

## **Student Bar Association National Law School of India University, Bangalore**

January 5th 2013

Suggestions to the Justice Verma Committee – Amendments to Criminal Laws relating to Safety and Security of Women

### Introduction

As students of the National Law School of India University, we are taught to engage with the law critically and responsibly. We thus have a few suggestions to offer to the Justice Verma Committee regarding amendment of the law to provide for speedy justice and enhanced punishment for sexual offences against women.

We have provided several recommendations towards changing existing legal provisions, as well as suggestions for guidelines and sensitization in respect of matters not covered by the law. We have categorised our recommendations under two broad heads covering: (i) amendments to the substantive law relating to definition of, and punishment for, various sexual offences; (ii) amendments to procedural law covering the entire process from filing of an FIR to the trial. We have also drafted a list of amendments proposed to the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act, which can be found at the end of this document.

Under the first head, we have examined the issues with the existing provisions of the Indian Penal Code, and made recommendations in five specific respects: problems with the existing definition of penetrative sexual assault; characterization of free consent and the issue of passive submission; definitions of particular terms in the context of sexual assault; the urgent need to rework the law relating to non-penetrative sexual offences; and sentencing and punishment, covering an examination of the feasibility of various alternatives including the death penalty, chemical castration as well as a national sex offenders register. We have also offered general suggestions in respect of compensating and rehabilitating the victim, removing the exception with regard to marital sexual assault, and re-working the age of consent keeping in mind the evolving state of society.

Under the second head, we have examined the issues of police reforms, widening the scope of protection to victims of sexual offences, media reporting of sexual assault and victim privacy, and medical examinations. Drawing on earlier efforts, we have made several suggestions for comprehensive reforms in the police system. We have proposed amendments to existing laws with the objective of ensuring the protection of the victim's safety and privacy during the process of investigation and trial of sexual assault cases. Finally, we have suggested the incorporation of several guidelines and rules in respect of medical examination of victims of sexual assault that must be made binding on medical practitioners, so as to make the process less traumatic for the

victim, as well as training and sensitization of medical practitioners which we believe is essential for this purpose.

We have declined to offer any suggestions regarding special or fast track courts for the trial of cases of sexual assault, since there is no empirical evidence to suggest that they are more efficacious in this regard. We believe that more rigorous implementation of existing provisions such as s. 309 of the Code of Criminal Procedure, 1973, would be sufficient to ensure speedy trials and justice delivery.

The Protection of Children from Sexual Offences Act, 2012 adequately provides for punishment of sexual offences against children below the age of 18, and hence we have omitted references in the existing law with regard to the same so as to avoid redundancy and confusion due to overlaps.

Besides analyzing existing legislations and the Criminal Law Amendment Bill, 2012, we have attempted to use comparative jurisprudence and best practices from other jurisdictions wherever possible, in order to provide as wide and comprehensive a perspective as possible.

## **AMENDMENTS TO SUBSTANTIVE LAW**

### **PENETRATE FOR SEXUAL PURPOSE**

The proposed amendment to Section 375(a) of the IPC uses the expression ‘penetrate for a sexual purpose’. We believe that this is problematic and raises the threshold of proving sexual assault, increasing the burden on the prosecution significantly, and thereby lessening conviction rates. This expression being used here is perplexing as the Criminal Law Amendment Bill 2010 makes no mention of needing to prove ‘sexual purpose’.<sup>1</sup>

This is also a departure from the general purpose of the present amendment Bill which seeks to view rape as not merely a sexual crime, but a crime of violence. Thereby, we submit, the expression contradicts the aim behind the Bill.

We suggest, instead, that the expression be replaced with ‘intentionally penetrates’. This standard is used in the United States Federal Rape Law, as well as in South Africa, among other countries. We believe that it establishes sufficient mens rea, and is also in sync with the view that rape should not be seen in narrow sexual terms.

### **FREE CONSENT AND PASSIVE SUBMISSION**

It is important to realize that women may not always protest or cry out for help while being raped through terror or for minimizing the damage inflicted upon herself, but this should not be construed as consent, as the Courts have wrongfully done in some cases.<sup>2</sup> This interpretation of ‘passive submission’ not amounting to consent has been clarified in *Rao Harnarain Singh v. The State*,<sup>3</sup> and it is increasingly recognized that the consent must be reasoned and deliberated upon.

Thus, the 84th Law Commission of India report on rape and allied offences suggested that ‘free and voluntary consent’ be substituted in place of ‘consent’. The former implies active consent, and thus removes the possibility of the Courts interpreting silence or non-resistance as consent. Similar definitions of consent are also used in other countries, all of them placing a high degree of importance on the consent being active.<sup>4</sup>

Further, the Courts have often placed the burden on the prosecution to prove that there was no consent.<sup>5</sup> We believe that the burden should be explicitly shifted to the accused to prove that there was consent instead. The onus should not be on the victim to prove that there was no consent, as in the case of submission or no violent protest, she may not be able to sufficiently prove the lack of consent. Thus, we believe that for more efficient functioning of the penal provisions, the burden must be shifted, which will lead to an increase in conviction rates in the case of genuine rape cases.

To this end, we propose the amendment of s.114A to the Indian Evidence Act to create a presumption of absence of consent in all cases of sexual assault, in the event of the victim giving evidence to that effect.

