

Submissions to Justice Verma Committee by Vrinda Grover

To,

Hon'ble Mr. J. S. Verma (Retd.)

Hon'ble Ms. Justice Leila Seth (Retd.)

Mr. Gopal Subramanian

January 5th, 2013

Subject: Submissions to Justice Verma Committee on law, policing and related matters to ensure justice and curb impunity for sexual violence against women

Preliminary Observations:

At the outset I submit that the terms of reference of this Committee, as represented in the public notice, are extremely narrow and inadequate, as it seeks suggestions only with regard to cases of aggravated/ extreme sexual assault and enhancement of punishment. My submission however takes a broader and more comprehensive approach, as the safety, security, dignity and promotion of women's rights requires such a perspective.

It may also be pertinent to mention here that while the present incident of gang rape of a young woman in Delhi has proved to be the tipping point and led to a nationwide outrage and the constitution of this Committee, this issue has been the subject of rigorous debate, research, analysis and study, spearheaded by the women's movement for over 25 years. The problems are therefore known, the issues formulated and the range of potential answers, solutions and way forward have on many occasions been presented to the government and Parliament.

Many of us have rigorously engaged with specific questions of legal reform pertaining to issues of violence against women. A strong demand for amendment of laws relating to sexual violence commenced in the 1980's pursuant to the judgment of the Supreme Court in the Tuka Ram v State of Maharashtra (AIR 1979 SC 185), which led to some amendments in the criminal laws. Campaigns for further law reform, particularly on the aspect of sexual violence against women, have continued ever since. This Committee may recall that pursuant to the dismal failure of the legal system to hold DGP S.P.S. Rathore responsible for the molestation and sexual harassment of a young sportswoman, who was driven to suicide, the Government (Ministry of Home Affairs) had brought out the Criminal Law Amendment Bill, 2010, to reformulate the law on sexual assault. The women's movement after holding national consultations submitted a detailed document providing alternative draft legislation for protection of women, children and sexual minorities from sexual violence. Although the Home Secretary promised us broad ranging public consultations, no further steps were taken in this regard by the Government.

Even as late as August, 2012 a detailed critique of the Criminal Law Amendment Bill, 2012,(hereinafter referred as Cr.L.A) was submitted on behalf of women's groups, lawyers, academics, and activists from the across the country to the Ministry of Home Affairs (MHA) and the National Advisory Council(NAC). The reply of Ministry of Home Affairs to this Preliminary Note was forwarded to me in October 2012 by the NAC. The reason for mentioning these earlier engagements with the government is to draw the attention of this Committee to the fact that in the recent past, amendments to the law relating to sexual violence have been proposed and submitted in writing to the government. The government has on each occasion failed to take on board or engage with these proposals.

It is perhaps for this reason that I approach this Committee with some skepticism and fatigue. While I appreciate that this Committee is determined to make its recommendations in a time bound manner, I do however think that a consultative interaction with women's rights activists and those who have been working in this sphere, could have contributed to making the recommendations more robust and attuned to our concerns. However, as the Committee has only sought suggestions via email and fax, my submissions for your consideration are detailed below.

As the Committee is receiving numerous and wide ranging submissions, I will confine my submissions to only certain aspects of reform of the legal system and laws which I consider pertinent to the mandate of this Committee.

For the State to meet its obligations both under the Indian Constitution and the UN Conventions ratified by the Government of India, including Convention on Elimination and Discrimination Against Women (CEDAW), International Convention on Civil and Political Rights (ICCPR) etc., the law reform exercise must provide comprehensive amendments to ensure that a woman's right to life, bodily integrity and dignity is respected. Sexual violence against women is an impediment to the achievement of the fundamental right to equality and the enjoyment of other freedoms. It is a manifestation of unequal power relations between men and women and prevents women's full advancement. Violence against women, or the threat, or fear of violence, reinforces women's subordinate position in society.

1. Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Bill, 2012 (hereafter referred to as 'S.H. Bill 2012'):

The SH Bill which was passed without any serious debate or discussion by the Lok Sabha on September 3rd, 2012, is now pending approval by the Rajya Sabha. Brief comments on the shortcomings of the SH Bill.

i. The definition of sexual harassment in the S.H. Bill 2012 lacks clarity, is scattered in different Sections of the Bill (See Section 2(n) and Section 3), is confusing and needs to be redrafted and made coherent. The definition of sexual harassment needs to be rephrased.

ii. The S.H. Bill 2012 does not include within its ambit students of Universities, College, or schools. In compliance with the Vishaka Judgment many Universities including Jawahar Lal Nehru University, Delhi University formulated their own Policies and constituted mechanisms to prevent and redress complaints of sexual harassment. It is suggested that Universities whose anti-sexual harassment Policy, Rules and Committee mechanism meet the standard prescribed by the Vishaka Judgment, should be exempted from the purview of the S.H. Bill, 2012, as these mechanisms are more democratic and comprehensive to ensure prevention and prohibition of sexual harassment in educational institutions.

