

# The Influence of Public Outrage on Law Making: The Example of Indian Rape Cases

By Tamara Abdelwahed\* / Stella Gaumert\*\* / Laura Konrad\*\*\*

**Abstract:** Certain rape cases in India that occurred over the last decades have received more public attention than others, because of their gruesomeness or because the verdict provoked public outrage. This research paper examines what legal provisional changes were made to Indian rape law in order to meet the requests of the public using the example of the ‘Mathura rape case’, the ‘Nirbhaya case’ and the ‘Mahmood Farooqui rape case’. These cases sparked widespread calls for reform in India, demanding more security, better laws and justice for the victims. Activists and policy makers have expressed frustration at the lack of progress, saying there is no political will to move forward to implement stronger laws on the state level. Feminist groups and scholars thus demand that the law against violence against women shall create spaces that are safe and equal and that will help to lessen the social stigma for women. Both cases, the ‘Mathura rape case’ of 1972 and the ‘Nirbhaya case’ of 2012, have been followed by an amendment to the Indian Penal Code. In contrast to those two cases the ‘Mahmood Farooqui rape case’ of 2016 has been judged by the most actual penal law. The verdict still provoked criticism, this time because it was deemed too high a sentence in relation to other cases. The paper’s objective is to draw conclusions on the influence of public attention to law making in the light of a feminist approach to rape culture at the example of the chosen cases.

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## A. Introduction

Despite the relatively high number of reported rapes in India<sup>1</sup> only certain rape cases that occurred over the last decades have received significantly more public attention than others, because of the extreme helplessness of the victim, the exceptional violence of the culprits,

\* Law student at Potsdam University.

\*\* Law student at Humboldt University Berlin, B.A. (Berlin University of the Art).

\*\*\* Student of law and history, Humboldt University Berlin, B.A. (Heidelberg University).

1 Compare with Supriya Sharma, Delhi tops rape tally among metros, states, *The Times of India*, New Delhi 18 December 2012, <https://timesofindia.indiatimes.com/city/delhi/Delhi-tops-rape-tally-among-metros-states/articleshow/17657510.cms> (last accessed on 30 June 2017); B L Himabindu / Radhika Arora / Nuggeshalli Srinivas Prashanth, Whose problem is it anyway? Crimes against women in India, *GHA* 7 (2014), p. 2.

the social status of the persons involved or because the verdict provoked the public. Some of these cases even led to immense public attention which forced the government to pass several amendments for the rape law.

This paper aims to examine the question which influence on law making public outrage has. Therefore it focuses on rape cases, because rape is a crime that touches an extremely intimate sphere and has a high potential to inflict long lasting emotional pain, to create social stigma and especially fear among women and their families. The fact that potentially any woman could be raped by any man makes it an omnipresent threat, that is neither an exclusive problem of higher or lower social classes, nor is it a concern limited to the Indian society. The general fear and the extensive personal consequences for the victim and her surrounding result in the discussion being emotionally loaded, which leads to peoples willingness to take action.

To tackle the research question three exemplary rape cases which gained exceptional public attention, namely the 'Mathura rape case', the 'Nirbhaya case' and the 'Mahmood Farooqui rape case', will be examined. On their basis it shall be determined what legal provisional changes were made to Indian rape law in order to meet the requests of the public. First, they allow a comparison between one case that came up in the 1970's, so before the internet and social media could be used as a tool of spreading information extremely easily and fastly and to coordinate protests, with two more recent cases that were influenced by the use of modern media. Secondly the cases represent rapes of different nature and severity. While the 'Mathura rape case' deals with custodial rape of a minor girl which belonged to a social minority by police officers as representatives of the state, the 'Nirbhaya case' deals with unbelievable and especially unnecessary brutality against the victim, which is seen to be rooted in an insufficient legal protection of sexual assault towards women and the remaining patriarchal structures of Indian society which led to a misogynist mindset of many men. The 'Mahmood Farooqui rape case' in contrast gained its public attention mainly from the celebrity status of the accused, not from the severity of the rape itself. Finally, the two chronologically first cases in contrast to the 'Mahmood Farooqui rape case' lead to the demand of new laws and enhanced punishment while through the latter one the question arose whether law could be too strict and too undifferentiated for the different variations of severity of one and the same crime.

The following work is situated within the field of social movement theory as an interdisciplinary subfield of social sciences that offers several models to explain why, in which form and with which consequences a certain social mobilisation occurred. In this research

area the work of Tova Benski et al.<sup>2</sup>, Paul Burstein<sup>3</sup> and Sarah Turner<sup>4</sup> certainly play a significant role. Benski et al. focus on social mobilisations that started with the Arab Spring in 2010 in context of several other international mobilisations. They hereby elaborate amongst other things on the significance of emotions for the occurrence of mobilisations and the role of social media. Burstein analyses legal mobilisation as a social movement tactic at the example of the movement for equal employment opportunity, while Turner examines the connection between constitutionally-based demands of social movements and how successful these movements were. For the more specific topic of rape trials Pratiksha Baxi, an Assistant Professor from the Centre for the Study of Law and Governance in Jawaharlal Nehru University, can certainly be considered as one of the most important authors and must be taken into account as much as the comprehensive literature about strategic litigation.

The case related news presented by the media and its effects on the public will be identified by using the newspaper 'The Times of India', the magazine 'Outlook' and the online blog 'Kafila' as main sources. Due to reasons of language barrier and accessibility only English literature could be considered. It must, however, be taken into account that the level of access to foreign language skills normally correlates with a person's social class, which means that people from lower social classes in India are less likely to read English newspapers, magazines or blogs. Therefore, it is questionable how much the reaction and the involvement of all the social classes in public outrage depends upon such sources.

'The Times of India' as a renowned newspaper represents the widespread daily news access, since it is affordable and gets sold almost all over the country, moreover regarding its circulation it is India's third-largest newspaper and the largest selling one written in English.<sup>5</sup> 'Outlook' is a weekly published general interest magazine, which was first issued in 1995. It was chosen to reflect a more critical and serious view on the two more recent rape cases compared to the more informative and facts orientated character of a daily newspaper like 'The Times of India'. The online blog 'Kafila'<sup>6</sup> in opposition was considered to reflect an informal view in the sense that the articles were not exclusively written by journalists who are bound to their employer's interest but by authors who write as private persons but still have a certain expertise on their article's topic. The articles hereby reflect a critical personal opinion of the occurrences. Certainly, they are not eligible to display the opinion of

- 2 Tova Benski et al., From the streets and squares to social movement studies: What have we learned?, *Current Sociology* 61 (2013), pp. 541-561.
- 3 Paul Burstein, Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity, *American Journal of Sociology* 96 (1991), pp. 1201-1225.
- 4 Sarah Turner, Success in Social Movements: Looking at Constitutionally-Based Demands to Determine the Potential Success of Social Movements, 2013, <http://polisci.indiana.edu/undergraduate/heses/Turner.pdf> (last accessed on 24 March 2018).
- 5 Audit Bureau of Circulations, Highest Circulated amongst ABC Member Publications (across languages), [http://www.auditbureau.org/files/Highest%20Circulated%20amongst%20ABC%20Member%20Publications%20\(across%20languages\).pdf](http://www.auditbureau.org/files/Highest%20Circulated%20amongst%20ABC%20Member%20Publications%20(across%20languages).pdf) (last accessed on 25 June 2017).
- 6 KAFILA – 10 years of a common journey. Dissent, debate, create, <https://kafila.online> (last accessed on 20 June 2017).

society in a broader sense, since the authors belong to the academia or another upper social class. The same must be taken into account for the majority of the blog's readers, but this higher social group is also most likely to influence the law making directly.

