

BE IT MANU, BE IT MACAULAY: INDIAN LAW AND THE 'PROBLEM' OF THE FEMALE BODY

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In light of a series of recent reports of gender violence, a lot of debate has been generated about the massive number and alleged causes of rape and other sexual offences in India as well as possible remedies. This paper locates one of the deepest roots of the problem in a socio-legal approach that tends to consider a woman's body as a property of the husband. This approach is often defended in the name of ancient Indian tradition and may indeed be traced back to some early Indian texts though not others. This attitude of certain early Indian "law-givers" like Manu and Bṛhaspati is not exclusive, but matched well with the Victorian morality inherited by the administrators of colonial India and traceable in the I.P.C. drafted in 1860 under Lord Macaulay's leadership. Since the attitude has been largely retained even in the legal system of independent India, it has to be understood in its social context, for any legal structure is the product of its contemporary society. This paper tries to show how this socio-legal tendency to consider a woman's body as property to be protected and preserved for her husband affected the law regarding adultery, rape, molestation and prostitution throughout Indian history. It also tries to show how the construction and perpetual justification of this attitude in the name of "Indian tradition" is the product of a selective appropriation of certain sources, for a number of alternative traditions have often been overlooked. Locating the problem and its roots, the paper argues that the solution of this deep-rooted problem has to be social as well as legal. As a start, our hasty justification of any inequality on the grounds of Indian tradition needs to be informed by a more nuanced understanding of the multiplicity of Indian tradition and concurrently our law has to shed off the historical baggage of both the Dharmasāstric tradition and of Victorian morality, thereby proceeding

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to a more gender-neutral and sensible approach that will accept a person's absolute right over his/her own body.

I. INTRODUCTION

On the fateful night of December 16, 2012, a young medical student, later named 'Nirbhaya', was gang-raped, beaten up and tortured with an iron rod inside a Delhi bus. A male friend accompanying her was also severely beaten up. The incident sparked a wave of protests in Delhi. The anger of the 'civil society' overflowed, despite the arrest of the criminals and possibility of justice being neither delayed nor denied. The sad news that the victim lost her battle for life in Singapore inflamed the sentiment to a new high before everything returned to normalcy.

The incident was terrifying; the crime heinous. The anger it generated is no doubt justified. However, the issue has more serious dimensions to it. The rape of 'Nirbhaya' is not the only reported incident of such a case in recent times. On the contrary, growing sexual violence on women is a crisis threatening India in recent years. There is also no reason to believe that Delhi is an isolated case in this regard. The shameful report of a Guwahati teenager being openly molested, stripped, beaten up and tortured with cigarettes by a rowdy mob stunned us in the same year. In 2011, the recorded number of rapes in India allegedly amounted to almost one every hour.¹ In the early months of 2013, West Bengal witnessed a series of brutal rapes and murders of school and college students, of which the case of Kamduni near Barasat received huge public attention. Similarly startling was how two lower caste girls were kidnapped, raped and hanged from a tree at Badayun in Uttar Pradesh on May 27, 2014, followed by similar brutalities in Sitapur and Bahraich in the same state. What leads to such a pitiable condition? Can the problem be remedied through legal means alone?

There is a strong case for strengthening existing laws, and such demands have been voiced in the Delhi rape protests. However, merely an increase in the quantum of punishment will hardly help in dealing with the larger problem, for the root of the problem is more social than legal. It is not because the punishment for rape is too mild that the rapists rape. Rather, it is because there is very little scope of being punished at all. It is not our laws but our society that still emphasizes the notions of female virginity and chastity, and, as a result, often ends up ostracizing the victim—rather than the offender—of a sexual offence. Therefore, for a large number of Indian women, sexual abuse—especially if it amounts to loss of virginity—amounts almost to the end of life, since it jeopardizes the possibility of a respectable marriage. Thus many such cases are unreported. In some cases, rapists are made

¹ ROMILA THAPAR, *THE PAST AS PRESENT* 293 (2014).

to marry the victim. Any debate on the laws dealing with women, without considering these social aspects, is deemed to be incomplete in this regard. Not only are the makers and upholders of the law produced by their own society, the Implementation of the laws also depends on social agents beside the lawmakers—such as the victims, their families, police officers. So it is important to look at the social dimensions and origins of the law, from outside the strictly legal point of view. The concerned social notions are often justified in the name of (ancient) 'Indian culture' and (ancient) 'Indian tradition'. Therefore, as Romila Thapar has pointed out in a recent work, the social mindset produced by these notions often search for the solution in limiting the freedom of the victim—like incarcerating women at home after dark, not allowing girls to use cell phones to stop them from contacting boys, suggesting the repetition of the 'Saraswati Mantra' for a woman about to be raped or the observance of a 'Lakshman Rekha', etc.—rather than searching for the root of the problem. It is often the same social mentality that calls for the death penalty of the rapists on the ground that a raped woman is nothing but a *zinda lash* (living corpse).² Similar cultural mores lead to the insensitive statements of the Chief Minister and Home Minister of Uttar Pradesh about rape, including the presentation of rape as an error committed by the boys, alleging the free mingling of boys and girls as the cause of rape, and describing rape as 'sometimes right and sometimes wrong.' This paper, therefore, attempts to offer a glimpse of that believed culture or tradition which is regarded as the root of these notions, and their implications in the formation of laws. This paper intends to analyze a specific legal attitude in a number of ancient, medieval and modern Indian traditions. Its scope is therefore limited to the issue concerned, and it consciously refrains from entering into the larger debates of comparative religion, or commenting on the relative 'liberality' or 'conservatism' of any religious tradition over another (or the possible explanations for such differences.)

II. MANU TO MACAULAY: LOCATING INDIAN LEGAL TRADITION

Certain early Indian texts are loosely termed as 'law-books' by their early translators, and had significantly influenced the colonial perception of traditional Indian law. These are generally of two categories—*dharmasūtras* and *dharmasāstras* or *smṛtis*. The *dharmasūtras* are the older of the two, and were composed roughly in the middle of the first millennium BCE, the most notable of these being the four composed by the Gautama, Baudhāyana,

² ROMILA THAPAR, THE PAST AS PRESENT 293-294 (2014). (Here Thapar also shows how these mentalities, based on some believed religious tradition, reinforces the rape culture even in their protective forms. For instance, the recent riots at Muzaffarnagar in Uttar Pradesh was triggered by the fear that Hindu young women were falling into the clutches of and marrying Muslim young men. The slogan was to protect the women (*bahu-beti bachau*). But in the process of protecting the *bahu* and the *beti*, raping (Muslim) women was considered perfectly in order).

Āpastamba and Vasiṣṭha. When the society was more organized and settled, the new literary genre of the *dharmasāstras* or the *smṛtis* evolved. The *Manusmṛti* or *Mānavadharmasāstra* (c. 200BCE-100CE) is usually considered to be the monumental text of this genre. Following Manu, numerous other 'law-givers' composed their treatises, like Yājñavalkya (c. 2nd-3rd c. CE), Viṣṇu (c. 3rd c. CE), Nārada (c. 4th-5th c. CE), Bṛhaspati (c. 5th-6th c. CE) and Kātyāyana (c. 7th c. CE). All these texts are compositions of *brāhmaṇa* males, and have a very strong bias in favour of the highest caste and the male gender. The householder's life is usually portrayed as the ideal life in these texts and the discipline of a household is very much dependent on the subjection of the wife to the husband. Therefore, a man's proprietorship over his wife's body is pivotal to such discipline.

The institution of marriage is shown as an institution of giving away the daughter to a man. Women and property are often referred to jointly, and the necessity to protect both is pointed out. It is declared that the vice of anarchy is that property cannot be retained and the wife is not under control.³ In fact, kingship emerged to ensure the security of property and women, while the first king accepted this duty in return for a share of the property and women of his subjects.⁴ Women are not only conceived as a desirable possession bestowed by the wish-fulfilling tree,⁵ they are often bracketed with animal wealth, probably being considered as movable property. Like any property, they could be sold, mortgaged or given away. According to the *Garuḍa Purāṇa*, a man should defend himself at the cost of his wealth and wife.⁶ Having a similar idea, king Hariścandra gives away his wife to appease Viśvāmitra, in the *Mārkaṇḍeya Purāṇa*.⁷ The *Agni Purāṇa* also gives an interest rate of 1/70th of the original value for the pledged women and animal.⁸ Vijay Nath has observed that law-givers like Āpastamba, Manu and Yājñavalkya are of the opinion that family members cannot be gifted, sold or pledged. Manu clearly differentiates the wife, obtained from God, from cattle or gold, obtainable in the market.⁹ However, these only demarcate women's status as a different kind of property, but do not negate the idea of women being labelled as property. Manu declares:

³ VĀLMĪKI, THE RĀMĀYANA AYODHYĀKĀNḌA II.67.11 (Sheldon Pollock trans., Vol. II, 1987). (For the original text, see the text with the same translation, published from the New York University Press, New York, 2007).

⁴ VYĀSA, THE MAHĀBHĀRATA ŚĀNTIPARVAN XII.68.15-24 (Shripad Krishna Belvalkar ed., Vol. XIII, 1961).

⁵ HARIVAMŚA, I.86.56 (P.L.Vaidya ed., 1969).

⁶ GARUḌA PURĀNA, 109.1 (M.N. Dutt trans. & ed., Delhi, 2009).

⁷ MĀRKAṆḌEYA PURĀNA, VII.24 (F.E. Pargiter trans. & ed., 1969).

⁸ AGNI PURĀNA, 253.63.4 (A. Gangadharan trans., 2006).

⁹ Vijay Nath, *Women as Property and their Right to Inherit Property up to the Gupta Period*, 20(1-2) IND. HIST. REV. 1-15 (1993-1994).

