Law as an Instrument of Social Change: the Feminist Dilemma by Swapna Mukhopadhyay. P. 9-14. In In the Name of Justice: Women and Law in Society by Swapna Mukhopadhyay. New Delhi, Manohar Publishers and Distributors, 2/6 Ansari Road, Daryagunj, New Delhi - 2, 1998.

---

## Law as an Instrument of Social Change: The Feminist Dilemma

*Swapna Mukhopadhyay*

Legal reforms have been at the centre of the agenda for strategizing gender justice in India. This has been so, right from the time of nine-teenth century social reforms movements, through the period of nationalist struggles, down to the contemporary women's movement. In more recent times, this reliance on the efficacy of law and legal reforms to initiate changes in the social order towards a gender just and egalitarian society gets voiced in what might be termed the first comprehensive document marking the contemporary feminist movement in India, i.e. the *Report of the Committee on the Status of Women in India*. The committee viewed legislation as one of the. major instruments for ushering in changes in the social order in the post-colonial state. Legislation, it was felt, can '*act directly as a norm setter, or indirectly, providing institutions which accelerate social change by making it more acceptable*'. [1] Building a gender-just society was perceived as part of the task of nation building, of development and social reconstruction. The role of law in the whole process is perceived as non-ambivalent, *well-defined* and *positive*.

Two decades and many struggles later, the answers are no longer so clear-cut, in spite of the fact that the contemporary women's movement in India had in fact coalesced into a *movement* by mobilizing public opinion around the need for legal reforms for redressing individual cases of atrocities against women. The Mathura rape case of 1979, the Shah Bano case on divorce under the Muslim personal law in 1985 or the Bhanwari rape case in 1994 are landmarks that in many ways determined the course and content of the contemporary feminist movement in India.

The Mathura rape case had ushered in a wave of public outcry and was instrumental in bringing about wide-ranging changes in rape laws in the country. [2] However, even under the changed legal regime, hardly any substantive improvements seem to have taken place in the ground conditions. Although punishments have become more stringent, the rate of conviction has dropped significantly in the post-reform years. The insensitivity of the justice

delivery mechanism and the trauma of the rape victim under an unsympathetic system continues unabated.

The Shah Bano case typifies an attempt at societal change aborted at the altar of political exigency. In this case, the Supreme Court had held that a divorced Muslim woman, like divorced Indian women from other religions, has the right to receive a regular maintenance allowance from her husband under Section 125 of the Criminal Procedure Code of India. This judgement had provoked strong reactions from conservative Muslim segments of the country as it was perceived as an encroachment by the state into the arena of Islamic law. The Indian government subsequently buckled under the pressure and passed a new law negating the Supreme Court judgement. The Shah Bano case not merely exposed the importance of the state in bringing, about societal reforms in the face of fundamentalist opposition, it also brought out the multifarious ways in which such situations can be usurped by divisive forces to press for various sectarian goals. In this case, conservative right-wing Hindutva forces started pressing for a Uniform Civil Code, ostensibly to further the rights of Muslim women, although it was clear that a Uniform Civil Code by itself is unlikely to better women's position, unless such a code is also actually empowering for women. [3] It is well known that as personal laws under all religions stand today, they are stacked up against women. [4] As has been argued by some progressive Islamic scholars, Muslim personal laws can be reformed for greater gender justice even without recourse to a uniform civil code. [5] This is exemplified by a recent judgement delivered by the Bangladesh High Court, which calls for a progressive reinterpretation of Muslim personal law in line with modern social values. [6]

In the Bhanwari Devi case an enlightened 'Sathin' under the Women's Development Programme of the Rajasthan Government was subjected to mass rape for opposing the practice of child marriage in the community. The culprits are yet to be brought to book. This case continues to typify the near-impossibility under certain circumstances of successfully challenging deeply entrenched patriarchal power structures through legal channels alone. [7]

The contemporary women's movement is at the crossroads now. In the light of the experience of the last twenty years, the question that keeps recurring is whether legal reforms are capable of bringing about gender justice in society. Has law been instrumental in ushering in any change in the gender balance? Can legal reforms or litigation indeed ever deliver the goods? Law has in fact been often used to reinforce the social subjugation of women. [8] Some believe that given the patriarchal nature of the state, and given the reflection of such bias in the framing and dispensation of justice by the judiciary and its functionaries, it is not sensible to expect that law can ever be a potent force for change in the

existing social structure: that the hope of ensuring gender justice using law as an instrument of social engineering is an altogether impossible dream.

In a way this ambivalence about law and legal reforms in matters of securing gender justice is nothing new in the history of women's movement in India. Back in the nineteenth century, when social reformers like Raja Rammohun Roy and nationalists like Bal Gangadhar Tilak were concerned with oppressive social practices like 'sati' or child marriage, the tensions between the indigenous scriptural dicta and the colonial heritage of the British legal system always lurked in the background. While Rammohun's denunciation of the practice of sati had been based primarily on his reading of the scriptural text, Tilak's refusal to address social issues through legal instruments laid down by the foreign rulers was based on the perceived illegitimacy of the colonial hegemony in all its ramifications. The social history of the period is replete with the tensions between the liberalist strain of thinking of the pre-independence era which was geared to adopt and adapt from Western liberalist traditions on the one hand and the nationalist revivalist movements which aimed at social reforms working from within indigenous traditions on the other. Much of this tension can be attributed to the dominant political climate of the era.

