

WOMEN VICTIMS AND THE CRIMINAL JUSTICE SYSTEM: A COMPARATIVE ANALYSIS BETWEEN COMMON LAW AND CIVIL LAW COUNTRIES

Written by Mansi Jain

5th Year BA LLB (HONS) Student, Institute of Law, Nirma University, Gujarat, India

ABSTRACT

The laws on rape, domestic violence, and sexual assault have undergone major reforms in various common law and civil law countries, to the extent that the focus is being laid upon under-reporting of offences taking place against women and high rate of attrition in the criminal justice system, by emphasising on the necessity to avoid negative and prejudicial attitudes of the police, prosecutors, jurors, and judges towards the women victims. The unsympathetic attitudes of the criminal justice system led to victimisation of the victim and represents the bias existing in the criminal justice response towards the victims of sexual assault, rape, and domestic violence. Decades, after these law reforms, there is ample evidence to prove that victimisation of women victims happen at a high rate in the criminal justice system. The paper aims to present a comparative study and critical analysis of the criminal justice system responses in the United States, United Kingdom, France and India and other common law and civil law countries towards such victims from the perspective of police, prosecutors, jurors and judges and society per se. The paper argues that continued victimisation and prejudicial attitudes of the criminal justice system exaggerates the trauma suffered by these victims and results in less convictions of the accused, exonerating violent men.

STATEMENT OF PROBLEM

Despite enactment of various policies and reforms for the protection and prevention of the women victims from victimisation, the responses, and prejudicial attitudes of the professionals of the criminal justice system have not changed. These negative and unsympathetic responses

of victim blaming and questioning the credibility of such victim not only lead to dismal rates of crime reported by women but also results in their victimisation, due to which they suffer unbearable trauma resulting in the failure of a criminal justice system.

OBJECTIVE

1. The research aims at providing a comparative study of the criminal justice response in relation to women victims of rape, sexual assault, and domestic violence in common law countries like the United States, India and England and civil law countries like France, Germany, and Italy.
2. The research seeks to examine the factors responsible for underreporting of crimes happening against women, especially the negative responses of the criminal justice system.

RESEARCH QUESTION

1. Whether the prejudicial attitudes of the professionals of criminal justice system lead to victimisation of the women victims of rape, domestic violence, and sexual assault?
2. Whether the reforms taken by the common law countries and civil law countries in relation to protection of such victims and changing the unsympathetic attitudes of the criminal justice system have been successful?

METHODOLOGY

The doctrinal method of research is used in the paper. The author first identified the point of focus to be victimisation of women victims by the criminal justice system and then located the data in various reports and studies. The author, further referred to various journals, books and case studies to understand the topic and provided an analysis of her findings and observations.

LITERATURE REVIEW

1. Paper: “Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries, K. Daly and B. Bouhours, 2010”

The paper criticises the criminal justice system for failing to fulfil its obligation towards providing proper assistance to the victims. The author delves too much upon the definition of rape and sexual violence instead of dealing with the actual issue. The author focuses on the differentiation created by the police, concerning rape, that they classify rape as ‘real rape’ and ‘simple rape’ on the basis of weapons used and gives more weightage to real rape. The author has not done any comparison between the common law and civil law countries, the comparison is done between five common law countries in the paper. Further, the comparison is done based on the attitude of criminal justice system towards the victims but not on the laws created for their protection.

2. Book: “Feminism, Violence and Representation in Modern Italy: We are Witnesses, Not Victims, Chapter title - Being Witnesses, Not Victims: On the Affective Politics of Representation, Giovanna Parmigiani, 2019”

The author contends that women are seen from the perspective of victimhood, that they are always victims. She says that considering women as weak and always a victim, directly leads to their victimisation. The author gave examples on the National Campaigns where women protested against being considered always vulnerable but she did not present any case studies to elaborate on the statement.

3. Paper: “Lost in Translation: Domestic Violence, the Personal is Political and the Criminal Justice System, Kimberly D. Bailey, 2010”

The author criticises the current rape policies and domestic violence policies to be restricting woman’s autonomy. The author contends that it is because of the negative response of the criminal justice system that the victims resist to get involved in the system. The author provides suggestions to the problem and provides examples of the measures adopted in the United States for aiding domestic violence victims. However, the research is exhaustive and focusses on only one country and one crime.

4. Paper: “Discrediting Victims Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections, Lisa Frohmann, 1991”

The author criticises the prosecutors for having a biased approach towards the women victims and contends that the prosecutors shall seek truth, instead of making assumptions regarding the credibility of the victims. Similarly, the author criticises the police behaviour in recording the complaint of the victim in rape cases, based on the injuries suffered.

