

THE FRAUGHT TERRAIN OF LAW AND FEMINISM: 20 YEARS OF SUBVERSIVE SITES

Oishik Sircar* interviews Ratna Kapur** & Brenda Cossman***

I. INTRODUCTION

“One of the good things for me about feminism,” writes Gayatri Chakravorty Spivak, “is that it doesn’t, like Marxism, have a named book at the origin.”¹ As a feminist I have found great comfort in this observation. Yet, I must admit that for me there was a book which in many ways inaugurated and has inspired my feminist journey as a lawyer.

In 1999, as a law student at the ILS Law College, University of Pune (now the Savitribai Phule Pune University), I was introduced to Ratna Kapur and Brenda Cossman’s *Subversive Sites: Feminist Engagements with Law in India* (SS), at a lecture by constitutional law professor S.P. Sathe. Sathe was discussing the equality clause (Article 14), and referred to the arguments in the book to point at the distinction between substantive and formal equality; and explained why constitutional equality might not always be a universal good when equality becomes indistinguishable from sameness. It was a trenchant argument that

* Teaching Fellow and Doctoral Candidate, Institute for International Law and the Humanities, Melbourne Law School, The University of Melbourne. I am very grateful to Ratna Kapur and Brenda Cossman for agreeing to have this conversation with me. The interview was conducted over Skype on July 7, 2015 and finalised through email exchanges. Samhita Mehra transcribed the audio recording. I thank Debolina Dutta for our ongoing conversations about feminist legal traditions and their transnational travels that helped me immensely to frame the questions for this interview, and write the introduction. I also thank the participants at the Feminist Jurisprudence Reading Group at Melbourne Law School for introducing me to some of the references cited in the introduction. I acknowledge that the University of Melbourne from where I conducted this interview and wrote the introduction is situated on the lands of the Wurundjeri People of the Kulin Nation who have not ceded their sovereignty to the settler-colonial Australian state.

** Professor of Law, Jindal Global Law School and faculty with the Institute of Global Law and Policy, Harvard Law School.

*** Professor of Law, Faculty of Law, University of Toronto and Director, Mark. S. Bonham Centre for Sexual Diversity Studies, University of Toronto.

1 G. C. SPIVAK, *Culture: Situating Feminism*, in AN AESTHETIC EDUCATION IN THE ERA OF GLOBALIZATION, 123 (2012).

revealed how a hallowed constitutional standard could have internal contradictions. To be able to see this was revelatory: if a foundational lesson in the course on Indian Constitution was that no law can be *ultra vires* the Constitution (Article 13), this feminist insight taught me the importance of critiquing the Constitution's foundations itself.

Sathe had reviewed *SS* in the *Economic and Political Weekly* when it was published in 1996, and commended the book for marking a departure from the existing literature on women and law in India by foregrounding an explicitly feminist reading of the law.² The two decades prior to *SS*' publication had seen a lot of activist and scholarly writing on the broad field of 'women and law' emerge, prompted particularly by three key events. The first was the release of the landmark study called *Towards Equality: Report of the Committee of the Status of Women in India* in 1974.⁴ The second was the outrage against the Supreme Court's acquittals in the Mathura rape judgment that was mobilized by "An Open Letter to the Chief Justice of India," written by four law professors from the Universities of Delhi and Pune in 1979.⁵ The third was the *Shab Bano* judgment of 1985 that inaugurated the debates around women's rights under personal laws and the Uniform Civil Code.⁶ However, much of this legal scholarship treated both 'law' and 'woman' as uncomplicated categories, and 'women and law' as a field was concerned more about how laws adversely impact women's lives, or how laws could be used to save women from violence and uplift their status by making them formally equal to men.⁷ It was in the works of

2 S. P. Sathe, *Law and Women*, 41(41/42) ECONOMIC AND POLITICAL WEEKLY 2804-2806 (October 12-19, 1996)

3 PHULRENU GUHA ET AL., TOWARDS EQUALITY: REPORT OF THE COMMITTEE ON THE STATUS OF WOMEN IN INDIA (1974). Lotika Sarkar, the first woman professor of law to teach at the University of Delhi was the only lawyer on the committee.

4 *Tukaram v. State of Maharashtra*, (1979) SCC [Cr] 381.

5 Upendra Baxi, Lotika Sarkar, Vasudha Dhagamwar and Raghunath Kelkar, *An Open Letter to the Chief Justice of India*, SCC 1: 17 (1979). Interestingly, despite the presence of two prominent women feminist law professors as signatories, in the conclusion of the letter, all the signatories referred to themselves collectively as "lawmen."

6 *Mohammed Ahmed Khan v. Shah Bano Begum*, AIR 1985 SC 945.

7 *See generally*, LINA GONSALVES, *WOMEN AND THE LAW* (1993) and S.P. SATHE, *TOWARDS GENDER JUSTICE* (1993). Feminist scholars from history, sociology and English, had by this time advanced a much more rigorous analysis of law, gender and patriarchy that was still left wanting in the discipline of law. The references to these works are cited later in the interview.

only a handful of legal scholars and activists, particularly Nandita Haksar,⁸ Vasudha Dhagamwar,⁹ Archana Parashar¹⁰ and Flavia Agnes,¹¹ that a feminist analysis of law began to emerge. Some of this work being produced inside law departments was also informed through the processes of the institutionalisation of Women's Studies in universities,¹² and the already rich literature on the Sociology of Law.¹³ These authors were not necessarily always characterising their work as feminist, which is what I think prompted Sathe's comment on *SS*.¹⁴

The richness and rigour of the scholarship on law and feminism in India that both preceded and has come to exist after *SS* seems to have had very little impact on law teaching. In 1999, in an article titled "Feminism in Indian Legal

8 NANDITA HAKSAR, *DEMISTIFICATION OF LAW FOR WOMEN* (1986).

9 VASUDHA DHAGAMWAR, *LAW, POWER AND JUSTICE* (1992).

10 ARCHANA PARASHAR, *FAMILY LAW REFORM AND WOMEN IN INDIA* (1992).

11 FLAVIA AGNES, *STATE, GENDER AND THE RHETORIC OF LAW REFORM* (1995).

12 An edited volume carrying a selection of papers from four National Conferences on Women's Studies (1982-1988) reflected this trend.) *WOMEN AND LAW: CONTEMPORARY PROBLEMS*, (Lotika Sarkar and B. Sivaramayya eds., 1994).

13 See, Pratiksha Baxi, *Feminist Contributions to the Sociology of Law: A Review*, 43(43) *ECONOMIC AND POLITICAL WEEKLY* 79-85 (October 25-31, 2008). In this piece, Baxi also notes the difficulties women law professors like Lotika Sarkar and Ved Kumari have had to face in teaching rape law inside classrooms for a long time, which in many ways censored the possibility of using feminism as pedagogy in the legal academy. See also, Pratiksha Baxi, *Impractical Topics, Practical Fields: Notes on Researching Sexual Violence in India*, 51(18) *ECONOMIC AND POLITICAL WEEKLY* 80-88 (April 30, 2016).

14 Within the women's movements in India at that time, the public purchase for a term like feminism was much less in comparison to terms like Marxism and socialism. The use of feminism to describe the women's movements' political projects might have carried the possibilities of alienation and anomie, particularly because the taxonomies of belonging for Dalit, Adivasi or Muslim women could not be reduced to one ideology. I advance this not as a historical, but speculative argument drawing inferences from the analyses of the women's movements' political lives in pre and post-independence India in the following works: RADHA KUMAR, *THE HISTORY OF DOING: AN ILLUSTRATED ACCOUNT OF MOVEMENTS FOR WOMEN'S RIGHTS AND FEMINISM IN INDIA, 1800-1990*, (1993) [see particularly Chapter 6: "The Contemporary Feminist Movement" at pp. 96-114]; URMILA PAWAR AND MEENAKSHI MOON, *WE ALSO MADE HISTORY: WOMEN IN THE AMBEDKARITE MOVEMENT* (Wandana Sonalkar trans., 2008); SHARMILA REGE, *WRITING CASTE/ WRITING GENDER: NARRATING DALIT WOMEN'S TESTIMONIES*, (2013); ELISABETH ARMSTRONG, *GENDER AND NEOLIBERALISM: THE ALL INDIA DEMOCRATIC WOMEN'S ASSOCIATION AND GLOBALIZATION POLITICS* (2014); IRENE GEDALOF, *AGAINST PURITY: RETHINKING IDENTITY WITH INDIAN AND WESTERN FEMINISMS* (1999).

