

Submissions to Justice Verma Committee by WOMEN'S RESEARCH & ACTION GROUP (WRAG), Mumbai

SUBMISSION TO JUSTICE VERMA COMMISSION ON SEXUAL ASSAULT

Women's Research and Action Group (WRAG) is a non-profit organization based in Mumbai, working for the past 20 years on empowerment of women through community action and the law. Through its work with women from underprivileged, marginalized and vulnerable communities of Mumbai and other parts of the country, it has engaged with issues of sexual and gender-based violence against women and girls, the absence of justice and accountability in various contexts including mass crimes, and has engaged in advocacy initiatives towards addressing the existing impunity for crimes against women.

At the outset, WRAG wishes to foreground the inter-linkages between 'everyday' violence and harassment faced by all women and girls, and contexts of increased vulnerability, where such forms of violence are exacerbated. The increased vulnerability is caused due to

- a) identity of the victims / survivors – such as physically and mentally challenged women and girls, dalits, adivasis, sex workers, members of denotified groups, religious and linguistic minorities, as well as members of the LGBTI community; and
- b) special contexts – such as custodial situations, militarisation, communal violence, caste-based violence and other contexts of mass crimes, when the perpetrators enjoy de facto and de jure impunity.

WRAG is deeply concerned that the current public discourse has focussed on a 'strong law' and stringent punishment, including support for a capital punishment and chemical castration. We believe that such suggestions are made for political expediency and to assuage public outrage at this point in time, without any genuine attempt to substantially understand and address the complex issues contributing to violence against women and girls, particularly sexual violence. We are convinced that in addressing / arresting sexual assault against women and girls, the following aspects deserve to be examined:

- a) Amendments in law – substantive, evidentiary and procedural;
- b) Ways in which the law should be effectively implemented – including functioning of the police and judiciary, and accountability for dereliction of duties by public servants, and introducing transparent processes;
- c) Protection of rights of victims and survivors before, during and after trial – including issues of reparative justice;

- d) Working at the preventive level and addressing the root cause for violence against women and girls – the patriarchal and misogynist attitudes that exist in all sections of the Indian society;
- e) Enhancing aspects of good governance, ensuring efficient and transparent functioning of democratic institutions and eradicating corruption among government departments through a series of incentives, disincentives and administrative actions; (e.g. corruption within the police force, hospitals, transport authorities and various government departments duty-bound);
- f) Provision of services and infrastructural facilities that would enhance the safety for women and girls (safe, efficient and cheap modes of transport, well-lit roads etc.); and
- g) Other social, economic and cultural processes by which women and girls can be empowered and the perpetrators deterred / discouraged from committing violent acts.

Seen in this light, we believe that amendments in law form a part of the multi-pronged strategies that are required to effectively address the issue of sexual assault, and would not, by themselves, guarantee safety. Our suggestions on legal provisions are as follows:

I. DEFINITION – WHAT AMOUNTS TO SEXUAL ASSAULT?

a. Sexual Crimes as a Continuum: The IPC provision focusses only on peno-vaginal penetration. The Criminal Law Amendment Bill 2012 continues to retain a narrow definition of sexual assault, that focuses on penetration, albeit by body parts excluding objects other than the penis. The gap between outrage of modesty (S. 354 IPC) and penetrative sexual assault remains large. We believe that sexual crimes form a continuum that include a wide range of sexualized criminal acts. We believe that the Bill should recognise the structural and graded nature of sexual violence, based on concepts of harm, injury, humiliation and degradation, and use well-established categories of sexual assault, aggravated sexual assault, and sexual offences / harassment including attempt to sexually assault and rape. Consequently, we suggest a repeal of S. 354 and S. 509 of the IPC.

b. Sexual Assault: Sexual assault crimes include but are not limited to penetrative assaults. They include acts that use criminal force, including stripping, parading and mutilation which are intended to sexually assault, degrade or humiliate those who are so targeted.

c. Aggravated Sexual Assault: Recognising sexual assault in certain specific situations of conflict based on community, ethnicity, caste, religion and language, as well as physical / mental disability of the victim merit special recognition. Such contexts ought to be treated as aggravated circumstances due to the use of criminal force, the custodial position of the perpetrator, the nature of coercive circumstances, and the presence of multiple perpetrators;

d. Sexual Offences / Harassment: Acts within this definition could include public stripping and parading of women, groping and pinching of women, and also non-contact acts such as flashing, gesture, stalking, blackmailing via electronic media like MMS, etc.

