

## **Critical Commentary on the Gender Bias- Route of the Criminal Law (Amendment) Act, 2013**

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The reason for bifurcating the continuity of the legal development is because of the reason, the Criminal Law (Amendment) Bill, 2012 which was introduced in the Lok Sabha in December 2012, a few days before the incident of December 16, 2012 has become the focus and foundation for the changes that occurred in the next watershed moment; the incident of December 16, 2012 which had a grave impact on the recognition of sexually wrongful act by legislature as criminal acts. The other reason for bifurcation of the development and judicial interpretation is because of the fact that before the Nirbhaya incident there was a tilt towards gender neutral offences; even the 2013 ordinance was to a great extent gender neutral though was promulgated in haste. It is significant to note that the recommendations by the earlier Law Commission Reports were also gender neutral but it is contended that the same has been replaced by the Criminal Law (Amendment) Act, 2013. By this reason the changes brought in the sections in the Criminal Law (Amendment) Act, 2013 are challenged as discriminatory, arbitrary and severely prone to abuse.<sup>1</sup>

It would be pertinent to note the statistics that has been compiled by the government agencies as it shows that immediately following the amendment there has been a disturbing spurt in filing of rape complaints which have ultimately been found false by the courts. For instance, the Delhi Commission of Women (herein after referred as 'the DCW') has come up with the startling statistics that 53.2% of the rape cases filed between April 2013 and July 2014 in the capital were found to be 'false'.<sup>2</sup> The report says that between April 2013 and July 2014, of the 2,753 complaints of rape, only 1,287 cases were found to be true and the remaining 1,464 cases were found to be false. The report further reveals that between June 2013 and December 2013, the number of cases found to be untrue were 525. Between, January 2014 and July 2014, the numbers of false rape cases filed were 900. In many cases, the complainant turned hostile, and investigation revealed that revenge was the most common reason for filing a false complaint. In all, in 2013 there were a total of 1,559 cases of rape registered in Delhi, where the acquittal rate was 78%. This was a 22% jump from the earlier 46% of acquittal in 2012, when there were a total of 680 cases filed.

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<sup>1</sup> *Madhu Purnima Kishwar & Ors. v. UOI*, Petition filed by Madhu Purnima Kishwar challenging the validity of Criminal Law (Amendment), 2013 on 13.03.17.

<sup>2</sup> 53% cases filed between April 2013 and July 2013 false: Delhi Commission of Women, available at: <http://www.dnaindia.com/india/report-53-rape-cases-filed-between-april-2013-and-july-2013-false-delhi-commission-of-women-2023334> (last visited on May 01, 2017).

### 1. Commentary on the Scope of the Criminal Law (Amendment) Act, 2013

In context of the sexual crimes in this country, the Criminal Law (Amendment) Act, 2013 have brought the long overdue changes but it has also restricted the ambit and the scope of Criminal Law (Ordinance), 2013. Criminal Law (Amendment) Act, 2013 has amended the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, the Indian Evidence Act, 1872 and the Protection of Children from Sexual Offences Act, (PCSO), 2012. Nevertheless the scope of amendment has to be appreciated in context of the changes it has brought to the penal code but at the same time it needs to be understood that it has also added to problems as it is not free from lacunas. So, to figure out both the side of the coins let's have a glance on some of the changes which have been brought to the code by the Criminal Law (Amendment) Act, 2013 and they are as follows:

Section	Title	Punishment	Gender Neutral	Victim	Culprit
326A	Voluntary causing grievous hurt by use of acid	10 Years to Life 2 Lakh fine	Yes	Man/Woman	Man/Woman
326B	Voluntarily throwing or attempting to throw acid	5 Years to 7 Years Fine	Yes	Man/Woman	Man/Woman
354	Assault or Criminal force to woman with intent to outrage her modesty	2years and fine	No	Women	Man/Woman
354A	Sexual harassment and punishment for sexual harassment	3years and fine 1year and fine	No	Women	Man
354B	Assault or use of criminal force to women with intent to disrobe	3 years to 7 years and fine	No	Women	Man
354C	Voyeurism	1 year to 3 year 3 years to 7 years (second conviction)	No	Women	Man

