

MAKING LEGAL AID AND JUSTICE FOR WOMEN FROM INVESTIGATION TO DECISION A REALITY THROUGH A SENSITIZED JUDICIARY

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Historically whatever lip service may be paid to the ideal of the woman being a goddess or a 'Devi', or the so called Vedic vision of harmony with the cosmic order when there was no discrimination between the sexes, but in practice, whether in India or elsewhere in the world, a clearly subordinate status was assigned to the woman, who was made physically, emotionally and economically subordinate to the man, with no right to hold property or to make independent decisions. In some random selected verses, the "Manusmriti" has this to say:

8.371. If a wife, proud of the greatness of her relatives or (her own) excellence, violates the duty which she owes to her lord, the king shall cause her to be devoured by dogs in a place frequented by many.

9.2. Day and night woman must be kept in dependence by the males (of) their (families), and, if they attach themselves to sensual enjoyments, they must be kept under one's control.

9.3. Her father protects (her) in childhood, her husband protects (her) in youth, and her sons protect (her) in old age; a woman is never fit for independence.

9.5. Women must particularly be guarded against evil inclinations, however trifling (they may appear); for, if they are not guarded, they will bring sorrow on two families.

Friedrich Engels, has said in "The Origin of the Family"(1943): "The modern individual family is founded on the open or concealed slavery of wife....."

In "Islam, the Misunderstood Religion," Muhammad Kutub writes that an astounding question has been raised whether women have a soul and what is its nature? Suppose she has a soul, then is she born as a slave to man or is her status somewhat superior to a slave? Sheikh M.H. Kidwai writing in "Woman under Different Religions," noted a Russian custom which finding that "there is only one soul among ten women" called for presenting a whip to the bridegroom at the time of marriage, to keep the woman under awe. The same book notes that the Romans recommended that "as a horse whether good or bad requires spurs, so a woman maybe good or bad requires thrashing." Similarly a Chinese custom cautions husbands: "listen to the advice of wife, but act against it."

The 1860 Penal Code as it was originally conceived contained few gender specific provisions for benefit of women, and wherever they existed the penalties were comparatively lesser than what we find today particularly by the recent amendments to the law on rape or related offences, or the provisions against domestic violence or for dowry deaths. Even an offence like adultery, in

the 1860 Code which is still not amended, where the husband philanders with another man's wife punishable u/s 497, or entices away another man's wife, punishable by s. 498 IPC, the right to prosecute the adulterer was only conferred on the aggrieved husband of the enticed woman under section 198(2) Cr.P.C. The aggrieved wife of the philandering husband was given no right to prosecute the adulterer or the adulteress. The fact that the adulterous wife could not be prosecuted even as an abettor also reflected the mindset that the woman had no independent mind and had only been led astray by the adulterer.

Important Constitutional provisions for benefit of women

Some changes in the position of women are visible in our Constitution, which we have given to ourselves on 26th November, 1949. The Preamble speaks of securing for all citizens, that would mean men and women both, justice social, economic and political, liberty of thought and expression, equality of status, opportunity and fraternity which assures the dignity of the individual. Article 14 guarantees equality before the law and equal protection of law to all. Article 15 restrains the State from discriminating on the basis of religion, caste, sex or place of birth. More importantly Article 15(3) confers powers on the State to make special provisions for women and children. Article 16 speaks of equality of opportunity for all citizens in matters relating to any public office. The directive principle enshrined in Article 39(a) aims at providing adequate means of livelihood for men and women equally. Article 39(b) directs that the ownership and control of the material resources of the community are so distributed that they subserve the common good. Article 39(c) opposes concentration of wealth and means of production in a few hands. Article 42 speaks of the State providing for just and humane conditions of work and for maternity relief. Implicit in these Constitutional provisions is creating conditions for control of property and resources also with women, and for introducing special measures for improving their condition.

In *C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil*, (1996) 8 SCC 525 overriding importance has been given to s. 14(1) of the Hindu Succession Act, which has been enacted to remove the personal law limitations on the absolute right of the woman to hold and dispose of property. This is because Article 15(3) speaks of special provisions for women, which in conjunction with Article 21 reinforce the "right to life" in its wider meaning which includes equality and dignity and right to development, and for making the inherent attributes of a human being a reality for the woman too. Hence gender discriminatory restrictions and obstacles on the right of a woman to hold property, contained in personal laws are to be removed. Existing personal laws insofar as they violate Constitutional provisions for equality and development

could also be declared void in view of Article 13. Property is an important source for economic independence and cultural development, and for the woman acquiring the scientific temper, humanism and spirit of inquiry enjoined in Articles 51- A (h) and (j).

