

Reforming Sexual Offences in India: Lessons in Human Rights and Comparative Law

Simon Bronitt* and Ashutosh Misra†

Abstract: *This paper scrutinizes India's outmoded laws governing sexual offences, how they impact on women and how they deny access to justice for members of vulnerable groups in society. The authors posit that public concern over a perceived 'epidemic' of sexual violence ignores the prevalence (and immunities) granted to sexual violence that occurs within the family. The authors argue that the marital rape immunity in the Indian Penal Code (IPC), which is one of the few codes in modern democratic systems that accords males a right to rape wives with impunity, preserving an outdated view of gender relations and female sexuality that denies some women the right to denial based on marital status. The essay's comparative account reveals that Indian criminal law is seriously 'out of step' with legal developments in the UK, Australia and elsewhere. For instance, denying marital immunity to rape of child bride (under 15 years of age) and in cases, where a court has issued a judicial separation offers cold comfort to the majority of women whose husbands may still claim a legal privilege to rape. The development of rape laws in India since the 1980s, the authors conclude shows that reform invariably follows from crisis, such as the 2012 brutal rape of a physiotherapy student in New Delhi. Bronitt and Misra note that crisis-drive reforms tend to highlight the community concerns about leniency of punishment, rather than providing better laws, procedures and tools for investigation and supporting victim. The authors recommend that public debate in India must be shifted away from viewing sexual offences as crimes against public morality, decency or modesty. Instead, sexual offences reform must be viewed through a human rights prism, which is consistent with India's international obligations, seeking to eliminate both gender and sexuality-based violence and discrimination.*

* Simon Bronitt was appointed Director of CEPS at Griffith University in 2009. Prior to this appointment he was Professor of Law in the ANU College of Law in Canberra and Associate Director of the Australian Centre for Military Law and Justice, ANU. Between 2003-09 he served as the Director of the National Europe Centre – an EU funded Centre - in the Research School of Humanities at ANU. Drawing on comparative and interdisciplinary perspectives, he has published widely on criminal justice topics ranging across terrorism law and human rights, covert policing, family violence, and mental health policing. Simon Bronitt's principal publications include two leading textbooks, *Principles of Criminal Law* (3rd ed, Thomson Reuters 2010) and *Law in Context* (4th ed, Federation Press, 2012).

† Ashutosh Misra holds a PhD from the Jawaharlal Nehru University (2000) and is currently Associate Investigator at the *Australian Research Council Centre of Excellence in Policing and Security* (CEPS). Currently, he is developing two projects on 'the legality of drones under international law' and 'crime and corruption in international sport'. On the latter subject, he has successfully facilitated CEPS' collaboration with INTERPOL. He is also a visiting faculty with the National Security College at the Australian National University. Prior to migrating to Australia in 2007 he was a Research Fellow (2002-2007) at the Institute for Defence Studies and Analyses. He has published extensively including three books: *Pakistan's Stability Paradox*, (London: Routledge, 2012); *India-Pakistan: Coming to Terms* (New York: Palgrave Macmillan, 2010) and *Pakistan: Engagement of the Extremes* (New Delhi: IDSA and Shipra, 2008). He is spearheading CEPS' India-focussed research projects and forging academic and research collaboration with Indian security and policing institutions.

Introduction: Uncovering gender-based violence in India

Violence against women, including sexual violence, has been a persistent and chronic social problem within India. This has been the case notwithstanding the emergence of local reform movements in the 19th and 20th centuries that campaigned to improve the status of women and eradicate social practices that have entrenched gender inequality,¹ including the repeal of discriminatory laws and practices relating to dowry, the status of widows, child marriage, as well as demanding better education and equal political rights for women.² By the end of the century, British authorities were finding it increasingly difficult to ignore these calls for reform in light of the wider demands for political emancipation from colonial rule,³ and increasingly vocal demands from the suffragette movement on the domestic home-front.⁴ Demands for emancipation (both from Empire and Patriarchy) led women to assume leading roles in the reform movements of India, culminating in the foundation of the All India Women's Conference (AIWC) in the 1920s.⁵

India's independence from British rule in 1947 witnessed a further growth of women's organisations demanding reform.⁶ The rules relating to dowry were an early success: the Dowry Prohibition Act 1961, which was amended in 1984, strengthened the legal measures against perpetrators of dowry-related crimes.⁷ It would be fair to say that these early social movements in post-independence India were focused on eliminating the gravest social harms such as dowry-related offences of torture, murder and rape.

The key argument of this essay is that many of the laws and practices in India that denied women the same rights accorded to men were part of a colonial inheritance, rather than a product of local indigenous customs, traditions and religious practices. That said, custom, tradition and religion in India has played, and continues to play, a significant part in sustaining the subordination of women. Of course, this is not unique to India, and is a feature of many cultures. As the United Nations made clear in its 1993 *Declaration on the Elimination of Violence Against Women* (DEVAW):

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination.⁸

That religion plays a prominent role in subordinating women is particularly in India perplexing since Hinduism is replete with female goddesses, such as *Kali* and *Durga*, who were created from the synergies of the Gods to eliminate demons (evil) and were worshipped as a symbol of *Shakti* (feminine power) in Hindu mythology. However these mythological images of feminine power have done little to displace the entrenched and commonplace attitudes that devalue women in modern Indian society. As this essay concludes, it is this paradox that has been at the core of India's social system and gender relations for centuries, and continues to this day.

Sexual offences law in India: Reviewing a colonial inheritance

Until recently, the law in India recognised only a narrow range of sexual offences. Applying 19th century definitions of rape from English common law the offence was defined in gender-specific terms, namely an act of a male using his penis to penetrate a female's vagina without her consent.⁹ Using weapons or other instruments to violate a woman sexually, as occurring in the recent case discussed below, cannot constitute rape under law. This narrow definition of rape has been amended in most other jurisdictions, including in Australia and the UK, where any form of sexual penetration (whether by object or another part of the anatomy) can potentially ground liability for rape if it occurs without consent. The law even extends its protection to surgically constructed vaginas, ensuring that transsexuals are not denied legal protection. The Indian law has also continued to prioritise a traditional subjective model of fault for rape based on intention and knowledge, which enables perpetrators to raise a mistaken belief in consent to negate the liability of the accused – including where the perpetrators hold an honest but unreasonable mistaken belief in consent, for example where it has been induced by acute intoxication or discriminatory rape mythologies such as “No means Yes”.¹⁰ The controversy over unreasonable mistake defences has generated significant academic debate, and reforms in many jurisdictions including UK, Australia and Canada.¹¹ There appears to be limited attention in India on the extent to which traditional definitions of rape have played a role in shaping and excusing dangerous and discriminatory rape mythologies.¹²

