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## LAW AND THE SEXUAL SUBALTERN: A COMPARATIVE PERSPECTIVE

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KEYNOTE ADDRESS AT THE RE-ORIENTING LAW AND SEXUALITY CONFERENCE, OCTOBER 23, 1999, CLEVELAND-MARSHALL COLLEGE OF LAW

Globalization through Coca-colonization and MTV demands that we learn to have a conversation with one another. A conversation that is not conducted along the binaries of the West and the Rest, the colonizer and the colonies, the powerful and the impoverished, the here and the there. We need to begin a conversation that happens in the unexplored spaces in between these dichotomies. And in the arena of sex these binaries are particularly acute, where pleasure, desire and agency are assumed to be associated with the West while the third world subject is constructed almost exclusively through the lens of violence, victimization and impoverishment. We need to challenge the monochromatic lens through which sex is being viewed along such rigid boundaries.

Even as far back as 1942, this stereotype was challenged through the story of the *Quilt* written by Ismat Chughtai, a Muslim woman and fiction writer from Pakistan.<sup>2</sup> The story is told from the eyes of a young child who witnesses her aunt, a middle-aged sequestered housewife engaged in tempestuous relations of erotic pleasure with her female maid-servant in an upper-class Muslim household. The tempest is played out beneath a billowing quilt whose motions are compared by the child to that of a convulsing elephant. Ismat Chughtai's short story was charged with obscenity, a trial that lasted for two years and triggered a major social and political controversy. The charge was ultimately dismissed. But, as is the effect of most obscenity trials, it left the stain of immorality and stigma on both the sexual speech as well as the sexual conduct that were impeached.

The panels at the Re-orienting Law and Sexuality Conference, will share thoughts about alternative families, sex workers, and gay and lesbian legal identity. Each of these panels on the surface appears to be about status, rights and the law. But scratch beneath the surface, and each oozes sex, a stigmatized sex, a sex that is found to be so repugnant and visceral to some, that they would advocate its annihilation, its elimination, the extermination of the families, lovers and rights that are associated with it.

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<sup>2</sup>ISMAT CHUGHTAI, *THE QUILT AND OTHER STORIES* 7-19 (Tahira Naqvi & Syeda S. Hameed trans., 1990).

I am entering this conversation as a comparativist who wants to complicate the received wisdom about India in the West in regard to matters of sex, desire and the law. I want to address three issues:

- First, how sex generally and alternative sexuality more specifically, are emerging as zones of contest in the legal arena and are simultaneously cast as cultural controversies in post-colonial India.
- Second, I address how sexual subalterns, that is, gays, lesbians and sex workers, are challenging dominant sexual and cultural norms.
- And finally, I examine why a project of pleasure and desire is an important political goal in a post-colonial context.

I use the term ‘sexual subaltern’ as a theoretical device derived from subaltern studies, which is a particular form of historiography that has emerged in South Asia, giving voice to those who have been left outside of historical narratives produced by colonial or nationalist writers.<sup>3</sup> The term sexual subaltern is intended to bring together, the disparate range of sexual minorities within postcolonial India, without suggesting that it is either a homogenized or stable category. Indeed, the location and politics of the sexual subaltern in postcolonial India is mediated by class, caste and religion, producing a complex and at times even contradictory politics.

In India, sex is everywhere. But the pursuit of this particular pleasure and desire is denied it’s rightful place in the postcolonial world. If the U.S. media is any indication of how ‘the West’ and ‘the Rest’ is understood, how could we possibly have time for pleasure in between all of those natural disasters, riots, famines, teeming millions and our endless obsessions with electing and toppling governments. Of course, *even* the insider, certainly in the guise of the religious right, is hysterical over the images of sex being introduced into the Indian home through satellite broadcasting, as well as through the increasing mobilization of the sexual subaltern and their claim to sexual rights.<sup>4</sup>

