among other information about— (I) available emergency public/private crisis services; (II) benefits available for compensation; (III) progress in investigation (but not disclosure which interferes with investigation and trial), including arrest of accused, bail or his detention status, filing of charge sheet against accused, schedule of court hearing that the child must and may attend, and the judgment after trial, and sentence imposed, if any.

9. Women sexually abused in communal riots: In Mohd. Haroon v. Union of India[105], a writ petition was filed against the State Police for not providing adequate security to women which resulted in several rapes being committed during the said communal violence. The petition also highlighted the inaction on the part of State Police against the real culprits and the indifferent attitude towards the victim's rehabilitation and security in various procedural matters, such as recording of victim's statement and the medical examination. The Supreme Court pursuant to this obtained a status report from the State as well as, inter alia, directed recording of additional statements under Section 164 of the CrPC before a lady Magistrate and payment of compensation.

   Therefore, at times of conflict such as riots, the police should implement the investigation procedure in an expedited manner and should dedicate personnel towards registrations of complaints of sexual offences in order to ensure that victims are not further terrorised by the accused or their attempts at filing/pursuing a complaint is not thwarted in any manner.

   Further, as directed by the Ministry of Home Affairs in its circular dated September 4, 2009, exclusive Crime Against Women and Children' desk it should be ensured that such desks are specifically set up in order to ensure that crimes against women are properly documented, investigated and prosecuted during times of conflict.

10. Status reports: On demand victim should get period status reports of investigation from the police.

105 (2014) 5 SCC 252

11. More women representation in the police: While proviso to S.154 mandates that registration of cases disclosing certain crimes against women to be recorded by women police officers, the representation of women police in the total police force in the country is a dismal 6.11 per cent[106]. To give full effect to this provision, and also ensure that more women are involved in the investigation of sexual offences, Central Government must be ensure that at least 1/3rd of the police force in the country is comprised of women.

    In this regard, the MHA Scheme[107] to set up specialized Investigative Units for Crimes against Women (IUCAW) is appropriate. The IUCAW are proposed to be set up in 150 police districts with the highest rates of crimes against women, and the objective would be assisting the local police in investigation of heinous crimes. 1/3rd of the 15member Unit will preferably be female.

    As mentioned earlier, the percentage of women in the police force in the country is a mere 6.11 per cent. It is essential that for the scheme to be successful and also for the greater purpose of having a more inclusive and representative police force in the country, there needs to be a concerted effort to recruit more women into the police force. Recruitment should also be done from the minority communities. It is also important to undertake a crime mapping of all police districts in India to understand which police districts would benefit from IUWACs and better policing in general.

12. Strict timelines for completion of investigation: S.173(1) CrPC states that every investigation shall be completed without unnecessary delay, and as per S.173(1A), the investigation in relation to rape of a child may be completed within three months from the date of registration of FIR.

    Delay in investigation is a violation of the victim's right to effective justice and remedy. It must be ensured that investigation into all cases of sexual assault, acid attack, rape, stalking etc. are time bound and strictly complied with. S.166A IPC must be applied for unreasonable delays in investigation.

13. CCTVs should be installed in all police stations.

14. There should be a dedicated Woman and Child helpdesk at every police station.

6. RIGHT OF ACCUSED NOT BE TO FORCEFULLY EXAMINED

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) reads as follows:

"..No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 14 (3) (g) of the ICCPR enumerates the minimum guarantees that are to be accorded during a trial and states that everyone has a right not to be compelled to testify against himself or to confess guilt.[108]

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106 Bureau of Police Research and Development, Data on Police Organizations in India as on January 1, 2014, available at http://bprd.nic.in/showfile.asp?lid=1291

107 Ministry of Home Affairs, Investigative Units for Crimes Against Women, January 2015

108 Article 14 (3) (g) of the ICCPR "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality…(g) Not to be compelled to testify against himself or to confess guilt.

Article 20 (3) of the Constitution of India observes as follows:

"No person accused of any offence shall be compelled to be a witness against himself"

Sections 53, section 53A and section 54 of the Cr.P.C contemplate the medical examination of a person who has been arrested, either at the instance of the investigating officer or even the arrested person himself. The same can also be done at the direction of the jurisdictional court.[109] Section 53 contemplates the use of *`force as is reasonably necessary'* for conducting a medical examination. This means that once a court has directed the medical examination of a particular person, it is within the powers of the investigators and the examiners to resort to a reasonable degree of physical force for conducting the same.

Section 53A of the Cr.P.C (inserted in 2005) has been held by the Hon'ble Supreme Court to be mandatory in certain rape cases.

In *Krishan Kumar Malik vs. State of Haryana*[110], the prosecutrix was forcibly lifted, put in a Maruti van and gang raped. The Hon'ble Supreme Court held,

> *"…after the incorporation of Section 53A in the Criminal Procedure Code w.e.f. 2362006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in Cr.P.C the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences." (Para 45)*

As the DNA test was not conducted on the semen stains found on the underwear of the prosecutrix, her case could not be conclusively established.

In *Selvi vs. State of Karnataka*, a three Judge Bench of the Supreme Court was considering whether involuntary administration of certain scientific techniques like narco analysis, polygraph examination and the Brain Electrical Activation Profile (BEAP) tests and whether the results thereof are of 'testimonial character' attracting the bar of Article 20 (3) of the Constitution of India.

The Hon'ble Supreme Court held that involuntary administration of certain scientific techniques is unconstitutional. However, any information or material that is subsequently discovered with the help of voluntary administered test results can be admitted, in accordance with Section 27 of the Evidence Act, 1872.

Recommendations

The Supreme Court directions in Selvi vs. State of Karnataka must be strictly complied with.

DUTY OF PROSECUTION AND TRIAL OF OFFENCES

1. Prosecution of offences

1. At the outset it is required to be mentioned that the criminal justice system as it has operated so far has focused on the rights of the accused. But with the awareness of

109 Selvi and Ors.vs State of Karnatak and Anr. [2010 (7) SCC 263]

110 (2011) 7 SCC 130

crimes against women growing in the country, courts as well as law enforcement agencies have moved towards supporting the victims/survivors through the process of litigation. This has happened in various ways. The first breakthrough came in the case of Bhagwant Singh v Commissioner of Police[111] where this Hon'ble Court held that the de facto complainant has a right to be heard at the time of consideration of closure report filed by the police. Since then there have been several amendments in the law including provision for the survivor to file an appeal independently[112] and a provision for compensating victims of crime[113]. Victim's right of representation in the prosecution of offences is recognized to a limited extent by the proviso to S.24(8) of Code of Criminal Procedure 1973, by which the victim's lawyer may assist the Public Prosecutor with the permission of the Court. However, as recognized in the Justice Verma Committee Report[114], there is a need for independent right of representation to a survivor of violence. The survivor's lawyer should have independent access to the court, and not merely assist the Public Prosecutor, and be allowed to advocate for the particular concerns of the victim.

2. Nevertheless the fact remains that criminal prosecution is primarily the role of the State and traditionally the role of the victim has been restricted. In India, the Public Prosecutor is a statutory office, and the appointment is done as per S.24, Code of Criminal Procedure, 1973. While prosecuting offences of violence against women, the State has a Constitutional obligation to protect and respect the fundamental rights of the victim. The State has to adopt a victim/survivorcentred approach to the criminal justice system, where the victim/survivor's wishes, safety and well being take priority in all matters and procedures[115]. Prosecutors play a key role in protecting society from a culture of impunity and function as gatekeepers to the judiciary[116]. It is necessary that Public Prosecutors are also sensitized to the need of a survivor and Standard Operating Procedures are put in place.

3. The Guidelines on the Role of Prosecutors adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders states down that Prosecutors shall consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

4. It has been suggested that for certain crimes like sexual assault and child sexual abuse, for which special skills and a multidisciplinary approach may be required in order to achieve the most effective prosecution and best outcomes for those involved, prosecution services should consider creating specialized units or sections of their prosecution services that can concentrate on the investigation and prosecution[117].

5. The Supreme Court in various decisions has deliberated on the role of the Public Prosecutor. The Public Prosecutor is seen as an agent of justice and truth. It has been

111 (1985) 2 SCC 537

112 Proviso to S.372, Code of Criminal Procedure 1973

113 S.357A, Code of Criminal Procedure 1973

114 Justice Verma Committee Report, pg 304-307

115 New Jersey 'STANDARDS For Providing Services To Survivors Of Sexual Assault' (1998); Sourced from: <http://www.njdcj.org/standar2.htm>

116 Report of the Special Rapporteur on the independence of judges and lawyers (A/HRC/20/19), para. 93.

117 United Nations Office on Drugs and Crime and International Association of Prosecutors, The Status and Role of Prosecutors, December 2014

held that though the primary role of the Public Prosecutor is to ensure that an accused is punished, his duties extend to ensuring fairness in the proceedings and also to ensure that all relevant facts and circumstances are brought to the notice of the Court for a just determination of the truth so that due justice prevails.[118] The Court has given attention to the rights of the accused, and the corresponding duties of the Public Prosecutor.

6. There has however been little consideration by the Indian courts of the Public Prosecutor's duties towards complainants of sexual abuse.

Important duties of Public Prosecutors:

The Public Prosecutor can play an important role in making the criminal justice system more survivor-oriented and effective. To play an active role in making the criminal justice system more survivor friendly and in ensuring convictions, it is recommended that the Public Prosecutor should do the following

1. **Opposing bail:** The involvement of the Public Prosecutor in a case involving crimes against women should ideally start before the investigation is complete and at the time of opposing bail of the accused. Opposing bail of the accused, particularly in non bailable crimes like rape and sexual assault, is vital for ensuring the safety of the complainant and/or her family. No bail should be granted until the investigation is complete. If the court grants bail, the Public Prosecutor should pray for specific conditions in the Court order that the accused shall not attempt to contact the aggrieved woman/survivor and witnesses; that the accused should be prevented from visiting within a five kilo-meter radius the residence or place of work of the Survivor; or that the evidence shall not be tampered with.

2. **Interaction with the survivor:** The Prosecutor must meet the aggrieved woman/survivor, in advance, before the trial and brief her about the proceedings. This will ensure that the aggrieved woman/survivor is familiar and comfortable with the Prosecutor and the trial proceedings, and the Prosecutor also gets a first-hand account of the case from her. This is not against the provisions of the Indian Evidence Act 1872 and must not be considered as tutoring of the witness. This is a part of the process of prosecution and it is his duty to put the witness at ease and explain the process of examination-in-chief and cross-examination. Witnesses are allowed to refresh their memory and the victim/survivor must be allowed to read her S.164 statement before stepping into the witness box. This would be in keeping with the provisions of S.159 of the Indian Evidence Act 1873.

3. **Understanding of medical evidence:** Lack of clarity on all aspects of medical evidence and its usage as an interpretative tool can be a major barrier to successful prosecution. Hence, it is imperative that the Prosecutor develops a sound understanding of the medical evidence in each case, particularly the reasons for negative medical evidence.

4. **Medical evidence of survivor:** The Prosecutor must understand that the absence of medical evidence such as lack of injuries, or no sign of semen or tears of hymen in a case does not mean that rape and/or sexual assault did not occur. It could be that medical examination was delayed. Moreover, medical evidence is merely corroborative in nature, and should be presented by the Prosecutor during trial as such. The Prosecutor must also recognize that the aggrieved woman/survivor during the medical examination may have revealed additional details/information to the examining doctor (recorded in the medical history), which may not be in the FIR or

118 V. K. Sasikala v State represented by Superintendent of Police (2012) 9 SCC 771

the Sections 161 or 164(5) statements. To ensure that these are not misconstrued as "differences", the Prosecutor must be prepared to appreciate and present the statements accordingly. Interacting with the examining doctor to understand the nuances of evidence may be useful, without appearing to be "tutoring" him. This would also help the doctor to understand his role as an expert witness and be well prepared for the deposition.

5. **Medical evidence of accused:** The Prosecutor should also be aware about components of medico-legal examination of perpetrator. Often perpetrators claim lack of potency by way of medical tests such as testicular reflex, cremastricreflex, disease of the vas, systemic examination, deformity from other diseases etc. However the PP should be aware that these medico-legal tests are unscientific and do not form a part of medico-legal examination as mentioned in Section 164A of CrPC. The definition of rape under IPC as per CLA Act 2013 and POCSO Act 2012 has also gone beyond penetration by penis and mentions use of objects, and other forms of assault.

6. Witness Protection: The Prosecutor should recommend witness protection to the Court. As noted in the 198th Report of the Law Commission of India[119] witness protection is necessary in certain cases, even at the stage of investigation, and the Prosecutor can move the Magistrate to conduct a preliminary inquiry on the need for witness protection and witness identity protection.

Recommendations: The Hon'ble Court should direct the formulation of protocols for Public Prosecutors prosecuting cases of violence against women, keeping the needs of the survivor at center stage.

2. TRIAL OF OFFENCES

1. In *Tukaram v State of Maharashtra*[120] a three judge bench of the Supreme Court acquitted two police men accused of raping a 16 year old Dalit girl Mathura in the police station. The Court, in its judgment, reasoned that she was habituated to sexual intercourse, there were no injuries found on the body of the girl and that she had not raised an alarm and these facts indicated that it was a consensual "peaceful affair".

2. The evolution of the law on rape since then has been significant.

   After the outcry following the Mathura rape decision, Criminal Law (Amendment), 1983 was passed which introduced S.114A into the Indian Evidence Act, according to which, if the victim says that she did not consent to the sexual intercourse, the Court shall presume that she did not consent. Other provisions regarding nondisclosure of identity of rape victims (S.228A Indian Penal Code 1860), in camera proceedings for rape trials [S.327(2), Code of Criminal Procedure 1973], tougher sentences and punishment for custodial rape [S.376B, Indian Penal Code 1860] were also introduced.

3. Courts have also shown increasing sensitivity towards adjudication of rape cases, and have been alive to the fact that trials of rape cases are harrowing and are used as a tool for further harassment of the survivor. The Supreme Court has spoken for a victimcentered approach to evaluation of evidence[121], ruled that corroboration of the

119 Law Commission of India; 198th Report 'Witness Identity Protection and Witness Protection Programmes' (2006)

120 (1979) 2 SCC 143

121 State of Maharashtra v Chandraprakash Kewalchand Jain 1990 Cri LJ889

evidence of the victim was not essential[122], that lack of injuries on the body does not indicate consent[123], and that the sole testimony of the victim, if credible, could lead to a conviction[124].

4. The Court has also upheld the value of consent in sexual relationships as supreme, and has come down heavily on judicial characterization of the victim of a rape as a woman of "loose morals"[125], and urged judicial discretion and sensitivity in adjudicating crimes against women[126].

5. The Court has also upheld the right to privacy of the victim and has held that the name of the victim should be not be published in the judgments of the lower Court, or High Court or Supreme Court[127].

6. In *Sakshi v Union of India*[128] the Supreme Court laid down important guidelines for making trial of sexual offences for child survivors of violence more sensitive and responsive. The Court directed that in holding a trial of child sexual abuse or rape, a screen or some such arrangement should be made where the victim or witnesses do not see the body or face of the accused; during cross examination, questions to the victim from the accused should be given in writing to the Presiding Officer of the Court who may put them to the victim or witnesses in a language which is clear and is not embarrassing; and the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

7. The statutory amendments also reflect the changing societal consciousness towards crimes against women and issues of consent. Now, it is not permissible to adduce evidence or to put questions in the cross examination to the victim relating to general immoral character or previous sexual experience of the victim[129] and evidence of character or previous sexual experience in cases of sexual assault and rape is not relevant for the question of consent.[130]

8. Support Persons: Rule 4 of POCSO Rules 2012 provides for appointment of support person by CWC for the process of investigation and trial. The role of the support person is to keep the child informed of the proceedings, apprise the child of the role he may play in the judicial process and ensure that the concerns of the child for his safety and the manner in which he would like to provide his testimony are conveyed to the relevant authorities. However, adult survivors of sexual violence have no statutory right to appointment of support persons.

9. Vulnerable Witness Courtrooms: The High Court of Delhi has notified Guidelines for Recording of Evidence of Vulnerable Witnesses in criminal matters. These guidelines are applicable in all criminal courts in Delhi. The aim of the guidelines is to establish procedures for recording depositions of vulnerable witnesses, so as to enable them

122 State of Punjab v Gurmit Singh (1996) 2 SCC 384, B.C. Deva v State of Karnataka (2007) 12 SCC 122

123 Rajinder vs. State of Himachal Pradesh (2009) 16 SCC 69; State of H.P vs. Mango Ram(2000) 7 SCC 224

124 Karnel Singh v State of Madhya Pradesh (1995) 5 SCC 518

125 State of Punjab v Gurmit Singh (1996) 2 SCC 384

126 State of Karnataka v Krishnappa (2000) 4 SCC 75

127 State of Punjab v Ramdev Singh AIR 2004 SC 1290

128 AIR 2004 SC 3566

129 Proviso to S.146, Indian Evidence Act 1872 inserted by the Criminal Law (Amendment) Act, 2003 and subsequently substituted by Criminal Law (Amendment) Act, 2013

130 S.53A, Indian Evidence Act, 1872, inserted by Criminal Law (Amendment) Act, 2013

to give their best and most reliable evidence in criminal proceedings. It seeks to minimize secondary victimization of vulnerable witnesses.

Vulnerable witnesses have been defined to be those persons who have not completed 18 years of age. The protocol provides that the Court may appoint a facilitator to assist the vulnerable witness in effectively communicating at various stages of trial and/or to coordinate with the other stakeholders such as police, medical officer, prosecutors, psychologists, defense counsels and courts. The facilitator may be an interpreter, a translator, child psychologist, psychiatrist, social worker, guidance counselor, teacher, parent or relative of such witness.

Proceedings may be conducted in camera. In the case the court determines that the witness may not give a full and frank testimony in presence of the accused, or his counsel or the prosecutor, then the Court may order that the testimony be made available by live-link television. Video recordings of the depositions shall be under a protective order. The questions posed to the vulnerable witness should be as per the development level and should be simple and free from complex words, and only the Court can put the questions before the witness. If the safety of the vulnerable witness is deemed to be at risk, the Court shall arrange to have protective measures put in place for the child.

Vulnerable witness courtrooms have been set up in Delhi keeping the guidelines in mind. The vulnerable witness facility has a video link between the witness room and the courtroom and ensures that the vulnerable witness is not in direct proximity of the accused.

Recommendations

1. All the guidelines provided in Sakshi v Union of India must be made applicable to the adult survivors of sexual violence as well.
2. Provision of the vulnerable witness court rooms should be made throughout the country, and extended to adult survivors/witnesses. Once the charge sheet is filed and investigation is complete, the case should be tried in such court rooms.
3. Where there are no vulnerable witness courtrooms, it must be ensured that there is no contact between the survivor and the accused by designating separate areas in the courtroom complex for the survivors and the accused. It should also be open to the trial judge to conduct the trial through video conferencing with the accused, in cases where the accused is being held in a prison. This would avoid confrontation of the survivor by the accused.
4. All courtrooms should have a designated area where the survivor can interact with her lawyers and the Public Prosecutor.
5. The survivor must have a choice of her own lawyer to represent her. Such lawyer may be drawn either from the legal aid panel of the concerned Legal Services Authority or may be a lawyer of the choice of the survivor. The court may also appoint an amicus in cases where the survivor is not able to get a lawyer of her choosing. In all cases, the State must pay the fees of the lawyer representing the survivor. Here, reference is invited to The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 and the Rules framed thereunder. Rule 4(5) provides that "the District Magistrate or the Sub Divisional Magistrate may, if deem necessary or if so desired by the victims of atrocity engage an eminent Senior Advocate for conducting cases in the Special Courts on such payment of fee as he may consider appropriate." Having regard

to the proviso in Section 24(8) of CrPC, it must be ensured by the court that assistant by the lawyer of the victim is effective in nature. The trial judge should grant leave to the lawyer of the victim to represent the needs and interests of the survivor.

6. No accused person should be permitted to approach the survivor during the pendency of the investigation and the trial. Affidavits of the survivor submitted by the accused stating that she wishes to withdraw her statement made under S.164 or S.161 must be seen as intimidation of the survivor by the accused. The court must declare such a step as an effort to interfere with the prosecution and procure a hostile witness with the intention of getting an acquittal or a favourable order for the accused.

7. Having regard to Section 357C CrPC, the Magistrate must have the power to direct private hospitals to provide minimum medical assistance and also long term care to survivors of rape and acid attack.

3. SPEEDY TRIALS

1. As per S.309 CrPC, the trial shall continue on a day-to-day basis until all witnesses have been examined and in rape cases the trial shall, as far as possible, be completed within 2 months of filing of charge sheet.

2. Fast track courts: 11th Finance Commission had recommended a scheme for the establishment of 1734 Fast Track Courts (FTCs) throughout the country for the expeditious disposal of pending cases. It was a wholly Centre funded scheme. In this regard, the Commission had allocated Rs 500 crore. FTCs were to be established by the state governments in consultation with the respective High Courts. An average of five FTCs were to be established in each district of the country. The judges for these FTCs were appointed on an ad hoc basis. The judges were selected by the High Courts of the respective states. There were primarily three sources of recruitment first, by promoting members from amongst the eligible judicial officers; second, by appointing retired High Court judges and third, from amongst members of the Bar of the respective state.

3. FTCs were initially established for a period of five years (2000-2005). However, in Brij Mohan Lal v Union of India[131], the Supreme Court directed the central government to continue with the FTC scheme, which was extended until 2010-2011. The government discontinued the FTC scheme in March 2011. Though the central government stopped giving financial assistance to the states for establishing FTCs, the state governments could establish FTCs from their own funds. The decision of the central government not to finance the FTCs beyond 2011 was challenged in the Supreme Court in Brij Mohan Lal v Union of India[132]. The Court upheld the decision of the central government. It held that the state governments have the liberty to decide whether they want to continue with the scheme or not. However, if they decide to continue then the FTCs have to be made a permanent feature.[133]

4. In the 14th Finance Commission, the Department of Justice had made a proposal for strengthening judicial systems in the States, which included grants for establishment of 1800 fast track courts for a period of five years for heinous crimes, including offences against women and children. This was endorsed by the Finance Commission.

131 (2005) 3 SCR 103

132 (2012) 6 SCC 502

133 PRS, Overview of Fast Track Courts, http://www.prsindia.org/theprsblog/?p=2388

5. There are 895 Fast Track Courts, including FTCs for sexual offences, functioning in the country presently, as per data provided in the answer to Rajya Sabha Unstarred Question no. 1486 (May 2015) and the response provided by the Department of Justice, Ministry of Law and Justice.

6. In Delhi, there are 8 fast track courts dealing with cases of sexual assault and rape. Only three have women judges.

State responses to fast track courts

Proviso to section 26 (a) (iii) of the Cr.P.C states that an offence u/s 376, 376A, 376B, 376C, 376D or 376E of the IPC shall be tried as far as practicable by a Court presided over by a woman.

In response to an RTI Application dated 4th June 2015 sent by my office, it was intimated to us that there are 8 Fast Track courts in Delhi dealing with case under section 376 IPC, out of which three are presided over by women Judges.[134] There appears to be a tendency within the Judiciary to have male Judges deal with important judgments – even though the lives they are adjudicating on are those of women.

A study conducted by the Centre for Law and Policy Research notes there are 10 Fast Track Courts in the state of Karnataka.[135]

The study notes that lack of sensitivity remains a concern within the Fast Track Courts. For example, the Hon'ble Supreme Court of India in Lillu v State of Haryana[136] held that in view of International Covenant on Economic, Social and Cultural Rights 1966; United Nations Declaration of basic principles of Justice for Victims of Crime and Abuse of Power 1985, rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. The admission of two fingers and the hymen rupture does not give a clear indication that prosecutrix is habituated to sexual intercourse and is in violation of Article 21 of the Constitution. However, the Fast Track courts in Karnataka are not following the Supreme Court precedent.[137]

Pendency Rates

A study (unpublished) conducted in 2014 conducted by Lawyer's Collective, an NGO noted that out of a study of 172 case records in fast track courts in Maharashtra, 67.4%have resulted in acquittals, 13.4% in convictions while 19.2% of the cases are still pending.

Pendency in the Delhi Fast Track courts, as on 1st May 2015, is fairly high –ranging from 33 cases to 376 cases.[138]

According to the CLPR report "When compared with the rest of the criminal justice system, the special fast track courts appear to be relatively quicker in disposing cases. However, they do not appear to facilitate the disposal of a large number of cases and, as a consequence, case pendency in these courts remains high."[139]

Conviction Rates

134 RTI Copy with LCWRI, available on request

135 CLPR 'The Myth of Speedy and Substantive Justice' (2015)

136 (2013) 14 SCC 643

137 As above, at page 27

138 RTI Copy with LCWRI, available on request

139 CLPR 'The Myth of Speedy and Substantive Justice' (2015), page 28

According to the CLPR report, "The conviction rate of these courts is extremely low at 16.8% for the special fast track courts and 7.8% for the special court for child sexual abuse."[140]

The primary reason for the large number of acquittals is the incidence of witnesses turning hostile. The judgments reviewed revealed a disturbing trend of the prosecution making little effort to present alternative evidence or conduct a fuller investigation when faced with hostile witnesses and of courts not taking a proactive role in questioning the suspicious circumstances that caused witnesses in almost all of the cases to turn hostile.

The 2014 unpublished study by Lawyer's Collective also notes low conviction rate at 13.4%. The study notes that delay in filing of FIR, faulty investigations and the manner in which medical evidence is appreciated for example, lack of injuries contributes to low conviction rates.

