

Legislative Brief

The Criminal Law (Amendment) Bill, 2012 and Ordinance, 2013

The Bill was introduced in the Lok Sabha on December 4, 2012 by the Minister of Home Affairs, Mr Sushil Kumar Shinde. It was referred to the Department related Standing Committee on Home Affairs (Chairperson: Mr. Venkaiah Naidu), which submitted its report on March 1, 2013.

On February 3, 2013 the government notified the Criminal Law (Amendment) Ordinance to amend the IPC, CrPC and the Evidence Act.

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Highlights of the Bill

- ◆ The Bill and the Ordinance amend the Indian Penal Code, the Code of Criminal Procedure, and the Evidence Act.
- ◆ The amendments proposed seek to replace the offence of rape with sexual assault which has a wider definition.
- ◆ The Bill and the Ordinance protect the victim by penalising public servants who fail to record FIRs relating to sexual offences. They also require the victims to be provided with legal and medical assistance.
- ◆ The Bill specifies a separate offence for acid attack. The Ordinance provides for other new offences as well, such as stalking, voyeurism, assault to disrobe a woman and sexual harassment.
- ◆ The Ordinance prescribes higher punishments for sexual assault resulting in death or persistent vegetative state, gang sexual assault and repeat offenders.
- ◆ The Bill and the Ordinance increase the punishment for sexual assault upon a judicially separated wife. The Ordinance requires the court to be *prima facie* satisfied of the offence before it takes cognizance.
- ◆ The Bill and the Ordinance increase the consent age from 16 to 18 years.

Key Issues and Analysis

- ◆ Under the Ordinance, penalties for certain offences are inconsistent. For instance, minimum punishment for gang assault by private persons is 20 years, and for gang assault by a police officer is 10 years.
- ◆ The Ordinance penalises certain acts which are also punishable under special laws such as SC/ST (Prevention of Atrocities) Act, 1989. Punishments under the Ordinance are higher than under these laws.
- ◆ The Ordinance specifies the same punishment for penetrative and non-penetrative sexual assault. It does not provide a gradation of penalties on the basis of the gravity of the offence.
- ◆ The Bill and the Ordinance exempts un-consented penetration or touching of private parts for medical purposes from punishment.
- ◆ Age of consent has been increased from 16 to 18 years. There is a divergent view among various commissions on the age of consent.
- ◆ Marital sexual assault upon a woman is not an offence. This is at variance with the recommendation of certain commissions.

PART A: HIGHLIGHTS OF THE BILL AND ORDINANCE

Context

Sexual offences are penalised under various laws including the Indian Penal Code, 1860 (IPC), the Immoral Trafficking (Prevention) Act, 1956, the Protection of Children from Sexual Offences Act, 2012 (PCSO Act) and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

On December 4, 2012 the Criminal Law (Amendment) Bill, 2012 was introduced in Parliament to amend criminal laws on the recommendations of the National Commission for Women and the Law Commission's 176th Report.¹ The Bill defines rape as a gender neutral offence, specifies punishment for acid attacks and failure of a public servant to perform his duties. The Bill was referred to the Standing Committee on Home Affairs, which submitted its report on March 1, 2013.

Following protests against the Delhi gang rape case dated December 16, 2012, the government constituted a committee to review the law on crimes against women. The three member committee, chaired by Justice J.S. Verma, submitted its report on January 23, 2012.² Subsequently, on February 3, 2013 the Criminal Law Amendment Ordinance, 2013 that gave effect to some of the provisions of the Bill, came into force.

In this Brief, we discuss both the Criminal Laws (Amendment) Bill and the Ordinance. The major changes in the definition of offences and penalties are summarised in Table 1 on page 3.

Key Features

The Bill and the Ordinance amend the IPC, the Code of Criminal Procedures, 1973 and the Evidence Act, 1872. They amend the definition of existing sexual offences and their penalties. They also amend the procedure to be followed in investigation and trial of sexual offences.

