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ADVENTURES OF CROSSING THE BOUNDARIES OF LEGAL STUDIES: The Experiences from Writing an Inter-Disciplinary PhD Thesis

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This paper emerges from the experiences of writing of my PhD thesisⁱ from an inter-disciplinary back groundⁱⁱ where the frontiers of multiple disciplines vanishes to capture certain hitherto unattended social processes. How a strong discipline like legal studies invokes methodological challenges while one attempts to cross beyond disciplinary boundaries academically. This paper brings the methodological adventures and challenges of working with inter- disciplinary background. However, here, I limit the paper not going to the theoretical debates around inter- disciplinarity, cross-disciplinarity and multi- disciplinarity. My attempt here is to narrate the experience of an exciting academic expedition from merging frontiers of disciplines to understand the question of public health, women's rights and the question of body through the institutional interplays of judiciary and biomedicine- who got basic training in legal studies.

The exercise of power is an important theme in social science research, including health research, in a society where power is unequally distributed. This social and political situation of the distribution and exercise of power can be understood through different theoretical and philosophical perspectives and from different disciplinary viewpoints. However this theme hardly becomes research question in traditional and conventional ways of legal studies. An inter-disciplinary approach will facilitate novel ways of enquiry to address diversified power relationships. In my PhD thesis I attempted to conceptualise the composite issue of control over the body, within the frame work of exercise of power; by the institutions of law and biomedicine. This exploration has been done through caselaw analysis in my PhD workⁱⁱⁱ. In recent years, the body has become

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a subject matter in theoretical and empirical enquiries in social science research and is assuming the nature of a sub-discipline; where an analysis limited to strict disciplinary boundaries of any of the social science or humanities is almost impossible.

Body as a Research Question and Merging Frontiers of Disciplines

My PhD dissertation identifies three different categories of bodies based on the “character” of the body and the nature and ways in which the institutions of law and medicine dealt with it^{iv}. These categories are not biomedically-created, self-evident categories as mentioned in Hester’s work (2006).² Her work describes how biomedically bodies are created by pathologising women’s bodies based on their reproductive capacities or finding homosexuality as a self-evident category to be addressed by biomedicine. In this process of creation of categories of bodies based on their “character” attempted to distance body as a medical object. But the categories of bodies under this study are at the same time creation of different social process not simply a biomedical category demands pathological interventions. But the category of bodies here are the products of intersection of institutional interplays of law and biomedicine. This complex understanding demands asking research questions beyond the scope of disciplinary boundaries.

My PhD thesis broadly made these queries: How does the body become a subject matter of social sciences? What is the significance of the body when it is viewed through the merging lenses of two disciplines like law and medicine? How is power exercised within the institutional interplays of biomedicine and judiciary in contemporary India? These questions need to be answered theoretically and understood politically. In public health discourses body is considered as a site of biomedical interventions. In this process of understanding; what I gathered is legal institutions add legitimacy to the actions of power exercise by biomedicine and thereby reinforcing the authority of both biomedicine and law. As Cavallaro (2001:19) states

“At all times, the body is disciplined through various channels, such as legal and educational systems and controlled systemically by disciplines such as medicine”³

² Hester, Rebecca, J, *Body as a Border Field Statement* #2. as available on <http://ic.ucsc.edu/~rlipsch/QEs/Hester.bodyasborder.QE1.pdf>, (uploaded on 2006), [accessed on 11th November 2010].

³ Cavallaro, D, *The Body for Beginners*, Chennai: Orient Longman Limited, 2001.

The emergence of body as a subject of research in social theories is a concern for a wide range of sociological specialisms, like the sociology of health and illness. The body has become a theoretical and methodological ‘problem’ in social sciences. Moitra (2009) in her unpublished work traces the philosophical trajectories of body and epistemic concerns.⁴ She makes a significant comment on how philosophers and theorists considered body as a subject matter of their studies in the early period, and how body changed from being a recipient of theory to a site or subject matter of theorization. Moitra (2009: 8) claims

*“Mainstream theorists felt that since the body has a specific location, and a specific history, it cannot play a constitutive role in theory-building – theory being universal in its import. For the mainstream philosopher body becomes relevant only as a recipient of theory, in the sense that theories are applied to the physical world—the body. Theories introduce a kind of standardization”.*⁵

Social transformations are reflected in, and contribute to the development of the notion of body, control over body, and the discourse on sexuality and body politics. Fraser and Greco (2005), in their introduction to *The Body Reader*, situate these transformations with the shift in the demographic structure of western societies during late modernity.⁶ The authors relate it with the epidemiological shift and the corresponding changes in therapeutic relations. Changes in medical biotechnologies like genetic diagnosis, organ transplantation, and new reproductive technologies raise important practical questions for legality. These questions cannot be divorced from philosophical ones like nature and limits of human body and its relationship with personhood and identity. In the context of modernity (in pre- modern societies as well) as Cavallaro (2001) argues cultural norms regularly tried to delimit bodies through rituals and through a variety of laws to create clear cut boundaries around the body.⁷ Here one could feel the careful freedom of inter disciplinary frame work to capture not only the rising legal questions related to newly emerging social contexts but the dynamics of such contexts and the process through those contexts are produced also.

⁴ Moitr, S, ‘Body and the Epistemic Concerns: Tracing the Trajectory’. Paper presented at *Theorising Body: Problems and Perspectives*, International Conference Organised by Department of Philosophy, University of Calicut, November 24-26th, [Un published Work] 2009.

⁵ *Ibid.*

⁶ Fraser M. and Greco M, *The Body: A Reader*, Routledge, New York, 2005.

⁷ *Supra* n.3.

