

## Beyond Law and Rape Culture: Recovering the 'Gaze'

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### **Abstract**

In India the hierarchically arranged gender system featured with a male predominance and female subjugation allows for a 'male gaze' through which women are viewed as weak, vulnerable and become a 'consumed commodity'. This narrow gaze vis a vis women jeopardizes freedom of movement for women in public spaces as they confront with various sexual violence like rape, molestation etc. However, the legal framework has not been able to curb this imminent sexual violence because of a restricted value laden gaze that considers sexual violence as an individual/collective crime only. This escapes the root cause of sexual violence and intensifies the problem of gender inequality and gender violence in society. This paper attempts to analyze this narrow social gaze which viewed women as weak, vulnerable and thus increased their vulnerability in public spaces and how the legal framework reinforces this narrow social gaze and eventually delays in bringing the justice for women.

**Keywords:** Social gaze, gender inequality, sexual violence, law, rape culture.

### **Interfacing Gender and Sexual Identity**

Most of the thinkers in social science usually get inclined towards defining some terms for analyzing society and its structural dimensions: 'class' is a case in point and 'gender' is another. However, gender does not have the same level of rationalization attach to it as does class. But with its multifarious views gender has attracted an extraordinary amount of scholarly attention. Originally used in English as a grammatical term, it was adopted by feminist scholars of the 1970s to describe and analyze sexual difference. Over the time 'gender' allowed scholars to deviate from the previous notion of gender being related to anatomical sex and theorize it as more of a 'social construct' and so defined masculinity and femininity as social constructions. According to Stein (1999), gender is being usually seen as a 'psychological, social and cultural aspects of maleness and femaleness'. In 1972, the sociologist Ann Oakley also argued that:

"Sex is a word that refers to the biological differences between male and female.... Gender, however, is a matter of culture: it refers to the social classification into masculine and feminine...the constancy of sex must be admitted, but so also must the variability of gender."

It is thus a socially learned behavior which is internalized by male and female as they encounter social life and culture through the process of socialization. However, problem arises when these gender relations acquire different meanings to their lives and creates a 'social relational contexts' in which gender relations become hierarchical. As such men and women are produced to live with different realities

according to time and space, with male domination and female subordination in most spheres of life. 'Men are being taken as more outdoor going whereas women are seen as bearer of indoor responsibility; female identity is linked to her role as mothers; wives and daughters while male identity is linked to the productive work' (Geetha, 2002).

Power plays a very significant role in defining these roles and statuses. The theory of power has been connected to authority, domination, and/or exploitation and it is an entity that an individual or groups can possess. However, whichever group has power can define roles, can access to all the economic and political resources and can actually shape the social structure as per its own interests. In *Sexual Politics*, Kate Millet (1972) defined politics as a 'power structured relationships', arrangements whereby one group of persons is controlled by another'. What made her argument debatable was that she applied this definition to the relation between women and men. Thus Power manifests into the creation of gender inequality which exist across a range of resources, from income and wealth to social honour, cultural authority etc. She argues that those benefiting from inequalities have an interest in defending them and those who bear the costs have an interest in ending them.

This power relation is predominantly visible in case of male/female relationship which most often falls within the binary parameters of 'colony' and the 'colonizer'. Edward Said's concept of *Orientalism* strengthens perception of this gender hierarchy. He describes that:

An entire corpus of writing and other material - literature, poetry, philosophical tracts, government reports, religious commentary, etc. - represented the Orient in specific ways. 'Orientalism' refers to the processes and sites of producing a space called the Orient for western consumption, such that the West and the Orient come to be in a relation of superiority-inferiority. Western religious, aesthetic, philosophical, kinship, literary, scientific and ontological traditions come to be established as superior to their Oriental counterparts. And, hence, colonialism becomes justifiable as the 'civilizing mission' of a superior race. Most significantly for our purposes, 'Orientalism' also established the dominant meanings of masculinity through 'feminizing' entire populations who came to be represented as unfit for self-rule. So, the 'cunning Arab', the 'inscrutable Chinese', and the 'effeminate Bengali' were simultaneously stereotypes of gendered behaviour: they were, compared to western men, 'womanly'. This way of thinking proceeds, of course, from the premise that women are inferior to men. Hence, the idea that western men were superior to non-western men was based on the notion that 'masculine traits' were superior to 'feminine' ones" (Said, 1979).

### **Normalizing Gendered Statuesque: Male Hegemony, Social Gaze and Gender Identity**

For decades this hierarchical gender structure which is predominantly male dominated has entered into the consciousness of social milieu as a usual norm and continues to reinforce and create a narrow social gaze through which things are viewed from the perspective of men.

“Gramsci identified the maintenance of this hegemony is done through generating consent among people. For Gramsci, hegemony involves two elements through which it maintains its power: “...the first element of hegemony is that it produces consent among people to accept the group in power and live within existing structures. Second, this hegemony involves the production of what Gramsci (1971) calls ‘historically organic ideologies...[that] ‘organize’ human masses,...[and] form the terrain on which men [sic] move, acquire consciousness of their position, struggle, etc. As ideologies permeate both culture (Gramsci’s ‘civil society’) and politics, they settle into people’s unconsciousness to generate “sedimentation of common sense”, a shared understanding that the workings of society have a natural logic and are meant to be the way they are.” (Jubas, 2006)

In a patriarchal set up, this culture of male hegemony is reflected in the lifestyle, the dress code, and choices over the mobility or code of conduct, which men prescribe for women. These prescriptions are further diffused, sanctioned and reinforced as a norm of society.

“The normalized gender structure then diffused through influential agents like: priests, journalists, advertisers, politicians, psychiatrists, designers, playwrights, film makers, actors, novelists, musicians, activists, academicians, coaches, and sportsmen- who are the ‘weavers of the fabric of hegemony’ as Gramsci put it, its ‘organizing intellectuals’- these people regulate and manage the gender regimes: articulate experiences, fantasies, and perspectives; reflect on and interpret gender relations.” (Donaldson, 1993)

Thus the projection of women in their various gender roles, responsibilities, and their prescribed way of lifestyle is constructed and maintained through a larger social-cultural framework in which a woman acquires a gendered identity in the way society gaze at it, or rather the men gaze at it or projects it. That the gendered identity which women emulate as reflection of their ‘own self’ is actually the reflection of the essence of that social mindset in which they live in. They therefore perform their corresponding gender role designed by the society. This gender identity further reinforced by the process of dialogism through which the female gender involves in interaction with various agents of society and acquires meanings for itself. The concept of identity cannot mean simply ‘to be something’ or to be ‘identical with oneself’...rather, the principle of identity coincides with the principle of otherness which in Bakhtin’s terminology calls the ‘principle of dialogism’: “The self is the gift of other...Bakhtin argues, “I realize myself initially through others, from them I receive words, forms and tonalities for the formation of my initial idea about myself” (Coiner, 1995).

For decades women have viewed at themselves through the prism of this social gaze, succumbing to the male sexual violence and consider it a part of their fate- “Men look at women. Women watch themselves being looked at” (Berger, 1972).

#### Multiple Traps: Gendering Space, Modernity and Sexual Violence

As women are continued to being viewed as weak, vulnerable and at risk, their mobility is being restricted accordingly. They are constantly being monitored by

the male stakeholders of society over their mobility everywhere so as to make them follow some ethics in the public spaces, which according to the so-called norm, if not followed by them will invite repercussions. This attitude consequently leads to not only tension among women but also put the lives of women in jeopardy and exposes them to various sexual violence and discrimination in private and public domain.

A significant way to perceive this tension between men and women is through exploring their relationship with respect to their social identity and space they share, as part of their everyday lives- as it unfolds their relative rights, freedom and constraints. Although, historically, the public sphere has been made the domain of men and that of private sphere is being made the territory of women, this equation changes in the wake of modernity and new ways of lifestyle.

While modernity has offered ample opportunity for everyone to be more productive and beneficiary of economic growth and progress, it has equally brought a package of competition among all. The mounting needs and opportunities in the lives of men and women pull them into the public space for earnings. This led women start reclaiming over traditionally assigned spaces. In such a situation, i.e. women entering into public sphere become a threat to men- the traditional dweller of public space. Thus men in turn involved in carrying out violence against women in order to retain their authority and attempt to push women back into their traditional private sphere by creating a fear psychosis of sexual violence in the minds of women in the form of rape, molestation and sexual abuse and thus control their mobility by restricting them not to go beyond the *lakhman rekha* (the private sphere).

### **Ethics of Public Space, Sexual Violence and Culture at Crossroads: An Indian Experience**

In the recent part, rampant cases of sexual violence, rape, molestations etc, reflected the phenomena of this fear psychosis. The occurrence of such cases in an alarming speed seems to be re-sounding the popular belief that women must follow the ethics in public spaces and failing to conform to such ethics of space may invite inevitable consequences for them. Therefore, men's accessing into the public spaces may not require a purpose (i.e. carrying out specific tasks) but women must need one: the idea of women loitering in public spaces without purpose becomes both incomprehensible and condemnable. One such popular mindset highlighted by a study runs as follows: "...it is always men who are found occupying public space at rest.... women, on the other hand are rarely found standing or waiting in public spaces – they move across space from one point to another in a purposeful movement....women occupy public space essentially as a transit between one private space and another" (Ranade, 2007).

This popular belief which is fed on a narrow gaze of men, consider that, women wearing or revealing western clothing, or dancing in pub at night, or loiter in public spaces without purpose are often regarded as having forfeited the right to (male) protection and regard-this aspect is further backed up by the logic that "to

deliberately titillate men is a fault in a woman and the responsibility for its consequences ought not to be placed upon men" (Smit, 2012).

The molestation case in Guwahati committed by a perverted mob to the hapless girl and its post effects exhibited us this terrible misogynistic culture of Indian society: 'on 9 July 2012, a young student left a bar and was set upon by a gang of at least 18 men. They dragged her into the road by her hair, tried to rip off her clothes and smiled at the cameras that filmed it all. The woman was abused for 45 minutes and still no one called the police. When the police eventually turned up, they took away the woman but no attempt was made to arrest those men whose face could clearly be visible on camera' (Talukdar, et al., 2012). What more shocking was the post effects of the incidents where various comments and statements were put forward by leaders of our society towards the victim which reflected upon measures like prescribed lifestyle, dress codes, or limited mobility as ways to avoid such crimes. Therefore, women being subjected to sexual violence by not following such rules of modesty in public space may not be portrayed as victims, rather their 'worldliness' was to be blamed for the crimes they suffered. The chairperson of Karnataka State Human Rights Commission is one such conformist to such popular belief who said in a public meeting: Yes, men are bad....But who asked them (women) to venture out in the night....women should not have gone out in the night and when they do, there is no point in complaining that men touched them and hit them (Menon, 2012).

In today's India, women continue to confront with various kinds of violence like sexual abuse, sexual violence, rape etc. which they usually face in their day to day lives in both the spheres. However, all such violence are usually seen in individual or a collective crime in India which are inflicted upon woma(e)n by ma(e)n. Such a confined view limits the scope of looking at the deeply rooted misogynistic culture that causes such violence against women in society.

Talking specifically about 'rape', many researchers have found that rape is considered as functionally normative one and thus essentially a condoned behaviour which has gained the socio-cultural consensus as a common reality. In a rape culture the socio-cultural supports for rape is structurally integrated in all levels of society. This includes the institutionalizing of patriarchal values; socialization practices that teach non-overlapping notions of masculinity and femininity with men viewed as tough, competitive and aggressive and woman as tender, nurturant and weak; social; familial; political; legal; media; education; religious; and economic systems that favour men; and criminal justice and legal systems that fail to protect women (Rozee and Koss, 2001).

In a recent study (Fulu, et al., 2013) of 10,000 men in Asia and the Pacific, titled '*Why do some men use violence against women and how can we prevent it?*' found that almost half of those men interviewed reported using physical and/or sexual violence against a female partner. These respondents were interviewed across nine sites in Bangladesh, Cambodia, China, Indonesia, Sri Lanka and Papua New Guinea. During the survey the study puts forth various reasons for committing rape. It says that, "men begin perpetrating violence at much younger ages than previously thought. Half of those who admitted to rape reported their

first time was when they were teenagers; 23 percent of men who raped in Bougainville, Papua New Guinea, and 16 percent in Cambodia were 14 years or younger when they first committed this crime. Of those men who had admitted to rape, the vast majority (72-97 percent in most sites) did not experience any legal consequences, confirming that impunity remains a serious issue in the region. Across all sites, the most common motivation that men cited for rape was related to sexual entitlement - a belief that men have a right to sex with women regardless of consent. Over 80 percent of men who admitted to rape in sites in rural Bangladesh and China gave this response. Overall, 4 percent of respondents said they had perpetrated gang rape against a woman or girl, ranging from 1 to 14 percent across the various sites." Thus the study's findings reaffirm that violence against women is an expression of women's subordination and inequality in the private and public spheres. The findings also show how men's use of violence against women is associated with men's personal histories and practices, within a broader context of structural inequalities. For example, men who reported having perpetrated violence against a female partner were significantly more likely to have gender-inequitable attitudes and try to control their partners. For instance, in Bangladesh and Cambodia men who had highly controlling behaviour were more than twice as likely to perpetrate partner violence as those who did not use controlling behavior. The study also explores that the perpetrator's use of sexual violence is related to their childhood experience of witnessing the abuse of their mother.

### **Law and Sexual Violence: Questioning or Sanctioning Rape Culture**

The rape culture is prevalent in India since ages and has been used primarily as a tool of dominance to exert caste supremacy or class supremacy or even used many times strategically in a war torn areas (partition) so as to trigger the terror onto the minds of opponents and weaken them. For many thinkers rape is primarily an effective means of subjugation where some 'honour' of a caste, a class, a social group, or a family is violated through a narrowly defined 'chastity/purity' of a woman by making her 'impure' and this is very much related to Indian scenario. India has been typically configured with such violent incidents right from feudal society, to partitioned India to the modern time as well. There have been multiple examples of male superiority and female subjugation which exist in religious texts, literature, and in other discourses. All this perhaps provide a ground for Indian society to consider a woman's value with respect to her sexuality and decreases her values if she is being raped. Therefore, losing her chastity or honour becomes undesired at any cost. The Rajput queens of old era were to burn them alive rather than waited to be raped by conquering armies. That one factor in the large number of suicides of women in India following rape can be the fact that they are told that their life is ruined and not worth living. As in BJP leader Sushma Swaraj, speaking in Parliament in the aftermath of Delhi gang rape incident echoed the same notion that even if the Delhi rape victim were to survive, she would remain a *zinda laash* (a living corpse). In a culture that values patriarchy and diminishes social status and rights of women, the forcible rape of women may not

be a crime of major importance. Therefore, forcible rape may it be individual or gang rapes that are occurring with alarming regularity in India mark a trend of acceptance of such crimes giving a boost to patriarchal values at all levels in society.

In India sexual violence has often been perceived in a problematic framework of morality, public decency and honour and as a crime against the family or society, rather than a violation of an individual's bodily integrity. Section 375 of the Indian Penal Code explains rape as, 'penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape'. The exception to this definition is that sexual intercourse by a man with his wife, the wife not being below fifteen is not rape' (Menon, 2012). After a prolonged women's movement around *Mathura case*, the element of 'consent' was considered as a proof and thus in rape cases the onus of proving consent shifted to the accused. That is, once sexual intercourse was proved, if the woman states that it was without her consent, the court should presume she did not consent. However, the Criminal law Amendment Act 1983 accepted this demand partially in the case of custodial rape alone-that is, rape by a police, public servants, managers or public hospitals, wardens of jails etc.

The above facts show a conforming attitude towards the decade long notion that sexual violence or rape is a matter of crime only overlooking it as violation of woman's integrity as an individual, thus confer a lighter punishment regardless of the harm done to the woman.

This restricted definition of rape further forms the larger social gaze in which it remains a crime defined by law, therefore even legal measures have been unable to hit at the root cause and thus fail to arrest such power relations and dominance which create this mindset and play havoc around.

This legal consciousness for many researchers has been fed throughout by the wider socio-cultural set up and thus acquires meaning through every day practices, norms, and beliefs of ordinary citizens and emerges from people's experiences:

The study of legal consciousness 'traces the ways in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and legal meanings..... The study of legal consciousness in this more specific sense carries with it a program of analyzing and potentially unmasking hegemonic ideologies or structures that prevents a liberating consciousness of law's effects to emerge' (Nemec and Davis, 2012).

Law and society scholars have long emphasized the 'legal ignorance' of ordinary citizens. They said that as majority of people have never read legal doctrine, they learn about the law through media, professional, personal experience etc. Darley, et al. (2001) found that when people do not know their own state criminal law codes they make guesses based on their own personal opinions about what the law should be. It is this taken for granted quality of people's interpretations that allows for law to be shaped by ordinary citizens' beliefs and actions (Tinkler, 2008)

Thus the power of law usually is contingent upon people's beliefs and behaviours. Hence, proceedings of gender related crimes; legal consciousness gets influenced by the wider social mindset in which women are being represented. Menon (2012)

unveils this trajectory of judicial bias on rape in her book on *Seeing like a Feminist*. The patriarchal understanding of rape confines it to the narrow domain of crime against the honour of the family. In patriarchal perspective, rape is a fate worse than death; there is no normal life possible for the raped women; the way to avoid rape is to lock them up at home, within the family, under patriarchal controls. In this understanding, raped woman is responsible for the crime against her because either she crossed the *lakshman rekha* of time (by going out after dark) or the *lakshman rekha* of respectability (by dressing in unconventional ways or by leaving the four walls of her home at all). This patriarchal understanding is pervasive in the judiciary as well. In 2008, the Chief justice of Karnataka, Cyriac Joseph, stated that immodest dressing was the cause of the increasing crimes against women: 'nowadays women wear such kind of dresses in temples and churches that when we go to places of worship, instead of meditating God, we end up meditating on the person before us'.

Besides, the representatives of law and order machinery like police personnel also get influenced by the same values and norms of society in which socio-cultural stigmas stereotype girls and women as *defacto* drivers for rape. In a recent survey carried out by *Tehelka* magazine exposed such apathy or insensitivity of keepers of law i.e. police towards rape survivors and exposed the latent bias prevailing among the police personnel towards rape victims. In a two-week long investigation, *Tehelka* undercover reporters posing as research scholars, visited 23 stations across the NCR and spoke to more than 30 policemen with experience of 20-30 years. And what came out was shocking. "Seventeen senior cops of over a dozen police stations across Gurgaon, Noida, Ghaziabad and Faridabad were caught on spy camera blaming everything from fashionable or revealing clothes to having boyfriends to visiting pubs to consuming alcohol to working alongside men as the main reasons for instances of rape. 'It's always the woman who is at fault' was in essence the argument offered by a majority of the cops. Many of them believe that genuine rape victims never approach the police and those who do are basically extortionists or have loose moral values. Others believe that the women from Northeast could never be victims of forced sex as they are invariably involved in the flesh trade. Even more shockingly, some of them are of the view that if a woman has consensual sex with one man, then she shouldn't complain if his friends also join in. If a woman is doing late hours at the office then she had it coming... and the arguments keep coming" (Bhalla and Vishnu, 2012). One such sample Sub-Inspector Arjun Singh, SHO Surajpur Police Station, Greater Noida, pins the blame on the victim, "*Ladkiya ek seemit daire main, seemit kapdon main nahi niklengi... to apne aap khichaon ho jata hai. Wo khichaon bhi aggressive kar deta hai ki kar do bas* (If girls don't stay within their boundaries, if they don't wear appropriate clothes, then naturally there is attraction. This attraction makes men aggressive, prompting them to just do it". There's also ethnic bias against those from the Northeast. According to RajpalYadav, Additional SHO of Sector 29, Gurgaon, "*Yahan pe Darjeeling aur Nepal tak ki ladkiyan business purpose se aye hai... wo jaate bhade pe hain. Baad mein paisa nahi mila to rape case bata diya jata hai*" (Girls from Darjeeling

and Nepal have come here for business purposes. They go with men for money. Later, when the money is not sufficient, it becomes a rape).

However, for a long time, feminists and social activists have been opposing against this narrow definition of rape within society and in law and sought to relate it with violating integrity of an individual and seek to define rape and sexual violence beyond the scope of considering it as a crime only. Flavia Agnes, who has been very vocal about sexual violence and issues related to women, urges the necessity to evolve a new definition of rape. She regrets over the fact that legal consciousness ignores widening up the definition of rape because: "rape laws are based on 'the same old notions of chastity, virginity, premium on marriage and fear of female sexuality reflected in the judgments of the post-amendment period. Penis penetration continues to be the governing ingredient in the offence of rape. The concept of penis penetration is based on the control men exercise over their women. Rape violates these property rights and may lead to pregnancies by other men and threaten the patriarchal power structure..." (Agnes, 2002). Keeping with this understanding of rape, she points out, that in all other criminal offences, injury and hurt caused by weapons is considered more grievous, deserving of greater punishment than that caused by limbs; but in case of sexual assault, injury caused by iron rods, bottles or sticks does not even amount to rape and thus considered to be lesser crime. She urges therefore to use the term sexual assault to replace the categories of rape.

It is in this context that the idea of *risk-taking subject* has emerged within the feminist discourse in opposition to the *vulnerable subject* (Phadke, 2007). In the context of sexual violence, Shilpa Phadke suggests that a feminist demand for equal access to public space must be based not on a demand for safety and protection, but on the basis of 'equality of risk', the recognition that both men and women risk dangers of various kinds. So the feminist project should not be to protect women from attack, which is bound to feed into a narrative enforcing 'safe' behavior on the part of women themselves. Rather, the goal should be the certainty that if they are attacked, they would receive prompt redress, thus establishing the unequivocal rights of women to be in public spaces at all times of the day and night (Phadke, 2007).

This idea of 'risk' challenges the wider *social gaze* boost up by patriarchal values, in which women are being seen as vulnerable objects and make them believe to live in a pervasive culture of fear. The uproar over the Delhi gang rape 2012 and the subsequent movements followed after has equivocally demanded for this 'risk-taking' attitude and *Bekhauf Azadi* (complete freedom without fear) for all women across society. There were night walks in the heart of the capital to ensure not protectionary measures in the name of safety under shadow of police but a life of freedom without fear. The message was clear and loud: This is our city. Day or night, we should feel safe and free.

### **Challenges before Law:**

In spite of many well-framed laws directed in the protection for women against sexual violence, justice does not reach to the victim of sexual violence because of such a narrow framework of law which further affects the procedural and structural flaws in the judicial process. Moreover, not only the judicial procedures but the problem also gets mounted in most of the cases where the cultural stigma associated with rape survivors and their families create barriers in getting rapes cases reported. And those who do report often faces dehumanizing experience either from the supporters of perpetrators or from the police who in most cases decline to lodge FIRs for rape cases and aggravate the crisis. The lack of specialized training for police moreover makes them insensitive towards rape survivors, and most often police themselves involve in dehumanizing the person. In the case of seventeen-year old village girl who was drugged and gang raped in northern Punjab committed suicide in December, 2012 after a police officer pressed her to drop the case and marry one of her attackers. Reports surfaced that officers not only harassed the victim, but failed to register her case and attempted to broker an out of court settlement between her family and the families of her alleged attackers- a practice known locally as 'compromise' (Xu, 2013).

Even the legal process during trial also poses challenges in rape cases. Flavia Agnes (2002) points out that "the criminal justice system envisages an all powerful state prosecuting the vulnerable accused, and so the maxim on which it functions is that the benefit of doubt should go the accused. In cases of rape....the woman stands outside the power equations between the State and the accused". Another factor that put a challenge before law is that offences under the Criminal Code are crimes against the State; only the State can prosecute in a rape case. The woman raped is represented, not by her own lawyer, but by the prosecutor. The positive aspect of this is that that it is the responsibility of the State to make preliminary investigations and collect evidence. On the other hand this means that apathy on the part of the police and the prosecutor can seriously hamper the progress of a case. Defense lawyers engaged by the accused are paid high fees and are in general more motivated. Thus, treating rape as a criminal offence in effect seems to hamper prosecution (Menon, 2002)

Furthermore, rape laws are usually enacted mostly around procedural evidences which show a women's history of sexual relations thereby denies the idea of standards of consent and thus make the rape survivor guilty. The deep seated culture of victim-blaming and misogyny makes it more difficult to bring justice in the hands of the person who is being sexually abused or fall prey to sexual violence. In 2011 the Director General of Health Services (DGHS) discontinued the practice of the 'two-finger test' but it has been still in practice (until recently) to determine if the rape survivor is 'habituated to sex', In an October 2012 verdict, a Madhya Pradesh court held that a rape complainant was 'a consenting party' because "looking to her physical examination, she was found habitual to do the intercourse and therefore, she knew about that act but, she did not complain to anybody, till she reached to her house" (Krishnan, 2013). Only after a long drawn public outcry for reform in rape and related sexual assault laws, the Supreme Court of

India in 2013 has held that the two-finger test on a rape victim violates her right to privacy, and asked the government to provide better medical procedures to confirm sexual assault. The Indian government has finally banned this colonial, misogynist, and degrading medico-legal practice of inserting two fingers in the vagina for proving rape. The Human Rights Watch report, *Dignity on Trial* (2010), documented the widespread practice of this degrading test, which claims to document the size of the hymenal orifice, 'laxity' of the vagina, or 'old tears' in the hymen- all these reflect a traumatic experience which a rape survivor undergoes while proceeding for rape cases. This sometimes discourages their moral as they find such invasive tests as 're-rape'. Hence, many of rape survivors most of the time undermine the potential for successful prosecution.

This trend perhaps indicates for the continuous decrease in conviction rate over the years in rape cases. Since 1971 the conviction rate in rape cases in India which was 46% has been drastically reduced down to a mere 26%. This percent of conviction rate against the number of rape charges however is very less. According to some government data majority of rape cases in the country end up without conviction, which perhaps emboldens sick minds to fearlessly indulge in such acts. Data submitted by the Home ministry shows that while rape cases have increased steadily year after year, the conviction rate has remained constant. For example, the country as a whole saw registration of 21,397 rape cases in 2009, which went up to 22,172 in 2010 and 24,206 in 2011. But the convictions in the past three years could not cross the 6000-mark. It was 5,316 in 2009, 5,632 in 2010 and 5,724 in 2011, remaining constant at just about one conviction in every four registered cases. Figures also showed a rapid frequency in rape related crimes in India as per which a woman is raped every 22 minutes in India; that between 1971 and 2011 the registered rape cases saw a jump of more than 800 per cent, possibly the largest among all categories of crime (Sharma, 2012). National crime records show that 228,650 of the total 256,329 violent crimes recorded last year targeted women, with conviction rates for rape cases at 26 percent (France-Presse, 2012).

Therefore, there are challenges before law in order to deal with the nature of punishment to the perpetrators. As in the recent past innumerable incidents of rape and other forms of violence against women have created lots of furor and anguish, the response towards tackling such crimes was highly selective. Opinions in favor of death penalty or castration assume it as best way to mitigate sexual violence. This *means* however not enough to give a solution to the deep rooted dysfunctionalities of patriarchal society which is manifested through rape.

Having said that, many feminist groups and civil society organizations have sought for solutions which get deeper into the psychological and social roots of such crime. They based their argument against death penalty or castration on the assumption that rape and other forms of sexual violence is not just a women's issue, but a political one that should concern every citizen. When incidents of rape and sexual violence is happening on a huge scale in this country, when adivashi or dalit women, women from north east or from Kashmir, women with abilities or disabilities, women as working or at home all live under a pervasive fear of sexual

violence, such kind of punishments may create boomerang effect because of already low conviction rate in rape cases.

Some of the strong reasons against death penalty been grounded on the following assumption:

- Justice meted by the State cannot bypass complex socio-political questions of violence against women by punishing rapists by death. Death penalty is often used to distract attention away from the real issue and it changes nothing but becomes a tool in the hands of the State to further exert its power over its citizens.
- There is no evidence to suggest that the death penalty acts as a deterrent to rape. Available data shows that there is a low rate of conviction in rape cases and a strong possibility that the death penalty would lower this conviction rate even further as it is awarded only under the rarest of rare circumstances. The most important factor that can act as a deterrent is the certainty of punishment, rather than the severity of its form.
- The logic of awarding death penalty to rapists is based on the belief that rape is a fate worse than death. Patriarchal notions of honour lead us to believe that rape is the worst thing that can happen to a woman.
- An overwhelming number of women are sexually assaulted by people known to them, and often include near or distant family, friends and partners (NCRB, 2011) who might influence the family of the rape survivor to quit the complaint or may threaten them to face further psychological and social trauma for having reported against their own relatives.
- There has been several rape cases slammed against the military personnel, or the armed forces in many states. Rape Cases of Thangjam Manorama by the Assam Rifles in Manipur in 2004, or the abduction, gang rape and murder of Neelofar and Aasiya of Shopian (Kashmir) in 2009 etc. put a question on the effectiveness of death penalty on armed personnel as it has been presumed that with death penalty at stake, the guardians of the law will make sure that no complaints against them get registered and they will go to any length to make sure that justice does not see the light of day. The ordeal of Soni Sori, who had been tortured in police custody, still continues her fight from inside a prison in Chattisgarh, in spite of widespread public outcry around her torture.
- As we know, in cases of sexual assault where the perpetrator is in a position of power (such as in cases of custodial rape or caste and communal violence), conviction is notoriously difficult. The death penalty therefore would make conviction next to impossible (India Resists, 2012).

Thus various civil society and feminist group held the view that as the concept of 'rape' is embedded in a complex set of social, cultural, economic, political, patriarchal and feudal practices in India, death penalty cannot be the solutions and should therefore be sought in the educational, familial, social – religious – customs and traditions etc. "Indeed, the change needed to prevent violence against women

in India and across the world must be systemic, cultural change, not reciprocal violence to individual acts of barbarism" (Dutt, 2013). Silent witnesses to everyday forms of sexual assault such as leering, groping, passing comments, stalking and whistling are equally responsible for rape being embedded in our culture and hence being so prevalent today. Therefore, the best deterrent to rape is changing the mindset. Therefore, it is very much needed to condemn the culture of silence and tolerance for sexual assault and the culture of valorizing this kind of violence.

Responding to the recent judgment by fast track court on hanging the four men convicted of the gang rape and murder of a 23-year-old woman, many activists opposing death sentence held the view that while the widespread anger over the case on Delhi gang rape is understandable, authorities should avoid using the death penalty as a 'quick-fix' solution as death penalty cannot be a deterrent to such heinous crime and will not end India's scourge of rape: "Sending these four men to the gallows will accomplish nothing except short-term revenge," Tara Rao, director of Amnesty International India.

## **Conclusion**

### **Beyond Law and Women: Deconstructing Gender**

Therefore, we have to understand that any kinds of sexual violence could be inflicted upon women in private or public spaces as well but their root lies in the existing gender power structure which is instilled into the social fabric as a common reality. Therefore, as it involves a larger society, its people and their mindset, reducing it to a level of crime may not solve the real problem. Thus, unless we deal with these structural and cultural inequalities and recognize male violence as political rather than psychological, criminalizing sexual violence will not significantly alter gender relations or eliminate male violence. Thus, while considering the menace of sexual violence and its befitting mechanism, the legal consciousness should go beyond the purview of law to understand the wider social-structural domain in which the mindset for such crime is born, cherished and grow as an accepted norm.

Hence, in order to root out the genesis of sexual violence and many such crimes that happened in India on a regular basis, the rooted gender hierarchy has to be deconstructed in order to create a gender just society based on equal rights and freedoms for both the gender. The gendered identity which enforces women to perform various gender roles also need to be overhauled. The changes in gender role reversal within family and beyond could be promising ways to deal with this crisis in the long run. Moreover, new social values should also be ingrained into the minds of people through a social re-engineering process in form of educating minds. The very idea of allocating gendered space also should be made gender neutral so that all spaces are accessible and safe for women. As such a gender discourse should be adopted at all levels: in family, schools, institutions, law enforcing agencies and in the policy making process through which the values of gender equality could be permeated and a culture of gender sensitization and training on gender issues could be encouraged. Reformulations of the school

curriculum by incorporating gender aspects are also desired as it influences most of our minds. Further the policies should not limit gender as women's issue only rather should concern and fully engage men as well as women in the transformation of society.

All these would help in re-constructing or recovering the decade long *social gaze* that legitimizes misogynist culture and project women through the patriarchal discourse. The transformation so happened will also help in delimiting the freedom of women and will decisively put an end to the old markers of femininity which always taught them to learn to be 'others' and live with fear so to save their chastity, modesty and purity. Such initiative will also help in formulating ignited minds of youth so as to deconstruct the existing gender structure and its values. This paper thus concludes with the remark that:

The social-context approach gives us external factors about the way people behave; but what we need to understand is the ideas and the reasons for the behavior....what we need to understand is neither law in books nor law in action, but law in minds (Ewald, 2012).

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