CONSTITUTIONAL REMEDIES AVAILABLE TO VICTIMS OF SEXUAL CRIMES WHOSE IDENTITIES WERE REVEALED WITHOUT THEIR CONSENT

Suhaschandra B S

Best Citation - Suhaschandra B S, CONSTITUTIONAL REMEDIES AVAILABLE TO VICTIMS OF SEXUAL CRIMES WHOSE IDENTI-TIES WERE REVEALED WITHOUT THEIR CONSENT, 1 ILECR 23, 2022.

ABSTRACT

The paper looks at Section 228A of the Indian Penal Code which criminalises the act of printing or publishing or in any way revealing the identity of a rape victim. The specific question that the paper will attempt to address is: what are the remedies, particularly, constitutional remedies available to a rape victim whose name has been published without their consent. The Court in the case of *R.Rajagopal v. State of Tamil Nadu*[29] examined the issue of right to privacy and prior restraint of rights. While ruling on the unconstitutionality of prior restraint, the court also specifically recognized that the right to not have one's identity published exists with the victim of a sexual assault as part of their right to privacy. This was reaffirmed in the case of *Justice K.S. Puttaswamy and Ors. v. Union of India,*[30] allowing us an opportunity to examine other kinds of remedies against the three most likely violators of this right: the police, the media and the courts. Since the court in *Rajagopal* recognised the tortious and constitutional right to privacy, both remedies are explored in the paper. The police are considered to be state under Article 12 and constitutional remedies have been routinely sought against them. It is the idea of a tortious remedy that is more difficult due to the concept of a sovereign immunity. To navigate this idea, the concept of a constitutional tort is discussed. The media are not state and therefore to enforce fundamental rights against them, they either have to be shown to perform a public function under Article 226 or a indirect application of horizontality is required. Tortious action against the media is easily available due to them being private actors. The crucial role of social media as a platform and internet intermediary rights are also discussed. Finally, the Courts which print the name of the victim in the judgements are looked at. Due to their tortious immunity and their position under Article12 that only recognizes their administrative side as State, the most appropriate remedy would be to seek a remedy where the court passes an administrative order directing lower courts or frames rules whereby the courts can no longer publish the name of the victims. In conclusion, the need for these remedies and how a non-penal remedy has a wider scope due to the restrictive definition of the penal statute is discussed. The viability of a penal statute as a constitutional remedy is also discussed while keeping in mind the positive and negative nature of privacy rights.

INTRODUCTION

Section 228A of the Indian Penal Code[31] (hereinafter IPC) criminalizes a very specific act, namely, the act of publishing the identity of a victim of rape. This provision was introduced in 1983 through the Criminal Law (Second) Amendment Act of 1983[32] which also amended other sections of the IPC in relation to offences of a sexual nature. Such a provision is necessary considering the nature of the crime that is rape. As spoken about in the case of *Lillu v. State of Haryana,*[33] sexual violence is not only a crime against the bodily autonomy of the victim but also the dignity of the victim. This is compounded with the serious social stigma attached to being a victim of sexual offences in society, which often resorts to victim blaming which makes

[29] (1994) 6 SCC 632.
[30] (2017) 10 SCC 1.
[31] Section 228A, Indian Penal Code, 1860, Act no, 45 of 1860.
[32] Criminal Law (Second) Amendment Act of 1983, Act no, 43 of 1983.
[33] (2013) 14 SCC 643.

the instances of reported rape much lower than actual crime rates.[34]

Besides facilitating ease of reporting, the offence as codified in the IPC also gives the victim the choice to have their name published. This choice is important as some victims may want their name published on a principle, to take a stand against the social stigma. Apart from the victim's consent, the police can, in good faith, publish the name of the victim if they believe it will aid the investigation. Such a specific provision is not unique to the Indian criminal system, with countries like the UK[35] and the USA[36] also enacting similar provisions. However, this is merely a criminal remedy to the victim whose name has been published without their consent. The victim will merely be a complainant and it is the state that will prosecute the offender for the crime of publishing the identity of the complainant. This paper seeks to enquire into the other remedies available to the victim, in particular, constitutional remedies.

