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The Law, Gender and Women

KALPANA KANNABIRAN

The essays in this edition of the Review of Women's Studies, on the theme "Women and Law", look at women's lifeworlds, in some parts, and the extent to which the law has touched them. Where the law has touched lives, the quality of that engagement – legislative, interpretive, positive, restitutive, punitive – merits critical examination because it is of crucial importance to the precarious standing of women in a patriarchal set-up. While briefly pointing out the areas the essays tackle, this introduction broadens the scope of the review to a discussion on gender, law and violence.

The first issues that come to mind at the mention of "women and law" are rape, dowry death, sati. An attempt to take this further leads us to disentanglements from property, maintenance, labour protection, residence, child custody, citizenship. What is common to all these concerns is the issue of violence – brought about by an unequal social order, and also importantly, by the law's violence. And nowhere is this starker than in the case of women.

The question before us when we began work on this issue of Review of Women's Studies was: how should we approach the problem of "Women and Law"? Should the focus be on women-centred laws or provisions and their efficacy? Or should the focus be, instead, on the ways in which the law imagines women and the ways in which women have engaged with the law – spilling beyond fields traditionally associated with the phrase "women and law"? Or should we use the Delhi High Court's extended delineation of "sex" in the celebrated *Naz Foundation* case, to look at the question beyond simple classifications of male and female, viewing gender and law not in a manner that waters down the focus on women but in a manner that complicates our understanding of discrimination based on sex. And what is the place of violence? The experience of women in Gujarat, Kashmir, Manipur and Chhattisgarh (to name but a few places) has shown us the many faces of state violence and the ways in which the repressive state in concert with dominant interests wages war on women's bodies and their lives in a democracy.

In looking at the theme "Women and Law", our concern has been to look at women's lifeworlds, in some parts, and the extent to which the law has touched them. Where the law has touched lives, the quality of that engagement – legislative, interpretive, positive, restitutive, punitive – is of critical significance. All the essays in this review will focus on women and the law, and this introduction will introduce them briefly while broadening the scope of the review to a discussion on gender, law and violence.

Law's Violence and Gender

Let me begin with a disturbing illustration of "law's violence".¹ The Andhra Pradesh (Telangana Area) Eunuchs Act, 1329 F (Act No xv1 of 1329 F) is an enactment "for the registration and control of eunuchs". Section 2 of the Act provides for the maintenance of a register by the government that will contain "the names and place of residence of all eunuchs residing in the City of Hyderabad or at any other place...and who are reasonably suspected of kidnapping or emasculating boys or of committing unnatural offences or abetting the commission of the said offences..." Clearly the definition of unnatural offences that

I am grateful to Maithreyi Krishna Raj for inviting me to edit this issue, an opportunity I cherish; and to EPW.

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applied was Section 377 of the Indian Penal Code (IPC), which has now been read down by the Delhi High Court.

Section 4 of the Act, "Registered eunuch found in female clothes", casts a wider net.

Every registered eunuch found in female dress or ornamented in a street or a public place or in any other place with the intention of being seen from a street or public place or who dances or plays music or takes part in any public entertainment in a street or a public place may be arrested without warrant and shall be punished with imprisonment for a term which may extend to two years or with fine or both.

Section 5 provides for the punishment of a eunuch with imprisonment if it is found that he "has with him or in his house or under his control" a boy who is less than 16 years old. This boy could well be his child. Section 6 provides that the district magistrate may direct that any such boy be delivered to his parents or guardian, "if they can be discovered and they are not eunuchs; if they cannot be discovered or they are eunuchs, the Magistrate may make such arrangement as he thinks necessary for the maintenance, education and training of such boy..." Sections 5 and 6 deny eunuchs the right to relationship, family, child custody and reproductive autonomy. Finally, Section 7 penalises consensual and non-consensual emasculation and abetment to emasculation with imprisonment for a term, which may extend to seven years. But then Section 1-A of this Act states, "a eunuch shall for the purpose of this Act include *all persons of the male sex who admit to be impotent or who clearly appear impotent on medical inspection*" (emphasis added). So by this token all impotent men, all "emasculated" men, all male transvestites and "men found in female dress" attract criminal prosecution for their corporeal defiance of heteronormativity, of which the cornerstone is the potent, virile, sexually active, heterosexual man. The surveillance and colonisation of the body and mind of the eunuch – through the combined regulatory practices of policing and medical inspection – and the denial of life and liberty, is, in a literal sense, accompanied by an absolute denial of the right to freedom of speech, dress and aesthetic expression.