Recommendations:

1. Appointment of women Judges in accordance with the Cr.P.C is necessary
2. Training of judicial officers on issues of 'sex and gender' in order to inculcate sensitivity amongst the Judicial officers;
3. Procedure for filling up a vacancy if a Judge is on leave must be expeditious;
4. Provision of support services to the Judicial officers –support persons, interpreters, or welfare experts, in order to expedite disposal of the case.

4. SPECIAL PROVISIONS FOR PERSONS WITH DISABILITY

The Criminal Law (Amendment) Act 2013 introduced special safeguards for persons with disability. These are listed below

1. Proviso to S.54A, Code of Criminal Procedure 1973: In identification of the accused, if the person identifying the person arrested is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that person is comfortable with, and the identification process shall be video-graphed.
2. S.154(1), proviso (a), Code of Criminal Procedure 1973: A woman who is temporarily or permanently mentally or physically disabled, and who alleges commission or attempt of an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D, section 376E or section 509 of the Indian Penal Code, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator; recording of such information shall be video-graphed and the police officer shall get the statement of the person recorded by a Judicial Magistrate under S.164(5A)(a) as soon as possible.
3. Proviso to S.160(1), Code of Criminal Procedure 1973: Under the police officer's power to require attendance of witnesses, a mentally or physically disabled person shall not be required to attend any place other than his/her place of residence.
4. Proviso to S.164(5A)(a),Code of Criminal Procedure 1973: In certain cases of crimes against women, the Judicial Magistrate while recording statements of persons against

140 As above

whom the offence was committed and if the person is temporarily or permanently mentally or physically disabled, then the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement and the statement made by the person, with the assistance of an interpreter or a special educator, shall be video-graphed.

5. S.165(5A)(b), Code of Criminal Procedure 1973: The statement recorded under S.164(5A)(a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 137 of the Indian Evidence Act, 1872 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.

6. S.376(2)(l) Indian Penal Code 1860: Rape by a police officer of a woman suffering from mental or physical disability is punishable with rigorous imprisonment for a term not less than ten years and which may extend to imprisonment for life.

Recommendations

These provisions must be incorporated in all relevant protocols, as experience shows that law enforcement agencies are not aware of newly introduced provisions, nor are they sensitive to marginalized communities, including persons living with disabilities. A recent report on the lack of disability-friendly buildings in the Courts in Delhi is disturbing to say the least. A disabled man accused in a criminal case was forced to crawl to a fifth floor courtroom in a trial court in Delhi because of the lack of wheelchairs in the court complex. The judge has ordered a report from the Police Commissioner in Delhi and the Director-General of Prisons on the status and availability of facilities for accused persons with disabilities[141]. It is recommended that such an audit be done in all the police stations, court rooms and prisons in the country.

5. LEGAL AID

Article 39A of the Constitution, inserted by the Constitution (Forty second) Amendment Act, 1976, provides that the State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall in particular provide free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. Article 14 also obligates the State to provide for equal protection of laws to persons. This has been given statutory force by the enactment of the Legal Services Authorities Act, 1987. Under S.12(c) of the Act, a woman or a child filing or defending a case shall be eligible for legal services. S.2(1)(c) defines legal services to include the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of legal advice. Hence, every woman who is sexually abused must be given the opportunity to avail free legal aid.

Role of Community Based Organizations

Without bridging the social divide and waging a concerted effort to address the highly entrenched inequalities spawned and exacerbated by deep seated caste, gender and class discrimination and biases, there is a danger that Constitutional guarantee that all citizen are equal in the eyes of law gets bogged down in rhetoric and reduced to an unrealized tenet and principle both in terms of jurisprudence and polity.

141 The New Indian Express, A Shameful Way to Treat the Disabled, August 7th 2015, available at http://www.newindianexpress.com/editorials/AShamefulWaytoTreattheDisabled/2015/08/07/article2961387.ece

Hence prevention requires a well defined Rights and Responsibility Framework for the Duty Bearers and their cadre or team of implementers. In the light of this we recommend the following:

1. Define granularly the responsibility and obligation of the Legal Services Authority at the state, district and taluk or block levels in advancing the legal entitlements of all vulnerable and socially marginalized communities
2. Make the cadre of Para legal Volunteers drawn from the affected vulnerable community the mainstay of the justice delivery system on the ground.
3. Recognize best practices and award community-based organizations and Para Legal Volunteers who in partnership with the District Legal Services Authority (DLSA) reached out to provide legal aid and services to marginal communities who had hitherto been excluded from legal entitlements.
4. Scale up robust practices by strengthening the community's access to the schemes being provided by the Legal Services Authority.
5. Aim at ensuring that those who deliver justice and those entitled to all services and aid work together and ensure that every population, groups and within it the most vulnerable, hidden, difficult to reach are reached out to and brought within the ambit of both legal and social entitlements. In fact enable the Legal Services Authority to play a role of advocate to make sure that all providers service the marginal communities.
6. Realize the onerous responsibility ordained on us to universalize the rule of law; not be limited by and do whatever it takes to rise above all partisan and sectarian biases and discrimination the prevention vehicles must recognize their obligation to enable and enforce a level playing field to all populations that face structural and systemic inequities.

6. WITNESS PROTECTION

1. "The edifice of administration of justice is based upon witness coming forward and deposing without fear or favor, without intimidation or allurement in Courts of Law."[142] The Hon'ble Supreme Court in Zahira Habibulla H. Sheikh and Another vs. State of Gujarat and Other[143] said "Witnesses, as Benthem said are the eyes and ears of Justice system…If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralyzed and it no longer can constitute a fair trial." The Supreme Court also cited numerous experiences faced by the court on account of frequent instances of witnesses turning hostile, "due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface."
2. While the accused must get a fair and just hearing in our adversarial criminal justice system, it is equally important that witnesses and the complainant are also protected and able to speak without fear and intimidation by the accused or his/her accomplices. In cases of violence against women, especially rape and sexual assault, where the woman is in a socially and economically weaker position compared to the accused, there is often a great pressure on the complainant to withdraw the case and for the witnesses not to depose in court. In the face of such intimidation and

142 NeelamKatara v Union of India, High Court of Delhi, W.P.(CRL) 247/2002, judgment dt. 14.10.2003

143 (2004) 4 SCC 158

harassment, witnesses and the complainant often turn hostile, thus damaging the prosecution's case.

3. With the ultimate objective of providing a fair and just trial, there is a need to balance the need for anonymity of witnesses on the one hand and the rights of the accused, on the other, for an open public trial with a right to crossexamination of the witnesses, after knowing all details about witnesses[144]. To enable witnesses to depose freely and without fear, it is crucial to ensure that witnesses and their families are guaranteed physical and mental safety throughout the process of investigation and trial. States thus have a responsibility of ensuring witnesses' physical and mental safety both inside and outside the courtroom. There are three categories of witnesses: (i) victim-witnesses who are known to the accused; (ii) victimswitnesses not known to the accused (e.g. as in a case of indiscriminate firing by the accused) and (iii) witnesses whose identity is not known to the accused. Category (i) requires protection from trauma and categories (ii) and (iii) require protection against disclosure of identity[145].

4. Witness protection has found limited statutory recognition in anti terrorism laws. S.16 of Terrorist and Disruptive Activities (Prevention) Act [TADA], 1987 provided that proceedings under the Act may be held in camera;and the Special Courts have the power to protect witness anonymity by preventing the publishing of the witnesses' names and addresses. The constitutional validity of the provision was upheld in Kartar Singh v State of Punjab[146]. S.30 of the Prevention of Terrorism Act, 2002 [POTA] was similar to S.16, TADA. In People's Union for Civil Liberties v Union of India[147] the constitutional validity of the provision was challenged on the ground that right to cross examination is an important part of the right to a fair trial under Article 21 and fair trial includes the right for the defense to ascertain the true identity of an accuser. The Supreme Court, relying on the earlier decision in Kartar Singh v State of Punjab, held that the right to cross examination is not taken away by S.30; that identity of the witness would be withheld in exceptional circumstances where the life of the witness was in danger; and observed that

"The need for the existence and exercise of power to grant protection to a witness and preserve his or her anonymity in a criminal trial has been universally recognised. Provisions of such nature have been enacted to protect the life and liberty of the person who is able and willing to give evidence in support of the prosecution in grave criminal cases. A provision of this nature should not be looked at merely from the angle of protection of the witness whose life may be in danger if his or her identity is disclosed but also in the interest of the community to ensure that heinous offences like terrorist acts are effectively prosecuted and punished. It is a notorious fact that a witness who gives evidence which is unfavourable to an accused in a trial for terrorist offence would expose himself to severe reprisals which could result in death or severe bodily injury or that of his family members. If such witnesses are not given appropriate protection, they would not come forward to give evidence and there would be no effective prosecution of terrorist

144 Law Commission of India, Consultation Paper on Witness Identity Protection and Witness Protection Programmes, August 2004, available at http://lawcommissionofindia.nic.in/Consultation%20paper%20on%20witness%20identity%20Prot ection%20and%20witness%20protection%20programmes%20web%20page.pdf

145 Law Commission of India, 198th Report on Witness Identity Protection and Witness Protection Programmes, August 2006, pg 4, available at http://lawcommissionofindia.nic.in/reports/rep198.pdf

146 (1994) (3) SCC 569

147 (2004)9 SCC 580

offences and the entire object of the enactment may possibly be frustrated, under compelling circumstances this can be dispensed with by evolving such other mechanism, which complies with natural justice and thus ensures a fair trial."

After the repeal of Prevention of Terrorism Act, 2002, the provision for witness protection was included in the Unlawful Activities (Prevention) Act, 1967[148] by an amendment in 2004.

5. With regard to cases of sexual violence and protection of identity of the victim, S.228A IPC protects the anonymity of the victim and prohibits disclosure of the identity of the victim in cases of rape, except in certain circumstances. The Supreme Court in State of Punjab v Ramdev Singh[149] has also recommended that in the judgments of the lower Court, High Court and Supreme Court in cases relating to sexual offences, the name of the victim should not be published as it would be in "keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence". Another provision for witness protection is found in S.327, Code of Criminal Procedure which provides that trial of rape shall be conducted in camera, and that a woman Judge or Magistrate may conduct the trial as far as practicable. It also provides that it is unlawful for any person to print or publish any matter in relation to such proceedings except with the permission of the court. Further, S.273, Code of Criminal Procedure 1973 provides that all evidence taken during the course of the trial shall be taken in the presence of the accused or his pleader, but in cases where the evidence is to be recorded of a woman below the age of eighteen years who has alleged rape or any other sexual offence, then the Court may take appropriate measures to ensure that the woman is not confronted by the accused while at the same time ensuring the right of cross examination of the accused. This proviso to S.273 was inserted by the Criminal Law (Amendment) Act 2013 following the directions of the Supreme Court in Sakshi v Union of India[150]. Further, the Delhi High Court has notified Guidelines for recording of evidence of vulnerable witnesses in criminal matters, as discussed above. However, there is currently no statutory regime for providing physical protection to witnesses and complainants in cases of violence against women.

6. The Delhi High Court in judgment dated 14.10.2003 in Neelam Katara v Union of India[151], in a case of alleged murder, laid down guidelines for witness protection in cases punishable with death and/or life imprisonment. These guidelines are reproduced below:

(1) Definitions:

a) ""Witness" means a person whose statement has been recorded by the Investigating Officer under Section 161 Cr. P. C. pertaining to a crime punishable with death or life imprisonment.

b) "Accused" means a person charged with or suspected with the commission of a crime punishable with death or life imprisonment.

c) "Competent Authority" means the Member Secretary, Delhi Legal Services Authority.

148 Section 44, Unlawful Activities (Prevention) Act, 1967

149 (2004) 1 SCC 421

150 2004(6) SCALE 15

151 Crl.W.No.247 of 2002

d) Admission to protection: The Competent Authority, on receipt of a request from a witness shall determine whether the witness requires police protection, to what extent and for what duration.

(2) Factors to be Considered:

In determining whether or not a witness should be provided police protection, Competent Authority shall take into account the following factors:

(i) The nature of the risk to the security of the witness which may emanate from the accused or his associates.

(ii) The nature of the investigation or the criminal case.

(iii) The importance of the witness in the matter and the value of the information or evidence given or agreed to be given by the witness.

(iv) The cost of providing police protection to the witness.

(3) Obligation Of The Police:

(1) While recording statement of the witness under Section 161 Cr. P.C., it will be the duty of the Investigating Officer to make the witness aware of the "Witness Protection Guidelines" and also the fact that in case of any threat he can approach the Competent Authority. This the Investigating Officer will inform in writing duly witness.

(2) It shall be the duty of the Commissioner of Police to provide security to a witness in respect of whom an order has been passed by the Competent Authority directing police protection.

We further direct that the respondent, State shall give due publicity to the guidelines framed. We make it clear that the guidelines framed by us would not be in derogation of the powers of the concerned criminal court, if it forms an opinion that a witness requires police protection to so direct."

7. The Supreme Court in Zahira Habibulla H. Sheikh and Another v State of Gujarat and Other[152] called for urgent legislative measures to emphasize prohibition against tampering with witness, victim or informant. It also directed that the State of Gujarat "ensure that the witnesses are produced before the concerned Court whenever they are required to attend that Court and necessary protection shall be afforded to them so that they can depose freely without any apprehension of threat or coercion from any person."

8. The Law Commission of India has extensively dealt with the issue of witness protection. In its Consultation Paper on Witness Identity Protection and Witness Protection Programmes[153], a review of the earlier Law Commission reports on the subject (the 14th, 154th, 172nd and 178th Reports) has been given; and it also provides a detailed analysis of various witness protection programs across the world. The paper stressed on the importance of balancing the protection of the identity of the witness with the protection of the right of the accused to a fair public trial. The subsequent 198th Law Commission Report on Witness Identity Protection and Witness Protection Programmes dealt with witness identity protection during investigation and in Court

152 (2004) 4 SCC 158, judgment dated 12.04.2004

153 Law Commission of India, Consultation Paper on Witness Identity Protection and Witness Protection Programmes, August 2004, available at http://lawcommission of India.nic.in/Consultation%20paper%20on%20witness%20identity%20Prot ection%20and%20witness%20protection%20programmes%20web%20page.pdf

in cases exclusively triable by the Sessions Court and other equivalent Special Courts; and witness protection programmes outside Court. It gave detailed recommendations on both the issues. A Draft Bill was provided for the issue of witness identity protection.

9. **Important recommendations in the 198th Law Commission Report:** It recommended witness identity protection during the stages of investigation, inquiry and trial, and referring to the limited provisions of witness identity protection in the anti terrorism laws, recommended that there was a need for specific provisions that a witness anonymity order be passed where the life or property of the witness or the life or property of his or her relatives are in danger. It also distinguished between the protections given to the victim, and protection to other witnesses.

The following recommendations were made:

During investigation: It recommended a procedure for seeking witness identity protection at the stage of investigation, by way of an application to be presented to the Magistrate by the police through the Public Prosecutor; and at the stage of investigation there is no need to hear the accused or giving him an opportunity[154].

It further recommended that in every such application, the true identity of the threatened witness, and any other particulars which may lead to the identification of the threatened witness, shall not be mentioned, and instead a pseudonym or a letter of English alphabet shall be mentioned to identify the threatened witness, but the true identity and other particulars shall be disclosed to the Magistrate.

During inquiry: When the Police applies through the public prosecutor before the Magistrate for a preliminary order granting anonymity during the stage of inquiry, the Magistrate has to conduct a preliminary or voir dire inquiry as to whether the witness's life or property or that of his relatives is in danger. An in camera hearing is necessary. The accused may be heard separately and not in the presence of the victim or witness who are not known to the accused[155].

Before commencement of recording of statements of witnesses: In respect of other witnesses whose identity protection has not been sought during investigation or inquiry but where it is still considered necessary and in the case of fresh witnesses to be examined at the trial, there must again be an opportunity to the prosecution to apply for maintaining anonymity during the trial and, if need be, thereafter[156]. Keeping in mind the long delays in trial, it also recommended that the protection granted by the Magistrate or by the Sessions Court must last till the completion of the trial in the Sessions Court.

During trial: If witnesses have been given pseudonyms prior to the commencement of trial, then further proceedings should be held on the basis of the same pseudonyms. A two way television or video link and two way audio link for recording evidence of victims and witnesses not known to the accused and for whom anonymity is considered necessary was also recommended[157]. With regard to victims, it was proposed that the evidence at the trial would be by use of a two way close circuit television or video-link and two way audio system so that the victim need not depose in the immediate

154 Law Commission of India, 198th Report on Witness Identity Protection and Witness Protection Programmes, August 2006, pg 111, available at http://lawcommissionofindia.nic.in/reports/rep198.pdf

155 Ibid, pg 112-113

156 Ibid, pg 114

157 Ibid, pg 115

presence of the accused[158]. This proposal was made in the light of Sakshi v Union of India, where the Supreme Court made admissible video-conferencing method for purpose of hearing the victim or witnesses.

Witness Protection Programs: Witness Protection Programmes refers to witness protection outside the Court, and are a important factor in obtaining better conviction rates. In serious cases and at the instance of the public prosecutor, the witness (including victim) can be given a new identity by a Magistrate after conducting an ex parte inquiry in his chambers. In case of likelihood of danger of his life, he is given a different identity and may, if need be, even relocated in a different place along with his dependants till be trial of the case against the accused is completed. The expenses for maintenance of all the persons must be met by the State Legal Aid Authority through the District Legal Aid Authority. The witness has to sign a Memorandum of Understanding (MoU) which will list out the obligations of the State as well as the witness. Being admitted to the programme, the witness has an obligation to depose and the State has an obligation to protect him physically outside Court. Breach of MoU by the witness will result in his being taken out of the programme[159]. It also recommended other measures in the witness protection programme, such as re-location, survival allowance for a specific period of time, providing accommodation, transport, changes in the physiognomy or the body of the beneficiary etc[160].

10. Delhi Witness Protection Scheme, 2015: Delhi is now the first state in the country to notify a witness protection scheme[161]. The scheme defines "witness" as "any person who possess information or any document about any crime which is regarded by the competent authority as being material to any criminal proceedings and who has made a statement or who has given or agreed to give evidence in relation to such proceedings." The competent authority under the Scheme is the Member Secretary/ Officer on Special Duty of the Delhi State Legal Services who is responsible for issuing witness protection orders, and the Commissioner of Police shall be responsible for the overall implementation of witness protection orders. The scheme provides for protection of identity and other protection measures (defined as action taken by the court taking evidence during the testimony to ensure that witnesses may testify free of intimidation or fear for their and their family's lives, reputation and property and includes measures such as regular patrolling around witnesses' house; in camera trials; presence of support person during recording of statement and deposition; temporary change of residence to a relatives' house; use of vulnerable witness courtrooms; monitoring of mail and telephone calls etc.) An application for witness protection may be made by the witness, his family member, his legal counsel or Investigating Officer/ Station House Officer to the competent authority. The competent authority shall call for a "Threat Analysis Report" from the concerned police station. The report shall then categorize the threat to the witness, if any, as per the three categories provided in the scheme. The Scheme provides that an application may be disposed off in seven days from the date of filing. The witness protection order shall be implemented by a dedicated cell of the Delhi Police called Witness Protection Cell.

158 Ibid, pg 116

159 Ibid, pg 8

160 Ibid, pg 179182

161 Delhi Witness Protection Scheme, 2015 notified on 30.07.2015

Recommendations:

It is recommended that this Hon'ble Court direct all states to formulate witness protection schemes which are in line with the recommendations made by the Law Commission of India.

7. SENTENCING POLICY

There is a lot of confusion in the judgments of this Hon'ble Court on the issue of sentencing generally. In some judgments, the emphasis is on deterrence, in others on reformation ('therapeutic value of sentencing'). Some seem to emphasize the socioeconomic status of the accused as playing a role, while others do not.

In the final analysis, the sentence imposed appears to be based on a subjective decision of the judge in question. This is particularly evident in the matter of the death penalty as the judgment of the this Hon'ble Court in Bachan Singh v. State of Punjab[162] awarding different accused for the same crime.

Although the rarest of the rare is stated to be an objective test, it can be fairly subjective. Hence, there is a need for a well-defined sentencing policy to be articulated by this Court. It is to be noted however, that in the case of rape – this Court has indicated that a settlement or compromise cannot be a basis for reducing the sentence.

Statutory Provisions

The Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973 lays down a framework for imposing sentences for offences under the Indian Penal Code

- Section 53 of the IPC provides for the types of punishment that can be imposed on offenders liable under the IPC, namely, death, imprisonment for life, rigorous or simple imprisonment, forfeiture of property and fine.
- Section 29 of the Cr.P.C lays down the range of sentence that may be passed by Magistrates, depending on their jurisdiction. Section 325 of the Cr.P.C lays down the procedure if a Magistrate is of the opinion that the accused ought to be given sentence more severe that what he is empowered to inflict.
- Section 30 lays down the sentences that the High Court and Sessions Court can pass.
- Section 354 (3) of the Cr.P.C notes that when the conviction is punishable with death, the judgment shall state the special reasons for such sentence, if awarded.
- Section 360 of the Cr.P.C lays down the procedure for issuing an order to release a person on probation of good conduct or after admonition, provided special reasons are recorded under Section 361 of the Cr.P.C.
- Pursuant to the Criminal Law (Amendment) Act, 2013, certain sections of the Indian Penal Code, 1860, have been amended. The CLA has introduced sentencing on the basis of the official rank of the convict, position of authority or dominance of the convict and circumstances of the crime (communal/sectarian violence, pregnancy, mentally/physically disabled woman).

The following sections in the Indian Penal Code provide for the various grades of punishment applicable to cases of sexual offences:

162 (1980) 2 SCC 684

S.354 Assault or criminal force to woman with intent to outrage her modesty - Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.

S.354A.Sexual harassment and punishment for sexual harassment

1. A man committing any of the following acts
    i) physical contact and advances involving unwelcome and explicit sexual overtures; or
    ii) a demand or request for sexual favours; or
    iii) showing pornography against the will of a woman; or
    iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.
2. Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of subsection (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.
3. Any man who commits the offence specified in clause (iv) of subsection (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

S.354B. Assault or use of criminal force to woman with intent to disrobe - Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

S.354C. Voyeurism Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1 For the purpose of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2 Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

S.354D. Stalking (1) Any man who—

i. follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or

ii. monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking; Provided that such conduct shall not amount to stalking if the man who pursued it proves that

i. it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or

ii. it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

iii. in the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

S.376. Punishment for rape

1. Whoever, except in the cases provided for in subsection (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

2. Whoever—

a) being a police officer, commits rape,

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

c) being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

g) commits rape during communal or sectarian violence; or

h) commits rape on a woman knowing her to be pregnant; or

i) commits rape on a woman when she is under sixteen years of age; or

j) commits rape, on a woman incapable of giving consent; or

k) being in a position of control or dominance over a woman, commits rape on such woman; or

l) commits rape on a woman suffering from mental or physical disability; or

m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

n) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation For the purposes of this subsection,

a) "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any Law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government, or the State Government;

b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861;

d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

S.376A.Punishment for causing death or resulting in persistent vegetative state of victim Whoever, commits an offence punishable under subsection (1) or subsection (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

S.376B. Sexual intercourse by husband upon his wife during separation Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine. Explanation In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

S.376C.Sexual intercourse by person in authority.Whoever, being—

a) in a position of authority or in a fiduciary relationship; or

b) a public servant; or

c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or

d) on the management of a hospital or being on the staff of a hospital, abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than 5 years, but which may extend to ten years, and shall also be liable to fine.

Explanation 1: In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

Explanation 2: For the purposes of this section, Explanation I to section 375 shall also be applicable.

Explanation 3: "Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4: The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in Explanation to subsection (2) of section 376.

S.376D.Gang rape Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine;Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim; Provided further that any fine imposed under this section shall be paid to the victim.

S.376E. Punishment for repeat offenders Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.

International Law on Sentencing

While interpreting the scope of fundamental rights expressly guaranteed by the Constitution, regard must be given to International Conventions and the existing International human rights norms. India ratified the International Covenant on Civil and Political Rights (ICCPR) in 1979. Articles 6 of the ICCPR can be read in, and/or given effect in interpreting and enforcing fundamental rights, in particular, Article 21 of the Constitution. Article 6, ICCPR, reads as follows:

(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

.....

(6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

Broadly, for countries that retain the death penalty, Article 6, ICCPR imposes a twofold obligation, namely to restrict the death penalty to 'most serious crimes' and to reduce the number of capital offences and progressively move towards its abolition.[163] The meaning and scope of 'most serious crimes' has been laid as follows:

- States are not free to claim they comply with it merely because the crime in question is seen as serious in their specific context.[164]
- Not going beyond intentional crimes with lethal or other extremely grave consequences.[165]
- Offences should be life-threatening, in the sense that this is a very likely consequence of the action.[166]
- Only intentional killing fits the definition of most serious crimes.[167]
- Until the death penalty is fully abolished, retentionist States must ensure that the death penalty is imposed only for those crimes that involve intentional killing.[168]

The obligation to progressively reduce the number of crimes that attract the death penalty affirms that the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment might be imposed, with a view to the desirability of abolishing this punishment in all countries".[169] The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has observed that that the concept of 'most serious crimes' must be informed by the objective of progressive restriction of the scope of capital punishment with a view to its abolition.[170] In his report of a mission to India, he specifically recommended that the Indian legislation regarding the imposition of the death penalty should be reviewed to provide that the death penalty may be imposed for the most serious crimes only, namely only for those crimes that involve intentional killing.[171]

The introduction of the Criminal Law (Amendment) Act, 2013 which imposes death penalty for repeat rape offenders and rape that results in victim's deathhas been alluded to with concern in the UN Secretary General's reports to the UN General Assembly and the Human Rights Council. This observation appears in paragraphs that describe 'Member States

163 Report of the Secretary General, E/2015/49 at para 129(f)

164 Report of Rapporteur on Extrajudicial, summary or arbitrary executions, A/67/275, 9 August 2012, at para 38

165 ECOSOC Resolution, E/1984/84

166 Report of the Secretary General, E/2000/3, 31 March 2000 atpara 79

167 Report of Rapporteur on Extrajudicial, summary or arbitrary executions, A/67/275, 9 August 2012, paras 37, 66 and 130

168 Report of the Secretary General, A/HRC/27/23, 30 June 2014 atpara 72

169 UN General Assembly Resolution 2857 (XXVI) on Capital Punishment, dated 20 December 1971

170 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/67/275, 9 August 2012 at paras 39 to 43.

