Staging Nationalism: Political Gendering in Indian Rape Trials

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Abstract

This dissertation conceptualises the strategies employed by, and the political factors motivating, judges in Indian courts to create rape law in the courtroom. It does so by playing close attention to judicial language. The first part of the dissertation explores how judges circumvent the testimony of rape victims. The concept of judicial consent is developed, whereby judges assemble their own narrative of consent to replace the victim's narrative of non-consent. Two distinct forms of judicial consent emerge: constructive and ethnographic, which arise respectively from medical evidence and the co-option of the colonial strategy of defining culture through difference. The second part of the dissertation explores why judges employ such techniques. A nationalist agenda is shown to require the maintenance of a clear distinction between Indian and Western womanhood, which in turn requires that victims who do not fully adhere to the Indian ideal are not granted the ability to withhold consent to sex. This framework is at its starkest in the context of date rape, which must be invisibilised. Throughout, analysis of individual cases demonstrates that the repeated litigation of Indian cultural identity during rape trials comes at vast costs to rape victims, who are denied agency and justice.

Introduction

In Pillai's textbook on Indian Criminal Law, the chapter on sexual offences begins with a summary of the historical statutory development of rape law.[1] Rape law was 'overhauled' in both 1983 and 2013, each instance triggered by landmark rape cases that provoked national protests for their injustice.[2] This is factually correct, and it is certainly an understandable introduction for a textbook account of law. However, attending solely to statutory reform provides us with a restricted understanding of what rape law is, what it does, and how. An analysis of Indian statute alone may give the impression that rape law exists to provide rape victims with justice. Attending to jurisprudence, however, provides a different picture, giving credence to the view that law is as much a gendering strategy as it is gendered.[3]

Carol Smart writes that 'law' is not 'unified in intent, theory and practice.'[4] Rather, it 'operates with conflicting principles and contradictory effects at every level'.[5] Indian rape jurisprudence bears out this understanding of law. Rape law is constituted by much *more* than statutory rules; in practice, it unfolds as an amalgamation of conflicting principles. Labyrinthine reasoning is presented as self-evident, irrelevant information is dredged up and dressed up as evidence, and nationalistic conceptions of gender dictate judicial interpretation. Through practice, judges initiate meta-rules that not only directly undercut statutory frameworks but prove positively harmful to rape survivors. These rules remain uncodified, but their pervasive force that extends through time, arising from the unquestioning and uncritical use of precedent.

This dissertation aims to conceptualise the strategies employed by judges to create rape law in the courtroom, and to draw out their political motivations. How do judges generate rape law through practice, and why? Ascribing to Corey Rayburn's view that linguistic elements shape rape trial outcomes,[6] these questions will be answered by scrutinising judicial language and distilling the methodologies belied by them. The first part of this

[1] P. S. A. Pillai and K. I. Vibhute, *PSA Pillai's Criminal Law* (LexisNexis 2014) Chapter 40: Sexual Offences.
[2] Tukaram v State of Maharashtra AIR 1979 SC 185 [LNIND 1978 SC 254] and State (Government of New Delhi) v Singh and Others SC 114/2013 FIR 413/2012**.**
[3] Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (Sage Publications 1995) 228.
[4] Carol Smart, *Feminism and the Power of Law* (Routledge 2002) 4.
[5] Ibid.
[6] Corey Rayburn, 'To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials' (2006) 15 *Columbia Journal of Gender and Law* 436, 444.

dissertation explores the strategies used by judges to create rape law that both makes convictions difficult to secure and proves destructive to rape survivors. In this section, it will be argued that first-person testimony is bypassed in favour of the judicial formulation of new narratives of consent. Two kinds of judicial consent will be posited: constructive and ethnographic. Though these are procedurally different, they dovetail in their impact, as both work to disavow the victim's subjective experience and to replace testimony with a contrived narrative.

The second part of this dissertation explores *why* jurisprudence is mechanised in this way, arguing that the strategies developed for circumventing testimony and burying rape claims are politically motivated. Using feminist historiographies that illustrate the centrality of women to the postcolonial construction of national identity, as well as the political value of women for the Hindu-right, this section will demonstrate that rape trials are used as a platform to validate and re-invigorate the nationalist conceptualisation of Indian identity. The argument proceeds in two parts. Firstly, it will be shown that a nationalist agenda undergirds the judicial interpretation of evidentiary material and testimony. Since the binary of the Western and the Indian woman was and continues to be sacrosanct to nationalist ideology, judges face a dilemma when they are presented with a case narrative that threatens the stability of the boundary between the two. As such, testimony and factual evidence are approached selectively. Details are exaggerated, manipulated or overlooked entirely in order to cobble together a version of the victim that is not only gendered but *politically* gendered, fitting clearly on one side of the boundary and thus allowing the central pillar of national identity to remain intact. The second part of the argument illustrates the impact of this interpretation, arguing that the use of the rape trial as an instrument to bolster nationalist conceptions of identity necessitates the invisibilisation of date rape. Motivated by the desire to condemn women's sexual agency that is implied by the existence of the pre-rape consensual relationship, this invisibilisation is achieved through disfiguring the statutory meaning of consent and normalising masculine aggression.

Part I: Creating Consent

The statutory definition of rape is consent-based. Following the amendment of rape law in 2013, the Indian Penal Code provides a positive definition of consent: it is 'an unequivocal voluntary agreement when the woman by words, gestures or any form of non-verbal communication, communicates willingness to participate in the specific sexual act.'[7] A consent-based definition requires the victim to recall their subjective experience during the rape for the courtroom, because the acts of the victim assume paramount importance in determining whether a rape occurred.

Yet testimonies of rape are frequently disbelieved, and this disbelief opens up a gap to be filled. I contend that this gap is filled by the judicial formulation of consent. The challenge faced by the judiciary in contriving consent is that it does not suffice to substitute a different sequence of events from that described by the victim. It can never be premised on fact alone, because the agency of the victim is integral to consent. Judicial consent therefore claims to access the subjective experience of the victim from an objective standpoint. It must represent that the victim *did* exercise sexual agency in the past, whilst denying her the right to exercise agency over her narrative in the present.

Using contrasting cases, I propose two kinds of judicial consent: constructive and ethnographic. Each of these confronts testimony in a different way. I will explore both in turn, distilling the steps taken by the judiciary to create consent. Common to both constructive and ethnographic consent is a vexed confrontation with women's subjectivity: both disavow the victim's subjective experience as relayed in her testimony, whilst also claiming that they can access her *true* subjective experience from an external position. However, they are distinctive in approaching consent from different angles. Whilst constructive consent begins by disbelieving the victim's narrative, ethnographic consent begins by trying to inscribe value to testimony. Nevertheless, they arrive at the same destination by different routes, undermining testimony in favour of legally sanctioned narratives.

[7] S. 375 Indian Penal Code, Explanation 2.

1.1 Conceptualising Constructive Consent

The Criminal Law (Amendment) Act 2013 broadened the statutory definition of rape to encompass various forms of penetration and not solely 'sexual intercourse.'[8] Nevertheless, medical evidence of penetration 'remains crucial in rape trials.'[9] Consequently, courts regularly invoke the 'two-finger test' to determine the state of the hymen.[10] Mrinal Satish argues that the purpose of this test is uncertain: 'it is not clear whether they rely on these tests to determine whether penetration has occurred or for determining past sexual history.'[11] The reality is more complex, in that the medical examination originates a matrix of intersecting inferences. It is used to draw physiological conclusions in the present, to reach into the sexual past of the victim, *and* to draw conclusions about the victim's character.

