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Introduction

Women and Colonial Law

A Feminist Social History

A ‘status of Indian women’ report card in the second decade of the new millennium would present a very contradictory picture. Let us start from where most of those reading this book will be: the field of higher education. Although the presence of women in higher educational institutions has reached a very creditable 49 per cent, it is against a broader backdrop of at least 35 per cent female illiteracy, according to the latest All India Survey on Higher Education, 2019–20.¹ No doubt, the demand for education, from primary to high school to college, is growing in leaps and bounds, as women, and sometimes their families, recognize the importance of a greater chance of employability among the educated.

But women’s access to the world of paid employment, which ideally opens up fresh avenues of independence and opportunities for self-assertion among women, is ironically in decline: women constituted a mere 21.9 per cent of the above-15 workforce in 2011–12, down from 35 per cent in 1990, and an even sharper decline has been noted in the Periodic Labour Force Survey, 2017–18.² Even those women who do work outside the home for wages are systematically lower paid, overwhelmingly concentrated in some sectors (rural and unorganized) and afforded little or no legal protection.

¹ *All India Survey on Higher Education 2019–20* (Ministry of Education, Government of India, 2020), https://www.education.gov.in/sites/upload_files/mhrd/files/statistics-new/aishe_eng.pdf (accessed 9 December 2022).

² K. P. Kannan and G. Raveendran, ‘From Jobless Growth to Job Loss Growth: Gainers and Losers during 2012–2018’, *Economic and Political Weekly* 54, no. 44 (9 November 2019), pp. 38–44.

Gender Discrimination in India Today

Even after more than 70 years of independence, therefore, Indian women still face a formidable degree of discrimination in public and private life. The ratio of women to men in India has steadily fallen since 1911, when there were 965 women to every 1,000 men; the most recent census (2011) reveals a slight improvement after a long period of decline, at 943 per 1,000 men. But the child sex ratio (of girls under six) is an alarming 914. A single indicator such as this speaks of sex-selective abortions, the neglect of girl children and criminally negligent maternal health care facilities. In other words, the demographic disparity between the sexes speaks volumes of the systematic, rather than just the episodic or occasional, forms of discrimination against women. In post-independence India, 'adverse child sex ratios ... have become practically synonymous with gender discrimination'.³

Despite enduring mythologies about the home as the site of female power, the powers of women within families are severely circumscribed: in many cases, even wage earners have little or no real control of their incomes. Decisions relating to such personal spheres as sexuality and reproduction are too often determined or dictated by the interests of the reproductive patriarchal family. The shocking increase, in the last few decades, of sex selection, despite laws in place that prohibit such medical procedures as amniocentesis, reveal the limited control that women can claim over their own bodies. At the same time, women's active participation in sex selection, using sophisticated technologies, points to the complex ways in which patriarchy functions, especially as it rewards female complicity and obedience within the family. On the other hand, the large, until recently restricted, participation of women in surrogacy, which drew women into new forms of commercialized body use, and wombs in particular, has brought new ethical and legal issues to the foreground while complicating ideas of rights and female agency.

Gender violence in India is hardly confined to discrimination against female foetuses and children. There are also aspects of widespread violence against women which are specific to the Indian subcontinent, including the murder of women for dowry and the use of rape as a weapon in inter-caste and inter-community conflicts. The National Crime Records Bureau (NCRB) reported in 2019 that the proportion of Indian Penal Code (IPC) crimes committed against women with respect to total IPC crimes had

³ Mary E. John, *Researching Sex Ratios and Gender Biased Sex Selection: History, Debates and Future Directions* (UN Women and United Nations Population Fund, 2014), p. 2.

increased by 7.3 per cent over the previous year.⁴ What is more, one-third of all reported cases (30.9 per cent) were against husbands and other family members. Stranger rape was much rarer than rape by known men. These statistics revealed as much as they concealed: on the one hand, the home, neighbourhood, or familiar spaces frequented by women were far from safe; on the other, the high proportion of cases, of rape for instance, that were not pursued to their logical conclusion by the survivors themselves, seemed to suggest that the accusation of ‘rape’ was sometimes made by families wishing to thwart the sexual/marital independence and self-selection of young women and men themselves.

But it is also true that more than ever before, women themselves are demanding and framing new and important legal remedies to deal with a wide range of unprecedented crimes against women: the introduction of Section 498A of the IPC to cope with domestic violence and abuse, Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (PNDT Act),⁵ the Domestic Violence Act, 2005, and significant remedies sought against sexual harassment at the workplace (Criminal Law [Amendment] Act, 2013).

