



PARTNERS FOR LAW IN DEVELOPMENT

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# CRITICAL REFLECTIONS

## CRIMINALISATION AND SEXUALITY

# 3

**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', 'indecenty' 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.*

# CRIMINALISATION AND SEXUALITY

## PRESENTATIONS BY:

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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 PRESENTATIONS

These presentations question the over-reliance on the state for social change, notably through the exceptionalisation of violence against women within the coercive criminal justice machinery.

Rahul Roy's presentation questioned whether the feminist demand for countering violence to build a just and humane society can be fulfilled by reinforcing and legitimizing coercive mechanisms of the state. Despite the lessons of the anti dowry movement's experience with the criminal law, we seem to continue to rely upon the State and its carceral power, in itself patriarchal, as the primary means of fighting patriarchy. The trajectory of the women's movement, from the early campaigns to the Justice Verma Committee, continues to emphasise criminal law reform at the cost of communitarian political transformation. The increasing emphasis on punishment, public shaming and retribution can be viewed as a reflection of caste and class positions, speaking to our location in society. With little evidence of the reformatory potential of incarceration or the translation of punishment as a deterrence to crime, along with the studies on prison sub-cultures of violence, alienation and misogyny, he called for a stronger emphasis on community interventions to attain transformation.

Mrinal Satish's presentation also challenged the demand of harsher sentencing for rape, particularly through removal of judicial discretion in awarding less than minimum sentences. He analysed the problems with exercise of judicial discretion in sentencing in rape cases for the 30 years prior to 2013 amendment when the law permitted judges to reduce sentences below the mandatory minimum for 'adequate and special reasons'. He questioned the wisdom of limiting critiques of judicial discretion to only the problematic stereotypical grounds of virginity, marriage etc on which discretion was based, without critiquing the glaring absence of legal reasoning as the basis for sentencing. As a result of this insufficient focus, judicial discretion itself came to be viewed as a problem, done away with, and combined with higher sentencing structure. Mrinal drew attention to ways by which removal of judicial discretion, validates harsher sentencing and deterrence as a principle for bringing about change. Yet, it only allows greater acquittals, tokenist responses, while shifting exercise of discretion to more problematic agencies such as the police.

Akshay Khanna's presentation questions the need of feminist movement to legitimise its protests inevitably through reference to the law. Drawing parallels and distinctions with the campaign against Sec 377 by the queer movement, he drew attention to the ways in which relating with the law itself began to circumscribe the scope of the movement, and flattened its identity and organising. The concern he posed was not so much about law being one part of a protest, as it was about an obsessive focus on law and the state to validate a protest or movement. This he said, was exemplified in most feminist narratives of the post Nirbhaya moment which have been described in terms of outrage

against sexual violence or with reference to the law reform, rather than as a moment, defined by the takeover of the city by the protestors. He called for an urgent and conscious withdrawal from the state, inspired by the schizophrenic character of the law, which, on the one hand, offers the promise of emancipation from marginalization, but also forces engagement strictly within the parameters of the law and legal process, which allow little room for radical politics. This sense of politics he argued, has certain similarities with coloniality and its hierarchies, privileging those who are capable of thinking in terms of justice, abstraction and interpretation of law, as opposed to lower courts who are simply implementing the law. He contrasts such movements with the more radical mobilisation in Delhi in recent times, such as the 'kiss of love' and the 'sanitary napkins' campaign, that were unencumbered by law, legal legitimacy. They re-defined protest politics by being utterly irreverent to all institutions and systems of power, including the law.

## RAHUL ROY

### *Filmmaker*

An important aspect of countering violence against women has been the naming of violations and thereby forcing an acknowledgment and breaking of silence and denial. Therefore, naming has always been the first step in developing strategy to counter this violence. Naming and precise descriptions of violation are also requirements of law, while the process of naming and breaking the silence may not start with the aim of enshrining in law but particularly that tends to become the end point; the point after which there seems to be a closure to both naming and as well as any further expansion. And to re-open the process requires yet another pitched battle which often takes years. The other side to the story is that while the process of naming may not have the sole aim of it being enshrined in law and other solutions are always articulated and suggested, it is the framing of this in law which often becomes the focus and the state manages to not only draw attention to this process but also puts forward a face of reason and concern, as was clear post December 2012. Having said this as a kind of preamble to my presentation, I would like to start by confessing to a certain discomfort that I have carried since December 2012, at the jubilation and a sense of achievement displayed I heard at several meetings that were organized immediately after the Verma Committee submitted its report. The one common refrain that was that we have been waiting for this since 30 years. I could not really figure out, however significant and important the Verma Committee report was, that it could become the answer to the long wait of 30 years. I kept quiet because clearly that was not a moment for doubters. I say this, because I do feel it was a greatly significant moment, although not for the Verma Commission Report, but for the mass protest across the city. It was a fleeting moment that provided us with a proof that there are non-state led methods of making the city safe for women. The one image that is engraved in my mind is that of a young girl walking in the middle of Copernicus Road on the divider balancing herself like a trapeze artist at around 7.00 pm with cars whizzing past, without a single comment passed or honking. It was a like the most normal thing that she does every evening (I doubt if she ever did it again). I wonder, did we really engage with what happened to the social that makes up the city or even begin to understand it.