Sex is everywhere and not entirely unlike the US, it is a site of confrontation and contest in the public and legal arenas. Representations of sex and sexuality whether through diasporic productions, such as *Kama Sutra* and *Fire*, or through popular Hindi commercial cinema, are transforming or at least challenging dominant sexual norms. Several recent controversies have focussed on the Hindi film industry and the allegedly vulgar and indecent representations of women within these films. The voluptuous hip gyrations, and vampish maneuvers of the number one film star actress and heroine of the Hollywood screen, Madhuri Dixit, in a hit song and dance sequence, became the focus of public controversy and a legal challenge brought by a supporter of the religious right.<sup>5</sup> The distraught petitioner alleged that the sequence

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<sup>3</sup>SUMIT SARKAR, WRITING SOCIAL HISTORY 82-108 (1997). *See generally*, Ranjit Guha, *On Some Aspects of the Historiography of Colonial India*, in SUBALTERN STUDIES I (Ranjit Guha ed., 1982)

<sup>4</sup>Ratna Kapur, *A Love Song to Our Mongrel Selves* 8:3 SOCIAL AND LEGAL STUDIES: AN INTERNATIONAL JOURNAL 353-68 (1999). *See also*, Ratna Kapur, *Erotic Disruptions: Legal Narratives on Nation, Sex and Culture in India*, \_\_ COLUM. J. GENDER & LAW \_\_ (2000) (*forthcoming*).

<sup>5</sup>For a discussion of the 1993, hit film song and dance number, *Choli Ke Peechey Kya Hai?* (What lies behind the blouse?) from the Hindi commercial film *Khalnayak*, *see generally*, Shohini Ghosh, *The Troubled Existence of Sex and Sexuality: Feminist*

was “vulgar, against public morality and decency” and against Indian culture and ethos. The case was not successful in legal terms, but it succeeded in stirring up public opinion around the controversy. It was a controversy taken up by politicians and led to a tightening of the Censor Board guidelines. A similar controversy followed the release of another film song whose chorus line “Sexy, Sexy, Sexy” triggered a debate in national Parliament on the increasing “vulgarity and obscenity” in Hindi films. Part of the mollification provided to those shocked by the lyrics was to direct that the words ‘Sexy, sexy, sexy’ be substituted by the words ‘Baby, baby, baby’, which it seems is more in conformity with Indian cultural values.

But this discomfort around sex per se seems to be as internalized in the Anglo-puritanical world as it is in post-colonial India. As an outsider I am stunned at the extent to which sex dysphoria continues to inform the current reality of the United States. The fact that Americans could invoke the edifice of the constitution to impeach their President in the most humiliatingly possible way, where the lies were not as important as the sex and the sex was nothing less than sin, bewilders the outsider. And this discomfort even manifests itself when it comes to sexual representations. The insertion of the ‘Walmart man’, the digitally generated image in the U.S. version of Stanley Kubrick’s *Eyes Wide Shut*, to block any direct view of the sex in the orgy scene, is but one recent and intriguing example.

At the other end of the sex spectrum are the innumerable internet sites dedicated to sexual abstinence in the U.S. A particular favorite is one entitled “food for thought”. It asks us to imagine what the world would be like if no one ever had sex outside of marriage. The right answers are that there would be no rape, except of course rape within marriage, no incest, sexually transmitted diseases, pornography or teenage pregnancy. And then the cite goes on to suggest ways in which one can achieve this surreal state of sexual dysfunctionality. It lists several obstructive measures which include, keeping your clothes on; being wary of back rubs; and finally, to avoid television shows, websites, magazines, *and*, most critically, conversations that dwell on or remind you of sex. In other words, don’t even think about it!!<sup>6</sup>

And the discomfort becomes more acute when the sex talk and conduct is subversive and rebellious. The controversy surrounding the Robert Mapplethorpe exhibit in New York a few years ago, and the legalisation of gay marriages in Hawaii evoked such strong passions and emotive responses.<sup>7</sup> In both of our respective cultures, non-conforming desire is the “most shamed and secreted” of domains. The point to emphasize is that India does not have exclusive jurisdiction over sex hysteria, although the sex hysteria in India does have its own interesting dynamic. Both are different, and yet not different.

