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Secondary Victimization of Women in Rape Cases - An Analysis

SAMIKSHA KANDYA¹

ABSTRACT

Crimes against women have continued their upward trends in recent days and it does not remain just a matter of domestic law, but since India has ratified International Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), therefore protection of women from any kind of discrimination becomes obligatory, and here is where the need for an impartial and efficient Justice system comes into play. Such crimes can be prevented if the police machinery works in a more organized and dedicated manner². But the question remains that whether changing the law brings real changes in the society. Even though the Judiciary has been fairly strong and active in implementing the laws, the Criminal Justice system delays the process³. Till the enforcement of the laws is done properly by the Police and Courts, the Criminal justice System will fail to serve its purpose. Victims need to feel that they are an integral part of the Criminal Justice System and are not disregarded⁴. Law is there as a very rough guide and must be considered as the means to achieve justice. The Malimath Committee suggests ways and means to develop such synergy among the Judiciary, Prosecution and Police that restores the confidence of the common man in the present Criminal Justice System by protecting the innocent victim and by punishing the criminal⁵. Women should be able to rely on the justice system which is not biased and is free from myths and stereotypes, and on the Judiciary whose impartiality is not compromised in any situation. Justice is not a means but it is an end in itself which everyone who is right on their part deserves.

Keywords: *Secondary Victimization, CEDAW, Criminal Justice System.*

I. INTRODUCTION

The Criminal Justice System is established so as to bring Justice to the people in a fair and

¹ Author is an Advocate at Art of Living Foundation, Bengaluru, India.

² SUO MOTU WRIT PETITION (CRIMINAL) NO. 24 OF 2014, In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014.

³ CASE BECAME CATALYSTS FOR CHANGE IN JUDICIAL SYSTEM, SMRITI SINGH, TIMESOFINDIA.INDIATIMES.COM

⁴ Patricia A. Resick, The trauma of rape and the Criminal Justice System, www.jstor.org.

⁵ Report of the Malimath Committee on Reforms of the Criminal Justice System: Some observations, by Amnesty International, 19/09/2003.

impartial manner, treating both the sexes equally without any discrimination. But looking at the ongoing trend, there seems no doubt that the authorities are taking undue advantage of their powers and discriminating in case the victim is a woman. Even after having a Constitution of its own and adoption of other legislations and international conventions, India has continued to maintain a stoic silence when the women's rights are in question. If the victims are still secondary victimized, then the whole purpose of establishing the criminal justice system would destroy.

Until CEDAW (The Convention on the Elimination of All Forms of Discrimination against Women) in 1979 was brought, there was no Treaty which comprehensively talked about the women's rights in all spheres of her life, be it social, political, cultural, economic and family life⁶. The states by becoming a signatory to the Convention, commit themselves to undertake a series of measures to end discrimination. Therefore, in order to eliminate the gender based discriminations and harmful stereotypes against women; India ratified CEDAW on 25 June, 1993 which is often described as an international "Bill of Rights" for women.

It reveals that though there are various national legislations and International Convention on the Elimination of All Forms of Discrimination Against Women, that are adopted and enacted for the rights of women, but still because of the inefficiency of the criminal justice system, women are being objectified and denied the rights guaranteed by the Constitution of India.

Hence, this paper is a chilling account of the trials and tribulations of women who cry desperately for caring and sensitive attention. The yearning to create awareness about the heinous crimes that are being committed against women and to highlight the ineffectiveness of the criminal justice system inspired the author to make an in depth study of this subject.

II. THE PROVISIONS OF CEDAW ON SECONDARY VICTIMIZATION AND WHETHER THE INDIAN LEGAL SYSTEM IMPLEMENTS IT

Double or Secondary Victimization of women refers to the victimization first by the criminal and then by the criminal justice system by discriminating on the basis of gender thereby not recognizing the rights of women and not considering them at par with men in rights and freedoms. The concept of secondary victimization was used for the first time in The Convention

⁶ Convention on Elimination of All forms of Discrimination Against Women, <http://www.un.org>.

on the Elimination of All Forms of Discrimination Against Women. CEDAW emerged from the First World Conference on Women that was held in 1975 in Mexico coinciding with the International women's year⁷.

In order to understand the concept of secondary victimization and the need for implementing the provisions of CEDAW in the Indian legal system, a case must be looked into where it shows that how women are treated differently by the authorities and even the judiciary when a crime has been committed against them.

In *M. Kavya v. The Chairman, University Grants Commission*⁸, the petitioners who were undergoing post-graduation courses from UGC, lodged a complaint on 30.09.2013 with the Vice-Chancellor, Registrar of the University and the Chairperson of the Anti-Ragging cell stating that the 2 students from Physical Education course who were studying in the same university passed snide comments about the petitioners and used abusive language and then threatened them to assault and rape them.

