

# CONTINUITIES AND CHANGE: THE LAW COMMISSION AND SEXUAL VIOLENCE

—GEETANJALI GANGOLI AND MARTIN REW\*

*This paper primarily focuses on the role of the Law Commission of India in the law making process related to sexual violence and rape. The central idea behind the paper is that there is often a mismatch between the Law Commission and the law. The paper begins by contextualizing sexual violence and rape in India and describing the role of the Law Commission as a body that represents state interests and at the same time arguably stands outside it as well. Regarding the Law Commissions more accepting towards feminist interventions than other institutions, this paper explores two areas of enquiry. Firstly, it examines the role of women's movements in engaging with the Law Commission over the years. Secondly, it traces the conceptual continuities and changes over time between the 1980 and the 2013 reports of the Law Commission. The paper concludes that while certain key feminist demands have been dismissed or negated in the process of law-making, the same should not blind individuals to the importance of the law making process and the central role of the Law Commission with regard to violence against women.*

## I. INTRODUCTION

Sexual violence continues to be a serious issue for Indian women. The latest crime statistics released by the Home Ministry's National Crime Records Bureau (NCRB) state that 93 women are raped every day in the country.<sup>1</sup> The number of reported rapes a day has increased nearly by 700% per cent since 1971 - when such cases were first recorded by the NCRB. In over 95% of all recorded cases of sexual violence, the accused was either a family member or known to the victim.<sup>2</sup> However this statistic does not include incidents of rape

---

\* Geetanjali Gangoli, Senior Lecturer, School of Policy Studies, University of Bristol, UK & Martin Rew, Lecturer, International Development Department, University of Birmingham, UK.

<sup>1</sup> NATIONAL CRIMES RECORDS BUREAU, CRIME IN INDIA (2014) available at <http://ncrb.nic.in/CD-CII2012/Statistics2012.pdf> (last seen on Sept. 12, 2017).

<sup>2</sup> Monalisa Das, *95% Offenders Accused of Child Rape know their Victims: NCRB*, THE NEWS MINUTE, (Aug. 31, 2016) <http://www.thenewsminute.com/article/95-offenders-accused-child->

within marriage, as those are not classified as crimes. Research has also indicated a continuum between sexual and domestic violence in the home, and outside, suggesting that one form of violence may feed into, exacerbate and legitimise other forms of abuse.<sup>3</sup>

In cases of non-familial rapes, structural factors such as caste, community, and class status can contribute to sexual violence, and have an impact on women's ability to access the criminal justice system. Women from the working class, a minority, or 'lower' caste Dalit groups are particularly vulnerable to sexual violence, sometimes be in the context of communal riots, civil unrest, or conflict situations. Dalit women are very vulnerable to sexual violence from upper caste men.<sup>4</sup> Further, women from working class and lower caste backgrounds are less likely to get justice from the criminal justice system. A study conducted by the People's Union for Democratic Rights (PUDR), a Delhi based civil liberties group, looked at ten cases of rapes by police personnel and revealed that in most cases, the victim was a working class woman. In almost all cases, the accused was acquitted; some have been reinstated in their old posts.<sup>5</sup> Communalisation and the social and economic marginalization of Muslims in post independence India has resulted in sexual assaults perpetrated on Muslim women, as was apparent in the anti-Muslim riots in Gujarat in 2002<sup>6</sup>.

Sexual violence and rape have, therefore, been an important site of feminist activism, and as noted elsewhere, law and legal change have remained a central arena of feminist intervention in the area of violence against women, with women's organisations often simultaneously agitating against state ineptitude and/or complicity, and lobbying and working with the State towards legal reform.<sup>7</sup> Within these dynamics, the role of the Law Commission is significant both as it is a body that both represents State interests, but also perhaps stands outside it, and as it may be seen as less impervious and more open to feminist interventions than, for instance, the parliament or the police.

---

rape-know-their-victims-ncrb-49153 (last accessed Sept 12, 2017).

<sup>3</sup> SUSAN BROWN MILLER, *AGAINST OUR WILL – MEN, WOMEN AND RAPE* 45 (1<sup>st</sup> ed., 1975); LIZ KELLY, *SURVIVING SEXUAL VIOLENCE* 2-22 (1<sup>st</sup> ed., 1988).

<sup>4</sup> NATIONAL CRIMES RECORDS BUREAU, *CRIME IN INDIA* (2014).

<sup>5</sup> PEOPLE'S UNION FOR DEMOCRATIC RIGHTS, *CUSTODIAL RAPE: A REPORT ON THE AFTERMATH* 6 (1994).

