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Editorial Note

Indian Feminisms, Law Reform And The Law Commission of India: Special Issue In Honour of Lotika Sarkar

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I. Introduction

Lotika Sarkar, who passed away on 23rd February 2013, was a Professor of Law at Delhi University from 1951 till 1983, in addition to being a founding member of the Centre for Women's Development Studies, New Delhi and the Indian Association of Women's Studies. She was a member of the Committee on the Status of Women (Government of India) that produced the historic Towards Equality report in 1974. She is probably best known and remembered as one of the four signatories to the Open Letter written to the Chief Justice of India, in protest against the Mathura judgment in 1979. It is only fitting to dedicate this Special Issue on the Law Commission of India to Lotika's memory, for it seeks to build upon and continue her inquiry into the Commission's work on women's equality, that she undertook twenty-five years ago.

On October 7, 2016, the Law Commission of India (hereinafter referred to as 'LCI' or 'the Commission') released a questionnaire to gather public

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opinion on personal law reform, with the objective of initiating "a healthy conversation about the viability of a uniform civil code"[1]. This was in response to a reference made to the LCI by the Law Ministry a few months earlier to submit a detailed report on the subject. Uniform Civil Code (hereinafter referred to as 'UCC') had been on the agenda of the ruling Bharatiya Janata Party for years, which was revived in the public discourse in early 2016 by a petition filed before the Supreme Court of India by a woman called Shayara Bano, challenging the constitutional validity of the practices of instant triple *talaq*, polygamy and *halala* marriage.[2] This legal/political background aside, the questionnaire itself was a milestone in the life of the LCI. While the LCI had played an active role in changing specific family laws and provoking debate on several issues pertaining to women and family law, this was the first time that it had taken up the UCC question.

Reviewing the LCI's contribution in advancing women's equality through law reform in a 1988 study[3]– the inspiration behind this *Special Issue* – Lotika Sarkar had bemoaned the fact that despite being widely debated in public, the UCC question had not "interested the Commission sufficiently"[4] to have merited being taken up in any of its reports. This positioning of the UCC as an issue of women's equality was of course in keeping with the general view of the Indian women's movement in the 1980s, particularly in the aftermath of the *Shah Bano* judgment[5] and the Muslim Women's (Protection of Rights on Divorce) Act, 1986 enacted by the Congress government to undo the judgment. As any observer of the Indian women's movement would know, over the next two decades, the position of the movement shifted to one of opposing a uniform law, and in favour of tackling gender discrimination in the laws of each community separately, through initiatives from within.[6]

So, when the Commission finally took up the UCC question in October 2016, feminists across the board denounced it for the manner in which it was done, for its explicit anti-Muslim bias and its "superficial engagement with personal laws".[7] Though the questionnaire was prefaced with a call to examine the laws and customary practices of all religious groups, the questions primarily

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1 Law Commission of India, Questionnaire on Uniform Civil Code (Oct. 7, 2016).

2 On 22nd Aug 2017, the Supreme Court set aside the practice of instant triple *talaq* as contrary to Islamic tenets governing divorce. *See*, Saptarshi Mandal, *Triple Talaq Judgement and the Continuing Confusion about the Constitutional Status of Personal Law*, Economic and Political Weekly Engage Vol. 52, No. 35, (Sept. 2, 2017).

3 Lotika Sarkar, National Specialised Agencies and Women's Equality: Law Commission of India (1988).

4 *Id*., at 23.

5 Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.

6 Tanja Herklotz, Dead Letters? The Uniform Civil Code through the Eyes of the Indian Women's Movement and the Indian Supreme Court *available at* https://dann.rewi.hu-berlin.de/doc/Herklotz_Dead_Letters_VRue.pdf., (last visited on Oct. 19, 2016).

7 Shishir Tripathi, *Uniform Civil Code Debate focuses on Muslim Law but ignores other communities: Flavia Agnes,* Firstpost, Oct. 19, 2016, http://www.firstpost.com/india/

concerned Muslim Personal Law. Further, while the survey was purportedly to assess the "viability" of a uniform code, questions suggested otherwise. Thus, Question 16 asked, "What measures should be taken to sensitize the society towards a common code or codification of personal law?" suggesting that the Commission had already arrived at the conclusion that a common code was the solution to the problems besetting Indian family law.[8]

In the weeks following the release of the questionnaire, letters were written, op-eds and interviews were published, and public statements were issued – the full range of means through which feminism in India generally plays an educative role in the public sphere – questioning the supposed connection between uniformity and gender justice, the timing and manner of seeking public opinion on the issue, in addition to the content of the questionnaire itself.[9] While feminist interventions in Shayara Bano's petition before the Supreme Court were definitely more visible in the media, the Commission's questionnaire also served as a site for articulating feminist arguments to push back against both Hindu-nationalist and liberal-nationalist desires for a uniform code, and intervene in the wider public debate around personal law, minority rights and gender justice. Significantly, the questionnaire also served as a site for resisting the Muslim patriarchs' attempts to monopolise the right to represent the Muslim community.[10] We thought all that was happening around the questionnaire and the ensuing public discussion answered

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uniform-civil-code-debate-focuses-on-muslim-law-but-ignores-other-communities-flavia-agnes-3060730.html, (last visited on October 5, 2017).

8 *Supra* note 1, at 4.

9 *See*, Praneta Jha, *Prof Mary John thinks India is Not Ready for a Uniform Civil Code. Here's Why*, Catchnews, Oct. 22, 2016, http://www.catchnews.com/india-news/prof-mary-john-thinks-india-is-not-ready-for-a-uniform-civil-code-here-s-why-1477058846.html (last visited on October 5, 2017); The Wire Staff, Bebaak Collective Speaks Out Againts Triple Talaq and UCC, The Wire, Nov. 3, 2016, https://thewire.in/77731/bebaak-ucc-triple-talaq/ (last visited on October 5, 2017); Alternative Law Forum, Law Commission's Questionnaire on the Uniform Civil Code: A Critique, http://altlawforum.org/campaigns/law-commissions-questionnaire-on-the-uniform-civil-code-a-critique/ (last visited on October 5, 2017); Communist Party of India (Marxist-Leninist) Liberation, Letter to Law Commission regarding Personal Law Reform, http://cpiml.org/cpiml/letter-to-law-commission-regarding-personal-law-reform/ (last visited on October 5, 2017); Special Correspondent, Women Seek Triple Talaq Right, The Telegraph, Nov. 3, 2016, https://www.telegraphindia.com/1161103/jsp/nation/story_117189.jsp (last visited on October 5, 2017); Feminists were not alone in denouncing the questionnaire. Bihar Chief Minister, Nitish Kumar, refused to answer the questionnaire, pointing out the straightjacketed nature of the questions, which instead of leading to a fruitful dialogue on personal law reform, was likely to fuel social discord and erosion of constitutional values. *See*, PTI, *Not Possible to Form Opinion on UCC: Nitish to Law Commission*, The Indian Express, Jan. 12 2017, http://indianexpress.com/article/india/not-possible-to-form-opinion-on-ucc-nitish-to-law-commission-uniform-civil-code-muslim-personal-law-code-triple-talaq4471190/ (last visited on October 5, 2017).

10 *See*, Anuja Jaiswal, *We'll Ensure Muslim Women Fill UCC Form: Anti-triple Talaq Activists*, Times of India, Oct. 14, 2016, https://timesofindia.indiatimes.com/city/agra/Well-ensure-Muslim-women-fill-UCC-form-Anti-triple-talaq-activists/articleshow/54857331.cms (last visited on October 5, 2017).

a question that we had posed in our *Call for Papers* for this volume: "Is the Commission still politically relevant for Indian feminist movements?"