To locate the right of a victim to not have their identity published, the paper will initially delve into the Indian judiciary's understanding of the right to privacy and how they located this specific right within the right to privacy which in turn is located throughout Part III of the constitution.[37] Constitutional remedies though a fundamental right in themselves,[38] are not available against all actors. Unless a jurisdiction enforces direct horizontality, they are applicable only against the State, though they may be enforceable against private parties through indirect horizontality. Therefore, this paper will examine constitutional remedies available against three of the most likely offenders: the police, the media and the courts.

LOCATING THE RIGHT

To enforce constitutional remedies, it is first necessary to establish a right. This paper locates the right of a rape victim to not have their name published within the fundamental right to privacy as recognized by the Supreme Court in the case of *R. Rajagopal v. State of Tamil Nadu* (hereinafter "*Rajagopal*")[39] and affirmed in the much-acclaimed right to privacy decision of *Justice K.S. Puttaswamy and Ors. v. Union of India* (hereinafter "*Puttaswamy*").[40] The Right to privacy has always been a very contentious topic in Indian Constitutional law. In the early days of the constitution, when the courts refused to read rights together and identified them as silos, the right to privacy was not recognised.[41] Successive benches followed this ruling and held that upon a textual reading of the constitution, there does not exist a right to privacy in Indian constitutional law.[42] But post the *Bank Nationalisation* case[43] and the *Maneka Gandhi* case,[44] the courts declared that rights could be read together and certain rights flowed were not confined to individual fundamental rights.

This understanding by the court allowed future benches, albeit smaller than the eight-judge bench of *MP Sharma,*[45] to recognise the right to privacy but within the specific parameters of the case.[46] These judgements expounded the ideas of Justice Subba Rao in *Kharak Singh*[47] where he dissented by recognising the right to privacy within the

[34] Nithya Nagarathinam, *Enabling reporting of rape in India: An exploratory study*, Policy Report no. 15, THE HINDU CENTRE FOR POLITICS AND PUBLIC POLICY, 2015; Payal Mohta, *Meet the journalist documenting India's unreported rape cases*, OPEN DEMOCRACY, 2019, https://www.opendemocracy.net/en/5050/meet-the-journalist-documenting-indias-unreported-rape-cases/; Annie Gowen, *In India, it's not easy to report on rape*, THE WASHINGTON POST, 2016, https://www.washingtonpost.com/world/asia_pacific/its-not-easy-to-report-on-rape-in-india/2016/12/20/fab13528-c0b1-11e6-b527-949c5893595e_story.html.

[35] Policing and Crime Act, 2017, Acts of Parliament, Act no 399.

[36] Violence Against Women Act, 1994, Pub.L. 103-322.

[37] Justice K.S. Puttaswamy and Ors. v. Union of India, (2017) 10 SCC 1.

[38] Article 32, Constitution of India, 1950.

[39] (1994) 6 SCC 632.

[40] *Supra* no. 7.

[41] A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

[42] MP Sharma v. Satish Chandra, AIR 1954 SC 300; Kharak Singh v State of U.P., AIR 1963 SC 1295.

[43] RC Cooper v. Union of India, 1970 1 SCC 248.

[44] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

[45] AIR 1954 SC 300.

[46] *Supra* no. 9; Gobind v. State of M.P., (1975) 2 SCC 148.

[47] AIR 1963 SC 1295.

constitution. Bodily autonomy and right to privacy of one's thoughts were also recognised by the Supreme Court in *Selvi v State of Karnataka*.[48] This inconsistency by the court required a nine-judge bench to convene in the *Puttaswamy* case.[49] and unambiguously state the right to privacy as a core value of Part III of the constitution. The above history has been traced in detail in the judgement but the most interesting part of the judgement is how they conflated the rights of privacy and dignity as essential to each other.

