Sexual Violence, Discursive Formations and the State

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While in the face of the disorder of collective violence the state seems to absent itself so that we cannot guess how the judicial discourse would have constructed pathological sexuality, we have evidence of how 'individual pathology' is constructed in the rape trial during normal periods. Further, in the dense discursivity of the state as it engages in separating the normal from the pathological, we get a production of bodies (male and female) that normalises sexual violence at least for the purpose of the law.

THE World Mental Health Report contends that domestic violence and rape constitute approximately 5 percent of the global health burden for women in their reproductive years. Realising the enormity of the health burden on women that this imposes, the report urges the international community to take the physical and sexual abuse of women as an area of priority for research and social action. This paper looks at the processes through which, I believe, sexual and physical violence through the mechanism of rape is 'normalised' in Indian society. It also suggests certain directions in which the rape law might move to provide better protection to women.

Sexual violence against women is constitutive of social and political disorder in India. Widespread violence against women was witnessed at the time of the Partition of India with more than hundred thousand women having been abducted from each of the two parts of the Punjab alone [Butalia 1993; Menon and Bhasin 1993]. Not only were women abducted and raped, but slogans like 'Victory to India' and 'Long Live Pakistan' were said to have been painfully inscribed on the private parts of women. Although a Fact Finding Organisation was set up to enquire into these atrocities, the findings of the organisation were never made public. I have argued elsewhere that the bodies of women became political signs, territories on which the political programmes of the rioting communities of men were inscribed [Das 1995]. Although the judicial silence of this occasion is a stunning fact of history, I think one can suggest that in order to read this silence it is necessary to juxtapose it with other occasions when the judicial discourse is engaged in the task of separating 'normal' sexuality from 'pathological' sexuality, and to ask whether the very logic by which courts of law in India bring out this separation does not 'normalise' the violence against women during periods of disorder. In other words I submit that while in the face of the disorder of collective violence the state seems to absent itself so that we cannot guess how the judicial discourse would have constructed pathological sexuality, we do have evidence of how, 'individual pathology' is constructed in the rape trial during normal periods; and further, that in the dense discursivity of the state as it engages in separating the normal from the pathological, we get a production of bodies (male and female) that normalises sexual violence at least for purposes of the law.

RAPE IN JUDICIAL DISCOURSE

The pervasiveness of sexual violence at every level of social organisation has been decisively demonstrated by feminist scholars. Many have claimed that the everyday heterosexual practices and the practice of rape participate in the same structure of relations defined by patriarchal ideologies. For example MacKinnon has argued that "... sexuality is a set of practices that inscribes gender as unequal in social life. On this level sexual abuse and its frequency reveal and participate in a common structural reality with everyday sexual practice" [MacKinnon 1992: 126; see also MacKinnon 1989]. But there is a peculiar puzzle here. If sexuality in everyday life, sexual ecstasy and sexual abuse have complex, albeit discontinuous linkages, then how is it that the state steps in through its judicial institutions to 'problematise' the assumptions of everyday life regarding men's uncontested rights over women's bodies? If the law was only interested in treating sexual offences on analogy with offences against male property, as many have alleged, it would be difficult to explain the importance of the notion of consent in the case law as it has developed in India and elsewhere. Indeed, 'consent' of the woman turns out to be the most significant category for distinguishing between non-punishable sexual commerce with a woman and the offence of rape against her. In this context Smart (1989) considers that the significance of the category of consent is that it helps to systematically transform rape into consensual sex in the legal system. More recently Matoesian (1993) has identified a 'rape trial' as the site for examining how the victim's experience of sexual violence is delegitimised and decriminalised by converting it into consensual sex.

"Courtroom talk captures the moment to moment enactment and reproduction of rape as criminal social fact" [Matoesian 1993:27]. There is a genealogical link between the argument made here and Foucault's understanding of the relation between power and sex. In his history of sexuality Foucault (1980) understood power as essentially that which seeks to dictate its law to sex. This means first of all that sex is placed by power in a binary system of licit versus illicit and permitted versus forbidden sex. In this reading the effects of power take the general form of limit and lack. Yet it is Foucault above any other thinker who has emphasised that sexuality in modern societies is not so much a product of judicial-political prohibitions as of the will to knowledge/power that lies behind discourses defined by techniques of confession and scientific discursivity. Hence, "we must not think that by saying yes to sex, one says no to power" [Foucault 1980: 157]. This seems to imply that the search for freedom in the pleasures of sex is ironically what places a person under the domain of power. The distinction between sexual pleasure and sexual subjugation becomes blurred here. It is this very play between pleasure and subjugation, I shall argue, that defines techniques of confession in judicio-political discourse so that the woman's body is made to confess against her explicit speech; subjugation is read as pleasure. The court room trial and the structure of sentencing demonstrate how a woman's no to sex can be converted into a yes to it through the operation of judicial grammar and judicial sentencing. It is in these practices that we shall see what consent means in the dense discursivity of a field defined by the juridical domain.

JUDICIAL DISCOURSE

One way of conceptualising judicial discourse is to see it as a cross roads for multiple transactions by which a particular way of talking about rape sorts women into categories that brings law and social practices into congruence with each other. In their pathbreaking work on a semiotic un-
standing of judicial discourse, Greimas and Landowski (1976) have described how the legislative function of this discourse first separates the licit and illicit compartment of human desires through normative enunciations. These desires, they argued, are then classified and hierarchised through processes of judicial verification by an application of such distinctions as nature and culture on the one hand, and individual and social, on the other.

The legislative function in the discourse is a function of enunciation — it belongs to the order of being by which legal objects are brought into existence in the process of being named. The adjudicatory level, on the other hand, belongs to the order of doing. Although the linguistic practices encountered in judicial prose orient one towards thinking that the processes of adjudication belong to a reality that exists prior to being named, in fact it is the legislative function that gives direction to those elements of the world that will be selected for reference. Thus the order of doing is the operational sphere of those semiotic objects which have already been brought into existence by legislative enunciations or by the legislative definitions of reality.

The juridical domain is defined by the combinations of prescriptions and interdictions, 'that create a solid and immobile architecture', but since the production of rules is constantly subject to verification, the undifferentiated domains of non-prescriptions and non-interdictions that initially define the non-juridical domain can move into the juridical domain through the application of juridical phrases. In the final analysis, then, the juridical discourse splits into the two poles of grammar and semiotics. The legislative level is the level of grammar without content while the adjudicatory processes relate to the level of judicial verification through which content is given to the judicial grammar. The level of non-judicial discourse — devoid of both judicial grammar and judicial semiotics — constitutes a virtual world elements of which may enter the judicial world through judicial production and verification. It is this double process of judicial production and verification that negotiates the 'reality' of societal categories and fits it into frames of law. In the process the judicial discourse comes to mediate the everyday categories of sexuality and sexual violence, sorting and classifying the normal and the pathological in terms of marriage and alliance. It is because of the manner in which categories of alliance are brought into the process of judicial verification, separating women into 'consenting' and 'non-consenting' ones; regulating male desire by channelising it towards women of appropriate categories — that we can see why judicial discourse becomes silent when rules of alliance stand suspended during periods of collective violence. Let me try to give flesh to this argument by a consideration of the rape law in India.

