

The crime of rape law general essay

Law



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Introduction

" A murderer destroys the physical body of his victim , a rapist degrades the very soul of the helpless female". Arijit PasayatOf all the crimes that civilized society has punished over the years, perhaps the most heinous of all is the crime of Rape. What is even worse is that in our country the social conditions are still such that the often the helpless victim of this most perverse crime is blamed more than the perpetrator of the crime himself. It is said that the women are more responsible for getting raped than the men are accountable for raping them. Charges of dressing irresponsibly and luring men are leveled against the victims. Thus the suffering of the rape victim does not end with the completion of the detestable act itself, but continues long into the future, haunting her, like an albatross around her neck, weighing her down and slowly sapping away her will to live. Rape may be loosely defined as sexual intercourse with a woman without her consent. There are of course many more considerations which must be taken into account to properly understand the crime of rape, and hence the first chapter of the paper deals exclusively with the crime of rape as defined in Section 375 of the Indian Penal Code, 1860 (IPC). It is not just the act of rape which makes it in itself the most heinous crime, but when we look at it in the Indian context, it becomes if possible even worse. This is so because as stated earlier, in India the stigma of the rape victim does not end anytime soon. The institutional framework to support rape victims still seems to be as ineffective as ever, despite the efforts of the courts and the organizations working on this problem in India. Hence, once a rape victim escapes the clutches of the offender, she is immediately gobbled up by an insensitive criminal justice

system, which refuses to give any quarter to someone who already has been tortured beyond imagination by the nature of the act which has just been committed on her, violating not just her body, but her very life and soul, scarring it for the rest of her life. Even if the problem might not be so bad in the upcoming generations where parents of the girl may be well versed with the basics of handling the trauma and hence may act as effective support systems, one must still remember that the majority of India still lives in the villages, where the victim of rape is supposed to be equally at fault and devoid of all honor. Even if this were not to be true, the fact remains that rape as a crime is a blatant violation of a woman's body, mind and soul. Rape and the frequency of its occurrence seem somehow to symbolize a misplaced notion of male superiority wherein the woman has no place except as a sex object, all other facets of her existence being denied to her.

Legal framework governing rape cases:

Rape is a stigma which exists in the society from a long time. The dictionary meaning of word rape is " the ravishing or violation of a woman." The rape victim i. e. a woman as woman cannot commit rape due to biological reasons. She is traumatized after the event; it is very difficult for a woman to come out of this trauma. Rape in India is a cognizable offence. There are many provisions in various Acts. The word rape is legally defined u/s 375[1] of Indian Penal Code, 1860. It defines the rape and also prescribes its punishment. Whenever a man penetrates or does sexual intercourse with a woman without her consent or will it amounts to rape. Penetration here means that only a slightest of the touch of penis to vagina amounts to rape, unruptured hymen of woman does not prove that rape was not committed.

There are exceptions to it also i. e. when a man does sexual intercourse with his wife who is above 15 years of age. The rape law under Indian Penal Code had gone through a lot of amendments. In 1983, amendment was made and S. 376(2) i. e. Custodial rape, S. 376(A) i. e. marital rape & S. 376(B to D) i. e. Sexual Intercourse not amounting to rape were added. U/s 228A of Indian Penal Code, No person can disclose the name of the rape victim and if anybody discloses the name, he shall be punished with either description for a term which may extend to two years and shall also be liable for fine. U/s 114-a of Indian Evidence Act, presumption can be made as to the absence of consent in certain prosecutions for rape. U/s 53(1) of Code of Criminal Procedure, When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose. U/s 164A of Code of Criminal Procedure, provisions for medical examination of rape victim are given. U/s 327(2) of Code of Criminal Procedure, there should be in camera trial for all rape victims. Rape is defined under Section 375 of the IPC. Section 375 reads as:" 375. Rape. – A man is said to commit " rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :-First –

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Against her will. Second – Without her consent. Thirdly – With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or hurt. Fourthly – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes to be lawfully married. Fifthly – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly – With or without her consent, when she is under sixteen years of age. Explanation –

Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Explanation – Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. The word rape is derived from the Latin word ‘rapio’ which means ‘to seize’. In the layman’s language it means intercourse with a woman without her consent by force, fear or fraud[2]. The chief features of the section are undoubtedly consent and penetration. This is so because as will be seen later on, most of the cases turn on these factors only. If one can establish consent, then unless and until the girl is a minor, there can be no rape. At the same time, if one can prove that there was no penetration, then there can not be a case of rape. However it is clearly not as simple as that. Both these concepts are so complicated in themselves that sometimes it becomes near impossible to find answers to the countless questions that these issues throw up again and again even in the large mass of previous litigation on the subjects. What is consent? How is it defined? Is submission taken as consent? Similarly, what

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is penetration? Is the depth of penetration material? And other such similar questions have been the centre of many a debate. While some of these questions have been answered clearly by the courts, others have not been. So, for example, while it has been held conclusively that the depth of the penetration is not material in order to establish rape, and that even the slightest penetration is sufficient to make out a case of rape, the question of where consent ends and force begins is still one which is eagerly debated in each and every case.

Emerging issues of rape:-

Custodial rape:-Consequently, the Law was drastically amended and a new law entitled Criminal Law Amendment Act, 1998 came into existence in which the very concept of custodial rape' as being more heinous than ordinary rapes was accepted. This Act brought about some important changes in the existing provisions on rape in the Indian Penal Code. It has amended Section 376 of the IPC and has enhanced the punishment of rape by providing that it shall not be less than seven years. It has also provided enhanced punishment of 10 years of imprisonment for police officers or staff of jails, remand homes or other places of custody established by Law[3]. The Act has further inserted a new section in the Indian Evidence Act Section 114A which lays down that where sexual intercourse by the accused has been proved and the victim states before the court that she did not consent, the court will presume that there was absence of consent and the onus will be on the accused to prove that the women had consented to the act. The Act has amended the Code of Criminal Procedure and also provides for trial in camera. It has also inserted a new section in the IPC – Sec. 228 (a) – which

