



Submission to the Committee headed by Justice J.S. Verma on Amendment of Laws Relating to Rape and Sexual Assault

By

Partners for Law in Development
New Delhi
5th January, 2013

Partners for Law in Development (PLD) is a legal resource group that facilitates assertion of social justice and women's rights, addressing amongst other aspects, violence against women and women's rights vis a vis the family. We are based in New Delhi, but have been working in the states of Rajasthan, Chhattisgarh, Jharkhand, Bihar and Orissa.

PLD has been actively involved in the process of sexual assault law reform for the last 15 years. More recently, we have been part of the civil society responses to the 2010 and 2012 Criminal Law Amendment Bills. However, we are deeply concerned that the responses and concerns expressed by the women's organizations and the larger civil society to the proposed amendments have not been taken into account by the government.

The following submissions are not exhaustive. They cover elements of state responsibility in relation to prevention, protection, prosecution, punishment and compensation necessary for addressing sexual violence against women. State response and law reform relating to all sexual crimes is needed and necessary. In fact any plan to deter aggravated sexual assault must include action against lesser and routine sexual offences. Our submissions therefore go beyond the limited scope of reference assigned to the Committee, and we strongly recommend that the Committee's recommendations address comprehensive changes that are long overdue.

Substantive Provisions

1. The definition and scope of the offence of sexual assault: The offence of rape currently includes only the act of peno-vaginal penetration. However there are other penetrative forms of sexual assault, all of which need to be recognised on par as sexual assault. It is suggested that the offence of 'rape' be substituted with a graded offence of 'sexual assault' which shall include all acts where a man uses objects, penis, fingers or any other body part to penetrate the vagina, urethra, anus or mouth of a woman. The amended Sections 375, 376, 376 A,B,C and D must remain gender specific. In India, sexual assault occurs within the framework of gender power relations comprising predominantly of male violence against women. The law must explicitly recognise this. We are opposed to the gender neutral definition of sexual assault proposed in the Criminal Law Amendment Bill of 2012, as it suggests that rape could potentially be perpetrated by a woman against a man. Placing women on an equal footing with men as perpetrators of rape lacks any evidentiary basis and will be counter productive in a context where the victim gets blamed for inviting rape, and rape complaints are often dismissed as false.

2. Same sex sexual assault: Same sex sexual assault must be addressed separately and explicitly for realistic protection and redress. With Section 377 retained in its original form in the penal code, the shadow of criminality continues to hang over homosexuality, making it risky to report same sex sexual assault. An amended Section 377 will erase criminality completely, replacing it with an clear formulation penalising same sex sexual assault, leaving no doubt about the intent and application of the provision. We strongly recommend that the Section 377 be re-drafted in accordance with the Delhi High Court judgment in Naz Foundation vs NCT of Delhi, in gender neutral language to address same sex sexual assault, as well as sexual assault against transsexuals and transgender persons. Sexual offences against children will be covered by the Protection of Children from Sexual Offences Act 2012.

3. Aggravated Sexual Assault: Section 376 to include instances of sexual assault during sectarian (caste, ethnic, communal) violence, sexual assault against physically and mentally disabled women, and sexual assault carried out by the security forces. In such cases, the principle of command and superior responsibility are necessary to facilitate prosecution for actions and inactions of those in positions of command and leadership that allowed sexual assault to be perpetrated.

4. Acid Attack: A separate offence of acid attack be included. While sexual motives (rejection or transgression) are known to be the motive of most acid attacks, and that these nearly always target women, the offence needs to be defined in gender neutral language. There are cases where men and children accompanying the victim also bear the brunt of the attack. In a few cases, men are similarly targeted with acid for revenge. The law on acid crimes and control has been in force for 10 years in Bangladesh, and for 2 years in Pakistan and are gender neutral in language but enacted in response to its manifestation as a gender specific crime. Accounts from Bangladesh indicate that gender neutrality has helped respond to male victims who suffer collateral damage when women are targeted.

