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GENDERING THE LAW

THE LAW AND PROSTITUTION

BUDDHIST PRINCIPLES AND DOMESTIC VIOLENCE

LAW & SOCIETY TRUST

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Editor's Note

The first two Papers published in the Review cumulatively deal with the injustice of the law and social structures towards women in marginalized categories; respectively in the context of battered women and in regard to sex workers.

The first paper by **Priya Thangarajah** engages in an overview of the gender biases that still exist in the realm of law through a study of the 'Battered Woman Syndrome'. It examines judicial decisions and theories propounded as well as the steps taken in making the law, gender sensitive. This paper's basic assumption is that law is epistemologically biased and the neutrality that purportedly exists in law is created and maintained for the heterosexual middle class male.

The writer has not focused on the domestic violence laws recently enacted in Sri Lanka and India due to the absence of comprehensive case studies regarding the same. There is no doubt however that as praiseworthy as these particular laws are, their specific impact upon battered women remains to be seen. Previous legislative amendments to the penal laws, such as for example, regarding the prohibition of sexual harassment have been minimal in terms of their practical impact in Sri Lanka. Theoretical laws can accomplish little, after all, if prevailing social structures, a hostile legal process, unsympathetic judges and the absence of general awareness regarding the positive impact of such laws continue to discriminate against women.

The second writer, **Ponni Arasu** maps out a historical survey of sex workers and the applicable law during the colonial period in India. The paper attempts to analyse the process by which laws regarding sex work evolved in this region and points to some aspects of the applicable debates. It begins with the enactment of the Indian Contagious Diseases Act in 1868 and continues to analyse various versions of laws in different provinces which criminalized aspects of sex work, such as brothel keeping, soliciting customers, pimping and so on. This historical survey is then broadly contrasted with the current debates around sex work in India which has extended over the past 20 years and more.

It is important to understand that this paper tries to interrogate the constructed common sense understanding of 'sex workers as criminals' in the South Asian region today while emphasizing sex workers' articulations of their lives and rights and denial of the latter over time.

The third article by Ouyporn Khuankaew offers some appealing personal glimpses into the thinking of an activist struggling to come to terms with the contrast often presented between pristine religious teachings and actual practice. While this writer's views are put forward in the context of Buddhist teachings, there is no doubt that similar critical reflections may be relevant regarding practices propounded by Judeo-Christian theologians as well as those of the Mohammedan and Hindu faiths that impact adversely upon women.

Kishali Pinto Jayawardena

Gendering the Law

*Priya Thangarajah**

1. Introduction

This research paper addresses and seeks to answer the following questions: What is the Battered Woman Syndrome? Have the courts been sensitive enough to understand 'women who kill'? What are the problems that have risen from the use of this defence?

In regard to the scope and limitations of the research, it must be noted that this paper has restricted itself to one arena of gender bias; namely that of the Battered Woman Syndrome as a defence in murder. While rape laws or the law on sexual deviants also show ample proof in this regard, the researcher chose the Battered Woman Syndrome due to several reasons. First, women are seen as passive agents and as peace lovers. Measured against these standards, the violent act committed by them is shocking for the patriarchal legal system. Second, the recognition of this theory *per se* has then been in 'male terms', where the syndrome has been reduced to a pathological state. The lack of judicial decisions in India and Sri Lanka in this regard has been the paper's biggest drawback. But it must be noted that the reason for the same is that the law in these countries has been slow in coming to terms with violent women. For many years, domestic violence was seen as a private matter. Though laws on domestic violence have been enacted in both Sri Lanka and India, the impact of such laws is still at a preliminary stage. Consequently, legal proceedings relevant to these laws are not examined in this paper.

For the purpose of systematic and lucid presentation of data, the paper has been divided into three sections. The first section deals with the nature of the Battered Woman Syndrome and how the courts, in the exercise of the general criminal law, have dealt with the same. Section two examines an example of a case in India and the reaction of the Court. The final section looks at the problems that have been faced by women in using the Battered Woman Syndrome as a defence

Some preliminary thoughts may be relevant at this point. It is clear that the law makes the grand claim of neutrality and objectivity. Dworkin assures us that law is practiced through a scientific method that is applied to the facts of the situation and thus has no element of subjectivity. He goes on to argue that when law is not clear on a certain issue then judges may use their discretion in coming to a decision. Critical legal theorists such as Rosco Pound, Oliver Wendell Holmes and Lewlin have argued otherwise claiming that law is what the judge creates while sitting in his chair. Feminists too have criticised the neutrality of law claiming that there exists an epistemological bias in law, against not only the female but also against other minorities. The universality of the law, they argued, depend on those who have the power (through a reading of Foucault) to make some particulars universal while others are left out. Exclusion is achieved by differentiating between those particulars that fit a general rule and those that do not, and silencing the latter. Most feminists are committed to the position that however natural and common sense sex

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differences may seem, that these differences are not biologically compelled but rather that they are socially constructed. They (feminists) have challenged the private/public dichotomy of law which has left women unprotected and exposed against male brutality.

The 1970s saw the abuse of the wife by the spouse brought into the forefront of the public arena.¹ Feminist legal analysts concentrated on men's violence against women as a direct imposition of patriarchal power. Theorists such as Dobash found that men use violence as a punishment for the failure of women to fulfill their un-communicated sexual, emotional and physical needs. Feminists argued that violence is seen as a sign of manliness. The batterer sees his acts of violence as a characteristic of being 'male'. Judith Butler's theory of performativity extends this theory by suggesting that it is through this performance that the gendered subject is created. For Butler then, the 'masculine identity' exists only in the actions of the individual.² Feminists have also challenged the male perception that structured the definition of rape and discounted the harm of domestic violence. Another site of discrimination that is being currently looked at is the treatment of female criminals.³ The law generally compels and legitimizes the role of power in relationships and also helps to shape the way in which we perceive the role of the 'proper women'. Recent pedagogical endeavours in this regard have led many to question; does gender equality intend to protect the teenager from sexual aggression through statutory rape laws? Alternately should this concept envision respecting the sexual choices of the teenager and abolishing the law altogether? Further, should biological differences that influence criminality be stated or ignored? Should there be preferential treatment of female offenders given their gender roles and family responsibility or should the sentencing thereof be gender neutral?

Roberts argues that just as feminist looked at violence against women as a political act in keeping women in control and subjugation, violence perpetrated by women should also be looked at from a political angle rather than a biological one. This biological view casts the offender as a victim of a biological fate rather than an agent acting in a specific social and political context.⁴ Then the cure for this is to punish or cure the offender rather than change that oppressive situation in which the act was committed.

2. Women who kill

In general the law's response to the problem of violence in intimate relationships has not been swift. For centuries, legal actors neglected to notice or address the issue, an omission linked in large part to the broader problem of gender inequality deeply entrenched in the patriarchal culture. The common law of the Anglo-American world permitted the "master of the household" to "chastise" his wife using corporal punishment, as long as he did not inflict permanent physical injuries.⁵ Although American judges had

¹ Anderson. K. L. and Umberson. D.; *Gendering Violence: Masculinity and Power in Men's Accounts of Domestic Violence*; *Gender and Society*; Vol. 15, No. 3; June 2001 at 1

² Butler. J as cited from Anderson. K. L. and Umberson. D.; *Gendering Violence; Masculinity and Power in Men's Accounts of Domestic Violence*; *Gender and Society*; Vol. 15, No. 3; June 2001 at 1

³ Roberts. D. E.; *Symposium: Gender Issues and Criminal Law*; *Journal of Criminal Law and Criminology*; Vol. 85; No.1; 1994 at 1

⁴ Roberts. D. E.; *Symposium: Gender Issues and Criminal Law*; *Journal of Criminal Law and Criminology*; Vol. 85; No.1; 1994 at 10

⁵ Goldfarb. P.; "Intimacy and Injury: How law has changed for battered women"; Paper 18; 2004 at 2

explicitly rejected the doctrine of chastisement by the late nineteenth century, instead they began affirming a common law doctrine of family privacy that justified legal non-intervention in the marital relationship, despite evidence that a husband was subjecting his wife to physical abuse.⁶

Due to this history of dramatic under enforcement of crimes of intimate violence against women, feminist activists and an influential victim's rights movement combined their energies to remove the cloak of privacy from the problem of intimate violence and to position the issue within the public political agenda of the 1960s and 1970s. As battered women's advocates have observed, legal decision makers' perceptions of battered women are often still plagued by stereotypes and misperceptions. These problems manifest themselves acutely when legal interventions do not succeed in preventing intimate violence, and battered women find themselves on trial for killing their abusers.⁷

In an intimate relationship that becomes violent, the violence may become lethal. When it does so, the violence in the relationship has generally escalated to the extent that the abuser in the relationship kills the abused.⁸ Over the past three decades, psychologists have sought to understand more clearly the dynamics of abusive relationships, the experiences of battered women, and the psychological consequences of living for an extended period in an intimate relationship with a batterer.⁹

In the 1970s, psychologist Lenore Walker coined the term "Battered Woman Syndrome", a subspecies of post-traumatic stress disorder, to explain the perceptions and behavior of women in such situations.¹⁰ The Battered Woman Syndrome is a descriptive term that refers to a pattern of responses and perceptions presumed to be characteristic of women who have been subjected to continuous physical abuse by the partners.¹¹ Battered women's experience often include a history of threats of death by the husband, prior life threatening incidents by the spouse, and a belief that eventually her husband will kill her.

Walker divided the syndrome into three stages. First, "the tension building stage", consisting of minor abusive incidents in regard to which the woman is able to appease herself, thus convincing herself that she has control over the matter. Second, the 'acute battering stage – namely the stage when the severity of the battering escalates and then is followed by contrition where there is a show of remorse by the abuser convincing the victim of the abuser's remorse, but overtime the violence escalates both in its frequency and severity.¹² The third stage is the "Psychological paralysis" state. This is where the woman is left feeling guilty in regard to what she perceives as her inadequacies as well as feeling helpless as she becomes more and more convinced that she cannot leave the relationship due to emotional and financial dependency, lack of support from outside and social stigma. Thus, she increasingly cuts herself away from family and friends. At some point the woman might decide to break the cycle either by killing or causing grievous bodily harm to the batterer. If she is charged with homicide, while she will not deny the

⁶ *Ibid* 3

⁷ *Id.*

⁸ *Id.*

⁹ *Ibid* at 7

¹⁰ *Ibid* at 9

¹¹ Schuller, R. A. and Vidmar N.; "Battered Woman Syndrome: Evidence in the Courtroom"; Vol 16,

No. 3; Law and Human Behaviour; 1992 ; at 3

¹² *Id.*

charge, she will claim that the act was committed in self defence.¹³ But it has been extremely difficult to convince the courts of the merits of the claim. The obstacles to this difficulty in the legal scene are two pronged: the laws on self defence and pre conceived beliefs that people, including judges possess, in regard to relationship violence.

Criminal law generally assumes that people know how to behave and can choose their actions. In some instances however, criminal law accepts external forces as being responsible for a person's actions. Therein lies the inconsistency in criminal law as a theory and contingent intervention as a strategy¹⁴ Self defence for so long was narrowly defined as violent interaction between two males leading one to defend himself for self preservation. But with time, this began to be interpreted widely with the realization that a woman cannot (due to social, economical and cultural inequalities) defend herself in the same manner as a male, even more so when she has been a victim of spousal abuse for an extended period.