The paper's main part is structured in five parts. It first gives a definition of the terms, 'public attention' and 'public outrage'. Thereafter the following three parts are focusing on the specific rape cases. For each case there will be a subchapter with a short summary and a discussion of the 'public outrage' and 'public's attention' they were inflicting. For the first two cases there will also be a third subchapter focusing on the direct legal consequences resulting from them. This section is missing for the third case due to the difference of its impact. The paper's final conclusion will provide an outline of the benefits and disadvantages and general public change, which has been caused by the three cases.

## **B. The influence of public outrage on law making**

### *1. Public attention and public outrage*

If 'public outrage' has an impact and what role it plays in the law-making process in India, remains to be examined. This chapter will find a definition for the term 'public outrage', so it can afterwards be used to depict the specific forms of public attention at the example of the chosen cases. Public outrage and public attention shall not be used as synonyms, but as a different shaping of the same phenomenon, in which public outrage appears to be the most intense reaction to a matter of public interest. On the same scale public attention would be a lower level of response. Clear boundaries shall not be drawn as in numbers of protesters or newspaper articles, not only because of the diverse forms of public interaction, but also because it would not enrich the investigational outcome of this paper.

The term 'public outrage' can be found in very different discourses, all related to power, but not only with legal connection. Peter M. Sandman coined the term 'outrage factor'.<sup>7</sup> In public policy the 'outrage factor' describes the public's reaction to a risk, in which the reaction is not exclusively fact based. Being a risk communication consultant, Sandman focuses on the consequences for his clients, nevertheless some of his core issues can help to understand the phenomenon better. First of all, extremely high importance is attributed to 'public outrage', which in consequence can lead to too little attention for serious 'risks'.<sup>8</sup> But in case there is outrage, it must be heard, understood, and given a reasonable response. It may not be the best source of public policy, but it reflects certain values and concerns that

7 Peter M. Sandman, *Responding to Community Outrage: Strategies for Effective Risk Communication*, Fairfax 1993; Bernard J. Nebel / Richard T Wright, *Environmental Science: The Way the World Works*, London 1993, pp. 392-393; John A. Hird, *Superfund: the political economy of environmental risk*, Baltimore 1994, p. 70.

8 Nebel / Wright, note 7, p. 395.

could easily be omitted by an ‘objective’ risk analysis.<sup>9</sup> Furthermore, the media are seen as central influencers of public perception.<sup>10</sup>

Charles Tilly determines three main characteristics to define a social movement: groups must have sustained resistance against an opponent, rely on a support network and be working against an opponent.<sup>11</sup> However in social movement studies the term ‘Public Outrage’ itself is not used to determine an influential factor. Social movement studies ponder the organizational character of social movements and its elements, its reasons and its causes, such as ideology, opportunity structure, framing and organizational structures. Public opinion in the form of staged protests and engagement in mass examples of public disobedience to show displeasure, such as demonstrations, strikes or boycotts<sup>12</sup> are recognized as factors for policy change.<sup>13</sup> It is also recognized that constellations of strong emotions are central in terms of mobilizing actors, motivating people to participate in and then sustain activism.<sup>14</sup>

Transferred to the specific topic of this paper, the following analytical criteria can be deduced: The form of public perception to an event – here: occurrence of rape – has to be evaluated: Is there any reaction to an event? What kind of reaction? Afterwards the transported values should be looked at: Which are the transported values? Then the impact of the media: What influence did the media have. As a final step the reaction of powerful discourse participants shall be taken into account: To what extent did the state’s legislative power react? These factors will help to draw an extensive picture of the level of ‘public outrage’ in connection to the chosen rape cases.

## II. *Mathura rape case, 1972*

The long struggle for legal reform of the rape law took a new form<sup>15</sup> in a nationwide campaign for amendments of the antiquated rape laws after the perceived miscarriage of justice in the Mathura case.

9 *ibid.*

10 *ibid.*, p. 394.

11 Charles Tilly, *From Mobilization to Revolution*, New York 1978, (as cited in Turner, note 4, p. 13).

12 Burstein, note 3, p. 1203.

13 Turner, note 4, p. 8.

14 Bensi et al., note 2, p. 546.

15 Phadke calls it ‘contemporary women’s movement’, which continues till the present, as opposed to the previous ‘anti-colonial and reform movements’, see in: Shilpa Phadke, *Thirty Years On: Women’s Studies Reflects on the Women’s Movement*, *Economic and Political Weekly* 38 (2003), p. 4567.

## 1. Summary of the case

The so called ‘Mathura rape case’ occurred on 26 March 1972 in Desai Gunj Police Station in the district of Maharashtra.<sup>16</sup> Mathura was a young orphan tribal girl of between 14 and 16 years.<sup>17</sup> She and her brother were at the local police station to record their statements in respect of a complaint lodged by her brother.<sup>18</sup> At the police station, Mathura was raped by Head Constable Tukaram and Constable Ganpat. A day later she was examined by a doctor and filed a police complaint. Mathura’s medical examination revealed no injuries and evidence of prior intercourse.<sup>19</sup> However, the presence of semen was detected on her clothes and the pyjama of Ganpat.<sup>20</sup> While the Trial Court refused to convict the accused, the High Court reversed the finding and sentenced both police officers. The High Court held, that both men were complete strangers to Mathura and that it was unlikely that ‘she would make any overtures and invite the accused to satisfy her sexual desires and thus did not consent to intercourse’.<sup>21</sup> The Supreme Court acquitted both police officers using Mathura’s sexual history. Before the rape she had not been a virgin, which in their eyes proved her to be of easy virtue, her failure to raise an alarm and the lack of visible resistance to discredit her claims and held that ‘absence of injuries’ and ‘passive submission’ implied consent.<sup>22</sup>

## 2. Public attention and public outrage: Case based

Public attention for the ‘Mathura rape case’ only sparked after an open letter to the Supreme Court was published. It was written in reaction to the judgment in 1979 by Upen- dra Baxi a renowned law professor from Delhi University, who criticised the notion of consent adapted by the Court that practically equates submission to consent;<sup>23</sup> this letter was co-signed by three other eminent law teachers, namely Vasudha Dhagamwar, Raghunath Kelkar and Lotika Sarkar.<sup>24</sup> The letter exposed the contemptuous stereotypes of women held by the judiciary. Baxi intended to change Indian rape laws so that the burden of proof would shift away from the victim and to achieve the prohibition of victim identity disclo-

16 Tukaram v. State of Maharashtra, (1979) 2 SCC 143.

17 Jagdish S. Verma / Leila Seth / Gopal Subramaniam, Report of the Committee on Amendments to Criminal Law, 2013, p. 78, <http://www.prsindia.org/uploads/media/Justice%20verma%20committee%20report.pdf> (last accessed on 30 June 2017).

18 Verma / Seth / Subramaniam, note 17, p. 78.

19 Verma / Seth / Subramaniam, note 17, p. 79; Tukaram v. State of Maharashtra, note 16.

20 Tukaram v. State of Maharashtra, note 16.

21 *ibid.*

22 *ibid.*

23 Upendra Baxi, An Open Letter To The Chief Justice Of India, Delhi 1979, <http://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-Rape-Case.pdf> (last accessed on 19 June 2017).