**Rape in Indian Case Law**

At the level of the codification of law, rape constitutes an offence against the body. At one level, it may be seen along with other crimes in which force is used against a person resulting in grievous harm or death of the victim. Yet by separating and codifying a separate category under the heading of sexual offences, the Indian Penal Code, directly recognises the right of the state to regulate sexuality. It is important therefore to note that although in the sentencing structures one finds that the judges are compelled to constantly distinguish between grievous bodily harm caused by an attempt to rape a woman and rape proper: in the penal code itself sexual offences are classified through a binary distinction between 'rape' and 'unnatural offences'. The deployment of the concept of nature, as we shall see later, allows rape to be viewed as an offence which is 'natural' and men as falling into a natural state when the ordering mechanisms of culture are absent.

The law relating to crimes in India was codified in 1860 by the colonial British government by the introduction of the Indian Penal Code [Dhagamwar 1992]. The Code identified rape as an offence and made it punishable under Section 376. The definition of rape in this section read as follows:

A man is said to commit 'rape' who, except in the cases hereafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

- First — against her will.
- Secondly — without her consent.
- Thirdly — with her consent, when her consent has been obtained by putting her in fear of death or of hurt.
- Fourthly — With her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- Fifthly — with or without her consent, when she is under 10 years of age.

Explanation — Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Sexual intercourse by a man with his own wife, the wife not being under 10 years of age is not rape.

The original age of 10 years in the fifth clause has been amended through a series of legislative amendments so that it now stands at 16 years.

Even a cursory reading of the text would make it clear that in defining the offence of rape, the concern is with regulation of sexuality rather than protection of body integrity of the woman. One of the commentators to this paper, Stacy Cherry (1994), raised the question that a woman giving her consent because she believes herself to be lawfully married to an 'alleged rapist' seems particularly problematic. What kind of circumstances must exist, asked Cherry, for a woman to believe that she is married and yet possibly not be married? To my mind, this clause clearly brings out the manner in which social reality is mediated through the judicial discourse. For instance, in cases of bigamy a woman may believe herself to be married but the marriage is null and void in law. Hence although the husband may not have used any force in having sexual relations with her and indeed, the woman may have consented to the sexual relationship, in law he would be defined as a rapist according to this clause. When we read this along with the clause which does not consider it judicially possible for a husband to 'rape' his wife if she is above the age of 16, we can see that the offence of rape is about the regulation of sexuality and not about the protection of the body integrity of women.

An examination of the case law shows that the consent of a woman can be read as non-consent, and the absence of consent can be read as consent, depending upon where she stands in the system of alliance. What rape as illegal sexual commerce offends, it seems, is not the body of the woman but the order of correct sexual relations as defined by societal norms.

It is not that the law is not concerned with the question of consent. At the level of judicial verification, the question of injury to the body becomes crucial in finding evidence of consent, but at the level of judicial enunciation of norms that the question of consent in the definition of rape is a very complicated issue indeed. This becomes even more clear if we see the subsequent Section 377, which defines 'unnatural offences' and prescribes punishment for these.

Section 377 reads as follows: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment of life, or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine." The explanation states that "Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section" while a Comment to the Section clarifies that this particular offence consists of carnal knowledge against the order of nature.
I regret that I do not have information about the case law that developed around the category of unnatural offences at the moment, but an examination of this seems important to further amplify the notions of ‘nature’ as deployed in the judicial discourse. For the present I shall be content to note that in contrast to the law on rape, in which the notion of consent plays a very important part, the idea of voluntary participation is crucial for defining offences ‘against the order of nature’. Thus, in law, a man cannot be raped by definition and a woman submitted to sado-masochist practices by a man through the use of force could not be said to be raped; one is then compelled to conclude that rape is not an unnatural act. Indeed, as Charles Bright (1994) stated succinctly in his comments on this paper, “the whole question of female consent becomes a process of positioning the male to do what comes naturally – that is to act from and in nature, in full accord with both body (desire) and speech (will)”.

I think the point is sufficiently clear that the rape law is not oriented towards regulating the mobilisation of women’s groups to press for the judicial definition of what constitutes ‘penetration’.

As far as consent is concerned, the case law evolves in the direction that consent cannot be obtained after the act, that a woman who is sleeping or is intoxicated cannot give consent; that a woman who is not of sound mind cannot give consent; that if she had a misapprehension of the act then she cannot be said to have given consent. It seems from these cases that consent is defined in the process of judicial verification as an act of reason and will. This is clearly spelt out in Idan Singh 1977 Cri LJ 556 (Raj) in which it was stated that consent was an act of reason in which there was a conscious and voluntary acceptance of the act of sexual intercourse. Yet there is a counter text which assumes consent to be not only a matter of cognitive and moral recognition, but also the choice a woman makes between resistance and assent (Rao Harnarain Singh (1958) Cr LJ 563). Here we see that the will of the woman as expressed in her speech and the body of the woman as providing evidence of acceptance or rejection, are set in opposition to each other. As we shall see later, the body is made to often speak as under torture, against the idea of consent as constituting a cognitive category. Finally, since the underlying idea is that sexual intercourse with a woman defined as vaginal penetration is an act of nature, it is rarely asked as to what is constitutive of the act of sexual intercourse that a woman is consenting to? For example, in Jarnail Singh 1972 Cri LJ 824 (Raj), it was stated that if consent is given prior to sexual intercourse no matter how tardily or reluctantly and no matter how much force had been used, the act does not amount to rape. In all these issues a way of reading the relation between signs inscribed on the surface of the body and the ‘depth’ of female subjectivity are established.

As far as the second point pertaining to penetration is concerned, a number of cases define that partial penetration amounts to penetration for purposes of the law; that it was not necessary that the hymen be ruptured, and that the medical evidence may add to the other evidence but cannot be treated as sole evidence of rape having occurred since rape is a legal category and not a medical category. As was stated in Joseph Lines (1844) I C & K 393, “to constitute penetration, it must be proved that some part of the virile member of the accused must have entered within the labia of the pudendum of the girl, no matter how little.”

The 1983 amendments were expected to make it easier for victims to seek redressal, and case law since then has introduced the idea that mere absence of injury on the body of the prosecutrix does not constitute evidence of consent; neither is corroborative evidence always necessary. Surprisingly the rates of conviction are steadily declining. According to the statistics provided in Crime in India, the percentage of convictions in rape cases was in the range of 35 to 38 per cent between 1980 and 1986, in 1988 it declined to 8 and in 1990 to 9.1. Although many of these cases did not concern custodial rape, and several were in courts of law before the amendment was passed, one would have expected that the new directions which were given for interpreting consent, may have made conviction easier rather than making it more difficult. The question of why rates of conviction have declined is one to which I do not have a ready answer. It is worth considering, however, that the underlying assumptions of judicial production and verification – especially the normalisation of rape through its naturalisation – make the process of judicial reform much more difficult than was anticipated.

