



'Women make demands, but only ladies get protection'

By Oishik Sircar

The law remains entrenched in conservative sexual morality. It believes that only the 'good body' can be raped, assaulted or outraged. The good body is that of the good woman - the chaste and loyal wife, maintaining the integrity of the family, culture and nation. A bad woman's sexuality is illegitimate. Her body doesn't conform to the legal construct of a body that can be violated, so she has no legal recourse

"...[T]he essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body." -- A 1967 Supreme Court of India judgment

"...[V]irginity is the most precious possession of an Indian girl and she would never willingly part with this proud and precious possession." -- A 1984 Rajasthan High Court judgment

The law's engagement with the 'body' is primarily about protecting it. As soon as questions of violation of the body arise, the law jumps in with forms of incarceration and surveillance to protect the 'good body' from the 'bad body/ies'. These 'bad bodies' violate the 'good body' in very many ways: from rape to assault to outraging of modesty... The important question to ask is: When does the law think a 'body' can be raped, assaulted or outraged? In the cases mentioned above, it is the 'good body' that can be raped, assaulted, or outraged. However, only when the legal construct of the 'good body' is 'under threat of violation', or has been 'violated', will the law be of any use. If the 'body' does not meet the legal standards of a 'body that can be violated', there is no recourse. Further, there have been attempts by the judiciary, the police and society to maintain the ***status quo*** of the 'good body'. Thus, the 'good body' remains violable forever and is in need of perpetual protection.

The law also locates the 'good body' in constructed spaces. If the 'violation' happens on a 'good body' in a space which does not meet the notions of the legal construct, it is not considered a violation at all. The law's decision not to intervene is based on the construction of some sex as private, as part of a cultural and sacred space and beyond

legitimate intervention; in certain other cases, legal intervention is justified if the sex is public, and falls outside the constructed acceptable category of cultural and sexual norms.

Let's look at criminal law's attempts to 'protect' (read: regulate) the 'sexual' (read: compulsorily heterosexual/monogamous/married), 'female' (read: victim) body. And let's examine the spaces that can 'accommodate' the 'sexual female body', and where the law deems it fit to intervene.

Feminist legal scholar Ratna Kapur points out that law draws a defining line between 'good sex' and 'bad sex' and works on the basis of dominant cultural assumptions about sexuality, which construct women as chaste, loyal wives who maintain the integrity of the family, culture and nation. These are the 'good women'. 'Bad women' transgress these dominant norms, and they are either unable to secure the protection of the law, or their sexuality is regarded as illegitimate, hence criminalised and punished. In her latest book *Erotic Justice*, Kapur says that the criminalisation of some activities -- such as rape, adultery and sodomy -- and the non-criminalisation of other activities -- such as the rape of a woman by her husband -- are marked by the idea that there are certain forms of sexuality that are private, culturally accepted, and exercised legitimately within the family or marital relationship, which are legitimate spaces for containing women's sexuality in the name of protecting it. Despite sustained lobbying by the women's movement for law reform on issues of sexual violence, the law continues to maintain the public-private dichotomy, the dominant sexual ideology and the cultural assumptions on which they are based.

In her political analysis of feminist engagements with law, Nivedita Menon in her book *Recovering Subversion* points out that recourse to the law is seen as necessary and inevitable because it is believed that designing a law around an experience proves 'it matters'; law is the concrete delivery of rights through the legal system. The idea is to publicise private injuries, make them legally cognisable, and thus politicise them. Law is seen as the primary legitimating discourse and it is believed that legal criminalisation will socially delegitimise a practice. During 1980-1990, every issue concerning violence against women taken up by the women's movement resulted in legislative reform. These were very significant achievements for the women's movement, but the statistics each year of the number of rape cases kept on increasing, negating the deterrent value of the law reform. Why couldn't these new, more stringent laws tackle the menace of violence against women?

Women's rights lawyer Flavia Agnes, in her book *State, Gender and the Rhetoric of Law Reform* provides some answers. She points out: "The campaigns themselves were limited in scope... The solutions were sought within the existing patriarchal

framework and did not transcend into a feminist analysis of the issue... They seldom questioned the conservative notions of women's chastity, virginity, servility and the concept of the **good** and the **bad** woman in society... The rape campaign subscribed to the traditional notion of rape as the ultimate violation of a woman and a state worse than death."

