



**FEMINIST TRAVERSE FROM HISTORY THROUGH THEORIES TO JUDICIAL
DIALECTICS**

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ABSTRACT

The more appropriate question would be to ask the male class that if they would have menstruated, had the peculiar societal attitude towards sanitary pads been there? No, in my view. As it all happens in the same thread, the power structures are greatly composed of males ranging from law-making to social milieu who take decisions for women's well-being, despite having no concern of what they actually go through. For instance, a Secretary working round-the-clock to feed her family living in an under-developed country might get an insight to marry her boss and thereby shift her status of class to that of the boss. This subsumes two pertinent ideologies, one is the intuitive belief in the above contextualization of the term "boss" that it

necessarily must be a male and consequently, gives a call for "Lesbian Feminism". This covert ideology becomes a natural corollary to the other one, which happens to be the "Marxist Feminism". To bring more coherence to the idea imbibed in the aforesaid instance, the unequal economic relations force the women to get enslaved in the patriarchal rat trap due to the inevitable need of living and this being only one facet of male chauvinism, the whole of the patriarchal mindset and practices drive the society to such extent that a general term like boss gets a ubiquitous meaning referring to male. This makes me to pose another question that, will it bring any difference to the above narrative if the Secretary gets married to a female boss? In my opinion, not much, as although it does somewhere quench the quest of lesbian feminists but the causal inception of discriminatively-strained family structures and economic and power imbalances has led, though one woman out of the two, to subordination of the other, which irrespective of the fact is a woman. Therefore, the initial question concerning male menstruation itself gets answered by the above discussion and the perceived hypothesis that the male-structured society

obnoxiously affects the autonomy and liberty of women also gets proved.

INTRODUCTION

Feminism has been defined by various scholars and the underlying idea could be traced as an attempt to bring the patriarchal nature of society on the forefront and identify the inequalities in terms of opportunities and treatment and raise the concern to have equal access to all such rights which have been made available in the public discourse for both men and women. However, the idea of feminism is multi-dimensional as it depends upon the context in which the rights come for determination and thereby, a new facet of it could be expected every time. This is also the driving force behind the emergence of several “feminist theories” in the past whose ambit is still widening due to the substantive interpretation of existing laws and thus carving out a need to recognize the rights beneath the layers.

The break-up of my research paper is as follows- where Part I is the introduction itself, Part II provides a brief idea about the Indian and World feminism history, followed by Part III which will discuss in detail about different feminist theories and

they would be understood in the context of Indian Judgments and lastly, Part IV will provide with the concluding remarks.

HISTORIC AND DYNAMIC WAVES OF FEMINISM IN INDIA AND THE OUTSIDE WORLD

After a perusal of various scholarly writings, one can reach to a conclusion that irrespective of whether the feminist movement that had taken place in our country or in the rest of the world, the nature of rights been engrossed in any movement was varying with respect to the movements that had happened previously or to the movements existing correspondingly. This part of the submission would briefly deal with two different courses of feminist movements- one that took place in India and the other in the remaining world.

A. Indian Feminism History

The whole of the feminism history could be broadly divided into two phases: Pre- and Post-Independence.

1. Pre-Independence:

Since it is a known fact that India was subjected to the barbarity of the colonial rulers, one could also sense a westernized-ideological influence upon the Indian culture. Much part of our Constitution could be read as an extract from the British Constitution and this exhibits our westerly standpoint on the tales of equality, liberty, fraternity, autonomy and justice. The movement did not share its path with feminism as this term was coined much later and it all began as a “Social Reform Movement” for the eradication of social evils in the society like Sati System, Child Marriage, Illiteracy, Polygamy and the assertion of Widow Remarriage. Here, the women were the recipients of all these societal-upliftment initiatives. However, the women were not the flag-bearers of the movement and were much following the directions of the male leaders. Such males apprehended the integration of western ideas into Indian culture and responded by only inculcating the fairness principles cherished by the western men into the Indian culture and there from, coating them with the traditional Indian flavour.¹

There were stern efforts made by various leaders like Rabindra Nath Tagore, who went forward with the idea of establishing schools for girls and upheld the idea of widow remarriage. Also, Keshav Chandra Sen and Ishwar Chandra Vidya Sagar backed the prohibition on child marriage. There were several women-led institutions like Pandita Rama Bai’s Sharda Sadan (school for Indian widows), maternity and child welfare league in Baroda, Bhagini Samaj in Poona, amongst others and there were National organizations as well, like Women’s Indian Association (1917), National Council of Women in India (1920), Federation of University Women in India (1920) and All India Women’s Conference (1926).²

