

RESTORATION IN RAPE: A CASE FOR RESTORATIVE JUSTICE IN SEXUAL OFFENCES

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Abstract

With the #MeToo movement shaping up and victims from across the globe coming together on a common platform to call out their abusers, there is an increasing scepticism about the justice process and a growing alienation from it. The movement has not only served as a painful reminder of how pervasive sexual abuse is, but also how the due process fails most of these victims. Drawing from feminist theories of power inequalities and sexualisation of gender, the paper proposes redefining rape in the context of power dynamics rather than consent. It also delves on the inadequacies of the current model of defining crimes as against the State, the distinctive nature of rape, and why it is unjust and unfair to define it as an offense against the State and society. Establishing the psychological and social implications of sexual abuse, the paper focuses on the need to implement changes in the justice system by implementing restorative practices in cases of rape and making the justice process more victim-oriented. It also emphasizes on the

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need of victims to reclaim not just justice but also the agency to decide the course of action to pursue that justice.

I. INTRODUCTION

Rape, as it is generally defined, is an untoward, unwanted and non-consensual sexual act or behaviour of a man towards a woman or another man.¹ A major problem with this definition and the prevalent attitude in the criminal justice system is the over-reliance on consent as the determinant of whether there has been a commission of the offense or not. More than a sexual crime, rape is a gendered crime² which emanates from a sense of entitlement that men feel.³ Defining it in terms of consent, which pre-supposes equality of power among the two people engaged in the act, can get very problematic. Another reason why consent is a problematic determinant is because the law starts attaching value to the behaviour, conduct and character of the woman rather than the culpability of the man.⁴ This paper argues that the definition of these offences must be such that the undue reliance placed on consent must be reduced.

Another limitation in the definition of rape is that, like all other crimes, it is defined as a crime against the society. A crime in which the bodily autonomy of a person is being so grossly undermined and

¹DONALD A. ANDREWS & JAMES BONTA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (2010).

²Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997); See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

³Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987); Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997).

⁴Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 3 (2006); See Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL'Y REV. 2 (2016).

violated, should be defined as a crime against the victim. This paper argues for the redefining of such offences in terms of crimes against the specific individual.

In the Indian jurisprudence on rape, the discourse has largely been influenced by the brutal gang rape and homicide of Jyoti Singh. The case led to nationwide protest for the need to reform our rape laws. On the basis of Justice Verma Committee's Report, our laws underwent a transformation both in terms of substantive law, in criminalising certain offences that were not earlier recognised, like expanding the scope of Section 376 of the Indian Penal Code, 1860 beyond forceful penetrative sex, assaulting a woman with an intention to disrobe, voyeurism and stalking, and making the provisions pertaining to sexual harassment gender-neutral and stricter.⁵ Punishments for these offences were also made harsher, reflecting the reaffirmation of the retributive and deterrent theory of justice in the Indian criminal justice system.

The two primary stakeholders in the offense are the offender and the victim. This paper analyses the psychology of both these stakeholders before the commission of the offense and in the aftermath that follows the offence. Psychological as well as sociological studies have revealed that these offences have a distinctive nature.⁶ However, one stakeholder has been consistently ignored in most of the scholarly work, that is, the family members of the offender. The family members of the victim also undergo the trauma⁷ and shock of having someone close to them violated. This paper analyses the psychological impacts these offences have on the family members of both the victim and the offender as well as the real or perceived

⁵Criminal Law (Amendment) Act 2013.

⁶Craig T. Palmer, *Twelve Reasons Why Rape is not Sexually Motivated: A Sceptical Examination*, 25 J. SEX RES. 4 (1998).

⁷Priscilla N. White & Judith C. Rollins, *Rape: A Family Crisis*, 30 FAM. REL. 1 (1981).

contribution the offender's parents might have had in him committing the offense.

Emerging trends of criminal jurisprudence show a shift towards re-integrative and restorative justice systems,⁸ especially for minor offences and juvenile offenders. This paper analyses the possible implementation of the restorative justice model in cases of rape as well as the problems that may arise. This paper is divided into four parts. Part I of the paper focuses primarily on the conventional psycho-analytical theory of rape and its criticisms. Part II of the paper moves on to modern theories of rape, analysing it from the standpoint of the offender, what his psychological drives and motivations were for committing the crime, the psychological impact of the offense on the victim as well as the impact of the punishment, and the accompanying shame it has on the offender. Part III of the paper analyses the impact that the act and the aftermath it has on the families of the victim and the offender. Part IV of the paper deals with the recommendations to incorporate practices of the restorative justice model to better cater to the needs of the victim, offender and the community in cases of sexual assault as well as to understand and respond better to the psyche of an offender, thus reducing recidivism.

II. CONVENTIONAL PSYCHO-ANALYTICAL THEORIES OF RAPE

Traditionally psychology has been written from a predominantly male lens.⁹ The theories propounded, and the research conducted were

⁸John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 3 (2002); Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005).

⁹Rochelle Semmel Albin, *Psychological Studies of Rape*, 3 SIGNS, U. CHI. PRESS 2 (1997).

skewed because, from the nature of the hypothesis to the kind of questions asked, and the conclusions arrived at, the process was masked by a biased gender binary.¹⁰

Classical psycho-analytical theory relied on a singular and flawed premise. For them, the act of forceful sexual intercourse was a victim-precipitated act.¹¹ Freud¹² and Deutsh,¹³ among others opined that masochism is one of the dominant feminine traits and thus concluded that women are responsible for their own rape. Horney, on the other hand, viewed this passive submission of women as a product of their cultural upbringing.¹⁴ According to her, women have been conditioned socially for so long to believe that a man's wishes are paramount and she must submit to them, that she has internalized this submission and adapted this in her 'true nature'.¹⁵

Another proposition expounded by Freud was that men have some sort of 'exclusive possession' over women and in every case of traditional rape,¹⁶ it is not just the consent of the woman that has been violated but also the sole ownership of the man with which there has been interference.¹⁷ This view of women as property was normalized for a long time and remnants of this can still be seen today, when

¹⁰See CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* (2007).

¹¹David J. Giacopassi & Karen R. Wilkinson, *Rape and the Devalued Victim*, 9 L. AND HUM.BEHAV.4 (1985).