I would like to start from the position that principle aim of countering any form of violence, I presume is to build a humane and just society. So our politics and our political demand should be reflective of that position. It is in this light that we need to reflect on our demands for penalty from legal systems based on coercions, to ask ourselves if we are in some way contributing to reinforcing and legitimizing the coercive mechanism of the system. I am also asking the question that is more fundamental: Are we thinking of prevention? Are we discussing the systemic change that cannot be addressed through law, but requires a more communitarian approach. I am afraid what we are witnessing today is the pointing out of villains, demand that they

be punished and display of moral indignation that is easily picked up by the master of all moral indignation: the media. It sensationalizes, gives everyone the publicity that is required, without touching the conscience. There is no feminist research demonstrating that the offenders have been transformed because of the punishment or the victim lives have become better or safer because of the penal provisions. Even then we continued debating about the systems of punishment that are more efficient, to cast the net wider.

Here I would like to draw your attention to two points, one anecdotal and the other from our involvement with the women's movement in the 1980s. I have been over the last decade collecting the anecdotal stories of Jahangirpuri men narrating their lives and the changes that they are witnessing. In the late 1990s when I started working in the area, a common sight would be of a woman running from one house to another, trying to save herself from a violent husband who may or may not be drunk. However, it is nearly impossible witnessing this now. One of my informants explained the reasons behind the disappearance of this phenomenon. It seems that men are now truly scared of the Distress Call to the police helpline for women. The proliferation of mobile phone and the danger of the woman or a neighbour calling the police, to then being hauled to the police station and subsequently either bribing himself out or either providing in writing that he will not repeat the offence has changed the nature of this form of violence. I am told that the violence is now more controlled, measured and careful so that it never reaches the point where the police could appear. So slaps, pushing, abuse seems to have replaced the uncontrolled violence of the past. So it is not the violence that has disappeared, but aided by technology and pressure on the police to act, the violence has gone underground and therefore, remains unreported, never making it to the crime statistics.

The second point I want to make is in relation to the anti-dowry agitation of the 1980s which marked the coming of age of women's movement in Delhi. A document by Jagori in 2009 says, "two decades have gone by since the streets of Delhi resounded with anti-dowry slogans when women were picketing outside the homes of the families found guilty of dowry harassment. Streets have fallen silent but violence has not waned. Not only have dowry demands not gone down but onset of liberalization, the rise in consumerism have further stoked them, lengthening the dowry wish list. Notwithstanding a string of amendment to the Dowry Prohibition laws since 1961 and efforts to make the law more and more punitive, dowry and dowry related violence are rampant." Then there is a section in the report which says 'Is there a way forward', and goes on to say that, "there are no easy ways of breaking the lull in the movement. In fact it would be difficult to address the problem of dowry and dowry related violence through a single strategy. There can be efforts to revive the momentum, perhaps not in the sense of mega-movement of the 1970s and 1980s but through local activities sustained through a multi-pronged strategy combining agitations with cultural activities bringing out magazines, newsletters etc." - from a document called 'Resisting Dowry Death in India, 2009' written by Monobina Gupta. It is interesting how we are again and again reproducing the same debates about effectiveness and non-effectiveness of law,

what strategy and how do we move. What has been the experience in other countries? I want to quickly in broad (or rather crude ways) draw some parallel of our experience with the experience of let's say, specifically of U.S., Canada and U.K. What has been the experience in other countries, specially, the Western democracies. It is not surprising that in more ways than one, we in India traversing a similar path as far as countering violence against women is concerned. Though to be fair, there are differences that emerge through local cultural and social ideas, prime example being the idea of Mahila Panchayat. In Europe and U.S., interestingly, in 50s and even the 60s, a whole range of political ideas including the social democratic parties were talking of criminal, prison reforms and abolition of capital punishment. The early second wave feminism opposed all forms of state punishment. In fact, very interestingly, feminists at Berkeley, California as part of their opposition to the punitive arm of the State adopted the strategy of protesting rape by organizing protests outside the rapist's house with the aim of shaming him. Very reminiscent of what was happening in the 1980s in Delhi during the anti-dowry protests. However, in U.S., U.K. and Canada with more research revealing the silence, as well as the endemic nature of violence against women the situation changed rather dramatically over the next decade. Susan Brown Miller, et al. provided the impetus for merging the opinion of the Left and the Right that demanded criminalization and incarceration. The 1970s in the West, reflects the trend that started in India in 1990s. The scale of the problem, it seemed, could not be addressed through volunteerism and without involving State and an argument was made for the State to step in with funding and resources. And the State in U.S., U.K. and some other parts of Europe was more than willing to step in not only in terms of funding, but also through adoption of more and more coercive policies and punitive action. The period was marked by government funding of hotline, crises centres and shelters. The stepping in of state meant that policies were now decided in government offices, state agencies hired staff for the jobs, and women who were victims of violence became clients in need of individualized therapeutic assessment and help. It marked an end to political action, creating employment for specific categories like therapists, social workers and lawyers. If the provisions on PWDVA and our own anti dowry law were to be strictly implemented, this is exactly the scenario which awaits us in India. Though the 70s and 80s laws and policies on sexual and domestic assault went through several revisions and amendments, which sanctioned the introduction of mandatory responses, arrests. In the context of U.S. and U.K, where these policies have been well documented, show that these contribute to greater surveillance and criminalization of those, who with a happy dose of racism, could be described as 'natural born criminals,' working against social groups who lives are easiest to scrutinize and those least resistive to intrusion. I am obviously hinting to what happened to the Black community in the U.S. and creation of prison industrial complex. Tihar Jail is already experimenting with and becoming a factory of various goods including *namkeen* and furniture and it's not long before the penal system is outsourced and it becomes a more efficient site of production with a regular need for replenishment of labour. Recall here the films of the 60s and the 70s,

where jail featured aimless digging by the prisoners, leaving one wondering what were they digging for. Perhaps the answer will be corporatisation of jails for production.