II. The Law Commission Of India As The Object Of Feminist Inquiry

In the *Call for Papers*, we had written:

> *"Whether in terms of concrete statutory changes or as a discursive space for articulating new meanings, law reform has been a key political objective for Indian feminist movements. And in pursuing that goal, the Law Commission has been a key institution that feminists in India have engaged with, influenced, used its recommendations for advocacy with other institutions of the state and at times, also rejected them. Be it the introduction of the offence of "dowry death" in the Indian Penal Code, the proposal for gender neutral rape law, liberalizing divorce law by incorporating "irretrievable breakdown of marriage" as a ground for divorce, spelling out the rights and obligations of parties in a surrogacy contract or whether Section 498A of the Indian Penal Code, 1860 should be made a compoundable offence, the formulations and recommendations of the Law Commission have sometimes generated support, sometimes controversies and sometimes have opened new directions for feminists and caused new alliances to be forged (for instance, the issue of gender neutrality in rape law).*[11]"

Despite its relevance to feminist politics around the law as well as to the Indian legal system, systematic studies of the LCI as an institution, are rare. The earliest critical account of the Commission is a chapter titled *The Crisis of Law Reform* by Upendra Baxi in his celebrated 1982 book, *The Crisis of the Indian Legal System*.[12] Baxi characterised the "crisis" of law reform in India as "reform" being carried out as an ad-hoc, technocrat-led, instrumental process, having neither a "comprehensive grasp of social reality"[13], nor "a coherent philosophical, ideological base"[14]. Baxi charged that being part of the "crazy quilt"[15] of law reform agencies in India, the LCI revealed the same malaise. Baxi pointed at two sets of reasons why the LCI was unable to "transcend the crisis of the law reform".[16] The first pertained to the knowledge claims that the

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[11] Rukmini Sen & Saptarshi Mandal, *Indian Feminism, Law Reform and the Law Commission of India: Special Issue in Honour of Lotika Sarkar*: Call for Papers, Journal of Indian Law and Society (Jan. 26, 2014), https://jilsblognujs.wordpress.com/2014/01/26/call-for-papers-special-issue-in-honour-of-lotika-sarkar/, (last visited on October 19, 2016).

[12] Upendra Baxi, The Crisis of the Indian Legal System (1982).

[13] *Id*., at 245.

[14] *Id*.

[15] *Id*.

[16] *Id*., at 246.

LCI made in its reports regarding the nature of the problems and their recommended solutions. The second was a range of structural factors that constrained the functioning of the LCI. These were its non-permanent status as a law reform agency; its composition and the manner of appointment; the wording of the terms of reference framed by the Law Ministry for its functioning; the absence of a relationship of accountability between the Commission and the Ministry, such that the latter did not have to account for the non-implementation of the proposals made by the former, and so on.

The other study of the LCI, published six years after Baxi's book, was a report authored by Lotika Sarkar, as part of a larger project to assess how the central agencies created by independent India to pursue national development and nudge social change, had furthered the constitutional goal of women's equality.[17] Sarkar's colleague Vina Mazumdar wrote in the Preface, that the LCI was chosen for a case study, firstly, because law was a "primary instrument for bringing about changes in women's status"[18] and it was the task of the LCI to periodically review and recommend required changes in the law and secondly, to see if there had been any change in the Commission's attitude towards women over a period of time – a trend, Mazumdar claimed, had been witnessed in the case of the judiciary. Sarkar's study of the LCI largely built along the lines of Baxi's analysis of the knowledge claims made in the reports and structural issues that constrained the Commission institutionally.

But distinct from Baxi, Sarkar focused exclusively on how the Commission had addressed issues pertaining to women in its reports. Sarkar divided these reports into those that were "women specific" and those that addressed family law and implicitly had a bearing on women's lives. In the first category, Sarkar found eight reports submitted by the Commission since it was established. These dealt with suppression of immoral traffic in women;[19] married women's property;[20] criminal liability for husband's failure to pay maintenance or permanent alimony;[21] remarriage by Hindu widows;[22] guardianship

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17 *Supra* note 5.

18 *Supra* note 5, at 14.

19 Law Commission of India, *The Suppression of Immoral Traffic in Women and Girls Act, 1956*, Report No. 64 (March 7, 1975), *available at* http://lawcommissionofindia.nic.in/51-100/Report64.pdf (last visited on October 5, 2017).

20 Law Commission of India, *Married Women's Property Act, 1874.* Report No. 66 (May 12, 1976), *available at* http://lawcommissionofindia.nic.in/51-100/Report66.pdf (last visited on October 5, 2017).

21 Law Commission of India, *Criminal Liability for failure by Husband to pay maintenance or permanent alimony granted to the wife by the Court under certain enactments or rules of law,* Report No. 73 (May 15, 1978), *available at* http://lawcommissionofindia.nic.in/51-100/Report73.pdf(last visited on October 5, 2017).

22 Law Commission of India, *Hindu Widows' Remarriage Act, 1856,* Report No. 81 (December 20, 1979), *available at* http://lawcommissionofindia.nic.in/51-100/Report81.pdf (last visited on October 5, 2017).

in secular and Hindu personal law;[23] rape;[24] gender discriminatory Christian divorce law'[25] and dowry death.[26] In the second category were six reports, that addressed Christian personal law (different from the one listed in the previous category);[27] the effect of conversion on marriage;[28] a draft Bill prepared by the government on Christian marriage and matrimonial reliefs;[29]Hindu and civil marriage and divorce;[30] irretrievable breakdown of marriage as a ground for divorce;[31] and maintenance for children.[32]

Each report was examined by looking at how a particular issue came to the Commission (whether it was taken up *suo motu* or upon reference from the executive or the judiciary); the analysis of the problem and the recommendations made by the Commission; the evidence (if any) or considerations that the Commission based its recommendations on; whether the recommendations were favourable to women's interests; whether they were in consonance with constitutional ideals like equality and secularism; and finally, whether the recommendations were implemented. In the concluding chapter on recommendations, Sarkar, interestingly, emphasised the relevance of the LCI by characterising it as a "watch-dog" to rid the Indian legal system of its colonial

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[23] Law Commission of India, *The Guardians and Wards Act, 1890 and certain provisions of the Hindu Minority and Guardianship Act, 1956,* Report No. 83 (April 26, 1980), *available at* http://lawcommissionofindia.nic.in/51-100/Report83.pdf (last visited on October 5, 2017).

[24] Law Commission of India, *Rape and Allied Offences: Some questions of substantive law, procedure and evidence,* Report No. 84 (April 25, 1980), *available at* http://lawcommissionofindia.nic.in/51-100/Report84.pdf(last visited on October 5, 2017).

[25] Law Commission of India, *The Grounds of Divorce amongst Christians in India: Section 10 Indian Divorce Act, 1869,* Report No. 90 (May 17, 1983), *available at* http://lawcommissionofindia.nic.in/51-100/Report90.pdf(last visited on October 5, 2017).

[26] Law Commission of India, *Dowry Deaths and Law Reform: Amending the Hindu Marriage Act, 1955, The Indian Penal Code, 1860 and the Indian Evidence Act, 1872,* Report No. 91 (August 10, 1983), *available at* http://lawcommissionofindia.nic.in/51-100/Report91.pdf, (last visited on October 5, 2017).

[27] Law Commission of India, *Amendment of Section 2 of the Divorce Act, 1869 Enabling Non-Domiciled Estranged Women Christian Wives to Seek Divorce.* Report No. 224 (June 25, 2009), *available at* http://lawcommissionofindia.nic.in/reports/report224.pdf, (last visited on October 5, 2017).

[28] Law Commission of India, *Converts' Marriage Dissolution Act, 1866,* Report No. 18 (1866) *available at* http://lawcommissionofindia.nic.in/1-50/report18.pdf, (last visited on October 5, 2017).

[29] Law Commission of India, *Christian Marriage and Matrimonial Causes Bill, 1961*, Report No. 22, (1861), *available at* http://lawcommissionofindia.nic.in/1-50/Report22.pdf, (last visited on October 5, 2017).

[30] Law Commission of India, *Laws of Civil Marriage in India – A Proposal to Resolve Certain Conflicts.* Report No. 212 (October 17, 2008), *available at* http://lawcommissionofindia.nic.in/reports/report212.pdf (last visited on October 5, 2017).

[31] Law Commission of India, *The Hindu Marriage Act, 1955 – Irretrievable breakdown of marriage as a ground of divorce.* Report No. 71 (April 7, 1978), *available at* http://lawcommissionofindia.nic.in/51-100/Report71.pdf, (last visited on October 5, 2017).

