Subversive Sites 20 years later
Rethinking Feminist Engagements with Law

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It is hard to imagine rewriting a 20 year old text. So much of it was predicated on the events of the time, as well as our respective theoretical perspectives at that time. In *Subversive Sites*, we argued that law was a complex and contradictory site of social change for women. We brought a specifically feminist lens to the role of law in women's oppression and to both its limitations and possibilities in challenging that oppression. We focused on the legal regulation of women in and through the family, and the role of familial ideology in particular. We argued that feminist engagement with law, through litigation and law reform, were best envisioned as forms of discursive struggle, where women's rights activists have sought to challenge previously dominant norms, practices and roles of women, and reconstruct them as more full and equal citizens. Law could be a subversive site, but it was not always so. This question of law as a site of social change has remained a central question in both our scholarship in the intervening 20 years, but our theoretical influences and genealogies have evolved. It would be impossible now to imagine writing a text like *Subversive Sites*[1] without explicit attention to postcolonial theory, queer theory and neo-liberal critiques. Our work at the time was framed by a number of feminist influences – socialist feminism, intersectional feminism, poststructuralist feminism – and we sought to deploy these feminisms to construct a more complicated understanding of engagement with law. In the intervening years, our individual scholarship has continued to push forward a more nuanced and sophisticated understanding of law and social change, both centering and decentering the role of law. We have broadened the focus on our inquiries to sexuality, postcolonialism, neoliberalism, governmentality and popular culture. We have each sought to deploy diverse theoretical paradigms to better understand the role and limitations of law in social change.

We address one basic question: What would we do differently, with the benefit of 20 years of hindsight? This basic question raises many more specific ones: What did we miss at the time? What issues might we highlight now, with what theoretical

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* We are indebted to Oishik Sircar for kick-starting this rethinking project, who interviewed us on the legacy of *Subversive Sites*. Oishik Sircar interviews Ratna Kapur and Brenda Cossman, 'The Fraught Terrain of Law and Feminism: 20 Years of Subversive Sites' (2016) 12(1) *Socio-Legal Review* 133. The ideas that we pursue in this essay were first developed in that conversation.

1 Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (Sage 1996).

perspectives? What might we look at differently now? How might we now analyse feminist engagements with law, given the shift in our theoretical perspectives and the developments in feminist advocacy, scholarship and law? The questions are to a certain extent inseparable, yet we will try to tease out what we would do differently, and then, given these shifts in our theoretical lens, how we would analyse contemporary feminist legal engagements today.

What would we do differently? The theoretical framework of *Subversive Sites* would be more explicitly framed within a postcolonial feminist optic. We might foreground the ways in which gender is taken up within a postcolonial context by thinking through how gender, sexuality and culture formed the basis of postcolonial feminist legal thought, sutured together in and through the colonial encounter. Postcolonial feminism has its basis in postcolonial theory and subaltern studies, and challenges the central pillars of enlightenment thought including the ways in which history, time and the subject are constituted. By presenting a critical genealogy of gender through a postcolonial feminist reading, we would not only be able to contextualise the distinct ways in which gender has been taken up by feminists within a postcolonial context but also the specific ways in which governance feminism and carceral feminism play out in postcolonial India.

In the intervening years, both of our scholarship shifted to include an explicit focus on issues of sexuality. Our theoretical influences diverged somewhat,[2] yet were both influenced in different ways by queer theory, and its critical engagement with issues of sex and sexuality. Both theoretically and substantively, we could not imagine writing *Subversive Sites* today without a more explicit focus on issues of sexuality. Sexuality certainly made an appearance in *Subversive Sites*, yet it remained largely subsumed within our analysis of gender. Influenced by the work of Gayle Rubin, Eve Sedgewick, and other critical scholars of sexuality, we would approach sexuality as a unique axis of power, identity and practice.[3] Our subsequent work engaged with sexual subalternity[4] and queer theory,[5] in what we each hoped was a productive tension with feminism.

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[2] See for example our respective articles in Jindal Global Law Review special issue on *Law, Culture and Queer Politics in Neo-liberal times*. Brenda Cossman, 'Continental Drift: Queer, Feminist, Postcolonial' (2012) 4(1) *Jindal Global Law Review* 17 and Ratna Kapur, 'Multi-tasking Queer: Reflections on the Possibilities of Homosexual Dissidence in Law' (2012) 4(1) *Jindal Global Law Review* 36.

[3] See for example Gayle Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality' in Carole Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge 1984) 267 arguing that "an autonomous theory and politics specific to sexuality must be developed" (at 309). In her view, although feminist theory has made an important contribution to gender-based hierarchies within the realm of sexuality, "as issues become less those of gender and more those of sexuality, feminist analysis becomes irrelevant and often misleading. Feminist thought simply lacks angles of vision which can encompass the social organization of sexuality. The criteria of relevance in feminist thought do not allow it to see or assess critical power relations in the area of

This might involve addressing LGBT engagements in law in the last 20 years, from the constitutional challenge to section 377 of the *Indian Penal Code*, 1861, (*IPC)* to the emergence of trans advocacy and the Supreme Court recognition of trans rights. Indeed, the intervening years have seen an explosion in LGBT advocacy and scholarship.[6] But, the sexual subaltern and queer theory critiques do not focus on LGBT issues alone; indeed these theoretical frameworks challenge the identitarian politics of much LGBT activism and scholarship, arguing instead for a deeper critique of the sex/sexuality/gender matrices that produce the very binary identities of male/female, heterosexual/homosexual. Revealing its strong debt to Foucault, queer theory might consider the disciplinary implications of the surveillance of sexuality for subjects whose bodies are marked by "other" sexualities: S/M subjects, queer subjects, transgendered subjects, sex worker subjects, and others whose bodies are erotically charged. It would seek to reveal the ways in which these subjects are produced as deviant through a range of discursive and institutional practices. It is interested in the processes of normalisation

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sexuality" (at 309). Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press 1990) similarly argued for a theory of sexuality distinct from feminism's theory of gender: "This book will hypothesize, with Rubin, that the question of gender and the question of sexuality, inextricable from one another though they are ... are nonetheless not the same question, that in twentieth-century Western culture gender and sexuality represent two analytic axes that may productively be imagined as being as distinct from one another as, say, gender and class, or class and race" (at 30).

[4] See for example Ratna Kapur, *Erotic Justice: Law and the New Politics of the Postcolonial* (Taylor & Francis 2005); Ratna Kapur, 'Out Of The Colonial Closet, But Still Thinking 'Inside The Box': Regulating 'Perversion' and the Role of Tolerance in De-Radicalising The Rights Claims of Sexual Subalterns' (2009) 2 *NUJS Law Review* 381 at 385; Kapur, above note 2.

[5] See for example Brenda Cossman, 'Sexuality, Queer Theory and Feminism After: Reading and Rereading the Sexual Subject' (2004) 49 *McGill Law Journal* 847; Cossman, above note 2.

[6] Siddharth Narrain, 'Crystallising Queer Politics: The Naz Foundation Case And Its Implications For India's Transgender Communities' *(*2009) 2 *NUJS Law Review* 455; Saptarshi Mandal, ''Right to Privacy' in Naz Foundation: A Counter-Heteronormative Critique' (2009) 2 *NUJS Law Review* 525; Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* (Books For Change 2004); Ruth Vanita (ed), *Queering India: Same-sex Love and Eroticism in Indian Culture and Society* (Routledge 2002); Brinda Bose and Subhabrata Bhattacharyya (eds), *The Phobic and the Erotic: the Politics of Sexualities in Contemporary India* (University of Chicago Press 2007); Gautam Bhan and Arvind Narrain (eds), *Because I have a Voice: Queer Politics in India* (Yoda Press 2005); Jyoti Puri, *Sexual States: Governance and the Struggle over Anti-sodomy Law in India* (Duke University Press 2016); Gayatri Gopinath, *Impossible Desires: Queer Diaspora and South Asian Public Cultures* (Duke University Press 2005).

and in the possibilities of disruption and subversion. Notwithstanding its deconstructive mode and its antinormative positioning,[7] much of it has been explicitly or implicitly pro-sexual.[8] It is a theoretical perspective that would lead us to focus on the many ways in which dominant discourses of sexuality – including law – constitute sexual subjects, including the particular ways in which different women's sexualities are constituted. We would likely look very differently at issues around women's sexuality – whether in relation to sex work, obscenity, sexual assault and/or sexual harassment. We would approach these issues not simply through the lens of gender, but also through the multivalent lens of sex and sexuality.

