

See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication/309133540>

Pratiksha Baxi, 2016. "'Carceral Feminism' as Judicial Bias: The Discontents around State v. Mahmood Farooqui", Occasional paper series Interdisciplinary Law, Hyderabad: CSD.

Article · January 2016

CITATIONS

0

READS

1,467

1 author:



[Pratiksha Baxi](#)

Jawaharlal Nehru University

23 PUBLICATIONS 162 CITATIONS

[SEE PROFILE](#)



Council for Social Development
Southern Regional Centre, Hyderabad

INTERDISCIPLINARY LAW

Issue 3, October 2016

‘Carceral Feminism’ as Judicial Bias: The Discontents around *State v. Mahmood Farooqui*

Pratiksha Baxi



Council for Social Development
Southern Regional Centre, Hyderabad

INTERDISCIPLINARY LAW

Issue 3, October 2016

**‘Carceral Feminism’
as Judicial Bias:
The Discontents around
*State v. Mahmood Farooqui***

Pratiksha Baxi

ABOUT THE AUTHOR

Pratiksha Baxi is Associate Professor at the Centre for the Study of Law and Governance, Jawaharlal Nehru University. Baxi is the author of *Public Secrets of Law: Rape Trials in India* (Oxford University Press, 2014). This courtroom ethnography brings together her interest in sociology of law, feminist theory and violence. Baxi's research interests include critical perspectives on ethnographies of courts, medical jurisprudence, gender studies, politics of judicial reform, judicial iconography, courtroom architecture and visual culture of law.

ACKNOWLEDGMENTS

I am extremely grateful to Kalpana Kannabiran, Upendra Baxi, Jinee Lokaneeta, Deepak Mehta, Ghazala Jamil, Uma Chakravarti, Rupal Oza and P. Puneeth for their critical feedback and constructive suggestions on the paper. Conversations with numerous friends including Anuj Bhuwania, Jhuma Sen, Mrinal Satish, Prabha Kotiswaran, Chirashree Das Gupta, Swastee Ranjan and Nupur Chowdhry were most productive.

ABSTRACT

State v. Mahmood Farooqui has generated prolific conversations with many expressing reservation about the reception of the judgment, while others have commented on the very need for public discussion on this case as it now moves to the High Court. Does *State v. Mahmood Farooqui* present new jurisprudential possibilities and horizons in the way we think about consent and violence? How does *State v. Mahmood Farooqui* present to us the challenges of older ways of diagnosing and interpreting sexual violence? The claims of what has been dubbed as “carceral” feminism are seen as suspending scepticism about the inherent limits of legal language to deal with desire or violence. In other words, there seems to be anxiety about how does legal language translate sexual agency or sexual desire into juridical categories of consent or rape. Is this anxiety new, now directed towards the amendment of the rape law of 2013? Is this anxiety only generated because judges do not have the discretion to mitigate sentences for adequate and special reasons; or that the harm of forced oral sex is equated with the harm of peno-vaginal rape? This commentary examines the theoretical debate on carceral feminism, and the implications of reproducing this debate to frame the discontents around the 2013 amendment of the rape law.



I. Introduction

On 30 July 2016 Mahmood Farooqui (hereafter, MF), a well-known writer, performer, and artist, was found guilty of having raped an American Fulbright scholar from Columbia University at his home on 28 March 2015. He was convicted for rape under s. 375(d) IPC for seven years, the minimum mandatory punishment in such offences. Rape is defined under s. 375(d) IPC, wherein a man is said to commit *rape* if he applies his mouth to the vagina, anus, urethra of a woman against her will and without her consent. Consent ‘means 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.’ Provided that a ‘woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.’ *State v. Mahmood Farooqui*¹ (hereafter the MF judgment) is one of the many cases that have come on trial after the passage of the *Criminal Law (Amendment) Act, 2013* (hereafter CLA, 2013). This amendment followed nation wide protests against the gangrape and homicide of a young woman—named *Nirbhaya*, in popular discourse—in Delhi on 16 December 2012.

As the MF case is appealed, public attention has been drawn to the naming of forced oral sex as rape. *Carceral* feminists have been critiqued for celebrating the CLA 2013 or in this case, the MF judgment as a feminist victory. Does the MF judgment present new jurisprudential possibilities to conceptualise consent and violence (Devika and Menon 2016, Kannabiran 2016, Sen 2016, Sood 2016)? Or does it dilute due process standards, subvert criminal law and/or encourage ‘carceral’ feminism (Sethi 2016, Mustafa 2016, Das 2016)? Cossman cautions ‘just because you scored a legal victory does not mean that it’s a feminist victory. We need to critically examine the celebratory discourse that surrounds legal victories; we need to look at the ways in which such a discourse is embedded in the state and what the implications of that are for women’ (cited in Sircar 2016:157-158).

This commentary examines the theoretical debate on carceral feminism, and the implications of reproducing this debate to frame the discontents around the MF judgment and more generally the CLA, 2013. Since carceral feminism is a sticky concept, I begin with examining the definition of carceral feminism. In the context of the MF case, I examine whether carceral feminism is a new form of judicial bias? Further, do we then need to examine the method of reading law, which underlies the charge that carceral feminism blurs the distinction between prosecution and persecution and therefore, makes men vulnerable to victimisation by a ‘draconian’ ‘sex-negative’ law?

What is Carceral Feminism?

The literature on carceral feminism is largely an ‘indictment’ of the feminist use of law that leads to ‘the ironic effect of landing disproportionately marginalized, often racial minorities behind bars adversely affecting the families of lives of women in these communities, and the targeting, policing and criminalizing of disenfranchised

populations, leaving marginalized women more vulnerable to violence at the hands of the state - in prisons and inflicted by the police' (Iyer 2016: 20). The circulation of the category of carceral feminism may be traced to a specific critique by feminists critical of militarized models of international humanitarian law on human trafficking and neo-liberal forms of control that bring migrant bodies and borders into the prison-industry complex. Bernstein's argument (2010) which is based on an ethnography of the specific alliances between liberal feminists and Christian evangelical reformists in the US involved in the human trafficking campaigns, critiques powerfully the effects of such an alliance as supporting deportation of sex workers, and the consolidation of a securitized state apparatus in the name of women.

Analysing the Justice Verma Committee Report (henceforth JVC report), which was constituted to formulate recommendations on how to reform the rape law in the aftermath of the Delhi gang rape protests in 2012-13, Iyer notes that the feminist positions on the rape law amendment cannot be framed as an instance of 'carceral feminism.' Similarly, Kotiswaran (2016) acknowledges that Western models of governance feminism do not apply to Indian feminisms especially since the beginnings of the anti-rape law reform movements were imbued with the scepticism of the state. However, she reads the 2013 rape law amendment as expanding the scope of carceral politics as an unintended consequence of feminist engagement with law reform. While Kapur and Kotiswaran argue that post colonial feminisms cannot be fitted neatly into the framework of carceral feminism, yet they note that the critique arising from the carceral feminism framework is important and indeed been debated in Indian feminisms for nearly two decades². Kapur characterizes her response to governance feminism as 'schizophrenic' as she critiques Halley's definition of governance feminism; while at the same time she notes that 'feminism's carceral focus has only become more entrenched with the rise of neo-liberalism' (cited in Sircar 2016:158, also see Kapur 2013). Referring to the CLA 2013

...most of the amendments were unnecessary and only intensified the sexual surveillance of women's lives. Such reforms mostly resulted in strengthening the punitive power of the state rather than empowering women. The evidence that we did not need these laws is found in the subsequent conviction of the perpetrators under the old law, as the provisions did not have a retrospective effect. The convictions actually demonstrated that the law it existed prior to the amendments actually worked (cited in Sircar 2016:158).

Kapur's method of reading law implies that the rape law could have been made to work through external forces acting upon it (cited in Sircar 2016). Kotiswaran (2016) differs from this view recognizing that certain law reforms measure were necessary both at the level of naming and procedure, however she cautions that the amended rape law could also expand the regulation of sexuality. This is made manifest when the histories of feminist engagements with anti-rape law reform is read with the law reform on trafficking.

The feminist critique of law in India has enhanced awareness about the limits of law to deepen gender rights as human rights (see Agnes cited in Badhwar 2016). Yet the use of carceral feminism as a master category ignores powerful feminist arguments that have critiqued state law for nearly two decades now in India (Agnes 1994, Basu 2012, V. Das 1996, Joseph 2013, Kannabiran 2008, Kapur and Cossman 1996, Menon 2004, Mody 2002, Roy 2012). The critique of gender mainstreaming, governance or governmentality for example, predates what is now configured as governance feminism or state feminism (Menon 2009, Kannabiran and Kannabiran 2002). Further, the feminist critique of carceral politics has not been limited to incarceration (or detention) in prisons or camps. Rather feminists have critiqued the carceral politics of non-state law (U. Baxi 1985) such as customary panchayats (or the family), which authorise custodial violence in the domain of sexuality and choice (Chakravarti 2005). It is not clear how the anti-carceral feminist position addresses research and activism around the carceral politics of caste, which lynches, incarcerates, strips, parades, and humiliates. Would the framework of carceral feminism be applied to the use of special laws, which name caste violence as atrocity to challenge the monopoly of law, by the dominant caste? The argument for de-criminalisation was also asserted following the challenge to s. 377 IPC a colonial law that criminalises ‘unnatural sex against the order of nature’ (Puri 2011). In this context although feminists asserted demands for de-criminalisation, feminist pictures of the phallogocentric punitive state also found critique and challenge (Narrain and Gupta 2011, Puri 2011). The law reform debates of 2013 between feminists, child rights activists and queer rights activists were crafted in acute awareness of the ‘cunning of judicial reform’ (Baxi 2014). In this paper, I argue that the circulation of the sticky concept of carceral or lynch feminism in the aftermath of the MF case mystifies the feminist critique of law’s violence and feeds into anxieties that entrench the backlash against different strands of feminisms that converse in reflexive (or sometimes, angry) solidarity with each other (Kannabiran 2016, Sen 2016).

Publicity, Law and Feminist Politics

We know that publicity impacts legal processes in complex ways; and that silence or outrage is organised through social and political processes, now highly mediated. Highly publicised trials have found feminist commentary across a spectrum of positions. First, the mediated production of horror of rape has been critiqued for producing voyeuristic publics and numbing social awareness about the abject afterlife of rape survivors. Frozen pictures of victimhood were challenged by survivor discourses pointing to the materiality of life in the aftermath of rape. Second, in the aftermath of the Delhi gang rape protests, we read women’s accounts of experiences of sexual harassment in the chambers of law during the 2012 protests. Some wrote about how certain kinds of feminism enabled or deterred expressions of resistance. Indeed, feminist frameworks found improvisation and polyvocality complicated our understanding of consent and resistance. Third, the role of the media has been critiqued for deterring rape complaints in hounding rape complainants for news—putting their identity, privacy and safety at risk. The systematic rape abuse

directed at feminists on the cyber space has become a huge concern, especially in the on-going project of inscribing political conservatism through techniques of violence and censorship. The media instead of creating awareness directs carceral energies to feed into the nervous system of the state. The use of visual and social media as a mechanism for challenging sexual impunity has been challenged as having the effect of producing specific forms of rightlessness, exceptionalism or thanatopolitics (also see Dutta and Sircar 2013, A. Roy 2014).³ In the present context where ‘seditious sexualities’ have become the object of nationalist politics (Krishnan 2016), we simultaneously find an intensification of the argument that feminists are colonised by carceral energy.

