

A CRITICAL ANALYSIS ON THE CRIMINAL LAW AMENDMENT ACT, 2013

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▪ ***Framework of the Act***

a) *Exigency of shaping the law in a different manner-*

Years ago in the Vishakha case, the Supreme Court of India discovered the lacuna of any law protecting women from sexual harassment at workplaces and forwarded the guidelines to serve the same purpose until the government enacts a law for the above. However, it had taken even more than 15 years to pass the bill for the Parliament to that effect. This lucidly indicates the ignorance of the lawmakers to safeguard women. It also suggests the stretch of time which may pass without any protection from law in the country before that protection is legally granted. This was also the case with laws dealing with rape and sexual assault around the time the 2012 Delhi Gang Rape happened, with changes suggested and felt needed never made and long overdue.

b) *Heinous crimes of rapes and acid attack maligning the social structure-*

This was also the time when cases of rape and acid attacks started coming into notice of the public. There was a toss in the reporting of these cases, and the issue of protection of women started gaining attention in the debates amongst people. It also gave rise to a wider discourse and a need to build up laws dealing with protection of women was felt by and large.

c) *2012 Delhi Gang Rape case- Breaking of Public Patience-*

The contemptible 2012 Delhi gang rape in Delhi took place at night on 16 December 2012. On her ride back to her home in a private bus from a movie with her male friend, a 23 year old female, physiotherapy intern by profession was brutally beaten and gang raped by the six men in the bus inclusive of the driver. One of the six men was a juvenile, who did the greatest harm to the female victim. After the beatings and rape, both the victims (the girl and her friend) were

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thrown out of the moving bus by the offenders and left unattended on the side of the road, partially clothed. Later, the victims were taken to the Safdarjung Hospital in Delhi for treatment.³

Medical examination of the prosecutrix suggested that she was penetrated by probably a blunt rod-like object that had caused severe damage and harm to the internal organs of the victim. Such object was also found in the bus during the police investigation, which boosted the medical report.⁴ She died just thirteen days because of her injuries.

The story of the victimized women caught national attention and became the topic of discussion in media. People empathized with her, and she was nick-named as 'Nirbhaya' by the media. Sentiments of the people rose to demand justice for the deceased victim by immediate prosecution and strict punishment for the accused. Severe protests took place in Delhi, where thousands of them clashed with security forces. Similar protests took place in such major cities all across the country.

All the six accused were arrested immediately after the infamous incident. The accused who was juvenile was found guilty of rape and murder at the Juvenile Justice Board, under the Juvenile Justice Act on the 31 August 2013. He was sentenced to imprisonment of three years in a reform facility. Rest of the five accused men was tried before a Special Fast Track Court set up for the aforementioned case. Later one of the accused committed suicide in prison during his imprisonment, and the remaining four accused were found guilty of murder, rape, destruction of evidence and unnatural offences by the fast-track court. They were sentenced to death penalty by the court on 13 September 2013.

After the gang rape incident widespread protests took place. There were protest movements throughout the nation especially in Delhi, all demanding stringent laws to check all the violence occurring against women.

d) Justice Verma Committee: Establishing the base of the Act-

³ "What happened on the night of 16th December 2012?" Accessed on June 8, 2017.

<http://ibnlive.in.com/news/delhi-gangrape-what-happened-on-the-night-of-december-16-2012/420729-3-244.html>;

⁴ "How the police cracked the Delhi gang-rape case." Accessed on June 8, 2017.

<http://www.ndtv.com/article/cities/how-the-police-cracked-the-delhi-gang-rape-case-306698>;

On 22 December 2012, just exactly six days after the incident, the Central Government notified appointment of a judicial committee headed by J. S. Verma, a former Judge of Supreme Court, to suggest basic amendments to law of crime to strictly deal with cases of assault on women sexually. The committee included retired judge Leila Seth and leading advocate Gopal Subramaniam. The committee was accordingly given a month to submit its report on the same. It submitted the report within 29 days, on 23 January 2013. The report the main reason behind the crimes against women was failure on the part of the Government and Police in their functioning. Multiple amendments in the criminal law were suggested, particularly in the Indian Penal Code. The committee also suggested a new definition of rape to broaden the scope of the offence and increase the minimum punishment for rape. The report included certain acts like voyeurism and stalking to be included as crimes in the Indian Penal Code.⁵ Some more changes were suggested in the Evidence Act and the Criminal Procedure Code.⁶

▪ ***Introducing new offences in the criminal law***

e) *Acid attack (326 A) and Attempt to acid attack (326)-*

The Indian Penal Code has been amended and now is inclusive of the act of throwing or administering acid or an attempt to that effect.

