

**RECOMMENDATIONS FOR AMENDMENTS TO THE  
IPC AND ALLIED LAWS BY LAWYERS COLLECTIVE**

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**RECOMMENDATIONS FOR PUBLIC HEALTH  
FACILITIES IN CASE OF SEXUAL ASSAULT BY  
CEHAT**

## INTRODUCTION

This horrific incident of rape of a woman in Delhi has had a chilling effect on the entire country. It reflects the underlying deep-rooted discrimination against women. It is symptomatic of the fundamental malaise that exists in our society about how we treat women in families and communities and how we think of them as unequal to men. We must channelize this mobilization to begin introspecting and then transforming the social norms and State institutions and structures, which sanction disrespect and discrimination against women. These reforms must begin from our homes and then embrace all other community and State structures. We sincerely believe that we as women cannot and should not be cowed down and retreat from public spaces but come forward in large numbers to reclaim our roles as equal members of the society.

The Constitution of India adopted in 1950, gives us the right to equality and also provides for substantive equality under Articles 14 and 15. Through Article 21, it promises us a right to live with dignity and a right to privacy. However, when the Indian Penal Code was drafted, our Constitution had not come into existence. Lord Macaulay while drafting the Indian Penal Code in 1860 was not focused on the rights of the individual. He was focused on crimes against state and crimes against property, where women were considered property. While there was a chapter on crimes against human body, little to no emphasis was given to crimes against women. Unfortunately, till date, there have been no wide-scale changes made to these laws to reflect the changing social, cultural and political values of the country. The few changes that have been brought about have been done in a piecemeal manner where the first change since 1860 was brought in, in 1983, which recognized cruelty faced by women in marriage.

We recommend that a separate comprehensive statute on crimes against women be introduced which recognizes and penalizes all crimes that are committed against women. Currently, crimes against women are dealt with in separate statutes where a few provisions have been inserted in different laws to deal with the same. For instance, the Indian Penal Code, 1860 recognizes dowry death and cruelty and 'outraging of modesty' of women in its statute in different chapters. Further, we have a Pre-Conception and Pre Natal Diagnostic Techniques Act, 1994 that criminalizes sex selective abortion. Furthermore, there is another act called Commission of Sati (Prevention) Act, 1987, which criminalizes the practice of sati. Thus, the crimes against women

are scattered amongst many statutes. We recommend that a comprehensive statute that consolidates all the crimes against women is drafted.

Furthermore, we have laws for civil and criminal wrongs but we don't have a law on tort unlike the USA. We suggest that there is need for a civil law of tort, which encompasses wrongs committed against women such as harassment, sexual harassment, and defamation among others.

Lastly, for any concrete steps to be taken, we will need to vastly modify our conceptualization of women where instead of seeing them as passive, submissive, asexual beings in need of protection, we see them as independent, autonomous, sexually active beings who require additional measures to protect their interests precisely because of the treatment meted out to them by society for centuries.

Some measures that can be taken with immediate effect are ensuring meaningful involvement of women while drafting laws on gender crimes. Further, we need to recognize the role of media in aiding our efforts of introducing and sustaining commitment to a gender equal society. There is need to delink violence from sexuality and promote respect for women in mainstream media. Furthermore, we need to have large-scale awareness campaigns on gender equality where we teach our society to treat women with dignity and as equal fellow citizens. Thus, gender sensitization campaigns have to be initiated immediately in schools and colleges as well as in all State institutions, particularly in the police and judicial systems.

## **METHODOLOGY**

While drafting this report, we have divided sexual offences against women into two broad categories. The first category is the newly defined sexual assault in the pending Criminal Law (Amendment) Bill, 2012 which encompasses penetrative sexual assault and the second category is the broadly defined sexual harassment which collapses the contrived distinction between sections 354 and 509 and encapsulates it within a newly created section called sexual harassment. Further, we believe that there is a requirement to incorporate a substantive provision on the crime of disrobing and parading naked akin to the substantive provisions on acid attack.

Thus, the first section of this report studies amended section 375 on penetrative sexual assault as per criminal law amendment bill, 2012 and elaborates the changes that it deems necessary. It suggests among other changes deletion of gender neutrality of perpetrator, retaining the age of consent at sixteen, deletion of the concept of 'against her will' as well as deletion of marital rape exemption with the rationale given for each recommended amendment. Further, it brings in concepts of sexual assault within the context of communal violence. Secondly, it looks at the need for a definition and conceptualization of the concept of consent where consent should be understood as voluntary agreement to each act of the sequence of actions under the relevant section. Furthermore, it recommends deletion of section 377, as argued by Lawyers Collective in the case of *Naz Foundation v. Govt of NCT of Delhi* [160 Delhi Law Times 277], which says that we need to recognize the necessity to allow space and freedom for different modes of sexuality, and also that with the passing of the law of Protection of Children From Sexual Offences Act, 2012 the concerns of sexual assault against children have been resolved.

The second section lays down the second broad category of sexual offences committed against women under the heading of sexual harassment. It brings within its scope crimes of stalking, digital harassment, as well as other offences such as unwelcome sexual contact of groping, leering, lewd remarks among others. It grades the offences and punishments where it suggests imposition of fines for offences that occur more often. It also suggests authorizing personnel working in public places such as hotel managers, bus conductors, guards, traffic police among other personnel to be identified who will be authorized by the government to impose fines in case of commission of offence. These fines have been introduced for a variety of reasons. Firstly, it allows the responsibility of preventing crimes against women to be shared with the civil society thus introducing gender sensitivity in the mainstream through practice, secondly it brings in proportionality between offence and punishment, thirdly it brings in the concept of vicarious liability albeit indirectly as the law suggests that the employer impose a fine on the employee who commits the offence but does not require the employer to pay the fine. Here, we would like to assert that vicarious liability and command responsibility needs to be introduced in the case of sexual offences against women. Lastly and most importantly imposition of fines which can be collected by authorizes personnel commonly found in public spaces makes the law more accessible to women who may not want to go to court for a routinely occurring offence of sexual harassment.

Further, we discuss the law on self-defense, which is present in IPC and recommend an addition to it in terms of women being allowed to defend themselves when faced with sexual harassment. The intention behind this recommendation is to explicitly state that women who exercise their right to self-defence in cases of sexual harassment will be protected by law.

The third section of the report makes recommendations on bringing in a monitoring and evaluation scheme at three levels- districts, states and the centre. It recommends monitoring and evaluation of each section of the workforce, which sexual crime survivors come in contact with, beginning with the police including the lawyers, the medical staff, the social workers and the judiciary. It also puts forth our proposal on having a special rapporteur on violence against women at a national level.

The fourth section makes recommendations regarding rehabilitative measures such as the need for a compensation scheme which gives the survivors compensation when the complaint is lodged as well as the need for medical and legal aid among other measures.

The fifth section looks at investigation techniques, specifically forensic evidence collection and emphasizes the need to delete two finger testing as well as any evidence collection which focuses on the character of the survivor. It also talks about the need to delink medical treatment from forensic evidence collection.

The last section makes recommendations regarding amendments to other acts such as Army Act, Armed Forces Special Powers Act, which allow sexual assault to be punished with court martial in certain cases. It recommends changes so as to bring sexual offences against women committed by the army within the ambit of the court's jurisdiction, as currently it is required to be tried by the army courts. This has led to horrific incidents on injustice in the past where crimes like Manorama have occurred and the punishment for the same has been reduced due to extraneous circumstances such as the perpetrators belonging to the army.

**NOTE:** Due to the recent debates on death penalty, we would like to place on record our opposition to the demand for death penalty on the grounds that it is cruel and inhuman. Further, we would like to place on record our objection to amending the Juvenile Justice (Care and

Protection of Children) Act, 2000 as the philosophy behind the act was that it gives people below the age of eighteen a real chance to reform and this is a philosophy we agree with.

