SEXUAL VIOLENCE AND JUDICIAL DISCOURSE IN INDIA

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CERTIFICATE

This is to certify that the dissertation entitled **"SEXUAL VIOLENCE AND JUDICIAL DISCOURSE IN INDIA"** submitted by me for the degree of **MASTER OF PHILOSOPHY** is a bonafide work of mine, that has not been submitted in parts or full for any other degree of this University, or of any other University and is my own work.

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We recommend that the dissertation be placed before the examiners for evaluation.

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The Vedas cry aloud, the Puranas shout,
"No good may come to woman."...

They are foolish, seductive, deceptive-
Any connection with a woman is disastrous."

Bahina says, "If a woman's body is so harmful,
How in this world will I reach truth?"

Bahinabai (1627- 1700)
[*Women Writing in India* Volume 1, p.107]

Cha, me tired of men whistling at me
when I walking the government street.
And why the knowing glances and stares
when our eyes accidentally meet?
I'm fed up of being furtively fondled
without my knowledge or consent...
If you're black and on the game
who can you really tell?
Who wants to hear from a commodity
that we never ever sell?

Monique Griffiths
[*Watchers and Seekers*, p. 36]

CONTENTS

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PREFACE

There are too many influences on a person's intellectual journey for it to be evocatively expressed in a few words. If I have to single out *one* event in my life to clearly demarcate the two broad phases in my life, I would say that it is a research I involved myself in during my B.A. in Bangalore on how the concept of 'beauty' is related to the subordination of women. The year I did the research was also significant, because it was the year that saw the staging of the Miss world beauty pageant in Bangalore. The city in which I lived became the ground for both feminist protests and right wing women's vociferous remonstration against the beauty contest. In fact, this was the context in which I did the research; what drew me to the issue was to my mind a puzzlement over why there were differences in the media coverage over the feminist struggle and the right wing women's groups, and why they were both clubbed together in a way that sought to erase the feminist struggle against the contest. As I interviewed men and women students in the college that I studied, and as I began to read, I began to understand some of the ways in which women were subordinated, and how their participation in their subordination was sought. A few books and discussions that Shaji Vargese provided me while supervising my study had changed the way I perceived reality. It was during this year that my journey to feminism began in clear terms.

Shaji's words rung in my ears for many, many months before I understood more clearly what had at the time seemed like a lot of babble about not forgetting woods while looking at trees, or not forgetting the trees when looking at the woods. It has taken me all the years that followed to understand with some clarity how exactly gender, caste and class are related.

I really cannot remember at what point I chose the field of my study for this dissertation. Perhaps it was the fact that I was first influenced by the powerful and fiery works of radical feminism that ruled this decision. But equally important was the term I served as a student representative in the GSCASH in this campus, during 2000-2001, in my becoming 'obsessed' with sexual oppression and the law, and feminism's ways of dealing with both of these. GSCASH opened my eyes by means of experience to what I read about, and my experience of how women who fought cases of sexual harassment through the committee had to deal with the law and how, simultaneously, the law dealt with them. There was also a specifically *personal* phase

in this period, and this is what bound me to the subject. It is this and many other experiences that have kept me bound with a great intensity to the study out of which I wrote this dissertation, and I only hope that I have done justice to an area of such critical import.

CHAPTER 1

INTRODUCTION

> Sexual violence has become the taboo subject of feminist theory today...The kind of theoretical and genealogical scrutiny that other aspects of women's lives (the body, gender performativity, eating disorders, transgender politics, etc.) have occasioned is remarkably absent from studies of sexual violence...Such indifference is all the more remarkable since gendered crime such as rape and domestic violence show no sign of abating.[1]

Not for a moment intending to say that rape was a non-issue or that it was absent earlier, but only that it has become an important issue once again entering the domain of the public in various instances, in the period in which we live, the issue of rape has once again been catapulted into public discourses.

First, not only are we painfully reminded of the instances of sexual violence during the Gujarat Genocide, (which is but the most recent of the communal riots that seem to define our age), we are also aware of the highly sexualised language of the Hindutva ideology- a language that both posits an avowed threat of sexual violence from Muslim men towards Hindu women, as well as proposes the direction of sexual violence towards primarily Muslim women, but also increasingly, Christian women, as a weapon in its fascist designs. We are aware at the same time that the nature of the paradox is only superficial when this very government speaks of the need to enforce death penalty or capital punishment for rapists as the sole means to deter them. There is, really, nothing contradictory about the very structure from which sexual violence stems as a systemic characteristic projecting itself as the true championer of 'women's issues' and defender of women's 'honour'.

Second, the increasing use of sexual violence by dominant classes and castes, to repress the struggles of landless labourers, dalits, adivasis and 'lower' castes, has, in the context of what has been termed as the 'caste-wars', given new meaning to the traditional

[1] Mardorossian, Carine M. "Towards a New Feminist Theory of Rape" in *Signs: Journal of Women in Culture and Society*, vol. 27, no. 3, 2002.

'privileges' of the upper castes in the appropriation of the sexuality of lower caste women.[2]

Third, in spite of the well-maintained secrecy by the state over the actual functioning of the Army deployed in 'troubled areas' like Kashmir and the North- East, information of direct state terrorization in the form of sexual violence is available through various reports of civil liberties groups.

Fourth, police atrocities on women, often poor, lower-caste and adivasi women, most often take the form of rape, be it during routine police investigation, or when it is called upon to protect the interests of the dominant classes and castes by crushing peoples' movements and struggles against exploitation and oppression. These are instances from which both the nature of the state is made less mystified and the politics behind every act of rape made more obvious.

Then again, newspapers carry information very often about women and girls raped, telling us that even if we were blind about the use of rape in all the above mentioned contexts, these everyday reports in themselves are enough to convince us that the most common form of research on 'violence against women'- research of the variety of statistical analyses is not at all enough, as if the job of the social scientist lies primarily in collecting empirical evidence of the existence of social phenomena, and allowing the facts to describe reality by themselves. It is almost as if we still haven't moved from the need to establish the *existence* of rape in society. But again, and precisely because rape is silenced through various mechanisms, these kinds of work too are necessary, although the very silence regarding rape plagues even the attempt to prove just how pervasive it is in society.

What I intend to do in here is to study sexual violence and the legal discourse in India through an analysis of certain 'landmark' cases. Two very important issues underlie this proposal. Does sexual violence imply only rape or other forms of sexual intimidation of women, like sexual harassment, the public parading of women after stripping them naked, child sexual abuse, and battering that may be sexual in nature? I am aware that

[2] I shall use quotation marks for the first time while writing lower castes, because, the word lower in this term does not simply refer to the place of these castes in the caste hierarchy in India, it also conjures up in the mind, the accompanying ideological justification for this system of hierarchy which projects lower castes as lower in the hierarchy out of some essential intrinsic less worthiness.

there are difficulties in making any sort of clear cut differentiations between the various forms of sexual violence, and that "this conceptual overlap in the forms of sexual intimidation mirrors the correlative normative concepts of violation, terrorization, coercion, and dehumanization are related".[3] In this study, I am focusing on rape and as I use 'sexual violence' and 'rape' interchangeably, I am aware of the debates over whether rape ought to be categorized as violence or as a sexual offence. This debate needs greater attention and I intend to take it up subsequently. But, as many feminists have argued, rape is not just violence, like the act of hitting someone- it is *sexual* violence, and whether or not there is marked physical violence accompanying it, it is a violent appropriation of a woman's sexuality.

The second important issue is that regarding the methodological implications of analysing legal discourse on rape by concentrating on a few landmark cases. Such focuses may limit our vision of understanding rape and the operation of law, and may obscure the indisputable fact that rape is a pervasive reality. Ideally, we ought to be examining every case of rape that has reached the courtrooms in order to get a lucid picture. Kalpana Kannabiran and Vasanth Kannabiran examine all the Supreme Court judgements on rape in the period between 1950 and 2000, because "...placing the victims contiguously serves the additional purpose of creating a collectivity and forging a collective identity for women in the discourse of rape, something that is impossible to achieve through the conventions of legal citation, which aim primarily at isolating 'landmark cases', and thereby setting the women-victims in those cases apart from the rest, isolating them and making the rest invisible".[4] But this is an impossible task for this study given the constraints of time and space. Furthermore, some cases *do* become landmark cases, not because there is something 'special' about them but because they may enter the public domain with more force than other cases, they may take place at crucial historical junctures, or they may become important cases in the history of movements. The anti-rape campaign, which was one the important areas of struggle for

[3] LeMoncheck, Linda. *Loose Women, Lecherous Men: A Feminist Philosophy of Sex*, Oxford, Oxford University Press, 1997, p. 163. At times, the demands for clear definitions are impossible to meet because in reality, these borders might merge; at other times, the law clearly requiring specific categorizations, it seems to be necessary to have a deep conceptual clarity of the differences between them.

[4] Kannabiran, Kalpana and Kannabiran, Vasanth. *De-Eroticizing Assault: Essays on Modesty, Honour and Power*, Stree, Calcutta, 2002, p 106.

the women's movement in the 1970s and 80s, it is recalled, arose over the judgements on certain cases, and led to the women's movement realizing the patriarchal nature of the rape law itself. It is in this sense, then, that they are called 'landmark' and not because the act of rape itself has some particularly peculiar characteristics for as we know, rapes are extremely 'normal' occurrences in patriarchy.

This is what feminist analyses of rape first tell us- that rapes are not committed by some strange men with pathological disorders; they are, on the other hand part of the structure of male dominance and female subordinance as well as one of the tools that are deployed by the structure to maintain and reproduce itself. Rapes are also 'normal' in another sense, according to some feminists at least, because heterosexual relations under patriarchy are typically 'eroticisation of the relations of dominance and subordination', and the prescriptions for, if not actual practice of, male sexuality and female sexuality are such that the former is typically a display of aggression, strength and power, bordering very close to the violent, and the latter is typically a passive acceptor of the aggression, eroticising the position of being at the receiving end of it.[5] In an early study, Lorenne Clark and Debra Lewis argue that rape is the limit of coercive sex allowed and practiced in our societies.[6]

Another issue that needs to be stated here, is that such a study cannot work within the narrow confines of disciplinary boundaries. Reality is not neatly compartmentalized into sections, and disciplinary boundaries in the social sciences are artificially created ones. But what we have constructed for our own benefits, might come back to haunt us in a reified form. This cannot be more evident than when dealing with gender; and feminist theory and women's studies have had to work against the grain of established boundaries.

In the first chapter I shall review the understanding of patriarchy, sexual violence and the state in feminist theory. As sexual violence has mostly been a point of concern for radical feminism, this means, more or less, a focus on radical feminist theory. But if we acknowledge that the various streams in feminism were engaged not only in criticism of patriarchal thoughts, assumptions and justifications, but were also engaged in debate with each other over what were the best ways to understand women's position in society

[5] I shall be looking at the connection between 'normal' sex and rape later.
[6] Clark, Lorenne and Lewis, Debra. *Rape: The Price of Coercive Sexuality*, Toronto, The Women's Press, 1977.

and the best ways to change them, then we also need to be aware that concepts were contested, criticized and refined within feminist theory as well. For this purpose, whenever necessary, I will also in this section look at theoretical debates within feminism over certain concepts, especially that of patriarchy.

I shall then move on to the area of feminist legal theory and look at some of the attempts within feminism to develop a theory of the state. This will provide us an entry point into the specific question of rape and the legal system. In expounding a theoretical framework best suited for our purpose here, which is the analysis of rape and legal discourse in India, it is also necessary to understand that given our different history, we need to understand the structures of our society and the historical processes that have led to it. I therefore shall conclude this chapter with an attempt to outline the model through which we can carry out our analysis.

There are many levels at which we can read the judicial discourse on rape. Not only has the rape law been codified on patriarchal grounds, there are also many unwritten laws that enter pronouncements of justice in the courts. As the law is an arm of the state whose primary functions are to further the interests of the dominating groups and classes, perhaps the best place to look for views on proper female sexual behaviour, and the practice thereby of regulating sexuality as well as allowing free sexual access to women who fall into a certain category based on their caste and class, is the judicial discourse on rape itself. This is what I shall look at in the next two chapters.

I begin the third chapter with an account of the women's movement in India so that we can set the context from which the anti-rape campaign emerged to address certain key issues regarding the rape law. This campaign, apart from highlighting the 'normalcy' of sexual violence that women are subjected to, also dealt with the sexual violence that the state itself subjects women to. One of the largest issues in the campaign was over the innumerable cases of policemen raping women in their custody, or when going on a rampage against women who were part of a movement or struggle. The campaign also simultaneously highlighted the power of the state to directly repress its citizens.

Understanding the contexts within which custodial rape was emphasized by the campaign also entails an understanding of why the autonomous women's movement arose in the decade of the 70s, a decade which has generally come to be called a watershed decade- a decade of massive suppression by the state of people's movements, a decade that saw the imposition of emergency- the taking away of even the most basic of civil liberties and democratic rights that a liberal state is supposed to ensure for its citizens. It is in this time that the Supreme Court judgement on the Mathura case, where a 16 year old tribal girl was raped by two police made the women's movement realize not just how state power figures in custodial rape but also how deeply patriarchal the section on rape is in the Penal Code, and led it to question the interpretation of consent in judgements on rape. Thus, after I provide an outline of the women's movement, I also look at the sections in the penal code than deal with rape, so as to obtain an idea of the substantive rape law. I then summarise the cases that are primarily reviewed in this chapter and the fourth chapter. I do so because of a methodological consideration, as I review the judicial discourse on rape by looking at certain key issue, and how they figure either in common or different modes in each of the judgements that I am reviewing. This is a easier and more effective way to analyse case law, and points to the common issues underlying it better than if we are to take up each case and review them one by one. I continue the third chapter therefore by looking at how and why judicial discourse creates a set of opposition, which is the opposition between 'sexual intercourse' and 'rape', as defined in the sections on rape in the penal code, they depend mostly on whether there was consent or force involved. I conclude this chapter by looking at one instance when this opposition doesn't arise, which when the survivors of rape are not women but young girls. The judgements in these cases reveal the obsession with the virginity of young girls, and the courts address themselves to the loss of this virginity, not to the sexual violence itself that the girls are subjected too.

In the fourth chapter, I examine in further detail how various women who occupy different locations in the structure are treated by the court during the trials of their rapes. The first issue that is examined in this chapter is that of marital rape. I thereby go on to show that women exist in a continuum and not just a simplistic binary category of

'respectable' and 'disrespectable' women. It is normally argued that women whose sexual lives 'deviate' from the norm are punished by the courts by acquitting their rapists. I look at this issue, but I try to simultaneously also address the connection of this issue to the structure of caste, class and gender. Thus, the use of this binary opposition needs to be qualified by who exactly constitute either of these categories. This opposition is not just based on how women conduct their sexual lives, but also on which caste and class they are from. I hope to show that while women who occupy the first category by virtue of being upper caste women can fall into the second category owing to their sexual behaviour, women from lower castes, and tribal women are always pushed into occupying this category.

In the second section in this chapter, I look at how judicial discourse on rape is also used to reproduce the dichotomy of tradition and modernity, a product of the nineteenth century when one of the effects of the imperialist exploitation- the cultural encounter between the colonizer and the indigenous neo-elite, who were Western educated upper-caste, mostly Brahmin men- was at its peak. Interestingly, the first wide-spread furore among the dominant sections over 'colonial interference', was over the Age of Consent bill that was passed in 1891, which was passed in the context of the case and its wide spread publicity of the death of a young girl due to marital rape. This gave vent to a fury of activity over the construction of the 'traditional' that ought to be preserved from being polluted by the 'modern'. And in this section, I look at how the tradition and modernity distinctions is sought by the state in one particular judgement that was pronounced in 1984, and seek to connect it to the context of the feminist challenge that it addresses.

Finally, in the concluding chapter, I wish to reflect on some of the questions we started with. What picture we get out of the examination of these few cases about the nature of the Indian state, how rape actually occurs and is implicitly accepted by the state, and what happened to the anti-rape campaign of the women's movement are questions that I hope are addressed in the main chapters themselves. So, by way of a concluding chapter to the study I look instead at some of the issues that were only obliquely referred to in the main essays.

CHAPTER 2

PATRIARCHY, SEXUAL VIOLENCE AND THE STATE: A THEORETICAL FRAMEWORK

> "A focus on the conspiracy of silence regarding sexuality in India, whether within political and social movements or in scholarship, blinds us to the multiple sites where 'sexuality' has long been embedded. In the spheres of the law, demography and medicine, for instance, sexuality enjoys a massive and indisputable presence that is far from prohibited."[1]

The analysis of sexual violence and legal discourse in India is fraught with many questions- primarily, questions regarding the place of sexual violence in the maintenance and perpetuation of dominance and exploitation in society *and* the various systems within which the legal sphere is situated. These entail further, an understanding of feminist theorizations of society, state and sexuality and sexual violence.

Before that, I would like to take what might seem like a detour and briefly state the background from which modern feminist theory emerged. On a surfacial level, the work in hand seems to be on a deceptively simple level. It would seem as though an outline of the connection between patriarchy and sexual violence is an easy one, for although 'feminist theory' is extremely divergent, the focus on sexual violence can be found mainly in only one stream of feminist thought- radical feminism. Yet, if we understand that the various streams of feminism were simultaneously engaged with each other, even as their main concern was rights for or the emancipation or liberation of women, we will then get a better idea of the debates with feminism over theoretical frameworks and concepts.

Having to battle constantly not only against existing ideological justifications for the historical position of women, but also against inadequate theories for the explanation of the same, the 'second-wave' of the Western women's movement felt the need to come up with new theoretical frameworks and concepts. Theory building is part of a movement to end domination, for to end it, we have to first understand its various manifestations as

[1] John, Mary E. and Nair, Janaki. 'Introduction: A Question of Silence? The Sexual Economies of Modern India', in John, Mary E. and Nair, Janaki (eds.), *A Question of Silence? The Sexual Economies of Modern India*, New Delhi, Kali for Women, 1998, p. 1

well as equip ourselves with strategies to end that system. As it became increasingly clear to women that part of the fight against their domination is the search for new theories and concepts, various trends emerged in the women's movement that not only identified different reasons for women's position, but also thereby developed different strategies for change. The focus on what was to become the primary field of investigation and most important sites of struggle too were diverse.[2]

For the purposes of this study, it is not feasible to provide an account of the varied attempts within feminist theory to explain the conditions of women. While I shall primarily be focusing on what has come to be termed radical feminism, as it is in radical feminism that we find elaborations on the occurrence of sexual violence in human society, I still think it relevant to point out, to at the least a part of the debates over the concept of patriarchy itself, between radical, and socialist or Marxist feminist.

It seems to be a strange exercise indeed to be writing of the conceptualization of patriarchy in feminist theory at a time when it has come to be used freely, and generally accepted.[3] For precisely this reason, one ought to dwell on it at length.

