

Book Review: Women's Legal Strategies in Canada, by Radha Jhappan (ed)

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WOMEN'S LEGAL STRATEGIES IN CANADA EDITED BY RADHA JHAPPAN (TORONTO: UNIVERSITY OF TORONTO PRESS, 2002) 407 pages.¹

BY MANEESHA DECKHA²

The twentieth anniversary of the *Canadian Charter of Rights and Freedoms*³ has presented an opportune moment to reflect on its impact in securing for Canadians the liberal ideals of equality and justice enshrined within it. *Women's Legal Strategies*, a feminist collection of articles edited by Radha Jhappan, seizes part of this moment by extensively analyzing the successes that the Women's Legal Education and Action Fund (LEAF) and other women's groups have had with *Charter* intervention and litigation in the 1980s and most of the 1990s.⁴ Its subject area in this regard is broad, canvassing feminist involvement in leading cases and, to a lesser extent, legislative reform with respect to issues such as abortion, domestic workers, pornography, child care, and violence against women.

The goal of the collection is to provide answers to three questions:

First, should women persevere with the legal project despite its manifest perils? Second, by what measures and from whose point of view have women's litigation strategies been successful or unsuccessful? Third, what can we learn from the strategies pursued to date and how might they be improved in future struggles?⁵

The collection answers the first question with a resounding and, in most cases, quick "yes." This brief attention to the first question makes sense given the lead article by Sheila McIntyre addressing the traditional skepticism of (white male) Left theorists about pursuing rights litigation to engender social justice. In "Feminist Movement in Law: Beyond Privileged and Privileging Theory," McIntyre ably, if somewhat severely, responds to each prong of the Left critique with examples from feminist litigation to argue for continued feminist engagement with law and rights litigation in

¹ [*Women's Legal Strategies*].

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³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), (1982), c. 11 [*Charter*].

⁴ Due to this focus the title is somewhat broad. Jhappan is aware that *Charter* litigation does not exhaust the legal strategies used by women in Canada and addresses the reasons for this focus at the outset. Radha Jhappan, "Introduction: Feminist Adventures in Law" in Jhappan, *supra* note 1, 3 at 4 [Jhappan, "Introduction"].

⁵ *Ibid.* at 3.

particular.⁶ The rest of the authors focus their attention explicitly or implicitly on the more difficult second and third questions through scrutiny of previous, mostly *Charter*, litigation.⁷ Understandably, these answers are more tentative and context-specific.

The most definitive and consistent responses the collection gives to the second question of measuring the success of litigation and other legal strategies and the third question of how to improve upon this success are to advocate for the continued democratization, or diversification, of the women's movement in Canada. A constant theme is to document and critique the gender essentialism⁸ within the first years of feminist engagement with the *Charter* and to support the increasing inclusiveness of feminist legal advocacy perspectives consulted and presented. The volume clearly imparts twin messages: women's legal strategies are successful when they have been inclusive even if no legal case has been won and, even if a particular litigation results in a legal loss, it may still have been a success for feminists if it otherwise generated political momentum to disrupt conventional gendered sensibilities.

The difficulty in providing a more expansive response to the second and third questions is alluded to by several authors, but best articulated by Sheilah Martin in "Abortion Litigation."⁹ In her article, Martin usefully notes the dilemmas that the indeterminacy of cause and effect analyses pose to predicting or even analyzing in hindsight the impact of feminist legal advocacy. The unknowability of how things would have been *but for* the litigation, the difficulty in isolating legal change from other social forces to determine its exact impact on public opinion, and the complexity in

⁶ Sheila McIntyre, "Feminist Movement in Law: Beyond Privileged and Privileging Theory" in Jhappan, *supra* note 1, 42.