The medical examination plays an integral role in the formulation of constructive consent. The heavy reliance placed upon it in the rape trial can be partially explained if we compare the two-finger test to the strip-search. Though contextually different, these tests are strikingly similar. Where the strip-search is 'an everyday routine in women's prisons that verges on sexual assault',[12] the two-finger test is 'an invasive mimicry of the act of sexual violence.'[13] The similarity between the tests extends beyond method to purpose. On a superficial level, the purposes appear distinct, yet their motivations are profoundly similar. Both rely on distrust: where the strip-search is motivated by the prospect of hidden substances, the clinical examination is a gateway to rooting out the hidden sexuality of the victim. As Alan Hyde writes, 'Law constructs the vagina largely as a hiding place, full of secrets the eye cannot behold from outside, where drugs or other mysterious narratives lurk.'[14] The easy slippage between the tangible and intangible (drugs *or other mysterious narratives*) not only betrays the overlap, in law, between rape survivor and suspected criminal, but also allows us to begin to appreciate why the medical examination is so emphatically pressed for answers. The medical search can, it is believed, find answers that are just as concrete, as *substantial*, as illegal substances.

[8] S. 375 Indian Penal Code.
[9] Mrinal Satish, *Discretion, Discrimination and the Rule of Law* (Cambridge University Press 2006) 46.
[10] Ibid, 47.
[11] Ibid.
[12] Angela Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003).
[13] Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (Oxford University Press 2013) 63.
[14] Alan Hyde, *Bodies of Law* (Princeton University Press 1997) 165.

The sense of the victim's sexuality being a hidden secret that needs to be unearthed is heightened by legal reforms that made the past sexual history of victims inadmissible.[15] Pratiksha Baxi incisively argues that this reform has been undermined by reliance on the medical examination, which has become an underhanded way for defence lawyers 'to bring in past sexual history.'[16] This is then used to categorise the victim as 'habituated' to sex, thus 'transform[ing] a testimony of rape into a statement of consensual sex.'[17] 'Habituation' to sex places women in an (im)morally-charged category that is seen to indicate consent.

Whilst Baxi's work on medico-legal jurisprudence is a valuable starting point, this section reconceptualises the judicial treatment of testimony by illustrating the use of constructive consent. I argue that testimony is not *transformed* but *replaced*. It is irrefutable that, somehow, a transition from one narrative to a diametrically opposite one is made to deny the reality of rape; it will be argued here that constructive consent is the mechanism that achieves this. By tracing the intricacies of the process, it will be shown that disavowing women's subjectivity is integral to constructive consent, and that this form of consent operates subversively. Its subversive nature lies in how it pretends to be animated by the victim's agency even as it disavows it. Consent, in ordinary circumstances, demands the psychological ability to exercise agency. As Catharine MacKinnon writes, 'emphasis on nonconsent as definitive of rape sees the crime fundamentally as a deprivation of sexual freedom, a denial of individual self-acting.'[18] Judicial consent is subversive precisely because it denies the self-acting of the victim in the courtroom – since it undercuts her claim to her own story – yet it cannot dismiss her agency altogether. Instead, constructive consent intends to unearth what is presented as her *true* exercise of agency, reaching this conclusion circuitously by patching together scraps of information about the sexual body.

It will be shown that a three-part process takes place to devour a testimony of non-consent and replace it with constructive consent. First, since testimony cannot be transformed, it is made to vanish altogether. This is achieved through fictionalising language, and is complemented by using 'evidence' of the victim's sexuality to

[15] S. 155(4) of the Indian Evidence Act was repealed in 2002 by the Indian Evidence (Amendment) Act 2002 (Act 4 of 2003).
[16] Baxi (n13) 62.
[17] Ibid.
[18] Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2006) 237-238.

discredit them and undercut reliability.[19] Second, the medical examination is invoked as a gateway: both to construct the victim as a sexual body, and to reach back and reconstruct its past. Finally, a new narrative of consent is formulated. The construction of this consent by the judiciary relies on locating an active sexual agent in the past. But locating this active sexual agent does not automatically provide the sought-after conclusion of consent. Agency connotes freedom: to have the agency to freely consent one must also be able to withhold consent. Thus, the final part of constructive consent splits agency down the middle, transmuting it so that the located sexual agent can only *give* consent. It makes the victim's ability to *withhold* consent at the moment of the rape historically contingent: the sexual 'agent' located by constructive consent is created unfree.

1.2 Demonstrating Constructive Consent

The interpolation of the medical findings into the judgment begins the construction of consent. The following paragraph from a Supreme Court judgment in 2008, in which a gang rape allegation resulted in acquittal, demonstrates this:

> The veracity of the story projected by the prosecution qua allegations of rape must, thus, be examined. It has come in the evidence of PW8 that the prosecutrix had been married while a child but her *gauna* had not been performed as her husband, had, in the meanwhile, taken a second wife. The Doctor PW1 Dr. Smt. Christian has, however, opined that the prosecutrix was so habituated to sexual intercourse that it was not possible to ascertain as to when she had last been subjected to it. It has also come in the evidence of PW8 that the police had often questioned the prosecutrix as to why she was indulging in prostitution. The prosecutrix herself also admitted that she had once been arrested in the Ajanta Hotel case but had been bailed out by Shri Bansal, Advocate. It is indeed surprising that though, as per her allegations, all 13 accused had assaulted her one after the other, but the doctor did not find even a scratch on her person. The trial court and the High Court have not accepted the plea raised by the accused as to the adverse character of the prosecutrix as the evidence on this score was not conclusive.

[19] Baxi (n13) 80.

> We are of the opinion, however, that in the light of the facts mentioned above, it is probable that the prosecutrix was indeed involved in some kind of improper activity.[20]

The paragraph has been quoted in full because its structure is revelatory. We start with a 'story' that is 'projected': the connotations of fiction and theatricality are established at the outset, and it is clear that the victim's testimony is going to be treated sceptically. But does the testimony matter at all? It seems not: the sentences that immediately follow are nothing to do with the testimony (or 'story'). Instead, the judicial mind immediately traverses the past to construct the victim as purely a sexual body ('her *gauna* had not been performed'). Rather than transforming testimony into consent, subjective experience is mentioned only to be swiftly set aside. Fictionalising language is subtle yet powerful: it clouds the relevance of testimony, providing the perfect opportunity to disregard it.

Once testimony has been dealt with, the medical examination can be invoked as a more 'objective' substitute. The examination functions as a gateway, both to construct the victim as a sexual body and to summon its past**.** Furthermore, the construction of the sexual body exposes that the protection of women's agency through the category of consent is a fiction. In her critique of traditional feminist approaches to law reform, Rayburn argues that the focus is on rules and the application of rules 'as opposed to the rhetoric and images integral to the outcome of the trial.'[21] The distinction between the content of rape law 'rules' and the rhetoric that is actually at play is significant here. Whilst the exercising of women's agency through consent is central to Indian rape law,[22] in this case it is striking that the judiciary is outwardly critical of consenting acts and silently accepting of nonconsenting acts. The sexual body is constructed here in two contrasting forms: the virginal child bride, whose *gauna* has not been performed, and the adult *habituée* who 'indulges' in prostitution. One of these acts implies consent; the other, non-consent. Yet judicial disapproval targets the consenting act (prostitution) whilst exonerating the inherently non-consenting act (consummation of child marriage). It is clear that, whilst rape law accords women's consent paramount importance, the judicial perspective of consent in practice is skewed. How does the judicial valuation of consent influence the rape trial?

[20] Rajoo and Others v. State of Madhya Pradesh MANU/SC/8353/2008 [11].
[21] Rayburn (n6) 444.
[22] S. 375 Indian Penal Code.