[32] Law Commission of India, *Sections 24 to 26, Hindu Marriage Act, 1955: Orders for interim maintenance and orders for the maintenance of children in matrimonial proceedings,* Report No. 98 (April, 1984) *available at* http://lawcommissionofindia.nic.in/51-100/Report98.pdf, (last visited on October 5, 2017).

legacy and "keep up with modern needs".[33]A common thread running through her recommendations was of democratic accountability, which was sought to be furthered in two ways: one, by making the process of law reform more participatory and two, by bringing the LCI and its functioning within the purview of the Parliament. Thus, the recommendations ranged from institutionalizing consultation with individuals working on the ground and activist groups in preparing the reports, and inclusion of social scientists, legal academics and social workers as members of the LCI, to mandatory submission of the reports before the Parliament within a stipulated time and the government being accountable to the Parliament for non-implementation or partial implementation of the Commission's recommendations. Sarkar also recommended that more women be appointed as members of the LCI, particularly those with activist or academic backgrounds.

We cannot possibly make sense of Sarkar's 1988 Report as a feminist document without placing it in the context of a certain strand of Indian feminist thinking on the law. Coming out towards the end of the 1980s, the hope and optimism in the report about legislation as a source of social change strikes an odd note, as it differs vastly from other feminist assessments of the legal system during this period. The period between 1980 and 1990 was a decade derisively described by Flavia Agnes as "a golden period for Indian women, when protective laws were offered on a platter".[34] Indeed, every feminist campaign during this period, be it against rape, *sati*, "obscene" images of women or dowry violence, was promptly met by the lawmakers with new legislation. The experiences of individual women seeking to use the law and that of feminist collectives assisting them was however of frustration and hopelessness. The police were inaccessible, corrupt and represented the authoritarian face of the state. The judiciary was found to be no better, as decisions were based on reasoning that entrenched rather than dislodge the patriarchal attitudes operating outside the courtroom. When decisions were favourable, women found them to be "unimplementable"[35], as in the case of maintenance orders. Family courts, which were introduced in 1984 as lawyer-free alternative forums, where women were to be able to present their cases in their own words, were widely seen as old wine in new bottles.[36] All these experiences underscored the uncertainty and unreliability of legal recourse for women.

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[33] *Supra* note 5, at III.

[34] Flavia Agnes, *Protecting Women against Violence? Review of a Decade of Legislation, 1980-89,* Economic and Political Weekly Vol. 27, No. 17 (April 1992), at WS-19.

[35] Nandita Gandhi and Nandita Shah, The Issues at Stake: Theory and Practice in the Contemporary Women's Movement in India (1992), at 266.

[36] *Id.,* at 266-67. ("The procedures for these courts are just a whittled down version of civil court procedure, and are neither established ones nor a set of new, alternative ones. So women have to wait all day for their cases to be called, go through a hurried marriage counselling process, ask harried and rude clerks for information, run from pillar to post to supply all kinds of proof and documents and hire lawyers to write out their petitions but not to appear for them.")

While Sarkar's report does not share the above cynical perception of the Indian legal system, what it does resemble in tone and tenor is the 1974 *Towards Equality* report[37] prepared by the government appointed Committee on the Status of Women in India (1971-74). The chapter on women and the law in *Towards Equality* opened with the following words:

> *"One of the main characteristics of modern society is a heavy reliance on law to bring about social change. This is particularly true of countries which had for centuries been under foreign rule and attained independence after a long struggle."*[38]

Towards Equality posited the role of legislation "directly, as a norm setter, or indirectly, providing institutions which accelerate social change". Removal of "legal discrimination" by the post-independence legislature was deemed essential for achieving "complete liberty for women". To offer just one example of this decolonialist aspiration of legislation, *Towards Equality* viewed personal laws as vestiges of colonialism that was incongruent not only with gender equality, but also with "secularism, science and modernisation".[39] It recommended "expeditious implementation"[40] of a UCC in the interest of gender equality as well as national integration. All these ideas, as we have seen above, constituted Sarkar's vision of law reform and her yardstick for assessing the LCI.

The similarities between *Towards Equality* and Sarkar's Report, though separated by fifteen years, is not coincidental as Sarkar was also part of the committee that authored *Towards Equality*, and was one of the key figures that shaped the dominant post-independence feminist jurisprudence that viewed law as a critical instrument for overcoming women's social inequalities.[41] Thus, the particular feminist intervention that we encounter in both *Towards Equality* and Sarkar's report, is to recommend removal of any trace of inequality in the legal statuses between men and women, along with protective measures in favour of women to strengthen their bargaining position (in the case of family law). This was also Sarkar's personal brand of feminism, as we learn from Baxi. In his *First Lotika Sarkar Memorial Lecture* at the Delhi University in 2014, Baxi tells us:

> *"She chafed at the thought that all law, including the postcolonial, was colonial because it was primarily patriarchal. The law colonizes*

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[37] Phulrenu Guha Et Al, Towards Equality: Report of the Committee on the Status of Women in India 1974).

[38] *Id*., at 102.

[39] *Id*., at 142.

[40] *Id*.

[41] Vina Mazumdar is another such figure. *See*, Vina Mazumdar, Political Ideology of Women's Movement's Engagement with Law *available at* http://www.cwds.ac.in/wp-content/uploads/2016/09/PoliticalIdeology.pdf, (last visited on October 5, 2017).

women's bodies and consciousness; in it, the master-signifier is all male. She searched for the 'Male in the State' (an expression of feminist political theorist Wendy Brown) and fought to displace it with all her fury and might."[42]

Sarkar's 1988 study of the LCI embodied a particular set of feminist ideas about the law, legal reform and social change that were also specific to a time and place. While identifying and fighting the "Male in the State" remains a crucial feminist method, in posing the LCI as the object of feminist inquiry three decades later, we as editors, looked for an "updated" account of the institution. In our *Call for Papers*, we asked prospective contributors to reflect on the following questions:

"How has the Law Commission responded to feminist law reform initiatives in the twenty five years since the above [report] was written and how effective have the interventions of the Commission been in furthering those initiatives? Given the changes that have taken place in our understanding of and experience with the state in the intervening years, what will be our assessment of the Commission today? Is the Commission still politically relevant for Indian feminist movements? Our understanding of what issues are feminist issues has also changed significantly since the eighties. In her study, Sarkar focused on reports of the Commission that were 'women specific' and the ones that dealt with family laws affecting women. Today however feminists cannot afford to 'do' gender without simultaneously 'doing' caste or sexuality. In what new ways then, could we read the Commission's reports addressing women? And what feminist readings could we offer, if any, of those reports that seemingly have got nothing to do with women, say for instance, the 193rd report on the law of limitation in transnational litigation?"

Two other reasons made us interested in a feminist re-evaluation of the LCI. First, as noted earlier, there is a dearth of feminist literature on the LCI. While feminist scholars in India have subjected the judiciary, and particularly court judgments to critical discursive analyses, the reports of the LCI, which constitute an important source of legal knowledge production, have escaped feminist scrutiny.[43] We wanted to address this gap in the feminist literature on Indian law. Second, in the aftermath of the sexual offences law reform of 2013, whereby a number of feminist ideas about sexual violence were enacted into the criminal law via the recommendations of the Justice Verma

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[42] Upendra Baxi, Unlearning the law with Lotika Sarkar *available at* https://www.academia.edu/8360054/2014._Unlearning_the_Law_with_Lotika_Sarkar, (last visited on October 5, 2017).

[43] The reports on rape are an exception to this trend. *See*, Rukmini Sen, *Law Commission Reports on Rape*, Vol. 45, No. 44-45 Economic and Political Weekly (2010).

Committee,[44] we thought it necessary to examine the role played by different state bodies tasked with law reform in feminist struggles. Feminist scholars in other jurisdictions have scrutinised the work of law reform commissions and the understanding of "reform" espoused by them. In the next section, we discuss some of the issues raised by these inquiries to situate the LCI and the articles in this volume in a wider geographical terrain of feminist inquiry.

