THE RAPE LAW AND CONSTRUCTIONS OF SEXUALITY

MADHU MEHRA

PLD

PLD is a legal resource group pursuing the realization of social justice and equality for women through law, particularly in contexts of discrimination and marginalization. Founded in 1998, the organization locates women's rights as integral to achieving social justice in contexts of family, sexuality, culture, caste, conflict and development. It pursues its goals through three mutually reinforcing strategies comprising of creation of information and knowledge resources, development of capacities and perspectives, and engagement with public policy actors including civil society, UN human rights mechanisms and the state.

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ISBN: 978-93-84599-07- 2

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Printing: **Omni Print, New Delhi**
Financial support: **MacArthur Foundation**

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FOREWORD

All too often, law is discussed in relation to how it responds to or limits the availability of redress for all forms of sexual or gender based violence. Particularly because sexual violence was normalized in society, supported in no small measure by law's silence on the subject, law reform struggles became powerful means by which State recognition and accountability to act against systemic forms of sexual oppression was secured. Successive law reforms filled this vacuum, to the extent of at least of naming sexual wrongs, as they are experienced by women and children.

Yet, a somewhat expanded legal vocabulary on sexual violence has not significantly helped in bringing into focus the complex and interconnected ways by which ideologies and structures of caste and gender serve to regulate sexuality through the law. That sexuality is a site of power, and consequently an area of immense anxiety because of its potential to destabilise structures of privilege, through which entitlements and controls over property and resources are secured, and reproduced along lines of caste and gender, is yet to gain fuller recognition in our activism. As a result, these dimensions invariably get missed in discussions focused primarily on sexual violence or gender stereotyping, leaving unanswered questions of why law shames and punishes non-normative sexualities.

This resource book opens up the discussion on sexuality and its interlinkages with sexual violence. It reminds the reader that 'sexual wrongs' in ancient and modern law, in both *de jure* and *de facto* ways, have been less about addressing sexual violence than about enforcing notions of purity and pollution, and shame and lust, that are essential to reproducing caste and gender. Initiating this discussion through the familiar terrain of the rape law, it makes linkages with lesser known areas of law – including ancient law – to holistically unravel the politics of sexuality and its intersections with marriage, caste, and gender.

This effort is valuable not least because it is designed for social workers and activists, who despite their proximity to case work and victim support, have scarcely any resources on law that go beyond providing 'information' on legal provisions. As a tool of consciousness raising, a key

aspect of feminist mobilisation, this resource book helps to expose law's troubled relationship with sexuality, in ways that help understand why redress for sexual violence remains difficult to access, despite the law reforms.

Knowledge itself is a site of power in which complex analyses and understandings are limited to a select few, often in the academia, or those with a privileged education. By over-simplifying material for field workers in the social sector, and limiting legal resources to legal literacy alone, this knowledge divide is only widened. In that sense, this resource book is an extremely useful and unique contribution that facilitates a complex and nuanced understanding of sexuality as a site of power, state control, and political struggle in an accessible manner.

Uma Chakravarti
Feminist Historian, Democratic Rights Activist

PREFACE

The rape law has historically served to excuse male sexual aggression as desire, while disgracing women for their real or perceived sexuality. Inevitably then, the struggle for reform focused on transforming the rape law from a means of shaming women, to that of enforcing accountability for sexual violence. The campaigns yielded considerable legislative gains, while leaving untouched penal offences that punish non-normative consensual sex. A host of penal provisions cloister female sexuality within marriage, by forbidding all sexual expressions that disturb patriarchal controls and caste purity. For this reason, a discussion on sexual violence that excludes reference to the punitive responses to non-normative sexuality, fails to uncover how the old structures of power operate through the law, or get re-created in spite of law reform.

PLD has intentionally focused attention on the linkages between sexual offences and sexuality in all its work, including field work, research, trainings, and meetings. Since 2010, PLD's residential workshops and discussion platforms have stressed the need for exploring the continuum between sexual violence and sexuality, as reflected in the law, as well as in our individual perceptions about sexuality that privilege concerns about sexual wrongs over sexual rights. This resource book explores the role of law in regulating female sexuality, by contextualizing the rape law within the broader socio-cultural understanding of gender and caste as sites of power and privilege. Many other readings of the rape law – such as those relating to gender neutrality, fair trial and sentencing – could further enrich this understanding, but they are beyond the nature and scope of this resource book.

The resource book grew from a reflective process arising from a series of discussions within PLD on different approaches and iterations of a resource book on the rape law. Earlier iterations on summarizing legal provisions post the 2013 criminal law amendments, as well as of tracking reforms through landmark cases were shelved. After considerable brainstorming, it was agreed that 'information-centric' approaches, focusing on law without drawing linkages with structures of gender and caste through which social location, power and access to justice is shaped, or focusing on sexual wrongs to the exclusion of sexual rights, would only deepen the knowledge gap on law's relationship with power and sexuality.

A telling of legal provisions or narrations of the law reform story are no doubt informative, but do not sufficiently advance feminist goals of critically understanding and engaging with sexuality as a site of power. Since the resource book feeds capacity development and the creation of knowledge - both core strategies that define PLD's theory of change, it was felt that a complex and critical approach to sexual regulation would be necessary, especially for those sections of activists and change agents who have little or no access to such resources. Accordingly, the language is accessible, with minimal usage of legal terminologies, and the thematic focus limited to key aspects that tell a bigger story of the State's regulation of female sexuality.

Gratitude to Dipta Bhog and Rukmini Sen for being part of the brainstorming group that shaped this focus, and who later reviewed successive drafts – and to Dipta Bhog yet again, for the extensive inputs through the course of the last draft. Acknowledgment is due to Saumya Uma for her narratives of landmark cases that triggered campaigns for law reform, for an earlier work on rape law reform. And finally, thanks to Saumya Maheshwari, who helped with case law, footnotes, and who together with Manisha Chaudhry pointed out portions of the text that required simplification or elaboration.

This resource book is designed to complement PLD's trainings, while also being a stand-alone reading for students and social workers alike. It may also be of interest to those curious about feminist critiques of sexuality and the law. Given that this is resource book seeks to be accessible and a tool of debate, reflection, and learning, feedback from readers is especially welcome, for enabling PLD to gauge the value of producing and translating similar resources that critically look at the law through a feminist lens.

Madhu Mehra
Executive Director

INTRODUCTION

Decades of campaigning has led to significant changes and reform in the rape law. Some of the major concerns of the women's movements from the 1970s to the contemporary moment gradually succeeded in being incorporated into law. Sexual violations other than rape, such as stalking, sexual harassment, forced disrobing, taking or circulating photos of women in private moments without their consent, and so on have been named as offences. The law now forbids references to the victim's sexual past, which was earlier possible for purposes of discrediting the victim's version. Importantly, the law has now come to recognise factors such as age, disability, caste, tribal status, as well as contexts of custody that render women more vulnerable to victimisation, treating these as aggravating the offence of rape. The ambiguity around the term 'consent' has been removed with a definition that recognises a woman's capacity to agree or disagree to distinct sexual acts. These changes suggest that older associations of rape with lust and desire of men, or shame and virtue have come to be replaced with an understanding of rape as violation of the bodily and sexual autonomy of women. The rape law as it stands now incorporates notions of the personhood of women.

"The successive campaigns for law reform sought to replace the understanding of rape as an act of lust or sexual desire to being a form of violence against women.

The campaigns led by the women's movements, intersecting at different moments with the civil liberties, democratic rights, Dalit, queer, child rights and disability movements, broadly sought to contextualise rape in terms of the unequal power structures in society. Since the law itself was blind to the reality of systemic sexual violence against women, it became an essential site of struggle for reform, as a means of achieving social justice. The successive campaigns for law reform sought to replace the understanding of rape as an act of lust or sexual desire to being a form of violence against women. In contexts where inequality

was compounded on account of the victim being in custody of the perpetrator, or where a higher caste perpetrator victimises a Dalit or tribal woman - the law reform struggles sought to treat such rape more gravely - as an abuse of power or an atrocity, respectively.

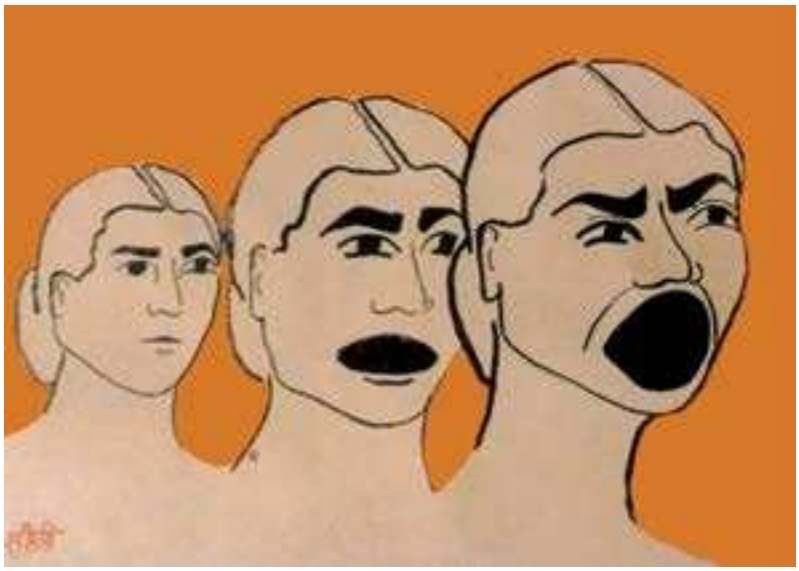
Legislative reform aimed to change dominant perceptions around sexuality that stigmatised and sexualised victims while excusing male entitlement and aggression. The campaigns demanded that all forms of sexual violations be named, and that legal procedures, rules of evidence be gender sensitive. The old vocabulary of 'modesty' and 'morality' was sought to be dropped in favour of descriptions that treat rape as violation of bodily integrity and sexual autonomy of the victims. Even the term 'rape' was sought to be replaced with 'sexual assault', although this did not eventually get incorporated into the law. Together, these demands sought to introduce the notion of women having ownership and control over their own bodies and sexuality to counter dominant values about female sexuality. The demand was that this should be reflected in formal legal vocabulary.

In its focus on rape and naming different forms of sexual offences, the law reform campaigns did not address other penal offences relating to sexuality – offences that punished adults for consensual sex. Thus, the gains of rape law reform are only partial, unable to effectively transform how the law structures gender and sexuality – specially but not only in relation to women. This resource book takes stock of how specific advances in relation to the rape law are interpreted, correlating these interpretations with other penal provisions on sexuality, to gain insight into the ways by which law constructs acceptable and unacceptable sexuality and gender relations. It seeks to probe the ways in which law interacts with social and cultural value systems, to understand why legislative reform may not substantially alter the functioning of the law, or the perspectives of the agencies tasked with implementing it.

WHY THE RAPE LAW?

Rape is one of the few offences that were recognised as 'wrongs' across centuries and societies. Although many different forms of sexual violations have existed across time and contexts, the victims of

"Although many different forms of sexual violations have existed across time and contexts – the victims of which include male, female and trans persons – adults and children – yet it was penile vaginal penetration that came to be treated as the only major offence.



This poster by Sheeba Chhachhi and Jogi Panghaal, Lifetools, for Saheli, Delhi, showing women move from silenve to vehement protest, epitomized the tenor of the vocal campaigns in the 1980s.

Courtesy: Our pictures, Our words by Laxmi Murthy and Rajashri Dasgupta, published by Zubaan Books.

which include male, female and trans persons – adults and children – yet it was penile vaginal penetration that came to be treated as the only major offence. This selective naming of a single type of sexual violation as the only serious offence, effectively erased State recognition of other forms of sexual violations, and the obligation to address the same effectively. This blindness and selectivity remained undisturbed in India from 1860, when the penal code was enacted, until 2012-13. It was with the enactment of the Protection of Children from Sexual Offences Act 2012 and the Criminal Law Amendment Act, 2013 – that the law finally came to recognise a gradation in sexual offences through naming of different sexual violations, within which rape remains the most serious.

The rape law has been most consistently and publicly contested and debated by the women's movements. In late 1970s and early 1980s, the cases of Maya Tyagi, Mathura, Rameeza Bee, Suman Rani amongst others, asserted the need for the law to recognise the concept of custodial rape. This required treating rape by the police (security forces, hospital staff, remand and protection homes) as more severe, because as State agents assigned the power to hold women in their charge, they bore a greater obligation to protect, care and adhere strictly to their duty towards those held in custody.

Simultaneously, the cases of Maya Tyagi, Aruna Shanbaug, as well as various cases of child sexual abuse highlighted the injustice of a definition of rape that failed to recognise anal and oral penetration, as much an act of violence and as offensive as penile vaginal.

The campaigns for law reform ultimately saw significant gains. The definition of rape was expanded to include oral, anal and vaginal penetrative sex; the concepts of aggravated and custodial rape were incorporated, and all references to the previous sexual experiences and history of the victim were dropped. Subsequently, the struggles by child rights groups and queer movements led to more challenges and further changes. A special law on child sexual offences was enacted in 2012, trans persons gained constitutional affirmation of the right to self-determination of gender in 2014, and demands for the repeal and reading down of the anti-sodomy law, Section 377 of the IPC, kept mounting. The challenges to criminalisation of homosexuality have continued through a cycle of petitions and appeals that have generated a mix of success, setbacks and renewed hope. References to women's sexuality are not limited to penal laws alone but also find mention in relation to matrimonial economic rights for women, which are conditional on the chastity of the separated or even divorced wife. The laws on obscenity, loitering, indecent representation of women, solicitation and sex work amongst others, are defined by moralistic standards, without regard to

Protests against the Supreme Court verdict in Mathura Case, 1978.

Courtesy: http://feminisminindia.com

women's sexual consent. Some of these laws have been included in the discussion on the rape law to gain comparative insight into the way sexuality is sought to be structured by the State. However, to retain a degree of focus, only some, not all such laws find reference in this resource book.

Essentially, it can be said that the only law relating to sexuality that has received the most persistent and intense attention, has been the rape law. The key issues of rape law reform have been much debated in the public domain. For these reasons, this area of law lends itself to understanding how and why the boundaries of legitimacy and illegitimacy, in relation to sexuality, are set in the way they are.

PURPOSE AND OBJECTIVES

This resource book is not intended to provide legal literacy, or information on the legal provisions to assist with case work. Rather, it aims to create a critical interest in and questioning of the regulation and control of female sexuality through the law, to motivate engagements with cross-cutting legal provisions on sexuality.

While the rape law provides a familiar entry point for reasons outlined above, it is not the sum total of the laws pertaining to sexual control. Together with other penal provisions, it creates a legal framework that reinforces social hierarchies or inequalities of good and bad sexuality. These set out the gradation of what is most desirable, what may be tolerable but not desirable, to what is bad, deviant and must be punished. Without critically questioning the foundational basis of each of the sexual offences, it is not possible to get a sense of the larger scheme of law that colours the functioning and implementation of the rape law.

Even as legal literacy or knowledge of specific legal provisions helps in providing crisis intervention and victim support, it is equally important to unmask the social values, gender relations and power structures that the law enforces. Law is not autonomous or independent of social values, institutions and society – in fact, as feminists have argued, it is very deeply embedded within them. If the rape law is read in relation to social values that inform it, as well as with other penal provisions on sexuality, it becomes clear why despite its advances, it has not

substantially transformed judicial understanding of gender roles, and gender relations, with respect to sexuality.

The agenda for change therefore cannot be limited to legislative gains, nor focus on law or lawyers as the primary change agents. Important as they are, social change requires a wider and continuing participation from a cross-section of society over a much longer process. In fact, change necessarily involves a continuing process of investment and activism, rather than mere legislative amendments or legal awareness or better access to justice.

LAW, SOCIETY AND SOCIAL TRANSFORMATION

Feminist studies of the law have long held that social and economic inequalities of women (and between women), are not simply the outcome of an unruly society that does not respect the rule of law. Instead, they are created, sustained and enforced by legal structures and design. Laws have historically served to protect male interests, particularly of those who are socially and economically more powerful. It crystallises interests of men from privileged ranks, who occupy positions of law-makers and law enforcers.

In the Indian context, it would serve the interests and value systems of economically robust men from higher castes, who occupy such positions. Since the law seeks to protect their material interests and the social institutions through which they control and subordinate others, engaging with law reform and claiming rights becomes of critical importance to marginalised groups and constituencies. It is through such efforts that laws have awoken to the realities of women, children, trans persons – differentiated by disability, caste, tribal status, sexual orientation and marital status. The rape law reform too, sought to change the meaning of rape as well as inject sensitivity into procedures, so as to accommodate women's experiences of violence, and make legal redress more victim-centric and fair.

Although changes in the written law are important, they are not sufficient to transform the way it is implemented. This is because the functionaries, agents and implementers of the law carry dominant understandings of sexuality, embedded as they are in the social values of institutions they

inhabit and control. The problem is no longer that the functionaries of the law are mostly men, which indeed they are. Institutional changes within the legal system have led to assigning work of sexual violence to women functionaries within the system – which has shown that the social values inherent in persons are not based exclusively on their sex or gender. So, while populating the legal system with more women makes it more representative of society and may possibly even generate empathy based on shared experiences, it is insufficient for transforming the functioning of the law. The tools of change involve questioning, re-thinking and re-imagining equality and justice in relation to sexuality. These are not immediate outcomes of legislative reform or orientation programmes for legal functionaries.