iii. A complete lack of respect for the dignity of the woman is reflected in S. 10(1) of the S.H. Bill, 2012, as the first step that it recommends on receipt of a complaint of sexual harassment, is conciliation between the complainant (aggrieved woman) and respondent. The mandate of the Vishaka judgment is to ensure a safe workplace/ educational institution for women, free of all forms of sexual harassment. S. 10(1) of the SH Bill, 2012, attempts to muster a compromise with scant regard for the dignity of women. Thus S. 10(1) of the S.H. Bill, 2012, in so far as it proposes conciliation as a first step, prior to an enquiry, deserves to be deleted.

- Section 14 of the S.H. Bill, 2012 which penalizes a woman for filing a false complaint is a highly mischievous and counter productive to the purported objective of this legislation. The crime of sexual harassment at the work place is one of the most under reported crimes in India for a host of reasons, including the anxiety to retain the employment despite a hostile and offensive environment at the workplace, caused by sexual harassment. Section 14 must be deleted, as it would otherwise deter women from making any complaint of sexual harassment, and may well prove to be the death knell for any redress against sexual harassment. It is therefore urged that this Committee recommends that appropriate amendments be made to the S.H. Bill 2012.

- It is suggested that the Justice Verma Committee recommends that the Sexual Harassment of Women at the Workplace (Prevention, Prohibition and Redressal) Bill, 2012, should not be passed by Parliament in the present form.

2. Police Accountability:

Institutional reform needs to be urgently introduced to ensure that the police functions as an agency in service of the people, bound by and accountable to the law. It is well established that to a large extent the impunity and brazenness with which sexual violence is committed is due to the complete absence of any effective, preventive measures undertaken by the police in this regard. The low rate of conviction can also in a large measure be attributed to the unprofessional, shoddy and partisan investigation conducted by the police force. Attitudinal and mindset changes in the police may take place over generations. To specifically address the issue of preventing, prohibiting and punishing sexual violence against women, immediate reforms and changes need to be instituted in the functioning of the police force.

i. To ensure that the rights, freedoms and dignity of women in this country are respected, it is imperative that clear, precise and transparent protocols are developed to guide police functioning at each stage. Particularly with regard to responding to complaints of sexual violence a protocol must be formulated enumerating clearly each step of the response of the police, on receipt of any complaint of sexual harassment, molestation or aggravated sexual assault. Every step of the investigation, the time frame within which it is to be completed and the legal and gender sensitive manner in which the investigation is to be conducted, must be specified. These protocols must be binding upon all police personnel. The investigation into all crimes of sexual violence must be conducted by a Sub-Inspector of Police and must be supervised by the Station House Officer (SHO) and Thana Inspector (TI).

ii. These protocols must be displayed and made available in the public domain. As mandated by S. 4 of the Right to Information Act, 2005 (RTI), it would be an obligation upon the police authorities to proactively publish and display these protocols.

iii. For these protocols to be effective and binding it is necessary that any breach of protocol must invite prompt administrative action, disciplinary action and punitive action. It must be the duty of all police personnel to diligently comply with the manner of investigation as detailed in the protocols. If any police personnel makes a departure from the same, he/she would be required to note the reasons for the same and explain that the same did not in any manner prejudice the investigation or the complainants right to justice.

In the event of any breach of protocol including any delay or denial in the registration of FIR the police personnel directly responsible for the same as well as the supervisory authority must be held administratively and criminally responsible for the same. The protocols must not only delineate the clear stages of action by the police and personnel but also lay down a clear chain of duty and responsibility. Guided by the doctrine of command responsibility, accountability must be secured from all levels of the police hierarchy, and the supervisory authority too must also be held administratively and criminally liable for all acts of omission and commission.

Unless these protocols are introduced and made binding immediately it is unlikely that there will be any change in the high levels of sexual violence suffered by women. Given the strong nexus between the police and the political class, it would require strong political will to make the police force accountable to the law and to its duties under the law.

- It is suggested that the Justice Verma Committee recommends that clear protocols be developed to instruct the Police in its response and investigation of all crimes of sexual violence against women.
- It is suggested that the Justice Verma Committee recommends that a clear chain of duty and responsibility be outlined in the protocol for the functioning of the Police.

- It is suggested that the Justice Verma Committee recommends that any lapse or failure to comply with the protocols attract strict punitive action for all police personnel and superior officers.
- It is suggested that the Justice Verma Committee recommends that accountability be secured for all acts of omission and commission by members of the police force, in the investigation of crimes of violence against women.