"In her childhood (a girl) shall be under the will of her father; in (her) youth, of (her) husband; her husband being dead, of her sons; a woman should never enjoy her free will."¹⁰

Seen in this light, a woman's body being marked out as husband's property is part of ancient Indian legal tradition. That, however, does not necessarily mean that we should follow that tradition loyally without any reform. Moreover, the very nature of these texts is questionable. One must remember that these texts were not the constitutions of early Indian states. Rather, these are merely prescriptive texts where certain authors prescribed some laws which they considered ideal. Whether these laws were ever applied, or whether they were even considered as laws, is under question.¹¹ The creative literature and the royal edicts are better source materials to understand how the society and polity actually functioned. Even among the normative Brahmanical prescriptive texts, the so-called lawbooks do not have unquestionable authority. The normative Brahmanical worldview conceived the human life in its four dimensions—*Dharma* (social ethics), *Artha* (profit), *Kāma* (pleasure) and *Mokṣa* (emancipation). The last of these does not pertain to the material world, the other three do. There were scholars who had specialized in any one of these three dimensions of a person's worldly life and composed treatises on that. Therefore, the *dharmasāstra* tradition has its parallels in *arthaśāstra* and *kāmasāstra* traditions. Manu's *Mānavadharmasāstra*, Kauṭilya's *Arthaśāstra* and Vātsyāyana's *Kāmasūtra* have become the monumental prescriptive texts for the two other dimensions of human life. Therefore, exclusively using the 'lawbooks' (the *dharmasūtras* and *dharmasāstras*) to understand early Indian legal tradition is not a very justifiable approach.¹²

Nevertheless, this is exactly how early Indian tradition was defined by the colonial government. When the early colonial government tried to understand the Indian tradition, they tried to view it through the religious prisms of Hindu Law and Muslim Law, following the *dharmasāstras* and the *shari'a* respectively. The problem with the former has been discussed. The latter is equally problematic. Just as there is no singularly acceptable text of ancient

¹⁰ MANU, THE ORDINANCES OF MANU, V.148 (Arthur Coke Burnell & Edward W. Hopkins trans., 1971). (Wherever, Manu has been quoted this translation has been used. For the original Sanskrit passages, see MANU, MANUSMṚITI WITH THE COMMENTARY MANUBHĀṢYA OF ĀCĀRYA MEDHĀTITHI, (Ganganath Jha ed., 1998).

¹¹ See NANDINI BHATTACHARYA PANDA, APPROPRIATION AND INVENTION OF TRADITION: THE EAST INDIA COMPANY AND HINDU LAW IN EARLY COLONIAL BENGAL (2008) for the argument that Hindu Law was a colonial invention and the Dharmaśāstric Tradition was not a legal tradition.

¹² For recent scholarly works on various alternative traditions within the Brahmanical practices, see LIVIA HOLDEN, HINDU DIVORCE: A LEGAL ANTHROPOLOGY (2013) for the tradition of divorce within Brahmanism, or MRIDUL EAPEN AND PRAVEENA KODATH, FAMILY STRUCTURE, WOMEN'S EDUCATION AND WORK: RE-EXAMINING THE HIGH STATUS OF WOMEN IN KERALA (2002) for the various family structures and prevalence of polyandry in Kerala.

Brahmanical Law, there is no one particular strand in Muslim Law as it follows different schools of Islamic jurisprudence. Ideally speaking, the Muslim Law is a set of rules based on Quranic injunctions. However, *The Quran* not being a law-book, there are only some scattered and often unexplained injunctions in the text. It is a historically established fact that Mohammed wanted to reform the tribal customary laws of his contemporary Arabia and replace some of them with new injunctions. However, there is no single unanimously accepted compendium of such laws. Muslim Law, therefore, is a set of rules variously collected and codified by various jurists. The *shari'a* is no single body, but has several schools. Hanafi, Maliki, Shafi'i and Hanbali are the four most prominent Sunni schools. But there are many other minor schools as well as Shi'i schools. In India, the most prominent school has been the Hanafi. However, the founder of the school, Imam Abu al-Hanifa, did not leave any written record behind. As a result, his thoughts are known only from the diverse interpretations given by his disciples and followers. Moreover, in India, Muslim Law remained as prescriptive as the Brahmanical Law, for the Sultans of Delhi and the Mughal Emperors had hardly ruled according to the *shariah*, and maintained a distinction between *dindari* (religious administration based on normative Islamic injunctions) and *duniyadari* (practical governance). This historical fact was hardly kept in mind by the colonial administrators and legislators who preferred to see Indians as highly religion-oriented people.

The present Indian state still bears the Hindu Laws and Muslim Laws, partly as legacies of that colonial mistake. The *Manusmṛti*, being one of the earliest Sanskrit texts translated into English, had an immense impact on the colonial understanding of early India. As a result, early India was seen only as the land of religious speculation, the laws of Manu, the chastity-obsession of Sītā and Anasūya, and the country of the Sati system; whereas the erotic literature of Amaru and Bharṛhari, Kālidāsa and Jayadeva, the decorations on the temples of Khajuraho or Konarak, the pragmatic diplomacy of Kauṭilya and the shrewd pleasure-seeking of Vātsyāyana, the polyandry of Draupadī and the charm of Ambapālī were receded to the background. This selective idea of the Indian tradition helped the nineteenth century British government, for it did not differ much from the Victorian Puritanism that the colonial government brought in. The Puritanical attitude about the female body was very much at work in the drafting of the Indian Penal Code (henceforth IPC) in 1860 under the leadership of Thomas Babington Macaulay. The female body was perceived as a possession of the husband. A female's modesty and integrity was to be preserved by keeping her body protected from the access of other males. These notions were in a manner shared by Manu, al-Hanifa and Macaulay.¹³

¹³ Since this paper primarily compares early Indian notions with the IPC and other modern Indian laws, we limit ourselves to these texts only. The Islamic Law, Quranic and Hanafi, interesting in its own right, deserves separate elaborate discussion in some separate paper, and the best person to do so would be a medievalist proficient in both Arabic and Persian. Therefore, our reflections on Islamic Law will be limited to a few cursory glances.

Since the IPC is still the most important code for identifying and punishing most of the sexual offences in India, it is worthwhile to have a close look at some of its relevant sections in the light of the background discussed so far.

III. DEFINING ADULTERY: AN INFRINGEMENT OF THE RIGHT TO PROPERTY?

One of the biggest markers of the woman's status as husband's property is the gendered concept of adultery. All the law-givers who conceived the female body as an exclusive property of the husband saw adultery as a serious offence. Let us have a glimpse of Manu's definition of adultery, for instance:

"He who addressed the wife of another at a watering-place, in a forest or wood, or at the union of rivers, would incur (the sin of) adultery.

Attendance upon her, sporting with her, touching her ornaments or clothes, sitting upon a bed with her, all this is called adultery.

If any man touches a woman upon an improper part (of her body), or being thus touched by her submits to it with patience, this is all called adultery, (if done) by mutual consent."¹⁴

Manu takes it as one of the most serious offences and suggests capital punishment for any non-*brāhmana* committing adultery.¹⁵ He also suggests different amounts of fine for the adulterous men, depending on their *varṇa* and the *varṇa* of their female partner.¹⁶ Possibly, these are for lower grades of adultery, like meeting up or touching clothes or ornaments, while the capital punishment is for actual sexual contact.

The clear suggestion is that adultery is a serious violation of another man's property (wife's body). The violation can be of several levels, and the punishment has to be proportionate. The violator has to be the man only, for only one worthy of possessing or enjoying a property can violate another's property rights. The woman, being herself the property, has no say in the matter. Therefore, a relationship which she consents to is also a criminal offence.

However, this consent would be a violation of her husband's ownership over her body. That is a dangerous possibility: a man's right to property being disregarded because of the agency of the property itself. Manu, therefore, prescribes the highest punishment for such an instance, not just death but something worse than that:

¹⁴ MANU, *supra* note 10, at VIII. 356-358.

¹⁵ MANU, *supra* note 10, at VIII. 359.

¹⁶ MANU, *supra* note 10, at VIII. 375-385.

“If a woman, made insolent by (the rank of her) family, or by (her own) parts, should prove false to her husband, the king should have her devoured by dogs in some much-frequented place.

He should cause the evil man to be burned on a glowing hot iron couch, and they shall place pieces of wood about it till the evil-doer is consumed.”¹⁷

Manu’s spirit is faithfully retained by the subsequent lawgivers. Nārada, for instance, clarifies the three different grades of adultery as meeting with another man’s wife in an unseasonable hour or place, sitting and conversing with her, and being sexually involved.¹⁸ Nārada’s punishments are a bit milder — a middling fine for adultery with a woman of lower caste, the highest fine for adultery with a woman of own caste, but capital punishment for adultery with a woman of superior caste.¹⁹ The woman participating in the act has been prescribed certain penances, including having her hair shaved, lying on a low couch, receiving bad food and bad clothing, and being assigned the job of a sweeper.²⁰

Bṛhaspati also tries to make the punishments lighter by distinguishing between the different grades of adultery:

“Winking (at a woman), smiling (at her), sending her messengers, and touching her ornaments or clothes is termed an adulterous act of the first (or lowest) degree.

Sending perfumes, garlands, fruit, spirituous liquor, food, or clothes, and conversing with her in secret, is considered an adulterous act of the second degree.

Sitting on the same bed, dallying, and kissing or embracing each other, is defined as an adulterous act of the highest degree by persons acquainted with law.

For these three grades of adultery, the first, middling and highest fines shall be inflicted respectively.”²¹

¹⁷ MANU, *supra* note 10, at VIII. 371-2.

¹⁸ Nārada in THE MINOR LAW BOOKS (PART-I) XII.62 (Julius Jolly trans., 1969). (All the quotations from Nārada are from this translation. For the original Sanskrit passages, see NĀRADA, NĀRADA SMṚITI, Research Series Nos. 133 & 135 (Heramba Chatterjee Shastri ed., 1988)).

¹⁹ Nārada *supra* note 18, at XII. 70.

²⁰ Nārada *supra* note 18, at.

²¹ Bṛhaspati, in THE MINOR LAW BOOKS (PART-I) XXIII.6-9 (Julius Jolly ed., 1969). (All the quotations from Bṛhaspati are from this volume. For the original Sanskrit passages, see BRHASPATI, BRHASPATI SMṚITI (P.V. Kane ed., 1933)).

Thus, we can see that the prescribed punishments for adultery were becoming milder over time, but the act was unanimously considered as a serious infringement of the husband's right to property. Manu would want a painful death for both the offender (the man) and the consenting woman, Nārada would fine the offender unless the offended husband was of a superior caste than the offender (which would demand capital punishment) and would spare the woman with a humiliating display of penance. Bṛhaspati would only fine the offender and let the woman go. However, Bṛhaspati's mercy to the woman seems to be on the ground that the woman is nothing but the object at stake, without agency. If that agency is expressed, when the adulterous act is performed after some seduction by the married woman, Bṛhaspati's sadism matches that of Manu:

"When a woman comes to a man's house and excites his concupiscence by touching him or the like acts, she shall be punished; half of her punishment shall be inflicted on the man.

