



PARTNERS FOR LAW IN DEVELOPMENT

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# CRITICAL REFLECTIONS

## SPEECH, SEXUALITY AND THE LAW

# 2

**From:**

**Roundtable on Exploring the Continuum  
between Sexuality and Sexual Violence**

**April 28, 2015**

The **CRITICAL REFLECTIONS SERIES** comprises 4 volumes on the following themes, drawn from the *Roundtable on Exploring the Continuum between Sexuality and Sexual Violence*, organized by Partners for Law in Development on April 28, 2015:

### **VOLUME 1**

#### **MARRIAGE, SEXUALITY AND THE LAW**

*Has not having sufficiently challenged the appropriation of desire, love and sexuality by marriage, weakened our ability to challenge criminalization of adolescent sex, breach of promise to marry, and indeed, the partial de-criminalization of marital rape? The discussions will also explore the de jure position and de facto reality of the law.*

### **VOLUME 2**

#### **SPEECH, SEXUALITY AND THE LAW**

*This session will explore issues of censorship that relies on notions of 'obscenity', 'indecent' and more recently, 'hate' speech, tracing the different laws that contribute to this; it will take stock of the relationship of women's rights activism to each of these – commenting especially on the ways in which we have been complicit with or challenging of these; and ways in which these legal concepts have contributed to de-legitimising positive sexuality and sexual expression.*

### **VOLUME 3**

#### **CRIMINALIZATION AND SEXUALITY**

*The discussions will problematise over-reliance on criminal law for social change, a medium through which sexual agency and non conforming sexuality has historically been punished. In relation to rape, it will take stock of sentencing structure and lack of judicial discretion in sentencing, to discuss the implications, particularly in terms of exceptionalising sexual violence. The positions on gender specificity and neutrality in relation to laws on sexual/ gender based violence will also be interrogated.*

### **VOLUME 4**

#### **FEMINIST PRAXIS AND DIALOGUE**

*What has been the impact of popular and social media on public dialogue and reason? In what way can we devise feminist ethics, taking into account the current challenges posed by the state and the media, to create space for dialogue, reflection, to evolve strategies beyond penal law, indeed law centric approaches and binaries, that are also affirming of sexuality.*

# SPEECH, SEXUALITY AND THE LAW

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## INTRODUCTION TO THE SERIES

This report is part of a series of four, each covering a theme from the roundtable organized by Partners for Law in Development (PLD) on April 28, 2015, to explore the continuum linking concerns of positive sexuality with sexual violence. Conversation around these themes have become necessary in the context of a considerably changed scenario following 2012, with the State, political parties, the national media and multiple stakeholders, many antithetical to positive sexuality, adopting sexual violence against women as part of their agenda. The spotlight on high profile cases, an enhanced punitive legal regime, the calls for death penalty and reduction of age of juvenility, entrenched the exceptionalised treatment of sexual violence, with scant regard for reason, principles of natural justice, or indeed affirmative sexuality. Equally, the shrill sound bite driven discourse seemed to overwhelm women's rights activism leaving little space for critical introspection on the law; or indeed, of expanding the engagement beyond State, law and media driven change, to actively forge linkages with sexuality related concerns.

In the context of this changed landscape, the roundtable sought to explore linkages between positive sexuality and sexual violence, reflecting on the dangers of a predominant focus on sexual violence, or indeed on criminalization and censorship. That the amplification of sexual violence at the cost of affirmative sexuality, and indeed positioning concerns and work in relation to these two, as being distinct, unrelated ends of a binary, rather than a continuum with interconnections that shaped the outcomes of each other. For instance, normative sexuality, or indeed, the privileging of sex in the context of romantic love and marriage, are ways by which sexuality is regulated and transgressive desires stigmatized. A primary focus on sexual violence to the neglect of more insidious ways by which sexuality is regulated eventually strengthens protectionist narratives. A feminist discourse constructed primarily around sexual violence and the penal law, without sufficiently addressing other forms of sexual control, cannot fully challenge the culture of victim blaming and selective justice – the very trends that continue to define cases of sexual violence. These concerns cut across the themes, pointing towards the need for an expansive, critical and transformatory engagement. While this roundtable speaks to events following 2012 protests and law reform, the concerns raised are of wider relevance.

The roundtable comprised four panel discussions on the inter-related themes relating to the law, sexuality and sexual violence. The discussion on each of the themes was initiated by presentations of three panelists, followed by conversation on the theme between all participants as well as the discussants. To not lose the richness and nuance of the discussions on each of the themes, the report reproduces as them as truly as possible, with minimal editing, keeping intact the flow of the discussions on each of the themes. This however, made the report substantially long one. So, in the interest of easy

access and readability, we opted for separate reports for each thematic panel, rather than a comprehensive report of the roundtable. Broken up into thematic reports, each is short, and can be read independently, although interconnections between the themes make for a richer reading. These reports seek to take forward discussions started at the roundtable, to widen and continue the dialogue with each other and in the different spaces we are part of.



## SUMMARY OF THE PRESENTATIONS

These presentations raise concerns for feminists in relation to censorship of sexist or misogynist speech – examining different grounds of censorship, some of which were invoked in the call to censor Mukesh Singh’s speech in India’s Daughter.

Nivedita Menon’s presentation focused on contradictions of turning to the state for regulating sexist speech, through legal categories that are intrinsically antithetical to sexual speech, and through processes that pervert feminist constructions of the problem. She referred to paradox of turning to the state to censor dominant narratives while struggling to legitimise marginalised accounts; questioning also, the claims of offensive speech and harm caused, in the absence of a unified feminist position on the matter and when no linear connection exists between representation and reception.