5. Paper: “Unheard and Uncounted: Violence against Women in India, Aaron Karp, Sonal Marwah and Rita Manchanda, 2015”

The paper emphasises on the needs of police reform in India, so that, there is no underreporting of crimes. The paper lacks on the point that it discusses the problem but does not discuss the measures adopted by India or the solutions that can be provided.

6. Paper: “Victims of Rape and their Right to Live with Human Dignity and to be Compensated: Legislative and Judicial Responses in India, K.L. Vibhute, 1999”

The paper discusses the failure of the National Commission for Women to protect the women from sexual offences. The paper contends that the criminal law in India is inefficient in protecting the plight of women victims and there the judicial approach to such victims is inconsistent. In reference, to this paper, the current paper discusses the law emerged later to tackle the menace.

7. Paper: “The Needs and Rights of Victims of Crime, Mike Maguire, 1991”

The paper discusses the victim’s movement in the United States and the United Kingdom. The paper discusses the victim support schemes which have been referred to in the current paper.

8. Paper: “The Paradoxical Victim: Intimate Violence Narratives on Trial in Italy, Alessandra Gribaldo, 2014”

The author has discussed the courtroom environment during the trial of a domestic violence case in Italy and has criticised the criminal justice system for their brutal and rude attitude towards the women victims. The author has presented a summary of the

prosecutor examination and the judicial behaviour and biasness while trying the case of women victims, which is used a reference example in the current research paper.

9. Book: “International Approaches to Rape, Chapter Title: Still Little Justice for Rape Victim Survivors: The Void between Policy and Practice in England and Wales, Nicole Westmarland, 2011”

The paper discusses various laws in England and Wales to prevent victimisation of women victims, but the implementation of these laws is not effective. There are still cases where convictions are resulting in acquittal. The paper discusses the case studies where the police behaviour is negative towards the women victims who are prostitutes. The laws and policies and the cases are referred to in the current paper.

10. Paper: “Fair Treatment or Preferred Outcome? The Impact of Police Behavior on Victim Reports of Domestic Violence Incidents, Laura J. Hickman and Sally S. Simpson, 2003”

The author contends that the police discriminate based on the colour of the victim. The police believe the black women to be always lying about their rape. The author argues that the police should be trained to have a positive behaviour towards all the victims and shall not discriminate on any grounds. This encourages the victims to report their crimes. The paper focusses on the police behaviour towards black and white women, but does not focus on the police behaviour towards women victims together.

11. Book: “Sexual Assault in Canada, Chapter Title: Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault, Holly Johnson, 2012”

The author argues that because of the negative responses of the police and prosecutors, women victims are resistant and unwilling to report their cases, due to which conviction rate is low. The reforms that are introduced are ineffective. Further, police consider a serious crime as not serious, depending on the injury suffered and weapons used, which leads to victimisation. The paper does not provide any suggestions to encourage the criminal justice system practitioners to respond effectively, however, it identifies the issue.

12. Paper: “A Comparison of Victim-Reported and Police-Recorded Crime in India, Kislaya Prasad, 2013”

The author contends that crimes against women are underreported in India because of the negative attitude of police towards women victims. As the important information related to the case is never recorded by the police because of underreporting, it leads to victimisation. The types of questions asked by the police to such victims, which lead to character assassination of the victims also leads to victimisation. The paper lacks in discussing the provisions in Indian laws, which aims at preventing victimisation.

13. Book: “You’re Dead – So What: Media, Police and the Invisibility of Black Women as Victims of Homicide, Chapter Title: The Deserving vs Undeserving Victim: Case Studies of Biased Media Reporting and Law Enforcement Intervention, Cheryl L. Neely, 2015”

The chapter focuses on victimisation due to victim blaming and re-victimisation. The negative responses of the criminal justice system and unfair treatment to the victims lead to secondary victimisation. The questions about the morality and character of the woman are majorly raised by the criminal justice system, which is brutal and negative. The chapter is referred to understand the attitude of the criminal justice system towards women victims.

14. Paper: “Stalking Victims, Victims of Sexual Violence and Criminal Justice System Responses: Is There a Difference or Just ‘Business as Usual?’, Jenny Korkodeilou, 2016”

The paper examines the responses of the criminal justice system including prosecutors, Crown Prosecution Services, and the ineffective implementation of laws in the United Kingdom. The paper discusses the negative thought-process of the police towards the women victims and rape myths. The fails to provide suggestions to resolve the issue.

15. Paper: “Role of the Victim in the Criminal Justice Process, P. V. Reddi, 2006”

The paper emphasises on the law reforms in India to prevent the victimisation of women victims. The paper presents a comparison of the laws in France, where the victim is encouraged to actively participate in the proceedings, but such case is not in India. The

paper provides suggestions, which we can adopt from the civil law countries to improve our system. As the paper was written in 2006, it does not discuss the major criminal law amendments in India.

