



Research Paper

Judicial Response to The Question of Sexual Violence and Protection of Women in India

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ABSTRACT

This article attempts to explore the judicial response to the problem of sexual violence in India, with a focus on how courts have interpreted and applied laws meant to protect women from sexual harm. Through a doctrinal analysis of the evolution of key judgments across various High Courts and the Supreme Court of India, the article traces both the progressive and regressive elements of judicial reasoning in cases involving sexual offences.

The article highlights how certain judicial pronouncements have reinforced problematic ideas of female modesty, chastity, and credibility, often leading to re-traumatisation and the moral evaluation of survivors. Notions of honour, silence as implied consent, and victim-blaming still surface in courtrooms, undermining the spirit of gender-just legislation such as the Criminal Law (Amendment) Act, 2013. By mapping patterns in judicial engagement with sexual violence cases, the article argues that while the law has evolved in text, its implementation is often constrained by social conditioning and outdated interpretive frameworks.

I. INTRODUCTION

All the provisions and guarantees of law, including the constitution, gain their true meaning through their interpretation by the judiciary. The judiciary, as the guardian of the constitutional rights of the public and the enforcer of justice for the marginalised, has rendered some crucial verdicts throughout the years. However, we often see the judiciary displaying a contrary attitude and blatantly patriarchal and misogynistic norms and attitudes that further degrade rather than uplift women's social standing.

Judges often discriminate between men and women either consciously or unconsciously, and this attitude of the judges reflects their overly conservative and rigid approach towards modern social questions and challenges. These problematic judgements are often justified as a means of protecting and recognising the complex nature of Indian customs and traditions, even in situations where a woman's legally defined rights are being violated. These problematic instances are not just mere exceptions but rather a consistent stance adopted by the courts of our country.¹

For instance, even recently, in 2021, the accused was asked if he was willing to marry the victim (a minor at the time of the incident) by the former CJI in *Mohit Subhash v. State of Maharashtra*.² This degree of moralistic and deeply misogynistic stances adopted by the courts showcases the deeply entrenched institutions of patriarchy and male-dominant culture in our courts.³

Through this article, there is an attempt made to explore several tropes and attitudes that were consistent with the handling of cases by the upper echelons of the Indian judiciary, and through the same,

¹ Bajpai, G. S., & Mendiratta, R. (2018). Gender Notions in Judgments of Rape Cases: Facing the Disturbing Reality, *Journal of the Indian Law Institute*, 60(3), 298–311.

² The State of Maharashtra v Mohit Subhash Chavan, Application for Cancellation of Bail No.32 of 2020.

³ Sukirti Jain, *Rape and Indian Judiciary*, 4 (3) IJLMH Page 5880 - 5886 (2021).

explore the evolution of judicial attitudes while dealing with issues of sexual violence, namely sexual harassment and rape.

SEXUAL HARASSMENT

In India, the question of sexual harassment has been rather swept under the carpet for the longest time. In fact, it was only through the 2013 Criminal Law Amendment Act that a precise definition of sexual harassment was devised. In the current scenario, the POSH Act, based upon the guidelines brought about in the Vishaka case⁴, governs concerns of sexual harassment in the workplace. However, even today, we find that cases of sexual harassment in the workplace are being grossly underreported despite the efforts of the judiciary and state to protect the dignity of women.

VISHAKA V. STATE OF RAJASTHAN

This case is perhaps the most progressive step taken by the Indian judiciary towards reaching the ultimate goal of gender parity and the protection of women from sexual violence. In the Vishaka case,⁵ the Supreme Court extensively recognised and relied on international treaties that had not been incorporated into domestic law. The Supreme Court delivered the first authoritative ruling on 'sexual harassment' in India and, faced with a lack of legislation, resorted to innovative measures by engaging in 'judicial legislation'. In this case, the Supreme Court laid down guidelines and norms that aimed at providing a framework for the protection of women from sexual abuse in the workplace.