¹²SIGMUND FREUD, *SOME PSYCHOLOGICAL CONSEQUENCES OF THE ANATOMICAL DISTINCTION BETWEEN THE SEXES* (1925).

¹³HELENE DEUTSCHE, *THE PSYCHOLOGY OF WOMEN* (1944).

¹⁴Karen Horney, *The Flight of Motherhood: The Masculinity Concept in Women as Viewed by men and Women*, 7 INTL. J. PSYCHOANALYSIS 324 (1926).

¹⁵Rochelle Semmel Albin, *Psychological Studies of Rape*, 3 SIGNS, U. CHI. PRESS 2 (1997); See Karpman, *Perversion as Neuroses (The Paraphiliac Neuroses): Their Relation to Psychopathology and Criminality*, 3 JOURNAL OF CRIMINAL PSYCHOPATHOLOGY (1941).

¹⁶Traditional rapes are those where the offender is not known to the victim and there is some element of violence involved.

¹⁷See SIGMUND FREUD, *COLLECTED PAPERS VOL. 4* (1959).

courts assume silence and passive submission as consent in cases of non-traditional rape.¹⁸

The most dominant and often used analysis of rape, which is used till date to blame the victim, is the 'just world' hypothesis. The just world hypothesis entailed that people will get what they deserve and they in fact deserve what they get.¹⁹ This shifts the focus from the culpability of the man to the offence being victim precipitated.

Some of the scholars tried to explain rape as an act of sexual deviance.²⁰ They characterized the rapist as someone with a psychopathological disorder and attributed biological and psychological reasons for why some men rape. However, many feminist scholars have argued that rape is not a socially deviant sexual act, but rather a socially conforming phenomenon²¹ in so much as it plays out in the form of inequality of power and gendering of sexuality, which is culturally endorsed.

Thus, the conventional psycho-analytical theories of rape began with and are mainly focused on victim blaming and later progressed into blaming the acts on psychological disorders. They failed to address the inherent inequality in the sexual process out of which this desire to control and dominate the woman or anyone vulnerable arises.

¹⁸Non-traditional rapes are usually those where the offender is known to the victim and is there is a fiduciary relationship or otherwise the existence of a power inequality.

¹⁹ Lerner & Simmons, *Observers Reaction to the Innocent Victim*, 4 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY (1966).

²⁰See Giannell, *Psychological Needs Characteristic of Four Criminal Groups*, 69 JOURNAL OF SOCIAL PSYCHOLOGY (1966).

²¹Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997); See CATHARINE A. MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* (1989).

III. A MOTIVATION AND IMPACT ANALYSIS: MODERN THEORIES OF RAPE

A. *Criminological Perspective*

One of the pertinent contributions of feminist jurisprudence on rape is that it is “culturally dictated, (and) not culturally deviant.”²² The psycho-analytical theories have been rejected by the current scholarship and the feminists need to be applauded for their efforts in changing the discourse on rape from being understood as a victim precipitated act to acts of sexual violence committed as an exercise to display masculine power and domination.²³ The modern theory of rape analyses four major psychological drives that cause a man to rape, namely, power, male entitlement and commoditisation of sex, status, and prior victimization.

Feminist theories of rape are centered around the power differential that exists between a man and a woman in a sexual act. Sexuality has been gendered²⁴ with men being taught to be tough, aggressive and dominant, and women conditioned to be tender, weak and submissive and this power dynamic plays out most prominently during the activity of sex.²⁵ “Males and females are created through the erotization of dominance and submission”.²⁶ More than a sexual act motivated by lust, rape is an act of violence motivated by a desire to dominate and establish superiority. Most victims are vulnerable and are those who can be subjugated. The age-old defense of rapists being

²²Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997).

²³Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987).

²⁴Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).

²⁵Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL'Y REV. 2 (2016).

²⁶CATHARINE A. MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* (1989).

morally depraved and psychopaths has no empirical evidence to support it.²⁷

Masculinity and femininity are culturally defined and involve the attribution of certain traits to a male body²⁸ which later manifest themselves in an attempt to overpower a woman. Many a times, the aspiration and social pressure to ascribe to this standard of ‘masculinity’ and prove it to others, acts as the motivation. Thus, power interaction happens on two levels. On the primary level, it manifests in the domination of the vulnerable. On the secondary level, however, the power dynamic plays out between those who hold this position of power and are unstable.²⁹ Thus, men sexually violate the vulnerable not to just to assert their superiority over the victim but also to prove that they are superior to other men. This plays out the worst in gang rapes³⁰ where men who would not have otherwise committed any such act, are compelled by the circumstances to show to the other men how ‘manly’ they are. This also derives from the theory that women ‘belong to men’, wherein some men rape to deprive another man of his honour.³¹ In these cases, women are just instruments men use to showcase their power to other men. In cases where there is a differential status,³² and that drives the act, there is a

²⁷See Rochelle Semmel Albin, *Psychological Studies of Rape*, 3 SIGNS, U. CHI. PRESS 2 (1997).

²⁸Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).

²⁹Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997); Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL’Y REV. 2 (2016); See Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987).

³⁰Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987); Catharine A. MacKinnon, *Rape Redefined*, Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL’Y REV. 2 (2016).

³¹See Rochelle Semmel Albin, *Psychological Studies of Rape*, 3 SIGNS, U. CHI. PRESS 2 (1997).

³²Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987); Catharine A. MacKinnon, *Rape Redefined*, Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL’Y REV. 2 (2016).

need to maintain that status inequality and a desire to remind others of it. By means of example, soldiers of one country in a war, usually rape women of the other country to insult the enemy, exploit their vulnerabilities and establish superiority of status.

Apart from this power dynamics, men feel a sort of entitlement over women. This flows from the flawed Freudian analysis of men having ‘exclusive possession’ over women.³³ Although, the view of women as property has changed to a large extent, men often feel entitled to sex, especially from their wives.³⁴ This is also one of the leading causes of under-reporting of rape cases. Not only do men feel entitled over women, but women also internalize this entitlement in a sense of duty. Although, they do not willfully consent in the strictest sense, they might passively submit. This is a direct result of the normalization of sexual roles and stereotypes.³⁵ This submission is often viewed as amounting to tacit consent³⁶ which is why the meaning of consent must be redefined and restricted to active and participative consent.