<sup>6</sup> SYED A. HAMEED ET AL., *HOW HAS THE GUJARAT MASSACRE AFFECTED MINORITY WOMEN? THE SURVIVORS SPEAK* (2002), <http://cac.ektaonline.org/resources/reports/womensreport.htm> (last seen on Sept 9, 2017).

<sup>7</sup> GEETANJALI GANGOLI, *INDIAN FEMINISMS: LAW, PATRIARCHIES, AND VIOLENCE IN INDIA* page (Xth ed., 2007); GEETANJALI GANGOLI & MARTIN REW, *Strategic Co-option? Indian Feminists, the State and Legal Activism on Domestic Violence, in UNDERSTANDING GENDER BASED VIOLENCE: NATIONAL AND INTERNATIONAL CONTEXTS* 183, (Nadia Aghtaie and Geetanjali Gangoli, 10<sup>th</sup> ed., 2014).

This paper is concerned with the role of the Law Commission in India regarding sexual violence and rape. The Law Commission reports in 1980, 2003 and 2013 all played an important role in the framing of the rape law, though as we will see there was often a mismatch between the Law Commission and the law.<sup>8</sup> The paper will reflect on the shifts and continuities in Law Commission reports on sexual violence, focusing on the reports on rape in 1980 and the Justice Verma Commission report of 2013. More specifically, we are concerned with exploring two areas of enquiry. First, we seek to understand how the Indian women's movement has engaged with the Law Commission over these years. Second, we aim to trace the conceptual continuities and changes that have occurred between the 1980 and 2013 reports.

The first part of the paper discusses the context of the two reports: the 1980 report following feminist intervention regarding the Mathura rape case judgment, and the 2013 report following feminist and wider social movements responses to the 2012 rape and murder case of a 23 year old student in New Delhi. The second part of the paper unpacks the conceptual continuities and changes in which sexual violence has been constructed within these two reports, and how feminist politics has affected the content and discussion in these reports. We conclude by reflecting on the links between feminism, sexual violence and the Law Commission within the wider context of Indian politics and the State.

The theoretical framework used for this paper draws on Richard Freeman's notion of 'translation' where "some kinds of association or translation are legitimated and authorised just as others are excluded or denied".<sup>9</sup> In this instance, translation implies the movement(s) of meaning on rape and justice both in historical terms, from the 1980 Law Commission Report to the one released in 2013, and from expert opinion embodied in the reports to its formalisation in law. This points to the fact that, 'the central activity of law is the reading of texts - cases, statutes, regulations - and their imperfect reproduction and arrangement' where justice is always partial and, in this case, is an imperfect political and social compromise between recommendation and law making.<sup>10</sup>

## II. THE CHANGING CONTEXTS: 1980 AND 2013

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,

<sup>8</sup> GANGOLI, *supra* note 7; Geetanjali Gangoli, *Controlling Women's Sexuality: Rape Law in India*, in INTERNATIONAL APPROACHES TO RAPE, 101, (Nicole Westmarland & Geetanjali Gangoli, 10<sup>th</sup> ed., 2011).

<sup>9</sup> Richard Freeman, *What is 'Translation'?* 5(4) EVIDENCE AND POLICY 429, (2009).

<sup>10</sup> *Id.*, at 11.

which led to amendments to the rape law in 1983. The first case was that of Rameeza Bee, a Muslim working class woman from Hyderabad. In April 1978, she and her husband were arrested by the police for 'loitering' when they were returning from a late-night visit to the cinema. The police demanded a fine. The husband went home to bring the money. During his absence, Rameeza Bee was raped by three policemen. When the husband returned, he was beaten to death by the police. Rameeza Bee was prosecuted for enticing minor girls into prostitution. She was convicted on this charge, and was subsequently released on probation for a year.<sup>11</sup>

The second case was that of Mathura, a tribal agricultural labourer from Maharashtra aged around 14-16 years. She developed a relationship with Ashok, the cousin of Nushi, her employer. Ashok and Mathura decided to get married. On March 26<sup>th</sup>, 1972, her brother, Gama complained to the local police that Mathura had been kidnapped by Nushi and Ashok. Nushi, Ashok, Mathura and Gama were brought to the Police Station for questioning, and to record their statements. At 10:30 p.m., when they were leaving the police station, the head constable, Tukaram, and constable Ganpat held Mathura back. She was subjected to rape by Ganpat and an attempted rape by Tukaram. Mathura came out of the police station and announced to the crowd outside that she had been raped. The crowd surrounded the station, and exerted enough pressure to ensure that a case of rape was registered.