These are a sign of a pushback from women themselves. Domestic violence is perhaps the most pervasive kind of violence against women and deeply affects their health and well-being. *National Family Health Survey – 5* data showed that around one in every three women is a victim of mental, physical and verbal domestic violence. The NCRB data of 2015 itself showed that 113,403 cases of violence under Section 498A of the IPC were filed in that year, of which charge sheets were filed in 89.4 per cent of cases. There was thus a doubling of recorded crimes of violence against women by husbands and their families between 2005 and 2015. This has led to a backlash against the likely ‘misuse’ of such legislation by women themselves through the formation of Family Welfare Committees. In *Rajesh Sharma v. State of Uttar Pradesh* (2017), the judges claimed that ‘the fact that Section 498A is a cognizable and non-bailable offence has lent it a dubious place of pride [*sic*] amongst the provisions that are used as weapons rather than shield by

⁴ *Crime in India: Crime Against Women, 2018–19* (National Crime Records Bureau, 2019), p. xii.

⁵ This was amended in 2003 to the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act (PCPNDT Act) in order to improve the regulation of technology used in sex selection.

disgruntled wives'.⁶ As we shall see throughout this book, the cry of 'family in danger' has historically been raised when women assert their legal and social claims, and therefore enjoys a long and tenuous ancestry. Every effort of Indian legal feminists to lay claim to their bodies, public spaces, workplaces or homes is contested as too destabilizing.⁷

Even such pervasive and widespread forms of discrimination against women as exist in the Indian context, however, do not impinge equally or uniformly on all women. There are very distinct regional disparities, in addition to the hierarchies of class, caste and ethnicity, with which the hierarchies of gender intersect. By intersectionality is meant the simultaneous working of multiple systems of domination/oppression on one subject or class of subjects, especially those on the margins;⁸ it also implies that the burdens of one register may be undone at another. Although patriarchal arrangements are the norm, their specific nature varies widely according to the position of women in the class and social hierarchy (that is, caste, ethnic or religious group). In other words, in an economically and socially unequal society such as India, women do not constitute a homogenous collectivity with shared interests and needs. Kalpana Bardhan's early (1986) observation remains as true today: women 'are stratified as men are, by enormous differences in material resources, in the options available to them, and by the norms of status-appropriate work tied to their class and caste locations'.⁹

In the realm of work, there is a close correlation between caste and class at the lower echelons of society, with outcaste and tribal women working as wage labourers and forming the poorest and most visible section of working women in India.¹⁰

⁶ On women's groups who opposed this judgment, see Saurav Datta, 'Women's Rights Groups Urge CJI to Reconsider Section 498A Judgement', *Bar and Bench*, 1 August 2017, <https://barandbench.com/women-rights-groups-cji-section-498a-judgement> (accessed 31 July 2017).

⁷ See, for instance, Save India Family Foundation, <http://www.saveindianfamily.org> (accessed 4 February 2018).

⁸ See, for instance, Nivedita Menon, 'Is Feminism about "Women"? A Critical View on Intersectionality from India', *Economic and Political Weekly* 50, no. 17 (25 April 2015), pp. 37–44; Mary E. John, 'Intersectionality: Rejection or Critical Dialogue?' *Economic and Political Weekly* 50, no. 33 (15 August 2015), pp. 72–76.

⁹ Kalpana Bardhan, 'Women: Work, Welfare and Status: Forces of Tradition and Change in India', *South Asia Bulletin* (Spring 1986), pp. 3–16, esp. p.3.

¹⁰ J. Devika, 'Gender, Caste and Abjected Space', in *Women in the Worlds of Labour*, ed. Mary E. John and Meena Gopal, pp. 195–220 (Orient Blackswan, 2021).

As one goes higher up the social scale, the correlation between class, caste and gender hierarchies is less predictable. For example, the castes and tribes ranked lowest take part in wage labour, but women of middle- and upper-caste rural families are often withdrawn from the labour force, staying away from work on their own farms even as labour is hired in. In these cases, the withdrawal of women from the workforce functions as a symbol of upward social mobility. The chances of women from the middle and upper castes/classes entering the workforce are stronger in urban areas, although this is nearly always contingent on the availability of cheap female domestic labour which releases some women from household chores into a world of paid professional work. At every level of the workforce, from wage labourer to highly paid professional, gender discrimination always disadvantages women vis-à-vis men, whether in terms of opportunities, options or remuneration.

