FEMINIST JURISPRUDENCE AND INDIAN LAWS

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INTRODUCTION

Feminist jurisprudence took the juristic world by storm in the 1960s. The essence of this legal theory is Feminism, and it is based solely on Feminism. Essentially law is the creation of a society and for a setup that is heavily galvanized by male chauvinism. Thus, all the laws are, according to feminist jurists, disfavouring women and they should be modified so as not to disfavour the fairer sex.

India is a country where women have been at the receiving end of many atrocities. Thus, it must be assumed that even the laws should correspond to this fact that even history and psychology prove. However, the case is entirely different. As a matter of fact, Indian laws are seen to be going against the males in quite a remarkable manner. This paper throws light on such issues and brings forth whether feminist jurisprudence still manages to cling to life in India or does it crash down on all fours.

FEMINISM

Feminism is the idea that women should have political, social, sexual, intellectual and economic rights equal to those of men. It involves various movements, theories and philosophies, all concerned with issues of gender difference, that advocate equality for women and the campaign for women's rights and interests. According to Maggie Humm and Rebecca Walker, the history of feminism can be divided into three waves[185]

. The first wave was in the nineteenth and early twentieth centuries, the second was in the 1960s and 1970s, and the third extends from the 1990s to the present. Feminist theory emerged from these feminist movements. It is manifest in a variety of disciplines such as feminist geography, feminist history and feminist literary criticism.

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185 Rebecca Walker, Becoming the Third Wave, Ms. Magazine, January/February edition, 1992, p. 39–41

186 PJ Fitzgerald (ed.), *Salmond on Jurisprudence*, 12th Edn (2006) p. 2

The philosophy of law is known as jurisprudence[186]. Now it becomes a precarious situation as to what may Feminist Jurisprudence mean? One may by mustering up all ones faculties be able construe a definition of feminist jurisprudence that it is that philosophy which analyses the patriarchal connotations that are attached to the laws and legal setups and it questions them while using the crutches of feminism, and social marginalisation. I shall very humbly apologise for any kind of male chauvinistic vibes that I might be sending through this piece of work, but this shall be the best definition which my feeble intellect could make up.

Feminist jurisprudence is a house which has many rooms in it; in this it reflects the different movements in feminist thought. But what invites feminist legal theories is a belief that society and necessarily the legal order is patriarchal. It seeks to analyse the contribution of law in constructing, maintaining, reinforcing and perpetuating patriarchy and it looks at ways in which this patriarchy can be undermined and ultimately eliminated.

What is History? Ask any commoner; he or she may reply that the study or account of all the significant events of the past is what we may call as history. When the same question is searched in the authoritative pages of Merriam-Webster dictionary, it says: *a chronological record of significant events (as affecting a nation or institution) often including an explanation of their causes.*

But you put the same question before a feminist and the answer coming out of her pursed lips shall be, *History... is his story, the way he shall want it.*

Feminists believe that history has been written from a male point of view and it has been the reason for the subjugation of women, which should be changed. The wave of feminism started in the Victorian England as a fall out of significant events such as the Industrial Revolution and the Oxford Revolution. It may seem no less than an oxymoron that a country like England, which was being ruled by a woman Queen Victoria, was a country where women were no more than a marginalised section of the society.

These practises generated a wave of diffidence so wild that there was a whole new revolution with faces such as Virginia Woolf leading from the front. But our concern here is slightly different, though that has its roots in the history.

Feminist jurisprudence is probably the newest and in a manner most vociferously debated kind of Jurisprudence and it has often been blamed of being lop sided towards the fairer sex.

We shall dive into the depths of the seemingly shallow waters of this matter and try to find where the truth lies.

Salmond defines jurisprudence as the philosophy of law. To sound slightly more sophisticated one may say, *Jurisprudence is the analysis of fundamental legal relations, concepts and principles*, or as the Black's Law Dictionary puts it up:

"that science of law which has for its function to ascertain the principles on which rules are based, so as not only to qualify those rules in their proper order...but also to settle the manner in which doubtful cases should be brought under the appropriate rules. Jurisprudence is more a formal than a material science. It has no direct concern with questions of moral or political policy, for they fall under the province of ethics and legislation."