3. Crimes of Sexual Violence: To address the issue of violence against women, especially sexual violence, it is crucial to understand that sexual crimes form a continuum, and that any law reform should recognize the structural and graded nature of sexual assault. Sexual violence includes the entire spectrum of offences, from sexual harassment to aggravated penetrative sexual assault. All forms of sexual offences violate the right to bodily integrity, autonomy and dignity of a woman.

Existing provisions relating to sexual violence are scattered across the Indian Penal Code, 1860 (IPC) in Ss. 375, 376, 377, 354 and 509. In their current form these different sections do not project the reality of the varied and different forms of sexual violence inflicted against women. To incorporate a comprehensive understanding of sexual violence itself instead of making piecemeal amendments to different provisions it is proposed that a specific chapter be introduced in the IPC, which recognizes and penalizes the entire range of sexual violence. Attendant changes will also be required to be made in the Code of Criminal Procedure, 1973 and The Indian Evidence Act, 1872.

As mentioned above on August 23rd 2012, a preliminary response expressing major disagreements with the Criminal Amendment Bill 2012 (hereinafter referred to as 'Cr.L.A Bill') was communicated to the Union Home Secretary on behalf of women's groups, lawyers and academicians across the country. (A copy of the Preliminary Note is enclosed herewith as Annexure 1). (A copy of the para wise Reply of the Ministry of Home Affairs received by me via the NAC is enclosed as Annexure 2)

Comments to the Criminal Law Amendment Bill, 2012:

A. Penetrative Sexual Assault– Sec. 375 IPC

i. Expansion of definition of penetrative sexual assault under S. 375 IPC: The expansion of the definition of penetrative sexual assault under Sec. 375 IPC, beyond peno-vaginal penetration (rape) is welcome. It accommodates the long standing demand of the women's movement, to acknowledge as a grave violation of a woman's bodily integrity, all forms of penetrative sexual assault, thereby moving away from the patriarchal notion of peno-vaginal rape being a fate worse than death.

- It is suggested that the Justice Verma Committee recommends that penetrative sexual assault should be defined in an expansive manner and not confined to peno – vaginal rape, as presently under Sec. 375IPC

ii. Gender neutral sexual assault: The formulation of the crime of sexual assault in this Bill as gender neutral, in all circumstances, makes the perpetrator/ accused also gender neutral, i.e. a woman or man can be accused of sexual assault. The gender-neutrality clause in relation to perpetrators under S. 375 IPC is strongly opposed. The shift to making the perpetrator gender-neutral is incomprehensible and is not supported by any empirical evidence or justification. Across the country, women are facing severe forms of sexual violence. To enlarge the scope of penetrative sexual assault and in the same breath to make the crime gender neutral, displays bad faith on the part of the government. Such an interpretation shows an absence of basic understanding that rape/penetrative sexual assault is a crime of power, domination and violence, committed on women because of their subordinate and unequal status in society. Across the country, women are being subjected to severe forms of sexual violence. It is acknowledged that sexual violence targets others too such as transgender women and sexual minorities, and legal reform must address their vulnerability and provide adequate protection.

The reasoning given by the MHA in its reply of October 2012 for formulating sexual assault as a gender neutral crime was, “In this regard it is stated that not only women but young boys are also at times subjected to forced sexual assaults. Forced sexual assault causes no less trauma and psychological damage to a boy than to a girl subjected to the offence. Boys and girls are both subjected to oral sexual intercourse too. Both young girls and boys are regularly used for all kinds of sexual acts and sexual perversions in certain tourist centers. It is, therefore, necessary to make the law gender neutral”. There is no disagreement that boys need to be protected against forcible penetrative sexual assault. I was involved in the drafting of The Protection of Children from Sexual Offences Act, 2012, on behalf of the National Commission for the Protection of Child Rights, and in our draft legislation, submitted to both the Ministry of Women and Child Development and to the Parliamentary Committee on the subject, we had recommended that this legislation be gender neutral, both qua the perpetrator and the victims. The Protection of Children from Sexual Offences Act, 2012 is a gender-neutral law, which provides protection to boys too from sexual violence.

- It is suggested that the Justice Verma Committee recommends that the offence of sexual assault be kept gender specific, with only men being accused of sexual assault.

iii. Definition of Consent: There is no amendment proposed to the flawed definition of consent under Sec. 375 IPC. The present definition has in many cases proved highly inadequate and worked against the interest of justice for women. To ensure that trials are less hostile and burdensome for the rape survivor/victim it is critical that the jurisprudence of rape/sexual assault shifts from the consent of the victim/survivor to the conduct of the accused. This would require a change in the manner in which sexual assault and consent is legally defined. Subsequent to

which there should be appropriate changes in the trajectories of investigation, the line of cross-examination, presentation of evidence during trial, and determination of guilt in judgments.