**Judicial Grammar and Judicial Semantics**

In terms of the two poles of judicial grammar and judicial semantics proposed by Greimas and Landowski (1976), we get the following taxonomy. At the pole of judicial grammar, the law defines two circumstances—the first in which rape cannot occur by definition, and the second where no judicial verification in terms of the circumstances relating to consent is necessary. The former covers cases of sexual
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intercourse between a man and his wife, regardless of the consent or otherwise of the wife. The possibility that a man could use force to have sexual intercourse with his wife is in the realm of judicial nullity. The second is the case of a girl below the age of 16 in which case only the fact of intercourse has to be established in order for the offence of rape to have occurred. A wife who has been forced into submission by her husband and a man who has obtained the consent of a girl below 16, are subjects in the 'real' world—a reality that judges have to encounter in the courts again and again—but since the real world is a virtual world as seen from inside the law, it needs the mediation of judicial phrases to negotiate this 'messy' reality. As we shall see later, there is a tension between judicial grammar and judicial verification so that a judgment may take into account that a man does not have a right to inflict grievous bodily harm on his wife in the process of having sexual intercourse with her although within the limits of the judicial grammar, this cannot be classified as rape. In the converse case, when judges have encountered the evidence of a girl's consent to sexual intercourse even if she is proved to be below 16 (but not much below this age) this has been taken to constitute mitigating circumstances for reduction of the period of imprisonment. The judicial grammar then leaves a whole domain of sexual commerce to which the distinction between force and consent, comes to be applied in order that the difference between 'sexual intercourse' and 'rape' be judicially demonstrated. It is in the play of power here to define sex that we find that the distinctions between nature and culture come to be articulated in order to dramatise masculinity and femininity as capability. The following sections depend heavily upon evidence taken from modes of reasoning in the judgments in rape cases. Hence the judicial prose that has its own stylistic peculiarities, is embroidered in my prose (so to say) but I hope it retains its mark of 'otherness'.

**Force and Consent**

The deployment of the concepts of force and consent in the process of judicial verification moves at two different axes constituted by reading the signs on the body and relating them to the speech of the woman. In every case the speech of the woman is pitted against her body for the production of truth. In the process of judicial verification, the judges find that either the body bears witness to the truth of the statements of the prosecutrix that she had been forced into submission, or contrarily, it provides evidence to negate the speech of the woman. While in all cases pertaining to the violation of body integrity, it is inevitable that the body would be objectified in the process of judicial verification, here the body is objectified as a sexual body. The female body is defined in this discourse primarily as one which is marked by the impress of male bodies on it leading to a gendered reading of this process of objectification of the body. The first question in a rape trial that the judges seek to determine is whether sexual intercourse has occurred. A whole way of talking about the sexualised body comes into play here; is the hymen intact; how much of a finger could be inserted into the vagina under medical examination; is penetration to be understood as vulval or vaginal; etc. Thus, a whole topology of signs is created that move on the surface of the body, territorialise it, and constitute it as a sexual body, fit or unfit for exchange. The body is objectified in ways that become a kind of judicial pornography. I give an example of this particular mode of verification on the question of whether the offence committed is to be classified as a sexual offence or is better treated as a non-sexual one.

In this case (SC 58/1986 decided on 20/1/1987, per P N Santhakumari, Sessions Judge, Ernakulam, Kerala) the prosecution case was that the accused, who was 17 years old, committed assault and rape on a two-year-old girl when her mother had left her in the care of her elder brother (seven years old) for a short while, when she went to post a letter. The mother came back and found that her son was standing in the corridor and crying. The door to the room in which the accused was with the baby was locked and did not yield to her repeated attempts to push it open. Looking through the window she saw the accused, in a half naked position, lying on the baby. He was committing sexual assault on her, having laid her on the floor while he shut her mouth with his hands. On finally being able to get into the room, the mother found the girl to be bleeding profusely. The girl sustained injury on her private parts and was rushed to the hospital.

In the medical evidence it was stated that there was a perineal tear on the private parts of the girl and profuse bleeding. The doctor had deposed that he could not examine the girl completely because she needed urgent medical care to save her life. In arriving at the sentence in this case the judge had to decide whether the offence committed by the accused constituted rape. She summarily dismissed as absurd the plea put by the respondent/accused that she could not examine the girl completely because she needed urgent medical care to save her life.

Now the question arising for consideration is whether there was penetration to the vaginal canal so as to term it rape. In case of rape the prosecution in order to prove sexual intercourse, need prove penetration in the vaginal canal. Penetration is enough so as to constitute rape whereas without penetration the offence or the act cannot be termed 'rape'. ... The girl being two year old penetration appears not easy. Still there is perineal tear... There is no concrete evidence of penetration into the vaginal canal of the girl in spite of the perineal tears on the private parts of the girl which can probably be caused by criminal force. Presence of the seminal stains and human sperm heads on the girl's frock and the evidence of the mother that the accused lay on the girl does not prove penetration though it does prove sexual assault. Thus the act does not come within the purview of 'rape' as defined in 375 IPC ...

The accused having laid the girl on the floor shutting her mouth by his hands and being half naked lying against her as seen by the mother and having completed sexual act by the discharge of semen which the mother saw him wiping off from his own private parts and also from the body of the girl, the accused having taken the girl to the room and having done the act with the determination and the intention to commit the offence of rape though he had completed his sexual acts there being no evidence as to penetration which is the most essential ingredient for rape, it is only sexual assault and attempt of rape.

This lengthy quotation has been given here, not because this represents the typical way in which judges define penetration—there are many other cases in which the judges have held that partial penetration is sufficient to constitute penetration under the law—but rather to show that while the same act is constituted as a sexual act for the man, there is an ambiguity as to whether a girl child's body can be treated as a sexual body in the commission of this very act.

I give one more example in which the judges came to an opposite conclusion, viz, that though the girl had not sustained any injuries the offence was that of rape. It seems to suggest that the question as to whether the girl had been sexualised by the experience is an important one in determining whether the offence is sexual in nature. It shows that the movement between surface and depth—between reading the body and reading the woman as subject provides the underlying grammar of judicial verification. This example is of a case in which the respondent/accused was a medical officer staying in a joint family. One day he tricked a young friend of his niece who was then eight years old to come to the house when he was alone with his niece. He then
compelled the young girl to commit fellatio on him and also slightly inserted his penis into her vulva and had an ejaculation. Although the girl did not relate this to her parents immediately since he had threatened her with dire consequences, the story came out in the next few days. On being confronted by the girl’s enraged father, the accused confessed that he had frequently abused other girls in a similar manner, including his own niece. In the course the statements made by the accused were treated as extra judicial confession made in the presence of the girl’s father and his relatives. In this confession he clearly stated that he had “raped Tulna and had also committed the same kind of sexual assault on earlier occasions with Richa, Priti, and other girls of that locality, but being a doctor he had been careful enough not to rupture their hymen”.

