

**IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES
NO. 10**

**ADDRESSING RAPE AS A HUMAN RIGHTS VIOLATION:
The role of international human rights norms
and instruments**

International Women's Rights Action Watch Asia Pacific



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CONTENTS

	Page
Preface	1
I. Introduction	2
II. Rape in Asia: Definition and concerns	3
Legal definition	4
Feminist critique	6
Test of reasonableness	6
Applying human rights norms to the legal definition of rape	7
III. Definition of rape in international human rights law	10
UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	10
Other international human rights treaties and bodies	13
UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	13
UN International Covenant on Economic, Social and Cultural Rights (ICESCR)	14
UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	14
UN Convention on the Rights of the Child (CRC)	15
Other international legal instruments	16
The UN Declaration on the Elimination of Violence against Women	16
The International Criminal Tribunals for Rwanda and the former Yugoslavia	16
The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power	17
The Prevention of Crime and Treatment of Offenders (Guidelines)	18

IV. Access to justice: Legal issues and challenges	18
Standards in determining consent	19
'Lack of consent' versus 'against the will'	19
Age and consent	21
Male-defined behavioural standards	23
The question of credibility in lack of consent	24
Character and reputation	25
Corroboration and treatment of circumstantial evidence	26
Treatment of medical evidence and psychiatric/psychological evaluation	28
Consideration in child rape cases	30
Issues of procedure	33
Belated complaints	33
Bail	33
Trial process	34
Examination and cross-examination	35
Trial Observations	36
Judgments	37
Penalties and sentencing	38
Compensation	39
Civil action for rape	41
Justice and closure	42
Other areas of concern	42
Pregnancy arising out of rape	42
Incest	43
V. The application of international standards in domestic law	43
The role of judges	44
Significance and application of human rights norms	45
Judicial activism	46
Application of female-defined behavioural standards	47
VI Conclusion	48

Preface

This paper seeks to raise awareness of lawyers and judges on existing international human rights norms and instruments that can assist in the interpretation and application of constitutional and national laws in rape cases. It includes a collection of some judgments in the Asia Pacific region as well as norms set by international human rights instruments that may be applied in rape litigation. It also covers specific issues in such cases that pose major problems, specifically in litigation. In so doing, it is hoped that the paper will guide readers in interpreting and applying the provisions of national constitutions and laws – including common and customary law and international instruments – when conducting trials or making decisions.

The focus of this paper is on rape as a human rights violation which affects girls and women. Although boys can experience rape too, such cases require a different and detailed approach that is beyond the scope here. Likewise, with the exception of ad-hoc war crimes tribunals (i.e. the International Criminal Tribunals on Yugoslavia and Rwanda), the paper does not cover recent international law developments regarding rape in the context of war, armed conflict or its link to crimes against humanity since the sweep of such developments is very wide. Moreover, the emphasis here is on domestic litigation.

Finally, while the focus is primarily on the Asian experience, it is hoped that the ideas forwarded here will still be of use to advocates, lawyers and judges in the Pacific as well as in other regions of the world.

I. INTRODUCTION

Rape is regarded as a serious offence in most Asian countries. However, the framework and the language of the law often do not reflect women's lives. For example, legally, the term 'rape' is commonly defined with a narrow focus on penile penetration. In some South Asian nations, acts of sexual violence like the insertion of foreign objects into the vagina are included under a provision called 'outraging the modesty of woman',¹ which by its very language is problematic and reveals a male bias. The terms 'sexual assault' or 'criminal sexual conduct' used legally in other jurisdictions of the world are not found in many countries in this region.²

Rape litigation reflects complex and contentious issues including strong and inhibiting cultural factors. In numerous Asian countries, a rape survivor³ is often confronted with concerns of 'honour' and 'chastity' and is often dissuaded from pursuing the complaint. Rape is also used as a weapon to punish, intimidate, coerce, humiliate and degrade. To make matters worse, rape laws in most countries require proof of not only force, but of resistance to force (albeit reasonable), unlike victims of other crimes against persons or property who are not required to resist, to prove that a crime has been committed. Indeed, criminal law is based on the paradigm of male lives, particularly the lives of men in the public sphere. Lawyers and women's rights activists are confronted with instances where male behavioural standards are used to win a rape case.

While there is an impressive advancement in courts where progressive interpretations and implementation of laws and judgements have forefronted women's experience, these precedents are not easily accessible or available for use in the courtroom or for law reforms. To overcome this gap, this paper includes judgments that show how, within a formal and patriarchal framework, courts have

¹ For example Section 354 Indian Penal Code, 1860.

² In the United States, the Michigan state's Criminal Sexual Conduct Act of 1974 created a series of offences, each of which is described as criminal sexual conduct. Each degree covers a range of sexual assaults, differentiated according to the amount of coercion used, whether or not penetration has taken place, the extent of physical injury inflicted and the age and incapacitation of the victim. In Canada there are categories of sexual assault based on the amount of violence with no distinction made between penetration and other sexual acts. This way a whole range of women's experiences with sexual violence has been included in the legislation.

³ The preferred term in this paper is 'survivor'. However, given in most countries the term used in judgments and legal parlance to describe a woman who has been subject to rape is 'victim', the two terms will, at times, be used interchangeably here.

managed to develop the law with a survivor's perspective. In some jurisdictions like in India, international human rights law is cited as judicial precedent in cases of human rights violations including rape. These judgments come from a variety of states, almost all of which follow the common law system. They are not exhaustive and many jurisdictions have been left out due to difficulties in obtaining corresponding cases or statutes. However, the concerns across the regions are similar and it is hoped that this paper will not only be useful in an individual litigation but also, facilitate law reforms in the area of rape.

The issues presented are categorised under various headings including the concept and definition of rape; standards in determining lack of consent; evidentiary requirements; credibility questions; special procedural issues; and penalties and sentencing. Each is discussed by presenting the specific problems related to the category, and the human rights norms that may be used to address them in litigation. Selected court decisions that illustrate how human rights norms have been used are also included. As well, the paper covers suggestions on addressing law reform and considering positive precedents in the region.

II. RAPE IN ASIA: DEFINITION AND CONCERNS

In general, rape is said to have taken place when a man forces a woman to have sexual relations against her will. It is an act of violence and aggression that is gender specific in character, and humiliates and degrades women. It is widely prevalent but the sexual nature of the crime makes it extremely underreported since it is closely linked to honour, purity and chastity. This results in making the act more widespread since perpetrators get away with impunity.

Within the family, rape can occur in various contexts like in marriage (i.e. marital rape) or among close relatives (i.e. incest).⁴ Poverty can exacerbate a woman's experience of rape too. Women seeking to escape such conditions are often lured into accepting fraudulent jobs or marriage offers and then trafficked into forced prostitution where they have no access to the justice system.⁵ In situations of communal violence, on the other hand, rape is used to subjugate and inflict 'shame'

⁴ In many contexts too, a husband cannot be prosecuted for rape against his wife, except when they are legally separated.

⁵ Trafficking in women and children in India report commissioned by the National Human Rights Commission 2005.

on women and by extension, on their families and communities. Similarly, during times of internal conflict rape has been used to punish women for opposing the state.⁶ Women have also been raped because of their identities as members of an ethnic group or for being adherents of a particular religion or caste.

Since rape is concerned with sexuality, and since sexuality is a site that is controlled by men⁷, rape is often treated as an injury to the larger community and not to the woman herself. This often results in situations where the woman is pressured not to report the crime or into marrying the rapist. Owing to this attitude as well, rape within marriage is not taken seriously and neither is it an offence in many countries.⁸

The substance, structure and culture of rape laws have a strong gender bias. While the substantive definition of the law is narrow in its focus, procedural laws are often formulated on the formal model of equality in gender-neutral terms that do not take note of the historical disadvantage which women face. The question becomes more complex if we note how the criminal justice system expects a woman to recount the violent act in a detailed and detached manner, when in some cultures talking about sex is taboo and women would not discuss such matters even with their close relatives. To the system a rape survivor is just a witness who has to describe the act – her social and economic realities are not part of trial process.⁹

Legal definition

Broadly, there are two ways in which laws in this region define rape. First, there should be sexual intercourse with a woman, and second, it must be without her consent. Intrinsic to the concept of rape then are the notions of penetration and forced or involuntary sexual relations.

⁶ See 'Rape as a tool of war : A fact sheet' at <<http://www.amnestyusa.org/women/rapeinwartime.html>>.

⁷ This is a concept derived from feminist critiques of patriarchy and the dynamics of power relations between men and women: this position says that the ideology makes women's bodies and the practice of their sexuality contested grounds for the legitimate exercise of control and dominance by men over women. For more on feminist critiques see pp. 6.

⁸ For an analysis on such cultural practices in the family that are violent towards women see the 'Report of the Special Rapporteur on violence against women, its causes and consequences submitted in accordance with Commission on Human Rights resolution 2001/49' UN Doc E/CN.4/2002/83 dated 31 January 2002. (hereinafter 'Report of the Special Rapporteur on violence against women').

⁹ Agnes, Flavia (2002) 'Law, Ideology and Female Sexuality: Gender neutrality in rape law', *Economic and Political Weekly*, 2nd March 2002.

The Penal Code enacted in the mid-nineteenth century during British colonial rule continues to operate in India, Bangladesh, Sri Lanka, Malaysia and Singapore, with minor variations across these countries. All, however, still look at rape from the narrow angle of penetration, more specifically, penile penetration of the vagina under non-consensual circumstances. Any other violent act – such as the use of objects or instruments – is either treated as a different crime (e.g. ‘sexual offence’ in Bangladesh or ‘outraging the modesty’ in India) or not treated as a sexual offence at all (e.g. in Nepal). In many of these countries then, actual penile penetration of the vagina is necessary to bring about a complaint of rape.

The historic focus on the act of penetration largely derives from male preoccupation with ensuring women’s chastity and ascertaining the paternity of children.¹⁰ This possibly explains how non-consensual anal sex falls under Section 377 of the Penal Code (‘Offences against the order of nature’) as opposed to being recognised as a form of rape.¹¹ There are efforts to move away from narrowly defining sexual violations to acts only involving the penis. In Sri Lanka for example, amendments to the criminal law in 1995 to criminalise incest expanded the definition of forced sexual abuse to cover other acts besides penile penetration. However, even in countries where the definition of rape has been expanded, rape involving penetration of the vagina by a penis is still perceived as being more ‘severe’ than other forms of rape.

In the Philippines, for example, the law on rape (Republic Act No. 8353) was amended in 1997, after about five years of advocacy by women’s groups. Under this, rape became broadly defined to include not only penile penetration of the vagina but also the introduction of objects or instruments into the genital orifice or anal orifice, and penile penetration of the vaginal orifice or mouth of a person, male or female. Nevertheless, penalties differ between the penis-vagina form of rape and the other acts recognised as constituting rape. The penalty for the latter is much lower.

¹⁰ Flavia Agnes, ‘Protecting Women Against Violence? Review of a Decade of Legislation 1980-89’ *Economic and Political Weekly*, Vol 27, No 17, 25 April 1992.

¹¹ In fact Section 377 of the Penal Code punishes such acts even among consenting adults. The law has often been used to harass, discriminate against and persecute same-sex persons engaged in consensual sexual activity. Challenges to this law on the basis that it breaches the International Covenant of Civil and Political Rights and in India, possibly also the Constitutional guarantee to equality rights, have been unsuccessful. In Sri Lanka, the attempt to abolish this law met with resistance and resulted in a worsening of the situation. ‘Law, Ethics and HIV/AIDS in South Asia: A study of the legal and social environment of the epidemic in Bangladesh, India, Nepal and Sri Lanka’ [hereinafter ‘Law, Ethics and HIV/AIDS in South Asia’], United Nations Development Programme Report, 2003, p19.

