

**NIRBAIYA CASE: A PRETENTIOUS INTERPRETATION INVOLVING  
MODESTY AND EXUBERANCE**

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**I. ABSTRACT**

*SEEK TRUTH TILL ETERNITY AS WE DON'T ALWAYS WIN BATTLES BUT IT'S GOOD TO  
KNOW WE FOUGHT*

- *LAUREN BACALL*

One such battle won was the judicial intervention in guiding or advising the legislation to make laws in par with the current day contextual and situational requirements. **“In countries with a written constitution,** the reach of judicial power is almost unlimited—it is only in the wisdom of its exercise that the balance of a written constitution is maintained. However, today, failure on part of the legislative and executive wings of the Government to provide ‘good governance’ makes judicial activism an imperative. Words are the skin of the language and we opted literal interpretation for time immemorial. Then came the need for identifying the true intention behind any legislation and so developed the other rules of interpretation Now here we stand where the Courts themselves display prudence and moderation and be conscious of the need for comity of instrumentalities as basic to good governance.” The nirbaiya case is one such remarkable trail that repaired the outcry of civil society as rape is a crime, which has a devastating effect on the survivors; it has been described as a “beginning of a nightmare”.

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## **II. RESEARCH METHODOLOGY**

The secondary data is the source for this doctrinal research article. The analysis will be done following the descriptive research methodology. Case analysis method alongside Conceptual analysis of judicial activism has been undertaken.

## **III. RESEARCH OBJECTIVES**

- To examine the judicial craftiness involved in the judgment of the case and the reasons for the same
- To portray the constant chaos led by the youth, against the failure of governance to provide a safe and dignified environment for the women of India, who are constantly exposed to sexual violence and the response after the judgment.
- To analyse the interpretative tools involved and how charismatically they are used as an aid to arrive at such a conclusion in the case.

## **IV. RESEARCH QUESTIONS**

1. What are the reasons behind the rationale of the judicial activism in the case?
2. Whether the judgment really sounds effective keeping in mind the future scenario and the previously decided cases of the same category?
  - A. If yes, what are the benefits such a trail bestows upon the feminine jurisprudence and in protection of such a cognizable offence in India?
  - B. If no, what is the scope of misuse of such a judgment in any of the laws for the time being in force?

## CHAPTER: 1

### INTRODUCTION

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One basic and fundamental question that confronts every democracy, run by a rule of law is, what is the role or function of a judge. Is it the function of a judge merely to declare law as it exists-or to make law? And this question is very important, for on it depends the scope of judicial activism. It is recognized that the judges do make law, though not in the same manner as the legislature, it will immediately become apparent why judges can and should adopt an activist approach. That's how came the idea of Judicial activism. The Supreme Court has developed a new normative regime of rights and insisted that a state cannot act arbitrarily but must act reasonably and in public interest on pain of its action being invalidated by judicial intervention. It has expanded the frontiers of fundamental rights and of natural justice. In the process it has rewritten some parts of the constitution<sup>2</sup>. The right to life and personal liberty and the procedure established by law has been converted de facto and de jure into a procedural due process clause contrary to the intent of the makers of the constitution. In the law few years the Supreme Court has, through intense judicial activism, become a symbol of hope for the people of India. It has augmented its moral authority and acquired a new credibility with the people through judicial activism and judicial creativity. The activism had taken a new brilliant role in the Nirbaya Gang Rape Trail proceedings. The apex court's judgment was based on the incident being the "rarest of rare" – a criteria required to award the death penalty in India. [judicial](#) rulings that are suspected of being based on personal opinion, rather than on existing law is judicial review

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<sup>2</sup> Chief Justice P.N. Bhagwati, *Judicial Activism in India*, [https://media.law.wisc.edu/m/4mdd4/gargoyle\\_17\\_1\\_3.pdf](https://media.law.wisc.edu/m/4mdd4/gargoyle_17_1_3.pdf), Last accessed on Aug 26, 2017.