The tools of change require longer processes of debate and engagement with each of the different laws that are related to sexuality without selectivity - even as rape may be the central focus. This must involve questioning the hierarchies of positive and negative sexuality in society and in the law; the inconsistent basis for defining some sexual acts as lawful and others as criminal, setting contradictory logic for what is legitimate or illegitimate sexuality. Exploring the reasons for criminalisation of sexual acts is as, if not more necessary, than knowing what offences the law creates. Transformation involves public education and involvement in questioning and debate on the basis or principles on which some acts are criminalised while others are decriminalised. Different modes of communication would widen the scope of such exchange and debate - in ways that ultimately aid questioning and displacing of dominant social values. Unless the change is owned by a large majority of people, from whom the legal functionaries are also drawn, it is not likely to manifest in the implementation of law. For the law to deliver what the law reform intended, a more consistent framing of sexuality across different legal provisions is necessary, as is the creation of an environment where sexual rights are respected, asserted and protected.

WHO CAN USE THIS RESOURCE BOOK?

This resource book is designed for social workers, lawyers, paralegals and students who have some familiarity with the rape law, to encourage them to probe and unpack the linkages between social values, gender

relations and the law as they relate to prevalent understandings of sexuality. It is intended for change-makers to facilitate critical questioning, reflection, engagement and forging of linkages across sectors and themes on issues relating to sexuality. Particularly for those working on violence against women, including sexual violence, this resource book seeks to build an appreciation of the linkages between cases of rape/ sexual violence and regulation, including self-regulation and stigma in relation to sexuality.

To ensure that this resource book is accessible to a range of such stakeholders, the writing style and terminology has been simplified without losing sight of the complexities of the issues involved. For this reason, references to legalism and legal provisions have been avoided. While some familiarity with the law will certainly help in engaging better with the issues raised in this book, it is also hoped that for those who are unfamiliar, it will generate interest in the law. A summary of the penal offences relating to sexuality is included as an annexure, which re-classifies disparate offences to enable a feminist reading of the way sexuality is structured in the law. For those keen to delve deeper, the footnotes provide case name and reference, for further reading.

STRUCTURE OF THE RESOURCE BOOK

In addition to this introduction, there are four chapters in this resource book, of which 1- 3 address three core aspects of the rape law that have been the subject of considerable debate and campaigns for reform. Each of these areas of law reform bring out the competing visions of sexuality and sexual violence that have shaped the law reform debates, eventually resulting in the changes sought through campaigns. The chapters look at why these aspects assumed importance, the assumptions that the law reform sought to challenge - to ask whether the eventual incorporation of changes sought in the law, led to the outcomes envisioned. Have changes in the text of the law, transformed the manner in which it is interpreted and applied to cases? Chapters 1 – 3 deal with three different aspects, while the conclusion in chapter 4, picks up common threads that outline how law constructs sexuality.

Chapter 1 looks at why the definition of rape was limited to one type of penetrative sexual act and not others. Across history, there is

enough evidence to show that sexual practices included various kinds of penetrative sex – between same and opposite sex partners, despite which, only penile vaginal sex fell within the scope of rape. What were the reasons for this visibility and invisibility; inclusion and exclusion, in the law? This chapter probes these questions by exploring linkages of sexual acts with social structures and power relations that are sustained through sexual hierarchies of normal sex versus unnatural or deviant sex.

Chapter 2 takes a closer look at consent, a key aspect that distinguishes rape from legitimate heterosexual sex. It compares judicial interpretations of non-consent in rape cases with the (ir)relevance of consent in several other sexual offences, to ask why this defining aspect of rape is such an unstable category. Is the selective use of consent purely arbitrary or is it part of a mindful plan that privileges some kinds of sexuality, while stigmatising others? A new definition of consent that requires evidence of women's sexual agency is at odds with the irrelevance of consent – including within marriage, in relation to adolescents, same-sex desire and extramarital unions. How does the determination of consent and non-consent tie up with constructions of good and bad women, as well as good and bad sexuality in law, are some of the issues this chapter will raise.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (PoA), recognises violations by dominant caste persons against Dalits and tribals as atrocities. **Chapter 3** looks at the extent to which the PoA displaced the judicial focus on women's virginity and chastity, to develop an understanding of rape as a tool of power, oppression, and retribution between social groups instead. Is the treatment of victims any different in cases of sexual atrocities, where besides gender inequality, there is blatant assertion of power over oppressed social groups? How do courts identify markers of power and powerlessness between social groups? Do they acknowledge livelihoods, poverty, labour, dress and mobility as the lived markers of caste identity to effectively address atrocities? Or are literal expressions like caste slurs the only way by which the law is able to distinguish atrocities from mere offences? This chapter looks at whether the old equations of power and domination (asserted through sexual violence) impact the way law responds to rape. To what extent does the implementation of

the PoA, in the context of rape, demonstrate the capacity of the law to address sexual violence as a weapon of oppression – in ways that could potentially be extended to contexts of conflict and communal violence, to transform the understanding of rape itself?

The conclusion in **chapter 4,** draws from discussions on each aspect of rape – namely which sexual acts constitute rape and why, how is consent interpreted and how are the most blatant assertions of rape as power addressed by the courts – to piece together how these construct gender and sexuality. Most prominently, these point to the ways in which sexual offences in the law ultimately seek to institutionalise sexuality within marriage – while simultaneously shaming, stigmatising, and punishing, in various degrees, sexual expressions that are at odds with this imperative. It dwells upon why law reform on rape alone, or a focus on sexual offences, are not sufficiently transformational. Sexuality as a site of inequalities results from a larger legal design, that is neither limited to the rape law or sexual violence. A change agenda calls for engaging with the entire sphere of sexual regulation and dominant social values, through more broad-based strategies and interventions that ultimately seek to affirm sexual rights and build opinion among a cross-section of society.

Chapter 1

SEXUAL ACTS THAT CONSTITUTE RAPE

Legal definitions are a powerful medium by which the State may acknowledge experiences of violation, or ignore them as irrelevant through its silence. The definition of rape illustrates ways in which the law recognises some sexual acts, while rendering invisible other similar acts. There are reasons for such inclusions and exclusions, so we unpack aspects of the definition of rape relating to sexual acts that fall within its scope, and those that do not. The reasons for such inclusions and exclusions tell us how the law seeks to organize sexuality.

For 153 years since its enactment, Section 375 of the Indian Penal Code (IPC) defined rape as 'sexual intercourse' by a man with a woman under specific conditions, which was consistently interpreted to mean penile penetration of the vagina. It was well known that other types of penetrative sex were practiced, between men and women, as well as between same-sex partners. Yet, judgment after judgment interpreted rape to be only penile vaginal penetration. In 1966, the Supreme Court was faced with the question of whether a grown man who had inserted his finger in an infant's vagina, causing it to rupture and bleed profusely, should be punished for rape. The Court felt that penetration by a finger did not amount to rape, instead, convicting the accused for outraging the infant's modesty. Ironically, the court was willing to stretch the definition of modesty to the body of a seven-and-a-half-month infant – but not expand the meaning of sexual intercourse to include 'digital' penetration.

Although the amendments in 2013 expanded the scope of rape to include all penetrative sexual acts, it continues to date to be an offence that is only perpetrated against women, in the eyes of the law.

This chapter looks at the values that inform the penile vaginal fixation of the rape law to understand what it says about sexuality and sexual hierarchies in society.

FEMALE SEXUALITY, MARRIAGE AND CASTE

Rape as a sexual wrong is mentioned in Judeo-Christian and Hindu religious texts, Greek and Hindu mythology, as well as in ancient Roman and Hindu law, amongst others. The word rape is derived from the Latin word *'raptus'* in Roman law, which referred to abduction or kidnapping of an unmarried girl. The offence across cultures, in ancient law, was the wrongful taking away of a virgin girl from the custody of her guardian/ father. Implicit in the taking away of the girl was sexual access to her without the guardian/ or father's consent. As a result, there was no distinction between 'taking away' of the girl by force or by wilful elopement.

The origins of the rape law across cultures lie in the need to protect the control assigned to men over the reproductive capacities of girls and women under their charge. It is the male guardians: father, head of the clan, or husband, who regulated female sexuality and reproduction along lines pre-determined by their social status and rank. This explains why, over the years, the focus on penile vaginal penetration has not just remained, but also evokes the most emotive responses in comparison to any other sexual offence. In patriarchy, a woman's body and sexuality, much like land, cattle, or capital, is an important resource. Traditionally, the daughter was the property of the father who commanded ultimate authority to give her away in marriage. Likewise, the husband was the guardian of his wife, over whom he acquired unqualified sexual access upon marriage. In the Indian context of the elaborate caste system, regulation of female sexuality took on additional importance for through it, caste was reproduced and sustained.

Sexuality, like food and occupation, is subject to the rules of purity and pollution, within the caste system. Complex scriptural and ideological

injunctions were designed to enforce marriage arrangements most appropriate to reproducing not just purity of caste but also the differentiation between castes, so as to maintain hierarchies. Accordingly, the rules of sexual control varied with rank and status, which in India, was marked by caste. The Hindu scriptures cast a sacred duty upon the father to marry the daughter, a duty that could only be fulfilled if the daughter was a virgin – for virginity was essential to marriage. To quote the Yajnavalkya Smriti: "*One should marry a woman whose virginity is intact, endowed with auspicious marks, not previously wed by another….of the same varna, …*"[1] A daughter's virginity and a wife's chastity were both critical resources, for they determined purity of caste based bloodlines, or line of descent. Therefore, virginity enabled two important functions through which caste was reproduced - marriage and lineage. This value system was entrenched through a combination of rewards and punishment, to compel self-regulation by women, alongside familial and community policing. Later, State law and punishment helped enforce stringent sexual regulations, the many examples of which remain in contemporary law. The next chapter dwells on the ways these two aspects, virginity and chastity, assumed a lasting legal significance in the context of the rape law.

"Complex rules relating to virginity and marriage were caste-specific, designed to regulate women's sexuality differentially, so as to reproduce caste along with its hierarchies.

These elaborate and complex rules relating to virginity and marriage were caste-specific, designed to regulate women's sexuality differentially, so as to reproduce caste along with its hierarchies. Marriage was a necessary institution for harnessing the reproductive capacities of women for sustaining patriarchy, caste and for passing on property to legitimate heirs. The higher caste women bore the burden of reproducing pure bloodlines to sustain lineage and caste, and were therefore subject to the strictest sexual taboos to ensure purity. Dalit women, on the other hand, with no claims to lineage, were required to be less rigid about sexuality, as they bore the burden of reproducing labour and labouring hands. Additionally, higher caste men exercised sexual access over Dalit women, commanding both their labour and sexuality.

The patriarchal control over reproductive and productive labour of women across castes explains the importance attached to penile vaginal

1 As quoted in Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (Calcutta: Stree, 2003), pg. 28

sex, including through the rape law. Historically, the rape law did not differentiate between elopement or forced abduction, between consent or non-consent of the woman. Its concern was 'unauthorised' sexual access to the woman, or trespass into the domain of authority of the male guardian. Concepts like bodily integrity of the victim, or the girl/ woman were irrelevant to the offence. In some contexts, the woman was seen as an accomplice to the crime and punished. Resolutions varied with the degrees of purity or pollution attached to the caste of the victim and the perpetrator. So, in some cases marriage of the 'defiled' victim to the rapist; payment of financial compensation by the rapist to the male guardian or husband; or exchange/ targeting of girls-women from the clan of the rapist were appropriate ways of settling scores.

"The patriarchal control over reproductive and productive labour of women across castes explains the importance attached to penile vaginal sex including through the rape law.

Such forms of caste/ community determined 'popular justice' for sexual transgression (irrespective of consent), continue in contemporary times. There is retaliatory violence and killings of Dalit boys in marriages of choice with higher caste girls, or against couples of the same '*gotra*' in Haryana; or indeed, the allegations of 'love-jihad' that seek to discredit marriages of Hindu girls with Muslim boys. In contrast are the proposals for marriages to reach a 'compromise' in rape cases, between victims and perpetrators with similar caste backgrounds.

This close relationship between marriage and sexuality is not limited to societal norms and practices, but is integral to the way modern Indian law confines female sexuality within marriage. The State and the judiciary have defended compulsory heterosexuality and enforced female fidelity within marriage, through a set of mutually reinforcing offences pertaining to marriage. Section 497 IPC makes adultery by a wife a criminal offence, for which her lover can be punished with imprisonment up to 5 years. However, the wife may not be punished. Adultery is a ground for divorce for either spouse under the marriage laws, therefore making it a civil wrong between two persons. Yet, when committed by the wife, it is treated as a crime! Similarly, Section 498 declares the enticing of a married woman by a man for the purpose of having or even intending to have 'illicit' sex a crime, punishable by a maximum of 2 years' imprisonment.

"Historically, its concern was 'unauthorised' sexual access to the woman, or trespass into the domain of authority of the male guardian.

The State approach to female sexuality and marriage becomes more clear on reading these two offences with the explanation to Section 375 on rape.

The explanation declares "*sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape*" making it abundantly clear that the law was designed to uphold exclusive sexual access and reproductive control by men over their wives, while criminalising extra-marital sex by wives. Together, these penal provisions suggest that the sexual offences were originally crafted to protect male ownership of wives rather than the bodily integrity of women. Despite the passage of a century and a half, this penal framework remains intact.

A constitutional challenge to the penal offence of adultery was made by Smt. Sowmithri Vishnu on the grounds that it was discriminatory to women. Her husband had filed a case of adultery against another man during their divorce proceedings. Dismissing the contention of discrimination, the Supreme Court (1985) quoted a telling phrase: "*Breaking a matrimonial home is not less serious a crime than breaking open a house*'."[2] If anything, this is an indication that the law perceives women's sexuality and reproduction as part of the male estate, making any trespass (regardless of the woman's choice in the matter) punishable. Yet, the judiciary has consistently rejected the view that the offence of adultery is discriminatory to women, on the ground that it 'lets off' the errant wife from penalty. That assigning a woman's sexuality to the command of a husband and shaming her for her sexual choices – much like stoning, stripping and parading in a community – is a form of public humiliation which ought to have no place in modern law, is an aspect that the Courts have yet to awaken to and consider.

PENILE VAGINAL RAPE: THE ONLY SERIOUS OFFENCE FOR 153 YEARS

The types of sexual offences other than rape in the IPC, tell us not just about sexual behaviours that the State considers wrong, but also why they are considered wrong. Most importantly, the sexual offences other than rape, reveal how these compare with each other and the manner in which they are graded.

For a century and a half, the penal code contained only two sexual offences against women besides rape. Those of 'use of force' (Section

2 Sowmithri Vishnu v. Union of India 1985 AIR 1618 (Supreme Court of India).

354) and the use of 'word or gesture' (Section 509) to outrage the 'modesty' of a woman – the former being punishable by a maximum of a 2 year sentence or fine, and the latter being punishable by a maximum of a 1 year sentence or fine. Neither of the two required the police to arrest the accused. In contrast, a minimum sentence of 7 years was stipulated for rape, requiring immediate arrest of the accused to prevent tampering with evidence or intimidation of the victim during the period of investigation.

"This meant any sexual assault other than penile vaginal rape was to be addressed through the first two offences, defined by the morality of the victim, with negligible consequences for the accused.

This meant any sexual assault other than penile vaginal rape was to be addressed through the first two offences, defined by the morality of the victim, with negligible consequences for the accused. This vast vacuum or silence in the law – despite enough evidence of a range of penetrative and non-penetrative acts of sexual violence – denied even the hope of appropriate legal recognition or redress to scores of victims. It was troubling though telling, that the two sexual offences (which still remain in law) were defined with reference to the victim's 'modesty', and not the actual actions that violate her. Such terminology was an invitation to judge the victim's dress and conduct, rather than the actions and behaviour of the accused.

Not surprisingly, in the case of the infant girl 'raped' by insertion of finger, the accused, Major Singh, although finally convicted for outraging the modesty of a woman- resisted the charge on the ground that an infant cannot be said to possess modesty. Therefore, the law was designed to provide serious legal redress for only penile vaginal penetration, as all other sexual offences were unnamed and unrecognised, despite being widely prevalent.[3]

In 2012, when a girl was groped, disrobed, paraded and assaulted by a mob of nearly 50 men in a busy street of Guwahati for nearly 40 minutes, no legal action followed. It was only when a trophy video of the assault made by one of the accused, went viral on the internet, that a national outrage forced legal prosecution of persons identified in the video. For this prolonged sexual torment, the accused were only charged with 'outraging the modesty' of the victim.