- It is suggested that the Justice Verma Committee recommends that the definition of consent in the law on sexual assault be redefined.

iv. Age of Consent for Sexual Intercourse: In the light of increasing evidence from courts, records of crimes, as well as studies on the exercise of agency by young people, it is suggested that the age of consent to sexual intercourse should be retained as 16 years and not increased to 18 years. Increasing the age of consent to 18 years would create conditions for misuse of the provision, particularly in the context of inter-caste/inter-religious relationships that attract social disapproval. A similar amendment needs to be made in The Protection of Children from Sexual Offences Act, 2012, where the age of consent has been raised to 18 years. It is well borne out from court cases that criminal cases of rape, abduction and kidnapping are frequently foisted upon young boys/men in situations, where the young boy and girl have exercised their right to choice, often against parental sanction. Raising the age of consent to 18 years will only lead to criminalizing the exercise of sexual agency by young people and will not in any way protect the bodily integrity of young women or their right to sexual autonomy.

- It is suggested that the Justice Verma Committee recommends that the age of consent be kept at 16 years and not raised to 18 years.

v. Marital Rape an Exception to Sec. 375 IPC: The exception to S. 375, which is retained by the Cr.L.A. Bill 2012, of sexual intercourse or sexual acts by a man with his own wife who is above the age of 16 years, in many ways strikes at the root of the matter. If the objective of the legislation is to guarantee a woman an absolute right to bodily integrity and all physical and sexual relations to be premised on equality and desire of both parties, then the exception of marital rape deserves to be deleted. Sexual assault by any man, irrespective of the relationship of the woman with that man, must be codified and penalized as a crime. For the law to signal, through a specific exception, that the husband has absolute and unbridled right to have forced or non consensual sex with his wife, amounts to an acceptance, sanction and encouragement of sexual abuse, sexual assault and rape of a woman within marriage. This is in direct contravention to the constitutional promise of equality, dignity and India's obligation under international conventions.

- It is suggested that the Justice Verma Committee recommends that the exception to S. 375 IPC be deleted and marital rape be recognized as a crime.

vi. S. 376 A of the Cr.L.A. which provides for a lesser sentence from 2-7 years if a man sexually assaults his wife who is living separately under a decree of separation, should be deleted. Sexual assault without the consent of a woman irrespective of the relationship with the perpetrator should attract the same sentence.

- It is suggested that the Justice Verma Committee recommends that the punishment for sexual assault of a wife living separately under a judicial order or otherwise, be the same as codified for the crime of sexual assault.

B. NON-PENETRATIVE SEXUAL ASSAULT

i. Gap in law of sexual offences: There continue to be serious gaps in the codification of crimes of non-penetrative sexual assault. The Cr.L.A. Bill, 2012, retains a narrow scope of sexual assault that focuses on penetration, albeit beyond peno-vaginal rape. There is a large gap in codification of crimes under the Penal Code between outrage of modesty (S. 354 IPC) and penetrative sexual assault. Sexual crimes form a continuum, and the law should recognise the structural and graded nature of sexual assault, based on concepts of hurt, harm, injury, humiliation and degradation, and use well-established categories of sexual assault, aggravated sexual assault, and sexual offences. Certain forms of sexual violence against women are still not prohibited, proscribed or penalized and these need to be specifically formulated as new offenses.

Dismissing the suggestion to codify separate offences to cover the spectrum of crimes experienced and suffered by women the Home Ministry replied, "Separate provisions of each offense does not seem to be relevant as all the offences are co-related and are already covered under Ss. 354 and 509. Stringent punishment has since been proposed in both sections. The provisions like forcibly removing clothes, parading naked etc., are also covered under special acts like the SCs and STs (Prevention of Atrocities) Act, 1989. The stalking etc., was discussed by the HPC and it was opined that it would be difficult to prove the offence of stalking and hence was not covered".

The Committee would recall the sexual assault of a young girl by a gang on a public road in on July 9th, 2012. Due to the gap in penal provisions, the legal system failed to acknowledge and consequently appropriately redress the severity and gravity of the sexual assault suffered by her. The accused were charged inter alia under S. 354 IPC and have since been convicted for a maximum period of two years imprisonment. (A copy of the judgment of CJM, Kamrup, Assam in State vs. Amar Jyoti Kalita and Ors. is enclosed as Annexure 3).

The trivializing of all forms of sexual assault of women, barring peno-vaginal rape, has undoubtedly played a role in encouraging widespread and systematic sexual violence against women.