The University directed the matter to the Anti-ragging cell instead of Vishakha Committee which is specifically made to address such complaints relating to sexual assault. The petitioners on 1.10.2013 gave a police complaint and the news about the complaint got published in the Indian Express and later in The Hindu. The Anti-ragging committee formed an Enquiry Committee of 9 members. But the committee kept the respondents and the petitioners on same footing and considered the case one of ragging and not of sexual assault. The Committee permanently expelled both the petitioners and respondents from hostels and stated this matter to be political and a clash between two student groups. The matter when reached to the Vice-Chancellor as directed by the Court, he said that these should not affect the studies and future of the students and everyone will continue to pursue their education in the university and asked them to give an unconditional apology. Aggrieved by this, the petitioners went to the Madras High Court and filed a Writ of Certiorari to stay the order passed by the University. This is a case of re-victimization where the petitioners were first victimized by the respondents and then by the institutions. The Court referred to Article 1 of the Convention on The Elimination of All Forms of Discrimination Against Women⁹, which defines the term "discrimination against

⁷ 1975 World Conference on Women, Mexico City, June 19-July 2, 1975, http://www.5wwc.org/conference_background/1975_WCW.html.

⁸ *M. Kavya v. The Chairman, University Grants Commission*, Writ Petition No. 11217 of 2014 and M.P. Nos. 1 to 3 of 2014.

⁹ "discrimination against women" under Art.1 of CEDAW states that any discrimination, 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 the women, irrespective of their marital status on the basis of equality of men and women, of human rights and fundamental freedom.

women" and also referred to Art. 5¹⁰ of CEDAW where the obligation is on the State to take appropriate measures to eliminate discrimination against women.

A case that should be referred here which came up before the Committee on the Elimination of Discrimination is about Karen Tayag Vertido, a Filipino National who lodged a complaint against the Government of Philippines before the Committee on the Elimination of Discrimination Against Women, under a Communication dated 29.11.2007. She was raped by the President of the Chamber of commerce in March 1996 when she was working there as the Executive Director. She lodged a complaint with the police within 48 hrs but it was dismissed by the Public Prosecutors for lack of probable cause. However, she appealed to the Secretary of the Department of Justice which was allowed but the trial of the accused took an agonisingly long period of 8 years from 1997 to 2005. On 26.4.2005, a lady Judge of the Regional Court of Davao City acquitted the accused on the basis of three principles derived from the precedents set by the Supreme Court. They are:

- (a) It is easy to make an accusation of rape and it is difficult to prove, but more difficult for the person accused, though innocent, to disprove.
- (b) In view of the intrinsic nature of the crime of rape in which only two persons are usually involved, the testimony of the complainant must be scrutinised with extreme caution and
- (c) The evidence for the prosecution must stand or fall on its own merits and cannot be allowed to draw strength from the weakness of the evidence of the defence. The Trial Court doubted the complainant as why she did not escape when she had opportunities to escape and save herself.

The victim aggrieved by the judgment then filed a complaint before the Committee on the Elimination of Discrimination against women, contending that she was re-victimized by the state. The committee noted that Article 2(c)¹¹ of CEDAW though does not expressly provide a right to a remedy, but it is implied in the provision and held that the complainant had suffered re-victimization through stereotypes and gender based myths.

¹⁰ Art. 5 of CEDAW enjoins upon States Parties to take appropriate measures to modify the social and cultural patterns of contact of men and women, with a view to achieving the elimination of prejudice and customary and all other practices, which are based upon the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women.

¹¹“Article 2 of CEDAW- 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:..... (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”.

A Hand Book of Justice for Victims was prepared by the United Nations Office in 1999 for Drug Control and Crime Prevention, where Chapter I of the book points out that secondary victimisation refers to the victimisation that occurs not as a direct result of the criminal act, but through the response of institutions and individuals to the victim¹². In one of the paragraphs, it was given that the attitude of individuals is important as the family, friends and colleagues distance themselves from the distress of the crime by blaming the victim that her behaviour must have contributed to what has occurred or even cause the victimisation.

Before CEDAW, there were so many strong foundations of Human Rights Law like UN Charter of 1975, Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966), where all of these promoted equality of both the sexes and fulfilment of human rights, but were not equipped enough to deal with inequality and all forms of discrimination against women. Therefore, CEDAW was adopted by the United Nations General Assembly in 1979, which came into force in 1981, and is often described as the International Bill of Rights for Women, as it comprehensively talked about women's rights in all spheres of life be it social, cultural, political, economical and family life¹³. By virtue of Art. 17¹⁴ of CEDAW, a Committee on The Elimination of Discrimination Against Women was established to monitor if the member countries are implementing the provisions of CEDAW. India also signed the Treaty on 30th July, 1980 but it took 13 years for India to ratify it, which was finally done on 9th July 1993. As regards India, it established a National Commission for Women in 1992, and in 1997 it established a parliamentary committee on the empowerment of women. Also, the government of India announced the launching of a national policy on Women's Empowerment in the year 2001. But the reality of the condition of the women is continued to be harsh despite giving Constitutional guarantees of 'justice; social, economic and political' and assurances of a life of freedom, equality and dignity. The state parties under Article 2(f) of CEDAW is obligated to modify or abolish existing laws, regulations, customs and practices which are discriminatory against women. But then also, marital rape is still not criminalized by the Indian Legal System as it is believed by the legislature and judiciary that marriage is a 'sacrament' and bringing such laws will make a mockery of the marital relationship. Even the 172nd Law Commission Report, 2000 on Review of Rape Laws state that

¹² Handbook on Justice for Victims, on the use and applications of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations Office for Drug Control and Crime Prevention.

¹³ Global Women's Rights: CEDAW, Feminist Majority Foundation, www.feminist.org, last accessed on 16.10.2020.

