

**Valedictory Address at the International Conference on Feminism and the Law:
Revisiting the Past, Rethinking the Present and Thinking the Way Forward**

By Justice Prabha Sridevan

It is indeed my honour that I have been invited to address you who have gathered at this International Conference on Feminism and the Law which is to remember Dr. S.P. Sathe, one of the greatest jurists we have known. At an Exchange facilitated by CHRI and INTERIGHTS, I was a member of the core group, since the Madras High Court hosted it. Dr. Sathe was one of the participants. Judges, Civil Society activists and, of course, Jurists took part in the exchange. I remember how thrilled I was that I actually met Prof. Sathe. He said that Courts have a duty to affirm the constitutional promises. He said, "Let us begin by removing a popular myth that judges do not make the law, they merely find the law and apply it. Even at the district level a judge's role is not mechanical. Trial Courts can interpret a statute to further the objective of the law; judges who want to shun their responsibilities are bound to be mechanical." He also said "Because Courts are accountable to the people of India in whose name the Constitution speaks- they must make maximum endeavour to render justice. It is not enough that their decisions are according to law; they must be just." Dr. Sathe glowed with wisdom and age did not wither him. He wrote unceasingly and incisively. He believed that Courts were accountable to the people and the human rights values were non-negotiable. His observations on the Tribunal system in India mean much to me since I now head one. He wrote that Tribunals shall be established as an alternative system of justice with "sound principles of openness, fairness and independence." It was his belief that only the faith of the people constituted the legitimacy of Courts, Here, where he lived and carried on his work I hope a band of young

academics will come up to continue his work and raise the standards of Indian legal scholarship.

I thought I would speak about the voice of the woman. Is it heard, is there a change? Much has changed, but more remains the same. As the French say, plus ça change, plus c'est la même chose. A recent news item spoke about the two-finger test for rape survivors as "unscientific and degrading" and that it must be banned. The two-finger test violates the woman's right to equality, her right to dignity, and her absolute right over her body and the fact that only now there is a move to ban it shows how we have looked at the woman. We must see this right clearly as an unassailable right, but we see it through a glass darkly and the legal system is part of us. The world of the man and the world of the woman are different, and conditions like war, economic depression, famine, even natural disasters like tsunami affect and impact them differently and unequally. After the Haiti earthquake prisoners escaped. And many women were raped, unprotected as they were in the rubble. It seems the street lights were kept on for 24 hours in the hope that the incidents of this violence will be less. Physical vulnerability, social vulnerability and economic vulnerability are gendered in their nature. Even within the weaker sections, the dalit women, the disabled women, the HIV women, Muslim women and the girl child are more vulnerable. Positive affirmation of her rights must be intended by those in power, wherever the seat may be and the intention must become action.

I will narrate a case. Pothumalli, a Dalit woman applied to the post of a Noon meal organiser. When another person was appointed overlooking her claim, she filed a writ petition challenging the appointment of the other. The Madras High Court referred to the directions of the Supreme Court that in appointment of cooks and helpers, preference shall be given to Dalits, Scheduled

Castes and Scheduled Tribes, and observed that, “Feeding of children by members of the Scheduled Castes will go a long way in removing the social disparities and practice of untouchability in different forms” and that “communal feeding by engaging cooks from underprivileged society will remove instantaneously some form of untouchability and will be a milestone in our march to an egalitarian society.” This is positive affirmation in action, a ray of light passing between the closed doors. This is a classic example of understanding the history and background of the politics of subjugation/discrimination, and without this understanding on the part of law-makers and law-enforcers, equality will not become real.

Such rays of light have come in the past too, but they have not grown into an enlightened space. When you consider the right to property of a Hindu woman, long ago in Tulsamma’s case(AIR 1977 SC 1944) the Supreme Court broadened the scope of S.14(1) of the Hindu Succession Act in a woman empowering way. But recently a great opportunity was lost when the Supreme Court in Omprakash v. Radhakrishnan (2009 15 SCC p.66) preferred to interpret S.15 of the same Act textually. Economic empowerment, which includes right to property, will strengthen her voice. In a judgment, the homemaker’s work was economically assessed by the Madras High Court. After that some Tamil magazines, interviewed women and asked their views. They said, “Now I know I have a worth.” It was not as if, by the judgment the women got paid for the 24x7 work that they do, just the knowledge that the work had an economic worth gave a fillip to their self-esteem. Recently there was a news item, to enact a comprehensive stand-alone legislation regarding marital property which is equal and equitable.