MacKinnon writes that 'Consent often operates as a flag of freedom flown under the illusion that, if it is instituted as a legal standard, whatever sex women want will be allowed and whatever sex women do not want will be criminal.'[23] It is apparent here that legal standards of consent can be undermined by the *value* that is accorded, in practice, to the act of consenting. By excoriating the indulgent prostitute in dialectal opposition to the virginal child bride, the disturbing subtext is that *had* the victim remained a virgin, thus allowing the narrative of an unconsummated child marriage to prevail, her testimony of rape in the present would have been believable. In other words, the ability to *withhold* consent in the present is historically contingent, depending not only upon the acts of the sexual body in the past, but also upon how consent and non-consent are respectively valued. In spite of the letter of the law, the judicial mind traversing the past of the sexual body is more satisfied to find evidence of non-consent than of consent. Based on this valuation, the victim's ability to withhold consent in the present is contingent upon an absence of consenting acts in the past. Consent is therefore not a freedom-flag, instead operating as a guise under which agency is wrested away from the victim as they testify. If the sexual body has been active in the past, the woman cannot assert non-consent in the future.

The final sentences expose much in context of the whole excerpt, and bring us to the conclusion of constructive consent. The paragraph begins with a crime alleged by the victim; by the end of the paragraph, the victim has been transformed into the criminal. The question posed at the outset is, to paraphrase, does the victim's narrative have 'veracity'? The conclusion reached in response is that 'the prosecutrix was indeed involved in some impromptu activity.' The crux of judicial consent is that it always operates at a sub-textual level. On one hand, there is a sharp disjuncture between what the judgment sets out to determine and what is considered to be a relevant conclusion. On the other hand, the opening question and the conclusion could be seen as corresponding; even if the literal meaning of the conclusion is irrelevant, a statement regarding 'impromptu activity' is simply the obscure way in which consent reached circuitously must be presented. Constructive consent is implicit but powerful, sitting beneath a declarative statement regarding the victim's sexual activity. Since constructive consent invokes the agency of the victim obliquely, relying on excavating fragments of the past and narrativizing them to gesture toward a consenting agent, there is no way for it to be explicitly refuted.

[23] MacKinnon (n18) 245.

The search for veracity has nothing to do with what the victim says. Testimony is not, as Baxi suggests, transformed into consent but instead is wholly disregarded. The medical exam, which is seen to provide objective truth, also conveniently provides a gateway to construct the victim as a sexual body and then explore its past. In this quasi-archaeological process, the category of consent itself is repurposed, so that nonconsenting acts are reified whilst consenting acts that betray sexual agency are condemned. Evidence of non-consent is preferable to consent; forced virginity, even if in lieu of forced marital sex, makes for a 'better' (more believable) victim than a sexually active one. There is no room for an active sexual agent if a rape trial is to result in conviction, even to the extent that the ideal victim would be a child bride as opposed to a prostitute. If the judicial excavation of the sexual body finds sexual agency, it divorces the ability to give consent from the freedom to withhold it. Once agency is transmuted in this way, the victim's testimony of rape, which has already been discarded, has no chance to resurface. The conclusion of judicial consent is reached through repurposing fragments of the victim's past to coalesce into a new, irrefutable form of consent – irrefutable because it claims to belong to the victim herself but has never been spoken by her. It is, in that sense, not unlike the consent deemed to have been given by the woman at the point of marriage, which also, arguably, is understood to be animated by a woman's agency. It does not have to be voiced: by way of circumstance, it simply *is*. Being both illogically reached and sub-textually presented, constructive consent is dangerous because it cannot be logically refuted or explicitly denied. In this way, it is the equivalent of saying that 'consent was made' rather than 'the victim had consented'. This absurd result arises out of locating an active sexual agent who is able to consent whilst revoking this agent's freedom to withhold consent. It is arrived at through stringing together scraps of action found in the process of excavating the sexual body's past.

1.3 Ethnographic Consent

Constructive consent is a route to renouncing the victim's testimony, but a conflicting impulse, geared toward *rehabilitating* the victim's testimony of non-consent, is also pertinent in Indian jurisprudence. This impulse gained traction in the aftermath of *Tukaram v State of Maharashtra*, the landmark case that precipitated the

overhaul of rape law in 1983.[24] The victim, who had been raped by police constables in a police station, was disbelieved by the Supreme Court on the basis of an absence of injuries and their perception of her character.[25] The case resulted in extensive changes to both the IPC and the Indian Evidence Act,[26] including the insertion of Section 114A into the IEA, which creates a presumption of rape in certain circumstances of power imbalance, where sexual intercourse has been proved.[27]

As well as precipitating statutory change, the backlash to this decision also altered the judicial treatment of testimony. Following *Tukaram*, the Supreme Court took a drastically contrasting approach to the victim's testimony in *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* (hereafter referred to as *Bharwada*).[28] This case laid the groundwork for a new approach, which attempts to re-inscribe believability to the testimony of rape victims. It continues to influence jurisprudence, having gradually become 'the primary authority when the issue before the courts is whether an accused can be convicted solely on the basis of the testimony of the prosecutrix.'[29]

The purpose of this section is to interrogate the impact of *Bharwada* and to show its foundational role in the establishment of ethnographic consent. Rather than rendering testimony credible, it will be argued that the *Bharwada* approach paradoxically undercuts the value of the victim's testimony. It takes a circuitous route to believability, adopting an ethnological impulse similar to that which underpinned colonial rape law. Its destructive legacy persists: contemporary cases still make the victim's believability contingent upon the extent to which they can be mapped onto the imagined rape victim.

It is necessary to place the Indian rape trial in its historical context, because the *Bharwada* approach problematically adopts the colonial fixation with ethnographic difference. The medical examination was born of the belief that science can circumvent the lies of untrustworthy 'native' subjects. Rape convictions in colonial India were difficult to obtain due to imported ideas that constructed Indian women as inherently deceitful: the

[24] Pillai and Vibhute (n1).
[25] Tukaram (n2) [5].
[26] Pillai and Vibhute (n1).
[27] S. 114A Indian Evidence Act 1987.
[28] Bharwada Bhoginbhai Hirjibhai v. State of Gujarat 1983 AIR 753, 1983 SCR (3) 280.
[29] Satish (n9) 40.

British presumption of frequent false charges was reproduced in India and 'combined with colonial ideas about Indian culture.'[30] The native woman was therefore a 'doubly doubtful complainant.'[31] This ethnological project of medical jurisprudence[32] produced a presumption of disbelief, necessitating a search for 'objective truth' which could be relied upon. Consequently, the 'truth-technology' of medical searches emerged, through 'the insertion of glass rods, cones, pipettes or fingers into the vagina of the raped survivor.'[33]

Jurisprudence in postcolonial India *still* relies heavily on an ethnological archetype of the Indian woman, though the approach has been re-oriented. Rather than being used as a springboard to disbelieve the 'native' woman, the ethnological archetype serves the purpose of providing a benchmark for believability. It does so by reviving the colonial project of constructing difference between 'native' and 'Western'. Andrew Taslitz's 'storytelling theory' is pertinent here, under which 'the story of a case must be told in a way to satisfy a jury's needs for narrative coherence and fidelity.' Though Taslitz's theory refers to the role of American juries, his ideas can be calibrated to judicial reasoning in the Indian context. Fidelity refers to how well a story fits with the listener's 'sense of reality.' Narrative coherence refers to how a story 'hangs together', determined by whether it has structural, material and characterological coherence.[34] *Bharwada*'s influence makes characterological *coherence* inhere in a system of ethnographic *difference*. In other words, the character sought in the rape narrative – one who allows the story to 'hang together' while conforming to the judge's accepted sense of reality – is imagined in opposition to an external character that does not exist in the victim's story at all. The lascivious 'Western woman' looms in the judicial imagination, directing the search for coherence and fidelity.