Feminist critique

Feminist literature does not offer any specific definition of rape, but instead provides a stinging critique of the andocentric definition of rape in law, particularly its focus on penis-vagina contact. According to this critique, women's human rights are violated by the conventional legal definition of rape because this denies them the right to protection from and the redress for such violent acts, and at the same time reduces their experiences to unfortunate private incidents.

In addition, feminist literature also devotes much of its analysis to the common view in the legal system that rape is an act of sex and lust. Drawing on empirical research, its proponents have debunked this as a myth. Rape is considered as an act done not for sexual gratification but to hurt, humiliate, degrade or subjugate a woman. It is an act of violence, aggression and hostility.¹²

The importance of this view is not confined to mere theoretical arguments. Feminist literature points out that the erroneous perception of rape as a crime of lust concretely brings out anti-women court decisions. In many decisions for instance, acts of violence, which are supposed to be considered as rape are viewed as unfortunate consequences of provocative acts by female victims originating from the way they moved, dressed or talked in specific situations, or conducted themselves generally in the community. Courts have also excused the acts of rape by male youth offenders on grounds that they acted out of lust.

Test of reasonableness

Common law standards invoke a 'test of reasonableness' in proving a case. In an accident case, for example, often the court will consider how a 'reasonable man' would have responded or the degree of caution he would have exercised. But the

¹² For detailed analysis on varied feminist critiques see the following: Susan Brownmiller (1976), *Against Our Will: Men, Women and Rape* (New York, Bantam); Carol Smart (1989), *Feminism and the Power of Law* (London and New York, Routledge); Catherine Mackinnon (1987), *Feminism Unmodified* (Harvard University Press); Martha Albertson Fineman and Nancy Sweet Thomadsen (eds.) (1991), *At the Boundaries of Law* (New York and London, Routledge); Cornell Drucilla (1991), *Beyond Accommodation: Ethical feminism, deconstruction and the law* (New York and London, Routledge); Tove Stang Dahl (1987), *Women's Law: An introduction to feminist jurisprudence* (Oslo, Norwegian University Press); Suzanne E. Hatty (2000), *Masculinities and Violence* (London/Delhi Sage); A. Cornwall and Nancy Lindisfarne (eds.) 1994, *Dislocating Masculinities* (New York, Routledge); On the application of rape law and the complexities see Flavia Agnes (1990), *Journey to Justice* (Majlis Bombay); Dhagamwar Vasudha (1992), *Law, Power and Justice* (New Delhi, Sage publications).

'reasonable man' is a creation of common law based on a fictitious personification of the court and jury's social judgment. In the past, the 'reasonable man' has even been defined as 'the man who takes the magazines at home, and in the evening pushes the lawn mover in his shirt sleeves'.¹³ A presiding judge thus has to decide what 'reasonable' means, and it is inevitable that different judges may take variant views on the same question given the elasticity of this term.¹⁴

The phrase 'reasonable woman' was never coined although some jurists argue that despite the use of the masculine gender, there is no doubt that the term 'reasonable man' includes a 'reasonable woman'.¹⁵ In reality, however, this standard has traditionally never included the experiences and perspectives of women. In cases of rape the way women perceive the offence is quite different to men. On the whole, the common definition of rape is seen as a male-defined concept of harm done to women – the harm being brought about only by the penis, and done only to a vagina or hymen. Harm is also often belittled by allegations such as provocation, loose morals or ill reputation, and in some cases, dismissed on grounds of marriage to the perpetrator.

Applying human rights norms to the legal definition of rape

The constitutions of India, Bangladesh, Nepal and Sri Lanka recognise a wide range of fundamental rights. These are potentially quite broad in their application and include the right to life, liberty, and equality before the law and equal protection of the law. Most constitutions in the region also prohibit discrimination against women. Discriminatory laws can thus be challenged as violating constitutional rights. At the same time, some states like India and Nepal provide that laws in favour of women cannot be challenged as discriminatory. Judicial recognition of this body of rights could be highly relevant to issues that arise in cases of rape.

Apart from constitutional guarantees, there are international human rights norms that can be applied to widen the definition of rape in domestic contexts. The examples below illustrate this in relation to marital rape and forcible oral sex.

¹³ An American writer quoted by Lord Greer in *Hall v. Brooklands Auto Racing Club* (1933). KB 205 at 224.

¹⁴ Lord Macmillan in *Glasgow Corporation v. Muir* (1943). AC 448 at p457.

¹⁵ Rogers, W.V.H. (1989), *Winfield and Jolowicz on Tort*, Sweet and Maxwell; London; 13th Edition at p46-47, in Ramanathan, Usha (1999), 'Images (1920-1950) Reasonable Man, Reasonable Woman and Reasonable Expectations' in Amita Dhanda and Archana Parasher (eds.), *Engendering Law: Essays in Honour of Lotika Sarkar*, Eastern Book Company, p33.

Marital rape

In *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995),¹⁶ the Australian court recognised the concept of legitimate expectation of an international instrument's observance in the absence of a contrary legislative provision. Thus, for countries that have ratified international treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), for instance, laws that exclude married women from the protection of anti-rape provisions, whether expressly or impliedly, or exclude married women of a certain age from legal protection against rape by their husbands, are discriminatory.¹⁷ Yet, in most countries the concept of marital rape does not exist.

Fortunately, this situation is slowly but surely, changing. For example, in India, unwanted sexual intercourse by a man with his wife is not rape unless she is below fifteen years of age. This can be challenged under the anti-discriminatory provision of the country's Constitution and bolstered through the use of international human rights law. While it is possible that in certain situations courts may not strike down a discriminatory law or may make judgments that are not favourable to women's human rights, the trend in recent times indicate that they direct the government to formulate policies or changes in this regard.¹⁸

Even more promising, the Nepal Supreme Court in a path-breaking judgment in *Forum for Women, Law and Development v. His Majesty's Government* (2002) interpreted marital rape as a crime and held that:

'If an act is an offence by its very nature, it is unreasonable to say that it is not the offence merely because of difference in person committing the act. It will yield discriminatory result [sic], if we interpret that an act committed to any other woman is an offence and is not an offence, if the same act is committed to one's own wife. There is no justification in differentiating between the women who are wives and other women. Such discriminatory practice is against the provisions of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and letters and spirit of Articles 11(1), (2) and (3) of

¹⁶ (1995) 128 ALR 353.

¹⁷ A further elaboration on the standards set by international human rights instruments for rape is found in the following section.

¹⁸ *Forum for Women, Law and Development v. His Majesty's Government* (2002) Supreme Court Bulletin 2059, Vol. 5, p13. See also Law, Ethics and HIV/AIDS in South Asia.

the Constitution of the Kingdom of Nepal. No law can be interpreted against provisions of the Constitution and treaties and international instruments to which Nepal is a party. Therefore, to exempt an offence of rape committed to one's wife by the husband is against recognised principles of justice.¹⁹

The judgment is of great significance as it recognises marital rape as a form of violence and also holds that not recognising it as such amounts to discrimination against married women. Apart from being path-breaking, this case is of great interest in the way lawyers used CEDAW during the hearings. Instead of addressing the issues of discrimination from the formal way of comparative standards, lawyers arguing for the Forum For Women Law and Development cited CEDAW as a relevant source of law to bring non-discrimination and substantive equality standards to the statutory provision of rape, thus raising the normative content of protection which had till then not recognised marital rape as an offence.

Another important development on marital rape includes the judgment of the European Court of Human Rights which held that marital immunity from the charge of rape is inapplicable in modern times. As well, the Court has observed that the debasing character of rape is so manifest that the applicant could be convicted of attempted rape irrespective of his relationship with the victim.²⁰

Similarly significant is the case *R v. Lavallee* (1990)²¹ where the Canadian Supreme Court had to decide whether the plea of self-defence was available to a woman who killed her husband after he had repeatedly abused and threatened her. At the trial, the history of the abusive relationship was presented and the court also cited expert evidence on the 'battered woman's syndrome'. Usually, self-defence requires a plea of an immediate danger. In this case, however, the court modified the requirement allowing the defendant to raise the plea of self-defence. This judgment can be of great relevance even in jurisdictions where marital rape is not a remedy available under criminal law.

Forcible oral sex

Public Prosecutor v. Kwan Kwong Weng (1997)²² is an important judgment in the context of expanding the definition of rape beyond its legal meaning of penetration.

¹⁹ *ibid.*

²⁰ See *CR v. The United Kingdom* (Case No. 48/1994/495/577); *SW v. The United Kingdom* (Case No. 47/1994/494/576).

²¹ 1990 1 SCR 852.

²² 1997 1 SLR 697; 1997 SLR Lexis 6.

In this case which took place in Singapore, the accused forced a woman to have oral sex with him. Forcible oral sex, however, is not defined as rape in the country's Penal Code. Instead, it is listed as a crime under Section 377 which, as mentioned earlier, covers acts broadly termed as 'Offences against the order of nature'.²³ In the absence of legislation defining forcible oral sex as a crime of rape, the judgment of Singapore's Court of Appeal, deserves mention because it expands the definition of rape and overcomes the narrow scope of existing rape laws in many of the former British colonies – which have a similarly worded provision as the Singapore code – that define rape only in relation to penetration.

III. DEFINITION OF RAPE IN INTERNATIONAL HUMAN RIGHTS LAW

While rape is considered a form of violence against women, and numerous formulations of its definition exist in national and local legal systems, there is no explicit definition provided in international humanitarian or human rights law. Nevertheless, there is an impressive body of jurisprudence, both international and national, concerning women's human rights. This jurisprudence is of practical relevance and value to judges and lawyers and is set out in this section.

UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention)

Rights for women under the CEDAW Convention are based on three principles: non-discrimination, substantive equality and state obligation.

Non-discrimination and substantive equality

In 1992, the Committee on the Elimination of Discrimination against Women (CEDAW Committee) formulated General Recommendation 19²⁴ which defined gender-based violence as a form of discrimination, placing it squarely within the

²³ This says: 'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to ten years, and shall also be liable to fine.' Section 377 of the penal code of Singapore, Malaysia, India and Bangladesh are similar in their definition of same sex behaviour as an offence. Similar provisions exist in other countries of the region.

²⁴ General Recommendations are authoritative statements by the CEDAW Committee, on the meaning of the provisions in the CEDAW Convention with respect to the rights of women and the obligations of States parties.

rubric of human rights and fundamental freedoms, and making clear that states are obliged to eliminate violence perpetrated by public authorities and private persons.²⁵ In this recommendation the Committee elaborated on how gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.

Specifically, it defined discrimination under the Convention to include:

'[G]ender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.'²⁶

Accordingly, gender-based violence may breach specific provisions of the Convention regardless of whether those provisions expressly mention violence.

By terming this phenomenon as discrimination the CEDAW Committee expanded the scope of discrimination to go beyond acts by the state to include acts by private actors (i.e. individuals). In other words, while individuals are not directly liable under international human rights law, states are still responsible for efforts to eliminate and mitigate violations by private persons as part of their international obligations.²⁷ In the context of rape, this gains significance as women are more at risk of being victims and face gender-specific obstacles in seeking redress.

Rape as a form of gender-based violence is also regarded as discrimination within the meaning of Article 1 of the CEDAW Convention. This stipulates women's rights and freedoms to include:

- The right to life;
- The right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment;
- The right to equal protection according to humanitarian norms in times of international or national armed conflict,
- The right to liberty and security of person;
- The right to equal protection under the law;
- The right to equality in the family;
- The right to the highest standard attainable of physical and mental health; and
- The right to just and favourable conditions of work.

