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Political Activism, Legal Discourses and Sexual Violence in India

<https://www.e-ir.info/2013/02/06/political-activism-legal-discourses-and-sexual-violence-in-india-what-does-the-delhi-rape-case-reveal/>

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Rape is linked with power, that is, the power that men enjoy in society.... Rape brings out, and enlarges opposition between the sexes nakedly, unlike other forms of gender based oppression, such as lower wages for women. Rape, and the fear of rape therefore is an instrument for terrorising and paralysing women, contributing to a low sense of self worth (Gothoskar, 1980).

The brutal incident of rape and murder in December 2012 of a 23 year old woman on a bus in Delhi has been the catalyst of intense social and political activism against sexual violence in India. The woman and her companion were attacked with iron rods by the six men who were driving around the city on a bus and stopped to pick up the pair; they thought it was regular public transport vehicle. She was repeatedly gang raped, while the bus drove through a series of police checkpoints over several hours; subsequently, the men stripped the pair and dumped them by the side of the road. She died from her injuries on 26th December 2012, marking a sombre end to the year.

This incident has received much attention within the media both nationally and internationally, and there have been calls for changes to the rape law. These demands range from the rational – speedy disposal of rape cases, abolition of the two finger[i] test – to the controversial – death sentences for rapists – to the ludicrous – chemical castration for men convicted in rape cases[ii]. As is apparent from these demands, the political movement itself that has followed this incident is multifaceted, and unlike earlier activism on sexual violence against women no longer confined to left wing and feminist groups and individuals.[iii]

It seems timely at this stage to reflect on how current legal discourses construct sexual violence is constructed in India, and to think of ways in which these can be challenged to ensure safety for women.

Shifts in Rape Law in India

The rape law was first enacted in 1860 as a part of the Indian Penal Code (IPC), and was defined as penile penetration into the vagina. [iv]. The crime of rape therefore is gender specific, and can only be committed by men on women, and male rape by men can only be charged under Section 377, which criminalises both consensual and non consensual sex between men as an unnatural sexual act (Gangoli, 2011)[v]. The law does not however criminalise marital rape, and until 2010, allowed the victim's sexual history to be adduced during trial, under Section 155 of the 1872 Indian Evidence Act. It has been suggested that the legal concern with defining rape as an offence was to regulate the sexuality of the woman, and not to protect her bodily integrity (Das, 1996).

Three cases in the late 1970s and early 1980s created a public debate around the issue of rape, and fed into the newly emerging feminist movement in India. This movement created a nationwide campaign on the issue of rape which led to amendments to the rape law in 1983.

The first case was that of Rameezabee, a Muslim working class woman from Hyderabad, arrested on the grounds of 'loitering', who were gang raped by three policemen, and prosecuted for enticing minor girls into prostitution; the

Political Activism, Legal Discourses and Sexual Violence in India

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second of a tribal girl, Mathura, raped in a police station by two policemen; and the third, Maya Tyagi, a middle class young woman, sexually harassed, stripped in public and gang raped by the police (Gangoli 2010).

The three cases, both individually and collectively, led to a major campaign on the issue of rape in police custody. At a national level, the feminist campaign focussed on demanding amendments to the rape law, asking for a legal recognition of rape by men in authority, a formal recognition of rape within marriage, and an expansion of rape beyond penile penetration to reflect the experiences of women.

Rape Law Amendment

On August 12th 1980, a Bill was introduced in the Lok Sabha to amend certain provisions of the rape law. The Bill suggested four major changes. Firstly, a prohibition on press coverage of any incident of rape, or any publicity that revealed the name of the offender or the victim. Second, a new section, which attempted to define consent more clearly. Rape was held to have taken place when a man has sexual intercourse with a woman 'without her free and voluntary consent.' Thirdly, the marital rape exemption would not be applicable in cases of judicial separation. Finally, a major amendment was the introduction of Section 376 to the IPC, which introduced a new category of rape — gang rape and custodial rape, or rape by the police, by public servants, by superintendents or managers of jails, remand homes, or hospitals, committed on women under their custody. These 'categories' of rape were treated as aggravated sexual assaults, and incurred a higher sentence than other forms of rape, and the onus of proof was shifted from the victim to the accused, reversing the generally applicable legal principle of innocent until proven guilty. Finally, the Bill provided that under Section 228 A, rape cases should be conducted 'in camera', i.e., unlike other trials, they would not be subjected to and open to public scrutiny and attendance (Bill No. 162 of 1980). The Bill was referred to a Joint Committee comprising of representatives from both houses of Parliament, which consulted with women's groups, lawyers and the press (1982).

