

**COMBINED COMMENTS OF DELHI AND BANGALORE GROUPS ON THE
PROPOSED AMENDMENTS TO CRIMINAL LAWS RELATING TO SEXUAL
ASSAULT**

**(to be read with Delhi groups comments on the tabular version of the Bill; and PLD's
note on legal responses to acid attacks)**

I: SEXUAL ASSAULT

A. **The Bangalore Groups**, though as a whole are agreeable to the changes in rape laws, however, certain concerns were expressed:

1. To make sexual assault gender neutral in non custodial situations is not based on any empirical evidence. There is no articulation of the fact of sexual assault by women on men and it is difficult to understand the motivation or the logic in extending the net of perpetrators to women in non custodial situations. There was deep suspicion of the logic and rationale of making women liable to criminal sanctions as perpetrators across the board especially when there is no evidence of the same. **As such sexual assault in non custodial situations should continue to be gender specific with the law recognizing that only men can perpetrate this offence.**
2. Concern was expressed on the term 'penetrate for a sexual purpose' in Sec 375(a). What the phrase in effect does is to raise the threshold of proving sexual assault to an impossible level. The problem with the introduction of the need of proving sexual purpose is two-fold:
 - Firstly the experience with the SC ST Atrocities Act clearly shows that the most difficult part of the said enactment is to discharge the burden that the offence was committed with an intent to humiliate and intimidate a member of the Scheduled Caste. In fact the low conviction rate under the SC ST Atrocities Act flows out of this high threshold requirement. A compelling illustration of the same is the fact that even though the perpetrators of the Khairlanji massacre were tried under both the IPC provisions as well as SC ST Act provisions they were acquitted of all offences under the SC ST Act and convicted under the IPC provisions thereby pointing to the difficulty of establishing 'intent to humiliate and intimidate a member of the Scheduled Caste'. Similarly it is highly probable that future cases under this provision will result in acquittal merely because the prosecution will be unable to discharge the high evidentiary burden of showing that a sexual assault was perpetrated without consent and 'with a sexual purpose'.
 - Secondly the phrase 'sexual purpose' stands on a different footing from even 'sexual gratification'. One is forced to conclude that one of the understandings of 'sexual purpose' would be sex for the purpose of reproduction as compared to 'sexual gratification' which means for sexual pleasure. If that is so, the wider meaning of sexual assault as encompassing all forms of penetration would be defeated by this phraseology as it is probable that any sex which is non penile vaginal would definitely be construed as not for a 'sexual purpose'. Further the

very idea of moving from the offence of rape in the 1860 Penal Code to sexual assault is to see the crime as not one of sex but a crime of violence. Introducing the requirement of proving 'sexual purpose' in effect defeats the entire purpose of the Criminal Law Amendment 2012 and renders it an exercise in futility.

3. Concern was also expressed on the retaining of marital rape. This provision is totally opposed to the equality and non discrimination provisions of the Indian Constitution.
4. The raising of the age of consent under Sec 375 'sixthly' to eighteen is again fraught with dangerous consequences. When young people are engaging in intimate and sexual relationships at younger ages often against the will of their parents, the possible misuse of provision 'sixthly' needs to be considered. While there is the reality of communal and moral policing particularly when it comes to young people from different religions and castes falling in love and running away, the raising of the age of consent to eighteen gives parents an easy tool with which to prosecute young lovers who go against parental dictates of 'arranged marriage within the fold of one caste/religion'.
5. The proposed amendments should also factor in the way it would affect the other provisions of the Penal Code. In particular, it should be noted that the proposed amendments by defining sexual intercourse broadly so as to include both oral sex as well as anal sex have in effect covered the gap in the understanding of rape in the Indian Penal Code of 1860. This means that one of the reasons for retaining Section 377 namely that it is the only law making non consensual sexual acts a criminal offence does not stand any more. Further if the proposed amendment is read along with the criminalisation of penetrative sexual assault perpetrated on children under the Protection of Children from Sexual Offence Act 2002, then the logic of Section 377 being the only law to criminalize sexual assaults on children is also negated. Thus the only remaining purpose the law serves is to persecute consensual intimate acts between adults in private. This remaining legislative rationale of Section 377 is contrary to a constitutional guarantee of equality, dignity and privacy for all and therefore the Criminal Law (Amendment) Act of 2012 should forthwith repeal Section 377.

B. The Delhi women's groups expressed some of the similar concerns:

1. The Sexual Assault provision needs to be gender specific, i.e. the perpetrator should be male, and the victim however, should be gender neutral.
2. The definition of aggravated sexual assault needs to be enlarged.
3. There should be a series of graded offences – penetrative and non-penetrative sexual assault
4. 'sexual purpose' as used in Section 375 (amended) needs to be changed to sexual intent
5. Consent needs to be defined
6. Age of consent, which as per the amendment is 18, should be 16
7. The exception to section 375 should be deleted, thereby making marital rape an offence
8. 'Authority' in Section 376 (2) (e) needs explanations and illustrations