# Section 1: Proposed Amendments to Sexual Assault and Related Laws

This section discusses the amendments to the sections 375, 376, 377 and section 90. It discusses the amendments to the crime of sexual assault and the punishment for sexual assault. It lays down the section of the Indian Penal Code, 1860 as it exists and also lists the proposed section under the Criminal Law (Amendment) Bill, 2012. It further elaborates the changes that is recommended discussing the rationale for the proposed changes. It further discusses the need for deletion of section 377, which currently has been retained in the IPC and discusses the need for a definition of consent as well as the elements of the conceptualized consent.

## **A) AMENDMENTS TO SECTION 375 AND DELETION OF SECTION 376A, IPC**

### **Current Section 375. Rape :**

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

Firstly.- Against her will.

Secondly.- Without her consent.

Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

### **Proposed Section 375: Sexual Assault:-**

A person is said to commit “sexual assault” if that person—

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

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

(ii) any object manipulated by such person,

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

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

(c) engages in “cunnilingus” or “fellatio”,

under the circumstances falling under any of the following six descriptions:—

Firstly.—Against the other person’s will.

Secondly.— Without the other person’s consent.

Thirdly.— With the other person’s consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or of hurt.

Fourthly.—When the person assaulted is a female, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes to be lawfully married.

Fifthly.—With the consent of the other person when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by that person personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that action to which such other person gives consent.

Sixthly.—With or without the other person’s consent, when such other person is under eighteen years of age.

Explanation I.—Penetration to any extent is “penetration” for the purposes of this section.

Explanation II.—For the purposes of this section, “vagina” shall also include labia majora.

Exception.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.

### **Recommendations**

- I. The perpetrator needs to be made gendered, specifying it to be a man, while the victim can remain gender neutral.**

We need to retain gender specificity in the sexual assault law as making it gender neutral law denies the reality that in an overwhelming majority of sexual assault cases, men are the aggressors and there is a negligible number of cases where women have been the perpetrators. Further, every criminal law is supposed to serve the dual purpose of defining crimes and acting as a deterrent to the public from committing crimes, and hence is supposed to set the normative standard for the society. By making the sexual assault law gender neutral, it negates the reality that rape is a crime of power committed within the paradigm of social and physical inequality between the male and the female. Further, the element of stigma that attaches itself to the victim serves to re-victimize her. Also, it erodes the deterrence value of criminalizing rape as it will inevitably be used against women in rape trials, where men will state that women were aggressors in rape trials.

Thus, the recommendation is that the perpetrator of the crime needs to be gendered, i.e. a man while the survivor of the crime can be gender neutral. This amendment along with the deletion of Section 377 will ensure that concerns about non-consensual sexual intercourse with homosexuals and transgender people are taken care of by the sexual assault law.

Thus, the section should read

**S. 375** “ A man is said to commit “sexual assault” if he...”

## **II. The age of consent needs to be sixteen years, not eighteen years**

As per the current section 375 of IPC, the age of consent is 16 while as per the 2012 Criminal Law Bill, the age of consent is 18 years. We recommend that the age of consent be retained at 16 as increasing it to 18 serves no purpose. It is an accepted fact that by the age of sixteen, women are sexually mature, biologically and psychologically, and that their sexual instincts are very much alive. Increasing the age of consent to 18 years will only make women between 16 and 18 who exercise their right to sexual autonomy extremely vulnerable.

As can be seen from the statistics released by National Crime Records Bureau, there has been a 256.25 percent increase in the kidnapping of women between the ages of 15-18 for the purpose of marriage and in 2010, 46.9% of the abducted girls, were kidnapped for the purpose of

marriage. It's a well-known fact that a large majority of these complaints have been filed by parents of girls who were in relationships which the parents disapproved of. More than 1000 adolescents die every year due to honour killings linked to marriage. Thus, as can be seen from the above figures, in case of a consensual relationship, which goes against the honour of parents, they will use the age of consent as a tool to file complaints of sexual assault and kidnapping and pray for writs of habeas corpus. This has been reiterated by a trial court judge who says that increasing the age of consent is undemocratic and regressive and will only serve to give license to the police to harass teenagers.<sup>1</sup>

Further, the Director of Haq, says that a lot of young people get married not because they are emotionally ready for the commitment but because it allows them to have legitimate sex.<sup>2</sup> The laws should not aid moral policing and harassment of teenagers.

Thus, we recommend that the age of consent be retained at 16.

### **III. Section 375, Firstly – *Against the other person's will* needs to be deleted.**

The essence of the offence of rape is lack of consent to sexual intercourse. Once that is proved, there is no need to prove anything else such as “against her will”. Courts have typically looked at marks of injury to prove resistance, which in turn is taken to indicate that the sexual intercourse was “against her will”. This imposes a burden on the woman to prove that she resisted physically and if she cannot show that there was physical injury, the converse is assumed that there was no rape or that there was consent to sexual intercourse.

This is reflected in the Orissa High Court 2004 judgment of *Sukru Gouda v. State of Orissa*<sup>3</sup> where Justice A.S. Naidu held that, “Law is well settled that it is not possible for a single man to commit sexual intercourse with a healthy adult female in full possession of her senses against her will. If there would have been any resistance by P.W. 1, at least some scratches or bruises would

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1 Smriti Singh “Raising Age of Consent to 18 regressive, undemocratic: Court” , Times of India , June 1, 2012. at [http://articles.timesofindia.indiatimes.com/2012-06-01/india/31958627\\_1\\_sessions-judge-age-bar-age-limit](http://articles.timesofindia.indiatimes.com/2012-06-01/india/31958627_1_sessions-judge-age-bar-age-limit)

2 Bharti Ali “Age of Consent Catastrophe” The Tribune, Monday, 21 May, 2012 . Also found at <http://www.haqrc.org/blogs/age-consent-catastrophe-tribune-monday-may-21-2012>

<sup>3</sup> 2004 CriLJ 1566 at para 11.

have been found either on her body or on the body of the appellant...” This was good law for four years in Orissa till Justice Pasayat overturned the judgment in 2008 in the Supreme Court stating that “the High Court itself noticed that there were two contradictory grounds. One was that no such incidence had taken place and this was a case of false implication; other was that the act was with consent. Such irreconcilable stand should not have found favour with the High Court”<sup>4</sup> Thus, it is evident that where no physical injuries are present the courts are unwilling to acknowledge it as a case of rape and assume consent on the part of the woman.

Also, consent is inevitably seen as an integral part of “against the will”. Thus, a case under section 375 firstly is held to a higher standard of proof in practice. It has to be proven that a) the case was without her consent as defined in section 90, b) the accused was aware that the act was without her consent as defined in section 90, and c) the act was against her will as evidenced by physical injuries. This has been seen in the Supreme Court case of *Chhoteyal* in 2011<sup>5</sup>. This is problematic since it focuses on the victim and puts her on trial instead of the accused. Only when there is overwhelming evidence of lethal weapons being used, and threats being issued have the courts been willing to accept “against her will”. Typically, the evidence that is admitted in this case is medical evidence of a ruptured hymen or injuries on the private parts of the victim. In the absence of this, proving against her will becomes impossible.

Hence we recommend that “against her will” be deleted as absence or presence of injury has no relevance to whether or not a woman consents to sexual intercourse. This will also make the provision consistent with section 114A of Indian Evidence Act.

#### **IV) Marital Rape Exemption needs to be deleted**

Legitimate non-consensual intercourse hits at the heart of equality between men and women. Once it is accepted that sexual intercourse between two adults must only be with consent, there is no reason why sexual intercourse by a husband with his wife without consent shouldn't be an offence. Sexual intercourse without consent has the same devastating impact on a woman whether she is married to the man or not. Indeed, within the marital context there is supposed to

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<sup>4</sup> *State of Orissa v. Sukru Gouda* 2008(16)SCALE189

<sup>5</sup> *State of Uttar Pradesh v. Chhoteyal* (2011) 2 SCC 550

be a relationship of trust and expectation of respect for autonomy of decision is supposed to be higher.