²⁵ Rebecca Cook (1994), 'State Responsibility for Violation of Women's Human Rights' in *Harvard Human Rights Journal* 7, p125-175.

²⁶ CEDAW General Recommendation No. 19. para 6.

²⁷ Cook, *op. cit.* p125-175.

State obligation

As noted earlier, under the CEDAW Convention, states also have an obligation to take measures and change laws that are discriminatory and ensure the practical realisation of women's human rights – including the rights of rape survivors – by undertaking extra measures and introducing enabling conditions. Under Article 2 of the Convention, states are obliged to:

- Adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- Establish legal protection of the rights of women on an equal basis with men and to ensure through the competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- Refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- Take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;
- Take all appropriate measures, including legislations to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women; and
- Repeal all national penal provisions, which constitute discrimination against women.

Without forwarding a specific concept of rape here in terms of acts, these provisions still provide some basis for challenges in courts to the contents of rape in law.²⁸

The Concluding Comments²⁹ of the CEDAW Committee also elaborate on obligations of States parties with regards to rape. In its Concluding Comments to the first report of the Indian government, for example, the Committee expressed

²⁸ With acts that may never be considered part of legal definition, however, the approach should be through law reform. The jurisprudence developed to date, casts an obligation on the judiciary to apply international human rights standards in the interpretation of national constitutions and to apply international human rights law domestically. These are other norms that can be used in courts.

²⁹ Concluding Comments highlight accomplishments, shortcomings and obstacles that a reporting State party has faced in its implementation of the CEDAW Convention. They also identify areas of concern and suggest recommendations for further action. See <<http://www.iwraw-ap.org/committee/comments.htm>>.

concern that women are exposed to the risk of high levels of violence, rape, sexual harassment, humiliation and torture in areas where there are armed insurrections. It then recommended that law reforms be introduced in relation to rape, as proposed by the Indian National Commission on Women.³⁰

With Nepal, the Committee expressed concern about discriminatory cultural practices that make women vulnerable to violence.³¹ In the context of rape this requires a state to address the substance, structure and culture of the law which inhibits access to justice. It includes changing the narrow definition of rape; making the investigative process friendlier towards women; including women's experiences into the discussion on consent; making the justice delivery system accessible through innovative court room procedures; and providing a supportive environment. The state is also obliged to change the concept of consent through legislative reform or change the standards of consent through judicial interpretation.

In light of these comments, the Committee has recommended that:

'States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for the victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention.'³²

Other international human rights treaties and bodies

Apart from the CEDAW Convention, there are other international human rights treaties and declarations which consider rape as a form of gender-based violence and a human rights violation.

UN International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

ICERD recognises that certain forms of racial discrimination may be directed towards women specifically because of their gender, for example, sexual violence committed against women members of a particular racial or ethnic group. It

³⁰ CEDAW A/55/38 (2000). paras 30-90.

³¹ CEDAW A/59/38. (2004). Part 1. paras 186 and 206. (2004).

³² CEDAW. General Recommendation No. 19 (1992). para 24 (b).

addresses this issue and recognises that there could be pregnancy resulting from racially motivated rape, and that in some societies, women 'victims' of rape may also be ostracised. As well, the Convention recognises that due to discrimination and gender-related impediments, such as gender bias in the legal system, women are hindered by a lack of access to remedies and complaint mechanisms.³³

UN International Covenant on Economic, Social and Cultural Rights (ICESCR)

General Comment 16 of the Committee on Economic, Social and Cultural Rights,³⁴ the expert body that monitors the implementation of the ICESCR recognises that substantive equality for women will not be achieved simply through the enactments of laws or adoption of policies that are facially gender-neutral. States should recognise that such laws, policies and practice can fail to address or even perpetuate inequality between men and women, because they do not take account of existing economic, social and cultural inequalities particularly those experienced by women. For instance, in the case of rape, a state may have enacted a law against rape but this does not take into account the economic, social and cultural obstacles women possibly face in accessing this piece of legislation.

UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

While CAT does not specifically mention rape, its definition of torture is wide enough to include it as a form of gender based torture. Article 1 of the Convention defines 'torture' as,

'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

³³ ICERD. General Recommendation No. 25: Gender-related dimensions of racial discrimination. Fifty-sixth session (2000).

³⁴ General Comment No. 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights). Thirty-fourth session (2005).

The devastating impact of rape satisfies the requirement of 'severe physical or mental pain'. Various international authorities have recognised rape to constitute a form of torture, as defined in CAT, when it is used in order to obtain information or confession, or for any reason based on discrimination, or to punish, coerce or intimidate, and is performed by state agents or with their acquiescence.³⁵ Many acts of sexual violence – including rape, gang rape, abduction, sexual slavery, forced pregnancy, forced marriage, forced maternity and sexual mutilation – constitute torture under customary international law. These acts are considered war crimes and constitute grave breaches of the Geneva Conventions.³⁶

UN Convention on the Rights of the Child (CRC)

Article 34 of the CRC casts an obligation on states to protect the child from all forms of sexual exploitation and sexual abuse. In particular states are required to take measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity, use of children in prostitution and use of children in pornographic performances and materials. The Committee on the rights of the child has stressed the role of independent national human rights institutions (NHRIs) in the promotion and protection of the rights of the child. The Committee recommends that the NHRIs have the power to support children taking cases to court including the power to take cases concerning children's issues in the name of NHRI and to intervene in court cases to inform the court about the human rights issues involved in the case.³⁷ The setting up of NHRIs in countries as suggested by the committee would thus provide valuable support to children who are victims of rape. The Committee has further observed that violence including rape and other forms of sexual abuse, can occur in the family or foster setting or

³⁵ 'Report by the Special Rapporteur [on Torture], Mr P Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33', UN Doc E/CN.4/1986/15 dated February 19, 1986. See also *Rape as a weapon of war and a tool of political repression* in 'The Human Rights Watch Global Report on Women's Human Rights', Human Rights Watch, 1995. <<http://www.hrw.org/reports/pdfs/g/general/general958.pdf>>.

³⁶ The Fourth Geneva Convention of 1949 specifies in Article 27 '[W]omen shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault.<<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5>> Further, Article 147 of the same convention designates "wilfully causing great suffering or serious injury to body or health," "torture," and "inhuman treatment" as war crimes and as grave breaches of the conventions. (Source: HRW Report 1995 *Rape as a Weapon of War*, <http://www.glow-boell.de/media/en/txt_rubrik_3/HRW_Report_1995.pdf>.

³⁷ Committee on the Rights of the Child General Comment No 2 Thirty First Session (2002) CRC/GC/2002/2.

be perpetuated by those with specific responsibilities towards children, including teachers and employees of institutions working with children, such as prisons and institutions concerned with mental health and other disabilities. State parties have the obligation to protect children from all forms of violence and abuse, whether at home, in school or other institutions, or in the community. Programmes must be specifically adapted to the environment in which children live, their ability to recognise and disclose abuses and their individual capacity and autonomy.

Other international legal instruments

*The UN Declaration on the Elimination of Violence against Women*³⁸

The Declaration on the Elimination of Violence against Women defines violence against women as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life’.³⁹ It should also be understood to encompass, but not be limited to ‘physical, sexual and psychological violence occurring within the general community, including rape [and] sexual abuse’ and ‘physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs’.⁴⁰

The International Criminal Tribunals for Rwanda and the former Yugoslavia

The International Criminal Tribunal for Rwanda has conceptualised rape as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’,⁴¹ while the Commission of Experts appointed to study the situation in the former Yugoslavia concluded that ‘rape constitutes a crime under international humanitarian law’.⁴² Further, the International Criminal Tribunal for the former Yugoslavia, in a landmark decision on the

³⁸ Adopted by UN General Assembly Resolution 48/104, 20 Dec. 1993.

³⁹ *ibid.* Article 1.

⁴⁰ *ibid.* Article 2.

⁴¹ *The Prosecutor v. Jean-Paul Akayesu*. Case No. ICTR-96-4-T. 2 September 1998. para 598. <<http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm>>.

⁴² Final Report of the Commission of Experts, S/1994/674 - 27 May 1994 (Part II, J) established pursuant to Security Council Resolution 780 (1992) [S/RES/780], adopted by the Security Council at its 3119th meeting. Also see James C O’ Brian *The International Tribunal for Violations of International Humanitarian Law in the former Yugoslavia* 87 *American Journal of International Law* 639 (1993).

rape of Muslim women during the Bosnian war, defined rape as a crime against humanity, rather than as a war crime, and was an act which was in clear violation of the laws and customs of war.⁴³ While these decisions have been made under special circumstances, they indicate the seriousness with which the international community considers the issue of rape and represent important developments in law.

*The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*⁴⁴

This declaration defines 'victims' to mean persons, who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operating within member states, including those proscribing criminal abuse of power. It gives insightful guidelines on the formulation of laws and policies that one could use while addressing law reform.

Clause 6, for instance, requires judicial and administrative processes to be responsive to the needs of victims and facilitate the following:

- a) Inform 'victims' of their role and scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested for such information;
- b) Allow a 'victim's' views and concerns to be presented and considered at appropriate stages of the proceedings where her personal interests are affected without prejudice to the accused and consistent with the relevant national criminal justice system;
- c) Provide proper assistance to 'victims' throughout the legal process;
- d) Take measures to minimise inconvenience to 'victims', protect their privacy when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf from intimidation; and
- e) Avoid unnecessary delay in the handling of cases and the execution of orders or decrees granting awards to 'victims'.

⁴³ *Prosecutor v. Dragoljub Kunarc, Radomir Kovac and Zoran Vukovic*. Case No. IT-96-23 T and IT- 96-23/IT 22 Feb 2001. <<http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf>>.

⁴⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power G.A.40/34, annex, 40 U.N. GAOR Supp. (No.53) at 214, U.N. Doc. A/40/53 (1985) Adopted by General Assembly resolution 40/34 of 29 November 1985.

The Prevention of Crime and the Treatment of Offenders

International guidelines on the role of prosecutors were laid down during the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders.⁴⁵ According to these guidelines, prosecutors are expected to consider the views and concerns of 'victims' when their personal interests are affected. They must also ensure that 'victims' are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power mentioned previously.⁴⁶ The guidelines are exhaustive and cover all that a prosecutor is expected to do.

IV. ACCESS TO JUSTICE: LEGAL ISSUES AND CHALLENGES

In most jurisdictions, criminal law requires the prosecution to prove the guilt of the accused. This is because an accused is presumed to be innocent unless proven guilty. This is a fundamental principle of criminal jurisprudence as the accused is pitted against the might of the state. Hence Article 11 of the Universal Declaration of Human Rights requires that anyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which s/he also has all the guarantees necessary for her/his defence. Similarly, Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) declares, 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law'. Article 14 of the ICCPR also lays down the fair trial processes that domestic laws of States parties should adhere to. Courts are required to follow these as well.

A rape survivor is a witness and her evidence requires all the ingredients that would prove the guilt of an accused in any criminal trial. Because of the sexual nature of the crime, however, the testimony of the survivor is often considered as akin to an accomplice to the crime. This can also be due to the problematic and contentious nature of consent that often reflects male behavioural standards.

⁴⁵ Havana, 27 August to 7 September 1990. UN Doc A/CONF.144/28/Rev.1. para 189.

⁴⁶ Section 13 (d).