171 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/23/47/Add.1, 26 April 2013 at para 106

that have extended or enlarged the scope of capital punishment".[172] Further, the Special Rapporteur on Violence against Women during her mission to India in 2013 made the following recommendations:

> *"(c) Amend the Criminal Law (Amendment) Act, 2013 and in particular review the provisions that provide for the death penalty in Section 376A; include a definition of marital rape as a criminal offence; expand the scope of protection of the law and include other categories of women, including unmarried women, lesbian, transgender and intersex women, religiousminorities and underage citizens; and define gang rape as multiple crimes requiring appropriate punishment (section 376D).*[173]

The above recommendation shows that the death penalty for rape is not acceptable as a measure to protect women from sexual violence. Measures to counterviolence against women have to be in accordance with international human rights standards and death penalty for rape under Section 376, IPC is in violation of Article 6 of the ICCPR.

Recommendations at the National Level

In India neither the legislature nor the judiciary has issued structured sentencing guidelines. The Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, chaired by Dr. Justice V.S. Malimath, in 2003, had recommended that a Statutory Committee be set up to lay down sentencing guidelines in order to bring about certain regulations and predictability in the matter of sentencing. In 2008, the Committee on Draft National Policy on Criminal Justice (the Madhav Menon Committee) reasserted the need for statutory sentencing guidelines. The Malimath Committee had noted that

- for many offences under the IPC only the maximum punishment is prescribed and for some offences the minimum may be prescribed as it leaves a lot to the discretion of the judge.
- the Law Commission in its 47th report stated that a proper sentence is a composite of many factors, the nature of offence, the circumstances extenuating or aggravating the offence, the prior criminal record if any of the offender, the age of the offender, the professional, social record of the offender, the background of the offender with reference to education, home life, the mental condition of the offender, the prospective rehabilitation of the offender, the possibility of treatment or training of the offender, the sentence by serving as a deterrent in the community for recurrence of the particular offence.
- offenders also have to be classified as a casual offender, an offender who casually commits a crime, an offender who is a habitual, a professional offender like gangsters, terrorist or one who belongs to mafia and different kinds of punishments so far as the offenders are concerned. In fixing a sentence many factors are relevant, the nature of offence, the mode of commission of the offence, the utter brutality of the same, depravity of the mind of the man.

172 Report of the Secretary General, A/HRC/24/18, 1 July 2013 at para 13; Report of the Secretary General, E/2015/49 at para 24

173 Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/26/38 Add.1, April 2014 at Para 78

Objective of Punishment

There is no clarity on the objective of punishment as such. As held by this Court in the case of Narinder Singh v. State of Punjab[174]

> *"14. The law prohibits certain acts and/or conduct and treats them as offences. Any person committing those acts is subject to penal consequences which may be of various kinds. Mostly, punishment provided for committing offences is either imprisonment or monetary fine or both. Imprisonment can be rigorous or simple in nature. Why are those persons who commit offences subjected to such penal consequences? There are many philosophies behind such sentencing justifying these penal consequences. The philosophical/jurisprudential justification can be retribution, incapacitation, specific deterrence, general deterrence, rehabilitation, or restoration. Any of the above or a combination thereof can be the goal of sentencing.*
>
> *15. Whereas in various countries, sentencing guidelines are provided, statutorily or otherwise, which may guide Judges for awarding specific sentence, in India we do not have any such sentencing policy till date. The prevalence of such guidelines may not only aim at achieving consistencies in awarding sentences in different cases, such guidelines normally prescribe the sentencing policy as well, namely, whether the purpose of awarding punishment in a particular case is more of a deterrence or retribution or rehabilitation, etc. In the absence of such guidelines in India, the courts go by their own perception about the philosophy behind the prescription of certain specified penal consequences for particular nature of crime. For some deterrence and/or vengeance becomes more important whereas another Judge may be more influenced by rehabilitation or restoration as the goal of sentencing. Sometimes, it would be a combination of both which would weigh in the mind of the court in awarding a particular sentence. However, that may be a question of quantum.*
>
> *16. What follows from the discussion behind the purpose of sentencing is that if a particular crime is to be treated as crime against the society and/or heinous crime, then the deterrence theory as a rationale for punishing the offender becomes more relevant, to be applied in such cases. Therefore, in respect of such offences which are treated against the society, it becomes the duty of the State to punish the offender. Thus, even when there is a settlement between the offender and the victim, their will would not prevail as in such cases the matter is in public domain. Society demands that the individual offender should be punished in order to deter other effectively as it amounts to greatest good of the greatest number of persons in a society. It is in this context that we have to understand the scheme/ philosophy behind Section 307 of the Code."*

A matter of discretion

While law may prescribe a minimum, it also provides a maximum and leaves it to the judge to decide the sentence. This raises the issue of discretion as mentioned in the case of Sumer Singh v. Surajbhan Singh[175]

> *"33. It is seemly to state here that though the question of sentence is a matter of discretion, yet the said discretion cannot be used by a court of law in a fanciful and whimsical manner. Very strong reasons on consideration of the relevant factors*

174 (2014) 6 SCC 466

175 (2014) 7 SCC 323

have to form the fulcrum for lenient use of the said discretion. It is because the ringing of poignant and inimitable expression, in a way, the warning of Benjamin N. Cardozo in The Nature of the Judicial Process:

"The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in social life'."

34. In this regard, we may usefully quote a passage from Ramji Dayawala & Sons (P) Ltd. v. Invest Import: (SCC p. 96, para 20)

"20. ... when it is said that a matter is within the discretion of the court it is to be exercised according to wellestablished judicial principles, according to reason and fair play, and not according to whim and caprice. 'Discretion', said Lord Mansfield in R. v. Wilkes, 'when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular' (see Craies on Statute Law, 6th Edn., p. 273)."

35. In Aero Traders (P) Ltd. v. Ravinder Kumar Suri the Court observed: (SCC p. 311, para 6)

"6. ... According to Black's Law Dictionary 'judicial discretion' means the exercise of judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right. The character, and, as used with reference to discretion exercised judicially, it implies the absence of a hardandfast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate. (See 27 Corpus Juris Secundum, p. 289.) When it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice and not according to private opinion; according to law and not humour. It only gives certain latitude or liberty accorded by statute or rules, to a Judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him."

Thus, the Judges are to constantly remind themselves that the use of discretion has to be guided by law, and what is fair under the obtaining circumstances.

36. Having discussed about the discretion, presently we shall advert to the duty of the court in the exercise of power while imposing sentence for an offence. It is the duty of the court to impose adequate sentence, for one of the purposes of imposition of requisite sentence is protection of the society and a legitimate response to the collective conscience. The paramount principle that should be the guiding laser beam is that the punishment should be proportionate. It is the answer of law to the social conscience. In a way, it is an obligation to the society which has reposed faith in the court of law to curtail the evil. While imposing the sentence it is the court's accountability to remind itself about its role and the reverence for the rule of law. It must evince the rationalised judicial discretion and not an individual perception or a moral propensity. But, if in the ultimate

eventuate the proper sentence is not awarded, the fundamental grammar of sentencing is guillotined. Law cannot tolerate it; society does not withstand it; and sanctity of conscience abhors it. The old saying "the indecent manner and the rainbow of mercy, for no fathomable reason, should be allowed to rule. True it is, it has its own room, but, in all circumstances, it cannot be allowed to occupy the whole accommodation. The victim, in this case, still cries for justice. We do not think that increase in fine amount or grant of compensation under the Code would be a justified answer in law. Money cannot be the oasis. It cannot assume the centre stage for all redemption. Interference in manifestly inadequate and unduly lenient sentence is the justifiable warrant, for the Court cannot close its eyes to the agony and anguish of the victim and, eventually, to the cry of the society. Therefore, striking the balance we are disposed to think that the cause of justice would be best subserved if the respondent is sentenced to undergo rigorous imprisonment for two years apart from the fine that has been imposed by the learned trial Judge.

37. Before parting with the case we are obliged, nay, painfully constrained to state that it has come to the notice of this Court that in certain heinous crimes or crimes committed in a brutal manner the High Courts in exercise of the appellate jurisdiction have imposed extremely lenient sentences which shock the conscience. It should not be so. It should be borne in mind what Cicero had said centuries ago:

"It can truly be said that the Magistrate is a speaking law, and the law a silent Magistrate.28"

38. A few decades ago thus spoke Felix Frankfurter:

"For the highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law of which we are all guardians—those impersonal convictions that make a society a civilized community, and not the victims of personal rule."29

39. We part with the aforesaid reminder."

Doctrine of Proportionality

Proportionality as a legal principle in criminal law refers to the balance between the offence perpetrated and the corrective measure or the punishment imposed upon the offender.

Article 29(2) of the Universal Declaration on Human Rights, 1948 states that *"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."* Article 6 of the International Covenant on Civil and Political Rights provides that "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of commission of crime and not contrary to the provisions of the present Covenant." Article 6 (2) of the International Covenant on Civil and Political Rights, 1966 states that ""sentence of death may be imposed only for the most serious crimes".

The Supreme Court of Canada in R v Oakes[176], directed courts to examine the following in order to achieve proportionality:

i) Is the measure adopted fair, just and non arbitrary?

ii) Is it rationally relatable to the object sought to be achieved?

176 (1986) 1 SCR 103

iii) Is it carefully designed to achieve the objective?

iv) Do the means employed infringe fundamental rights as little as possible (Is there a lesser intrusive manner to achieve the object? The principle of least restrictive alternative)

v) Is there is a balance between the right impaired and the objective that it intends to achieve

Proportionality is an essential element of the Rule of Law and is also implicit in Articles 14, 19 and 21 of the Constitution of India. However, the concept of proportionality is largely discussed by courts in cases involving the death penalty and is the basis for the development of the principle of "rarest of rare" cases wherein death penalty may be awarded. However, unlike other jurisdictions, where Courts have laid down a well defined test or standard to examine whether a legislative measure is proportionate, this Hon'ble Court has taken a narrow view by equating proportionality with the concept of 'just deserts' in the case of State of UP v Sanjay Kumar.[177]

The following sections in Indian criminal law give importance to the principle of proportionality:

- Under section 63 IPC, the fine imposed must not be excessive.
- Under section 375, Cr.PC, where the accused pleads guilty, there shall be no appeal except only to the extent or legality of the sentence in case of guilty plea.
- As per proviso to section 385 (2), Cr.P.C, the court may dispose of appeals limited only to the "extent and legality of the sentence" if so framed without sending for the records of the case.
- Section 385(3) Cr.P.C deals with appeals only on the ground of severity of the sentence

Discussions on judgments on this Court on proportionality

The principle of proportionality is implicit in Article 14, 19 and 21 of the Constitution. In Bachan Singh v. State of Punjab (1982) 3 SCC 24, J. Bhagwati in dissenting opinion observed:

> *"Proportionality principle constitutes an important constitutional criterion for adjudging the validity of a sentence imposed by law. If a law provides for imposition of a sentence which is disproportionate to the offence, it would be arbitrary and irrational and would not pass the test of reason, would be contrary to the rule of law and void under Article 14, 19 and 21"*

The Supreme Court in the case of State of Rajasthan v. Vinod Kumar[178] stated that the punishment should always be proportionate /commensurate to the gravity of offence and in the past had also mentioned that proportion between crime and punishment is a strong influence in the determination of sentences.[179] This court has laid that the nature and gravity of the crime but not the criminal which are germane for consideration of appropriate punishment in a criminal trial, the Court in the case of Ravji v. State of Rajasthan[180] stated that the punishment to be awarded for a crime should be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should respond to the society's cry for justice against the criminal.

177 (2012)8 SCC 537

178 (2012) 6 SCC 770 at para 23

179 (State of M.P. v.MunnaChoubey (2005) 2 SCC 710 at para 12

180 1996 (2) SCC 175

However, unfortunately, no clear and consistent principles emerge even in the cases where proportionate sentencing is examined. Although there is no doubt that sentencing must be individualised and involve hearing the person convicted, there is a confusion as to whether it involves an examination of the nature and gravity of the offence alone or an analysis of the mitigating and aggravating circumstances around the offence and the offender.

Aggravating and Mitigating Factors

While determining the quantum of sentence, the Court may give due consideration into the aggravating and mitigating factors. However, the relative weight to be given to these factors depends on the facts and circumstances of the particular case.[181] Aggravating and mitigating factors in awarding death penalty have not been stipulated by statutory provisions in India.

In Machi Singh v. State of Punjab[182] it was held that death penalty may be imposed under S. 302 of the IPC, after considering the (i) manner of commission of murder; (ii) motive for commission of murder; (iii) antisocial or socially abhorrent nature of the crime; (iv) magnitude of crime; (v) personality of victim of murder, eg. helpless woman. It also noted the following propositions that emerged from Bachan Singh v. State of Punjab: (i) the death penalty need not be inflicted except in gravest of extreme culpability; (ii) the circumstances of the offender along with the circumstances of the crime are to be taken into account; (iii) life sentence is the rule and death sentence is an exception; and (iv) the aggravating and mitigating circumstances have to be balanced.

Sexual Offences cases

In rape cases, section 376A (punishment for causing death or persistent vegetative state during commission of offence of rape) Section 376E (punishment for repeat offenders under Section 376 and 376A), permit imposition of death penalty. This Hon'ble Court has held that in the award of death sentence (involving a rape and murder) even if the aggravating circumstances are satisfied to the fullest extent and there are no mitigating circumstances favouring the accused, the rarest of rare test will still have to be applied.[183]

Despite the deletion of the provision on exercise of discretionary power by the Criminal Law (Amendment) Act, 2013 and the judgment of the Hon'ble Court in the case of Shimbhu v State of Haryana[184] where it was held that "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 and it is an offence against the society and is not a matter to be left for the parties to compromise and settle". The High Courts in India continue to consider mediation between the parties in a rape case, as seen in the recent order of the High Court at Madras on 18.06.2015 in V. Mohan v. State represented by The Inspector of Police[185], where mediation was ordered between the rape survivor and the rape accused.

Following this case, it was reiterated by the Supreme Court in State of Madhya Pradesh v. Madanlal[186] that "in a case of rape or attempt of rape, the conception of compromise under no circumstances can really be thought of." At present the law allows no scope for exercise of such discretionary powers and such judgments are not good in law.

181 Bachan Singh v. State of Punjab(1982) 3 SCC 24

182 (1983) 3 SCC 470 at paras 3240

183 ShankarKisanraoKhande v. State of Maharashtra (2013)5 SCC 546

184 (2014) 13 SCC 318

185 Crl. A. no. 402/2014

186 2015 (7) SCALE 261

Lastly, the Justice Verma Committee Report also noted that the fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.[187]

It is true that in a recent judgment of this Hon'ble Court delivered on 1st July, 2015 in State of Madhya Pradesh Vs. MadanLal, which held that mediation was not possible in rape cases, but it is our observation that judgments of this Hon'ble Court are being ignored or overlooked by other Courts. It is, therefore, recommended that this Hon'ble Court in its administrative jurisdiction should direct courts to follow certain guidelines while dealing with cases of crimes against women.

Position in Other Countries

Various countries around the world have developed detailed Sentencing Guidelines and identified aggravating and mitigating factors in cases of Rape / Sexual Violence. Some of them are as follows

1. United Kingdom: The Sentencing Council has introduced the Definitive Guidelines for Sexual Offences, under Section 120 of the Coroners and Justice Act 2009, in the United Kingdom. These are applicable to all offenders aged 18 and above, who are sentenced on or after 1 April 2014. The guidelines categorise sexual offences into specific categories, that is rape, assault with/without penetration, assault on children by family members or by a person in a position of trust, assault on children below the age of 13, assault on persons with a mental disorder, etc. Further, under each of these categories the aggravating factors and mitigating factors are specifically defined. Broadly, the aggravating factors for sexual offences are: (i) specific targeting of a particularly vulnerable victim; (ii) Offence committed whilst on licence; (iii) steps taken to prevent the victim reporting an incident or concealing evidence; (iv) Commission of offence whilst under the influence of alcohol or drugs; (v) Location of offence; (vi) timing of offence; and (vii) Blackmail or other threats made. In relation to sexual offences against children and persons with mental disorders the following are additional aggravating factors identified by the Council: (i) Severe psychological or physical harm; (ii) Ejaculation; and (iii) Pregnancy or STI as a consequence of offence, are also considered as aggravating factors.

   Further, under the relevant legislations in the UK, past convictions/ repeat offences are considered as an aggravating factor. Some of the mitigating factors identified by the Sentencing Council are: (i) Age and/or lack of maturity where it affects the responsibility of the offender; (ii) Mental disorder or learning disability, particularly where linked to the commission of the offence; (iii) No previous convictions or no relevant/recent convictions; (iv) Sexual activity was incited but no activity took place because the offender voluntarily desisted or intervened to prevent it (in cases of assault of a child below 13 years).

2. South Africa: Section 51 (3) (aA) of the Criminal Law (Sentencing) Amendment Act 38 of 2007, specifies the following factors which will not count as substantial and compelling circumstances to justify the imposition of a lesser sentence: complainant's previous sexual history; the apparent lack of physical injury to the complainant; the accused person's cultural or religious beliefs about rape; and any relationship between the accused person and the complainant prior to the offence being committed. Further, the Supreme Court of South Africa in S v Matyityi 2011

187 Justice Verma Committee Report, page 117, para 79 (ii) (c)

1 SACR 40 (SCA), the SCA, held the following are not mitigating factors: previous conviction in a related/unrelated case and rape victim's injuries.

3. Uganda: Section 34 of the Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions, 2013 lists the following as consideration in determining a sentence for defilement: (a) the age of the victim and the offender; (b) the nature of the relationship of the victim and the offender; (c) the violence, trauma, brutality and fear instilled upon the victim; (d) the remorsefulness of the offender; (e) operation of other restorative processes; or (f) the HIV/AIDS status of the offender. Further, Section 35 lays down the following aggravating factors in determining a sentence for defilement: (a) the degree of injury or harm; (b) whether there was repeated injury or harm to the victim; (c) whether there was a deliberate intent to infect the victim with HIV/AIDS; (d) whether the victim was of tender age; (e) the offender's knowledge of his HIV/AIDS status; (f) knowledge whether the victim is mentally challenged; (g) the degree of premeditation;(h) threats or use of force or violence against the victim; (i) knowledge of the tender age of the victim; (j) use or letting of premises for immoral or criminal activities; (k) whether the offence was motivated by, or demonstrating hostility based on the victim's status of being mentally challenged; or (l) any other factor as the court may consider relevant.Further, Section 36 lays down the following mitigating factors in determining a sentence for defilement: (a) lack of premeditation; (b) whether the mental disorder or disability of the offender was linked to the commission of the offence; (c) remorsefulness of the offender; (d) whether the offender is a first offender with no previous con viction or no relevant or recent conviction; (e) the offender's plea of guilty; (f) the difference in age of the victim and offender; or (g) any other factor as the court may consider relevant.

   Section 22 states that the following circumstances have to be considered in imposition of sentence of death in rape or defilement cases: (a) repeated acts of rape or defilement; (b) act done under a common purpose or conspiracy; (c) repeat an offender (d) by an offender knowing or having reasonable cause to believe that he or she has acquired HIV/AIDS; (e) repeatedly by an offender who is supposed to take primary responsibility of the child victim; (f) where the victim was gang raped or gang defiled; or (g) where the victim is disabled, mentally challenged, has sustained serious injuries arising from the infliction of grievous bodily harm; or any other grave circumstances.

4. Australia: Section 21A of Crimes (Sentencing Procedure) Act lays down the following as aggravating factors: (i) the victim was a police officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation or voluntary work (b) involvement of use of violence (c) involvement of use of a weapon (ca) involvement of use of explosives or a chemical or biological agent (cb) involvement of the offender causing the victim to take narcotic drug, alcohol or any other intoxicating substance (d) previous convictions (e) commitment of the offence in company (ea) commitment of offence in the presence of a child under 18 years of age (eb) commitment of the offence in the home of the victim or any other person (f) involvement of gratuitous cruelty (g) injury, emotional harm, loss or damage caused by the offence was substantial (h) offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability); (i) offence was committed without regard for public safety.

Therefore, a similar set of objective factors categorized as aggravating and mitigating factors, should be identified and applied as sentencing guidelines in India.

COORDINATED DELIVERY OF SERVICES

Currently, one of the major barriers to access to justice for survivors of violence is the non-coordinated delivery of services. The survivor has to visit different agencies like the police station, hospital, court, Child Welfare Committees (for POCSO cases) at different stages of the criminal justice system. These agencies operate in silos and there is no coordination between these different agencies. The survivor is left to navigate the system on her own. The process leads to the victim suffering revictimisation.

ONE STOP CENTERS

1) The establishment of One Stop Crisis Centers (OSCC) is based on a survivor-centered approach to providing services. A victim centered approach is defined as the systematic focus on the needs and concerns of a victim to ensure the compassionate and sensitive delivery of services in a non-judgmental manner. It seeks to minimize retraumatization associated with the criminal justice process by providing the support of survivor advocates and service providers, empowering survivors as engaged participants in the process.[188]

2) International evidence shows that one stop crisis centers (OSCCs) in different locations are found to be useful for survivors of different forms of violence. These centers are known to provide effective psychosocial care, medical care, emergency shelter services as well as handholding for survivors of violence against women in the course of their trial period. The establishment of an OSCC enables coordinated services for survivors of violence against women[189].

3) One stop crisis centers as a method of addressing violence against women have been operational in the western world for more than 2-3 decades and in South Asia for longer than a decade. Most of these models have been evaluated and there are critical lessons to be learnt from these models. Several OSCC models in countries such as Bangladesh, South Africa, England & Wales, Rwanda, Zambia and Australia have different histories and origin. The Australian rape crisis centre set up was an outcome of the feminist movement and is based in a community set up. This centre receives survivors who seek services for healing from the consequences of rape and who wish to engage in group therapy. The entire program is volunteer led, where in volunteers undergo six week training. While the Rape crisis centers in England &Wales run a sexual assault referral program (SARC) which operate as centers to provide emergency medico legal services and in some places they are not even able to provide medical treatment and care. The SARC centers after carrying out medico legal service refer for medical aid and psycho social services. Closer home are the Bangladesh OSCCs which provide medical, legal and psychosocial services , but the psycho social services are outsourced to NGOs and they are finding it difficult to sustain due to dependence on NGOs.

188 State of New Jersey, Division of Criminal Justice, 'Standards For Providing Services To victims Of Sexual Assault' (1998); Sourced from: http://www.njdcj.org/standar2.htm

189 WHO, Clinical and Policy Guidelines for Responding to Intimate Partner Violence and Sexual Violence, 2013, available at http://apps.who.int/iris/bitstream/10665/85240/1/9789241548595_eng.pdf

4) In the Indian context, two practices in relation to OSCC have been established since more than a decade. Dilaasa is a hospital based OSCC providing psychosocial support, health services, emergency shelter, legal aid and police support. This OSCC has now been replicated by the Government of Maharashtra, Health Department through its NRHM scheme in 11 additional hospitals. While these hospital based centers have proved successful in dealing with the survivors of violence at the initial stage they have been unable to provide support to the survivor through the process of prosecution and trial. This is due to the lack of support services for survivors of violence in the courts.

5) The second practice is that of Special cell for women and children in police stations. It is a collaborative effort of the MWCD and the TISS and has been replicated in different parts of the country to provide different services at the level of police stations.

6) Given this evidence from India, a 2 tier system is proposed for ensuring best and comprehensive services for survivors of VAW. The first tier is shall be hospital based OSCCs and the second tier shall be court based OSCCs

7) **Hospital based OSCC –**

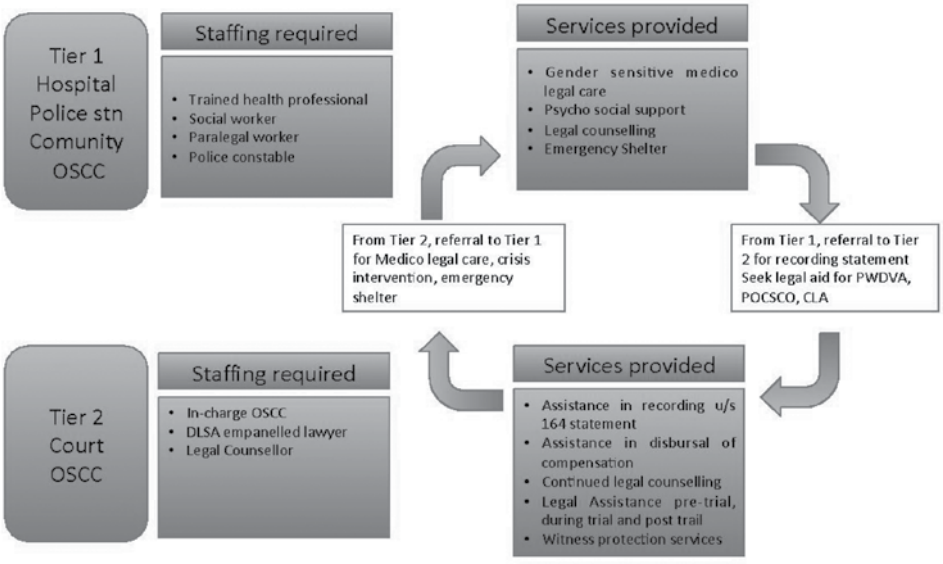
- ❖ OSCC housed in the hospital shall be treated as a department of the hospital. Health professionals of the hospital shall be oriented to screen patient population especially (women, children and trans gender people) for any form of violence and its health effects.
- ❖ The OSCC will have a trained team of crisis interventionists which shall be counselors and nurses. Besides these, the OSCC shall also have a doctor in charge of the OSCC who will work in close coordination with the OSCC team to ensure that survivors are receiving free medical care, counseling, police help and emergency shelter services. She/ he shall be deputed by the medical superintendent of the hospital.
- ❖ The hospital based OSCC shall make a provision of emergency shelter services within the hospital in case the survivor perceives a danger to her life.
- ❖ Health professionals of the hospital and not just the OSCC shall be trained in carrying out their therapeutic and medico legal roles as per law and shall be equipped to carry out their roles comprehensively.
- ❖ The OSCC shall have a provision to seek expertise of language interpreters for survivors speaking different languages as well as survivors who are unable to speak or hear. A handy list of special educators shall also be maintained at the level of the OSCC in order to facilitate effective communication with children reporting abuse.
- ❖ The OSCC shall also maintain a resource directory for additional services such as income generation, skill building, long term shelter services etc.
- ❖ The hospital based OSCCs shall be implemented in coordination with the health department, women and child department, women's commissions of respective states.