Under the self defence doctrine, a killing is justified only if the killer

- a) genuinely and reasonably believes
- b) imminent danger of death of grievous bodily harm and
- c) used reasonable force to counteract
- d) unlawful force.¹⁵

In *Ibn- Tamas v. United States*, the trial court refused to admit expert testimony of the Battered Woman Syndrome. This was the first case where the Battered Woman Syndrome was used as a defence.¹⁶ The appellate Court allowed the rule of enabling expert testimony in this instance. *Ibn-Tamas*,¹⁷ a nurse was married to a man in the medical profession who beat her often, and had a history of violence toward women. When she was pregnant, the victim beat her in consequence of which she shot/killed him and was then charged with murder. *Ibn-Tamas* argued self-defence. Witnesses at the trial testified that he had begged her not to shoot. An expert testified in regard to the "Battered Woman Syndrome." But the Judge refused to let the testimony be heard, saying that the victim was not on trial. The Appeals Court reversed the decision, and said that an "expert can testify, even to question, where the subject matter is beyond the understanding of the average layman."¹⁸

It is of note that the law also requires the defendant to establish imminent danger. Thus the doctrine focuses on the temporal character of danger as is illustrated in the following examples. Deborah Davis¹⁹ shot her husband as he slept. He had threatened to kill her once he woke from his slumber. Powell²⁰ shot her husband while trying to take the gun away from him as he suddenly awoke from his sleep.

¹³ *Id.*

¹⁴ Zimring. F. E.; Towards a jurisprudence of family violence; Crime and Justice; Vol. 11; Family Violence; 1989

¹⁵ Creach. D. L.; "Partially determined imperfect self defence: the battered wife kills and tells why"; Vol. 34 No.3 Feb; *Stanford Law Review*; 1982 at 4

¹⁶ Hereafter, at times referred to as BWS

¹⁷ *Ibn-Tamas v. US* 407 Atl Rpt 2d 626 US Circuit Ct of Appeals for DC; DC; 1979

¹⁸ *Id.*

¹⁹ As cited from *supra* note 14

²⁰ As cited from *Supra* Note 14

Proportionality of force is another element that is important – this involves instances where women shoot unarmed spouses.²¹ The doctrine also requires that there should be no initial act that the batterer responded to. Some courts have even gone as far as holding that there should be no fault at all by the women, for example, no willingness to fight, or otherwise provoke the attack or invite it.²² While in some cases, the court acquitted women who killed their husbands in their sleep as they had threatened to physically and sexually abuse them as they had done in the past, some courts charged the women of the crime even when the alcoholic husband was charging towards her.

Later, the attitude of the law changed somewhat. In *State v. Kelly*²³ expert testimony relating to the Battered Woman Syndrome was accepted. Traditionally women who commit acts of violence have been seen as irrational or insane. In the past, the defence of insanity was almost always routinely applied to cases where battered women killed. Traditional sex role attitudes in marital relationships may make the court biased towards these women who kill.²⁴ *Lavelle*²⁵ a leading Canadian case in this regard, described the manner in which the traditional common law has ignored women in regard to these definitions. Later, the law changed also in stipulating that the act does not necessarily need to be committed after the provocation.²⁶ The primary thrust is to establish a pattern of responses exhibited by battered women. The important fact to be kept in mind was that these are not responses given by normal women but women who have undergone years of abuse.

In 1981, just before Richard Celeste had become Governor, the Ohio Supreme Court had decided *State v. Thomas*²⁷, upholding the murder conviction of a battered woman despite the trial judge's exclusion of expert testimony on the Battered Woman Syndrome. In March 1990, the Court reversed itself. In the landmark case of *State v. Koss*²⁸, the Court overturned a battered woman's conviction for voluntary manslaughter against her batterer due to the exclusion of expert testimony concerning the Battered Woman Syndrome (BWS). Later in 1990, the state legislature adopted a statute permitting the admission of expert testimony regarding BWS in the trial of a defendant who pleads self-defense to charges that she committed violence against her batterer

In a 1993 case known as *Rogers v. State*²⁹, the Florida Court of Appeals authorized the admission of expert testimony on the Battered Woman Syndrome in appropriate cases. Despite the new case and the new rules for clemency, Florida's battered women activists chose to proceed cautiously, avoiding mass applications for clemency and recommending that each petitioner file an individual request for commutation. By the end of 1993, sixteen battered women had filed an individual application for

²¹ *Supra Note 15* at 11

²² *Supra Note 15* at 12

²³ as cited from *supra* note 15

²⁴ Follingstad, D. R., Poleck, D. S. et al ; "Factors predicting cases where battered women kill their husbands"; Vol. 13; No.3; *Law and Human Behaviour*, 1989 at 11

²⁵ as cited from *Supra Note 24*

²⁶ O'Donovan, K.; "Laws knowledge: the judge, the expert, the battered woman and her syndrome"; Vol. 20 No.4; *Journal of Law and Society*; 1993 at 5

²⁷ as cited from *id.*

²⁸ As cited from *Id*

²⁹ *supra* note 24 at 11

clemency under Florida's revised procedures. After separate hearings, two women were granted clemency and they were released from prison in 1993. In a 1990 case called *Commonwealth v. Craig*,³⁰ the Kentucky Supreme Court embraced an expansive understanding of the Battered Woman Syndrome. Reversing prior law, the Court indicated that the Battered Woman Syndrome was not a psychological condition about which only a mental health professional could attest, but one about which information on the dynamics of battering and its consequences was broadly relevant.³¹

In *State v. Wanrow*³², the Washington Supreme Court ruled that the accused who had been on crutches, had committed the killing in self-defense when the deceased, a known child molester with a history of violence, entered her home. The court stated thus:

*"It is clear that the jury is entitled to consider all of the circumstances surrounding the incident in determining whether the defendant had reasonable grounds to believe grievous bodily harm was about to be inflicted".*³³

In *State v. Garcia*³⁴ (1977) the defendant had been physically and sexually assaulted by two men who threatened to return. Garcia went home, got a gun, and killed the men. In her second trial she was acquitted on the grounds of self-defence. It has since been argued successfully in many US courts that the victim of the Battered Woman Syndrome who kills during a lull in her partner's violence even whilst he is asleep may be seen to believe that she is in immediate danger, if one defines the reasonable perception as based on the reasonable perception of a battered woman and not the reasonable perception of the heterosexual middle class upper caste male. The Battered Woman Syndrome theory suggests that the woman is living in a constant state of terror, convinced that one day her partner will kill her. In this situation, the immediacy of danger is a constant.³⁵

Since in a battering situation, violence is always a strong possibility, the threat is always there, even during the ostensible lulls. It must be remembered that the women in these cases are not alleging that because they are battered that they have the right to kill, but that because of the 'history of violence in the relationship', they have become 'sensitive to cues from the batterer' that generate a feeling or belief of imminent danger³⁶

Reasonable amount of force

The State v. Wanrow, (cited above), also dealt with the issue of whether a woman can use a weapon to defend herself if the male is not armed. This particular court recognized that to fight equally with a man, a woman may need to use a weapon.

³⁰ See *Commonwealth v. Craig*, 783 S.W.2d 387 (Ky. 1990).

³¹ *Supra* Note 15 at 4

³² *Supra* Note 24 at 14

³³ *Supra* Note 24 at 14

³⁴ *Supra* Note 24 at 14

³⁵ *Supra* Note 24 at 14

³⁶ *Supra* Note 24 at 14

It is clear that the idea of equal force being defined as the same for a woman/man conflict as opposed to a male/male conflict is unacceptable given not only the physical differences but also the gender differentiation in socialisation that is commonplace. When considering BWS victims, one must also remember that most of these women have endured long-term punching, throwing, choking and kicking. Their partners' hands, fists and feet have in fact been dangerous and potentially lethal weapons. Yet, until recently in America and in Australia, case law has not been interpreted to include the danger of these body weapons as grievous enough or as a serious enough threat to permit self-defence with a non-body weapon.³⁷ Juries, without understanding BWS and the dynamics of battering, see a gun or a knife as excessive force in relation to the batterer's violence.

The adversarial legal system tends to reject complexity and appears to insist that all human conduct could be distilled into simple explanations. Explaining that battering relationships are typically characterized not just by physical violence but by other manifestations of coercive control requires a more sophisticated analysis of the long-term dynamics of the relationship rather than descriptions of violent episodes.³⁸ Despite significant social progress in understanding the problem of intimate violence, traditional notions of gender remain a powerful force in the assessment of any battered woman's self-defence claims. Actual women - diverse, flawed, and complex - often fall short of the cultural ideal and are found less credible. If understanding their situation requires understanding the long and psychologically complex dynamic of a relationship, then the adversarial system is a poor forum for conveying that truth.³⁹ The consequence is that many battered women are disbelieved. In these circumstances, disbelief can have dire consequences, including incarceration, injury, and even death. The more the accused diverges from the internalized cultural understanding of the good battered woman, the greater her credibility problems. Perhaps not surprisingly, experience has shown that the features of the good battered woman stereotype are drawn from the traditional female stereotype to the extent that the less demure, docile, and deferential the battered woman is seen to be, the more credibility problems she has encountered.⁴⁰

Battered women's survival strategies, such as self-medication with drugs or alcohol, and previous instances of fighting back, may lead to a counter story that she provoked intimate violence. Women who are perceived to fall outside narrow and traditional gender role expectations of mainstream culture, whether by personality (e.g. independent, assertive) or identity (e.g. lesbians, African-American women), face particular difficulties in having their claims to have acted out of fear for their lives seen and heard.⁴¹ Battered women's credibility problems are exacerbated by the fact that the techniques routinely used by the legal system to assess credibility do not comport with psychological understandings of reactions to trauma.⁴²

³⁷ as cited from *Supra note 15*

³⁸ *Supra Note 15* at 4

³⁹ *Supra note 24* at 11

⁴⁰ *Supra note 24* at 19

⁴¹ *Supra Note 26* at 4

⁴² *supra note 26* at 5

For example, a standard technique in the adversary system is to impeach a witness' credibility by showing that the witness made prior inconsistent statements about pertinent events, making it more likely that current statements are manufactured. However psychologists indicate that among the consequences of trauma are confusion, disorientation, and memory repression, such that soon after a violent event a woman may provide the police an account that during a recovery process, she comes to know as false or incomplete.⁴³ A court's evidentiary system is organized around an understanding that contemporaneous accounts are more accurate than subsequent accounts. Therefore battered women may confront a paradox. The memory complications that can flow from the violence that some battered women suffer are regarded as undermining the reliability of current accounts of that violence.⁴⁴ Yet with respect to the psychological reality of the situation, initial memory problems may actually support a finding that she suffered significant trauma, and subsequent accounts may be the most accurate versions of events. The problem then is that it is not a diagnosable mental disorder but rather the effects of battery on women. Because of this, the state of the women's mind might be perceptively different from that of a 'reasonable man'.⁴⁵

In one case where BWS was disallowed, it was on the basis that the elements had already been accounted for in a correct judicial instruction on self defence.⁴⁶ On the other hand, BWS has been accepted as useful in explaining the state of mind of the women after the killing and during the offence (*People v. Minnis 1983*).⁴⁷ In many of these cases, the Battered Woman Syndrome itself has not been used as a defence; rather it has been used to convince the jury that the woman thought there was grave and imminent danger to her life and thus committed the act of self defence.