¹⁴“Article 17(1) – For the purpose of considering the progress made in the implementation of the present Convention, there shall be established a Committee on the Elimination of Discrimination against Women”.

sexual intercourse by the man with his own wife who is not being under sixteen years of age, is not sexual assault or rape¹⁵.

India also did not sign the Optional Protocol of 1999 and therefore does not submit to the authority of CEDAW committee its report and recordings on the violence against women. India also made a Declaration under Article 5(a) of CEDAW, that it will follow the policy of non-interference in the personal affairs of any community and therefore these Khap Panchayats¹⁶ have now taken a bad shape in the society which is still following the abolished retributive theory of an eye for an eye and a tooth for a tooth, which will make the whole world go blind. In 2012, after the brutal gang rape case of a physiotherapy student of 23 yrs old in Delhi on a moving bus, famously known as the Nirbhaya rape case, the government due to protests and public pressure immediately formed a committee comprised of 3 members of the legal profession to give legal advice on the reforms to be brought in the criminal justice system. And many reforms were observed, but at the time of 2015 world report, the Human Rights Watch reported that ‘the Indian government had yet to introduce monitoring and reporting mechanisms to track their implementation’¹⁷.

India is a patriarchal society where most of the violence committed against women at the hands of her family, therefore CEDAW came for the rescue of women and pledges to protect and fulfil the human rights of women in the family setting and to protect them from all forms of discrimination and it has been in effect since 1981.

In 1992, Bhanwari devi who was a saathin working in the women’s development project of the Rajasthan govt., raised her voice against the evil practice of child-marriage where the villagers were marrying a nine month old child. For preventing this marriage, she was gang raped by the upper caste men of her village in front of her husband. The district court acquitted all five men involved in this heinous crime on the reason that the 4 men were Gujjars and one was a Brahmin and therefore the rape was impossible. The court refused to believe that the upper caste men can go to such an extent and lose all sense of caste and class and commit such a crime. But if India’s National Crime Records Bureau is considered, then more than 4 Dalit women are raped everyday and with 2014 statistics saying crime against Dalit women rose 19% and in most of the cases, it is done by the men from the upper caste. This case clearly showed the connection between rape and power. The matter then reached the Supreme Court of India via a PIL filed

¹⁵ <http://www.lawcommissionofindia.nic.in/rapelaws.htm>

¹⁶ Khap Panchayat is a union of a few villages, mainly in north India which has recently emerged as a quasi-judicial body inflicting harsh punishments based on age old customs and traditions.

¹⁷ Human Rights Watch, *World Report 2015: Events of 2014*, https://www.hrw.org/sites/default/files/wr2015_web.pdf.

by a group of NGOs by the name of ‘Vishakha’ in which the petitioners urged the court to intervene on the very important issue of sexual harassment at the work place. It thus read the provisions of CEDAW (as India is already a signatory of the Convention) and laid down binding guidelines as the vishakha case¹⁸.

The struggle to secure International women’s rights as Human rights was marked by the 1993 Vienna World Conference on Human Rights. Immediately after this conference, the United Nations General Assembly passed a Declaration on Violence Against Women (VAW) which states to strengthen the process of effective implementation of CEDAW. It also acknowledges that the Violence against women has been practiced from long back and is considered as manifestation of historically power relations which has led to the domination of men over women and discrimination against women¹⁹.

The Preamble of CEDAW emphasizes that such discrimination “violates the principles of equality of rights and respect for human dignity”. UDHR, 1948 also clearly says that girls and women and boys and men have the same rights and there should not be any discrimination based on Gender. As these discriminations leads to gender based violence which is considered as “normal” part of gender relations, asserting that in order to maintain patriarchy, it needs violence or threat of violence by the “dominant class” known as ‘men’ to the “subordinate class” known as ‘women’, and for this the law is seen as an instrument to bring the change in the distribution of power.

The Article 1²⁰ of CEDAW prohibits any kind of discrimination or distinction made on the basis of gender²¹. The provision coincides with the feminist movement which is grounded in the idea that the lives of women should not be determined solely by gender and that the women should be entitled to equality and dignity without any discrimination²².

Article 2(a)²³ of CEDAW talks about the principle of equality of men and women and to incorporate it in the constitution or national legislations. Also, Art. 2(f) states that the state parties are required to take all appropriate measures, including legislations and to abolish or

¹⁸ Vishakha and others v. State of Rajasthan and others, AIR 1997 SC 3011.

¹⁹Ratna Kapur, The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics, 15 Harv. Hum. Rts. J. 1 2002, www.heinonline.org.

²⁰ Article 1 of CEDAW - “Discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex”.

²¹Lorena Sosa, Laetitia Ruiz and Dr. Conny Rijken, Gender Based Victimization, Tilburg University, 13/03/2014.

²²Margaret Thornton, The development of Feminist Jurisprudence, http://www.ler.edu.au/Vol%209_2/Thornton.pdf, last accessed on 16.10.2016.

²³ Art. 2(a) of Convention on the elimination of all forms of discrimination against women states that - states that it is the responsibility of every nation to put the principle of the equality of men and women in the national Constitution or other appropriate legislation if not incorporated so far.

modify the laws, regulations; customs or practices that still exist and constitute discrimination against women.

Further to this, Article 5(a)²⁴ of CEDAW require the states to take all appropriate measures in achieving the elimination of harmful stereotypes of women by modifying the social and cultural patterns of conduct of men and women which is based on inferiority or superiority of either of the sexes or gender essentialism, where certain roles are attributed to men and women by the society.