e. Recognition of Marital Rape: We recommend a deletion of the exception provided for marital rape, bearing in mind that women are full citizens of this country, who enjoy the constitutional guarantees of, inter alia, right to life, liberty, equality and non-discrimination. Similarly S. 376A of the IPC, which prescribes a lesser punishment for a man who commits sexual assault on his wife during separation, is regressive and requires to be deleted with immediate effect. Any apprehensions about introducing laws into the “privacy of the home” hold no waters, in the light of introduction of laws such as Prevention of Domestic Violence Act – which recognises sexual assault as a form of domestic violence and a civil wrong.

f. Gender Neutrality: Further, while the effort to ensure gender neutrality with respect to those who are the complainants/ victims of sexual assault is welcome, as it would extend protection to men, transgender and trans-sexual victims. However we believe that the perpetrator has to remain gender-specific under all circumstances (custodial and non-custodial) and limited to men as perpetrators, as there is no empirical evidence in India to support a finding to the contrary. In addition, introducing gender neutrality of perpetrators brings in a false notion of equality in a society that is otherwise highly inequal and discriminatory against women, misogynic and infact the root cause of violence against women.

g. Age of Consent: In the light of increasing evidence from courts, legal precedents, records of crimes, as well as studies on the exercise of agency by young people in asserting their choice with respect to sexuality and relationships, we suggest that the age of consent to sexual intercourse should be retained as 16 and not increased to 18. We believe that increasing the age of consent to 18 would enable parents / guardians to misuse the provision in the context of choice marriages and inter-caste / inter-religious relationships that they do not approve of, by making false allegations of rape, in order to exercise control over the adolescent girl using the state machinery and the power of law. Such a provision would also provide a tool with which the boy and his family would be harassed and humiliated.

II. PRE-TRIAL STAGE

The protection of victims of sexual assault requires developing a set of measures aimed to ensure the safety, physical and psychological well-being, dignity, and privacy of victims who are appearing as witnesses in criminal proceedings or otherwise seeking legal redress.

Simultaneously, through a combination of penal sanctions and administrative action, public servants ought to be made accountable for dereliction of duty, which prevent the law from being implemented in an unbiased and effective manner, thereby scuttling the process of justice.

a. Address social obstacles: address social obstacles to lodge a complaint of sexual assault – bias / insensitivity of police, stigma faced by woman, lack of familiarity with legal processes, lack of confidence in the police, safety of women complainants at police stations

b. Address issue of autonomous functioning of the police force: address bias of police and the need for autonomous, transparent functioning that is free of political pressures

c. Standard Operating Procedures: Provide for Standard Operating Procedures with detailed guidelines for each aspect of investigation (Refer to the SOPs in place for the Delhi Police since 2005); build in provisions for accountability for violation of the SOPs; SOPs should be reviewed to ensure that they reflect a gender sensitive and meticulous approach to investigation and officially adopted by all police departments in states and UTs, and should be made publicly accessible.

d. Improper / Biased / Shoddy Investigation: The responsibility of a proper investigation falls on the investigating agency. Any delay, shoddiness, partisanship and inefficiency in collection of evidence, and lack or delay in medical examination etc should be considered as a grave dereliction of duty, liable to administrative and / or other action.

e. Proforma for Medical Examination of Sexual Assault Victim: Ensure that the proforma is not biased against the victim; prohibit the two finger test which is widely used during medical examination of the rape victims to determine whether they are ‘habituated to sexual intercourse’; also exclude other observations that comment on the past sexual history of the victim – such as old tears to the hymen.

f. Professional Training for Collecting Medico-legal Evidence: Recording of medico-legal evidence is imperative, that may be used to obtain a conviction in rape cases) and crime kit (additional tool used for the collection of medico-legal evidence, containing slides, swabs, test tubes and other equipment to collect samples of blood, hair, semen fingernail scrapings). Investigators should be provided professional training in this regard.

g. Sensitive and Humane Treatment to Victim-survivor: Gender-sensitivity, professional and humane treatment to the victim-survivor with full respect to the dignity, privacy and confidentiality should be provided for; complaints to the contrary should be taken up by higher authorities. Continuous supervision by senior officials of the manner in which victims-survivors are treated is important.