It becomes apposite to mention that the male leaders did not adopt a Substantive Approach in the emancipation of suppressed Indian women as all the initiatives were a camouflage in the name of equality by confining them within the four-walls of the house due to the fear of allurement by western ideas, allowing them to flip the pages but not to choose any profession other than to be a household

¹ Rekha Pande, “The History of Feminism and Doing Gender in India” 26 *Journal of Scielo* 3 (2018)

² *Id.*

(very much manifest in the Nationalist Movement when Gandhiji tasked the women with household works like spinning and weaving as a part of their contribution) or building a Catch-22 situation for them, whereby they have to choose either between family/marriage on one side or religion on the other. If we come back in the contemporary time, the same fear of getting swayed by the westernization persists today or could be said that just the Formal Equality exists for women. In the recent past, a remark was made by the Uttarakhand Chief Minister that women while wearing “ripped jeans” obliterate the cultural heritage of our country and to the astonishment of all, questioned that what values will they impart upon the next generation?

2. Post-Independence:

A major shift was seen in the outlook of the law-makers towards women rights in the post-independence era. Since there were bizarre rounds of tension erupting in the country immediately following the independence, much heed was not paid to

women’s equal rights in the society. However, even amongst these crisis, the women’s question was not completely neglected and various codified laws were made to curb what were evils for women existing from more than a century. These include the inclusion of Clause 3 in Article 15³ of the Indian Constitution which empowers the State to make special provisions for women, the Hindu Marriage Act, 1954 which evicted polygamy and conferred equal rights of divorce upon both men and women, the Hindu Succession Act, 1956 (however, the true nature of feminism in this law was realized in 2005 with its amendment and much really in the recent case of *Vineeta Sharma v. Rakesh Sharma*⁴), the Dowry Prohibition Act, 1961, the Maternity Benefits Act, 1961 (this law in my opinion goes against the direction of feminism, which I will discuss in the further part of my submission), amongst others.

This period also saw the rise of the women communist groups as that of the Communist Party of India (Maoist Party). The Party intended to and worked for the prevention of dowry, eve-teasing, obscenity

³ Art. 15(3)- Nothing in this article shall prevent the State from making any special provision for women and children

⁴ (2019) 6 SCC 164

and raised the misery of women living in slums. Following the CPI, there were other organizations holding up for women like the Self-Employed Women's Association (SEWA) which aims to provide protection to the women workers against the harassment or oppression of the employers, along with economic security. Also, the National Commission for Women (NCW) established in 1992 is the grievance redressal mechanism for women with respect to the complaints of cruelties or rights suppression, like violence against women, dowry complaints, property rights, etc.⁵ *If we have a closer look at the works of the women groups in the pre-independence period and to an extent till the decades immediately following independence, were more related to ameliorating women from the deep social vices and on the other hand, women-led organizations in the late 20th century were highlighting the need to recognize the rights of women. This shows that such number of women had gain the liberty to raise an independent voice against the oppression so faced by them, which was not the case in the colonial era.*

B. World Feminism History:

The term feminism has been toiling since so long along the boundaries of different masses that it cannot be given a static definition. Initially, the term was used in France in 1837 by Charles Fourier who considered women's liberation to be a precursor to social progress. Later in the early 20th century, it became a word-of-mouth in the United States and since US was the hegemonic power, feminism flared up to other European countries.⁶ In this sub-part, I will discuss briefly about the three major waves of feminism that took place in the US and alongside, cite certain judgments of feminist colour showing that how the Bench had shaken the social structures deep-rooted in gender-biased norms.

The *First Wave* began in the 19th and early 20th centuries when the women did not even have the minimal rights, like right to vote, education, property, etc.⁷ *However, if we compare the campaigned rights by women in US to that of India, one could infer that American women struggled for the very basic rights as the suffragettes protested for enfranchisement till several years which encompassed the whole of the first wave,*

⁵ *Supra* note 1

⁶ Kathryn M. Stanchi, Linda L. Berger, et. Al. (eds.), *Feminist Judgments: Rewritten Opinions of*

the United States Supreme Court 26 (Cambridge University Press, Cambridge, 2016)