While the Sessions Court acquitted the accused, the Bombay High Court reversed the judgment and convicted and sentenced Tukaram and Ganpat for rape. The Court held that since the police were strangers to Mathura, it was unlikely that "she would make any overtures or invite the accused to satisfy her sexual desires." Justice Koshal, of the Supreme Court, reversed the High Court judgment. According to the judge, as there were no injuries shown in the medical report, the story of "stiff resistance having been put up by the girl [was] all false"<sup>12</sup> and the alleged intercourse was a "peaceful affair". Justice Koshal dismissed Mathura's testimony that she had raised an alarm, and further held that under § 375 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'),<sup>13</sup> only the 'fear of death or hurt' could vitiate consent for sexual intercourse, and further stated that there was no such finding.<sup>14</sup>

The third case was that of Maya Tyagi, a middle class young woman, who, on 18th July 1980, was driving to her parents' house in Haryana. The

<sup>11</sup> Vimla Farooqi, *A Woman Destroyed: An Interview with Rameeza Bee*, in IN SEARCH OF ANSWERS: INDIAN WOMEN'S VOICES FROM MANUSHI 186 (Madhu Kishwar & Ruth Vanita, 10<sup>th</sup> ed., 1986).

<sup>12</sup> Tukaram v. State of Maharashtra, (1979) 2 SCC 143 : AIR 1979 SC 185.

<sup>13</sup> § 375, Indian Penal Code, 1860.

<sup>14</sup> VASUDHA DHAGAMWAR, LAW, POWER AND JUSTICE: THE PROTECTION OF PERSONAL RIGHTS IN THE INDIAN PENAL CODE 253 (10<sup>th</sup> ed., 1992).

car broke down on the way, and while it was being repaired a policeman in civilian dress tried to molest Maya. He was beaten up by her husband. The policeman returned with a contingent of policemen. The police opened fire and shot her husband dead. Maya Tyagi was dragged out from her car, beaten, stripped and paraded through the town. She was finally taken to the police station, where she was raped by the police. She was charged with being a dacoit (armed robber), and subsequently released on bail.

The three cases described above have several points in common. In all three cases, the victims were innocent of having committed any crime. Hence, the action of the police in holding them in custody was in itself illegal. Rameeza Bee and Mathura were socially and economically disadvantaged. Rameeza Bee was a Muslim and Mathura a tribal woman. In both these cases, their testimony was suspected. Mathura was held to be a “shocking liar” as she was not a virgin prior to the rape, and had a lover. As she was “habituated to sex”, the judge concluded that she had consented to sexual intercourse with the accused. In two of the three cases, the woman was re-victimised by having false cases filed against them — Rameeza Bee was convicted of procuring minor girls into prostitution, and it was further alleged that her marriage was illegal, and she was sexually promiscuous. Maya Tyagi was accused of being a dacoit. Mathura was castigated by the Supreme Court for indulging in premarital sex and lying.

The three cases, both individually and collectively, led to a major campaign on the issue of rape in custody. Following the assault on Rameeza Bee, there were public protests in the city of Hyderabad.<sup>15</sup> However, the accused were acquitted by the Sessions Court on the grounds of rape, and were instead admonished for wrongful confinement. The Mathura case led to a major nation wide campaign on the issue of custodial rape, following the open letter written in September 1979 by four law teachers — Upendra Baxi, Lotika Sarkar, Vasudha Dhagamwar and Raghunath Kelkar — to the Chief Justice of India. The Maya Tyagi case was discussed in the Lok Sabha (House of Parliament) over four days, following which a judicial inquiry was initiated by the Uttar Pradesh government. At the time, the women’s movement focused on the importance of custodial rape as a specific form of male power over women, and on the representation of the victim within the criminal justice system.<sup>16</sup>

Unlike the cases in 1980 that were directed against working class and minority women, the sexual violence case that triggered a social movement against rape in 2012-13 was the single incident of the rape and murder of a 23 year old woman student, Jyoti Pandey (variously called ‘Damini’ or lightening;

<sup>15</sup> Kalpana Kannabiran, *Rape and the Construction of Communal Identity*, in EMBODIED VIOLENCE: COMMUNALISING WOMEN’S SEXUALITY IN SOUTH ASIA 32 (Kumari Jayawardena & Malathi de Alwis, 1996).

<sup>16</sup> GANGOLI, *supra* note 7.

or 'Nirbhaya' or fearless by the press due to legal restrictions introduced in 1893 on divulging the name of a victim of rape - see section II) on a bus in Delhi. The student and her male companion were attacked with iron rods by six men who were driving around the city on a private bus. The driver stopped to pick up the pair, who thought it was a regular public transport vehicle. The woman was attacked with iron rods and gang raped, while the bus drove through a series of police checkpoints over several hours. Her companion was beaten. Subsequently, the men stripped the pair and dumped them by the side of the road. She died from her injuries on 26<sup>th</sup> December 2012, marking a sombre end to the year.