354D	Stalking	Extend to 3 years and fine Extend to 5 years and fine (second conviction)	No	Women	Man
370	Trafficking of person	7years to 10 years and fine More than one-10 years to LI Minor- 10 years to LI and fine More than 1 minor 14 years to LI and fine When public servant trafficking any person – LI for natural life.	Yes	Man/ Woman	Man/ Woman
370A	Exploitation of a trafficked person	5years to 7years 3years to 5years and fine.	Yes	Man/Woman	Man/ Woman
375/376	Rape/ Punishment for rape	10years to LI	No	Woman	Man
376A	Punishment of causing death or resulting in persistent vegetative state of victim	20years to LI	No	Woman	Man
376B	Sexual intercourse by husband upon his wife during separation	2years to 7years and fine	No	Wife(Woman)	Husband(Man)
376C	Sexual intercourse by a person in authority	5years to 10years and fine	No	Woman	Man
376D	Gang Rape	20years to LI for natural life and fine	No	Woman	Man
376E	Punishment	Imprisonment	No	Woman	Man

	for repeat offenders	for natural life or with death			
509	Word, gesture or act intended to insult the modesty of a woman	3years with fine	No	Woman	Man

Categorically, under the new provisions most of the offences that were gender neutral have been made gender specific. There is no denying the fact, the Criminal Law (Amendment) Act, 2013 was based primarily on the recommendations of the Justice Verma Committee and was enacted haphazardly. In the emotionally charged atmosphere that prevailed at the time, Parliament did not undertake the due deliberation of the amendments or debate each clause, anxious to appease public sentiment and enact more stringent rape laws. And this appears to be an absurdity in law for which no possible reason can be comprehended. Now an attempt has been made to critically examine one by one the sections which came through the amendment of 2013 in the criminal law.

### 1.1 Retrospective Application

First of all before moving on to the provisions of the Criminal Law (Amendment) Act, 2013 it is noteworthy that this act came into force on 2<sup>nd</sup> April, 2013 but it has given retrospective effect as it deemed to have come into force from 3<sup>rd</sup> February, 2013 the day Criminal law (Amendment) Ordinance was passed. So, this amendment is directly hitting the Article 20(1) of the Constitution of India which deals with the ex- post facto laws. It is essential to understand that ex-post facto law are those laws which impose penalties on the acts already done or which increases the penalties for the acts already done.<sup>3</sup>

Article 20(1) may be divided into two parts:-

- i) No person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charged as an offence.
- ii) No person shall be subject to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Part I makes it clear that penalties cannot be imposed retrospectively, *i.e.* upon the acts already done. Henceforth, if an act is not an offence at the time of the commission of it then later on it cannot be made an offence, so as to punish the person for the commission of the said act.

Part II provides that no person shall be subject to greater penalty than that which might have been inflicted under the law in force at the time of its commencement.

<sup>3</sup> Kailash Rai, *The Constitutional Law of India* 230 (Central Law Publications, Allahabad, 9<sup>th</sup> edn., 2010).

It would be relevant to note here the judgment of *Kedar Nath v. State of West Bengal*,<sup>4</sup> accused committed an offence under the Prevention of Corruption Act. The punishment prescribed under the act for the offence was imprisonment or fine both. However, in 1949 the Act was amended so as to enhance the punishment by additional fine equivalent to the amount of money found to have been procured by the offender. The hon'ble Supreme Court held that the enhanced punishment in 1949 could not be applicable to the offence committed in 1947.

Hence, from the Article 20(1) and KedarNath case it is quite apparent that the retrospective effect given to the amendment act is unconstitutional though it is for a brief period of 2 months as some of the provisions in the Act imposes stricter punishment and created some new offences when compared to ordinance.

