

POSTCOLONIAL EROTIC DISRUPTIONS: LEGAL NARRATIVES OF CULTURE, SEX, AND NATION IN INDIA

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We always knew that the dismantling of the colonial paradigm would release strange demons from the deep, and that these monsters might come trailing all sorts of subterranean material. Still, the awkward twists and turns, leaps and reversals in the ways the argument is being conducted should alert us to the sleep of reason that is beyond or after Reason, the way desire plays across power and knowledge in the dangerous enterprise of thinking at or beyond the limit.¹

With the familial and domestic space of the nation as imagined community, non-heteronormative sexuality is either criminalized, or disavowed and elided; it is seen both as a threat to national integrity and as perpetually outside the boundaries of nation, home and, family.²

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¹ Stuart Hall, When Was "The Post-Colonial"? *Thinking at the Limit in The Post-Colonial Question: Common Skies, Divided Horizons* 259 (Iain Chambers and Lidia Curti, eds., 1996).

² M. Jacqui Alexander, Erotic Autonomy as a Politics of Decolonization: An Anatomy of State Practice in the Bahamas Tourist Economy in Feminist Genealogies, Colonial Legacies, Democratic Futures 97 (M. Jacqui Alexander and Chander Mohanty, eds.).

I. INTRODUCTION

In a recent diasporic production called “Fire,” the film’s director Deepa Mehta represents the dilemma of culture and authenticity that I seek to voice through this paper. The story involves the attraction between two rather stunningly beautiful women, Radha and Sita, who live together in a joint family household ruled by the bell of their mute mother-in-law. Their husbands are involved in other pursuits— whether it be celibacy for the purpose of finding spiritual salvation, or a sexual relationship with another woman who happens to be Chinese. Radha and Sita, whose names are the repositories of Indian cultural values in ancient texts and scriptures, are reimagined in the contemporary moment to transgress nearly every sexual, familial and cultural norm that constitutes India as it is imagined. The two women’s appropriation of rituals such as *khurvachauth*, a fast kept by wives to secure the longevity of their husbands, constitutes a celebratory moment when they trespass into an “unacceptable” sexual space. This moment culminates in what one reviewer curiously described as “the Indian lesbian scene.” But the women are not damned into the sexual exile of a “decadent West.” Instead, they are legitimated through another cultural move, the testing of a woman’s purity through the *angnipariksha*, the Fire that redeemed the original Sita from the wrath and condemnation of her husband Lord Ram and her community. Culture is invoked to counter culture. And this is where my story begins. This article is located on the precipice of desire and subversion. It is a story about normative sexuality in India and the ways in which it is inbred with an exclusionary narrative about culture, a narrative that is Hindu, unitary and fixed. It is also a story about how sexual speech and the performance of the sexual subaltern in law can serve as transgressive spaces of desire and pleasure. I examine specific legal controversies in the area of sexual speech, and the legal rights of the sexual subaltern, namely sex workers and gays and lesbians. These legal stories about sexuality are crossbred with stories about culture, producing their own hybridized offspring. I examine the spaces created by hybrid fantasies in law and how these spaces unhinge stoic and monotonous tales about sexuality and culture, and challenge dominant sexual ideology and exclusionary stories about culture.

My key concern is to look at the multiple ways in which culture is deployed in contemporary legal controversies about sex and sexuality in India. I examine the central place of culture in discourses on sexuality. I discuss law’s role in simultaneously reinforcing an essentialist story about culture as well as providing space for resisting this construction. I examine how this cultural move is being used to delegitimize sexual practices and

activities by casting them as foreign and contaminating. I also discuss how cultural hybridity is deployed through strategic essentialism to counter this authentication of Indian cultural values, a move that is ultimately intended to expose the fluidity of culture and Indian cultural values. I look at some of the limitations strategic essentialism poses for the sexual subject, in particular, the sexual subaltern in a postcolonial context.

There are several concerns that bring me to this project. The first is my own subject location. As a postcolonial feminist intellectual in law living and working in the context of India, I am immediately presumed to be committed to Third World Nationalist causes and secondly, faithful to native cultural traditions. But, I am also a cosmopolitan and a subaltern sexual subject, and these positions imply acceptance as well as rejection of the native in favor of the Western, as having forsaken my tribe for the sake of the self. In part, it is my own very complex location and the search for the space between the authentic subject and the native informant that provokes my engagement in the subject of postcolonialism, law and sexuality.

Secondly, the political concern that brings me to this project is to create a space for marginalized sexual expression and sexualities by locating them in the historical past while simultaneously challenging and subverting dominant sexual ideology. I want to navigate the possibility of speaking about and representing sex and sexuality in a way that does not set it up in opposition to culture. I need to negotiate some complex postures to ensure that I can participate in culture in a way that challenges cultural orthodoxy, without falling over and crumbling into an essentialist heap. I attempt to create a space for a broader range of sexualities through the retelling of the past, while at the same time, avoiding cast-iron representations through this retelling.

I must confess that the pursuit of a politics of pleasure also compels me towards this project. I seek to explore why a political project of desire is important in a postcolonial context and how can desire can be theorized and reclaimed in a postcolonial context. Why should we, and how can we, disrupt the script that represents women in a so-called developing context as victims constantly in need of rescue while rehabilitating and rewriting a script of women who are also interested in what lies behind Madhuri's blouse³, under Chughtai's *Lihaaf*⁴ (The Quilt) or between the sheets in the

³ In 1993, the hit film song and dance number, "*Choli Ke Peechey Kya Hai?*" ("*What lies behind the blouse?*"), from the Hindi commercial film *Khalnayak*, was the subject of a legal challenge brought by a supporter of the Bhartiya Janata Party, the Hindu Nationalist party that has recently formed the government, on the grounds that it was obscene. The case was dismissed by the

Kama Sutra condom ads?⁵ The current literature on women in India, outside of our own context, is largely focused on issues such as dowry murders or *satis*, poverty and population. Uma Narayan points to the need to think about “(1) the kinds of Third-World Women’s issues that cross Western borders more frequently than others; and about (2) the effects of such ‘editing’ and the ‘reframing’ such issues undergo when they do cross borders.”⁶ And within the context of India, the ascendancy of the Hindu Right⁷ has accentuated my interest and commitment to a project of desire as an important political goal.⁸

trial court and, on appeal, by the Delhi High Court. See *infra* at 11. See more generally, Shohini Ghosh, The Troubled Existence of Sex and Sexuality: Feminist Engagements with Censorship, in Image Journeys 233 (Melissa Butcher & Christianne Brossius eds., 1999).

⁴ Ismat Chughtai’s short story, *The Quilt*, was charged in 1942 as being obscene as it depicted the erotic relationship between a Muslim housewife and her maidservant. The charges were dismissed on the grounds that no four-letter words were used in the work. Ismat Chughtai, The Quilt and Other Short Stories 7-19 (Tahira Naquvi & Syeda S. Hameed, trans., 1990).

⁵ Sushma Swaraj, the Information and Broadcasting Minister at the time, declared that condom ads should not be explicit and anything suggesting activity between the sheets be prohibited. *Kama Sutra* is the brand name of a condom and its advertisements have been the subject of legal and public controversy in India for a number of years. Sushma Swaraj, AIDS Campaign Must Advocate Sex Only with Life Partner, Not Just Safe Sex, (April 11, 2001) <<http://www.the-week.com/98may17/cover.htm>>; see also Times of India, April 18, 1998, at 3.

⁶ Uma Narayan, Dislocating Cultures: Identities, Traditions, and Third World Feminism 100 (1997).

⁷ See generally Brenda Cossman & Ratna Kapur, Secularism’s Last Sigh? Hindutva and the (Mis)rule of Law (1999); and Brenda Cossman & Ratna Kapur, Secularism’s Last Sigh?: The Hindu Right, the Courts, and India’s Struggle for Democracy, 38 Harv. Int’l. L.J. 113 (1997).

⁸ A caveat is necessary. Through this paper I am constantly addressing the problem of positionality. “I” enter each story in a different disguise, enacting a different performance. My multiple subjectivities weave their way through the tapestry of this paper. I work with the Center for Feminist Legal Research, which together with others, has participated in the debates on culture and sexuality, in areas such as sex work, sexual speech and sexual identity. These contestations have taken the form of litigation, law reform proposals, legal and popular writings. I am the subject of the many different stories that I relate and am simultaneously objectified through my own analysis. I am a spectator of the cultural representations

II. NARRATIVES OF CULTURE, SEX, NATION

Hysteria about culture is sweeping the country. Everywhere, cries of Indian cultural values being in danger are heard. And the threat, the risk, the enemy, time and again, appears to be sex and sexuality. The legal contest over the screening of the *Bandit Queen* in India, convulsions around the holding of the Miss World Beauty pageant in India in November 1996, outcries over satellite broadcasting, and protests over the emerging visibility of sexual subalterns all reflect a growing unease with the increasing publicity of sex and sexuality.⁹

All of these reactions regard sex as something that threaten Indian cultural values, the Indian way of life, the very existence of the Indian nation. In order to understand these contemporary cultural controversies, it is necessary to understand something about the relationship between culture and sexuality in the story of the Indian nation – a relationship that is being disrupted by the newly emerging sexual subalterns as well as the assertion of sexual speech. The current moral paroxysms around culture must be seen in the wider context of the relationship between culture and sex negotiated in the nineteenth century. In the late nineteenth century, Hindu nationalists and revivalists reconstituted the Home – along with sex and sexuality – as a “pure” space of Indian culture, uncontaminated by the colonial encounter.

Partha Chatterjee has argued that as there were no public spaces or institutions available to nationalists for constructing a national culture, the modern nation was fashioned in the autonomous private domain of culture.¹⁰ The “official” culture of Indian middle class nationalism was elaborated in the private domain – the Home – which had important implications on the role of sexuality in nationalist discourse. The Home as the repository of national identity had to be protected from colonial intrusions by women, using their virtues of “chastity, self-sacrifice, submission, devotion, kindness, patience and the labors of love.”¹¹ But the

framed within a nationalist discourse, and a subversive participant in the enactment of the script.

⁹ Ratna Kapur, *The Profanity of Prudery: The Moral Face of Obscenity Law in India*, 8 *Women: A Cultural Review* 293-302 (1997).

¹⁰ Partha Chatterjee, *The Nationalist Resolution of the Women’s Question*, in *Recasting Women: Essays in Colonial History* 233, 236 (Kum Kum Sanghari & Sudesh Vaid, eds., 1989).

¹¹ *Id.* at 247. Chatterjee links this transformation of the woman through nationalist ideology with the disappearance of social reform in the late nineteenth

nation entrenched in a respectable sexuality was not just the product of official India nationalism. As Tanika Sarkar has argued, the reconstitution of the norms of elite sexuality in India were also a product of the dynamics of orthodox and traditional social forces in the consolidation of elite hegemony in India.¹²

Similarly, Lata Mani has examined how the *Sati* debate earlier in the nineteenth century set the discursive stage on which nationalists later in the century performed the gender and sexuality script, through the intertwining of sexuality and nationalism.¹³ She argues that the early nineteenth century debate between social reformers and conservatives over the legitimacy of *Sati* in Indian culture was not about the rights of women but a debate over tradition. It was a debate through which social reformers tried to reform Indian culture in order to undermine the legitimacy of Britain's rule while the conservatives took the position that the colonial power had no role to play in the sphere of tradition and culture. Women served as the site for the re-articulation of tradition and culture.

The works of Partha Chatterjee, Tanika Sarkar, and Lata Mani on women and nationalism help us to understand the ways in which culture and sexuality were reshaped and reconstituted through the colonial encounter.¹⁴ Women's sexual purity, confined to and safeguarded within

century. The nationalists of that period were completely opposed to social reform as it would open the door to the colonial power to act in the domain where the nationalists regarded themselves as sovereign. Thus, the issue of female emancipation disappeared in the late nineteenth century precisely because of the refusal on the part of nationalists to allow any political negotiation of the women's question with the colonial power. The lives of women during this period had already changed rapidly, but in a manner that was consistent with the terms of nationalist ideology. *Id.* at 250.

¹² See Tanika Sarkar, Colonial Lawmaking and Lives/Deaths of Indian Women: Different Readings of Law and Community, in Feminist Terrains In Legal Domains: Interdisciplinary Essays on Woman and Law 210-238 (Ratna Kapur, ed., 1996). Sarkar argues, in contrast to Chatterjee, that the home was also a highly contested space, and women were not simply the preservers of cultural identity. The age of consent controversies gave rise to a plethora of medical and administrative literature, which revealed the extent of violence experienced by girls married off at the age of puberty.

¹³ Lata Mani, Contentious Traditions: The Debate on Sati in Colonial India, in Recasting Women: Essays in Colonial History 88 (Kum Kum Sanghari & Sudesh Vaid, eds., 1989).

¹⁴ See Gayatri Gopinath, Nostalgia, Desire, Diaspora: South Asian Sexualities in Motion, in Positions: East Asia Cultures Critiques, (Elaine Kim &

the home and representing in turn the purity of Indian culture, was a constituting feature in the emergence of the Indian nation. Paradoxically, just as the emerging Indian nationalist bore the mark of Western conceptions of nationalism, so too did the reconstituted space of Indian sexuality bear more than a slight resemblance to Victorian sexuality. The idea of sex and sexuality as a dangerous corrupting force, to be carefully contained at all costs within family and marriage, was as Victorian as it was Indian. But, within the emerging fantasy of the nation, the chastity and purity of Indian women, by which this dangerous and contaminating force was controlled, came to represent not only the purity of Indian culture but also its superiority to the culture of the Empire.

