

## FEMINIST JURISPRUDENCE AND WOMEN RIGHTS IN INDIA

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### Abstract

India is a country where women are having high status in theory but are vulnerable in practice. Feminist jurisprudence is philosophy to understand the women issues. There are various theories to understand the feminist perspective about law and society. Feminist jurisprudence is understanding women's right which is being inculcated in Indian law and Constitution of India. In India there are various laws to protect and empower them. Law plays a monumental role to protect their rights, the purpose of the paper is to understand the feminist jurisprudence and evolution of law related to women.

**Key words:** feminist jurisprudence, law, feminist theory, women's right

### Introduction

India venerates women as goddess and mothers. Rivers and nations are named as women. The low status of women is due to cultural, educational, religious, economic, and social reasons. Women have become second class citizens. Women are an important part of the society. They constitute one half population of the world. "The voice of working women" a document of UNO(1982) makes a significant static statement "women make up 50% of world's population, comprise 33.3% of the official labour force, perform nearly 66.6% of all working hours, receive 10% of world's income but own less than 1% of world's property."

Feminist Jurisprudence is a philosophy of law based on the political, economic and social equality of the sexes. It is an emerging burgeoning school of legal thoughts that encompasses so many issues as well as theories of legal issues. Feminist jurisprudence evaluates and critiques the law by examining the

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relationship between gender, sexuality, power, individual rights and judicial system as a whole.

Feminist jurisprudence is a collection of movements and ideologies aimed at establishing and defending equal social economic, political, legal rights for women. A feminist is a supporter of equal rights for women. Feminist theory is the result of feminist movements, aims to understand the nature of gender inequality by examining women's social roles and live experience.

Feminist jurist campaign for women rights such as: contract law, law of property, voting right also promoting bodily integrity, autonomy and reproductive rights of women. The history of Western feminist engagement with law is conventionally traced to the demand for equal legal rights by suffragists. Women demanded an eventually gained that non-oppression or non-discrimination for women involved recognition of the differences between man and women. Others insisted that man and women should be treated the same<sup>1</sup>. Different feminist has given the different view on this matter.

### **Historical background of feminist jurisprudence**

Feminism is not a very old concept; it emerges in late nineties and early twenties. The persons concerned about the women suppression and discrimination initiated the feminist jurisprudence. John Stuart Mill was the person who advocates the women voting right in the west. In 1889, in Paris on the platform of the founding of Congress of the Second International, the question of equal rights of men and women was raised by Clara Zetkin<sup>2</sup>. This was the first time that the question of equal rights for women raised from any International platform. The anthropologist Margaret Mead observes the complexity of women's history. At any given moment, the experience of women grows out of a complicated web of cultural values, specific social and economic circumstances, and the response of individual women to both. The family was generally perceived as hierarchy with the man as father and head, and women and children as his inferior. Feminist jurisprudence is a development from the women's movement which recognised in the late 1960's and early 1970's with the writing of Simon De Beauvoir, Betty Freidan, Germaine Greer, Kate Millet, Eva Figes and others. To cash the development

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<sup>1</sup> Sharma Gokulesh, *Feminists Jurisprudence in India: Women's Rights* 90-100 (1<sup>st</sup> ed. 2008).

<sup>2</sup> Mukherjee Kanak, *Women's Emancipation Movement in India: A Marxist View* 11 (1<sup>st</sup> ed.1989).

of feminist jurisprudence, on the heels of feminist sociology, feminist philosophy and feminist history was a natural “extension of the engagement of female reflection and speech to one more area of discourse”. There was a large proliferation in the 1970 and 1980 in women studies courses.<sup>3</sup>

### Theories of feminism

Feminism is a controversial concept today. The best way of looking at feminist jurisprudence is to see it as the ideology of women as oppressed section, in struggle against their oppression just as socialism is the ideology of the working class organised in class struggle. A fundamental goal of feminist theory is to analyse gender relations. How gender relations are constituted and experienced and how it is equally important.<sup>4</sup> The study of feminism is to know the situation of women and the analysis of male domination. By studying gender it is hoped to gain a critical distance on existing gender arrangement<sup>5</sup>. Gender is the social phenomena to construct and to equally regulate societies. It is reflection of the male-stream masquerading as the norm for the division of labour and concomitant enjoyment of benefits. This social taxonomy is saturated with negative reciprocity; equality based on such relationships is illusive.<sup>6</sup>

There is no single feminist theory like any complex legal philosophy. Feminist jurisprudence has generated a rich variety of ideas on the situation of women. One of the important concerns amongst the western feminist is to understand the cause of women's subordination. It is known that women are not biologically inferior and their lower status to man is man-made. Generally the four main theories of feminism in the world are:

- Liberal feminism
- Marxist feminism
- Radical feminism

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<sup>3</sup> Bishnoi Ram Bhagwana, *Feminist Jurisprudence and Women Empowerment*, AIR March, 38-43, 2010.

