

Rape adjudication in India in the aftermath of Criminal Law Amendment Act, 2013: findings from trial courts of Delhi

Preeti Pratishruti Dash

To cite this article: Preeti Pratishruti Dash (2020): Rape adjudication in India in the aftermath of Criminal Law Amendment Act, 2013: findings from trial courts of Delhi, Indian Law Review, DOI: [10.1080/24730580.2020.1768774](https://doi.org/10.1080/24730580.2020.1768774)

To link to this article: <https://doi.org/10.1080/24730580.2020.1768774>



Published online: 04 Jun 2020.



Submit your article to this journal [↗](#)



Article views: 52



View related articles [↗](#)



View Crossmark data [↗](#)

RESEARCH ARTICLE



Rape adjudication in India in the aftermath of Criminal Law Amendment Act, 2013: findings from trial courts of Delhi

Preeti Pratishruti Dash

ABSTRACT

This paper assesses the impact of the Criminal Law Amendment Act, 2013 (CLA-2013) on rape adjudication, by examining 1635 rape judgments from trial courts of Delhi pronounced between 2013 and 2018. Of these, 726 cases were adjudicated under the old law, of which 16.11% resulted in convictions and 909 cases were adjudicated under the CLA-2013, of which 5.72% resulted in convictions. Analysing this data, the paper argues that absence of engagement with criminal justice literature linking mandatory minimum punishments with higher acquittal rates, led to unintended consequences, like reduced convictions under the CLA-2013. The paper also finds similar patterns between nature of rapes and reasons for acquittal under both laws, highlighting that mere legal reform, unaccompanied by governance and social reform, does not yield far-reaching results. The paper concludes by questioning the use of criminal law as a site for feminist reform.

ARTICLE HISTORY

Received 5 November 2019

Revised 6 February 2020

Accepted 6 March 2020

KEYWORDS

Rape adjudication; sexual violence; mandatory minimum sentences; carceral feminism; governance feminism; unintended consequences; Criminal Law Amendment Act 2013; empirical analysis; Delhi trial courts

Introduction

India has recently adopted a heavily punitive approach to sexual offences. This is evident from the Criminal Law Amendment Act, 2013 (CLA 2013), which expanded the definition of rape and introduced a mandatory minimum punishment of seven years for rape, and the Criminal Law Amendment Act, 2018 (CLA 2018), which enhanced the mandatory minimum punishment for rape to ten years and introduced the death penalty for rape of children below 12 years of age.¹ The Indian Parliament also amended the Protection of Children From Sexual Offences Act, 2012 (POCSO) in 2019 and increased the mandatory minimum punishments for sexual offences against children.² Further, the Andhra Pradesh State Legislative Assembly introduced amendments to the Indian Penal Code (IPC) introducing the death penalty for rape in response to the outrage following a brutal gang-rape and murder in Hyderabad in December 2019.

The efficacy of such overtly carceral measures remains under-studied, although women and child rights groups have mostly been critical of these developments. In this paper, I examine the impact of the mandatory minimum punishment introduced by CLA 2013 on rape adjudication in India, in the backdrop of feminist groups in India working with the J.S. Verma Committee (Verma Committee) to enact this legislation. I do this by analysing

CONTACT Preeti Pratishruti Dash  pdash@lm19.law.harvard.edu  Project 39-A, National Law University, Dwarka, India, New Delhi, 110078

¹The Criminal Law (Amendment) Act 2013, s.9; The Criminal Law Amendment Act 2018, s.5.

²The Protection of Children Against Sexual Offences (Amendment) Bill 2019 (passed by Rajya Sabha, 24 July 2019).

judgements in cases of rape across trial courts of Delhi, decided over a six-year period between 2013 and 2018. I examine a total of 1635 rape judgements during 2013–18 from the state of Delhi, of which 726 were adjudicated under the old law, and 909 under the CLA 2013. Under the old law, 117 cases (16.11%) resulted in convictions, while under the CLA 2013, this number was limited to a mere 52 cases (5.72%). I show that introduction of a mandatory minimum punishment for rape under the CLA 2013 was not backed by sufficient research on the issue, and was especially uninformed of studies which link removal of judicial discretion with fall in the rate of conviction, and thus, resulted in unintended consequences.

I also study the treatment of non-peno-vaginal rapes under the CLA 2013. These constitute a minuscule fraction of the total cases adjudicated, indicating judicial and societal attitudes that consider non-peno-vaginal rape “less serious”, thereby preventing reporting and prosecution. Further, I compare the nature of cases and reason for acquittals under the old law and CLA 2013. The findings indicate strikingly similar patterns between the two, further establishing the inefficacy of the amendment in reforming pressing issues in the investigation and adjudication of rapes in India. I argue that a punitive approach to sexual violence, unaccompanied by institutional and social reform, has resulted in unintended consequences in adjudication of rape cases.

Using these findings, I argue that the CLA 2013 failed to achieve the far-reaching reforms that feminist groups who worked with the Verma Committee had aspired for, mainly for want of a nuanced understanding of criminal punishment and sentencing theories, while pushing for their demands. I demonstrate that failure of these feminist groups to engage sufficiently on questions of appropriate punishment for sexual violence enabled the state to restrict its response to stringent punishments, with little attempt in addressing other related concerns. Finally, I underscore the disparate impact of the criminal justice system on the marginalized and emphasize the need to create a feminist discourse on sexual violence, which goes beyond using criminal law as a site for feminist reform.

Methodology

I study a total of 1635 judgements pronounced by trial courts of Delhi over a period of six years, from 2013 to 2018. Delhi is relevant in this context since it has consistently recorded the highest rate of sexual offences, as shown by Crime Statistics published by the National Crime Records Bureau.³ Further, unlike other states, trial court judgements from Delhi are freely available online.

I collected the data from the official websites of the trial courts and also from the website, *indiankanoon.org*, which freely makes available the judgements from trial courts of Delhi. The keywords I used for the searches were “rape”, “sexual offence”, “sexual violence”, “promise to marry”, “penetration”, “peno-vaginal”, “non-peno-vaginal”, “anal penetration”

“Criminal law (Amendment) Act 2013”, “J.S. Verma Committee” “outraging the modesty”, “crimes against women” and “collective conscience”. I filtered the data by

³Ministry of Home Affairs, Government of India, Crime Statistics 2016 <<http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/Crime%20Statistics%20-%202016.pdf>> accessed 6 October 2019; Crime Statistics 2017 <<http://ncrb.gov.in/StatPublications/CII/CII2017/pdfs/CII2017-Full.pdf>> accessed 3 November 2019.

year, beginning with 2013. These keywords produced over 10,000 results for each year, and I collated the relevant cases through a preliminary reading of each of these judgements. For a few cases, I was able to find only the interim orders and not the final judgement. For these cases, I used the Sessions Case Number to obtain the judgement from the individual trial court websites. Through this process of filtering over 5 months, I finally collated a total of 1635 judgements, between 2013 and 2018.

The data cover judgements from both, the CLA 2013, as well as the older law on rape. Though the amendment was enacted in 2013, the judgements in a majority of cases adjudicated under the CLA 2013 came to be pronounced only in 2014–15. Most judgements pronounced till 2014, thus, were of cases adjudicated under the older law of rape. Thus, the data-set for the present paper, gave me the opportunity to comparatively analyse rape adjudication under both legislations.

The sentencing orders for most conviction cases were available neither on *indiankanoon.org* nor on the individual trial court websites. For want of sufficient number of sentencing orders, I decided to exclude data on sentencing from the research, as the sample size was not sufficient to draw any conclusions. I also excluded cases decided under the Protection of Children from Sexual Offences Act, 2012 (POCSO), so as to retain focus on the rape of adult women, and understand the implication of the CLA 2013 on adjudication of these cases. For pre-CLA 2013 cases, I have included data on rape of women between 16 and 18 years of age, so as to understand the impact of increasing the age of consent from 16 to 18 years by the CLA 2013.

The data, admittedly, is not exhaustive since it has been obtained through a trial and error process of online searches. The only other way of verifying this data was through filing RTI applications to the courts, which was not a feasible option, given the delays involved in that process. Though not exhaustive, the data, nonetheless, give a fair approximation of patterns and trends of rape adjudication in India, both, prior to, and after the enactment of the CLA 2013.⁴

CLA 2013 and rape adjudication: findings from judgements

Unlike their American counterparts, the Indian Women's Movement (IWM) has consistently expressed scepticism of carceral projects that strengthen the power of the corrupt, post-colonial state.⁵ Yet, actors within the IWM, as well as other feminist players in India, have not completely distanced themselves from the state's carceral projects. This

⁴Rukmini S., 'The many shades of rape cases in Delhi' (The Hindu, July 2016) < <https://www.thehindu.com/data/the-many-shades-of-rape-cases-in-delhi/article6261042.ece> > accessed 15 January 2020. In this study, the author created a data-set of 583 cases of which 460 cases were fully argued before the trial courts in 2013. In my data-set, I found a total of 392 cases. The difference might be attributed to the fact that I have specifically excluded cases where the prosecutrix was below 16 years of age (the age of consent before the enactment of CLA 2013) since the focus of my study is on the rape of adult women. In her study, since she included all cases of sexual assault, including those adjudicated in the pre-POCSO phase, it probably includes rapes of minors and love affair and elopement cases involving women less than 16 years of age. Further, as already stated, the data in my paper are not exhaustive, as online databases may not include all the pronounced judgements. However, the differences in these numbers do not impact my findings, as both studies find a significant proportion of cases which are love affairs and elopements, and breach of promise to marry cases. Rukmini S's study finds a higher proportion of love affairs by young couples (29.8%) than my study (23.5%) which further substantiates the possibility of her including elopement cases of women younger than 16 years of age.