It is not only within the workforce that there is tremendous differentiation between women in terms of caste, class and community. Within that basic unit of the family itself, there are strict hierarchies that assign power and status to women according to their relationship to dominant male members of the family and are aligned to each stage of the life cycle. Thus, most rural girl children may be relatively powerless, in both the economic and the social senses. Young adults, and especially young wives, due to the prevalence of village exogamy and patrilocal residence, especially in north India, are placed in extremely stressful situations in their early married life and are usually treated very poorly. However, a woman's status is considerably enhanced by marriage and especially by the birth of male children. The marriage of sons and the entrance of younger women to the household again enhances the status of the mother. In many cases, however, the widowed woman shares the burden of her husband's death and is devalued economically and even ritually in the household. Finally, the chances of very old women becoming an economic burden and social embarrassment are very high.

This extreme stratification of women, both within and outside families, makes any single solution to the degraded position of Indian women quite difficult. Stratification on the basis of age, class, caste or ethnicity also makes the creation of bonds of solidarity between women within families or in society difficult, if not impossible, since patriarchies reward varying degrees of compliance and submission, which alone gives the system its stability. This helps to explain such phenomena as the active involvement of women themselves, such as mothers-in-law, in the murder of young brides in various parts of the country today or in sex-selective abortion. The complex ways in

which the position of women is structured also makes it difficult for collective women's action to make patriarchies the specific target of attack or reform. Patriarchies function with and alongside other forms of stratification which are called simultaneously into question when any serious campaign for social transformation is mounted.

The Law and Indian Women

Legal solutions to pervasive gender discriminations therefore must take into account the ways in which such discrimination receives meaning in and through other structures of Indian society. The forms of discrimination faced by Indian women as they have been discussed previously are not only a feature of Indian social structures, but, ironically, may even be supported by the ambiguities of the legal-judicial framework. For instance, the Indian constitution has assured women an enviable degree of equality in its guarantee of equality as a fundamental right. Thus, Article 15, which deals with the prohibition of discrimination, says: 'The State shall not discriminate against any citizen on the grounds only of religion, race, caste, sex, place of birth, or any of them.' Yet, within the constitution itself, what has been given with one hand has been taken away with the other. Thus, Article 25(1), which protects the right to freedom of religion, says: 'Subject to public order, morality and health and to the other provisions of this part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.' On the face of it, Article 25 does not appear to contradict the Article on fundamental rights, since freedom of religion is subject to the fundamental rights listed in Part III of the constitution. Yet, in the name of freedom of religion, or questions of faith, which have left, until recently, personal laws strictly alone, women are discriminated against in the most fundamental ways: large sections of women are denied equal rights to property, to rights within the family, to maintenance, and to divorce, guardianship and adoption.¹¹ Nancy Fraser addressed the seemingly contradictory force of struggles for cultural equality and dignity, on the one hand, and the continuing demand for economic and material equality, on the other. She recognized quite early their intertwined nature, compelling both 'the recognition of difference' and

¹¹ 'Shani Shingnapur Entry Row: HC Asks Maharashtra to Protect Fundamental Rights of Women', *Mint*, 1 April 2016, <https://www.livemint.com/Politics/FVallLLZ5qM1WTQHirUTAJ/Shani-Shingnapur-entry-row-Bombay-HC-asks-Maharashtra-to-pr.html> (accessed July 2022). *Dr. Noorjehan Safia Niaz and 1 Another v. State of Maharashtra and Others*, 26 August 2016.

socio-economic ‘redistribution’ as essential remedies to cultural domination on the one hand and economic inequalities on the other.¹²

There is agreement that the effect of such personal laws, even when they have been codified, as for the Hindus, has been the subordination of women; arguments have also been made by some feminists in support of some aspects of personal law. There is no longer feminist unanimity about the need for a Uniform Civil Code, and there is instead a renewed call for gender justice among feminist law reformers. These debates have been heightened by the recent decision of the Supreme Court to ban ‘triple talaq’ among Muslims in India (2017) and with the Indian parliament passing a law to criminalize ‘triple talaq’ (2019).

