



## DOES THE NEW AMENDMENT TO CRIMINAL LAW ACCORD PROTECTION TO WOMEN? - AN ANALYSIS

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<sup>2</sup>M.K. Gandhi, Speeches and Writings, G. A. Natesan and Company, Madras, 1933

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### ABSTRACT

The Criminal Law (Amendment) Act, 2013 is a recently Indian legislation passed by the parliament which provides for amendment of *Indian Penal Code*, *Indian Evidence Act*, and *Code of Criminal Procedure*, 1973 on laws related to sexual offences in light of the protests after Delhi gang rape case. This new Act has expressly recognized certain acts as offences which were dealt under related laws. These new offences like, acid attack, sexual harassment, voyeurism, stalking have been incorporated into the *Indian Penal Code*. The most important change that has been made is the change in definition of rape under IPC. Certain changes have been introduced in the *Criminal Procedure Code* and *Evidence Act*, like the process of recording the statement of the victim has been made more victim friendly and easy. The author in this article wishes to analyze the effect of recent criminal law on protection of women.

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## INTRODUCTION

Indian Legal system has been on that has gone through a lot of changes through time. This is due to political as well as social situation and standing of the country. The legislature has executed their best duty confirming corrective measures and stricter laws for crimes against the women. All these amendments have provided women to get justice, to feel safe, to live in a free environment. Women throughout the world have been awarded lower status than men. In the last couple of decades, violence against women, (gender-based violence) has manifested as the most burning and obstinate social problem across regional, social and cultural boundaries. Violence against women is construed as a grave human rights violation and a pervasive public health problem that concerns all sectors of society. An overwhelming majority of judgments from across the world gives a singular message-'rapists deserve no sympathy'.

Seldom in legislative history, was a law been amended so quickly, bowing to public sentiment, as was done by the Government of India through an Ordinance on anti-rape laws. The death of an unnamed young woman "Nirbhaya", a female physiotherapy intern, following a brutal gang rape in last month of 2012 in Delhi, India, prompted the world to recognize the degree of violence against women and it has been noticed that sexual harassment is not only an Indian problem but it's a global one.

### Violence against Women

The Semantic meaning of crime against women "is direct or indirect physical or mental cruelty to women. Crimes which are "directed specifically against women" and in which "only women are victims" are characterized as "Crime against Women". Male violence against women is worldwide phenomenon.

In the Indian society, position of women is always perceived in relation to the man. This perception has given birth to various customs and practices. Violence against women both inside and outside of their home has been a crucial issue in the contemporary Indian society. Women in India constitute near about half of its population and most of them are grinding under the socio-cultural and religious structures. Violence against women includes rape, sexual assault, insult to modesty, kidnapping, abduction, cruelty by intimate partner or relatives, trafficking, persecution for dowry, dowry deaths, indecency, and all other crimes listed in *Indian Penal Code*. Rape is one of the most common crimes against women in India.

**Rape**<sup>1</sup> – A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following description:

First, against her will.

Secondly, without her consent

Thirdly, with her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly, with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly, with her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly, with or without her consent, when she is under sixteen years of age.

### Sexual Harassment

Sexual harassment is intimidation, bullying or coercion of a sexual nature, or the unwelcome or inappropriate promise of rewards in exchange for sexual favours. Sexual harassment in India is termed "Eve teasing" and is described as: unwelcome sexual gesture or behaviour whether directly or indirectly as sexually coloured remarks; physical contact and advances; showing pornography; a demand or request for sexual favours; any other unwelcome physical, verbal/non-verbal conduct being sexual in nature.<sup>2</sup> And Whereas the Supreme Court in *Vishakha v. State of Rajasthan*<sup>3</sup> has formulated guidelines to address sexual harassment until a suitable legislation is enacted in this respect.

### Domestic Violence

<sup>1</sup> Section 375 of Indian Penal Code, 1860.

<sup>2</sup> Although there is no specific law against sexual harassment at workplace in India but many provisions in other legislations protect against sexual harassment at workplace, such as Section 354, IPC deals with "assault or criminal force to a woman with the intent to outrage her modesty, and Section 509, IPC deals with "word, gesture or act intended to insult the modesty of a woman.

<sup>3</sup> AIR 1997 SC 3011.