⁷ *Ibid.*

⁸ Gender essentialism refers to a set of theoretical practices that ascribe a unity to the signifier "women" such that the experiences of all women, despite the differentiating factors of race, class, sexuality, ethnicity, religion, and ability are reduced to issues of gender. It is a myopic view that privileges the experiences of those women who are only adversely affected by gendered power relations and equates them with those of women marginalized by several axes of power. "Intersectionality" is the term used in feminist legal circles, drawing from the work of Kimberle Crenshaw, to signal a commitment to analyses that recognize differences among women, affirm the multiplicity of women's social locations, and accept that one's experience of gender will change according to one's race or class, for example, and vice versa. The "intersectional" critique of gender essentialism is now well established in feminist literature. See Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 139 U. Chicago Legal F 41; Kimberle Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color" (1991) 43 Stan. L. Rev. 1214. See also Elizabeth V. Spelman, *Inessential Woman: Problems Of Exclusion In Feminist Thought* (Boston: Beacon Press, 1988).

⁹ Sheilah Martin, "Abortion Litigation" in Jhappan, *supra* note 1, 335.

precisely defining what qualifies as success in litigation are all factors that negate simplistic or universal theories of feminist litigation.¹⁰ The resulting speculative nature of assessing what will be good litigation to pursue for women explains the lack of sustained discussion in the collection about how to pragmatically and strategically pick and choose from among various litigation options.¹¹

That the collection spends more time examining past litigation than charting out new legal projects for feminists to adopt must also be understood in its proper economic context, a point several authors highlight. The ability to select whether to conduct or intervene in litigation is a luxury feminist organizations have rarely enjoyed. Given the scarce resources of many citizen groups in general and the prohibition against active and extensive law reform activities that applies to groups seeking charitable status under income tax laws,¹² much feminist legal advocacy has been reactive rather than proactive. Accordingly, many of the contributions analyze the development of a particular piece of litigation, taking care to note the essentialist or anti-essentialist dimensions of the strategy, without considering whether it was the right strategy to take at that time or extrapolating from these cases to consider additional pragmatic criteria for future initiatives. As the introduction deliberately sets the question of devising better strategies for the future as one of the “guiding motifs of enquiry,”¹³ the limited specific and pragmatic discussion on this issue may also prove to be disappointing to some readers. This disappointment will not be acute, however, as several of the essays do take up this question and offer more global guidelines describing how to improve legal strategies.

In this regard, Jhappan presents a compelling argument for replacing equality discourse, which has dominated feminist advocacy with the attendant focus on section 15 of the *Charter*, with the discourse of justice. In “The Equality Pit or the Rehabilitation of Justice?”¹⁴ Jhappan describes equality as a “subset of [the] much larger normative principle” of justice.¹⁵ She argues that the ideas and aspirations associated with the signifier “justice” reflect what lies at the core of feminist desires. It is

¹⁰ *Ibid.* at 340.

¹¹ *Ibid.*

¹² Susan D. Phillips, “Legal as Political Strategies in the Canadian Women’s Movement: Who’s Speaking? Who’s Listening” in Jhappan, *supra* note 1, 379 at 382.

¹³ *Supra* note 4 at 3.

¹⁴ Radha Jhappan, “The Equality Pit or the Rehabilitation of Justice?” in Jhappan, *supra* note 1, 175.

¹⁵ *Ibid.* at 194.

unnecessary, then, to pursue claims through the language of equality, especially when section 15 jurisprudence mandates tortured and problematic comparisons between one group and another.¹⁶ Jhappan's article closely engages with the second and third inquiries animating the volume of identifying successful strategies for feminism and improving upon them. She discusses several *Charter* cases and reframes their central issues in the language of justice through a creative use of the "principles of fundamental justice" discourse emanating from section 7 *Charter* jurisprudence. Jhappan's proposal to imbue the "principles of fundamental justice" with a grander, more politicized meaning than its current largely procedural connotations suggests promising new theoretical directions for rethinking current conceptual frameworks organizing feminist advocacy.