In “Deconstructing equality versus difference”, Joan W. Scott, writes, “The history of women needs to be retold... as part of the story of the creation of a gendered work force....certain conceptualizations of male skill rested on a contrast with female labour (by definition unskilled.)” Professional spaces are also male, and the doors which open career advancement like networking, reinforce the barriers. And sexual harassment at work is only one of the barriers. This has long existed but has been given a name only after Vishaka (AIR 1997 Sc 3011). These spaces can become equal only if they become more inclusive and consciously factor in the reality of women’s lives. For example while handling the family-work balance women do face a time crunch. Recently a friend suggested that considering that women lose valuable years bearing children and nurturing them in the early years, their retirement should be deferred. This was a man; I must inform you in all fairness. His suggestion may not be workable, and if enacted as law may even be successfully challenged. But it indicated a registering of the woman’s reality. In the Prosecutor v. Jean Paul Akayesu, the International Tribunal held that, rape is a form of aggression the central elements of which cannot be captured in a mechanical description of objects and body parts, it noted” the cultural sensitivities involved in public discussion of intimate matters and recalled the painful reluctance and inability of witnesses to disclose graphic anatomical details of the sexual violence they endured.” It was intended to reconstitute law’s perception of women’s experience of sexual violence. It is another example of registering the woman’s reality.

It is in this world that the State and other institutions, take shape and therefore they are congenitally discriminatory, if you may call it that. So even law and justice can only be integration into this predominantly male world. One reason for this implicit masculinity is the fact that the person before the

law is constructed as a person without gender, race, religion, or class totally detached from the ground reality. But this is not true, and therefore this formal equality construct of such a person itself is unacceptable. Though the persons in power earnestly intend to uphold equality, they cannot help reflecting their own shared life experiences. And this life experience, speaks in a male voice, because the world we live in, systemically supports or facilitates if you will, male supremacy. This systemic bias shades the thought processes that lie behind the laws too and the courts merely apply laws in their judgments.

This is why Prof. Sathe warned that it is not enough if Courts act according to law, they must be just. When I speak of Justice I must tell you that in a Grotto in Italy it seems there are sculptures of the Seven Deadly Sins and The Seven Virtues. It seems the centre figure of the Virtues is Justice shown as a Woman with Strength on one hand and Compassion on the other. The judgment of the Dalit woman is touched with compassion and understanding of those who stand behind the closed doors. By the way just opposite Justice is Injustice the centre figure among the Vices. Injustice is depicted as a man, and the scene of injustice is a woman being violated by a man.

It is truly said that men do not lose control and get violent, they control through violence. This exercise of power results in and affirms inequality. It is this which maintains the vulnerability of women to her disadvantage. I referred to physical, social and economic vulnerability, being gendered in its nature, now I must add religious vulnerability too. If there is any discriminatory practice in any religion or in any personal law it is always against the woman. This is a sweeping statement and such statements are most prone to be attacked, but I am sure this is correct. In fact recently when I was in Bhopal at the NJA we were discussing how intrepid Mary Roy must have been to raise a

voice against the personal law. Mary Roy successfully challenged the discriminatory provisions of the Travancore Christian Succession Act (AIR 1986 SC 1011) the barriers of tradition and culture are the hardest to break.

And at every level the culture is an unequal one. Culture is one of the poorly defined and poorly understood words in the English language. When you say she was a woman of culture you mean it as a compliment. But when you want to criticise some practise you may derisively say that is their culture. Here the connotation is entirely different. The structure of culture is not monolithic, I am a woman, I am an Indian, I am Tamil, I belong to a particular community, I am an urban product , so I have all these cultures affecting me negatively or positively. It would be incorrect to say that my culture is static and one-sided. It is not easily definable, but it is basic to the human rights constituent. It can be used positively to mobilise people in their struggle for human rights or abused by power groups.

But whatever may be the components of our culture when I say 'our' I mean each one of us, it is infused with the deep-rooted belief that the family is a safe haven and the woman is the site on which the sanctity of this haven is built and protected. It is this tradition, this thinking that is so embedded in us, that even when we occupy seats of power which should protect equality, we feel, we must instead protect the integrity of the home. This manifests itself in silence or abetment or collaboration in violation of the rights of women. Women cannot question, they must accept.

There is much to be learnt, and can be learnt, but only if we empty our minds of the unwisdom that chokes them. In a training programme for judges that I had co-ordinated, we had invited litigants to share their experiences. The wife who went to the Family Court said, "The judge did not even look at me

when I explained the need for early hearing, he just looked down and a date was given. Even if he had looked at me and explained why my petition cannot be heard early I would not have minded. He did not even hear me or look at me.” This means only one thing, that she wants to be treated as a person, as a person with rights. Very often the woman feels that the denial is because she is a woman. She is often right.

