

Skewed Normatives in India's Judicial Discourse on Rape

India has relatively strong [legal frameworks](#) in place to promote gender equality. However, the achievement of justice and equality for women in their everyday lives remains an elusive goal. Medha Garg analyses some judicial pronouncements from cases involving rape to argue that the judiciary itself often displays patriarchal attitudes that indirectly reinforce sexist and misogynistic norms.

Indian judiciary, time and again has proffered deeply unsettling and misogynistic observations in cases involving rape. In a recent judgment passed in *Mohit Subhash Chavan vs. the State of Maharashtra & Anr.* [2021], the former Chief Justice of India asked the accused whether he is willing to marry the victim, who was a minor at the time of the alleged assault. In a similar judgment passed by the Madhya Pradesh High Court [2020], the Court declared that the accused will only be granted bail on the condition that the victim ties a 'rakhi' on the accused, thus laying on him a brother's duty of protecting his sister's honour as per Hindu cultural norms. In both these instances the suggestion seemed to be that the law that had been breached was a *moral law* which demands that men should be women's protectors rather than the Indian penal code that stipulates non-violation of each individual's personhood regardless of gender.

Similar perturbing observations about how an Indian woman "ought" to have reacted "after being ravished" were made by the Karnataka High Court [2020] while granting bail to the rape-accused. Once again, the Court seemed to be trying the character of the victim before trying the crime committed by the accused. As these remarks drew immense indignation, activists and academicians [slammed](#) the adjudicatory reliance on "moralistic and misogynistic grounds" and demanded verdicts based on laws and facts; not on prejudice.

Rape Tropes

However, there are hundreds of rape cases in India's judicial system that engender patriarchal tropes of female integrity routinely. Once, the Supreme Court actually fashioned a check-list to determine the reliability of a "traditional Indian woman" as opposed to a "western woman" (See, para 9, *Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat* [AIR 1983 SC 753]).

Other than the cases that prompted this piece, in recent times, such outrageousness can be observed in cases like *Tarun Jit Tejpal vs. State of Goa* [2021], *Vikas Garg vs. State of Haryana* [2017], *Md. Farooqui vs. NCT of Delhi* [2017], and *Raja vs. State of Karnataka* [2016]. This image, alarmingly microcosmic of judicial dispositions toward rapes, became ubiquitous on social media after the deeply unsettling remarks by the Karnataka High Court on June 22.

All these cases lay out certain standards of conduct to be observed by the victims of rape – both before and after the commission of crime – failing which their character inevitably descends into the arena of freewheeling promiscuity;

a tunnel-visioned area where their testimony is consequently deemed false or unreliable. As such, archaic notions of 'apt' femininity and sexual restraint are invoked to test the reliability and veracity of a victim's statement.

Attempts are made to determine consent not by what the woman said, but by what the man understood. Dr. Veena Das of Johns Hopkins University [reminds](#) us that courtrooms are fast becoming sites for examining how the victim's experience of sexual violence is "delegitimised and decriminalised by converting it into consensual sex." Countless attempts are made to establish the victim's complicity to intercourse. The existence of injuries on the victim's body, and how or whether force is used somehow become crucial elements in the [determination of consent](#).

Moreover, such observations simply disarm the unarmed. It is perturbing how fact-finding in a rape case ends with labelling the victims as women of 'easy virtue' or as any other archetype that comfortably slots into the androcentric hierarchy of [judicial morality](#).

Underlying Causes

Like all institutions, the judiciary too is run by individuals. At times, individuals perform abysmally owing to their obliviousness to the crudity of their remarks. Consciously or unconsciously, Indian adjudicators have let themselves be the purveyors of misogyny and sexism. Such facile generalisations are not unprecedented as *history* lends credence to those outmoded claims.

This is not to say that judgments should be eager to please; rather, they must refrain from endorsing gender stereotypes.

In his *Concept of Law* (1961), HLA Hart argued that in a legal system, judges take upon themselves the obligations to apply valid legal norms, even where others might reasonably deem them catastrophically wrong to feel that way. As such, public opinion is shaped by judgments; it is seldom the case that judgments are impacted by public opinion. Given this, sexist remarks in judgments do offer legitimate grounds of public indignation. While popular outcry once remained unheeded by those wielding power, the advent of social media has fashioned it into a potent tool for the rectification of public errors.

This too, however, is naturally not perfect. At times, the media bestows incongruent levels of attention (and thereby, [justice](#)) to victims, some of whom it then sacrifices on the altar of selective outrage while others suffer public amnesia. Some stories will only be unearthed by generations to come, who will sit in judgment when they scrutinise their history – which is our present.

The Way Forward

Solving a problem, in any case, begins with the recognition of its existence. While it is indubitable that the Indian judiciary has been unmindful in generalising the conduct of the victim, in many cases, these remarks were subsequently [expunged](#) from the records. This expunging of the insensitive remarks might be seen as a redeeming feature of such orders.

Possessing far-reaching power as it does, the judiciary needs to exemplify rectitude rather than endorse patriarchal predilections that have plagued these judgments. They show vestiges of a gendered normativity and apathy toward the plight of victims which need to be eradicated. Our revered judiciary might as well lead this change – by practising abstinence from passing skewed observations.

There were some signs that this change might be starting. Recently, in *Aparna Bhat & Ors. vs. State of Madhya Pradesh & Anr.* [2021], the Supreme Court took charge of the situation and while considering the Bangkok General Guidance for Judges, which constitutes stereotypes apropos women that must be avoided in judicial pronouncements, observed that passing such statements reinforces the already existing stereotypes against women, and indirectly sends out a message that the criminal system condones the acts of the accused.

However, despite the guidelines iterated by the Indian Supreme Court, many Indian courts have continued with similar remarks and victim-shaming in cases like *Tarun Jit Tejpal vs. State of Goa* [2021] and *Abhishek Chouhan v. State of Madhya Pradesh* [2021].

In addition to being enjoined by their consciences from making such remarks, judges in the future, one hopes, would be inclined to follow the example of the Supreme Court in *Aparna Bhat*. It is time to ensure a legal system that is not grounded in misogyny and sexism. The very existence of an instance like *Aparna Bhat* may predict the beginning of an appreciable shift towards the development and inclusion of more gynocentric standards in law and order. One hopes this materialises into a sustained improvement in attitudes across board instead of becoming a thing of the past; forgotten as a solitary occurrence in the tides of public empathy.

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