

PANEL DISCUSSION REPORTS
**FEMINIST PERSPECTIVE OF
LAW AND LEGAL SYSTEM IN
CONTEMPORARY INDIA**

18th March 2016



Centre for Economy Development and Law



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The engagement of law with feminism is problematic where it claims to stand for social justice but upon foundations being questioned as patriarchal. If the legal system emanates from partisan origins, how far can an egalitarian approach be possible towards aspects of gender? CEDL organizes the workshop to analyse reforming law and restructuring Indian legal order with a feminist perspective.

**PANEL
DISCUSSION
REPORT**

RAPPORTEUR:

AMEYA M R

PANEL MEMBERS:

Dr. K GOPINATHAN (Professor, Department of Philosophy, University of Calicut)
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Dr. SHEEBA K. M. (Asst. Prof., Department of History, Sree Sankara University, Kalady)
Dr. SREEREKHA (Centre for Women Studies, Jamia Milia Islamia University)
Adv. P. M. AARATHI (Associate Fellow, Centre for Social Development, New Delhi)
Adv. SOBHA P. V., Adv. ANIMA MUYARATH, Adv. DAYANA

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FEMINIST PERSPECTIVE ON LAW AND LEGAL SYSTEM IN CONTEMPORARY INDIA

The Centre for Economy, Development and Law conducted a national workshop on Feminist Perspective on Law and Legal System in Contemporary India, on 18th March 2016. In the Welcome Speech, Dr. Sonia K. Das mapped the link between feminism and social justice. Only if gender justice is realized, social justice which is a promise given in the Preamble of Indian Constitution will become a reality for the people of India. The Presidential Address was delivered by Mrs. Binu Poornamodam Cholayil, the Principal of Government Law College, Thissur. Recalling the voices from a women's college in Thrissur, she noted how far the word "feminism" has gained a negative connotation in society and how someone calling herself "feminist" is looked upon as a stranger by the society.

The discussion panel which is a perfect combination of academics and activism was initiated into discussion of the theme by Dr. K Gopinathan, Professor at the Department of Philosophy, University of Calicut, creative and scholarly writer, and also director of many documentaries and feature films including *Ithramathram*.

Dr. Sheeba K. M. from the Department of History, Sree Sankara University, Kalady, commenced the conversation by elaborating her concept of theoretical position of feminism as a framework capable of encompassing and addressing any marginalised community such as Dalit, Adivasi, and transgender, along with women. It is ultimately a position against domination. Dr. Sheeba delved into the origin of nation-states to explore the basic element of inequality in the legal system. The dominant norms of a particular time will form the standards of formation of that society. The concept of "citizen" itself is not inclusive; she condemns the term represents only the elite in the society. The historical development of the notion of citizenship clearly reveals this. The power structure existing in the society was legitimised by being incorporated into the legal system and thus constituting an original flaw. Dr. Sheeba raised the question, how such a system can be transformed into an egalitarian one. Judgments of many cases such as Suryanelli and Vithura suggest the biased standards of courts. It is "voluptuous" in her opinion. The neutrality and objectivity that the methodology of law claims is largely absent, it seems. In such a backdrop, the gender sensitivity of law is to be analysed. She was also not ready to trust the argument of feminist

empiricism that exclusion of a larger group of human beings can be remedied through mere additions of provisions and legislations.

Dr. Sheeba voiced her disagreement with some of the laws such as the law of provocation since they are superficial in her opinion; they often fail to attend to deeper realities. Laws should engage human lives. If jurisprudence signifies the relation between life and law, it has to directly address the beneficiaries. Dr. Sheeba emphasized that law is to be considered for a rethinking, not under feminist empiricism, rather, a feminist standpoint.

Any concept will touch the people only if it is localized. The concept of feminism was set apart as a domain of the upper-class, upper-caste Western women, until recently. Dr. Sreerekha of the Centre for Women Studies, Jamia Milia Islamia University, entered into the discourse by challenging the common notions of what feminism is and who is/can be a feminist. The entry of the word 'gender' has political relevance. The introduction of the academic discipline of Gender Studies has helped to broaden the definition of 'patriarchy' as a system including both men and women who contribute to it, acknowledge multiple sexual identities apart from male and female, and bring about dialogues and social movements based on these realizations. An important debate is on whether the subject of "women" is lost today. If the subject is divided into multiple identities like "elite white woman", "dalit woman", and "Muslim woman", then what is the relevance of "feminism"? This debate was central to Post Feminism. Technological innovations that made possible sex changes, emergence of variegated academic disciplines like Sexuality Studies, Gay/Lesbian Studies, and recognition of 'masculinity' as impacted by the dialogues of feminism have largely contributed to broadening the domain.