A study of federal judges appointed during the Presidency of President Jimmy Carter, showed that the judge who was male when asked what his greatest problems were, as a man, lawyer/judge, answered that he had none as a man, many as a lawyer. But 81% of the women judges said they faced discrimination such as bias against women or a belief that women’s place is in the home. So the woman-ness itself is the disabling factor. This inherent devaluation and negative experience are factors we have to count in when we speak of access to justice and right to equality and dignity. Is the woman’s voice heard in a space of justice? How can we improve the audibility of her voice? When I was in class I or II, I remember that when the teacher asked us, “Who broke the scale or whatever?” a chorus of voices would be heard “Not me Miss!” I do not think children have changed from those distant times of my childhood, and sadly nor have adults. Any time one speaks of gender inequality, you often hear a defensive voice of denial and how wonderfully women are treated and it is actually the reverse dynamics. The consciousness of gender inequality, of the way the social arrangements give automatic advantages to the male or result in undeserved disadvantages to the female is a sine qua non of gender politics which is committed to removing the systemic discrimination which attends on the woman. It is by the sustained and increased stepping up of the awareness that one can make the woman’s voice heard.

In the manual prepared by the Indian Council for Child Welfare "Saving the Girl Child" it is said "Rigid customs and tradition make it difficult for an individual to even attempt to change the traditional practices. The fear of being alienated by the community is large" This is stated in the context of female infanticide, but it is equally applicable to all customs and practices. The traditional patriarchal structure which is ostensibly intended to protect women and the traditional spaces where women are deified or devified, actually curb the woman's freedom and mobility and deny them the control over themselves. In the guise of ensuring their safety, their self autonomy is wrested from them. She cannot protest against this trespass on her rights, because it is stated to be in her interest. So even a dignity-based response is muffled by repression, denial and manipulation and women are blamed for provoking the violence. And thus a culture of silence is perpetuated. The woman has no agency in the definition of tradition or culture, she is merely the site on which the battle was fought and whether she was called Helen or Sita, it hardly mattered. This is why we have honour killings and khap panchayats.

In an article written by Homa Khaleeli, "Afghan women fear for the future", (The Hindu 5th February 2011) while dealing with Afghan Women's rights, the writer observes that though, "their rights were the prominent part of the rhetoric of invasion, the treatment of women in the Taliban is increasingly being discussed as part of local culture" and that "there is a clear opinion that women's rights were (a) not that relevant and (b) irreconcilable with peace in Afghanistan." It is evident that it is so easy to brush away cruelty and violence to women as accepted practice and thus smother social conscience and the voice of human rights.

To defend her rights, a woman will have to shout aloud to be heard over the crisscrossing sounds of emotional ties, family honour, community approval and economic security. She is caught in a Catch 22 situation, and very often she cops out by being silent. All the institutions whether they are families, caste groups, communities, educational institutions, political structures, courts and the media are based on norms and values that are built on social hierarchy where the woman is on a lower rung of the ladder.

This gender inequality hits women and ultimately it retards development. The Millennium Development Goals cites gender equality as one of the targets to attack global poverty. Amartya Sen has said that to achieve development and improving governance, nothing is more important than the economic, political and social participation of women. If a country invests in improving the condition of women, the returns will be good governance, economic stability, improved law and order, and above all a robust democracy. In her article "The Pay off from Women's Rights", Isabel Coleman writes that, "Lawrence Summers, when he was chief Economist at the World Bank, concluded that girls education may be the investment that yields the highest return in the developing world". Giving women more control over resources and enabling her economically will accelerate reaching the equality goal. Human rights are by their nature anti-majoritarian, and the equality rights of women which are human rights, are anti-majoritarian too because the male share in the social, economic and political power pie is much larger than the woman's. So the share in the pie will have to be reworked and redistributed equally.

In her "Aspirations of Law", Naina Kapur writes that only equality law embraces truth, and "A true aspiration of human rights calls for designing

(sometimes redesigning) processes so that they are compassionate and enabling. Systems which enter daily life and prevent harm occurring in the first place.” In The Naz Foundation case, the Court wrote that the underlying theme of our Constitution is inclusiveness which alone can assure to all, a life of dignity and non-discrimination and that “This was the Spirit behind the resolution of which Nehru spoke so passionately.” I think Dignity is the key word. We have also conveniently forgotten the Constitutional promise of Fraternity. This is the recognition of another human being as an associate, as a kindred being, however different he or she may be. None of us can be separate from the whole, each one of us is part of the whole, and diminishment or degradation of one, affects the whole. Yes, I know John Donne said it more beautifully and he also warned us what will happen if we forget that no man is an island,” Ask not for whom the bell tolls, it tolls for thee.” In a case the Madras High Court, found that some hundred and odd persons were rounded up by the police and sent to an institute of mental health. They had no mental health problems, they were only poor and wandering and because the streets must look clean, the unclean ones got moved away. Their offence was they were poor and homeless and therefore voiceless. The State, the police and the Magistrate had failed in upholding their Constitutional rights. Inclusiveness alone will ensure that the poor, the old, the sick, the women, the oppressed, the prisoners, the trans-genders and all the other different ones live with dignity.

