Feminist Legal Engagements towards a Transformative Justice

Abstract

Menon’s foundational book ‘Recovering Subversion, Feminist Politics Beyond the Law’ (2004) presents a critical feminist postcolonial contribution to deconstruct the concept of universal rights and law as a tool of constructing and safeguarding the autonomous individual legal subject within a constructed public and private legal framework; to ask whether feminist legal engagements can be transformative? This question has become critical in relation to Menon’s recent silencing of women’s voices in ‘The List’ on the basis of not engaging with the long-term feminist struggle for ‘due process’, yet seemingly contradicting her own commitment to ‘think creatively about new forms of political engagement that are located in realms we have not seriously engaged with’ (p.239). This chapter maps how Menon’s book has informed my ‘transformative methodology’ (Krishnadas, 2008), to centre and listen to women’s experience, and to dismantle the processes and systems which marginalise and erode women’s voices. This methodology challenges and reconstructs conceptions of agency, capacity and location of the rights bearer within the plurality of legal systems, beyond ‘due process’, to highlight what may be understood as the most invaluable tool in feminist critical theory; to listen to the plurality of women’s voices to create new agencies, capacity and spaces to transform justice.

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Nivedita Menon is a leading Indian feminist political scholar having taught political theory for the last three decades, from Lady Shri Ram Collage, the Political Science Department of Delhi University, to her current position as a Professor at Jawaharlal Nehru University, teaching at the Centre for Politics and Political Theory at the International Studies School.

Menon has authored a series of books which examine the relationship of law, the state and feminist politics, for which the book ‘Recovering Subversion, Feminist Politics and the Law’ (2004), makes a critical contribution to understanding whether law can be transformative? This is a question she has pursued in her writings and in her every day teaching and activism, and has informed my long-term critical engagement with feminist legal strategies, to work towards a ‘Transformative Justice’ (Krishnadas, 2019).

Nivedita is renowned for her ongoing challenge to the patriarchal and postcolonial political hierarchies both within academia and the wider society. In an interview entitled ‘The Instigator’, Neha Dixit, created a ‘Portrait of Nivedita Menon’ which addressed the accusation by the Hindu Right that Menon had made ‘ anti-national remarks’, in an edited recording of a lecture she delivered on campus which was circulated in social media. In response to the police complaint led by a student member of the right wing party, and a series of threats against her, fellow academics and students created the ‘I Stand with Nivedita Menon’ campaign, where students expressed their gratitude for her ‘instilling within them a lifetime of critical thinking’ (Dixit, 2016).

Yet controversially in 2017, Nivedita Menon author of the book ‘Seeing Like a Feminist’ (2012), exposed her potential blindness to the demands of female students who had called out male academics for sexual harassment via the online publication of ‘The List of Sexual Harrassment Accused’ (LOSHA) on social media. Raya Sarkar circulated this list of alleged male sexual harassers in leading progressive Universities, based upon confidential allegations made by female students who did not have trust in the formal University complaint process. In, as Menon phrased ‘the tradition of debates in feminist politics in India’ (2019), 12 of us issued a brief statement stating:

As feminists, we have been part of a long struggle to make visible sexual harassment at the workplace, and have worked with the movement to put in place systems of transparent and just procedures of accountability. We are dismayed by the initiative on Facebook, in which men are being listed and named as sexual harassers with no context or explanation” (The Statement, 2017)

Menon appealed to the students stating The List would jeopardise the longterm feminist struggle against sexual harassment, and that the circulation of a list with no accountability, information or content seemed to endanger the gains of decades of feminist politics that have succeeded in defining what sexual harassment constitutes and building a climate in which young women can speak up without fear’ (2018). Yet Meghana writes, “in this context, it seems that the likes of Menon and Kidwai have forgotten the consequences of lodging a complaint. The “due process” of the intra-university/state mechanisms in no way protects an accuser’s identity. That anonymity is maintained only such that a stranger across the world may not easily know who the accuser is, but within the institution, this is freely known” (2017). Meghana sets out that Menon’s “repeated use of the words “finger-tip activists” as the first offence; “ Does our decision to use new forms somehow make us less “authentic” as activists? To demand that the victim speaks up is in itself an act of aggression” (2017).

