CHAPTER – VII
GENDER AND LAW

It is asserted that there exists a distinction between sex and gender.1 According to this distinction, sex is connected with biology, whereas the gender identity of men and women in any given society is socially and psychologically (and that means also historically and culturally) determined. Biological and physical conditions (chromosomes, external and internal genitalia, hormonal statues and secondary sex characteristics), lead to the determination of male or female sex. To determine gender, however, social and cultural perceptions of masculine and feminine traits and roles must be taken into account. Even though gender is socially constituted deference between women and men, reflect each society’s interpretation of biological deference.

Gender is learnt through a process of socialization and through the culture of a particular society concerned. In many cultures, boys are encouraged in the acts considered to display male traits (and girls vice versa) through the toys given to children (guns for boys, dolls for girls), the kind of discipline meted out, the jobs or careers to which they might aspire, and the portrayal of men and women in the media. Children learn their gender from birth. They learn how they should behave in order to be perceived by others, and themselves, as either

---
masculine or feminine. Throughout their life this is reinforced by parents, teachers, peers, their culture and society.

Every society uses biological sex as one criterion for describing gender but, beyond that simple starting point, no two cultures would completely agree on what distinguishes one gender from another. Therefore there is considerable variation in gender roles between cultures.

7.1 Gender relations

It refer to the socially-structured relationship between women and men, men and men, women and women, at different ages and stages of the life-cycle, which together help to transform biologically different males and females into socially differentiated men and women, through the acquisition of culturally-defined attributes of masculinity and femininity as well as the resources and responsibilities which are associated with these categories.² It is often claimed that Gender relations has to analysed from to be different prospective.

Firstly, Gender Blind, a perspective which often appears gender-neutral (i.e., does not specify and specific gender) but which takes the life experiences, needs, interests and constraints of the male social actor as the standard one and, therefore, representative of both genders.

Secondly, Gender Aware, a perspective which accepts that men and women, within the same class and even the same household, may have some overlapping needs and interests but that their differing life experiences and the

² Supra note 1, p. 36.
unequal distribution of resources and responsibilities between them will also give them gender-specific needs and interests which may conflict.

7.2 Gender differences and social status of woman

Early in childhood women and men are socialized with regard to temperament, role and status. Women are socialized to be more sensitive and perceptive in their relationships with other people; they are more dependent on these relationships and are passive. Men are socialized into being aggressive, outgoing, more confident and are trained to control and manipulate the external environment.

This socialization of gender roles takes place within the family. Family itself is looked upon as a natural institution arising out of biological necessity. There are many kinds of families in our society at this point of time. Whatever the family structure, the outstanding feature of these is that it is based on sexual inequality. It is the eldest male who has control over the property, assets, management of family affairs.

It is within this kind of family structure that a woman is socialized to accept a role and status, which is inferior to the male members. Her own identity is through the family as a daughter, wife and mother. The society and religion reinforce this and it appears that the law coerces her to accept this status. She is not recognized as a citizen with right to her own individuality. And she faces subtle denigration in daily life to the extent that she despises herself and other

---

women. It is nothing but oppression of women. There are various theories of oppression, they are exploitation, discrimination, situational womanity, treatment of women as separate class, patriarchy, marginalisation, powerlessness, cultural domination.  

India is one of the world’s oppressive societies, where women have been subjected to exploitation, oppression and discrimination. The focus on women’s issues and the concern for their development have gained considerable importance in the past decade. Despite the central place assigned to women in national policies and strategies of development, women still remain differentiated and discriminated in every sense of the term — educationally, economically, politically and socially.

Gender inequality has proved to be primary, durable and far more stable than any other form of inequality, *i.e.*, economic, political, racial, cultural etc., which are secondary in nature. It is highly paradoxical that the secondary contradictions had gained social recognition far earlier, while inequality based on sex was marginalized and kept invisible for centuries.

A society based on sexist ideology condemns women to the position of inequality, inferiority, oppression and discrimination. She is virtually made ‘incidental’ as opposed to ‘essential’. She became an object cast in a mould of

---

man’s making. Her total existence from birth to death is circumscribed by and subservient to man, while man himself is privileged not to be reciprocally or mutually bound. Traditional India has always seen woman as a member of the family, as a wife, mother, daughter or daughter-in-law, and never was she viewed as a member of society or an individual with identity.