The case had come up before the High Court of Madhya Pradesh which had accepted the entire evidence of the prosecution but had nevertheless entertained a doubt as to whether the offence could be classified as rape. The High Court held that since there were no signs of injuries, on either the girl or the accused, the offence was not one punishable under either the provisions of rape or of causing grievous bodily harm, but only under Section 354 IPC on the ground that the respondent had outraged the modesty of a young girl.

The decision of the High Court created a scandal in the international press. Although the state did not prefer an appeal, the father of the girl appealed in the Supreme Court, against the judgment. In its review of the case, the Supreme Court held that there was enough evidence that the respondent “without completely and forcibly penetrating the penis into the vagina of the girl had slightly penetrated within the labia majora or vulva or pudenda without rupturing the hymen and thereby satisfied his lust after ejaculation of semen”. The Supreme Court held that this was sufficient to constitute the statutory definition of penetration which was necessary to prove rape and accorded punishment accordingly.

In contrast to the earlier case that we discussed in which the girl had suffered grievous bodily harm, in this case the girl was forced to co-operate with the accused and had hence escaped injuries on the body. The accused, being a doctor had the technical skills not to rupture the hymen. In the earlier case of the two-year-old child, the offence was declared to be a non-sexual one. In this case the Supreme Court came to the conclusion that it was a sexual offence that had been committed.

I suggest that underlying the discussion on what constitutes penetration and hence rape, is another discourse that criss-crosses the discourse on sexuality and this is the discourse on alliance. In Hindu society the young girl, with her body unmarked by the sexual desires (lusts) of men, is considered the appropriate gift in marriage that establishes alliance between men. A girl’s awakening into sexuality is considered not as the work of her own desire but rather the working of male desire, which in the code of alliance is most appropriately, the desire of her husband. The sexual offence of rape against a young girl thus becomes an offence against the code of alliance — although this is only obliquely alluded to in the judicial discourse. Hence in the case of Tulna, the Supreme Court having defined the offence as that of rape, went on to state the following:

We are told at the bar that the victim who is now 19 years old, after having lost her virginity still remains unmarried undergoing the untold agony of the traumatic experience and the deathless shame suffered by her. Evidently the victim is under the impression that there is no monsoon season in her life and that her future chances for getting married and settling down in a respectable family are completely marred.

Without making every qualification, I would like to maintain that judgments on rape in the case of young girls (especially if a girl is a virgin), lie at the intersection of the discourse on sexuality and the discourse on alliance so that the question of whether a sexual offence has been committed, is decided not by recourse to the opposition between force and consent but on the issue of whether the body has been so sexualised by the experience as to make it unexchangeable in marriage. Thus, it is not only a matter of regarding the signs on the surface of the body but also constructing an ‘inside’, much as Foucault talks of the inside being in the nature of a fold. Hence, in the first case of the two-year-old child, the offence came to be constituted as one of having caused bodily injury, but not rape, although the injuries were on the private parts of the girl. While in the second case, although the girl did not sustain any injuries and her hymen was not broken because of the technical mastery over the body that the accused had by virtue (or vice) of his profession, the act was clearly defined as sexual in nature. I suggest that this may be attributed to the fact that the two-year-old child though badly injured, was not seen as having been ‘sexualised’ by the act whereas the eight-year-old by having been compelled to experience male sexuality had been so sexualised as to be constantly ashamed by her experience. In fact the judges quoted from her account in their judgment to show that what she experienced may be appropriately termed as sexual violation. For example, she had stated that “Nawal Chacha (uncle) put his male organ inside my vagina and since it was fat it kept slipping out. After that my vagina was paining”. The judge’s reference to her feelings of shame in recalling these events shows that it is not only changes in the body but also in the construction of the self as a sexual being that determines ‘marriageability’ of a girl and hence the judicial discourse dwells on her memory of the event as much as on bodily harm as constitutive of rape.

Whereas in the case of a child or a virgin the question is whether a body previously unmarked by the impress of male desire on it, has been ‘sexualised’ through the offence under trial, in the case of women who may be defined as ‘sexually experienced’, the discourse on sexuality and alliance intersects on a different point. This is the point at which a slippage occurs in which the offence against the body and will of the woman becomes transformed into an offence against the rules of alliance. These rules implicitly state that men may only treat those women as sexually available who are not integrated into the structure of alliance. Thus, those men who recognise each other in the ‘matrimonial dialogue of men’ to use the evocative phrase of Levi Strauss (1969), are normatively required to constitute the women as signs, as women carrying significance in this dialogue. If, on the other hand, a woman is not chaste and is therefore without significance, in the exchange between men, then she may be seen as available for sexual experimentation. In all such cases the rape trial becomes a dramatic enactment, showing how force may be used against the will of the woman but is likely to be converted into consent by the application of judicial reasoning on the relation between surfaces and depths in defining the mode of being female.

The example I offer for the first kind of reasoning — i.e., the offering of judicial protection to a woman who is integrated into the structure of alliance — is to be found in a judgment delivered by the Karnataka High Court in Criminal Appeal No 79 of 1983, D. II — II — 1986, in the case of the stale of Karnataka (Appellant) and Mehaboob and Others (Respondents). The case was as follows. The prosecutrix was a married woman, normally resident in Bangalore, who had gone to another town by bus, to see her ailing father. From the bus stand she took an autorickshaw which was being driven by one of the accused. On the way the driver stopped and at his whistle another accused entered the autorickshaw. Instead of going to the residential colony, where her father lived, the driver took the rickshaw to a lonely place. The prosecutrix was threatened and bodily carried to a ditch where she was raped. The defense plea was that the absence
of injuries on her body or on the accused showed that the prosecutrix did not resist and hence her accusation was a tissue of lies. The Sessions Court had acquitted the accused on the grounds that injuries were not found on the woman or on the accused, and there was lack of other collaborative evidence to prove rape. In an appeal against the order of acquittal, the Appellate Court held that it was possible that the woman did not physically resist for fear of being assaulted and that absence of injuries could not be constituted as lack of proof of a sexual offence having been committed on her. The court also held that it was now settled law that corroboration was not essential for conviction and that necessity of corroboration was a matter of prudence. In this case since the prosecutrix was a respectively married woman, her testimony did not need collaborative evidence. The order of acquittal was thereby reversed.

This case is a good example of the manner in which femininity as capability is constructed, and how the rape trial may become a dramatic enactment of the division between a good woman and a bad woman, displaying norms of femininity.

The defence had also relied on an earlier case (Pratap Misra vs State of Orissa, AIR 1977, SC 1307; (1977 Cri LJ 817) when it had been held that absence of injury either on the accused or the prosecutrix shows that the prosecutrix did not resist. (We shall come to this case later).