Men also feel entitled over women due to the commoditisation of sex.³⁷ There is a “*culture that sexualizes commodities and commodifies women’s sexuality*”.³⁸ Due to a culture where men can ‘purchase’ sex, they feel more entitled to it. Since women are objectified, violating their consent is viewed analogically closer to

³³SIGMUND FREUD, COLLECTED PAPERS VOL. 4 (1959).

³⁴L. F. Lowenstein, *Rape: Recent Psychological Research into Victims and Perpetrators*, 74 POLICE JOURNAL 3 (2001).

³⁵See Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).

³⁶Mahmood Farooqui v. State (Govt. of NCT) Criminal Appeal 944/2016.

³⁷Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997); Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).

³⁸Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997).

shoplifting, rather than a crime against the human body. There is a reason why an offence that completely vilifies bodily autonomy is so often and so conveniently delegitimized; because if women are objects and sex is a commodity, then it is less morally reprehensible to just steal it if it is not given to you.³⁹

The power and entitlement that men feel over women can also be a result of prior victimization.⁴⁰ There are various studies to show that victims of child sexual abuse carry a lot of trauma and emotional baggage into their adult years. This damage to their personality manifests in various forms. Sexually abused male children are more likely to become sex offenders than female children⁴¹ because of the nature in which sexualities are gendered and how the victims and the society around them react to their sexual abuse. Children are usually chosen as victims because of their vulnerability and the ability to dominate their will. The offenders in these cases, usually share a relationship with their victims which makes the trauma worse. In cases where the victim shares a relationship of dependency with the offender(father-son),⁴² the transition from a victim to an offender is more likely. When the son grows up to have someone depend on him, he disregards their lack of consent to show his dominance. This leads

³⁹*Id.*

⁴⁰Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016); L. F. Lowenstein, *Rape: Recent Psychological Research into Victims and Perpetrators*, 74 POLICE JOURNAL 3 (2001); Tara Cossel, *Child Sexual Abuse Victims and their Families Receiving Services at Child Advocacy Center: Mental Health and Support needs*, THE MCNAIR SCHOLARS RES. J. (2010).

⁴¹Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016); Vandana Choudhary et al., *Review of Randomised Controlled Trials on Psychological Interventions in Child Sexual Abuse: Current Status and Emerging Needs in the Indian Context*, 38 INDIAN J. PSYCHOL. MED. 4 (2016).

⁴²Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016); See Merab Kambamu Kiremire, *Rape of Prostitutes: A Tool of Male Power and Control?* 21 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY 74 (2007).

to the normalization of disrespecting the bodily autonomy of someone to assert one's masculinity.

Cultural endorsement of child pornography has also commoditised the sexuality of children and normalized this abuse in the minds of the offenders. As a society, we may condemn child sexual abuse but have normalized the sexualisation of their bodies.⁴³ This commoditisation further entrenches the male entitlement over sex.

In cases of male victims of child sexual abuse, at a time in their development when they are being socialized into masculinity and the accompanying traits of emotional stoicism, power, domination and aggressiveness, they find themselves in a confused state.⁴⁴ Therefore, they become vulnerable when they are expected to be strong. These victims experience additional shame because they are supposed to repel sexual abuse with emotional indifference and develop sexual practices manifesting their masculine power.⁴⁵ Each victimization is a blot on their masculinity which, they as adults transmit onto their victims. Some children are thus socialized into offenders, owing to their prior victimization.

The stigmatization and shame that surrounds the offence of rape also impacts the offender.⁴⁶ On being convicted, most jurisdictions practice disintegrative shaming for the offender in order to reduce recidivism. This flawed analysis, however, falls through in every

⁴³Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).

⁴⁴See Carol Coohy, *Gender Differences in Internalising Problems among Sexually Abused Early Adolescents*, 34 INTL. J. CHILD ABUSE AND NEGLECT 11 (2010).

⁴⁵Vandana Choudhary et al., *Review of Randomised Controlled Trials on Psychological Interventions in Child Sexual Abuse: Current Status and Emerging Needs in the Indian Context*, 38 INDIAN J. PSYCHOL. MED. 4 (2016).

⁴⁶Danielle J.S. Bailey & Jennifer L. Klien, *Ashamed and Alone: Comparing Offender and Family Member Experiences with the Sex Offender Registry*, 43 CRIM. JUST. REV. 4 (2018); Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005).

empirical study.⁴⁷ Offenders are named and shamed in some societies by means of a sex-offender list. Media trials, public shaming and humiliation are often counter-productive measures. In a bid to reduce recidivism, they create offenders who now feel further isolated from the society they live in with no respect for social norms.⁴⁸ Deviancy thus is heightened and not controlled. Specifically, in cases of rape, disintegrative shaming has potential to do more harm than good. In an attempt to show domination and masculinity, which also entails a disregard for any form of inhibition, offenders have shown recidivist tendencies and an attempt to violate the same woman again.⁴⁹ Another problem with shaming sexual offenders is that the same amount of shame is attached to a man who rapes as a result of misunderstanding consent and one who blatantly disregards it.⁵⁰ While there existed some scope in the earlier paradigm to reform the offender and restore justice to the victim, shaming both of these classes of offenders equally creates a feeling of injustice in him and he starts normalizing disrespect of consent.

Thus, among the various psychological factors that drive a man to disrespect the consent and will of a woman, his desire to portray culturally defined masculinity plays the most major role.

B. Victimological Perspective

The victim, on the other hand, undergoes an unimaginable level of trauma which is often aggravated by a lack of recognition by the law and society that she has been violated. This is sometimes due to the proximity of the relationship the victim shares with the offender,

⁴⁷Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005).

⁴⁸*Id.*

⁴⁹L. F. Lowenstein, *Rape: Recent Psychological Research into Victims and Perpetrators*, 74 POLICE JOURNAL 3 (2001).