In Justice Chandrachud's opinion, he quotes paragraphs from multiple earlier judgements and one of the judgements he quotes is from *Rajagopal* which was a case that held that prior restraint of the freedom of speech and expression under Article 19(1)(a) was not valid. The court also dealt with the issue of privacy and held that anything in the public record cannot be claimed to be protected within the right to privacy, except for victims of sexual offences who should be subjected to the indignity of having their name dragged through the media.

Having located the right as a facet of dignity, the violation of this should be viewed seriously by the court especially with how close the idea of dignity was made out to be to the concept of privacy. While the two are not the same, they do have multiple overlapping areas and once this right has been established, the remedies for violation must be examined.

REMEDIES AND ACTORS

A right is of no use without a remedy.[50] The right to constitutional remedies is available as a fundamental right under Article 32 of the constitution where parties may directly approach the Supreme Court or under Article 226 where the parties may approach the High Court.[51] According to traditional notions and textual interpretation, fundamental rights are, barring a few exceptions,[52] enforceable vertically, or only against the state. State, in turn, has been defined under Article 12.[53]

Justice Jeevan Reddy, the author of the judgement in *Rajagopal,* recognised not just the constitutional right to privacy but also the right to privacy under tort law. Therefore, victims can proceed under constitutional remedies or under tort law. This paper will deal individually with the three actors most likely to violate the above-mentioned right. The three actors are not exhaustive. The remedies discussed against the actors can be used against other similar actors too. Therefore, the remedies outlined against police actions also apply to other state bodies and the action against the media can also apply to other similar private actors. The third section dealing with the courts will be unique given the unique situation of the courts as State under Article 12 of the constitution.

THE MEDIA

The media has often been described as the fourth pillar of democracy and play a vital role in the dissemination of information which in itself is an essential part of democracy as it helps people make informed choices and encourages dissent. But they have also been known in the past to unnecessarily sensationalize a news item in order to increase circulation and readership/viewership. In fact, it can be argued that the main actor threatened by Section 228A of the IPC are the media given how the section is worded in terms of printing and publishing.

An active and independent media is necessary to encourage a spectrum of opinions but they cannot be free from all regulation. They must be accountable for the matter they publish. Even *Rajagopal* was a case of press freedoms where the court spoke about the right to privacy of persons who are published by the press without consent. The court held that the press could publish and make available for critique any matter already in the public domain, with the exception of certain cases one of which is victims of sexual crimes. Therefore, the media are one of the primary actors and have a vested interest in violating this right of the victims. But a

[48] (2010) 7 SCC 263.
[49] *Supra* no. 7.
[50] HM Seervai, *Constitutional Law of India,* vol 1 (4th edition, Universal Book Traders, 2002).
[51] Article 226, Constitution of India, 1950.
[52] Articles 17, 23 24, Constitution of India, 1950.
[53] Article 12, Constitution of India, 1950.

criminal remedy against a media network that has published the name of the victim is of no particular help to the victim themselves. While it works as an effective deterrent, it does not offer the victim any direct compensation.

Tort remedies against the media can be filed directly before the appropriate court as they are private actors as well. As the right was already elucidated in *Puttaswamy,* and there are no exceptions in the penal statute, the media cannot claim that they were entitled to publish the identity of the victim. Constitutional remedies, on the other hand, are more complex against private actors. The media cannot fall under the definition of State under Article 12 unless the particular media house in question is "functionally, financially and administratively" controlled by the government as held in the case of *P.K Biswas.*[54]

There are two routes under which remedies may be sought against private actors: by proving that they perform a public function and therefore are liable to remedies under Article 226 as held in the *BCCI* case[55] or by indirect and direct horizontal application of the right to privacy.