The state employs different institutional mechanisms to exercise power over the body and through the exercise of power, creates different categories of bodies through different social processes. My work views the concept of control over the body from the point of convergence of the two disciplines, namely, law and biomedicine. The institutions of biomedicine and law have a colonial origin and are products of modernity in the context of India. In the post-colonial context, it is interesting to look at the process of the control over the body and it is fundamental in the discussion of the interplay of the institutions of biomedicine and law. Both these institutions also play a crucial role in the day to day lives of people. The very understanding of health and illness is addressed through medical procedures/ intervention of medicine in the dominant discourse by sidelining the questions of social determinants of health the questions related to epidemiology. This leads to a social context in which the limited understanding of legalised rights of people who seek medical help as well as medical professionals who deliver these services are recognized and codified. As Burney (2000)⁸ suggests the relationship between the institutions of law and biomedicine needs to be evaluated in their specific contexts to analyse the process of ‘medicalisation’ of the body and ‘legalisation’ of medical procedures to see how they work hand in hand in the contemporary milieu.^v Such an analysis suggests stepping out of the traditional boundaries of legal studies. As Zola (1978) observes

“...medicine is becoming a major institution of social control, nudging aside, if not incorporating the more traditional institutions of religion and law. It is becoming the new repository of truth, the place where absolute and often final judgments are made by supposedly morally neutral and objective experts. And these judgments are made not in the name of virtue and legitimacy, but in the name of health. Moreover, this is not occurring through the political power physicians can hold or can influence, but is largely an insidious and often undramatic phenomenon accomplished by “medicalizing” much of daily living, by making medicine and the labels “healthy” and “ill” relevant to an ever-increasing part of human existence.”

Hester (2006) suggests that biomedicine is one of the key archetypes through which modern bodies have been represented and understood.⁹ Twigg, (2006) furthers the argument saying that the experience of entering in to a health care system as a patient is

⁸ Burney, Ian A., *Bodies of Evidence: Medicine and the Politics of the English Inquest – 1830-1926* Baltimore and London, The John Hopkins University Press, 2000.

⁹ *Supra* n.2.

one in which the body becomes alienated from the self.¹⁰ That is, it becomes an object of observation and intervention by others, including researchers in different disciplines of the social sciences and the natural sciences. Even before entering into a health care system, body can be subject matter of study or object of scientific or social science enquiries. In biomedicine the significance of body is not confined to that of the patient but extends to the bodies of health care practitioners also. The institution of a hospital is key site of bio-medical care. Neither the biomedical procedures nor the judicial processes do attempt to consider or understand the experience of patient about her body. Here one can draw similarities in the processes in judicial paradigms as well.

An enquiry of the deployment of power on the body cannot be separated from the politics of gender. However all female bodies have been not exposed to power in the same way. In the western context the biomedical and judicial intervention as a way of expression of power has been experienced differently by women of the lower classes, women of colour, women of alternative sexualities, women in sex work and bourgeois white women. My work also recognises the heterogeneity of the category of women and women's bodies. Gendered Bodies are produced while two powerful institutions such as law and medicine act together. The process of construction of gendered bodies tracks how the process of 'medicalisation' of bodies and the 'legalisation' of medical procedures work hand in hand. The medico-juridical categorization of bodies according to social identities and the social process in context of the creation of gendered bodies is analysed. The multifaceted interrelations of the institutions of law and medicine are examined to understand the body politics of the construction of gendered bodies. These categories are not rigid and inflexible. Hence the study takes advantage of the dynamics provided by the inter-disciplinary frameworks.

Women's bodies have been considered as central to the political health of state. As Hester notes, they are seen as the means of reproducing and hence guaranteeing the social and economic future of the society. The contribution of medicalisation can be seen as representing women as care takers of their own health, health of families and that of the societies as well. However these kinds of duties and responsibilities assigned to women as part of their gender roles never correlate with any binding rights provided by the either welfarist or protectionist state. As Hester notes all exercises of power are

¹⁰ Twigg, J, *The Body in Health and Social Care*, New York: Palgrave Macmillan, 2006.

directly connected to women's bodies. Her study also explores the ways in which female subjects resist these deployments of power.

The [female] body has thus far remained colonized through the discursive practices of natural sciences, particularly the discourses of biology and medicine. It has generally remained mired in presumptions regarding its naturalness, its fundamentally biological and precultural status, its immunity to cultural, social, and historical factors, its brute status as given unchangeable, inert and passive, manipulated under scientifically regulated conditions (Grosz (1994) as cited in Hester 2006 p.22).

Our forensic textbooks also bring the same discursive practices in the legal parlance with the help of biomedical knowledge system. The modern paradigm, biomedicine as well as the judicial interventions, and the combination of both, juridico-medical interventions, in the case laws in my study have created the relationship between castes, religion, and gender. My work acknowledges the important and inherent class and caste character in juridico-medical interventions. Similarly, in Hester's *Field Statement#2* identifies the creation of certain health norms based on a "universal" subject of white, male, hetero sexual as opposite to racialised and gendered bodies in the context of the United States. To map out the features in the contemporary context in India, inter-disciplinary way of approach helped to capture the complex web of social realities.

The Foucauldian understanding of body is that it is an entity saturated with historically specific meanings. The analysis of bio- power of body do not adequately explore social factors, like class, race, caste, or gender inscribing on the body disciplinary power.^{vi} Twigg (2006) examines the impact of social class, race, and sexuality on the body and she suggests that social class impacts directly and profoundly on bodies (in terms of direct impact on mortality and morbidity rates), and inscribes it in symbolic and expressive ways.¹¹ Also, access to health facilities and well-being and health outcomes have a direct relationship social class. Thus the association between class and body is complex and is a combination of the material and the symbolic in which bodies are formed as well as expressed through social class Twigg, (2006).¹² In the case of race, the body is the central site for the process of racialisation and bodily difference is inscribed with social meaning. It will be even more complex in the caste system which in itself it is complex and diversified. But marking bodies in a social hierarchy with

¹¹ *Supra n.10.*

¹² *Ibid.*

preferences of taste and in terms of acquiring cultural capital, caste shows same tendencies as social class. In terms of health outcomes too we see the same hierarchical expression of social class.