The marital rape exemption is based in the age-old pronouncement by Hale in 1676, published in 1736 that “*the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract*”<sup>6</sup> This led to the marital rape exemption in USA and UK from which India has derived its laws. However, by 1991, in UK the case of *R v. R*<sup>7</sup> recognized that lack of recognition of marital rape had no legal basis since sexual intercourse was no longer confined to marriage and therefore the basis of marital rape exemption, which had been the word unlawful, had been eroded. Thus, the result of this judgment was that consent assumed the focal point of the investigation, irrespective of the relationship between the plaintiff and the defendant. The Law Commission of United Kingdom in 1992 agreed with this position and declared that while adults have the right to enter into a marital contract, it is the laws of the state that determine the rules and obligations of this contract which can be redefined in keeping with the changing moral and social codes of conduct. It finally stated that the notion of irrevocable sexual access on the part of the wife had been changing gradually and was completely eliminated.<sup>8</sup> Lord Lane stated that the marital exemption rule laid down by Hale did not serve any purpose in the modern society. He said “*There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behavior*”.<sup>9</sup> He finally stated that the pronouncement by Hale was not law; that it was a common law fiction that had become repulsive and redundant in modern society.<sup>10</sup>

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6 Quoted in *History of the Pleas of the Crown* (1736) vol. 1, ch. 58, at p. 629. Sourced from *S.W. v. THE UNITED KINGDOM* [1995] ECHR 52.

7 [1992] 1 A.C. 599

8 The Law Commission, UK, “Criminal Law: Rape within Marriage” dated 13 January, 1992 at 18.

<sup>9</sup>*Supra* note 7.

<sup>10</sup>*Supra* note 7.

The defendant appealed against this judgment to the Court of Appeal, Criminal Division where his appeal was dismissed and it was expressly stated that “*We take the view that the time has now arrived when the law should declare a rapist a rapist subject to the criminal law, irrespective of his relationship with his victim...The position then is that that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the whole proposition should not be held inapplicable in modern times. The only question is whether section 1 (1) of the 1976 Act presents an insuperable obstacle to that sensible course... The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the subsection adds nothing... and it should be treated as being mere surplusage in this enactment ...I am therefore of the opinion that section 1 (1) of the 1976 Act presents no obstacle to this House declaring that in modern times the supposed marital exception in rape forms no part of the law of England.*”<sup>11</sup>

Thus, we see that the marital rape exemption was done away with unequivocally in the United Kingdom and in Scotland. However, the laws in India remain unchanged, even though the premise it was based on, which were the laws of UK has disappeared. The rationale for the marital rape exemption in India is that wives are treated as the property of the husband or are seen as being subsumed within the legal personality of the husband. This is a legal fiction that has long since been done away with.

International legal instruments such as Declaration of Elimination of Violence Against Women and the Outcome Plan have endorsed criminalization of marital rape. Convention on Elimination of Discrimination Against Women says that men and women are to be treated as equal in marriages in Article 16(1)(c) which means that each should have the right to consent to sexual activity within marriages. India is a party to these instruments, however it still retains the marital rape exemption.<sup>12</sup> This is equivalent to legitimizing certain forms of rape and discriminating

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<sup>11</sup> *Supra* note 7.

<sup>12</sup> Article 16(1)(c) CEDAW 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (c) the same rights and responsibilities during marriage and at its dissolution...

against women based on their marital status. There is no legal or social rationale for allowing the marital rape exemption to continue.

Thus, Lawyers Collective recommends that the marital rape exemption be deleted and spousal rape be treated at par with non-spousal rape. Consequently section 376A, which talks about punishment in case of a separated couple, needs to be deleted.

## **B) AMENDMENT TO SECTION 376**

### **Current Section 376: Punishment for rape**

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,-

(a) being a police officer commits rape-

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

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

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

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

### **Proposed Section 376 : Punishment for Rape**

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

(2 ) Whoever,—

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

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

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

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

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

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

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

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

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

(g ) commits sexual assault on a person when such person is under eighteen years of age; or

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

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

(j ) commits sexual assault on a person suffering from mental or physical disability; or

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

(l ) commits persistent sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine.

### **Recommendations**

#### **I. Replace “position of economic or social or political dominance” with “undue influence”**

The phrase ‘*being in a position of economic or social or political dominance*’ in Section 376 (2)

(i) of the proposed Bill is too broad in its ambit as well as vague and is liable to be misused.

There is no current legal definition of economic dominance or social dominance or political

dominance. Since the penal law has to be clear and precise in its prohibitions, one has to strictly define the element of socio-economic domination in the context of aggravated sexual assault. Further, dominance should not be restricted only to social, economic or political but could be broader also.

We recommends that the words '*undue influence*', which have a specific meaning in law, should replace the words '*being in a position of economic or social or political dominance*'. The words '*undue influence*' are wide enough to cover any form of dominance and are capable of legal interpretation too. The amended Section 376 (2) (i) would now read as:

i) *being in a position of undue influence, commits sexual assault on a person under such influence*

## **II. Add sexual assault being committed in the context of communal violence within Section 376(2)**

As reflected by the Gujarat riots of 2002, women have often been used as targets in the context of communal violence where sexual violence is used as a strategy for terrorizing women based on their communal affiliation. The women's panel which visited Gujarat had reflected that women had been subjected to "unimaginable inhuman and barbaric" sexual violence during the riots including gang-rape.<sup>13</sup>

To protect women from such atrocities there is need to bring in a provision which says that in case of sexual assault perpetrated against a woman based on her membership of any community, the punishment will be in line with the punishment accorded for aggravated sexual assault under section 376(2).

The addition to Section 376(2) should read as follows:

(m) commits sexual assault on a person belonging to a group by virtue of a person's membership of that group where "group" means a religious or linguistic group, in any State in the Union of

<sup>13</sup> Jyotsna Singh, "Gujarat Muslim Women 'Rape Victims' ". Sourced From [http://news.bbc.co.uk/2/hi/south\\_asia/1933521.stm](http://news.bbc.co.uk/2/hi/south_asia/1933521.stm)

India, or Scheduled Castes and Scheduled Tribes within the meaning of clauses (24) and (25) of Article 366 of the Constitution of India.

## **C) AMENDMENT TO SECTION 90: CONSENT**

**Current Section 90: Consent known to be given under fear or misconception:** A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person- if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child- unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

### **Recommendations**

#### **I) Consent needs to be defined**

The reason for the negative definition of consent was that corroboration through proof of injury was needed to prove lack of consent. The underlying reason for the need for corroboration was the lack of willingness to believe the woman complainant.

The issue with the present definition of consent is that it focuses the trial on the survivor as she has to prove that she didn't consent instead of the accused proving that he believed that she consented and giving evidence to that effect. Further, when consent is not defined, it will be misused in case of sexual offences where the defendant can say that the complainant had consented and has withdrawn consent only after the episode.

The routine practice is to bring in evidence stating the unreliability of the woman's testimony mapped by 'lack of physical injury', 'conduct of the woman' and 'her character'.

The Scottish Law Commission in 2006 put forth three purposes for sexual offence laws, that of protection of a person's sexual autonomy; protection of persons at risk of being sexually abused; and promotion of a social or moral goal.<sup>14</sup> These purposes should be the guiding principle for

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<sup>14</sup> Scottish Law Commission, "Discussion Paper on Rape and Other Sexual Offences" January, 2006 at 15.

redrafting the sexual consent and rape laws in India.

The laws of United Kingdom treat consent as a part of the *actus reus*, where absence of consent is seen as central for the act to be committed.<sup>15</sup> Further, it is also a part of the defense. This has the advantage of shifting the focus to the accused where the accused has to provide evidence to show that there was consent. The principle of this model is respect for the sexual autonomy of both partners where both partners make the effort to ensure that there was consent. Thus, here the focus is on the actions of the accused to see what he did to ensure that he participated in a fully consensual act. Further, consent is supposed to have three elements – physical, mental and the ability to use both freely. Therefore, if the consent has been obtained on the basis of force, threat of force, pressure or any kind of force that prevents free conscious consent from being actualized, it won't be considered consent. This has been restated in the case of *Chhoteyal*<sup>16</sup> in the Supreme Court in 2011. Prior to this too, it was stated in the cases of *Mango Ram* that consent requires “requires voluntary participation by the victim not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having fully exercised the choice between resistance and assent. Whether consent existed or not has to be ascertained on the basis of the facts of a given case”.