Education,” Archana Parashar proposed and drafted a model syllabus for a course of Feminist Jurisprudence for law students.¹⁵ In 2003, the National Commission for Women and the Bar Council of India (BCI) organized a meeting in Delhi with lawyers and law professors to design a Feminist Jurisprudence curriculum for LLB and LLM courses in India.¹⁶ Around this time I remember studying an upper year optional course in our (BCI approved) syllabus with an unwieldy name: ‘Women and Law and Law Relating to the Child’. This course taught us the contents and provisions of a whole range of landmark judgments and legislations in India that were broadly concerned with the welfare (not rights) of women and children. This was, by itself, a worthy learning objective. However, by equating women and children as objects of conjoined vulnerabilities, discussions in this course infantilized women and thus considered them to be existentially in need of protection and saving by the law, not from it. In doing this, the pedagogical imperative of the course reinforced, rather than questioning what Kapur and Cossman have called “familial ideology,”¹⁷ which is at the foundation of the ‘feminized’ vulnerabilities that we were taught that the law has the capacity to alleviate. Not surprisingly, the words patriarchy or feminism were not uttered even once in class, let alone gender. It is this shape that the teaching of ‘women and law’ has taken within the legal academy that betrays the radical roots of feminist legal scholarship and activism in India. In 2008, the BCI Rules of 2008 listed “Gender Justice and Feminist Jurisprudence” as an optional course under the “Constitutional Law Group.”¹⁸ This tick-the-box insertion of feminism, as Pratiksha Baxi has argued, tends to reduce it to a “perspective” rather than recognizing its “epistemic challenge” to the foundations of legal theory and legal education.¹⁹

So when I first read *SS* by following up on Sathe’s reference, it served the purpose of being both a very effective textbook for learning feminist

15 Archana Parashar, *Feminism in Indian Legal Education*, in *ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR*, 89-116 (Amita Dhanda and Archana Parashar eds., 1999).

16 *Meeting on Feminist Jurisprudence*, NATIONAL COMMISSION FOR WOMEN, <http://ncw.nic.in/frmreportFeministJurists1.aspx> (last visited May 4, 2016).

17 RATNA KAPUR AND BRENDA COSSMAN, *SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA*, 87-172 (1996).

18 Bar Council of India, Rules of Legal Education, 26 <http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf> (last visited May 4, 2016).

19 Pratiksha Baxi, *Feminist Contributions to the Sociology of Law: A Review*, 43(43) *ECONOMIC AND POLITICAL WEEKLY* 79, 81 (October 25-31, 2008).

jurisprudence as well as a compendium case book on women and law. In the way the book is written it could have been taken up as a text for teaching feminist jurisprudence in Indian law schools, except that it has never been. A feminist reading of law, the project that Kapur and Cossman undertook, was meant to disturb the assumptions on which faith in law as a tool for securing women's rights continues to be understood as a matter of common sense, both inside and outside the classroom. Taking ahead the feminist legal work that was already emerging in the first half of the 90s, *SS* looked at law as a site of contradictions when it comes to women's rights. At that time it was the most comprehensively written monograph of its kind. One of its central motivations was to demonstrate how a feminist reading can enable us to see any engagement with law reform as one that is fraught with contestations between law simultaneously being a tool of domination and emancipation. This Pharmakon-like characteristic of law generally tends to get glossed over in favour of treating domination and emancipation as Manichean categories.²⁰ As Kapur and Cossman noted in the introduction to *SS*:

... we argue that the role of law cannot be adequately captured by a dichotomous understanding of law as either an instrument of oppression or of liberation. We believe that the terrain of law is much more complex, in both the oppression of women and in its promise for challenging that oppression.²¹

The lessons about feminist legal scholarship and activism that I have learned from my reading and re-reading of *SS* over several years have found expression in the small corpus of scholarship that I have produced.²² When I read it in law school, *SS* opened up for me an insight into the exciting possibilities of interdisciplinary work in law, and for later generations of

20 The Derridian reading of this expression, first introduced by Plato, means medicine that is cure and poison at the same time. See, Jacques Derrida, *DISSEMINATION*, 61-172 (Barbara Johnson trans., 1981).

21 Kapur and Cossman, *supra* note 3, at 12.

22 Two pieces that are particularly reflective of this are: Oishik Sircar, *The Fallacy of Equality: 'Anti-Citizens', Sexual Justice and the Law in India*, 210-250, in *STATE OF JUSTICE IN INDIA: ISSUES OF SOCIAL JUSTICE*, VOL. II (Ranabir Samaddar ed., 2009); Oishik Sircar, *Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse*, 49 *OSGOODE HALL LAW JOURNAL* 527-573 (2012).

feminist lawyers in India it has provided a model of scholarship that teaches you both about the politics and methods of doing a historically grounded and postcolonial feminist jurisprudence with a post-structural temperament, that was hitherto not available in any significant measure within the legal academy. This bringing together of postcolonialism and post-structuralism to feminist legal theory in India reflects Kapur's and Cossman's postgraduate legal education in North America, and is captured in the two epigraphs with which the book begins. One is by Gayatri Chakravorty Spivak, who enabled postcolonial feminism to be taken up globally as a scholarly method and not as identity politics, and the other by writer and poet Dorothy Allison, who as a sex-positive lesbian femme was a key advocate of sex-positive feminism in the Sex Wars in USA. Not surprisingly, Prabha Kotiswaran, reviewing *SS* in the *Harvard Women's Law Journal* (now the *Harvard Journal of Gender and Law*) in 1997, wrote:

Subversive Sites is the first Indian book of its kind that articulates the experiences of the Indian women's movement in explicit terms of feminist legal theory. [...] Apart from the rigor of the feminist legal scholarship that Subversive Sites pursues, the book has significant implications for Indian legal scholarship in general. To date, Indian legal scholarship has not addressed issues of legal theory from a political perspective and has not generally drawn from non-legal disciplines.²³

For me, *SS* has stood the test of time (despite having gone out of print) because its scholarly depth has strongly influenced the writing of critical legal theory in and on India. I say this because the tragedy of feminist work across disciplines is the way in which it gets ghettoised. This is so much more the case with legal theory in the Common Law world, especially if one looks at how even within the body of scholarship that has come to be called Critical Legal Studies (CLS) in the Anglo-American legal academy, feminist legal theory and critical race theory have remained marginal, or considered its identitarian offspring,

23 Prabha Kotiswaran, *Rumblings of a New Beginning: The Case of Feminist Legal Scholarship in India*, 20 HARVARD WOMEN'S LAW JOURNAL 350-351 (1997) [emphasis in original].

CLS being the ideological parent.²⁴ Even if SS, as per my assessment, resisted the tragedy of ghettoisation, the fact that it was seldom taken up as a teaching text in law schools in India says much about the orthodoxy of legal education in the country.²⁵ The book seems to have engaged feminist scholars from other disciplines writing on the law rather than legal scholars themselves. These engagements have not always been informed by Kapur and Cossman's political and methodological orientation. In fact, feminist political scientist Nivedita Menon, whose important 2004 book *Recovering Subversion: Feminist Politics Beyond the Law* – titled as if it is was a response directed at SS – had disagreed with their premise.²⁶ But it will be fair to say that SS facilitated feminist lawyers to learn