Asking the Women's Question

The repeated, regular, asking of a question marks a method. Across the disciplines feminists ask a set of questions and which constitutes *women's question*. To Bartlett (1991: 371) women's question in law is that... which is designated to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective...In law asking *women's question* means examining how the law fails to take into account the experiences and values that seem more typical of women than men, for whatever the reasons, or how the existing legal standards and concepts might disadvantage women.¹³

Present day feminists have expanded the women's question into the queer question to address the issue of how law fails to incorporate the experiences of people of different sexual orientations. The analysis of selected the case laws in my thesis ask the women's question in this broader sense and tries to address the issue of the non-incorporation of certain experiences within the judicial system when biomedical system plays a crucial role in defining categories and experiences. Bartlett (1991) suggests three feminist methods while "doing law" by feminist analysis of case laws.¹⁴ One is to ask the 'women's question' to expose the substance of law may silently and without justification submerge the perspectives of women and other excluded groups; second method is 'feminist practical reasoning' that expands the traditional notions of legal relevance to make legal decision making more sensitive to those features of a case that are not already reflected in legal doctrine; and the third method is 'conscious raising' which is a means of testing the validity of accepted legal principles through the lens of the personal experiences of those who are directly affected by these principles.¹⁵ In my study mainly deployed the method of asking the 'women's question' along with 'feminist practical reasoning' and 'conscious raising' to some extent. By using the method of asking 'women's question' my work tried to reveal the ways in which the

¹³ Bartlett Katharine, T. and Kennedy, R., *Feminist Legal Theory: Readings in Law and Gender*, Boulder: Westview Press, 1991.

¹⁴ *Ibid.*

¹⁵ *Ibid* at p.371.

institutional arrangements of two powerful institutions of law and biomedicine contribute to the subordination of women in the contemporary context in India. My PhD thesis is an endeavour to expose how the hidden upshots of joint interventions of judicial and medical institutions do not explicitly discriminate but how the social structures embody norms and practices that renders subordination of women in different levels. Using ‘women’s question’ as a method and politics has helped my PhD work to use critique as an integral method to legal analysis to check the precedential value of a case, stating of the facts of application of law to the facts in the selected case laws and the assumption of gender neutrality in judicial process. My understanding acknowledges the category of women include innumerable other categories and hence falls in the category of work which identifies the heterogeneous character of women and the intersectionalities involved.

Feminists’ substantive analyses of legal decision making have revealed to them that so called neutral means of deciding cases tend to mask, not eliminate, political and social considerations from legal decision making. Feminists have found that neutral rules and procedures tend to drive underground the ideologies of the decision maker, and that these ideologies do not serve women’s interests well. Disadvantaged by hidden biases, feminists see the value of modes of legal reasoning that expose and open up debate concerning the underlying political and moral considerations (Bartlett 1991: 381).

Menon (1999) argues that legal discourse constitute the ‘body’ as an object that can be defined through a series of binary oppositions like male/female, healthy/diseased, heterosexual/homosexual.¹⁶ Rape and sexual violence cast women as ‘bodies’ for feminist and legal discourses. The individual inheritance of rights instead of group or communitarian inheritance clearly creates gendered bodies in the field of law. Male bodies are treated as perfect, clearly bounded and solid; whereas female bodies are considered as penetratable, subject to cyclical changes and has having droopily drawn boundaries due to their reproductive functions.¹⁷

The question of body started being addressed by the feminist movements^{vii} starting from the beginning of the 1970s. Many of the campaigns centered on body like rights of

¹⁶ Menon N., *Introduction*, In Menon, N. (Ed.), *Gender and Politics in India*. New Delhi, Oxford University Press, 1999.

¹⁷ *Ibid.*

women to control their bodies-specifically contraception and abortion, or control over childbirth, safe public places, measures against domestic violence and rape Kapur & Cossman (1996).¹⁸ Historically the emergence of the idea of female sexuality is discussed in India during the British colonial period as traced by Khanna and Price (1994) as a 'natural' fall of sexuality represented by adult, preferably married, able bodied, hetero sexual couple.¹⁹ Gangoli (2007:77-118) as well as Kumar (1993: 96-142) claims that rigid local norms of female sexuality limit the sexual expression of women within marriage.²⁰

Hindu widow remarriage, child marriage and charitable works of Christian missionaries are the practical sites of evolution of female sexuality in colonial India and Khanna & Price, (1994) cited this as theory of passive female sexuality.²¹ Through the categorisation and control of sex work on the one hand and through the regulation of male sexuality in the British Army base in India by the implementation of *Contagious Disease Act* of 1864 on the other, two categories of women were constituted; women as active agents and as victims in sexuality related problems (*Ibid*). The *Contagious Disease Act, 1864* identified sex workers as sexual dangers, responsible for massive increase of sexually transmitted diseases in the army and there were specific provisions for medical tests for 'army prostitutes' and registration for them. Here, the instrument of law interfered in female sexuality outside the ambit of the family.

Another active site of discussion on female sexuality is myths around motherhood. In post- colonial India, the state started regulating female sexuality through birth control measures. Chandiramani (2007: 227-231) regards sexuality as a source of male power and female oppression.²² Sexuality is not a private issue but it is issue of health, of

¹⁸ Kapur, R. and Cossman, B., *Subversive Sites: Feminist Engagements with Law in India*, New Delhi, Sage, 1996.