5. Change of Vocabulary: Outdated and offensive terms such as ‘rape’ ‘ravishment’ ‘enticement’ ‘chastity’ ‘outraging of modesty’ in the substantive provisions, to be replaced with terms that define harms in terms of sexual assault, violence and violation of bodily integrity.

6. Age of Consent: The age of consent for sexual assault must be 16 years. Additionally, if a girl between 16 to 18 years denies consent, the court must accept her testimony without corroboration. Likewise, if the girl between 16 to 18 years admits consent before the court in a case of rape against a peer, the charges against the accused should be dropped. This is to prevent criminalization of sexual expression amongst peers by young persons, often against the wishes of their parents. This approach introduces the concept of ‘evolving capacities’ for sexual expression amongst young persons, and harmonises the proposed reform of the IPC with the Protection of Children from Sexual Offences Act 2012, that has increased the statutory age of consent to 18 years. Any such cut off age is always arbitrary, and the law must be cognizant of evolving capacities to consent to sex between peers. We recommend that a peer is no more than 4-5 years apart in age.

7. Sexual harassment of women: Currently this is covered by Section 354 and 509. These provisions to be replaced by a graded offence of violating the bodily integrity of women. Acts within the

gradation to include, public stripping and parading of women, tonsuring the hair, blackening the face and parading, groping and pinching of women, and also non-contact acts such as flashing, gesture, stalking, blackmailing via electronic media like MMS, etc. The recognition of this set of sexual offences is vital for responding and punishing a range of offences, that when unpunished, fuel perpetration of lesser and aggravated forms of sexual assault. This comprises the set of crimes that are routine, carried out with impunity, and have normalized sexual violence against women.

8. Marital rape: Marriage does not imply consent of the wife to sexual intercourse with the husband. For any sexual act between the husband and the wife to be consensual, the consent of the wife must be real and explicit and not assumed. India is one of the very few countries which continue to retain the marital rape exception to the definition of rape. This clause must be repealed and forced sexual assault by the husband must be recognized as a criminal offence.

Reparation & Support Services

1. Reparation includes both compensation and rehabilitation for the victim. Reparative justice for violence against women, including sexual violence, must integrate support services for healing and recovery of the victim. To that end, it should be the obligation of the State to make provisions for medical treatment, psychological care, shelter and income, in order to overcome possible destitution and social ostracism.

2. The state must establish Violence Against Women Assistance Cells which would be responsible for providing immediate access to quality and free medical attention, psychological counselling, legal aid and other support services as may be required by the victim. These cells should be uniformly available and accessible in urban and rural areas, in zones of peace and conflict.

3. These Cells must provide 24-hour service, including access to interpreters for disabled victims, access to translators for victims who do not speak the local language, transport facilities, access to information about legal aid, compensation schemes and so on.

3. A case worker must be provided for each victim whose case is being investigated or prosecuted. Case workers should inform the victim/survivor in an age-appropriate way about the trial, support the silent and listen to her concerns. Case workers should be appointed and employed by the courts and funded through the victim and witness protection programme.

4. There should be provision for compensation to the victims, computed on the basis of injury received. The first instalment should be paid within 15 days of filing of FIR. This should be independent of the outcome of the trial or the victim retracting her statement at a later point due to whatever reasons. Section 357A of the CrPC, which talks about awarding compensation to the victims of crimes, should be proactively enforced. It is useful to draw upon the framework for paying compensation under the SC ST Prevention of Atrocities Act, 1989. The central government has introduced a scheme for Relief and Rehabilitation for Victims of Rape. However, this scheme must be revised to be available to all victims of sexual violence, and not be conditional upon reporting the case to the police without delay or cooperation with the prosecution.