Feminist legal studies have also developed considerably in the intervening years, with trenchant critiques about feminist engagement with law in the forms of "carceral feminism" and "governance feminism".[9] Elizabeth Bernstein describes carceral feminism as "the commitment of … feminist activists to a law and order agenda and ... a drift from the welfare state to the carceral state as the enforcement apparatus for feminist goals".[10] Janet Halley develops a similar idea with the concept of governance feminism, describing it as referring to "the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power … Feminists by no means have won everything they want – far from it – but neither are they helpless outsiders. Rather, as feminist legal activism comes of age, it accedes to a newly mature engagement with

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[7] See for example *Queer Theory Without Antinormativity* (2015) 26(1) *Differences: A Journal of Feminist Cultural Study*, on the anti-normativity of much queer theory.

[8] See for example Elisa Glick 'Sex Positive Feminism, Queer Theory and the Politics of Transgression' (2000) 64(1) *Feminist Review* 19 on the extent to which early queer theory affirmed transgressive sexual practices.

[9] On carceral feminism, see Elizabeth Bernstein, 'The Sexual Politics of the "New Abolitionism"' (2017) 18(5) *Differences: A Journal of Feminist Cultural Studies* 128-151; Elizabeth Bernstein, 'Carceral politics as gender justice? The "traffic in women" and neoliberal circuits of crime, sex, and rights' (2012) 41(3) *Theory and Society* 223; and Elizabeth Bernstein, 'Militarized humanitarianism meets carceral feminism: The politics of sex, rights, and freedom in contemporary antitrafficking campaigns' (2014) 36 *Signs* 45. On governance feminism, see Janet Halley, Prabha Kotiswaran, Hila Shamir and Chantal Thomas, 'From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Governance Feminism' (2006) 29 *Harvard Journal of Gender and Law* 335; and Janet Halley, Prabha Kotiswaran, Rachel Rebouché and Hila Shamir, *Governance Feminism: An Introduction* (Minnesota University Press 2018).

[10] Bernstein (2017), above note 9 at 143.

power."[11] Halley is critical of the failure of feminism to more self reflectively engage with the question of complicity with state power.

Would these feminist critiques have changed the way we wrote *Subversive Sites*? Undoubtedly, we would have engaged with the critiques. Yet, in many respects, we believe that the conception of law that we were trying to offer – of complexity and contradiction – is one that is consistent with these later developments. We fundamentally agree that feminist engagement with law is not simply a progressive narrative. Feminist engagements can be turned against feminism objectives, as we sought to demonstrate in the chapter on the Hindu Right. Similarly, feminist engagements with law could often be hijacked by other conservative and patriarchal ideologies, rendering the judicial discourse and decisions rather less than progressive.

However, if we were rewriting *Subversive Sites,* we would likely attend more carefully to and delineate the engagement of criminal law and incarceration from other modalities of regulation. Many of the early law reform campaigns focused on criminal law reforms, and we argued that these campaigns could be viewed as discursive struggles over the meaning of gender. While we continue to see law reform campaigns as such discursive struggles, we would be more explicitly skeptical of the turn to criminal law. First, in our scholarship in the intervening years, we have both come to focus on the decriminalisation of conduct: from homosexuality to sex work to obscenity. As part of our focus on sexuality as a unique axis of analysis, we have each, in our respective ways, sought to bring attention to the inappropriate and damaging ways in which consensual sexual conduct continues to be criminalised, and its oppressive impact on the lives of women and sexual minorities. Second, we have seen the rise of the carceral state, and agree with the critique of feminism's complicity in the deployment of the criminal law. We have seen the ways in which feminist campaigns for stronger criminal laws have been coopted by the various law and order agendas of conservative states. And we have come to question the extent to which engagements with criminal law in particular can bring about social change, even in light of a more nuanced understanding of discursive change. In the intervening years, we have seen the extent to which social change lies as much in social media, popular culture and/or marketisation that bring about changes in social norms and consciousness.

Yet another significant shift in our own scholarship in the intervening years has been an increasing focus on the role of popular culture in social change, and its complex relationship with questions of law and rights.[12] Each of us has engaged in sustained

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[11] Halley et. al (2006) and (2018), above note 9.

[12] See for example Ratna Kapur, 'Unruly Desires, Gay Governance, and the Makeover of Sexuality in Postcolonial India' in Nikita Dhava, Antke Engel, Christophe Holzhey and Volker Woltersdorff, *Global Justice and Desire: Queering Economy* (Routledge 2015) at 115 and 120-126; Ratna Kapur, 'In the Aftermath of Critique We Are Not in Epistemic Free Fall: Human Rights, the Subaltern Subject, and Non-Liberal Search for Freedom and Happiness' (2014) 25(1) *Law and Critique* 24.

analysis of the ways in which issues of sexuality and gender are represented in popular culture, from Bollywood films to American television. We have argued that popular culture representations have often created space for alternative and indeed subversive representations of sexuality and gender. We have juxtaposed legal and cultural representations, comparing and contrasting the visions of sexuality and gender that are imaginable, hoping to use the discursive space created in popular culture to crack open some of law's more conservative and paternalistic representations.

In terms of substantive issues, perhaps the most glaring omission from *Subversive Sites* was the emerging critique of neoliberalism. At the time, there was a literature emerging around structural adjustment, with a particular focus on the impact on women in developing countries. We included a brief reference to the potential impact of these structural adjustment policies on feminist engagements with law in Chapter Two. But the trenchant critique of neoliberalism – including the feminist and legal literature – was only in its genesis. We could say the same of the rise of the Hindu Right – it too was in its early stages, and many at the time thought that we were giving it too much attention. In *Subversive Sites*, we did identify the emerging challenge of the Hindu Right. We largely failed to do so in relation to neoliberalism.

It would be possible to identify and critique other substantive issues that were left out of *Subversive Sites*. While we sought to adopt an intersectional analysis, we largely focused on the intersection between gender and religious identities. We did not take up caste, class, ethnic and linguistic identities. Would we do this differently today? As we discuss further below, our analysis would certainly attend more specifically to the intersections of gender and sexuality, highlighting for example the ways in which familial ideology is informed by monogamous and heteronormative constructions of gender and sexuality. To further develop our concept of familial ideology, we would need to attend to other intersections; for example to the idea of "the joint family" that was not only religiously specific (to which we gestured) but also intersected with caste (to which we did not). We could not ignore the proliferation of feminist scholarship attending to gender and caste in the last two decades.[13] Uma Chakrabarty for example has demonstrated the centrality of marriage and sexuality in the reproduction of caste, and the extent to which women's sexuality was protected and regulated to uphold the purity of caste. She has highlighted the role of endogamous marriage in particular in maintaining caste. If we were to rewrite *Subversive Sites* today, we would look more carefully for the ways in which the specific instantiations of familial ideology in law reflect and reproduce this caste endogamy. We did not see it in the cases we examined, in large part because we did not look for it.