We also submit that the third clause under s. 375 of the IPC be amended to include criminal intimidation as well, as defined under s. 503 of the IPC. This will give the clause a much broader and practical scope, as the threats may not be of death or injury, but may still be significantly severe so as to coerce the victim into consent. For example, the threats may be in relation to her reputation or the interests of her children. This recommendation is also supported by the 84th report of the Law Commission of India.

## EXPLANATIONS

It is recommended that the definition of a hospital in Explanation 3 to Section 376, not be confined to the “precincts” of such hospital, but include any location where healthcare services are provided. Further, it is recommended that the term ‘person suffering from mental or physical disability’ in the proposed s.376(2)(j) be replaced with ‘person with disability’ to bring it in line with the broad definition under existing law, recognising the particular vulnerability of such persons to sexual assault.

## NON-PENETRATIVE SEXUAL OFFENCES

Sexual violence in all its forms, be it verbal, contact-based or penetrative, is extremely degrading and humiliating to the victim. However, the existing provisions of law dealing with non-penetrative and verbal sexual acts, namely Sections 354 and 509 of the IPC, are not very effective insofar as the offence itself is poorly defined in terms of “outraging the modesty of a woman”, and the punishments provided are not deterrent enough, as is evidenced from the statistics provided by the National Crime Records Bureau.<sup>6</sup> A plain reading of s. 354 seems to suggest that it was added, almost as an afterthought, to cover instances of sexual battery not

amounting to rape, while s.509 seems to be a watered-down version of s.354, dealing with instances where physical force is not involved.

To this end, it is submitted that all forms of sexual violence be brought under the head of “sexual offences” instead of the status quo where it is scattered over Sections 354, 375– 377, 509 of the IPC. This is essential for the following reasons:

1 Sections 354 and 509 use the concept of “modesty of a woman” – a problematic and antiquated term that clashes with modern notions of womanhood, and the dignity and independence of women. It also leads to reliance on subjective morality in making determinations under these provisions.<sup>7</sup> The current exercise of suggestions for enhancing punishments for sexual offences against women is a good opportunity to re-examine not only the meagre and inadequate punishments imposed by these sections, but also their deeply sexist and anachronistic wording in terms of defining the offence itself.

It is also pointed out that the law currently prescribes different mens rea requirements for different sexual offences. In the case of rape, it is the victim’s consent that is determinative and not the accused’s mental state; but this is not so under Sections 354 and 509. It is submitted that there exists no rational basis for differentiating between these categories of offences given that they spring from the same underlying cause. Recategorising all these offences under the common umbrella will help do away with such anomalies.

It is proposed that this recategorisation of “sexual offences” be carried out on the lines of the suggestions of the 172nd Law Commission Report, which recommended the inclusion of Section 376E in order to bring “unlawful sexual contact” within the ambit of “sexual assault”.<sup>8</sup> It is further proposed that offences that at present fall within the scope of s. 354 and s. 509 be redefined as “sexual harassment”, in keeping with international standards recognizing the same as a violation of the dignity of the individual.

The issue then arises as to how sexual harassment ought to be defined. The primary points of conflict that arise among the various perspectives discussed earlier are whether the crime should be defined from the perspective of the victim or the offender, and whether reasonableness or rationality ought to play any role in such a definition. It is submitted that while – in order to achieve complete justice – the crime ought to be defined from a victim’s perspective, a degree of reasonableness (not necessarily implying rationality) would have to be incorporated into it in order to prevent the definition from leading to extreme and inefficient results.

A balanced approach could be achieved by keeping the standards of culpability high, in order to prevent frivolous complaints or place a presumption of guilt on the accused; while the actus reus itself could comprise a wide range of actions, ranging from gestures to verbal abuse to physical contact. Thus, it is clear that a delicate balance between the interests of the victim and the presumed innocence of the accused has to be maintained while specifying the technical requirements of the offence.

In the light of these discussions, it is proposed that sexual harassment be defined in terms of the guidelines laid down by the Supreme Court of India,<sup>9</sup> which have also been adopted by Parliament in the Protection of Women against Sexual Harassment at Workplace Act, 2012. Further, it is suggested that strict liability be presumed in cases where the offender is in a position of authority over the victim, or where the two are in a fiduciary relationship, in order to make the crime more easily reportable and increase the rate of conviction in cases where proof is traditionally hard to obtain on account of the victim's reluctance or helplessness due to pressure **and non-cooperation from the organization or family.**

## **SENTENCING AND PUNISHMENT**

Rape must be construed as more of a strict-liability offence, and thereby it is welcome that the proposed amendment bill takes away the judicial discretion to impose a sentence lower than the seven years prescribed due to any mitigating circumstances.

## **ON CASTRATION AS A PENALTY FOR SEXUAL ASSAULT**

We believe that castration, whether surgical or chemical, is not an appropriate punishment, as it misunderstands the nature of rape as a crime. Rape is not just about uncontrolled manifestation of sexual urges, it extends to exertion of power, violence, intimidation, aggression, and aims for humiliating and inflicting damage, both psychological and physical, upon the victim in several cases. Thus, the efficiency of castration is questionable, as it categorizes the rationale of rape in very narrow terms, limiting it only to be about sex.

It is going by the perspective that the sole or key motivation for rape is the sexual desire of men (called the evolutionary perspective) that the concept of chemical castration becomes relevant, according to scholars.

