

**FEMINISTS SAY 'NO' TO RECENT RAPE JUDGEMENTS:
AND THERE IS NOTHING FEEBLE ABOUT IT!**

30th September 2017

In the wake of the protests following the 2012 Delhi gang rape, India had witnessed a welcome sharpening of understanding around sexual violence and consent. Legal reform recognized the principle of affirmative consent – i.e, the principle that consent must be nothing short of an unequivocal positive ‘Yes’ (whether through words or gestures) to engage in a sexual act. In public discourse and popular understanding too, the understanding that ‘No means No’ had been strengthened. Recent Court verdicts and orders have however dealt a deep blow to this hard-won and progressive advance.

As women and women’s groups with a long history of working on issues of gender justice and with survivors of sexual violence, we are deeply disturbed by the 13th September 2017 bail order of the Punjab and Haryana High Court which cited the victim’s “experimentation in sexual encounters”, “promiscuous attitude and voyeuristic mind” as part of its legal reasoning for granting bail to three men convicted in the Jindal Law School gang rape case. In so doing, the Punjab and Haryana HC has strengthened the dangerously patriarchal notion that rape is not rape when the woman is “promiscuous”, and that “promiscuous” women invite rape since their “promiscuity” can be read as consent. It also stands in clear violation of the Indian Evidence Act that specifically prohibits referencing the victim’s sexual history or character in adjudication of cases of sexual assault.

Another equally disturbing instance is the 25th September 2017 verdict of the Delhi HC overturning the Trial Court conviction of Mahmood Farooqui for rape. This verdict takes the legal and social understanding of consent back several decades by claiming that “instances of a woman’s behaviour are not unknown that a feeble ‘no’ may mean ‘yes’.” This verdict also formulates different legal standards required for deciphering consent in cases involving “conservative” women and those involving “intellectually/academically proficient” women for whom “equality is a buzzword.” It seems that for the Delhi HC, it is the woman's character (her being conservative or modern, educated or illiterate), not the man's failure to respect a No, which carries weight in deciding an appeal against a rape conviction.

The verdict concludes that the victim is not deserving of justice because the accused failed to accept her 'No' (despite clear evidence of her repeatedly communicating the same to him). The Delhi HC judgment, while acknowledging that the law defines consent as "affirmative consent", sets aside this understanding and coins a new principle of "affirmative denial" for "intellectually/academically proficient" and non-conservative women. While the law clearly states that absence of physical resistance will not imply consent, the verdict suggests that non-conservative and intellectual women must not only communicate their lack of consent but also bear the burden of making sure the man understands that when she says no she really means no. When a categorical no is not considered sufficient to communicate lack of consent, is it only signs of brutality and physical injury which must be accepted as "proof" that the woman did not consent? This effectively opens the door for acquittal in all rape cases where the victim has not also been severely physically injured.

It must be underlined that throughout the trial, the defence had maintained and led evidence to show that no sexual act at all took place on that day and that the complainant was not truthful. The High Court confirmed the trial court's finding that the complainant's testimony was honest and credible and found her to be a 'sterling witness'. However the HC acquitted the Accused, arguing on his behalf that he probably had not understood the 'No' because sometimes, due to the "gender binary", women's 'No's' may be "feeble". Such reasoning also disregards the fact that the Complainant in this case was never cross-examined on her description of rape, or whether her 'No' was misunderstood as a 'Yes', and neither did the Accused ever state that he mistakenly assumed consent.

Similarly, the High Court judgment gives considerable importance to whether a person with a bi-polar condition can comprehend lack of consent, despite the fact that the defence produced no medical evidence to show that the Accused was diagnosed with bi-polar disorder, nor argued that this medical condition can impair comprehension.

The verdict sets a dangerous precedent, both legally and socially. In law, it opens the door for every rape accused to claim that he had mistakenly read the woman's No as a Yes. It weakens the principle upheld by the 2013 amendment in the rape law that consent for sexual activity is not a woman's default setting;

that nothing less than clear “Yes” on the part of the woman can count as consent; and that the mere absence of a “No” does not mean “Yes”. **It sets an unfair and impossible burden on the victim-complainant – whereby she must not only prove she did not consent, but also that her lack of consent was not misunderstood as consent by the accused!**

Moreover, the verdict re-affirms the entrenched cultural practice of ignoring a woman’s No and deliberately assuming that No actually means Yes. It sends out a message that the responsibility for understanding and respecting a No does not lie with men; rather the onus is on women to make sure their No is understood! It sends out a message that even if a woman fears for her life, she must ensure she sustains injuries so that her violation is recognised as rape.

It sends out a message that even when a woman has categorically communicated lack of consent, the Judiciary is free to displace this with its own assumptions of how women actually behave. It sends out a message that a woman who asserts her sexual autonomy will either be told that when she said ‘No’ she actually meant ‘Yes’ and that if she ever says ‘Yes’ to sex she should be prepared for her future ‘No’s’ to be disregarded, both by the perpetrator as well as the legal system.