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[13] See for example Uma Chakrabarty, *Gendering Caste Through a Feminist Lens* (Popular Prakashan 2003); Anupama Rao (ed), Gender and Caste (Zed Books/Kali for Women 2005); Sharmala Rege, *Writing Caste, Writing Gender: Narrating Dalit's Women's Testimonies* (Zubaan Books 2006); Janaki Abraham, 'Contingent Caste Endogamy and Patriarchy' (2014) 49(2) *Economic and Political Weekly*; Prem Choudhry, *Contentious Marriages, Eloping Couples: Gender, Caste and Patriarchy in Northern India* (Oxford University Press 2007).

In the intervening years, feminist engagements with law have continued to produce outcomes that are complex and contradictory. In the sections that follow, we consider three significant legal interventions that cluster around violence against women: sexual harassment, domestic violence and rape. We ask two questions: (1) What would the theoretical analysis from *Subversive Sites* reveal in relation to each of these legal engagements? and (2) How would attention to the postcolonial, the carceral and the sexual reveal what we might not have seen with the *Subversive Sites* lens? We hope to illustrate, in concrete ways, the extent to which the theoretical framework of *Subversive Sites* continues to have analytic traction, but also the ways in which our more recent theoretical influences would now supplement that framework.

1.0 Violence Against Women

Violence against women has long been a focal point in feminist engagements in law in India. As we mapped in *Subversive Sites*, early campaigns around sati and the age of consent, to second wave campaigns around rape and dowry deaths, violence against women has been foundational to feminist engagements with law, and a central site of discursive struggles over the meaning of gender. Legal campaigns against violence against women have continued, and in this section, we consider three different legal interventions: first, the Supreme Court guidelines and subsequent legislation on sexual harassment in the workplace; second, the civil law on domestic violence; and third, the Criminal Law Amendments in the aftermath of the Delhi rape case. Each of these legal interventions represent a different form of legal regulation: employment law in the context of sexual harassment, family and civil law in the context of domestic violence, and criminal law in the context of rape. As such, each allows for a consideration of the ways in which feminist campaigns for law reform engage with these different forms of the law.

1.1 Sexual Harassment in the Workplace

Sexual harassment, as a specific legal concept, is of recent vintage in India. The practice of unwanted sexual advances, remarks or acts had previously been addressed within the *IPC* ~~(*IPC*)~~ within the framework of insulting or outraging the modesty of women. Section 354 criminalised assault or use of criminal force against a woman, "intending to outrage or knowing it to be likely that he will thereby outrage her modesty".[14] Section 509 prohibited any word, gesture or act "intended to insult the modesty of a woman".[15] Unwanted sexual practices were not tied conceptually to

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[14] Section 354 of the *IPC* states "Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

[15] Section 509 of the *IPC* states "Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by

discrimination and harassment, but rather, to protectionist notions of women's sexuality. Modesty was not defined within the *IPC* but articulated through the case law.

One of the first high profile cases, bringing considerable media attention to the issue of sexual harassment was the complaint brought by Rupan Deol Bajaj, against KPS Gill, the Director General of Police in the northern state of Punjab. The complaint was filed under both ss 354 and 509 of the *IPC*. Gill was charged with slapping the complainant on her "posterior" and sexually intimidating her at a dinner party. Although the High Court quashed the complaint, it was reinstated by the Supreme Court in 2005.[16] Gill was fined a large sum of money, to be paid to Bajaj as compensation in lieu of spending three months in harsh imprisonment.

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The Supreme Court decision has been hailed by some as a feminist victory, and Bajaj commended for her courage and persistence, particularly in the face of such a powerful opponent. The case succeeded in bringing considerable public attention to the issue of sexual harassment. Yet, like many such high profile cases, the broader meaning of the complaint was highly contested and divisive. Many considered the allegations overblown, trivial and insulting to a public hero.

Moreover, within the judicial discourse itself, the case illustrated some of the limitations of the existing criminal provisions. The complaint was framed within the discourse of modesty, not connected to the concepts of equality, discrimination or harassment. In considering the meaning of modesty, the Supreme Court referred to dictionary definitions and previous case law, concluding that:

> … the ultimate test for ascertaining whether modesty has been outraged is, is the action of the offender such as could be perceived as one which is capable of shocking the sense of decency of a woman.[17]

On the facts, the Court stated that

> it cannot but be held that the alleged act of Mr. Gill in slapping Mrs. Bajaj on her posterior amounted to 'outraging of her modesty' for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady – 'sexual overtones' or not, notwithstanding.[18]

The Supreme Court decision in the *Bajaj* case, like the criminal framework more generally, was cast in the protectionist language of modesty. In classic protectionist

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such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both."

16 *Mrs. Rupan Deol Bajaj & Anr vs Kanwar Pal Singh Gill & Anr* (1996) All India Reports 309 (*Bajaj*).

17 Above note 16.

18 Above note 16.

terms, women are constituted as the weak, vulnerable, chaste, modest. The harm is understood not to their equal dignity, but rather as a harm to their sexual chastity and modesty; it is a harm to their sexual morality, and in turn to a broader societal sexual morality.

The inability of the 'modesty' provision to adequately address claims of sexual harassment ultimately led to the filing of a class action petition in 1997 in the Supreme Court of India. The petition was brought by a number of social action groups and non-governmental organisations seeking legal redress for women whose work had been obstructed or inhibited because of sexual harassment in the workplace.[19] In *Vishaka v. State of Rajasthan* (*Vishaka*), the Supreme Court held for the first time that sexual harassment in the workplace violated women's equality rights and their right to life and liberty under Articles 14, 15 and 21 of the Constitution, and that employers were obliged to provide mechanisms for both the prevention and resolution, settlement or prosecution of sexual harassment. The Supreme Court set out guidelines on sexual harassment in the workplace and held that the guidelines were to remain in force as law until the appropriate legislation was passed incorporating them into law.[20] The guidelines defined sexual harassment as including:

> … such unwelcome sexually determined behaviour (whether directly or by implication) as:
> a) physical contact and advances;
> b) a demand or request for sexual favours;
> c) sexually coloured remarks;
> d) showing pornography;
> e) any other unwelcome physical verbal or non-verbal conduct of sexual nature.

The definition is followed by a somewhat convoluted paragraph suggesting that the complainant provide evidence of fear of reprisal or discriminatory treatment in relation to her work, such as adverse impact on the possibility of promotion or recruitment, should she object to the impugned conduct. In other words, there is a suggestion that the conduct in question not only be demonstrated as unwelcome, but also as creating a hostile work environment.

The parameters of the *Vishaka* guidelines and definition were clarified in a subsequent decision. In *Apparel Export Promotion Council (AEPC) v AK Chopra (AEPC),* the Supreme Court again considered the question of sexual harassment and the application of the guidelines.[21] In this case, the complainant lodged a sexual harassment complaint against the chairman of the company. After an inquiry, the chairman was dismissed. He

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19 *Vishaka v State of Rajastha* (1997) All India Reports 3011 (SC).

20 This position was reiterated by the Supreme Court in *Medha Kotwal Lele and Ors v Union of India and Ors* (2013) All India Reports 93 (SC).

21 *Apparel Export Promotion Council v AK Chopra* (1999) All India Reports 625 (SC).

challenged the dismissal through the courts, on the ground that he had never actually touched the complainant. As described in the facts, the chairman had tried on several occasions to molest her, but had never actually touched her. The High Court held that 'trying' to molest a female employee was not the same as actually molesting her, and that the chairman's conduct could not therefore be impugned. The company appealed to the Supreme Court.

The Supreme Court accepted the definition of sexual harassment as laid out in *Vishaka*, and had no difficulty concluding that attempting to molest is sexual harassment: "the behaviour of the respondent did not cease to be outrageous for want of an actual assault or touch by the superior officer."[22] In so doing, the Supreme Court made clear that the definition of sexual harassment includes attempts to sexually touch, and was not restricted to actual touching.