But that is not all. This law, unarguably, represents the starkest form of sex discrimination and violent exclusion. A "eunuch" is an impotent man; all eunuchs must be registered; no eunuch may wear ornaments or female dress, in private or in public; and no eunuch may have a child in his care. It is not clear from this legislation whether parents are permitted to keep a transgender child in their care. Would this child then attract the same criminal provisions? Would parents then become abettors in the crime of allowing freedom to a transgender child? The assumption in the law is that eunuchs are created through "emasculatation" and/or "impotence," both of which are treated as interchangeable and the result of conscious decision (in which consent of the person "emasculated" is irrelevant) – *mens rea*. This law obliterates the possibility that persons might be born with attributes of both sexes, and might reasonably choose to perform as one or the other or both; and it obliterates the distinction between sex as attribute and sex as performance. Further, it assumes a self-sustained, closed community – an assumption that does not allow for the social coexistence of eunuchs, men and women. And yet this is a forced separation, effected by a draconian law that forces

parents and neighbourhoods (even where they are inclusive) to expel transgender kin from their midst lest they invite criminal prosecution. Alternatively, transgender people are forced to adopt a flat male identity in return for social acceptance at every level, and indeed to be at liberty.

At another level, a look at this legislation is important because it tells the story of the law's construction of difference and the law's delineation of hegemony based on difference, in this instance, gender hegemony, with a sharp focus on bodily aesthetics and procreative/heterosexual capacities.² This law tells the story of the law's performance of violence, neither as punishment for crime, nor as punishment for dissent, but because as a homogenising force bearing the weight of Reason, it polices bodies and is intolerant of difference. This law also tells the story of our society's intolerance of difference, rather its selective and conditional tolerance of difference and diversity, a point discussed by Jo Chopra (quoted below) in the context of persons with intellectual disability. A cursory glance at this law throws up themes that reverberate through all the essays in this collection.

Womanscape and the Law³

Dispossession and discrimination are overarching themes that are inextricably linked and get expressed in each of the contexts examined here in very specific ways.

Disability is... "The Last Frontier" in the battle against discrimination and injustice. ...Although we speak of tolerance and diversity, many of us are uncomfortable with people with disabilities making choices in their lives, distressed by the idea of them having sexual relationships and appalled by the vision of them bringing more people like themselves into the world.⁴

Critiquing approaches to disability in public discourse, Chopra points out that persons with intellectual disabilities are more likely to be sexually abused since they are dependent on adults for basic personal needs, which make them submissive in relation to these adults, and often "lack the social skills to assess a dangerous situation". State violence – sexual assault by public servants, as in the case discussed – fades into the background in the face of the "calamity" of allowing reproductive choice to an intellectually challenged woman.

Clearly separate from this is the discussion on the capacity of an intellectually challenged woman to discharge "mothering"

A Tribute to a Pioneer

Neera Desai (1925-2009), feminist scholar and sociologist, stood out as the first academic in her generation to bring the learnings and insights of the women's movement into women's studies and feminist sociology.

A pillar of support to young struggling scholars and activists, her calm strength and firm commitment to democratic rights provided stability to many of our early battles for visibility and voice. Her gentle speech, scrupulous scholarship and cautious formulations were always woven around a profoundly radical understanding of justice.

This issue of the Review of Women's Studies is offered as a tribute to Neeraben – comrade, mentor and friend.

Kalpna Kannabiran

functions. As Chopra points out, mothering is more about caring than about IQ – and women in general require support in child-care. What is it, then, that disempowers an intellectually challenged woman? The right to reproductive choice and freedom is critical for all women, but especially for women with disabilities. The case Chopra discusses in this article is one of the cases Pavan Kumar and Anuradha (p 37) examine in their essay on gender, disability and law.⁵ Women with disabilities in India are a socially invisible category – powerless, isolated and extremely vulnerable to abuse and violence. While no specific disability law mentions women as a category that requires special attention, the Working Group on Empowerment of Women for the Eleventh Five-Year Plan (2007-2012) acknowledges the lacunae in law and policy where women with disabilities are concerned.⁶

The Sachar Committee Report points to the specific ways in which Muslims in India face discrimination and importantly counters stereotypical constructions of socio-demographic indices in Muslim communities. In the spirit of deliberative democracy, Razia Patel (p 44) critically examines the debates on Muslim Personal Law and the various positions adopted by different bodies and forums on the question of equal rights for Muslim women, suggesting a way forward.