makes disclosure of the identity of the victim in rape cases an offence punishable with imprisonment for two years. Custodial rape is an aggravated form of rape. It is an assault by those who are supposed to be guardians of the women concerned that are specially entrusted for their welfare and safekeeping. In case of custodial rape, the physical power that men have over women gets intensified with the legally sanctioned authority and power. Single women, widows with young children and women belonging to the lower strata of society who have to eke out a living against all odds, become easy prey to custodial rape because they are already deprived of the supportive mechanisms. Fortunately, reporting of custodial rape is not very frequent in this country. Three rape cases in police custody were reported in 2002 and one such case was registered in 2003 – which took place in Tamil Nadu. But even if one such incident takes place that denigrates the image of the entire criminal justice system. The Judiciary has taken a very a serious view regarding the commission of custodial rape. Whatever amendments, brought in rape laws to make the punishment more stringent, is mainly because of those judgments. In the State of Maharashtra vs. Chandra Prakash Keval Chand Jain case, the court remarked decency and morality in public life can be protected and promoted' if courts deal strictly with those who violate the societal norms. When crimes are committed by a person in authority, i. e. a police officer, superintendents of jails, or managers of remands homes or doctors the courts approach should not be the same as in the case of a private citizen. When a police officer commits a rape on a girl, there is no room for sympathy or pity. The punishment in such cases should be exemplary. Gang rape- When one or more persons acting in furtherance of their common intention rape a woman it is treated as gang rape. It is the <https://assignbuster.com/the-crime-of-rape-law-general-essay/>

crudest and the most extreme form of male chauvinism and is considered an aggravated form of rape under the Indian Penal Code. For a man, it may be merely a calculated and cold-blooded instrument of oppression or revenge, whether on an individual woman, a caste or a class but for the woman it is a terrible experience. Gang rape, especially by criminals in uniform has become common. It is consistently used as an instrument of intimidation in India. It is also employed as a weapon of vengeance, a means of settling scores with other men and their families. It is a very serious crime. The minimum punishment of this offence is 10 years, but it can be extended to life imprisonment. In India, there is no dearth of cases of this sort. On the night of February 1988, a group of policemen helped by home guards and chowkidars entered the village Pararia in Bihar, and created terror by committing this type of offence, which even today villagers remember as a bad dream. It was to avenge the assault on two of their colleagues, which had taken place a week before. Fourteen policemen went on a rampage of looting destructing and committing mass rape. These policemen were acquitted in court on the strength of their defence counsel's argument that those women could not be equated with such ladies as hail from decent and respectable society. These women were engaged in menial work so they were of questionable character. After the judgment, there was total silence. No one deemed fit to speak on behalf of these poor women who earned their living by the sweat of their brows. Another case of mass rape of 25 tribal women of Ujaimaidan Tripura in June 1991 follows exactly the Pararia pattern[4]. The brutalization perpetrated by the counter insurgency outfit, the 27 Assam Rifles, who raped women from the age of 12 to 45 years. These are the two instances of many cases which take place from time to

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time in the country. Such instances appear in the newspaper and the public mind is stirred for the time being but gets lost in oblivion with the passage of time.

Marital Rape:

The term 'marital rape' refers to unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent. The words 'unwanted intercourse' refers to all sorts of penetration (whether anal, vaginal or oral) perpetrated against her will or without her consent. There are principally three kinds of marital rapes:•

Force-only Rapes- The husband uses only enough force to coerce the wife to

intercourse. • Battering Rapes- Women are raped and simultaneously

battered by their husbands- beaten, slapped, pushed, shoved etc. In

battering rapes, women experience both physical and sexual violence

Sadistic/ Obsessive Rape- These involve torture and/or other perverse sexual

acts. Pornography is frequently involved in sadistic forms of rape. Thomas

Babington Macaulay, the architect of the Indian Penal Code, adopted the

same line of thinking while drafting the provisions of rape. Under the heading

" Offences against human body", clauses 359 and 360 dealt with the offence

of rape. The former read as under:" A man is said to commit rape who,

except in the circumstances hereinafter excepted, has sexual intercourse

with a woman under circumstances falling under any of the five following

descriptions: First: Against her will. Secondly: Without her consent while she

is insensible. Thirdly: With her consent when her consent has been obtained

by putting her in fear of death or of hurt. Fourthly: With her consent, when

the man knows her consent is given because she believes that he is a

different man to whom she is, or believes herself, to be married. Fifthly: With or without her consent when she is under nine years of age.

Exception: Sexual intercourse by a man with his wife is in no case rape."

Clause 360 stipulated the punishment for rape to be not more than fourteen years and not less than two years, with or without an additional fine. Thus, in Macaulay's draft, there was clear preference of the rights of the husband over his wife against the wife's right to herself[5]. The wife was not entitled to accuse her husband of rape, whatever the circumstances. But this provision, based on common law was not suitable to Indian conditions, especially at a time when child marriages were rampant. The low age of marriage should have necessitated the Law Commissioners to afford protection to child brides from sexual assaults. But Macaulay was much engrossed with the English Criminal Law system and Victorian notions of morality emphasizing the low status of women in society and thereby, failed to realize the injury which such provisions could do to the female populace. The final version of rape in Section 375 of the Indian Penal Code, 1860[6], differed little from Clause 359. The only amendments effected were in clause fifthly, wherein the age was fixed at ten years, and the exception which read as:

" Sexual intercourse by a man with his own wife, the wife not being under ten years of age is not rape".

The subsequent years witnessed further changes with regard to the marital rape exemption clause[7]and it now reads as:" Sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape."

Section 376(1) thereafter spells out that, " Whoever, commits rape... unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years or with fine or both." The Penal Code therefore spells out the offence of marital rape in a very restricted sense[8]. It specifies a statutory age limit of 12 years for married women, beyond which the offence does not extend. In other words, to constitute the offence of rape within the marital bonds, the wife must be less than 12 years. If she is between 12 and 15, an offence is committed which is less serious in nature[9], attracting mild punishment. However, once the age crosses fifteen, the rape legislation affords absolute immunity to the husband to impose himself on his wife and exercise complete sexual control over her body, in direct contravention to Human Rights regulations.