The rationale of silencing voices on the grounds that they are not being able to speak within institutional structures is deeply concerning and in many ways contradicts Menon’s own postcolonial feminist critique. The proposed leading work: “Recovering Subversion, Feminist Politics and the Law’ ‘urges the serious consideration… That at this historical moment law has limited capacity to pursue justice’ (2004, 204). Yet in her response to the author of the list, Menon turns the discourse to distinguish ‘due process’ from the law, drawing upon the backdrop of the “atmosphere in which Indian courts are increasingly referring to ‘false’ complaints of domestic violence, and ‘misuse’ of rape laws, it is incumbent upon feminists to establish to the extent possible, *context and explanation* around our claims of sexual harassment” (2017 b). Menon’s appeal to withdraw the list and work towards justice using ‘due process’ in which ‘we said the larger feminist community would back them’ (2019), is a reminder of Gayatri Spivak’s critical feminist postcolonial question ‘Can the subaltern speak?’ (1988).

Menon’s founding work ‘Recovering Subversion, Feminist Politics and Law’, (2004) challenges “The experience of feminist politics in the arena of law as not only raises questions about the capacity of the law to act as a transformative instrument but more fundamentally, points to the possibility that functioning in a manner compatible with legal discourse can radically refract from the ethical and emancipatory impulse of feminism itself” (2004, p.3). It is at this point that I retrace my own engagement with feminist legal engagements over the last 25 years and question how can Menon’s argument be reconciled with silencing women’s experiences of sexual violence, and stifling new methods of resistance and subversion, which Menon herself returns to in her recent chapter citing “ Is the goal of subverting, escaping, exceeding this State framework on our agenda at all?” (2019).

**Rights and the Constitutional Paradox.**

Menon’s foundational book “Recovering Subversion, Feminist Politics and the Law’, has been an anchor to the philosophical and ideological contradictions in the women’s movement experienced through the postcolonial complexities of gender, citizenship and rights to dismantle our constructions of law and social justice today. Menon presents the dilemma of rights and constitutionalism, in which she presents rights as a multi value system as compared to the constitution which prioritises the safeguarding and uniform definition of the autonomy of the individual self, which directly excludes the ‘other’. This is particularly evidenced in the way law, as a constitutional tool, defines the binaries of right, wrong, public and private, male female. Through an analysis of sexual violence, abortion and the political representation of women, Menon draws upon an array of feminist literature which questions whether women should engage with law, based on the findings that; law actively discriminates against women, law is interpreted in patriarchal ways, equality does not take into consideration the social and economic hierarchies of men and women, and the law benchmark is male, which does not consider women’s subjective experience of oppression (2004, p.4).

In light of the recent erosion of women’s voices to present ‘The List’, I consider the contradictions and tensions within the women’s movement, to inform and challenge the argument presented in Menon’s recent justifications for silencing what may be understood as the most invaluable tool in feminist critical theory; to centre and listen to women’s experience, and to dismantle the processes and systems which marginalise and erode women’s voices.

Over the last 25 years, Menon’s writing and activism has deeply informed my critical engagement with rights strategies. From my four years of field work with women’s groups, living in the temporary shelters of the post-earthquake rehabilitation villages in Latur, Maharshatra India , to engaging with the ‘Gender Just Laws’ Personal Law and the Uniform Civil Code debate, to inform my long-term research pursuit of the question; ‘From east to west, can feminist legal strategies be transformative? Post-disaster to everyday times of crisis’ (2019).

The very title ‘Recovering Subversion, Feminist Politics Beyond the Law’, identifies the text as going beyond current debates on politics and law, with a bold intent to ‘Recover Subversion’. Menon strategically sets out the context for her book in her Preface and Acknowledgements, which trace the drawing together of previous work which has been tried and tested in a range of Indian and internationally published articles and chapters in Edited Collections. The Acknowledgments for this book are attributed to her friends, from the humble search for office space sought in the early PhD stages in the 1990’s to the later years of a wide range of international fellowships in Paris, London, Chicago, Michigan and Delhi, indications of privilege within the academic field. The cosmopolitanism of research locations is enhanced by the references to ‘legendary’ academics such as Etienne Balibar for whom she recollects in awe, made passing references to ‘I told Foucault’ (x), carefully balanced with reference to activists, students, reading groups, intellectual debates, movements and family. This context anchors and legitimises the leap that Menon takes in challenging ‘ the paradox of constitutionalism’- the tension in which the need to assert differing moral visions comes up against the universalising drive of constitutionality- the language of universal rights.