The public response to this incident has been complex and hybrid, and, unlike in the 1980s, not primarily restricted to the feminist movement. On the one hand, there have been seemingly spontaneous vigils against sexual violence by university students in universities in Delhi and elsewhere, where young women are claiming their right to live a life of dignity in the public sphere, free from the fear of sexual violence. The incident of rape became a focal point for a social movement on the wider issue of the safety of women in public spaces, including sexual harassment and other forms of sexual violence. On the other hand, the case has led to MPs and politicians voicing misogynist views. For instance, Congress Parliament member Abhijit Mukherjee dismissed protesters against the rape as "dented and painted women", or middle class women who have no knowledge of Indian 'realities', frequent discos, and take part in candlelight vigils because they are fashionable. Moreover, Samajwadi Party leader Abu Azmi and RSS chief Mohan Bhagwat believed that rapes are a mostly urban phenomenon, linked to westernisation and women wearing "less clothes" and that urban women need to protect themselves by staying at home, and should only venture out of the home whilst chaperoned by male relatives.

Such views reflect patriarchal fears and anxieties about the women's bodies in the context of globalisation. It has also been argued that civil society focus on an urban incident of rape of a student – therefore representing an aspiring upper middle class (even though Jyoti Pandey herself was from a working class/lower middle class family) – detracted from the endemic nature of sexual violence experienced by working class, rural and Dalit women; and more generally, on all women in the context of their home, and marriage.<sup>17</sup>

As in the 1980s, the social movement in 2012-13 also focused on the relatively rarer cases of 'stranger rape' rather than marital or familial rapes, even though feminists used the incidents to draw attention to the latter. At both points in history, social movements called for rapid changes to the rape law. In 2013, demands range from the rational – speedy disposal of rape cases,

<sup>17</sup> Geetanjali Gangoli, *Public Outrage Against the Delhi Gang Rape Case: What Does It Tell Us?* ASIAN AGE, <http://www.asianage.com/geetanjali-gangoli-505>, (last seen on Sept. 5, 2017).

abolition of the two finger test - to the controversial – death sentences for rapists – to the ludicrous – chemical castration for men convicted in rape cases.<sup>18</sup>

### III. THE 1980s: THE LAW COMMISSION AND LAW MAKING ON RAPE

In April 1980, the Law Commission of India published its report on rape<sup>19</sup>. This was followed by a Bill in August 1980 in the Lok Sabha that suggested major amendments to the rape law. This was then referred to a Joint Committee comprising of representatives from both houses of Parliament, and various ministries. After 44 sittings, the report was tabled in the Lok Sabha on November 2, 1982 – two years after the Bill was first introduced in Parliament.<sup>20</sup>

There were various iterations to the Bill between these stages; this paper is primarily concerned with how the Law Commission Report was variously interpreted and translated by the Parliament before becoming law in 1983. The Law Commission report in 1980<sup>21</sup> considered not only the reference made by the government, but also consulted a range of women's organisations, and interested Members of Parliament. On the one hand, it has a well-articulated feminist understanding of rape, for instance arguing that rape is the 'ultimate violation of the self', and focusing on the way in which rape victims are further victimised by the criminal justice system. The Law Commission also recommended the concept of 'custodial rape', again a feminist demand – for instance, where a man has custody over a woman as a police man; or as superintendent of an institution – and that perpetrators should be subjected to a greater custodial sentence. There was also a discussion of the concept of 'full and free consent', and the Commission accepted that violence was not necessary in rape, and that silence did not automatically mean consent:

*“Under the amendment as recommended, it would not be open to the Court to draw an inference of consent on the part of the woman from her silence due to timidity or meekness...”*<sup>22</sup>.

<sup>18</sup> Geetanjali Gangoli & Martin Rew, Political Activism, Legal Discourses and Sexual Violence in India, E-INTERNATIONAL RELATIONS, (Feb. 6, 2013) <http://www.e-ir.info/2013/02/06/political-activism-legal-discourses-and-sexual-violence-in-india-what-does-the-delhi-rape-case-reveal/> (last seen on Jan. 20, 2016).

<sup>19</sup> LAW COMMISSION OF INDIA, 84th Law Commission of India Report, Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence 6 (1980) <http://lawcommissionofindia.nic.in/51-100/report84.pdf> (last seen on Jan. 21, 2016).

<sup>20</sup> Joint Committee, Report on the Bill to amend the Indian Penal Code, 1860, the Criminal Procedure Code, 1973, and the Indian Evidence Act, 1872 (1982).

<sup>21</sup> *Supra* note 20.

<sup>22</sup> *Id.*

In line with feminist concerns, the Commission also recommended that the victim's past sexual history not be used by the prosecution in rape trials as a way of discrediting the woman's testimony.