We propose the following definition of consent:-

- (a) The unequivocal voluntary agreement where the person has by words, gestures, or any form of non-verbal communication, communicated willingness to participate in the act referred to in this section;
- (b) “Unequivocal voluntary agreement” means willingness given for specific and be limited to the express act consented to under this section.

*Explanation 1* – For the purposes of this section, consent obtained by duress, threat, terror, fear, coercion, undue influence, misrepresentation or mistake of fact shall not be unequivocal voluntary agreement.

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<sup>15</sup> Sections 74-76, Sexual Offences Act, 2003

<sup>16</sup> *State of U.P. v. Chhoteyal* (2011) 2 SCC 550.

*Explanation 2-* For the purpose of this section, existence of a current or previous dating or marital relationship will not imply consent to any act under Section 375.

## **D) DELETION OF SECTION 377**

**Current Section 377: Unnatural offences-** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 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.

### **Recommendation**

#### **I) Section 377 needs to be deleted**

Section 377, criminalises all penile – non vaginal sexual acts under the ambit of ‘carnal intercourse against the order of nature’. But the prohibition under Section 377 applies only to sexual acts between men and between men and women, since it proscribes penile – non vaginal sex. Sexual acts between women are outside the domain of Section 377, IPC.

In July, 2009, the Delhi High Court in the *Naz Foundation Case*<sup>17</sup> had read down Section 377 to exclude consensual sexual acts of adults in private from its purview, thereby decriminalizing adult consensual sex between men. The High Court read down Section 377 on account of concerns relating to child sexual abuse and non-consensual sex between adults, which the Petitioner, Naz Foundation (India) Trust, had itself kept in mind and accordingly prayed for reading down the said law. This decision was appealed against in the Supreme Court of India but the High Court judgment was not stayed. In February-March, 2012, final arguments took place in the case and the Supreme Court has now reserved its judgment.

The Parliament has now passed the Protection of Children against Sexual Offences Act, 2012 in May, 2012 that seeks to protect children from sexual assault and sexual harassment, amongst

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<sup>17</sup> *Naz Foundation v. Government of NCT of Delhi* 160 Delhi Law Times 277

others and provides a comprehensive child-friendly redressal mechanism to deal with such offences. After the passage of this new law, the issue of child sexual abuse is covered under this law and Section 377, IPC becomes redundant in this regard.

Further, it is important to note that the proposed provisions on sexual assault would cover non-consensual sex between same-sex partners or between men and transgender persons.

The Government itself had admitted that Section 377, IPC was primarily used with regard to non-consensual sex between adults and to address child sexual abuse. Accordingly, Section 377, IPC in its current form becomes superfluous and serves no purpose, since these concerns are now dealt with under the above-mentioned respective laws, which have been specifically enacted to cover cases of sexual assault and child sexual abuse, with clearer intent and precise definitions. Section 377, IPC is thus rendered redundant and ought to be repealed. It is an established principle of law that reason is the soul of law and when the reason of any particular law ceases, the law itself becomes unreasonable and should cease to exist.

In light of above, Lawyers Collective recommends the deletion of Section 377 from the IPC.

## Section 2: Conceptualization of the Offence of Sexual Harassment

We propose that a new section on sexual harassment is created whereby we incorporate the offences envisaged under sections 354 and 509 and bring it within the ambit of sexual harassment. To this effect, this section outlines the proposed section of sexual harassment and further outlines a new provision on disrobing and parading naked which are crimes committed often in certain states such as Madhya Pradesh. It also proposes an addition to the section on self defense to include self-defence in case of sexual harassment.

## A) SEXUAL HARASSMENT

We suggest that there is need to add a substantive provision on sexual harassment as it involves both tactile and non-tactile offences. Currently, sexual assault not amounting to penetration is recognized in the sections of 354 and 509 under the chapters of Offences Against Human Body and Criminal Intimidation, Insult and Annoyance. There is need to bring in a single provision on sexual harassment which grades the different offences that occur against women which causes sexual harassment..

We propose that it is defined on the lines of the definition given in the *Vishaka judgment* with certain modifications.

### **Recommendations**

Sexual harassment should include such unwelcome sexually determined behavior (whether directly or by implication) as:

- a) stalking
- b) digital harassment
- c) physical contact and advances;
- d) demand or request for sexual favours;
- e) sexually coloured remarks;
- f) showing pornography;
- g) any other form of violation of privacy
- h) any other unwelcome physical verbal or non-verbal conduct of sexual nature.<sup>18</sup>

**Stalking and Digital Harassment:** We suggest that offences listed in clauses (a) and (b) being stalking and digital harassment are serious offences thus requiring the punishment of imprisonment as suggested in proposed section 354 where the punishment is by imprisonment of a maximum of five years with a minimum sentence of one year. The definitions of stalking and

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<sup>18</sup> *Vishaka and Others v. State of Rajasthan* AIR 1997 SC 3011.

digital harassment are based on the definitions suggested in the draft submitted by National Commission of Women in 2006 on amending the criminal laws.

They are as follows:-

- The definition of **stalking** should include following or approaching the woman, loitering near or entering the woman's workplace, residence or any other place she visits; or keeping the woman under surveillance; or interfering with the property of the woman; or sending offensive material to the woman; or any other act which could lead to annoyance, fear or criminal intimidation of the woman. These incidents have to occur thrice or more for it to be called stalking.<sup>19</sup>
- The definition of **digital harassment** should include any digital or telephonic communication such as emails, photographs, chats, telephone calls which is initiated , solicited or made by a man which are obscene with the intent to or knowing that it will annoy, harass, abuse , intimidate or stalk another woman will have caused digital harassment.<sup>20</sup>

**Other Offences:** This incorporates verbal, written, nonverbal or visual sexual communication which is unwelcome to the woman. It basically incorporates commonly seen behavior on the part of the perpetrator such as the following:-

- **Verbal or written:** Comments about clothing, personal behavior, or a person's body; sexual comments; singing lewd songs; requesting sexual favors; sexual innuendoes; or any other sexual verbal or written communication which does not involve bodily contact.
- **Nonverbal:** Looking up and down a person's body; derogatory gestures or facial expressions of a sexual nature; following a person not amounting to stalking or any other sexual non-verbal communication, which does not involve bodily

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<sup>19</sup> Criminal Law Amendment Act, 2006 submitted by the National Commission of Women at <http://ncw.nic.in/PDFFiles/Amendments%20to%20laws%20relating%20to%20women.pdf>

<sup>20</sup> *Id.*

contact.

- **Visual:** Showing obscene posters, drawings, pictures, or showing private body parts or any other sexual visual communication, which does not involve bodily contact

We suggest that such offences be brought within the ambit of summary disposal of trial as per Chapter XXI of the Code of Criminal Procedure.

There is need to impose fines as penalty, where certain people will be authorized by the state and the central government to fine the offenders. Such authorized personnel need to be the personnel who are commonly found in public places such as traffic police, guards in metro stations, railway stations and buildings, bus conductors, school authorities, college authorities, hotel managers among others. Further, the authorized person should have the right to detain the accused unless he is willing to furnish his particulars and the authorized person is satisfied that the accused will answer summons or any other proceedings against him.

Furthermore, in case of other offences, the first offence should lead to a fine of Rs. 500 and a document akin to a traffic challan should be made. In case the accused is unwilling or unable to pay the fine, he should be produced in court and the offence should be tried as a summary trial as per Section XXI of CrPC. In lieu of fine, the accused should be imprisoned for a minimum of 30 days. In the case of a repeat offence, the accused should be charged with a heavier fine of Rs. 2000 or face imprisonment of sixty days.

