

CRIMINAL LAW AMENDMENT, 2000 (CLA):

These are a collection of broad comments and stray thoughts by Laxmi Murthy to the CLA 2000. This document was prepared in 2006

1. Burden of Proof

The Amendment in 1983 following the campaign by women's groups led to some changes in the Indian Evidence Act (IEA). Prior to 1983, the burden of proof to establish the commission of rape by the accused was wholly on the prosecution. No distinction was made in cases of rape by policemen.

According to the Criminal Law amendment (CLA) 1983, the concept of 'custodial rape' was broadened to include not only police stations, but hospitals, remand homes jails. Also, according after the CLA 1983, where sexual intercourse by the accused is proved, the court shall presume that the woman did not consent (Sec 114-A, IEA). The widespread impression was that the policemen involved in custodial rape now had to prove their innocence – seemingly a victory for the women's movement. But, contrary to popular perception, things have not changed all that much.

The prosecution first has to establish the fact of sexual intercourse. The entire gamut of lodging the FIR, medical examination, recording the statement by the police, and deposition in court still has to be gone through. Delay in lodging FIR, delay in medical examination, inconsistencies in the FIR, statement before the police and the testimony in court remain prime factors in favour of defence lawyers. The woman who is raped still has to undergo the humiliating experience of seizure of clothes, preparation of slides of vaginal smears, tests for presence of sperm etc as part of the evidence. She also has to undergo grueling and humiliating cross examination, because the clause allowing the 'past sexual history' of the woman has not yet been deleted. Further, the woman has to go through the harassment of repeated test identification parades to identify the accused. The prosecution has to adduce circumstantial as well as medical evidence to establish the identity of the perpetrator. It is only after the above facts and circumstances have been established that Sec 114-A of the IEA comes into play. At this stage, if a woman says she did not consent, then it is presumed that she did not consent.

Since the whole case rests on 'consent', the routine practice, as in other rape cases is to bring in evidence that the woman's testimony is unreliable. Here the same familiar terrain may be covered: lack of physical marks of injury, her conduct before and after the incident, and of course, her 'character'. Her conduct may involve circumstances showing that she willingly accompanied the accused, she did not raise alarm, she did not disclose the happening immediately to someone, or there was delay in registering the complaint. On top of it, there are legal provisions in cross-examination for impeaching the credibility of the woman. "It may be shown that the prosecutrix was of generally immoral character" (Sec 155 (4) IEA). [The Law Comm, while agreeing to delete this section, again has introduced evidence relating to 'past sexual history' of the complainant by stating that the medical examination of a complainant should state whether the victim was used to sexual intercourse or not.] **This is a section we have to strongly recommend be scrapped.** *(In a case we investigated in Nagaland in April, a 19-year old woman was raped at gun-point by an army jawan. He used a condom, and she had just given birth to a baby 2 weeks before. So her vagina was 'loose', and there were no semen stains (because of the condom), and no 'signs of struggle', (because the machine gun was near her head). Conclusion by public hospital doctor: she was not raped. It is just sickening.)*

A study by PUDR “Custodial Rape: A Report on the Aftermath” (May 1994) looks at the custodial rape cases in Delhi in the 10 years after the amendment. They found that barring 2 convictions by the High Court, the accused policemen in all cases were acquitted and reinstated in uniform. The defence in all cases relied on the factors mentioned above to demolish the credibility of the woman who was raped. This is an excellent report – must read.

Shifting the burden of proof on to the accused is a departure from criminal jurisprudence in all democratic countries, which presumes a person innocent until proven guilty by due process of law. While we may feel impatient and disillusioned with the law as applicable in women’s cases, especially violence against women, I feel we must not lose sight of larger democratic trends. The only other laws where the burden of proof is shifted is in draconian laws like TADA and its present-day clones – the State Laws dealing with ‘terrorism’. We are familiar with the way in which criminal law is used to incarcerate people struggling for their rights, and in the name of ‘national security’, democratic rights are squashed by laws like TADA . After TADA has lapsed, Prevention of Terrorism Act (POTA), the M.P. Special Areas Protection Act and the Karnataka Control of Organized Crime Bill etc. Tami Nadu Prevention of Terrorist Activities Bill in 1998, A.P. Banned Organisations (Prevention and Restrictions) Bill and the A. P. Prevention of Unlawful Activities Bill (both 1998) all of which define “unlawful activity” in very loose terms. Most of these are targeted at crushing peoples’ movements, not ‘terrorism or organised crime’ as claimed.

I feel we seriously need to re-think this provision, especially in the light of the fact that it does not seem to have made **any** difference in convictions in custodial rape cases. In fact, it may even be to the contrary (i.e. less convictions after the 1983 Amendment – see PUDR report). This may be similar to the argument against death penalty for rape, since there may be more hesitation to convict rapists if there is a death penalty.

What may be more useful is trying to thrash out better ways to translate into legal terms our experiences why :

1. There is a delay, even weeks and months in complaining, especially custodial rape.
2. Why there is a difficulty in complaining, especially if it is the same police station she has to go to lodge the complaint. Can there be no alternative?
3. There may be no physical evidence of struggle, especially in custodial rape
4. Why medical examination may not yield evidence of rape.
5. Why the character of the woman or her past sexual history are not relevant factors to establish sexual assault.

