Rape, Retribution, State
On Whose Bodies?

Although the rhetoric of capital punishment operates in the name of women, its objective is not the right to bodily autonomy of all women. Retribution aims at punishing men for having breached the contract between the masculinist state and all men. A reading of the Lok Sabha debates around the amendments to the rape law in 1983 indicates that the object of legislative reform was politicised between the state and the individual offender, defining the powers of the masculinist state over the kind of women who may be sexually accessible to all men, and others to some men.

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The proposal to hang the rapist is squarely located in the politics of memory, which manipulates public outrage, to deflect attention from those conditions which create, normalise and sustain violence against women. It is this politics of memory that I shall address in this paper, by evoking a reading of the Lok Sabha debates in 1983 when the rape law was amended for the first time.[1]

I
What is the Object of Punishment?

At first glance the object is rape. The rhetoric of capital punishment to rapists presents us with an object called rape as if there were a consensus on what constitutes rape. However, in recent years rape has been redefined as political violence against all women, and the law critiqued as that agent of the state which systemically transforms rape into sex. It has been pointed out that the very processes of naming a juridical object are significant, since for law all that falls outside its ambit does not exist in reality, yet juridical categories are represented as neutral guarantors of meaning.

The rhetoric of death penalty is successful for it frames law, in the image of law – as neutral and the sole legitimate agent of deterrence. It is in presenting itself as a neutral and coherent whole that the law succeeds in deploying power [Smart 1989]. This very power is deployed herein to constitute rape as a transparent category, as if social and legal discourses on rape constitute their object identically. The rhetoric of death penalty naturalises both the role of the state as a legitimate agent of deterrence and the object of deterrence, taking the juridical category of rape as a given.

However, not only is there no evidence to demonstrate the direct correlation between death penalty and deterrence of crime but it is not clear what the object of deterrence is. In this paper I offer a reading of the text of the 1983 parliamentary debates and the current debate on death penalty, to argue that the object of deterrence is not to deter rape against all women. Rather its objective is to control normal levels of violence against some women and increase disciplinary power over all women. I first look at how law constitutes rape as an object to explicate what exactly is sought to be deterred.

Feminist analyses of the juridical and social discourses on rape have amply demonstrated that in law the bodily autonomy of all women has not been its chief concern. If we take a cursory look at the manner in which the statute on rape frames its object,[2] we see that it does not include all forms of rape. In 1983 when the rape clause was renamed as 'sexual offence' the emphasis on 'heterosexual' rape which is defined by the forceful penile penetration of the vagina remained unchanged.[3] Rape by sticks, fingers, other sharp objects does not constitute rape. This emphasis on heterosexual rape[4] based on penile penetration may be understood in the way in which patriarchal descent is traced in patriarchal social structures, to which the control of female sexuality is central. Patrilineal mechanisms of tracing kinship in patriarchal societies place emphasis on the purity of descent, so much so that rape of the woman is constructed as the defilement of the descent group itself. In such cultures the emphasis on the regulation of women's sexuality makes it necessary to criminalise some forms of hetrosexual rape in everyday contexts.

The gendered exchange of violence in society which poses men as subjects of violence and women as objects of violence is made intelligible by the discourses of shame and honour. Rape as an offence of honour and as stigmatic or shameful for the woman is a powerful construct since the stigma is transmitted from the woman to the woman's family, community or even nation, depending on the political context [Das 1995]. In this discourse the honour of men is traced through the purity and chastity of women. The template that rape is worse than death or that rape must be experienced as shame on one's self is where the disciplinary power of the discourse articulates itself. In the internalisation of the discourse, it is made invisible, naturalised.

It is within such a social and legal framework that, in the contemporary debate on rape and death penalty, Advani authors the proposal to legislate capital penalty on the ground that rape is more heinous than murder, for it reduces a woman to a "living corpse" (*The Times of India*, October 5, 1998).

The construction of rape as worse than death which is informed by the existing social discourses on shame and stigma, further act to retrench it. To equate rape with murder then also acts to marshal the idea that women are the carriers of the honour of individual men or male defined collectivities. Also the corollary of this

proposition is further strengthened, that a good woman would rather die than be raped or sustain life threatening injuries trying to resist rape. The translation of these social discourses into legislative measures would legitimise the notion that death scripts the raped woman's life, positioning her as an eternal victim, thus implying the death of the raped woman as a subject.

