

CHAPTER 9

CITADELS OF POWER AND IMPUNITY, DISTURBED BUT NOT DISLODGED

Evaluating the 2013 Law Reforms in the Anti Rape Law in India

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INTRODUCTION

The violent gang-rape and consequent death, of a young para-medical student, now referred to as *Nirbhaya*, on 16 December 2012, in New Delhi, compelled thousands to join the spontaneous public protests. The protestors foregrounded the routine and endemic nature of sexual violence experienced by women. The shame, silence and denial, that had for too long shrouded the reality of sexual violence, stood ruptured, as women claimed their right to equal citizenship, asserting the freedom to live, dress and love, without the omnipresent fear of violence. In the cacophony of public outcry, feminist activism challenging patriarchy, misogyny, structural inequality and embedded discrimination, jostled anxiously against the shrill cries for retribution, through castration and summary execution, of the 6 men accused of *Nirbhaya's* rape and murder.

Cries of “We want justice”, raised by the youth and particularly women, demanded from the State, justice, not only for *Nirbhaya*, but also to prevent, prohibit and punish, the pervasive and multiple forms of sexual violence suffered by women. The abject failure of the criminal justice system and the entrenched impunity for sexual violence against women could no longer be denied. To contain this public outrage the government on 23 December 2012, hurriedly appointed a three member Justice Verma Committee, to examine the lacunae in criminal laws and their enforcement in cases of “sexual assault of extreme nature against women”.¹

The Justice Verma Committee presented its comprehensive analysis and recommendations in a record one-month, in January 2013.² The Verma Committee Report mapped the socio-economic, cultural, political and juridical basis for sexual violence against women. Marking a paradigm shift it stated, “Another humiliating aspect of the crime against women is that her status in the patriarchal structure of

society also impedes her access to justice. The inequities of social status, caste prejudices, and economic deprivation further compound the gender injustice.”³

Drawing upon the fundamental right to equality, non-discrimination and the right to personal liberty and life, guaranteed under the Indian Constitution, the Report placed the onus on the State to ensure systemic and substantive equality for women in all spheres, as an imperative for violence against women to be diminished and erased. Sixty-three years after India became a Republic, the Committee drafted a Bill of Rights for women, spanning their entitlements in the private and public sphere.⁴ It stated, “Empowerment of women means the advancement of women as contemplated under Articles 14 and 21 of the Constitution through integrated strategies, frameworks, programmes, plans, activities, budgets, which aim to eliminate structural inequalities and which enable women to gain power and control over decisions and resources which determine the quality of their lives in a sustainable manner.”⁵

These wide-ranging proposals for transformative change however found scant resonance in the actions of the government, which limited itself to amendments to criminal laws. For almost three decades the women’s movement had been advocating for a change in the anti-rape law.⁶ It however took, a gruesome loss of life and an unprecedented public uproar, for an apathetic Parliament, blatantly protective of male privilege over women’s bodies, to unanimously pass the Criminal Law Amendment Bill, in February 2013.^{7,8}

The women’s movement critically interfaced with the Verma Committee and subsequently with Parliament on these legal reforms. Feminist engagement with law has been fraught and contentious, acutely cognizant that legal processes replicate hierarchies and prejudice, to obstruct justice. However in a milieu where subordination and violence against women, enjoys social approval, religious sanction and political patronage, the domain of the law becomes a necessary site of contestation.

In 1983, the Indian Supreme Court acquitted two police men charged with the rape of a young tribal girl, *Mathura*, at a police station, on the untenable grounds, that *Mathura* was “habituated to sex”, for there was an “absence of any injuries or signs of struggle” on her body and she had not “raised any alarm for help”. The agitation by the women’s movement led to the first phase of amendments to the rape law.⁹ Locating “custodial rape” at the intersection of state power and gender inequality, the jurisprudence of power rape was introduced; the burden of proof shifted on the accused entailing stringent punitive sentence. Additionally, all rape trials were to be conducted “in-camera” and a legal bar placed on the disclosure of the identity of the victim.

THE CRIMINAL LAW AMENDMENT ACT (CLA) 2013

Prior to the 2013 amendments, only outraging the modesty of a woman and peno-vaginal rape were arrayed as sexual offences against women, leaving many sexualized forms of harm, injury and humiliation without legal remedy. This gap in the Indian Penal Code (IPC) was corrected through the recognition of a gradation of different forms of sexual violence against women, as crimes. The amended law delineates prohibited male conduct and establishes a normative standard premised on bodily integrity and dignity of women.