In India, abuse of power by public officials to procure, often violently, sexual intercourse has been a particular concern motivating reform. In the early 1980s, the legislature inserted an aggravated offence of “custodial rape” into the Indian Penal Code (IPC). The offence applied to public officials (such as police officers) who abused their positions of trust or authority over the victim¹³. The genesis of the reform were three high profile cases of custodial rape - Rameezabee in 1978 in Hyderabad, Mathura in Maharashtra in 1980 and the Maya Tyagi in Bagpat in 1981 – which generated significant public outcry.¹⁴ A bill, passed in 1983, amending the 1860 Indian Penal Code (IPC), deemed custodial rape to be a more heinous offence than other categories of rape. Following the Delhi rape and murder case in 2012, the penalty provisions for custodial rape were further enhanced with the Criminal Law (Amendment) Bill, 2013.¹⁵ While the provision is a welcome addition to the statute-book, sadly, custodial rape stands as one of the most under-enforced offences in the IPC. The latest official national crime statistics for India reveal that there was only one reported incident of custodial rape! Further examination of the last decade of official statistics reveals that while law enforcement activity relating to violence against women across all categories has increased,¹⁶ custodial rape continues as a rarity: 2002 statistics reveal that only 3 of the 16,370 rape offences (under section 376 IPC) were custodial rapes, and a decade later, 2012 statistics reveal that custodial rape constituted only 1 of the 24,206 rape offences.¹⁷

Abusing positions of trust and authority are not however limited to public officials or police officers. Abuses of trust and authority also occurs within families for example. Recent official statistics in India reveal that in 98.2% of the cases offenders are known to the victim, and include parents, close family members and neighbours. Of greatest concern in this statistical picture is the acute vulnerability of children: of the total rape cases reported in 2012, half the victims of reported rape were children under the age of 18.¹⁸ A note of caution however is required in relation to the interpretation of official statistics related to reported crime. The prevalence of child-rape in these statistics can be explained by law enforcement prejudices and stereotypes relating to 'worthy' and 'unworthy' rape victims, and the greater credibility and police attention that is paid to 'innocent' victims rather than older and more sexually experienced victims. This dichotomy impacts upon investigator priorities but is also reinforced by the courts, since judges often accord more sympathy (and credibility) to younger and more 'innocent' types of victims. For example, in the case of *Chandraprakash Kewalchand Jain v the State of Maharashtra*, 1990, the court held that because of India's "stands of decency and morality... a woman, more so a young girl would not sake her reputation by levying a false charge concerning her chastity".¹⁹ Similar sentiments were expressed by the Supreme Court in the *Madan Gopal Kakkad v, Naval Dubey and Anr*, 1992, a case of 9 year old victim that '...having lost her virginity still remains unmarried ... and that her future chances for getting married and settling down in a respectable family are completely marred'.²⁰ By contrast, cases where the victim was manifestly not a virgin, being 'habituated to sex', and where no injury marks on the penis or body of the accused consistent with resistance by the victim were evident, the courts have tended to accord more credibility towards the alleged perpetrator's claim that the female consented freely.

In India, presenting evidence of a reputation for 'loose morals', in common with many other jurisdictions, has been a staple defence strategy in rape trials (see for example the attacks on chastity and morality of the victims in *The Mathura case*, 1980). There has been some judicial resistance to these strategies, for example, in the *State of Maharashtra v Madhukar N Mardikar*, 1991, the Supreme Court had ruled that the '... unchastity of a woman does not make her open to any and every person to violate her person as and when he wishes.'²¹ Subsequently, in the *State of Punjab v Gurmit Singh*, 1996 the Supreme Court ruled that despite being 'habituated to sex', the woman cannot be considered of 'loose moral character'. In 2003, in its 172nd report the Law Commission of India referred to the New South Wales *Crimes Act 1900*, which provides that "in prescribed sexual offence proceedings, evidence relating to sexual reputation of the complainant is inadmissible".²² Based on the recommendations of the Law Commission, which incorporated the demands of several women's rights groups, the Indian Parliament amended the Evidence Act, inserting section 146, that states that a rape victim can no longer be questioned about her sexual history and 'general immoral character', rejecting what the courts had condoned in the rape cases since the 1980s.²³

Gender violence is of course not limited to rape. The official statistics for 2012 report that there occurred 8,233 dowry deaths (section 302/304 IPC); 106,527 cases of cruelty by husbands and relatives (section 498-A IPC); 45,351 assaults on women with the intent to outrage their modesty (section 354 IPC); and 9,173 cases of insult to the modesty of women (section 509 IPC). Except for the dowry deaths, every other crime against women witnessed a rise of around 6 percent in 2012 in comparison to 2008.²⁴ The 2012 NCRB report also mentions that there were 2.84 cases occurring every hour in India (amounting to nearly one case every 20 minutes) in which 3.55 persons were arrested in 2012.²⁵

Reforms to criminal law and procedure seem to have done little to stem the tide of gender violence in India. Does this mean that these legal reforms are a failure? It is well known in criminological circles that 'official' crime reports are not an accurate estimation of the scale or type of crime in society for a range of reasons. A 'dark' figure of crime exists, which remains unreported in police official crime statistics.²⁶ International victimisation studies suggest that much crime against women and children is not reported. This means that the steady increase in the number of rapes and crimes against women that are *reported* in the official statistics may be viewed as the 'tip of the iceberg'. Furthermore, increased reporting of rape by victims may simply reflect better and more effective investigative activity.