⁷ *Id.* at 28

whereas, though such rights were earmarked for women by the Indian male influencers, but the women initiated their struggle for more progressive rights which came in the form of second wave in US. The *Second Wave*, as mentioned previously, had a progressive drive through by raising the concern of male-chauvinistic society as an embargo upon the equal development of women. This resulted in several codified laws granting substantive equality like the Equal Pay Act, 1963, the Women's Educational Equity Act, 1975, the Pregnancy Discrimination Act, 1978, and few other legislations. However, the women groups were unsuccessful in bringing women on the same parlance where the men stood and the movement seemed to crumble in the late 20th century.⁸

The *Third Wave* came as a response to the issues not addressed by the previous waves and also, could be said that it revived the wave which apparently happened to be faded. The women of this period went against the idea of 'generalization' propounded by the middle and upper-class white females and invoked the concept of 'individuality' which proposes that the women sufferings in one corner of the

world cannot be equated with that of the other. The term feminism is a multi-faceted concept and cannot be restricted in its meaning while interpreting terms and expressions like gender and gender identity, sex and sexuality, as *heteronormativity* (recognizes only gender binary, and sexual/marital relations are meant only for opposite sexes) becomes a hurdle for *homosexuality* and the same was harshly accepted by the white-females in the past.⁹

Potentially, the third wave focused upon the *experiential feminism* by taking into consideration individual concerns and not using them as lens for other women's experiences. In this phase, a feministic view was visible in the judicial pronouncements. In the case of *Safford Unified School District v. Redding*¹⁰, Justice Ginsburg, being the only female on the bench, restrained the Assistant Principal from conducting a strip-search of a 13-year-old girl who was suspected of possessing drugs. Ginsburg was of the view that if such search is conducted, it would cause a traumatic impact upon the life of the girl seeking to her 'age and sex' and thus, the probable psychological-impairment should be avoided despite the compelling precedents.

⁸ *Id.* at 28-29

⁹ *Id.* at 29

¹⁰ (2009) 557 U.S.

Also, the US media portrayed the 3 female justices dissent in the **First Post-Hobby Lobby Contraceptive Case (2014)**, where it became clear that a justices' sex becomes a determining factor for his/her reasoning as in this case, the male sex and the religion were the driving forces behind the majority judgment and dissent showed the growing feminism.¹¹

REFLECTION OF FEMINIST OR FEMINIST LEGAL THEORIES IN INDIAN JUDGMENTS

So far, one thing has become clear that different women perspectives had emerged at different times in different parts of the world and have transformed into various branches of feminism. This means that the feminist theories strike at the gender-biased roles embedded in the societal system and when such theories seek to identify (identification of subordination of women by men and unequal power-sharing, leads to a study of "feminist jurisprudence") and reform such biased structures through law, they are called as 'feminist legal theories.' Also, as Katharine Bartlett has mentioned

in her work that three legal methods could be deployed by the courts- *firstly*, by raising the women question to know the gender-biased practices, *secondly*, through practical reasoning, by contextualizing the immediate women concerns into legal arena and *thirdly*, through consciousness-raising, which will lead to a conversation with women of their experiences and then giving meaning to them.¹² Here under, I will mention such recent Indian judgments where the courts have deployed a feministic view with a compliance to the above feminist legal methods and also, how a particular view corresponds to a feminist legal theory or just a feminist theory (outside the law theories).

In my opinion, the feminist theories have either become a cause or an effect of the below-mentioned feminist legal theories, which are-

1. Liberal Feminism:

This feminism works on the principle of individual freedom and the same must be determined in relation to what has been occupied by men and thus, incorporates the 'sameness principle'.¹³ The sameness argument becomes a drawback for the

¹¹ *Supra* note 6 at 37

¹² *Id.* at 37-38

¹³ *Id.* at 30-31

women itself as it restricts the women's liberation sphere to that extended to men. In the case of *Saurav Yadav v. State of Uttar Pradesh*¹⁴, the Supreme Court upheld the sacrosanct principle of 'Merit' and said that a reserved-category candidate (Vertical Quota, i.e. OBC, SC, ST) has to be allowed in the Horizontal Quota, (which includes women, transgenders', handicapped, etc.) if such candidate has secured enough marks to fall in the latter category. In this case, Sonam Tomar secured much higher marks than specified for the OBC category and was eligible to qualify in the General Quota for females (Unreserved Females). The court went against the decision of UP Government by allowing the horizontal quota and said that this would reflect more high-scoring candidates. Thus, the court differentiated between 'reservation' and 'special provisions for women' under Article 15(3) – general female quota. *If we go back to the original question, the reverse of this case would lead to a situation, though the women are getting reservation to ameliorate of their historically disadvantaged position and compete with*

men but, that would not garner equality under all circumstances for women and many will remain subjected to the inequalities.

