

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 2

2021

© 2021 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

A Critique of Gender Neutrality in India

TRUSHA MODI¹

ABSTRACT

The research paper aims at understanding feminist legal theory and putting across points which will prove that how making laws gender neutral would destroy the little security that women have managed to gain after a long battle against the patriarch society. The research paper describes the different theories that led to the oppression of women and the emergence of a feminist era. The paper puts across the opinion that making such laws gender neutral will put females in a vulnerable position and years of struggle would go down the drain in mere seconds.

Feminism reflects the idea that men and women should have equal political, economic, and social rights. Feminists do believe in equality, but it should not compromise its meaning and must be followed in its substantive form and not in its formal sense. Women have fought for their rights and identity since decades; they are yet to reach the end of this struggle or maybe there is no end to it. However, their attempts have not been futile as there has been a huge change in the position of women now to what it was then. Many female activists have dedicated their whole lives in bringing these changes and some have also lost their lives in the process. Feminism is not just the struggle to end male chauvinism but it is a commitment to eradicate the ideology of dominance in society and reorganising it so that self-development of people can take precedence over imperialism, economic expansion and material desires. The Legal System in India plays an important role in feminism. Thousands of feminist movements have led to changes and amendments in laws and new laws have been introduced to provide security to women against the injustice faced by them from the society. The paper counters the opinion that the existing women centric laws are against fundamental right of equality and such laws should be made gender neutral. Gender neutral laws are the one that do not specify requirements as to the gender of the perpetrator or the victim. Such laws are applicable to all irrespective of their gender. Gender-specific laws are very few and can usually be invoked by women in cases such as rape, domestic violence and so on.

The misuse and abuse of laws was and is quite prevalent in the patriarchal socio-cultural society

¹ Author is a student at Jindal Global Law School, India.

against women because of the neutrality that existed in law and this was needed to be countered by developing a mechanism such as feminist jurisprudence or feminist legal theory to remove inequality. Feminist legal theory is based on the idea that law has played a vital role in the subordination of women. The reason of subordination of women by law is in the fact that almost all public laws have been made by men in the history of civilization. “As the world has been shaped by men, who for this reason possess larger shares of power and privilege.”². These words quoted by Luce Irigaray introduce us to the concept of cultural feminism-

“I will never be in a man’s place; a man will never be in mine. Whatever the possible identifications one will never exactly occupy the place of the other- they are irreducible the one to the other.”³

Cultural feminism which is also known as difference or special treatment theory lays down the idea that the perceptions, situations and experiences of men and women are different. For instance, the way women perceive rape and sexual harassment is different than men because of the culture and different values they are born and brought up in. Carol Gill’s theory elaborates this point, “Girls are taught to value to privilege principles of rights, individualism, and autonomy.”⁴. Men and women have biological differences as well, such as the situations that arise for a woman due to pregnancy are not to be faced by men. “The differences between the sexes, whether rooted in culture or biology, have made cultural feminist say that significant difference between men and women should be acknowledged legally where they disadvantage one sex.”⁵ In recent years, based on these differences many laws have been introduced for the rights and protection of women which are discussed later in the essay. According to critics of this theory, not many differences exist along the gender lines and have argued that pointing out these differences and making special laws for women lead to gender stereotypes and domestication of women. However, the cultural feminists’ contents that differences need not necessarily be weaknesses, if treated as strengths it would help women in gaining their rights. Women’s art, craft, narrative capacity, critical eye, ways of knowing things and their heart are all things to celebrate.