Standards in determining consent

'Lack of consent' versus 'against the will'

Consent is a crucial defence in a rape trial. Many laws on rape explicitly require as an element of the crime, either 'lack of consent' or 'against the will'. Sri Lanka, for instance, has defined rape as sexual intercourse without consent, deleting the traditional common law and Indian requirement of sexual intercourse as 'against the will of the woman' which in the past has encouraged courts to look for proof of violence and bodily injury.⁴⁷ In other contexts, circumstances that constitute 'lack of consent' or 'against the will' include:

- When a woman's consent has been obtained by putting her or any person in whom she is interested in, in fear of death or hurt;
- 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 herself to be lawfully married; and
- When at the time of giving such consent, she is of unsound mind [sic] or in a state of drunken stupor, or has been administered drugs and she is unable to understand the consequences of her action.⁴⁸

An important development on the definition of consent is found in the Australian and Hong Kong laws. Under their statutes, 'recklessness' on the part of the man is grounds for conviction. Thus the prosecution can either prove that at the time of intercourse the man knew that the woman did not consent or was reckless as to whether she consented or not. Here 'reckless' means that although an accused did not know that the woman had not consented, he nevertheless went ahead to have sexual intercourse with her not caring if she consented or not.⁴⁹ This progress aside, 'passive submission' has still often been confused with consent by courts.

R v. Ewanchuk (1999)⁵⁰ analyses the various myths associated with rape and is a judgment that developed jurisprudence which has changed the traditional

⁴⁷ Savitri Goonesekere (2004), *Violence, Law and Women's Rights in South Asia* (UNIFEM South Asia), p64.

⁴⁸ Section 375 of the Indian and Bangladesh penal code that defines rape. Corresponding provisions exist in other penal codes in the region.

⁴⁹ *The Queen v. Lau King Sang, Cheng Yau Tong and Lee Hon Mo* (1991) HKC LEXIS 949.

⁵⁰ *R v Ewanchuk* (1999) SCJ 1 No 10.

approach to consent. Though the ruling is in the context of Canadian law which enumerates a series of conditions (e.g. submission by reason of force, fear, threats, fraud or the exercise of authority) under which the law will deem an absence of consent in assault cases, and notwithstanding the complainant's ostensible consent or participation, it is nonetheless very relevant because of the way the court analysed the myths about rape.

Briefly, the complainant, a 17-year old woman, was interviewed by the accused for a job in his van. She left the van door open, as she was hesitant to discuss the job offer in his vehicle. After the interview, the accused invited her to see some of his work, which was in the trailer behind the van. Again, the complainant purposely left the trailer door open but the accused closed it in a way which made her think that he had locked it. Thus, even though there was no evidence that the door had actually been locked, she became frightened at this point. The accused then initiated a number of moves each progressively more intimate than the previous, despite her protests every time. He stopped on each occasion when she said 'no' but persisted shortly after with an even more serious advance.

Clearly, any compliance by the complainant was done out of fear and the conversation that occurred between them indicated that the accused knew that she was afraid and not a willing participant. Despite this, the trial judge acquitted the accused of sexual assault relying on the defence of 'implied consent'. This decision was upheld by the Court of Appeal before the Supreme Court of Canada finally reversed it by holding that the defence of 'implied consent' did not exist in Canadian law. Instead, it unanimously observed that, 'the case is not about consent since none was given. It is about myths and stereotypes'. The Supreme Court referred to authorities on sexual consent and quoted the following to justify its stand:

'Myths of rape include the view that women fantasise about being rape victims; that women mean 'yes' even when they say 'no'; that any woman could successfully resist a rapist if she really wished to; that the sexually experienced do not suffer harms when raped (or at least suffer lesser harms than the sexually 'innocent'); that women deserve to be raped on account of their conduct, dress and demeanour; that rape by a stranger is worse than one by an acquaintance. Stereotypes of sexuality include the view of women as passive, disposed submissively to surrender to the sexual advances of active men, the view that sexual love consists in the 'possession' by a man of a woman, and that the heterosexual sexual activity is paradigmatically penetrative coitus.'

In short, the ruling held that in order to be legally effective, consent must be given freely.

In *R v. Hall* (1993),⁵¹ the accused was employed as an educator at schools for the hearing impaired. Over a 13-year period of employment, he assaulted seven hearing-impaired women aged 15 to 18 at the time. The accused initially claimed that he was either (i) not involved in sexual activities, or (ii) that the women had consented, or (iii) that he believed that they had consented to the alleged acts. However, following further investigation, the accused admitted to being sexually involved with some of the victims after they had ceased to be students. He also admitted to sexual contact with some others while they were students. The complainants often did not verbally or physically resist his advances as they felt that they had no choice but to respond to since he was either their coach or teacher.

Under Canadian law, if a complainant submits or does not resist by reason of the exercise of authority, the offence of sexual assault is made out as a charge. Consequently, the so-called defence of 'honest belief', i.e. that the complainant consented to the sexual activity, becomes harder to prove.⁵² Accordingly, the Ontario Court held that the lack of physical and verbal resistance did not amount to consent. It ruled that there was power imbalance on many occasions of which the accused was aware. He knew that it was wrong to be sexually involved with the students, and he was also in a position of authority with regards to some of the complainants who had been subjected to 'conditioned compliance'⁵³ during their residency periods from an early age. Neither did he enquire that they consented, and instead was wilfully blind to whether or not they did. He was subsequently convicted on charges of sexual assault and indecent assault.

Age and consent

The age of consent is a legal concept – often translated into legislation – which prohibits a man from having sexual intercourse with a woman below that age; the commission of which results in a crime of statutory rape whereby consent

⁵¹ (1993) O.J. No 3344; DRS 95-04385.

⁵² This judgment was made before *R v. Ewanchuk* (1999) mentioned earlier.

⁵³ Conditional compliance occurs in situations when the victim does not verbally or physically resist the advances of the accused because she finds herself powerless as the accused is in greater control of her. The development of this concept diminishes the defence theory that when the victim does not raise any objection the accused can infer that she consented to sex.

by the woman is immaterial. Rape of minors and teenagers often fall under this category. The age of consent varies from 16 to 18 years in different jurisdictions. In South Asian countries, marriages involving young women or girls below the statutory age prescribed by law continue to be performed. Indeed, even though child marriages are prohibited by special statutes, they are nevertheless considered legal under various family laws. This is because the law prohibiting them only chooses to punish those who perform such marriages, but leaves the question of the marriage's validity to the personal laws of those concerned. In such situations sexual intercourse below the statutory age of consent is not termed as rape as personal laws do not recognise marital rape. Further, the age of consent varies if the accused is the husband. In India, sexual intercourse by a man with his wife amounts to rape only if she is below 15 years. Such cases are rare given the cultural context of child marriages and children below the age of fifteen are hardly in a position to press charges of rape against their husbands.

Problems also arise when young women are not able to prove their age. This happens in situations where they are (i) just below the age of consent, (ii) illiterate, or (iii) do not possess any documents to show proof of age. In such cases, courts perform a test called 'ossification' where a doctor studies the shape of the bones and comes to a conclusion regarding the age of the girl. It is not a conclusive test but both the defence and the prosecution try to use it to their advantage. The issue becomes important because as mentioned, sex with a woman below the age of consent amounts to statutory rape. Her consent would thus be immaterial.

Courts are confronted with a dilemma in cases where the age of the accused and that of the girl is close to the age of consent. Existing laws do not make any distinction between statutory rape by teenagers versus those by adult males. A possible solution is to treat teenage offenders as juveniles as this would not only deal with the age factor but the gap factor between the accused and victim. The lesser the gap, the lower the sentence imposed should be. However, this should be exercised with caution where power relations are at play. For example, in a case where the victim who works as a domestic helper, and is close to the age of 16 years has sexual intercourse with her employer's 19 year old son, power relations play a dominant role even though the man is himself very young.

For sentencing in such cases, the severity of punishment is not as important as the surety of punishment. Formulations of the juvenile justice system could be adopted. Even so, in the long run, recommendations should be designed to address the overall dilemmas around the issue of consent. This would inevitably mean legal reform.

Male-defined behavioural standards

Consent has traditionally been defined by male behavioural standards.⁵⁴ In many court decisions in Asia, factors that define lack of consent include the degree of resistance, loose moral behaviour or community reputation, physical injuries, and previous sexual relations with accused or other men, etc. The ‘test of reasonableness’ described earlier often determines how the ‘reasonable man’ would react in a given case and does not include women’s experiences.

The following cases from India illustrate how a protectionist approach of courts in the absence of gender sensitivity may end up enforcing stereotypes. They highlight how the imposition of male-defined behavioural standards can be detrimental to women. The cases are included here to caution lawyers and human rights activists to be aware of such approaches and to address arguments accordingly.

In *Karnel Singh v. State of M.P.* (1995),⁵⁵ the conviction was upheld on the basis of the statement of the woman. However, the court appeared more impressed by the fact that she had explained the absence of injuries, by stating that ‘she was laid on minute sand which was lying on the floor; and, therefore, there were no marks of injury’. In other words, the burden of proof in this instance fell on the woman.

In the same case, the court took a protectionist approach based on gender stereotypes. Responding to the defence’s argument about the delay in filing the complaint, the court said, ‘India[n] women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband!’⁵⁶ At the same time, in upholding conviction, it generalised about Indian women by male-defined behavioural standards and by forming an opinion of them as if they were superior to women from other cultures, who supposedly would have behaved differently.

In *Kuldeep K Mahato v. State of Bihar* (1998),⁵⁷ the Indian Supreme Court, again judging by male-defined standards, observed that the ‘victim’ had sufficient opportunity not only to run away from the house where she was raped but could have also sought help from her neighbours.

⁵⁴ See footnote 12.

⁵⁵ AIR (1995). SC 2472.

⁵⁶ *ibid.*

⁵⁷ AIR (1998) SC 2694.

In *Kumudi Lal v. State of U.P.* (1999),⁵⁸ the victim died of strangulation yet the court reduced the death sentence of the accused to life imprisonment.

'The circumstances indicate[d] that the victim was not unwilling initially to allow the appellant to have some liberty with her. The appellant not being able to resist his urge for sex [then] went ahead in spite of her unwillingness for a sexual intercourse but she offered some resistance and started raising shouts. At that stage in order to prevent her from shouting, the appellant tied her *salwar* [trousers] around her neck that resulted in strangulation and death.'⁵⁹

The main concern here is not the reduction of sentence, but rather, the reasoning given by the court which reinforces myths about rape.

The question of credibility in lack of consent

Since consent is the single most important defence in a rape trial, defence lawyers often bring into the evidence the character and reputation of women to attack the survivor's credibility. In the penal laws of some countries, when a man is prosecuted for rape or an attempt to 'ravish', it may be shown that the survivor was of generally immoral character. This is called impeaching the credibility of a witness and the conduct of the 'victim' is to be brought into question.

Where credibility is an issue, the approach of the Supreme Court of Canada is worth considering:

'Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence, which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.'⁶⁰

Although made in the context of instructions to be given to a jury, the process is the same for a judge acting alone.

⁵⁸ AIR (1999) SC 1699.

⁵⁹ *ibid.*

⁶⁰ *R. v. W (D)* (1991). 1 SCR 742.

Character and reputation

As stated, in consent issues the character and reputation of a 'victim' often come into play. Attacking a woman's character and questioning her past sexual conduct are all instances that reinforce the myths about rape. The cases below illustrate how courts have been swayed by the character and reputation of the woman.