## CHAPTER: 2

### NIRBAYA: VICTIMIZATION BEYOND CONJECTURE

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#### 2.1 FACTS:

“Nirbhaya” is the pseudonym used for the rape victim of the infamous 16 December 2012 Delhi gang rape incident. On just another chilly December night in Delhi, Nirbhaya and her friend were returning from a movie theatre, they were waiting for a bus. One of the would-be culprits convinced them to get on an empty bus with tinted windows. They were assaulted by six males, one of whom was a minor, aged 17. The friend, when he tried to protect Nirbhaya, was beaten up by the perpetrators. Nirbhaya was not just sexually violated, her body was mutilated beyond human imagination<sup>3</sup>. Her intestines were pulled out, and private parts mutilated. She later died of multiple organ failure, internal bleeding and cardiac arrest on the 29th of December.

#### TIMELINE SHOWING THE FATEFUL INCIDENT:

**Dec 21-22, 2012:** Thakur arrested in Aurangabad district of Bihar and brought to Delhi. Victim records statement before the SDM in hospital.

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**Dec 23, 2012:** Protesters defy prohibitory orders, take to the streets. Delhi Police Constable Subhash Tomar, on duty to control protests, rushed to hospital with serious injuries.

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**Dec 25, 2012:** Girl's condition declared critical. Constable Tomar succumbs to injuries.

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**Dec 26, 2012:** Following a cardiac arrest, victim flown to Singapore's Mount Elizabeth Hospital by the government.

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<sup>3</sup> Nirbhaya rape case: *What happened on that dark fateful night of December 16, 2012*, IANS, 06-May-2017, <http://www.mid-day.com/articles/national-news-nirbhaya-rape-case-verdict-flashback-dark-night-of-december-16-2012-delhi/18226167>, last accessed 10 August, 2017.

**Dec 29, 2012:** Victim succumbs to injuries and other medical conditions at 2:15 A.M. Police add murder charge in the FIR.

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**Jan 2, 2013:** The then Chief Justice of India Altamas Kabir inaugurates fast track court (FTC) for speedy trial in sexual offence cases.

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**Jan 3, 2013:** Police file charge sheet against five adult accused for offences including murder, gangrape, attempt to murder, kidnapping, unnatural offences and dacoity etc.

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**Jan 7, 2013:** Court orders in-camera proceedings.

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**Jan 17, 2013:** FTC starts proceedings against the five adult accused.

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**Jan 28, 2013:** JJB says minority of juvenile accused is proved.

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**Feb 2, 2013:** FTC frames charges against five adult accused.

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**Feb 28, 2013:** JJB frames charges against the minor.

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**Mar 11, 2013:** Ram Singh commits suicide in Tihar jail.

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**Mar 22, 2013:** Delhi HC allows national media to report trial court's proceedings.

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**Jul 5, 2013:** Inquiry (trial) in JJB against juvenile in gangrape-cum-murder case and robbery concludes. JJB reserves verdict for July 11.

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**Jul 8, 2013:** FTC completes recording of testimonies of prosecution witnesses.

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**Jul 11, 2013:** JJB holds minor guilty of illegally confining and robbing a carpenter on December 16th night before allegedly taking part in the gangrape. Delhi High Court allows three international news agencies to cover the trial in the case.

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**Aug 22, 2013:** FTC begins hearing final arguments in trial against four adult accused.

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**Aug 31, 2013:** JJB convicts the minor for gang rape and murder and awards three-year term at probation home.

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**Sep 3, 2013:** FTC concludes trial. Reserves verdict.

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**Sep 10, 2013:** Court convicts Mukesh, Vinay, Akshay, Pawan of 13 offences including gangrape, unnatural offence and murder of the girl and attempt to murder her male friend.

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**Sep 13, 2013:** Court awards death to all four convicts.

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**Sep 23, 2013:** HC begins hearing the convicts' death sentence reference sent to it by the trial court.

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**Mar 13, 2014:** HC upholds death penalty awarded to the four convicts.

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**Mar 15, 2014:** SC stays execution of 2 convicts, Mukesh and Pawan after they filed appeals. Later stays execution of other convicts also.