Domestic Violence can be described as when one adult in a relationship misuses power to control another. It is the establishment of control and fear in a relationship through violence and other forms of abuse. The violence may involve physical abuse, sexual assault and threats. Sometimes it's more subtle, like making someone feel worthless, not letting them have any money, or not allowing them to leave the home. Social isolation and emotional abuse can have long-lasting effects as well as physical violence. In 2005, a law was drafted to give relief to women subjected to domestic violence viz., Protection of women from *Domestic Violence Act, 2005*.<sup>4</sup>

### Dowry Death

Section 498-A<sup>5</sup> of the *Indian Penal Code*<sup>6</sup> covers dowry-related harassment. As with other provisions of criminal law, a woman can use the threat of going to court to deter this kind of harassment. The *Indian Penal Code* also addresses dowry deaths in section 304-B<sup>7</sup>. If a woman dies of "unnatural causes" within seven years of marriage and has been harassed for dowry before her death; the Courts will assume that it is a case of dowry death.

### Female Foeticide

Female foeticide is a heinous act and an indicator of violence against women. The determination of the sex of the foetus by ultrasound scanning, amniocentesis, and in vitro fertilization has aggravated this situation. Although no moral or ethical principle supports such a procedure for gender identification. The Government of India passed the Pre-conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act In 1994<sup>8</sup>, with the aim of preventing female foeticide. It was later amended and replaced in 2002 by the *Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act*.<sup>9</sup>

### Trafficking

Trafficking is defined as a trade in something that should not be traded in for various social, economic or political reasons. Thus we have terms like drug trafficking, arms trafficking and human trafficking. The concept of human trafficking refers to the criminal practice of exploiting human beings by treating them like commodities for profit. Women in India are exploited for sex trade and are traded like commodity. *Devadasi* system is one form of exploitation of women prevailing in northern part of Karnataka and southern part of Maharashtra. Immoral Traffic Prevention Act, 1956<sup>10</sup> deals with the problem of trafficking and punishment to the abuser.

### Indecent Representation of Women

<sup>4</sup> Act No. 43 of 2005.

<sup>5</sup> This section speaks about cruelty by the husband or relative of the husband which will drive women to commit suicide or harassment in view of meet unlawful demand for property, shall be punished under the code.

<sup>6</sup> Act No. 45 of 1860.

<sup>7</sup> This section speaks about dowry death and punishment for the same.

<sup>8</sup> Act No. 57 of 1994.

<sup>9</sup> Act No. 14 of 2003.

<sup>10</sup> Act No. 104 of 1956. This legislation has been amended twice in 1986 and 2006.

The derogatory representation of women in the media is more a social, cultural and economic problem than purely a physical one. The subjection of woman to indecent representation is a global one. The model portrays a flawlessness in them that is an impossible perfection erodes self esteem of women.

The advertisements that end a message across women that, only if they acquire beauty as depicted by advertising images can they attain happiness and bliss in life motivate these women to take extreme steps to achieve that appearance. This is dealt under a special law in India, The Indecent Representation of Women (Prohibition) Act, 1986.<sup>11</sup> Apart from the above there is much violence against women. The above are but few. The law has been trying to curb these violence's and the latest was a major amendment carried to various laws in 2013 based on J. Verma Committee report.

### Overview of the Verma Committee Report

The committee of three-member Commission, headed by former Chief Justice of India, Justice J.S. Verma which was assigned to review laws for sexual crimes has comprehensively set out the political framework and constitutional framework within which sexual assault must be located within which non-discrimination based on sex must be based and focuses on due diligence by the state in order to achieve this as part of its constitutional obligation. Reviewing leading cases and echoing the critique of Indian women's groups and feminist legal scholars whether in the case of *Mathura*<sup>12</sup> or even the use of the shame-honour paradigm that has trapped victim-

survivors in rape trials and in *khap* panchayats, the committee observes: "...women have been looped into a vicious cycle of shame and honour as a consequence of which they have been attended with an inherent disability to report crimes of sexual offences against them."<sup>13</sup> In terms of the definition of rape, the committee recommends retaining a redefined offence of "rape" within a larger section on "sexual assault" in order to retain the focus on women's right to integrity, agency and bodily integrity. Rape is redefined as including all forms of non-consensual penetration of sexual nature.<sup>14</sup> The offence of sexual assault would include all forms of non-consensual, non-penetrative touching of sexual nature.

The first set of questions had to do with the nature and quantum of punishment. Treading this issue with care, the committee enhances the minimum sentence from seven years to 10 years, with imprisonment for life as the maximum. On the death penalty, the committee has adopted death penalty; the committee has adopted the abolitionist position, in keeping with international standards of human rights, and rejected castration as an option. The second question had to do with the reduction of age in respect of juveniles. Despite the involvement of a juvenile in this incident, women's groups and child rights groups were united in their view that the age must not be lowered, that the solution did not lie in locking them up young. Given the low rates of recidivism, the committee does not recommend the lowering of the age, recommending

instead, and comprehensive institutional reform in children's institutions.