How, even if a woman has earlier had consensual sexual relations, she can also be sexually assaulted by that same man eg: marital rape, date rape etc. Consent once or on earlier occasions does not mean consent for ever more. The law recognises it in cases of women separated from their husband etc, so why not in other cases.

2. Child Sexual Abuse:

Current proposal doesn’t seem to deal with it effectively – either in definition, or procedural matters. Currently there is a confusion about age – below 16yrs is considered ‘minor’ rape, but its 15 yrs if the girl is married, and for other purposes in law, ‘minor’ is defined as below 18yrs. The CLA suggests 16 yrs. Some (Bombay meeting) seem to be suggesting changing the definition of ‘child’ to 18yrs.

We need to think this through a bit. According to the law, sexual intercourse with anyone below a certain age is considered unlawful i.e. rape. The question of consent doesn’t enter the picture. Are we then saying that the ‘age of consent’ should be 18yrs? What about consensual sexual activity below that age? Everyone knows that adolescent sexual activity starts well below that age –

technically it will all be considered 'rape'. How do we handle this? [In my M.Phil research, I came across several girls who were kept in the Govt. Remand Home in Tihar as 'rape victims', who were actually girls of 13-14 yrs who had run away with their boyfriends. Their parents complained, especially in inter-caste cases, they were nabbed by the police, locked up in a remand home till they reach 18, and the boyfriends were locked up for rape charges, many under-trial for several years. The 'age of consent' is being lowered in many European countries to as low as 12 yrs (Holland, Sweden etc).

The challenge for us is not to criminalise consensual sexual activity of teenagers, but define 'consent' and 'coercion' in a way that would ensure protection against forced sex. Some suggest putting in safeguards like a maximum age difference between the girls and boy i.e. if both are adolescents etc. But this again may get into technicalities, and sometimes unrealistic. Eg. Do we presume that a 15 year-old girl cannot have consensual sexual relations with a 22 year-old boy? Nope!

Also agree that the law needs to recognise sexual abuse of young boys too. Maybe a separate section of child sexual abuse can deal with it. The procedural changes suggested by Sakshi (not accepted by Law Comm) sound positive i.e. video taping statements etc.

3. Gender Neutrality

In general would agree that gender neutrality would go against the woman, but we need to recognise:

- Men too can be sexually assaulted – by men, as well as by women (in rare cases)
- Women too are capable of perpetrating sexual assault on men in the broadened definition of the CLA, and also on other women.

The above is more possible in situations of custody (jails/hospitals/mental asylums etc) or situations of caste/communal violence etc, where women may collude, or actually initiate sexual assault on men of lower castes/ minority communities. But given the current socio-legal climate, I tend to agree that it may be better not to have a law covering cases of sexual assault brought by men against women (except sexual abuse of the male child).

The challenge again is not to avoid putting it into a legal framework because in the majority of cases women are the ones subjected to sexual assault, but to frame the law in a way which would cover even the unlikely cases without creating more problems for women.

Same Sex violence

I agree with the suggestions of the LGBT group (Bombay meeting) "Because of context and realities of same sex interactions are different, they would prefer a separate law dealing with same-sex sexual assault, and initiative needs to come from the LGBT community."

But we also need to strongly support the deletion of Sec 377 and emphasis that consensual sexual activity between two adults (actually I feel this should be "*two persons*" – why do we assume that 'children' are not capable of consensual sexual activity?) cannot be punished by law.

Simultaneously, then, there needs to be some protection for sexual assault of men in situations we know are common – in custody etc.

The suggestions that Section 376 (2) dealing with custodial sexual assault should be gender neutral, and Section 375 and 376 should not be gender neutral is OK. If there is an additional Section about Child Sexual Assault, I think it would mostly cover all situations.

4. Sexual Harassment

Deletion of 354 is a good idea. In fact, even 509 can be deleted. Women's modesty need never more get outraged! Section 376 D can be expanded on the lines of the Vishakha judgment.

But Section 376 D "Unlawful sexual contact" sounds as archaic. This term 'unlawful' is absurd. What we need to emphasise is: 'unwanted' 'undesired' 'non-consensual'. Even this 'sexual purpose' seems ill-defined. I see the need for some such thing (otherwise, as someone has pointed out, even a gynecological examination will come under sexual assault) but the present definition leaves much to be desired.

5. Marital Rape

Inclusion of marital rape should be strongly recommended. The concept that a man has full right over a woman and her body just because he is married to her is abhorrent. However, we need to think through several things:

1. Question of consent and when did the consent stop? This is especially relevant when the woman complains after a longish time period.
2. Question of punishment. If the penalty we are recommending is imprisonment, what happens to the woman if the husband was the only earning member? Do we really see women complaining of marital rape if they know the husband is going to be locked up? Often, women seem to want the violence/sexual assault to stop, and the man to "be taught a lesson" and not necessarily removed from their lives. I know this is near-impossible to implement in criminal law. Could we think of some civil provisions, like the Lawyer's Collective Domestic Violence Bill?

Also, something like psychotherapy/counseling or something? Or else, what happens after he serves his sentence and comes out – continue as before?

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