⁵Prabha Kotiswaran, 'Governance Feminism in the Post-colony: Reforming India's Rape Laws' in Janet Halley and others, *Governance Feminism: An Introduction* (University of Minnesota Press 2018). Kotiswaran refers to the IWM as the autonomous phase of the women's rights movement, which was free from affiliations to any political parties.

is evidenced by the intense feminist engagement with the Verma Committee in introducing legal reforms on sexual violence, which culminated in the enactment of the CLA 2013.

The CLA 2013, incorporating several recommendations of the Verma Committee, introduced some long-standing demands of the feminist groups related to sexual violence laws, including recognizing and penalizing a wide range of non-penetrative sexual offences against women.⁶ However, despite the IWM's scepticism of state-led carceral projects, feminist groups who submitted their demands before the Verma Committee betrayed a lack of serious thought and engagement on the issue of sentencing and appropriate punishment for sexual violence.⁷ For instance, their unequivocal denouncement of the death penalty did not inhibit them from demanding life imprisonment without parole or remission (LWORP), which is subject to similar and intense critique as capital punishment by criminal justice scholars.⁸ Further, despite the tremendous criticism of mandatory minimum punishments, feminist groups demanded removal of judicial discretion and a minimum punishment of seven years' imprisonment for rape.⁹ This demand found ultimately found its way into the CLA 2013.¹⁰

This section discusses the findings from judgements of rape adjudications pronounced between 2013 and 2018 across trial courts of Delhi. It begins by tracking the shift in outcomes of rape cases and then goes on to analyse the basis of the acquittals, nature of adjudicated cases and treatment of non-peno-vaginal rapes under the CLA 2013. It shows that the CLA 2013, though enacted with the well-meaning intention of granting greater sexual autonomy and dignity to women, failed to achieve desirable changes in adjudication of rape cases. In fact, it resulted in some unintended consequences, such as the reduced rate of conviction for rape.

Mandatory minimums and judicial decision-making

In India, feminist scholars have noted that the conviction rate for rape has been extremely low, indicative of the impunity for rape and sexual offences.¹¹ Analysis of crime statistics has also shown that conviction rate for crimes against women stands at an abysmal rate of 19%, compared to the average 47% for all crimes.¹² The CLA 2013 sought

⁶The Criminal Law Amendment Act, s.8. Earlier, the only provision covering non-rape sexual offences was 'Outraging the modesty of a woman' punishable for a maximum of two years under The Indian Penal Code, 1860, s.354.

⁷Responses to J.S. Verma Committee (*Feminist Law Archives- Partners for Law in Development*) <<http://feministlawarchives.pdindia.org/category/sexual-violence/justice-verma-committee/>> accessed 6 October 2019; Prabha Kotiwaran (n 5) 98.

⁸Rachel Barkow, 'Life without Parole and the Hope for Real Sentencing Reform' in Charles G. Ogletree and Austin Sarat (eds) *Life without Parole: America's new Death Penalty?* (New York University Press 2012); Madhurima Dhanuka, 'A new form of Life Imprisonment for India' in Dirk Van Zyl Smit and Catherine Appleton (eds) *Life Imprisonment and Human Rights* (Hart Publishing 2016); Nishant Gokhale, 'Life Imprisonment in India: A Short History of a Long Sentence' (2018) 11(3) NUJS Law Rev. <<http://nujlawreview.org/2019/02/08/life-imprisonment-in-india-a-short-history-of-a-long-sentence/>> accessed 4 October 2019.

⁹The Indian Penal Code 1860, s.376 (1) (prior to enactment of the CLA 2013).

¹⁰The Indian Penal Code 1860, s.376(1) (as amended by the CLA 2013).

¹¹Pratiksha Baxi, 'Carceral Feminism as Judicial Bias: The Discontents around State v. Mahmood Farooqui' (*Interdisciplinary Law CSD Hyderabad*, January 2016), <https://www.researchgate.net/publication/309133540_Pratiksha_Baxi_2016_%27Carceral_Feminism%27_as_Judicial_Bias_The_Discontents_around_State_v_Mahmood_Farooqui_Occasional_paper_series_Interdisciplinary_Law_Hyderabad_CSD> accessed 5 October 2019; Nivedita Menon. *Recovering Subversion* (University of Illinois Press 2004) 5–6.

¹²Sujan Bandyopadhyay, 'A closer look at Statistics on Sexual Violence in India' (*The Wire*, 8 May 2018) <<https://thewire.in/society/a-closer-look-at-statistics-on-sexual-violence-in-india>> accessed 6 October 2019.

to address these issues by strengthening legal mechanisms to deal with sexual violence and ensuring women's right to sexual autonomy and bodily integrity. It aimed at ensuring effective prosecution and guaranteeing accountability by stringently punishing those convicted of rape. Research showed that rape myths around character of the woman, which had been rendered inadmissible through an amendment to the Indian Evidence Act in 2002, had found their way into the sentencing phase.¹³ Through the provision of a mandatory minimum punishment of seven years' imprisonment, feminist groups who worked with the Verma Committee to enact the CLA 2013 sought to exclude such information completely from rape adjudication and sentencing.

An examination of judgements of rape cases adjudicated in Delhi between 2013 and 2018, however, revealed that these aims were far from realized. Of the 1635 cases examined in this paper, 726 were adjudicated under the old law, and 909 under the CLA 2013. The average rate of conviction under the old law across the six years was 16.11% (117 cases). Under CLA 2013, this fell to 5.72%, that is, a mere 52 cases. The already low rate of conviction for rape, thus, appears to have been further diminished after enactment of the CLA 2013.

Year-wise conviction and acquittal rates under both legislations are as follows:

Existing literature on criminal law and sentencing has repeatedly found that the removal of judicial discretion for an offence results in a fall in conviction rate. Andrew Ashworth, while comparing sentencing regimes around the world, notes that mandatory minimum sentences have seldom yielded desired results, and often come into conflict with fundamental principles of considering individual sentencing factors in deciding sentencing outcomes.¹⁴ Viewing sentencing as one stage in the larger process of criminal justice, he finds that prosecutors and judges often make strenuous efforts to divert cases away from a mandatory minimum sentence that they believe to be unduly harsh in general or in particular cases.¹⁵ Studies on jury nullification have also shown that juries often acquit defendants, even in the face of overwhelming guilt, because they are driven by their own sense of justice and fairness, and believe the defendant does not deserve the punishment.¹⁶ While analysing the role of different stakeholders in the criminal justice system, William Stuntz noted that jury nullification was a consequence of removing

Table 1.

Year	CLA 2013		Old law	
	Convictions	Acquittals	Convictions	Acquittals
2013	1	12	62	317
2014	10	132	36	175
2015	9	160	12	71
2016	10	150	5	35
2017	12	247	2	11
2018	10	156	NA	NA
Total	52	857	117	609
	909		726	

¹³Mrinal Satish, *Discretion, Discrimination and Rule of Law: Reforming Rape Law Sentencing in India* (Cambridge University Press, 2016) 61–90.

¹⁴Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press 2012).

¹⁵*ibid*; Michael Tonry, 'Mandatory Minimum Penalties and the U.S. Sentencing Commission's 'Mandatory Guidelines'' (1991) 4(3) Fed. Sent. Rep. 129.

¹⁶Andrew D. Leipold, 'Rethinking Jury Nullification' (1996) 82(2) Virg. Law Rev. 253.

power from the hands of juries, as they had no option but to acquit when they felt that the punishment was too harsh for the offence.¹⁷

Specifically in cases involving sexual offences, mandatory minimum terms have also seldom had a positive impact in adjudication. Kristina Scurry Baehr, while examining data from 10 years of mandatory minimum sentencing in sexual violence in South Africa, found that it led to more inconsistent sentencing across different sexual crimes.¹⁸ In India, too, similar trends have been recorded in cases of custodial rapes, where introducing severe sentences actually resulted in fewer convictions and no increase in the number of complaints, given existing constraints of the system.¹⁹ Feminist groups who submitted their demands before the Verma Committee have also themselves acknowledged the validity of this argument, while denouncing capital punishment.²⁰ Mrinal Satish has argued that in the Indian context, mandatory minimum punishments would shift the discretion from the judiciary to the police, and even in the cases which get prosecuted, judges would most likely acquit in light of the aforesaid factors.²¹ Yet, this research was not accounted for, and decades of criminal law research across different jurisdictions were overlooked in demanding the introduction of mandatory minimum punishment and removal of judicial discretion for rape in India.