3 State of Punjab v. Major Singh 1967 AIR 63 [Supreme Court of India].

In 1973, a sweeper in a Bombay hospital attacked a nurse, Aruna Shanbaug, at the hospital premises because she had reprimanded him. He tied a dog collar to restrain her, and on discovering that she was menstruating, raped her anally. When the hospital staff found Aruna the next morning, she was brain dead as the dog collar had cut off the oxygen supply to her brain. As a result, Aruna lived the remainder of her life, till May 2015, in a permanent vegetative state. Although the hospital learnt that Aruna was anally raped, they concealed the fact to save her from 'social' stigma as she was engaged and to be married. The medico-forensic examination for rape, with its focus on the vagina, was unable to confirm rape. This social stigma and legal definition of rape together erased sexual violence from the prosecution case, which resulted in conviction of the accused for theft and attempt to murder. The invisibility and silence on different kinds of sexual wrongs, made it impossible for victims to seek legal redress that matched the gravity of the harm inflicted.

"The only type of sex recognised as desirable and orderly was sex for procreation, thus termed as 'natural'. Same-sex sexuality for that reason was not only a 'sin', but also punishable by law. Not surprisingly then, Section 377 criminalises 'voluntary' rather than forced sex.

The above discussion demonstrates the role played by the law in regulating access to penile vaginal sex, particularly for ensuring the viability of marriage as a gateway to reproducing lineage and caste. Since the prevalence of other forms of penetrative sexual acts was well known, as was same-sex desire, it remains to be seen how the law treats non-procreative, as well as non-heterosexual desire. The IPC under Section 377 terms 'voluntary' non-penile vaginal intercourse as 'unnatural' and therefore an offence. It uses the phrase 'carnal intercourse' not sexual intercourse to distinguish 'unnatural' or other kinds of penetrative sex from the 'natural' or penile vaginal one. The 'unnatural offences' may involve man, woman or animal, and requires that such penetrative sex be had 'voluntarily' between the offending parties. It is punishable with a sentence up to 10 years, almost on par with the punishment for rape.

Such acts, according to Section 377, are 'against the order of nature', echoing Biblical treatment of 'non-procreative' sex as 'unnatural' and 'sinful'. During the enactment of the IPC in 1860, the colonial government was strongly influenced by conservative Victorian values that were drawn from the Biblical injunctions against recreational and non-procreative sex. The only type of sex recognised as desirable and orderly was sex for procreation, thus termed as 'natural'. Same-sex sexuality, for that reason was not only a 'sin', but also punishable by law.

Not surprisingly then, Section 377 criminalises 'voluntary' rather than forced sex. These Victorian views on sexual 'deviance' found no resonance in the Hindu traditional texts, but over time, found support from the brahminical moral need to regulate sexual boundaries of purity-pollution and lineage.

CAMPAIGNING FOR LAW REFORM

The women's movement sought to dislodge sexual violence from its patriarchal moorings of protecting virginity, chastity, modesty – moving instead to an understanding of bodily integrity as the basis for defining sexual violations. The law reform campaigns called for naming different types of sexual wrongs experienced by women initially, and then children, to demand an inclusive definition of rape with a gradation in sexual offences, moving subsequently to demands by queer movements for decriminalisation of homosexuality. The campaign for change grew with each case of injustice, triggering protests, debates and demands for accountability and law reform. Starting in the late 1970s, with cases of sexual violence against women by police and security forces, the momentum grew in the late 1990s with cases of child sexual offences and the joining of the child rights groups. In the early 2000s, the demands to decriminalise homosexuality emerged, initially in the context of HIV prevention work, growing quickly into assertions of right to life and non-discrimination on grounds of sexual orientations and gender identities. Despite the longer history of struggle by women's movements in relation to rape, the expansion in the definition of rape was first introduced in the context of child sexual offences. The cases and events triggering these struggles are summarised below.

Sexual violence by police, security forces and in conflict

In 1980, the UP State constituted a Commission to inquire and report on sexual brutalities perpetrated by the police on Maya Tyagi after they killed her husband and his friends in cold blood. This was known as the infamous Baghpat case. The police forcibly stripped and paraded Maya Tyagi in the streets of Baghpat, groping, prodding and repeatedly inserting a lathi in her behind, to force her to stand up as she crouched in self-protection. The Commission held that

"But the commission asserts that it is incorrect the police raped her.

How does the commission define rape? The brutalities committed on Maya Tyagi's body were not rape? To touch a lone women sitting in a vehicle and pass vulgar remarks, to drag the woman out, bare her breasts and touch them and shove a stick into her body, are not rape? Then what is rape? Maya Tyagi's husband and her well-wishers were shot down in front of her because some policemen had wanted to rape her and she had resisted and he; husband had stopped the policemen from so doing. The policemen thought it easier to rape Maya Tyagi when she was alone, and so they dragged her out and started molesting her and wished to take her away, but Maya Tyagi continued to resist. Because of this resistance the attack on her was intensified and when the policemen failed to maul her physically, they inserted what characterises their body and personality together into her body. According to the commission, all this does not amount to raping though whatever has been described above is taken from the newspaper reports on the commission. The truth is that it was not only rape but the real form of rape where the desire to exhibit force was more marked than the sexual act."

PUCL Bulletin 1981

penetration by an object did not amount to rape or gender based violence. This case evoked enormous outrage about police impunity, also raising questions about the legal vacuum in relation to naming and acknowledging sexual violence against women – within the definition of rape and in relation to sexual humiliation in public. Demanding that this be treated as rape, a PUCL Bulletin noted: "*The truth is that it was not only rape but the real form of rape where the desire to exhibit force was more marked than the sexual act.*"[4] This was the first articulation of rape as crime of power, unconnected with chastity, modesty or lust- in this case, of male power combined with the power of the uniform. The fact is that the police could have killed Maya Tyagi as they did her husband. Yet, they chose to single her out from the rest of her group, for stripping, parading and inserting the lathi in her – in full public view, because of the notion that sexual humiliation, when inflicted on women, is worse than death. This explains why Maya Tyagi was subjected to public disgrace in a way that shamed and hurt her sexually.

In Manipur, on 10 July 2004, a team from the security forces, called the Assam Rifles, took a young activist Thangjam Manorama into custody

4 http://www.pucl.org/from-archives/may81/baghpat.htm

for interrogation, suspecting her affiliation with the banned People's Liberation Army. She was blindfolded, tied, and beaten in front of her family members, before being taken away to reportedly be handed over to the police station. However, the next morning, Manorama's body, with multiple signs of torture and bullet marks, was found in the fields. Post-mortem revealed gunshot wounds in her genitals. While the law was clear on killing, it did not view pumping bullets into the vagina as rape.

As the details of brutality became public, the outrage in Manipur escalated, leading to an unprecedented protest by the local women's movement called the Meira Peibis (women torch bearers) who stripped naked in front of the headquarters of Assam Rifles, carrying a banner saying 'Indian Army Rape Us'. The protest was a powerful visual rejection of the association of rape with shame, honour and chastity, emphasising instead the elements of power, entitlement and impunity exercised by men over women – that were magnified when the men were uniformed armed personnel, empowered by the State with laws that allowed them extraordinary powers over civilians. Sexual violence by the security forces in these circumstances, was nothing but a demonstration of brute force over communities, that was played out over the bodies of women. The State government was forced to establish a Commission of Inquiry headed by Judge Upendra Singh. Although the Assam Rifles refused to cooperate, unsuccessfully approaching the judiciary to scuttle the inquiry – the inquiry report was accepted and upheld by the High Court in 2004, with the caveat that it could not be made public.[5] The continued attempts by the Assam Rifles to declare the report invalid failed and finally, after 10 years, the Supreme Court directed the government to pay Rs. 10 lakhs to her family as interim compensation, in 2014.

"The protest was a powerful visual rejection of the association of rape with shame, honour and chastity, emphasising instead the elements of power, entitlement and impunity exercised by men over women.

During the communal violence in Gujarat in 2002, a women's fact finding team interviewed and documented large scale sexual brutality against women and girls in public, including the insertion of rods. The women's movements repeatedly brought to light, the relationship of power with rape in diverse contexts, documenting evidence of

5 Human Rights Watch (2008), 'These Fellows Must Be Eliminated', https://www.hrw.org/reports/2008/india0908/3.htm#_ftn101, accessed on 25 November 2015

On 15 July, 2004, Meira Paibis, or the torchbearers of Manipur, stripped naked to protest against atrocities by the Indian armed forces, outside the Kangla Fort in Imphal, headquarters of the Assam Rifles.

Courtesy: Our pictures, Our words by Laxmi Murthy and Rajashri Dasgupta, published by Zubaan Books.

different types of penetrative sexual assault on women to call for accountability and law reform. Each of these cases foregrounded contexts within which power is aggravated and magnified – in relation to police, security forces and in communal violence. Despite the continued campaigning, the law for women was slow to change. The changes to the definition of rape were eventually enacted after campaigning for a law on child sexual abuse, when cases of children made visible the legal incapacity to redress penetrative assault with fingers and objects.

Child sexual abuse

The poignancy and vulnerability of abuse in the context of children paved the way for judicial recommendations for law reform to address all forms of penetrative sexual assault. The trajectory of events leading to change began with Sudesh Jakhu's case (1996) that exposed continuous abuse of a 6 year old daughter by the father. He took her to hotels with his colleagues, where over alcohol and pornography, they abused the child by inserting fingers into her anus and vagina. Jakhu also made her perform sex acts on him. Although the father was tried for rape, the courts expressed its inability to convict him for rape, since there was no

penile penetration of the vagina; treating it instead as 'outraging the modesty' of a woman.[6]

This booklet was released at the 2nd Annual Stakeholders Conference, Mumbai, 2015 on Child Sexual Abuse organised by The Foundation.

Courtesy: www.satyamevjayate.in

In 1997, a public interest petition by a women's organisation, Sakshi, called on the Supreme Court to expand the definition of rape, in light of the widespread nature and forms of child sexual abuse. It demanded that rape include penile/anus, finger/ anus or vagina, object/ anus or vagina, penile/oral penetrations. Avoiding the task of re-defining rape on grounds that it was a legislative function, the Court issued directions for law reform instead. It also recommended procedural changes to make the law more responsive to child victims of sexual assault.[7]

Acting on the directions in the Sakshi judgment, the Law Commission of India submitted its 172nd report in 2000, recommending that the definition of rape be made gender neutral to extend protection to young boys, address all types of sexually violent penetrative acts under Section 375, and do away with Section 377 that criminalises sodomy.[8]

While the process of law reform continued, case after case continued to highlight the failure of the law in offering redress to victims of child rape. In 2008, a man in his mid-fifties was charged and convicted under Section 354 of the IPC, and sentenced to 2 years of imprisonment for inserting his fingers into the vagina of a 7 year old girl.[9] This offence was reported by the victim's mother, who passed away while the case

6 Sudesh Jakhu v. K.C.J. and Ors. 62 (1996) DLT 563 (High Court of Delhi)
7 Sakshi v. Union of India and Ors. W.P. (Crl) 33/1997 (Supreme Court of India).
8 Review of Rape Laws, 172nd Report of the Law Commission of India (March, 2000).
9 Tara Dutt v. State of NCT of Delhi, Crl.Rev.P. No. 321 of 2008 https://indiankanoon.org/doc/136220056/.

was going on, so the child's father sought to settle the matter with the accused person. The Delhi High Court upheld the conviction while rejecting the father's application, lamenting that legislative inaction had made law a site of injustice in cases of 'digital rape'.

Several draft proposals for law reform later, the Protection of Children from Sexual Offences Act 2012 (POCSO) was enacted, which recognised all penetrative sexual assault on par with each other, in addition to a range of other sexual wrongs inflicted on children.

Sexual violence against women

The law reform in relation to rape (and other sexual offences) for women despite an older history took longer, with piecemeal amendments over three decades, finally accelerated by the watershed moment of public outrage against the fatal gang-rape of Jyoti Singh in a bus in Delhi on December 16, 2012.

A government appointed three-member committee headed by Justice Verma was tasked with making recommendations for law reform, enabling the diverse group of women, trans and gay persons, sex workers and those representing contexts of disability, and conflict, to channel submissions to the Committee. The recommendations of the Committee proposed the most comprehensive articulation at the policy level ever, of State responses to sexual violence, including through law reform. The definition of rape proposed by the Committee included 'person' as a victim (to make redress for sexual offences available to women, men and trans), and covered all forms of penetrative sexual assault.[10] However, the criminal law amendment of 2013 adopted the latter expanded definition of rape, but recognised only women victims and male perpetrators.[11]

The 2013 amendments introduced a gradation of offences, including sexual harassment, stalking, voyeurism, acid attacks and disrobing of women, in addition to expanding the scope of rape under Section 375

10 Report of the Committee on Amendments to Criminal Law (January, 2013), at 439.

11 Criminal Laws Amendment Act, 2013.

From the Delhi Queer Pride March, 2009. Drawing from the Quit India movement that sought to overthrow the British colonial rule, the slogan '377 Quit India' is a reminder that the anti-sodomy provision is a remnant of an exploitative, deeply unequal, moralistic Victorian order which is at odds with the values of the Indian Constitution, to demand that it be expunged from law.

Courtesy: PLD

to include penetration by man of a woman's vagina by penis, mouth or object/ finger; anus by penis, mouth or object/finger; mouth by penis; or to make a woman do so with any other person against her will or without her consent.

Trans persons and men

The social silence and stigma around same-sex desire and gender non-conformity has meant the denial of Constitutional rights and freedoms for lesbian, gay, bisexual, intersex and trans persons. The existence of Section 377 of the IPC magnifies this stigma, casting same-sex desiring persons under the shadow of criminality. Drawing from the archaic colonial Victorian concept of 'sin', all homosexual sex remains criminalised without distinction as to consent. The law can be said to be patently homophobic since non-consensual oral and anal sex have come to be included within the purview of (heterosexual) rape. This singles out same-sex desiring persons for criminalisation since 'voluntary' penetrative sex is the target of Section 377. As a result, persons identified or perceived as sexual minorities are exposed to, and in fact, targeted for extortion and blackmail. They also have no meaningful legal protection against non-consensual sex.

"The existence of Section 377 of the IPC magnifies this stigma, casting same-sex desiring persons under the shadow of criminality. As a result, persons identified or perceived as sexual minorities are exposed to, and in fact, targeted for extortion and blackmail. They also have no meaningful legal protection against non-consensual sex.

Recognising this discrimination in law, the Delhi High Court, in the Naz Foundation case in 2009, decriminalised consensual same-sex activity, to bring parity between Sections 375 and 377.[12] By reading down Section 377, the Delhi High Court held that only non-consensual same-sex penetrative acts would fall within the purview of crime. This path-breaking judgment was reversed by the Supreme Court on appeal in December 2013.[13] The appeal led by several conservative and religious entities, including one Suresh Koushal, found favour with the Supreme Court. A curative petition on the same subject has however been admitted by the Supreme Court, promising to have a full Constitutional bench look afresh into the matter, given its importance. In April 2014, in a case initiated by the National Legal Services Authority (NALSA), the Supreme Court affirmed the right of all persons to be recognised by a gender of their choice, without having to undergo a sex reassignment surgery.[14] This meant that months after re-criminalising homosexuality under Section 377, the same court pronounced that the Constitution allowed persons the choice of identifying their gender regardless of the biological sex. It affirmed the right of trans persons to self-identify their gender, directing State recognition for this, with affirmative action to help overcome the stigma, exclusion and discrimination in educational and employment opportunities. The NALSA however, remained silent on the question of sexual and personal rights for trans persons, avoiding the issue of sexuality completely.

SUMMING UP

Every aspect of the law on sexual violence – the acts it declares as offences, its terminology, the age, sex and gender of the victim it recognises (and those it does not), reveals a lot about its objectives and purpose. Likewise, exclusions and silences in the law tell important stories about who it seeks to protect, and who it does not. The scriptural references too, provide insights into the origins of the law and the value systems it embodies – much of which continues to colour the contemporary law. A joint reading of different legal offences with a

12 Naz Foundation v. Government of NCT of Delhi 160 DLT 277 (High Court of Delhi).
13 Suresh Kumar Koushal v. Naz Foundation and Ors. CA No. 10972/2013 (Supreme Court of India).
14 National Legal Services Authority of India v. Union of India W.P. (C) NO.400 OF 2012 (Supreme Court of India).

historical perspective, bring out the relationship of the rape law with the institution of marriage and caste, in a manner that a reading of the rape law in isolation does not allow.

The threads in relation to value systems, intersectional reading of rape with other sexual offences and aggravating contexts of caste and communal violence, will be opened up further in the next two chapters. In Chapter 2 we will unpack how deeply the law is invested in the brahminical values of virginity and chastity through which hierarchies of caste, class and gender are entrenched; and continue to explore the inter-links of the rape law with offences related to homosexuality, adultery and the enticement of married women. Chapter 3 will bring greater focus on contexts that exacerbate demonstration of masculinity, patriarchal power and identity politics over marginalised social groups, during caste, communal and sectarian violence to understand demands by women's movements for treating rape in such contexts distinctly, with greater seriousness.

The amendments to the written law took several decades, as a result of which it now recognises an expanded definition of rape and other forms of sexual abuse. The journey for reform was ushered in the wake of cataclysmic protests that pushed the State to demonstrate its concern through law reform. Despite the advances made, the changes were not extended to same-sex desiring persons or to trans persons. The fate of same-sex desiring and trans persons remains uncertain at the time this resource book went to print, indicating the troubled terrain of law reform – or indeed of achieving law reform that is responsive to all persons, based on the principles of consent, bodily integrity and sexual autonomy.