The postcolonial critique of rights had been developed in the 1990’s through the work of Subaltern Studies volumes, edited by Upendra Baxi and Partha Chatterjee, which initiated a deconstruction of Derrida, Foucault, Habermas, and Marx. Menon progresses this debate through her engagement with critical feminist perspectives on rights, from the western based tradition of Carol Smart, Nancy Fraser, Gayatri Spivak, Ratna Kapur to the Indian field based activist writers Flavia Agnes, Meena Dhanda, Kalpagam, Uma Bharati and Kunkum Sangari amidst many more. I have engaged with each of these scholars within my PhD on the Role of Rights in Reconstructing Gender Relations’ (2004), which deconstructs the traditional rights discourses of recognition and redistribution towards an intersectional approach, which I have set out in a series of articles ; i) ‘From Recognition to Reflection’, reconstructing the hierarchies in political representation, (Krishnadas, 2007a) ii) ‘From Redistribution to Revaluation’, revaluing women’s reproductive and productive capacities (Krishnadas, 2007b) and iii) ‘Relocating the Master’s Domain’, dismantling the location of violence within the public and private legal sphere (Krishnadas, 2007c). It is through this deconstructive process that I have actively sought to reconstruct the rights regime, through a transformative methodology (Krishnadas, 2008), i) reflecting women’s voices ii) revaluing women’s resources and iii) relocating violence from the public/ private divide. It is through a sustained critical engagement with this critique, combined with an active research application in local contexts that I have applied this ‘Transformative Methodology’ (2008) for reclaiming rights over the last decade to create the Community Legal Outreach Collaboration Keele (CLOCK) initiative as an active public, private and third sector transformative mechanism for access to justice (clock.uk.net), ‘CLOCK A Transformative Methodology(2018) .

**Can Feminist Legal Strategies be Transformative?**

I first came read Nivedita Menon’s work, alongside Kishwar, and Kalpagam, in the dusty copies of the Economic and Political Weekly which had been stacked in the make shift of the office of the Beaucamp Kriti Samiti (Earthquake Relief Committee), of the public interest litigant S.Krishnadas, who had filed a case against the Government of Maharashta for failing to implement the Maharasthra Emergency Earthquake Rehabilitation policy. I had visited the office, from our charitable relief camp, where I had lived for four years, working with women’s groups in the rehabilitation and reconstruction of their lives, livelihoods and homes. Over those four years I had worked with 7 women’s groups, in 7 villages, for 7 days of the week. From the initial charitable response to women’s need during the six months emergency relief phase, we began to discuss women’s rights, particularly as the living conditions in the relief shelters were so crowded, and the social and economic tensions rose, with an increase in domestic violence. From a series of grass root workshop activities, we developed ‘women’s rights’ initiatives of awareness raising, legal fayres, village dispute resolutions and private law proceedings in the local courts. As time went on people’s needs for housing, sanitation and basic needs magnified, and we became aware of a public interest litigation case filed by S.Krishnadas (1994) against the State Government of Maharashtra under Article 14 and 21 of the Constitution, for the right to equality and the right to life. I was invited to observe the proceedings, and witnessed villagers directly questioning the Chief Minister of Maharahstra regarding their entitlements in the Maharashtra Earthquake Emergency Relief and Rehabilitation Plan. The delays and obstructions to meeting the judicial directions were met through the Earthquake Relief Committee’s continued protest alongside the case, of hunger strikes, road blockades and initiating a judicial inquiry of the earthquake process, which secured an order to reconstruct 4,000 houses and provide basic amenities, a seemingly success of legal strategies to secure Constitutional rights.

It was later, having left the earthquake area and moved to Kerala, to stay with my newly found joint family, to support my delivery of our first daughter, that I began to read Nivedita Menon’s ‘State Gender Community Citizenship in India, (1998). The article provided a critical perspective to reflect upon the rights based, legal and social movement strategies, which I had engaged with in Latur, specifically from the perspective of the women’s groups, and how their participation and voices in the struggles were impacted by their religious and caste identities. From the perspective of being a white, British citizen, female graduate with no responsibilities other than which I chose to taken on within the Maharashtra villages, to becoming a wife, a ‘person of Indian origin’ and member of a joint family in Kerala where my daughter was born in a shared labour room of only women in the village hospital- that my reading of Nivedita Menon critique of the modernising project of law through the construction of the individualised and autonomous subject, stood in stark contrast to my experience as a woman in terms of the interdependency, cultural and relational experience of motherhood and my identification with the women’s movement, which was to inform my PhD research and longterm commitment to developing feminist legal strategies.