In *State of Maharashtra v. Madhukar Narayan Mardikar* (1991),⁶¹ the complainant was a commercial sex worker who reported being raped by a policeman. Even though the Indian Supreme Court convicted the accused, it also observed that the survivor,

'Was honest enough to admit the *dark side* of her life. 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. She is equally entitled to the protection of law. Therefore merely because she is a woman of *easy virtue*, her evidence cannot be thrown'. [Emphasis in italics added]

The court's use of the term 'easy virtue' is telling of how even at this level, judges are influenced by the dominant bias against sex workers in society. The High Court had earlier dismissed the complainant's case on grounds that it would be extremely unsafe to allow the fortune and career of a government official to be jeopardised by the uncorroborated testimony of 'such a woman who makes no secret of her illicit intimacy with another person'.⁶²

The *Prem Chand v. State of Haryana* (1989)⁶³ case relates to the gang rape of a woman who had eloped with her boyfriend but ended up being raped by two officers at the police station. The arguments of the defence lawyer reflects the way in which the character and reputation of the woman was projected,⁶⁴ and

⁶¹ AIR (1991) SC 207.

⁶² The reasoning of the High Court is found in the judgment of the Supreme Court since it was an appeal against the order of the High Court.

⁶³ AIR (1989). SC 937.

⁶⁴ *Ibid.* 'The counsel for the appellants [the accused] referring to the evidence of the medical officer who on examination on the victim girl gave his opinion that the girl was used to having frequent sexual intercourse and particularly there was no mark of violence of sexual assault on any part of her body, as well of other urged that the victim was a woman of questionable character and easy virtue with lewd and lascivious behaviour and the very fact that this girl had not complained of the alleged rape said to have been committed at the police station till she was interrogated by the prosecution witness 20 shows that the present version was not worthy of acceptance'. [sic]

subsequently persuaded the court that the 'peculiar' facts and circumstances of the case coupled with the conduct of the 'victim' did not warrant the minimum sentence required under the law.

The judgement caused a furore where the court in another order clarified that it had not characterised the 'victim' as a woman of questionable virtue or made any reference to her character. Rather, it maintained that the expression 'conduct' was used in the lexicographical meaning⁶⁵ for the limited purpose of showing how the woman had behaved or conducted herself in not telling anyone for about five days that she had been sexually assaulted. Despite going on the defensive, the court still did recognise the fact that especially when the offenders are police officers, it is quite normal for a woman to be silent about a case of sexual assault and only complain later.

Corroboration and treatment of circumstantial evidence

In the region, there has been a slow shift from the requirement of corroboration, where some courts have now started to hold that a man may be convicted on the sole testimony of the woman. Even so, the shift is still very marginal and there is a tendency to disbelieve the evidence of the survivor depending on the attitude of the presiding judge. At times the language of the law puts the burden on the survivor. Under the Bangladesh Evidence Act, for example, with the leave of the court, a witness's credibility may be impeached through attacks on character.⁶⁶ Likewise, while judgments have watered down this concept, the provision remains handy for defence lawyers who use it to harass witnesses. It would require a very sensitive judge and an alert prosecution to object to irrelevant questions of this nature.

As an aside, it is worth pointing out that while the law allows for the victim's character to be questioned, in many systems previous complaints and convictions of the same nature against an accused cannot be used to show his conduct except on the question of sentencing. This clearly indicates the gender bias in the law.

⁶⁵ The court implies that the term conduct has been used in the literal meaning as defined in the dictionary. The Oxford Dictionary describes conduct as the manner in which a person behaves.

⁶⁶ 'When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character'. Section 155 of the Evidence Act, dealing with impeaching credit of the witness. Malaysia, Singapore and India which had a similar provision in their laws have repealed this.

The two examples below show how courts have developed the law in relation to corroboration and treatment of circumstantial evidence. However, while the judgment of the Indian Supreme Court in convicting a man used male behavioural standards, in Hong Kong the court appreciated the facts very differently.

In *State of Maharashtra v. Chandraprakash Kewalchand Jain* (1990),⁶⁷ the case involved a police constable who had allegedly raped a woman. In line with the Indian Supreme Court's earlier view that a 'victim' of rape cannot be treated like an accomplice, and that nothing under the law would require corroboration,⁶⁸ the trial court held that the evidence of the 'victim' established the guilt of the accused. Nevertheless, upon appeal, the High Court acquitted him. Indeed, in the past, courts have held that the woman's evidence must inspire confidence. Yet the whole notion of 'inspiration of confidence' is often up to the subjective satisfaction of a judge.

In another case of a woman raped by a policeman, the Supreme Court while observing that the police constable in uniform and on public duty had coerced the 'victim' into total abject surrender, also noted that it was never suggested during her cross-examination that the woman was not a prostitute,⁶⁹ revealing yet again, the male biases of the judiciary in rape cases.

In *The Queen v. Chow Siu-Hei and Tsang Hin-Fung* (1996),⁷⁰ the accused were charged with raping a 13-year old girl. The sequence of events in the case started with a group of boys amusing themselves on the waterfront. Three girls then joined them and the group stayed together playing guessing games where the loser on each occasion had to drink beer as a forfeit. The 'victim' lost a number of times and drank a fairly large quantity of beer, which made her, according to witnesses, unsteady and slurred in her voice and to an extent, incoherent. She left the waterfront in the morning in a cab with three of the boys, believing that another girl in the group would join them at her apartment. The friend did go to the 'victim's' apartment where they played some more games. The 'victim' also consumed more alcohol before taking some tablets to relieve her dizziness and falling asleep.

⁶⁷ 1990 1 SCC 550.

⁶⁸ 'If she does not lack understanding, ordinarily her evidence must be accepted without requiring further corroboration and conviction can be founded on that basis. Her evidence must receive the same weight as attached to an injured witness'. See also *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* (1983) 3 SCC 217.

⁶⁹ 'Even a prostitute has to be paid to make her agree to such intercourse'. See *State of Maharashtra v. Prakash and another* (1993) Supp (1) SCC 653.

⁷⁰ 1996 HKC Lexis 1037; 1996 HKCU 123.

In her evidence, the 'victim' claimed that having slept for some time she sensed that she was being touched and that someone was doing something to her. She realised then that she was being raped. She spoke of two occasions of penetration, but used the term 'molesting'. This was an important factor because in many jurisdictions, the victim has to use the word 'penetration' as opposed to 'molesting' because the latter may not lead to a charge of rape. This notwithstanding, the accused argued that the victim was willing and that she did not say anything but instead lay motionless. So there was on one hand evidence of willing cooperation and consensual intercourse, and on the other, of gang rape while the victim was comatose and unable to resist.

Significantly, the trial judge directed the jury to look at the charge against each of the accused individually. On the issue of consent he observed,

'What is rape? It is a person having sexual intercourse with a person without her consent and at the time that he has that sexual intercourse without her consent, he knows she does not consent, or he is reckless as to whether she consents or not. And reckless means that he did not believe she was consenting and could not have cared less whether she was consenting or not, and pressed on regardless.'

He continued saying,

'In order to commit the offence of rape you don't have to be the person who actually has sexual intercourse with a woman without her consent. If another person takes part in it, by holding her down or holding onto her, or doing something in order to prevent her resisting, knowing that she is not consenting and believing that she is not consenting, then that is equally rape even though it is not the person who actually penetrates her'.⁷¹

Based on these and other directions, the jury was able to return a guilty verdict. The directions of the judge holding that accomplices in rape cases have a role as participants – even when they may not have participated in the actual act but prevented the victim from resisting – is of great relevance in rape trials.

Treatment of medical evidence and psychiatric/psychological evaluation

A medical witness is an expert to assist the court. S/he is neutral and does not represent the interest of either parties, and her/his evidence is really of an

⁷¹ *ibid.* paragraph 14.

advisory character given on the basis of the symptoms found during examination. This expert witness is expected to put before the court all materials inclusive of the date which induced her/him to come to a particular conclusion and at the same time, enlighten the court on the technical aspects of the case by explaining the terms of science. This way the court, although not an expert, may form its own judgment on those materials after giving due regard to the expert's opinion because once this is accepted, it no longer represents the latter's individual opinion but that of the court.

Medical evidence assumes great importance in rape trials. The survivor cannot have a bath and must keep her clothes intact for tests. The problem is compounded in many countries as health centres are not available or accessible for immediate medical check ups. Often too, medical examinations can only be done in government hospitals because a crime has been committed. But by the time a woman reaches there – for which a requisition is required from a judge – valuable time and crucial evidence in the form of semen, hair, etc. is lost.⁷²

More worrying, doctors are not always sensitive to rape victims. Despite medical evidence to the contrary, there have been instances where they still speak of the tear of the hymen as indicating a woman is not a virgin.⁷³ Such judgments appear prevalent in South Asia. In other instances, like in India where there are insufficient psychiatrists and psychologists, these experts are not usually called as witnesses in rape cases.

An early judgment of the Privy Council in *Chiu Nag Hong v. Public Prosecutor* (1965),⁷⁴ a case from Hong Kong, approaches the issue of corroboration with caution. The case and judgment is discussed at length below because it deals with many issues including consent and medical evidence.

The complainant was befriended by the accused and they knew each other for about a week. They went dancing. The accused persuaded her that her

⁷² Similarly, there is a lot of paper work involved even before the clothes can be sent for examination during which valuable time is lost and evidence destroyed. These concerns make the issue extremely complex and problematic and adds to difficulties in assessing the impact of the crime.

⁷³ For a critique of medical evidence see Pratiksha Baxi (2005), 'The Medicalisation of Consent and Falsity: The Figure of the Habitue in Indian Rape Law' in Kalpana Kannabiran (ed.), *The Violence of Normal Times* (New Delhi, Women Unlimited).

⁷⁴ (1965) 31 Malayan Law Journal. p40.

husband was sick and drove her to a house where the latter was supposedly present. When she went inside the house, he pushed her into a room and under threat of strangulation, she was raped by him. The accused argued that it was consensual sex and this – the issue of consent – became one of the core issues of direct conflict between the two parties. The defence called a male specialist in Obstetrics and Gynaecology to give evidence, and in the doctor's view, had she been in a state of shock due to what had happened, the woman would be unlikely to be able to give such a detailed account of the offence. By inference therefore, it was contended that there was consent.

Despite this, the trial court convicted the accused on the basis of the complainant's evidence. This decision was confirmed by the Court of Appeals but later reversed by the Privy Council which held that where a judge convicts an accused without corroborating evidence, it should be made clear that s/he has taken this into account. Put differently, the judge is aware of the risk of convicting without corroborative evidence, and yet still finds the accused guilty beyond reasonable doubt.

In the case of *Manga v. State of Haryana* (1979),⁷⁵ the 'victim' was hearing impaired and also did not possess the faculty of speech and hence could not make a statement. The defence argued that she was not examined and the doctor had opined that she could not have been raped on the day as alleged in the investigation. The court upheld the conviction by accepting the medical evidence that recorded injuries on the victim and a torn hymen even though there was no bleeding and held and that these two circumstances were sufficient to convict the accused.

Consideration in child rape cases

Child rape requires a totally different approach to the foregoing discussions.⁷⁶ In the case of a child, consent would be of no relevance but courtroom procedures are often the same as that for an adult. Most systems have laws protecting the juvenile child and prescribe a friendly ambience during their trial. However, in the case of a child rape 'victim' this is not so, and the child is subject to cross-examinations.

⁷⁵ AIR (1979) SC 1194.

⁷⁶ This paper restricts itself to raising certain issues relating to child rape and does not discuss the larger issue of child sexual assault.

In public interest litigation,⁷⁷ the Indian Supreme Court has ordered trial courts to place a screen so that the child witness does not have to see the accused. Further, the questions put in cross-examination on behalf of the accused are required to be given in writing to the trial judge who may direct these to the 'victim' or witnesses in language that is clearer and not embarrassing. The child should also be allowed sufficient breaks as and when required.⁷⁸ In cases where the child is of an age when s/he cannot testify, courts have taken the evidence of parents instead. Judges, however, are required to convince themselves about the capacity of the child to testify before them. If the testimony of the child is cogent and clear, and the child exhibits an understanding of questions put to her/him, conviction can take place on their testimony alone. If possible, corroboration by medical evidence is prudent.