Bharwada is so faithful to the blueprint of colonial medical jurisprudence, in instituting a binary between the Western woman and the native woman for the purpose of excoriating untruthfulness, that its language mirrors directly that of nineteenth-century British medical jurists. The only difference is the target. Where, in 1856, Norman Chevers wrote in his manual of medical jurisprudence that 'an European' must learn how 'a combination

[30] Elizabeth Kolsky, '"The Body Evidencing the Crime": Rape on Trial in Colonial India, 1860–1947' (2010) 22 *Gender & History* 109, 123.
[31] Ibid.
[32] Baxi (n13) 64
[33] Ibid, 73.
[34] Andrew Taslitz, *Rape and the Culture of the Courtroom* (NYU Press 1999) 15.

of sensuality, jealousy [and] absolute untruthfulness' drives the 'natives of India',[35] in *Bharwada* the Supreme Court condemns the Western rape survivor, who may be a 'gold digger', wish to 'wreak vengeance' on the male 'for real or imaginary wrongs', may want 'publicity or notoriety', may be motivated by 'jealousy' or by the wish to 'win sympathy.'[36] The Supreme Court buys into sexist, ethnological stereotyping for its own purposes, categorising the Western woman as a jealous, promiscuous liar, intent on revenge, possibly insane. Chevers' diagnosis of sensuality, jealousy and untruthfulness has been repurposed. Against this backdrop, the Supreme Court constructs a *new* ethnological blueprint for the Indian woman, who will 'rarely […] make false allegations of sexual assault.'[37] This victim would not lie due to fear of ostracism, losing love and respect, embarrassment, or the risk of tainted chastity and accusations of promiscuity.[38] It is important to note that truthfulness is intertwined with a fixed, socially acceptable pattern of sexual activity: Indian women tell the truth because *any* intercourse, even that which is criminal and forced, exposes them to a loss of respect and the potential to be branded promiscuous. And it is not only in this case that these sentiments have been voiced. Thirteen years after *Bharwada*, the Supreme Court overturned an acquittal, stating that the trial court had "over-looked that a girl, in a tradition bound non-permissive society in India, would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society."[39] Fourteen years after that, it found that "in Indian society any girl or woman would not make such allegations [of rape] against a person as she is fully aware of the repercussions flowing therefrom [...] a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity."[40]

Consequently, underpinning the binary opposition between the Western and Indian woman is a matrix of beliefs regarding the intersection of sexuality, truth and criminality. Angela Davis notes that 'the notion that female "deviance" always has a sexual dimension persists in the contemporary era.'[41] The *Bharwada* factors rely on an inversion of this formula, connecting truthfulness with a certain pattern of sexual behaviour, or rather, an

[35] Norman Chevers, *A Manual of Medical Jurisprudence for Bengal and North-Western Provinces* (F. Carbery 1856) 8.
[36] Bharwada (n28) [282].
[37] Ibid.
[38] Ibid.
[39] State of Punjab v Gurmit Singh & Others (1996) AIR 1393, 1996 SCC (2) 384.
[40] Wahid Khan v State of Madhya Pradesh (2010) 2 SCC 9 [21].
[41] Davis (n12).

absence of ownership over sexuality. Indian women are chaste or monogamous, and therefore believable; Western women are hypersexual and therefore more likely to be liars. If the Indian woman defies her ethnographic prototype and betrays a sexuality more akin to that of her lascivious, Western counterpart, then the *Bharwada* factors fail her, and she is no longer believable.

What is the impact of bolstering the credibility of the Indian rape victim via an ethnological and sexist stereotype? The cost is steep. By creating an ideal rape victim against which to measure the testifier, the reliability of the victim becomes contingent upon how well they fit the template. In turn, the victim must *prove* that their character fits the template through their behaviour in the courtroom. Satish distils the impact of the template victim into a dual burden on the real victim: 'in addition to the burden of fitting the profile of the stereotypical rape victim, the Court appears to expect a certain behaviour from the rape victim during the act of rape itself and subsequently, when she is testifying in court.'

Bharwada thus brings us back to familiar ground, in that its methodology returns to examining the body. Constructive and ethnographic consent overlap, even though they both begin with strikingly different approaches. Where, in *Rajoo*, testimony is disavowed from the outset in favour of using the medical examination to reconstruct the past of the sexual body, *Bharwada* sets out to give the victim a chance to speak and be heard. It intends to highlight the value of testimony, yet it simply takes another route to devaluing it. Ultimately, both *Rajoo* and *Bharwada* seek to locate 'truth' by examining the sexual body and overlooking testimony. In *Rajoo*, this begins with the medical examination: the state of the hymen is a sign that carries meaning but also serves as a sign*post* to the victim's past. In *Bharwada*, the ethnological profile of the stereotypical rape victim provides a new birthplace for the semiotic search for veracity. By providing a concrete profile, it also unleashes a juridical impulse to seek out visible evidence of this profile. The behaviour of the victim in the courtroom is scrutinised, and bodily signs are read as if they expose character.

Part II: Staging National Identity

The *Bharwada* factors illustrate the features of normative sexuality in India, including 'motherhood, wifehood, domesticity, marriage, chastity, purity and self-sacrifice.'[42] Drawing on feminist historiographies of the colonial encounter, Ratna Kapur writes that 'normative sexuality was incorporated into the nationalist agenda, where the discourse of purity and chastity produced a sexuality that was distinct from the contaminating, corrupting, (imperial) West.'[43] That normative sexuality continues to play an integral role in propping up an essentialised Indian culture, and that law plays an active role in propagating this, is evident in the nationalistic language that infiltrates *Bharwada*. The judgment takes a position that is both geographically rooted in India and idealistically committed to Indianness. The need for corroboration is approached by the judiciary 'with [their] feet firmly planted on the soil of India and with [their] eyes focussed on the Indian horizon.'[44] The nationalistic impetus is coupled with wariness about the Western approach: 'We must not be swept off the feet by the approach made in the Western World which has its own social mores, its own permissive values, and its own code of life.'[45] This lengthy, jingoistic elaboration on perspective, so sensitive to independence in its reference to 'Indian soil', calls into question the *purpose* of the pronouncement. Ostensibly, it is to 'resolve the basic problem [of whether] corroboration to the testimony of a rape victim is essential to establish the charge.'[46] Yet foregrounded in the approach is the same motivation that Kapur locates in the aftermath of the nineteenth-century colonial encounter: to seek to 'mark the distinction between the colonial power and the colonial subject' via 'cultural constructs' that constitute the features of normative sexuality.[47]

Partha Chatterjee provides a framework of interrelated dichotomies that explains how women's sexuality came to play a prominent role in the nationalist understanding of culture. He writes that the nationalist ideological response to colonialism was 'built around a separation of the domain of culture into two spheres – the material and the spiritual.'[48] In the material sphere, it was desirable to imitate the West, learning its 'superior techniques

[42] Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Permanent Black 2005) 55.
[43] Ibid, 56.
[44] Bharwada (n28) [282].
[45] Ibid.
[46] Ibid [280].
[47] Kapur (n42) 55.
[48] Partha Chatterjee, 'The Nationalist Resolution of the Woman Question', in Sangari Kumkum (ed), *Recasting Women: Essays in Indian Colonial History* (Rutgers University Press 1990) 233–253, 237.

of organising material life.'[49] In the spiritual domain, however, the East was superior, so it was necessary to strengthen 'the distinctive spiritual essence of the national culture.'[50] The material/spiritual dichotomy corresponded with the ideologically stronger dichotomy of outer/inner, in which the outer is ultimately unimportant, but the inner represents the nation's 'true identity'.[51] Guarding the spiritual was thus integral to the nationalist construction of identity: it was the golden ticket for making concessions in the modern material word *without* compromising on a true, Indian identity. When this inner/outer dichotomy was applied to everyday life it resulted in a separation of the social space into the home/the world.[52] In turn, this dichotomy became gendered, with the woman representing the home and the man the material world.[53] Thus, women became the lynchpin holding together the nationalist construction of Indian identity, as well as the bulwark holding off the encroachment of Westernisation from the sacrosanct spiritual centre of culture.[54]

Women continue to be integral to nationalist identity, being instituted as markers by the Hindu nationalist movement. Nowhere is this better encapsulated than in the RSS Chief Mohan Bhagwat's statement on the prevalence of violence against women in India. According to him, crimes against women are worthy of condemnation, but they can be slotted into the nationalist conception of Indianness for political exigency. These crimes happen, he says, in 'urban India', not 'Bharat': "Where 'Bharat' becomes 'India' with the influence of western culture, these type of incidents happen."[55] The reality of violence against thousands of women is trivialised, becoming an evidentiary sidenote serving a broader nationalist hypothesis. Rape is simply an unfortunate consequence of the true dilemma, the threat posed by Westernisation to 'Bharat'.

