

STAGES OF LAW AND THE 'WOMAN' BIAS

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But first we must ask: what is a woman? "Tota mulier in utero", says one, 'woman is a womb!'

-Simone de Beauvoir, *The Second Sex*¹

THE JURISPRUDENCE BEHIND BIAS

Touching the area of persistent 'woman' bias in law and legal rationality is an abstract terrain as both the concepts, i.e. law/legal rationality as well as sex/gender are 'highly dynamic, open textured concepts available to innumerable competing interpretations and formations.

The state of contemporary Indian legal scholarship shows an overwhelming reliance on positivist ideas about the law'.² Early feminists accepted the view that law has neutral and universal values, so they simply sought to extend its application to women, in the form that it exists. This gave rise to the concept that sexuality is a private sphere issue and thus not relevant to the public sphere. The interdependence of the public and private sphere makes a mockery of the idea that law only regulates the public sphere.³ The strict doctrinal interpretation hardly seems to do justice in this scenario. The idea that femininity is a social construct challenges the argument that women and men have different identifiable characteristics. But it goes further and explains how it is not a matter of choice for women (and men) to transcend the constraints of femininity (or masculinity).⁴

The contemporary feminist legal theory is constructed out of a combination of analytic and political-ethical claims. Analytically, the claim is that sex/gender is one important social structure or axis of social differentiation, and is hence likely to characterize and influence the shape of law. Politically and ethically feminist theory starts out from the assumption that the ways in which sex/ gender has shaped the world, including through laws, have been unjust. In other words, sex/gender consists not just in differentiation but in domination, oppression or discrimination. Legal sex differentiation, in short, on the whole

¹ S. de Beauvoir, *The Second Sex* (London: Vintage Classics, 1997).

² Parashar Archana, 'Introduction', *Engendering Law: Essays in Honour of Lotika Sarkar*, (ed.) Dhanda Amita, Parashar Archana (Lucknow: Eastern Book Company, 1999), p.3.

³ Dhanda Amita, Introduction, Ibid at p. 8.

⁴ Bartky Sandra Lee, 'Foucault, Femininity and Modernisation of Patriarchal Power', *Feminism and Foucault*, (ed.) Diamond Irene, Quinby Lee (Boston: Eastern University Press, 1988), p.61.

disadvantages women.⁵ The basis of legal rationality, in the light of law's role as a dominant and legitimating carrier of inclusions and exclusions is, accordingly, a matter in need of continuing critical interrogation.⁶ It has to be seen how *body/women/ emotion/ nature* is strategically differentiated from *mind/ men/ reason/ culture* as basis of a cultured society.

SEX, GENDER AND THE LAW

Sex it has been assumed refers to an underlying natural reality of a body sexed as either male or female with penis or vagina. Gender on the other hand, has often been taken to refer to the socio-cultural move from maleness to 'masculinity' or from female to 'femininity'. However, they are more complex than this. In fact there is an argument that the '*sex is as constructed as gender*'.⁷ Gender, accordingly would mean the way society and law names and forms bodies as 'sexed',⁸ for example the trans-genders and queer groups till recently got virtually no protections of law, as they did not fit into the binary setup of constructed domain of 'sex'. As for the law, it is established fact that an 'act' paves way to an 'experience' which may become a 'habit' and further a 'custom' which if followed and accepted by majority may end up being a 'law'. To say that the 'meaning of law can be authoritatively determined is a fallacy, it simply allows for one interpretation to gain dominance at the cost of another. Therefore there must be an acceptance of the fact that legal meaning is constructed rather than pre-existing.'⁹

THE HOUSEHOLD HIERARCHY: PUBLIC v. PRIVATE DEBATE

Our legal reasoning is based on the concept that there exists a homogenous harmonious unit within a household wherein males and female have their own distinctive but equally important roles to play. As easy it is to make one-self comfortable with the assumption, equally difficult it is to know years and years of conditioning of one and all about the 'ideal' behaviour, right and wrong, moral and immoral, and beneath all of this the 'power play'. Again our legal system has voluntarily chosen to divide this structure into private and public; wherein public sphere will have protections for all 'person/s', but the

⁵ Lacey Nicola, 'Feminist Legal Theory and the Rights of Women', *Gender and Human Rights*, (ed.) Knop Karen (Oxford: Oxford University Press, Academy of European Law, 2004), p.16.