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Gradation of Sexual Crimes: The amended IPC introduced a gradation of sexual offences, including sexual harassment; disrobing or parading a woman naked in public; voyeurism; stalking; and acid attack. A distinct statute also provides an in-house mechanism to counter sexual harassment of women at the workplace, which is recognized as a form of gender discrimination and hence a violation of fundamental rights.¹⁰ Public stripping and parading a woman is frequently deployed to humiliate and punish, particularly *dalit* and *adivasi* women, who challenge patriarchal, caste or other traditional forms of authority. The criminalisation of voyeurism, protects the privacy of a woman and thus penalizes any man who watches, photographs or disseminates images of a woman, in a state of undress or when engaged in private acts. Stalking, criminalises the following or monitoring of a woman, physically or electronically by a man to foster personal interaction, despite her clear indication of disinterest. During the Parliamentary debate in the Lok Sabha (House of People), prominent male

political leaders, expressed misgivings on codifying stalking and voyeurism as offences, for they confessed to having indulged in similar (mis)conduct to woo women.¹¹ In a context where the distinction between sexualized harm and romantic flirtation is blurred, the clear articulation of penal law acquires significance. Stalking, has forced women to drop out of school, college, switch jobs, even change residence, to escape the terror of the stalker. Acid attack is a particularly egregious crime, where a mere refusal by a woman to form a romantic liaison with the male suitor, can have devastating consequences, physically and otherwise. With acid, easily available for over the counter purchase, this crime has seen a sharp rise.¹²

Feminists advocated, that S. 354 IPC dealing with molestation, be redrafted, and the problematic patriarchal notion of “outraging a woman’s modesty”, be purged from the legal lexicon and replaced with the phrase “violation of a woman’s bodily integrity and dignity”.¹³ Parliamentarians however expressed their inability to comprehend what constitutes, the ‘dignity of a woman’!

Redefining rape: Marking a clear departure from the patriarchal framing of rape which proscribed only peno-vaginal penetration, the CLA 2013 enlarged the scope of rape offence to include all non-consensual sexual penetration by a man of a woman, including, peno-anal, peno-oral, and penetration by any other body part, or object into any orifice of the woman. According primacy to the notion of bodily integrity and centrality to the consent of the woman, the rape definition now reflects the violations suffered by women, rather than the anxieties of safeguarding lineage. It also defines consent, as an unequivocal, voluntary agreement that communicates willingness on the part of the woman to engage in that specific sexual act and further clarifies that the absence of physical resistance does not imply consent to the sexual act.

Marital Rape Excluded: The primacy accorded to a woman’s sexual autonomy and agency, however does not extend to a wife who is above 15 years of age. The law retains the Exception that excludes marital rape from the offence of rape. The concession made by CLA 2013 was to extend the purview of rape to any wife living separately, though entailing a lighter prison sentence. Thus the privileging of the husband’s dominion over the wife’s body continues. Interestingly, the Protection of Women from Domestic Violence Act, 2005, a civil law, enumerates “sexual abuse”, as a form of domestic violence and offers legal protection against the same. Feminists have flagged this aberration in law and with ongoing public debates marital rape remains an agenda for future law reform.

Age of Consent: Under the 1983 rape law, penetrative sexual acts below the age of 16 years, was criminalized as ‘statutory rape’. The Protection of Children from Sexual Offences Act, 2012, however introduced 18 years as the age below which the consent for sexual act would be legally irrelevant. Taking advantage of this dichotomy, conservative forces in Parliament also raised the age of consent in the CLA 2013 to 18 years, in the face of stiff opposition from feminists. Surveys in India provide evidence of increased consensual sexual activity between young persons in the age group of 16-18 years.¹⁴ This amendment is regressive on many counts, it strengthens the stranglehold of family and community to control sexual agency and maintain the status quo, by invoking rape charges in inter-caste and inter-religion relationships, of young persons aged 16-18 years. A recent analysis shows that almost 40% of rape cases decided in Delhi in 2013 were of ‘consensual sex’ between young persons, criminalised by the 2013 amendment.¹⁵ It is precisely these cases that provide fodder to proponents of ‘misuse’ of rape law.

No Protection for Transgenders and Men from Sexual Violence: A noticeable lacunae in substantive law is the absence of protection for transgender persons and men from sexual violence. Evidence suggests that they are subjected to heinous sexual abuse and assault, particularly at police stations, jails, during caste atrocities,¹⁶ necessitating the introduction of specific crimes of sexual assault, for their protection. With consent underpinning the 2013 amendments, the case for the repeal of Sec. 377 IPC, that criminalises consensual same-sex relations, becomes invincible.¹⁷

Structural and Procedural Impediments: For sexual violence to diminish and conviction rates to improve, much more than amendment to the substantive law is required. Impunity for sexual violence against women preys upon the fault lines in the legal system viz. institutional bias; systemic sexism; partisan and misogynist investigation; degrading medical examination; traumatic and harsh legal proceedings.

Bias: Contempt and suspicion shadow the rape victim, from the police station to the courtroom. Lodging a First Information Report (FIR), the first prerequisite for accessing justice, is invariably an insurmountable hurdle. The underlying malaise stands revealed from the official reply of Uttar Pradesh police stations to a Right to Information (RTI) application that enumerates, “mobile and internet culture, western influence and indecent dressing sense among women” as some of the reasons behind the rise in rape cases.¹⁸ To preclude this, clear and precise protocols, prescribing the mode of police functioning, must be adopted.

