

## Gender Justice – Role of Feminist Jurisprudence

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### Introduction:

In the present context I would like to gently remind that even from the days prior to the occupation of India by outside forces we were having freedom of movement and equality with men as evidenced from the Sanskrit shloka from the smritis,

**“yathra naaryasthu poojyanthey ramanthey Devathaaha**

**Yathraithaasthu na poojyanthey sarvasthathraapalaaha kriyaaha”<sup>2</sup>**

(யத்ர நார்யஸ்து பூஜ்யந்தே ரமந்தே தேவதாஹா

யத்ரைதாஸ்து ந பூஜ்யந்தே சர்வ ஸ்தத்ராபலாஹாக்ரியாஹா)

This translates into that “Where women are respected there reside Gods; and where women are disrespected all the efforts of the society come to naught”.

But due to various factors inimical to the peaceful co-existence of the mankind the abovementioned principle was forgotten and Feminist Jurisprudence as a philosophy of law based on the political, economic, and social equality of sexes and also as a field of legal scholarship began only in 1960s. It influences many debates on sexual and domestic violence, inequality in the workplace, and gender based discrimination. Through various approaches, feminists have identified implications of seemingly neutral laws and practices. Laws affecting employment, divorce, reproductive rights, rape, domestic violence, and sexual harassment have all benefited from the analysis and insight of feminist jurisprudence.

Feminists believe that history was written from a male point of view and does not reflect women's role in making history and structuring society. Male-written history has

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<sup>2</sup> Manusmiriti 3.56

created a bias in the concepts of human nature, gender potential, and social arrangements. The language, logic, and structure of the law are male-created and reinforce male values.

## **Schools of Jurisprudence:**

Though feminists share common commitments to equality between men and women, feminist jurisprudence is not uniform. There are three major schools of thought within feminist jurisprudence.

(i) Traditional, or liberal, feminism asserts that women are just as rational as men and therefore should have equal opportunity to make their own choices.

(ii) Another school of feminist legal thought, cultural feminists, focuses on the differences between men and women and celebrates those differences; this group of thinkers asserts that women emphasize the importance of relationships, whereas men emphasize abstract principles of rights and logic. The goal of this school is to give equal recognition to women's moral voice of caring and communal values.

(iii) Radical or dominant feminism focuses on inequality. It asserts that men, as a class, have dominated women as a class, creating gender inequality. For radical feminists gender is a question of power. Radical feminists urge us to abandon traditional approaches that take maleness as their reference point. They argue that sexual equality must be constructed on the basis of woman's difference from man.

## **Feminist Jurisprudence:**

Feminist jurisprudence represents the diversity of feminist philosophy and theory<sup>3</sup>. All feminists share the belief that "women are oppressed or disadvantaged in comparison

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<sup>3</sup> Bell Hooks (Gloria Jean Watkins), *Feminist Theory: From Margin to Centre*

with men and that their oppression is in some way illegitimate or unjustified. The intellectual guiding force behind current women's movement is feminism which produced special knowledge in every field such as feminist sociology, feminist philosophy, feminist history, including feminist jurisprudence. Feminist jurisprudence is a natural extension namely law and justice. Law related strategies have played an important role in the campaigns of women's organizations to achieve greater equality and social justice.

Feminist belief that law in constructing, maintaining, reinforcing and perpetuating patriarchy and it looks at ways in which this patriarchy can be undermined and ultimately eliminated..

The feminist inquiry into law concentrates on the following issues.

- i) Examination of legal concepts, rules, doctrines and process with reference to women's experiences.
- ii) Examination of the underlying assumptions of law based in male female and ostensibly gender neutral distinctions.
- iii) Examination of mismatch, distortion or denial created by the deference between women's life experience and the laws assumption or imposed structures.
- iv) Patriarchal interest served by the mismatch.
- v) Reforms to be made in the law to eliminate patriarchal influences.

**Liberal Feminism:** It is an individualistic form of feminist theory, which focuses on women's ability to maintain their equality through their own actions and choices. The historical origin of contemporary liberal feminism goes back to the 18<sup>th</sup> century. An important principle of this philosophy was individualism by which was meant that an individual possesses the freedom to do what he wishes without interference from others. Its emphasis is on making the legal and political rights of women equal to men. Liberal feminists argue that society holds the false belief that women are, by nature, less

intellectually and physically capable than men; thus it tends to discriminate against women in the academy, the forum, and the marketplace. Liberal feminists believe that "female subordination is rooted in a set of customary and legal constraints that block women's entrance to and success in the so-called public world". They strive for sexual equality via political and legal reform.

**Radical Feminism:** It is also known as dominant feminism, is a perspective within feminism that calls for a radical reordering of society in which male supremacy is eliminated in all social and economic contexts. Radical feminists view society as fundamentally a patriarchy in which men dominate and oppress women, and seek to abolish the patriarchy in order to liberate everyone from an unjust society by challenging existing social norms and institutions. This includes opposing the sexual objectification of women, raising public awareness about such issues as rape and violence against women, and challenging the very notion of gender roles.

Radical feminists posit that, because of patriarchy, women have come to be viewed as the "other" to the male norm, and as such have been systematically oppressed and marginalized. They further assert that men as a class benefit from the oppression of women. Patriarchal theory is not generally defined as a belief that all men always benefit from the oppression of all women. Rather, it maintains that the primary element of patriarchy is a relationship of dominance, where one party is dominant and exploits the other for the benefit of the former. Radical feminists believe that men (as a class) use social systems and other methods of control to keep women (and non-dominant men) suppressed.

Radical feminists seek to abolish patriarchy by challenging existing social norms and institutions, and believe that eliminating patriarchy will liberate everyone from an unjust society. Ti-Grace Atkinson maintained that the need for power fuels the male class to continue oppressing the female class, arguing that "the *need* men have for the role of

oppressor is the source and foundation of all human oppression. As Bell Hooks says in her book, *Feminist theory: From Margin to Centre*, “Feminism is the struggle to end sexist oppression. Therefore, it is necessarily a struggle to eradicate the ideology of domination that permeates Western culture on various levels, as well as a commitment to reorganizing society so that the self-development of people can take precedence over imperialism, economic expansion, and material desires.”

**Cultural Feminism:** It reverses the focus of liberal feminism. It is concerned with women’s differences from men. It argues that important task for feminism is not to include women into patriarchy, and prove that women are similar to men and can function like men and meet male norms, but to change institutions to reflect and accommodate values that they see as women’s nurturing virtues, such as love, empathy, patience and concern”. It is an ideology of a "female nature" or "female essence" that attempts to revalidate what cultural feminists consider undervalued female attributes. It is also a theory that commends the difference of women from men. It is based on an essentialist view of the differences between women and men and advocates independence and institution building.

Post - modern feminism sees equality as a social construct and a product of patriarchy, hence in need of feminist reconstruction. The school emphasizes the process of self - definition and the method that will raise consciousness and give voice to the unknown in women’s experience.

## **Feminist Philosophy of Law<sup>4</sup>:**

The rule of law holds that law presumes and reflects a world-view in which the goal is to achieve a set of presumptively coherent and stable propositions. This aim is understood as the “rule of law”. Feminist critics point out that conceptualizing the rule of law in terms of

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<sup>4</sup> Stanford Encyclopedia of Philosophy, published first in May 2009 and substantially revised in October 2017

coherence and consistency tends to reinforce and legitimate the status quo and existing power relationships. Indeed, one primary purpose of law as traditionally understood is to promote stability and order by reinforcing adherence to predominant norms, representing them not only as the official values of a society, but even as universal, natural, and inevitable. Law is thus seen as setting the official standard of evaluation for what is normal and accepted—what is required, prohibited, protected, enabled, or permitted. Feminist philosophers of law judge the status quo thus enforced as patriarchal, reflecting ancient and almost universal presumptions of gender inequality. This is not a conceptual necessity; law need not be patriarchal. Law does, however, reflect power relationships within societies.

Throughout history, and in virtually every society, men and women have been viewed not only as different, but also as unequal in status and in power. Women were typically cast as opposites to men within an overarching set of dichotomies: men considered rational, aggressive, competitive, political, dominating leaders; and women seen as emotional, passive, nurturing, domestic, subordinate followers. Versions of this set of assumptions have been widely and pervasively incorporated in long-standing institutions from politics and economic arrangements to educational and religious institutions, to aesthetic standards and personal relations—and law is no exception. A central task of feminist philosophy of law is articulating what equality requires against this background of patriarchy.

Another central theme in feminist philosophy of law is the viability of the public/private distinction. For liberals, including liberal feminists, there remains a domain of private life that should be reserved for individual choice. Radical feminists raise the concerns that patriarchy and sexual dominance pervade private relationships and there are no clear lines to be drawn between actions that primarily affect the individual and actions that affect others more broadly. Legal structures that permit or reinforce dominance within intimate relationships are thus deeply problematic and must be overturned. No individual is entitled to inflict gratuitous harm upon another and no one should have to live in fear. These are among

the few uncontroversial principles accepted in all moral systems and form the core of the criminal law in every society. Keeping peace and order has long been considered a fundamental justification for the very existence of the state or legal authority.

Until the 20<sup>th</sup> century, however, these commitments did not protect women from a frequent source of danger, their intimates: husbands, lovers, relatives, friends, or employers. Indeed, for much of history these common threats to the personal security of women were not recognized as harms at all that it was the business of the state to address. Instead, they were frequently taken to be inevitable, a matter of right, or justifiable. Not surprisingly, a great deal of feminist legal scholarly attention and reform effort has been directed to revealing and changing the many ways in which law fails to protect women and girls against forms of violence such as rape (including date rape and marital rape), domestic abuse, sexual harassment, and other types of abuse. Although some countries do not collect official data and the nature and incidence of such violence varies widely by culture, many studies indicate that no society is exempt from these forms of violence. The **2012 United Nations Millennium Development Goals Report** observed that although equal numbers of boys and girls are now attending school across the globe, violence against women continues to undermine progress towards all goals.

In legal theory about gendered violence, the possibility of separating the public from the private sphere is critical. Historically law did not address injuries inflicted by intimates. So, while the single greatest civil purpose of law has been to keep men from violating one another (the only greater being to repel foreign invasion), much violation of women by men has been considered as a private matter beyond the purview of law. Domestic chastisement was once considered legitimate discipline of one's wife and marital rape was excluded from the definition of rape in many criminal law statutes. Feminists criticized the presumption that such behaviour among intimates was beyond the purview of the criminal law and these limitations have largely been overcome, at least in the United States and Europe.

Unfortunately, in much of the world today discrimination is far from over, but no less effective for its increased subtlety. In some ways progress toward equality has been substantial in many parts of the world. But in other respects advances have been slow, even in progressive nations. Enshrining equality in law is a far different matter from implementing it in practice. Women have been active participants in the public sphere in large numbers in many societies for thirty years or more. Yet the great majority of women remain clustered in the bottom or middle ranks in otherwise male dominated professions, or segregated into traditionally female fields. Politics remain strongly male dominated.

## **Conclusion:**

Law furthers social stability but may entrench norms of oppression. Law can also be a necessary means for reform. Law can be an anchor to the past or an engine for the future. They take the utilitarian view of society dealing with men and women spiritually equal but naturally not so. Each function has its place. Feminist jurisprudence is an effort to examine and reformulate legal doctrine to overcome entrenched bias and enforced inequality of the past as it structures human concepts and institutions for the future. A day may come when people will adopt the natural way of life again.

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