⁶ Grear Anna, 'Sexing the Matrix', *Gender, Sexualities and Law*, (ed.) Jones Jackie *et.al.* (US: Routledge, 2011), p.39.

⁷ Butler J, *Gender Trouble: Feminism and Subversion of Identity*, (London and New York: Routledge, 1990), p.7.

⁸ Supra n.6, p.40.

⁹ Supra n.3, p.11

private sphere is claimed to be domestic issues between 'male' and 'female' *ultra-vires of our legal hold* itself.

At the core of patriarchy lies a relative power question. Economic, social and political power in relation to the vulnerable groups lies at the command of patriarch.¹⁰ Inside the household, just like the society the choices exercised '*reflect male needs, male concerns and male experience.*'¹¹

CONSTRUCTION OF 'IDEAL SEX' BEFORE LAW ?

A number of judgments confirmed by the judiciary rest on just a single understanding of the problem's cause and remedy. Such 'justice' is partial or sometimes even corrupted form of justice. In the case of *Ashis v. D.C. Tewari*,¹² where both husband and wife insisted to reside with their families of orientation, Justice Dua reminded the litigants: '*her mother must grasp this vital fact, taking it for granted that after marriage the girl has to go and live with her husband....Mrs. Tewari has to look upon her mother-in-law as her own mother...'*. This kind of interpretation of conjugal duty of marriage included transferring woman as a gift from one household to another, thereby acquiring new rights vis a vis her husband's kin, and relinquishing those in respect of her own kin.

Then again there have been assumed instances wherein the judges of the apex court have declared that consent to marriage implied to marital intercourse, and latter must follow in a very short span after marriage, that too as and when the husband demands it. Judges readily affirm that the procreation of children is one of the principle aim of marriage and all the normal womenfolk have an innate desire for motherhood: '*the birth of a child puts an end to minor misunderstandings and bickering between spouses, for the parties concentrate on lavishing in common their love on the child and thus are brought together.*'¹³ Then there are judgments which label the mother as unnatural, irresponsible and illegally cruel: '*the husband, his sister and his parents were always crazy to have a child in the family but appellant (wife) dashed their hopes by resorting to termination of pregnancy.....if the wife*

¹⁰ *Chakraborty Gangotri*, 'Constitution, Gender Justice and the Supreme Court', *Cochin University Law Review (CULR)* (Vol.26, Iss.01&02, March, 2002), p.183.

¹¹ Cossman Brenda, Kapur Ratna, 'On Women, Equality and the Constitution: Through the Looking Glass of Feminism', *NLSIU Journal*, (Bangalore, Vol.I, 1993), p.20.

¹² A 1970 Del 98, cited in Uberoi Patricia, 'Hindu Marriage Law and the Judicial Construction of Sexuality', *Feminist Terrains in Legal Domains: Interdisciplinary Essays on Women and Law in India*, (ed.) Kapoor Ratna (New Delhi: Kali For Women, 1996), p.195.

¹³ *Ibid*, p.201, for the purpose of detailed study please read, *Lachman Utamchand Kirpalani v. Meena alias Mota*, A 1964 SC 40, para.6.

*deliberately refuses to satisfy husband's natural and legitimate craving to have a child, the deprivation reduces him to despair and affects his mental health.....the court has to attach due weight to general principle of spiritual benefit of having a son who can offer a funeral cake and libation of water to the manes of his ancestors.'*¹⁴ Here the judge has attached no thought as to asking the 'woman question' nor has he tried to think from a neutral view including the wife's problem, but rather imposed his own ideologies of the 'want' of not just a child, but a male child – the son!