This story of nation, culture, and sexuality remains as germane in the current moment as it was in the nineteenth century. The suturing of culture and sexuality in the fantasy of the nation continues to set the discursive stage on which the emerging debates on sex and sexuality are erupting. New sexual images and sexual subalterns are disrupting the script. They are challenging the underlying assumptions about sex and sexuality. They are challenging what has become over the years a naturalized and universalized set of ideas about sex. The features of this dominant understanding of sexuality have been discussed in the work of Gayle Rubin.¹⁵ In this understanding, sex is a natural force and something that is sinful and dangerous. And it is something that will be subjected to unduly harsh penalties, unless it falls within the parameters of normative sexuality, which in its most pure form is heterosexual, marital, monogamous, reproductive and non-commercial. Normative sexuality is accorded the maximum legal and social benefits while practices that fall outside of this dominant sexual ideology, such as sodomy or commercial sex work, bear the greatest social and legal stigma.¹⁶ Border crossings between what is described as “good” sex and “bad” sex take place from time to time. But the crossing of really “bad” erotic practices into moral and legal acceptability is feared and resisted.¹⁷

Lisa Lowe, eds., 1997); *see also* Sarkar, *supra* note 10.

¹⁵ *See* Gayle Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, in Pleasure and Danger: Exploring Female Sexuality 267 (Carole S. Vance, ed., 1992).

¹⁶ *See, e.g.*, Section 377 of the Indian Penal Code (1860), which provides a minimum penalty of ten years imprisonment for sodomy.

¹⁷ *See* Rubin, *supra* note 13 at 283. *See also* Frank Valdes, who argues how in the United States only one form of desire, “cross-sex desire,” is permitted to be expressed openly and protected constitutionally. This draws attention to “the

The sexual subalterns are challenging these ideas about sex and sexuality and in turn threatening the purity of the Indian nation. The challenge is not altogether new. In the nineteenth century, the widow challenged normative sexuality; that is, she challenged the heterosexual, marital good sex category through the assertion of her right to remarry. The contemporary sexual subaltern similarly threatens to further breach the boundary between good sex and bad sex, to speak the language of variation, and challenge the hierarchy of sexually disdainful conduct that is integral to dominant sexual ideology as described by Rubin. These challenges are taking place within a rapidly changing political context. The past decade has witnessed the aggressive assertion of neo-nationalism, personified in the emergence of the Hindu nationalist party, which has recently formed the government at the national level.

Yet there is something categorically different about the new issues. The contemporary controversies pose explicit challenges to the idea that sex is a negative, contaminating and corrupting force. Part of the perceived threat to Indian cultural values is coming from the assertion of sex itself as a dynamic and affirming experience, which has led to fears that the very fabric of Indian culture and ethos is under threat of erosion, if not collapse. The unleashing of sexual speech and expression from its negative rhetoric to an assertion of sex as a right and an affirmative experience is the explicit tension that characterizes the contemporary moment.

This sexual challenge is simultaneously a cultural challenge. The challenge to dominant notions of sex and sexuality is received within the narrative of nation, as a fundamental threat to Indian cultural values. Because of the particular way in which sexuality and culture were sutured together, the new sexual subalterns and sexual images are erupting as cultural controversies. New popular Hindi film songs are being castigated for being vulgar and against Indian cultural values and sexual subalterns, such as gays and lesbians, and are being targeted as Western contaminants threatening to erode Indian culture and ethos.

But the new sexual images and newly radicalized sexual subalterns are not only disrupting the cultural script. As I will argue, they are simultaneously attempting to rewrite the script; they are not simply abandoning the terrain of Indian cultural values, but rather, trying to write themselves into the script. Both sides of the debate are draping themselves

ultimate target of legal regulation of same-sex sexuality – the social expression of non-conforming desire which the traditionalist state views as disruptive of the heteropatriarchal status quo.” Francisco Valdes, *Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the end of the Twentieth Century*, 1 J. Gender Race & Just. 213, 217 (1997).

in the cultural flag. The new images and the increasing visibility of new sexualities are presenting a fundamental challenge to the nation which has been partly constructed by the stitching together of sexuality and culture.

But the contemporary contests that are taking place in the legal arena are also informed by very different understandings of culture. Stuart Hall has discussed at least two different ways of thinking about cultural identity. According to Hall, one position on cultural identity is that it consists of “one, shared culture, a sort of collective ‘one true self,’ hiding inside the many other, more superficial and artificially imposed ‘selves,’ which people with a shared history and ancestry hold in common.”¹⁸ Cultural identity is based on a common historical experience, a sense of unity, on an idea that we are “one people.” It is a position that assumes cultural identity is stable and unchanging. Cultural identity consists of an essence that needs to be excavated and brought to light.

The second view of cultural identity is based on the recognition that there are points of similarity within the context of a culture, but there are also points of difference, of discontinuity and dispersal. It does not entail an archaeological search, but a re-telling of the past. As Hall points out:

[W]e cannot speak about one identity, one story without acknowledging the ruptures and discontinuities of the story we tell or re-tell. We cannot speak for very long, with any exactness, about “one experience, one identity,” without acknowledging its other side – differences and discontinuities Far from being grounded in a mere “recovery” of the past, which is waiting to be found, and which, when found, will secure our sense of ourselves into eternity, identities are the names we give to the different ways we are positioned by, and position ourselves within, the narratives of the past.¹⁹

This view recognizes the hybridity of culture, that it is a fluid and shifting concept that cannot be contained.

In the legal stories I relate, I will explore the different understandings of culture that characterize the current debates on culture and sexuality. I will expose the ways in which cultural essentialism is deployed to reaffirm dominant sexual ideology by those in positions of

¹⁸ Stuart Hall, *Cultural Identity and Cinematic Representation*, in *Black British Cultural Studies: A Reader*, 210, 211 (Houston A. Jr. Baker, et al. eds. 1996).

¹⁹ *Id.* at 212.

power and how such an approach views culture as static and immutable. I will also examine the ways in which cultural arguments are being made by those attempting to challenge this dominant narrative of culture, sex and nation. I will argue that although the arguments may, at first glance, appear to deploy the same cultural essentialism wed by those in positions of power, at a deeper level, these arguments can be seen to be based on cultural hybridity. I will attempt to reveal the ways in which this cultural hybridity is deployed, though in subtle ways, to counter the stagnant, fixed and unmoving approach to culture that characterizes the essentialist approach. I examine the possibilities of cultural hybridity in accommodating or creating greater space for the sexual subaltern and sexual speech. My discussion will look at the ways in which these contemporary tensions are being played out in the legal domain, how law is implicated in the formulation and reformulation of culture and sexuality. The results of the discursive struggles in this arena have been inconsistent and contradictory and alliances contingent upon the issue involved, often producing contradictory results for women.²⁰

III. CONTEMPORARY CONTROVERSIES

I begin with the film the *Bandit Queen* and its significance in the cultural wars being waged in the courtroom against popular representations of sex and sexuality in Hindi commercial cinema. I then talk of how “Western” cultural contaminants are metastasizing throughout Indian homes via satellite broadcasting. Programs such as *Baywatch*, *The Bold and the Beautiful* and the MTV music video channel, are being condemned for being denigrating to women and displacing them from the position of respect and honor they enjoyed in some ancient, long lost, Hindu past. In the final section, I move to the moral panics being created by sexual minorities, whose increasing visibility is apparently threatening to destroy the fantasy of the joint Indian family and the ancient cultural values and traditions that have cemented it together.

A. Sexual Speech

The legal domain is providing the stage where the cultural contest over new images being introduced through satellite broadcasting and commercial cinema is being fought out. Sexual speech and sexual

²⁰ See generally Ratna Kapur & Brenda Cossman, Subversive Sites: Feminist Engagements With Law in India (1996) for a discussion on law as a site of discursive struggle in India.

expression, whether in the form of Hindi film songs, *Baywatch*, or even the Miss World Beauty pageants, constitute zones of contestation where culture is invoked by all sides to either legitimize or delegitimize sexual speech.

The controversies are informed by a cobweb of legal rules, regulations and administrative guidelines designed to regulate sexual (and other) speech. Although freedom of expression is protected by Article 19 of the Indian Constitution, the constitutional guarantee permits many exceptions. According to Article 19(2), freedom of expression is subject to “reasonable restrictions” including those in the interests of “morality and decency.” The legal regulation of sexual speech, primarily through the criminal law of obscenity, has been held to be just such a reasonable restriction.²¹ Section 292 of the Indian Penal Code (1860) prohibits obscenity. Obscenity is defined as any visual or written material that is “lascivious or appeals to the prurient interest” or which has the effect of depraving or corrupting persons exposed to it. Section 292 is based on an 1868 English decision, *R. v. Hicklin*, which has been approved and repeatedly applied by the Supreme Court of India.²² In upholding the constitutionality of the obscenity law, the Supreme Court further defined obscene to mean “offensive to modesty or decency, lewd, filthy and repulsive.” It also stated that in determining whether a work is obscene, the court should consider “our community mores” and whether the material appeals to the “carnal side of human nature.”²³

Sexual speech is further regulated by the Cinematography Act (1952) (India), which sets the legal framework for India’s film industry. It created the Central Board of Film Certification to scrutinize films and

²¹ See *Ranjit Udeshi v. State of Maharashtra*, A.I.R. 1965 SC 881.

²² The test for obscenity in *Hicklin’s* case was, “whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall... it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.” *R. v. Hicklin*, L.R. 3 Q.B. 360 (1868). Approved and followed by the Supreme Court of India in *Ranjit Udeshi*, *supra*; *Chandrakant Kalyandas Kakodkar v. The State of Maharashtra*, A.I.R. 1970 SC 1390; *K. A. Abbas v. Union of India*, A.I.R. 1971 SC 481; *Samresh Bose v. Amal Mitra*, A.I.R. 1986 SC 967; *Life Insurance Corporation of India v. Prof. Manubhai D. Shah*, A.I.R. 1993 SC 171.

²³ See *Udeshi*, note 21, at 889 ¶ 21.

ensure that they do not jeopardize the security of the State, friendly relations with foreign states, public order, decency, and the sovereignty and integrity of India. Pursuant to this end, the Act empowers the Central Government to formulate guidelines with which the certifying authorities must comply when granting permission for the public exhibition of films. These guidelines have been revised periodically, most recently in 1991. They require the Board to judge a film "in its entirety" and "in light of contemporary standards in the country." Clause 2 of the guidelines direct the Board to ensure that "scenes degrading or denigrating women in any manner," "pointless or avoidable scenes of violence, cruelty and horror," vulgarity, obscenity and depravity that may offend human sensibilities and the glorification of "anti-social activities," are not presented.²⁴ Scenes involving "sexual violence against women like attempt to rape, rape or any form of molestation, or scenes of a similar nature" are also to be avoided and if any such incident "is germane to the theme it shall be reduced to the minimum and no details shown."²⁵ More recently, the regulation of sexual speech has been further supplemented by the Indecent Representation of Women (Prohibition) Act (1986), which prohibits the indecent representation of women through advertisements or in publications, writings, paintings, or figures.²⁶

The tangle of sex laws set out the terrain on which representations are contested as legitimate or illegitimate, as within or outside legitimate public culture. It is the terrain upon which different groups and constituencies are contesting new images. Sexual speech is becoming contentious precisely at the moment when cultural nationalism is (re)emerging, finding its most visceral form in the image of the Hindu Right. I examine two recent controversies: the censoring of the film *The Bandit Queen* and the call to regulate satellite broadcasting, including efforts to prevent the launch of an adult television channel in India.

1. *The Bandit Queen*

The controversy surrounding the screening of the *Bandit Queen* in India needs to be examined in the context of broader popular cultures

²⁴ Clause 2 (vii) of the guidelines issued under §5-B of the Cinematography Act (1952) (India).

²⁵ *Id.* Clause 2 (xi).

²⁶ Section 4, Indecent Representation of Women (Prohibition) Act (1986) (India).

controversies, especially with respect to Hindi commercial cinema, which are bringing about a transformation of public space and public culture. Representations of sex and sexuality, whether through diasporic productions such as *Kama Sutra* and *Fire* or through popular Hindi commercial cinema, are transforming/subverting dominant sexual ideology. Several recent controversies have focused on the Hindi film industry and the allegedly vulgar and indecent representations of women within these films. In 1993, "*Choli Ke Peechey Kya Hai?*," ("*What's Behind the Blouse?*"), a hit song and dance sequence from the film *Khalnayak*, starring the top female actress, Madhuri Dixit, became the focus of public controversy and a legal challenge brought by a BJP supporter.²⁷ Madhuri's voluptuous hip gyrations, vampish maneuvers with co-dancer Neera Gupta, and erotic verses, led to allegations by the distraught petitioner that the sequence was "vulgar, against public morality and decency" and against Indian culture and ethos. The case was dismissed by the trial court and on appeal by the High Court. Even though the case was not successful in legal terms, it succeeded in stirring up public opinion around the controversy. This controversy was subsequently taken up by politicians and led to a stricter approach by the Central Board of Film Certification (Censor Board). A similar controversy followed the release of the film song "Sexy, Sexy, Sexy" from *Khuddar* which triggered a debate in Parliament on the increasing "vulgarity and obscenity" in Hindi films.²⁸ The Board directed that the words 'Sexy, sexy, sexy' be substituted by the words "Baby, baby, baby," which it seems conform more with Indian cultural values.

The Bandit Queen, a film directed by Shekar Kapur, represents the life of Phoolan Devi, a woman who belongs to a poor, lower caste rural family. It depicts her struggle as a bandit in the Chambal Valley of Bihar and the violence she experienced at the hands of her thirty-year old husband, the police and the upper caste Thakur villagers. Although the film had been screened in many countries around the world, its release in India was delayed by the Censor Board, which demanded a series of cuts to the film. Scenes deemed unacceptable for Indian audiences included the explicit depictions of gang rape as well as Phoolan's violent revenge

²⁷ See Ghosh, *supra* note 3, and Kapur, *supra* note 7.

