Teaching Law from a Feminist Perspective

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Having taught in the National Law School of India University for almost two decades and been a resource person for several gender sensitisation programmes for personnel in the judiciary, police force, administration etc and having read about the way the judiciary in the United Kingdom and United States of America respond to cases of crimes or even civil matters relating to women I am more than ever before convinced that one cannot hope for fairness and justice to marginalised groups like women unless we change our approach to the teaching of law in our institutions. After all we are talking about changing attitudes and perspectives and we ought to start with the young. It is much easier to influence the young men and women in our institutions. It is, therefore, imperative that we mainstream the feminist approach to the teaching of law. Already Catharine MacKinnon[1], Archana Parashar and Amita Danda[2] have made a case for it. I just want to reemphasise several of their arguments on the basis of my experience of teaching in the Law School and at the same time being involved in women and law related work – research, training or as support for NGO's.

Attitudes are products of our socialisation and education. It is our attitudes that influence the way in which we work and respond to people we meet and have to deal with. They are too deeply instilled as we have been imbibing values and attitudes since our birth. It is hard to get rid of prejudices and biases that are deeply entrenched and internalised since childhood. The attitudes and values we imbibe or are taught are based on the kind of society we live in and the need generally to maintain the status quo and therefore why they reinforce the gender stereotypes. This is the reason why I believe that we should start with the law schools if we want a sensitive judiciary and legal profession - sensitive to the concerns and issues that affect various groups of people, socially and economically disadvantaged, if we want to see a just and equal society.

Having read judicial decisions from India and abroad one can see the resistance to the idea of a more equal space within the family and home or even at the workplace. Here are a few examples. "Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21[3] nor Article 14[4] have any place."[5] Ratna Kapur and Brenda Cossman argue that the Court's approach to gender itself is problematic," the Court resorts to doctrine of "only on the grounds of sex" and argues that there are other factors not based on sex that justify the differential treatment of a daughter, such as the fact that daughters go to another family after marrriage. The reasoning exemplifies the problematic distinction between sex and what it implies, that is the failure to explore the connections between such customary practices and the social construction of gender…….. Stereotypes of women are used as justification for differential treatment, without any real analysis of disadvantage, nor any attempt to explore the extent to which these stereotypical roles of women have served to reinforce women's inequality."[6]

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[1] Catharine MacKinnon, Mainstreaming Feminism in Legal Education
[2] Amita Danda and Archana Parashar (eds), *Engendering Law*, Eastern Book Company, 2007(1999)
[3] Article 21 of the Indian Constitution guarantees Right to Life and Personal Liberty
[4] Article 14 of the Indian Constitution guarantees Right to Equality
[5] Harvinder Kaur v. Harmander Singh Choudhry cited in "On Women, Equality and the Constitution" by Ratna Kapur and Brenda Cossman in *National Law School Journal*, special issue 1993, p 55.
[6] Ibid p33

Kathryn McCann in "Battered women and the law: the limits of the legislation"[7] demonstrates how "legislative reforms are fettered at every level of their application namely by the higher courts and through case law, within the magistrates' court and in the response of the police to wife abuse." In the article mentioned she writes that rights created by a legislation are altered in practise showing that existing sex inequality is reproduced and there has been very little improvement in the material position of women. This is with reference to the Domestic Violence Law in the United Kingdom.

Another example, this time from the U.S. A – "In *Corne*, in which two women were pressured for sexual favors in exchange for employment advancement, the individualization and its effect as a bar to recovery is most prominent. Judge Frey, finding no sex discrimination, stated: "In the present case, Mr Price's conduct appears to be nothing more than a personal proclivity, peculiarity, or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge."[8] MacKinnon states that what all these cases convey is that even though the incident took place in an employment context between people who were working in an unequal relationship by virtue of their position in hierarchy and the work was made unbearable and resulted in loss of opportunities, "somehow the incident has nothing to do with work. This is clearly a matter of point of view. For the perpetrator, it may be a diversion; the victim undoubtedly *wishes* it had nothing to do with work."[9]

I am merely quoting from three different legal systems to how universal patriarchy is and how deeply entrenched it is in the judicial system of all three countries. These are not isolated cases, there are numerous such cases which have led me to conclude that unless there is a radical transformation in the society and the legal system there will never be an end to sex discrimination that one sees and experiences in the different jurisdictions. Mere reforms in law and formal equality will not result in progress towards to a just and equal society.