Police Accountability: To obviate this mindset among law enforcement officials, CLA 2013, penalizes the refusal of the police, to lodge a FIR, or investigate an offence of sexual violence in contravention of the law, and to the prejudice of the victim, as a crime, with a mandatory six-month sentence. This is a milestone in securing institutional accountability. However due to the “brotherhood of *Khaki*” among the police, it remains unenforced.¹⁹

Sexism: The contestation between misogyny and dignity is palpable even in judicial verdicts. While one trial court rebukes women, “The girls are morally and socially bound not to indulge in sexual intercourse before a proper marriage and if they do so...they cannot be heard to cry later on that it was rape.”²⁰ Another trial judge, states, “It may be reiterated that simply because the victim was working as a sex worker before the incident in question, does not confer any right upon anyone to violate her dignity or to rob her and can certainly not be a ground to award lesser than the minimum prescribed punishment.”²¹

Character and Past Sexual History: To avert the rape trial being converted into an inquisition of the woman victim, the CLA 2013 explicitly excludes as irrelevant and inadmissible evidence relating to the character or past sexual history of the victim. The significance of this amendment cannot be overemphasized, for although the Supreme Court has held that a woman victim is not an accomplice in a crime of rape²², the ghost of the *Mathura* judgment continues to stalk rape investigation and trials. Supreme Court judgments hold that the sole testimony of the rape survivor, if credible and consistent is sufficient for purposes of conviction.²³ The legal system however continues to furtively seek corroboration, from the body of the victim, as suspicion, disbelief and prejudice against the rape victim runs deep.

Dubious Medical Examination and Insidious Findings: Studies conclude that usually sexual assault causes no physical injuries. The Supreme Court stated, “*Rape is a crime and not a medical condition....Whether the rape has occurred or not is a legal conclusion, not a medical one.*”²⁴ Clarifying that injuries cannot be a measure of absence of consent, the Court stated, “*It is wrong to assume that in all cases of intercourse with the women against will or without consent, there would be some injury on the external or internal part of the victim.*”²⁵ Despite such clear jurisprudence, the absence of physical injuries casts aspersions on the veracity of the accusation of rape.²⁶

In contravention of law and policy, the per-vaginum or “2 finger test”, is routinely conducted to note the size of vaginal introitus, elasticity of the vagina or the nature

and tear on the hymen. These are in turn used to interpret the character of the rape victim and read immorality into her past. Reference to the victim's character, enters the courtroom through the pretext of the medical report, where the inference of "habituated to sexual activity", prejudices the trial, and allows the accused to make the claim that the sexual act was consensual. Cautioning against this the Supreme Court has stated, "*Even assuming that the victim was previously accustomed to sexual intercourse, that is not a determinative question...It is the accused who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone.*"²⁷ The Supreme Court also held that "*undoubtedly, the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent.*"²⁸

Right to medical treatment: Emphasizing the dignity of the rape survivor the Court observed, "*Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence.*"

The CLA 2013 casts a statutory duty on all health facilities, public and private to provide first aid and treatment, free of cost to all survivors of sexual violence and acid attack. Failure to respect this legal obligation is now an offence.

In March 2014, the Union Health Ministry issued Model Guidelines and Protocol, prescribing consent and dignity of the rape survivor as the guiding principles.²⁹ It clarifies that medical findings, if any, are only corroborative and not determinative in cases of rape.³⁰

Low Conviction Rate: While the 2013 NCRB data discloses an encouraging trend of reporting by women of sexual violence, the low conviction rate is worrisome.³¹ It underscores that access to justice remains arduous, harsh and the trial procedure insensitive. An analysis by *The Hindu*, of 583 rape cases decided by Delhi District Courts in 2013, indicate that one-fifth of the cases ended in acquittal as the woman victim either turned hostile (i.e. won't confirm earlier evidence or statements to the law enforcement agencies) or did not appear in court to testify.³²

Many institutional and procedural gaps contribute to this high level of attrition: protracted and insensitive trials with cross-examination retraumatizing the rape

survivor; the absence of a robust witness-victim protection programme; lack of paralegal support to enable the woman victim to navigate the criminal trial;³³ and an indifferent prosecution to represent her.

Fast track court: Delay is the bane of the Indian criminal justice system.³⁴ To meet the rape victim's right to speedy justice, CLA 2013 provides for a rape trial to conclude within two months and in some cities fast track courts constituted. However except for a few high profile trials, most languish for months if not years.³⁵

Witness protection: The recommendations of the 198th Law Commission of India's report and Supreme Court judgments for a comprehensive victim-witness protection programme have not been acted upon.³⁶ To secure redress for the violation of their dignity, women have to stake their lives, confronted by threats, often in equivalence of socioeconomic status.³⁷