Efforts of Law Commission

The Law Commission of India in its 42nd report[10]put forward the necessity of excluding marital rape from the ambit of Sec. 375. In their words, " Naturally the prosecutions for this offence are very rare. We think it would be desirable to take this offence altogether out of the ambit of Sec. 375 and not to call it rape even in a technical sense. The punishment for the offence may also be provided in a separate section." The subsequent Law Commission[11]however disagreed with the restructuring suggested by the former. They felt that such arrangement would " produce uncertainty and distortion" and hence Sec. 375 should " retain its present logical and coherent structure." With regard to age, however, they were of the opinion that it should be increased to 18 years. In their words, " the minimum age of

marriage now laid down by law (after 1978) is eighteen years in the case of females and the relevant clause of Sec. 375 should reflect this changed attitude. Since marriage with a girl below eighteen years is prohibited (though this is not void as a matter of personal law) sexual intercourse with a girl below 18 years should also be prohibited." The recommended section thus read as: " Exception: Sexual intercourse by a man with his own wife, the wife not being under 18 years of age is not rape." Even the latest report of the Law Commission[12] has preferred to adhere to its earlier opinion of non-recognition of " rape within the bonds of marriage" as such a provision " may amount to excessive interference with the marital relationship." The only suggestion made is (again) with regard to age that may be enhanced from 15 to 16 years.

Judiciary on Rape Cases:

This chapter will basically consist of a case by case discussion of several important cases on the topic arranged in a chronological order, highlighting the chief features of each case. This chapter will lay the ground for the next chapter which will contain the analysis of all these cases when taken together in an attempt to identify patterns, similarities and changes which have come about over the years. The first case that will be discussed is *Ghanshyam Misra v. The State*[13]. The case was decided in the year 1956. The facts of the case are that the accused was a school teacher, who raped a ten year old student of his school in one of the school classroom. The case came before the Supreme Court. The girl was medically examined and it was found that her hymen was torn. The man also had certain signs of struggle, namely, injuries on his left thumb and his penis. The court held that the

accused was in fact guilty of the rape of the ten year old girl. The tear in the hymen and the injuries on the accused were taken as enough corroboration for the prosecution story and the evidence given by the girl. It is important to note that the court opined in this case that a person could never be convicted on the basis of an uncorroborated testimony of the victim and that the court must look for sufficient corroboration of the story of the victim before deciding. The Supreme Court held in the ill-reputed Mathura Case[14] that she was not a moral woman. Since, she had a boyfriend so she was exposed to "sexual intercourse" the Court thus implied that a woman who is habituated to sexual intercourse probably enjoys it, even when done with unwillingly with no consent. The Mathura Case proved that it is difficult for a woman to make someone believe that she had consented to the act "beyond all reasonable doubt"; the case raised the pertinent question to redefine consent and to amend the rape laws. Another demand was that the victim's past sexual history will not be treated as evidence against her. A prostitute also has the right to not get raped[15]. The judges were gender biased; they drew prejudice against the women, and were inclined to save their male counterparts. This decision sparked a spontaneous protest and accordingly a nation-wide struggle was launched against by filing a petition by the Bharatiya Mahila Federation and the Women's Lawyer's Council. The petition came up before a bench headed by the Chief Justice J. Untwalia who held that that the woman's organization had no locus standi to file a review petition[16]. The protests to the ruling by women's organisations led to Government of India amending the law. The Criminal Law Amendment Act, 1983 has made a statutory provision in the face of Section. 114 (A) of the Evidence Act, which states that if the victim says that she did not consent to

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the sexual intercourse[17], the Court shall believe that she did not consent. New laws were also enacted following the incident; the Section 376(punishment for rape) of the Indian Penal Code underwent a change with the enactment and addition of Sections 376(A), Section 376(B), Section 376(C), and Section 376(D). Thus, in *Rajiq v. State of Uttar Pradesh*[18]the court clarified that the absence of injuries on the person of the girl may not be fatal to the prosecution and corroborative evidence may not be an imperative component of judicial credence in rape cases. But again in the case of *Sheikh Zahir v. State of Bihar*[19], the ideal of the Supreme Court was put to test. The Criminal Law (Amendment) Act 1983 was a step towards reforming the old, archaic rape laws prevalent since the mid-part of the nineteenth century. It sought to modernize the provisions in order to meet the demands of the changed socio-economic circumstances of the country. Two major contributions of the amendment with regard to rape were incorporation of the concept of ‘custodial rape’ and enhancement of severity of punishment. The amendment made the treatment of the rape victim much more humane. Next in line is another of a line of shocking and in the researcher’s opinion insensitive decisions of the Supreme Court. In the case *Phul Singh v. State of Haryana*[20], the court reduced the sentence for a person convicted for the rape of a cousin’s wife from 4 years rigorous imprisonment to 2 years. Krishna Iyer, J., while opining that “ordinarily rape is a violation with violence of the private person of a woman – an outrage of all canons”, seems somehow to think that it becomes a little less of an outrage when committed by a 22 year old man with a wife and kids. The reasoning given for shortening the sentence was that the man was very young and had a whole life ahead of him, and so it would be unfair to impose

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a sentence of 4 years on him. In the researcher's opinion, not only is the reasoning faulty, but the statutory ground on which the decision stands is shaky as well. This will be discussed later in the project. The next case is after a period of 8 years from the last one. Decided in 1987, the case of Uttam Kumar[21] is more or less a straightforward one, discussed only because it highlights one of the factors which are taken in to consideration by the judges while deciding a rape case. The case involved the rape of a minor girl by two men while she was out grazing cattle in the fields. The court refused to listen to any more contentions once the fact that there was a rape was established, and said that since the girl is below 16 years of age, the question of her consent is immaterial and any consent given by her is in fact no consent. Further, the court said that rape by more than one person is a gang rape even if the total number of people culprits is two. The next case is a decision of considerable importance. In the Madhukar case[22], a police constable was alleged to have committed an attempt to rape a woman named Banubi. It was contended by the defence that the woman Banubi was a woman of easy virtue, and therefore her testimony can not be relied on. And that in any case it would be a fatal mistake to jeopardize the service and the future of a government employee based on the word of an unchaste woman. The Supreme Court brushed aside these conditions while holding that, " Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes." This is a good decision in as much as it recognizes the fact that each and every women has a right to live with dignity, and that just because she lives by ways which are considered immoral by our society does not mean that her honor and her