Shreemoyi Nandini Ghosh questioned not just the grounds on which the call for censorship of Mukesh Singh’s speech (in India’s Daughter) was based, but also that the third party has no locus in seeking a gag order. His speech was sought to be censored on the misplaced notion of its bearing on the culpability, when the conviction was neither the subject matter of the pending appeal and when extra judicial confessions in any case are inadmissible. Flagging contradictions in feminists invoking the argument of a case being sub judice, given the history of critique of the assumptions about judicial neutrality and neutral justice on which the concept of ‘sub judice’ is based. She also cautioned against defining ‘judicial process’ to include not just trial and appeal against conviction but also all stages of appeals against the sentence, in light of the length of legal proceedings in India and its implications of silencing critiques. The presentation suggested that the call to invoke hate speech against parts of India’s Daughter is part of a trend of seeking exceptionally coercive approaches in criminal law to violence against women.

Siddharth Narain was of the view that, although legal redress against hate speech is necessary, the problems with the available offences (and taking recourse to them) in the criminal law need some discussion, particularly in relation to ‘offending sentiments’. The evolving comparative jurisprudence on this points to limiting the application of criminal law to hate speech that directly and proximately results in violence, or where extreme vilification is an incitement to discriminate; pointing out the value of civil law remedies and non-legal measures, including in cases of moral injury.

There are certain paradoxes that we face in the field of censorship. There are set of demands on the state which can be grouped into three axes – first, to censor on question of the sexuality and the expression of non-normative free sexual desire; secondly, whenever multiple voices are expressed from within religions and when there is criticism of religious traditions. These two demands are made by conservative right wing forces. And the third set of demand on the state is to censor hate speech which is made by the secular, left or progressive people which includes the hateful representation of marginalized identities, powerless, *Dalits*, women, poor, Muslims etc. So the demand of censorship can be classified into these three categories.

One of the paradoxes we face is that, when, we as feminists, make demands for censorship from the state for limitation on the political speech of other forces or any material, the only recourse we have is to laws. And these laws actually represent the world view of the dominant. For example, if we demand, as we did in the 80s, restrictions on images which objectify women, we take recourse to those laws which talk about indecency or obscenity because we don't have laws against objectification. In other words, we are using laws which represent the world view of the dominant. What happens if we feel, as many of us do, that it is obscene to show high levels of consumption when people are starving. Recently, we saw that an example of a different approach by which feminists managed to get an advertisement of Kalyan Jewellers withdrawn, which showed an emaciated slave body as a prop to Aishwarya Rai wearing jewellery, which seemed certainly much more obscene to all of us than the nude body of a woman. There would be no legal recourse against such an advert as this is not within the scope of indecency or obscenity as defined in the law. I differentiate between the kind of initiative taken in addressing an actual advertiser and someone participating in an ad, that is to say, addressing non-state actors by producing a public debate, an approach that is very different from asking the state to censor or invoking the law. These two approaches are not equivalent at all. What is interesting is that there is another notion of obscenity that is involved here which the law cannot address and that is one of the key paradoxes we face with respect to censorship as censorship entails turning to the law and to the state.

The second set of questions that arise from the fact that we as feminists, defend freedom of expression, not from the point of view of a liberal individual who has/should have unfettered voice to express his/her innermost views. The ideas of our freedom of expression is grounded in a vision of social justice and collectivity, which is actually the basis of our demand for and belief in freedom of expression, because we in a power laden and extremely heterogeneous society, we need to protect the voices of dissent. We want that - but this very notion of social justice also ties up with the need to censor

dominant voices that produce hate speech. So, there is freedom of expression for voices of dissent versus censorship for hate speech. And we need to recognise that the line between the two in heterogenous public is not clear because we need to speak in the heterogenous public which is not just 'we' but there are multiple listeners. So, this idea of freedom of expression, based on the notion of collectivity, rather than on the myth of the individual, leaves us demanding freedom of expression in some cases and demanding censorship on hate speech and other cases. This, I think is another paradox, that we need to think about.

Here I would like to come back to the point where Mihira's question on why feminists are held up to higher standards. The point is we do hold ourselves up to higher standards. This in the sense that I don't think that the right wing has any problem with making contradictory demands - censor this but let that flourish- but we have a problem as we want to be ethically consistent when we say we demand freedom of expression as well as censorship. These paradoxes arise because we hold ourselves up to very complex ethical standards.

These points that I am raising have been long thought about in the women's movement and are very, very serious ongoing debates. But I am puzzled by ways in which the debates are getting reproduced, as if from the 80s, but in a new way. Whether it is for the desire for sexuality alongside focus on sexual violence, which is the trajectory we saw in the last session; or from the 80s censorship position to proliferation of discourses to a return to, 'But my god, what is happening and do we need to have some kind of restrictions on images?'. I don't think it is simply a repetition of the 80s but something new and we need to think about why the questions are new again. The third set of questions has to do with questions of representation and reception. Once we recognize or accept the idea that representation is not a simple relationship between an image and how it is received and we recognise that the meaning of an image or an utterance is not contained inside it, but, it is produced by the context in which it is placed, we come to accept and understand that something is not by itself obscene. For example, a diagram drawn by a Class 12<sup>th</sup> biology teacher of the reproductive system may be utterly boring for the class but during tea-time or break, it may become a space of pornographic delectation. As a teacher, I sometimes imagine that I write something on the blackboard and it may later become spaces of desire; but it could, who knows?