III. Law Reform Commissions As Objects Of Feminist Inquiry

If the work of figures like Lotika Sarkar and Vina Mazumdar exemplified hope and optimism about the law's emancipatory potential for women, other scholars have viewed it with scepticism and have advocated a strategic engagement with the law. Archana Parashar argues that the problem is not so much with law's inability to bring social change, as with feminists' "inappropriate expectations"[45] of the same. Parashar suggests that feminists engage with the law pragmatically, being aware of its limitations. Ratna Kapur and Brenda Cossman similarly argue in favour of feminists exploiting the discursive and participatory aspect of law reform campaigns,[46] while being aware of their drawbacks, chief among which is the homogenizing nature of the rights discourse that tends to flatten ideas about women and women's interests. Nivedita Menon, while holding that law reform can at best deliver "temporary and short term redress" and thus disagreeing with Kapur and Cossman's characterization of law as a "subversive site", still maintains that feminists cannot abandon the law altogether.[47] Thus, the question no longer is whether feminists should embrace or reject the law. Today, most feminists in India, as elsewhere, would agree with Mari Matsuda's idea of "multiple consciousness":

> *"There are times to stand outside the courtroom door and say 'this procedure is a farce, the legal system is corrupt, justice will never prevail in this land as long as privilege rules in the courtroom'. There are times to stand inside the courtroom and say 'this is a nation of*

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[44] Justice Verma Committee on Amendments to Criminal Law, Report of the Committee on Amendments to Criminal Law (Jan. 23, 2013).

[45] Archana Parashar, Women and Family Law Reform in India: Uniform Civil Code and Gender Equality (1992).

[46] Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagement with Law in India (1996) (Kapur and Cossman write: "By revisioning law reform campaigns as discursive struggles, where competing normative visions of the world are fought out, we can begin to understand feminist engagement as an effort to destabilize and displace previously dominant meanings of gender". A related aspect of law reform campaigns, they note, is that they enable women from diverse backgrounds to come together and participate in these discursive struggles in law.).

[47] Nivedita Menon, Recovering Subversion: Feminist Politics Beyond the Law (2004).

laws, laws recognizing fundamental values of rights, equality, and personhood'."[48]

Feminist writings on the law in the last thirty years have approached diverse forms and sites of legal engagement with this attitude of multiple consciousness.[49] One such site has been the official law reform agencies. Regina Graycar and Jenny Morgan, two Australian feminist law professors, provocatively asked in the title of their 2005 article – "Law Reform: What's in it for Women?"[50]. Graycar and Morgan, who served on the law reform commissions of the Australian states of New South Wales and Victoria, respectively, outlined three factors that determined whether "law reform" had anything in it for women: whether these bodies were willing to step outside existing legal categories and frameworks to look at a problem; whether "reform" was imagined as more than mere statutory change; and whether recommendations for reform were made on the basis of empirical or qualitative research. Below we discuss each separately in the context of the LCI.

A. Looking Outside Pre-existing Legal Categories

Graycar and Morgan argue that given the fundamentally "male" character of traditional legal concepts and doctrines,

"… it may be the case that if law reform agencies narrowly circumscribe their work, their considerations might be more inclined to exclude the interests of women. The more narrow the terms of reference, the more likely that the existing legal framework will be retained. If the terms of reference contemplate only minor re-adjustment, we may preclude the possibility of developing new and perhaps more appropriate ways of responding to a legal problem than how the problem or issue was defined in the past when women and other disadvantaged groups had no input into the parameters within which an issue or problem was placed."[51]

Indeed, in the Indian case, Baxi has criticized the LCI for its "limited self-definition of its role"[52]. Baxi notes that the terms issued to the first eight commissions (1956 to 1977) comprised of "law reform matters mixed up with carefully manicured bureaucratic generalities"[53] such as improving and sim-

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[48] Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 Women Rts. L. Rep. 11, 11 (1989).

[49] For an overview, *See*, Susan Armstrong, *Is Feminist Law Reform Flawed? Abstentionists & Sceptics*, Australian Feminist Law Journal, 20:1, 43-63 (2004).

[50] Reg Graycar and Jenny Morgan, *Law Reform: What's in it for women?,* Windsor Yearbook on Access to Justice, 23, 393-419 (2005).

[51] *Id*., at 398.

[52] *Supra* note 14, at 256.

[53] *Id*., at 255.

plifying the central legislations, improving the efficiency of the legal system, implementation of the Directive Principles of State Policy, and so on. But instead of making use of the general wording of their mandates, successive commissions chose to limit their briefs to examining only the technical questions of law, or what Baxi calls, following Lord Devlin, the "lawyer's law"[54]. Thus, even when the mandate of the First Law Commission was defined broadly as addressing issues pertaining to "administration of justice", it limited itself to the formal institutions of dispute resolution, namely, the courts and tribunals. Every Commission since then has demonstrated the same tendency.

Graycar and Morgan are quick to note however, that law reform agencies can productively engage with the social experience of law even without broadly framed terms of reference. They cite the example of the Victorian Law Reform Commission (Australia), which in 2004, upon examining the defenses to homicide recommended that the defense of provocation be abolished. This was based on an inquiry into the factual contexts of homicide – who killed whom, in what circumstances, what defense was used by whom, and to what effect. A factual as opposed to a doctrinal inquiry into the subject revealed that the provocation defense offered a way for men to get away with murder of their female partners by showing how they had been *provoked* by sexual jealousy. But the same did not happen in the case of women who killed their partners (much less in number than the former) in response to domestic violence, because it was not regarded as something that could provoke women to kill. The recommendation to abolish the defense therefore was based on an understanding of the gendered circumstances in which individuals killed, and the gendered assumptions underlying the defense of provocation that benefited men who killed.

A comparable example from the Indian context will be the 91st Report of the LCI that dealt with the phenomena dubbed as "dowry deaths"– the death of young women at the hands of husbands and/or in-laws preceded by the latter's persistent demand for dowry, or women committing suicide as a result of such demands. The report noted that while every such incident could be brought within the scope of an "offence already known to the law"[55], two difficulties arose in specific cases: "(i) either the facts do not fully fit into the pigeon-hole of any known offence; or (ii) the peculiarities of the situation are such that proof of directly incriminating facts is thereby rendered difficult."[56] Thus, the case of a woman driven to commit suicide could be "pigeon-holed" into the offence of abetment to commit suicide only if there was definite evidence of instigation or encouragement by the husband and/or in-laws. Similarly, even in situations with strong possibility of homicide, finding evidence beyond reasonable doubt proved difficult, since the crime was

[54] *Id.*
[55] *Supra* note 27, at 1.
[56] *Id.*

"committed within the safe precincts of a residential house"[57] and "the shackles of the family are so strong that truth may not come out of the chains".[58]

Given these particular difficulties, the Commission broke away "from the traditional way of approaching a crime",[59] and adopted a problem-solving approach that took it to the law of evidence. Since, the legal problem was one of causation, which could not be addressed through the "normal rules of evidence"[60] the Commission recommended inserting a presumption, which was crafted to correspond to the specific factual circumstances accompanying "dowry deaths".[61] The presumption clause proposed by the Commission was to the effect that if a married woman died within five years of marriage, from burns or injuries sustained in the matrimonial house where she resided with her husband, and if the death took place behind closed doors, it may be presumed that the death was not accidental. A second clause along the similar lines was proposed that created a presumption of homicide or suicide caused by persistent demands for dowry, should credible information of such demand be available. The Report also recommended interventions in substantive criminal law, but the creative use of the legal device of presumption in this case is an example of how reform could be imagined from within law and yet reflect the gendered experience of the law.

B. Law Reform Not the Same as Statutory Change

The second factor in Graycar and Morgan's analysis that prevents law reform commissions from substantively impacting women's lives is their exclusive concern for statutory change, while ignoring other avenues of effecting social change. The authors are joined in this criticism by Audrey Macklin, a Canadian law professor, who in a 1992 article characterized the Law Reform Commission of Canada ("LRCC") as a

> *"rational actor in the judicial/legislative political arena whose conception of law reform and its proper institutional role served to advance its own interests as a legal bureaucracy."*[62]

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[57] *Supra* note 27, at 2.