Sex – role division was the means by which the entire social system was divided into male and female spheres. In the process of structural elaboration, social roles, which were linked to production, governance and ecclesiastics in which public power was concentrated, became the exclusive domain of men. The reproductive capacity of woman was exploited to tie her down to the roles within the confines of home and withdraw her from sociological participation. The family with its male dominated authoritarian structure was defined as the proper place for women and the institution of marriage legitimized it. Social pressures kept women conforming to the conventional role expected of them – a role that dictated conformity and obedience; while men occupied the instrumental role of rationality and power. The unequal gender relationship is pervasive from marriage and family to work and politics in all of which the servile position of woman is indelibly printed.

Patriarchal structure was culturally designed and gender behaviour is socially constructed. Sex – roles are not mere scientific description of the roles related to each but are cultural directives. The social control of women is not carried out through rigid authoritarian system of force nor is women visibly
subjected to coercion. It is effected through engineering consent among women themselves. Women are conditioned to embrace the secondary status, instead of being openly coerced to accept it. Strength as sex-role differentiation is derived, in part, from male propaganda of ideologies about women which are internalized and perpetuated by women themselves in large measures.

The denial of equality for women and the exclusion of women from the benefits of development are not a malady for women alone. They also affect the fabric of the society and influence the direction of its change. Neglect of this phenomenon may lead to the distortion of social values and attitudes. It is emerging as a critical problem of sufficient magnitude meriting the attention of the pursuers of knowledge in all spheres. Hence, there has been a recognition in the past decade that the gender discrimination should be called into question.

7.3 Gender Difference and Law

The debate over the meaning of equality is further complicated in the context of women, and gender equality. The prevailing conception of equality as sameness has led to a focus on the relevance of gender difference. If women and men are different, then how can they be treated equally? But if they are treated differently, then what becomes of the principle of non-discrimination on the basis of sex? Do the constitutional guarantees require that women and men be treated the same? Those are but a few of the questions that have arisen in relation to the relevance of gender difference. Three very different approaches to the question of gender difference have been developed; protectionist, sameness

Supra note 5, at p. 89.
and corrective. In the first approach, women are understood as different from men—more specifically, as weaker, subordinate and in need of protection. In this approach, any legislation that treats women differently than men can be justified on the basis that women and men are different and that women need to be protected. Any differential treatment of women is virtually deemed to be intended to protect and thus benefit women. This approach tends to essentialise difference, that is to say, to take the existence of gender difference as the natural and inevitable. There is no interrogation of the basis of the difference, nor consideration of the impact of the differential treatment on women. In the name of protecting women, this approach often serves to reinforce their subordinate status.\(^9\)

The second approach is an equal treatment or sameness, approach. In this approach, women are understood as the same as men; that is to say, for the purpose of law they are the same and must be treated the same.\(^10\) In this approach, any legislation that treats women differently than men is seen to violate the equality guarantees. This sameness approach has been used to strike down provisions that treat women and men differently. It has, however, also been used to preclude and analysis of the potentially disparate impact of gender neutral legislation. According to the sameness approach, it is sufficient that women and men be treated formally equally. Any recognition of gender


\(^10\) This approach is exemplified by S. Jahwari, "Women and Constitutional Safeguards in India" (1979) 40:11 Andhra Law Times Journal.
difference in the past has been perceived as a tool for justifying discrimination against women.

Some feminist approaches have endorsed this conception of equality according to which gender difference ought to be irrelevant, and women ought to be treated exactly the same as men.\textsuperscript{11} These feminists argue that any recognition of gender difference in the past has simply been a justification for discriminating against women. Advocates of this approach argue that so-called 'special treatment' has historically been used to discriminate against women. Any recognition of difference between women and men and any attempt to accommodate those differences is seen to provide a justification for continued unequal and discriminatory treatment.\textsuperscript{12} They point to the use of gender difference in the past in prohibiting women to vote, to be elected to government, to be admitted to the legal profession and other such participation in the economic, political and cultural dimensions of society.