In India there has been mounting political pressure on authorities to take prompt action when offences occur. An example of this is the widespread public outrage that spilled onto the streets of New Delhi in 2012 following a gruesome rape and beating that led to the subsequent death of a 23 year old physiotherapy student, Jyoti Singh Pandey. She had been travelling with a male friend on a bus when she was attacked by six men including a juvenile (who was seventeen years and six months old at the time of the offence). The woman died of her injuries two weeks later. The six men were arrested and tried, though the principal perpetrator, Ram Singh died in custody in March 2013 at the high security Tihar Jail in Delhi, authorities claiming it to be suicide, though media reports suggest the death may have occurred in suspicious circumstances.²⁷

Responding to public outcry around the case, the government established new fast-track courts to facilitate a speedy trial. In August 2013, the juvenile accused in this case was found guilty of rape and murder and sentenced to three years' imprisonment in a correctional home, (including the prior 9 months spent in remand). In September 2013, the four remaining accused were convicted of murder and rape, and sentenced to death by hanging.²⁸ In passing the death sentence, the trial judge made the follow remarks:

[The] court cannot turn a blind eye to such a gruesome act...when crime against women is rising on a day-to-day basis, so, at this point in time court cannot keep its eye shut...there should be exemplary punishment in view of the unparalleled brutality with which the victim was gang raped and murdered, as the case falls under the rarest of rare category. All be given death...this is a time when serious

crime against a woman has come to the fore and now its judiciary's responsibility to instil confidence among the women.²⁹

To serve as an effective deterrent, laws must be framed so as to capture the true nature and seriousness of the harm. Punishment, which must be proportionate to that harm, will only be legitimate when it follows from trial and pre-trial processes that are fair for both offenders and victims. However, the exemplary punitive message offered by the trial judge above, while promoting public confidence temporarily, is unlikely on its own to have significant deterrent effect in the longer term - indeed, there is little data to suggest that capital punishment is an effective deterrent for these types of crimes.³⁰ Recent empirical studies and reviews demonstrate ambiguity in the deterrent effect of capital punishment on a range of crimes due to data assumptions.³¹ Hence a more important strategy is to devote resources to improving the laws and procedures governing gender violence; in this respect, law reform in India has been much needed and somewhat overdue.³²

Change however is coming. Another immediate effect of the 2012 New Delhi rape and murder case, was the establishment of a judicial committee in December 2012. The committee headed by J.S Verma, a former Chief Justice of India; submitted a report, proposing amendments to criminal law to deal with sexual assault cases more effectively.³³ Accepting more than 90% of the Committee's recommendations, the government introduced into Parliament the Criminal Law (Amendment) Act, 2013.³⁴ The Act introduced several new offences to the IPC including: section 326A (voluntarily causing grievous hurt by use of acid, etc), Section 326B (voluntarily throwing or attempting to throw acid), Section 354 (sexual harassment), Section 354B (assault or use of criminal force to woman with intent to disrobe), Section 354C (voyeurism), Section 354D (stalking) and Section 370 (trafficking of persons).³⁵

Against this background, our chapter reflects on why the criminal law in India (IPC) and cultural attitudes have been so resistant to reform, and what lessons can be learned from other jurisdictions, particularly from the perspectives of human rights and comparative law. This essay highlights the outdated state of the IPC, drawing on the legal developments in Australia and elsewhere, and concludes by identifying some of the key reforms needed to tackle gender violence more effectively in the 21st century. Ultimately, the impact of law reform has limits, and in our view, it is public education that offers the most promising prospect for culture change in this field. As the United Nations Declaration on the Elimination of Violence Against Women (DEVAW) notes at Art 4(j), State Parties must take "all appropriate measures, especially in the field of education, to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women".

Law reform and sexual offences in India

Legal reforms in India have been largely reactive in dealing with violence and sexual offences against women. A key driver of reform is the Law Commission of India. The first Law Commission in India was established in 1834 under Lord Macaulay, which recommended the codification of the Criminal Law (leading to the IPC), Criminal Procedure Law and other issues. The first Law Commission of independent India was established in 1955 for a three year term, and since then, has convened regularly to deal with legal matters. The latest, the Twentieth Law Commission, convened in January 2013, was chaired by former Supreme Court Justice, D.K Jain. The Commission examined existing laws in accordance with the government's directives or terms of reference, proposing amendments to the law as appropriate. The reports of the Law Commission are considered by the Ministry of Law in consultation with other departments and ministries, and its reports are submitted to the Parliament for consideration.³⁶

The Law Commission has been asked twice to examine legislation related to rape; first in 1980 ('Rape and allied offences-some questions of substantive law, procedure and evidence', Ninth Law Commission) and, more recently, in 2000 ('Review of Rape Laws', Fifteenth Law Commission). Based on the recommendations of the Ninth Law Commission in 1980, the Criminal Law (Amendment) Act 1983 was passed by Parliament. The Act made the following changes to the IPC: Section 376(2) (custodial rape); Section 276(A) (marital rape) and section 376(B&D) (sexual intercourse not amounting to rape). The amendments prohibited the disclosure of the names of victim(s) and perpetrator(s). The other key changes brought about by the 1983 amendments in the Code of Criminal Procedure were that it provided for medical examination of the rape victim (Section 164A) and trial for rape to be conducted 'in camera' to protect the privacy of victims (Section 327(2)). Consistent with the common law, there was no minimum punishment specified in rape cases. The 1983 amendments modified this, imposing a minimum of ten years of imprisonment for the rape of a girl under the age of 12, of a pregnant woman and also in cases of gang and custodial rapes.³⁷

The most recent 2013 amendments to the IPC modernized the definition of rape, and clarified the circumstances where consent is negated: Section 375 IPC now defines "rape" where a male:

- (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 a 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,

This definition of rape is applied to offences committed under any of the following seven conditions: First, against her will; second, without her consent; third, 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; fourth, 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; fifth, 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; sixth, with or without her consent, when she is under eighteen years of age; and seventh, when she is unable to communicate consent.³⁸

Section 376 further prescribes 'rigorous punishments of either description for a term which shall not be less than ten years (previously seven), but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine'. The 2013 amendments have been particularly severe in prescribing punishments for gang rape and repeat offenders. Under Section 376D (gang rape) the new provisions provided 'rigorous punishments for a term which shall not be less than twenty years, but which may extend to life, which shall mean imprisonment for the remainder of the person's natural life and with fine'. Under 376E (repeated offenders of rape) the new law provided life imprisonment and or death.³⁹

Although there have been significant advances to the law governing sexual offences in the past year, there remain several specific areas which remain problematic. In the next section, we examine three of these: (i) marital rape immunity; (ii) pre-marital and false promise; and (iii) homosexual law reform.

(i) Marital rape immunity: Time to revoke the licence to rape?