The violence against women and other campaigns focused only on the woman as victim. They did little to displace the dominant sexual ideology and conservative sexual morality on which law is based. Sex remained something from which good and decent people ought to be protected. The movement's engagement with law reform has, in the evocative words of Alice Miller, been a classic case of where "women make demands and ladies get protection".

The rhetoric of rape law reform

The provision on rape in the Indian Penal Code (IPC) reinforces not only Victorian morality but also the non-agency of women. The general principle in Section 375 is that if a man has sexual intercourse with a woman below the age of 16, with or without her consent, he is guilty of rape. But if the woman is his wife and above 15 years of age, the act is not rape. A nominal punishment is provided if the wife is between 12 and 15 or is living separately from him under a decree of separation or under any custom or usage (Section 376-A). "The undeniable conclusion is that a wife is presumed to have given irrevocable consent to a sexual relationship with her husband even though there is no presumption of consent for any other purpose, including the marriage itself," mentions Ved Kumari in her gender analysis of the Indian Penal Code.

Rape and sexual violence in India has been one of the most visible and strongly articulated issues in the women's movement since the infamous case of Mathura in the late-1970s. Mathura was a 16-year-old tribal girl from Maharashtra, who was raped by two policemen within a police compound. The sessions court acquitted the policemen on the grounds that since Mathura had eloped with her boyfriend she was habituated to sexual intercourse and hence could not be raped. The court further held that Mathura had consented to sexual intercourse with the policemen. On appeal, the high court convicted the policemen and held that mere passive submission or helpless surrender due to threat or fear cannot be equated with consent. The Supreme Court set aside the high court judgment and acquitted the policemen. The apex court held that since Mathura had not raised any alarm and there were no visible marks of injury to her body, her consent was not consent, but it could be brushed aside as passive submission.

The Supreme Court judgment in the Mathura case triggered a campaign for change in

the rape laws. The campaign called for a redefinition of 'consent' in Sections 375 and 376 of the IPC, which had remained unchanged in the statute books since 1860. The case had shown that it is extremely difficult for a woman to prove that she did not consent 'beyond all reasonable doubt', as was required by criminal law. In response, the government promptly set up a Law Commission, on whose recommendation the Criminal Law Amendment Act of 1983 was passed. The amendment to the IPC allowed submission of a non-corroborated statement by a woman who has been raped, but only in case of rape in custody. Also, the mandatory minimum punishment was made more rigorous.

Although the amendment had only partly accepted the demands of the campaign, the enactment was an indication of some measure of success. However, in 1989 when the Suman Rani case happened, the campaign had died down. In spite of the rigorous punishment brought in through the amendment in cases of custodial rape, in this case the Supreme Court reduced the sentence from the minimum 10 years to five years on grounds that the woman was of 'questionable character' and 'easy virtue' with 'lewd' and 'lascivious behaviour'. The court also dismissed a review petition filed by women's groups. The Suman Rani case was no exception; the judiciary was routinely awarding less than the minimum sentence in rape trials despite the statutory mandate laid down by the amendment. The Suman Rani case was reason enough for the women's movement to sit up and take notice of the fact that its recourse to legal reform as the final means of addressing sexual violence was proving ineffective. The amendment also did not bring about a positive change in the attitude of the judiciary, in spite of the well-publicised campaign.

A section of the Indian Evidence Act (Section 155 (4), now repealed), which allowed the defence to introduce evidence to demonstrate that the prosecutrix was of 'generally immoral character', was increasingly being used by the courts to reduce the sentence. The purpose of the section was to discredit the testimony of the witness. It was based on the assumption that 'unchaste' women cannot be believed when it comes to matters of sex. As soon as the defence demonstrated that the woman was sexually promiscuous, her sexuality belonged in the public sphere. She was no longer entitled to the protection of criminal law. Instead, she was penalised.

Sexual passivity on the part of women has then been looked at as necessary to ensure that male lust is kept under control and also to be able to deserve protection. As the Shiv Sena mouthpiece **Saamna** suggested, it is women's responsibility to dress and carry themselves properly to ensure that men don't get turned on. Also take the case of the bar dancers who were protesting with placards saying, 'We are not prostitutes', an open articulation that they are sexually less tainted than sex workers are and thus deserve protection. An articulation which attempts to claim legitimacy by creating

hierarchies of sexual behaviour, or invisibilising the 'sexual' to make things look 'good' and 'respectable'.