- The Non-Ideal Females

In some more recent times the situation has not changed a great deal, in *Satni Bai v. State of Madhya Pradesh*,¹⁵ court has already hypothesized the gender role and it shows in his decision making wherein judge describes the appellant as 'wicked mother'. In the case mentioned above judge instead of pointing any relevance to evidence showing 'involvement' of appellant in the crime has based his decision on her 'reaction' to the crime. Court held: *'the normal reaction for any mother would have been to go hysterical and clutch the body of her son'* whereas the appellant here was found standing near the dead body of her son with blood stained axe in her hand, on this reasoning she was held guilty, although rest of the evidence was circumstantial. It is pertinent to note here how the judge defined the attributes - *'motherhood is one of the most precious gifts endowed upon mankind, and there is no relationship more pristine and pure than that of mother and her child. No mother in normal circumstances can tolerate even a scratch on the body of the child'* but after defining such characteristics, the judge based his decision, not on rule of law, but solely absence of 'natural' reaction of a mother.

Another interesting example contrary to the abovementioned, still a far cry from the correct reasoning is of the famous Rajiv Gandhi assassination case¹⁶ wherein the dissenting judgment was noteworthy to include *'she was led into conspiracy by playing on her feminine instincts. She became an obedient participant without doing any dominant role. She was persistently brainwashed.....her actions were characterized by obedience that followed from the fact thatshe belongs to a weaker sex.....and was helpless in escaping from the cobweb'*. Judges are caught in the conservative mode of seeking truth through scientific and

¹⁴ Ibid, p.202, also see *Satya v. Siri Ram*, A 1983 P&H 253.

¹⁵ (2010) 2 SCC 646

¹⁶ Ibid, also see *State through S.P., CBI/SIT v. Nalini and Ors.*, AIR 1998 SC 2628, Justice Thomas judgment.

empirical endeavours, but hardly do they put to use rationality and practical reasoning from a gendered perspective.

- Attributes Of Ideal Sex

There are stereotypes of what is ideal and what is non-ideal, which determine the case laws. Therefore even after decades of independence, our laws are not free from type-casted images of women. How do women feel equal, is this equality merely a formality to pose to our civilized conscious subjecting the women to this bias again and again? In our law, either the women are treated with leniency as she is inherently weaker sex, or if she tilts from the image of 'ideal woman', she may get even greater and severe punishment from the men faced with same charges. The case of Paniben¹⁷ proves this theory right, as such women are seen as transgressing not only the 'social norms', but also the 'gender norms'. The judge pointed out: 'it is hard to fathom as to why even the mother in her did not make her feel'.

MEDIATION STAGE: TOWARDS A SOLUTION OR A PROBLEM BY ITSELF?

Mediation within the family, viewed as one of the successful method of Alternate Dispute Resolution miserably fails in the context of our patriarchal societal norms. Within family we have hierarchical structure which is hardly gender neutral and women always are on the receiving end.

Family counseling establishes the fear of being socially ostracized in women if they refuse to go back to the same abusive husband or the marital home. The success rate of mediation in India shows the data or statistics indicating the percentage of female victims who have agreed to sacrifice their mental/ physical peace in the name of protecting the family honour, the future of her kids and finally her own sustenance.¹⁸ Mediation, may prove to be a boon for the civil matters, but it still is at its very embryonic stage to be applied in the domestic front, without taking into consideration the anthropological and structural positioning of woman in a household.

The process in practice only involves narrowing down the issues, hence saving court's 'precious' time in finding the merits. Many factors that influence a woman's decision to go

¹⁷ Ibid, p.104, also see AIR 1992 SC 1817

¹⁸ Patel Yamini, Sharma Ritu, 'Mediation Revisited- A Myth For Women At Grass Root Level', *All India High Court Cases* (New Delhi: AIHC, Vol.3, Iss.7, July, 2009), p. 81.

back to her spouse are based on factors which become clearer if we keep the ‘*stand-point epistemology*’ of the victim in mind and then finding a solution rather than blindly ‘*incorporating*’ the tools of change in the already existing patriarchal legal mechanism.