The opposition to the sexual subaltern in India has evoked a response that challenges the dominant sexual and cultural narrative. A recent example involves the release of the diasporic production *Fire*, by Toronto based film director Deepa Mehta, in India in November 1998. The story involves the attraction between two

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*Engagements with Censorship*, in IMAGING INDIA 233 (Melissa Butcher & Christianne Brossius eds., 1999).

<sup>6</sup><<http://members.aol.com/Intift/ej/Steps.html>> (visited Oct. 8, 1999).

<sup>7</sup>For a history of the gay marriage controversy, *see* <<http://hawaiigaymarriage.com/docs/keydates.html>> (visited Dec. 15, 1999).

sisters-in-law, Radha and Sita, who are married to two brothers, Ashok and Jatin, respectively. Both the husbands are represented as almost uniformly undesirable and resistible. While Ashok is preoccupied with his search for spiritual salvation and raising money for his gurus scrotum operation, Jatin continues to serve as the lap dog lover of Julie, an Indian Chinese woman, an affair he refuses to surrender even after his marriage. Radha and Sita, whose names are the repositories of Indian cultural values in ancient texts and scriptures, representing the dominant understanding of Indian wives as devoted, self-sacrificing and presumably straight, are recuperated in the contemporary moment to transgress nearly every sexual, familial and cultural norm that constitutes India as it is imagined. The two women enter into a sexual relationship with one another, which is not simply the consequence of bad marriages. In fact, Sita demonstrates her choice and agency throughout the film, constantly pushing the boundaries of pleasure and passion with Radha, until Radha herself is brought to a realization that her relationship with Sita is also one of desire and choice. *Fire* propelled the issue of homosexuality into the forefront of public debate.

Despite the fact that the film cleared the Censor Board without any cuts, the mobs of the Hindu Right disrupted screenings in a number of major cities in India. And their protests took the form of an alarming destruction to the property of cinema houses where the film was screened as well as attacks against members of the viewing audiences.<sup>8</sup>

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

The only way to understand this hysteria is to understand that it is not only about sex - it is also about culture. In India, culture and sexuality have both been tethered together as a result of the colonial encounter. In the 19th century, nationalists safeguarded women's sexual purity, and confined it to the home, opposing any attempts by the colonial power to intervene in this space. The home and women's sexuality represented the purity of Indian culture and was constitutive of the emerging Indian nation.<sup>9</sup>

Because of the particular way in which sexuality and culture have been sutured together, in the contemporary context the new sexual subalterns and sexual images are also erupting as cultural controversies. The controversy over *Fire* involved a contest over the meaning of Indian culture as well as the place and status of

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<sup>8</sup>*Fire Makes Shiv Sainiks See Red*, TIMES OF INDIA, Dec. 3, 1998, at 1; *Patit Pavan Targets Fire in Pune*, EXPRESS NEWS SERVICE, Dec. 4, 1998; *Ban Fire, Says Sena Mahila Aghadi*, EXPRESS NEWS SERVICE, Dec. 1, 1998.

<sup>9</sup>Partha Chatterjee, *The Nationalist Resolution of the Women's Question*, in RECASTING WOMEN: ESSAYS IN COLONIAL HISTORY 233, 236 (KumKum Sanghari & Sudesh Vaid eds., 1989); Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India*, in RECASTING WOMEN: ESSAYS IN COLONIAL HISTORY 233, 236 (KumKum Sanghari & Sudesh Vaid eds., 1989); Tanika Sarkar, *Colonial Lawmaking and Lives/Deaths of India Women: Different Readings of Law and Community*, in FEMINIST TERRAINS IN LEGAL DOMAINS: INTERDISCIPLINARY ESSAYS ON WOMAN AND LAW 210 (Ratna Kapur ed., 1996).