What I am trying to say is that the meaning of things are not contained inside the representation. Once we recognise this aspect of representation, we simultaneously recognise that we cannot predict the reception of ideas, as there are multiple viewers and multiple readerships and the so-called male gaze of the camera is subverted by the queer gaze of the audience, etc. This would mean, then, that our political speech can be their hate speech. So Katju can say that Periyar was preaching caste hatred (and you know that has been quite a controversial statement), or Mayawati will be accused of preaching caste hatred, or secular activists will be accused of promoting communal disharmony and so on and we all know this. So, our political speech becomes their hate



speech and there is no space in which we can objectively prove that this is one or the other. In one space, it will always be hate speech and in another space it will always be political speech. Similarly, when you come to the questions of reception, for example, one of the key debates over the film 'India's Daughter' was whether what Mukesh Singh (one of the accused rapists) was saying was to be treated as hate speech against women and does it produce a sense of exaltation and general agreement in the male audience or does it produce a sense of shame and horror amongst men, that this person does not represent me; surely men are thinking that too, and we don't know that for sure. I was present at the screening of a documentary by Sania Ashmeem, in which boys and men actually say terrible things about women and sexual harassment to the camera, but in the audience, the response of some of the men was, 'Couldn't you find a single man who didn't say this? How is it that all your men are saying this?'. So with reception, is it clear that know exactly what that image represents and that all of us are seeing the same thing in the same image? Now among ourselves, I say 'we' as if we are a homogenous voice, but over the Ambedkar cartoon, 'we' all had different voices. Personally, I did not read the cartoon denigratory but many others found it to be so and violent towards Dalits. Clearly, it is not like one image has a single meaning, it is not like the intention of the author is fully known, it is not as if the reception is not multiple. When this happens, then, what do we do and what are the questions that arise in terms of turning to the state to censor.

I am going to conclude with one small point which picks up on something that I said, which I have a feeling was misinterpreted. Close to fifteen years now, I have argued and believed that the law can be counterproductive to the feminist ethics. You can see that when the language that we have to use is the language of the law. For example, 'cruelty' is one of the grounds for divorce, so if a man having an extra-marital affair is not treated by the judge as cruelty, then the woman cannot get divorce. So, for her to get divorce, the judge must feel that there has been cruelty. Similar is the case with obscenity and nudity and so on. So that continues the thread that what do we have if we don't have the law? In this context my position is that we can only counter images and utterances and receptions with more images and utterances and receptions. We can influence someone who produced an image to make them realise how hateful it is, and they might withdraw or they might not withdraw it, but we must do it outside of state spaces. Increasingly, under the current dispensation where the state is so willing to speak up on behalf of women, we need to be very careful of that. I was wondering if lawyers here can appreciate, not so much in this context, but in other contexts like rape, whether civil law or an alternative set of imaginations which might or might not be implemented as law, how we think about breach of promise of marriage. Can it not be thought of as breach of contract? Because the woman is hurt, she is angry and she actually wouldn't have slept with the man had he not promised to marry her and her only recourse is through the language of rape and sexual violation and the law. Can there be nothing in the lines of a civil remedy, to get back or be compensated for the years she spent,

without resorting to the language of violation and crime? I am sorry I brought that point in shadily but I wanted to speak about it.

Coming back to this point I say that there should not be any attempt on our part to resort to the state to control any kind of speech, unless that speech is, 'Right now, let us go and burn down that church'. But even in that case, it is the burning of the church that we should be talking about and not the fact that someone said that the church is to be burnt.

I will take off from the point made in the last session, about feminism's relationship with carceral or criminalising institutions of the law, to look at the sexual speech question through that. We know that in some ways sexual violence has a long history of being constructed as an exceptional space, in the law; like the dowry amendment, which shifted the burden of proof, feminist engagement with the law has constructed non-bailable offences and created a language of atrocity around sexual violence. At the time when these legislative changes were demanded and enacted, the exceptional laws like TADA and POTA that created non-bailable offences were not in place. The concept of extra-judicial confessions in POTA came much later, but the idea of an extreme violation can be seen in laws relating to sexual violence, dowry or dowry death. The demand for immediate shifting of burden of proof where dowry and death occur, to charge for homicide is an example. I am going to start from that point, that feminist articulation of sexual violence has a particular relationship to exceptional law and criminal law. There is a structural relationship between the two; it not just that feminists have just conceptualised responses in terms of criminal laws or that we just take recourse of the criminal law easily, but the structuring of law is in itself modified when it comes to sexual violence.

That leads me to talk about the recent 'India's Daughter' controversy, particularly about how some feminists drew parallels between the extra-judicial confessions of accuseds in terror trials like Kasab or Afsal Guru, that they made to the media or were coerced to give to the media, with Mukesh Singh's confession, equating the two. This position raises two questions – the first being, what is sub-judice, since that is one ground raised in the call to censor Mukesh Singh's speech. The second is, what is our take as feminists, on the recourse we want against speech that we find problematic, particularly when such speech is perceived by us as infringing the rights of a victim or an accused in legal case? There is confusion in the stance relating to these issues, so its necessary to de-mystify the law on it.

First, I want to clarify the concept of sub-judice as a lot of confusion exists in public on what is sub-judice means or what one can say about a pending case or any kind of case. There is no statute that explains the term sub-judice, it is not part of any legislation. The idea of sub-judice draws from the Sections 2 (c) and (b) of the Contempt of Courts Act, which pertain to scandalizing or bringing disrepute to the judicial process and obstructing the course of justice. When we talking about something being sub-judice, it means there is a pending court proceeding on which your comments or views may in some way, obstruct the course of justice, scandalize the judiciary or bring disrepute or lower the dignity of judges. The idea of restraining or censoring views in relation to a matter that is sub-judice is premised on the belief that the judicial mind is neutral; its

like a blank slate, so comments on the case is disruptive of not just judicial neutrality but also, disruptive of the judicial process related to that case itself. The question I ask is when did we as feminists buy into the notion of objectivity and neutrality of the judicial mind? Our efforts to push for and conduct judicial trainings is all about changing the judicial mind. When we conduct gender sensitisation of judges, or protest in wake of the Nirbhaya case, all this is done with the aim of influencing the judicial process. When some protestors were holding up posters saying 'Hang them', whom were they talking to? Obviously, these messages were to the judges, calling upon them to hang the accused. Likewise, the evening news or discussions on cases are intended to influence the courts, planned and timed as such. No one buys into the notion that there is some kind of enclosed space in which the judges live in, in which they are immune to the news about protests or discussions on cases. Then how can we justify or argue that in the case of India's Daughter, or in select cases or certain kinds of speech may not being articulated in the public sphere because it may interfere with the judicial process.