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body is free to be violated by anyone and everyone. The next case is the Madan Gopal case[23]. The case is about a medical practitioner habitually raping small girls aged in their very early teens or before that after inviting them to his house to play with his niece who was of the same age group. The case is important because in the case the Supreme Court held that it was not necessary to look for extraordinary corroboration for the story of the victim, and that unless and until such story was rendered unbelievable or improbable due to the existence of certain factors, there could be a conviction based on the same. The case was even more important in that the judges did not let a shaky medical opinion deter them from delivering justice. Hence this case did not turn out to be one where the accused gets off at some technicality, which unfortunately is all too common in India. The court held that the opinion of the medical expert was merely advisory in nature, and that rape being a legal and not a medical condition, such opinion could in no case be binding on the court. The court went on to set aside the order of the high court and gave rigorous punishment of 7 years to the accused along with imposing a fine of Rs. 25000. In the researcher's opinion this is a very good decision showing the level of concern and consideration that all judges must have for the victims of rape. The next case State of Maharashtra v. Prakash[24], decided in 1992. This also in the researcher's opinion is a good decision. The judges took into account the fact that the victims in this case were poor rustic villagers, and used it to explain several factors that were against the prosecution. The case involved a constable and a businessman dragging a couple which was visiting the village for a festival out and then threatening the wife that the husband would be shut in prison if she did not let them have sexual intercourse with her. The wife succumbed and the

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court said that this was not consent but passive submission falling under Section 375 thirdly. Hence the court once again made sure that the accused could not get away on mere technicalities and were punished for their crime. In the Fanibhushan case[25], the court seemed to be doing everything right until the actual time when they delivered the sentence. The case was one of a gang rape of a village girl by three men. The high court had found them guilty and had imposed the life sentence on the accused. The Supreme Court went in to all the aspects of the case, stating that the testimony of the victim was to be taken at face value and was not to be treated at the level of the testimony of an accomplice to the crime. However the court reduced the sentence of the accused, and did not cite any significant reasons for the same. The only reason cited was that the gang rape did not seem to be pre planned but happened only because the men gave into their lust and lost control. In the researcher's opinion this is a blatant misuse of judicial discretion, and also adding insult to injury to the victim. The next case is a landmark judgment in this field of law. The Chandrima Das case[26] is important for many reasons. In this case the court considered the question if the Railway could be held liable for paying damages to the victim of a gang rape committed by railway officials. The victim was a Bangladeshi national, and this further complicated matters as it was contended that she did not have the same fundamental rights available to her as normal citizens on India do. The court set aside all such contentions and held that the railways was in fact liable to pay damages to the victim, and that she did indeed have certain fundamental rights as being a person even though she is not a citizen of India. The last case to be discussed is State of Karnataka v. Krishnappa[27]. The court was dealing with an appeal to set aside the order <https://assignbuster.com/the-crime-of-rape-law-general-essay/>

of the high court reducing the sentence awarded to a man who was held guilty of the rape of an 8 year old girl. The Supreme Court explicitly said that 'special and adequate' reasons were needed to award a sentence that was lesser than the minimum sentence prescribed in Section 376 of the IPC, and that the reasons that the High Court gave, namely that the person was drunk and intoxicated and so did not know what he was doing, fell under neither categories. In the researcher's opinion this is an excellent decision, showing that the court was actually serious about ensuring that justice was done, and wasn't merely going through the motions. Now that we have seen several cases spanning around 5 decades focusing on the attitude of the judiciary in the cases we can efficiently consider the mass of cases as a whole and try and arrive at a conclusion as to changes if any in the judiciary's attitude towards rape in our country. As a general observation it can indeed be said that of late the judiciary's attitude has improved and they are now more sympathetic to the victim and more sensitive to the trauma that she is going through. Time and again there have been cases which have shown blatant insensitivity of the judges towards the victim. This is apparent in cases such as Tukaram and Phul Singh and others. Both these cases featured the judiciary tackling an obvious case of rape, and even then in the former the person was acquitted altogether and in the latter the sentence was reduced to a mere two years without any plausible reason whatsoever. As far as the length of sentence is concerned there seems to be either a lack of understanding in the judiciary's mind or just plain disregard for the concept of justice. While in Phul Singh Krishna Iyer, J., cited the reason that the accused was a young man of 22 years of age and so such a young man should not be punished for a long duration as this would be unfair on his

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family, in yet another case the judges of the high court seemed to think that being intoxicated and having an old mother is enough reason for reducing the sentence. In another case the fact that the rape was not pre meditated was taken as sufficient reason to reduce the sentence. In the Addeppalli case[28]the Supreme Court reduced the punishment and did not give any reason for it whatsoever. Such cases time and again mar the judicial record in cases dealing with rape, when the judges are clearly more sympathetic to the convicted rather than the hapless victim. However in all fairness it must be said that there have indeed been several positive changes in the judiciary's attitude towards rape in India. For example, the level of corroboration needed for the victim's testimony has come a long way since the Ghanshyam case in 1956 where it was said that there should be complete corroboration of each and every part of the victim's story in order for there to be a conviction to more recent cases where the standard of corroboration is lesser, the current standard being that as long as the victim's testimony is not full of glaring holes and is not made untrustworthy due to some reasons it can not be scrutinized using standards higher than the testimony of any other eyewitness. This change showcases the changing attitude of the judiciary as moving towards a more victim friendly approach. Same can be said about the judicial attitude towards medical opinion in such cases. While earlier there used to be acquittals even if the slightest doubt was seen in the medical opinion after the examination of the victim, of late the Supreme Court has held in several cases that medical opinion is merely advisory in nature and rape being a legal condition and not a medical one it was not for the medical expert to decide whether there has been a rape but for the court. Apart from the case mentioned above, cases such as the