<sup>4</sup> Jha Shankar Uma, Mehta Arti, Menon Latika, *Status of Indian Women 2* (1<sup>st</sup> ed. 1998).

<sup>5</sup> *Ibid.*

<sup>6</sup> Suchinmayee Rachna, *Gender, Human Rights and Environment*, 41 (1<sup>st</sup> ed. 2008).

- Socialist feminism.<sup>7</sup>
- **Liberal feminism**

The inferior position of women, according to the supporter of this theory is due to cultural and psychological factors. The link between liberal philosophy and women's equality was first made in 1792 by Marry Wollstone Craft. Women are the first and foremost human being not sexual beings. In this respect women are exactly like man, whose primary and no one claims to be male but only to be human being<sup>8</sup>. According to liberal Feminist Jurist improvement in social customs, institutions, laws and attitudes will transform society as a whole and women will get equal status.

- **Marxist feminism**

According to Marx and Engel, capitalism is the root cause for women's oppression. Capitalism transformed all human relations into marketable commodities. Thus human labour was seen as mean of production and human beings were seen as instruments. Women in this system become instruments of production and reproduction. The concept of private property brought a basic change in the family. It assured the supremacy of the man in the house the women's house work lost its significance compared with the men's work in obtaining a livelihood<sup>9</sup>. Marxist feminism believes that social existence determines consciousness. "Women work is never done" is the aphorism it describes the nature of women work. So Marxist feminist jurist believes that to understand why women are oppressed, one has to analyse the links between women works status and women self-image. According to the Marxist jurist the domestic slavery is the central Marxist theory on women's oppression. They consider that the source of women's oppression lies in the role of the family as a reproducer of labour power for capitalism and also unequal role of women inside the family. So understanding the role of the family is key to understanding women's position as second class citizenship in society. Women relegated to the role of sex objects, subject to the approval or disapproval of men. They are still today fighting for the right to control their own bodies and

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<sup>7</sup> Gokilavini, S. and Jelesin, *Marriage, Dowry, Practice and Divorce*, pp 44, 45 (1<sup>st</sup> ed. 2008).

<sup>8</sup> *Ibid.*

<sup>9</sup> Tong Rosemarie, *Feminist Thought: A Comprehensive Introduction*, 40 (1<sup>st</sup> ed. 1997).

reproductive lives. It began with the family, but the repercussions extend far beyond life inside the family<sup>10</sup>.

### • **Radical feminism**

This phase of movement occurred 1969-1970, which had important link with the Liberal movement. Sexual oppression and sexual division of labour relating to women were over looked in Liberal movement. It was realised that root of subordination lies in the biological family. The radical feminist jurist campaigned for removal of all sex discrimination and man was consider as foe and subordination of women was taken as bio psychological supremacy of man over women. Natural differences lead directly to the first division of labour based on child birth and motherhood which assigned women to a dependent and powerless role and will continue to do so long as they continue to be children.

### • **Socialist feminism**

According to socialist feminism both gender and class are responsible for women's inferior position. One of the socialist feminists, Juliet Mitchell, while analysing the position of women found, though family is fundamental to women's oppression there are some separate structure. The emergence of concept of private property, confining women to production of children and persistence of gender inequalities caused a great hurdle in women's socialist movement<sup>11</sup>. Socialist feminists combine the class and sex as women's oppression.

Men control women's productivity both within the house hold and outside in paid work. Within the house hold women provide all kinds of free service to their children, husband, and other members of family, throughout their lives. Men also control women's reproductive power. In many societies women do not have the freedom to decide how many children they want, when to have them, whether they can use contraception, or terminate a pregnancy etc. Apart from individual male control, male dominated institutions like the Church or State (i.e., religion and politics) also lay down rules regarding women's reproductive capacity.<sup>12</sup>

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<sup>10</sup> Smith S., <http://socialistworker.org/2013/01/31/marxism-feminism-andwomens-Liberation>.

<sup>11</sup> Tripathi S.C. and Arora Vibha, *Law Related to Women and Children*, 4 (3<sup>rd</sup> ed. 2008).

<sup>12</sup> Ghosh Jayati, *Structures of Insecurity*, Frontline, January, 4, 2008, 27.

## Legal rights of woman in India

Social condition of women was not equal in ancient India. There are various provisions for the betterment of women and for her equal rights in Constitution of India which came into effect after its commencement on 26<sup>th</sup> January, 1950. There are special provisions for women under Article 53 and social justice is one of the basic of Constitution of India. The following are the some initiatives undertaken to protect the rights of women.

