



INTERNATIONAL JOURNAL OF ADVANCE RESEARCH, IDEAS AND INNOVATIONS IN TECHNOLOGY

ISSN: 2454-132X

Impact Factor: 6.078

(Volume 7, Issue 3 - V7I3-1574)

Available online at: <https://www.ijariit.com>

Interaction of Law and Gender in India: A jurisprudential analysis from Feminist Perspective

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ABSTRACT

Feminists' efforts in the last decade have led to the passing of much legislation including the laws on: abortion, rape, maternity benefits, equal remuneration, sexual harassment, domestic violence. In context of India, laws prohibiting sati, child marriage, dowry, right to property and other have been passed. Despite these legislations, socio-economic status of women has shown little improvement resulting from a gap between women's formal legal rights and their continuing substantive inequality. The assumption working here is that either law is an instrument of change or that of oppression

Keywords— Law, Gender, Woman, Feminism, Criminal Law

1. INTRODUCTION

“It is therefore important for feminism to sustain its challenge to the power of law to define women in law’s terms. Feminism has the power to challenge subjectively and to alter women’s consciousness. It also has the means to expose how law operates in all its most detailed mechanisms, whilst it is important that feminism should recognize the power that law can exercise, it is axiomatic that feminists do not regard themselves as powerless.” (Carol Smart, *Feminism and the Power of Law*).

Feminists’ efforts in the last decade have led to the passing of much legislation including the laws on: abortion, rape, maternity benefits, equal remuneration, sexual harassment, domestic violence. In context of India, laws prohibiting sati, child marriage, dowry, right to property and other have been passed. Despite these legislations, socio-economic status of women has shown little improvement resulting from a gap between women’s formal legal rights and their continuing substantive inequality. The assumption working here is that either law is an instrument of change or that of oppression. Law always works as a double-edged sword. Law is the accuser and accused, the wrong and the remedy.[1]

Feminist Jurisprudence: Understanding Feminist Legal Theories

The term “feminist jurisprudence” disturbs people. That is not surprising, given patriarchy’s convenient habit of labeling as unreliable any approach that admits to be interested, and particularly given the historic a priori invalidation of women’s experience. That longstanding invalidation also causes women, including feminist women, to be reluctant to make any claims beyond the formal reach of liberalism.[2] But despite this invalidation and non-acceptance, feminist scholars have voiced their opinions and brought forward the experiences of many other. Feminist theorists have made valuable contributions to law by adding a female perspective to legal discussions. As Patricia A. Cain (*Feminism and the Limits of Equality*) has written that ‘our contributions are especially valuable, not because we speak from a female perspective, but because we speak from a previously silenced perspective’. She further writes that feminist method is about being in the world in a way that embraces both our separateness and our connectedness with others. “We need to build feminist legal theories that support the telling of our individual truths, as well as the theories that protect the space we share with others as we construct our identities. I believe it is time to recapture from the patriarchy such principles as individual autonomy, privacy, free speech, intimacy and association (intimacy and association are values that need to be extended to protect those relationships that are essential to our constructions of self. These include same-sex couples as well as other relationships with non-biological families).” Ratna Kapur and Brenda Crossman (in *Subversive Sites, Feminist Engagements with Law in India*) have attempted to characterize the considerable literature on women and law that emerged in India in the 1980s in the three categories of: (a) protectionism; (b) equality; and (c) patriarchy.

Protectionism: The writers under this category have emphasized the need for law to protect women who are assumed to be naturally weaker than men. This protectionist approach simply accepts traditional and patriarchal discourses that construct women as weak, biologically inferior, modest, and so on. These and other so-called ‘feminine’ characteristics are perceived as natural, and thus, the appropriate starting place for legal regulation.

Equality: Under this approach the relationship between women and law is seen as one of promoting equality. This literature highlights both laws that continue to discriminate against women and successful challenges to such discriminatory laws. Writers under this approach have tended to emphasize problems in relation to the under-enforcement of existing legal provisions which govern women’s equality rights. This approach views law as a tool of social engineering