- It is valid in some jurisdictions for certain degrees of offence. In California, chemical castration is selectively applied to child sex offenders who are repeated offenders.
- However, this would be effective only if sex is seen to be the sole motivation for rape, which is not the case according to other writers.
- Further, in India, implementing the said system would be problematic given the constructive interpretation of Article 21 whereby torture is prohibited. In the USA, there have been challenges to chemical castration on grounds that this is violative of the stance against torture and cruel and unusual punishment.<sup>10</sup> May be considered unconstitutional.
- Considering the feminist perspective that rape is more about domination based on gender and a display of masculine control over women's bodies, it seems unlikely that this principle will promote recidivism.
- Further, the rates of conviction are likely to fall further, which will only be counterproductive.

## **ON DEATH PENALTY AS A PUNISHMENT FOR SEXUAL ASSAULT**

The imposition of death penalty for the crime of sexual assault will be very much in the nature of a knee-jerk reaction. However, we believe this measure will not necessarily serve to lower the rate of rapes in the country, for the following reasons:

- The conviction rate in rape cases in India is already abysmal, with the rate in Delhi being as low as 5%. A number of factors, dealt with in other parts of this report, come together to make this possible. However, imposing the death penalty for rapists will only add to the low rate of conviction.
- Judges will be more reluctant to convict, especially in cases of caste-based crimes wherein the rapist would often be from the dominant caste.
- Additionally, the sanctity that is afforded to the prosecutrix's statement will no longer exist. The standard of proof will become higher. In practical terms, this will translate into more harassment in the courtroom for the prosecutrix with no higher likelihood of conviction.
- A large number of cases do not make it beyond the lower court stage. Even currently, the lower judiciary is not known for its sensitivity to rape cases. Imposing the death penalty will ensure sympathy for the rapist and a fall in conviction. Even if the new law puts in place a mechanism for conviction to be confirmed by the High Court in each case, or in cases where there are prima facie discrepancies, it will slow down the process of trial even further.
- The imposition of the death penalty for rape could also facilitate the subsequent murder of the victim by the rapist. A rapist will be much more keen to hide the evidence once the crime is committed. Additionally, if his possible punishment will not increase in either case, and murder will reduce his chances of being identified as the rapist, he will be very likely to kill his witness i.e. the victim.
- The effectiveness of the death penalty with respect to deterring a criminal on the street has not been established. Studies conducted by institutions such as the National Academy of Sciences in the USA have been inconclusive with respect to whether death penalty has an effect on crime. This will be true especially in the India context because of the remote possibility of conviction. Furthermore, even once condemned to the death row, only a small percentage actually makes it to the executioner's block. In such a case, imposing the death penalty is not likely to create a deterrence effect by instilling fear in the mind of the criminal on the street due to the remote possibility of it ever applying to them.

Therefore, we recommend against imposition of the death penalty for sexual assault under any circumstances.

## **SEX OFFENDERS REGISTER**

- In addition to the existing penal provisions for rape, a National Sex Offenders Register could be maintained. This already exists in other common law nations such as USA, UK, Canada and Australia. While in those cases, the focus is much more on identifying child molesters and keeping them away from areas with children, the concept could be tweaked to create a deterrence effect in the Indian setting.

- o Under the system, government services such as the provision of supplies under one's ration card would be revoked for persons in the Register. Persons in the Register could also be made ineligible for government jobs for a certain period.

- o Inclusion in the register would not be permanent but based on a system of gradation with a higher offence leading to inclusion for a longer period.

## **OTHER SUGGESTIONS**

- Grant financial assistance to rape victims to recuperate as well as sue effectively in courts (such as in the schedule r/w Rule 12(4) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995).

- Making marital sexual assault a criminal offence by removing the exception to this effect.

- As per the Protection of Children from Sexual Offences Act, 2012 and the Criminal Law (Amendment) Bill, 2012; the age of consent has been raised to eighteen. We are of the opinion that maintaining eighteen to be the age of consent is not in line with the needs of a diverse and evolving society wherein children are discovering and exploring their sexuality at an earlier age. Furthermore, in a culture of disconcerting communal and moral policing, raising the age of consent to eighteen, gives the parents of young people from different castes or communities who fall in love and elope to get married an easy tool to prosecute them for choosing their partners outside their social groups. We urge the committee to affix the age of consent at sixteen so as to ensure that young people have the right to exercise their sexual autonomy

## **AMENDMENTS TO PROCEDURAL LAW**

### **POLICE REFORMS**

The police are unable and, to some extent, unwilling to make arrests in most of the cases reported to them. Of the men actually charged with rape, a very small minority is convicted. Reforms to the police system are long over due and several attempts at reform have been previously suggested. We urge the committee to consider police reforms as an intrinsic part of reforms in laws relating to sexual assault.

## **INSULATING THE POLICE FROM POLITICIZATION AND CRIMINALIZATION:**

While noting the obligations that police are under to investigate all complaints, the question is how much time they put into their investigations. In innumerable cases across the country the police is inextricably linked with the local political party leaders and the goons associated with them or otherwise which exercise control over their functioning. For example, the police often refuses to register complaints/FIRs against well known, influential people in their jurisdiction even if they had been involved in committing crimes as heinous and as violent as rape. They are thus very much prone to criminalization and politicization and hence laws need to be put in place that would make the police an independent and transparent body that would be insulated from such elements. Such drastic changes in law are a must to stop practices by the police stating a crime involving any form of sexual harassment to be just a good natured and harmless teasing by boys. Also there are umpteen number of cases where police have refused to register FIRs in cases of sexual harassment blaming the incident upon the girl/victim and how the same had conducted herself.

