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DISTINCTIVENESS OF PROCEDURE OF TRAIL OF OFFENCES AGAINST WOMEN.

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ABSTRACT

This article investigates why the security and justice system has failed to protect women especially with regard to procedural requirements in ensuring the criminal justice system amidst new criminal jurisprudence. It also tries to understand the basic dicta of the traditional criminal justice system and the suitability of their application in contemporary times. It is sought to outline various crimes against women, and bring out the nuances of new criminal jurisprudence in the existing legislation and to critically evaluate them.

Keywords - *Distinctiveness, justice, offences, trail*

INTRODUCTION

The right to life and liberty is the most important of all human rights because existence and protection of life are condition precedent for the enjoyment of the rest of the human rights. The importance of the right to life and personal liberty is evidenced in the traditional criminal system which has created procedural safeguards through the due process of law or procedure established by law. Some of these rights are kept even beyond the reach of the executive power during an emergency also.¹ The ultimate goal of a legal system is the realization of justice or freedom, which is long and complicated, which plays a vital role in society.

Man is rational and would like to live in society as a social being. However, due to myriad reasons always women have become victims of various crimes. That is the fact of the matter, in all the societies despite women being accorded hallowed position in scriptures of all religions crimes against women continue to be perpetrated unabated. Law is one of the great civilizing forces in human society, and that the growth of civilization has generally been linked with the gradual

¹ Forty- fourth Amendment Act, 1978 has made significant change in Article 359 it provides that the President does not have the power to suspend the enforcement of the fundamental rights guaranteed in Articles 20 and 21 of the Constitution.

development of a system of legal rules together with machinery for their regular and effective enforcement.

This has led to the enacting of laws and the creation of mechanisms to protect women. Many of the acts which are injurious to women were criminalized through various statutes. But these crimes still persist unabatedly, indicating abysmal failure of the security and justice provisions which is witnessed in procedural laxity in the trial of offences against them. The whole system is tilted towards the accused person,

Constitution also gives many rights to the accused person. The often quoted and criticized adage of the criminal is that “better that ten guilty persons escape than one innocent suffer.” The other basic principle responsible for tilting the scale in favour of the accused is the popular Latin maxim of “*Ei qui affirmat non ei qui negat incumbit probatio*,” (He who invokes the aid of the law should be the first to prove his case)² and as crime is generally proven affirmatively, the burden lies on the prosecution, which is clear that the victim has to prove the guilt of the accused person and then there is a paradigm shift of onus of proof from the prosecution to the accused person, further the accused also reverts with the presumption of guilt by the court in his favour.

“*Nullum crimen sine lege*” is the principle in criminal law and international criminal law that a person cannot or should not face criminal punishment except for an act that was criminalized by law before he/she performed the act. Adding up to this, there are constitutionally guaranteed rights to the accused person which will serve as a shield to the accused. Ultimately because of multiple protections available to the accused person, there are wrong acquittals, which pose a serious threat to the society and also the criminal justice system.

CORDIAL PRINCIPLES OF TRADITIONAL CRIMINAL JURISPRUDENCE

The best description of the expression “Due process of Law” would say that it means, in each particular case, such an exercise of the power of government as the settled maxim of law permit

²Keane, A. The Modern Law of Evidence, 5th edn., (London: Butterworths, 2000), p.86.

and under such safeguards for the protection of individuals rights as those maxims prescribe. “Due” means what is ‘just and proper’.³

The Due process development in India is enriched mainly by two principal reasons: First, the concept of ‘procedure established by law’ under Article 21 is required to be just, fair and reasonable because of the interactions of Articles 14, 19 and 21. Secondly, inter-relationships among Articles 20, 21, and 22, as a corollary of development under Article 21, have furthered this phenomenon to a considerable extent.⁴ Regarding the first reason, the Constitution Makers preferred a neutral phrase “procedure established by law” in Article 21 for the protection of life and personal liberty of persons with a clear intention to avoid the possible judicial vicissitudes pertaining to due process of law.⁵

The expression “Due Process” has derived its meaning from the word “the law of the land” used in Section 39 of Magna Carta of 1215. The due process in the common law system is shaped and nourished by customary practice. But the American legal system went one step ahead and gave statutory recognition to the due process. The terms “the law of the land” and “due process of law” were transplanted in the American soil by English Colonialists. US Congress incorporated Human Rights in the Constitution by the first ten Amendments that are known as Bill of Rights. The Fifth Amendment⁶ and Fourteenth Amendment⁷ to the US Constitution are the most important because they lay down that person’s life, liberty or property would not be deprived without due process of law.⁸

³ Dr Chidananda S. Patil, “Due Process Analysis of New Criminal Jurisprudence” in Dr Geetha Bhaskar and V Sudesh ed. *The changing law: Lecture on Current Trends in Jurisprudential Thought* (Bangalore Prof.V.B. Coutinho Sistieth Birthday Celebration Committee,2003) p.187

⁴ P. Ishwara Bhat, *Fundamental Rights*, (Kolkata: Eastern Law House Private Ltd. 2004), p.90.