- **Live in relationship**

Living relation is recent form of family where two adults decide to live together under a roof without a marriage. In January 2008, Apex court validated long term live in relationship as marriage. Children born from such relationship will no longer be called illegitimate. Justice Malimath Committee (2003) stated that relationship for a reasonable time should enjoy the legal rights of wife<sup>13</sup>. In *Mahabat Ali v. Mahammad Ibrahim Khan*<sup>14</sup>, The Court said that law presumes in favour of marriage against concubinage, when a man and women have cohabitated continuously for a number of years. There is requirement of evidence of long cohabitation for number of years. But the number of years has not been specified by law. In *Badri Prasad v. Deputy Director Consolidation*<sup>15</sup> the Apex Court recognised a live in relationship as a valid marriage.

- **Right to dignity**

To live with dignity is the basic right of human being. Women are vulnerable in nature and are more sensitive and delicate. Normally this right is not enjoyed by the women and due to patriarchal culture women has to suffer various kind of humiliation in society. In *Surjit Singh v. Kanwaljit Kaur*<sup>16</sup> Punjab and Haryana High Court held that medical examination of a women for her virginity would certainly violet her right to privacy. Virginity test is obviously a violation of dignity of women. In *Gautam Kundu v. State of West Bengal* the Apex Court held that permitting blood test to prove or disprove paternity for maintenance is embarrassment and humility for women.

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<sup>13</sup> Justice Malimath, *Committee on Reforms of Criminal Justice System*, Jan. 17, 2018

<sup>14</sup> *Mahabat Ali v. Mahammad Ibrahim Khan*, AIR 1929 135 P.C. (India).

<sup>15</sup> *Badri Prasad v. Deputy Director Consolidation*, 1978 AIR 1557 (India).

<sup>16</sup> *Surjit Singh v. Kanwaljit Kaur*, AIR 2003 P&H 353 (India).

- **Sexual offences**

Sexual offences can be defined as every act of a male being whether on the physical, mental or intellectual plane of consciousness which leads to infelicity pain or suppression of the will of another being is an offense. Sexual offences are covered under Indecent Representation of Women (Prohibition) Act, 1986, Indian Penal Code 1960, Suppression of Immoral Trafficking of women and girls Act, 1956, Dowry Prohibition Act, 1961 and The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

- **Indecent representation of women**

Women are being represented indecently in media. The terms obscene, indecent or vulgar are difficult to define. It is merely related to the moral values of society. Provisions related to obscenity have been included in section 292 to 294 of Indian Penal code. In the landmark judgement *Ranjit D. Udeshi v. State of Maharashtra*<sup>17</sup> The Supreme Court accepted the test laid down in English case *R.V. Hicklin* to judge the obscenity of a matter. The obscene matter in a book must be consider by itself and separately to find out whether it is so gross and its obscenity so decided that it is likely to deprive corrupt those whose mind are open to influence this sort and into whose hand the book is likely to fall.

- **Eve teasing**

Eve teasing is used to refer to sexual harassment faced by women in public places. Making or passing unwelcome sexual jokes showing obscene, gestures, winking, whistling, staring etc. earlier eve teasing was treated as born right of male. Sometimes responsible and respected persons of society try to justify such activity saying that these are the normal mistakes of youngsters. It is done intensity to hurt women physically, emotionally, physiologically, socially, spiritually or to gain attention of that woman. Men use to do all teasing due servitude position of women in society. In 2013 parliament has passed an enactment The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. It is a significant step forward for the women's movement in the struggle against gender-based oppression. The enactment represented a victory in the face of the dilly-dallying, diversionary tactics and stiff opposition from entrenched

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<sup>17</sup> Ranjit D. Udeshi v. State of Maharashtra, AIR 1965 SC 881 (India).

interests. The legislation, however, suffers from a range of problems – from provision of punishment for complaints which are found to be false, to the exclusion of “project workers” such as ICDS, ASHA, and Midday meal workers, who increasingly account for a large section of the female workforce, from the ambit of the law. A very serious lacuna, again, is that the law contains no provision whatsoever for elected representation within sexual harassment committees.

### • Dowry deaths

Dowry is the oldest custom in society which is prevalent in every part of country. Dowry death is common in Indian society. Presently our society is developing its technique and scientific temperament but women are being burnt for the want of dowry in India.

Dowry is define in Section 2 of the Dowry Prohibition Act, 1961 and further clarified by Hon’bl Supreme Court in *Ashok Kumar v. State of Haryana*<sup>18</sup> as any property or valuable security given or agreed to be given either directly or indirectly by one party to another during or after marriage.