There have been many incidents of the police refusing to register an FIR which has severed the process of justice for the victim, often leading to extreme consequences. The Code of Criminal Procedure provides no discretion to police officers regarding the registration of FIRs and the Supreme Court has held time and again that the police have no option but to register an FIR if information is provided about a cognizable offence. The Court has gone so far as to say that an errant police officer should be suspended<sup>11</sup> or imprisoned<sup>12</sup> for not registering an FIR. Yet, this practice continues in many parts of the country. We recommend that the Supreme Court's orders regarding non-registration of FIRs be included in each State Police (Punishment and Appeal) Rules, such that the provision on punishment should have an additional sub-part that reads as follows:

“Any police officer who, when approached by a person to file an FIR, refuses to do so, shall be suspended immediately, and if on departmental inquiry it is found that such officer had failed to register an FIR regarding culpable homicide or murder or rape or any other sexual offence, he or she shall be liable to imprisonment for a term not less than six months but which may extend to two years.”

There must be laws put in place to make it mandatory for the police to register an FIR in all cases involving sexual harassment. This can be done by adding a proviso to s.154(3) of the CrPC.

## **INTERVIEWING THE VICTIM**

As Indians, we live in a patriarchal society, it is essential that rape and the rapist be examined within the context of patriarchy and the social control of women. It is obvious that police screen cases not so much based on objective and reliable facts but on a system that caters to the myth that only certain women get raped. The investigator also must intrude on the most private and personal details of the survivor's life. Thus, the police perpetrate a second rape by making a

woman's character and morals an issue. They reinforce the cycle of victim blaming that makes rape the most underreported crime.<sup>13</sup>

Police questioning may equally provide the rapist with a measure of indirect protection. Many women seem to be aware of the insensitive treatment of rape victims on the part of the police. Police sometimes argue that insensitive questioning is necessary in order to prepare the woman for aggressive cross-examination by the defence counsel. However, police brutalisation of the victim is responsible for the failure of woman to report the crime of rape. Some police, with their inept questioning, may rape the woman psychologically and, with their lack of understanding, may be responsible for many instances of severe emotional damage and psychological trauma. In contrast, the apprehended rapist may receive lenient and congenial treatment from the police.

Further, when it comes to interviewing or taking down a report from the victim, police should be more sympathetic and sensitive to the issue that she has been subjected to a crime of violence against her body irrespective of how much physical or bodily injury she has suffered. The notion that rape is a crime that expresses power and violence against the body of an individual must be sensitized among the police and guidelines must be laid down to educate the police how to conduct themselves, rather how to question a victim in such a crime.

Also, it is felt that there should be some forms of questioning that should absolutely not be allowed while interviewing a victim in a sexual harassment case. For example, questions relating to the sexual activity of the victim, the manner in which the alleged offender(s) defiled her (Is she sexually active? Whether her shirt was taken off first or was it her skirt? Did he/they touch her chest?) Such questions not only are an unreasonable and impertinent intrusion into their privacy but pose the victim to further embarrassment and trauma.

There is thus a need to sensitise police officials. We recommend:

- All newly recruited officers should have a special sensitisation module in their training curriculum with particular focus on the malaise of victim-blaming and their role as facilitators of law and order and what all that entails.
- For existing officers, a strict code of conduct within the police station needs to be laid down, that punishes errant police officers with temporary suspension up to a period of minimum period of 6 months and for more serious offences, imprisonment to a period of three years. This provision can be inserted as amendment in Section 154 (3).

### **UNDER-REPORTING OR NON-REPORTING OF CASES**

Cases involving sexual harassment often go unreported as police refuses to register them on grounds that the crime was committed in a different jurisdiction over which they have no authority and that the victim must get herself there to get the FIR registered. In such cases, the victim is unnecessarily harassed. It should be made mandatory by law for police officers in

charge to register all complaints involving sexual harassment irrespective of the jurisdiction the same should fall under. Subsequently, the police must do the needful for the case to be registered in the correct jurisdiction and for the investigation to start without any delay.

### **MAKING THE POLICE SYSTEM WORK**

The police officers in the lower rungs of the police hierarchy and the constables that are involved in the process of registering and FIR and subsequently conducting investigations in a case of sexual harassment or for that matter any crime have no incentives career wise to improve themselves or do their jobs dutifully and scrupulously. This fails to encourage them to work which acts against the interests of the victim. As suggested by the Padmanabhaiah Committee on Police Reforms, there must be career-planning at all levels of the police to keep them motivated with better opportunities and incentives.

Efforts should be made in basic training of the police and at advanced courses to re-educate police and other officials in the treatment and handling of rape survivors. The legal process has to become more sensitive. This must remain a persistent demand and one of the key objects of police reforms would be to achieve a timely, sensitive and guaranteed response from the police on any crime reported by a woman.

### **WOMEN POLICE OFFICERS**

Women police officers should be given a greater role in investigations work. Women officers should become an integral part of the police organisation, performing a special role dealing with crimes against women and children and tackling juvenile delinquency. Women police officers should share all the duties performed by male officers. We strongly recommend that women officers should be recruited in much larger numbers than at present, particularly to the ranks of Assistant Sub-Inspectors and Sub-Inspectors of Police.