Both the Punjab and Haryana HC bail order and Delhi HC acquittal verdict protect men who “assume consent” of women who are educated or not “conservative”, and enable men to deliberately misread consent when none exists. These verdicts come at a time when there is an escalation of the backlash against any effort to displace the entrenched prejudice and bias which regulates women’s access to justice. It must also be understood in the context of the overt and covert social backlash against women laying claim to their citizenship, whether in terms of accessing public spaces, education, equal opportunities at the workplace, the right to redressal for violence, or the right to exercise their choice in intimate relationships, marriage and religious practice.

We, the undersigned individuals and representatives of women’s movement organisations, condemn the ongoing politics of backlash against women in law, society and polity today and call for introspection from all concerned on how gender equality for all survivors of rape is made a reality.

Organisations:

1. Nirantar Trust
2. Padmini Kumar, Joint Women's Programme
3. Abir Neogy, Koel Chatterjee, Paromita Chowdhury for Das Theke Das Hazar
4. All India Network of Individuals and NGOs working with National and State Human Rights Institutions
5. Amita De, Shramjivi Mahila Samity
6. Anita Das, All India Women Hawker Federation
7. Annie D Raja, National Federation of Indian Women
8. Anuradha Banerji and Vani Subramanian, Saheli Women's Resource Centre
9. Anuradha Kapoor, Swayam, Kolkata
10. Arundathi Vishwanath, Sambhavnaa Institute, Palampur
11. Arundhati Dhuru and Meera Sanghamitra, National Alliance of People's Movements (NAPM)
12. Bebaak Collective
13. Bittu Karthik and Nisha Biswas, Women against Sexual Violence and State Repression (WSS)
14. Bulbul Das, Delhi University Women's Association
15. Darshana Mitra, Alternative Law Forum
16. Deepa V, Sama
17. Ekabali Ghosh for Women Against Sexual Harassment
18. Forum Against Oppression of Women, Mumbai
19. Geetha Nambisan, Jagori Delhi
20. Henri Tiphagne, Executive Director, People's Watch; National Working Secretary, Human Rights Defenders' Alert – India; National Working Secretary, All India Network of Individuals and NGOs working with National and State Human Rights Institutions
21. Human Rights Defenders' Alert – India
22. Jasmeen Patheja, Blank Noise
23. Joyanti Sen, Sachetana
24. Kavita Krishnan, All India Progressive Women's Association (AIPWA)
25. Kavita Srivastava, People's Union for Civil Liberties (PUCL)
26. LABIA – A Queer Feminist LBT Collective
27. Maimoona Mollah and Asha Sharma, Janwadi Mahila Samiti (JMS), Delhi
28. Malini Bhattacharya, Mariam Dhawale and Kirti Singh, All India Democratic Women's Association (AIDWA)
29. Manak Matiyani, The YP Foundation
30. Manshi Asher, Himdhara Collective
31. Maya Gaurav and Aarthi Pai, SANGRAM
32. Maya John, Convener, Centre for Struggling Women (CSW)
33. Meena Seshu, Veshya Anyay Mukti Parishad (VAMP)
34. Nandita Shah, Co-Director, Akshara
35. Ovais Sultan Khan, Act Now for Harmony & Democracy (ANHAD)

36. Poonam Kaushik, Pragatisheel Mahila Sangathan, Delhi
37. Rajesh Srinivas, Sangama
38. Rajni Tilak, Rashtriya Dalit Mahila Andolan
39. Sappho for Equality
40. The Orinam Collective, Chennai
41. Urvashi Butalia, Zubaan Publishers
42. Volga, Kalpana Kannabiran, Vasant Kannabiran, Stanley Thangaraj for Asmita, Hyderabad
43. Yasmeen, Awaaz e Niswan
44. Zakia Soman, Bharatiya Muslim Mahila Andolan (BMMA)
45. Nimisha, Olakh
46. Masooma Ranalvi for WeSpeakOut
47. Forum to Engage Men (FEM)
48. Anurita Pathak Hazarika, North East Network

Individuals:

- | | |
|---|--|
| 1. A.S.Vasanth Kumari | 24. Brandt D'Mello, Mumbai |
| 2. Aakanksha Singh, Mumbai | 25. Chaitali |
| 3. Abha Bhairya | 26. Debalina |
| 4. Abhisikta Dasgupta | 27. Debasri Basu |
| 5. Achin Vanaik | 28. Devaki Jain |
| 6. Aditi Joshi | 29. Dhivya |
| 7. Akhila Sivadas | 30. Dr Ajita, Dalit Activist/ Feminist, Delhi |
| 8. Akkai Padmashali | 31. Dr Anjali Mehta, Ophthalmologist |
| 9. Amita Pitre | 32. Dr Chayanika Shah |
| 10. Amrita Nandy | 33. Dr Mary John |
| 11. Anand Grover | 34. Dr Mitu Khurana |
| 12. Anita Singh | 35. Dr Mohan Rao |
| 13. Anu Priya | 36. Dr Nivedita Menon |
| 14. Anubha Rastogi, advocate, Mumbai | 37. Dr Rukmini Sen, Ambedkar University, Delhi |
| 15. Anupama Potluri, Assistant Professor, Hyderabad | 38. Dr Sabina Pillai, Delhi University |
| 16. Anupriya | 39. Dr Uma Chakravarti |
| 17. Anuradha Prasad | 40. Dr. Ajita Rao, Dalit Activist/Feminist |
| 18. Archana Dwivedi | 41. Dr. L. Ramakrishnan, Chennai |
| 19. Avipsha Das | 42. Dr. Meena Gopal, Mumbai |
| 20. Ayesha Kidwai | 43. Dyuti |
| 21. Beulah Shekhar | 44. Ekta Oza |
| 22. Bhaswati Mukherjee, Indian Foreign Service | 45. Enakshi Ganguly Thukral |
| 23. Bishakha Bhanja | 46. Fathayya Khan |