²⁸ In May 1994, a meeting was convened by the Minister for Information and Broadcasting, with the Censor Board, members of the National Commission for Women, cable television operators and members of the film industry. Amongst those who argued in favor of increased censorship was Uma Bharati, a BJP member of Parliament. The Censor Board undertook to ensure that the screening of "vulgar" songs and dances are prohibited. See Shohini Ghosh, *supra* note 3.

against her husband and the upper caste Thakurs. The director refused to make any cuts. At the same time, Phoolan Devi, on whose life the film was based, brought a petition to prevent the film from being released in India. She alleged that the film did not accurately represent her life, and somewhat contradictorily, that the representations of the sexual violence violated her privacy. Culture was invoked at every turn in the controversy to either justify or contest the cuts to the film.

The Delhi High Court initially banned the screening of the film. The order was based in part on a cultural platform, which supported the right to privacy arguments advanced by the plaintiff, Phoolan Devi. The Judge, quoting from the *Mahabharata*, an ancient Hindu epic, stated "a naked woman ought not to be seen and the learned ones ought to avoid seeing a naked man as well. Sex and food are to be enjoyed in a lonely place alone."²⁹ Ultimately, Phoolan Devi settled her case, accepting a payment of 40,000 pounds and the producer's agreement to make four cuts to the film. Although the High Court ban was lifted after the settlement, the struggle with the Censor Board continued until the producer finally agreed to make further cuts, against the wishes of the director. Still the controversy would not die.

A member of the Gujjar community, the caste to which the bandits in the film belong, subsequently filed a writ petition before the Delhi High Court seeking to quash the certificate granted to the film and to restrain its exhibition in India. The petitioner contended that though audiences were led to believe that the film depicted the character of "a former queen of ravines," the depiction was "abhorrent and unconscionable and a slur on the womanhood of India." He further argued that his community, the Gujjars, had been depicted as morally depraved, especially in the scene involving a Gujjar rapist. He alleged that the screening would "rupture the social fabric" and "if that is the way we are supposed to see the abuse of a woman in a commercial movie, then it depicted a crisis of culture."³⁰ The petitioner stated that the film lowered the prestige of women in general and the community of Mahallas, the community of which Phoolan Devi was a member, in particular.

The single judge of the Delhi High Court who heard the case admitted the petition and quashed the certificate granted to the film. He directed that more cuts be made to the film and, until such time as a new

²⁹ See order of the Delhi High Court dated December 20, 1994 at 31, staying the screening of the film. (Available on file with author.)

³⁰ See coverage of the case in *Debate on How Vulgar is Bandit Queen*, The Pioneer, February 17, 1996, at 6.

certificate was granted by the Censor Board, prohibited the screening of the film in India. The film's producer and distributors filed an appeal against the order to the Division Bench of the High Court, which upheld the decision of the judge. The Division Court focused on three features of the film: a two minute frontal-nude scene of Phoolan Devi being made to fetch water from a village well; one rape scene, which showed the naked "posterior" of Baba Gujjar, the rapist; and the use of expletives throughout the film. All three representations were held to be revolting, denigrating to women and capable of "arousing sexual or sensual or lascivious feelings in the average man."

The Court's reasoning was informed, in part, by Article 51-A of the Indian Constitution. The article provides that "it shall be the duty of every citizen of India to value and preserve the rich heritage of our composite culture." In addition, the State shall endeavor to strive "towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to *higher levels* of endeavour and achievement." The Court also referred to the Eighth Report of the Parliamentary Standing Committee on Communications. In response to the demand for a more liberal approach by the Censor Board, so that Indian films could compete with the foreign television network, the Committee stated that accepting such an argument "would mean allowing competition in vulgarity."³¹ Hence foreign television was equated with vulgarity *per se*. The Court also cited with approval the Committee's view that there was:

An erosion of traditional Indian values, folk art and culture. Basic moral values of our rich Indian traditions should not be allowed to be compromised, eroded or diluted at any cost. The question is how to guard against several Indian films, which are posing a danger to the social fabric and communal harmony. There has to be a check on films which have a baneful influence on children and adolescents. We should see that the film media is not abused.³²

The producer and distributors appealed to the Supreme Court of India, which overturned the High Court decision, and reinstated the original findings of the Tribunal. The Supreme Court reviewed the guidelines

³¹ Central Board of Film Certification, Eighth Report of the Parliamentary Standing Committee on Communications (1995) (India) at ¶1.8.

³² *Id.*

established under the Cinematography Act, and the case law on obscenity.³³ The Court held the guidelines require that the individual scenes must be seen within the context of the overall theme. In applying the guidelines to the *Bandit Queen*, the Court concluded that the scenes of nudity, rape and the use of expletives, “were in aid of the theme and intended not to arouse prurient or lascivious thoughts, but revulsion against the perpetrators and pity for the victim.” The Court permitted the screening of the film subject to the original conditions imposed by the Appellate Tribunal.

In the Supreme Court trial, the arguments were primarily focused on whether the scenes in question were obscene and offended a particular community or degraded women or, if taken as a whole, had a redeeming artistic or social value. A cultural lens was deployed to determine if a part of the work, which seen in isolation would be abhorrent, had a redeeming social value. One example used by the Court was the *Kama Sutra*. The Justices stated, “We may view a documentary on the erotic tableaux from our ancient temples with equanimity or read the *Kamasutra*, but a documentary from them as a practical sexual guide would be abhorrent.”³⁴

The cultural arguments were significant in *The Bandit Queen* case, as it was a film alleged to have transgressed legitimate cultural expression in India. The violence against women depicted in the film was argued by some to violate the standards of decency. However, the Supreme Court held that these representations constituted legitimate cultural expression as they were intended to expose and condemn that violence. The representation of “social evil as evil” was no longer to be circumscribed *per se*. The cultural contest resulted in pushing at the margins of legitimate cultural expression. Freedom to express the oppressive reality of life for women in India was recognized. According to the Court, the film did not insult Indian womanhood as three women members had sat on the censorship tribunal that reviewed the film and allowed it to pass.

Yet the culture contest did not end with the Supreme Court decision. Debates over the cultural appropriateness of the film persisted in the press and in the public arena. The broader cultural controversies over the representations of sex and sexuality continued to abound. Some feminists and feminist groups regarded the film as derogatory and violative of women’s equality rights. Madhu Kishwar, feminist and activist, argued that the film was made from a Western gaze and “...largely to satisfy the western palate which delights in seeing non-Western people as exotic species very

³³ See *Bobby Art International v. Om Pal Singh Hoon*, A.I.R. 1996 SC 1846; *Abbas v. Union of India and Samresh Bose v. Amal Mitra*, *supra* note 22.

³⁴ *Bobby Art International*, *id.* at 1851, ¶ 50.

different from themselves.”³⁵ She further argued that the film pandered to the “...[s]tereotype images the West has of India, a land of female infanticide where parents are brutal in their treatment of daughters and where evil mothers-in-law torture their daughters-in-law to death.”³⁶

Partha Chatterjee, writing for a weekly newspaper, argued, “Worst of all is the grading that corresponds to the aesthetics of the Western eye looking at India – reducing the harsh, contrasting character of Indian light and striving for soft, luminous colours in a parody of the English water-colour tradition exemplified by the works of John S. Coatman and others.”³⁷ Another critic, Krishna Prasad, stated that the film played up “every recognizable cliché that the West has about India – caste, royalty, poverty, heat and lust, by his depiction of revolting and gratuitous sex.”³⁸ Prasad urged the censors to take action “for the sake of clean cinema” and the “greater good of the community,” and “before the floodgates of fornication open.” The tension around culture was aggravated by the very positive response that the film received in the foreign press. For example, Alexander Walker, writing for the *Evening Standard*, stated in his article entitled *Shock of the East*, “...this film uses such brutal events to articulate an urgent argument about women’s rights in an Asian society where sexist violence has never been pictured so graphically. . . with the ending of apartheid in South Africa, world opinion may now focus on the sub-continent and force a reform in the apartheid of gender and caste that exists there. If so, *Bandit Queen* will have played no small part.”³⁹

One criticized sequence in the film was the sex scene between Phoolan Devi and her lover, Vikram Mallah. The scene takes place in a room in a city where Phoolan takes Vikram to recover from a gun shot wound. During this sequence, Phoolan is depicted on top of Vikram Mallah having sex with him. One critic, Pankaj Butalia, remarked that the representation was untenable, partly because it was unlikely that a “rustic” woman could have

³⁵ Madhu Kishwar, *The Bandit Queen: Film Review*, 84 *Manushi* 34, at 35 (1994).

³⁶ *Id.* at 36.

³⁷ Partha Chatterjee, *The Cowgirl Goddess*, *The Economic Times*, New Delhi, August 23, 1994, at 8.

³⁸ Krishna Prasad, *Besides Manusmriti Kapur Should Have Quoted Kama Sutra*, *The Sunday Observer*, August 24, 1994, at 7.

³⁹ Alexander Walker, *Shock of the East*, *Evening Standard*, May 12, 1994, at 27.

made love in this manner. He described the sequence as “A very chic scenario confirming the universal as well as ultra modern nature of her consciousness and sexual politics – *despite her rustic nature.*” (Emphasis added.)

Another writer stated that:

The movie has certain scenes where Vikram Mallah and Phoolan Devi are shown making love in a room in Kanpur wherein she assumes the superior position and initiates the process. Such a scene, which Shekhar Kapur himself admits as born of “poetic license,” seems unnecessary and contrived. Another scene showing Phoolan bathing by the river, semi-nude, with Vikram Mallah playing *Peeping Tom* seems equally out of sync with the modesty of rural folk bathing in public places.⁴⁰

These positions assume that the representation of a woman initiating sexual activity is in some respect indecent and outside the purview of prevailing cultural norms, representing a “western gaze” on India for the benefit of western audiences. A few groups challenged this position. The Centre for Feminist Legal Research countered this assumption arguing that the active role was in fact not alien to Indian culture. “The inversion of traditional sexual roles is not a ‘modern’ phenomenon. The poet Chandi Das has praised the deliberate, sensuous union of the two/the girl playing this time the active role/riding her lover’s outstretched body in delight.”⁴¹

Culture was deployed in different ways through the case as well as in the debates surrounding it. On the one hand the representation of sexual violence was regarded as a form of titillation threatening to erode the “rich Indian cultural heritage and ethos.” The assumption appeared to be that any representation of sex, even when it is about sexual violence is *per se* contrary to Indian cultural values. Contrary to this approach, was the view that the representations of sex and sexuality have always been a part of Indian culture and heritage. Both of these approaches can be seen to represent an essential approach to culture, the former representing culture as something that has been impervious to the incursions of sex and sexuality and the latter advocating that sex and sexuality have always been a part of Indian culture. Both positions can be seen to regard culture as

⁴⁰ Asha Choudhary, Canning the Controversy: The Saga of the Bandit Queen, 4 *Voices: A Journal on Communication and Development*, 27 at 28 (1996).

⁴¹ Ratna Kapur & Shohini Ghosh, The Bandit Queen Comes Out on Top, *The Bulletin: Rights of Women* 10-12 (1995).

static and fixed, but the implications of their arguments are quite different. In the anti-Bandit Queen argument, sexuality was something to be feared and kept at arms length, whereas in the argument of those defending the Bandit Queen, sexuality was perfectly acceptable and integral to Indian cultural identity. In the arguments defending the Bandit Queen, there is an effort to complicate the cultural script in law, and disrupt the dominant narrative of culture, sex and nation.

2. Satellite Broadcasting and Adult Television

The transmission of sexy images and images of sex through satellite broadcasting have become increasingly available to Indians and are evidently in high demand.⁴² But it has also come in for considerable disapproval from the Hindu Right as well as many progressive, feminist, and human rights groups. Satellite broadcasting is increasingly being regarded as the vessel of contamination that transports the decadent practices of the West into the Indian anatomy, corroding and corrupting the purity of its cultural values and traditions, especially through its representations of women.

In 1995 the National Human Rights Commission (NHRC) expressed concern over the "invasion" of a satellite television and appealed to the people to fight the ever-growing "television menace" since it was spreading the "message of violence." Justice Ranganath Misra, former Chief Justice of the Supreme Court of India, and the chairperson of the NHRC at the time, stated that television had indirectly been promoting the "psychology of violence" and that it was even more dangerous than AIDS.⁴³

The hysteria has led to debates as well as litigation to determine what is appropriate for Indian audiences to view in their home. One women's group has filed a petition in the Delhi High Court seeking to regulate satellite broadcasting in India. It is requesting the Court to instruct "police stations not to permit the relay of any indecent, vulgar, offensive programs depicting and presenting women in an indecent manner in violation" of the Indecent Representation of Women Act (1986) (India). The National Commission on Women (NCW) and several other women's

⁴² Until the early 1990s, television was entirely state-controlled. *See generally* Srinivas R. Melkote, et al., *International Satellite Broadcasting in South Asia: Political, Economic and Cultural Implications* 295-315 (1998).

⁴³ *Shiv Sainiks Stop Screening of "Fire" in Two City Theatres*, Times of India, Dec. 11, 1995, at 1, 6.

groups supports this petition.⁴⁴

The objection to the representation of sex on television is wrapped in a cultural loincloth. The petitioners state that sex and sexuality are imports of satellite broadcasting and are “morally and culturally tearing [apart] the national and cultural ethos” of the country.⁴⁵ The petition questions whether “our time tested cement i.e. culture and ethos [should be allowed] to be corrupted and eroded by [the] weaponry of sex and as a consequence... allow ourselves to be subsumed and swallowed in the western culture resting on [the] power of sex, violence and crime.”⁴⁶ The petition goes on to state that:

India has a different policy on sex exhibitions and sex products unlike the western world where sex shops are on display in almost every street. Sex and entertainment are regarded as an industry. Education on sex and biology is one thing, but using sex and women as weapons of sexual excitement for crass commercial gains as is done by Foreign Television Networks, is another...⁴⁷

The petitioners are concerned over the sensationalizing of sex and its effect on the family.