Certain problems that occur when a child is a witness warrants attention. For instance, the child has to be guided and assisted through the trial process. Given this, legal provisions must be made to admit hearsay evidence so that people who have heard the account of the abuse can testify in cases of child rape. Also, with the advancement of technology, courts should use, wherever possible, closed-circuit television and videotaped evidence to record and observe the evidence of the child. In Fiji, after lengthy submissions to the Director of Public Prosecutions, the court permitted a nine-year-old to give her evidence behind a screen.⁷⁹ Similarly in New Zealand,⁸⁰ a child can give evidence by videotape, through closed-circuit television or from behind a screen. Necessary changes can thus be brought about in the evidence laws of the region.

⁷⁷ Under the laws established by judicial precedents, any individual can seek constitutional remedies in public interest. Cases have been filed on behalf of marginalised groups by public-spirited individuals and human rights groups.

⁷⁸ *Sakshi v. Union of India* (1999) 6 SCC 591 and (2004) 5 SCC 518 at pp 546.

⁷⁹ Reported in Fiji Initial States Party Report to the Committee on the Rights of the Child, 1996 CRC/C/28/Add.7.

⁸⁰ Evidence Amendment Act 1989 (No. 104 of 1989), 13 November 1989.

GUIDELINES ON HANDLING RAPE CASES

Fair trial standards have always insisted on the right of the accused, but not the complainant, to have legal representation. The following guidelines by the Indian Supreme Court have included and extended many of the rights that are hitherto available only to the accused to the 'victim'.⁸¹

- Complainants of sexual assault cases should be provided with legal representation by someone who is well acquainted with the criminal justice system, and can, among other things, assist the 'victim' at the police station and in court, prepare her for the case, explain the nature of proceedings to her, and provide her with guidance as to how she might obtain help of a different nature – for example, counselling or medical assistance – from other agencies. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests at the police station represents her till the end of the case.
- Legal assistance should be made available at the police station. Since the 'victim' might very well be distressed, the support of a lawyer while she is being questioned at the police station would be of great assistance.
- The police should be obligated to inform the 'victim' of her right to representation before any questions are asked of her. Further, a police report should state that the 'victim' was informed of this right.
- A list of available lawyers should be kept at the police station for 'victims' who do not have a particular lawyer in mind or whose own lawyer is unavailable.
- Upon application by the police, a lawyer should be appointed for the complainant by the court, at the earliest moment. However, to ensure that the 'victim' is questioned without delay, advocates should be authorised to act at the police station before leave of the court is obtained.
- In all rape trials, anonymity of the victim must be maintained as far as possible.
- Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment. Therefore, some form of a criminal injuries compensation fund should be made available.⁸²

⁸¹ *Delhi Domestic Working Women's Forum v. Union of India and others* (1995) (1) SCC pp14.

⁸² In India, compensation for victims is awarded by the court upon conviction of the offender and depends upon the individual judge. The Criminal Injuries Compensation Board, is yet to be constituted. The Supreme Court has held that such a board when constituted will take into account the pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of childbirth if this occurred as a result of rape. See *Delhi Domestic Working Women's Forum v. Union of India and Others* (1995) 1 SCC 14.

Issues of procedure

Belated complaints

In a criminal case, the complainant is required to lodge a report at the earliest opportunity. In rape cases, however, as already noted, there is a general reluctance on the part of a female survivor to report the offence immediately. Fear, shame and stigma besides the controlling influence of the family are factors that often prevent her from coming forward and lodging a complaint. While delay in filing a case is usually fatal to the prosecution, there have been some positive judgments which acknowledge the reasons of such a delay and still end with the accused being convicted. Despite this, it is advisable for the prosecution to submit evidence about the reason for the delay at the chief examination stage so that it is not taken advantage of by the defence later.

The following case of *Public Prosecutor v. Teo Eng Chan and Others* (1987) demonstrates how the courts have condoned the delay in filing a complaint. Upon reaching home, a 'victim' of gang rape remained silent when questioned by her mother. After a bath she went to bed. She had a nightmare about being pregnant. The next morning, without informing her mother or her sisters, she went to a clinic and asked the nurse for contraceptive pills. When the nurse asked her to see the doctor, the young woman told her that she had been gang raped. The doctor then referred her to the police but did not conduct a detailed medical examination as she did not have facilities to do so. Subsequently, on the issue of the delay in filing a complaint, the court took note 'of her youth and inexperience, her evidence of her relationship with her family and her ignorance of ways of making complaints to the police'. It also accepted the survivor's reasons for not making a complaint before she saw the doctor.⁸³

Bail

The accused in a rape trial is entitled to certain rights relating to his liberty. Foremost among these is the right of bail that is available under all criminal jurisdictions and is also a requirement of fair trial standards under the ICCPR.⁸⁴ Article 9(3) of the ICCPR recognises the right to bail: 'It shall not be the general rule that persons awaiting trial be detained in custody but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings,

⁸³ See (1987) SLR 475; (1987) SLR LEXIS 221 (High Court) decided on 3 November 1987.

⁸⁴ Article 14 of the ICCPR.

and should occasion arise, for execution of the judgment.' The ICCPR clearly implies bail is the rule and jail the exception. Under the common law system an offence is committed against the state. The victim is therefore only a witness for the prosecution. The victim has no way of knowing when the accused seeks bail as she is considered only as a witness.

Almost all systems require the accused to be produced before a judge or magistrate within a stipulated period after his arrest. This generally ranges from 24 to 72 hours in different countries. In some like India, the law also provides for anticipatory bail, which means that anticipating arrest, the accused can obtain bail. Once this happens, the accused is not arrested unless he violates the conditions imposed on him, or is sentenced after trial.

Courts have great discretion in granting or rejecting bail: it may be granted either immediately or after an investigation is completed. Clearly, the right to bail is a human right; however, in granting it, courts must accord it as much consideration as they would to an accused of murder. In other words, in granting bail in cases of rape, Courts must have consideration for the impact of the release of the accused on the woman concerned, in terms of increased vulnerability to threats, physical harm and so on. This is very important, as often the 'victim' does not even have a way of knowing whether the accused has been granted bail or not, as she is considered only a witness in the matter- who are procedurally, not informed of such decisions. Courts and prosecutors should have the mandate to be inclusive of the prosecutrix in the procedures of the court, to ensure her awareness and knowledge of the steps being taken to ensure justice for her.

Trial process⁸⁵

In most countries, the law dictates that criminal trials are open to the public. The ICCPR lists moral concerns and privacy of parties involved as situations when courts do not have to hold a public trial. In some countries too, there are statutes which specifically provide for the exclusion of the public from trials involving

⁸⁵ Under the ICCPR, an individual is entitled to fair trial standards both at the pre trial stage and at the trial stage. See Article 9,10, 14 and 15. See also 'What is a Fair Trial? A Basic Guide to Legal Standards and Practice', Lawyers Committee on Human Rights New York, 1995 and *Draft Body of Principles on the Right to a Fair Trial and a Remedy* in 'The right to a fair trial: Current recognition and measures necessary for its strengthening. Final report prepared by Mr. Stanislav Chernichenko and Mr. William Treat' UN Doc E/CN/Sub.2/1994/24 dated 3 June 1994 at p63.

situations where a witness may not testify because of acute embarrassment or fear.⁸⁶ Additionally, the right to privacy must be available to a 'victim' from the outset, i.e. the initiation of a complaint, meaning that her name is not to be published at any stage. While strict prohibitions exist when the case is taken up for trial, the right to privacy must also be enshrined at the stage of investigation itself. Countries should consider making it mandatory for rape survivors to have the option of having their trials in-camera.

Others argue that in-camera trials have a tendency to 'cover up' the real issue, and that it would be difficult to monitor rape cases and attitudes of the justice delivery system. However, the right of the survivor to privacy must take precedence over the right to know. The choice must be hers to decide on whether she wants to go public or not.

Whereas countries like India have made it mandatory for a court to hold a rape trial in-camera, in Tonga, this is optional, meaning that the power is discretionary and the woman must make a request to the court first. In situations like this, not all women are aware of such a provision in the first place or if they are, may not be bold enough to make this request.

Examination and cross-examination⁸⁷

In common law systems the prosecutor begins a case by examining witnesses to elicit the necessary facts required to prove a case. The questions must be simple, clear and easy so that the witness is able to give cogent replies. If the prosecutor loses sight of a relevant fact, this might affect the outcome of the case. For example, it may allow the defence lawyer to pick holes in the prosecutor's examination to prove the case of the accused. Thus, a witness has to be very alert to face this onslaught of words.

Evidence laws permit the credibility of a witness to be impeached by cross-examination. Defence lawyers have wide latitude on the kinds of questions they can ask even though the court can disallow questions that are not relevant to the facts of a case. More worrying, most rape victims are ill-equipped for cross-

⁸⁶ In *Geise v. United States* (1958). 262 F.2d 151 the public were excluded in a rape case where witnesses were minors.

⁸⁷ Article 14 (3) of the ICCPR requires that a person facing a criminal charge must have the right to examine the witnesses against him. Section 137 of the Evidence Act in India guarantees this right in both civil and criminal cases. Similar provisions are found in the law of evidence in countries following common law.

examinations. Already, the process of recounting details of the violent act to strangers is very traumatic. This is made worse by a court atmosphere that is very impersonal and intimidating. Indeed, even with progressive laws and judicial pronouncements, cross-examinations of witnesses still tend to be hostile. It becomes almost belligerent in some rape trials.

While some amount of detailed narration of the crime is necessary, these details should be elicited from the woman in the chief examination stage itself. Prosecutors, however, spend very little time briefing rape survivors. This is because even the best of them can be uncomfortable and inhibited while discussing details of the crime thus adding to the woman's distress.

Trial Observations

Having observers in a courtroom is one way of ensuring a less hostile environment. With the permission of the court, the presence of observers – e.g. feminist and human rights groups – in court halls could act as a check against irrelevant and unnecessary questions. Above all, it can provide strong support to a witness who otherwise would face a hostile 'predominantly male' environment. Prosecutors should object to unnecessary cross-examination that calls into question the conduct of the woman, and should also be sensitised on positive judgments on rape law. This is especially since the defence lawyer will want to win the case at any cost to prevent his/her client from facing imprisonment, and will use every trick of the trade to achieve this. In this light, the witness has to be equipped to face such a situation.

Trial observation is a method by which human rights groups monitor a trial and observe whether it is conducted according to fair trial standards. An observer representing the human rights organization watches the proceedings and participates in as many hearings that may be possible. The observer's presence makes the participants – particularly the judge and the prosecutor – aware that they are under scrutiny and this awareness may influence them to be fair. The presence of the observer can imbibe confidence in the victim and would make sure that justice is done and seen to be done.⁸⁸ International trial observation is a process where trials of cases of harassment and persecution of human rights activists and political opponents by Governments are observed.⁸⁹

⁸⁸ <http://www.ohchr.org/English/about_publications/docs/train7-f.pdf>.

⁸⁹ For further reference see <http://www1.umn.edu/humanrts/monitoring_chapter_13.html; <http://icj.org/article.php3?id=article>>.

In some systems as in India a victim of a crime can, with permission of the court engage the services of a lawyer to assist the public prosecutor.⁹⁰ The lawyer cannot argue or cross examine the witnesses but can file written submissions in the court. Women's groups make use of this provision to monitor cases of rape.⁹¹ Lawyers can also be watching brief holders. They cannot participate directly in the trial but can assist and brief the victim about the legal processes prior to the commencement of the evidence.