Punishment and Sentencing: Public fury asked for castration³⁸ and the penalty of death to be imposed as punishment for rape. This clamour was determinedly opposed by the women's movement. The movement resisted the notion that rape was a fate worse than death, and argued that with a conviction rate as low as 26% certainty and not severity of punishment would create prevention.³⁹ With no proven deterrence, the spectacle of hanging a few convicted rapists would distract public vigil to ensure that the state meets its obligations to create conditions for equality and safety for women. The Verma Committee accordingly abjured prescribing the death sentence.⁴⁰ But introduced death penalty for three circumstances, where the injury inflicted in the course of the commission of the rape caused the woman to die, or be in a persistent vegetative state; and for repeat offenders, thereby creating a new class of "rarest of rare" cases.⁴¹ To appease the outcry, CLA 2013 also introduced imprisonment for the remainder of the accused's natural life, as a sentence. Such stringent and harsh sentences have failed to lower the graph of sexual violence, as the conviction rates remain dismal.⁴²

Compensation: Developing a more holistic notion of justice, law, policy and judgments now award compensation to the rape victim-survivor. Holding rape to be a failure of the State to protect the fundamental rights of the victim, the Supreme Court directed the State to provide substantial compensation (in the range of INR 5,00,000- 10,00,000) and assist in rehabilitation.⁴³ The CLA 2013 through the Cr.P.C., clarified that the rape victim was entitled to compensation for the injury suffered, from the scheme evolved



Photographer: Ramesh Lalwani

by the State independent of criminal trial proceedings.⁴⁴ Indian jurisprudence is however yet to articulate the rape survivor's right to reparation, and not just compensation.⁴⁵

Aggravated Rape: Feminist documentation and analysis of the marked targeting of women's bodies, during communal attacks; caste violence; and in zones of conflict with intensive militarization, have expanded the understanding of coercive circumstances, where power rape is perpetrated. The CLA 2013 enlarged the categories of aggravated rape beyond the precincts of the police station; jail; hospital; remand home; women's institution; to include areas under the operation of armed forces; rape by a person in a position of trust or authority; or control or dominance; or during communal or sectarian violence. In cases of aggravated rape, the burden of proof shifts to the accused and a rebuttable presumption of absence of consent is raised against

him.⁴⁶ This expansive categorization of situations of power rape reflects the brute reality of women's existence, with their vulnerability and discrimination heightened, by the intersectionality of gender, class, religion and ethnic locations. Pertinently, CLA 2013 did not classify caste as a specific category, even though impunity for sexual assault of *dalit* women is endemic.⁴⁷ Sec. 376(2)(g) IPC has for the first time been invoked in cases of gang-rape of Muslim women during the Muzaffarnagar communal attack of September 2013, when clashes between Muslims and Hindus left 62 dead and many injured and displaced.⁴⁸

Sexual assault of women in Kashmir, Manipur, Nagaland and other states of Northeast, where armed forces operate under the legal cover of the Armed Forces Special Powers Act (AFSPA), by men in uniform, have rarely ever been probed, prosecuted or punished, spawning a culture of impunity.⁴⁹ Sexual Violence here is an act of domination grounded in a complex web of gendered cultural preconceptions, deployed to torture, humiliate, or punish, a group, terrorizing not just the victim, but the entire community.⁵⁰ In Kashmir, complaints of a mass sexual assault by the army, of women of Kunan and Poshpora, in 1991, were dismissed as militant propaganda and have not been investigated till date.⁵¹ To obstruct investigation into the rape and killing of Thangjam Manorma in Manipur, the Assam Rifles, sought refuge under the clause of prior sanction clause for criminal prosecution of members of the armed forces, in Sec. 197Cr.P.C. and AFSPA 1958.⁵² The law also bestows on the armed forces the discretion to claim court martial to prosecute the officer accused of rape, thus trumping the woman victim's right to fair trial before the ordinary court.⁵³

As a first step towards disabling this absolute impunity, CLA 2013 has added an Explanation stating that no sanction shall be required for the court to prosecute a public servant accused of sexual offences.⁵⁴ However, with no corresponding dilution of the legal immunity clause under AFSPA, and the prioritisation of court martial, the deep roots of impunity remain firmly entrenched.⁵⁵

Conspicuous by its absence is a similar amendment to the Kashmir code to surmount the hurdle of legal immunity, occasioned by S. 197 Cr.P.C.⁵⁶ Even post the 2013 amendments, the prior sanction clause can still come to the aid of the armed forces, in Jammu and Kashmir, to escape prosecution in a case of sexual violence. The question that needs to be asked, can the rape of a woman by a man in uniform ever be committed while acting or purporting to act in the discharge of official duty, to protect the country?

Even without the legal immunity shield, in anti-Maoist counter insurgency operations, in Chhattisgarh, sexual violence of women by the security forces is routinely overlooked. The tribal teacher and activist Soni Sori's complaint of custodial

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sexual torture, confirmed by medical examination, evoked no institutional ire.⁵⁷ Rather the accused police officer received the President's Gallantry award.⁵⁸ Such omissions by the State in the name of national security embolden sexual violence against women of vulnerable groups.⁵⁹

CONCLUSION

The amended laws are yet to create deterrence and diminish sexual violence against women. The absence of enabling and sensitive structures and processes, discourage victims from accessing courts. The failure to allocate and utilize funds demonstrates the lack of political will. The backlash is already upon us as whispers of 'misuse' and 'false cases' gain momentum and call for the law to be whittled down. There is an urgent need for a comprehensive monitoring and

evaluation of the legal amendments, if law is to translate into justice and transform lives. In the political sphere, shrill slogans of women's safety and attempts by orthodox forces to shackle women's sexuality threaten to drown the aspirations of equality and freedom. The chants of *Azaadi* (the Urdu term for freedom), that reverberated across Raisina Hills, in December 2012, may reduce to a faint echo, unless each manifestation of impunity, irrespective of its location and visage, is challenged and defied.