The question is whether in Indian society....sex should be allowed to become a staple food in every home especially in joint families where in the evening members of the family from grand parents to grand children sit together and watch television and listen to the radio over meals. The question is whether the increasing use of sex can be allowed to tear apart our cultural ethos and cultural fibre, which is holding the vast nation state into one cohesive state.⁴⁸

According to the petition, the threat to women’s position in India is external – the contaminant resides outside of Indian cultural values; the

⁴⁴ At the time of writing, the case is still pending before the Court.

⁴⁵ Nirmala Sharma v. Union of India, Civil Writ Petition No. 2697/95 at 23.

⁴⁶ *Id.* at 43, 44.

⁴⁷ *Id.* at 23.

⁴⁸ *Id.* at 44.

contaminant is Western. The implicit assumption is that there is a pure space of Indian culture, untouched and uncorrupted, where women are not degraded by the decadent Western obsession with sex.

In a separate petition, the NCW has also demanded a ban of a proposed adult channel called *Plus 21*. Although the content of this channel remains unknown, the Commission is arguing that it is intended to be “sexually titillating” and pornographic and can result in harm or injury to adolescents, women and other so-called vulnerable sections of society. The petitioners concern is to “prevent cultural shock to the viewers.” The Commission, together with several other women’s organizations who are co-petitioners, alleges that the representations of sex and violence on the proposed channel will encourage patterns of behavior in real life that are very harmful to women. The concern of the petitioners is once again framed through a cultural periscope. They express the view that “Indian traditions, which have been built over centuries and are reflected in the Indian Constitution and the safeguards that it has imposed for public morality are now under threat of erosion from obscene and vulgar programs on foreign channels.”⁴⁹ The petition cites the decision of a district court judge as authority for its position:

As regards beaming of obscene/vulgar program through the foreign channels, the government will have to initiate a clear policy to stop cultural invasion by technological and scientific means and by such other means as may be feasible. It is hoped that the government shall become live and conscious to its constitutional obligations to see that foreign TV Network [sic] do not uproot Indian Culture, traditional values and Indian laws by display of vulgar programmes for economic reasons.⁵⁰

The petition further alleges that incest and other sexual abuses are on the rise partly as a result of “exposure to electronic media that [is] emphasizing aspects of life that are alien to the India culture.”⁵¹

The petitioners are seeking an injunction from the Court to restrain

⁴⁹ *Id.* at 5.

⁵⁰ *Vinodanand Jha v. State*, Civil Writ Petition No. 2697/95 (August 1, 1996), Order of the Metropolitan Magistrate at 23.

⁵¹ *Supra* note 45, at 18.

the transmission of *Plus 21* anywhere in India. Several women's organizations have also written to the Prime Minister's office requesting that he prevent an adult channel from being created.⁵² The letter states that there is a "breakdown of social and cultural norms taking place through the invidious influences let loose in the media..." It further states that there is a break up of "traditionally valued social norms in the face of 'modernization' fueled by provocative and permissive TV programmes and advertisements in a number of channels..."⁵³

The broadcasters have opposed the petition seeking to ban satellite and cable television. Some feminist groups, including the Center for Feminist Legal Research and Media Storm, have also intervened in the case.⁵⁴ Among the arguments advanced in the intervention application is one that seeks to counter the position that Indian culture and ethos must be protected from cultural invasion from the West:

It is pertinent to state that India's local and indigenous cultures and traditions have enormous strengths of their own and are not likely to be undermined by foreign media. It may be recalled that the diverse cultures of India survived 200 years of colonial rule. The argument of the petitioners also rests on an assumption that "Indian culture" is a homogenous entity, which has certain clearly identifiable ingredients, which can therefore be protected. On the contrary, India is a conglomeration of diverse traditions, races, religious groups, peoples, tribes and ideologies that cannot be defined as "one culture."⁵⁵

The interveners argue that the imposition of one "Indian culture" on the people of India is a violation of their free speech and equality rights. The forceful imposition of a homogenous Indian culture will only serve to enforce traditional notions of womanhood and family that "are regressive

⁵² Intervention application by the Center for Feminist Legal Research and Media Storm, in the National Commission of Women and Others v. Union of India and Others, Civil Writ Petition No. 2697 of 1995 (available on file).

⁵³ *Id.*

⁵⁴ *Id.*, Letter dated September 21, 1996, to the Prime Minister signed by ten women's organizations annexed to the petition seeking to ban satellite broadcasting.

⁵⁵ *Id.* at 6.

and have dangerous implications for women and threaten to reinforce notions that have been challenged by the women's movement." The interveners argue that television is providing a forum for women to challenge traditional roles and create diverse and different representations of women. Regarding sex and sexuality, the interveners contend that:

Indian history provides countless examples of a rich and diverse heritage depicting sex and sexuality, which ought to be valued and developed rather than submerged under the assault of conservative morality. It is inconsistent to argue that sex and sexuality is not a part of India's culture considering that India's diverse cultural heritage includes the Khajuraho temples, the Kamasutra, Geet Govinda and other such works.⁵⁶

The cultural arguments advanced in the *Bandit Queen*, the Satellite Broadcasting case, and the *Plus 21* litigation represent different concerns and positions. The arguments advanced by the NCW and other women's groups in these cases are concerned with women's equality rights. Their arguments, however, are informed by an approach to culture and sexuality that is essentialist and deeply nationalistic. There is no doubt that for feminists, the struggle around culture is a particularly complex one. The struggle for women's rights has emerged simultaneously with the struggle for nationalism. Nevertheless, feminism has a tenuous relationship with nationalism, and has been cast as Western and imperialist at different historical moments. For this very reason, feminists have often had to project themselves as nationalists to counter this attack. As Geraldine Heng has stated,

Indeed, nationalism is so powerful a force in the Third World that to counter the charge of antinationalism – the assertion that feminism is of foreign origin and influence, and therefore implicitly or expressly antinational – the strategic response of a Third-World feminism under threat must be, and has sometimes been to assume the nationalist mantle itself: seeking legitimation and ideological support in local cultural history, by finding feminist or protofeminist myths, laws, customs, characters, narratives and origins in the national or communal past or in strategic interpretations

⁵⁶ *Id.* at 8.

of religious history or law.⁵⁷

Feminism has operated within the discourse of nationalism as anti-Western and has had to position itself as anti-Western to establish its legitimacy. It has adamantly denied allegations of being Western, and sought to establish a distinctively Indian feminism with an authentic Indian feminist subject. This distinct subject has been constructed on essentialist notions of "the West" and "Western feminism." This position can be a treacherous one as is revealed in the arguments presented by the NCW and other women's groups in the *Bandit Queen*, Satellite Broadcasting and *Plus 21* cases.⁵⁸

The use of culture is effective in countering any anti-nationalist allegations, but the failure to reflect on the contradictory nature of culture leads to a host of problems. The NCW and other women's groups argue about Indian culture unreflectively and thus end up essentializing the very culture that they have sought to transform in other arenas. They have essentialized the discourse that has itself presented difficulties for women such as constructing women as mothers of the nation or the repositories of sexual purity. This position converges with the narrative of culture, sex and nation in postcolonial India, with its emphasis on the purity of its women.⁵⁹ The deployment of Indian cultural values by the NCW in the context of the satellite broadcasting case ends up being very conservative. Their arguments are constructing a pure place of authenticity which is remarkably similar to the strategies of the religious right, whose vision for

⁵⁷ Geraldine Heng, "A Great Way to Fly": Nationalism, the State, and the Varieties of Third-World Feminism, in *Feminist Genealogies, Colonial Legacies, Democratic Futures*, 30-35 (M. Jacqui Alexander & Chandra Talpade Mohanty, eds., 1997).

⁵⁸ The anti-imperialist, anti-western, pro-nationalist rhetoric is not necessarily progressive. As Stuart Hall argues, "nationalism is not only *not* a spent force; it isn't *necessarily* either a reactionary or progressive force, politically." Stuart Hall, *Culture, Community, Nation*, 7 *Cultural Studies* 349, at 353 (1993). He argues that nationalism has no sense of political belongingness, that it can be progressive and reactionary simultaneously.

⁵⁹ See Jawaharlal Nehru, *Foreword - India Old and New*, in Jean Filiozat *India, The Country and It's Traditions* (1961), where he states that India's individuality resides in the women of India: "...I think that Indian women, from whatever part of the country one may select them, represent the essence of India, more perhaps than the men. Indian women's have excelled in her history in many of the masculine qualities, even in war. But essentially they have remained feminine." See also Jyoti Puri, *Women, Body, Desire in Post-Colonial India: Narratives of Gender and Sexuality* (1999).

women is similarly based on restoring women to a position of respect and honor that they enjoyed in some bygone era as wives and mothers.⁶⁰

In contrast, the arguments advanced by the interveners in the Satellite Broadcasting case and others in hindsight reflect a more complex position on culture. Their primary argument is that sex and sexuality are not external contaminants because they have always existed in Indian culture and tradition. Whether through "Indian" poetry, literature, or sculpture, sex and sexuality is being said to have existed in Indian culture well before the market, the Empire and the Mughals. Their effort at complicating culture is distinct. The argument rests ostensibly on an essentialist basis, but it is nevertheless challenging the dominant script in the way the story has been told and continues to be told. They are exploding the dominant authentic voice to resist the narrative of culture, sex and nation that is being told and that is being naturalized and universalized through its telling and re-telling. In challenging this voice, they are exposing the hybrid nature of culture, that there are other versions, that the story is neither stable nor fixed. The repudiation of the West and things Western within the dominant script are strategies for securing cultural and political legitimacy. The interveners are complicating the opposition of "Western" and "Indian" and developing a less homogenous and essentialist approach about Indian cultural values and the location of women, sex and sexuality within that culture.

B. The Sexual Subaltern

The threat to Indian cultural values, however, is not seen as coming from the celluloid screens and satellite skies alone. The cultural contaminant has also been detected in the practices of sexual subalterns, in particular, sex workers, gays and lesbians.⁶¹ The sexual subaltern has become the focus of increasing concern since the AIDS crisis has perforated the sexual environment. The threat of a pandemic in India has

⁶⁰ *Supra* note 20, Ch. 4. See also Ratna Kapur & Brenda Cossman, Communalizing Gender, Engendering Community in Women and the Hindu Right 232 (Tanika Sarkar & Urvishi Bhutalia, eds., 1995).

⁶¹ I use the term "sexual subaltern" as a theoretical device derived from subaltern studies, to bring together in this instance the disparate range of sexual minorities within postcolonial India, without suggesting that it is either a homogenized or stable category. The location of the sexual subaltern in postcolonial India is complex, at times contradictory, and not invoked exclusively as an identity of resistance to dominant sexual categories. For a more general critique of the changing usage of the term "subaltern" see Sumit Sarkar, The Decline of the Subaltern in Subaltern Studies in Sumit Sarkar, Writing Social History 82 (1997).

posed a critical challenge to dominant cultural attitudes regarding sexuality. The concern over the pandemic has led to the harnessing of cultural arguments on both sides of the good sex/bad sex binary. In this section I address the ways in which culture is being deployed in law either to contain the practices of sexual minorities and exorcise the cultural contaminant, or historically ground the existence of the sexual subaltern in an effort to recast the treatment of sexual minorities in law.

1. Sex Work

In the early 1980s, state officials denied that AIDS could be a problem in India because of the “moral values” of Indian men and women. One professor of medicine at the Medical College of Trivandrum, Kerala, stated:

Even at the end of the twentieth century, the Eastern culture is untinged in its tradition of high morality, monogamous marriage system and safe sex behaviour. Our younger generation and youth still practice virginity till their nuptial day. The religious customs and god-fearing living habits are a shield or protection against many social evils. It will be difficult even for HIV to penetrate this shield, except in certain metropolitan populations.⁶²

In 1998, the Report on Global HIV and AIDS epidemic estimated that over four million people in India were HIV positive people primarily in the states of Maharashtra, Tamil Nadu and Manipur. The moral righteousness of Indian sexuality has indeed been put to a challenge and culture is being invoked to reassert this righteousness. This process is particularly evident in the legal regulation of sex work.

The AIDS crisis, and its rupturing of the cultural script of the purity of Indian sexuality, has lead to a heightened concern and surveillance of so-called “at risk populations,” including sex workers. The crisis has sparked a plethora of research with an emphasis on “knowing and measuring sexual practices of ‘at-risk populations,’ such as the youth, college students, and sex-trade workers.”⁶³ Moreover, the crisis has created a heightened state surveillance of sex workers, amongst others, as the

⁶² AIDS Bhedbhav Virodhi Andolan, *Homosexuality in India: Culture and Heritage in A Lotus of Another Colour* 21, at 22 (Rakesh Ratti, ed., 1993).

⁶³ Puri, *supra* note 59, at 283.

primary transmitters of the disease. The language of this surveillance is deeply imbued with assumptions about AIDS as a Western disease that has been imported into India through promiscuous Western lifestyles. The "Western white male" is cast as a sexual conqueror who is tearing through the cultural hymen and leaving in his wake strewns of fallen women and a fallen culture. At times, the sex worker is implicated in this cultural demise, castigated for abandoning the moral purity and sexual abstinence that constitutes the bedrock of Indian culture.