Patriarchy has been variously theorized to mean either a separate structure that has caused women's oppression trans-historically where men control women sexually, socially, economically and ideologically, or a structure which, though relatively autonomous, is linked to the modes of production or, more recently, as a structure parallel to, but interlinked with other systems of oppression and exploitation like class, race and caste, where each is given equal weightage. Radical feminists developed the concept of patriarchy when it began to be clear that there was a need for concepts that would explain the specific nature of the structured relationship between men and women, challenging both liberal feminists' assumption that it was the lack of rights that was the reason for inequality between the sexes, and the prevalent reductionist approaches to the 'woman question' in the left. As theories of patriarchy gained currency, and as socialist feminists

[2] Alison Jaggar provides an extremely useful analysis of the various streams with feminist theory and politics, although not the recent developments. See Jaggar, Alison. *Feminist Politics and Human Nature*, New Jersey, Rowman and Allanheld, 1983.

[3] Kandiyoti for instance says that 'patriarchy' is the most overused concept in feminist theory. See Kandiyoti, Deniz. "Bargaining with Patriarchy", in *Gender & Society*, Vol. 2 No. 3, September 1998, London, Sage Publications.

realized that explaining women's conditions in society and through history using traditional marxism was deeply problematic, they seemed to borrow this notion from radical feminism. The nature of the relationship between patriarchy and capitalism or the mode of production came to be explored variously, the most famous of which is the dual-system approach where women's oppression was analysed in terms of two systems- patriarchy and capitalism, the former explaining the mode of human reproduction and the latter, the mode of production. Other trends within socialist feminism sought to re evaluate traditional Marxist concepts themselves in the new light of women's conditions, realizing that mechanistic applications of either marxism or theories of patriarchy were insufficient to explain reality. Although there was a realization that ideological issues were an important concern, the focus was on the material roots of oppression.[4]

In a significantly large section of feminist theory, either patriarchy came to denote primarily an ideological system, or the ideological aspects of women's oppression gained precedence over others. It is at this time too, that feminists took on the idea that women and men were placed differently in society because of the natural differences between them. The sex/ gender distinction was made in order to emphasise precisely that *gender* was socially constructed. Irrespective of whether the biological differences between the sexes or the social construction of gender were recognized as the root cause of women's oppression, there was the strikingly stubborn persistence of patriarchy across societies and through history crying for an explanation.

Kate Millet, one of the first feminists who attempted to provide a general theory of women's oppression using the concept of *patriarchy*, identified her main object as a study of the relations between the sexes as a political one.[5] Men, as a group, control women, as a group, and the nature of the relationship between them is one primarily of *power*- and it is in this sense that the relationship is a political one.[6] For Millet, patriarchy

[4] As most socialist feminist reworking has concentrated on the area of the family and women's work, I shall limit myself to only certain aspects of the debate between socialist and radical feminists on patriarchy that are directly connected to our main task at hand, which is the relationship between patriarchy, sexual violence and the state and law.

[5] Millet, Kate. *Sexual Politics*, New York, Avon Books, 1971.

[6] One of the interesting ideas that her book offered was the ways in which to systematically enlarge the understanding of "politics" and "power" themselves, beyond the traditional understanding, and see them in everyday interactions. Millet actually sees the sexual relationship as providing the most fundamental concept of power.

is an institution that structures the relationship between the sexes as one of dominance and subordinance- where the male dominates the female. While recognizing that patriarchy varies historically and regionally, she nevertheless sees it as pervading all other political, economic and social forms. Often understood as the 'natural' order of things, the most pervasive support for patriarchy in the realm of ideas comes from the explanation that the relationship between men and women in human society is organized on the basis of the biological differences between the two. But "...since patriarchy is a social and political form, it is well here, as with other human institutions, to look outside nature for its origins." [7] While seeing theories of the origins of patriarchy in prehistory as being necessarily speculative owing to the absence of concrete evidence, there is ample evidence in myths and kinship ties that there was a pre-patriarchal human history. Millet's guess is that the discovery of paternity is an important one in the shift from an egalitarian society to a patriarchal one.

Millet identifies the family as the fundamental unit of patriarchy. The family, society and the state are separate but connected institutions existing within the larger institution of patriarchy. The most important functions of the family are reproduction, that ought to be legitimate, and socialization of children into accepting patriarchy's ideology. Women's economic dependence on men is also one of the ways in which patriarchy operates to sustain its control over women. In her scheme, it is interesting that although she speaks of variations in patriarchy, for example across class, she is more interested in the effects of class within patriarchy than in pursuing the relationship between the two. Women's relationship to class is more impermanent than men, and they don't enjoy all the benefits that men of the same class do. But in this she also seeks the reason for their conservativeness- more or less rendered parasitic, women are aware that their benefit lies in the benefits of the men they depend upon and are therefore unable to search for radical solutions.

As the majority of women in society live off sexual exchange with men, sexuality indeed is an important area through which patriarchy ensures its control of women. In her, we find one of the early attempts to theorize sexuality as socially constructed. She notes that whereas the woman is rendered primarily sexual, an animal being not capable

[7] Ibid., p. 109.

of intellectual pursuits, there is also the double burden of having to constantly prove that she doesn't even like sex, if she has to be approved of in society. There are moreover, two moments of how female sexuality is actually constructed in society- one, the woman is the receiver of male sexual cruelty, and two, she has to also repress her sexual desires, especially if outside of the ordained monogamous marriage relationship, in order to qualify herself as a good woman.[8]

Although she acknowledges that no system of oppression would last for long without its collaborators, she notes that the use of force in patriarchy is much higher than in other systems of oppression. It is all the more obscured though, because patriarchal ideology has been so effective in making it seem invisible. The legal systems and religions of patriarchy have historically institutionalized force. While masculinity itself is constructed around display of brute force and physical strength, just as it is only the male who is allowed displays of force and strength, there is yet another important form that force takes. One form of patriarchal violence is sexual in character, and it is in rape that it gets fully realized. Not only that, "Patriarchal societies typically link feelings of cruelty with sexuality... The rule here associates sadism with the male ("the masculine role") and victimization with the female ("the feminine role")."[9]

Millet was thus talking of the various ways in which patriarchy controls women- socially, economically, sexually and ideologically. But while she elaborated the specific nature of women's oppression, and was one of the first to seize the recognition of the need to do so, there are many inadequacies in her theory of patriarchy. In her effort to show that patriarchy exists in almost every known society, she fails to take the variations seriously, and therefore cannot look for the reasons for these variations. McDonough and Harrison, for instance, criticize her for trying to replace the inadequacies of marxism with its primary emphasis on class with the opposite inversion where sexual oppression becomes *the* primary force in society.[10] Millet does not provide a *material* analysis of

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[8] She finds evidences of the first, of how male sexuality is constructed around expressing cruelty, in modern literature. As literature is a means of controlling women under patriarchy, this is also a reflection of actual expressions of sexuality in society.

[9] Ibid., p. 44.

[10] McDonough, Roisin and Harrison, Rachel. "Patriarchy and Relations of Production" in Kuhn, Annette and Wolpe, AnnMarie (eds.). *Feminism and Materialism: Women and Modes of Production*, London and New York, 1978.

women's oppression, and even though she acknowledges the importance of Engels, "her presentation of Engels's work transformed it almost beyond recognition into a subordinate contribution to what she called the sexual revolution."[11] In other words, whereas Millet concentrates on the importance of ideology in the oppression of women, she doesn't give an adequate explanation of what *material* conditions lie behind this ideology.[12]

It is in this context that socialist feminism centers on providing explanations of the relationship between the organization of human production and that of human reproduction. Thus, attention is paid to the nature of women's labour in specific modes of production and the historical organization of the family as the fundamental unit, not only of human reproduction but also, visibly prior to the capitalist mode, of production. Where sexuality enters the analysis, the emphasis is either on the organization of it in the family, especially the monogamous family, because the material reasons for it are much more obvious, or in discussions of repressions of it in society. As one socialist feminist puts it, "...socialist-feminism tends toward theoretical abstractions in its exploration of gender relations at all the different levels of social, economic, and psychological organization, and in so doing has all kinds of mechanisms for actually not talking about sexuality."[13] It is probably for this reason that we do not find serious attempts to analyse *sexual violence* within socialist feminism. It is to the credit of radical feminism that sexual violence even came to occupy such an important place in feminist theory and the women's movement.

One of the first feminists to assert the importance of the place of sexual violence in patriarchy was Susan Brownmiller. In her *Against Our Will: Men, Women and Rape*, she tried to establish an important link between rape and patriarchy.[14] Brownmiller's

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[11] Vogel, Lise. Woman Questions: Essays for a Materialist Feminism, London, Pluto Press, 1995.

[12] Barrett, Michele. "Ideology and the cultural production of gender" in Newton, Judith and Rosenfelt, Deborah (eds.). *Feminist Criticism and Social Change: Sex, Class and Race in Literature and Culture*, New York and London, Methuen, 1985. Some socialist feminists fall into the same trap that radical feminists are criticized for, when they see patriarchy and capitalism as two separate systems, the former is taken to be principally an ideological or psychological force.

[13] Lewis, Jill. "The Subject of Struggle: Feminism and Sexuality" in Joseph, Gloria I. and Lewis, Jill. *Common Differences: Conflicts in Black and White Feminist Perspectives*, Boston, South End Press, 1981, p.239.

[14] Brownmiller, Susan. *Against Our Will: Men, Women and Rape*, Harmondsworth, Penguin Books, 1975.

explanation for the occurrence of rape is based on one major assumption- that the human species is physiologically constructed in such a way as to make the male capable of raping the female. The basic difference between sex in the animal world and the human is that the formers' sex life or 'mating' is controlled by the female estrous cycle whereas the latter is not. In the place of these physiological signs, humans "have evolved a complex system of psychological signs and urges and a complex system of pleasure...Man's structural capacity to rape and woman's corresponding structural vulnerability are as basic to the physiology of both our sexes as the primal act of sex itself. Had it not been for this accident of biology, an accommodation requiring the locking together of two separate parts, penis into vagina, there would be neither copulation nor rape as we know it."[15]

Brownmiller's task was to provide a historical understanding of rape, as "Critical to our study is the recognition that rape has a history, and that through the tools of historical analysis we may learn what we need to know about our present condition."[16] Yet, in spite of her insistence on the need for historical analysis, her account of how rape came into existence in primitive society is more speculative.[17] The 'first rape' in human society, which occurred due to some woman's struggle with some man over her assertion of her lack of sexual interest in him, is where she sees the germ of patriarchy as having really originated. With the first rape came to man the realization that he had the biological power to rape, and the discovery that he could use it to control women.

With this also came to woman the realization that neither could she counter her rape with a similar act, nor could she depend on other women, who could offer only limited defence against man, both owing to physiological reasons- the first owing to her lack of a penis, and the second owing to her weaker physical strength. Having understood this, she chose to ally herself with *some* of those very beings who could rape her. Brownmiller thus perceives rape as the central force in the establishment of patriarchy. "Female fear of an open season of rape, and not a natural inclination toward monogamy,

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[15] Ibid, p.13-14.

[16] Ibid, p.12.

[17] The search for explanations of the historical origins of patriarchy leads her to briefly examine marxist explanations which she rejects; she has more sympathies with Bebel than with Engels, although she sees no relevance of their works for her study.

motherhood or love, was probably the single causative factor in the original subjugation of woman by man...The historic price of woman's protection by man against man was the imposition of chastity and monogamy."[18] This is clearly an inversion of Engels explanation that monogamy emerged due to the origin of private property. For Brownmiller, the origins of private property precede the emergence of property. In fact, woman was the first property of the man, first and foremost, in the sexual sense. Man developed slavery, private property and hierarchy through the instance that was provided by the subjugation of woman.

When she writes that rape "is nothing more or less than a conscious process by which *all men* keep *all women* in a state of fear", what is implied is an attempt to how all women, irrespective of race and class, are oppressed by all men.[19] Herein we realize that Brownmiller's theory of rape is also, at another theoretical level, a radical feminist attempt to firstly recognize *women* as a separate category before providing accounts of their oppression as a group.

In the attempt to show how all women are capable of being subjected to sexual violence, she does not comprehend the historical links between gender, class and race. Angela Davis has pointed out that most of the early feminist accounts of rape subtly reinforce the myth of the black male rapist, thus not recognition that race, like gender, is a system of oppression, that partly gains support from the creation of stereotypes.[20] This is not only a reflection of the racism in white feminists, it is also the reflection of the problem inherent in positing 'all women' and 'all men' as analytical categories of uniformity, and the dangers of a feminism that is not grounded on a historical analysis of how exactly gender, class, and race are linked at different historical and spatial contexts. The other major danger in Brownmiller's analysis is that she sees a biological grounding for patriarchy. To say that the mere fact of possessing a penis makes it possible for men to rape women is to deny that the 'deployment of the penis as a weapon' is under the particular circumstances of patriarchy. Such a theory is deeply nihilistic about the possibility of change, and cannot really be of use in our fight against patriarchy.

[18] Ibid, p.16-17.

[19] Ibid, p.15.

[20] Davis, Angela Y. "Rape, Racism and the Myth of the Black Rapist", in *Women, Race and Class*, New York, Random House, 1983.

Somewhere it is based on an assumption that has actually served as the most important ideological justification of patriarchy- that it emerges from *natural* conditions. To struggle for a society free of oppression, we must first recognize that it has historical origins, and not natural ones. We can change socio-economic orders, but we can't change the biological existence of the penis. Brownmiller does not see the 'deployment of the penis as a weapon' in the act of rape as specific to the kind of society we live in.

There is very little use indeed of sexuality as a concept if it is taken to have a pre-social foundation, on which society structures modes of repressing or expressing it, where "sexuality is an innate sui generis primary natural prepolitical unconditioned drive"[21]. The debates over sexuality have been so vast that to chart one's course around it would be a huge task.[22] Mary John and Janaki Nair suggest that, "...'sexuality' must connote a way of addressing sexual relations, their spheres of legitimacy and illegitimacy, through the institutions and practices, as well as the discourses and forms of representation, that have long been producing, framing, distributing and controlling the subject of 'sex'."[23]

The question of sexuality can never be reduced to whether it is allowed to be freely expressed or not, or the ways in which its expressions are repressed in a society. To think merely in these terms is to somewhere assume that there is a natural *something* that constitutes sexuality, whose articulations are socially produced only in as much as they are not permitted outside of certain institutions and practices that are normalized.

In classical marxism, for instance, the typical view of sexuality emerged from Engels's *Origin of the Family, Private Property and the State*. Engels understanding of sexuality can be found in his discussions on women's resigned 'acceptance' of the pairing marriage that eventually led to the institutionalization of the monogamous marriage, on the setting up of the institution of prostitution alongside monogamous marriage so that it could serve as a means through which men could continue to have sexual access to more women than one, and the shift from the free sex of the ancients to

[21] MacKinnon, Catherine A. "Sexuality", in Herrman, Ann C. and Stewart, Abigail J. (eds.) *Theorizing Feminism: Parallel Trends in the Humanities and Social Sciences*, Waterpress, 1994, p. 261.

[22] See for instance Rich, Ruby B. "Review Essay: Feminism and Sexuality in the 1980s" in *Feminist Studies*, Vol. 12, no.3, 1986, John, Mary E. and Nair, Janaki. " A Question of Silence? An Introduction" in John, Mary E. and Nair, Janaki. (eds.). *A Question of Silence? The Sexual Economies of Modern India*, Kali for Women, New Delhi, 1998 and Freccero, Carla. "Notes of a Post-Sex Wars Theorizer" in Hirsch, Marianne and Keller, Evelyn Fox (eds.). *Conflicts in Feminism*, New York, Routledge, 1990.

[23] John, Mary E. and Nair, Janaki. " A Question of Silence? An Introduction", ibid, p. 1-2.

the now curtailed 'individual sex-love' of bourgeois morality where the woman nevertheless appears to enter as an equal partner. While there is no doubt about the importance of Engels's *Origin*, among the problems that are now recognized by feminists is one concerning his understanding of female sexuality, which are superimpositions of some of the Victorian values of sexuality backwards in time.[24]

Kate Millet, for instance, pointed out that in Engels's view that women welcomed the transition to monogamy inasmuch as it meant that they could now limit sexual activity with one man only lies the suggestion that women disliked sex as much in prehistory as it was assumed and expected that they did in Victorian society. Women do not exist in *Origin* as sexual *subjects* with needs and desires of their own- their sexuality is seen always in relation to male sexual needs. As Mary Evans puts it while tackling Engels for being so noticeably unquestioning about naturalistic assumptions regarding sexuality, "Indeed, one reading of *The Origin* would reveal a subtext which explicitly demands greater male sexual access to women."[25]

The radical nature of Engels's views on sexuality are not lost here, for he saw how much women were curtailed from expressing their sexual desires by the double standards that monogamous marriage requires, and how their withdrawal from social production makes them not only dependent on men but also deepens fears about losing social standing due to unwanted pregnancies which again curtail their sexuality. Evans's problem with Engels's prognosis of sexual relationships between women and men under socialism is that it moves to the other extreme- from one where, under capitalism, it is repressed and highly regulated, to one where there is virtually no regulation at all. It is thus not clear what the exact nature of sexuality under socialism will be, except that it is expected to be a liberated one, and left untouched, Evans points out that it could only end up being a fuller expression of a patriarchal sexuality.

Here also lies the clue to our realizing one of the important problems that beset later day marxist works that concentrate on the liberation of sexuality from the shackles

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[24] See Millet, Kate. op. cit., esp. p. 115-119; Lerner, Gerda. *The Creation of Patriarchy*, Oxford University Press, Oxford, 1986, p. 22-23 and Evans, Mary. 'Engels: Materialism and Morality', in Sayers, Janet, Evans, Mary & Redclift, Nanneke. *Engels Revisited: New Feminist Essays*, Tavistock Publications, London and New York, 1987.

[25] Evans, Mary. Ibid, p.82.

of bourgeois morality. [26] This preoccupation with 'liberating' sexuality, without seeing what form it will continue to take once it is liberated completely hides the issue of sexual violence, or to somewhat dismissingly see it a result of the unnatural repression of male sexuality.

It was only during the consciousness raising meetings of the second wave of the women's movement that it was fully realized that what was at stake in the field of sexuality in women's oppression was much more. That sexual violence was more common than it seemed, and that, contrary to usually held assumptions that only strangers and perverted sexually repressed, deviant men raped, women experienced it in some of the most intimate moments of their lives led to a comprehension of how important sexual violence was in subjugating women, thereby changing the conception of sexuality in feminist theory forever.