-
- 23 Prabha Kotiswaran, *Rumblings of a New Beginning: The Case of Feminist Legal Scholarship in India*, 20 HARVARD WOMEN'S LAW JOURNAL 350-351 (1997) [emphasis in original].
- 24 For articulations of these see, Robin West, *Deconstructing the CLS-Fem Split*, 2 WISCONSIN WOMEN'S LAW JOURNAL 85 (1986); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?* 22 HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 301 (1987).
- 25 In a report published by the Indian Council for Social Science Research in 1975, Upendra Baxi offered a compelling case for interdisciplinary legal research in India, emphasizing why legal scholarship needs to draw on social sciences and the humanities for the discipline to have any transformative relevance. One can argue that Baxi's vision was partially achieved through the establishment of the National Law School of India University in Bangalore (NLSIU) in 1987 and the institutionalisation of the integrated 5-year B.A. LL.B. programme where some social science and humanities subjects were made part of the law curriculum. However, in a 2007 piece Baxi lamented that the prototype of the National Law Schools that now mark excellence in Indian legal education have reprivatized legal knowledge by becoming centres for the production of "elite theories." It is interesting that even in these so-called enlightened spaces of legal learning, including the growing numbers of private law schools in India that claim global eminence by the very virtue of their names, feminist legal studies has continued to be a marginalized subject – not just in terms of courses offered, but also when it comes to hiring patterns and non-discrimination policies for women faculty and staff. I make this assertion on the basis of having taught at the West Bengal National University of Juridical Sciences (2008-09) and at the Jindal Global Law School (2009-2012). Having said this, it is important to note that the foundations for SS emerged out of a course that Kapur and Cossman taught at NLSIU. Similarly, a significant work on the social history of women and law in colonial India was written by feminist historian Janaki Nair, also with support from NLSIU. See, UPENDRA BAXI, SOCIO-LEGAL RESEARCH IN INDIA: A PROGRAMSCHRIFT, (1975); Upendra Baxi, *Enculturing Law? Some Unphilosophic Remarks*, in ENCULTURING LAW: NEW AGENDAS FOR LEGAL PEDAGOGY, 2-21 (Mathew John and Sitharam Kakarala eds., 2007); JANAKI NAIR, WOMEN AND LAW IN COLONIAL INDIA: A SOCIAL HISTORY (1996).
- 26 See generally, Nivedita Menon, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW (2004).

from and contribute to the scholarship on law in India that was already being done by feminists in disciplines in the social sciences and the humanities.²⁷ To open up feminist legal scholarship and indeed legal scholarship in India, to the immensely rich possibilities of interdisciplinary and collaborative work has been one of the most significant contributions of *SS*.

The scholarly breath of *SS* covered legal history, constitutional law, criminal law, law reform and the politics of religion and law in India. Written in the wake of the demolition of the Babri Masjid in 1992, it was a book for its time that advanced an unprecedented feminist jurisprudential analysis of the gendered discourses of militant Hindu nationalism and its connection to women's rights and equality. In reading the book I was trained to see feminist legal theory not only as one that is concerned with gender and law, but one that laid out feminist critique as a method for reading law as a discursive body of knowledge, politics and most importantly power. When I encountered feminist legal theory through *SS* for the first time, I was also getting acquainted with Marxism as a method with which to think about justice and rights of the marginalised;²⁸ a method that legal theory lacked. Class and gender came together as the lenses through which the systems of injustice in patriarchy and capitalism, and the law's collusion with them, were revealed. Despite their uneasy alliance,²⁹ feminism felt like more than a mere phi-losophy for interpreting the world. It seemed like a more powerful tool than Marxism with which the world could indeed be changed. I will credit *SS* for that – especially because it enabled me to see how Marxism in India considered class to be all consuming, and thus actively sidelined or de-prioritized gender and sexuality.³⁰

It took me quite a while till after graduating from law school to own a copy of *SS*. It was not easily available at bookstores. *SS*' blue bordered cover with a

27 References to these works appear in the interview section below.

28 The three initiating texts for me were: EVGENY PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* (1987); UPENDRA BAXI, *MARX, LAW AND JUSTICE* (1993) and B.S. Chimni, *Marxism and International Law: A Contemporary Analysis*, 34(6) *ECONOMIC AND POLITICAL WEEKLY* 337-349 (Feb. 6-12, 1999).

29 *See generally*, Heidi I. Hartman, *The Unbappy Marriage of Marxism and Feminism: Towards a More Progressive Union*, 3(2) *CAPITAL & CLASS* 1-33 (Summer 1979); Catharine A. MacKinnon, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

30 I acknowledge feminist sociologist Sharmila Rege's contribution to this understanding as well. *See*, Sharmila Rege, *Homophobia in the name of Marxism*, 31(22) *ECONOMIC AND POLITICAL WEEKLY* 1359-1360 (June 1, 1996).

water-coloured face of a woman on it was so powerfully imprinted in my mind, that whenever I visited any bookstore my eyes would start searching for it on the shelves. From the now shut down Manney's in Pune, to Strand in Bombay, to Bahri's in Delhi, and Chuckervertly and Chatterjee in Calcutta, and several visits to used book stores in Daryaganj (Delhi) and College Street (Calcutta), I spent many years trying to find it without success. In 2004, at the warehouse of Sage publishers in Calcutta, I finally bought the book for a discounted price. It was the last copy they had. Worn out at the edges, the cover had faded, and the pages were yellowing – the copy that I bought looked like one which had a well-travelled erudite life. In reality though, it was just lying, gathering dust in the warehouse.

I've been privileged to have both Ratna and Brenda as mentors at different stages of my academic life. In 2002, I interned at the Centre for Feminist Legal Research that Ratna had set up in Delhi in response to the absence of a space within the legal academy in India that fostered collaborative and interdisciplinary feminist research on the law. Later we were colleagues at the Jindal Global Law School in 2010-11. From 2007-08, Brenda was my LLM thesis supervisor at the Faculty of Law, University of Toronto. What I have learnt through an engagement with their work for over a decade now has been an invaluable training in critical and queer-feminist legal scholarship.

I do recognize some discomfort with the absence of a politics of caste and settler-colonialism (and their intersections with feminist and queer politics) in Kapur's and Cossman's scholarship. I pose this concern not as an identitarian one, but as one of discourse, structure and the politics of queer-feminist knowledge production that accounts for the places and institutions from within which scholarly knowledge on feminism and law is produced.³¹ This imperative of grounding scholarship by accounting for an author's subjectivity³² – even if it

31 For a similar discussion related to the connections between experience and theory production in the context of caste, *see*, Gopal Guru and Sundar Sarukkai, *THE CRACKED MIRROR: AN INDIAN DEBATE ON EXPERIENCE AND THEORY* (2012).

32 For the source of this insight, I acknowledge Debolina Dutta's doctoral research on the politics of feminist jurisprudential knowledge production and how this is a material practice of self-making tied to a time and place. For some allusions to this argument, *see generally*, Debolina Dutta, *Rethinking Care and Economic Justice with Third World Sex Workers*, 186-201, in *THE PALGRAVE HANDBOOK OF GENDER AND DEVELOPMENT*, (Wendy Harcourt ed., 2016).

is fragmented, hybridized and nearly impossible³³ – has long roots in the feminist experiential writing genres of autobiography,³⁴ auto-ethnography³⁵ and auto-critique,³⁶ and has also been addressed in feminist legal scholarship.³⁷ In feminist scholarship, compelling arguments have been made both as a critique³⁸ and defense of the idea of experience.³⁹ I feel that such a methodological move carries immense subversive potential,⁴⁰ and gains particular significance at a time when the neoliberal and neo-colonial networks through which a lot of queer-feminist legal scholarship is produced and published⁴¹ end up reinforcing the very hegemonic orders such scholarship of solidarity aims to subvert.⁴² I am left wanting for such gestures in Kapur's and Cossman's writings. By this I don't mean to say that this is completely absent,⁴³ but it is not foregrounded in ways

33 See generally, JUDITH BUTLER, *GIVING AN ACCOUNT OF ONESELF* (2005).

34 See generally, Caren Kaplan, *Resisting Autobiography: Out-Law Genres and Transnational Feminist Subjects*, 208-216, in *WOMEN, AUTOBIOGRAPHY, THEORY: A READER*, (Sidonie Smith and Julia Watson eds., 1998).

35 See generally, Sangtin Writers Collective and Richa Nagar, *PLAYING WITH FIRE: FEMINIST THOUGHT AND ACTIVISM THROUGH SEVEN LIVES IN INDIA* (2006).

36 See generally, Sharmila Rege, *Dalit Women Talk Differently: A Critique of 'Difference' and Towards a Dalit Feminist Standpoint Position* 33(44) *ECONOMIC AND POLITICAL WEEKLY* Vol. 33, No. 44 WS39-WS46 (1998); JUDITH HALBERSTAM, *THE QUEER ART OF FAILURE* (2011).

37 See generally, Elizabeth Adjin-Tettey et al, *Postcard From the Edge (of Empire)*, 17(1) *SOCIAL AND LEGAL STUDIES*, 5-38 (2008); Archana Parashar, *Responsibility for Legal Knowledge*, in *DECOLONISATION OF LEGAL KNOWLEDGE*, 178-204 (Amita Dhanda and Archana Parashar eds., 2009); See generally, Larissa Behrendt, *Home: The Importance of Place to the Dispossessed*, 108(1) *SOUTH ATLANTIC QUARTERLY*, 71-85 (2009).