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**Apr 15, 2014:** SC directs police to produce dying declaration of the victim.

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**Feb 3, 2017:** SC says it would hear afresh the aspect of awarding death penalty to the convicts.

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**May 5, 2017:** SC upholds death penalty to four convicts, says the case falls under the category of 'rarest of rare' and the offence created "tsunami of shock".

## 2.2 SOCIAL OUTRAGE

“We have never seen such brutality all over lives” was the statement of the doctors in Nirbhaya’s case who was brutally gang raped. The death of this 23 year old physiotherapy student raised the question, “Is a woman’s dignity and life worth anything in this country?” The answer to this is in negative. Because first of all, our laws are lax and secondly there is lack of intention to implement these laws properly. Only judiciary has taken some stringent measures from time to time to lay down the landmark judgments. Feminist and women’s movements gained momentum and incentive. The culprits were made an example of and condemned. Not just social, there were legal repercussions of the incident too<sup>4</sup>. The UPA government was being pressurised to make stricter laws regarding rape and dealing with juveniles committing heinous crimes.

## 2.3 JUDICIAL BLENDERS

- The Supreme Court has expressed strong disapproval of courts casting a stigma on the victim’s character, but stigmatization continues, leading to acquittals. The Supreme Court in a 1996 judgment said, “The trial court interpreted that the victim was habituated to sexual intercourse just because the speculum the doctor used entered her vagina easily and hence she was of loose character. These observations lack sobriety expected of a judge. No stigma should be cast against a victim of sex crime who is on trial”
- One another problem is that of courts false interpretation in examining the presence of consent of the Rape victim. “One such case is the case of **Tuka Ram v. State of Maharashtra**<sup>5</sup> the Supreme Court observed that, ‘no marks of injury were found on the person of the girl after the incident and their absence goes a long way to indicate that the alleged intercourse was a peaceful affair, and that the story of a stiff resistance having been put up by the girl is all false.’

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<sup>4</sup> Mythreyee Ramesh, 2012 *Delhi Gangrape: Death Penalty For 4 Convicts in Nirbhaya Case*, The quint, 5 May, 2017, <https://www.thequint.com/news/2017/05/04/nirbhaya-verdict-to-be-announced-by-supreme-court>, last accessed August 29, 2017.

<sup>5</sup> **Tuka Ram v. State of Maharashtra**, AIR1979 SC 185

- Imrana case showcased the adverse effects that would arise if the personal laws are allowed to decide such sensational cases dealing with the modesty of a woman. Imrana was raped by her father in law in UP and the village elders treated it as a case of adulteration instead of rape and ordered her to leave her husband and consider herself married to her father in law. This view of the religious institution was highly criticized. After a lot of media attention she got justice and her father in law was sentenced to a term of ten years of imprisonment. We consider our nation as a diversified land of religious freedom but we still fail to recognize that women under such system, under certain circumstances, are victimized and denied of their rights.
  
- *Vishaka and others v. State of Rajasthan*<sup>6</sup>, highlights one another factor that is widely prevalent today, the corrupted attitude of police officials and Judiciary who are reluctant to avail justice to the victim due to the power and authority overruling them in the societal arrangement. Bhanwari Devi was a grassroots level worker in Bhatari village under the Women's Development Project in Rajasthan. In 1992 she was gang raped by 5 high caste men of her village when she got involved in speaking against child marriage. Her case attracted a lot of media coverage once it became clear that she was being denied justice on the basis of her low caste and gender. The case reflects how this nexus of power which operated on the social factors of caste, class and gender oppressed the least privileged in the existing social system.”

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<sup>6</sup> *Vishaka and others v. State of Rajasthan*, AIR 1987 SC 3011



## **CHAPTER: 3**

### **ACTIVISM: A NIRBAYA PANORAMA**

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#### **3.1 LEGAL UNLOCK**

“Until 2012, the definition of rape was restricted just to sexual intercourse. There was no place for uplifting the modesty and dignity of women. The nirbaya case has rewritten the existed tradition old rape laws and thus ensuring justice to the rape victims through Justice Varma Committee<sup>7</sup>.