24 Baxi, note 23; Mala Khullar (ed.), *Writing the Women's Movement: A Reader*, New Delhi 2005, p. 132.

sure.<sup>25</sup> Thus a legal case became scholastic and a social discourse, the former sparking the latter. And for the first time in India a case induced public protest about rape; a hitherto taboo subject, came to be discussed openly.

As a direct response to the judgment women's groups were formed; one of them by Lotika Sarkar one of the cosigners of the open letter. Her 'Forum Against Rape' formed in January 1980 was the first feminist group in India against rape.<sup>26</sup> For the first time various isolated protests across the country were brought together as one and women's groups began to form a, albeit only temporarily lasting, homogeneous women's movement - for the first time pursuing legal reform.<sup>27</sup> On 8 March 1980, International Women's Day, 1500 women marched on the streets of Delhi, Mumbai, Hyderabad and Nagpur<sup>28</sup> to demonstrate against the decision by the Supreme Court to acquit the policemen and to demand a retrial.<sup>29</sup> Women organised public meetings to discuss reforms of the rape law<sup>30</sup> and for poster-campaigns, they performed street-theatre, submitted petitions to members of parliament and the prime minister.<sup>31</sup> But the protesters were limited to the educated upper-middle-class women who belonged to women's rights organisations.<sup>32</sup> With headlines such as 'Women's organisation demands reopening of Mathura case' or 'Rapists should be whipped' the newspapers ensured that the Mathura case became a national focus for the anti-rape campaign.<sup>33</sup>

Public outrage at the time had another dimension than it has today, but the nationwide protests were enough to require a prompt reaction from the government.<sup>34</sup> A law commission<sup>35</sup> was set up as response from the government to the anti-rape-campaign and its recommendations included the campaign's two major requests: One being that the onus of proving consent shifted from the prosecutor to the accused, the second being that in a rape trial

25 Baxi, note 23.

26 Vibhuti Patel, In memoriam: Lotika Sarkar 1923 – 2013, *FeministsIndia*, 25 February 2013, <http://feministsindia.com/in-memoriam-lotika-sarkar-1927-2013/> (last accessed on 17 June 2017).

27 Phadke, note 15, pp. 4567, 4575.

28 Moni Basu, The Girl Whose Rape Changed The Country, *CNN.com*, November 2013, <http://edition.cnn.com/interactive/2013/11/world/india-rape/> (last accessed on 20 June 2017).

29 Radha Kumar, The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India, 1800-1990, New Delhi 1993, p.130; Amrita Chaci, Over Their Dead Bodies, *New Internationalist*, Northhampton 1 June 1981, <https://newint.org/features/1981/06/01/bodies/> (last accessed on 20 June 2017).

30 Kumar, note 29, p. 130; Phadke, note 15, p. 4567.

31 Khullar, note 24, p. 133; Kumar, note 29, p. 130.

32 Kavita Nandini Ramdas, As Rape Reports Increase in Delhi, a Call for Uncommon Men and Women, *The New York Times*, New York 17 June 2013, <https://india.blogs.nytimes.com/2013/06/17/as-rape-reports-increase-in-delhi-a-call-for-uncommon-men-and-women/?mcubz=1> (last accessed on 20 June 2017).

33 Chaci, note 29.

34 Flavia Agnes, Protecting Women against Violence? Review of a Decade of Legislation, 1980-89, *Economic and Political Weekly* 27 (1992), p. WS20.

35 Namely the Law Commission of India.

the woman's past sexual history and general character should not be used as evidence.<sup>36</sup> The Commission also added certain pre-trial procedures such as women should not be arrested at night, policemen should not touch a woman when arresting her, statements should be recorded in the presence of a relative or a representative of women's organisations.<sup>37</sup> However, the Bill which was presented in 1980 by the parliament did not include most of these recommendations.<sup>38</sup>

### 3. Direct legal consequences: The Criminal Law (Second Amendment) Act, 1983 (Act No. 46)

The Criminal Law Amendment Act of 1983 was to some extent a reaction and translation of the demands of the women's movement by the Lok Sabha and changed the rape law<sup>39</sup> for the first time since 1960.<sup>40</sup> The act added situations of 'aggravated rape' under Section 376 (A) to (D) Indian Penal Code (IPC), criminalising custodial rape in Section 376 (A) IPC.<sup>41</sup> Under the new section sexual intercourse by persons in a custodial situation was an offense, even if it was with consent of the woman. Additionally, for the first time a minimum punishment was laid down in Section 376 IPC.<sup>42</sup> But the act still only named penile penetration and hereby emphasised heterosexual rape committed by men.

The parliamentary debate in 1983, on the creation of Section 228A IPC, which criminalises the publication of the name of the victim, was structured by the discourse of shame and stigmatisation by the community. During the debates the raped woman was even compared to, by members of the Lok Sabha, a 'prostitute' in respect of her stigmatised status, after the rape being 'unchaste', 'a fallen woman'.<sup>43</sup>

Further, the Indian Evidence Act (IEA) of 1872 was also amended by the Criminal Law Amendment Act, 1983.<sup>44</sup> Section 114A was incorporated; in the aforesaid cases of aggravated rape the Court shall now presume in cases where intercourse has been established but the question of consent remains contested that the victim did not consent. Thus, indirectly imposing the burden of proving that there was consent, contrary to what the victim claims,

36 Law Commission of India, Eighty fourth Report on Rape and Allied offenses: some questions of substantive Law, procedure and evidence (1980), pp. 13-22, available at: <http://lawcommissionofindia.nic.in/51-100/report84.pdf> (last accessed on 19 June 2017).

37 *ibid.*

38 Agnes, note 34, p. WS20.

39 Only the amended sections pertinent for this paper's issue shall be mentioned.

40 Pratiksha Baxi, Rape, Retribution, State: On Whose Bodies?, *Economic and Political Weekly* 35 (2000), p. 1996.

41 The Criminal Law Second Amendment Act No. 46 (1983), <http://bombayhighcourt.nic.in/libweb/act/yearwise/1983/1983.43.pdf> (last accessed on 20 June 2017).

42 *ibid.*

43 Baxi, note 40, p. 1996.

44 The Criminal Law Second Amendment Act No. 46 (1983), note 41.



upon the accused. This was an exception of the general rule of presumption of innocence of the accused. Debates about Section 114A IEA were concerned with the abuse of ‘power rape’, where women from socially disadvantaged backgrounds would take advantage of the reversal of the burden of proof to falsely accuse ‘respectable men’ in custodial positions.<sup>45</sup>

The passing of the amendment was pushed back several times, so that when it was finally passed, the campaign of the amendment had died down and the enactment was simply welcomed as a step into the right direction without further criticisms on the changes that were not made.<sup>46</sup> The struggle for change of the antiquated rape law around the Mathura case led to a change in awareness and approach to rape that facilitated the discourse on the topic by a wider part of society.

### *III. Nirbhaya case, 2012*

Compared to rape cases like the ‘Mathura rape case’ which happened long before multimedia became accessible for a great number of people, the extent and the conditions under which nowadays cases reach the public are very different, which shall be represented by the following case.