Court based OSCC

- ❖ The court OSCC at tier 2 shall have a dedicated room for receiving the survivor. It shall be used for the purpose of counseling, recording the statement of the

survivor. The court based OSCCs shall operate under the state legal services authorities.

- Staff of the tier 2 OSCC shall comprise of legal services advocate / legal services counselor of DLSA. The court OSCC shall be headed by a nominated officer of DLSA
- The role of the court OSCC shall be to assist the survivor of VAW right from the investigation to completion of trial . The survivor shall be assigned a permanent legal services advocate and her number shall be shared with the family of the survivor
- The OSCC shall assist in disbursal of compensation, witness protection and any other services as required by the survivor / survivor .
- The OSCC shall also work in close coordination with the public prosecutor and shall make a provision of counselors to accompany the survivor to the courts. The counselors and the lawyer assigned to the survivor shall be abreast with the court proceedings and shall communicate the progress of the case to the survivor from time to time Below are mentioned the pathways for survivors/ survivors reaching the tier 1 and tier 2 OSCCs



- The Ministry of Women and Child Development has also taken the initiative of establishing OSCCs, one per state. The MWCD has provided the autonomy to states to determine the location for the OSCC . The OSCCs could be in the community, hospitals, police stations etc .
- However it is argued that just one OSCC per state is inadequate for responding to survivors of violence against women. Further survivors from different districts may not be able to access OSCC . Hence it is suggested that at least 1 OSCC per district be established if a comprehensive response to VAW has to be provided.
- It is further suggested that in the absence of a OSC, every public hospital must have the following professionals to process a case of acid attack or sexual violence: a medical professional to conduct the medicolegal examination, an FSL professional to collect samples and if possible analyze the samples in the hospital, a professional providing psychosocial services and a list of lawyers empanelled with the concerned legal services authority.

INTEROPERABLE CRIMINAL JUSTICE SYSTEM

The Government of India has launched a scheme of connecting the different components of the criminal justice system under the Digital India program umbrella. Under the National eGovernance Plan (NeGP), "eKranti" or eGovernance is considered an essential pillar of the Digital India program[190] and focuses on the potential for transforming governance through technology. The rationale behind it is that "All databases and information should be in electronic form and not manual. The workflow inside government departments and agencies should be automated to enable efficient government processes and also to allow visibility of these processes to citizens. IT should be used to automate, respond and analyze data to identify and resolve persistent problems. These would be largely process improvements."[191]

One of forty four Mission Mode projects under the eKranti initiative is the Interoperable Criminal Justice System (iCJS). The iCJS aims to interlink several related applications, namely ePolice, eCourts, e Jails and eProsecution[192]. Currently, eCourts and ePrison applications are under implementation. The eCourts project's expected outcome is "connecting all the courts in the country to the National Judicial Data Grid through WAN and additional redundant connectivity to enable integration with the proposed interoperable criminal justice system..."[193]and the project is currently in Phase II as per reports[194].

The ePrisons project is also under implementation, with 35 states and 311 prisons on board[195].

Under the ePrisons initiative, the Prisoner Information Management System (PIMS) is under implementation in the Tihar Jail in Delhi. PIMS is a web based system and has been designed by the National Informatics Center. It is an online database of all relevant information on prisoners and would involve the uploading of information on the court proceedings that undertrials are involved in and the uploading of court orders. Uploading and updating of the court orders will be done by the Directorate of Prosecution, and the DSLSA is involved in training of the officers of the Directorate of Prosecution for using the software.

The Crime and Criminal Tracking Network and Systems (CCTNS) is a Mission Mode Project and aims to integrate and connect policing at all levels, and provide a platform for nationwide sharing of information on crimes and criminal investigation across various police organizations.

For the iCJS to be successful, it is imperative that the independent projects of eCourts, ePolice, ePrisons and eProsecution are fully functional.

Recommendation: It is suggested that this Hon'ble Court direct the concerned Ministries to provide status reports on the implementation of the project.

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190 Government of India, Digital India, EKranti: Electronic Delivery of Services, available at http://www.digitalindia.gov.in/content/ekrantielectronicdeliveryservices

191 Government of India, Digital India, EGovernance: Reforming Government through Technology, available at http://www.digitalindia.gov.in/content/egovernance%E2%80%93 reforminggovernmentthroughtechnology

192 Government of India, Press Information Bureau, Digital India, http://pib.nic.in/newsite/efeatures.aspx?relid=115276

193 Government of India, Department of Justice, eBook, page 69. See, http://doj.gov.in/e book.pdf

194 Supreme Court of India, ECommittee Supreme Court of India, Policy and Action Plan Document: Phase II of the eCourts Project, January 2014, available at http://supremecourtofindia.nic.in/ecommittee/PolicyActionPlanDocumentPhaseIIapproved 08012014indexed_Sign.pdf

195 National Prisons Information Portal, http://eprisons.nic.in/NPIP/Public/Home.aspx

REHABILITATION AND REPARATION FOR SURVIVORS OF VIOLENCE

The right to remedy and reparations refers to the obligation of the wrongdoing party to redress the wrong done to the victim. The right to remedy and reparations is well recognized in international human rights instruments, specifically:

1. Article 4 (d) of the Declaration on the Elimination of Violence against Women observes that States should develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to the mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they have suffered. States should also inform women of their rights in seeking redress through such mechanisms.

2. The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and serious violations of International Humanitarian Law, adopted by the General Assembly in 2005, start with the premise that "the State is responsible for ensuring that victims of human rights violations enjoy an individual right to reparation". The Basic Guidelines and Principles affirm that the modality of reparation must be proportional to the gravity of the violation and can include the following forms: restitution, as those measures to restore the victim to his/her original situation before the violation; compensation for any economically assessable damage; measures of satisfaction including, among others, the verification of the facts and full and public disclosure of the truth, the search for the whereabouts of the disappeared, public apologies, judicial and administrative sanctions against persons liable for the violations, commemorations and tributes to the victims; and guarantees of non-repetition.

   The right to reparation with regard to rape / sexual violence cases is linked to the due diligence principle and the failure of the State to meet its commitments under international law. General Recommendation 19 (1992) of the Committee on the Elimination of Discrimination against Women provides that "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation."

   The Hon'ble Supreme Court of India has noted that rape is in direct breach of India's obligations under international law. In Re: Indian Woman says gang raped on orders of Village Court published in Business and Financial News[196], this Hon'ble Court observed that "No compensation can be adequate nor can it be of any respite for the victim but as the State has failed in protecting such serious violation of a victim's fundamental right, the State is duty bound to provide compensation, which may help in the victim's rehabilitation."

VICTIM COMPENSATION IN INDIA

The Hon'ble Supreme Court in Delhi Domestic Working Women's Forum vs. Union of India[197] directed the National Commission for Women (NCW) to evolve a "scheme so as to wipe out the tears of unfortunate victims of rape''. In accordance with the directions NCW framed a Scheme for Relief and Rehabilitation of Victims of Rape.[198]

196 (2014) 4 SCC 786

197 (1995) SCC 1 14

198 NCW 'Revised Scheme for Relief and Rehabilitation of Victims of Rape' (15th April 2010)

Although the NCW scheme was envisaged to be in addition to the provisions of the Cr.P.C, it eventually did not become law.

The right to reparation and remedy is recognized in India under section 357 and section 357A of the Cr.P.C. The two sections are distinct from each other in terms of the authority awarding the compensation, and the conditions for award of compensation. Under S.357, the Court awards compensation, while under S.357A, the State Legal Services Authority or District Legal Services Authority is the authority responsible for disbursing of compensation.

The relevant provisions from the Code of Criminal Procedure 1973 have been reproduced below:

Section 357. Order to pay compensation.

1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment order the whole or any part of the fine recovered to be applied—

   a) in defraying the expenses properly incurred in the prosecution;

   b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

   c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

   d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented, before the decision of the appeal.

3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.

4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

Section 357A. Victim compensation scheme

1) Every State Government in coordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who, require rehabilitation.

2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1)

3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

5) On receipt of such recommendations or on the application under subsection (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in-charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

Section 357B. Compensation to be in addition to fine under Section 326A or Section 376D of Indian Penal Code The compensation payable by the State Government under section 357A shall be in addition to the payment of fine to the victim under section 326A or section 3760 of the Indian Penal Code. These provisions have been discussed below:

1. Interim relief and compensation: In Bodhisattwa Gautam v Subhra Chakraborty, it was held that jurisdiction to pay interim compensation shall be treated to be part of the overall jurisdiction of the Courts trying the offences of rape. In Suresh v State of Haryana, the Court recognized the importance of interim compensation, held that it is the duty of the Courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the Court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the Court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.

   The Code of Criminal Procedure 1973 contains provisions for the grant of interim relief, including compensation. S.357A(2) makes a provision for grant of interim compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation, on a recommendation by the Court. However it provides no guidance as to the stage at which interim compensation should be paid.

Practice in Delhi: In Delhi, the recommendation for grant of interim compensation is made by the court and also by the Station House Officer (S.H.O) of the concerned police station. While the recommendation by the court for grant of interim compensation is usually after the chargesheet is filed by the police and the Court takes cognizance of the matter, the recommendation from the police is done after filing of the FIR. Following the directive of the High Court of Delhi in Khem Chand and Ors v State of Delhi[199] the Delhi State Legal Services Authority is informed of the registration of a complaint of rape by the concerned Station House Officer (S.H.O.) of the police station. The S.H.O also recommends grant of interim compensation in appropriate cases, and on the basis of this recommendation DSLSA makes the necessary inquiry and grants the interim compensation. This system of payment of interim compensation is thus faster and more effective. However, this system is not followed in cases of child sexual abuse.

Cases of child sexual abuse: Rule 7(1) of the Protection of Children from Sexual Offences Rules 2012 provides that the Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation. In light of this provision, payment of interim compensation is only made on a recommendation by the Special Court. This leads to delay as the court considers interim compensation only on taking cognizance of the offence after the filing of charge-sheet.

Provision of medical benefits and other interim reliefs: S.357A(6) provides for those instances where the State or District Legal Services Authority is of the opinion that the victim needs immediate firstaid or medical treatment or any other interim relief. It may make an order for provision of such relief on a certificate of the concerned police officer. This type of compensation is not courtdirected and gives the concerned legal services authority the mandate to grant compensation.

2. Compensation at the conclusion of trial: As per S.357(1)(b), when the Court imposes a sentence of fine or a sentence (including a sentence of death) for which fine forms a part, the Court may order the whole or any part of the fine recovered to be given as compensation for any loss or injury caused by the offence, when the court is of the opinion that the compensation is recoverable by such person in a civil court. However, there shall be no payment of the fine before the period allowed for presenting the appeal has elapsed, and where the appeal has been presented, and then there shall be no payment of fine before the decision of the appeal.

   As per S.357(3), even in cases where the Court imposes a sentence of which fine does not form a part, then the Court has the power to order the accused person to pay compensation to the person who suffered loss or injury for the act of the accused.

   Appellate Court, High Court and Court of Session are also empowered to grant compensation.

199 ILR (2008) Supp. (5) Delhi 92

S.357A(3) supplements S.357 and provides that the trial court, at the conclusion of the trial, can make a recommendation to the State Legal Services Authority/ District Legal Service Authority for grant of compensation to the victim or her dependents in the following cases:

- Where the compensation awarded under S.357 is inadequate for the rehabilitation of the victim (for example, where the accused is poor and unable to pay the fine); or
- Where the cases end in acquittal or discharge and the victim has to be rehabilitated.

It must be noted that as per S.357B, the compensation payable by the State Government under S.357A is in addition to the payment of fine to the victim under S.326A or Section 376D of the IPC.

3. Application by victim or dependents: S.357A(4) provides that in cases where the offender is not traced or identified and where no trial takes place, the victim or dependents may make an application to the State or District Legal Services Authority for grant of compensation.

Loss or Injury

Both under section 357 (1) (b) and 357A, it is necessary for "loss or injury" to have taken place before a Court can award reparations to a victim. Would the fact of rape not constitute loss or injury – both psychological and physical or both?

The Report of the Special Rapporteur on Violence against Women on Reparations to Women who have been subjected to Violence notes that rape has both tangible and intangible consequences.[200]

Intangible consequences may include loss of virginity or loss of social standing, while intangible consequences include pregnancy or medical treatment. The Special Rapporteur notes:

> *"Although some of the intangible assets that are often taken from victims of sexual violence, such as virginity or social standing, cannot be returned, all the tangible assets of which victims of sexual violence are commonly stripped should be borne in mind. Communal and family ostracism, abandonment by spouses and partners and becoming unmarriageable or sick are all too commonly synonyms of material destitution, and the costs of ongoing medical treatment, pregnancy, abortions, and raising children resulting from rape, are all too real to deny. To date, no reparations programme has succeeded in fully reflecting the economic impact of raising children born of rape."*[201]

The Report of the Special Rapporteur recommends that reparations should not concentrate on violations of civil and political rights but should include crimes targeting women and girls. It must be acknowledged that same violations entail different harms for men and women, women and girls, and also for women and girls from specific groups.[202]

Rape consequently is a "loss or injury" within the meaning of the Cr.P.C with different consequences for women and children, and different groups within women.

200 Rashida Manjoo, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, A/HRC/14/22 (19th April 2010).

201 As above, page 22.

202 As above, page 33.

The Report of the Special Rapporteur also cautions against a limitation period in claiming compensation. The report notes, "Narrow applications deadlines or a closed list system may not allow different victims to come forward and claim reparations when they feel physically and psychologically prepared to do so."[203]

State Schemes for Victim Compensation

Now let us examine the State Schemes for Victim Compensation.

All States and Union Territories have notified Victim Compensation Schemes. There are wide discrepancies between the Schemes of different States. For example:

- In notification dated 12th July 2012 of the Home Department of the Government of Odisha, maximum limit of compensation for rape is Rs 1 lakh fifty thousand, which is the same in case of rape / sexual assault of child victims;
- The Delhi Victim Compensation Scheme provides a minimum compensation of Rs 2 lakhs for rape, and a maximum compensation of Rs 3 lakhs for rape (Notification dated 2nd February 2012, Home Department). Compensation in case of rape / sexual assault of a child in not separately provided for;
- The State of West Bengal vide notification dated 1st November 2012provides compensation of Rs 20,000/ in case of rape, and Rs. 30,000/ in case of rape of a minor;
- Limitation periods are provided in the State schemes for victim compensation; however the period of limitation varies. For example, the Delhi Victim Compensation scheme stipulates that no claim for compensation shall be entertained after a period of three years from the date of occurrence of the crime. The West Bengal Victim Compensation Scheme stipulates that no claim may be made by the victim after a period of six months from the date of the crime.
- With regard to the procedure for grant of compensation, the State Schemes direct the District Legal Services to examine the claim whenever a recommendation is made by a Court under section 357A subsection (2) or subsection (3), or when an application is made by the victim or his / her dependents directly to the State / District Legal Services Authority under section 357A (4). There are no guidelines laid down in any of the Schemes for how the State / District Legal Services Authority should examine or verify the contents of the claim.

A Right to Information application was made before the National Legal Services Authority on 9th July 2015 seeking information on the total number of recommendations for compensation received from the court by the State and District Legal Services Authorities in India in cases of rape and acid attack, and the number of cases where such compensation has been granted.

All the SLSA and DLSA responses have not been received, but the responses that have come show that very few survivors have benefited from the Schemes. For example, in five districts in Chattisgarh (Surajpur, Balod, Bilaspur, Ambikapur and Bemetara), courts have made no recommendations for grant of interim compensation in cases of rape and acid attack. In Maharashtra, the situation is similar as seen from the replies received from six of the District Legal Services Authorities (Nanded, Bhandara, Nandurbar, Buldana, Aurangabad, and Latur). There also, courts have made zero recommendations for grant of interim compensation. Only in the district of Wardha, five recommendations were made by the court for to the DLSA for grant of interim compensation in cases of rape. No such recommendations were made in cases of acid attacks.

203 As above, page 19.

Compensation in cases of sexual abuse of minors

Under the Protection of Children from Sexual Offences Act 2012, sexual offences of minors are of various types: penetrative sexual assault, non-penetrative sexual assault and sexual harassment. Under the Act, minors are both male and female children.

However, it can be seen that under the State victim compensation schemes, the compensation amount available to female and male minors might be different. This is because compensation is provided to a victim of "rape" where the victim is defined as female only. Male minor victims of penetrative sexual assault may be covered under provisions for "child abuse" but the compensation amount may be lower in such cases. For example under the Delhi Victim Compensation Scheme 2011, a victim of rape or her dependents may claim a maximum of Rs.3,00,000/ but a victim of child abuse is entitled to a maximum of Rs.50,000/ as compensation. A writ petition[204] is pending before the High Court of Delhi on this issue. It seeks to declare that the Schedule of the Delhi Victims Compensation Scheme, 2011 relating to victims of child sexual abuse and assault as contrary to Articles 14, 15 and 21 of the Constitution of India.

It is necessary to pose the following questions:

1. Should there not be a payment in rape cases unrelated to the finding of loss or injury, at least in relation to those who fall below a specified income criteria? Administrative reparation schemes are drafted with the intention of obviating some of the costs and difficulties associated with litigation.[205] In this regard, inquires by the SLSA / DLSA into claims of compensation for rape cases must be simple.
2. Should there not be an all India uniform maximum amount to be paid upon the lodging of an FIR in relation to rape cases? In the case of Laxmi vs. Union of India[206], the Hon'ble Supreme Court fixed an amount of Rs. three lakhs per acid attack victim. Similarly, a minimum amount should be fixed for victims of rape / sexual assault.
3. Should there not be compensation for those who do not file FIR's but are survivors of rape / sexual violence?

Recommendations

1. It is suggested that the practice in Delhi of grant of interim compensation by the Delhi State Legal Services Authority on a recommendation made by the police, should be adopted nationwide. After registration of cases of rape or acid attack, the concerned Station House Officer should make a recommendation for grant of interim compensation to the concerned Legal Services Authority. It is further suggested that to avoid delays in the payment of interim compensation in child sexual abuse cases, this method also be applied in those cases.
2. It is suggested that the trial court must inquire into and recommend compensation at the stage of bail proceedings of the accused.
3. It is suggested that any medical report be considered as adequate for the purpose of grant of compensation. In addition, women and children who are very poor or backward face greater hardships in reporting and accessing the criminal justice system. In cases of women and girls who are indigent, the SLSA/DLSA may consider waiving inquiry proceedings.

204 The Minor through Guardian Zareen v State (Government of NCT of Delhi), W.P. (Crl) 798/2015

205 Supra, footnote 2

206 (2015) 5 SCALE 77

4. It is suggested that directions be passed that the state Victim Compensation Schemes include all offences against minors as specified in the POCSO Act 2012, and that they do not discriminate against minor male victims/survivors of abuse. The scale of compensation should be uniform for both minor male and female victims/survivors.

5. In Re: Indian Woman says gang raped on orders of Village Court published in Business and Financial News (2014) 4 SCC 786:

   "...no rigid formula can be evolved as to have a uniform amount, it should vary in facts and circumstances of each case" (at para 18).

   Although the quantum to be paid may vary from case to case, it is recommended that an all India minimum amount be specified in relation to rape cases.

6. No limitation period should exist for a claim for compensation in case of rape.

7. Under section 357A, rehabilitation cannot be confined to payment of compensation. In accordance with The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, rehabilitation must include shelter, counseling, vocational rehabilitation, victim protection, or anonymity as appropriate.

8. In In re: Suo Moto Harassment and Physical Abuse of Ms.M[207]

   Ms. M, a lawyer, approached the Supreme Court seeking intervention in a case of gang rape and harassment by her husband's family members. The Supreme Court directed the DSLSA to extend all support and assist Ms. M. The DSLSA, in a laudatory step, has empanelled the woman in its panel of lawyers and she is currently working in a Child Welfare Committee in Delhi. Such support should be extended in other cases as well.

9. The SLSA / DLSA must take initiatives to spread awareness about Victim Compensation Schemes through pamphlets, media, radio, and reaching out to victims in a proactive manner.

As lack of funds is cited as a problem in implementation of the Schemes, it is recommended that the Central government provide a one time fund to the States, following which the State governments must allocate funds for the Scheme.

VICTIM PROTECTION SERVICES

It is a known fact that there is a gap between actual incidence of sexual violence and what gets reported. There is also a difference between what is reported by survivors and what gets registered by the police.

Notions of shame and honour associated with rape often prevent survivors and their families from divulging the crime. The insensitivity and long delays of the criminal justice system also deter survivors from reporting the crime to the police. In several cases, the perpetrator may be an uncle, father, young cousin, brother etc. In such situations the family may not want them arrested. Evidence from CEHAT's implementation of a comprehensive health care response in Mumbai hospitals brought to light factors such as economic dependency of the accused's family on the survivor. Hence, while the concerns about the survivor's health and well being may bring them to the health centre or counsellingcentre, they do not want to report the crime to police. These survivors like others may be in need of health care, support, counselling and rehabilitation. In India, such services are linked to registering a

207 Suo Moto Writ Petition (Criminal) 1/2014

police complaint. For the ones that do not wish to register a police complaint, they just do not get any services.

Yet such survivors do access medical services at hospitals.

Problems with mandatory reporting to police

In the USA, some states have expanded mandatory reporting beyond intimation to law enforcement agencies alone. The state of Kentucky mandates reporting to the Adult Protective Services instead of law enforcement agency. In fact in the state of Kentucky, a social worker contacts the survivor and not the police. The survivor is offered social or / and legal services as determined by her and the course of action is determined based on a dialogue with the survivor. The Kansas state domestic violence and sexual assault support program has laid down a model policy regarding mandatory reporting. The policy states that decision of reporting to law enforcement agencies or to social and rehabilitation services lies with the survivor. The policy also states that specific personnel directed by the VAWA to mandatorily report cannot dismiss their responsibility by merely intimating the police machinery and their responsibility is to also provide psycho social interventions and put survivors in touch with appropriate support agencies. (Pickert, 2013)

We propose a system such as "Victim Protection Services (VPS)" be created where such victims and families can report without having to go through the police system.

The aim of the VPS is to provide range of available services to the victim and respecting her autonomy and agency in deciding what she wants to do.

Victim Protection Services (VPS) must provide the following:

1. Safety and security of the victim through safety assessment and planning
2. Counselling to the victim and her family
3. Referral for health care and follow up
4. Ensure privacy and confidentiality
5. Follow up plan through home visit
6. Compensation
7. Social support
8. Mobilise economic support, skill building and so on.

It is important to recognise that all survivors may not wish to seek justice through the CJS, but shall require support services such as psycho social support , health care , rehabilitation and welfare services to heal from abuse . Thus efforts should be made in the Indian context to delink the support and welfare services from the police and criminal justice system so that these services are made accessible for all survivors of sexual violence.

ACCOUNTABILITY OF LAW ENFORCEMENT PERSONNEL AND OTHER PUBLIC OFFICIALS

1. Issues relating to public servant

1.1 **Definition of public servant:** The term 'Public Servant' is defined in Sec 21 of the Indian Penal code. In the context of present lis , the term 'public servant' denote

persons who are in Central Government and or State Govt Service/ Posts including personnel belonging to the armed forces.

1.2 **Legislative frame work:** That it is submitted that recruitment and conditions of service including matters of discipline of persons appointed to public services and posts in connection with the Union or a State is governed by Part XIV of the Constitution of India.

1.3 **Position regarding All India Services:** The conditions of service of persons belonging to the All India Services is governed by Article 312 of the Constitution of India. Accordingly, Parliament has enacted the All India Services Act, 1951, wherein and where under All India Services (Conduct) Rules, 1968 and All India Service (D&A) Rules, 1969 have been enacted.

1.4. **Suspension:** Rule 3 of the All India Service (D&A) Rule ibid provide for suspension of a member. In the context of disciplinary proceeding (including sexual misconduct if any) initiated under the said rules, the Government of a State or the Central Government, having regard to the circumstances in any case and the nature of the charges, is satisfied that it is necessary or desirable to place under suspension a member of the Service, it may do so. Further, the Rules provide that where a member of the Service who is detained in official custody whether on a criminal charge or otherwise for a period longer Service in respect of, or against, whom an investigation, inquiry or trial relating to a criminal charge is pending may, at the discretion of the Government be placed under suspension until the termination of all proceedings relating to that charge, if the charge is connected with his position as a [member of the Service] or is likely to embarrass him in the discharge of his duties or involves moral turpitude. A member of the Service shall be deemed to have been placed under suspension by the Government concerned with effect from the date of conviction, if, in the event of conviction for a criminal offence, if he is not forthwith dismissed or removed or compulsorily retired consequent on such conviction provided that the conviction carries a sentence of imprisonment exceeding fortyeight hours.