⁵⁰Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005).

which is why consent, which is used as the major determinant, is often contextualized. Contextualization of consent is often a means that the courts use to presume consent or deny non-consent based on an absence of clear resistance. The victim thus suffers from self-blame, self-hate and shame.⁵¹ There is deep seated fear and apprehension of being violated again, and resentment and frustration from the formal processes as well as the community's reception. Rape trials often operate as means of secondary victimization because courts, in an attempt to determine whether the act was consensual or not, begin with blaming the character and actions of the victim.⁵² As power dynamics play out in the society, there is also a denial that she has been raped because she internalizes his dominance over her and thus does not see it as an aberration. Gas-lighting is another psychological impact that victims of sexual abuse and rape generally experience during rape trials as they begin doubting not only the veracity of their own testimonies but also their sanity.⁵³ Thus, victims, not only suffer at the hands of the offender, but are also consistently failed by the community in which they live and survive everyday with now a marred morality as the justice system re-victimizes them.

Every rape trial begins with and ends at either blaming the victim for complicity in the act, leading on the man, motivating him, or just a blatant denial that the woman has been raped. Courts have, in their reliance on consent, often placed high standards on resistance by the woman to constitute a lack of consent.⁵⁴ This negates any possibility of the woman denying consent on the basis of fear or apprehension of

⁵¹Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 3 (2006).

⁵²Courtney E. Ahrens & Rebecca Campbell, *Assisting Rape Victims as They Recover from Rape*, 15 J. INTERPERSONAL VIOLENCE 9 (2000).

⁵³Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical and Mental Health Systems*, 12 VIOLENCE AGAINST WOMEN 1 (2006).

⁵⁴Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987); Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994).

being further physically harmed. The criminal justice system, as it exists, always gives the benefit of the doubt to the accused.

While proving a lack of consent, courts investigate into the behaviour, actions and sexual history of a woman, casting aspersions on her morality and character. Instead of proving the culpability of the offender, the victim is made to prove her innocence.⁵⁵ They are made to live through the experience a second time over when they report to the police and are cross questioned in the courts. Among the many other reasons for under-reporting, they generally prefer to not report rape to avoid being victimized again at the hands of the insensitive police and the judicial system.

As a result of this secondary victimization, a victim begins co-opting the society's denial of her rape and begins to think she is crazy. Since everyone around her cannot be wrong, she falls in the trap of self-hate and mistrust⁵⁶ for having put her family and the offender through a needless frenzy.

Studies have shown that most victims fall into a trap of mistrust⁵⁷ wherein they not only start distrusting the system, feeling a sense of resentment and frustration because of the structural inadequacies failing to be sensitive towards them, but also start distrusting themselves. This phenomenon is known as gas-lighting⁵⁸ and is

⁵⁵See Priscilla N. White & Judith C. Rollins, *Rape: A Family Crisis*, 30 FAM. REL. 1 (1981).

⁵⁶Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994); See LEE MADIGAN, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* (1991).

⁵⁷Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 3 (2006); Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994).

⁵⁸COUNSEL TO SECURE JUSTICE & NATIONAL LAW UNIVERSITY DELHI, *PERSPECTIVES OF JUSTICE: RESTORATIVE JUSTICE AND CHILD SEXUAL ABUSE IN INDIA* (2018); See Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994).

usually a product of manipulation. The manipulation, as it plays out in these situations is through the society and the justice system.

The denial that she has been raped is also a consequence of her internalizing and normalizing culturally defined sexual roles of power and violence and is an outcome of her trying to avoid the ostracization of having lost her honour. The shame that the woman has to live with is not helped by the label of being a 'victim'. She is painted as this woman who has been harmed, her dignity snatched, and her honour pilfered.

Non-disclosure of rapes and silencing of victims, however, comes at a huge price. Victims don't just deny rape, but also don't report it as they are usually afraid of the repercussions that ensue. An inability to emotionally express the pain and trauma they are going through further pushes them into depression and severely impacts their psychological and physical well-being.⁵⁹

The stigmatization and shame⁶⁰ that accompanies the act often alienates the victim from her own body. She loses agency over her own activities and often falls prey to disintegration from the society. Rape affects children, in a worse manner, insomuch as they are robbed of their innocence. Often times not understanding the wrongs that have happened to them, they start normalizing the vitiation of consent and the blatant disrespect of any person's bodily autonomy. They are generally accused of lying and concocting stories. Their impressionable and vulnerable minds undergo deep emotional

⁵⁹Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 3 (2006).

⁶⁰Merab Kambamu Kiremire, *Rape of Prostitutes: A Tool of Male Power and Control?* 21 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY 74 (2007); See L. F. Lowenstein, *Rape: Recent Psychological Research into Victims and Perpetrators*, 74 POLICE JOURNAL 3 (2001).

upheaval on not only being violated but also being denied a voice and accused of lying.⁶¹

Therefore, both the victim and offender are impacted on a psychological level and every act of rape causes a sense of insecurity and anxiety in the society about falling moral and safety standards.

IV. IMPACT ANALYSIS OF RAPE ON THE FAMILIES OF THE VICTIM AND THE OFFENDER

Crime is often seen as an act of social deviance. Rape, however, is a distinctive crime by nature. As argued before in the paper, rape is a socially conforming act and not a deviant act.⁶² Although recognized by the criminal justice system as an offence, in reality it is often justified as an act of entitlement or victim precipitation. Acts leading men to commit such offences and exercise this power and entitlement is a product of the gender socialization, and cultural endorsement and perpetuation of sexual stereotypes of masculinity.⁶³ This makes the interaction that the victim and offender have with the society very unique. The way the victims' family members and friends react to the instance of rape plays an important role in their recovery. The accusation and trial for rape as well as the aftermath of conviction also has an impact on the family members of the accused. This is often an ignored stakeholder in the analysis of rape.⁶⁴ Since the author

⁶¹Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. COMMUNITY PSYCHOL. 3 (2006).

⁶²Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 3 (1997).

⁶³Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).

⁶⁴Danielle J.S. Bailey & Jennifer L. Klien, *Ashamed and Alone: Comparing Offender and Family Member Experiences with the Sex Offender Registry*, 43 CRIM. JUST. REV. 4 (2018).

argues for an adoption of restorative practices in delivering justice to victims, all these stakeholders, especially the community become very important. There is limited literature on the impact on and reaction of the family members of rape victims and how they contribute to the healing process but it is highly important for the understanding of the operation of restorative justice practices in cases of sexual abuse.