One of the State responses to the threat of cultural contamination stemming from the AIDS crisis is to instigate law reform. Currently, sex work or prostitution is regulated primarily by the Immoral Traffic (Prevention) Act (1956) (India).⁶⁴ It was enacted in pursuance of the International Convention for the Suppression in the Traffic in Persons and the Exploitation of the Prostitution (of Others) signed in New York in 1950. The primary objective of the statute is to criminalize the outward manifestations of prostitution, including soliciting, trafficking and the keeping of brothels, rather than to abolish prostitution or criminalize the prostitute *per se*.⁶⁵ The Act also contains certain welfare measures that are

⁶⁴ The Immoral Traffic (Prevention) Act (1956) (India) makes no distinction between child prostitution and adult prostitution. Prostitution is defined in section 2(f) of the Act as "the sexual exploitation or abuse of persons for commercial purposes." This definition has been construed by the courts to mean "promiscuous and indiscriminate sexual intercourse for hire." A single act of sexual intercourse for hire, or indiscriminate sexual intercourse without payment, does not constitute prostitution under the existing statute. *See also* Center for Feminist Legal Research, New Delhi, Memorandum on Law Reform of Women in Prostitution in India (1999) (available on file with author).

⁶⁵ Some related provisions are found in the Indian Penal Code (1860) which contains general sections against the trafficking and slavery of women and children, as well as state-level police, railway, beggary, health and public order statutes. In particular, see §365 which deals with kidnapping or abducting with intent to secretly or wrongfully confine a person; §366A which deals with procuring minor girls; §366B which deals with the importation of a girl from a foreign country; §367, which deals with kidnapping or abducting a person in order to subject them to grievous hurt, slavery etc.; §370 which deals with the buying or disposing of any person as a slave; §371, which addresses the habitual dealing in slaves; §372, which deals with the selling of a minor for the purposes of prostitution; §373 which address the problem of buying a minor for the purposes of prostitution; §374 which deals with unlawful compulsory labor. Other general provisions include Art. 23 of the Indian Constitution which prohibits the trafficking in human beings and all forms of forced labor; Art. 39 which provides that the State should direct its policy towards securing, among other things, a right to adequate means to livelihood for men and women equally and equal pay for equal work for

directed at the rehabilitation of women in prostitution.

The laws regulating sex work are based on notions of outlawed sexuality. The fact that women in sex work are paid, perceived to be promiscuous, and regarded as carriers of contagion and disease, places them outside the framework of acceptable sexuality.⁶⁶ Ostensibly, the law is not intended to target the women in sex work. The intention of the Act is to punish traffickers and those who exploit women for the purposes of prostitution or commercial vice. However, soliciting and living off the earnings of a prostitute woman and prostitution in a public place are all punishable activities under the Act. There is also a provision that implicates all women by placing the onus on a woman to prove that she is not a prostitute if such a complaint is made against her— otherwise she can be removed from the locality where she resides.⁶⁷ The provisions of the Act operate to deny sex workers the right to residence, mobility, expression and work. Thus, the law works primarily against sex workers rather than against those who exploit them.

The State's current interest in legal reform resides not in facilitating the rights of the sex worker, but in the fear of contagion.⁶⁸ This is evident from its initial legislative response to the AIDS pandemic, which was to propose an AIDS Prevention Bill (1989).⁶⁹ The Bill was withdrawn when it was pointed out that the provisions explicitly discriminated against large sections of society, in particular, prostitutes and gay men, and was patently unconstitutional. The Bill provided health authorities with invasive policing powers in the form of forcible testing and isolation of so-called

men and women so that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength.

⁶⁶ Rubin, *supra* note 15. The legal regulation of sex work in India has not been studied adequately. For an evaluation of some of the theoretical understandings that inform the law in the U.S., see Holly B. Fechner, Three Stories of Prostitution in the West: Prostitutes' Groups, Law and Feminist "Truth", 4 Colum. J. Gender & Law 26 (1994).

⁶⁷ *Supra* note 64, §20.

⁶⁸ See Dr. N.R. Madhava Menon, Revised Draft Bills with Explanatory Notes on The Immoral Traffic (Prevention) Act (1956), at 43: "The control of HIV/AIDS infection which is sexually transmitted in prostitution is also possible if criminality in the activity is removed and more openness is provided on organizational matters."

⁶⁹ For a detailed critique of the Draft Bill see AIDS Bhedbhav Virodhi Andolan, Women and AIDS (1990).

high-risk groups without any accountability. It further required registered medical practitioners to report to the relevant government authority any information they received regarding the identity of persons known to be HIV positive. The Bill reflected the State's interest in finding ways to bring more sex workers, and other targeted groups, into the open and subject them to HIV testing. It was a way of controlling the Western contaminant, isolating the purveyors of this contaminant and saving Indian civilization from further threat of erosion.

More recently, a draft of the Maharashtra Protection of Commercial Sex Workers Act (1994), proposed by the Maharashtra State Women's Commission, provides that sex workers, pimps, and brothel owners be branded with indelible ink if they are found to be suffering from sexually transmitted diseases.⁷⁰ Any person found suffering from such a disease is liable to be quarantined until they are cured and subject to the payment of a fine.⁷¹ The proposal must be considered in the context of the cultural sanitization campaign being pursued by Pramod Navalkar, Minister for Cultural Affairs of the then Shiv Sena/BJP alliance government in the state of Maharashtra. In an effort to clean up culture when he first came to power, Navalkar attempted to restrict the hours of work of barmaids, an effort which failed as a result of protests from bar-owners. The government then decided to stop serving liquor well before midnight. The barmaids complained that the restriction deprived them of tips which formed the bulk of their earnings. Navalkar remained adamant in his position "to repel the attack on our culture by sexual permissiveness."⁷²

A number of other proposals for law reform have recently been drafted, also under the auspices of various government bodies. The proposals are at times conflicting and contradictory. It is significant that the state has initiated proposals at this juncture. AIDS has threatened the notion of the purity of Indian sexuality and contributed to a cultural crisis. The law reform proposals represent an attempt to respond to this crisis. Some of these proposals simply reassert the traditional cultural script against the corrupt sexual subaltern, others attempt to find ways to rescue

⁷⁰ See comment in Sadhna Mohan, Needed: Privacy in a Public Battle Against AIDS, *Times of India*, February 6, 1998, at 4; Maria Abraham, Positively Inhuman: Maharashtra Orders Compulsory HIV Testing and Segregation of Women, *The Week*, February 1, 1998, at 32.

⁷¹ The Protection of Commercial Sex Workers Bill (1994) Ch. 5, §17 (India).

⁷² Andrea D'Souza, Pramod Navalkar: Hopping Mad, *Savvy*, September 1995, at 134-137.

the subaltern from her dreadful fate, and yet others attempt to radically rewrite the cultural script of sex and sex work.

Two law reform proposals dealing with prostitution have been drafted by the National Law School of India University, at the behest of the Ministry for Women and Child Development. One of the proposals recommends mandatory testing of prostitute women, while also conferring rights on the woman to take legal action against pimps, brothel owners and clients.⁷³ In contrast, the second proposal is concerned with the AIDS crisis, but recommends that "in order for prostitutes to protect themselves from HIV infection, AIDS and other sexually transmitted diseases, they must have safe working conditions."⁷⁴ It recommends decriminalization of prostitution, but continues to criminalize all other individuals who are connected to the work of the prostitute, as well as to emphasize rehabilitation of "the prostitute woman."⁷⁵ In a similar vein, in its *Report*

⁷³ See The Prevention of Immoral Traffic and Rehabilitation of Prostituted Persons Bill (1993) (India), which seeks to prohibit immoral trafficking, especially in women and children, and to mitigate the suffering of victims of prostitution. It provides "victims" of forced prostitution the right take legal action against brothel-keepers, pimps and customers alike. Women were also given the right to demand special damages for harm resulting from sexual abuse or the intentional transmission of diseases acquired through the refusal of a customer to practice safe sex. A proposal to mitigate the suffering of women and children in prostitution through community-based rehabilitation, vocational training and health schemes, which included the mandatory testing of prostitute women for HIV, was also suggested. In addition, a welfare fund, made up of fines, grants from the government and other bodies is to be set up to support the rehabilitation and HIV prevention programs and meet the educational and medical expenses of children of prostituted women.

⁷⁴ See The Prohibition of Immoral Traffic and Empowerment of Sexual Workers Bill (1993) (India). The Bill is intended to "prohibit immoral trafficking especially in women and children and to confer rights on sexual workers with a view to prevent sexual exploitation and protect health and hygiene in sexual work." *Id.* It provides severe punishment of people involved in immoral trafficking and child prostitution. The Bill also proposes the decriminalization of voluntary sex work equating it with other kinds of labor. It also proposes a rehabilitation regime to be maintained by a Welfare Fund set up by State governments. See also Memorandum of Law Reform of Women in Prostitution, *supra* note 64.

⁷⁵ See the Sex Worker (Legalization for Empowerment) Bill (1993) (India), which recognizes that sex work is a legitimate exercise of the right to work and that the right to work includes the right to solicit. It also sets out a number of non-discrimination measures that need to be implemented to help remove the stigma prostitutes experience. The Bill provides that a prostitute cannot be deprived of her personal liberty or the right to retain custody of her child because she is a prostitute.

on Societal Violence on Women and Children in Prostitution, 1995-96, the National Commission for Women made recommendations for legal reform, as well as reforms to health care, education, child care and housing for sex workers and their children. The overall focus of the recommendations is to mitigate the harshest impact of prostitution on sex workers and their children, and in so doing, the NCW is attempting to take the concerns of women in prostitution into account. In terms of specific legal reforms, the NCW recommends several amendments to the Immoral Traffic (Prevention) Act (1956): eliminating the imprisonment of prostitutes, relating cases involving sex workers to civil rather than criminal courts, and repealing section 4 of the Act, which prohibits living off the avails of prostitution. Other recommendations include reforms to law enforcement intended to reduce police harassment and violence. Beyond these legal reforms, the stated objectives of the NCW include preventing the entry of women into prostitution, and an effort to reduce the demand for prostitution.

The Report of the NCW concludes with a brief discussion of the place of prostitution in Indian culture:

Many historical visions contain the germ of the desirable response from the mainstream society towards women in prostitution. Legend says one jealous group of persons, envious of the growing fame of Sri Ramakrishna Paramahansa, took him to Sonagachi, sure that he would be seduced and subsequently exposed. As a pre-plan, some women surrounded Sri Ramakrishna. He was moved and fell at their feet saying he could see 'ma' in them Lord Buddha's famous disciple Amrapali was a famous courtesan. Women in prostitution in our society have traditionally been

It prohibits sexual abuse of a prostitute and provides for criminal and civil remedies for such abuse. A prostitute shall be entitled to exercise her right to health care and anyone who prevents her from doing so can be charged under the provisions of the Indian Penal Code. There is a recommendation for minimum pay for sexual services, the creation of a welfare fund to pay for medical expenses and old age support. It also recommends guidelines for the formation of prostitute collectives, which will determine the conditions of work, including the maximum number of customers that a woman will entertain as well as the minimum wage to be received. The collective can also have its own fund to which members of the collective can contribute. The funds may be used to set up child care facilities, education for their children, the purchase of prophylactics and any other purpose that is beneficial to them. *See also* Memorandum of Law Reform of Women in Prostitution, *supra* note 64.

held in high esteem and their rights ensured and protected by Chanakya in the Arthashastra.⁷⁶

The Report thus attempts to close by wrapping its recommendations in a culturally appropriate bow. Overall, the position of the NCW can be seen as one of attempting to address the real concerns of prostitutes, without condoning prostitution itself. It attempts to be pro-sex worker, without being pro-sex work. Their response thus indicates a slight shift in the thinking about the rights of women in prostitution. At the same time, it must be evaluated against the overall stand of the NCW on the issue of culture and the role of women in Indian society. The Commission has endorsed the recommendations proposed in the draft National Cultural Policy (1992), which emphasized that "women in India were a great sustaining and preserving force of culture, . . . the cultural fabric in India continues to be enriched by women's contribution and . . . women must be assigned an important role in all programs of creativity or preservation."⁷⁷ Any position deviating from this stand is deemed to be anti-Indian culture and womanhood.

Some feminist groups are trying to shift the explanation for legal reform more clearly into an economic exploitation argument. Notwithstanding this effort, the cultural arguments slip in via the back door and end up reinforcing the cultural essentialism that informs the State's discourse. Their approach is to characterize sex workers in India as victims, whose work is determined by economic hardship. This approach is located on an East/West binary and assumes that choice is possible in the West, while economic oppression in Asia is so all-encompassing that the very possibility of choice or agency is negated.⁷⁸ The discourse of feminists and the State in the context of the legal regulation of sex work is embedded in a tension over culture and the construction of the sex worker

⁷⁶ National Commission for Women's Annual Report of 1992-93, at 55 (India). The Commission was asked to comment on the draft National Cultural Policy proposed by the Department of Culture.

⁷⁷ *Id.* at 52.

⁷⁸ For example, Jean D'Cunha, states that even if it were to be assumed that in the North prostitution should be a woman's occupational choice, "[I]t cannot be considered so in the socio-cultural milieu of Asia where it is at best a 'survival strategy' for the large majority of women. Choice can exist only when a certain amount of freedom or option is available in decisionmaking. This is conspicuously absent in most cases at least in India where either physical force or socio-economic coercion lead women to a life in prostitution." *Supra* note 69.

as either a victim of the Western male and market or a cultural contaminant.⁷⁹

The intensification of the repressive move to further regulate the lives of sex workers has been challenged by the sex workers themselves. They are contesting the underlying assumption that economic necessity drives women into prostitution. In 1995 the *Durbar Mahila Samanywaya Committee* was formed as a forum exclusively consisting of sex workers and their children. In 1995, the Committee organized the First National Conference of Sex Workers, which issued a statement asserting that sex is primarily for pleasure and intimacy. The statement also challenged dominant sexual ideology, which allows “for sexual expression only between men and women within the strict boundaries of marital relations within the institution of family.”⁸⁰ Another group of women in prostitution has similarly stated,

We believe that a woman's sexuality is an integral part of her as a woman, as varied as her mothering, domestic and such other skills. We do not believe that sex has a sacred space and women who have sex for reasons other than its reproductive importance are violating this space. Or if they chose to make money from the transaction they are immoral or debauched.⁸¹

These emerging voices of the sexual subaltern are posing a frontal challenge to the nationalist narrative of sex and culture. These sex workers are directly challenging the idea that sex in general and commercial sex in particular are inherently negative, corrosive or otherwise dangerous. They are boldly asserting the rightful place of sex. And in so doing, they risk being cast as an even more dangerous affront to Indian culture and the nation.