1.6. **Penalties:** Article 311 of the Constitution of India deals with dismissal removal and reduction in rank of persons employed in civil capacity under the Union or in State. The second proviso to 311(2) states that the procedure provided therein need not be followed if the termination is consequent upon a conviction by a court of law, or for reasons to be recorded in writing and enquiry can be dispensed with.

Independently of Article 311, a public servant can be removed on the doctrine of pleasure (Union of India & Anr. v Tulsiram Patel & Ors.[208], Moti Ram Deka v General Manager, N.E.F[209] Union of India v. Major S.P. Sharma[210] and B.P. Singhal Vs. Union of India and Anr[211]).

Rule 6 of the Rules ibid provide for imposition of major including termination, dismissal removal from service etc and for minor penalties as per procedure set out therein. Rule 14 for special procedure in certain cases. Accordingly, where any penalty is imposed on a member of the Service on the ground of conduct which has led to his conviction on a criminal charge; or where the disciplinary authority is satisfied, for reasons to be recorded by it in writing, that if, is not reasonably practicable to hold

208 AIR 1985 SC 1416

209 1964 SCR (5) 683

210 (2013) 10 SCC 150

211 (2010 (6) SCC 331

an inquiry in the manner provided in these rules; or where the President is satisfied that, in the interest of the security of the State, it is not expedient to hold an inquiry in the manner provided in these rules, the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit.

1.7. **Other Central Government Servants:**

Similarly, the CCS (CCA) Rules, 1965 has been enacted under Provision to Article 309 of the Constitution of India governing the conduct of every Central Government Servant including every civilian Government servant in Defence Services other than those to whom the said Rules do not apply (Rule3). Rule 10 deals with suspension and Rules 11 to 18 deal with imposition of major and minor penalties. Rule 19 deals with special procedure in certain cases. Suffice to state that the provisions are pari materia with the provisions governing conduct of persons belonging to the All India Services as submitted herein above.

1.8. **Govt. Servants for whom special provisions have been made:**

Members belonging to Defence Forces lime the Army, Navy and Air Force and other armed forces like BSF, NSG, Coast Guard, Assam Rifles, ITBP, SSF, etc., are governed by respective Service Laws, which are special laws enacted by the Parliament. They are also governed by service conduct rules issued by the competent authority from time to time. It is submitted persons belonging to these services can be suspended and or proceeded against under respective Service Discipline Acts for offences of sexual misconduct. However certain offences like murder, culpable homicide not amounting to murder and rape committed in respect of civilian persons by any member of the Force is outside the purview of their Act(s) unless committed in specified circumstances. (For example see Section 69 and 70 of Army Act, 1950). Suffice to state that provisions governing suspension, dismissal following conviction by criminal court are more or less the same as it exists for other central government servants. (For example see Sec 19 of the Army Act, 1950 read with Rule 14 of the Army Rules, 1954 and Sec 22 read with Rule 17 of the said Act and Rules). Similar is the provision by and large in respect of persons in Service/Post of any State.

It is therefore submitted that there is a Constitutional and Statutory framework to deal with public servants for acts of misconduct.

Disciplinary action against Public Servants for Sexual Harassment at the Workplace

Government Servants: The directions of the Supreme Court in the Vishakha v State of Rajasthan and Ors[212] were incorporated by the Government into the Service rules under 3C of the Central Civil Services (Classification, Control & Appeal) Rules, 1964. These are given as under:

3. General

(1) Every Government servant shall at all times (i) maintain absolute integrity;

(ii) maintain devotion to duty; and

(iii) do nothing which is unbecoming of a Government servant.

3C. Prohibition of sexual harassment of working women

(1) No Government servant shall indulge in any act of sexual harassment of any women at her work place.

212 (1997) 6 SCC 241

(2) Every Government servant who is incharge of a work place shall take appropriate steps to prevent sexual harassment to any woman at such work place.

Explanation For the purpose of this rule, "sexual harassment" includes such unwelcome sexually determined behaviour, whether directly or otherwise, as

(a) physical contact and advances;

(b) demand or request for sexual favours; (c) sexuallycoloured remarks;

(d) showing any pornography; or

(e) any other unwelcome physical, verbal or nonverbal conduct of a sexual nature

The Central Civil Services (Classification, Control & Appeal) Rules, 1965

The procedures for initiating disciplinary action against a Government servant for misconduct are provided under the Central Civil Services (Classification, Control & Appeal) Rules, 1965. The Government of India's instructions under Rule 11 of the CCS (CCA) Rules provides for penalties in two categories: major penalties and minor penalties. Major penalties constitute compulsory retirement/ removal from office/ dismissal from Office. Further, Rule 14 of the same Rules states that nature of the disciplinary action and quantum of punishment has to commensurate with the gravity of the offence committed. The minor penalties and major penalties in rule 11 of the CCS (CCA) Rules, 1965 have been graded in order of the severity to be awarded to a charged Government servant in proportion to the gravity of misconduct/ negligence which has given rise to the issue.

In MedhaKotwalLele v Union of India[213] the Supreme Court observed as follows:

"Complaints Committee as envisaged by the Supreme Curt in its judgment in Vishaka's Case, 1997 (6) SCC 241 at 253, will be deemed to be an inquiry authority for the purposes of Central Civil Services (conduct) Rules, 1964 (hereinafter called CCS Rules) and the report of the complaint Committee shall be deemed to be an inquiry report under the CCS rules. Thereafter the disciplinary authority will act on the report in accordance with the rules."

In the Central Civil Services (Classification, Control and Appeal) Rules, 1965, rule 14, in sub-rule (2), the proviso before the Explanation states:

"Provided that where there is a complaint of sexual harassment within the meaning of rule 3 C of the Central Civil Service (Conduct) Rules, 1964, the Complaints Committee established in each Ministry or Department or Office for inquiring into such complaints, shall be deemed to be the inquiring authority appointed by the disciplinary authority for the purpose of these rules and the Complaints Committee shall hold, if separate procedure has not been prescribed for the Complaints Committee for holding the inquiry into the complaints of sexual harassment, the inquiry as far as practicable in accordance with the procedure laid down in these rules."

Ending impunity of public servants for crimes against women

Accountability of public servants is also eroded by impunity from prosecution. In this regards, the relevant provisions of the Code of Criminal Procedure, 1973 are as follows:

Sections 197 of the Code of Criminal Procedure (CrPC) prevent courts from taking cases of alleged offences in the discharge of official duty, for various categories of public servants including police officers, without the prior sanction of the government.

213 (2013) 1 SCC 297

197. Prosecution of Judges and public servants.

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government: 1 Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression" State Government" occurring therein, the expression" Central Government" were substituted.

Explanation — For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376C, section 376D or section 509 of the Indian Penal Code.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub section will apply as if for the expression" Central Government" occurring therein, the expression" State Government" were substituted.

(3A) 1 Notwithstanding anything contained in sub section (3), no court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991 , receives the assent of the President, with respect to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the court to take cognizance thereon.]

(4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

What is of great significance, is that the requirement of prior sanction in the case of public servants in subclass (1) of section 197 has been done away with leading to greater accountability of public servants in the matter of sexual abuse. The rational for this Explanation is that it can hardly be argued that an act of sexual abuse is done in the discharge of public duty.

It is unfortunate that the said Explanation does not govern sub-clause (2) as well. Data indicates that rape by the Armed forces in border areas is a known phenomenon and needs to be addressed in the same manner as rape by any other public servant.

In this connection, attention is also invited to the provisions of Armed Forces (Special Powers) Act, 1958 which has a similar provision for sanction. It is submitted that the said Explanation should govern the provisions of the said section as well.

Section 6. Protection to persons acting under Act – No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

It is pertinent to note that the Act was challenged in the case of Naga People's Movement of Human Rights v. Union of India[214], where this Hon'ble Court upheld the same subject to guidelines, and was under the consideration of this Court again as recent as in 2012, in the case of General Officer Commanding v. CBI with Additional Director General v. CBI[215], where it was held that sanction is mandatory for a criminal trial however, in the case of a court martial, no sanction under Section 6 of the Act is required.

It may be mentioned that implementation of the Armed Forces Special Powers Act, (AFSPA) 1958 and similar laws in the Jammu and Kashmir and the north-eastern states of India has led to a host of abuses by the army-violence against women is one of the primary manifestations of these. A 2006 report of the Medicines Sans Frontieres (MSF) in Kashmir states that 11.6% of interviewees admitted they had been victims of sexual violence since 1989. Almost two-thirds of the people interviewed (63.9%) had heard over a similar period about cases of rape, while one in seven had witnessed rape.[216]

Most cases of sexual violence that are reported, fall through because of a lack of proper investigative procedures.

The CEDAW Committee in its concluding comments recommended review of the application of the Armed Forces Special Powers Act and its amendment or repeal so that sexual violence against women perpetrated by members of the armed forces or uniformed personnel be brought under the purview of ordinary criminal law. The UN Special Rapporteur on Violence against Women also recommended repeal of the Armed Forces (Special) Powers Act and the Armed Forces (Jammu and Kashmir) Special Powers Act. The Verma Committee was of the view that such forms of sexual assault deserve to be treated as aggravated sexual offence in law. That it is important to note that sexual assault in situations of communal violence, regional conflicts and armed conflicts are committed upon women and children on account of their identity.

214 (1998) 2 SCC 109

215 AIR 2012 SC 1890

216 Kashmir: Violence and health: Medicines Sans Frontieres, November 2006 at page 3

2. POLICE REFORM

Any proposals and efforts to change laws around violence against women will yield little results until police organizations the first port of call for every woman victim are reformed. Fundamental, holistic and core changes in policing are needed and necessary.

The issue was raisded in this Hon'ble Court in Prakash Singh v. Union of India[217]. The brief facts were that The National Police Commission was appointed by the Government of India on 15th September, 1977. It made eight reports in total, dealing a wide range of subjects including police reforms, accountability, professional independence, maintaining public order, etc. When the recommendations of National Police Commission were not implemented, a petition under Article 32 of the Constitution of India was filed in this Hon'ble Court, praying for issuance of directions to the Government of India to frame a new Police Act on the lines of the model Act drafted by the Commission in its 8th report, in order to ensure that the police is made accountable to the law of the land and the people.

The Court issued the following guidelines to the Central Government, State Governments and Union Territories for compliance with, till the framing of appropriate legislations:

❖ **State Security Commissions**

The State Governments were directed to constitute a State Security Commission in every State to ensure that the State Government does not exercise unwarranted influence or pressure on the State police and for laying down the broad policy guidelines so that the State police always acts according to the laws of the land and the Constitution of the country. The watchdog body to be headed by the Chief Minister or Home Minister as Chairman and have the DGP of the State as its exofficio Secretary. The other members of the Commission to be chosen in a manner promoting function independent of Government control. The States were direct to adopt any of the models recommended by the National Human Rights Commission, the Ribeiro Committee or the Sorabjee Committee.

The recommendations of this committee to be binding on State Governments and their functions were to be "laying down the broad policies and giving directions for the performance of the preventive tasks and service oriented functions of the police, evaluation of the performance of the State police and preparing a report thereon for being placed before the State legislature"

❖ **Selection and Minimum tenure of DGP**

The Director General of Police of the State was directed to be selected by the State Government from amongst the three senior most officers of the Department who have been empanelled for promotion to that rank by the Union Public Service Commission on the basis of their length of service, very good record and range of experience for heading the police force. The selected official is to serve a minimum tenure of at least two years irrespective of the date of superannuation. The DGP may be relieved of his responsibilities by the State Government acting in consultation with the State Security Commission in case any action is taken against the official under the All India Services (Discipline and Appeal) Rules or in the case of conviction by a Criminal Offence by a court, or in a case of corruption, or if the official is otherwise incapacitated from discharging his duties.

❖ **Minimum tenure of I.G. of Police and Other officers**

Inspector General of Police incharge Zone, Deputy Inspector General of Police incharge Range, Superintendent of Police in charge district and Station House Officer incharge of a Police Station, also to serve a minimum tenure of two years unless disciplinary proceedings

217 (2006) 8 SCC 1

are undertaken against them or in case of conviction in a criminal offence or a case of corruption or are incapacitated.

❖ **Separation of Investigation**

The investigating police to be separated from the law and order police, ensuring speedier investigation, etc. Full coordination between the two wings was however stressed upon.

❖ **Police Establishment Board**

Police Establishment Boards to be set up in each State, its functions to include – deciding transfers, postings, promotions, and other service related matters of and below the rank of DSP. It is to be a departmental body comprising of the DGP and four other senior members. The State Govt. may interfere with the same only in exceptional circumstances and after recording reasons for doing the same. It is to also function as a forum of appeal for disposing off representations from officers of the rank of Superintendent of Police and above regarding their promotion/transfer/disciplinary proceedings or their being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State.

❖ **Police Complaints Authority**

Police Complaints Authority to be set up at the District level to look into complaints against police officers up to the rank of DSP and a State Police Complaints Authority at the State level to look into complaints against officers up to the rank of SP and above. The State level Complaints Authority is to take cognizance only of allegations of serious misconduct by the police personnel, including incidents involving death, grievous hurt or rape in police custody. The district level Complaints Authority is to, apart from the above cases, also inquire into allegations of extortion, land/house grabbing, etc. The recommendations of the Complaints Authority, both at the district and State levels, for any action, departmental or criminal, against a delinquent police officer shall be binding on the concerned authority.

❖ **National Security Commission**

Central Government to set up a National Security Commission at the Union level for selection and placement of Chiefs of the Central Police Organizations who are to be given a minimum tenure of two years. The commission is also to review measures to upgrade the effectiveness of the forces, improve service conditions, ensure coordination, etc.

The aforesaid directions were made binding on the Central Government, State Governments or Union Territories, and were directed to be complied with on or before 31st December, 2006 so that the bodies aforenoted can become operational at the onset of the New Year.

Almost at the same time, the Ministry of Home Affairs constituted a committee to draft a new Police Act (the Police Act Drafting Committee, chaired by Soli Sorabjee). A Draft Model Police Act was submitted to the Centre and the Supreme Court in 2006. The Act was to be as the law made by the Centre and to be taken as a template for all other states. The Courtappointed Monitoring Committee took the view that both the orders and the legislation *"clearly reflect dilution, in varying degree, of the spirit, if not the letter, of the court's directives"*.[218]

There have been several committees that have submitted monitoring reports to this Hon'ble Court since then.

Recommendation of Justice Verma Committee on Police reforms:

The report recommends that when a new Police Act is framed it should conform with the with the Model Police Act, 2006 proposed by the Sorabjee Drafting Committee and the Police

218 Justice KT Thomas Monitoring Committee Report, 2010, page 11. The Committee submitted its final report in August 2010 and thereafter wound up its work.

Act annexed with the 8th report of the National Police Commission. It must also clearly lay out the duties and responsibilities of the police officers with the prevention of harassment of women and children in public places and public transport as a specific duty. Also that even without the Act this duty should be carried out in letter and spirit by the police officers. The report observes that the Bureau of Police Research and Development of India has issued some guidelines for the training of Sub-inspectors but the same needs to be meticulously imbibed in police personnel through training.

The report notes various Supreme Court judgments where the court has made observations in favour of ushering in police reforms. One such example is that of Prakash Singh &Ors. Vs Union of India & Ors[219], whereby the court noted that National Police Commission, National Human Rights Commission, Law Commission, Ribeiro Committee, Padmanabhaiah Committee and Malimath Committee had all broadly come to the conclusion of urgent need for police reforms with agreement on the key areas of focus that cover the following aspects:

1. State Security Commission at State level;
2. Transparent procedure for the appointment of Police Chief and the desirability of giving him a minimum fixed tenure;
3. Separation of investigation from law and order; and
4. A new Police Act which should reflect the democratic aspirations of the people, including the institution of separate Police Complaints Authority at the district and state level to register complaints by people against police officers of all ranks. The authority would be empowered to hold enquiry and investigation and also provide recommendation which would be binding on the concerned authority.[220]

"Police Complaints Authority: There shall be a Police Complaints Authority at the district level to look into complaints against police officers of and up to the rank of Deputy Superintendent of Police. Similarly, there should be another Police Complaints Authority at the State level to look into complaints against officers of the rank of Superintendent of Police and above. The district level Authority may be headed by a retired District Judge while the State level Authority may be headed by a retired Judge of the High Court/ Supreme Court. The head of the State level Complaints Authority shall be chosen by the State Government out of a panel of names proposed by the Chief Justice; the head of the district level Complaints Authority may also be chosen out of a panel of names proposed by the Chief Justice or a Judge of the High Court nominated by him. These Authorities may be assisted by three to five members depending upon the volume of complaints in different States/districts, and they shall be selected by the State Government from a panel prepared by the State Human Rights Commission/LokAyukta/State Public Service Commission. The panel may include members from amongst retired civil servants, police officers or officers from any other department, or from the civil society. They would work whole time for the Authority and would have to be suitably remunerated for the services rendered by them. The Authority may also need the services of regular staff to conduct field inquiries. For this purpose, they may utilize the services of retired investigators from the CID, Intelligence,

219 (2006) 8 SCC 1

220 In the UK, the Independent Police Complaints Commission (IPCC) supervises and investigates public complaints against the police and can take over the supervision or investigation of any complaints case. The Head of Police must by law give the IPCC access to police documents and premises. Complaints can be made by persons other than victims or even via a third party or through independent organisations like the citizens advice bureau. Complainants have the right to appeal to the IPCC if their complaints are not registered. Complainants are kept informed about the progress and conduct of the investigation into their complaint and given a summary of evidence, explaining how conclusions were reached. If the complainant is not satisfied, s/he can appeal.

Vigilance or any other organization. The State level Complaints Authority would take cognizance of only allegations of serious misconduct by the police personnel, which would include incidents involving death, grievous hurt or rape in police custody. The district level Complaints Authority would, apart from above cases, may also inquire into allegations of extortion, land/house grabbing or any incident involving serious abuse of authority. The recommendations of the Complaints Authority, both at the district and State levels, for any action, departmental or criminal, against a delinquent police officer shall be binding on the concerned authority."

The report made the following further specific recommendations to be kept in mind while drafting the new Police Act, keeping Police accountability in mind:[221]

> *"First, in relation to the functions and powers of the Complaints Authority which is the Police Accountability Commission in Chapter XIII, we take the view that mandatory inquiries into only "serious misconduct" as defined in the Act would be too narrow. This would according to Section 167, Chapter XIII include only any act or omission of a police officer that leads to or amounts to: (a) death in police custody; (b) grievous hurt, as defined in Section 320 of the Indian Penal Code, 1860, (c) rape or attempt to commit rape or (d) arrest or detention without due process of law. All other cases may only be the subject of inquiry by the commission if referred to by the Director General of Police and if, in the opinion of the commission, the nature of the case merits an independent inquiry. We take the view that serious misconduct should include the commission of or any attempt to commit any sexual offence by any police officer or the abetment of any sexual offence by a police officer. This must include the turning a blind eye of the commanding police officer to the commission of such offences by his subordinates. The committee also feels that all types of misconduct should require mandatory investigation by the Police Accountability Commission. This would include: fabrication of evidence, inordinate delay, death in police action, torture which does not amount to grievous hurt and harassment of a complainant who seeks to register a complaint relating to a sexual offence."*

The Verma Committee took the view that while there is no need to wait for the passing of a Police Act to implement the directives, and that as and when a new Police Act is passed by Parliament, it "should be consistent substantially with the Model Police Act, 2006 proposed by the Sorabjee Drafting Committee and the Police Act annexed to the 8th report of the National Police Commission".

The Committee had also made specific recommendations in relation to the functioning of Police Complaints Authorities. To be implemented, these would require amendments to either the state Police Act or the government order which establishes the Complaints Authority. At present, there is not even an operational Police Complaints Authority in every state. As of August 2015, Complaints Authorities are functioning only in five states.[222]

Post Verma Committee, the status is as follows:

A new Committee was constituted by the Bureau of Police Research & Development (MHA) in 2013 to amend and redraft the Model Police Act, 2006. A Draft Model Police Act 2014 has been prepared, but it is not in the public domain.

221 http://nlrd.org/wpcontent/uploads/2013/01/121798698JusticeVermaCommitteereport.pdf

222 Complaints Authorities have been set up on paper in a total of 9 states and 5 Union Territories, but many of these are tied up in litigation and not operating.

As of August 2015, 17 states[223] have passed new police legislation. None are consistent with the directions of the Supreme Court of India.

For a more detailed discussion on Police Reforms, see the CHRI report on monitoring and compliance with the directives of the Supreme Court, 2014[224].

It is pertinent to note an incident which took place in Jalna District of Maharashtra, where a 17year victim of rape was used as bait to catch the accused and was raped again in the process[225]. The Inspector in charge of the operation has since been suspended pending inquiry.

Similarly, Malwani Police in Mumbai conducted a raid on several lodges and two star hotels, arresting consenting adults who had checked into private rooms. They were harassed and booked under Section 110 (indecent behaviour in public) of the Bombay Police Act and the Prevention of Immoral Trafficking Act[226].

3. MEMBERS OF PARLIAMENT/ MEMBERS OF LEGISLATIVE ASSEMBLY/ MEMBERS OF LEGISLATIVE COUNCIL

3.1 Article 84 of the Constitution provides for disqualification of membership of Parliament and Article 102 provides for disqualification. .Similarly, Articles 173 and 191 provide for disqualification of membership and disqualification of membership of State legislature respectively.

3.2. The Representation of Peoples Act, 1951 also provide for qualification and disqualification to become a Members of Parliament or to become a Member of Legislative Assembly. Sec 8 of the Act in particular provides for disqualification on conviction for certain offences. The said Sec covers wide range of offences under the IPC as well as under other laws.

3.3 Essentially the scheme of disqualification upon conviction laid down by the 1951 Act only contemplates disqualification upon conviction and not before. See Manoj Narula v. Union of India[227].

It is therefore, submitted that both the constitution and the statues regulate the qualification and disqualification of M.Ps, M.L.As and M.L.Cs, and no further intervention from this Court is required at this stage. It is a different matter that Parliament may consider adding to qualifications, a disqualification to the effect that a person accused of serious offences such as rape should not be qualified and should be disqualified at the stage of taking cognizance of the complaint by the Court as suggested by the Verma Committee, or at the stage of framing of charges as suggested by the Law Commission vide report No. 244 of February, 2014.

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223 These are Assam, Bihar, Chhattisgarh, Gujarat, Haryana, Himachal Pradesh, Karnataka, Kerala, Maharashtra, Meghalaya, Mizoram, Punjab, Rajasthan, Sikkim, Tamil Nadu, Tripura, and Uttarakhand.

224 State Security Commissions: Bringing little to the table, A study of police oversight in India, http://www.humanrightsinitiative.org/programs/Report2014/CHRI_Report2014%20.pdf, last accessed on 21st August, 2015

225 http://indianexpress.com/article/india/indiaothers/jalnarapevictimtwiceusedasbaitonce evenbeforefir/, last accessed on 18th August, 2015

226 http://www.midday.com/articles/mumbaicouplespickedupfromhotelroomschargedwithpublic-indecency/16437186, last accessed on 18th August, 2015

227 (2014) 9 SCC 1 para 64 @ pg 45 and para 72 @ pg 48

GENDER BUDGETING

Gender Responsive Budgeting (GRB) is a budget that acknowledges the gender patterns in society and allocates money to implement policies and programmes that will change these patterns in a way so as to move towards a more gender equal society[228]. GRB has been recognized as one of the most pragmatic tools to accelerate investments for gender equality and women's empowerment. In fact one of the main achievements noted by governments across the Asia Pacific region in their 20 years' review of the Beijing Declaration and Platform for Action was the introduction of GRB as the main tool to recognize gender concerns and make adequate investments across sectors to address those concerns.[229] Since then, more than 10 member states have adopted GRB in various forms manifesting as: (a) gender budget statements; (b) the inclusion of genderresponsive budgeting in national budgetary frameworks; and (c) designation of a minimum budget allocation for gender equality initiatives.

The Government of India adopted 'Budgeting for Gender Equality' as a mission statement in 200405. By introducing the Gender Budget Statement in 200506, India became one of the few countries across the globe to showcase in the public domain its commitment to gender equality and women's empowerment. Setting up of Gender Budget Cells in around 57 Ministries/Departments, sustained capacity building of government officials at all levels and introduction of new schemes such as all women banks, sancharshakti scheme and others initiated by the Government as a part of Gender Budgeting have been critical strategies adopted to strengthen efforts towards institutionalizing GRB. These important steps put India on the global map of GRB and many countries started looking towards India for guidance on GRB.

Magnitude of Gender Budget

The magnitude of gender budget i.e. the quantum of allocations for women as a proportion of total budget remained almost stagnant at 5.5 per cent until 2013-14. However, not only has the proportion of allocations for women as percentage of total budget declined from 5.5 per cent to 4.5 per cent in the Union Budget 201516, but there is also a significant decline in absolute numbers. As per the latest Gender Budget Statement, while the Budget Estimate figure for 2013-14 was Rs. 98,030 crore, the figure stands at Rs. 79,258 crore in this year's budget.