Perhaps the most well known radical feminist and feminist legal theorist today is Catherine MacKinnon, whose works need a careful examination for though deeply problematic as a general theory of women's oppression, they provide some useful insights on law and sexual violence.[27] For MacKinnon, women's oppression centres on sexual oppression so much so that it is not enough to merely state that sexuality is gendered. Rather, it is gender in itself that is completely sexualized and a true feminism, 'a post- marxist' feminism is that radical feminism which conceptualizes the entirety of reality in this light. Male dominance is first and foremost *sexual* in nature, and female subordination is first and foremost the organized expropriation of their sexuality by men, the essence of their existence being captured in their sexual objectification by men. Thus, "Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away...Sexuality is that social process which creates, organizes, expresses, and directs desire, creating the social beings we know as women and men, as their

[26] I have in mind especially Herbert Marcuse, the much renowned New Left theorist, who unwontedly celebrated anything that goes against the general grain of bourgeois sexual morality. For him, they all have the actual potential to threaten the bourgeois social order. Marcuse, Herbert. *Eros and Civilization: A Philosophical Inquiry into Freud.*

[27] MacKinnon, Catherine A. "Feminism, Marxism, Method and the State: An Agenda For Theory" in *Signs: Journal of Women in Culture and Society*, Vol. 7, No. 3, Spring, 1982 and MacKinnon, Catherine A. "Sexuality", in Herrman, Ann C. and Stewart, Abigail J. (eds.) *Theorizing Feminism: Parallel Trends in the Humanities and Social Sciences*, Colorado, Westview Press, 1994.

relations create society."[28] If women experience their primary existence as sexual objects fulfilling the male needs that emerge from eroticised dominance then the area principal to feminist inquiry is women's personal lives, as it is here that these relations are lived out daily, internalized and experienced as alienation (in the marxist sense). But male dominance is so perfect that only has the world been constructed from the male point of view, but the representation of the world from the male point of view is what has been taken as universal objective truth. Thus for MacKinnon feminism's claim to truth cannot rest on these male imperatives, it critiques the dichotomous distinctions on which this point of view is based. The feminist method is *consciousness raising*, an inquiry into women's personal lives which unearths the commonality of women's experience that have not just been censured into silence through male dominance but also unrecognizable as *emerging* from those very power relations.

The first problem with her analysis is that it sees sexuality as the only relevant category to feminism and women's oppression as completely mapped out in the realm of the sexual. But women certainly operate in so many other spheres of human existence-even within the family where the expropriation of women's sexuality has the sanction of the sacred, the moral and 'nature', women are not merely 'things' whose sexuality is expropriated-they are simultaneously engaged in production and the nurture and care of children and other members of the family. Gender configures in all of these spheres of women's lives, but *not* through the mediation of the sexual realm. Surely, very few women do no work at all and very few women in the world live highly ornamental and sexualized lives.[29] Part of the task of feminism is to investigate sexuality and how it operates to ensure women's subordination but this is not its *only* task.

To conceive sexual objectification as the basis of male dominance is to distort the historical connection between gender and class, and race. It is also a veiled agreement with the patriarchal view that women are actually not agents, in any real sense, of history. It is to say that it is men who have made history whereas women have just been there,

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[28] MacKinnon, Catherine. "Feminism, Marxism, Method and the State: An agenda For Theory", ibid, p.515-516.

[29] Prostitution is a different issue, for although prostitutes live highly sexualized and objectified lives, the exploitation and sexual objectification is much more direct and visible, and MacKinnon is speaking about a sexual objectification that is rendered invisible.

eking out a *thingified* existence, either happy or unhappy with their alienated life, but never trying to change it. The problem therefore is not only that MacKinnon sees sexuality as the 'lynchpin of women's subordination'; it is also that women are seen as mere victims of their situations, who have been incapable of resistance.[30] If women are really so completely victimized, it is not clear how a feminist politics is possible or of what use it would be even if it did somehow magically emerge, or to explain how it has actually emerged- a reality that certainly cannot be denied. How then will consciousness raising work, if women are wholly victims? At the level of method, the other set of linked problems can be found. There is no place in her feminism of any historical inquiry necessary to understand the creations and reproductions of conditions of subordinance.[31] As MacKinnon already presumes that marxism and feminism are totally incompatible to each other she deals the final blow to any sort of connection between the two, however uneasy and fraught with tensions the relationship might seem, in the realm of the method.

It is precisely this finality about the appropriate method of feminism that is criticized by other feminists. While the importance of consciousness raising is not denied as an approach that turns the analytical searchlight into what has been hidden and dismissed under the rubric of 'subjectivity'- women's experience of sexual violence coming to mind at once, it certainly cannot be put down as *the* method of feminism. Jill Lewis, for instance, critiques this method of radical feminism, which although tremendously appealing to women (it actually being the reason she attributes to radical feminism's popularity) has some serious limitations. "...this listing of sexual abuse and violence by men is usually disconnected from the complexity of historical social and psychological factors which provide the relentless contexts in which men are prone to this violence and women, with minimum social options for resisting it, accomodate it and perpetuate the conditions which provide it. The method of "inventories", which is still central to the radical feminist tendencies in feminism, implies that the accumulation of

[30] There is of course vast difference between resistance to subordination and a revolutionary movement to end that entire structure of oppression. But a complete victim cannot even visualize individual act of resistance let alone be part of an organized movement against it.

[31] Whatever the problems in socialist feminism, it has realized the importance of the method of historical materialism to feminist theory. There is also the vast area of women's history that MacKinnon ignores when she rejects this method as incommensurable to feminism.

evidence, and the meaning of the points of enactment of male power- and most especially in the flesh of women's sexuality- is enough spontaneously to produce some kind of cross-cultural (for the evidence is always cross cultural evidence), universal understanding of men as oppressors... The clearcut inventory of male abuse is drawn from real social contexts, but not explained in terms of those social, cultural, and historical contexts nor of the social relations necessary to sustain them, with all the implicit contradictions and twilight zones they imply."[32]

But criticisms notwithstanding, the tools that radical feminism first provided us cannot be completely debunked because until this concepts emerged in feminist theory, there were really no systematic explanations of women's subordination that did not see it merely as an adjunct to some other more central problem or primary contradiction. What we ought to do therefore is to qualify these terms so that they don't seem to arise from an ahistorical analysis or give rise to a deep-rooted nihilism about the possibility of radical change. It is thus that in another instance of feminist theorization, of the nature of the state, it is not possible either to say like classical marxism does, that the state is primarily a class state enforcing, reproducing and mystifying the interests of the ruling classes, or like radical feminism does, that the state is primarily male enforcing, reproducing and mystifying male dominance.[33]

The relationship between feminism and law is an extremely complex issue. It is, too the say the least, weighed down by the perils of adopting the correct strategy in the seemingly self- defeatist attitude of asking the very state that ensures that male dominance is perpetuated to change its laws and ensure legal reforms for changing women's positions in society.[34]

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[32] Lewis, Jill. "The Subject of Struggle: Feminism and Sexuality", op. cit., p 235-236.

[33] For radical feminist theorizations of the state, see Millet, Kate. op.cit., Walby, Sylvia. *Theorizing Patriarchy*, Oxford, Blackwell, 1990and MacKinnon, Catherine A. "Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence" in *Signs: Journal of Women in Culture and Society*, Vol. 8, No. 4, Summer, 1983.

[34] This issue has divided many feminists, especially in the much-publicised debates over anti-pornography ordinances, as to whether feminists ought to give more power tot the state to interfere in the lives of individuals when asking for the state to intervene in the violence that pornography causes to women. (The issue is also more complex than this, and there is no agreement over whether pornography itself is harmful is to, and whether agreed-upon violence in consentual sex or sadomasochism is a reflection of eroticisation of dominance and subordinance or whether it is truly democratic and really doesn't manifest itself in other spheres of the lives of the partners. For a list of references on this debate, and for some of the issues

Feminists have questioned the public- private divide that modern jurisprudence is based on, and how most of the pressing needs of women are relegated into the private sphere where the state, ostensibly due to its neutrality but really due its patriarchal nature, does not interfere. In issues other than that of sexual violence like those over pregnancy and maternity benefits, feminist legal theorists have argued either that women obtain their rights through the equality approach or the difference approach.[35] But as MacKinnon points out, in either case, the norm from which to judge whether women are equal or different is the male norm, and instead favours what she calls the 'dominance approach'.[36]

If the state serves the interests of the dominant classes and groups, the state is also compelled to grant certain concessions to subordinated classes and groups when there are organized demands and pressures. Even as the state provides them, its basic character is never undermined through legal reforms; rather, they act as placating mechanisms and maintain the overall structure of society. But this recognition does not mean that the legal arena is abandoned as a site of struggle altogether.[37]

Thus, while marxism pointed out that the liberal democratic state was not in the least bit the neutral arbitrator between individuals that it is portrayed as, it certainly is not merely a state of the classes who own the means of production. Similarly, while the power of radical feminism's theorization that the state is patriarchal or male is not lost to us, the state is not just that either. How intrinsically related they are to each other cannot be made clearer than from a historical investigation into their creation.

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involved in it, see Freccero, Carla. "Notes Of a Post-Sex Wars Theorizer" in Hirsch, Marianne and Keller, Evelyn Fox (eds.). *Conflicts in Feminism*, New York, Routledge, 1990.

[35] For an introduction into feminist legal theory, see Cossman, Brenda. "Feminist Legal Theory" in *The Thatched Patio*, Vol.3, No.4, July/August 1990.

[36] See MacKinnon, Catherine. *Feminism Unmodified: Discourses on Life and Law*, Massachusetts, Harvard University Press, 1987 and MacKinnon, Catherine A. "Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence" in *Signs: Journal of Women in Culture and Society*, Vol. 8, No. 4, Summer, 1983. her discussions on the rape laws are extremely insightful, and I shall elaborate them later.

[37] Patricia Williams speaks of the dangers of accepting completely a critique of rights, a luxury that cannot be to use to oppressed groups. See Williams, Patricia J. "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" in Weisberg, D. Kelly (ed.). *Feminist Legal Theory*, Philadelphia, Temple University Press, 1993.

In *The Creation of Patriarchy*, Gerda Lerner develops a conceptual framework particularly useful for us.[38] Her study of how patriarchy came to be institutionalized over a vast span of time in early Mesopotamian society points out the inefficiencies of mono-causal theoretical frameworks, and shows instead that not only is patriarchy a historical creation, but also that the formation of archaic state and class relations are related it, and that the site of women's sexuality (meaning not just their reproductive capacities but also their sexual capacities) played an important and essential part in these processes.

> In every known society it was women of conquered tribes who were first enslaved...the enslavement of women, combining both racism and sexism, preceded the formation of classes and class oppression...Class is not a separate construct from gender; rather, class is expressed in genderic terms...from its inception in slavery, class dominance took different forms for enslaved men and women: men were primarily exploited as workers; women were always exploited as workers, as providers of sexual services, and as reproducers...For women, sexual exploitation is the very mark of class exploitation...The class position of women became consolidated and actualized through their sexual relationships...Economic oppression and exploitation are based as much on the commodification of female sexuality and the appropriation by men of women's labor power and her reproductive power as on the direct economic acquisition of resources and persons.[39]

Gerda Lerner's analysis is also extremely useful in another very important issue for feminist theory as she show how central slave women are to an understanding of the relationship between the family, the class relations of slavery and the archaic state. Any feminist account of reality that does not speak of the majority of women, the non-elite women is incomplete, distorted and dangerous. What is implied here are the dangers of treating women as a single undifferentiated category. Women's cooperation to patriarchy or what she specifies as *paternalistic dominance* is obtained not just because of internalization of patriarchal ideological values, but for some also because they are part of the classes that own the means of production. Moreover, where women's relationship to class has been mediated through the nature of their sexual relationships with men, then

[38] Lerner, Gerda. *The Creation of Patriarchy*, Oxford, Oxford University Press, 1986.
[39] Ibid, p.213-216.

the ideas of 'good respectable' women and 'deviant easy' women play a significant part in re-enforcing women's cooperation to their dominance. Lerner also shows how force, both actual and the threat of it, is equally central to how women's subordination is sought. To understand how the system of patriarchy has continued to exist for so long in history, albeit with changes both across time and space, is to understand not only that it is related to class relations but also how crucial the, broadly speaking, two sets of tools of consent and coercion is for ensuring by and large women's cooperation.

These issues are of special import to us in the task at hand for while the conceptual framework she uses is to understand the creation of patriarchy over a long period of time in the specific context of Ancient Mesopotamia, they show us how central a task the control of women's sexuality has been to the archaic state.

Uma Chakravarti uses Gerda Lerner's conceptual schema to understand early Indian society and conceptualizes the rise of the structure of *brahmanical patriarchy* and the relations between gender, class, caste and the state.[40] In the period of the shift to an agricultural economy, between the eighth and the sixth centuries BC, when caste and class divisions emerged, Chakravarti notes that brahmanical literature is especially obsessed with the control of the sexuality of the upper-caste women to ensure both "caste purity (by mating only with prescribed partners) and patrilineal succession (by restricting mating with only one man). From then on female sexuality had to be 'managed' and therefore a crucial question for us to pursue is "in whose hands does the management of female sexuality come to reside; further do women participate in this process of management?" This was the general context in which women's 'essential nature' came to be identified with their sexuality..."[41] It is clear that the archaic state's functions were primarily two-fold, one concerning the regulation of women's sexuality and the other, concerning property.

It might seem to be a deviation from the main object of this study to be concerned with brahmanical patriarchy in early Indian society especially after I have accepted that we have to be careful when using the concept of patriarchy and understand that its configurations and relationships with class and caste do not remain static over time. But

[40] Chakravarti, Uma. "Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State" in *Economic and Political Weekly*, Vol. XXVIII. No. 15, 1993, p.579-585.

[41] Ibid, p.581.

then, we only have to remember that the period of British colonialism from which we have '*inherited*' so to speak the legal apparatus, is also a period where there was a constant going back to brahmanical texts by the upper caste male elite in order to prove that if the 'woman question' was to be a central index in the mapping of civilization, then the colonizer's civilizing mission was uncalled for. The interpretation of the 'status of women' in early India became a crucial battle in this cultural encounter between the colonizers and the indigenous elite. And as Kumkum Sangari and Sudesh Vaid write, "...the implications of the reconstitution of patriarchies in the colonial period bear significantly upon the present."[42]

As the past came to be reconstructed in this light and the idea of the innate 'superiority' of the Indian upper-caste chaste woman made so by the 'superior spirituality' of Hinduism, it became a tool with twin purposes- one to prove to the British that their interference in the social and religious lives of the colonized was unnecessary and would not be tolerated, and the second, to prove that while ancient India itself was characterized by a very high status for women it was only later, especially with the advent of Islam that this civilization was corrupted.[43]

The significant point is not just that chastity and suffering are extolled into virtues and the marks of superiority of the good Hindu upper caste woman vis-a-vis the West, while the superiority and the equality in the golden age of Hinduism was being 'rediscovered', there was absolutely no place in it for the 'vedic dasi', for the majority of women.[44]

It is in the light of the understanding that patriarchy is both related to class and caste and inherent to them and that its changes and rearrangements can be understood only in the context of its complex relationship with caste and class that I wish to study the sexual violence and legal discourse in India.

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[42] Sangari, Kumkum and Vaid, Sudesh. "Recasting Women: An Introduction" in Sangari, Kumkum and Vaid, Sudesh (eds.). *Recasting Women: Essays in Colonial History*, New Delhi, Kali for women, 1989.

[43] On how these assumptions are implicit in the 'reformist' tradition, and the reasons for these reforms, see the collection of essays in Sangari, Kumkum and Vaid, Sudesh (eds.). *Recasting Women: Essays in Colonial History*, New Delhi, Kali for women, 1989.

[44] See Chakravarti, Uma. "The Myth of the Golden Age of Equality- Women Slaves in Ancient India" in *Manushi*, Vol. 3, p.8-15; and Chakravarti, Uma. "Whatever Happened to the Vedic *Dasi*? Orientalism, Nationalism and a Script for the Past", in Sangari, Kumkum and Vaid, Sudesh (eds.) ibid, p. 27-87.

The task for feminism today is that the appropriation of landless, lower caste and dalit women's sexuality and labour be placed centrally in theory for understanding the class, caste and gender relationships. For feminist discussions on sexuality in our contexts to be only speaking of upper caste women's sexuality and the control over it, is a dangerous reproduction of brahmanical patriarchal ideology itself and erases the systemic character of the sexual violence faced by lower caste and dalit women.

Patriarchy, class, and caste operate together to justify the sexual violence by upper caste men of lower caste and dalit women by always positing them as already loose, impure and readily making themselves available and 'offering' sexual services. Thus, never is it allowed to be even recognized to be an issue of sexual violence. In fact, both the religious scriptures, and everyday ideologies do just the opposite- warning the upper-caste male of the 'vile, vicious and corrupt' nature of lower caste women as it simultaneously provides ideological justification of this sexual violence. Not only is it institutionalized prostitution served to buttress the effects of the monogamous marriage on the upper-caste male by allowing sexual access to more than one woman, the expropriation of lower caste women's sexuality too is an institutionalized one, and an aspect critical to the interrelationship between gender and caste.

But just as with patriarchy, so too with caste- it cannot be understood ahistorically. The changes and tensions in it over time have to be realized before understanding how caste and gender operate in instances of rape, and other forms of sexual humiliation like the stripping naked and parading of dalit women by upper caste men to reinforce their domination over dalits. As Kalpana Kannabiran and Vasanth Kannabiran write, "...the most absolute exercise of power is that grievance or dissent is not even articulated. To articulate a grievance indicates a degree of political awareness of a wrong which the absolute exercise of power does not permit. Today, an increasing amount of violence enforces the maintenance of 'order' in relations of caste and gender."[45] Thus, the politics behind the 'everyday appropriation' of lower caste women's sexuality is most visible in the contexts of 'caste atrocities' or 'caste wars' where sexual violence is used as a terrorizing weapon by the upper castes when their position is

[45] Kannabiran, Kalpana and Kannabiran, Vasanth. *De-Eroticizing Assault: Essays on Modesty, Honour and Power*, Stree, Calcutta, 2002, p. 59.

threatened by a growing consciousness of lower castes regarding the nature of their exploitation and oppression and their subsequent organizing against it.

It is in the light of all that I have outlined that I shall proceed to review the case laws that I have chosen.

CHAPTER THREE

RAPE LAW IN THE REITERATION OF PRESCRIPTIONS FOR FEMALE SEXUAL CONDUCT

We have suggested in the last chapter, the framework within which judicial discourse on rape can be analysed. There is another preliminary demand that such analysis necessitates, because we are analyzing the legal discourse in a period after the issue has been raised by the women's movement in India as one of the pivotal areas for the feminist struggle. If we are also to keep in mind a simultaneous exercise to "seek to uncover the dialectical relation of feminism and patriarchy", it becomes indispensable to offer at least a summarized account of the struggle- one of the things we can not deny is that the struggle itself has had various impacts on the judicial discourse.[1] In fact, one of the objects of this study is also to reveal the law's veiled ways of addressing feminists and the women's movement themselves. I therefore propose to provide an account, albeit a very sketchy one, of the women's movement and its anti-rape campaign at the outset, and then proceed to review some of the judgements on rape.

A Brief Account of the Contemporary Women's Movement in India and its Anti- Rape Campaign

> The experience of colonial rule was one of the most important formative influences on the feminist movement of the early twentieth century, whereas an equivalent influence on contemporary feminism has been the experiment of democracy in post- Independence India.[2]

Charting a history of the women's movement in India is not possible here, neither is it directly connected to the main object of this study. That women here, like elsewhere, have resisted patriarchy from the beginning of its inception and have sought to rework their spaces through subversive mechanisms, becomes clear while analyzing women's

[1] I borrow the phrase from the summary provided at the back cover of Sangari, Kumkum and Vaid, Sudesh (eds.). *Recasting Women: Essays in Colonial History*, New Delhi, Kali for Women, 1989.