The second point I will take up, is about the question of the Mukesh Singh's speech in India's Daughter, which some feminists said amounted to a confession and on this basis argued for censorship. The concerns raised were that his confession on camera, whether inculpatory or exculpatory, should be censored on the grounds - whether he blamed somebody else or he accepted blame for himself, amounts to an extra-judicial confession, i.e., he confessed to a crime outside of the court. It was argued that therefore this speech would harm the accused and must be censored. The legal position on this needs to be de-mystified. The extra-judicial confessions are not allowed as probative evidence in a trial except under exceptional laws. Only under POTA can a police confession be used against an accused. In this particular case the trial is over, the accused, Mukesh Singh has been convicted, his first appeal is over, his second appeal on death penalty is pending in the court - and we are still saying that that his statement should be proscribed. Such an assertion has implications for how we want to define the scope of sub-judice. It basically means, that we are expanding the scope of sub-judice to mean a case which begins at the stage of filing of an FIR should not be deemed to have concluded until the after the three appeals - that means the three appeals against sentence/ death penalty. If this interpretation is endorsed by feminists that the matter remains sub judice as the judicial process continues through the entire process of all appeals relating to the death penalty then you are saying that there cannot be any discussion or debate on a case through the pendency of all appeals..That means that you cannot talk about the Kunan Poshpora or the Shopian rapes, you cannot talk about any kind of crime that has happened. If you want to take the sub-judice idea seriously as adopted by some feminists in the case of India's Daughter, this is what it means. Surely it cannot be anybody's case that we remain silent on these issues, or cease protests, or judicial trainings. It is necessary to therefore de-mystify the legal ideas we are talking about, because the moment sub-judice word is invoked, the press gets scared of contempt of court by scandalizing the judiciary.

The concept of sub-judice arises from an attitude of reverence to judicial imagination, which is to be viewed as a sacred space where certain kind of speech or things are allowed and certain others are not. The question then is not one of sub-judice or confession as positioned, but one of what happens to the victims and the accuseds when speech infringes their rights? In such instances, there are questions of privacy and fair trial and media trial in scandalous cases, for which existing legal protections are available. For instance, the High Courts and the Supreme Court have again and again recognised the constitutional right to fair trial and in some cases, the constitutional right to privacy. Thus, the accused or victim already has recourse before the constitutional courts if fundamental rights of fair trial and judicial due process are violated and can get a gag order. The problem however is how gag orders are used, or who are the people who get gag orders. We have seen that Supreme Court judges or R.K. Pachauri in TERI sexual harassment cases obtain gag orders. Phoolan Devi, sought one, because she objected to the depiction in the film and the Delhi HC ruled on privacy grounds that she was entitled to have that gagged, but it was overruled in the Supreme Court. So, individuals whose rights are violated have recourse to remedy from constitutional courts. India's Daughter raises the question, whether viewers have the right to be offended? For example, when as feminists, we are offended by, say, a movie, do we have a right to get it gagged? When it is neither clear what is the offence and what is the harm caused by it is from a purely criminal law point of view, what remedy does one have? When you call upon the carceral institutions of the state, you need to have higher standards as you cannot deny that it is a violent system that violates rights routinely and that cannot privilege your sense of violation, when as the criminal law system itself is an extremely violent.

On the right to privacy and fair trial of the victims and accused when freedom of speech infringes their right, I would suggest that there are already existing remedies and recourse to constitutional remedies and courts i.e., High Courts and Supreme Court. They have recourse by way of a gag order which is given by the courts only in some high profile cases such as that of Justice Swatantra Kumar and R.K. Pachauri. Therefore, as individuals whose rights are violated, they have recourse in the Constitutional remedies on grounds of privacy and fair trial. But as a feminist or a viewer we don't have a right to gag anything by which one is offended, when it is not clear what is the harm caused.



I would specifically focus on issue of hate speech and link it to debates around the offences related to gender and sexuality. Under Indian law, there are three kinds of hate speech legislations. First are penal provisions that are linked to public tranquility type of offences, such as inciting riots (Sec. 153A). Second, are provisions dealing with offending sentiments (such as Sec. 295A which deals with insulting a religious symbol or a religion itself). The third, relates to legislation that addresses systemic or institutional discrimination, such as, the SC/ST Act and recently, the transgender bill passed by the Rajya Sabha which has a provision covering hate speech. The idea behind these specific legislations is that there are communities or groups who need to be protected from extreme vilification or discrimination, acknowledging that this vilification is a historical fact and still exists. If you look internationally at how other countries have dealt with the hate speech question, the UN Special Rapporteur, as well as comparative best practices, they point that most jurisdictions, except some like the US, have retained hate speech laws, but have got rid of criminalizing hurt sentiments. They have converted hurt sentiments type of offences, into laws which protect against extreme vilification or incitement to discrimination against certain vulnerable groups. Here, often the vulnerable groups are minorities and identity-based groups, based on gender, sexual orientation, etc., depending upon the context of that jurisdiction. In most jurisdictions, you will see that race and religion based hatred that are common, but in some countries, other aspects are also brought in.