- It is suggested that the Justice Verma Committee recommends that new offences of sexual crime are codified recognising the structural and graded nature of sexual violence based on concepts of hurt, harm, injury, humiliation and degradation, and use well-established categories of sexual assault, aggravated sexual assault, and sexual offences to define them.

ii. Additional Sexual offences to be defined: New provisions should be formulated to define crimes that punish acts against women including, stripping, parading naked, tonsuring of hair and mutilation, which are intended to sexually assault, degrade or humiliate women who are so targeted. It would be relevant to mention here that through an amendment in 2004 the state of Madhya Pradesh had introduced a new section, S. 354A which penalizes assault or the use of criminal force on any woman to disrobe or strip her in public. This humiliating form of sexual violence (stripping, disrobing and parading a woman naked) is routinely inflicted, particularly on women belonging to disadvantaged groups or transgressing social norms. The Home Ministry found no merit in this suggestion either and simply observed that these practices are already covered by the SC/ST (Prevention of Atrocities) Act, 1989. The SC/ST Act as is well known has a record of very poor implementation and enforcement in the country and has hence failed to provide any protection from grave sexual violence to the most vulnerable among women.

Further, stalking, blackmailing (including through internet), as well as sexual harassment, must be codified as crimes under the rubric of sexual offences. Specifically with reference to stalking the attention of the Committee is drawn to the reply of the Ministry of Home Affairs which states, "The stalking etc., was discussed by the HPC and it was opined that it will be difficult to prove the offence of stalking and, hence, was not covered". Suffice it to say that this opinion could only have been espoused by a person ignorant of law and ill informed of the dangerous consequences of stalking for the safety of women. In fact there is usually a substantial paper trail establishing complaints of stalking and many witnesses with whom the victim has on different occasions spoken about being stalked and her fear of harm or injury from the stalker.

- It is suggested that the Justice Verma Committee recommends that the offences of stripping, parading naked in public, stalking etc. are codified as new offences of sexual violence against women.

iii. 'Outraging modesty of a woman' to be replaced with 'violation of bodily integrity: S. 354 and S. 509 IPC, which contain archaic notions of 'outrage of modesty', ought to be repealed, and a clear gradation of offences and punishment as mentioned above should be inserted. The crime of sexual assault should rest firmly on the concept of violation of bodily integrity and dignity. The association of the dignity and bodily integrity of women with patriarchal concepts of modesty, chastity and honour, have proved to be a major hurdle in developing a jurisprudence that would promote respect for equal rights of women.

- It is suggested that the Justice Verma Committee recommends that notions of modesty, chastity and honour be deleted from the statute.

C. Aggravated sexual assault during communal and sectarian violence:

Women's bodies are routinely targeted during communal and sectarian violence to humiliate, intimidate and degrade the dignity of women and their community. Sexual crimes committed during the genocidal attack on Muslims in Gujarat in 2002, and Christians in Kandhamal, Orissa

in 2008, are well documented. The recent judgment of a Special Court in the Naroda Patiya massacre also recognizes that rapes were committed as part of the policy to intimidate and humiliate the Muslim community. (The judgment of the special court can be accessed at: <http://www.cjponline.org/gujaratTrials/narodapatiya/NP%20Full%20Judgmnt/Naroda%20Patiya%20-%20Common%20Judgment.pdf>. The relevant paragraphs are: Part 2, point 58 (Pg. 368); Finding on PW-142 (Pg. 1186); Point number XI-B (Pg. 1697).

During episodes of communal and sectarian violence, which usually involve the direct and indirect involvement of public servants occupying positions of power and authority, the regular system of reporting, investigation, recording of witness testimony or medical examination, are rendered inaccessible and improbable for the victims. The law must take note of these special circumstances and provide procedures for investigation, trial and evidence collection accordingly.

- It is suggested that the Justice Verma Committee recommends that sexual assault committed during communal and sectarian violence is recognized as a category of aggravated sexual assault under law.
- It is suggested that the Justice Verma Committee recommends that no prior sanction for prosecution under Sec. 197 Cr.P.C shall be required for prosecuting public servants being tried for offences committed during and in relation to communal and sectarian violence.
- It is suggested that the Justice Verma Committee recommends that appropriate and gender sensitive procedures for investigation, evidence collection and trial be formulated for prosecution of sexual crimes, taking into account the conditions prevailing at the time of communal or sectarian violence.

D. Inclusion of Doctrine of Command/ Superior Responsibility: The doctrine of command/superior responsibility must be incorporated in a law dealing with crimes relating to sexual violence against women. This well recognized principle of International Criminal Law implies that persons in positions of official power (Civil or Military), by reason of their position have effective control and knowledge or ought to have knowledge of the acts or omissions of their subordinates who commit any offence of sexual violence against women. In the Rome Statute of the International Criminal Court the doctrine is provided under Article 28. As mandated by this doctrine, the law must hold criminally liable and accountable all superior/senior officers who allow, or fail to prevent, or did not take necessary steps to prevent or stop the commission of sexual violence against women, by their subordinates.

- It is suggested that the Justice Verma Committee recommends that the doctrine of command/superior responsibility be incorporated in the law against sexual violence of women.

