

**Submissions by Rebecca Gonsalvez and Vijay Hiremath, Advocates,
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To,
The Chairperson and Members
of the Justice J.S. Verma Committee
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Sub: Proposed changes in law on sexual assault and the Juvenile Justice (Care and Protection of Children) Act, 2000.

We are advocates, practising in Mumbai, and have been working on the issues of the criminal justice system for more than 10 years. Our main area of work has been providing legal aid to indigent accused and convict prisoners, and also assisting the women who have been victims of crimes such as rape, sexual harassment, acid attacks, and domestic violence. We have appeared as watching advocates in some rape cases in Mumbai. We have also been closely associated with the Juvenile Justice System in Maharashtra, and have represented juveniles in conflict with law, as well as children in need of care and protection in numerous cases. We recognise the need to treat children differently, which is what our system and our Courts have constantly emphasized.

At the outset we must state that we are most distressed by the rape and murder of the 23 year old girl in Delhi, which has propelled a national campaign for change as far as the law and the criminal justice system in cases of sexual assault of women are concerned. All steps should be taken across the country to ensure that such crimes are not repeated.

We have put down our suggestions below:

1. Analysis of the existing law and system.

Prior to making any changes in the present law on rape/sexual assault, or introducing any new laws on the same, there is an urgent need to analyse the working of the present law, and the criminal justice system including the judicial system, and the reasons for the failure of justice. More often than not, it is not the absence of effective laws, but the failure in their implementation that results in a denial of justice. There is a need to strengthen the investigation and prosecutorial system, to have proper forensic laboratories staffed with qualified personnel who are able to deliver the results of analysis on DNA and other tests expeditiously. It

is necessary to have sensitive judges presiding over rape trials, who are sensitive to the plight of a rape victim, and ensure that she does not have to face unnecessary humiliation in court at the hands of the defence lawyers or the accused. It is imperative to analyse the judgments of the Courts in cases of rape in order to understand the reasons for the acquittal of the accused. Some Sessions Judges in Mumbai have released offenders convicted of rape on probation, some have released them on conviction on their solemnization of a marriage with the victim! Such cases shock our conscience. Judges, prosecutors and the investigative authorities must be given training to sensitize them, and equip them with cases of rape and sexual assault in the best possible manner. Even if a new law is brought into effect, if the reasons for the failure of the system are not redressed, the new law would serve no purpose, other than to appease the public for the present.

2. Focus should be on prevention of crime and protection of women.

Apart from the harsher punishments for the persons who have been found guilty of offences of rape there is need to focus on preventive and protective measures for the safety of women. It is the duty of the State to protect its citizens. The changes in the law and the procedures may take time but the immediate steps that the government at the centre and the states need to take is to introduce ways to prevent crimes against women, and to protect them. Measures as simple as having special buses for women, putting constable on buses and trains, especially those running late at night should be taken. Women form a substantial part of the workforce. There is a need for positive discrimination in the form of protective measures for women, to encourage, and not to instead discourage women from pursuing their daily activities, being a part of the workforce, and actively participating in public life.

3. No death penalty/chemical castration for rape.

No developed country in the world has death penalty as a punishment for rape. It is a cruel and inhuman punishment. So is chemical castration. More and more countries are abolishing the death penalty as a punishment for any crime. Studies have shown that the death penalty has not proved to be a deterrent over all these years for any crime. Hence introducing a barbaric punishment such as the death sentence/chemical castration for rape will be an extremely regressive step.

4. There should be a change in the sentencing policy.

A look at the judgements in rape cases shows that in very rare cases have rape convicts been given a sentence of life imprisonment. The courts are very lenient when it comes to sentencing rape convicts, and invariably find reasons to impose

a punishment less than the minimum. There should be a mandatory minimum sentence of 10 years for a rape convict, and no exception or leniency should be shown. To give examples: Offences of possession of a commercial quantity of narcotic drugs or psychotropic substances under the stringent Narcotic Drugs and Psychotropic Substances Act (NDPS) are punishable with a minimum of 10 years and a maximum of 20 years, leaving no option for the judge to impose a punishment of less than 10 years, but in the case of a heinous offence like rape the judge can impose a punishment below the minimum 'for reasons to be recorded in writing'. An offender who uses a dangerous weapon or causes grievous hurt, or attempt to cause grievous hurt to any person at the time of committing robbery will be punished with a mandatory minimum sentence of 7 years. Therefore, why allow the imposition of a punishment below the minimum for a heinous crime like rape? This option of imposing a punishment below the minimum must be done away with. Statutory rape can be separately criminalized and penalized with an appropriate punishment. The Probation of Offenders Act can be made applicable to cases of statutory rape.

Offenders convicted in cases of sexual offences should not be entitled to remission of sentence, or to premature release. Prisoners convicted of offences under the NDPS Act are denied remission and premature release. Sexual offenders can be added to this list.

Offenders convicted in cases of sexual offences should not be entitled to furlough leave. In the State of Maharashtra, prisoners convicted of offences of robbery and dacoity, and offences under the Bombay Prohibition Act are not entitled to release on furlough leave. Neither are offenders under the NDPS Act. Sexual offenders can be added to this list.

Such measures, rather than the imposition of the death sentence could serve as deterrents.