3. Discussion of the Indian Scenario

Section 300 exception one of the Indian Penal Code states that 'culpable homicide is not murder if the offender, whilst deprived of the power of self control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.'⁴⁸

Explanation- whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.

Let us take a hypothetical case to illustrate the difficulties that a battered woman in India would face in claiming the benefit of the criminal law. Let us name the defendant as Janaki. Janaki shot and killed Charu, her live-in boyfriend. At her trial for murder, Janaki admitted to shooting Charu⁴⁹, but asserted that she had shot Charu in self-defence, basing the defence on the Battered Woman Syndrome. Janaki and Charu had known each other for most of their lives when they first began dating two years prior to the

⁴³ *supra* Note 26 at 29

⁴⁴ *Supra* Note 26 at 30

⁴⁵ *Supra* Note 24 at 23

⁴⁶ *Supra* Note 24 at 4

⁴⁷ *Supra* Note 24 at 6

⁴⁸ Indian Penal Code

⁴⁹ Names stated herein have no relationship to living persons

shooting. By the end of 1991, Charu and Janaki began living together. In July 1993, they moved into a new mobile home.

Janaki testified that the relationship was marked by violence and intimidation, including incidents of Charu pushing her against a wall, injuring her shoulder enough for her to go to the emergency room, and punching her in the abdomen, rupturing an ovarian cyst. She stated that he would purposely soil his clothes and then order her to clean them. He controlled the couple's money, and eventually ordered Janaki to quit her job. He did virtually all of the grocery shopping. On the two occasions when he permitted her to do the shopping, he required her to present to him the receipt and the exact change. At times, he would deny her food for three to four days. He also blamed her for his sexual difficulties.

Approximately three weeks before the shooting, Charu's behavior became more egregious. In the middle of the night, almost every night, he would wake Janaki up by holding his hands over her mouth and nose so that she could not breathe. Charu had trouble sleeping and on several occasions accused Janaki of changing the time on the clocks. He often told her how easy it would be to kill her by snapping her neck, shooting her with a gun, or suffocating her, and then hiding her body in a cave. This discussion occurred almost every time that they awoke.

Three days prior to the shooting, Janaki fixed a plate of food, which Charu refused to eat or to let her clear from the table. He put cigarette butts in the food and played with it. Janaki testified that if she had cleaned up the food, he would have beaten her. Janaki testified that Charu forced her into having sexual relations against her wishes, that he blamed her for his periodic impotency, and that two days prior to the shooting, he anally raped her.

The night before the shooting, Charu yelled at Janaki and threw flour, sugar, cider, and bread on the floor. They argued all night, and before Charu went to work on Wednesday morning, he ordered Janaki to clean up the mess and informed her that he would kill her if she did not do it by the time he came home, and struck her on the arm. After he left, Janaki went to see her mother and they returned to Janaki's and Charu's mobile home. Janaki testified that her mother seemed entirely uninterested in Janaki's situation. When Janaki's mother left, Janaki went to see Charu's father, and then she returned to her mobile home.

At 12:45 p.m., Charu came home from work early and, according to Janaki, he sneaked to the mobile home so that she would not see him. She did see him, however, and when she did not get up to meet him at the door, he started yelling. When Charu moved to the kitchen door, Janaki ran to the bathroom. Janaki testified that she could not get out of the tiny bathroom window and that she was afraid that Charu was going to kill her. She then ran to Charu's closet and grabbed his gun out of the holster. She ran back to the kitchen while Charu continued to yell at her and threaten to kill her. According to Janaki, she fired two warning shots and when Charu continued to threaten her, she shot him in the arm twice. Each of these two bullets also entered his torso. Charu fell and then started to get up again, continuing to threaten Janaki. Janaki shot Charu two more times, while he was bent over; the shots entered Charu in the back.

A pathologist with the Coroner's Office, testified that Charu had two bullet wounds in the arm, one in the chest, one in the abdomen, and two in the back.

In support of her self-defence argument, Janaki presented the testimony of Dr. Priyaranjan, a clinical psychologist who has extensive experience in treating and diagnosing women with the Battered Woman Syndrome. Dr Priyaranjan, explained the classic symptoms and signs of the battered woman syndrome and then described her examination of Janaki. Dr. Priyaranjan stated that she had diagnosed Janaki as suffering from the Battered Woman Syndrome and that Janaki reasonably believed that she was in danger of imminent death or serious bodily harm at the time of the shooting.

What would Janaki's chances be before a court of criminal law? My submission is that she would be faced with great difficulty in trying to claim the benefit of the Indian criminal law. This is in the context of the fact that legal attitudes to battered woman syndrome in India are varied. To establish the defence of self defence, the following elements must be shown: (1) that Janaki was not at fault in creating the situation giving rise to the argument or fight; (2) that Janaki had an honest belief that she was in imminent danger of death or great bodily harm and that her only means of escape from that danger was in the use of such force; (3) that Janaki did not violate any duty to retreat or avoid the danger. It is apparent that establishing these elements in this case will be a difficult if not an impossible task.

4. 'Mad Women Kill!'

Female defendants may and in most cases have in fact been forced to plead insanity, pre-menstrual syndrome or post partum depression as the Indian law is unable to recognise the constraints of traditional female roles that cause them to commit the crime.⁵⁰ Women's reliance on these defences reflects society's reluctance to understand women's problems unless it is within the framework of 'illnesses'.⁵¹ Punishment is in context of the responsibilities that the woman has towards her children and family. Judges treat women more leniently when they assume that family responsibility will create informal social control and that a mother is of vital importance for the child's welfare.⁵²

Embedded in this thinking is a male based model which views the potential violent criminal as someone who is not the primary care taker of children. Its is also to be noted that judges have not sentenced women leniently if they have departed from the stereotypical norms such as poor, black, queer, single or women who commit 'unfeminine crimes'.⁵³

Some investigations have argued that the law of self defence is biased against the women especially if the crime committed by her is against her husband. The success of diminishing capacity shows that a woman's only justifiable defence to murder is insanity/automatism.⁵⁴ The legal system then employs the diminishing capacity as a means to deal with the contradictions faced. One, that of a submissive wife and two, of a violent man who torments her. Society then allows for temporary insanity as a compromise

⁵⁰ Roberts. D. E.; Symposium: Gender issues and criminal law; *Journal of criminal law and criminology*; Vol. 85; No.1; 1994 at 11

⁵¹ As cited from *Id.*

⁵² *Ibid.* at 12

⁵³ *Ibid* at 13

⁵⁴ Kasian. M.; Battered Women Who Kill: Jury simulation and legal defences; *Law and Human Behaviour*; Vol. 17, No. 3; June 1993

which, on one hand, acknowledges the wrongful act, while, on the other, partially excuses their legally culpable behaviour.

On the other hand, feminist legal scholars have argued that the Battered Woman Syndrome fails to address the reasonableness of the women's actions. Feminist have argued that even the Battered Woman Syndrome has led to the 'pathologizing' of women as this is then viewed as a mental illness.

5. Conclusion

We have seen then that there is a need to challenge the biases that exist in the law and the practice of the same. There is also a need to challenge the very definition of crime. Holding the mother responsible for the violence meted out to the children while she too is a victim of the same violence due to notions such as the 'selfless mother' is inherently unfair. Courts often require the showing of serious physical injury apart from the un-permitted sexual intercourse, failing to understand that the threat of violence upon them or a third party is part of the sexual violence itself. Statutory rape laws and rape laws only protect the chaste and virtuous girl/women. Determination of which girls/women deserve the protection of the law depends on their sexual history, class caste, race and sexuality.

The path for gender equality does not lie in the sameness or difference debate but rather in eradicating the use of gender difference to keep women at an inferior position, for injustice does not flow directly from difference alone but rather from the manner in which those differences are transformed into social, economical and political deprivation. Understanding injustice therefore requires understanding the manner in which the law operates within certain social conditions. There is no doubt that race, class, sexual orientation and caste should also be taken into account when questioning the law's standpoint.

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Women in 'Business' (Dhanda): A Historical Survey

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1. Introduction

It is of some interest that the National Commission for Women has recently stated that prostitution is not the oldest profession as is commonly stated but is rather, the 'earliest 'oppression'¹. This statement in many ways is a pointer to the confusion as well as the nature of the discussion in respect of the institution of prostitution in India and elsewhere.

Prostitution is an institution that encompasses various factors. This paper does not analyse any one aspect of prostitution but rather, comprises, a preliminary survey of its various aspects which have emerged from archival sources as well as from contemporary writings on the subject. This paper covers the period in India from the enactment of the Contagious Diseases Act (1868) till today. It is necessary at the outset, to specify which 'prostitute' is the focus of this paper. Prostitution, as we know it today seems to have emerged during the British rule. Many different forms of the institution seem to have existed earlier. The *Devadasi* tradition is one such example. There were also 'dancing girls' and 'women of the harem' during the Mughal period. We know little about most of these institutions.

Even in its most recent manifestations, prostitution is organised/practiced in various ways. One difference lies in class distinctions. While some 'sex workers' might be working for more money and with richer people, others work at the level of subsistence. They get paid a nominal sum and work in abysmal working conditions while catering to persons of a poorer background. This paper, however, is about the latter- namely, brothel based prostitution within city spaces. This is not to say that rich people do not go to these brothels but the analysis points to the fact that these 'sex workers' get paid lesser than those who can be called 'call girls', for instance. The paper is about female sex workers and does not address both men and *hijras* who are also in the profession. This is a specification that has emerged from the available archival records. Most of the archival records on prostitution address brothel based prostitution by women, while male sex workers are not included at all and *hijras* are addressed more within the Criminal Tribes Act. Both these aspects warrant a separate search. In the contemporary period, experiences of male sex workers and that of *hijras* who are sex workers still remains relatively undocumented. While this may constitute a lacuna in the paper, I do not perceive it as a limitation. Both male and *hijra* sex workers warrant certain specific frames of reference, by virtue of their gender and sexual identities, which are outside the scope of this paper.

One aspect of this paper relate to perceptions of the prostitute and prostitution. The construction of the 'prostitute' is often embedded within those of male, female, sex, pleasure, desire, sexuality, economy,

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¹ Societal Violence on Women and Children in Prostitution; A Report by the National Commission for Women; 1995-96.

class and in the colonial context, also race. An analysis of this construction is an important background for a discussion on prostitution as, Gail Pheterson states,

'The deconstruction of the category "prostitute" is necessary to counter prejudice and to conduct scientifically valid enquiry'²

This construction, it is argued, is based on legal and moral grounds rather than on the precise characteristics of the prostitutes, which is almost impossible to ascertain, involving moreover a problematic process if such is embarked upon. It is this construction that has informed and constricted attitudes and discussions over prostitution, both within the state and otherwise (including among feminists).