However, the reasoning of the Supreme Court reached this conclusion by drawing on an older ~~reference to the~~ pre-~~*Vishaka*~~ discourse of modesty and decency, rather than a right to bodily integrity or sexual autonomy. The Court stated for example that "any action or gesture which, whether directly or by implication, aims at or has the tendency to outrage the modesty of a female employee, must fall under the general concept of the definition of sexual harassment".[23] In the Court's view, the conduct of the chairman in trying to sit next to the complainant and touch her, despite her protests, constituted "unwelcome sexually determined behavior" on his part, and was an attempt to "outrage her modesty". His behaviour was against "moral sanctions" and did not withstand the test of "decency and modesty", and therefore amounted to unwelcome sexual advances. The Supreme Court made explicit reference to sexual harassment as a form of sex discrimination and a violation of Constitutional rights.[24] But, it did so in a manner that also tied sexual harassment to harm to modesty and sexual morality, thereby suturing the older protectionist discourse to the definition of sexual harassment.

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Comment [A6]: Please check: here it says the Supreme Court reached this conclusion by reference to the pre-Vishika discourse, then in the footnote it states that the Court cited the definition from the Vishika case. Is this consist re: pre/post? **Corrected**
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[22] Above note 21 at para 29

[23] Above note 21 at para 24.

[24] After citing the definition from the *Vishaka* case, the Court stated, in a clear recognition of the discourses of equality: "An analysis of the above definition, shows that sexual harassment is a form of sex discrimination projected through unwelcome sexual advances, request for sexual favours and other verbal or physical conduct with sexual overtones, whether directly or by implication, particularly when submission to or rejection of such conduct by the female employee was capable of being used for effecting the employment [sic] of the female employee and unreasonably interfering with her work performance and had the effect of creating an intimidating or hostile working environment for her. There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty the two most precious Fundamental Rights guaranteed by the Constitution of India." Above note 21 at para 26.

In 2013, the Central Government passed the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act* 2013 (*SHWWA*), which superseded the *Vishaka* guidelines. The *SHWWA* closely follows the Supreme Court guidelines.[25] Unlike the protectionist discourse of the *IPC* modesty provisions, the preamble of the *SHWWA* categorically states that sexual harassment is a violation of women's fundamental rights to equality and life. It further provides that women have the right to a safe environment in the workplace, free from sexual harassment. In a separate section, the Act sets out the circumstances that may amount to sexual harassment, which includes conduct that interferes with a woman's work or creates an intimidating, offensive or hostile work environment for her; or constitutes health and safety problems for her.[26] The remainder of the Act sets out the procedural requirements for complaints and the duties on employers.

At one level, both the *Vishaka* ruling and the *SHWWA* appear to be a feminist victory. Both recognise the pervasive harms of sexual harassment that women experience in the work place, and seek to put into place duties and procedures whereby employers are both made responsible for redressing any such harassment. But, using our analysis from *Subversive Sites,* we can see how the development of the sexual harassment law has emerged as a site of contradiction for feminist engagements with law. On one hand, the law now explicitly recognises sexual harassment as legally actionable. It has done so in a manner that links sexual harassment with sex discrimination and the constitutional rights of women. However, it has not done so in complete rupture from the discourses of the past. Rather, the language of modesty, decency and morality continues to cast a long shadow over the law of sexual harassment. The harm of sexual harassment continues to be rooted in protectionist ideas of women's chastity and traditional sexual morality. The harm is as much one of sex as it is one of harassment. The *AEPC* ruling as well as the new Act provide examples of how the right to equality is not *per se* a progressive terrain for feminist engagements, and can be used to reproduce gender and sexual stereotypes.[27]

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25 Section 2(n) of the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act* 2013 (hereinafter *SHWWA* 2013).

26 Above n 24, section 3 of the *SHWWA*.

27 We have addressed this issue of equality being a contested terrain in law where different positions on gender difference are played out. See for example Brenda Cossman and Ratna Kapur, 'Women, Equality Rights and Familial Ideology' in Ratna Kapur (ed), *Feminist Terrains in Legal Domains: Interdisciplinary Essays on Women and Law in India* (Kali for Women 1996); Ratna Kapur 'Un-Veiling Equality: Disciplining the "Other" Woman through Human Rights Discourse' in Mark Ellis and Anver Emon (eds), *Islamic and International Law: Searching for Common Ground* (Oxford University Press 2012) at 265; Ratna Kapur, 'Outliers of Gender Equality', *Feminist Legal Studies* (forthcoming 2018).

While the methodology of *Subversive Sites* would have led us to reveal these contradictory discourses embedded in the law, we would also now consider some of the problematic implications of the sexual harassment law through a different lens. As Ratna Kapur has explored in some of her more recent work, sexual harassment law that focuses on the sexual part of the conduct rather than the harassment part of the conduct has troubling implications. As a number of feminist writers in the West have observed, sexual harassment laws and policies run the risk of targeting sexual conduct, including potentially consensual sexual conduct, while deflecting attention away from harassment and discrimination.[28] An understanding of sexual harassment that remains tethered to a dominance feminism and its vision of sexuality as exclusively a site of danger risks identifying the harm as exclusively one of sex, rather than one of harassment. Moreover, as Kapur's work has argued, it is an understanding of sexuality that fits all too well with a traditional ideology of Indian women as modest and chaste. The harm, through this vision, is one of any and all sex threatening that modesty, rather than the harm of deploying sex as a form of employment harassment and discrimination.

The *SHWWA* ~~2013~~ has done little to disturb or alter the normative scaffolding of gender and sexuality that structures sexual harassment. The core ingredient of the definition is that the sexual conduct must be 'unwelcome'. This is of course an important defining element of sexual harassment, potentially distinguishing the actionable conduct from consensual sexuality. However, the complainant has the burden of proving that the conduct was unwelcome, and this burden remains invariably conditioned by dominant sexual and cultural norms, including the complainant's conduct. More specifically, it means that the complainant's sexual past, mode of dress and conduct, and conformity to cultural prescriptions may be introduced as relevant evidence in determining whether the conduct was 'unwelcome'. Dress, behaviour, cultural conformity, marital status, and even profession may thus be used to demonstrate that the accused was incited to the conduct, and may be sufficient evidence to disqualify a claim of sexual harassment. Waitresses, bar-room dancers, and other performers are all vulnerable to such claims.

Comment [A7]: Already abbreviated above as SHWWA without the date. Ok

We would also now more carefully consider the form of legal regulation deployed in feminist and subsequent regulatory strategies. Interestingly feminists did not pursue a criminal response to sexual harassment in the petition to the Supreme Court, but called instead for employment guidelines. At the time, they did not seek a revision to the provisions of the *IPC* and their emphasis of women's modesty. Instead, the petitioners sought and received guidelines directed at employers to prevent and remediate sexual harassment. From the perspective of a critique of carceral feminism, this was a significant development and suggested that the strategy marked a break from feminism's legal engagements frequently turn to the criminal law and its reliance on the carceral state. As

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[28] See for example Vicki Schultz, 'Reconceptualizing Sexual Harassment' (1998) 107 *Yale Law Review* 1683; Vicki Schultz, 'Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What Can We Do About It' (2006-2007) 29 *Thomas Jefferson Law Review* 1; Janet Halley, 'Trading the Megaphone for the Gavel in Title IX Enforcement' (2014) 128 *Harvard Law Review Forum* 103; Laura Kipnis, *Unwanted Advances: Sexual Paranoia Comes to Campus* (HarperCollins 2017).

a form of employment law, the guidelines and then the *SHWWA* impose obligations on employers. It requires the creation of internal complaints committees, and sets out the procedures for inquiry. It provides amongst other things for compensation to be made available to the complainant, as well as for disciplinary measures to be taken against the respondent. While there are no doubt questions about the relative enforceability of these provisions – under-enforcement is a chronic and an ongoing problem, and the *SHWWA* does not apply to the informal sector where the vast number of women in India actually work – the *SHWWA* nevertheless sought to build a non-carceral regulatory regime which potentially provides compensation directly to the complainant.

