

## PalArch's Journal of Archaeology of Egypt / Egyptology

### WOMEN'S ACCESS TO JUSTICE: UNDERSTANDING THE BARRIERS

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Palarch's Journal Of Archaeology Of Egypt/Egyptology 17(12). ISSN 1567-214x**

**Keywords: Access to Justice, Criminal Justice System, Prosecution, Violence against Women, Victim, etc.**

#### ABSTRACT

Violence against women has been increasing globally, putting an interrogation mark on the implementation mechanism of the governmental policies, both nationally and internationally. The National Family Health Survey (NFHS-4) reports that almost every woman has faced violence of different nature, since the age of 15. The ever-increasing statistics relating to violence against women has resulted in legislating/framing various new policies like sensitising the prosecution system, harsher punishments to the offenders, *etc.* for the elimination of such crimes but they are without much success. In spite of all the efforts, many of the victims of such crimes do not report due to the dread of social stigma and dearth of confidence upon the justice delivery mechanism. The failure of laws in controlling the crime rate and protecting the women from such crimes raise a doubt regarding the presence of challenges in the judicial process that prevent the victims from having access to the criminal justice system. Unless the issues which prevent the victims of such crimes from having access to justice system, the violence against women cannot be eliminated from the society. Thus, this paper aims to investigate various issues/challenges that threat/prevent the women from approaching the criminal justice system and seeking justice.

#### Introduction

Violence against women has been increasing globally, putting a question mark on the governmental policies, both nationally and internationally. It is being reported that one in every three women experience violence, either by intimate partner or non-partner, raising a major concern for women health, empowerment of the fairer sex and gender equality. The National Family Health Survey (NFHS-4) of 2015 has reported that almost every woman has faced violence of different nature, since the age of fifteen (Sheikh, 2018). And it is estimated that less than 40% of the female victim seek help formally or informally and only around 10% reports the case with police as per United Nations Office on Drugs and Crime (2019). According to World Bank Report (2018), violence against women costs up to 3.7 percent of GDP in some countries, which is quite alarming. Thus, the ever-increasing statistics relating to violence against women

and decrease in reporting has resulted in legislating various policies like sensitising the prosecution system, harsher punishments to the offenders, *etc.* for the elimination of such crimes but they could not achieve much success. However, the problem related to violence of women seems to be carcinogenic and uncontrollable inspite of all the efforts taken by the government and one of the most probable reasons for this is connected to the problem with access to justice.

Before going deeper into the issue related to access of justice in violence against women, it is necessary to understand the term 'violence against women'. According to Article 1 of Declaration on Elimination of Violence Against Women has defined "violence against Women" as "any act of gender-based violence that results in physical, sexual or psychological harm or suffering to women, and this includes the threats of such acts including arbitrary deprivation of liberty". Violence against women folk is at times difficult and critical to prosecute especially when the violence is perpetrated by someone known like husbands, fathers, colleagues, or neighbours. There are researches that suggest that women are more at risk from people they know than they are from strangers (ICRW, 2004). One such reason is lack of reporting or under reporting of the crime. Victims are reluctant to approach the prosecution service seeking justice due to many reasons. In an article in *Livemint* (2018), it was stated that almost 99% cases of sexual violence in India goes unreported and if it the case, it is an alarming fact. The failure of laws in controlling the crime rate and protecting the women from such crimes prove that there are number of issues that prevent the victims from having access to the criminal justice system, like patriarchal mindset of the prosecution system, under-reporting of such crimes, incompatible pre-trial procedures, *etc.* Unless the issues that prevent the victims of such crimes from having access to justice are resolved, the violence against women cannot be eliminated from the society. Thus, this paper aims to investigate various issues that threat or prevent the women from approaching the criminal justice and seeking justice. The paper is divided into three sub-heads – the first will look into the idea as to how violence against fairer sex is a violation of human rights. Then the next part will check the procedures undertaken for the elimination of the violence against them by the legislature. Then the next part of the paper will see what are the challenges connected with the access to justice and analyse whether justice may be accessed by the victims of the gender-based violence and finally, the paper will conclude with necessary findings and conclusion. This paper will be based on both primary data *i.e.*, Law Commission Reports and secondary data like research papers on the topic.