Feminism is defined by the Oxford dictionary as *the advocacy of women's rights on the grounds of sexual equality.*

Arguably the most prominent feminist jurist Catherine Mackinnon says, *Feminist Jurisprudence is an examination of the relationship between law and society from the point of view of all women.*[187]

Rather than going deep into the waters of feminism that the shore becomes out of sight, we shall now be more focused regarding the topic at hand. Has feminist jurisprudence got the same veracity and conceptual strength in the perspective of Indian laws that it can boast of regarding the western laws? This shall be our search in this paper.

The enquiries that feminist jurisprudence undertakes were given in a very plain and prim manner for the first time by Heather Wishik. These were:

1. What have been and what are now all women's experiences of the life situation addressed by the doctrine, process or area of law under examination?
2. What assumptions, descriptions, assertions and/or definitions of experience-male, female or ostensibly gender neutral- does the law make in this area?
3. What is the area of mismatch, distortion or denial created by the differences in the women's life experiences and the law's assumptions or impose structures?
4. What patriarchal interests are served by mismatch?

187 Catherine MacKinnon, *Feminism Unmodified : Discourses on Life and Law*, 1st Edn (1987) p. 52

5. What reforms have been proposed in this area of law or women's life situation? How will these reform proposals, if adopted, affect women both practically and ideologically?

6. In an ideal world, what would this woman's life situation look like, and what relationship, if any, would the law have to this future life situation?

7. How do we get there from here?[188]

To begin with, let us look at the rape laws in India. Section 375 of the Indian Penal Code defines rape as "A man is said to commit rape, who, except in circumstances hereinafter excepted, has sexual intercourse with a woman....." The framers of the IPC probably never gave a thought that even a woman is potentially capable of committing a rape. The *sine qua non* for convicting a person for rape in India is penile penetration. So, women can only be victims and to put it very succinctly, may be feminist jurisprudence if looks at this situation shall plead that nothing is perfect. What is even more disturbing is the fact that they are held to be not liable even for gang rapes. The Supreme Court in *Priya Patel v State of M P*[189] held that *It is conceptually inconceivable for a woman to commit rape. So how can a woman be held liable for gang rape?*

The most amusing part is that for holding a person liable under Section 376 (2) (g), it is not necessary that each person of the gang has sexual intercourse with the victim. It was an appalling judgment by the Apex court and attracted much controversy from the legal fraternity. However, the feminist jurists might refrain to opine on such matters. It was later in a Sessions court judgment, the Sessions Court judge held, and very convincingly and correctly that a woman can equally be liable for abetting the crime of rape as a man[190]. This must have caused the feminist jurists like Catherine MacKinnon to take uncomfortable shifts in their graves.

The matter becomes infinitely uncomfortable for the feminist jurists in cases of homosexuality. Section 377 of IPC that punishes unnatural sexual intercourse says *whoever has carnal intercourse against the order of nature with any man, woman or animal, shall be punished....* Even this provision holds that male homosexuals or gays shall be liable for having committed a penal offence in our country but female homosexuals are not within the purview of this provision. Now in all these examples, the basis of feminist jurisprudence, i.e. laws' omission of and bias against women's concerns falls flat on all fours.