### **WIDENING THE SCOPE OF PROTECTION FOR SEXUAL OFFENCES**

The 2012 Amendment Bill under the proposed amendment to Section 273 of the CrPC insists on evidence being taken in the presence of the accused with the exceptions of certain circumstances like the victim being below 18 years of age. Also, the Protection of Children against Sexual Offences Act allows the child to be transferred to another place of residence within twenty four hours if they believe that care and protection is required (e.g. if it is suspected that the offender and the child reside in the same household). However, no provisions have been made for any other vulnerable groups to immediate protection and safeguarding of their interests after approaching the police. We therefore suggest that the amendment be extended to include all victims of sexual assault or other sexual offences by omitting the words “below the age of 18 years”.

## **MEDIA REPORTING**

Section 228A of the IPC has rarely been invoked against media houses reporting about victims of sexual assault. The manner in which several newspapers and the electronic media report instances of rape warrants a case to be filed under this provision. While there are reports that go to the extent of revealing the name of the victim, many others disclose information that is sufficient to reveal the identity of the victim. This information is often in the form of her place of birth, nationality, age, place of study or work, among other such details.

We urge this committee to find a means to popularise this provision such that police stations that are investigating an instance of rape must also monitor the reporting of the matter and book charges if an offence is committed. If any identifying information is revealed, then the reporter and the editor responsible for that report must be booked under this section. Further, Section 228A(2)(a) must be deleted such that under no circumstances must there be any disclosure of the victim's identity by the police. Where such disclosure is made, the investigating officer be punished appropriately. We further suggest that in case such reports are brought to the notice of the court, appropriate proceedings be initiated by the court in question.

The right to privacy has been recognised by the Norms of Journalistic Conduct released in 2010 by the Press Council of India which states that, "while reporting crime involving rape, abduction or kidnap of women/females or sexual assault on children, or raising doubts and questions touching the chastity, personal character and privacy of women, the names, photographs of the victims or other particulars leading to their identity shall not be published." Although this is merely recommendatory, there is a need, now more than ever, to ensure that there is compliance with this sentiment.

The sensationalism, speculation and victim blaming associated with reporting instances of sexual violence infringes on the dignity and well being of the victim and hinders evidence gathering. It is our suggestion that the committee recommend the Press Council and the News Broadcasting Standards Authority to convene and make serious efforts towards effectively implementing guidelines on reporting matters of sexual violence. There must also be a mechanism of holding those reporters who deviate from these guidelines accountable for the same. In the recent Delhi gang rape case, we saw the nation's biggest electronic media houses voluntarily deciding to not cover the funeral rites of the victim proving that self-regulation is possible. The mood is conducive now to urge the media to take steps towards regulating itself and we urge the Committee to push for this.

## **MEDICAL EXAMINATIONS – EXCEPTION FOR HYGIENIC OR MEDICAL PURPOSES**

The proviso to Section 375(b) retains the exception to penetration for "hygienic or medical purposes." We believe that this could be subject to misuse by medical and health care workers.

Since any form of medical or healthcare treatment already required the consent of the patient of his/her guardian or next friend, this provision is redundant, and must be deleted.

## **PROCEDURE FOR EXAMINATION AND RECORDING OF FINDINGS**

One of the vital steps of investigation into cases of sexual assault against women is the medical examination, which is usually carried out by a practiced medical examiner in a government hospital, when such exam has been requisitioned by the police. Given the sensitive nature of the crime, it is important that the victim's dignity and privacy is respected at all time during the examination. However, the current manner in which medical examinations are conducted leave much to be desired on that front. Too often victims are forced to undergo archaic medical examinations like the 'two-finger test', used to determine whether the victim has been habituated to sexual intercourse. These findings are then recorded by the medical practitioner in their report, and may be used by the defence counsel to malign the character of the victim.

- The first area in which we would recommend you to take stringent action is the medical examination itself. We would recommend you to require all medical practitioners conducting examinations on victims of sexual assault (not just victims of rape, but of indecent assault or attempted rape) to ensure that they obtained full, informed consent from the victim (if the victim is above 16 years old, or her parents/guardians if she is a minor or incapable of giving consent).
- The consent should be obtained by way of a consent form (in the specified form under Annexure I), under S.164A of the Criminal Procedure Code, 1973.
- Such consent must be obtained after the victim is made aware of the exact nature of the various examinations she will have to undergo and her right to refuse to undergo any or all of the examinations.
- Such consent should be obtained in the presence of two witnesses (as is the current practice in medical jurisprudence<sup>14</sup>).
- The Medical Examination Report should only contain such information as is directly relevant to determining whether the incident of sexual assault took place, and to what degree. At no point in time should the Medical Examiner make any judgments as to the veracity of the complaint of the victim, or the moral character of the victim. The Report of the Medical Examiner should concern itself solely with physical and forensic evidence.

The Medical Examination Report should be in the specified form as in Annexure II, and such Report shall be made a pre-requisite for a valid examination under S.164A of the Criminal Procedure Code.

We recommend S.164A of the Criminal Procedure Code be amended accordingly.