16. Paper: “The Trauma of Rape and the Criminal Justice System, Patricia A. Resick, 1984”

The paper examines the psychological trauma suffered by the women victims and the victim blaming culture which results in self-blaming, increases further trauma and leads to victimisation. This results in the victims withdrawing themselves from the society. In such cases it is the responsibility of the criminal justice system, to protect the victims and prevent them from victimisation, where they are lacking. The paper discusses the steps taken by the American Bar Association to overcome the issue. The paper does not provide a detailed study of the laws enacted in the United States to deal with the issue.

INTRODUCTION

The criminal justice system is obligated to work for providing justice to the victims. Prevention of crimes and punishing the perpetrators are its major duties. There have been various reforms and amendments in the existing laws and new laws are created relating to rape, domestic violence, or any other form of sexual violence or crimes against women, but there are still various challenges faced by the criminal justice system in both common and civil law countries. One of the major challenges faced by the criminal justice system is the victimisation of women victims. Victimisation refers to a phenomenon where the victim of a crime is treated unfairly or is being made victim of the same crime again through victim blaming, facing trauma or through injustice being done against him. Thus, blaming a rape victim that rape has happened because of her own clothes is an instance of victimisation. Despite various provisions in the laws to deal with the women victim with respect and preventing secondary victimisation, the response of the authorities of the criminal justice system towards women victims of rape and other sexual offences is negative in nature.

Victims, especially women victims are often blamed for the crimes happening against them. They are considered responsible for ruining a perfectly good case, or for being non-cooperative, or too confident and not afraid of answering the questions of the prosecutor. However, since

past few years, the issue of victimisation has been taken into consideration and the criminal justice practitioners has recognised the rights of the victims to get justice and fair treatment of their cases. There is a requirement of reforms in the criminal justice system in many countries in many fronts, especially concerning the issue of victimisation. There is a requirement of providing training to the police personnel while dealing with a woman victim. Similar training is to be provided to other criminal justice practitioners. Simply taking legislative measures is not sufficient, instead there is a need of refining the present criminal justice system to ensure justice and prevent victimisation. The present system places the victim at the backseat in the criminal justice network and the victim has no source to take an active participation in the proceedings. Instead, they are subjected to victimisation and their credibility is always questioned. No proper mechanism is being provided for their sufferings and they are compelled to suffer through the trauma in silence. This makes it necessary to take important legislative steps for protecting the interests of the victims, especially women victims and obligates the criminal justice system to assist and protect the women victims who approach them for justice.

The focus of the study in this paper is the response of criminal justice system, that is, police, prosecutors, and judges towards the women victims of rape and other forms of sexual violence. It has been understood that despite various provisions emphasising on the fair treatment of victims and prevention of victimisation, the response of the criminal justice system towards the victims, especially women victims have been always disrespectful and negative. Thus, the paper critically analyses the issue through developing an understanding of the problem through the comparison of the laws relating to the issue in both common and civil law countries. The paper is divided into two parts. Part I discusses the legal development of the subject in both the common and civil law countries and Part II discusses the response of the criminal justice system towards the women victims and suggestions and observations relating to same, along with some case studies relating to the matter.

LAWS RELATED TO COMMON AND CIVIL LAW COUNTRIES ON VICTIMISATION OF WOMEN VICTIMS

Rape and other forms of crimes against women have been declared illegal and a criminal offence in both common and civil law countries. It is considered as a violation of the human

rights and is a crime against humanity. It is further an assault against the integrity and dignity of the person against whom it is committed. Article 2 of the United Nations Universal Declaration of Human Rights provides for the protection from any kind of discrimination and right to freedom and live with dignity.ⁱ The Resolution 48/104 of the General Assembly of the United Nations declares rape as a violation of human rights.ⁱⁱ In the common law countries, in USA, the “Convention on the prevention, punishment and eradication of violence against women”ⁱⁱⁱ was set up in 1994 for the prevention of violence and offences against women. In the USA, the “Jacob Wetterling Act” was introduced in 1994 and “Safety Act, 2007” was introduced to ensure mandatory maintenance of a register of record of sexual offences and to ensure safety and fair treatment of the victims of such sexual offences, including women victims. The “Domestic Violence Unit” was set up in Washington D.C. to provide assistance to the victims of domestic violence. Similarly, the “National Organisation for Victim Assistance” was established for providing assistance to victims and preventing their victimisation.