My sense of the hate speech question based on gender is that you cannot de-link it from the larger question of reform of hate speech law, for example, the issues which came up in the 'India's Daughter'

I am engaged in law-reform process with the Law Commission and one way going forward is to change the existing system, by doing away with the idea of criminalizing hurt sentiments and the narrow the scope of what is criminalized to extreme vilification and incitement of discrimination, as well as, of course, in cases when there is violence, with direct approximate link between speech and the violent act.. The courts have dealt with this question over a period of time and have held that there has to be proximity between what you say and the occurrence of violent act for it to be called as hate speech. Recently, in the Shreya Singhal case on Section 66A, it was emphasized that as far as Indian law is concerned, this is the position.

The reason why it might be difficult to pitch for this in India is that there is a big gap between how criminal law functions and the way it is incorporated on these statutes. We know how people are persecuted and harassed under these laws. But despite this, my sense of this issue is that there needs to be one core area which law still has to deal

with. The other measures for hate speech may be, for instance, civil remedies besides the criminal law. The entire debate on, for instance, whether it is the Ambedkar cartoon or the Danish cartoon, that there must be a recognition in some of these cases of hurt sentiment that there is a moral injury involved. It might not be a legal injury, but how is it recognized that there is a moral injury, because if the relationship between a believer and an icon is disrupted, then how is that disruption recognized? Ideally, this should not be an issue for criminal law to take on but other alternatives outside of the law should be established by way of the non-legal measures.

The other way of dealing this issue is through counter-speech. For instance, the action taken by police when there are online rumors is one of the best examples where they have become more active and started sending the counter-messages or counter-statements to stop the rumors. These are some mechanisms that we need to explore. Also, when we talk about institutionalized discrimination or systemic discrimination there has to be a high standards set for this. The idea is that taking mere offence must be differentiated from this particular harm, and for that distinction, there has to be high standards. Again if we look at countries such as Canada, they have set a high standard, so they narrow the scope when they differentiate between offence and discrimination.

I will end by linking it to the specific issue of gender and sexuality. For instance rape videos being circulated by the rapist, which Sunita Krishnan took up, including to the Supreme Court. She blurred the face of the victim but not the rapists, putting it up and in circulation, to ask to get the rapists identified. With this kind of circulation, there is a certain kind of charge that the media objects are beginning to have. There is also the issue of anonymity and spread is quick and vast. So these issues will come up in a big way and how do you intervene in these spaces and ask whether the law should intervene in such spaces. Also, there are provisions in the IT Act which talks about consent; Sec. 66E of the Information Technology Act says that you cannot circulate any material without the consent of the person. But from my point of view, it is a complex issue and there is a domain of what falls within hate speech that needs to be curbed, but equally, we need to make sure that this domain is as narrow as possible. We need to take into account the fact that there are huge problems in taking recourse of the criminal justice system and ask ourselves, if there are any other ways by which we can engage with the system.

## DISCUSSION

**JANAKI NAIR:** Thank you, those were three extremely insightful presentations. What struck me when they were speaking was also the extent to which feminists have generated sophisticated discussion over the last few decades which is also suffused with questions of the law, making it a very interesting discussion. This discussion has reflected certain set of questions that point to and address some of these concerns and anxieties that feminists have been raising. Just to say a few things before we open up for discussion, that there was a great optimism expressed towards the law in 1980s, viewed as something that will dramatically transform the lives of women. That has taken a bit of knock partly because of the kinds of ways in which the case laws have unfolded, in that what has happened in the courtrooms is quite different from what is envisaged in the letter of the law. Nivedita has summed it up well when she says that laws have been counter-productive but I will quote her own words back to her and say that . one cannot abdicate the law as the law does not abdicate us necessarily. So there is something to be engaged with in the sphere of the law, as we have seen in the other two presentations. I go with Nivedita in the sense that we cannot rest all our faith in the legal transmission alone, we also need to think what happens in the society outside. I recall that in the 1980s, when films, routinely, especially Malayali films, used to be advertised by words and images related to “rape”, the reaction of the feminists was to tear those posters to symbolically disrupt the ways in which rape was being enjoyed in the Indian cinemas. Little simplistically, that kind of protest was in some way adequate to counter certain kind of enjoyment of sexual violence against women. Certainly we have come a very long way since then.

To me it seems that what Sreemoyee and Siddharth are trying to say is that the law itself is much more complex as a sphere and they are trying to give us a view from the inside by saying that and we need to think of ways by which the isolation of judiciary can be countered and the ways in which we can strengthen some aspects of the law, vis-a-vis those groups which are affected by the hate speech. I come to this from a different position, when some of us were at the receiving end during 2012, as we were getting legal notices regarding the fact that our contribution to the NCERT text books had hurt certain sentiments. I agree with Siddharth when he says that we need to consider what feminists would like to define as hate speech and demand legal remedies, within the larger context in the subcontinent of waving the banner of hurt sentiment at the slightest provocation. We have seen a wonderful example of this in a recent film, ‘Court’. We felt the importance to distinguish between hurt sentiment (that people have been appealing since the 19<sup>th</sup> century), from what we should acknowledge as historical wounds. Can we strengthen the ways in which historical wounds are thought about. Would the kind of things that are being said about women be seen on the same plane as the SC and ST communities, who have managed to secure the protection of law. I would

like to say, although it may sound a little provocative, that while hate speech against caste has become un-permissible because of the strength of the law and political organisations, we cannot claim the same kind of triumph about feminism, despite the extraordinary energies that have gone into pointing out how certain representations offend women. I often wonder what accounts for the difference or whether the provisions of the law, actually make such a difference. Also, there are new registers on which offences related to speech take place - such as MMS, with new devices other than images or cinema.