The court, in its judgment, declared that considering International Covenants and treaties is important to realise and purposively interpret the several guarantees of gender parity and the right to work with dignity as enshrined in Article 14, 15, 19(1)(g) and 21. The Court stated that any international convention which is not against one's fundamental rights and is in harmony with the spirit of the Indian Constitution must be incorporated into the legal provisions to enlarge its meaning and expand the scope for the realisation of the goal enshrined. This power is founded on Article 51 (c) and the jurisdiction of the parliament to pass legislation for implementing international treaties and norms, as stated in Article 253 and Entry 14 of the Union list in the seventh schedule of the Constitution.

THE POST- VISHAKA SCENARIO

The Vishaka judgment acted as a path-bearer for most instances of judicial activism, and the judiciary has been adept in filling the gaps existing in the present judicial framework ever since. Following the Vishaka verdict, there have been numerous cases addressing a variety of concerns related to the implementation of the recommendations, as well as other administrative and technical aspects.⁶

*Apparel Export Promotion Council v. A.K. Chopra*⁷, was the first case where the guidelines laid down in the Vishaka case were applied. The main legal issues that were brought to the court were:-

- (1) Whether in cases of sexual harassment, is actual 'physical contact', a necessary ingredient or not?
- (2) If a superior's behaviour is against decency and modesty, does it amount to sexual harassment?
- (3) Does the High Court have the authority or the required jurisdiction to interfere in the decision made by the authorised disciplinary authority or not?

The Supreme Court provided a wider interpretation of the term "sexual harassment" and also expressed the view that physical contact alone is not the only determinant in handling allegations of sexual harassment. The Supreme Court stated that the High Court had no ostensible authority to interfere with the quantum of punishment as in cases of departmental proceedings, the disciplinary authority and the appellate authority are the sole fact-finding authorities.⁸ In this case, the Supreme Court ruled that any action or gesture, whether explicit or implied, that intends to or has the potential to offend the modesty of a female employee, must be classified as sexual harassment according to the general definition.

What was apparent was that even after the formulation of extensive guidelines in Vishaka to tackle the question of sexual harassment, their implementation was often lacking and ineffective. There is a lack of whole-scale implementation of the guidelines not only in their form but also in their substance and spirit. Thus, the guidelines often failed to effectively transform the work environment into a safe and secure workplace in all aspects and ensure women the right to work with dignity, decency and respect.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 has been implemented to safeguard women against sexual harassment in the workplace and to address and resolve

⁴ Vishaka v. State of Rajasthan (1997) 6 SCC 246.

⁵ Vishaka v State of Rajasthan, (1997) 6 SCC 241.

⁶ Diva Devarsha, Implementation of Vishaka Guidelines: Post Vishaka Judgement, IJLPP, Vol 1 (2014).

⁷ Apparel Export Promotion Council v. A.K. Chopra 1999 (1) SCC 759.

⁸ Apparel Export case, at p. 770.

complaints related to such harassment. The act was formulated in accordance with the guidelines given by Justice Verma in the Vishaka case, while also considering the safeguarding of women's fundamental rights to equality (Article 14), the right to life (Article 21), and the right to pursue a profession (Article 19(1)(g)).

RAPE

The act of rape is considered one of the most abhorrent crimes, particularly when considering the Indian context, where its severity is heightened. The current institutional system aimed at assisting rape victims in India remains persistently inadequate, despite the concerted efforts of the courts and groups dedicated to addressing this issue. Therefore, after a rape victim manages to free herself from the control of the perpetrator, she is promptly trapped by an unsympathetic criminal justice system that denies any tolerance to an individual who has already endured unimaginable torture due to the nature of the crime committed against her.

Rape trials in India have undergone a transformative change for the better. As it is seen in the early years following independence up until the seventies, the judicial systems advocated for a rather conservative, insensitive and narrow-minded approach to dealing with rape cases. These stances adopted by the court rather reflect the way courts often found it convenient to reflect prevalent tropes of patriarchy and misogyny within their judgements.⁹ If we look through how the court has ruled in rape cases over the years, we find that up until the *Tukaram case*, the judicial approach in dealing with cases of rape was largely in favour of the accused.