Flavia Agnes argues that in highly publicised cases, ‘trial judges lean more towards conviction even if the case is not fit for conviction so that they don’t receive flak from the media or activists’ (Agnes cited in Badhwar 2016). If this picture of judicial anxiety about adverse publicity is sociologically accurate (see Narrain 2014), should feminists refuse to represent rape survivors in highly mediated cases, or refuse to speak to the media about such trials? Should routine cases under CLA 2013 find feminist publicity to interrupt a discourse that reinforces the picture that ‘Delhi has had only two rape cases worth reporting—the Nirbhaya case and the Mahmood Farooqui case...located at the opposite end of our rape laws’ (Agnes cited in Badhwar 2016)? It has been argued that ‘media trials by feminists’ need to be called out to rescue due process and fair trial from the nervous system of the carceral state. What then is the analytical difference between ‘phallogocentric’ media trials and ‘feminist’ media trials? Since Mathura, Bhanwari, Khairlanji, Naroda Patiya to Nirbhaya, feminists have conversed and disagreed with each other about the politics of law reform that emerges around specific trials. Is the public debate around MF case about the politics of rape law reform or a critique of law and publicity? Should all feminists—whether labelled as carceral, lynch, silenced, nuanced or strategic—take a break from scopical and phallogocentric circuits of publicity? Or is it specific kinds of publicity that some feminists should take a break from?

The debate on the CLA 2013, dramatized in the commentary around the MF case, indexes scepticism at three interrelated levels:

1. the feminist method of treating sexual violence complaints with belief instead of suspicion by providing support to the complainant if she wishes to make a complaint while ensuring due process.
2. the politics of labelling critique (Gautam 2016, Lakshmi 2016, Das 2016).
3. the privileging of sexual violence over the invisibilisation of other social justice projects or civil liberty concerns (Rizvi and Sethi 2014, Kotiswaran 2016).

The critique of the MF judgment begins with the caveat that disagreeing with the MF judgment does not mean that the complainant is disbelieved or a victim-blaming stance is adopted. This position takes seriously the defence argument that the sexual act, with or without consent, could not have happened at all. There are two strands of

critique of the MF judgment. First, the ‘nothing happened’ viewpoint which states that judicial interpretation of defence evidence was bad in law, and perhaps even biased in favour of carceral feminism (Sethi 2016). Second, the ‘something happened’ viewpoint seeks to interrogate the definition of consent and the question of gradation in sentencing in acquaintance/date rape cases.

The critique the CLA 2013 which adopts the affirmative juridical definition of consent (see Kotiswaran 2016) flows from the idea that while it is possible to consider that ‘something happened’ yet lack of consent may be an afterthought for women unable to take responsibility for their sexual agency. Should carceral feminists then not nuance notions of sexuality by crafting their legal advocacy in the interests of men who make ‘honest but reasonable mistakes’, too?⁴ Carceral feminism has also been ascribed to that strand of feminism, which does not factor in the male inability to read consent, and for not framing law reform keeping in mind the consequences of stigma experienced by some men. Here, stigma of all raped women is seen on a different register to the attrition of stigma on some men. To characterise such a critique as misogynist is to silence.

How then may we have a collective discussion on how to express anger at sexual impunity without aligning with the phallogocentric response that silences or exceptionalizes? Who does the politics of labelling each other either as carceral feminists or rape apologists, benefit? What is the difference between silence and silencing? For neither does silence on a conviction index support for the accused nor does outrage necessarily reveal the harm of rape. Surely, the important question is whether feminist outrage, carceral or anti-carceral, sharpens public awareness that a no means no.

Does the anti-carceral feminist position critique the chilling effect of strategic lawsuits against public participation (SLAPP) filed against feminists as a specific form of backlash?⁵ Is the use of civil defamation law by a powerful man, following multiple sexual harassment complaints at the workplace, against feminist lawyers also a matter of concern to civil liberty activists?⁶ Is the criminalisation of anti-rape protests under obscenity laws, such as the protest in Kerala,⁷ a concern for anti-carceral positions?⁸ The critique of publicity must be seen as not only violative of the right to privacy of the complainant and/or the defendant but also for activating carceral energies of state and non-state bodies of law and governance.⁹

In the debate around the MF case, carceral feminists are pictured as those feminists who deploy horror against rape as a rhetorical strategy to generate public opinion and label those who believe in the innocence of the accused as misogynist. In other words, carceral feminists are pictured as lynch mobs that label, stigmatize and censor. Mona Das (2016) has argued that ‘calls for “outrage” do not serve the cause of justice. How are these calls different - except in degree - from the calls for publicly killing or castrating rapists?’ While outrage can silence, the phallogocentric response to rape that calls for murder or castration is not identical to feminist outrage calling for effective (or stringent) imprisonment. Equally scepticism of the carceral energies generated by

the horror against sexual violence, especially against already marginalized identities in the context of right wing state formation also needs to find representation.¹⁰ The use of the metaphor of ‘lynch mobs’ to describe how feminist discourse signals a representational crisis. Equally the anti-anti-carceral description of feminists as ‘rape apologists’ marks a representational crisis.

Carceral feminism has also defined as a project that exceptionalizes sexual violence removing it from rights based discourses and social justice projects (Sethi 2016). In the MF case those who have acclaimed the case as jurisgenerative (Cover 1986) have been pictured as *carceral* on the grounds that they have wronged an innocent man pinning their collective pain and anger against rape, on MF and all those who support him by labelling them as ‘misogynist.’ This has been compared to the experience of those activists and lawyers who are labelled as anti-nationals for pleading the innocence of terror suspects.¹¹ The accused is also exceptionalized, wherein metonymic associations are made with the victimization of terror suspects. This is ironic since the survivor’s evocation of the 16 December gang rape case has been severely critiqued.

Feminist Politics and Legal Representation

The commentaries around the MF case also point to the deepening of oppositional positions between civil liberty and feminist arguments, although there has been a great deal of overlap between the two. The two complex movements have offered us specific pictures of the law as Kafkaesque. While there has been much criticism since the 1980s that the rape law amendments, and feminists, now characterized as carceral, have diluted civil liberties, we have yet to review the genealogy of this charge fully. If we consider the feminist position on the right of the accused to legal representation, feminists have not argued that rape accused should not be represented by women lawyers or that lawyers who represent rape accused ought to be censured.¹² Yet at the time of the Delhi gangrape trial the Saket Bar Association had decided to boycott the rape accused and physically assaulted the defence lawyers in this case for defying the boycott. While the public statements of the defence lawyers about women who are raped had drawn much criticism, at the same time, feminists had condemned the Saket Bar Association’s call for the boycott of rape accused in the Delhi gang rape case.¹³

It would be fair to argue that feminists have not supported or advocated boycott, censure or condemnation of lawyers who represent rape accused—and indeed, in the realm of male dominated defence lawyering (or state appointed legal aid lawyers), women lawyers also represent rape accused. For this politics of boycott is seen as a product of hyper masculine politics that feeds into carceral masculine publics, which constitute rape as worse than death. In relation to the feminist discomfort with criminalization of sexual agency and love, many feminist criminal lawyers refuse to argue false promise cases or lodge false cases of rape in love and choice marriage cases. Feminist activists and lawyers have worked to free both women and men against whom criminal cases have been filed for choosing a partner of their own choice.

The second register of critique by civil liberty activists has been that feminists demand immediate arrests and police custody in rape cases, without waiting for an investigation that can determine whether or not an arrest should happen. Carceral feminists have been accused of abandoning the critique of state policing that uses torture to extract confessions. When feminists insist on immediate police action (as compared to demanding laws on mandatory arrests as in the US),¹⁴ as a mechanism to ensure timely investigation and evidence collection, and to prevent pressure or intimidation of the complainant, should this be only read only as expanding the power of the punitive phallogocentric state? Rather than deploy a homogenised conception of the state, do we need to develop critique based on ethnographic insights into how feminist lawyers and activists engage with the deeply gendered practices of the police at an everyday level (Lokaneeta 2016)? The debate around the MF case should also provoke us to review the extent to which anti-rape campaigns have attempted to genderdue process and fair trial; and redress the manifold injustices of the carceral state towards rape survivors. After all, it was the Supreme Court which took suo moto cognizance of a news report that policewomen had put a ten year old child in the lock up when she went to file a complaint of rape in 2015.¹⁵

Rape trials have been critiqued for positioning the rape survivor as an injured witness, a bystander in a case between the state and the accused. Despite changes in the law, the 2013 amendment has not altered judicial language to supplant the word ‘prosecutrix’ which literally means the female prosecutor who persecutes. We have ample evidence that women are routinely pressurized to turn hostile—through techniques of violence, intimidation or social coercion. The state provides scarce support mechanisms, if any to rape survivors as prosecution witnesses. Indeed as Agnes (2016) has argued despite the protests leading to the enactment of the CLA 2013, the judiciary continues to deliver judgments, which repeat the structure of sexual impunity found in the Mathura case in 1979. Law reform has failed to reflect on compromise in a legally plural field, for the court is a site where the monopoly to compromise is contested. In this scenario, the role of the lawyer with the prosecution is critical to redress the manifold forms of hostility.

In *Delhi Domestic Working Women’s Forum v. Union of India* (1995), the Supreme Court held that legal representation is a right that could be exercised by the survivor of rape. The Supreme Court held that the brief of such a lawyer would be to assist the victim right from the stage of filing a complaint until the case is heard. They were entrusted with the task of explaining the legal procedure to the victim, assist her to file the case in the police station, prepare her for the testimony and make information available to her in case she needed counselling or medical assistance.¹⁶ This was codified by the 2009 amendment of the Code of Criminal Procedure, 1973 (inserted by Act 5 of 2009) under s. 24(8) which held that the ‘court may permit the victim to engage an advocate of his choice to assist the prosecution.’ Yet survivors usually do not have access to their own counsel to represent them rather remain dependent on the prosecutor’s legal talent (or lack of it).

In the MF case, the complainant returned on a tourist visa (since her research visa had lapsed and the host university in Delhi did not help her with the requisite paperwork) to lodge a criminal complaint in June 2016.