A key reform in the 1980s was to clarify that lack of consent stood at the heart of the offence, dispensing with requirements to prove either force against the victim or physical resistance. The 1983 reforms in India clarified that rape was constituted by sexual intercourse 'without her free and voluntary consent'. The IPC did however preserve one, long-standing and widely applicable exception, namely rape within marriage. Consistent with the position in most common law jurisdictions, including Britain, marital rape in the IPC was not considered to be an offence. According to the common law, marital consent to sex, once given, could never be withdrawn while the marriage persisted.⁴⁰ The 1983 reform did however qualify the scope of the immunity, providing that it would not apply in cases where there was an order of judicial separation in place between husband and wife.⁴¹

Rape within marriage generally however remains outside the ambit of the IPC. An increasing number of countries have criminalised marital rape, including most

recently, Bolivia (2013), Turkey (2005) and Malaysia (2007). The immunity has also been abolished, by both legislative and judicial decision, in most Commonwealth jurisdictions including inter alia England and Wales (1991), Australia (1991), Canada (1983), and South Africa (1993). The Justice Verma Committee constituted in December 2012 to look into the criminal laws in India extensively evoked precedents from the common law in various jurisdiction, including Australia's, to recommend the criminalisation of marital rape. The Verma Committee report emphasised that legal prohibition on marital rape should be 'accompanied by changes in the attitudes of prosecutors, police officers and those in society more generally'.⁴² It also recommended introducing 'widespread measures raising awareness of women's rights to autonomy and physical integrity, regardless of marriage or other intimate relationship'.⁴³ The Committee recommended, without any qualification, that 'the exception for marital rape be removed'.⁴⁴

In response, the Parliamentary Standing Committee on Home Affairs, in its 167th report noted that 'somewhere there should be some room for wife to take up the issue of marital rape'.⁴⁵ It was also felt that 'no woman takes marriage so simple that she will just go and complain blindly. Consent in marriage cannot be consent forever'.⁴⁶ The Parliamentary Standing Committee noted that it is preferable that sexual violence within marriage be charged as 'cruelty against women' under the IPC rather, than the more serious offence of rape, since such charges have 'potential for destroying the institution of marriage'.⁴⁷ The Committee argued that 'if the marital rape is brought under the law, the entire family system will be under great stress'.⁴⁸ This 'concession' by the Parliamentary Standing Committee is, with respect, sending a mixed message about sexual violence in marriage. A wife, like a husband, ought to have an unqualified right to say no, and determine the conditions, circumstances and context for sexual intimacy. Weakening that position renders the other person merely an instrument of sexual gratification; this disregards the other person's autonomy and right to human dignity (which is protected under the Indian Constitution). It is not a principled position for the criminal law. So the controversy persists in India then whether married women have a right to say no to their spouse, placing the country in an increasingly narrow range of nations that deny this fundamental right to women.⁴⁹ The persistence of the licence to rape within marriage is of particular concern in light of the 2009 Indian study in Eastern India (Orissa, Bihar, West Bengal and Jharkhand) which revealed that women are more prone to violence from their husbands than anyone else. The study suggested that almost 25% of the women respondent have experienced "forced sex" by their husbands.⁵⁰

(ii) *Premarital sex: Criminalising sexual deceit?*

Another controversy relating to rape that is gaining increasing attention in India is pre-marital sex arising from false promises of marriage. Arranged marriages are the predominant way of legitimising long-term 'live in' relationships. India's conservative cultural and societal norms thus attach a high value attached to female

chastity and virginity, and premarital sex is strictly disallowed. As a result, there have been several cases in India where females and their aggrieved families have filed complaints against their boyfriends or partners, accusing them of rape for having premarital sex and failing to marry them. According to the Delhi Commission of Women 'false promise' cases constitute almost half of over 250 cases reported every month.

But is a false promise of marriage by male that leads to sexual intercourse sufficient to negate the women's consent and leave the man guilty of rape? In 2010, a Delhi local court ruled that premarital sex under these circumstances was 'equivalent to rape' since the man had coerced the woman into sex by promising marriage. At common law, there is a long line of authority, tracing back to the 19th century (*R v Clarence* (1888) 22 QBD 23), establishing that in order to negate or vitiate consent the male's fraud must relate to the "nature and character of the act". Thus, not all types of sexual deceit or induced mistake will leave a man guilty of rape.

A leading decision in Australia illustrates how restricted the notion of consent is under the common law. In *Papadimitropoulos v R* (1958), the accused fraudulently procured sexual intercourse from a young Greek woman, recently arrived in Australia, by tricking her into believing that she had gone through a marriage ceremony with him. In fact, the accused had simply given notice of his intention to marry at the Melbourne Registry Office. With this belief, she consented to sexual intercourse on their "honeymoon". There was some evidence that the young woman never intended to consent to intercourse outside marriage. The accused deserted her shortly after the "honeymoon". The High Court affirmed the formulation in *Clarence* that the mistake induced by the fraud must relate to the "nature and character of the act". The High Court was not prepared to extend vitiation of consent beyond a mistake relating to "the identity of the physical act and the immediate conditions affecting its nature". On the facts of *Papadimitropoulos* the mistake made by the young woman was insufficient to destroy consent since it related to an "antecedent inducing cause—the existence of a valid marriage". The Court did however recognize that the accused could be charged with another offence, obtaining sexual intercourse by false pretences.

In May 2013 the Supreme Court of India ruled that premarital sex in such circumstances could not be deemed to be rape. The court held 'There is a clear distinction between rape and consensual sex ... There is a distinction between the mere breach of a promise and, not fulfilling a false promise'.⁵¹ The Supreme Court in a case against a South Indian film actress Khushboo on charges of endorsing premarital sex ruled that 'it cannot be an offence'.⁵² But the Madras High Court in June 2013 went a step ahead in a case by ruling that 'couples who have premarital sex [are] to be considered married'; presumably with the effect that consent is implied by law, and that any offence is beyond the scope of the law of rape!⁵³ Extending the marital rape immunity to pre-marital cases is neither legally sound, nor practically sensible, leaving a much wider category of women vulnerable to male sexual violence by their partners (whether married or not).

In another judgment a Delhi court acquitted man from a charge of rape, ruling, 'In my opinion, every act of sexual intercourse between two adults on the assurance of promise of marriage does not become rape, if the assurance or promise is not fulfilled later on by the boy'.⁵⁴ This is consistent with the common law position identified above. But in the same breath, the judge also triggered a controversy, in a passing remark, about the immoral character of *her* actions: 'She [the complainant] must understand that she is engaging in an act which not only is immoral but also against the tenets of every religion. No religion in the world allows pre-marital sex'.