The Committee recommended that the gradation of sexual offences should be retained in the Indian Penal Code, 1860 (IPC).

The Committee recommended the following:

- Rape should be categorized as a separate offence and it should not be limited to mere penetration of Vagina, anus and mouth but also any sort of non consensual penetration of sexual nature should also be termed as rape.
- Nonconsensual sexual intercourse within the marriage sphere should also be recognized as Rape which means the relationship between the victim and the accused should not be taken into consideration<sup>8</sup> and the exception prevailing for marital rape should be struck down.
- If the rape causes death of the victim or a “persistent vegetative state” then the accused should be sentenced to a term of rigorous imprisonment of 20 years or for the rest of the life<sup>9</sup>. The same extends to gang rape also.
- Voyeurism be included as an offence and should be made punishable for upto seven years of imprisonment, stalking or attempts to contact a person repeatedly through

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<sup>7</sup> Samanwaya Rautray, *Supreme Court confirms death sentence for four convicts in Nirbhaya gang rape case*, The Economic Times, May 06, 2017  
[http://economictimes.indiatimes.com/articleshow/58531130.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://economictimes.indiatimes.com/articleshow/58531130.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst), last accessed 10 August, 2017

<sup>8</sup> PRS | Parliament Track | Report Summaries | Justice Verma Committee Report Summary, Prsindia.org (2017), <http://www.prsindia.org/parliamenttrack/report-summaries/justice-verma-committee-report-summary-2628/>, (last visited Mar 13, 2017).

<sup>9</sup> Section 376A of Indian Penal Code, 1860.

any means by up to three years and Acid attacks would be punished by up to seven years of imprisonment; trafficking will be punished with rigorous imprisonment for seven to ten years.

- Recommended to introduce a separate Bill of Rights for women that entitles a woman a life of dignity and security and will ensure that a woman shall have the right to have complete sexual autonomy including with respect to her relationships.

### **3.2 AMENDMENTS AS A RESULT OF THE COMMITTEE**

The Indian Penal Code (IPC) was amended to provide death penalty in rape cases that cause death of the victim or leave her in a vegetative state. The Act also introduced several other new offences in IPC such as causing grievous injury through acid attacks<sup>10</sup> (326A and 326B) sexual harassment<sup>11</sup> (354A), use of criminal force on a woman with intent to disrobe<sup>12</sup> (354B), voyeurism<sup>13</sup> (354C) and stalking<sup>14</sup> (354D). These offences are no more gender neutral as per the amended act of 2013. Non-consensual sexual act within marriage is still not made punishable, even though the amount of punishment has been increased. Another amendment is the addition of Section 326A<sup>15</sup> regarding the acid attacks, the proviso clearly states that the fine which is imposed on the convict shall be such that it is just and reasonable

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<sup>10</sup> 326A and 326B states that, “Whoever causes permanent or partial damage or deformity to, or bums or maims or disfigures or disables, any part or parts of the body of a person or causes grievous hurt by throwing acid on or by administering acid to that person or by using any other means with the intention of causing or with the knowledge that he is likely to cause such injury or hurt, shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and with fine.”

<sup>11</sup> 354A states that, “A man committing any of the following acts—physical contact and advances involving unwelcome and explicit sexual overtures; or a demand or request for sexual favours; or showing pornography against the will of a woman; or making sexually coloured remarks, shall be guilty of the offence of sexual harassment.”

<sup>12</sup> 354B states that, “ Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.”

<sup>13</sup> 354C states that, “Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished.”

<sup>14</sup> 354D states that, “Any man who— follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking.”

<sup>15</sup> Supra note 8

to meet the medical expenses of the treatment of the victim of acid-attack. Such fine shall be imposed directly to the victim.”