She reminded of the need to comparatively analyse the present working conditions of women, largely in informal sector, in the historical context of celebration of the day of March 8th. Dr. Sreerekha opined that the amount of unpaid or less paid work done by women under conditions of massive deprivation of workers' rights has only increased since industrialization. In certain other cases, the education given to women fails to bear any fruit in terms of academic or working output. The concept of feminism is to be re-worked in this backdrop as well. She sought the attention of the audience to the lack of clarity in the implementation level of government programmes for women like the Nirbhaya Fund and asserted the greater need for gender sensitization of the male population. She concluded by

reinforcing the life-changing role of feminism in the contemporary society of redefined identities.

As an Associate Fellow of the Centre for Social Development, New Delhi, Adv. P. M. Aarathi shared her concern for all the women law graduates who form the majority of most of the law universities and colleges but not in the active fields of practicing or academics. This discrepancy points out the patriarchal nature of judiciary. A main problem while talking about patriarchy is with the identification of “enemy”. When we have to quarrel with this enemy embedded in ourselves, our closest circles and simplest deeds, feminist becomes a constant trouble-maker in the society. In her view, court is one of the most male-centred institutions in this world built by men who have gained so many privileges. One who puts forth a politics that questions the rubrics of the system will be estranged by the society. It was in 1950 that a girl got admission to the Law School of Harvard University for the first time. This was followed by other renowned law schools world-wide, later in 1960s and ‘70s. Aarathi quoted from the famous feminist legal scholar Catherine MacKinnon that, female lawyers cannot help but have certain affection for Formal Equality Theory with all its limitations. Many of the female lawyers end up not becoming ‘good lawyers’ trying desperately to balance between being ‘good house wives’.

P M Aarathi further streamlined her dialogue to the question of what is “doing law” in the academic level with respect to feminism. The repeated regular asking of a question marks a method. Across the disciplines, feminists ask questions which constitute “women’s questions”. Over the past two decades, feminists have expanded these questions so as to address the issues of how the judicial system fails to incorporate experiences of people of different sexual orientations. If it is experiences that lead to law-breaking situations, how can such multitude of experiences be integrated into the judicial system? Katherine Bartlett has suggested three feminist methods while doing law:

1. To ask women questions: to expose the substance of law which may silently and without justification submerge the perspective of women and other excluded groups.
2. Feminist practical reasoning: It extends the traditional notions of legal relevance to make legal decision making more sensitive to those features of a case which are not

already reflected in the legal doctrine. The Shah Bano Begum Case is a classical example of feminist practical reasoning.

3. Conscience raising: Testing the validity of an accepted legal principle through the lens of personal experiences of those who are directly affected by these principles. Vishaka vs State of Rajasthan Case demonstrated this method by talking about a nonexistent law on sexual harassment of women at workplace, and examining how international legal instruments can be used in the context.

Gender neutrality, often passively assumed in the judicial process or passed as *obiter dictum*, is actually not that easily pursued. A critical reading of case laws will expose their antithetical stand to women, Adivasis, dalit and so on. And hence, she asserted, this is a time that necessitates a “critique” of the contents of law as well as judicial decisions. She discussed the recent amendments to rape laws in India, in the line of their attempt to answer women’s questions. The court has, from time to time, categorised women into “good” and “bad”, and took the clear anti-feminist position that the rape of “good women” are to be punished while “bad women” deserve rape. Many common social restrictions upon individual freedom of women decide this categorization and justification of rape, even within the judiciary. Further Aarathi commented on the accusation of misuse of law in cases where women are the complainants. The credibility of the woman, who was subjected to some violence and yet took the hard road to turn it into a complaint through the inhospitable institutional procedure, is straight-away challenged in the courtroom. On the other hand, how far a male complainant is forced to prove that he is the best litigant? A woman is subjected to additional, legal violence in such a biased judicial system. Aarathi concluded her session by restating the need for law scholars to be sensitive to issues of diverse sections of society upon whom the sword of law may befall in a situation where mere difference of opinion renders one liable to punishment.