In many states the law stipulates that rape trials are not conducted in public but in camera. This is an exception to the general rule that trials must be conducted openly. Under the Indian law, the court can, on applications made before it, allow particular persons to have access to, or remain in the court hall when proceedings are on.⁹² However, unless the prosecutor stresses on these provisions courts in India do not as a rule follow them.⁹³ The ICCPR, while stipulating that a public trial is basic requirement for fair trial standards, permits certain categories of trials to be conducted outside the purview of the public. One such category relates to cases where the interest of private lives of the parties so requires.⁹⁴

Trial observation can be an important process by which a rape trial can be monitored to assess whether it addresses the concerns of rape victims.

Judgments

Aside from the consent issues discussed earlier, courts must also exercise caution in relation to judgments. Rape is often viewed as a matter of lust and passion rather than as violence. In other instances, courts have linked this phenomena to the institution of marriage. Even though such positions may secure conviction of the accused, this is done at the expense of reinforcing patriarchal beliefs and violating human rights norms. The following examples indicate how social norms can affect a rape judgment.

⁹⁰ Section 301 Code of the Criminal Procedure.

⁹¹ I have personally filed many applications on behalf of victims and women's groups to assist the prosecution and monitor trials.

⁹² Section 327 (2) and (3).

⁹³ The Supreme Court has bemoaned the fact that trial courts are either not conscious of the provision or realize its importance and has stressed the significance of holding trials in camera and not to allow any person to print or publish any matter in relation to such proceeding. *State of Punjab vs. Gurmit Singh* AIR 1996 SC 1393.

⁹⁴ Article 14 (1).

In *Phul Singh vs State of Haryana* (1980),⁹⁵ the accused raped his cousin's wife. He was sentenced to four years imprisonment. The Indian Supreme Court reduced the sentence to two years taking note of the age of the accused who was in his twenties and that the victim and that her parents had forgiven him. The court in this case relied on the affidavit filed by the victim's father in law in this regard and not that of the victim. In another case, the Indian Supreme Court held that the fact that after the rape the victim was living with the accused and had a child is a relevant consideration in fixing the quantum of sentence.⁹⁶ In societies where a great premium is placed on virginity and where sex outside the institution of marriage is considered taboo, judgments of this nature not only reinforce these myths but are also detrimental to women's rights.

Penalties and sentencing

Rape is a serious offence and needs to be dealt with severely. However, demands for harsh sentences can eclipse the real issues involved. One has to keep in mind that the harsher the sentence, the greater the requirement of proof for conviction. Thus the demand for the death penalty as a punishment for rape must be approached with great caution. Setting aside the debate about the ethics of capital punishment, severe punishments necessarily imply that the gains accrued from positive judgments will be offset by the smaller number of convictions.

What is required is a definite sentence rather than a severe punishment. Experience has shown that the higher the sentence imposed upon conviction for rape, the lower the number of convictions would be. It is worth recalling that the concept of a minimum sentence was introduced because it was felt that the power of judges to impose a sentence was too arbitrary. Furthermore, the issue of penalty should be viewed from a human rights perspective, that is, under international law even though states can determine sentences, torture and inhumane forms of punishment are prohibited.⁹⁷

Most statutes also prescribe a maximum period of imprisonment. In India, courts have the discretion to reduce to a minimum period, a sentence of an accused for adequate and special reasons mentioned in the judgment. Some of these have related to the woman's character or views that rape is due to man's uncontrollable lust. At other times courts have also taken into consideration

⁹⁵ *Phul Singh v. State of Haryana* AIR (1980) SC 249.

⁹⁶ *Bishnudayal v. State of Bihar* AIR (1981) SC 39.

⁹⁷ See for example, Article 7 of the ICCPR.

the age of the accused and his status in society, all exhibiting a bias in the culture of the law.

Compensation

The complainant in a rape trial also has a right to compensation.⁹⁸ The State should endeavour to provide financial compensation to victims if it is not available from the offender.⁹⁹ This has to be seen as a retribution for the violence inflicted on her and not for the sake of family honour. Yet, how does one determine compensation in such cases? Can one draw a parallel to accident cases while taking note of the fact that nothing can compensate for the violence of rape? If that were so, one would risk getting into the realm of determining the quantum

In some states, comprehensive legislation is required to provide for compensation. In the absence of legislation, however, courts can grant compensation to a rape survivor without going into the details of her age, status, etc. but instead compensate her based on the fact that it was an act of violent crime against her. Arguments have also been forwarded for the government, via a state fund, to provide compensation. This is justified on grounds that rape is a criminal offence, i.e. it is a crime against the state versus a crime committed between two individuals. Under the CEDAW Convention, States parties are obligated to protect women's rights. A link could therefore be made to support the argument that the state should provide for compensation by allowing judges to 'attach the property' of the accused – i.e. transfer a portion of his assets to the 'victim' – before a verdict has been passed.

In other regions like the Pacific, the issue of customary law is of particular concern as most cases of rape are not reported but instead solved by village chiefs. Village chiefs play an important role as mediators but there is great use of the 'settlement approach' when dealing with cases of rape, in addition to the application of customary defences. Under the 'settlement approach' fathers, uncles or brothers of the 'victim' get the compensation, as rape is seen as a devaluation of the bride price of girls. Other customary practices have involved the community forcing a girl to marry the rapist.

In *Chairman Railway Board and Others v. Chandrima Das and Others* (2000),¹⁰⁰ a Bangladeshi national was gang-raped by several employees of Indian Railways

⁹⁸ Article 12, The Declaration of basic principles for victims of crime and abuse of power

⁹⁹ *ibid.*

¹⁰⁰ AIR (2000). SC 988.

who had lured her to a hostel where they committed the offence. A lawyer filed a public interest litigation seeking restitution for her. The High Court then ordered the Indian Railways to compensate the 'victim' with a sum of 1,000,000 Indian rupees. The Board appealed against the decision arguing that they were not liable for this since the 'victim' was not an Indian national and therefore not protected by the Indian Constitution. Moreover, it maintained, the rape was committed by private individuals so they should instead be made liable for this.

The Supreme Court referred to a number of international human rights norms and standards including the Universal Declaration on Human Rights (UDHR), CEDAW, and various judicial colloquia including the Bangalore Principles of 1988,¹⁰¹ the Zimbabwe Colloquia of 1994,¹⁰² the Hong Kong Colloquia of 1996¹⁰³ and the Guyana Colloquia of 1997.¹⁰⁴ These colloquia require the judiciary to consider international law. Specifically referring to Article 2 of the UDHR – which ensures the entitlement of rights and freedoms guaranteed under it without distinction as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status – the Supreme Court upheld the judgment of the High Court on compensation, and found that the Indian Railways was vicariously liable for the action of its employees.

As the following example shows, the yardstick for compensation can just as easily reinforce existing social norms reflecting gender bias. It also can reinforce the patriarchal norm that women are only allowed sexual relationships within the institution of marriage.

A medical graduate who raped an eight-year old child was convicted by the trial court. He then chose to file various appeals. When the case finally came up to

¹⁰¹ Judicial Colloquium on the promotion of the Human Rights of Women and the Girl-Child through the Judiciary (the Bangalore Principles, 1988) <http://www.thecommonwealth.org/Internal/34021/34008/gender_and_human_rights/>.

¹⁰² Regional Judicial Colloquium for Africa, Zimbabwe (the Victoria Falls Declaration of Principles for Promoting the Human Rights of Women, 1994) <http://www.thecommonwealth.org/Internal/34021/34008/gender_and_human_rights/>.

¹⁰³ Regional Judicial Colloquium for Asia and South Pacific region (the Hong Kong Conclusions, 1996). <http://www.thecommonwealth.org/Internal/34021/34008/gender_and_human_rights/>.

¹⁰⁴ Regional Judicial Colloquium for the Caribbean region (the Georgetown Recommendations and Strategies for Action on the Human Rights of Women and the Girl-Child, 1997). <http://www.thecommonwealth.org/Internal/34021/34008/gender_and_human_rights/>.

the Indian Supreme Court, the child was 19. The court subsequently awarded the 'victim' a sum of 25,000 Indian rupees, to be paid by the accused. At the same time, however, it observed,

'We are told at the bar that the victim after having lost her virginity still remains unmarried undergoing the untold agony of the traumatic experience and deathless shame suffered by her. Evidently, the victim is under the impression that there is no monsoon season in her life and that her future chances for getting married and settling down in a respectable family are completely marred'.

In a paternalistic fashion, it further noted that, 'the helpless panic stricken father of the victim with a broken heart has entered the portals of this Court and is tapping the door, crying for justice.'¹⁰⁵

Civil action for rape

Normally, rape is tried as a criminal offence between the state and the accused. However, a 'victim' also has the option of filing a civil action. The right to lodge a complaint of this nature is derived from either a statute or common law. A civil action is over and above a criminal action. Its ambit is very wide, for instance, one can bring litigation for negligence against the police or other state authorities for not responding to help.

One of the main advantages of civil litigation is that the plaintiff can engage her own lawyer rather than depend on the state prosecutor. Civil actions are also easier to prove because the degree of proof required in such cases depends upon a preponderance of probabilities. This simply means that the court has to take note of all the evidence and come to the conclusion whether a 'reasonable' person could accept the facts. It does not require proof beyond reasonable doubt. On the downside, civil action can mean that a 'victim' has to pay for her expenses. As well, the accused may not be in a position to pay for damages even if he is found guilty.

In *Rolls v. Attorney General* (1989),¹⁰⁶ the plaintiff brought a civil action against the government of the Cook Islands for damages in a case where an escaped prisoner attempted to rape her. Her case was based on the common law on vicarious liability that the state is responsible for the actions of prisoners under

¹⁰⁵ *Madan Gopal Kakkad v. Naval Dubey and Another* (1992). 3 SCC 204.

¹⁰⁶ *Rolls v Attorney General of the Cook Islands* [1991] CKHC 3; HC Civil Case 036 of 1989 (1 June 1991) <<http://www.pacii.org/ck/cases/CKHC/1991/3.html>>.

its care, and must protect the public from them. She was subsequently awarded a sum of \$15,000 for the 'injuries and loss' she sustained.

Justice and closure

Due consideration ought to be given to the time lag between the commission of the offence and the trial and verdict. There are various stages where delay may be fatal to a rape case. The first is at the stage of registering the crime. While legal systems condone delays if these are justified, it is a requirement of prudence that the crime be reported at the earliest, as this would otherwise give defence lawyers a reason to attack a survivor's evidence. Delayed reporting may result in crucial evidence being destroyed. Once the crime is reported, an investigation should be conducted by police personnel who then file a report to the court. At this stage the survivor would have narrated her experience to the police, medical personal, psychologists etc. However, for various reasons, there is always a gap between the time the case is reported and taken up for trial. When this happens the survivor has to repeat her statements all over again, sometimes even after four to five years. This makes it a very traumatic experience for her particularly if there is no support system.

Once a report has been lodged, procedures and timeframes differ in each country. A case runs under the minimum, medium or maximum sentence, thus determining the sentence that will be imposed. Certainly, every country has its own procedures relating to a trial, and actual procedures take time or may be prolonged. This should be kept in mind when lodging a report so that a 'victim' is not under false hopes of immediately accessing justice. Such delays that do a disservice to 'victims' highlight another area in which legal reform is necessary.