II
Politics of Memory: Lok Sabha Debates, 1983

It is important to evoke a politics of memory at this point to look at the way in which the official discourse constituted the raped woman in the parliament in 1983, and how it translated the demands of the women's movement in the legislative realm. A reading of the text of the Lok Sabha debates suggests a central concern with discourses of shame, stigma, death, and defilement as the defining features of the rape experiences of the victim. Three categories of women emerge here.

(1) the raped woman as the 'bearer of stigma' versus the 'normal woman'.

(2) the 'chaste woman' versus the 'unchaste' woman.

(3) the 'married' versus the 'unmarried' woman.

Framing Rape as 'Shame'

The parliamentary debate in 1983, on the creation of Section 228A, which criminalised the publication of the name of the victim and any matter relating to the incident was structured by the discourse of shame and stigma. Those in favour of the amendment argued that the law must not allow any publicity to the case of rape because the victim would further be stigmatised by her community. Those against it recognised the power of the press in bringing the criminals to book in the first place and argued that the press has to be given a degree of freedom for the victim herself cannot speak about the rape experience.

One MP stated,

> A rape victim is practically given the same status as a prostitute. She bears a stigma in the eyes of the society. She has to hide herself. She cannot openly say what's happened to her. She has to make a complaint surreptitiously (Amal Datta, 1983: 421, Lok Sabha debates [hereinafter referred to as LS debates] November 21).

The MP argued that even though the law intended to protect the victim, in its formulation the law had gone too far. According to him, however, the power to consent to publication ultimately must lie with the women's groups who should be authorised to act even without the victim's consent. Thereby here, the raped woman was not positioned as a subject with whom the burden of consent can lie. In the debates the loss of chastity and subsequent stigma attributed to the raped woman was constructed as a symbolic death – both of her social status and the self, as is typified in the speech cited below.

> Once a lady is raped, not only is she not acceptable by society, but also she is not acceptable by the parents, and instead of helping the lady everybody wants to take undue advantage for which she is not liable or she is not to be blamed and ultimately she has to live a life of a prostitute (Nusrul Islam 1983: 393, L S debates, December 1).

This discourse marks the loss of status of the raped woman by giving her another stigmatised status, that of the prostitute. Here the prostitute is a bearer of stigma for she cannot withold her consent from any man. She has no chastity to guard and hence cannot be gifted in marriage. The raped woman as the bearer of stigma similarly is rendered unmarriageable by the act of rape (or becomes unfit to remain in a marriage).

The woman's body marked with the impress of strange male desire is closed to a chaste woman's life; her body reduced to that inner space robbed of the virtue, which would otherwise make her worshippable. As a fallen body it may be appropriated by a multiplicity of 'strange' male desires for the raped woman has no option but to "live a life of a prostitute".

The normal woman then is one who is marriageable or the monogamous married woman, the latter a chaste, married woman who has never been sexually desired by other men – for acts of traumatic violence by men other than the husband – are constructed as acts of male desire which permanently defile a woman. Women who transgress or resist the patriarchal norms of alliance and heterosexuality by desire or force then lie in the realm of all that which is not normal and implicitly seen as deserving further violence.

Chaste Versus Unchaste Women

The production of chaste and unchaste female bodies constitutes the underlying grammar enunciating the Indian Evidence Act (IEA), which makes it possible to ascribe meaning to the proposition that a real victim must also be a 'moral' or 'chaste' woman. As we know Section 228 of the IEA which makes legally relevant the character of the woman was not amended in 1983. This clause assumes that the 'character' of women and thereby their capacity to tell the truth is derived from their status, defined by the nature of women's sexual or marital relationships to men.

The question of character evidence[5] in fact came for discussion squarely in the context of shifting the onus of proof in custodial rape cases (Section 114A, IEA), which was introduced following the Mathura Open Letter and the subsequent agitation. It was argued that the woman's character especially her sexual history was relevant so that 'respectable' men (as they were referred to in the speeches) may not be framed by 'unscrupulous' women be it at the design of more powerful men or a result of personal motivations. As Moolchand Daga stated:

> Some girls are very clever and are the agents of police. These days it's the world of politics, police can falsely accuse anyone it wants on charge of rape. What is the way of saving oneself from them. You have written here that the girl's past history will not be asked, then how will you come to know about the girl? (1983: 431, LS debates, November 21, translated from Hindi).