Prostitutes within the law are defined by their behaviour of soliciting money for sex. This makes them vulnerable to punishment legally and socially. Two other constructions associated with prostitutes are that of sexual pleasure and diseases. The label of the 'whore' gives her 'greater freedom to enjoy sex'³. The questions that emerge out of these constructions, regarding the relations between, sex, pleasure, disease and money are often not asked. Pleasure, for instance, of the prostitute or the customer, are often consciously kept out of these discussions. This might be also because we still do not resort to appropriate language to speak of pleasure. This silence relates also to the importance of the discourse of 'suffering'. The term 'suffering' is used in many instances such as in relation to natural disasters, communal carnages as well as in regard to the lives of prostitutes to garner social support on moral grounds⁴. It is easier to establish an issue as socially significant and worth adequate attention by a portrayal of suffering within the same. It is harder to garner similar support through a discourse of pleasure, for instance. But at the same time, suffering limits this support to one emerging from a 'moral' standpoint rather than one based on 'ethics'⁵.

Another important aspect is one that is raised by Walkowitz, which discusses prostitution in Victorian England to illustrate a construction of culture through the paradigms of masculinity and femininity⁶. Predictably, male and female sexuality are constructed as starkly different and opposing- the 'men are from Mars and women are from Venus'⁷ syndrome. Categories such as 'bad' and 'good' women and lustful and morally upright men are created. Victorian feminism, she argues, attacked the bad woman and the lustful man. Through this process, there emerged a cultural construction based on notions of social purity. This in turn, informed punitive action against all practices that challenge social purity, including

² Pheterson, Gail; The category "prostitute" in Scientific Inquiry; *The Journal of Sex Research*; August; 1990.

³ *ibid.*

⁴ Kleinman, Arthur and Kleinman, Joan; *The Appeal of Experience; The dismay of images; Cultural appropriations of suffering in our times.*

⁵ I argue for a difference between concepts of morality and ethics. By the former I refer to an attitude informed by a fixed set of values and strictures, which are not to be breached. By ethics I mean a worldview that provides space for various 'moralities', social structures, personal choice, freedom, human rights and so on. It is one where there is an attempt to set a basic standard for human life and existence while attempting to circumvent judgments based on social norms and practices.

⁶ Walkowitz, Judith; "The Maiden Tribute to Modern Babylon"

⁷ I am referring to those books prevalent within a pop culture of addressing masculinity and femininity and consequently men and women as different and opposing.

homosexuality. This construction can be illustrated through the type of melodrama where an innocent female victim is attacked by a 'bad' male villain and is then rescued by a 'good' male.⁸ The above are just two examples of the construction of 'prostitutes'. But in many ways, they illustrate prevalent opinions and the internalised conditioning in all of us about the 'prostitute'. Contemporary feminists and prostitutes themselves define prostitution or at least some aspects of it. Such a definition is as hard or easy as defining any person in any profession. The prostitute receives money for sexual acts as a means of living. They enter and remain in the profession with or without consent, as is the case with many other professions. Compulsion to enter a profession and to remain in the same is equally reprehensible in all such cases.

This profession, however, places them within a certain construction of transgressive sexuality⁹. First, as opposed to the married wife, she is expected to be relatively less monogamous, at least at moments. But at the same time she can also decide to be monogamous at any point in time and that does not in anyway discount her earlier non-monogamy - a formulation that applies to all indulging in sexual activity. Second, her relationship with the customer is one that gives her a certain agency in terms of her as the provider of services and also as one outside his moral universe. The challenge she poses to the latter can place her within the realm of the 'forbidden' which in itself, means agency. This, however, is not a unitary picture and the exact opposite is simultaneously prevalent, making her vulnerable in society. Third, sex for her is a saleable product and has implications in regard to her class status. This however is not limited to prostitutes alone as the value of money in sexual relations, be it through dowry or class-specific romances, is known to us. Yet as far as the prostitute is concerned, it is an acknowledged fact. Therein lies the difference.¹⁰

As one can see, every description is followed by a disclaimer and what remains of the prostitute who we are attempting to define, is that very basic transaction between her and the customer for the sexual act(s). If she does not perform these transactions she becomes an ex-prostitute the same way as any person retiring from a profession. The experience of the profession does not get discounted just because they do not perform it anymore¹¹. Similarly, if they wish to shift to another profession they should be able to with ease, if they possess the necessary qualifications and that applies to prostitutes too¹². The paper consequently is premised on the treatment of 'sex work' as 'work'. While the attempt to define our actor in the paper has proved to be chaotic in nature, it is this chaos that is also the empirical reality. One needs to acknowledge these various aspects while addressing prostitution.

⁸ Walkowitz, Judith; "The Maiden Tribute to Modern Babylon"

⁹ Sexuality is more than sexual behaviour. It encompasses eroticism, sexual behaviour, social and gender roles and identity, relationships, and the personal, social and cultural meaning that each of these might have. (Sexuality and Sexual Behaviour; A Critical Review of Selected Studies: 1990-2000, CREA pub. 2002)

¹⁰ My thanks to Andrew Nash for pointing out this crucial qualification regarding the 'economics of sexuality' so to speak.

¹¹ My thanks to Sophia Kamaruddin for this significant point that adds strength to the definition attempted here.

¹² It is important to remember that, while the profession can be defined down to its basic, the reality however is very different. Social norms and conditioning force prostitutes into a position which is wrought with taboo and ostracisation.

Before we move on to the substantive content of the paper, the difference between trafficking and prostitution needs to be asserted. While trafficking is a crucial aspect of prostitution, it cannot be the only frame of reference. It is often the tendency to collapse the two categories. In this paper, I address trafficking as and when the need arises. There is also an attempt to stay within the geographical limitations of what is India today. Trafficking is prevalent even within the region, and it is these instances that will be discussed. Trafficking demands a separate, though related search and analysis, which is beyond the scope of this paper.

The first section of the paper outlines the legal background of the discussion and then analyses the various themes that arising from it. The discussion begins with the Contagious Diseases Act of 1868. It is this law that brought the prostitute into the public sphere both in India and Britain. Further, it played a crucial part in the construction of the 'prostitute' and prostitution. It also initiated the spatial definitions of prostitution in terms of the 'red light' area, as it identified certain regions where prostitution was practiced-in this case around cantonments.

This was also the time when the prostitute became a site of disease and moral degradation; consequently she was one to be kept separate from the rest of society. I will not go into a detailed discussion of the Contagious Diseases Act, as it is a much written about issue but will only provide a quick survey. The crux of this section is an analysis of the various Provincial Acts, with regard to 'Prevention of Prostitution and Immoral Trafficking in Women and Girls', which emerges from the early 20th century. The basis of the Immoral Trafficking Prevention Act (ITPA) of 1956 can be identified in these acts. It is the ITPA that defines the legal position of prostitutes in India today.

A few themes emerge from this legal backdrop. First, there is the shift of prostitution from being a disease to amounting to engaging in criminal activities and more recently back to a combination of both. Second, I discuss the politics of law-making itself and the disjuncture, if any, between legislation and execution. Third, the research contains an analysis of nomenclature that spans varied terms such as 'wretched woman'¹³, 'fallen woman'¹⁴ and 'bad woman'¹⁵ to 'sex worker'¹⁶, 'women in prostitution'¹⁷, 'women in business (dhanda)' ¹⁸ and so on. This becomes very important with regard to the significance of 'naming'¹⁹ in any social phenomena. It is through this naming that the constructions of the prostitute are undertaken and the impact of these constructions is felt. Naming is significant to an addressal of both oppression and assertion. Fourth is a discussion of the concept of 'moral panic' which is rampant in many discussions of prostitution, especially in history writing. While one cannot negate the significance of this as a frame of reference, it can be challenged. A certain nuancing of this framework is argued for through

¹³ This term is often used in legislative debates and in native newspaper records.

¹⁴ Ibid.

¹⁵ This term is prevalent in native newspaper records and is used among prostitutes themselves.

¹⁶ This is a term preferred by that group of contemporary feminists who view sex work as work and argue for decriminalization of prostitution while some even ask for labour regulations for prostitutes.

¹⁷ This is a term preferred by some feminist groups working with prostitutes. They regard it as a relatively neutral term amongst the options available.

¹⁸ This term emerges as one that is preferred by prostitutes today. This is clear from their statements in the NCW reports and in pamphlets of their own organisations.

¹⁹ Satre, Geanpaul; *The idiot in the family*; Paris; 1971

relevant substantiation. Fifth, related to the concept of 'moral panic' is a discussion of the concept of consent- the most controversial within the law as in all other discourses.

The next section of the paper deals with, what one can be loosely referred to as the 'voice of the prostitute'. Here the methodology shifts away from a historical narrative to one that is a more focused search for this voice. It does not trace the difference in these voices over time, as they are, predictably so, not well documented. The sources for this section are the index references to petitions filed by prostitutes in the late 19th century and the articulations of prostitutes today. This discussion takes us forward to a survey of the various positions within the ongoing feminist debates around prostitution. Consent recurs as an important issue in this context. It also brings us back to the question of naming, which has been discussed earlier. A lacuna in this section is the discussion of folklore among prostitutes as illustrated by Sumanta Banerjee in the context of 19th century Bengal²⁰ and by contemporary feminists in Bombay²¹. This is an area that requires a specific methodology in research, which is very different from the methods used in this paper.

2. The Law (s)

The Contagious Diseases Act of 1868 in India as those of Britain in 1864, 1866 and 1869, (hereafter the Act) were introduced to control the spread of venereal diseases through prostitution among English soldiers in cantonments. The law meant in actual terms, the subjection of prostitutes to a compulsory system of registration and mandatory testing for venereal diseases. Those known or alleged to have venereal diseases were confined within 'lock hospitals' where they were 'treated' till the time the concerned officer certified that she was cured²². It was as a result of this law that for the first time, the prostitute was identified and acknowledged within specific geographical spaces. Second, the law was meant to ensure the safety, primarily of the soldiers and consequently, that of the prostitute.

In practice however, the law facilitated forced confinement and harassment of these prostitutes in the regions where the Act held effect and within the hospitals. This was the beginning of a trend in regard to laws on prostitution that was wrought with contradictions and double standards. Such laws reinforced the notion of the uncontrollable male sexual drive but with a class specification. They focused on the poor, white, male soldier as opposed to the 'cultured', white, 'gentleman'. Most importantly, they named the prostitute as someone causing a disease, and that too, due to moral degradation. This was distinct from the perception of prostitution as a crime, as was the case soon after.

While the law specified prostitution as a disease within the Contagious Diseases Act, the reactions to the law from the native newspapers of the time tell us another story. The reaction ranges from 'hearty' approval to concerns about over-legislation and implications on morality.

The *Mitrodarya* from the Bombay presidency dated 12 April 1868 reads,

²⁰ Banerjee, Sumanta; *Dangerous Outcast: The Prostitute in Nineteenth Century Bengal*

²¹ Meena Seshu; *Sangram; Bombay.*

²² D'Cunha, Jean; *Prostitution: The Contemporary Feminist discourse; Embodiment: Essays of Gender and Identity; Thapan, Meenakshi ed.*

"... over-legislation has attained its climax".