Further, the “Violence Against Women Act, 1994”, “Violence Against Women Reauthorisation Act, 2013” and the “The Family Violence Prevention and Services Act” have been enacted to the prevent and protect the women victims. The “Department of Justice” obligates the police to mandatorily file a complaint reported or record any information received concerning the sexual offences against women and take immediate actions and follow the legal procedure required. The “U.S. Code Title 42 – Rights of the Victims” under Section 10606(b) provides the women victims of domestic violence or any other crimes against women, the right of fair treatment and right to be treated with respect and dignity. The “Department of Justice” is required to inform the victims of crime with the progress and results of the investigation. The failure of the police officials to perform their duties thoroughly will result in departmental inquiry and civil and criminal charges against them as per the “U.S. Constitution”. The “Criminal Justice Standards” Rule 3(1.2), created by the “American Bar Association”, requires the prosecutor to work effectively and efficiently for convicting the guilty person and protecting the interests of the victim and provide proper support and assistance to them. Further Canon 3 of the “Code of Conduct for United States Judges” requires the judges to be respectful, impartial, diligent and provide a fair treatment to the victims of crime.

Similarly, in England and Wales, the “Sexual Offences Act, 2003”, mandatory registration of the sexual offences and fair treatment of the victims is required to be done by the criminal justice system. Further, a special team of police officers is appointed to investigate the rape cases in England in pursuance of the “Sapphire Project” of 2005. Special courts are established in England and Wales with proper courtroom environment, separate entrances and waiting areas for the victims, experts and perpetrators, dedicated court rooms for specific matters and proper training is provided to the staff and the officials to prevent any kind of victimisation of the women victims. This court set-up facilitates effective participation of the victims in the proceedings and information sharing and the intervention by support systems has been made easier which has resulted in the public gaining confidence in the criminal justice system in England and the accomplishment of justice.

As the people of England were still unsatisfied with the rape laws to be insufficient, in 2007, the “Cross Government Action Plan on Sexual Violence and Abuse” was introduced which provided a comprehensive plan with objectives of maximising the prevention of sexual violence against women, to provide a proper support system and healthcare facilities to the women victims and survivors and to ensure an improvement in the behaviour and response of the criminal justice system towards women victims of rape and sexual violence. The action plan emphasises on increased reporting of the cases and mandatory investigation of the cases of sexual offences and proper prosecution. It further emphasises for the appointment of specialist rape prosecutors to prosecute the rape cases and assist the victims. The action plan also advocates for special measures to be adopted to make it easier for the victims to present evidence in the courtroom proceedings. Thus, ensuring greater victim participation. The “Together We Can End Violence Against Women and Girls: A strategy”, also known as the “VAWG Strategy” of 2009 was the first policy to recognise the gender-based violence and used the terms “violence against women and girls” instead of using gender-neutral terms. It was an integrated approach to end violence against them and to prevent, provide and protect the women victims of such crimes. The policy provides for a helpline for the victims of sexual violence in every police jurisdiction or each area where a particular police station has a jurisdiction. It also provides for the training of the officials of the Crown Prosecution Service and the police officers concerning the treatment of women victims of rape and other sexual offences. In the Criminal Procedural Rules, 2020, the prosecutor has the discretion to either

prosecute or reject a case, which is to the prejudice of the victims as he may reject a case based on his own bias which leads to victimisation.

In India, Justice J.S. Verma Committee was established to prepare a report to provide recommendations for the change in India's rape laws and the criminal justice system responses towards the women victims. The committee recommended that a proper framework mechanism shall be provided to provide equal rights to women to ensure a paradigm shift from women as the objects of protection to an individual who is a holder of rights. The report further emphasised on the need of creating laws and programmes for providing proper support and assistance to rape victims and proper training to the police, prosecutors, and judges to have a sensitive attitude towards the rape victims and victims of sexual offences to prevent re-traumatisation and re-victimisation of women victims. Section 154(1) of the "Code of Criminal Procedure, 1973 (hereinafter referred to as CrPC)" mandates the police officer who is in-charge of the police station to reduce to writing any information provided to him of a commission of a cognisable offence. Section 154(3) of CrPC provides a remedy to a person in cases where such person can send through post and in writing, the relevant information to the police superintendent in cases where the officer in-charge of the police station refuses to record the information provided under Section 154(1) of the Code. And if the police superintendent is satisfied that a cognisable offence has been committed, then in such a situation, he can direct the investigation of the offence to any subordinate or he himself can proceed to investigate the case.

Further, Proviso 2 to Section 161(3) provides that for any offence against a woman as mentioned in the proviso, the statement of such woman must be recorded in writing by a woman police officer. Thus, avoiding any kind of victimisation. In the case of "Mohd. Jainal Abedin v. State of Assam"^{iv}, the court held that the investigating officer has to take all the relevant evidence and information into consideration both from the side of prosecution as well as the defence. The state of Chhattisgarh through its state amendment act "Chhattisgarh Act 25 of 2015" amended the above discussed proviso to impose a mandate to record the statement of the woman through audio-video recording and imposed an obligation on the woman police officer recording the statement of such woman victim to protect her identity. Thus, there are active steps taken by the Indian government both at the central and state level to protect the women victims of crimes against women from victimisation. Proviso to Section 26(a) of the

Code provides that when a matter related to rape is tried, the court shall be presided over by a woman.