[2] Kumar, Radha. *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India, 1800-1990*, New Delhi, Kali for Women, 1993, p.1.

literature or for instance, their participation in certain movements that tried to question the tyranny of brahmanical patriarchy, as Buddhism and the Bhakti movements did.[3]

But it is to 'moments' in colonial history that precedents of the contemporary women's movement in post-colonial societies are generally traced. Kumari Jayawardena in her *Feminism and Nationalism in the Third World* points out that women's large scale participation in the national liberation movements and revolutionary struggles in colonies under imperialist domination the 19th and 20th centuries led to the emergence of 'early feminist' movements.[4] Similarly, Radha Kumar's *The History of Doing* looks at both the reforms initiated by the male elites as well as women's early articulations of questions of gender, and their involvement in anti-colonial struggles in large numbers.[5] Colonial education for women was primarily the outcome of a newly emergent national bourgeoisie's or elite's need to have 'civilized' wives for the upper-caste neo-elite Western educated men. But whatever the reasons, it raised the possibility of an access to institutionalized education for the first time to women, who were earlier forbidden through the use of religious scriptures, along with lower castes, from having access to formal education. Education was also important in that it provided a space from which women articulated their critiques of patriarchal practices. These accounts, effectively erased from nationalist historiography, are now available to us and show many 'proto-feminist' attempts in the colonial period at outlining the structures of brahmanical patriarchy as portrayed for example in the works of Pandita Ramabai and Tarabai Shinde.[6]

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[3]. See Tharu, Susie and Lalitha, K. (eds.) *Women's Writing in India: 600 B.C. to the Present*, 2 Volumes, New Delhi, Oxford University Press, 1993 for literary expressions of how women have questioned and critiqued patriarchy. See also Chakravarti, Uma. "The World of the Bhaktin in the South Indian Tradition" in Roy, Kumkum (ed.). *Women in Early Indian Societies*, New Delhi, Manohar, 1999 for how the bhakti tradition was used by women to raise questions of gender. The ways in which women used the religious realm in India to 'escape' dominant patriarchal demands on them is similar to how women elsewhere have used religion, in the absence of other spaces from which to subvert the demands that gender made on them. For this similarity, see Lerner, Gerda. *The Creation of Feminist Consciousness: From the Middle Ages to Eighteen-Seventy*, New York, Oxford University Press, 1993.

[4] Jayawardena, Kumari. *Feminism and Nationalism in the Third World*, London, Zed Books, 1986.

[5] Kumar, Radha. *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India, 1800-1990*, New Delhi, Kali for Women, 1993.

[6] See Chakravarti, Uma. *Rewriting History: the Life and Times of Pandita Ramabai*, New Delhi, Kali for Women, 1998.Tarabai Shinde's *Stri Purush Tulna* offers a scathing critique of the stereotypes of men and women. See Shinde, Tarabai. "*A Comparision of Men and Women*", in Tharu, Susie and Lalitha, K. (eds.), op.cit, volume 1.

The social reform movements that were initiated by Western educated indigenous male elite, too, continue to have a deep impact on our lives today. They still have repercussions for us and play an important part in the constitution of the gendered subject in the legal arena.[7]

The nineteenth century social reform movements aimed at eradicating some of the 'social evils' that affected women. The 'status of women' became a key issue in the battle between the colonizer and the indigenous male elite. While the colonizer held the practices to be evidence of the barbaric and uncivilized nature of those they ruled, creating an important ideological justification for colonialism itself, the indigenous male upper-caste elite had to now rescue themselves from these accusations. In the backdrop of all this, the social reform movements arose primarily because there was an urgent need that was felt to 'recast' women in order to fulfill the demands of the new age, while reconciliating with the demands on women that the on-going ideological project of upper-caste Hindus to construct a 'golden past' which was to guide women's conduct.

The tensions and reconciliation between the colonial, nationalist and reformist agendas for women, and the deeply patriarchal grounds and assumptions that they share continue to shape our lives and debates regarding gender even today, and is clearly visible in the domain of law.

Movements that, on the other hand, were more material in nature, aiming at changing class relations, or what Sangari and Vaid term 'democratizing movements', were potentially more radical on the question of gender.[8] Yet, "a preoccupation which is common to both modernizing and democratizing movements is the preoccupation with the regulation of sexuality and different modes of control in the face of the emergence of women into a new public sphere, political participation, new labour processes and the consequent changes in the family structure."[9] At many places, these movements imposed an upper-caste model for women's conduct and sexual behaviour on lower caste women. If at all and whenever conditions of women's subordination were recognized in a manner that dint treat it as an adjunct, it was put off to a later date, on the grounds that it would

[7] See in the essays in Sangari, Kumkum and Vaid, Sudesh (eds.). *Recasting Women: Essays in Colonial History*, New Delhi, Kali for Women, 1989.

[8] Sangari, Kumkum and Vaid, Sudesh. "Recasting Women: An Introduction" in ibid, p. 19.

[9] Ibid, p. 21.

divide the struggles, split up movements and diffuse the energies that went into their making.

Constitutional equality and promises of the Indian state after Independence to address 'discrimination' occurring due to religion, caste, class and gender saw a near complete suspension of questions regarding women's subordination. The granting of formal equality as well as the opening-up of spaces to upper-caste middle-class women effectively invisibilised actual subordination of women and the reconstitution of patriarchies through the policies of the new state.

By the later half of the 1960s, it becomes clear that the Indian state had failed its promises and Nehruvian socialism shows up, clearly and visibly, to be mere rhetoric to cover-up the actual policies of the state to strengthen the ruling classes and groups. This period and the next decade saw the emergence of the naxalite movement, radical movements against caste, and the anti-price rise movements, and student unrest. The deepening of the 'crisis' of the state saw the imposition of the rule of Emergency being imposed in 1975. Women were not only participating in these struggles that were being brutally being crushed by the state, as it became clear that the Left was failing to address women's subordination, an autonomous women's movement slowly began to emerge.[10]

In the period of massive State violence, the autonomous women's movement began to address the various forms of violence that women were subjected to, both inside and outside the family. Dowry murders and rapes become two important issues in making the struggle against violence against women central to the women's movement. It was becoming increasingly clear that both actual violence and the threat of violence are central to the processes that reproduce patriarchy.

The Anti-Rape Campaign of the women's movement began when four lawyers wrote an open letter to the Supreme Court in September 1979, a year after the judgement on the 'Mathura case' was delivered, and circulated it widely, calling attention to the grounds on which the two policemen who had raped Mathura, a young tribal girl within

[10] Constraints do not allow me to look at other struggles, although I do not intend to limit myself more or less to the urban women's movement. See Sen, Ilina (ed.). *A Space Within the Struggle*, New Delhi, Kali for Women, 1990 for a collection of essays on this.

the premises of the police station.[11] This led the women's groups to question the rape laws in their entirety, and a massive agitation against rape as well as pressure to amend the sections on rape in the penal code followed. Many other instances of custodial rape, rape of women by policemen, were also coming into light at the time, and women's groups and civil rights groups were trying to address the ways in which state power was present in instances of rape not just through the silencing and dismissal of rape, but also through the perpetuation of it.

One of the major demands that the women's groups raised was over the issue of 'consent', which was central in the Mathura judgement. In the 1980 Bombay national conference of the women's groups, there ensued a fiery debate over whether they would be making a correct move by asking that the law shifts the onus of proof to the accused in the case of rape, and many women who were also active in civil liberties groups pointed out that they would be setting a wrong precedence for the state could use this provision to jail activists of progressive movements. The other group of women pointed out that the state already had enough legal grounds and other repressive powers to do that, and there was a vote taken over whether the women's groups would push for extending the shift of onus to non-custodial situations as well. It ended after it was put to vote twice, and it was decided to push for an amendment that shifted the onus to the accused only in cases of custodial rapes. This term custodial rape was used to signify rapes in situations where the victim was in the 'custody' of the rapist, extending from the police to also include public servants, hospital staff and jailers. The other major demand made was that there be no probing into the past sexual history of the woman during the proceedings; some women's groups also asked that there be 'in camera' trials or trials behind closed doors so as to prevent sensationalism and possibilities of further slander for the woman and there was also a demand that there be a minimum punishment stipulated for offenders. While the Law commission accepted two major changes, regarding the onus of proof and past sexual history of the victim, the bill that was drafted and the act that was finally passed, Criminal Law (Amendment) Act, 1983, as to be expected, did not take any of the major

[11] Details on the campaign are taken from Agnes, Flavia. "The Anti-Rape Campaign: The Struggle and the Setback" in Datar, Chhaya (ed.). *The Struggle Against Violence*, Calcutta, Stree, 1993, Gandhi, Nandita and Shah, Nandita. *The Issues At Stake: Theory and Practice in the Contemporary Women's Movement in India*, New Delhi, Kali for Women, 1992 and Kumar, Radha. Op.cit.

recommendations seriously. For instance, it did not state that the past sexual history of the woman was irrelevant to proving whether she was raped or not. The demand for 'in camera' trials too, was conveniently used to curb the freedom of speech of the media, and made any coverage of a rape trial a punishable act. The women's groups realised that one of their own demands had backfired on them, and that, moreover, a woman faces social ostracisation and other dangers even *before* the trail begins in the court.

Rape in the Indian Penal Code

Rape was initially classified in the Penal Code codified in 1860 in the chapter dealing with Offences Against the Body. It was defined in Section 375 was the Indian Penal Code thus,

> A man is said to commit 'rape' who, except in the cases hereafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:
>
> First- Against her will.
>
> Secondly- Without her consent.
>
> Thirdly- with her consent, when her consent has been obtained by putting her under fear of death or 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 or without her consent, when she is under 10 years of age.
>
> *Explanation*- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.
>
> Sexual intercourse by a man with his own wife, the wife not being under 10 years of age is not rape.

The minimum age required for consent has been changed through amendments and at the present stands at 16 years of age. The Criminal Law (Amendment) Act, 1983, also changed the classification of rape; it is now classified under Sexual Offences. The stipulated punishment for the offence of rape is laid out in section 376 of the Indian Penal Code and this section was also amended in 1983 owing to the demands of the women's groups.

After the amendments, section 376 relating to the punishment for rape reads as follows:

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall be punished with imprisonment of either description for a term which may extend to two years or with fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever...

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him;

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody or in the custody of a public servant subordinate to him;

(c) being on the management or staff of a jail, remand home or other place of custody established by or under any law for the time being in force of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable for fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of either description for a term of less than ten years.

Explanation 1: Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

Explanation 2: "Woman's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widow's home or by any other name, which is established and maintained for the reception and care of women and children.

Explanation 3: "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

The starting point for reviewing the judicial discourse on rape will be these sections themselves. Although we need to examine the issues raised here in much more detail, which we shall do later, it would be useful to spell out what the substantive law on rape itself amuses and reinforces, and thereby see its continuities with judgements on rape.

Section 377, dealing with 'unnatural offences', is defined thus:

> Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment of either term which may extend to 10 years and shall also be liable to fine.
> *Explanation*: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Veena Das points out that we ought to take these sections on rape and read them together with the section on 'unnatural offences', an exercise that will leave us with no doubts "...to conclude that rape is not an unnatural act...the rape law is not oriented towards protecting the body integrity of a woman but towards the regulation of sexuality..."[12] This assumption, that rape is an extension of the natural instincts of a man, who will make use of 'opportunities' to fulfill the predatory natural sexual instincts by forcing himself on any woman who provides that opportunity, is found in any number of judgements on rape. The court in these instances, only reinforces the patriarchal assumptions that men are naturally sexually aggressive, and women, at least 'honourable women', are not only submissive to this aggression because they are by nature meek and passive, but can also *only* consent within the parameters of what constitutes permissible sexual behaviour for them at that historical juncture. Within these parameters, they also do not have the choice to refuse sex, made most clear when we look at the exception in Section 375. It is the institution of marriage that primarily defines permissible expressions of female sexuality, especially for women from upper castes, and within this

[12]Das, Veena. "Sexual Violence, Discursive Formations and the State" in *Economic and Political Weekly*, Vol. XXXI, Nos. 35- 37, Special Number, September, 1996, p. 2413.

institution, the wife has no choice but to consent, and her rape by her husband is not even legally recognized.

Another important issue that strikes us here is that regarding the classification of rape, for this too is a major area of contention even within feminism. The debate over whether rape be classified as a sexual offence, or as an act of violence, is not unique to India, and I shall illustrate with just two instances of how it has occupied feminists and others elsewhere. In Canada, Lorenne Clark and Debra Lewis argued in 1977 that when rape is seen as a sexual offence, it is seen as a source of pleasure, and rapists usually argue that their intention was never to hurt of force women but only to give and take pleasure; they therefore suggested that rape be reclassified as assault rather than as sexual offence.[13] In France, a Commission for the reform of Criminal Law saw Michel Foucault, serving as a member, argue strongly that rape is really no different from the offence of slapping a person, and that the law had to punish only the violence in the act, and nothing more. In *La folie encerclée,* he went to the extent of suggesting that rape be treated like any other civil offence, because sexuality, in any case, cannot come under the purview of punishment, as it already is burdened under so much repression.[14] The two women on the committee registered their protests over his views and refused to accept his propositions.

In India, when a national meeting on rape was held in 1990, this was one of the issues under discussion. What emerged during the discussions was that for an individual woman fighting her rape, emphasizing its relation to sexuality could be effective, but we need to move away from "the individual woman's violation to the rape of women in general, so that the issue always remains in focus."[15] Seeing rape as related to sexuality could not be so effective while working out strategies, especially over 'structural violence', in instances of custodial, state and communal violence. Lotika Sarkar writes, "It is important to emphasise that rape is not primarily a sexual offence... Treating rape as a sexual offence and not as a offence of violence has hardened the rule that lack of

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[13]Clark, Lorenne and Lewis, Debra. *Rape: The Price of Coercive Sexuality*, Toronto, The Women's Press, 1977.

[14] Cited in Mardorossian, Carine M. "Towards a New Feminist Theory of Rape" in *Signs: Journal of Women in Culture and Society*, Vol. 27, No. 3, 2002.

[15] Forum Against Oppression of Women. *Report of the National Meeting on Rape*, Bombay, 1990, p. 10.

consent on the part of the woman has to be proved beyond a reasonable doubt."[16] She sees the move made through the 1983 amendment to reclassify rape as a sexual offence as against the earlier one as a backward step.

But I argue on the contrary, that, even if seeing rape as an act of violence and not sexual violence specifically is only a strategic move, it is weighed down with important considerations. It is difficult to assume that there is nothing sexual about rape, and that it is an act of violence akin to other acts of violence- and the difference is not necessarily always one that sees the difference of *shame*, yet another tool of patriarchy, being considerably present in the one, and not so much in the other. The emergent difficulties of this view is that all sex is, in spite of evidence of history and reality, taken to be only a site of pleasure, that sex and violence are seen as two separate practices, again contrary to reality, and fail to answer the rather common-sense question that at once arises in our heads, that if rape is only violence, and not sexual, then why go into the exercise of it at all? Surely, the beating of a woman and other similar physical violence would suffice in the intention to cause violence and humiliation. It is not at all being argued that rape is not violence, but only that sex and violence cannot be seen as two completely separate realms. Rape, rather, is *sexual violence*.

Primary cases under review

It would be useful if a summary were provided of at least the cases that I shall be largely reviewing in this chapter and the next, but where necessary, I shall cite from other judgements.[17] All the cases under review are judgements from the Supreme Court, excepting the *Rameeza Bee case* where I shall look into the proceedings of the enquiry commission that was appointed and the *Jayanti Rani Panda v. State of West Bengal* case, where I review the Calcutta High Court judgement.

[16] Sarkar, Lotika. "Rape: A Human Rights versus a Patriarchal Interpretation" in *Indian Journal of Gender Studies*, Vol. 1, No. 1, January-June 1994, p. 69-70.

[17] This is also methodologically necessary because I cannot review of the cases separately, but rather, look at certain crucial concepts in case law.

Pratap Misra and Others v. State of Orissa (1977)[18]

Pramila Kumari Rout and her husband Bal Krishna Rout were staying in a lodge on a tour, and was five months pregnant at the time. Three NCC cadets raped her, taking turns to detain her husband. The chowkidar of the lodge found the husband outside the room weeping and being held down by two of the cadets, and came back with a few other men, some of them were forest officials of the place. There was an altercation, and a complaint was lodged. Four days later, Pramila also had an abortion owing to the rape.[19]

Tukaram and Another v. State of Maharashtra or the Mathura case (1978)

Mathura, a 16-year-old tribal girl was raped by two policemen, Tukaram and Ganpat, within the police station. Her brother had registered a case of kidnapping against her lover' aunt and uncle, because she was having a relationship with a man of her own accord. It was in this regard that she went to the police station with her brother, her lover, and the aunt of her lover, in whose house she worked. As she was leaving the police station, a policeman, Ganpat, detained her, took her into the premises again, locked the gates, and then forced her to remove her clothes in a toilet and gazed into her vagina with a torch. He then pushed her on a cot and raped her. The other policeman, Tukaram, was too intoxicated to actually rape her, but he too sexually assaulted her.[20]

The Rameeza Bee case (1978)

Rameeza Bee and her husband were returning home after having watched a film in the night in their cycle rickshaw, when her husband got down to urinate near a graveyard. Seeing her alone, two policemen took her to the police station, on the pretext that she was a prostitute, where she was raped by several policemen. Her husband was brought to the police station the next day and beaten up severely and murdered. There was a massive statewide agitation that followed, and due to the pressure, the government appointed Justice Muktadar on a one-man enquiry commission. This commission did not have any punitive powers but it found the accused guilty and recommended their punishment

[18] The years provided in the brackets in the heading of all cases are the years in which the judgements were pronounced.

[19] *Pratap Misra and Others, Appellants v. State of Orissa, Respondent*, 1977 Cri. L.J. 817

[20] *Tukaram and Another, Appellants v. State of Maharashtra, Respondent* AIR 1979 SC 185.

wherein the policemen on an appeal to the Supreme Court got the case transferred to the Sessions Court in Raichur, Karnataka, for 'fair trail' and were acquitted by the judge.[21]

Satto and Others v. State of UP (1979)

An eleven-year-old girl, Kumari Bismillah, was raped by three boys when she was tended to cattle near a field where the three were cutting grass. The three boys forced her into a neglected brick kiln nearby and raped her, after tying up another cowherd who was nearby. Of the three, Satto, the youngest, was ten years of age, and Bucha, the oldest, was fourteen years of age. The High Court had turned down an appeal that the lower courts had been too severe in imposing a sentence of 2 years of imprisonment to be served out by detention in an approved school. But the Supreme Court set aside the ruling and ordered that they be released on probation of good conduct and entrusted to their parents' care because they were 'very young' and not 'incorrigible rapists'.[22]

Phul Singh v. State of Haryana (1979)

Phul Singh, of 22 years of age, raped 'the temptingly lonely prosecutrix of twenty four', Pushpa, his cousin's wife, in her house next to his. The Sessions Court sentenced him to four years of Rigorous Imprisonment and the High Court turned down an appeal. The Supreme Court, on his appeal that the victim, who is a first cousin of Phul Singh, and her parents had forgiven him, and noting that he was a young man 'showing signs of repentance', reduced the sentence to two years Rigorous Imprisonment.[23]

Rafiq v. State of U.P. (1980)

Draupadi, who was a *Bal Sewika* in a village welfare organisation, was raped by Rafiq and three others when she was sleeping in the village girls' school. She reported it to the *Mukhiya Sewika* the next morning and a case was filed in the police station. Some of the witnesses turned hostile and shifted their stands in the Court. The Sessions Court found Rafiq guilty and charged him a sentence of seven years of Rigorous Imprisonment but 'gave the benefit of doubt' to the three others. The High Court and subsequently the

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[21] *Mr. Justice Muktadar Commission of Enquiry in the Matter of Detention of Ahmed Hussain and Rameeza Bee, Death of Ahmed Hussain, Alleged Molestation of Rameeza Bee etc.*, May, 1978.