Patriarchy: This approach sees law as an instrument of patriarchal oppression. Kamla Bhasin in her pamphlet, *What is Patriarchy?* (1993) describes the meaning of the term patriarchy in simple words. The word patriarchy literally means the rule of the father or the patriarch and originally it was used to describe a specific type of male-dominated family- the large household of the patriarch which included women, junior men, children, slaves and domestic servants all under the rule of this dominant male. Now it is used more generally to refer to male domination, to the power relationships by which men dominate women, and to characterize a system whereby women are kept subordinate in a number of ways. But it is more than just a term: feminists use it like a concept, and like all other concepts it is a tool to help us understand our realities. Sylvia Walby in her book, *Theorising Patriarchy* calls it “a system of social structure and practices in which men dominate, oppress and exploit women”. Linked to this system is the ideology that men are superior to women, that women are and should be controlled by men and that women are part of men’s property. She further explains that men control the following areas of women’s lives in a patriarchal system:

- women’s productive or labour power[3]
- Women’s Reproductive power[4]
- Control over women’s sexuality [5]
- Property and other Economic [6]

Thus this approach sees law and legal system as patriarchal which favors men who are powerful and dominate over women. Systems of jurisprudence, the judiciary, judges and lawyers are, for the most part, patriarchal in their attitudes and in their interpretation of the law.

These three approaches inform almost all the feminist legal theories of the world. Due to their different approach towards women’s issues the various feminist thoughts are categorized under four schools, namely: liberal, radical, cultural and postmodern.

2. SCHOOLS OF FEMINIST THOUGHT

Liberal Feminism: Liberal feminism is rooted in the belief that women as well as men are rights-bearing, autonomous human beings. Rationality, individual choice, equal rights and equal opportunities are central concepts for liberal political theory. [7] It begins from the basic premises of liberal theory: individualism and equality. Accordingly, the focus of liberal feminism has been on woman as individuals-in particularly, the extent to which women have been denied the status of individuals, and denied the liberal goal of equality. [8] Liberal feminism building on these concepts, argues that women are just as rational as men and that women should have equal opportunity with men to exercise their right to make rational, self –interested choices. Law is not the answer for equality unless the reasoning behind giving rights to women is based on respecting women as women and not based on a male perspective of a technical formal equality which requires women to fair on the male standards, to be ‘similarly situated’ as men. In *Reed V. Reed* [9], the first equal protection case decided favorably in the Supreme Court of US for women, the Court held that the state of Idaho could not presumptively deny to women the right to administer estates. With respect to such activities, the court saw that women and men are “similarly situated”. That is no demonstrable difference between the sexes justified treating them differently. [10] The legal thought was based on abstract universality in which maleness was the norm of what is human.

Radical Feminism: Radical feminism attempts to provide a more structural analysis of women’s oppression, based on the concept of patriarchy. As Supriya Akrekar succinctly describes ‘the context of radical feminism is that gender inequalities are the outcome of an autonomous system of patriarchy and that gender inequalities are the primary form of social inequality. Boyd and Sheehy describe: this analysis locates women’s oppression in patriarchy, a systematic expression of male domination and control over women which permeates all social, political and economic institutions. The desire for supremacy, the psychological pleasure of power, and male fear of female sexual and reproductive capacity are identified as the motivating forces of patriarchy.[11]

Radical feminist perspectives of law tend to examine the ways in which it is informed by and serves to reinforce patriarchal social relationships. In *Bradwell v. Illinois* [12], where one MS. Bradwell sought a license to practice law, Justice Bradley observed, the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. “This is the law of the creator... I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities... in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions and callings shall be filled and discharged by men....decision and firmness which are presumed to pre- dominate in the sterner sex.” [13]

Cultural Feminism: Cultural feminists, like radical feminists, focus on woman’s differences from an. Cultural feminists, however, unlike their radical sisters, embrace woman’s difference. Carol Gilligan argues that women, because of their different life experiences, speak in a different voice from their male counterparts. She identifies the female voice with caring and relationships. Woman’s moral vision encompasses this different voice. Woman’s difference is good. They regard woman as nurturing, as valuing personal relationships, the attributes which are to be valued by men. [14]

Postmodern Feminism: Postmodernism rejects the concepts of objectivity and neutrality, insisting that knowledge is a product of perspective and thus always partial. Chris Weedon writes, 'post structuralism proposes a subjectivity which is precarious, contradictory and in process, constantly being reconstituted in discourse each time we think or speak.' Post structuralist feminism does not reduce women's oppression to singular or universal factors, but rather examines the multiple and shifting dimensions of women's oppression [15]. There is simply no such thing as the essential woman. There is no such thing as the woman's point of view. There is no single theory of equality that will work for the benefit of all women. Indeed there is no single change or goal that is in the best interest of all women. Postmodern feminist question earlier feminist attempt to redefine the category 'woman'. Any definition even one articulated by feminists, is limiting and serves to tie the individual to her identity as a woman. Angela Harris has argued that the meta-theories of gender constructed by Catharine MacKinnon and Robin West rely on a concept of woman that has been abstracted from experience of white women. To propound any single definition of woman is to tend towards essentialism. According to them woman is a fiction, a non-determinable identity. [16]

