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The Sexual Assault Discourse: Deontology and Disorder

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Introduction

The Criminal Law Amendment Bill, 2013, passed by Parliament in March, presents a mixed bag. On the one hand, voyeurism and stalking have been classified as offences, members of the armed forces have been made culpable for acts of rape and consent has been defined very narrowly as an unequivocal, voluntary agreement. On the other hand, the proposals to introduce gender-neutral rape provisions and criminalise groping have been rejected. Marital rape has not been criminalised and the age of consent has been increased to eighteen years.

It is important to analyse the legal parameters that could ensure sustainable safety for women. This Issue Brief compares the Indian legal position with that of four other jurisdictions—the United Kingdom, Singapore, South Africa and two states of the United States—regarding provisions made for penetrative and non-penetrative sexual offences, marital rape, age of consent and gender neutrality. These countries have been chosen as representatives of developing democracies (South Africa), relatively safe yet patriarchal societies (Singapore), and both unitary and federal developed democracies (the UK and the US respectively). The Brief keeps in mind that differing socio-economic conditions may have some bearing on the kind of solutions a government would opt for when dealing with sexual violence.

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History of Rape Laws

The offence of rape was first identified as the theft of a man's property. The woman belonged to her father or husband, and to have intercourse with her was to deprive the father of a suitable bride price and the husband sole ownership of his wife's body. As women became the keepers of society's honour, it became a slur on a family's dignity and a woman's modesty to have been defiled by another man.¹ This belief continued long throughout history, until as recently as 1945, when countries started reforming rape laws. In an analysis of worldwide rape law reform, Franck, Hardinge and Wosick-Correa noted that the growth of individualism in the post-war era led to the newfound classification of both offenders and, more significantly, victims as free standing individuals. Rape, therefore, was no longer an assault on the family but on the individual, her body, and her modesty.² It took many waves of feminism to do away with the criteria of modesty, which stands upon a patriarchal bedrock refusing to recognise the concept of individual autonomy and bodily integrity³ and relies on the inspection of the victim's past sexual behaviour. Unfortunately, this progress was not uniformly undertaken by all countries. Even today, India has a separate provision for outraging the modesty of a woman.

The Necessity of Stringent Laws

Rape is a unique crime. It is not only a physical violation of a person's body, but also an assault on the autonomy of the person. Sexual intercourse and sexual touching are acts to which a person may, under certain circumstances, agree and even derive pleasure from. There is, therefore, a question of choice and consent involved, which does not exist for other crimes. The law does not let someone consent to being murdered (euthanasia debates apart) but both law and society have space for two people to engage in consensual sexual activities in private. In fact, sexual offences are the *only* crime in which the question of consent is actually involved. Therefore, when a person chooses to ignore the will of the other person in a situation where the victim had the option to accept or decline, that person is injuring the victim twice over.

Securing Safety through Laws

The wave of feminism in the 1970s saw radicals like Catherine MacKinnon asking for an overhaul of societal structures, particularly of legislatures and courts, so that the drafting and interpreting of laws could be more gender-friendly. This led to an increasing dependence of women on laws as a path to justice in the case of sexual offences. They hoped that by criminalising certain behaviours society could be made a safer place. However, this dependence was created without the requisite overhaul, making women dependent on mostly male legislatures to draft laws often enforced by insensitive and chauvinistic police forces and interpreted by a largely patriarchal judicial system.⁴

Definitional Dichotomies

To have a comprehensive understanding of rape it would be useful to begin with differences in definitions across jurisdictions. Variouslly termed as rape, sexual assault or sexual abuse, the scope of and sentences for penetrative sexual offences differ widely. The Bill in India has chosen to define rape as penetration of a woman's body by a man with any part of his body or any object or applying his mouth to the vagina, anus or, urethra of a woman.

Table 1: DEFINITIONS OF AND PENALTIES FOR SEXUAL OFFENCES AND HIGHEST PENALTY AVAILABLE.