Investigation/ Pre-trial Stage

1. The police in every state must have Standard Operating Procedures with detailed guidelines for each aspect of investigation and the role of the police during trial. The Delhi Police already has such Standard Operating Procedures since 2005, but they are not followed in practice. Individual accountability for non compliance with these procedures is discussed below.
2. The two finger test which is widely used during medical examination of the rape victims to determine whether they are 'habituated to sexual intercourse' or not, be explicitly barred. Where proformas are used to record the medical examinations, there should not be any query regarding the state of the hymen (torn, intact, old tear etc.). Since questions relating to past sexual history are barred vide amendment to Section 146 of the Indian Evidence Act in 2002, requiring the medical examination to record the state of the hymen goes against the spirit of this amendment.
3. Evidence from medical examination of the victim is vital to the prosecution case, and hence the victim must be examined by a qualified medical practitioner as soon as possible. Medical examination of the victim under Section 164A of the CrPC does not require an order of the Magistrate, as is often insisted by the police. This must be explicitly stated to avoid delay in medical examination and consequent loss of crucial evidence. It may not be compulsory for a victim to be examined by a female doctor. But if the victim is uncomfortable being examined by a male doctor, in that case a female doctor must be provided for her.
4. Forensic tests to include DNA tests. Victims should not be subjected to lie detection tests as is done in some parts of the country.
5. A witness and victim/survivor protection programme must be in place with staff and funds to implement the same. It should be headed by a senior official in the relevant departments at the local, state and national levels. These should be available for victims of violation of bodily integrity (outraging the modesty in the current law) as well. In cases where defendants or persons close to the defendants threaten or attack victims or obstruct the course of justice, they should face legal action.

Gender Sensitive Trial

1. Develop a victim-centred approach to criminal justice that focuses on the needs of the victims and witnesses in all judicial proceedings.
2. Time bound trials: lengthy trials that erode the victim's resilience and patience are counter productive to justice. Trials in rape cases must be concluded within a period of 90 days. And after the evidence of the victim is recorded, the hearing must take place on an everyday basis.
3. Provision for interpreters/ translators in order to record the testimony of disabled victims or witnesses. A list of interpreters/ translators must be maintained with the police. Cases involving disabled women mostly lead to acquittal as their testimony is either not recorded at all or is recorded without the help of independent interpreters. Often the help of family members is taken in interpreting the testimony, which affects the case adversely in the appeal proceedings where these testimonies/ interpretations get discredited on the ground that family members are interested parties. Reliance on the interpretation of the testimony of the family members goes against the rule

of impartiality of criminal trials. The Protection of Children from Sexual Offences Act 2012 provides similar support services for disabled children. The same should be extended to adult disabled victims of sexual assault.

4. Analysis of reported cases show that a large number of cases end in acquittal because key witnesses, including doctors who have prepared the medico legal report are not examined in court. This needs to be addressed, and the quality of prosecutors must be improved.

5. Questions pertaining to the past sexual history of the victim are now barred by the law. During trial, the defense should not be allowed to place evidence relating to the real or perceived association of the complainant with sex work, solicitation or entertainment related work.

6. 'Compromises' are encouraged, and facilitated in a large number of rape cases before and during the trial. Compromising or settling rape cases is not allowed under the law. Yet this is encouraged directly and indirectly including by bearing pressure upon the victim and her family to turn hostile during the trial. Such trends need to be detected and prevented, and in fact, can be prevented considerably through a victim protection programme.

7. Experience has shown that in-camera trials do not serve the purpose they intend to as as the victim is surrounded by aggressive defence lawyers and the accused in a closed court room. In in-camera trials, and otherwise, the victim should be shielded from the accused. A battery of defence lawyers and their juniors should not be present. Additionally, the victim must be allowed to have a 'next friend' present in the court with her.

8. A direct confrontation between the victim and the accused must be avoided during the trial. The system of using a screen or curtain between the victim and the accused, which is used in cases of child sexual offences is strongly recommend. Additionally there may be separate waiting room for the witnesses and the victim, where they can sit prior to deposition. A one way glass screen may be considered for Test Identification Parades.

Sentencing

1. In cases of aggravated sexual assault, punishment should be for life imprisonment with no parole or remission. In non aggravated cases, parole may be granted only after 75% of the sentence has been served.

2. We are strictly opposed to the suggestion that sexual offences should be punished with death penalty. Firstly, there is no scientific basis for claiming that death penalty has deterrent effect. Secondly, there are studies that show that as punishment becomes stricter, the rate of conviction falls. Finally, death penalty embodies the idea of retribution which is as violent as the offence for which it is being suggested.