In fact, these grounds informed the government's refusal to legislate 'power rape', a motion moved by Geeta Mukherjee, which was defined as:

> Where a woman is raped under economic domination or influence or control or authority, which includes domination by landlords, officials, management personnel, contractors, employers and moneylenders, either by himself or by persons hired by him, each of the person shall be deemed to have committed power rape (1983: 412, L S debates, December 1).

In his reply to Mukherjee's proposal, P Venkatasubbaiah (the minister of state in the ministry of home affairs), said to criminalise "rape by economic domination" would be 'counterproductive' (1983: 432, LS debates, December 1).

The idea that some women would misuse the provision to falsely accuse 'respectable' men (read: men in positions of authority) implied that women from less 'respectable' classes or caste backgrounds would not observe similar

rules of shame and honour, nor hesitate to lie. Neither would rape be stigmatic to women of these backgrounds for are all such women not potentially available to all men, especially the dominant class men? Thus demonstrating the manner in which in the making of law, the script of shame and honour is written on the bodies of women from socially disadvantaged backgrounds.

Marital Rape or Child Marriage?

The Indian rape law divides women into those who cannot consent and those who cannot withhold consent to sexual intercourse from their husbands. The former is the provision which prohibits sexual activity for all unmarried women up to 16 years of age and those married up to the age of 15 years. The latter is the provision which holds that (adult) marital rape is not criminal.

The bill proposed by the Joint Parliamentary Committee recommended the inclusion of rape of 12-year-old wives as aggravated rape which meant a higher sentence. It, however, reduced the punishment for rape of wives between 12 to 15 years to a maximum of two years rigorous punishment. It also created a separate sexual offence, which does not amount to rape but was criminalised as 'illicit-sexual intercourse', to describe rape of a woman separated from her husband [J P C 1982:8].

On this amendment the J P C report said that,

> The committee feels that in a case where the husband and wife are living separately under the decree of judicial separation, there is a possibility of reconciliation between them until a decree of divorce is granted. Hence, the intercourse by the husband with his wife without her consent during such period should not be treated as, or equated with rape. The committee is of the opinion that intercourse by the husband with his wife under such circumstances should be treated as illicit sexual intercourse [J P C 1982:8].

This proposed amendment was accepted in the Lok Sabha[6] (see Sec 376, IPC).

Clearly then the rights of the husband over the wife and the 'interests' of the patriarchal family were privileged, normalising the widescale violence used by men to enforce relationships of marriage. The distinction between rape and sexuality blurs, from the woman's point of view, for the state permits force in sexual intercourse, not only by describing it as normal but normalising it for the sake of 'reconciliation'. Here power is deployed to constitute married women's sexuality as passive for the capacity to say no to sex within marriage is not recognised by the law as a legal right.

As a matter of fact, during the debates it was argued by a number of MPs that marital rape should not be criminalised at all, irrespective of the age of the wife. Patil argued that child marriage laws should be effectively implemented rather than criminalising any sexual relations between a husband and wife (1983:369, LS debates, December 1). Jethmalani concurred and I quote:

> You must completely eliminate from the provision any situation in which a man can be held guilty of rape against his own wife. The proper solution to this problem is that you must prevent marriages taking place at an early age.... Marriage is permitted; marriage is good, even if it takes place when it is an early marriage you recognise it as valid (1983:414-5, LS debates, December 1).

Like Jethmalani, L K Advani in his note of dissent in the J P C stated:

> extremely reprehensible though child marriage is, it surely cannot be put in the same category as rape [JPC 1982:23].

While those against marital rape, argued for its exclusion from the bill and for the effective implementation of law on child marriage,[7] it is interesting that the idea of child marital rape as a deterrent to child marriage was most clearly articulated by P Venkatasubbaiah in his reply to the suggestions put forward by the members of the Lok Sabha (see 1983:430, L S debates December 1). Neither position was concerned with the wife's consent or her right over her body. For Moolchand Daga criminalising marital rape was against 'Indian' culture/'sanskriti'. He said:

> I do not understand why you have gone into detail. The issue of husband wife rape is entirely new, how can we bring this provision as rape looking at our culture (sanskriti) (1983:376, L S debates, December 1, translated from Hindi).