She wanted to contact some lawyer but there were summer vacations in the court. She called some lawyers but they did not take her case since they knew the accused. Since her tourist visa was going to expire, she herself decided to go to the Police Station and lodge the complaint (at page 23).

How do rape survivors access counselling, support or legal representation? The debate has not focused on the question of access rather it has dwelled on the nature of legal representation engaged by the complainant.

Instead, the MF debate has been about whether the prosecution vilified the defendant's wife, introduced innuendos to create a prejudicial image of the accused or mobilised carceral feminism by asking for an enhanced sentence (Sethi 2016). Mustafa (2016) draws an analogy with those state prosecutors famed for anti-terror cases for pursuing sexual violence cases with equally abundant carceral zeal with the prosecution in MF case as illustrating how due process is hollowed out of criminal law. Here we get a picture of a theatrical prosecution that persecutes, and exceptionalizes sexual violence by instituting impunity against innocent defendants. This picture challenges the framing of the feminist counsel with the prosecution as heroic, authentic or legally persuasive. Is there any difference between the state prosecutor and the counsel for the victim? Do state prosecutors use similar legal strategies to prosecute rape, as they do in terror cases? When, and how are prosecutorial techniques of persecution of terror suspects and rape defendants analogous? How does counsel of the victim negotiate with the prosecutorial office driven by targets, ambitions and politics?

And importantly, what kinds of due process questions have arisen in other instances where victims have been represented by counsel in other rape cases post 2013 amendment? Consider the highly publicised case when a woman executive who had hired an Uber cab was raped in Delhi in December 2014. In this case, the counsel for the victim, Colin Gonsalves challenged the Delhi High Court's decision to allow the accused to re-examine 13 witnesses including the victim.¹⁷ The Supreme Court observed that the DHC had erred for 'mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall.'¹⁸ The role of the counsel arguing on behalf of the victim that the Delhi High Court's decision to recall witnesses amounted to a re-trial for the survivor, who was treated as a bystander rather than as a victim with an interest in the criminal justice system was not seen as carceral or hollowing out due process. Rather, if at all, this case illustrates the importance of legal representation for survivors who have a stake in the criminal legal system. This highly mediated case witnessed the 'iron hand'¹⁹ of the court announcing rigorous imprisonment for life (imprisonment till the remainder of natural life) for the offence under Section 376 (2)(m) (committing rape causing grievous bodily harm) of the IPC, among other sections of the IPC. Yet this case did not attract the sticky concept of carceral feminism. Is the charge of carceral feminism reserved for feminist counsel or does it extend to all prosecutors and lawyers irrespective of the typology of prosecutorial styles or politics in highly mediated cases? If the critique is not about the prosecutorial styles of lawyers representing victims, then the critique must be directed at sentencing.

Deletion of the Adequate and Special Reasons Proviso

We could read the introduction of capital punishment in two provisions of CLA 2013 (where the victim dies or is left in a vegetative state; or in the case of a repeat offender), either as a spectacular failure of the women's movement for not having been able to contain law reformers' response to carceral publics that demanded the wrath of the punitive state against rape accused. Alternatively as Mrinal Satish argues the CLA 2013 could be framed as a spectacular success for it restricted the introduction of death penalty in the amended rape law.

So, that is the irony of the manner in which the law was brought in. The urgency meant that Parliament while debating it perhaps did not see that there was no death penalty. In fact, when the accused were sentenced to death, the home ministry even made a statement that the new law has capital punishment, but the law does not reflect that.²⁰

Whether or not, the CLA 2013 is seen as a failure or success, of the women's movement or the JVC, we must resist revisionist accounts of a complex and charged moment of law making. The charge that feminists are carceral rests on the perception that 'vanguard' feminists demanded the deletion of judicial discretion to mitigate the sentence on ground of adequate and special reasons in 2013. How do we arrive at this argument?

In 2000, groups such as Sakshi (or later the AIDWA through its draft bill of 2002)²¹ held the view that the proviso of judicial discretion should be deleted—a view, which was not, shared across all women's groups or feminists academics. In response to Sakshi, the 172nd Law Commission held that

Any number of situations may arise, which it is not possible to foresee, and which may necessitate the awarding of lesser punishment than the minimum punishment prescribed. Safeguard against abuse is provided by requiring that adequate and special reasons be mentioned in the judgment, for awarding such lesser punishment. Nor is there justification in the criticism that such discretion once conferred is liable to be abused or that it will always be misused to help the accused (at para 3.2.2.).

Can it be argued that there was a dominant feminist view on the deletion of adequate and special reasons, especially since following Flavia Agnes' (1994) influential essay it became feminist common sense to attribute arbitrary mitigation of sentence to judicial bias? Ignoring the 172nd Law Commission, the Criminal Law Amendment Bills of 2010 and 2012, for instance, deleted the proviso, while recommending that the expanded definitions of sexual assault should be punished with a minimum sentence of seven years to life. In these Bills, it was envisaged that judges would have the discretion to punish between seven years and life for 'non-aggravated' sexual assault. The sentencing structure proposed in the JVC not only responded to the carceral

publics, which demanded death and castration but it was also in an internal conversation with earlier Bills. Further as Mrinal Satish who was part of the JVC research team notes:

Prior to 2013, the IPC provided for a minimum sentence (seven years in non-aggravated cases and ten years in aggravated cases) and provided discretion to judges to reduce the sentence below the minimum by providing ‘adequate and special reasons.’ Studies, including mine, indicated that courts often used irrelevant factors to reduce the sentence below the minimum. Hence, the 2013 amendments removed this discretion that judges had to reduce sentence below the minimum.²²

In 2013, groups such as Lawyers Collective and CEHAT did not demand the deletion of adequate and special reasons in their written submissions to the JVC. Similarly, Vrinda Grover’s written submissions, articulates the feminist position against death penalty and castration. However, Grover’s written submission did not demand the deletion of the judicial discretion proviso. Rather she recommended that a special cadre of public prosecutors should be trained.²³ The deletion of judicial discretion to mitigate sentencing was also critiqued during the 2013 law reform moment. Further, Mrinal Satish (2016a, 2016b) has argued discretion would move to less accountable sites of criminal law with pernicious effects on survivors.

The gender neutral, Criminal Law Ordinance 2013, that followed the submission of the JVC report introduced death penalty and deleted judicial discretion. The Ordinance was met with protests and critique. The revised formulations by women’s groups following the meeting of February 22nd, 2013 for Jt. Sec (MHA) Mr. Chauhan²⁴ urged the government to retain judicial discretion and remove death penalty. Similarly the note addressed to Arun Jaitley, Leader of Opposition, Rajya Sabha titled ‘Some Key Amendments to Criminal Law (Amendment) Bill, 2012 and Criminal Law (Amendment) Ordinance’ 2013, Proposed by Women’s Groups to Members of Parliament (dated March 9, 2013) made the following demands:

1. Remove phrase ‘or with death’ in Section 376A (punishment for causing death or resulting in persistent vegetative state of victim) and Section 376E (repeat offenders), offences introduced by the Criminal Law Ordinance, 2013. The memorandum recommended the removal of death penalty as it ‘will only reduce convictions and may lead to rapists and assaulters killing women to prevent them from giving evidence.’

2. In relation to the punishment for rape proposed under Sec 376 (1) and Sec 376 (2), the women’s groups argued that ‘there must be judicial discretion in sentencing under stated special circumstances otherwise the enhanced sentences in this bill will only lead to an even lower conviction rate.’ It was proposed that the following proviso be added:

'Provided that the Court may, in exceptional circumstances, for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term less than ___ years.

Explanation: The following factors may not be considered as exceptional for justifying reduction of sentence below the minimum. These include: economic, social and educational status of the convict; the payment of compensation by the convict; the infamy and mental agony suffered by the convict; the previous sexual history and conduct of the victim, or that the victim has married post the offence of rape.'

The government did not accept these recommendations. In a meeting with the Home Ministry, a delegation of six feminist representatives from Delhi, Bombay and Hyderabad, the Joint Secretary vehemently opposed bringing judicial discretion back on the grounds that the 'adequate and special' proviso is abused too much by the judiciary to give minimal sentences to rapists (dated 3 March 2013).

Law reform then is shaped by the internal histories of the law, as much as external forces acting upon it. Law reformers have been aware that the Supreme Court has noted that judges are reluctant to direct law's carceral energy towards rape accused, once convicted, as a matter of routine. What does adequate and special mean? In a pre-amendment judgment, the Supreme Court held that:

The expression 'adequate and special reasons' indicates that it is not enough to have special reasons, nor adequate reasons disjunctively. There should be a conjunction of both for enabling the court to invoke the discretion. Reasons which are general or common in many cases cannot be regarded as special reasons.²⁵

In 2005, the Supreme Court clarified that 'the power under the proviso is not to be used indiscriminately or routinely. It is to be used sparingly and only in cases where special facts and circumstances justify a reduction.'²⁶

As recent as 2016, some Judges have thought it appropriate to force a rape survivor to marry the accused and constitute such forced marriages brokered by the judiciary as an adequate and special reason to mitigate or reduce the sentence in pre-amendment cases.²⁷ Yet in 2013, *Shimbu and Anr v. State of Haryana*, the Supreme Court clarified in a gangrape case that compromise is not an adequate and special reason to mitigate sentence, holding that

... Religion, race, caste, economic or social status of the accused or victim or the long pendency of the criminal trial or offer of the rapist to marry the victim or the victim is married and settled in life cannot be construed as special factors for reducing the sentence prescribed by the statute.²⁸

Further, the Supreme Court held that:

This Court has in the past noticed that few subordinate and High Courts have reduced the sentence of the accused to the period already undergone to suffice as the punishment, by taking aid of the proviso to Section 376(2) Indian Penal Code. The above trend exhibits stark insensitivity to the need for proportionate punishments to be imposed in such cases.²⁹

In other words, the internal history of the judiciary archives judicial insensitivity to proportionality, and for treating an exceptional provision as routine. Has the CLA 2013 re-activated the intensity of carceral energy within the judiciary against rape accused? And does the sluggish pace of carceral energy, which discards the doctrine of proportionality, throw the criminal legal system into a legitimization crisis? Can we read the deletion of judicial discretion in relation to a series of mandatory provisions as a means to redress this crisis?