Endnotes

- 1 The Committee was constituted by GOI Notification No. S0 (3003)E, dated December 23, 2012 to look into possible amendments to the Criminal Law to provide for quicker trial and enhanced punishment for criminals committing sexual assault of extreme nature against women.
- 2 The J. Verma Committee received emails from a cross section of people and heard representatives of the women's movement.
- 3 Verma Committee Report, *supra* note 1, at 14. Available at: http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf (last accessed on January 20, 2015)
- 4 Verma Committee Report, *supra* note 1, at 429.
- 5 Verma Committee Report, *supra* note 1, at 43.
- 6 Responding to the Criminal Law Amendment Bill, 2010 proposed by the UPA Government, the women's movement held two national consultations and submitted an alternative draft legislation for protection of women, children, and sexual minorities from sexual violence to the then Union Home Secretary, Mr. G.K.Pillai.
- 7 The Criminal Laws (Amendment) Ordinance was promulgated on February 3, 2013 and the Criminal Laws (Amendment) Act was enacted on April 2, 2013.
Lok Sabha, Statutory Resolution and Government Bill, Discussion on the Statutory Resolution regarding Disapproval of Criminal Law (Amendment) Ordinance, 2013 and Criminal Law (Amendment) Bill, 2013 (March 19, 2013), available at <http://164.100.47.132/LssNew/psearch/Result15.aspx?dbsl=9781>.
- 8 Ashish Mukherjee, *Women's Groups Reject Ordinance on Rape to Sign it* (February 2, 2013) available at <http://www.ndtv.com/article/india/women-s-groups-reject-ordinance-on-rape-laws-urge-president-not-to-sign-it-325628>.
- 9 *Tukaram and Anr v. State of Maharashtra* (AIR 1979 SC 18) The Supreme Court observed that, "Mathura is habituated to sexual intercourse, as is clear from the testimony of Dr. Shastrakar," and "The seminal stains on Mathura can be similarly accounted for. She was after all living with Ashok and very much in love with him." It was also stated that, "no marks of injury were found on the person of the girl after the incident and their absence goes a long way to indicate that the alleged intercourse was a peaceful affair, and that the story of a stiff resistance having been put up by the girl is all false."
In the face of nationwide protests by women's groups, in 1983, the government passed the Criminal Law Amendment Act.
- 10 Sexual Harassment at the Workplace (Prevention, Prohibition and Redressal) Act, 2013 available at: <http://wcd.nic.in/wcdact/womenactsex.pdf>
- 11 Lok Sabha, Statutory Resolution and Government Bill, Discussion on the Statutory Resolution regarding Disapproval of Criminal Law (Amendment) Ordinance, 2013 and Criminal Law (Amendment) Bill, 2013 (March 19, 2013), available at <http://164.100.47.132/LssNew/psearch/Result15.aspx?dbsl=9781>.
Lakshmi Chaudhry, "Politicians united against women: Hey, stalking is romantic!" March 19, 2013 available at: <http://www.firstpost.com/politics/politicians-united-against-women-hey-stalking-is-romantic-666625.html>
- 12 Kamal Kumar, "Acid Attacks: A scar on India", January 24th, 2014, available at: <http://www.aljazeera.com/indepth/features/2013/09/acid-attacks-a-scar-india-2013927165429393354.html>
- 13 Section 354 IPC: –
Assault or criminal force to woman with intent to outrage her modesty. –Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall be liable to fine.
- 14 Nisha Susan and Nishita Jha, "Sex, Lies and Homework", April 24th 2010, available at: http://archive.tehelka.com/story_main44.asp?filename=Ne240410coverstory.asp
Damayanti Dutta, "Age of confusion", March 22nd 2013, available at: <http://indiatoday.intoday.in/story/age-of-consent-sex-parliament-debate/1/259007.html>
- 15 Rukmini S., *The Many Shades of Rape Cases in Delhi*, *The Hindu* (July 30, 2014), available at <http://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece>;
Rukmini S., *Young Love often Reported as Rape in our 'Cruel Society'*, *The Hindu* (July 31, 2014), availa-