In its judgment the Appellate Court admitted that according to the medical officer the woman had not complained of any pain in her private part. However “as stated by the medical officer herself further, there would be such pain or injury only if the victim is virgin and admittedly PW -1 was a married woman and used to sexual intercourse. Therefore, the fact there were no injuries on the person did not necessarily mean either the story of PW -1 regarding the incidence was unreliable or that she was a consenting party”.

The judges went on to state further that “We have gone through the evidence of PW -1, with utmost care, particularly having in view the defense version of the case tried to be made out affecting the character of PW -1, but for the suggestions in the cross examination which she has also stoutly denied, there is nothing to even remotely suspect that she is a woman of such easy virtues”.

We shall see a little later that how judges interpret the absence of injuries depends upon their understanding of the character of the woman and more precisely whether a woman ‘habituated to sexual intercourse’ is firmly bound within the structure of alliance or whether she can be treated as someone outside it.

In this particular case, the dividing practices by which the good woman and the bad woman are separated becomes even clearer since the judges gave an elaborate discourse on the meaning of consent. It may be worthwhile to quote this at some length.

And whilst the sands were running out in the time glass, the crime graph of offences against women in India has been scaling new peaks. This is why an elaborate rescanning of the jurisprudential sky through the lenses of ‘logos’ and ‘ethos’ has been necessitated. In the Indian case refusal to act on the testimony of a victim of sexual assault is adding insult to injury. Why should the evidence of a girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion?... We must not be swept off the feet by the approach made in the Western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the Western world. It is wholly unnecessary to import the said concept on a turn-key basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society and its profile.

Having established through the means of spatial differentiation, the difference between a social milieu which is permissive (i.e., the West) and one in which girls live in a “tradition bound non-permissive society” (i.e., India), the judges map this spatial difference onto a difference between women of two kinds. They give no less than 12 reasons why one may presume that women in India, would not make false allegations of sexual assault ‘with the rare exception of one or two cases coming from possibly amongst the urban elite’. These 12 reasons define the limits within which sexual desire may move. Thus, a woman admitting to sexual assault against her would be conscious of social ostracisation; if she is unmarried she would apprehend the difficulty of securing an alliance with a suitable match from an respectable or an acceptable family; she would risk losing the love and respect of her husband; she would feel extremely embarrassed in relating the incident to others on account of the upbringing in a tradition bound society where by and large sex is taboo.

I need not labour the point further that a woman whose testimony is likely to be believed is normatively defined as one who is ‘tradition bound’, who displays the appropriate modesty with regard to male desire, and who is in danger of losing the love and respect of her husband if it turns out that she had consented to sexual intercourse with another man. This brings me to the issue of how judicial logic is applied to issues of consent when the woman does not come within these defined limits, and hence violates the definition of a good woman.

I should like to take my examples of judicial reasoning of this kind from two cases — one (state of Orissa vs Pratap Misra), was quoted in the previous judgment and the second, Tukaram vs State of Maharashtra, more popularly known as the Mathura case, was alluded to earlier. It may be recalled that Mathura, a young girl who was between 14 to 16 years old had been raped at the police station while her brother and lover were outside the police station. The Sessions Court had acquitted the accused arguing that there was a world of difference between sexual intercourse and rape and that there was no evidence to support the contention of the prosecution that she had not consented to sexual intercourse. The High Court, on appeal, reversed the decision of the Sessions Court on the grounds that passive submission by the girl could not be read as consent. The judgment that we shall be considering is that of the Supreme Court which reversed the decision of the High Court and set aside the conviction of the two accused.

Let us see how Mathura is portrayed as a social persona in the judgment. “Mathura (PW 1) is the girl who is said to have been raped. Her parents died when she was a child and she is living with her brother, Gama (PW 3). Both of them worked as labourers to earn a living. Mathura (PW 1) used to go to the house of Nushi (PW 2) for work and during the course of her visits to that house, came into contact with Ashok, who was the sister’s son of Nushi (PW 2) and was residing with the latter. The contact developed into an intimacy so that Ashok and Mathura (PW 1) decided to become husband and wife”. Following this Mathura’s brother Gama had lodged a report at the police station alleging that his sister had been kidnapped by Nushi. At the police station the Head Constable asked Mathura to wait while he asked the others to move out. It was while her companions were waiting outside that the head constable took her to a toilet situated at the rear part of the police station, loosened her underwear, lit a torch and stared at her private parts. He then dragged her to a chappar and felled her on the ground and raped her.
in spite of protests and stiff resistance. After this a second constable fondled her private parts but was unable to rape her because she was in an intoxicated condition.

The main contention of the appellants before the Supreme Court was that there was no direct evidence of rape since no injuries were found on the body of the girl or of the accused. The Court held that no marks of injury were found on the person of the girl and "their absence goes a long way to indicate that the alleged intercourse was a peaceful affair and that the story of stiff resistance put out by the girl is all false". The High Court had found evidence of passive submission, believing the victim when she stated that "immediately after her hand was caught by Ganpat, she cried out. However, she was not allowed to raise the cry when she was being taken to the latrine but was prevented from doing so. Even so, she had cried out loudly. She stated that she had raised alarm even when the underwear was loosened at the latrine and also when Ganpat was looking at her private parts with the aid of a torch". The Supreme Court, however, held that the cries and alarm were a concoction on her part. It said that it was preposterous to suggest that she was so overawed by the persons in authority and the circumstances that she could not resist. The judges supported the judgment of the Sessions Court including the version that "Finding Nushi angry and knowing that Nushi would suspect something fishy, she (Mathura) could not have well admitted that of her own free will, she had surrendered her body to a police constable. The crowd included her lover Ashok and she had to sound virtuous before him."

How is it that in the state of Karnataka vs Meboob and Others, the judge made such a strong case for giving full credence to the stated version of the woman that force had been used against her, despite absence of injuries, while in the present case the Supreme Court had no hesitation in assuming that the girl had actively participated in the act of intercourse at the police station with a constable? This, in spite of the fact that her brother and lover waited outside. One has to take recourse to the structure of alliance relations within which the girl/woman was placed to see why her body was seen as if it were pitted against her speech. Mathura was already cast in the social persona of a woman who had taken a lover and hence her protests could be dismissed as a tissue of lies. In support of the judge's contention the medical evidence was read to show how habituated to sexual intercourse she was. "Her hymen revealed old ruptures. The vagina admitted two fingers easily". Thus, the reading of the surface of the body is made to confirm to the judge's reading of the 'inside' of her being - his conviction that she was a particular kind of girl who would be so overcome by her sexual desire for the constable whom she had never even seen before that she would surrender her body to him while her lover waited outside and then make accusations of rape in order to appear virtuous. Taken together, these two judgments show that judicial belief or disbelief in the woman's version of the events is a matter of the classificatory practices through which good women are separated from bad women - it has less to do with protecting the body integrity of the woman and more to do with regulation of sexuality in accordance with rules of alliance. Far from problematising the practices of sexuality in this regard, the judicial discourse normalises the dividing practices. Sexual violation becomes the opportunity in which courts of law become the sites of dramatic enactment of the judicial norms through which the relation between the surface of the body and the depth of feminine being could be read to create the female as the subject, a necessarily fragmented one since her body and speech are put at war with each other.