Through the “Criminal Law Amendment Act of 2008” major amendments have been made in the Code for the benefits of the victims and for the prevention of victimisation. The definition of the victim was included under the code by incorporating Section 2(wa) in the Code. The Malimath Committee Report as well as the 154th report of Law Commission also advocated for the rights of the victims and recommended that there must exist a victim-oriented approach in the criminal law in India and that the state must provide the victims compensation from its own funds and must adopt protective and preventive measures. The amendment act of 2008 has paved way for the victim’s participation in the trial proceedings. The Proviso to Section 24(8) read with Section 301(2) and Section 302 of the Code provides the victim the right to appoint an advocate of his choice. However, this right is limited to the extent that the advocate appointed by the victim cannot conduct examination-in-chief. Such power is available only with the public prosecutor. The advocate appointed by the victim only provides assistance to the public prosecutor. “Proviso to Section 372 of the Code provides the victim with the right to appeal against the acquittal of the accused, conviction for a lesser offence and for inadequate compensation to the victim”. Further, Section 357 of the Code provides for the right of compensation to the victim and the shortcomings in the said section were addressed through Section 357A added through the 2008 Amendment Act. Through Section 357A, it was realised that compensation shall be given to victims irrespective of the fact if the offender is convicted or not. It also requires the state to rehabilitate the victim and grant adequate compensation. It also requires the legal services authority of the state or district to provide compensation to the victim where the accused is not identified and to provide free medical and first-aid facility to the victims. Immediate treatment is required to be given by the hospitals in rape cases and if this provision is violated, then the hospital in-charge of the said hospital is held punishable under Section 166(b) of the “Indian Penal Code, 1860”. The state is obligated to form its own victim compensation scheme under Section 357A.

As per “Section 113A, Indian Evidence Act, 1872”, the court may presume that the suicide committed by a woman within seven years of her marriage, is abetted by her husband or the relatives of her husband in cruelty cases dealt under “Section 498A of the Indian Penal Code, 1860”. In Section 113B of the Act, the court shall presume that the accused person has caused

the dowry death of the woman. Under Section 114A of the Act, in a rape case if a woman states that she has not consented for sexual intercourse, the court has a mandate to presume that she had not consented for the sexual intercourse. Certain amendments were made in the Act through the “Criminal Law Amendment Act, 2013”. Section 53A was added to the “Indian Evidence Act, 1872” through said amendment which provides that the evidence of character or previous sexual experiences of the woman, provided to prove the consent of the woman in rape cases is not relevant. Similarly, Proviso to Section 146 was also added and provides that such questions which lead to character assassination of a woman victim of rape or questions related to her previous sexual experiences cannot be put to her for proving her consent. Special legislations like the “Protection of Children from Sexual Offences Act, 2012” which provides for the establishment of special courts and in-camera trial of the child victim and “Protection of Women from Domestic Violence Act, 2005” have also been created.

In the Civil law countries, in Europe, in 2010, the European convention of Human Rights which works under the Council of Europe was established to deal with the matters of violence against women.^v Various forms of crimes against women like, rape, gender mutilation, forced marriage, domestic violence, mental or physical violence, sexual violence was criminalised under the convention. Rape was first criminalised internationally under the Lieber Code in 1863 and was further criminalised under the common Article 3 of the Geneva Convention, 1947. Article 3a of the Council of Europe’s Convention declares violence against women as a violation of human rights and provides a legal framework to protect the women victims and to punish the perpetrators of the crimes against women. It provides for the proper assistance to victims and proper support in cases of sexual violence. The convention further provides for the protection of the witnesses of the crime and imposes an obligation on the legal system to deal with the women victims of crime in a respectful and lawful manner. The convention provides for the provisions of compensation to the victims and appropriate sentencing mechanism. It ensures that the perpetrators are mandatorily punished and measures are taken for the proper implementation of the laws through proper investigation procedure, mandatory prosecution of the case and following the procedural law. It mandates the judicial authorities to seek truth and provide proper assistance and legal aid to the women victims. Thus, inquisitorial system is followed to prevent the victimisation of the women victims. The convention is ratified by most of the European states.