The persistent discrimination against women in India as it exists in the wider societal sphere is also starkly obvious in the uneven access to the legal system. Given low levels of education and the generally low economic status of most women, few are able to translate legal provisions into practice, or challenge and change some of these provisions. There may even be, as many feminist scholars have shown, a preference for non-state arbitration mechanisms or alternative dispute resolution mechanisms, as in the popularity of family court arbitrations.¹³ Nearly all rural and most urban women do not come into direct contact with the legal apparatuses of the state, are sometimes not conscious of their rights, and have neither the resources nor the time to pursue justice in the cumbersome judicial system, often choosing alternative modes of dispute resolution even in cases of sexual assault.¹⁴ Laws that are intended to transform the status of women are flouted with impunity: though the minimum age of marriage of girls is 18, and the proportion of women marrying underage is

¹² Nancy Fraser, ‘From Redistribution to Recognition? Dilemmas of Justice in a ‘Post Socialist’ Age’, *New Left Review* 1, no. 212 (July–August 1995), pp. 68–93.

¹³ For a critique, see Srimati Basu, ‘Judges of Normality: Mediating Marriage in the Family Courts of Kolkata, India’, *Signs: Journal of Women in Culture and Society* 37, no. 2: Unfinished Revolutions (a special issue edited by Phillip Rothwell) (January 2012), pp. 469–92. She says: ‘The challenge for feminist jurisprudence here is to establish substantive rather than innovative gender justice, even through noncompliant agents, and to be vigilant of constant cultural adjustments to seemingly radical reform.’ S. Basu, ‘Judges of Normality’, p. 470.

¹⁴ Rupal Oza, ‘Sexual Subjectivity in Rape Narratives: Consent, Credibility, and Coercion in Rural Haryana’, *Signs: Journal of Women in Culture and Society* 46, no. 1 (2020), pp. 103–25.

declining, 26.8 per cent of marriages occur below that age.¹⁵ It is not surprising therefore that feminist legal scholars and activists have rarely considered it sufficient to pursue only legal remedies to the predicaments of Indian women.

In part, this is a recognition of the contradictions that beset the Indian legal system. Despite the growing numbers of women in the legal profession, and despite the significant rise and visibility of feminist lawyering and feminist law reform campaigns, the edifice of legal justice in India remains more or less wholly constructed, interpreted and administered by men, to whom feminist law reform campaigns may have made little difference. On the legislative side too, women accounted for a mere 5 per cent of total parliamentarians in 1991, to inch upwards by 2019 to the level of 78 women in a 543-person Lok Sabha and 24 women in a 242-person Rajya Sabha in the same year, leaving India 148th in international rankings.¹⁶ The career of the Women's Reservation Bill is revealing: the 108th constitutional amendment bill which seeks reservations for women to one-third of all seats in the parliament and legislatures was passed in the Rajya Sabha in 2008, but has lapsed to become the longest pending legislation of the Indian parliament.¹⁷ While it may be facile to assume that women alone may represent women, or articulate and demand protections and enhancement of opportunities under law, the chances of a serious challenge to entrenched patriarchies brighten when women themselves are present at all levels of preparation and administration of the law.

Nevertheless, it is a testament to Indian feminism's sustained campaigns and intellectual dedication over the last three decades that we are today at a stage where, given the quantum of legislation that is being passed, the 'Gross Legislative Index'¹⁸ is impressive even by international standards. Yet repeated reversals in court have led feminists to express wariness about relying too heavily on legal reform and litigation strategies. The reliance on

¹⁵ Mary E. John, *Child Marriage in an International Frame: A Feminist Review from India* (Routledge, 2022), p. 130.

¹⁶ 'Information Regarding Global Gender Gap Index (GGGI) and Gender Inequality Index (GII)', Ministry of Parliamentary Affairs, https://mpa.gov.in/sites/default/files/Women%20in%20Parliament_0.pdf (accessed 2 October 2022).

¹⁷ As this book goes into print, women have been assured of reservations to legislatures and the parliament, but at an (indefinite) moment in the future and for a limited period of time. 'Women's Reservation Bill 2023 [The Constitution (One Hundred Twenty-Eighth Amendment) Bill, 2023]', PRS Legislative Research, <https://prsindia.org/billtrack/the-constitution-one-hundred-twenty-eighth-amendment-bill-2023> (accessed 12 February 2024).

¹⁸ This phrase is taken from Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas Publications, 1982), p. 79.

law as a publicly coded, universally acknowledged and categorically stated system of rights and powers has been repeatedly undermined by courtroom reversals. In other words, Indian feminism may have won greater formal than substantive legal equality.