Menons’ book ‘Recovering Subversion, Feminist Politics Beyond the Law’, (published the same year as my PhD), presented a series of significant arguments and contributions to feminist political and legal theory. Menon’s core argument, building upon her earlier work, is the post colonial critique of constitutionalism, as a method of ‘safeguarding the autonomy of the individual self’ (p.1). The key critique lies in the homogenising process of individualisation, specifically of the legal subject, which ‘renders invisible women’s subjective experience of oppression’ (p.4). Menon’s post-colonial critique of the construction of citizenship and the subject of the state, progresses western liberal feminist critiques of the neutral subject of the state as an autonomous male subject. This ‘invisibility’ provides a vacuum for the appropriation of the subject ‘woman’, which has traditionally and to date been argued as coopted by hierarchies of religion, caste, and sexuality, to marginalise and exclude ‘other’ identities.

Drawing upon my experience of working with women’s groups in the 7 villages, I was able to apply Menon’s critique to trace how identities were constructed through the state intervention of the MEERP, which prioritised the representation of the higher caste Hindu women, and marginalised the Muslim, low caste Dalit and tribal women from the rehabilitation and reconstruction discourse. Returning to Menon’s deconstruction of the western male philosophical discourses of Habermas, and applying the feminist critique from Fraser, Benhabib, and subaltern perspectives of Spivak, I have been able to progress and challenge the discourse of recognition as a hierarchical process, which was able to erode women’s participation from the process. Rather I proposed a method of reflection where women may return the gaze by occupying seats in the local political spheres, whether it may be the Mahila Mandal (Women’s Group committees), the Village Panchyat, or the State level committees; (Krishnadas, 2007a).

Menon’s second critical strand is in relation to the discourses on resources, and related materialist feminist approaches, which in the consideration of gender difference demand attention to class identities. Menon draws upon the materialist feminist approaches, Mitchell, Barrat, Hartstock, Nicholson, to explore how resources are allocated in the public and private sphere through the construction of productive and reproductive labour, the valuation of wages, and the devaluation of care-giving. Menon draws upon Indian scholarship to challenge this construction as man-made, as the ‘public’ is only able to exist in relation to the preserved ‘private’ space as the domestic sphere as Gayatri Spivak argues that the private is ‘actually the texture of public activity (2004,11). This informed my research on how women’s reproductive and productive labour were devalued within the earthquake reconstruction process, to develop a strategy of how their labour may be revalued, (Krishadas, 2007b).

Finally Menon revisits the liberal feminist critique of the public and private sphere, which questions the legitimate extent of the authority of the law and ‘enabled the private, domestic sphere to be ‘excluded from the values of justice and equality’. In the book Menon presents a specific analysis of the ‘Body and Law’ through the exploration of the abortion question in feminist politics, the construction of sexual violence in law, and the representation of women in politics, to see how the body is constructed as a public or private matter and whether feminist engagements over law reform can be transformative. It is in these chapters of analysis which the postcolonial experience presents a critical challenges to Eurocentric feminist rights discourses, with particular focus upon the dilemma of the right to privacy.

The chapter ‘Abortion: When Pro-choice is Anti-Women’, presents the paradoxical position that Indian feminists have found themselves to ‘demand curbs on access to abortion in the face of rising instances of selective abortion of female foetuses’ (2004, p.66). It is here that Menon challenges the feminist legal strategy to demand the ‘right to privacy’, in relation to the concern that the State has abdicated its responsibility for women’s bodies and the protection of the female foetus. The feminist legal discourse of individual ‘choice’ is clearly limited as the right to life is critically limited by factors of livelihood. Hence Menon reflects upon the wider concept of justice, as beyond the individual autonomous self, but interdependent upon the economic, social and cultural factors.

Menon’s chapter ‘Sexual Violence: Escaping the Body’, further challenges conceptions of how law constructs the female body and sex, to ‘reenact and resediment dominant patriarchal and misogynist values’ (2004, p.107). Menon draws upon Indian feminist research which exposes how the offence of rape has been used to regulate women’s sexuality in a protective and punitive manner, based upon ‘values’ of virginity and chastity, where the law defines rape to address the ‘harm’ caused to a family or community, rather than understanding women’s experiences. This provides a critical discourse which questions the ‘success’ of the feminist movement in achieving significant law reforms through sexual offences legislation, to question why the reporting and conviction rate remains low, for which Menon draws upon Agnes’ caution of how increased legislation reinforces State power, and calls for a ‘totally different concept of justice’ (2004, 120) .This has particularly impacted my understanding of how law constructs, protects and regulates the public and private sphere, (Krishnadas, 2007c) and particularly Menon’s definition of the private sphere as a ‘judicial void’, which has continued to inform the development of CLOCK as intersecting the public and private legal framework.