Her nose, lips and ears having been cut off, she shall be paraded in the streets and plunged into water; or shall be torn to pieces by dogs in a public place frequented by many persons."²²

That the ideas of the three lawgivers were not totally divorced from social reality, at least in this case, is testified by the two epics. Both the epics contain the story of the hero Parasurāma which tells how he beheaded his own mother Reṇukā who was aroused by seeing king Citrasena in water-sport and thus committed an offence of adultery against her husband Jamadagni who ordered her to be beheaded. This story, a legend of the Bhṛṅgu clan to which Manu also belonged, matches the spirit of Manu.

On the other hand, the *Rāmāyaṇa* contains the story of Ahalyā, the wife of the sage Gautama, who consented to an adulterous advance by Indra. There, Indra is punished by the sage's curse, while Ahalyā is cursed to a long and severe penance, as Nārada would want it to be. The same epic also shows Śūrpanakhā, the sister of Rāvaṇa, trying to seduce Rāma and Lakṣmaṇa, an act punished by mutilating her nose and ears, as Bṛhaspati would suggest.

It must be mentioned in passing that the conditions seem to have been a shade better in Islamic prescriptive texts. In Islam, marriage is not a sacrament, but a contract. The Prophet Mohammed strongly denounced the customary practice of contemporary Arabia where a woman was considered to be property and was sold to the highest bidder. *The Quran* (IV.19) declares the marriage to be a contract where both the parties should consent in full knowledge.²³ Thus,

²² Bṛhaspati, *supra* note 21, at XXIII. 15-16.

²³ See DAVID PEARL, A TEXTBOOK ON MUSLIM PERSONAL LAW 3 (1987).

adultery is seen in Islam as a violation of a contract, rather than an infringement of the husband's proprietary right. It is, according to *The Quran*, an evil opening the road to other evils.²⁴ Thus, the woman's agency is accepted in the matter, and the punishment is to be equal for both the parties:

*"The woman and the man
 Guilty of adultery or fornication—
 Flog each of them
 With a hundred stripes:
 Let not compassion move you
 In their case, in a matter
 Prescribed by God, if ye believe
 In God and the Last Day:
 And let a party
 Of the believers
 Witness their punishment."*²⁵

The punishment for adultery in Islam is milder than what the three Brahmanical lawgivers prescribed and it recognizes the agency of both the parties. It also does not consider the loss of 'chastity' as the end of a woman's life, but prescribes that an adulterous woman should be married to only an adulterous man, and vice-versa.²⁶ However, adultery still remains only the violation of the body of a woman married to someone else, and not the violation of the body of a man married to someone else. The marital contract recognizes the husband's sole authority over the wife's body, allowing the husband to legally marry up to four women. So, even in the much reformed language of Islam, the status of the female body is only a shade better than it is in the eyes of Manu, Nārada and Bṛhaspati. The definition of illicit sexual proximity in the Hanafi texts comes curiously close to the Brahmanical law-books, since it is not limited to sexual intercourse (as in the Maliki texts), but is extended to a proof of privacy (*khalwat*) between a man and a woman.²⁷ Thus, the prescriptive notions of the three Brahmanical lawgivers were not worlds apart from the prescriptive notions of Islam.

However, what the three lawgivers suggested was not the only version of the social outlook towards adultery. Another prescriptive text, Vātsyāyana's *Kāmasūtra*, provides an alternative approach to the matter. The text says:

²⁴ *The Quran, in* MUSLIM PERSONAL LAW: SHARIAT-I-ISLAM XVII.32 (Kabir Kausar trans., 1987) (Further references to Quranic injunctions are from this book).

²⁵ *Id.*, at XXIV.2.

²⁶ *Supra* note 24, at XXIV.3.

²⁷ DAVID PEARL, *supra* note 23, at 49.

“Any action which conduces to the practice of Dharma, Artha and Kama together, or of any two, or even of one of them, should be performed, but an action which conduces to the practice of one of them at the expense of the remaining two should not be performed.”²⁸

Given the logic, an act like adultery, not sanctioned by *Dharma* (social ethics), but beneficial to *Kāma* (pleasure), becomes justified if it brings some material profit (*Artha*) as well. Vātsyāyana refers to earlier authorities who enlisted such cases where sexual pleasure with another man's wife is permissible on such a ground. These cases are:

According to Gaṇikāputra:

1. A self-willed woman who has been previously enjoyed by many others,
2. A twice-married woman previously enjoyed by many others,
3. A woman who has mastery over a powerful husband who is a friend of an enemy,
4. A woman capable of turning the mind of her disaffected and powerful husband,
5. A woman winning whose friendship may help in helping a friend or ruining an enemy or accomplishing some difficult purpose.
6. A woman who may help in killing her husband and obtaining his vast riches.
7. A woman whose riches can be helpful in a condition of poverty without any imminent danger.
8. A woman who is in love and—if refused—can cause problems like bringing gross accusations, making weak secrets public, detaching her powerful husband, uniting her powerful husband with an enemy or helping an enemy.
9. A woman whose husband has violated the chastity of the wives of the concerned man.
10. A woman who can help in killing the enemy of the king, a task deputed to the concerned person.

²⁸ VĀTSYĀYANA, THE KAMA SUTRA 67 (Sir Richard F. Burton trans., 1993). For the original Sanskrit, see VĀTSYĀYANA, THE KĀMASŪTRA (Radhavallabh Tripathi ed., 2005).

11. A woman who controls the woman the concerned man loves.
12. A woman who can help in getting a rich and beautiful woman under someone else's control.
13. A woman whose husband is an enemy's friend and who will help in breaking that friendship.

According to Cārāyaṇa:

14. A woman kept by a minister or who repairs to him occasionally.
15. A widow who can be helpful in accomplishing a purpose.

According to Suvarṇanābha:

16. A woman who passes the life of an ascetic or like a widow.

According to Ghoṭakamukha:

17. The virgin daughter of a public woman.
18. A virgin female servant.

According to Gonardīya:

19. Any woman of a good family and proper age.²⁹

Therefore, we can see that there were several social opinions about adultery. Whereas the moral standard set by these authorities of *kāmaśāstra* is not a very comfortable one, they represent an opinion where the female body is at least not viewed as a property of the husband but something on which the woman—and her choice—has some authority.

If the epics have the beheading of Reṇukā and the punishments of Ahalyā and Śūrpanakhā, the same tradition also sometimes celebrates cases of adultery. In the *Rāmāyaṇa*, the great hero Hanumān is presented as the child of an adulterous union between the Wind-god and Añjanā. However, no adultery has been celebrated as much as that of Kṛṣṇa. The *Gāthāsaptasatī*, a compilation of early Prakrit poems, attributed to the Sātavāhana king Hāla, has a very nice verse about Kṛṣṇa, saying:

“adya api bālah dāmodarah iti iti japite yaśodayā.

Kṛṣṇamukhapreṣitākṣam nibhṛtam hasitam vrajabadhūbhiḥ.

²⁹ VĀTSYĀYANA, *supra* note 28, at 82-84.

*(Even to this day Dāmodara seems (to me) a child'—when this was spoken by Yaśhodā, the women of the Vraja (cowherds' village) smiled covertly casting their look towards Kṛṣṇa's face.)*³⁰

Here, the reference to the *vrajabadhūs* suggests that the poet imagines the married women of Vraja among Kṛṣṇa's amorous playmates. The *Viṣṇu Purāṇa* states that the women sported with Kṛṣṇa at night, despite being forbidden by their husbands.³¹ Irrespective of the marital status of the women, Kṛṣṇa's love play is an amorous festive dance in the earlier sources. The *Bhāgavata Purāṇa*, however, stretches the matter much beyond a simple festive dance in a society with lesser taboos, and makes Kṛṣṇa steal the clothes of the bathing cowherd women and satisfy all kinds of demands of these women who are portrayed as selfless devotees.

Even the law giver Nārada spared some exceptional cases of adultery where the man has intercourse with the wife of one who has left his wife without her fault, or of one impotent or consumptive, if the woman herself consented to it.³²

However, a look at the Section 497 of the IPC would show that we have not moved much from the time of Manu and Bṛhaspati yet. The Section says:

*"Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case, the wife shall not be punished as an abettor."*³³

The idea is again, clear. Adultery is an offence committed by a man against a man. The wife, or better to say the wife's body, is nothing but the property in contestation. Therefore, a sexual union between two consenting adults becomes a crime, but only when the woman is married and not the vice-versa. Since the woman is not treated as a party with agency, the IPC agrees with Bṛhaspati in not punishing her. Her consent is not a question to be considered, not even in the exceptions allowed by the old Nārada. In another respect, the nineteenth century document is more 'advanced' than the ancient texts. The possibility of a woman's consent is not even discussed, and the act is

³⁰ HĀLA, THE PRAKRIT GĀTHĀSAPTAŚATĪ II.12 (Radhagovinda Basak ed. & trans., 1971).

³¹ VIṢṆUMAHĀPURĀNNAM V.13.59 (M.N. Dutt ed. & trans., 2005).

³² Nārada *supra* note 18.

³³ S. 497, INDIAN PENAL CODE, 1860, <http://indiankanoon.org/doc/1833006/> (Last visited December 13, 2013).

tolerated with the consent or connivance of the husband.³⁴ Therefore, the criminality or legitimacy of a sexual union between two adults will depend not on the consent of either of them, but on the consent of a third party. The IPC in this manner retains and advances upon our ancient tradition - not the entire tradition with its multiple voices, but a particular one. Section 497 of the IPC is drafted in such a manner that even the old authorities of that particular tradition would feel humbled by the genius of Macaulay's committee.

IV. PERCEPTION OF RAPE: AN ASSAULT ON HUMAN RIGHT OR AN ATTACK OF THE MALE ORGAN ON THE VAGINAL MODESTY

The problem of rape has to be located in this socio-legal context. Since the body of a woman is treated as the property of her husband, rape becomes a violation of the husband (or the husband-to-be)'s right to property, that too in a forcible manner. Therefore, rape has often been conceived not as a violation of the victim's human rights, or her fundamental right over her body, but as a social crime against her 'modesty' which seems to be preserved in her vagina. The offence is considered a grave one, for what is left in a woman's life if her modesty, honour and chastity are not preserved for her husband?³⁵ Manu would want corporal punishment for it.³⁶ The punishment would probably be capital punishment for deflowering, while a person who forcibly molested a girl would have two of his fingers cut and pay a fine of 600 *panas*.³⁷ However, what remains in the raped woman's life? Since the only purpose in her life is conceived as keeping her body intact for her husband, she—though the victim of rape—becomes defiled and spoilt. Bṛhaspati's approach to a raped woman makes the matter quite apparent:

"When a woman has been enjoyed against her will, she shall be kept in the house well guarded, smeared (with ashes), lying on a low couch, and receiving a bare maintenance only.