38 See, Joan W. Scott, *The Evidence of Experience*, 17(4) *CRITICAL INQUIRY*, 773-797 (1991).

39 See, Johanna Oksala, *In Defense of Experience*, 29(2) *HYPATIA*, 388-403 (2014).

40 LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* (1999)

41 See generally, Carys J. Craig, Joseph F. Turcotte, Rosemary J. Coombe, *What's Feminist About Open Access? A Relational Approach to Copyright in the Academy*, 1(1) *FEMINISTS@LAW* (2011), available at: <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/7/54> (last accessed: April 13, 2016);

42 CLARE LAND, *DECOLONIZING SOLIDARITY: DILEMMAS AND DIRECTIONS FOR SUPPORTERS OF INDIGENOUS STRUGGLES* (2015).

43 Brenda Cossman and Ratna Kapur, *Trespass, Impasse, Collaboration: Reflection on Methodologies and Experience in Doing Research on Women's Rights in India*, 2(2) *THE JOURNAL OF HUMAN JUSTICE* 99-118 (Spring 1991).

that meet my high expectations from their scholarship.⁴⁴ It is, in fact, the scholarly rigour demonstrated in *SS* and their other works that prompts me to raise this concern.⁴⁵

The Kapur and Cossman collaboration produced another influential book in 1999 – *Secularism’s Last Sigh? Hindutva and the (Mis)rule of Law* that critiqued the Hindutva judgments of the Supreme Court of India and took forward the analysis of the Hindu Right and its relationship with secular law, an examination that began in *SS*. This book showed how the ideology of the Hindu Right claimed legitimacy not against, but in alignment with the liberal rights discourse of secularism enshrined in the Constitution.⁴⁶ Since then they have charted separate theoretical trajectories – Kapur has been writing on human rights law, sex work, trafficking and migration from postcolonial and Subaltern Studies perspectives;⁴⁷ while Cossman has been writing on queer legal theory, sexual citizenship and popular culture drawing on, broadly, a governmentality studies framework.⁴⁸

Books take on lives of their own after publication; and especially if it is a book that that has become a key text in its genre that has also challenged disciplinary boundaries, its life is one that generally exceeds the intentions of the author, and much of that is owed to the “changing context of its reception.”⁴⁹

44 For example, in the introduction to *SS*, Kapur and Cossman, commenting on the book being a collaborative feminist project write about their use of the collective pronoun “we”: “By using ‘we’, we attempt to avoid the false objectivism of the detached author, and to capture the sense of perspective, location and participation that is essential for scholarship and for the resolution of the dilemmas that confront all of us who endeavour to use law to advance progressive social movements.” However, in the rest of the book, they do not provide an account of either their subject positions or how the collaboration worked. Kapur and Cossman, *supra* note 3, at. 15.

45 For an auto-critique of my journey as a male feminist lawyer, see Oishik Sircar, *Doing and Undoing Feminism: A Jurisdictional Journey*, 50(20) ECONOMIC AND POLITICAL WEEKLY 44-47 (May 16, 2016).

46 BRENDA COSSMAN AND RATNA KAPUR, *SECULARISM’S LAST SIGH? HINDUTVA AND THE (MIS)RULE OF LAW*, (1999).

47 See, RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* (2005); RATNA KAPUR, *MAKESHIFT MIGRANTS AND THE LAW: GENDER, BELONGING, AND POSTCOLONIAL ANXIETIES* (2010).

48 See, BRENDA COSSMAN, *SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING* (2007).

49 I borrow this trenchant way of describing the life of a book from Judith Butler’s preface to the second edition of *Gender Trouble*. See, JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY*, vii (2010).

Will *SS* be as ground breaking an experience it was for me, if it is read by a law student in 2016? I would say possibly more than it was for me, because the times are saturated with events that make the arguments in the book ever more immediate and relevant for feminist legal thought and practice. Books also outlive their usefulness. I wouldn't, however, consider *SS*' running out of print as the death of its ideas; its legacy goes far deeper than that. The 20th anniversary of *SS* is thus both a cause for celebration and mourning – a celebration of its feminist legacy that continues to inspire critical legal scholarship in and on India, and at the same time a mourning of its unavailability to a new generation of feminist scholars and activists. There is possibly a worthy subversive project in digitising the book and distributing it for free online. In fact, it will make for an important archive of feminist legal scholarship in India to digitise all those books and writings in the area – many of which I have cited here – that have gone out of print.⁵⁰

This two decades mark of the publication of *SS*, I thought, is an opportune moment to interview Ratna Kapur and Brenda Cossman about the book, their scholarly and political motivations behind writing it, the feminists scholars who have inspired them, their experience of transnational feminist collaboration, what they think were the drawbacks in the text, and to learn from their reflections about the contemporary concerns for feminist legal work that emerge from *SS* today: especially in light of the rise of governance and carceral feminisms, the 2013 rape law amendments in the aftermath of Jyoti Singh Pandey's gang-rape and murder, the reversal of the *Naz Foundation* judgment in *Koushal* by the Supreme Court of India, and the resurgence of the Hindu Right.

II. INTERVIEW

Oishik Sircar (OS): *I would think of SS as a transnational collaborative feminist project – given the authorial partnership/friendship between the two of you – based on the time of writing, at two different locations – Canada and India. Would you characterize it that way?*

50 A project of a similar nature, though one that specifically focuses on activist documents and judgments, is being undertaken by the organisation Partners for Law in Development. See, FEMINIST LAW ARCHIVES, <http://feministlawarchives.pldindia.org/> (last visited May 19, 2016)

Ratna Kapur (RK): Yes, I think both of us regarded *SS* as a collaborative project. Both Brenda and I were linked to the National Law School of India University (NLSIU) in Bangalore, which was just launching at the time, and they were keen to support the development of critical legal scholarship in India. The association with the school included teaching and research at NLSIU related to feminist legal theory.

Brenda Cossman (BC): We were also quite fortunate to receive funding from the International Development Research Council of Canada, which facilitated our travel and collaboration. We wrote about our work as a feminist collaborative project in an article in 1991 entitled “Trespass, Impasse, Collaboration: Reflection on Methodologies and Experience in Doing Research on Women's Rights in India.”⁵¹ This article - that we are now a bit underwhelmed with - engaged with the idea of collaboration - albeit in a way that was based in 1990s identity politics, though it also tried to transcend this politics.

OS: *What was the motivation behind the book?*

RK: We were looking at the range of literature on gender and law in India – both activist and scholarly. We were trying to map the history of women’s engagement with law through the colonial and post-colonial period, right up to the present. And this comes out particularly in the first chapter (“Feminist Legal Revisions: Women, Law and Social Change”) in which we historically trace women’s engagement with law reform from colonial times to the contemporary women’s movement. We began the book with this account of feminist legal history, because such an analysis had been absent in legal scholarship in India. That was certainly one strong motivation behind the book – to make our feminist assumptions about the link between law and social justice layered and complex.

At the same time, this was a period when public interest litigation was becoming a significant aspect of engagements with law, based on linking social justice and law reform projects. The idea was, and continues to be, that when we use the law in achieving social justice and we fail, we have tended to locate this failure in the individuals and groups using the law – as if there was some lack in strategy, or implementation – but we seldom seemed to question the law itself. So we were motivated to address this underlying question – to look at the law

51 Kapur and Cossman, *supra* note 43.

as a complex entity that not only gains meaning from how it is used by people, but also lends meaning to things.

We wanted to critique the prevalent idea that law is just patriarchy. While it is patriarchal, it is a bunch of other things too. We wanted to unpack the contradiction in the heart of the belief that ‘law is patriarchy, but we just need to change the law’. And to develop this argument required a very textured, nuanced and complicated idea of law itself, which unfortunately was lacking in Indian legal scholarship at that time.

BC: I should mention that for me the process of complicating my analysis was not where I could engage with equal rigour with scholarship and activism in India. As a white Western woman, an outsider, I had less access to and engagement with activism. I decided to immerse myself in research. So I spent years reading everything there was to be read, and trying to synthesize it. In a piece that I wrote after the publication of *SS*, I discussed the difficulties with positionality and the question of location in doing collaborative feminist legal studies from a comparative law perspective.⁵²

OS: *In the effort that is put in to prepare for writing a book, the very idea of trying to read through everything is in itself both daunting and exciting at the same time. I’m curious to know, how long did this process take? Or did writing and learning happen simultaneously?*

RK: It took five years. During this period we did not only research. Some writing projects prior to *SS* were planned: like a special volume on feminism and law with the *National Law School Journal*.⁵³ But we were also writing as political and cultural developments were taking place during the period of the research that had considerable influence on the project. And it is during this process that we came to realize both the need and absence of feminist legal analysis in India. Of course, critical feminist work was happening – but this was primarily by the historians. It was the feminist historians who were bringing together feminism and law.