## 1.2 Acid Attacks

Acid attack is not something unheard of in India. As, it has shocked the conscience of our nation again and again – with mutilated faces, unbeaten survivors coming to the frontlines to share their horrific stories and families driven to bankruptcy supporting recovery cost. Indian Penal Code was modified in 2013 for the first time to add regulations tailored to acid attacks. Under section 326A acid attack has been inserted to the IPC, 1860, to protect individuals from acid attacks which have been a great problem in the recent years. This provision is thankfully a gender neutral provision; under which penalty for acid attacks is imprisonment for not less than 10 years which may extend up to life imprisonment. The provision also provides for fine to be paid by the culprit to the victim which will be equal to the just and reasonable medical expenses of the victim. This is not enough, as an attempt for acid attack is also punishable with 5years which may extend to 7years of imprisonment and it provides for fine if required under section 326B of the IPC, 1860.<sup>5</sup> The worth mentioning feature of this section is that it only includes acid but expands its definition to any substance which is of corrosive, burning or acidic in nature. But to my humble view the insertion of these two sections are not at all necessary. As the expression “corrosive substance” used in section 326, IPC includes acid also. The purpose would be served if the schedule to the Code of the Criminal Procedure 1973 was amended to make the offence under section 326 of the Indian Penal Code triable by Court of Session instead of by Magistrate of the First Class.<sup>6</sup>

## 1.3 Sexual Harassment

Then, there is sexual harassment of women especially the working women at work place by their male counterparts is one of the evils of the modern society and we are incapable of combating this evil. In a public interest litigation filed before the apex court, the need for effective legislation to curb sexual harassment of working women was emphasized. In

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<sup>4</sup> AIR 1953 SC 404.

<sup>5</sup> The Criminal Law (Amendment) Act, 2013(Act 13 of 2013),s. 5.

<sup>6</sup> Harish Chander, *The Indian Penal Code A Critical Commentary* 514 (Eastern Law House, Kolkata, 2017).

*Apparel Export Promotion Council v. A.K. Chopra*<sup>7</sup> as early as 1993, at the International Labour Organization seminar held at Manila, it was recognized that a sexual harassment of women at work place was a form of ‘gender discrimination’ against women. The Parliament enacted section 354A in Amendment Act, 2013 giving effect to the guidelines of Vishaka’s<sup>8</sup> case. The forms of sexual harassment highlighted in the section 354A are as follows: - i) physical contact/advances which may involve unwelcomed and explicit sexual overtones; ii) or a demand or request for sexual favors; iii) or forcibly showing pornography; iv) or making sexually colored remarks. The punishment for sexual harassment is up to three years, or with fine, or with both for events described in clauses i) and ii) Imprisonment up to one year, or with fine, or with both in other cases. Section 354B punishes assault or criminal use of force on women to compel to disrobe her or make her naked and this is a gender specific provision with imprisonment not less than 3 years which may extend to 7 years along with the fine.<sup>9</sup> Though, the brilliant legislative action has been taken but still this section is not free from anomalies for instance, if we have a glance on section 354A (1) and 354 they both require physical contact at the hands of perpetrator, as such there is a lacuna when it comes to differentiating the types of ‘physical contact’ amounting to sexual harassment and outraging the modesty of a woman. Also the offence of making sexually colored remarks had already been covered under section 509 with the same degree of punishment, so, again making of one more specific clause *i.e.* 354A (iv) is a futile effort.

#### 1.4 Voyeurism

Now coming on to the Section 354C *i.e.* voyeurism, the essence of which is ‘observing’ but which may also involve the making of a secret photograph or video of the subject during an intimate activity.<sup>10</sup> Voyeurism means the gratification derived from observing the genitals or sexual acts of others, usually secretly.<sup>11</sup> Emphatically, going by the letter of the law, the section shows clearly that voyeurism is a gender biased crime which is punishable if committed by a male accused and no provision for a female is envisaged if she harms another woman or man *i.e.* only men are termed as voyeurs. Not only this but if one will examine the laws regarding voyeurism in India with other countries then it can be said that the other countries like Canada, Australia and United States they also want to deter voyeurism just like India does but there lies a critical difference and *i.e.* the laws in these countries includes each and every person carrying out such act to be punished *i.e.* this law protects every person (men and women as the case may be) who is a victim of an illegal act of voyeurism.<sup>12</sup> It would also be pertinent to mention, the Justice Verma

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<sup>7</sup> AIR 1999 SC 625.