In France, “the Fichier Judiciaire Automatise des Auteurs d’infractions sexuelles” makes it mandatory for registering the complaints of sexual offences against children and adults which are of serious nature and are punishable with imprisonment of five years or more. In the civil law countries like France and Germany, specialist advocates are appointed to provide specialised support to the women victims and survivors and for their legal representation in the courts. The preamble of the French code of criminal procedure requires the judicial authority to ensure fair treatment to the victims and respect and protect their rights throughout the court proceedings. Further, the code provides for the active participation of the victim in the proceedings to ensure justice and convict the perpetrator which is absent in the laws of the common law countries. Article 15(3) of the French code of criminal procedure, requires the judicial police to mandatorily record the complaint filed by the victim and to transfer the same to the judicial police officer in whose jurisdiction the offence is committed, for investigation purposes. Thus, the police officer has no authority to accept or reject a complaint and he must mandatorily register the complaint and forward it to the officials of criminal justice system to move the case further, thus, preventing victimisation at the initial level. The district prosecutor has been given the power to accept or reject the case with proper justifications, however, the victim has been provided the right to appeal against such decision under Article 40(1) of the code, thus, preventing victimisation. Article 41 of the code requires the district prosecutor to provide proper support and assistance to the victims of crime.

Further, Article 53(1) of the Code requires the judicial police officers to inform the victims of their rights and provide proper assistance through victim support association. Article 306 requires the proceedings to be held in-camera for the offences of rape, sexual aggression, torture or other forms of sexual violence and the judge or the prosecutor must avoid creating any pressure on the victim. Article 706(11) of the code provides that the victim must be provided proper compensation based on the damages suffered by her and in case of the absence of the victim, her legal beneficiaries must be provided that compensation. It can be ascertained that the criminal procedure code of France provides for various provisions for ensuring a victim centric approach to prevent victimisation but the provisions lack in providing a guidance system to the criminal justice system officials to ensure fair treatment of the victims. A more comprehensive framework mechanism is required for the same.

In Italy, the National Campaign was organised in 2010, where women protested being considered vulnerable and always in need of protection. It was contended by the women, that being considered weak and in need of protection, directly attacks their dignity and is a violation of their human rights. It directly leads to their victimisation as they are always seen and considered as victims.

CRIMINAL JUSTICE SYSTEM RESPONSE TOWARDS THE ISSUE OF VICTIMISATION OF WOMEN VICTIMS

It has been argued by various criminologists and law makers that by increasing the conviction rates of rapists, rapes can be prevented as it will create deterrence and the punishment inflicted will set an example in the society. There have been significant improvements introduced in the criminal justice system concerning the treatment of rape victims and appropriate training have been provided to the police, prosecutors, and judges to properly assist the women victims of rape and other forms of violence against them. However, the implementation of the laws discussed in Part I and the response of the criminal justice system have not been up to the mark and there remain various challenges that need to be addressed.

One of the important challenges that is faced is the tendency of the criminal justice system to cause victimisation of the woman victim, leading to secondary trauma in the form of insensitive attitude towards the victim or through victim blaming. Providing proper assistance to the victim by having a victim-centric approach and following a quest for seeking the truth leads to efficient conviction rates and prevents injustice. The proper intervention by the criminal justice system officials helps in preventing victimisation or re-victimisation of the woman victims, helps in the restoration of the victim in the society and revamping their dignity, provides them with access to justice, increases conviction rates and creates deterrence and reduces attrition in rape cases. It is necessary for the criminal justice system to have a victim centric approach instead of them being inclined towards the innocence of the accused.

In 1982, England, there was an outcry when a documentary concerning a police officer aggressively interviewing a rape victim went viral. This led to the establishment of the “Sexual Offences Commission” under the supervision and control of Home Office. However, the police

still had the discretion to not file a complaint based on their reasoning that no crime has taken place, which was a major issue. Thus, there was a need of efficient investigations and prosecutions to increase the conviction rates in cases of violence against women. Consequently, “Her Majesty’s Crown Prosecution Service Inspectorate (HMCPsi)” and “Her Majesty’s Inspectorate of Constabulary (HMIC)” decided to perform a joint thematic inspection in 2001.^{vi} The inspection was done with the objective to analyse the procedure and practices followed by the prosecutors and the police and to understand the reason of low rates of conviction. It was concluded that there is a need of better coordination between the police and prosecution, to facilitate a thorough investigation and the quality of victim care was also found to be inefficient. The recommendations made by the inspection team were accepted and the “Rape Action Plan” was formulated to protect the victims from victimisation. The action plans failed as another documentary went viral in 2006 showing a police officer laughing on the pornographic images displayed in the station and the police’s negative attitude towards a woman victim of rape, who was a prostitute by profession. The police instead of collecting evidences and investigating the case, asked the woman victim to ‘kill herself’ instead of reporting the case in the police station. In continuation of the action plan, further investigations were done by HMCPsi and HMIC in 2006 and 2010, but it was found that only a few recommendations were achieved and the attitude of the criminal justice system officials is still negative towards the women victims.