326A. Voluntarily causing grievous hurt by use of acid, etc.:

If somebody throws acid on someone or administers it which causes permanent or partial damage or deformity with the intention or knowledge that he is likely to cause such damage, he is liable under 236A. The person will be punished with imprisonment of minimum 10 years, which can extend to life imprisonment. The person convicted will also have to pay a fine, an amount reasonable to meet the medical expenditure of the victim which will be given to the victim. In the Ordinance to the Act, the fine was limited to a maximum amount of Rs 10 lakhs.⁷

⁵ "Report Summary: Report of the Justice Verma Committee on Amendments to Criminal Law, 2013." Accessed on June 10, 2017.

<http://www.prsindia.org/parliamenttrack/report-summaries/justice-verma-committee-report-summary-2628/>

⁶ Bhattacharya, Rituparna. "Criminal Law (Amendment) Act, 2013: Will it ensure women's safety in public spaces?" Accessed on June 10, 2017.

<http://www.spaceandculture.in/index.php/spaceandculture/article/view/11/2>

⁷ Accessed on June 10, 2017.

<http://www.gktoday.in/criminal-law-amendment-act-2013/>

326B. Voluntarily throwing or attempting to throw acid:

If a person attempts to do the act stated in 326A, he will be punished with a minimum term of 5 years, which can extend to 7 years, with a fine.⁸

f) Sexual Harassment against a woman (354A)(1)-

A man is said to have committed sexual harassment if he indulges in any of the following acts:

1. Physical contact and advances involving unwelcome and explicit sexual overtures
2. Demand or request for sexual favours; or
3. Showing pornography against the will of a woman; or
4. Making sexually coloured remarks

For offences under (1) and (2), the sentence can be of maximum 3 years or fine or both. For (3) and (4), it may extend to 1 year or fine or both.⁹

g) Act with intent to disrobe a woman (354B)-

Under this provision, the act of criminal force or assault by a man against a woman coupled with the intention of disrobing or compelling her to be naked in a public place is punishable. It will also include an abetment to such act. The punishment will be an imprisonment of minimum three years and maximum five years coupled with fine. This offence can only be committed by a man.¹⁰

h) Crime of Voyeurism (354C)-

It punishes a man who captures or sees or disseminates the images of any woman who is engaged in a private act in such circumstances in which she would usually have the expectation that she is not being observed by the perpetrator or any other person.¹¹ If that particular woman has given consent to capture such images but not to their dissemination, or dissemination of such images to a third person, it will be an offence.

⁸ "Simplifying the Criminal Law (Amendment) Act, 2013." Accessed on June 10, 2017.

<http://grayscale.org.in/entries/general/simplifying-the-criminal-law-amendment-act-2013-%E2%80%93-ipc-part-i>

⁹ *The Criminal Law Amendment Act, 2013.*

¹⁰ *Ibid.*

¹¹ *Supra* note 9.

The provision also provides for subsequent conviction in case the offence is committed a second time. For first conviction, imprisonment will be between 1-3 years with fine and in case of subsequent conviction it will be between 3-7 years. Only a man can commit the offence on a woman.¹²

i) Stalking (354D)(1)-

Stalking includes the following ingredients-

1. Monitoring the use by a woman of the internet, email or any other form of electronic communication, or
2. Watching or spying on a woman, or
3. Following a woman or trying to contact her for personal reasons, even if she is disinterested.

In such abovementioned cases, man can prove his innocence only if he can prove that the stalking he was doing was done for preventing or detecting crime in which he had the responsibility to do as was entrusted to him by the State or if done to adhere to a law for any other valid reason. This provides protection to police personnel who are following a woman to conduct investigation in any kind of a criminal case.¹³

The offence is no longer gender-neutral, and only a man can commit the offence on a woman.