[22] *Satto & Others v. State of U.P.* 1980 L.W(Crl.) 1

[23] *Phul Singh v. State of Haryana* AIR 1980 SC 249.

Supreme Court turned down the appeal that was filed on the grounds of absence of corroboration of the testimony of the victim, and the absence of marks of injuries on her person.[24]

Bharwada Bhoginbhai Hirjibhai v. State of Gujarat (1983)

Two girls, 10 and 12 years of age, went to a friend's house to meet her. Her father called them into the house, lying that she was inside, and tried to compel one of the girls to "indulge in an indecent act" at which the girl started crying and escaped him. He then raped the other girl. Her parents were out of Gandhinagar, and came back only four or five days later. Parents of both girls did not wish to disclose the rape, but the President of the Mahila Mandal of that locality came to know of it, and along with a group of 500 other women met Bharwada Bhoginbhai in his house and asked him to apologise, and at his refusal to do so, a complaint was lodged. The chief defence ploy was to state that there was a history of old trade union rivalry between the girl's father and Bharwada Bhoginbhai, and the father had therefore tutored the girl to allege a false case against Bharwada. But the Sessions Court came to the verdict that Bharwada Bhoginbhai was guilty of 'sexual misbehaviour', and an appeal to the High Court was turned down. The Supreme Court too turned down an appeal on the additional ground that there were some minor discrepancies in the testimonies. It also ruled that there was no need for corroboration of the testimony of a rape victim in all cases. The Court while admitting that Bharwada Bhoginbhai was guilty of the charges reduced his sentence from two and a half years of Rigorous Imprisonment to that of fifteen months of Rigorous Imprisonment due to certain 'special' circumstances that it went on to state.[25]

Jayanti Rani Panda v. State of West Bengal (1983)

A teacher at the local village school used to visit the residence of a young girl, and one day said that he was in love with her, and promised to marry her after obtaining the consent of her parents. She entered into a relationship with him on the promise of marriage. When she became pregnant, she refused to have an abortion as he suggested at which he terminated the relationship and disowned the promise of marriage. The girl filed

[24] *Rafiq v. State of Uttar Pradesh* 1980 Cri. L.J. 1344 SC.

[25] *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* 1983 Cri. L.J. 1096 SC.

a complaint on the grounds that her consent to sexual intercourse was based on the promise. But the case was dismissed, and even at the review petition she filed to the Calcutta High Court, he was acquitted.[26]

Prem Chand and Another v. State of Haryana or the Suman Rani case (1989)

Suman Rani was raped by two policemen Prem Chand and Kushi Ram at Bhiwani, after they took her and Ravi Shankar, who had abducted her from Bhawani Khera, to the police station. It took five days for her to get back to her home, and then file a case at the police station. The trail court held all three, Ravi Shankar, and the two policemen guilty, but all three appealed to the High court. The case against Ravi Shankar, who had also raped her twice before abducting her, was dismissed by the Court because she 'had been going around with him and had been having sex with him', but it dismissed the appeals made by the police men. The Supreme Court in its judgement, held that rape had been committed, but reduced the sentence from the mandatory minimum specified in Section 376 after the 1983 amendment to half of the period, that is, to five years, on the grounds that Suman Rani's conduct, and the fact that it had taken her 5 days to complain about her rape were adequate reasons to invoke the special provisions in the same section for a sub-minimum sentence.[27]

Kamta Tiwari v. State of Madhya Pradesh (1996)

Pinky a seven year old girl, had gone to a barber's shop with her father Parmeshwar Lal Sharma and her brother. After she had her hair cut, she left her father who was still in the shop, and went to the electrical shop of Kamta Tiwari, who used to visit their house and was fondly called 'Tiwari uncle', and asked him for some biscuits. He took her to a shop, brought her a packet of biscuits, and then took her away. Her then raped her, and murdered her and tried to dispose of her dead body by throwing it into a well. The Supreme Court dismissed an appeal to change the lower courts' sentence of death penalty to him.[28]

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[26] *Jayanti Rani Panda, Petitioner v. State of West Bengal and another*, 1984 Cr. L.J. 1535.

[27] *Prem Chand and Another, Appellants v. State of Haryana, Respondent* AIR 1989 SC 937

[28] *Kamta Tiwari v. State of Madhya Pradesh* 1997-1-L.W. (Crl.) 153.

The Dichotomies of Coercive sex and Normal sex, Rape and Sexual intercourse or Force and Consent

Just how crucial the question of consent and the grounds on which it is assumed is to rape law was realized by the women's movement in India during the agitation that followed the SC judgement on the Tukaram and Another v. State of Maharashtra or the Mathura case. For sexual intercourse to qualify as within the purview of the legal definition of rape it has to be without the consent of the woman, except in cases of unmarried girls below the stipulated minimum age of consent whose consent is not legally valid, and in the case of wives above the minimum age of consent whose non-consent is not legally valid.

We begin to discern that the rape law, like rape itself, is crucial to patriarchy at this very instance. What is but a reflection of patriarchal prescriptions, the rape law assumes that women enter sexual activity only as secondary subjects, or more specifically, as sexual objects. Women, *good* women, ought not to initiate sex, they ought to wait for the man to express his sexual desire for them, and then they can consent. To borrow the words of MacKinnon, 'men initiate, women submit. That's consent?'. That is why, the first step in the legal process of the rape trial, is the question as to whether there was sexual intercourse. Only then does the question raise as to whether this sexual intercourse was in accordance with the woman's desires or not. The primacy is given to the proving of sexual intercourse, because in reality too, it is the man who has the authority to be a sexually active subject, the woman is the object of male desire.

We are now treading on uneasy grounds, and we must indeed tread warily here, as many have assumed that it is women themselves who are reified in patriarchy, and not just their sexuality. This, in a sense, is also a problem with Veena Das's position in the article cited above, and is a problem with the use of a structuralist position that emerges from Levi Strauss without any qualifications.[29] The main problem with a straightforward reduction of the woman to an object status, is that we assume again that women have no agency at all and no ability to resist, an assumption that is undoubtedly a dangerous one,

[29] See for instance, Lerner, Gerda. *The Creation of Patriarchy*, Oxford University Publications, Oxford, 1986 for a critique of Levi Strauss's theory of the exchange of women, especially chapters one and two.

falling-even as it might emerge from a critique of it-as it does into the same patriarchal grounds by positing women as incapable of actively resisting patriarchy.

We know that women, however much codes of conduct may so prescribe, do not just mutely accept what is expected of them, and this is a problem of great intensity on the specific issue of human sexuality, because the differences between prescriptive behaviour and actual behaviour might be a large one, and yet incapable of being correctly assessed.[30] It cannot be truer than in the context of India, where women especially upper caste women, are expected to steer clear from the talk of sex and act as desexualized beings if they wish to fully command what is granted to respectable upper caste women in brahmanical patriarchy. In opposition to this stands the other set of 'non-respectable' women- lower caste women, dalit women, tribal women (as also now women from religious minority communities)- in other words, the majority of women. Caste, class and gender, resting and reinforcing itself both on the material foundation of the systemic 'privileges' that upper caste men derive of the regular violent expropriation of the sexuality of lower caste and dalit women and on the ideological reproduction of not just this expropriation but the entire structure through the division of women based on caste into 'respectable' and 'non-respectable' women, produces an opposite position for lower caste women. This is a position where they are assumed to be *oversexualised* beings, a ready justification, in the case of resistance to it, that they are ever ready for sex, always 'seducing' and provoking men, specifically upper caste men into having sex with them.

Let us now look at the judicial discourse on force and consent with these observations. The first dichotomy that we come across in the rape law is that between force or coercion and consent. It is only if there is actual visible physical force on her person does she have a choice of being believed by the court; where there is no actual physical force but a threat of such force on the vent of non- submission to the rape, the law requires ample evidence to infer that these threats were issued, and if issued, then be capable of being carried out.

The woman's lack of consent is best shown not by her statements that she did not consent, but by the presence of injuries on her body. The woman ought to offer the

[30] Lerner, Gerda. *The Majority Finds its Past*, New York, Oxford University Press, 1986, In chapter 10, she raises the difficulties regarding gauging the difference between prescriptive and actual sexual behaviour.

stiffest possible resistance that ought to be visible during medical examination. Flavia Agnes cites one particular 1989 case of a 9-year-old girl raped by a 21-year-old man in Delhi. The Delhi High Court turned down the conviction by the Sessions Court because there were injuries only on his body and not on his penis, whereas the rape of a minor child causes injury to the penis of the rapist. Flavia Agnes captures the absurdity underlying the rape trials when she writes, "While earlier the girl had to put up sufficient resistance to suffer injuries on her own body, the situation seems to have become worse. Now she is expected to put up even more resistance, so that the accused also sustains injuries-not just on his body, but even on his penis!"[31]

In the Mathura case, the Sessions Court had acquitted the two policemen Tukaram and Ganpat, and held that the act was not one of rape but of sexual intercourse. The Bombay High Court, though, convicted the two policemen on the account that there was a world of difference between passive submission and consent, and that Mathura had not consented but only passively submitted to it. But in 1978, the Supreme Court acquitted the two constables on the basis that she could not have, as the High Court said, passively submitted to her rape even when she knew that her brother, her lover and his aunt were just outside the police station. She could not have been "so over-awed by the appellants being persons in authority or the circumstances that she was just emerging from a police station that she would make no attempt at all to resist." The High Court had not been able provide substantial findings that the fear out of which her consent had been obtained was the fear of death or hurt. The third clause in section 375 states that sexual intercourse is rape is it has occurred "with her consent, when her consent has been obtained by putting her in fear of death or hurt." Mathura had no injuries on her body to show that she had been raped.

In the Pratap Misra case, where a five- months pregnant woman had been raped by three men, the fact that she did not have an abortion immediately after her rape, but only 4 days later, was one of the basis for the Supreme Court to assume that there was no rape, and acquitted the rapists. It held that "It is very difficult to assume for any person to rape single-handedly a grown up and an experienced woman without meeting the stiffest possible resistance from her."

[31] Agnes, Flavia, op. cit., p. 127-128.

In the two cases cited, there were no injuries on the bodies of the women raped. Due to this absence of proof of force, although this was not the primary reason, the rapes could be easily dismissed by the Court.

In the Pratap Misra case, even the woman's subsequent abortion of a five months old foetus as a consequence of her rape could not be construed as evidence of force, for the medical opinion was that in the case of forcible intercourse thrice, there would be immediate abortion. The woman's body, unfortunately, had not obeyed the rules of medical science, so that the abortion was seen as unconnected with the case!

On the processes by which the concepts of force and consent are used in rape law, Veena Das writes, "In every case the speech of the woman is pitted against her body for the production of truth. In the process of judicial verification, the judges find that either the body bears witness to the truth of the statements of the prosecutrix that she had been forced into submission, or contrarily, it provides evidence to negate the speech of the woman."[32] She notes, of course, that it is not just in the case of rape, but also in all cases of violation of body integrity that the body is so objectified by the Court. The difference is that in the case of rape, the body's objectification is a sexual objectification.

If we push her argument further, we find that the insistence on medical evidence of force on the body gives a certain concreteness to the claims of sexual violence, a concreteness that otherwise patriarchy does not provide to 'mere' statements made by women.[33] One recalls here the observations made by Uma Chakravarti on how brahmanical patriarchy in the Indian context required that there be not just a distrust of women's conduct regarding sexuality (so as to justify the minute control over it that caste and gender requires to preclude the threatening of the order by 'deceitful' sexual acts) but also a general distrust of women as capable of deceit in every sphere of life. [34] It would be apt to also note here, what a Madras High Court cites from an earlier judgement. "...about the need for corroboration that on a charge of a sexual offence against a woman or girl, the judge should direct the jury in clear and simple language that it is dangerous to

[32] Das, Veena. op. cit., p. 2415.

[33] It has to be noted here that not all judgements reveal an obstinate obsession with medical evidence, but these are the rules that are generally followed.

[34]Chakravarti, Uma. "Conceptualising Brahmanical Patriarchy in Early India: Gender, Caste, Class and State" in *Economic and Political Weekly*, Vol. XXVIII. No. 15, 1993, p.579-585.

convict on the uncorroborated evidence of the complainant, because *human experience* in the Courts has shown that women and girls, *for all sorts of reasons and sometimes for no reasons at all* tell a false story which is very easy to fabricate, but extremely difficult to refute."[35]

Firstly, on what basis does this statement of the judge come to stand for legal knowledge and a caution for subsequent judges to exercise? It is something that we could not refute at once, for the basis of this knowledge comes from nothing less than *human experience*. By posing to be emerging from 'human' experience (not even worded as 'man's experience' or 'experiences of man, which would have sufficed given that semiotics in conditions of patriarchy expects us to somehow infer that the term 'man' includes 'woman'), it is at once deemed neutral, with knowledge claims that cannot be contested unless its facade of neutrality is ripped apart. Secondly, so what is it that this human experience teaches us? That women and girls are bound to lie, that they have an inherent capacity to lie for no reasons at all. They lie, it would seem, because they *can* lie, and because they are women and lying is what comes *naturally* to them. The propensity to lie, it would seem, is something that comes from *within* the woman, a tendency that nothing less than nature creates in her, and which would create havoc were it not for the regulations imposed on her by society. Putting it simply, women are to be treated as liars, deceitful scheming and wicked persons whose words ought not to be taken at face value especially not if they are regarding the sexual realm. Agreed, that the principles of natural justice requires that every case be proven and not merely assumed as the truth, but one is left wondering if this is all there is to the rigorous questioning and corroborations that are typically involved in rape trials.

But this is not all there is to the question of force. We need to look deeper into sexuality under patriarchal conditions if we are to understand why force is so central to the rape laws, what forms of it are taken as legally valid expressions of it, and where is the line drawn between forced sex i.e. rape, and 'normal' consensual sex, and who draws this line. Catherine MacKinnon offers the most stunning insights on this issue. 'Normal' sex under conditions of domination- subordination, we come to realize are not so

[35] Court of Appeal (Criminal Division) consisting of Lord Justice salmon, Lord Justice Fenton Atkinson and Mr. Justice Milmo in *re, Neville Benson Henry Jeffrey Patrick Manning*, 53 Cr. App. R. 150, cited in Madras High Court judgement on *Myilsami alias Mylan* 1970 L.W(Crl.) 182, emphasis mine.

different from rape, because one of the ways in which patriarchy reproduces itself is through the processes that eroticises the dominance- subordinance relationship.[36] Thus 'normal' sexuality too under patriarchy is created and directed towards expressing the domination- subordination relationships in the realm of sex. The intention in saying this is not that all heterosexual activity sees heterosexual women in the role of passive seekers of male sexual expressions of domination. Women do have the agency to refuse to be passive or masochists, and they do exercise this agency, but this only comes second to the right of men over their sexuality; and in the contexts where the man is socially sanctioned this right through religion, institutions and custom, the right of woman to at least say 'no' let alone initiate sexual relationships on her own without fear of consequences is seldom respected.

MacKinnon writes, "...force and desire are not mutually exclusive. So long as dominance is eroticised, they never will be...Sexual intercourse may not be deeply unwanted- the woman would never have initiated it- yet no force may be present."[37] Thus, there is really no point from which a conceptualization of force that extends beyond that of violence or physical force can enter the judicial discourse. Perhaps this is even a case of expecting too much, for even physical violence need not always be seen by the court as proof of rape, the idea that women are also raped through the use of other kinds of force- emotional blackmail, economic considerations, and social considerations- indeed sounds implausible to the law.

Yet, feminists have repeatedly pointed out that women are more often than not, raped by persons known to them- landlords, overseers, acquaintances, friends, and persons they share intimate relationships with- husbands and lovers. Physical violence may not always be present; it may not be necessary. A wife may submit to her husband's desire to have sexual intercourse even though both of them know that she does not desire it. Here, the husband may not cause physical violence, but this does not rule out that it is sexual violence nevertheless. That is, there may be no need for physical force, but this does not imply a mutuality of desire. The wife knows that she cannot not consent, as the

[36] *MacKinnon, Catherine A. "Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence" in Signs: Journal of Women in Culture and Society, Vol. 8, No. 4, Summer, 1983. See also Bartky, Sandra Lee. Femininity and Domination: Studies in the Phenomenology of Oppression, New York, Routledge, 1990.*

[37] Ibid, p. 650

husband would nevertheless insist on it, and if she is completely economically dependant in her husband, her non- consent would immediately or ultimately declass her as she may be thrown out of her home. Similarly, a landlord while raping a landless labourer, may not have to use physical violence because there is an implicit or explicit recognition that her non-compliance would lead to stoppage of wages, and other drastic effects for herself, her family, and even her entire caste.

We need to point out here that physical violence does not merely enter the act of rape in order to make the woman submit to the rape. Rather, the violence only *seems* to be apart from the part that is treated as 'specifically' sexual about rape. Normally, in case law, this is means penile penetration of the vagina, and might also extend to include penetration by other objects. Injuries on parts of the woman's body other than the vagina cannot be seen as separate from the 'sexual violation', or as an accompaniment of the latter. This physical violence directed at the entire body of the woman can also be, and is, sexualized, and is as much a part of the rapist's intention of sexual violence.[38]

One has to note here that mere absence or presence of injuries is not the single decisive factor or even the most important factor in case law. If this were to be true then proving rape would be only a matter of showing that there was violence or the threat of it, which could even be seen as a practicality deemed necessary for the purposes of justice. But, as Veena Das points out, on how precisely to *interpret* an absence, the Court relies on whether the woman is a honourable woman, a woman whose testimony can more or less be believed, or is a woman of 'easy virtue', 'habituated to sexual intercourse', and therefore a woman who cannot be believed. Just how important the sexual conduct of women is to her status, and others' perceptions of her is clear by how the court believes that a woman who has transgressed social customs regulating sexual behaviour, a woman who cannot be trusted to obey patriarchal sexual norms, cannot be trusted in any other matter, least of all her statements. If she has defied the prescriptions for sex, then she

[38] See LeMoncheck, Linda. *Loose Women, Lecherous Men: A Feminist Philosophy of Sex*, Oxford, Oxford University Press, 1997, for a discussion on the conceptualization of sexual appropriation, and the relation between concepts of violation, and violence. See also on the connections between battery and sexual violence within the marital relationship, Geetha, V. "On bodily Love and Hurt" in John, Mary E. and Nair, Janaki (eds.). *A Question of Silence? The Sexual Economies of Modern India*, New Delhi, Kali for Women, 1998.

most certainly will have defy the need for truth. For the majority of women, there is the other problem that goes hand in hand- they are available for all men, and they will never speak the truth. It doesn't matter in any case, and there is really no need to go into whether she is speaking the truth or not, for she has no right to say no to any man and she is incapable of speaking the truth.