The principles in international instruments and conventions such as the 1986 U.N. Declaration on the Right to Development and CEDAW or the Vienna 'Convention on Elimination of All Forms of Discrimination against Women, 1979,' which was ratified by India in 1993, the Beijing Declaration and the International Covenant on Economic, Social and Cultural Rights, are binding on India. These International instruments similarly call for removal of restrictions on a woman's right to hold property, and for abolition of discriminatory personal laws and for affirmative legislation and appropriate economic and social reforms as a means for eradicating all forms of social injustice and for establishing a new international economic order which facilitates empowerment of the woman, and could contribute significantly towards the goal of equality between the sexes.

Provisions under Penal Code and Criminal Procedure Code principally for gender specific crimes

As a result of the Constitutional provisions, International instruments and conventions and public pressure gradually some new gender sensitive provisions have been introduced in criminal law and in some cases the existing provisions have been made more stringent.

Penal Provisions

Thus Act 43 of 1983 has introduced s. 228 A IPC which makes publishing or printing name or disclosing identity of victim of rape and allied crimes to the public an offence punishable with upto 2 years and fine.

For overcoming the difficulty of absence of direct evidence or for identifying the persons who could be responsible, where a woman was murdered in the confines of her matrimonial home, the crime of dowry death under s.304 B was inserted in the Penal Code by Act 43 of 1986, which made the husband or his relatives liable for a minimum punishment of 7 years extending upto life, if a woman dies an unnatural death within 7 years of her marriage and cruelty or harassment for dowry demands by the husband or relative was shown. A presumption was also raised u/ s. 113 B of the Evidence Act that the accused had caused the dowry death where it was shown that soon before her death the woman was subjected to cruelty or harassment in connection with dowry demands by the accused.

For the offence of Abetment to commit suicide u/s 306 which is punishable with upto 10 years sentence and fine, a presumption of abetment to commit suicide

by a married woman is raised against the husband or his relative by s. 113 A of the Evidence Act inserted by Act 43 of 1983, if it is shown that there is evidence of cruelty by the husband or his relatives and the death takes place within 7 years of the marriage.

Causing miscarriage in different situations, with or without the woman's consent punishable under sections 312, 313, 314 and 315 IPC, offences of kidnapping or procuration of a minor or major female for different purposes under sections 363, 366, 366 A, 366 B, 367 372 and 373 IPC and offences against marriage in Chapter XX of the Penal Code under sections 493, 494, 495, 497 and 498 IPC which are variously punishable from 2 years extending to 10 years or life, are some of the existing unchanged provisions for crimes against women.

Cruelty by husband or his relatives with a wife by wilful conduct driving her to commit suicide or causing grave injury or danger to life, or limb or health or harassment for the purpose of extracting some property or valuable security from the wife or her relations was made punishable under section 498 A IPC inserted by Act 46 of 1983, with up to 3 years imprisonment and fine.

The Protection of Women from Domestic Violence Act, 2005, has been enacted for providing comprehensive relief to wives, partners or others who suffer violence or harassment in a domestic relationship with the respondent.

The Dowry Prohibition Act, 1961 makes taking or giving dowry punishable with a minimum sentence of 5 years, or with a minimum of 6 months, extending to 2 years for demanding dowry. Presents can be given to the bride and bridegroom by preparing a list of presents as provided in the Dowry Prohibition (Maintenance of Lists of Presents to the Bride and Bridegroom) Rules, 1985, which is to be kept with the gift receiving spouse.

The Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act 1994 was introduced to check the scourge of sex selection and elimination of female fetuses. It prohibits determination and disclosure of the sex of the foetus at birth or for making advertisements offering to determine the sex of the foetus.

Rape and associated offences which have been significantly amended by the 2013 Criminal Law Amendment Act will be discussed separately below.

Special provisions for women undergoing investigations as accused or witnesses

S. 46(1) proviso, inserted by Act 5 of 2009 disallows touching a woman for arresting her if she is told that she is being arrested, unless she resists arrest which can then only be effected by a woman police officer.

