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Contemporary Challenges in Feminist Jurisprudence

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ABSTRACT

Feminism is one of the most criticised theories, despite it having no negative connotations for anyone involved. Neither does it talk of extinguishing the rights of the men and nor does it try to give unwarranted entitlements to women. Despite all that, there are fewer feminists, every day. The deep rooted patriarchy, insecurities, and injustices would always try to stop the movement of the women from being oppressed to being free. Feminist jurisprudence encompasses the examination of many strands of feminist theory, as well as the themes that have originated and developed within feminist thinking, as well as the application of theory to issues that concern members of the class. It is the law's neutrality as a mechanism that perpetuates women's inequalities. Feminists hold a position that seeks to challenge the current legal status quo by focusing on the institutions and laws that would be required to correct the gender imbalance in society.

Keywords: *Feminism, post modernism, radical, cultural, morality, liberal..*

I. INTRODUCTION

Feminism is one of the most divisive phrase in today's world, being advocated for, violently opposed, misconstrued, and branded in a variety of ways depending on the user. It is a word symbolic of a movement for the emancipation of the 'second gender'² in its struggle to not be treated as 'second' to men. Even though it may be traced back to the writings of John Stuart Mill³ in the 19th century, who firmly fought for equal status for women, the Feminist movement is widely seen as having begun in the second half of the 20th century. Mill's utilitarian theory-based insight was fundamental: emancipation of women, the world's other half population, will actually result in the betterment of the rest of the world, a unique stand for the time. This essay, based on this assumption, aims to comprehend the concepts of feminism, feminist jurisprudence, feminist jurisprudence theories, and the issues that feminist jurisprudence faces

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² French author Simone De Beauvoir in her celebrated work 'Second Sex' discusses the treatment of women throughout history. She asks 'What is woman?' and argues that 'man' is considered the default and 'woman' is considered the 'other'. Thus "humanity" is male and man defines woman not herself but as relative to him. [Source: en.wikipedia.org]

³ In his essay 'The subjection of Women' as published in 1869

in modern times.

II. WHAT IS FEMINISM?

Feminism is a conscious understanding of the reality that there is discrimination in society based on gender, that women are oppressed and suppressed by men and women alike just for being women, and that this condition needs to change with the emancipation of women. The basic premise of males subjecting women to men is universally understood as a phenomenon, but the fact that ingrained patriarchal attitudes produce a sense of righteousness in women's attitudes toward subjecting other women to men is a fact that cannot be overlooked. Any person (be it male or female) who understands and recognises that there exists sexism, male domination and patriarchal attitude, detrimental to the position and condition of women, and 'who takes some action against it, is a feminist'⁴. As Gloria Steinem puts it, 'a feminist is anyone who recognizes the equality and full humanity of women and men'⁵.

As Prof. Nomita Aggarwal puts it, 'feminism is a struggle concept..... a struggle for power to women'. Feminism does not imply that the movement should ensure that women must despise men, that all men exploit women, or that women must have a higher status than men, but rather that women have been conditioned for generations to believe that their personal choices and autonomy must conform to patriarchal dictates, and that it is necessary to eliminate all forms of patriarchal oppression.

III. WHAT IS FEMINIST JURISPRUDENCE?

In its most basic form, jurisprudence is defined as "the science of law" that is 'mainly concerned with the regulation of human activity in conformity with each society's set values, objectives, and goals'. In law and society, feminist jurisprudence asks the 'woman issue' Moving forward from the basic premise that humanity is male, as previously stated, this stream of legal theory examines law critically using the notions of absence of gender neutrality in law.

As John Stuart Mill points out in his celebrated work 'The subjection of Women' that in the primitive society, the reason as to the subjugation of women might have been based on the factor of physical strength and that 'it arose simply from the fact that from the dawn on human society every woman was in a state of bondage to some man, because she was of value to him and she had less muscular strength than he did'⁶. Mill compared the situation of women to that

⁴ Prof. Nomita Aggarwal, 'JURISPRUDENCE (Legal Theory)', 354 (Central Law Publications, 10th Ed. Reprinted 2016).

⁵ As available on www.harpersbazaar.com.

⁶ John Stuart Mill, 'The subjection of women' (1869) as available on www.earlymoderntexts.com at p.3.

of a slave to his master, and he acknowledges that, even though slavery ended, women's situation or the extent of their bondage weakened due to the long-running struggle, but stemming from the fact that, unlike slaves, men sought not only physical labour from women, but also their sentiments and intimacies of affection. And this has been going on for so long that the connection between men and women, with women being submissive to men, appears natural in nature, and what appears natural appears conventional.

Feminist jurisprudence thus examines law critically, based on the notion that women are not prioritised in the creation of laws. Even for 'women,' laws are made with male satisfaction in mind, not with women's best interests in mind. Even when they carry a woman's interest, that interest is safeguarded in terms of male fulfilment. Questions challenging the gender bias of law will remain unanswered and, if answered, unsatisfactory as long as women are men's 'responsibilities,' as long as they are 'weak' in the eyes of law (in terms of not having the faculties necessary to make their own decisions), and as long as law is made for the man, from the "reasonable" point of view of the "reasonable" man and not the person, questions challenging the gender bias of law will remain unanswered.

Even in this 'Post-Modern' era of technological growth, women's position has not improved significantly from a few decades ago. Despite the impetus gained by the 'feminist school' after the 1970s, little has changed, and other kinds of female subordination and subjection have emerged. Technology has also been used to oppress and subjugate women. It is vital to quickly comprehend the various theories in feminist jurisprudence before getting into the details of the issues faced by women and feminist school of law.

IV. FEMINIST LEGAL THEORIES

Feminist legal theory is approached from a variety of perspectives. There is no such thing as a complete feminist theory. Liberal, radical, socialist, and Marxist approaches to feminism, as well as cultural, postcolonial, transnational, relational, postmodern, dominance, difference, and pragmatist approaches, have all contributed to their own effects. In this article, the researcher will briefly delve into a few that are widely considered significant.

Liberal: Liberal feminism is based on the belief that women are rational autonomous individuals who are entitled to the same rights as men.⁷ It finds one of its most staunch supporters in John Stuart Mill. Liberal feminists seek to make 'liberal laws truly liberal to women'⁸. They seek egalitarian justice on the basis of sameness. Despite assurances from the

⁷ Suri Ratnapala, 'Jurisprudence' 262 (Cambridge University Press, 2nd Ed.).

⁸ Ibid.

law, women are generally not treated equally.

For instance, section 497 of the Indian Penal Code deals with adultery and its penalties. This Section of law's inherent inequity and bigotry stipulates that no woman can ever seek restitution for being a victim of adultery by a cheating husband, nor can she pursue the woman who is equally involved with her husband. However, the 'men who suffers from his wife's immorality' has the right to prosecute the other guy involved for all 'reasonable' reasons. Truly speaking, this section was the flag bearer of the belief that "women belong to men" and that 'getting the attention of one female is a primitive competition between two guys' and eventually this provision has been struck down.

The law doesn't recognise the legal rights of offended wife and as a token compensation considers the 'adulterer wife' as a victim. Different treatment of persons similarly placed defeats the aim of equality.⁹ If the husband conducts an illicit affair with an unmarried woman in this circumstance, the lady has no recourse and is repeatedly assured that she is free to seek divorce. Alas! What a pity! A fundamental concept derived from this provision is that, while a woman is the possession of a man, a man is never expected to be the possession of a woman. Not that the researcher believes that any gender should be reduced to the ownership of the other, but the similarity cannot be ignored for the sake of argument and the inherent inequities that exist.

When the argument arises whether, women should be treated equally at par with men or with special regard to their circumstances, liberal feminists' advocate that they should be treated same as the differences or the so called special circumstances of women have been used as the tools to suppress and oppress them.

Radical: Having one of the strongest voices in Catherine MacKinnon, radical feminists 'assert that the law is male'. In contrast to liberal theorists, MacKinnon believes that the equality theory cannot expose women's subordination since it only requires equal treatment when women's circumstances are similar to men's - which men have guaranteed does not happen very often.¹⁰ Equality doctrine is not only ineffective; it also helps perpetuate women's subordination by providing an illusion of fair treatment that dampens women's insight into their own oppression and makes them more compliant participants in that oppression.¹¹

⁹ Ibid.

¹⁰ Katherine T. Bartlett, "Feminist Legal scholarship: A History Through the Lens of California Law Review" [California Law Review Vol.100 Issue 2, 2012] at p. 402 as available at <http://search.ebscohost.com/login.aspx?direct=true&db=bsh&AN=74152439&site=ehost-live> .

¹¹ Ibid.

Mackinnon further tries to establish this point by citing examples of gender neutral laws or entitlements like those of free speech and expression that entitle men to exercise the right in negation to women by defining them and talking about them the way they feel fit¹² and also of the 'right to privacy' which covers aspects like birth control and sexual autonomy and choice of abortion in favour of women, but 'along with those rights, greater pressure from men to have sex – and fewer excuses not to have it'¹³. According to MacKinnon, men control women 'by eroticizing women's availability to men on men's terms'¹⁴.

Despite the fact that Radical feminists' non-subordination theory has been highly condemned for openly naming the cause of women's oppression as males, as well as for objectifying women in theory, this is one school of thought that is particularly prevalent in feminist jurisprudence.

Cultural: Cultural feminists emphasise difference between men and women that they say are shaped by 'masculine values and views of the world. Carol Gilligan's hypothetical drama¹⁵ throws light at how cultural feminists think of a utopian society where laws will protect everyone from all harms. According to them, the differences between men and women are cultural, such as women's nurturing and loving attitudes vs men's pragmatic approach. What cultural feminists fail to recognise is that society's assigned roles have been so imposed on the sexes that both men and women have developed stereotypical attitudes concerning gender standards. This concept is lost on cultural feminists, who believe that men and women may be equally sensitive and logical.

Socialist: They call state patriarchal. The material base of patriarchy is that men control women labour power and men control women's bodies, and to end this capitalism must be abolished and 'when women are given equal power in the power structure, women can be liberated'.

Post-modernism: Postmodernists advocate for subjectivity over objectivity in law. Essentially, both male and female perspectives and techniques are distinct, and laws are typically crafted from a male perspective. They go on to assert that the terms "man" and "woman" are simply effects of language, that these terms are socially constructed and have no independent validity, and that they are developed by males from a masculine perspective. As a result, post-modernists contend that if things are socially produced, they can be rebuilt or deconstructed. They do not strive to create female-oriented categories by deconstructing male-

¹² For instance the birth of the term "FEMINAZI" for those women who talk in support of women's rights and against sexism.

¹³ Supra note 15 at p. 403.

¹⁴ Ibid.

¹⁵ Where a boy and a girl were asked the same question and the boy's answer was logical and he girl's approach was insightful.

oriented categories; rather, they deny the existence of categories altogether.

Towards egalitarian gender justice, post-modernists to pacify the movement are advocating for gender neutral laws.

V. MODERN CHALLENGES TO FEMINIST JURISPRUDENCE

The difficulties to feminist jurisprudence are so many that the scholar will never be able to fathom them all. Nonetheless, an attempt is made to simplify and enumerate the concerns' knowledge. Although it would be a misconception to label these issues "contemporary." They've always been there. The primary source of the problems addressed here is not any recent invention. Some of them may have changed with the passage of time, but their essence remains the same: women's oppression.

One of the biggest challenges to feminist jurisprudence is **men**, who are afraid of what might happen if their counterparts attain equality. The fear in men of the unknown not only does not let them accept women as their equals but also makes them suppress women in ways unimaginable. For instance, an economically and educationally independent female member of a family is expected to fit the gender norms and be a 'wife, daughter and mother' material even if she is career driven. The laws that have accepted younger age for women for marriage and older age for men to marry only restrict women in the name of their biological character while discriminating between men and women.

Another big challenge to feminist jurisprudence is **women**. An interesting read for this argument would be available when one visits the website 'womenagainstfeminism.com'. This is just one example of how feminism as an ideal is thwarted with the arguments often raised by feminists themselves calling feminism 'a plague to the society'. For some women, the patriarchal attitude is so deeply entrenched in their minds that like in 'Stockholm Syndrome' they do not want to see their oppression and are critical of women who do not accept patriarchy in its complete dimension.

Further, feminist jurisprudence has been trying to tackle the **imbalance in the laws that got created in the name of creating balance**. With Maternity benefits and pregnancy laws etc. the laws reduced women to their status of disability and at the same time deepening the divide between men and women by not providing similar provisions to men who have to face temporary disabilities in their life. The researcher is not in favour of calling pregnancy a disability, but the state does treat it like that in spirit. A pregnant woman loses her value. A woman with family to take care of post-marriage, loses her value. A woman with kids loses her value. Yet, the state or the society does not expect men to go through the same struggle.

John Wayne said, *“They have the right to work wherever they want to – as long as they have dinner ready when you get home”*.

Another major challenge faced by feminist jurisprudence is the **objectification of women**. Women all around are subjected to impossible standards of external beauty and body shaming tactics, and the inherently patriarchal mind-set ensures that women are brought up in a way that they stay conscious with the struggle for the beauty standards of Cleopatra or Greek Goddesses. There is a further sexualisation of women and more than the intellect, weightage is given to outer beauty standards. Even the Miss America pageant that boasts of providing of the largest scholarships in the world for education to the finalists has hardly ever had to give out scholarships as none of the finalists ever applied for scholarships.¹⁶ After all the words of Friedrich Nietzsche are not lost on the researcher, who said, *“when a woman has scholarly inclinations there is usually something wrong with her sexual organs”*.

Morality is another challenge to feminist jurisprudence. Morality is subjective, yet women all across the world have been forced to carry the morality of both themselves and the males in their household. The fact that a German woman would be treated as a murderer if murdered by her family members in the name of honour in Germany, but Turkish ethnic women would be treated as ‘manslaughter’ in Turkey demonstrates how entrenched it is in the state's patriarchy to accept the life of a woman in relation to the morality of the man she offends, even if it is based on her ethnic cult. In India, honour killings are common. With the decentralisation of power, we've seen Khap Panchayats become their own courts, putting the honour of the women in their Khaps above all else, and any act of love or independence is seen as bringing dishonour. So much so that a male member eloping with a girl may force the Khap to humiliate a female member of that guy's family, even to the point of ordering the female to be raped by the community's men.

Since the last few decades of women being more vocal about their preferences and about their **right for sexual autonomies**, there have been sections in the society very critical of the ‘waywardness’ of women. The entities and things that stayed inside the four walls of their chambers, coming out in the open with their voices on the most basic and essential of their traits has been perceived as a threat to the foundations of the society. As radical feminists were pointing out, the equality is only as a matter on paper and not in spirit. If a female is vocal about her sexual choices, orientations and perceptions, she is branded as immoral. The length of her clothing, decide her character. In India, there has been such a differential and detrimental

¹⁶ Source: Last week Tonight with John Olliver published on 21.09.2014.

attitude towards sexual autonomy of a woman that all aspects of a woman's autonomy are scrutinized and adjudged by the society and redefined to suit their dictums. The right to marry or not to marry, the right to give birth or choose abortion or the right to be in a live-in relationship, are all not her choices to be made, but for the society and the state to brand for her and approve for her. Napoleon Bonaparte asserted, "*Nature intended women to be our slaves. They are our property.*"

Another challenge faced by feminist jurisprudence is by **media**. The media that can make you or break you, as it deems fit. If it was media that gave the push for *Nirbhaya*, it is the media that reports heavily on the 'misuse' of laws relating to women. It is not denied in the essay that women related laws are not misused. But, misuse of law is not gender specific. Can it be said that men do not misuse the laws? Rather, even men in the house for their ulterior motives use the women in their families to misuse the gender specific laws as well as the general laws. Yet, the media and the common society is quick to point out that 'women misuse the laws'.

And this **misplaced argument of misuse of laws by women**, have been used by scores of people to prevent the legislation to the tune of criminalising marital rape. There are a variety of reasons why marital rape is not criminalised, ranging from a lack of comprehension of the term "NO" to the deep idea that after marriage, a woman "belongs" to her husband and must be accessible to him according to his needs. Despite the fact that the state never speaks publicly about men's availability for their spouses unless she files a petition for recovery of conjugal rights, the general perception in society is that women have no option in sexual autonomy. The issue is similar with workplace sexual harassment rules, which include a provision for punitive action against women who appear to be abusing the legislation. As a result, every failed complaint under the statute will result in the complainant's punishment. That in and of itself will dissuade a complainant from filing a complaint, first because of the stigma associated with it, and second because of the fact that Indian organisations are not in favour of fostering such complaints, but rather of discouraging them. Regrettably, the objective is not to prevent acts of sexual harassment from occurring, but to prevent complaints from occurring.

For the deep pervasive gender based discrimination, **patriarchy** can never be lost sight of. The patriarchal and matriarchal societies of the world can be distinguished. Because patriarchy is so ubiquitous, it has a propensity to convert matriarchal or matrilineal communities to patriarchal societies. As evidenced by the fact that a few South Indian civilizations that were once matrilineal or even matriarchal have begun to show traces of patriarchal mentality. The man is always the family's head, and he determines the duration, tenure, and boundaries of freedom for the family's female members.

Economic independence or dependence is another challenge in this area. Despite constituting half of the population of the world, how much property do women own? And even when some women do, how many truly own properties or are not owning them in the name and interest of other male members. Even though the liberal democracies around the world guarantee equal pay for equal work, it is a fact that women are not preferred for top-level positions in corporate and work environments as ‘aggression’ as a trait in a leader is best suited for men and in women it is inappropriate. By the gender, without even conducting interviews for work positions a woman’s mettle and worth gets decided. They are most sought after for the positions of ‘Receptionists’ and ‘administrative staffs’ but less preferred for high profile jobs. And whenever this argument is raked up, the offended jump straight into the circle with the examples of the likes of Indira Nooyi¹⁷ and Nirmala Sitharaman¹⁸ saying that, the argument is invalid. But the fact of the matter is that such women indeed are a handful and they get celebrated out of proportion and this celebration ignores the fact that of the fortune 500 companies only a slender majority may have women like them and it is still a man’s world.

Political justice is another challenge for feminist jurisprudence. Where political autonomy in the name of *one person - one vote* is celebrated, it is equally ignored how in the developing countries like India, the votes of women are also determined by the male members in the family. The political ideology of the family to which a woman is married to, must most necessarily become her ideology too and anything to the contrary is seen as disrespect.

One of the further challenges for feminist jurisprudence is the usage of acts of **sexual violence** against women to suppress women. Sex as a tool of exploitation and suppression is rampant in today’s day and age. No matter how stringent the law became post 2013 Criminal Law amendment, it is a fact that the crime against women is at an all-time high. Irrespective of age the tool of rape is used to oppress and suppress women. This reminds the researcher of a conversation she had with a doctor in one of her journeys. The discussion as to why rape occurred, made the doctor lament that ‘this is how we (men) show the women their actual place’. It was again the doctor who further commented that ‘the men who think like that are no men’, but unfortunately they are. As long as so much weight is tied to the purity and sanctity of a woman’s chastity, as long as she is referred to as ‘khuli tijori’¹⁹ (open safe), as long as a woman past a certain ‘time’ out on the roads is immoral, and as long as men take it upon

¹⁷ CEO Pepsi Co.

¹⁸ Current Union Finance Minister of India.

¹⁹ A reference to a joke made in a popular cinema by the name of Jab We Met when the lone female in an abandoned station is asked to be cautious by the station master for ‘a lonely woman is nothing but an open safe’ and as such her chastity may be stolen.

themselves to teach women what their place is, feminist jurisprudence will struggle.

Further challenge to feminist jurisprudence is the **discouragement of speech and expression** in women. In today's age of advanced technology, women are more prone to cyber bullying including being subjected to abuses, morphing and such other tools of harassment for simply existing in the virtual world. References may be even drawn to the cases of Gurmehar Kaur, or of Varnika Kundu or of popular celebrities like Deepika Padukone and Priyanka chopra who are 'slut-shamed' by the virtual community for their expressions or their attires or even the way they sit next to the Hon'ble Prime Minister of India. Any woman willing to express her opinion has to be willing to accept to be subjected to online abuse and the same goes unmonitored or unregulated by the state machinery.

Lastly, the most important challenge of feminist jurisprudence is the **masculine point of view of the law**. For instance, the test of reasonableness is the test of what a reasonable 'man' thinks, even when a woman is protected in law, she is protected to the extent of man's sensibilities. For example, u/s 497 IPC, as already enumerated a woman can neither be prosecuted nor can she prosecute. A clear example of how the woman is the property of the man. Further, how as regards abortion, a married woman has to take permission of her husband before abortion. It is the body of the woman, yet she is to be answerable to others for their approval, so on and so forth.

VI. CONCLUSION

"The most important things justice, equality, liberty, secularism – these are concepts if you teach your child when six or seven, they keep for the rest of their lives. Children have to realise you have to share with others. It's not just enough to make money."

- (Late) Justice Leila Seth

Feminism poses significant problems to society and the law. The fight is just for equality. It isn't such a tough concept to grasp when you consider how every other aspect of society is being improved. Untouchability is no longer practised in Indian society, which is entangled in the webs of the caste system, and admission to places of worship is not restricted to any man from any strata. Despite this, the so-called divided classes of males have banded together and waged a global campaign against women. If a woman pollutes a place of worship with her unholiness and impurity, there is a ruckus. Women are subjugated by the exact tools that were designed to defend them.

Despite the fact that it has no negative connotations for anyone engaged, feminism is one of the most widely criticised theories. It also does not advocate for the abolition of men's rights or the grant of unjustified privileges to women. Despite this, every day there are less feminists. Deep-seated sexism, insecurities, and injustices would always try to stifle women's progress from oppression to freedom. The researcher finds solace in Justice Leila Seth's words, realising that if every child is raised as a person, understanding that the world is to be peacefully shared, the utopia of an egalitarian society may one day become a reality, because no matter what, emancipation of a few women will never mean emancipation of all, and education of a few will not mean education of all.

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