3. HOW DOES GENDER WORK IN LAW AND HOW DOES LAW WORK TO PRODUCE GENDER

Language matters. Law matters. Legal language matters. [17] Carol Smart in her 1992 argument explains how norms, cultures and social order construct the present gendered law. She explains this in three phases. The first 'law is sexist' phase proposes that the law is sexually biased. This sexism by no way is a surface problem. ".....that in differentiating between men and women, law actively disadvantaged women by allocating to them fewer material resources (for example in marriage and on divorce), or by judging them by different and inappropriate standards (for example as sexually promiscuous) or by denying them equal opportunities.....or by failing to recognize the harms done to women because the very harms advantaged men (for example prostitution and rape laws)". For example, the maintenance laws in India where the wife has to prove that she was a loyal, chaste and dutiful wife to get maintenance from her husband, the rape cases of black, poor or Muslim women where the court uses the argument that these women are promiscuous to reject their pleas.

The second 'law is male' is based on the empirical observations that most of the lawyers and lawmakers are 'male'. And "that the ideals of objectivity and neutrality which are celebrated in law are actually masculine values which have come to be taken as universal values" [18]. After discussing the first two phases Smart comes to the final argument that 'law is gendered' she lays emphasis on how law operates as a process of producing fixed gender identities rather than simply as the application of law to previously gendered subjects. [19]

This paper now seeks to analyze the various laws and statutes in force in the Indian legal system to examine the extent to which they appear to be gendered.

Equality: Formal and Substantive

Articles 14, 15 and 16 of the Indian Constitution guarantee equality. However, the general principle of equality has nowhere been defined in the Constitution. From gender perspective, there are two dominant approaches to equality- formal approach to equality and substantive approach to equality.

In the formal approach, equality is seen to require equal treatment. To treat likes alike and unlike unlike. Article 14 of the Indian Constitution exemplifies the formal approach. It guarantees equality before law and equal protection under the law. Article 14 is based on the doctrine of reasonable classification which implies that only those individuals who are similarly situated must be treated the same in law. Thus, equality does not require that all individuals be treated the same, but only those individuals who are the same. Equality is thus equated with sameness and sameness is the pre-requisite for equality. The formal approach to equality spills over into the judicial approaches to Article 15 and 16 of the Constitution. Article 15 prohibits discrimination on the grounds of religion, race, caste, sex and place of birth. Article 15(3) allows the state to make special provisions for women.

In substantive approach, equality is based on the actual impact of law. It takes into account inequalities of social, economic and educational background of the people and seeks the elimination of existing inequalities by positive measures. Substantive equality is directed at eliminating individual, institutional and systematic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society. Within this model of equality, differential treatment may be required not to perpetuate the existing inequalities but to achieve and maintain a real state of effective equality. [20]

According to the second approach, Article 15(3) of the Constitution is not to be seen as an exception to anti-discrimination rule under Article 15(1) but it is to be regarded as a necessary extension of the object of equality. Although in some landmark cases [21] the courts have recognized the substantive approach to equality to provide compensatory measures to disadvantaged groups and deviated from the formal approach, still formal equality continues to dominate the judicial thinking. These two approaches to equality can be seen to be followed in the following decided cases:

In the case of Anuj Garg and Ors. Vs. Hotel Association of India and Ors [22] the constitutional validity of Section 30 of the Punjab Excise Act, 1914 was challenged, the said section prohibited employment of any man under the age of 25 years or 'any woman' in any part of such premises in which liquor or intoxicating drug is consumed by the public. The Delhi High Court declared the said section to be ultra vires Article 19(1)(g), 14 and 15 of the Constitution to the extent it prohibits employment of any woman in any part of such premises. The aggrieved respondents then approached the Supreme Court questioning the restrictions on the employment of men. The Hon'ble Supreme Court upheld women's equal right to employment and freedom and stressed on the duty of the State to ensure safe working conditions for women in any such premises. It held that "sex classifications may be used to compensate women for particular economic disabilities they have suffered, to promote equal employment opportunity", to advance full development of the talent and capabilities... but such classifications may not be used, as they once were, to create or perpetuate the legal, social and economic inferiority of women.