The issue of pre-marital sex is presently a challenging one for the authorities. According to a Delhi Police investigator, most cases filed in pre-marital cases are not aimed at securing a conviction for rape, but rather applying pressure on the man to proceed with the marriage.⁵⁵ In Maharashtra a woman filed charges of rape against a father-son duo, but later retracted and withdrew the charges in the High Court, admitting that it was a false claim after the male agreed to marry her.⁵⁶ The unfortunate effect of these cases is these matters are registered as 'false complaints' of rape under section 375 (...when the man knows that he is not her husband, and that her consent is given because she believes that he is another man she is or believes herself to be lawfully married).

It is clear that there is need for greater certainty in the law. The social and moral consequences of this type of sexual deceit for young Indian women are enormous; the stigma and damage to reputation cannot be nor should be trivialized. In India, at least, there is a strong case to further protect young women from males who intentionally exploit vulnerabilities and lie to them in order to induce pre-marital consent.

(iii) Homosexual law reform: A human rights or moral issue?

Sexual offences law in India, as demonstrated above, has been remarkably resistant to reform. This applies equally to same-sex offences, which in the language of the 19th century IPC, were categorised as unnatural offences, punishing a range of acts against the "order of nature". The core offence is section 377 IPC which punishes as 'unnatural offences' any act of 'carnal intercourse against the order of nature with any man, woman or animal', which is liable to ten years' imprisonment and a fine.⁵⁷ These 19th century offences, while not framed in terms of suppressing homosexuality, have been used widely in many parts of the Commonwealth to criminalise consenting sexual conduct between males, whether that conduct occurs in private or in public.

The continuance of offences criminalising homosexual sex between consenting adults was challenged by significant changes in social and moral attitudes towards same-sex sexuality in the latter half of 20th century.⁵⁸ In Australia, the states of New South Wales, Victoria and South Australia were at the vanguard of reform in the 1970s and 80s, modernising and abolishing a wide range of homosexual offences. There were however jurisdictions more resistant to reform: Queensland, Western Australia and Tasmania were the last to repeal the offences criminalising consenting

sexual conduct in private between adult males. There are some important lessons for India from reviewing the Australian experience in the 1990s, particularly in relation to the language of human rights has the potential to promote reform in jurisdictions still resistant to change.

The issue of homosexual law reform in India, and the legitimacy of section 377 IPC, was thrust centre stage in December 2013, when after 12 years of legal battle, the Supreme Court overruled a previous Delhi High Court's ruling in July 2009 that the section was contrary to Article 14 of the Constitution, which ensured that every citizen is equal before law and entitled to equal opportunity of life.⁵⁹ The Supreme Court's reversal was widely viewed by gay-rights activists as re-criminalising homosexuality.⁶⁰

The verdict stirred strong emotions from India's civil society comprising not only the lesbian, gay, bisexual and transgender (LGBT) community, but also NGOs, artists, academics including Nobel Laureate Amartya Sen, students, Bollywood stars, human rights activists and politicians have expressed deep regret, calling the verdict 'disappointing', 'outrageous', 'inhuman' and 'insensitive'.⁶¹ The judgment polarised the Indian political milieu too. The right-wing Bhartiya Janta Party (BJP) president Rajnath Singh declared, "homosexuality is an unnatural act and cannot be supported".⁶² The Indian National Congress (INC) on the other hand—led by its Party's leader Sonia Gandhi, reversing the 2008 stand that gay sex was immoral and an act of perversion—strongly opposed the verdict. A week later, the government filed a review petition in the Supreme Court to re-examine the verdict on Section 377.⁶³

It is important to understand that the Supreme Court decision did not rule out reform; it merely refused to extend its constitutional jurisprudence on equality to strike down a criminal provision. Indeed, the Court was clear that the responsibility for making such a significant change to the law, on which there remains considerable moral and political controversy, lies with the legislature, not unelected judges:

Notwithstanding this verdict, the competent legislature shall be free to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General.⁶⁴

Moreover, even if domestic legislative action is not forthcoming, the decision and legislation may be challenged at the international level under the International Covenant on Civil and Political Rights (ICCPR), to which India is a signatory. It is noteworthy here that India had signed and ratified the ICCPR on 10th April 1979. Both possibilities have been realised in other countries, Australia being a case in point.

Across many national jurisdictions that inherited the English common law, including India and Australia, the criminal law has been used to repress and stigmatise homosexuality. Not long ago in Australia, homosexual offences were used to

penalise ‘unnatural acts’ between consenting adult males. But the modernisation of sexual offences in Australia over the last two decades has removed the repressive and discriminatory aspects of those laws dealing with homosexual behaviour. Today every jurisdiction has repealed or amended its laws prohibiting same-sex sexual conduct between consenting adult males in private.

The story of how this came about is significant for India. Unlike India, criminal law is a primarily a matter of state law: Tasmania was the last state refusing to repeal its laws criminalizing sexual conduct between consenting males. This recalcitrance spurred Nick Toonen, a member of the Tasmanian Gay and Lesbian Rights Group, to appeal before the United Nations Human Rights Committee to determine whether the Tasmanian laws violated his right to privacy under the ICCPR. Toonen argued that prohibiting certain sexual acts only between males drew distinctions based on sex and/or sexual orientation, and thus constituted discrimination contrary to Article 26 of the ICCPR. In April 1994, the UN Human Rights Committee (HRC) ruled that the existence of the offences in Tasmania constituted an arbitrary interference with Toonen’s privacy.⁶⁵

With no immediate legislative or legal remedy forthcoming in Tasmania, the Federal Government passed the *Human Rights (Sexual Conduct) Act 1994* which enacted a constitutional shield that would invalidate any Commonwealth, State and Territory laws which arbitrarily interfered with sexual conduct between consenting adults (defined as older than 18 years) in private.⁶⁶ It took another three years, and after nine years of Toonen’s struggle through the UN, Amnesty International, Federal government and High Court, before the Tasmanian legislature made the necessary amendments to give effect the Toonen decision. These reforms have had huge social significance in promoting gay rights: from being a laggard in gay rights, Tasmania has become a leader - in 2012, the Tasmanian Premier announced his intention to pass laws to legalise same-sex couples to marry.⁶⁷ There is a lot that India, especially its legal community and civil society, can learn from Nick Toonen’s case.