### Amendment to various criminal laws in 2013

There was a large scale amendment for the protection of women in 2013 criminal law.

The incidents which were on rise due to conventional reasons as well as development in technology prompted the legislature to bring the sea change in the law. Consequently, on December 22<sup>nd</sup> 2012, Government of India appointed a three-member judicial committee headed by the former Chief Justice of India, Justice J.S. Verma. Popularly, known as the Anti-rape Act, amends the *Indian Penal Code* (IPC), 1860, the *Code of Criminal Procedure* (Cr. P.C), 1973, the *Indian Evidence Act* (IEA), 1872 and the *Protection of Children from Sexual Offences Act*, (PCSO), 2012. In a way, the Act is a radical expression of the fifty-seventh session of the Commission on the Status of Women held at the United Nations Headquarters, New York, on March 15<sup>th</sup>, 2013 as both the interventions focus on violence against women with particular emphasis on women's safety and security. Sadly, even after the declaration by the United Nations in 1993, that any type violence against women is a violation of human rights, incidents of violence against women continue to be reported, which definitely is a tip of a very ugly iceberg.<sup>15</sup>

The Criminal Law (Amendment) Act, 2013 that came into force on the 3rd of February, 2013 amended as well as inserted new sections in the IPC with regard to various sexual offences. The new Act has expressly recognized certain acts as offences which were dealt under related laws. New offences like, acid attack, sexual harassment, voyeurism, stalking have been incorporated into the Indian Penal Code. Following the amendments introduced by the Criminal Law (Amendment) Act, 2013, Section 375 of the IPC defines rape as non-consensual intercourse, penetration using the penis or 'any object or a part of the body', or oral intercourse. Justice Krishna Iyer in the case of *Rafiq v. State of U.P*<sup>16</sup> made a remark that, "a murderer kills the body, but a rapist kills the soul". The Act also specifies circumstances where consent may be nominally given but not valid, such as: consent obtained through coercion or threats; consent obtained by falsely impersonating the victim's husband; and consent from a victim 'unable to understand the nature and consequences' of what she is agreeing to due to 'unsoundness of mind or intoxication'.

When a victim is below 18 years of age, penetration or intercourse is considered rape regardless of whether consent was given.<sup>17</sup> Parliament did include 'death penalty' under Sec 376<sup>18</sup> because the legislature was of the opinion that it should be awarded only in cases of 'rarest of rare'.<sup>19</sup> But Courts have been awarding life imprisonment which is imprisonment till last breath which shows no leniency is granted to the

<sup>15</sup>Rituparna Bhattacharyya, 'Criminal Law (Amendment) Act, 2013: Will it ensure women's safety in public spaces?', *International Journal of Humanities and Social Science*, vol. 1, 2013, p. 14.

<sup>16</sup>1981 AIR 559.

<sup>17</sup> The Act inserts Sections 375, 376 and 376A-D into the Indian Penal Code. Section 375 defines 'rape'.

<sup>18</sup> As suggested by Verma Committee.

<sup>19</sup> *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

<sup>11</sup>Act No. 60 of 1986.

<sup>12</sup> *Tukaram v. State of Rajasthan*, 1979 AIR SC 185.

<sup>13</sup> Justice Verma Committee on Amendments to criminal law, *Vigyan Bhavan Annexe*.

<sup>14</sup> *Ibid* at para 111.