The punishment for the offence is imprisonment up to three years for the first offence, and shall also be liable to fine and for any subsequent conviction would be liable for imprisonment up to five years with fine.¹⁴

▪ ***Several amendments in the existing laws***

j) Definition of rape-

¹² “Changed Legal Position on Sexual Offences -Understanding Criminal Law (Amendment) Ordinance, 2013.” Accessed on June 11, 2017.

<http://nlrd.org/resources-womens-rights/rape-laws/government-notifications-advisories-rape-laws/changed-legal-position-on-sexual-offences-understanding-criminal-law-amendment-ordinance-2013;>

¹³ *Supra* note 14.

¹⁴ *Supra* note 9.

The Parliament by the Amendment Act, 2013 widened the ambit of rape by making certain non-penetrative act also as offence amounting to rape. The Amendment Act, 2013 repealed the Ordinance (Amendment) Act, 2013 which was having wider ambit, thereby raising serious questions regarding the loopholes that the judiciary could confront in future.

Provisions before the Act:

Sections 375, 376 and 376 A-D of the Indian Penal Code covered rape. However, medical examination was not an exception under the old provision. Rape under the IPC had been interpreted to mean only penile-vaginal intercourse.¹⁵

Provision after the Act:

Section 375 – Under the new section, a man is said to commit rape if there is:

- Penetration of penis into vagina, urethra, mouth or anus of any person, or making any other person to do so with him or any other person;
- Insertion of any object or any body part, not being penis, into vagina, urethra, mouth or anus of any person, or making any other person to do so with him or any other person;
- Manipulation of any body part so as to cause penetration of vagina, urethra, mouth or anus or any body part of such person or makes the person to do so with him or any other person;
- Application of mouth to the penis, vagina, anus, urethra of another person or makes such person to do so with him or any other person;
- Lastly, touching the vagina, penis, anus or breast of the person or makes the person touches the vagina, penis, anus or breast of that person or any other person.¹⁶

The 2013 Act expands the definition of rape to include oral sex as well as the insertion of an object or any other body part into a woman's vagina, urethra or anus. The offence of rape has now been amended and given a broader definition which is comprehensive enough to include

¹⁵Arvind Narrain. "The Criminal Law (Amendment) Bill 2012: Sexual Assault as a Gender Neutral Offence." *Economic and Political Weekly*, 2011. Accessed on June 11, 2017.

<http://www.epw.in/web-exclusives/criminal-law-amendment-bill-2012-sexual-assault-gender-neutral-offence.html>;

¹⁶*Supra* note 15.

any kind of penetration and also in any body part of the woman or girl. This is the most important change because earlier section 375 of the IPC only included the penile-vaginal penetration as rape. The new recommendations of adding any penetration would be considered as rape was the most efficient tool in widening the scope of rape which was also demanded earlier as seen in the suggestion given by the fifth law commission report. Registration of complaints and medical examination was also included.

The new amendment defines ‘consent’, as an unambiguous agreement to engage in any sexual act and further that the absence of resistance will not mean consent. *Non-consent is a key ingredient* for commission of the offence of rape.¹⁷ The definition of consent therefore is the main key to the outcome of a rape trial, and has been interpreted systemically to degrade and discredit victims of rape.

Exception from medical examination:

An exception to the above has been provided for the purpose of medical examination¹⁸. The Supreme Court in April in 2013 censured current medical tests for rape survivors, and has criticized severely the two-finger test discussed in the case of *Lillu @ Rajesh v. State of Haryana*.¹⁹ The centre was directed by Justice BS Chauhan and Kalifulla to provide better medical tests that do not violate the dignity of rape-survivors, thus preventing a “second rape”.

Offences those are gender-specific:

The offence of rape i.e. sexual assault was earlier a gender neutral offence, however, now it is women centric. Now only a man can commit this offence that too only against a woman.

Section 376A and life imprisonment:

The punishment for rape is at the least seven years, and may in some brutal cases extend up to imprisonment for life. A man who by profession is a medical officer, jail officer, police officer, army personnel, public servant or public officer and commits rape on any girl or woman or any

¹⁷ *Ibid.*

¹⁸ *Supra* note 12.