<sup>8</sup> *Vishaka v. State of Rajasthan* AIR 1997 SC 3011.

<sup>9</sup> The Criminal Law (Amendment) Act, 2013 (Act 13 of 2013), sec. 7.

<sup>10</sup> Nisshant Laroia and Devanshi Dalal, “Critical Commentary on the Gender- Bias Route of Sexual Harassment Laws in India: Examining the Pro-female Tilt & its Consequences (with special reference to sec 354C and 354 D of the Indian Penal Code)” *IJTRA* 2 (September 2015).

<sup>11</sup> Black’s *Law Dictionary*, 10<sup>th</sup> edn., 2014.

<sup>12</sup> *Supra* note 2.

Committee Report which was the basis for the Criminal Law (Amendment) Act, 2013 has also proposed to use the term “whoever” to refer to the offenders. Hence, it is crystal clear by the report of Justice Verma Committee that such offence can be perpetuated by either males or females and therefore for the better protection of the society the government should not only have considered the substantial part but also all the parameters regarding the same and thereby giving blanket jacket to female offenders is unconstitutional and practically unjust to the other sex.

### 1.5 Stalking

Coming on to the next section i.e. 354D stalking, which no longer now means only following the person or forcibly interacting with them rather it now includes unwanted telephone calls, sending derogatory messages or e-mails “that disturb the peace of mind of any individual”. In more precise words Stalking – physical or electronic via phone calls text, messages or e-mails is now considered as an offence punishable with one to three years of imprisonment for first conviction and is extendable up to 5 years for the second conviction with fine. As, it was the belief of Justice Verma panel, “ offences such as Stalking, Voyeurism, Eve-teasing are perceived as minor offences, but if not checked, these crimes will lead to a growing culture towards serious offences like Rape”. It is quite noteworthy, over 60 countries have laws for Stalking including Washington, Australia, Germany, Canada, Singapore and the laws here in the above stated countries are gender neutral which emphatically means the possibility of offences like stalking being committed both by men and women.<sup>13</sup> However, in India the laws are Gender Specific, as the provisions for the said section clearly reads, only a male can commit the said crime and henceforth can be the accused although if a woman does the same act then it will be considered as No crime. So, it seems to be a clear case of discrimination and biasness against males.

One more significant contention is there regarding the offences of Stalking and Voyeurism and i.e. these offences have actually reversed the principle of Burden of Proof. As, the golden rule that runs through the web of civilized criminal jurisprudence is that an accused is presumed to be innocent unless he is found guilty of the charged offence i.e. the principle of Innocent Until Proven Guilty.<sup>14</sup> More precisely, the traditional and legal principle is that the burden of proof lies on the prosecution, to prove that the crime has been committed by the accused. The rule has its origin in the Roman maxim *ei qui affirmat non ei qui negat incumbit probatio*,<sup>15</sup> namely, he who seeks the aid of a court should be the first to prove that he has a case and that in the nature of things it is more difficult to prove negative than the affirmative. Presumption of innocence is a human right as envisaged under Article 14 (2) of the ICCPR, 1966.<sup>16</sup> Article 11(1) of the UDHR, 1948 also provides that any charged with penal offences has a right to be presumed innocent until proved guilty according to law in a public trial at which he has

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<sup>13</sup> Harish Chander, *The Indian Penal Code A Critical Commentary* 5 (Eastern Law House, Kolkata, 2017).

<sup>14</sup> K.D. Gaur, *Criminal law Cases & Materials* 100 (Lexis Nexis, Gurgaon, 8<sup>th</sup> edn., 2015).

<sup>15</sup> Phipson on Evidence, 90 (11<sup>th</sup> edn., 1970).