### 3.3 LEGISLATIVE GENESIS ON ACTIVISM

- **Suo Motto v. State of Rajasthan**<sup>16</sup> popularly known as German Lady rape case. It is a landmark judgment laying down principles and guidelines for the protection of dignity of the women. hon’ble Mr. Justice N.N. Mathur, who wrote the judgment, took *Suo Motto* cognizance of a rape case of a foreign tourist in Rajasthan in May 2005 which had hit the headlines of State and national newspapers. In this case, court laid down certain highly relevant guidelines for criminal investigation and trial of offences against women in rape cases. The court opined: “In order to combat the increasing crime against women and to ensure protection and preservation of their human rights – the criminal justice system needs to be addressed from the point of view of systemic victim support service. There is need to promote proactive role of police as well as trial courts”.
- **Sakshi v. Union Of India (UOI) And Ors**<sup>17</sup> “In holding trial of child sex abuse or rape, following guidelines were made

A screen or some such arrangements may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or face of the accused;

The victim of child abuse or rape, while giving testimony in court, should be allowed sufficient breaks as and when required.

The apex court has directed trial courts to effectively control the recording of evidence in rape trials and not let defence counsels intimidate the victim with offensive questions.

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<sup>16</sup> **Suo Motto v. State of Rajasthan**, RLW 2005 (2) Raj 1385, 2005 (4) WLC 163

<sup>17</sup> **Sakshi v. Union Of India (UOI) And Ors**, AIR 2004 SC 3566, 2004 (2) ALD Cri 504

### 3.4 AMELIORATION AFTER THE ACTIVISM

Changes were drastic after the record of such a fateful incident. The government responded with the passage of several new sexual assault laws, including a mandatory minimum sentence of 20 years for gang rape, and six new fast-track courts created solely for rape prosecutions. As an indicator of the scope of the problem of rape prosecution, the "Nirbhaya" case was the only conviction obtained among the 706 rape cases filed in New Delhi in 2012<sup>18</sup>. Between 16 December 2012 and 4 January 2013, Delhi police recorded 501 allegations of harassment and 64 of rape, but only four inquiries were launched. However, it appears that the "Nirbhaya" case has had an effect on the willingness of rape or molestation victims to report the crime; police records show that during the final nine months of 2013 almost twice as many rape victims filed a police report and four times as many allegations of molestation were made. Following the incident the government set up the [Nirbhaya Fund](#) to address violence against women. The Fund is administered by [Department of Economic Affairs](#) of the finance ministry<sup>19</sup>.

### 3.5 IGNORANT AND UNFAIR TRAIL: AN AMICUS CURIAE CRITIQUE

The case, being a signatory and revolutionary in nature, had an amicus curiae who made a fair criticism on the trial procedures and highlighted the denial of rights made to the accused by the Court.

- A fair hearing under section 235(2)<sup>20</sup> of the Code, not only includes oral submissions but is also intended to give an opportunity to the prosecution and the defence to place the relevant material bearing on the question of sentence before it and only thereafter, pronounce the sentence to be imposed on the offender<sup>21</sup>.
- In the present case, though this procedure was formally complied with, the Trial Court and the High Court failed to appreciate the spirit of the law. It is submitted that: a) the

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<sup>18</sup> Sunny Hundal, [Delhi rape: one year on, has anything changed for India's women?](#), (December 10, 2013), The Guardian, <https://www.theguardian.com/world/2013/dec/0/delhi-rape-one-year-anything-changed-india-women>, Last accessed on August 28, 2017.

<sup>19</sup> Nirbhaya Fund, Press Information Bureau Government of India Ministry of Women and Child Development (December 13, 2013). Last accessed on August 28, 2017.

<sup>20</sup> Section 235(2) of Civil Procedure Code, states that, "If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

<sup>21</sup> see *Santa Singh v. State of Punjab*, (1976) 4 SCC 190, Para 3-6

Trial Court failed to put any of the accused to notice on the question of imposition of the death sentence; b) sufficient time to reflect on the question of death penalty was not granted to the accused; c) none of the accused were heard in person; d) the Trial Court made no genuine effort to elicit those circumstances of the 7th November, 2016 e) there was no individualized or personalized hearing or application of mind on the question of sentence; f)The Trial Court failed to put the accused to notice of the range of mitigating factors they could have pleaded, in case death penalty was sought to be imposed on them. Each of these six deficiencies, taken individually or cumulatively resulted in the denial of a fair and effective hearing on the question of sentence to each of the accused.