In another liberal feminist judgment of *Vineeta Sharma v. Rakesh Sharma*¹⁵, the Apex Court held that a daughter will have coparcenary rights in the ancestral property *retroactively*, even if the father has died as happened in the present case. Again, if the court would have reiterated the stand taken in *Prakash v. Phulavati*¹⁶ (only living daughters of living coparceners are eligible to be coparcener), then despite bringing the daughter and son on the same footing, the daughter could be considered as stuck in marsh.

Also, in *Secretary, Ministry of Defense v. Babita Puniya & Others*¹⁷, the Supreme Court held that the women officers shall be granted with permanent commissions in the Army and shall be appointed with command assignments by not restricting them to staff appointments only. The same decision was followed in *Union of India v. Lt. Cdr. Annie Nagaraja*¹⁸ by allowing

¹⁴ (2020) SCC 1109

¹⁵ (2019) 6 SCC 164

¹⁶ (2016) 2 SCC 36

¹⁷ (2020) 7 SCC 469

¹⁸ (2015) SCC 1862

permanent commission for women officers in Navy.

2. Radical Feminism:

Under this branch, the feminists hold that the subordination of women by men, whether in social, economic or religious affairs, is the root cause for inequalities and the same could only be curbed by deconstructing the patriarchal structures and reconstructing them.¹⁹ In my opinion, the **Marxist and Socialist Feminism** is a product of radical feminism, as Marxists and Socialists consider capitalism (women are not treated fairly in terms of pay, especially the women laborers) and patriarchy responsible for women subordination and same is the case under radical feminism.

In the recent past, the patriarchal notions being red in tooth and claw were bashed by the courts. In *Hassan Mohd. v. State of Haryana*²⁰, the Punjab and Haryana High Court was critical of the acts committed under the Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994. The accused was not granted anticipatory bail as

he was determining the sex of the fetus, though of a decoy customer deployed by the raiding team of doctors and claimed dramatically that he was only conducting ultra sound as shown through a pre-recorded video on LCD, under the pretext of sex determination. Further, in *State of Gujarat v. Ramesh Chandra Ramabhai Panchal*²¹, the 'Two Finger Test' was held to be Unconstitutional as being violative of right to dignity and privacy protected under Article 21²². The test is conducted on a rape victim to check whether she is a virgin or not or has consented before getting raped. *This test clearly projects the patriarchal mindset where no wrong is considered to be committed if the victim of rape had been in a sexual relationship prior to the rape so committed.* Similarly, in *Mamta Devi v. State of Himachal Pradesh & Others*²³, the High Court eliminated the misogynistic mindset of the State which did not allow 'Compassionate Appointment' to married daughters. The court was of the view that a daughter remains a daughter even after marriage alike the son. *The State*

¹⁹ *Supra* note 6 at 31-32

²⁰ CRM-M-34797 of 2020

²¹ (2020) SCC 114

²² Art. 21- Protection of life and personal liberty No person shall be deprived of his life or personal

liberty except according to procedure established by law

²³ (2016) SCC 4176

considered that since after marriage, she can easily sustain her life by having a share in the husband's property or could be inferred to be husband's property itself and thus, cannot claim compassionate appointment upon her father's death.

Also, the Sexual Harassment complaints stand on no different pedestal. In *Punjab and Sindh Bank and Others v. Mrs. Durgesh Kuwar*²⁴, the woman Bank employee was transferred after she raised voice against an officer for sexually harassing her and also regarding corruption at her branch. The Supreme Court quashed the said order by upholding the High Court judgment. *The men trying to dominate the women does not take any coercive action until she remains subservient to them and if the woman takes any action, she faces undue and unreasonable consequences.*

3. Cultural Feminism:

Cultural feminism is much embedded in the society itself and the same is acceptable to certain women who call themselves to be feminists. This feminism considers that women are meant for activities like caring, sharing, intimacy, warmth, etc. and are different from men by having their own

private sphere.²⁵ Several critiques have come and gone to the cultural feminism and a synonymous approach also came into existence by the name **Care, Affect and Vulnerability Feminism**. This approach was also followed by our freedom strugglers in the pre-independence era like Jawaharlal Nehru, who in his work, *Discovery of India*, mentioned that when the men were behind the bars, the women got an opportunity to come on the forefront and continue with the freedom struggle which they were not able to do otherwise in the past. He also mentioned that it was shocking for the men at that time, that such large number of women have mustered courage to fight against the British Raj as according to him women are 'non-violent and non-aggressive'. Also, when Mahatma Gandhi started the Salt March, it was the private sphere of women that came into light as salt being a necessary ingredient for everyday life and brought women into role due to her designated household work.