⁵ Constituent Assembly Debates, Vol. VII, (New Delhi: Secretariat, Government of India, 1948-1949), pp. 845-852.

⁶No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

⁷All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁸ The first Ten Amendments to the US Constitution came into effect on November 3, 1791. However, only first eight Amendments dealt about the protection of human rights.

In the Constituent Assembly of India, our forefathers fear that ‘the procedure established by law’ would deter and that would have a balancing approach with the insertion of article 21 and 22. However, B.N. Rao did not adhere to the change that has occurred in the United States Supreme Court’s view after 1937, of vitiating substantive due process in economic and social legislation.⁹ Article XXXI of the Japanese Constitution provides that “No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to the procedure established by law.” Finally, the said assembly endorsed article 22 would serve an adequate measure without the presence of Due process of law provision under article 21 of the Indian Constitution.¹⁰

Right to equality also imbibes in criminal jurisprudence, right to get fair compensation; Article 20 guarantees the constitutional protection to the person said to be an accused, who is also accorded with fair equality and judicial voice perhaps wider in respect to the right to life and personal liberty where the accused person is also attached with human rights protection in prison. These rights cannot be altered or changed since it is imbibed in the constitution of India.

VARIOUS CRIMES AGAINST WOMEN

There are various crimes against women which are termed as Violence against women (VAW). It is also known as gender-based violence, primarily committed against women. Vivid types of crimes against women include rape and its aggravated forms as mentioned in Indian Penal Code, molestation, acid attack, domestic violence, dowry harassment, trafficking of women for prostitution, sexual harassment etc. In the present circumstances, when offences against women are on a peak, the definition of rape has though expanded with the Criminal Law Amended Act 2013 and also stringent definition was done in Criminal Law Amended Act 2018, to catch through the net the accused person and to see that he is in no way goes without being punished with the introduction of mandatory minimum punishment but also enhanced punishment which may extend to life or death sentence depending upon the aggravated of offences. Certain areas remain grey such as other forms of sexual assaults like protracted sexual assaults by the kith and kings,

⁹ T.R. Andhyarujina, “The Evolution of Due Process of Law by the Supreme Court”, in, Supreme but Not Infallible, B.N. Kirpal, et.al., (ed.), (New Delhi: Oxford University Press, 2008), pp. 195-196.

¹⁰ V.N. Shukla’s Constitution of India, 12th edn., (Lucknow: Eastern Book Company, 2013), p.215.

relatives, marital rape as it does not recognise other forms of sexual assaults like protracted sexual assault by relatives, marital rape as aggravated forms of rape. This causes grave injustice to the victim.

Adding to this section 155(4)¹¹ of Indian Evidence Act 1872, is a sought of open defence given to the accused who can humiliate the victim of violence in the courtroom by the questioning of her past sexual history. There are other aspects to be looked into like lack of proper investigation, the presumption of innocence until guilt is proved, unprompted medical examination both in the case of rape or attempt to rape. Medical examination of the victim and the accused soon after the incidence often yields a wealth of corroborative evidence. Such valuable evidence will be lost if a medical examination is not conducted in a timely manner.

As observed by Justice Krishna Iyer in *Rafique v. State of UP*,¹² “when a woman is ravished, what is inflicted is not a merely physical injury but the deep sense of some deathless shame.... judicial response to Human Rights cannot be blunted by legal bigotry.” Therefore, rape laws were amended after infamous *Kathua* and *Unnao* and *Nirbhaya* cases to make them more deterrent and make them more cooperative towards victims, insisting upon professional investigation, diligent prosecution, and an expeditious trial. Failure of law reflects the failure of society to protect and serve humanity.

DEVIATIONS FROM SETTLED PRINCIPLES OF CRIMINAL JURISPRUDENCE

The Constitution of India and the Criminal Procedure Code give some basic rights to the person accused of a crime. One of the basic tenets of our legal system is the benefit of the presumption of innocence of the accused until he is found guilty at the end of a trial based on evidence. In a democratic society, even the rights of accused are sacrosanct, the accused in India are afforded certain rights, the most basic of which are found in the Indian Constitution. The history of crime is as old as the existence of humanity on this earth. The criminal justice system revolves around

¹¹Sec 155(4.) of Indian Evidence Act 1872 When a man is prosecuted for rape or an attempt to ravish~ it may be shown that the prosecutrix was of generally' immoral character.