## **B) DELETION OF SECTIONS 354 AND 509**

Since tactile and non-tactile forms of sexual harassment are being covered under one comprehensive section, it eliminates the need for sections 354 and 509. Thus, we recommend that they be deleted.

### **C) SUBSTANTIVE PROVISION ON DISROBING AND PARADING NAKED**

We need to have a substantive provision on the most common forms of aggravated non-penetrative sexual assault such as disrobing and parading naked. The rationale for this amendment is the need to specify the different forms of violence that women undergo, and list down the most common forms of harassment with illustrations to assist the victim/survivor as well as the personnel that they come in contact with, in understanding the crime.

#### **Recommendations**

The offence of **disrobing** needs to include using of criminal force or assault to removing any piece of the woman's clothing without her consent.

Illustration – A intentionally pulls up a woman's veil. Here A intentionally used force to her, and if he does so without her consent intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to violate her dignity.<sup>21</sup>

The offence of **parading naked** includes forcing a woman to go to a public place without her consent, after she has been divested of her garments or with the intention of disrobing her in the public space.

Illustration- A intentionally forces a woman to go into a place without her consent, and disrobes her. Here, A intentionally used force to her intending or knowing it to be likely that he may thereby frighten, humiliate or annoy her, he has used criminal force to violate her dignity.

### **D) AMENDMENT TO SELF-DEFENCE TO INCORPORATE SELF DEFENCE IN CASE OF SEXUAL HARASSMENT**

**Current Section 97. Right of private defence of the body and of property-** Every person has a right, subject to the restrictions contained in section 99, to defend-

First.- His own body, and the body of any other person, against any offence affecting the human

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<sup>21</sup> Based on Oxford dictionary definition of stripping. Further, section 350: Criminal Force [illustration (f)], Indian Penal Code, 1860.

body;

Secondly.- The property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

### **Recommendation**

Self-defense is the natural instinct of human beings when they are being attacked. Therefore the need to explicitly provide for the right of self-defense in the case of sexual harassment in order to protect the women who exercise their right to self-defense from unwanted criminal prosecution in case of hurt, bodily harm or trespass. Thus, we recommend that Section 97 of the Indian Penal Code, 1860, which provides the right to self-defense of body and property be amended to include right to self-defence in case of sexual harassment.

## **Section III: Protocols and Laws for Monitoring and Reporting Crimes Against Women**

This section lists down our suggestions on putting in place a substantive provision in law on monitoring crimes against women to monitor the attitudes of the police, the lawyers, medical staff, judiciary towards women. Further it recommends appointment of a national level rapporteur to report on crimes against women, who will be required to submit her report to the parliament as well as publish it in the public domain.

### **A) NEW SECTION ON MONITORING CRIMES AGAINST WOMEN**

There needs to be a process in place for regular monitoring and evaluation of the legal system's response to crimes against women, specifically the functioning of the courts, not only to monitor the delays and pendency but also to evaluate the quality of the judgment, and the attitude of bias against woman so that such trends can be corrected.

Thus, we need to bring in a section on monitoring of crimes against women. There needs to be a committee set up at the district level, state level and national level, comprising of members from the women's rights movement and independent of the government to monitor the crimes

perpetrated against women, the treatment meted out at police stations, by public prosecutors, doctors, media and the judiciary. They will look into the number of FIRs filed, and will be contactable by the caseworker in case the police is unwilling to register the FIR. The monitoring committee will analyse the filing of the FIR, the trial, the disposal of case, pendency of case to see whether the personnel were gender sensitive, and whether appropriate reliefs were given the survivor. This committee will be independent of the government. It will be required to prepare a quarterly report which is uploaded on its website. Further, it will send these reports to the state or central government as the case may be.

## **B) NEW SECTION ON APPOINTMENT OF SPECIAL RAPPORTEUR ON CRIMES/VIOLENCE AGAINST WOMEN**

There should be a national level rapporteur for reporting on crimes against women. The mandate of these rapporteur will be as following:-

- a) to examine ways and means to prevent crimes against women;
- b) to monitor the implementation of the laws relating to violence /crimes against women
- c) to request for and receive information from all relevant sources on crimes against women with a special focus on violation of protocols set up for the police, lawyers and the judiciary in case of sexual crimes against women
- d) to promote effective application of national and international laws on crimes against women
- e) to take into account gender perspectives when analyzing information received
- f) to emphasize and recommend practical solutions to reducing gendered crimes, including identifying best practice mechanisms
- g) to report annually to the Legislative Assembly and the Parliament and disseminate their report to the public domain.

## **Section IV: Rehabilitative Measures**

This section recommends creating laws and protocols for rehabilitative mechanisms such as compensation schemes, rape crisis cells and witness protection programs.

#### **A) REHABILITATION MEASURES**

a) This section will provide for rape crisis cells attached to one police station in every district. It will require that every rape case be attended by a social worker who will be attached to the case till completion of case to provide psychological support and social support through the process of the trial. This will also help ensure that the survivor does not drop out of the trial.

b) There will be a female lawyer who will be a women's rights lawyer who will take up the case and will be attached to the case from the moment the survivor enters the police station to lodge the complaint till the conviction, The lawyer will interact with the police and ensure that the FIR is registered properly. She will monitor the interaction between the survivor and the police to ensure that the survivor is not made uncomfortable by the questions of the police and that her dignity is respected. Further, she will interact with the medical personnel to ensure that the survivor is given the medical treatment that is needed. Also, she will see to it that the survivor's informed consent is taken before conducting a forensic examination and that derogatory and humiliating tests such as two finger testing is not done.

c) There will be provision of health services as per the protocols for sexual assault drafted by CEHAT, which is provided in the second part of the report. Further, it will provide for medical aid to the survivor for which the expenses will be borne by the government.

d) It will provide for setting up of forensic laboratories in every district, which can give prompt medical reports.

e) Under the current scheme, as per section 357A of Code of Criminal Procedure, monetary compensation is awarded only after conviction. This is too late as the judicial process takes years to reach completion. The survivor needs monetary assistance for accessing medical and legal facilities. Thus, this provision needs to be amended to ensure that the survivor gets financial assistance at the time of lodging of complaint.

f) It will provide for witness protection to be given to the survivor.

## **B) NEED TO INTRODUCE LAWS AND PROTOCOLS FOR WITNESS PROTECTION**

There is need for a protocol on witness protection to be introduced in law as per the Delhi High Court guidelines on witness protection and the 198<sup>th</sup> Law Commission Report on Witness Protection.

The section should include, among other recommendations, the following:-

- It needs to include protection of the identity of the victim/survivor right from the stage of lodging of complaint till conviction.
- There needs to be a two-way closed circuit television in the Sessions Court for recording evidence during trial so as to ensure complete privacy of witness.
- There needs to be a mechanism put in place to provide them protection outside the court premises.
- Publication of identity of victim will need to be prohibited. Though section 228A exists in IPC, it is currently interpreted to mean identity protection from when the FIR is registered. The identity must be protected from when the survivor lodges the complaint.
- Sufficient breaks have to be given to witnesses while recording evidence.
- The witness should be allowed to answer in writing, as often that is less stigmatic as per *Sakshi v. Union of India*.

## Section V: Protocols and Laws on Investigation

This section lists our recommendations on laws and protocols for forensic evidence collection and studies the need to delink it from medical treatment.

### **NEED TO INTRODUCE PROTOCOLS AND LAWS FOR COLLECTION OF FORENSIC EVIDENCE AND TIME LIMITS**

A written protocol on recording medical evidence needs to be a part of the law. Such protocol exists having been framed by CEHAT but doctors across the country are not universally following it. Hence medical evidence is lost resulting in acquittal.

We propose that the CEHAT protocol be made a part of the law.

We would like to emphasize here that forensic examination needs to be delinked from medical examination. Thus, the medical examination will be with the purpose of treating the survivor while the forensic examination will be with respect to ascertaining the nature of assault, collecting evidence such as semen sample, any evidence of recent sexual activity among others.