Example of mediations fits in as a classical example of failure of such incorporation in so far as a household unit is concerned. We must not forget factors like economic dependence, educational background, social stigma in abovementioned cases. Jurisprudentially feminist consider that this process revolves around a ‘power’ game. The solutions through mediation worsen the situation of the woman by coercing her to go back to her matrimonial house and accept and submit to the situation, which may not be in her own best interest- sometimes may even result in the consequent death of such a victim, being proved as an accident. Mediators just like the judges belong to the ‘*dominant group*’ and impose their ideals and principles and morals on the domestic structure, and hardly keep in mind the ‘*experience*’ of the female victim.

THE ‘WOMAN’ BIAS IN CONJUGAL RELATIONS, PROPERTY RIGHTS & MAINTENANCE RIGHTS

There is an apparent ‘woman’ bias in the Courts as well as the legislation which determine the women’s entitlements at time of divorce. As per Flavia Agnes,¹⁹ they look into ‘title’, ‘fault’, ‘need’ and ‘contribution’, therefore while the economic right of women revolve around the maintenance, the granting of it is premised on her assessed need and fault. That implies her right is pitted against issues of sexuality and ‘sexual purity’.²⁰ Agnes further points out the glaring void within Indian matrimonial statutes which do not provide for division of property upon divorce, as it is done in many civil law countries. Thus, fear of poverty, destitution or lowering of economic standards haunts women during divorce proceedings. Courts have penalized women for pursuing career at the cost of their primary duty of being a care taker of family, wherein the court claimed this act itself as cruelty and a ground for divorce²¹. The courts thereby left little choice for a woman, either to remain

¹⁹ Agnes Flavia, ‘Conjugal Property, Mortality and Maintenance’, Ch.2, *Handbook of Gender*, (ed.) Ray Raka (Oxford: Oxford University Press, 2012), p.52.

²⁰ Ibid.

²¹ *Suman Kapoor v. Sudhir Kapoor*, II (2008) DMC 774 SC

married or hold on to a job.²² Such a vague and shallow application of rule of law cannot be an objective gender neutral law, but definitely a patriarchal application.

Factually the role that a woman plays in the household barely gets any recognition, in terms of economy or importance. It is taken for granted, as this work requires a woman to be on her 'duty' all through 365 days of year without any break, still because of the reason it is unpaid labour, it is hardly given any importance. Consequently, as the woman is tired, overworked, and works unrecognized, she remains at the bottom end of the power relations within the household. Even when a woman is going out to work, this would not relieve her of her duties of a homemaker in addition to an equal economic partner for the household.

This discussion becomes pertinent as it shows how at the time of divorce, the property that was acquired by the husband during the course of marriage becomes his property alone, his wife's contribution in creating this asset by performance of her domestic chores is completely neglected by the legislature as well as judiciary, since marriage is not seen as an economic partnership.²³ Similarly if husband dies intestate the wife has same status in the property as the children and they get equal shares, totally forgetting she has contributed towards the formation of such assets.

Maintenance laws of India show a similar picture. In practical terms it is humiliating experience for a woman to get an adequate maintenance, though we can't deny the fact that marriage is a patriarchal paradigm and results in economic dependence of the woman. Now, in order to lessen the burdensome duty of husband to maintain the wife, the issue of morality comes into picture. s.125, CrPC²⁴ also links morality with the maintenance. That becomes an easy tool for husbands to entangle women in vicious and dilatory litigation over may be a pittance.²⁵

²² This instance has been seen in cases related to public domain also, wherein resignation was the asked at the time of marriage or first pregnancy, for more details see popular judgment of Air Hostess Case, *Air India v. Nergesh Meerza*, (AIR) 1981 SC 1829.