Procedural amendments

- The Ordinance requires certain steps to be taken when the statement of a victimised woman or a differently-abled person is being recorded in sexual offence cases. These are: (a) that the statements should be recorded at a place of the victim's choice; and (b) that the victim should be provided with assistance from lawyers, health care workers or women's organisations. Furthermore, statements of physically or mentally disabled victims would have to be video-graphed and the victims have to be provided with special educators. The Bill also includes these provisions. However, it does not make special provisions for disabled persons.
- Under both, the Bill and the Ordinance, men below 18 years and above 65 years of age, and women cannot be required to attend as witnesses at any place other than the person's residence. Prior to the Ordinance, apart from women, this provision only applied to men below 15 years of age.
- Under both, the Bill and the Ordinance, the Court may take steps to ensure that victims of sexual offences, who are minors, should not be confronted by the accused at the time of taking the victim's evidence.

Evidence on past sexual experience

- The Bill and the Ordinance provide that the person's previous sexual experience would not be relevant while determining whether there was consent with respect to offences related to sexual assault, sexual harassment and assault to outrage the modesty of a woman.

Sexual offences

- The Bill and the Ordinance substitute the offence of rape with sexual assault which is a gender neutral offence. Under the Ordinance, sexual assault constitutes un-consented: (a) penetration of the vagina, urethra, anus or the mouth; and (b) touching of private parts (vagina, anus, penis and breasts). However, under the Bill, it does not include un-consented touching. The Ordinance also defines and penalises certain other acts, such as voyeurism, stalking, disrobing a woman and sexual harassment, which were punishable under the IPC under the broader offence of assaults upon the modesty of a woman.
- The Ordinance specifies punishment for rape resulting in death or persistent vegetative state, and higher punishment for repeat offenders. These offences may be awarded the death sentence. The Bill does not provide for these offences.

Table 1: Comparison between provisions of the IPC, Bill and the Ordinance

Issue	Indian Penal Code, 1860	Criminal Law (Amendment) Bill, 2012	Criminal Law (Amendment) Ordinance 2013
Disobedience of law by a public servant	No specific provision.	Knowingly disobeying laws relating to investigation is punishable with imprisonment for one year and/or fine.	Also penalises failure to record information in sexual offence cases of sexual assault and stalking.
Meaning of sexual assault (SA) or rape	Un-consented penetration of the vagina by the penis.	Un-consented penetration of the mouth, anus, urethra or vagina with the penis or other object; un-consented oral sex; the offence is gender neutral.	Same as the provisions of the Bill. Also includes un-consented touching of private parts.
Exception to SA or rape	Sexual act between a man and his wife if: (a) she is over 15 years old; and (b) the wife is not judicially separated from the man.	Same as the IPC. The age of consent for the wife is increased to 16 years. Un-consented acts for medical or hygienic purpose.	Same as the provisions of the Bill.
Age of consent	16 years.	18 years.	18 years.
Relevance of character of victim to prove consent	No bar on evidence of immoral character of a victim to prove consent in a rape case.	Bars use of previous conduct or character of the victim to prove consent.	Same as the provisions of the Bill.
Marital SA/ rape	Is not an offence if the wife is over 15 years of age.	Not an offence against a wife over 16 years.	Same as the provisions of the Bill.
Punishment for SA/ rape	7 years to life imprisonment and fine.	7 years to life imprisonment and fine.	Same as the provisions of the Bill.
Punishment for gang rape	10 years to life imprisonment and fine.	10 years to life imprisonment and fine.	10 or 20 years to life imprisonment.
SA/Rape upon judicially separated wife	Maximum 2 years imprisonment.	Punishable with 2 to 7 years imprisonment.	Punishable with 2 to 7 years imprisonment. Courts to take cognizance if there is <i>prima facie</i> evidence of offence.
SA/ Rape by armed personnel	No specific provision. Public servant includes armed personnel. Punishment: 10 years to life imprisonment and fine.	Same as under the IPC.	Specific offence. SA by armed personnel within the area they are deployed in. Penalty remains same. Requirement for sanction not removed.
SA resulting in death or vegetative state	No specific provision. Rape and murder dealt with as two separate offences.	Same as under the IPC.	Specific offence. Punishment 20 years to life imprisonment or death.
Touching	Outraging a woman's modesty. Punishment: imprisonment for maximum 2 years and fine.	No specific provision.	Outraging a woman's modesty: 1 to 5 years imprisonment and fine. Physical contact involving unwelcome and explicit sexual overtures: up to 5 years imprisonment and or fine. Touching of private parts: 7 years to life imprisonment.
Verbal SA	Use of words or gestures to insult a woman's modesty. Punishment: 1 years imprisonment and/or fine.	No specific provision.	Demand/ request for sexual favours: up to 5 years imprisonment. Verbally outraging modesty: up to 3 years imprisonment. Sexually coloured remarks, forcible show of pornography: up to 1 year
Punishment repeat SA offenders	No specific provision for this offence.	Same as under the IPC.	Specific offence. Life imprisonment or death, except SA by a man on his judicially separated wife.
Assault to disrobe a woman	Outraging a woman's modesty. Punishment: imprisonment for maximum 2 years and fine.	No specific provision.	Specific offence. Punishable with 3 to 7 years imprisonment.
Voyeurism	No specific provision for this offence.	Same as under the IPC.	Specific offence. Punishable with 1 to 3 years imprisonment.
Stalking	No specific provision for this offence.	Same as under the IPC.	Specific offence. Punishable with 1 to 3 years imprisonment.
Acid attack	No specific provision. Covered under grievous hurt. Punishment: up to 7 years imprisonment.	Specific offence. Punishment: 7 to 10 years imprisonment and up to 10 lakh fine as compensation.	Same as provisions of the Bill.
Trafficking	Covered under slavery, abduction and kidnapping for purposes of prostitution. Also provided for under the Immoral Trafficking Prevention Act, 1956.	Same as under the IPC.	Also penalises recruitment, transfer, transport, harbouring a person for the purpose of prostitution, forced labour, organ removal by use of threats or inducement. Punishment: 7 to 10 years imprisonment.