### **Magnitude of the Problem in India**

The magnitude of the problem of violence against womenfolk may be adjudged/understood by observing the increasing crime rate in spite of making a number of amendments in the criminal law. There had been various changes made out in the criminal laws with the objective of easing the access of justice for the female victims. But the increasing number of crimes against women seems to show an altogether different picture to the on-lookers. In 2008, the rate of reported violence against women was 1, 95, 856. In 2014, after bringing about the famous 2013 Criminal Law Amendment, the NCRB has reported the increasing rate of crime against women. Against 3, 39, 457 registered crimes against women in 2014, there were 3, 39, 954 registered cases in 2016 and 3, 78, 277 registered cases in 2018 showing an ascending growth. Such steep growth in the crimes against women forces one to question the efficiency of prosecution mechanism for crimes against women and the laws relating to it.

### **Conceptual Overview of Violence Against Women**

Women's rights were not always considered as human rights and it was only in

the World Conference on Human Rights (1993) in Vienna that it was declared by the participating countries that even the rights of women are inclusive within the ambit of universal human rights. However, the journey leading to this declaration took a long and persistent struggle by the women rights movement to convince the international community to recognise that violence against women is a serious violation of human rights. As a result of continuous movement, the international human rights instruments - Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) expressly provide for the principles of non-discrimination and equality and that the State parties ensure that the rights laid down in the human rights instruments are implemented without discrimination.

Thus, violence against the fairer sex is a violation of the basic human right that guarantees safety, security and life without discrimination to every human being. The United Nations International Research and Training Institute for the Advancement of Women (INSTRAW, 2005) has reported that at least one in every three women or around one billion women, have been beaten, forced in sexual relationship, or abused otherwise. According to the same report, it is stated that most of the time, abuser is a member of her own family or an acquaintance of hers. Sexual violence and childhood sexual violence are considered to be two of the most damaging crimes in the society as the effect of these crimes can have long-term consequence on physical and mental health of women and their well-being as per Cross Government Action Plan (2007). The U.N. Conference on Women (1985) stated in the final report as –

“Violence against women exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned and sexually abused and raped. Such violence is a major obstacle to the achievement of peace.”

In an analysis of UNIFEM Annual Report of 1993, it was provided that violence against the women, be it private or public violence, was recognised as an abuse of human rights of women (Kraus & Mantilla, 1995). The Universal Declaration of Human Rights was the first U.N. instrument on human right that expressly provided for equality of men and women, but it did not identify violence against the womenfolk as a distinct problem. Then the women centric Convention on the Elimination of All Forms of Discrimination against Women talked about various forms of discrimination but it did not include provision on violence. Finally, it was the U.N. Committee on Discrimination against Women (CEDAW) that talked about abused women and a focus on reform of the law. Even the Recommendation 19 of CEDAW provides that ‘gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy freedom on a basis of equality with men’. The preamble of the U.N. Declaration on the Elimination of Violence Against women has expressly provided that the gender-based violence is the outcome of the “unequal power relations between men and women”. The efforts of the international laws ultimately led to the recognition of women’s right to safety against all type of violence as a basic human right and violent behaviour towards the women is definitely violation of the human right.

### **Procedural Guarantee for Eliminations of Violence Against Women**

There are number of legislations – both substantive and procedural for eliminating the evil of violence against women across the globe. There are number of substantive laws like Indian Penal Code, Dowry Prohibition Act, PCPNDT Act, *etc.* legislated in India for the purpose of eliminating violence against women, keeping at par the international norms and standards due to the concerted efforts of the Judiciary, Legislature, Law Commission of India, NGOs and Women activists. Even the Constitution of India has guaranteed a dignified