¹⁹ Khanna, R. and Janet, P., 'Female Sexuality, Regulation and Resistance', *Gender & Development*, 2(2), 1994 at pp. 29-34.

²⁰ Kumar R, *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India 1800-1990* (pp96-142), Kali for Women, New Delhi. 1993; Gangoli G, *Indian Feminisms: Law, Patriarchies and Violence in India* (pp-79-118), Ashgate Publishing, Ltd. England, 2007.

²¹ *Supra n. 19*.

²² Chandiramani, R., 'Pleasure Me Safely, Can You?', in Menon, N. (Ed.), *Sexualities: Issues in Contemporary India Feminism* (pp.227-231), New Delhi: Women Unlimited, 2007.

gender, or power, of economics and of violence. Sexuality presents a set of relations between body and social meaning. The relationship between body and the dimensions of difference is complex and variable. The concise and limited historical analysis of “body politics” in India reveals the scope of understanding of production of gendered bodies through jurido-medical process is multifaceted one and requires a non-conventional, non- traditional and not disciplinarily confined analysis.

Analysis of Case laws as a Method

In legal research, analyses of case laws are important not only to understand the judicial trends but also to examine case laws as sources of law. In India after the British colonization understanding of law changed tremendously as Menon (1999: 273) observes ‘legality replaced authority’.²³ Under the legal system before British rule a judgment had no other object than solving a legal dispute. After that the practice of “precedent” came into force as a source of law. She observes under British system “the judge fixed interpretation once and for all, and further development of the law could take place only through cases”.

Present day legal system also follows ‘precedent’ as a source of law. The judicial decisions of the Supreme Court are bound by all other subordinate courts of the country. The decisions of the High Courts are considered as precedent for the subordinate courts of the same state and can be used as precedent by other High Courts. The binding nature of precedents is discussed in the Article 141^{viii} of the Constitution of India and is widely discussed in many case laws. Litigation related to healthcare is very rare in India. Majorly cases related to medical negligence are dealt by the *Indian Penal Code, 1860* and the *Consumer Protection Act, 1986*. In very limited cases the constitutional courts^{ix} have discussed whether right to life is a fundamental right or not; that is the constitutionality of right to health as a fundamental right. There are very rare instances of the constitutional courts dealing with ‘bodies’. The case laws under I selected for my study are the merging points of law and medicine under different situations and hence their analysis is identified as a methodological tool to understand the intersectionalities of law and medicine.

Kapur and Cossman (1996) present three approaches while attempting to contextualize case laws pertaining to gender discrimination in the High Courts and the Supreme Court

²³ *Supra* n.16.

of India.²⁴ These are protectionist, sameness and corrective. Under the protectionist approach women are constructed as weak and subordinate and thus deserving protection. These differences justify their differential treatment by courts. In the equal treatment or sameness approach women are constructed as same as men and treated exactly the same as men in Courts.²⁵ In the corrective approach women are viewed to require special treatment as a result of past discrimination. In their analysis the authors divide on concept of equality as: formal equality (equality is equated with sameness and any differential treatment between similarly situated individuals constitutes discrimination) and substantive equality (recognize that sometimes equality requires differential treatment to individuals).

In the context of India, the dual statuses of being a patient/health care seeker and being a litigant is always influenced by social class, gender and caste. Hence it is important to bring in the relationships among the social factors of parties into the analysis of the case laws selected for study. Hence the analyses of selected case laws in my work use feminist legal methods along with class analysis from a Marxist perspective and explore the ideas of Foucault in addressing body and body politics. MacKinnon (1982: 515) explains “method” as that which “organises the apprehension of truth; it determines what counts as evidence and defines what is taken as verification”.²⁶ Bartlett (1991: 370) exposes the significance and political relevance of feminists using methods in legal analysis -

*“Feminists cannot ignore method, because if they seek to challenge existing structures of power with the same methods that have defined what counts within those structures, they may instead “recreate the illegitimate power structures [that they are] trying to identify and undermine”. Method matters also because without an understanding of feminist methods, feminist claim in law will not be perceived as legitimate or correct.”*²⁷

²⁴ *Supra* n.18.

²⁵ *Ibid.*

²⁶ MacKinnon, Catharine A., ‘Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence’, 1983 *Signs*, 8(4), 635-658.

²⁷ *Supra* n.13.

Law as a Tool for Social Transformation / Site of Power and Means of Oppression

The feminist debate on law has always revolved around the query on whether law is a tool for social change that addresses the inequalities and the discriminations existing in an unequally power and the resource distributed society, or a tool for the exploitative/powerful forces to exploit the less powerful sections? Smith (1989) rearticulates the idea of law acts as a simple tool of liberation or the tool for oppression and to view how it constitutes institutionalised and formalised sites of power struggles. The dominant feminist argument is that the male characteristics of law and the state lead to subversion of women in the society. As MacKinnon (1983:644) proposes “the state is male in the feminist sense. The law sees and treats women the way men see and treat women” in a strict hetero sexual understanding.²⁸

MacKinnon’s (1983:635-658) argument is that all social relationships are gendered. There is no neutral terrain and law is no exception to this.²⁹ Smith (1989) finds this problematic since MacKinnon sees no division between law, the state and the society.³⁰ Smith elaborates that that law occupies a specific space in the politics of gender. Law may be exceptionally powerful and oppressive to women but it acts as a tool to transform the society, to meet the needs of the women, and yet remains as a site of power. At the same time, Smith (1989) agrees that the law is grounded in patriarchy, class and ethnic division and not a free floating entity.³¹ She says that law does not hold the key to unlock patriarchy; it provides a forum for articulating alternative visions and accounts. Most feminists while agreeing on the power of law as a social tool for social transformation agree that law cannot subvert the structure of power.