In *Satbir Singh v. State of Punjab*<sup>19</sup> the Apex Court held that the property or valuable property given or agreed to be given in connection with the marriage is considered as dowry. But customary payments in connection with the birth of child or other ceremonies are not involved within ambit of dowry. Section 3 of the Dowry Prohibition Act 1961 ensures penalty for the giving or taking dowry.

### • Succession right

Hindu Succession Act 1956 provide right to inherit ancestral property by women. The Hindu Succession (Amendment) Act 2005 has brought radical change in the present Act. Daughter whether married or unmarried has been provided the right of succession in the joint Hindu family property; if the joint Hindu family is governed by the Mitakshara Law. Daughters are also liable like Son to bear the liability of the properties.

*Stri* means women and *stridhan* means property of women. The Hindu sages define the *stridhan* as property of women by different means such as gift by parents, any stranger and naputal gift. Now male and female are treated equal without

<sup>18</sup> Ashok Kumar v. State of Haryana, AIR 2010 SC 2839 (India).

<sup>19</sup> Satbir Singh v. State of Punjab, AIR 2001 SC 2828 (India).



any distinction. According to the section 14 of Indian Succession Act, 1956 property of a woman is her absolute property. Section 29 A provide equal right to daughters in coparcenary property i.e., succession by survival ship.

### **Other offences against women**

Indian Panel Code contains various sections to protect women from violation their rights such as Section 354 provided that assault or criminal force to women with intent to outrage her modesty shall be punished for a term, which shall not be less than one year by which may extend to five years shall also be liable for fine.

Section 354A of Indian Penal Code talk about the sexual harassment when a man commit unwelcome physical contact and advances or a demand or request for sexual favour showing pornography etc. punishment for sexual harassment for a term which may be extend to three years or with fine or both.

Section 354C of Indian Penal Code explains voyeurism which means if any man watches or captures the image of women engaged in a private act in any circumstances where she would usually have being observed shall be punished with not less than one year, which may extend up to three years. For second time convict will be punished not less than three years which may extend to seven years.

Section 354D of Indian Penal Code talk about stalking. Stalking is defined as any man who follows a women and contacts, or attempt to contact such women to force her repeatedly to interact despite a clear indication of disinterest of such women. Monitor the women through internet, email or other communication commits the offence of stalking. A person who commits the offense of stalking shall be punished on first conviction with imprisonment for a term which may extend to three years and shall also be liable for fine. On the second conviction he may be punished with imprisonment of five years and also is liable for fine.

### **Crime of rape**

Rape is most heinous crime against women. It destroys the psychological and social being of women. Victim also leads traumatic life. The victims suffer with mental agony, trauma and imprinted scars on her mind which never heals in her life. Attitude of society towards rape victim is worst. Rape victim are being treated as offender rather than victim. Women of all age

groups right from childhood to old age are victimised for rape. Section 376 of Indian Penal Code provides punishment for rape. In *Delhi Domestic Working Women's forum v. Union of India*<sup>20</sup> the Supreme Court analysed the defect of existing systems, it said that firstly complaints are handled roughly and are not given due attention as is warranted women more them often humiliation by the police. Rape trials become traumatic experience and even worse rape itself. In *Bodhi Sathwa Gautam v. Subhra Chakrabarty*<sup>21</sup>, the Supreme Court awarded an interim compensation of Rs. 1000 per month to the victim of rape until her charges of rape are decided by the trial court.

### Conclusion

Women are still not free, exploited, sold as commodity, liquidated without the law and held hostage by an exploitative combination. Gender injustice to the weaker section is the disturbing concern of all, men and women, politicians, professionals and people with social conscience. No society can be free, fair and just until its women enjoy freedom and equal opportunities for enfoldment of full potentials. Presently if we see the world as cause and effect attitude, we found that problem in the world is because of ignorance. In reality human being are equal in existence. Why women are being exploited and why they are not getting equal opportunities?

Feminist jurisprudence is a philosophy to know the reason of women's subordinate situation. It tries to find out the root cause of gender discrimination prevailed in society. Women rights are protected by law in India, but these laws as instrument are not implemented properly. Especially social attitude toward women have to change. Economic and psychological empowerment is the part and parcel of women movement. The house hold work performed for one's own family is not counted as economic activity, unlike house hold work performed by employer. The house hold work done by women should be paid and must regard as important to other productive work.



<sup>20</sup> Delhi Domestic Working Women's Forum v. Union of India 1995 SCC (1) 14 (India).

<sup>21</sup> Bodhi Sathwa Gautam v. Subhra Chakrabarty, (1996) I SCC 490 (India).