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Gurmit Singh case[29] clearly show the changing attitude of the judiciary towards the victims themselves. The judges now keep in mind the social conditions of the victims and chastise the lower authorities wherever the victims are ill treated, such as in the cross examination where it is said that the victim is raped all over again and this time in front of the whole courthouse, and in accounting for factors such as the delay in lodging of complaint[30] which earlier used to be enough to cast doubt on the story of the prosecution. In Delhi Domestic Working Women v. Union of India[31] the Apex Court laid down the following broad guidelines: The complainants of sexual assault cases should be provided with legal representation i. e. they should be provided an advocate who could help her properly. Legal assistance will have to be provided at the police station since victim of sexual assault might very well be in a distressed state upon arrival at the police station and guidance of a lawyer at that stage is very necessary. The police should be under duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed. A list of advocates who deal in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable. In all rape trials anonymity of victim must be maintained, as far as necessary. A " Criminal Injuries Compensation Board" should be established. Interim compensation should be given to rape victim even if the case is still going on in the court. Medical help should be provided and woman should be allowed to abort the child if she becomes pregnant due to the incidence. Compensation should be provided to rape victim to rehabilitate herself. Thus in conclusion, as has been shown earlier the judicial attitude

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towards rape has undergone significant changes with time. The system has definitely moved towards a more victim friendly approach and the judiciary has definitely played its part not just by a general shift in attitude but by actually laying down guidelines in several cases[32]for the treatment of rape victims etc. However there is definitely a lot of ground still to be covered. The judiciary must undoubtedly play its part in achieving the needed changes, let us hope that while doing so they do not go overboard and make a system that leads to the conviction of even those who are innocent simply because the judiciary is biased against anyone who is accused of rape. What is needed is not viewing the accused with a bias in favor of the victim, but to make sure that those who are in fact guilty do not get away on mere technicalities as they have for quite some time in our country.

Deterrent factor in rape laws: Myth or Reality.

Despite the stringency in the societal and governmental approach towards this dreadful menace the increasing trend of rapes has remained unabated. It is a known fact that recorded rape cases are only the tip of the iceberg as not only many cases of rape are not reported, but also many of those cases in our country are not registered. Even if they are reported, the unscrupulous officers in the police stations do not register the cases. Even if the case is registered and an investigation starts, the female victims mostly feel shy and embarrassed to answer delicate questions posed by male investigating officers; as a result, the truth is not revealed. In India, although, many rape cases are charge sheeted, a large number of these cases ultimately end in acquittal[33]. There are many reasons for the large-scale acquittal in rape cases. Prolongation of investigation, laxity on the part of the investigating

officers, non-availability of witnesses, etc. have been identified as major contributing factors for the same. Medical evidence is a crucial piece of information, which is required for establishing the case of rape in a court of law. It has been observed that lady doctors in government hospitals in many cases hesitate to give frank medical opinion in rape cases for fear of appearing as a prosecution witness and being subjected to embarrassing cross-examination. The Law Commission of India in its report (1980) also pointed out that the report of the medical examination is often cursory or is not sent in time. The Commission recommended some addition to the provision in the Code of Criminal Procedure, the most important being that the report shall state precisely the reasons for each conclusion arrived at[34].

IMPEDIMENTS IN THE JUSTICE DELIVERY

A. Low Reporting of CasesThe most prominent difficulty in the delivery of justice to the victims of sexual offences is the very low reporting of cases. Data relating to sex related offences are mostly available from the police record, clinical setting, non-governmental organizations and survey research. But whatever information is available on the subject is merely the tip of the iceberg. Because of the very nature of the offence, incidents are not properly reported to the police on account of many reasons arising out of ignorance, illiteracy, and fears of retaliation from the offenders or merely because of an inability to have access to the police. There is also a fear of shame and stigmatization of the victims and their families, or reluctance on the part of the family to report the case, especially where the perpetrator is powerful and rich. Lack of faith of the common people in the official law enforcement

mechanisms of the Police, Courts and laws also add to the problem of under reporting of sexual cases[35].

B. Investigation

Not only are many sexual cases not reported, but the unscrupulous officers in the police stations do not register many such cases in India. Investigation of sex offences, particularly rape cases, requires extra sympathetic handling of the traumatized victims. The investigators must try to establish proper rapport with the rape victims and help the latter overcome shame, nervousness and reluctance. The investigator must impress on the victim that he is concerned not only with the arrests and conviction of the offender but also the victim's welfare. Female victims also feel shy and embarrassed to answer delicate questions posed by male investigating officers. It will be useful if female investigating officers record the statements of rape victims wherever possible. Unfortunately, the number of women police personnel in the country is totally inadequate. It is almost less than one per cent of the total force and is available only in big cities and in special wings of the Criminal Investigation Department. In one dacoity (armed robber) case that occurred in a village the rape of the women folk in the house came to light only because of the proper interrogation of the victims by a woman Sub-Inspector who was brought from Rourkela. It is necessary that the strength of women investigating officers in the State Police be adequately increased and also to train them in supportive and sympathetic interviewing techniques. In countries like Australia, increased use of female officers and specially trained Sex Crime Units' have produced positive results.

C. Physical and Medical Examination of the Victim

Immediate physical examination of the victim is of utmost importance because this is the beginning point of any investigation. Moreover, it helps in ruling out the possibility of false allegation, which happens many times because of many reasons. In India, though about 80 per cent of the rape cases are charge sheeted by the police, a large number of these cases ultimately end in acquittal because of various factors like delayed reporting, unfavorable medical opinion, witnesses turning hostile, etc. One important factor behind the failure of a large number of cases in courts of law is the negative opinion given by the Medical Officers who examine the rape victims. Medical evidence is a crucial piece of information to establish the case of rape. The police investigator has to rely upon the examining physician collecting the best evidence in the case – evidence from the body of the victims. It is seen that lady doctors in government hospitals hesitate to give frank medical opinion in rape cases for fear of appearing as a prosecution witness and then being subjected to embarrassing cross examination in courts of law. In one case, two officers of a well-known engineering concern raped a tribal girl by taking her out on the pretext of arranging a job for her. This created a commotion and the workers in the factory went on strike. The case ended in acquittal because of the information given by the lady doctor and also because of the gaining over of some witnesses who impeached the character of the victim. 25 The Law Commission in its Report (1980) also pointed out that —the report of medical examination is often cursory or is not sent in time. The Commission recommended some additions to the provisions in the Code of Criminal

Procedure, the most important being, that the —report shall state precisely the reasons for each conclusion arrived at.