But India while ratifying the Convention, made 1 reservation and 2 declarations where the reservation on Article 5(a) by the Government of India declares that, it will abide by the provisions of CEDAW as long as it does not make the state interfere in the personal affairs of any community without its initiative and consent, and this is how the first declaration keeps India from enforcing equal rights between men and women²⁵.

The Committee in its General Recommendations No. 12 (Eighth Session, 1989) talked about violence against women and highlighted various useful recommendations if implemented by the state parties in tackling the patriarchal attitude. It states that Articles 2, 5, 11, 12 and 16 of CEDAW requires the state parties to act to protect women against any violence at workplace, family or any other area of social life. It suggests that the Judiciary and the law enforcement agencies must be given 'gender sensitive' training; the media should 'respect and promote respect for women'²⁶. The General Recommendation No. 19 (11th Session, 1992), also talked about violence against women and gave a number of recommendations where it says that the gender based violence is a form of discrimination where women are restricted to enjoy their rights and freedoms equally with men. It also acknowledges that the measures that are necessary to take to overcome family violence there must be criminal penalties and civil remedies, legislation should remove the defence of honour if there is any murder or assault is committed in the family²⁷. However, these recommendations seem only to be highlighting the extent of the violence and not tackling the problems. Since, neither CEDAW nor it's the General Recommendations or observations by the Committee are legally binding, therefore the

²⁴ To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

²⁵ Bobbie Khanna, CEDAW and the Impact on Violence against Women in India, <https://uwbpolicyjournal.files.wordpress.com>.

²⁶ Elizabeth McGeown, In India, patriarchal perceptions of women are often the cause of gender-based acts of violence. In light of this, is CEDAW equipped to challenge these deeply entrenched stereotypes of women in Indian society?, Postgraduate HRC 2015 Working Paper No.7.

²⁷ General recommendations made by the Committee on the Elimination of Discrimination against Women, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

state parties who do not intent to enforce these provisions may exploit it. India has also not ratified the Optional Protocol where the Committee monitors the compliance of the CEDAW provisions by the state parties and receives the complaints from individuals or groups within the jurisdiction. Hence, India does not comply with the regular reporting to the Committee. As regards India, it had submitted its report after 7 years to the Committee which is supposed to be sending every 4 years and combined its second and third, and fourth and fifth report. The Committee still have various objections on the steps taken by the India regarding the continuing legality of marital rape and an alarming increase in the violence against women

III. COMPLAINT MECHANISM AND TRIAL PROCESS IN INDIA LEADING TO THE DOUBLE VICTIMIZATION OF WOMEN

In 1999, Economic and Political Weekly published an Editorial '*Stinking Criminal Justice System*', which highlighted the need to bring drastic reforms in the present Criminal Justice System in India²⁸. It has been more than fifteen years since the article was published but the condition is still the same and has even become worse. It is reported that in every 47 minutes, a woman is raped in India.

(A) Police

Police²⁹ have a primary duty to maintain peace and protect its citizens 24 hours a day and seven days a week, without showing any favour or ill will towards anyone. They have to carry out their duties and responsibilities impartially in all situations³⁰. But the trend is very different which is highlighted in the present paper. India has the lowest citizen to police ratio in the world. The recommended ratio is that for every 200 citizens, there must be 1 police officer, but in India the ratio is 1 police officer for 700 citizens and if taken account of those tied up for 'VIP Security', the ratio will be close to 1 police officer for every 1000 citizens³¹. *The Committee on Elimination of Discrimination notes that there is a critical shortage of trained police force and legal and forensic staff in many countries which deals with the requirements of criminal investigation.* Moreover, the pay for police is also very poor and the chances or opportunities for advancement are rare which encourages them to involve in corruption. The widespread corruption at all levels leads to the denial of justice³².

²⁸S. R. Sankaran, Criminal Justice System: A Framework for Reforms, Economic and Political Weekly, Vol. 34, No. 22 (May 29 - Jun. 4, 1999), pp. 1316-1320.

²⁹ As defined under the Indian Police Act, 1861.

³⁰ Rose Johnson, Obligations & Job Duties of Police Officers, Houston Chronicle, www.work.chron.com

³¹ William M. Doerner & William G. Doerner, Double Victimization, 2010.

³² Gardner Harris, For rape victims, Police are often part of the problem, nytimes., 22/01/2013.

The criminal procedure is initiated by the filing of First Information Report (FIR), where the main purpose is to inform the police about the commission of any cognizable offence. Therefore, any person and not necessarily the victim, who is aware that an offence has been committed, can file FIR³³. It is the duty of the police to register the complaint in order to start the criminal proceedings, as the court in the case of *Lalita Kumari v. Govt. of U.P & Ors*³⁴, held that the registration of FIR is mandatory under section 154 of the Code and if the information discloses commission of a cognizable offence, then the police officer is duty bound to register that complaint³⁵. In an incident on 26th December 2012, a women of 18 years of age committed suicide after the police officer refused to arrest the men involved in her gang rape. She was asked by the police officers to settle the matter by dropping the charges and marrying her rapists. In India, many women end up marrying their rapists³⁶.