On the other hand, there was only partial understanding of rape as an abuse of male power over women. Therefore, the report uses the term 'forcible rape', which can be seen as a contradiction in terms, as all rapes by definition are forced. Feminist demands that marital rape be criminalised were also accepted in part, therefore the recommendation made was that rape within marriage be criminalised only under some situations, for example, in the case of judicial separation and child marriage. Contrary to feminist demands, the Law Commission recommended that rape trials be conducted in camera, and that restrictions on identifying the victim be placed on the press. While this was aimed at protecting rape victims from further embarrassment, as 'certain details of an intimate character may have to be narrated in court', we have argued elsewhere that rather than seeing rape as an abuse of male power, this further sends a message that rape is shameful, and that rape victims are shamed by the act of rape.<sup>23</sup> Further, arguably, the Mathura rape case could not have become a focus of feminist and public inquiry had such press restrictions been applied at the time, and as we saw in Section I, this led to the press using pseudonyms in rape cases.

The Bill introduced in August 1980 had the following clauses. First, an amendment was made to §228 of the IPC that prohibited press coverage of any incident of rape, or any publicity that revealed the name of the offender or the victim, and the insertion of § 228A that mandated that rape cases be conducted 'in camera', therefore they would not be subjected to and open to public scrutiny and attendance. Second, § 375 was introduced in the IPC, redefining consent in rape cases as sexual intercourse by a man with a woman 'without her free and voluntary consent'. § 375 also stated that the marital rape exemption would not be applicable in cases of judicial separation, therefore creating a partial expansion of the category of marital rape in Indian rape law. Finally, § 376 of the IPC<sup>24</sup> was introduced, which created a new category of rape, i.e. rape by members of the police within their official jurisdiction, by public servants, by superintendents or managers of jails, remand homes and hospitals, on women under their custody. Gang rape was included within this category of aggravated rape, and all these categories attracted longer custodial sentences than other forms of rape. Significantly, under Section 376, the onus of proof was shifted from the defendant to the accused. That is, 'if the woman stated that she did not consent, the court would presume that she did not consent'.<sup>25</sup>

---

<sup>23</sup> *Supra* note 9.

<sup>24</sup> *Supra* note 15.

<sup>25</sup> The Criminal Law (Amendment) Bill No. 162.; *Supra* note 7.

The Joint Committee report supported the concerns of some feminist groups that § 228<sup>26</sup> and § 228A<sup>27</sup> of the IPC would prevent women's organisations from protesting against rape judgments and rape cases, as this could potentially identify both victim and offender, and that "it would lead to an indirect form of press censorship."<sup>28</sup> Therefore the report recommended that under certain circumstances, publicity may be 'necessary for proper investigation'; therefore that publicity be permitted if the victim desired it, or it was in the interests of the case.<sup>29</sup>

In further agreement with feminist concerns, 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, that rape of minors be included under the aforementioned section and that the rape of a physically and mentally disabled woman be brought within it.<sup>30</sup> However, on the issue of marital rape, the Committee took a somewhat conservative stand, suggesting that in the case of judicial separation, "there is a possibility of reconciliation until the decree of divorce is granted, therefore nonconsensual sex between a judicially separated couple not be treated as rape".<sup>31</sup> Further, it was recommended that the rape of a minor girl within marriage be considered a less serious offense than other forms of child rape. In a note of dissent accompanying the recommendations, a member of the Committee, Member of Parliament L.K. Advani opposed the provision criminalising the rape of a minor by her husband, on the ground that rape within marriage should not be recognised under any circumstances, stating that:

*"...reprehensible though child marriage is, it surely cannot be put in the same category as rape...We therefore favour an unqualified exception saying that 'sexual intercourse by a man with his own wife is not rape.'"*<sup>32</sup>

The Commission's concerns and Advani's intervention in this debate expose some of the anxieties felt by conservative forces about feminist interventions. Allowing marital rape to be criminalised, even in the limited area of child marriage and judicial separation was construed as a threat to the institution of marriage itself, which was constructed on the undisputed sexual rights of men over women within marriage. Reiterating in the following words:

---

<sup>26</sup> *Supra* note 15.

<sup>27</sup> *Supra* note 15.

<sup>28</sup> *Supra* note 9.

<sup>29</sup> *Supra* note 18, at 6-7.

<sup>30</sup> *Id.*, at 9-11.

<sup>31</sup> *Supra* note 21, 8-9.

<sup>32</sup> *Id.*, at 24-25.