A. *Psychological and Social Impact on the Victims' Families*

a) Cases of Traditional Rape

The traumatic impact of rape is not limited to the victim, but the stigma that is attached to the victim often also mars the family members.⁶⁵ Victim blaming extends to questioning the upbringing of the girl, thus directly attacking the parents. Parents and husbands are blamed for not being 'capable' of keeping the girl safe.⁶⁶ Thus, the family members of the victim are not untouched by the shame that surrounds the victim. They are in fact burdened by an extra responsibility, because they are victims of shame but must keep a brave front and emotionally express only in such a way that the victim is not further victimized by even her family members.

In the way family dynamics pan out, male entitlement plays out differently in a 'traditional' and 'non-traditional rape'.⁶⁷ In cases of traditional rape, men are initially blamed for not doing enough to protect their women; they begin internalizing this guilt and develop anger. This anger and feeling of vengeance towards the offender can turn out to be more harmful than beneficial. This is because it takes

⁶⁵Priscilla N. White & Judith C. Rollins, *Rape: A Family Crisis*, 30 FAM. REL. 1 (1981); See Courtney E. Ahrens & Rebecca Campbell, *Assisting Rape Victims as They Recover from Rape*, 15 J. INTERPERSONAL VIOLENCE 9 (2000).

⁶⁶Priscilla N. White & Judith C. Rollins, *Rape: A Family Crisis*, 30 FAM. REL. 1 (1981).

⁶⁷Margo I. Wilson & Martin Daly, *Male Sexual Proprietariness and Violence against Wives*, CRIMINAL PSYCHOLOGY VOL. 1 (2014).

away from the healing process and support to the victim and all energies and expression of emotion are directed towards the offender. This is deeply problematic on a secondary level, wherein it normalizes the sense of entitlement that men feel over women and reinforces culturally defined stereotypes of hapless women being protected by their masculine saviours. It is often this confidence and dependence that blurs lines of consent.

There are other negative reactions by the family members which may prove to be detrimental. These include pitying the victim or blaming them.⁶⁸ Both of these negatively impact the healing process. Expression of anger and its channelization also becomes problematic in these kinds of situations. This is because when the family members feel a sense of retribution towards the offender and he is someone known to the victim, she is often caught between addressing her own needs of care and sensitivity and placating their anger in order to avoid backlash. Even in situations where the offender is not known to the victim, she has been socialized into internalizing guilt and anger, and thus instead of helping her, this further pushes her into self-blame and self-hate. Family members should help victims to externalize this anger, acknowledge their fury in a constructive way and to vent their emotions in healthy manner.

b) Cases of Non-Traditional Rape

In non-traditional rapes, however, this becomes even more complicated because a member from the ‘supportive family’ system is the offender. Most of these cases are a product of male entitlement over their wives or attempts by uncles, fathers, and brothers to assert their power over powerless, naïve and vulnerable children. These

⁶⁸Courtney E. Ahrens & Rebecca Campbell, *Assisting Rape Victims as They Recover from Rape*, 15 J. INTERPERSONAL VIOLENCE 9 (2000).

violations of consent are generally normalized by the victims themselves leading to denial of having been raped. These have an adverse impact on young boys, especially, who are unable to reconcile their vulnerability as a victim and indoctrinated ideas of masculinity, resulting in transitioning them from victims to offenders.⁶⁹ Mothers usually deny that their children have been sexually abused by their fathers, uncles or other relatives. At times, even when they don't deny it, they refuse to support their children in confronting the offender. This is because these women are in a precarious position themselves. Often dependent on the man, and culturally taught to be submissive, they don't stand up for their children for the fear of being violated, or worse, left by their husbands, with no shelter. Thus, even when they know that their children are being violated, mothers are generally helpless. Similarly, when husbands rape their wives, initially these women deny that they have been raped. Sometimes due to non-recognition of marital rape by the law or rejection of its occurrence by the society, the victim feels further trauma of having no form of formal or informal recourse. In such a situation, friends, counsellors and self-support groups can be of great assistance to women.

B. Psychological and Social Impact on the Family Members of the Accused

The psychological impact of a rape is however not limited to the victim's family members. The family members of the offender are often an ignored stakeholder because there is hardly any acknowledgement of harm. They interact with the society post the accusation and conviction of the offender and face the same amount of shame, start internalizing the blame for improper socialization and

⁶⁹Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).

are sometimes left helpless and often childless (post incarceration), with no one to provide for them.

Many jurisdictions practicing disintegrative shaming,⁷⁰ often employ methods like publishing sex-offender lists, public notices naming sex-offenders and other such methods which make the population aware of the identities and stigmatizing them in the community in which they live. Arguably, this is a form of double punishment not only because of the permanency of these lists but also the stigma attached to their personality usually remains in the memories of the general population. In doing so, these offenders are generally demonized. This gets problematic because a lot of attention is taken away from the human aspect of the offender, defeating any scope of reformation and reintegration within the society. The family members of the offender are also subjected to this shaming to an equal measure. They are blamed for 'raising a rapist'. Accompanying this shame is social isolation⁷¹ that the family members face and a deep sense of injustice of facing repercussions of an offence they never committed. Their socialization that is blamed is not a burden for them to bear alone. The media, the market and every institution with a voice and power to generate a narrative sell and propagates the same idea of masculinity and entitlement. A convenient scapegoat in this process is the family of the offender.

An important role that family members play is being a part of an informal social network of support for the offender to help him re-

⁷⁰Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005); See John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 3 (2002).

⁷¹Danielle J.S. Bailey & Jennifer L. Klien, *Ashamed and Alone: Comparing Offender and Family Member Experiences with the Sex Offender Registry*, 43 CRIM. JUST. REV. 4 (2018).

integrate with the society and reduce recidivism.⁷² Family members generally tend to isolate themselves from the offender in an attempt to escape the shame that accompanies any association with him. This ostracization of the offender, not just by the formal structures in the society but also by severance of all social relations constituting his informal safety net, do little to prevent recidivism, and in fact encourages it.⁷³

Another consequence of this shaming is that the family members start internalizing it and fall into a trap of self-blame. This further defeats the whole purpose that the inflicted shame had sought to achieve. Shaming of family members follows as an implication of shaming the offender. As soon as this blame is shifted back to the family members and by implication, socialization, the offender never internalizes the guilt. This further ensconces his belief of entitlement as socially justified. This shaming and shifting of blame take away from the moral culpability of the offender of having vilified a woman's consent.⁷⁴ The family members, instead of providing support to the offender start blaming themselves and in the process of self-doubt, defeat all chances of reintegration of the offender back in the society.