	Penetrative Sexual Offence		Non-Penetrative Sexual Offence		Highest Available Penalty
	Definition	Sentence	Definition	Sentence	
India	Rape: Penetration to any extent with penis, other body part or object into anus, vagina, urethra or mouth; Applying mouth to penis, vagina, anus or urethra	Rigorous imprisonment for minimum seven years that may extend to life imprisonment.			Death Penalty
United Kingdom	Rape: Penile penetration Assault by Penetration: Penetration with any body part or object	Life Imprisonment	Sexual Assault: Sexual Touching	Imprisonment for Ten Years	Life Imprisonment
Singapore	Rape: Peno-vaginal penetration Sexual Assault by Penetration: Penile penetration of anus or mouth, Object penetration of vagina or anus.	Imprisonment for a term up to 20 years			Death Penalty
South Africa	Rape: Penetration into a person's genitals, anus or mouth, with the genitals or any part of the body of the accused, or any object or any part of the body of an animal	Imprisonment for a minimum period of 15 years for the first offence, 20 years for the second offence and 25 years for the third and any subsequent offence	Sexual Assault: any kind of sexual touching, of any part of a person's body, by the accused with any part of his body, or an object, or an animal that falls short of penetration but is sexual in nature		Life Imprisonment
District of Columbia	Sexual Act: Penetration, however slight, of the anus or vulva with a penis, hand, finger or any other object or any contact between the mouth and the penis or vulva or anus.	First degree sexual abuse (sexual act along with use of force, threatening or placing the victim in fear of death, bodily injury or kidnapping, rendering the victim unconscious or intoxicating or drugging the victim): Life Imprisonment Second degree sexual abuse (sexual intercourse in a situation where the victim is incapable of appraising the nature of the conduct or of declining participation in that sexual act or of communicating unwillingness to engage in that act): Imprisonment for maximum 20 years	Sexual Contact: Touching the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person with any body part or object, either directly or through clothing.	Third degree sexual abuse (sexual contact along with use of force, threatening or placing the victim in fear of death, bodily injury or kidnapping, rendering the victim unconscious or intoxicating or drugging the victim): Imprisonment up to 10 years and a fine of \$100,000 Fourth degree sexual abuse (sexual intercourse in a situation where the victim is incapable of appraising the nature of the conduct or of declining participation in that sexual act or of communicating unwillingness to engage in that act): Imprisonment up to 5 years and a fine of \$50,000	Life Imprisonment
California	Rape: Sexual intercourse without consent or against the will of the victim.	Imprisonment for 3, 6 or 8 years.	Oral copulation and/or sodomy against the will of the victim	Not more than 1 year in a county jail 2, 3 or 4 years in state prison	Death Penalty

Sources: Section 9, Criminal Law Amendment Bill, 2013; Sections 1, 2, 3 and 4 Sexual Offences Act, 2003; Sections 375 and 376, Singapore Penal Code, 1871; Section 5, Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, Section 1, Criminal Law (Sentencing) Amendment Act, 2007, Schedule 2, Criminal Procedure Act, 1977; DC ST § 22-3001, 22-3002, 22-3003 and 22-3004, District of Columbia Official Code, 2001; Sections 261 and 264, California Penal Code, 1873.

There is a wide range of punishments provided for, ranging from seven years to life imprisonment. Being of common law jurisdiction, the legislature does not specify the exact punishment through sentencing guidelines. It is for the courts to devise the right sentence on a case to case basis, creating the possibility of arbitrary and discrepant sentencing across courts. South Africa, while defining various sexual offences thoroughly, has not prescribed any minimum or maximum sentence, leaving this completely to the discretion of the courts. This leads to the same problem of discrepant sentencing. Singapore, on the other hand, has not classified non-consensual sexual touching as an offence. The State of California, which saw the highest number of reported rapes in the US in the past one year, sets the minimum sentence at a mere three years. (See Table 1)

Poor Enforcement Mechanisms

The debate surrounding rape laws encompasses two major issues—the framing of broad and comprehensive laws and an efficient enforcement mechanism. Within enforcement there are three subissues—reporting, investigation and prosecution.⁵

Reporting becomes an 'issue' while enforcing rape laws because of the hesitation to register complaints. This hesitation arises only in situations where it is easier for a victim to swallow her grief rather than approach the authorities. The media reported the horrific incident in which police officers in Punjab harassed a victim with such indecent questions that it drove her to suicide.⁶ The National Crime Records Bureau showed a conviction rate of only 26.4 for rape cases in 2011.⁷ Studying the withdrawal of rape cases in a regional court in South Africa, Vetten and Motelow found that most cases were withdrawn due to maladministration of court procedures and police inefficiency.⁸ Given the situation, it is hardly surprising that most cases of rape go unreported.

