



ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR (1999). By Amita Dhanda and Archana Parasher (Eds.). Eastern Book Company, Lucknow. Pp. xv + 415. Price Rs. 400.

THIS VOLUME of eighteen essays is a festschrift to a much loved and respected teacher of law, Prof. Lotika Sarkar, who spent over thirty years at the Faculty of Law of Delhi University. The contributors comprise *Ma'am* Sarkar's students and colleagues at the Faculty of Law, colleagues at the Centre For Women's Development Studies with which she has been associated since its inception in 1981 and other teachers of law from many diverse locations. Apart from the wide ranging influence Prof. Sarkar has wielded over many people she has inspired a whole generation of students by her handling of the law in the classroom - doing what teachers are supposed to do - but rarely succeed in doing, i.e., getting the students to develop a passion for the field they have chosen to study. The festschrift not only captures the inspiring presence of *Lotikadi* in the field of law -as it should- but also consolidates the understanding emerging over the last two decades in the field of women and the law.

A unique aspect of Prof. Sarkar's engagement with law is her deep commitment to activism; feminist scholars are aware of the letter she and three other teachers wrote to the Supreme Court over its judgement in the case of the rape of a tribal girl in police custody in 1979 in Maharashtra but this was only the beginning of Prof. Sarkar's legal activism. The strength of the festschrift is that it celebrates the life of an activist teacher as well as encapsulates the history of legal activism in its heyday, during the eighties of the last century. Those of us who lived through its heady moments - a time now sadly gone - have been reminded by this volume of a time when the judiciary, along with other institutions, was tested and expanded; as a consequence spaces were opened up for a phase of public interest litigation when the poor and other marginalised groups forced themselves upon the consciousness of the eminent judges of the apex court of India. In the post-emergency period the women's movement, like other fraternal movements repeatedly sought the intervention of the courts to enforce rights and seek justice. Who can forget the famous judgement in the pavement dwellers case where the court recognised the rights of the poor to seek a livelihood especially at a moment like today when a series of judgements of the apex court are responsible for the loss of livelihood of thousands of workers. At a dark time like this it is useful to recall that important phase in our history and celebrate the career of *Lotikadi* whose life touched the cross cutting lines in many arenas of the legal activism



of this phase.

A number of interesting essays reflect this phase: Nandita Haksar discusses her experiences in human rights lawyering from a feminist perspective; S. Muralidhar describes the battles he and *Lotikadi* fought to make the legal and administrative authorities accountable in the case of the Agra Protective Home; Upendra Baxi focuses on the issues raised in the notorious case of the buying of a woman in a piece titled 'From Human Rights to the Right to be a Woman'; and Vina Majumdar both provides an overview of the women's movements' engagement with the law and analyses the contradictions thrown up by the movement in its relationship to the state. In a sense, I believe, this is one of the core areas of the book and requires a more detailed discussion.

Vina Majumdar's comprehensive and very analytical paper brings together her rich experience in the women's movement as well as her grasp of the actual stages of the movement's engagement with the law and the complexities of the legal issues involved. Rejecting the simplified approach of mechanically categorising actions of the women's movement she draws attention to its dynamic responses to the law, compelled, as it is by the changing political, social, economic and other national realities. Informed by a new understanding the women's movement of the eighties also deliberately sought a new identity by breaking out of inherited class and cultural norms - a distinctly patriarchal legacy - which had hitherto positioned women's problems as social rather than economic or political. Vina Majumdar aptly reminds us of the place of chroniclers like her at a time of a loss of collective institutional memory and she proceeds to recount, with her characteristic gusto, the various moments in the history of the women's movements' engagement with the law, over rape, dowry violence, and amniocentesis among a host of other issues.