In the specific issue of rape adjudication under CLA 2013, there is a lack of sufficient data to establish a causation between mandatory minimum punishment and fall in conviction rate. However, a correlation between the two cannot be ignored, given the extensive comparative research linking removal of judicial discretion and fall in conviction rates. In the Indian context, this is even more relevant because prior to the enactment of CLA 2013, judges could, and often did, impose less than seven years' punishment for peno-vaginal rapes, while invoking rape myths and stereotypes about women's character and sexual history.²² Despite changes to the law on punishment for rape under the CLA 2013, there was no change in the rules for appointment of judicial officers. Thus, over the span of six years of the cases covered in this paper, it is very likely that there was an overlap of judges who presided over cases under the CLA 2013 and the older law on rape. Given that other factors around a case, such as lawyering and investigation, remain the same, the major apparent change confronting these judges, then, is the removal of their own discretion to impose lesser punishment. The problem is magnified in light of the fact that even cases of non-peno-vaginal rapes, which earlier warranted a maximum of two years' imprisonment (under the provision for outraging the modesty of a woman), now carry a seven-year mandatory minimum.²³ It is thus unlikely that the judges who invoked sexist stereotypes to impose lesser punishment

¹⁷William Stuntz, 'The Pathological Politics of Criminal Law' [2001] 100 Mich. Law Rev. 505.

¹⁸Kristina Scurry Baehr, 'Mandatory Minimum Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa', (2008) 20 Yale Journ. of Law and Fem. 213.

¹⁹People's Union for Democratic Rights, 'Custodial Rape: A Report on the Aftermath' (1994) <<http://pldindia.org/wp-content/uploads/2013/03/PUDR-report-on-custodial-rape.pdf>> accessed 11 October 2019; Laxmi Murthy, 'Criminal Law Amendment Act, 2000' (8 September 2006) <http://pldindia.org/wp-content/uploads/2013/04/Comments-by-Laxmi-Murthy-to-Criminal-Law-Amendment-Bill-2000.pdf>> accessed 13 October 2019; Prabha Kotiswaran (n 5).

²⁰Responses to J.S. Verma Committee (n 7).

²¹Saikat Datta, 'Interview: Though India's rape law has been overhauled, it still lacks sentencing policy' (*Scroll*, 13 December 2016) <<https://scroll.in/article/823982/interview-though-indias-rape-law-has-been-overhauled-it-still-lacks-a-sentencing-policy>> accessed 13 October 2019.

²²Mrinal Satish (n 13).

²³The Indian Penal Code, 1860, s. 375, s.376(1).

under the older law, would now consider all rapes as severe enough to warrant a minimum of seven years' imprisonment.

It is relevant to acknowledge here the role of other factors which could have played a role in a fall of the rate of conviction. For instance, the public frenzy and clamour for punishing sexual offences stringently following the gangrape and murder in Delhi in 2012 could have contributed to a higher rate of conviction in the years immediately following this incident, given higher public scrutiny on the police, prosecution and courts. For want of data on conviction rates in the period prior to the Delhi gang-rape and murder, this argument cannot be completely overlooked. However, it is also relevant to note that the rate of conviction for cases decided under both, the CLA 2013 and the older law, has remained consistent between 2013 and 2018 – around 15% under the former law and 6% under the latter law, as seen in Figure 1. [Figure 1(b)]. Further, the tapering down of conviction rates in sexual offences after quietening of public fervour around the same is not a fully sustainable argument in light of data on the death penalty in sexual violence cases. Lower courts imposed the highest number of death sentences in 2018, and the proportion of sexual violence cases where the death penalty was imposed has been consistently rising between 2016 and 2019 – from 18% in 2016, 39.81% in 2017, 41.35% in 2018 and 52.94% in 2019.²⁴ Thus, in cases involving violent rapes accompanied by murders, judges have been imposing stringent punishments, even after the enactment of the CLA 2013. However, for a large majority of cases which do not come in this category of violent stranger rapes, the conviction rate appears to have reduced, and it is here that the role of mandatory minimum punishments gets amplified. The next section contains a more detailed discussion around the nature of cases adjudicated under the older law of rape and CLA 2013 and argues that the role played by mandatory minimum is particularly magnified in some cases where judges are driven by patriarchal notions around rape, such as the non-peno-vaginal rape cases, or past relationship of the victim and the perpetrator.²⁵

Thus, the only major change in law confronting judges deciding cases of rape is the mandatory minimum punishment which takes away their discretion to impose lesser sentence. The impact of non-legal, social factors affecting their decision-making process is outside the scope of this paper. However, notwithstanding the lack of sufficient data to establish a statistical causation, it is plausible to link the higher rate of acquittal under CLA 2013 with the introduction of a mandatory minimum punishment and removal of judicial discretion.

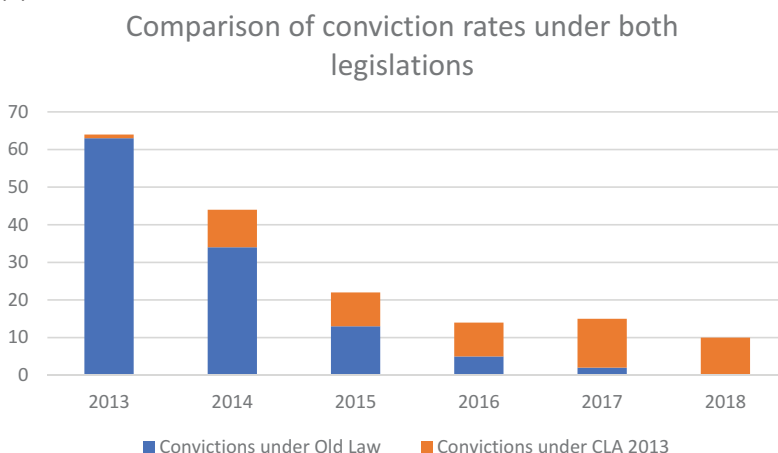
Basis of acquittals

The CLA 2013, as inferred from the submissions of feminist groups to the Verma Committee, was enacted to reform the manner in which the law on sexual violence viewed and treated women who had been subjected to sexual violence. This is evident from the changes in the substantive and procedural laws of rape. The CLA 2013 not only amended the substantive law of rape and other sexual offences but also amended

²⁴Project 39 A, *Death Penalty in India - Annual Statistics 2019* (National Law University Delhi 2019) <<https://www.project39a.com/annual-statistics>> accessed 4 February 2019.

²⁵(n 32, 38).

(a)



(b)

COMPARISON OF CONVICTION RATES UNDER
THE CLA 2013 AND OLDER LAW ON RAPE

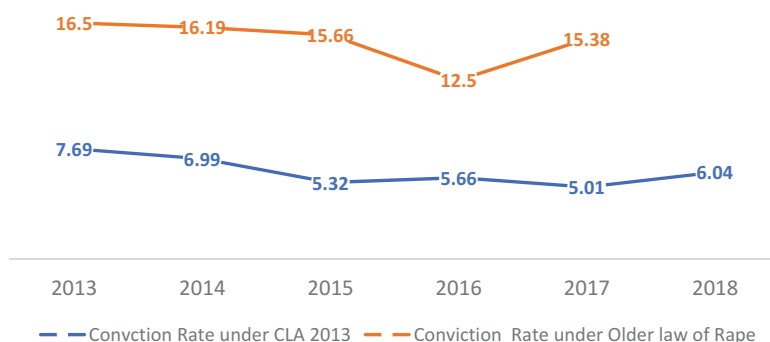


Figure 1. Comparison of conviction rates under both laws

procedural laws of evidence for such cases. The amendments to the Indian Evidence Act, 1872 barred the use of sexual history in determining the consent of the woman and shifted the onus of proving consent to the accused, requiring courts to mandatorily presume the absence of consent if the prosecutrix stated so in her testimony.²⁶ These sweeping amendments were enacted with a view to communicate, through law, that the legal system would grant dignity and autonomy to women who had been subjected to sexual violence.

This section focuses on the similarity between the nature of cases and the judicial reasoning in cases of acquittals under the CLA 2013 and the older law on rape, without going into detailed questions of quality of evidence and nature of arguments by the

²⁶The Indian Evidence Act, 1872, s.53A, s.114A (as amended by CLA 2013).

prosecution and defence.²⁷ Using the similarity in patterns of adjudication and decision-making in rape cases under both the laws, this section demonstrates that mere legal reform, when unaccompanied by social and governance reform, cannot bring about significant positive shifts in the manner of adjudication of these cases.²⁸

The findings in this section indicate that the most common reasons for acquittals under both the legislations broadly remain the same: the prosecutrix turning hostile and not supporting the case of the prosecution, the court disregarding the testimony of the prosecutrix as unreliable, and the prosecutrix herself being untraceable. Combined together, these form 76.66% of the total acquittals in rape cases under the old law and 80.86% acquittals under the CLA 2013, as seen in Figure 2. The remaining acquittals were due to varied reasons including the quality of evidence, judges' perception of the facts and understanding of consent, all of which could not be classified into categories reflective of a pattern.

The details of how the three most common reasons are invoked to acquit the defendants, including the nature of cases where they are used to acquit, are as follows:

Hostile testimony of prosecutrix and her role in registering and prosecuting the rape

The most common reason for acquittal of cases under both the new and the old law was the prosecutrix turning hostile, and not supporting the case of the prosecution. In these cases, the woman who had originally registered the complaint subsequently failed or refused to support the story of the prosecution on material points, thereby leading to acquittal of the accused. Under the new law, this was true of 446 out of 857 acquittals (52.04%) under the CLA 2013 and 268 out of 609 acquittals (44%) under the old law.

Feminist scholars in India have noted the common phenomenon wherein survivors of rape are routinely pressurized to turn hostile, through techniques of violence, intimidation and social coercion.²⁹ In fact, the phenomenon of survivors turning hostile has often been attributed as the major reason behind the high rate of acquittals in rape cases under the older law.³⁰ Merely broadening the definition of rape and prescribing more stringent punishments under the CLA 2013 has clearly not resolved other problematic practices surrounding rape trials in India.