Lise Gotell's "Towards a Democratic Practice of Feminist Litigation?: LEAF's Changing Approach to *Charter* Equality" offers a thoughtful review of the feminist litigation strategies LEAF has used since its inception in 1985 to argue, in a post-structural vein, for feminist advocacy that emphasizes multiple interpretations.¹⁷ By a close examination of the factums LEAF has drafted in its interventions, Gotell charts a "series of critical changes"¹⁸ in LEAF's litigation strategies. She shows how LEAF has moved away from gender essentialism, but still retains faith in "foundationalism" or the Enlightenment-derived belief that experience leads to uncontested truth. Continuing the trend of critiques of crude versions of standpoint theory,¹⁹ Gotell argues against a feminist litigation strategy that asserts that its position is right or true because it is based on women's experience. As Gotell notes, the effectiveness of this position is that it collapses the different experiences women have as well as competing versions of "truth" or the "correct" course of action. Gotell illustrates this

¹⁶ *Ibid.*

¹⁷ Lise Gotell, "Towards a Democratic Practice of Feminist Litigation?: LEAF's Changing Approach to *Charter* Equality" in Jhappan, *supra* note 1, 135.

¹⁸ *Ibid.* at 164.

¹⁹ In general, standpoint theory asserts that only persons inhabiting certain (oppressed) social locations are legitimate producers of knowledge about their social locations because they are the only ones with lived experience of these social locations and so in a position to reveal the particularity of purportedly universal claims. It is a theory that marries experience with truth such that (privileged) persons who do not share the experience have no authority with which to claim to know or generate knowledge about that particular experience. See Donna Haraway, *Modest_Witness@Second_Millennium---FemaleMan©Meets_Oncomouse™: feminism and technoscience* (London: Routledge, 1997) 302, n. 32, discussing Nancy Hartsock's seminal work in this area. The debate over standpoint theory has been forcefully waged in legal circles in early Critical Race Theory where scholars debated the special insights or "voice" a scholar of colour may have to better understand racism vis-à-vis his or her white colleagues. See generally Richard Delgado, *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 1995).

tension well with the example of pornography, and the radical feminist position LEAF unapologetically took in *R. v. Butler*²⁰ despite considerable dissension in feminist communities. Instead of perpetuating the Enlightenment myth of justice being founded on truth, Gotell encourages feminists to abandon the liberal project of establishing objective, positivistic, and fixed foundations such as tests, categories, and boxes through which to analyze inequality and discrimination. She favours supplanting this traditional mode of legal analysis with a type appearing in LEAF's recent factum in *Vriend v. Alberta*²¹ that "attempt[s] to reflect complexity, contingency, and contending feminist positions."²²

The collection also contains contributions that consider future strategies after providing excellent surveys of feminist legal engagement with the *Charter* and otherwise in discrete subject areas. "Negotiating the Citizenship Divide: Foreign Domestic Worker Policy and Legal Jurisprudence"²³ by Daiva Stasiulis and Abigail B. Bakan introduces readers to the overwhelmingly feminized, racialized, and classed nature of live-in domestic work under the current configurations of the capitalist global economy. After thoroughly canvassing the exploitative aspects of the current federal regime for domestic workers, the Live-in Caregiver Program (LIP), including comparing the relative strengths of the LIP with its predecessor and international counterparts, the authors review the few litigated cases concerning the employment and immigration rights of domestic workers. They also provide a contextualized discussion of possible next steps in litigation in this area. Namely, rather than rely on privatized victories that benefit only a few individuals, the authors challenge the racist and sexist nature of the entire LIP under the *Charter* and advocate for better immigration legislation as a whole.

In "Legal as Political Strategies in the Canadian Women's Movement: Who's Speaking? Who's Listening?" Susan D. Phillips considers whether litigation is a strategy worthy of feminist pursuit by examining the impact of feminist legal advocacy in the 1990s in the areas of violence against women and national child care.²⁴ Phillips directly engages with the collection's second organizing question by asking whether "litigation in the cases discussed in this chapter [has] been successful and

²⁰ [1992] 1 S.C.R. 452 [*Butler*].