Chapter 2

CONSENT AND CHARACTER

The early references in mythology, religion and ancient law defined rape in terms of taking away the virgin daughter from the custody of the father/ male guardian, without his consent. This emphasis on virginity was necessary for the marriageability of the girl, to sustain male lineage and family honour. The modern law seems to displace this understanding of rape by shifting the focus from virginity to 'consent' of the girl/ woman. This shift is significant since it moves away from treating women as chattel whose mobility and sexuality is controlled by the patriarch or male head of the clan, to persons who may make decisions about their own sexuality.

The introduction of 'non-consent' as the basis for defining rape in modern law, imbues the subject with personhood, discretion and autonomy in relation to sexuality. This contrasts with the moral view of confining female sexuality to marriage and reproduction only. A woman's consent is the key aspect in relation to rape that distinguishes a private sexual act from the offence of rape. Has the recognition of a woman's consent in the law, displaced the centuries old association of women's sexuality seen only in terms of virginity and chastity? In this chapter, we see the extent to which the concept of consent has shifted the meaning of the rape law.

THE CONTOURS OF SEXUAL CONSENT

The law requires a male perpetrator and a female victim to constitute rape, so that the capacity to consent resides in female subjects only. In addition, the law sets an age at which the female subject is assumed to have the discretion to make decisions in relation to her sexuality.

This age is prescribed by law, and until the girl attains this age of discretion, sex with her is considered 'statutory' rape. In other words, any sex with an underage girl, whether wilful or coerced, is deemed as rape on account of her vulnerability, arising from the lack of physical, psychological and intellectual capacity to comprehend its nature or implications. Thus, legal capacity to consent is vested in the female subject who is above the age of discretion.

The age of sexual consent, however, varies greatly across time and societies, based more on subjective cultural, social and political reasoning than on any rational basis. In India itself, the age of discretion has changed considerably, moving from 10 years at the time of enactment of the IPC in 1860, to 18 years in 2012. In the intervening phase, it moved up to 12 years in 1891, then to 14 years in 1925, followed by 16 years in 1940, before the last increase to 18 years with the enactment of the POCSO. The IPC adopted this increase in 2013. The age of consent in many countries varies between 11 to 18 years. However, in some countries, there is simply no age of sexual consent for women, for all sex outside of marriage is a punishable offence. In India, the increase in age of sexual consent to 18 years brings it on par with the minimum age of marriage for girls.[15]

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For all appearances, law endows all women who have attained the age of discretion, the right to make decisions over their sexuality so long as it is in relation to men (because Section 377 criminalises homosexuality). This implies the capacity to engage wilfully in sex, or to not agree to do so. Essentially, it gives women the right that men have always enjoyed– to be sexually active, and to mutually agree to do so with their sexual partners. While the term 'consent' denotes all of this, there are a few additional considerations in law that restrict the right to consent to all women. These restrictions specify which women may never consent, or whose consent is irrelevant to the law; as distinguished from those women who are assumed to always consent, or in other words, be incapable of refusing sex.

15 Prohibition of Child Marriage Act, 2006.

THE WIFE

The category of women whose consent does not matter, relates to wives. An exception to the definition of rape states that consent is irrelevant for sexual intercourse by a husband with his wife, if the wife is above 15 years of age.[16] Not only does a wife lose her capacity to consent in relation to her husband, but additionally, the law does not allow her the right to consent to have sex outside marriage, through a combination of two sexual offences – that of adultery and 'enticing' away a married woman.

Section 497 of the penal code allows a husband to prosecute and punish the man he assumes his wife is involved with, for adultery. While the wife is not punished, she is sufficiently humiliated, and her sources of support and companionship outside of marriage are penalised. What is telling is that the offence of adultery does not stand where the husband has 'consented' to the wife's adultery. In other words, a husband may lawfully consent in the eyes of the law, to extramarital sexual encounters of his wife, making the wife's consent or the lack of it, irrelevant.

"Not only does a wife lose her capacity to consent in relation to her husband, but additionally, the law does not allow her the right to consent to have sex outside marriage.

Drawing from the spirit with which public stoning and floggings are sanctioned against women for 'illicit' sex in some countries, the offence of adultery shames women, through the less brutal options offered by the modern criminal justice system. The law does not allow the wife to prosecute the husband in criminal law for adultery, treating it as a matter of civil remedies between two parties in a marriage contract. Likewise, Section 498 of the penal code declares the act of 'enticing or taking away' a married woman with the intention to have 'illicit intercourse', leaves no doubt about the scheme of the legal position on consent within the institution of marriage.

This triad of laws – the exception to marital rape, offences of adultery and enticement – leads to two complementary interpretations. First, that the wife is not a person but property of the husband, to be used at

16 Section 375 on rape, exempts husbands from being prosecuted for marital rape. The position on marital rape after the 2013 amendments and the Supreme Court verdict in Independent Thought vs Union of India (2017) is that - (a) a wife under 18 years may prosecute her husband even while they are cohabiting, but (b) an adult wife may prosecute her husband only if she is not cohabiting with him.

will, or alternatively, that marriage implies a one-time, unqualified and irrevocable consent by the wife to have sex with her husband.

THE IMMORAL WOMAN

The second qualification in relation to consent relates to women whose 'morality,' and sexual purity are in doubt. Women whose lives, conduct, and previous sexual history cast a suspicion about their 'virginity' and 'chastity', are deemed unlikely to ever refuse sex. Until 2003, the rules of evidence expressly allowed a rape accused to produce evidence to establish the victim's 'immorality' to discredit her testimony of rape.[17] Since the status of a victim in a rape trial is no more than that of a witness (along with other witnesses), her version of the incident could be set aside in face of evidence suggesting a previous sexual history, which could be simply inferred by old tears in the hymen. The phrase 'habituated to sex' recurring in rape cases, is uniquely used to shame girls and women in medical reports, by defence lawyers during trial, and the judiciary in its verdict. Through the rules of evidence, the law introduced the notion of 'good' and 'bad' woman, to dismiss the 'bad' women as unreliable. Although dropped from law in 2003, this suspicion continues to colour the practice and the application of the law. Aspects related to a woman's clothes, mobility, lifestyle, association with the opposite sex and medical information on hymen tears, trimmed pubic hair and so on, are used to speculate on her character. The millennial old morality in which Victorian and brahminical values are embedded, were thus accommodated in the law.

As a result, the rape law reflects two contradictory strains – the textual recognition of a woman's control over her sexuality, alongside the shaming of women who appear to exercise such control. Women's rights activists therefore pushed for defining the meaning of consent in the text of the law, so that the interpretation by courts would not steer too far away from the core elements of consent. A definition of consent was introduced by the 2013 amendments, that requires evidence of "*the*

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17 Section 155(4) of the Indian Evidence Act, 1872 allowed a man accused of rape to show that the woman was of 'generally immoral character' so as to discredit her as a witness. This section was deleted in 2003, although rape trials continue to invoke morality and chastity of the victim.

unequivocal, voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act."[18] This definition shifts the way the courts are expected to approach consent.

From the earlier position of asking the victim to provide proof of how she communicated her refusal to have sex, the law now requires the accused to provide evidence of how the victim communicated to him her willingness to engage in each sexual act she alleges to be rape. Through the definition of consent in relation to rape, along with changes in the law on evidence and medical examination protocols, the law has shifted its position to treating rape as a matter of women's virtue and morality, to it being a violation of her right to bodily integrity as well as sexual agency. Yet, as we see in this chapter, the manner in which the rape law is interpreted and applied to cases by the legal functionaries is an altogether different story.

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CHARACTER, VIRGINITY AND CHASTITY

Broadly two complementary streams appear within the judicial discourse relating to sexual consent – one, that greatly empathises with the hapless victim, which like the brahminical cultural discourse, views rape as a fate worse than death for a virgin, for it results in a social death by potentially destroying her marriage prospects in India. The other that disparages and humiliates the victim for her conduct, character, sexuality, to reject the allegation of rape.

The Supreme Court verdict in 1983, in a widely cited case of Bharwada Bhoginbhai Hirjibhai,[19] emphasised that the victim's testimony was enough for conviction because the lifelong stigma in India made it inconceivable for an Indian woman to lie about rape. The judgment contrasts Indian women with Western women, attributing low morality to the latter, who unlike Indian women, were capable of intentionally framing men in false cases of rape for economic gain or vengeance. The court concludes therefore, "*In the Indian setting, refusal to act on the*

18 Explanation 2 to S. 375 IPC

19 Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat 1983 AIR 753: 1983 SCR (3) 280

testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury."

In 1990, the Supreme Court upheld that the woman's version should be sufficient to convict the accused, stating, "*Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society as in some of the Western and European countries. Our standard of decency and morality in public life is not the same as in those countries*," to explain that "*ordinarily a woman, more so a young girl, will not stake her reputation by levelling a false charge concerning her chastity.*" [20]

Ideals of Indian womanhood that are repeatedly invoked draw upon the upper caste, brahminical value systems and taboos. Central to these values are virginity, chastity and marriage. The loss of marriage prospects and widowhood, both result in social death and lasting stigma, consequences that the judicial reasoning invoke repeatedly in rape cases. While deciding on the term of imprisonment for the man convicted of raping an 8 year old girl, the Supreme Court noted the 'pitiable' state of the victim, who "*having lost her virginity still remains unmarried … (she) is under the impression that there is no monsoon season in her life and her future chances for getting married … are completely marred.*"[21] Each of these seemingly favourable decisions that result in convictions constantly invoke brahminical value systems. Complaining of rape under these stringent

The poster by the National Campaign for Housing Rights, West Bengal depicts the woman as the passive subject to the intrusive male gaze.

Courtesy: Our pictures, Our words by Laxmi Murthy and Rajashri Dasgupta, published by Zubaan Books.

20 State of Maharashtra vs. Chandraprakash Kewalchand Jain AIR 1990 SC 658
21 Madan Gopal Kakkad v Naval Dubey 1992 SCC (3) 204

social norms, was like a self-inflicted death sentence for upper caste women. The labouring lower caste, particularly Dalit women, were not viewed in this manner. Although the references to the 'ideal' Indian womanhood appear to be a universal category – sexual taboos in society as well as the law, operated differentially for high and lower caste women as summed up by a British judge of the Madras High Court:[22]

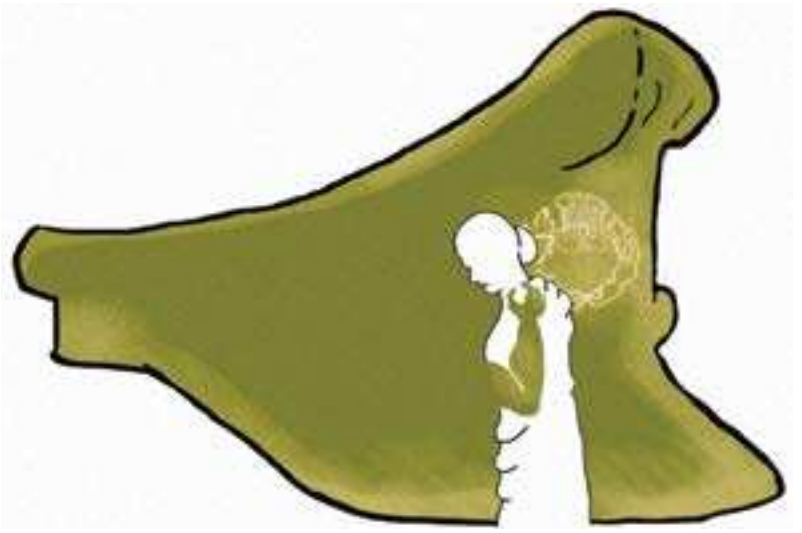
"On the one hand, take the case of a high caste female, who would sacrifice her life to her honour, contaminated by the embrace of a man of low caste, say a Chandala or a Pariah. On the other hand …. a woman without character, or any pretensions of purity, who is wont to be of easy access. In the latter, if a woman from any motive refuses to comply with the solicitations of a man, and is forced by him, the offender ought to be punished, but surely the injury is infinitely less than … the former."

"Ascertaining whether or not a woman consented, required an evaluation of her virginity-chastity against the brahminical value system, which has made previous sexual history relevant for determining rape.

Ascertaining whether or not a woman consented, required an evaluation of her virginity-chastity against the brahminical value system, which has made previous sexual history relevant for determining rape. In two separate cases of rape in 1978 – of Mathura in Chandrapur district of Maharashtra and Rameeza Bee in Hyderabad, the accused police officers defended themselves successfully in the courts of law, by stating that the victim was of easy virtue and a prostitute, respectively. Both these cases triggered a chain of nation-wide protests that led to the first set of legislative reforms.

Mathura (1978), a 16-year-old tribal girl, was brought to the police station by policemen in response to a complaint by her brother, as she had eloped with her boyfriend. After concluding inquiries, the policemen detained Mathura alone, raping her while her family waited outside. The Sessions court acquitted the two policemen on the ground that Mathura did not resist or raise an alarm, noting the findings of her medical examination that she was 'habituated to sexual intercourse'. The court concluded that as a girl of 'loose morals' who had engaged in sex before marriage, she must have consented to sex with the police officials, lying about the rape only to save face before her family.

22 Vasudha Dhagamwar, *Law, Power and Justice* (Delhi: Sage, 1992), p.115 quoted in Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (Calcutta: Stree, 2003), pg. 124.



The Bombay High Court reversed the judgment, on the grounds that passive submission or the absence of resistance, cannot be treated as consent for sexual intercourse. They recognised that submission was inevitable in face of the power imbalance between the uniformed police and the young tribal girl within the police station. Yet, in appeal, the Supreme Court, called Mathura a "*shocking liar*" as she had neither bodily injuries to prove physical resistance nor had she cried out loud for help. They felt, the intercourse was a "*peaceful affair*" with her consent, for these reasons.[23]

Outraged by the reasoning of the Supreme Court, widespread protests broke out across the country. Four law professors from Delhi University wrote an open letter to the Chief Justice of India, pointing out the unfairness of expecting a tribal girl in police custody to even attempt to resist rape without endangering herself.[24] The campaign in the wake of the Supreme Court verdict in the Mathura case raised two core issues, that of submission not amounting to consent, and the context of custodial rape. The letter noted that the power differential between the victim and the police, along with the nature of official duty of police, combined to make consent irrelevant in the case of Mathura.

23 Tukaram & Anr. v. State of Maharashtra, 1979 AIR 185 SC
24 Upendra Baxi, Lotika Sarkar, Raghunath Kelkar and Vasudha Dhagamwar (1979)

The notion of custodial rape was incorporated into the law by the first amendments in 1983, as a more serious form of rape, punishable by a higher sentence. The amendment deemed any sexual encounter by an officer with a person in his official custody – in police stations, protection homes, remand homes, prison, hospitals and educational institutions - was by definition rape.

The 1983 amendments however, left the issue of 'consent' untouched, which resurfaced in the case of Suman Rani from Haryana. This case demonstrates the persistence of the ideology within the legal system that with the loss of virginity, the girl loses the right to refuse sexual consent to any men – or be treated seriously if rape is proven. Like Mathura, Suman Rani (1984) had eloped with her boyfriend, and was found by the police *en route* to Jammu, on a complaint by her father. While escorting the couple back, the police kept Suman Rani and her boyfriend in separate rooms and during this time, two policemen raped Suman Rani. Her boyfriend was charged with abduction and rape, although Suman Rani had made no complaint against him. Five days after returning home, she registered a case of rape against the two policemen. The policemen were tried for rape along with her boyfriend.

Despite arguments on behalf of the two policemen that Suman Rani consented to sex because she was 'habituated to sexual intercourse', the Sessions court convicted them, on the ground that "*even a girl of easy virtue is entitled to all the protection of law and cannot be compelled to have sexual intercourse against her will and without her consent.*" The boyfriend was given a lighter sentence, but the policemen got 10 years imprisonment as prescribed for custodial rape. On appeal, the Punjab and Haryana High court acquitted the boyfriend but held the policemen guilty of rape. The policemen then appealed to the Supreme Court pointing out that Suman Rani was "*of questionable character and easy virtue with lewd and lascivious behaviour*", and that she delayed filing the FIR. On these grounds thus, the highest court reduced the mandatory minimum 10 year sentence to 5 years.[25]

25 Prem Chand & Another vs. State of Haryana 1989 Cri LJ 1246

For an adult married woman, prosecuting rape comes with predictable obstacles as she has no virginity to lose. These obstacles magnify when the woman is divorced, separated or in a live-in relationship, as these categories are socially not considered 'chaste'. A 1997 case involved a separated woman who worked as a maid, who complained of gang-rape by a few auto drivers. After the incident, they offered her food and dropped her to a secluded spot, from where she flagged a stranger on a bicycle for help. The stranger called the police, after which a case was registered.