Dr. K. Gopinathan shared the opinion that feminism is more related to power and its injustices than merely women. The discussion session that followed was vibrant with diverse voices from the audience. Law on not only rape but also adultery, juvenile justice, and Union Civil Code have been part of it. The very language of legal writing was put through scrutiny; to strengthen this, Dr. Sheeba quoted the verbatim, ‘the whole of humanity is subsumed

under the pronoun “he”. Further the panel discussion moved on to the second session moderated by Dr. Mercy Thekkekara.

Pioneering the second session of the panel discussion, Dr. Sobha P. V. enunciated the theoretical definition of “justice” the absence of which largely results in human sufferings. Conceptually, “justice” can be defined as “non-injustice” – the condition of not having injustice. If gender justice is posed as a state of having no suffering, in the international context, it foresees the wellbeing of the being in relation with the other beings. Hence, an institution and/or social situation including the making, enforcement and practicing of law, feminist jurisprudence, political reservation for women, social visibility and interventions of women, or the changing woman-man relationship, are to be understood in the context of human wellbeing. One of the basic issues that concern her is whether we have the space to problematise all the structural violence against us. If a group or person is experiencing oppression, poverty or suffering from a relational context, the other agents are getting advantage at the sufferer’s expense; such a system is unjust. Therefore, gender justice in relation to jurisprudence should be conceived not merely as political and administrative actions of law making, practicing, enforcing etc., but also, as permeating the conceptual frame and social fabric that formulate the affairs of day-to-day life. Furthermore Dr. Shobha explained that conception of gender justice implies certain sensitivity to the transformative relations, mentality shift from androcentricity, and the increasing social space of women in the context of changing gender-social relations.

Coming to the point of “gender”, she clearly stated that once “gendered”, probably through many processes of socialization and role-defining, it works almost independent of the physicality of the body to which it belongs. She noted her departure from the common way of accusing “the structure” as something apart from us. She said the structure exists by and through ourselves, our roles and relationships, and the system we belong to. Dr. Shobha elaborately theorized the conceptualization of gender and gendered selves. “I” itself in this context will be a social and self-reflexive construct. Even before one understands that this is not what “I” am, the conceptualization and construction of what one is happens. The categorization of behaviours, ascribed qualities, values and expectations on human beings into dichotomies of ‘feminine’ and ‘masculine’ (categorization of ‘third gender’, ‘trans sexual’ etc. also come under this) will produce strictly defined gender selves. But the recognition that these identities are transformable can bring about new sensitivities to

individual and society and thus engage in reflection upon and fight against injustices embedded in themselves.

Adv. Anima Mularath initiated her session with the outright proclamation of her stand that, "I Am a Feminist". She said, such a statement itself has become a political activity at a time when even those who actively stand for women's causes apologetically claim not to be feminists. She approached her theme of 'Gender Perspective in Criminal Laws', from a historical point of view. The Victorian morality is hugely reflected in criminal laws of our land almost all the basics of which are laid down in the colonial era and pursued till date without fundamental amends. Many provisions removed from the legal documents of the colonialist countries exist in our state as a remnant of the subjugation. She went on with a reading of Indian mythology where two male gods- Vishnu and Paramasivan- and the offspring of their homosexual relationship - Ayyappan- are worshiped. Legal provisions such as Art. 377 would probably not have emanated from within such a cultural context, Adv. Anima argued. She further marked the anti-feminist nature of Indian legal system by recalling one of its basic conceptions that women are property of men. In her analysis, consensual sex between two persons becomes crime under the laws of adultery because it allude to trespass of man's land or other property; otherwise it should have constituted only a part of divorce terms. The real seriousness of the situation is revealed when we read along with it that non-consensual sex is penalized through the conspicuous absence of marital rape laws.

