

# Virginity and rape sentencing

A woman who is sexually active, before or outside of marriage, is not considered to have suffered too much harm in a rape; and the accused gets off with a lighter sentence

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**T**he horrific gang rape incident in Delhi has led to demands for amending the law to provide for more stringent punishment for rape, including a call for death penalty. Over the last few days, there have been various debates about the advisability of making such changes to the law. An issue that has not been highlighted in these debates is the existing state of rape sentencing. Any attempt at law reform needs to include an examination of this issue. My analysis is based on my doctoral study at Yale Law School, in which I examined all rape cases decided by all High Courts and the Supreme Court over the last twenty five years.

Section 376 of the Indian Penal Code (IPC) prescribes the punishment for rape. For non-aggravated forms of rape, the minimum punishment is seven years imprisonment, and the maximum is life imprisonment. The minimum punishment for aggravated rape (gang rape, rape of a girl under the age of twelve, custodial rape) is ten years imprisonment, and the maximum is life imprisonment as well. In both these circumstances, courts have the discretion to sentence below the prescribed minimum term of imprisonment, if they provide "adequate and special reasons" for so doing. The crucial question is: how do courts determine the appropriate sentence to be imposed on an offender? A basic understanding of the trial process is essential here.

The Criminal Procedure Code (CrPC) divides the trial into two distinct phases — the guilt determination phase and the sentencing phase. In the guilt determination phase, the court either convicts or acquits the offender on the basis of evidence presented in this regard. If the offender is convicted, then the sentencing phase begins. In this phase of the trial, the court considers evidence and arguments on factors relevant to the determination of sentence. Ruling on the factors that a court should consider in deciding on sentence, the Supreme Court has held that the nature of the offence; the presence of aggravating and mitigating circumstances; the prior criminal record of the offender; his age, professional, social, and educational background, amongst others are relevant.

Another important consideration is the theory of punishment that should be followed — deterrence, rehabilitation, retribution, etc. Since the IPC does not provide guidance to courts on any of these issues, except for prescribing maximum — and in some cases, as in rape — minimum punishments, judges have the absolute discretion to determine the sentence for each individual offender. Unlike some other countries, such as the US and England, India does not have sentencing guidelines for judges to follow while sentencing.

These guidelines generally list factors that the court should (and should not) consider while sentencing. Their absence is one of the reasons for the rampant disparity that exists in sentencing across crimes, including rape, in India. In fact, the Supreme Court has itself repeatedly acknowledged the existence of disparity in its death penalty practice. It has observed that sentencing has become "judge-centric," instead of being based on principles. The same critique applies equally to rape sentencing. But, the causes for disparity in rape sentencing, compared to capital sen-

tencing or sentencing in other crimes, are entirely different.

## A MATTER OF VIRTUE

What makes rape sentencing different from sentencing for other crimes? Unlike other offences, the crime of rape carries its own baggage. Over the years, stereotypical and patriarchal notions have developed with regard to women's sexual behaviour. Most of these notions are based on the assumption that the chastity and virginity of a woman are her most important "assets." Popular notions consider rape as a fate worse than death since it robs women of these "virtues" and casts a stigma over victims for the rest of their lives.

A woman who has already "lost" her chastity and modesty by having sexual relations before or outside of marriage, is not considered to have suffered too much harm; and the perpetrator is therefore not required to be punished too severely. In order to ensure that such stereotypical notions relating to the sexual behaviour and sexual mores of women are not considered in rape trials, the Indian Evidence Act was amended in 2003, prohibiting the defence from impeaching a rape victim's testimony on the basis of her past sexual history.

Unfortunately, the amendment

in which such evidence finds its way into the trial. The crucial fact that the prosecution has to prove in rape cases is the lack of the woman's consent to intercourse. Unlike laws of various other countries, Indian law does not require the prosecution to prove that the offender knew that the woman had not consented, or intended to rape the woman. The woman's testimony that she had not consented to intercourse is sufficient. In fact, SC has consistently held that conviction can be based solely on the testimony of the woman. But, the court has to be satisfied that the woman's testimony is reliable. It is here that stereotypes enter rape adjudication.

## THE TWO-FINGER TEST

An important piece of evidence in rape cases is the report of the medical examination of the rape victim. Medical and forensic evidence enables the prosecution to show that penetration of the vulva by the penis (a pre-requisite for the offence of rape) had in fact taken place. Doctors are required to testify to this fact, as also the

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appears to have impacted only the guilt determination phase of the trial, and not the sentencing phase. The site of stereotyping has merely shifted from the guilt determination phase to the sentencing phase of the trial, and stereotypes have an adverse impact on rape sentencing. In cases where the woman's behaviour does not adhere to stereotypical constructs, the men who raped them end up getting lower sentences.