The move to introduce mandatory provisions regarding punishments, registration of FIRs, reporting of child sexual abuse cases, and increased age of consent may also be read as a response to the state's inability to deal with the legitimization crises that arises due to the failure of police and judicial reform. Further, mandatory provisions have been a response to state failure to deal with violence against women in several jurisdictions. While the role of 'vanguard' feminists, with or without legal expertise, in shaping the rape law in its current form remains to be traced, it must be acknowledged that it was a feminist argument that the criminal legal machine that deals with death and life imprisonment, without gradation of sentencing or judicial discretion, would act against rape survivors. Equally feminists acknowledged that the efficacy of punishment was far more important than stringent sentences. Within the sentencing debate, there are two broad positions. One view is articulated by Flavia Agnes who argues that we need to de-link recovery from trauma from the length of sentencing. It is not true, says Agnes that 'only when the accused is given maximum punishment is the victim able to overcome the trauma of rape' (cited in Badhwar 2016). And the second commonplace view links sentencing not only to trauma and recovery or to retributive justice but also sees a sentence as a means to prevent repeat offences. In both views, the focus is effective sentences rather than higher sentences as a means of deterrence.

Adequate and special reasons not to enhance the sentence in the MF Case

In the MF case, the court rejects the prosecution's argument for an enhanced sentence on the grounds that there are no adequate and special reasons to enhance the sentence. This was the defence's argument that is absorbed by judicial reasoning on sentencing. The 1983 amendment did not require Judges to state adequate and special reasons not to enhance punishment, although courts have held that special reasons for giving maximum sentence in rape cases must be recorded. The Allahabad High Court noted that

There is no justification for the trial court while convicting the accused-appellant for the offence under Section 376 IPC to sentence him to life imprisonment without appreciating the mitigating and aggravating circumstances placed by both sides, and without assigning special reasons. Only because Section 376 IPC provides for life imprisonment as the maximum sentence does not mean that the Court should mechanically proceed to impose the maximum sentence without explaining the circumstances for awarding maximum punishment by a reasoned order (para 18).³⁰

The sentencing order in the MF case gives reasons for not awarding more than the minimum mandatory. The court gives credence to the fact that the convict is 44 years old, married and highly educated scholar who has a family to support. The arguments of the defence that do not form adequate and special reason not to enhance the sentence is that he is bipolar; he was remorseful, did not influence the complainant, that the act was not brutal or violent, he was not habitual, did not have criminal antecedents and that the complainant was not his student, so there was no breach of trust. The second half of the sentencing order is about fines and compensation. The court notes that the prosecutrix as a foreign national had come to do research and she could not continue her research since MF betrayed the trust she reposed in him as a friend. The court held that the fact that she incurred costs to return to India to lodge the criminal complaint provided ground for compensation under s. 375 A of the CrPC.

It is interesting that adequate and special reasons not to enhance minimum mandatory sentence was not seen as an important addition to the emergent sentencing policy in CLA 2013 cases. Rather, Grover's argument that the rape brought disrepute to the nation as ground for enhancement of punishment was highlighted (Das 2016). In this context, Agnes argues that 'the risk of hurting public sentiments, national honour or honour of a city (like Mumbai) is a slippery terrain within criminal law and invoking these sentiments tends to violate the rights of the accused' (cited in Badhwar 2016). In this view, while there is a slippage between phallogocentric notions of the honour of the nation-state and feminist articulations of reputation of a gender just nation, both articulations should 'stay within the framework of evidence-based conviction' lest there 'be miscarriage of justice' (Badhwar 2016).

For both women lawyers the sentencing argument meant occupying a battlefield where politics had to be bracketed to represent the best interests of their clients. As a feminist lawyer, some opined that Vrinda Grover should have left the sentencing arguments to the state (or argued for the minimum mandatory). Others argued that a feminist lawyer, who works with the state prosecutor, would represent the best interests of her client and therefore, support the prosecutor's brief for enhanced punishment. At the stage of sentencing, feminist lawyering meets the limits of its own politics. Apart from the question whether feminist ethics should inform sentencing arguments in a criminal trial, the two responses enjoin in an agreement that the

reputation of a postcolonial nation state can only be framed in relation to rightist phallogocentric nationalist frameworks. The feminist prosecutor then is critiqued for her investment in the imagination of rape bringing disrepute to a non-existent gender just society. And the danger of a wrongful conviction communicated through the reproductive metaphor of ‘miscarriage’ of the feminised yet blindfolded figure of justice when juxtaposed with the image of the female prosecutor who persecutes produces panic (Kannabiran 2016).

Dignity Before the Law

Feminist critique has been directed at the reliance on sexist stereotypes, for humiliating rape survivors and deriving pleasure from a sexualized trial. Feminists have critiqued courtroom language and the constitution of the rape trial as a pornographic spectacle. Yet it benefits the cause of feminism if defence lawyers eschew stereotypes and put out a strong defence. Indeed, strange defence arguments have been heard in the same fast track court where the MF case was heard. For instance, in a bail hearing the defence argued that the criminal complaint ‘was basically a case of road rage but it was given a colour of rape by the prosecutrix.’³¹ In other words, after the 2013 amendment the defence could claim that women who are raped while walking alone through lonely places are in reality consumed with ‘road rage’ and therefore, lie about being rape. For the defence when unable to rely on older stereotypes invents newer stereotypes. And if the MF trial entirely displaced older phallogocentric structure of rape trials, then perhaps this should be cited as the most important aspect of this case, irrespective of the judicial outcome and its fate in the future.

It is accurate to argue that the MF case was notable since brilliant and respected lawyers argued the case with the prosecution and for the accused person. Nitya Ramakrishnan, one of the most talented defence lawyers in the country, assisted by Mr. Ashwath acted as counsels for the accused and additional public prosecutor Mohd. Iqar represented the state. Well-known feminist lawyer, Vrinda Grover, assisted by Ratna Apnendar was counsel for the complainant. This must be appreciated for the craft of argument and rigour of reasoning, on both sides, raises the standard of any criminal trial. After all the Uber rape accused appealed on the grounds that he had not got adequate legal representation.

However, the experience of any rape trial, whether or not feminist prosecutors or feminist defence lawyers examine the witness, must be evaluated from the point of view of the woman who testifies to rape. It is therefore puzzling to read a description of the MF trial as dignified.

The trial was completed in record time - and we cannot shy away from the fact that the speed was possible also in part because of the cooperation of the defence. From accounts in the media, the trial was fair and dignified. All because even lawyers on both sides are ‘one of us,’ people who have impeccable credentials of standing up for gender justice and human rights (Das 2016).

It was disconcerting to read this description of the rape trial. No matter how sensitive the court may be, giving testimony to rape is *necessarily* undignified for the woman. This is the *necessary* violence that the law must direct at the prosecutrix to ensure a fair trial. Denying that the rape ever happened, suggesting that the woman lied, or manipulated evidence, and providing motive about the lie is necessary not only in the interest of the accused but also of a fair trial. Similarly prosecutors, may try to minimise harm during the chief-examination, however the nature of testimony is such that the legal process itself marks subjectivity perniciously.

In court, description of the rape, its duration, the length of the dress, the position of the survivor in relation to the accused, and her thoughts or feelings must be narrated. In most trials, unlike this one, the survivor testifies before a large team of defence lawyers, mostly men. Although such trials are in camera, to testify in front of a room full of lawyers where a screen may or not be situated blocking her view of the accused is an intimidating experience. It is disturbing that none of the accounts of this case depict curiosity about what it means to take the stand.

No account has wondered whether prosecutors explain to survivors that their clothes now exhibited to them in court have gaping holes after the forensic examiner's incisions. On the stand, the woman often has to reply in forced choice answers—Yes, No or I don't know. She has to deny that she has not lied repeatedly. She experiences hostility, derision and disbelief through the cross-examination. Even if she is not cross-examined on the act of rape, she has to deny the scenario created by the defence.³² She has to deny that her allegation is a product of a disturbed mind, or that her attraction for the accused person led to a false accusation. She has to withstand rigorous cross-examination about fact, circumstance and motive. Even under the amended law, despite claims to sensitivity, the process of testifying must direct 'necessary' violence to the survivor in the interests of a fair trial.

Sole Testimony

The other myth-making of the law is the assumption that judges convict on uncorroborated testimony of the survivor, since they hold on to a picture of rape worse than death. It has been argued that in a 'he said, she said' situation, it is dangerous to rely on precedents that were based on colonial law that placed premium on chastity and virtue. Indeed in the MF judgment, the court observes that:

It is well settled law that in a case of rape, the sole testimony of the victim is sufficient to establish the guilt of the accused and no corroboration is required. The evidence of the victim of sexual assault cannot be tested with suspicion as that of an accomplice (158-159).

However, what does the court mean when it says that the testimony is sterling? Have Indian courts believed whatever testimony the woman narrates? Or is there a jurisprudence that informs the doctrine of sole testimony? In *State (Govt. of NCT of*

Delhi) v. *Deepak S/o Heera Lal*³³ the Saket court acquitted the accused and held that ‘if there are some circumstances which cast doubts in the mind of the court of the veracity of the victim’s evidence then it is not safe to rely on the uncorroborated version of the victim of rape’ (at para 21).

Rai Sandeep @ Deepu v. *State of NCT of Delhi*³⁴ holds:

To test the quality of such a witness, the status of the witness would be immaterial... What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court.

While it is for the apex court to test whether or not the testimony of the complainant was sterling,³⁵ the doctrine of sole testimony has not meant that the court believes every allegation of rape. Can we generalize that judges rely on older notions of sole testimony to convict and therefore the judicial interpretation of the CLA 2013 is draconian? Does the metaphor ‘draconian’ block critical methods of reading the law?

Consider the fact that in July to August 2016, the same court where the MF case was heard, pronounced acquittals in at least 6 cases. For example, in *State v. Akbar Ali @ Pappu Khan*,³⁶ the Saket trial court held that ‘the prosecution has failed to establish its case against the accused beyond reasonable doubt’ (at para 18).³⁷ The Saket court was guided by *Narender Kumar v. State* where

...it was held that even in a case of rape, the onus is always on the prosecution to prove affirmatively each ingredients of the offence. Such onus never shifts. The prosecution case has to stand on its own leg and cannot take support from weakness of the case of defence. However, the great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence (at para 16).

State (Govt. of NCT of Delhi) v. Sonal Joshi acquitted the accused, an advocate by profession. The court found that ‘the physical relations between the prosecutrix and the accused were with the consent of the prosecutrix.’³⁸ This judgment also relies on *Robit Chauhan v. State NCT of Delhi*, 2013, Bail application no. 311/2013 dated 22.05.2013 that there may be cases where both persons out of their own will and choice develop a physical relationship.

Many of the cases are being reported by those women who have consensual physical relationship but when the relationship breaks due to one or the other reason, the woman uses the law as a weapon for vengeance and personal vendetta.³⁹

While each trial looks at individual biographies and facts, trials are also occasions for labelling sexual politics. Trials therefore provide language to accounts about how vengeful women mobilize the rape law when their sexual relationship fails. This picture of increasing feminine vengeance as a social fact, reported in the media, presents consensual sex as a risk for men. Here the rape script that no woman would lie about rape since it would fill her with deathless shame is not adopted. For, judicial interpretation in evaluating evidence must choose between different kinds of rape scripts—and precedents allow judges to make this choice while appraising sole testimony as evidence.