(iv) *Developing a human rights model for reform of sexual offences*

India is not unique in maintaining anachronistic colonial laws from another era. The Pacific Islander Countries have similarly inherited codes which have not kept pace with changing societal norms. An excellent article on this topic has attempted to identify a range of “international good practice standards” for the Pacific Islander Countries which could be applied to future reform priorities in India.⁶⁸ These good practice standards include inter alia:

- the criminalisation of marital rape;
- the adoption of gender neutral offences that extend protection to males as victims of sexual offences;

- the recognition that victimisation by persons ‘known to the victim’ such as a family member is a serious abuse of trust, and therefore should operate to aggravate rather than mitigate the seriousness of the offence.⁶⁹

It would also be helpful to incorporate the international models proposed by the United Nations’ Handbook and Supplement for Legislation on Violence Against Women, which proposed that sexual offences should approach consent as “unequivocal and voluntary agreement”, and that the accused should be required to prove the steps taken to “ascertain whether the complainant/survivor was consenting”.⁷⁰

Conclusion

From the contemporary Australian, Canadian and British perspective, Indian law still represents a time-capsule of 19th century ideas about the criminal law, sex and sexuality. But times change, and from the 1970s many of the cardinal legal principles governing sexual offences were subject to a sustained feminist critique in Britain, Australia, Canada and the US. This movement has achieved significant reforms, which in many of these jurisdictions continue to be ‘work in progress’. By comparison, reform in India has been more spasmodic, driving forward in response to a notorious rape case and ensuing public outrage. It is also apparent the approach to adjudication of sexual crime in the Indian courts often lacks gender insight, leading to contradictory and confusing legal positions. This chapter discussed and highlighted instances where the local courts, high courts and the Supreme Court of India have adopted different and opposing arguments in cases of rape, homosexuality, marital rape and pre-marital sex. In this respect, India must pursue further initiatives (similar to those undertaken in Australia, Canada and Britain) in both judicial and legal education that tackle systematic gender bias among lawyers and judges.⁷¹

The immunity toward marital rape is the most prominent example where the IPC continues to adhere to an outdated view of gender relations. As a leading US feminist scholar, Catharine MacKinnon, pointed out in this respect, “the law sees and treats women the same way that men see and treat women.”⁷² The common law right of a husband to rape his wife with impunity has long been contested both as matter of principle and policy. By the last decades of the 20th century, many jurisdictions had abolished or circumscribed the immunity by statute, and both the High Court of Australia and the House of Lords in England, held that the immunity was no longer part of the common law in a modern liberal society. The IPC was amended, narrowing the scope of the immunity as noted above: a husband can be convicted of raping his wife *only* if she was under 15 years of age or where a judicial separation order is in force.⁷³ This however, does not go far enough.

This article joins the present chorus of calls for reform of the IPC. It is however distinctive in conceiving of rape and other sexual offences not as ‘crimes against morality or modesty’, but rather as forms of gender-based or sexuality-based

violence. Put simply, sexual crimes in India should be reconceived as crimes against human rights, specifically, the right to equality, with reform guided by its obligations under international human rights law (including the ICCPR and CEDAW) and relevant 'soft law' instruments (such as DEVAW and other UN policy documents discussed above).

NOTES

The authors would like to thank Mr Abhishek Vikram, Advocate of the Supreme Court of India for his inputs, comments and research material support. The authors also thank Samantha Gillespie, CEPS Research Assistant at Griffith University, for her research and editorial assistance. Any error(s) are of course, the authors' exclusively.

¹The 19th century social reform movements in India were spearheaded by Raja Ram Mohan Roy who campaigned to outlaw *sati* or self-immolation of wives following their husband's demise, polygamy and obtain property rights for women, and Ishwar Chandra Vidyasagar who campaigned to lift the ban on widow remarriage: see A. Prema. "Raja Ram Mohan Roy's struggle for the upliftment of women". (2013) 8(2). *Golden Research Thoughts*. pp. 1- 4. Also see S. Sharma, 'How safe are Indian women?'. *Live Mint & the Wall Street Journal*, <http://www.livemint.com/Leisure/rd0h9G1FsynsOhBa5pfXdK/How-free-are-Indian-women.html> (10 August 2013).

²Geetanjali Gangoli, *Indian feminisms: Law patriarchs & violence in India*, (Abingdon, Oxon: Ashgate Publishing Group, 2007), pp. 79-98.

³B. Medcalf and T. Medcalf, *A concise history of modern India* (2nd ed., New York: Cambridge University Press, 2006), p. 146. It has been suggested that India's protest movements, necessarily focused on emancipation and resistance from British colonisation, rather than the need for women's rights and equality in society: R Ray, *Fields of protest: Women's movements in India*, (Minneapolis: University of Minnesota Press, 1998), p.36.

⁴At this time, British politicians were subject increasingly to vocal and disruptive protests of suffragettes demanding legal equality and the right to vote. The suffragettes used militant tactics, public demonstrations and held several women's parliaments by the Women's Freedom League and Women's Social and Political Party to secure women's equality in the right to vote: E. Pankhurst, *The Suffragette: The history of the women's militant suffrage movement 1905-1910*, (USA: Source Book Press, 1911).

⁵R Ray. Op Cit.

⁶These groups also tackled environmental issues (from pollution to de-forestation), socio-economic issues (from price regulation of rice and the socio-economic rights of the tribal communities), as well as calling for tougher laws to avert industrial disasters and promote work-place safety.

⁷Bipin Chandra, *India after independence 1947-2000*, (New Delhi: Penguin, 2000), p. 456.

⁸*Declaration on the elimination of violence against women*, UN General Assembly, A/RES/48/104, 85th plenary meeting, 20 December 1993 (DEVAW), <http://www.un.org/documents/ga/res/48/a48r104.htm>. DEVAW is a form of 'soft law' rather than binding legal treaty. Significantly DEVAW confirms that "gender-based violence" is a form of discrimination and violation of human rights, prohibited under

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted by the United Nations in 1979. Accessed 9 November 2013.

⁹ Section 375 IPC. See <http://districtcourttallahabad.up.nic.in/articles/IPC.pdf>. Also see: S.Yeo, 'India'. in J. Heller & M.D. Dubber (eds.), *Handbook of comparative criminal law*. (Stanford: Stanford University Press, 2011), pp. 288-319.