In the context of the contemporary women's movement, the ambivalence that marks feminist engagements with law as an instrument of ensuring gender justice has a somewhat different character. While demand for legal reforms has been one of the major foci for mobilizing popular support, and specific cases of atrocities on women have been used to further the aims of the movement, the disenchantment with the potential of law as an instrument of social transformation has been triggered by two simultaneous developments. On the one hand, last twenty years' experience of the effect of legal reforms has been perceived to be not altogether positive. At least two essays in this collection strongly conform to this view. The meticulously researched documentation by Flavia Agnes in this volume on the effects of legal reforms in the area of violence against women covering rape and domestic violence as well as dowry-related violence, suggests that laws, old and new, are structured to operate against the larger interests of women. The treatment of women under institutionalization as argued by Usha Ramanathan in her paper reinforces this view. Neither litigation, nor legal reforms have, in the opinion of the authors been able to deliver gender justice. The dominant social culture within which such justice is sought to be mediated have proved to be much too strong for legislation or judicial activism alone.[9]

The second development can be traced to the growing engagement of feminist research with the post-modernist wave in Western academic thinking and its deconstructionist implications for a monolithic, linear strategy for women's

empowerment, Nivedita Menon's paper in this volume reflects some of the analytical complexities that arise in the context of cross cutting discourses in the field of law for gender justice. Menon's paper exhibits the undercurrent of tension between conflicting compulsions of contemporary research in feminist jurisprudence and feminist practice and activism in the legal arena. However, recent thinking in the area has made considerable progress in addressing such tensions squarely by laying bare the complex and contradictory nature of law, and the need for such understanding for successful accessing of law as an instrument of social change. The arena of law is seen as a site for discursive struggles, where the dominant notions of gender, tradition and culture are challenged from a multiplicity of perspectives, including the feminist perspective. The extent to which law is made to serve as an instrument of gender justice depends to, a large extent on an informed understanding of the strength, and the potential weaknesses of the dominant ideology of gender and the ability to engage with tenacity and wisdom, to explore the moral and substantive weaknesses of the familial ideology in the legal arena.[10]

A relatively new area of legal discourse in the context of gender is social rights - of women, such as the right to health. Usha Ramanathan's paper included in this volume recounts the current status of law on women's health. What it does not explore in depth is the whole range of issues that are linked with women's reproductive rights and their legal ramifications. The Indian Penal Code does not admit of the notion of marital rape, thereby signifying a negation of a major dimension of such rights to women. The link between this negation and the role of the dominant familial ideology that shapes the contours of women's substantive legal rights in the country is fairly obvious.

The rights discourse does open up new dimensions of analysis and investigation. Social movements which aim at fighting exploitative practices may utilize the moral strength of individual dignity to strategize the fight for justice. However, in order to invest such strategization with some substantive content, it has to be properly contextualized. For instance, the whole issue of reproductive health rights for women in India needs to be seen in the perspective of the dismal status of primary health care in the country, as also the rampant poverty of the masses that negates access to basic needs irrespective of gender.

The papers included in this volume were presented as theme papers in a national seminar on 'Women and Law'. The seminar brought together in one platform a wide range of people-from sitting judges to senior practising lawyers and legal experts, people from civil rights and human rights backgrounds, as well as feminist scholars and activists-to deliberate on the potential of law as an instrument of gender justice. A second major achievement of the seminar was in the area of opening up of new dimensions in the legal discourse on gender

issues, such as women's health and law, and institutionalization of women under the law. It is hoped that this collection of papers and the discussions that took place in the seminar will provide added fillip to the quest for gender justice with the help of legal instruments.

**Notes**

1. Towards Equality: Report of the Committee on the Status of Women in India (1975), P. 102, n. 2.

2. The Criminal Law (Amendment) Act of 1983. See also Annexure 3 in Vasudha Dhagamwar, Law, Power and Justice: The Protection of Personal Rights in the Indian Penal Code, rev. edn., Sage, New Delhi (1992) for the text of 'An Open Letter to the Chief Justice of India', dated 16 September 1979 in which four legal experts question a Supreme Court decision to acquit the accused in the Mathura rape case. Tukaram v. State of Maharashtra (1979) 2 SCC 143. Also see Chapter 8 in Dhagamwar.

3. Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagement with Law in India, Sage, New Delhi (1996), pp. 65-7.

4. Kirti Singh, 'Unequal Personal Laws', The Pioneer, 28 February 1996.

5. Asghar Ali Engineer, 'A Model for Change in Personal Law', Times of India, 25 July 1995.

6. Rashid Talib, 'Echoes of Shah Bano Case', Hindustan Times, 5 July 1997.

7. See Kavita Srivastava and Sanjoy Ghosh. ‘Against Our Will’, Humanscape, February 1996.

8. Amita Dhanda's work, among others, has shown how the invocation of insanity has been used in India to reinforce women's subjugation in the arena of personal law, and how expressions of dissent under oppressive familial conditions have been interpreted as insanity in divorce proceedings. The examples of cases where deviations from role- models have been interpreted as manifestations of mental disorder that are cited by Dhanda are truly mind-boggling. They include utterly frivolous reasons such as not being able to do housework, acting familiar with strangers, crying in front of guests, receiving gifts with the left hand, not taking daily bath, putting too much salt and pepper in the food, making paranthas when asked to make chapatis, boiling two packets of milk when asked to boil one, etc. See Amita Dhanda, 'Insanity, Gender and the Law',

in Patricia Uberoi (ed.), Social Reform, Sexuality and the State, Sage, New Delhi (1996). For a critical evaluation of a wide sample of judgements involving all aspects of personal law from the point of view of women's rights, see the collection of articles in Indira Jaising (ed.), Justice for Women: Personal Laws, Women's Rights and Law Reform, The Other India Press, Mapusa, Goa (1996).

9. N. Haksar and A. Singh, The Demystification for Women, Lancer Press, New Delhi (1986).

10. For a very readable account of this position see Ratna Kapur and Brenda Cossman, Subversive Sites: Feminist Engagement with Law in India, Sage, New Delhi (1996).