Kapur and Cossman (1996: 22) identify the different streams of understanding on role of law in society to address the rights of women.³² Some legal commentators have suggested that the problem is one of the enforcement and access. Others have suggested that the law alone may be unable to eliminate women’s inequality. Yet others have

²⁸ *Supra* n.26.

²⁹ *Ibid.*

³⁰ Smith, J., *The Body Hispanic: Gender and Sexuality in Spanish and Spanish American Literature*, Clarendon Press, Oxford, 1989.

³¹ *Ibid.*

³² *Supra* n.18.

begun to suggest that the problems are more structural, that law is informed by and serve to reinforce patriarchy.

The crucial debate within the group which identifies the significance of law and feminist jurisprudence is on the question of what claims should be demanded from law; equality or special considerations? In the nineteenth century, feminist movements debated the basic question of whether it is better for law and the state to treat women as equal to men with equal rights and responsibilities or give special considerations to them with regard to their female capacities (reproductive capacities) (Smith 1989: 82). As Scales, (1986) suggests lawyers are trained to desire abstract, universal, objective solutions to social ills in the form of legal rules or doctrines.³³ The detail analysis of case laws discusses this further.

Like law, language is a medium and a system of classification to identify similarities and differences among situations. Law needs a theory of differentiation. Feminism is a theory of differentiation suited to it MacKinnon (1983).³⁴ Domination, disadvantage and disempowerment are the areas where feminist jurisprudence primarily steps in. Another prominent perspective argues that law should be revisioned as a site of discursive struggle, where competing visions of the world are fought Kapur & Cossman, (1996: 21).³⁵

The demand for legal rights has long been the central theme of women's movements in India Agnes (1992) Mazumdar (1999: 339-374), Singh (1994: 375-396) Kumar (1993:96-142).³⁶ The demand for women's rights and legal reforms was part of social reforms movement in the nineteenth century and came also from women in the

³³ Scales, Ann C., 'The Emergence of Feminist Jurisprudence: An Essay', 1996 *Yale L J.*, 95, at p.1372 .

³⁴ *Supra* n.28.

³⁵ *Supra* n.18.

³⁶ Agnes, F., *Introduction in Women and Law in India* (pp. ix-xiv), Oxford University Press, New Delhi, 2004; Mazumdar, V., 'Political Ideology Of The Women's Movements Engagement With The Law', in Dhanda, A. and Parashar, A.(eds.), *Engendering Law Essays in Honour of Lotika Sarkar Lucknow* at pp.339-374, Eastern Book Company, Lucknow India, 1999; Singh, K, 'Obstacles to Women's Rights in India', in Cook, Rebecca J. (ed.), *Human Rights of Women: National and International Perspectives* at pp.375-396, University of Pennsylvania Press, Philadelphia, 1994; Kumar, R, *The History of Doing: An Illustrated Account of Movements for Women's Rights and Feminism in India 1800-1990* at pp. 96-142, Kali for Women, New Delhi. 1993.

independence movement Kapur & Cossman, (1996).³⁷ Feminist historians have critically examined the relationship between law in colonial India and women's subordination (Sarkar, 1993:1869-1878); Nair, (1996)).³⁸ One of the early documents on women's rights in independent India, *Toward Equality: Report of the Committee on the Status of Women in India* observes the role of law from a liberal feminist perspective as follows.

One of the main characteristics of modern society is a heavy reliance on law to bring about social change... The tasks of social reconstruction, development and nation building all call for major changes in the social order to achieve which legislation is one of the main instruments. It can act directly as a norm setter or indirectly providing instruments which accelerates social change by making it more acceptable. (Ministry of Education and Family Welfare, 1975: 102)

A critique of liberal perspective of the early government documents – *Towards Equality* and the *National Perspective on Plan* is done by Kapur and Cossman (1996: 25) in *Subversive Sites*.³⁹ As such, this literature does not question law's commitment to social change, not does it consider the role of law in the subordination of women, beyond the discriminatory character of some laws. It does not interrogate the ideological character of law in constituting and sustaining unequal power relations beyond the liberal understanding of explicitly discriminatory laws. Rather it focuses on both law reform and law enforcement.

The nuances in analysis of feminist engagement with law are dealt with in the works of Agnes (2004, 2007).⁴⁰ Her works mainly tries to analyse legal provisions and judicial interpretations and raises difficult questions about how law operates in women's lives. She asks the question "whether social change and gender justice can be brought about

³⁷ *Supra n.18.*

³⁸ Sarkar, 'Rhetoric Against Age of Consent: Resisting Colonial Reason and Death of a Child-Wife', *Economic and Political Weekly*, 1993, 28(36), 1869-1878; Nair, J, *Women and Law In Colonial India: A Social History*, Kali for Women in collaboration with the National Law School of India University, 1996.

³⁹ *Supra n.18.*

⁴⁰ Agnes, F., Introduction in *Women and Law in India*, Oxford University Press, New Delhi, 2004 at pp. ix-xiv; Agnes, F., 'State Control and Sexual Morality: The Case of Bar Dancers of Mumbai', in John Mathew and Kakarala Sitharamam (Eds.), *Enculturing Law: New Agendas for Legal Pedagogy*, New Delhi: Tulika Books, 2007 at pp.158-175.

merely passing stricter laws” Agnes (1992: 19).⁴¹ Agnes is skeptical about the actions of the women’s movements that demand more law enforcement to attain gender justice and she challenges as

Almost every single campaign against violence on women in the 1980s resulted in new legislation aimed at protecting women. However, these had little impact. Why have these new enactments been ineffective in tackling the problem of violence on women? So long as the attitudes of the establishment remain anti- poor, anti- minority and anti- women to what extent can laws bring social justice? (Ibid)

Feminist literature started recognizing the linkages between women’s subordination and control over their sexuality in the 1980s. Women’s sexuality and exercise of power to control over female sexuality is becomes a framework to analyse laws governing reproduction, sexual violence and pornography. In this framework law is recognised as based on male norms, male experience, and male domination.