Are we then at the limits of the emancipatory potential of law? Clearly, an abdication of the law is not an option, and it is more worthwhile to be conscious of the limits of the law and to work within them, recognizing all the time that legal remedies must be part of, and given meaning within, wider social movements. Brenda Cossman and Ratna Kapur had long acknowledged the need for broader legal literacy, with a focus not just on legal claims and lawyering but on the larger goals of the women's movement.¹⁹

Within the feminist movement itself, the question of law reform and legal strategies for women has posed new theoretical and practical dilemmas. The Indian feminist movement continues to seek legal remedies for social practices that specifically discriminate against and disadvantage women, such as widow immolation, dowry murders and sexual harassment, while demanding equality or protection in spheres of work and education. In the last two decades, there have been complex debates on the place of law in redressing gender hierarchies, securing gender-specific protections and ensuring equality. Kalpana Kannabiran has suggested looking beyond the strictly legislative to focus on the life of law in India today: 'Where the law has touched lives, the quality of that engagement—legislative, interpretive, positive, restitutive, punitive—is of critical significance.'²⁰ As the Indian state (for example) reveals great sophistication in harmlessly transforming the language of feminism into the language of 'empowerment' resulting in a 'domestication' of gender, on the one hand, and as Indian feminism has had to confront divisions between feminists themselves on issues relating to sex work, abortion rights, surrogacy and sexual violence at the workplace, on the other, the relationship between women and law has become even more entangled with issues that are not strictly about women alone.

Some Anglo-American legal theorists had for long suggested that 'the rhetoric of rights has become exhausted, and may even be detrimental' to the cause of women's equality. The 'rhetoric of [equal] rights is inadequate', said Carol Smart, in a situation where women are demanding rights for which

¹⁹ Brenda Cossman and Ratna Kapur, 'Women and Poverty in India: Law, Legal Literacy and Social Change', *Canadian Journal of Women and the Law* 6 (1993), pp. 278–304.

²⁰ Kalpana Kannabiran, 'The Law, Gender and Women', Review of Women's Studies, *Economic and Political Weekly* 44, no. 44 (31 October 2009), pp. 33–35.

there have been no masculine equivalents in the past—say, for instance, women's rights to reproductive choices, especially a woman's right to choose abortion.²¹ Equally pragmatic considerations led Martha Fineman to say that 'the unequal and inequitable position of women can only be remedied through pervasive legal accommodation of difference.... There has been a move away from equality as one of the organising principles of legal thought.'²² Indeed, she argues that a theory of 'difference', rather than the discourse of 'equality', may be a more rewarding strategy for legal feminists to pursue. Other feminist legal theorists such as Catherine Mackinnon argue that both the 'sameness' and the 'difference' approaches are subtended by a belief that 'man' is the ultimate measure of 'woman'.²³ Mackinnon says: 'Under the sameness rubric, women are measured according to correspondence with man, their equality judged by proximity to his measure. Under the difference rubric, women are measured according to their lack of correspondence from man, their womanhood judged by their distance from his measure.'²⁴ She calls instead for a move towards substantive equality that recognizes women's realities. In short, Mackinnon's critique of liberal legalism, of which the sameness/difference binary is fully a part, stops short of a critique of the legal form itself, arguing instead that the barriers to equality are often legal.

In India, the dilemmas of the sameness/difference rubric have been made vividly clear in the field of contestations of personal laws and in the process of formulating a Uniform Civil Code.²⁵ But whereas theorizing 'difference' has become critical in multicultural societies where the 'neutrality' of institutions has only perpetuated historical cultural disadvantages (as in the civil rights of

²¹ Carol Smart, 'The Problem of Rights', in *Feminism and the Power of Law*, by Carol Smart, pp. 138–59 (Routledge, 1989), p. 139. See also Martha Fineman, 'Feminist Theory in Law: The Difference It Makes', *Columbia Journal of Gender and Law* 2, no. 1 (1992), pp. 1–23.

²² Fineman, 'Feminist Theory in Law', p. 15.

²³ Catherine Mackinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), p. 221.

²⁴ *Ibid.*, p. 244.

²⁵ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Oxford University Press, 1999), pp. 94–110; Madhu Kishwar 'Codified Hindu Law: Myth and Reality' *Economic and Political Weekly* 29, no. 33 (13 August 1994), pp. 2145–61; Tanja Herklotz, 'Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court', *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 49, no. 2 (Special Issue: Fundamental Rights and Directive Principles—The (Un)fulfilled Promises of the Indian Constitution) (2016), pp. 148–74; Rajeswari Sundar Rajan, 'Women between Community and State: Some Implications of the Uniform Civil Code Debates in India', *Social Text* 18, no. 4 (65) (Winter 2000), pp. 55–82.