This newspaper refers to the Act as 'too bulky' and disapproves of the same. There is also a note of skepticism expressed about the 'real intentions' of the British government to 'get money' for which it rebukes the government.²³

On the question of morality there are two different perspectives that are expressed. The *Guzarat Mitra* dated 10th May 1868, states;

*" in the absence of any legal restraint any woman, if she pleases can easily turn prostitute and become the source of poverty disease and death to many a thoughtless man "*²⁴

On the contrary, there is also the opinion such as this from the *Mitrodarya* of Bombay dated 12th April 1868;

*" ...though the proposed law may effect some good, it gives legal sanction to the immoral practice of prostitution. We do not know... how people of enlightened morals may regard this piece of legislation which recognizes and permits a practice which always ought to be regarded with disgust and contempt, and which deserves not to be protected by law, but to be eradicated entirely; but the proposed law is sure to appear odious in the eyes of the people of conservative ideas like ours "*²⁵

For some others, there seems to have been no doubt that prostitution is and always has been a crime. In the following report from the Bombay chronicle of April 1868, there is at the start, a relatively progressive note, stating there are many other 'evils' in society apart from prostitution, such as drug trafficking, alcohol, gambling and so on. One just begins to heave a sigh of relief at this less cruel attitude towards prostitution when the author is quick to state that,

"The wretched women, who are often driven by want into this shameless and vile profession, are deservedly regarded with contempt and loathing. But persons engaged in trades of opium and spirits are considered merchants of great respectability"

In the same account, the author discusses the contagious diseases act which he sees as valuable but with one vital reservation;

"The profession of prostitution is an evil... which it is not in the power of the government to eradicate entirely, without giving rise to other evils more hateful and pernicious in character. But though human governments are powerless to cope successfully with this vice, nature has provided for her own remedy... she punishes those who indulges in it with painful diseases, thus deters

²³ NNR; Bombay; 1868; Week ending 18th April; NAI.

²⁴ NNR; Bombay; 1868;NAI

²⁵ NNR; Bombay; 1868; NAI

many from tasting its forbidden pleasures. But the proposed law, by removing this wholesome dread of painful consequence will encourage immorality."²⁶

As a last note, one has to take into account that this presence of prostitutes within the public sphere, was specifically noticed and spoken against like in the *Dacca Prakash* of Bengal dated 26th April 1868 which states,

*" if the Contagious Diseases Act is passed, the government will come into close contact with these women and they will consider themselves favoured."*²⁷

While this does seem to have distressed the writer at the time, he says reluctantly that,

*" the people who oppose the Contagious Disease Act say that the Government should not interfere in these trades but act as if they are ignorant of such practices. But government intervention will reduce the evil"*²⁸

What is of importance to us is that the presence of the prostitute in the public sphere that we analyze with hindsight did not go completely unnoticed at that time.

Thus the Contagious Diseases Act initiated discussions within the legal forum and within the indigenous press. The context for the forthcoming Provincial Acts in early 20th century can be traced back to cases such as that of Mussamat Ameerun in 1859. Ameerun had bought two girls from their respective fathers. The transaction happened in the presence of the local religious head. The magistrate of the region, Mr. Toogood, however, 'rescued' them on charge of them being retained for 'purposes of prostitution.' Ameerun filed a petition in court praying for their release. Her petition was not taken up after Mr. Toogood had filed his response. The lieutenant governor 'declined to interfere on her behalf' in sight of the facts of her 'admitted profession' as well as 'the certain consequences to the children of their returning to her custody'²⁹. This case is one of many others concerning kidnapping, 'leasing' and selling of girls for 'purposes of prostitution'³⁰. This specific case led to a debate among official circles in regard to the need of a specific law to address such 'offences'³¹. At this point in time a consensus was reached that the then forthcoming Criminal Procedure Code would address these crimes and will deal with the same, thus negating the need for separate legislation.

The late nineteenth and early twentieth century saw a number of occurrences that seem to have had an impact on law making. One such phenomenon was that of White Slave Traffic. There were a number of appeals to the government to check the cases of the use of British towns by trafficked white women for prostitution³². Within this context the Suppression of Prostitution Act was passed in Bombay as a police

²⁶ NNR; Bombay, 1868;NAI

²⁷ NNR; 1868; Bengal; NAI

²⁸ ibid

²⁹ Home; Judicial (A); File no.7; 12th August; 1859.

³⁰ Home; Public; File no.62-63; 30th November 1864, Home; Public; File no.27-28; 8th September 1864.

³¹ Home; Judicial (A); File no.7; 12th August; 1859.

³² Home; Police(A); File no.50-58; 1893, Home; Police (A); File no. 40-41; 1903

act in May 1892³³. Thus begins the story of Provincial Acts in regard to the control and suppression of prostitution in the cities of British India; a process that lasted more than 60 years till the coming of ITPA. Consequently similar police acts were passed in both Madras and Calcutta. These acts entailed certain basic features. First, segregation of prostitutes to specific areas within the city, presumably relating to those areas that are now referred to as 'red light areas'.³⁴ Second, punitive measures against those who are alleged or proven to have acquired or retained girls for purposes of prostitution. Third, punitive measure against those who rent/lease or use houses for purposes of prostitution. Fourth, any person proved or alleged to be soliciting for purposes of prostitution was punishable.

Bombay contained the most stringent of all the laws and it is in this background that the strengthening of laws in Calcutta and Madras are discussed. Without going into the details of that discussion we can just look at one specific statement that is of relevance to us. The lieutenant governor of Bengal, at this time (1904) states,

*".... Your letter deals with two separate though connected questions, viz. the check of prostitution in Calcutta and the spread of venereal diseases among soldiers stationed in the presidency town."*³⁵

This is one of the first instances when a difference is established between the two issues. He deals with the question of venereal diseases and the related question of segregation of prostitutes in certain parts of the city in another letter- where he opposes the segregation on grounds of it facilitating 'organised vice'.

This seems to be the beginning of the shift away from the discourses around disease to that of crime. The next two decades, till the early twenties, the focus with regard to prostitution seems to have been divided between issues of White Slave Traffic and that of the protection of minor girls and women who are 'rescued' from prostitution. There are discussions about where the girls are to be placed after they are 'rescued' and a suggestion is made by the Home Department to the local governments, as early as 1903, that 'all girls below the age of 16 are to be removed from brothels'³⁶. There is some indication that public opinion is against this stand and the question still remains as to where the girls would be sent, once rescued. The places they are sent to have to be 'secular' or of the same religion as that of the girls' otherwise, the whole process would be seen as one undertaken by the government for proselytisation.

A number of aspects can be discussed from within the occurrences of the early twentieth century. As pointed out, the shift begins to towards looking at prostitution as a crime. Further, there is the beginning of yet another crucial aspect within prostitution and that is the 'age of consent'. The age, now suggested to be 16, is a question that would soon be subjected to enormous debate. Also, this period marks the first time that national and international trafficking in women and girls for prostitution, is acknowledged and dealt with. The first two decades thus set the stage for the Provincial Laws that came thereafter

³³ Home; Police (B); File no. 116-118; May 1892.

³⁴ The exact origin of the term and the use of the colour red and light are not known and could be another area of study.

³⁵ Home; Police (A); File no. 21-2-3; February 1904.

³⁶ Home; Judicial (A) Proceedings; File no. 174-176; 1908.

The Bombay Prevention of Prostitution Act (1923) was among the first, followed soon after by the Calcutta Suppression of Immoral Traffic Bill. It is important to mention these two bills consecutively as one can see that the collapsing of 'prostitution' and 'trafficking' begins to occur within the sphere of the law. It is in the Calcutta bill that notions of space became further consolidated by its clear statement that brothels will not be allowed near schools and temples. S.C.Mukherjee one of the important actors with regard to this law in the legislative assembly states in the 'objects and reasons' for the law that;

"It is a truism you can never make people moral by legislation. But, immorality when it assumes a commercial aspect and proves a dangerous menace to the welfare of society must needs be suppressed with the aid of law backed by public opinion " ³⁷.

In early 1926, Shah Syed Emadul Haq proposed the Bengal Suppression of Brothels Bill in the Bengal legislative council. The bill was very similar to the then recently passed, Calcutta Suppression of Immoral Traffic Bill. The bill was opposed by 33 members all of whom were of the Hindu faith, and more importantly, it was supported by 12 members, all of whom were Muslims. In the objects and reasons of the bill, he states,

"Sir, prostitution is severely condemned in the Muhammadan religion, and I do not think any other religion on the face of this earth ever supports the diabolical vice. Therefore, the main object of this bill is to wipe out public prostitution from the country" ³⁸

This statement exemplifies the linkage of religion to the question of prostitution. The law was founded on notions of Islamic morality and was supported only by the Muslims in the council. Another example of religion was the amendment made to the Madras Suppression of Immoral Traffic Bill (1928, amended 1930). The girl 'removed' from the brothel, if proved to be 18 was to be kept in a 'rescue home' or 'any other such place that the court sees as fit'. Custody however will not be with a 'person of a different religious persuasion from that of the girl'³⁹. Thus the otherwise loathed women and girls of the brothel were still attributed with a religious identity.

The Madras Suppression of Immoral Traffic Bill was passed in 1928. This bill is important, as it is the only law in all the provinces that was proposed by a woman, namely Muthulakshmi Reddy who was also the only woman in the legislative councils of the country at the time. The bill among other things, necessitated that a 'woman social worker of well known credentials' should accompany the police officer in instances of 'rescue'. It also suggests whipping as punishment for pimps. It is in this bill that the linkages are made between industrialization and prostitution,

"...rapid growth of urban populations with its...permanent congregations of unmarried men in towns...new situation which needs to be differently dealt with " ⁴⁰

³⁷ Home; Police (B) Deposit; File no. 24-XVI; 1923.

³⁸ Home; Police; File no. 24; 1923.

³⁹ Home; Police; File no. 24/IV/30; 1930.

⁴⁰ Home; Police; File no. 24/IV/28; 1928

As a justification for the need for legislation she states,

"...power is taken for the suppression of brothels, for the rescue, protection and custody of young girls, and for punishing men and women who participate in this vice for gain..."⁴¹

The United Provinces Prevention of Prostitution Act (1929), which is very similar to its counterpart in Bombay, is a good illustration of the contradictions inherent in the laws in regard to the question of consent.

"6. Any person who procures or attempts to procure any woman or girl, whether with or without her consent, to become a prostitute..."⁴²(emphasis my own)

"8. Whoever detains any woman or girl against her will..."⁴³ (emphasis my own)

While the 'age of consent' is not mentioned in the law, the question of consent is not clearly specified. This ambiguity is a consistent feature in all these laws throughout the colonial period. This only points to the lack of importance given to the question and thus the lack of discussions about the same. This however leads to an 'age of consent' debate that seemed to have occurred in 1923, in regard to prostitution. This debate illustrates that age of consent has always been a concern in spite of the lack of legal clarity on the subject. It was argued that the age of consent, in 'Indian opinion'⁴⁴ was to be 21. One writer in the *Indian Social Reformer* dated 23rd June 1923, pointed to the confusion in public opinion, between the age of consent debate with regard to marriage and in regard to the question of prostitution. He clarified thus;

"the phrase 'age of consent' owing to the heated controversy 30 years ago, has come to mean...about rape by husbands or other"⁴⁵

It has to be made clear, he argued, that this debate was with regard to –

" procurers and does not in any way affect husbands" ⁴⁶

If this is made clear, he was confident that 'public opinion' will support the age of consent being 21. In the same article, this writer also spoke of brothel-based prostitution being a western import, thus playing a part in destabilizing the traditional family system in Bombay.