homosexual identity in Indian culture. Opponents, in particular some of the more extreme Hindu nationalist groups, argued that the representation of the sisters-in-law in a lesbian relationship and appropriation of a litany of cultural rituals by them to celebrate and legitimize their ‘perverse’ bond was an offence to Indian cultural values. One spokesperson for the Hindu Right stated, that the movie should be banned to protect “society and our own daughters, wives and sisters” from the “Western concept of lesbianism”.<sup>10</sup> The *Mahila Agadhi*, a women’s wing of the Hindu Right, were particularly concerned about the impact of homosexuality on the Indian marriage and family, the bedrock of Indian culture. “If women’s physical needs are fulfilled through lesbian acts, the institution of marriage will collapse.”<sup>11</sup> They read the film as an attempt to convert women to lesbianism, which would lead to the demise of the Hindu marriage and the joint family. The arguments of the Hindu Right were based on an understanding of Indian culture as immutable and static.

Gay and lesbian groups, amongst others, contested the position of the various segments of the Hindu Right, and defended the film as an important statement of lesbian identity in India. In Delhi, gays and lesbians came into the public space for the first time to defend the screening, and through their public presence, challenge the stark declaration that lesbians do not exist in Indian culture.<sup>12</sup> They asserted that lesbianism had always been a part of Indian culture and lobbied for the film to be a means for recognizing the rights to sexual identity and repealing legislation that discriminated against such preferences. They attempted to complicate the notion of culture, as something that is constantly negotiated and in the process of construction. And it is this process that has been used to create space for the sexual subaltern including, in this instance,—the lesbian subject. The challenge disrupted normative sexuality and the surety of meaning accorded to Indian cultural values.

In both our worlds, erotic behavior remains acceptable if it operates within the parameters of the state ideology, that is, it is heterosexual, marital, monogamous, and of course, non-commercial. Like homosexuality, commercial sex work has also been increasingly targeted for threatening the parameters of dominant sexual ideology. In the U.S., the recent zoning laws that constitute part of the ‘quality of life’ campaign being zealously pursued by Rudolph Guliani, represents a simultaneous attack on erotic expression and the practice of stigmatized erotic communities. The regulations prohibit sexually oriented businesses from operating within 500 feet of residential areas, which is presumably the distance between good and evil, of schools, day care centers, houses of worship or one another. The new regulations directly target not only the erotic expression of women, but also undermines gender equality as it impacts primarily on female workers, in particular, strippers and dancers. And this is not an isolated phenomenon. In July 1999, a resolution and an anti-trafficking bill were introduced in the U.S. congress, urging Americans to advance public morality, restrain the growth of illegal sexual speech and activity, and create an environment in which ‘children will learn to do good and oppose

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<sup>10</sup>*Fire Makes Shiv Sainiks See Red*, *supra* note 8, at 1.

<sup>11</sup>*Ban Fire, Says Sena Mahila Aghadi*, *supra* note 8.

<sup>12</sup>*Deepa Mehta Leads Candlelit Protest*, *ASIAN AGE*, Dec. 8, 1998; Chitra Subramanyam, *War Over Lesbianism: Is it Un-Indian*, *ASIAN AGE*, Dec. 10, 1998 (quoting Pamela Rooks, director of *Train to Pakistan*).

evil”.<sup>13</sup> And one of the evils to be opposed included prostitution which was singled out as one of the root causes of organized crime, the creation and use of illegal pornography, and the spread of sexually transmitted diseases.

The sex worker in India is similarly being addressed as a community that is threatening the well-defined contours of cultural and sexual normativity. Her increasing visibility is due in part to her association with the AIDS crisis as well as the increasing mobilization of sex workers in India. In the early 1980's, state officials denied that AIDS could be a problem in India because of the 'moral values' of Indian men and women. One professor of medicine at the Medical College of Trivandrum, Kerala, stated:

“Even at the end of the twentieth century, the Eastern culture is untinged in its tradition of high morality, monogamous marriage system and safe sex behaviour. Our younger generation and youth still practice virginity till their nuptial day. The religious customs and god-fearing living habits are a shield or protection against many social evils. It will be difficult even for HIV to penetrate this shield, except in certain metropolitan populations.”<sup>14</sup> In the 1998 Report on Global HIV and AIDS epidemic, it was estimated that over four million people in India are HIV positive, located in townships, villages and metropolitan cities throughout the country. The moral righteousness of Indian sexuality has indeed been put to a challenge and culture is being invoked to reassert this righteousness.