D. Delay in Disposal of Cases

There is very often, unfortunate delay in the disposal of cases involving crimes against women in the courts. From a sample study of 100 cases of rape, kidnapping and abduction, carried out by a study group of the Bureau of Police Research and Development, Govt. of India, it was found that only in 34 percent of cases. Another problem of the rape victims at the time of trial deserves notice. Section 155(4) of the Indian Evidence Act 1872, permits the cross-examiner to ask the victim of rape questions about her past character. These questions can be very embarrassing and places the victim under severe emotional strain. The questions can cover not only her immoral association with the accused in the past, but also her alleged immoral character. Only amending the law can check this. The Law Commission of India in more than one of its reports has recommended an amendment of this provision[36]. The law needs to be more sensitive as rape is a crime which is committed against a woman's right to bodily integrity and the victim should be treated with utmost cordiality in presence of a female police officer so that she can shed all her inhibitions and assist the police in nailing the criminal. There are a few points in the law, which are open to debate. Sexual intercourse by a man with his own wife, where the wife is over 15 years of age, is not rape. Sexual intercourse in a custodial situation is deemed an offence (policemen, public servants, managers of public hospitals and remand homes or wardens of jails), even if it is with the consent of the woman. As a whole, the process of law is biased against the victim. If the

victim is a minor, the onus is on the accused to prove his innocence. But if the victim is a major, it is up to her to prove her charge. Therefore, the defence finds it worthwhile to prove that the victim is a major. The judiciary finally awakened to the fact that the victim is a most important part of the criminal justice system. More PILs should be filed for people who cannot file for themselves. Rape, molestation and abductions, the crimes are numerous but low conviction rates for the same is one of the major reasons for the growing number of offences against women, point out experts. " Apart from other factors, the low conviction rate in the cases of rape is the biggest worry we have today. There is hardly any deterrence. Law should provide fast track courts to deal with such cases," says Girija Vyas, former Chairperson, National Commission for Women (NCW). While there were 37, 000 cases of molestation and eve-teasing in 2006-07, the conviction rate for such crimes, is below 30 per cent. For rape it is just a dismal 27 per cent. Brinda Karat, All India Democratic Women's Association (AIDWA), member says, " I have raised the issue in the Parliament several times that there is a need to step up conviction rate in rape cases drastically. Poor legal system, wrong understanding of policemen in these cases and lengthy procedures especially in child rape where after horrifying rounds of investigation the victim starts feeling that she is an accused and should not have registered the case, are few reasons for low conviction rate."" In every 10 hours, a girl of the age of 1-10 is being raped in India. We are raising this issue and have demanded enforcement of stringent laws by government," she adds. Reacting to a recent incident in which a minor was raped by a constable and his accomplice in a moving car in the national capital, Vyas says, " This is a special case and it should be dealt with a fast track court. On many

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occasions, complains do not get registered on time and then it is very difficult to prove that rape actually happened. It should be registered within 24 hours of the incident. The accused believe they can get away with it. Officials are corrupt and easily bribed (some are even committing rapes themselves). Women are shamed and humiliated when they come forward because of the backward notion that it's the woman's fault (even when the 'women' are young children). If they make a case, it becomes public knowledge and their families and society shun them in many cases as they are then seen as 'damaged goods'. If unmarried they will have great difficulty getting married. Courts don't always do justice for the victim and find rapists not guilty for ridiculous reasons. Predators know this and take advantage of it. Even if they get caught, if they have enough money or influence, nothing will happen to them. A woman would have to turn the case into a media circus to have a chance at justice and 90% of rape victims in India would not do so out of fear and shame. According to the criminal justice system in India, rape is an offence against the state not a crime against an individual. The matter has to be reported by the rape-victim to the police and First Investigation Report (FIR) prepared by the police, inquest and identification parade conducted by the police and medical examination report prepared by the recognised government hospital have major bearing on the judgement. After the police file a charge sheet, the trial is conducted in a Sessions Court. During the trial the victim has no choice to select a lawyer to defend her case. The state appointed public prosecutor represents her. The rape-victim is merely the prosecution witness. Hence during investigation and rape trial she is completely at the mercy of the state.

Can castration of sexual offenders will be a sufficient deterrent

The debate on castration as a punishment for rape has gained momentum with Additional Sessions Judge, Kamini Lau again recommending castration as a suitable punishment for rapists[37]. She observed that: Castration is the most befitting sentence which can be imposed on any paedophile or serial offender but the hands of this court are tied as the statute does not provide for it. Indian legislators are yet to explore this as an alternative to conventional sentencing. The message to be sent is to be loud and clear and that any person who messes with the child will not be spared.[38]Noted jurist Fali S Nariman supported the idea mooted by the ASJ and said: My instinctive reaction is to applaud what has been recently recommended by a Delhi Court. The punishment recommended does fit the crime. The horrendous offence of rape debases and stigmatizes the victim as almost no other offense. It has been proved that a long term imprisonment is no deterrent; something more drastic is definitely required to put the fear in the perpetrator. If you say this is uncivilized, my answer is, so is death penalty for murder[39].

What is Castration?

Castration is any action, surgical, chemical or otherwise by which a male loses the function of the testicles. Castration is used in many countries as a mode of punishing sexual offenders Castration is practiced in two ways: One is Surgical Castration: The process of surgical castration, called orchiectomy involves the removal of the testes with the idea that the removal of testes would result in loss of testosterone which would in turn cause elimination of

sexual desire. And the other is Chemical Castration: Chemical Castration is practiced by the administration of medication such as Depo-Provera, which has the ability to suppress testosterone and cause a loss of sex drive and reduction in sperm production of the subject. Many countries use either of the two procedures to punish a sexual offender. California was the first state to specify the use of chemical castration as a punishment for Child Molestation[40]. Later, Florida passed a similar law in 1997[41]. In 2009, Poland approved a similar law which allows forcible castration for paedophiles. In March 2010, Mendoza, a province in Argentina also passed a law which authorizes the courts to punish sexual offenders by chemical castration.[42] Similarly, in Czechoslovakia, even first time sexual offenders can be subjected to surgical castration[43].