This confusion between the two debates addressed here, is of interest to us in our discussion. With regard to rape by husbands, the age of consent remained around 12 and 13 and the slightest increase in this age

⁴¹ Ibid.

⁴² Home; Police; File no. 24/XI/29; 1929.

⁴³ Ibid.

⁴⁴ NNR; Bombay; 1923; NAI

⁴⁵ NNR; Bombay; 1923; NAI

⁴⁶ *ibid.*

was met with opposition. On the other hand, if the age of consent for the prostitute was to be as high as 21, it indirectly gave sanction to young girls being raped by their husbands but not by others. The British, on the other hand, we are informed, were reluctant to fix the age at 21, as they wished to take into consideration, the 'the habits and customs of the people of the country'⁴⁷. However, it is interesting that a reporter had taken offence to this view and stated that the 'British are suggesting lower morals to the natives'⁴⁸. He stated that the argument used in the context of 'age of consent' within marriage cannot be used here, as they related to two different cases altogether.

Yet another set of opinions at this time within the native newspapers emerged with regard to prostitution itself as well as other aspects of the laws. One such point was the connection between prostitution and poverty. The *New Times* dated 3rd August 1923 read;

" if you (referring to the government) make people live in slums, adopt insanitary ways, give them bad food and bad air, prostitution must spring up under the most restrictive conditions...mere punitive or prohibitive legislation will not solve the problem. In several cases it may only make it more acute"

Taking this logic a step further, the *Lokamanya* from Bombay dated 13th of August 1923, made a linear connection between, prostitution and poverty, with the point made that the British was addressing the former without doing the same in regard to the latter, which was its 'root cause'. This poverty, in turn, was argued to have been caused by the British with the need for Swaraj being asserted. This logical progression also attempted to prove that Swaraj was needed at that time to prevent prostitution.

The most delightful of all the provincial bills was the one that was proposed in Bihar by Mr.Tajamul Husain⁴⁹ in 1939. He stated that it was based on its counterparts in Punjab and United Provinces. This bill for 'Suppression of Prostitution and Immoral Traffic' was one of the few, or maybe even the only one where we find a suggestion to make prostitution illegal

*" 7. Whoever commits prostitution shall be punished with imprisonment upto a year. "*⁵⁰

Although the punishment was lower than that for the pimp, it was the first mention of such a provision. This bill contained clauses that addressed male and female adultery, most aspects of which were dropped in the legislative council debates. The details of these debates, which would have been of much use, are unavailable to us. Some references to the same, point to the fact that there was some discussion about these clauses in question and about its proponent being unkind to the 'opposite gender' while giving levies to his own. Nevertheless, this bill remains illustrative of the one instance in India that punitive action against the prostitute for prostitution as opposed to soliciting was suggested but it was turned down. The proponent wrote of the prostitute as being the 'greatest slur on womanhood' and of those

⁴⁷ *ibid.*

⁴⁸ *ibid*

⁴⁹ Home; Police; File no. 24/3/39

⁵⁰ *ibid*

indulging in prostitution as 'those people who...commit sin against society, nation and against humanity'⁵¹.

These provincial laws discussed above were in effect throughout the colonial period and were replaced only by the Immoral Trafficking Prevention Act (1956). This Act (ITPA) outlaws soliciting (sec.8) and punishes (through fine and imprisonment), any person who lives of the earnings of a 'prostitute or who allows their premises to be used for prostitution'⁵². It also punishes prostitution in public places (sec.7). The law also provides for search without a warrant of any place from where the police can 'rescue' all those who they believe are being made to carry on prostitution. This often includes children of prostitutes. These children are then sent to 'protective homes' or foster care⁵³.

Most of the provisions of the law bear a stark resemblance to the various Provincial Acts. The contradictions within the Provincial Acts with regard to consent and the punishing of soliciting remain unresolved. The ITPA in many ways seems to be the consolidation of the flow of Provincial Acts over the 50 years before its enactment.

A few basic observations are relevant at this point regarding the legal background of prostitution. On the question of nomenclature, many patterns emerge. First, the collapsing of prostitution and trafficking begins at an early stage and remains so. The ITPA, in fact, even leaves out the term prostitution, while including provisions that affect prostitution and not trafficking. Second, in all the correspondence and discussions over the Acts in question, it is the prostitute who is named and referred to. Unlike the Contagious Diseases Act, where there was also a construction of the male who is the customer, the customer is hardly discussed in the Provincial Acts. There is only one instance where the connections are made between migrant workers in industries and prostitution. Otherwise, it is the woman who is 'wretched', 'fallen', 'the greatest slur on womanhood' and so on.

The other group, which includes men, is that of pimps and brothel owners. There is hardly any specification within these categories; instead, they are addressed as 'any person who...' or as 'all those indulging in prostitution'. Thus there is therefore an absence of the naming of these individuals. This in turn may be a reason as to why, although such laws have been posited as 'protecting' the prostitute, the contrary has been evidenced in their execution. This is a trend that continues today with the execution of ITPA.

Third is the most important term, that seems to inform law making on prostitution in India- namely, 'immoral vice'. Although the reference to 'vice' is dropped in 'independent' India, the reference to 'immoral' remains in the relevant laws. Trafficking for prostitution, as opposed to that for other purposes such as domestic labour or child labour, is differentiated through the term 'immoral'. It is this term that has always made 'prostitution' distinct from many other 'evils' involving women and children, including violence against women in general, child marriage, Sati and so on. The 'immorality' of prostitution has

⁵¹ Home; Police; File no. 24/3/39

⁵² Report on Thinking through, thinking beyond; Centre for Feminist Legal Research; 2000

⁵³ *ibid.*

been perceived as its only intrinsic and significant aspect. This has limited law making and also other social activism, as the perceptions within the law spill over to other sections of society and vice versa.

3. The Concept of 'Moral Panic'

This leads us to the theme of 'moral panic'. It has been argued by scholars that the crux of the problem with colonial law making and general perceptions on prostitution is that they were based on the perception of 'moral panic.' It is apparent from the accounts that this aspect is crucial. In the 1850s and 60s one saw the fear of girls getting abducted by prostitutes as was the case in reference to eunuchs too. The Contagious Diseases Act emerged also as a result of the fear of immorality among the ranks of the British Indian army, which was construed to be a slur on British 'civilization' and consequently its rule. The various provincial laws voiced the fear of the disruption of the heterosexual, monogamous family in the cities. The ITPA continued in this tradition.

Some interventions, however, can be made regarding this concept of moral panic. First, it cannot be the only frame of reference while addressing the question of prostitution, as illustrated earlier. Various aspects of the process of law making and other identities of religion and race are engrained in the laws around prostitution. It would be simplistic to imagine legislators working based solely on an anxiety concerning the institution of prostitution which has existed over a long period of time. Second, as mentioned earlier, there has never been a law enacted in India that punishes a person for prostituting themselves. The law punishes other aspects of prostitution such as soliciting, pimping, brothel keeping, trafficking and so on, but not the act of prostituting oneself. If moral panic was as intense and extensive as it is portrayed to be, this process should have reached its logical end and punished this act. This however, has not occurred till today. The reasons for this are still unclear and have to be examined. But it does challenge the 'moral panic' argument in significant ways.

Third, there is often a tendency to look at this panic as a homogenous category. There is often a judgment on it as being patriarchal and thus negative. It can be argued, however, that there are traces of genuine concern in both this panic and the patriarchy. Both categories cannot be built as those to be uniformly loathed in all such cases. Mr. Toogood (Ref Pg 12), for instance, while acting based on a moral anxiety, might have also genuinely cared for the two girls he 'rescued'.

This might be the case with all the actors in question, who are often constructed as patriarchal. It remains that the 'care' in itself is not neutral or universal and is constructed by the anxiety and patriarchal values, but the existence of it has to be taken into account for a more nuanced understanding of all the factors in question. This discussion can be placed within the context of children in prostitution, as an illustration. While questions of consent, method of execution of the law, rehabilitation measures and so on remain important unresolved issues, one cannot lose sight of the violence of forced child trafficking or forcible retention in any profession, including prostitution.

4. Shifting the Notion of Prostitution to a Combination of Disease and Crime

In regard to the shift of prostitution from within the frame of disease to that of crime, one has to note, that there is a shift today back to the frame of disease through the policies around HIV/AIDS. Prostitutes are often identified as a 'high-risk' group. While the logic of this identification may appear as faulty in the first instance, the possibility of a prostitute suggesting the use of condoms is much higher than that of most other women.

Second, it is the male customers who can spread the virus to their wives and then children and thus can also be referred to as a 'high-risk' group. Third, and most importantly, the concept of a high-risk group is intrinsically flawed as HIV can be transmitted through various other activities such as blood transfusion, needles etc. this makes each and every one of us a high-risk group.

While policies and work around HIV/AIDS for and among prostitutes is of enormous importance, the focus has to be one supplemented by an understanding of the rights of the actors involved.

Without the latter HIV/AIDS work today, runs the risk of resembling the lock hospitals of the late 19th century. Getting back to our discussion, this time, however, it is prostitution, which is made the disease and not individual prostitutes. All prostitutes are subject to mandatory testing, although illegally. This testing is couched by those 'concerned'⁵⁴ within the language of 'reproductive rights' and even 'human rights'. Irony is thus taken to its extreme.

5. The Voice(s) of the Prostitute(s)

The following discussion can be placed within the ongoing debates among feminists and sex workers regarding prostitution. The debate is around 15 years old. The basic positions in the debate can be identified as follows,

- a. Abolitionist.
- b. Decriminalisation.
- c. Legalisation.

While these are just simplistic categories for purposes of analysis, they are layered and nuanced and often overlap with one another. The abolitionist approach is one that believes that prostitution is a moral problem and thus needs to be rid of. It has little place for rights of any of the actors involved. This approach can be illustrated by police action on prostitutes in many parts of the country, especially those where they are not organised in unions, such as in Delhi.

Decriminalisation is argued for most by many NGOs that work within the mandates of a rights based approach. They speak of the right of the sex worker as well as the right to do sex work. It critiques the present law on the grounds that it violates the sex workers' right to family, bodily integrity, life and

⁵⁴ By 'concerned' I mean government officials, policy makers and some non-governmental organizations who work with an abolitionist attitude towards the institution of prostitution

equality among other things. Further it views sex workers as market actors by virtue of their profession. However, it does not consider labour laws as necessarily pro-labour and thus does not argue for its execution with regard to sex work. The legalisation argument asks for sex work to be recognised as a legally permissible profession, thus bringing sex workers within the ambit of right to health, education, voting and so on. This approach also argues for the enactment of labour laws with regard to prostitution.

Having outlined the basic stands, one can move further into the variations within the same, not just with regard to the suggested changes in legislation, but also a broader perception of sex work itself. One can do this through the voice of the prostitutes themselves. The petitions filed by prostitutes in late 19th century form a background to this discussion.