Throughout Menon’s discourse of women’s body, through feminist legal strategies for abortion and sexual violence- there is a question with regard to the homogeneity of ‘woman’, drawn out in her third chapter ‘Reservations for Women: ‘Am I that Name’? It is in this chapter that the tension throughout the book and wider work is exposed, in relation to how women’s bodies are constructed through the ongoing post colonial and patriarchal cultural, economic and social frameworks of caste and religion, which continue to demarcate, divide and extend the hierarchies in the women’s movement to date.

Together the chapters create a wider question regarding the constructions of feminist concepts of choice, consent, will and representation, within a wider theoretical framework of the construction of agency, capacity and location within the public and private sphere. Through the application of Menon’s post colonial deconstruction of these concepts, provides a starting point to reconstruct within an intersectional framework, creating the economic, social and cultural context to unravel the hierarchies and rebuild through centring and listening to women’s experiences, reflecting women’s voices, revaluing resources and relocating frameworks of justice.

**Transforming Justice**

Menon traces the move within feminist critical perspectives from the reliance upon the law as a liberal tool for equality and emancipation, towards a critical understanding of law as a tool of colonialism which is actively discriminatory towards women, through the patriarchal interpretation and application of law which renders invisible women’s subjective experience of oppresssion, divides the public and private legal framework and colonises women’s bodies within. Legal campaign strategies in India have found that campaigning for change within the law is not enough and can only provide legitimacy or public awareness, and that constant recourse to law to create legislation, can lead to increasing state control and the state’s recognition or erosion of ‘legitimate’ claims, which she traces through the legislative reform for sexual violence, where every recourse to law can lead to the patriarchal interpretation and definition of terms by fixing meaning of gender, creating uniform categories and decontextualizing experience to become sterile with ‘rigid codification’, locating legal issues within a distinct public and private sphere.

The legacy of Menon’s work ‘Recovering Subversion, Feminist Politics Beyond the Law’, is to understand the limits of rights discourse in relation to the relation to the state, and law, for which in Menon’s recent work (2019) she states:

“Our political task, then, is to step away from seeking state-led transformations and to enter into the more continuous everyday practice of hegemonizing common-sense meanings around contested notions, so that ‘our’ subversive understanding becomes the common sense. Of course we continue, whether we like it or not, to be situated in the terrain defined by the state, and we are compelled to respond to the various ways in which our subjectivities and our lives as ‘citizens’ are defined by it. So I do not suggest that we abdicate the state, for the state will not abdicate us. However, our political practice cannot remain limited to the terms set by this framework and lies in the question : Is the goal of subverting, escaping, exceeding this framework on our agenda at all?” (2019)

It is this legacy which has informed, drives and questions my development of the CLOCK intiative as critical response to develop a collaboration of legal actors across the public, private and third sector sphere. The initiative has been developed as a critical response and challenge to LASPO, (2013), which significantly withdrew legal aid from the scope of family and welfare law. The development of CLOCK has been a careful negotiation of how to assist vulnerable persons access justice whilst holding the state accountable and creating evidence based interventions for the reform of legal aid. The innovation has been to focus upon listening to the person who is seeking access to justice to understand how justice is perceived, and offering pathways beyond the formal processes of law to be able to engage with a range of legal and charitable services offering counselling, mediation and social and economic support, as alternatives or alongside the legal process towards a more holistic concept of justice. The increasing requests for assistance, not only directly from the community, but from the number of referrals from public services, such as the Court, Police, Local Authority Children’s Service, Schools and GP services, the private sector law firms and the third sector charitable Sexual and domestic violence services, highlights the layers, intersections and blurred boundaries of state actors with private and charitable services, and the need for grass root community engagements to create and negotiate alternative and transformative pathways through a multi-dimensional justice system.

Whilst Menon’s work clearly advocates stepping away from state-led transformations, our grass root engagement and collaboration with state, private and third sector services, creates a mechanism to directly engage with each ‘rights bearer’ and listen to their experience, needs, and perceptions of justice. It is through an intersectional and multi-agency approach we may provide support to create agency, enhance capacity across the public and private sphere. This process presents a dialectical approach to justice, to engage, monitor and reform State led services from within, and demand that the State is accountable and responsive to community legal needs (Krishnadas and Taha, 2020).

It is at this point important to return to Raya Sarkar’s publication of ‘The List’, to review it as a progressive and subversive step to call out not only the alleged perpetrators of sexual violence, but as precisely the method that Menon advocates to ‘ subverting, escaping, exceeding this framework’ to ultimately to call out the limitations in aligning with ‘due process’, without the critical transformation of the institutions and the processes within, and ultimately as Menon herself called for ‘to think creatively about new forms of political engagement that are located in realms that we have not seriously engaged with’ (2004, p.239).

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