It is questionable whether lower incidences of reported rape indicate a safer environment for women. As Denise Snyder, Executive Director of the DC Rape Crisis Centre put it, “With sexual assault, seeing higher numbers should often be interpreted as a positive sign, if it means that more women are feeling comfortable to step up and say 'I was raped and I demand justice!'.”⁹ Studies indicate that as gender parity increases in both private and public spheres (workplaces and households) there is a social backlash that expresses itself in terms of an increasing number of rapes.¹⁰

Table 2: RAPE STATISTICS

	Number of reported rapes in 2011	Population in 2011
India	24,206	1,028,737,436
United Kingdom	16,041	63,200,000
Singapore	4,787 (total crimes against persons)	5,183,700
South Africa	56272 (rape + sexual assault)	50,586,757
United States of America	75341	311,800,000

Sources: National Crime Records Bureau; Office for National Statistics; Crime Situation for 2011, Singapore Police Force; Crime Report 2010/2011, South African Police Service; Uniform Crime Report 2011, Federal Bureau of Investigation

It is possible to fiddle with statistics in order to show a trend of increasing reportage, decreasing total numbers, or a small ratio of rapes per person. The mere fact that rape statistics are figuring in the thousands should be a reason for great alarm. It is perhaps true that a higher number of reported rapes show that victims are gaining the confidence to speak up, but this development is completely eclipsed by the sheer number of rapes taking place.

Evidence Collection

It is not easy for a rape victim to submit to evidence collection. So soon after one's bodily integrity has been attacked, it is particularly traumatic to allow a stranger to touch and examine all areas of the body yet again. It is an activity that doctors and counsellors need to carry out jointly, sensitively, not as another routine job. Yet, it is a mark of how horrifying the crime is that such examination is absolutely necessary to collect evidence. The second round of trauma is the first step towards justice. It is, therefore, particularly unfortunate when collected evidence is left untested.

The process of evidence collection involves using a cotton swab to collect evidence from the vagina, noting bruises on the body, and collecting hair and other fibres left on the victim and at the site of the crime. It is much more invasive for the victim than the accused, who is asked to provide DNA samples only much later.¹¹ Evidence collection in India also includes the “two-finger test”, to check the laxity of the vagina, which some activists have termed as 'second rape'.¹²

In the US, rape kit costs, unavailability and improper implementation have presented huge problems for rape survivors in their search for justice. The Violence Against Women Act of 2005, which came into effect in May 2009, requires state governments that want to continue receiving federal grants to pay for anonymous rape tool kits, a process where data collected from the victim is disclosed only to very few people.¹³ However, in far too many cases, evidence collected remains untested in laboratories, preventing the prosecution from providing sufficient incriminating evidence. California has the largest backlog of untested rape kits lying either in storage facilities or submitted to crime labs but not yet examined.¹⁴ In Washington, D.C., not only are rape kits short in supply, but there are not enough hospitals staffed with specially trained staff, and the victim is expected to receive police authorisation before being examined.¹⁵

Well-meaning websites throughout the UK inform the public about what to do in cases of sexual attack—the list sounds like something you would use in a torture cell: do not bathe, do not brush your teeth, do not eat, do not change your clothes, do not go to the toilet.¹⁶

Yet, the victim's body is the scene of a crime in sexual offences and needs to be thoroughly examined. It is regrettable that after such intensive disregard of bodily integrity, a victim still often does not receive justice.

Inadequate Sentencing

Widespread sensitisation coupled with strict law enforcement mechanisms and a short trial period should help resolve this problem, but sentencing (as seen in Table 1) is far too inadequate as a deterrent. Prison sentences from three to seven years in California and India and no statutory minimum sentence prescribed for District of Columbia and Singapore means that judges can be as lenient or as harsh as they wish. South African law, however, sets an example by not prescribing a maximum term but only the requisite minimum, which is 15 years. If such a provision were to be effectively enforced, the deterrent effect of the penalty would be much stronger.

Particular Peculiarities of Rape Laws

Two groups in society face particular problems when dealing with rape law enforcement—dating couples (of both orientations) and married women.

Age of Consent

A study on the adoption of statutory rape laws in the US claims that religious conservatives and radical feminists both agreed on the need for statutory protection for adolescent women. However, liberal feminists believed that young women should not only be protected but also empowered to take their own decisions, and thus sought an “age-span” provision, which would allow minors above a certain age to engage in sexual activities if they so wished.¹⁷ Thus, the age of consent became an important issue.