Despite the fact that the Supreme Court ruled as far back as in 1952 that conviction on rape could be made solely through the testimony given by the victim, the court felt the necessity of developing measures to assess the victim's credibility. This stance adopted by the court was supported by the now-repealed provision of the Indian Evidence Act (Section 155(4)), which allowed for the defence in a rape prosecution to present evidence indicating that the victim had a typically "immoral character". Such attempts at character assassination were regularly employed to deduce the falsehood of her testimony.

These stringent regulations on corroboration, the previous sexual history of the victim, and the concept of "consent" were interpreted in a way that aimed to bring about extreme humiliation and dishonour to the women of the nation. Notwithstanding the Supreme Court's numerous progressive rulings, traditional moral beliefs nevertheless influenced whether the accused were found guilty or not guilty.

The judiciary consistently perpetuated traditional gender biases against women by prioritising the concept of "honour and chastity". The courts, even now, through their rulings, propagate an image of a woman's chastity to be regarded as her esteemed virtue, which she values greatly, and thus, as rape forcefully deprives her of this virtue, it undermines her honour. This prevailing perception of rape, which is still being perpetuated by the criminal justice system, creates significant obstacles for women seeking legal justice. Such a stance adopted by the courts is visible when one investigates some of the early judicial pronouncements regarding rape cases.

AN EVOLUTION OF RAPE TRIALS: ANALYSIS OF CASE LAWS

In *Ghayanshyam Mishra v. The State*,¹⁰ a 1957 case was regarding a school teacher who raped a ten-year-old student in his class. The girl underwent a medical examination, which revealed that her hymen had been ruptured. The man, too, had evident indications of a physical altercation, specifically wounds on his left thumb and genitalia. The court determined that the accused was indeed culpable for the sexual assault of the ten-year-old girl. The laceration in the hymen and the wounds on the accused were deemed sufficient corroboration for the prosecution's narrative and the testimony provided by the girl. However, what is crucial to highlight is that the court expressed the view in this instance that *an individual could never be found guilty, only based on the uncorroborated testimony of the victim*. The court emphasised the need for adequate corroboration of the victim's account before reaching a verdict.

However, the attitude of the courts was not always of such an erroneous and problematic nature, as seen in *Madhukar Mardikar v. State of Maharashtra*.¹¹ The defence counsel, in this case, argued that the woman, Banubi, was promiscuous and of 'easy virtue', thus questioning the reliability of her testimony, and in that case, it would be a grave error to endanger the position and prospects of a government employee solely on the testimony of a morally promiscuous woman. The Supreme Court disregarded these circumstances and maintained that "*Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also, it is not open to any and every person to violate her person as and when he wishes*". This ruling is commendable as it acknowledges the fundamental entitlement of every woman to live with dignity, irrespective of her lifestyle choices that may be deemed immoral by our society.

⁹ Bajpai, G. S., & Mendiratta, R. (2018). Gender Notions in Judgments of Rape Cases: Facing the Disturbing Reality. *Journal of the Indian Law Institute*, 60(3), 298–311.

¹⁰ Ghanshyam Misra v. The State, AIR 1957 Ori 78.

¹¹ AIR 1991 SC 207.

Despite the fact that in several instances, the court decisions portray the sheer insensitivity the judges have towards the victim, such as in the *Tukaram and Phul Singh* cases. We find that largely the judiciary has come a long way from the insensitive and extremely limited outlook in dealing with rape cases. This is particularly true in the case of the extent of corroborative evidence required for the victim's testimony, which has come a long way from the *Ghanshyam* case, where the court stated that in order for conviction to take place in rape cases, there must be complete corroboration of the victim's story. This stance has shifted to a rather victim-friendly method where the victim's testimony holds true unless there are glaring holes and gaps that could be punched in to the victim's testimony.