State (Govt. of NCT of Delhi) v. Parmod Yadav not finding evidence of false promise of marriage, recorded consent and acquitted the accused.⁴⁰ *State (Govt. of NCT of Delhi) v. Mohd Inshal*⁴¹ the accused was acquitted on the basis of the woman's testimony, now declared hostile by the prosecution, that after the criminal complaint the accused had 'performed Nikah with her without any pressure and they have been living happily' (at page 4). On cross-examination, she testified that she had filed the complaint against her partner with whom she had a consensual sexual relationship. Further, in response with the defence, she said:

She also admitted that she was Hindu before the marriage and the accused is Muslim and that the accused had told her that he would convince her parents about their marriage. She also admitted that because of difference in religion she was apprehensive that there would be problem in their marriage. She admitted that the accused did not marry her under pressure after the registration of the case. She also admitted that accused never forced her to abort the pregnancy and she made the complaint because of annoyance.

Here, we get a picture of an alliance between the complainant, accused and the defence—wherein the rape law becomes the site where sexuality is regulated. CLA 2013 does not displace the use of the rape law to regulate sexuality or as a technique to arrange marriages that meet the resistance of families and/or men. The only difference seems to be that the case is fast tracked with the FIR lodged in May 2016 and judgment pronounced in July 2016. Here too we find that the complainant is not pictured as someone who was too ashamed to file a rape complaint, rather she is portrayed as having sexual agency, which is seen as illicit by her family. Criminal law is then used to convert illicit sexual alliances into legitimate sexual alliances.

Reading these judgments post CLA 2013 we find that the older critique of the use of the rape law as a site for regulating sexuality is not entirely displaced. Nor do these judgments necessarily help us read the MF judgment as one in a series. Rather this method of reading judgments clarifies that carceral feminism, as a form of judicial bias is not mobilised in all cases. The question still remains what kind of rape scripts do judges choose to rely on as the definition of rape expands to forced oral sex—and whether the court deploys a different language that departs from conventional rape scripts (or stabilised pictures of victimhood)?

Psychologizing Consent

If we turn to the MF judgment, where the court describes the survivor's testimony as sterling and credible, do we encounter judicial prose pruned of the usual juridical narratives of phallogentric rape trials? The first register at which the judgment produces anxiety is the very naming of forced oral sex as rape. It gave judges the power to determine the gradation of punishment by fixing the minimum punishment at seven years and maximum punishment for life. The law named the harm of forced penile penetration, as equivalent to the harm of the 'substitute' of the penis such as the tongue that forcibly penetrates a vagina. The law no longer classifies the harm a woman experiences when a man forcibly thrusts his tongue into her vagina as outraging her modesty. Further, consent to forms of physical intimacy such as kissing or hugging is no longer implied consent for oral sex.

Indian law now recognizes this as an act of rape, a form of violence that is abhorrent not only to the body of the victim but also to the social body. However, as per common sense of rape outside the word of the law, the harm of forcible insertion of the tongue into the vagina is not seen as being equivalent to the harm of vagino-penal rape. The MF judgment offers a counter to this common sense by stating that the harm of such violence lies in a specific kind of loss, which is most valuable to the personhood of any woman. This is the loss of the control over her sexuality—in other words, rape is not defined through phallogentric standards of loss i.e., chastity or honour. The MF judgment speaks a different kind of judicial language, which does not emphasize the violence of the act by quantifying force by calibrating broken body parts or quantum of force.

The second register of anxiety is that forced oral sex cannot be corroborated due to the lack of forensic or clinical evidence unless the complaint is filed immediately to allow the collection of DNA samples (although DNA evidence itself may not always be conclusive). What kinds of shifts are required in medical protocols and forensic practices in case of an allegation of forced oral sex? And does the insistence on the potency test, now named as violative of the accused's human rights, indicate older ways of diagnosing rape? How central is medical evidence in those rape trials marked by an absence of marks of resistance or injury? In the MF case, the defence argument rests on evidence that tries to establish that the allegation of forced oral sex is a product of a disturbed mind that aims at vengeance following rejection of sexual advances. While psychiatrists are not yet called to testify as expert witnesses to read consent off psychological states or the mind (against the woman's speech), the displacement of older ways of medicalizing consent, may in future give rise to what Carol Smart (1989) calls 'psychologizing consent.'

The third register of anxiety is directed at the judicial opacity towards the altered states of mind of the accused person, who suffered from bipolar depression, as brought on record from the accused's wife's email exchange with the complainant. The judgment does not offer us any context to why certification of mental illness is not provided (or recorded) to set the context of the accused's statement in court. The defence narrative, as available from the judgment, indicates that the defendant neither attested to having cried and therefore been comforted; nor did he state that he was drinking.

Rather the defence denies that any physical contact happened, other than the woman's hug (which she denied) as she left. The defence has strenuously stated that such contact was not possible, and the defendant was busy working. Yet public discourse around this case has resourced the mental health of the accused as a ground to assume that this condition would have constituted an adequate and special reason for mitigating sentence, had feminists not turned the rape law into a hyper-carceral machine. Is the MF case then read, in courts of public opinion, to suggest that he may have been mistaken about the fact of consent, even though the defence did not argue consent? And does this sound more or less natural as compared to the testimony of the complainant?⁴²

Citing Nirbhaya

Consider the testimony of the woman researcher that she was reminded of the infamous words of Mukesh Singh (hereafter MS), the 2012 Delhi gangrape accused, which found global attention (Roychowdhury 2013).⁴³ The court notes that the:

First thing she thought that she had seen a clip of documentary of Nirbhaya case where the rapist had said, 'if she (victim) did not fight, she would still be alive' (at page 18).

The reference to Nirbhaya has found much critique. It is seen as embellishment or at best, a manipulation to appeal to judicial sympathy. Das (2016) has argued:

It appears to me that the constant referencing of Nirbhaya is to bring to this case the extreme brutality and violence of the former, and to trigger in our minds - as well as the judicial mind - disgust and revulsion towards the accused equal to that felt towards perpetrators in that case. This itself is cause for worry.

The argument here is that the testimony (and the prosecution) is the primary site that organises and manufactures carceral feminism by generating disgust towards the accused as if MS could replace MF. How do we read the word and world of the survivor on the stand from the judgment? Could the testimony be read as signalling something else? The evocation of Nirbhaya is read as if it indexes stranger rape, gang rape or heightened brutality. Yet, it could equally speak to how a specific kind of visual grammar of sexual violence attaches itself to memory and lodges itself to communicate a specific message in an entirely different context, biography and circumstance. Many have written about how as a visual language Nirbhaya gained a global currency where a certain kind of gaze was transfixed on the violated body as also to the spectacle of protests that followed. The message that to resist is to die was powerfully coded through the visual grammar of the media reporting in the West. To evoke Nirbhaya is not to equate different kinds of victimhood to gain the sympathy of the police or the judge as a hapless foreigner but it could also mean that the woman made metonymic rather metaphoric associations with fear and resistance. This does

not mean that MF stands for MS rather it codes a series of complex associations about what a rapist may do.

Is it reasonable to doubt the veracity of the testimony on the grounds that the survivor testified that she faked an orgasm to put an end to the forced oral sex? Although the defence chose not to cross-examine the survivor on her testimony to forced oral sex, is the testimony to an orgasm only the body's confessional to pleasure? A study by Emily Thomas, Monika Stelzl and Michelle LaFrance showed that women fake orgasms to stop forced or unwanted sex.⁴⁴ For women, faking an orgasm may be a strategy to regain a degree of sexual control to put an end to unwanted sex. Was the court's acceptance that faking an orgasm is what some women may do to stop unwanted sex as credible a departure for judicial reasoning? This contextual reasoning does not become a template for judicial reasoning in the future, for judicial interpretation does not go to the extent of arguing that fake orgasm may be thought of as an act of passive resistance.

As far the message communicated by the trial about conduct is concerned, the judgment does not rest on a picture of how a 'good' woman would behave. Rather the judgment categorically states that while cosmopolitan behaviour may include smoking, drinking, hugging and kissing, it precludes sex without consent—the latter, named as rape. The trial communicates a different message about sexual conduct—no, means no even when hugs and kisses have been exchanged. While the defence denies such any sexual intimacy, and therefore for the defence the question of implied consent is not relevant, the judgment communicates to us the possibility that the complainant would be believed irrespective of her (im)moral conduct (drinking, smoking, hugging or kissing). Nor does the judgment stabilize sexuality as a code or norm. Minimally, this case illustrates that conduct or bodies are not framed through frozen normative referents in the legal word and world. Rather the thick description of emotion, fear and passion is read in relation to a series of other signifiers.

Apology or Admission

Both the prosecution and the defence invite the court to determine what was MF thinking when read the first few lines of an email he received from the prosecutrix on 30 March 2015? What were these two or three sentences?

I tried calling you, but was unable to get through. I want to talk with you about what happened the other night. I like you a lot. You know that. I consider you a good friend and I respect you, but what happened the other night wasn't right. I know you were in a very difficult space and you are having some issues right now, but Saturday you really went to (sic) far (at page 117-118).

The accused's brief email conveying 'my deepest apologies' (at page 118) in response to the email cited above 'clinches the case of the prosecution' (at page 142). The court notes that the 'defence raised by the accused is difficult to believe considering that there was no urgency on the part of the accused to have replied the said email. The reading of the first 2 - 3 lines of the email do not in any manner justify the reply given

by the accused' (at page 142).⁴⁵ The court also observes that the highly literate accused understood the reference to the context of what the prosecutrix was referring to, the apology is therefore an admission. Reading this in relation to s. 8 of the Indian Evidence Act, the court finds the email, which offers the accused's deepest apologies as 'any behaviour or conduct of a person' that is 'relevant if it had a nexus with the offence alleged to have been conducted' (at para 47).

Rather than reproduce these emails here, one may ask how was this email read when it circulated in the circuits of virtual conversations? What kinds of conversations did it generate on consent (Devika and Menon 2016, Sethi 2016)? Was the 'no' ignored to emphasize 'consent'? Was the 'no' seen as an afterthought—proof of a 'disturbed mind'?

The second email from the woman to the defendant finds a response from MF's wife.

I am deeply disturbed by your email. What you have described is an ordeal. I cannot imagine how you have dealt with it so far. Needless to say that I stand with you. If you require any help of any nature including legal, I will assist. This is completely unacceptable behaviour, especially for me since it happened under my roof. ... The issue is also complicated by the fact that he is a Bipolar depressive. I really don't know how to express how responsible I feel. I have already spoken with his psychiatrist and we both feel that this matter should be reported to the authorities if you so wish. Please find me and his family with you in the process of healing, as I hope the process will be of healing.