If further proof were needed of the classification of women suggested by the case law, one could refer to state of Orissa vs Pratap Misra. In this case a pregnant woman who was in a holiday resort with a man, was raped by some NCC students. Despite the presence of corroborative evidence, what weighed heavily with judges in pronouncing the sentence of acquittal was the finding that the man she was accompanied by was not her husband but her lover. The absence of injuries on her body was then seen as a sign of her consent and it was assumed that the man had contracted with the students to make her available for sexual intercourse. Even the fact that she had a miscarriage following this sexual assault was seen as unconnected to the event of rape.

We are now in a position to give a concise description of the classification of women that emerges in the rape trials. There is first a binary distinction between a girl who is a virgin and a woman who is sexually experienced. Desirable women are those who can be integrated into the system of alliance - virgin girls by being gifted in marriage to 'respectable and acceptable' families (to use the phrase which occurs frequently in the judgments) or those who are already so integrated. Sexual desire in these women is regulated by the structure of alliance - hence an offence against them constitutes a sexual offence for it violates the codes through which the matrimonial dialogue of men is conducted. By the same logic, however, the women who are described as of easy virtue, 'habituated to sexual intercourse' with men who are not their husbands, do not have rights to the protection of the state. In their cases the body always speaks to negate their speech. By declaring them to be shocking liars, the courts construct a category of women in whose case a 'no' to sex can be converted to a 'yes' by the application of judicial reasoning. I shall now argue further that the judicial discourse does not simply blot out such women from sight but actively constitutes them as available for the satisfaction of male lust by the judicial phrasing of the relation between surface and depth. This is the logic within which we can understand the concern of the case law to define, first, what is penetration and second, what is consent. The first re-orders the body as surface on which the judicial gaze can read different kinds of signs, establishing either complicity to sexual intercourse or resistance to it. The presence or absence of injuries, the state of the sexual organs of the woman all become evidence of where her place is in the division between virtuous and wanton women. The second question, that of establishing consent which requires inference about the will of the woman, then turns on the question of how depth or the interior motive of a woman may be establishing the surfaces of the body through the judicial gaze. Female subjectivity is made transparent as the judicial gaze moves from the surface to the depth of the body. Thus, the integrity of her being is shattered in the rape trial and the whole question of female consent becomes a 'process of positioning the male to do what comes naturally - that is to act from and in nature, in full accord with both body (desire) and speech (will)' [Bright 1994:3].

**Construction of Male Desire**

The discourse on male desire is veiled. The judicial phrases uttered in judgments, nevertheless, show clearly that the concept of nature is deployed to first define men's desire for female bodies as 'natural', and then the classification of women that we discussed is used to direct such 'natural' desires towards the appropriate categories of women. Here too we shall see that the discourse on sexuality intersects with the discourse on alliance but the points of intersection are somewhat different.

Since male desire for female bodies is seen as 'natural' almost as a counterpart of rape being seen as an offence that does not violate the order of nature, the judicial discourse on male sexuality is engaged in the creation of a 'social savage' [Greimas and Landowsky 1976]. This social savage is tamed by the application of rules of alliance which provide the grid within which men may be constructed through their relatedness to each other. Thus, desire in the male is schooled through rules
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of culture by placing men in positions relative to each other, and desire for female bodies is regulated through this social recognition that then grant to each other in the system of alliance. Male desires are then judicially classified in accordance with the various points of intersection between the discourse of sexuality and the discourse of alliance.

Desire for the female when embodied in a young male is classified as instinct, provided it is directed towards a woman who is not integrated in the system of alliance and hence can be categorised as a woman of easy virtue.

The judicial construct of 'young male acting out his natural sexual instincts' is deployed in the sentencing structure in the course of hearing on mitigating circumstances granted to the accused. It may be evoked in the context of acquittal or even in cases when judges are laying out their reasoning as to why the offence should be treated as a grave one. Independent of the context, the judicial phrasing (emphasised in the following texts) make this construct of a 'natural sexuality' residing in the male, available for thought. This is particularly striking in face of the fact that women courts classify as of 'easy virtue' are never seen to be acting out any natural instincts which would be symmetrical to the construction of desire in the male.

In the case (SC 58/1986, Ernakulam) of the two-year-old child who was sexually assaulted by a young man discussed in the paper, the assistant sessions judge gave her reasoning for reduction of the period of rigorous imprisonment as follows. "It is indeed a cruel and wretched act to commit sexual assault or attempt to rape an infant girl of two years, especially in the circumstance that the accused was sharing his stay in the residential apartment of the family of that girl along with them. At any rate the accused could have refrained from whatever his sexual instincts may be, from the child. Still in due consideration of the prime of youth of the accused and his tender age of running 17 at the time of the act...etc."

The second case, I would like to cite, is that of an unmarried woman who was raped by a hospital attendant after he had taken her to an empty room on the pretext that he was taking her to the ward where her niece was admitted. After rejecting the defense plea that the prosecutrix could not be believed because she was not a virgin and that there were discrepancies in her account, the court observed:

The beastliness and atrocity of the crime is evident from the injury resulting due to the thrust. According to PW 2, the doctor, about thirty stitches were put for the ragged tear inside the vagina and blood transfusion also had to be given. There is no evidence of any provocation or enticement from the side of the victim. There is no evidence that the prosecutrix is of easy virtues. The accused is aged 32 years and the crime evidently is not the result of any impulsive act due to the irrepressible sexual urge of an adolescent or younger.

Many other examples could be given of this form of reasoning. I hope the point is sufficiently clear that in the process of judicial verification, courts construct the category of young males who are acting out their impulses and 'irrepressible sexual urges' when they rape women. The judicial intervention is not directed towards the protection of all women from such males on the prowl. What the courts do through their intervention is to define the category of women on whom these urges may be acted out and separate them from the women on whom these acts may not be committed. The former are defined as women of 'easy virtue', while the latter are women who in future may be integrated into the system of alliance or are already within it.

I believe it is this definition of certain kind of sexual violence as stemming from the order of nature, which allows agents of the state such as policemen to commit rape and sexual assault on those women, who have come within their jurisdiction due to the disturbances in the code of alliance. In the case of Mathura which has already been discussed, it was the complaint lodged by the brother against her lover that allowed the police constabulary access over her. The judicial phrasing of the Supreme Court judgment was also based upon the fact that she had a lover, she was habituated to sexual intercourse and the hymen had shown 'old' tears. It was as if it's 'natural' for such a woman to agree to sexual intercourse with the constable whom she had not even known before, right in the police station while her relatives, including her lover, waited outside. In other cases of custodial rape also, one common feature has been that the woman has violated the code of alliance and hence becomes a field on which men may gratify their sexual instincts.