The Joint Committee report, voicing the concerns of some feminist groups, opposed Section 228 A, holding that under certain circumstances, publicity may be 'necessary for proper investigation' and may be desired by the victim. Further, the Committee suggested that provisions regarding rapes by policemen be strengthened, that Section 376 be extended to all the staff of a jail, not merely the supervisory staff; that rapes in hospitals be extended to include visitors, as well as patients, and that the rape of minors be included under this section. Other general recommendations made by the Joint Committee included: that women should not be arrested after sunset and before sunrise; that medical examination of the accused and of the complainant be performed immediately on complaint, that social welfare officials be associated in the procedures; that compensation be given to rape victims to compensate for social ostracism. However, the Joint Committee report did not accept the recommendations of women's organisations that the past sexual history of the woman not be adduced in the evidence, or during cross examination (Joint Committee Report, 1982).

The final law did acknowledge the importance of custodial rape, but did not take up many suggestions made by women's groups. The law continued to treat the past sexual history of the woman as relevant (this was repealed only in 2003); and press restrictions on the trial were imposed. Further, marital rape continued to be outside the remit of the rape law, though the amendments allowed rape charges to be brought forward for judicially separated couples. While this was a significant shift, the amendment did not go far enough in challenging patriarchal assumptions about women's rights within marriage. Finally, rape continues to be defined exclusively as penile penetration into the vagina. The rape law therefore is based on, and legitimises several patriarchal presumptions, and attitudes regarding male and female sexuality, including the idea that within marriage women are the sexual property of their husbands.

Implementation

While the rape law itself is problematic, there are also issues with implementation. In spite of legal amendments, custodial rape by the police are treated as 'routine' cases, negating the amendments made in 1983, and rates of conviction in cases of custodial rape are very low (PUDR, 1994 cited in Gangoli, 2011). Women are most likely to be believed if they are single and 'virginal', or married and 'chaste'. Further, working class women are seen as sexually available, as they are less secluded and consequently less 'respectable' than middle class women.

Political Activism, Legal Discourses and Sexual Violence in India

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Judicial interpretations in cases of custodial rape following the 1983 amendment demonstrate that in spite of the change in the law that shifted the onus of proof in these cases onto the accused, judicial interpretations remained centred on questions of the 'character' of the complainant. As most of the cases of custodial rape are perpetrated against working class women, class assumptions regarding sexuality are apparent. In an incident of gang rape by police men in a village in the state of Bihar in 1988, a large group of police gang raped 19 women. The case attracted much press coverage, and the state government awarded the women Rs. 1000 as ex-gratia payment. However, as the investigation by the local police was not carried out properly, there was insufficient evidence to convict the accused, and the judge remarked, "It can not be ruled out that these ladies might speak falsehood to get a sum of Rs. 1000 which was a huge sum for them" (cited in Baxi, 1995, p 128). Further he noted the defence counsel's argument that "the women could not be equated with such ladies who hailed from decent and respectable societies, as they were engaged in menial work, and were of questionable character." (Cited in Baxi, 1995, p 129).

Women are more likely to be believed if they conform to social stereotypes of the chaste and virginal woman, and if this is the case, judges are less likely to insist on corroborative evidence under the 1872 Indian Evidence Act, which is often reduced to physical injuries suffered by the victim (1972 Cri L J 824 Raj) or other witness statements (Naravan V. The State of Rajasthan, 2007). Judgements are also based on nationalist sentiments, where Indian women are seen as less likely to lie about rape because of the higher standards of morality in Indian society. In a case of custodial rape, the judges held that to disbelieve a woman, especially a 'young girl' was to insult womanhood, and they suggested that Indian women are unlikely to lie about rape. The judges stated:

Ours is a conservative society where it concerns sexual behaviour. Ours is not a permissive society, as in some of the western or European countries. Our standards of decency and morality are not the same as in those countries... Courts must also realise that ordinarily a woman, more so a young girl, will not stake her reputation by levying a false charge concerning her chastity' (State of Maharashtra V. Chandraprakash Kewalchand Jain with Stree Attyachar Virodhi Parishad V. Chandraprakash Kewalchand Jain 1990).

The judicial mind exercises sympathy where the victim is a young and virginal child. While deciding on an appeal made to the Supreme Court ten years after a child of 9 was raped, the judges noted that the loss of virginity had blighted her chances of a happy married life:

'... the victim who is now 19 years old, after having lost her virginity still remains unmarried undergoing the untold agony of the traumatic experience and the deathless shame suffered by her. Evidently, the victim is under the impression that there is no monsoon season in her life and that her future chances for getting married and settling down in a respectable family are completely marred' (Madan Gopal Kakkad V. Naval Dubey and Anr 1992).

Even after the 2003 amendment which disallowed the use of the 'past sexual history' of the woman in rape trials, these stereotypes continued to affect sentencing of the accused. A study of rape cases conducted by a law professor revealed that in cases where the medical report indicated that the woman had been sexually active before marriage, lower sentences were imposed on the offenders than in where a virgin was raped [vi].

These judgments reveal a number of assumptions about male and female sexuality. Most obvious is that the courts constantly emphasise the 'chastity' of the raped woman, or its absence. Even in 'positive' judgments, when the woman conforms to the standards of womanhood held as ideal by the judge, the focus is on the loss of honour and shame suffered by the woman. Rape is not seen as a violation of bodily integrity, but as a loss of family honour.

