

REVIEW ARTICLE*

Engendering Law Essays in Honour of Lotika Sarkar Lucknow by AMITA DHANDA AND ARCHANA PARASHAR (eds) (Lucknow (India): Eastern Book Company, 1999), pp 415. Recommended retail price \$US 20.00 (ISBN 81-7012-666-5).

Even the Publisher of this book is one of “maam’s bachas” (children) – a former student. Professor Lotika Sarkar is a formidable woman. As the editors of this book, who are also her former students, say, “she is a matriarch of the women’s movement”. This book to honour her is a collection of essays from former students and colleagues and friends. Professor Sarkar taught criminal law, criminology and conflict of laws in the Faculty of Law, University of Delhi. She was and is involved in myriad activities as a visiting scholar, member of the Government India Committee on the Status of Women, and in her connection with the India Law Institute and the Centre for Women’s Development Studies.

Lotika Sarkar and her friend Dr Veena Mazumdar sat on and wrote the Report for the Government of India Committee on the Status of Women in India. That Committee had a profound influence on their lives and the Report *Towards Equality* was published in 1974. It is “a founding text” which revolutionised thinking about women and “is by far the most important document relating to social, legal, political and economic concerns affecting women”.

Professor Lotika Sarkar played a central role in two important legal debates outlined in the book. She was a co-signatory to the open letter to the Chief Justice of India criticising the decision in *Tukaram v State of Maharashtra*¹ which overturned an earlier decision where two policeman were held guilty of raping a fourteen year old girl in a police station. The ensuing public debate resulted in changes to the law of rape, particularly the reversal of the onus of proof in cases of custodial rape. The accounts of the issues raised in the debate by contributors Nandita Haksar and Veena Mazumdar point to the tensions between women’s demands and civil liberties. As Lotika Sarkar said when asked why she had not demanded the reversal of the onus of proof in all rape cases – “do you want to hand over power that can be used to stifle all political dissent?” The implication was that in post Emergency India false accusations of

* Gail Pearson, Senior Lecturer in Law, UNSW. Gail Pearson was involved in women's issues at Jawaharlal Nehru University, New Delhi where she was a graduate student in the 1970s.

1 (1979) 2 SCC 143.

rape against a man who had to prove consent could be used for political purposes. Some women's groups demanded in camera trials. Other groups opposed in camera trials and the prohibition of publication of the victim's name as an attack on the ability of women to organise politically around the issue of violence against women.

In 1981 Lotika Sarkar was a co-petitioner in the *Agra Protective Home* case.² This public interest litigation sought an examination of the physical and mental health of prostitutes kept in a State run Home for their protection and rehabilitation. The women were kept in appalling conditions. Many were kept illegally and thirteen had gone insane. S Muralidhar's account traces the saga of 'governmental lawlessness' until the end of 1997. The matter was kept alive by monthly reports to the Supreme Court on conditions in the home from the District Judge, Agra and reveals the lack of any due process in the incarceration of women under the *Immoral Traffic in Women Prevention Act 1956* be they prostitutes soon discharged in many cases to the custody of a pimp for "proper care, guardianship, education and training", or respectable married women with children as illustrated in the case of Lalita picked up by the police outside a main hospital.³

One theme comes through constantly in this book and that is human warmth – among and between the contributors and the person they honour; and for the lives of the many they celebrate even in the dissection of individual anguish.

For me, Upendra Baxi's piece "From Human Rights to the Right to be a Woman" is the fulcrum of the book. Baxi, Law Professor and former Vice-Chancellor of the University of Delhi, tells us the story of Kamla. A chattell slave, Kamla was bought and sold three times in the space of a week from a State government guesthouse in central India. The third time she was sold to a journalist and the matter was taken to the Supreme Court of India which ordered the State Government to account for the sale of a person from State premises. The Court also ordered that Kamla be placed in a women's home. Kamla disappeared. No one knows if she is dead or alive. Neither the newspaper nor the Court did anything to find her. Kamla's story prompted a play by India's most famous playwright and a Bollywood movie.

As Baxi says, Kamla was commodified by both the feudal market in lust and by the market in aesthetics and the market in human rights. When Kamla's constitutional and human rights were invoked this resulted simply in her "elimination". Baxi points to a failure of the existing human rights discourse, and an over-reliance on the politics of identity and status rights in the contemporary women's movement. He applauds two things: the language and moral agency of those who suffer exemplified in an Indian Sex Workers Manifesto;⁴ and the utility of law – international law and the adoption of human rights standards in domestic law as in *Gaurav Jain v Union of India*.⁵

2 *Upendra Baxi and Lotika Sarkar v State of Uttar Pradesh* Writ Petition No 1900 of 1981 (1983) 2 SCC 308; (1986) 4 SCC 106; (1988) 9 SCC 388.

3 See SLP (Crl) No 161/1986.

4 [sexworknet@gn.apc.org].

5 (1997) 8 SCC 114.

This book comes at a time when faith in law and rule of law notions is at a low ebb among many engaged with Indian society and feminism. Yet the tenor of the essays, while critical, is optimistic – for recognition of the way in which differences are contested within the law; for a revitalisation of legal education which will incorporate feminist insights at its core and ultimately for social justice.