One cannot deny the fact that the society is male dominated which leads to difference of power between men and women. Here, power does not mean only physical power but power in society. It is because of this power that they receive various privileges. “Dominance theory which focuses

² Nancy Levit, Robert R.M. Verchick. 2016. *Feminist Legal Theory*. New York: A Primer

³ ibid

⁴ ibid

⁵ ibid

on difference of power between the sexes argues that the inequalities women experience as sex discrimination in the economic, political and familial arenas result from patterns of male domination. This theory says that men are privileged, and women are sub-ordinated, and this privileging receives support from most social institutes as well as complex system of cultural beliefs. Law is complicit with other social institutions in constructing women as sex objects and inferior, dependent beings.”⁶ The male domination and support from societal institutions can be seen through following examples. One never asks a man whether he is a virgin or not before fixing his marriage. They have the complete freedom to do as per they wish without any societal pressures. No one stops a man from going out at night. They can enter jobs that require physical strengths without being questioned. The society and social institutes perceive women as sexual objects and dependent beings. “Dominance theorists cite the lack of legal controls on pornography and sexual harassment, excessive restriction on abortion and inadequate responses to violence against women as examples of the ways laws contribute to the oppression of women.”⁷

The patriarchy that exists in the Indian society is the rule that men (father, husband and brother) are superior within a family which gives birth to suppression of women, domestic violence, dowry system and other harassment faced by women. All these is an indication of dominance by men. This conveys the idea that when subordination and injustice against women perpetuates from within her family how can she be free from societal subordination and injustice by legal institutions. Law has contributed in this subordination by not introducing severe and stringent laws for punishing these perpetrators. After years of protests by promoters of rights of women there has been an introduction of various laws which aim at granting women their rights. Some of these are Dowry Prohibition Act, Medical Termination of Pregnancy Act, Indecent Representation of Women Act, Maternity Benefit Act National Commission of Women Act, Indian Divorce Act, Equal Remuneration Act and the Sexual harassment of Women at Workplace (prevention, prohibition, and redressal) Act.

The oppression of women is not only because of the patriarchy that exists but also because of the economic inequality that was created because of capitalism and is explained in the Marxist and Socialist feminist theories. The Marxist feminist theory has its roots in the “Friedrich Engels’ book *The Origin of the Family, Private Property and the State* (1884). Under capitalism, Engels argued, household management lost its public character. It no longer concerned society. It became a private service: the wife became head servant, excluded from all participation in social

⁶ *ibid*

⁷ *ibid*

production. According to him, women's subordination was neither biologically natural nor God-given; instead, the class relations of capitalism enforced the gender hierarchies that anchored women's oppression. According to Marxist feminists, private property gives rise to economic inequality, dependence, political and domestic struggle between the sexes, and is the root of women's oppression in the current social context."⁸ Socialist feminism elaborated on the interconnectivity of the patriarchy and capitalism. The socialist feminist theory points out that liberation can be achieved only when both economic inequality and cultural sources of oppression is removed. It claims that apart from cultural oppression, capitalism creates unequal balance in wealth which hinders women's progress as they are economically dependent on male counterparts whether their husband, brother, or father and this leads to their oppression and suppression.

The above theory can be explained by the oppression and objectification of women at workplace which acts as a barrier for their economic progress. Women are often treated as an object of sexual attraction rather than a professional likeminded colleague by most men at their workplace. Such people think women are only required to fulfil their sexual desires and are not worth anything else. Fashion advertisements to pornography demonstrate females as commodities of sexuality. While choosing a job or a career option the primary factor that a woman needs to consider is their safety. They hesitate to do night shifts even if their profession demand so. Many young girls are not allowed to become an actress or a model because according to them it is an "unsafe" business. To remove the economic inequality and dependency on their male counterpart there need to be laws that ensure women safety and protection from sexual harassment at workplace. To ensure their protection, a handful of companies provide a separate set of rules that need to be followed. Cars along with drivers are being provided for night shifts. However, the numbers of companies that do so are few in numbers. It provides women a sense of security and freedom and allows them to lead their lives as they will. The Sexual Harassment of Women at Workplace Act, 2013 was introduced to provide a safe environment to women at workplace and help them excel in their career without any fear. The introduction of such law was made because of the case of Vishaka and Ors v. State of Rajasthan⁹ by the Supreme Court to fill in the gaps and vacuum present in the existing laws.

The suppression and discrimination against women take place not only on account of gender but also based on their caste, ethnicity and race, sexuality, religion, and class. The oppression faced

⁸ Armstrong, Elisabeth. 2020. "Marxist and Socialist Feminism." *Study of Women and Gender: Faculty Publications-Smith College*. Accessed June 16, 2020. https://scholarworks.smith.edu/cgi/viewcontent.cgi?article=1014&context=swg_facpubs.