There was one more email exchange between the complainant and the wife thereafter. We must note here that these email exchanges with the complainant does not fall within the meaning of privileged communication between husband and wife.

The spousal privilege was a right exercised by the defence, which it appears chose not to call the wife to the stand. As 'the wife of the accused,' the defence argued that 'the communications between her and the accused are privileged communications,' and 'nothing can be inferred that after the emails, her relations with the accused had not become strained. She might have sought explanation from the accused which the accused might have explained which might have satisfied her that he is not guilty and that the allegations are false' (at page 104). The accused in his statement informed the court that his wife felt 'strongly about the issue sexual violence' (at page 58).

The court observed that it found it impossible to believe that on the one hand, the wife 'had advised the prosecutrix to take action and also showed sympathy while on the other hand she deleted the said emails and had not questioned her husband regarding the same' (at page 157). And concludes that 'no reasonable or respectable person nor his wife would remain silent if a false allegation of rape is made by a woman via email against her husband' [at para 68(6)]. Was the court's reading of the wife's email, unreasonable? The assessment of the court about the emails evokes the test of what a 'reasonable man' (Ramanathan 1999), or 'reasonable woman' may do when faced with a false allegation.

The voice of the feminist-wife framed now as the ‘unreasonable’ wife or then as the ‘reasonable’ feminist makes its presence in public discourse. In the court of public opinion, two responses organize the narratives of the wife: one is a gesture of solidarity that enforces her public testimony that speaks to his innocence⁴⁶ and the second response is sceptical, framing her position as complicit. Did she struggle with the terrible burden that her written words to the complainant were read as weakening her husband’s case? While spousal privilege is exercised in court, the wife also has the right to make an appeal of his innocence as her public testimony.⁴⁷ How do the two discourses intersect? And what kind of public debate on reasonable doubt does the legal narrative generate?

Reasonable Doubt

What then is reasonable doubt? It is mythmaking to suggest that the 2013 amendment shifted burden of proof on the accused in all rape cases. It is the onus of proof that shifts, once consent is established, and it is only when the woman testifies that she did not consent that the onus to prove lack of consent in non-aggravated rape cases shifts to the accused. As Jaising clarifies:

Even in the case of custodial rape (Mathura’s case), changes in the law did not shift the burden of proof. There is a difference between the ‘burden of persuasion’ which is always on the prosecution and the ‘onus of proof.’ It is only the onus which shifts after the prosecution discharges the burden of persuasion. Hence, in the case of custodial rape, the law says, after sexual intercourse is proved and the woman states that she did not consent, then the onus shifts to the accused. This means that the woman subjects herself to cross-examination on the issue of absence of consent. This is ultimately for the judge to decide whether the witness is credible and has proved absence of consent. It does not dispense with proof beyond reasonable doubt the burden being on the prosecution alone, as has been suggested. This statement of law holds true not only for rape but for all crimes.⁴⁸

In the MF case, it was the prosecution’s task to prove rape beyond reasonable doubt, and the court noted that ‘the prosecution has established its case from its own evidence and did not take the aid of the defence witnesses’ (at page 154). The anti-carceral feminist position suggests that judges now deploy a frozen picture of victimhood (in the image of Nirbhaya) or adopt a traditional rape script in newer contexts of sex and coercion. Is *carceral feminism* a new form of judicial bias? Do feminist passions of ‘retribution’ that inhabit the amended law and now the judicial body, replace judicial reason? The critique is directed not only to phallogocentric passions against rape but to feminist passions which reflect a collective anger against the pain and harm of rape, now individuated on all rape accused, irrespective of the nature of harm or context. Is judicial reason transfixed by the world of the survivor to announce a verdict of guilt or does judicial reasoning also draw meaning from the word of the law? How does the court interpret reasonable doubt?

Consider *Ashish Batham v. State of MP*

Mere suspicion, however, strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is greater should be the standard of proof required [(2002), 7 SCC 317 at para 23].

In the MF case, defining what constitutes a doubt that is reasonable, the court observes:

Nevertheless in a criminal trial prosecution has to prove its case beyond reasonable doubt but the doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth to constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantive, should not be mere vague apprehensions. A fair doubt is based upon decision of common sense. In *Sucha Singh and another v. State of Punjab* J.T. 2003(6) SC 248 it has been ruled that exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent (at page 160-161).

Reasonable doubt, we are told, must not be abstract, hyper emotional, vague, fanciful, nor based on every suspicion or hypothesis. While what constitutes ‘reasonable doubt’ may be contested in a court of appeal, the court does make manifest the judicial reasoning behind the guilty verdict. In other words, the prolific truth claims generated in public discourse when these are emotions, suspicions or apprehensions do not translate into juridical definitions of reasonable doubt. Does publicity impact judicial perception of how reasonable is reasonable doubt? And to what extent, if any do, the circuits of publicity where such debates are staged, sometimes acrimoniously, impact judicial outcomes? How do judges deal with publicity and do they respond to publicised rape trials, differently? And how do legal notions of reasonable doubt intersect, if at all, with the social production of doubt?

Concluding Remarks

Do we need to be attentive to what kinds of questions are not raised when specific cases find acrimonious debate? The startling lack of debate on how researchers, whether at home or abroad, deal with sexual violence in the course of travel and work did not find comment. Should the University, which affiliates a foreign research scholar, minimally assist her with a research visa? Should safe housing, counselling and legal assistance to women researchers be a priority in research institutes or universities? Should universities insist that various embassies offer support and collaborate to organize workshops or trainings on how to prevent and redress sexual violence? The second question is the unspoken question of race. In many cases the argument that a foreigner (read: privileged, white and rich) has been treated, as an

exceptional legal subject is commonplace. It elides complex questions about race, class and gender in rape trials in India. We have not unpacked the series of anxieties encoded in the postcolonial carceral/anti-carceral feminist position about race and gender. Nor have we asked do these feed phallogentric anxieties about sexual panic configured by race, class and gender?

The third question is why do some cases, like the MF case generate the question of the rights of the accused or the afterlife of those convicted of rape (also see Menon 2013)? If there is virtually no research on bail in rape cases, how can the argument that the Delhi gang rape case has had the chilling effect of denying bail to all rape accused be assessed? The civil liberty question of state support to impoverished families of rape convicts has not commented on newer shifts, witnessed for example in the Birbhum case. In the Birbhum case⁴⁹ where 13 men were found guilty of having raped a woman purportedly at the orders of a 'traditional court,' described as kangaroo court in the media, the court observed that the convicts were the main bread winners of their families comprising old parents and children. The impoverishment of the families as result of the punishment to the convicts required 'some measures to be taken' since this is a 'human rights issue as well' (at 91). The court categorically notes that while the convicts 'must suffer for their misdeeds,' the members of their families must not suffer for their misdeeds (at 92). As a 'welfare state,' the court held that beneficial legislation such as Maintenance and Welfare of Parents and Senior Citizens Act, 2007, the Juvenile Justice (Care & Protection of Children) Act, 2000 must be extended by the district administration to the families of the convicts (at 92). The court further instructed that the judgment read out to the convicts and arrangements for legal aid to the accused be made in the correctional home, if they preferred to appeal. Yet this judgment an outcome of a highly mediatized and political trial did not generate comment about when does a punitive state evoke the welfare state to entrench human rights of the accused's family.

The fourth question is about what are our histories of what U. Baxi (2014) calls 'unlearning the law,' or the legal method. For example, what kinds of generalisation arise from juxtaposing similar cases, in contrast to cases that are not similar? Does the politics of juxtaposition produce different readings, which resists the easy categorisation of feminist politics as carceral or anti-carceral? Consider Narrain's (2014) juxtaposition of the Delhi gangrape case with the Gujarat mass violence case in Naroda Patiya to comment on capital punishment. Narrain (2014) proffers:

The judgment in the 16 December Delhi rape case imposed the death penalty based upon the depravity of the offence and the demands of the 'collective conscience of society.' On the other hand, in the Naroda Patiya judgment in the case of the rapes and murders of Muslims in this part of Gujarat, the court held that it cannot go down the route of giving the death penalty but preferred a graded system of life imprisonment based upon the degree of culpability of the different offenders. The latter is a new way of thinking about the logic of punishment. Justice Jyotsna Yagnik rejects the retributive logic and forces us

to explore deeper questions about unthinkable violence, responsibility and punishment.⁵⁰

This judgment then counters the argument that there are no precedents that think of gradation of punishment in cases where life sentence is pronounced in exceptional contexts of mass violence. Can we then make the claim that all publicised trials lead to the intensification of carceral punishment?

Narrain further argues:

The judge in this case finally comes to the conclusion that for this crime of mass murder and rape, the 32 accused should be given different gradations of punishment ranging from imprisonment for 14 years to imprisonment for life. Is there something one can learn from the judgment in the Naroda Patiya case (as it is familiarly known) when it comes to thinking about the issue of both crime and its punishment?⁵¹

Further, the court recorded that the testimony of those survivors of gangrape who could not identify the accused, or where the police did not bring the evidence on record does not mean that the survivors had lied or exaggerated. Nor did it mean that the court could not acknowledge their pain and suffering. By extending Z, a survivor of gangrape the dignity of hearing, Justice Yagnik held that it was fitting to record deep concern about the violation of the survivor's right by archiving her testimony of suffering. As Narrain says, 'the pain of those who have suffered unbearable loss needs to be acknowledged. This acknowledgement of pain and loss can itself begin the process of healing.'⁵² The court acknowledges the truth of the survivor's experience. Therefore, where evidence is either destroyed, weakened or lost it does not mean that the rape testimony is a lie. How would this judgment fit in the binary created by the framework of carceral and anti-carceral feminism? Does the production of the binary that sets carceral feminists against anti-carceral feminists, re-organise the public secrecy of rape, especially in a context where feminism itself has been othered by hyper-nationalist projects? Does the category of carceral feminism then mystify the problem it seeks to address?



Endnotes

¹SC No.: 118/15 And New SC No. 1590/2016, Additional Sessions Judge, Justice Sanjiv Jain, Special Fast Track, Saket Courts, Delhi, dated 30.07.2016

²Iyer (2016) argues that Indian feminists cannot afford the call for a ‘break from feminism’ (see Halley et al 2006) while Ratna Kapur argues for a ‘break from Anglo-American feminisms’ in order to create a space for other feminisms including postcolonial feminisms (Kapur in Sircar 2016: 158). While Indian feminists have argued that the project of decriminalization should be taken seriously, they have also debated whether they can afford to take a break from criminal law reform.