E. Rape and other sexual crimes constitute Torture: The Revised Prevention of Torture Bill, 2010, proposed by the Select Committee of the Rajya Sabha and currently pending before the

Home Ministry treats rape and other forms of sexual crimes committed by a public servant as forms of torture.

The Explanation to Section 3 that defines the offence of Torture provides, Explanation II- For the purposes of this section, 'torture' includes but is not limited to the following, namely:- [...]

(a)(vi) rape or threat thereof and sexual abuse of any kind, including sodomy, insertion of foreign objects into sex organs or rectum or electric shock to the genitals. (b) maltreating members of the family of a person and [why make this conjunctive] inflicting shame upon the victim or any one by such act as stripping the person naked, parading him in public places, shaving the victims head or putting marks on his body against his will;

(c) other analogous acts of mental or psychological torture.

- It is suggested that the Justice Verma Committee recommends that the definition of Torture as proposed in Section 3 of The Revised Prevention of Torture Bill, 2010, by the Select Committee of the Rajya Sabha, is adopted by the Ministry of Home Affairs and placed before Parliament.

F. Statutory Immunities Perpetuate Impunity for Sexual Violence by Police, Army and Security Forces: In the 1980s, following a strong nation-wide campaign by the women's movement after the Supreme Court judgment in *Tukaram v State of Maharashtra* case, the concept of custodial rape was introduced in the law through Section 376 (2) of the Indian Penal Code, with respect to sexual violence. This amendment for the first time made a crucial link between state authority, control, exercise of power and sexual violence.

Over the years conditions and situations of aggravated sexual assault upon women have increased and the law must take note of the same. In the 80's it was the police station and other institutional spaces that were viewed as the key sites of aggravated sexual assault. Today the sites, situations and circumstances of vulnerability of women have expanded.

Significantly, the recently enacted The Protection of Children from Sexual Offences Act, 2012 has enlarged the purview of aggravated sexual assault to include: a police

officer and all areas to which his authority or influence extends; a member of the armed forces or security forces and all areas to which his authority or influence extends; public servant; where the victim of sexual assault is a physically or mentally disabled child; sexual assault by a relative or a person having a domestic relationship with the child a person in a position of ownership or management or staff of an institution of the child; person in a position of trust or authority; and sexual assault committed in the course of communal or sectarian violence; stripping or parading the child naked in public; etc.. Significantly, while these categories of aggravated sexual assault were included for the protection of children, many of them are conspicuous by their absence in the enumeration of situations of aggravated sexual assault under the Cr.L.A. 2012. This Bill does not include within the category of aggravated sexual assault, sexual assault by members of the

armed forces or security forces; or sexual assault in the course of communal or sectarian violence nor does it make stripping or parading a woman in public a criminal offense.

Serious complaints and allegations of sexual violence by members of the Indian army and the Central Armed Police Forces, including the CRPF, BSF, NSG etc., are frequently reported from the states of North East and Jammu and Kashmir, where these forces exercise extraordinary powers awarded to them under Armed Forces Special Powers Act (AFSPA). In many parts of Central India too a large number of Central Armed Police Forces are now deployed, and here too complaints of sexual violence have been reported and even taken to Court in Chhattisgarh. The truth about the grave allegations of mass rape and sexual assault in Kunan – Poshpara, Kashmir in February 1991, rape and murder in Shopian in Kashmir in May, 2009, the sexual assault and killing of Thangjam Manorama in Manipur in July 2004, can only be known through an impartial investigation, prosecution and trial.

Justice however, even for victims and survivors of rape in these conflict zones, is hostage to the exercise of discretion by the Executive, by virtue of the layers of statutory immunities embedded in statutes. Special laws such as, The Armed Forces Special Powers Act, 1958, and the Jammu and Kashmir Armed Forces Special Powers Act 1990, not only award extraordinary powers, including the right to shoot to kill, but the same is reinforced by the requirement of prior sanction from the Central Government to institute any legal proceedings. This discretionary power has been exercised by the Central Government to block all prosecution of any human rights violations, including rape, torture, enforced disappearances and extra judicial killings of civilians. This is reinforced by the ordinary law under The Code of Criminal Procedure, 1973, through Ss. 197 (2), 132 and 45. Section 197 Cr. P.C. mandates that the Court shall not take cognizance of any offence committed by a member of the Armed Forces or the Central Armed Police Forces, unless prior sanction is secured from the concerned government/ competent authority.