- ble at
<http://www.thehindu.com/news/national/stories-behind-sexual-assault-rulings-shine-light-on-reality-of-rape/article6265285.ece?ref=relatednews>
- 16 "Human Rights violations against sexual minorities in India", A PUCL-K fact-finding report about Bangalore, February 2001, available at: <http://www.pucl.org/Topics/Gender/2003/sexual-minorities.pdf>
- 17 S.377 IPC- Unnatural offences. —Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1 [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.— Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.
 In *Naz Foundation v Government of NCT, Delhi*, (2009) 111 DRJ (1) DB the Delhi High Court read down S.377 IPC to exclude sexual activity between consenting adults in private.
 On an appeal preferred by the respondents, the Supreme Court overturned the High Court verdict in *Suresh Kumar Koushal v. Naz Foundation* (2014)1SCC1 and currently the Supreme Court is hearing a curative petition filed by the Naz Foundations and other petitioners.
- 18 *Mobiles, Western Culture, Indecent Dressing Reasons for Rape: UP Police'*, October 30th 2014, <http://www.newindianexpress.com/nation/Mobiles-Western-Culture-Indecent-Dressing-Reasons-for-Rape-UP-Police/2014/10/30/article2500521.ece>
- 19 The Supreme Court has observed on several occasions, that bound as they are by the ties of brotherhood, it is not unknown for police personnel to remain silent or pervert the truth to save their colleagues. See *Prithipal Singh and Ors v State of Punjab* (2012) 1 SCC 10 at paragraph 75. *Munshi Singh Gautam v. State of M.P.* (2005) 9 SCC 631 at paragraph 6
- 20 *State v Sushil Kumar*, S.C No.34/2013, Special Fast Track Court, Dwarka dated October 7th 2013 and *State v Ashish* S.C.No. 109/2013, Special Fast Track Court, Dwarka dated December 20th 2013 both delivered by Justice Virender Bhatt. Subsequent to the first judgment the Delhi High Court in *Suo Motu Cognizance v. Suo Motu Cognizance* (W.P. (C) 8066/2013), pointed out the bias in the decision.
- 21 *State v Deepak*, S.C No. 57/2013, Special Fast Track Court- 2, Tis Hazari dated November 1st 2014.
- 22 *Om Prakash v. State Of U.P.*, AIR 2006 SC 2214
 The Supreme Court of India held that, "A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence."
- 23 *Mukesh v State of Chhattisgarh* (2014) 10 SCC 327
State of Punjab v. Gurmit Singh (1996) 2 SCC 384
- 24 *State of Tamil Nadu vs. Raju @ Nehru* (2006) 10 SCC 534
- 25 *State of UP v. Chhotey Lal* (2011) 2 SCC 550 at paragraph 25.
- 26 *Achey Lal v State Govt of Delhi* CRL.A No. 1534/2011, Delhi High Court dated 30.10.2014 "...However, besides the injuries on the vagina there is no other injury mark on the body of the deceased or on the appellant to show that there was any protest by the deceased. Hence we are of the opinion that it has not been proved beyond reasonable doubt that the appellant committed sexual intercourse with the deceased contrary to her wishes or her consent." (Para 9)
- 27 *State of UP V. Pappu @ Yunus and anr* (2005) 3 SCC 594 at paragraphs 11, 12.
- 28 *Lillu @Rajesh v State of Haryana* (2013) 14 SCC 643 at paragraphs 2,5
- 29 Ministry of Health and Family Welfare "Guidelines and Protocols: Medico-legal care for survivors/victims of sexual violence", March 19th 2014, available at: <http://www.mohfw.nic.in/showfile.php?lid=2737>
- 30 *Ibid.*
- 31 See <http://ncrb.nic.in>
 Reported rapes increased from 16,075 in 2001 to 33,707 in 2013. A more than 50% increase (NCRB, 2014). Conviction rates have declined from 44% in 1973 to 27% in 2013. Cases pending investigation in the beginning of 2013: 47, 457. Charge sheet submitted: 28, 755 (60%). Investigations still pending: 14,940 (31 %). Trials were completed in -18,833 cases (39%).
- 32 Rukmini S., *The Many Shades of Rape Cases in Delhi*, *The Hindu* (July 30, 2014), available at <http://www>.

- thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece;
- 33 In the 'Shakti Mills' case, the victim fainted in Court when pornographic clips were shown to her as part of the evidence gathered. Flavia Agnes, "Shakti Mills gang rape victims seek change in Juvenile Justice Act" December 26th 2013, available at: <http://archive.indianexpress.com/news/shakti-mills-gangrape-victims-seek-change-in-juvenile-justice-act/1211767/0>
- 34 Krishnadas Rajagopal, "Criminal justice process itself a punishment, says CJI". August 16th 2014, available at: <http://www.thehindu.com/news/national/should-complete-criminal-trials-in-three-years-says-cji/article6321467.ece>
- 35 In the seven cases of gang-rape during communal violence in Muzaffarnagar, Uttar Pradesh in September 2013, the FIR's were filed by October 2013 however the charge sheets which according to law are to be filed within 3 months were only filed by May 2014. The trials have yet to commence despite legislation mandating that trials in cases of sexual offences are to be completed within a period of 2 months from the filing of a charge sheet.
- 36 Law Commission of India, "Report on Witness Identity Protection and Witness Protection Programmes," 198th Report, 2006 at Chapter VIII, Section (A) at Page 110, available at: <http://lawcommissionofindia.nic.in/reports/rep198.pdf>
Zahira Sheikh v State of Gujarat (2006) 3 SCALE 104 at Para 41.
- 37 In *Mohd Haroon v UoI (2014) 5 SCC 252* the Supreme Court directed the State Government to provide security to the 7 Petitioners who were victims of gang rape during communal violence until the completion of the trials, however despite the security provided by the State, the Petitioners continue to live in a state of fear, anxiety and insecurity. The delay in filing of charge sheets and ensuring that trials against the named accused persons commence at the earliest, has encouraged intimidation and coercion to continue on behalf of the accused persons. Further, due to the granting of bail to some of the arrested accused, the Petitioners and their witnesses continue to face a grave and real threat to their personal safety and the safety of their family members.
- 38 After considering castration as a punishment to persons convicted of sexual offences, the Justice Verma Committee declined to recommend the same observing that "castration fails to treat the social foundations of rape which is about power and sexually deviant behaviour." at para 42, page 253.
Report of the Committee on Amendments to Criminal Laws (January 23, 2013), comprising of Justice J.S. Verma (Retd.), Justice Leila Seth (Retd.) and Mr. Gopal Subramaniam, Available at: http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf (last accessed on January 20, 2015)
- 39 "Statement by women's and progressive groups and individuals condemning sexual violence and opposing death penalty" December 24th 2012, available at: <http://kafila.org/2012/12/24/statement-by-womens-and-progressive-groups-and-individuals-condemning-sexual-violence-and-opposing-death-penalty/>
- 40 Verma Committee Report, Ibid 1, at Para 23, at pg. 245
"In our considered view, taking into account the views expressed on the subject by an overwhelming majority of scholars, leaders of women's organisations, and other stakeholders, there is a strong submission that the seeking of death penalty would be a regressive step in the field of sentencing and reformation. We, having bestowed considerable thought on the subject, and having provided for enhanced sentences (short of death) in respect of the above-noted aggravated forms of sexual assault, in the larger interests of society, and having regard to the current thinking in favour of abolition of the death penalty, and also to avoid the argument of any sentencing arbitrariness, we are not inclined to recommend the death penalty."
- 41 Criteria for determining whether a case is rarest of rare can be found in *Bachhan Singh v State of Punjab (1980) 2 SCC 684* at Para's 38-40.
- 42 Conviction rate in cases of rape (S.376 IPC) in 2012- 24 % and 2013-27 %
See Table 4.12 <http://ncrb.nic.in/CD-CII2012/Statistics2012.pdf> and Table 4.12, <http://ncrb.gov.in/>
- 43 While acknowledging that no amount of compensation can provide respite to a victim-survivors of sexual violence, the Supreme Court has in several cases directed State governments to pay compensation to survivors of sexual violence in lieu of the government's failure to protect and prevent the violation of the fundamental rights of such victim-survivors:
In Re: Indian Woman says gang-raped on orders of Village Court published in Business & Financial News dated 23.01.2014 (Suo Motu Writ Petition (Crl) No. 24/2014) directed State to enhance compensation

from Rs.50,000 to Rs. 5 lakhs to be paid to a woman who was gang raped on the orders of her community as punishment for being in a relationship with a man from a different community.

In *Mohd. Haroon v UoI* (2014) 5 SCC 252 directed the State to pay compensation of Rs. 5 lakh and provide other rehabilitation to each of the 7 women Petitioners who were survivors of gang rape during communal violence.

Satya Pal Anand vs. State of M.P. (2014) 4 SCC 800 enhanced interim relief from Rs.2 lacs to Rs.10 lacs each to the two Dalit girls who were gang-raped by men from the dominant caste.