The survivor will have a right to consent to the examination. If she is unwilling to go for a forensic exam, then she will be provided medical assistance as is needed. Further, every medical facility will be obligated to provide her with medical treatment.

Two Finger Testing: It needs to be specified in law that two-finger testing will not be a part of the forensic evidence collection. Since, we have moved away from the pronouncement of Hale which distinguished between lawful and unlawful sexual intercourse and we accede that all intercourse irrespective of the relationship between the two persons is lawful if it's consensual, gathering evidence regarding past sexual activity serves no purpose.

In such a scenario, her past sexual history is not relevant to the act of sexual assault. Since, the two finger testing is used to determine whether the woman is habituated to sexual intercourse, the test is redundant and chauvinistic as it allows the defence to sneak in character evidence, which is considered illegal. A report titled Dignity on Trial by Human Rights Watch on two finger testing interviews a public prosecutor who says, "Where the defense takes the line that there was consent [to sexual intercourse], usually they also look to medical evidence for support.

And if the medical report says anything about the two-finger test, then they draw it out in court—saying she was habituated so consented and is falsely implicating the accused.” Another prosecutor says, “The finger test is relevant for the defense...if the medical report says that two fingers have passed, the defense can show that she is habituated. This shakes the testimony of the prosecutrix [the girl or woman].”<sup>22</sup>

In majority of the cases, the survivor’s consent for the test is not taken, yet the results are presented in court. Often, the judges too lack the information to understand what the medical evidence means. Though, in theory, being habituated to sexual intercourse is no excuse for rape, it is often used to assert that the women have “loose morals”.

The Supreme Court in its judgment in 2003, called the medical evidence collected in a rape trial which included two finger testing “hypothetical and opinionative”.<sup>23</sup> A high-powered government committee in 2010 also recommended that two-finger testing be banned. The Maharashtra Government has also banned it. Additional Sessions Judge Kamini Lau said “The test is violative of the fundamental right to privacy of the victim.” She says, “State action cannot be a threat to the constitutional right of an individual. What has shocked my conscience is that this test is being carried out in a routine manner on victims of sexual offences (even minors) by doctors.”<sup>24</sup> Despite these efforts, it still continues to be used in rape trials. Thus, there is need for a specific section which makes two finger testing illegal.

Evidence on Attire of Survivor: In Florida, Statue of Crimes, section 794.022 says - “Notwithstanding any other provision of law, reputation evidence relating to a victim's prior sexual conduct or evidence presented for the purpose of showing that manner of dress of the victim at the time of the offense incited the sexual battery shall not be admitted into evidence in a prosecution under s. 794.011.”<sup>25</sup>

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22 Human Rights Watch , “Dignity on Trial” <http://www.hrw.org/reports/2010/09/06/dignity-trial>

<sup>23</sup> State of Punjab v. Ramdev Singh AIR 2004 SC 1290

<sup>24</sup> Kalpana Sharma, “Judges, Judgments and Women’s Rights” 15 March 2010, Hindu. At <http://www.hindu.com/mag/2010/10/31/stories/2010103150090300.htm>

<sup>25</sup> Section 794.022: Rules of Evidence Statute of Crimes, Florida, <http://law.justia.com/codes/florida/2005/TitleXLVI/ch0794.html>

Similar provisions need to be introduced in Indian law since one of the first questions asked to the survivor, is about her clothing. We need to have a law that allows women the dignity and space as an equal citizen in India, who has the freedom given to her by the constitution to dress in any way she wants, and nothing she does can incite the man to sexually assault her. Thus, we need to delink any evidence which implies an assessment of the woman's character from the crime of rape.

## Section VI: Other Recommendations

### **AMENDMENT OF ARMY ACT, 1950 AND AFSPA, 1958**

There is need to delink sexual assault, which occurs within the army or is committed by army personnel from the Army Act, 1950 and Armed Forces Special Powers Act, 1958 and bring these crimes within the ambit of IPC where the army personnel is prosecuted like every other citizen without any special provisions made for them. Currently, section 70 of the Army Act, 1950<sup>26</sup> states that if a crime of rape occurs while on active service, or at any place outside India or at a frontier post specified by the Central Government by notification, it will be tried by court martial. Further, as per section 6 of Armed Forces (Special Powers) Act, 1958<sup>27</sup> prior sanction of Central Government is needed before prosecuting the armed forces personnel who are operating in areas, which have been declared as disturbed by the government.

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<sup>26</sup> **70. Civil offence not triable by court-martial.** A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences-

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf.

<sup>27</sup> **Section 6. Armed Forces (Special Powers) Act, 1958 : Protection to persons acting under Act.** No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act

These sections gives the army a broad license to commit crimes against the general population without any accountability and leads to incidents like the rape of Manorama in Manipur.