h. Support Services to Victim-survivor: When a person complains of sexual assault, every police station should be duty-bound to provide an immediate access of the victim to lawyer, medical attention, psycho-social / trauma counselling and other support services as may be required. Psychological support is crucial to the healing of the survivor. Medical professionals should be allowed to provide medical / psychological assistance to the victim-survivor without undue interference by the police.

i. Exclusion of Sanction for Prosecution of Public Servants: We suggest an exclusion of the application of S. 45 and S. 197 Cr PC to the provisions of sexual assault, in order that the existing widespread impunity for sexual assault where it is committed by public servants, is ended. We believe that no sexual assault can ever be construed as being perpetrated “in discharge of official duty” and therefore the statutory requirement of prior sanction from the government for prosecution of public servants ought not to be extended to the crime of sexual assault;

j. Witness Protection: Protection of victims and witnesses from the pre-trial to post-conviction stages in accordance with the jurisprudential developments and Law Commission's 198th report released in August 2006; strictly enforce legal action on those who attempt to intimidate / threaten / coerce a witness, including pressurizing the victim-survivor and family members to turn hostile during trial, thereby obstructing the course of justice.

k. Compensation: Compensation to be given to the victims, computed on the basis of injury received. The first instalment to be paid within 15 days of filing of FIR. This should be independent of the outcome of the trial or the victim retracting her statement at a later point due to whatever reason. Proactive enforcement of Section 357A of the CrPC, which talks about awarding compensation to the victims of crime. The the framework of compensation under the SC ST protection of atrocities Act 1989 may be adapted suitably for compensations to victims.

l. Need for a Humane Police Force: Recruitment of women into the police force, by itself, will not ensure that victims-survivors of sexual assault are treated in a dignified, humane and respectful manner. Training in this regard is required for both male and female police officials. Continuous supervision and monitoring is imperative to ensure that they follow this.

m. Collection and Compilation of Data: Ensure efficient methods of collecting and compiling data related to complaints of sexual assault.

III. TRIAL

i. Swift and certain prosecution

ii. Time bound trials: Trials in rape cases must be concluded within a period of 90 days; lengthy trials that erode the victim's resilience, patience and memory, should be avoided.

iii. Victims' Lawyers: In trials of sexual offences, the victim-survivor should ordinarily be permitted to engage a counsel of her choice to assist the prosecution. In addition free legal, medical, psychological and rehabilitative services should be made available to enable working class women to pursue legal justice.

iv. Interpreters / translators: Provision for interpreters/ translators in order to record the testimony of disabled victims or witnesses. Cases involving disabled women end in acquittal as their testimony is either not recorded at all or is recorded without the help of independent interpreters. Often the help of family members is taken in interpreting the testimony, which affects the case at the High Court stage as family members are interested parties and relying on their interpretation of the testimony goes against the rule of impartiality of criminal trials.

v. Accountability of Prosecutors: an analysis of reported cases show that a large number of cases are end in acquittal because key witnesses such as doctors are not examined in court. This needs to be addressed. Prosecutors should be made accountable through administrative and / or other action for dereliction of their duty.

vi. In camera trials: Experience has shown that in-camera trials are not helpful as it is more traumatic for the victim to be surrounded by aggressive defence lawyers and the accused in a closed court room. Additionally there is no scope for monitoring the trial, which becomes important given the attitudinal biases that actors in the legal system have towards women who complain of sexual assault. On the other hand, in camera trials have also been helpful in preventing voyeurism in an open court, which obstructs a safe and secure atmosphere for the victim-survivor to depose in. Hence, it is suggested that in camera trial could be left to the option of the victim-survivor, and where opted for, 3-4 persons of her choice should be allowed to remain in the court room to provide her psychological support.

vii. Witness protection: better provisions should be implemented for shielding the victim from the defence, including the accused – such as through the use of a physical shield, closed circuit cameras, video conference, voice and face distortion. These are discussed in further detail in the Law Commission of India's 198th report. Distance between the witness box and the seating of the accused should be substantial, and direct confrontation between the victim and the accused should be avoided at all cost.

viii. Cross Examination: Guidelines must be laid down for the cross examination of a victim of sexual violence, particularly highlighting the changes in the CrPC sections which now do not allow character assassination or looking at past history of the victim.

ix. Protection of Human Rights Defenders: Take measures to protect human rights defenders and other individuals who provide protection to victims.