<sup>16</sup> International Covenant on Civil and Political Rights, 1966, art. 14(2).

had all the guarantees necessary for his defense.<sup>17</sup> This is the fundamental principle of criminal jurisprudence as it is believed that it is better to allow an accused to go scot free rather than punishing an innocent. This principle became a fundamental part of Criminal Law of India in *V.D. Jhingan v. State of Uttar Pradesh*<sup>18</sup> in which it was held, the cardinal rule of our criminal jurisprudence that the burden in the web of proof of an offence would always lie upon the prosecution to prove all the facts constituting the ingredients beyond reasonable doubt. If there is any reasonable doubt, the accused is entitled to the benefit of the reasonable doubt. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Also the rule as to burden of proof in criminal cases is that the onus of proving that the accused not only committed the guilty act, but also did so with a guilty mind, necessary to constitute the crime charged, rests upon the prosecution throughout a criminal charge and never shifts to the defence.<sup>19</sup> In other words it is left to the prosecution to prove the existence of all the facts necessary to constitute the offence charged beyond reasonable doubt, and if there is any reasonable doubt regarding the guilt of a person charged with a crime, the benefit of it is given to the accused. For instance, in a recent case, *Bibuishan v. State of Maharashtra*, the Supreme Court, while allowing the appeal reversing the order of the High Court convicting the accused for rape under sec 376 read with sec 511 of the IPC, 1860 held that the benefit of doubt should be applied in favour of the accused where the charges against him are not proved beyond reasonable doubt.<sup>20</sup> So, in the offences of Stalking and Voyeurism where it is more significant for the burden of proof to lie on the prosecution, the onus of proving innocence in the new law is emphatically reversed i.e. now it lies on the accused. Henceforth, the new offences like aforesaid seems to be in contravention with the fundamental principle of criminal jurisprudence and in that context the principle would now mean Guilty until Proven Innocent. It is to be understood that the fundamentals are created before giving birth to any law so that there is uniformity in making of laws. The another essential of criminal trial says that the prosecution must prove the commission of crime beyond reasonable doubt but in serious offences like voyeurism what can be seen is, the burden of proof has been reversed and as a result it now ensure more possibility of conviction. It is clear that the standard of reasonable doubt exists for the protection of the accused and implicit in it is the understanding that since it is the prosecution that brought the case, they must take full responsibility to prove that there remains no reasonable doubt that the accused did in fact commit the crime for which they are charging him with.

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<sup>17</sup> Universal Declaration of Human Rights, 1948, art.11(1).

<sup>18</sup> AIR 1966 SC 1762.

<sup>19</sup> In *Woolmington v. Director of Public Prosecution* [1935] AC 462. Woolmington was charged with the murder of his wife. He did not deny that he had shot her, but he stated that the gun had gone off accidentally while he was endeavouring to induce her to live with him by threatening to shoot himself. The House of Lords quashed the conviction and held that the prisoner is entitled to the benefit of doubt. If the jury is either satisfied with the accused's explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.

<sup>20</sup> Cr App No 1262 of 2007 decided on 19<sup>th</sup> September, 2007. The Supreme Court, after examining the evidence of the doctor and upon satisfaction that there was no bodily injury to the prosecutrix and relying on the deposition of the doctor that the prosecutrix was habituated to sexual intercourse, took the view that the high court and the trial court had not correctly appreciated the evidence.