[58] *Id.*

[59] *Supra* note 5, at

[60] *Supra* note 27, at 1.

[61] The Commission divided these into eight *factual components*: the victim being a female; mostly in her twenties; married woman/young mother dependent on husband/ his relatives; death by fire, injury or poisoning; history of unhappiness with no reason save for *persistent, determined and oppressive* demand for dowry; case registered as accident or suicide, and homicide is brought into the picture with *great reluctance* by the police, and only upon *great persuasion* by the deceased's family; location of the incident is always the matrimonial home; when reported by the husband/in-laws, it is reported as suicide, but when reported by women's family or relatives, it is reported as homicide. *Id.,* at 3-4.

[62] Audrey Macklin, *Law Reform Error: Retry or Abort*, 16 Dalhousie L.J. 395, 415 (1993).

Macklin argued that the LRCC's work revealed an impoverished understanding of both *law* and *reform*. The LRCC typically concerned itself with the statutory law, disregarding issues of improving the legal process. Citing the example of the newly introduced anti-stalking provision in the Canadian Criminal Code, Macklin wrote:

> *"If one seriously wants to reform the 'law' regarding stalking of women, formulating a new law would only comprise a small part of the task and would, in my view, be a futile and counterproductive exercise if taken in isolation. It is futile because it would not do a damn bit of good and it is also counter-productive because it would create a sense in the mind of the public (minus the women affected by it) that something had actually been done."*[63]

Similarly, on the issue of *reform*, Macklin wrote:

> *"If you want to change the 'law', changing the words on paper is only one way, and not necessarily the optimal way. Where the injustice experienced by a particular group is related to systemic oppression, it is reasonable to suppose that that status of disadvantage permeates all elements of the system, and altering words on paper typically produces little change, or else, generates new counter-strategies to neutralize any positive effects and maintain the status quo. That is why introducing a new and improved stalking law may well turn out to be a waste of time. Police officers will still have latitude to decide whether to arrest, prosecutors will still exercise discretion about whether to prosecute, and judges will still bring whatever gender biases they possessed prior to passage of the legislation, to bear on statutory interpretation, fact finding and the sentencing process."*[64]

Coincidentally, Flavia Agnes makes a similar intervention about India's *reformed* rape law, in an article published the same year as Macklin's.[65] The rape provisions in the Indian Penal Code (hereinafter referred to as 'IPC') were amended for the first since their enactment, in 1983, following feminist protests across the country triggered by the Supreme Court's judgment in *Tukaram v. State of Maharashtra,*[66] where the Court had acquitted two policemen of rape, on the reasoning that since the victim had not raised an alarm it could not be concluded that she had not consented. Though the feminist demand for a clear definition of consent in the penal code was not met, two main highlights of the 1983 Amendment were: legal recognition of rape in custodial situations, and the placing of the burden of proof on the accused

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63 *Id.,* at 400.
64 *Id.,* at 403.
65 *Supra* note 36.
66 *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143 : AIR 1979 SC 185.

in such cases, and mandatory minimum sentences, which however could be departed from by the judges by recording "adequate and special reasons".[67] Agnes argued that *Tukaram* was an aberration, and that there were decisions before the amendment, which showed that the law could have been interpreted progressively if the judges wanted to. In other words, it was not the statutory law that needed reform. On the other hand, judgments post-reform revealed the same patriarchal attitudes and concerns in judicial reasoning – "the same old notions of chastity, virginity, premium on marriage and fear of female sexuality"[68] – that the new amendment was supposed to contain. Agnes showed that after the amendment, judges routinely awarded less than minimum sentences based on considerations such as the accused being a young offender or a first-time offender, that nothing but trivialized the offence. *Law reform* had not only been unsuccessful, but had also been counter-productive.

In the case of the LRCC, Macklin asserted that the reason why it adopted the narrow focus on statutory law reform, to the exclusion of issues pertaining to judicial appointment and administration of the legal system, was because acknowledging the role of these latter issues in "law-creation implicitly de-centers legislative reform as the *sine qua non* of legal change, which in turn undermines the long run legitimacy of the Commission itself as an agent of legislative reform."[69] Macklin thus welcomed the dissolution of the LRCC, arguing that entrusting law reform to any institution whose agenda was set by lawyers was only likely to entrench legalism and forestall possibilities of substantive social change for women and other marginalized groups.

As opposed to Macklin's suggestion to do away with law reform commissions altogether, Graycar and Morgan consider if a different *process* of arriving at recommendations for statutory reform, such as institutionalizing participation of the affected social groups and taking their worldview seriously, can address the problem. While the authors cite the Canadian feminists' experience of rape law reform as an example, the Indian case also offers some insights on participatory law reform. In 1980, in response to feminist protests against inadequacies in the rape law referred to earlier, the Law Ministry requested the LCI to undertake a detailed examination of the issue. In addition to receiving submissions from women's organizations from different parts of the country, the Commission held discussions with the representatives of nine organizations based in Delhi. Unprecedentedly, the outcome of these deliberations – the 84th report of the LCI[70]– acknowledged the contribution made by these individuals and organizations. But while feminists were included in the process of formulating law reform recommendations, we struggle to locate the feminist understanding of the law of sexual assault in the report. Thus, while the report

[67] Criminal Law (Amendment) Act, 1983.
[68] Agnes, *supra* note 36, at WS-21.
[69] Macklin, *supra* note 64, at 404.
[70] *Supra*, note 26.

appears to be sensitive to the vulnerability of the rape victim/survivor and acknowledges the secondary victimization that a woman is subjected to by the legal system, it continues to understand rape as a problem of male lust rather than gendered power relations. Further, while the women's organizations were included in the process in order to draw on their experience of the legal system in actual cases, the Commission rejected most of the experience-based suggestions on legalistic grounds. The two suggestions that were made by women's groups to counter judicial bias in rape trials – a clear definition of consent and mandatory minimum sentence – were both rejected by the Commission.[71]

The Indian example is however different from the Canadian one cited by Graycar and Morgan in one crucial aspect, which helps in putting the participation issue more sharply. Unlike the Canadian case where feminist participation came from a broad coalition of women reflecting diverse "knowledge, experience and needs",[72] in the Indian case, participation has always been restricted to a few prominent feminist organizations. Thus, for the 84th Report, the LCI consulted nine organizations, all of which were Delhi-based. The second time it proactively sought inputs from women, again regarding rape law reform, it involved three organizations, again, all of them from Delhi. This second occasion was the result of a *writ* petition filed before the Supreme Court of India by a feminist organization named *Sakshi*. The petitioner had urged the Court to declare that the term *sexual intercourse* used in Section 375 of the IPC (defining the offence of rape) included any non-consensual penetrative sexual act, irrespective of the gender of the parties. This was based on the concern that the existing definition of rape as unauthorized penile-vaginal penetration was inadequate for addressing the range of penetrative sexual assault that women, men and especially, children, were subjected to. The Court referred the matter to the LCI, which invited *Sakshi* and two other feminist organizations[73], and the National Commission for Women – a government body, for their inputs. Based on their suggestions, the Commission submitted the 172nd Report, where it recommended the widening of the definition of rape and making the offence gender neutral, among other things.

Gender neutrality of rape law was however not an idea that found favour with most feminist activists and organizations, who feared that the move will only exacerbate women's vulnerability to the legal process. Agnes wrote that underlying the proposal was "a presumption that, through a stroke of a pen, the offence of rape will be desexualised and the stigma attached to the offence

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71 The latter was revived by the government in the final proposal that was enacted.

72 *Supra*, note 52, at 408 (quoting Sheila McIntyre).

73 These were, Interventions for Support, Healing and Awareness (IFSHA), an NGO and the All India Democratic Women's Association (AIDWA), the women's wing of the Communist Party of India (Marxist).

will vanish"[74]. *Saheli*, a Delhi-based, autonomous feminist collective expressed concern that the Commission had made these proposals "without adequately consulting women's organisations, child rights organisations and sexual minorities to make the process entirely representative".[75] Thus, the participatory impact of law reform that authors like Graycar and Morgan, and Kapur and Cossman[76] refer to is much more than tokenistic consultation with women/women's organizations in the process of formulating law reform recommendation. As Menon notes, with the ascendance of NGOs in the Indian women's movement, who have "their own organizational, funder-driven agendas"[77], the question of who speaks for women is a fraught one.