*“Even though Advani makes a token acknowledgment to ‘modernity’ by calling child marriage reprehensible, this is contradicted by his subsequent words. In other contexts, feminists have argued that the socially sanctioned sexualisation of a child in cases of child marriage has been the most reprehensible aspect of child marriage. Therefore, far from being treated as an exception; sexual abuse of children within marriage should be punished more severely than other forms of sexual abuse.”*<sup>33</sup>

The Joint Committee made several general recommendations to the Bill. The Committee suggested that the right to private defense extended to causing death should be given to a woman on molestation, as on rape. In addition, to safeguard women’s safety, women should not be arrested after sunset and before sunrise; that medical examination of the accused, and of the complainant be done immediately on complaint; that social welfare officials be associated in the procedures; that compensation should be given to rape victims to compensate for social ostracism.<sup>34</sup> Many of these suggestions are based in social norms and notions about rape. As we have seen in Maya Tyagi’s case,<sup>35</sup> women’s safety cannot be guaranteed by not arresting women at night, and this suggestion merely reinforces the notion that rape takes place only at the dead of night. Ludicrous in itself, the idea can also contribute to disbelief in cases when the incidents of rape do take place at other times, as is evident in the Lok Sabha debates following the Maya Tyagi incident. Another limitation of the Joint Committee report is that it did not take into cognizance the recommendation of the Law Commission, and of women’s organisations that the past sexual history of the woman not be adduced in evidence, or during cross examination.

However, both the Law Commission and Joint Committee Report seemed to be influenced in part by feminist rhetoric and concerns. This can be seen in contrast to the Lok Sabha Debates, where feminist principles are acknowledged in a tokenistic manner, and there were concerns that women’s organisations had gone too far in some of their demands. One Member of Parliament referred to an appeal made to the Delhi High Court to review a rape case in which the accused had been acquitted, followed by demonstrations outside the Court, which was seen as not ‘consistent with the rule of law’.<sup>36</sup> The fear that feminists go too far in some demands was something of a refrain during the debates, most evident in the debates around marital rape. More than one MP expressed horror at the proposal to criminalise rape of minors within marriage:

<sup>33</sup> Gangoli, *supra* note 7.

<sup>34</sup> *Id.*

<sup>35</sup> Pankaj Pachauri, *Death Penalty*, INDIA TODAY (Feb. 15, 1988) <http://indiatoday.intoday.in/story/ishwar-singh-tyagi-case-six-uttar-pradesh-policemen-sentenced-to-death/1/328903.html> (last seen on Sept. 17, 2017).

<sup>36</sup> Shri Daga, Lok Sabha Debates (1983), cited in *supra* note 7.

*"The concept of rape within marriage is new. It is against our culture. In our country, in some parts, girls develop earlier. Even if they are young, their bodies are ready for sex."*<sup>37</sup>

In a similar vein, it was argued that if child marriages were not prevented by law enforcers, it was 'absurd' to stop men from exercising their *conjugal rights* within these marriages, and to expect the husband to become a *hermit*.<sup>38</sup>

The feminist proposal adopted by the Law Commission, that the past sexual history of the woman be disregarded during the trial was opposed as another unreasonable feminist demand and it was feared that if it was accepted, false cases of rape would be filed by women, especially against rich and powerful men to malign them, perhaps at the behest of the police.<sup>39</sup> There were concerns such as:

*"...not all women were 'virtuous, therefore such women were likely to lie about rape: after all, we are not dealing all the time with virtuous women. We may also deal with some women who, unfortunately, do not conform to the normal standards of womanhood."*<sup>40</sup>

The rape law amendment of 1980 therefore remained an amalgam of feminist concerns interpreted and translated<sup>41</sup> by the Law Commission, and then reinterpreted by the Lok Sabha and the Parliamentary Joint Committee. The final version in 1983<sup>42</sup> was very different from some if not most feminist concerns, however there was, within the Law Commission and the Joint Committee, a sense that they were aligned partly to feminist interpretations of sexual violence and rape.

#### IV. 2013: LAW COMMISSION AND LAW MAKING ON RAPE

Following Jyoti Pandey's rape case, a Law Committee made up of Justice J.S. Verma, Justice Leila Seth (both retired judges) and Gopal Subramaniam was constituted by the Government to look into possible amendments to the Criminal Justice Law "to provide for quicker trial and enhanced punishment for criminals committing sexual assault of extreme nature against women". The Justice Verma Committee report (*hereinafter* referred to as "report") was submitted to the Prime Minister within thirty days, and unlike the amendments in the 1980s, the rape law amendments in 2013 took less than a few days after

<sup>37</sup> *Id.*, at 415.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*, at 431.

<sup>40</sup> *Id.*, at 413.

<sup>41</sup> Gangoli, *supra* note 7.