In the third approach, women are understood as a historically disadvantaged group and as such, in need of compensatory or corrective treatment. Within this approach, gender difference is often seen as relevant and as requiring recognition in law.\textsuperscript{13} It is argued that a failure to take difference into account will only serve to reinforce and perpetuate the difference and the underlying inequalities. In this approach, rule or practices that threat women

\textsuperscript{11} Supra note 9, p. 181.
\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
differently from men can be upheld, if such rules or practices are designed to improve the position of women. If, however, the legislation or practice is based on a stereotype or an assumption that women are different, weaker or in need of protection, it would not be upheld.

There are some important similarities between the protectionist approach and the corrective approach. Most significantly, both of these approaches conclude that gender difference can be relevant and therefore must be recognized in law. However, there are important distinctions between these approaches. Most notably, the protectionist approach is more likely to accept both gender differences and special protection as natural or essential. The corrective approach, on the other hand is more likely to consider the basis of the difference, and the impact of recognition versus non-recognition of the difference, on the lives of women. Gender difference is not essentialised, but rather, its relevance is seen in the context of past disadvantage. It other words, gender difference needs to be recognized because of the extent to which it has historically been the basis of disadvantage and discrimination.

These approaches to gender difference are often seen to roughly correspond to the formal and substantive approaches to equality. Both the protectionist and the sameness approach to gender can be seen to be based on a formal model of equality, whereas the corrective approach to gender is based on a substantive model of equality. It is important, however, that these debates not be collapsed. The adoption of a substantive approach to equality does not automatically resolve the question of the relevance of gender difference. That is,
a substantive approach does not necessarily correspond to a corrective approach to gender. Rather, it might in a particular context determine that treating women differently would further contribute to their disadvantage, and thus conclude that women ought to be treated the same. A substantive approach to equality, while opening the space for gender difference to be recognized, does not eradicate the need to make choices regarding when and how difference ought to be recognized.

The basis inquiry of the substantive approach is whether the impugned provision contributes to or reinforces the subordination of women. In some contexts, this substantive approach will require a sameness approach, whereas in other contexts it will require a corrective approach. For example, in relation to basic civil and political rights such as the right to vote and the right to own land, gender would be considered irrelevant in the pursuit of equality, and any recognition of gender would likely only contribute to, or reinforce, the subordination of women. In relation to employment rights, however, a substantive approach may require a recognition of women's reproductive differences in so far as the pursuit of equality will require that women are provided with maternity leave and benefits.

7.4 Feminism

It is true that, the world over, women have a lower status than men—socially, economically, educationally and politically. However, there is a difference in the analysis of the origin of subordinate status of women, the persisting lower status and what strategies are to be adopted and devised to end
this subordination. This different perception has given rise to three major ideological movements\textsuperscript{14} namely Liberal Feminism, Radical Feminism, Socialist Feminism.

7.4.1 Liberal Feminism

The historical origin of contemporary liberal feminism goes back to the 18\textsuperscript{th} century – the enlightenment period of Western Europe. It was natural that one of the many subjects the thinkers of this era touched was the nature and role of women. An important tenet of liberal philosophy was individualism, by which was meant that an individual possesses the freedom to do what he wishes without interference from others. Mary Wollstonecraft, besides other, is a well-known liberal feminist, famous for her ardent support for women's causes.\textsuperscript{15} And she wrote the first systematic and serious work on the subject namely a \textit{Vindication of the Rights of Women} in 1972.\textsuperscript{16} The basic idea of the work was that women are first and foremost human beings and not sexual beings. Women are rational creatures, capable of governing themselves by reason. Hence, if women are denied natural rights, it must be proved that they have no rational capacity.\textsuperscript{17}

John Stuart Mill, an ardent liberal, on \textit{Subjection of Women}, argued, “the existing relations between the sexes, the legal subordination of one sex to the other, is wrong in itself, and now one of the chief hindrances to human


\textsuperscript{16} \textit{Ibid.}

improvement and that it ought to be replaced by perfect equality admitting no power or privilege on the one side nor disability on the other.18

Liberal feminism flourished in the 1960s but it did not provide more insight into the roots of woman's subjugated status. The liberal began to enlarge the concept of equality beyond the formal equality in civil and political spheres, to child care facilities, the rights of poor women and women's control over their reproductive life. They advocated improvement in social customs, institutions, laws and attitudes while accepting the existing social structure. According to them, reforms will transform society but radical restructuring is not essential.