5. Sexual Assault other than rape

Outraging the modesty of a woman as defined in section 354 of the Indian Penal Code is punishable with a maximum of a mere 2 years in prison, and is bailable. Section 509 of the Indian Penal Code, which penalises insulting the modesty of a woman by word, gesture or act, is punishable with a maximum of one year of imprisonment, and is also bailable. These two sections are intended to cover all forms of sexual abuse, assault and harassment of women other than rape. Therefore, no matter how serious the offence, anything less than rape is punishable with a maximum of a mere 2 years in prison! So, if a male offender sexually assaults and abuses a woman in every way possible, but there is no penile vaginal penetration, he could be punished by sending him to prison for a mere two years! There is an urgent need to separately define and penalize aggravated forms of sexual abuse/assault of women, and make them punishable

with the appropriate punishment, depending on the gravity of the offence. It is also necessary to make the imposition of a certain minimum punishment for such offences mandatory. There should be no option for the court to impose a sentence below the minimum. Such offences must be made non-bailable.

The punishment for the offences u/s 354 and 509 of the Indian Penal Code must be increased, depending on what these sections would cover if a new section/s on aggravated sexual assault is introduced. The imposition of a certain minimum punishment for such offences should be made mandatory. There should be no option for the court to impose a sentence below the minimum. Such offences must be made non-bailable.

While the Indian Penal Code makes theft, punishable u/s 379, 380 and 381 of the Indian Penal Code non-bailable, and punishable with 3 years, 7 years and 7 years respectively, insulting or outraging the modesty of a woman, and sexually abusing/assaulting her in every way other than rape, is bailable, and punishable with a mere one and two years respectively!! Economic offences such as criminal breach of trust are non-bailable and punishable with a maximum of 3 years of imprisonment. Certain offences of forgery, such as forgery of a public record, or a valuable security are non-bailable, and punishable with imprisonment for 7 years, and for life or 10 years respectively.

The Probation of Offenders Act should be made inapplicable to sexual offences. Offenders convicted of the commission of sexual offences which by their very nature are heinous, cannot and should under no circumstances be released on probation.

6. Victim Compensation Scheme

All States must set up 'Victim Compensation Schemes' and 'Victim Compensation Funds' as required by section 357A without further delay. The Supreme Court in the case of Delhi Domestic Working Women's Forum Versus Union of India & Others (1995) 1 SCC 14 passed on 19/10/1994 directed the National Commission for Women to draft a 'Victim Compensation Scheme' for rape victims to be implemented by the States, and also issued directions for the provision of legal aid and assistance to the victims of rape. Section 357A was introduced in the Code of Criminal Procedure in the year 2009. However, till today apart from a few States such as Delhi, Manipur and Meghalaya, a vast majority of States have not set up Victim Compensation Schemes and Funds. To have 'Victim Compensation Schemes' and 'Victim Compensation Funds' would go a long way in ensuring justice to the rape victims.

7. Legal aid to the victims of sexual assault

The Supreme Court in the case of Delhi Domestic Working Women's Forum Versus Union of India & Others (1995) 1 SCC 14 passed on 19/10/1994 emphasized the need for the victims of rape to be provided with legal aid and assistance from the registration of the FIR till the conclusion of the case, and laid down guidelines for the same. However, sadly, almost 20 years down the line, these guidelines have not been implemented. The victims of rape and sexual assault must be provided with legal aid and assistance. This will go a long way in ensuring justice to them.

8. Medical examination of the victim

The medical examination of the victim in cases of rape and sexual assault/abuse must be conducted in a sensitive manner. There is a great need to do away with the humiliating 'two-finger test' in rape cases. Medical professionals who conduct medical examinations in cases of rape and sexual assault/abuse must be given special training in order to sensitize them, and enable them to conduct the medical examination in as painless and sensitive a manner as possible.

9. Registration of FIR

The police must register the FIR immediately, and without any delay. As per the Cr.P.C., if the FIR pertains to the jurisdiction of another police station, the police must register the FIR immediately, and transfer the FIR to the police station having jurisdiction immediately.

10. Witness Protection System

India does not have a 'Witness Protection System' at present. In many cases, especially where the accused are rich, powerful and influential, witnesses turn hostile and do not support the prosecution, resulting in the acquittal of the accused in heinous crimes. Victims are often threatened, or paid off to turn hostile in court. The Supreme Court, as well as the Law Commission of India has emphasized time and again the need for a proper 'Witness Protection System'. While certain laws may have a few provisions for the protection of witnesses, there is no holistic law on witness protection in our country. However, this must be balanced with the right of the accused to be aware of the witnesses who are likely to depose against her/him, which is an essential part of the right to a fair trial.

11. Registration of Sexual Offenders and monitoring them after their release from prison

The registration of sexual offenders must be made mandatory. Their details, such as DNA and fingerprints must be kept on record, and should be made available to investigative agencies across the country. Further, a monitoring system to keep track of them post their release from prison must be set up. This will go a long way in preventing sexual offences by repeat offenders, and will also assist investigators.

12. Fast-Track Courts

There is a clamour by the public for setting up fast-track courts. However, having fast-track courts does not necessarily mean that justice will be done. To assign a particular category of cases depending of the nature of the offence to a fast-track court, while not assigning other cases where the accused have been languishing in custody for longer periods of time would be unfair, and violative of the right of the accused to a speedy trial. While the victim may also have a right to a speedy trial, this has to be balanced with the right of the accused to speedy trials, especially where the accused are in custody. In the absence of mechanism to hear the appeals expeditiously the cases even if decided expeditiously in trial courts remain

The general perception is that the accused is 'guilty until proven innocent', whereas criminal jurisprudence dictates that the accused is 'innocent until proven guilty'. The fundamental right of the accused to a fair trial is one of the basic elements of a criminal justice system, which cannot be ignored, nor can it be trampled upon.

Our suggestions on the proposed amendment to the juvenile laws is sent separately.

We urge the Hon'ble Committee to consider our suggestions/recommendations. We would be happy to expand on any of the above recommendations/suggestions, provide any additional information, make any additional recommendations/suggestions, and participate in any discussion/debate on the same.

Sincerely
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