PUBLIC FUNCTION

In the case of *BCCI v. Bihar,*[56] the Supreme Court held that if a body is held to be Not State under Article 12, it is not the end of constitutional remedies available against them. If they perform a public function, they can be amenable to remedies through a writ petition filed before the High Court under Article 226. This seems to be an exception to the general strict understanding of the vertical operation of fundamental rights where they can be enforced only against the state. Certain private bodies are held to be accountable to follow fundamental rights given the gravity of the function they perform.

Whether the media performs a public function is a question to be discussed as the Court did not lay down general rules as to what public function is and to what limits it will be covered under Article 226. In that case, the court dealt only with whether the BCCI was discharging a public function with regards to its unique monopoly over the selection of the Indian Cricket Team. In the case of *Unnikrishnan v. State of AP,*[57] the court held that medical colleges were amenable to writs as they perform a public duty as they are the conduit through which the parties could get a medical degree. Applying this argument to the current scenario, the media is the conduit through which people receive this information. They are the portal which allows people to receive the information that is vital to the function of democracy, the protection of which is a function of the fundamental rights. Therefore, the media can be said to perform a public function and by extension be open to writ petitions under Article 226 for violation of the privacy of the victims if they publish the victim's identity without their consent.

HORIZONTAL APPLICATION OF PRIVACY

Another method of enforcing the rights against the media would be through a horizontal application of the right to privacy. This can be directly horizontal where a private actor is held responsible for a direct breach of privacy and the rights are directly enforced against them. The above section which talks about the public function doctrine is one such attempt. The other is a form of indirect horizontality.

Indirect horizontality is when the state is recognized as having certain positive obligations to further a right and not just negative obligations to protect them. Such positive obligations will compel the state to take action against the private actor who breached the right in order to uphold its own obligations. Therefore, the right will be indirectly enforced against the private actor. *Rajagopal* itself was a case where the right to freedom of the press was pitted against the right to privacy of the government officials. The court noted that it was necessary to balance the freedom of press with the laws that were consistent with the democratic way of life as the constitution ordained. Incidentally one of the parties in the dispute was the state but this was coincidental as they

[54] P.K. Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111.
[55] BCCI v. Bihar, (2015) 3 SCC 251.
[56] *Ibid.*
[57] 1993 SCR (1) 594.

claimed a breach of their right to privacy. If the breach of the right to privacy of a state actor in their personal capacity could be examined against the media, why a petitioner should be denied the same. Another interpretation could be the positive obligation to uphold the right to privacy which has been entrusted to the state by *Puttaswamy*. It clearly recognised the positive aspect of the right to privacy and state that the State must take measures to protect the privacy of the citizens. One such direction was for the State to implement a data protection regime at the earliest to protect the informational privacy of the people.

Therefore, an action can be sought against the media by claiming a horizontal right to privacy against them or by impleading the State and asking a direction against them to ensure that the media respect the right to privacy of the victim.

THE COURTS

The third most likely violator of the right are the courts. It is ironic that the very court that upheld this right would violate it on so many occasions. The violations mainly occur when the court mentions the name of the victim in the judgement thus allowing the name to be widely circulated as judgements, especially the Supreme Court and High Court judgements are printed in court reporters. This has not been a one-off incident but a trend in the Supreme Court where the name of the rape victim is mentioned along in the rape judgement.[58] The explanation to the IPC section also allows publication of High Court or Supreme Court judgement without fear of any criminal sanctions as it excludes these from within its ambit. The Supreme Court has also on multiple occasions in the past ruled that courts should refrain from mentioning the name of the victim.[59] Despite making such a declaration, infringements do keep happening. In light of this situation, remedies beyond what are normally available may need to be looked at.

Judges are saved from tortious liability for any act they commit within their power as judges as per the Judge (Protection) Act, 1985,[60] the realm of constitutional remedies against the court on the other hand occupy a unique feature by virtue of the definition of State under Article 12 and the uniqueness of adjudicatory functions. It has been held by the Supreme Court that the judiciary would fall under the category of State in its administrative side which frames rules but not under its judicial side.[61] In the following case of *AR Antulay v. RS Nayak,*[62] the Supreme Court decided that Article 14 violations of natural justice will be addressed by the Supreme Court and the matter was sealed in the case of *Hurra v. Hurra*[63] where the court conclusively held that no remedy under Article 32 could lie from the Supreme Court to the High Court or from one High Court to another. Instead it fashioned the remedy of the curative petition wherein it will cure any gross violation of natural justice which had taken place and not for any violation of fundamental right.