PART B: KEY ISSUES AND ANALYSIS

Inconsistencies within the Ordinance

Under the Ordinance, certain acts may constitute separate offences under different sections of IPC and may bear different penalties. This issue did not arise under the Bill as it did not provide for the offences detailed below.

Table 2: Comparison of provisions relating to similar offences

Offence	Ordinance	Punishment
Gang sexual assault by a private person	Sec. 376D	20 years to life imprisonment and compensation.
Gang sexual assault by a public servant	Explanation 2, Sec. 376(2)	10 years to life imprisonment and fine.
Touching by use of criminal force to outrage the modesty of a woman	Sec. 354	1 to 5 years imprisonment and fine.
Unwelcome physical contact as sexual harassment	Sec. 354A	Up to 5 years imprisonment and/or fine.
Verbally outraging a woman's modesty	Sec. 509	Up to 3 years imprisonment and fine.
Making sexually coloured remarks	Sec. 354A	Up to 1 year imprisonment and/or fine.
Demanding sexual favour	Sec. 354A	Up to 5 years imprisonment and/or fine.

Sources: Criminal Law (Amendment) Ordinance, 2013; PRS.

Overlap and inconsistencies of the Ordinance with other laws

The IPC is a general law. Actions penalised under the IPC may also be punishable under special laws. Special laws such as SC/ST Prevention of Atrocities Act and the PCSO Act seek to protect certain class of persons on account of their vulnerable position in society. The punishment for offences under the Ordinance is higher than under these special laws. Furthermore, some offences under the Ordinance only protect women, whereas, under the special laws, they protect both men and women. The following table depicts the variance in these provisions.

Table 3: Comparison of offences and punishments under the Ordinance and other laws

Offence against minors	PCSO Act, 2012	Ordinance, 2013
Age of consent	18 years. No reduction within marriage.	18 years. In marriage 16 years for girls.
Sexual assault excluding touching	7 years to life imprisonment.	10 years to life imprisonment.
Touching of private parts	3 to 5 years imprisonment.	10 years to life imprisonment.
Touching by a public servant	5 to 7 years imprisonment.	10 years to life imprisonment.
Gang assault of touching	5 to 7 years imprisonment.	20 years to life imprisonment.
Forcing a child to strip or parade naked in public	Protects both boys and girls. Punishment: 5 to 7 years imprisonment. Up to 3 years for making a child exhibit any part of his body with a sexual intent.	Protects women. Punishment: 3 to 7 years.
Offence	Information Technology Act, 2000	Ordinance, 2013
Capturing the image of private parts	Protects both men and women. Punishment: up to 3 years and/or fine up to Rs 2 lakh.	Only protects women. Punishment: 1 to 3 years imprisonment and fine. Second offence with 3 to 7 years.
Offence	SC/ ST Prevention of Atrocities Act, 1989	Ordinance, 2013
Disrobing	Protects both men and women. Offence need not take place at public place. Punishment: 6 months to 5 years.	Only protects women. Punishable when committed at public place. Punishment: 3 to 7 years.