Most countries fix the age of consent at 16 years, with a corresponding age limit for statutory rape. This allows adolescent minors to engage in sexual activities corresponding to normal hormonal growth while protecting younger children from being involved in activities whose implications they may not completely understand. It also works as a shield against paedophiles. In Singapore, the limit for statutory rape is lower than the age of consent, with a reduced punishment for offences against teenagers between 14 and 16 years of age, leaving them at a greater risk of harm, but incapable of consent as well. The D.C. approach is better. Instead of fixing an age for statutory rape, they have declared age of consent to be 16 and allowed for a space of four years within which people can consensually engage in sexual activities. This approach is more helpful than the UK model where a definite age is specified for teenage romance. Imposing such clear limits will be problematic in cases where the partners are of different ages and one crosses the age of 16 before the other. India, however, has muddled up the age span provision by increasing both age of consent and the age for statutory rape to 18, which signals the death knell for any kind of legal teenage romance.

Table 3: AGE OF CONSENT, AGE FOR STATUTORY RAPE AND EXCEPTIONS FOR DATING RELATIONSHIPS

	Age of Consent	Age for Statutory Rape	Exceptions for dating relationships
India	18 years	18 years	None
United Kingdom	16years Exception: Adults in a position of trust with person over 16 but under 18 years cannot enter into sexual activity with such person.	16years More stringent punishment for sexual offences against children below 13 years.	Consensual sexual touching between persons aged 13 years to 16 years is permissible but persons above 16 and under 18 years may not do so. A person is not guilty of abusing his position of trust with a child if a sexual relationship existed between them before the position of trust arose.
Singapore	16 years	14 years Under 13 years in case of a wife	Sexual touching is not an offence. Penetration is permissible when both parties are above 16 years of age.
South Africa	16 years	16 years	Consensual sexual touching is lawful between persons if both are under 16 and above 12 years of age and the age difference between them is not more than two years.
District of Columbia	16 years	Any person more than four years older to a person below 16 years. Enhanced penalty if the child is below 12 years.	A person less than four years older to a person below 16 years may engage in consensual sexual penetration and touching with such a person.
California	18 years	18 years	Reduced sentence if the age difference between the parties is within a gap of three years.

Sources: S.375, Indian Penal Code; S.9, Criminal Law Amendment Bill 2013, Ss.9-12, Sexual Offences Act, 2007, Ss.375 and 376A Singapore Penal Code, 1871; S.1, Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; §22-3001, District of Columbia Official Code, 2001; S.261.5, California Penal Code

Marital Rape

Marital rape was not considered a criminal offence for much of history because wives were initially considered part of their husbands' property. Later, the marriage contract was supposed to be a sign of perpetual consent.¹⁸ Presently, many jurisdictions still refuse to criminalise marital rape on the grounds that finding evidence of lacking consent within the bedroom will be difficult. There are also voices of “concern” that believe marital rape laws will be widely misused.¹⁹ A study on the likelihood of adoption of marital rape laws indicates that when many small changes are made to 'marital rape' laws a complete or major overhaul becomes less likely.²⁰ Though this view is based on empirical evidence, we can certainly link it to the Indian scenario, where both marriage and criminal laws have undergone amendments several times. On the other hand, we can also simply link India's acceptance of this offence as a clear symptom of the insensitive, patriarchal structures that frame and draft our laws.

Disregarding ideology and making a case for criminalising marital rape solely on merits, it is rather pretentious to say that evidence collection will be difficult when sexual abuse has been made an offence under the Domestic Violence Act. It is a further sign of disregard for a woman's dignity that sexual abuse under the DV Act is merely a civil, not criminal, offence.²¹ Where a married woman does not desire reconciliation or restraining orders but wishes her rapist imprisoned, the option simply does not exist.