<sup>42</sup> The Criminal Law (Second Amendment) Act, 1983.

to be passed into as a law through an emergency ordinance, turning the entire process of law making into what Baxi has rightly called a *judicial spectacle*.<sup>43</sup>

The report claims its legitimacy from the civil society movement and, tellingly, the opening lines of the 631 pages long report reference “the countrywide peaceful public outcry of civil society, against the failure of governance to provide a safe and dignified environment for the women of India, who are constantly exposed to sexual violence”<sup>44</sup> The first chapter of the report draws on constitutional guidelines as well as developmental literature, notably Amartya Sen’s ideas of sustainability, and the second chapter addresses gender justice and India’s obligations under international conventions. A number of stakeholders were consulted including feminist groups, legal experts, medical professionals, and academics.

The report acknowledges the long standing role of the women’s movement, and the generalised misogyny and victim blaming within the parliament, and argues, in line with feminist principles, that, “the right to be protected from sexual harassment and sexual assault is...guaranteed by the constitution, and is one of the pillars on which the very construct of gender justice stands”.<sup>45</sup> Further, it points out that the legal and social focus on stigma and shame in rape cases has the counter effect of reiterating the stigma for the victim, adding that rape is an issue of *bodily integrity*’ for the woman, rather than against the woman’s family or the wider community.<sup>46</sup>

The report had a very clear understanding of ‘everyday’ rape and sexual assault as a form of male violence against women and men, adding that the specific gendered aspect of rape should not be diluted by making the act gender neutral, and the term *rape* as opposed to *sexual assault* be used because of a shared understanding of the term in the Indian context. It also recommended that the offense of rape be redefined to go beyond penile penetration into the vagina as in the older law on rape. The offense of sexual assault was suggested to include non-penetrative sexual touching. It also recommended that marital rape be criminalised, stating that the marital rape exemption violated the fundamental objectives of the Convention on Human Rights, the “very essence of which is human rights, dignity and freedom”.<sup>47</sup> In essence, in *everyday* acts of rape and sexual assault, the perpetrator could only be a man, though victims could be both women and men. However, the report did not recommend that

<sup>43</sup> Pratiksha Baxi, *The Official Emergency Continues - The Ordinance on Sexual Assault*, KAFILA (Feb. 2, 2013) <https://kafila.online/2013/02/03/the-official-emergency-continues-the-ordinance-on-sexual-assault-pratiksha-baxi/> (last seen on Jan. 20, 2016).

<sup>44</sup> J.S. VERMA COMMITTEE, GOVERNMENT OF INDIA, REP. OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (2013).

<sup>45</sup> *Id.*, at 2.

<sup>46</sup> *Id.*, at 94.

<sup>47</sup> *Id.*, at 114.

Section 377 of the IPC<sup>48</sup> (that criminalises *unnatural sex* or consensual and non-consensual sex between men) be repealed, therefore retaining the problematic criminalisation of some kinds of consensual sexual activities.

The report reiterated the importance of speedy justice in rape and sexual assault cases, and a gradation of the offense of rape, where cases of gang rape, or instances where the victim is in the custody of people in authority, such as the police and armed forces, were treated as more serious, and therefore to be dispatched speedily through the criminal justice system. Interesting in these cases, the recommendation was that the perpetrator was not gender specific but could be either woman or man, as could the victim.

The report also recommended that the controversial *two finger test* for survivors of rape by doctors no longer be used in rape cases. This test allowed 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. The report has a detailed chapter that recommends sensitive procedures and guidelines for medical practitioners in rape and sexual assault cases, within a Sexual Assault Crisis Centre (in line with developments in the UK and Canada). Along with recommending that age, injuries, medical conditions and other individual particulars are taken into account, the report states categorically that, "the issue of whether sexual assault occurred is a legal issue and not a material diagnosis. Consequently, doctors should not, on the basis of the medical examination, conclude whether rape had occurred or not".<sup>49</sup> This alludes also to the prior use of medical 'evidence' to determine whether the woman was habituated to sexual intercourse, and therefore a likely victim.

The actual law was passed only days after the submission of the report, through an emergency ordinance.<sup>50</sup> This ordinance has been criticised by feminists, both as we will see, due to its content, but also because of the manner in which due democratic process appear to have been bypassed.<sup>51</sup> This was in stark contrast to 1983, where discussions and debates on the law took over three years.

There were a number of dichotomies between the report in 2013 and the ordinance. The ordinance retained the marital rape exemption;<sup>52</sup> therefore, continuing to place women in violent and abusive marriages unable to

<sup>48</sup> § 377, The Indian Penal Code, 1860.

<sup>49</sup> *Supra* note 45, 274.

<sup>50</sup> The Criminal Law Amendment Ordinance No. 3 of 2013; Bhattacharya, Criminal Law (Amendment) Act, 2013: Will it ensure women's safety in public spaces?, *Space and Culture*, available at <http://www.spaceandculture.in/index.php/spaceandculture/article/view/11/2> (last visited 19th Sept. 2017).