Another, more serious consequence follows from the conviction and incarceration of the offender. This usually plays out in cases where the offender is from a poor background. Once he is put in jail, his parents are often left with no means of sustenance if he was their only child.⁷⁵ Although it is true that this risk exists with all forms of crime,

⁷²Biance Bersani et al., *Marriage and Desistence from Crime in Netherlands: Do Gender and Socio-Economic Context Matter?* 25 J. QUANTITATIVE CRIMINOLOGY 1 (2009).

⁷³DAVID W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE* ED. 5 (2015); LAWRENCE W SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* (2007).

⁷⁴Anne-Marie McAlinden, *The Use of 'Shame' With Sexual Offenders*, 45 BRIT. J. CRIMINOLOGY 3 (2005).

⁷⁵Annie Cossins & Malory Plummer, *Masculinity and Sexual Abuse: Explaining the Transition from Victim to Offender*, 21 MEN AND MASCULINITIES 2 (2016).

the distinctive nature of the offence he has been convicted for means that any form of community support that they may have gotten otherwise, would be denied to them. Sometimes the offender leaves behind his wife and children who grow up with the shame that was associated with him. Those children are deprived of an opportunity of a normal life and the wife is robbed of her honour, because no one will accept the wife of a 'rapist'.⁷⁶ These people live with these labels and the shame associated with it despite being innocent by all means.

Thus, there are a lot of socio-cultural factors also that influence the kind of impact rape has on the families of the offender and the victim. A shame society will ostracize the family and the offender to social exclusion whereas a guilt society will hold the offender responsible and encourage him to acknowledge the harm he has caused and make him internalize the blame. Thus, there should be a shift towards restorative practices and establishing guilt cultures to better deal with crimes of sexual violence.

V. RECOMMENDATIONS

A. *Implementation of Restorative Justice in Cases of Rape*

There is a global trend for making justice more meaningful and victim-centric, focusing on the needs of the victim, acknowledging the harm caused by the offender, and reintegrating both of them within the community through restorative practices.⁷⁷

While in most jurisdictions where this has been implemented, it has remained limited to first time juvenile offenders or cases of minor offences, this section seeks to analyze the interaction of gender with

⁷⁶*Id.*

⁷⁷HOWARD ZEHR & ALI GOHAR, LITTLE BOOK ON RESTORATIVE JUSTICE (2003).

the restorative justice model and the feasibility of initiating restorative justice practices in cases of rape.

Restorative practices are premised on certain foundational principles and emphasize on certain core values.⁷⁸ It recognizes crime as a harm to interpersonal relations and social bonds, creating certain liabilities to repair that damage. It is not just the offender who owes a duty to 'set things right' but also the community to become a support structure for the victim. The uniqueness of the restorative model is that it focuses on the motivations of individual offenders.⁷⁹ This serves two purposes. It helps personalize the conferencing processes in order to make them more effective. It also leads to a recognition that it is possible that the offenders might be victims themselves who have been harmed and need social integration and healing. The values that restorative practices emphasize on are empathy, respect, and an acknowledgement of guilt.⁸⁰

The focus is shifted from the crime as being an offence against the State to an act that causes harm to an individual. The victims' and community's needs are prioritized over the often misunderstood and paternalistic conceptions of justice. It thus extends the role that victims play in the justice process from mere informants of crimes to members of the society who deserve true justice.⁸¹ It changes the definition of what justice means, whether it is justice for the victims to address their needs or justice in the form of punishment to the offender.

⁷⁸HOWARD ZEHR & ALI GOHAR, *LITTLE BOOK ON RESTORATIVE JUSTICE* (2003); See U.N. Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (2006),

https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf.

⁷⁹Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 *THEORETICAL CRIMINOLOGY* 1 (2006).

⁸⁰See John Braithwaite, *Setting Standards for Restorative Justice*, 42 *THE BRITISH JOURNAL OF CRIMINOLOGY* (2002).

⁸¹HOWARD ZEHR & ALI GOHAR, *LITTLE BOOK ON RESTORATIVE JUSTICE* (2003).

Restorative justice can lead to an emotional closure. The victim is not just physically harmed, but psychologically scarred and emotionally broken after a rape. In a controlled setting with people they can trust and those who support them, they can reclaim justice in a more meaningful way. In restorative setting, the length of the victim's skirt or the colour of her lipstick is not blamed as being the reasons for the actions and behaviour of the offender. She is taken as a victim who has been harmed and who deserves justice. She has full control over how she seeks that justice. She can choose to forgive and move on, but she is not forced to.⁸² Thus, forgiveness by the victim doesn't depict success of the restorative process. Acknowledgement of the guilt and handing out of the apology, however, form a critical part of the process.⁸³ In cases where there is a true recognition of guilt, the offenders take direct responsibility and accountability for their actions instead of blaming the society and moral depravity. More than any other measure, this helps in reducing recidivism.⁸⁴

Thus, in restorative practices, forgiveness is never forced. Although in principle this is sound yet when it plays out in the reality of rape cases, it might be a problem. The involvement of the community in this process also means that the values that the community holds in high esteem are represented in the justice process. While all efforts may be made to not blame victims, it might be that a woman who rejects an apology may be passively coerced by her society and

⁸²Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice*, in *RESTORATIVE JUSTICE: CRITICAL CONCEPTS IN CRIMINOLOGY* VOL. 2 (2009).

⁸³U.N. Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (2006), https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf.

⁸⁴DAVID W. VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE: AN INTRODUCTION TO RESTORATIVE JUSTICE* ED. 5 (2015); LAWRENCE W SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* (2007).

community to accept it. The inequality of power thus continues to pervade the process, which is a cogent argument that many scholars use for excluding the application of restorative processes in sexual offences.⁸⁵ However, since every restorative process does not mandate community participation, to a certain extent, this concern can be contained by following a victim-offender conferencing model.

