

SAGE LAW

# WOMEN and LAW

Critical Feminist Perspectives

Edited by

KALPANA KANNABIRAN



# Women and Law

## Critical Feminist Perspectives



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# Women and Law

For  
Leela Dube (1923–2012),  
Lotika Sarkar (1923–2013)  
and  
Vina Mazumdar (1927–2013)  
who made a difference.

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## List of Abbreviations

AAY	Antyodaya Anna Yojana
AIDS	Acquired Immunodeficiency Syndrome
AIDWA	All India Democratic Women's Association
AIMPLB	All India Muslim Personal Law Board
ARTs	Artificial Reproductive Technologies
BJP	Bhartiya Janata Party
BMMA	Bharatiya Muslim Mahila Andolan
BPL	Below Poverty Line
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESC	Centre for Environment and Social Concerns
CRC	Convention on the Rights of the Child
CrPC	Criminal Procedure Code
EC	Executive Committee
ESI ACT	Employees' State Insurance Act
GDP	Gross Domestic Product
GM	Genetically Modified
HIV	Human Immunodeficiency Virus
HLEG	High Level Expert Group
HPV	Human Papilloma Virus
ICCPR	International Covenant on Civil and Political Rights
ICDS	Integrated Child Development Services
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICSSR	Indian Council of Social Science Research
ILO	International Labour Organisation
IPC	Indian Penal Code
IPR	Intellectual Property Rights
JSA	Jan Swasthya Abhiyan

JSTF	Joint Special Task Force
JSY	Janani Suraksha Yojana
MCD	Municipal Corporation of Delhi
MMR	Maternal Mortality Rate
MTPs	Medical Termination of Pregnancies
MWA	Muslim Women's Act
MWRN	Muslim Women's Rights Network
NHRC	National Human Rights Commission
NHSRC	National Health Systems Resource Centre
NMBS	National Maternity Benefit Scheme
NMML	Nehru Memorial Museum Library
NRHM	National Rural Health Mission
OBC	Other Backward Classes
PCPNDT Act	Pre-conception and Pre-natal Diagnostic Techniques Act
PHFI	Public Health Foundation of India
PHM	People's Health Movement
PIL	Public Interest Litigation
PUCL	People's Union for Civil Liberties
RCH	Reproductive and Child Health
SICHREM	South Indian Cell for Human Rights Education and Monitoring
SISSPA	South India Small Spinners Association
SOCO	Society for Community Organisation
SRB	Sex Ratio at Birth
STF	Special Task Force
TADA	Terrorist and Disruptive Activities (Prevention) Act
TFR	Total Fertility Rate
UDHR	Universal Declaration of Human Rights
UGC	University Grants Commission
UHC	Universal Health Coverage
UNCAT	United Nations Convention against Torture
UNCRPD	UN Convention on Rights of Persons with Disabilities
WRAG	Women's Research and Action Group

## Preface

Women's movements in India have rich and diverse genealogies and have been marked by persistent and protracted struggles. Despite this history, we have in recent times found ourselves shocked at the decimation of decades of struggle. And yet it is also true that our words and our work—as women from different and distinct social locations and generations—have together and severally cascaded out of our small radical spaces and have transformed constitutional commonsense.

What is the political framework within which non-discrimination based on sex must be based? How has feminist common sense transformed the meaning of due diligence by the state as part of its constitutional obligation? If opportunities are crucial in order that people realise their full capabilities, what is the extent to which women are distanced from this goal through a rejection of due diligence by the state? The collection of essays in this volume explores the different dimensions of women's engagement with law. By no means exhaustive, this volume attempts to flag some issues and problems in the ways in which laws speak to women's lives in India. Its significance, I believe, lies in its pedagogic potential and in its demonstration of the centrality of gender to legal pedagogy.

I am indebted to Maithreyi Krishna Raj for inviting me to put together a collection for the Review of Women's Studies, *Economic and Political Weekly*, 31 October 2009. Some of the essays in this volume are from that special issue. I am grateful to *Economic and Political Weekly* and *Indian Journal of Gender Studies* for permission to reprint essays and to SAGE Publications for their interest and patience. I am also thankful to Sanika Gokhale, student of National University of Juridical Sciences, Kolkata, who assisted me in the work of putting this manuscript together in the summer of 2012.

This volume is dedicated to Leela Dube, Lotika Sarkar and Vina Mazumdar, all of whom were members of the Committee on the Status of Women in India (1974) that brought out the *Towards Equality* report,

which continues to be the touchstone of our understanding of gender-based discrimination and inequality in contemporary India. More importantly, they were teachers who made a world of difference to the way we—an extended, dispersed, multidisciplinary, intergenerational student community—understand life and law today. We celebrate their lives and their work and hope that we as feminists have imbibed some small part of their teaching in letter and spirit.