In the eyes of the courts when does sexual instinct become unholy lust? I have suggested that this is so when the sexual act has made a girl who was previously suitable for being given in marriage, now unmarriageable. We already saw that this is reasoning applied in the case of Tulna, the eight year old girl. In that case the appellants and the defendants belonged to 'respectable' families — a point emphasised quite strongly in the judgment which noted that the girl's father was a journalist who had travelled abroad, and the people involved were men of 'status'. The same reasoning, viz, that the offence of rape consisted in having made the girl unmarriageable, may be found when the accused belongs to a higher status than the girl, except that in such cases the judges may either seek to correct the injustice by insisting on a marriage between the victim and the offender, or the punishment may consist of financial compensation to be provided to the girl to secure a bridegroom who would be willing to marry her.

Rose Verghese (1992) cites a case (Braj Kumar Chauhan versus the state of Orissa) in which the judge first tried to arrange a marriage between the prosecutrix and the accused. After the attempt failed, the judge then reduced the sentence of imprisonment of the accused and instead fined him Rs 3,000 which was to be paid to the prosecutrix. He stated that the prosecutrix 'now a young girl, will be left at lurch on account of the stigma' due to the publicity that the case must have locally received, and prospects for her marriage appeared bleak. However, she could be rehabilitated, he thought, if she received some financial assistance. In order to achieve this end, the financial compensation was to be provided to her and the term of imprisonment of the accused accordingly, reduced. Clearly the courts are instrumental in 'trade off' in this case so that a man of a lower social status may be provided with the financial incentive to marry the woman who has otherwise become unmarriageable. The concern is again not with protection of the body integrity of the woman but with correcting the disturbance in the system of alliance? which has been violated by 'untamed' male desire.

The judges are also likely to treat sexual desire as 'unholy lust', in cases of gang rape if the husband is present at the time of the sexual assault. This is, provided, the man is recognised as an appropriate partner in the matrimonial dialogue. In one case, three men broke into a house, committed robbery and gang raped the wife, one by one, while the husband was held by the other two men on the point of a knife. In the First Information Report, the husband did not report the rape "due to fear of loss of reputation". "However after the accused were identified and arrested he reported the rape saying that "this should not happen to any husband in future" [Cited in Verghese 1992:159; emphasis mine]. In awarding the sentence of 10 years rigorous imprisonment, the court noted the heinous nature of the crime. Although the woman had not physically resisted the rapists, the judges noted that this was "due to fear of death of her husband, herself, and her child". As Purvi Shah (1993:4) noted in her astute comments on the paper, "This court's decision is not based on any injury to the woman's body or lack of consent. Rather, it is framed within the context of the harm
her husband, family and she – within the context of her family – may face. Indeed, this woman has been made into a wife or husband, family and she – within the confines of the male to be disposed off as he wishes.

The third construction of the rapist is of a man securing vengeance against another man by violating the latter’s wife, daughter or sister. In such cases also the woman’s body is merely the sign through which men enter into relationships with each other. In the Indian courts this comes up frequently in the context of policemen going on a rampage of looting, destruction and mass rape in order to punish the population of a village or a locality. Varghese (1992) quotes the case of 14 policemen who went on a rampage against the women in a small village in order to avenge an insult to one of their colleagues (Quoted in Varghese 1992, and Dhagamwar 1992). The court acquitted the policemen on the ground that the women in the village who were from the lower castes could not be equated with ‘such ladies who hail from decent and respectable societies’ as they were engaged in menial work and were of questionable character? The judge further added that “[i]t cannot be ruled out that these ladies might speak falsehood to get a sum of Rs. 1000, which was a huge sum for them”.

Because the naturalisation of male desire is connected to systems of alliance, the whole question of marital rape is removed from the arena of judicial discourse. The satisfaction of male desire when it is sought to be fulfilled within the confines of matrimony is considered legitimate, no matter how it is fulfilled. The legal code does not recognise marital rape – hence at the level of judicial grammar, this category does not exist. In the process of judicial verification, however, the judges can find instances when grievous bodily harm has been done to the wife in the process of the exercise of his conjugal rights by the husband. In such cases the courts have held that while a husband can cause grievous bodily harm to the wife, this cannot be classified as a sexual offence. The first and best known case of this kind was reported in 1890 when Phulmoni Dasee who was a little over 10 years died when her husband tried to have forcible sexual intercourse with her. The husband was convicted under section 338 of the Indian Penal Code which deals with causing grievous hurt by doing an act so rashly as to endanger human life or personal safety of another. Subsequently the age of consent was raised to 12 and has continued to rise till 16 [see Dhagamwar 1994]. The law clearly takes recourse to the idea that marriage is the prescribed institution for the satisfaction of ‘natural’ sexual instincts – hence sexual intercourse within marriage cannot be considered a sexual offence. If a woman incurs injury during sexual intercourse with her husband this is to be treated with other non-sexual offences of a similar kind. Thus in the case of a conjugal couple, the surface of the female body has no information to convey for determining the nature of the ‘inside’ for she does not exist as a subject for purposes of rape law.

Pratiksha Baxi (1995) argues that the discourse on marital rape, not only in the courts but also in the parliamentary debates normalised the use of force in sexual intercourse within marriage. She points out that in the report of the Joint Parliamentary Committee on the proposed amendments to the rape law, a separate category of ‘illicit sexual intercourse not amounting to rape’ was created to cover cases in which a man is separated from his wife has forcible sex with her (the JPC Report 1982:8). In defence of this amendment it was stated that “The Committee feel that in a case where the husband and wife are living separately under the decree of judicial separation, there is a possibility of reconciliation between them until a decree of divorce is granted. Hence, the intercourse by the husband with his wife without her consent during such a period should not be treated as, or equated with rape. The Committee are of the opinion that intercourse by the husband with his wife under such circumstances should be treated as illicit sexual intercourse” [The JPC Report 1982:8; cited in Baxi 1995:73]. Baxi’s interpretation of this statement is impeccable: “The distinction between rape and sexuality from the woman’s point of view gets blurred for the state permits force in sexual intercourse, not only for describing it as normal but by normalising it for the sake of ‘reconciliation’. Here power is deployed to constitute married woman’s sexuality as ‘passive’ for the capacity to say ‘no’ to sex within marriage is not recognised by the law as a legal right.”