⁹ AIR 1997 SC 3011

by women because of one's gender i.e. being a women along with caste, class, race and sexual oppression that exist in the society is called as intersectionality and their struggle against such intersectionality has given birth to the intersectional feminist theory. The justice system in India does not give a special recognition to victims of intersectional oppression and discrimination. There are no separate laws for intersectional population of women. The Mathura¹⁰ rape case is a prime example where the Supreme Court held that the 14-16 year old young girl, Mathura who belonged to a tribal Adivasi group was raped by two policemen, had consented to the sexual intercourse on the grounds that there were no bodily injuries caused because of stiff resistance as claimed by her and there was no cries or alarms and concoction on her part. The Supreme Court's judgment showcased that "Legal equality and right strategies not only fail to address the harm facing intersectionality targeted populations but also often shore up and expand systems of violence and control."¹¹ The girl was showed no mercy and the language used by the court assassinated her character and termed her as a person "habituated to sexual intercourse." According to me, one of the reasons for such a flawed judgement was the fact that she belonged to a lower caste and the police officer was an upper-caste man. In my opinion, the violence and injustice against such intersectional population of women needs to be addressed by making effective laws for them and increasing their representation in the state legislatures and parliament. A Public Interest Litigation was filed by Criminal Justice Society of India a Non-Governmental Organization in 2018, which claimed "section 375 of the Indian Penal Code (which deals with rape of woman by a man) was discriminatory and violated the right to equality i.e. Article 14 and Article 15 which prohibits discrimination on the grounds of religion, race, caste and sex of the Indian Constitution."¹² The purpose of the Public Interest Litigation was to raise voice against the injustice towards men. They believed a man, or a transgender can be a victim of rape too and that a man too requires protection under law. However, Supreme Court declined to entertain the PIL as it was a parliamentary matter. In 2019 the Central government firmly opposed the PIL and came to a decision that section 375 and 376 should remain untouched as in India, majority of rape victims are women and the perpetrators mostly are men. In its statement the central government clearly stated that such laws have been made keeping in mind the patriarchal nature of Indian society and that making such laws gender neutral will cause more harm than good.

There already exists several drawbacks in the rape and sexual harassment laws of India whereby

¹⁰ *Tukaram v State of Maharashtra*, 1979 AIR 185

¹¹ Conaghan, Joanne. 2008. "Intersectionality and the Feminist Project in Law." In *Law, Power and the Politics of Subjectivity: Intersectionality and Beyond.*, by Davina Cooper. London: Routledge Cavendish.

¹² Press Trust of India. 2018. *SC declines to entertain PIL to make rape gender-neutral offence*. November 12. Accessed May 20, 2020

it needs to be proven that the women did not consent to the sexual intercourse, especially in cases of marital rape where a husband has raped his wife. It took 9 years for the courts to punish the Nirbhaya gang rape perpetrators. If rape and sexual harassment laws are made gender neutral it would open-up avenues for inflicting greater trauma and humiliation on a section, already marginalized. It was only after the “Tukaram and Anr Vs State of Maharashtra” and the “Nirbhaya gang rape” cases various amendments took place in the section 375 and 376 of IPC, whereby the burden of proving consent was shifted upon the man, prohibition of cameras during rape trial proceedings, victim’s name should not be disclosed in media, and victim’s sexual history was made irrelevant. It took years of fight to bring in these amendments. If laws are made gender neutral it would defeat the purpose of these reforms. “On an average in the last 17 years approximately 90 rape cases took place in India every day.”¹³ Thus, making rape laws gender neutral will lead to a more severe situation.