At the same time, it is important to recognise that the *SHWWA* did not completely break with the carceral approach. The Act provides that local complaints committees may forward the complaint to the police for registering the complaint under section 509. This highlights the extent to which the *SHWWA* does not displace or repeal the criminal provisions but operates as a supplement to them. Sections 354 and 509, and their emphasis on outraging or insulting modesty, and its deeply problematic understanding of harm, continue to define and frame the potential carceral response to sexual harassment. More significantly, after the Delhi gang rape in 2012 (discussed in further detail below), and in light of the massive protests demanding more stringent laws, the government introduced an additional provision in the *IPC* criminalising sexual harassment. The new provision, section 354A, reproduced the definition of sexual harassment as set out in the *Vishaka* guidelines, and introduced a penalty of up to three years or a fine or both in the event of a conviction for 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. Conviction for making sexually coloured remarks carries a term of imprisonment up to one year in prison, or a fine or both. Notably, the new provision has been included alongside the existing provision on outraging the modesty of a woman ~~of a woman's modesty~~. While feminists were not necessarily driving the turn to carcerality in this instance, there was little objection to the inclusion of this provision. The alignment of demands for women's rights with the carceral apparatus of the state not only strengthened the security and surveillance regime within which women's rights and sexuality are increasingly addressed, but also undermined some of the gains made by the *SHWWA* that sought solutions outside of the carceral regime.

Comment [A8]: Phrasing: either outraging of women's modesty or of a woman's modesty.

Further, it is important to consider the regulatory and carceral approaches to sexual harassment in light of neoliberalism, and its strategies of privatisation. The *SHWWA* imposes obligations on employers to enforce the rights that it creates. It is a highly privatised regulatory regime that fits neatly within the logics of neoliberalism. Although it imposes obligations, it is the employers who are responsible for setting up the internal complaints committees, and it is these committees that are responsible for the inquiry and resolution of complaints. The committees are, for the purposes of inquiry, delegated the same powers as vested in courts under the Code of Civil Procedure. Given the enormous challenges of access to justice in the Indian justice system, with its judicial backlogs and overwhelmed dockets, this privatised regime is not inherently problematic. It provides a potential opportunity for localised access to justice. However, it is a regime that will need to be carefully monitored for the ways in which it does, and does not,

interpret the rights under the *SHWWA*. At the same time the incorporation of sexual harassment into the *IPC* is designed to deter and contain sexual behavior through a security apparatus that offers to produce the stability required for the flourishing of neo-liberal markets.

Given the pressure on employers and the desire to avoid being subjected to litigation or criminality, employer-drafted codes can often decree that the workplace be completely sexually sterile, and employers can announce a 'zero-tolerance' policy on sexual humour. It is worth considering the implications for sexual rights and sexual expression once we consider that sex *per se* is being framed within the language of protectionism, cultural conservatism, modesty or violence. Who determines whether an action has crossed the boundary of cultural modesty or is unwelcome?

At one level, these questions on the scope and definition of sexual harassment are similar to those current in the West. However, a postcolonial lens requires that the issues be considered in light of the unique relationship between sexuality and culture as sites of contestation in India since the late 19th-century, as well as having been integral to assertions of nationalism and resistance to colonial rule. Constructions of sexuality are deeply implicated in the boundaries that are drawn between legitimate and illegitimate sexuality, which are further displaced onto expressions of national identity. The idea of outraging or insulting the modesty of women, which after the *AEPC* decision, has been firmly inscribed in the judicial approach to sexual harassment and reinforced by the new provision incorporated into the *IPC* alongside the earlier modesty provisions. Sexual harassment continues to be interpreted through the lens of modesty and the cultural construction of women's sexual behaviour as chaste, passive, pure and virginal. The failure to challenge and displace the normative in our engagements with law, makes it possible, despite feminist efforts and engagements with law (or partly because of them), to re-inscribe sexuality within dominant norms. As we would have concluded in *Subversive Sites*, the legal engagements with sexual harassment indeed emerge as complex and contradictory, but with the additional lens of sexuality, postcolonialism and neoliberalism, all the more so.

1.2 Domestic Violence and the Protection of Women from Domestic Violence Act, 2005.

The *Protection of Women from Domestic Violence Act* (*PWDVA*) was passed in 2005, to provide civil remedies protecting victims of violence. The *PWDVA* is distinct from the provisions of the *IPC*. The anti-cruelty provision of the *IPC*, section 498(a), prohibits a husband or relative of the husband from subjecting women to cruelty, defined as "any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman". Section 304B of the *IPC* criminalises violence against women when it can be shown that the death of a woman was caused in conjunction with dowry demands. These provisions have been criticised for failing to provide immediate and effective remedies for women who are experiencing domestic violence. The

PWDVA, in response to this lacunae in the law, sought to provide civil remedies to women who are victims of domestic violence.

The law has proved significant insofar as feminists have succeeded in securing legal protection for women in the domestic sphere that has proved resilient to such interventions. Part of this reluctance is a hangover from the colonial encounter, where the home was a site of autonomy from colonial rule, and where legal interventions in this arena by the colonial power were vigorously opposed by cultural and anti-colonial nationalists. The most radical element of the new law is that it legally recognises marital rape as a form of domestic violence. While the criminal law has not been amended to enable a woman to file a rape case against her husband or domestic sexual partner, she is now given access to new civil remedies, including securing a protection order or injunction against her abuser, including her husband.

Under the new law, domestic violence is not confined to wives, but includes mothers, daughters, sisters, widows, divorced women living in the home, as well as, those who are in an informal relationship with the accused including a bigamous relationship. In other words, it covers all domestic relationships in a 'shared household'. A shared household is very broadly defined to include a household where the abused person lives singly or with the abuser. Presumably the Act would also cover a man who abuses or beats up a sex worker with whom he has had a long standing relationship, such as a pimp, or an ongoing sexual relationship, though the scope of this provision would need to be tested in the courts. A case can be filed against any ~~m~~ adult person as well as other relatives of the husband or male partner. Thus women are not just considered victims, but also can be perpetrators of violence against other members of the household, including children, the elderly and daughters-in-laws.

Domestic violence is broadly defined including physical abuse, sexual abuse, verbal and emotional abuse, and economic abuse.[29] The Act establishes a right to live in a shared residence,[30] and then provides for a range of orders once domestic violence is established. Protection orders can prevent the husband or partner from a range of behaviors including committing any act of domestic violence, entering a place of employment, communication, alienating assets, and violence towards dependents.[31] Resident orders allow the woman to remain living the household, and restrain the husband or partner from entering, disposing, alienating or otherwise disturbing the household.[32] A complainant is also entitled to an order for monetary relief, to meet expenses of the victim and any child related to domestic violence, including loss of earnings, medical expenses, loss from destruction of property and maintenance.[33] A

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[29] See Section 3 of the *Protection of Women from Domestic Violence Act* (hereinafter *PWDVA*).

[30] Section 17 of the *PWDVA*.

[31] Section 18 of the *PWDVA*.

[32] Section 19 of the *PWDVA*

[33] Section 20 of the *PWDVA*.

separate provision allows for compensation orders to compensate for injuries including mental torture and emotional distress.[34] Finally, the Act provides for custody orders, granting temporary custody and access, including the denial of visitation if harmful to children.[35]

The Act is intended to provide a broad range of immediate relief for victims of domestic violence, allowing them to remain in their homes, prohibiting their abusers from contacting them, while providing for financial relief and temporary custody of their children. It is a shift from the sometimes exclusive focus on criminal law, choosing instead to provide civil relief to the victim of violence, rather than seeking to punish the perpetrator.