7.4.2 Radical Feminism

The beginning of radical feminism coincides with the second phase of feminism around 1969-1970. It is contended the radical feminism has important ties with liberal feminism, the feminists who spoke of sexual politics. Liberal feminists overlooked the necessary connection between sexual oppression, sexual division of labour and the economic structure, therefore their claims remained reformist.19 Today, the radical feminists have replaced the struggle for vote and for legal reform with the demand for destruction of patriarchy.

The premise from which the radical feminists proceeded was that the roots of subordination lie in the biological family, the hierarchal sexual division of society and sex roles themselves: factors which must be fundamentally recognized if true gender equality has to be established. The propounders of

18 As Quoted in John Charret, *Feminism*, (London: Dept and Sons Ltd., 1982), p. 34.
19 *Supra* note 17, p. 16.
radical feminism contended that the biological distinction is used to distinguish social functions and power. The dictum that anatomy is destiny, operates in the present society through sex role distinctions. Biological differences result in the male domination of power and thus a historical fact more rooted in biology than in economy and they consider gender relations to be the fundamental form of oppression. Another contention of the radical feminists is that the patriarchal system is preserved via marriage and family through sexual division of labour in society. It manifests itself in diverse form but in all such forms the avenues of power are in male hands. The radical feminists aver that though there is no reason why reproduction and socialization should occur in family, this basic pattern has been there in historical societies. Thus, the nuclear family is considered to be an impediment in the full realisation of equality. This contention differentiates them from liberal feminists.20

The main averment of radical feminists was not only removal of all sex distinctions but also there being no place for men in their lives. Man was considered as an enemy and subordination was seen as bio-psychological supremacy of male over female. The radical feminists believed in sexual preference, control over one's body, free sex and collective child care. According to them masculine hostility manifests itself through rape, pornography and sexual violence. The overthrow of male dominance requires a complete sexual revolution which would destroy traditional sex taboos. Through consciousness

---

raising women should be made aware of this dominance, solidarity among them be developed and they should be made self-reliant so that they are not dependent on men in any sense.\textsuperscript{21}

\textbf{7.4.3 Socialist Feminism}

According to the socialist view, women's inferior status is rooted in private property, and class-divided society. Sexist ideology and structures such as the family maintain women's inferior status in society. Oppression is inclusive of exploitation but reflects a complex reality. For the socialist feminists it is imperative to understand the operation of hierarchical sexual ordering of society within the class structure. They also feel that overthrow of the capitalist system by itself will not mean transformation of patriarchal ideology. It would be necessary to organize struggles simultaneously against capitalism and patriarchy.

Socialist feminists believe that the powerlessness of women in society is rooted to four basic structures: production, reproduction, sexuality and socialization of children. Family, as the radical feminists observed, was an institution which reinforced women's oppressive condition. Family and economy should not be looked upon as separate systems but as vitally interacting systems. The unequal and hierarchical sex role operates in both the domains, of family and economy.\textsuperscript{22}

\begin{flushleft}
\textsuperscript{21} Supra note 14.
\textsuperscript{22} Supra note 14, p. 17.
\end{flushleft}
The orthodox Marxist analysts considered housework as producing only use value but not exchange value. A group of socialist feminists argue that women's oppression is based on unpaid housework. The debate further focused attention on the issues of women's position as housewives and of domestic labour's contribution to the reproduction of social relations. A very important issue relating to the strategy is whether there is a place for women's movement in their emancipation? What is the relation of women's movement and the wider struggles? Like the radical feminists, the socialists feminists are not anti-man. They believe in collaborating with men if the latter support their cause and do not exhibit an instrumental approach towards women. But they do believe that women's issues are specific, they need focused analysis and focused attention. Hence women's groups have to be independently organised but they cannot ignore the other struggles for oppression.

In the Indian context the dominant approach has been liberal feminist, where action has been organised taking the existing structures. Indian social reformers of the 19th century talked practically in the same vein as the liberal feminists, giving right of education to women so that they become better wives and mothers, removal of social customs like sati, child marriage, the ban on widow marriage, etc., Some of the concepts and ideas used by the radical feminists and social feminists were critically used in India where conditions of poverty, unemployment, insufficient development prevail. In such circumstances family; may not be viewed as an obstruction but as security. Similarly the issues

23 Supra note 15, p. 12.
of sexual freedom, sexual preference, etc., may not be as widespread as in
developed western countries.