To atone for her sin, she shall be caused to perform the Krccha or Pāraka penance, in case she had intercourse with her equal in caste;

³⁴ It can be argued that the words 'such sexual intercourse not amounting to the offence of rape' suggest that the woman's consent is being considered, since that is what differentiates adultery from rape. However, it does not change the fact that the woman's consent cannot alter the illegality of the enjoyment of her own body, but her husband's consent can. We cannot also ignore the fact that though the woman's consent makes adultery a less serious offence than rape, even her consent does not make her a party to the offence.

³⁵ This social mentality had amply contributed to the practice of *jauhar*, which glorified a woman's suicide to preserve her 'chastity', or *Sati*, a practice which meant that the woman's life lost its purpose with the husband's death. Thapar rightly locates rape as an inherent part of this cultural tradition of violent and brutal treatment of women. See Thapar, *supra* note 1, at 262.

³⁶ MANU, *supra* note 10, at, VIII. 364.

³⁷ MANU, *supra* note 10, VIII. 367.

*but if she has been enjoyed by a man of inferior caste, she shall be abandoned and put to death.*³⁸

We have not moved much beyond that state, if we consider the number of people equating rape to murder even today. Our common sense says that a woman's life has much more to offer, even beyond her so called 'chastity'. Therefore, equating rape with murder, and demanding death penalty for that reason, crystallizes the mentality of limiting the value of a woman's life between her thighs, a social attitude contributing to other kinds of social evils like 'honour killing'.

This conceptualization of the female body as property reserved for the exclusive use of the husband leaves no scope for the recognition of marital rape. According to K. Vibhute, this exemption is based on the mutual matrimonial contract which denied a wife the right to retract her marital consent to engage in sexual intercourse with her husband.³⁹ The Protection of Women from Domestic Violence Act, 2005 shows marital rape as a mere civil dispute rather than as a criminal act. This makes it crystal clear that marriage is not yet regarded as a contract of mutual partnership between two consenting adults, but a sacrament marking out a man's ownership over his wife's body.

Another grave problem with such a conceptualization is that it is only a woman who can be raped, and only a man can be a rapist, according to both the ancient authorities and the IPC.

An attempt to reinvent rape as a gender-neutral crime was made in the form of the Criminal Law (Amendment) Bill, 2013 which conceptualized "sexual assault" as follows:

"A person is said to commit "sexual assault" if that person—

- a) penetrates, for a sexual purpose, the vagina or anus or urethra or mouth of another person with—*
 - (i) any part of the body including the penis of such person;*
or
 - (ii) any object manipulated by such person, except where such penetration is carried out for proper hygienic or medical purposes;*
- (b) manipulates any part of the body of another person so as to cause penetration of the vagina or anus or urethra or mouth of such person by any part of the other person's body;*

³⁸ Brhaspati, *supra* note 21, at XXIII. 14.

³⁹ K. Vibhute, *Rape within Marriage in India: Revisited*, 27 IND. BAR REV. 167 (2000).

(c) *engages in “cunnilingus” or “fellatio”*

This attempt at expanding the scope of sexual assault to embrace both genders, although argued by many to be a much needed step forward, was not sustained. When the Bill was passed, the gendered version of the crime was reverted to.

Section 375 of the IPC, after the Criminal Law (Amendment) Act, 2013, has been reformed as saying:

“A man is said to commit ‘rape’, if he—

- (a) *penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
- (b) *inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person, or*
- (c) *manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person; or*
- (d) *applies his mouth to vagina, anus, urethra of a woman or makes her to do so with him or any other person,*

under the circumstances falling under any of the following seven descriptions:-

First— Against her will

Secondly— Without her consent

Thirdly— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt

Fourthly— With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly— With her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or

unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly—With or without her consent, when she is under eighteen years of age.

*Seventhly—When she is unable to communicate consent.*⁴⁰

Therefore, the violation of a person who is a male or someone of a marginal gender is not a rape, nor is it a rape if the violator is a woman or a person of any third gender. Macaulay had perceived rape as nothing but an offence of the penis against vagina. An act equally traumatic in nature or equally endangering a person's human dignity and the right over his/her own body was not considered rape, if the violating organ was not the penis or the violated organ was not the vagina. The most recent amendment rectifies this attitude partly, since now the penetration of the victim's bodily orifice by any part of the body or any foreign object or forcing a victim to perform oral sex can be considered as rape. However, despite these modifications, rape is still seen as an offence that can only be performed by a man against a woman. It is still viewed as a question of forcible penetration, penile or non-penile, of the woman's bodily orifices, rather than as an offence against an individual's right to his/her own body.

The obsession with penetration has often meant that the offence cannot be considered as an attempt to rape unless the accused 'proceeded beyond the stage of preparation' for such penetration.⁴¹ Flavia Agnes rightly points out the impracticality of such a law where the victim has to satisfy the court beyond reasonable doubt that the accused had gone beyond the stage of preparation and actually attempted to penetrate her.⁴² As a result, in the absence of penetration, an offence of attempt to rape is converted to a much lighter offence. Pallavi Arora has given the example of *Tarkeshwar Sahu v. State of Bihar*⁴³, where Sahu had lured the victim into his hut and attempted to rape her after having disrobed himself. But, the victim failed to establish that the accused proceeded beyond preparation and actually attempted to penetrate her. Eventually, Sahu escaped with a minor punishment of imprisonment for two years.⁴⁴ In the case of *Jaichand Lal Sethia v. State of W.B.*⁴⁵, the accused escaped the charge of attempt to rape, despite laying the victim forcibly on the

⁴⁰ See S. 375, The Criminal Law (Amendment) Act, 2013, (April 2, 2013), <http://indiacode.nic.in/acts-in-pdf/132013.pdf>.

⁴¹ *Rameshwar v. State of Haryana*, 1984 CRI L J 786 (P&H) (February 14, 1983).

⁴² Flavia Agnes, *Violence Against Women: Review of Recent Enactments*, in IN THE NAME OF JUSTICE: WOMEN AND LAW IN SOCIETY 81-116 (Swapna Mukhopadhyay ed., 1998).

⁴³ (2006) 8 SCC 560.

⁴⁴ Pallavi Arora, *Proposal to Reform the Law Pertaining to Sexual Offences in India*, 3 *JILS (Monsoon)* 2012, 241-242."

⁴⁵ AIR 1967 SC 483.

bed and breaking the strap of her trousers, because it could not be proven that he went beyond the stage of preparation and attempted to penetrate the victim.⁴⁶ To substantiate its findings, the Delhi High Court substantially relied on the 19th century decision given by Melvill J. in *Empress v. Shankar*⁴⁷:

*“We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think that conviction of an attempt at rape ought not to be arrived at unless the court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events, and in spite of all resistance.”*⁴⁸

The last few words in the quoted statement make another aspect of the approach quite apparent, that an offence is rape only when the victim uses all kinds of possible resistance. If a victim does not resist, understanding the futility of any such attempt, she bears a moral responsibility in her rape.⁴⁹ Perhaps Melville’s statement could be attributed to Victorian Puritanism working in the mind of a nineteenth century Englishman. Unfortunately, the attitude has extended well into the fag end of the twentieth century. In *Suresh Nivrutti v. State of Maharashtra*⁵⁰, the court declared that if a woman meekly submits to sexual intercourse it would be a case of consent.⁵¹ The Criminal Law (Amendment) Act, 2013, tries to rectify this attitude by declaring:

“Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.

*Provided that a woman does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.”*⁵²

⁴⁶ Pallavi Arora, *supra* note 44, at 342.

⁴⁷ ILR 5 Bom 403.

⁴⁸ Pallavi Arora, *supra* note 44, at 242-243.

⁴⁹ This position is curiously similar to the Islamic position. In Islam, rape does not signify the end of a woman’s life, since being forcibly raped is not a violation of the marital contract. Thus, while many Islamic jurists prescribe to stone a rapist to death, there is no clear injunction to ostracize the raped woman. However, the problem is that the onus lies on the woman to prove that she has been raped forcibly and without consent. If she fails to do so, the act is often turned into an act of adultery which makes the woman liable to a punishment equal to the punishment of her violator.

⁵⁰ 1999 Cri LJ 895.

⁵¹ See Explanations, S. 376, INDIAN PENAL CODE, 1860, http://www.vakilnoi.com/bareacts/indianpenalcode/indianpenalcode.html#Section_376_Punishment_for_rape (last visited December 15, 2013).

⁵² See Explanation 2, S. 375, INDIAN PENAL CODE, 1860, *in* The Criminal Law (Amendment) Act, 2013.

It may be hoped that the new law helps in reforming the socio-legal attitude to rape, where the victim is expected to resist the violation of her 'chastity' to the last possible level (and thus subject her body to the extreme level of torture and possibly death) by the court, to appease the rapists by sweet and affectionate words according to religious leaders, and to satisfy everybody from police officers to ministers about the 'decency' of her dress and behavior, to avoid responsibility for her own rape.

It is the same approach that problematizes the issue of molestation. The offence being generally considered as less serious than rape, the molesters are rarely punished. Women hardly dare to lodge a complaint against a molester, since the accused would face a minor punishment while the victim would be stigmatized with loss of modesty. The terminology used is not mine, but again marks the very attitude of the IPC which considers a sexual assault as 'outraging the modesty of a woman'.⁵³ What this 'modesty' is and where it lies are impossible to fathom, but the Supreme Court succeeded in performing that impossible feat in *Rupan Deol Prasad v. Kanwar Pal Singh Gill*⁵⁴, by defining 'modesty' as 'an attribute which is peculiar to a woman as a virtue that attaches to a female on account of her sex'.⁵⁵ Therefore, loss of 'modesty' is the loss of a 'virtue', and which victim will risk publicizing that? Since 'modesty' is exclusive to a woman, a male or a person of any other sex does not possess it. Thus, sexually molesting a non-female hardly counts as an offence.