Another element in any restorative justice process is the acknowledgement of guilt.⁸⁶ Although, implementing restorative practices in rape cases can be beneficial in some cases, there are several structural shortcomings with applying this model. While it might be helpful in the sense that the trauma of secondary victimization that the criminal justice system is plagued with in rape trials can be avoided, it is difficult at times to ensure effective participation of the offenders in the process. The reason for this is male entitlement, and them finding justifications in stereotypical sexual roles. It is an essential pre-requisite that the offender must feel a certain amount of guilt and must take responsibility of the harm he has caused. In cases of rape, this acknowledgement of guilt becomes complicated when offenders start externalizing the blame.⁸⁷ They often blame the culture for generating stereotypes of sexual roles and commoditising sex. If there is no sense of guilt in the offender, any form of reconciliatory measure is bound to fail. Thus, the process will never be set in motion. This will be more common in cases where the offender is known to the victim. This is also what makes rape a distinctive crime. Most cases are such where the victim and offender know each other and, in such situations, it is not just the offender who

⁸⁵Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice*, in RESTORATIVE JUSTICE: CRITICAL CONCEPTS IN CRIMINOLOGY VOL. 2 (2009); Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 1 (2006).

⁸⁶HOWARD ZEHR & ALI GOHAR, LITTLE BOOK ON RESTORATIVE JUSTICE(2003).

⁸⁷Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 THEORETICAL CRIMINOLOGY 1 (2006).

justifies his actions and externalizes the blame but also the society which fails to recognize the act as morally reprehensible owing to the familiarity.

An often-ignored area in the existing literature on restorative justice is the interaction of gender and restorative justice. Since it is usually not applied to more serious offences like rape, there hasn't been much research on how the victim, offender and community will react to restorative processes in those cases. Rape is a gendered crime and thus to apply restorative practices to rape, it is important to understand the implications that a differential access to power may have.⁸⁸

In any restorative process, the offender who has harmed is often made to feel a sense of freedom and pride in his/her vulnerabilities.⁸⁹ They are encouraged to be open about their fears and weaknesses and vulnerabilities. This becomes extremely beneficial in cases of rape where the man can see beyond the smokescreen of his masculinity and the woman can find solace. His need to violate her may be a product of his prior victimization. These things are never revealed in a conventional criminal justice procedure. They not only provide a closure to the victim but also a vent to the offender.⁹⁰ Men are also many a times burdened to conform to high standards of masculinity. The harms that this leads to can only be addressed by processes such as these.

Thus, although not free of limitations, the application of restorative justice practices in rape cases can be very beneficial for solving certain problems that the criminal justice system does not even recognize. Thus, it is suggested that these practices can be used as

⁸⁸Barbara Hudson, *Restorative Justice and Gendered Violence: Diversion or Effective Justice*, in RESTORATIVE JUSTICE: CRITICAL CONCEPTS IN CRIMINOLOGY VOL. 2 (2009).

⁸⁹HOWARD ZEHR & ALI GOHAR, LITTLE BOOK ON RESTORATIVE JUSTICE(2003).

⁹⁰*Id.*

supplemental tools in post sentencing stages of the judicial process more effectively.

It is pertinent to note the recent Criminal Law (Amendment) Act, 2018 which reflects precisely a growing retributive trend in the sentencing policy of the legislature for sexual offences. The major change introduced in this amendment was to increase the punishment of individuals convicted for committing rape of a girl under the age of 12 years and 16 years. It introduced the death penalty for gang rape of a girl under 12 years of age at a time when most countries are trying to abolish capital punishment by moving towards a more reformatory model of justice. The amendment also made changes to procedural law to disallow the accused to apply for anticipatory bail in cases of rape of minor girls under the age of 16, and to expedite the appeal and trial processes.

Thus, it is evident that the road to a restorative justice system seems long and daunting, especially in the Indian legal context.

B. Redefining the Contours of Consent and Agency

“The victim may come to court seeking vindication and redress; he is likely in fact to experience a long and lonely wait in a public place, in fear of being further abused.”⁹¹

a) Reclamation of Victims' Agency

Just as every other crime, rape is defined as an offence against the State. This section of the paper analyses the various problems associated with this conception of rape being an offense against the State.

⁹¹Antonia Cretney et al., *Criminalizing Assault - The Failure of the Offence against Society Model*, 34 BRIT. J. CRIMINOLOGY 1 (1994).

In cases of rape, this usurpation of the criminal justice system by the State has three problems. Firstly, in some cases, the State has a share in the blame and defining it in such a way takes away from the State's need to acknowledge any responsibility. Secondly, the process as it operates, leads to secondary victimization⁹² of the victim at the hands of the police officials and in the court during trial where she is made to recount the horrors of the incident and is questioned, and cross questioned to no end. Thirdly, it takes away the agency from her to decide the course of justice she seeks. Rape is a distinctive crime because of the trauma that ensues as a result of it, and so it is possible that no sort of retributive or reformatory model of meting out justice addresses the needs of the victim or lessens the trauma she goes through.⁹³ Defining the offense against the State and allowing it to decide the course of justice often results in limiting the focus on the offender's motives and tendencies and not the victim's need for justice.

Every time a woman feels unsafe on the streets of a city, it is a failure of the State machinery to maintain safety on the roads. Thus, for masking its own inadequacies, the State successfully shifts the entire blame onto the offender. Apart from taking moral responsibility, the State also owes a justification to the victim and a share in the blame. Many scholars have also referred to these acts by the State as usurpation of conflicts.⁹⁴

The way in which a trial shapes, prosecutors are not only blind to the needs of the victim but sometimes, in their insensitivity, they start

⁹²Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical and Mental Health Systems*, 12 VIOLENCE AGAINST WOMEN 1 (2006); See Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994).

⁹³Nils Christie, *Conflict as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977); See Antonia Cretney et al., *Criminalizing Assault - The Failure of the Offence against Society Model*, 34 BRIT. J. CRIMINOLOGY 1 (1994).