The following are index references to petitions from prostitutes from the time of the enactment of the Contagious Diseases Act. As mentioned earlier none of these petitions are available to us, and the analysis has to be based on the index references. The petitions referred to varied aspects. One such example was that of the 'hardships inflicted on them- on account of'⁵⁵ the Contagious Disease Act. The lock hospital often formed the context of these petitions. The complaints ranged from the conduct of the medical officer in charge to the conduct of other medical personnel. Many petitions were also filed against the 'needless detention in lock hospitals.'⁵⁶ There was even one petition in 1881 that solicited 'that prostitutes be examined by female doctors'⁵⁷. This was filed by a man on behalf of 'public prostitutes'. Another recurring plea was for 'exemptions from the provisions of the'⁵⁸ Act. Residents of various areas near cantonments, however, asked for the inclusion of those areas in the Act⁵⁹. Others however, 'appealed against'⁶⁰ the Act in question. In the early 20th century the petitions were against 'expulsion'⁶¹ of prostitutes from their areas.

The references to these petitions dwindle from the 20th century onwards, although there were some references till 1920. This could mean either that these petitions were not included in the index records, or that they did actually reduce in number and frequency. Of this, however, we do not know. Given the restricted sources through which we are attempting to study these petitions, one can only say that the Contagious Diseases Act and the later acts of the early 20th century were not accepted passively by prostitutes in some regions at least. It is apparent that further information on these petitions would add enormous value to any study of prostitutes in India. At this juncture, one has to be content with this basic observation.

⁵⁵ Home; Public (B); File no.76; 11th September 1869, File no. 162; 21st August 1869

⁵⁶ Home; Sanitary (B); File no. 58-59; August 1888.

⁵⁷ Home; Sanitary (B); File no.24; October 1881.

⁵⁸ Home; Public (B); File no. 95; 11th June; 1870, File no. 4-5; 11th February 1871, File no.84; 24th June; 1871, File no. 45; 11th February; 1871, Sanitary (B); file no. 9 and 10; May 1868, File no.1 and 2; August 1877, File no.1; April 1887, Judicial (B); September 1907.

⁵⁹ Home; Sanitary (B); File no. 65; 1881.

⁶⁰ Home; Public (B); File no. 8; 24th July; 1869, File no. 120-121; 19th September 1868, File no.38-39; 24th July 1869, File no. 154; December 1871,

⁶¹ Home; Public (B); File no.99; December 1908, File no. 81-82; May 1918.

Prostitutes in contemporary India have over the past 20 years and more, organized themselves in three cities- Calcutta, Bombay and Trivandrum. One has to remember that it was the activities around HIV/AIDS, that facilitated the emergence of these organisations. Government and non-government funds were invested in this area for these purposes. Over time however, these initiatives have taken on a life of their own. Most of the arguments of the sex workers in these regions coincide with that of the decriminalisation school. There are however some crucial differences. One aspect that these movements have brought to the fore is the significance of the participation of sex workers in all policies related to them. These cover the areas of health, right to residence, education (mainly of the children of prostitutes) and labour rights. These unions have been a forum to ensure these rights for sex workers. As a unified, representative body, it is also one that any individual sex worker can approach in cases of violence, discrimination and violation of rights. These unions address police atrocities, violence perpetuated by the local *goondas* and individual cases of breach of rules such as the refusal to use condoms or to pay. Also, they have set up networks across the nation among themselves and with other organisations that address the issue. This networking has meant, apart from physical and emotional gains in everyday life, visibility for sex workers in general.

In the sphere of perceptions of prostitution, the voices of the sex workers have created substantial ripples. It has been the sex workers who have initiated, across the world, and in India, a discourse of pleasure with regard to prostitution. This conflicts directly with the unitary perception of prostitutes as oppressed women who have been betrayed in life and have been subjected to constant violence. Sex workers on the contrary speak not only about sexual pleasure, but also about the emancipation in their lives by virtue of their profession. There have been analyses where the prostitute has been placed in opposition to the wife in a monogamous, heterosexual marriage for instance. While the similarities between the two have to be identified and acknowledged, the relative privilege of the sex worker is also an aspect that these organisations explain. With regard to property ownership, for instance, it is the sex worker who is one of the few women who can own assets and money that is entirely hers, and is not a case of shared ownership with the husband, as is the case with many wives. In the 1930s, there was a huge furore when property based franchise was granted to Indians. It was the prostitutes, who were the only women who could vote, as all other women, at that time in India, were not allowed to own property⁶².

The question of motherhood is another example. Representatives of sex workers organisations speak of how motherhood amongst prostitutes is experienced very differently from most other women. In the former case, the focus is the experience of motherhood itself, as opposed to women within the mainstream marriage set up, where she is the carrier of the 'seed', which is the heritage of the family. The focus, thus, is not on the woman in and of herself, but on her role as a reproducer of family progeny and heritage.

There are crucial differences that are articulated, in regard to the relationship with the customer or even the *maluk* or husband. The place of the prostitute within mainstream morality, as mentioned earlier, places her in a privileged position vis-à-vis the men in her life. Another crucial aspect of these discussions is a celebration of the sense of community among prostitutes, within geographical regions at least. The shared experience of the profession, in all its forms, facilitates this identity. There is folklore among prostitutes

⁶² My thanks to Tanika Sarkar for this useful information.

constituted by a shared language, identity, practices and even rituals. This aspect problematises the notion of consent in significant ways. A woman, trafficked and/or forced into prostitution might in the beginning regret her fate, so to speak. But in the long run, the sense of belonging to a community, might give her security and thus relief. It problematises the concept of a woman once trafficked, remaining a person who is in non-consensual sex work. This community identity of a group of women and some men and *hijras*, by virtue of their profession, might be an option that is not open to many others, such as other women who might be subject to violence and exploitation. This identity also provides space for an articulation of pleasure as much as it does of pain.

The above discussion is one form of articulation amongst sex workers organisations. Some comments can be made about the same. The basic criticism of these arguments is that, it tends to romanticize the profession to an extent that the other aspects of it that are not so positive are invisibilised. The question of trafficking for instance is not problematised at all in this articulation which in turn ignores issues of consent, child prostitution and so on. Even within the aspects discussed as positive and transgressive, certain criticisms can be made. First, these arguments are based on an essentialised picture of both the sex worker and the 'wife'. While the sex worker is given the responsibility of being 'transgressive' at all costs, the 'wife' is denied this option. A wife within a heterosexual, monogamous marriage might not be challenging social norms in a clear manner.

On the other hand, 'transgression' itself cannot be defined within the confines of certain actions and identities. It also defines itself based on one's own vibrant subjective position. This has to be given space in any discussion of sexuality as with all other identities. While all aspects of the process through which the prostitute passes with regard to her sexual identity is acknowledged and celebrated, the same is not done for the wife, as the latter is not 'transgressive' in its strict sense of the term. Even on the question of a community identity, it would be a falsification to portray it as unique to women in sex work. This is a phenomenon that is prevalent in many groups in various professions involving different forms and levels of pleasure and pain.

Another stream of articulation within sex workers is one that does not celebrate pleasure as much. It falls well within the rights approach, while also describing the life of a prostitute as an alternative structure for sexual relations in general. This is a more balanced picture, although it does have the danger of falling into the trap of invisibilising pleasure yet again. The organisations that stand by these arguments address trafficking as an issue relatively more than the former. Discussion of trafficking by sex workers' organisations is at its nascent stage and has a long way to go.

Both these arguments, with slight differences from one another, together structure prostitution as a challenge to patriarchy and deny the earlier feminist approach of it being yet another manifestation of patriarchy. There emerges from these voices a more nuanced understanding of patriarchal structures and practices rather than a denial of the same.

There are many variations within these voices in the sphere of 'naming.' Those who agree with the decriminalisation and legalisation approach refer to prostitution as 'sex work'. This, in many ways, defines their arguments. Within sex workers organisations, there are many layered practices in this regard.

We have instances from Bombay where sex worker also used the terms of 'good' and 'bad' women to refer to themselves to a third person. Among themselves, the most common term seems to be 'women in business' or *dhandewali*. Many organisations are increasingly using the term 'women in prostitution' as the most non-judgmental option of those that are available. There has been a conscious or unconscious denial of the term 'prostitute', due to its negative connotations over the ages. Both the terms 'sex worker' and 'women in prostitution' hold value in terms of their implications on the rights of the actors involved. *Dhandewali*, in spite of its negative connotations in colloquial speech, emerges as being of as much value as Dalit, for instance. Along the same lines, the reclaiming of the term 'prostitute' might also be a worthwhile effort. For purposes of lobbying and raising public opinion, the terms thus far used seem to serve the purpose. What is of importance is that there has been a process among all those addressing the issue, including some government bodies, on the issue of naming. This in itself is a welcome change.

Yet another aspect of naming has been that of all the other actors involved in prostitution. This includes the pimps, the brothel owners, customers and 'husbands'. This process with its roots in the prostitute's language has taken root in all forays where the issues are addressed. As opposed to colonial legislation, government documents today, refer directly to all these different actors. While in execution of the laws, the targeting of prostitutes remains intact, the attribution of terms to all the other actors is a positive change. Customers still remain outside the ambit of discussions around prostitution. Even the articulations of prostitutes themselves do not attribute specific features or judgments on customers. This of course is a difficult task, given the number of customers from varied socio-economic and cultural backgrounds, who participate in prostitution. It is, however, important to begin to address this group, as their invisibility, contributes to the illegitimacy of the profession itself. The sex workers union in Calcutta has a few regular customers amongst its members. The naming of the 'husband' or the female partners of prostitutes, is an act that informs us aspects of their lives, that were till now, unknown to those outside the system.

In short, a process has begun whereby, naming that was in history used for subjection of specific individuals and groups, is being used for visibility and assertion. It is not a homogenous practice and differs over various regions and over time. The naming also works well within the paradigm of 'us' and 'them', where terms used by those within the institution might never be disclosed actively to those outside. This of course might be a conscious decision for maintenance of the strength of the community identity, for instance. Nevertheless, naming has reached a magnitude where, a process initiated by the sex workers and NGOs is being gradually thrust upon the government machinery. This is a crucial aspect also of the self-assertion and struggle of sex workers and their supporters.

6. Conclusion

The paper explores certain basic themes within prostitution in India namely nomenclature, moral panic and that of consent. It also hopes to point to aspects of prostitution that remain relatively unaddressed and demand focus. First, the research engages an analysis of the Provincial Acts and the Immoral Trafficking Prevention Act. Second, it engages in an effort to record the voices of prostitutes and other actors within prostitution in history as well as those that are contemporary.

The project of the paper is to place the contemporary sex workers' movements in India and the debates around prostitution within a historical context, however limited. It is also an effort to record the history of contemporary social movements. Both these projects often play into one another. At the end of this effort a number of questions emerge in regard to labour, gender, sexuality, family and so on.

From a historical perspective, one can identify a narrative of change as well as continuity. While the law itself and the processes surrounding these issues have undergone significant changes, certain underlying attitudes still persist. The disjuncture between law and the execution of the same is an illustration. The perceptions that consider prostitutes to be 'fallen' and thus with no moral right to claim any security from the state are still prevalent. The concept of rape, for instance, is most often, not seen to apply to the prostitute at all. This is only one example, but it is this lack of personhood in the construction of prostitutes that informs the lack of importance given to their rights.