The Trial court acquitted the accused, but the High Court convicted them. On appeal by the accused, the Supreme Court in 2016 reversed the conviction of rape on the ground that the victim's conduct immediately after the incident was not typical of a rape victim, and therefore her version did not inspire confidence. Noting that, "Instead of hurrying back home in a *distressed, humiliated and a devastated* state, she stayed back in and around the place of occurrence, enquired about the same from persons whom she claims to have met in the late hours of night, returned to the spot to identify the garage and even look at the broken glass bangles, discarded litter etc. …*Her avengeful attitude in the facts and circumstances, as disclosed by her, if true, demonstrably evinces a conduct manifested by a feeling of frustration stoked by an intense feeling of deprivation of something expected, desired or promised*."

The Court also made special mention that she was living with a man, who she stated to be her husband, although they were not formally married. This made her unreliable, coupled with the fact that she was familiar with the accused men, leading to the insinuation of a deal-gone-wrong.[26]

MEDICAL DETERMINATION OF PREVIOUS SEXUAL HISTORY

Typical of scores of cases is the shaming of girls and women by the legal machinery for being sexually active. Evidence of old hymen tears, if the vagina permitted entry of two fingers, and lack of physical injuries lead to inferences of previous sexual history, which serve to disgrace

26 Raja v. State of Karnataka (2016)10 SCC 506

Following a gang-rape in February 2012, Suzette Jordan persisted not only in the struggle to pursue her own rape case despite insinuations of victim-blaming, she also emerged as a powerful public voice against the hostile legal process that subjects victims to humiliation and shaming; rejecting the legal 'protection' of confidentiality that forbids disclosure of the victim's identity in public.

Source: 50millionmissing.info

the victim. Defence lawyers routinely do so to tip the balance of the case in favour of the accused, but they are not the only ones. Medico-forensic reports that are meant to be neutral and factual, inevitably focus their inquiries on the victim's virginity to jump to conclusions about her sexuality.

Medical reports typically declare women as 'habituated to sex' based on the elasticity of the vagina. This is determined by insertion of two fingers, and the presence of old hymen tears. Neither of these has any scientific basis. While the presence of injuries is important evidence, their absence ought not to have adverse implications for rape, since the definition of rape does not require physical resistance of the victim. Yet, the absence of injuries is invariably mentioned in medical reports, for dwelling on in the trial.

As the case of an 18 year old girl shows, Courts dismiss rape cases on these grounds, while simultaneously shaming victims. The girl claimed she was enticed into the accused person's house and raped when she went to fill water from the borewell. The Trial court as well as the High Court convicted the accused, but the Supreme Court set aside the conviction solely on the ground that there was no evidence

of semen or injury on the victim, no torn clothes and most importantly, that the girl appeared to be 'habituated to sexual intercourse'.[27]

Scriptural texts, including the Manusmriti believed that women were sinful, unreliable, given to provoking and arousing men, and needed to be controlled through a system of rewards and punishment. The ideological controls took the form of positioning virginity and chastity as the highest attainable virtues of women, to encourage self-regulation. Additionally, a system of shaming and punishment was sanctioned to bring transgressions to book.

Medical jurisprudence seemed to draw upon a similar understanding of women. Modi's textbook of Jurisprudence and Toxicology, the most influential text in medical education and practice, believed that the status of the hymen and flexibility of the vagina were sufficient to make a decision on whether or not a rape had occurred. It espoused that while women lie, their bodies cannot, recommending medical examination focussed on hymen tears and vaginal flexibility amongst others, to ascertain their sexual purity. Based on this, the medical report typically made notings on whether the woman was 'habituated to sex' or not. This served as authoritative scientific knowledge on rape till 2015 in India, dropping all such notions only in the 25th edition that was issued in 2016.

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The irony of the misplaced authority accorded to medico-forensic reports is brought out by the apathy of the medical personnel towards the victims and the unreliability of their reports. Medical reports only serve a limited purpose, and even in that they are frequently flawed because of the delays, faulty storage facilities for samples, and incorrect findings, as brought out in the case of Bhanwari Devi, a lower caste social worker employed by the Rajasthan government.

In 1992, Bhanwari Devi was gang-raped by higher caste men in retaliation to her efforts against child marriages. The obstacles and delay in her medical examination after registering the FIR show the insensitive and cavalier responses of the medical system. Being acquainted with legal procedure, Bhanwari registered her complaint at the nearest police

27 Bibhishan v. State of Maharashtra: 2008 Supreme Court Cases (Criminal) 163

station. The next day she was sent to the Primary Health Centre (PHC) at Bassi for a medical examination, which could not be carried out, as no female doctor was present. The male doctor refused to examine her, referring her instead to Sawai Man Singh (SMS) Hospital in Jaipur, where the concerned doctor refused to conduct any tests without orders from a Magistrate, though this was not a legal requirement. She was able to secure the orders of the Magistrate only the next day, 48 hours after the rape. The vaginal swab, which is to be taken within 24 hours, was taken more than 52 hours after the commission of rape. The semen of five different men was found, although these did not match the semen traces of the five accused of gang-rape. Rather than be concerned about the negligence and lapses in pre-trial processes, to explain the inaccurate medical findings, the trial court acquitted all the accused, based amongst other things, on the lack of medical evidence.

In acquitting, the court observed that it was inconceivable for a mixed group of higher caste men to jointly rape, and that too, a lower caste woman. Moreover, a middle aged woman, according to the judge was an unlikely rape victim. In addition to gender insensitivity, the judgment smacks of caste privilege and bias, as it betrays ignorance of centuries of sexual access to lower caste women by higher caste men.

In another case involving a 17 year old girl, the medical report noted that there was no injury on the body, and that the girl's pubic hair were trimmed, the vagina permitted two fingers and the hymen had irregular tears. On this basis, the report pronounced that her "*vagina is of habitual type*". A case of an unfulfilled promise to marry, there were enough grounds for the court to reject the allegation of rape, without dwelling on the medical findings which as per contemporary science, are not just irrelevant to rape but also sexist and voyeuristic towards women's bodies. Yet, the Courts dwell precisely on the medical details: "*The above extracted medical evidence speaks volumes of the fact that she was habitual to sexual intercourse. So much so, she had cut her pubic hairs. A girl below the age of 16 years can be hardly expected to be conscious about these things*."[28]

28 Raju @ Raj Kumar v. State of Haryana, Criminal Appeal No.515-SB of 1993 (High Court of Punjab and Haryana).

Medical examination forms also record the size or 'built' of the woman. Courts have often dismissed rape cases on the grounds that well-built or older women are unlikely to be raped.[29] Courts are known to say that it is difficult for a man to singlehandedly restrain a fully-grown, well-built woman, to overpower and rape her. Although the law does not require physical resistance to demonstrate lack of consent, yet medical tests and the judiciary look for signs of torn clothes, audible cries for help, injuries on the bodies of the woman, especially her breasts and vagina, injuries on the penis of the accused or other marks of resistance, medical evidence of nail marks, bite marks, semen stains on the clothes of the woman and the accused etc. These are viewed as more convincing evidence of non-consent.

JUDICIAL INSENSITIVITY TO UNDERAGE GIRLS

With the enactment of POCSO in 2012, the age of sexual consent was increased from 16 to 18 years. As a result, all sexual contact involving a person under the age of 18 is now considered a criminal offence under POCSO. Most women's groups and the National Commission for Protection of Child Rights were against the increase in age of consent, so as not to criminalise pubescent adolescents who explore sexuality. Contemporary social context affords much greater exposure, information, and interaction across genders among children and adolescents. The law must be alive to these social realities so as to not hurt or harm adolescents in the course of protecting the young from abuse.

The international law relating to children requires that the evolving capacities of children be respected. In other words, international law calls for policy and law to differentiate between the needs of infants, from primary school children; of pre-pubescent from pubescent and older adolescents. POCSO however, treats everybody under 18 years as a flat category, without regard to the developmental and biological growth in respect of sexuality.

When the increase in age of sexual consent was tabled, women's groups called for retaining the age of consent at 16 years, or alternatively, including an 'age-proximity' clause, if the age of consent was increased

29 Pratap Mishra vs State of Orissa AIR 1977 SC 1307

"The consequence of making sexual consent uniformly irrelevant, even among older adolescents who explore intimacy with and between peers, has allowed the law to be rampantly used by parents of girls... a medium of sexual policing and retribution that is similar to 'honour' related crimes.

to 18 years. The aim of 'age proximity' or 'romeo-juliet' clause, calibrates law to avoid criminalising consensual sexual contact among peers, while striking at relationships of power and manipulation of older adults with minors. Adopted in other parts of the world, this approach acknowledges adolescent sexuality while protecting the young from sexual manipulation and abuse by older adults. Unfortunately, this suggestion was disregarded and the age of sexual consent increased to 18 years. The consequence of making sexual consent uniformly irrelevant, even among older adolescents who explore intimacy with and between peers, has allowed the law to be rampantly used by parents of girls to retaliate against their boyfriends and husbands of their choice. Rather than being a tool for protecting against child sexual abuse, the law in such cases has become a medium of sexual policing and retribution that is similar to 'honour' related crimes.

The language and approaches of the judiciary also undermines the spirit of sensitively responding and protecting underage girls (and boys), who were below 16 years (until 2012) and below 18 years (after 2012). Regardless of conviction or acquittal in a case, one would expect sensitivity and care in the language of the judgments pertaining to child sexual abuse. Alarmingly though, in a large number of cases, the medical reports and judiciary respond to underage girls just like adult women, shaming them for real or perceived sexual activity. Equally worrying is the fact that these judgments make no concession for the girl even when the accused is much older in age – an aspect that the principle of 'age proximity' mandates.

Take the instance of the case of a girl aged about 14 years, who complained that she was tricked into going to a hotel with the accused who raped her. Both the Sessions and the High Court convicted the accused, but the Supreme Court cited various reasons for overruling the conviction, including that the girl's testimony did not inspire confidence, as she was a woman of easy virtue. Referring to the child as a "dissolute lady", the Court observed: "*The prosecutrix appears to be a lady used to sexual intercourse and a dissolute lady. She had no objection in mixing up and having free movement with any of her known person, for enjoyment. Thus, she appeared to be a woman of easy virtues*." [30]

30 Musauddin Ahmed v. State of Assam 2009 (4) RCR (Civil) 856

In another case, a 13-year old girl was raped by a family acquaintance while alone at home. Her medical examination was delayed by a week, her clothes were not seized and the vaginal smear was not taken for checking the presence of semen. Under these circumstances, no findings of the incident were possible in the medical report. The trial court convicted the accused for rape but on appeal, he argued that the medical examination of the victim did not reveal any external or internal injuries, implying that the victim was accustomed to sexual intercourse. The High Court of Madras reversed the rape conviction in 2010, relying on two old tears in the hymen, to infer that the victim was accustomed to sex. The court instead convicted the accused of a lesser offence under Section 354.[31]

Old hymen tears, by the very terminology, do not pertain to the incident in question. Yet, they seem to have a bearing on the incident of rape. Regardless of the age of victims, the approach of the law seems to be one that seeks to punish 'theft' of virginity, rather than protect a minor from abuse; to evaluate morality of victims, rather than sensitively evaluate the facts of the case to provide redress.

RAPE CHARGES ON ACCOUNT OF BREACH OF PROMISE TO MARRY

There is a visible trend of young women filing rape cases against men with whom they have been in consensual relationships. The triggers for filing a rape complaint may be more than one, and often include the relationship being exposed to her family, occurrence of pregnancy or child birth, rejection by the man at a later date, or marriage of the man to another woman. The judicial nit-picking seems to revolve around whether or not marriage was promised explicitly or assumed by the individuals concerned, an aspect beyond the scope of this discussion. What is of concern here is the manner in which the judicial narrative seeks to shame victims for loss of virginity, virtue and marriageability – rather than determine 'consent' to adjudicate charges of rape.

In 2007, the Supreme Court[32] observed, "If a full-grown girl consents to the act of sexual intercourse on a promise of marriage and continues

31 Balakrishnan @ Durai v. State C.A. No. 478/ 2009 (High Court of Madras).
32 Pradeep Kumar v State [Supreme Court of India, 2007]

"In a large number of cases, the medical reports and judiciary respond to underage girls just like adult women, shaming them for real or perceived sexual activity.

to indulge in such activity until she becomes pregnant *it is an act of promiscuity on her part and not an act induced by misconception of fact."* Similar sentiments were expressed by the Delhi High Court (2009), observing, "...ultimately, it is woman herself who is the protector of her own body. Promise to marry may or may not culminate into marriage. It is the prime responsibility of the woman in the relationship or even otherwise to protect her honour, dignity and modesty. *A woman should not throw herself to a man and indulge in promiscuity, becoming* [a] *source of hilarity. It is for her to maintain her purity, chastity and virtues."* [33]

In 2013, the Delhi High Court echoed the notions of opposing morality set out in the Bharwada verdict of 1983, of the permissive Western woman and the virtuous Indian counterpart. Explaining its reasons for dismissing a rape case, the court noted: "…. *here is a complainant who appears to be quite an ultra-modern lady with an open outlook towards life, enjoying alcohol in the company of men which is evident from the photographs placed on record, …She does not appear to be such a vulnerable lady that she would not raise her voice on being immensely exploited over such a long period of time."*[34]

The observations of the Tripura High Court in a case where the inter-caste relationship did not culminate in marriage despite a child born of it, the court rejected the charge of rape, awarding instead compensation to the complainant, with the observation that: "The appellant by promising to marry the victim woman, persuaded her to have sexual relations and caused pregnancy. The reprehensible conduct of the appellant left behind him a trail of misery, ignominy and trauma. *The only solace is that she married subsequently*. The female child born out of the illicit relationship is now living with her married mother and she is about 14 years old now."[35]

That the loss of virginity destroyed marriage prospects, is at the core of why rape (premarital sex by force or by choice) was historically treated as a sexual wrong. This continues to be the thread that ties social and judicial imagination in the new millennia, in ways that remind us of the

"By reinforcing premarital sex as shameful, that makes women a "subject of hilarity", courts undo legislative advances, while simultaneously reminding us of how deeply embedded the law is in dominant cultural values — the site where the real battle for reform must ultimately be fought.

33 Arif Iqbal @ Imran v. State [High Court of Delhi, 2009]
34 Rohit Chauhan v State [High Court of Delhi, 2013]
35 Sri Rajesh @ Bapi Saha v State of Tripura [Tripura High Court, 2015]

"It should trouble us that consensual sexual relationships at a later point get caught within competing labels of rape and 'promiscuity,' both of which reinforce pre-marital sex as wrong and hurtful to women.

historical origins of rape. It is this that triggers not just complaints of rape in contexts of breach of promise to marry, but also of unrelenting judicial shaming of women. It should trouble us that consensual sexual relationships, at a later point get caught within competing labels of rape and 'promiscuity,' both of which reinforce pre-marital sex as wrong and hurtful to women.

CONCERNS THAT REMAIN

Successive changes in the text of law signal that consensual sexual activity can no longer be used against women to shame them or to discredit their worthiness as witnesses in rape prosecutions. Not only does the 2013 definition of consent assume sexual agency in women, premised as it is on their capacity to negotiate specific sexual acts, but changes in medico forensic procedures have outlawed the use of two-finger tests and references to old hymen tears. At least in the text of the rape law, the linkages between previous sexual activity of the victim and her capacity to refuse sexual consent at a later point - have been erased. Yet, the functioning of the law remains a different story. Despite changes in the evidence law in 2003, by which references to the victim's "*immorality*" were dropped, in recognition that it has no bearing on her credibility as a witness - the legal process, including the courts - continued to treat that as pertinent in rape prosecutions. The distinction between textual changes and the interpretive approaches that shape the functioning of the law is an old one.

Not surprisingly then, in its order granting bail to gang-rape convicts during the pendency of their appeals in 2016, the Punjab and Haryana High Court blamed the victim for the series of coerced sexual acts, on account of "*adventurism and experimentation in sexual encounters*". As the girl was blackmailed into sex by fellow students at her university who procured her nude photos, the High Court placed the burden on the victim for "*misadventure stemming from a promiscuous attitude and a voyeuristic mind*".[36]

36 Vikas Garg and Ors v. State of Haryana [Cr.M.No.23962 of 2017; Cr.M.No.26910-11 of 2017; Cr.M.No.26930 of 2017]

Across the world, rape remains the most under-reported crime. Women have found many ways of coping, despite what the law holds out as 'justice' for rape. This is partly because of the debilitating and unrelenting shaming that different agencies of the law offer to women who seek legal recourse. What is particularly striking about consent is that the language used by the judiciary to disgrace women is no different from the cultural and societal space which shames them into silence. By reinforcing premarital sex as shameful, that makes women a "*subject of hilarity*", courts undo legislative advances, while simultaneously reminding us of how deeply embedded the law is in dominant cultural values – the site where the real battle for reform must ultimately be fought.

Chapter 3

SEXUAL VIOLENCE AS ATROCITY

This chapter looks at how the legal framework of atrocities in relation to rape has helped alter the meaning of rape as an act of male lust, to an assertion of power, privilege and entitlement that sustains social and economic structures of oppression. The implementation of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (PoA), suggests the transformational potential of law – in providing an alternative vocabulary for rape, that potentially can be expanded to sites of conflict, sectarian and communal violence, where targeted sexual violence is used to retaliate against social groups and oppressed communities.

"The term 'atrocity' situates acts of individual and collective violence against Dalits and tribals within historical forms of oppression and domination that exist within the Hindu caste system.