**KINDLY NOTE THAT WE WILL BE MAKING A SEPARATE SUBMISSION PROPOSING AMENDMENTS TO PROCEDURAL LAW AND EVIDENCE LAW.**

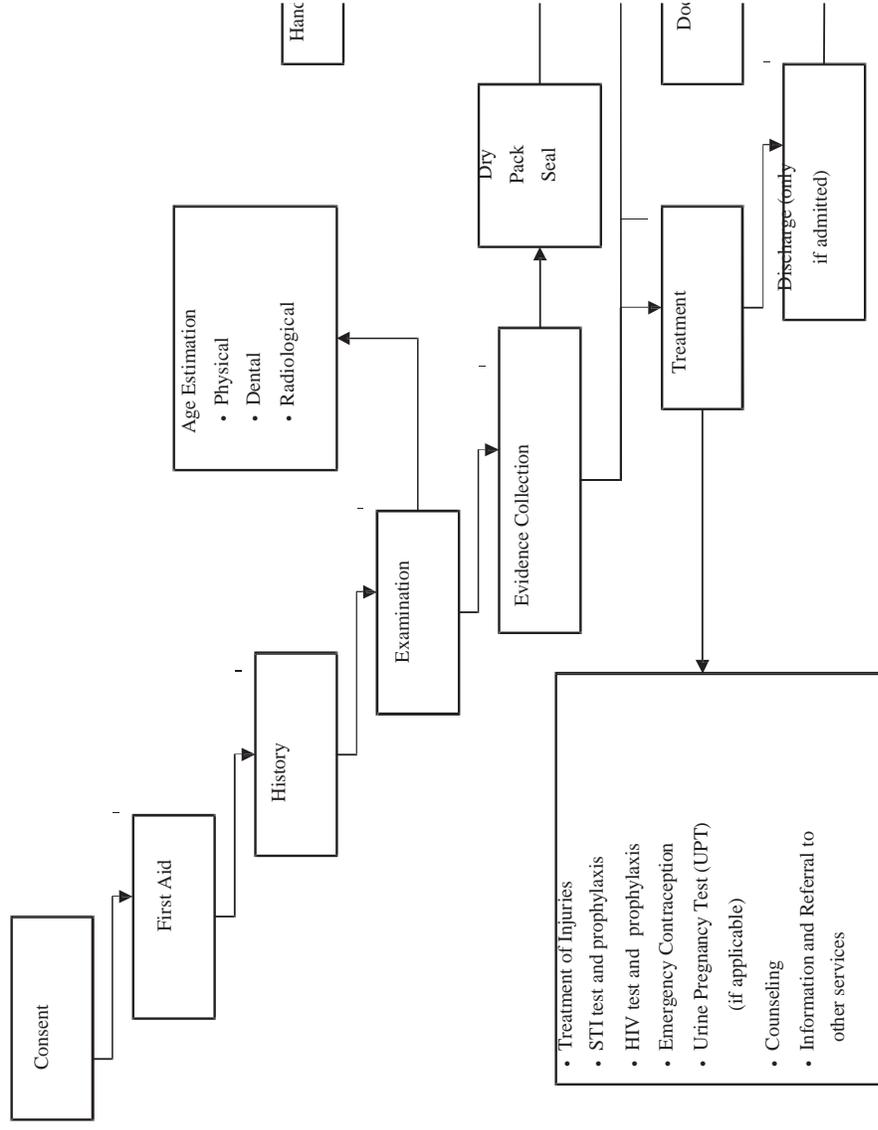
# **GUIDELINES FOR HEALTH FACILITIES IN CASES OF SEXUAL ASSAULT BY CEHAT**

1. All health facilities, whether public or private, clinics or hospitals, must be equipped to conduct an examination of a survivor of sexual assault. As per Section 164 (A) of the CrPC, any registered medical practitioner is qualified to conduct such an examination. Moreover, a survivor must be free to approach any health care provider that he/she trusts and is comfortable with. No health facility must turn away a survivor of sexual assault.
2. The facility should designate staff for examination of survivors and collection of evidence. They should be trained on the issue of sexual violence and its impact on physical and mental health. They should also have the necessary training and experience to carry out an examination appropriately.
3. The facility should lay down clear procedures and protocols to be followed in cases of sexual assault and these should be made available to all providers. This includes assembling all the contents required for a medical examination in one place.
4. A uniform, gender sensitive proforma for medical examination and treatment of sexual assault should be implemented across the country. The proforma must not record any findings that are irrelevant to the case of sexual assault, such as built of the survivor, old tears of the hymen or size of the vaginal introitus. Due importance must be given to the recording of history and ensure that no detail is missed out. It must include a section on treatment so that this crucial role of the health system is not omitted. (A sample proforma is annexed as Annexure 2)
5. The proforma must not restrict itself to the IPC definition of ‘rape’, but must be able to record all kinds of sexual assault that have been defined by the World Health Organization. This includes penetration of vagina/mouth/anus by finger/penis/object as well as non-penetrative assault such as inappropriate touching, kissing, sucking, fondling and forced masturbation.
6. There must be no delay in conducting an examination and collecting evidence in cases of sexual assault as evidence is lost with time. The urgent nature of the examination cannot be over-emphasized.
7. The examination should be carried out in a non-threatening, quiet, and private place. Adequate waiting space should be made available for relatives accompanying the survivor. Sufficient lighting and a comfortable examination table are necessary for a thorough examination.
8. In case a female doctor is not available for the examination of a female survivor, a male doctor should conduct the examination in the presence of a female attendant. In case of a minor/person with disability, his/her parent/guardian/ any other person with whom the survivor is comfortable must be present.

9. Police personnel must NOT be present during any part of the process.

10. A police requisition is not mandatory for conducting a medical examination and providing treatment to survivors of sexual assault. (*State of Karnataka v Manjamna* (2000 SC (CrI) 1031/CriLJ 3471/2006(6) SCC 188). Survivors may report directly to the health facility first and health facilities must not turn them away for want of a police requisition /complaint.

The following are the components of a comprehensive health care response to sexual assault and mu cases:



1. **Informed Consent:** Specific written informed consent must be sought by the examining doctor before beginning any procedure. Consent of the survivor must be sought for:

- a) treatment,
- b) physical and genital examination,
- c) evidence collection,
- d) disclosing information to law enforcement authorities
- e) photography (if photographs are taken).

While seeking consent, the survivor must be given all information about the nature of examination and evidence collection that will be carried out. All survivors must be informed of the benefits of undergoing the examination, but if a survivor refuses a certain part of the medical procedure, informed refusal must be documented. Consenting to the above should not be a pre-requisite for availing treatment.

As per Indian law, cases of sexual assault need not be mandatorily reported to the Police. Section 39 of the CrPC provides a list of offences that must be mandatorily reported to the Police, but sexual offences are not a part of this list. This means that the survivors consent is necessary before such information is disclosed to law enforcement agencies.

It must be specified that any person over the age of 12 years can give consent. Consent must be taken from the guardian/ parent if the survivor is under the age of 12 years or if the survivor is unable to give his/ her consent by reason of mental disability. (Section 89 IPC)

## 2. Documentation of Details of Sexual Assault –

- a. Examining doctor should record the history of the incident as narrated by the survivor.
- b. Details of the assault must be documented as this is relevant to examination, evidence collection and provision of a medical opinion. History documented should mention:
  - i. Date, time, place of assault
  - ii. Number of assailants and relationship of survivor to assailant
  - iii. Injury marks that the survivor may state to have left on the assailant's body
  - iv. Type of sexual assault – whether and what kind of penetration occurred, if there was non-penetrative assault in terms of fondling, kissing, sucking, licking of body parts or forced masturbation.
  - v. whether there was emission of semen
  - vi. if a condom or lubricant was used
  - vii. use of verbal/physical threats or weapons
  - viii. Use of physical force and body areas touched
  - ix. alcohol/drug intoxication
  - x. if the survivor was menstruating at the time of assault/examination

- xi. Whether he/she washed, bathed, douched, urinated after the assault

The proforma used for medical examination must include the above points so that no detail is missed out.

- c. In case of children, diagrams and dolls should be used to elicit an accurate history.
- d. The doctor must call upon experts in case of a survivor who is mentally unsound or unable to hear or speak.

### **3. General Examination-**

- a. The purpose of examination should be to identify signs of harm (injuries, scratches, bite-marks, etc on face, neck, shoulders, breast, upper arms, buttocks, thighs) that has been caused to the survivor as a result of the assault.
- b. The above must be documented in detail. Nature of injury (laceration, contusion, incision, abrasion, redness, swelling), size, site, shape, with time since injury must be described. Injuries are best represented when marked on body charts. They must be numbered on the body charts and each injury must be described in detail.
- c. It is important to keep in mind that injuries might not always be seen. The absence of injuries is not indication of consent. There may be circumstances in which the survivor may have been threatened with bodily harm, physically restrained, or afraid to resist for other reasons, thus explaining absence of injuries. In fact, only one-third of cases of sexual assault have visible injuries. (Bowyer and Dalton, 1997) Moreover, mucosal injuries heal rapidly. They may not be visible during examination and may not leave any scars either. (McCann et. al, 2007) Even so, cases of assault have been proved even in the absence of injuries. (For instance, *State of H.P. v. Tara Chand And Anr* 2008 (3) Shim LC1).
- d. An assessment of the general mental condition of the survivor should be made. Any signs of intoxication by ingestion or injection of drug/alcohol must be noted.

### **4. Genital examination –**

- a. A genital examination must be carried out only if the survivor gives history of genital assault such as penovaginal/anal penetration, fingering or by object.
- b. All findings related to the episode of assault must be recorded, such as swelling, bleeding, tears, redness on the labia, vulva, fourchette, perineum, urethral opening, anal opening. These must also be marked on body charts
- c. The size of the vaginal introitus has no bearing on a case of sexual assault, and therefore the two-finger test of admissibility must not be conducted (*State v. Munna, FIR No. 513/07, PS Shalimar Bagh*). It is often used against survivors in court to prove that they are 'habituated to sexual intercourse', even though such information about past sexual conduct has been considered irrelevant to the case. (Section 146 of the Indian Evidence Act).
- d. Hymen should be treated like any other part of the genitals and the status of the hymen need not be recorded routinely. Research shows that an intact hymen does not rule out sexual assault, and a torn hymen does not prove previous sexual intercourse. In a study that attempted to diagnose, on the basis of physical examination whether a woman had previously engaged in sexual

activity, the researchers found that they had mis-diagnosed ‘virgins’ in 50% of the cases, suggesting that integrity of the hymen does not necessarily provide information about sexual history. (Underhill RA, Dewhurst J. “The doctor cannot always tell. Medical examination of the “intact” hymen. *Lancet*. 1978 Feb 18;1 (8060):375-376.) Therefore, only those findings related to the hymen that are relevant to the episode of assault (findings such as fresh tears, bleeding, edema etc.) are to be documented.

5. **Age Estimation:** Must be conducted in case of survivors over 10 and under 20 years. Age must be estimated by taking into account physical, dental as well as radiological age.