¹⁹ *Lillu @ Rajesh v. State of Haryana*, AIR 2013 SC 1784.

other female may be incarcerated for a term period of at least ten years. Life imprisonment extending to death as punishment has been set for situations where the rape results in death of the victimized girl, or leading the victim to enter into a vegetative state. Under the newly amended sections a punishment of at least 20 years has been prescribed for gang rape.²⁰

k) Trafficking of persons (Section 370A)-

Section 370 of the Indian Penal Code is substituted with new sections 370 and 370A.

Sec. 370 Trafficking of person:

Under this section, a person is aid to commit trafficking when for exploitation he:

Transfers, transports, harbors, recruits, or receives, any person or persons, by using force or threats, or any other kind of coercion, or by abducting anyone, or through fraud, or any other kind of deception, or by using abuse of power, or by using inducement of any kind, including the giving or receiving of payments or benefits in any form, in order to get the consent of any individual having control over the person who has been recruited, transported, harbored, or transferred or received is responsible for trafficking.

The term "exploitation" shall include any form of physical exploitation or any act of sexual exploitation, or slavery or practices similar to slavery, servitude, or the removal of organs forcefully.²¹

Victim's consent is immaterial:

The victim's consent is absolutely immaterial in the establishment of the offence of trafficking. Whosoever is held guilty for the offence of trafficking shall be awarded punishment of *rigorous* imprisonment for a term which shall not be less than seven years, but which may extend to ten years, and shall also be liable to fine. The offence involves the trafficking of more than one person or a minor. The punishment prescribed for a person who is not a minor- is rigorous imprisonment for a term which shall not be less than ten years or even may extend to imprisonment for life, and shall also be liable to pay a certain amount of fine. Where the

²⁰ *Supra* note 12.

²¹ *Ibid.*

trafficking is that of a minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine. Where the offence involves the trafficking of more than one minor, it shall be punishable with rigorous imprisonment for a term which shall not be less than fourteen years but which may extend to imprisonment for life, and shall also be liable to fine.²²

Police officers involved in trafficking:

When a police officer or any public servant is involved in committing the offence of trafficking of any person then, such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.²³

370A. Punishment for a person who engages the trafficked person into sexual exploitation:

This section deals with punishment of any person who engages in offence of trafficking a minor or other for committing further sexual exploitation. The offender must have proper and considerable knowledge or a reason to believe that such a minor or any other person has been trafficked. In case the trafficked person is a minor, the offender shall be punished with rigorous imprisonment for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine. In case he or she is of any other person who is not a minor, the offender will be punished with rigorous imprisonment for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.²⁴

1) *Changes introduced in the Criminal Procedure Code and Indian Evidence Act-*

Changes to the Code of Criminal Procedure, 1973:

- **Insertion of 198B**

No Court shall take cognizance of any offence that is punishable under section 376B of the Indian Penal Code where the persons are in a marital relationship i.e. married couple, except upon at first instance satisfaction of the facts which constitute that the offence upon a complaint having been filed or made by the wife against the husband.

²²*Supra* note 12.

²³*Ibid.*

²⁴"Laws on Sexual Harassment: Existing Indian laws." Accessed on June 11, 2017. <http://safedelhi.jagori.org/deal-with-sexual-harassment/legal-information>;

- **Insertion of 357B**

This section mainly provides for an additional compensation i.e., in addition to fine under acid attack or rape: section 326A (i.e. acid attack) or section 376D of Indian Penal Code. This compensation has to be deciphered by the state government.²⁵

Changes to the Indian Evidence Act, 1872:

- **Evidence of character or previous sexual experience not relevant in certain cases**

In prosecution for any offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code or for attempt to commit any such offence, where the question that turns up is of ‘consent,’ any kind of evidence regarding the character of the victim or regarding such person's prior sexual experience with any person shall be irrelevant on the issue of such ‘consent’ or the ‘quality of consent.’ A new section 53A has been inserted to this effect.