3. We are also opposed to chemical castration as a punishment for those convicted of sexual offences. Sexual assault is embedded in a framework of power and has got very little to do with sex. Targeting the sexual organ therefore is a misplaced remedy. Further, this does not foreclose the perpetration of sexual assault with objects/ iron rods as in the recent Delhi gang rape case.

Additionally, as with the death penalty, there is no scientific basis for claiming the deterrent effect of chemical castration. However there is enough evidence to suggest that such procedures have adverse health impacts. It is also an invasive procedure and goes against the right to life and bodily integrity of a person as enshrined in the Indian Constitution.

Prevention

1. Uniformed policemen deployed at all public places, so that women are able to identify whom to approach in times of crisis.
2. Reform of public transport system, including regulation of private buses, autos and car services, strict monitoring of tinted glasses on private and public vehicles and improving the frequency and reach of public transport.
4. Mass visible and audio messages on what constitutes sexual offenses and what are the remedies and punishment for the same, in all public vehicles and public places such as markets, bus stands, train stations, malls, etc.
5. Quality gender sensitization must be institutionalised within every part of the criminal justice system: medical personnel, police, public prosecutors, and the judiciary.
6. Sex/ sexuality education must be made part of school curriculum.

Accountability

1. There must be clear provisions for holding public officials, such as the police, accountable for dereliction of duty. Individual accountability must be strictly attached for non observance of the guidelines contained in Standard Operating Procedures for every case.
2. We suggest that Sections 45 and 197 of the Code of Criminal Procedure be inapplicable to cases of sexual assault, where the accused are members of the Armed Forces or public servants. This is in order to end the widespread impunity that currently exists for sexual assault where it is committed by public servants. We believe that no sexual assault can ever be construed as being perpetrated “in discharge of official duty” and therefore the statutory requirement of prior sanction from the government for prosecution of public servants ought not to be extended to the crime of sexual assault.
3. There should be CCTV cameras inside police stations, to monitor police performance and recording of complaints.
4. Medical professionals, an important set of actors in the sexual assault trials, often inordinately delay or refuse to conduct medical examination of the victims. The procedures can be humiliating and the findings in their reports counter-productive (as for example, habitual to sex). There must be some mechanism for discouraging such practices, and for enabling individual accountability.



5. Both government and private hospitals and nursing homes should be duty bound to provide free emergency medical aid to victims of sexual violence, and should not insist on the filing of an FIR prior to providing medical attention.

6. Under section 483 of the Criminal Procedure Code the High Court has power of general superintendence over the district courts. In cases of acquittal of sexual assault by the trial court that are overturned by the High Court, there should be an internal mechanism that allows the High Court judge to communicate to the district court judge the reasons for the overturning and comment on the short-comings in appreciation of facts and evidence. This can serve as an important internal learning mechanism to detect and communicate gender bias.

Judicial Attitudes

1. Judicial attitudes continue to be gender biased. More extensive and serious efforts at changing these attitudes is necessary. A perusal of various reported judgments post the 2002 amendment to the Indian Evidence Act (Sec. 146) have shown that courts still rely, and/or refer to the past sexual history and 'immoral character' of the victim. **(Please look at Annexure 1)**

2. In cases of acquittal of the accused or reduction of sentence, the reasoning of the Court should be not be based on inferences of the 'character of the victim' as is common practice. Inferences and perceptions about the victim's morality and sexuality influences the appreciation of evidence to result in acquittal, disables the judiciary from objecting to hostile and humiliating cross examination, and finally, is used to justify sentence reduction. Clear guidelines for judiciary are necessary to bar reliance upon real or perceived previous sexual history of the victim.

3. Continuous gender sensitisation education of judges be mandatory. This becomes important in view of the kind of judgments that have been announced in the recent past, not only by the District Courts, but also various High Courts and the Supreme Court.

Monitoring & Review

1. A data base of cases of sexual assault be maintained to track the implementation and performance of the law, and to identify its weaknesses for future reform.