BC: Absolutely, it was the historians who had done by far the most engaging and nuanced scholarship on law and feminism in India. But, they were

52 Brenda Cossman, *Turning the Gaze Back on Itself: Comparative Law, Feminist Legal Studies, and the Postcolonial Project*, 2 UTAH LAW REVIEW 525-544 (1997).

53 Ratna Kapur and Brenda Cossman (eds.) NATIONAL LAW SCHOOL JOURNAL, Vol. 1 [Special issue on ‘Feminism and Law’] (1993).

The Fraught Terrain of Law and Feminism: 20 Years of Subversive Sites

not specifically trained in law. So for us this was a big motivation – to think about what it would mean to do this kind of critical work from within the discipline of law.

RK: I think the people we were reading and drawing on at that time – Janaki Nair, Radhika Singha and Tanika Sarkar – they were all doing this work and now there is a whole new generation of people who are doing it. The feminist historians were the initial people who did this work and influenced us enormously. That's really where I think our inspiration came from. We found very little in legal scholarship in India – no analysis with rigorous and critical historical engagement.

OS: *What you say is interesting, because the endorsements on the book's back cover are from Ania Loomba, Rajeshwari Sunder Rajan and Tanika Sarkar, two feminist literary scholars and a feminist historian, and not from any legal scholars...*

BC: That's correct. I think the book was sent for review and the initial comments from scholars such as Tanika Sarkar, Ania Loomba, and Rajeshwari Sunder Rajan really excited us. So we automatically just went to them to get the endorsements.

OS: *Why do you think feminist scholarship of this kind was happening within the discipline of history, but not law? Does this have to do with the influence that Subaltern Studies has had on feminist history writing?*

RK: Oddly enough, *Subaltern Studies* had a very poor record of addressing issues of gender and sexuality. They were concerned with the subaltern voice, but this voice emerged invariably as a 'peasant' voice that was male. There was little rigorous analysis of gender difference or the difference gender made to the analysis, except by Spivak,⁵⁴ who had pointed out this absence.⁵⁵

OS: *So was it a response to a certain kind of lack in legal and feminist legal scholarship in India that SS was responding to?*

54 It was not until 2000 that a volume of *Subaltern Studies* was themed on gender. See, COMMUNITY, GENDER AND VIOLENCE: SUBALTERN STUDIES XI, (Partha Chatterjee and Pradeep Jeganathan eds., 2000).

55 See, G.C. Spivak, *Can the Subaltern Speak?* in *MARXISM AND THE INTERPRETATION OF CULTURE*, 271-313 (Cary Nelson and Lawrence Grossberg eds., 1988); G.C. Spivak, *Subaltern Studies: Deconstructing Historiography*, in *SELECTED SUBALTERN STUDIES* (Ranjit Guha and G.C. Spivak eds., 1998).

RK: I think there were three different aspects that influenced our response. First, there was the absence of legal scholarship. The main person who brought theoretical rigour to legal scholarship in India at that time was Upendra Baxi – and although he did address issues of women’s rights, he was not approaching law from the perspective of feminist legal theory.⁵⁶ There was of course no lack in terms of feminist activist engagements with law – however, there was very little scholarship in terms of the limits of that engagement. Second was the place of feminism within the institutional space of the legal academia. I am referring to the time when NLSIU had just been established and was the first national university to deal with law and expressly promote legal research and scholarship, and both of us were teaching and researching there. It was a new law school, with a pretty progressive vision, but even then there was hardly any feminist space available. There was some marginal engagement in a couple of courses in jurisprudence, but that was it. Third, and more generally was an absence of focus on, or attention to law in feminist thinking. It was for this reason that the Center for Feminist Legal Research was set up in 1995. It was conceived as a space for research unavailable either within the institutional space of the legal academia, or the activist space of feminist politics. So I think these three things came together in terms of both influencing us and also giving Brenda and me a reason to work on the *SS* project – and to do this for the discipline of law.

OS: *In the second half of the 90s, around the time that SS was published, the only other book that I can think of which engaged with similar concerns was Engendering Law: Essays in Honour of Lotika Sarkar, edited by Amita Dhanda and Archana Parashar.⁵⁷ That was published in 1999, a few years after SS. What kind of scholarship were you learning from and drawing on?*

BC: Published in the early 90s, Archana Parashar’s book on family law was quite influential for us.⁵⁸ That was one work that offered a sophisticated framing

56 For some representative works, see, Upendra Baxi *On Being a Woman*, in MAMBRINO’S HELMET: HUMAN RIGHTS FOR A CHANGING WORLD, 168-180 (1994); Upendra Baxi, *Violence Against Women in the Labyrinth of the Law*, in INHUMAN WRONGS AND HUMAN RIGHTS: UNCONVENTIONAL ESSAYS, 67-88 (1994); Upendra Baxi, *From Human Rights to the Right to be a Woman*, in ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR, 275-290 (Amita Dhanda and Archana Parasher eds., 1999).

57 ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR, (Amita Dhanda and Archana Parashar eds., 1999).

58 ARCHANA PARASHAR, FAMILY LAW REFORM AND WOMEN IN INDIA, (1992).

of the debates around the Uniform Civil Code (UCC). At that time the UCC debates and feminist positions on it were becoming increasingly contentious, and even fractures began to show as religion had entered the discussion with the *Shah Bano* case,⁵⁹ and we saw the rise of Hindu Right.

RK: Outside of law, Rajeshwari Sunder Rajan and Zakia Pathak offered an excellent analysis of the *Shah Bano* judgment in their *Signs* article.⁶⁰ Zoya Hasan's work on Muslim women was also influential⁶¹ as was Lata Mani's work on Sati, and her particular focus on consent was very educative for us.⁶² There was also Mrinalini Sinha's book on colonial masculinity,⁶³ and Kum Kum Sangari and Sudesh Vaid's classic edited collection *Recasting Women*.⁶⁴ We read some bits of Prem Chowdhry's work, which was looking at law and conjugality;⁶⁵ and Patricia Uberoi's work on family law.⁶⁶ Rajeshwari Sunder Rajan of course wrote a brilliant book on gender and postcolonialism, which was also important for us.⁶⁷

BC: We were influenced by many feminists from disciplines other than law who in their work had actually focused on law as a site. They weren't trained in law and yet it was a sophisticated analysis of law that we could learn from. So as legal scholars, we weren't really reinventing the wheel - we were building on what had come before us, and trying to bring that kind of a sophisticated feminist analysis to law.

RK: In all honesty, there was very little emerging from the legal academia

59 Mohd. Ahmed Khan v. Shah Bano Begum And Ors, AIR1985 SC 945.

60 Pathak, Zakia and Rajeswari Sunder Rajan, *Shabbano*, 14(3) SIGNS 558-582 (1989).

61 ZOYA HASAN, FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE IN INDIA, (1994).

62 Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* 7 CULTURAL CRITIQUE 119-156 (Autumn 1987).

63 MRINALINI SINHA, COLONIAL MASCULINITY: THE 'MANLY ENGLISHMAN' AND THE 'EFFEMINATE BENGALI' IN THE LATE NINETEENTH CENTURY (1995).

64 RECASTING WOMEN: ESSAYS IN INDIAN COLONIAL HISTORY, (Kum Kum Sangari and Sudesh Vaid eds., 1990).

65 Prem Chowdhry, *Conjugality, Law and State: Inheritance Rights as the Pivot of Male Control in Northern India*, 21(1) INDO-BRITISH REVIEW 59-72 (1996).

66 Patricia Uberoi, *When is a Marriage not a Marriage? Sex, Sacrament and Contract in Hindu Marriage*, 29(1-2) CONTRIBUTIONS TO INDIAN SOCIOLOGY 319-345 (January 1995).