Sources: Protection of Children from Sexual Offences Act, 2012; Information Technology Act, 2000, Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and the Criminal Law (Amendment) Ordinance, 2013.

Gravity of offence vs. gradation of punishment

Under the Bill, sexual assault only included penetrative sexual assault: by objects or body parts. However, under the Ordinance sexual assault includes a variety of un-consented sexual conduct, ranging from touching of private parts to penetrative sexual assault. The punishment for all forms of sexual assault under the Ordinance is the same: seven years to life imprisonment. It does not provide a gradation in penalties on the basis of the gravity of the offence.

The Ordinance is at variance with the PCSO Act that penalises touching a minor's private parts with imprisonment for three to five years³ and penetrative assaults with imprisonment for seven years to life imprisonment.⁴ As per

Ordinance,
New
Section
375(e) and
376 (1)

the Verma Committee Report, the punishment for penetrative sexual assault should be seven years to life imprisonment, and for non-penetrative assaults should be up to five years.

In various countries penetrative and non-penetrative assaults carry different penalties. For instance, in UK, France, Germany non-penetrative assaults carry a lower punishment than penetrative assaults.⁵ In Canada, where ‘sexual assault’ includes both penetrative and non-penetrative acts, the term of imprisonment extends from one to ten years based on the gravity of the offence.⁶

Meaning of sexual assault

Bill, Clause 5;
Ordinance Exemption New Section 375

Exemption for medical or hygienic purposes

Under the Ordinance, penetration or touching by the penis, other body parts or objects for ‘proper medical or hygienic purposes’, even if without the victim’s consent, is not punishable. It is unclear under what circumstances penile penetration may serve a hygienic or medical purpose.

Bill and Clause 5;
Ordinance New Section 376(2)(e)

Assault on a person in a hospital

The Bill and the Ordinance penalise different categories of sexual assault with different penalties dependent on the nature of the relationship between the victim and the perpetrator. The term of imprisonment for sexual assault is seven years to life imprisonment; and for custodial sexual assault is from 10 years to life imprisonment.

Sexual assault by a member of the hospital management or staff upon a ‘person’ in the hospital carries the same penalty as a custodial assault. The provision does not distinguish the relationship between a hospital staff with a ‘patient’, and any other ‘person’ in the premises of the hospital.

Age of consent

Bill and Clause 5;
Ordinance New Section 375

The Ordinance and the Bill provide an age of consent of 18 years. Previously, the IPC provided an age of consent of 16 years. This new provision is in conformity with the PCSO Act, 2012.⁷ However, various committees have differed on their recommendations on the age of consent. These are indicated in the table below.

Table 4: Age of consent as per different commissions

Commissions	Age of consent	Reasons/ remarks
LCR 42 nd , 1971	16	Misinformation about victim’s age should be a defence when the victim is between 12 -16 years.
LCR 84 th , 1980	18	As marriage of a girl below 18 is prohibited, sexual intercourse should also be prohibited.
LCR 156 th , 1997	18	As age for kidnapping was increased from 16 - 18 years.
LCR 172 nd , 2000	16	-
NCW, 2006	18	Consented activity is exempt if victim is 16-18 years old and accused ≤ 5 years older than victim.
Verma, 2013	16	Consented sexual activity with persons above 16 years should not be penalised.

Sources: Law Commission Reports; NCW’s draft Indian Penal Code Bill, 2006; Report of the Verma Committee to Amend Criminal Laws, 2013.

Some countries have a different age of consent as well as a defence of low age gap between consensual participants. Provisions of five such countries are depicted in Table 5 below.