¹²A.I.R. 1977 S.C. 1307.

the “accused” and “law” function as the means to an end called “justice”. Crime and justice are related to each other through “laws”. The “criminal justice system involves the interactional patterns among crime victim, crime reporter, police, prosecutor, courts, defence counsel and corrections, probation and parole personnel.”¹³ The primitive man had not known anything like human rights. With the dawn of civilization, one might have hoped that some respect for human rights would emerge.¹⁴

There is a presumption of innocence of the accused person till his guilt is established beyond any shadow of a doubt. Law believes that “It is better that ten guilty persons escape than that one innocent suffers.”¹⁵ An accused is to be presumed to be innocent unless the presumption is rebutted.¹⁶ In a criminal trial, the presumption of innocence is a principle of cardinal importance and so the guilt of the accused must in every case be proved beyond a reasonable doubt. Probabilities, however strong, suspicious and grave, can never take place of proof.¹⁷

The Universal Declaration of Human Rights, 1948 which was adopted by the United Nations, declared “whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, “and” it is essential if a man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law”¹⁸

The recommendations of the Committee on Reforms of the Criminal Justice System (Malimath Committee, 2003) in respect of the burden of proof and standard of proof in criminal law. Presumption of innocence and proof beyond a reasonable doubt is not only entrenched in the criminal justice system of India but are also part of Fundamental rights guaranteed under article 21 of the Indian Constitution. Criminal procedure is an obstacle course. Certain of the evidence is

¹³ “Manuscript was written by Manu about 2500 years before between 200 BC-100 AD

¹⁴ “Arthashastra” was written by famous Author Kautilya or Chanakya between 221 and 300 B.C.; “Arthashastra” is divided into 14 books sub-divided into 150 Chapters covering 180 topics running into 5391 Sections (salokas).

¹⁵ Blackstone, William Sir, (1723-80), Commentaries on the Laws of England, 15th Edn. 1809, Vol. 4, p.358.

¹⁶ Kaliram v. State of HP, AIR 1973 SC 277; Santa Ram v. State, AIR 1962 SC 605; also see K. N. Nanavati v. State of Maharashtra and others, AIR 1962 SC 605

¹⁷ Babu Singh v. State of Punjab 1964 (1) Cr L J 566; State of Punjab v. Bhajan Singh, 1975 Cr.L. J. 282; Sharda v. State of Maharashtra, AIR 1984 SC 1622

¹⁸ Preamble, Universal Declaration of Human Rights, 1948.

not admissible. The burden of proof is on the state and the accused at trial is guaranteed with certain rights.

There are only a few aspects of the Due Process model. These protections serve two overlapping and sometimes conflicting goals: truth determination and protection of the individual rights from encroachment by the state.¹⁹ That is the protection of the innocent and punishing the guilty. Procedural law is intended to facilitate and not obstruct the course of justice.²⁰ The wellbeing, liberty and security of the individual was the cornerstone of these principles. But when the very principles evolved for the purpose of protecting liberty become convenient tools in the hands of the perpetrators of crime, the concept of Due Process has to undergo a metamorphosis to respond to the changed crime scenario. What is accepted to be the process due to an accused during one time may seem to be luxury accorded to him at a different time? In such circumstances, the processual laws are to be amended and the underlying jurisprudence of administration of criminal justice changed to serve the basic purpose, i.e. truth determination.

The changed legal regime may appear to impinge upon the liberty of an individual, but the society has to run this risk for its own survival. The new legislations have a new criminal jurisprudence to properly deal with newer forms of criminality. New criminal jurisprudence is based on the proposition that repression of criminal conduct is the essential function of the criminal process. The further underserved acquittal has no less bad repercussion on society and its moral than a wrongful conviction. It is an accepted principle of the accusatorial system that the prosecution should substantiate the charge against the Defendant beyond a reasonable doubt. But this principle is given a go by shifting the initial burden to the defense in social and economic offences on the ground that these offences threaten the entire social-economic fabric of the state.

¹⁹ David M. Crowe, “Costs and Plea-Bargaining Process: Reducing the price of Justice to the Non indigent Defendant”, (1979)89 Yale L.J.333-352at 334

²⁰ Mahesh Chandra, Socio-Economic Crimes, 1979, N.M, Tripathi Pvt Ltd, Bombay at 110

JUDICIAL RESPONSE.