S. 46(4) Cr.P.C. inserted by Act 25 of 2005 restrains arrest of a woman after

sunset and before sunrise, other than in exceptional circumstances with the prior permission of the Judicial Magistrate 1st Class.

Under s. 47(2), proviso, for immediate search for a person hiding in a residence occupied by a *pardanshin* woman, not wanted for the crime, the woman should be asked to withdraw herself before breaking open the apartment if the officer cannot otherwise obtain admittance for searching for the concerned person.

Vide s. 51(2) Cr.P.C females are to be searched only by females with due regard for decency.

Section 53(2) Cr.P.C provides for medical examination of female accused by or under supervision of a female Registered Medical Practitioner (RMP).

Under section [157(2) proviso inserted Criminal Procedure Amendment Act 2008] the statement of the victim of rape is to be recorded at her residence or a place of her choice, and preferably by a woman police officer in the presence of her parents, guardians, near relatives, or a social worker.

By s.164 A, inserted by the Criminal Procedure Amendment Act, 2005 the Medical examination of the rape victim is to be conducted by a government, local authority, or private Registered Medical Practitioner within 24 hours of the complaint and the report should note the name and address of the woman, the person bringing her, the victim's age, material collected for DNA profiling, marks of injury, general mental condition, details of other material particulars, reasons for conclusions, whether consent for examination was obtained from woman or guardian, time of starting and finishing medical examination.

Under s. 167 (2), proviso to explanation II, inserted by Act 5 of 2009, Women accused under 18 years are not to be sent to jail and are only to be detained in a remand home or recognized social institution, where the investigation cannot be completed within 24 hours.

By section 173(7)(a) introduced by Cr. Procedure Amendment Act 2008 the investigation with regard to a child rape is to be completed within 3 months of the report with the police station

Special provisions for trials:

By the proviso to s. 26 (a) and the 2nd proviso to s. 327(2), inserted by the Criminal Procedure Amendment Act 2008, as far as possible the offences under section 376 or sections 376 A to 376 D shall be tried by a woman judge, and by section 327 (2) Cr.P.C (inserted by Act 43 of 1983), the trial shall be held *in camera*.

Vide section 357 Cr.P.C the Court can direct that part or whole of the fine recovered from the accused be defrayed for prosecution expenses, or as payment for loss and injury to a person which could be recoverable in a Civil Court, or for restoration of property stolen, criminally misappropriated, or

disposed of etc. Even when no fine has been awarded, the Court can direct the offender to compensate the victim for the loss or injury caused to him.

As on occasion the offender may not be able to adequately compensate the victim or his dependants for his/ her loss/ injury and rehabilitation, particularly in trials relating to sexual offences, or where the victim has to be rehabilitated even where the accused is not tried, on the recommendation of the 152nd and 154th Law Commission Reports s. 357 A has been inserted by the Cr. Procedure Amendment Act 2008 calling upon the State government to prepare a victim compensation scheme whereby on the recommendation of the Court or even on a direct application to it by the victim or his dependents, where injury is proved but the offender is not identified, the DLSA or the SLSA has to decide on the compensation amount after enquiry within 2 months. The State or District Legal Services Authority can also order for immediate first aid or medical facilities by any hospital public or private which is bound to provide the same (u/s 357 C Cr.PC, ins. by CrL. Law Amendment Act, 2013) on a certificate being issued by the Station officer regarding the injury to the victim. By a judgment dated 3.5.2013, in *Ankush Shivaji Gaekwad v. State of Maharashtra*, the Apex Court has directed that the trial Court must invariably examine the need for awarding compensation under section 357 and give reasons for awarding or not awarding compensation in each case. In *Delhi Working Women's Forum v. Union of India*, (1995) SCC 14, the National Commission for Women in India were directed to frame a scheme for award of compensation to victims of rape within 6 months, and the Central government was directed to ensure implementation of the scheme. Setting up a Criminal Injuries Compensation Board pursuant to the Directive Principle contained in Article 38(2) was also recommended in the same judgment, as rape victims suffer substantial economic loss and some are too traumatized to continue employment. This has now become a reality with the victim compensation scheme introduced by the 2008 amendment.

Amendments to IPC, Criminal Procedure Code and Evidence Act by Criminal Law Amendment Act 2013, especially with regard to rape and allied offences.