7.4.4 Feminist Jurisprudence

Feminist jurisprudence represents the diversity of feminist philosophy and
theory. Notwithstanding differences in approaches, all feminists share the belief
that "women are oppressed or disadvantaged in comparison with men and that
their oppression is in some way illegitimate or unjustified. Under the umbrella of
this general characterization there are, however, many interpretations of women
and their oppression, so that it is a mistake to think of feminism as a single
philosophical doctrine. Just as there are diverse images of liberation, so there are
a number of feminist philosophies, yoked together not so much by their particular
claims or prescriptions as by their interest in a common theme.

The intellectual guiding force behind current women's movement is
feminism which produced special knowledge in every field such as feminist
sociology,24 feminist philosophy,25 feminist history,26 including feminist
jurisprudence. Feminist jurisprudence is a natural extension of the engagement
of female reflections and speech to one more area of discourse, namely law and

24 Freeman, The politics of women liberation: A case study of emerging social movements
and its relations to the policy process in Lloyd Introduction to Jurisprudence, 4th edn. op. cit
at p. 1026.
25 C. Gould and M. Wartofsky Women and Philosophy: Towards a Theory of Liberation
(1978), in Lloyd Introduction to Jurisprudence, 4th edn. op. cit at p. 1026.
26 L. Gordon Women's Body: Women's Rights: A Social History of Birth Control (Grossman,
1976), and Heroes of Their Own Lives: The politics and History of Family Violence (Virago,
1989), and C. Smart, Regulating Womanhood (Routledge, 1992). in Lloyd Introduction to
jurisprudence, 4th edn. op. cit at p. 1026.
justice. Law related strategies have played an important role in the campaigns of women's organizations to achieve greater equality and social justice.

Feminism in general and feminist jurisprudence in particular, stems from a firm belief that society, and necessarily legal order, is patriarchal. It seeks to analyse the contributions of law in constructing, maintaining, reinforcing and perpetuating patriarchy and it looks at ways in which this patriarchy can be undermined and ultimately eliminated. This is one of the things that clearly demarcates feminist jurisprudence from mainstream legal theory.

The feminist inquiry into law concentrates on the following issues.

i) Examination of legal concepts, rules, doctrines and process with reference to women's experiences.

ii) Examination of the underlying assumptions of law based in male female and ostensibly gender neutral distinctions.

iii) Examination of mismatch, distortion or denial created by the deference between women's life experience and the laws assumption or imposed structures.

iv) Patriarchal interest served by the mismatch.

v) Reforms to be made in the law to eliminate patriarchal influences.

---

28 L. Bender (1988) 38 J. Legal Educ. 3. in Lloyd Introduction to jurisprudence, 4th edn. op. cit at p. 1026.
30 Ibid.
Schools of Feminist Thought:

P.A. Cain classifies feminism into four schools, namely, liberal, radical, cultural and postmodern, and the early theme and pursuit of feminists about law was equality.

Liberal Feminism is rooted in the belief that women as well as men, are rights bearing autonomous human beings. Rationality, individual choice, equal rights and equal opportunity are central concepts of liberal political theory and liberal feminism, building on these concepts, argues that women are just as rational as men and that women should have equal opportunity with men.

Radical feminists, focus on difference between women and men and support affirmative measures to challenge inequality.

Cultural feminists also emphasise on difference but view it more positively. They use the rhetoric of equality to advocate change that supports the values based on difference, namely, caring rational connectedness and the like.

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

31 P.A. Cain "Feminism and the Limits of Equality" in Lloyd Introduction to Jurisprudence, 4th edn. op. cit at p. 1026.
32 Supra note, 29, at p. 1106.
34 Carol Gilligan, In a Different Voice (1982), . in Lloyd Introduction to jurisprudence, 4th edn. op. cit at p. 1110.
35 Supra note 29, at p. 1111.
Feminist theory challenges the positive empirical tradition, the assumption that through observation and measurement by an objective observer the truths about reality will emerge. Feminist legal methods, by contrast, are influenced by interpretative and hermeneutic tradition, and by the critical theorists approach is to emancipate to uncover aspects of society, especially ideologies, that maintain the status quo by restricting or limiting different groups access to means of gaining knowledge.