Despite the amendment, there was no progression in the judiciary's attitude towards rape as a violation of women's rights. "Unfortunately, judgments in the post-amendment period convey a dismal picture: the courts seemed preoccupied with the rape victim's future prospects of marriage and concerned over the loss of her virginity," says Agnes. In fact, the same old notions of chastity, virginity, premium on marriage and a basic distrust of women and their sexuality were reflected in judgments of the post-amendment period. The dominant image of the raped woman as 'victim', 'in need of protection from male lust' was also not dislodged.

The question of loss of virginity is built into the way statutory rape is defined under Section 375 of the IPC. Penetration of the vagina by the penis is a necessary prerequisite for the offence of rape to be committed. Thus, forcible penetration of any object/organ other than the penis into any other orifice, apart from the vagina, is not rape according to the patriarchal IPC. The location of 'rape' is inside the woman's vagina, and any form of force without consent outside of the vagina would amount to an archaic crime called 'outraging of modesty of a woman' (Section 354), provided it is established that she can be said to be possessing modesty. So, in 1967, you had a two-judge bench of the Supreme Court deliberating on whether a female child of seven-and-a-half years could be said to be possessed of 'modesty', which could be 'outraged'.

Reading Agnes's and Kumari's works one understands that the penetration requirement is linked to conservative notions of chastity and the fear of pregnancy by someone other than a legitimate father. The concept of penis penetration is based on the control men exercise over *their* women. In other words, the priority given to penetration by the penis over all other forms of penetration or sexual assault is historically based on the need to defend the rights of the legitimate father rather than the woman's bodily integrity. Rape violates these property rights and may lead to pregnancies by other men and threaten the patriarchal power structures.

The penetration requirement also leads to the categorisation of offences -- one deserving greater punishment than the other. Given the fact that penis penetration continues to be the governing factor in the offence of rape, sexual assault is categorised on the basis of proximity of penetration. Thus, an unsuccessful attempt at penetration is categorised as attempt to rape, and warrants only half the punishment (Section 376 r/w Section 511). The rest falls into the abovementioned category of outraging of modesty.

For instance, a high court judgment convicted a rapist for the offence of ***attempt to commit rape***

on the grounds that the perpetrator could not penetrate deep enough. "How deep is deep enough," asks Kalpana Kannabiran, well-known women's rights activist from Asmita in Hyderabad. "Ironically the rapist's unsuccessful attempt at penetration is equated with the loss of his manhood and forgiven as attempt to commit rape. All the acts of force, gagging, the violence involved in this case, were wiped out by the failure to penetrate, which alone could place at risk the 'modesty' of the woman," she adds.

Later petitions and campaigns by women's groups did make the Law Commission, in its 172nd Report, and the Supreme Court in 2004 mention that all forms of forced/non-consensual penetration -- vaginal, anal or oral -- should be considered equivalent degrees of sexual assault. Nevertheless, the dominant ideology of the judiciary towards women's sexuality remains entrenched in its conservative sexual morality. Illustrations abound of recent cases where lower courts have acquitted rapists following their promise to marry the victim. "And marital rape still remains an exclusion from the statutory rape definition, to the extent that even the 172nd Report of the Law Commission rejected any proposal to repeal the marital rape exception, on the grounds that it would amount to 'excessive interference with the marital relationship'," says Kapur.

In one of her most acclaimed works, Carol Smart writes that the development of judicial discourse has happened within the binary logic of the law, which is unable to look beyond the dyads of consent/non-consent, penetration/non-penetration, public/private, and is completely inappropriate for addressing questions regarding the 'ambiguities of rape'. This calls for some strategic caution while feminists engage with the law that Nivedita Menon directs us towards. She points out: "The dominant modes of constituting the self -- as woman, as criminal, as victim -- are maintained and reinforced through legal language. Judgments are never only about the 'crime' being discussed in the trial, but constantly imply and refer to deviations from dominant norms. Thus, the law legitimises dominant norms, which ultimately is what feminist practice contests."

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Endnotes

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