A large number of these acquittals under both legislations are cases registered under provisions of rape that involve consensual sex, which is subsequently deemed illegitimate due to various reasons. These are discussed below:

Consensual but illegitimate: promise to marry cases. A significant proportion of reported rapes in my data set comprised what I classify as 'promise to marry' cases. Such cases see women giving consent to sexual intercourse on the basis of arguably false/ fraudulent promise of marriage. Upon failure of actualization of the promise to marry, the woman files a complaint of rape, alleging that the consent was obtained by misrepresentation or fraud, and thus was not consent at all.³¹ Under the old legislation,

²⁷ A detailed examination of evidence would not be possible from the judgement alone, unless the entire case record is examined. For the purposes of this paper, I have been able to examine only judgements, and not all the case papers, for want of access.

²⁸ Prabha Kotiswaran (n 5).

²⁹ Pratiksha Baxi (n 11).

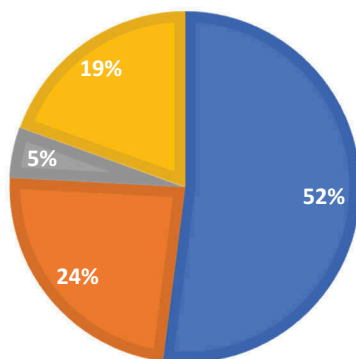
³⁰ *ibid.*

³¹ Arushi Garg, 'Consent, Conjuality and Crime: Hegemonic Constructions of Rape Laws in India' (2018) 20(10) Soc. and Leg. Stud. 1.

(a)

ACQUITTALS UNDER CLA 2013

■ Prosecutrix turned hostile ■ Unreliable testimony of prosecutrix
■ Prosecutrix untraceable ■ Others (miscellaneous)



(b)

ACQUITTALS UNDER OLD LAW

■ Prosecutrix turned hostile ■ Unreliable testimony of prosecutrix
■ Prosecutrix untraceable ■ Others (miscellaneous)

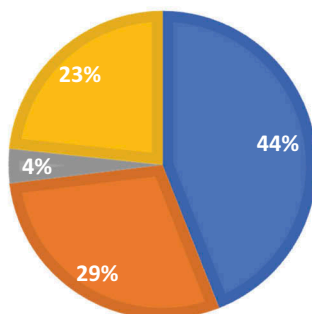


Figure 2. Reasons for Acquittal under both laws

between 2013-2017, there were a total of 171 promise to marry cases, out of a total of 726 cases (23.5%). There were 259 such cases under the CLA 2013, out of a total of 909 cases (28.4%). The facts in the cases varied, as some cases involved long-term relationships, and even had the couple residing together, while others involved one-time sexual encounters between a couple “in love”. One hundred and fifty-four promise to marry cases (90.05%)

resulted in acquittals under the older law, while the CLA saw acquittals in 257 promise to marry cases (99.22%) [Figure 3].³²

In 140 cases of acquittals under CLA 2013 the prosecutrix herself turned hostile to the prosecution in 54.4% cases, and in 25 cases (9.7%) she subsequently married the accused. Under the older law, the prosecutrix turned hostile in 84 cases (54.5%) and married the accused in 22 cases (14.2%). In some cases, the prosecutrix testified that she was not interested in pursuing the case since she had subsequently met the accused and he had agreed to marry her.

Another common pattern in this category was married women bringing charges of rape against men who were not their husbands. In several of these cases, the woman herself testified before the court that the relationship was consensual and she had filed a complaint at the insistence of her husband or to save her marriage. In the remaining cases of acquittal under both laws, the judge concluded that the relationship was probably consensual on the basis of the fact that the prosecutrix and the accused were known to each other and that the complaint was filed due to disagreement between the prosecutrix and her husband.³³

Promise to marry cases routinely feature in conversations around rape cases in India and have been highlighted by postcolonial feminists as feeding into patriarchal notions of marriage as the only site for sexual expression.³⁴ The large proportion of promise-to marry cases under the old and new legislations prove that in large parts of India, where pre-marital sex is viewed as unacceptable, sex can only be legitimised through marriage. In such a society which values the virginity of women before marriage, a partner's refusal to marry a woman after having sex with her would bear a very high cost, since it would render her "unsuitable" for marriage. Criminal law of rape, therefore, becomes a tool for women who feel that their partners have taken advantage of them by first "trapping" them into having sex and then refusing to marry them. In the context of Bangladesh, another South Asian country with similar socio-cultural understanding of gender and sexuality, it has been argued that such cases are filed for strategic reasons as it is more respectable to be a victim of rape than to have given consent to pre-marital sex.³⁵ Unsurprisingly, therefore, in several cases, women alleged that the defendant, with whom they were in love, gave them something to eat or drink which made them unconscious, following which they were raped. This, perhaps, was an attempt to protect their image before the court as a "good woman" who would not consent to "illicit sex". Such an understanding of pre-marital sex also explains why many women who file these cases subsequently turn hostile, once the defendant agrees to marry them.

Similarly, extra-marital affairs, especially by women, are unacceptable in a traditional patriarchal society like India. For a woman having sex with a man other than her husband, the cost of being "discovered" or "caught" would mean the end of her marriage, leaving her

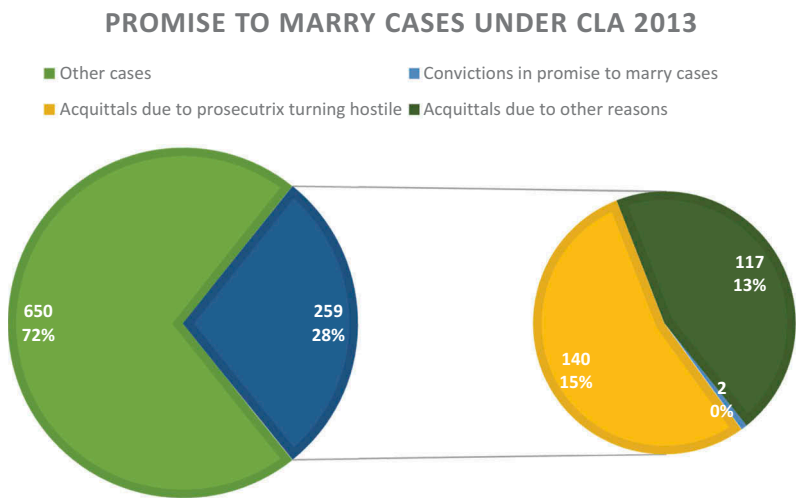
³²The rate of acquittal in promise-to-marry cases under the CLA 2013 is higher by 9.17% than under the older law. Given the patriarchal narrative of women bringing false cases of rape to courts, the introduction of a mandatory minimum punishment of seven years' imprisonment could possibly have played a role in this increased rate of acquittal. This finding, therefore, buttresses the argument made in Section A of this paper.

³³Interestingly, the prosecutrix herself has not claimed so, though her deposition has not been examined for want of availability in this data.

³⁴Pratiksha Baxi, *Public Secrets Of Law: Rape Trials In India* (Oxford, 2013) 235–268; Monica Sakhrani, 'Reading Rape post-Mathura', (2016) 23(2) *Ind. Journ. of Gend. Stud.* 260; Arushi Garg (n 31).

³⁵Dina M. Siddiqui, 'Blurred Boundaries: Sexuality and Seduction Narratives in Selected 'Forced Marriage' Cases from Bangladesh' in Manisha Gupte, Ramesh Awasthi and Shradha Chikerur (eds), *Honour and Women's Rights: South Asian Perspectives* (Masum 2012).

(a)



(b)

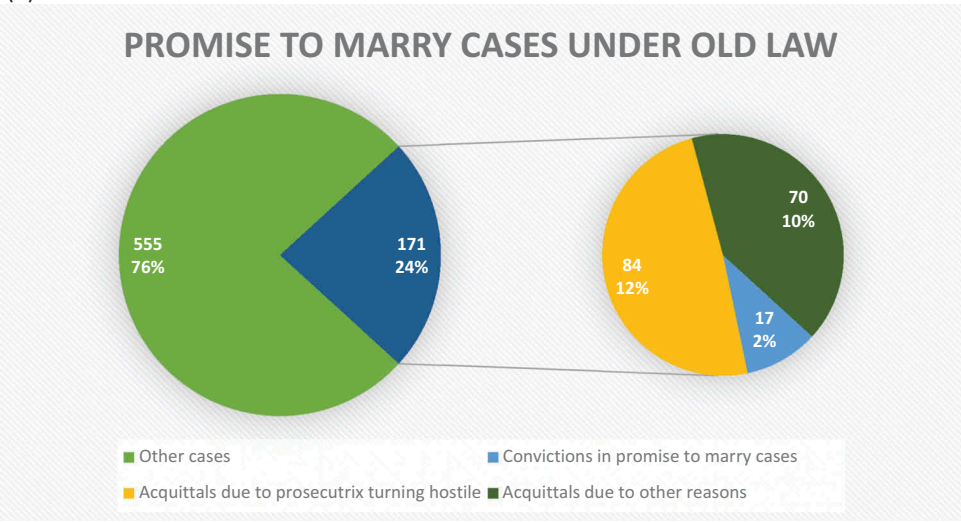


Figure 3. Proportion of Breach of Promise to Marry cases under both laws

socially, and, in all likelihood, financially, unsupported. To save her marriage and her socio-economic status, therefore, it is plausible for a woman to resort to criminal law and file a case of rape. Despite the Supreme Court’s ruling in *Prashant Bharti v. State of Delhi* that promise to marry cases filed by married women are *per se* false and unacceptable, such complaints continue to be filed and prosecuted, albeit, usually resulting in acquittals.³⁶

³⁶*Prashant Bharti v. State of NCT of Delhi* (2013) 9 SCC 293.