" Chemical castration "

Following the Delhi rape and murder, so-called " chemical castration" of convicted rapists has also been widely advocated. In fact, some major political parties have also voiced their support for such a move. Anup Surendranath has argued cogently in The Hindu as to why " chemical castration" is not necessarily the right legal response. It no doubt draws the focus away from the manner in which the wider socio-political contexts as well as more intimate sites, such as family and community, are implicated in perpetuating patriarchy, gendered violence and misogynist attitudes. The advocacy of " chemical castration" as a punitive measure does not account for the complex reality of sexual crimes in India, whether against women, men or children. Moreover, in its very focus on biological masculinity, " chemical castration" arguably echoes dominant patriarchal and hetero-

normative constructions of rape. However, an equally serious concern is that in its very framing, "chemical castration" as a punitive measure medicalises rape by instrumentalising pharmacological interventions to treat paraphilias such as voyeurism, exhibitionism, sexual masochism, paedophilia, etc.

Biological psychiatry is a double-edged sword and advocates of "chemical castration" have to bear in mind that legitimising its use as a punitive instrument within the criminal justice system is another very slippery slope, which may have serious unintended consequences in the future.

The abuse of so-called narcoanalysis in criminal investigation in India is a case in point. In 2010, the World Federation of Societies of Biological Psychiatry (WFSBP) published guidelines bringing "together different views on the appropriate treatment of paraphilias from experts representing different continents." The WFSBP publication, noting the long history of the use of antiandrogens (the most widely used family of drugs) and more recently the use of selective serotonin re-uptake inhibitors (SSRIs—largely in cases involving "less dangerous sex offences" like exhibitionism), makes several observations, which are very relevant to bear in mind. These include: While there is evidence that pharmacological interventions may indeed reduce paraphilia and help reduce recidivism amongst sex offenders, "little is known about which treatments are most effective, for which offenders, over what duration, or in what combination." Moreover the "great majority of pharmacological studies are uncontrolled studies without placebo comparison" and that some methodological problems are observed.

Importantly, the WFSBP maintains that treatment must "include freely given informed consent. Indeed, these treatments must remain a choice to be made by the patient on the basis of medical advice." (p. 644) Further, "not

every sex offender is a candidate for hormonal treatment, even if it has the benefit of being reversible once discontinued." (p. 643) Pharmacological interventions are to be " part of a more comprehensive treatment plan including psychotherapy and, in most cases, behaviour therapy" with the added caution that " antiandrogen treatment may increase psychotic symptoms if any." (p. 645) Finally, the guidelines also stress the need for systematic risk assessment prior to treatment, consistently high level of medical and psychosocial monitoring of those receiving treatment and several other measures. Indeed, other studies have also underlined that chemical castration can cause significant psychological impacts such as increased anxiety and depression, which may have its own consequences for offenders and the communities they live in, not to mention a range of other longer term physiological problems. Lack of consistent treatment or stoppage not only has potentially serious consequences for the person undergoing the treatment but can also lead to re-offending. It is rather ironic that one of the most widely used drugs in " chemical castration" is ' medroxyprogesterone acetate', the key active ingredient in Depo Provera, against the use of which women's rights groups have long campaigned owing to its serious side effects. Not only are the doses given to men far greater but the manufacturer, Pfizer, in fact introduced a ' black box' warning in 2004 that prolonged use leads to loss in bone density noting further that " bone loss is greater with increasing duration of use and may not be completely reversible" (Stinneford 2006: 575-576). Last year, The Guardian ran a debate on the subject, which highlighted the complications, risks and concerns of such procedures while underlining the conditions under which such medical interventions can possibly be accepted.

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The latter include free and informed consent, judicial supervision, sound medical and psychosocial support during treatment and that such medical interventions are best used, as for example in Denmark, when limited to a very small proportion of sex offenders and is closely regulated. However, whatever the condition under which it is undertaken, the effects of "chemical castration" are closer than it appears to physical castration. In fact, to the extent that it undermines the physical integrity of a person, exposes one to long-term adverse health consequences and "involves administration of a mind altering drug purely for purposes of incapacitation (as opposed to medical treatment)" "chemical castration" amounts to a cruel and unusual punishment (Stinneford 2006: 595-597). Even if this argument were to be rejected, the question is whether India's criminal justice system possesses the range of resources and institutional capacities required to effectively administer what is a very complex and long-term individualised medical and psychological treatment protocol? Given the struggle of the country's public health system to deal with public health including mental health challenges and the woefully inadequate health infrastructure of the prison and probationary services, the answer is a clear and resounding 'No'.

A study published in 2011 by the National Institute of Mental Health and Neurosciences (NIHANS) on health challenges in the Indian prison system, using the Bangalore Central Prison as a case study, makes it clear that the criminal justice system is far from able to deal with even the most basic health issues and challenges (and there are many) confronting it. Foisting on such a system a complex and demanding procedure in the name of "chemical castration" is more than a recipe for failure. It is downright dangerous as it is most likely to do little more than provide a false sense of

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security while exposing victims, offenders and the community to further risks.

The question is can such a law be enacted in India?