The analysis locates women’s oppression in patriarchy, a systematic expression of male domination and control over women which permeates all social, political and economic institutions. The desire for supremacy, the psychological pleasure of power, and male fear of female sexual and reproductive capacity are identified as the motivating forces of patriarchy...Radical feminists focus on revealing the patriarchal nature of law and its oppressive impact on all women. Central concerns include the ways in which the legal system reinforces male control over women’s sexuality and lives, together with the exclusion or marginalization of women’s values and priorities in legal structures and processes (Kapur & Cossman, 1996: 29).

Theoretical enquiries around the subordination of women are based on different aspects of women’s experience. As Bartlett (1991: 386) observes⁴²

“Feminist post-Marxists find this foundation in women’s activities in production, both domestic and in the marketplace; others emphasize women’s position in sexual hierarchy, in women’s bodies, or in women’s response to the pain and fear of male violence. Whatever the source, however these feminists claim that the material deprivation of the oppressed gives them a perspective—an access of knowledge—that oppressors cannot possibly have”.

⁴¹ Agnes, F. ‘Protecting Women against Violence: Review of a Decade of Legislation 1980-89’, *Economic and Political Weekly*, 27(17), 19-33, 1992.

⁴² *Supra* n.13.

My PhD work mainly does an inquiry through the analysis of case laws the women's position in sexual hierarchy and in women's bodies as well as women's response to pain and fear and finds standpoint epistemology^x is useful in the analysis. In this thesis the foundation of analysis on the experience of different categories of bodies while going through a jurido-medical process and to understand the creation of gendered bodies.

The Feminist Critique of Rights

Any research to understand judicial process with a gender perspective instigates to review feminist critique of rights. Nivedita Menon (1999:256) broadly articulates *"from seventeenth century rights began to be seen as inheriting in individual, rather than in groups or communities. This individual detached from social context and conceived of as constituted by the limits of the body, was clearly male..."*⁴³

Smith (1989) suggests that the rhetoric of rights has become exhausted and detrimental, especially when women demand for special rights like reproductive rights that have no equivalent masculine counterpart. While examining why rights remain so attractive to feminists, she also traces the root in the concept of equality. She attacks the liberal ideology of rights in the nineteenth century framed by John Stuart Mill and the liberals by pointing towards the limitations of the notion of equality framed within the capitalist social order. This notion is always of an 'equality of individuals under the law' which is not competent enough to address the structural inequalities based on class, race and gender. Further, liberal ideology has influenced the conceptualisation of law as a potentially neutral arbiter and protector of the weak. Early feminists used rights as central to many campaigns to create legal subjectivity for women with specific rights in private and public life. Like the Marxist critique, the feminist critique also realises the limitation of rights like the basic feature of right, i.e. to claim a right or entitle a right women are subjected to additional qualifications based on the information related to sexual relationship, marriage, divorce, separation and so on. To be equitable in claiming the allocation of rights in the case of women means to fulfill certain legal requirements in terms of obligations. Feminist works recognise the limits of the claim to right and the regulatory potential inherent in state protection; specifically when state deals with institution of biomedicine.

⁴³ *Supra* n.16.

However feminists like MacKinnon (1983) identify the importance of claiming an issue in the parlance of rights as it gives the issue public legitimacy. For her, rights constitute a political language through which certain interests of women get advanced.⁴⁴ Like the Marxian critique, the feminist critique also targets the rights which oversimplify the complex power relations (Smith, 1989).⁴⁵ Acquisition of a legal right may create a false impression that it has resolved the power difference. Legal rights are not capable to resolve a problem. Rather, it reorders the problem into defined which requires a legal solution (*Ibid*). Feminists also recognise the counter-productivity of the rights in terms of its mere self-interest of the individual and disadvantageous to the women's movement, as Marxists condemn rights in the context of working class movement.

Understanding the Question of Power

The law and the biomedicine create a complex transferable interplay of power. What are the ways in which power is exercised? Is this exercise of power constructive or exploitative? What are the major features of this process of exercising power over human bodies when two powerful institutions intersect?

Foucault's analysis of interaction between the body and institutions is much discussed among feminists as well as queer theorists. Mills (2007: 82) reads the unique nature of Foucauldian analysis of power as:

*[m]any analyses of power have focused on the role of institutions, but Foucault analyses the operation of power largely outside the realm of institutions; for this reason, the body is one of the sites of struggle and discursive conflict up on which he focuses. Rather than a top – down model of power relations which examines the way state or institutions oppress people, he is concerned to develop a bottom- up model, where the body is one of the sites where power is enacted and resisted.*⁴⁶

Foucault's "biopower" is central to the debates on exercise of power on human bodies.

According to Foucault, in the classical period there was the emergence, in the field of political practices and economic observation, of the problem of the birthrate, longevity, public health, housing, and migration. Hence, there was an explosion of numerous and diverse technique of archiving the subjugation of bodies and the control

⁴⁴ *Supra* n.26.

⁴⁵ *Supra* n.30.

⁴⁶ Mills, S., *Michel Foucault*, London and New York: Routledge, 2007

of populations, marking the beginning of “biopower”... through biopower, life itself has become the issue of political struggle. (1978:10)

Foucault (2003: 246) identifies birth rate and illness as two of the central concerns of biopower. He identifies these two issues directly affects the productive force of the population.