IV. PUNISHMENT

We believe that much of the recent public discourse around introducing capital punishment for sexual assault in the rarest of rare cases as well as physical / chemical castration, are reinforcing aspects of retributive justice aimed at an eye for an eye, rather than restorative justice which are more suitable for a just and humane society that we believe in. We are principally against retributive forms of justice, and feel that the Indian legal system needs to move towards restorative forms of justice, where the perpetrator is not considered less than human, but as a person with a potential to repent, reform, be rehabilitated and reintegrated in society. Such a potential maybe assessed during the course of the sentence and parole. The assessment of perpetrators of sexual assault or recurrent domestic violence need to be carefully done observing his attitude towards all women and the victim in particular.

i. No to Death Penalty: For the reasons stated below, we suggest that death penalty be excluded as a form of punishment for sexual assault.

- There is no scientific basis for claiming its deterrent effect.

- Studies show that as punishments become stricter, the rate of conviction falls as then judges are reluctant to award harsh sentences.
- Death penalty embodies the idea of retribution which is as violent as the offence for which it is being suggested.
- We also believe that the state does not have the right to take away anyone's life.
- There are caste, religious, class biases that are bound to come in, as those who are more privileged and enjoy political clout in society will engage highly professional legal services to escape from death penalty.
- Given the fact that an overwhelming number of women are sexually assaulted by people known to them, and often include near or distant family, friends, husbands, workplace superiors and partners, we believe that the punishment of death penalty for rape will further deter victims-survivors from reporting the crime.
- There have been, and are bound to be, errors of judgment – which cannot be undone.
- We believe that death penalty becomes a tool in the hands of the State to further exert its power over its citizens, which we do not support.

ii. No to Physical / Chemical Castration: We are against physical / chemical castration as a form of punishment for sexual assault, irrespective of whether it is voluntary or involuntary, for the following reasons:

- Sexual assault is not about the inability to control sexual urge or desire but about exercising power over the victim, stemming from patriarchal values. Suggesting castration as a punishment for sexual assault is therefore, based on an erroneous presumption of the philosophy of rape.
- Even if it was argued that chemical castration would impair the production of testosterone which is linked to aggression, aggression is an important component of not only sexual assault but also other brutal forms of assault and murder that are non-sexual in nature. There is no logic in privileging sexual assault for this form of punishment, over other crimes that involve comparable amount of aggression.
- Castration does not guarantee non-penile forms of brutal sexual assault, such as insertion of objects into the orifices of the victim's body, forced nudity and mutilation of sexual organs.
- Castration – physical or chemical, voluntary or involuntary – violates the fundamental right to life and bodily integrity of the person concerned, as guaranteed by the Indian Constitution.
- There is no empirical data indicating its deterrent effect.

- At a practical level, since it involves administering injections to convicted persons every three months, how will the police trace them once released? If they are not released and are kept in prison, what is the rationale behind castration anyway?

iii. No to Life Sentence Without Parole: Though this is an option being thought by many to contribute to the safety, awarding a person convicted of sexual assault with a life sentence for the whole of his life without parole, deprives the person of a window of opportunity to repent the crime, to reform and rehabilitate. However there have to be strict forms of assessment to ensure that the accused has the potential to reform before being released on parole.

iv. In cases of aggravated sexual assault, punishment should be for life imprisonment with no remission. The sentences for custodial rape and sexual assault must be enhanced compared to the sentences for civilian rape and sexual assault, to act as a deterrent for security officers misusing the power they have derived from being officers of the state.

v. We also believe the law should punish sexual assault with murder more strongly than that without murder, so that the law does not provide an incentive for the perpetrator to kill the victim-survivor of rape.

vi. Reparative justice: effective implementation of existing schemes for compensation / rehabilitation for sexual assault with budgetary support. These include but are not limited to the Victims Compensation Scheme (brought about through a 2008 amendment to S. 357A of the Cr PC) as well as the National Commission for Women's scheme for assistance and support services to victims of rape. Statutory recognition of comprehensive psycho-social support, care and treatment to victim-survivors.

Contact Persons: Saumya Uma & Vahida Nainar (Trustees)

Vibhuti Patel (Trustee), Nasreen Contractor (Co-Director) and Varsha Rajan Berry (Co-director)

Women's Research & Action Group, 101, Zaithunvilla, Behind Airview Building, near Vakola Market, Santacruz (East), Mumbai 400055. Ph: 022-26674830; wrag2009@gmail.com / codirectorswrag@gmail.com