¹⁰ I. Dobinson, & L. Townsley, 'Sexual assault law reform in New South Wales: Issues of consent and objective fault', *Criminal Law Journal*, 32 (2008), pp.152-166.

¹¹ Ibid. p.160.

¹² For a review of these legislative reforms, see S. Bronitt and B. McSherry, *Principles of criminal law*, (3rd ed., Sydney: Law Book Co., 2010), pp 656-669. In New South Wales, for example, *The crimes amendment (Consent- sexual assault offences) act 2007 (NSW)* introduced a statutory definition of consent: that "a person consents to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse: s.61HA(2) The Act also identified an expanded list of circumstances in which a person's consent would be negated or vitiated (examples include: when the person is intoxicated, asleep or suffers from a mental incapacity). Further changes include the adoption of an objective fault element (which limit the scope of mistakes, and require proof that perpetrators had taken certain steps to establish consent).

¹³G. Gangoli. Op. Cit., pp.79-98.

¹⁴ Ibid, pp.80-84.

¹⁵ Bipin Chandra, *India after independence 1947-2000*, (New Delhi: Penguin, 2000), p. 456. Section 376C covers custodial rape by a person in authority with woman in his custody. It says, 'whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine'. Also see: R. C. Jiloha, 'Rape: Legal issues in mental health perspective', *Indian Journal of Psychiatry*, 55:3 (2013), pp. 250-255.

¹⁶ According to the National Crime Records Bureau (NCRB), *Crime in India - 2012 Statistics*, 24270 cases of crime were reported against women in 2012. This constituted an annual rise of 6.4 %, with a steady increase in reported offences since 2008.

¹⁷ National Crime Records Bureau, *Crime in India 2012*, Ministry of Home Affairs, Government of India, <http://ncrb.nic.in/>. See Table 13.5 – 'Reported custodial rape cases and their disposal by police and courts during 2012', p. 555. The IPC provisions indicating an 8.9% increase since 2008. During 2012, 4.8% cases were reported under the special and laws (SLL) provisions.

¹⁸ 12.5% victims were girls under 14 years of age, 23.9% between 18-18 years of age, 50.2% in the 18-30 age group, 12.8% aged between 30-50 years while 0.05% over 50 years of age.

¹⁹ Geetanjali Gangoli and Martin Rew, 'Political activism, legal discourses and sexual violence in India', *E-International Relations*, 6 February 2013, <http://www.e-ir.info/2013/02/06/political-activism->

legal-discourses-and-sexual-violence-in-india-what-does-the-delhi-rape-case-reveal/. Accessed 27 October 2013.

²⁰ Ibid.

²¹ 'Rape laws in India', *Legal India*. At <http://www.legalindia.in/rape-laws-in-india>.

²² Justice B.P. Jeevan Reddy (Retd.), Justice Leila Seth (Retd.), N.M. Ghatate and Subhash C. Jain, 'One hundred and seventy second report on review of rape laws March, 2000', *Law Commission of India*, 13 March 2000, <http://www.lawcommissionofindia.nic.in/rapelaws.htm>.

²³ Siddharth Narrain, 'For an effective law on rape,' *Frontline*, 20:23, (8-21 November, 2003), <http://www.frontline.in/static/html/fl2023/stories/20031121003109700.htm>. Accessed on 12 October 2013.

²⁴ National Crime Records Bureau, *Crime in India 2012*, Ministry of Home Affairs, Government of India, <http://ncrb.nic.in/>, pp. 79-83.

²⁵ Ibid., p. 6.

²⁶ See Rob White and Santina Perrone, *Crime, criminality & criminal justice*, (Victoria: Oxford University Press, 2008), p.27.

²⁷ Devesh K. Pandey and Shubhomoy Sikdar, 'Delhi rape case main accused Ram Singh found hanging', *The Hindu*, 12 March 2013, <http://www.thehindu.com/news/national/delhi-gangrape-main-accused-ram-singh-found-hanging/article4496333.ece>. Accessed on 16 April 2013.

²⁸ '2012 Delhi gang rape case: RIP Jyoti, 4 will hang on Dec 16. But the juvenile won't', *India Today*, 13 September, 2013, <http://indiatoday.intoday.in/story/delhi-2012-gangrape-convicts-death-penalty-quantam-of-punishment/1/309529.html>. Accessed on 22 October 2013.

²⁹ Press Trust of India, 'Delhi gang-rape case: Death sentence for all four convicts', *The Times of India*, 13 September 2013, http://articles.timesofindia.indiatimes.com/2013-09-13/india/42039872_1_advocate-v-k-anand-four-convicts-delhi-high-court. Accessed on 7 October 2013.

³⁰ Evan. J. Mandery, *Criminal justice illuminated, capital punishment: A balanced examination*. (Sudbury, MA: Jones & Bartlett Publishers, 2005), pp. 41-63.

³¹ S.N. Durlauf, C. Fu, S. Navarro, 'Assumptions matter: Model uncertainty and the deterrent effect of capital punishment', *American Economic Review: Papers and Proceedings*. 102:3 (2012), p. 487-492.

³² A. Chalfin, A.M. Haviland and S. Raphael, 'What do panel studies tell us about the deterrent effect of capital punishment? A critique of the literature', *Journal of Quantitative Criminology*. 29:1, (2013), pp. 5-43.

³³ The Committee invited public submissions that would facilitate "quicker investigation, prosecution and trial, and also enhanced punishment for criminals accused of committing sexual assault of an extreme nature against women".

³⁴ Ministry of Law and Justice, 'The criminal law (amendment) act 2013', *The Gazette of India*, 2 April 2013, (New Delhi: Controller of Publications, 2013).

³⁵ Ibid.

³⁶ For a detailed history and establishment of various Law Commissions please see Law Commission of India, Ministry of Law and Justice, <http://www.lawcommissionofindia.nic.in/main.htm#a6>. Accessed on 4 December 2013.

³⁷ 'Rape laws in India', *Legal India*, 23 December 2013, <http://www.legalindia.in/rape-laws-in-india>. Accessed on 7 January 2013. Also see, 'Amendments to the laws relating to rape and related provisions', National Commission for Women, <http://ncw.nic.in/PDFFiles/Amendments%20to%20laws%20relating%20to%20women.pdf>. Accessed on 7 January 2013.