Penal Code Amendments:

New or amended sections 166 A, 166 B, 326 A, 326 B, 354, 354 A, 354 B, 354 C, 376, 376 A, 376 B, 376 C, 376 D, 376 E, 509 have been introduced in the penal code.

S. 166 A : For requiring appearance of witness in police station or other place when prohibited by law, or for failing to record an FIR in relation to rape and cognate offences a minimum 6 months imprisonment extendible upto 2 years with fine has been prescribed.

S. 166 B: Hospital in-charges of government, local bodies, and private hospitals not providing immediate, and free treatment for rape and cognate offences, which are required to be provided by newly introduced s. 357 C Cr.P.C will be punishable with imprisonment upto 1 year or/and fine.

s. 326 A deals with causing scars, disfiguration, disability or other grievous injury by acid throwing which has been made punishable by a minimum 10 years RI, extending upto life, with fine which has to be utilized for meeting medical expenses of the victim.

The attempt to commit this offence has been made punishable u/s 326 B with a minimum 5 years RI, extending to 7 years and fine. Offences u/ss 326 A and 326 B have been made sessions triable and non-bailable

s. 354 or criminal force with woman to outrage her modesty has been made punishable with a minimum sentence of 1 year, extending to 5 years and fine. The offence has been made cognizable and non-bailable

s. 354 A provides for 3 years R.I. for sexual harassment, by making physical contact with unwelcome sexual overtures, or demands for sexual favours, or showing pornography against the woman's will, or a sentence of upto 1 year for making sexually coloured remarks. The offence has been made cognizable.

Use of criminal force for disrobing a woman has been made punishable with minimum 3 years imprisonment, extending to 7 years and fine u/s 354 B. The offence has been made cognizable and non-bailable

Voyeurism u/s. 354 C for clandestinely watching or capturing on camera an unaware woman's private acts, or disseminating such images has been made punishable with a minimum of 1 year extending to 3 years and fine. Repeating the offence carries a minimum 3 years sentence which extends to 7 years and fine. The offences are cognizable and on repetition non-bailable

Stalking (354 D) i.e. following or contacting a woman directly or on the internet despite her objections has been made punishable at the first instance with upto 3 years and for a subsequent conviction with up to 5 years. The offences are cognizable and for repeated stalking, the offence is non-bailable

Trafficking of persons (s. 370), which speaks of recruiting, transporting, harbouring, transferring, receiving a person for the purpose of physical, sexual exploitation or any form of slavery or forced removal of organs by threats, using force, abduction, fraud, deception, abuse of power, or by giving payments has replaced the earlier provision dealing only with keeping of slaves. The earlier sentence which extended to 7 years has been enhanced to a minimum of 7 years R.I. extending upto 10 years, when one person is trafficked, and a minimum of 10 years R.I. extending to life, where more than one person is trafficked. For trafficking a minor, a minimum punishment of 14 years R.I.,

extending to life, and for repeated trafficking of a minor, life imprisonment is provided for the remainder of the offender's natural life with fine. When a public servant or police officer is involved in trafficking then the sentence is imprisonment for the whole of his natural life and fine. Consent of victim is immaterial for a trafficking offence.

For sexually exploiting an already trafficked minor a minimum 5 years R.I. extending to 7 years and fine is provided under section 370 A. Trafficking offences have been made triable by a Sessions Court, and are cognizable and non-bailable

Rape under the amended section 375 IPC, clauses (a) to (d) now includes penetrating the penis or other object or body part to any extent into the vagina which includes the labia majora, mouth, urethra or anus of a woman, or manipulating the body of the victim forcing her to commit such acts with the offender or another in the 6 circumstances regarding absence of consent mentioned in the earlier s. 375. A seventh circumstance has been added where the woman was unable to give consent. 18 has replaced 16 as the age below which consent was treated as immaterial. As absence of resistance to rape may be due to the victim being overawed or due to the offender or offenders being armed, it is clarified that from mere absence of resistance consent to the sexual activity cannot be inferred.

For excluding sexual acts with a wife from being treated as rape, her age has to be above 15 years, as opposed to 12 years earlier.

For the offence under s. 376(1), the minimum sentence of 7 years extending to life has been retained. But the powers of the Court for giving a lesser sentence for special reasons has been done away with.