**RAHUL ROY:** I have a couple of questions and some comments. Since I come from a tribe which is censored even before we speak, I am actually very touchy about censorship. My speech is deemed subversive by the state even before I speak. To me the problem is that besides the law itself (given that censorship is essentially connected with the law), the existence of law creates a whole regime of private censorship. It came up starkly in the context of the film 'India's Daughter' where some of the feminists fell in the trap of privately censoring film, by seeing the film and then saying that it should not be seen by others. That is a trap that we need to be very very careful about within the women's movement because we have been repeating the same debate since the 80s. Honey Singh's concert in December, 2012 is another example, because there, although no one demanded legal action there was a huge protest accompanied by a demand that the concert should be stopped, which was actually stopped on account of the massive protests outside the venue. Looking back I feel that we need to revisit our stand where we were not actually asking for prosecution but the protests actually led to a condition where he wasn't able to perform. So, how does that place us on sharing the ground with the right wing actors? That is a question that we really need to address.

**RADHIKA CHITKARA:** We are talking about not resorting to the state as quickly as we do to ask for censorship and instead to opt for strategies encouraging some kind of self-reflection, a good example of which is Kalyan Jewellers. But we also had Perumal, the Penguin Books and the Orient Blackswan, followed by India's Daughter, different examples of a collectivity asking somebody to not say something or not to show a movie. So, there is a clear division within the movement that whether or not India's Daughter was harmful or whether or not it should be shown at all. On one hand we have that sort of space where existing inequalities or violence get reproduced even more, and on the other hand we can't seem to find a consensus within the movement of what should be permissible and what should not be permissible. Leaving aside the State, there is also a lot of contestation happening outside of the State which is leading to pre-censorship anyway.

**RITUPARNA BORAH:** I want to talk about censorship not from the State's point of view but also self-censorship within the feminist movement by ourselves. My first example is the letter by some feminists on the movie 'India's Daughter' I had several reservations about the ground of sub-judice that they raised. But since they were lawyers, I was not able to counter their language of law with my non-legal language. The second example is

when the Vogue Empower ad on 'My Choice,' against which there were counter-videos by feminists which were very problematic and aggressive because they said questioned how Vogue could talk about women - that since Vogue ad was not talking about rural women or fat women and so on, they had no right to talk about women. This to me was very problematic, while the main video did not seem problematic to me. Therefore as feminists we need to ask ourselves things like whom are we talking about because the feminist movement is very fragile - it is not just one movement but there are several movements coming into it like that of the students or the young people which may not have roots in the women's movement but are speaking the feminist language. So how do we see the feminist movements and other movements in this context?

**SREEMOYEE NANDINI GHOSH-** I want to pick up the point about private regimes of censorship and the reverence for the law, as kinds of internalised regimes censoring our own speech and our own ways of dissenting. The law creates a regime of permissible and non-permissible speech and whether we want to or not, we internalise them and don't want to violate. The other aspect is related to the feminist movement's standards. We need to think about both in the discussion on censorship.

**FARAH NAQVI:**I want to raise three points that came to my mind while hearing the panelist. First of all going by the three concrete examples of Honey Singh's concert, India's Daughter and Aishwarya Rai's racist ad, while comparing all of them, there is in some sense a similarity in that the demands were made to ban or censor these on grounds that it will influence behavior. So all these were mirroring a kind of incitement to violence, that is covered by a legal provision, although not all these protests invoked the law or a ban. But, the Deepika Padukone video comes in a separate category because nobody asked for a ban of that. It was critiqued, and the language or style of the critique is a wholly separate issue. But in the abovementioned three examples we felt that the case is stronger, if it is linked to behavioral change. So, viewing, reception of anything and its censorship gets credibility only when it is linked to actual behavior.

Second, on the issue of rape video, there is a problematic terrain over here, because what is rape video circulated anonymously, is like porn for people viewing it. So how do we begin to stop, engage, critique, decontextualise it to arrive at an absolute position? Do we go back to the argument of intent, which takes us back to the point when we say the filmmaker didn't intend to do this or the author didn't intend to do that, which seems really irrelevant to the entire debate of representation, because you put it out there for your audience. How do we ethically and legally engage with the rape video issue?

Third, Janaki made the point of how the feminist movement is not able to generate that kind of powerful political stand on the issue of hate speech which the Dalit movement has already achieved. Perhaps the existence of law has created a deterrent effect in the society, even though the caste prejudice is widely practiced, but it seems somewhat different because of the fact that the law came into existence because of the robust Dalit politics, so it is not as if the law came in and then everyone in India started being careful



of how one should speak. Instead the law was in itself a product of a vibrant non-State space of Dalit politics because of which the law came into existence and made conditions in which caste abuse was not permissible. The SC-ST law is a very exceptional identity-based law. Can the women's movement hope to reach that level of Dalit politics?

Last point, from the first session, I want to make is that the women's movement has always been active around the law reforms, but a debate spanning sexual violence to desire has never taken place. What has remained consistent is that through these years, this amorphous women's movement, has always been moving around the law reforms, be it rape law reform or dowry law reform, etc. So that is something to note in this periodisation that we went from one law to another as the focus of our work.

**MIHIRA SOOD:** My question for Nivedita is that in relation to hate speech, is there a distinction between collective dissent based on collective identity that is different from majoritarian dominant voice seeking censorship. How would this apply to intersectional identities – in terms of even determining who is the collective that is being spoken for, and what amounts to a dissenting voice.