Many of the articles outline certain areas of law and suggest general or specific reforms. Ved Kumari argues that although the *Indian Penal Code* is seemingly neutral in that it applies to all persons, it is informed by an underlying Victorian morality. She examines suggestions for reform from the National Law School of India, the Centre for Female Legal Research and a proposal by the National Commission of Women to enact a comprehensive Code of criminal laws with respect to women. KN Chandrasekharan Pillai examines shortcomings of the Criminal Procedure Code. He is critical of a proposal that rape offences should be heard by an all woman Court.

In his piece on Gender, Constitution and the Courts, SP Sathe points out that in *Bodhisattwa Gautam v Subbra Chakraborty*,⁶ rape was recognised not only as an offence against the *Indian Penal Code* but also as a violation of a Constitutionally guaranteed human right under Article 21 which contains the Right to Life and incorporates the right to live with dignity and personal freedom. He points out the significance of this decision and argues that there should be consequent changes to the rules of evidence and that the exclusion of marital rape from the *Indian Penal Code* should now be unconstitutional.

When Lotika Sarkar first began teaching at the University of Delhi in the 1950s she was told that she could not teach criminal law as she would have to teach rape to classes of men and women. In 1996 at a conference of Indian and Australian legal academics, Ved Kumari explained how rape had been removed from the criminal law curriculum at the same University for similar sensitivities! Nandita Haksar in her piece on the tension between human rights and women's rights refers to the way in which mass rape was used in Santhal Pargannas, a tribal area, as a means of political control.

Women's labour is vital to the economy. Neera Chadha assesses decisions under the *Equal Remuneration Act 1976* and the *Maternity Benefit Act 1961* and reaches the conclusion that this protective legalisation has not been wholly successful. As Chhatrapati Singh points out the *Equal Remuneration Act 1976* does not apply to the unorganised sector. The *Minimum Wages Act 1948* applies to agricultural work but forestry work is mostly regulated under the labour rules of the *Forest Act*. Under these rules, wage rates are even lower than under the *Minimum Wages Act 1948*. Even so, there is a wage differential. Labour is classified as hard or soft. Women do soft work – such as stone breaking – and they get paid less than men. Nevertheless, as RP Sathe points out, in *Visakha v State of Rajasthan*⁷ the Supreme Court on a public interest petition said that the threat of sexual harassment of working women prevented a woman from

6 (1996) 1 SCC 490.

7 (1997) 6 SCC 241.

pursuing her career and violated Article 19(1)(g) of the Constitution, which guarantees rights to carry out any occupation, was discrimination under Article 14 and violated Article 21. The Supreme Court issued Directions to combat sexual harassment until suitable legislation could be put in place.

DN Saraf points out that although the *Consumer Protection Act* 1986 provides no specific protection for women it does recognise a special place for women in that Consumer Disputes Redressal Agencies (similar to Consumer Tribunals) must include a woman. Complaints regarding medical services can be heard by the Redressal Agencies and in *Achutrao Haribhau Khodwa v State of Maharashtra*⁸ the Supreme Court considered Australian law on the standard of care in medical negligence cases.

The human rights versus women's rights; religious freedom versus secularism issues are at the fore in the proposals for a Uniform Civil Code for personal law. This is discussed by Alice Jacob in the context of reforms to Christian Marriage Law and by both Nandita Haksar and Veena Mazumdar. B Sivaramayya examines statements of the Supreme Court on the matter in his discussion of responses to the recommendations of the Report by Committee for the Status of Women in India.

Three papers provide an historical perspective. Malavika Karlekar retells the story of Nistarini Debi 1832-1916, an abandoned wife and later widow, juxtaposed with the story of the *Hindu Widow Remarriage Act* 1856. Uma Ramanathan samples cases that reveal women's lives from the 1920s to the 1950s. Veena Mazumdar provides an account of the Indian women's movement and its engagement with the law since the 1970s. She tells us of the one third reservation of seats for women in the Panchayats through the 73rd and 74th Constitution Amendments in 1992 and of the 81st Constitution Amendment Bill 1996 to reserve one third of seats for women in the Parliament.

Two papers provide provide an international perspective. A contribution from Lord Lester QC examines the way in which European Community law has enhanced British law in combating sex discrimination. JN Saxena looks at protections for Refugee Women.

Archana Parashar argues for gender as a central concern of legal theory and provides the outline of a model course in Feminist Jurisprudence. Amita Dhanda warns of the legal psychologising of dissent in her discussion of a number of cases in which the Court has played the role of diagnostician.

All contributors in their different ways hold to faith in the law, conscious of its inadequacies. Nandita Haksar and Ved Kumari point out the shortcomings of some strategies for legal intervention. The Shah Bano case,⁹ resulted in legalisation which does not protect divorced Muslim women who require maintenance. A writ petition to challenge one set of legislation applicable to tribal women would result in the application of another Act – the *Indian Succession Act* 1925 - which does not recognise common property or use rights and may turn common tribal property into private property.

8 (1996) 2 SCC 634.

9 *Mohd Ahmad Khan v Shah Bano Begum* (1985) 2 SCC 556; 1995 SSC (Cri) 245.

I shall leave the last word to my friend Veena Mazumdar who first introduced me to Lotika Sarkar: “I may have lost the sense of certainty which I shared with the earlier generations of the Indian women’s movement ... in viewing legalisation as the major instrument for ushering changes in social order and building a gender just society... But I would still argue that a historical failure at a particular point of time should not be generalised to ... an impossibility.”

As the editors and contributors honour and thank Lotika Sarkar so must we thank the editors. And can we have an improved index and a Table of Statutes and Table of Cases.