**Kalpana Kannabiran**

## Introduction

In looking at the theme “women and law”, our concern in this volume has been to look at women’s life and worlds—in some parts—and the extent to which the law has touched them. Where the law has in fact touched lives, the quality of that engagement—legislative, interpretive, positive, restitutive, punitive—is of critical significance. 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 the multiple intersecting sites of discrimination and dispossession have opened out several layers in earlier concerns on questions of women’s entitlements and citizenship.

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, looking at 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 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.

The first issues that flash at the mention of women and law are rape, dowry death and sati. An attempt to take this further leads us to disentanglements from property, maintenance, labour protections, residence, child custody, citizenship, etc. What is common through all these concerns is

the issue of violence—of an unequal social order, but also importantly, law's violence. And nowhere has this been starker than in the case of women.

The history of women's struggles in India around rights in relationship has revolved across communities, on entitlements to domestic resources and rights to domestic space irrespective of title and ownership. Indira Jaising chronicles the passage of the *Protection of Women from Domestic Violence Act*, 2005, 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 the relationship is harmonious, the home is a shared space. The problem, however, still remains where 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 well-being? Flavia Agnes 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 need for a shift in constitutional interpretation on this issue.

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-à-vis their communities and in relation to the state? Sagari R. Ramdas 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. Land is a critical asset for women and access to land the most difficult. Adivasi women and women from forest-dwelling communities have had a plural relationship with the forest landscape—a relationship that is both material and spiritual. Ramdas undertakes a critical assessment of *The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act*, 2006, and traces the gaps between legislative intent and bureaucratic translation into awards; she

argues that patriarchal stereotypes and paternalism determine the processes set into motion by the bureaucracy at the state level.

Meera Velayudhan draws the discussion on land out to look at the ways in which women in the South Asian region have secured access to land—examining processes under customary law and public law. In this discussion, it can scarcely be forgotten that women's land ownership in the region remains low, with land ownership by women in India being less than 2 per cent. Patrilineal inheritance in most parts of the region, with few exceptions that do not add up, bar women from obtaining primary access to land. Velayudhan takes a broad sweeping 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 impacted labour. In a situation where informalisation is spreading to engulf the labourscape, Padmini Swaminathan finds that data-gathering tools are not equipped to capture the changing realities of women's work participation, disentitling them from protective legislation. Critically examining policy documents that speak of the informalisation of the formal sector, she traces the legal and socio-economic implications of this process for women. Through an analysis of statistics of women in the workforce, notably the informal economy, she draws an important connection between the higher participation of women in paid work compared to men and the higher morbidity among women in comparison to men. Legal régimes with reference to the informal sector are more visible in their absence and dysfunctionality than in their protective role. Within this large space of absence of due diligence on the part of the state, Swaminathan examines the gendered calibrations of exploitation that exacerbate the situation of women workers.

D. Nagasaila's chapter analyses the substantial provisions of labour law as applicable to women, tracing the judicial precedents laid down by the Supreme Court and the various high courts in India. In the formal sector where unions are active in foregrounding workers' demands, historically, studies have pointed to a ghettoisation of women's concerns by trade unions that have tended to be dominated and led by men. Examining the working of the *Industrial Disputes Act*, Nagasaila finds that despite the fact that this legislation has the potential to institutional equitable

conditions of work for women in industry by disciplining managements into gender appropriate norms and policy at the workplace, women's issues have tended to be seen as individual issues and not a collective concern that the union deliberates and negotiates upon. As a result, awards in the banking and the textile sector, as she argues, are overwhelmingly about wage revisions, share in gains and dearness allowance. She also finds, importantly, that not only are norms of the "worker" weighted against women, they also assume that the worker is not "different", that is, not differently abled and does not belong to Scheduled Caste (SC), Scheduled Tribe (ST) or minority community.

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 essay by Kalpana Kannabiran tracks jurisprudence on sex discrimination and points to the problems therein. Following judicial twists, she examines closely the process of reasoning, the points of deliberation and contestation among petitioners, respondents and courts in cases of sex discrimination. Through a sociological reading of case law, she attempts to map the plural threads of reasoning with respect to women's status, position, vulnerabilities and rights and attempts to uncover their ideological underpinnings.