Empowerment, equality and dignity are the desiderata of the contemporary concept of gender justice. The three underlying assumptions of gender justice are (i) equality and difference, (ii) the 'public' and the 'private' dichotomy and (iii) cultural pluralism and women's rights.

The central thinking of feminists since 1970's is the emphasis on equality with men. Then the questions do women want to be treated like men, does equality requires different treatment. Should difference to ignored or emphasized and if emphasized, what, if any, is the place of affirmative actions to assist the different to achieve functional equality. Hence, feminists have only two choices, either equality on the basis of similarity between the sexes or special treatment on the basis of sexual difference. Some favour the former, since difference always means women's difference, and this provides a basis for treating women worse as well as better than men. But equal treatment approach only benefits some women who meet male norms.36

It has been said that dichotomy between the 'public' and the 'private' is ultimately what the feminist movement is about. This has lead to perpetuation of discrimination in the domestic life of women.

The other principal issue that confronts feminists is whether different cultures should allow women to live according to their own value system. Coleman cites disturbing examples to demonstrate the consequences of allowing cultural practices exception from liberal rights and freedoms, the use of the so called 'cultural defence' can lead to women being denied protection that would be taken for granted by women within the dominant culture.

Feminist legal theory is built on feminist insights of women's social reality and attempts to fill a void in contemporary jurisprudence by being accountable to women's concrete social conditions and changing them. This new relation between law, woman and society is highly criticized because it is not neutral to the extent that it aims to restructure procedure, adjudication and legislation so that impact of law on women's lives is equal to that of men.37 Though protectionist by approach and often viewed as 'unequal' it acknowledges the social norms which perpetuate sex inequality attempts to equalize the gender equation by embodying women's experience in law and adjudication. For principles of feminist jurisprudence to be translated into legal process, the judiciary must acknowledge the inequalities in our social, economic, political,

---

legal and religious structures, and challenge them by restructuring institutions, which marginalize women's enjoyment of fundamental rights.38

Feminism stimulates the study of social, economic political institutions and their norms from the standpoint of women and their life experiences. The feminist movement has contributed to the institutional changes, and to assist the policy makers to promote gender justice more effectively. However, excessive importance to their methods may produce disturbing results, which may affect social cohesion and harmony.

7.4.5 The Feminist Dilemma in India

Legal reforms have been at the center of the agenda for strategizing gender justice in India. This has been so, right from the time to nineteenth century social reforms movements, through the period of nationalist struggles, down to the contemporary women's movement. In more recent times, this reliance on the efficacy of law and legal reforms to initiate changes in the social order towards a gender just and egalitarian society gets voiced in what might be termed the first comprehensive document marking the contemporary feminist movement in India. Namely the Report of the Committee on the Status of Women in India. The Committee viewed legislation as on of the; major instruments for ushering in changes in the social order in the post – colonial state. Legislation, it was felt, can “act directly as a norm setter, or indirectly, providing institutions

38 Ibid, at p. 133.
which accelerate social change by making in more acceptable.39 Building a
gender just society was perceived as part of the task of nation building, of
development and social reconstruction. The role of law in the whole process is
perceived as non-ambivalent, well-defined and positive.

Two decades and many struggles later, the answers are no longer so clear
-cut, in spite of the fact that the contemporary women’s movement in India in
fact coalesced into a movement by mobilizing public opinion around the need for
legal reforms for redressing individual cases of atrocities against women.40 The
Mathura41 rape case of 1979, and the Bhanwari42 rape case in 1994 are
landmarks that in many ways determined the course and content of the
contemporary feminist movement in India.

The Mathura rape case had ushered in a wave of public outcry and was
instrumental in bringing about wide-ranging changes in rape laws in the
country.43 However, even under the changed legal regime, hardly any
substantive improvements seem to have taken place in the ground conditions.
Although punishments have become more stringent, the rate of conviction has

102, n.2.
(New Delhi, Vikas publication, 1997) p. 9.
42 1987 Cr. L.J.1541
43 The Criminal Law (Amendment) Act, of 1983. Sec. Also Annexure 3 in Vasudha
Dhagamwar, Law Power and Justice: The Protection of Personal Rights in the Indian Penal
Code, rev. edn. Sage, New Delhi (1992) for the text of An open Letter to the Chief Justice of
India; dated 16 September 1979 in which four legal experts question a Supreme Court
decision to acquit the accused in the Mathura rape case. Tukaram v. State of Maharashtra
(1979) 2 SCC 143.
dropped significantly in the post-reform years. The insensitivity of the justice delivery mechanism and the trauma of the rape victim under an unsympathetic system continues unabated.