**NIVEDITA MENON:** To Mihira's question, I would say that the distinctions between the dissent and majoritarian censorship, or between intersectional identities, are unsustainable. We imagine our politics to be so shiny bright that they're clear to others, to assume that the distinction we're making is sustainable, although increasingly we've seen that these distinctions don't work. Siddharth said that the law needs to address one core area of hate speech, although with a high bar to strike only at speech with leads to violence. I am asking, what is that incitement to violence, or what is the speech that leads to some action for us to treat it as censorable speech. What could be such a high standard? To me incitement to violence does not work. Let us take the example of the rape video, which becomes a sort of test case, of proliferation of such speech. The point you made about the video being porn for some, takes us back to a point when many of us had said that the pornography industry is based on a lot of violence such as rape, drugging, etc. So our argument in such cases, has been that the image has to be seen as an image, including this. But Sunita's campaign, where she made public the faces of the rapist and concealed the face of the victim, has emerged as a counter-statement, rather than censorship. I think a larger point is that one shouldn't keep turning to the law; instead we as feminists need to say that these images are working because of the sense of shame attached to it, which is also the case with close circuit cameras, which capture say, women's breasts. What if as a response, we were to launch a campaign of images of breasts without faces, where we say, 'If you want to see breasts, then see breasts of 80 year olds, 10 years old, a man's breasts, etc.' I feel angry that we need to be constantly scrutinising the place for a camera because somebody wants to watch breasts! Even rape works because once a man sleeps with a woman, he has power over her. We need to address that shame – to say, it is nothing, you only had sex! Of course, I

realise that that shame will not go away that easily, and there will be women who will commit suicide because of this.

I am saying, as feminists we must produce an alternative discourse without turning to the law, and do that more aggressively. We need to be able to produce counter-discourses of shame, where men feel ashamed to say some things about women. In the National Law University incident, where someone from AIB said something offensive and the students protested, I feel that the protest did not take the form of stopping it as such but to pointedly walk out. Similarly, the protest against Honey Singh was actually effective because it was not directed at state but at the organisers – yet, it also gave a moment for everyone to think about his lyrics. If something like this were to happen in my University, I should not be going to the VC to ban it but there should be enough space to do and say things so that the ‘offending thing’ gets delegitimised. At the same time, we cannot say that let them organise, and we will later produce counter-speech. There needs to be some way in which the counter-speech can also be immediately created depending on the situation and the effect it has. So all forms of protest need not be in the form of censorship and we do need to make a distinction between invoking a State censorship laws from collective forms of producing counter-speech.

**SIDDHARTH NARAIN:** Responding to some questions, I would say that, hate speech in relation to gender and women is directed towards a particular group; but in the case of a rape videos the issue is whether we want to see it in terms of the individual woman who has not given the consent or do we want to view it as a concern of the larger community. The issues are more complicated when it comes to the gender specific issues. On Farah’s point on intent, I would say that intent in law is very important as it is malicious intent which distinguishes the hate speech from that which is not hate speech. Intent is read by judges based on the context attached to the case. It is true that, in the SC/ST Act the speech provisions are very wide to curb the hate speech. Yet you cannot include within this scope, things spoken against a leader of the community or forbid the use the word ‘untouchable’ etc, which is a reflection of the historical struggle.

In terms of Nivedita’s question, I think a lot of people who have written about it, in particular, Susan Benesch who has written about the five principles on which there is consensus, say for example to say something offensive in a very communally tense situation, like in Rwanda if you say ‘Tutsis are cockroaches’ on radio then that is kind of situation we would be talking about.

**AYESHA KIDWAI:** I would like to take up the case of the National Law University where one could see comments on social media, which made it very complex. One of the things I have faced often as a member of the gender committee in JNU are the comments and statements made in social media, which is increasing at an alarming pace these days. One of the problems is that it is done anonymously and they identify the complainant or they identify a group of women, and for many, this is scandalising the public about them. We have complaints which claim to be directed at all women or at specific groups

or at individual women. Although intent is difficult since the such forms of speech are anonymous, yet the women feel that it is targeted at them. So it is imagined to be hate speech. Here, you can't counter an un-named person. It creates circulation of anti-women material. No law can take care of this, although its emerging as one of the biggest tools used to harass women. In the 90s there was a similar case of blue films being shown in boys hostels. In the NLU Delhi case, there was enough discussion to make it an opportunity for gaining confidence to speak about it in the future, but how do you exercise that right? When can you disrupt a performance? This also happened when a senior lawyer of the Supreme Court was charged with sexual harassment; women's groups protested outside, he was himself the chairperson of the committee that acquitted him. So the issues are complex and it has to do with recipients, then how do you determine what is legitimate protest against hate speech?

**SRIMATI BASU:** Going back to my point that feminism is lodged in a space of exception and groups who are against feminism resort to Art. 15 which asserts both equality and protection at the same time. So the question is if you are making an extreme case, I have a problem putting religion in that same space as caste and race or gender. One must prove structural privilege not simply invoke religion as the basis - because religion inevitably attracts innumerable cases, for example, going back to the case when some people air the dirty linen of their community in public, as the case of the Sikh woman in England, their critiques are sought to be silenced. Also, in the Charlie Hebdo case, is it offending because its discrimination against Muslims by the politically dominant in France or is it offending the sentiment of a group? Does it matter if you offend the Pope in the same way in France? And that is where the murkiness lies. So it is difficult to determine the relationship of hate and violence, unless someone declares that 'I am raping you because you belong to X caste/category'. How can we factor in the understanding, the idea that things have different receptions and perceptions?

**ARCHANA DWIVEDI:** I was thinking of censorship in terms of the calculation that if you allow this it would lead to something else, like sex education in schools. Censorship is also based on idea of tolerance and intolerance and depends on political ideology we uphold. So what is not tolerable to us may be perfectly acceptable to someone else. So if we feel that something is against the interests of larger public, then there is the divide where we don't tolerate something but expect others to tolerate our views. Also, about the intent, it depends on the intent of the law, but who decides that. Is it stated in the rulebook or interpreted in the judge's mind, because a law can be understood and applied in so many ways.

**SIDDHARTH NARAIN-** On the point of religion, the shift has been that you protect religious groups and shift from blasphemy laws to protection laws. And on the issue of intent, the judges read the intent based on the context.