Therefore, child marriage is a social problem which the state must effectively outlaw but marital rape is not an 'Indian' problem. The former is a problem of tradition and the latter, is constructed as against tradition or not Indian. The relation between how the nation is constituted by tracing its identity through its women, was drawn throughout the debates. In arguing for capital punishment, it was put forward that rape be considered a 'national crime', Nusrul Islam argued,

> Our is a country of Sita and Savitri and traditionally we regard our women as such and to our women chastity is everything, if it is lost, everything is lost; not only lost, socially she becomes dead. So there is no harm in treating it as national crime and there is no harm to provide capital punishment for it (1983:393, L S debates, December 1).

Nusrul Islam therefore, could speak of our women, a discourse in which women are not subjects. The image evoked here is that of a chaste Hindu woman. In its imagination then the nation is Hindu, which marks its difference from the other by the control it exerts over the sexuality of its female population.

In all these constructions which are clearly predicated on the discourses of honour and shame of the nation or the collectivity in question, then marks its identity by taking pride in its women's chastity. 'Unchaste women', wives prostitutes, women on whose bodies violence is inscribed or women who act as desiring subjects, do not constitute the nation as an imagined community – these women are seen to deserve the violence of rape, for they blur the very point at which this difference is located – the control over female sexuality. The efficacy of this iconography [Parker et al 1992] lies in the fact that these are actual experiences of women – Rameeza Bee [Kannabiran 1996] or Maya Tyagi who were constructed as 'prostitutes' – their claim to truth disqualified because they were seen as deserving the violence they experienced.

In conclusion then in the 1983 debates the object of legislative reform was positioned between the state and the individual offender, defining the powers of a masculinist state over what kind of women may be sexually accessible to all men and what kind to some men.

III
Who Is the Subject of Punishment?

Clearly then the juridical history of the rape statutes reveals that the rapist as a social category is not transparent either. Recent work [see Albin 1977; Mackinnon 1989; Smart 1989] has shown that in the judicial discourse the rapist has either been construed as atavistic, a male body which falls from culture being blinded by sexual passion; the perverted man needing medical attention or the victim of societal forces. In all these stereotypes of the rapist we are

continually confronted with the assumption that all men are by nature possessed by biological needs, which are harnessed, controlled or disciplined by processes of culture.

Analyses of legal judgments on rape have shown that generally rape is classified as 'heinous' when it is committed against women who fall within the ambit of 'good' women [Das 1996]. Moreover, Indian courts continue to constitute rape as pathological sexual instinct which can be disciplined by cultural processes, in the case of sentencing through the mechanisms of law. The two models of punitive action – deterrence and rehabilitation – are based on this construct of male sexuality. The model of rehabilitation strives to 'cure' men overwhelmed by their sexual instincts through meditation and other forms of therapy. The model of deterrence, I argue, strives to deter men from acting out their natural biological instincts (on women who are defined as inaccessible herein). This biologism that underlies either model fails to address rape as a form of normal sexual practice which is predicated upon power, which image the 'woman as take-able' and the 'man as sexually inviolate'. Studies on the patterns of sentencing in rape cases have shown that these are some of the grounds on which the sentence is often mitigated [Das 1996; Verghese 1992].

With the implementation of the death penalty, the rate of conviction will be lowered. For if this biologism underlies the sentencing, the rapist will not be held responsible entirely for his act, judges will be loathe to send men to death. With capital punishment the rule of corroboration that the woman, if she is telling the truth, should bear injuries on her body will be further strengthened. The character evidence clause will come to play in the trial, a very major role. Very few women will be believed. The pressures on victims not to file complaints against the accused will compound. With the legislation on death penalty the victim's testimony would pose a greater threat to the offender. Thus creating greater risks for women by posing them as evidence par excellence, in the trial between the state and the offender where the raped woman is the chief witness.

The call for death penalty will also increase the disciplining of women into stereotypical roles of what constitutes a good woman. Messages to women not to indulge in behaviour that is inappropriate to a certain notion of womanhood such as cautioning women not to dress provocatively, go out alone after dark or the idea that a group of women live alone if they do not live in the protection of 'their' men.

Moreover, the rhetoric extends disciplinary power over all women by scripting rape as worse than death, such that the fear of rape also increases exponentially the disciplining of women to enact appropriate feminine roles. An internalisation of the idea of rape as worse than death acts to further self-censorship, such being the power of the twin discourses of shame and honour.