m) Changes to the :Protection of Children from Sexual Offences Act, 2012-

In section 2(1), in clause (d), the word “eighteen years” was substituted by the words “sixteen years”. Section 42A was inserted which basically stated that the above act is to be interpreted not in derogation of the provisions of any other law for the time being currently in force and, in case there comes up any inconsistency, the basic provisions of this Act shall have an overriding effect on the provisions of any such upcoming law to the extent of making it inconsistent.²⁶

- ***Over-criminalization***

This portion of the research paper is mainly descriptive which is mainly trying to show that how various crimes erode and bring up the basic ‘principle of legality’ and produce severe punishment— something that should not have ideally been imposed on anyone at all, or that violates the ‘principle of proportionality’ by being too sincere in light regarding the seriousness and brutality of the offense. It offers a new categorization of the novel crimes that have been enacted: ancillary offenses, overlapping statutes, and crimes designed to prevent risk. In most of

²⁵ *Supra* note 12.

²⁶ *Supra* note 12.

the cases, the strict enforcement of all these laws brings the results that any reasonable man will deem it to be unjust. Eventually, the same debate popped up during the time when the aforementioned act was being discussed in the Parliament. The very member of opposition, Shashi Tharoor went against the bill by opposing it while putting forward the complications and problems that may occur in the near future. He said that by bringing the children of the age below 18 years out of the category of juvenile and treating them as adult will have harsh and severe implications on the future of the very person and also the society. This will lead to the over-criminalization of the offence as the punishment prescribed for them must not be retributive but must be restorative. But, the Women & Child Welfare Minister (Maneka Gandhi) gave a very well reply to all the contentions given by Shashi Tharoor that the persons who are above the age of 15 years develop mentally as well as physically and are well versed with the right and wrongs. The cases administered, in which the juveniles had committed some of the very heinous and brutal crimes were seen acquainted with what they did and accordingly also took the advantage of being a juvenile by becoming safe for the same. Indeed, the over-criminalization is not at all there as of now.

- *Critique*

- n) *Not strong enough-*

The Act that was introduced was reprimanded by many people of being weak enough to protect women from harassment. Many of its provisions were accepted with a welcoming attitude but still many were inadequate to safeguard the rights of women. One of the inadequacy that can be pointed out was the failure to criminalize marital rape — as was the recommendation given by the Verma Committee — which was basically argued to make India get placed in the company of a select group of nations, including China, Pakistan and Saudi Arabia.²⁷ Opponents in the debate preceding the 2013 Act insisted that criminalizing marital rape would sabotage the institution of marriage, and would allow women to fabricate claims of rape, since rape within marriage was ‘difficult to prove.’ The remedy espoused by the self-styled saviors of marriage is divorce or prosecution for cruelty, but not for rape. However, the proponents on the other side who were in the favour of criminalizing marital rape would tend to argue that such “justifications” ignore the

²⁷“Government Ordinance vs. J. S. Verma Committee Recommendations.” Accessed on June 12, 2017. <http://www.ibtimes.co.in/articles/430786/20130202/government-ordinance-vs-js-verma-committee-recommendations.html>;

very basic harms induced by the crime of rape, which violates a woman's physical integrity and sexual autonomy by hitting on her to submit to unwanted forceful sexual intercourse.

o) Suggestions of the Committee not incorporated-

The Criminal Law (Amendment) Act, 2013 has been severely criticized by most of the human rights organizations and women's rights organizations for excluding certain number of suggestions that were given by the recommendation of the Verma Committee Report which primarily included- marital rape, reduction of age of consent, amending Armed Forces (Special Powers) Act such that no sanction is needed for prosecuting an armed force personnel accused of committing any offence against a woman. The Government of India has replied that the changes will take place only after a proper discussion and that the suggestions given have not been rejected completely.²⁸

p) A comparison between the Committee's report and the Act-

The major differences between the recommendations as approved by the President and the J. S. Verma Committee are as follows:

- The Justice J. S. Verma Committee recommended 20 years imprisonment for gang-rape and life imprisonment for rape and murder but refrained from using the term "death penalty" though there was public outcry to sentence rapists with death sentence following the brutal gang-rape and murder of a 23-year-old medical student in Delhi on December 16, 2012. However, the Act passed went for a harsher punishment for a rapist – a minimum of 20 years imprisonment for rapists and even death penalty in cases where rape causes death of the victim or the victim falling into a persistent vegetative state.
- The report given by Justice Verma Committee recommended criminalization of marital rape, but the Act excluded it.
- The report given by Justice Verma Committee recommended restriction of politicians facing sexual offence charges from contesting elections. This too was not included.