With this contemporary context in mind, the narrative of the rape victim is always received in the courtroom as politically charged, because normative sexuality is so integral to preserving what is deemed to be national culture. The stakes are therefore high when it comes to evaluating testimony. Ethnographic consent comes to

[49] Chatterjee (n48) 237.
[50] Ibid, 238.
[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] See also Maitrayee Chaudhuri, 'Gender in the Making of the Indian Nation-State' (1999) 48.1 *Sociological Bulletin* 113, 127.
[55] 'RSS Chief Mohan Bhagwat At It Again' (India Today 2013) <https://www.indiatoday.in/india/north/story/rss-mohan-bhagwat-at-it-again-says-women-should-be-just-housewives-and-husbands-should-be-the-breadwinners-150908-2013-01-06>.

occupy a significant role in a politicised context; applying the *Bharwada* model is not just about determining veracity, but also about re-instituting female bodies as markers of national culture. Female subjectivity becomes politically dangerous, because it allows for the subversion of normative sexuality. A testimony of gang rape from the mouth of a sex worker must be disbelieved because it threatens to destabilise cultural identity: a victim who has previously exercised sexual agency and now claims that she did not consent to sex problematises the binary between Western and Indian sexual mores by, in the court's eyes, trying to cross from one side to the other.

Analysis of recent Indian jurisprudence shows that *Bharwada* is not anomalous in its approach. In this section, I will argue that contemporary rape jurisprudence continues to problematically stage the construction of Indian national identity. The outcome of rape trials is over-determined by nationalist drive, so that the interpretation of evidence is politically regulated. This political regulation takes place through the homogenisation of testimony. Since, as Chatterjee shows, the Indian woman at the heart of the nationalist construction of identity was and remains defined *in contradistinction* to the Western woman, the courts have trouble receiving the testimony of women whose behaviour does not align with either; who, in other words, exercise sexual agency like the Western woman, but, through a testimony of rape, attempt to withhold consent like the chaste Indian woman should. In the nationalist construction, the right to withhold consent remains the privilege of those women who adhere to normative sexuality. For this reason, the interpretation of testimony is politically skewed to shoehorn the narrative of the victim onto one side of the binary. Validating heterogenous experience would suggest that the line is crossable and the logic flawed. To say that a woman who does not fit the *Bharwada* factors *is* a victim of rape would be to dismantle the boundary of the normative sexual identity of the Indian woman, and, in turn, to allow the fulcrum of the nationalist identity to crumble with it.

Thus, it will be argued, the adjudication of rape entails two concomitant trials: first, the trial of the accused, and second, at a macro-level, a re-trial, to determine the stability of an Indian essentialist culture, and to propagate a postcolonial Indian national identity. Of course, the second trial has a foregone conclusion. Consequently, rape victims are caught in the crossfire between the co-constitutive desires to reify normative sexuality and reinvigorate Indian identity. Judicial interpretation of testimony is, therefore, politically inflected; evidentiary material means what it *must* mean to maintain the integrity of the Indian/Western binary and the role of women as cultural markers.

2.1 Political Inversion of Testimony

The political inversion of testimony is carried out in two ways, both of which are transparent in *Vikas Garg and Others v State of Haryana*.[56] This recent case involved rape by three men of one woman, all of whom were known to one another being students at university together. The rapes were the culmination of blackmail and threats regarding nude photographs of the victim. Political inversion of evidence was achieved, firstly, through the selection and foregrounding of extrinsic information as relevant. Once irrelevant information is made to appear significant, testimony is reformulated so as to preserve the integrity of the constructed ideal Indian woman and, in turn, the nationalist construction of identity. This reformulation relies on a process of selection and transmutation: scraps of the victim's testimony are severed from their coercive context and re-dressed to consolidate her identity as transgressive.

Extracting from the cross-examination, the judgment assembles a string of information about the victim's behaviour that is unrelated to the rape: 'her hostel room was searched leading to recovery of condoms by the Warden […] She further admitted that she used to smoke cigarettes […] Apart from this, she admitted use of drugs but clarified it was not by choice.'[57] These factors bear no relation to the circumstances of the rape, but are dredged up here and tied together to consolidate an image of the victim as transgressing the template of the ideal Indian woman. It is telling that the possession of condoms is considered as dangerous as drug use. Structurally, this grouping exposes the commitment of the judiciary to a moralistic distinction between chastity and sexual agency, itself integral to the role of the Indian woman as cultural marker. Already before the facts of the alleged offence are discussed, the court paints the victim as a woman who has exercised sexual agency, and who has therefore relinquished the right to withhold consent.

Once the victim's identity has been established as transgressive, the groundwork has been laid to invert her testimony in order to consolidate that identity. The judicial re-iteration of blackmail strips all the contextual information that reveals a coercive and abusive relationship, and instead fetishizes the object of the blackmail;

[56] Vikas Garg and Others v State of Haryana (2018) 1 CriCC 176 (2017) 4 RCR Criminal 934 2017 PHC 094.
[57] Ibid [13].

namely, the nude photographs. The contrasting presentations of the blackmail, first from the victim herself and then as paraphrased by the judiciary, are reproduced below:

> *Victim's testimony*
>
> "He (Hardik) would make me do crazy things like run around the entire campus in the day, leave my class in the middle because he wanted nude pictures, would not let me meet my friends whenever I wanted, would not let me eat food, drink water or do anything without his permission."[58]
>
> "He then sent his own pictures and coaxed me into sending my nude pictures. These pictures later became the basis of this long drawn blackmail of sexual, emotional, physical harassment."[59]
>
> *Judicial interpretation*
>
> "We are conscious of the fact that the allegations of the victim regarding her being threatened into submission and blackmail lends sufficient diabolism to the offence, but a careful examination of her statement again offers an alternate conclusion of misadventure stemming from a promiscuous attitude and a voyeuristic mind. She states that "he (Hardik) then sent his own nude pictures and coaxed me into sending my own nude pictures."[60]

Within the context of the victim's testimony, the photographs were used as a tool to exert control over every aspect of the victim's life. Yet this exertion of power finds no significance in the judicial re-framing, in which the nude pictures are brought into focus as the only significant detail in order to ensure that the victim's testimony homogenously indicates her deviance. Instead, the sending of the nude photographs is re-presented not as coerced by the perpetrator but as offered willingly by the victim, arising from her 'promiscuous attitude and voyeuristic mind.' This accusation of voyeurism is legally functional because it undoes the allegation of blackmail, substituting a forced action for one intentionally sought. That the inversion of testimony is politically motivated rather than legally driven is transparent in the simple fact that *there is no legal reasoning given* for the

[58] Vikas Garg (n56) [11].
[59] Ibid [8].
[60] Ibid [24].

interpretation. The judgment simply states that 'a careful examination of her statement again offers an alternate conclusion'; it does not elucidate how, precisely, the examination can offer a different conclusion. In fact, rather than making a careful examination – which would attend to the coercive context and the utilisation of the photos to exert control – the treatment of testimony is deliberately circumscribed, excising the sent photos from the narrative and, presumably, suturing this detail to scraps of irrelevant information previously highlighted, such as the evidence of illicit activity (condoms in the hostel, smoking), in order to reach a conclusion that the photographs were voluntarily offered out of sheer promiscuity and voyeurism. This conclusion is then presented as self-evident, with no explanation offered other than that a *careful* examination of the evidence exposes that, in reality, no blackmail could have taken place.