Conclusions

This brief assessment of Indian rape law, and its implementation highlights that the best efforts by feminists can only partially influence the criminal justice system. The Indian feminist movements have recognised rape as a form of male oppression and control over women since the 1970s. However the Indian legal system prefers to see it as an issue of loss of honour of the raped woman. Recent moves to reform the rape law, such as the Criminal Law Amendment Bill, 2012 introduced in the Lok Sabha in December, seek to replace the term rape with sexual assault, and to introduce a wider range of sexual offences than the current rape law, including '(a) penetration of a person's

Political Activism, Legal Discourses and Sexual Violence in India

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vagina, anus, urethra or mouth with any part of the body including the penis, or any other object for a sexual purpose; (b) manipulation of a body part of another person so as to cause penetration of the vagina, anus, urethra or mouth by any part of the other person's body; (c) cunnilingus and fellatio (Criminal Law Amendment Bill, 2012). However, and controversially, the widening of the category of sexual assault also seeks to make the crime gender neutral, and women, men and trans gendered persons are deemed possible perpetrators of sexual violence. The Justice Verma Committee Report published in January 2013, is closer to feminist concerns, and indeed has been praised as providing 'the Delhi protests with a manifesto for radical transformation'. (Baxi, 2013) The Justice Verma report casts rape as a gendered crime, which is primarily committed by men (while victims could be men and transgendered persons), seeks to expand the legal concept of consent, and also recognises and recommends that marital rape be recognised as a crime.

Demands for legal changes are often an immediate response to social issues, especially in the area of gender based violence, but even moderate 'successes' – such as the inclusion of the custodial rape clause and the repeal of the 'past sexual history' clause – are often rendered useless where social attitudes regarding women's sexuality remain unchanged. Recent online fora such as <http://feministsindia.com/> and <http://lawandotherthings.blogspot.co.uk> have debated this dilemma, and perhaps within this context, calls for increased stringency in rape trials following the tragic case in Delhi, can perhaps yield very little in the absence of consistent intervention to shift social attitudes. Feminists are also concerned that the Justice Verma Committee report, while welcome, may not go far enough in some areas – for instance, the report does not comment on Section 377 IPC (Baxi, 2013), or in the area of rights of disabled people and sexual minorities.

To conclude, while feminist legal interventions may remain unsatisfactory there is a danger in abandoning the legal sphere – as some commentators argue on the grounds that feminist engagement with law in itself can 'radically refract the ethical and emancipatory impulse of feminism itself' (Menon 1995:369), as they serve to meet the State's agenda in 'categorising, concretising, and regulating (sexual or otherwise) behavior, which can be inimical to the interests of marginal groups' (Menon 1995: 370; Menon, 2004). The dangers in abandoning the legal sphere for feminists, as we have argued elsewhere (Gangoli and Rew, 2011), is that the legal sphere gets taken over by misogynist interventions that demand protection for women, rather than protecting women's rights; they then project women's bodies as belonging to the family or nation, rather than to themselves, subsequently calling for the death penalty or chemical castration. Legal intervention, therefore, must be seen as part of multiple strategies within the Indian women's movement which seek to challenge, redefine and reshape patriarchal conceptualizations of women's sexuality in law and society.

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Political Activism, Legal Discourses and Sexual Violence in India

Written by Geetanjali Gangoli and Martin Rew

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[i] This test allows doctors to insert two fingers into the raped woman's vagina to figure out whether the hymen is distensible or not. This then leads to the inference that the rape survivor is habituated to sex, introducing past sexual history into rape trials. See for instance <http://www.ndtv.com/video/player/india-matters/rape-more-than-a-battle-for-justice/261525>; Pratiksha Baxi, <http://lawandotherthings.blogspot.co.uk/2013/01/ban-two-finger-test-in-rape-trials.html>;

[ii] <http://www.asianage.com/geetanjali-gangoli-505>

[iii] Gangoli, 2007; Shah and Gandhi, 1989.

[iv] Under Section 375, the IPC states that a man is said to commit the offence of rape against a woman under the following six circumstances. Sexual intercourse against the victim's will:

- Without the victim's consent;
- With her consent, when her consent has been obtained by putting her or any person that she may be interested in fear of death or hurt;
- With her consent, when the man knows that he is not her husband;
- With her consent, when at the time of giving such consent she was intoxicated, or is suffering from unsoundness of mind and does not understand the nature and consequences of that to which she gives consent;
- With or without her consent when she is under sixteen years of age.

[v] In July 2009, following much action by human and gay rights groups, the Delhi High Court revoked the criminalisation of consensual sexual acts between men under Section 377. However, this was only applicable to the State of Delhi and not the entire country.

Political Activism, Legal Discourses and Sexual Violence in India

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[vi] <http://lawandotherthings.blogspot.co.uk/2013/01/chastity-virginity-marriageability-and.html>

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