Aggravated punishment for rape has been introduced by the 2013 Amendment Act under s. 376(2), clauses (a) to (n) where rape is committed by a police officer at the police commits station premises, or with a woman in his jurisdiction or in custody, or by a member of the armed forces in the area deployed, or by a staff or management member of a jail, remand, or other women's or children's institution, or hospital, or by a relative or a teacher in a fiduciary relationship, or for rapes during sectarian or communal violence, or with a woman knowing her to be pregnant, or on a woman below 16 years, or a woman incapable of giving consent, or a a physically or mentally challenged woman, or where a person is in a position of dominance over the woman, or whilst committing rape he causes grievous bodily harm, or commits repeated rapes with the same woman. There the minimum sentence is 10 years, which may extend to imprisonment for the whole of the offender's remaining natural life with fine.

s. 376 A makes rape which results in the woman's death or reduces her to a

vegetative state punishable with a minimum of 20 years or imprisonment for the whole of the person's remaining natural life.

s. 376 B makes sexual intercourse with a wife during separation punishable with a minimum of 2 years extending upto 7 years with fine.

s. 376 C makes sexual intercourse not amounting to rape by abuse of his position for the purpose of seduction of a woman, by a person in authority or in a fiduciary relationship, or a public servant or superintendent or mangager of a jail, remand home or other place of custody, or a woman or children's institution, or on the management or staff of a hospital punishable with a minimum 5 years RI, which could extend to 10 years with fine. Sexual intercourse would have the wider meaning given in the amended s. 375(a) to (d).

376 D makes gang rape punishable with a minimum of 20 years RI, which could extend to the whole of the natural life of the offender and fine which is payable to the victim for meeting her medical and rehabilitation needs.

s. 376 E makes Repeat offenders for offences under sections 376, 376A, or section 376 D punishable with imprisonment for their whole remaining natural life or death. All the aforesaid rape and cognate offences have been made cognizable, Sessions triable, and non-bailable, except the offence of sexual intercourse by husband with wife during separation u/s 376 B IPC, which is only cognizable on complaint of wife (vide newly introduced section 198 B Cr.P.C) and is a bailable offence.

The punishment for an offence u/s 509 of making lewd gestures or remarks or exposing objects for insulting the modesty of a woman has been increased with up to 3 years S.I. and fine, in place of 1 year, with optional fine.

Criminal Procedure Code Amendments:

The information about all such above noted offences are to be recorded by a woman police or any woman officer by s.154 (1), first proviso.

If these offences are committed on a temporarily or permanently physically or mentally disabled woman, then the woman police officer should record this evidence at the woman's residence or other convenient place of her choice, and also videograph the evidence as per s. 154(1), 2nd proviso (a) and (b)

Under s. 160(1) proviso, a male witness below 15 years or above 65 years or a woman or a mentally or physically disabled person acquainted with a crime shall only be required by the police to give their statements at their place of residence.

Vide s. 161, 2nd proviso the statement of a woman victim of a crime u/s 354, 354 A, 354 B, 354 C, 354 D, 376 , 376 A, 376 B, 376C, 376D, 376E, 509 IPC shall only be recorded by a woman police or woman officer.

Vide sections 164(5) and 164[5A(a)], in the aforesaid rape and cognate offences

the Judicial Magistrate is to record the statement of the victim at the earliest in a manner the Magistrate considers best suited in the circumstances, preferably on oath. Under s. 164[5A(a) 1st and 2nd proviso, if the person making the statement is permanently or temporarily mentally or physically disabled the Magistrate shall take help of an interpreter or special educator for recording his statement, and this statement shall be videographed.

Under s.164[5A(b)] the statement of such a disabled person can be taken into account in lieu of the examination-in-chief of the witness u/s 137 Evidence Act, and he can be cross-examined on the basis of this statement without further recording the examination-in-chief at the trial.

For public servants accused for offences under sections 166 A, 166 B, 354, 354 A, 354 B, 354 C, 354 D, 370, 509 IPC the requirement for sanction under section 197 Cr.P.C has been done away with.

The requirement in s. 273 Cr.P.C for recording the evidence in the presence of the accused or his pleader has been modified by adding a proviso that for a woman under 18 who was subjected to rape or other sexual offence, the Court is to take appropriate measures for ensuring that the woman is not confronted by the accused, while at the same time ensuring cross-examination of the accused.