The extent to which increasingly outspoken sex workers represent a challenge to the dominant narrative of culture, sex and nation may help explain the lack of willingness to promote the rights of women in sex work and the continued emphasis on regulation and moral surveillance. Supporting the rights of sex workers runs the risk of being cast as foreign,

⁷⁹ See Gopika Solanki & Gitanjali Gangoli, The Official Discourse Around PITA, 31 Economic and Political Weekly, 3298, 3299 (1996).

⁸⁰ Durbar Mahila Samanywaya Committee, Sex Worker's Manifesto, presented at First National Conference of Sex Workers, November 14-16, 1997.

⁸¹ Sangram, A Statement of Women in Prostitution 2 (1997).

as Western, as corrosive to Indian cultural values. It thus becomes safer to address some of the problems with the existing law on a terrain that does not condone the practice of commercial sex, but rather, simply attempts to mitigate its harsher impacts. Even groups like the NCW, which have begun to recognize some limited rights for sex workers, also continue to condemn the practice of sex work and go to some length to ensure that this pro-sex worker/anti-sex work position is given some cultural justification. Moreover, the nationalist narrative aligns with a particular feminist approach, which similarly views sex and sexuality from a lens of danger. The elision of these two discourses is such that the politics of positive sexuality and pleasure advocated by the sex workers remains virtually inaudible.

As a result of the alliance between cultural nationalist and feminist discourses, the sex workers who advocate a pro-rights, pro-work stand may be unlikely to succeed on their own discursive terms. It may be that they will need to address the issue of culture and to formulate their own arguments in more explicitly cultural terms. Some writers and feminist groups have begun to draw attention to the need to address the cultural arguments when advocating the rights of sex workers. They are attempting to develop a more complicated analysis of the cultural location of the sex worker in India and to counter the cultural essentialism that has informed the legal debates. Prabha Kotiswaran, for example, sees the need “to uncover, document and rescue from patriarchal and colonial discourses, the successes and struggles of prostitute women in India over the ages contained in tales and epics.”⁸² She reviews the existing literature on the treatment of prostitution in ancient literature to reveal their existence in the Indian cultural context, as well as the manner in which sex was celebrated in ancient texts and social life in contrast to the stigma that surrounds the subject of sex in the contemporary moment.⁸³

⁸² See Prabha Kotiswaran, *Preparing for Disobedience: An Introduction*, 21 B.C. Third World L.J. 161 (2001).

⁸³ “Prostitution seems to have existed alongside practices such as concubinage, maintenance of harems by royalty and female slavery. Prostitutes accompanied hunting expeditions of Kings and their armies on war. They could and did form guilds, held meetings and demanded greater civic and domestic rights. Then came the period of the Smritis, considered as one of the sources of Hindu law. Authors who write about this era tend to confuse several sexual activities such as homosexuality adultery and bestiality with prostitution. Thus, where there are sanctions against such acts, the authors presume the same to be applicable to prostitution, substituting their own moral judgment for what may have actually taken place. The reality seems to be that this period witnessed state-regulated prostitution. Hence, prostitution was legalized and the Smritis contained several

There was in ancient India, a clear categorization of prostitute women into four types; the *Kumbhadasi*, the *Rupajiva*, the *Ganika*, and the *Veshya*. The first two carried on prostitution in a clandestine fashion; the third and fourth did so in an open fashion. *Kumbhadasi* was considered to be the lowest class of prostitute woman. She was usually a servant or a house-maid and rendered sexual services to the owner of the house-hold. *Rupajivas* were next in the hierarchy and they were of many types. Some of them held important maid positions in house-holds while some of them were bored wives who sought sexual satisfaction either with or without their husbands' knowledge. Others were professional dancers and yet others came from lower classes and carried on prostitution with their husbands acting as pimps and deriving benefit from their work. The category of *ganikas* were women who had taken to prostitution as an occupation and were regulated by the laws of the state. They were usually required to be well-versed in the 64 arts described by *Vatsyanana* before they could be called a *ganika*.⁸⁴

Kotiswaran states that her argument is not intended to be revivalist or regressive. She is not calling for a return to any glorious past, much less to state-sponsored and regulated prostitution. Her purpose is to challenge the stereotypical images of the third world woman, in particular, the prostitute at a time when India is seriously rethinking the legislative policy on prostitution.

It will remind us of the agency of prostitute women through the ages, against oppressive patriarchal structures. It will remind us of the graded nature of state policies on prostitution, accompanied by the tolerance and ambivalence of Indian society towards the practice. It will remind us of the role of criminal law in the British project of sex colonization and the apathy they displayed towards the needs of prostitute women when the latter did not serve their purpose anymore. It will refresh our memories of nationalists eager to condemn prostitution while they constructed an image of the Indian prostitute victim, which

rules as to the conduct of prostitution." *Id.*

⁸⁴ *Id.*

persists to date.⁸⁵

Similarly, Sumanta Banerjee has reviewed the history of the prostitute woman in nineteenth century Bengal. He provides a brief account of the prostitute woman's shifting position from pre-colonial to colonial times. He uncovers a vast literature stretching back to the fourth century B.C. that lays down rules of conduct between prostitutes and their clients and the punitive measures to be imposed on clients who harmed the prostitute and cheated her of her earnings. Prostitution came to be regarded as a crime during colonial times, when the British sought to penalize it through the enactment of the Cantonment Act of 1864 and the Contagious Diseases Act of 1868.⁸⁶ Banerjee's work reveals the complex relationship between prostitutes and the colonial regime, their clients and themselves. His work challenges the assumption of the prostitute as a recent "import" from the west, as well as the assumption that the category of prostitute was homogenous and uniformly regarded as sinful or bad. The literature he draws upon reveals the diverse composition of the prostitute community as well as their presence and popularity in popular culture.⁸⁷

Banerjee's and Kotiswaran's works historicize the contemporary debates both in and outside of the law on prostitution by locating the role of the sex worker in the construction of the nation, countering imperialism and consolidating Indian national culture. They further complicate the cultural essentialism inherent in the State's discourse and some feminist discourse, which is based on static models of Western or Indian cultural differences. A more complicated notion of culture is developed to counter the assumption that the sex worker is either an external contaminant infecting the native population through promiscuity and disease or a victim stripped of the mantle of chastity and sexual purity that are the markers of Indian culture for women. It is used to recuperate for the sex worker a position of pleasure and desire within the framework of Indian culture, thus refuting the challenge that she is an external contaminant. It is deployed to counter the cultural move that erases the existence of the Indian sex worker, as well

⁸⁵ *Id.*

⁸⁶ Sumanta Banerjee, Dangerous Outcast: The Prostitute in Nineteenth Century Bengal 146 (1998).

⁸⁷ There are several other writers who have complicated the picture of prostitution by revealing the history of these women. *See generally*, Janaki Nair, The Devadasi, Dharma and the State, in Feminist Terrains and Legal Domains: Interdisciplinary Essays on Women and Law (Ratna Kapur, ed., 1996) at 243; Veena Oldenburg, Lifestyle as Resistance: The Case of the Courtesans of Lucknow, India 16 *Feminist Studies* 259 (1990).

as to challenge dominant sexual ideology through the lubricant of pleasure and agency of the sexual subaltern. In challenging dominant sexual ideology, the excavation of culture simultaneously creates a space for arguing for the sexual rights of women in prostitution.

2. A Gay Wave

The issue of sexual identity has been dragged into the public debate on sex and sexuality partly as a result of AIDS, but also through the increasing visibility of gay men and lesbian women. The holding of gay and lesbian conferences and national retreats, publications by members of the gay and lesbian community, and the tentative, but significant engagement with this issue by academics from different disciplines is a new phenomenon. Most recently, the controversy that exploded over the screening of *Fire* in India propelled the issue of homosexuality into the forefront of public debate.

Homosexuality is not directly targeted by law. However, it is indirectly regulated by section 377 of the Indian Penal Code, which makes it an offense to have unlawful carnal knowledge of any person. Although it is neutral on its face in terms of sexual identity, the provision is used primarily against gay men.⁸⁸

i. The Cultural Out-law

A cultural contest over the existence of homosexuality in Indian tradition has emerged in the legal domain. Between February and April 1994, there were several reports in national newspapers about the existence of "rampant homosexuality" in New Delhi's Tihar jail, which is India's largest jail block for convicted criminals and under-trials. A report by a team of doctors who visited the facility and interviewed the inmates revealed that ninety percent of them engaged in "homosexual activity."⁸⁹ The doctors expressed concern over the possibility that many of the men could be carriers of the HIV virus. They recommended that condoms be provided to prisoners in order to protect them from the virus or the further spread of the virus. However, the Inspector General of Prisons at the time, Kiran Bedi, was opposed to the distribution of condoms on the grounds that it would encourage homosexuality and also that it would amount to an

⁸⁸ Lobinita Ghosh, *Macaulay's Law Haunts Calcutta's Gays*, *Asian Age*, August 5, 1998, at 4. Shomona Khanna, *Gay Rights*, *Lawyer's Collective*, June 1992, at 4.

⁸⁹ Minu Jain, *Coming to their Aid*, *Sunday*, March 31, 1994, at 85.

admission that homosexuality existed in the prison. She stated that homosexuality was a punishable crime under the Indian Penal Code, and that the distribution of condoms would amount to the acceptance of the crime.

There was considerable debate about the issue in both the print and visual media. Bedi's position was that Indian society was not ready to amend the existing law, implying that homosexuality had never been a part of Indian culture. She also stated that she was personally not reconciled "to accept homosexuality as a normal human practice."⁹⁰ Others disagreed, arguing that section 377 of the Code, which criminalized the act of sodomy, was an obsolete law, that had been enacted by the British and had since been repealed in Britain, and that India should follow suit.⁹¹ They simultaneously argued that homosexuality had always constituted a part of Indian culture as was evident from passages in the *Kama Sutra*. Once again the cultural move that denies the existence of homosexuality in India is challenged through a counter-cultural move which argues that homosexuality has always existed in Indian culture.

Alongside such controversies, there has also been an increase in the mobilization of gays and lesbians, which has been met with considerable resistance. The opponents have been joined in their condemnation by the Shiv Sena, the militant wing of the Hindu Right. Navalkar warned that any attempt to propagate "perverted sexual values" would not be tolerated. Similarly, the women's wing of the Bhartiya Janata Party, the more moderate voice of the Hindu Right, has stated that "the demand for legal sanction of lesbianism is too vulgar and irrelevant in the Indian context."⁹²

These controversies have climaxed in the filing of two very different petitions in the Delhi High Court. One petition has been filed by Janak Raj Rai, a lawyer and chairman of the Family Conciliation Service Centre, an organization working for the welfare of families in trouble. The petitioner objects to the suggestion that the jail authorities distribute condoms to the inmates, arguing, amongst other things, that it would violate section 377 and "turn the jail into a brothel."⁹³ He is requesting the court to

⁹⁰ Amit Prakash, Law, Prejudice Block Condom Supply to Tihar Inmates, *The Pioneer*, February 24, 1994, at 2.

⁹¹ *Id.*; see also Shankar Sen, Citizen and the Law: A Case for Decriminalization, *The Statesman*, March 1, 1994, at 8.

⁹² BJP Mahila Morcha, Women's Decade: Mahila Morcha Response, in *Dashak Ke Jharokhe Mein* (1991), at 1.

⁹³ Condoms for Prisoners Opposed, *The Pioneer*, February 23, 1994, at 2.

prohibit the Delhi administration from supplying condoms to the inmates of Tihar Jail, and conduct an investigation into the practices taking place in the jail. He is also arguing that the Delhi administration be directed to medically examine each of the inmates and segregate those suffering from the AIDS virus. In order to prevent sexual activity from taking place between the inmates, he recommends that neon lights be used in the wards during the night and night patrols be conducted by the wardens. He defends his position on the ground that "homosexuality [is] against the dignity, honour and religious sentiments of the citizens of the country."⁹⁴

A second petition has been filed by AIDS Bhedhav Virodhi Andolan, (ABVA), an AIDS anti-discrimination organization, against the Union of India, challenging the constitutional validity of section 377 of the Indian Penal Code.⁹⁵ In the petition, the group attempts to counter the indignation of those who view homosexuality as a "foreign contaminant" by locating the emergence and visibility of gay, lesbian and bisexual identities within the narrative of an ancient Indian cultural tradition. The petitioners argue that "ancient Indian art and sculpture in India testifies to the prevalence of homosexuality in this country to a greater or lesser extent." This strategy is intended to refute the idea that homosexuality is a perverted Western import by demonstrating that it is materially inscribed in the historical context of India.