offender.<sup>20</sup> Sexual harassment is bullying or coercion of a sexual nature, or the unwelcome or inappropriate promise of rewards in exchange for sexual favours. The critical factor is the unwelcomeness of the behaviour, thereby making the impact of such actions on the recipient more relevant rather than intent of the perpetrator.<sup>21</sup> After amendment, sexual harassment has been made a gender neutral offence whereas earlier, a man who makes unwelcome sexual advances, forcefully shows pornography or demands/requests sexual favours from a woman commits the offence of sexual harassment; this is punishable by imprisonment of up to three years. Making sexually coloured remarks also amounts to sexual harassment, which is punishable by imprisonment for up to one year. Sec 326A has been added to the IPC as often the cases of throwing acid on faces of woman have surfaced. Beauty of face is a feature often primarily associated with females in chauvinistic male society. As such where a perpetrator wants to do damage to a female, he often prefers throwing acid on her face so as to destroy her beauty, regardless of any intentions. To curb such a horrifying menace, this crime has been added specifically in clear words under IPC with punishment of either description of not less than 10 years which could be upto life imprisonment along with fine. Parliament made an amendment to IPC, adding Sec 354B, to create a new offence namely, 'Assault or use of criminal force to woman with intent to disrobe'. Voyeurism has been made it punishable under the new law.<sup>22</sup> Voyeurism means and described in the section as 'watching a woman when she is engaged in a private act including sexual acts, like use of lavatory, or when private parts are exposed'. Punishment is 1 to 3 years imprisonment and fine for first time offenders and 3 to 7 years for second time offenders. Stalking<sup>23</sup> is a term commonly used to refer to unwanted or obsessive attention by an individual or group toward another person. It has been described as 'following a woman, attempting to foster personal interaction despite indication of victim's disinterest, spying, and monitoring electronic communication'.

Compensation shall be paid by the State Government for the victim and it has been stated that hospitals whether private or government has to provided immediate assistant to the victim.<sup>24</sup> Certain portion of fine also shall be given to the victim if the court directs so. As to Evidence Act,<sup>25</sup> it has been stated that 'in prosecution for an offence under section 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E of IPC, evidence of character of the victim or of such persons previous sexual experiences with any person shall not be relevant.

## Conclusion

Access to violence free and safe public space is the basic right of a woman. Yet, the greatest challenge relates to the alarming threat to women's safety and freedom of movement in public spaces. 'Longer jail terms' or 'capital punishment' enhances women's safety and security in public, although for sure such law may inculcate a sense of fear among the culprits. For the

first time, the Act endeavours punishable offence for those police officers who fail to register First Information Report (FIR). The Act also addresses penalties for other abhorrent forms of crime (stalking, touching, sexually coloured remarks, voyeurism, human trafficking and acid attacks. However, it remains unclear as to how the perpetrators of the offences like touching, stalking, and sexually coloured remarks would be accused and subsequently prove the assailant as guilty.

Further, the Act has increased the age of consent to 18 years, which remained 16 since 1983. Critics argue that raising the age of consent to 18 leaves ample room to wrongly prosecute teenagers (boys) below 18 (more precisely 16-18) years as rapists or offenders of sexual assaults simply for kissing, hugging or even having consensual sex with a female counterpart of his age. There are already ample laws prescribing deterrent punishment for offences against women. What is actually required is a concrete legislation, this was however, partially achieved through the passing of the Criminal Law (Amendment) Act, 2013; to infuse sensitivity, understanding and more significantly, the mindset among police, executives to implement the laws more in spirit than in letter. Only then deterrent punishment can be awarded in crimes against women.

## Suggestions

- The offences of under Ss. 354A (1) and 354 both require physical contact at the hands of the perpetrator. As such there is a lacuna when it comes to differentiating the types or forms of 'physical contact' amounting to sexual harassment and outraging the modesty of woman.
- The offence of making sexually coloured remarks was already being dealt u/s. 509. Again the sub-clause Sec 354A (iv) imposes same degree of punishment as Sec 509. Thus the need to make this change and the intention of the legislature is very unclear.
- Under the Act, the offence of stalking is limited to the physical act of following or contacting a person, provided that there has been a clear sign of disinterest, or to monitoring the use by a woman of the internet, email or any other forms of electronic communication. Sometimes stalking can also be without physical act. The section should be amended to including mental act also.
- The absence of law on marital rape (sexual assault), would also fail the objective of this Act as married women cannot be protected. The law u/s. 376-A and exception u/s. 375 should be deleted equate marital rape and sexual assault.
- The compensation stated under section 357 of Cr.P.C. is only in cases of gang rape and acid attack cases. The other rape cases have been neglected without any justified rationale at the mercy of the court to provide fine. If court is not satisfied to grant fine they have to give reasons in recording but in no way they are bound to give compensation from the Fines. This would be clear discrimination and hence compensation should be given in all types of sexual offences and heinous offences.

<sup>20</sup> Swamy Shradananda v. State of Karnataka, 2008 (13) SCC 767.

<sup>21</sup> Section 354 (A) of IPC, 1860.

<sup>22</sup> Section 354C of IPC.

<sup>23</sup> Section 354D of IPC.

<sup>24</sup> Section 357 of Cr.P.C.

<sup>25</sup> Section 53 (A) of Indian Evidence Act.