To get back to the issue of equating law reform with statutory change, critics argue that a fallout of this tendency is that implementation of the recommendations emerges as the soul yardstick for assessing the relevance or performance of law reform commissions. Baxi points out the methodological problems associated with focusing on *implementation* as the term could refer to a range of outcomes[78], all of which are not within the control of the LCI. Arguing that the work of law reform commissions can contribute to progressive change even without producing draft legislations or recommendations for statutory change, and bypassing questions of implementation, Graycar and Morgan note that "the way issues are talked about"[79] is of value. In particular, they point towards dissenting opinions in the reports which, they argue, enrich the public discourse on an issue, and thus could be utilised by feminists and those speaking from marginal positions to articulate their arguments and visions for social change. In the Indian case however, Baxi notes the "virtual absence of dissenting opinions"[80] in the corpus of LCI reports. While the First Law Commission had the maximum number of dissenting opinions in its reports, in Baxi's counting, they had been "virtually non-existent" from 1968 onwards. Baxi connects this finding to, one, the discontinuation of the practice of appointing part-time members, who, arguably could express their autonomy and individuality with greater confidence than full-time members, and two, to the "status-oriented attitude of deference"[81] prevalent in Indian society that prevented individual members from disagreeing with the position taken by the Chairman, often a retired senior judge of the Supreme Court.

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74 Flavia Agnes, *Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*, Economic and Political Weekly, 37(9), 2002, pg. 844–847.

75 Saheli, *Newsletter,* (January-April 2012).

76 Supra note 48.

77 Menon, *supra* note 49, at 221.

78 Baxi lists four probable meanings of "implementation": timely publication and dissemination of the reports; processing of the reports by the concerned ministries and departments; introduction of Bills in the parliament based on the recommendations; realization of the effect of the amendment or new law. Supra note 14.

79 *Supra*, note 52 at 405.

80 *Supra*, note 14, at 265.

81 *Id.,* at 266.

It is important to recall in this context, the dissenting note of Anna Chandy on the offence of adultery in the 42nd report. Chandy was the first woman from Kerala to get a law degree and practice law, the first female judge in both colonial and independent India, and, also the first female member appointed to the LCI. On §497 of the IPC, that allowed a husband to bring criminal charges of adultery against a man who had sexual intercourse with his wife, after considering a range of options, the Commission had recommended retaining the clause, but making both the wife and the man who had sexual intercourse with her, liable to punishment. The Commission reasoned that while the objective behind exempting the wife from prosecution in the original formulation of the clause was in view of the weak social position of women, such protectionist attitude towards women was no longer warranted. Chandy in her note of dissent called out the hypocrisy inherent in the Commission's position, which was purportedly based on a concern for the equal treatment of women (holding women equally responsible for their actions as men), but reinforced women's unequal position in marriage. Chandy wrote:

> *"The removal of this exemption clause does not cause damage to the basic idea of the wife being the property of the husband. On the other hand, it merely restates the idea, and adds a new dimension to it by making not only the trespasser but the property also liable to punishment. This, as noted before, can hardly be considered a progressive step."*[82]

Chandy proposed removing the sexism in the original formulation of the clause, but argued in favour of retaining adultery as an offence, since she thought society had a legitimate interest in protecting the institution of family. We need not agree with Chandy's idea of using criminal law to uphold sexual discipline in marriage, but her dissent stands out for making visible that both protectionism and its obverse mean little for women, unless accompanied with an analysis of their foundational inequality in any given context. §497 has survived a constitutional challenge since then[83] and continues to remain in the IPC in its original form, indicating the tenacious grip of patriarchy. But for us, it also testifies to the radical nature of Chandy's intervention in 1970.

C. Attitude Towards Empirical Research

The third factor that according to Graycar and Morgan determines the usefulness of law reform for women is the extent to which law reform recommendations are based on empirical research. They write out how law reform commissions often tend to devise legal solutions based on dominant,

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[82] Law Commission of India, *The Indian Penal Code*, Report No. 42 (June 2, 1971), *available at* http://lawcommissionofindia.nic.in/1-50/Report42.pdf (last visited on October 5, 2017).

[83] *Sowmithri Vishnu* v. *Union of India*, 1985 Supp SCC 137 : AIR 1985 SC 1618

commonsensical understandings of social phenomena that may not reflect the extent or the exact nature of women's disadvantages. This is borne out by Baxi's account of the *working methods* of the LCI, that not only showed a *limited self-definition of its role* as a body concerned with *lawyer's law* as discussed earlier, but also a "self-imposed limitation on sources of information"[84] used to understand the nature of a problem. It emerges from Baxi's account that the practice of starting off the data collection process by circulating a questionnaire, as we saw in the case of the UCC at the beginning of this article, has been a longstanding one, though, one without any serious consideration for the questions of method. Baxi writes:

> *"There appears no systematic approach to data collection. For instance, questionnaires are used, often ignoring the well-known techniques of constructing a questionnaire; there is no pre-testing, sampling, codification and no attempt at drawing correlations among responses. The tools used to elicit opinions and information are unfortunately prescientific, crude and misleading: this is not surprising since the secretariat of the Commission and the Commissioners themselves have no training in social science methods to suggest or perform this kind of work."*[85]

Questionnaires are sometimes used by the Commission to elicit information from specific respondents, such as the police, judicial officers and bar associations, regarding practices followed or challenges faced in the administration of any particular law or the legal system in general. These days, the questionnaires are uploaded on the website of the Commission. They primarily serve as tools to survey public opinion on a given topic ("what do you think about…?"). The reports using them, however, do not tell us as to why public opinion was deemed relevant, why specific questions were deemed relevant, and whether and how the opinions expressed informed the recommendations of the LCI. Once again, we are supported in this observation by Baxi, who writes:

> *"Indeed, the 'culture' of law reform in the LCI appears to be imbued with a degree of dogmatism verging almost on arbitrariness and even authoritarianism. … Time and again, the reports not merely fail but even fail to try to give reasons for particular views or recommendations. It almost appears that the Commission does not always think that giving reasons for its views and proposals in necessary or justified; it assumes almost an oracular mission."*[86]

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[84] Baxi, *supra* note 14.
[85] *Id.,* at 260.
[86] *Id.,* at 266.

Baxi found the LCI to be "generally allergic to statistical information and aggregate data analysis."[87] He concluded, quite rightly, that the Commission was "just not concerned with the law in operation outside the courtroom."[88] That these observations hold as good today as they did in 1982 is evident from the articles in this *Special Issue*. Here, we will just use one report to illustrate the problem. There may hardly be another legal provision which has caused as much concern to the state and elicited as much alarmed reaction from its actors and agencies, as §498A of the IPC. This provision, enacted in 1983 in the wake of rising incidents of *dowry deaths*, makes any act of *cruelty* against wives by husbands or in-laws, a criminal offence. It is categorized in the IPC as a serious offence, which means that the police can arrest the alleged offender without authorization from a magistrate (i.e. cognizable), that the arrested person cannot get bail as a right (i.e. non-bailable), and that the parties can not settle the dispute between themselves (i.e. non-compoundable). Owing to these features, its opponents argue that it is extremely easy to register false or frivolous complaints under this provision and that there are no safeguards against such *misuse*.

In a 2010 judgment, *Preeti Gupta v. State of Jharkhand*, involving a case under §498A, the Supreme Court urged the LCI to examine the provision, in view of the "common knowledge that exaggerated versions of the incident are reflected in a large number of complaints"[89] and recommend how the Section may be amended. The Commission submitted the 243rd Report[90] in August 2012, in which it recommended that while the Section should be retained as a non-bailable offence, it should be made compoundable, i.e. the parties should be allowed to settle and withdraw the case. But on the charge of *misuse* itself – the dominant discourse in which the Section is couched and the very reason why the matter was referred to the LCI in the first place – the report fails to satisfy. The report deals with the misuse issue in three moves. First, it agrees that the Section is indeed misused, which it holds, is undesirable, and hence, calls for a "rational solution"[91]. In this, it fails to interrogate the idea of *misuse* itself. What do people mean when they complain of misuse of §498A? Does misuse refer to false complaints or frivolous complaints, and if it is the latter, then what is the understanding of frivolity?