Unless we realise that we are working with new values using pre-existing systems and institutions created to preserve a different social order and achieve inequality we are going to be banging heads against a wall. New values and new goals need new attitudes and new systems to achieve them. One cannot possibly hope that the mechanism created to run one vehicle will be good enough for another one. Therefore it is very essential that the tools we employ too are new. The Feminist Legal Method asks new questions, provides new methods of analysis and therefore the end result is different from what is achieved by using the same old institutions to achieve new goals. Being teacher of both history and law I know firsthand the importance of acknowledging one's biases and prejudices and how looking at a subject from a different perspective changes one's understanding of it.

For too long in India, in particular have we relied on the positivist conception of legal knowledge. Though in other parts of the world new perspectives emerged and were applied to the teaching and understanding of law and legal systems in India we are still bound by the positivist approach. For eg., empirial legal theory which analyses the social, economic and political context of legal doctrine has little or no relevance as teachers continue to rely only on teaching black letter law delinked from the social, political and historical context and therefore studying law in a vacuum when it is not created in such a vacuum. Rather than presenting any theory as a universal perspective it is important to acknowledge the partial perspective so that law and legal education can become more inclusive.

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[7] Kathryn McCann,"Battered women and the law: the limits of the legislation" in *Women – in – Law : Explorations in Law, Family and Sexuality*, eds. Julia Brophy and Carol Smart, 1985 pp 71 ff.
[8] Catherine A. MacKinnon, *Sexual Harassment of Working Women*, Yale University Press, 1979 p. 84
[9] Ibid, p. 86

Archana Parashar argues that "feminist critiques of legal theory explicate this partial perspective most effectively and therefore, it is important that everyone takes feminist insights about the nature of legal (and any other) knowledge into account.[10]" She further argues that empirical legal theory treats law as a social phenomenon – that is, as something that exists in a particular political, economic and social context and should be studied in that context. She states that this kind of an approach necessitates an interdisciplinary approach which feminist scholarship best fits.

Explaining this position further she presents the fact that all action is based on certain assumptions and it is the job of everyone – lawyer or feminist- to understand what they are and whether they are justifiable or not and in reference to what. How does the feminist approach help us in the study and understanding of law? First and foremost feminist legal scholars have demonstrated that what has been considered to be a neutral standard in law is actually the male norm, classified as an objective standard. As a consequence women have long struggled to conform to it. For eg., the whole interpretation of the law relating to rape which hinges on the question of consent, based on the reasonable man standard. Literally it is that the standard that a reasonable man might conform with. Therefore, the requirement of evidence of physical resistance, marks of injuries on the body of the prosecutrix and the accused, the prior history of sexual activity on the part of the prosecutrix etc. If one were to on the other hand look at this from the perspective of a woman, brought up in a patriarchal society taught to be timid and modest and not aggressive and fearing for her life, paralysed by fear into inaction then one might be able to realise that absence of physical injuries does not mean consent. Many of the cases of rape in the Indian courts which resulted in acquittal have been due to the absence of such an understanding.

Similarly there are questions regarding formal equality and substantive equality. Many have argued that when we talk about equality there is no place for affirmative action, because in their viewpoint equality meant same treatment. What they fail to understand is that treatment of unequals as same is to arrive at injustice. One necessarily has to take into consideration the biological and social differences if one has to actually succeed in achieving justice. For eg., only women get pregnant and therefore they have to be provided with maternity benefits in the context of employment – in terms of certain changes in the work they do during their pregnancy, provision for payment of wages when they need to go on leave for their delivery or due to miscarriage and protection of their employment. Denying all this in the name of same treatment of equals is to contribute to inequality and result in injustice. For men and women are different and though there maybe equality in the law in society there is grave inequality between the two sexes that cannot be remedied by the mere formality of the law.

Another issue is that of the public/private divide, the principle that the law cannot enter the home. This is really a very curious principle which I can prove wrong by using an example from Indian law and practice. For eg., S. 377 of the Indian Penal Code makes illegal sexual intercourse "against the order of nature" and therefore criminalises the sexual behaviour between persons of the same sex. Now one would assume that sexual activity within one's home is within the realms of the private sphere and that the law should have nothing to do with what one does there, yet the law actually punishes people for what they do in the privacy of their homes. At the same time for long the law did not concern itself with violence and assault perpetrated by a man on his spouse, in the name of this public/private divide. Even today when there are laws to protect women from domestic violence, judges, policemen and even lawyers are reluctant to provide the relief that the law guarantees women.

[10] Supra n. 2 p. 5.

It is in the background that I think it is time that feminist jurisprudence was made a compulsory course and feminist legal perspective was mainstreamed and not confined to the fringe course taught by some feminist to a small number of interested students while the majority graduate blissfully ignorant of the inequality that exists in the law and the legal systems that they have been trained to go out and work with.