## **ADDITIONAL RECOMMENDATIONS FOR MEDICAL EXAMINATION**

- As far as possible, the examination is to be conducted by a female medical officer.
- The two-finger test/per vaginal test should be discontinued<sup>15</sup>, or at the very least made optional. Doctors who conduct the two-finger test without prior informed consent of the victim, should be made liable for sexual assault or medical negligence at the option of the victim.
- The Medical Examination must be conducted as speedily as possible after the incident, in order to obtain the best possible quality of forensic evidence.
- The Medical Examiner must ensure that they have conducted a thorough examination to obtain all possible forensic evidence. Evidence so obtained must be stored safely, so as to prevent contamination of evidence. A useful tool in this regard would be 'rape kits' similar to those in use in the USA.
- The Rape Kit should contain- Instructions, Bags and sheets for evidence collection, Swabs, Comb, Envelopes, Blood Collection Devices, Documentation forms. The examinations may include the collection of blood, urine, hair, and other bodily secretions; photo documentation, collection of the victim's clothing; collection of any other possible physical evidence. The specimens must collected must be stored appropriately to prevent contamination.
- These examinations should be conducted by a forensic examiner (along the lines of the Sexual Assault Nurse Examiner in the USA), who has received specialized training in performing such examinations.
- Centre for Enquiry into Health and Allied Themes (CEHAT) has prepared a kit similar to the 'rape kit' mentioned above, known as the Sexual Assault Care and Forensic Evidence Kit<sup>16</sup> along with a model protocol<sup>17</sup> to be followed when administering such examinations. Both the kit and the protocol are extremely victim sensitive, and we would recommend the use of such kits and the strict implementation of this protocol in all hospitals which and by all doctors who are authorized to conduct medical examination of survivors of sexual violence.

## **ADMISSIBILITY OF MEDICAL EVIDENCE**

Observations by the medical practitioner as to the sexual history/habits of the victim, or the victim's moral character, should be considered irrelevant and inadmissible under s.45 of the Indian Evidence Act.

Textbooks of Medical Jurisprudence which discuss the physical characteristics of a woman habituated to sexual intercourse<sup>18</sup> or other such matters which are not directly relevant to the medical or forensic evidence being placed on trial should be considered inadmissible in court. Such textbooks violate the dignity and the right to privacy of the victim, and lead to a secondary form of sexual assault of the victim at the trial stage.

Only observations which are in direct relation to the forensic or medical/physical evidence sought to be adduced should be admitted and considered by the courts.

## **EDUCATION AND TRAINING OF MEDICAL PROFESSIONALS**

- The institution and continuation of a mandatory course on the basics of dealing with survivors of sexual violence, in particular the correct way to conduct medical examinations of such survivors, should be made a pre-requisite for a medical college to obtain accreditation from the Medical Council India.
- A standardized set of guidelines, similar to the ones arrived at by CEHAT, should be the required material for the mandatory course on dealing with survivors of sexual violence. This will help to prevent the harm caused by textbooks on medical jurisprudence, which refer to the moral character of victims based on their sexual habits, or which refer to the physical characteristics of ‘virgins’, and which encourage doctors to make moral judgments with respect to the victims and their sexual habits.
- Specialized training programmes should be instituted for medical professionals to sensitize them to the correct manner in proceeding with examinations of victims of sexual violence, without violating the victim’s dignity and privacy. Such specialized training should be made mandatory for all such doctors who are authorized to conduct such medical examinations.

## **PROPOSED AMENDMENTS TO THE INDIAN PENAL CODE, CODE OF CRIMINAL PROCEDURE AND THE INDIAN EVIDENCE ACT**

A. In section 228A of the Indian Penal Code (45 of 1860),

(i) in sub-section (1), the words, figures and letter “or section 376D” shall be omitted;

(ii) clause (a) of sub-section (2) shall be omitted;

(iii) after sub-section (3), the following sub-section shall be inserted:

“(4) Where the disclosure under sub-section (1) of this section is made or abetted by a police officer, such police officer shall be subject to disciplinary action and shall also be liable to fine which shall not be less than one thousand rupees but may extend to twenty five thousand rupees.”

B. For sections 375, 376, 376A, 376B, 376C and 376D of the Indian Penal Code (45 of 1860), the following sections shall be substituted, namely: —

‘375. Sexual assault.

A person is said to commit sexual assault if he—

(a) knowingly penetrates, the vagina or anus or urethra or mouth of another person with—

(i) any part of the body including the penis of such person; or

(ii) any object manipulated by such person;

(b) manipulates any part of the body of another person so as to cause penetration of the vagina or anus or urethra or mouth of such person by any part of the other person's body;

(c) engages in "cunnilingus" or "fellatio";

under the circumstances falling under any of the following six descriptions: — Firstly— Against the other person's will.

Secondly— Without the other person's consent.

Thirdly— With the other person's consent when such consent has been obtained by putting any person in whom such other person is interested, in fear of death or of hurt or by criminal intimidation. Fourthly— When the person is a female, with her consent, when he 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 to be lawfully married. Fifthly— With the consent of the other person when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by that person personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that action to which such other person gives consent.

Explanation 1. —Penetration to any extent is "penetration" for the purposes of this section.

Explanation 2. —For the purposes of this section, "vagina" shall also include labia majora.

### 376. Punishment for sexual assault

(1) Whoever, except in the cases provided for by sub-section (2), commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than twenty five thousand rupees.

(2) Whoever, —

(a) being a police officer, commits sexual assault—

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a person in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits sexual assault on a person in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits sexual assault on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, commits sexual assault on a person in that hospital; or

(e) being a relative of, or a person in a position of trust or authority towards, the person assaulted, commits sexual assault on such person; or

(f) commits sexual assault on a woman knowing her to be pregnant; or

(g) being a member of a group of persons having a common intention and in furtherance of that intention commits sexual assault; or

(h) being in a position of economic or social or political dominance, commits sexual assault on a person under such dominance; or

(i) commits sexual assault on a person with disability; or

(j) while committing sexual assault causes grievous bodily harm or maims or disfigures or endangers the life of a person;

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than fifty thousand rupees.