- 44 25 out of 29 State governments have notified victims-compensation schemes wherein the discretion to determine the amount of compensation has been given to the District Legal Service Authority, in accordance with the 2005 amendment to the Criminal Procedure Code, however the Supreme Court has observed that the same is yet to be implemented effectively. The Maharashtra State government in 2013, launched the Manodharia Scheme aimed at providing financial, medical and legal aid, rehabilitation and counseling to survivors of rape and child abuse. See more at: <http://www.firstpost.com/mumbai/maharashtra-launches-manodhairya-scheme-for-victims-of-rape-abuse-1102131.html>
- 45 CEDAW Committee, "Concluding observations of the Committee on the Elimination of Discrimination against Women" CEDAW/C/IND/CO/SP.1, October 22nd 2010 at Para F.35 (a) and (e), 'Recommendations' available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2FCO%2FIND%2FCO%2FSP.1&Lang=en
- 46 Sec 114A, Indian Evidence Act, 1872. *Supra* note 9.
- 47 Priyanka Dubey, "A Portrait of the Indian as a Young Dalit Girl" September 10 2014, available at: <https://in.news.yahoo.com/a-portrait-of-the-indian-as-a-young-dalit-girl-034726310.html>
See also, National Campaign on Dalit Human Right, <http://www.ncdhr.org.in/>
- 48 Initially the 7 FIRs of gang rape were registered under S. 376 D IPC (Gang rape). It was only after the Victims filed a Contempt Petition in the Supreme Court (Contempt Petition Civil No.479/2014) alleging malafide in investigation that this provision was added by the police.
See also: Neha Dixit, "Shadow Lines", August 4th 2014 available at: <http://www.outlookindia.com/article/Shadow-Lines/291494>
- 49 S.6, Armed Forces (Special Powers) Act 1958, and S.7, Armed Forces (Jammu & Kashmir) Special Powers Act, 1990
- 50 CEDAW Committee, "General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations" CEDAW/C/GC/30, October 18 2013, available at: <http://www.ohchr.org/Documents/HRBodies/CEDAW/GComments/CEDAW.C.CG.30.pdf>
CEDAW Shadow Report, "Women in Conflict Prevention, Conflict and Post Conflict Situation" 2014
- 51 February 1991, Kunan Poshpora, Kashmir: Women of the neighbouring villages of Kunan and Poshpara, in Kashmir, claim that, during a search and cordon operation, personnel of the 4 Rajputana Rifle of the Indian Army sexually assaulted and raped many women, with numbers of victims ranging between 23-50 women. In January 2015 the Jammu and Kashmir High Court stayed the order of the judicial magistrate directing re-investigation into the case.
See: "Konan Poshpora mass rape: 22 years on, state still out to scuttle probe" Indian Express, 24th February, 2014. Available at- <http://archive.indianexpress.com/news/konan-poshpora-mass-rape-22-years-on-state-still-out-to-scuttle-probe/1140570/0>. Accessed 9th April 2014.
- 52 Manipur, 2004: A judicial inquiry into the death of Manorama has found that she was mercilessly tortured before being shot dead by a team of the 17 Assam Rifles regiment of the Indian Army.
W.P.(C) No.5187 of 2004 was filed before the Guwahati High Court by Col. Jagmohan Singh, Commandant of 17th Assam Rifles challenging the competence of the State of Manipur to appoint a Commission of Inquiry, in view of the prior sanction Sec.6 AFSPA, 1958. Judgment of the Guwahati High Court-Col. Jagmohan Singh and Another v. State of Manipur and Others 2010 (4) GLT 1014
The case is currently being heard by the Supreme Court-'Manorama murder case reaches Supreme Court,' The Times of India, 11th July 2011, available at <http://timesofindia.indiatimes.com/city/guwahati/Manorama-murder-case-reaches-Supreme-Court/articleshow/9190153.cms> (last accessed 13th May 2014).
The Report of the Judicial Inquiry-Krishnadas Rajagopal, "Manorama 'mercilessly tortured'" No-

vember 14 2014, available at: <http://www.thehindu.com/news/national/manorama-death-brutal-torture-probe-panel/article6596278.ece>

53 S.1, S.3(2) and S.70, Army Act, 1950

54 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, however the 2013 Amendment has inserted the following: *“Explanation— For the removal of doubts it is hereby declared that no sanction shall be required in case of public servant accused of any offence alleged to have been committed under sections 166A, 166B, 354, 354A, 354B, 354C, 354D, 370, 375, 376, 376A, 376C, 376D, or section 509 of the IPC.”*

55 Verma Committee Report, Ibid at paragraph 11, page 171: *“At the outset, we notice that impunity for systematic or isolated sexual violence in the process of Internal Security duties is being legitimized by the Armed Forces Special Powers Act, which is in force in large parts of our country. It must be recognized that women in conflict areas are entitled to all the security and dignity that is afforded to citizens in any other part of our country. India has signed the International Convention for the Protection of All Persons from Enforced Disappearance, which has to be honoured. We therefore believe that strong measures to ensure such security and dignity will go a long way not only to provide women in conflict areas their rightful entitlements, but also to restore confidence in the administration in such areas leading to mainstreaming.”* ‘Recommendation’: at para 12, page 151:

“12(g) There is an imminent need to review the continuance of AFSPA and AFSPA-like legal protocols in internal conflict areas as soon as possible. This is necessary for determining the propriety of resorting to this legislation in the area(s) concerned; 12 (h) Jurisdictional issues must be resolved immediately and simple procedural protocols put in place to avoid situations where police refuse or refrain from registering cases against paramilitary personnel.”

56 The Jammu and Kashmir Criminal Laws (Amendment) Act, 2013 (Act No. XI of 2014), 22nd March 2014.

57 Tusha Mittal, *“Shockingly, Soni Sori Has Been Sexually Tortured With Stones. Who Will Answer For This?”* December 24th 2011, available at: <http://www.tehelka.com/shockingly-soni-sori-has-been-sexually-tortured-with-stones-who-will-answer-for-this/>

58 Sonal Mehrotra, *“Outrage over gallantry award for Chhattisgarh police officer”* January 30th 2012, available at: <http://www.ndtv.com/india-news/outrage-over-gallantry-award-for-chhattisgarh-police-officer-571276>

59 CEDAW Committee, *“Concluding observations on the combined fourth and fifth periodic reports of India*”* CEDAW/C/IND/CO/4-5, July 18th 2014 at paragraph 12, 13(b) available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CEDAW%2F-C%2FIND%2FCO%2F4-5&Lang=en