Clearly an engagement with the law was necessary as it, more than any institution of the state, impinged directly and at all times on the lives of women. Given the new found reluctance of post modern feminist scholars who have pointed to the futility of the women's movements' (what is wrongly regarded as an obsessive) focus on the law, it is necessary to bear in mind that what is actually futile is to consider that we can step off the legal terrain - the law works on us whether we want it to or not; it therefore has to remain an arena of struggle and we cannot afford to lose our horizon of a feminist legal system whatever the nature of contradictions in our relationship with the state. She spiritedly criticises contemporary intellectual traditions, which deny the validity of absolutist moral positions as that will mean that the feminist movement will lose both its politics as well as its emancipatory ideology, a position I share with her.

Nandita Haksar's thought provoking and personalised essay is both a complementary piece to that of Majumdar and an insightful recounting



of the last two decades, which pose a number of new concerns. It ranges over issues of an early development of feminist ethics in law, the move towards making the courts recognise the *locus standi* of feminist groups speaking for and on behalf of women, early dilemmas of feminist lawyers and legal activists in seeking legal changes especially in relation to the new rape law proposed by the Law Commission in 1983. The amendments in the rape law had a crucial bearing on civil liberties, such as the reversal of the burden of proof, and led to a heightened awareness among feminists to take greater care in articulating their demands as the state uses the feminist concern for protective legislation to subvert them and play out its own agendas in curbing the civil rights of dissenting groups. As Nandita Haksar points out feminists soon recognised that they would have to evolve a new feminist jurisprudence.

Haksar spends a considerable segment of her essay on examining the conflicting positions that can emerge when the rights of some segments of society are pitted against others: from the mid-eighties onwards the women's rights activists have had to qualify their positions on what was usually referred to as the Uniform Civil Code (renamed as the Egalitarian Civil Code by some activists) as we find ourselves more and more overwhelmed by a communalisation of the state and civil society. Examining the contradictions that exist between women's rights and the rights of communities with specific references to tribal customary laws in the north-east Haksar points out that such a situation can become a point of conflict between the community and the rights of the individual tribal woman. She builds her argument on the need to redefine what is normally regarded as 'tribal law' as 'tribal jurisprudence' instead. This is an important distinction for her as tribal jurisprudence has evolved ways and means of preserving the ecological balance and preventing ecological degradation by [also] evolving complex sets of practices which form a part of their jurisprudence. Central to their jurisprudence is the concept of collective rights and collective property. These are now being eroded by the Indian state for developmental projects (and now by multinationals for exploiting resources) and therefore women's movement must not be a legitimiser of such processes by taking recourse to the Indian Succession Act in arguing for women's right to property, as the Act does not recognise common property. Haksar believes that instead of taking recourse to legal battles women should engage in political battles, which will transform the law in consonance with tribal socio-cultural traditions. Haksar strongly advocates working towards a new and more sensitive feminist jurisprudence, which can draw upon the human rights tradition, feminist critiques of the law and tribal jurisprudence. She sums up her position by pointing out that a political understanding of the complexities of our society will enhance our legal strategies-not limit them as they seem to be at the moment.



S. Muralidhar's essay provides a case study of the opening of spaces through the court's positive response to public interest litigation and the limits of such litigation, given the lack of sensitivity and concern in the larger state structures. It is clear from his fascinating but chilling account of how the law which permits the lives of inmates in 'protection homes', who are not there by choice but by circumstance, to be taken over by state actors such as the police and the magistracy. The same system, however, cannot provide women relief from the vagaries and the corruption of the administration which can detain them against their will and quite often illegally. The legal activists pursuing the case knocked at every possible legal door. Attrition set in when the apex court ended any commitment to public interest litigations by transferring all cases of a 'social' nature to the National Human Rights Commission! The courts can now rest in peace while the administration which has 'protective' custody of 'vagrant' women can still have rules which hold that the inmate 'can write or receive a letter once a month during the period of detention...subject to the condition of good behaviour'. Despite the grimness pervading Muralidhar's essay with its combination of activist grit, moving life narratives of women in 'protective custody', and administrative insensitivity the fact that he can still end on a hopeful note and uphold the significance of PIL is testimony to the courage of some members of the legal profession. That too is a tribute to Prof. Sarkar.