THE PROTECTION OF VIRGINITY OR THE MOST PRECIOUS POSSESSION OF AN UNMARRIED INDIAN GIRL – RAPE OF YOUNG GIRLS

> "(J)udgement on rape in the case of young girls (especially if girl is a virgin), lie at the intersection of the discourse on sexuality and the discourse an alliance so that the question of whether a sexual offence has been committed, is decided not by recourse to the opposition between force and consent but as the issue of whether the body has been so sexualized by the experience as to make it unexchangable in marriage."[39]

In 1984, the Rajasthan High Court stated in a judgement, "Virginity is the most precious possession of an unmarried Indian girl. She never willingly parts away with this proud and precious possession."[40] It is from this judgement that the title for this section is taken, for stated so bluntly, it opens our eyes to what underlies judgement on rape of young girls. Veena Das tells us that the consideration here, on whether the offence is classified by the court as a sexual or a non-sexual offence, is precisely whether the girl has been 'robbed' of her most precious possession – her virginity – by the act.

Brahmanical patriarchy's essential requirement of caste purity gave rise to the custom of child marriage, wherein the girl would be given virtually no opportunity to defile the purity of her caste by cohabiting with a man outside the caste. Her reproductive and sexual capacities had to be protected at any cost for fear of miscegenation and her womb was to be 'gifted' to her husband as soon as she reached puberty, which was ensured by religion and custom. In fact, when the 1860 Penal Code had fixed the minimum age of consent for both married and unmarried girls at the age of ten, there was hardly any controversy because it did not interfere with the practice of *garbadhan*, whereas the subsequent amendment that raised it to 12 years was carried out in the

[39] Das, Veena. op.cit., p. 2416.

[40] *Babu, Appellant v. State of Rajasthan, Respondent* 1984 Cri.L.J.74 (RAJ.)

backdrop of the huge controversy that the Age of Consent bill passed in 1891 had raised, as it directly affected the obligatory cohabitation of the husband and the wife soon after she reached puberty.[41]

It is the structure of caste and gender that adds special import to the question of the virginity of unmarried girls in our context, a question that is repeatedly reflected in judgements. As to whether girls themselves know the precious of their virginity – yes, from their very birth, as cited earlier. Every girl knows that the position of her family, the ability to success a good match for her from a respectable family, her entire life depends on it.

In the *Bharwada Bhoginbhai* case, in the context of the defence plea that a past trade union rivalry between the father of the girl and Bharwada Bhoginbhai had caused the false allegation of rape, the judge says that "Even at the age of 10 or 12 a girl in India can be trusted to be aware of the fact that the reputation of the entire family would be jeopardized upon such a story being spread. She can be trusted to know that in the Indian society her own future chances of getting married and settling down in a respectable or acceptable family would be greatly marred if any such story calling into question her chastity were to gain circulating in the society."[42]

In these few words, the judge charts the course of life for girls, a journey from their parental home into their marital home, referring her not just to the man she would get married to, but to his entire family. Thus the rape of girls is a crime against both the families that constitute the lives of girls – one, the present family of the girl, and two, the future family into which she will enter when married. Thus the conviction of rapists of young girls arise due to the reparation justice to both these families – first, for the extra trouble that her family has to undergo in getting her married later, and second, in anticipation of the family that she will married into later.

In the *Satto & Others v. State of U. P.* case the HC judgement, quoted in the SC judgement stated "They chose a girl of 11 years to satisfy their lust. They spoiled her life by committing his *(sic)* offence as her father would experience considerable difficulty in

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[41] See Engels, Dagmar. *Beyond Purdah? Women in Bengal, 1890-1939*, New Delhi, Oxford University Press, 1996 and Sarkar, Tanika. *Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism*, New Delhi, Permanent Black, 2001.

[42] *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, op.cit.

arranging her marriage. They were so cruel that all the three committed rape on minor child."[43]

That consideration of marriage is the grounds on which justice is provided by the court is best captured in the SC ruling on the *Bharwada Bhoginbhai* case, not simply because it goes on at length about the difficulties of young girls who are raped to get married, but also because the issue of marriage is involved yet again in the SC's reduction of the sentences imposed on Bharwada Bhoginbhai by the HC. "In the view that we are taking the appellant will have to be sent back to jail after an interval of about 6 ½ years. The appellant must have suffered great humiliation in the society. The prospects of getting a suitable match for his own daughter have perhaps been marred in view of the stigma in the wake of the finding a guilt recorded against him in the context of such an offence."[44] Now the State is worrying itself over not only the marriage of the girls who was raped, but also the marriage of the daughter of the rapist!

Another point that we need to note here to understand that familial concern back the judicial discourse on rape is that in the cases where the rapist is known to the young girls, the courts are horrified that their trust in him is taken advantages of thus by him while committing the offence of rape. In *Bharwada Bhoginbhai,* "The magnitude of his offence cannot be overemphasised in the context of the fact that he misused his position as a father of a girl friend of P.W.1 and P.W.2. P.W.1 and P.W.2 were visiting his house unhesitatingly because of the fact that his daughter was their friend. To have misused this position and to have tricked them into entering the house, and to have taken undue advantage of the situation by subjecting them to sexual harassment, is crime of which a serious view must be take."[45]

Whereas the discourse seems to have changed (somewhat) over the years, in 1997, in the *Kamta Tiwari v. State of Madhya Pradesh* case, the Supreme Court in its ruling on the rape and murder of Pinky, a seven year old girl, daughter of Parmeshwar Lal Sharma, tells us once again that the rapist and murderer of Pinky, Kamta Tiwari, "was also a resident of the same locality used to occasionally visit the family of

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[43] *Satto & Others v. State of U.P.*, op.cit.

[44] *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, op.cit.

[45] *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, op.cit.

Parmeshwar and his children used to call him 'Tiwari uncle'".[46] The Court repeats this fact once gain, when finally upholding the death penalty that was imposed on him by the lower courts- "the evidence on record clearly establishes that the appellant was close to the family of Parmeshwar and the deceased and her siblings used to call her *(sic)* 'Tiwari Uncle'. Obviously her closeness which *(sic)* the appellant encouraged her to go to his shop...When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man."[47]

In this case, the *murder* of Pinky precludes any attempt of the court to address the question of the impending marriage of young girls and how their rape affects it, but there is one commonality in this ruling and *Bharwada Bhoginbhai-* that the rapists in both these cases were men who were in positions of trust and were known not only to the girls but also to their families. This makes it seem as if it would not be a case of pushing it too far to argue that the courts are also worried over what would happen to *normal* everyday interactions between families if young girls are raped by men who are 'close' to their families.

But as young girls begin to grow up, their virginity cannot be just assumed and is need for a thorough medical examination to check if they were virgins when they were raped, and to consider the possibility that they just might have consented to their rape, through an examination of their conduct. In the *Babu v. State of Rajasthan* case that was cited at the beginning on this section, "the medical evidence showed that prosecutrix was virgin up to the time rape was committed upon her".[48] In the *Satto and Others v. State of U.P.* case, the Supreme Court notes that the girl is an honest girl; she is "the artless victim".[49]

In the event that they are sexually active girls, the benefit of any doubt over whether they were below the minimum age of consent is given to the accused. In the *Tukaram & Another v. State of Maharashtra* case, the doctor who examined Mathura estimated her age to be between 14 and 16 years. But Mathura was a poor tribal girl, and

[46] *Kamta Tiwari v. State of Madhya Pradesh*, op.cit.

[47] *Kamta Tiwari v. State of Madhya Pradesh*, op.cit.

[48] *Babu, Appellant v. State of Rajasthan, Respondent*, op.cit.

[49] *Satto & Others v. State of U.P.*, op.cit.

she was also having a relationship with Ashok, her lover. "Her hymen revealed old ruptures", and to account for the presence of seminal stains on Mathura's clothes, the Sessions Court judge, who is quoted at length in the Supreme Court judgement, said, "she was after all living with Ashok and very much in love with him...". Therefore, "The learned Sessions Judge found that there was no satisfactory evidence to prove that Mathura was below 16 years on the date of the occurance."[50]

Thus, the refusal to convict her rapists is the State's way of reinforcing the prescriptive codes for women regarding how they conduct their sexual lives, and to always posit lower caste, dalit and tribal women as women who can be raped by anybody. In the case of Mathura, the court is also reinforcing the codes of brahmanical patriarchy on a tribal girl. It is at once, a way of judging a tribal girl's conduct by codes of a structure to which she is not so much an outsider as a person who is central to it.

With these observations, we shall move to the next chapter to take up these issues in greater detail.

[50] *Tukaram & Another v. State of Maharashtra*, op.cit.

CHAPTER FOUR

DEGREE OF UNFREEDOM: WIVES, CONCUBINES, PROSTITUTES, 'LOOSE' WOMEN, TRIBAL WOMEN AND LOWER CASTE WOMEN

> Neither [wives] of [seigniors] nor [widows] nor [Assyrian women] who go out on the street may have their heads uncovered. The daughters of a seignior...whether it is a shawl or a robe or [a mantle], must veil themselves...when they go out on the street alone, they must veil themselves. A concubine who goes out on the street with her mistress must veil herself. A sacred prostitute whom a man married must veil herself on the street, but one whom a man did not marry must have her head uncovered on the street; she must not veil herself. A harlot must not veil herself; her head must be uncovered...[1]

This chapter is divided into two main sections. In the first, we continue with the examination of cases outlined in the previous chapter, on issues of how the state reproduces the distinction between 'respectable women' and 'non-respectable woman' that emerges out the context of caste, class and gender in the judicial discourse on rape. The ruling of the court is based to a large extent on whether the woman falls into the former category or the latter, whether she is a respectable upper caste married woman or whether she is a 'non-respectable', 'loose', tribal or lower caste or dalit woman. In the second section of this chapter, we shall look at the cases that reflect the obsession with 'national culture' and how the tradition .vs. modernity dichotomy refigures itself in legal discourse on rape.

(I)

In *The Creation of Patriarchy*, Gerda Lerner wrote on how as gender and class come to be institutionalized, women came to occupy positions that provided them with degree of unfreedom. "The class position of women became consolidated and actualized through their sexual relationships. It always was expressed within degrees of unfreedom on a spectrum ranging from the slave woman, whose sexual and reproductive capacity

[1] Middle Assyrian Law § 40, on rules regarding veiling of women, cited in Lerner, Gerda. *The Creation of Patriarchy*, Oxford, Oxford University Publications, 1986, p. 134.

was commodified as she herself was; to the slave-concubine, whose sexual performance might elevate her own status or that of her children; then to the "free" wife, whose sexual and reproductive services to one man of the upper classes entitled her to property and legal rights."[2]

Let us now consider how its recurrence in our time and space contexts is reflected in the legal discourse on rape.

Wives cannot be raped (legally) by their husbands, if they are above the minimum age of consent. The marital exception clause to section 375 still holds, and when women's groups have attempted to pressurize the state to legally recognize marital rapes, they have been dismissed. A husband cannot legally rape his wife because her sexual services to him are integral to the marital relationship itself, sanctioned by religion, the state and reinforced by patriarchal ideology. If sexual violence is a violent expropriation of a woman's sexuality, then the husband cannot be accused of it. For he can't be charged with violently expropriating something that is already his. When the institutionalized appropriation of women's sexual and reproductive capacities (and labour) is at the root of marriage and family, then the rape law that emerges out of that context reflect and reinforces it.

In fact the women's movement had tried to bring in at least in part, a legal recognition of marital rape by asking for the proposed amendments in the rape laws to include the rape of a women by her husband when they are living separately by a court degree. Instead, as Pratiksha Baxi points out, the Joint Parliamentary Committee created a new category of 'illicit sexual intercourse not amounting with rape' on the arrangement that if it were equated with rape, it rules out the possibility of reconciliation between the husband and wife during the period of their separation, and before a divorce is obtained.[3]

This shows that it is the protection of the institution of marriage and family that operates as the concern for the state, and not any concern over the sexual violence that women are subjected to. Thus, a husband can simply not be convicted under the rape law

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[2] Ibid, p. 215.

[3] This is pointed out from the JPC report by Pratiksha Baxi, cited in Das, Veena. "Sexual Violence, Discursive Formations and the State" in *Economic and Political Weekly*, Vol. XXXI, Nos. 35- 37, Special Number, September, 1996 p. 2421

unless the wife is under the consenting age – he can be charged under other sections in the I.P.C., but not in this particular one, because the legal recognition of marital rape will strike a blow at the heart of the twin institution of marriage and family.[4]

Thus the respectable wife is the one who has the least degree of unfreedom. She has no freedom to say 'no' to her rape by her husband, but if her own behaviour is 'impeccable' and beyond doubt, and if she is upper-caste, then there are greater chances that she will be believed by the courts in case of her rape by someone other than her husband. It is noteworthy that just as virginity is said to be the most precious possession of the unmarried Indian girl, so, too, in another High Court judgement delivered by the Nagpur Bench "...chastity is the jewel of the Indian woman".[5]

In the case of Jayanti Rani Panda, she is a girl who was a little above 16 when the accused first obtained her consent to sexual intercourse on the promise of marriage. But it is only a promise of marriage, and their relationship is not a legally valid relationship. It is the girl's entry into the relationship that must be punished, not the teacher seduction of her and his having used the false promise of marriage to obtain her consent.

Not surprisingly, the Calcutta High Court states " If a full *(sic)* grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is *an act of promiscuity on her part* and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to *pardon the act of the girl* and faster criminal liability on the other, unless the court can be assured that from the very inception the accused never really intended to marry her."[6] Thus it is the act of the girl that cannot in any case be pardoned by the court. We also notice the mode in which the girl's sexual activeness is construed in the court's language. If she 'continues to indulge in such activity' – her being sexually active (on

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[4] Mac Kinnon cautions us against thinking the contrary i.e. a legal recognition of marital rape is a sign of the 'sensitivity' of the judiciary regarding gender. Rather, she says, where it has been legally recognized, it is a reflection of the changes regarding the marital relationship in reality itself. When more and more heterosexual couples are living together instead of being legally married, it makes more sense to the judiciary to shift the focus from whether they were married to how intimate and close was the relationship between the woman and her rapist. See MacKinnon, Catherine *A.* "Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence" in *Signs: Journal of Women in Culture and Society*, Vol. 8, No. 4, Summer, 1983.

[5] Cited in the SC ruling on the case. *State of Maharastra v. Priya Sharan Maharaj & Others* (S.C.) 1997 –1- L.W. (Cri.) 322.

[6] *Jayanti Rani Panda, Petitioner v. State of West Bengal and Another*, 1984 Cr. L.J. 1535.

whatever grounds) renders her so dishonourable that at the discursive level, her actions can't be named in any other sense, it can only be termed in a deprecating manner as 'such activity'. Then the court continues – "... until she becomes pregnant, it is an act of promiscuity on her part." The least a sexually active unmarried girl ought to do is to not become pregnant, for her pregnancy is openly visible evidence of how she has violated the codes of sexual conduct. What could have continued with a lot of care and caution, the potentially subversive act of an unmarried girl being sexually active, now suddenly explodes in the public sphere when she becomes pregnant – ample evidence of her threat to the structure. It is thereby an act on her part that can't be pardoned for reasons of double intensity.

To go back to the specific case of Jayanti Rani Panda, in trying to find a point from which her case can enter the legal framework, there is an attempt to use the 'misconception of fact' concept in the Penal Code. And this leads to another set of problems that the court must resolve. Can his action be covered under the meaning of this concept? No, the court rules, because he did not lie to her when he promised to marry her. There is no misconception of fact here; indeed, the court sees no evidence that he did not intend to marry her when he made the promise. The girl said that he backed out of his promise when she became pregnant and refused to undergo any abortion as per his suggestion. Yet the court's excuse is that the reasons for his failure to keep the promise are not clear to it. "The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been difficult if the consent was obtained by creating a belief that they were already married."[7] How could this false belief have been created? The High Court has already quoted the session court's judgement – "A false promise is not a fact within the meaning of the code. The matter would have been otherwise if the accused on the pretext of fake marriage or posing as a husband ravished the girl."[8]

[7] Ibid.

[8] ibid.

Before it begins to seem like this is only legal nit-picking intending to serve as an excuse to acquit the accused and thereby punish the girl for her unpardonable act, we are struck by something else that the court is saying at another level that recalls to us clause fourthly of section 375, "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".

Let us consider here the irony of the girl for a moment. In the case that he had kept his promise and they had lawfully married each other, from then onwards, he had the legal right to rape her any number of times. In the case that he had arranged for a fake marriage in order to obtain her consent for sexual intercourse, then she could claim that his appropriation of her sexuality amounts to rape legally. But where she entered into a relationship giving her consent on the grounds of promise of a future marriage, she can make no claims at all.

Whereas if he had deceived her into believing they were legally married when they were actually not, he could be charged of rape. It is again the institution of marriage that the rape law is addressing itself to. A *deception* of being married makes a mockery out of the institution of marriage itself, and this is why the law cannot allow it. And by supporting marriage and family, it is the regulation of women's sexuality that the courts are also reinforcing. We note again, "She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is that if she had really been assured of marriage by the accused who was visiting her house and in whose promise she had faith, why should she keep it a secret from her parents if really she had belief in that promise."[9]

The court here is implying that the might actually be lying about having been assured of marriage at all, or not having taken it seriously when he offered her the promise. What the court is saying is that if at all there was any promise, it was more an excuse for the girl to go ahead with something she wished to anyways- to indulge in 'acts of promiscuity', rather than anything seriously taken by either of the two. Thereby, the girl is to be punished because it is she who is mocking at marriage, not taking it seriously, and having sex before she is married. Thus, this case shows us, that in case a woman is

[9] ibid.

legally married to the man, then her 'no' to him automatically becomes a 'yes'; if the marriage is a faked one and she was not aware that it was illegal, then her 'yes' with him would become a 'no'; and in case her 'yes' is a conditional yes, it is a 'yes' irrespective of whether the conditions hold or not.

The judgement on the Jayanti Rani Panda Case also pinpoints the fact that rape is constructed to mean one single act, and not a continuing practice. The woman has to single out one act – clearly specifying the beginning and end of it. If, as in this case, it (rape) refers to the entire process through which the man has, over a considerable length of time, appropriated the woman's sexuality, and the woman, in retrospect, sees the period not as one that marks a consensual relationship, but as one that involved the expropriation of her sexuality, then that is invalid for the court. Consent, once given, on whatever grounds it may have been based, can not be withdrawn, neither can a woman in retrospection come to realize that she was raped. Which is why a prior relationship between the rapist and the victim suspends any possibility of legal rape.