Explanation 1. —For the purposes of this sub-section, —

(a) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children;

(b) "hospital" means any location where medical services are provided and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

(c) "person with disability" shall have the meaning assigned to it under s. 2(t) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996).

Explanation 2. —Where a person is subjected to sexual assault by one or more persons in a group of persons acting in furtherance of their common intention, each of the persons in the group shall be deemed to have committed sexual assault within the meaning of this sub-section.

376A. Sexual intercourse by a person in authority. Whoever, being—

(a) in a position of authority; or

(b) a public servant; or

(c) a superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or

(d) on the management of a hospital or being on the staff of a hospital,

takes advantage of such position and induces or seduces any person either in his custody or under his charge or present in the premises, and has sexual intercourse with that person, such sexual intercourse, not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to ten years and shall also be liable to fine.

Explanation 1.—In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (c) of section 375.

Explanation 2. —For the purposes of this section, Explanations 1 and 2 to section 375 shall also be applicable.

Explanation 3. —“Superintendent”, in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.

Explanation 4. —The expressions “hospital” and “women's or children's institution” shall respectively have the same meaning as in Explanation 1 to sub-section (2) of section 376.

376B. Sexual harassment

(1) Whoever, —

(a) engages in unwelcome sexually determined behaviour towards a woman, whether directly or by implication, including:

(i) physical contact and advances;

(ii) a demand or request for sexual favours;

(iii) sexually coloured remarks;

(iv) showing pornography; or

(b) engages in any unwelcome physical, verbal or non-verbal conduct of sexual nature or intrudes upon the privacy of any woman by:

(i) uttering any word, or;

(ii) making any sound or gesture, or;

(iii) exhibiting any object, or;

(iv) singing or reciting any obscene song or ballad; commits sexual harassment.

(2) Whoever commits sexual harassment shall be punished with simple imprisonment for a term of three months, which may extend to three years and shall also be liable to fine, which shall not be less than ten thousand rupees.

#### 376C. Unlawful sexual contact

(1) Sexual harassment is unlawful sexual contact when it involves assault or use of criminal force.

(2) Whoever commits unlawful sexual contact shall be punished with imprisonment of either description for a term of one year which may extend to seven years and shall also be liable to fine which shall not be less than twenty five thousand rupees.”

C. Sections 354, 377 and 509 of the Indian Penal Code shall be omitted

D. After sub-section (3) of section 154 of the Code of Criminal Procedure, 1973 (2 of 1974), the following Proviso and sub-sections shall be inserted:

“Provided that any information regarding the commission of sexual assault or other sexual offences shall mandatorily be recorded.

(4) No police officer shall refuse to record any information received under this

section, only on the ground that the offence was, or appears to have been, committed

outside the jurisdiction of the police station where the information was received: Provided that in case of recording of information where the offence was or appears to be committed outside the jurisdiction of the police station where the information was received, the police officer in charge of such police station shall forward a copy of the recorded information to the police station having such jurisdiction, within twenty-four hours of recording of such information.

(5) Any officer who refuses to record information under this section shall be subject to disciplinary action and punished with a fine which shall not be less than one thousand rupees but may extend to fifty thousand rupees.”

E. After section 273 of the Code of Criminal Procedure, 1973 (2 of 1974), the following Proviso shall be inserted:

“Provided that where the evidence of a person who is alleged to have been subjected to sexual assault or any other sexual offence is to be recorded, the court may take appropriate measures to ensure that such person is not confronted by the accused while at the same time ensuring the right of cross examination of the accused.”

F. For section 164A of the Code of Criminal Procedure, 1973 (2 of 1974), the following section shall be substituted, namely:—

‘164A. Medical examination of the victim of sexual assault.

(1) Where, during the stage when an offence of committing sexual assault or attempt to commit sexual assault is under investigation, it is proposed to get the person of the victim with whom sexual assault is alleged or attempted to have been committed or

attempted, examined by a medical expert, such examination shall be conducted by any registered medical practitioner with sufficient training in the medical examination of survivors of sexual violence, with the prior, informed consent of such victim or of a person competent to give such consent on the victim’s behalf, and such victim shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The consent of the victim shall have been obtained only after the registered medical practitioner has given a full explanation to the victim or such person as is competent to give consent on the victim’s behalf, of the exact nature of various components of the examination to which the woman or such person as is competent to give consent on the victim’s behalf.

(3) Such consent shall be required to be obtained in the format prescribed and shall be required to have been obtained in the presence of two witnesses.

(4) The registered medical practitioner to whom such victim is sent shall, without delay, examine such victim and prepare a report of his examination in keeping with the specified format of such reports as may be prescribed.

(5) The report shall state precisely the reasons for each conclusion arrived at.

(6) The report shall specifically record that the consent of the victim or of the person competent to give such consent on the victim’s behalf to such examination had been obtained.

(7) The exact time of commencement and completion of the examination shall also be noted in the report.

(8) The registered medical practitioner shall, without delay forward the report to the investigation officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(9) Nothing in this section shall be construed as rendering lawful any examination without the consent of the victim or of any person competent to give such consent on the victim's behalf.

Explanation – For the purposes of this section, “examination” and “registered medical practitioner” shall have the same meanings as in section 53.’