Women's health and law clearly sit at the intersection of two hegemonic superstructures: patriarchy and the law and it is, therefore, predictably a vulnerable space. Within this space, the loaded understanding of women's bodies and the lack of understanding of the multiple layers and subgroups of women as against one homogenous section of population, render it even more so. Shruti Pandey's chapter reviews and critiques both these constricting and enlarging propensities within the Indian law, as it exists and as it looks forward. The focus on reproductive health where women are concerned to the exclusion of all other basic health concerns reflects the continuing and troubling persistence of ideological frameworks that construct women in biomedical terms in state policy. Although there is a token commitment to shifting to a serious and systemic consideration of social determinants of health, a close reading of legislative and policy overtures reinforces the belief that there is a sharp disjuncture between such commitments and the practice of health law and policy. Pandey argues that the basic understanding of the right to health as a human right—and the fact that this right is both an entitlement and an intrinsic

part of the right to freedom—still continues to remain firmly outside frameworks of official discourse on health matters. Her chapter looks at the relationship between women, health and law and the paradoxes therein in three parts: the *Medical Termination of Pregnancy Act*, a high court decision on maternal mortality and morbidity, and the debates around sex-selective abortions.

The right to reproductive choice and freedom is critical for all women, but especially critical for women with disabilities. While ordinarily, consent refers to “unequivocal voluntary agreement”, it takes on a different resonance with radically different consequences in terms of the right to personal liberty for persons with disabilities—especially for women with profound intellectual disabilities. Both consent and custody are deeply embedded in and validated by the law.

What is the place of care in the conception of justice for persons with disabilities—especially the profoundly disabled? The need for good care for the asymmetrically dependent would focus on support for life, health and bodily integrity, stimulating the senses, imagination and thought in the process. The need for good care for the care-giver is reflected in the need for social and institutional arrangements that allow for care-giving as a real choice, enabling it and providing every support that it requires—ranging from the cultural/emotional to the economic.<sup>1</sup>

In the case of the profoundly disabled, however, there is a conflation of care with custody and a troubling convergence of will between the state, community and family, with state-run institutions arrogating to themselves the absolute control over women’s sexuality and the negation of the right to bodily integrity which is at the core of the right to personal liberty. 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 XI Plan acknowledges the gap in law and policy where women with disabilities are concerned.<sup>2</sup>

Anita Ghai and Rachana Johri pick up this feminist concern with reproductive rights and propose an intersectional reading of the right to abortion from the dual perspective of women’s rights and reproductive rights. Examining the framework of the *Prenatal Diagnostic Testing Act*, they challenge the view that abortion is the only option when prenatal testing

reveals a birth abnormality. They suggest that the concept of individual choice itself is socially conditioned and present a powerful argument for the need to address the tension between feminists and disability rights advocates.

Identity politics for a long part of India's political landscape refers to movements, campaigns, party strategies and group assertions that mobilize political support around caste and religious identities to gain access to political power and public goods, services and resources of the state. Zoya Hasan's chapter focuses on identity politics and its impact on gender equality. The analysis in Hasan's chapter comprises two principal sections. The first section introduces the key issues of secularism and women's legal status; the second section focuses on the approach and strategies of influential political parties, women's movements and Muslim women's groups towards legal reform and the question of a uniform civil code. Hasan looks at the debates on secularism in contemporary India with a focus on the impact of identity politics on gender equality. The implications of the interface of politics and religion for women's rights generally and minority women's rights more specifically merit close examination. Hasan's chapter examines the situation of minority women, through a discussion on secularism and women's rights, the interplay of politics and religion and women's part in identity politics and finally the debates around the rights of minority women, including the debates on the uniform civil code.

Anita Tiphagne's chapter uses as its base the specific cases of police abuse of women in the name of combing operations in the search for Veerappan, the sandalwood smuggler. Citing the victim stories gathered from the reports of the Sadasiva Commission of enquiry set-up by the National Human Rights Commission (NHRC) and also from personal narratives and case studies gathered from field visits in the area, this account brings to the fore the gruesome violations perpetrated by officers and the terrifying consequences of impunity for women survivors of state violence.

The eleven essays in this collection examine a range of concerns, some taking a fresh look at "typical" problems of women and law, others bringing in concerns that have not been the subject of critical reflection, despite being at the core of women's engagement with law.

## Notes

1. Martha C. Nussbaum. 2006. *Frontiers of Justice: Disability, Nationality, Species Membership*. New Delhi: Oxford University Press.
2. [http://planningcommission.gov.in/aboutus/committee/wrkgrp11/wg11\\_rpwoman.pdf](http://planningcommission.gov.in/aboutus/committee/wrkgrp11/wg11_rpwoman.pdf), accessed on 20 September 2009.