In various other cases, police are themselves the offenders as happened in the *Mathura Rape* case³⁷, where two police constables Tukaram and Ganpat were involved in raping a 16 year old labour class girl. According to the Human Rights Report in 2014, there were continued incidents of police raping women, including while in police custody. NGOs stated that the NHRC underestimated the number of rapes committed by police, as most of the victims did not report the crime due to social stigma and possible acts of retribution when the perpetrators were the police officers³⁸.

CEDAW does not have any strict enforcement mechanism and it relies on the reporting procedure from states which can be factually inaccurate as regards to their compliance. India is also not a party to the Optional Protocol which introduced a complaint and investigation mechanism and monitors if the provisions of CEDAW are breached by the state parties. The Committee has insisted that India should ratify the Optional Protocol, but India is not receptive giving reasons that it has adequate laws and resources in terms of redress for the violation of Human rights of women. But the Committee is not convinced that India has done much to eradicate the stereotypes that are entrenched in the Indian Patriarchal society, and therefore ask India to again consider its stand on the declaration it made on Article 5(a) of non-interference in personal affairs of any community without their involvement or consent. The CEDAW Committee gave a number of suggestions where it asked the state to implement the

³³ See *Hallu v. State of Madhya Pradesh*, (1974) 4 S.C.C. 300, 303.

³⁴ 2013 (13) SCALE 559.

³⁵ SUO MOTU WRIT PETITION (CRIMINAL) NO. 24 OF 2014, In Re: Indian Woman says gang-raped on orders of Village Court published in *Business & Financial News* dated 23.01.2014

³⁶ Heather Timmons & Sruthi Gottipati, *Woman dies after a gang rape that galvanized India*, 28/12/2012.

³⁷ *Tuka Ram And Anr vs State Of Maharashtra*, 1979 AIR 185, (1979) 2 SCC 143.

³⁸ India Human rights report, 2013.

recommendations given by the Justice Verma Committee after the brutal Delhi gang rape case to amend the Criminal law thereby allowing for speedy trials and heightened punishment for the perpetrators of sexual violence against women. Moreover, it suggested that the judiciary, medical practitioners and law enforcement agencies should be given training on women's rights. Additionally, the Committee encourages that the efficacy of the police is improved upon, and that the police officials 'fulfil their duty to protect' women against violence. The CEDAW Committee highlighted that the secondary or double victimization of women by the criminal justice system impacts their access to justice and leads to the heightened vulnerability to threats and physical and mental abuses during arrest, questioning and even in detention³⁹.

(B) Judges

1. Delay in the judicial process

India is the largest Democracy and Judiciary is the part of the democratic process which has got wide powers and performs various important roles and functions which are not confined to the traditional jurisdiction of civil and criminal. Judiciary protects the rights of the citizens and acts as the interpreter and guardian of the Constitution. Its purpose is to administer justice to the people in a fair and impartial manner⁴⁰ and within a reasonable period of time, as it is rightly said that *Justice delayed is Justice denied*. And in India there is a backlog of 30 million cases and even if no new cases are filed, Judiciary will take around 350 years to dispose of all the cases⁴¹. Though the legislature has made various laws to protect women, but the delay to deliver judgment on the part of the judiciary slower the court proceeding and denies justice to the victims⁴².

In the case of *Mohd. Yaseen v. State*⁴³, the rape victim was a minor girl of 9 years of age and an acquaintance. The rape was brutal and therefore the defendant was given a 'minimum' of seven years of imprisonment. On appeal, the High Court was of the opinion that there were enough aggravating circumstances to enhance the prescribed punishment. However, since the judicial decision already took 19 years, the court reasoned that the victim must have settled down in life and therefore the delay was considered as a mitigating factor, destroying the essence of justice.

³⁹Committee on the Elimination of Discrimination against Women, General recommendation on women's access to justice.

⁴⁰ Kamal Rana, Role and Functions of Judiciary in India, 07/03/2014.

⁴¹ Manekshaw, Has India failed because of its Judicial System?, IBTL, 03/01/2013, www.ibtl.in.

⁴² Dr.Kamalaveni & Dr. Rupa Gunaseelan, "Loopholes in Judicial System-Paves way to Violence against Women", (IOSR-JHSS) Volume 18, Issue 3 (Nov. - Dec. 2013), PP 55-56.

⁴³ Mohd. Yaseen v. State, 2005 Cri.L.J. 307 (J&K).

Similarly, in *Nehru v. State of Madhya Pradesh*⁴⁴, the defendant was an 'affluent' goldsmith who raped a 16 year old girl for sexual pleasure treating her as an object. It was observed by the court that the rape survivor has 'suffered a permanent scar on her life', but since the offence had taken place 13 years earlier, therefore now the monetary compensation 'would do justice'. Here due to the delay in deciding the case, the court like the goldsmith treated the justice on monetary terms. The court also treated the victim as a commodity exchanging Justice for money compensation.