**JAYA SHARMA:** We often get confused about what we have a problem with - is it the sexual nature of any material or sexism. It seems simple but it is not, for instance, Honey

Singh's songs. We as feminist activist need to look into the issue that from where the discomfort comes and I suspect that that whether the discomfort comes from the fact that anything is too sexual, and not necessarily because it is sexist as there is a slippage between the two. Also the way we deal with porn and our attitude towards it is problematic as if all of it is bad and sexist. The other thing is that we say we don't want to use the law much but we want to use counter-speech but somewhere there is an anxiety that there should be one kind of counter speech. The different positions and diversity are not recognised.

**APARNA CHANDRA:** Talking about the legitimate forms of protest and disruption I would point out that, when we talk of counter speech, we assume that all speech is of the same value. Yet, its circulation depends on who is dominant and who is oppressed. Taking another example from NLU Delhi, students put up posters showing the kind of sexist jokes that are cracked and how gender hierarchy is maintained in the campus. This was seen as disruptive acts of angry feminists who can't have a calm debate. The issue of challenging the hegemony then gets shifted to the question of disruptiveness and whether it is a legitimate or illegitimate form of protest. So, how can we engage but in ways that are disruptive, because not all forms of disruptions are equal or all forms of speech are equal.

**MONA SINGH:** Let me state that in the campus at NLU Delhi, sexual harassment is not unheard of, but action being taken on sexual harassment complaints is totally unheard of. This is not a campus with a rich history like JNU or an older institution, yet we were trying to build something. Three years ago, when students were playing Holi, some University students were making videos of the girls. When dragged to the Registrar and the VC, no action was taken. So some girls protesting against a performance means, so even though there was some space for protest it did not mean that the institution shared the ideas with feminists? It is just individuals or a small group of students who protest and the institution does not imbibe the culture of no tolerance for sexual violence. So protest needs to be encouraged in spaces like these.

**NIVEDITA MENON:** I think what happened in NLU Delhi was fair protest. Of course the counter-speech will not have the same power as a hegemonic speech, but if there is a continuous protest happening it will affect the general behaviors. Even in JNU it happens, but we need to create spaces for legitimate protest from our point of view.

**NANDINI RAO:** My little dissenting note on the regime of private censorship when we are talking in terms of the film, which many of us spoke about, when the State says ban it internationally, it is different when feminists protest against it. In my view former was censorship but the latter only about postponing the film.

**SHREEMOYEE NANDINI GHOSH:** In response to Nandini, the protest letter of feminists based on sub judice and hate speech overlapped with the State ban, since the matter of hate speech cannot be resolved by mere postponement.

**POULOMI PAL:** In Canada there is a distinction between offence and discrimination. But in India, in the women's movement, we have always interacted with law in a certain way and I wonder why there hasn't been a general legislation that deals with non-discrimination in India. We have the SC/ST Act which covers caste discrimination but I am not sure why we haven't asked for a law against all intersectional discrimination.

**JANAKI NAIR:** that has been an extremely lively discussion. To wrap up, a suggestion was made by Lawrence Liang about articulating the right to be heard as opposed to the right to free speech is something we have to think about. The thing about law is that there have to be attempts to reform law, both from within and outside the law and we had great inputs from lawyers here as well as the feminist take on what the law can actually achieve or what is the limitation of the law. So thank you very much for that.



## CONCEPT NOTE FOR THE ROUNDTABLE

The past couple of years have witnessed surge of interest on issues related to sexual violence. Sweeping law reform has instated a new legal paradigm to address sexual violence. Political parties have competed in elections over who can best provide 'women's security'. Strident calls for death sentence, media attention and exemplary state action in high profile cases have come to mark the exceptionalism within which sexual violence has come to be framed. Recurring outrage and calls for censorship of sexual expression, banning books, documentaries, art and entertainment shows in the interest of honour, culture and safety of Indian women, from obscenity and indecency have continued relatively unchallenged. Sexual violence is no longer taboo subject – it has currency in elections, national media, public discourse – and is of concern to a diverse cross section of society.

Have sexuality and sexual rights been marginalized in the process of amplifying sexual violence? How do the women's rights and progressive voices continue to engage, debate and respond to events in ways that do not unintentionally strengthen and reinforce protectionist narratives, or positions that exceptionalise sexual violence, or indeed, state centric change processes. And importantly, how to does our articulation of sexual violence, not diminish or marginalize discourses that are affirming and advancing of positive/ non-normative sexuality.

Has the reliance on criminalization, law, the state, and the national media as the key vehicles of change, shrunk the spaces for dialogue, nuance, affirmative sexuality? Have our interventions/ engagement strategies, including in relation to select cases, contributed to a vocabulary where violence and victimhood dominates the conversation on sexuality. Has our discourse on sexual violence neglected the differing ways in which violence is viewed, understood and appropriated within patriarchal structures and the nation state, such that it lends itself to protectionism and censorship of sexual rights. PLD's work with counselors, crisis centres and social workers suggests that a paradigm that focuses heavily on sexual violence, does not lend itself to affirming or defending positive sexuality. Accordingly, community groups, counselors and courts grapple with multifarious cases of 'rape': somewhere consent is material to determination of rape, others where age or condition of marriage is the key determinant, prodding us go beyond simplistic binaries of consent and non-consent. While criminal redress is theoretically available (within the limitations of a fraught legal system), there is no easy articulation or ready defence of autonomy, desire and sexuality.

This roundtable seeks to discuss the many ways in which sexuality, sexual rights and sexual violence are inter-related, and explore the ways our strategies and framing of sexual violence has impacted positive sexuality in the current context. It seeks to critically reflect on how our reliance on criminal law and a sound bite driven media, have shrunk spaces for dialogue, reflection, uncertainties and mindful articulation of sexual violence. It seeks to explore ways of articulating and responding that do not compromise positive sexuality; or indeed, limit our ability to defend and affirm sexual rights.