- Also, differently situated individuals have been sentenced to death by a ‘one-penalty-fits-all’ order without application of mind to their individual characteristics and personality. This hits at the very root of Article 14<sup>22</sup>, which prohibits similar treatment of differently situated individuals. The Trial Court and the High Court was so overwhelmed by the nature of the crime and conviction, that it completely ignored the fact that mitigating factors in the case of each accused could be different. This disregard of the individuality of the accused overlooks the very dignity and worth of a person, irrespective of the fact that he is a condemned offender, thus offending Article 21<sup>23</sup> of the Constitution of India. This fatal breach in the sentencing process, fails to treat each of the accused as an unique and distinct individual, but pre-judges them as belonging to a class of unworthy, ‘homogenous’ class of condemned criminals. Pertinently, this Court in *Santosh Kumar Bariyar v. State of Maharashtra*<sup>24</sup>, highlighted the need to rigorously apply the safeguards of Article 14 and 21 to process of sentencing.

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<sup>22</sup> Article 14 of the Constitution states that, “The State shall not deny to any person equality before the law or the equal protection of the laws.”

<sup>23</sup> Article 21 states that, “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

<sup>24</sup> *Santhosh Kumar Bariyar v. State of Maharashtra* (2009) 6 SCC 498, para 82, 83, 130-149

## **CHAPTER 4**

### **CRITIQUE: MASCULINITY V. FEMINIST APPROACH**

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#### **4.1 CULTURAL AND FEMINIST OUTBURST**

“Indian youth tend to associate the country’s large metropolitan cities with economic opportunity and modernity but for many, life in an urban metropolis is characterised by insecurity and the ever-present threat of violence. When what came to be referred to as the ‘Delhi gang-rape’, or simply the ‘Delhi rape’, captured the headlines, violence on the streets and the lack of security for women quickly reemerged as rallying points for students, activists and ordinary citizens in Delhi and around the country, feeding, ultimately, into transnational discourses about and mobilisations against gender-based violence. The need for constant negotiation with fears and apprehensions around public mobility was questioned; the disjuncture between male and female understandings of security in the public arena was interrogated; and institutional failings and lacunae were laid bare and challenged. In effect, the protests that followed the incident provided an opportunity structure for the articulation of oppositional views in the area of civic life and progressive views in the sphere of gender relations.

Feminist Jurisprudence comes up converging around questions of female autonomy and mobilisations against violence. In sociological studies, the problems posed by violence are often conceptualised in terms of the conflicts and tensions between modernity, tradition and changing social structures<sup>25</sup>. In both media and scholarship, approaches to gender-based violence vary from those that essentialise gender as a stable construct across societies, and those that prioritise the intersections between “race, class, ethnicity, nationality, disability, sexual orientation and many other characteristics as well as gender” A perceived “crisis of masculinity” was linked to a “sense of displacement” brought on by women’s empowerment

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<sup>25</sup> S. Srivastava, *Taking the aggression out of masculinity*, *The Hindu*, January 3 2013, <http://www.thehindu.com/opinion/op-ed/taking-the-aggression-out-of-masculinity/article4266007.ece>, last accessed on September 02, 2017.

and the economic transformation of society<sup>26</sup>. The growth of women's economic power was linked to male hostilities and violence against women." Against the backdrop of widespread 'victim-blaming', among authorities as well as the wider public, conceptual linkages between mobility and vulnerability can be seen as providing a rationale for the paternalistic hectoring of women for their 'unwise' behaviour (in personal safety terms) and instructing women "to be vigilant, to be careful, not to take unnecessary chances<sup>27</sup>."