The Criminal Law (Amendment) Act, 2013, introduces a wide array of new offences which define the contours of voyeurism, stalking, etc. While these are certainly beneficial for women, the crimes continue to remain gendered. They make it clear that a man shall be guilty of sexual harassment for physical contact and advances involving unwelcome and explicit sexual overtures; or a demand or request for sexual favours; or showing pornography against the will of a woman; or making sexually coloured remarks.⁵⁶ Similarly, a man assaulting or using criminal force to any woman or abetting such an act with the intention of disrobing her or compelling her to be naked, commits an offence punishable with imprisonment of up to seven years and a fine.⁵⁷ Any man who watches or captures the image of a woman engaging in a private act, in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator, or disseminates such image is liable to imprisonment up to three years and a fine.⁵⁸ A man who follows a woman and contacts, or attempts to contact, such woman to foster personal interaction repeatedly despite a clear

⁵³ See S. 354, INDIAN PENAL CODE, 1860.

⁵⁴ (1995) 6 SCC 194.

⁵⁵ Pallavi Arora, *supra* note 43, at 254.

⁵⁶ See S. 354-A, The Criminal Law (Amendment) Act, 2013.

⁵⁷ See S. 354-B, The Criminal Law (Amendment) Act, 2013.

⁵⁸ See S. 354-C, The Criminal Law (Amendment) Act, 2013.

indication of disinterest by such woman, or monitors the use by the woman of the internet, e-mail, or any other form of electronic communication, commits the offence of stalking.⁵⁹ Therefore, it has been made clear that there is no offence involved in unwelcome physical advances, demands for sexual favours, showing pornography against one's will, making sexually coloured remarks, attempting to disrobe one person, watching or capturing the image of a person in a private act and disseminating such image, and following and contacting a person to foster personal interaction repeatedly despite a clear indication of disinterest or monitoring the electronic communications of such a person, if the acts are performed by a woman or a non-male, or/and if the victim is male or non-female. All of these are reasserted as attacks on 'female modesty' by a male, rather than on human dignity. The males and the other non-females, not possessing such modesty, are not seen worthy of legal protection against such acts.

The idea of considering the female body as a property to be preserved and protected by and for the husband therefore not only problematizes the social existence of a woman, but also subjects the other sexes to the burden of social stereotypes. It makes all the non-female genders vulnerable to sexual offences without a chance of legal protection. It also burdens the male with the social stereotype of 'masculine power', while burdening the woman with the stereotype of 'feminine modesty.' As the ideal woman should be modest, the ideal man should be powerful enough to protect the modesty of his wife. A man, thus, can not only not be raped or sexually assaulted, but claiming to be a victim of such an offence is only a stain on his masculinity. Similarly, he can hardly demand a cover against possible false accusations, as the court has full confidence in the stigmatizing power of the India society:

"Normally a woman would not falsely implicate for the offence of rape at the cost of her character. In Indian society, it is very unusual that a lady with a view to implicate a person would go to the extent of stating that she was raped."⁶⁰

That this legal approach is not divorced from the social outlook is endorsed by numerous mainstream movies in several Indian languages where the inevitable establishment of the 'hero' is not by any other human virtue but by his power to beat up a galaxy of villains, generally to protect the heroine from molestation/rape or to avenge such an offence. This is the same society that has been worshipping as its ideal hero Rāma, a person who is known for destroying almost the entire male population of a community to avenge the abduction of his wife and also for being reluctant to accept his stigmatized wife who was abducted against her will. Only an assurance from a divinity in

⁵⁹ See S. 354-D, The Criminal Law (Amendment) Act, 2013.

⁶⁰ *Supra* note 51.

a fire-ordeal about her 'chastity' would make Rāma accept Sītā, only to desert her again on the first instance of a questioning of her 'modesty'.⁶¹

If both the major sexes face such disadvantages because of the socio-legal stereotypes, the other sexes are predictably faced with more crippling problems. The fallacy of our gendered legal terminology came to light recently when a 'female' athlete of international repute, Pinki Pramanik, was accused of raping another woman. The whole debate revolved around whether Pramanik is a male or a female, since only a male can rape. Therefore, the medical boards were assigned the impossible task to determine one of the two major sexes for a person who biologically may have belonged to neither, involving much man-handling which may have amounted to sexual assault against her had her gender been recognized as female.

To summarise, the perception of the female body as male property neatly fits into certain ancient Indian texts as well as the Victorian morality that informed Macaulay's drafting of the IPC, which has made it only too easy for the colonial rule to regard "Indian culture" as merely those strands of the same which happened to fit the moral parameters followed by them. The same outlook in some cases equates rape with murder, rather than remedying the social mentality responsible for rape, and seeks solution in the awarding of capital punishment to the rapists.

However, just like in the case of adultery, early Indian tradition has many voices on this issue. The *Rāmāyana* is not the only epic of India, and the

⁶¹ Of course, the *Rāmāyana* is not a fixed, monolithic tradition but has many versions with different kinds of reception within different strands of the society. In some folk traditions of women, Sītā has been appreciated more than Rāma. See A.K. Ramanujan, *Three Hundred Rāmāyanas: Five Examples and Three Thoughts on Translation*, in *MANY RĀMĀYANAS* 22-49 (Paula Richman ed., 2012). Paula Richman, *Introduction: The Diversity of the Ramayana Tradition*, in *MANY RĀMĀYANAS* 3-21 (Paula Richman ed., 2012). Paula Richman, *Questioning and Multiplicity within the Ramayana Tradition*, in *QUESTIONING RAMAYANAS* 1-21 (Paula Richman ed., 2000). Romila Thapar, *Foreword*, in *QUESTIONING RAMAYANAS* vii-xii (Paula Richman ed., 2000). Nabanita Deb Sen, *Nārīr Mahākāvya, Rāmākathār Punahkathan: Candrāvati Rāmāyana*, in *RĀMĀYANA CARCĀ: BHĀRATE O BAHIRBHĀRATE* 256-266 (Tapas Bhowmik ed., 2010). Linda Hess, *Rejecting Sītā: Indian Responses to the Ideal Man's Cruel Treatment of His Ideal Wife*, 67(1) J. AMER. ACAD. RELIGION 21 (Mar., 1999). Velcheru Narayana Rao, *A Rāmāyana of their Own: Women's Oral Tradition in Telugu*, in *MANY RĀMĀYANAS* 114-136 (Paula Richman ed., 2012). Usha Nilsson, *Grinding Millet But Singing Of Sita: Power and Domination in Awadhi and Bhojpuri Women's Songs*, in *QUESTIONING RĀMĀYANAS* 137-151 (Paula Richman ed., 2000). Madhu Kishwar, *Yes to Sita, No to Ram: The Continuing Hold of Sita on Popular Imagination in India*, in *QUESTIONING RAMAYANAS* 285-308 (Paula Richman ed., 2000). However, in the representation of Rāma as the 'ideal man' and Sītā as the 'ideal wife' a particular normative Brahmanical representation is usually given more weightage than the other versions. It is often ignored that historically the character of Rāma and Sītā, even within the normative Brahmanical tradition, has not remained static, but evolved over time. For details, see Kanad Sinha, *A Tale of Three Couples and their Poet: Rāmākathā, Love and Vālmiki in South Asian Tradition*, in *XVIII(1-2) STUD. IN HUMANITIES IN SOC. SCIEN.* 43-79 (2011).

other major one revolves around the question of punishing the molestation of a woman. Unlike Sītā, Draupadī is not subjected to a fire-ordeal for proving her 'chastity'. Rather, she time and again demands and ultimately gains justice for her molestations by people like Duḥśāsana, Jayadratha and Kīcaka. In the discussions on war and peace on the eve of the great battle in the epic, the issue of her molestation is often central. When Yudhiṣṭhira, Bhīma and Arjuna express their preference for peace, Draupadī vents her anger out to Kṛṣṇa:

"This hair was pulled by Duḥśāsana's hands, lotus-eyed lord; remember it at all times when you seek peace with the enemies! If Bhīma and Arjuna pitifully hanker after peace, my ancient father will fight, and his warrior sons, Kṛṣṇa! My five valiant sons will, led by Abhimanyu, fight with the Kurus, Madhusūdana! What peace will my heart know unless I see Duḥśāsana's swarthy arm cut off and covered with dust!"⁶²

Draupadī's sentiment is echoed in the words of Sahadeva:

"What the king has said is the sempiternal law, but see to it that there be war, enemy-tamer! Even if the Kurus should want peace with the Pāṇḍavas, you should still provoke war with them, Dāsārha! How could my rage with Suyodhana subside without bloodshed after seeing the Princess of Pāñcāla manhandled in the hall? If Bhīma, Arjuna and King Dharma stick with the Law, I want to fight him in the battle, and be gone with the Law!"⁶³

Similar words are uttered by Kuntī, the mother-in-law of Draupadī, as well:

"Not the rape of the kingdom, not the defeat at dice, not the banishment of my sons to the forest grieves me, as it grieves me that that great dark woman, weeping in the hall, had to listen to insults."⁶⁴

Justly the person to whom these statements are made is Kṛṣṇa, the same person who marries the numerous women abducted and possibly raped by the eastern plunderer Naraka.

The *Mahābhārata*, therefore, speaks in a different voice that does not subject the victim of a sexual offence to ignoble tests of 'chastity'. Rather, it

⁶² VYĀSA, THE MAHĀBHĀRATA (VOL.III) 80.35-40 (J.A.B. Van Buitenen trans., 1978). For the original verses, see VYĀSA, THE MAHĀBHĀRATA, UDYOGAPARVAN, edited by (Sushil Kumar Dey ed., Vol VI, 1940).

⁶³ *Id.* at V. 79.1-4.

⁶⁴ *Supra* note 62, at V. 135.15-19.

encourages the women to seek the punishment of the offenders without attaching any stigma to their own characters.

Similarly, Islam has a very strong tradition against stigmatizing a woman. It is traditionally held that there was a false accusation of adultery against 'A'isha, the favourite wife of the Prophet. However, Mohammed did not discard his wife, since the accusation could not be proven. Possibly this incident was followed by the Quranic injunction about punishing those who bring false accusations against chaste women:

*“And those who launch
A charge against chaste women
And produce not four witnesses
(To support their allegations)—
Flog them with eighty stripes;
And reject their evidence
Even after; for such men
Are wicked transgressors.”*⁶⁵

Unfortunately, it is not the tradition of Draupadī and Kṛṣṇa, Kuntī and Sahadeva, not even the sensibility of Mohammed, that dominates the law and the society. Rather, the voices of Manu and Bṛhaspati loom large on the Rāma-worshipping society. The Victorian morality of Macaulay and Melville also preferred the same way, and the modern Indian law and society has not moved much beyond that. For the sake of modesty, very few Indian women still dare to seek justice after a rape or molestation. Rather, many of them remain silent, many consider it as the end of a woman's life, and many actually end their life as Sītā had to do in the end.