The Act has been challenged on several occasions. While the courts have upheld the constitutionality of the PWDVA,[36] they have also significantly narrowed its applicability. Most notably is the case of *Batra v. Batra*, in which the Supreme Court significantly narrowed the scope of the shared household, and thereby limited the remedy available to victims of domestic violence. Section 2(s) defines shared household as:

> a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, *irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.* (emphasis added)

In the *Batra* case, the couple had been living in a house owned by the husband's mother. The husband brought a petition for divorce. In the course of the proceedings the wife sought an order allowing her to live in the house, arguing that since she has lived in the house of the mother-in-law (along with her husband), she has a right under the PWDVA to reside in that house.[37] Justice Markendey Katju dismissed this contention, stating as follows:

> If … accepted, then it will mean that wherever the husband and wife lived together in the past that property becomes a shared household. It is quite possible that the husband and wife may have lived together in dozens of places e.g. with the

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[34] Section 22 of the *PWDVA*.

[35] Section 21 of the *PWDVA*.

[36] See for example *Aruna Parmod Shah v Union of India* where the Delhi High Court upheld the constitutionality of the Act and *Dennison Paulraj v Union of India* (2009) 6 CTC Madras HC in which the Madras High Court similarly upheld the Act.

[37] Above note 28, section 2(s) read with section 17 of the *PWDVA*.

> husband's father, husband's paternal grandparents, his maternal parents, uncles, aunts, brothers, sisters, nephews, nieces, etc. If … accepted, all these houses of the husband's relatives will be shared households and the wife can well insist in living in all these houses of her husband's relatives merely because she had stayed with her husband for some time in those houses in the past. Such a view would lead to chaos and would be absurd.[38]

The Court concluded :

> … in our opinion the wife is only entitled to claim a right to residence in a shared household, and a shared household would only mean the house belonging to or taken on rent by the husband, or the house which belongs to the joint family of which the husband is a member.

The Court held that the property in question was neither owned by the husband nor part of joint family property, and therefore was not a "shared household". The reasoning and holding runs counter to the plain meaning of section 2(s) – which specifically states that a property can be a shared household "*irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household*". The Court pursued what it described as a "sensible" interpretation, and in the process significantly curtailed the scope of the *PWDVA*.

The Courts have also whittled down the scope of the Act by restricting the category of women who can apply for protection. In the case of *D. Velusamy v. D. Patchaiamma*,[39] the Supreme Court limited the applicability of the PWDVA to marriages and relationships in the nature of marriage stating that if a man has a:

> … keep whom he maintains financially and uses mainly for sexual purposes and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage.[40]

The Court thus held that the PWDVA applied only to a live-in relationship where the couple publically held themselves out to society as spouses.[41] As set out in *Subversive Sites* the case is once again reflective of what kind of woman and sexual unit is entitled to protection. While it shifts the goal posts to include women who are in long term relationships outside of marriage, it remains embedded within what we referred to as familial ideology, but with a specifically heteronormative, and monogamous focus. The progressive potential of the Act to protect mistresses is sharply curtailed and even mistresses who have been with the same man for a long period of time or may share a relationship like a marriage with the man are now excluded through the narrow judicial

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38 Above note 28 at 175.

39 *D. Velusamy v D. Patchaiammal* (2011) All India Reports 479 (SC).

40 Above n 38 at [33].

41 Above n 38 at [33].

reading of the Act. This position was reiterated in *Indra Sarma v VKV Sarma*,[42] where the appellant and the respondent were living together for 18 years and the appellant was aware of the fact that the respondent was married. The Court held that the appellant could not claim any relief under the PWDVA stating that a relationship with a married man was not in the nature of marriage, and that the status of the appellant was "that of a concubine". The Court went on to declare that:

> A concubine cannot maintain a relationship in the nature of marriage because such a relationship will not have exclusivity and will not be monogamous in character.[43]

From the perspective of our arguments in *Subversive Sites*, these cases reflect the resilience of familial ideology and the normative order, despite the ostensibly progressive nature of the Act. The arguments we presented in *Subversive Sites* continue to have traction in the context of the domestic violence law where women are regulated within the tight boundaries of familial ideology. But we would now focus more specifically on heteronormativity and its prescriptions of monogamy. The Act continues to operate against a set of exclusions, of women who are not entitled to protections from violence inflicted by intimate partners on grounds of their sexual conduct and status. The courts continue to fallback on conservative understandings of the family and women's sexuality. While the extension of protections to non-marital long term relationships is somewhat disruptive it remains contingent on the woman's sexual conduct and chastity.

The PWDVA is perhaps the example in which the analysis we deployed in *Subversive Sites* continues to have the most traction, with some tweaks in emphasis. The analysis would have led us to reveal these protectionist and conservative discourses embedded in the law. The difference in analysis with our current queer and postcolonial lens would be subtle, but not insignificant. The idea of heteronormativity would now take greater salience, decentering the heuristic of familial ideology; along with its great emphasis on the structures and discourses of sex and sexuality. Similarly, while *Subversive Sites* would have lead us to highlight the extent to which the PWDVA represents a significant intervention in the private sphere, a postcolonial lens would more closely tie the resistance to this intervention to colonial history, and the discursive contestations over the domestic, the private, and the family, in the postcolonial present. Finally, we would emphasise the form of legal regulation; specifically the choice to focus on family rather than criminal law. The approach is not a carceral one, diverging from what has in the past been an almost singular focus on criminal law for addressing violence against women.

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[42] *Indra Sarma v VKV Sarma* (2014) All India Reports 309 (SC).
[43] Above note 41 at [56].

1.3 The Delhi rape case and the Criminal Law Amendments

The gang rape and murder of Jyoti Singh Pandey on 12 December 2012 has left a searing mark on India's legal and political landscape. The outpouring of anger and outrage on the streets of Delhi and elsewhere in the aftermath forced the Central government to set up the Committee on Amendments to the Criminal Law ('Verma Committee') to make recommendations on legal reforms in the area of sexual violence.[44] The Committee was asked to review the existing laws and suggest amendments to better address the issue of sexual violence. The Committee chose to address its mandate within the broader framework of the Constitution and the fundamental rights of citizens, including the right to individual autonomy and bodily integrity. The Verma Committee made its recommendations within a self-imposed deadline of one month.

The Report, while somewhat unwieldy in its 627-page length, made recommendations which were bold and far ranging in their attempt to confront sexual violence. The Report stated that the issue of sexual violence needed to be addressed through a woman's right to bodily integrity, sexual autonomy and legal recognition of adult consensual sexual relationships.[45] It recommended that the marital rape exception be removed.[46] It recommended that the 'eve teasing' provisions of section 354 of the *IPC* be fundamentally revised, eliminating the language of outrage and modesty, and replacing it with language that focuses instead on "the unwelcome threat of sexual nature" or "unwanted advances". It recommended the elimination of section 509 of the *IPC*, with the targeted conduct to be better addressed within the revised section 354. The Report opposed the demand that the death penalty be made available in rape cases, although it did recommend that some of the penalties be increased.

Comment [A9]: of what Act? Indian Penal Code - *IPC*

Comment [A10]: Of what Act? Indian Penal Code

It recommended that acid attacks and stalking be made distinctive offences. It recommended that same sex relationships be given constitutional protection and the right to sexual orientation be recognised as a human right.[47] The Report framed its recommendations within the discourse of rights rather than an outdated notion of 'Indian womanhood' based on chastity, conservative sexual morality, honour and purity, which has framed much of the legal regulation of sexual violence. Indeed, the Report explicitly rejected the discourses of shame and honour in which rape and sexual assault have been addressed, insisting instead that violence against women is a violation of a woman's bodily integrity.