The intervention by the judiciary has been liberal and progressive throughout the years. Judicial activism, a growing trend has been very helpful in the protection and empowerment of women. Since the judiciary cannot make law but only interpret and pass judgments through it, its sensitivity towards women's safety can be admired. But that doesn't change the fact that crimes against women have risen notably this year in cases of rapes, kidnappings, murders and dowry deaths. The National Crime Records Bureau data shows a spike in rape by 12-15% among other crimes against women as well. If not for the pendency of cases and delay in delivery of the judgment, the nation would progress faster along with women's safety. Women in India have been oppressed since a long time but since the establishment of the judiciary, things have been better but not as they should be. The punishment imposed should be more stringent in order to discourage such other vile acts of criminals. It is nothing but a synthesis of research for Judges.

The Hon'ble Supreme Court in *Laxmi v. Union of India*,²¹ in order to curb massive acid attack on the women in the past few years, gave stringent directions to the Home Secretary, Ministry of Home Affairs associating the Secretary, Ministry of Chemical and Fertilizers, to restrict and sale of acid throughout the country. Further condemning acid attack the Apex court gave several dictums for the protection of acid attack victims, with minimum compensation for the victims, adequate publicity of victim compensation schemes, private hospitals must not refuse treatment to victims and full treatment must include medicines, food, bedding and reconstructive surgeries.

In another celebrated case in *Delhi Domestic Working Women's Forum v. Union of India*²², the court held that rape is an offence against the right to privacy and dignity of women. Further in *Lilly@Rajesh & Anr v. State of Haryana*²³ for the first time, the Supreme Court, in this case, realized the agony and trauma of rape victim who had to go through a two-finger test to give her character certification and after analysing through various precedents, held that it is a violation of victims right to privacy and dignity.

²¹(2014) 4 SCC 427.

²² (1995) 1SCC 14

²³ AIR 2013 SC 1784

In *Nirbhaya's case*,²⁴ the Supreme Court had rejected the plea of all the four convicts for the purpose of challenging the death penalty which was awarded to them.

In the case of *Parhlad and Ors v. State of Haryana*²⁵, the court called an offence of rape as basically an assault on the human rights of the victim. It was seen as an attack on the individuality and physical sovereignty of a woman.

In a recent case, *Ravi v. The State of Maharashtra* decided on 3 October 2019,²⁶ the Supreme Court imposed maximum punishment to the offender of rape, without any remission/commutation.

CRITICAL EVALUATION AND CONCLUSION

According to National Crime Records Bureau's (NCRB) recent report 'Crime Clock-2005', which tracked criminal activities over the last year, the country reported one crime against women every three minutes; one molestation every 15 minutes; one rape every 29 minutes, one dowry death every 77 minutes, and one sexual harassment case every 53 minutes. Among the crimes listed by the NCRB, rape, molestation, sexual harassment, and dowry deaths were reported more frequently. The figures could be much higher as only those crimes, which were reported to the police under the Indian Penal Code (IPC), were listed on the Clock. Out of all the crimes against women, rape is the most heinous one. Delhi is the least safe city for women. In 2004, it accounted for 30% of rapes recorded in the country's 35 major cities, according to the Bureau. There were 457 reported rapes in the city out of 1510 cases reported in others. Rape can occur anywhere, even in the family, where it can take the form of marital rape or incest. It occurs in the Community, where a woman can fall prey to an abuser.²⁷

²⁴ Ram Singh died during the trial period, four adult convict's sentences to death, hanged on March 2020 at 5:30 AM IST at the Tihar Prison Complex, New Delhi. Juvenile convict released on 20 December 2015. This Juvenile Justice (Care and Protection of Children) Amendment Bill 2015 was passed by the Rajya Sabha.

²⁵ CRIMINAL APPEAL NO. 983 OF 2015

²⁶ <https://indiankanoon.org/doc/155871239/?type=print>

²⁷ <https://ncrb.gov.in/>

There are a number of legislations in existence which deal with violence against women, very recently Criminal law Amendment Act, 2018 was passed which makes law relating to certain heinous sexual offences against women more stringent. But laws on statute books will not make difference unless they are implemented with unerring accuracy, stringency with professional investigation and prosecution. It is unfortunate that even after the Amendment of 2018, there is a high rise in the offences against women. In the final analysis, it is felt that the procedural aspect should be fair without giving room for minute room to the guilty to escape under the garb of legal or constitutional rights. Processual flaws should be filled in order to render timely and efficient justice to the women victims of violence.