This political manoeuvre of de-contextualising scraps of information to reach a foregone conclusion is repeated in relation to another lascivious detail of the case, which the judicial imagination, unsurprisingly, latches onto. Again, part of the victim's testimony is given below, in contrast to the judicial interpretation:

> *Victim's testimony*
>
> "He then forced me to purchase a sex toy against my will. I kept pleading that I do not want as it is a very shameful thing to have but he kept insisting as he wanted me to use it, so he could gratify himself via skype on the days when he could not force himself physically upon me. On 26.1.2015, I acceded to his demand of buying the sex toy under pressure of my photographs getting exposed in the entire university."[61]
>
> *Judicial interpretation*
>
> "The perverse streak in both is also revealed from her admission that a sex toy was suggested by Hardik and her acceptance of the same."[62]

In order to maintain the integrity of normative sexuality, the judicial interpretation obscures aspects of testimony that problematise the role of the victim and threaten to destabilise the role of the Indian woman by

[61] Vikas Garg (n56) [11].
[62] Ibid [25].

mixing in elements of Western female behaviour. The victim's testimony here presents a quandary, for it demonstrates behaviour that both transgresses and upholds normative sexuality. On one hand, the victim exhibits abhorrence of sexual self-fulfilment, regarding the sex toy as being innately 'a very shameful thing to have.' On the other hand, the mere fact that she uses it, even if under coercive pressure, is enough to banish her from the realm of Indian normative sexuality. Consequently, the judicial interpretation of her testimony must shed any material that threatens to perforate the binary of the Indian chaste woman in contrast to the Western sexual woman, which is so integral to the nationalist conception of Indianness. The context of blackmail is erased, replaced by a 'perverse streak' that unites the victim and perpetrator in mentality.

In this case, the political bent to judicial interpretation is apparent in the contrast between testimony and its re-production. Since the subjective experience of women is open to judicial scrutiny, the trial provides the perfect opportunity to iterate upon normative sexuality, sharpening its aspects by manipulating testimony. The rape victim must fit within or without the template: the binary must remain intact. Rape trials reduce rape victims to political tools, their narratives being subsumed into a larger re-trial of culture. This trial continues to be staged, over and over, and regardless of the wide gulf between testimony and judicial interpretation of it, testimony must be politically calibrated to the prop up the ideology of the master script.

2.2 Invisibilising Date Rape

It has been shown that courts use interpretive discretion to police the boundaries of normative sexuality for women. This requires an inversion of testimony. As is evident in *Vikas Garg*, in order to preserve the binary between the Western and the Indian woman, evidence that threatens to shatter the distinction must be blotted out. Once the woman has shown herself to be an active sexual agent, any signs that might align her with the behavioural expectations of the ideal Indian woman must be erased.

Susan Estrich's definition of 'simple rape' is useful in this context. 'Simple rape' is perpetrated by a friend, relative or acquaintance.[63] Unlike 'real rape', it is not the violent act of a stranger, nor accompanied by aggression or

[63] Susan Estrich, *Real Rape* (Harvard University Press 1987) 4.

threats with weapons.[64] Estrich's framework slots into Indian jurisprudence because she notes that what law says and does in practice are two different things.[65] She writes that 'the law's abhorrence of the rapist in stranger cases […] has been matched only by its distrust of the victim who claims to have been raped by a friend or neighbour or acquaintance.'[66] When placed in conversation with Indian jurisprudence on rape, Estrich's argument sheds light on the retrogressive impact of using a rape trial to crystallise a nationalist ideology. The nationalist ideology is invested in a clear distinction between the Indian and the Western woman because its strength and desire to preserve an authentic, unpolluted Indian culture derives from a line that cannot be crossed. For this reason, simple rape, and its most threatening subcategory of 'date rape',[67] presents an epistemological problem. Date rape presupposes that women *legitimately* have the option to exercise pre-marital sexual autonomy. It envisions a context where women can exercise sexual agency without repercussion and without being penalised for transgression of normalised sexuality. Implicit in a date rape is the very thing that is anathema to the role envisioned for women in nationalist ideology: a free and active sexual agent.

The concept of date rape also disrupts the Hindu nationalist construction of motherhood, which is integral to its religious right-wing political aims. Mothers are important to nationalist discourse both on a material and a symbolic level. [68] On a material level, mothers are vital 'reproducers of biological and cultural systems.' Their reproductive labour is valorised, as is their ability to inculcate the nationalist agenda into their children. The free and active sexual agent that inhabits a date rape scenario is a particular threat to Hindu nationalist ideology, to which the sexuality of single women is dangerous and which requires them to be 'contained within heterosexual patriarchal boundaries.' Hindu nationalism can only embrace Indian women inasmuch as they conform to their designated political role: namely, as vessels of biological and social reproductive labour.

Both anticolonial nationalism generally, and Hindu nationalism specifically, require date rape to be invisibilised because a woman in control of her sexuality cannot have this behaviour implicitly sanctioned via legal protection

[64] Estrich (n63).
[65] Ibid.
[66] Ibid.
[67] Date rape is defined by the Encyclopaedia Britannica as 'the forcing or coercing of a victim into unwanted sexual activity by a friend, romantic suitor, or peer through violence, verbal pressure, misuse of authority, use of incapacitating substances, or threat of violence.'
[68] I will return to the symbolic level in the following subsection.

from rape. The woman who transgresses nationalism's stipulated sexuality makes herself an outlaw. In turn, there can be no such thing as date rape. Judges reaffirm in the courtroom what legislation does not: that the autonomous sexually active woman must be condemned. In the rape trial, this condemnation takes the form of exonerating the perpetrator and making the victim unrapable. What is striking in the treatment of date rape is the extent to which the judiciary will go to preserve its conception of national identity. Thus far it has been argued that the interpretation of testimony is politically inflected for this purpose; it will now be argued that this creative interpretive capacity is stretched so far that statutory provisions are nullified in practice. If we focus our attention purely upon black-letter law, it can be seen that Indian statute has evolved so that, in theory, it is sensitive to date rape and no longer privileges 'real rape'. Following the 2013 amendments, no signs of injury need be present, and, moreover, consent is explicitly revocable.[69] The latter provision is particularly pertinent because it allows a woman who has had prior sexual relations with a partner to revoke consent. Yet this statutory impulse to recognise scenarios of date rape *as rape* is undone through judicial interpretation. Since the courts have assumed the task of bolstering nationalist identity, yet are confronted with the fact that the law on the books no longer requires a woman to live up to the chastity benchmark that, ideologically, the courts remain invested in, adjudication must go to great lengths to invisibilise date rape.

The judicial reasoning in *Mahmood Farooqui vs State (Govt of New Delhi)* pushes statutory interpretation to breaking point in its farcical understanding of consent.[70] This case had high stakes from a political perspective: an allegation of rape came from a student against an academic and cultural icon with whom she had previously had extra-marital romantic relations. Purely from this context of power imbalance, as well as the evidence of former romantic relations, it is evident that the odds would have been stacked against the victim. What is striking is that the judicial reasoning advanced to refute the claim of rape not only nullifies statute but also belies logic. The relevant facts of the case are as follows: the victim visited the house of the accused, who was with a friend and very drunk, as well as very upset. The victim waited in his office, but later happened upon him while he was alone and attempted to comfort him. At this point he forced oral sex upon her. The victim refused his advances

[69] S. 375 Indian Penal Code, Explanation 2: "Consent means [...] willingness to participate in the *specific sexual act*" (emphasis added).
[70] Mahmood Farooqui v State (Govt of New Delhi) CRL.A.944/2016.

prior to his act but testified that she feigned orgasm during the act because she feared the strength of the appellant and thought that, by 'acquiescing', she would avoid further physical harm.