The above discussion raises certain pertinent questions regarding the applicability of such a law in India. While the intention of the ASJ in making such a recommendation is commendable, yet, at the same time it is submitted that this form of punishment is a manifestation of a regressive outlook. If such a law is made it would not be a sound law for a number of reasons: First, the argument of castration as a punishment for rapist is based on the premise that penetration is the only way of committing a rape. The Criminal Law Amendment Bill, 2010 seeks to widen the definition of rape. If the aforesaid amendment is effected then such a law would lose its relevance, as it is contrary to the definition of rape as envisaged in the amendment. Secondly, Castration as a form of punishment cannot be sustained, if a gender neutral law is enacted because women cannot be castrated and if castration is advised only for men then the law would most likely fall as it would be violative of Article 14. Thirdly, Forced Castration is barbaric and is not commensurate with the rights of the prisoners. It is worthwhile to note that the Supreme Court in its various judgments has accepted that prisoners are also entitled to enjoy fundamental rights. Desai, J. in Harbans Singh v. State of UP^[44] pointed out that the conviction of a person for a crime did not reduce him to a non-person vulnerable to major punishments imposed being imposed on him. The SC has also recognized the right of a prisoner not to be subjected to torture^[45]. Requiring Castration for rape would mean that it is acceptable to treat prisoners as less than humans.

Fourthly, this argument is based on the premise that Rape is essentially a sex crime only which is not true. Leading psychiatrists are of the view that Rape is about violence, power, domination and humiliation of a victim. It also ignores the fact that many a times repressive societies use rape as a weapon of political persecution. Such incidents have happened in the past in Zimbabwe, Haiti, Libya, and Srilanka etc. How can castration solve that problem? Fifthly, there is no evidence to suggest that persons subjected to castration will not commit a sexual crime again. Ales Butala, a member of The Prevention of Torture Committee of The council of Europe noted that:" The delegation that visited the Czech Republic in March and April came across three cases in which the offenders had committed serious sex related crimes, including serial rape and attempted murder, after being surgically castrated.[46]" Finally, Rape is a brutal criminal act and incarceration should be the punishment for it, looking for medical remedies would be misplaced. Thus, rather than prescribing barbaric punishment like this, there should be an attempt to weed out the problems prevalent in our Criminal Justice System so that criminals are brought to the book. That alone would be sufficient in deterring individuals from committing this heinous crime.

The politics of criminal justice reform

Time and again, around the world, tragic and horrific crimes have been used to play the rights of " victims" and " offenders" against each other, often resulting in populist but counter-productive criminal justice policies, which, in the long run, create more problems than meaningful solutions. More often than not politically popular criminal justice reform, which invariably claims to privilege " victims", has meant a shift away from liberal rehabilitative

approaches towards measures such as indeterminate sentences, mandatory minimum sentences, mandatory charging, reversal of burden of proof, etc. While such measures may appear to be vindicated in specific individual egregious cases, their overall impact has remained far from positive, including in crime prevention. In fact, more often than not these measures, often justified as ‘exceptional’ or ‘special’, tend to get normalised with significant negative consequences, often for the very marginalised communities they are supposed to protect. In fact, "protection" and "prevention" are two other discourses that are just as vulnerable to being instrumentalised to further strengthen the coercive and controlling apparatus of the state. A well-known example from India (and in fact elsewhere in South Asia) is the use of ‘protective custody’ to remand women ‘rescued’ from brothels in ‘homes’ where they are then highly vulnerable to abuse and exploitation. The truth is that requiring the state to protect individuals from abuse by private actors often has very many unforeseen effects, chief among which is the strengthening of the state’s coercive powers. It is critical that India’s human rights community takes up the challenge of ensuring that instrumental use of "victims", "prevention", "protection", etc. are not used to foist further irrationalities on a criminal justice system already suffering from multiple deficiencies. It is especially important to guard against the tendency to overly privilege "prevention", important as it is, because that path leads to the adoption of a risk-based as opposed to a reformatory or rehabilitative approach to criminal justice. As Lianos and Douglas (2000) have argued, a risk-driven approach is necessarily illiberal because it perceives and analyses the world through categories of menace. In other words it institutionalises continuous scanning

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for threats and the dominance of fear and anxiety. As Lee (2007) underlines, since the fear of crime came to be established as a "criminological concept" and "an object of social scientific enquiry" in the late 1960s in the USA, it has ascended to become a 'new regime of truth', the obsession with which is so great that we have come to see the reduction of fear of crime "as almost as important as the reduction of crime itself." (ibid: 203) Two examples from the an ICHRP report on the topic underline the systemic impacts of risk-based penal policies in the West: a) the Federal Bureau of Prison regulations require psychologists working with offenders in US prisons, particularly sex offenders, to perform a dual role of therapist and evaluator in relation to their risk of recidivism; and, b) the English Probation System's risk assessment indexed factors related to indicators of poverty, homelessness and disadvantage, leading Vivien Stern to note: "so if you score highly on measures of poverty, you are by definition 'risky'. If you are risky you will be subject to more controls and thrust more deeply into the suspect part of the population from which it is hard to get out." Naming and shaming, one of the motivations driving the move for sex offender registries in India, fits well with such risk-based penology and is in fact already at play in the Delhi case, but with quite different consequences. Residents of Ravidas Camp, the basti that was home to the alleged rapists, already find themselves named, shamed and thrust into the suspect population. The deccan herald quotes a resident, Kamla, as telling IANS: "I wish I could go to India Gate to join the cause but I fear I might be outcast if people come to know that I am from Ravidas Camp." Another resident is reported as saying: "I don't know how will I get my children admitted to a school as the incident has earned a bad name to this place (Ravidas Camp)." And

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underlying all this is a more basic fear, in the words of another resident: "You never know when a mob may attack the slum and torch or ransack our houses. But we want to say that we are as angry as the whole nation. We want them to be hanged." Of course they would, for it is not just the alleged rapists but also the whole of Ravidas Camp that is now "risky" and on trial. The predicament of Ravidas Camp illustrates tellingly the problem with legitimising ostracism and stigma (through devices such as sex offender registries) as an instrument of criminal justice policy; more often than not it simply attaches itself to the least powerful social classes. It cannot however overcome the impunity enjoyed by the powerful: Narendra Modi, is widely touted as potential Prime Minister despite remaining an unapologetic Chief Minister who presided over an episode of the most horrific mass sexual violence imaginable; ex-Haryana DGP SPS Rathore's teenage victim Ruchika, ended her own life unable to bear the torment that her battle for justice had become; SP Ankit Garg was awarded the President's Medal despite being named by Soni Sori as the one who supervised her torture and sexual violence against her... sadly, the list is long.