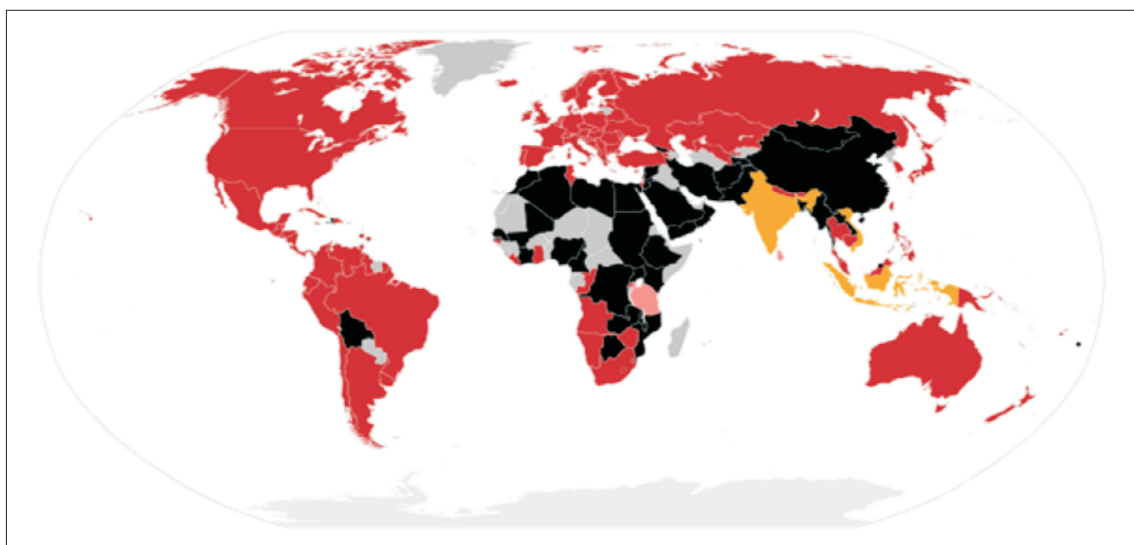
India has thus failed to live up to its international legal commitments in fora such as the Convention for the Elimination of Discrimination Against Women (CEDAW), which expects state parties to provide men and women the same rights and responsibilities throughout their marriage and the same

personal rights as husband and wife.²² When it signed the CEDAW, India also undertook to repeal all national penal provisions which constitute discrimination against women.²³ By not repealing the exception to marital rape provided in the IPC, India has been in violation of its international commitments.

Table 4: CRIMINAL STATUS OF MARITAL RAPE

	Legality	Sentence	Legislation
India	Legal except for judicially separated couples. Lower standards for statutory rape in case of child marriage. Non-criminal form of domestic violence.	Same as rape in case of judicially separated couples. Previously, imprisonment up to two years. Same as statutory rape in case of wife under 15 years. Previously, imprisonment up to two years if wife was between twelve and fifteen years. Protection orders, residence orders, monetary compensation for the aggrieved person.	Indian Penal Code, 1860 read with Criminal Law Ordinance, 2013. Protection of Women from Domestic Violence Act, 2005
United Kingdom	Illegal	Same as rape	Sexual Offences Act, 2003.
Singapore	Legal except for judicially separated couples where there is an injunction or a protection order against sexual activity between the couple. Lower standards for statutory rape in case of married couples.	Same as rape Same as statutory rape	Singapore Penal Code, 1871 read with Penal Code (Amendment) Act, 2007.
South Africa	Illegal	Same as rape	Prevention of Family Violence Act, 1993 read with Criminal Amendment (Sexual Offences and Related Matters) Amendment Act, 2007, Criminal Procedure Act, 1977 and Criminal Law (Sentencing) Amendment Act, 2007.
District of Columbia	Illegal	Same as rape	District of Columbia Official Code, 2001
California	Illegal	Same as rape	California Penal Code, 1873

Sources: S.9, Criminal Law Amendment Bill, 2013; Sexual Offences Act, 2007; S.375, Singapore Penal Code, 1871; Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; §22-3019, District of Columbia Official Code, 2001; S.262, California Penal Code



- Marital rape is criminalized
- Marital rape is criminalized only if the couple is legally separated
- Marital rape is a form of non-criminal domestic violence
- Marital rape is known not to be criminalized

Gender Neutrality

The Justice Verma Committee had strongly recommended that the Government of India should decriminalise homosexuality and ensure that people of all sexual orientations and all genders, including transgenders, should be guaranteed complete equality under the law. This would also be in tune with our constitutional obligations to provide equality to all Indian citizens.²⁴ While the Criminal Law Ordinance had taken a progressive step by making the offence of sexual assault gender neutral, Parliament has taken a step back by not enacting that provision. Rape is thus still to be understood as an attack by a man on a woman, and the law will continue to turn a blind eye to the brutalities of homosexual rape, male rape, and rape by a female. This is the most regressive of all positions within our sample group. In Singapore, while the offender can only be male, the victim can be of either sex. All other countries have gender-neutral provisions for sexual offences.