Consensual, yet impermissible: love affairs and runaway marriages. Under both the old and new laws on rape, complaints were registered and prosecuted in cases of consensual couples, who were forcefully separated by familial or societal pressures. In a large percentage of these cases, women turned hostile, claiming that the complaint had been filed at the insistence of their parents or relatives, who were against the relationship. The number of cases under this category was higher under the older law on rape because the CLA 2013 raised the age of consent to 18 years, and as a result, all relationships involving women between 16 and 18 years came to be treated as statutory rape and prosecuted under the POCSO Act.³⁷

Under the older law, 169 cases (23.2%) involved runaway marriages between young couples, who were in consensual sexual relationships that were not approved by their parents. In these cases, the couples elope in order to get away from parents opposing the relationship, and subsequently, the girl's parents file a case of kidnapping and rape against the boy. A total of 137 (81.06%) of these cases involved a prosecutrix who was between 16 and 18 years of age. A total of 163 of these cases (96.4%) resulted in acquittals. From these, the prosecutrix turned hostile in 100 (61.3%) cases and claimed that the relationship was consensual. In the remaining cases, the court presumed the presence of consent on the basis of the circumstances of the case and the fact that the complaint had been filed by the girl's relatives. In 12 cases, although the accused was acquitted of charges of rape, he was convicted of kidnapping, as the prosecutrix was below 18 years of age. Seventeen cases under this category were adjudicated under the CLA 2013, and the prosecutrix turned hostile in 11 (64.7%) of them, claiming that the complaint had been forcefully registered against her partner by her family [Figure 4].³⁸

Notwithstanding the fact that women are routinely pressurized to turn hostile, the high numbers of cases involving promises to marry, love-affairs, runaway marriages are telling of the ways in which criminal law is used as a tool to assert patriarchal control over women's sexuality. Enacting more laws aimed at protecting the sexual autonomy and dignity of women, has clearly not changed how societal realities interact with the legal system. The common theme across these different cases is the complete absence of acknowledgement of the sexual autonomy of women, especially when asserted before or outside marriage. In her ethnographic study of rape trials in India, Pratiksha Baxi has examined closely the nexus between traditional, patriarchal family structures and the legal institutions and actors in reinforcing gender roles.³⁹ Observing patterns from the registered cases, she found that a criminal complaint against the partner of the daughter charging him with statutory rape, abduction, or kidnapping was a stabilized legal strategy to "recover" a daughter who enters into an "improper" alliance.⁴⁰

Despite sweeping amendments to the definition of and punishment for rape, as well as procedural laws surrounding the offence, the nature of cases filed under CLA 2013 closely

³⁷(n 10); 'National Consultation On Adolescent Sexuality, Health and The Law: Mapping Intervention Related Challenges and Strategies' (Partners for Law in Development, August 2017), <https://www.academia.edu/36941131/National_Consultation_on_Adolescent_Sexuality_Health_and_the_Law_Mapping_Interventions> accessed 21 October 2019.

³⁸Cases of love-affairs form a small proportion of total cases under the CLA 2013 in my data-set. Under the older law, these cases formed a large proportion of acquittals. Despite the small number of these cases, the acquittal rate under the CLA 2013 remains consistently higher than that under the older law. This is another factor which highlights the role played by mandatory minimum punishments in bringing down the rate of conviction.

³⁹Pratiksha Baxi, *Public Secrets of Rape Law* (n 34) 235–268.

⁴⁰*ibid.*

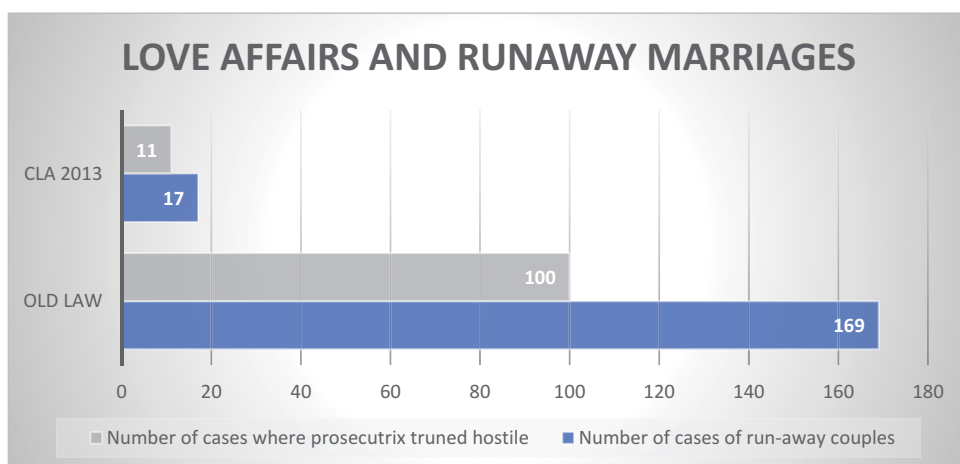


Figure 4. Love Affairs and Runaway marriages under both laws

resembles those under the old law. The CLA 2013, aimed at protecting the rights of women, has thus, done little to change the status quo vis-à-vis patriarchal control over women's sexual autonomy and agency.

Unreliable testimony of the prosecutrix

A commonly cited reason for acquittal under both legislations was the court discarding the testimony of the prosecutrix as unreliable and not inspiring confidence. This was true of 204 out of 857 (23.8%) acquittals decided under the CLA 2013, and 177 out of 609 (29.06%) acquittals under the old law.

The testimonies of the prosecutrix were deemed unreliable for a variety of reasons including inconsistencies between her statements at different stages of the trial, failure to disclose details of the incident to anybody, delay in registering the complaint. Conduct of the prosecutrix before and after the incident of rape was also relied upon by courts to render her testimony unreliable. For instance, in one case, the court noted that the prosecutrix had not been raped as no “victim of sexual assault would stop to eat *golgappa*”.⁴¹ In another case, the court acquitted the accused as it did not find it “understandable” that, despite being a married woman who must be habituated to sexual intercourse, prosecutrix felt an itching sensation in her private parts after being raped, which is why she bathed after the incident, leading to loss of medical and forensic evidence.⁴² The judgements under both legislations are rife with stereotypes about the behaviour of an “ideal victim” which plays a big role in determining the outcome of the case.⁴³

Another commonly invoked reason for deeming the testimony unreliable was delay in filing the complaint. For the offence of rape in India, there is no limitation in filing a complaint.⁴⁴ However, delays in registration of complaints imply loss of medical and forensic evidence, non-availability of witnesses and inconsistencies in testimonies, as

⁴¹*State v. Naresh Dahiya*, S.C. No. 83/2013 (Tis Hazari District Court).

⁴²*State v. Hawaldar*, S.C. No. 72/14 (Dwarka District Court).

⁴³*Rafiq v. State of Uttar Pradesh* AIR 1981 SC 559; Susan Estrich, *Real Rape* (Harvard University Press 1988); Mrinal Satish (n 13).

⁴⁴The Code of Criminal Procedure 1973, s.468.

a result of the lapse in time. In the absence of medical and forensic evidence, courts hesitate to convict the accused, especially because of the regressive and archaic belief that only medical evidence represents the “objective truth”.⁴⁵ Therefore, acquittals in such cases are extremely commonplace. In trial court judgements on rape in Delhi, however, delay in registration of the complaint itself was counted as a ground to doubt the statement of the prosecutrix. In one case adjudicated under CLA 2013, a factor taken into account by the court while acquitting the accused was that the complaint was filed only one day after the alleged date of the rape.⁴⁶ Non-disclosure of details of the incident to close friends or family immediately after the incident was also considered sufficient by courts to deem the testimony unreliable, without any regard for the stigma, shame and trauma that might prevent her from talking about it.

In a fair adversarial legal system, a defendant cannot be convicted of a crime unless there is incriminating evidence supporting a conclusion of guilt beyond reasonable doubt. Some acquittals in rape cases in India, on the basis of inconsistencies in the testimony of the prosecutrix, notwithstanding the brutality of the offence, are thus, arguably, an indicator of the fairness of the criminal justice system. However, the factors that were relied upon in Delhi to deem testimony of the prosecutrix in rape cases unreliable reflect deep-seated patriarchal attitudes of the judiciary.

Courts in India routinely find the testimony of a rape survivor believable when she fits within their imagination of a “good woman”, i.e. when she is “chaste, pure, monogamous, honourable and confined to the domestic sphere”.⁴⁷ A sexually active (read: deviant) woman who does not conform to social norms and expectations about “good women” would find it difficult to navigate the justice delivery system which would always view her with suspicion. In his empirical study of rape sentencing in India, Mrinal Satish found that rape myths and stereotypes about behaviour and sexual history play a role in determining sentencing outcomes in rape cases.⁴⁸ Findings from rape trials in Delhi between 2013 and 2018 are consistent with such arguments and are also indicative that the enactment of CLA 2013 has not limited the entry of stereotypes about “good” and “bad” women in rape trials, despite changes to the law of evidence around admissibility of women’s character and the presumption about consent.

