

Gender justice, interrupted



Death or longer prison terms for rape under a new law will not empower women; what they need is the safety to walk on the streets free from the fear of sexual violence

The adoption of the Criminal Law Amendment Act 2013 by the Indian Parliament is a moment to be neither celebrated nor mourned. It is a moment to pause and reflect over what exactly has been achieved ever since the Delhi gang rape and murder of the 23-year-old student, and what has been lost. The Act converges with the recent global spotlighting of violence against women, including the adoption of a declaration on the elimination and prevention of violence against women and girls at the recently concluded U.N. Commission on the Status of Women in New York. Both these interventions highlight how the safety and security of women and girls around the world remains an elusive goal.

Two formulas

The specific question that arises is just exactly how state and non-state actors achieve this goal. There are at least two dominant formulas that have emerged in this arena over the decades. The first is a rights agenda, where the rights of women and others oppressed by sexual violence are specifically recognised and then a legal and policy agenda for protecting these rights formulated. The rights to equality, bodily integrity and sexual autonomy, freedom of speech, including sexual speech, and safe mobility, would be amongst those rights to be foregrounded and secured. The Verma committee, mandated with the task of recommending legal reforms to ensure women's safety, in part adopted this approach. The right to consensual adult sexual relations was the key area to be protected from discrimination and infringement through the adoption of a broad array of legal, policy, and educational initiatives.

The second approach is to foreground the state's role in ensuring the safety of its citizens by strengthening its security apparatus, including border controls, intensifying the sexual surveillance of citizens, disciplining the sexual behaviour of individuals and regulating and monitoring sexual conduct through law enforcement agencies. While autocratic states already pursue this route, there is a worrying trend of liberal democracies also adopting such an approach, including India. The move towards equating justice with the imposition of the death penalty or stringent prison sentences constitutes the lynchpin of this approach.

At least two factors have facilitated this approach towards security. Ever since the global war on terror, states have been accorded a justification for curbing human rights in the interests of the security of the nation and its citizens. Rendition, water boarding, incarceration without due process, have all been justified on this ground. A second factor is that non-governmental organisations, including those women's groups with a zealous focus on the issue of sexual violence against women, have not paid sufficient attention to the promotion of women's sexual rights, except for some forays into the area of reproductive rights. This focus on violence against women has been warmly welcomed by dominant players in the international legal arena. Global violence against women has been recognised as a human rights violation; rape has been incorporated as a war crime in the Rome Statute; and sexual violence in conflict and post-conflict has been specifically addressed by Security Council resolutions. While the focus on violence is important, the mechanism through which it has been addressed has not necessarily been empowering for women. These interventions have not destabilised the

dominant understanding of women as victims and female sexuality as passive; nor have they toppled the gender stereotypes that inform all of these initiatives.

The constant justification for a focus on the criminal law to address violence against women has been that prevention will take time. However, criminal law initiatives that further entrench a sexually sanitised regime fail to distinguish between sexual speech and unwelcome remarks, and target all sexual behaviour that does not conform to a sexually conservative script as reprehensible, make the battle to centre rights all that much harder. The new law in India retains the language and provisions dealing with the “outraging of the modesty” and chastity of a woman and then simply expands the range of activities that threaten or blemish this antiquated understanding of female sexuality. This approach cannot be a recipe for empowerment nor foster progressive change in thinking on matters of sex and sexuality.

Perhaps the most significant and pervasive issue left unaddressed by the new law is the everyday sexism that pervades the workplace, the public arena, the media and the educational system. No amount of censorship of sexual images can address the problem of sexism, the performance of which was on full display in the Indian Parliament during the debates on the new law. While sexual harassment, including unwelcome sexually coloured remarks, is criminalised, a focus on deterrence does not eradicate sexism nor produce respect for women. It merely empowers the state and the criminal law.

Unchallenged stereotypes

Leaving sexism and gender stereotypes unchallenged is likely to have a boomerang effect. The new laws will be used to go after individuals and communities who transgress or challenge established norms, or are already sexually stigmatised, marginalised, and viewed with suspicion. Sex workers may continue to be regarded per se as trafficked under the ‘sexual exploitation’ provisions. Merely extending the tentacles of the criminal law into their everyday lives without affording them rights with which to fight the violence and the exploitation they experience will force these women into more clandestine and exploitative situations and, ironically, increase their vulnerability to being trafficked. Similarly, gay men might be left with little protection from the sexual violence they experience as they have not been accorded the right to consensual sexual relationships. In fact, the new sexual regime will leave them more vulnerable to allegations of criminality, perversion and continued stigma. Muslim men might continue to be targeted as being more rapacious and lascivious especially in the States ruled by the Hindu Right. Female migrants will be targeted as trafficked victims and continue to be incarcerated in the name of protection; and young people will continue to have “pre-marital” sex, clandestinely, and often under unsafe conditions, now that the age of statutory rape has been retained at 18.

The exclusion of marital rape from the purview of the new law reinforces the sexual prerogative of husbands, leaving some women wondering why they should get married if it means they would enjoy fewer rights. And the fundamental question remains whether this expanded legal edifice will be able to stop the kind of attack that occurred on the Delhi bus last December.

The reactions to the U.N. Declaration and debates on the new criminal law in India furnish telling insights on the extraordinary levels of resistance to the very idea of the right to sexual autonomy and gender justice on the part of dominant groups, and the subsequent scramble to reinforce the rights of an already overprotected male elite. In New York this was evident in the debate on the declaration. The Muslim Brotherhood claimed that the declaration would lead to a “complete disintegration of society” and decried the possibilities of allowing women to prosecute husbands for rape or sexual harassment. Others such as the Vatican were concerned over references to access to emergency abortion, and sexually transmitted diseases.

In India, the new law represents a trend in South Asia to equate justice with the death penalty and stringent imprisonment terms. Yet empowerment for women cannot lie in merely attaching a death sentence on to the crime of rape, or increasing the mandatory minimum sentences for rape. How will these measures act as deterrents when indeed

such changes will see the already low conviction rate for rape plummet even further? Empowerment rests in the ability of women, sexual minorities, and religious minorities to be able to walk on the streets free from the fear of sexual violence, sexual harassment and rape.

The young women and men born in the crucible of globalisation and neo-liberal economic reforms are unlikely to be discouraged from demanding a gender-friendly and egalitarian workspace. And there is still a possibility that the new law in India will be challenged in the Supreme Court for violating women's right to equality as well as excluding sexual minorities from its protection. The protests after the Delhi rape were demanding justice in the form of more freedom not autocracy, respect not fear, and a more egalitarian society, not a reaffirmation of the established gender and sexual hierarchies of power. The old order has definitely been shaken, and its values based on exclusion and prejudice have undoubtedly passed their expiry date.