188 MDA Freeman, *Lloyd's Introduction to Jurisprudence*, 7th Edn (2001) pp. 1124-1125

189 (2006) 6 SCC 263

190 *State* v *Meena Devi*

India has always been criticised and looked down by the west as a backward country and so far as the worst fears of any Indian i.e. the Human Development Index is concerned, we all shall seek the nearest corners to hide our faces. Our legislature showed some real courage and enacted legislations to fight social evils against women like dowry, sexual harassment and even child marriage. Thus, we have legislations like the Dowry Prohibition Act, 1961 and even these that seek to protect the modesty and stature of women such as the Indecent Representation of Women (Prohibition) Act, 1986; Married Women's Property (Extension) Act, 1959, Matrimonial Causes War Marriages Act, 1948 and many more. So far as the law that has been flaunted the most and the champion of women rights flaunt it the most is the Prevention of Women from Domestic Violence Act, 1986 and it has been extended to all sorts of domestic women, including live-in partners, mothers, sisters, mother-in-law, sister-in law, nieces etc. I suppose even the most vociferous critics of chauvinism shall be appreciating this step of our parliament which is also criticised of being dominated largely by males. The most disturbing part of enactment of these legislation is that we have given such a large space for their misuse that it is because of this that a large number of unwanted litigations are being seen in the courts.

Section 2 (a) of the Domestic Violence Act reads: "aggrieved person means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent."

And Section 2(q) reads: "**respondent** means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner."

To put it plainly, no female can ever be a respondent in any case under this act and no male can ever be an aggrieved party. As a natural consequence, the Domestic Violence Act remains one of the most misused legislation of the country.

Indians worship women. The Indian Penal Code punishes anyone who tries to outrage the modesty of a woman by applying criminal force under Section 354. This provision includes males as well as females as in this provision, the term 'he' is referred to both men as well as women[191]. However, the same is not the case with Section 509, where law seeks to prevent the modesty of a woman and prevent practices like eve teasing. But

191 Section 8, Indian Penal Code, 1860

what the about practices such as 'adam teasing'? For that matter, either men do not possess any modesty or they have already been stripped of it so no need to preserve it any more.

Austin opined that law had two parts a normative or the prescriptive one and a descriptive one. The major function of jurisprudence was to deal with the descriptive one and the prescriptive or the normative one was the domain of the legislature. No matter in the above advanced examples whether we concern with the prescriptive ones or the descriptive ones, we observe that feminist jurisprudence fails to stand on its limbs. The question is not whether feminist jurisprudence is acceptable or not, some of its most distinguished achievements in India include the well known case of *Shah Bano Begum v Mohd. Ahmed Khan*[192], where the Apex Court upheld the right of a woman to maintenance above the personal law, though eventually, things had to bow before the personal law and in a display of crude politics, we saw the passing of The Muslim Women (Protection of Rights on Divorce) Act 1986. Though, Shah Bano ended up in disappointment spilled by the Parliament but *Vishakha v State of Rajasthan*[193] brought some light still, there have always been disappointing judgments like that of Nikita Mehta. Thus, all these observation strengthen the assumptions and axioms that feminist jurisprudence proclaims but looking at the wider picture, we see that we have started drifting away from a predominantly patriarchal setup. Article 14 of the Constitution, reservation for women and even rulings by the Supreme Court in *Danial Latifi v. Union of India*[194] read the Act with Art 14 and 15 of the Constitution which prevent discrimination on the basis of sex and held that the intention of the framers could not have been to deprive Muslim women of their rights. Further the Supreme Court construed the statutory provision in such a manner that it does not fall foul of Articles 14 and 15. The provision in question is Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 which states that "a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband". The Court held this provision means that reasonable and fair provision and maintenance is not limited for the *iddat* period (as evidenced by the use of word "within" and not "for"). It extends for the entire life of the divorced wife until she remarries.

Thus, it has been observed that the situation in India is more or less a quixotic one which has sketched a portrait that limps on both the sides. But what is worth reckoning

192 (1985) SCC 2 556

193 (1997) 6 SCC 241

194 (2001) 7 SCC 740

is that feminist jurisprudence in itself is not a potent juristic tool so as to completely lambast the legal set up of India. As it has been rightly said by Austin that jurisprudence has the descriptive domain of law, our evidences are convincing enough to realize that feminist jurisprudence, as a study is quite fascinating, but it also suffers from some lacunas as do the other juristic theories, though these are less evident as they have a veil of years of subjugation and ostracisation hiding them.