It is evident that the entire structure of the case depends upon the charges framed by the prosecution and in the offences like Stalking and Voyeurism it is contended that even though the accused had no *mens rea* still it becomes problematic and difficult for him to prove the absence of the same. For instance, if a person is accused of stalking a woman through her facebook the accused though know he doesn't have any *mens rea* but there exists no procedure, standard or guidelines by which he can prove the absence of malicious intent. Most importantly no basic criteria has been mentioned for the offence of stalking and thereby simply the prosecution has to assert that the supposed act amount to proposed crime i.e. zero responsibility is levied upon them to establish the accused as guilty. So what is to be understood is that when the deciding factors like to show disinterest in case of being stalked and no consent of being viewed while carrying out an act of privacy is in the hands of the victim so the onus to prove the presence of the act should also be on them. Let's take another example regarding Voyeurism, if a woman gives her consent to a man to see her while carrying out private act and later on files a frivolous complaint then there remains no way with the accused to prove the presence of any consent. Henceforth, the filing of the complaint by the woman shows that she is not accepting of giving of any consent. So, it is very essential that the burden of proof should lie on the prosecution to prove the guilt and set guidelines should be there for the accused to prove the absence of signs of disinterest or the presence of consent on the part of the woman. Henceforth, it is crystal clear with the reversal of the burden of proof, the only requirement from the side of prosecution is to just bring the charges and the rest burden lies on the accused. This increases the scope of filing of the frivolous complaints to harass the accused as the complainant would be aware that the entire onus will be on the accused. And this appears to be the violation of the principle of justice since it is the well established principle that no one can be convicted on the mere establishment of an allegation. Hence the amendment in the criminal law regarding section 354C and 354D appears to frame certain questions which needs to be answered and the most significant question is the use of the word "Any men" in both the aforesaid sections. Throwing light on these two words a question that needs to be answered is "why men"? For that it needs to be understood that law has given a mandate to be applicable equally to every person in a particular society without any injustice being caused to the others. But the aforesaid two offences convict and portray only men as stalkers and voyeurs that means Stalking a man would never implicate a woman as such an act by a woman is not considered as an offence. So, the lacuna which the Indian Legislature needs to analyze is that when an act is not declared as a wrong how can one seek remedy for the same and this should be kept in mind while making laws for the protection of rights.

The next section deals with the trafficking of person i.e. 370 and 370A which has substituted the earlier section 370 into the two aforesaid offences. And the section clearly mentions whoever for the purpose of exploitation (a) recruits (b) transports (c) harbors (d) transfers or (e) receives , a person or persons , by using threats or using force or any other form of coercion or by abduction or by practicing fraud or deception or by abuse of power or by inducement including receiving or giving of payments in order to achieve the consent of any person having control over the person recruited, transported, harbored, transferred or received will be punished with the imprisonment ranging from at least seven years of imprisonment for the remainder of that person's natural life depending on

the number or category of persons trafficked.<sup>21</sup> Thankfully, this provision is gender neutral and hopefully is capable of protecting rights of the various sections of the society including the vulnerable section i.e. women and children.

## 1.6 Rape

Last but not the least is the amendment that has been made under section 375 and 376 of the Indian Penal Code, 1860 i.e. Rape. After *Nirbhaya's*<sup>22</sup> gang rape case of Delhi, there was immense concern about the safety of woman in India which led to prolong agitation by people in India particularly in Delhi.<sup>23</sup> So the earlier section 375 did not deal with any comprehensive definition for penetration but the amendment to criminal law has overcome with this lacuna as well and now it provides for a comprehensive definition, which precisely says,

A man is said to commit “rape” if he-<sup>24</sup>

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,-
  1. against her will
  2. without her consent
  3. 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.
  4. 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.
  5. 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 he gives consent.
  6. with or without her consent, when she is under eighteen years of age.
  7. when she is unable to communicate her consent.

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<sup>21</sup> The Criminal Law (Amendment) Act, 2013(Act 13 of 2013), s. 8.

<sup>22</sup> *State v. Ram Singh*, AIR 2014 SC 1649.

<sup>23</sup> AIR 1953 SC 404.

<sup>24</sup> The Criminal Law (Amendment) Act, 2013(Act 13 of 2013), s. 9.