This does not end here, as the women are considered to be child-bearing machines and the same is placed as a duty upon them by framing the Maternity Benefits Act and

²⁴ (2020) SCC 774

²⁵ *Supra* note 6 at 33-34

there is barely any issue raised with regard to paternity leave which ironically is asked by a miniscule fraction of the total working-men population. In *Santosh Mahadev Atkar v. State of Maharashtra*²⁶, the wife was killed by her husband with a hammer as she left the house without preparing tea for him and his defense in the court was that, ‘whatever happened was a sudden and grave provocation’. The Bombay High Court ordered him 10 years’ imprisonment but keeping that aside, *a noteworthy point here is that according to cultural feminists, a woman is meant for ‘caring activities’, so does this justify the act of the accused-husband as it was the wife’s mistake for not taking proper care of her husband?*

4. Postmodern Feminism:

Under this feminism, it is believed that ‘Universalization’ or ‘Essentialist’ principles should not be the preceding idea for understanding the subordination of women by men and rather, the approach must seek to screen individual cases or experiences. According to postmodern feminists, even a well-built legal system or the controlling precedents cannot

generalize in their treatment, irrespective of howsoever good the precedent is, and the circumstances have to be viewed differently.²⁷ The same could be established through the case of *Jitin Mothukiri v. State of Maharashtra*, where the Bombay High Court was of the view that there cannot be a straight jacketed formula that in what manner a woman will react to an outrage upon her. In this case, the girl after an overnight party was subjected to sexual advances by her friend, when she decided to stay back. She repelled through force, but the accused in the court contended that she was friendly with him and they even clicked photographs during the party. *If we go by the precedents, then there might come a situation where the court could lean in favour of the accused by agreeing that the girl consented to such act. But such generalization cannot be made as it would be derogatory to the dignity of that girl and the same was the opinion of the court.*

These feminists also challenge the heteronormativity ideas and recognize issues pertaining to gender identity and sexual orientation as these concepts are not explicitly mentioned in any text and have to

²⁶ (2021) SCC 248

²⁷ *Supra* note 6 at 35-36

CONCLUSION

be regarded by applying a substantive approach. By this, the postmodern feminism encapsulates within its manifold **Lesbian Feminism**, which condemns ‘heteropatriarchy’ and upholds the rights of LGBT community. Similarly, in *Veera Yadav v. Government of Bihar and Others*²⁸, the Patna High Court directed the State (Central Selection Board of Constable in Bihar) to extend the date for inviting applications, as the State had only allowed men and women to apply for the post of constable. Similarly, in *M. Srinivasan v. State*²⁹, the Madras High Court allowed the prosecution to invoke Tamil Nadu Prohibition of Harassment of Women Act, 2002 against the accused. The court was of the view that a transgender has the complete right to identify her gender, by adhering to the *National Legal Services Authority v. Union of India*³⁰ case and in this case, the transgender has chosen herself to be a woman. *Although the court has approached the case through a precedent, but at the same time, the facts of the case drove the court to seek for the appropriate precedent.*

It would be appropriate to say that whatever be the feminist method or theory so devised, the breakdown of the patriarchal structures and the renaissance of equal rights for both men and women could only happen if the aggrieved persons like women and transgenders’ come into political picture and frame substantive laws and policies for their respective communities. Since the number of women members in Parliament have now increased to a certain extent, a considerable debate on women issues could be noticed leading to various women-based laws coming into existence. Also, though there had been substantial changes in the legal infrastructure for the amelioration of women, but there is lot more needed to take place. For instance, the criminal justice system acts as a safeguard for the accused persons by protecting them against arbitrary arrests and detention but comparatively, there is a disproportionate treatment meted to the ‘victims’ as well as ‘witnesses’, and the same was very much manifest in the recent ‘Unnao Rape case’. Thus, the feminist groups must be supported by the government in their efforts to bring equality amongst the masses, irrespective of any background they share.

²⁸ (2020) SCC 827

²⁹ (2020) SCC 6311

³⁰ (2014) 5 SCC 483



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