#### 1. Summary of the case

The ‘Nirbhaya case’, also called ‘Delhi gang rape case’<sup>47</sup>, took place in the night of 16 December 2012. Jyoti Singh, a 23-year-old physiotherapist student, and her male friend took a chartered bus on their way home from a cinema in South Delhi. In the bus were only six other men including the driver who started to assault the girl 15 minutes after the two entered the bus. The situation soon changed from an upcoming argument between the drunken men and the woman’s friend into a physical attack by the gang. After beating the man up, two of them gagged him in the front of the bus and hit him with iron rods while the others pinned the woman down and repeatedly hit her in the abdomen. Five of the men then took turns to rape her while the bus was still driving.<sup>48</sup> The rapists stripped both people off their clothes before throwing them out of the moving bus. A passer-by found them on the road

45 Baxi, note 40, p. 1996.

46 Agnes, note 34, p. WS20; Phadke, note 15, p. 4567.

47 State Govt of NCT of Delhi v. Ram Singh & Ors., (2013) SC 114/2013.

48 Sharmila Lodhia, From “living corpse” to India’s daughter: Exploring the social, political and legal landscape of the 2012 Delhi gang rape, WSIF 50 (2015), p. 89; Chandrani Banerjee, They Tried Throwing Me Out Of The Bus, But I Wouldn’t Allow It. An exclusive interview with the 28-year-old software engineer who was with ‘Jagruti’, Outlook The Magazine, New Delhi 14 January 2013, <https://www.outlookindia.com/magazine/story/they-tried-throwing-me-out-of-the-bus-but-i-wouldnt-allow-it/283459> (last accessed on 1 July 2017); Neeraj Chauhan, 40-min ride: Beaten, raped & dumped, The Times of India, New Delhi 18 December 2012, <https://timesofindia.indiatim.es.com/city/delhi/40-min-ride-Beaten-raped-dumped/articleshow/17659331.cms> (last accessed on 1 July 2017); Neeraj Chauhan / Dwaipayana Ghosh / Raj Shekhar, Delhi gang rape case: Victim

and called the police. In the hospital the victim's condition shocked the doctors who had to remove large portions of the badly damaged intestines in a four-hour-surgery the next day. After ten days the woman was transported to the Mount Elizabeth Hospital in Singapore but died in the early morning of 29 December.<sup>49</sup> The name Nirbhaya was given to her by 'The Times of India', meaning 'Braveheart' or 'Fearless', while 'Outlook' named her Jagruti, 'the Awakening'.<sup>50</sup>

## 2. Public attention and public outrage: Case based

In contrast to the long timespan between the incident of the 'Mathura rape case' and its consequential legal action, the level of public interest regarding the 'Nirbhaya case' developed in an incredibly short time from 'public attention' into severe 'public outrage'. Also, the topic did not just drop out after a short time as usual but kept influencing not only the national but also a global discourse.<sup>51</sup> The protests started three days after the incident in different cities, on 19 December 2012. Many people were expressing their solidarity with the victim in different ways. For example, plenty 'facebook' or 'WhatsApp' users changed

battles for life, 3 accused held, *The Times of India*, New Delhi 18 December 2012, <https://timesofindia.indiatimes.com/city/delhi/Delhi-gang-rape-case-Victim-battles-for-life-3-accused-held/article-show/17656605.cms> (last accessed on 1 July 2017); Dwaipayan Ghosh / Raj Shekhar, Cops say attack was premeditated, men wanted to have 'fun', *The Times of India*, New Delhi 18 December 2012, <https://timesofindia.indiatimes.com/city/delhi/Cops-say-attack-was-premeditated-men-wanted-to-have-fun/articleshow/17657468.cms> (last accessed on 2 July 2017); Raj Shekhar / Dwaipayan Ghosh, Girl gang-raped in moving bus in Delhi, *The Times of India*, New Delhi 17 December 2012, <https://timesofindia.indiatimes.com/city/delhi/Girl-gang-raped-in-moving-bus-in-Delhi/articleshow/17646614.cms> (last accessed on 2 July 2017); Tribhuvan Tiwari, These Are Plucked Chickens. All six accused were from a Delhi slum. Does life on the margins turn men into beasts?, *Outlook The Magazine*, New Delhi 14 January 2013, <https://www.outlookindia.com/magazine/story/these-are-plucked-chickens/283460> (last accessed on 3 July 2017).

- 49 Chauhan, note 48; Chauhan / Ghosh / Shekhar, note 48; Risha Chitlangia, Injuries shock docs, victim still critical, *The Times of India*, New Delhi 18 December 2012, <https://timesofindia.indiatimes.com/city/delhi/Injuries-shock-docs-victim-still-critical/articleshow/17659259.cms> (last accessed on 1 July 2017); Shekhar / Ghosh, note 48; Delhi gang rape victim dies in Singapore hospital, *The Times of India*, New Delhi 29 December 2012, <https://timesofindia.indiatimes.com/city/delhi/Delhi-gang-rape-victim-dies-in-Singapore-hospital/articleshow/17803889.cms> (last accessed on 3 July 2017).
- 50 Support grows for Nirbhaya, *The Times of India*, New Delhi 24 December 2012, <https://timesofindia.indiatimes.com/city/bengaluru/Support-grows-for-Nirbhaya/articleshow/17738427.cms> (last accessed on 1 July 2017); Chandrani Banerjee / Amba Batra Bakshi, Rape happens. The 'normalcy' of violence – sexual violence being the most perverted – is India's lot. One girl's nightmare focuses the light, *Outlook The Magazine*, New Delhi 14 January 2013, <https://www.outlookindia.com/magazine/story/rape-happens/283458> (last accessed on 3 July 2017).
- 51 Maitrayee Chaudhuri, National and Global Media Discourse after the savage death of 'Nirbhaya': Instant Access and Unequal Knowledge, in: Nadja-Christina Schneider / Fritzi-Marie Titzmann (eds.), *Studying Youth, Media and Gender in Post-Liberalisation India. Focus on and beyond the 'Delhi Gang Rape'*, Berlin 2015, p. 19.

their profile picture into a black dot, the film unit 'Queen' wore black clothes at work and many civilians were participating in candle marches, shouting slogans on the streets or signing petitions to create awareness.<sup>52</sup>

However, there were also (political and religious) official voices practicing 'victim shaming' or identifying the cause for rape as an outcome of urbanization, migration, 'westernization' or the degeneration of sexual morality. For some of them the problem was only related to men of lower castes and classes, occasional even going so far as to depict rape as a natural male behaviour.<sup>53</sup> These machismo driven statements from officials were enhancing the gap between many citizens, especially the younger ones, and the political class even further and were also heating up the public situation,<sup>54</sup> so the anti-rape protests were soon spreading from Delhi to other major cities all over India and intensified. On 22 December the situation started to turn violent when the Delhi police decided to use water cannons despite the cold weather and tear gas to disperse protesters who were marching towards governmental areas. Roads and metro stations leading to this area were blocked and many protesters who tried to get beyond the barricades or fight the police were arrested.<sup>55</sup> The medial attention was especially rising when thousands of peaceful protesters were enduring