Allocations for the National Women's Machinery

The national women's machinery of the country i.e. Ministry for Women and Child Development (MWCD) has remained grossly underfunded over several budget pronouncements. However, the figures are particularly striking this year as the allocations for MWCD have been halved from an amount of Rs. 21,194 crore to Rs. 10, 287 crore for 201516. Further, the major share of the allocations to the Ministry goes towards children (Integrated Child Development Services Scheme) leaving only about five per cent for schemes exclusively meant for women. As per the latest budget, the allocations for 'women exclusive schemes' or 'women welfare'

228 Gender Budgeting Handbook for Government of India, Ministries and Departments, Ministry of Women and Child Development , Government of India, 2007 available at http://wcd.nic.in/gb/material/Resource%20Material/GB%20Handbook%20and%20Manual/Hand %20Book.pdf

229 UNESCAP and UN Women. (2014). Progress in implementation of the Beijing Declaration and Platform for Action: Perspectives of Governments in the Asia Pacific Region. Available at http://www.unescapsdd.org/files/documents/Beijing%2B20%20%20summary%20report.pdf

(as stated in the Union Budget) is an amount of Rs. 789 crore, a reduction from 920 crore in 2014-15.

Further, budget allocations for several other important interventions have either seen a marginal increase or reductions altogether. For instance, allocations for schemes such as Swadhar Greh, Women's Helpline and the National Mission for Empowerment of Women have seen a considerable decline. Even for interventions such as 'Working Women's Hostels' which finds an explicit mention in the Bharatiya Janata Party's (BJP) election manifesto, only a marginal increase has been announced despite the fact that, on an average, there are less than two hostels per district, with concentration only in select states. Moreover, the most worrying aspect is 'zero' allocation for some of the extremely critical interventions such as the scheme for implementation of the Protection of Women from Domestic Violence Act, 2005.

Utilization of budgets continues to be an equally important concern. In fact, one of the main reasons cited in the report of the Department related Standing Committee on Human Resource Development for underutilization of funds was nonapproval of a number of important interventions proposed by the Ministry. These included, among others, interventions such as Restorative Justice for Rape Victims, Women's Helpline and Assistance for construction of shelter homes for single women. Furthermore, Swadhar Greh, One Stop Crisis Centres and NMEW were in the process of appraisal which contributed to delay in utilization of funds. Even with regard to the Nirbhaya Fund, although the total budget for the scheme is Rs. 3000 crore in 201516, the amount remains unutilized.

Highlighting the abysmal allocations for gender equality and women's empowerment in India, the Committee on Elimination of Discrimination against Women has emphasized on the need for increased investments for the MWCD and for gender budgets across ministries. In 2014, following its review of the fourth and fifth periodic reports submitted by India, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also reiterated the need to strengthen institutions such as the National Commission for Women and the State Commissions.

One of the main arguments for the decreased financial allocations for key issues, including the issue of women's rights, is the increased devolution of untied funds from the central pool of taxes to State Governments as a result of recommendations from the 14th Finance Commission. However, as several stakeholders have argued, the net increase of funds at the disposal of states is at best modest. Moreover, the transfer of a number of social sector schemes to State Governments, either entirely or substantially, will require considerable amount of investments from states to retain the current level of social sector spending. Therefore, given the current fiscal commitments, the gender agenda might get inadvertently neglected.

Recognized as one of the fastest growing economies in the world, India is viewed as an important global player. Therefore, stepping up of investments to gender equality commitments by the Indian Government will go a long way in sending the right and strong signals worldwide and provide the much needed fillip to the gender agenda that has remained chronically underfunded.

Allocations to Key Schemes by Ministry of Women and Child Development (in Rs. Crores)			
	2014-15		2015-16
Schemes	BE	RE	BE
Indira Gandhi Matritva Sahyog Yojana	400	360	402.23
Swadhar Greh	115	30	50

Restorative Justice to Rape Victims	20	0	0
Rashtriya Mahila Kosh	20	0	0
BetiBachao, BetiPadhao	90	45	97
One Stop Crisis Centers	20	0	2
Women's Helpline	10	0	1
National Mission for Empowerment of Women	90	10	25 434
Rajiv Gandhi Scheme for Empowerment of Adolescent Girls (SABLA	700	630	10
Assistance to States or of Protection of Women From Domestic Violence Act, 2005	50	0	0

Nirbhaya Fund

As per the Ministry of Finance's RTI reply, total Rs.2000 crores have been sanctioned for 2013-15 in the Nirbhaya Fund.Ministrywise allocation of Nirbhaya Funds is as follows :

S. No	Ministry	Scheme	Project Period	Fund Sanctioned	Details
1.	Ministry of Road Transport and Highways	Women Safety on Public Road Transport	2014-15	Rs.50 crores	Total expenditure of Rs.1,42,63,214/ made towards payment of consultant fee, as on 14th May 2015.
2.	Ministry of Home Affairs	Backend integration of distress signal from victims with mobile vans and control rooms	2014-15	Rs.150 crores	See below
3.	Ministry of Women and Child Development	One Stop Center	2015-16	Rs.18.58 crores (total project cost for two years)	No funds have been released or utilized as on April 2015.
		Universalisation of Women Helpline	2015-16	Rs. 69.49 crores (total project cost for two years)	

So far, the UT Division of MHA has provided information on the utilization of Nirbhaya Fund. Regarding UT Division, MHA, Nirbhaya funds have been allocated to Delhi Police for their scheme "Safety for Women" for the years 2014-15 and 2015-16.

Year	Money allocated to	Scheme	Money approved	Funds utilized
2014-15	Delhi Police	Safety for Women	Rs.2,82,61,180/-	Rs.2,35,51,885/ (up till 31.3.2015)
2015-16	Delhi Police	Safety for Women	Rs.3.4 crores	---

DATA COLLECTION: CRITIQUE

In the preceding section on 'Extent of the Problem', I have highlighted that incidence of reported cases of violence against women, as borne out by official NCRB data, has been increasing steadily. In 2013, this increase has been dramatic, and although the official NCRB data for 2014 has just been published, it clearly shows that this trend has continued. State-wise police data also reinforces this increase[230].

The immediate and foremost reason for this appears to be the direction given by the Hon'ble Supreme Court in Lalita Kumari v. Govt. of U.P[231] for mandatory registration of FIRs in cognizable cases, combined with the introduction of Section 166A Cr.P.C. Increased media engagement on the issue of violence against women has also played its part in mainstreaming and creating better awareness about the legal remedies available. While it is difficult to draw a direct correlation between better public awareness and increased reporting of VAW, it is definitely likely to facilitate women's access to justice by making familial & other social support structures more supportive.

What is of concern though is that State agencies, particularly the Police, may justify and therefore normalize, the reason for increased incidence of VAW to proactive registration of FIRs. Recent media reports seem to suggest this:

Delhi Police has justified the increase in number of crime cases by saying that the rise is due to police personnel no longer hesitating to register FIRs. "Cops have no fear in registering crime cases and I have no hesitation in placing on record that reluctance to register cognisable crime has almost disappeared among Delhi Police officers," Bassi said during the annual press conference of Delhi Police on Friday.[232]

During interviews in the course of a study on attrition of sexual violence cases within the criminal justice system in India (Lawyers Collective; 2014; unpublished), senior police officials from Delhi and Mumbai echoed similar sentiments:

"Though there was underreporting before 2012, the numbers of cases being reported in Mumbai have considerably increased after the Nirbhaya incident." (Senior Police Officer; Mumbai; January 2014)

"In the last one year, we have seen a three times increase in the number of complaints of rape being reported to the police. This is a really encouraging trend although this is likely to stabilize over time."(Senior Police Officer; Delhi; December 2013)

Hence, the frame of enquiry needs to shift from "total incidence or rate of crime" to police performance i.e. disposal of the cases registered by the police, and the rate of conviction.

The same news report on Delhi's increasing crime rate (quoted above) notes that about 70% of the cases registered during the year remained unsolved.[233] According to NCRB 2013 data, out of a total 47457 cases of rape for investigation (including pending from previous year), 14940 remained pending at the end of the year. The 2014 data also shows that

230 Mumbai Police data for registered cases of rape in January 2014December 2014 shows a 35% increase over the same period in 2013. See https://mumbaipolice.maharashtra.gov.in/Statistics%20Report%20From%202006%20to%202014. asp. In Delhi, where the overall increase in crimes is almost 50% in 2014, the increase in registered cases of rape is 24.5% over the year 2013. See http://www.delhipolice.nic.in/PDF/CRIME_RATE.pdf

231 (2014) 2 SCC 1

232 http://www.dailymail.co.uk/indiahome/indianews/article2894786/DelhiPolicestatistics revealfivewomen-rapedmolestednationalCapitalday.html

233 Ibid.

approximately 30% of rape cases for investigation (including pending from 2013) remained pending at the end of the year.

Another issue of concern is the number of cases of rape where the offender is known to the victim. NCRB data for 2013 puts this number at 31,807 out of total 33,707 reported cases (94.4%). The latest 2014 data also has 32,187 out of total 37.413 reported cases (86%) in this category. An analysis shows that most of offenders were reported as neighbours (33.9% in 2013 which shows a slight decline to 26% in 2014. What is significant is that the 2014 NCRB has used more disaggregated categories compared to the earlier exercises. For instance, the family members category is further disaggregated to rape by 'Grandfather, Father, Brother, Son etc.' (2%), and close family members other than these (3%). Hence, the decrease in some numbers could be a result of this refinement in categories rather than reflecting an actual change. The new data needs to be examined carefully before making any definitive conclusions.

In an overwhelmingly high number of cases (57.1% in 2013 and 60% in 2014) though, offenders were reported as other known persons – a category which has not been defined.

This issue was dealt with closely by the Justice Usha Mehra Commission. In Its Report, the Commission noted that close to 50% of such cases included neighbours and other known persons. In these days of nuclear families, it is unlikely that children aged 37 years (which constitutes a significant section of victims of rape by neighbours & other known offenders) would know their neighbours. Thus, the Commission recommended that this category of neighbours & other known offenders is a flawed one, and should be taken out of the 'known offenders' category.[234] The amicus notes that this issue has not been addressed in the revision to methodology (including proformae) carried out by NCRB in its 2014 data exercise.

The Justice Mehra Commission presents a compelling argument since shrinking of this category shifts the onus back to the State and the Police to ensure better safety for women. In any case, rape is a violation of a woman's right to dignity and bodily integrity, and the State and its agencies have an absolute obligation to prevent and protect her from such violation, irrespective of who the perpetrator is and the space she is in. The community, and specifically community based personnel such as para medical, Anganwadi, and para legal workers, also have a crucial role to play in preventing violence against women which takes place within community spaces. This aspect has been dealt with in detail in the section on Prevention.

Strengthening and engendering the existing data collection mechanisms is another important requirement. Reference has already been made to the Crime and Criminal Tracking Network System (CCTNS), which was initiated with the objective of bringing better connectivity and integration in crime data collection and management, across the country. Engendering of the CCTNS platform, not only in terms of sex disaggregated data, but also data collection process is essential.

Data relating to VAW is collected by multiple agencies such as the NCRB (Ministry of Home), NFHS (Ministry of Health), and Ministry of Women & Child Development (implementation of special laws within its jurisdiction). Despite this, one of the major challenges is the lack of reliable, comprehensive and genderdisaggregated data. The NCRB data only covers crimes against women under the Indian Penal Code and certain special legislations. While on an immediate reading, the just released 2014 NCRB data appears to have addressed to an extent, concerns relating to lack of disaggregated data and gaps in methodology, the exercise by virtue of its reliance on FIRs and police reports, has inherent limitations. The NFHS, which

234 Report of Justice Usha Mehra Commission (2013). See pgs. 5558.

is the only national survey that collects data pertaining to VAW, provides a samplebased finding merely on a few of the indicators, and does not provide a comprehensive picture.

Finally, there is a need to integrate and make available gender disaggregated data from the courts. This is the only way to ensure that future legislative and policy reform on VAW is informed by evidence on the ground.

Recommendations:

1. Delete the category of "neighbours and other known offenders" from the NCRB dataset on Rape in its Crime in India Reports. This will facilitate collection of more accurate and disaggregated data on rape, which will help to devise prevention and response strategies, and also ensure stronger police accountability.
2. Strengthen and engender the existing data collection mechanisms including the proposed CCTNS mechanism.
3. Undertake largescale representative samplebased community data collection on violence against women, similar to the NFHS – 3, so as to ensure that laws and policies are based on evidence generated in a comprehensive manner.
4. Collect data on the prosecutions under section 166A, IPC

MONITORING AND EVALUATION

Good governance is the key to equitable socioeconomic development, and the key to good governance is accountability of the actors both state and nonstate that play a role in such governance. Monitoring and Evaluation (M&E) is one of the foremost tools which facilitates good governance by identifying what works and what doesn't in policy design and implementation.

According to the World Bank, the information that M&E programs and systems generate is critical for raising awareness and promoting a debate about the efficiency of public programs and policies. It can empower citizen to hold their government accountable – as long as there are also the mechanisms in place for the government to use this feedback to make changes in budgeting, planning, or efficiency of programs.[235]

In 2009, the outline of the Performance Monitoring and Evaluation System (PMES) for Government Departments was approved and initiated. Under the Performance Management Division (PMD) of the Cabinet Secretariat, each Department is required to prepare a Results Framework Document (RFD) consisting of the priorities set out by the Ministry concerned. Six monthly reviews for course correction, and annual performance review against identified results is undertaken by the PMD.[236]

The Ministry of Women & Child Development's RFD for 201415 lists as one of its objectives, 'Promoting an environment free from violence and discrimination against women as well as socioeconomic empowerment of marginalized women;'. It provides for certain actions and success indicators for meeting this objective for that calendar year.[237]

235 World Bank, Monitoring and Evaluation for Better Development Results, available at http://www.worldbank.org/en/news/feature/2013/02/14/monitoringandevaluationforbetter developmentresults

236 Cabinet Secretariat. Performance Monitoring and Evaluation System for Government Departments. http://performance.gov.in/sites/default/files/document/pmes/PMES%20201415.pdf

237 http://wcd.nic.in/

However, a look at the websites of the PMD or other Ministries/Departments does not give any information on whether this exercise has continued into 2015-16.

The PMES and the RFD process itself had its limitations: a) it resulted in too much emphasis on 'quick wins' in the form of prioritising quantitative change rather than medium or long-term qualitative impact or "outcome"; and b) while there was a provision for six monthly review to facilitate course correction, this was used primarily only for realigning targets rather than using the opportunity to assess the processes as well as the targets. Despite this, it provided an important platform for real time performance monitoring of Government action.

Another fundamental problem with the "performance" oriented assessment process is that it emphasises on individual entities/agencies and their performance. It is quite different from evaluation, which focuses on policies and programmes on the whole, and includes a significant qualitative component.

Effective monitoring is closely linked with existence of a robust data collection and management system. It must be based on continuous needs assessment and evidence generated, on a real time basis, and not merely expost facto evaluation and "scoring" on an annual basis. Only with on the ground evidence generated through sex disaggregated data that periodic course correction would be possible.

Given this interlinkage between data collection and performance monitoring, the Amicus feels that the Ministry of Statistics and Programme Implementation is in a position to undertake this task in a coordinated manner.

Further, unless the monitoring of Government action on VAW is linked with budgetary commitments, the exercise will not strengthen existing prevention and response systems and thereby, not translate into concrete results for women survivors. A good example of this is the United Kingdom's 'Public Service Agreements System' (PSAs), which have come to be seen as the international model par excellence of the setting of performance targets broadly linked to the budget process[238].

While there is a need to review and initiate a robust and evidence based monitoring system, independent evaluation of Government action on VAW (mentioned above) is critical to ensuring transparency and accountability. Keeping this in view, the Amicus strongly recommends the setting up of independent Rapporteurs on VAW, who would be attached to statutory bodies such as the National Commission for Women, the National Commission for Protection of Child Rights, and the National Human Rights Commission, and undertake annual/periodic evaluation of Government action, within their respective mandates.

The Rapporteurs will work in close coordination with government bodies and relevant civil society organizations, and be empowered under the relevant statutes to conduct fact-finding missions on issues relating to VAW. These Rapporteurs will be required to submit annual reports to their statutory body, which will further submit such reports before the Parliament, in the exercise of their existing statutory mandates. It is essential that the Rapporteurs on VAW be domain experts with established track record and have an independent establishment, with adequate administrative support so as to prevent gradual erosion of powers such as in the case of National Commission for Women.

In fact, to ensure strengthened implementation of laws and policies, it is imperative that evaluation be made a statutory function of these statutory bodies. Currently, it is only

238 World Bank Independent Evaluation Group. Performance in Government The Evolving System of Performance and Evaluation Measurement, Monitoring, and Management in the United Kingdom (2010). http://siteresources.worldbank.org/INTEVACAPDEV/Resources/ecd_24.pdf

the Right to Education Act, 2005 that vests in the NCPCR, the statutory power to monitor its implementation. This must go hand in hand withstrengthening these institutions, particularly the NCW, which in its current form, has less powers than the NHRC. It is understood that the proposal for strengthening the NCW through amendments to the Act is pending consideration by the Government.

Finally, social audit is an established and proven method of strengthening and enforcing State accountability in Government service delivery. In India, the concept of social audit was legislated and institutionalized with the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA). The Act mandates the regular conduct of social audits of works sanctioned under MGNREGA in the gram sabha at least once every six months. In Andhra Pradesh, the social audit process covers many programmes like NREGS, Sarva SikshaAbhyan, ICDS, IAY etc. and the Village Social Auditors facilitate these social audits.

In the context of VAW, globally, participatory social audits have been used successfully to map forms and patterns of abuse not captured in official data; in the context of safety in public spaces, to name a few. The significance of participatory social audits lies not only in providing additional data sets to improve service delivery but also by empowering local communities and actors so that they can strengthen the accountability of service providers and implementing agencies to their own communities[239].

CONCLUSION AND RECOMMENDATIONS

This report leads to the conclusion that this Hon'ble Court has played a large role in stimulating legislative and policy change in the matter of addressing sexual abuse .Often advances have been made in law and policy following judgments. Some noteworthy examples of this are the provision of compensation to survivors, witness protection schemes suggested by this court. At other times the impact of community based organziations and their activism has impacted law and policy and the practices evolved by these organizations have become part of law and judicial guidelines. In locating the survivor of VAW at the center of concern, the judiciary has discharged its Constitutional role of protecting the rights of women in the Criminal Justice System. The message of the brief is that no social change is possible without coordinated functioning of all stakeholders Most of all, for law to have any meaning in the lives of people, it must speak to their lived experiences and respond. The voice of the survivor must be heard with respect and not undermined as " Only her word"

This exercise of mapping and analyzing the progress on violence against women, before and after the Nirbhaya incident of 16th December 2012, reinforces issues that are already well known and also raises some concerns that have not been extensively discussed in the public domain.

Some significant advances that deserve special mention have been in the spheres of criminal law reform (both substantive and procedural), proactive measures to increase women's representation in policing, digitization and linking of components of the criminal justice system, greater focus on supporting the survivor through the process of a criminal proceeding and preventing revictimization, the shift from compensation being viewed as against the accused/person convicted to recognition of reparation for the survivor – are all geared towards facilitating the survivor's access to justice.

239 UN Women's Virtual Knowledge Centre to End Violence Against Women and Girls. http://www.endvawnow.org/en/articles/1143participatorymonitoringandevaluation.html. See examples of social audits in VAW context.

However, as this amicus has reiterated throughout this brief, much more remains to be done. In particular, the analysis reinforces that non-implementation or ineffective implementation is the key concern. Lack of coordination between the police, prosecution, correctional services, and the courts; and poor institutional accountability mechanisms are factors that contribute to and perpetuate the problems with implementation. Attitudinal bias and genderbiased perceptions continue to permeate the society – and by extension, institutional response on VAW.

Within this backdrop of successes and continuing challenges, the amicus has made several suggestions/recommendations. Many of these suggestions/recommendations are based on the combined experience of institutions and individuals that have either been part of the criminal justice system or have interacted closely with it in their capacity as providing crucial support services and interventions for women survivors of VAW. In this chapter, some of the key suggestions/recommendations are presented, sectorally, that may be considered for future policy action:

Key Recommendations on Prevention:

1. Women in Policing: Ensure a targeted and time bound plan for recruitment of women in police so as to close the gap between the situation on the ground and the minimum 30% reservation policy target; and that this must go hand in hand with addressing basic operational and functional concerns comfronting women on duty. Also, a needs and feasibility assessment of existing policy initiatives on women's recuritment is essential.
2. Police Accountability: All States should be directed to collect and provide comprehensive information on the enforcement of Section 166A IPC from its introduction in May 2013 to the present, on a case by case basis.
3. An Independent Complaints Procedure should be set up to address complaints against the Police and in particluar, complaints in the matter of failure to make a free and fair investigation.
4. Safety in Public Transport: All States should enact appropriate scheme/regulation to regulate public transport, particularly frequently used contract carriage buses, radio taxis, and taxi web aggregators, so as to ensure safe public transportation for women at all times, or where such regulations do exist, review and ensure their effective implementation.
5. The Ministry of Transport and Highway should formulate a basic/model scheme to goven webbased taxi or other public transport aggregators so as to minimise interstate variance to the extent possible, and lay down certain basic minimum standards. Further, such webbased and radio taxi schemes to be declared as "contract carriage" within the meaning of Section 2(7) of the Motor Vehicles Act 1988 to ensure they are bound to comply with minimum safety standards, including installing GPS system & panic button, undertake mandatory background checks of drivers, requirement of a bank guarantee to operationalise, prohibiting exclusion of liability of the company.
6. Sex Offenders Public Registry: The Amicus does not recommend implementation of the proposed proposed "online database of chargesheeted sexual offenders nationwide, to be accessible to the public through a Citizen Portal in the Crime and Criminal Tracking Network and Systems (CCTNS) project". While the deterrent value of a Sex Offenders' Registry is yet to be proved in other countries across the world, given the unaccountability within and the absence of police reform, there is a great danger that such a registry will end up being a tool of harassment in the hands of the police.

7. Education and Awareness: Undertake mandatory sex education in schools so as to inculcate responsible and safe sexual behaviour amongst young adults; and ensure that curriculum and textbooks in schools are revised to include informative and critical thinking about sex and gender, and not reinforce gender stereotypes. The Right of Children to Free and Compulsory Education Act, 2009 should be suitably amended to ensure that the NCF2005 recommendations on gender mainstreaming in the curriculum are complied with.

8. Legal Services Authorities, in exercise of their statutory mandate, should undertake dedicated awareness campaigns on the specific issues of VAW, encompassing information about laws, legal procedures, duties of police and other functionaries, and other available support services. These campaigns must involve local stakeholders.

9. Media reporting of VAW: Media persons and establishments should follow/comply with the regulatory framework in place relating to reporting of VAW cases and the directions issued by the judiciary, including in the recent Shreya Singhal v. Union of India (2015) case.

10. Sensitization and Training of Police, Prosecution and Judiciary: Central and State training institutions/academies should design and conduct structured and continuing training and sensitization programmes for police, prosecution and judicial officers. These programmes should be designed for inductees and inservice officers, and at all levels, so as to ensure holistic institutional reforms in attitudes, and skill building.

11. Periodic review and assessment of existing training curricula and programmes must be undertaken so as to ensure their continued effectiveness.

12. Discriminatory and insensitive language that revictimises women and perpetuates stereotypes should be discouraged by the presiding judge as an abuse of the process of court. Please see page 93 for specific recommendations relating to discriminatory language.

Key Recommendations on Substantive Law

1. Marital rape as an offence: Forced sexual intercourse within marriage should be brought within the ambit of definition of rape under section 375 IPC, by deleting Exception 2. Further, the Police should be directed not to register cases under section 377 IPC, where the forced sexual intercourse by the husband is in the form of anal penetration, since this provision is violative of Articles 14, 15 and 21 of the Constitution. Instead, in view of the expanded definition of rape, such cases should be registered under section 376 IPC.

2. Rights of Adolescents/Lowering Age of consent: The current position of the law, that the age of consent has been increased from 16 years to 18 years under section 375 sixthly, is clearly discriminatory against young adolescent/young adult males who are in consensual sexual relationships with adolescent girls between 1518 years, and must be declared bad in law as it is detrimental to public interest. This is also in conflict with prevention efforts which focus on sex/sexuality education to encourage responsible sexual behaviour amongst young adolescents.

3. In the opinion of the amicus, the proposed amendments to the Juvenile Justice Act, 2000 granting discretion to the Board whether to try a juvenile between the ages of 16-18 years is not in public interest and is contrary to the judgments of this Court in Subramaniam Swamy& Ors v. Raju through Member Juvenile Justice Board and Anr.[240] and Salil Bali v. Union of India[241].

240 (2014) 8 SCC 390

241 (2013) 7 SCC 705

Key Recommendations on Registration and Investigation

1. Non disclosure of identity of Survivor: Police should be directed to ensure strict compliance with the prohibition to disclose the identity of the survivor, particularly to the media, except as provided under Section 228A and further elaborated by this Hon'ble Court in ABC v Commissioner of Police (2013).

2. Implementation of uniform protocol for medicolegal care in rape: States should ensure immediate adoption and implementation of the Central Government (Ministry of Health & Family Welfare) Guidelines & Protocols for medicolegal care for survivors of rape, so that there is uniformity in providing gender sensitive medicolegal care.

Safeguards for Recording of statement by Magistrate:

3. To support the survivor to deal with trauma and give a comprehensive statement in the deposition before the Magistrate as per the requirement under Section 164 (5A)(a), she should be first provided emotional and trauma counseling through the One Stop Centers (OSCs); the lawyer and police facilitation officer attached to the OSCs will also accompany the survivor during statement recording.

4. Recording of statement under section 164(5A)(a) Cr.PC should be made optional, at the instance of person against whom the offence has been committed. This will ensure that every survivor has the option to choose whether she wants to give her statement under this section, which will be admissible as evidence, instead of a statement under section 161 CrPC. In such cases, the statement so given should be considered as her examinationinchief under section 137 CrPC. She should, however, be made aware of the relevant procedures and the consequences of giving her statement to the Judicial Magistrate so that she can make an informed decision.