Table 5: GENDER NEUTRALITY OF RAPE LAWS

	Offender	Victim
India	Male	Female
United Kingdom	Gender Neutral	Gender Neutral
Singapore	Male only	Gender Neutral
South Africa	Gender Neutral	Gender Neutral
District of Columbia	Gender Neutral	Gender Neutral
California	Gender Neutral	Gender Neutral

Sources: Section 9, Criminal Law Amendment Bill, 2013; Sections 1, 2, 3 and 4 Sexual Offences Act, 2003; Sections 375, Singapore Penal Code, 1871; Section 5, Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; DC ST § 22-3001, 22-3002, 22-3003 and 22-3004, District of Columbia Official Code, 2001; Sections 261, California Penal Code, 1873

Finding Solutions

Filling in loopholes in the law, though necessary, is certainly not sufficient to prevent the commission of the crime. Each country needs to develop specific solutions keeping in mind the popular mentality. Uniform laws across the globe may not produce uniform results. In a society like India, widespread sensitisation is required to bring about the realisation that women require the same amount of dignity and respect that is accorded to men.

Small Practical Steps

Reducing the crime rate of a city would ideally involve dangling the stick and the carrot together—mass awareness campaigns and felicitation of “well-behaved” cities on the one hand, and severely deterrent laws and enforcement on the other. Efficient enforcement would again require sensitising the police force and awarding “citizen-friendly” police stations and taking strict disciplinary measures against officers who harass complainants or fail to register First Information Reports.

Prime-time television programmes and advertisements that put forth educational, but non-preachy messages are one way of starting sensitisation. School textbooks can also play a big role in breaking gender stereotypes by including stories and examples where women engage in typically 'male' activities and vice-versa. Awareness campaigns that point out instances of gender-equality from religious texts are also a way to gain attention in more conservative circles. However, awareness building and sensitisation will not change attitudes overnight. This is a long-term project that should target primary school students with particular vociferousness, so that the younger generations can think outside the patriarchal box. For the present, strict policing of roads, allowing shops and hawkers to populate streets late into the night, training their owners to function as police informants and engage potential harassers, and encouraging women to use public transport are some measures that could create potentially safer spaces.

Legal Overhaul

At the same time, the power of the law to change societal attitudes can definitely not be undermined. Article 3 of the CEDAW expects state parties to take all appropriate measures, including legislation, to ensure the full development and advancement of women.²⁵ Article 5(a) requires all state parties to modify the social and cultural conduct patterns of men and women to eliminate prejudices, customs and practices based on stereotypes or ideas of inferiority of either sex.²⁶ Read together, state parties have the obligation to legislate, where necessary, to modify social conducts that are derogatory to either gender. Law and sociology experts speak extensively of the constitutive quality of law in manipulating social behaviours. They consider the law to be an integral part of society and, therefore, instrumental in bringing about social change. “Lead laws” are a very valuable tool when seeking to direct society along a more civilised path.²⁷

The Verma Committee came out with a comprehensive set of proposals that covered not just immediate questions of stringent punishment but also consent and freedom, state responsibility, bad parenting, and police sensitivity. Indeed, these factors make up the very social subculture within which a rapist develops.²⁸

It would be helpful for the government to draft legislation based closely on the committee's report. Studying sexual offence laws of other countries, collecting global best practices and reconstituting them for the particularities of India would help to begin tackling these still-extant major problems.

Conclusion

The struggle for sexual autonomy and bodily integrity has been long in the making, but it is gradually increasing the scope for women from all sections of society to gain their voices and agency. The movement has now gone beyond women's rights and sexual assaults to the very roots of patriarchy,

challenging the constraints it poses to both men and women. Social media plays an active role in mobilising public opinion in this regard, but it is limited primarily to more privileged classes. Reaching out to the entire Indian population and explaining the contradictions inherent to a system that ignores the well-being of half its population remains a complex challenge. However, with some amount of dedication, reconciliation is not only possible but absolutely achievable.

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