The judicial interpretation of the scenario shatters the statutory meaning of consent. Consent, as we know, is defined in statute as 'an unequivocal voluntary agreement when a woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific act.'[71] This definition is explicitly cited in the judgment. Yet, shortly after, it is unravelled in practice. The judgment states: 'The *history of intimacy* and the unabashed liking/attraction of the prosecutrix may have *given an impression* to the appellant of consent'[72] (emphasis added). In one fell swoop, the concept of irrevocable consent is introduced and the requirement for 'unequivocal' consent is undone. A historical relationship, it seems, is enough to validly convey consent for any future act; a woman does not have to communicate willingness to participate in any 'specific act'. Something akin to irrevocable marital consent is invoked to haunt non-marital relationships. Similarly, the need for consent to be 'unequivocal' is undone, because the judiciary is content to accept a broad-brush 'impression' of consent.

We then have, more perplexingly, temporal misplacement of evidence to seal the finding of consent. The judgment concludes that 'The orgasm which was feigned by the prosecutrix, avowedly for the purposes of preventing further damage to her, may have been taken by the appellant as willingness on the part of the prosecutrix because it understood/misunderstood as a non-verbal communication of consent.'[73] The credibility of this judgment is undermined by the fact that, by this point, the act constituting rape *had already occurred.* If this action was misunderstood to constitute consent, that is immaterial to the crime; yet it is cut out and pasted backward onto the relevant moment to provide a narrative that is non-linear and erratic yet, somehow, legally tenable.

In spite of this bizarre achronological treatment of testimony, in which events are torn apart and stitched back together, perhaps the most violent divisionary act carried out in this case is the rupturing of consent. This is

[71] S. 375 Indian Penal Code, Explanation 2.
[72] Farooqui (n70) [46].
[73] Ibid.

where the statutory definition of consent buckles under the weight of interpretation. It is important to note that the misrepresentation of 'consent' as it relates to rape law was also facilitated by statute. Rather than attending to the definition of consent that was added after the 2013 amendments and is specific to rape, the court prefers to focus on the standard definition of consent in Section 90 of the IPC. This states that consent is vitiated if 'the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.'[74] By using Section 90 rather than the relevant definition of consent in Section 375, the court begins to view the scenario through the perspective of the accused: what did they know and what did they believe? The (alleged) rape is then examined entirely from the vantage point of the accused, but the shift in perspective is passed off as legally viable.

Once the perspective of the accused has become the appropriate site of judicial scrutiny, the court latches onto the communicative nature of consent. Consent is split into two facets: what is expressed by the victim, and what is understood by the accused. This allows for a process of judicially-sanctioned gaslighting to unfold. It is concluded that 'the unwillingness of the prosecutrix was *only in her own mind* and heart but she communicated something different to the appellant' (emphasis added).[75] Through these interpretive gymnastics, the victim is immobilised in the courtroom. The burden placed on the prosecution to prove consent becomes unsurpassable, because the issue is not whether the victim did or did not consent. The issue becomes whether the perpetrator received the message. This creates a fenced loophole, and such arguments as 'the appellant had no idea at all that the prosecutrix was unwilling' are declared valid.[76] The exonerating impetus escalates to the extent that consent is robbed of its proper meaning:

> It is not unknown that during sexual acts, one of the partners may be a little less willing or, *it can be said unwilling* but when there is an assumed consent, it matters not if one of the partners to the act is a bit hesitant. Such feeble hesitation can never be understood as a positive negation of any advances by the other partner.[77]

[74] S. 90 Indian Penal Code.
[75] Farooqui (n70) [47].
[76] Ibid.
[77] Ibid.

'Less willing' and 'unwilling' are collapsed into one, and the statutory requirement of 'unequivocal consent' becomes a distant memory. The judicial gloss on consent transposes it onto a sliding scale, in which a hesitative but entirely consensual sexual act is imagined in order to conflate it with a non-consensual act. This obfuscation of meaning transmutes consent to the extent that it is no longer functional, leaving the core of Indian rape law disfigured. The result is not only inadequate, but retrogressive, because it undoes the protection of statute provided in the 2013 amendments in favour of a nonsensical transmogrification of consent.

2.3 Normalising Aggression

The judgment in *Farooqui* effectively rewrites the entire crime of rape and, in the process, exposes that Indian rape law is thoroughly gendered. *Farooqui* invents a *mens rea* for the crime (there must be an understanding of the lack of consent) as well as a defence of mistake of fact.[78] Judicial interpretation inverts the direction of its concern from the victim to the perpetrator, coming full circle from the disavowal of the victim's subjective experience (as demonstrated in 1.2) and proving that rape law is gendered on different levels. Both *Bharwada* and *Vikas Garg,* the latter of which parrots the value-judgments of the former, demonstrate that law is explicitly gendered, because both judgments are rooted in a condemnation of female sexuality. *Farooqui* does not adopt this approach with the same verve, yet it is a frightening development because it shows us that the gendered nature of rape law runs deep. Its procedural approach is gendered, because subjective experience is not considered to be inherently unreliable. Whilst the testimony of the victim cannot be trusted, close attention to the subjective understanding of the perpetrator is considered a valid way to determine whether there was a rape. Judicial cognisance of subjectivity is gendered.

Focussing on the actions of the accused is a useful way to continue the project of invisibilising date rape. As well as attending to the mental state of the accused, the court misconstrues the physical dimension of the crime of rape by emphasising the actions of the accused. In the first part of this dissertation, I emphasised law's fixation with the body of the victim, as opposed to their testimony, when determining whether a rape occurred. The medical examination puts the sexual organs of the woman under a lens and uses this as an opportunity to reach

[78] Anupriya Dhonchak, 'Standard of Consent in Rape Law in India: Towards an Affirmative Standard of Consent' (2019) 34 *Berkeley Journal of Gender Law and Justice* 29, 40.

into the sexual past of the victim. The body of the perpetrator is examined too, though the search is not motivated by determining sexual activity, past or present. Instead, it is a search for masculine aggression, which is normalised by the court as a hallmark of rape. In this way, the body of the accused is also interpreted in a way that undermines statutory developments. While statute specifies that partial penetration is sufficient for the crime of rape,[79] and therefore does not require the act to come with additional aggression or create injury, the judicial examination of the masculine body looks for aggression that is extraneous to the act of rape itself for a finding of rape. Given that aggression is most unlikely in date rape, where victim and perpetrator have a prior relationship and are well acquainted, date rape becomes legally unviable. The search for aggression exposes an ideological flaw in the law's conceptualisation of rape. Rape must always resemble what Estrich calls 'stranger rape' *even if* it is with an acquaintance. Like stranger rape, it must be violent, aggressive, and physically injurious to the woman beyond the act of the rape itself. In this paradigm of rape, coercion simply does not feature. Rape law thus is politically charged in its understanding of what rape is. It fails to recognise rape as an act of exercising patriarchal power; instead, rape is hermeneutically confined to the exercise of physical force.