67 RAJESHWARI SUNDER RAJAN, REAL AND IMAGINED WOMEN: GENDER, CULTURE AND POSTCOLONIALISM (1993).

in India. And that's because feminism itself was not taken very seriously in law faculties. You did have an earlier generation of law professors like Lotika Sarkar, Upendra Baxi, S.P. Sathe and Vasudha Dhagamwar writing about women and law, but they weren't doing feminist legal analysis. There were however feminist activists such as Flavia Agnes, who was doing feminist lawyering in the courts, and bringing that experience to her writings.⁶⁸

OS: *And given that a substantial part of your legal trainings happened in the UK and North America, who were your feminist influences from that part of the world?*

BC: Strangely, but surely, Catherine MacKinnon was very influential.⁶⁹ Not necessarily in terms of writing *SS*, but her work had opened up a way to think about law and feminism that was ground breaking. I say this despite however much we might disagree with her analysis and politics. But, there were many others, Carol Smart for example.⁷⁰

RK: Others were Elizabeth Schneider,⁷¹ Patricia Williams,⁷² Kimberle Crenshaw.⁷³

BC: Feminist legal theory and critique was proliferating in the late 1980s and 1990s. I think we were very influenced by that moment of critique in North American feminism, particularly critique about complicating feminism, to include multiple forms of identity and oppressions. Crenshaw's concept of intersectionality was a very foundational concept for us, and strongly influenced our approach to religion in *SS*.⁷⁴

OS: *When you decided to write *SS*, who was your intended readership and what kinds of responses did you receive after publication? Do you think the book went out of print because*

68 FLAVIA AGNES, *STATE, GENDER AND THE RHETORIC OF LAW REFORM* (1995).

69 CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

70 CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989).

71 *See generally*, Elizabeth Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 *NEW YORK LAW SCHOOL LAW REVIEW* 387-399 (1993).

72 PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1992).

73 Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 *THE UNIVERSITY OF CHICAGO LEGAL FORUM* 139-167 (1989).

74 Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color*, 43 *STANFORD LAW REVIEW* 1241-1299 (July 1991).

the need for the kind of feminist arguments you were making did not have a market any longer?

BC: *SS* was very clearly directed to the Indian audience. That was very important, given that the work was located in India. This informed our decision about where to publish. We wanted to ensure that the book was available for Indian readers at an affordable cost. We never went looking for a university press; we were looking for an academic publisher based in India. Sage was a publisher based in India that also had a base abroad. And, you know, the fact that the book turned out to receive a little bit of traction internationally was welcome. It got good reviews outside of India, but we were not writing for an international audience.

RK: *SS* got reviews everywhere, which for us was an affirmation of the fact that a feminist critique of law in India, written from within the discipline of law, was required. About the market of readership and the book going out of print: I have a mixed response. A work like this did not have a market even when it was published. And it is interesting that now, when it is out of print, there seems to be a demand for it. I don't know whether this has anything to do with the law of demand and supply – I hope not. But I do feel that one of the things that we wanted to do with the book was to write it in a way that it offered both theoretical analysis to the reader, and it could also be read as a case book. And anyone interested could use the analysis to read other cases as well.

The other thing is that when we wrote *SS*, while it did have a disciplinary home, it did not have an institutional home. By this I mean that although written as a book of legal scholarship, it was not necessarily used in law schools to teach law. I think a market for scholarly work grows when books are used in teaching in the particular discipline. That has, unfortunately, not been the case with *SS*. It is only now that I hear of some of the newer law schools expressing interest in using it as a teaching text – and that holds out some hope for it to acquire an institutional home. But the book is out of print, and we have obviously not been doing much in terms of responding to that need.

BC: When it went out of print it might just have been a sense of, oh it has run its course; because books do run their course. But I think that in some ways, over time, *SS* became a piece of the canon, and it is still a very useful as a teaching book for courses on feminist legal studies.

RK: And we've been talking about the idea of revising it for reprint for a while – it's just that we've moved so far on to other projects and also so far away from the analysis that we presented in *SS*. It would be difficult to get back to it. We do not see ourselves ever revising the whole book. That would require tremendous effort. We played with the idea of trying to do a revised introduction to a new print edition of the book. But we are still ambivalent.

OS: *You were talking about the very positive reviews that the book received not just in India but elsewhere as well. What was the kind of response from the feminist lawyering community in India or at least those who were interested in the area of women and law/ law and feminism here?*

BC: I remember that The Literary Book Trust had organized a full-day symposium on *SS*.⁷⁵

RK: The Literary Book Trust was partly involved in helping publish this book. When they put together the symposium, I remember someone told us: "Well, we're putting you out... like, a lamb to slaughter."

OS: *Did they consider the book the lamb or the two of you?*

RK: I think the two of us! There was always the sense that we had to prove our credentials on the ground, and if you haven't sufficiently done that, or adequately done that, then you have to prove your credentials as a nationalist or at least somehow distinguish ourselves from the west.

In writing a book, you do not normally have to meet this rather strict criteria, but because Brenda and I were doing this together it was simply something that was required. And secondly, we were moving beyond the 'this is patriarchy' kind of notion of law and trying to look at law in more complex terms, to revisit its history, look at the colonial encounters and the postcolonial engagements with law. This whole critical genealogy was missing from previous accounts of gender and law. And so we were pushing the envelope and of course, and when you do that, you will get some push back, from activists, feminists as well as lawyers.

BC: There's also a limit to what you can make of comments from activists or lawyers who are only interested in knowing more about how the book can

75 Symposium, *Subversive Sites: Feminist Engagements with Law in India*, THE BOOK REVIEW LITERARY TRUST (23 September, 1996).

equip them to make better arguments in court. Because they just want to go to court and make the best argument they can to win. We did receive many such comments. It is a functional, problem-solving mode of engagement with a scholarly work. And certainly this is a professional compulsion for a law teacher. In my teaching over the years on feminism or sexuality in North America and India, I always have to frame discussions that enable students to think harder about the kind of arguments they are going to make, because these arguments, to the extent that they have traction with the court and actually get repeated by the court in precedents, have serious implications for the future of the struggle that I'm trying to advance. So that's a place where I have tread a difficult path of trying to think of argumentation not just as a functional lawyering tool, but also as an analytical and scholarly tool. I've written elsewhere about the idea of victories within losses and losses within victories.⁷⁶ Because you really need to think about the discursive implications of what you're arguing and then how the court might hear it and how the court will use it in writing a judgment, and then how that judgment will become a precedent for later judgments to come. So some of the responses from Indian lawyers to the book about how it fell short of providing better arguments that could be used in court, is in many ways reflective of the tension that I negotiate with in teaching law even today.

OS: *The chapterisation of SS does not necessarily follow the standard script of feminist legal scholarship that tends to be consumed by its focus on violence. A chapter that stands out in this sense is the one on the impact of the Hindu Right on legal discourse and gender (Chapter 4). This is something that had not been done in feminist legal work in India before. What made you focus on this?*

RK: You know there is something to be said about the response to the book with regard to this question as well. When our book went out for the initial review, one of the reviewers said that Chapter 4 ("Women, the Hindu Right and Legal Discourse") did not seem to fit in with the rest of the book. We had received similar comments from many others as well about Chapter 4. Many thought that the Hindu Right is just hot air, that they are just a passing phase, and that we should not take them too seriously. And by taking them seriously we were giving them too much airtime and visibility. But we could see the way in which the Hindu Right had started using law, and making constitutional and

⁷⁶ See, Brenda Cossman, *Canadian Same Sex Relationship Recognition Struggles and the Contradictory Nature of Legal Victories*, 48 CLEVELAND STATE LAW REVIEW, 49-59 (2000).

liberal rights arguments in a sophisticated way. And I think our work on looking at some of the literature already for a book that we would write later, demonstrated that their ideologues were brilliant; they weren't stupid men, they were really quite brilliant and they were able to figure out how to work with the law, rather than work against the law.

Thus, a critique of Hindutva was central to our analysis of feminist engagements with law in India. This is where the intersection between gender and law was headed. We had already experienced the demolition of the Babri Masjid, and we had begun working on our law and secularism book. For that we were mapping and monitoring what was going on with the ways in which Hindutva ideology was engaging with law and gender. Prior to the publication of *SS*, some discussions that form part of this chapter were published in a volume co-edited by Tanika Sarkar and Urvashi Butalia called *Women and the Hindu Right: A Collection of Essays*.⁷⁷ If you look at this book you'll see that although there was some rich discussion taking place in other disciplines on the connections between Hindutva and gender, hardly anything was happening in law. Our chapter was one of two feminist works that engaged centrally with law, and the other was Flavia Agnes'.⁷⁸

So, Chapter 4 caused a lot of anxiety amongst feminists because at that time, a lot of the activist circles that I'd been visiting were simply not willing to see the Hindu Right as some kind of serious threat. Even when these feminists were challenged from within by women from minority groups they closed ranks. They felt that feminism should only speak the language of secularism, and not engage with questions of religion and religious identity. And I think that was the chapter of the book that was most criticised at the time. With the rise of the Hindu Right, and the ways in which the judiciary started to speak its language in the Hindutva cases – this chapter provided essential intellectual foundation for our later book on secularism.