The history of women's struggles in India over rights in relationship has, across communities, revolved around entitlements to domestic resources and rights to domestic space irrespective of title and ownership. Indira Jaising (p 50) chronicles the passage of the Protection of Women from Domestic Violence Act, 2006, which redefines the "domestic" in very important and far-reaching ways, setting out a vision (difficult even for the judiciary to accept unequivocally) that whether or not ownership is shared, whether or not a relationship is harmonious, the home is a shared space. The problem, however, still remains when conflict in marriage leads to divorce or dissolution in a patriarchal society in which women within marriage are in a state of economic dependency. What of the woman's economic rights and her material needs, both of which are closely tied to her psychosocial wellbeing? Flavia Agnes (p 58) critically examines women's travails in securing maintenance in courts that decide at best in favour of formal rather than substantive equality in these matters. Perhaps, she suggests, there is the need for a shift in constitutional interpretation of this issue.

Feminist theory has demonstrated the close connections between the private and the public, between the domestic and the community. Women's access to, and control over, resources, and indeed women's entitlements are fraught at every level. How have women from adivasi and other forest-dwelling communities asserted their control over the forestscape? What are the ways in which they have expressed their plural, productive and non-economic engagements with the forest both vis-a-vis their communities and the state? Sagari Ramdas (p 65) takes a close look at the ways in which the implementation of the Forest Rights Act in Andhra Pradesh reinforces patriarchal and stereotypical constructions of adivasi women, completely negating their autonomy and their concerted resistance to neoliberal policies that have flattened their lands and destroyed livelihoods. Meera Velayudhan (p 74)

takes a broad sweep look at women's rights to land and assets in south Asia, using the experience of the Working Group on Women and Land Ownership as her point of departure.

Several valuable studies have demonstrated the specific ways in which neoliberal policies have affected labour. In a situation where informalisation is spreading to engulf the labourscape, Padmini Swaminathan (p 80) finds that data-gathering tools are not equipped to capture the changing realities of women's work participation, disempowering them from protective legislation. Critically examining policy documents that speak of informalisation of the formal sector, she traces the legal and socio-economic implications of this process for women.

Courts continue to be a critical space for recovering entitlements and seeking redress against discrimination. How have courts understood and interpreted discrimination based on sex? The concluding essay by Kalpana Kannabiran (p 88) tracks jurisprudence on sex discrimination, and points to the problems therein.

After over three decades of feminist activism in which negotiations around law and justice delivery for women occupied a central place, we are at a point where questions of diversity, difference, and multiple intersecting sites of discrimination and dispossession have opened up several layers in earlier concerns on questions of women's entitlements and citizenship. This issue of the Review of Women's Studies engages in an interdisciplinary exploration of some of these sites.

NOTES

- 1 I borrow the expression "law's violence" from Sarat and Kearns. "A Journey through Forgetting: Toward a Jurisprudence of Violence" in Austin Sarat and Thomas R Kearns, *The Fate of Law* (Ann Arbor: The University of Michigan Press), 1993, 209-73.
- 2 Andrew N Sharpe (2002), *Transgender Jurisprudence: Dysphoric Bodies of Law* (London and Sydney: Cavendish Publishing Ltd), discusses the complexities in the judicial imagination of sex/gender in Australian and US jurisprudence. However, the concerns raised by this legislation are distinct.
- 3 I borrow the title from Volga et al (2000), *Womanscape/Mahilavaranam* (Secunderabad: Asmita).
- 4 Jo Chopra, "Contested Motherhood", *The Hindu*, Magazine, 30 August 2009, 4.
- 5 *Suchita Srivastava & Anr vs Chandigarh Administration*, Supreme Court of India, CA No 5845 of 2009, Petition(s) for Special Leave to Appeal (Civil) No(s) 17985/2009.
- 6 http://planningcommission.gov.in/aboutus/committee/wrkgrp11/wg11_rpwoman.pdf. Last accessed on 20 September 2009.



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