³<http://www.hardnewsmedia.com/2014/03/6247>

⁴The related question then is should rape be a strict liability offence, in all situations, without the defence of mistake of fact available to the defendant in ‘acquaintance’ rape or ‘date’ rape? Should consent under the influence of alcohol be classified as rape for all forms of forced penetration? This stance also raises the related question of the expansion of the criminalisation of love affairs treated as rape by the family and the police (Kotiswaran 2016)?

⁵Statement by feminists against R K Pachauri’s intimidation of complainants’ lawyer, Vrinda Grover. 2016. *Kafila*, April 12, <https://kafila.org/2016/04/12/statement-by-feminists-against-r-k-pachauris-intimidation-of-complainants-lawyer/>, accessed 11 September 2016

⁶<http://scroll.in/article/806530/rk-pachauris-civil-suit-against-a-womens-rights-lawyer-could-set-a-very-dangerous-precedent>

⁷<http://www.news18.com/news/india/kerala-women-wrap-themselves-in-banners-to-protest-badaun-gangrape-694166.html>

⁸See *Preetba K.K. and Ors. v. State of Kerala and Ors.* 2016 (2) KHC 808, 2016(2) KLJ490, 2016(2)KLT482

⁹Sonal Makhija, *Privacy & Media Law*, <http://cis-india.org/internet-governance/blog/privacy/privacy-media-law>, accessed 15 September 2016

¹⁰<http://www.hardnewsmedia.com/2016/08/Why-Mahmood-Farooqui-Judgment-Deeply-Flawed>

¹¹<http://www.bangaloremirror.indiatimes.com/columns/views/Whose-side-are-you-on/articleshow/53863368.cms>, accessed 11 September 2016

¹²In the hyper-publicised Delhi gang rape the lawyers of the accused gave disturbing interviews to Leslie Udwin in the controversial documentary film *India’s Daughter*. In this context, AIDWA argued that ‘the correct course of action for the government is

to file an FIR and take prompt action against the defence lawyers in the Nirbhaya case, M. L. Sharma and A. P. Singh, for making hateful and derogatory speeches and inciting violence against women in the BBC documentary and on national television.’ (see <http://timesofindia.indiatimes.com/india/AIDWA-opposes-blanket-ban-on-BBC-documentary/articleshow/46478188.cms>). The pressure on the Bar Council led to a show cause notice to the two defence lawyers. This demand to prosecute defence lawyers for publicising sexist and even unlawful prescriptions towards all women however is directed to limit the effects of publicity, without weighing its impact on the rights of the accused whose appeal is now in the Supreme Court. As the case is being heard, the Supreme Court has appointed as amicus curiae ‘senior advocates Raju Ramachandaran and Sanjay Hegde to defend’ the Delhi gang rape accused on the grounds that the convicts’ lawyers were not criminal law experts (see <http://timesofindia.indiatimes.com/city/delhi/SC-to-work-overtime-for-Nirbhaya-hearing/articleshow/53162911.cms>).

¹³ Petition to the Bar Council of India dated 6 February 2013, <http://feministlawarchives.pldindia.org/wp-content/uploads/Petition-to-BCI.pdf?>, accessed 11 September 2016

¹⁴ Mandatory arrest laws in domestic violence and rape cases have been critiqued for their failure to represent the interests of Black women in the US (Ruttenberg 1994).

¹⁵ In *Re: Indian Express Newspaper Report dated 10/4/2013 Titled Women Cops put minor Rape Victim in Lock-Up*, MANU/SC/1422/2015, Supreme Court of India, 06.11.2015

¹⁶ *Delhi Domestic Working Women’s Forum v. Union of India* 1995(1) SCC 14

¹⁷ <http://indianexpress.com/article/india/india-others/uber-rape-case-sc-sets-aside-hc-order-to-re-examine-the-victim-and-12-other-witnesses/>. Also see <http://www.hrln.org/hrln/womens-justice-/pils-a-cases/1688-sc-stays-delhi-high-courts-order-regarding-recalling-of-witnesses-in-the-uber-rape-case-issues-notice-to-delhi-police-and-accused.html>, accessed 11 September 2016

¹⁸ *AG v. Shiv Kumar Yadav and Anr*, Criminal Appeal Nos.1187-1188 of 2015, Supreme Court of India, decided on 10 September, 2015 at para 27, <https://indiankanoon.org/doc/33982557/>

¹⁹ <http://www.newindianexpress.com/nation/Uber-Cab-Driver-Gets-Life-Term-Imprisonment-for-Rape/2015/11/04/article3112823.ece>

²⁰ <http://www.livemint.com/Politics/NVAKs00OBmKBLZoHdqGRJO/Several-Verma-panel-recommendations-left-untouched-Mrinal-S.html>, accessed 11 September 2016

²¹ The Criminal Law (Amendment) Bill 2002, Redrafted By AIDWA

<http://feministlawarchives.pldindia.org/wp-content/uploads/aidwa-version-latest.pdf?>

²²Forget the Chatter to the Contrary, the 2013 Rape Law Amendments Are a Step Forward, <http://thewire.in/60808/rape-law-amendments-2013/>, dated 22/08/2016

²³Also see press release on the parliamentary standing committee overlooking the JVC report on rape law reform 6 March 2013, <http://feministlawarchives.pldindia.org/wp-content/uploads/press-release-urging-government-to-make-gender-just-laws.pdf?>

²⁴<http://feministlawarchives.pldindia.org/wp-content/uploads/womens-groups-formulations-sexual-assault-bill-2013.pdf?>

²⁵*Kamal Kishore v. State of H.P.* MANU/SC/0306/2000

²⁶*State of M.P. v. Bala @ Balaram* MANU/SC/0873/2005 at para 11

²⁷<http://www.livewlaw.in/madras-hc-passes-order-permitting-person-convicted-of-rape-of-a-minor-to-settle-the-matter-through-mediation/>

²⁸MANU/SC/0871/2013 at paras 21 and 22

²⁹MANU/SC/0871/2013 at para 24

³⁰<https://indiankanoon.org/doc/146712267/>

³¹*State v. Imran* SC No. 141/2015, ASJ Sanjiv Jain, (Spl. FTC), South East, Saket Court, 16.08.2016.

³²The defence did not cross-examine the woman about the act of forced oral sex and the duration of the act.

³³SC No.: 240/14, ASJ Spl. FTC/Saket Courts/ND, 08.06.2016

³⁴MANU/SC/0623/2012 : (2012) 8 SCC 21

³⁵*Tameezuddin @ Tammu v. State (NCT of Delhi)* MANU/SC/1621/2009 : (2009) 15 SCC 566

³⁶S.C. No. 115/14, dated 29.08.2016, Additional Session Judge, Shri Sanjiv Jain, Special Fast Track Court, Saket, New Delhi

³⁷*State (Govt. of NCT of Delhi) v. Murari Lal Tayal* (SC No: 484/15 16.07.2016, in the court of Shri Sanjiv Jain, Additional Sessions Judge Special Fast Track, Saket, New Delhi), the court found ‘material improvements in the testimony of the prosecutrix’ which ‘do not find support from the direct, circumstantial and documentary evidence’ (at para 30).

³⁸S.C. No. 67/14, dated 28.07.2016, Additional Session Judge, Shri Sanjiv Jain, Special Fast Track Court, Saket, New Delhi at para 13

³⁹ ibid at para 12

⁴⁰ SC No. 184/14 dated 27.07.2016, Additional Session Judge, Shri Sanjiv Jain, Special Fast Track Court, Saket, New Delhi

⁴¹ SC No. 75/16, dated 27.7.2016, Additional Session Judge, Shri Sanjiv Jain, Special Fast Track Court, Saket, New Delhi

⁴² Cavallaro traces the growth of ‘mistake of fact as a defense to rape from its adoption in 1964 to its virtual demise’ in Californian rape law. She notes that the mistake in fact defence as a derivative of statutory rape in a case in California wherein the defendant was mistaken about the age of the complainant rather than her consent. Despite strict liability laws, there was a ‘smooth elision of the correlation between age and actual consent’ (1995:822). In many jurisdictions, self-induced intoxication does not constitute the defence of honest but reasonable mistake. In India, while the *CFLR Draft Legislation on Sexual Assault and Related Provisions 2005* recommended that the ‘defence of honest but reasonable mistake’ ought to be included in a chapter entitled General Defences in the IPC, it specified that ‘self-induced intoxication; recklessness or wilful blindness; not taking reasonable steps to ensure that whether consent had been given will not constitute defence under rape’ (also see Beveridge 2006). <http://feministlawarchives.pldindia.org/wp-content/uploads/CFLR-draft-updated-2005.pdf?>, accessed 11 September 2016

⁴³ <http://www.telegraph.co.uk/travel/news/India-attacks-dos-and-donts-for-safe-travel/>, accessed 11 September 2016. In some cases, American women who had hitchhiked or taken a cab alone at night have been blamed back home for not heeding advice about the rape culture in India. These victim-blaming discourses also constitute women’s responses to sexual assault when abroad (<https://mic.com/articles/46239/india-rape-gang-rape-of-american-tourist-in-india-should-remind-us-of-the-risks-of-traveling-abroad#.Rgl2wddUi>)

⁴⁴ <http://www.independent.co.uk/life-style/love-sex/sex-women-fake-orgasms-to-stop-unwanted-sex-study-female-orgasm-a7132351.html>, accessed 11 September 2016

⁴⁵ The defence had argued that the defendant was on chatting on phone when he read and responded to the email. However, when he realized what was written in the email, he called her after an hour to deny the allegations.