²¹ [1998] 1 S.C.R. 493.

²² Gotell, *supra* note 17 at 165.

²³ Davia Stasiulis & Abigail B. Bakan, "Negotiating the Citizenship Divide: Foreign Domestic Worker Policy and Legal Jurisprudence" in Jhappan, *supra* note 1, 237.

²⁴ *Supra* note 12.

by what measures?”²⁵ She then offers three general criteria to evaluate the success of litigation: “Did litigation help frame or reframe the issue in ways that can be used politically by the movement? Did the case facilitate political mobilization within the movement and among allies? Did the judicial decision lead to changes in the law, policy, or process?”²⁶ Phillips’ attempt to initiate theory in this area underscores the fact that although it is difficult to predict the feminist success of any piece of litigation, this does not mean that litigation should be pursued without careful analysis. More of these directives to challenge and assess future feminist litigation would have been a valuable line of analysis for the collection to develop.

Still, those articles that restrict their focus to the collection’s second question of assessing past litigation are nevertheless engaging. Sheilah Martin’s article on abortion litigation, especially the *Morgentaler*²⁷ decision, is the type of close analysis of a particular topic that will benefit readers conversant with feminist debates who are seeking more detailed analyses of particular areas. After discussing the speculative nature of inquiries into this area,²⁸ Martin assesses different types of abortion-related litigation, giving a firm sense of how issues have developed, the state of the current law, as well as the feminist strengths and weaknesses at each turn.

Similarly informative is Diana Majury’s “Women’s (In)Equality Before and After the *Charter*,” a tight, if somewhat dated, analysis of *Charter* equality jurisprudence under section 15.²⁹ The chapter gives section 15 non-experts a concise and engaging history of the Supreme Court’s shifting understandings of equality up to 2000. Majury is refreshingly frank when she tells us that she refuses to provide a review of the jurisprudence suggesting general themes and trends because the inchoate nature of the cases precludes a coherent analysis. She highlights some of the intricate issues regarding the meaning of equality that have arisen (for example, the responsiveness to intersectionality and the naturalization of disability and sex issues), but she “[does] not offer a bigger picture because at the moment [she] cannot find one.”³⁰ Instead of feeling disoriented, however, the reader feels informed.

One of the collection’s most attractive features is the rigour with

²⁵ *Ibid.* at 399.

²⁶ *Ibid.*

²⁷ *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

²⁸ See the discussion accompanying footnote 8.

²⁹ Diana Majury, “Women’s (In)Equality Before and After the *Charter*” in Jhappan, *supra* note 1, 101. Majury tells us that the chapter was written primarily in 1995 and revised in 2000.

³⁰ *Ibid.* at 118.

which many authors apply an intersectional approach and otherwise practise the anti-essentialism they discuss in their articles.³¹ Consider Joanne St. Lewis' insights into the racialized dimensions of cases in which LEAF has intervened. These cases are discussed earlier in the collection, but in "Beyond the Confinement of Gender: Locating the Space of Legal Existence for Racialized Women,"³² St. Lewis adds valuably to the earlier discussions by illustrating the complexity of the race issues that emerge in feminist analyses of pornography considered in *Butler* and of sex equality rights in prison considered in *Weatherall v. Canada (A.G.)*.³³ Her article is directed at "the question of why feminist legal theorists and activists must apply the expertise and perspectives of racialized women in the arguments they make before the courts"³⁴ and argues that "racialized women provide an opportunity for a revisioning of feminist legal strategies."³⁵ As such, it covers familiar terrain in feminist theory, including legal theory, and would be most engaging to readers relatively new to critical race feminism, especially within Canada. In this respect, St. Lewis offers a rich overview of systemic racism in Canadian law and its interaction with conventional gender issues.