- 52 Candlelight protest in Ganjam against Delhi gang rape case, *The Times of India*, New Delhi 21 December 2012, <https://timesofindia.indiatimes.com/city/bhubaneswar/Candlelight-protest-in-Ganjam-against-Delhi-gang-rape-case/articleshow/17702157.cms> (last accessed on 2 July 2017); Medical students protest against Delhi rape, *The Times of India*, New Delhi 21 December 2012, <https://timesofindia.indiatimes.com/city/kanpur/Medical-students-protest-against-Delhi-rape/articleshow/17701001.cms> (last accessed on 2 July 2017); Protestors, activists seek justice for rape victims, *The Times of India*, New Delhi 21 December 2012, <https://timesofindia.indiatimes.com/city/lucknow/Protestors-activists-seek-justice-for-rape-victims/articleshow/17700437.cms> (last accessed on 2 July 2017); Chandana Arora / Nitisha Kashyap, 'Queen' film unit protests against Delhi gang rape, *The Times of India*, New Delhi 21 December 2012, <https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/Queen-film-unit-protests-against-Delhi-gang-rape/articleshow/17692539.cms> (last accessed on 2 July 2017); Komal Guglani, When words fail, a dot speaks volumes, *The Times of India*, New Delhi 21 December 2012, <https://timesofindia.indiatimes.com/city/chandigarh/When-words-fail-a-dot-speaks-volumes/articleshow/17701877.cms> (last accessed on 2 July 2017).
- 53 Lodhia, note 48, pp. 94-95, 99.
- 54 Nadja-Christina Schneider, Introduction, in: Schneider / Titzmann (eds.), note 51, p. 9.
- 55 Delhi gang rape case: Protests must lead to action, ex-Army chief VK Singh says, *The Times of India*, New Delhi 22 December 2012, <https://timesofindia.indiatimes.com/city/delhi/Delhi-gang-rape-case-Protests-must-lead-to-action-ex-Army-chief-VK-Singh-says/articleshow/17716660.cms> (last accessed on 2 July 2017); Delhi gang rape case: Teargas, water cannons used against protesters, *The Times of India*, New Delhi 22 December 2012, <https://timesofindia.indiatimes.com/city/delhi/Delhi-gang-rape-case-Teargas-water-cannons-used-against-protesters/articleshow/17718108.cms> (last accessed on 2 July 2017); Delhi gang rape: Police use water cannons on protesters, *The Times of India*, New Delhi 22 December 2012, <https://timesofindia.indiatimes.com/city/delhi/Delhi-gang-rape-Police-use-water-cannons-on-protesters/articleshow/17717093.cms> (last accessed on 2 July 2017).

the winter cold, but also the disproportionate reaction of the state was playing a significant role.<sup>56</sup>

Right from the beginning, while the protests themselves remained peaceful, protesters were demanding implementation of stricter laws. Some of them were asking for draconic punishment for rapists like public hanging, while others could understand the anger but found the demand for more violence saddening.<sup>57</sup> The protesters, who were predominantly, but not exclusively, emerging from the younger generations of the urban middle class,<sup>58</sup> were mainly criticising the lack of governmental action against ‘rape culture’<sup>59</sup>, ‘victim shaming’ and the objectification of women and demanded fast track trials for rapists.<sup>60</sup> Nevertheless, the protests had neither a single person nor a certain collective leading them and were hence rather spontaneous, chaotic and lacked a clear agenda. Therefore social media networks were playing a significant role for the formation and coordination of the movement.<sup>61</sup> Since Belair-Gagnon, Mishra and Agur claim that the majority of social media users can be found among the younger generation, that means between 18 and 35 years old, of the middle and upper class, the area of influence through this medium is limited to a relatively specific circle of people.<sup>62</sup>

‘The Times of India’ generally seemed to remain a neutral correspondent, mainly expressing opinions through interviews within their articles. Nevertheless, the language of the interviews often emphasised the brutality of the rape or the victim’s struggle for her life. Also the fact that the authors were giving her the glorifying name ‘Nirbhaya’ (‘Braveheart’), made it clear that ‘The Times of India’ was in favour of the victim and the

56 Schneider, note 54, p. 9.

57 Poulami Roychowdhury, News and views "The Delhi Gang Rape": The Making of International Causes, FS 39 (2013), p. 285; Himanshi Dhawan, Rape outrage alters language of protest, The Times of India, New Delhi 20 December 2012, <https://timesofindia.indiatimes.com/city/delhi/Rape-outrage-alters-language-of-protest/articleshow/17686600.cms> (last accessed on 1 July 2017); Sanjay Ojha, Protests against Delhi gang rape, The Times of India, New Delhi 20 December 2012, <https://timesofindia.indiatimes.com/city/ranchi/Protests-against-Delhi-gang-rape/articleshow/17687026.cms> (last accessed on 1 July 2017).

58 Schneider, note 54, pp. 9 -10.

59 Rape culture describes an environment “in which rape is prevalent and in which sexual violence against women is normalized and excused in the media and popular culture.” (Women’s Center, What is the “Rape Culture?”, <http://www.marshall.edu/wcenter/sexual-assault/rape-culture/> (last accessed on 18 March 2018). Also see John C. Pollock et al., Cross-National Coverage of Rape and Rape Culture. A Community Approach, in: Jan Servaes / Toks Oyedemi (eds.), *The Praxis of Social Inequality in Media. A Global Perspective*, Lanham et al. 2016, p. 203.

60 Arora / Kashyap, note 52; Dhawan, note 57.

61 Schneider, note 54, pp. 10-11.

62 Valerie Belair-Gagnon / Smeeta Mishra / Colin Agur, Reconstructing the Indian public sphere: Newswork and social media in the Delhi gang rape case, *Journalism* 15(8) (2014), p. 1071.

protesters and certainly influenced the readers.<sup>63</sup> The authors of ‘Outlook’ acted very similarly, but in contrast accused the state’s insufficient legal protection for women directly.<sup>64</sup> ‘Kafila’ went a step further and expressed an even harsher critique within a more feminist approach.<sup>65</sup>

Many – especially international – newspapers were not only sketching the victim in the colours of a heroine, but also identifying the deeper cause for the rape incident within the clash of two Indias: one modern, the other backward. The concern about the violation of modern human rights might be the reason for the case’s immense international recognition. The victim was often portrayed as a modern educated woman, who got adapted to a ‘westernised’ lifestyle, while in contrast the attackers were described as a group of drunken low cast or low class migrants from rural areas who lived in the slums. That the victim’s family originated from a similar rural context was in contrary almost never mentioned as much as the victim’s male friend, who had also been severely beaten up, was not part of the main concern.<sup>66</sup> Also the identity of the victim as a urban Hindu, middle-class, upper-cast woman – her embodying characteristics that can be seen as the ‘desired’ ones from an official side and are emerging to be seen as normative qualities – enabled the media to create a feeling of empathy among a large number of people and simultaneously to even draw a seemingly ‘everywoman’ image of her. At the same time rape cases of people who do not fit in these officially ‘desired’ criteria like poor, non-Hindu, low-cast, rural women or trans people, sex workers and so forth do not at all create equal awareness or support from the public. The rape and murder of Surekha and Priyanka Bhotmange, two dalit women, in a small town named Khairlanji in 2006 f. e. was similar in its brutality but did not evoke official claims for social justice and massive demonstrations similar to the reaction of the ‘Nirbhaya case’.<sup>67</sup> The high international concern for specific cases of violence like the one in Delhi

63 Compare with e.g. Braveheart gang rape victim wanted to live, The Times of India, New Delhi 29 December 2012, <https://timesofindia.indiatimes.com/india/Braveheart-gang-rape-victim-wanted-to-live/articleshow/17804152.cms> (last accessed on 3 July 2017); Police use water cannons on protesters, note 55.

64 Compare with e.g. Meena Kandasamy, How Do We Break The Indian Penile Code? This cultural sanction of rape must stop, the state has to speak, Outlook The Magazine, New Delhi 14 January 2013, <https://www.outlookindia.com/magazine/story/how-do-we-break-the-indian-penile-code/283463> (last accessed on 4 July 2017).

65 Compare with e.g. Shuddhabrata Sengupta, Water Cannons, Tear Gas, Ordinance: How the State Responds to Protests Against Rape and the Justice Verma Committee, KAFILA, 3 February 2013, <https://kafila.online/2013/02/03/water-cannons-tear-gas-ordnance-how-the-state-responds-to-protests-against-rape-and-the-justice-verma-committee/> (last accessed on 19 June 2017).