⁴⁶ <http://www.tehelka.com/2016/08/i-stand-by-my-innocent-husband-anusha-rizvi/?singlepage=1>, accessed 11 September 2016

⁴⁷ Would it yet another illustration of carceral feminism or dilution of due process to interrogate the English law on spousal privilege in criminal trials, an area of debate among legal scholars? Interpreting s.122 of the *Indian Evidence Act*, the Karnataka High Court acquitted a man convicted of rape and murder on death row. The court held that the wife could not testify to the communication with her husband that he

along with his accomplice had raped and murdered her sister. *Nagaraj Alias Kumar Alias Anand ... vs State of Karnataka* on 18 September, 1995, 996 CriLJ 2901, ILR 1996 KAR 2, <https://indiankanoon.org/doc/1963203/>

⁴⁸ <http://www.dailyo.in/politics/indira-jaising-intervenues-in-alleged-debate-on-2013-rape-law-mahmood-farooqui-case/story/1/12737.html>

⁴⁹ *State of West Bengal v. Jolba Maddi@ Balia and Anrs*, Additional Sessions and District Court Judge, Shri Siddhartha Roy Chowdhury, Bolpur, Birbhum, dated 20.9.2014, Sessions Case No 51 of 2014

⁵⁰ <https://hillele.org/2014/01/13/sexual-violence-and-the-death-penalty-arvind-narrain/>

⁵¹ *ibid.*

⁵² *ibid.*



References:

- Agnes, Flavia. 2016. Crime repeats itself, *The Indian Express*, 20 January, <http://indianexpress.com/article/opinion/columns/crime-repeats-itself/>
- Badhwar, Natasha. 2016. 'Can't Compare Brutal Gang-Rape With Forced Oral Sex: An interview with Flavia Agnes, *Outlook*, 5 September, <http://www.outlookindia.com/magazine/story/cant-compare-brutal-gang-rape-with-forced-oral-sex/297766>
- Basu, Srimati. 2012. Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India, *SIGNS* 37, 2: 469-492.
- Baxi, Pratiksha. 2014. *Public Secrets of Law: Rape Trials in India*, Delhi: Oxford University Press.
- Baxi, Upendra. 1985. *Discipline, Repression and Legal Pluralism*. Peter Sack and Elizabeth Minchin. eds. Legal Pluralism Proceedings of the Canberra Law Workshop VII. Australia, Pink Panther: Law Department, ANU.
- Baxi, Upendra. 2014. Unlearning the Law with Lotika Sarkar. The First Lotika Sarkar Memorial Lecture, Campus Law Centre, University of Delhi, 22 February 2014, <http://clc.du.ac.in/full-Event.aspx?id=13>
- Bernstein, Elizabeth. 2010. Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns, *Signs: Journal of Women in Culture and Society* 2010, vol. 36, no. 1:45-71.
- Chakravarti, Uma. 2005. From fathers to husbands: of love, death and marriage in North India. Lynn Welchman and Sara Hossain (eds) in *'Honour': Crimes, Paradigms and Violence against Women*, London: Zed Books.
- Cover, Robert M. 1986. Violence and the Word, *Faculty Scholarship Series*. Paper 2708. http://digitalcommons.law.yale.edu/fss_papers/2708
- Das, Mona. 2016. Mahmood Farooqui case: May the lynch mob please disperse, *Catch news*, 11 August 2016, <http://www.catchnews.com/pov/mahmood-farooqui-case-may-the-lynch-mob-please-disperse-1470853292.html/fullview>
- Das, Veena. 1996. Sexual violence, discursive formations and the state, *Economic Political Weekly*, XXXI (35-36-37): 2411-23.
- Devika, J. and Nivedita Menon. 2016. The Mahmood Farooqui Rape Conviction – A Landmark Verdict, *Kafila*, August 14, <https://kafila.org/2016/08/14/the-mahmood-farooqui-rape-conviction-a-landmark-verdict-j-devika-nivedita-menon/>
- Dutta, Debolina and Oishik Sircar. 2013. India's Winter of Discontent: Some Feminist Dilemmas in the Wake of a Rape, *Feminist Studies*, 39, 1:293
- Gautam, Nishtha. 2016. Farooqui's conviction a victory for rape victims, but does it taste all sweet? *Daily O*, 31 July 2016,

<http://www.dailyo.in/politics/mahmood-farooqui-convicted-rape-american-scholar-response/story/1/12100.html>

Halley, Janet. 2006. *Split Decisions: How and Why To Take A Break From Feminism*. New Jersey: Princeton University Press.

Halley, Janet, Prabha Kotiswaran, Hila Shamir and Chantal Thomas. 2006. From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex and Sex Trafficking: Four Studies in Governance Feminism, 29 *Harvard Journal of Law and Gender* 335.

Iyer, Shruti (2016). Taking A Break From The State: Indian Feminists in The Legal Reform Process. *Journal of International Women's Studies*, 17(2), 18-29, <Http://Vc.Bridgew.Edu/Jiws/Vol17/Iss2/3>

Jaising, Indira. 2016. Indira Jaising on the 'debate' (misogynistic attack) on 2013 rape laws, *Daily O*, 3 September 2009, <http://www.dailyo.in/politics/indira-jaising-intervenes-in-alleged-debate-on-2013-rape-law-mahmood-farooqui-case/story/1/12737.html>

Joseph, Sophy. 2013. 'Castration' as a hegemonic form of punishment: A Legal History Point of View, *Savari: adivasi babujan and dalit women conversing*, 24 January, <http://www.dalitweb.org/?p=1578>

Kannabiran Kalpana. 2008. Sexual assault and the law, in Kalpana Kannabiran and Ranbir Singh (eds) *Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India*, pp. 104–69. New Delhi: Sage.

Kannabiran, Kalpana. 2016. The Cure For 'Moral' Panic, *Outlook*, 12 September 2016, <http://www.outlookindia.com/magazine/story/the-cure-for-moral-panic/297807>

Kannabiran, Kalpana and Kannabiran, Vasanth. 2002. *De-eroticizing Assault: Essays on Modesty, Honour and Power*. Popular Prakashan.

Kapur, Ratna and Brenda Cossman. 1996. *Subversive Sites: Feminist Engagement with Law in India*. New Delhi: Sage.

Kotiswaran, Prabha. 2013. *Unintended Consequences of Feminist Action*. *Kafila*, <http://Kafila.Org/2013/02/18/Unintended-Consequences-Of-Feminist-Action-Prabhakotiswaran>

Kotiswaran, Prabha. 2016. Governance Feminism in the Post-Colony: India's Rape Law Reforms of 2013 (September 5), available at SSRN: <http://ssrn.com/abstract=2834762> or <http://dx.doi.org/10.2139/ssrn.2834762>

Krishnan, Kavita. 2016. Sex and sedition: What the JNU dossier tells us about the right-wing imagination, *Scroll*, 27 April, <http://scroll.in/article/807268/jnu-dossier-shows-how-sex-and-sedition-go-hand-in-hand-in-the-right-wing-imagination>

- Lakshmi, Rama. 2016. Tackling the silences around Mahmood Farooqui, *Outlook*, 1 August, <http://www.outlookindia.com/website/story/tackling-the-silences-around-mahmood-farooqui/297095>
- Lokaneeta, Jinee. 2016. 'Violence' in Lisa Disch and Mary Hawkesworth eds. *The Oxford Handbook of Feminist Theory*, NY:Oxford University Press.
- Menon, Nivedita. 2004. *Recovering Subversion: Feminist Politics Beyond the Law*. Delhi: Permanent Black.
- Menon, Nivedita. 2009. Sexuality, caste, governmentality: contests over 'gender' in India, *Feminist Review* 91, 94-112 (February 2009) | doi: 10.1057/fr.2008.46
- Menon, Nivedita. 2013. Why was Ram Singh Killed in Tihar Jail, *Kafila*, 12 March 2013, <http://kafila.org/2013/03/12/why-was-ram-singh-killed-in-tihar-jail/>
- Mody, Pervez. 2002. Love and the Law: Love-Marriage in Delhi. *Modern Asia Studies* 36, 1: 223-256.
- Mustafa, Faizan. 2016. The story of a rape trial, *Statesman*, September 8, <http://www.thestatesman.com/mobi/news/163901-the-story-of-a-rape-trial.html>
- Narrain, Arvind and Alok Gupta. 2011. *Law like Love: Queer Perspectives on Law*, Delhi: Yoda Press
- Narrain, Arvind. 2014. Sexual Violence and the Death Penalty: A Tale of Two Judgments, *Economic & Political Weekly*, XLIX, 3: 38-42.
- Puri J. 2011. GenderQueer perspectives. In *Law like Love: Queer Perspectives on Law*, ed. A Narrain, A Gupta, pp. 203-227. Delhi: Yoda Press.
- Ramanathan, Usha. 1999. Reasonable Man, Reasonable Women and Reasonable Expectations, in Amita Dhanda and Archana Parashar (eds) *Engendering Law: Essays in the honour of Lotika Sarkar*. Pp: 33-70. Eastern Book Company: Lucknow.
- Roychowdhury, Poulami. 2013. 'The Delhi Gang Rape': The Making of International Causes *Feminist Studies* 39 (1): 282-292.
- Roy, Anupama. 2014. Critical Events, Incremental Memories and Gendered Violence, *Australian Feminist Studies*, 29:81, 238-254\
- Roy, Srila. 2012. *Remembering Revolution: Gender, Violence and Subjectivity in India's Naxalbari Movement*. Delhi: Oxford University Press.
- Rizvi and Sethi. 2014. Confronting Certainties. *Hard News*, 9 March 2014, <http://www.hardnewsmedia.com/2014/03/6247>
- Ruttenberg, Miriam H. 1994. A Feminist Critique of Mandatory arrest: An Analysis of Race and Gender in Domestic Violence Policy, *Journal of Law and Gender*, Vol 2: 171:199

- Satish, Mrinal. 2013. Virginty and rape sentencing, TOI, 12 January, <http://www.timescrest.com/society/virginty-and-rape-sentencing-9566>
- Satish, Mrinal. 2016a. *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India, Delhi: Cambridge University Press.*
- Satish, Mrinal. 2016b. Forget the Chatter to the Contrary, the 2013 Rape Law Amendments are a Step Forward, *The Wire*, 22 September, <http://thewire.in/60808/rape-law-amendments-2013/>
- Saxena, Namit. 2016. Curious case of the Mohd. Farooqui trial, *Livelaw*, 2 September, <http://www.livelaw.in/curious-case-mohd-farooqui-trial/>
- Sen, Jhuma. 2016. Dastaan-e-State v Farooqui, *Outlook*, 6 September 2016, <http://www.outlookindia.com/website/story/dastaan-e-state-v-farooqui/297184>,
- Sethi, Manisha. 2016. Why the Mahmood Farooqui Judgment is Deeply Flawed. *Hard News*, August 23, 2016, <http://www.hardnewsmedia.com/2016/08/Why-Mahmood-Farooqui-Judgment-Deeply-Flawed>
- Sircar, Oishik. 2016. The Fraught Terrain of Law and Feminism: 20 Years of Subversive Sites (interview with Ratna Kapur and Brenda Cossman), *Socio-Legal Review*, 12(1):133-162
- Smart, Carol.1989. *Feminism and the Power of Law*. London: Routledge
- Sood, Mihira. 2016. Why The Backlash against the Mahmood Farooqui Judgment is Manipulative and Dangerous, *Huffington Post*, 29/08/2016, <http://www.huffingtonpost.in/mihira-sood/why-the-backlash-against-the-mahmood-farooqui-judgment-is-manipu/> Accessed on 19/08/16.





Council for Social Development
Southern Regional Centre, Hyderabad

Interdisciplinary Law is an occasional papers series from CSD, Hyderabad that explores the intersection of law with diverse disciplines across the social sciences, humanities, sciences and medicine.

This series presents papers that experiment with an eclectic blend of methodological tools in order to effectively engage with the diversity of questions that arise in intersection with law within each area and between different fields and disciplines as well. In all the areas, a close examination of statutory and jurisprudential sources, case-law, legal statistics and legal hermeneutics and representation will form the core of scholarly engagement.