Prosecutrix not traceable

Another pattern which emerged from cases adjudicated under both the legislations was acquittals in cases where the prosecutrix was not traceable and therefore could not be examined in court. There were 40 acquittals out of 857 (4.66%) for this reason under the CLA 2013, and 22 out of 609 acquittals (3.6%) under the older law.

These cases often involved women who were foreign tourists or migrant labourers. In the case of foreign tourists, the woman would often be given offers of cheap accommodations in hotels around Delhi, where she would be trapped and allegedly raped. Soon after the incident and filing a complaint with the police, the prosecutrix would leave for her

⁴⁵Durba Mitra and Mrinal Satish, ‘Testing Chastity, Evidencing Rape: Impact of Medical Jurisprudence on Rape Adjudication in India’, (2014) 49(41) EPW 51.

⁴⁶*State v. Radhey Shyam Mishra*, S.C. No. 576/2017 (Tis Hazari District Court).

⁴⁷*State of Maharashtra v. Tuka Ram* (1979) 2 SCC 143; *Prem Chand and Anr. v. State of Haryana*, AIR 1989 SC 937 (Popularly known as Suman Rani case). *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* AIR 1983 SC 753, *Rafiq v. State of Uttar Pradesh* AIR 1981 SC 559.

⁴⁸Mrinal Satish (n 13).

home country, thereby making it impossible to trace her and, thus, to pursue the prosecution. There were four cases under CLA 2013 involving survivors from the United States, Uzbekistan, Netherlands and Kazakhstan, respectively.⁴⁹ Similarly, cases under the older law saw residents of Nepal and Myanmar leaving the country after filing complaints of rape.⁵⁰ Other cases involved migrant labourers who had come to Delhi from far off states within India like Manipur and Bihar, looking for work, but left soon after filing complaints of rape against their employers or co-workers.⁵¹

These cases are telling of the inaccessibility of the Indian legal system for women who are not familiar with the system and/or from socio-economically marginalized backgrounds. Amending the law, therefore, has had very little impact in increasing its accessibility for this class of complainants. While the rise in the percentage of acquittals in this category under the new law is not large, it is worrying to see how marginalized women, such as migrant labourers, and those unfamiliar with the social and legal setting of India, such as foreign tourists have, arguably, been rendered more vulnerable after the enactment of the CLA 2013.

Treatment of non-peno-vaginal rapes

The CLA 2013 brought about a huge shift in defining rape by expanding it beyond peno-vaginal penetration, to include penetration of the vagina, anus or urethra with a penis, objects or fingers, as well as non-consensual oral sex. This change was strongly pressed for by feminist groups in light of their prior experience of the reality of sexual violence in India.⁵² The amendment, thus, was introduced anticipating that it would enable women to file complaints for a broader range of violations of their sexual autonomy and bodily integrity. However, data from rape trials in Delhi show that of the 909 cases adjudicated under the CLA 2013, only 39 cases (4.29%) involved non-peno-vaginal offences. Further, only four of these cases (10%) resulted in convictions, and three of them (75%) involved non-peno-vaginal sexual offences coupled with peno-vaginal sexual offences. Even the cases which resulted in acquittals involved both peno-vaginal and non-peno-vaginal offences [Figure 5].

A reading of the cases reveals that both in the arguments of the prosecution, as well as in the judicial decisions, non-peno-vaginal offences were treated as ancillary to the main offence of “rape” which was the peno-vaginal penetration. In several of these cases, prosecutors argued that the accused raped the prosecutrix and *also* inserted his hand into her vagina or his penis into her mouth, etc. Similar language is also used by judges in their pronouncements. The language used to describe non-peno-vaginal rape is “carnal intercourse against the order of nature” or “unnatural sex”, akin to the sodomy law in India.⁵³

⁴⁹*State v. Mahmood Farooqui* S.C. No. 118/2015 (Saket District Court); *State v. Palvanova Dilduz* S.C. No. 1355/16 (Saket District Court); *State v. Yasir Altaf* S.C. No. 110/14 (Patiala House District Court); *State v. Vikas Daboo* S.C. No. 28,450/16 (Tis Hazari District Court).

⁵⁰*State v. Vinod Mehto* S.C. No. 157/2013 (Karkardooma District Court); *State v. Ral Kap Thanga* S.C. No. 68/2012 (Tis Hazari District Court).

⁵¹*State v. Mangmin Thang Haokip* S.C. No. 117/2013 (Saket District Court); *State v. Pawas Prasoon* S.C. No. 207/2013 (Karkardooma District Court).

⁵²Relevant here the cases of Soni Sori, who was raped by CRPF Jawans in Maoist-inflicted Chattisgarh, and the rape of Thangjam Manorama by the Armed Forces in Manipur. Both these crimes were extremely brutal and involved not only peno-vaginal penetration but also injury to the genitalia of these women by burning and shooting.

⁵³The Indian Penal Code 1860, s. 377; Consensual homosexual adult relationships were decriminalized in *Navtej Singh Johar v. Union of India* W.P. (Crl.) 76 of 2016 Supreme Court of India.

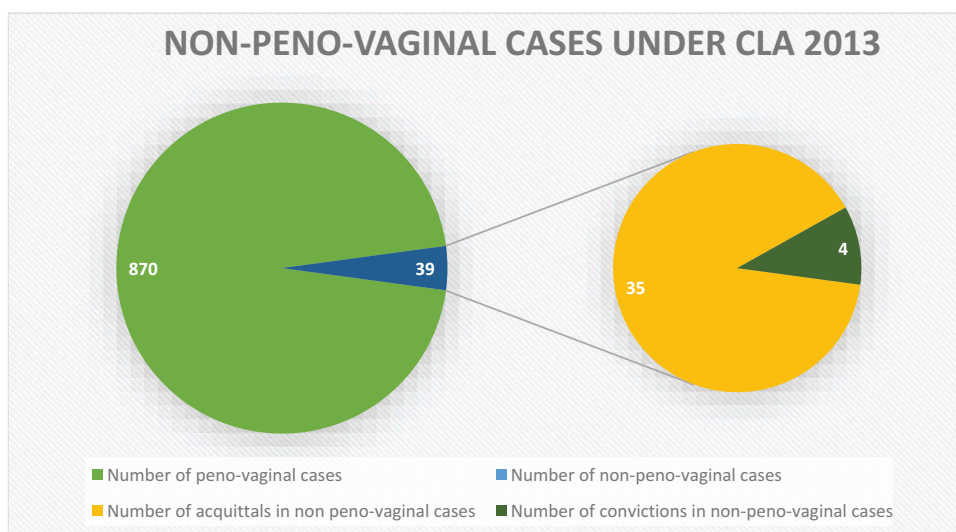


Figure 5. Non-peno-vaginal cases under the expanded definition of rape in the CLA 2013

Interestingly, these cases also included a separate charge under the sodomy provision, implying clearly that “rape” involves peno-vaginal penetration, while some non-peno-vaginal penetrative acts are non-rape charges.

When feminist groups pushed for an expanded definition of rape, they sought to shift legal and societal attitudes towards different forms of sexual abuses directed at women. Recognition of a broad range of non-peno-vaginal penetrative acts as “rape” by the CLA 2013 was, thus, intended to signal that the legal system would not tolerate various forms of sexual violence against women and would in fact, punish them as rape. However, the reality of treatment of non-peno-vaginal rapes under the CLA 2013 is vastly different from this imagination. Such societal attitudes that treat the offence as a less important crime than peno-vaginal rape are also reflected in how legal institutions, including the judiciary, view the problem. Amending the law in such a scenario is likely to have unintended consequences in how these cases are tried. For instance, in one of the first instances of non-peno-vaginal rape prosecutions in Delhi, Mahmood Farooqui, a prominent filmmaker was convicted for committing oral rape upon an American citizen.⁵⁴ His conviction led to a split between various feminist groups, many of whom debated the justness of seven years’ imprisonment for the act.⁵⁵ In the appeal, Farooqui

⁵⁴State of NCT of Delhi v. Mahmood Farooqui, S.C. No. 118/2015 (Saket District Court); This was the only case (mentioned in the data) which resulted in conviction and did not include a charge of peno-vaginal penetration.

⁵⁵Manisha Sethi, ‘Why the Farooqui judgment is deeply flawed’ (Hardnews Media, 23 August 2016) <<http://www.hardnewsmedia.com/2016/08/why-mahmood-farooqui-judgement-deeply-flawed/>> accessed 22 October 2019; Natasha Budhwar, ‘Interview with Flavia Agnes: Can’t Compare Brutal Gang-rape with forced oral sex’ (Outlook, 25 August 2016) <<https://www.outlookindia.com/magazine/story/cant-compare-brutal-gang-rape-with-forced-oral-sex/297766/>> accessed on 22 October 2019; Kalpana Kannabiran, ‘The cure for Moral Panic’ (Outlook, 2 September 2016) <<https://www.outlookindia.com/magazine/story/the-cure-for-moral-panic/297807/>> accessed 22 October 2019; Mihira Sood, ‘Why The Backlash Against the Mahmood Farooqui Judgment is Manipulative and Dangerous’ (Huffington Post, 29 August 2016) <https://www.huffingtonpost.in/mihira-sood/why-the-backlash-against-the-mahmood-farooqui-judgement-is-manipu_a_21461459/> accessed 22 October 2019; Pragya Singh, ‘Thinking out of the Witness Box’ (Outlook 16 September 2016) <<https://www.outlookindia.com/magazine/story/thinking-out-of-the-witness-box/297859/>> accessed 22 October 2019; Krishnadas Rajgopal, ‘Divergent views over judgment in Farooqui

was acquitted by the Delhi High Court, on the basis of a deeply flawed and patriarchal understanding of consent.⁵⁶ In her testimony before the court, the survivor stated that she had said “no” multiple times before and during the act. The Delhi High Court, however, fell back on stereotypes to second-guess the survivor’s testimony, and observed that “instances of woman behavior are not unknown that a feeble no may mean a yes”. The Supreme Court refused to interfere with the High Court’s judgement and dismissed the case *in limine*.⁵⁷ Thus, Farooqui walked free, the victim was discredited by two appellate courts, and the case revealed a split among feminist groups in India that had been invisible in their submissions to the Verma Committee.