A review of the Pratap Misra and Others case also points to some of the issues that we have raised so far. In this case, the fact that Pramila Kumari Rout was in a lodge with a man who was not her husband, Bal Krishna Rout, when she was gang raped was the basis for the acquittal of the three NCC cadets who had raped her. The court dwells on this fact at considerable length- the woman is not legally married to the man she is staying with at the lodge, the man is already married to somebody else, his first wife from whom he is not legally separated is still living, so that *even* if these two did exchange garlands as they claim to have, their marriage is not legally married, and *at best* she can be treated as the 'concubine' of the man... The High Court findings are duly quoted in the Supreme Court saying, "she was living in a state of concubinage with P.W. 2".[10]

The victim is not a wife, not a respectable woman, but at best a 'concubine'.[11] Her rape by the three men is therefore not recognized. In any case, if she is "at best a concubine", what is she at worst? The court clears it for us as the case proceeds, in case we are in doubts at what it is hinting at.

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[10] *Pratap Misra and Others, Appellants v. State of Orissa, Respondent*, 1977 Cri. L.J. 817

[11] It is worthy to note that the two did not enter the legal discourse as lovers, but she as his concubine.

It is repeatedly stated in the judgement that she is 'an experienced lady'. So, how does the court provide an explanation of why this woman, who is only a concubine, who is an experienced woman whose experiences have been gained not through the regulated route of sex within marriage but through 'immoral' activities, is now making 'false' claims of being raped? And what explanation is provided for why her lover too is standing with her in accusing the three NCC cadets? "We do not mean to suggest even for a moment that PW2 was a pimp, but the fact remains that the appellants undoubtedly wanted to have negotiations with him before insisting upon him to open the door. This is also a circumstance that militates against the case of rape and shows that PW2 himself connived at the sexual intercourse committed with his concubine."[12]

What had occurred was this- the three men had come up to the window of the room in which Pramila and Bal Krishna were staying and asked him to open the door. At a refusal, went away, only to come back after a few minutes and again asked that the door be opened. As soon as Bal Krishna opened the door, he was caught hold of by two of the cadets and pushed out of the room. When he was thus being detained by two, the third went in, locked the room, and raped Pramila Kumari. Pramila was raped by the three in turn. When the chowkidar of the lodge saw a weeping Bal Krishna being held outside his room by two men, he went away and came back with a few more men. Of the crowd, there were also some forest officials. This crowd ordered the rapist who was then inside the room to come out, and asked the other two to let go of the man. There was a fight between the rapists and the crowd, and this was one of the strategies to acquit the three. The three rapists said that they were not actually raping her, but had intercourse with her, after negotiating with her lover to do so. It was only at the heed of the forest officials who wanted revenge because they had an altercation that Pramila and Bal Krishna had trumped up charges against them.

It is the version of the rapists that the Court fully endorses, because the victim is not a respectable woman. She is, rather, a concubine, a loose woman, or a prostitute, although the court never clearly states that is assumes she is a prostitute; and based on this assumption, her sexuality can be violently expropriated by any man. The sexual violence that she is subject to is not a crime that will be recognized by the State.

[12] Ibid.

Significantly, in this case, although she suffers from a miscarriage four days after her rape, that too cannot be treated by the court as evidence that she was subject to forcible intercourse. This was dismissed as evidence on the grounds that it dint occur immediately after her rape, whereas it would have, according to medical opinion, occurred just after if the case was of forcible intercourse repeatedly thrice. There were no other injuries present on her body, and the medical opinion that again was quoted by the Supreme Court was that "The opinions of medical experts also show that it is very difficult for any person to rape single-handed a grown up and an experienced woman without meeting stiffest possible resistance from her."[13]

Even the fact that she was a mid-wife was made out against her by the Supreme Court. A mid-wife, if not any other woman ought to be able to resist; being a mid-wife is also what adds up to her 'experience'. We are left wondering if there are yet other reasons why this is being stressed. One, there is a general fear of the powers of the mid-wife, a fact that has been noted in many historical periods and across regions. A mid-wife must be in a position to overpower the three NCC cadets who were her rapists. Two, the court is puzzled over how to label her as a concubine of Bal Krishna when it knows that she was a mid-wife, and somehow, therefore, does not neatly fit into the definition of the concubine. She is a somewhat independent woman, and cannot really be seen in the traditional model of the 'concubine' or the 'kept woman', literally, the woman who is kept or whose needs of shelter, food and clothing are all provided for by the man for sexual services she renders to him.

In the *Prem Chand and Another, Appellants v. State of Haryana* case, or what is generally known as the *Suman Rani case*, similar arguments are made in the judgement.[14] Here, the complaint of rape was not only against the two policemen who had raped her, but also against the man who had initially abducted her and was taking her to Jammu. This man Ravi Shankar had raped her on two occasions before he abducted her. The High Court dismissed the sentence that the Sessions Court imposed on Ravi Shankar, on the

[13] ibid.

[14] *Prem Chand and Another, Appellants v. State of Haryana, Respondent* AIR 1989 SC 937

grounds that "she was a willing party and had been going around with Ravi Shankar appellant and had been having sex with him of her free will."[15]

A woman can never accuse a man who she is in a relationship with, of raping her. This is similar to the law's treatment of marital rape, and yet not quite the same. It is *similar* in the sense that the man is, like the husband, even though he may not be legally married to her, entitled to appropriate her sexuality and rape her without being legally punished for it. [16] It is *different*, and especially so for the woman, because he is *not* her husband, and in violating the prescribed codes regulating her sexuality, she is a 'loose woman' and therefore, especially if she is also poor, lower caste or dalit, the state sanctions her rape by any other man as well.

In the case of Suman Rani, the High Court dismissed the case against Ravi Shankar because he can't have raped her if she was already having sex with him, but it did not dismiss the case against the two policemen who raped her in the police station in Bhiwani. When they appealed to the Supreme Court, the major consideration that made it reduce their sentence from 10 years R.I. to 5 years R.I. was that she was, as the defence counsel has stated, after *meticulously* going through testimonies and medical evidence, "a woman of questionable character and easy virtue with lewd and lascivious behaviour and...the very fact that this girl had not complained of the alleged rape said to have been committed at the Police Station by these two appellants to anyone till she was interrogated by PW20..."[17]

The Medical Officer, "on examination of the victim girl gave his opinion that the victim girl was used to have *(sic)* frequent sexual intercourse and parturition and there was no mark of violence of *(sic)* sexual assault on any other part of her body..."[18] Yet again, the way the sentence is constructed opens our eyes to what it only reflects. In the order of sequence, what needs to be first ascertained is whether or not the girl is a good, respectable virgin girl or not. But Suman Rani does not qualify, "she is used to having sexual intercourse". It is only secondary to be ascertained whether the girl or woman has

[15] Cited in the SC judgement, ibid.

[16] This is of course, in the case of the man and the woman's relationship not going against the customs that regulate caste purity. In case it does, the relationship exists on a completely different plane, and it makes both of them vulnerable to extreme and brutal violence from society and the state's agencies.

[17] *Prem Chand and Another, Appellants v. State of Haryana*, op.cit.

[18] ibid.

been sexually assaulted, and it secondary, because the first considerations outweigh the second many a times. It has taken her five days for Suman Rani to reach her home and subsequently file an FIR, so, obviously, no- she does not have any marks of evidence of her rape that can be revealed by her medical examination. Therefore, although "an offence of this nature has to e viewed very seriously and has to be dealt with condign punishment", (and this is the court speaking in the post- amendment period) the "peculiar facts and circumstances of this case coupled with the conduct of the victim girl...do not call for the minimum sentence as prescribed under S. 376 Sub-section (2)."[19]

This case, as Radha Kumar notes, also revealed just how vulnerable are women who 'elope' with the men they are in a relationship with, come to cities and other places away from their homes, in the hope that the anonymity of the city will provide them a safety from fears of being persecuted by the police. Most of the women who thus come to unfamiliar places, are rendered even more powerless, and the police is involved in a regular subjection of them to sexual violence.[20]

This brings to our mind the *Mathura case* at once.[21] One huge factor that the court manipulated in order to acquit the two policemen who had raped Mathura was why did she not cry out for help, when she was being raped by them in the police station, when she knows that her brother and her lover are waiting for her outside the gate? The court overlooks the fact conveniently that she might not be sure of that familial support. It is in fact because her brother Gama, had registered a complaint against Ashok, with whom she was having a relationship, Nushi, the aunt of Ashok, and her husband, that she was in the police station in the first place.

Here too, the medical examination provides evidence for the courts to easily dismiss her as a 'loose' girl, and therefore, a girl whose rapists can't be punished. "The girl has no injury on her person. Her hymen revealed old ruptures. The vagina admitted two fingers easily."[22] Again, the emphasis is on the fact that her hymen revealed old ruptures and her vagina admitted two fingers easily. Repeated over and over, in the

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[19] ibid.

[20] See Kumar, Radha. The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India, 1800-1990, New Delhi, Kali for Women, 1993.

[21] *Tukaram and Another, Appellants v. State of Maharashtra, Respondent* AIR 1979 SC 185

[22] ibid.

judicial discourse is that Mathura is "a shocking liar" whose testimony "is riddled with falsehood and improbabilities".[23]

The Sessions Court and the Supreme Court ruled that Mathura had had sexual intercourse with Ganpat, one of the two policemen, and was certainly not raped. The Supreme Court also quotes the High Court's judgement where it is revealed that Mathura had not even known or met either of the two policemen prior to her act, and this has been proven beyond any doubt. If Mathura was lying about being raped by Ganpat and Tukaram, then why is it that she was lying? The Sessions Court's explanation is quoted in the Supreme Court ruling, an explanation that needs to be carefully noted. "Finding Nushi angry and knowing that Nushi would suspect something fishy, she (Mathura) could not have very well admitted that of her own free will, she had surrendered her body to a Police Constable. The crowd including her lover Ashok, and *she had to sound virtuous* before him. This is why- this is a possibility- she might have invented the story of having been confined at the Police Station and raped by accused No. 2."[24]

If we are go in accordance to judicial discourse on rape, there is one specific reason why 'immoral' women who are habituated to intercourse are so prone to falsely accusing men of raping them when they themselves might have sought out the sex. This brings back to the division between 'honourable' and dishonourable' women. 'Honourable' women are inviolable, or at least ought to be, and they are generally not treated with suspicion by the court when they are raped. But 'dishonourable' women are to be made freely available to all men, who can subject them to sexual violence without being deterred by any fear of punishment. They ought to be suspected by the courts because they are always trying to *project* themselves as honourable, and will go to any lengths for this.

To now look at what we have cited from the Mathura judgement as the reason given by the court for her 'false allegation' in this light. Mathura is a 'dishonourable' girl, she is not a virgin, she is a tribal girl, and she is a poor labourer. She is in love with Ashok, the nephew of Nushi, in whose house she works. It is imperative that they do not find any reason to suspect her 'morality'. Mathura is therefore trying to project herself to

[23] ibid.

[24] ibid, emphasis mine.

be what she is not, she is pretending to be 'virtuous'. Shed of the legal technical language that courts use in their rulings, let us now look at how this official version of the incident looks like; and this is the version of the state.

When Mathura is suddenly, in the midst of the hassles over a complaint that her brother has filed against her lover, filled with the desire to have sex with two policemen she has never even met, she is thrilled that one of them detains her from leaving with her brother, her lover and his aunt. He gives her an opportunity to both fulfill her sexual desire as well as continue with her outward pretence at virtuosity. She goes out of the station, and then finds that Nushi is angry and suspicious. She knows that it will now not suffice to excuse herself on the basis that she was detained by the policemen, and so quickly concocts the story of being raped by them. Everybody, that is, everybody excepting the two poor policemen Ganpat and Tukaram, now happily goes away. Mathura's pretence at being honourable and gaining a status that she otherwise doesn't derive from being a poor, tribal girl, is not given away, Nushi is happy, having got an adequate reason from Mathura to quench her anger; and Ashok is happy because Mathura is virtuous. That leaves behind the two policemen, who are burdened by the false accusations. They have to wait before the Supreme Court finally rescues them from the misery that they are subjected to by a slip of a girl-14 to 16 years of age, poor, tribal, with old ruptures in her hymen, whose vagina admits two fingers easily- who is engaged in the exercise of pretending to be honourable.

Let us finally look at the discourse on Rameeza Bee now. Here, there are no in-between areas. The strategy of the State is to without dilly-dallying, position her as a prostitute throughout the entire proceedings. This is really the best strategy for rapists, because a prostitute can never be raped, because she 'lives off' her sexuality. In the case of Rameeza Bee, it was on the pretext that she was a prostitute that the two policemen initially arrested her, and took her to the police station where she was raped by several policemen. And again in the report of the Muktadar Commission, the questions that were being asked were- is she a prostitute, was her marriage to Ahmed Hussain a legal Muslim marriage in accordance with the principles of Nikah, does she know her faith, is she a good Muslim? Not, how to ensure that the policemen who subjected her to sexual

violence and murdered her husband Ahmed Hussain are punished. Thus, in this case, it wasn't the rape that figured, but primarily discussions over her character and religiosity.

As Kalpana Kannabiran and Vasanth Kannabiran note in an extremely telling essay, every time the police produced witnesses to claim that they had had sex with her for money, Rameeza Bee is made to remove her veil, so that they can identify her.[25] Rameeza Bee is a poor labourer Muslim woman, and she is not allowed to veil herself, which is traditionally the marker of visible distinctions of class, as it operated for women.[26] The veil is especially forbidden to the common prostitute, and in making Rameeza Bee unveil herself a number of times, the State is engaging itself in correcting the wrongs of this grave crime, which is the crime of a prostitute trying to pass herself as a honourable woman.

Thus, in the entire narrative of the state, her rape itself does not figure even as a mildly important issue, even if not the central one. Even though the judge of the inquiry commission finds the policemen guilty of raping Rameeza Bee, and recommends their punishment, it is not followed up. The state went into the exercise of appointing the commission, it will be remembered, in order to appease the groups that were protesting against the rape of Rameeza and the murder of her husband. When the policemen appealed to the Supreme Court to transfer their case outside Andhra Pradesh, it is willingly obliged. The Raichur Sessions Judge acquitted all the policemen who had raped her, and an appeal filed by a women's group in Bangalore was dismissed.

(II)

Bharwada Bhoginbhai is a classic example of how the legal discourse on rape is one way to perpetuate the tradition .vs. modernity dichotomy, that was initiated during the colonial period.[27] The ideological reconstitution of the gendered subject in the production & reproduction of new patriarchies contingent to the demands of the changes in the material and social world came to be articulated through, to borrow Hobsbawm's

[25] Kannabiran, Kalpana and Kannabiran, Vasanth. *De-Eroticizing Assault: Essays on Modesty, Honour and Power*, Stree, Calcutta, 2002, p. 170- 188.

[26] See Lerner, Gerda, op.cit.

[27] *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat* 1983 Cri. L.J. 1096 SC.

term, the 'invention of tradition'. The courts continue to use this tradition–modernity dichotomy, and reinforce it blatantly, as throughout this particular judgement, precisely because of the threat of the feminist agitation against rape. Lati Mani in her work as the discourse on Sati in the colonial period shows how "Tradition was thus not the ground on which the states of woman was being contested. Rather the reverse was true: women in fact become the site on which tradition was debated and reformulated".[28]

Phulmonee, a young girl who died as a consequence of marital rape in the 19th century in Bengal, was the subject of the explosion of an entire controversy over the rising of the age of consent from 10 to 12 years.[29] It was a well- publicized 'scandal' leading to a widely participated debate where the tensions between the reformist and nationalist Hindu elite voices can be seen clearly, it was a case with important consequences, leading as it did to the passing of the *Age of Consent Bill* by the colonial government in 1891, and a detailed examination of this case could also serve as a point from which to see how patriarchy reconstituted itself during colonialism, and how exactly the dichotomy of tradition and modernity were constructed to support these reconstitutions, and to ensure a 'recasting' of women. Even though I shall not be able to do so owing to certain constraints, even this brief an outline is enough to bring to our mind the fact there is a continuity in the operation of tradition and modernity of which women are the site.

In the colonial period it was the colonizer that was being challenged by the production of this dichotomy, I argue that in *Bharwada Bhoginbhai*, it is feminism (on the pretext that it is yet another 'western' idea) that is being implicitly challenged. Let us look at the case again in the light of this argument.

> ...(R)arely will a girl or a woman in India make false allegations of sexual assault on account of any factor as has just been listed. The statement is generally true in the context

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[28].Mani, Lati. "Contentious Tradition: The Debate on Sati in Colonial India" in Sangari, Kumkum and Vaid, Sudesh (eds.). *Recasting Women: Essays in Colonial History*, New Delhi, Kali for Women, 1989, p. 118.

[29] For a detailed analysis, see Sarkar, Tanika. *Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism*, New Delhi, Permanent Black, 2001, who argues that central to Hindu militant nationaism in Bengal was the issue of conjugality itself. See also Engels, Dagmar. *Beyond Purdah? Women in Bengal, 1890-1939*, New Delhi, Oxford University Press, 1996.

of the urban as also the rural society. It is also by and large true in the context of the sophisticated, not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too, from amongst the urban elites. Because: -

(1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred, (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours. (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being over powered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is a taboo. (9) The natural inclination would be to avoid publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husbands' (*sic*) family of a married woman, would also more often than not, want to avoid publicity on account of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence. (12) The reluctance to dace interrogation by the investigating agency, to face the Court, to face the cross- examination by counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.[30]

There are several points at which we can discern the patriarchal assumptions about women, particularly women's sexuality in this case. While the Court rules that corroboration is not required, it does so on the basis that the uniqueness of the Indian conditions make it possible for us to believe a woman who files a case of rape here. The exceptional cases are to found from among the elite women, and here, elite refers not to caste or class, but to the most *westernized* section of society- it would be apt to note at the very outset that the women's movement activists too are seen in such a light. This is at one level, a veiled threat that this belief in honesty of Indian women and the relaxations

[30] *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, op. cit.

thereby in the taxing demands of jurisprudence that the application of Indian traditions accord to women, shall be lost if they allow themselves to be swayed by Western influences, which has come to attack us now in the garb of feminism, and is causing them to distancing themselves from tradition. And it is also something that is already, really happening, not just a prognosis, for the Court asks us to look into the changes in reality- while almost every woman in an honour and tradition bound society can be believed when she alleges a man of raping her, there are a few who might indulge in false complaints- and these few women are likely to come from elite society.

Apart from routine reinforcing of the institution of family, and the regulation of female sexuality through it, it is clear what the additional message here to women is, "the sixty crores anxious eyes of Indian women" who are being addressed. The state is saying that it is for their own good that they are reminded to continue abiding by tradition, because if they are honourable by these standards, they at least stand a chance of getting justice from the courts of law. But if they were to become like the Western woman, these little relaxations will be pulled away from them.

What is especially worth noting is that this judgement was delivered in 1983, at a time when the anti-rape campaign was on, and yet it seems to have hardly had an effect on the Court. Although one arm of the state, the legislature is looking into the amendments in rape laws, the other arm, the judiciary, is busy completely denying a recognition of this struggle. This is plain when we notice the absence of the utilization of any sort of feminist concepts and terms in which rape ought to be understood, in the language of the Court. This absence speaks for itself; for, instead, we find the Court continuing forth to speak in an extremely patriarchal language. The terms of the discourse still remains to be set firmly on patriarchal grounds and there is a stubborn refusal to allow any *leakages* of feminism (excepting when the judge says, " male chauvinism in a male dominated society").