BC: The Hindutva judgments were passed in 1996 as well⁷⁹ – the year *SS*

77 Ratna Kapur and Brenda Cossman, *Communalising Gender, Engendering Community: Women, Legal Discourse and the Saffron Agenda*, in *WOMEN AND THE HINDU RIGHT: A COLLECTION OF ESSAYS*, 82-120 (Tanika Sarkar and Urvashi Butalia eds., 1995).

78 Flavia Agnes, *Redefining the Agenda of the Women's Movement within a Secular Framework*, in *WOMEN AND THE HINDU RIGHT: A COLLECTION OF ESSAYS*, 136-157 (Tanika Sarkar and Urvashi Butalia eds., 1995).

79 *Manohar Joshi v. Nitin Bhaurao Patil & Anr*, AIR 1996 SC 796.

was published. I think our hunch about the way law will play into Hindutva ideology was not off the mark. The other thing that was obviously influencing us at the time of writing *SS* was the UCC debates. And I feel we still could have done much more with Chapter 4. But we didn't make this central to our work until *Secularism's Last Sigh?*.

OS: *You were writing SS at a very interesting political moment in India – in the early nineties. The period saw both the rise of the Hindu Right – with the demolition of the Babri Masjid in 1992 – and also saw the emergence of a liberalized India in 1991, marking the beginning of the impact of structural adjustment programmes – in a way these were the nascent days of neoliberalism. Yet in your discussions, there isn't much of a foregrounding of the connections between law, capitalism and patriarchy. Why is that? Of course, in the constitutional equality chapter (Chapter 3), you do offer a trenchant critique of formal equality, and in effect of the liberal rights discourse. Yet, like the sustained critique of Hindutva that you take on in Chapter 4, you don't do the same for capitalism.*

BC: We really appreciate this question. For us, the very idea of neoliberalism was still quite new at that time and in the literature that we were reading. To the extent that there was anything really being written about neoliberalism vis-à-vis gender, it was still the language of structural adjustment. The kind of surge of literature around neoliberalism that we see now wasn't quite there yet. And so you know, though clearly this was happening around us, it was the period where it was just starting to take off. We have a very small section in Chapter 2 (“Women, Legal Regulation and Familial Ideology”) that struggles with some of the questions around structural adjustment, and we put it in there because we had a sense that this was going to be fundamental and that it was going to radically alter the way we engage with law and feminism. Yet, we could only give it a small space in the book.

It's interesting that afterwards, I went on to co-edit a book that was all about neoliberalism and privatisation and its impact on feminism and law, located in Canada.⁸⁰ This book was published in 2002, and by that time it was just all about neoliberalism. In the intervening period there was an explosion of literature on neoliberalism in general and on how it impacts women in particular.

80 PRIVATIZATION, LAW AND THE CHALLENGE TO FEMINISM (Brenda Cossman and Judy Fudge eds., 2002).

But when we were writing *SS* in the mid-nineties discussions around neoliberalism were at a stage of early genesis and we didn't have a clear grasp of where it would go – so we could do only as much as we could in the book.

RK: While writing *SS*, I think we were focused on the Hindu Right because that is what was happening at that time. I do agree that we ought to have paid more attention to structural adjustment and its gender implications, and connect it to how the Hindu Right was actually working with this. I think it would have made a compelling argument at that time. But as Brenda mentioned, the literature was sparse, and the sense of the impact that India's liberalization would have on the rise of the Hindu Right was something that we had not yet worked out fully.

BC: It's true that *SS* can possibly be fairly criticized for not offering a more sustained feminist critique of capitalism and law. But it is a criticism that makes sense to us now. At the time of writing, we were focused on building an intersectional methodology of doing feminist legal scholarship in India that took the question of religious identity seriously. That was what we thought was imperative for the time. We identified Hindutva as carrying a most divisive threat within feminism. That is what we were drawn toward in terms of the contemporary moment and that was really what came into sharp focus in the book. On the same lines one can criticize *SS* for not considering caste and class, and indeed sexuality, in our intersectional analysis. But what we were interested in was to offer an analytical tool, and not tick identitarian boxes. Of course, caste/gender, and class/gender intersections are extremely crucial. It's just that we did only one – gender/religion. Though I should clarify that I am not suggesting that the methodology we offered is a portable model, and all you do is replace one identity with another and you'll get the same result.

OS: *Much has happened to Feminism (with a capital F), both in India and globally, since you wrote SS – particularly in the wake of queer legal theory*⁸¹ and Janet Halley's call to

81 See generally, FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS (Martha Albertson Fineman, Jack E. Jackson and Adam P. Romero eds., 2009).

The Fraught Terrain of Law and Feminism: 20 Years of Subversive Sites

'take a break';⁸² to the emergence of carceral⁸³ and governance feminisms;⁸⁴ to of course, the return of brutal gendered and sexualized violence in a way that has never been mediatized and consumed before. Does law continue to be a subversive site for you?

BC: Yes, you know, feminism has obviously come a long way, and it has taken a lot of hits in this journey. In the 80s, feminism was fighting for its legitimacy in the academy. In the 90s, feminist perspectives began to have traction and credibility. By the 2000s, the mainstreaming of feminism began to attract feminist critique such as governance feminism and carceral feminisms. I spent several years in conversation with Janet Halley about whether or not to take a break from feminism. My own position was that it was not necessary to take a complete break from feminism.⁸⁵

I thought it was helpful to take off the gender lens sometimes, and look through the sexuality lens, or look through a critical theory lens, but to then come back and see what gender could add to a critical theory or sexuality lens. I believed that queer theory brought something different to the analysis of sexuality. You could see things you could not otherwise see, if you were only looking at gender. But then it seemed important to bring gender back into focus through feminist theory.

I also think that the critique of carceral and governance feminisms is actually quite consistent with the kind of analysis that we did in *SS*: which was to say that law is complicated and just because you scored a legal victory doesn't mean that it's a feminist victory. We need to critically examine the celebratory

82 JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

83 Carceral feminism refers to feminist politics and activism that consider criminalization and incarceration as the most effective remedies for sexual wrongs like 'trafficking' and 'rape'. In taking ahead this demand, carceral feminists align closely with conservative religious and neoliberal forces. See, Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36(1) *SIGNS* 45-71 (2010).

84 Governance feminism (GF) is "the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power." Feminist victories in the GF mode, share its objectives with that of carceral feminism. See, Janet Halley, Prabha Kotiswaran, Hila Shamir, Chantal Thomas, *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/ Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 *HARVARD JOURNAL OF LAW AND GENDER* 335-423 (2006).

85 Brenda Cossman, *Sexuality, Queer Theory and "Feminism After": Reading and Rereading the Sexual Subject*, 49 *MCGILL LAW JOURNAL* 847-876 (2004).

discourse that surrounds legal victories; we need to look at the ways in which such a discourse is being embedded in the state and what the implications of that are for women. So I see the governance and carceral feminisms critique as being in continuity with the thought: be careful what you wish for, you might actually get it.

With the rise of governance and carceral feminisms, we have come to realise that a little bit of feminist thought can be a dangerous thing, when it gets embedded into state practices. I welcomed the feminist critiques of governance and carceral feminisms – because it only helps to point to the fragility and perils of legal victories for feminism. It exposes the deeply contradictory relationship between law and feminism.

RK: I have a kind of schizophrenic response to governance feminism. I think it is an important tool insofar as it shows us how feminism itself is not necessarily an expressly progressive project, and I think that is a hugely significant lesson. Where my schizophrenia comes from is the way Halley sets out governance feminism based on a very specific definition of feminism. So my position is more based on the idea of taking a break from Anglo-American feminisms, and creating space for other feminisms, such as postcolonial feminism, which does not fit with the criteria of feminism that Halley sets out. It seems to me that doing gender in a postcolonial space consists of a different set of alignments and ingredients.