Upendra Baxi's essay on the violation of the human rights of a poor woman by people purportedly sympathetic to the oppressive conditions under which many women in our country live is a critique of what Baxi calls 'lecherous' Indian state and civil society which are in his view clearly beyond human rights redress. Kamla, the main protagonist in the case of trafficking of women, marks for him the 'beginning and the end of social activist and judicial activism's flirtation with organised crime against women'. This is not quite true though this is not a good word to use these days. I think Hamida's case marks a different kind of experience in the context of social activist and judicial activist interventions. Baxi raises important questions about the need to take cognisance of the 'moral agency' of the communities for whom 'protective' legislation is passed and in the specific case in question to the irresponsibility of our media and, to an extent, of our judges who played the Kamla issue to the hilt to catharsis some of their guilt over their lack of concern for human rights during the emergency. However, his flagellation of 'social activists' and the easy slide he makes to indicting women rights movements that haven't done this or that (p. 284) is tiresome and too quick to point fingers. Why should women's rights activists or human rights activists have to carry the burden of the actions of journalists looking for a good story? There is a history of sensitive and self reflexive concern on the trafficking of women before and beyond Kamla that women's rights activists have been



engaged in, which appear to have escaped the attention of Prof. Baxi. Bringing that in would have balanced his justified critique of the handling of trafficking in women and rounded his essay.

A number of papers present a critique of different aspects of the existing law. In a close examination of the Indian Penal Code, Ved Kumari looks at the way the code reflects the patriarchal values that ensures male domination, power and authority and reiterates the public-private dichotomy which have a crucial bearing on clauses in the code relating to sexuality and are shaped by patriarchal values about procreation and marriage. Ved Kumari also examines the clauses relating to dowry deaths and exposes the anomalies in the law whereby a married woman needs to die before the state can swing into action. She also makes the point that criminal law needs to be gender sensitised in its conception, formulation and administration; a sentiment that is echoed in many of the other essays. K.N. Chandrashekhara Pillai examines the Criminal Procedure Code and S.P. Sathe analyses judicial decisions to illustrate how judges share the prevailing societal ideas but also on occasion challenge them because the constitution forces them to do so.

Some of the essays in this volume such as those of Prof. Sivaramayya and Alice Jacob focus on the desired goals of a gender sensitive legal system and others such as those of D.N. Saraf, Neeru Chaddha, Chhatrapati Singh and J.N. Saxena deal with specific aspects of the law and social policy from a gendered point of view. Anthony Lester looks at sex discrimination laws in the context of Europe and Archana Parasher makes a strong claim for the introduction of feminism in Indian legal education. She argues that feminist theory is relevant for understanding all legal theory and she also strongly rebuts the current disillusionment among some Indian feminists with law and argues that it is premature to give up an engagement with the law in the struggle to end the oppression of women and the aspiration for social justice. Her essay is a fine example of a constructive engagement with feminist theory and how to build it into a course in legal education. Amita Dhanda's essay charts out a very new field by examining the way dissent is sought to be psychologised and socially controlled through labelling of women's behaviour by judicial pronouncement even when the case does not require such a pronouncement. Dhanda's paper alerts us to the way women are railroaded into mental health institutions for social and not psychiatric reasons and the role of courts in the detention process. At another level of the legal field Malavika Karlekar's paper recalls a long history of engagement with the law in the context of marginalised groups of women and the resilience of women battling unfair marriage rules and observances in the context of kulin widowhood. An important and delightful paper with which this review can be concluded is that of Usha Ramanathan who provides a fascinating exploration of the judicial construction of the 'reasonable man' and by



implication the 'reasonable woman'. Her juxtaposition of these two at the end of the essay is most telling. As she remarks pithily 'reasonable' expectations span the distance between the 'reasonable man' and the 'reasonable woman'. She comes to this conclusion by a close reading of judgements delivered between 1920 and 1950 and is the only essay on the legal system in this collection that could make us laugh at the utter ludicrousness of judicial reasoning rather than despair at the way the judicial mind often works. We need that desperately to keep ourselves going in the face of the grim realities we live in.

This is a book that manages to be useful, varied and a celebration of a life! I am glad that it was written.

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