Quoting Nivadita Menon from *Seeing Like a Feminist*, Adv. Anima discussed how "rape" is criminalized in different contexts. Rape is a crime for a traditional patriarchal society since it hurts the family reputation; the same logic decriminalizes marital rape as well. On the other hand, for a feminist, rape is a crime because it is the violation of an individual's right to self determination. She criticized the lack of clear definition of "consent" in our laws. However the situation has slightly changed over the years. Section 498A in the IPC and The Protection of Women from Domestic Violence Act, 2005 etc. have been incorporated as a result of many strong women movements. A consolidation of such nation-wide movements happened in the Nirbhaya case of 2012 though criticism against it is numerous. Any movement/discourse will be triggered by a certain factor; all factors need not always trigger movements. For instance, the place of incident – the national capital – is said to have been an important factor in arresting huge popular attention in the Nirbhaya case whereas the same

metro with the reputation of being the most unsafe for women witness far more reported and non-reported rapes per day that elude similar responses. Adv. Anima said she views the 2012 responses very positively in this respect. The Justice Verma Commission Report which resulted from the above incidents had several progressive provisions and recommendations expanding itself into areas of marital rape, sex workers and transgender rights. One of its major points of relevance is that it widened the definition of “rape” and specifically categorized types of sexual abuses. How far they are accepted by the government is yet to be examined.

As a response to the earlier discussion on ‘who is the enemy of feminism?’ she remarked that it is indeed patriarchy. In her opinion, a man is a beneficiary of patriarchy whereas woman is its victim and instrument. Then she moved on to discuss The Immoral Traffic Prevention Act, 1956. Though sex work is not illegal in India, the Act very tactfully targets women by criminalizing solicitation, absurd definition of “brothels”, and impose institutional violence upon a section that is basically driven by poverty and educational backwardness. It should be thoroughly reworked so as to properly address social realities and provide protection to those women. She referred to the struggles of female packing workers at Kozhikode Supply co to suggest the economic discriminations being faced largely by women in informal sector which is one of the reasons leading them to sex work. Adv. Anima asserted that, feminist legal reforms in the area should begin by changing the very name of the Act into “Sex Traffic” Prevention Act, removing notions of “morality” subjectively decided by society. She concluded by bringing into notice of the audience the recent formation of Kerala’s first women’s trade union at Kozhikode, amidst the questions of women’s visibility in politics.

In the opinion of Adv. Dayana, the most patriarchal spaces will be those of police and judiciary given the strong relation between patriarchy and power. Sharing the concern of Dr. Aarathi, she noted that there is a situation whereby women practicing lawyers, who form only a low percentage of women law graduates, are largely incapable of arguments and cross-examinations in court rooms. In her analysis, it is the result of socialization women undergo since ages where she is trained not to talk aloud or question anyone. Another instance of the manifestation of patriarchy rooted in judiciary is the strict dress-code followed by lady judicial officers. She also narrated her personal experience of standing for freedom of expression in court and the consequent alienation faced from the apostles of

justice of the land. Such gender injustices and subordination of women within the judicial system can be changed only through efforts in larger groups.

Adv. Dayana stressed the inevitability of restructuring laws in order to ensure women's rights. In most of the personal laws, where injustices in the existing custom of a community are legitimized and authoritatively executed, property rights are denied to women. She exemplified the argument with provisions of Muslim and Hindu personal laws related to marriage, will, etc. Inaccessibility to land, money and property renders ineffective a majority of legal protections and judicial assistance guaranteed to women. In conclusion, she strongly recommended fundamental changes in laws to be formulated through people's representatives in order to basically build women's socio-economic capacity to utilize the judicial system and avail gender justice.

Themes of discussion still remained numerous for the interactive session. The audience actively debated issues such as reservation, representation of women in political parties as well as executive positions, and sexual violence as a mode of establishment of power imparted by military forces in North East and Jammu and Kashmir, from different points of view. Conceptual clarity was sought on the distinction between "matriarchal" and "matrilineal" societies. Responding to the audience, the panel deconstructed the notion of "common sense" as reflecting androcentric mindset. Dr. Mercy Thekkekara appropriately concluded the panel discussion by emphasizing the role of women in challenging patriarchy and progressively reconstructing roles and relations from family to society.

The final academic activity of the Centre for Economy, Development and Law for the year 2015-16 was wound up as the Director Abhilash Gopinath rendered vote of thanks to the participants.