Similarly, in the United States, the victim-blaming game has been played since decades. Since 1980s and 1990s, during the trial by jury system, it was believed that the way a woman dresses, plays a major role in her getting raped. It was believed that if a woman is wearing revealing clothes, she is asking for sexual intercourse. This is not only the case in United States, but in several countries, where a few members of the criminal justice system fail to understand and respect the plight of a woman victim. In the 1989 Florida case, where a woman was brutally raped, the jurors specifically referred to the clothes worn by the woman and contended that depending on the type of her attire during the time of commission of the offence, the woman invited herself to be raped.^{vii} It is to be noted that in 1982, there were many steps taken to prevent victimisation and one of these steps was the “President’s Task Force on Victims of Crimes”^{viii} and even after taking various steps, the judicial attitude was still negative. Thus, the stereotype that woman is responsible for their own rape has been in existence since time immemorial. However, major rape law reforms and legislations have been enacted as discussed

in Part I but the stereotype and negative attitude towards women victims always remains the same.

In India, in 2022, when a 24-year-old unmarried woman approached the High Court of Delhi and filed a petition for getting her abortion done legally, the presiding judge while denying her right to abortion, commented that, “she could give birth and then leave the child for adoption”.^{ix} Similarly, in a judgment given by the Bombay High Court in 2021, the judge said that the skin-to-skin contact is necessary to consider an offence as sexual assault under Section 7 of the POCSO Act.^x However, the Supreme Court had reversed the judgment in the both the instances, but these decisions of the High Court are sufficient to prove that even after the enactment of various provisions for the protection of victims from victimisation, the response of the judges towards victims in some cases is still negative towards the victims, leading to their victimisation. In the case of “Delhi Domestic Working Women’s Forum v. Union of India”^{xi}, the court emphasised on the need of providing legal assistance to the rape victim from the initial level of filing the case in the police station and held that the counsel appointed for the victim shall provide her assistance at all the stages of proceedings.^{xii}

Another instance with respect to the trial of the cases related to intimate partner violence in Italy is also tragic. It is to be noted that the testimony of victim plays an important role in the domestic violence cases in Italy.^{xiii} However, the testimony of women victims is always rendered uncredible by the prosecutors and the judges because of their inherent bias towards them. The evidence of good character and gender assumptions are given more weightage instead of the testimony of the victim. The judges and the prosecutors, in most of the cases, frame an assumption that if a woman is victim of intimate partner violence or rape or any other sexual offence, she must be silent and hesitate in answering the questions of the court. Thus, if any woman acts contrary to such assumption and acts confidently, her testimony is presumed to be uncredible which not leads to victimisation, but is also a mockery of justice.

The phenomenon of victimisation not only leads to injustice but also creates an unending trauma for a woman victim which is hard to recover. Merely by creating laws and regulations, the negative attitude of the criminal justice system practitioners cannot be changed. There is a requirement of stringent regulations, punishments, and proper training. It is important to recognise the needs of the women victims of crimes. It is necessary that they are not disregarded

and their pain and plight is understood. Seeking truth is one of the important tasks of the criminal justice system, and the police, prosecutor as well as the judges must seek truth while investigating, prosecuting, or adjudicating a case. The civil law countries are at a better status than the common law countries, as they believe in investigating the case from both sides and actively seek truth, so that, justice is done fairly. Whereas, in the common law countries, the criminal justice system is more accused oriented. It is to be realised by the practitioners of the criminal justice system that they are the officers of law and they are required to be unbiased and fair in their approach.

ANALYSIS AND SUGGESTIONS

The efforts taken by the lawmakers of various common law and civil law countries have proved themselves beneficial for ensuring the well-being of the victims and survivors of crimes, especially, the women victims of rape and other sexual offences and helps in prevention of victimisation. However, even after the laws are enacted, the attitude of some of the practitioners of the criminal justice system is still to the prejudice of the women victims, which leads to injustice and unfair treatment of the victims. The law reforms, amendments and enactment of various legislations have been done for the sole purpose of recognising the needs of the victims of crimes. The laws created by different countries overlap in one or the other aspect, but together, they intend to provide a proper procedural framework, so that the response of the criminal justice system practitioners is positive towards the victims, especially, women victims. It is necessary to ensure that the victims are given an opportunity to actively participate in the proceedings, which is preferred more in civil law countries as compared to common law countries. The criminal justice system practitioners shall not disregard the victims and the common law countries shall seek to make them an integral part of the system. The criminal justice system shall assist the victims at all levels and there must exist proper coordination between the practitioners of the system amongst each other. For example, the prosecutor must coordinate with the investigating judge or the police officer, so that no relevant evidences are left for the proper trial of the case. The prosecutors, instead of assuming and making an expectation to the behaviour of the women victim, must act impartially and provide assistance to them with an unbiased approach. It shall be made mandatory to report a case of violence

against women and the prosecutor shall not be given a discretion to discharge such case. The same provision has been provided in the POCSO Act in India under Section 19 and 20, where the mandatory reporting of the cases in relation to offences against children have to be done and similar provisions are required to be made.