Despite one's familiarity with feminism, however, all readers would benefit from a reduction of the overlap in content between the articles alluded to above. Even readers new to feminist debates regarding essentialism and LEAF's earlier complicity in gender essentialism might find the repeated explanations of this problem and LEAF's exhibition of it unnecessary. The cogency of Jhappan's introduction and McIntyre's article would increase if the overlap in their articulations of feminist responses to the Left's traditional position that any engagement with the law legitimates legal liberalism were reduced. Similarly, a large part of Phillips' discussion of the Canadian Panel on Violence Against Women, a government initiative established in 1991 following the aftermath of the Montreal Massacre, parallels McIntyre's earlier discussion. Further, Stasiulis and Bakan's piece might have read better had it appeared after St. Lewis' article, which assumes the grander theoretical scope of revealing systemic

³¹ It is a credit to the editor that omissions from the text, which would further diversify the range of women's experiences discussed, are candidly acknowledged and explained at the outset. See Jhappan, "Introduction" *supra* note 4 at 23-28.

³² Joanne St. Lewis, "Beyond the Confinement of Gender: Locating the Space of Legal Existence for Racialized Women" in Jhappan, *supra* note 1, 295.

³³ [1993] 2 S.C.R. 872.

³⁴ *Supra* note 32 at 296.

³⁵ *Ibid.* at 298.

racism and the importance of racialized perspectives on law for feminist strategy. The latter would work well before the heavily detailed piece by Stasiulis and Bakan, which takes up one specific area of systemic racism—the LIP.

Overall, the collection covers its ambitious scope relatively well. Like most feminist texts, however, just what counts as feminist advocacy is not explicitly discussed in the collection. It would, however, appear to be a preliminary question to be addressed before deciding whether a particular advocacy project is successful. This would entail setting out what feminist litigation means. Most articles explicitly argue that at the very least feminist means an intersectional approach. But none of the articles delve into detail about whether an organization like LEAF should support litigation that would ameliorate the positions of some women at the expense of others.

The *Symes*³⁶ case, in which Beth Symes, a lawyer, claimed that the *Income Tax Act*³⁷ infringed her *Charter* right to equality because she could not deduct as a business expense the child care expense of hiring a nanny, presents this dilemma clearly. Although two articles criticize the classist and racialized dimensions of this case, neither indicate whether they believe that the case was a feminist one given that had the Court agreed with Symes, privileged women like her would have benefited at the expense of less privileged women such as her nanny whom, as one contributor to the collection states, Symes sought to commodify as a “tax write-off.”³⁸ Does a commitment to intersectionality require feminists to support only those cases that benefit some or all women *without* harming *any* women? Or may it tolerate more of a utilitarian calculus? Is the first standard of “harming no women” utopian? If so, and we are thus willing to tolerate benefitting some women at the expense of other women (or even non-elite men), by what criteria are we to assess whether a case or goal is worthy of the label “feminist”? Does everything count as feminist as long as multiple and competing viewpoints are advanced to the court? How is LEAF to proceed in cases of sustained and deep feminist conflict as in *Butler* or elsewhere? These are no doubt difficult questions and the collection can hardly be faulted for neglecting them when feminist theorizing in general has not taken them up. Rather, I include them here as suggestions for future research in this area.

In short, *Women’s Legal Strategies* is engaging and, despite its datedness in parts, instructive. Given its ambitious scope, readers will find

³⁶ *Symes v. Canada* (1993), 1993 4 S.C.R. 695.

³⁷ R.S.C. 1985, (5th Supp.), c. 1.

³⁸ *Supra* note 32 at 310.

different aspects of the text useful depending upon their expertise with feminist theories, *Charter* jurisprudence, and legal discourse in general. Yet, the collection's readable style, varied topical content, and discussion of many leading cases involving equality issues offer opportunities for almost all individuals to expand their knowledge. It is an excellent choice for anyone who desires to learn more about how Canadian women have litigated and lobbied these last twenty years and where we should go from here.