I also think a feminist critique of carceral feminism is absolutely crucial because it carries deep implications for law. Feminism's carceral focus has only become more entrenched with the rise of neoliberalism. In fact, feminism's faith in the criminal law and a punitive regime has become central to much legal advocacy. Take the aftermath of the 2012 Delhi gang rape and murder of Jyoti Pandey: most of the legal amendments were unnecessary and only intensified the sexual surveillance of women's lives. Such reforms mostly resulted in strengthening the punitive power of the state rather than empowering women.⁸⁶ The evidence that we did not need these new laws is found in the subsequent conviction of the perpetrators under the old law, as the new provisions did not have retroactive effect. These convictions actually demonstrated that the law as it existed prior to the amendments actually worked.

86 Ratna Kapur, *Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India*, 14 MELBOURNE JOURNAL OF INTERNATIONAL LAW 317-345 (2013).

At the same time, it is important to recognise that thousands of people – especially the youth – came out on the streets to protest after the horrific Delhi gang rape and murder. These protests had a significant influence on the recommendations subsequently adopted by the Justice Verma Committee report. It was the market that produced the space for these young people to come out and protest. They were born in the crucible of liberalized India, where the market has played a significant role in formulating their understandings of freedom and gender. The point is not whether this is good or bad. It is about trying to understand how freedom is experienced and exercised by this younger generation and it is about accepting that neoliberal India has allowed a space for resistance to emerge that so far, I think, a certain brand of feminism had not allowed for.

As a postcolonial feminist I take this instance seriously rather than flimsily dismissing it as a ploy of the market. It is important to think through the role of the market in the contemporary women's movement, how it takes up gender and defamilialises it; while at the same time, is very much aligned with the idea of the consumer citizen. What does that do in terms of the performance and expression of gender in the context of India?⁸⁷ The protestors on the streets of Delhi in December 2012 were talking about rights to sexual autonomy and bodily integrity in a way that I had not seen anywhere else in the world for a very long time. These young people are products of the market space and are developing a kind of feminist consciousness that is very refreshing. At the same time we have to be attentive to the potential traps of doing feminism from within this space.

BC: There were hints of this in *SS*, but it is more apparent in the way we see feminism work today. I think there is a tendency of feminists engaged with law to rely on the criminal law. This has historically been the case in both colonial and postcolonial India, where calling over and over again for criminal laws to address particularly egregious modes of sexual violence has been a standard feminist practice. Over the last twenty years or so, I have grown to be very critical of the use of criminal law to advance any kind of aggressive feminist agenda. I'm not saying that there is no role for the criminal law, but when you look at the intersection between sexuality and the criminal law, it has not been a pretty story.

87 Ratna Kapur, *Pink Chaddis and SlutWalk Couture: The Postcolonial Politics of Feminism Lite*, 20(1) FEMINIST LEGAL STUDIES 1-20 (April 2012).

The criminal law has actually been used very regressively against various forms of consensual sexuality. When I write and teach about law, I emphasize that there are very different forms of law, very different modalities of regulation, and we should think in a more sophisticated way about the type of regulation that would be most appropriate. Both Ratna and I have over the years done a lot of work independently around sex work, and that brings into sharper relief the limitations of the criminal law. Much of my work right now is about arguing for the decriminalization of any kind of consensual sexuality, and I am seeing how reactionary the criminal law can actually be. So going back to *SS*, I would say that we were making fledgling arguments about the difficulties of asking the criminal law to be your friend in a feminist project.

RK: Interestingly enough, I see how criminal law has become more and more central to feminism today. In the early 90s, we were still having some debate around the UCC. It seems to me, that somehow those have vanished. Today, there is an almost obsessive focus on the criminal as the site for social justice, a focus that has only worked to our peril.

BC: That reflects in history too. Throughout much of the colonial and the immediate postcolonial period, the big campaigns were asking for some degree of criminalisation, whether that was child marriage or Sati, it was all about criminal law.

RK: The campaigns were also about family law. Raising the age of consent was very much about family law and about national identity. But throughout there has been a consistent focus on criminalizing wrongs rather than protecting rights.

This overwhelming focus on criminalisation is something we can see even in the context of how LGBT groups are mobilizing today. Section 377 of the IPC has become all consuming. I do not deny that the focus on decriminalization is important. But one of the things I've been talking about more recently is that in doing this we shouldn't miss out on participating in other debates, especially how the UCC is making a comeback on the BJP government's agenda. LGBT groups should be involved in that discussion, so it does not remain a discussion about religion, and can develop into a more complicated public debate about sexuality and constructions of the family.

BC: My emphasis would be much more on understanding modes of legal regulation – because some forms of regulation do not always look legal but are

founded on law. So we miss out on understanding the work that law is doing surreptitiously. I think we identify criminal law as the place to go to – both for law reform demands, as well as for demands of decriminalization – because criminal law is the one that appears more authoritative, that makes the strong moral claims, and commands strong discursive power. My take on demands for law reform is to say that maybe criminal law is the one that regulates some kind of harm, but when the criminal law is doing its work, it is a blunt object and people go to jail. There are probably better ways to think about regulation, to regulate things before the harm happens in the first place. So around sex work, to think about multiple alternative forms of regulation: to get municipal regulation, health and safety regulation, sexual harassment legislation.

There is a need, therefore, to offer analyses that enable us to understand the intricacies of how a family law reform is fundamentally different than a criminal law reform. I think in *SS* we may have bought into this a little bit, to say that the discursive power of a campaign for law reform, in itself being more powerful than the law itself that gets passed. The campaign itself can be transformative. Often demands for criminal law reform can be a rallying place, but the critique of carceral feminism is one that we need to take seriously. Feminist demands for criminalisation can and have done as much harm as good.

In my view, decriminalization is an essential part of a sexual rights agendas and it is important to emphasize that that decriminalization does not mean de-regulation. To say that consensual sex – be it homosexual sex, or sex work – has been taken out of criminal law, does not mean we leave it to be regulated by the market. LGBT rights for example do not end with the decriminalization of homosexuality. Family law, human rights law, sexual harassment law, taxation law – these are all forms of regulation that will be relevant for gay legal subjects.

RK: I do believe that we've internalized a specific way of thinking about law and social justice that is almost exclusively focused on the negative. This unfortunately does not produce a rights culture amongst minority groups. These movements should not just be narrowly focused on criminal law, as that is almost inevitably handing more power to the state and strengthening its regulatory and governance capacities.

OS: *If you were to think of writing SS today, or revise it – what would you need to change in the way it was conceptualized 20 years back?*

RK: I would bring the postcolonial analysis much more strongly to the project. I think we kept our analysis confined to a post-structural feminist analysis. The second thing – and this is something I’ve written about in a piece called “Hecklers to Power?”⁸⁸ – I worry that that feminism has become nothing more than hecklers to power. Women’s rights are being taken up by all sorts of actors, including the Hindu Right as well as the market. It is not necessarily evident that taking up the cause of gender is a radical project. Third, obviously we would make neoliberalism and the market more central to our analysis, and think through how for example the Mathura protests in the 1970s were different from the Jyoti Singh Pandey protests in 2012. What were the implications for feminism and law, and what difference did these protests and the legal reforms that followed make to women’s lives as well as to our understandings of the role of law in social justice pursuits?

BC: For me, two things we would do differently. First, there would be a more obvious postcolonial analysis. Second, we would take up a more explicit analysis of sexuality and queer theory, which did not seem utterable at the time *SS* was written. We would take on different kinds of intersectionalities. I think certainly gender and sexuality would be one that will be much more front and centre, and really using sexuality, not in terms of looking at LGBT folks per se, but really just sexuality itself as a variable.

OS: *Does that mean that you would consider at some point reworking Subversive Sites?*

RK: No, that’s just not on the cards. We will not be able to do it. We might still do a chapter or a preface to a new edition, and maybe have a handbook of case law on gender equality that could be a useful teaching tool or a casebook. But a rewrite would not be possible. It would be a completely different book.

BC: I think even if it is possible to rewrite the first chapter on feminist legal histories and add what has happened in the last 20 years, it would change dramatically after that. We would have to fundamentally change our conceptual analysis.

88 Ratna Kapur, *Hecklers to Power? The Waning of Liberal Rights and the Challenges to Feminism in India*, in *SOUTH ASIAN FEMINISMS*, 333-355 (Ania Loomba and Ritty A. Lukose eds., 2012).

The Fraught Terrain of Law and Feminism: 20 Years of Subversive Sites

OS: *Ratna and Brenda, many thanks for taking the time to speak with me. This has been a very educative discussion for me.*

BC: It was a pleasure Oishik, and thank you for prodding us to think about SS after so many years. I can't believe it has been twenty years actually.

RK: I am glad SS has been given this recognition through your experience of it. What else can a teacher hope for?

* * * * *