Despite the far-sighted recommendations of the Verma Committee's Report, the law ultimately enacted by the Parliament of India left out almost every single one of the Committee's key recommendations that would have advanced the rights to gender

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44 JS Verma, Leila Seth and Gopal Subramanium, *Report of the Committee on Amendments to Criminal Law* (Government of India, 23 January 2013).

45 Verma, Seth and Subramanian, above note 43.

46 Verma, Seth and Subramanian, above note 43 at 117.

47 Verma, Seth and Subramanian, above note 43 at 51, 54 and 406.

equality and respect for women (*Criminal Law (Amendment) Act 2013* (India) Act No 13 of 2013 ('*CLA Act*')). It imposed the death penalty in cases where rape leads to the death of the victim or permanent maiming, retained the provisions dealing with outraging the modesty of a woman, and retained the exemption of marital rape from the purview of the criminal law.[48]

The new law did nothing to challenge the dominant norms of gender and sexuality that have long been inscribed in the criminal and other legal regulation of sexual violence. An opportunity to revise and redefine sexual crimes was instead a reinscription of the traditional norms of female modesty, chastity and cultural values. At the same time, the new law augmented the carceral power of the state to regulate and discipline the sexual behaviour of its citizens in the direction of fewer rights and more surveillance.[49] The addition of the death penalty for rape represented a pyric victory for the carceral. On the one hand, it represented a significant discursive statement of the ultimate carceral punishment. On the other, its addition was superfluous, in light of the fact that rape that results in death is tantamount to murder, which is already a capital offence under s 302 of the *IPC*. Yet, the successful call for the death penalty is a powerful performance of the

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[48] For an overview of the recommendations of the Verma Committee's report that were accepted or rejected by the government in its ordinance, see NDTV, *Read: Ordinance vs Verma Commission Recommendation* (1 February 2013) <http://www.ndtv.com/article/india/read-ordinance-vs-verma-commission-recommendations-325436>.

[49] For a similar analysis of the legacy of the Delhi rape case from the perspective of goverance feminism, see Prabha Kotiswaran, 'Governance Feminism in the Postcolony: Reformig India's Rape Laws' in Halley et. al (2018), above note 9; see also Debolina Dutta and Oishik Sircar, 'India's Winter of Discontents: Feminist Dilemmas in the Wake of a Rape' (2013) 39(1) *Feminist Studies* 293. Dutta and Sircar observe at 302, on the death of Ram Singh in prison: "For feminists, this deepens the dilemma of confronting a criminal justice system that weighs heavily not only against the female victim/survivor of sexual assault but also against the working-class male accused". See also Poulami Roychowdhury, '"The Delhi Gang Rape": The Making of International Causes' (2013) 39(1) *Feminist Studies* 282-292.

demand not only for carceral vengeance, but also for the most extreme form of the punishment.[50]

The trial of the accused in the Delhi rape case resulted in four of the accused ultimately being convicted under the law as it stood before it was amended and, on 13 September 2013, they were awarded the death penalty. Sections 303 and 304 of the *IPC* provides a maximum penalty of death in cases of murder. The fifth accused committed suicide while being held in custody awaiting trial and the sixth, who was just under 18 years old and hence considered a juvenile when the crime was committed, received a punishment of three years (the maximum that the law allows for in such cases). In arriving at a conviction, the system appears to have worked under the legal provisions as they existed *prior to* the *CLA Act*, which did not have retrospective effect. The death sentence was awarded under the already existing provisions that allow judges to impose such a sentence in the 'rarest of rare' murder cases. The outcome puts into question the need for more laws and, more importantly, compels a deeper interrogation of the purposes served by the subsequent legal changes.

But the feminist discursive struggle over the Delhi rape case cannot be told by the law reforms alone. The protests in the street that followed are significant in their own right. The presence of the young women on the streets of Delhi and beyond was itself a fundamental challenge to the traditional norms of Indian womanhood. These young women were from a new era of globalisation and neoliberal market reforms, coming of age with a different set of cultural attitudes and employment opportunities. Their protests

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50 In May 2018, the Central government adopted an ordinance, amending the *Protection of Rights of Children from Sexual Offences Act 2012* (POSCO) imposing the death penalty for raping a child under the age of 12. The measure was viewed as a knee jerk response to the outrage and protests over two sensational rapes of young minors. The first concerned the drugging, rape and violent murder of an 8 year old girl belonging to the nomad Bakarwal Muslim community, in Kathua, a town in the northern state of Jammu and Kashmir, in January 2018. The brutality of the rape and murder together with the discovery of her body at a temple, sparked outrage against the Central government, in particular, the Bharatiya Janata Party (BJP), whose members appeared to support the rapists and also attempted to communalise the event. The second case, in Unnao, a town in the northern state of Uttar Pradesh, involved the rape of a 17 year old girl in June 2017, that involved a BJP member of the legislative assembly (MLA). The victim identified her rapist, though the police refused to record any names in her complaint. Instead in April 2018, the victim's father was arrested and placed in judicial custody. While in custody, he sustained serious injuries due to being subjected to a brutal physical assault and subsequently died from his wounds. Within days of his death the victim attempted to immolate herself in front of the home of the BJP Chief Minister of the state, Yogi Adityanath, as no action had been taken against either the accused or police. Her act drew public attention to the case and once again sparked outrage across the country, which led to the subsequent arrest of the MLA member as well as the suspension of the police officers involved in her father's murder. The adoption of the death penalty was once again used to placate the protestors and an angry public, but also reflected the pattern of continuous resort by the state to penal measures in relation to sexual violence that serve to reinforce and strengthen the carceral state rather than the rights of the concerned women.

were a powerful rejection of the valuation of women in and through traditional familial ideologies. Some of the placards on the streets denounced the familial understandings of 'Indian womanhood' that have curtailed and cabined women's freedom. 'I am not your mother, daughter, sister or wife. I am a citizen. I demand equal rights'. Indeed Jyoti Pandey herself was representative of this generation of young Indian woman – educated, employed, with a new degree of freedom and mobility – yet one still fundamentally threatened by violence.

The protests also represented a sharp shift in the direction of a neo-liberal political rationality that is increasingly characterising and shaping the terms of gender within India as well as within the global context and international legal arena.[51] Coming from a lower income bracket, Jyoti Pandey's parents sold their land to support her desire to become an educated professional, and it had been her intention to in turn support the education of her younger siblings once she began earning enough. The image of an aspiring Indian woman making a valid, hard-earned place for herself within a sexist national order that is now also linked to a global economic order, marked a significant moment in the effort to inscribe the new generation within the neo-liberal schema of gender. Pandey embodied the aspirations of millions of such women.

The protests were an extraordinary performance of a new modality of gender and sexuality, one articulated in and through neo-liberal market rationality. These young women's insistence of their rights and their bodily integrity was a powerful articulation of a new sovereignty in the direction of sexual autonomy and sexual expression that is both political and personal. Their mere presence in the streets challenged the traditional claim that women do not belong in the public sphere, and may be responsible for the violence committed against them there. The dress and fashion styles of this new generation of young Indians repudiated the oft-repeated claim that dress was somehow the trigger for the rape.