Information received by me in pursuance of a RTI application, irrefutably establishes that these statutory immunities provide complete and absolute immunity against any prosecution by ordinary courts. The information received from the Ministry of Defence, Government of India states, (1) 44 applications were received by the Ministry of Defence for grant of sanction for prosecution of members of the Indian Army, posted in Jammu and Kashmir between 1989-2011. (2) 33 requests for grant of sanctions for prosecution of Indian Army personnel were rejected (3) 11 requests for grant of sanction of prosecution of Indian Army personnel are still pending determination (4) NIL requests for grant of sanction of prosecution of Indian Army personnel have been granted. (Reply of the Ministry of Defence is enclosed as Annexure 4). These figures lay bare the truth that the Government has refused to grant sanction for the prosecution of any member of the armed forces or the Central Armed Police Forces, for prosecution before the regular criminal court. Thus, statutory immunities available under the law to the armed forces and the Central Armed Forces, translate into absolute impunity for sexual violence and other human rights violations. The provision of prior sanction introduced during colonial times to

protect public servants from frivolous, vexatious prosecutions persist in our law today and have morphed into an iron shield that protects these forces from accountability for egregious human rights violations including sexual violence.

Further, special laws regulating the Army and other Central Armed Police Forces, such as the Indian Army Act, 1950 and The Border Security Forces Act, 1968, provide that cases of rape of a civilian will be treated as a 'civil offence' and tried before the ordinary criminal court. However an over broad interpretation of the term 'active duty'/'active service' and the prior right given by these laws to the Commanding Officer of the unit of the accused to determine whether a personnel accused of rape will be tried before the ordinary criminal court or through court martial proceedings, has ensured that members of the armed forces and other security forces are not prosecuted by the ordinary criminal courts. A court martial proceeding does not meet the test of fair trial before an independent and impartial judiciary, infringes the right to justice and remedy of the victim and is in contravention of international human rights jurisprudence.

- It is suggested, that the Justice Verma Committee recommends the deletion of the requirement of prior sanction for prosecution, of a member of the armed forces or the Central Armed Police Forces, under Section 197(2) (3) and (3A) Cr.P.C. and similar provisions under special laws such as AFSPA, for all cases of rape or any other form of sexual violence.
- It is suggested, that the Justice Verma Committee recommends that all cases of rape or any other form of sexual violence by a member of the army or the Central Armed Police Forces, shall be treated as a civil offence and shall be tried before the ordinary criminal court.
- It is suggested, that the Justice Verma Committee recommends the deletion of the requirement of prior sanction for prosecution of a member of the police force, under Section 197 Cr.P.C for all cases of sexual assault and any other form of sexual violence.

G. Deletion of S. 377 IPC: Sec 377 needs to be deleted from the Indian Penal Code particularly since 'sexual assault' has been broadly defined under the Criminal Law Amendment Bill, to include all forms of non consensual penetrative sexual assault, and The Protection of Children from Sexual Offence Act 2012 criminalises penetrative sexual assault on children. Thus the only remaining purpose this provision serves is to criminalise consensual intimate acts between adults in private, which the Delhi High Court has held as contrary to the constitutional guarantee of equality, dignity and privacy for all. The judgment of the Supreme Court in this matter is awaited.

The deletion of S. 377 IPC must be swiftly followed by the grant of recognition and rights to persons of different sexual orientation. Upon the deletion of S. 377 IPC it may be required to introduce a penal provision that prohibits and punishes non-consensual, coercive sexual acts between same sex persons. To protect transgender persons from sexual violence, particularly that

inflicted by persons in positions of official power and authority, such as police, security forces, prison personnel and others, a distinct offence should be codified.

- It is suggested that the Justice Verma Committee recommends the deletion of Section 377 IPC in its present form.

4. Sentencing:

The women's movement has consistently and once again opposed the shrill and ill-informed demands for death sentence for rapists and chemical castration for sex offenders. (A statement issued by Women's groups opposing death penalty is enclosed as Annexure 5 dt. December 16th, 2012). As has been argued on many occasions death penalty is not a deterrent against commission of sexual assault. It is apprehended that the introduction of the death sentence may in fact be inimical to the safety of women and may induce the perpetrator to eliminate evidence of sexual violence by killing the victim of sexual assault. Also, in a majority of cases the perpetrator is known to the rape victim and in many instances the accused are members of the victim's family. It needs to be considered whether a death sentence would discourage a victim from even lodging a complaint and seeking judicial redress. Will harsher sentences compel victims of sexual violence to suffer in silence without hope.

One of the key challenges today is the abysmal conviction rate of 26%. To address this, systemic and long term changes in institutions, legal structures, practices and procedures are required. Introduction of death sentence and chemical castration will merely serve to distract from these measures, and not alter the scale and gravity of sexual violence experienced by women across the country. The need of the hour is certainty of punishment and a harsher sentence may only serve to further lower the conviction rate, thereby further encouraging impunity for sexual violence. The demand for death penalty also directly feeds into the patriarchal notion, that rape is a fate worse than death and a raped woman is a living corpse. The law must not in any way stigmatize the survivor of sexual violence and circumscribe women's lives through moral codes. I am also enclosing for the Committee an account written by a rape survivor titled, "I Fought For My Life... And Won". Narratives such as this should influence and guide the legal and institutional reform process. (The inspiring account as published in Manushi magazine is enclosed as Annexure 6 dt. July 1983)

- It is suggested that the Justice Verma Committee rejects all demands for death penalty and chemical castration as punishment for rape and sexual assault, and make recommendations that will improve the conviction rate for sexual offences.