V. THE 'PROBLEM' OF THE PROSTITUTE: A WOMAN WHO OWNS HER OWN BODY

The issue of prostitution poses interesting questions in the socio-legal framework that considers a woman's body as a property of the husband. After all, a prostitute's body not only has no particular male owner, but also is used by the woman herself as a source of income. She is a perfect contrast to the housewife the society idealizes. Many of the Sanskrit words to denote a prostitute emphasizes this aspect of her social existence, such as *pum̐ścalī* (a woman who moves around among men), *vāravānitā* (a woman for many) and *sādhāraṇī* (public woman). Many lawgivers saw their existence as dangerous for

⁶⁵ *Supra* note 24, at XXIV.4.

the public order. For Gautama, even the murder of a prostitute is no crime.⁶⁶ Manu believed all prostitutes to be thieves and swindlers.⁶⁷

It is worth exploring if the approach of the modern Indian state is very different from that of the old lawgivers. Usually the people responsible for aiding prostitution, rather than the prostitutes themselves, are regarded as the real exploiters and criminals in the 'Immoral Traffic (Prevention) Act 1956'. Any person who keeps or manages, or acts or assists in the keeping or management of a brothel; a tenant, lessee, occupier or person in charge of a premises used as a brothel; any person over the age of eighteen years who knowingly lives, wholly or in part, on the earnings of the prostitution of any other person; any person who procures or attempts to procure a person for the purpose of prostitution, whether with or without his/her consent; any person detaining a person, with or without his/her consent, in any brothel or in or upon any premises with intent that such person may have sexual intercourse with a person who is not the spouse of such person, are all considered offenders punishable to various degrees. The prostitute, however, is seen as a victim rather than offender. Therefore, prostitution as a profession is itself not punishable, unless it is carried on in a 'public place' notified under subsection (3) or within the distance of 200 metres of any place of public religious worship, educational institution, hotel, hospital, nursing home or such other places, and unless the prostitute causes public nuisance by using his/her seductive skills in public places.⁶⁸ The law is certainly aimed at the necessary cause of preventing the exploitation of women for prostitution. However, any possibility of an agency of a person to decide on a commercial use of his/her sexuality is virtually denied by viewing prostitution as an outright act of exploitation.

It can hardly be doubted that exploitation is integrally linked with prostitution. Often the prostitutes are procured by force, blackmail, cheating, fraud and other tricks. There must be laws to protect women from these offences, and also to protect the children and minors from being lured into the profession. However, if a person—either because of dire poverty or because of being socially ostracized or for some extra income—chooses to use his/her own body as a means to earning his/her bread, on what ground that becomes 'immoral' is difficult to understand, unless the ground is the outright negation of a person's right over his/her own body. This is exactly the approach undertaken by the law when procuring or detaining even a consenting adult for prostitution (which loosely includes any kind of sex with someone who is not the concerned person's spouse) is declared punishable.

⁶⁶ *Gautama Dharmasūtra*, in *THE DHARMA SUTRAS: THE LAW CODES OF ANCIENT INDIA XXII.2* (Patrick Olivelle ed., 1999). For the original Sanskrit, see GAUTAMA, GAUTAMA DHARMA SŪTRAM, (Veda Mitra ed., 1969).

⁶⁷ MANU, *supra* note 10, at IX. 259-260.

⁶⁸ See the Immoral Traffic (Prevention) Act, 1956.

Even this infringement of a person's sexual rights could be justifiable for a greater good, if the law actually could have done anything to protect the victims (mainly women and often children and minors) from the widespread network of exploitation linked with prostitution. But, it does exactly the opposite. Despite so much legal effort to eradicate it, prostitution is an undeniable social reality in almost every urban centre of India and many non-urban centres. People know where the red light areas are located and how to access the other networks of prostitution. The police and the administration know it as well as the public does. The social reality is time and again portrayed in contemporary literature, theatre and film. But, the law prefers to keep its eyes shut. As a result, prostitution runs generally through some arrangement of mutual coexistence with the local administration and police. The business is hardly intervened and thrives along with the exploitations involved in it. The prostitutes, living in a grey zone between legal non existence and actual existence, are easily subjected to any kind of exploitation. They can hardly claim a cover for any of their human rights, and a prostitute has hardly any way to seek justice for being cheated, exploited, tortured, raped or even murdered, a situation that would have delighted the ancient Gautama. The stigma attached to their profession also dehumanizes their social existence, often restricting the scope of the cultivation of the other human faculties in them. Only criminalizing the traffickers has failed to be a sufficient remedy to all these. Legally recognizing and regulating the profession can possibly do better to bring the prostitutes out of the grey zone and infuse much-needed transparency in the profession.

In fact, the issue of prostitution has been widely debated, and feminists are divided on the issue. A good number of radical feminists—such as Andre Dworkin, Catharine MacKinnon and Melissa Farley—strongly believe that prostitution and commercial use of sex (such as pornography) is not about female sexuality or sexual equality. Prostitution is all about male sexuality, the socio-economic power attributed to gender, and men's entitlement to access female body at will. So they might conform to the Indian legal attitude of considering the prostitute as a victim (though not with the social attitude of stigmatizing the prostitute as unchaste). On the other hand, there is a strong argument (which we are following) that prostitution is a way out of patriarchy where a woman can be the owner of her own body and use it for commercial purpose. While forcing someone into the profession is no doubt problematic, a woman should have the right to choose it as a profession for economic sustenance, better standard of life, erotic diversity or any other consciously considered purpose.⁶⁹ Kate Millet pointed out the economic dimensions of prostitution in 1971:

⁶⁹ For the arguments against commercial use of sex, see ANDREA DWORBIN, *PORNOGRAPHY: MEN POSSESSING WOMEN*, (1981). Andrea Dworkin & Catharine MacKinnon, *Pornography and Civil Rights: A New Day For Women's Equality*, ORGANIZING AGAINST PORNOGRAPHY, MINNESOTA (1988). Catharine MacKinnon, *Trafficking, Prostitution and Inequality*, 46(2) HARV. C.R.-C.L.L. REV. 271-309 (2011). Melissa Farley, *Bad for the Body, Bad for the Heart*:

"I don't think you can ever eliminate the economical factor motivating women to prostitution. Even a call girl could never make as much in a straight job as she could at prostitution. All prostitutes are in it for money."⁷⁰

Millet's claim that 'all' prostitutes are in the profession for money seems a bit exaggerated. However, that a good number of prostitutes enter the profession on their own accord and continue for economic benefits are seen from the autobiographies and testimonies of many modern Indian prostitutes from various periods, including Manoda Debi of early twentieth century Bengal, Nalini Jameela of late twentieth century Kerala, and Sapna Gayan of present-day Sonagachi in Kolkata.⁷¹ These women—coming from different backgrounds, reflecting different social attitudes, and choosing the profession for different reasons—are unanimous in the demand for the recognition of their professional rights. Thus, Manoda Debi writes in her autobiography *Shikshita Patitar Atmacharita* (1929):

"If we have to sell our beauty and youth, then why secretly like thieves...we will enter the market directly, bargain for the right price and sell it at a suitable price."⁷²

She points out that everyone sells their intelligence, so there is no reason why a beautiful woman should not sell her body, and claims that the great men of the country were tied to the feet of prostitutes and the money of wealthy people flow into the homes of prostitutes. So she chose this profession, though she had enough education to earn her livelihood as a tutor of small children, telephone operator, nurse or music-teacher.⁷³ Nalini argues in her autobiography *Oru Laingikatozhilaliyute Atmakatha* (2005) that those who want to leave the profession should be helped, while those who want to stick to it of their own accord deserve to get the opportunity to work with dignity and rights. Sex workers do not need sympathy or compassion, but acceptance. They need some privilege and power to choose their clients, fix the remuneration and time to be spent with each client, and exit the profession if they

Prostitution Harms Women Even If Legalized or Decriminalized, 10(10) VIOLENCE AGAINST WOMEN 1087-1125 (2004). Melissa Farley, *Prostitution and Trafficking in Nevada: Making the Connections*, PROSTITUTION RESEARCH AND EDUCATION, SAN FRANCISCO (2007). For arguments in favour of prostitution, see KATE MILLET, *THE PROSTITUTION PAPERS: A CANDID DIALOGUE* (1973). The greatest defence of commercial use of sex probably comes in the *Post Porn-Modernist Manifesto* (1989) signed by several artists connected with such professions, including Veronica Vera, Candida Royale, Anne Sprinkle and Frank Moore.

⁷⁰ Sulagna Khan, *Re-presenting the 'Fallen': The Unconventional Life Stories of Manoda Debi and Jameela*, LV(1-2) J. ASIATIC SOC. 48 (2013).

⁷¹ See *Id.*, at 47-72; see generally MANODA DEBI, *THE AUTOBIOGRAPHY OF AN EDUCATED PROSTITUTE* (2011); NALINI JAMEELA, *AUTOBIOGRAPHY OF A SEX WORKER* (2007).

⁷² MANODA DEBI, *supra* note 71, at 47.

⁷³ MANODA DEBI, *supra* note 71, at 47-56.

so desire.⁷⁴ She calls for ensuring that no rules are imposed on those who are willingly prepared to sell or buy sex.⁷⁵ Similarly, Gayan, in the Sex Workers' Freedom Festival, Kolkata (2012), said:

*"I chose this work. It's like any other job, but still I have no rights because society judges me and prevents me from having recognition."*⁷⁶

So, she also speaks for legal protection with social security schemes, strengthening an enabling and protecting environment, ensuring financial security, prevention of trafficking and right to migrate, access to quality health services, freedom to work and choose occupation, association, social justice and livelihood.⁷⁷

In fact, prostitution is integrally connected with the problem of rape not only because it alters the male ownership of a female body, but also because prostitutes are among the worst victims of rape and sexual abuse without any legal remedy. Living in the grey zone of existence, a prostitute can hardly demand legal security against rape, molestation or any other offence. Manoda writes:

*"I had to learn the art of getting to assess people side by side with being fake. Who has come with the aim of stealing, who was infected with ugly diseases, who was a wicked man, who was a simpleminded good man, all we have to understand by looking at their faces. At times I had fallen into dangers also. There are groups of people who go to the houses of prostitutes for dacoity. Sometimes they even murder prostitutes. A fallen woman has to trade in this way with her life in her hands."*⁷⁸

Gayan also points out that police have repeatedly arrested her, and clients have hit her when she asked them to wear a condom. Sex workers have no freedom to protest the abuses they faced.⁷⁹

On this particular aspect, the early Indian understanding seems to be more pragmatic. Though the lawgivers condemned prostitution, they never pretended to deny its existence. Rather, Nārada permits intercourse with a prostitute.⁸⁰ The entire Book Six of the *Kāmasūtra* concerns the prostitute's trade and its nitty-gritty.