With this in mind, the only remedy that can be realistically demanded is that the administrative side of the Judiciary which is State under Article 12 and amenable to writ jurisdiction, be impleaded and a remedy be sought wherein the administrative side be asked to frame rules or issue directions to the courts to not print the name of the victim. This order can be sought because by not ensuring that the victim's name is not published, the court has failed its positive obligation of protecting the right to privacy of the rape victims. As to the effectiveness of the remedy, the above cases where the court noted that the courts must refrain from publishing the name of the victim, they were not the *ratio decidendi* of the court but rather *obiter dicta*.

Article 141 of the constitution binds lower courts to follow law as laid down by the Supreme Court but it is also well established that only the *ratio* of a case is binding and not the

[58] Karthi @ Karthick Vs. State represented by Inspector of Police, Tamil Nadu, (2013) 12 SCC 710.
[59] State of Rajastha v. Om Prakash, (2002) 5 SCC 745; Bhupinder Sharma v. State of Himachal Pradesh, (2003) 8 SCC 551.
[60] Judge (Protection) Act, 1985, Act no. 59 of 1985.
[61] Premchand Gagr v. Excise Comr. Allahabad, AIR 1963 SC 996.
[62] (1988) 2 SCC 604.
[63] (1999) 2 SCC 103.

obiter dicta.[64] Therefore, though the Supreme Court had observed that courts should refrain from publishing the name of the victim, it was not absolutely binding upon the other courts or successive benches. Therefore, asking the court to frame rules or issue directives in this regard in pursuance of the positive right of privacy will yield a better response from the lower courts.

CONCLUSION

The final question that is to be addressed is why these alternate remedies are needed. Why not allow the criminal remedy to stand. These remedies are not only important because they allow the victim the choice to pick a remedy that they may need but also because the criminal remedy primarily worked against the police or the private actors only. While many cases have been filed against the press, how much it has helped the victim is a different question altogether.[65]

The most important reason why these remedies are required is also because of the restricted scope of section 228A of the IPC. It only applies to rape victims and rape itself has a very restrictive definition. But going by Justice Jeevan Reddy's opinion, the right is available to victims of all sexual offences. This makes the right have a much wider scope than the offence and therefore allows more victims to be compensated. Further, a criminal statute cannot be the sole remedy for a constitutional right as it does not give the victims substantive relief. While the offender may be penalised, there is no way the victim can remedy the situation or seek compensation. This question was comprehensively dealt with by the US Supreme Court in *Wilson v. Libby*[66] where it held that a penal statute cannot be the remedy to a constitutional right, especially if it was not intended to be one.

This paper attempted to examine the remedies available to a victim of a rape or any sexual offence whose identity has been revealed without their consent. Most rights have a negative as well as a positive impact. The right to speak comes with the right to not speak. Similarly, the right to privacy should also entail the right to not hold anything private. A victim of a sexual offence should have the right to reveal their name if they so wished. As the right to privacy was clarified in only 2017, there has not been much time for privacy jurisprudence to develop in this direction but hopefully the courts continue to recognise this right as important and not engage in further pitting of rights against each other leading to situations where they must prioritise one over the other. Rather, finding ways to read them harmoniously would be the best way forward.

[64] Dir. Of Settlements, A.P. & Ors vs M.R. Apparao & Anr, (2002) 4 SCC 638.
[65] B.Janakiram vs The State Of Tamilnadu, 2017 (1) LLN 461 (Mad.).
[66] Wilson v. Libby, 498 F. Supp. 2d 74, 77–83 (D.D.C. 2007).