Also, the reliance on medical opinion for conviction has also undergone a transformative shift. Earlier, even slight inconsistencies within the medical opinion were seen as grounds for acquittal. Nowadays, the court rather only considers medical opinion to be that of a mere advisory nature, which has often led to common sense prevailing, aiding in the victim's quest for justice. The court's approach in dealing with victims of rape, barring a few exceptions, has largely been much more sensitive and victim-friendly. This is evident from several instances where the court barred the counsels from repeating insensitive and triggering questions as well as statements and recognising the daunting power imbalance and the helplessness with which rape victims approach the court to aid in their quest for justice as the court are often accommodative of complaints which are launched long after the occurrence of the incident.

However, the several tropes which are in play in judicial sentencing in rape trials are still as apparent and appalling as ever. Some of these dominant tropes include

(I) The Stereotypical Image of the Perfect Rape Victim

We often find that judges, through their comments and statements, inadvertently create this distorted image of what a "rape victim" should be. Hence, we often find courts comparing real-life victims of rape to these stereotypes to assess the credibility of the victim's testimony. This is particularly evident in the court's assessment of the demeanour of the victim during the testimony, where they recall the incident. The courts often go in search of signs of the victim showing signs of agony or emotional trauma as proof of the occurrence of the incident and vice versa. Thus, the victims are burdened with the pressure of fitting into this image of the conventional stereotypical rape victim, as the courts have come about to expect certain emotions and levels of behaviour of the victim while testifying.

Hence we often find a situation in which, in addition to the burden of proof in trying to prove the incident of rape, the victim is further burdened with the "*burden of performance*", so that her attitude during her testimony is in line with the gendered and archaic cultural stereotypes the courts come to expect of rape victims. This notion of a woman being emotional during her testimony playing a relevant role in the court's decision is seen in many cases, such as the Supreme Court's decision in *Kamalanatha v. State of Tamil Nadu*,¹² where the judge noted that the demeanour of the victim during her testimony further spurred the court to believe the testimony of the victim:

"While recalling the forcible act of rape, the [trial] court noticed the torrential flow of tears from the eyes of P.W.8 with all pain and conscience shocked; the court listened to the most startling and saddening story of P.W.8 who is yet to attain mental maturity."

This attitude to typecast a certain image of a rape victim and any deviance from this image as being a clear indicator of some wrongdoing on the victim's part is something that is routinely found in judgements even today, such as the 2016 case, *Raja v. State of Karnataka*,¹³ where the court while acquitting the accused in a case of gang rape held that :

"Her post-incident conduct and movements are also noticeably unusual. Instead of hurrying back home in a distressed, humiliated and devastated state, she stayed back in and around the place of occurrence, enquired about the same from persons whom she claims to have met in the late hours of the night, returned to the spot to identify the garage and even look at the broken glass bangles, discarded litter etc...Her avengeful attitude in the facts and circumstances, as disclosed by her, if true, demonstrably evinces a conduct manifested by a feeling of frustration stoked by an intense feeling of deprivation of something expected, desired or promised. Her confident movements alone past midnight, in that state, are also out of the ordinary... The medical opinion that she was accustomed to sexual intercourse when admittedly she was living separately from her husband for 1 and ½ years before the incident also has its own implication."

Even in judgements where the judges aim at delivering judgements which are gender-neutral and tend to empower women. We find that inherent notions of sexism and archaic beliefs and value systems of the judges come to the forefront. Thus, by reaffirming these views of a stereotypical image of a woman, these judgements

¹² *Kamalanatha v. State of Tamil Nadu*, AIR 2005 SC 2132.

¹³ *Raja v. State of Karnataka* AIR 2016 SC 4930.

aimed at empowering women do more bad than good. This was particularly evident in the 1985 judgement *Bharwada v. State of Gujarat*,¹⁴ where the judge, while delivering what he considered to be an 'empowering' and 'victim-friendly' decision, felt the need to justify his reasoning behind why the testimony of Indian women in rape trials are to be believed, thereby inadvertently creating this stereotype of the Indian rape victim:

"Even at the age of 10 or 12, a girl in India can be trusted to be aware of the fact that the reputation of the entire family would be jeopardised, upon such a story being spread. She can be trusted to know that in the Indian Society, her future chances of getting married and settling down in a respectable or acceptable family would be greatly marred if any such story calling into question her chastity were to gain circulation in the Society. It is also unthinkable that the parents would tutor their minor daughter to invent such a story to wreak vengeance on someone. They would not do so for the simple reason that it would bring down their social status in Society, apart from ruining the prospects of their child. They would also be expected to be conscious of the traumatic effect on the psychology of the child and the disastrous consequences likely to ensue when she grows up. She would prefer to suffer the injury and the harassment, rather than to undergo the harrowing experience of complaining regarding a charge reflecting on her chastity"

Another disturbing trope often found in the Indian judicial system is how sexual offences are viewed as offences only against the institution of marriage. As a result, judges tend to differentiate between an unmarried woman who is a virgin and a sexually active (possibly married) woman. When a woman who has not had sexual intercourse is raped, according to the courts, her chances of getting married are reduced, and therefore, the judicial system readily classifies it as a sexual offence. Conversely, women who engage in sexual relationships with men other than their husbands are subject to different treatment, as their worth in the marriage "market" is already lowered. Thus, the court is often hesitant to classify it as a sexual offence. Such an approach is linked to the outdated gendered notion that an Indian woman's value is ultimately linked to her chastity. Such an attitude is reflected in the case of *Madan Kakkad v. Naval Dubey*,¹⁵ where it was stated that:

"...after having lost her virginity, remains unmarried, undergoing the untold agony of the traumatic experience and the deathless shame suffered by her. The victim is under the impression that there is no monsoon season in her life and that her future chances for getting married and settling down in a respectable family are completely gone."

(II) Sexist Remarks

We often find deeply misogynistic and sexist remarks within several judgments of both higher and lower courts in India. These remarks often range from objectifying women to equating a superior status for men concerning the social standing of women. A prime example of this would be the *Jagannivasan v. State of Kerala*¹⁶, While trying to determine whether the sexual act committed was consensual or not, the court held that:

"There is evidence on the record that the appellant had been employed in Dubai and presumably had mastered a handsome income when compared to persons working in his home state. He was a bachelor and an attractive catch for girls in his brotherhood to be bonded in matrimony...It would rather be safe to lean in favour of the appellant and accord him the benefit of the doubt."

In another instance, the court held that a rape victim lives a life filled with a "deep sense of deathless shame", while this was meant to justify the statement that women do not tend to lie about them being raped, the court failed to recognise the social connotations and impact their statement or words hold. The court, in other instances, has undermined the gravity of the offence of rape, as seen in the *Vinod Kumar v. State of Kerala*¹⁷ case, where the court, while acquitting an accused in a rape case, commented: *"that his wife would find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly the prosecutrix has found."*

II. CONCLUSION

The judges and the courts have often attempted to construct a fixed perception of a general rape victim, which tends to display ingrained misogyny, employ unnecessary and insensitive remarks within their judgements, and even make remarks that diminish the seriousness of the act. Even when the judiciary makes an effort to adopt a victim-centred approach, their fundamental lack of understanding of gender concepts results in reinforcing gender stereotypes and perpetuating a biased portrayal of both perpetrators and victims.

There is a societal expectation that, when making legal decisions, the courts should not only focus on punishing wrongdoers but also consider the well-being of the victims. The Indian judiciary is predominantly composed of males, and the vindictive perspectives held by many of its members create significant challenges

¹⁴ *Bharwada v. State of Gujarat*, 3 SCC 217 (1983).

¹⁵ *Madan Kakkad v. Naval Dubey* 3 SCC 204 (1992)

¹⁶ *Jagannivasan v. State of Kerala*, Supp 3 SCC 204 (1995).

¹⁷ *Vinod Kumar v. State of Kerala*, 2014 (4) SCALE 537.

for women who have experienced sexual offences in their pursuit of justice. The prejudiced judicial procedures not only perpetuate the subordinate position of women in society but also present a crucial question regarding whether women can receive fair treatment from a justice system that is based on the assumption of women's inferiority compared to men. Given the extensive influence of verdicts on society and their establishment of a legal precedent, the significance of the harm caused by sexist rulings cannot be overstated.