6. **Evidence Collection:**

- a. The nature of forensic evidence collected is to be determined by three main factors - nature of assault, time lapsed between assault and examination and whether the person has bathed/washed herself since the assault.
- b. If the survivor reports within 96 hours (4 days) of the assault, all evidence including swabs must be collected without fail, in keeping with the history of assault. The likelihood of finding evidence after 72 hours (3 days) is greatly reduced, however it is better to collect evidence up to 96 hours in case the survivor may be unsure of the number of hours lapsed since the assault.
- c. The nature of samples taken is determined to a large extent by the nature of assault and the history that the survivor provides. The samples collected should be consistent with the history. Swabs from the vulva, vagina, anal opening for ano-genital evidence must be collected depending on the history and examination. For example, if the survivor is certain that there is no anal intercourse, anal swabs need not be taken. Often lubricants are used in penetration with finger or object, so if there is such a history, relevant swabs must be taken for detection of lubricant. If there is struggle during the sexual assault, and the survivor mentions in the history that she scratched the accused, then epithelial cells of the accused may be detectable in nail scrapings and nail clippings.
- d. A ‘wet smear’ must be prepared and examined under the microscope for spermatozoa. Spermatozoa may be seen only within 72 hours of the assault.
- e. Clothes that the survivor was wearing at the time of the assault are of evidentiary value if there are any stains/tears/trace evidence on them. Hence they must be preserved. Each piece of clothing must be described. Presence of stains - semen, blood, foreign material etc - should be properly noted. Any tears or other marks on the clothes must be noted. If clothes are already changed then the survivor must be asked if s/he has the clothes that were worn at the time of assault and these must be preserved. Clothing must be folded in such a manner that the stained parts are not in contact with unstained parts of the clothing.
- f. If a woman reports with a pregnancy resulting from an assault, she is to be given the option of undergoing an abortion, and protocols for MTP are to be followed. The products of conception (PoC) may be sent as evidence to the forensic lab (FSL) for establishing paternity / identifying the accused.
- g. Blood must be collected for grouping and also helps in comparing and matching blood stains at the scene of crime.

- h. Blood and urine must be collected for detection of drugs/alcohol as the influence of drugs/ alcohol has a bearing on the case. If such substances are found in the blood, the validity of consent is called into question. In a given case, for instance, there may not be any physical or genital injuries. In such a situation, ascertaining the presence of drug/alcohol in the blood or urine is important since this may have affected the survivor's ability to offer resistance.
  - i. Each sample must be sealed and labeled separately.
  - j. All samples including clothes must be air dried before storing them in their respective packets. This is crucial as wet samples may decompose and be unfit for analysis by the time they reach the Forensic Science Laboratory.
  - k. Samples must be dispatched to the Forensic Science Laboratory through the police as early as possible. Clear channels of communication between police, health facility and forensic science laboratory are to be established so that reports of Chemical Analysis are received by the doctor within three months.
7. **Chain of custody:** The hospital must designate certain staff responsible for handling evidence and no one other than these persons must have access to the samples. This must be done to prevent mishandling and tampering. If a fool-proof chain of custody is not maintained, the evidence may be rendered inadmissible in the court of law. A log of handing over of evidence from one 'custodian' to the other must be maintained.
8. **Treatment:** Treatment for the effects of sexual assault is the most crucial role of the health care provider and must be provided free of cost. To ensure that survivors receive treatment at health facilities, it is crucial that this be made a part of the proforma. The WHO prescribes that survivors be assessed and treated for:
- a. Injuries: must be treated based on severity. Antiseptic applications, pain killers, suturing may be required. Tetanus Toxoid injection must be provided in case the survivor has sustained injuries and is not already immunized.
  - b. Pregnancy: If the survivor reports within 3-5 days of a peno-vaginal assault, Urine Pregnancy Test must be conducted to determine if she is already pregnant. If not, then Emergency Contraception must be provided. If the survivor has reported more than 2 weeks after the assault and has not yet got her period, then UPT must be done to check if she is pregnant as a result of the assault. In case a pregnancy is detected, abortion needs to be provided.
  - c. Sexually Transmitted Infections: microbiological investigations for assessment of STIs, blood investigations for Hepatitis B and HIV must be done. Prophylactic antibiotics for prevention of STIs may be administered as relevant
  - d. HIV prevention: Post Exposure Prophylaxis (PEP) for HIV should be given if a survivor reports within 72 hours of the assault. Before PEPs are prescribed, an assessment of HIV risk must be done
  - e. Psychological trauma: Counselling to address psychological trauma caused due to the assault must be provided. The survivor must also be put in touch with other agencies for responding to different needs.

The survivor must be called for follow up examination to note the development of bruises or other injuries, test for pregnancy, VDRL, etc.

All treatment to sexual assault survivors must be provided free of cost.

9. **Opinion:** Provision of a 'reasoned medical opinion' is a responsibility of the examining doctor. A provisional as well as final opinion must be provided in each case of sexual assault.
  - a. The examining doctors must never comment on whether rape occurred or not, as this is outside the purview of their role. Based on medical examination, it is not possible to draw such a conclusion. Requisitions from police should also not ask the doctor to comment on whether 'rape occurred or not'.
  - b. The doctor must never comment on past sexual history of the survivor in the proforma, nor in the opinion. Comments such as 'habituated to sexual intercourse' are gender biased, unscientific and irrelevant.
  - c. **Provisional Opinion:** A provisional opinion must be provided by the doctor based on the examination conducted and the history given by the survivors. It should be kept in mind that normal examination findings neither refute nor confirm forceful sexual assault. The absence/presence of positive findings must be correlated with delay in reporting, use of threats, being rendered intoxicated, acts such as bathing, douching, urinating which may have led to loss of evidence. No doctor should omit provisional opinion for want of Chemical Analysis reports.
  - d. **Final Opinion:** A final opinion must be provided once Chemical Analysis results are received from the Forensic Science Laboratory. The final opinion must be formulated keeping in mind the history of sexual assault. Negative CA reports may be due to lapse of time, due the survivor having bathed, washed, douched, urinated, due to a condom was used, or because she was menstruating. This must be explained in the final opinion.
10. A carbon **copy of the documentation** done by the doctor (including examination findings, history recorded, evidence collected, opinion, treatment and investigations) must be provided to the survivor free of cost.

## **ANNEXURE 1: EVIDENCE FROM HOSPITAL-BASED RESEARCH IN INDIA**

CEHAT has been implementing a comprehensive health care response to sexual assault in three public hospitals in Mumbai. As part of this, a proforma and manual has been implemented that guide the doctor in conducting medical examinations of sexual assault survivors. Comprehensive medical and psychological support is provided to all survivors who report to these hospitals.

Data from 94 cases of sexual assault that have been responded to in the three public hospitals in Mumbai between 2008 and 2012 shows that:

1. Out of 94, almost half ie. 42 survivors reported to the hospital directly to seek treatment for health consequences arising out of the assault. This underscores the need for recognition of voluntary reporting at these hospitals so that survivors are able to access treatment without a police requisition. Disclosure is due to a health complaint in a majority of cases.
2. 45% reported with completed peno-vaginal penetration. Others include fingering, masturbation, attempted penetration, anal penetration, touching of chest etc.
3. 61.8% of the survivors had changed clothes, 50% had bathed, 36.8% had douched, 88.2% had urinated and 52.9% defecated. In these cases, even if the survivor had reached the hospital within 24 hours, the chances of finding evidence may have reduced drastically.
4. Less than half of the survivors (38%) showed genital injuries and less than one fifth (19%) showed physical injuries.
5. Assailant a known person in majority of cases. Usually a trusted person such as child's own father, uncle, neighbour, shop keeper, neighbour who the child was accustomed to playing with
6. The assault is usually a planned act. Assailants have promised the child a toy, or a chocolate, money or simply time to play. Adolescents have been promised a job. Among adults, motives such as dispute, robbery, property matters or vulnerability caused due to mental illness are apparent.
7. Assault usually occurs in perpetrator's home, survivor's home or neighbourhood area.