The petition is replete with references to homosexuality within the texts of the *Kama Sutra*. Quoting references from its own report, *Less Than Gay*, on the existence of homosexuality in India, the petitioners allege that the *Kama Sutra*, which was compiled as early as the fourth century A.D., contains an entire chapter on homosexual sex as well as on lesbian sex. One example that has been translated from the original verses states,

Young masseurs usually wearing hair ornaments do allow their friends as well as some men to have mutual oral congress. Sometimes young actors or dandies allow undersexed or elder men to have sex with them. It is also practiced by young men who know each other well. Sometimes men who are effeminate indulge in oral sex with each other simultaneously by lying alongside one another inversely. When a man and a woman lie down in an inverted position with the head of the one towards the feet of

⁹⁴ *Id.*

⁹⁵ See *AIDS Bedbhav Virodhi Andolan v. Union of India*, Civil Writ Petition (1993), at 142 (on file with author).

the other and carry on oral sex with each other, it is called *Kakila*; this term is also applicable to oral congress between two males as also two girls or women.⁹⁶

The petition also refers to passages describing acts of transvestites and eunuchs. Referring again to its report on homosexuality in India, the petition sets out the descriptions of two kinds of eunuchs referred to in the *Kama Sutra*:

The *Kama Sutra* refers to two kinds of eunuchs – those disguised as males and those as females. Eunuchs disguised as females imitate their dress, speech, gestures, tenderness, timidity, simplicity, softness and bashfulness; they derive imaginative pleasure, and their livelihood from *Auparishtaka* (homosexual sex) and lead the life of courtesans.

Eunuchs disguised as males lead the life of shampooers and practice *Auparishtaka* with the males they shampoo.⁹⁷

The text, as cited in the petition, goes on to describe eight ways in which the second eunuch has sex with the males with whom he interacts.

The petitioners also submit that the female and male aspects reside simultaneously in every individual. This concept is known as sexual dualism. What modern psychologists in the twentieth century now acknowledge as sexual dualism in each individual was a principle enunciated in ancient traditions in India. *Ardha-nari* (half-woman) is a form in which Siva is represented as half-male and half-female, typifying the male and female energies.

The position of the ABVA, which legitimates the existence of homosexuality by tracing its historical and cultural origins in Indian tradition, can be seen to be informed by cultural essentialism at one level. The ABVA petition deploys tradition and culture in much the same way as those who oppose homosexuality. Yet once again, the position on culture being advocated by them can be read as an attempt to counter the dominant story being told about homosexuality. Their story is not an intransigent archaeological rendition of the past – attempting to unearth the “true” cultural history. Rather, it is an approach that is attempting to capture the complexity of culture and sexual identity within the context of Indian

⁹⁶ *Id.* at 142.

⁹⁷ *Id.*

history. Cultural essentialism is, at one level, being used to argue that lesbian and gay sexuality has always been a part of Indian culture and that such practices have lay buried under the legal debris of colonialism. Their argument is evidence of the fact that gay and lesbian sexuality is not a contemporary phenomenon of Western pollutants that are destroying Indian culture. The cultural story that insists that lesbians and gays do not exist in Indian culture is being countered by a story that they do exist. The ABVA's strategy is an attempt to complicate the story, to challenge the dominant heterosexist overtures of the dominant cultural script, with one that challenges the story line as well as the storytellers.

Locating gay and lesbian sexual identity in a golden past performs several strategic functions. Jyoti Puri has argued:

First, to locate the emergence and visibility of gay/lesbian/bisexual identities within the narrative of an ancient, albeit discontinuous, sexually liberal national cultural tradition; second, to assert contemporary gay/lesbian/bisexual identities against the manifestations of homophobia and heterosexism through representations of this history. This strategy also serves to refute pervasive heterosexist attitudes that dismiss gay/lesbian/bisexual women and men as the embodied imperfections of Westernization or Islamization.⁹⁸

The fact that homosexuality is materially inscribed in the historical context of India refutes the argument that sexual identity is Western and alien to Indian culture. It simultaneously serves to subvert dominant sexual ideology and the heterosexist assumptions on which it is based in the contemporary context.⁹⁹

ii. The Cultural Politics of *Fire*

In November 1998, Deepa Mehta's diasporic film *Fire* was released in India and became the subject of yet another moral and cultural panic.¹⁰⁰ The henchmen of the Hindu Right (including the *Mahila Agadhi*), the women's wing of the militant and virulently anti-Muslim *Siva Sena*, and

⁹⁸ Puri, *supra* note 59, at 263-264.

⁹⁹ *Id.*

¹⁰⁰ Ghosh, *supra* note 3.

the *Bajrang Dal*, a faction of the Right that has become the moral policeman of Indian culture, directed their ire towards the screening of *Fire*.¹⁰¹ Despite the fact that the film cleared the Censor Board without any cuts, mobs disrupted screenings in a number of major cities in India, including, Bombay, Delhi, Meerut, Surat and Pune. These protests took the form of an alarming destruction to the property of cinema houses as well as attacks against members of the viewing audiences.

Several film personalities and lawyers filed a petition in the Supreme Court of India. It submitted that the attack on the cinemas violated the directors' freedom of expression and requested that the Court to direct the State to take action to stop the vandalism and safeguard the rule of law.¹⁰² The government directed that the film be sent back to the Censor Board for a further review. The Board once again cleared the film without any further cuts. However, many cinemas did not screen the film for a second time for fear of further destruction to their property or harm to the patrons.

Prior to the release of the film, Deepa Mehta anticipated an aggressive response to its cultural content and agreed to change the name of one of the protagonists, from Sita to Neeta. The move was an attempt to slip into a less confrontational and compliant position on culture. This alteration reflects fears about the offense that the film could cause to Indian audiences because of its representation of an intimate and sexual bond between Sita and her sister-in-law, Radha. Both names are derived from central female characters in Indian epics, whose attributes of virtue, self-sacrifice, and devotion to their respective husbands have come to represent the hallmarks of Indian womanhood as it is imagined. Mehta's compromise is a move that stands out as a stark example of the ways in which Indian society is being held ransom to one version, one story and

¹⁰¹ The Hindu Right, or the Hindu Nationalists, are a nationalist and right wing political movement devoted to creating a Hindu State in India. It includes the *Bhartiya Janata Party* (the political arm of the Right, which is currently in power at the national level), the *Rashtriya Swayam Sevak*, (the main ideological component of the Right) and the *Vishwa Hindu Parishad* (the exponents of the Right's religious doctrine). Other parties include the militant and anti-Muslim *Shiv Sena*. These organizations collectively promote the ideology of *Hindutva* which seeks to establish a Hindu state in India. There are several offshoots and newer segments of the Hindu Right, which include the *Bajrang Dal* and women's wings of the main and subsidiary bodies, including the *Mahila Aghadi*.

¹⁰² Apart from Deepa Mehta, the remaining petitioners belonged to religious minority communities.

one truth about Indian culture.¹⁰³

The controversy over the film involved a contest over the meaning of Indian culture as well as the place and status of homosexual identity in Indian culture. Opponents argued that the representation of the sisters-in-law in a lesbian relationship and the appropriation of cultural rituals such as *kharvachauth* (a fast kept by wives to ensure the longevity of their husbands) celebrated a perverse bond. The Shiv Sena threatened to disrupt the screening in Maharashtra if the film was not banned, alleging that it was “not a part of Indian culture.”¹⁰⁴ They read the film as an attempt to convert women to lesbianism, which would lead to the demise of the Hindu family.

These groups seem to view Indian culture as a museum piece—something that is static and immutable, that can be excavated and restored to its pristine purity. This view was seriously challenged during the course of the controversy.

Gay and lesbian groups, among others, contested the position of the various segments of the Hindu Right, and defended the film as an important statement of lesbian identity in India. In Delhi, gays and lesbians came into the public space for the first time to defend the screening, and challenge the stark declaration that lesbians do not exist in Indian culture. They asserted that “Lesbianism is not alien to Indian culture.”¹⁰⁵ Lesbian rights supporters also argued that homosexuality had always been a part of Indian culture. “Why do we pretend it doesn’t exist? Homosexuality has always been there.”¹⁰⁶ Forums such as the New Delhi-based “Campaign for Lesbian Rights,” which formed as a result of the controversy, lobbied for the film to be a means for recognizing the rights to sexual identity and a catalyst to repeal legislation that discriminated against such preferences. Their arguments were also in part based on the position that homosexuality had always been a part of Indian cultural values. In contrast to the position of the Hindu Right, they said that lesbians were included in the story of Indian culture.

¹⁰³ Yet the change is a curious one given that so much of the film is transgressive, and to tinker with names merely draws attention to its subversive possibilities rather than mitigate a potentially violent reaction to the film.

¹⁰⁴ Madhu Jain & Sheela Raval, Controversy: Ire over Fire, India Today, December 21, 1998, at 78.

¹⁰⁵ Deepa Mehta Leads Candlelit Protest, Asian Age, December 8, 1998, at 9.

¹⁰⁶ Chitra Subramanyam, War Over Lesbianism: Is it Un-Indian?, Asian Age, December 10, 1998, at 10.

Their arguments can be read as complicating the notion of culture, treating it as something that is constantly negotiated and constructed. And it is this process that has been used to create space for the subaltern including, in this instance, the sexual subaltern: the lesbian subject. Throughout the film, traditional rituals and stories are invoked to counter the dominant cultural view of Indian families.

There can be no return to a pristine, unalloyed Indian culture. This is not to argue that there is no such thing as Indian culture. Rather, it is to argue that the production of culture is a historical process, constantly changing and altering. It is to argue that the shape-shifting of culture and an inquiry into its construction are legitimate processes. The cultural argument provides the legitimacy tool for sexual subalterns. However, the cultural argument has serious limitations, which I address next.

IV. THE CULTURE CONUNDRUM

We need to move away from a picture of national and cultural contexts as sealed rooms, impervious to change, with a homogenous space “inside” them, inhabited by “authentic insiders” who all share a uniform and consistent account of their institutions and values.¹⁰⁷

These controversies over sexual speech and sexual subalterns reflect the growing unease and discomfort over the “cultural transformations” taking place in India. Law has served as a site of contest over the meaning and construction of Indian culture in the context of sex and sexuality. In this section, I elaborate on the different ways in which culture is being deployed in the legal debates on sex and sexuality.

Cultural essentialism (a stagnant, exclusive understanding of culture) is being deployed by those in a position of power and dominance to legitimate dominant sexual ideology. It is used to delegitimize those who are trying to challenge dominant sexual ideology and cultural authenticity. Cultural essentialism weaves a cultural tale based on a notion of oneness, of one culture that is fixed and timeless. The longing for a strong cultural identity has been an important desire and symptom of post-colonialism in the contemporary Indian context. In the hands of dominant conservative groups, it is based on the idea of a substantive or real essentialism, and becomes reactionary. It becomes an exclusionary discourse – a tale shaped

¹⁰⁷ Narayan, *supra* note 6, at 33.

in the image of intolerance and disapproval of difference. Cultural essentialism has been used in the legal stories I have discussed to resist the challenges posed by the defenders of sexual speech and the sexual subaltern because they are threatening to Indian cultural values and the dominant sexual ideology on which such values are based. The theme of contagion and contamination is constantly invoked in each of these areas. Prostitution is contaminating in a physical way in so far as it is spreading HIV through the respectable population. Similarly, the airwaves are contaminating Indian cultural values through the sexual representations they beam into the pure homes of Indians. And the gay issue has been regarded once again as something that is contaminating the Indian family with its proselytizing agenda.

This theme is also deployed to counter the threat of "Western imperialism." The contaminant, which is corroding Indian culture, comes from the West, from outside of Indian culture. Satellite broadcasting is regarded as contaminating Indian culture. Gay sexual identity is similarly cast as a Western import that is targeting Indian youth and stripping them of the secure mantle of Indian cultural values, which reside in the institution of heterosexuality. AIDS is also posited as an import from a decadent and promiscuous Western culture that is setting adrift Indian cultural moorings. It is a step short of arguing that sex as a whole is a contaminating and corrosive import of Western cultural value.

At the same time, cultural arguments are being deployed by disempowered and marginalized groups to challenge the dominant narratives of culture, sex and nation. The arguments being deployed verge on a similar cultural essentialism, but their effects are different. By complicating the cultural script, they challenge the homogenous and essentialist approach to Indian cultural values and the location of women, sex, and sexuality within that culture. These arguments can be seen to be informed by cultural hybridity. This is an understanding of culture that challenges the search for a real, original culture as a narrow essentialist telling of the story of Indian culture in relation to sexuality. It is based on the idea that culture is never stagnant and fixed, but is constantly shifting and fluid. Cultural hybridity exposes the limits of cultural essentialism by revealing that culture is and continues to be in a process of construction. And this process creates space for the possibility of alternative sexual practices and behavior that both challenge and subvert dominant sexual ideology. Cultural hybridity represents the post-colonial moment, which Stuart Hall describes as the point of recognition that a return to a set of uncontaminated values is impossible.¹⁰⁸

¹⁰⁸ Hall, *supra* note 1, at 247.

By engaging with Indian cultural values, do all sides of the debate not run the risk of also essentializing and authenticating Indian cultural values? Cultural arguments can be a powerful and creative force for hitherto disempowered and excluded people. The unearthing of some buried past has been and continues to be an important exercise for marginalized and disadvantaged groups, that includes women, racial, caste and religious minorities. It can be an empowering and important form of resistance. In the context of the three issues discussed, cultural essentialism is at times being used to argue that sex and sexuality, prostitution, and gay sexual identity have always existed in Indian culture. In the hands of marginalized groups, cultural essentialism can be strategic, rather than based on a substantive or real essentialism. As Annie Bunting argues, "essentialism from a dominant position can perpetuate oppression while, as a means of challenging dominant ideologies, it can be necessary and persuasive."¹⁰⁹

But there is a need to ensure that the cultural move, which is used to challenge the dominant narrative of culture, sex and nation, does not in turn become its own unifying, essentialist and exclusionary discourse. The use of culture in this exclusionary way can be detected in the three legal stories I have related in this paper. In the petition challenging the constitutional validity of section 377, the deployment of culture presents this very problem. Their rendition of the cultural past is overwhelmingly a Hindu rendition. Their story for the inclusion of gays and lesbians can be said to be at the cost of the exclusion of another minority – a religious minority, namely the Muslims. The problem of exclusion is starkly manifested in the work of Giti Tandani. Her story of the exclusion of lesbian identity is told explicitly within a Hindu nationalist framework. The Muslims are among those who obliterated the glorious (Hindu) lesbian past through conquest and imposition of their alien cultural norms and values.¹¹⁰ The dangers of such an argument are all too obvious within the context of communalism and right-wing politics. The Hindu nationalists are unlikely to take on the issue of sexual identity as a serious cause.