The protests following the Delhi rape signify a profoundly contradictory moment in feminist engagement, not simply with law, but with the meaning of gender and sexuality in the public sphere more generally. The demand for rights, as sovereign individuals, mimics the market rationality of neoliberalism. Yet it also represents a powerful rejection of the values of traditional Indian womanhood. The protests as a demand for law reform meet with mixed results. The most radical of the demands for the reform of rape law remain unrealised, yet the most carceral of the demands were enacted. But the results cannot be measured in law alone. To the extent that, as we claimed in *Subversive Sites*, feminist engagement with law is part of a broader discursive struggle

Comment [A11]: Signified or signify?OK

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51 For an analysis of the Delhi rape case in the context of neoliberalism, see Sareeta Amrute, 'Moving Rape: Trafficking in the Violence of Postliberalization' (2015) 27 *Public Culture* 331; Tara Atluri, 'Bus/Bas/बस: The 2012 Delhi Gang Rape Case, City Space and Public Transportation' in Surajit Chakravarty and Rohit Negi (eds), *Space, Planning and Everyday Contestations in Delhi* (Springer 2016) and Tara Atluri, 'The Young and the Restless: Gender, "Youth" and the Delhi Rape Case of 2012' (2013) 9(3) *Sikh Formations: Religion, Culture, Theory* 361-379.

over the meaning of gender (and we would now add, sexuality), the Delhi protests represent a complex and potentially transformative moment.

2.0 Rethinking Feminist Engagements in and Beyond Law

These three issues constitute part of a trend in the law reform campaigns of the contemporary women's movement in India that have in large part focused on sexual wrongs, including rape, domestic violence, dowry murders, obscenity, and trafficking. Lobbying and campaigning on these issues has undoubtedly created a considerable amount of public awareness about issues of violence against women, and has resulted in the emergence of non-governmental organisations and other services to assist women who are victims of violence. These campaigns have drawn attention to the lack of effective laws against rape, child sexual abuse, and domestic violence in India and been overwhelmingly successful in translating very specific violations experienced by individual women into a more general rights discourse. Yet despite all of these engagements and successful law reform campaigns, violence against women continues to occur on a staggering scale. The rape, domestic violence and harassment statistics have only increased.[52]

We remain critical of these interventions and our positions are reinforced by a postcolonial feminism as well as other critical traditions that have been critical of legal campaigns and initiatives on violence against women that have failed to displace the dominant gender and sexual norms. In fact, as the three interventions suggest, campaigns on violence against women have reinforced negativity about sex and sexuality and moralism around sex, and often reinforced dominant gender norms that invite protectionist legal responses towards women that are entrenched in conservative cultural and nationalist moorings. Thus, initiatives that, at one level, are being pursued in order to advance rights to sexual or bodily integrity have not necessarily proved to be progressive, and have had paradoxical implications. This situation forces an interrogation of the relationship between feminist goals and law.

Each moment has been presented as a victory for women's rights. Yet the analysis in *Subversive Sites* would complicate these outcomes. The sexual harassment decision and law produced guidelines that were sweeping in terms of breadth and scope, and included sexual speech and sexual conduct. The orthodoxies nestled within the law exemplified how the issue of sexuality remains framed within a negative discourse, where female sexuality continues to be regarded as something to be protected. The *CLA Act* further exemplifies this trend, where sexuality is increasingly framed within a carceral politics.

Comment [A12]: CLA Act already abbreviated above without date.
OK

[52] The 2014 National Crime Records Bureau report *Crime in India* showed there has been a staggering increase in crimes against women, including an increase of 9.2 percent from 2013, and over a 100 percent increase in the incidence of crimes against women since 2004. National Crime Records Bureau, *Crime in India - 2014* (Minister of Home Affairs Government of India, 2014) at 88.

At the same time, gender has not remained a monopoly of feminist activists and advocates. Sexual rights advocates, religious orthodoxies, and the neo-liberal market have all become significant players and advanced agendas on gender that challenge dominant feminist positions. The protests that erupted after the Delhi rape, brought thousands of young men and women on to the streets of major metropolitan cities in India. It was a rare sight in a liberal democracy to see thousands on the street protesting specifically on the issue of violence against women. At one level these protests were about the exhaustion that young women experience on a daily basis at being pawed, ogled at, molested, in the process of going about their everyday lives, including getting on a bus and going to work. At the same time these protests were almost entirely driven by young men and women who were born in the crucible of neo-liberal market reforms and are now consumer citizens. They brought the issue of violence against women into the public space from a very different place than the feminists who first engaged with rape in the context of the Mathura rape.[53] It is a space of the educated young aspirational middle class for whom freedom is expressed in terms of the market and laws' role is to facilitate that freedom rather than provide that freedom. It is a politics that is transformative in its rejection of gender as tethered exclusively to familial relationships, and demands equal rights as citizens rather than as mothers, wives and daughters.

Comment [A13]: Should this be possessive 'the law's role' or 'laws' role'? corrected

The collaboration of the religious right, which has only continued its ascension to governance in the intervening years, with the neo-liberal market, operates to enable specific understandings of gender, where sexuality remains firmly regulated by the criminal law, and cultural norms. Gender liberation is demonstrated through greater employment opportunities while at the same time the Hindu Right seeks to embed women's liberation firmly within the context of a specific Hindu family form and marital relationship. The space for the legal recognition of a more pluralistic understanding of relationships and families remains fraught, even though the lived reality is quite different. Live in relationships, heterosexual and homosexual, are not uncommon. Recently, the Supreme Court recognised the right of "unwed" mothers to the custody of their children. Transgendered persons have been declared by the Court as having all the constitutional equality rights as all other citizens, including the right to marry.

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53 The Mathura rape case involved a custodial rape of a young tribal woman, who was between the ages of 14-16, in 1972. While the sessions court acquitted the two accused policemen, stating that the victim was "habituated to sexual intercourse" and her consent was voluntary, the Bombay High Court overturned the acquittal, holding that passive submission due to fear induced by threats to life could not be construed as consent. The Supreme Court overturned the High Court ruling, partly on the grounds that Mathura did not show signs of resistance, had no visible marks of injury on her body and did not scream or raise any alarm. One of the justices stated that as "she was used to sex, she may have incited the cops … to have intercourse." The sex was thus construed as consensual: *Tukaram and Another v State of Maharashtra* (1979) All India Reports 185. The holding led to several academics writing a letter to the Supreme Court protesting against the Court's construction of consent. And the decision resulted in the formation of women's groups in India, feminist mobilisation on rape and the first public campaigns for law reform of the rape laws.

The increased visibility of women in the public arena, their dress, style, and sense of self-confidence have been partly facilitated in and through the market. The market has been a central player in producing this "new Indian woman" or "desi girl" who is oozing self-confidence and a "power girl". Yet this new face of the Indian woman struggles against a cultural space that is resisting her transformation. Violence against women remains endemic in India. And any number of laws have not stemmed the tide. The laws that have focused on criminal justice and carcerality have only encouraged the emergence of a sexual security regime that governs and regulates the expressions of sexuality in the interests not of women, but of the security of the nation-state and stability of the market. The fact that young men and women supported some of the more drastic provisions of the *CLA Act* 2013, even while expressing their rights to equality and freedom on the street, is evidence of the contradictory space that gender inhabits.

Yet, we also have seen a shift to other forms of regulation, including as discussed here, the use of employment and family law to address issues of sexual violence. While the simple shift to non-criminal modes of regulation is not a panacea, it is a shift that is worth further interrogation. Non-carceral approaches may offer a possibility of avoiding the reliance on the state as a sexual security regime, and may offer victims of sexual violence a broader range of choices and legal alternatives. Rethinking *Subversive Sites* would lead us to consider a broader range of alternative modalities of justice and governance. What might the role be for a revision of restorative justice? How do contemporary forms of legal regulation produce self-governing subjects? What is the relationship between legal and non-legal discourses in producing these self-governing subjects?

We have raised here a number of questions about feminist engagement in law that we would approach somewhat differently. It is intended as a modest reflection piece. We make no claim about the comprehensiveness of these approaches. An exciting new generation of legal, feminist and queer scholars has emerged interrogating a vast array of legal engagements, strategies and discourses, from a multiplicity of approaches. The future of feminist and other critical engagement with law lies in their critical interventions and imaginations.