The AIDS crisis is being projected as an external contaminant, a western disease that has been imported into India through promiscuous western lifestyles that is rupturing the cultural script of the purity of Indian sexuality. The 'Western white male' is cast as a sexual conqueror who is tearing through the cultural hymen and leaving in his wake strews of fallen women and a fallen culture. And the sex worker is implicated in this cultural demise castigated for abandoning the moral purity and sexual abstinence that ostensibly constitutes the bedrock of Indian culture, despite the evidence of 800 million people to the contrary. And here we find an interesting point of commonality between our worlds. Sexual abstinence is being propagated as the bedrock and salvation of both our cultures.

The legal response of the State has been to place the sex worker under intense scrutiny, drafting laws that project her as the vector and transmitter of disease. Even the responses of legal activists, human rights organizations and some feminists have not been particularly helpful. The dominant approach is to characterize sex workers in India as victims, whose work is determined by economic hardship and other coercive circumstances. This approach is located on an East/West binary, and assumes that choice is possible in the West, while economic oppression in Asia is so all-encompassing that the very possibility of choice or agency is negated. Asian women are setup in opposition to Western women: the Asian woman is invariably cast as chaste and vulnerable to exploitation in contrast to the promiscuous Western woman who is ruled by the (im)morality of the market. And this image of the victim subject feeds into the international arena, especially into the distinction between forced and voluntary prostitution that informs international human rights discourse today. This distinction does not challenge the assumption that prostitutes in the

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<sup>13</sup>H.R. Res. 239, 106<sup>th</sup> Cong. (1999).

<sup>14</sup>Aids Bhedbhav Virodhi Andolan, *Homosexuality in India: Culture and Heritage*, in A LOTUS OF ANOTHER COLOUR 21, 22 (Rakesh Ratti ed., 1993).

Third World are more likely to belong to the forced category, to be sex slaves, than those in 'the West'. Radical feminists and the religious right in the United States, have embraced this image of the 'third world prostitute', and this image is conflated with the plight the 'prostitute' more generally. That is, an alliance between our worlds on the subject of prostitution is being forged in and through the body of the victim subject, and used to advocate a legal and political response that will eradicate prostitution, and in the process the prostitute—eradicate that is the victim subject.

The intensification of the repressive moves to further regulate and penalize the lives of sex workers has been challenged by the sex workers themselves, within the United States, in the Asia-Pacific more generally, and in India more specifically. Sex workers in India are contesting the assumption that economic necessity drives women into prostitution, that it is immoral or that it is a cultural contaminant. In 1995 a national committee was formed in India consisting exclusively of sex workers and their children which has conducted two national conferences. They challenged repressive social and legal measures that delegitimize their families, constructing them as dens of immorality, and breeding children for sexually exploitative purposes. The parental competence of sex workers has been castigated in much the same way as gay parents here have been castigated and vilified, as child sexual abusers, pedophiles and sexual vultures.

The committee organized the First National Conference of Sex Workers in 1995, which issued a statement asserting that sex is primarily for pleasure and intimacy. The statement also challenged dominant sexual ideology, which allows "for sexual expression only between men and women within the strict boundaries of marital relations within the institution of family."<sup>15</sup> The workers stated that, "We believe that a woman's sexuality is an integral part of her as a woman, as varied as her mothering, domestic and such other skills. We do not believe that sex has a sacred space and women who have sex for reasons other than its reproductive importance are violating this space. Or if they chose to make money from the transaction they are immoral or debauched."<sup>16</sup> Sex workers are challenging the idea that sex in general and commercial sex, in particular are inherently negative, corrosive or otherwise dangerous.

In India as well as the U.S. sexual abstinence, the elimination of the prostitute, and the vilification of gays and lesbians seem to be directed towards creating a sex-free environment, or at least restricting it to a controlled and exclusive familial and marital space. But these forms of repression have generated a pro-sex resistance, mobilizing in particular the sexual subaltern who is challenging the idea that there is just 'one way to do it' and 'live it'. The sexual subaltern is recuperating sex as both a political project, liberating it from dominant familial and sexual ideology, as well as a less stigmatized and more pleasurable project.