life and right to equality to women through its various provisions (*viz.* Art. 14, 15(1) and 21) and entrusted every Indian citizen with the duty to renounce practices which are offensive to the self-esteem or self-respect of women (Art. 51A(e)). Keeping in line with the Constitutional guarantee, various provisions of Indian Penal Code (I.P.C.), Criminal Procedure Code (Cr. P.C.) and Evidence Act were amended in 1983, 2002, 2005, 2008, 2013 and 2018 respectively to facilitate the reporting and investigating of violence against women, especially sexual violence. The 1983 Amendment brought about changes with regard to prosecution of custodial rape by providing enhanced punishment (Sec. 376 (2) of I.P.C.) and presumption of absence of consent (Sec. 114 (A) of Evidence Act) in such cases. In 2002, the Evidence Act was amended to delete Sec. 155 (4) and added a provision in Sec. 146 of the Evidence Act which prohibited the defence lawyer from discrediting the victim's testimony by proving her past sexual acts especially in cases of sexual assault. 2005 saw the amendment of Cr.P.C. with regard to the provisions of medical examination, in cases of sexual violence and plea bargaining. 2008 Amendment has made changes with regard to the behavioural obligations of medical personnel and other healthcare providers in case of victims of sexual violence. Sec. 154 of Cr. P. C. was amended in 2013 to include the provision that information given by the victim of such crimes must be recorded by the women police officer or any women officer. This provision further states that in the event of the victim being temporarily or permanently mentally or physically disabled, then the information has to be recorded and video-graphed by a police officer at the residence of the victim who want to report, or any other convenient place in the presence of interpreter or special educator (wherever necessary). Further the police officer must get the statement of the victim recorded by a Judicial Officer as soon as possible under Sec 164 (5A) (a). Sec. 309 of Cr.P.C. provides that the enquiry or trial relating to the sexual offences must be completed within a period of two months from the date of filing of charge-sheet, however it nowhere mentions the time-limit for filing the charge-sheet. With regard to the presence or absence of consent of the victim, Sec. 114A of Evidence Act provides that in case the sexual intercourse by the accused is proved and there remain the question as to the presence or absence of consent of the victim, and the victim states that she did not consent, then the Court must presume that she did not consent. Further in 2018 Criminal Law Amendment Act, new addition of crimes was done in the Indian Penal Code and accordingly, necessary changes were made in the Evidence Act and the Criminal Procedure Code to accommodate the additions made in the IPC.

From the above procedural guarantee of criminal law, it can be understood that the sexual violence against the community of women is considered to be serious and the government wants to protect the women from this evil. Therefore, the criminal law prosecuting such crimes has been amended number of times to increase the efficiency of the prosecution mechanism. However, the rate of reported crimes and successful prosecution somehow raise an eyebrow over the fruitfulness of the provisions.

### **Issues in Access to Justice**

The low rate of reporting of crimes and failed prosecution are due to various reasons beside the inefficient implementation mechanism. After all, violence against women has been always classified something private and hence, there are various types and different nature of issues that stand as a hurdle in the access of justice for the female victims. There are number of studies indicating that only a small portion of victim population approach the prosecution system seeking justice and there are number of reasons *e.g.* stigma, relationship between the offender and rapist, embarrassment, fear of rejection by family,

self-blame, *etc.* for not reporting the crime (Williams, Linda S., 1984). Thus, Corsini (2012) has rightly commented that cultural practices in India continue to affect human behaviour and therefore at times, law alone cannot control the crime rate of violence against women. Had the law been a successful in curbing the increasing rate of crime against women, the ever-changing criminal laws would have been able to control it but the reality shows an altogether different picture.

An issue in relation to the women's accessing the justice system in criminal cases is the proving the case beyond reasonable doubt. In criminal cases, the burden of proof is upon the prosecution to prove the case beyond reasonable doubt with necessary/admissible evidence. This strict requirement, at times, stand as hurdle in the way of accessing justice for the victims of violence against women because many of the violence occur in the private sphere with less available evidence for public eyes. The standard of proof in criminal cases is definitely higher than mere 'preponderance of the evidence' (the certainty must be greater than 50%) in civil cases. Definitely the reason for strict requirement of standard of proof in criminal law is understandable but this strict standard is difficult to achieve in certain crimes against women resulting in the acquittal of the accused. Thus, the highest requirement of the standard of proof in the violence against women needs a serious reconsideration for a successful prosecution.

With regard to the female victims of sexual violence, beside the issues related to standard of proof, there remain other barriers that prevent the women from accessing the mechanism of prosecution. The victims and their families experience different kind of difficulties and barriers in accessing justice, *e.g.* official biases in the prosecution of rape cases (Bryden and Lengnick, 1997) which at times results in the unwillingness of the victim in seeking legal redress. Although there are reforms in rape laws, yet they appear to play somewhat secondary role than it is ought to have believed. Besides, the issues that stands as hurdle in the way of access to justice is the culture of endless delays in Indian courts (Derby, 2014).