Coming back to my argument, there is little evidence that increased criminalization has either empowered women or made them safer in or outside their homes. Support for criminalization has almost always fed by anger and fear. In the context of U.S., the fear of black male has always been very high and continues to be so even today. In India, we are not short of many categories of others. It is not an accident that 32% of those in jail in Maharashtra today are Muslims while their population in the state is 12%. That fact also is, that fear and vulnerability of women is not just an imagined state but based on real everyday experience of discrimination, dis-privileging and intimidation. However, should we allow this real fear to translate into promotion of incarceration needs more carefully thought through. How are we to reach a conclusion that incarceration is actually going to make our cities safer?

Are there other ways by which we can imagine making our cities safer? Some experiments on the small level are noteworthy. But to be of significance, the scale has to be much bigger and the politics has to be more innovative. Criminal justice systems are probably the least effective institutions for deep and transformative change. Studies all over the globe have shown that the utter failure of the prison system institutions. Most studies confirm that prisons reinforce criminal subcultures, impoverish families, making those jailed more bitter, unemployable and more misogynist. Given the scale of violence against women, retributive justice that criminalizes men seems to be the most popular mode of responding to the horrors that we face. However, the fact is that meaningful transformative social change can only be achieved by transforming identities, groups and structures. For various groups from Left and specially feminists to embrace the agenda of punishment is worth looking at closely. How we punish reveal much more about our politics and not just our politics but our caste and class position. It is a not-so-pleasant peep into our own position in the social order and hierarchies therein, and worse, our ideas of the State. Revenge, cynicism about reform, inflicting of pain, wounding, if those are going to be our response from a feminist position to aggression and violation, then I think, something has gone horribly wrong. Some of the provisions in the Criminal Amendment Act 2013 are such that they lend to criminalizing offences which should have other forms of redressal; specially referring to Sec 354A. To harness State power as a counter balance to a patriarchal power is a dangerous game to play because the State is the biggest patriarch around.

The susceptibilities to agendas of criminalization and failure to separate processes of social control from institutions of penalty have serious social consequences. Moreso, in the current scenarios of cataclysmic social changes. Communities simply cannot be transformed into safe and civil spaces by installing cops and cameras into every corners or social workers in every home. The instrumentalist approach which state and non-state actors are utilizing is going unquestioned. The thousands of cameras looking at everyone all the time is another implication besides supposedly making the city safer

for women. Criminalization does not solve the problem of uprooting of people from villages, to urban cities and centres. However, it does provide an outlet for legitimate rage without disturbing any dominant equation including those of patriarchy and capital.

## MRINAL SATISH

*Associate Professor, National Law University*

I am going to be looking at the issue of sentencing. In the discussion on rape law reform in India, historically to now, sentencing has been one of the central issues. In this presentation, I will talk about how deterrence has shaped sentencing through two related aspects – one, the issue of higher sentencing as deterrence, in higher sentences, death penalty and importantly, what I will focus on, a strict minimum mandatory sentence that does not allow room for judicial discretion; and second aspect I will focus on is what the removal of judicial discretion in sentencing for rape implies, and its consequences.

The 1983 amendments to criminal law (post Mathura) which brought in custodial rape provisions and changed various provisions in the CrPC and Evidence Act, also introduced minimum sentences as a harsher sentencing regime. The stated aim of the minimum sentence was that of general deterrence. With deterrence as objective, you are not looking at preventive measures, except to the extent of making harsh punishments the main means of preventing people from committing crimes. Later, around 2000, death penalty is proposed for stronger deterrence – with the then government talking about bringing death penalty for rape, discussions on law reform, bill tabled in Parliament which is subsequently withdrawn. Of course in Section 376(1) and 376(2) of IPC, as they existed prior to 2013 amendment, the judges had the discretion to reduce sentence by providing adequate and special reasons, which provided the opening for all sorts of reasons being given to reduce sentences. All along from 1983 upto 2013, we find reasons that amount to sexist gender stereotyping offered in judgments as ‘adequate and special reasons’ or as ‘mitigating circumstances’ as basis for reducing sentences. In response to this, there is a call constantly, for something to be done about judicial attitudes, about such reasons, eventually leading some to take the position that we need to reign in the discretion that judges have. In this context that you also have the Law Commission Report in 2000, which sees doing away with judicial discretion in rape sentencing as a solution, by removing the phrase ‘adequate and special reasons,’ making it mandatory for the judge to impose a minimum of 7 years of punishment.