The pursuit of a politics of pleasure and desire is an important political goal. Pleasure and desire is a feature of the lives of women in postcolonial India, rich and poor, urban and rural. Yet its denial has stigmatized pleasure as much as it has

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<sup>15</sup>First National Conference of Sex Workers, *Sex Worker's Manifesto* (1997) (presented at the First National Conference of Sex Workers organized by Durbar Mahila Samanywaya Committee, at Yuba Bharati Kriangan Salt Lake Stadium, Calcutta) (available on file).

<sup>16</sup>Veshya AIDS Muquabla Parishad [VAMP] and SANGRAM, *A Statement of Women in Prostitution 2* (March, 2000) (available on file).



stigmatized sex. Almost every representation of the erotic or sexual pleasure is cast within a pornographic genre or as a cultural transgression, characterized as western and foreign. Even in the United States, public disclosures of sex, even if consensual, are permissible provided they are declared within the framework of marriage or sin and repentance, a technique President Clinton quickly mastered, in which case there is the possibility of forgiveness and salvation. The stigma of fantasy and desire found its celluloid expression in *Eyes Wide Shut* which *Time* magazine described as the ultimate film about sex, but which I could only understand as the ultimate film about sexophobia—well certainly fantasy phobia.

In India, sex can safely be raised in the public domain as long as it is about violence, coercion, and victimization. The sexual subject must be an abject subject, a victimized subject. How can such a subject position be liberating or emancipating? There is no doubt that the victim subject has played an important role in challenging the subject of liberal rights discourse, a subject who was autonomous and de-historicized, existing prior to society. It highlighted the fact the subject does exist within a social environment and is in part constructed by it,—that is—a subject that experiences institutionalized discrimination and violence. Yet this subject has not necessarily produced a liberatory politics for women, and indeed has reinforced the patronizing and protectionist response to women within their national context as well as by the international community to Third World women more generally.

My remarks are intended to challenge the disempowered, tragic subject that has come to dominate our imaginations and our responses, especially when that subject is located in the Third World. I want to think about ways in which we can create a space especially for the sexual subaltern subject in pleasure, who exists in both our worlds though she expresses herself in culturally specific ways. This subject can shatter any claim to a universal sexual or cultural truth, as the sexual subalterns are diverse and pluralistic. Emphasizing the pleasure of this subject does not deny the violence and exploitation that surround her life, but serves to challenge the representation of her exclusively as a victim, of according to her partial agency. Giving visibility to the sexual subaltern in pleasure not only challenges the dominant story related about sex in the domestic context as something that is negative and also alien to Indian culture and ethos, it also challenges the stereotyped representations of the Third World subject in the First World as an abject subject.

When we recognize the multi-dimensional aspects of women's lives in the post-colonial world, then the possibility of dialogue between our worlds can be mooted. It is only when the 'Other' is not perceived or constructed exclusively in terms of her disadvantage that any conversation about what to do about the disadvantage can be a genuine or even an effective one. Many feminists, human rights groups, other activists and progressive scholars in the West betray an utter lack of respect for women who exist in disadvantaged situations by assuming that they are defined only in terms of their disadvantage, that they do not have the capacity to choose, that they are sex slaves and their liberation lies in rescue and rehabilitation.

In conclusion, my hope for the conference is to find ways in which to think about developing a theory of erotic justice that would bring erotically stigmatized communities from our respective worlds into a mutual conversation, a minimum normative theory that would perhaps require nothing more than consent and tolerance. We should remain skeptical of any strategy that advocates the superiority of assimilation over non-assimilative politics, of uniformity over diversity because that will lead only to an exclusionary politics. The transformation of the world will

only come about when difference is cultivated and harnessed as a strength. The strategies we formulate and the assumptions we challenge today are critical, not so much for us, but for the fact that there will ALWAYS, always be another 'other' that will come along.