In a system where the reporting of peno-vaginal penetrative rapes is low, and where the police often refuse to register rape cases against powerful people,⁵⁸ it is unlikely that cases of non-peno-vaginal rapes would be treated with the same urgency and importance as peno-vaginal rape. The same is true of courts as well. It is extremely unlikely that judges, who imposed less than minimum punishment for peno-vaginal rapes on the basis of “character” and “loose morals” of the prosecutrix, would now convict defendants for non-peno-vaginal rapes carrying seven years’ imprisonment.⁵⁹ Thus, the expanded definition of rape, juxtaposed with a mandatory minimum punishment of seven years’ imprisonment, does not make it conducive to enforce legal sanctions against non-peno-vaginal rapes. The minimal number of cases of non-peno-vaginal rape adjudicated under the CLA 2013, and the frequent resorting to the provision for sodomy to charge non-peno-vaginal penetration, underscores that non-peno-vaginal rapes are not considered “serious enough” by the legal system as well as by the society, thereby preventing its reporting and prosecution.

Analysis and conclusion: implications and lessons of CLA 2013

When the Verma Committee invited suggestions from the public on reforms regarding laws on sexual violence, feminist groups saw it as an opportunity to facilitate the enactment of legal reforms, free from patriarchal stereotypes about women’s sexuality. Yet, as the data above indicate, such stereotypes continue to influence rape adjudication, even after enactment of the CLA 2013. Of course, feminist groups engaging with the Verma Committee were only one set of actors who played a role in the enactment of the CLA 2013 and many suggestions of the Verma Committee, particularly those around social and governance reform, did not find any place in the new law. However, to the limited extent of introduction of a mandatory minimum and using punitive criminal law as a site for messaging around pro-women reform, the feminist groups failed to engage deeply with debates and research on criminal justice and sentencing policy. This section argues that failure to engage sufficiently with issues of criminal justice and sentencing exposed inconsistencies within feminist groups’ own imagination and understanding of

case’ (The Hindu, 26 September 2017), <<https://www.thehindu.com/news/national/divergent-views-over-judgement-in-farooqui-case/article19758420.ece>> accessed 22 October 2019.

⁵⁶ *Mahmood Farooqui v. State of NCT of Delhi*, CrI. App. 944/2016 High Court of Delhi.

⁵⁷ Mehal Jain, ‘SC Rejects Victim’s Plea Against Acquittal Of ‘Peepli Live’ Director Mahmood Farooqui In Rape Case’ (Live Law, 19 January 2018) < <https://www.livelaw.in/sc-rejects-victims-plea-acquittal-peepli-live-director-mahmood-farooqui-rape-case/>> accessed 22 October 2019.

⁵⁸ Nivedita Menon (n 11).

⁵⁹ Mrinal Satish (n 13).

sexual violence, by way of a collapsed continuum as far as punishment for rape was concerned. The CLA 2013, thus, becomes a case on point to demonstrate the unintended consequences of feminist engagement with the state, symptomatic of governance feminism. This, in turn, highlights problems in using criminal law as a site for feminist reform.

Collapse of the continuum

The demand for law reform by feminist groups in India who engaged with the Verma Committee was aimed at the legal recognition and graded criminalization of a range of sexual offences perpetrated against women. This was important because the experience of the feminist groups while working on sexual violence showed that women were sexually harassed, humiliated and brutalized in multiple ways, beyond what was recognized by the law. For example, while the law of rape recognized only penile penetration of the vagina, women were routinely subjected to other kinds of violation, such as the insertion of objects and weapons in their genitalia or the insertion of penis into their mouths.⁶⁰ Limitations of the law, however, meant that these crimes could not be prosecuted as rape, and the only other relevant provision was that of “outraging the modesty of a woman”, which attracted a maximum of two years’ imprisonment.⁶¹ Feminist groups, including actors of the IWM, objected to this because it invoked patriarchal norms of womanhood and observed that in all criminal offences, injury and hurt caused by weapons is considered more grievous and deserving of greater punishment than that caused by limbs. However, this was not true for sexual assault as injury caused by iron rods, bottles and sticks did not even amount to rape.⁶² In the cases of peno-vaginal rape, judicial discretion was often invoked to impose punishment below seven years’ imprisonment based on her past sexual history, acquaintance with the perpetrator, marital status, socio-economic status, and so on.⁶³ Therefore, Indian feminist groups demanded before the Verma Committee for recognition of the perpetration of sexual violence against women on a continuum, graded on a scale of harm and humiliation.⁶⁴ Further, for these feminist groups, setting a mandatory minimum punishment for rape and expanding its definition was necessary in order to signal moving away from a male-centric definition of rape, centred around penile penetration of the vagina.

Indian feminists had struggled for decades to expand the definition of rape to go beyond penile penetration. Such a struggle was based on the radical feminist concept articulated by Catherine A. MacKinnon, who argues that much like heterosexuality, the crime of rape centres on penetration.⁶⁵ According to her, penile penetration of the vagina may be less pivotal to the woman’s sexuality, pleasure or violation, than to male sexuality.⁶⁶ Therefore, the crime of rape, defined as penetration of the vagina with the penis, is hinged on male-centric loss.⁶⁷ For Indian feminist groups as well, a definition of

⁶⁰(n 52).

⁶¹The Indian Penal Code, 1860, s. 354.

⁶²Nivedita Menon (n 11) 109.

⁶³Mrinal Satish (n 13) 61–90.

⁶⁴Responses to J.S. Verma Committee (n 7).

⁶⁵Catherine A. MacKinnon, ‘Feminism, Marxism, Method And The State: Towards A Feminist Jurisprudence’ (1983) *Signs: Journ. of Women in Soc.* 647.

⁶⁶*ibid.*

⁶⁷*ibid.*

rape that hinged on penile penetration of the vagina was reflective of the control men exercised over “their” women.⁶⁸ Indian feminist groups who engaged with the Verma Committee, in seeking to expand the definition of rape, were thus, seeking to define the crime from the point of view of the woman, drawing from their experiences working in sexual violence.

Similarly, the experience of feminist groups with judicial discretion inspired the recommendation for setting a mandatory minimum punishment for rape. This was important since allowing judicial discretion gave room to sexist notions about women and their behaviour at the sentencing stage resulting in perverse outcomes, such as reduced sentences for defendants who raped “loose” or “immoral” women.⁶⁹ Given the massive influence of rape myths and patriarchal stereotypes in legal systems and processes, it was logical for feminist groups to demand such changes.

Yet, using criminal law as a site for feminist legal reform came with unanticipated costs. As findings from rape trials in Delhi between 2013 and 2018 indicate, the CLA 2013 not only failed to rid the system of existing prejudices but actually resulted in undesirable and unwanted consequences. Removing judicial discretion for punishment for rape combined in a grim fashion with patriarchal nature of courts and legal structures in India to result in a reduced rate of conviction in cases of rape, as judges did not convict in cases they felt were not “serious rapes”. The very few cases of non-peno-vaginal rapes adjudicated under the CLA 2013 and the even fewer cases resulting in convictions speak volumes about how societal and judicial attitudes towards rape remain unchanged despite legal reform. Additionally, the nature and kind of rapes adjudicated under CLA 2013 and the broad reasons for acquittals did not change substantially. Similar to the old law, under CLA 2013 too, markers for “genuine” or “serious” rapes were factors such as (un)familiarity of the prosecutrix and the accused, sexual “character and history” of the prosecutrix, her marital and socio-economic status, and so on.⁷⁰ Reforming the law, thus, had little impact in changing the manner in which rape cases are adjudicated in India, and certainly failed to achieve the far-reaching changes that feminist groups had aspired for, at least in the context of rape of adult women.

In her work on governance feminism, Janet Halley observes that feminist engagement with institutions of power has resulted in significant achievements for women across spheres of social and economic life. Governance feminists, she argues, “*have been in some cases highly successful in changing laws, institutions and practices, very often, remarkably, for the better*”.⁷¹ Yet, some initiatives have produced harmful unintended consequences that need to be addressed. The enactment of the CLA 2013, and the data from rape trials in Delhi between 2013 and 2018, is a case in point.

Countering the argument that governance feminists, especially in post-colonial settings like India, are uncritical of their own enterprise, Shruti Iyer notes that the Indian feminists (including the Verma Committee submitters) engage with the state while being mindful of the costs that governance feminism brings with it.⁷² According to her, the

⁶⁸Nivedita Menon (n 11).

⁶⁹Mrinal Satish (n 13).

⁷⁰Susan Estrich (n 43); Arushi Garg (n 31).

⁷¹Janet Halley, ‘Preface: Introducing Governance Feminism’ in Janet Halley and ors. *Governance Feminism: An Introduction*, (University of Minnesota Press 2018).