In this case the judiciary followed a substantive approach, and relied on compensating women for their past oppression.

In *Air India Vs Nergesh Meerza* [23], a regulation providing for termination of service of an air hostess in *Air India International* on her first pregnancy was held to be arbitrary and abhorrent to the notions of a civilized society. In this case also the Supreme Court has maintained the substantive approach in which women are not to be denied opportunities because of their biological differences.

Criminal Laws

The Indian Penal Code, 1860 is a glaring example of the extent to which laws are gendered on the basis of familial ideology and patriarchy ensuring male domination, power and authority.

The familial ideology constructing women as wives and mothers, as economically dependent on their families (which is evident in the maintenance laws, pushing women to low paid jobs) has resulted in the subordination of women. The legal regulation of women in and through this familial ideology sustains this subordination. The family which the law has created is essential to women's socio-economic survival at the same time as it is the site of women's socio-economic oppression as can be seen in case of dowry deaths. They family may be an important source of emotional support for women at the same time as it may be a site of emotional struggle and violent relationships. This dependency of woman on family is presented as 'natural' consequence of natural roles. Women have been constructed as self-sacrificing mothers, loyal and chaste wives, dutiful and virginal daughters. Women who live up to the ideals of motherhood and womanhood are accorded some protection; those who fail to measure up are penalized. The law has created public/private distinction based on the understanding of family as something private. It has operated to immunize the oppression of women within this domestic sphere as well as to obscure the extent to which private sphere is itself created and protected by the state regulation.

Rape and sexual assault

The laws on rape and sexual assault have undergone a considerable change with the enactment of Criminal Law (Amendment) Act, 2013. It took a long time for the state to recognize the gravity of rape cases and only when the rape was accompanied by a brutal murder did the state come to senses to amend the laws on rape. These amendments came too late and at a great cost. The amendment may be notable in providing for increased punishments and recognizing different forms of rape but it has not achieved the object of recognizing women as human. Simple rape was not enough to arouse the wrath of law. Only when it becomes accompanied by serious violent acts do the punishments go up. The laws on rape continue to reflect traditional assumptions about women's sexuality- chastity, virginity, honor. Laws however strict are unable to control the rise in assaults and the suicides by the abused. The whole legal thought makes the woman a victim. Laws are based on the protectionist approach, woman needs to be protected. A woman has no agency. The familial ideology of public/private distinction operates here. Legal regulation of rape is concerned only when it has occurred in the public sphere. The woman is presumed to have given irrevocable consent to sexual relationship with her husband. Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age is not rape. Wife is treated as a property of her husband having no sexual agency. Under section 376-A a husband is liable for rape where there has been a judicially recognized rupture in the marital relationship.

Private sex is only immunized if it is legitimate sex that is sex within marriage. A woman who is not married, if she decides to be sexually active, she does so at her own peril. The assumptions under section 155 (4) and 146 of the Indian Evidence Act have been characterized as

- Women lie about rape
- Women deserve to be raped
- Women provoke rape

These assumptions reinforce the view that a woman is responsible not only for her sexual behavior but also for a man's' misbehavior. The past sexual conduct of the prosecutrix is admissible in evidence and her promiscuity may be raised and is raised in cross-examination to injure her character and shake her credibility.[24] Law only protects obedient wives and innocent virgin daughters, because they are to be protected others who deviate have no morals and they cannot qualify for justice.

In *Shri Bodhisattwa Gautam vs. Miss Subhra Chakraborty* [25], the court remarked... "women also have the right to life and liberty... their honor and dignity cannot be touched or violated... women in them have many personalities combined. They are Mother, Daughter, Sister and Wife and not play things for center spreads in various magazines, periodicals or newspapers nor can be they exploited for obscene purposes... they must have the liberty, freedom... to live the roles assigned to them by Nature... rape is a crime against entire society."

Such legal discourses reinforce the patriarchal notion of protection, of treating women as property that has no sexual agency. She needs to be protected from sex. Such notions have also been reinforced by the laws on obscenity (s.292), laws punishing for outraging a woman's modesty (s 354 and 509). These laws also raise the assumptions that either men have no modesty or their modesty is impossible to outrage or even when it is outraged, they can take care of themselves without needing law's protection. Further the laws on rape indicates that women cannot rape and women cannot seduce a man because women are to be protected from sex, they cannot be a part of sex.