The victims shall be made aware of their rights and the prosecutor shall involve the victims in the decision-making process, like in France, where the victims take active participation in the investigation process and trial proceedings. The specialised courts must be created for the trial of the rape cases and serious crimes against women, like in the England and Wales, where specialised agencies are created to assist the women victims and the trial takes place in special courts. The trial must be conducted in-camera and the victim shall in no way come in direct contact with the accused. The counsel of the defence or the prosecution shall not be permitted to ask such questions leading to character assassination of the woman victim, like in “Section 146 of the Indian Evidence Act, 1872” and there must exist a friendly environment in the court, so that the victim shall feel comfortable in giving her testimony. By ensuring proper victim participation, the victim will regain the faith in the criminal justice system and by ensuring proper support of the criminal justice system through rehabilitative measures, the victim can be restored to society and her victimisation can be prevented. By providing proper training to the investigating police officers appointed for the case of sexual offences and violence against women, and training them specifically with respect to the proper treatment of the women victims and ensuring safe environment, victimisation of women victims will be prevented at the initial stage of criminal proceedings.

Further, establishing the Victim Assistance Units can help the court immensely as they will lead to a free flow of dialogue between the terrorised victim and the advocate. The services like providing relevant information regarding the court proceedings and the functioning of the criminal justice system, proper psychological counselling and therapy to the victims, a proper system for informing the victim of his case and the date of appearance, establishing proper waiting rooms with all facilities and providing fear management training to the victims to overcome the fear to testify in court and making them habitual of the courtroom environment by giving them tour of the court, are some services which can be provided by the Victim Assistance Units.

Judiciary can also play an important role in preventing victimisation. They can protect the victim from traumatisation and victimisation by ensuring a friendly environment in the court and avoiding continuous proceedings. By providing the victims with sufficient breaks between the court proceedings and ensuring fair treatment by treating the victim with respect, dignity, sympathy and courtesy, victimisation of the woman victims can be avoided. The judges should have an unbiased approach towards the case and shall act neutrally and seek truth. The judges shall treat the victim with compassion. This will make the victims feel comfortable and safe and will be encouraged to cooperate in the proceedings and will support the efforts of the criminal justice system. It is necessary to give the victims, the respect that they deserve, instead of being unsympathetic and having a negative attitude towards them.

CONCLUSION

Ensuring participation of the victim in the investigation and the trial proceedings is necessary to regain her confidence in the criminal justice system. The victim shall be provided with the information regarding the trial and shall be allowed to raise objections when the trial is delayed or when the prosecution is not actively performing its duties. To prevent the victimisation of the women victims, both the common law and civil law countries have enacted various laws and rape law reforms. Specialised courts and specialised agencies have been established in the England and Wales, to ensure proper courtroom trial of a woman victim. Similarly, in India, major criminal law amendments have been done in the procedural code and the evidence act, to ensure effective victim participation. In the United States, the Department of Justice mandates the criminal justice practitioners to mandatorily follow the procedural law for ensuring fair treatment of the victims, as embedded in the U.S. Constitution and special legislations are created for the same. In Civil Law Countries, specifically, in France, the prosecutor is mandated to prosecute a case and seek truth. The French Code of Criminal Procedure, mandates the police to mandatorily record the complaint in cases of violence against women and to mandatorily investigate and prosecute the case. Thus, effective steps are taken to prevent the victimisation of the women victims.

However, the response of the criminal justice system practitioners is still negative in cases where they form an inherent bias about the woman victim, and dismiss her case, questioning

her credibility. Thus, instead of mere enactment of the laws, effective implementation is required and proper training of the criminal justice system practitioners is to be done. There is a requirement of stringent punishments in case of failure to follow the procedural laws while dealing with the case of a woman victim of rape and other sexual offences. The presumption that is framed in the minds of people regarding the character and sexual experience of a woman and her conduct in the court, needs to be changed. The Criminal Justice System shall emphasise on the rehabilitation and restoration of a woman victim and the blame culture and rape myths like “women lie about rape” shall be replaced with an active response and positive actions of the criminal justice system. These actions shall comprise of proper adherence to the procedural laws and providing proper support, assistance and guidance to the victims and a change in the negative attitude of the criminal justice system practitioners to a positive and sympathetic attitude towards the women victims of rape and other sexual violence.

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ENDNOTES

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ⁱⁱ Ibid.

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