2. Consent of the victim

In rape cases, consent of the victim plays a crucial role in deciding the matter and due to lack of evidence that the rape survivor did not consent for the sexual intercourse, the court on many occasions becomes insensitive towards women victims since all the crimes against them must be proved beyond reasonable doubts⁴⁵. And the most shocking and heart breaking case is the Mathura Rape Case⁴⁶, where the victim was raped by the police constables in the police station. The Sessions Court held the police constables to be not guilty and acquitted them. The sad part is the reason which the court gave behind its judgment, that 'Mathura was habituated to sexual intercourse' and she is of loose morals, and therefore clearly implied that the sexual act that happened in the police station was consensual. It also went further to say that if the girl is not screaming, then it was assumed that she has given her consent. The High Court reversed the judgment and gave 1 and 5 years of rigorous imprisonment to Tukaram and Ganpat. But when the case again went in Appeal to the Supreme Court, the High Court verdict was reversed and the accused were once again acquitted by the Lordships. They ignored the difference between 'Submission' and 'Consent'. If a girl of 16 years of age is asked to remain in police station for further questioning and the lights are put off, then what type of consent can be assumed? Consent involves submission but not the other way round. Consent of a woman is very important⁴⁷. When she says NO, then it does not remain just a word but it is a complete sentence in itself that says no don't do this, or don't touch me, or respect your boundaries. This small word means that you do not have a right to do anything which is unacceptable and which is against the dignity and against her consent, even if the other person is her husband. The

⁴⁴ *Nehru v. State of Madhya Pradesh*, 2001 Cri.L.J. 1118 (M.P.).

⁴⁵ Dr. Kamalaveni and Dr. Rupa Gunaseelan, "Loopholes in judicial system – Paves way to violence against women, IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 18, Issue 3 (Nov. - Dec. 2013), PP 55-56, www.iosrjournals.org.

⁴⁶ *Tuka Ram and Anr vs State Of Maharashtra*, 1979 AIR 185, (1979) 2 SCC 143.

⁴⁷ Section 375 of the IPC prior to its amendment in 2013 defines 'Rape' as - a man committed rape if he had sexual intercourse with a woman under six circumstances, where in 5 cases the consent is considered as important. Only in the sixth case, the consent of the victim is of no relevance when the girl is under 16 years of age (statutory rape). This section was also not gender-neutral and only man could commit rape and woman could only be raped.

Supreme Court cited that “Mathura did not raise an alarm and has no visible marks or injury on her body” which shows that she did not resist the advances. Upendra Baxi raised few important and eye opening questions in writing an open letter to the Chief Justice of India- as why she was asked to remain in the police station when they have already recorded her statement? What was the need to put off the lights and shut the door when the girl was inside? Why Tukaram did not do anything to rescue the girl from Ganpat? This was an extraordinary decision sacrificing the human rights of women under the law and Constitution⁴⁸. The Supreme Court did not even pay heed to the precedent in *Nandini Satpathy case*⁴⁹, where Justice Krishna Iyer condemned the practice of calling women to the police station, and said that it is a gross violation of Section 160(1)⁵⁰ of the Criminal Procedure Code.

It is very difficult for the victim to prove absence of consent especially in custodial rape. The burden of proof is on the victim to show that rape has been committed against her will. But then a major reform took place in the law, by inserting Section 114 A in the Indian Evidence Act, which states that in cases of custodial rape, gang rape and rape of a pregnant woman, if the victim states in a court that she did not consent, then the court shall presume that she did not consent and the burden of proof will shift to the accused⁵¹.

3. Immoral character of the victim

Along with the consent, the immoral character of the victim was seen as the defence in a rape trial under Section 155(4) of the Indian Evidence Act, which finally repealed in 2003⁵². Such character evidence could be used to infer that the testimony by the victim was false. But the bad character of the accused is of no relevance in the court of law⁵³. When the laws themselves are so discriminatory and carry an inherent bias towards a particular gender (women), then how far can the victim be assured of achieving Justice.

In *Pratap Misra v. State of Orissa*⁵⁴, the Court termed the victim a ‘concubine’ since she was in a relationship with a married man and had subsequently entered into a bigamous marriage

⁴⁸Upendra Baxi, Vasudha Dhagamwar, Raghunath Kelkar & Lotika Sarkar, An open letter to the Chief Justice of India, 16/09/1979.

⁴⁹*Nandini Satpathy v. P.L. Dani and Anr.*, (1978) 2 SCC 424.

⁵⁰Provides that no woman shall be required to attend at any place other than the place in which such woman resides.

⁵¹“Rape laws of India”, published by MyNation Foundation, www.mynation.net/rapelaw.htm, last accessed on 17/05/2017.

⁵²“Section 155 – Impeaching credit of witness – The credit of the witness may be impeached in the following ways by an adverse party, or with the consent of the court, by the party who call him :- (4) when a man is prosecuted for rape or attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.”

⁵³Section 54 of the Evidence Act says that – “In criminal proceedings (including rape), the fact that the accused person has bad character is irrelevant unless evidence has been given by him that he has a good character in which case it becomes relevant.”

⁵⁴(1977) 3 S.C.C. 41, 46-47.

with him. On a pleasure trip with her husband, she was raped by three men. But the court acquitted all three on the ground that the victim did not have injuries on her body and therefore she must have consented for it. Moreover, she had only sobbed and not screamed during intercourse. The victim due to gang rape miscarried after few days and the court opined that if the intercourse were by force, then she would have immediately miscarried and not after few days.