66 Roychowdhury, note 57, pp. 282-284.

67 Krupa Shandilya, Nirbhaya’s Body: The Politics of Protest in the Aftermath of the 2012 Delhi Gang Rape, *Gender & History*, 27(2) (2015), pp. 465, 478, 482-483.

was also explained with them being regarded as an index for ‘the inferiority of non-Western cultures’.<sup>68</sup>

The Indian government, however, first tried to fight off the protests evoked by the ‘Nirbhaya case’, but due to the widespread protests and the immense attention by the media, it set in the Justice Verma Committee to create a report unexpectedly soon. This report finally led to the Criminal Law (Amendment) Act, 2013.

### 3. Direct legal consequences: Criminal Law (Amendment) Act, 2013

The Justice Verma Committee’s task was to create an interdisciplinary report that deals with all variations of sexual criminality as much as with their prevention and punishment. It considered the suggestions of several governmental and nongovernmental institutions as much as national and international human rights organisations, social activists, lawyers, academics and law students, medical personnel, psychologists and many more.<sup>69</sup> The committee’s final report was used as a basis to create the Criminal Law (Amendment) Ordinance, 2013.<sup>70</sup> The ordinance led after several changes to the Criminal Law (Amendment) Act, 2013 which was passed on 2 April 2013, only four months after the rape incident had happened. It contained amendments to the IPC, the Code of Criminal Procedure, 1973, the IEA 1872 and the Protection of Children from Sexual Offences Act, 2012. Amongst other points of the amendment the most important and also heavily criticised changes for the IPC regarding rape were the following: Sections 354A, 354B, 354C and 354D now include the important ban on Sexual harassment, Assault or Use of criminal force to a woman with intent to disrobe her, Voyeurism and Stalking. Nevertheless Section 354 still includes in its definition the outrage of female ‘modesty’, a term which remains undefined, as reason for the action’s criminalisation as Section 509 does also. ‘It does not make sense to retain the idea that something amounts to violence only when the modesty of women is outraged, and not the bodily integrity of all women, irrespective of modesty. [...] What we wear, who we sleep with, where we go, what work we do - is not relevant to proving sexual assault.’<sup>71</sup> writes Pratiksha Baxi. Also, Sections 375, 376, 376A, 376B, 376C and 376D IPC were substituted with new Sections which deal with the topics rape, punishment for rape and different forms of sexual intercourse. The increase of the minimum punishment for rape to a seven-year imprisonment was fulfilling the public’s demand for stricter punishment, while Sec-

68 Roychowdhury, note 57, p. 285; Urmila Goel, The Delhi rape case and international attention. An interview with Urvashi Butalia, in: Schneider / Titzmann (eds.), note 51, pp. 133-135.

69 Verma / Seth / Subramaniam, note 17, pp. i-ii, v-vi.

70 Manoj Mittal, Justice JS Verma gave India collegium system, The Times of India, New Delhi 23 April 2013, <https://timesofindia.indiatimes.com/india/Justice-JS-Verma-gave-India-collegium-system/articleshow/19685392.cms> (last accessed on 4 July 2017).

71 Pratiksha Baxi, The Criminal Law Ordinance 2013 on Sexual Assault. Cut, Paste and Shock!, KAFILA, 5 February 2013, <https://kafila.online/?s=The+Criminal+Law+Ordinance+2013> (last accessed on 21 June 2016).

tion 375, which defines sexual actions of a man and the necessary circumstances under which these actions against a woman are regarded as rape, was seen more critically: The vice versa case of a woman raping a man does, regarding to this definition, not exist. Nevertheless, this Section is apparently very important, but it has also been heavily criticised for including in Exception 2 that '[s]exual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape'. This makes this regulation an extremely misogynist one, since a man can rape his wife without committing a crime, even if she is not an adult yet, despite the fact the amendment also raises the age of consent to 18 years of age under Section 375. Raping his own wife is only punishable for the man if the partners were already living separately. However, in October 2017 Exception 2 to Section 375 was declared illegal by the Indian Supreme Court, as far as concerning wives under the aged 15 to 18.<sup>72</sup> It was acknowledged that this exception was conflicted with several legal sources, like Art. 15 (3) Constitution of India, the public Child Marriage Act, 2006 (where minimum marriage age for girls is laid down to 18 years) and also international laws, like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

A further reason for critique is certainly the fact that the other exception of rape under Section 375, which says that '[a] medical procedure of intervention shall not constitute rape', does not include the necessity of the patient's consent at all.<sup>73</sup> Also certain forms of violence of a same sex relationship are spared out, which is no surprise since Section 377 still forbids same sex intercourse when the amendment entered into force.<sup>74</sup> The act further can be criticised for not distinguishing between different gradations of violence in connection with rape or between its nature.<sup>75</sup>

Also, very important are the amendments of the Sections 53A and 114A for the IEA, 1872, which protect women from victim shaming. They determine that if in an investigation the question of the woman's consent is an issue, the woman's character or any 'previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent' and respectively that if a woman has allegedly been raped and states that she did not give her consent, the court shall not presume otherwise.

Altogether the protests around the 'Nirbhaya case' were not only provoking a legal change but also depict a shift away from a mentality that holds rape to inflict 'deathless shame'. Instead referring to the victim as a 'living corpse' the women became transformed into 'India's daughter' by the public. Therefore the public outrage contributed to the alteration of gender relations in India and created awareness of patriarchal ideologies and the rhetoric of 'victim shaming'.<sup>76</sup>

72 Independent Thought v. Union of India and Anr., (2017) W.P. (C) No. 382 of 2013.

73 Baxi, note 71.

74 *ibid.*

75 *ibid.*

76 Lodhia, note 48, pp. 89-90.

#### IV. Mahmood Farooqui rape case, 2016

Contrary to the two cases which were just presented, the so called ‘Mahmood Farooqui rape case’ did not gain its public attention because of gruesomeness. Quite the opposite, the verdict of seven years imprisonment for forcing oral sex on a woman caused discussions about too harsh rape laws.<sup>77</sup>

##### 1. Summary of the case

In March 2015 a 30-year-old US-American scholar from Columbia-University was allegedly forced to oral sex by Mahmood Farooqui. Not only the origin of the woman caused special interest, but also the accused himself, Farooqui being a well-known Bollywood director. In June of the same year the woman pressed charges against Farooqui for the alleged offence,<sup>78</sup> punishable under Sections 376, rape, of the IPC. In the time between the assault and the report to the police the woman and the accused continued to have personal contact. Their emails and text messages played an important role in the legal proceedings.<sup>79</sup>

In June 2016 Farooqui was found guilty in an over 150-page-judgement<sup>80</sup> and the minimum punishment of seven years imprisonment was awarded.<sup>81</sup> Remarkable in this judgement is that the notion of consent, which is defined as ‘an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or nonverbal communication, communicates willingness to participate in the specific sexual act’<sup>82</sup> in Indian Law, was examined in depth.<sup>83</sup> Furthermore, not only the ‘victim’s’ loss of honour was recognised by

77 E.g. even the feminist lawyer Flavia Agnes questions the appropriateness: Natsha Badhwar, Interview with Flavia Agnes: Can’t Compare Brutal Gang-Rape With Forced Oral Sex, *Outlook The Magazine*, New Delhi 5 September 2016, <https://www.outlookindia.com/magazine/story/cant-compare-brutal-gang-rape-with-forced-oral-sex/297766> (last accessed on 20 June 2017).