5. A Trained Cadre of Public Prosecutors for prosecuting Crimes of Violence Against Women: A separate cadre of Public Prosecutors comprising largely of women Public Prosecutors should be established. All Public Prosecutors must undergo mandatory trainings, which include a comprehensive understanding of sexual violence and violence against women; the gendered and unequal nature of society; specific challenges posed by physical and mental disabilities; the

vulnerabilities of socially, politically or economically disadvantaged women; laws and procedures relating to sexual assault and sexual violence; and professional competence to conduct trials relating to sexual violence in accordance with standards of fair trial, principles of natural justice and the demands of gender justice. These trainings should be conducted by persons with an understanding of women's rights and gender justice. A more fundamental change that needs to be brought about in the criminal justice system is to make the office of the Public Prosecutor or the Directorate of Public Prosecutor autonomous of the government.

- It is suggested that a cadre of trained and gender sensitive Public Prosecutors be created to prosecute cases of violence against women.

6. Cadre of Para legal to assist the Survivor through the legal process: A specially trained and sensitized cadre of paralegals, with a basic knowledge of law and understanding of gender and rights of women be created. This paralegal cadre to be affiliated to the Legal Services Authority and given accreditation. Their task would be to inform the survivor of gender based violence about legal procedures and guide her through the judicial process. This will help in making the legal process particularly the trial a little less intimidating and hostile for the survivor of violence.

- It is suggested that a cadre of trained paralegals be developed to assist the survivor of sexual violence through the legal process.

7. Norms related to Medical / Forensic Examination and Medico-Legal Documentation: Gender sensitive procedures and protocols for medical care, treatment and examination of the victim of sexual violence be specifically laid down. Prohibit the two finger test and detailed examination of hymen and documentation of old injuries to hymen. Appropriate directions should be issued to all hospitals – public and private and medical colleges.

- It is suggested that the Justice Verma Committee recommends that a national protocol be developed for the dignified treatment and medical examination of survivors of sexual assault, particularly prohibiting the two finger test.

. Reparation including Compensation, Restitution: As a measure of reparative justice, for victims and survivors of sexual assault, the 2012 Bill must lay down State obligations towards such remedy and reparation, including provisions for medical treatment, psychological care, shelter, and income, in order to overcome possible destitution and social ostracism. These provisions should not be linked to the criminal trial and prosecution.

- It is suggested that the Justice Verma Committee recommends that a statutory obligation be imposed on the State to provide reparative justice to the survivors and victims of sexual assault. The obligation of the State to provide professional and long term services includes, counseling, medical treatment, shelter, economic opportunities through training and employment, redignification of the survivor in society. The State must pay monetary compensation for failing

in its duty and responsibility to protect. The award of compensation and provision of services, by the State, should not be linked to the criminal prosecution and trial.

8. Orientation and Sensitization of the Judiciary: Orientation and sensitization workshops must be held to enable Judicial Officers to understand sexual violence, gender inequality and related issues. It is also important to underscore that rape or sexual assault is a legal category and not a medical category. Medical evidence can only have corroborative value and cannot be determinative in a trial of sexual assault. The World Health Organization in its guidelines on medico-legal care for victims of sexual assault states that it is a commonly held myth that “rape leaves obvious signs of injury” and clarifies that “only approximately one-third of rape victims sustain visible physical injuries.” The jurisprudence established by the Supreme Court that conviction can be based on the sole testimony of the prosecutrix, where it is found reliable, must find reflection in the judgments of all Courts.

- It is suggested that the Justice Verma Committee recommends that Judicial Officers be sensitized on issues and jurisprudence relating to sexual violence against women.

10. Annual monitoring and evaluation of efficacy of laws relating to sexual violence: It is imperative that a critical and rigorous analysis is undertaken of all judicial verdicts of Trial Courts and Appellate Courts to map what are the precise reasons for the low conviction rates. This will help identify the gaps and weaknesses in the legal process and also sketch the patterns of violence as they emerge. Insights gained through this analysis can guide institutional practices and legal reform. Professionals engaged with these issues must conduct this analysis.

- It is suggested that the Justice Verma committee recommends an Annual Monitoring and Evaluation of all judgments of sexual crimes against women.

Please let me know if any additional information or clarifications are required.

Sincerely

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