Though this section now provides for a comprehensive definition of penetration and makes it clear that penetration now means “penetration to any extent”, and lack of physical resistance is immaterial for constituting an offence. Also it defines penetration yet it is not free from criticism and the major criticism of this section is that it has become more illogical by the explanations. For instance, if a person forcefully inserts a carrot in the mouth of a woman and try to depict her giving oral sex, such a conduct may be outraging the modesty of a woman and by no stretch of imagination can it be termed as rape. So, the very obvious question that arises here is that is it reasonable, fair, just or rational to consider as ‘rape’, acts other than the peno-vaginal intercourse that are incapable of medical corroboration, when the sole testimony of the prosecutrix is sufficient to convict?

Now, it would suffice to say that chiefly the following changes have been brought for rape by the Criminal Law (Amendment) Act, 2013:

- i) the definition of section 375(a)- 375(d) has been widened and now it includes the non-peno-vaginal acts that are incapable of medical corroboration;
- ii) the age of consent has been raised from 16 to 18 years of age making every case of sexual intercourse or intimacy with a woman under 18 “statutory rape” or “rape of a minor”;
- iii) in the cases of adult rape as well, the term consent has been given a very constricting and easy to abuse meaning in Explanation 2 of section 375 making it almost impossible to establish the charge by circumstantial evidence;
- iv) the discretion of the court to award less than 7years of punishment for good and adequate cause, in any situation at all, has been taken away by repealing the previously proviso to section 376(1) and 376(2).

Henceforth, the plain reading of the amendment under sec375 signifies that the present definition of rape wrought in the 2013(Amendment) make it easy to subject an accused to a prosecution the mere circumstance of his having been alone with the woman, who may, for the extraneous reason files a complaint, since no medical corroboration is required or possible for the non- penetrative acts that are being included in the definition of rape under section 375. In addition to this there is no denying the fact that the idea of punishment in the criminal law is based on the principle of proportionality that precisely means that the punishment of the offender should be in consonance with the severity of the crime which h/she has committed. So when such is the principle, the obvious question that arises, is the minimum mandatory sentence of 7years not contrary to the principle of proportionality and judicial discretion? Also if one will consider section 375 then the inherent danger of the legislative approach taken by 2013 act, and the vast scope of its abuse can be illustrated, as section 375 provides that a man commits “rape” if he “manipulates any part of the body of a woman so as to cause penetration into....any part of the body of such women, or makes her to do so with him or any other person.” By this definition the sole testimony of a woman that a man forced her to put her finger into her own ear would be sufficient to constitute rape and would then result in mandatory imprisonment of 7years of the convicted man. And also most importantly in the exaggerated definition of rape are the words “she is not able to communicate her consent”

not vague and liable to abuse in the absence of any specification as to the nature of the inability to express consent?

### **Imposing harsher punishments and death penalty**

The Criminal Law (Amendment) Act, 2013 not only introduced new offences or changes in existing offences but it has also imposed much higher and severe punishments if a person commits any sexual offence. After the rape of Nirbhaya, there were demands to impose harsher punishments for committing sexual crimes. Cardinal principle of applied practical criminology enunciate that crime can be controlled or prevented only if adequate punishment commensurate with the gravity of the offence is meted out to the accused at the earliest. The deterrence depends on adequacy and immediacy of conviction. Even the advocates of reformist approach in criminology would call for adequate punishment, once it is established that the offender is guilty of the crime, especially in such a situation where he has not only committed a heinous crime also deprived the basic human rights and dignity of the victim in such a way that it can never be mended or replenished.<sup>25</sup>

Death for rapist has become a familiar theme in Parliament whenever the matter comes up for discussion in the wake of large-scale rapes taking place in the country. But harsher punishments no matter how harsh, is not going to solve the problem. Even the death sentence is also not going to solve the problem because it is too severe. Awarding death penalty appears to be a solution to complex problem. The most hotly contended issue involving death penalty is whether it serves to deter people from committing rape. Death sentence has been there for centuries for murder and yet murders keep on increasing day by day.<sup>26</sup> Despite its questionable deterrent effect, some advocates argue that death penalty can effectively restrict criminality; at least it ensures that the convicted criminals never get the opportunity to commit the same crime. However, this contention is untenable as modern criminology identifies reformation of the convict but not retribution. Thus, justice demands removing such a person from society till he can be cured; not that he be removed from the world itself.<sup>27</sup> The Malimath committee on reforms of Criminal Justice System states that death penalty could be in fact counter-productive. It would give the rapist the idea that if the same penalty applies to murder and rape, he might as well kill the victim and thereby do away with the only witness in the crime. The legislative object for not awarding death penalty in the I.P.C before amendment was for preservation of the life of the victim rather than that of the accused.<sup>28</sup> Moreover, Rape is a crime of passion which is mostly unplanned and is committed on sudden impulse so there can be no deterrent effect on the victim while committing the crime. It is apparent that death penalty does not deter crime but it is likely to further reduce the chances of conviction.<sup>29</sup>