78 Farooqui-Chronology, *Times of India*, New Delhi 30 July 2016, <http://timesofindia.indiatimes.com/city/delhi/FAROOQUI-CHRONOLOGY/articleshow/53466572.cms> (last accessed on 20 June 2017).

79 J Devika / Nivedita Menon, *The Mahmood Farooqui Rape Conviction – A Landmark Verdict*, *KAFILA*, 14 August 2016, <https://kafila.online/2016/08/14/the-mahmood-farooqui-rape-conviction-a-landmark-verdict-j-devika-nivedita-menon/> (last accessed on 20 June 2017).

80 Filmmaker Farooqui Gets Seven Years Jail for Raping American Woman, *Outlook The Newswire*, New Delhi 4 August 2016, <http://www.outlookindia.com/newswire/story/filmmaker-farooqui-gets-seven-yrs-jail-for-raping-american-woman/948986>, (last accessed on 20 June 2017).

81 ‘Peepli (Live) director Mahmood Farooqui sentenced to 7 years of imprisonment!’, *Times of India*, New Delhi 26 February 2017, <http://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/Peepli-Live-director-Mahmood-Farooqui-sentenced-to-7-years-of-imprisonment/articleshow/53541572.cms> (last accessed on 20 June 2017).

82 Explanation 2 to Section 375 IPC (post 2013-amendment); Devika / Menon, note 79.

83 Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India*, Cambridge 2017, p. 17.



the court, but also the loss of control over her own sexuality – a fact which can be seen as a complete novelty in Indian rape judgements.<sup>84</sup>

## 2. Public attention and public outrage: Case based

If 'public attention' and 'public outrage' are seen as different levels of distinctiveness on a scale of public perception the 'Farooqui rape case' is to be located on the 'attention' side of the scale, especially in direct comparison to the above reviewed cases, since there were no manifestations or other forms of public outbursts in the streets. However, there are several reasons why the coverage of this case was considerable.

Farooqui is described as 'socially and intellectually influential'.<sup>85</sup> His position as a renowned person of the Indian public life and especially as part of the country's intellectual elite exposed all of the director's failures in a more direct manner. His social position alone would have been sufficient to gather broad public attention, but there are a number of additional reasons for the extremely broad public interest. Despite the fact that all women should hold the same rights and be valued equally, the nationality of the US-American plaintiff seemed to play an important role. Three out of five<sup>86</sup> articles which can be found in the online archive of 'The Times of India' mention her citizenship already in the headline: 'US-American victim'<sup>87</sup>, 'guilty of raping an American national'<sup>88</sup>, '7 years in jail for rape of US woman'<sup>89</sup>. Apart from the apparently higher general interest in the case, there is no further valuation of her nationality, as in having a 'higher or lower honour' due to being a

84 *ibid.*

85 Rama Lakshmi, Tackling The Silences Around Mahmood Farooqui, Outlook The Website, New Delhi 1 August 2016, <http://www.outlookindia.com/website/story/tackling-the-silences-around-mahmood-farooqui/297095> (last accessed on 2 July 2017).

86 except: Farooqui-Chronology; 'Peepli (Live) director Mahmood Farooqui sentenced to 7 years of imprisonment!', Times of India, New Delhi 26 February 2017, <http://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/Peepli-Live-director-Mahmood-Farooqui-sentenced-to-7-year-s-of-imprisonment/articleshow/53541572.cms> (last accessed on 20 June 2017).

87 American woman rape case: Delhi Police seeks maximum punishment for Mahmood Farooqui, Times of India, New Delhi 28 January 2017, <http://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/American-woman-rape-case-Delhi-Police-seeks-maximum-punishment-for-Mahmood-Farooqui/articleshow/53519207.cms> (last accessed on 2 July 2017).

88 Sana Shakill, Bollywood filmmaker Mahmood Farooqui held guilty of raping an American national, Times of India, New Delhi 30 July 2016, <http://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/Bollywood-filmmaker-Mahmood-Farooqui-held-guilty-of-raping-an-American-national/articleshow/53465343.cms> (last accessed on 2 July 2017).

89 Shailaja Neelakantan, 'Peepli Live' co-director Mahmood Farooqui gets 7 years in jail for rape of US woman, Times of India, New Delhi 4 August 2016, <<http://timesofindia.indiatimes.com/india/Peepli-Live-co-director-Mahmood-Farooqui-gets-7-years-in-jail-for-rape-of-US-woman/articleshow/53541269.cms> (last accessed on 2 July 2017).

western woman. These two elements led to high public interest in the process right from the beginning. Another attention gathering factor is linked directly to the judgement itself. The conviction under Section 375 (D), for forcing oral sex on a woman, which led to the minimum sentence for rape of seven years imprisonment for Farooqui. The sentence evoked a wave of outrage, wherein the opinions varied from 'draconian law' to 'finally just rape laws'.

A general debate on 'carceral feminism', a practice that privileges the resolution of women's issues, was initiated.<sup>90</sup> The popular feminist lawyer Flavia Agnes was criticised for allegedly marginalising the rape of the US-American scholar,<sup>91</sup> by saying: 'I do not endorse the view that whether it is oral sex by a friend in his drawing room or a gruesome gang-rape where weapons are used causing grievous injury, the same yardstick must be used for assessing the harm or trauma caused by invoking the premise that a rape is a rape.'<sup>92</sup> Reading the whole interview puts Agnes' statement into another context: 'I have always been against stringent punishment, either as retributive justice or for its deterrent value. [...] I also do not believe that only when the accused is given maximum punishment is the victim able to overcome the trauma of rape. It is necessary to delink the two.'<sup>93</sup> A general critique of the Indian penal system is perceivable, which directly affects a society's core values, especially when death penalty is still practiced.<sup>94</sup>

'It is well settled law that in a case of rape, the sole testimony of the victim is sufficient to establish the guilt of the accused and no corroboration is required.'<sup>95</sup> This reversion of burden of proof, explicitly carved out in the ruling, affects directly forever lasting male privilege, while being directly linked to the legitimate fear of too high sentences.

In such a diverse society as it is the case with India's, the 'high' social rank of the participants in this case builds another value enacting factor and was made a topic in the news: 'Many things need to be taken into account, particularly the respective class position, the power balance that operates and whether the victim belongs to a marginalised Section and

90 Pratiksha Baxi, 'Carceral Feminism' as Judicial Bias: The Discontents around State v. Mahmood Farooqui, *Interdisciplinary Law* 3 (2016), <http://www.csdhyd.org/PBaxi-IL3-CSDH.pdf> (last accessed 2 July 2017); Kalpana Kannabiran, The Cure For 'Moral' Panic: In the liberal public sphere, Mahmood Farooqui's trial is not yet over. Concerns over 'carceral feminism' and 'flawed' trials reveal our insecurities, *Outlook The Magazine*, New Delhi 12 September 2016, <http://www.outlookindia.com/magazine/story/the-cure-for-moral-panic/297807> (last accessed on 2 July 2017).

91 *ibid.*

92 Badhwar, note 77.

93 *ibid.*

94 E.g. Section 376 Indian Penal Code; Amnesty International, Wenn der Staat tötet: Liste der Länder mit und ohne Todesstrafe Stand 1. Juli 2017, p. 9, [http://www.amnesty-todesstrafe.de/files/reader\\_wenn-der-staat-toetet\\_laenderliste.pdf](http://www.amnesty-todesstrafe.de/files/reader_wenn-der-staat-toetet_laenderliste.pdf) (last accessed on 2 July 2017).