In Foucault’s (1980) history of sexuality, power was understood as essentially that which dictates its law to sex by dividing sexuality between licit and illicit and permitted and forbidden compartments. In looking at the relation between power and sexuality as it is revealed in the judicial discourse in India, I suggest that it is encountered not in the form of limit and lack but in its dynamic active form of production of bodies and speech – both male and female. The sites of judicial discourse are the female body and male desire – while there is a corresponding silencing of the discussion on female desire and male bodies”. As we have seen, it is male desire which is considered ‘natural’, hence ‘normal’ and the female body as the natural site on which this desire is to be enacted. Women are not seen as desiring subjects in the rape law – as wives they do not have the right to withhold consent from their husbands – although the state invests its resources in protecting them from the desires of other men. Paradoxically
women defined in opposition to the wife or the chaste daughter, i.e., women of easy virtue, as the courts put it, also turn out to have no right to withhold consent. Unlike the case of the wife, however, it is not through the application of judicial grammar but through judicial semantics that this right though legally granted is taken away in the course of court hearings. As Purvi Shah (1994:6) put it, “A reading of female desire as interpreted by the courts demonstrates that while men are seen to be acting out their ‘natural’ urges when engaging in ‘illicit’ sex, women who show any sort of desire outside the confines of marriage are immediately considered ‘loose’. By escaping the confines of male-centred discourses of sexuality and alliance, these women are then castigated by becoming the objects of any sort of male desire. Rape is not a crime but is reduced to an act that she herself deserves or seeks... Under the court’s adjudication of these rape cases, every man thus becomes not an object of female desire, but rather these women who show ‘illicit’ desire become consensual objects of male desire even against their will”.

Thus it is clear that a woman’s ‘yes to sex outside marriage puts her in a position in which she is rendered judicially incapable of constructing desire in the singular for a particular man. Her illicit desire places her within the power of any man and especially within the power of the agents of the state such as policemen. It would, however, be a mistake to think that this is only a disciplining of female desire. It is equally a disciplining of male desire. By constructing male desire as ‘natural’ it is also generalised, so that once the system of alliance is suspended in thought, then one woman is considered as good as any other for the satisfaction of this desire. Thus the judicial discourse cannot admit of desire for a particular woman even in the male subject. One may recall the evidence of the chowkidar (watchman) of the guest house in the Pratap Misra case that he had found the man crying helplessly outside the room in which the NCC cadets raped the woman, presumably his lover. Similarly Mathura’s brother and husband were made to wait outside the police station while she was raped by the constable. Just as there seems to be no place for the woman as the desiring subject in the judicial discourse, but there is an elaborate vocabulary for describing the female anatomy and the impact of sexual intercourse on it – correspondingly there is no reading of the signs of sexuality on the surfaces of the male body for establishing sexual offences, nor any understanding that desire in the male may be for a particular woman rather than for a generalised, standardised female body.

About the only question that seems medically relevant is whether the accused is capable of sexual intercourse or not and whether there are signs of injury especially on the sexual organs of the male. Both in the case of the two year old child and the eight year old child who were violated, the judges found evidence of sexual acts on the part of the male. Tulna, the eight year old child described the fattening of the penis and the pain she experienced when the man tried to insert his penis into her vulva. Similarly the judges had evidence of ‘ejaculation of semen’ in the two year old’s case. Yet in both cases the judges only considered the question of penetration – although in one case partial penetration was considered sufficient to constitute rape while in the second case it was not. An alternate way of constructing rape would be to consider the evidence on the male body – reading the surface as conveying information on the nature of the offence – as sufficient for establishing it as a sexual offence. In that case the whole question of what constitutes penetration would become irrelevant as both male and female subjects would be constructed in their wholeness.

**CONCLUDING OBSERVATIONS**

In the introduction to this paper, I raised the question as to whether an understanding of how judicial discourse constructs normal and pathological sexuality at the level of the individual could help us to understand the widespread violation of women during episodes of collective violence and the judicial silence in the face of such grave disorders. I am not sure that we have an answer to the question but it appears to me that I may have found a possible direction towards which such an enquiry could move. If the combination of judicial production and verification (judicial grammar and judicial semantics) that we have considered produces a discourse on rape which places itself essentially on the intersection of the discourse of sexuality and the discourse on alliance, and which provides the essential function of protecting the system of alliance rather than protecting the body integrity of women, then the law can only function as long as normal classifications of marriageable and non-marriageable women; and of men who recognise themselves as partners in alliance versus those for whom such recognition is withheld since they are not likely partners in alliance: is in place. Since the the function of law turns to sort out women and position them in terms of availability and non-availability with reference to different categories of males, the entire judicial discourse falls silent in face of the collapse of these categories. This does not explain why desire to assert collective identity whether of nation or of community should become metamorphosed into the desire to humiliate men of other nations or communities through violent appropriation of ‘their’ women, but I believe that my analysis lays the foundation for understanding why the judicial institutions of the state become silent in the face of such disorder. I cannot find even the rudiments of a jurisprudence in the Indian legal system (but perhaps this can be generalised for other legal systems) that could address the problem of rape in the kinds of contexts in which the problem is not of ordering and sorting women but of protecting their body integrity against brutal rape and abduction.

**Notes**

[An earlier version of this paper was presented at the seminar on ‘States of Violence’, held in Michigan. I am especially grateful to the student commentators Carole McGrahanan, Purvi Shah and Stacy Cherry; and to Charles Bright for comments that proved extremely challenging in the revision of the paper. Discussions with Upendra Baxi, Pratiksha Baxi and Kalpana Viswanath were very fruitful for formulating the issues.]

1 I am grateful to Pratiksha Baxi for compiling the list of these cases for me.

2 The female body is objectified as a general body – all women are assumed to have a ‘normal’ body with the same kind of changes as a result of sexual activities.

3 Many of the cases that are analysed here are cited in the painstaking report on sentencing structures in rape cases by Vergheese (1992).

4 Pratiksha Baxi has argued that the link between shame and sexual violence often results in rape being seen as ‘worse than death’ – an interpretation that she says the Indian women’s Movement has consistently tried to reject (Baxi 1995). See also Kalpana Vishwanath (1994) who shows how the idea of shame and sexuality as a linked pair are internalised by women.

5 I wonder if we can compare this with mediation in feud – another system in which men recognise each other through the exchange of violence – in which the party that is on the verge of losing may be persuaded to accept blood money to terminate the feud.

6 The question of how temporality enters the judicial discourse is very important, not only at the level of judicial grammar which determine how cases become classifiable but at the level of judicial verification. Delay in the case of reporting a rape seriously prejudices the outcome not only because of the difficulty of obtaining medical evidence, but also because judges are less likely to believe a woman if she has delayed reporting the case. In the Indian judicial system the delays in arriving at a judgment (in Tulna’s case the Supreme Court gave its judgment 11 years after the event) can make time itself a resource in the hands of litigants. The systematic examination of temporality cannot be undertaken here – it would require another paper.

7 It should be noted that when the exchange of
violence is within the framework of the institution of feud, there are strict rules which control the styles of violence that may be used. The sexual violation of women by the feuding parties is strictly considered outside the normative frame [see Das and Bajwa 1994]. What we witness in the case of policemen going on a rampage against lower caste women cannot be derived from rules of feud in which only men of equal status are said to ‘recognise’ each other, but a perverted theory of punishment in which the illegitimacy of state practices combine with a perverted working of caste hierarchy to produce the kind of outcome we are describing here.

8 This point was made forcefully by Purvi Shah (1994).

9 Desire for a male sexual partner is similarly generalised as an enactment of unnatural desire—an offence against nature.

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