*In order to regulate and protect these forces, security mechanisms such as forecasts, statistical elements and overall measures have to be installed around random element inherent in a population of living beings so as to optimize a state of life to maximize and extract forces.*⁴⁷

The relationship between capital and health is discussed in Foucault’s work and he developed a term for it “noso- politics”:

*“Nosology or the categorization and classification of disease, intersects with politics when the consideration of a disease is a political and economic problem for social collectivities which they must seek to resolve as a matter of overall policy. Insofar as sick bodies are non- productive bodies from which a profit cannot be extracted, disease and illness is a political issue which must be addressed at the level of public policy... a particular system for separating the normal and the abnormal was set up.” (Hester: 11)*⁴⁸

The law-medicine nexus creates gendered bodies in the everyday medical and legal practices like; the infectious body, the reproductive body and the violated body. It is socially and academically relevant to explore how law and medicine exercise power and create gendered bodies. Law and medicine have the power to define themselves and the law on occasions defines the medicine. It is interesting to locate the instances of these complex operations of power. There are academic inquires that seek to understand power in the context of intersection of literature and medicine (Mangham & Depledge, 2011). They argue the “sense of power that comes with scientific training, providing medical authority, is implicit in much of the medical writing of the time”. (*Ibid*: 4)

⁴⁷ Foucault, M, *The Birth of the Clinic*, Routledge, London, 2007

⁴⁸ *Supra* n.2.

Smith's (1989:7) work tries to understand law in similar ways. She observes, "the term law operates as a claim to power in that it embodies a claim to superior and unified field of knowledge."⁴⁹

Foucault (2007) attempts a non- economic analysis of power. He identifies the development of the disciplinary society where growths of new knowledge like medicine, epidemiology, criminology etc. produce new fields of exploration and further creates new modes of surveillance and regulation over human beings. Smith (1989) elaborates this analysis.

Foucault's concentration on the growth of the disciplinary society reflects his great interest in the mechanism of power than the 'old' questions of who has power. He also rejects the tendency which is apparent in the traditional formulation of power, of treating power as if it were negative, repressive and juridical. He maintains that power is creative and technical. By this it is meant that the mechanisms of power create resistances and local struggles which operate to bring about new forms of knowledge and resistance. Hence power is productive, not simply a negative sanction which stops or restricts oppositional developments⁵⁰.

Mills (2003: 2007) while discussing the impact of Foucault's thinking in post- colonial theory and feminist theory quotes Diamond and Quinby (1988):

"Both [feminism and Foucault] identify the body as the site of power...both point to the local and intimate operations of power rather than focusing exclusively on the supreme power of the state. Both bring to the fore the crucial role of discourse in its capacity to produce and sustain hegemonic power and emphasise the challenges contained within marginalised and/or unrecognised discourses, and both criticise the ways in which Western humanism has privileged the experience of Western masculine elite as it proclaims universals about truth, freedom and human nature." Mills (2007: 29)⁵¹

However Foucault does a significant reconceptualisation of power, but one cannot avoid the class analysis of power. For Foucault, 'power' in the Marxian understanding is

⁴⁹ *Supra* n.30.

⁵⁰ *Ibid* at p.6

⁵¹ *Supra* n.46.

diminishing. Conversely Smith (1987) argues if it happens significance of law could have been also diminishes.⁵² Our present day accounts growing legalisation in everyday life from conception of human life (now it begins before that, in case of surrogacy and regulation over reproductive technologies) to legal definition of death (in case of organ transplantation: brain death/ body death). Foucault himself argues that for making a claim to authenticity, it has to be scientific. Making a claim for the scientific is in itself an exercise of power. Claims to scientificity attach a greater value to a knowledge system. Further, Smith (1987) argues that Foucault does not compare the scientists' claim to truth with that of lawyers^{xi}, and it is important to recognise the power that law attaches through its claim to truth. Law deploys powers to defend this rigidity. Here the exercise of power is different from the Foucauldian understanding.

The Choice of Framework

The existing understanding is that law became part of the method of regulation of human bodies in the context of appropriation of medical categorisation and welfare practices and not as part of judicial practices. In my thesis I explore the role of judicial practices in such instances. Law engages with each minute aspect of the body and regulates the activities of the human body in subtle ways. And to comprehend the subtleties the primary question is which framework one has to use.

It engages with the question how the inherent patriarchal nature of law and biomedicine is reflected in everyday practice and tries to reproduce gender stereotypes and even assume a protective role. How far do the dimensions of class and caste contribute to this practice? Can one say that the bodies produced by the medico-judicial process are classist-casteist-gendered bodies as part of exercise of power?

The arguments in this paper would locate why certain approaches are useful to bring when different categories and classifications merges in complex social situations where multiple disciplines play crucial roles. In India the specializations like health care laws or public health laws still in infant stage and not really develop methodologies to comprehend multiple realities. I agree that critical legal theories and feminist jurisprudence open avenues to solicit nuanced research questions for legal scholars however the possibilities of using an interdisciplinary approach enhances the intersectional inquiries much more creative. For example a work with an understanding that the question of gender is inseparable from that of questions related to caste, class,

⁵² *Supra n.30.*

religion, globalisation, capitalism and institutional inter- plays would be comfortable with adventures of crossing disciplinary boundaries of legal studies. It is the responsibility of the institutions of legal studies to endorse more creative ways of research to formulate better perspectives to hitherto unattended social process through phenomenal research questions.

ⁱArathi PM, (2012) *Gendered Bodies, Medicine and Law: A Study of Selected Case laws from India*, Jawaharlal Nehru University(JNU), New Delhi (Un published)

ⁱⁱ Thesis was submitted to Centre of Social Medicine and Community Health, School of Social Sciences, JNU ; which is an interdisciplinary centre consisting of students from different social sciences backgrounds like sociology, social work, political science, history, economics, behavioral science, public health and different streams of biomedicine like allopathic, ayurvedic, nursing etc. The centre offer training to students in political economy of health, public health research and methodologies and epidemiology.