95 State Govt of NCT of Delhi v. Mahmood Farooqui [2016] para 68.9, SC No.: 118/15 And New SC No. 1590/2016.

suffers from multiple levels of vulnerabilities. It is important to work towards this, particularly in intimate partner violations.<sup>96</sup>

Mahmood Farooqui stands in a special relationship to the chosen media sources. He was a member of the 'Kafila' collective, where he was suspended immediately after the accusation became public.<sup>97</sup> He also wrote for 'Outlook' where he published three articles about historical topics between 2005/6<sup>98</sup> and was once portrayed in an interview about his art (2015).<sup>99</sup> 'Outlook' did not distance itself from Farooqui as 'Kafila' did, which can easily be explained by the different organisational structure of the news sources as well as the temporal component. Both, the blog and the magazine, exhibited a high coverage of the case. In 'Outlook – The Newswire' steady updates about the case<sup>100</sup> and from the court<sup>101</sup> were published. Furthermore, the blog and the magazine provided a deep analysis of the societal impact that has been depicted above. 'Kafila' discussed broadly the general medial perception of justice in rape cases after the 2013 law amendment. The verdict in the Farooqui case is seen as 'an unmistakable and important shift in the way in which rape is viewed in a courtroom.'<sup>102</sup> In comparison coverage of the case by 'The Times of India' is very low, a striking difference can be seen in the depth of analysis, which barely exists in those articles. Focus is laid on facts and temporal aspects.<sup>103</sup>

96 Badhwar, note 77.

97 J Devika, Admin Notice: Kafila Collective, KAFILA, 30 June 2015, <https://kafila.online/2015/06/30/admin-notice-kafila-collective/> (last accessed on 2 July 2017).

98 Mahmood Farooqui, Few Bland Men: In terms of scholarship, compared to the centenary year, the 150th year of 1857 draws a spectacular blank, Outlook The Magazine, New Delhi 10 September 2007, <http://www.outlookindia.com/magazine/story/few-bland-men/235500>; *ibid.*, Our Lady Of Jhansi: While it rescues Lakshmi Bai from the conjoined yokes of rebel-patriot, her true metier will only emerge when the gadar is studied as an event in its own right, not as a prologue to the glorious march of Indian nationalism, Outlook The Magazine, New Delhi 4 September 2006, <http://www.outlookindia.com/magazine/story/our-lady-of-jhansi/232373>; *ibid.*, Empire Is Born In A Six By Four Cell: Indian history is peripheral in these essentially Brit books on the old Empire and the modern Corp, Outlook The Magazine, New Delhi 10 July 2006, <http://www.outlookindia.com/magazine/story/empire-is-born-in-a-six-by-four-cell/231792> (all: last accessed on 2 July 2017).

99 Stuti Argawal, Interview with Mahmood Farooqui: Mahmood Farooqui: The writer-director on his endeavour to revive the lost art form of dastangoi, Outlook The Magazine, New Delhi 13 April 2015, <http://www.outlookindia.com/magazine/story/mahmood-farooqui/293866> (last accessed on 2 July 2017).

100 Lakshmi, note 85.

101 One can't decide how woman must conduct after trauma: court told, Outlook The Newswire, New Delhi 4 March 2016, <http://www.outlookindia.com/newswire/story/one-cant-decide-how-woman-must-conduct-after-trauma-court-told/932550> (last accessed on 2 July 2017).

102 Devika / Menon, note 79.

103 Farooqui-Chronology, note 78.

Contrary to the other two cases no immediate response of the State can be examined. Nevertheless, the case can be classified as 'high-profile'. Cases can be 'high profile' due to several factors, 'for instance, a case becomes symbolic to protect the reputation of a city or the honour of a country etc. These are complex situations which put the judge under tremendous pressure.'<sup>104</sup> As consequence of being the first case with extraordinary broad public interest after the 2013 Law Amendment, the Farooqui Case was not only interesting due to its legal outcome but also of high explosive nature regarding the emotionally loaded topic of rape laws.<sup>105</sup> And certainly the judgement cannot be evaluated without these influences.

### C. Conclusions

While the demands for legal changes were numerous and manifold and many of them were never pursued, two cases engendered a reaction from the public strong enough to bring change in the form of the above examined amendments.

However, public outrage does not always come in the form of a positive force striving for change. Those cases which trigger the emotions of the public by sensationalism, walk a thin line between demanding better laws, fairer trials, justice for the survivors and wanting retribution among others in the form of extreme punishment that abuts on bloodthirstiness, as it was the case at the sentencing of the 'Nirbhaya case' where the crowd outside the courtroom shouted: 'Hang them, hang them!' The five accused men, the sixth had died in prison, were afraid that they were not going to have a fair trial because of the high public pressure. Except for one accused, who was a minor, all of them were sentenced to death in the end. Are these draconian sentences necessary in order to generate change and a rethinking process in a patriarchal society?

The haste in which the 2013 Amendment was enacted lead to a problematic outcome, all variations of rape are treated the same and induce the high punishment of a minimum of seven years, which leads to disproportionately hard sentences. The same is true for the insertion of Section 354A IPC which punishes sexual harassment of a woman by a man. The insertion of this offence was certainly necessary, but a maximum punishment of three years imprisonment and a possible additional fine seem disproportionately high.

However, most effects of the public outrage have a positive spin. The increase of public attention also leads to more media attention and coverage of the subject matter, especially since the 'Nirbhaya case' the media reports more about rape cases which subsequently leads to more public awareness. There has been a general movement for more security for women and victim sympathy dominates for the survivors.

104 Badhwar, note 77.

105 In September 2017 the conviction was overturned after Farooqui appealed against the decision in Delhi's high court: Mahmood Farooqui v. State (Govt of NCT of Delhi), [2017] CRL.A. 944/2016.

The enactments against violence on women over the last decades led to some progressive steps. The Criminal Law Amendments have changed the definition of consent, the definition of rape was extended and the most recent one of 2013 implemented a number of new criminal offences in the law such as stalking, voyeurism, acid attacks and forcibly disrobing a woman. However, it remains to be seen, if the position of women in Indian society has been improved by the application of the amended law. The nomenclature has changed from 'victim' to 'survivor',<sup>106</sup> as have the references of the case names which can be observed at the example of the three above discussed cases, where the case names show the empowerment that has taken place. They went from the name of the victim 'Mathura',<sup>107</sup> over the honorary name of the survivor 'Nirbhaya' to finally display the name of the accused. But very little has changed for the survivors, despite the public attention that has been focused on the issue. The law has become more stringent as a deterrent, but the conviction rates continue to be low at 10 to 15 per cent.<sup>108</sup> Many judiciaries still defend to traditional views of women and their stigmatisation where their honour is concerned and thus a rape survivor continues to suffer from suspicion in the courtroom.<sup>109</sup>

Even now rape continues to be considered a heterosexual crime committed by the male, the law thus emphasises stereotypes and keeps disregarding other gender identities and crimes that are committed by women or towards other persons.

The cases above have shown exemplary that strong demands for legal changes can engender public debate on a basic level. But it is the medial attention which exposes the deficits in the system and gives a voice to the demands and hopes of the masses and documents their outrage. Thus, it can be concluded that publicity through media has proven to be the most effective tool in motivating the state to act.

106 Flavia Agnes, Crime repeats itself, *The Indian Express*, Mumbai 20 January 2017, <http://indianexpress.com/article/opinion/columns/crime-repeats-itself/> (last accessed on 20 June 2017).

107 Phadke, note 15, p. 4569.

108 Agnes, note 106.

109 *ibid.*