⁷²Shruti Iyer, ‘Taking a Break from the State: Indian Feminists in the Legal Reform Process’ (2016) 17(2) *Journ. Of Int. Wom. Stud.* 18.

CLA 2013 deliberately omitted some of the most progressive recommendations of feminist groups and the Verma Committee, and allowed for the death penalty, lowered the age at which a juvenile could be tried as an adult, and failed to criminalize marital rape. In spite of this, however, it cannot be ignored that Indian feminist groups appeared uninformed of very important debates around issues of criminal justice and sentencing in their responses to the Verma Committee, and pushed for legal reforms which did not translate into substantial changes on ground.⁷³

The most common feminist demand cutting across different responses to the Verma Committee, was the need to recognize sexual violence as occurring on a continuum and broadening the definition of rape. Once the definition was broadened, however, feminist groups, in their submissions to the Verma Committee, did not seek to grade (different kinds of) rape on a continuum, as they had demanded for all other cases of sexual violence. Thus, penetration of the vagina with a penis warranted the same amount of punishment as non-consensual oral sex or penetration of the anus or urethra with objects or fingers. All acts within the broad definition of rape, except aggravated forms of rape which warranted higher mandatory minimum punishment of 10 years, were now bracketed together as the same with respect to punishment. The continuum theory of sexual violence, that feminist groups had skilfully argued for in their submissions to the Verma Committee, therefore, collapsed in their demand for a mandatory minimum punishment for rape.

Sharon Marcus critiques the collapsed-continuum theory of sexual violence for linking language and rape in a way that can be taken to mean that representations of rape, obscene remarks, threats and other forms of harassment should be considered equivalent to rape, despite being “less harmful” than the offence of rape itself.⁷⁴ Indian feminists, in their demands before the Verma Committee, for recognition of sexual violence as a continuum avoided this pitfall and successfully intervened to enact a law which recognized different sexual offences on a scale of severity. The continuum, however, collapsed, in their case, for different forms of the crime of rape. Although the CLA 2013 prescribes higher punishment of 10 years’ imprisonment for aggravated forms of rape and criminalizes all sex with a woman in custody of a man, this does not take away from the fact that introduction of mandatory minimum punishments club all kinds of rape under that category, be it rape simpliciter, or aggravated forms of rape.⁷⁵ The refusal to engage with the issue of graded punishment for rape left unanswered many questions that arise after the concerns regarding an appropriate definition of rape have been taken care of.

Theoretically, the inconsistencies within the two feminist articulations of sexual violence, i.e. “sexual violence as forming a continuum” and “all rapes are equally harmful”, can be reconciled with the assumption that every rape is harmful enough to warrant a mandatory minimum of seven years’ imprisonment, and the punishment goes up to a maximum of life imprisonment based on the brutality of the assault, the vulnerability of the victim, etc.⁷⁶ The argument, then, is that CLA 2013 leaves room for

⁷³Pratiksha Baxi, ‘Carceral Feminism as Judicial Bias’ (n 11).

⁷⁴Sharon Marcus, ‘Fighting Bodies, Fighting Words’ in Judith Butler (ed) *Feminists Theorize The Political*, (Routledge 1992).

⁷⁵The Indian Penal Code 1860, s. 376(2).

⁷⁶In cases of aggravated forms of rape, the assumption is that all such rapes are serious enough to warrant 10 years’ mandatory minimum punishment.

judicial discretion while deciding between imprisonment of seven years and that for life. However, this argument fails in the face of data on rape adjudication in Delhi between 2013 and 2018, showing a reduced rate of conviction and low prosecution of non-peno vaginal rapes. The fallacy of this argument was also exposed in the aftermath surrounding Farooqui's conviction, which led to a major divide between feminist groups on whether the offence was deserving of seven years' imprisonment, revealing the lack of deliberation of the issue of punishment for rape during the process of enacting the CLA 2013.⁷⁷

Thus, while the CLA 2013, drawing from inputs of Indian feminist groups, deals with the problem of narrow male-centric definition of rape, its broad generalizations regarding punishment reveal a failure, on part of the state as well as the feminist groups, to capture a nuanced understanding of punishment and sentencing. An effective sentencing system, based on proportionality, sets graded punishments for different offences on the basis of severity, while leaving space for exercise of judicial discretion. In this respect, the CLA 2013 failed on the sentencing front by bracketing all kinds of rape in terms of punishment deserved.

Concerns with using criminal law as a site for feminist legal reform

In addition to avoiding important issues of sentencing, Indian feminists who engaged with the Verma Committee also failed to appreciate the realities of the criminal justice system in India, which has a severely disparate impact on the poor, in their submissions to the Verma Committee.⁷⁸ Though denouncing capital punishment, the demand for LWORP and stringent mandatory minimum punishment by feminist actors betrayed a shallow understanding of the discriminatory impact of the criminal justice system. In sexual violence cases, these realities are coupled with sexist, patriarchal attitudes to perpetuate the cycle of marginalization against vulnerable men and women, as is evident from the nature of rape cases adjudicated under the CLA 2013 and the older law on rape and the basis of acquittals. Critiques of carceral feminism in the American context have opposed the use of law in a way that is blind to the targeting, policing and criminalizing of disenfranchised populations. They oppose carceral institutions that imprison disproportionately marginalized, often racial minorities, adversely affecting the families of lives of women in these communities.⁷⁹ Marginalized women in such communities are especially left more vulnerable to violence at the hands of the state – in prisons and inflicted by the police, and often robbed of the control over their own lives, which is transferred to state institutions.⁸⁰

Feminist groups in India have also been aware of the limitations of the law in bringing about social change, as legal institutions have themselves created and contributed to the subordination of women.⁸¹ However, this has not motivated them to refrain from

⁷⁷(n 55).

⁷⁸National Crime Records Bureau, Prison Statistics India (2016) <<http://ncrb.gov.in/StatPublications/PSI/Prison2016/PrisonStat2016.htm>> accessed 22 October 2019; Anup Surendranath and Shreya Rastogi, *Death Penalty India Report* (National Law University Delhi 2016).

⁷⁹Aya Gruber, 'Rape, Feminism and the War on Crime', (2009) 84(4) Wash. Law Rev. 581; Elizabeth Bernstein, 'Carceral Politics as Gender Justice?: The 'Traffic in Women' and Neoliberal Circuits of Crime, Sex, and Rights' in David M. Halperin and Trevor Hoppe (eds) *The War On Sex* (Duke University Press 2017) 297–322.

⁸⁰Jeannie Suk Gersen, 'Criminal Law Comes Home', (2006) 116 Yale Law Journ. 2.

⁸¹Brenda Cossman And Ratna Kapur, *Subversive Sites: Feminist Engagement With Law In India* (Sage Publication, 1996).

seeking legal reforms in the arena of criminal law. Even within this framework, their focus has been on ensuring prosecution for sexual offences and eliminating sexist prejudices from investigation and trial proceedings. This has therefore resulted in little normative discussion on the role of carceral punishment for sexual offences. Conversations on alternative, non-carceral responses to sexual violence, have largely been missing from the debate, with the exception of some discussion on survivor-centric approaches to sexual crimes.⁸² Thus, when state authorities respond to populist demands by enacting harsh punishments for sexual offences, feminist groups are unable to contribute to the discourse beyond simply denouncing the punitive developments.

While the need to critique the over-punitive approach of the state cannot be over-emphasized, feminist groups in India need to go beyond that and develop their own feminist discourse on appropriate graded punishments for different crimes. Moreover, the failure of the CLA 2013 in realizing the feminist dream of ridding rape law of sexist biases and presumptions raises concerns about using criminal law as a site for feminist reform. Invoking Upendra Baxi's argument that legal reform invariably leads to some form of institutional reform, Prabha Kotiswaran argues that this may not be true in the Indian context, given the poor implementation of laws and large-scale corruption in the post-colonial context.⁸³ The CLA 2013 is a case on point for this argument. This reinforces not only the need to challenge the increasingly punitive approach adopted by the state in responding to sexual violence, but also to examine this as an important checkpoint for a re-assessment of feminist goals in this area.

Acknowledgments

The author is a Research Associate at Project 39A, National Law University, Delhi. She completed her BA.LLB (Hons.) from National Law University, Odisha (2014), and LL.M. from Harvard Law School (2019). The paper forms part of the author's LL.M. thesis in May 2019. The author is thankful to Professor Janet Halley, Royall Professor of Law at Harvard Law School for her invaluable supervision throughout the course of writing the thesis. Many thanks are due to Jane Bestor, Prabha Kotiswaran and Mrinal Satish for their helpful feedback. Similar thanks are also due to colleagues at Project 39A, particularly Himanshu Agarwal and Gale Andrew, for crucial suggestions on structuring and presenting the data in this paper. The author is also thankful to the participants at the Young Scholars Workshop (February 2020) at Humboldt University, Berlin, as well as the anonymous reviewers at the Indian Law Review, for their critical feedback in improving this paper. All errors are the author's own.

Disclosure statement

No potential conflict of interest was reported by the author.

⁸² Anupama Katakam, Interview with Flavia Agnes - For a victim-centric approach (Frontline, 31 October 2014) <<https://frontline.thehindu.com/social-issues/for-a-victimcentric-approach/article6500057.ece>> accessed 22 October 2019.

⁸³ Prabha Kotiswaran, (n 5).