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Buddhism and Domestic Violence

*Ouyporn Khuankaew**

1. Introduction

I grew up in a traditional rural village located in the north of Chiang Mai, Thailand thirty years ago. Modernization had not yet reached the village. Therefore, our way of life was mainly influenced by Buddhist and local cultures. With no electricity, tap water and unpaved roads, the community was completely economically self-reliant. The temple was our main community center for both religious and social life. The temple abbot was from our area and he was very committed to his practice and the Dhamma training of the young novices. When someone was sick, he would travel to the home of that person and conduct ceremonies to ease the mental suffering of the sick one. In return for his spiritual guidance, the community took care of the material needs of the inhabitants of the temple. It was a tradition that the best food was always given to the temple first. Most of our lives, either personal (birth, sickness and death) or communal (weddings, house warming, funerals and festivals) were always connected to the temple, monks, and the relevant religious ceremony.

My father was a very devoted Buddhist. If he could have afforded to, he would have donated much money to the temple. As an elder man, my father had a very close relationship to the temple and with the abbot. My father did not drink but had several wives. He was a very generous person but very violent and controlling both as a husband and a father. In those days poverty was a common suffering for many of the village folks. However, the difference between my family and our neighbors was the constant violence in our home. I still recall as a young child that I did not feel bad about being poor, but the most difficult part of my childhood was the constant fear of violence that could happen at any moment. When we did not have food to eat, we could go borrow from our neighbor, but when our father threatened or beat us, we could not go anywhere asking for help. And nobody came to rescue us. The abbot would go visit the poor, the sick but when a man was beating his children or his wife he did not go to save them. It was only when I became a feminist in my late twenties that I made sense of what happened during my childhood. The experience of domestic violence made me committed to feminism and non violent work. I was not interested in Buddhism until my early thirties.

In retrospect, I wonder if the reason I was not interested in Buddhism in my adolescent life was because I could not take refuge in traditional Buddhist culture when I experienced violence within my home. Through feminist eyes, I commenced looking for what Buddhism offers to ease the suffering of women in particular. Two main important elements of Buddhism touched me in that regard. One was the declaration of the Buddha that women as well as men can achieve enlightenment. Because of that principle, the Buddha himself allowed women to become monks more than two thousand five hundred years ago. This was a very powerful and liberating principle for me as a woman because this was a principle embodying justice, equality, balance and harmony.

* Activist, Thailand

2. My Working Experience

Part of my work over the past seven years involved reducing violence against women. I have worked with various Buddhist groups in South and Southeast Asian societies (Burma, Cambodia, Thailand, India and Sri Lanka), through workshops on gender, violence against women and being involved in several initiatives women leadership. One of the common forms of violence that we discuss is domestic violence. In every Buddhist group that we work with, be they monks, nuns, village women leaders, non governmental or governmental workers, upper class women or refugee women, domestic violence is viewed as a private affair, a common event that happens in the family. Thus, no individual or institution acts to protect or rescue those who are the victims.

When we discuss the roots cause of domestic violence, we find that as much as is the case in other religious cultures, Buddhist tradition and beliefs have also been a major reason for domestic violence. How and why could this be the case when the Buddha's words concerning women were so liberating and encouraging in regard to the inherent potential of women?

First let us examine the manner in which Buddhism performs its roles in these societies. The countries mentioned above except India, follow the Theravada tradition. This is the school of the elders, which means that it is the most traditional and conservative as it follows the origins of the teachings written down by monks many hundred years ago. However, in my view, when something is traditional and conservative, it often means that it is suppressive of women. Patriarchy has existed for many thousands of years and when one says that we should keep the tradition, it also means keeping the notion of patriarchy in place. In these countries, except Sri Lanka where full ordination of women was recently revived, women cannot be ordained as monks. The reason given is because the tradition of women's ordination is already lost or that such a tradition never existed. Here we see very clearly how Buddhist institutions and monks are using tradition to perpetuate patriarchy. These traditions are used supposedly to preserve Buddhism, but, ironically are against the Buddha's very words and actions. When we discuss further other Buddhist traditions and beliefs that contribute to domestic violence and other forms of women oppression, we find numerous examples. In Buddhist societies where women are not allowed to fully ordain as monks, women are often told by monks that being born as a woman is bad *karma*; they have to accumulate much 'merit-making' so that in the next birth they will be born as a man and thus can become a monk. This belief makes women feel inferior and thus, accept whatever gender-based violence that happens to them as part of their fate in being a woman.

When a woman asks guidance from a monk when her husband causes her suffering (such as beating, gambling or drinking alcohol) the advice given by the monk is, most often, to maintain patience and compassion. It is thus said that karma is the cause of this suffering so she cannot do much except be patient and kind to her husband so that one day the karmic force will cease and everything will be fine. We find this kind of advice reflected not only in the beliefs expounded by the monks but also embodied in common beliefs among Buddhist people including women themselves. This manner of karmic interpretation is very strong and it is one of the factors as to why a woman remains in an abusive marriage even when her life is in danger while the neighbors and community leaders do not interfere even when

they are aware that domestic violence is being practiced. In Cambodia, where domestic violence is the most common form of violence against women, we were informed that this interpretation of Buddhist karma is very deep rooted.

However, it is clear that this interpretation of karma is incomplete. If we look at karma as an individual act, perhaps it may be said that a woman is suffering because of her karmic choice to marry a violent partner. But it is not karma from her previous life that made her become a victim. It is structural violence influenced by patriarchy that results in women becoming victims of violence at home, at work and in public spaces. We are brought up to believe that in every institution that influences our lives, men are the ones who hold power, be this in the context of family, education, media, politics, religion, or legal and economic systems. Thus, decisions, rules and standards in society are made based upon their needs, values and beliefs. This is structural violence because women who constitute half of the population in every society are not participating in essential decision making that affects their livelihood. Structural violence is therefore both the cause and factor that buttresses all forms of oppression of women.

Structural karma is a higher level of karma that is caused by the social and cultural context in which each individual lives. It is collective because it is comprised of the accumulated acts that are committed by each individual living in the society. This structural karma is very important as it is a force that influences individual karma. Both karmic interpretations together help us to come to correctly understand violence against women. The structural karma of women's oppression is caused by several factors such as poverty and war, but the main causes are values and belief systems about the roles of women and men. These are the images perpetuated through family, school, media, and religious teachings. When we asked workshop participants in Cambodia as to how women and men are viewed and valued in their society, the followings were the answers:

Women are weak, thus, cannot be independent. They need parents or husbands to protect and guide their lives. Women are supposed to be good listeners and good followers of their parents or husbands. Once married, women are the property of men, and have to be loyal to their husbands. Widowed women are view as worthless. Women's roles are as mother and housewife. They are the ones who are expected to preserve cultures and traditions.

These beliefs influence women to feel subservient to their husbands. It makes society and even women themselves believe that they are subjected to violence because they did something wrong or were not good mothers, wives and so on. The belief that women cannot live an independent life and that once married are the possession of their husbands or that a widowed woman is worthless makes it very difficult for a woman to get divorced.

We heard from workshop participants from India and certain ethnic groups in Burma that parents forced their desperate separated daughters to go back to their husbands. Even when cultures and tradition are oppressive to women, they are raised to believe to preserve them.

Next let us see how men are viewed and valued in these societies.

Men are protectors, ones who sacrifice; leaders of the household and community, the breadwinners, ones who are trustworthy, ones who are strong and brave, confident and wise.

These beliefs result in men thinking that they are better, stronger and more valued than women. Once married, they believe that they have a right to lead and control their spouse and children. When a wife is not behaving in a 'proper way', then it is in keeping with these norms to beat her in order to correct her behavior.

The monks, just like most of us, also grew up with this belief and value system. With this understanding we can see why monks always instruct the woman to be patient, compassionate and accepting when her husband abuses her. This is due to the fact that because the monks do not have the knowledge to understand this problem from a structural level or in terms of collective karma; they cannot see a holistic way to help the woman. We can say that the monks do not have a complete 'right action' in their Dhamma advice to women who are victimized.

From our experience in teaching feminist counseling in this region we found that most people including psychologists, counselors and health workers who are dealing with the victims of domestic violence often fall into this trap as well. This informs us that each of our beliefs and value systems is deeply ingrained in our mind and actions. Without the right understanding and mindfulness to comprehend this issue, we contribute to perpetuating the oppression of the women, both at the individual and structural level instead of alleviating suffering.

Part of the resistance to the feminist movement in the region is the claim that feminism is a western concept, thus is not relevant to Asian cultures. For us women, speaking out about how we are oppressed breaks the silence, which is the first step of liberation. But because in our cultures we are expected to be followers and listeners, not speaking our minds, women who do not follow those images often get criticized and attacked.

One of the strategies I use to deal with this reaction is to find allies among men. Men need to learn to take responsibility to change this oppressive system that they are part of. Whenever I can, I co-facilitate gender-based violence workshops with the monks or men who are supportive of our cause. Through working with some monks, I have learnt that there are some Buddhist teachings about family and relationships that clearly define the manner in which the husband should treat his spouse. These teachings stress the equality in the partnership. These are teachings I had never heard before in any sermons by monks. In fact, on one occasion, my monk colleague informed me that it was because of my request that he had to go through the text of the old teachings to look for these valued principles. This implies that monks are the only ones that have power in the institution; not only can they interpret Buddhist teaching based upon their worldview but they can also be selective on what teachings they like to impart to the public. Most elders in traditional (patriarchal) societies do not reach out to teach the men as to the manner

in which they can behave wisely in a way that supports peace and harmony, both within the family and in society.

In general, monks never talk about domestic violence or particularly preach to men about the role of a good husband. The emphasis has always been the responsibility of a woman to improve and tolerate her husband. We also know that in general, monks have little knowledge about worldly life let alone understanding about domestic affairs since they do not live worldly lives themselves.

Insofar as the legal system is concerned, be it in a police station or a court, the outcomes are often not favorable to women as those institutions are also very patriarchal.

3. Conclusion

The issue of domestic violence has to be looked at from different angles. First we have to re- investigate our own views on this and ensure that when we oppose a contrary view, we can handle those views skillfully rather than angrily. We need to reject wrong views, values and belief systems that are ingrained in our minds; namely that the differences between men and women based upon biological differences also lead to an inferior social construction of women, that domestic violence is a private affair and that it is invariably the fault of the woman. In order to counter these beliefs that have oppressed women through the ages, it is important to replace such beliefs with new thinking and impart such thinking to people we encounter, be they children or adults.

The following are some examples;

'Domestic violence is not a family affair: friends, community and institutions have to intervene. Often times the victimized woman is isolating herself because she feels ashamed. Since nobody comes to intervene she thinks that nobody cares to help her and thus, dare not ask for help.....

.....women and men have few biological differences. For examples, women can give birth while men can not, women have menstruation but men do not; women can breast-feed and men cannot. But men and women possess the qualities of human potential equally which can develop once the opportunity is afforded. These qualities are patience, leadership skills, household skills, raising children skills, confidence, wisdom, bravery, being a bread winner for the family, compassion, and physical and mental strength.'

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