Table 5: Comparison of age of consent in different countries and the defence of low age gap

Country	Age of Consent	Exemption in case of low age difference when acts are consensual
Canada	16	If the accused is not more than 2 years older than a complainant of 12 to 14 years; If the accused is not more than 5 years older than a complainant of 14 to 16 years.
UK	16	If the victim is 13 to 16 years old and the accused is less than 18, and the accused is mistaken about the age of the victim, there is a defence.
USA	16-18	37 states provide an age of consent of 16 years; 6 states have an age of consent of 17 years; 8 provide an age of consent of 18 years. Age gap exemption ranges from 2 to 5 years.
Finland	16	If there is no great age difference between complainant and the accused.
Australia	16	In four states consensual sexual intercourse is not punishable if both parties are below the consent age.

Sources: Canadian Criminal Code, 1985; Sexual Offences Act, 2003; Criminal Code of Finland, 1996; Statutory Rape, ASPE, Department of Health and Human Services, United States of America, 2004; Australian State Laws.

Marital sexual assault

Bill and
Clause 5;
Ordinance
New
Section
375,
Exception

The Bill and the Ordinance penalise un-consented sexual activity against a man or a woman. The same acts would not be punishable if a man engages in un-consented activity with his wife when she is over 16 years of age. A similar exemption also existed under the IPC. This raises two issues.

Various Commissions have taken different views on the issue of whether marital rape should be an offence. Table 6 indicates the opinion of these Commissions.

Table 6: Arguments on whether marital rape should be an offence

Issues	LCR,1980	LCR, 2000	NCW draft Bill	Verma Committee	Ordinance
Imprisonment for rape	Max. 14 years.	7 years to life imprisonment.	7 to 10 years.	7 years to life imprisonment.	7 years to life imprisonment.
Marital rape as an offence	No.	Not an offence unless wife is ≤18.	Yes. Punishment: 7 to10 years.	Yes. Punishment: 7 to10 years.	Not an offence unless wife is ≤16.
Reasons	No reason given.	Excessive intervention in marital relationship.	No reason given.	Relationship should not determine consent.	-
Punishment for rape of a judicially separated wife	Max. 14 years. Includes wife living separately.	2 to 7 years. Lower punishment as bond of marriage exists.	Treat like rape.	Treat like rape.	2 to 7 years. For cognizance satisfy <i>prima facie</i> case.

Sources: 84th Law Commission Report, 1980; 172nd Law Commission Report, 2000; draft Bill of the National Commission for Women, 2006; Report of the Committee on Amendments to Criminal Law, 2013; Criminal Law (Amendment) Ordinance, 2013

Marital rape is a crime in a number of countries, such as UK, Turkey, Canada, USA.⁸ In 1993, the United Nations' General Assembly had adopted a Declaration of Elimination of Violence against Women which specifically included marital rape as a crime against women.⁹

Before the Ordinance, rape could be committed by a man on a woman. The Ordinance changes this to an offence of sexual assault that is gender neutral. However, the exception to marital rape is provided only to the husband, and not to the wife (if she engages in sexual activity with the husband without his consent).

When a judicially separated wife is raped the Ordinance requires the court to be satisfied that a *prima facie* case is made out before taking cognizance on a complaint. This was not required under the IPC. It may be noted that the punishment in this case has been increased from up to two years to two to seven years imprisonment.

Notes

1. Statement of Objects and Reasons, Criminal Law (Amendment) Bill, 2012.
2. Report of the Committee on Amendments to Criminal Law, January 23, 2013.
3. Section 7 and 8, Protection of Children from Sexual Offences Act, 2012.
4. Section 3 and 4, Protection of Children from Sexual Offences Act, 2012.
5. Section 222-23 and 222-27, French Penal Code; Section 177(1) and (2), German Criminal Code, 1998; Sections 1, 2 and 3 United Kingdom's Sexual Offences Act, 2003.
6. Section 271, Canadian Criminal Code, 1985.
7. Section 2(d), Protection of Children from Sexual Offences Act, 2012.
8. UK's Criminal Justice and Public Order Act, 1994 and the Sexual Offences Act, 2003; Article 102, Turkish Penal Code, 2004; Criminal Code of Canada, 1970; In 1993 all states in the United States of America had ended their penal laws to delete the exception to marital rape.
9. Article 1, Declaration on the Elimination of Violence against Women.

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