47. Freny Manecksha Independent journalist
48. Gauri Shringarpure
49. Gautam Bhan
50. Geeta Menon
51. Geeta Seshu, Independent Journalist, Mumbai
52. Geetha Narayanan
53. Hasina Khan
54. Indira C
55. Indira Jaising
56. Jagdeep Chhokar
57. Janaki Abraham
58. Janaki Nair
59. Jarjum Ete
60. Jaya Vindhyala, advocate, Hyderabad
61. Jhuma Sen
62. Jhumy Goswami
63. Jinee Lokaneeta
64. Joginder Panghaal
65. Juhi Jain
66. Kalyani Menon-Sen
67. Kamayani Bali Mahabal, Feminist, Mumbai
68. Kamla Bhasin
69. Karen Gabriel, Associate Professor, Delhi University
70. Karuna D. W.
71. Kavita Muktidoot Kowshik
72. Ketki Ranade
73. Koyel Ghosh
74. Kritika A
75. Lalita Ramdas
76. Laxmi Murthy
77. Madhu Bhushan
78. Madhu Joshi
79. Mala Bhandari
80. Mala Bhandari, Sadrag
81. Malini Subramaniam, Independent Journalist
82. Mansi Asher
83. Meena Seshu
84. Minakshi Sanyal
85. Mohini Giri
86. Mridu Kamal
87. Nafisa Barot
88. Nandini Rao
89. Nandita Gandhi, activist and researcher, Mumbai
90. Nandita Narain
91. Nastasia Paul-Gera
92. Nayana Chowdhury
93. Neera Chandhoke
94. Neerja Malik
95. Neety Sahu
96. Neha Dixit
97. Niharika Banerjee
98. Nikita Agrawal
99. Nikita Azad
100. Nikita Sonavane
101. Nisha Biswas
102. Nitika Pant
103. Noor Zaheer
104. Nowruz, Delhi
105. Padmini Kumar, Joint Women's Programme
106. Pamela Philipose
107. Paramita Banerjee
108. Poushali Basak, Mumbai
109. Pratyay Malakar, Chennai
110. Priya Das
111. Priya Pillai
112. Punam Sawhney
113. Purnima
114. Pushpa Achanta
115. Pyoli, advocate, Supreme Court
116. Rachana Mudraboyina, Telangana Hijra Transgender Samiti
117. Radhika Khajuria
118. Raj Merchant
119. Rajeswari Gorana
120. Rakhi Sehgal
121. Ranjita Biswas
122. Rebecca John
123. Rinchin
124. Ritu Menon
125. Sandhya Gokhale, Mumbai
126. Sanjukta Guha Thakurta

- 127.Saptarshi Mandal
128.Satish Kumar Singh
129.Sayan Bhattacharya, PhD student
130.Seema Azad
131.Seema Azad
132.Seema Baquer
133.Seema Srivastava Sreeniwas
134.Shabnam Hashmi
135.Shalini Gera
136.Shals Mahajan
137.Sharmistha Choudhury, West Bengal
138.Shobha Raghuram
139.Shoma Sen
140.Shraddha Chatterjee
141.Shreya Banerjee
142.Shruti Chakravarty
143.Shweta Tripathi
144.Smita Bajpai
145.Smriti Nevatia
146.Soma Marik
147.Somnath Mukherjee
148.Sophia Khan
149.Srabasti Majumdar
150.Sriparna Ganguly Chaudhuri
151.Subhagata Ghosh
152.Sumita
153.Suneeta Dhar
154.Svati Shah
155.Swarna Rajagopalan
156.Tashi Choedup,Bodhgaya
157.Usha Ramanathan
158.Vanessa Chishti
159.Vasanth Kumari
160.Vimal Thorat
161.Vimochana
162.Vyjayanti Vasanta Mogli
163.Yasmeen, Aawaaz-e-Niswaan
164.Zarina Bhatt
165.Zulekha Jabin
166.Dr. Shivani Nag (Ambedkar University
Delhi)
167.Ritu Dewan
168.Ujwala Kadrekar
169.Dr.Shilpa Phadke
170.Nazia Akhtar
171.Lalita Ramdas
172.Brinda Bose
173.Radhika Desai
174.Svati Joshi
175.Panchali Ray
176.Nilanju Dutta