Another issue that acts as hurdle is the way prosecution process takes place in the court, especially the evidencing process and the public trials of the private violence (like rape, domestic violence, *etc.*). At times, the prosecution process makes the victim feel that she is being inflicted with violence again and again. Also, many a times, it is felt that a girl is being raped because of her actions which might have attracted the offender to commit rape. And due to such blaming thought process, a victim tends to hide the incidence of sexual violence from the prosecution system thereby making the access to justice inaccessible or myth.

Further, the lack of financial liberation on the part of women and their powerlessness to move out of a violent situation and state inaction against offenders of violence also prevent the women from accessing the justice delivery system (Coomaraswamy, 2005). Even at times, the prosecution system stresses that it is the women who is primarily responsible for the preservation of the family rather than seeking justice to the victim. Many of the victims of such crimes do not report due to the dread of social stigma and want of faith upon the criminal justice system (Human Rights Watch, 2017).

### **Analysis & Conclusion**

From the above discussion, it is clear that there is no dearth of laws for the protection of women but there are problems that stand in the way of victim and prevent her from approaching the prosecution system. The issues that act as hurdles in the way of justice may be understood from three different perspectives – one at prosecution level, others at societal level and at individual

level. At prosecution level, there are instances where it has been stated that the prosecution officials and medical personnel, at times, seem to discourage the victim from approaching the justice delivery mechanism on the basis of various aspects like social stigma, prolonged investigation, harassment to family members and blaming the victim. However, this scenario fluctuates on the basis of the setting where the victims belong – whether rural or urban. In rural set-up, this problems like social stigma, blaming the victim, harassment to family members, reducing the prospect for marriage, *etc.* might be more but in urban set-up, the problems like prolonged investigation, reducing reputation of the family, *etc.* maybe more. In relation to societal perspective, the challenges in relation to women's access to justice take another facet depending upon the caste, education, financial status and the mindset of the people. The issues mentioned above may vary but never absent in an Indian society. In *Barriers of Justice* (2017), a number of victims were interviewed wherein they stated that there are instances where the villagers have either out-casted the family of victim or threatened to do so for approaching the prosecution system and seeking justice. Because the villagers feel that by going Court, the chances of the victim getting marriage prospect reduces. Also, the villagers, at times, feel that reporting of such incidents will result in losing the respect of the village. This scenario might change a bit if the society is that of urban locality with higher education but there is no denial to the presence of challenges in the women's access to justice. Even the class status, at times, prevents one from approaching the prosecution process because of the fear of losing respect in the society. This variation in insight may be considered at individual level as well. Being a part of the society, even we, as individuals, get influenced by the peer pressure present across the society. The patriarchal mindset definitely influences every one of us, be it the person from the prosecution system or someone from outside the system. And unless this outlook is changed in all the level, the laws alone cannot reduce the rate of crime by increasing the reporting and prosecution.

Thus, this paper does not advocate for new piece of legislation, rather advocate for a change in the approach towards the problem. The plightful status of women in the access of justice was even observed in *Nipun Saxena's* case (2018) and therein it was stated that the female victim of sexual violence is treated worse than the perpetrator of the crime. The victim of such violence is treated like untouchables and at times, even ostracised the victim and her supporters from the society (Human Rights Watch Report, 2017). Because of many such fears, many a times violence against women are less reported in the name of protecting the false honour of the family. In Verma Committee Report (2013), it was acknowledged that failure of good governance in the society is the apparent reason for the unsafe environment demolishing the rule of law and not the absence of piece of legislation. Further the Committee Report conveyed that Judges should act as legal tool to build a culture of discipline in the courtroom imposing sanctions on the advocates for making unwarranted requests for adjournments to cause undue delay, resulting in failure of justice. Further to make the prosecution process comfortable and convenient for the rape victims, they should be examined by trained nurses or medical practitioners who would be treating them post sexual violence. Even the Human Rights Committee (1992) mandates the State parties that they should act in order to eliminate the prevalence of violence against women and they may be held responsible for private acts of violence against women, and in case they “fail to act with due diligence to prevent human rights violations or to investigate and penalise the acts of violence, and for providing compensation.” According to the Special Rapporteur (2011), “the State's due diligence obligation under

international human rights law consists of preventing, investigating, punishing acts of violence against women, protecting women from violence, and providing an effective remedy and reparation to victims of violence". Thus, it seems like rendering of justice to the victims of gender-based violence will remain a myth, unless the overall societal patriarchal outlook towards the problem and the solution changes.

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