

On the Ethics of Law

By Prathyush Parasuraman

The following op-ed stems from research I did for The Bangladesh Legal Aid and Services Trust (BLAST) while producing a research note 'On The Use Of Character Evidence Of Victims In Rape Trials' that helped outline reasons for repealing provisions legalizing use of character evidence in Bangladesh's Penal Code .

I keep coming back to the central question of whether law and contemporary ethics collide and collude with one another, and if they don't, at what point does the lag begin fraying the fabric of what holds a society together? Law largely is a product of the context in which it was codified. But then what happens when the context changes but the laws stagnate? Must not law be a dynamic institution then?

These questions become especially pronounced when dealing with issues along the lines of gender. They feel more pronounced on reading the history of the usage of character evidence in rape trials, the rationalization of it, and the historical context in which character evidence as permissible in a court of law was codified.

"[In rape trials]... aspects of easy virtue or chastity are recurring themes... rape is addressed within frameworks of morality, chastity and honour, instead of being viewed as a crime against an individual and a violation bodily integrity".¹

In the South Asian context, Rape as an act exists within a culture of impunity. In addition to rape cases not being reported or filed with the police due to the ubiquitous social stigmatization of survivors of rape, there are also legal barriers to the successful prosecution of perpetrators of rape. A key obstacle is Section 155(4) of the Evidence Act, 1872 which states

"When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character."

This allows for character evidence of a rape victim's character, and her past sexual history, to be introduced in rape trials. In common law, it was "permissible to attack the moral character and reputation of a complainer" in cases of rape. However, this legislation has a detrimental, prejudicial impact on rape trials, and diminishes the likelihood of men who have committed rape from being convicted.

The Bangladesh Legal Aid and Services Trust (BLAST) recently researched judgments over a ten year period between 2000 and 2010 to identify cases where the survivor's character evidence had been considered by the higher courts (High Court and Appellate Division of the Supreme Court).

From the compendia, it quickly becomes apparent that the judges draw inferences regarding the guilt or innocence of the perpetrator based on their perceptions of the victim's character. Character evidence

¹ *Medical Evidence in Rape Case in Bangladesh: Law and Practice*, Bangladesh Legal Aid and Services Trust, 2009.

becomes a consequential piece of evidence when deciding whether the accused be held guilty or not. Often, judgments about a victim's character have even rendered her statements totally unreliable.

For example, in *SreePintoo Pal V The State* [30 BLD (AD) 2010, Page 220], the court appears to have considered the complainant's behavior in climbing a tree as evidencing her 'bad character' and therefore diminishing her credibility. The complainant was a young woman domestic worker allegedly raped by her employer. The Court noted that "...the victim entered into the house of the accused by climbing [a] paupa [sic]tree as the gate of the house was closed which also proves that the victim is a woman of easy virtue, so her evidence cannot be believed without the corroboration of reliable evidence..."

This also works in the favor of the survivor as the affluence and background of the girl. Therefore, this also brings up the question of the legal consequences of socio-economic status in such cases. Furthermore, the inherently problematic, and medically illegitimate practice of the two-finger test is used to corroborate character in many of these cases.

There has been dialogue regarding changing the laws, creating rape shield laws, defining consent, and creating uniform and sensitive medico-legal procedures. But if as a society, we refuse to contend not only with inherent biases, like the effortless linking of morality with sexuality, but also with the role that outdated laws play in a society, the rapid flux of time will place us in a position where the chasm between our ethics and our laws will be too distant to bridge.