⁷⁴ NALINI JAMEELA, *supra* note 71, at 138.

⁷⁵ NALINI JAMEELA, *supra* note 71, at 142.

⁷⁶ Sulagna Khan, *supra* note 70, at 61.

⁷⁷ Sulagna Khan, *supra* note 70, at 61-62.

⁷⁸ MANODA DEBI, *supra* note 71, at 57.

⁷⁹ Sulagna Khan, *supra* note 70, at 61.

⁸⁰ Nārada *supra* note 18, at XII. 78 (PART-I).

In early India, the chief location of urban amusement was the courtesan's quarter, since the courtesan appears as an inevitable companion of the *nāgaraka* (urban man) in each and every event. The *ganikā*, in fact, is the female counterpart of the *nāgaraka*, the accomplished and cultured urban woman, and not a mere prostitute. In the *Kāmasūtra*, she appears to be at the top of the eight categories of public women.⁸¹ She was to be efficient in several arts and crafts including singing, dancing, playing instruments, painting, decoration, wine and beverage-preparation, conjuring tricks, sleight of hand, telling jokes and riddles, completing words, reading aloud, improvising poetry, staging plays, metrical senses, literary knowledge, gambling and etiquette.⁸² Thus, the *Dhūrtaviṭṭasamvāda*, claims that a man acquired self-confidence, heroism, ready wit, elegant pose, brilliance of spirit, knowledge of human mind, and acquaintance with the arts by attaching himself to a courtesan, and declares that the difference between a courtesan and an ordinary woman is like the difference between a chariot and a bullock cart.⁸³ Kṣemendra, a twelfth century scholar, describes the courtesans as epitome of culture and fine arts.⁸⁴ Therefore, famous courtesans abound in early Indian history and literature, right from the time of the Buddha, when Āmbapālī was the famous courtesan of Vaiśālī. A cultured and rich courtesan, Vasantasenā, is the central character of Bhāsa's second-century drama *Cārudatta* and of Śūdraka's *Mṛcchakatika*. The Jaina canon also knows of courtesans well-versed in the sixty-four arts and having personal picture-galleries.⁸⁵ Even in the eleventh century, courtesans were so important that they are shown as mounting elephants in a king's retinue, in Hemacandra's *Triṣaṣṭiśalākāpuruṣcarita*.⁸⁶ Still, it will be wrong to assume that the courtesan's social position was as respectable as that of her male counterpart, the *nāgaraka*. Respected for her accomplishments, the courtesan was also socially degraded because of her profession. Generally controlled by the mother, she was expected to mate with any man paying for her, without any agency of her own. Daṇḍin informs us that seducing a courtesan against her mother's permission could amount to death as punishment.⁸⁷ Thus, when Vasantasenā refuses the advances of the rich and powerful Saṁsthānaka, in the *Mṛcchakatika*, his *vīta* (pander) blatantly says:

⁸¹ VĀTSYĀYANA, *supra* note 28, at 237.

⁸² VĀTSYĀYANA, *supra* note 28, at 69-72.

⁸³ *Dhūrtaviṭṭasamvāda*, in GLIMPSES OF SEXUAL LIFE IN NANDA-MAURYA INDIA: THE CATURBHĀNI 59 (M. Ghosh ed., 1975).

⁸⁴ B.N.S. YADAVA, SOCIETY AND CULTURE IN NORTHERN INDIA IN THE TWELFTH CENTURY 331 (1973).

⁸⁵ J.C. JAIN, LIFE IN ANCIENT INDIA AS DEPICTED IN THE JAINA CANONS AND COMMENTARIES 217-218 (1984).

⁸⁶ B.N.S. YADAVA, *supra* note 84, at 331.

⁸⁷ DAṆḌIN, DAŚAKUMĀRACARITA 59 (M.R. Kale ed. & trans., 1979).

*"Your body is merchandise to be purchased with money. Therefore, serve equally the man you love and the man you don't."*⁸⁸

Vasantasenā herself seems to share the ambivalence about her profession. In *Cārudatta*, she tells a masseur who apologizes for offending her— "Don't worry, I am a *gaṇikā*."⁸⁹ In *Mṛcchakaṭīka*, she describes her man-handling by Saṁsthānaka as 'what befits the profession of a courtesan.'⁹⁰ In the *Ubhayābhisārikā*, the *vīta* tells the *gaṇikā* Mādhvasenā that a courtesan's duty is to exact by every means the passion of a person, lovable or not, to earn money.⁹¹ These statements, placed on the mouths of these characters, reflect a common social attitude shared by the authors. The concept became even more vulgar later on. Thus, in a thirteenth century book of popular erotic stories, *Śukasaptati*, the author, Cintāmaṇi Bhaṭṭa declares:

*"Even a prostitute mates with a man, but she never spares to cheat even her dearest ones. I salute these prostitutes, for whom even own souls are not beloved."*⁹²

There, the prostitutes like Sthagikā of Ratnāvātī, Madanā of Jayantī, Kalāvātī of Suvarṇadvīpa—and their advisor *kuṭṭānis*—had the sole intention of robbing their clients of all the money they had, to which some—like Keśava—succumbed, while others—like Guṇādhya—triumphed over the tricks of the prostitutes by superior tricks.⁹³ On the other hand, there is the sad story of the courtesan Ratipriyā of Vilāsapura, who had to endure the pain of copulating with the pervert *brāhmaṇa Viṣṇu*, for over six hours, since the courtesan was not allowed to back out after receiving money from a client.⁹⁴

Therefore, the courtesan's participation in the urban world of pleasure was not always amusement, but professional compulsion. However, her education and self-will could also act as a way out. Thus, Āmbapālī took refuge in the Buddhist *saṅgha*. Vasantasenā ends up marrying her poor lover Cārudatta. The Jaina tradition remembers the courtesan Kośā who loved none other than Sthūlabhadra, and became a Jaina nun when Sthūlabhadra renounced the world.⁹⁵ Similarly, Devadattā, a courtesan of Pātaliputra, remained devoted to her lover Mūladeva, refusing to follow her mother's command to accept

⁸⁸ ŚŪDRĀKA, MRCCHAKATĪKA 9 (Sukumari Bhattacharji trans., 2003). For the original Sanskrit drama, see ŚŪDRĀKA, MRCCHAKATĪKA OF ŚŪDRĀKA (Jaya Shankar Lal Tripathi ed., 2002).

⁸⁹ BHĀSA, CĀRUDATTA 20 (C.R. Devadhar ed. & trans., 1939).

⁹⁰ ŚŪDRĀKA, *supra* note 88, at 117.

⁹¹ *Ubhayābhisārikā*, in GLIMPSES OF SEXUAL LIFE IN NANDA-MAURYA INDIA: THE CATURBHĀNI 9 (M. Ghosh ed., 1975).

⁹² CINTĀMAṆI BHATTA, ŚUKASAPTATI 141 (Nrisinha Prasad Bhaduri ed. & trans., 2007).

⁹³ *Id.*

⁹⁴ *Supra* note 92, at 187-188.

⁹⁵ *Supra* note 85, at 218.

the rich merchant Ayala, and defending her stand in the court.⁹⁶ Standing as a contrast to Mādhavasenā, Anaṅgadattā in the *Ubhayābbhisārikā* chooses her lover over her mother's command, and earns a passionate praise from the *vīta*.⁹⁷ Therefore, participation in the urban world of pleasure, educational and cultural accomplishment, and economic independence allowed the courtesan a certain amount of choice and freedom that a woman was often denied within the family.

This freedom was often very fruitful, financially and culturally. In early Indian history, literature and legend, we see the presence of a number of highly accomplished courtesans who were also quite rich. Āmbapālī was rich enough to feed the Buddha with hundred thousand followers and gift him a big mango grove.⁹⁸ Śālavatī's daughter Sirimā received 1000 *kahāpanas* per night.⁹⁹ The profession was a lucrative career option, as indicated by the story in the *Vinaya Piṭaka* about how a banker's daughter decided to choose this as her profession and charged very high fees.¹⁰⁰

No doubt, all the prostitutes did not enjoy a similar position. Not all of them were *ganikās*. as Sukumari Bhattacharji has shown, there were many other kinds of prostitutes, like the *rūpajīvā* (not culturally so accomplished and dependent upon her beauty) or *Veśyā* (one who banked on her clothes and ornaments for seducing clients) or the lowly *varṇadāsī*, *kumbhadāsī* or *ganikādāsī* who were barely slaves and servants. Many of them did not enjoy the economic prosperity of a *ganikā* and often had to struggle hard for earning in the old age.¹⁰¹ Bhattacharji refers to the pathetic tale of Kaṅkālī in the *Samyamātrkā*, who was sold at seven as a slave and started as an ordinary prostitute. After losing her youth, she underwent all kinds of pathetic experiences including attempts to disguise her age and loss of looks to seduce people, murdering a prison warder, begging, nursing, stealing, selling loaded dice, wine-selling, fortune-telling, acting, feigning insanity, etc before ending up as a procuress for a young prostitute named Kalāvātī.¹⁰²

However, lack of pretension about prostitution in early India at least offered some social security to the prostitute and also benefitted the state. If we look at the prescriptions made in the *Arthaśāstra*, we can find out how the regulation of prostitution could be more useful than criminalizing it. Kauṭilya prescribes state-regulated prostitution with some security provided to the prostitutes. The fine for defamation of a courtesan, thus, would be 24 *paṇas*, for

⁹⁶ *Id.*

⁹⁷ *Ubhayābbhisārikā*, in Ghosh, *supra* note 91, at 9.

⁹⁸ SACRED BOOKS OF THE EAST 106-107, 171-172 (F.Max Muller ed., Vol. XVII).

⁹⁹ DHAMMAPADA 308-309 (1906-1914).

¹⁰⁰ SACRED BOOKS OF THE EAST 360-361 (F.Max Muller ed., Vol. XX).

¹⁰¹ Sukumari Bhattacharji, *Prostitution in Ancient India*, in WOMEN IN EARLY INDIAN SOCIETIES (Kumkum Roy ed., 2011).