⁹⁴*Id.*

picking easy options.⁹⁵ Plea bargaining is one of the various procedures by which the victim loses all sorts of agency in the process. A 'deal' is struck with the offender and the prosecution. All relevant 'mitigating' factors, but justice to the victim, are accounted for. Another common practice is that in situations where a woman is kidnapped and raped or is robbed after her rape, the prosecution tries to make a case of armed robbery or an act of violence.⁹⁶ This de-recognition of the offense by the system is often detrimental to the woman because it delegitimizes the trauma she is facing by portraying her as an extra-sensitive victim.

Another problem is reductionist attitude of the courts and the police who see the victims as mere informants of crime who will assist them in getting a conviction. Prioritizing that as a goal of the process, they make every effort in knowing every exact detail, making her revisit the ordeal.⁹⁷ For a woman to heal, it is important that she vent her emotions in a healthy manner and seek lasting justice that addresses her needs. The current adversarial justice system not only ignores her needs but also disallows her any opportunity within the system to advocate for her needs. Thus, this usurpation by the State is often unwarranted.

b) Redefining Consent

Another pertinent concern in rape jurisprudence is the over-reliance on consent in determining whether the offence has been committed. The focus shifts from the culpability of the man to acts of the victim. The victim thus undergoes the same trauma a second time over trying to prove the absence of consent and therefore, innocence.

⁹⁵Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"*, 9 HYPATIA 3 (1994).

⁹⁶Susan Estrich, *Rape*, 95 YALE L. J. 6 (1987).

⁹⁷Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical and Mental Health Systems*, 12 VIOLENCE AGAINST WOMEN 1 (2006).

Even in seemingly progressive jurisdictions where ‘no means no’ has been widely recognized and the requirement of resistance to prove non consent has been done away with, the approach taken by the courts to determine whether rape has been committed is to contextualize this absence of consent in the absence of resistance.⁹⁸ Reliance is placed on the past behaviour of the victim, familiarity with the offender, sexual activity of the victim, and her character.

The second problem with defining rape in terms of consent is that the woman is often in no position to effectively exercise her choice in giving the consent. This is because of the inherent power inequality that exists in certain social situations.⁹⁹ Especially in cases of intimate partner violence and child sexual abuse, the victims are either too subjugated to choose whether they consent or not or have not internalized the concept of consent.¹⁰⁰ They could have consented only if they had the agency and power to. In the absence of that, if the law fails to recognize her abuse because of the consent approach, the law has failed her. Similarly, in cases of child sexual abuse, the victims are generally unaware of the concept of consent.¹⁰¹ They share a relation of trust, intimacy and dependence with their abuser. They cannot conceive that they would do anything wrong to them. This makes them vulnerable. If this vulnerability is not recognized by the law, the child is left unprotected, and most cases end in denial of the act.

Thus, this over-reliance in most cases proves to be detrimental as it derecognizes the most traumatic experiences of victims. There is an increasing need for the law to progress with the time, for rape to be

⁹⁸Mahmood Farooqui v. State (Govt. of NCT) Criminal Appeal 944/2016.

⁹⁹Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. AND POL’Y REV. 2 (2016); LEAH E. DAIGLE, VICTIMOLOGY VOL. 2 (2015).

¹⁰⁰LEAH E. DAIGLE, VICTIMOLOGY VOL. 2 (2015).

¹⁰¹Vandana Choudhary et al., *Review of Randomised Controlled Trials on Psychological Interventions in Child Sexual Abuse: Current Status and Emerging Needs in the Indian Context*, 38 INDIAN J. PSYCHOL. MED. 4 (2016).

defined as an offense against the individual person and not have consent as the determinant.

VI. CONCLUSION

Rape is a complicated and often misunderstood offense. This paper has argued that it is not merely a sexual crime but more an act of violence and a means to assert power and dominance. While understanding the deep psychological trauma the victim undergoes after being raped as well as recognizing the various motivations that actual and potential offenders have or might have, the paper has analysed the impact the act and conviction has on the family members and the community. It is only with the recognition that a crime emanates from societal prejudices that a restorative model of justice delivery can be envisioned.

It is argued that restorative practices are best suited to meet the ends of justice for the victims and for balancing the needs of the offender. When a convict experiences guilt, there is room for introspection and self-improvement allowing for their reintegration into society. When they are made to feel ashamed about who they are, by assigning labels, they start equating their act to their identity.¹⁰² This demonization of the person rather than condemnation of the act is precisely the reason the criminal justice system has been failing in its end. Restorative justice recognizes that the abuser and abused don't exist in the binary that the criminal justice system paints them to be. By understanding the motives of the abuser, and thus his needs, reintegrating him in the community becomes effective, thus also ensuring reduction in recidivism. In this way, by changing the focus

¹⁰²Everyday Feminism, *9 ways to be accountable when you've been abusive*, February 1, 2016, available at <https://everydayfeminism.com/2016/02/be-accountable-when-abusive/> (May 10th, 2018).

from the actor to the act, normalcy can be restored in a better manner. This is especially true for cases of rape where it is important to demonize the act more than the individual for the offender to understand that what he has done is condemnable. This is because till the time the discourse changes to openly condemning the acts of rape and intimate partner violence, the offenders will keep hiding behind excuses of societal endorsement of entitlement.

This process may prove to be more useful in cases of child sexual abuse where the vulnerable, confused and often broken children are dealt with in an environment that is conducive and healthy. This also helps in their understanding that the act is not just wrong but also highly condemnable in the society. This curbs the victim to offender transition which is often seen as sexually abused boys grow up, enter into adult relationships and breach the same trust that was snatched from them in their childhood and exploit the same dependence and vulnerability which made them victims in the first place.

Thus, active efforts must be taken by legislatures across the world to change the way justice is meted out in cases of rape and intimate partner violence by focusing more on the needs of the victims, changing notions of consent, and letting them have agency over the course of proceedings.

There is, however, scope for further empirical research on the impact that re-integrative shaming and acknowledgement of guilt will have on rape convicts' family members. Further doctrinal research also needs to be conducted on how gender and restorative practices interact in order to build models of restorative justice that can suit the needs of victims of gendered crimes like rape.