Rape as an act of male entitlement and power is masked in the socio-legal vocabulary of lust and shame. In the context of caste, the sexual access by men of dominant castes over Dalit and tribal women, has sustained old systems of domination and oppression between social groups. Sexual violence against Dalit and tribal women is not just normalised, but also glorified as an entitlement of men from dominant castes. The term 'atrocity' used in law, displaces such normalisation of rape – as indeed, its treatment as an individual wrong. Atrocity suggests that the violations inflicted are more than the sum total of crimes when perpetrated against Dalit or tribal victims by non-Dalits or non-tribals. The term 'atrocity' situates acts of individual and collective violence against Dalits and tribals within historical forms of oppression and domination that exist within the Hindu caste system, that must be addressed with gravity by the State machinery as part of fulfilling the Constitutional promise of eliminating discrimination based on 'race, caste and sex'.

The Constitution acknowledges the necessity of special responses in overcoming old and new forms of discrimination against specific social

groups. It is for this reason that besides guaranteeing fundamental rights to all persons, the Constitution outlaws untouchability, and forbids discrimination and provides for affirmative action for women, children, Dalits and tribals. It forbids restrictions to accessing public facilities and services, while providing for affirmative action in the fields of education and employment for the Dalit and tribal communities, categorised within the Constitution as Scheduled Castes (SC) and Scheduled Tribes (ST). Recognising the inter-dependence of tribal livelihoods and survival with land, the Constitution forbids alienation of tribal lands.[37] The necessity of special laws to address specific forms of oppression and vulnerability flows from this Constitutional premise.[38] For purposes of the discussion on rape as atrocity, the PoA together with the IPC are relevant.

"Such violations and targeting are not treated as mere breach of law and order, but as atrocities. That is to say, such offences assume more gravity than the sum total of what the acts involved suggest.

The PoA recognises the targeting of SC/ST persons by non-SC/ST persons as attempts to restore the old systems of entitlement and oppression by the higher caste, in violation of the Constitutional order. Such violations and targeting are not treated as mere breach of law and order, but as atrocities. That is to say, such offences assume more gravity than the sum total of what the acts involved suggest. These violations seek to intentionally humiliate, punish and degrade. In this context, the targeting of SC/ST girls and women is often sexual in nature. For more than the physical harm on the victims alone, such targeting is designed to 'put the community in their place'.

In its recognition of structures of inequality, within which violations assume the quality of brutal exercise of power to subordinate victims because of birth or descent, the PoA holds the potential to transform the judicial narrative of rape. It has the capacity to displace the obsession with virginity and chastity of the victim, to instead, define rape as a tool of power and oppression. This chapter looks at ways by which

37 Constitution affirmed and sought to protect their co-dependence on lands, forests and natural resources, which was an integral aspect of their livelihoods and habitat, through the Fifth and the Sixth Schedules, which protect tribal land from being alienated.

38 The Protection of Civil Rights Act, 1955 addresses untouchability related barriers and exclusion from accessing public places and services, and the Employment as Manual Scavengers and their Rehabilitation Act, 2013, that seeks to eliminate the manual cleaning of human excreta while provisioning rehabilitation for manual scavengers.

"The differentiation in relation to women's sexuality based on caste is also reflected through rules of marriage, that very clearly set out the privileges of higher caste men versus the strictures against lower caste men in relation to 'each other's' women.

rape as atrocity is treated by the courts, and how judicial narratives treat power dimensions, as they exist in relation to sexual atrocities against SC/ST women and girls.

SEXUAL NORMS DIFFERENTIATED BY CASTE AND GENDER

Caste hierarchies are based on differential norms for each social group, built on the notions of purity and pollution attributed to each group. These norms of purity and pollution relate to marriage, sexuality, food and occupation, differentiated for each group and shape the terms on which they relate to each other. That is to say, caste is as much about the social and economic location of each group in terms of occupation, sexuality and other attributes, as much as it is about these rules by which caste groups relate to each other – that is to say, '*parasparic rishte*' or the relationship between castes. These determine their access to resources, control over labour and reproduction; as well as rules of marriage within and between castes/social groups, setting out what is most desirable, just tolerable and that which is forbidden. Together, they shape and rationalise the extent of power or powerlessness between genders and castes.

Regulating female sexuality is intrinsic to creating and reproducing caste, as discussed in the earlier chapters. The ideals of virginity and chastity, although seemingly universal, are enforced stringently for upper caste women who bear the burden of reproducing caste purity and male lineage. In contrast, Dalit and tribal women, are reproducers of labour and not lineage, therefore these taboos are not applicable to them. On the contrary, customary systems existed to legitimise sexual access to Dalit women by men

Protesting caste based dicrimination and atrocities.

Source: Unknown

from dominant caste groups. By virtue of their social rank, they have commanded the labour of and sexual access to Dalit women. The differentiation in relation to women's sexuality based on caste is also reflected through rules of marriage, that very clearly set out the privileges of higher caste men versus the strictures against lower caste men in relation to 'each other's' women. Hindu scriptural codes prescribe endogamy to ensure marriages within one's social group. Two kinds of deviations to this norm are recognised - the marriage of a higher caste man to a lower caste woman (*anuloma* or in the natural order of things), or the marriage of a lower caste man to a higher caste woman (*pratiloma* or against the natural order of things). While the former may be tolerated as a lesser union, the latter is forbidden and punished, in some cases with death. These millennial old norms are visible till today in so-called honour crimes, particularly involving marriage or elopement of Dalit men with higher caste women, and in the intercommunity unions between Muslim men and Hindu women.

"The sexualisation of SC/ ST women provides immunity to dominant caste men for the sexual violence they perpetrate against Dalit and tribal women, while their hold over ideologies and systems of justice absolves them of accountability or consequences.

The sexualisation of SC/ST women provides immunity to dominant caste men for the sexual violence they perpetrate against Dalit and tribal women, while their hold over ideologies and systems of justice absolves them of accountability or consequences. Caste domination normalises sexual targeting of women because their caste and tribal identity renders them powerless. It has legitimised publicly orchestrated sexual humiliation of Dalit women, to retaliate against assertions of rights or claims by the Dalit and tribal communities. The stripping, parading and gang-rapes of Dalit and tribal women are ways by which retaliatory violence serves to restore the old status quo. The law recognises sexual atrocities against SC/ST women, when they are assaulted by non-SC/ST men, the prosecution of which requires the relevant offence/s from the penal code to be combined with provisions of the PoA. The treatment of sexual atrocities by the Courts tells us whether the promise of legislative intent and purpose is manifested in the way the law is implemented in the context of rape atrocities. Distinguishing an atrocity from a 'mere' offence, one parliamentarian bemoaned the poor implementation of the PoA, emphasising the relationship of power and domination that make Dalit and tribal women more vulnerable to sexual targeting, and therefore it must be treated differently from routine crime. "*Why are only dalit women*

chosen? Why are not women in one's family chosen for committing rape? They are also women. Be it a dalit woman or a woman in an upper caste family, the anatomy of their bodies is the same."[39]

This chapter maps the judicial treatment of rape atrocities, in the context of vulnerability and powerlessness of Dalit and tribal victims, as well as in contexts of retaliatory violence against Dalits and tribal individuals/ families that seeks to 'show them their place'. These two patterns of targeting are treated and categorised differently in this chapter. The discussion probes the extent to which contexts where power and powerlessness is compounded by caste structures, are able to transform judicial narratives on rape.

ATROCITIES IN THE CONTEXT OF VULNERABILITY AND POWERLESSNESS OF SOCIAL GROUPS

Being a Dalit or tribal woman, especially in a rural context, involves certain kinds of livelihoods and occupations that require physical labour and travel across distances. Just as higher caste women live within tightly regulated domestic spaces, the Dalit and tribal women's lives are marked by physical toil whether for daily wages or collection of fodder, fuel, water for sustenance, often involving travel over long distances on foot. Caste and tribal status invariably entail distinct geographies and markers in terms of garments, ornaments, livelihoods and habitats, which distinguish Dalit and tribal women from others. Therefore, even when the perpetrator is not personally acquainted with or aware of the caste and tribal status of the victim, in rural contexts he is likely to recognise and identify it. The body politics of women are as much determined by their gender as by their caste, tribal status, livelihoods and poverty, which compound their vulnerability to violence.

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Although one would assume a degree of familiarity with such markers of caste and tribal status within a given context, the legal system and judiciary display complete ignorance about such lived realities of women and communities. For instance, take the Orissa High Court's

39 Dr Manda Jagannath, MP (Nagar Kurnool), in 2003, as quoted in Pratiksha Baxi, 'On Interpreting Rape as/ and Atrocity' in *Public Secrets of Law: Rape Trials in India*, (OUP, 2014) on page 283.

"The judicial blindness to social realities is a barrier to sexual atrocities being addressed with the seriousness that the law intended – either in contexts of power and powerlessness, or as retribution directed at a previously disenfranchised group when they dare to claim rights.

approach while disposing an appeal against a rape conviction. The victim had complained that she was accosted and raped by the accused, Sukuru Gowda, while collecting firewood in the jungle.[40] She told her husband about the incident, who reported the crime to the police. The accused denied it, arguing instead that this case was a false complaint, filed on account of a fight between the parties.

The trial court convicted the accused of rape and atrocity. The High Court acquitted him of all charges on the grounds that, "...[the victim] *was an able-bodied tribal woman aged thirty five years. She had gone to the jungle alone which pre-supposes that she had the mental courage and physical strength to overcome any ordeal…,*". That the judge should assume that it takes mental courage, rather than the fact of simply being tribal to be in a jungle alone, reveals complete ignorance of the lives of tribal women. This ignorance can only be the result of both class and caste privilege, for what else would explain such alienation from underprivileged realities in Odisha, which has a high tribal population. The court also failed to probe deeper the insinuation of an existing conflict between

40 Sukuru Gowda v. State of Orissa 2004CriL J1566 (High Court of Orissa)

the parties, which raises possibilities of rape as a form of sexual retribution against the victim. The judicial blindness to social realities is a barrier to sexual atrocities being addressed with the seriousness that the law intended – either in contexts of power and powerlessness, or as retribution directed at a previously disenfranchised group when they dare to claim rights.

Similarly, when Pappu Khan,[41] appealed against his conviction for sexual atrocity, the High Court of Rajasthan betrayed an inexplicable ignorance about local socio-economic realities. This case involved the rape of a tribal woman by a truck driver, who had agreed to give her a lift. The trial court convicted the accused for the offence of rape and atrocity. Yet, the High Court of Rajasthan set aside this conviction on atrocity even though the accused knew the tribal identity of the victim, it had not been proved that he committed the offence of rape *because* of that identity. "*In the instant case, …there is no evidence that he committed rape on her for the reason that she belonged to scheduled tribe. He raped her without prejudice of caste to which she belongs only to satisfy his sexual desire.*" This demonstrates a lack of understanding that atrocity involves recognising and taking advantage of a woman whose vulnerabilities arise from her caste/ tribal status. That it should be obvious to distinguish a tribal woman by her garments, and the nature of livelihood that compels her to ride a truck alone, are assumptions the court seems unwilling to apply. The court failed to appreciate that the nature and degree of vulnerabilities that come with being a labouring tribal woman who travels long distances, is precisely what makes her a soft target for rape, without risk of accountability. By linking the crime to one of 'sexual desire' rather than the vulnerability of the victim, the court cloaks the history of sexual targeting of women on account of caste and tribal status.

The High Court of Karnataka too exhibited blindness towards how caste shapes lives, labour, and mobility related vulnerability and powerlessness of SC/ ST women and girls. In this case, a 15 year old Dalit victim went out at noon with her 13 year old nephew to collect cattle fodder when the 4 accused apprehended them. They dragged the victim to a nearby sugarcane field, where they raped her, fleeing

41 Pappu Khan v. State of Rajasthan 2000 1 RLW 551

when her nephew brought help from the village. Her mother took the victim to the police to register an FIR for rape under the IPC. Later, on completion of investigation, the provisions of PoA were added. While the trial court convicted all the accused for sexual atrocities punishable under IPC read with PoA, the High Court sustained the conviction for rape only, acquitting the accused persons of committing atrocities. Failing to see how being Dalit possibly explained why the children were collecting fodder in the first place, the High Court, cloaked vulnerabilities arising from caste and tribal status, by treating atrocity as "lustful act of misguided youth."[42]

In situations of conflict, where paramilitary or armed police forces are deployed, the power differentials are much more magnified. Here, easy counter-narratives are generated to ensure impunity. Meena Khalko's is one such case. As a 15 year old Oraon tribal girl in Chhattisgarh where conflict between the Maoists and the State created fertile ground for police excesses on civilians, Meena's vulnerability was heightened. On July 2011, she was raped and shot dead by the police in Sarguja district in North Chhattisgarh. According to the police version, Meena, yet a child, was a Naxal who was killed in a cross-fire of Maoists. When the issue of rape was raised, the police claimed that the young girl was 'habitual' to sex, providing sexual services to truckers in the area. The furore against the police cover up led to the appointment of a one person judicial commission. The inquiry report, released after four years, found the police version to be fabricated. The report notes that Meena was forcibly raped, sustained many injuries and then killed, without overruling the possibility of gang-rape. While the family was given compensation of 2 lacs by the state government, the accountability of the police officers involved remains uncertain.

ATROCITIES TO PUNISH ASPIRATIONS AND RIGHTS CLAIMS

Symbols of independence, prosperity or material acquisitions associated with privilege and rank in society, when achieved by the SC/ST, have often provoked violent backlash to 'put them in place'.

42 Hanamath and Ors. v. State of Karnataka 2006 CriLJ 1844 (High Court of Karnataka)

So, accessing higher employment or educational opportunities, high academic performance, acquisition of land or material resources such as motorbikes, shoes, jeans, or assertion of legal claims against the higher caste, have been known to invite violent, even fatal backlash. The targeting of women and girls invariably assumes a sexual dimension. Precisely because of the association of female sexuality with clan honour, the sexual targeting of women is not intended to simply harm the person targeted, but to signal emasculation of the community. It serves to punish social groups through the harm inflicted on individual female bodies. This is the reason why rape is used as a weapon in conflict situations, between communities, sects and nations, and in war. In the case of SC/ST, it is a reminder of the old privileges of the higher caste over Dalit and tribal women.

So, when Bhanwari Devi (discussed in chapter 2), a social worker with the Rajasthan government, from a lower caste potter community, reported a child marriage within the Gujjar community in 1992, she was not seen as just doing her job. She was perceived as crossing her social rank, for the Gujjars are an economically and politically dominant Other Backward Caste (OBC) in Rajasthan. In their eyes, her actions were a transgression of both caste and gender boundaries. Such was the level of impunity enjoyed by the Gujjars, that despite the efforts of the police to stop the marriage, they still managed to hold it secretly. Soon after, Bhanwari was gang-raped by five men, mostly but not only Gujjars, led by those against whom she had reported on the child marriage case. These surrounding circumstances made the nature of violence clear, yet the trial

Bhanwari Devi continues to fight for justice, 25 years after she was gang-raped.

Source: Frontline, Volume 30, Issue 6, 2013.

court concluded that a mixed group of higher caste men would not have 'defiled themselves' by raping a woman of a lower caste. All the accused stood acquitted, while the appeal against this case remains pending in the High Court.

Atrocities as retribution are usually designed to strip the victim and her family of every shred of dignity, survival and security, plunging them into a pre-Constitutional abyss. As the case from Bhamtola shows, long delayed convictions are empty justice.

"Atrocities as retribution are usually designed to strip the victim and her family of every shred of dignity, survival and security, plunging them into a pre-Constitutional abyss.

In July 2004, in Bhamtola, Seoni district of Madhya Pradesh, 3 Dalit women (of a SC family of Mahar community) were gang-raped by 30 men belonging to the Gowli caste, a dominant OBC. The overt reason held out by the Gowli, was that this was an act of revenge for an alleged elopement of a Gowli girl with a Dalit Mahar boy. About 30 men raped the Dalit boy's mother and two aunts, having first paraded them through the village, to 'teach them a lesson' for insulting a caste higher than theirs. According to the victims however, the girl's elopement was a pretext. The main reason was that they were an unusual Mahar family as they owned land, had direct water from the canal, freshwater wells, and their children went to school. One of the men from the family was even a secretary in the Panchayat. The fact that this Dalit family was not in the employment of the higher caste or beholden to them, was deeply resented. Cases were registered under the provisions of the IPC relating to gang-rape, kidnapping, as well as under the PoA.

It took more than a decade for the accused to be convicted and awarded life sentences by the trial court. However, the victim's family, evicted from the village right after the violence had lost their land and hard-earned status. As compensation, they received a barren piece of land and a job to one of them, both highly inadequate in restoring their security or dignity. Not being able to survive on barren land outside the village, the family eventually built a house at their own cost in a Dalit colony. This case reveals the intention and impact of atrocities, which ultimately seeks to return the victims to a position of historical subservience, which the law cannot redress.

The Khairlanji case of 2006 is the most emblematic of the law's erasure of the lived circumstances within which caste atrocities occur.