9. Position of Delhi groups generally was that the term “dominance” under Section 376 (2) (i) must be defined, otherwise it is vague.
10. **Position of PLD with regard to Section 376 (2) (i)**: this section views certain kinds of sexual assault as deserving of higher sentence as they are aggravated for different reasons; this one it seems is on account of excessively unequal power relations between the perpetrator and the victim, in ways other than those listed under 376(2). However, penal provisions must be **very strictly and clearly** defined if they are to be implementable (to minimize abuse of the law). The category of inequality proposed here is so vague that it is not implementable. The problem will not be solved by defining ‘dominance’ alone. How are “social, or economic, or political” to be interpreted? There is no reference to constitutionally recognized terms like SC/ST, so this category could not intend to have covered these; besides there is a special law for SC/ST. What does this refer to then? Even sociologists will debate on who might be socially or politically inferior or superior in a given context on a case to case basis – particularly in India... and a magistrate is no anthropologist or sociologist. This provision requires (as it reads presently) domination on any single axis to be attracted; but what will happen if the victim is seen as more dominant on the other two axis? We feel this will bring extraneous and political arguments to prolong the case to the detriment of the victim, and will create unhelpful jurisprudence. We suggest deletion of the provision.
11. Two fingers test not admissible for sexual history and any doctors conducting it to be punished.
12. Sectarian violence (ethnic, caste based violence etc) to be included
13. Need to introduce responsibility of a person in command/ responsibility of a public servant.
14. Coercive circumstances to be brought in as a part of aggravated sexual assault and security forces
15. Process for medical procedures and medical examinations needs to be laid down (medico forensic procedures)
16. A specific directive to be given to the hospitals

II. ACID ATTACK

- A. The Bangalore Women’s Groups agree with the introduction of Sections 326 A and 326 B. Though they have NOT mentioned any concern about the section being gender neutral, however, they state that the introduction of acid attacks is a much needed legislative response to the horrific pattern of attacks by men on women which has been happening with impunity till now. One hopes that this strong legislative response combined with strong implementation will stamp out this pattern of horrific attacks.
- B. Amongst the Delhi Women’s Groups, there are two views on the gender neutrality of the acid attack provisions. One view suggests that by making the law gender neutral, it refuses to acknowledge that these are gender specific attacks and that there is a systemic targeting of women which takes place when a woman repels a man’s sexual advances. The gender neutrality of acid attacks poses the danger of *destroying the jurisprudence* that will come out of this section. The perpetrator should be male and victim should be female. The opposing view was that there can be a situation where persons who belong to sexual minority groups or men are attacked by acid and such a situation also needs to be accounted for, whereby these victims should have access to

S. 326A. It was expressed that if the victim was not made gender-neutral then he/she would be excluded from the compensation. The proponents of the gender specific option responded that transgender and male victims can prosecute under grievous hurt and other provisions, and seek compensation under Section 357 Cr.P.C. A third option suggested was that the perpetrator could be male and the victim could be any person, as in the sexual assault amendments.

Thus, three positions have been put forth:

- 1) Where the section requires that the victim be gender neutral and the perpetrator be a man
- 2) Where the victim is a woman and the perpetrator is a man
- 3) Both the victim and the perpetrator be gender neutral, that is retain the provision as it stands

There was also discussion on 'fine which may extend' to 10 lakh. The question was whether there should be a minimum amount to be paid. One suggestion was that in the event of the perpetrator being unable to pay, it will be stated that the state will have to pay a minimum of 2 or 3 lakh and this amount will be reviewed every 5 years. This compensation has to be delinked from trial. It was also argued that the focus of the law should be to provide immediate relief to the victim in terms of medical treatment, apart from punishing the perpetrator.

PLD's position is that the provision be gender neutral, and additional suggestions to ensure victim specific relief be suggested. PLD also feels that the compensation provision should make specific reference to section 357A CrPC. See PLD's note attached.

Another point put across was with regard the term 'hurt' used in the short note as this would link it to Section 325 IPC and would lead to an incongruity. It was discussed that the language of the section allows one to move away from hurt and grievous hurt to encapsulate the damage that acid attacks cause and by allowing the short note to say hurt, the usage of this section will become problematic due to the linkage that will be made with S. 325. (*Vrinda, can you elaborate this position more clearly, indicating what you propose instead.*)

Additional Suggestions by Delhi groups:

- A. It has also been suggested that provisions with regards to witness protection should be introduced
- B. There was a strong demand for the removal of the archaic phrase of 'outraging the modesty of a woman' and replace it with 'violation of the bodily integrity of the woman' and make it a graded offence including stripping, disrobing, etc and make the perpetrator gender specific (male). There were concerns that in cases of 'mob punishments' like parading naked etc, women also could be involved but it was pointed out that women accused could be charged under Section 34, IPC under the rubric of common intention and brought to book. Similar demands have been raised in the context of Section 509 (word, gesture or act intended to insult the modesty of a

woman) wherein the phrase 'modesty of a woman' should be replaced with sexual harassment along with making it a graded offence again to include cases of non-contact sexual harassment like stalking, blackmailing via electronic media like MMS, etc.

PLD's Note on section 160 IPC

Present Section 160 of Cr.P.C. reads as follows:

“.....Provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than the place in which such male person or woman resides.”

As per the proposed amendment, the words “under the age of fifteen years” are to be replaced with “under the age of eighteen years or above the age of sixty-five years”.

After the amendment the provision reads as follows:

“.....Provided that no male person **under the age of eighteen years or above the age of sixty-five years** or woman shall be required to attend at any place in which such male person or woman resides”

This expands rather than restricts existing protections, possibly with an eye on 498A. PLD accepts the amendment proposed.