I suggest that these omissions, these pretensions that there is no campaign, no struggle outside the Courts is a deliberate strategy, and ought to be read along with something else, to which I shall come in a moment. It is a double reminder to women in India that feminism is bad as well as useless, ultimately harmful to women. It is more useful for women to continue to be faithful to Indian tradition, for they can then strike

bargains, however uneasy, with it, and take recourse to what it offers to 'honourable' women, chaste, virtuous and accepting women.

Seen in this light, I argue that the perplexity at finding the Court suddenly burst forth, as it were, and spending scores of words on describing the 'essential' nature of Western woman and the Indian woman and the differences between the two becomes apparent. It is about time that the law does *something* about the women's movement and what better way to do it, than by pretending to ignore it completely, posing as though it wasn't even worth taking note of, as if it really dint even exist, while delivering the judgement, and instead providing various other obviously anti-feminist points from the discourse can continue to go on, even and especially if it has to be potentially possible to offer advantages to individual women fighting the case. Let us examine how the Western woman is constructed through this case, to act as a sort of warning to what is impending to Indian women in case they choose to become Western:

> "It is conceivable in the Western society that a female may level false accusation as regards sexual molestation against a male for several reasons such as:
> (1) The Female may be a 'gold digger' and may well have an economic motive- to extract money by holding out the gun of prosecution or public exposure.
> (2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.
> (3) She may want to wreak vengeance on the male for real or imaginary reasons. She may have a grudge against a particular male, or males in general, and may have the design to square the account.
> (4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.
> (5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.
> (6) She may do so on account of jealousy.
> (7) She may do so to win sympathy of others.
> (8) She may do so upon being repulsed.[31]

[31] ibid.

One can see here the hidden equations between feminism, the West, mental illnesses, viciousness, moral depravity and so forth. The western woman might cry "rape, rape" in order to square her grudge against one man in particular, or all men in general. This implies that feminists are those, who, sometimes due to real, but most of the times due to imaginary reasons, bear 'grudges' against all men. The use of this particular word is not lost to us, having as it does undercurrents of pettiness, ill will and bitterness. In the game of revenge that the Western woman indulges herself in, the charge of rape becomes an ultimate tool.

There is another set of deeply problematic assumptions about women's sexuality and sexual conduct, in the sections on Western women. The judge remarks that a woman might be so mentally ill that she makes herself believe that she was rape, by 'phantasizing' (even spelt this way) so that she feels as if she were actually 'desired, wanted, and chased by males'. The alleging of rape has other curative properties- the degree of self-importance and ego-boost that it offers for the female who is wont to be, for reasons not mentioned, suffering from a deep sense of inferiority complex! By falsely implicating someone, she ensures fame for herself as she enters the public eye as a victim, and gains immediate celebrity status. It thus reinforces the idea that women's accounts of their rape emerges out of their 'hopeful' fantasies that this is true or becomes true in the future, and dismisses the actual violence that is at the heart of rape.

The *Bharwada Bhoginbhai* case is significant because it tries to reconfigure the tradition and modernity dichotomy for our times, and feminism is thereby addressed through this one judgement in ways that possibly has not been addressed in any other. But in wishing to show its continuity to the discourse on two other cases that had been previously stated, a few years earlier, but also *after* the anti-rape campaign had started, I shall cite from these rulings:

> When rapists are revelling in their promiscuous pursuits and half of humankind- womankind- is protesting against its *hapless lot*, when no *woman of honour* will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative testimony...When a woman is ravished what is inflicted is not merely physical injury, but "the deep sense of deathless shame".

"A rape! a rape!.....
Yes, you have ravish'd justice;
Forced her to do your pleasure." [32]

> It may be marginally extenuatory to mention that modern Indian conditions are *drifting into societal permissiveness* on the carnal front promoting proneness to pornos in life, what with libidinous 'brahmacharies', womanising public men, *lascivious dating and mating by unwed* students, sex explosion in celluloid and book stalls and corrupt morals reaching a new 'high' in high places. The unconvicted deviants in society are demoralisingly large, and the State has, as yet, no convincing *national policy on female flesh* and sex sanity.[33]

What we see in these two instances is the attempt to emphasis the 'national' culture, the traditions that are being eroded. Whereas in the first case, it is no woman of honour in the Indian setting that deserves the special emphasis, in the latter case, it is a general lament on that modern Indian conditions are drifting into societal permissiveness, and thereby causing a depressingly low level of morals. The court's bemoan on why the state has no 'national policy on female flesh' points clearly shows us that one of the primary functions of the state is precisely to have such a policy with which to govern the 'female flesh', by which we assume that the reference is to women's sexuality or to women's bodies. There is also a reference to the anti-rape campaign in the second case cited above, and it is portrayed as emerging almost as a plaintive plea for protection from the state.

In the *Satto & Others v. State of U.P.* case, although the judgement was delivered before the Mathura case, what is interesting is that the court is so full of compassion for the three rapists of the eleven year old girl, because they are young boys. These boys "forcibly went through the adolescent exercise of rape", and "it is not as if these little lads are incorrigible rapists or violent toughs running amock."[34] Here, the voice of the judge is reminiscent of that of a patriarch who is gently admonishing little boys who might have run away with a little money to buy some sweets from the corner store. Here, the court

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[32] *Rafiq v. State of Uttar Pradesh* 1980 Cri. L.J. 1344 SC, emphasis mine.
[33] *Phul Singh v. State of Haryana* AIR 1980 SC 249, emphasis mine.
[34] *Satto & Others v. State of U.P.* 1980 L.W(Crl.) 1.

goes through a large amount of research done on the conditions of remand homes, and their effects on juvenile offenders, but not once is there ever an attempt to cite even one feminist text on sexual violence.

CHAPTER FIVE

CONCLUSION

Every feminist analysis is caught in the battle of providing a vision in theorizing reality in ways that does not pose women as mere victims of oppression- because we have seen that women are not just victims of oppression, and noted how women have historically used varied forms and modes of resistance. On the other hand, it must also steer clear of posing women to be completely free, with unrestricted agency, who can by various methods, escape all the strictures of systemic prescriptions for their behaviour.[1] This current study about sexual violence and judicial discourse in India is no exception.

Instead of trying to assess exactly just how much agency the individual possesses to act against prescriptions of structure, it might be more useful to look at the debate over the exact relationship between structure and human agency from a slightly different angle, and from a slightly different focus point, look instead at how the structure is enforced, often violently over individuals whose acts of agency are both obvious and dangerous to the order.

In this light, it is hoped that this study has suggested that just as sexual violence itself is crucial to the reproduction of patriarchy, caste and class, so too, the judicial discourse on it has to be seen as one of the ways in which the structure of caste, class and gender reiterates itself to punish those women who violate the systemically imperative codes for women's sexual conduct. It is hoped that by showing exactly how such women are punished severely by the State, in this case through the rape laws, for being sexually active in ways that are outside the prescriptions of the structure, it is also shown that much as women might be posited as solely sexual objects, women really do not allow themselves to be reduced thus to the status of an object. And yet, this becomes a reason for the state to punish *them*, instead of their rapists, thus marking them off as women who are freely available to all men.

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[1] See Kumkum Sangari's "Consent, Agency and Rhetorics of Incitement" in Sangari, Kumkum. *The Politics of the Possible*, New Delhi, Tulika, 1999, for an extremely useful article how to move away from any simplistic understanding of women's agency onto a clearer understanding of how women's agency "within so-called 'traditional' societies and accompanying discursivities may actually be one of the ways by which consensual elements in patriarchies are often made."

But for dalit and other lower caste women, and tribal women who fight their rapes in the courts, the judicial discourse is considerably different. Here, it is not a case of punishing them for violating prescriptions. Rather, they are assumed to *always and already* be in that position, and these 'sexual stereotypes', which are justifications for the routine violent sexual expropriation they are subjected to by upper caste men, come to dominate the judicial discourse.

If judicial discourse on rape law was to be an index of how women actually live, then the majority of women would seem to be living out their entire lives in a vicious circle in their attempt to rise over their class and caste and gender. To start with, they are 'dishonourable' women. So they desire and manage to have sex with every possible man. This again makes them more dishonourable. In an attempt to overcome this, and claim a place and status of honour, they cry 'rape, rape' and accuse men of having forced them whereas the contrary is what is held to have happened in most likelihood. Their claims are dismissed by the courts, and the State restores them back into their original category- of 'non-respectable' women. If there is any outcome at all of their futile exercise to overstep their place and wish for something better, it is only that they are made even more non-respectable. The judicial reasons in the Mathura case are perhaps the most evident example of this. Thus, the judicial discourse on rape speaks the language of the sexual stereotypes that reproduces caste, class and gender, and confirms an easy access for men, to lower caste women, tribal women and dalit women.

Thus, if rape is intended not to be an act of violence like other acts of violence that are 'non-sexual' in nature, but is specifically the violent appropriation of a woman's sexuality, then it brings to mind one issue of specific import to feminist theory on rape and of strategic import to the feminist struggle to end it, an issue that we looked at in the third chapter on the section on how rape ought to be classified in the register of law. What some feminists envisage in the advocacy of a move to classify rape as an act of violence is that the realm of the *sexual* is separate from the realm of *violence*. As we saw, such an argument, in the first place, deems the two as separate realms, far from what actually constitutes reality.

Then what is it that is really conceived behind this move? Undoubtedly, whatever the outcome and meaning of it, it emerges from the intention of ensuring that rapes are

punished, and that rapes ultimately do not occur at all. But is the intention enough by itself? That this is a strategic move is not lost on us. The question that we ought to pose here is: is this strategy going to be of use, even in the '*here and now*'? For it is considerations of the *here and now* that makes movements, however radical and revolutionary the complete vision may be, strategize. To overthrow the entire system of oppression is our ultimate goal; but in the meanwhile, women continue to live in these conditions of oppression. A strategy means this much and nothing more: that, for this 'meanwhile', there be some measures against our subordination.

The pertinent question is whether this strategy of the legal reclassification of rape to an act of violence is going to be effective when women fight their rapes in the legal sphere.[2] But how far can it help us fight rape in the legal arena? Reclassifying rape as violence does not fool *anybody* about its connection with sexuality, least of all the state. We had examined some of the arguments made, and these were based on the ground that the judiciary's greater level of disbelief of victims of rape, as compared to victims of other acts of violence would lessen with rape being removed from the area of sexual offence and moved into the area of violence. But we have seen precisely what the considerations of the courts are in expressing their disbelief of women who are subjected to rape, and who are the women come under this suspicion more often than not. Where not only rape, but the rape law too, is a significant part of the structure and the processes that reproduce it, a change in classification will not change the entire judicial discourse on it.

With this, we proceed to take on another question that looms large in our horizon, which is what is the relationship between feminism and the law.[3] I do not intend to say that the impossibility of overthrowing the structure through 'small' strategic measures makes us discard these attempts and struggles themselves. The winning of these measures, however small or insignificant they seem when seen in the context of an entire

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[2] In a sense, this is more important immediately than arriving at a theoretical position on rape that best reflects it reality, and I write this because it strikes me thus, in spite being aware of the dangers on thus separating theory and struggle.

[3] In the Indian context of this relationship over issues of violence against women, see Agnes, Flavia. "Review of a Decade of Legislation, 1980- 1989: Protecting Women Against Violence?" in *Economic and Political Weekly* (7), WS19- WS33, 1992.

structure, is also the effort of many struggles. We had seen in the third and fourth chapter, for instance that what might seem to some as an extremely small struggle to pressurize the State to remove the marital rape exception clause is actually an extremely critical issue, and is connected to the root of the material basis and the social relations of gender. Ultimately, struggles that battle against a structure is part of the continual and larger feminist project of an entire end to domination and subordination, and cannot be dismissed away as irrelevant.

Thereby, in this context, while we realize that the legal sphere is not the only sphere of struggle, it is nevertheless *one* of the sites of struggles. We can't simply wish away the law, or pretend that we don't need to engage with it. We have to fight it, but that is not our sole agenda. An examination of the judicial discourse on rape reveals the nature of the state and how this discourse is one of the ways in which the interests of the dominant groups are protected and furthered by the state, and an area for struggle.

By way of continuing the concluding remarks on the strategies of the women's movement, I also wish to address the question of the need for a radical and continued struggle against sexual violence. In the second chapter, when trying to arrive at a framework for the current analysis, we saw the circumstances that led to an emphasis on sexuality in feminist theory, and on struggles against the various forms of sexual oppression that women face. Whatever the limits of a feminist struggle that emphasizes only on sexuality as a site of struggle, the strategic import of this emphasis on sexuality for the women's liberation movement at that historical moment is not lost to us- if all women, albeit in extremely varying degrees, across class, caste and race are subject to an appropriation of their sexuality by men, then it makes one of the most obvious case for the recognition of *women* as a separate group, a recognition that had to be fought for, and removed from previous attempts that treated gender only tangentially. Where the institutionalization of caste, gender and class make it extremely tenuous indeed dangerously presumptive to take for granted any alliance, between women across class, caste as well as religious identities, whatever similarities in the appropriation of all women's sexualities could be used by the women's movement to forge that alliance, however weak and transitory it might be to start with.

It is interesting to note here, how the issue of sexual oppression of women has figured as a strategy of Marxist-Leninist groups in India. As Prem Chowdhry notes, "...the extreme left Marxist- Leninist groups in Bihar have successfully used the resentment and resistance of lower castes to the sexual exploitation of their women by higher caste landowning class men as a mobilization issue and strategy."[4] Similarly, U. Vindhya notes of the women's organizations allied to CPI (M-L) PW in Andhra Pradesh that were formed during mid 1980s, "...one of the first issues that these urban-based groups took up was that of violence- individual instances of violence against women in the family, rape and molestation- similar to the one the women's movement had addressed in an earlier phase."[5] She offers also an interesting contrast between how 'patriarchy' is used quite freely in the party documents but the term 'feminism' itself continues to be seen as diversionary. The 'sexuality debates' and the debate over 'patriarchy', which we looked at in the second chapter for deriving a framework of analysis, have indeed come to have far reaching results.

Lastly, there is another particular danger that we ought to address in any feminist analysis of sexual violence, which is the danger of enforcing a desexualized existence by focusing solely on sexual violence. This cannot be of more importance than to our contexts. It is interesting to note that Madhu Kishwar, in fact, provides celibacy for women as *the* strategy for women to draw the 'respect' that patriarchy grants to women, thereby speaking the same insidious language of patriarchal ideology. [6] So how does feminism address the perils of equating sexuality with sexual violence, and making it seem as if women's experiences of the realm of sexuality were only one of oppression? Not as, some would suggest, by completely *dis*-privileging feminism as a site of theories on sexuality, but by consistently and painstakingly building up a model of understanding

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[4] Chowdhry, Prem. "Enforcing Cultural Codes: Gender and violence in northern India" in John, Mary E. and Nair, Janaki (eds.). *A Question of Silence? The Sexual Economies of Modern India*, New Delhi, Kali for Women, 1998, p. 347.

[5] Vindhya, U. "Comrades-in-Arms: Sexuality and identity in the contemporary revolutionary movement in Andhra Pradesh and the legacy of Chalam" in John, Mary E. and Nair, Janaki (eds.). ibid, p. 170. She offers also an interesting contrast between how 'patriarchy' is used quite freely in the party documents but the term 'feminism' itself continues to be seen as diversionary.

[6] Kishwar, Madhu. "Women, Sex and Marriage: Restraint as a Feminine Strategy" in *Manushi*, Vol. 99, 1997,p. 23-36. This is precisely what the judicial discourse on rape offers to us, holding women responsible for their rapes by being non-chaste.

sexuality that does not see women are purely victims of oppression. Feminist theory seeks to address the various ways in which women's systemic subordination is ensured. Feminism is also at once a vision of the future, where there is no dominance and exploitation, as also a vision of the past and present that sees women trying to act in the world in terms over which they have some control at least.[7] Here, we need to note that Kalpana Vishwanath shows us how the women's movement in India has addressed the links between gender, sexuality and shame, thereby salvaging the realm of sexuality from being predominantly ruled by that of sexual oppression, which in any case, is not what constitutes all of women's sexual experiences in reality.[8] Sandra Lee Bartky, in an extremely interesting essay, writes of how the general 'women's shame' and gender, as well as the specific 'shame of embodiment' produce various forms of psychological oppressions that women are subjected to, "the "generalized condition of dishonor" which is women's lot in sexist society".[9] The women's movement here has had to directly address how shame figures in enforcing women's subordination, and how we ought to contest it.

The link between shame and sexuality brings us finally to one of the issues that we started with, which is the issue of why a State that is patriarchal speaks of imposing death penalty on rapists.[10] In one of the cases that we have reviewed, the *Kamta Tiwari v. State of Madhya Pradesh*, the Supreme Court in 1996, upheld death penalty for the man who had raped and murdered a young girl.[11] Oft-repeated statements by persons who are in the machinery of the State for imposing 'death penalty', do not emerge out of the justification that severe punishment to rapists will serve as a deterrence (which is undoubtedly an eye-wash, because rape which is systemic cannot be ended by the State

[7] There is a poem by a-dZiko Simba that says, "Sisterwoman sisterwoman Talk about the pleasure Talk about the pain that seems to capture this adeptly. See Simba, a-dZiko. "Woman Talk" in Cobham, Rhonda and Collins, Merle (eds.). *Watchers and Seekers: Creative Writing by Black Women in Britain*, London, The Women's Press, 1987, p.13.

[8] See Vishwanath, Kalpana. "Shame and Control: Sexuality and Power in Feminist Discourse in India" in Thapan, Meenakshi (ed.) *Embodiment: Essays on Gender and Identity*, New Delhi, Oxford University Press, 1997.

[9] Bartky, Sandra Lee. "Shame and Gender" in Bartky, Sandra Lee. *Femininity and Domination: Studies in the Phenomenology of Oppression*, New York, Routledge, 1990, p. 85.

[10] For an essay on the issue of death penalty and rape, see Kannabiran, Kalpana and Kannabiran, Vasanth. *De-Eroticizing Assault: Essays on Modesty, Honour and Power*, Stree, Calcutta, 2002, p. 96- 103, titled "Death for Rape?"

[11] *Kamta Tiwari v. State of Madhya Pradesh* 1997-1-L.W. (Crl.) 153.

imposing such penalties) but also because there is an implicit assumption that women who are raped suffer a death of sorts, owing to the 'deep sense of deathless shame' that their rape evokes in them, and assumption that is reiterated in judgement after judgement on rape. The death penalty imposed on rapists thereby seems to be a *just end*- a death for a death- one being the actual death of the rapist imposed by the State, and the other, a 'death' that women *ought* to feel as soon as they are raped, and continue to feeling all their lives.

But we need to dismiss this, knowing very well what reasons are the state's reasons for this, not only because it emerges from patriarchal grounds, but also because we ought not to give the state more power than it already has. At the same time, we reject the shame that is associated with rape. As Purewal and Kapur write, "Shame is the power with which society represses women and permits sexual violence. Refuse men that power. Do not feel ashamed".[12]

[12] Purewal, Jasjit and Kapur, Naina. *Have You Been Sexually Assaulted?*, New Delhi, p.17.

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