How do we ensure that this promise of equality becomes real for all? We can do it “By walking the mile in another person’s shoes” to quote Justice Claire L’Heureux -Dube of Canada. Otherwise it is hard to understand the nuances of the woman’s feelings or how diminished she feels. A woman is charged with wrecking the marriage because she complains of violence. The truth is the

marriage broke when the hand was lifted the first time. Marriage must be a partnership of equals not a space where power is played. In *The State v. Godfree Baloyi*, Justice Albie Sachs of South Africa said, “in practice the concept of autonomy has been used to protect the abusive husband from the actions of the State, but not the abused wife from the actions of the husband.” In *State of Punjab v Gurmit Singh* case, the trial court actually disbelieved the complainant’s version and drew conclusions for which there was no support on facts or evidence and which were gender unfriendly. The Hon’ble Supreme Court criticised this attitude severely. These cases explain to us what the woman faces when she ventures to speak. When Justice Sachs came to our High Court, I was a lawyer then, he told me as I was taking him around that the structures are so imposing but forbidding. If a judge of the highest court of his country felt this way, the less said about the ordinary woman the better. That is why a woman does not readily seek justice. Unless the atmosphere is one, which acknowledges her reality and her right to equality, she will not do so with faith.

Now I will share some cases decided by the Madras High Court relating to women which I think shows the change in the voice of the women in their journey towards equality. As early as 1936, the Madras High Court (1936 Madras Weekly Notes P.171 {*Emperor v. Subbiah Gownder*}) held that domestic violence is not acceptable and said with wry humour that wife-beating was not one of the General Exceptions in the Penal Code. There was a case where a mother killed her children (1989 LW {Criminal} P.86 [*Suyambukkani v. State of Tamilnadu*]) but failed in the attempt to kill herself. The Court took note of the reality of marital cruelty, her abject poverty and the hopelessness of her life and evolved the concept of Sustained provocation and imposed a lesser punishment. In a case where the father of a minor wanted to

terminate her pregnancy against her will (1994 Writ Law Reporter 1991[V.Krishnan v.G.Rajan @ Madipu Rajan]), the Court upheld her right and dealt with the right to privacy and the right of inviolability of one's person. The Courts have tried to be just, and not to merely uphold the law. These are examples, where the courts had walked the mile in another person's shoes that is women's shoes. I will tell you about two other cases where the Court did walk the extra mile, but the woman too actively championed her change. One is the case that I referred to in the beginning of my speech. Pothumalli, the Dalit anganwadi worker is one woman who knew that she has a right to occupy public space. Her voice is really a voice of courage, because she is not only a woman but also a Dalit, and hence doubly discriminated. Women have become or becoming agents of change.

There is another judgement reported in 2008 3 TNLJ 640 (Pinniyakkal vs. District Collector and ors.). This is special because when I began I spoke of how culture and tradition shackled the women's voice and religious vulnerability is also gendered in its nature. Here the petitioner asserted that she had the right to be the pujari in the temple after her father, and the fact that she was a woman can make no difference. The High Court protected her right and observed that "The altars of the God must be made free from gender bias. Only then the constitutional mandate under Article 15 and 51 (A) (e) will become a reality." If Pinniyakkal had not asked for justice, the Court could not have upheld her right. Here I must mention that both the cases of Pothumalli and Pinniyakkal were decided by Justice K. Chandru. May be there is a moral here, when men listen to the woman's voice with greater empathy and understanding and awareness, the dissonances of discrimination will die down.

Nora in Ibsen's "A Doll House" replies to her husband, that she does not believe that first and foremost she is a wife and mother. She says, "I believe that first and foremost I am an individual just as much as you are." If this belief in the woman as an individual is nurtured and encouraged, young women will not go missing. And law must be redefined and restructured to reflect the needs of women and values of equality. The change must come by change of law and the change in society and women, whose life experiences need to be registered to reach this goal, must be the ones who seek the change.

Thank you.