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<sup>25</sup> P.M. Nair, "Crime and Punishment of Rape" 7 *C.B.I. Bulletin* 33(1999).

<sup>26</sup> Anirudh Rastogi and Pupil Srivastava, "Death Penalty for sexual offences: Easy alternative but difficult consequences" 42 *Mainstream* 25(2004).

<sup>27</sup> *Ibid.*

<sup>28</sup> M.V. Rajesh, "Rape and Punishment" 2 *K.L.J* 12 (2000).

<sup>29</sup> Naresh Pareek and Kunal Kumbhat, "Death penalty for Rape" 11 *Cr.L.J* 219 (2005).

Thus making the sentence harsher may not help but some measures like fast-tracking rape-cases and over-haul of our value system will certainly help.<sup>30</sup> Since the legislature has already taken adequate measures, there is hardly any justification for death punishment, which, in fact, might be retrogressive, instead of having any deterrent effect. It might even bring down the rate of conviction further. A judge would prefer to acquit an accused of rape instead of sentencing him to death.<sup>31</sup>

## Conclusion

These amendments implemented in the Code, are result of many debates, protests and recommendations by various committees. But, the basic problem with these amendments is that they rely on deterrent theory of harsher punishments which sometimes may not correlate with the crime committed. Global experiences have confirmed that it is not the severity of the punishment, but the certainty of the punishment which brings down crime in any society. Harsher punishments are no guarantee to the reduction of crime. Also, it has been seen that instead of removing the infirmities in our criminal justice system, the tendency is to add draconian provisions to each such law, ineffective implementation of which agitates the public; and, leads to disenchantment with the law and order machinery. Instead of strengthening and professionalizing the institutions responsible for providing safety to citizens and delivering justice, the resort is often to knee jerk alteration of legal provisions that trample on the sacredness associated with due process requirement. No doubt, the stated aim of feminism is to assert the principle of equality and the Indian Constitution recognizes that women suffer a great deal of disadvantages in our society and hence need special measures for their protection. With that in view, several special laws have been enacted to strengthen the rights of women in areas where they get unfair treatment. However, such special measures should not end up being so heavily weighted against men that they defeat the very purpose of delivering justice and instead trample on the rights of men and their families, especially those that are wrongly implicated. Gender equality should mean equality before law. Women don't constitute a homogenous category in India or anywhere else in the world. On the one hand, India has women without education, living in grinding poverty and lacking support systems. And, on the other hand, there are growing classes of women from elite educated families who have been given all the opportunities to compete with men and even come out winners. In between these two extremes are a whole range of women with varying degrees of advantages and disadvantages. To assume the same level of victimhood for all categories of women and to place the same lethal weapon by way of draconian laws in the hands of all women without regard to their circumstances while assuming all men are always wrong doers and exploitative of women under all circumstances amounts reverse discrimination which can have lethal consequences.

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<sup>30</sup> Arvind Narrain, "Sexual Violence and the Death Penalty" 3 *EPW* 38(2014).

<sup>31</sup> Nisshant Laroia and Devanshi Dalal, "Critical Commentary on the Gender- Bias Route of Sexual Harassment Laws in India: Examining the Pro-female Tilt & its Consequences (with special reference to sec 354C and 354 D of the Indian Penal Code)" *IJTRA* 2 (September 2015).