The Supreme Court in *Bharwada*⁵⁵ and other cases describes that how a woman treasures her chastity and virginity and experiences a sense of ‘deathless shame’ if she is raped. If the woman is perceived as unchaste, then it has been seen through various judgments that it impacts sentencing. In cases where the sexual history of the victim is considered and it is shown that the victim was sexually active outside marriage, then the trial courts and High Courts imposes a lower sentence on the defendant. But in case where the doctors at the time of medical evidence are not able to insert two fingers into the hymen orifice of the women (the ‘two finger’ test)⁵⁶, then the courts tend to impose a higher sentence on the defendant. As Ratna Kapur rightly says that the Indian courts have viewed the typical rape victim as ‘chaste, pure, monogamous, honourable and confined to the private domestic sphere’⁵⁷. She would generally be ‘a Hindu, a virgin daughter or [a] loyal wife’. And such testimony would be considered as true by the court, and any inconsistent sexual behaviour of women with the dominant values and norms, would weaken her case⁵⁸.

(C) Lawyers

As the ‘Officers of the Court’, Lawyers have the absolute ethical duty to bring to the knowledge of the judges what the Truth is without distorting the facts and evidence of the case. In rape trials, the defence lawyering often involves intimidating the rape victim and questions her character. Like in the *Nirbhaya Case*, one of the defence lawyers, M L Sharma said that the women are made by the nature as fragile, weak that needs protection by the men. She should not be roaming around in the city with any person other than her family members; otherwise they excite men and create such atmosphere which invites for their rape. The other defence

⁵⁵ *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, (1983) 3 S.C.C. 217, 226. In this case the Supreme Court opined that any unmarried woman would not falsely allege rape as that would hamper her prospects of finding a match in ‘a respectable or acceptable’ family.

⁵⁶ Earlier the Criminal Justice System devises such ways like “Two-finger test” in order to prove rape, where the prosecution first has to establish that the defendant had sexual intercourse with the victim. That was done by the medical practitioners by inserting two fingers in order to determine the virginity of the victim during medical examinations, as medical evidence of penetration is still crucial in rape cases. But this further aggravates the trauma and suffering of the rape victims. However the Parliament in 2003 repealed the provision in the Indian Evidence Act which permitted the past sexual history of the rape victims.

⁵⁷ Ratna Kapur, *Erotic Justice: Law and the new politics of post colonialism* 34 (2005).

⁵⁸ See *Rameshwar v. State of Rajasthan*, A.I.R 1952 S.C. 54.

lawyer, AP Singh went to an extent even to say that if it would have been his own daughter going out with a boy at this time of the day or does anything which is unacceptable according to his ideologies, then he would have put his daughter on fire for such shameless attitude⁵⁹. If lawyers with such insensitive and brutal nature are made to represent in courts, then Justice will only be an imaginary thing to achieve.

Moreover, lawyers many times asks such indecent and disrespectful question to the women who are already victims of crime during the cross examination that they have to re live their rape which becomes nothing more than a torture for them and the legal proceeding becomes humiliating for them which encourages them to put an end to their lives. In 1992, when the Babri Masjid was demolished, a 23-year-old photojournalist from Mumbai went to cover the incident, where she was dragged to a trench outside the mosque and though wasn't raped, but was sexually assaulted and got several injuries but was saved by a passer-by who came to her rescue. When she approached the Court, the Lawyer bombarded her with such indecent questions like what were you wearing when the incident took place? How could the daughter of a good family have gone to cover the demolition? Do you smoke? Do you believe in God?⁶⁰

One of the big reforms that happened after Nirbhaya case was the setting up of fast-track courts for sexual assault cases so that the victims and their families get justice sooner. But the path to justice for these victims remains far from speedy. And the lawyers are big culprits in this who keeps postponing the dates of appearance so that they can delay the proceedings and take more money for every hearing. And lawyers must know that any delay in this would significantly reduce the chances of finding the biological of rape during the medical examination which leads to the disruption of evidence and will not allow the victim to prove that something so scary and nasty has actually happened to her⁶¹.

IV. CONCLUSION

Rape is one of the most heinous crimes that are committed against women. It not only sexually exploits her body, but leaves a permanent scar on the image of the victim. Despite Constitutional guarantees of 'justice; social, economic and political' and assurances of a life of freedom, equality and dignity, rape and other heinous crimes are ravaging the lives of millions of women. Feminists believe that the Justice for women can be achieved if the society gets rid of the concept of gender-essentialism where it fixes certain roles for men and women discriminating on the basis of their sex, and where the perpetrators are conditioned to believe

⁵⁹India's Daughter, A documentary by BBC, 2015.

⁶⁰Victims blamed in India's rape culture, By Ruchira Gupta, <http://edition.cnn.com/>.

⁶¹The slow road to justice for India's rape victims, <http://www.aljazeera.com>.

that the women are unequal in comparison to men and therefore gives men the right to objectify women to fulfil their sexual desires⁶².

The Criminal Justice System which consists of police, court and prison has the utmost responsibility to protect women from lawbreakers. But it is seen in many instances that when it comes to women, the criminal justice system somehow becomes silent or even unjust and discriminatory, and fails to serve its purpose which leads to their double victimization. The women therefore, have started showing their resistance towards sexual violence and agitate for changing the socio-cultural and political practices in India by indulging in ways like sit-down protests, candle light marches, ad campaigns, freeze mob, rallies etc. to bring to the knowledge of the general public about these heinous crimes committed against women. They are trying to wake up the sleeping law enforcement authorities⁶³. Therefore, there is an urgent need to take a fresh look at the position in which the women as a victim of crime is placed in our criminal justice system.