¹⁰² *Id.*, at 210.

assault 48 *panas*, for lopping off her ears 51.75 *panas*, and for forcibly enjoying her 1000 *panas* or more.¹⁰³ Forcibly enjoying a *rūpajīvā* was to be fined with 12 *panas*. The fine for forcibly attacking a *gaṇikā*'s daughter would be 54 *panas* plus a fine of sixteen times her mother's fees.¹⁰⁴ Similarly, the lawgiver Yājñavalkya prescribed a fine of 50 *panas* for molesting a courtesan, and a fine of 24 *panas* each for gang-raping her.¹⁰⁵ Kauṭilya suggests that the state should pay for the training of the *gaṇikā*, as well as of the *rūpajīvā*, and to pay her a salary. The short term substitute for a *gaṇikā*, the *pratigaṇikā* was to be paid half of her salary.¹⁰⁶ The *gaṇikās*, *pratigaṇikās*, *rūpajīvās*, *veśyās*, *dāsīs*, *devadāsīs*, *pumścalīs*, *śilpakārikās* and *kausīkastrīs* were to be given pension in the old age as well. These women could also be employed in old age as cooks, store-keepers, cotton-wool and flax spinners, and in other jobs.¹⁰⁷

If these means would provide some job security and legal protection to the prostitutes, the state would also benefit from it. All kinds of prostitutes paid a regular tax to the state. A twelfth century text named *Nammayasundarikathā* says that the state received 25-30% of the prostitute's income. Kauṭilya prescribes forfeiting of half of the monthly income of a *rūpajīvā* in times of crisis.¹⁰⁸ Moreover, the prostitutes could serve the state in various other capacities. She could act as a spy.¹⁰⁹ A *gaṇikā* could be used to entertain a customer for royal interest. Kauṭilya prescribes a whipping with 1000 lashes or a fine of 5000 *panas* for refusing such a customer.¹¹⁰ The *Mahābhārata* shows prostitutes being used to satisfy the army,¹¹¹ to entertain guests in the celebration of victory¹¹² and to lure an important diplomat.¹¹³ Yājñavalkya prescribed that if after receiving her fees a prostitute refused to oblige her customer she would pay a fine double her fees; if she refused him before accepting the fees she paid her fees as fine.¹¹⁴

The entire picture gleaned from the sources therefore shows that, in early India, prostitution was accepted as a prevalent phenomenon.¹¹⁵ In spite of several problems, there were suggestions to regulate the trade, providing protec-

¹⁰³ Sukumari Bhattacharjī, *supra* note 101, at 205, 213.

¹⁰⁴ KAUTĪLYA, THE KAUTĪLYA ARTHAŚĀSTRA IV.2 (R.P. Kangle ed. & trans., 1997).

¹⁰⁵ YĀJÑAVALKYA, YĀJÑAVALKYA SMṚTI II.293 (B.S. Bist trans., 2004). For the original Sanskrit, see YĀJÑAVALKYASMṚTI, (Manmatha Nath Dutt trans. & K.L. Joshi ed., 2006).

¹⁰⁶ Sukumari Bhattacharjī, *supra* note 101, at 202-204.

¹⁰⁷ Sukumari Bhattacharjī, *supra* note 101, at 211.

¹⁰⁸ KAUTĪLYA, *supra* note 104, at V. 2.

¹⁰⁹ KAUTĪLYA, *supra* note 104, at VIII. 17.

¹¹⁰ KAUTĪLYA, *supra* note 104, at IV. 13.

¹¹¹ VYĀSA, *supra* note 62, at V. 195.18-19.

¹¹² VYĀSA, *supra* note 62, at IV. 64.24-29.

¹¹³ VYĀSA, *supra* note 62, at V. 84.

¹¹⁴ Yājñavalkya, *supra* note 105, at II. 295.

¹¹⁵ For the location of the prostitution within the culture of pleasure in urban early India, see Kanad Sinha, *Sporting with Kāma: Amusements, Games, Sports and Festivities in Early Indian Urban Culture*, LV(2) J. ASIATIC SOC.73-120.

tion and security to the prostitutes, and revenue and benefit to the state. This also provided the prostitute a human status, just like any other professional, and let her attain excellence in several humane and cultural faculties. Thapar notes how this culture of prostitution is a remarkable example of the existence of alternative traditions. The courtesans, prostitutes and *devadāsīs* were not required to maintain the boundaries of caste identity. They could deny the centrality of procreation, not observe monogamy, and have an independent income. Naturally, they were beyond Manu's rules regarding the subservience of women to fathers, husbands, and sons.¹¹⁶ They contributed immensely to Indian classical music and dance forms. The courtesan's freedom also lay in her access to power, as she was well-connected to the life of the royal court and the urban rich. If courtesans became concubines of the kings and bore children to him, such children or their descendents could even be claimants to the throne. Such a descent is associated with Kumārapāla, a pre-eminent Caulukya king of Gujarat.¹¹⁷ This social recognition must have also been a protective shield from sexual abuse. Thapar rightly says that the awareness about the abuse of prostitutes and a concern about rape victims in early India suggest a greater degree of condemnation of the act, than is often forthcoming in our times.¹¹⁸

Even in medieval India, the female performing artists (like the *baijīs*) retained this legacy under court patronage, until the colonial state with its Victorian prejudices which degraded these women to the denounced status of 'nautch girls'. Janaki Nair has shown that the *devadāsī* had considerable ritual status in precolonial Mysore, and could legitimately own and transfer property.¹¹⁹ Pre-colonial India, indeed, had a wide variety of traditions to look at the issues like sexuality and prostitution, a variety missing in the colonial modernity inspired by Victorian Puritanism. Thapar comments:

"Perhaps the absence of the notion of Satan and of 'original sin' in Indian mythology of pre-modern times, allowed there to be a sane attitude to sexuality as one of the components of a balanced life. The internalization of Victorian mores in the nineteenth century helped to unsettle this sanity."¹²⁰

The present Indian lacks that pre-colonial common sense, and prefers to turn away from the social realities. Therefore, prostitution remains in a grey area of pretended non-existence, the prostitutes being subjected to exploitation without protection. Legalizing prostitution as a profession, with proper

¹¹⁶ Thapar, *supra* note 1, at 274.

¹¹⁷ Thapar, *supra* note 1, at 27-274.

¹¹⁸ ROMILA THAPAR, *supra* note 1, at 273.

¹¹⁹ Janaki Nair, *The Devadasi, Dharma and the State*, XXIX ECON. & POL. WKLY. 3157-3167 (December 10, 1994). See also JANAKI NAIR, *MYSORE MODERN* (2012).

¹²⁰ ROMILA THAPAR, *supra* note 1, at 273-274 (2014).

registration and regulation, would have been a better security against exploitation, would provide the prostitutes some legal protection and human dignity, would help to restrict sexually transmitted diseases, would save an immense amount of human resource from wastage, and would also boost the state exchequer. Kauṭilya and Yājñavalkya had realized that. It is high time that we also do.

But before that the society as well as the law needs to solidify the woman's right over her own body. The constructions of 'chastity' and 'modesty' embedded in female virginity are nothing but a socio-legal approach to turn the female body into a man's property and to protect that property by all means. This is the tradition of Manu and Bṛhaspati. This is also the legacy of Macaulay's inherited Victorian morality. Perhaps because of the coincidence of the two, this is the tradition our state and society still prefer to unquestioningly accept as our ancient tradition, overlooking the alternative traditions. The multiplicity of the early Indian tradition is testified in the prescriptions of Kauṭilya and Vātsyāyana. The *Mahābhārata* reiterates time and again the multiple meanings of *dharma*. That these alternative voices were no less powerful than those of Manu and Bṛhaspati is testified not only in the enigmatic life of Kṛṣṇa and the strong voices of Draupadī and Sahadeva, but in a wide range of early Indian creative literature and art. A world of sexual freedom, often amoral, appears time and again in the creations of Amaru, Jayadeva and Cintāmaṇi Bhaṭṭa. The famous novel by Daṇḍin, the *Daśakumāracarita*, not only portrays the sexual amorality of urban India in the eighth century, but repeatedly compares the three virtues of *dharma*, *artha* and *kāma*, giving equal importance to each.¹²¹ The temple-walls of Khajuraho and Konarak, Puri and Bhuvaneshwar, testify a social attitude where sexuality could be viewed and discussed outside of a Puritanical prism. Medieval India also witnessed the diverse world of Islamic traditions which could present several alternatives.

One may argue that ancient tradition, no matter how progressive or regressive, need not be taken into account at all while formulating current laws, which should consider only the contemporary social reality. While there is much merit in this argument, criminal law progresses through amendments and there is natural continuity between the old and the new understanding of every crime. Moreover, retrogressive provisions in the law are very often justified by a large fraction of the Indian society on grounds of the ubiquitous "Indian culture" and thus it is certainly worth exploring and exposing the alternative trends of ancient Indian culture, if for no other reason than to establish the fact that "culture" at any point of time is fluid and multi-faceted, and this fluidity is to be borne in mind while formulating laws as well as while making social judgments. The emphasis is on social judgments here since laws, at least in theory, do not take ancient Indian tradition into account while

¹²¹ DANḌIN, *supra* note 87.

being written, but the implementation of every law depends to a large extent on social perception which continues to be informed by notions of what is traditional. To illustrate, theoretical existence of laws would not be any help, if a man who is not taken seriously by a large fraction of the society when complaining of rape, would not proceed to the stage of a legal battle, and a woman who is shamed for losing her virginity would prefer to keep all evidence of her sexual exploitation private. Since such social judgments claim to draw their validity from what is traditional, they certainly need to be informed by a more nuanced understanding of tradition which as a corollary brings about a more nuanced understanding of contemporary society as well.

Therefore, it is essential to question the stereotypical understanding of 'Indian tradition' heavily based on a selective appropriation of a particular strand of normative literature, overlooking the others. Our laws, often carrying the baggage of Victorian Puritanism, are perpetuated legally and socially partly due to this partial understanding. As long as we fail to combat this with more nuanced understandings of our traditional as well as contemporary social existence, our 'heroes' will go on protecting the modesty of their on-screen heroines by beating up dozens of goons, thousands of Nirbhayas will continue to be molested and raped every day without any record or punishment, most natural romantic companionships will continue to end up in 'honour killings'. The candle lights of protest will remain too feeble to eradicate the legacy of the Manus, the legacy of the Macaulays.