²³ *Supra* n.24, p.54.

²⁴ S. 125 (4), CrPC- "No wife shall be entitled to receive an allowance for maintenance or interim maintenance and expenses of proceedings.....if she is living in adultery,or if they are living separately by mutual consent".

²⁵ *Supra* n.24, p.59.

Even the Hindu law of monogamous marriage became a tool in the hand of husband not to pay maintenance in the case of *'Vimala v. Veeraswamy'*²⁶ wherein husband pleaded that being a second marriage, it is bigamous, hence he is not liable to pay anything for such relation. Similarly in another case of *Rajlingu v. Sayamabai'*²⁷ the plea of bigamous marriage was taken. The law is twisted and turned to fulfill the benefits of patriarch and goes against the vulnerable gender of the society. The extreme patriarchy spills over from the mind of the judge who goes to the extent of humiliating the woman during such litigation in *Malti v. State of Uttar Pradesh'*²⁸ wherein it was stated that – *'if the man and woman chose to live together and indulge into sex, no marital status can be conferred automatically by their living upon such woman. She is not entitled to legal status of wife in the eyes of law and society. Law and society treats such woman either as concubine or a mistress....the two may agree to live together to satisfy their animal needs. But such a union is never called a marriage. A woman leading such a life cannot be bestowed with the sacrosanct honour of wife. No marital obligations accrue to such a woman against her husband. Such a wife must be termed as adulteress.'*²⁹

This view has been echoed in yet another Supreme Court's judgment which involved live-in relationship between a woman and a married man, such woman was designated as 'keep' and 'mistress',³⁰ still the only hope remains due to some rare judgments which do upheld the right of women in the technical defective marriages and gave 'wife' broad interpretation.³¹

²⁶ (1991) 2 SCC 375

²⁷ I (2007) DMC 396 Bombay

²⁸ I (2001) DMC 104 Allahabad

²⁹ Supra n.24, p.63.

³⁰ *D. Velusamy v. Patchaiammal*, 2010 (10) SCC 469

³¹ *Chanmuniya v. Virendra Kumar Singh Khuswaha*, 2011 (1) SCC 141, this matter is referred to a larger bench and judgment is still awaited.

CONCLUSION

It was established during the course of study that the different status to women starts at the level of a house-hold, and a household is not a homogenous harmonious unit, but hierarchical in its nature. Secondly, it was proved that the reasoning put-forth by the husbands, judges, power heads of societal structure against the women clearly showed that there is a systematic structural strategic bias in the allocation of decision making and the bargaining power within home as well as society. Consequently against the popular notion my argument was that judiciary does create an image of ideal sex by either protecting the female (for the reason of women being weaker sex) or in cases wherein women deviate from the ideal sex image, by awarding graver punishments to women than men placed in the same situation. Resorting to mediation within the matrimonial setup is more of a problem rather than the solution, as the women have to compromise her safety, peace and wants because of other social constraints such as mass ridicule. Even where there is de jure equality, law in its actual functioning discriminates against women because legal agents interpret laws in patriarchal ways.³²

To reduce the 'woman' bias within the law cannot be a one step process. We must remember, if we need to make the law victim oriented, we cannot ignore the victim's experience. Now, that will imply that law cannot be objective³³, and subjectivity along with the truth has to be taken into consideration. Voices of women must be added while formatting legislation, or women judges may be appointed to try women related cases. Secondly, social rights should not be kept out of bound for women by labelling them as non- enforceable. Non-inclusion of social right entitlements is the major problem with respect to improving

³² Sachs A., Wilson J.H., *Sexism and the Law: A Study of Male Beliefs and Judicial Bias*, (ed.) Robertson Martin (Oxford: Oxford Press, 1978), p.9.

³³ Law is never objective, it is only a tool for the law makers to give importance to one aspect while choosing to ignore the other.

women's status in society. The very basis of social entitlements forms the private- public debate, and unless 'private rights' are intact, it cannot result in extending 'public rights'.

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