### **EXHORTATION TO MINIMIZE HEINOUS RAPE TRAGEDIES**

- In India, there is a significant delay in reporting rape cases which leads to loss or diminish in the physical injuries that the courts consider to be prima facie evidence. Such delays also result in destruction of proof by the accused as in cases of gang rape the offender is usually unknown to the victim herself. The courts should not stress the importance of physical or genital injuries to validate the allegations of Rape.
- Rape exists because of the patriarchal and male dominant mindset and culture that condones it in an explicit way. The effective lawlessness in this regard also encourages it in the one or the other way. The urgent need of today is the systematic social change and legal reform. Unfortunately, there is a little or no political will for such reforms to take place due to media and powerful social figures. The only way to bring about the changes is by allowing spirited citizens to take centre stage<sup>28</sup>.
- Rape is rooted in two reasons. It is primarily a foundational issue. It is the failure of social norms, from the family to educational institutes, to exercise control. Thus society has gone weaker. People might have gone to school, but that is not education, that is literacy<sup>29</sup>. Today the boys only want fun through women - and that obviously

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<sup>26</sup> Arjun Rajkhwa, *Cultural Critique after Nirbaya*, (Vol 3, 2016)

[http://www.lib.latrobe.edu.au/ojs/index.php/wfb/article/view/655/html\\_13](http://www.lib.latrobe.edu.au/ojs/index.php/wfb/article/view/655/html_13), Last accessed on August 29, 2017

<sup>27</sup> R. Kapur, 'Rape and the crisis of Indian masculinity'. The *Hindu*, December 19, 2012. <http://www.thehindu.com/opinion/op-ed/rape-and-the-crisis-of-indian-masculinity/article4214267.ece?ref=relatedNews>, last accessed on September 02, 2017

<sup>28</sup> Mishra Sood, advocate on record in Supreme Court of India, New Delhi, India.

<sup>29</sup> Kiran Bedi, retired Indian Police Service officer and the current Lieutenant Governor of Pondicherry.

means disrespect for women. Good policing means that the law is the same for everyone. We never spared any VIP. It was all about being accountable to the community. Today, the police is accountable only to the VIP.



## CHAPTER: 5

### CONCLUSION

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*“THE FIRE-ALARM AT MIDNIGHT MAY DISTURB YOUR SLEEP, BUT IT KEEPS YOU FROM BEING BURNED AT NIGHT.”*

*EDMUND BURKE*

As rightly pointed out by Edmund Bruke, that’s exactly how Judiciary works. The question: “Which is supreme under our constitution—Parliament or the Supreme Court?” is a mischievous one. The answer is “neither”. It is the constitution and the laws that are supreme. And it is the constitution that declares that the final interpreter of the law is the Supreme Court. There is no disharmony between Parliament and the judiciary, and no individual member of government should claim to speak for that great institution. Disharmony between the government and the courts is a different matter—if there were complete harmony between them, this country would not be worth living in. It is the duty of the judges to interpret the constitution and the laws, and if this creates clamour and controversy, well then, that is the price we have to pay for living in a participatory democracy<sup>30</sup>. Courts alone retain their original function of standing between the government and the governed.” The Delhi rape prompted many media commentators in India to examine and address the links between violence perpetrated by men against women, socialisation of misogyny, and culture. Links between masculinity, masculine-making cultures, society’s patriarchal mindset, and women’s experiences of harassment, discrimination and violence, were explored at length by a range of commentators<sup>31</sup>.

This is truly “judicial activism” at its best—with the courts standing between the government and the governed.

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<sup>30</sup> [Fali S Nariman](http://www.caravanmagazine.in/perspectives/case-judicial-activism), The Case of Judicial Activism, *The Caravan*, A journal of politics and culture, (May 1, 2011), <http://www.caravanmagazine.in/perspectives/case-judicial-activism>, Last accessed on August 28, 2017.

<sup>31</sup> P. Baxi, *Rape cultures in India*, *Kafila* (blog post 2012). <http://kafila.org/2012/12/23/rape-cultures-in-india-pratiksha-baxi/>, Last accessed on August 28, 2017.

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