ⁱⁱⁱ My PhD work is an attempt to explore the construction of gendered bodies and the role of institutions of law and medicine in it through the analysis of three relatively recent (late 1990s) judicial debates from India. Three case laws are selected for this purpose. The selection of the case laws is based up on the nature of issues involved and the socio economic back grounds of the parties concerned in the cases. The first case law leads to an understanding of the position of the judiciary while dealing with an infectious body (Mr. X v. Hospital Z, AIR 2003 SC644). This case deals with the rights of Acquired Immune Deficiency Syndrome (AIDS) patients and points towards grey areas in law/absence of the law. The second case law concerns issues relating to new reproductive technologies (Baby Manji Yamada v. Union of India and Anr,WPC No.369/2008). This is a surrogacy case that gives us a chance to look at the politics of the combination of institutions of law and medicine, in a neo liberal market economy. This case law further draws our attention to the discussion on the implementation of law to legitimise medical procedures. The third case law is a gang rape case which enables to understand how, in a patriarchal society, the institutions of law and medicine act together to reinforce morality through interpreting forensic evidences. This case law also helps us to understand the class and gender character of Indian judiciary.

^{iv}The concept of **Infectious Body** deals with the first case law, *Mr. X v. Hospital Z*^{iv}. This case law locates the diverse linkages between human rights and public health. It sees how the public health goal of ensuring conditions of health for people and the human rights goal of identifying, promoting and protecting the societal determinants of human well- being complement each other. The complexity of the web of issues associated with judicial intervention in dealing with an infectious body as opposed to a healthy body is the major concern of discussions and arguments under this case law. A discussion of the *HIV/AIDS Bill*, 2006 tabled before the Parliament of India additionally

contributed to the discussion of the legal creation of category of infectious bodies in contemporary India. It further sees how the participation of institutions of medicine limits or adds complexities to these interventions. As Rimke (2003) elucidates in her work on the connection between morality and medicine:

...the morally compelled objectivity of the scientific medical gaze produced the pathologization of morally and ontologically corrupt subjects through an exterior reading of the body as text- as a decipherable, knowable and (re)presentable object- which both expressed and confirmed the existence of pathological interiorities. (Rimke, 2003 cited in Hester 2006, p. 23)

The notion of **Reproductive Body** studied in the second case law, the *Baby Manji Yamada v. Union of India and Anr*, is in the context of sexuality. Through the analysis of first judicially debated case in surrogacy in India, the study tries to understand surrogacy in the Indian context and how reproductive bodies are created with the help of the institution of law and medicine. How the definition of infertility changed over a period of time and how the medicalisation of infertility opened markets for technologies further indicates the context in which reproductive bodies are created in the contemporary context in India. The concept of the reproductive body is theoretically based on the concept of biomedicine as a technique of biopower, and operating through biomedicine to pathologise women, reveals how in order to control is exercised over both their productive as well as reproductive capacities. The legal creation of reproductive bodies is located at the examination of the proposed legislation put forward by the Ministry of Health and Family Welfare (MoHFW) and the Indian Council for Medical Research (ICMR) on The Draft *Assisted Reproductive Technology (ART) Regulation Bill and Rules* (2008) as one of its contexts.

The idea of **Violated Body** is examined through the third case law, the *Suryanelllicase* (Not mentioning the title of the case due to ethical concerns on confidentiality reasons). The idea of violated bodies is developed through a discussion of the role of morality in patriarchal societies and how the institutions of law and medicine work together to reinforce this morality. The violated bodies are created in the process of medical identification of female body through the two finger test in rape cases and the tracing of resistance marks on perpetrators of sexual violence. The forensic evidence produced before a court of law, the judicial acceptance of such evidence and remarks based on these evidences are instances of the creation of violated bodies in sexual violence cases

^vBurney (2000), in the study of medicine and the politics of English inquest during 1830 to 1926, defines the term as follows: “Medicalisation”, a term most often used to denote the progressive expropriation of health from the public sphere and its relocation

in an exclusive professional domain, represents an important variation on this theme: through the process of medicalisation, pre-existing social understandings of and responses to such basic human experiences as pain, illness, and death are seen to be displaced by arrangements that both produce and legitimate a narrower set of expert interventions” (p. 10).

^{vi} “According to Foucault, in the classical period there was the emergence in the field of political practices and economic observation, of the problem of birthrate, longevity, public health, housing and migration. Hence, there was an explosion of numerous and diverse techniques for archiving the subjugation of bodies and the control of population, marking the beginning of “biopower”. (Hester 2006, p. 10).

^{vii} There is no single women’s movement but several and they raise questions of gender, based on political understanding, ideology, social base and modes of action. (Arathi, 2007, p. 5)

^{viii} Article 141 of the Constitution of India states that the law declared by the Supreme Court shall be binding on all courts within the territory of India (Shukla, 2001, p. 454).

^{ix} In Supreme Court of India and in High Courts, where matters related to the constitutional provisions are discussed. Other than that medical negligent cases are dealt by subordinate criminal courts and consumer redressal forums where medical service is covered under s.2 (O) of *Consumer Protection Act, 1986* under services. "Service" means service of any description which is made available to potential (users and includes the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, 2[housing construction] entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. <http://chdfood.gov.in/Word%20Documents/18C.P.Act.pdf>, accessed on 21.15.2010

^x “Feminist standpoint epistemology identifies women’s status as that of victim, and then privileges that status by claiming that it gives access to understanding about oppression that others cannot have”. (Bartlett, 1991, p. 385)

^{xi} Smith (1987) does not claim that law attempt to claim itself a science” but law has its own method, its own testing ground, its own specialized language and system of result” (medicine also has methods, testing grounds, specialized language and system of result) the way that science does.