G. For section 114A of the Indian Evidence Act, 1872 (1 of 1872), the following section shall be substituted, namely:—

‘114A. Presumption as to absence of consent in prosecutions for sexual assault. In a prosecution for sexual assault, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the victim against whom sexual assault is alleged to have been committed, and the victim states in his evidence before the Court that he did not consent, the Court shall presume that he did not consent.’

H. In the second schedule of the Code of Criminal Procedure, 1973 (2 of 1974), after Form No. 27, the following Form shall be inserted, namely:—

FORM NO. 27A

Consent of Victim of Sexual Assault for Medical Examination

(See section 164A)

To:

Dr and other personnel associated with the said hospital/dispensary.

I, (Name of the person giving consent) hereby give voluntary consent to:

1. Examine and treat

(Patient's name)

(myself / my ../ specify other relationship ) for the effects of sexual assault;

2. Conduct a medico-legal investigation for the purpose of assisting the police in apprehending and/or prosecuting the persons who committed the assault. This investigation will include a physical examination which may involve an examination of the mouth, breasts, vagina, anus and rectum; in addition it may include the removal and isolation of articles of clothing, scalp hair, foreign substances from the body surface, saliva, pubic hair, samples taken from the vagina, anus, rectum, and the collection of a blood specimen.

3. Inform the police the history given and the findings of the examination, and provide them with any substances collected during the course of the medical investigation and any information and observations that might assist them in apprehending and/or prosecuting the person(s) who committed the assault.

I give my consent to the above fully and freely. I also understand that I have a right to refuse either a medico-legal investigation or informing the police or both, but my refusal will in no way result in denial of treatment for the effects of the assault.

The content of above is explained to me in language which I understand and hence I sign.

(Name and Signature of Witness) (Name and Signature of Patient)

(Name and Signature of guardian or relative of the patient when patient

(Date, Place and Time) is unable to give consent.)

## AUTHORS' NOTE

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The opinions expressed here do not necessarily represent the views of National Law School of India University.

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## References

1 Section 375. A man is said to commit “sexual assault” if he –

(a) penetrates the vagina, the anus or urethra or mouth of any woman with

(i) any part of his body; or

(ii) any object manipulated by such man

except where such penetration is carried out for proper hygienic or medical purposes;

2 See *State of Maharashtra v. Suresh Nivrutti Bhusare*, (1997) 2 Crimes 257 Bom .

3 *Rao Harnarain Singh v. The State*, AIR 1958 Punj. 123, 126 ¶ 7.

Also See eg., *Uday v. State of Karnataka*, 2003 (4) SCC 46; *Pradeep Kumar v. State of Bihar*, AIR 2007 SC 3059.

4 For example, see S. 348, Queensland Criminal Code 2000 (QCC), Section 348 defines consent as: “consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.”

5 *Uday v. Sate of Karnatka*, 2003 SCC ( Cri) 775; *Pradeep Kumar Verma v. State of Bihar*, 2007 AIR SCW 5532; *Sanjay Kumawat v. Sate of M.P.* 2008 (1) Crimes 540 (MP).

6 Between 2010 and 2011, the reported instances of crimes under § 354 increased by 5.8%. The reported instances of crimes under § 509, however, declined by 14%. “Chapter 5: Crimes against Women”, Annual Crime Report 2010-11, National Crime Records Bureau. Available at , accessed on 03.01.2013.

7See, for instance, the decisions in *Major Singh v. State of Punjab*, AIR 1967 SC 63 ; and *Rupen Deol Bajaj v. K.P.S. Gill*, AIR 1996 SC 309, at ¶¶ 14–15.

8Law Commission of India, 172nd Report on the Review of Rape Laws (2000), at p. 21.

9*Vishaka v. State of Rajasthan*, AIR 1997 SC 3011.

10 Owen D. Jones, Sex, “Culture, and the Biology of Rape: Toward Explanation and Prevention”, *California Law Review* , Vol. 87, No. 4 (Jul., 1999), pp. 827, 914

11 Legal Correspondent, “Police can’t refuse to register FIR, asserts Supreme Court”, *The Hindu*, <http://www.hindu.com/2007/07/25/stories/2007072557300100.htm> (2 January 2013).

12 D. Mahapatra, “Cops understand only crack of whip, says Supreme Court”, *The Times of India*,

[http://articles.timesofindia.indiatimes.com/2008-08-09/india/27950081\\_1\\_firs-complaint-apex-court](http://articles.timesofindia.indiatimes.com/2008-08-09/india/27950081_1_firs-complaint-apex-court) (2 January 2013).

13 A. Bhalla and G. Vishnu, “The Rapes will Go On”, *Tehelka*, available at, .

14 H W V Cox, *Medical Jurisprudence ad Toxicology*, 5th Edition, 1987.

15 The World Health Organization has issued guidelines for examining survivors of sexual violence and requires that such examinations be minimally invasive, further stating that even clinical procedures like bimanual examinations are necessary after sexual assault. Instead emphasis is placed on the collection of forensic evidence in the most minimally invasive way possible. Sourced from- “Dignity on Trial: India’s Need for Sound Standards for Conducting and Interpreting Forensic Examinations of Rape Survivors”, *Human Rights Watch*, 2010.

16 <http://www.cehat.org/go/SafeKit/Home>

17 <http://www.cehat.org/go/uploads/SafeKit/safekitprotocol.pdf>

18 One such textbook is *Medical Jurisprudence* by Dr. R. M Jhala and V. B. Raju.