5. Lastly, to protect the survivor from further victimization, in the course of her cross-examination, the law should include a safeguard against prosecution for any inaccuracies in the statement given by her under section 164(5A) CrPC, unless these are material contradictions. Detailed recommendations on this issue are mentioned earlier in the brief.

6. Uniformity and standardization of police operating procedures: Uniform Standard Operating Procedures for the police for recording and investigation of crimes against women should be issued and implemented in all States, including incorporating good practices in certain states such as the system in Delhi put in place vide directions in DCW v. Delhi Police (2009) and Khem Chand and Ors. v. State of Delhi (2008), encouraging e registration of FIRs, circumstances in which police must mandatorily be in plainclothes, ensuring victim receives status reports during investigation, strict adherence to statutory timeline for completion of investigation etc.

7. Special responsibility under POCSO Act cases: Police should take special care to ensure strict compliance with the statutory safeguards and fulfill its special responsibility, during registration of complaint and investigation of POCSO Act cases.

8. Right of accused not to be forcefully examined: The Hon'ble Supreme Court's directions in Selvi and Ors. v. State of Karnataka and Anr. (2010) regarding validity of scientifically administered tests must be strictly complied with.

Key Recommendations on Prosecution and Trial

9. Standard Operating Procedures for Prosecutors: Uniform Standard Operating Procedures for Prosecutors should be issued and implemented in all States. The SoPs should pay particular attention to the role of the Prosecutor in addressing the needs of the survivor, including:

i) Meeting the survivor, in advance, before the trial and brief her about the proceedings to ensure that she is familiar and comfortable with the Prosecutor and the trial proceedings. This is not akin to tutoring the witness and is part of trial preparation.

ii) Ensuring the bail application is opposed, and in case the Court grants bail, pray for specific conditions in the Court order against unauthorized contact with survivor/ witnesses and evidence tampering.

iii) Indepth understanding of medical evidence and its interpretation, particularly the reasons for negative medical evidence so as to ensure that such evidence is accurately presented before the Court. The SoPs should also include guidance that during medical examination, the survivor may have revealed additional details in medical history, which may not be in the FIR or the Cr.PC statements. To ensure that these are not misconstrued as "differences", the Prosecutor must be prepared to appreciate and present the statements accordingly. Further that medical tests to verify the perpetrator's "potency" are not only unscientific but also not contemplated as per the new statutory definition of "rape" that has gone beyond penovaginal penetration.

iv) Guidance that the Prosecutor should recommend witness protection, even at the stage of investigation, requesting a preliminary inquiry on the need for witness protection and witness identity protection.

Appointment of Judges and Support Infrastructure:

10. Ensure appointment of women judges to deal with cases of VAW, in accordance with the provisions of Cr.PC. as well as expeditious procedures for filling up vacancies for onleave judges (This recommendation is for on leave judges only or for vacant positions per se?). Also provide for adequate support personnel for Judicial officers in the form of support persons, interpreters, or welfare experts, as may be required, in order to ensure efficacious disposal of cases.

11. Provide regular and comprehensive orientation and refresher trainings for judicial officers, which should include detailed sessions on issues of 'sex and gender' in addition to the substantive and procedural aspects. Since attitudinal bias and gender stereotypes hamper decision making particularly in VAW cases, such sessions should allow for detailed discussion and reflection rather than being an obligatory exercise.

12. Witness Protection: All states should formulate witness protection schemes, in line with the recommendations made by the Law Commission of India.

13. Sentencing: Law Commission of India should formulate sentencing guidelines for cases involving sexual offences.

Key Recommendations on Role of Legal Aid and Community based Organizations

i) Define granularly the roles and responsibilities of the Legal Services Authority at the state, district and taluk or block levels to ensure maximum outreach and meeting the "unmet needs" of women and other marginalized groups. Towards this, also ensure recognition and effective utilization of the cadre of Para legal Volunteers.

ii) Recognize best practices and award community based organizations and Para Legal Volunteers providing legal aid and services at the community level; and scale up robust practices identified through regular monitoring and impact assessment.

Key Recommendations on Coordinated Service Delivery

1. Set up and strengthen One Stop Centres for VAW: All States should implement the Central Government scheme for One Stop Centres by setting up, operationalizing, and making adequate budgetary provisions for support infrastructure and human resource to ensure that these Centres can function in an effective manner.
2. Elinking the Justice System: The concerned Ministries should submit to the Court, the status report on implementation of the Interoperable Criminal Justice System (iCJS) project, which aims to interlink the related ongoing electronic initiatives, namely ePolice, eCourts, eJails and eProsecution.

Key Recommendations on Reparation and Compensation

1. It is suggested that the practice in Delhi of grant of interim compensation by the Delhi State Legal Services Authority on a recommendation made by the police, should be adopted nationwide. Further, that medical report should be considered as adequate for the purpose of grant of compensation. In cases of women and girls who are indigent, the SLSA/DLSA may consider waiving inquiry proceedings.
2. Victim Compensation Schemes of States should include all offences against minors as specified under the POCSO Act, and that there should not be any discrimination against minor male survivors, whether in terms of process or scale of compensation.
3. Although the quantum to be paid may vary from case to case, an all India minimum amount should be specified in relation to rape cases. No limitation period should exist for a claim for compensation in case of rape.
4. Under section 357A Cr.PC, rehabilitation cannot be confined to payment of compensation. In accordance with The Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, rehabilitation should be construed to include shelter, counseling, vocational rehabilitation, victim protection, as may be required.
5. The SLSA / DLSA should undertake largescale awareness initiatives about the provision of Victim Compensation through pamphlets, media, radio, and community outreach, in coordination with police, health care workers and other community level functionaries.

Key Recommendations on Police/Institutional Accountability

An independent complaints committee should be set up to deal with complaints received against the police.

Key Recommendations on Data Collection and Monitoring & Evaluation

Data collection

1. Undertake largescale representative samplebased community data collection on violence against women, similar to the NFHS – 3 but on a more extensive scale, so as to ensure that laws and policies are based on evidence generated in a comprehensive manner.
2. Strengthen and engender the existing data collection mechanisms on violence against women so that more variables and disaggregated information is available for formulation of targeted policies. The NCRB 2014 data collection methodology does appear to be a significant improvement, particularly in terms of covering gender disaggregated data and addressing gaps in earlier methodology. However, the data, which has just been released, requires careful examination to make a definitive comment.

3. Strengthen coordination between different agencies, which currently collect/have provision for collection of data relating to VAW. In particular, greater coordination between the Ministries of Home (NCRB) and the Ministry of Women &Child Development as well as between the Government and the judiciary is essential.

Evaluation and Social Audits:

1. Independent Rapporteurs on Violence against Women should be established as part of statutory bodies such as the National Commission for Women, the National Commission for Protection of Child Rights, and the National Human Rights Commission, which will be responsible for conducting periodic evaluation and impact assessment of laws, policies, and programmes on the issue.
2. Institutional reforms, particularly of the National Commission for Women, should be undertaken on an urgent basis to ensure that the Commission has parity in terms of powers, autonomy and status, with other similar national machineries. Towards this, the proposed amendments to the National Commission for Women Act, 1990 should be urgently reviewed and considered.
3. Undertake and encourage participatory social audits on VAW, which is an internationally proven method of not only of collecting additional data not captured through official sources but also of strengthening local communities to demand and enforce institutional accountability.

Key Recommendations on Gender Budgeting

1. Substantially increase budgetary allocations on gender equality, including towards implementation of existing laws, policies & programmes; planning and implementing new initiatives such as the 'One Stop Centre' Scheme; to strengthen institutions particularly the National Women's Machinery; and to undertake regular and intensive capacity development and awareness generation programmes, at all levels and with multiple stakeholders.
2. The Central and State Governments should ensure effective utilization of the committed budget by plugging gaps in scheme/programmatic processes and accountability mechanisms, strengthening service delivery, and maximizing outreach.

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IMPLEADMENT APPLICATION FILED BY LCWRI IN THE CASE OF

Mrs.Goolrokh M. Gupta Vs. Mr.BurjorPardiwala and & Ors

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION
I.A. NO. ___ OF 2013 IN S.LP No. 18889 / 2012

IN THE MATTER OF:

Mrs. Goolrokh M. Gupta ....Petitioners
Versus
Mr.BurjorPardiwala and &Ors ... Respondents

AND IN THE MATTER OF:

Mr. Feisal Alkazi and Anr. ...Applicants

APPLICATION FOR IMPLEADMENT AND DIRECTIONS

To the Hon'ble Chief Justice of India

And his Companion Judges of the

Supreme Court of India

The Applicant above-named most respectfully showeth:

1. The above-stated Special Leave Petition has been filed in this Hon'ble Court challenging the final judgment and order dated 23.3.2012 in SCA No 449/2010 passed by the Hon'ble High Court of Gujarat. In the aforesaid impugned judgment, the majority by 2:1 held that (i) a Parsi woman by virtue of contracting a civil marriage with a non Parsi man under the Special Marriage Act ceases to be a Parsi; (ii) That it was not possible for the High Court to decide on the evidence available as to whether religious practices prohibiting non Parsi from entering Agiaris is an integral part of Parsi Zoroastrian or not; and (iii) No writ deserves to be issued to respondents at this stage. According to the dissenting opinion, a woman who is born Parsi Zoroastrian does not cease to be a Parsimerely by virtue of solemnizing the marriage under the Act of 1954 with a man belonging to another religion concurred in part with regard to lack of maintainability. However, the dissenting opinion concurred with regard to lack of maintainability.

2. The Applicant No. 1 is an Indian Citizen. He is a qualified Master of Social Work. He is a noted Theatre Director and also works in the fields of education and social work. He has authored several books for children. He had been a Supervisor at the Sanjivini Society for Mental Health for over fourteen years. The Applicant No. 1 is Muslim by religion. The Applicant No. 2 is an Indian Citizen. She is She has a Masters degree in Sociology and is a trained counsellor. She is the Founder Director, Aarth-Astha which is an NGO working in the field of disability in Delhi.The Applicant No. 2 is Hindu by religion.

3. The Applicant No. 1 and Applicant No. 2 were married under the Special Marriage Act 1954 on January 29th,1988 in New Delhi. Neither of the Applicants changed their religion after

marriage as the provisions of the Special Marriage Act, 1954 allows both partners to follow their respective religions.

4. The Applicants have two sons from the wedlock, Zain, aged 23 years and Armaan, aged 20 years. Both the children of the Applicants fill up 'atheist' in forms that ask which religion they follow.

5. The family of both the Applicant-Husband and the Applicant Wife have examples of individuals who have entered inter-religious marriages. There are practicing Buddhists, Catholics, Protestants, Jews and Hindus in the extended family of the Applicants, and the family is richer for it.

6. The Applicants are adversely affected by the impugned final order and judgment which holds that a Parsi Zoroastrian woman ceases to be a Parsi Zoroastrian by virtue of entering into a marriage with a Hindu man under the SMA, 1954. Though the judgment has been passed against an individual, it affects all women irrespective of their religion who are married or will get married under the Special Marriage Act, 1954. The Applicants are therefore aggrieved by the impugned order and judgment of the High Court of Gujarat. The Applicants submit that the impugned judgement suffers from following errors in law:

I. The Special Marriage Act, 1954 was enacted to facilitate inter-religious marriages in India

7. In 1868 the colonial state in India received a petition signed by a member of the BrahmoSamaj seeking legislation for marriages amongst their members such that they could freely marry as per their own rites. This petition initiated the introduction of a civil marriage law in India. The colonial State in India responded to this petition in the form of a Bill to regularise civil marriages. The Bill was revised three times and ultimately enacted as The Special Marriage Act (Special Marriage Act) III of 1872.

8. The Special Marriage Act III of 1872 was an optional law initially made available to only those who did not profess any of the faith traditions of India. Hindus,Muslims, Christians, Sikhs, Buddhists and Parsis had to renounce whatever religion they were following in order to marry under this Act. This was a serious drawback in encouraging marriages under the Act. Therefore, in 1922 The Special Marriage Act was amended to make it available to Hindus, Sikhs, Buddhists and Jains to marry within these four communities without renouncing their religion. However, there was another drawback to this enactment, which was not addressed by the amendment. A marriage under the SMA resulted in a deemed severance whereby succession would be regulated by the Indian Succession Act of 1865.

9. In 1954, the Special Marriage Act of 1872 was repealed. The Special Marriage Act of 1954 was enacted. As per the Statement of Objects and Reasons it was enacted in order "to provide a special form of marriage which can be taken advantage of by any person in India and all Indian nationals in foreign countries irrespective of the faith which either party to the marriage may profess." The parties may observe any ceremonies for the solemnization of their marriage, but certain formalities are prescribed before the marriage can be registered by the Marriage Officers.

10. Under the Special Marriage Act, 1954, Section 20 provides that persons opting for a civil marriage under the Act, would retain the same rights and disabilities with regard to the right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850 applies. In other words, marriage under the Act would not affect the right of succession to any property, in the same way that it would not be affected by his or her renunciation of religion, or having been excommunicated from the communion of any religion or being deprived of caste.

11. However, the Special Marriage Act, 1954, in the form of Section 19, specifically retains the provision regarding severance of persons professing the Hindu, Buddhist, Sikh or Jain religion, married under the Act from the undivided family.

12. With respect to inheritance, the Special Marriage Act, under Section 21, provides that succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the Indian Succession Act, 1925. Further, Section 21 provides that for the purposes of the section, it Chapter III of Part V (Special Rules for Parsi Intestates) would be deemed to be omitted from the Indian Succession Act, 1925.

13. However, on the recommendation of the Law Commission of India (59th Report, 1974), Parliament enacted the Marriage Laws (Amendment) Act, 1976. A true copy of extracts of the act are annexed herewith and marked as ANNEXURE A-1 (pages __ to __). This Act added section 21-A to the Special Marriage Act. As per Section 21-A, where a marriage of any person professing the Hindu, Buddhist, Sikh or Jain religion with a person professing the Hindu, Buddhist, Sikh or Jain religion is solemnized under the Special Marriage Act, Sections 19 (effect of marriage on member of undivided family) and 21 (Succession to property of parties married under the Act) shall not apply and Section 20 (rights and disabilities not affected by Act), in as much as it creates a disability shall also not apply.

14. Therefore, under section 21 A, section 19 will not apply in cases of marriage of a Hindu, Sikh, Buddhist or Jain to another Hindu, Sikh, Buddhist or Jain and the Hindu Succession Act would apply in such marriages as the law of succession.

15. The interpretation of a co-joint reading of sections 19, 20 and 21 A is that by virtue of two persons of different faiths marrying one another, a change of their religion does not result by law.

II. The Special Marriage Act, 1954 is a Progressive Legislation

16. The Special Marriage Act,1954 is a progressive legislation. It has been held that the Act applies to all Indian Citizens, irrespective of their caste, creed or religion. In Dr. Abdul Rahim Undre vs. Padma Abdur Rahim Undre,AIR (1982) Bom341, High Court of Bombay, held:

> *"23. It can safely be said that Special Marriage Act is in reality an Indian Marriage Act, which applies to all Indian Communities irrespective of caste, creed or religion.Even the religious marriages can be registered under the said Act. On such registration the religious marriage can be converted into secular marriage... However, a secular marriage cannot be converted into religious marriage...It cannot also be forgotten that the establishment of a secular society is the aim and goal of Indian Constitution. Therefore in the area and field which is secular or nonreligious laws will have to be common for all citizens of India, and that is what has been done, though to limited extent by enacting Special Marriage Act at least leaves a choice open which is available to all the citizens of India irrespective of their caste, creed or religion."*

17. The Hindu Marriage Act of 1956 was made applicable to Hindus, Buddhists, Sikhs and Jains. Consequently, marriage between a Hindu and a person outside these four religious communities is not permissible under the HMA. Such marriages will be valid only if performed under the Special Marriage Act 1954.The Law Commission in its Report Number 212, October 2008, observed, "religion of the parties to an intended marriage is immaterial under this Act; one can marry under its provisions both within and outside one's community."A true copy of extracts of the Law Commission Report No. 212 of October 2008 is annexed herewith and marked as ANNEXURE A-2 (pages __ to __).

18. The Special Marriage Act, 1954 has facilitated inter religious marriages in India without requiring the parties to the marriage to renounce their religion.Marriage between persons of different religions have been recognised as valid under the Special Marriage Act 1954 by various High Courts across the country (Late R. Sridharanby Legal Heirs vs The Commissioner of Wealth Tax Madras and Ors AIR 1970 Mad 249, SmtGitika Bagchi vs Subhabrota Bagchi AIR 1996 Cal 246, Mohd. Ajmal vs Sivadasan and OrsWP (Crl) 107/2010 High Court of Kerala). This Hon'ble Court in Mrs.Valsamma Paul vs Cochin University and Ors,AIR 1996 SC 1011 acknowledged that 'The Hindu Marriage Act 1956 and Special Marriage Act 1954 made the marriage between persons belonging to different castes and religions as valid marriage' (at para 30).

19. The SMA 1954 is specific to India and is in consonance with the Indian State's commitment to secularism and equal respect for all religions. It is a progressive legislation enabling couples to solemnise their marriage while retaining their respective religious identities. It is interesting to note that The Special Marriage Act of 1872 continues to be in force in Pakistan and Bangladesh.

20. The effect of the impugned judgment is essentially a prohibition on inter-religious marriages. Countries which prohibit inter religious marriage specify this prohibition in legislation. For example, section 10 of the Islamic Family Laws Act 1984 of Malaysia prohibits the marriage of a Muslim man to a non Kitabiya woman, and the marriage of a Muslim woman to a non Muslim. Civil marriages are an option only for non Muslims.

III. The Scope of Section 19 of the SMA is Restricted

21. Section 19 of the Special Marriage Act 1954 provides that where a person professing the Hindu, Buddhist, Sikh or Jaina religion under the Special Marriage Act, 1954, it shall be deemed to effect his severance from such family. It is pertinent to note that the Section is limited in its scope.

22. First, Section 19 specifically applies to those persons professing Hindu, Buddhist, Sikh or Jaina religions. There is no like provision applicable to persons professing other religions. A person professing Christianity, Islam or Zoroastrian who chooses to get married under the Special Marriage Act, 1954 is not deemed to effect severance from his or her family.

23. Further, where applicable, Section 19 only deems severance from a person's family and not from the religion itself. The Special Marriage Act, 1954 does not envisage a situation where a person is severed from their religion as a result of marriage under the Act. On the other hand, the impugned judgment has held that the Petitioner ceased to be a Parsi Zoroastrian as a result of her marriage to a Hindu. Such a finding is contrary to the provisions of the Special Marriage Act, 1954.

24. It is further submitted that the deemed severance effected by Section 19 is only for the limited purposes of succession. It does not hinder a person's personal relations with their family. Section 19 corresponds to Section 22 of the old Special Marriage Act 1872, and according to the 59th Report of the Law Commission of India,'its principle object is to replace co-parcenary rights and other rights concerning the HUF by a position under which the person marrying will become a divided co-parcener. The Report further refers to the debates in the Joint Committee and notes that section 19 was retained in order to simplify the law of succession as follows:

    The Joint Committee gave anxious consideration to this clause as that had been made the subject of attack in many of the opinions received on the ground that it penalises marriages under this law. After careful consideration the Joint Committee have decided to retain this

clause in its original form particularly because it has the desirable effect of simplifying the law of succession."

25. Consequently, Section 19 is concerned with succession alone and has no connection with the religious identity of the marrying person. It does not imply that the person marrying under Special Marriage Act is obliged to severe his or her personal relations with the natal family.

IV. The interpretation of the judgment and the reading of section 19, 20 and 21 A in the manner the impugned judgment does is in violation of Article 14 of the Constitution

26. The Respondent–Trust permits a male Parsimarried to a non-Parsi to enjoy all the rights and privileges of the Parsi Zoroastrian religion while denying such rights to Parsi Zoroastrian women married to non Parsi men.

27. With regard to the above, the majority judgment of the Hon'ble High Court of Gujarat observed that:

> *"In all religion, be it Christian, be it Parsi, be it Jews, the religious identity of a woman unless specifically law is made by the Parliament or the legislature, as the case may be, as per the religions, shall merge into as that of the husband. Such rights would be the rights other than those as may be available to a woman given by the nature and the rights as otherwise specifically protected by express provisions of statute. It is hardly required to be stated that such principle is generally accepted throughout the world and therefore, until the marriage, after the name of the woman, the name of the father is being mentioned and after marriage, name of husband is being mentioned for the purpose of further describing her identity" (at Para 26).*

28. Such a finding is erroneous and contrary to the provisions of the Special Marriage Act, 1954. As submitted above, it is clear that the Special Marriage Act, 1954 does not require a woman to adopt her husband's religion or name upon marriage. An increasing number of women in India retain their own surnames upon marriage and do not adopt the surname of their husbands. To assume that it is mandatory for all wivestomerge their identity with that of the husband, while the husband is free to maintain the identity of his choice is in violation of the right to equality guaranteed Article 14.

29. The impugned judgment suffers from a misreading of the law and has serious implications for women who enter inter-religious marriages and who do not wilfully choose to change their religions. To make it mandatory for all women to accept the faith of their husbands, while the husband is free to choose his religious faith is, in effect, tocreate a separate law for women and a separate law for men, which is in violation of Article 14. Making it obligatory for women to change their religions after marriage to the religion followed by their husband, while the husband has liberty to retain or change his religious faith - is not based on any intelligible differentia and only serves to perpetuate inequality between men and women.

V. Reading SMA in the manner the Impugned Judgment does is in violation of Article 21 of the Constitution of India

30. It is an established position of law that the fundamental rights under the Constitution are to be interpreted in an expansive and purposive manner and not in a narrow and pedantic fashion. Such liberal interpretation would invest fundamental rights with significance and vitality and enhance the dignity of the individual and the worth of the human person. This

was held by this Hon'ble Court in the case of Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608.

31. Article 21 of the Constitution guarantees the right to life and personal liberty to all persons. It is based on the premise that all human beings are born with certain inalienable rights like life, liberty and happiness, which are fundamental for the realization of their full personality. Article 21 has been interpreted to include rights to privacy, substantive due process, dignity and health, amongst others that have been deemed central to the concept of civilized existence in a democratic society.

32. This Hon'ble Court has heldinNoise Pollution (V), In re, (2005) 5 SCC 733 a life with human dignity includes all those aspects of life which go to make a person's life meaningful, complete and worth living. It is submitted that faith forms the core of a person's being and is intrinsic to individual identity. The respect of a person's faith is therefore a part of the respect of the right to dignity, protected under Article 21.

33. The term 'religion' has been judicially considered in Commissioner, Hindu Religious Endowments, Madras v. LakshmindraThirthaSwamiar of Sri Shirur Mutt1954 Indlaw SC 33 wherein the following proposition of law have been laid down:

"(1) Religion means 'a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being';

(2) A religion is not merely an opinion, doctrine or belief. It has its outward expression in acts as well;

(3) Religion need not be theistic."

34. It is thus, Constitutionally impermissible to force a person to cease to follow a particular religion and second, to foist the religion of another person onto that individual. Forcing a wife to merge her religious identity with that of her husband, impairs her dignity and violated Article 21.

VI. Reading SMA in the manner the impugned judgment does is in violation of Article 25 of the Constitution

35. Article 25 of the Indian Constitution affirms freedom of conscience, and free profession, practice and propagation of religion. In Faheem Ahmed v. Maviys @ Luxmi2011 IndLaw Del 1218, it was held that:

> *"India is a secular country and under Article 25 of the Indian Constitution, right has been given to every citizen to profess, practice or propagate any religion. The cherished ideal of secularism which is the hallmark of our Constitution has been expressly recognized under the said Article 25 of the Indian Constitution. The Constitution does not put any kind of embargo on the right of any person to freely choose any religion he or she so likes or the religion which one is to adopt and practice in his or her life. It is well-settled that freedom of conscience and right to profess a religion implies freedom to change his or her religion as well. The Constitution of India does not define the word 'religion' and rightly so, as the framers of the Constitution could not have perceived to give any exhaustive definition of 'religion'."*

36. In this regard, the right to practice and profess religion has been interpreted differently from the right to propagate religion.

37. In essence, the right to propagate ones religion cannot infringe upon another person's right to freedom of religion. This was laid down by this Hon'ble Court in Lily Thomas vs Union of India (JT2000(5)SC617 at Para 62:

> *"Under the constitutional scheme every person has a fundamental right not merely to entertain the religious belief of his choice but also to exhibit his belief and ideas in a manner which does not infringe the religious right and personal freedom of others"].*

38. The limitation on the right to propagate religion was affirmed in Rev Stainislaus vs. State of Madhya Pradesh [AIR 1977 SC 908], and in SatyaRanjanMajhivs State of Orissa and Ors. (2003)7SCC439, wherein this Hon'ble Court held there is no fundamental right to convert another person to one's own religion; however the right to propagate one's religion is protected by Article 25.

39. The Law Commission of India, in Report No. 235/2010has noted that the freedom of conscience and the right to profess, practice and propagate religion as enshrined in Article 25 of the Constitution connotes the right to communicate the religious belief to others by expounding the tenets of that religion. The Report makes it clear that conversions are separate from marriage and notes that conversion is a solemn act, and cannot be treated as an event which can be achieved through a mere declaration - oral or writing. Importantly it notes that 'Conversion which is bereft of any particular formalities or religious rites cannot be placed on the same pedestal on marriage which can be recognized in law only if customary rites and ceremonies are gone through'. A true copy of the Law Commission Report No. 235/2010 is annexed herewith and marked as Annexure A-3 (pages __ to __).