²⁸ Editorial. "Open to revisions in anti-rape bill: Govt." *The Times of India*. February 3, 2013.

- The report given by Justice Verma Committee recommended that the senior police or army officials be held responsible for sexual offences committed by their junior but the Act rejected it.
 - The report given by Justice Verma Committee recommended making videography of recording statement from victim mandatory but the Act made it optional.²⁹
- q) A comparison between the draft ordinance of the Act and the Act as approved by the President³⁰-*
- The report given by Justice Verma Committee recommended the word as rape for the definition of sexual offences but the ordinance with the word “sexual assault” replaced it. However, in the Act, the term “rape” is used.
 - The report given by Justice Verma Committee recommended fine shall be just and reasonable to meet medical expenses for treatment of victims of acid attack, while in the Ordinance it was set up to Rs. 10 lakhs.
 - Sexual harassment: "Clause (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature" has been removed in the Act. Punishment for offence under clause (i) and (ii) has been reduced from five years of imprisonment to three years.” Only a man can commit the offence on a woman, it is no longer gender-neutral.
 - Voyeurism: The offence is no longer gender-neutral, only a man can commit the offence on a woman.
 - Stalking: The offence is no longer gender-neutral, only a man can commit the offence on a woman. The definition has been rearranged and reworded by breaking it down into clauses. The following sentence has been removed "or watches or spies on a person in a manner that result in a fear of violence or serious alarm or distress in the mind of such person, or interferes with the mental peace of such person, commits the offence of stalking." Punishment prescribed for the offence has been altered. A man found committing the offence of stalking a woman would be liable for getting imprisoned up to three years for the first offence, and shall also be liable to fine and for any subsequent conviction would be liable for imprisonment up to five years and with fine.³¹

²⁹ *Supra* note 29.

³⁰“Ordinance bypasses all vital recommendations of Verma panel.” Accessed on June 12, 2017.

<http://www.thehindu.com/news/national/ordinance-bypasses-all-vital-recommendations-of-verma-panel/article4372835.ece>

³¹ *Supra* note 14.

▪ *Conclusion*

The Criminal Law (Amendment) Act, 2013 is basically known to be the most concrete step taken by the Government of India in order to put a stop at violence against women.³² The majority of amendments done by the Act in the Indian Penal Code not only broadens the ambit of most of the offences, but also identifies and introduces new offences like acid attacks.. This was a bold step, but also a step long overdue.³³ Despite its some flaws and drawbacks like the non-inclusion of marital rape as a crime, the Act is in itself progressive in its approach and vision to fight a battle like a warrior against violence against women. It includes a basic change in the definition of rape which is more sought of centered around women and broader in its approach to what constitutes rape. The Act acknowledges the doctrine of “rarest of the rare” to be used to give death penalty as punishment to the offenders of crime, increasing the deterring factor against the commission of rape. Not only the Indian Penal Code but provisions of the Criminal Procedure Code and the Evidence Act are also amended under the Act. It is the first Act to recognize the privacy of victims of sexual assault, discontinuing with the practice of physical examination of the sexual history of the victims for evidence.³⁴

However, the Act by itself is not sufficient to seek justice for any kind of violence against women.³⁵ For resolving this issue, the Indian Government needs to make a great amount of investment in building up requisite and adequate infrastructure to deal and resolve the crimes supplemented by meaningful reforms in judiciary (by-building fast track women’s courts, engaging more women lawyers, women doctors to examine victims) and modernization of the police system across whole of the country.

³² *Ibid.*

³³ R.C. Borpatragohain. “Safeguarding the Dignity of Women under the Criminal Law Amendment Act 2013-A Critical Analysis.” *Space & Culture India*, Vol. 1 no. 2 (2013).

³⁴ *Supra* note 14.

³⁵ Aparna Viswanathan. “A task only half finished 2013.” Last modified on August 28, 2013. <http://www.thehindu.com/opinion/lead/a-task-only-half-finished/article5065462.ece>: