

International Journal for Crime, Justice and Social Democracy



A Reflection on Gang Rape in India: What's Law Got to Do with It?

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Abstract

The brutal gang rape of a physiotherapy student in India in December 2012 drew the world's attention to the problem of sexual violence against women in that country. Protests and mass public reaction towards the case pressurized the government to respond to the crisis by changing the laws on sexual violence. However, these new laws have not led to a decrease in violence against women (VAW). Is this the result of the failure of the rule of law? Or does it highlight the limitations of law in absence of social change? This paper addresses the need for using law as a key tool in addressing violence against women in India. It recognizes that unless we address the structural and root causes of violence against women, our analysis will be limited. It is important to bridge the creation of new laws, with an analysis that speaks to the role of hypermasculinity, neoliberalism and culture in VAW. If unaddressed, what may result instead are quick fixes, symbolized by the passing of new laws that act as token gestures rather than ones leading to transformative action.

Keywords

India; gang-rape; law; hypermasculinity; political economy; culture.

Introduction

Jyoti Singh Pandey was 23, living and studying physiotherapy in New Delhi, India. To pay her way through school, she worked part-time at a call centre, answering questions from Canadians about their mortgages in a globalized economy. On 16 December 2012 Jyoti was brutally gang raped, disemboweled, her naked body thrown from the moving vehicle and left for dead. As the brutality of the case created headlines around the world, anger propelled protests and vigils all around the nation, often with violent responses by the police. These protests, some outside Parliament, resulted in the immediate appointment of Justice Verma to a Commission tasked with developing comprehensive recommendations to change the laws on sexual violence. The demand for new law and the subsequent passing of new legislation focused the issue of law reform as the primary solution to reducing the apparent epidemic of gender based sexual violence (GBSV) in the country.

The purpose of this paper is to examine the limitations of law in reducing violence against women (VAW) in India, in light of the Pandey case. We begin by examining how VAW as entrenched in the international human rights law discourse was vernacularized¹ in India. Situating the origins of rape laws in India highlights the limitations of legal reforms in curbing the epidemic. The case study of Jyoti Singh Pandey further reveals how addressing VAW primarily through the criminal justice system has blinded us to a critique of structural violence in postcolonial societies. Thus, we deconstruct the discourse on VAW through a reflection on the ensuing enactment of hypermasculinities in the aftermath of violent neoliberal economic policies marginalizing certain Other² women and men.

We explore True's (2012) complaint that a discussion about political economy is absent in VAW discourse and analysis. Instead, VAW in Other societies continues to be framed as a by-product of oppressive cultural practices. In this discourse, culture is singularly placed in opposition to modern secular laws based on hegemonic western ideologies. From the perspective of the Subaltern (Otto 1996), the result is a call for 'saving the brown woman from the brown man' (Spivak 1993: 93) through more legislation that often serves as a quick fix disabling us to move beyond token change (Bishop 2005). We argue that such legal reform is ineffective and represents little more than 'paper tigers' (Hornbeck et al. 2007: 273). Finally, drawing on recent research (Association for Women's Rights in Development 2013; Htun and Weldon 2012), this paper concludes that it is the mobilization of autonomous feminist social movements employing multi-sectoral strategies, including but not limited to engaging with the law, that will deliver the critical tools and means necessary to create meaningful change in addressing gender-based forms of VAW.

Rape and criminal law reform in India

Kapur and Cossman (1996) argue that the Indian women's movements' focus on rape as a legal reform issue emerged primarily through cases of custodial rape in the late 1970s. Two prominent cases galvanized the movement towards national campaigns demanding legal reform: the custodial rape of Rameeza Bee, a young Muslim woman in 1978 (Kannabiran 2010); and that of Mathura, a young tribal woman in 1980 (Kapur and Cossman 1996). In both these landmark cases, the emphasis in the trials was not on evidence of rape but rather the victim's sexual history and their characterization as promiscuous, leading to the acquittal of the police officers charged (Kannabiran and Menon 2007).

This decision led women activists around the country to stress rape was a violation of a woman's right to her body, constituting one of the worst form of violence against women. They led national campaigns challenging the prevailing legal and social understandings of rape and consent that were originally part of the Indian Penal Code drafted in colonial India and unchanged for nearly 150 years in which consent could be implied from absence of injuries (Kapur and Cossman 1996). The women's campaign actively shifted to a discourse of patriarchy in which violence against women was situated within a larger framework of systemic oppression of women by men.

The central government appointed a Law Commission enquiry which recommended reforms to rape law based on the demands from the women's movement. After much deliberation, a joint parliamentary committee passed the amendments to the rape law in 1983. These amendments included recognition that consent was irrelevant in custodial rape, and established mandatory minimum sentences for rape (Kapur and Cossman 1996). Although the new law contained a watered-down version of the original recommendations, this was nevertheless considered a victory for women's activists, representing a 'politics of the possible' (Butalia 2002: 209). Since

the early 1980s, feminists' pressure on government bodies have continued to contribute towards the creation of new criminal and civil laws or amendments of old laws³ (Ganguly 2007).

Three decades later, the events following the Jyoti Pandey case take a remarkably similar trajectory. One of the first demands of the protests and the demonstrations following the rape was the call for legal reform. Caving under pressure, the Delhi Chief Minister Sheila Dikshit directed the Delhi High Court to establish five 'fast track' courts to try the five accused men in the case (CBC News 2013a). In addition, the Ministry of Home Affairs appointed a judicial committee headed by Chief Justice Verma to review sexual violence laws and recommend amendments. The Verma Committee's recommendations were prepared in collaboration with women's organizations and feminists. They included rejection of the death penalty; making acid attacks a criminal offense; criminalizing marital rape; and broadening the definition of sexual assault to include voyeurism, stalking, and assault with intent to disrobe women. In addition, the recommendations also addressed rape by state officials, trafficking and stringent punishment for raping a minor. When the Bill passed in March 2013, many activists marked this law as a milestone in India's women's rights movement (CBC News 2013b).

However, the final amendments made to the rape law were deemed by many as regressive. The recommendations on rape by state officials, such as a specific punishment for rape of a minor, were ignored and there was silence on marital rape. Moreover the legislation called for the death penalty where rape had caused death or serious injury to the victim or where the conviction involved 'repeat offenders', making rape convictions even harsher than previously (Malhotra 2013). Irrespective of the effectiveness of these legal amendments, the response to the Pandey case represented an instance of civil society, with the women's movement at the forefront, demanding and successfully attaining intervention from the state primarily through law reforms. This all occurred over a remarkably short time span of three months.

Challenges of ratifying national laws with the global VAW agenda

Kapur and Cossman (1996) highlight divisions within the Indian women's movement around utilizing strategies to address violence against women that relied extensively on the state, and especially on criminal law. While some activists continued to lobby for criminal legislation to protect women against violence, others were concerned with the willingness to extend the criminal powers of the state through enacting such legislation (Kannabiran 2010; Kapur and Cossman 1996). A key concern was the appropriation of feminist language by the state, without embracing feminist politics (Ganguly 2007). Kapur and Cossman's (1996) analysis of how law is implicated in the oppression of women reveals in particular the ways in which familial ideology constituted legal regulation of women as economically dependent wives and mothers, with emphasis on women's natural roles and responsibility within the family. This legal discourse was then used by the state to advance political agendas of reactionary social movements such as the Hindu Right.

By the 1990s, Butalia (2002) was arguing that Indian feminists could no longer maintain a discourse that primarily situated women as victims, as stark examples of violence against women by other females became evident through communal riots in 1992. For instance, during the destruction of Babri Masjid, female Hindu fundamentalists were known to provoke assault by Hindu men on Muslim women: 'If a girl who has been raped commits suicide, will her brother not take revenge? Hindus must make sure they are feared by others ... If they rape 10-15 of our women, *we must also rape a few to show we are no less* [emphasis in original]' (Butalia 2002: 228). Thus Indian feminists could no longer afford to think in simplified dichotomy, casting men as pure aggressors and women as pure victims. Subsequently, the Indian women's movement necessarily examined how women were also invested in politics of community identity. This

forced the movement to examine implicit assumptions about whether gender identity was enough to build a movement cutting across caste, class and race (Butalia 2002).

Thus, in the 1990s, the Indian women's movement was forced to confront the messy realities and challenges of navigating through a national rhetoric of pluralism and nation states exercising their right to difference while upholding the discourse of a global feminist agenda that pushed for the universality of women's rights as human rights, rooted in western ideology. The fundamental right to self-determination was juxtaposed against the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) articles that 'obliged the state to correct any inconsistency between international human rights law and the religious and customary laws operating within its territory' (Coomaraswamy 1997: 1259). Amirthalingam (2005) summarized the situation with his observation that 'cultural practices and traditions need to be preserved, while certain universal values must be equally protected' (Amirthalingam 2005: 707).⁴

When signing CEDAW, India continued to allow separate personal laws for religious minority communities such as upholding the Sharia Law among Muslim minorities, even if they violated the basic tenets of the convention. Shah Bano, a Muslim woman, sued for maintenance under the criminal procedure law even though the Muslim personal law allows Muslim men to not pay maintenance. The Supreme Court of India decided to draw from the criminal law provision and ruled in favour of the woman, leading to rioting and uproar in major cities. Anger among the minorities was expressed in the discourse of rights to self-determination, pluralism and diversity. This led the then Prime Minister Rajiv Gandhi to amend the criminal law so as to appease the angry Muslim minority, despite the clear violation of women's rights as presented in this case (Coomaraswamy 1997). Attempts to over-rule the clause of personal law met with violent protests from minority groups, as highlighted in the case of Shah Bano.

Conversely, we saw the Hindu Right fundamentalists make a strong demand for a uniform code, determined by Hindu law.⁵ With a focus on the inadequacies of Muslim law and despite clear gender biases in Hindu law, a myth was created that "enlightened" Hindus are governed by an ideal gender-just law and this law now needs to be extended to Muslims in order to liberate Muslim women' (Agnes 1998: 107). Agnes argued that, although legal reforms were necessary, it was important to be cautious of 'modern secular laws' pushed by CEDAW which could be appropriated by fundamentalist elements to further their own anti-minority propaganda. Such instances of misappropriation further polarized the western conventions of women's rights as articulated through CEDAW and criminal laws on VAW because they were incompatible with the rhetoric on patriarchal traditional and personal laws⁶.

The aftermath of a globalizing VAW agenda

An increased global focus on VAW, primarily led by northern feminists and regulated by the UN bodies, has led to a different debate amongst feminists in the Global South on the foreign co-optation and ideological imperialism associated with the discourse (Deo 2012; Otto 1996). In addition to a persistent focus on law reform and despite its limitations as outlined above, an important aftermath of the globalization of this discourse has been an increased NGO-ization of Southern women's groups addressing the issue (Desai and Naples 2002). Often led by Southern elites trained in the North and catering to foreign funders' preference of funding, VAW has led to tensions and fractures within NGOs as priorities identified by local activists such as economic empowerment are ignored (Deo 2012). Desai and Naple (2002) stress that this NGO-ization has led to a decline in radical critique. Reflecting on the successful campaigning of different women in the 1990s, Deo (2012) comments that this unification has come at the cost of overlooking the

differences between women's understandings of the causes and solutions of VAW, including a downplaying of poverty and inequality as a feminist issue.

When we have a legal discourse on VAW, primarily driven by the new successors of the colonial state, transnational governments such as the European Union (EU), hegemonic nation states from the global north, and aid agencies such as USAID (Halliday and Osinsky 2006), what underpinning structural factors are we excluding or undermining in the analysis? Which aspects are more privileged than others in explaining the violence that women around the world live with, and to what effect? In the next section, we situate the discussion on VAW in India within the context of neoliberalization, hypermasculinities and culture.

Neoliberalization policies

It is the gendered social and economic inequalities between women and men that make women most vulnerable to violence and abuse in whatever context ... it is women's impoverished situation relative to men that is at the root of violence ... these gendered inequalities are rooted in structures and processes of political economy that are increasingly globalized. (True 2012: 5)

There is little evidence globally of a deterrent effect of the criminal justice response to VAW (WHO 2010). Focusing on reforming individualistic laws to punish individual perpetrators obscures the preventive initiatives that would require fundamental alterations in economic and social structure. If we placed the analysis of VAW within the broader context of violence, we can begin to recognize the social, cultural and legal meaning that give violence its power, and that 'structural violence' is rendered invisible by the hegemony of 'ordinariness' (Stanko 2006: 543). Just as violence is normalized, so too are the inequalities of both men and women in a harmful globalized economy.

As True (2012) notes, the global political economic order is usually absent in VAW analysis. This is evident in the official UN discourse and UN secretary general's UNITE campaign to end gender-based violence by 2015 that does not explore the links between women's political participation, degree of social and economic equality and prevalence of VAW. Much of the literature is focused on how VAW *affects* the local or national economy⁷ as opposed to examining the particularities of how a globalizing neoliberal political economic order has further exasperated violence against women and men, particularly in the developing world.

The significance of material inequalities between certain Other men and women in perpetuating VAW complements feminist scholarship that is attentive to local socio-cultural contexts of violence and the need for culturally relevant interventions that eliminate this violence (Merry 2006, 2009). However, True (2012) simultaneously notes that women's increasing economic activity and independence is often viewed as a threat to culturally ingrained male dominance, which can lead to increased male violence against women. In the case of 'India Rising', women are increasingly taking up non-traditional jobs in transnational spaces such as call centres that require them to work at odd hours to facilitate their interaction with western customers. Not only has this resulted in women's increased visibility in occupying public spaces at odd hours but has also brought in a shift in the cultural paradigm of work that is increasingly exposed to western ways of living and being, with this 'westernization' becoming an easy target for blame.

In a blog following the death of Jyoti Singh – an employee of a call centre – Vandana Shiva wrote that there is a connection between the growth of unjust economic policies and intensification of crimes against women, stating, '[v]iolence against women has taken on new and more vicious

forms as traditional patriarchal structures have hybridized with the structures of capitalist patriarchy' (Shiva 2013). The Indian National Crime Records Bureau reported a startling 240 per cent increase in rape cases since the 1990s. According to Shiva's analysis, one of the reasons underlying this rise in violence is that the economic model shaped by a capitalist patriarchy is based on the commodification of everything, including women. In this culture of commodification, 'everything has a price and nothing has a value' (Shiva 2013). This is evident in the devaluing of women's contribution to the economy, through the informalization of women's labour that deepens women's economic vulnerability, making them further susceptible to all forms of violence (Shiva 2013). Thus, she concludes that social reforms can no longer be separated from economic reforms, with the latter needing to be built on the foundations of the former in order to redress gender inequality in society (Shiva 2013).⁸

While neoliberal policies have led to the expansion of women's employment, they have simultaneously led to the feminization of poverty, atrocious working conditions, increased poverty, and adverse health effects. These same conditions have disempowered many men (True 2012). Swarns (2002 as cited in Moore 2005) notes that, as women are increasingly challenging traditional roles in society through pursuit of education and employment opportunities, men are feeling a 'corresponding level of resentment' (Moore 2005: 1474).

As a result, the economic status of some women has been accompanied by new circumstances and new manifestations in gender relations. One noteworthy change is the decrease in women's economic reliance on men. As a result of this shift, some men have reacted to the way that global capital has undermined their earning power and facilitated women's earning power, reducing men's authority relative to some women. At times, their resistance takes the form of VAW rather than resistance against political and economic forces that are responsible for the perception of their relative powerlessness. Men's targets of violence – women – are easier for men to control than the neoliberal, global and colonizing forces responsible for rendering some men as powerless.⁹

Hypermasculinities

Is it power or the yearning for power that causes violence? (Amirthalingam 2005: 697)

Postcolonial scholar Ashis Nandy coined the term 'hypermasculinity', which Agathangelou and Ling (2004) differentiate from 'hegemonic masculinity', the tradition of masculinity. Hypermasculinity refers to a 'reactionary stance when agents of hegemonic masculinity feel threatened or undermined, thereby needing to inflate, exaggerate or distort their traditional masculinity' (Agathangelou and Ling 2004: 519). Ignoring gendered analyses, and long before feminists began studying VAW, earlier studies on violence and colonization by Arendt and Fanon illustrated the 'cathartic' violence used by colonized marginalized men against 'their' women. Arendt was concerned with violence as a whole, rather than a gendered conceptualization, and stated that 'every decrease in power is an open invitation to violence' (Arendt 1958: 87).

The aftermath of post-colonial identities shaped by neoliberal inequalities further exacerbate the unequal power relationship between some men themselves. Rogers' (2008) anthropological study investigated the sexual harassment of female students in an Indian inner-city college in Chennai, Tamil Nadu. Here, men's violence against women was situated in campus inter-caste and class conflicts aggravated by the social changes resulting from India's integration in the global economy. This analysis reveals the intersections of men's powerlessness due to the larger

context of global economic restructuring, its influence on already marginalized populations, and the aftermath of the anger where women continue to bear the brunt of this violence (Rogers 2008).

The men who resort to gender violence often invoke women's failure to adhere to certain cultural values, in favour of what is deemed as enactment of western values, as a valid justification for the violence. Okin (1998) argues that political power of religious fundamentalism is closely associated with the rejection of imposition of what are perceived to be 'western' or 'white' culture and ideas.

On the night she was assaulted, Jyoti was out late at night with her friend, not her brother or a husband or fiancé. This was used as one of the excuses by the perpetrators: that is, she should not have been out with her male friend so late at night (Nolan and Brown 2013). The Mumbai police commissioner attributed the violence to the westernization of the Indian education system: 'Countries with sex education in their curriculum only have an increased number of crimes against women' (*Indian Express* 2013). A self-proclaimed spiritual guru with a wide following, Asaram Bapu and his supporters infamously valorized patriarchy in victim-blaming: 'She should have called the culprits [her] brothers and begged before them to stop. This could have saved her dignity and life. Can one hand clap? I don't think so' (*Economic Times* 2013).

While such stances received wide public criticism, the demonstrations and protests following the rape were largely composed of men. This brought to light some contradictions within the shifting forms of Indian masculinities. Ritupurnah Borah, a feminist queer activist who helped organize the Citizen's Collective Against Sexual Assault stated:

I'm really happy about men protesting. But recently, because men's voices are more audible, they take over many of the protests ...We've been requesting the men to slop sloganeering and let the women slogan, but it's not happening. They say, 'Oh come, we're coming out and helping you'. (Uptown 2012)

She further stated her group recognized several men among the protesters who had attacked members of her collective with misogynistic threats. 'They told us we had no right to protest there, and if we wear indecent clothes, they will molest us'. On the one hand, the presence of these thugs further created a hostile atmosphere for women during the protests where they were subjected to groping and ogling by the men (Uptown 2012).¹⁰ On the other hand, there were instances of genuine solidarity as demonstrated by the 'Skirt the Issue' campaign in Bangalore which saw 25 men with more than 200 supporters wearing skirts to raise awareness that the choice of clothes could not be a justification for rape (Boocock 2013).

By situating the increasingly brutal and endemic VAW as part of a broader structure of global power relations in no way reduces the culpability of individual men for their actions. However, a focus on the effects of neoliberal policies allows us to examine how they further marginalize certain Other men in the third world, and how that marginalization also make certain Other women more susceptible to heightened violence.

When we fail to 'ask the man question' (Dowd 2010: 415), the result is a decontextualization of multiple masculinities and the ways in which men are situated within unequal power relations. Instead, Other cultures are essentialized and violence on Other women's bodies is explained through patriarchal cultures that have oppressed women for centuries. The unsaid part of the argument is the silent juxtaposing of the violent Other with the gender-just Self. And yet all of the above analysis is usually ignored and, instead, violence on Other women's bodies is

explained and talked about through oppressive patriarchal traditions and cultural customs, posed in opposition to 'modern secular laws' rooted in western ideologies, as we explore in the next section.

Lest we forget: 'According to our culture'

Halliday and Osinsky (2006) lament that most postcolonial scholars focus on subjects which are struggling to make meaning of global forces in local contexts. One exception is Merry's (2003) ethnographic analysis of international law as a site of global culture production, which she compares to being similar to state law. She argues that, despite its lack of enforceability, the CEDAW Convention's regulatory strength depends on a form of cultural legitimacy of an international process of consensus building, and its impact is dependent on its cultural legitimacy and embodiment in local cultures and legal consciousness. However, she notes that there is an artificial juxtaposition of culture and cultural practices of the 'local' as being incompatible with modernity and secular law. This was evident most recently in the 2013 Commission on the Status of Women (CSW) UN summit on VAW where Michelle Bachelet, head of UN Women remarked 'culture and religion must not be allowed to block proposals to eliminate and prevent violence against women and girls' (Ford 2013a). And yet, the very next day, she agreed to tone down the language in the CSW gender violence document¹¹ to appease conservative governments as long as the words used 'reflected the spirit' of key issues and did not undermine past agreements (Ford 2013b). What is the implication of essentializing certain cultures that are blamed for holding 'progress' captive?

It is undeniable that certain cultural practices and attitudes directly skew a society's ability to collectively address VAW. 'When rape happens to a young girl, culture stands in opposition with the law' (Shisana and Simbayi 2002: 1478). In the latest sexual crime Bill in India, marital rape went unrecognized, much to the dismay of activists and legal advocates. The silence was rooted in the institution of family and marriage. The Bharatiya Janata Party leader Rajiv Pratap stated, 'Imagine if the woman I have been married to for 20 years one day turns around and says I have raped her. It will shake the institution of marriage if marital rape is recognized as rape' (Raman 2013).

However, how much VAW can be justified in the name of patriarchal culture? Whose culture? What implications does this have on how we make sense of understanding violence as a cultural phenomenon intrinsic to particular cultures as opposed to how certain cultural attributes can be exploited for propagating VAW in violent globalizing economies? What of the men?

We argue that 'culture' is a highly appropriated discourse, co-opted by those who perform hypermasculinity as well as by those in the West who condone this performance. Salo (2010) noted that 'newer forms of nationalism are emerging, accompanied by the public performance of hypermasculinity that often draws upon a rich imagery of a romanticized traditional culture'. Simultaneously, acts of violence that result from a performance of hypermasculinity within the context of marginalization through neoliberal policies are interpreted as rooted in core cultural gender inequities, that perpetually situate the cultural Other as traditionally backward and oppressive. Why is there an absence of 'culture' as a normative frame of analysis for situating violence against white, Northern, Western, women? Is 'culture' the burden that only Other women face?

It is largely because of the highly problematic conceptualization of patriarchal culture in understanding violence against women that 'patriarchy' became a heavily contested term. Hunnicutt (2009) identifies the early criticisms of patriarchy as being 'under-theorized', oversimplifying power relations through assumed universality, and ignoring the differences

among men by casting them as a singular group. This simplistic theorization of patriarchy only had space to present women as victims. The biggest weakness of subscribing to an essentialist theory of patriarchy was that it did not successfully account for why only certain men used violence against women in societies that were categorically represented as patriarchal (Hunnicut 2009). Any analysis of VAW drawing on the culture argument today must confront these questions as the first step in de-essentializing Other men and women.

Dowd (2008) critiqued feminist analysis' essentialist treatment of men as a homogenous group and proposed to 'ask the man question' in feminist theory in efforts to de-essentialize men in the field. Asking about men serves feminist theory by acknowledging the realities of multiple masculinities, with a stronger analysis of men's power exposing how structures and cultures are 'male'. Our analysis of the men's response to violence in India has demonstrated 'shifting masculinities' (Doron and Broom 2013¹²) with an emerging debate amongst different men about new ways and meanings of performing and embodying masculinities. It is informative to ask how certain men are themselves disadvantaged by oppressive systems in order to expose the subordination of some men by others, influencing their impact on male-female relationships (Dowd 2008; also see Hunnicutt 2009). As evident in the narratives of men reacting to their further marginalization as a result of 'capitalist patriarchy' through violence against women, it helps to deconstruct the myth of the inherently violent Other man.¹³

Hunnicut (2009) takes up the task to reconceptualize "patriarchy" to be a relevant tool of analysis. In essence, much like Dowd (2008), she calls for a de-essentialization of patriarchy by acknowledging the varieties in patriarchal structures among different cultures. We must confront the reality that patriarchal ideology may endure despite structural gains in gender equality. A key example of this is the formulation of VAW legislation worldwide as a significant stride towards structural gender equality. As this paper has illustrated, the key limitation of these laws is in the very reproduction of patriarchal ideologies embedded in the laws that further subordinate women in the name of upholding the family structure. Hunnicutt (2009) also calls for an analysis of patriarchy that is developed together with other forms of hierarchy and domination. In this paper, we have subscribed to an analysis that accounts for colonial, economic, ethnic and cultural diversities in order to situate VAW as a product of multiple forces colliding together in a violent web.

Hunnicut (2009) lastly calls for moving beyond the artificial dichotomy of 'oppressor and oppressed', and instead situating VAW within 'terrains of power' in which both men and women wield varying amounts of power. This directly speaks to Bishop's (2005) point that people can simultaneously occupy spaces of power and powerlessness: be the oppressed and the oppressor.

The role of law, not the rule of law, in violence against women¹⁴

Not surprisingly, we argue that the adoption of all of these common, civil and criminal laws have not resulted in a reduction of VAW in our case studies. As noted by Scheingold (2004: 5), the push for law reform was driven, by a myth of rights that is premised on a direct linking of litigation, rights and remedies with social change. Due to a lack of viable alternatives other than the formal structure of law, law continues to be a significant area of feminist intervention to address VAW. Activists have turned to the law and to the state for redress, demanding criminal penalties for VAW, state support for the women survivors,¹⁵ and new laws condemning VAW and ending men's impunity. Neoliberalism is happy to comply with quick fixes like passing a criminal statute. The hijacking of this call for law often stems from a reactionary law and order agenda, resulting for example in the over-representation of the marginalized in the criminal

justice system, and regressive policies like the death penalty in India in the most recent crime Bill on sexual violence.

Merry (2009: 48) noted that community institutions have been weakened through urbanization, migration, and cash-based economies, rendering law and the state, or government, as ultimate arbiter. Social movements focused on VAW developed a three-prong approach emphasizing punishment and reform of the perpetrator,¹⁶ and protection of the survivor. Criminalization was a principal demand of the anti-violence movement in the West and it became the dominant approach globally, as noted above. While not described in the literature, this is a good example of the kind of legal transplant theories exemplified by scholars such as Trubek et al. (1994) and Houtzager (2005). The transplanting of legal exports into developing countries also used the trick of human rights as a screen for the importation of neoliberal economics and laws that focused on individual accountability rather than systemic approaches to, for example, women's economic empowerment.

Underlying the concept of 'Rule of Law', Baxi (2008) points out, is the idea that rules are applied by an independent judiciary and autonomous legal profession. This indeed helps to camouflage the patriarchal and gender inequitable ways that the law operates, especially rape law, and how it is rooted in western ideology. For Friedman, legal culture refers to what 'people think about law, lawyers and the legal order: it means ideas, attitudes, opinions and expectations with regard to the legal system' (Friedman 2006: 189). This belief in the law as a 'quick fix' glosses over the cultural change required, and provides political expediency that often we as feminists have bought into. Menon's (2004) work on the Subaltern and law notes that, for post-colonial societies such as India, the establishing of Law as the only legitimate discourse meant the marginalization and devaluing of all other discourses for bringing about positive social change.

How effective is this global push for law reforms? As Ortiz-Baareda and Vives-Cases (2013) found out, not very. After examining VAW legislation worldwide, the authors noted that:

... most VAW related laws do not incorporate desirable elements and are significantly limited in terms of their content and application as well as their ability to provide women with integrated treatment for and protection from violence. (Ortiz-Baareda and Vives-Cases 2013: 70)¹⁷

True (2012) further argues that criminal justice approaches to VAW aim to identify and prosecute perpetrators of violence while providing victims with little protection and redress. The key weakness with the criminal justice approach within the context of VAW is that it deals with consequences rather than causes of violence. Police and legal responses focus on prosecution and protection rather than prevention. This is based on the assumption that prosecution of crime can prevent future crime, even though the World Health Organization and London School of Hygiene and Tropical Medicine (2010) report found little evidence of a deterrent effect in the criminal justice response to various forms of VAW. Thus, True argues that rather than just uphold protection orders or criminalize perpetrators, legal and criminal justice systems need to reinforce nonviolent social norms and challenge risk factors for VAW. Similarly Charlesworth (1999) gives voice to our concern that pursuing individual criminal responsibility and accountability will distract us from investigating the structural relations of power and domination that make gendered violence endemic.

The law occupies a complex place in its intervention, one that can be hoped to be both emancipatory and disciplinary (Merry 2009: 52). Another significant feature of the use and the role of law in addressing VAW is the particularity of race and class, as ethnic minorities and

marginalized peoples are more vulnerable to both violent victimization and punishment by the criminal justice system. Essential to this analysis is an appreciation of colonial histories and the presence of a postcolonial framework in which to position the law as it operates in particular places.

Feminists have had mixed views on the appropriate reaction to VAW in national legal systems. While many of us have long been skeptical of systems of criminal justice, many have still supported the strict application of existing law and called for stronger penalties (Edwards 2010). We live with the contradictions. We know that focusing on individual acts of VAW can obscure the structure relations of power and domination that make them possible (Charlesworth 1999: 390). We opposed the law and order agenda, as so evocatively expressed by Lee Lakeman (2005). And we want the police to come when we call.

Moving beyond the essentialist dichotomy of 'pure oppressors/oppressed' in law can mean moving beyond the obvious weakness of the criminal justice system's approach to VAW; that is, dealing with the consequences rather than the causes as police and legal responses focus on prosecution (of the oppressor) and protection (or the oppressed), rather than prevention (True 2012). This further opens up space to explore the role of law in social change. We know that law can be a powerful force for social change but that translating law into action requires enormous time and resources. To be successful in changing behaviour and societal norms, law must be implemented and enforced. Feminists' interaction with law alone is insufficient to curb violence against women globally. This interaction must be reinforced with other multisectoral strategies.

Feminist social movements

A recent study of policy change on VAW in 70 countries over 40 years by Htun and Weldon (2012) illustrated that it is the autonomous mobilization of feminists in domestic and transnational contexts that is a critical factor accounting for progressive¹⁸ policy change on VAW. These findings confirm what feminist anti-violence activists have been saying for many decades. This global comparative study, of unprecedented scope, conceptualized the definition of a progressive social policy as government action on VAW (Htun and Weldon 2012: 552).¹⁹ Complementing this study, the Association for Women's Rights in Development (AWID) (2013) conducted an aggregate analysis of a broad range of multi-sectoral strategies utilized by organizations worldwide to address gender-based violence. The most common trend among organizations was to use diverse and multiple strategies, thus demonstrating an understanding of how VAW was linked to internalized beliefs and attitudes, public policies and services, women's disempowerment in the private domain, economic marginalization and importance of their presence, and the form and extent of participation in the public sphere. Most importantly, the primary focus of these multi-sectoral strategies was on mobilization and collective activism as opposed to demanding more legal reforms or amendments (AWID 2013).

Rape and sexual violence are sustained by patterns of gender inequality which cut across geo-political, economic and social boundaries, with impunity. Without justice being done, the violence and gender inequalities which give rise to such violence are perpetuated. As Andrews has noted, 'the unravelling of the cultures of masculinity and patriarchy so deeply ingrained in political and social DNA will require more than a legal and constitutional framework to radically eviscerate such deeply ingrained attitudes' (Andrews 2007: 8). This is not to discount the enormous symbolic and substantive possibilities generated by a legal edifice committed to addressing VAW but such legal infrastructure requires constant, vigilant and effective monitoring of its implementation and enforcement processes, most effectively carried out by well-resourced autonomous feminist organizations.

Unpacking the term 'resistance' offers more comprehensive ways to interpret power and powerlessness by drawing on a post-colonial analysis. Most of this paper has referred to men's sexualized VAW. We must also refer to the extraordinary agency of women's resistance and see autonomous feminist organizations as a layered site of women's resistance, the reach of which extends across all boundaries of race, class, geography, caste, culture and nation state boundaries. In the context of global restructuring, Eschle and Maiguashca (2005) argue for feminist analyses which seem to understand how other forms of power are constitutive of neoliberal economic developments. .

Conclusion

Although numerous laws related to rape have been passed in India due to feminist groups pressuring the government, these laws have been ineffective through the lack of implementation and, in some cases, have actively worked against the interests of women (Ganguly 2007). Most recently, Indian rape laws have once again been mobilized by civil society movements after the high profile gang rape cases. While, on the one hand, feminist mobilization has contributed to the successful creation of new laws, on the other hand, as Ganguly notes, 'it is safe to postulate that most feminists have little or no faith in legal solutions to violence' (2007: 9).

This was evident in the Indian women's movement as feminists grew increasingly disillusioned by the role of law reform in combating violence against women and because they saw a disconnection between enactment of new laws and their implementation. This disillusionment did cause a shift in how women's organizations chose to engage with law. Instead of focusing on demanding law reform, some organizations focused on taking up individual women's cases in courts, while others focused on the lack of institutional support for women and created women's centres to provide women with legal assistance, health services and counseling (Kapur and Cossman 1996). There is a lack of other viable structural alternatives to address violence against women. Ganguly (2007) argues that while feminists have continued to look at the state with suspicion for their role in perpetuating women's oppression, they nevertheless maintain their engagement with the state for legislative reforms.

We cannot do without law addressing VAW. But without the multi-sectoral approaches as evidenced by the studies of civil society and social movements, law alone as a strategy to address VAW is doomed to fail. We do not advocate for a withdrawal of engagement with the rule and the role of law. But we must take into account the latest research that shows us that it is critical that resourced autonomous feminist civil society organizations are critical to any progressive social policy on VAW that uses law. Further, without applying the lenses of hypermasculinity, neoliberalism, culture and a political economy of VAW, our analysis of its causes and consequences will be sorely limited, and continue to allow for a justification of quick fixes by symbolically passing laws that neither hold men accountable or confront the culture that Merry (2009) exhorts us to transform.²⁰

In India, UN Special Rapporteur on Violence Against Women, Rashida Manjoo expressed regret that the amendments made to the rape laws in India were not reflective of the recommendations from the Justice Verma report. What was a 'golden moment to examine whether legislative measures in India were sufficient' became a lost opportunity. The raft of new amendments including the death penalty 'fails to address the structural and root causes and consequences of violence against women ... The need is transformation of society and empowerment of women' (Dhar 2013).

Justice Verma died just as this paper was being completed. His final comments are prescient. He noted that this rape crisis in India is a crisis of governance and democracy. He queried how hypermasculinist politicians can enact laws addressing rape, without holding themselves accountable: 'Just as you have ignored the women, you ignore half the population. If you ignore half the population, what is the progress you are talking about?' Laws alone, without a cultural transformation are not sufficient to achieve progress towards realizing gender-just societies. 'Human development, unless engendered, is fatally endangered'.²¹

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¹ Coined by Levitt and Merry (2009), vernacularization is the process of appropriation and local adoption. Within the case of women's human rights, we explore how these ideas connect with a locality, assume the ideological and social attributes of the place, and also retain the original formulation.

² In the context of this paper, we subscribe to an understanding of Other based on Said's Orientalism that uses the Other as a concept to theorize about race, ethnicity and colonialisms as well as to discuss the construction of third-world subjects as the objects of inquiry for North American and European discourses.

³ Examples included: shifting the onus of proof of rape from the defendant to the accused; redefining consent in rape cases; marital rape exemption not applicable in judicial separation (1980); introducing a new category of rape by members of the police and public servants, of women under their custody, carrying longer sentences than other forms of rape (1980); inclusion of domestic violence clause in the criminal code (1983); national law banning sex selection pre-selection (1993); national laws on sexual harassment in the workplace (2003); extending the right to matrimonial property to women experiencing domestic violence (2005) (Ganguly 2007).

⁴ Levitt and Merry (2009) articulate this stance as the resonance dilemma: human rights ideas and practice need to resonate with existing ideologies to be locally adopted. However, to be legitimate as human rights, they must also reflect universal principles or standards.

⁵ In light of the recent general elections in India, the newly elected BJP party, the political offspring of the Hindu Right movement, under Prime Minister Narendra Modi's leadership has pushed for re-introducing a uniform civil code, stating that 'there cannot be gender equality till such time India adopts a Uniform Civil Code ... that [draws upon] the best traditions and harmonizing them with the modern times' (BJP Manifesto 2014: 41).

⁶ In 2000, a CEDAW committee expressed concern that the principle of non-State intervention was impeding progress in guaranteeing women's rights because government only intervened when religious communities requested intervention (Merry 2003). Experts noted that ethnic and religious groups maintain patriarchal traditions and perpetuating personal laws of these communities was incompatible with women's rights and a breach of the convention because high rates of gender based violence took place through customary practices such as dowry, sati and devdasi systems. The committee wanted a single, non-discriminatory system and pressed India to adopt a uniform code for all its religious communities and eliminate personal laws on discriminatory grounds, juxtaposing secular modernity to religiously based and oppressive sets of family laws. While this push was ignored by the Indian government at the time, under the new government, it very well may become a reality.

⁷ For example, the 2005 brief by the International Center for Research on Women on the Millennium Development Goal Series contextualizes VAW within how it affects the economy as opposed to how the economy affects and is linked with VAW: 'Violence against women exacts a high toll in terms of health and economic costs'. Monetary costs of VAW including expenditure on goods and services to prevent violence, the treatment of victims, and the apprehension and prosecution of perpetrators are

substantial. Indirect costs, although hard to measure, are recognised as impacting on the economy through women's lower productivity and diminished quality of life.

⁸ Shiva's analysis has further been developed by Nivedita Menon (2013) in her response to Marxist scholars who have written extensively about the December rape and murder, contextualizing the class and caste aspects of both the perpetrators and the civil society response.

⁹ This argument is not uncontested. Babalwa Daza, a South African court counselor who helped women navigate through the South African court systems contends, 'Some people say unemployment. Others will say poverty. I don't agree with that. Since when do you rape because you are hungry?' (Swarns 2002:1474, as cited in Moore 2005).

¹⁰ Rukmini Shrinivasan, a female journalist from *The Times of India* also reported being groped during the protests by participants who were 'overwhelmingly male'. We have seen similar accounts – sometimes far more gruesome such as gang rape – from women protesting in Tahrir Square; and women were reportedly groped during the Occupy Protests across North America in summer 2011.

¹¹ This could be because she was about to announce her resignation from the UN to return to Chile to run for President and needed to leave a 'legacy' by having a final agreed document.

¹² Doron and Broom's (2013) collection is an example of de-essentializing South Asian men in feminist theory as the authors in the collection move beyond cultural typologies and recognize South Asian masculinities as shifting, culturally located and situated within the politics of nationalism, globalization and economic struggles.

¹³ Once again, it is important to note that this analysis does not justify or validate the act of violence by some men on women. Rather, it helps us better understand some of the structural reasons underpinning why some men and women are caught in the chain of violence, rather than a homogenizing generalization about inherent cultural tendencies for some men to be 'naturally' violent.

¹⁴ It is important to acknowledge that this paper is not meant to dismiss the importance of passing criminal law on sexual violence. The motive is to highlight the critiques of a singular focus on criminal law, and how it blinds us to the structural factors influencing VAW.

¹⁵ The preferred term to 'victims'.

¹⁶ Although Merry uses the term 'violinator', this paper uses the more standard term 'perpetrator', but we acknowledge the importance of Merry's significant contribution to the field.

¹⁷ They found that more than 60 per cent of the countries formulated VAW legislation as 'domestic violence' rather than focusing on VAW. The authors suggest that this type of 'gender-neutral legislation' tends to prioritize stability of family over the rights of women, and can be easily manipulated against women. Only 28 countries included a definition of the four forms of abuse in VAW legislation: economic, physical, psychological and sexual.

¹⁸ Their definition of a progressive social policy is one that is distinguished by the specific intention of empowering or improving the status of groups that have been historically marginalized, excluded and stigmatized.

¹⁹ In her previous work, Weldon (2002) has stressed that it is not just the existence, but also the autonomy of women's groups (independent of political parties) that is important for influencing policy. She argues that descriptive representation of women in political processes does not significantly improve substantive representativeness. Rather, 'where women's movements interact with effective policy machineries, I should see greater responsiveness to violence against women' (Weldon 2002: 1167).

²⁰ As a post-script to this paper, protests and demonstrations, some violent, have again occurred throughout India after the horrific, and separate, rape and murder of two five year old girls.

²¹ Justice Verma quoting Mehbub ul Haq, the founder of the Human Development Report (NDTV 2013).

Please cite this article as:

Sharma R and Bazilli S (2014) A reflection on gang rape in India: What's law got to do with it? *International Journal for Crime, Justice and Social Democracy* 3(3): 4-21. doi: 10.5204/ijcjsd.v3i2.155.

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