The question then is retribution for what? It should be clear by now that the retributory logic operates within the structures of patriarchy which pose the state as the guarantor of the honour of a certain kind of women. It does not and will not in its enactment, provide retributory justice to all women. Further it entrenches the patriarchal common sense that those women who do not enact patriarchal standards of morality invite rape by provoking the uncontrollable natural male sexual urge, do not deserve retributory justice. The objective of retributory justice here is a certain kind of law and order, which on the one hand posits the state as the guardian of the chastity of a certain kind of women and on the other increases the disciplinary power over all women.

Thereby, although the rhetoric of capital punishment operates in the name of women, its objective is not the right to bodily autonomy of all women. Retribution, in this case capital punishment, aims at punishing men for having breached the contract between the masculinist state and all men. Its aim is to deter men from transgressing the 'normal' levels of violence against women. Thus the consequence of the proposal is to normalise violence against women which is seen as 'normal' in society and to deter what is seen as pathological sex/violence against women. The rhetoric of death penalty then really stages a dialogue between the powers of the state and its male subjects, which turns a blind eye to the risks women live and survive at an everyday level. EPW

Notes

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1 Following the Mathura Open Letter [Baxi et al 1979] written by four law professors to the chief justice of India, condemning the Supreme Court for acquitting two policemen charged with rape and molestation of 14 year tribal girl, Mathura, the issue was taken up by various women's groups. The groups pressed for an amendment in the rape law [see Agnes 1983; Dhagamwar 1992; Gandhi and Shah 1990; Baxi 1994; Sarkar 1994]. The demands proposed by the groups were then looked into by the 84th Law Commission in April 1980. In August 1980 the government drafted a bill which was presented to the Lok Sabha subsequently. The bill did not include any of the positive recommendations made by the Law Commission. It excluded one of the demands of the campaign, i e, that a woman's sexual history and general conduct should not be treated as legally relevant in constituting evidence in a rape trial. The other demand regarding the shift in the onus of proof was accepted only partially, in the custodial rape cases. But what merited the ire of the women's groups was that the bill attempted to make any publication relating to the rape trial a non-bailable offence with imprisonment up to three years by creating Section 228A. The 1980 bill was discussed and critiqued by the women's groups all over the country. The bill was then referred to a Joint Committee of the Parliament on December 1980 which submitted its report nearly two years later. It was only on December 25, 1983 a year after the J P C report had been submitted, that the bill was finally enacted after a four-hour debate in the Lok Sabha held on November 18, November 21, and December 1, 1983 respectively. Only 15 members were present and the Criminal Law (Amendment) Bill was passed in 1983.

2 Section 375, Indian Penal Code defines rape as follows:

A man is said to commit rape who, except on cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:

First: Against her will. Second: Without her consent. Thirdly: With her consent, when her consent has been obtained by putting her or any other person in whom she is interested in fear of death or of hurt. Fourthly: With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is, or believes herself, to be lawfully married. Fifthly: With her consent, when, at the time of giving such consent, by reason of unsoundness of the mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly: With or without her own consent when she is under 16 years of age. Exception: Sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape [The Criminal Law (Amendment) Act, 1983, Gazette of India Part-II. (Ext p 1 (No 53): also cited in Dhagamwar, 1992: 342]. A new category of sexual offences was created which

were described under sections 376 A, B, C and D, which while not amounting to rape, were criminalised as unlawful sexual intercourse. These offences were to carry a maximum punishment of five years.

3 In the realm of interpretation, partial penetration is sufficient to constitute rape.

4 The constitution of rape as a sexual offence therefore also implied a silencing of the violence on men by men (or women on women, although it may be argued that such violence is not paradigmatic to homosexual relations).

5 Pramila Dandavate and Geeta Mukherjee were the sole voices arguing that victim's sexual history was irrelevant in the quest to establish truth, See Dandavate (1983:450, LS debates).

6 Geeta Mukherjee and Susheela Gopalan registered their dissent as members of the JPC [see the JPC 1982:29]. Also see Dandavate in 1983: 449, L S debates, November 21.

7 It is interesting that in 1891 the issue of prevention of child marriage resulted in the criminalisation of sexual relations between a married couple if the wife was below the legal age of consent. The British legislators, raised the age of consent from 10 to 12 years for both married and unmarried girls, subsequent to the rape of 11-year old child bride Phulmonee Dasee.

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