¹⁰⁹ Annie Bunting, *Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies*, in *Feminist Theory and Legal Strategy* 6, 12 (Anne Bottomley & Joanne Conaghan, eds., 1993).

¹¹⁰ See generally Giti Tandani, *Sakhiyani: Lesbian Desire in Ancient and Modern India* (1996). For a discussion of how purity of the essentialist project operates in the context of sex/gender categories to exclude other identities in law, in particular the transgendered subject, see Hassan Shafiquallah, *Shape-Shifters, Masqueraders, & Subversives: An Argument for the Liberation of Transgendered Individuals*, 8 *Hastings Women's L.J.* 195 (1995).

However, as has been demonstrated in other situations where they purported to champion women's rights, their motivating concern was to use this strategy as a way in which to attack the Muslim other as intolerant and barbaric.¹¹¹

And this brings me back to *Fire* and the point where my story began. The celluloid Radha (not Sita) is forced to undergo the test of purity through *Fire*. Unlike the epic version where the *agnipariksha* is a public event, and Sita voluntarily sits in the middle of a burning wood fire (to prove her fidelity to her husband and divine consort, Ram), Mehta's *Fire* takes a different cultural turn. Radha's sari catches fire from the burning gas stove. We have no idea if she survives until the camera brings us to the closing sequence in the setting of the famous Nizamuddin tomb, the burial place of a Sufi Muslim saint – Sufism being a belief system that accommodates different sexual practices. The camera encircles the two women, Radha and Sita, embracing one another with a beloved's gaze. Radha survives the test of purity, but unlike the epic version of Sita, this time the test is not for the sake of cultural purification and sexual recuperation. Rather, it is for validating her love for Sita through the represented cultural space that they inhabit. Mehta's counter cultural move does not leave us in the end with an uncomplicated authenticated subject. The two women strategically invoke culture throughout the film and their relationship is continuously reconstituted through these moves. In the end, their temporary occupation of a Muslim spiritual space, the space of a persecuted religious minority, the space of another "Other," brings us to the brink of a new level of complexity and challenge.

But I am pulled away from the brink by my recurring dilemma. The risk of strategic essentialism is that we do essentialize culture, albeit momentarily. *Fire* can be subject to another interpretation – namely one of a totally essentialized culture – the mythologization of a culture from the point of view of an Asian immigrant in Canada. Deepa Mehta's subsequent disavowal of *Fire* as a lesbian film, and thus refuting that which is most subversive of Indian culture, unmasks her project as one of securing legitimacy.

Strategic essentialism can be deployed to mobilize people to do political work, yet it can still fall into the trap of some irreducible essentialism. In deciding "when our essentializing strategies have become traps, as opposed to having strategic and necessary positive effects,"¹¹² Gayatri Spivak argues that a strategic use of essentialism must be subject to

¹¹¹ Kapur & Cossman, *supra* note 60, at 232.

¹¹² Gayatri Chakravorty Spivak & Ellen Rooney, *In a Word: Interview in The Essential Difference* 153 (Naomi Schor & Elizabeth Weed, eds., 1994).

persistent critique, “otherwise the strategy freezes into something like what you call an essentialist position.”¹¹³ She also emphasizes how the position of the strategist is important. “So, to an extent, we have to look at where the group – the person, the persons, or the movement – is situated when we make claims for or against essentialism. A strategy suits a situation; a strategy is not a theory.”¹¹⁴ She has argued that her own remarks about strategic essentialism have been taken up in discourses that are influenced from sites of influence and power, and “that the marking of the critical moment, which is the strategic moment, have been erased.”¹¹⁵

Yet Spivak and others have been critiqued for their anti-essentialist stands and for taking deconstruction to the point that it is no longer possible “for the native to speak.”¹¹⁶ Rajeswari Sunder Rajan has attempted to break through the essentialist, anti-essentialist impasse in the context of debates about *sati* and the free will/coercion dichotomy. Feminists have continuously argued that *sati* is a coercive practice and that the women are victims, while the pro-*sati* lobby has argued that *sati* is a voluntary act and that the woman feels no pain. Sunder Rajan, drawing on the work of Elaine Scarry and her focus on the “radical subjectivity of pain,” argues that the focus on the pain of the dying woman, reminds us of the woman’s subjectivity, as well as the fact that the pain impels the suffering subject towards freedom.¹¹⁷ Sunder Rajan’s reformulation avoids the complete erasure of the woman’s subjectivity through her experience of pain, while at the same time recognizes that the experience of pain actuates the

¹¹³ *Id.* at 154.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Benita Parry accuses Gayatri Spivak of being “so enamored of deconstruction that we’re not able to let the native speak.” See Benita Parry, *Problems in Current Theories of Colonial Discourse*, 9 *Oxford Literary Rev.* 27 (1997).

¹¹⁷ Rajeswari Sunder Rajan, *Real or Imagined Women: Postcolonialism, Gender and Culture* (1995), at 9. *Sati* is a practice where a woman will sit on the funeral pyre of her husband and immolate herself with his body. The debate on *sati* has been an ongoing one despite the fact that it is not a widespread practice. In 1929 it was prohibited by law in Bengal, a northeastern Indian state, by William Bentinck, a British governor. It is assumed to have declined in frequency thereafter. In post-Independence India, there have been stray incidences of *sati* reported, about forty in all, mostly in some northern Indian states. *Id.*

woman's desire to escape, to be free from it.¹¹⁸

I borrow from the insights of Sunder Rajan to argue in favor of a sexual subaltern subject-in-pleasure, rather than in pain – the female subject at the point of orgasm, rather than demise. This subject can assist in moving beyond the cultural essentialist/anti-essentialist divide. Cultural essentialism that is used for either dismissing or validating issues of sexuality is not in and of itself helpful.¹¹⁹ The use of culture to argue against the existence of female sex and sexuality or against the existence of the sexual subaltern reinforces dominant sexual ideology and the idea that there is just “one way to do it” and “live it.” Similarly, cultural explanations that try to prove the existence of these “contaminants” within Indian culture can become their own exclusionary discourses, as I’ve already discussed. The arguments around culture are to some extent arguments about authenticity, more specifically about who constitutes the authentic Indian subject. The desire to produce a purified, authentic subject slides into cast-iron representations of identity and culture. In the sexuality debates, the sexual subject is a site of cultural contest, where the cultural legitimacy entails making a claim of authenticity. And these claims rest, albeit momentarily, on cultural essentialism.

Shifting the focus onto the location and desire of the sexual subject creates the possibility of disrupting both the sexual and the cultural script. Foregrounding the subjectivity as well as the subaltern location of the sexual subject provides a trajectory into the debates on sexuality and culture that ensures the instability of sex and sexuality as a category, as well as culture as a category that is fluid and shifting. More specifically, the sexual subaltern subject-in-pleasure can challenge the dominant cultural and sexual norms that perpetuate the notion that sex is dirty and corrupting, that it needs to be curtailed, confined, restricted, and cabined. The

¹¹⁸ Lata Mani is also propelled in a similar direction. She concedes that there is no such thing as a voluntary *sati*, but does not succumb to Spivak's position that such a position leads to the complete erasure of the woman as a subject who can speak. She rephrases Spivak's query (Can the subaltern speak?) by posing a series of questions, “Which groups constitute the subaltern in any text? What is their relationship to each other? How can they be heard to be speaking or not speaking in a given set of materials? With what effects? Rephrasing the question in this way enables us to retain Spivak's insight regarding the positioning of women in colonial discourse without conceding to colonial discourse what it, in fact, did not achieve – the erasure of women.” Lata Mani, *Cultural Theory, Colonial Texts: Reading Eyewitness Accounts of Widow Burning*, in *Cultural Texts*, 392, 403 (Lawrence Grossberg, et al., eds., 1992).

¹¹⁹ Narayan, *supra* note 6, at 111.

foregrounding of pleasure and desire challenges the ways in which cultural essentialism is used in law to reinforce a negative representation of sex and casting it as something that is alien to Indian culture and ethos. And the pursuit of desire and pleasure, at least as a heuristic device, is both positive and empowering. Unlike *sati*, where death looms as it focuses on the pleasure of the sexual subaltern, the possibility of ecstasy goads the subject into agency, bliss, and at times, even a sense of accomplishment. By recognizing the subjectivity of the sexual subject, she is not constructed exclusively as a victim. It is a subject that creates space for the articulation of a notion of partial agency, a space somewhere in between the victim subject and the autonomous ahistorical liberal subject.¹²⁰

The fact that the sexual subaltern is not a monolithic group also shatters any claim to a universal sexual and cultural truth or story. This subject challenges the ways in which cultural essentialism can be used to reinforce and reinscribe dominant sexual ideology and a creeping cultural hegemony around sex as something that is alien to Indian culture and ethos. The convulsions of the sexual subaltern (subject-in-pleasure) provide a counter-hegemonic possibility to challenge the broader relations of power, knowledge and the crooked "truth" about sex and sexuality.

This analysis helps untangles at least some of the dilemmas surrounding cultural essentialism and enables us to remain committed to the project of cultural hybridity. We need to continue to understand the fluidity of culture as a concept that is constantly shifting, changing and malleable, as well as the hybridity of culture, that it is constituted differently in different specific historical moments.¹²¹ In this way, we can contest the notion of a pure Indian culture. My intention is not to romanticize or glorify cultural hybridization. It is a confused, at times alienated, and displaced concept. My intention is to disturb the certainty of knowledge that is projected by *real* as opposed to strategic cultural essentialism through the presentation of kaleidoscopic memories, to disrupt orthodoxies without necessarily replacing them.

Yet several questions remain. How can the sexual subaltern subject-in-pleasure be articulated in law? Law is not a celebratory space. It is a space we go to when things go wrong – when the rules are broken. However if law is discourse, it plays a role in the construction of the

¹²⁰ Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 Colum. L. Rev. 304 (1995).

¹²¹ See Inderpal Grewal & Caren Kaplan, *Introduction: Transnational Feminist Practices and Questions of Postmodernity*, in *Scattered Hegemonies* (Inderpal Grewal & Karen Caplan, eds., 1994).

subject. Law is constantly engaged in re-inventing and re-interpreting the subject, including the sexual subject. In the legal stories I have related, law is also a space where a cultural story is told about sexuality, often a cultural story that is rooted in a dominant cultural script. When the sexual subaltern subject-in-pleasure comes to law, whether to claim rights, or to challenge a punitive regime that bounds her off as someone who is stigmatized, inauthentic or foreign, she counters the weight of sexual and cultural normativity as she transgresses the boundaries of both. In challenging these normative boundaries, she creates the possibility for the recognition of multiple sexual identities or sexual practices through redefining and redrawing the boundaries.¹²²

V. CONCLUSION

My project has been to complicate the picture of Indian cultural values and its relationship to sex and sexuality in law. I have explored this relationship in the context of contemporary debates on sexual speech, and the rights of the sexual subaltern. I have attempted to destabilize the dominant narrative of culture, sex and nation that keeps sex stigmatized and the sexual subaltern marginalized and silent. I have examined the possibility of strategically deploying culture to contest cultural orthodoxy without falling into the essentialist and universalizing trap of that orthodoxy. I challenge cultural and sexual hegemony by recuperating a notion of the sexual subaltern subject-in-pleasure. The paradox of course is that my project of recuperating the dancing body begins from a discussion about culture in the context of violence and victimization. My effort is to displace the body in flames with the dancing body in ecstasy, while keeping us aware of the danger inherent in exploring sexuality through the subaltern location of the sexual subject.

The sexual subaltern subject-in-pleasure can recuperate a space for sexuality within the cultural text, which has been stigmatized and treated as incoherent and unnatural in the contemporary culture wars. It is a device that is not merely asserting the pleasure and agency of those who participate in normative sexuality. Rather, this subject can create heterogeneous ways in which to speak about sex (in and outside of law) from a subaltern location and shift the stigma associated with this location.

¹²² For example, Lisa Bower discusses the disruptive possibilities of the queer subject in the legal arena in the United States. She examines how the articulation of a queer notion of "non-identity" within the legal field has the possibility of destabilizing certain legal classifications. Lisa C. Bower, *Queer Acts and the Politics of "Direct Address": Rethinking Law, Culture and Community* 28 *L. & Soc'y Rev.* 1009, 1014 (1994).

At the same time, we remain attentive to problems and risks associated with the space from which she is speaking. The “pleasure” of the prostitute is not intended to negate her struggle against exploitation or hardship, but it can challenge the prejudice and the cultural straightjacket that attempts to silence her through an exclusive discourse of victimization, pain and moral contamination. Similarly, the homosexual, and other sexual subversives, can and are in fact asserting their agency through assertions of pride and sexual pleasure that are no longer entombed in cultural crypts, yet are located in the very complex story of Indian culture and Indian sexuality. They simultaneously risk familial and social rebuke and even violence for expressing their subalterneity. The sexual subaltern subject-in-pleasure challenges the inviolability of the linear narrative that law tells about sex and culture in India and continuously ruptures and redraws the boundaries of both. Its disruptive potential creates the possibility of telling more complex stories and to speak from a space “somewhere in between.”