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# Barriers to Access to Justice for Rape Survivors in India

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## ABSTRACT

*More than ten years have passed since the barbaric Nirbhaya incident in 2012, when humanity was ashamed on all counts. More recently, the Hyderabad veterinarian rape and murder incident is another glaring example of the condition of women safety in India. Females in India irrespective of age continue to remain unsafe and the tales of rape survivors is even more tragic. According to Human Rights Watch rape survivors in India face significant barriers to obtaining justice and critical support services. According to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, access to justice and fair treatment means victims should be treated with compassion and respect for their dignity. They have every right to access the machinery of justice and to quick redress, provided by statutory provision, for the injustice that they have suffered. To ensure victims are provided redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible, judicial and administrative mechanisms should be established and strengthened wherever necessary,. Victims should be informed of their rights in getting relief through such mechanisms. But unfortunately, in India women and girls who survive rape and other sexual violence often suffer humiliation at police stations and hospitals. For them access to justice leads to secondary victimization where they have to knock at each and every door of justice. Further, police are frequently unwilling to register their complaints, victims and witnesses receive little protection, and medical professionals still compel degrading “two-finger” tests. The tragic death of the Unnao rape survivor after being burnt alive by the accused bears testimony to the fact that access to justice for rape survivors is mirage. This hurdles to justice and dignity is further intensified by insufficient health facilities, counseling, and legal help for victims during criminal trials. Legal and other reform adopted since the Nirbhaya incident have not been fully realized. According to Sustainable Developmental Goal No.16 sexual violence is prevalent where there is conflict, or no rule of law, and countries must take measures to protect those who are most at risk. Thus promoting rule of law and upholding human rights are paramount if we seriously ever seek to realise these goals.*

**Keywords:** Rape survivor, rule of law, access to justice, victimisation, abuse of power

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## I. INTRODUCTION

### “Injustice anywhere is threat to justice everywhere”

- Martin King Luther Jr.

In a sound legal system which is accessible to all, law must be the means and justice should be the end. Law derives life and meaning through access to justice. The basic principle of the rule of law is access to justice. In a system devoid of access to justice, people’s voices are unheard, their rights are denied, nobody opposes discrimination and decision-makers lack accountability. Different societies have their own meaning of access to justice. Even if defined differently, it always has inherent relationship with dispute resolution as the latter’s purpose is to do justice only. Thus access to justice is considered similar to access to dispute resolution method provided by the state. This innate right is not dependent on affirmative state action but with the advent of welfare state, it means not only to litigate or resolve the dispute but also to equal, affordable, quick access to the forums and enforcement of relief which is individually and socially just. Access to justice is provided by the constitution substantively by certain guaranteed fundamental rights by giving equal protection of laws, equality of opportunity and status, right to life and personal liberty to all its citizens and on violation of these rights to approach the court.

The expression “access to justice” can’t be defined correctly without defining the term justice. “The notion of justice evokes the cognition of the rule of law, of the resolution of conflicts, of institutions that make law and of those who enforce it; it expresses fairness and the implicit recognition of the principle of equality”.<sup>2</sup> The idea of access to justice constitutes, firstly a strong and effective legal system with rights clearly defined, enforceable and supported by substantive legislations and secondly is a useful and accessible judicial/ remedial system easily available to the litigant public.”<sup>3</sup> It “therefore means that the ability to approach and influence decisions of those organs which exercise the authority of State to make laws and adjudicate on rights and obligations.”<sup>4</sup> Access to justice is defined in the black’s law dictionary as “the ability within a Society to use courts and other legal institutions effectively to protect one’s rights and pursue claims.” It considers a potential system acquiring appropriate legal remedies within the Civil and Criminal justice fields. Thus judiciary, being an important system, has a crucial role in ensuring access to justice.

### Access to Justice under the Constitution of India

Apart from the Universal Declaration on Human Rights<sup>5</sup> and International Covenant on Civil and

<sup>2</sup> Rawl, J., A Theory of Justice, Edition 1997, Cambridge, Cambridge University press, at 11.

<sup>3</sup> Kaifulla Ibrahim, F.M., J., Rule of Law & Access to Justice, 31.01.2014- 02.02.2014, Tamil Nadu State Judicial Academy

<sup>4</sup> Ghai Yash and Cottrell Jill, 2010, “Rule of Law and Access To Justice” Marginalized communities and Access to Justice”, *Routledge, New York*, p. 3

<sup>5</sup> Article 8 where everyone has the right or an effective remedy by the competent national Tribunals for acts the fundamental rights granted by the Constitution or by law.

Political Rights<sup>6</sup> the Constitution of India, the living document and basic law of this country, provides substantive basis for access to justice. The preamble of the Constitution secures social, political and economic justice to all the citizens. Under Part III from Article 14 to 32, certain fundamental rights are guaranteed to every citizen. These rights are not absolute but they are protected under Article 13 of the Constitution which prohibits that enactment of any law which is inconsistent with the fundamental rights.

The Constitution of India declares through Article 14 that:-

“The state shall not deny any person equality before law or equal protection of laws within the territory of India.” So every citizen in India, irrespective of his social, economic and political stature, has accessibility to the courts in the same manner equally and indiscriminately by virtue of article 14 of the Constitution.<sup>7</sup>

According to Article 21 of the constitution “No person shall be deprived of his right to life and personal liberty except in accordance with procedure established by law’.

The procedure which curtails this fundamental right should be fair and just and reasonable. Therefore this non arbitrary and fair procedure is

making available the court process legal services to both the parties of the dispute. The Constitution provides safeguards when the fundamental rights are violated by the state in the form of right to constitutional remedy i.e. to have direct access to the Supreme Court or High Courts having the power of extra ordinary writ jurisdiction under Article 32 and Article 226 respectively.<sup>8</sup> Article 32 of the Constitution is in itself a fundamental right.<sup>9</sup>

Under the Directive Principles of State Policy the state is under an obligation to promote and secure justice through Article 39A, which states that

“The State shall secure that the operations of the legal system promote justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice is not denied to any citizen by reason of economic or other disabilities”.

#### **Access to justice for Rape survivors in India**

Rape survivors who choose to report face many obstacles to seek justice in India. Families are a source of pressure for survivors to remain silent, and those who come forward may see their

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<sup>6</sup> Article 14(3) guarantees to everyone: The right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him any such case if he does not have sufficient means to pay for it.

<sup>7</sup> Menon Madhava, N.R., “Serving the justice needs of poor”, *The Hindu*, December 3, 2013

<sup>8</sup> The Indian Supreme Court stated in *Keshav Singh Re AIR 1965 SC 745* “The existence of judicial power

in that behalf must necessarily and inevitably postulate the existence of right in citizens to move the court in that behalf.”

<sup>9</sup> Article 32 states, “(1) the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part [Part -III] is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.”

families endure harassment, and even be made to flee. Rape survivors are still forced to undergo the “two finger test” by doctors and medical professionals creating further trauma to women and girls where they are subjected invasive and degrading assault without any medical basis and psychologically harming them in addition to the trauma already suffered. Survivors may have great difficulty accessing counseling services, or have no access, and must contend with insufficient legal support, including delays in filing their complaints. Survivors bring forward cases where the accused was from a powerful background also faced pressure from law enforcement officers to drop their case, or to “compromise,” rather than move forward through the judicial system which is responsible for low conviction rates in the country

These barriers are magnified for survivors from Dalit, Adivasi and Muslim communities who face caste and religious discrimination in addition to sex discrimination when accessing the legal system. All these elements are part of a system where a survivor has to undergo numerous humiliations in their futile attempt to access justice

Apparently, rape and sexual violence against women in India has received more attention since the widely-reported gang rape and murder of a paramedical student in the capital, Delhi, in 2012. Government figures for 2017 show that, on average, there were more than 90 rapes a day reported. Relatively few of the victims of these rapes are likely to see their attackers convicted. So the question is-Is there something wrong with our Criminal Justice delivery system. Official

figures show a significant increase in the number of rape cases being reported to the police since 2012 from just under 25,000 to more than 38,000 in 2016.

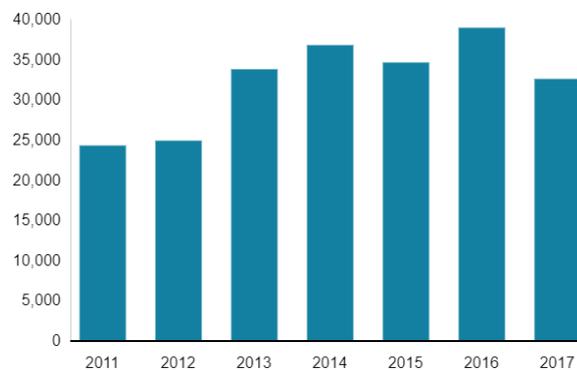


Fig no.1. Source National Crime Records Bureau

In 2017 32,559 cases of rape were reported to police. But courts in India struggled to deal with this increase because by the end of the year there were more than 127,800 cases pending. See fig no 1

However the conviction rate is not that promising either. Between 2002 and 2011, convictions were secured in about 26% of all cases that went to court. After 2012, the conviction rate started to improve before falling back to just over 25% in 2016. In 2017, the conviction rate went up to just over 32%. It’s a cumbersome task to secure convictions provided the length of time it takes for cases to reach courts and the difficulties faced by both the victims and potential witnesses.. See Fig no.2. India's conviction rate for rape cases appears to be higher than some other developing countries. In South Africa, a research in 2017 revealed that only 8% of rapists who were taken to court were convicted. And in Bangladesh, conviction rates are extremely low, according to a 2018 study by a women's rights group. In the certain parts United kingdom there has been an

increasing gap between rape case being reported to police and the numbers that actually result in conviction. This year, the proportion of reported rapes in England and Wales going to court was at its lowest level for more than a decade, which was due to the desire of the prosecuting authorities to maintain a comparatively high rate conviction of 60 %. Sweden and other Nordic countries have been criticized by Amnesty International for having relatively poor levels of conviction for rape and sexual assault, despite a high score in the global surveys for gender equality. It has been observed that in certain countries there are differences in their legal definition of the meaning of rape, in police recording procedures in prosecuting systems. Cultural attitudes may sometimes also affect how survivors and their families as well as law enforcement system react to sexual assault

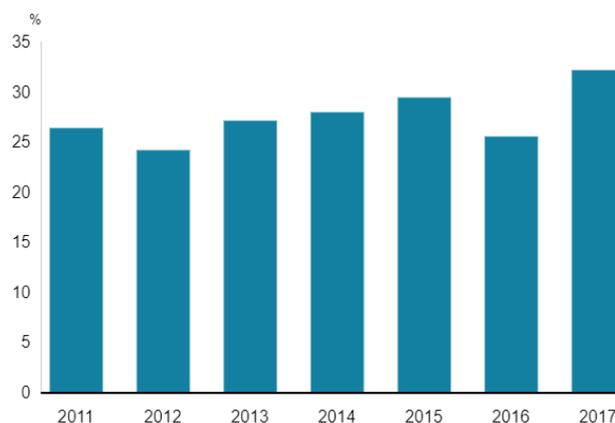


Fig no.2. Source National Crime Records Bureau

### Objectives

1. To critically analyse the reasons for lack of access to justice for rape survivors in India

2. To suggest reforms which need to be initiated to ensure access to justice for rape survivors
3. To suggest remedial measures to ameliorate the conditions of rape survivors in India

### Methodology

To critically analyse the present position of rape survivors in India secondary data has been collected from different sources like journals, articles, reports, surveys, books, internet etc. After analyzing the sources an attempt has been made to suggest steps to improve the plight of rape survivors taking into account the ground realities. Changes in the judicial set has also been suggested.

### II. CURRENT POSITION IN INDIA

India has made wholesale changes to its rape laws in recent years, including expanding the definition of rape to include that the absence of a physical struggle does not equate to consent. Another recent reform is the 2012 Protection of Children from Sexual Offences Act (POCSO) which called for the establishment of child friendly courts and practices that would not require a minor survivor to make numerous court appearances to deliver their testimony, and law enforcement officers who fail to register complaints made by sexual violence survivors will also face compulsory jail time. However, many of the recommendations made by the Justice Verma Committee on Amendments to Criminal Law, made after the infamous Delhi gang rape case in 2013, have yet to be implemented. In particular, the Committee had

recommended many systemic and procedural reforms including police reforms, reforms in management of sexual violence cases and education reforms aimed at preventing sexual violence. United Nations Sustainable Development Goal 5 calls for Gender Equality and enumerates several targets, including:

- End all forms of discrimination against all women and girls everywhere
- Eliminating “all forms of violence against all women and girls in the public and private spheres, including sexual [violence]”
- The adopting and to strengthen “sound policies and legislation that are enforceable for
- promoting to gender equality and empowering women and girls at all levels

In 2018, whole India was shocked by the barbaric abduction, gang rape and murder of an 8 year old girl in Kathua district of the north Indian state of Jammu and Kashmir. This case attracted wide media attention throughout the country where sexual assault against women and girls has become a common thing. According to India’s National Crime Records Bureau, around 100 sexual assaults are reported to police every day. However, actual number is far higher, as a government survey revealed that 99.1% of sexual violence cases go unreported, often due to pressure from family members. Even in cases that do that make it into the criminal court system; justice for victims is often hard to obtain. In the Kathua case, the young victim was a Muslim from the poor nomadic Bakarwal tribe and the eight accused were part of the local majority Hindu community. In many areas across

India, political tensions ran high between Muslims and Hindus and the public reaction to the murder investigation soon became embroiled in bitter sectarian divisions. Protests were held across the country and it was alleged by the supporters the accused persons were innocent targets in an anti Hindu plot which was instigated by investigators who were Muslims. Numerous attempts were made to disrupt the police investigation and thwart legal processes. Some even resorted to death threats and attacks against the prosecution lawyers, witnesses, and victim’s family.

The Bakarwal Community to which the deceased victim belonged came under sustained attack and family had to leave the village where the assault took place. Taking note of the situation the Supreme Court gave orders that fair trial was not possible in Jammu so the case was moved to Pathankot in the neighboring state of Punjab to ensure impartiality in the legal process. Against this backdrop, the judgment of the Special Court on 10 June 2019 came as a relief to many. Six out of the seven men charged were found guilty, with three sentenced to life in prison for gang-rape and murder, and three given five years for destroying evidence in order to protect the perpetrators. A seventh man was acquitted and an adolescent is yet to stand trial. On a positive note, the Special Court pronounced judgment within a year of starting the trial, which is a rarity if we consider the already overburdened country’s criminal justice system. is a rare achievement in India’s overburdened criminal justice system. While this is definitely laudable, the fact that justice was

finally delivered (subject to appeal) in the Kathua case must not overshadow the many obstacles that had to be surmounted in reaching this acceptable conclusion. Rather, it should be seen as an illustration of the many impediments faced by thousands of survivors of sexual violence across India, especially those from marginalized communities including Muslims, Dalits, and Adivasis.

Unfortunately, the speedy and effective justice delivered by the Special Court in Athankot does not represent the experiences of the vast majority of survivors, and a fair and swift trial in cases of sexual violence remains the exception, rather than the norm. In 2016 – the last year for which official statistics are available – there were 133,000 cases of sexual violence pending trial and conviction rates remain abysmally low.

In recent times the Unnao rape case is another glaring example of a high profile case where the victim from a marginalised section was fighting for justice against powerful people. In this case an elected representative from the ruling party stood as accused along with his driver of raping a girl from the Dalit community. Situation was so pathetic that the rape survivor having no other option in order to get her criminal complaint registered; set herself on fire before chief Minister's residence. Her legal battle was ongoing and a criminal complaint for fraud had been filed against her by the parent of one of the men charged with rape in the case. Further, due to the assault by the supporters of the accused, the father of survivor had to be taken into police custody but he died shortly, with a medical examination finding injuries consistent with him

having been beaten. But she too died after some time

No doubt we should celebrate the verdict in Kathua case, but we should not forget that every day in India women and girls experience sexual violence and assault and are often confronted with intimidation, threats, and coercion that inhibit them from reporting their violation or forces them into settling or dropping their cases. Women who are subjected to additional discrimination on the ground of class caste, religion or disability face greater obstacle to access justice

In India the alarming cases of rapes against women and girls particularly on the basis of caste and the downplaying by key state officials of the grave criminal nature of gender-based sexual violence forced U N Committee on the Elimination of Discrimination against women (CEDAW) to express concern. The situation has, however, failed to improve. In April 2018, over 600 academics from India and abroad joined together to write an open letter to the Indian government, pointing out the rapes and lynchings appeared to be a targeted campaign against minorities and expressing anguish over the lack of action by the Indian government. India's criminal justice system remains inaccessible and insensitive to most survivors of sexual violence. Rape survivors find it really hard to get their cases registered with the police, don't get enough legal support and wait for years until their case gets a hearing.

Swift, systemic change is necessary to make trials expeditious during day-to-day hearing of

cases, similar to Kathua trial. Justice needs to be done and be seen to be done so that all survivors of sexual violence can place their faith in the legal system, safe in the knowledge that they will be heard and their claims treated seriously. The onus is now on the Indian government to move beyond token action and ensure that the criminal justice system is responsive to survivors needs and is equipped to handle the high volume of sexual violence cases that are currently pending.

### **Areas of concern regarding problems of Rape survivors**

Different civil society organizations across India and come out with flaws and gaps in the policies in the gender justice related laws. Laws which are limiting in nature or does not address the situation that survivor has to undergo before receiving justice.

1. Two Finger test violates the right of rape survivor to privacy, physical and mental integrity and dignity. Medical treatment should be carried out in such a manner that constitutes cruel, inhuman and degrading treatment. The state is obliged to provide the safety measure which can ensure and protect the right of survivors. In 2013 Supreme Court ordered ban on two finger test and come out with better medical procedure to confirm sexual assault. Despite such practice are prevalent. Testimonies from our field also indicated in most of the cases, survivor had to undergo two finger test for medical examination.

2. Ministry of Family and Health has issued a guideline for providing proper medico-legal care to the survivor. The guideline suggested that uniformity in approaching, treating and documenting the case of violence especially rape.

The purpose was to set the course of more sensitive and human approach to survivors of rape and sexual violence when they arrive at hospital for treatment. Guideline clearly mentioned that treating doctor should keep proper recording and documentation of medical history and facts. This kind of practice should be clearly directed to doctors. But, survivor still had to visit many hospitals for medical treatment. The guideline compulsorily needs to add in the curriculum of MBBS and Nursing courses

3. Justice Usha Mehra committee recommended One Stop Centre across Indian states and Union Territory. The centre ensures to provide in house facility of a nurse, gynecologist, police inspector, forensic expert and councilor- all under one roof for proper examination of the case. As per the ministry guideline budgeted amount for construction of each One Stop Centre is Rs. 48,69,371 and Rs. 321 Cr. for constructing 36 One Stop Centers. But ministry only allocated Rs.93 Cr. And recently only 10 One Stop centre are operational. This scenario should be taken seriously and only institution (One Stop Center) which can provide holistic support to survivor of rape and sexual offence should be in utmost priority list of the centre and state government.

4. Under the amended Criminal law, victims cannot be denied for treatment in the hospital weather private or government. It is thus mandatory obligation, if not hospitals can be sued with likely penal consequences.

5. With an allocation Rs 1000 crore every fiscal year since it was introduced in 2013-14, the Nirbhaya Fund, went on to become to Rs 3000 crore in 2015-16 largely due to unutilisation

despite proposal being made from various ministries. Further it was observed that out of the total fund, no appropriate head was allocated to initialize the expenditure for the same

6. Police is the immediate authority where survivors can go to for protection and safety. Instead police ended up not even registering the complaint of survivor and victim of sexual violence. Justice Verma Committee recommended filing a complaint of sexual offence online, police should be trained to deal with sexual offence appropriately and most importantly police force must understand their accountability to law and no one else.

### III. CONCLUSION

In cases of minors/adolescent cannot sign or be the witness, there is a need of an adult to represent the case, whereas there are many cases where the family is not supportive, a provision of Guardian ad litem can help in addressing the case for the minor. Guardian ad litem is a person the court appoints to be a legal re-presenter in the case of minor for the best interest of the child. In cases of bail, there is a chance of the victim becoming hostile, For improvements in such cases Witness Protection Scheme gives protection to witness. But such progressive laws are hardly implemented or awareness on such laws is absent or un-operational. Lawyers and organizations working on issues of violence against women should keep a track of such laws to get a speedy justice. In 2008 few changes in the laws have been made for instance 372 CRPC gives the right to appeal against the accused if found guilty, but such existing laws are hardly implemented. Prof. G.S Bajpai from National

Law University, Delhi rightly pointed out that lawyer is reluctant to fight for survivor in such circumstances. He also opined that cases of such kind are almost negligible. Equal footing of both, the accused and survivor has to be considered as their constitutional right. Despite, the denial of constitutional right is rampant in the judiciary; hence it is necessary that the laws of this country obligate the judiciary system to ensure equal footing and participation of survivor. The survivor should be considered in every step such as during the investigation, charge making, bail granting, cross-examination, medical examination, compensation granting, and charges on the accused. Functional helpline with state-authorized linkages with police and medico legal officers in line with present laws. Also proper yearly budgetary allocations, training, technology upgradation and linking up to NGOs and media for effective implementation of helpline. Anti -Rape discourse has not considered lack of shelter homes to be sexual violence issue. In addressing the issues of violence against women, a separate institutional network to provide shelter homes for ensuring safety of the rape survivors should be put into operation. Demanding space in the mainstream media which are gender sensitive in reporting, documenting and representing the case of Gender Violence. Judgments made by the courts should give priority to the statement of the survivor/witness rather than the medical report which is considered to be the prime evidence. Practice such as comment on hymen, and two finger test perpetuate stereotypes and hold no significance in generating evidence. A

component of medical treatment and psychological support to be provided to all survivors has to be made operational instantaneously. · A holistic redressal system should be in place such as short stay for the survivors, financial assistance, assistance of legal action in their cases, counseling sessions for survivors and their family etc. · Focused studies should be done on specific thematic areas such as studies on actual cases and cases that are reported, how effective in the Alternative platforms of justice for women, for example the Bombay special cell project, 2002.

immediately implemented, then surely more tragedies like Kathua case can be prevented.

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#### **IV. SUGGESTIONS**

- To achieve positive systemic change, state officials should work in close cooperation with civil society organizations, activists, and survivors who can provide invaluable insight and expertise.
- Proper implementation of existing laws, introducing procedural reforms and clearing backlog of cases pending in criminal courts is need of the hour.
- Greater sensitivity while dealing with sexual violence cases, making the police more accountable and showing compassion towards the survivors
- Allocating sufficient funds to counter and end gender based violence is also necessary.
- Women's rights organisations should be provided with sufficient funding so that they can deliver support services to women and girls at the grassroots level.

More needs to be done but if these important improvements which are long overdue are