<sup>51</sup> *Id.*

<sup>52</sup> *Supra* note 45; § 375, The Indian Penal Code, 1860.

access the law when raped by intimates. It also created the offense of rape and sexual assault as a gender-neutral offense, for both perpetrators and victims, in *everyday contexts* as well as the aggravated rape cases (e.g. gang rape and custodial rape cases). Unlike the report, the ordinance did not define sexual assault (non-consensual and non-penile penetration into bodily orifices) as having any gradations as to severity, nature or impact. The ordinance also retains the two finger test, and the past sexual history clause<sup>53</sup> - both controversial and critiqued by the report - therefore continuing historical injustices in rape cases and trials, and perpetuating rape myths.

On the other hand, there were some similarity between the ordinance and the report. Both enabled the setting up of speedy trials in some cases of rape. Neither challenged the criminalisation of consensual gay sex. What is significant here, in our view, is that gender neutrality allows women to be charged with rape offences by men, and could potentially be used as counter accusations in marital disputes. Also, gay men could be charged with both 'unnatural sex' under Section 377<sup>54</sup> and with rape under the sexual offences act.

## V. CONCLUSIONS: FEMINIST ENGAGEMENT AND CONTINUITIES IN THE LAW COMMISSION

As we have seen, feminist interventions played an important role in affecting law commission reports on rape and sexual violence. This has been the case both in 1980 and 2013, where both reports drew on feminist rhetoric and arguments to bolster and strengthen their case. The 2013 report is much more detailed, and draws on a range of related influences (developmental, human rights) though the voice and influence of the women's movements remains predominant.

However, in both cases, we see that the translation from feminist politics to law commission and further on to law is complex and the interpretation of feminist principles remain partial. For instance, feminist demands in the 1980's on the treatment of custodial rape as an aggravated form of sexual violence led to an inversion of the innocent until proven guilty principle; and in 2013 social movement demands for a speedy resolution on the Jyoti Singh case led to the setting up of special courts, the judicial wisdom of which remains controversial. The speed at which the Law Commission's 2013 report became law through an emergency ordinance showed how translation in this instance was primarily a political process resulting both from a Congress wish to show political strength for an upcoming election, and as a result of the unprecedented level of social protest that occurred immediately after the

---

<sup>53</sup> *Id.*

<sup>54</sup> § 377, The Indian Penal Code, 1860.

rape. Consequently, calls for *justice*, mediated through the symbol of Nirbhaya, resulted in legal resolutions, which compromised key feminist interests and concerns.

Further compromises were evident in the fact that a number of key feminist demands were simply ignored and negated in the process. This included the criminalisation of marital rape, the abolition of the two-finger test and the use of the past sexual history of the woman. In this regard, there were definite continuities in the manner in which feminist concepts of rape were excluded from the process of legal translation. In particular, the exclusion of marital rape as a criminal offense from the emergency ordinance, despite it being recommended by the 2013 Justice Verma Law Commission Report, maintains the idea that rape is essentially a crime perpetrated by *strangers* and dismisses the fact that rape is, as is well known, a crime overwhelming committed by someone the victim knows from their immediately family, wider relatives, or friends. For instance, the National Family Health Survey of India found that ever married women in India experiencing sexual violence were most likely to experience sexual violence from their husbands than any other male (over 90%), and never married women who have experienced sexual violence have most often been abused by a relative (27 percent), a friend or acquaintance (23 percent), a family friend (8 percent), a boyfriend (19 percent) than a stranger (16 percent).<sup>55</sup> Consequently, the patriarchal basis of the 'Indian family', where the woman is understood to be the sexual property of the husband, goes fundamentally unchallenged. Why this exclusion occurred needs further investigation.

However, we argue that this rather dismal picture should not blind us to the importance of the law making process, and the central role of the law commission in this process. As long as feminists continue to engage with the law - which we continue to believe is a worthwhile project in conjunction with other forms of social activism<sup>56</sup> - working with Law Commissions to reform laws on gender violence remains an important area of work.

<sup>55</sup> National Family Health Survey – 3, *Domestic Violence*, NATIONAL FAMILY HEALTH SURVEY, INDIA, <http://www.rchiips.org/nfhs/NFHS-3%20Data/VOL-1/Chapter%2015%20-%20Domestic%20Violence%20%28468K%29.pdf> (last seen on Jan. 20, 2016).

<sup>56</sup> G. Gangoli and M. Rew, *Strategic co-option? Indian feminists, the State and legal activism on domestic violence* in UNDERSTANDING GENDER BASED VIOLENCE: NATIONAL AND INTERNATIONAL CONTEXTS. London: Routledge (N. Aghtaie and G. Gangoli, 2014).