I believe that in 99% of the cases if a woman tries to rape or sexually harass a man, he would be able to defend himself. The aftereffects of a rape are far more severe on a woman than a man. A woman who has been raped is looked down upon by the society. Instead of moral support, she gets blamed for getting raped. The society puts allegations on her claiming that she must be the one who would have invited and attracted him; she must have consented; she should not have worn short clothes and go the night clubs and pubs and such other defamatory statements are made. Her behaviour is watched constantly while a trial is going on. One wrong move on her part and she may not get justice. There is a direct attack on her character and self-esteem. Sometimes her own family would disown her because of societal pressure. Such pressure makes it difficult for her to survive and lead a normal life from thereon. In the Mathura rape case the judge has questioned the character of the young girl who was sexually active, and believed that since she had consented it once, she must have consented to this as well and there was no rape. The judges have the power to mitigate the sentences of the offender in certain special circumstances. These circumstances are not mentioned in black and white letter of the law, but the judges on their own discretion have given reasons which are not fair and show empathy towards the perpetrator. Some reasons are that such that “the woman was sexually active before marriage, the perpetrator lost his job during the trial, the society has humiliated him, and he has suffered enough.”¹⁴ If gender neutral laws are introduced women will fear filing a case, the man will threaten her with a counter claim and winning a case would become more difficult.

¹³ Diti Pujara, Gurman Bhatia, Karishma Singh and Raju Gopalakrishnan. 2019. *Statistics on rape in India and some well-known cases*. December 6. Accessed May 15, 2020 <https://www.reuters.com/article/us-india-rape-factbox/statistics-on-rape-in-india-and-some-well-known-cases-idUSKBN1YA0UV>.

¹⁴ *Bharwada Bhoginbhai Hirjibhai v. State of Gujrat*, 1983 AIR 753

However, we cannot overlook the need to provide protection to the men and transgenders who have gone through rape or sexual harassment. The Justice Verma Committee which was formed to recommend amendment to Criminal Laws suggested that a perpetrator can be a man only, but a victim can be women, man, or a transgender instead of women only. The transgender can file a suit of sexual harassment under Section 354 of the Indian Penal Code as directed by the Supreme Court in the case of *Anamika versus Union of India & Ors* where the petitioner was a student of Delhi University and requested anonymity of identity. Physical or mental Domestic Violence against men is also an issue that needs to be addressed urgently. The Domestic Violence Act, 2005 makes the nature of case a civil complaint where women seek relief in terms of money, housing, and other allowances rather than the traditional way of criminal prosecution under IPC section 498-A. Such laws are introduced for betterment and ease of women and does not discriminate against men. In my opinion, if separated laws for the same are to be introduced for men and transgender, the lawmakers and courts should ensure that there is no misuse of the law by men and decision must be given only after a proper inquiry in the matter without any bias or prejudice. Generally, many questions are raised against the reservation of seats for women at the parliament, gram panchayat and such other workplaces or institutes. However, these reservations are not made with the intention of discrimination between genders but to encourage participation of women and to provide them with their rights which are suppressed or denied due to male majority. Also, it is important to have women at such places so that they can represent the whole community and voice their opinions and ideas from a female perspective.

The question of gender neutrality mostly arises in the case of rape, sexual harassment, and domestic violence laws. In my opinion the prime hindrance in making these laws gender neutral is its misuse. Such laws may provide a freeway to the perpetrators and they will come out unscratched because of the inherent inequality that exists. It will become easy for them to put the blame on the female and the patriarchy society will agree to it. The existing law system does not ensure complete safety and justice to a female victim, as primarily reaching the court of law for seeking justice is difficult. “There is an increase in the number of cases where the male members of the family themselves rape girl child and females of their own family.”¹⁵ Thus, addressing these loopholes in existing laws such as rape laws should be a priority rather than making them gender neutral. If the lawmakers consider making them gender neutral, it is the responsibility of the judges, courts, and police to act sincerely and honestly without any bias and make sure that

¹⁵ India Today. 2020. *Rapes in India: 94% offenders known to victim, every 4th victim a minor*. January 10. Accessed May 20, 2020. <https://www.indiatoday.in/india/story/rapes-in-india-offenders-victim-minor-data-ncrb-1635691-2020-01-10>

the real victim gets justice. In India even in the present times a woman fears raising her voice because of the threat that, if they do so they will either be raped or harassed.