Other areas of concern

Pregnancy arising out of rape

Pregnancy arising out of rape is closely linked to the issue of abortion, the status of which differs around the Asian region and requires a separate study in itself. In Malaysia and India, abortion can be performed if the pregnancy will cause mental and psychological injury to a woman.¹⁰⁷ In cases of rape, however,

¹⁰⁷ For Malaysia, see Section 312 of the Penal Code (Act 574) on 'Causing miscarriage' and the corresponding section of the Indian penal code.

the issue becomes more complex if the fact of pregnancy is used as evidence. For example, in a Madras case, the court's permission was sought to terminate a pregnancy to allow a DNA test on the foetus.¹⁰⁸ By the time permission was obtained, it was dangerously close to the end of the second trimester, i.e. harmful to the health of the woman. Thus, as far as possible court permissions should be avoided, and this would be more likely if the law recognises abortion as a right.

Incest

Incest is one of the least reported crimes because the site of the crime is the family. Many states do not have a separate definition of incest. They only have prohibited degrees within which persons cannot get married. In the Pacific, however, incest is defined as a distinct sexual offence. For instance, in Fiji, any male person who has carnal knowledge of a female person, who is to his knowledge his granddaughter, daughter, sister or mother, is guilty of a felony and is liable to imprisonment for seven years.¹⁰⁹ If a female over 16 consents to sexual relations with a male relative, the penalty for both is a maximum of seven years imprisonment. In Tuvalu and Kiribati, the age of consent is set at 15 years, and in the Cook Islands, Tonga and Vanuatu the penalty for incest is 10 years imprisonment.

V. THE APPLICATION OF INTERNATIONAL STANDARDS IN DOMESTIC LAW

In the last decade there has been an impressive development where international human rights standards are being used in litigation. This has been extremely important in the context of laws relating to women. When submitting their reports to the various expert committees that monitor the different international human rights treaties, countries have also indicated positive judgments by courts to show that they have fulfilled their obligations under these conventions. Courts today are also looking to international standards rather than merely falling back on precedents, and in this, the judiciary plays a critical role.

¹⁰⁸ Unreported judgment, 1993 Madras High Court. DNA testing is used to identify the accused in paternity suits.

¹⁰⁹ Laws of Fiji, Consolidated Legislation (1985) Penal Code (Cap 17), Section 178 <http://www.itc.gov.fj/lawnet/fiji_act/penal_code.html>.

The role of judges

Judges do not make laws in the same sense that legislators do. Rather, they interpret the law and when this is unclear, they are expected to fill in the gaps. The reasoning given by judges, thereby, becomes *de facto* law in and of itself. The more a judge has to apply her/his reasoning, the more s/he 'makes' law. In countries whose constitutions provide for judicial review, judges can strike down laws that are discriminatory or interpret these in consonance with constitutional guarantees or human rights principles. For example, the Supreme Court of Canada in *R v. Morgentaler* (1988)¹¹⁰ held as unconstitutional, the country's abortion law, which stipulated that an abortion was a criminal offence unless approved by a hospital committee. In so doing, the court observed that Canadians wanted a broad interpretation of the constitutional guarantee of the liberty and security of the person. In effect, its actions in striking down the law were as if it had been repealed by Parliament.

Judges are well placed to provide leadership in advancing gender interests, and to translate the commitments of governments into reality by referring to international standards. These, in turn, can inform decision-making in litigation at all levels, whether or not they have been incorporated into domestic legislation.¹¹¹ It is the vital duty of an independent, impartial and well qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop common law in light of the values and principles enshrined in international human rights law.¹¹²

The Indian Supreme Court has read the provisions of international treaties to which India is a party into domestic law. In the case of *Vishaka and Others v. State of Rajasthan and Others* (1997),¹¹³ the court framed guidelines on sexual

¹¹⁰ 1 SCR 30.

¹¹¹ Lum, B., Byrnes, A. and Connors, J. (eds.) (1997). *Advancing the Human Rights of Women: Using international human rights standards in domestic litigation*. Commonwealth Secretariat.

¹¹² The Bangalore Principles, developed at the first judicial colloquium among senior judiciary of the Commonwealth, 1988. The Bangalore Principles, the concluding statement of the colloquium are also reproduced in *Developing Human Rights Jurisprudence Vol 7 Seventh Judicial Colloquium on the Domestic Application of Human Rights Norms*, London Commonwealth Secretariat and Interights.

¹¹³ AIR (1997). SC 3011. This case arose out of a class interest litigation filed by women's groups against the state for having failed to protect and safeguard the rights of women in workplace against sexual harassment and abuse. The litigation was filed in the context of a brutal gang rape of a social worker who was 'taught a lesson' by the perpetrators for having tried to prevent child marriages in the state of Rajasthan.

harassment citing Article 11 of the CEDAW Convention, which directs the state to take appropriate measures to eliminate discrimination against women in the field of employment. This includes the prevention of gender-specific violence and sexual harassment in the workplace. The court also referred to the Australian case of *Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh* (1995)¹¹⁴ and cited favourably, that one has a legitimate expectation to have international instruments observed, respected and enforced, in the absence of contrary legislation. In *State v. Filipe Bechu* the Magistrates Court cited CEDAW and stated that the State has responsibility to ensure that all forms of discrimination against women are eliminated.¹¹⁵

Significance and application of international human rights norms

Statutory common law on rape is often ambiguous, uncertain or incomplete, allowing wide latitude in judicial interpretation. This is where human rights norms are relevant. Judges can draw upon these to interpret and creatively apply them to constitutional provisions, and common and customary law alike. In so doing, they draw attention to the wealth of decisions from countries with shared jurisprudential traditions, where judges have engaged in such interpretation and application.¹¹⁶ Indeed, interpretation of the law must be consistent with international human rights norms. So while customs, traditions, culture and religion assume great importance to individual and group identities, none of these considerations should be invoked to excuse violence against women.

Equality and justice both require a sensitive understanding of the needs, realities and perspectives of women so that they may be free from violence and infringements of their 'personal dignity' and privacy. Violence against women is an affront to human dignity, a violation of human rights and a barrier to the achievement of substantive equality. It is the duty of the judiciary to understand the nature, extent and impact of violence against women in the conduct of proceedings in their courts and in their judgments.¹¹⁷ Judges and judicial officers at all levels should be gender-sensitive and aware of the need to protect women

¹¹⁴ (1995) 128 ALR 353.

¹¹⁵ Criminal Case No. 79/94. <<http://www.rrrt.org/assets/OHCHR%20Best%20Practice%20Case%20Study.pdf>>.

¹¹⁶ Conclusions of the Asia Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights. Hong Kong 1996.

¹¹⁷ *Vishaka and Others v. State of Rajasthan and Others* AIR (1997) SC 3011.

against violence through a proactive interpretation of the law.¹¹⁸ National courts should also take into account international human rights norms, and mould and develop the law consistent with these norms.

Among the human rights instruments that can be used for the development of jurisprudence for the promotion of women's human rights are the CEDAW Convention and the Declaration on the Elimination of Violence against Women. Other non-gender specific instruments include the ICCPR and its Optional Protocols, the ICESCR, ICERD and CAT. Other non-gender specific instruments that can also be used in this regard are the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Guidelines on the Role of Prosecutors, Code of Conduct for Law Enforcement Officials,¹¹⁹ and Basic Principles on the Role of Lawyers.¹²⁰

Judicial activism

In a case of rape or sexual assault, there are two elements involved: the sexual nature of the contact; and the absence of consent. While the first element is objective, the second is purely subjective. This is determined by reference to the complainant's subjective internal state of mind based on the evidence, towards the act at the time when it occurred. While the woman's testimony is the only source of direct evidence as to her state of mind, the trial judge must still assess her credibility in light of all evidence presented.

Judgments in criminal cases do not only reflect the guilt or innocence of an accused. They often reflect social norms. Even a sensitive judge who acknowledges that women are discriminated against can bring a certain bias into a judgement that might reinforce patriarchal norms. The thinking and decisions of judges are more likely to reflect and represent their own identity-based experiences rather than that of groups of which they are not a part.¹²¹ Particularly in rape, they bring into

¹¹⁸ *ibid.*

¹¹⁹ Adopted by General Assembly resolution 34/169 of 17 December 1979. <http://www.unhchr.ch/html/menu3/b/h_comp42.htm>.

¹²⁰ Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990 <Source: http://www.unhchr.ch/html/menu3/b/h_comp44.htm>.

¹²¹ Mahoney, Kathleen. E. "Gender and the Judiciary: Confronting Gender Bias", in Adams, K. and Byrnes, A (eds) (1999) *Gender Equality and the Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the girl child at the National level*, Report of the Commonwealth Secretariat, pp 90.

their decisions a cultural value system that is often replete with sexist assumptions and prejudices against women. In such cases, gender bias can take the form of myths and misconceptions about the social and economic realities encountered by women. There is a tendency to blame the 'victim'.¹²²

There should thus be consciousness among judges that in interpreting the law, they must be motivated by the larger objective of addressing deeply embedded prejudices against women and the historically unequal gender relations in society. They must strive in every case to engage in creative interpretation that seeks to reconstruct these relations and bring out genuine equality. One of the most important areas in which to carry out this task is criminal law, as suggested in the CEDAW Convention's Article 2(g), which obliges states parties to 'repeal all national penal provisions which constitute discrimination against women'. This also constitutes a call to jurists to apply to penal laws, the principle of substantive equality, and to modify legal doctrines that do not respect this.¹²³ The development of public interest litigation in India is an example of judicial activism where the courts have moulded the relief for and protected the human rights of rape survivors.

Application of female behavioural standards

Judges must bear in mind that the complainant's fear need not be reasonable, nor did it have to be communicated to the accused in order to determine that there was lack of consent. While the plausibility of the alleged fear and any overt expressions of it are obviously relevant to assessing the credibility of the complainant's claim that she consented out of fear, this approach is subjective. Courts must be conscious of the fact that while considering the fear of the victim, they do not bring a male standard into it. In this context, international standards on the issue of consent gains significance. Rather than address this from a male behavioural standard, international human rights standards look at the issue from the perspective of all persons, including women.

As a result of conflicting judgments on what constitutes 'lack of consent' or 'against the will', the judge's role assumes greater importance since a conviction would depend upon how s/he defines these.

¹²² See the Report of the Special Rapporteur on violence against women, *supra*.

¹²³ Justice Claire L Heureux-Dube, *Applying Women's International Human Rights*, pg 25 Eighth Judicial Colloquium on the Domestic Application of International Human Rights Norms held in Bangalore, India, 1998 published in *Developing Human Rights Jurisprudence, Vol 8* published by Commonwealth Secretariat and Interights.

VI. CONCLUSION

Rape is an extremely traumatic experience for a woman and not all of her ordeal gets heard or understood. The best of trials can never truly compensate for the agony that a woman undergoes. But the trial process can take note of her experiences and this is best done by addressing it through recognition of international standards that have evolved after a series of law reforms in which the women's movement has participated.¹²⁴

The use of international human rights instruments by courts in countries like India to advance women's human rights has been a very positive development. Similarly, the rejection of concepts such as 'mistaken consent' and 'reckless behaviour' by the man as grounds of prosecution, has provided valuable judicial precedents and can serve as a blueprint for change.

This paper is not exhaustive but has touched upon some of the crucial issues that relate to rape. The focus is seen from the angle of the law and the crime. Within these parameters it has weaved in various developments in international law, as well as selected domestic laws. It is hoped that this will facilitate discussions and be of use to human rights practitioners, lawyers and judges who are part of the process to develop feminist jurisprudence on this subject.

¹²⁴ This would also involve sharing positive developments in the region such as the One-Stop Crisis Centres that were introduced in Malaysia. Here, all investigations by medical personnel and the police are conducted at the same place, making the task for the survivor to narrate her evidence much easier, and where she is given trauma care. Such a structure is worth replicating in other countries. Unfortunately these centres are not functioning any more. They are an ideal model that would be worth replicating in other countries.



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