After this, I will talk about the post December 16, 2012 protests, and the significance of the placards calling for ‘death for the rapist’. In most of the 80,000 emails that Justice Verma Committee received from the public, there was just one line saying ‘hang them by the nearest pole’. So in different ways, the wider sentiment being pushed across was to have a harsher punishment as the only way to deter people. In terms of addressing rape where a woman gets killed, including prosecuting Dec 16<sup>th</sup> itself, there was difficulty in invoking homicide provision for such a situation. So the prosecution tried to show that the accused pushed her to the road and tried to run the victim over to invoke

the provision of homicide, through showing the intention to commit homicide. Keeping this in mind, a new provision was introduced, where death or persistent vegetative state is caused in the course of committing rape, to justify death penalty. This is unique offence in IPC, as here you are not looking at the intention to kill, but you are drawing upon intention to carry out some other crime to invoke the concept of felony murder - which ironically, is the kind of offence the rest of the world is getting rid of. In Verma Committee recommendations in terms of sentencing, though it went with Law Commissions' recommendation of removing judicial discretion in 376(1), it did not recommend full life sentences, that is for all of natural life, for aggravated rape under 376(2). The whole life sentence was recommended for the provision where death is actually caused and for gang rape. But in the Criminal Law Amendment Act, 2013, there are full life sentences (that is for all of natural life) for 376(2) which is aggravated rape. The Parliament included in the amendment various things under 376(2) that were not even there in the Law Commission's report or Verma Committee's report. For instance, 376(2)(f) which pertained earlier to rape of a girl below the age of 12 years as an aggravated offence, is now 16 years; and then, the legal age of consent has also been increased from 16 to 18 years from what was earlier - 12 years for aggravated rape, and 16 years as age of consent. This with the maximum punishment of imprisonment for the whole of natural life, creates a situation where in a case of consensual sexual relationships with girl of 17-18 age group, the judge actually has a discretion to award imprisonment for the rest of the person's natural life, or a minimum sentence of 10 years, with no discretion to reduce the sentence to below 10 years.

Removing judicial discretion comes from a tough-on-crime approach, which is to say, 'nothing doing, all these people go to jail for the rest of their lives'. But the question to be asked is how does this actually work? What happens when one removes judicial discretion? I will use the example of rape law itself to explain this. Starting from 1950s, when the Supreme Court was treating rape victims as accomplices to the offence, to later, when the courts shifted their position to saying that you can take the sole testimony of the women to convict, that is to say, convict only on the basis of her testimony. We clearly see that in cases where the sole testimony is considered by the judges as there is no other evidence, if they convicted, there award reduced sentences. When basing conviction on sole testimony, that is to say, where discretion to convict cannot be exercised as there is no other evidence, the discretion shifted to sentencing. This shows that when discretion was removed from the adjudication or the conviction process, it did not disappear - but merely moved from one part of the system to another part, that is the sentencing part. So, in my study of sentencing, my assessment of the problem was not that the rape sentencing was too little, but rather, that the sentencing was not being implemented properly for the 30 years when the law allowed stating of 'adequate and special reasons' for sentencing. One of the factors on which judicial discretion appears to be based repeatedly is the marriageability of the victim. The prospect of marriage has an important bearing on rape sentencing. Likewise, factors like virginity, chastity and all the stereotypes which played a role in adjudication of the

crime itself (the role of which diminished with importance placed on the sole testimony of the victim), neatly move across to the sentencing phase. So all aspects of gender stereotyping and rape myths - past history, marital status, relationship between the abuser and victim, then start influencing the sentencing process. When there are injuries present, then they give a higher punishment, and when there are no injuries then they tend to either acquit or give lower punishments. Unfortunately, in doing away with judicial discretion, the most important problem which received no attention at all, and therefore went unchallenged, was lack of reasoning. Even though judges were giving reasons, but these reasons are different from legal reasoning – and that is a critical point that needs attention. So if judges said that they will reduce the sentence because of the young age of the offender, they judges never explained why young age is a factor that ought to be considered in that particular case. So, while there was much criticism about the reasons judges offered or the sentences they awarded, the judges were never challenged for their lack of legal reasoning. For instance, trial courts across the country over the period of 25 years (this is based on my work) gave minimum sentences in 70% of the cases. When the minimum sentence of 7 years was given, it was given without any legal reasoning. This meant that there might be someone who deserved less than 7 years yet was given 7 years, and there might be someone who deserves life sentence yet was only given 7 years. The interesting fact is that when you speak to judges, they say that giving the minimum sentence is a safe option– “if I give 7, I won’t get overruled, people would not come after me saying why did you give less than 7 years, so it’s a safe option to exercise.” So, we let the judges get away by exercising the safe option for 30 years. So what do you do in terms of reforming issues of sentencing? Unfortunately, there is a tendency to look at other countries to adopt their methods without doing sufficient research on how the law actually worked in those countries. This is evident in multiple law reports. There is one model of sentencing reform, where you structure the discretion that the judges have. In terms of structuring discretion, mandatory minimum sentencing is one way of eliminating discretion. Andrew Hashworth who has studies on this issue, says that when you have mandatory minimum, then the court tend to either acquit or even worse, the discretion moves to another site or agency within the legal system. As in the case of plea bargaining in the US, the judge has little or no discretion in deciding the punishment because the prosecutor has already decided what’s the charge with the judge having very little scope of one or two years. This understanding is based on theories of discretion, in this case the the hydraulic theory of discretion which says that discretion is like a fluid in a pipe, when you press it at one end, the fluid just moves to another place. In US, the plea bargaining shows how the discretion moves to the stage of charging, where you bring in the lesser charge to the court. When applied to the Indian context, removal of judicial discretion means it shifts to the police (not the prosecutor, as in the US). So infact, by removing the judicial discretion, you are empowering the police more. The likelihood is that you will simply not get charges for offences with a minimum mandatory 7 years or 10 years. Instead, they will be reduced to Sec 354, of violating modesty, attempt to rape, for allowing the sentence to drop. Same thing happened in South Africa where they

introduced mandatory life sentences for certain types of rape – this didn't work because judges didn't believe that those categories of rape actually deserve sentences for 20 years. So they started either acquitting or finding ways to get out of this which we see in our district courts. For instance, there are cases of consensual sex where the girl is less than 18 but the judges say I don't think it was rape, therefore I am going to acquit the person. Doing away with judicial discretion is not the way of going about addressing the problems that existed with the law or with earlier problems in relation to exercise of discretion. In my view, the sentencing aspect introduced by the Criminal Law Amendment Act is completely wrong, which will result in higher acquittal rates; and in convictions, there will be a tendency to award the same sentence which will continue to build cynicism towards sentencing process, the criminal justice process and the entire legal process.

I want to suggest that what we call engagement with law is in fact, an obsession that is counter-productive to a feminist project. I will do so by looking at this engagement in the context of criminal law, comparing this as well to new forms of protests taking place in Delhi today. I'll be arguing is that there is an urgent need for a very conscious subtraction from this relationship with law; for the movement to turn away from the question of law itself to instead, look at politics outside of law for which a certain irreverence to law is required. First, I want to look at law as having certain schizophrenic character, especially in the context of post-coloniality, where on one hand, law retains its colonial character to establish hierarchies within societies, becoming both the mechanism for the status quo and an instrument of violence. On the other hand, the law as a protector of rights is seen as the means that will deliver post-coloniality itself. This seeming schizophrenia within the structure of law itself is also reflected in the way in which we as feminist, queer activists engage with the law.

This schizophrenia within criminal law will be the focus of my presentation. Its too simplistic to just say that the criminal law provides the state a monopoly of violence in the name of protection, because on the other hand, you have human rights law (as well as other types of law) where the deliverance of post-coloniality takes place. An easy juxtaposition explaining this – is Sec 377 on the one hand which is the colonial law and on the other hand, the penal amendments related to sexual violence. This is the exact schism between the two elements of the law - the law as a source of violence alongside that which will deliver that protection against violence.

The broad argument vis-a-vis Sec 377 is firstly, that there is a co-constitution between the movement and the law. In a lot of my fieldwork between 2005 and 2007, travelling around the country and speaking to old queer people as well, I would always ask these questions - what is Sec 377? How did you first hear about it? How did it mark the queer activism? A lot of people said that until late 1990s they never heard of the law. It's not that there wasn't a relationship of violence and eroticism between the body of the state/police and the working class queer male body. While that was always there, a certain transformation takes place in the late 1990s the State appears to wake up to realizes that there is this law. This is a complicated argument to make, particularly because we don't really know how the law was used at the lower court level or at the police stations; this data has not yet been mined and analysed. But we don't see a number of cases until the 90s, when there seems to be an explosion of cases in High Courts where Sec 377 provides a space of action on the emergent cases of child sexual abuse. It's only in the late 90s where broadly elite queer activists pick up Sec 377 as the rallying point for action and suddenly Sec 377 begins to appear in the public sphere as a a point of tension in the relationship between queer working class body and the state. So there is a certain

transformation that is taking place in that relationship with the law; the reason I say transformation because it enters the realm of legality. The threat of law becomes an element of that negotiation, displacing to some extent eroticism as the realm of negotiation, between queer working class body and the policeman who wants a blowjob.

What we have from then on is (and that is something that we did quite consciously) that we recognized that there is hetero-normativity that acts upon queer bodies to exclude, to violate, to discriminate, etc - and Sec 377 provides that space in the law to make these experiences of violence intelligible. It is in that process that we gave Sec 377 a social life. It's kind of an activation, it circulates outside the spaces of the courts, constitutionality etc. and I am not simply saying that elite queer activist are talking about symbolic violence of law drawing upon the corporeal violence on working class body. It is also that the working class body starts engaging with constitutionalism, fundamental rights, interpretations of Sec 377, to mark a distinction between the act and the identity. So what's happening is transformation, it's not simply a new form of violence, but transformation of that relationship with the state into a legal kind of negotiation. In that sense, the first part of Sec 377 story is that which gave a social life to the legal provision. So, on the one hand, we as a movement constituted the law, made it socially, politically meaningful. On the other hand, the queer movement itself comes to be constituted by that engagement with the law. For instance, in the Delhi queer moment, we consciously moved away from identity politics and said 'no we'll talk about sexuality in fundamentalism and nationalism, we are not simply going to talk about us as a different type of person which demands same rights. Let's do queer politics.' Yet, when the case entered the court (with the Naz Foundation and Lawyers Collective petition), the legal battle was upon us. It was then that Voices Against 377 became a formation, to organizing ourselves, distribute labour as affidavits had to be made, power of attorney prepared. The need to come together to get work done was the starting point, not the need to become a coherent legal entity, which we eventually did become. We started organizing our activities and our imagination in relation to that law. There was a moment at the lawyer's office, while we were discussing how to describe ourselves in the petition of Voices Against 377, when the wisdom of the lawyers prevailed over our articulation of ourselves as queer. We had to consider that a few minutes were all that was available in court to convey to the judge who we are, which did not allow for a discussion on queer ideology and politics. In that time, it was possible to articulate only those aspects of human rights language which resonate with fundamental rights, so all we were left with was LGBT, and a return to using identity, which did not describe our politics. So from a queer movement that emerged because we felt the need to address larger concerns, rather than just speak to the law, we become entrapped or committed to a very different kind of legal project, which eventually led to the Delhi High Court decision and then the SC judgment. What has happened as a result of this engagement with the law is the capturing of the political and social conversations within this narrow legal framework. So on the one hand we were compelled to organized ourselves as a

coherent legal entity to engage with the law, and then, the engagement with the law itself entrapped our imagination of politics. Even after the Supreme Court has done its dramatic turnaround, there is still a large number of the elite activists who are extremely committed to the law, continuing to go on with Sec 377 project; of course there is lots of tensions and fissures too. Probably the tensions is the best thing that can happen in queer movement. Its better for contestation to define the movement rather than unquestioning commitment to a legal project.

What is the peculiarity of this obsession with the law? I think we can draw very helpfully from an analysis of the obsession with law in the women's movement as well. There is something quite peculiar about the turn to the law when there is a rupture, wherein the truth of socio, economic, political organization of a society is suddenly exposed. For instance, what happened in the post-rape/murder moment which everyone calls Nirbhaya movement, there was a certain rupture, making a certain truth visible - that truth is not simply about patriarchy and violence, it's equally about centre of Delhi being shut down for 13 days. It's unfortunate that no one really looks at that as the most significant aspect of that moment. Within that period, in the women's movement itself we see an immediate withdrawal to the law, as though the protests, the organising and the political conversation is only relevant in so far it results it results in articulation on the juridical register, either in policy or law. This has marked civil society activism (and I use civil society in Partho Chatterjee's sense), of people - a certain elite who imagine that it is the realm of constitutionalism or rather constitutionality, it is the courts, it is the Parliament etc. which is the site for struggle, for movements etc. There is something peculiar about that. My sense, I am not the first person to make this suggestion, it has certain continuity with colonialism, with Macaulay's strategy on education, of creating a class of people who are brown in colour but are white in their thinking and action. There is certain hierarchy of courts and legal system where those higher up in Privy Council, High Courts, are deemed capable of thinking in terms of justice and abstraction and interpretation of law, whereas lowers courts are consigned to simply implementing the codified law. So certain hierarchy is created where the language of law is placed right on top. An extension of this kind of imagination is that the struggle for law must ultimately feed into this particular hierarchy, which also resonates with class hierarchy today in terms of who controls the language of law, who negotiates the terms of what goes into draft legislation, in whose language that is being articulated. There is certain continuity between the colonial and the law that must be addressed today, and this in some sense is creating ruptures constantly.

To get back to a point made earlier in this panel, which is about the question of legitimacy of protest. Protests only appear to be relevant if they result in policy or law reforms. We must ask what is the source of legitimacy, if we are talking about creating an ethical community, a sense of ethical self that holds us together as feminists and enables us to imagine ourselves as a feminist, queer movement, what kind of self-coherence do we see. This resonates Darves's work with on ethical selves, with the

queer movement, especially in Delhi. Looking at topography of this self, of this movement, one can argue that it absolutely mirrors the state power. The demand of this ethical self is about coherence, it's about completeness, it's about our ability to act or rather for this ethical self to be co-terminus with life itself, all of which are precisely the claims of the law. Our desire for a coherent self and the project of being able to imagine a feminist or a queer movement mirrors precisely the problem of reproduction of state structure. It is in this context that I argue, it becomes important that we withdraw from the relationship with law completely.

What I am arguing we need to recognize the possibility of doing so – in fact, these things are actually happening before us in Delhi, in terms of collective action with complete irreverence to the law. In this, there is something that seems like is a return to a queer project, which is so only because of its irreverence to law. For example, the kiss of love protest in front of Hindu Mahasabha, in the aftermath of which people were detained, taken to jails, and they proceeded to perform *shaadi* and dances. Or take for instance, the sanitary pad campaign and protests thereafter. There is an unmistakable shift that these new forms of protests mark, to which the predictable response of the old and wise of the queer movement, is that this is not how the protest needs to be done, why wasn't the police permission taken? Why indeed? Because, they are not protesting the law of the state; they are addressing the actual form that politics has taken in this country today, rather than single out the fringe for moral policing without critiquing the dominant power structures. It's not simply a question of whether we should engage with this stuff or let's not engage with the state at all, but rather, it is to recognize those forms of 'unruly politics' as a form of politics in themselves that are not asking for legitimacy, that these disruptions are not demanding legitimacy from law.

## DISCUSSION

**NIVEDITA MENON:** Two questions I have is thinking about, one has to do with how the attempt to use an ethical collectivity mirrors the state. I am wondering about the sustainability of that argument because a certain kind of High Left/ High Feminist politics might have been like that but I think the movement which we find ourselves in, the feminist queer politics is heterogeneous. The feminist queer politics across the country in the last decade, the notion of ethical collectivity is heterogeneous. My other question is to do broadly with the law, I am thinking about the need for us to make a distinction between law reform and litigation. Where there are discriminatory provisions on the statute books, then we DO have to engage (like TADA or AFSPA), we must engage. So with section 377. The distinction between engaging with law to remove section 377, which is what the queer movement has engaged with to give us a safe city. You are forced to engage with law to remove section 377. To adapt to the legal forum, we found ourselves saying that this law targets specific people not behaviour, and discovered that it was the Supreme Court giving us our line, that 377 is about behaviour and not people. Our previous argument were suddenly taken over to restore criminalisation of section 377. What alternative ways do we have to remove laws that violate us, if not through such limited engagement?

**SIDDHARTH NARAIN:** Even in the discussion on whether we should push the Delhi government to enact an amendment to Sec 377 state-wise, I think engaging with the state legislature is a deeply political act that involves engaging with a democratic framework at a very political level. There is distinction between PIL/ litigation strategy and maybe some kind of policy reform and parliamentary reform.

**ARCHANA DWIVEDI:** I draw upon Rahul's idea of punishment and reform to voice certain confusions that I have. I completely agree that our sense of justice continues to be caught up with punishment. However, when two parties are in conflict, with injustice against one, what are the alternate ways of conveying that the justice is done? This takes us to the idea of justice. Whenever there is a conflict, we seek justice from some authority, and if that authority takes a reasonable stand then the aggrieved says 'justice is done.' This authority can be the State, or the law or the panchayat. Whenever there is conflict, we seek some sort of intervention, how else does justice happen? Even if we wish away the State/ law, there will still be a need for an intervention from an authority with the power to deliver justice. What would such an alternative authority be?

**FARAH NAQVI:** Akshay, you said that the struggle for justice either leads to law reform or turn to the law, but to echo what Archana is saying, the very public idea of justice is equal to law. There is no other imagination of justice. Whether it is on sexual assault or anything else. I interviewed Bhanwari Devi years after the violence inflicted on her in Jaipur. When I asked her 'what is your idea of justice?', I expected to hear that it had been delivered through the many ways through which the movement recognised her,

the global community affirmed her. She had gained recognition, become an icon of the struggle of the women's movement, and participated at Beijing. However, she said, '*didi pet pe bhook tab tak rahegi, jab tak kanoon se nyaya nahi milega*'. Not comprehending, I said, '*dus saal beet gaye aur appeal bhi nahi hui, chhod do*, let's move on'. She firmly insisted, '*mujhe kanoon se nyaya chahiye*'. I think she was saying that if there was a wider social outrage about what had happened to her, she may have dismissed the trial court acquittal, saying so what, '*iss judge se nahi mila*.' But she can't do that if that judge became symbolic of nation, of the country. Akshay you say the language of 377 petition was not feminist enough or that when fighting a case we subjected ourselves to a regressive language because that is what works in the law. Yes, but when legal justice matters to the victim, you do that for her. For example, when supporting Bilkees fight for justice, my feminist politics did not shape the language, but the idea of what is necessary for legal justice, ...which means you package the woman like a victim the court will acknowledge. You ask her to lower her head in court, on what to wear and what to not wear. That is not a moment for my feminist politics, but her case and her struggle for justice. The transfer order from the Supreme Court was problematic from a feminist perspective, steeped in pity, in the language that sexual violence destroys the life. Despite that language, we celebrated the order. My point is that what legal justice means to people varies – its complicated as the struggles of Bhawari and Bilkis show.

**AYESHA KIDWAI:** Law need not always be criminal law, it can also be an enabling one like the Vishakha guidelines. At JNU, by implementing Vishakha, we received a lot of complaints which helped us create a particular kind of institution. The question to ask is how do we conceive of laws that enable? Is our critique of criminal justice system, also one of creating institutions which can administer law in a more sensitive manner. One of the responsibilities under the sexual harassment law was undertake gender sensitisation. This worked for some but not others, yet there was constant negotiation and re-negotiation, as the idea is not to set up a system that throws people out, throws students out, but to change and transform. In principle, criminal law can be responsive too, so my question is whether the problem is with the institutions through which criminal justice is dispensed? I also think that in the women's movement, there is a belief that the only real feeling is that which is legitimized by the enactment of a law. So in relation the Nirbhaya case, it became necessary to invest in the law. While 377 might have initiated a movement around a legal action, it widely induced emotional solidarity and support. The focus on law can sometimes legitimise rallying points that we push for, so our critique of the law must not call for a total withdrawal, but point to more complex engagement in which law is not the only focus.

**MARY JOHN:** Rahul, I want to understand where your critique of the focus on perpetrators and incarceration is leading to. The prison industrial complex and imagery of it, is far from the truth if you look at the US. It remains publicly funded and most of the time prisoners are doing absolutely nothing. It seems to be purely a way of managing surplus population. The Indian prisons with large number of under-trials and unemployable population within it seem to also do this. Are these ways to keep them

out of work? We should think more carefully about this. The call against incarceration seems to be a little general, as this depends on who the perpetrators and victims are. For instance in Haryana, where perpetrators are Jats and victims are Dalit girls, there it matters a lot that justice is brought, and with it whether the SC/ST Act will be applied. So when you say prevention must be prioritised as incarceration is not the answer, can you give us a hint, where you want to take this to.

For Akshay, Can an absolute position on the state, as you seem to have, can be sustained. For instance in relation to the caste system, the civil society is the problem, so it is the State we must go to.

**SHRIMOYEE NANDINI GHOSE:** Having been in Kashmir for a year and a half has fundamentally changed the way I think about law. I started to recognize courts as the space of truth telling and as its records as archives. We got the cases of Konan Poshpora re-opened, got state documents and medical reports of the women, statement by perpetrators of that time. With this, my critiques of the law, my understanding of how I framed women's relationship with the law, suddenly changed. I realized that actually the courts can be an archive of things that have happened. I don't think we pay enough attention to the law as a space of truth telling (of the victim's truth, of contested truth). The other point I want to make relates to the need to distinguish between law reform, litigation and the institutional changes produced through the Vishakha guidelines. The gains of the Committees and the rules set under this could go just as easily and we want to retain the sexual harassment policies as they have been in different universities before the present law came into force.

**RAHUL ROY:** To respond to the questions raised in respect of my presentation, the point I was making is that the criminal justice system seems to be the ONLY space to seek justice which to my mind is a problem because the law addresses only the individual while the things that we are trying to address are much larger than the individual. In the context of violence against women, what we are talking about is systemic phenomenon, it's not just happening between two individuals. How can one hope to address this entirely through the law, through criminal justice which responds to individual cases only. To me the starting point is to see if there are other ways and other spaces where justice can be addressed, and in that sense, it seems to me that the court becomes THE place to get a re-affirmation that justice is being done, precisely because there is no other space. The lack of other spaces seems to be the result of the lack of imagination in creating other ways of addressing these issues and problems through, for instance, an alternative imagination of justice, of which Mahila Panchayat is one example. A non-criminalizing way of dealing with lot of problems that actually get criminalized. Can we think of other systems like that where justice can be imagined, because again and again what seems to be fairly clear is that courts are an archive of the injustice that has happened, but not an archive of justice, which is something we need to seriously address. MahilaPanchayat is an example of the way it can be addressed.

**SHRIMOYEE:** But with sexual violence, there is a whole culture of compromise, where courts function as Mahila Panchayats. Or marry the rapist, which is also a form of justice.

**RAHUL ROY:** It is not fair to take the worst kind of example to discredit forums like the Mahila Panchayat.

**NIVEDITA MENON:** How fair is it to compare the best kind of legal justice with the worst kind of panchayat justice?

**RAHUL ROY:** GSCASH would be another example of addressing issues without criminalizing.

**RUKMINI:** In my observation, when the girl in a case of what may be called 'statutory rape' where the girl is under the age of 16 years, but says sex was consensual - the judge has to convict under law. But I observed that the sentence given would be of one day imprisonment, or even one week. It seems like a statement by the judiciary that even if the law declares this to be a crime, there is no moral force behind it, so they chose to not bring the full force of state to bear down on it. There is great value in judicial discretion but the discussion after 2012 ended up demonizing discretion so much so, that its positives were not discussed at all. Despite the history of giving lower sentences for rape, there is a value to judicial discretion which we see in such cases, and its worth reinstating.

**MRINAL SATISH:** I think choice to access the criminal justice system or not should be upto the person, but some of the laws recently enacted, take away that choice. For instance sexual harassment law, or section Section 357C CrPC contain mandatory reporting provisions. To respond to Rukmani's question, I found exact same thing, in statutory rape cases between 1983 to 2013, where there was clear evidence by the girl testifying that she had consented and that she didn't want to pursue the case anymore. Here the court had no choice but to convict, but reduced the sentence period to the time the man had already spent in custody, giving a lesser sentence. I would compare this with concept of jury nullification where juries acquit people despite clear violation of law, indicating to the state that we don't really accept the law. So I definitely believe having judicial discretion is important. We need to think about the manner in which you structure that discretion, without getting getting rid of it. For instance in 166A of IPC, where you say we'll punish the police when they don't register FIR, the police starts hoisting rape in all sorts of cases (even where women is using it in property dispute) to make the point, 'look it is being used' undermining what was intended to be a helpful provision.

**AKSHAY KHANNA:** I must clarify, that my problem is with the way in which there is 'all roads lead to the law'. In this kind of space or other similar spaces, when there are any protests, there seems to be a need to connect with the law or the State. My sense is that in order to imagine a new kind of politics we need to address the limitation of structure

of existing politics. The critique of representative democracy as the aspirational form, new imaginations how justice can be imagined, relationship between authority and justice can be re-imagined but with an element of some subtraction with relationship to law. That subtraction has to be quite radical, to be able to imagine other ways of doing politics. I am at no point saying that there should be NO engagement with law, I am saying but in order for these new forms of politics to take shape, for new forms of organization, there has to be de-coupling from that connection with the law. Especially in terms of law, one cannot insist on normative statement, it's about recognizing these forms of politics, these ways of addressing political landscape as valuable in and of themselves, rather than evaluate them on the basis of what law reform has happened. It's more of a form of thought, a way of approaching a certain kind of historical process, it's not an empirical kind of description, there is some kind of desire of coherence, even if there is idea of diversity. One moment come to mind. All conversations before the Calcutta conference a few years back where trans people, of various gender articulations were trying to be in that space, but I being a person who is male bodied, was excluded from that space that identifies itself as feminist. What exactly does that mean? This is the moment there is re-grouping after several years, where there is emergence of Dalit feminist, queer feminist; the de-articulation of that stable subject is re-grouping here and it does re-group over this. So there is that an undefined realm of that coherence which continues to hold out, and continues to exclude people. These are my reflections on the anxieties that the conversations around sexual violence reveal - questions on gender neutrality, perpetrator and victim, and the anxiety that there would be gap in law, as far as male embodied or queer bodied were concerned. This suggested a desire of ethical self to have imagination co-terminus with life, to be complete and to be whole and when the law does not resonate completely with this ethical subject, it's a position of failure, and that is what you must suggest in law reform. I am not saying that law is irrelevant to working class but how do movements imagine the site of struggle, how do we construct for ourselves and what is the place of law in that, there needs to be de-coupling there, putting the law in its place, to enable other forms of political action.

## 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.