Despite a sequence of events that clearly indicates brutal caste backlash, the courts chose to only recognise penal offences without the element of atrocity. The Bhotmange family was one of the three Dalit families in the Khairlanji village dominated by Other Backward Classes (OBCs), in Maharashtra. The family's social and economic success disturbed the caste status quo in the village through their achievements and assertion of legal rights and citizenship, in many ways. The mother, Surekha, tilled her land with two sons Sudhir and Roshan; the youngest daughter, Priyanka at 17 years was a high school topper who used to cycle to college. The family had resisted efforts of land grabbing by the village and even testified in a case of assault registered against the persons attempting land grab. The atrocities unfolded against this backdrop.

खैरलांजी कांड की सीबीआई जांच होगी : पाटिल

The police inaction in the Khairlanji massacre of September 27, 2006, led to large scale Dalit mobilisation and protests, compelling the Maharashtra State government to hand over the investigation to the Central Bureau of Investigation in November 2006.

Source: Hamara Mahanagar

The non-Dalit villagers gathered in September 2006, to retaliate against the family, killing all but the father, Bhaiyyalal, who managed to escape. The mob dragged the four victims, Surekha and her three children, from their home to the village centre, where they were beaten, stripped naked, raped and strapped to a bullock cart, to be finally killed in full public view. The bullock cart pokers were reportedly thrust into their private parts, the daughter even raped after her death. Later, at a village meeting, everyone was ordered not to talk about the killings.

Bhaiyyalal, the father who witnessed the incident from hiding, reported the matter to an indifferent police. It was only when the mutilated bodies were found the next day that a formal report of the crime was recorded. In 2008, the trial court pronounced the death sentence for six persons and life term for two without applying

provisions of PoA, taking the view that the massacre was spurred by simple revenge for an earlier case of assault involving the police *patil* of a nearby village. Since the PoA requires literal utterance of caste-based slurs, the court overlooked the chain of events that led to the violence. In August 2010, the Nagpur bench of Mumbai High Court confirmed the judgment of the Sessions Court. Sexual violence against Surekha and Priyanka was erased from the case by the courts, which reduced it to a crime of multiple revenge killings by a mob.[43]

Photo of Priyanka Bhotmange with a report under the PoA establishing that this attack was part of the organised killings of Dalits, as part of the widespread protests and documentation at the time.

Source: www.news18.com

In many ways, the Khairlanji case symbolizes the erasure of everyday inhuman atrocities that Dalits, particularly Dalit women, suffer. For why else would the court not take note of the simmering discontent against the family whose daughter's academic achievements surpassed many, of the rancour caused by a Dalit girl cycling to college, of the anger against a family that dared to resist land encroachment and have the gumption to testify against the dominant caste in a court of law – to simply reduce the matter to murder as revenge? Spectacles of publicly orchestrated sexualised brutalities on naked bodies is never 'revenge', but atrocities that aim to etch retribution in community memory as a warning to others.

"Spectacles of publicly orchestrated sexualised brutalities on naked bodies, is never 'revenge', but atrocities that aim to etch retribution in community memory as a warning to others.

43 Judgment by Bombay High Court, Nagpur Bench was delivered on 14 July 2010 in Central Bureau of Investigation vs. Sakru Mahagu Binjewar and Others, Criminal Confirmation Case No. 4/2008, Shatrughna and Others vs. Central Bureau of Investigation, Criminal Appeal No. 748/2008, Gopal Sakru Binjewar and Others vs. Central Bureau of Investigation, Criminal Appeal No. 763/2008, and Central Bureau of Investigation vs. Gopal Sakru Binjewar and others, Criminal Appeal No. 170/2009 and No. 171/2009.

CHALLENGES IN RE-FRAMING RAPE IN CONTEXTS OF POWER AND OPPRESSION

Judicial approaches that either perceive rape as an individual wrong- an aberration that results from 'uncontrolled passion' and 'lust'- or dismiss complaints because of the victim's previous sexual history, are problematic in themselves, but they become all the more worrying when used to minimise sexual atrocities against Dalit and tribal women. To overcome this 'blindness' or lack of clear guidelines on indicators by which the court might establish that the accused had knowledge of the victim's SC/ST status, substantial amendments were introduced in the PoA in 2016. These amendments introduced many more ways by which the SC/ ST are known to be targeted, including non-consensual sexual contact or making gestures of sexual nature, disrobing, parading, accusations of witchcraft and so on. They also set out conditions under which an offence must amount to atrocity. The conditions include having a dispute with respect to land or other matters (as in the Khairlanji case), or where the accused has personal knowledge of the victim and her family, that is to say, is aware of her SC/ST status.

The overwhelming focus on untouchability as the touchstone of caste discrimination, has diminished an expansive and complex understanding of 'atrocities' in the law. This is so particularly in relation to the way caste itself shapes the nature of roles, vulnerabilities and sexual taboos imposed on women and men. Clearly, the norms and expectations about women's roles are not uniform, but differentiated along caste. When judged by the norms of higher caste women – in terms of mobility, labour, physical strength - the Dalit or the tribal woman's heightened vulnerability to atrocities is lost.

Likewise, rape of a lower caste woman by a higher caste man may attract no social or legal consequences, while a consensual relationship between a Dalit boy and a dominant caste girl, might result in the inhuman torture and public humiliation of the boy's mother as in the Bhamtola case. The punishment for '*pratilom*' or transgression by a lower caste man who shares sexual intimacy with a higher caste girl in modern times is very often death, as testified by 'honour' related crimes. An understanding of the inter-links between caste and gender would lead to completely different consequences.

While caste magnifies privilege, entitlement or vulnerability and powerlessness within the Indian context, an aspect acknowledged by the PoA, the interpretation and implementation of the law erases this narrative, to restore old forms of impunity. That the PoA, which holds the potential for re-framing the way rape is viewed in contexts of power disparities, is yet to deliver in relation to rape atrocities – reminds us yet again, that legislative reform is a half measure, without complementary interventions outside the domain of law. It also bodes poorly for re-defining rape in contexts of compounded power relations – diminishing the future potential of the law effectively responding to rape in contexts of conflict and communal violence.

Chapter 4

REFLECTIONS

We return to the questions asked at the beginning of this resource book: what does the rape law tell us about sexuality, gender relations and the role of the state. Of the many different readings and aspects of rape law, the chapters touched upon only three, to bring into focus concerns around State regulation of sexuality. Each of the chapters, through different entry points, illustrates ways in which the State's anxiety about female sexuality is manifested in law.

The larger scheme of the law, of which the rape law is a part, sets out the State's perspective on good and bad sexuality, within which (hetero)sexuality contained within the institution of marriage is privileged the most. This is not to suggest that the law is homogenous in its approach to issues of gender and sexuality, for there are internal inconsistencies created by successive law reforms and progressive judgments. Yet, in comparison to the larger framework of law, the positive aspects are marginal, lacking the force to displace dominant narratives. For instance, homosexuality remains stigmatised as is female sexuality outside of marriage. In spite of introducing a definition of sexual consent that affirms women's sexual agency, the process by which law is interpreted and applied, restores the status quo where women are shamed for their sexuality, while the actions of the perpetrators are excused as youthful expressions of lust. The main theme that emerges from a reading of the rape law reform along with all other sexuality related offences suggests an anxiety about containing female sexuality within marriage, in different ways flagged below.

MARRIAGE, CASTE AND THE REGULATION OF FEMALE SEXUALITY

Some of the larger themes that emerge from a study of the laws on sexual violence, not so surprisingly, pertain to maintenance of the institution of marriage and through it, caste purity. Most of the older penal provisions on sexuality punish consensual sex, not forced sex. Historically too, the offence of rape sought to protect marriage and purity of bloodlines. While the modern law defines rape based on consent or non-consent, in its interpretation, it invokes all the higher caste pre-conditions for marriage to determine the worthiness of the victim. While not exhaustive, the following dominant conceptual themes emerge from the laws on rape and other sexual offences.

"In the judicial mind, there seems to be a connection between an unmarried girl/ woman's sexual activity and her ability to consent or refuse to consent to sex with men.

Virginity and the institution of marriage

Despite the emphasis on consent as the touchstone for determining rape, the overwhelming focus in rape trials has been to ascertain the complainant's sexual history. In the judicial mind, there seems to be a connection between an unmarried girl/ woman's sexual activity and her ability to consent or refuse to consent to sex with men. This assumption converts rape trials into roving inquiries on the victim's sexual past, sourcing whatever information that fuels such inferences. So, old hymen tears, elasticity of the vagina, trimmed pubic hair, boyfriend, elopement, and so on, become the basis for deciding whether or not the woman consented. In this scheme of things, physical injuries or gravity of bodily injury may help establish non-consent in routine cases.

The importance of marriage as an institution through which a woman achieves social relevance comes across powerfully in cases of conviction for rape, where the victim's virginity is established. While conviction is more likely – platitudes in cases give an inkling of the nature of harm that moves the Court the most. When the victim remains unmarried several years on until the disposal of the appeal, the courts bemoan a virtuous Indian woman who cannot lie about rape, or the victim's loss at being denied the 'monsoon' of her life (marriage).

These cases reiterate how rape renders a woman to 'deathless shame,' or '*zinda laash*' (living corpse), a sentiment that was expressed during parliamentary debates preceding the 2013 amendments.

The length of imprisonment may be reduced or increased, depending on whether the victim was a virgin or has been able to marry after rape, or remains unmarried.

Such is the intensity of value attached to virginity and marriage, the courts berate women for having sex voluntarily on promise to marry, by the man. The focus of judicial discourse in breach of promise to marry is less to do with 'consent' and 'non-consent', even after the 2013 amendments, but more with the woman's lack of discretion on pre-marital sex. Rather than limit their pronouncements to consent, the courts reprimand women for being 'promiscuous' when they ought to have known the difference between promise to marry and being married. The nexus between rape, virginity and marriage persists in law – both in its use in breach of promise to marry cases, as well as the judicial responses to women in such cases.

From Mathura to Suman Rani, to the more recent breach of promise to marry cases, the only shift has been that of vocabulary – from being termed as 'habituated to sex', of 'easy virtue', they are now simply termed 'promiscuous'. It appears that a single boyfriend or old hymen tears is all that it takes for women and girls to be shamed as such.

Chastity and marriage

Rape cases involving married women are more challenging since virginity is rendered irrelevant. So, in the case of Bhanwari Devi, where her husband corroborated rape, the Court held that a middle-aged woman is unlikely to be raped, that too in front of her husband; but in another case of gang-rape of a woman working as maid, the Court dismissed her version, including on the grounds that she had separated from her husband and was cohabiting with another man.

Chastity and fidelity are not mere expectations that the judiciary has of married women during rape trials. These are actively enforced by the law on married women through multiple ways that reinforce each other. The law requires a woman to be sexually available to her husband regardless of her consent, by making consent irrelevant to sex within marriage. Thus, not only does the law decriminalise marital rape between

cohabiting spouses, it also criminalises extramarital consensual sex by a woman through the offence of adultery, and denies a woman any autonomy in leaving the marital home, by criminalising the 'enticing' of a married woman for purposes of having 'illicit' sex with her.

These three aspects of the criminal laws – exemption to marital rape, the criminalisation of adultery and enticement of a married woman, are devices through which the State hands over complete control over the wife's sexuality to her husband – in recognition of the sanctity of his bloodline and lineage. These controls are not just punishable offences but also have repercussions on the wife's claims to economic rights, maintenance and support in marriage within family laws. Thus, a wife's claim to maintenance, alimony, or divorce, expressly require her to be chaste (even if separated and divorced) for bringing a claim for financial maintenance or alimony from her husband. A woman's role as an equal partner in marriage, who contributes to financial well-being and asset accumulation, is not the basis on which law recognises her claim for financial support. Rather, it is a concern for her 'destitution' on which maintenance is founded, a right she loses on evidence of being found to be 'unchaste'. It is not surprising then, that adultery cases (mostly unsuccessfully) are filed to undermine claims of economic support by separated wives.

"Exemption to marital rape, the criminalisation of adultery and enticement of a married woman, are devices through which the State hands over complete control over the wife's sexuality to her husband – in recognition of the sanctity of his bloodline and lineage.

Age of consent and marriage

The law fixes a minimum age of marriage and an age of sexual consent. The two are different and have vastly different implications on the lives of adolescents and young people. The age of consent was earlier assumed to be age of marriage, but over the years, a distinction between the two has sharpened. The age of marriage has increased progressively with a growing understanding of women's personhood and equality. Prohibition of child marriage was sought to ensure girls stay on in school, be protected from sex at an age when their bodies and minds are not yet ready, and importantly, prevent early childbirth with all its risks. Matrimonial obligations beyond these aspects were also too onerous and incompatible with the capacities of a younger adolescent – male or female.

Age of sexual consent, increasingly with the recognition of the rights of the child, was distinguished – often reduced, in comparison to marriage.

"Inferences on premarital sex are used for shaming and berating minor girls in rape cases, even through the legislative intent is premised on protecting the best interests of children.

Puberty, with its attendant sexual awareness and exploration had to be recognised as part of the rights of a child that placed the obligation upon the State to provide information, education and services to protect the sexual health of children and adolescents alike. One of these is to recognise evolving sexuality of the young by not criminalising such contact between peers or teenagers who are proximate in age.

Yet, in 2012, with the enactment of POCSO, the age of sexual consent was increased from 16 years to 18 years. One of the arguments in favour of increase in age was that sexual consent must correspond to age of marriage (18 years for girls). This is based on two worrying assumptions – one, that marriage for women primarily entails sexual and reproductive roles; and second, that sexual activity should ideally be contained within marriage. No wonder then that founded and unfounded inferences on premarital sex are used for shaming and berating minor girls in rape cases, even through the legislative intent is premised on protecting the best interests of children.

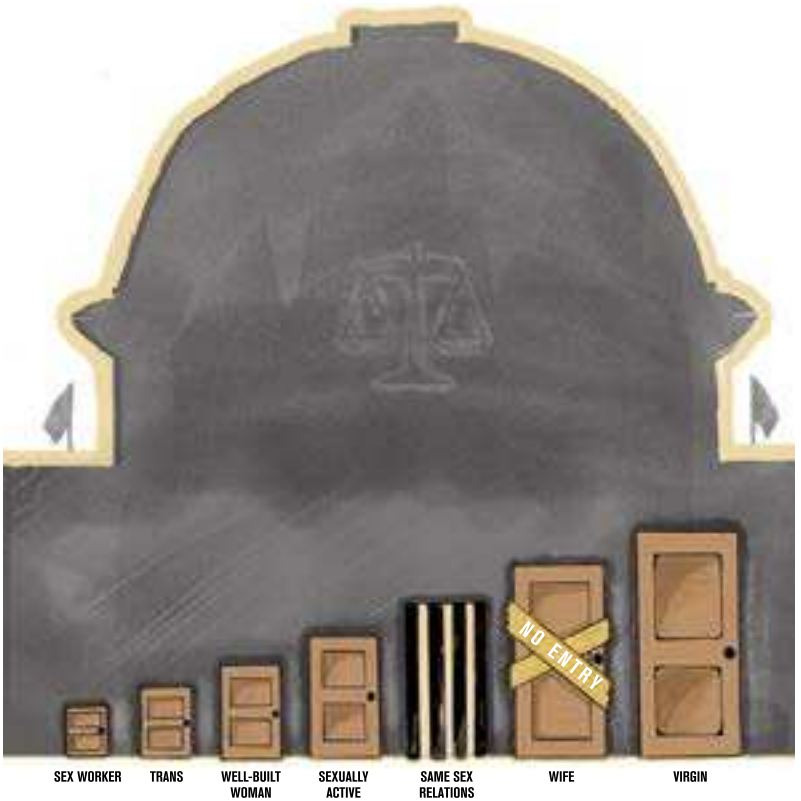
Countries that accept the evolving sexual capacities of adolescents, have set lower ages of consent at 11 to 16 years. Where the age is higher, say 18 years, laws ought not to criminalise consensual sex between young persons who are proximate in age. In contrast are countries where all sex outside of marriage is forbidden by law and punishable, including by death. India sits in an uncomfortable place where sexual consent and age of marriage are recognised as distinct, with a definition of sexual consent that respects women's sexual agency. Yet, by not differentiating the capacities of children between 0 to 18 years for purposes of protecting them against sexual offences, the law lends itself to moral policing and retribution by parents. Many cases are filed by parents to punish the boyfriend or husband of their daughters, especially when the boy is of another religion or lower caste. Sadly the law in this context, is a tool for 'honour' based retribution against boys and men in consensual relationships with underage girls.

Compulsory heterosexuality

The inclusion in 2013 of all non-consensual penetrative sexual acts by men on women within the definition of rape, implies that the State has accepted that anal and oral penetrative sexual acts, if consensual, are

legal between men and women. Yet, between same-sex partners, these continue to be criminalised and labelled as 'against the order of nature'. Section 377 IPC which criminalises 'voluntary' non-procreative sex as 'carnal intercourse', now implicitly applies exclusively to same-sex partners, since the 2013 amendments treat non-consensual anal and oral sex by men on women as rape.