This amendment is in accord with the directions in *Sakshi v. Union of India, (2004) 5 SCC 518* that the minor victim in such offences should not be made to confront the accused. *Sakshi* has therefore recommended that: In holding the trial of child sex abuse or rape:

- (i) a screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;
- (ii) the questions put in cross-examination on behalf of the accused, insofar as they relate directly to the incident, 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;
- (iii) the victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

Similarly in *State of Punjab v. Gurmit, (1996) 2 SCC 384*, it has been emphasized that the amended provision to hold trials of rape cases in camera be strictly observed, and that open trials be held as exceptions. The trial proceedings can also not be published without the Court's permission. It has also aptly been observed in *Gurmit: The court, therefore, should not sit as a silent spectator while the victim of crime is being cross-examined by the defence. It must effectively control the recording of evidence in the court. While*

every latitude should be given to the accused to test the veracity of the prosecutrix and the credibility of her version through cross-examination, the court must also ensure that cross-examination is not made a means of harassment or causing humiliation to the victim of crime. A victim of rape, it must be remembered, has already undergone a traumatic experience and if she is made to repeat again and again, in unfamiliar surroundings what she had been subjected to, she may be too ashamed and even nervous or confused to speak and her silence or a confused stray sentence may be wrongly interpreted as “discrepancies and contradictions” in her evidence.

S. 309(1) Cr.P.C as amended by the Amendment Act 2008, has been further amended by the 2013 Amendment Act which provides that the trial proceedings are to be continued from day to day until all the witnesses have been examined, unless the Court finds adjournment necessary for reasons to be recorded, and for offences under sections 376 or sections 376 A to D, the trial is to be concluded within two months of the charge sheet, i.e. this requirement is not only confined to the situation after the examination of witnesses has begun.

Evidence Act Amendments

The Criminal Law Amendment Act 2013 has also added s. 53 A of the Evidence Act, whereby for prosecutions under sections 354, 354 A, B, C and D, and 376, 376 A, B, C, D and E, where the question of consent is in issue, neither can any evidence be given regarding the character or previous sexual experience of the victim, nor can a witness be cross-examined on these aspects under the proviso to s. 146 of the Evidence Act.

For the aggravated kinds of rape mentioned in s. 376(2) IPC clauses (a) to (n), where sexual intercourse is proved, and the woman states in her evidence that she did not give consent, then the same shall be presumed under the substituted section 114 A of the Evidence Act.

The substituted s. 119 of the Evidence Act permits a dumb witness to communicate his evidence by writing or signs, but the Court has to take the help of an interpreter or special educator for recording the statement, which shall also be videographed.

Gap between theory and reality

While it is true that some stringent provisions have been introduced for crimes against women. But that is not reflected in the conviction or prosecution rate.

Women are still afraid of approaching the police or Courts for complaining about rape, molestation or sexual harassment, because the patriarchal, male chauvinist mind is all pervasive. After facing the grave humiliation at the hands of the of the sex offender, it becomes unbearable for the victim to be sneered or

jeered at by the police or advocates who consider the victimized woman herself as immoral, and some victims have described the ordeal before the trial Courts as worse than the rape itself.

This insensitive or chauvinistic attitude of the authorities and others concerned only emboldens the sex offenders for repeating such crimes.

The persons engaged in barbaric honour killings of couples who may want to marry outside the caste or disobey fiats from the elderly as to how they must behave or marry suffer from the same feudal, patriarchal, bigoted mindset which make the offenders take law in their own hands and award harsh punishments in kangaroo courts. The police and administration instead of protecting the victims actually side with such offenders. In *Lata Singh v. State of U.P.*, (2006) 5 SCC 475, *Bhagwan Dass V State (NCT of Delhi)*, (2011) 6 SCC 396 and *Arumugam Servai v. State of Tamil Nadu*, (2011) 6 SCC 405, the Supreme Court has recommended the harshest punishment against such offenders. It has also called for departmental action against the D.M. or SSP/ SP if they do not prevent such incidents despite prior information or if they fail to apprehend and prosecute such persons.

Because of the media outcry, and fear of administrative action I have found that many cases where there are clear signs of rape and murder, the case is only registered initially as a murder case, just as in the past dacoities with murder were shown only as murder cases, or dacoities were turned into robberies. The result is that the police fails to get the accused medically examined for finding signs of absence of smegma, which could suggest recent intercourse or for seeing whether he had any injuries caused by resistance of the victim, or collecting clothes of the accused and the deceased which might have shown seminal stains, or getting the DNA profiling done of such material, which could have provided scientific forensic corroboration regarding the crime, and the identity of the accused. The same perfunctory investigation is seen in trials for honour killings.

Independent witnesses, even when available are very reluctant to give evidence in cases, because of the growing selfishness these days that the crime does not concern them. In rape cases there is further reluctance because of the prejudice mentioned above that the woman is getting what she deserves.

Gangsters or politically well connected accused are often able to terrorize the witness or buy out witnesses into not deposing against them in Court. It has been lamented in *NHRC v. State of Gujarat*, (2008) 16 SCC 497 that unlike many foreign countries where witness protection programmes have been put in place, neither the State nor the Central Governments have enacted any law or framed any scheme for witness protection. In *Zahirullah Habibullah Sheikh v State of Gujarat*, (2006) 3 SCC 374, *NHRC v. State of Gujarat*, (2009) 6 SCC

767 and *State of Maharashtra v. Mangilal*, (2009) 15 SCC 418, it has been emphasized that equal to the right of the accused for a fair trial, is the need of the victim and State for ensuring prosecution of the offender, and for this a duty was cast on the police to produce all its essential witnesses after providing them with necessary protection. Entry of the public generally or some person who could intimidate the witness in Court could also be restricted under the proviso to s. 327 Cr.P.C. In *Vikas Kumar Rookrewal v. State of Uttaranchal*, (2011) 2 SCC 78, the role of the State and the Judge for the conduct of a fair trial has been emphasized. At para 22 it has been said that "The necessity of fair trial hardly needs emphasis. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases. The learned Judge has failed to take participatory role in the trial. He was not expected to act like a mere tape recorder to record whatever has been stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confers vast and wide powers on court to elicit all necessary materials by playing an active role in the evidence collecting process."

Witnesses are also less likely to lose interest or to be subject to pressures for turning hostile, if the trial can be conducted expeditiously and be carried out from day to day until the examination of all the witnesses is completed, and the outer limit for concluding the trial within two months of the charge sheet in rape and allied offences fixed under section 309(1) Cr.P.C and its proviso are observed.

Ultimately it is gender discrimination and the poor social, economic and educational status of the woman that is causative of both the woman's exploitation and the ready hostility of witnesses. Media, glare though it is temporary at best, focusses first on National or State capitals. The Delhi gang rape would not have led to such an outcry and media focus, had it happened in a backward rural area in Jharkhand or Chattisgarh. Witnesses do not depose in these cases because they think that the poor woman or child victim with no clout is not worth wasting their time on. I am disturbed by the number of cases in of dowry deaths, where the bride has been strangulated or burnt, and yet the informant father or other relative witness has turned hostile, probably after return of part of the dowry received or for other monetary considerations. It certainly is a reflection of the status of the unfortunate girl child both in the matrimonial as well as her maternal home. The indifferent and poor investigation is also the product of the perceived unimportance of the woman or child victim. This is ultimately reflected in the large number of acquittals in these matters.

As per a 1980 U.N. Report cited in *C. Masalimani Mudaliar's* case: "Women constitute half the world population, perform nearly two-thirds of work hours,

receive one-tenth of the world's income and own less than one-hundredth per cent of world's property”.

The basic solution then lies in empowering and improving the economic and educational status of women, carrying out special programmes for improving their lot, giving them greater rights for ownership of property as mandated by Articles 14, 15, 15(3), 16, 21, 39(a), 39(b), 39(c) and 42 and also by implementing international instruments calling for property rights and socio-economic development of women, such as the CEDAW declaration or the International Covenant on Economic, Social and Cultural Rights or the UN Declaration on the Right to Development, 1986.

Legal Aid

Absence of legal aid for the disempowered and impecunious woman is also an important reason for justice not being available to them. Section 12(c) of the “The Legal Services Authorities Act, 1987” makes all women and children eligible for legal aid, if they require it and are unable to engage a private lawyer. No income restrictions are placed on a woman seeking legal aid.