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ANNEXURE 1

The Committee may note the ways in which inferences of previous sexual history and gender bias continue to mar judicial verdicts. It is recommended that sentence reduction not be allowed on account of the age of the accused, the conduct of the victim or her sexual history. However, sentence reduction could be based on circumstances and contexts that do not trivialize the gravity of the offence but highlight reasons that are specific to the accused – good conduct, family distress and so on. These trends need to be checked.

- In a case currently under appeal in the Delhi High Court, Vinay Kumar Khanna, ADJ (Saket Courts), which acquitting the accused had noted that even though there were bruises on the victim and a tear in her posterior fourchette, the crime could not be proved because inter alia, “there were no bruises on the genitalia of the accused.” The judge noted that since there was a possibility that the victim might have had long nails at the time of the sexual assault and that she was also a ‘virgin’, she ought to have inflicted marks of injury on the accused person’s genitalia. Failure to leave such marks on the person of the accused led the court to presume the intercourse was consensual, despite extensive injuries on her person.
- In AIR 2010 SC 3813 the Supreme Court observed that the victim appeared to be a “lady used to sexual intercourse and a dissolute lady. She had no objection in mixing up and having free movement with any of her known person, for enjoyment.” Thus, “she appeared to be a woman of easy virtues.”
- In CrI. Appeal No 38-DB of 2000 (Punjab and Haryana High Court), the Court relied upon the two finger test and trimmed pubic hair to observe that the “victim was habitual to sexual intercourse, so much so, she had cut her pubic hairs.” Noting further that, “a girl below the age of 16 years can be hardly expected to be conscious about these things.”
- In Criminal Appeal No. 1217 OF 2003 the Bombay High Court involved rape of an 8 year old girl by an 18 year old youth. The Court reduced the sentence of an accused to 8 years taking into consideration “the degree of physical and mental damage” to the 8 year old victim, whose medical report showed no injury to the vagina suggesting that “the nature of the crime is not such as that it would indicate that it was done with utmost cruelty and perversity.” The sentence reduction was further justified on the grounds that the accused was a student of 18-19 years without a family criminal history, and therefore “was not mature and was not habitual to sex, thus he would not have known the implications of sex with an 8 year old.”
- The Patna High Court in Criminal Appeal (SJ) No. 73 of 1997, the court reduced the sentence for rape on grounds of long protracted proceeding to a trivial three and a half years. Although there is no overt gender bias in the reasons, it does trivialize the seriousness of the crime. As the accused was a student of 19-20 years at the time of rape, he had lost the prospect of good job as a result of conviction. Further, the accused had suffered great humiliation in society. As nearly 20 years had lapsed since the crime, the sentence of three and a half years served by the accused was deemed sufficient.

- In (2011) 1 GLR 502, the Guwahati High Court, while citing special reasons for modifying charges from Sec. 376 to Sec. 354, in the case of rape of a 14 year old school girl by a 18 year old boy - the court observed that the accused was “18 years old boy, and a young boy of such age is normally prone to sexual adventure which he might have undertaken because of natural and similar urge from the maiden victim.” It observed that the evidence was that the victim was *used to sexual intercourse* and was also under the age of 14 years. The Court observed that the accused was studying in higher secondary school at the time of the rape and was 25 years old at the time of conviction. He had no criminal antecedents.
- In another case, Justice Pinki, ASJ (Saket Courts), while acquitting the accused, noted disbelief that after the incident, “when the victim was under trauma and was not able to make a call to anyone, she managed to re-string her salwar.” This according to the court “showed that the case of the prosecutrix was false and an afterthought.” While noting the expression of the prosecutrix during her cross examination, the court observed that “she was crying and having tears. It is natural human tendency that victim always remains revengeful towards aggressor/ attacker and does not display any remorse. In this case, prosecutrix was forced to speak against her lover. She had shown remorse while identifying him before the court. It indicates that prosecutrix and accused were in friendly relation and nothing has happened and taken place against the wishes of the prosecutrix.”