I also suggest that the understanding of rape as excessive physical violence arises from the nationalist co-option of rape as a political tool. In the previous subsection, I noted that motherhood is integral to Hindu nationalism on both a material and a symbolic level. The Hindu nationalist movement has long capitalised on symbolising the state as 'Mother India'. The personified female nation is presented as threatened by the invasion of Muslim men, and in need of protection by male citizen warriors.[80] In this context, the act of rape itself is utilised by nationalistic hegemonic discourse. The partition of India is 'symbolically portrayed as the rape and dismemberment of Mother India by "alien" and "sexually predatory" men.'[81] There is thus political investment in envisioning rape as connoting gratuitous violence, because in the Hindu right-wing understanding, rape is only perpetrated by Muslim men against Hindu women. Stories of heinous sexual violence perpetrated by Muslim men abound in propagandist nationalist publications to consolidate fear and hatred of the 'Other'.[82] Rape is a

[79] S. 375 Indian Penal Code.
[80] Meera Sehgal, 'Mothering the Nation: Maternalist Frames in the Hindu Nationalist Movement in India ', in Kathleen M. Blee and Sandra McGee Deutsch (eds), *Women of the Right: Comparisons and Interplay Across Borders* (Penn State University Press 2012) 192–208, 197.
[81] Ibid.
[82] For instance, following the 2002 pogroms, the *Sandesh* (A popular Gujarati newspaper) ran a false story that a group of women had been dragged off a train by Muslim men, and some of their dead bodies were recovered with the breasts cut

physical threat to Hindu women, and the rape of Hindu women is understood as a violation of the honour of the whole community.[83] Literal rape and symbolic rape are accorded great value in the Hindu nationalist movement, the former always implying the latter. Conceiving of rape as excessively violent is a useful political strategy to engender hatred, and to inculcate women into nationalist discourse, who come to see Muslim men as 'sexualized threats to their and other women's physical purity and integrity.'[84]

Whilst courts cannot use this understanding of rape to explicitly target Muslim men – not least because the Hindu-right's concealment of rape by Hindu men does not, of course, play out in reality – it is my contention that the understanding of rape as inherently brutally violent, that *is* found in the courtroom, is culturally informed by the Hindu nationalist co-option of rape as a political tool. Strategically, this nationalistic understanding of rape (used in other contexts to target Muslim men) doubles-up in the courtroom to strengthen the heteronormative patriarchal control of women. It can be made to serve a different political purpose, making date rape a legal impossibility.

Whilst there is precedent to acknowledge that the victim's body need not show signs of injury to prove rape,[85] cases still raise an expectation of injur*ing* on the part of the accused. Thus, in *Vikas Garg*, the coercive context works to exonerate the perpetrators: the court finds that one 'compelling reason' for suspending punishment is the fact that 'the narrative does not throw up gut wrenching violence that normally precede or accompany such incidents.'[86] An absence of gut-wrenching violence is a disturbing standard to set for suspending a rape sentence, yet here it is literally normalised. Corey Rayburn posits that rape victims are subject to a 'burden of performance' in the courtroom.[87] Their behaviours greatly influence whether or not their narrative will be believed. I suggest here that rape law which expects and normalises masculine aggression provides perpetrators the *benefit* of performance: if, in their exercise of power during rape, they do not perform power in the way that is physically enacted, they benefit from absolution.

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off. The fabricated story spread widely. Meera Sehgal, 'Defending the Nation: Militarism, Women's Empowerment, and the Hindu Right', in Nancy A. Naples and Jennifer Bickham Mendez (eds), *Border Politics* (NYU Press 2014) 60–94, 67.

[83] Sehgal (n82) 66.

[84] Paola Bachetta and Margaret Power, 'Introduction', in Bacchetta and Power (eds), *Right-Wing Women: From Conservatives to Extremists Around the World* (Routledge 2002) 1–15, 9.

[85] See State of Uttar Pradesh v Babulnath (1994) 6 SCC 29 [8].

[86] Vikas Garg (n56) [23].

[87] Rayburn (n6) 439.

The judicial expectation of physical violence exposes that law is incognisant of rape being an exercise of power. In looking *only* for gut-wrenching violence, psychological violence and coercive power can be overlooked. Susan Brownmiller writes that, although all rape is an exercise of power, there are some cases in which rapists operate 'within an institutionalised setting that works to their advantage.'[88] Rapes during slavery and wartime are included in this category. But also included are more pernicious structures of power: 'rapists may also operate within an emotional setting or within a dependent relationship that provides a hierarchical, authoritarian structure of its own that weakens a victim's resistance, distorts her perspective and confounds her will.'[89] This category specifically includes date rape. By (mis)understanding rape as solely an exercise of physical power, the court is able to sieve date rape scenarios out of the courtroom.

Farooqui exemplifies this misunderstanding clearly in its use of the victim's statements. In an email sent after the rape, the victim wrote that sexual assault could not be explained away by the bipolar disorder of the accused, because it 'has everything to do with power. The assertion of power over a human being.'[90] The court's paraphrasing of this statement circumscribes it to the exercise of purely physical violence: the victim 'stat[ed] that the occurrence had to do more with the *physical* power of the appellant than the mental condition.'[91] There is thus a wilful incognisance of the exercise of coercive control.

[88] Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Open Road Media 2013) 547.
[89] Ibid.
[90] *Farooqui* (n70) [19].
[91] Ibid [101].

Conclusion

Smart's observation that law 'operates with conflicting principles and contradictory effects' applies well to Indian rape law.[92] Such conflicting principles arise many times in an examination of Indian rape jurisprudence and statute. The search for gut-wrenching violence in *Vikas Garg*, as well as the circumscription of power to connote physical violence in *Farooqui*, raises questions about whether rape is truly a consent-based crime in Indian law. If it *is* as a crime against autonomy, turning upon a lack of consent, then why is it understood as requiring physical violence? We might suspend disbelief and accept without question that rape is considered, in law, to be a consent-based crime, but then we find ourselves faced with a further stumbling block: Indian rape law provides us with many conflicting uses and meanings of consent. Statute tells us consent must be given for a 'specific sexual act'; jurisprudence shows us that a past consensual relationship is enough to unleash irrevocable consent. Consent must be 'unequivocal' according to the books, yet 'an impression' of consent suffices in practice.

This dissertation locates the contradictions of consent in a political desire to preserve the role of women as cultural markers. Based on this political impetus, the use of consent in practice must belie the protection of women's agency, because women who embrace sexual agency threaten the core of nationalist identity. There are practical strategies to manipulate consent to meet political ends: though the consent-standard appears to privilege the subjective experience of the victim, her perspective on her own agency is circumvented through judicial formulations of consent. Using the medical examination as smokescreen for objectivity, constructive consent looks for an active sexual 'agent' in the past and makes the consent of this agent irrevocable. In doing so, it rewrites agency so that sex is a one-time choice with eternal consequences, thus splitting the ability to withhold consent from the ability to give it. Ethnographic consent also provides a convenient tool to wrest away sexual agency, and at the same time provides the foundational stone for building nationalist identity in legal fora. By making the rape victim's honesty dependent upon normative sexuality, it casts women who do not conform to this standard beyond the protection of the law.

[92] Smart (n4).

The rape trial provides a convenient platform upon which to reinvigorate and stabilise the nationalist project. It does so by subsuming the narratives of rape victims into a broader narrative that attests to the coherence of essentialist Indian identity and the position of women within it. Evidence and testimony are therefore approached selectively. They are fragmented to provide de-contextualised snapshots of the victim. These can be reassembled to create a politically gendered identity and, in turn, preserve the Indian/Western boundary. Anything that suggests that the boundary is unfixed, or permeable, must be erased. The political impetus drives a desire to invisibilise date rape. Date rape can imply a circumstance wherein a woman who embraces her sexual agency has the ability to retract it. In other words, it requires a *true* agent, unlike that contrived through constructive consent. This free sexual agent has no place in the nationalist conception of women. The judicial abhorrence of this agent has resulted in a complete reappraisal of consent, turning it into a tool to privilege the perpetrator's subjective understanding of the sexual encounter and to make the victim's subjective understanding inert and incommunicable. The judicial application of rape law is politically gendered on several levels, not only demanding (and creating) conformity with the ideal identity of the Indian woman through the fragmentary treatment of testimony and evidence, but also wrenching the 'unequivocal' nature of consent away from the speaker. It is also gender*ing*, because it accords greater value to masculine understanding of sexual norms and thus legitimises the coercive sexual exploitation of women. Rape law that allows potential rapists to determine consent makes the legal protection of women a farce. Its politically gendered manoeuvres strengthen the patriarchal expression of coercive power.

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