Though at multiple places in the report, it shows deference to the Supreme Court's characterisation of *misuse* of §498A as "common knowledge"[92], we do not find any evidence to support such a claim. Herein the sec-

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87 *Id.*

88 *Id.*

89 *Preeti Gupta v. State of Jharkhand*, (2010) 7 SCC 667 : AIR 2010 SC 3363.

90 Law Commission of India, §*498A IPC,* Report No. 243 (August 30, 2012), *available at* http://lawcommissionofindia.nic.in/reports/report243.pdf (last visited on October 5, 2017).

91 *Id.*, at 15.

92 We are indebted to Jhuma Sen for sharing with us, her unpublished draft paper tracking the invocation of *common knowledge* in the judicial discourse on §498A.

ond move becomes significant. The report notes that though misuse happens, there is no reliable data to assess its extent. In posing the problem as one of absence of *reliable data*, the report again creates the impression that *misuse* is a self-evident phenomenon that can be measured, provided there is data. But then the report does not offer directions as to what kind of information might have filled this supposed data-gap.

Instead of lamenting the absence of reliable data, if the Commission had looked at the data that was available – the National Crime Records Bureau (NCRB) statistics – that several women's groups had used in their submissions to the LCI, it would have found that §498A cases constitute an extremely small proportion of the total number of criminal cases filed and that the number of women who are killed in their matrimonial homes owing to domestic violence is much higher than the number of cases filed under §498A, signalling that the provision is actually under-used. Further, instead of relying on popular images of unscrupulous women using the law to wreak havoc on their innocent husbands and in-laws, if the Commission had probed the idea of *misuse* with the help of detailed interviews and Focussed Group Discussions ("FGD") with actors in the legal system as well as lay people, it would have found – like many social science researchers[93] and women's groups with experiential understanding of the issue – that "misuse" is not a phenomenon that simply exists out there that can be objectively identified and countered. The Commission would have found that characterising an act as "misuse" of the law in the context of domestic violence, depends on background notions of violence, marriage, the wife's role in marriage and the law's role in marriage/marital violence, held by the speaker.

In the third and final move, the report notes that though misuse of §498A took place, which was undesirable and must be prevented, misuse itself could not be the reason for diluting or repealing the provision, because it served an important social function, namely, protecting women from violence: "mindless and senseless deprivation of life and liberty of women"[94]. We would argue that this redeeming move is hardly useful for women, since it keeps the idea of "misuse" itself, intact. Instead of facilitating understanding and dialogue by demystifying the notion, the report agrees with the misuse thesis and yet defends the provision against dilution or repeal, which, we would argue, only contributes to the public understanding of laws acknowledging the

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[93] Anjali Dave et al, *In Search of Justice and Care: How Women survivors of Violence navigate the Indian Criminal Justice System*, Journal of Gender-Based Violence, Vol. 1, No. 1 (2017); Prashant K. Trivedi and Smriti Singh, *Fallacies of a Supreme Court Judgement: Section 498A and the Dynamics of Acquittals,* Economic and Political Weekly Vol. 49, No. 52 (December 2014).

[94] *Supra* note 97, at 14.

gendered nature of violence as unfair and undeserved protection, and supports the backlash against such laws.[95]

The absence of empirical accounts of how the law is used by people as part of their larger disputes is the most palpable in the reports dealing with matrimonial law. Here we find reports making law reform proposals, in utter disregard of the fact that despite being regulated by statute, parties routinely bargain over the terms of divorce, maintenance, custody, visitation and so on. Thus, we find the 257th Report, where the Commission proposed legislating the idea of optional joint custody[96] without any examination of how custody disputes pan out, how divorcing couples bargain over custody, and how the proposed change in the legal framework by instituting a new "option" might affect the bargaining positions of the parties, particularly the wife. A comprehensive account of the *working methods* of the LCI when it comes to proposing reforms in matrimonial law is beyond the scope of this Introduction. But overall, on the question of empirical research, we can only conclude by reiterating what Baxi wrote in 1982: "the LCI reports continue to support the image that law reform is a relatively uncomplicated exercise for eminent public men, endowed with routine judicial experience."[97]

IV. The Articles in this Special Issue

The seven articles assembled in this *Special Issue* employ different feminist methods ranging from discourse analysis of the reports to assessing the practical consequences of their recommendations. If we extend Sarkar's categorization of the reports as "women specific" and family law related, to the period since Sarkar's Report, we find that between 1989 and September 2017, the Commission produced 10 reports that dealt with issues specific to women, such as rape and property rights of women, and 19 reports that addressed family law issues, where women were not the focal concern, but we assume women to be invariably impacted by those recommendations (see Annexure I). Out of the 10 reports in the first category, many are addressed to women's rights in family law, suggesting that the family continues to be the primary site of legal reform for women. On the other hand, the workplace was missing from the Commission's agenda when Sarkar wrote her report in 1988, and it has been conspicuously so in the period since then.

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[95] Two subsequent judgments of the Supreme Court that bear out the cultural potency of the idea of "misuse", are, *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273 and *Rajesh Sharma v. State of U.P.*, Criminal Appeal No. 1265 of 2017, decided on 27-7-2017 (SC).

[96] Law Commission of India, *Reforms in Guardianship and Custody Laws in India,* Report No. 257 (May, 2015), *available at http://lawcommissionofindia.nic.in/reports/Report%20No.257%20Custody%20Laws.pdf* (last visited on October 5, 2017)

[97] *Supra* note 14, at 269.

The articles presented in this *Issue* look at how the Commission has addressed at women specific issues such as rape and reproduction, to issues pertaining to family law such as divorce and matrimonial property rights, to issues where gender intersects caste in the regulation of intimate relationships. In our *Call for Papers*, we had sought feminist analyses of reports that had nothing to do with gender or women. While we did not receive any contribution on the report on the law of limitation in transnational litigation as we had wished, the first article in this issue is on the ostensibly gender-neutral subject of legal education.

Archana Parashar's article argues that the LCI's preoccupation with "lawyer's law" is connected to the dominant perception of law as positive law, which maintains its dominance through legal scholarship and legal education. Parashar's article illustrates this by looking at the 184th Report[98] on *Legal Education and Professional Training and Proposals for Amendments to the Advocates Act 1961 and the University Grants Commission Act 1956*. Parashar makes the crucial intervention that subjecting the LCI to institutional reform will not enable feminist struggles through the law reform, unless there is a transformation in how legal education is perceived and practiced. Srimati Basu's article continues the critical focus on "lawyer's law" and the de-contextualized nature of the method of proposing "reforms". Basu focuses on the 217th Report[99] on *Irretrievable Breakdown of Marriage: Another ground for Divorce*, but also takes the reader through the historical journey of the Commission's ambivalence towards divorce since its 71st Report.[100] Basu shows that the Commission frames the idea of "irretrievable breakdown" in divorce law as a matter of expanding options and increasing people's quality of life, but ignores the economic consequences of such a legal proposal for women.

The next two articles question the incipient familial ideology in much of the Commission's work. Sneha Banerjee's article analyses how reproduction is conceived by the LCI, by looking mainly at the 228th Report[101] on the '*Need for Legislation to Regulate Assisted Reproductive Technology Clinics As well As Rights and Obligations of Parties to a Surrogacy*', but also at the reports on transnational adoption and regulation of "prostitution". Banerjee shows how

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[98] Law Commission of India, *Legal Education and Professional Training and Proposals for Amendments to the Advocates Act 1961 and the University Grants Commission Act 1956,* Report no. 184 (Dec 20, 2002), available at http://lawcommissionofindia.nic.in/reports/184threport-parti.pdf (last visited on October 5, 2017).

[99] Law Commission of India, *Report on Irretrievable Breakdown of Marriage: Another Ground for Divorce,* Report no. 217 (March 30, 2009), available at http://lawcommissionofindia.nic.in/reports/report217.pdf(last visited on October 5, 2017).