V. SUGGESTIONS

- It is seen that the criminal justice system in India is not working as it should and it is observed by the Supreme Court that the police reforms have not taken place even after the judgment in *Prakash Singh & Ors v. Union of India & Ors*⁶⁴. Punishing the accused cannot be the only solution. But a strict action should be taken against those who are though in-charges (like police officers) to protect women of such crimes, but rather choose to be mere spectators of that crime. Therefore, the Justice Verma Committee also suggests that there must be a *Police Complaints Authority* at both district and state level which will keep a check on the acts of those police officers who are one of the accomplices in crimes either by actively involving in the crime or by being silent to these horrific acts⁶⁵.

- The rapists should of course be awarded a deterrent punishment, but there is also a greater need to secure protection and safety for women. Therefore, firstly we need to remove the stigma associated with this crime so that the victims do not bear it in silence and come out to seek justice. Better reporting will lead to better investigations and apprehending criminals before they have a chance to strike again. Also, the victims are not only sexually abused by the

⁶²<http://vle.du.ac.in/mod/book/print.php?id=9196&chapterid=13310>.

⁶³ Renae Sullivan, "Sexual Violence in India: The History of Indian Women's Resistance", McNair Scholars Research Journal, 2015, http://scholarworks.boisestate.edu/mcnair_journal/vol11/iss1/15.

⁶⁴Prakash Singh & Ors v. Union of India & Ors., (2011) PL May S-12, http://www.supremecourtcases.com/index2.php?option=com_content&itemid=135&do_pdf=1&id=21218.

⁶⁵ Justice Verma Committee Report, Chapter Twelve on Police Reforms. On 23 December, 2012, a three judge member committee, headed by Justice Verma was constituted This suggestion was also a part of the Supreme Court judgment in the case of *Prakash Singh & Ors v. Union of India & Ors.*, (2011) PL May S-12.

rapists, but they suffer pain, mental anguish and substantial financial loss as in many cases the victims are too traumatized to continue in employment. Therefore the Legal Cell established by the National Commission for women recommends that: according to the Directive Principles under Art. 38(1) of the Constitution of India, there is a need to establish a *Criminal Injuries Compensation Board*⁶⁶, as directed by the Supreme Court of India in the case of *Delhi Domestic Working Women's Forum v. Union of India and others*⁶⁷.

- India should recognize marital rape as an offence by the Indian legal system, and then only justice in the true sense is achieved. The representatives of *Sakshi* demanded the deletion of exception to rape in IPC. Because even if the woman is married, the force used by her husband without her consent for sexual intercourse should not be allowed and encouraged. But the 172nd Law Commission Report did not agree and said that marital rape cannot be made an offence as that would be unnecessary interference in the marital relationships⁶⁸. If this remains a situation then in the long run, India would never be able to deliver justice in a fair and impartial manner if it continues to consider women as a men's property and not an individual having rights and freedoms over her own body.

- Dying Declaration of the victim is an important part of the Evidence Act, and such declarations can be considered as the sole basis of conviction if it is proved that it was voluntary and not a result of tutoring, imagination or prompting⁶⁹. Even Justice Dipak Misra in the *Nirbhaya* Judgment noted in this case that it is not necessary that the dying declarations must be made under an oath or recorded specifically by the Magistrate. The only essential requirement is that the one who is recording the dying declaration must be satisfied that the victim was in a fit mental state to make such declaration and that the declaration was voluntary. And if there is more than one dying declarations then that would not make all the declarations incompatible. Delaying the procedure by not believing in the dying declaration will delay or even deny the delivery of justice to the victim and as we know that Justice delayed is justice denied which has been witnessed in a number of cases and the law enforcement agencies needs to realize that people are no longer in a mood to tolerate injustice or in action on the part of the authorities.

⁶⁶ Recommendations of the Legal Cell set up by the National commission for Women made during the year 2009-10: on Scheme for Relief and Rehabilitation for victims of rape, <http://ncw.nic.in/AnnualReports/200910/Eng/Recommendations.pdf>.

⁶⁷ *Delhi Domestic Working Women's Forum v. Union of India and others*, 1995 SCC (1)14, JT 1994 (7)183.

⁶⁸ Law Commission of India, One Hundred and Seventy Second Report: on Reviews of Rape Laws, March 2000, <http://www.lawcommissionofindia.nic.in/rapelaws.htm>.

⁶⁹ *Panneerselvam v. State of Tamil Nadu*, (2008) 17 SCC 190. This case exclusively laid down the important guidelines with respect to the admissibility of dying declaration.

- As it is seen in many recent cases⁷⁰, the court in the matters of rape, ask the victim to go for mediation or settlement with their rapist. There should be a provision in law clearly specifying that rape is a sexual offence and is non-compoundable and hence the rape victim and the accused cannot enter into mediation at any cost or for any reason.

- The courts must ensure that cross-examination of a rape victim by the defence lawyers is conducted in a sensitive manner so as to avoid harassment or humiliation to the victim, where the victim experiences the court procedures as second rape and choose either to remain silent or become hostile, which hinder the delivery of justice.

It is not enough to ask women's equality vis-a-vis men in her community. Because what if the men himself were the victims of oppression and exploitation. Such equality does not take women very far even if she becomes equal to peasant man who is himself brutalized and denied rights. Therefore, the fight for equality according to the present day Feminists does not only include the 'Equality' of women but the movements are for a just and equitable society for both men and women.

⁷⁰ See cases V. Mohan v. Cuddalore District and State of Madhya Pradesh v. Madan Lal.