40. It is also pertinent to note that some State governments have even enacted laws to prevent forcible conversions,however there is no prohibition on voluntary conversions. To make it compulsory for a wife in an inter-religious marriage to convert to the religion of her husband is essentially a forcible conversion, which is in violation of Article 25.

VII. Reading SMA in the manner the impugned judgment does is in violation of International law

41. It is an established position of law that international law can be used to expand and give effect to the fundamental rights guaranteed by our Constitution. [V/0 Tractor Export v. Tarapore& Co.1969 (3) SCC 562 at para 15; Jolly George v. Bank of Cochin (1980) 2 SCC 360 at para 10; Gramaphone Company of Indian Ltd v. BirendraBahadurPandey, (1984) 2 SCC 534 at para 5; Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647 at para 15; Vishakha&Ors. v. State of Rajasthan &Ors.(1997) 6 SCC 241 at paras 7 and 10; People's Union for Civil Liberties v. Union of India &Anr. (1997) 1 SCC 301 at paras 20-26; People's Union for Civil Liberties v. Union of India &Anr.(1997) 3 SCC 433 at para 13; Apparel Export Promotion Council v. A.K. Chopra(1999) 1 SCC 759, at para 26-27; Pratap Singh v. State of Jharkhand (2005) 3 SCC 551 at para 63-64; People's Union For Civil Liberties v. Union of India &Anr. [(2005) 2 SCC 436); Entertainment Network (India) Ltd. v. Super Cassette Industries, (2008) 13 SCC 10 at para 70-76, Smt. Selvi v. State of Karnataka (2010) 7 SCC 263 at para 236]

42. Reading SMA the way the impugned judgment does is in violation of the following internationals laws India is a signatory to:

    a. Article 16 (1) of the Universal Declaration of Human Rights 1948 states:

'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.'

b. Article 23 (4) of the International Covenant on Civil and Political Rights 1966 declares:

'States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.'

c. Article 2 (e) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, and Article 2 (f) of CEDAW are germane:

'States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;'

d. Paragraph 21 of General Comment 28 to the International Covenant on Civil and Political Rights states as follows:

'States parties must take measures to ensure that freedom of thought, conscience and religion, and the freedom to adopt the religion or belief of one's choice - including the freedom to change religion or belief and to express one's religion or belief - will be guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination. These freedoms, protected by article 18, must not be subject to restrictions other than those authorized by the Covenant and must not be constrained by, inter alia, rules requiring permission from third parties, or by interference from fathers, husbands, brothers or others. Article 18 may not be relied upon to justify discrimination against women by reference to freedom of thought, conscience and religion; States parties should therefore provide information on the status of women as regards their freedom of thought, conscience and religion, and indicate what steps they have taken or intend to take both to eliminate and prevent infringements of these freedoms in respect of women and to protect their right not to be discriminated against.' [Paragraph 21 of CCPR/C/21/Rev.1/Add.10, 29 March 2000]

43. While there is no one international law specifically dealing with forcible conversion of wives to the religion of their husbands, there are reports on the status of women in the light of religion and traditions.The report of the Special Rapporteur on Freedom of Religion or Belief notes in report dated24 April 2009, [E/CN.4/2002/73/Add.2]that :

'At the dawn of this third millennium, many women across the world suffer discrimination in their private and family lives and in relation to their status in society. Such discrimination, which is deeply rooted in the dominant culture of some countries, is largely based on or imputed to religion. It is often trivialized and tolerated by the State or society and sometimes sanctioned by law.'

The report calls upon States to undertake domestic measures such as education and training, legislative measures, generating public awareness, religious instruction and dialogue with

religious leaders, gender parity and combating extremism as strategies to improve women's status in light of religion and traditions.

VIII. Civil Unions in other countries that do not call upon either party to give up their religion

44. It may be noted that laws in countries where people following diverse religions and multiple ethnic groupsco-exist–civil union / marriagelawsdo not call upon either party to give up their respective religions. For example:

45. Under section 1 of The Civil Union Act 2006 of South Africa, two individuals over 18 years of age may enter into a civil union irrespective of religion, or even gender.

46. In the United States, any couple can get married following the acquisition of a marriage license. The couple do not have to be of the same religion under any of the State requirements in order to obtain a marriage license.

47. The Marriage Act 1949 regulates marriages in the United Kingdom. While marriage when either person is under the age of sixteen is void, and there are prohibited degrees of relationships stipulated under the law, there is no prohibition on persons of different religions marrying each other.

48. There is no law in India which prohibits inter-religious marriages. The impugned judgement of the Gujarat High Court, by deeming a conversion of the wife even in the case of a marriage performed under secular law, is not in consonance with the law of the land.

PRAYER

In the premises, it is most respectfully prayed that

a) This Hon'ble Court may be pleased to allow the Applicants to be impleaded as a party respondent in the subject Special Leave Petition,

b) Without prejudice to the prayer above, this Hon'ble Court may be please to permit the Applicants to intervene in the subject Special Leave Petition;

c) Pass such other and further order/s as may be deemed fit and proper in the circumstances.

AND FOR THIS ACT OF KINDNESS THE APPLICANT AS IN DUTY BOUND SHALL FOREVER PRAY

FILED BY:

New Delhi

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A BRIEF SYNOPSIS OF THE NEW OFFENCES/ PROCEDURES RECOMMENDED BY THE JUSTICE VERMA COMMITTEE ON AMENDMENTS TO CRIMINAL LAW

Mrinal Satish and Shwetasree Majumder

Verma Committee Report: A Two-Part Note

The Criminal Law Amendments suggested by the Justice Verma Committee are synopsised in a two-part guest post by MrinalSatish and ShwetasreeMajumder, who worked with the Committee. Mrinal is Associate Professor at National Law University, Delhi and Shwetasree is an IP attorney and founder of the law firm, Fidus Law Chambers.

INTRODUCTION

The Justice Verma Committee was set up by the Government of India after the gruesome gang rape incident that occurred in Delhi on December 16, 2012. The Committee was asked to review existing laws and suggest amendments to criminal law to effectively deal with instances of sexual violence. The Committee, however, did not view its mandate as only drafting new laws. It placed its mandate within the framework of the Constitution. The Committee grounded its report in the State's obligation to secure the fundamental rights of its citizens, which includes the right of every person to assert one's individual autonomy. In the context of women, if they are denied autonomy, even by actors other than State, the duty of the State does not diminish only on that ground. The failure to secure rights of women results in the State denying the right to equality and dignity that women are guaranteed under the Constitution. [See pages 65-67 of the Report]. The Committee's report, including the new offences that have been created, and modifications suggested of the existing ones need to be viewed within this Constitutional framework.

The Justice Verma committee has made wide ranging recommendations for changes to various laws that impact upon women's right to equality and right to dignity. In this two-part synopsis, we focus on amendments made to the criminal law framework relating to sexual violence. In Part I of the synopsis, we discuss the set of new offences recommended by the Committee, including stalking and voyeurism. We also discuss the modifications suggested to Section 354 of the Indian Penal Code, which defines the offence of "outraging the modesty of a woman." The offence has been re-christened as "sexual assault" and the terminology has been changed from archaic concepts of "modesty" to recognition of sexual autonomy, dignity and freedom. We also discuss amendments suggested to the Code of Criminal Procedure, 1973 (Cr.P.C.) and the Indian Evidence Act, 1872 (IEA). In Part II of the synopsis, we discuss amendments suggested to rape laws, the recommendation to introduce a new offence of trafficking, as also issues relating to medical examination of rape survivors. These synopses provide a summary and brief explanation of the changes recommended, and the reasons for these changes. They do not contain an analysis or a critique of the provisions.

AMENDMENTS TO THE IPC AND THE INTRODUCTION OF NEW OFFENCES

A. Acid attacks:

The Committee highlights the heinous and yet commonplace nature of acid attacks in several Asian and African countries including India (page 146). Although the Committee notes that traditionally the offence is dealt with under Section 326 of the IPC, it observes that "what happens when there is permanent physical and psychological damage to a victim, is a critical question and law makers have to be aware that offences are not simply based

on the principle of what might be called offence against the body, i.e., damage of the body, but they must take into account the consequences on the right to live with dignity which survives the crime" (page 147).

The Committee notes that the Criminal Law (Amendment) Bill, 2012 includes the offence of voluntarily causing grievous hurt, through use of acid. Under the proposed Section 326A of the Amendment Bill, if a person causes permanent or partial damage to the body of another person by throwing acid on, or administering acid to that person, with the intention of causing injury, or with the knowledge that injury shall be caused, that person shall be guilt of the offence defined in Section 326A. The Amendment Bill has proposed a minimum punishment of ten years, and a maximum of life. It has also proposed that a fine of a maximum of rupees ten lakhs may be imposed, which shall be given to the victim.

The Committee makes some key modification to this provision. It recommends that the offence not be confined to only throwing acid on a person. It suggests that if a person causes permanent or partial damage to the body of another person, by using means other than throwing acid, such person and acts, should also be brought within the purview of the section. The Committee also recommends that the victim should receive Central and State government assistance through a compensation fund (See Para 8 page 148). It further recommends that instead of a fine, the convicted person be liable to pay compensation to the victim, which should be sufficient to at least cover the medical expenses of the victim.

The first explanation to the section takes the offence beyond the specific sphere of acid attacks to other violent hate crimes against the body of a woman, which maim or permanently damage or disfigure her, such as forced circumcision of a woman or female genital mutilation. The second explanation pre-empts an argument against liability if the victim 'reverses' the visible effects of the attack, through medical treatment. This formulation captures the Committee's recognition that the offence is not only about physical damage, but also about right of a person to live with dignity.

The Criminal Law (Amendment) Bill, 2012 proposes the addition of Section 326B which punishes the voluntary throwing or attempt to throw acid on a person. The offence is punishable with imprisonment for a minimum period of five years, which may extend to seven. Along the lines of its recommendations for modifying Section 326A, the Committee recommends the broadening of Section 326B to include any other means to achieve the purpose of permanently or partially damaging a person's body.

B. Sexual Assault

Under the current Section 354 of the Indian Penal Code, a person who "assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty" is punished with imprisonment of upto two years, or fine, or both. The focus of the provision, rather unfortunately is on "outraging of the modesty" of a woman and invariably the defence against the application of such a provision has centred around what constitutes a woman's modesty, whether the woman in question was of such a character to claim that her modesty was outraged, whether young girls below the age of puberty have 'modesty' etc. Further, under the current formulation the offender can argue that he did intention to "outrage the modesty" of the woman, or that he did not know that his actions would result in the "modesty of the woman" being outraged. Hence, the need for change was palpable, so as to change the focus of the crime from notions of "modesty" to violation of sexual autonomy. The recasting of the provision therefore needed to be wider in scope, cover a range of offences (and consequently provide higher degrees of punishment) and be a gender neutral provision that criminalised unwelcome sexual acts of varying degrees of severity.

The Committee has recast the provision in its entirety to criminalise all acts of non-penetrative sexual violence under the umbrella term of 'sexual assault.' This ranges from the intentional contact of a sexual nature with another person without their consent, to using words, acts or gestures towards or in the presence of another person to create an unwelcome threat of a sexual nature or which result in an unwelcome advance. In its recommended avatar the provision shifts focus from the "modesty" of the woman being the lens to view the offence to an assessment of when sexual assault can be said to have occurred. The Committee also recommends the repeal of Section 509 of the IPC, since the acts criminalized under that section are covered in the recast Section 354.

Drawing from the Canadian approach, the Committee explains in the context of the recast Section 354 that while the offence of sexual assault should include all forms of non-consensual non-penetrative touching of a sexual nature, the 'sexual nature' of an act would be established if: "viewed in the light of all the circumstances…the sexual or carnal context of the assault [is] visible to a reasonable observer." The Committee observes that the courts will examine factors such as the part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, threats, intent of the accused and any other relevant circumstances but warns that it should not be a prerequisite that the assault be for sexual gratification. The motive of the accused is 'simply one of many factors to be considered."(page 112).

The Committee also recommends change in the sentencing framework. For an act that involves physical contact, a maximum penalty of imprisonment for five years has been recommended. For acts that do not involve physical contact, a maximum sentence of one year has been suggested.

C. Public Disrobing of a woman:

The Committee takes note of various instances across the country of humiliating a woman by publicly disrobing her. Recognizing this as a crime usually done with the intention of publicly humiliating a woman, the Committee proposes a separate provision to deal with this act. It recommends enactment of Section 354A to deal with this offence. A minimum sentence of three years, and a maximum sentence of seven years is recommended for this new offence.

D. Voyeurism

The Committee recommends the introduction of a new offence of voyeurism. Although the Information Technology Act covers invasion of privacy using electronic devices, the IPC does not contain a provision that defines and punishes voyeuristic acts. This new section achieves that purpose. The provision covers two types of instances (1) where the perpetrator watches the woman secretly, and (2) where the woman might have consented to the perpetrator watching her (for instance, when the woman might be in a relationship with the perpetrator) but not of any third party watching her at the perpetrator's behest. Watching a woman in these circumstances amounts to voyeurism if she was engaged in a 'private act', which, in the first explanation to the provision is defined as "an act carried out in a place which, in the circumstances, would reasonably be expected to provide privacy, and where the victim's genitals, buttocks or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the person is doing a sexual act that is not of a kind ordinarily done in public." The second explanation covers instances where a woman may have consented to her private images being captured by the perpetrator (such as, once again in instances of a relationship between them) but not to such pictures being disseminated by him to third parties. The recommended punishment for the offence of voyeurism is of imprisonment of one to three years and with fine, and in the event of a second or subsequent conviction with

imprisonment for a minimum of three years which may extend to seven years and also with fine.

E. Stalking

The Committee recommends the introduction of a new offence of stalking. "[T]he Committee was surprised to find out that offences such as stalking, voyeurism, 'eve-teasing'etc. are perceived as 'minor' offences, even though they are capable of depriving not only a girl child but frail children of their right to education and their freedom of expression and movement." Therefore, the Committee takes the view that"it is not sufficient for the State to legislate and establish machinery of prosecution, but conscious and well thought out attempts will have to be made to ensure the culture of mutual respect is fostered in India's children. Preventive measures for the initial minor aberrations are necessary to check their escalation into major sexual aberrations."(Page 215)

The offence of stalking (which is gender neutral) is committed in any one of three situations listed below:

Situation 1: Where a person

(i) follows another and

(ii) contacts, or attempts to contact them

(iii) in order to foster personal interaction

(iv) repeatedly

(v) despite a clear indication of disinterest, or

Situation 2: Where a person

(i) monitors the use by another person of the internet, email or any other form of electronic communication, or

Situation 3: Where a person

(i) watches or spies on another person,

(ii) in a manner that results in a fear of violence or serious alarm or distress in the mind of the other person, or

(iii) in a manner that interferes with the mental peace of the other person

The provision includes three exceptions, where the action will not amount to stalking:

(a) where the course of conduct is pursued for the purpose of preventing or detecting crime and the person accused of stalking has been entrusted with the responsibility of prevention and detection of crime by the state; or,

(b) where the course of conduct is pursued under any enactment or rule of law, or to comply with any condition or requirement imposed by any person under any enactment; or,

(c) where, in the particular circumstances the pursuit of the course of conduct was reasonable.

The punishment recommended for the offence of stalking is imprisonment of either description for a term which shall not be less than one year but which may extend to three years along with a fine.

AMENDMENTS TO THE CODE OF CRIMINAL PROCEDURE

The Criminal Law (Amendment) Bill, 2012 suggests amendments to five sections of the Criminal Procedure Code, 1973 (Cr.P.C). In light of its mandate and the changes suggested to the I.P.C. and other substantive laws, the Committee has suggested changes to various other sections of the Cr.P.C. We have summarized these changes and provided a brief commentary on the impact they will have, if enacted.

A. Section 39, Cr.P.C.

Section 39 imposes a duty on the public to report offences if they become aware of commission or the intention of a person/s to commit the offences listed in sub-section (1) of that section. If a person intentionally omits to inform the police or the nearest magistrate, such omission is punishable under Sections 176 and 202 of the Indian Penal Code, 1860 (I.P.C.), both of which provide a term of imprisonment which may extend to six months. Currently, Section 39(1) of the Cr.P.C. does not include sexual offences. The Committee recommends that Sections 326A, 354, 354A, 354B, 354C, 376(1), 376(2), 376A, 376B(2), 376C, 376D and 376F be added to the list of offences in Section 39(1), Cr.P.C.

This proposed change in the law recognizes the under-reporting of rape cases, because of survivors being discouraged by individuals who become aware of the incident. If the law is amended as suggested, a person who becomes aware of an incident of sexual abuse will be legally bound to report the crime.

B. Section 40A, Cr.P.C.

Section 40 of the Cr.P.C. is along the lines of Section 39. It casts a duty on officer employed in connection to the affairs of a village and residents of a village to report the commission of offences listed in Section 40(1). An officer employed in connection to the affairs of the village includes the members of the village panchayat, and others in similar leadership roles. The Committee recommends that a new section, Section 40A be added to the Cr.P.C. This section would obligate "every officer employed in connection with the affairs of a village, and every person who is part of a villagepanchayat" to report without delay, the commission (or the intention to commit) offences listed in that section. The offences listed are Sections 326A, 326B, 354, 354B, 354C, 376(1), 376(2), 376(3), 376A, 376B(1), 376B(2), 376C and 376D of the IPC.

This suggested amendment recognizes the fact that in rural areas, the sarpanch or a member of the village panchayat is often informed about the commission of a sexual offence. Panchayats often engage in getting the parties to compromise, and discourage the survivor and her family from reporting the incident to the police. If this suggestion of the Committee is accepted, the members of the panchayat and any other person in a leadership role in a village will be legally bound to report the offence to the police.

C. Section 54A, Cr.P.C.

The Committee recommends amending Section 54A of the Cr.P.C., which deals with "identification parades." The purpose of an identification parade is for a person who has information about the crime and/or the offender to identify a person who is suspected of having committed the crime. In an identification parade the person identifying generally points out the person to the police officer conducting the parade. Recognizing that the current process might not be disabled-friendly, the Committee has proposed that in cases where the person identifying is physically or mentally challenged, a different procedure be used. Instead of a police officer, such parade shall be conducted by a judicial magistrate, who shall devise a method of identification, which the physically or mentally challenged

person is comfortable with. The Committee has also suggested that the entire process be videographed.

D. Section 154, Cr.P.C.

The Criminal Law (Amendment) Bill, 2012 proposes amendments to Section 154(1), Cr.P.C. which deals with filing of First Information Reports. The amendment proposed by the Bill is that in cases involving Sections 354, 375, 376, 376A, 376B and 509 of the IPC, FIRs should be recorded, as far as possible, by a woman police officer.

The Committee makes four additional suggestions. First, it adds all sections in the IPC dealing with sexual offences against women (including those proposed by the Committee) to the list of offences already suggested by the Amendment Bill. Second, it suggests that if the rape survivor is a woman, then she should be provided legal assistance, as well the assistance of a healthcare worked and/or a women's organization. Third, in the event that the survivor (male or female) is temporarily or permanently physically challenged, the police officer is required to record the FIR at a place convenient to the survivor, in the presence of a special educator or an interpreter. The Committee also recommends that the process be videographed. The final recommendation is that after recording the survivor's statement, the police should get the survivor's statement recorded by a judicial magistrate.

Filing of the FIR is a major hurdle that a rape survivor faces. The atmosphere of a police station is not friendly to reporting a sexual crime. It has been alleged that police officers are not sensitive while recording FIRs for rape. Recognizing that women might be more comfortable in reporting the offence to a female police officers, previous law reform initiatives, including the Criminal Law (Amendment) Bill, 2012, have suggested that FIRs in sexual offences be recorded by women police officers. If the Committee's recommendations of providing legal assistance to a rape survivor, as well as the assistance of a healthcare worker and/or a women's organization is accepted, the process will be less intimidating than it currently is. This would result in rape survivors being provided better access to the legal system.

E. Section 160, Cr.P.C.

Section 160 of the Cr.P.C. deals with the power of the police officer to summon a person acquainted with the facts of the case. This is generally done for recording of the statement of the witness, and the person may be called to a police station. The existing provision, however, provides that no woman or a male under the age of fifteen shall be questioned, except at their residence. The Criminal Law Amendment Bill proposes to extend the age for men, providing that a man under the age of fifteen or over the age of sixty five shall be questioned at his residence. The Committee recommends that a physically or mentally challenged person also be questioned at his/her residence.

F. Section 164, Cr.P.C.

Section 164 of the Cr.P.C. deals with the recording of confessions and statements by Magistrates. The Committee recommends that as soon as the commission of a sexual offence is brought to the attention of the police, the police shall arrange to have the survivor's statement recorded by a Magistrate. It further recommends that in the case of a mentally or physically challenged person, such statement, the recording of which shall be videographed, shall be taken with the assistance of an interpreter or a special educator. It also recommends that in the case of mentally or physically challenged persons, this statement before the Magistrate shall be considered as their examination-in-chief. This implies that the person will not have to re-assert the statement at trial, but only be available for cross-examination.

A major reason for acquittals in rape cases is the survivor turning hostile. In a large number of cases, the survivor retracts from her prior statement to the police, due to societal and other pressures. The consequence of getting a statement recorded by a magistrate is that the survivor cannot claim that he/she did not make such statement, or dispute its contents. This would ensure that the person does not retract from his/her statement because of extraneous reasons. On the other hand, if she does retract, he/she will be liable to prosecution for making false statement under oath.

G. Section 197, Cr.P.C.

Section 197(1) of the Cr.P.C bars a court from taking cognizance of an offence, if it is committed by a judge, magistrate or a public servant, while acting or purporting to act in the discharge of his official duties, unless sanction is granted by the appropriate government. The Committee recommends that the section be amended to lift the bar on taking cognizance in sexual offences, as well as the offence of trafficking. Under the current framework, if a public servant commits an offence, including a sexual offence, the government has to grant sanction for prosecution. Delay in granting sanction, or cases where sanction is not granted leads to impunity in custodial rape cases. The amendment recognizes that committing an act of sexual violence cannot be a part of person's official duties. Hence, the Committee recommends that sanction be required in sexual offence cases be removed.

H. Section 198B, Cr.P.C.

The Committee recommends adding Section 198B to the Cr.P.C, by virtue of which a court is barred from taking cognizance of a report of marital rape, unless such report is made by the wife against her husband. This ensures that a third person does not interfere in a marital relationship, by filing a report of marital rape.

I. Section 327, Cr.P.C.

Section 327(1) of the Cr.P.C. states that all trials shall be open to the public. However, sub-section (2) states that trials of cases under Sections 376, 376A-D shall be conducted in camera. In suggesting modification of the Criminal Law (Amendment) Bill, the Committee proposes that trials for all the new sexual offences that it has suggested also be in camera. The Committee however recommends that unless there are compelling reasons, only the examination in chief and cross-examination be in camera. The rest of the proceedings should be open to the public in order to ensure that there is a check on misogynistic and prejudicial practices in court proceedings. The Committee further recommends that the survivor be provided with the assistance of a person from a women's organization through the trial.

J. Section 357, Cr.P.C.

One of the amendments that the Committee suggests in the IPC is that, if convicted, the offender should be liable to pay monetary compensation to the victim. Consequently, amendments have been suggested to Section 357, Cr.P.C. which empowers courts to award compensation. The proposed amendment operationalizes the amendment to the IPC by suggesting the requisite changes to the Cr.P.C.

K. Amendments to the First Schedule of the Cr.P.C.

In light of the seriousness of sexual offences, the Committee recommends that all the offences made punishable by the Amendment Bill be cognizable and non-bailable.

AMENDMENTS TO THE INDIAN EVIDENCE ACT (IEA)

The Criminal Law (Amendment) Bill suggests amendments to Sections 53A, 114A and 146 of the Cr.P.C. The Committee suggests further modifications to these proposed amendments, as well as an amendment to Section 119 of the Evidence Act.

A. Amendments to Sections 53A and 146, IEA

Sections 53A and 146 of the IEA deal with the issue of sexual history of the rape survivor. The Amendment Bill has proposes that in sexual offences, where consent is an issue, the character or past sexual history of the survivor shall not be relevant in deciding on the issue of consent. The Committee recommends that past sexual history should not be relevant in all sexual offences. It further recommends that past sexual history be considered irrelevant not only in determination of the question of consent, but during the determination of any other fact during the trial process.

The proviso to Section 146 bars the rape survivor being asked questions about her sexual history during cross-examination. The Amendment Bill makes the section gender neutral and adds a few more offences to the existing list. The Committee recommends that the bar on asking a rape survivor questions about her sexual history should extend to all sexual offences. In sum, the past sexual history of the survivor will not be a relevant fact in a prosecution for any sexual offence.

B. Amendment to Section 114A, IEA

Section 114A of the IEA states that in a prosecution for rape under certain clauses of Section 376(2) of the Indian Penal Code, if sexual intercourse is proved by the prosecution, and the issue is one of consent, and the woman testifies that she did not consent, the Court shall presume that the lack of consent. In light of the new offences recommended by the Committee, it suggests that the presumption apply to all the clauses of Section 376(2), as also to the offence of gang rape defined by the newly proposed Section 376C.

C. Amendment to Section 119

The final amendment suggested to the IEA is with respect to Section 119. Section 119 referred to people with speech disabilities as "dumb witnesses." The Committee recommends that an amendment be made to the section and that "dumb" be replaced by "persons who are unable to communicate verbally." It also recommends that in recording the evidence of such persons, the Court shall take the assistance of a special educator or interpreter, as required, and that the process be videographed.

The authors have prepared this synopsis in their individual capacities. They do not purport to represent the views, or speak for, the Justice Verma Committee. This synopsis has also been published on Bar & Bench.

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