³⁸ Ibid., p.4.

³⁹ Ibid., p. 8.

⁴⁰ S. Bronitt and B. McSherry, *Principles of criminal law*, (3rd ed., Sydney: Law Book Co, 2010), pp, 631-634.

⁴¹ Section 376B IPC, provides that 'whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine'.

⁴² Justice J.S. Verma (Retd.), Justice Leila Seth (Retd.) and Gopal Subramaniam, *Reports of the committee on amendments to criminal Law*, 23 January 2013. New Delhi, pp. 116-117, http://www.thehindu.com/multimedia/archive/01340/Justice_Verma_Comm_1340438a.pdf. Accessed on 27 January 2013.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Parliament of India, *Department related parliamentary standing committee on home affairs*, Report No. 167, Rajya Sabha Secretariat, New Delhi, p. 47, <http://www.prsindia.org/uploads/media/Criminal%20Law/SCR%20Criminal%20Law%20Bill.pdf>. Accessed on 18 January 2014.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Countries that preserve the immunity include China (not Hong Kong), Pakistan, Saudi Arabia and Afghanistan.

⁵⁰ Bontha V. Babu and Shantanu K. Kar, 'Domestic violence against women in India: A population-based study on prevalence and related issues', *BMC Public Health*, Volume 9:129, (May 2009), pp.136-148.

⁵¹ First Post Staff, 'Misreading the Madras HC ruling: Premarital sex is not marriage', *First Post*, 18 June, 2013, <http://www.firstpost.com/living/misreading-the-madras-hc-ruling-premarital-sex-is-not-marriage-883429.html>. Accessed on 15 October 2013.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Press Trust of India, 'Pre-marital sex immoral, no religion permits it: Delhi court', *The Tribune*, 5 January 2014, <http://www.tribuneindia.com/2014/20140105/latest-news.htm>. Accessed on 7 January 2014.

⁵⁵ Tripti Lahiri and Preetika Rana, 'Indian rape law offers desperate last resort', *The Wall Street Journal*, 29 November 2013, <http://online.wsj.com/news/articles/SB10001424052702303460004579192040826366178>. Accessed on 2 December 2013.

⁵⁶ Faisal Tandel, 'Woman admits her rape charges false as her boyfriend turns husband', *DNA*, 9 July 2013, <http://www.dnaindia.com/mumbai/report-woman-admits-her-rape-charge-false-as-boy-friend-turns-husband-858814>. Accessed on 18 December 2013.

⁵⁷ Section 377 'Unnatural offences', *IPC*.

⁵⁸ The impetus for reform stemmed from the landmark work of the Wolfenden Committee in the United Kingdom: *Report of the committee on homosexual offences and prostitution* (London: HMSO, Cmnd 247, 1957). The Committee, endorsing the liberal harm principle, argued that the criminal law should not be used as an instrument to protect 'morals', but is only justified where there is identifiable harm caused to others. Following the Committee's report, sexual acts between two adult males, with no other people present, were made lawful in England and Wales in 1967.

⁵⁹ Jason Burke, 'Indian LGBT activists outraged as supreme court reinstates gay sex ban', *The Guardian*, 12 December 2013, <http://www.theguardian.com/world/2013/dec/11/india-supreme-court-reinstates-gay-sex-ban>. Accessed on 19 December 2013.

⁶⁰ Utkarsh Anand, 'SC says gay sex punishable, withdraws protection to LGBT community', *Indian Express*, 12 December 2013, <http://www.indianexpress.com/news/sc-says-gay-sex-punishable-withdraws-legal-protection-to-lgbt-community/1206242/>. Accessed on 18 December 2013.

⁶¹ DNA Web Team, 'Supreme Court makes gay sex punishable offence, activists dejected', *DNA*, 11 December 2013, <http://www.dnaindia.com/india/report-supreme-court-makes-gay-sex-punishable-offence-baba-ramdev-feels-happy-with-verdict-as-many-express-outrage-on-twitter-1933110>. Accessed on 21 December 2013.

⁶² HT Correspondent, 'Homosexuality is unnatural, can't support: Rajnath', *Hindustan Times*, 15 December 2013, <http://www.hindustantimes.com/india-news/homosexuality-is-unnatural-can-t-support-rajnath/article1-1162734.aspx>. Accessed on 21 December 2013.

⁶³ Times News Network, 'Gay sex verdict: Government moves supreme court for review', *The Times of India*, 20 December 2013, http://articles.timesofindia.indiatimes.com/2013-12-20/india/45416820_1_review-petition-delhi-high-court-verdict-delhi-hc. Accessed on 21 December 2013.

⁶⁴ Suresh Kumar Koshal and others vs appellants and Naz Foundation and others vs respondents, 'Civil appeal no. 10972 of 2013', in the Supreme Court of India Civil Appellate Jurisdiction, 11 December 2013.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Rodney Croome, 'Tasmania is the logical 'first mover' on marriage equality', *The Sydney Morning Herald*, 6 August 2012, <http://www.smh.com.au/federal-politics/political-opinion/tasmania-is-the-logical-first-mover-on-marriage-equality-20120806-23oos.html>. Accessed on 9 November 2013.

⁶⁸ C. Forester. 'Sexual offences law reform in pacific island countries: Replacing colonial norms with international good practice standards. *Melbourne University Law Review*, 33:1, (2008), pp. 833-864.

⁶⁹ Ibid.

⁷⁰ United Nations' Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook and supplement for legislation on violence against women*, (New York: United Nations, 2009), p. 27, <http://www.un.org/womenwatch/daw/vaw/v-handbook.htm>.

⁷¹ For a review of the problem in Australia, see Senate Standing Committee on Legal and Constitutional Affairs, *Gender bias and the judiciary* (1994). This federal inquiry was prompted by publicity given to judicial remarks by Bollen J during a rape trial: "There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling." The Committee concluded that the directions were largely sanctioned by law, and that the problem of gender bias was systemic rather than individual: para 18.

⁷² Catharine A. MacKinnon, *Towards a feminist theory of the state* (Cambridge: Harvard University Press, 1989), pp. 161-162, in Kate Sutherland, 'Work sex and sex-work: Competing feminist discourse in the international sex trade' *Osgoode Hall Law Journal*, 42:1 (2004), p. 4.

⁷³ Section 376A IPC.