Adultery

Section 497 of the IPC punishes adultery. The provisions relating to adultery make liable only the man in adulterous relation and not the married woman. It is further provided that the aggrieved person entitled to file complaints is the husband (s 198(2) CrPC.).

The married woman is projected as a victim party of sex. And the husband is considered as having the sole proprietary rights over his wife's sexuality, which are violated by the intruder. No criminal remedy is available to the wife of the adulterous husband.

Prostitution

The criminal law as contained in IPC and the Immoral Traffic Prevention Act, 1956 perceive prostitution as a necessary evil which should be contained but not to be completely prohibited. The Act prohibits trafficking and soliciting. The legal regulation of prostitution under the Act is on one hand, concerned with restricting the space in which sex work can occur, that is, away from public view. But it is also concerned with the mere fact of prostitution itself, such that, even sex work or sex workers in a private home can fall within the scope of the Act. The ideal behind it is that good people need to be protected from the truth of prostitution. Law views prostitution as a necessary evil nurtured by immorality and illicit relationships.

Dowry Deaths and Cruelty

Section 304 B IPC read with Section 113 B of the Indian Evidence Act deals with a married woman's death within seven years of marriage due to burns, injuries or in circumstances other than normal. These provisions lay down that if soon before her death she was subjected to harassment for dowry by her husband or other relatives, such death shall be presumed to be dowry death. This provision assumes that a woman is harassed in marriage only for dowry or that harassment for dowry alone is worthy of legal protection. These are also some points which are raised in petitions for divorce by husbands. The criteria of seven years are another point of problem and once the seven years have passed there can be no dowry deaths as per law. Another problem is the interpretation of the requirement of harassment 'soon before her death'. Further as the crime takes place in husband's house, proof of such harassment is difficult to produce.

Section 498 A makes a husband and his relatives liable to imprisonment if they subject the woman to cruelty. Section 198 A of CrPC requires that courts can take cognizance of this offence only on police report or complaint by the woman, her closest relatives or with the leave of the court by any other person related to her by blood, marriage or adoption. By this provision the state continues to show its hesitation to interfere in the realm of family and marriage even if it is like to cost the woman's life. Further it takes cognizance of cruelty only by husbands and his relatives precluding imposition of any liability of an unmarried, widowed or separated woman is subjected to cruelty by members of her natal family. Another problem is regarding the interpretation of 'grave' injury. Other laws that help reinforce this familial ideology include those of procreation, kidnapping, and so on.

Feminist Legal Struggles- Hope for Change

We cannot get away from law even if that is what we would like to do. Because law is such a powerful, authoritative language, one that insists that to be heard you try to speak its language. Nor can we abandon caring whether law hears us. Law will continue to reflect and shape prevailing social and individual understanding of problems, and thus will continue to play a role in silencing and discrediting women. Since law inevitably will be one of the important discourses affecting the status of women, we must engage it. More stories need to be brought forward; more experiences need to be told. Feminists engaged with law must consider the question of multiple discrimination. Women do not experience discrimination only on the basis of sex. Rather, women may also experience discrimination on the basis of race, religion, ethnicity, caste, physical ability and/ or sexual identity. The way in which a Muslim woman experiences discrimination is intricately connected to both her identity as a woman and her identity as a Muslim. The way in which a lower caste woman experiences discrimination is intricately connected to her location in structures of both gender and caste subordination. Similarly, a lesbian woman faces discrimination based both on her gender identity and sexual identity. [26] By recognizing the different locations of women in relation to state, legal discourse, and the dominant society, the women's movement with the assistance of feminist legal scholars may be better able to formulate strategies that address the specificity of these positions. And to be heard we need to speak, we need to tell our stories, we need to repeat them with greater vigour so that when produced again and again they form a part of the legal system and get embedded in the legal discourse. Jurisprudence like law is persistently utopian and conceptual as well as apologist and political. Jurisprudence represents a constant and at least at times a sincere attempt to articulate a guiding utopian vision of human association. Feminist jurisprudence must respond to these utopian images, correct them, improve upon them, and participate in them as utopian images, not just as apologies for patriarchy.

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- [4] Women do not have the freedom to decide how many children they want, when to have them, whether they can terminate pregnancy etc., control by state through family planning programmes
- [5] Women are obliged to provide sexual services to their men according to their needs and desire, by trading their sexuality, by threat of rape etc.
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