The privileging of marriage and reproduction has been historically organised through rewards and punishments. Male control over the sexuality of the wife is fortified not just socially but also by law, through decriminalisation of marital rape and criminalisation of extra-marital unions. In addition, sex between same-sex partners is punished. That is to say, male domination over women is protected by the law, through sanctioning male control over women's sexuality, but also by stigmatising any deviance from heterosexuality. A family founded by



"The privileging of marriage and reproduction has been historically organised through rewards and punishments.

same-sex partners or those not conforming to the male-female binary, disturbs this 'hetero patriarchy'.

The origins of the stigma against homosexuality lie both in Biblical texts and Victorian puritanism, and its association of pleasure with sin. This made all non-procreative sex sinful. Sensual pleasure and desire itself were unruly and disruptive of the moral hetero-patriarchal order on which society was organised. The degrees of deviance varied, and within that, homosexuality was stigmatised and punishable.

With emergence of human rights, and within that the right of the individual to make decisions about one's body and sexuality, the idea of protection from sexual violence and harm, along with the right to express one's sexuality without discrimination was introduced. Sexual consent, rather than pre-ordained social roles became the test determining what the State must protect and not interfere with. Yet, homosexuality was re-criminalised by the Supreme Court in 2013. The same court subsequently affirmed the right of persons to determine their gender identity, regardless of the biological sex they are born with, while remaining silent about the legal status of their sexuality and marriage. The law, as it stands, continues to explicitly uphold the norm that only heterosexuality is normal, and that the institution of marriage must be founded on procreative sex.

Rape as a tool of power and oppression of social groups

Rape in contexts of disproportionate inequality of power or as a tool to degrade the 'other' has long vexed the struggle for rape law reform. From Mathura's and Rameeza Bee's case in late 1970s when the issue of custodial rape arose, to contexts of communal violence, conflict zones and caste oppression - women's movements have consistently sought recognition of rape as a tool of power and oppression. Precisely because of the association of women's sexual purity with honour of the clan and by extension, the community,women's bodies become soft targets during tensions and conflicts between social groups. An exertion of power against women through sexual violence is not intended to simply injure or kill, but to denigrate and defile the 'other'. Women's bodies become a battlefield for the aggressor group to emasculate the 'other' – to establish supremacy of one patriarchy over the other.

Despite legislative recognition of the atrocities against SC/ ST, the application of the law remains blind to the realities of caste and power structures as they impact the lives of women. The judicial discourse in the context of sexual atrocities erases the very recognition of unequal power relations, on which the concept of atrocities is based. Assumptions about the victim being 'habituated to sex', or the perpetrator's 'uncontrolled lust' serve to obscure the glaring disparities of power and powerlessness within which atrocities are perpetrated. In cases like Khairlanji, the manner in which the social and economic achievements of the Bhotmange family challenged old caste equations was glossed over, reducing the case to one of simple revenge and mob violence, cleansed of the context of caste oppression or sexual atrocities.

"Despite legislative recognition of the atrocities against SC/ ST, the application of the law remains blind to the realities of caste and power structures as they impact the lives of women.

Targeted sexual assault during communal violence, despite years of campaigning, is yet to be fully recognised in law, with appropriate rules of evidence and witness protection to enable legal redress. The recognition of rape as a weapon of power and oppression, despite legislative acknowledgement of atrocities, remains missing.

CHANGE AND REFORM: A CONTINUING PROCESS NOT LIMITED TO THE LAW

The rape law and its intersections with atrocities, demonstrate that despite progressive amendments and new terminologies in the law, patriarchy and caste recreate themselves through interpretation and application to cases. The language of purity and pollution may cease to find explicit mention in law, but its ideas and values persist in ways that seek to stigmatise sexuality that does not conform to patriarchal, heterosexual and brahminical ideals. Legitimate sexuality is enforced almost compulsorily within marriage, where women's consent is rendered irrelevant. Here the law assigns control of the wife's sexuality to the husband, while being openly hostile to sexual activity by women outside of marriage, and punitive towards same-sex desire. Not surprisingly then, the judicial discourse consistently appears to discredit victims 'habituated to sex' or 'promiscuous', while minimising rape even in contexts of atrocities, as individual acts of lust, without reference to unequal power relations between social groups.

Banner at Delhi's first Queer Pride March in 2008, that called for not just decriminalising sodomy, but also for an affirmation of sexual diversity. The following year in 2009, the Delhi High Court decriminalised sodomy, which the Supreme Court subsequently re-criminalised in 2013.

Courtesy: PLD

To displace this trivialisation of sexual violence in the law, much of the struggle for law reform has focussed on naming different forms of sexual violence and increasing sentences and punishment, demanding convictions and protesting acquittals. While there is no doubt that the reforms on sexual violence were necessary and long overdue, the law reforms of 2013 have exceptionalised penetrative sexual violence over others. There are higher sentencing slabs, and the leeway previously allowed to the judiciary in exercising their discretion to give lower than minimum sentences, has been taken away altogether in the case of rape. It was hoped that this would eliminate the tendency of the judiciary to award low sentences. As the previous chapters in this resource book show, ideological change cannot be tackled by changing the text of the law alone – and it may well result in more acquittals. Another worrying aspect about treating penetrative sexual violence as the most heinous crime is that such privileging closely resembles the patriarchal concerns about sexual purity of women's bodies – the very idea that the women's movements have struggled to displace.

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What do the concerns in this resource book tell us about the future of the agenda for change? It would be useful to ponder on two points in particular, that help move the process of change forward. The first point is whether an agenda for social change can afford to focus entirely on criminalisation, higher sentencing and penetrative sexual violence, without tackling the laws that criminalise consensual sex with equal vigour. The unrelenting focus on sexual violence has been to the complete neglect of consensual sexual expressions, that remain criminalised. The legal challenges to decriminalisation of homosexuality is movement driven and ongoing, but issues of adultery and enticement of a married woman, or the condition of chastity for claiming financial support as wives, have received little or no attention. Likewise, the criminalisation of consensual sexual expression among adolescents remains an area of consensus building within movements. The struggle for sexual autonomy cannot be limited to the context of heterosexual penetrative sexual violence, but must expand through securing legal affirmation for sexual rights of all persons. In that sense, the law reform against sexual violence must be part of a larger campaign for decriminalising and affirming all positive consensual expressions of sexuality and desire. The stigma and shaming of victims of sexual violence, including through law, cannot be dismantled so long as there is stigma and shaming of sexuality itself.

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Secondly, we turn to the question of the sites and tools of change knowing that a close association exists between the law and dominant social values. Even when legislative advances are achieved, the law in its implementation is interpreted by human agency. It is here that dominant social values come into play. Competing terminologies and perspectives jostle with each other within and outside the law. Feminist studies have shown that no matter how progressive the law is, and how inspiring a few judgments are, the law (of which the judiciary is a part) will be mediated through human agency and interpretation which are coloured by social values of the times. The idea that law is objective or outside of the social value system has long been rejected by feminist legal studies. What does this aspect of the law say to us about effective strategies for change, knowing that textual changes in the law will not translate into legal redress?

"The law reform against sexual violence must be part of a larger campaign for decriminalising and affirming all positive consensual expressions of sexuality and desire. The stigma and shaming of victims of sexual violence, including through law, cannot be dismantled so long as there is stigma and shaming of sexuality itself.

Beyond law reform, and the sensitisation of the judiciary, police and other agencies implementing the law, there is a need to reach out to the larger society. Legal functionaries are not insulated from popular values outside of the legal system, in spite of being exposed to sensitisation programmes. The agents of the law are rooted within social contexts of power and privileges that shape their perspectives and ultimately inform the application of the law. The challenging task before us is to engage with a cross-section of society, to aim for building an appreciation of equal and autonomous sexual rights for all persons amongst a critical mass of the population. Even as no consensus is possible in any society, we must ground a few key ideas on sexuality within and outside the legal system.

What are the modes and themes around which we might be able to engage with popular cultures and values systems more effectively? There may not be any easy answers or a single approach for all, as ongoing initiatives in diverse areas show. These initiatives must be expanded, but issues might be best addressed locally, by change agents whose context specific knowledge and proximity to communities would help sustain nuanced discussions. What is clear is that the strategies must be broad-based, local and ought not to be lawyer led or based on legalese, but must engage with and speak to the communities.

Ultimately, the questions raised by the resource book seek to generate interest in social workers and change agents towards integrating sexuality with the equality and social justice agenda. Sexuality, as discussed in each chapter embodies caste, gender and other hierarchies, through which privilege and marginalisation - in social, economic and political domains - is legitimised. As a concern, sexuality cannot be neglected, but must be integrated with all other issues that are at the heart of the struggles for social justice.

Appendix

SUMMARY OF SEXUAL OFFENCES IN THE PENAL CODE

GRADATION OF SEXUAL OFFENCES	PUNISHMENT

RAPE

DEFINITION OF RAPE

Until 2013, rape was understood as sexual intercourse by a man with a woman, defined strictly in terms of penile vaginal penetration. In 2013, rape was re-defined to include the penetration of the woman's vagina, mouth, urethra, or anus with a penis or other parts of the body – such as fingers; or penetration of the mouth with penis.

FIRST OFFENCE
Rigorous Imprisonment (RI) for 7 – life, + fine.
[376(1), IPC]

SUBSEQUENT OFFENCES
RI for life + fine, or death.
[376E, IPC]

Victim compensation from the State.
[357A, CrPC]

NON-CONSENT, COERCION, AND USE OF FORCE AN ESSENTIAL ELEMENT OF RAPE:

Non-consensual sexual intercourse, without use of force or coercion is also rape. The term consent was not defined in law until 2013. So judicial interpretation of consent, was based largely on perceptions about the woman's character, dress, and previous sexual activity and so on. The 2013 amendments, defined consent as, *"an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act"*.

The definition requires a man to ascertain the woman's willingness to participate in the particular sexual act.

In addition, sex coerced through use of physical force, or by threats to life of victim or person known to her is rape; or when a woman is unable to express her willingness or understand the consequences of her actions, as for instance when she is inebriated, are considered rape. All minors under 18 years are considered incapable of consenting to sex.

Rape under circumstances that heighten relationship of power and powerlessness is considered aggravated, attracting higher punishment

FIRST OFFENCE
RI for 10 – life (without parole), + fine.
[376(2), IPC]

SUBSEQUENT OFFENCES
RI for life + fine, or death.
[376E, IPC]
Victim compensation from the State.
[357A, CrPC]

- **Custodial** - Under certain conditions, where the accused person owes a duty to protect the victim by virtue of their relationship – as her supervisor, teacher, guardian, or exerts custodial authority over the victim such as in prison, police station, hospital, shelter home – commits rape, such rape is deemed as aggravated.

- **Heightened vulnerability** — Victimising a woman rendered more vulnerable on account of mental or physical disability, being a minor, or someone who has been sexually assaulted by the accused in question before; or in contexts of conflict and sectarian violence – constitutes aggravated rape.

- **Gang-rape** – when rape is committed by more than one person. All persons involved in this crime, whether they participated in the sexual acts or not, can be punished for the crime of gang-rape.

FIRST OFFENCE
RI for 20 – life (without parole), + fine.
[376D, IPC].

SUBSEQUENT OFFENCES
RI for life + fine, or death.
[376E, IPC]
Fine amount given to victim for medical expenses and rehabilitation.
[376D, IPC]
Victim compensation from the State.
[357A, 357B, CrPC].

- **When rape results in death or vegetative state:** When physical injuries inflicted during rape cause coma or death of the victim, the offence is considered more serious for the purposes of punishment.

FIRST OFFENCE
RI for 20 – life (without parole) + fine, or death.

SUBSEQUENT OFFENCES
RI for life + fine, or death.
[376E, IPC]

- **Performing carnal intercourse 'against the order of nature':** This provision covers sexual offences other than rape addressed under Sections 375 and 376. While this provision does not explicitly strike at homosexuality, it criminalises all forms of non-penile-vaginal acts that are 'voluntarily' performed. This serves to stigmatise homosexuality, and is routinely used for blackmail and extortion of same-sex desiring and trans persons.

RI for 10 – life, + fine.
[377, IPC]

SEXUAL OFFENCES OTHER THAN RAPE

OUTRAGING THE MODESTY OF A WOMAN

- Using force to injure a woman, or instil fear in her mind, with the objective of disrespecting her and outraging her modesty.

RI of 1 – 5 years, + fine.
[354, IPC]

- Using words or gestures to insult the modesty of a woman.

RI for up to 3 years, + fine.
[509, IPC]

USING FORCE TO DISROBE A WOMAN

Forcing a woman to undress is considered a sexual offence.

RI of 3 – 7 years, + fine.
[354B, IPC]

SEXUAL HARASSMENT

Extorting sexual favours from a woman, showing pornography to her against her wishes, making sexual overtures, or sexual advances that are unwelcome, are all considered as sexual harassment.

RI of up to 3 years, + fine.

Making sexually coloured remarks is also considered as sexual harassment, but is considered less serious than instances stated above, and carries a lesser punishment.

RI for up to 1 year, + fine.
[354A, IPC].

VOYEURISM

The offence of voyeurism covers two kinds of situations – one, where a man watches a woman while she is engaged in any 'private act' at place where she does not expect to be observed, that is to say, observes her without her consent; or if a woman consents to capturing of such private or intimate images which are disseminated without her knowledge or consent.

'Private act' refers to an act done in a place where the woman expects privacy, or where the victim's genitals, posterior or breasts are exposed or covered only with underwear. For example, this could be during the use of lavatory; while bathing, while changing clothes, or during any sexual act.

FIRST OFFENCE
RI for 1 – 3 years, + fine.

SUBSEQUENT OFFENCES
RI for 3 – 7 years, + fine.
[354C, IPC]

STALKING

Following a woman or contacting her repeatedly in order to personally interact with her, even after she has shown her disinterest, is considered stalking. Cyber-stalking, i.e., monitoring a woman's use of internet, email, etc., is also punishable.

However, if a woman is followed for the purposes of preventing or detecting crime, or under the direction of any law, or under other reasonable circumstances, then such an act will not be considered as stalking.

FIRST OFFENCE
RI for up to3 years, + fine.

SUBSEQUENT OFFENCES
RI for up to 5 years, + fine.
[354D, IPC].

TRAFFICKING AND SEX WORK

Sex with a person who has been trafficked is punishable under the law.

SEXUAL EXPLOITATION OF A TRAFFICKED ADULT
RI of 3 – 5 years, + fine.

Although this offence has been termed as "sexual exploitation," other laws criminalise 'consensual' sex work – i.e. soliciting sex work, undertaking sex work near public places, and living off the earnings of a sex worker. [Immoral Traffic Prevention Act, 1956]

SEXUAL EXPLOITATION OF A TRAFFICKED MINOR
RI of 5 – 7 years, + fine.
[370A, IPC]

SEXUAL OFFENCES RELATED TO MARRIAGE

RAPE OF NON-COHABITING WIFE

If a husband has sexual intercourse with his own wife but without her consent at the time when she is living separately from him either under a decree of separation or otherwise, then he will be punished for rape. However, this offence is considered as less grave than rape of a person who is not the wife of the accused.

RI of 2 – 7 years, + fine.
[376B, IPC]

RAPE/SEXUAL VIOLENCE AGAINST COHABITING WIFE

A cohabiting wife may prosecute for rape only if she is under 18 years of age (Independent Thought v. Union of India), and the husband will be punished irrespective of the marital relationship between them.

RAPE OF A MINOR COHABITING WIFE
RI for 7 – life, + fine.
[375, IPC]

A cohabiting wife over 18 years of age may not prosecute for rape under Section 375 of the IPC. She may however pursue criminal and civil remedies for domestic violence as below:

- **Section 498A:** when the husband or the relative of the husband does any act of cruelty to the woman, he shall be punished with the imprisonment which may extend to 3 years. Cruelty means any conduct that causes grave injury or endangers the life, limb or physical or mental health of the woman or forces her to commit suicide or harasses her to fulfil any unlawful demand of property.

If the wife is less than 16 years of age, then her husband will be tried and punished for 'aggravated rape,' with imprisonment of ten years to life without parole, and fine.
[376, IPC]

- **Domestic Violence Act**: provides a woman with civil remedies in the form of custody order, protection order, residence order, facility of shelter homes, medical facility, or any other kind of monetary relief.

ADULTERY

If a man has sex with a married woman, with the knowledge that she is married, then he can be punished for adultery. Extramarital sex by wife is an offence only if it is without the 'consent' of her husband.

RI for up to 5 years, + fine.
[497, IPC]

ENTICING A MARRIED WOMAN

When a man, with the intent of having sex, entices or takes away a married woman from her husband or any person having care of her.

RI for up to 2 years, + fine.
[498 of IPC]

ACID ATTACK

Throwing acid on a person or administering it to them by other means is a punishable offence. When such an act results in burns that lead to deformity, disfigurement, or disability, then the accused can be punished for the offence of causing grievous hurt using acid.

ACID ATTACK
RI for 10 – life, + fine.
Fine amount is given to the victim for medical expenses. [326A, IPC]

ATTEMPT TO ATTACK USING ACID
RI for 5 – 7 years, + fine. [326B, IPC]
Victim compensation from the State. [357B, CrPC]

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ISBN 978-93-84599-07-2
9 789384 599072