But, if the law prohibits past sexual history from being considered, how does it continue to impact rape sentencing? The answer is the nature of evidence required to prove rape, and the manner

presence of body fluids and injuries, if any. Note, however, that the law does not require ejaculation. The protocols followed by doctors in examining rape victims across India go much beyond determining whether penetration had occurred. They continue to make assessments of the woman's sexual history, and play a major role in advancing stereotypical notions relating to women's sexual mores, by providing a scientific veneer to the process. This process includes the examination of the woman's hymen and the distensibility of her vagina. Whether the hymen is torn, and if so, if such tears are old or new are noted. Doctors conduct the "two-finger

raped married women. Further, courts tend to impose lower sentences when a victim who was unmarried when the offence was committed, gets married during the trial. Since the rape did not impact the victim's ability to get married, the harm caused by the offence is discounted. An egregious example of this approach is the Supreme Court's decision in Baldev Singh v. State of Punjab (2011), another gang rape case that got a lot of media attention. One of the reasons that the Court gave for reducing the sentence in this case was that the victim was now married.

## DEATHLESS SHAME?

The second stereotype that affects rape sentencing is the perception that rape is a matter of shame for the victim. The Supreme Court has in fact frequently observed that a woman experiences a "deep sense of deathless shame" as a consequence of being raped.

Combined with the notion that a woman considers her chastity and virginity to be invaluable, a myth has developed that on being inflicted with this "shameful" act, a woman will necessarily physically resist her attacker, when sexually assaulted. Such physical resistance, it is believed, leads to injuries on the woman's body, which then demonstrates that sex was not consensual. Note, however, that the law does not require the woman to resist the attack. The presence of injuries might corroborate lack of consent, but the absence of injuries should not imply consent. Although courts do not appear to infer consent from absence of injuries, I found a marked decrease in sentences in cases where no injuries were present on the woman's body.

## LENIENCE WITH ACQUAINTANCE

The third interesting finding of my study was that courts consider acquaintance rape to be less traumatic than rape by a stranger. Offenders who were in a romantic relationship with the women they raped got lower sentences, compared to their counterparts who raped women they did not know. In cases of statutory rape where the under-aged girl had consented to intercourse, courts consistently imposed lower

test," ostensibly to determine whether penetration has occurred. This highly invasive procedure involves the doctor inserting one, two, or more fingers into the woman's vagina to determine the elasticity of the orifice. If the doctor is able to insert two or more fingers, it ostensibly indicates that the woman has had prior intercourse. The rationale behind this "test" is that if two fingers can pass

through the vagina, a body of the size of an erect penis could have passed through it at an earlier point in time.

Let me provide a concrete example of how the stereotypes find their way into the trial process through medical examination. Assume that in examining an unmarried rape victim, the doctor notes the presence of old tears on her hymen. The doctor also notes that she was able to insert two or more fingers into the vagina of the victim. Although the doctor does not expressly opine that the woman was sexually active, this information is conveyed to the court by way of the medical report. My study showed that in cases where the medical report indicated that the woman had been sexually active before marriage, lower sentences were imposed on the offenders who raped them. In contrast, in cases where the offender had raped a virgin, the sentence was relatively higher.

Another factor related to virginity is the perceived loss experienced by an unmarried victim, in terms of her marriageability. The Supreme Court has in a number of cases noted how rape adversely affects the chances of a woman finding a suitable groom. In this context, the Court has even held that the marital status of the woman can be a relevant factor in rape sentencing. It is not surprising then that offenders who raped unmarried (and virginal) women got higher sentences in contrast to men who

sentences on the offenders, based on the understanding that the young woman had otherwise "contributed" to the offence.

Law reform movements, as well as policy-makers have not paid much attention to issues pertaining to stereotypes surrounding rape sentencing. For justifiable reasons, their focus has been on steps to ensure higher convictions in rape cases. In addition to these efforts, there is need for reforms to rid rape sentencing of stereotypes. This would include: first, changing the nature of medical evidence collected in rape cases. Protocols for medical examination of rape victims should be modified, and corresponding changes should be made to medical education syllabi. The second reform required is the formulation of principles to be followed by judges while sentencing rape offenders. Factors that should not be considered in sentencing rape offenders (such as the victim's sexual mores) should be listed. Currently, a large number of offenders whose victims do not adhere to the stereotypical construct of a rape victim get lower sentences. Ensuring principled sentencing in tune with our constitutional values is a better guarantee for justice to rape victims, rather than legislative steps providing for capital punishment, chemical castration and the like. ■

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