[100] *Supra* note 32.

[101] Law Commission of India, on *Need for Legislation to Regulate Assisted Reproductive Technology Clinics As well As Rights and Obligations of Parties to a Surrogacy',* Report no. 228 (Aug 5, 2009), available atlawcommissionofindia.nic.in/reports/report228.pdf (last visited on October 5, 2017).

in addressing reproduction and women's reproductive labour, the LCI repeatedly privileges the hetero-normative family and renders women's agency invisible. Kirti Singh's article looks at the 242nd Report[102] entitled *'Prevention of Interference with the freedom of matrimonial alliances (in the name of Honour and Tradition): A Suggested Legal framework'*, and illustrates the unwillingness of the Commission to acknowledge the family as a site of denial of civil rights in partner selection and as a site of violence, and even to recognize the category of "honour" based crimes in the law. Singh's article shows the overlap between de-contextualised law reform and law's patriarchy, as expressed in the work of the LCI.

In the next article, Nidhin Donald offers a spatial reading of the same report on "honour crimes", in a sense pushing the boundaries of Singh's conclusions. Donald shows that "space" has a central presence in the Commission's recommendations, either marked specifically or through elision. For instance, the domestic space is understood by the Commission as unmarked by caste or violence. The Commission not only fails in providing protection in this space, but Donald argues that it also fails to account for the spatial dimensions of caste endogamy, namely, the enforced civic distancing, created by it. In this sense, the Commission's recommendations for law reform operate from a distance, failing to take account of the spatial vulnerabilities of couples in transgressive relationships.

The article by Geetanjali Gangoli and Martin Rew return us to the familiar terrain of LCI reports on rape law reform. Comparing two episodes of large scale feminist mobilization around rape, which resulted in legislative changes – first in 1980-83 mediated by the LCI and then in 2013 by the Verma Committee – the authors argue that though actions by the state drew on feminist rhetoric and arguments, the translation of feminist ideas into law is both complex and partial, and the resulting law remains in perpetual conflict with feminism. And yet, like so many others before, Gangoli and Rew argue that engaging with the law making process remains important in fighting against gender based violence, when accompanied with other forms of community and activist work.

The final article is by Albertina Almeida that brings questions of geography and history to feminist law reform. Almeida focuses on the peculiar position of Goa in the Indian Union and the Indian legal system, and how Goan women are uniquely positioned as compared to women elsewhere, owing to the Portuguese colonial roots of their legal system and society. As a result, within "national" debates, Goan women are posed as having better rights and

[102] Law Commission of India, *Prevention of Interference with the Freedom of Matrimonial Alliances (in the name of Honour and Tradition): A Suggested Legal Framework*, Report no. 242 (Aug 22, 2012), available athttp://lawcommissionofindia.nic.in/reports/report242.pdf (last visited on October 5, 2017).

protections than women elsewhere, since they are governed by relatively more egalitarian family law, which Almeida argues, works to ignore and erase the challenges faced by women within Goan patriarchy and the legal system.

V. Conclusion

Undoubtedly, the LCI has engaged with women's concerns, though not to our feminist satisfaction. Some of the common lines of critique in the articles in this *Special Issue* are: the narrow and decontextualized conception of the problems; keeping the institutions of marriage, family and caste intact while devising legal remedies; proposing legal solutions to social phenomena from a distance; and a tendency to invisiblize the differences among women, among others.

Baxi wrote in his assessment of the LCI in 1982:

> *"With the exception of women as a group, the LCI has yet to move towards articulation of legal frameworks for the depressed, exploited and vulnerable groups in Indian society. And in this sense the LCI's concern with law reform, by and large, avoids problems of social structure, though it attends rather well to those of the general legal structures for people at large in their various legal roles (basically as litigant)."*[103]

Similarly, on the LCI's ability to carry out its mandate, Sarkar wrote in 1988:

> *"[w]hile the prestige of this professional body depends on its performance, its effectiveness certainly lies outside its own choices, between keeping faith with the spirit, or ideology of the Constitution, and what it perceives as immediate political imperatives. (…) Law reform is not a task to be undertaken in haste, by amateurs who are not in a position to examine the full implications and ramification of an existing or proposed measure. The need for a review body of experts, to advise the government, parliament and the public is self-evident. But the conditions, under which the body can function effectively and meaningfully, require critical examination by all who believe in the rule of law and its role as instrumental of social transformation."*[104]

These are our feminist inheritance. Reading these observations three decades later, along with the articles in this *Issue* leads us to the following conclusion: if the sustained focus on *women* by the Law Commission of India is part

[103] *Supra* note 14, at 276.
[104] *Supra* note 5, at xxiii.

of the same legal culture that supplies the reasons for feminist dissatisfaction with *law reform* pursued by the Commission, then we need to reformulate the feminist questions we ask of the Commission. Instead of asking whether or how the Commission's work has addressed women and women's interests, we should ask how we may work towards rehabilitating the *social* in the understanding of *law reform* pursued by the Commission. We hope that a future *Special Issue* will take it up as its starting point.

Annexure I

REPORT NO.	YEAR	TITLE OF THE REPORT
WOMEN SPECIFIC REPORTS		
132	1989	Need for Amendment of the Provisions of the Chapter IX of the Code of Criminal Procedure, 1973 in order to ameliorate the hardship and mitigate the distress of Neglected Women, Children and Parents
133	1989	Removal of discrimination against Women in matters relating to Guardianship and Custody of Minor Children and Elaboration of the Welfare Principle
135	1989	Women in Custody
146	1993	Sale of Women and Children: Proposed Section 373-A, Indian Penal Code
172	2000	Review of Rape Laws
174	2000	Property Rights of Women: Proposed Reforms Under the Hindu Law
207	2008	Proposal to amend Section 15 of the Hindu Succession Act, 1956 in case a female dies intestate leaving herself acquired property with no heirs
224	2009	Amendment of Section 2 of the Divorce Act 1869 Enabling Non-domiciled Estranged Christian Wives to seek Divorce.
226	2009	The Inclusion of Acid Attacks as Specific Offences in the Indian Penal Code and a Law for Compensation for Victims of Crime.
252	2015	Right of the Hindu Wife to Maintenance: A relook at Section 18 of the Hindu Adoptions and Maintenance Act, 1956
FAMILY LAW RELATED REPORTS		
164	1998	The Indian Divorce Act, 1869 (Act IV of 1869)
204	2008	Proposal to Amend the Hindu Succession Act, 1956 as amended by Act 39 of 2005

REPORT NO.	YEAR	TITLE OF THE REPORT
205	2008	Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other allied Laws
208	2008	Proposal for the amendment of explanation to Section 6 of the Hindu Succession Act, 1956 to include oral partition and family arrangement on the definition of 'partition'
209	2008	Proposal for the omission of Section 213 from the Indian Succession Act, 1925
211	2008	Laws on Registration of Marriages and Divorce - A proposal for Consolidation and Reform
212	2008	Laws of Civil Marriage in India - A proposal to Resolve Certain Conflicts
217	2009	Irretrievable Breakdown of Marriage – Another Ground for Divorce
218	2009	Need to accede to the Hague Convention on the Civil Aspects of International Child Abduction (1980)
219	2009	Need for Family Law Legislations for Non-resident Indians
227	2009	Preventing Bigamy via Conversion to Islam - A Proposal for giving Statutory Effect to Supreme Court Rulings
228	2009	Need For Legislation to Regulate Assisted Reproductive Technology Clinics as Well as Rights and Obligations of Parties to a Surrogacy
235	2010	Conversion/reconversion to another religion - Mode of proof
242	2012	Prevention of Interference with the freedom of Matrimonial Alliances 2012 (in the name of Honour and Tradition) : A suggested legal framework
247	2014	Sections 41 to 48 of the Indian Succession Act,1925 – Proposed Reforms
257	2015	Reforms in Guardianship and Custody Laws in India
263	2016	The Protection of Children (Inter-Country Removal and Retention) Bill
265	2017	Prospects for Exempting Income arising out of Maintenance Money of 'Minor'
270	2017	Compulsory Registration of Marriages