Article 39 A introduced by the Constitution (42nd Amendment) Act, 1976 also casts a duty on the State to frame suitable laws and schemes for ensuring that justice is not denied to any citizen on account of economic or other disabilities or lack of equal opportunity. If an indigent resourceless prisoner or his paikar or agent, or a woman victim of violence or crime is not able to know the existing laws for her protection, or unable to access justice due to absence of means, or an *incommunicado* situation, then the all-embracing right not to be deprived of his/ her life or personal liberty except according to a fair, reasonable and just procedure guaranteed under Article 21 read with Article 14, stands automatically negated. Right to counsel of choice at time of arrest and at the trial are and to be informed of the grounds of arrest and right to bail in bailable offences is provided for by Articles 22(1), and sections 304 and 50 Cr.P.C which cast a duty on the Court to provide a defence pleader at State expense to an accused without a private counsel at the trial. In *Delhi Domestic Working Women's Forum*, the Apex Court has held that legal aid to a rape victim unable to arrange legal assistance herself may be provided at the police station itself from a panel of *pro bono* lawyers whose list is available at the police station, and who could assist the victim right through the trial.

Providing legal aid to a person who cannot afford a lawyer for representing him at this trial has been held to be a Constitutional right in *Suk Das v. Union Territory of Arunachal Pradesh*, (1986) 2 SCC 401, *Hussainara Khatoon (IV) v Home Secretary*, (1980) 1 SCC 98 and *M.H. Hoskot v. State of Maharashtra*

(1978) 3 SCC 544.

In *Suk Das* it was further observed that promoting legal literacy was an objective of the legal services programme and it was the obligation of the Court to inform the indigent prisoner of his/ her right to legal aid at State expense. The exceptions being where the accused is involved in a socially reprehensible crime such as child abuse or promoting prostitution or an economic offence, or where the crime may not involve imprisonment. *Khatri (II) v. State of Bihar*, (1981) 1 SCC 627 set aside the judgment of the blinded prisoners on the ground that they were not informed about their right to legal assistance at State expense, and reprimanded the High Court and other subordinate Courts for not providing legal aid merely because the illiterate prisoners had not asked for the same. The alibi of lack of resources for legal aid was also rejected.

For these reasons, and the fact that the heart of the resourceless litigant or his family members may not be "rankled" and disillusioned with the Rule of law for being "priced out of the legal system," that *Sheela Barse v. State of Maharashtra*, AIR 1983 SC 378 requires that a list mentioning all the male and female undertrial prisoners separately be sent to the District Legal Aid Committees, mentioning particulars of the convict, offences for which arraigned, and dates of jail entry. The DLSA is to provide a list of nominated legal aid lawyers who can enter jail and interview prisoners who seek their assistance within sight but out of hearing of jail officials. The lawyers were to be furnished with the required information about the prisoner. The list of such lawyers with the proposed date of their visits and interviews with the prisoners was to be put up on the notice boards inside the jails. *Sheela Barse* also directs that the State government bring out pamphlets informing the arrested prisoners in jails and police lockups about their rights, such as the right to be informed about grounds of arrest, right to apply for bail, right to be medically examined under s. 54 Cr.P.C, right to legal aid, right to inform arresting authority about a friend the arrested person may want to contact, whom the authority is required to call, ensure that female prisoners are only interrogated by or in the presence of female officers. Preferably lady Magistrates are to monitor jail and lock up conditions, as to whether the prisoner has been tortured, and ensure that the above and other conditions are complied with.

I would like to suggest here that such lawyers should be carefully selected by the DLSA, their regularity and uprightness of conduct be monitored directly by the appointing authority as well as by obtaining feed back from the beneficiaries of legal aid. Pamphlets be published and circulated by the State government and UPSLSA which apart from mentioning the above details regarding rights of the prisoners, also give the other details mentioned in the amended provisions, and the decisions of the Apex Court and the High Court regarding prisoners'

rights during investigation and trial. As far as possible women lawyers be selected for providing legal aid to women convicts.

Finally I would like to end with these inspiring words from *Sheela Barse*:

“The profession of law is a noble profession which has always regarded itself as a branch of social service and a lawyer owes a duty to the society to help people in distress and more so when those in distress are women and in jail. Lawyers must realise (I would add and Judges too) that law is not a pleasant retreat where we are concerned merely with mechanical interpretation of rules made by the legislature but it is a teeming open ended avenue through which most of the traffic of human existence passes. There are many casualties of this traffic and it is the function of the legal profession (and the judiciary, I need add) to help these casualties in a spirit of dedication and service.”