The contemporary women's movement is at the crossroad now. In the light of the experience of the last twenty years, the question that keeps recurring is whether legal reforms are capable of bringing about gender justice in society. Has law been instrumental in ushering in any change in the gender balance? Law has in fact been often used to reinforce the social subjugation of women.44 Some believe that given the patriarchal nature of the state, and given the reflection of such bias in the framing and dispensation of justice by the judiciary and its functionaries, it is not sensible to expect that law can ever be a potent force for change in the existing social structure; that the hope of ensuring gender justice using law as an instrument of social engineering is an altogether impossible dream.

In a way this ambivalence about law and legal reforms in matters of securing gender justice is nothing new in the history of women's movement in

---

44 Amita Dhanda's work, among others, has shown how the invocation of insanity has been used in India to reinforce women's subjugation in the arena of personal law, and how expressions of dissent under oppressive familial conditions have been interpreted as insanity in divorce proceedings. The examples of cases where deviations from role models have been interpreted as manifestations of mental disorder that are cited by Dhanda are truly mind-boggling. They include utterly frivolous reasons such as not being able to do housework, acting familiar with strangers, crying in front of guests, receiving gifts with the left hand, not taking daily bath, putting too much salt and pepper in the food, making paranthas when asked to make chapattis, boiling two packets of milk when asked to boil one, etc., See Amita Dhanda, 'Insanity, Gender and the Law', in Patricia Uberoi (ed) Social Reform Sexuality and the State, Sage, New Delhi (1996). For a critical evaluation of a wide sample of judgements involving all aspect of personal law from the point of view of women's rights, see the collection of articles in Indira Jasing (ed.) Justice for Women: Personal Laws Women's Rights and Law Reform, The other India Press Mapusa, Goa (1996).
India. Back in the nineteenth century, when social reformers like Raja Rammohan Roy and nationalists like Bal Gangadhar Tilak were concerned with oppressive social practices like ‘sati’ or child marriage, the tensions between the indigenous scriptural dicta and the colonial heritage of the British legal system always lurked in the background. While Rammohun’s denunciation of the practice of sati had been based primarily on his reading of the scriptural text, Tilak’s refusal to address social issues through legal instruments laid down by the foreign rulers was based on the perceived illegitimacy of the colonial hegemony in all its ramifications. The social history of the period is replete with the tensions between the liberalist strain of thinking of the pre-independence era which was geared to adopt and adopt from Western liberalist traditions on the one hand and the nationalist revivalist movements which aimed at social reforms working from within indigenous traditions on the other. Much of this tension can be attributed to the dominant political climate of the era.

In the context of the contemporary women’s movement, the ambivalence that marks feminist engagements with law as an instrument of ensuring gender justice has a somewhat different character. While demand for legal reforms has been one of the major foci for mobilizing popular support, and specific cases of atrocities on women have been used to further the aims of the movement, the disenchantment with the potential of law as an instrument of social transformation has been triggered by two simultaneous developments. On the one hand, last twenty years’ experience of the effect of legal reforms has been perceived to be not altogether positive. Flavia Agnes work has been an
important contribution to development of more complex and nuanced analyses of feminist engagement with law. Throughout her work, Agnes interrogates the impact of law reforms on women, and questions whether laws intended for women's benefit have lived up to their promise. Her work on violence against women, for example, has addressed the failure of law to adequately address the reality of violence.\textsuperscript{45} It has been argued that the law has failed in effectively addressing the problems of violence against women. Through a detailed examination of laws addressing rape, dowry, domestic violence, prostitution, indecent representation of women, sati, and sex determination tests, it has been shown that law was not successful in bringing about desired social change. Further it was contented that, Dowry laws, for example, failed both to challenge attitudes about women and marriage including parental pressure to 'marry off their daughters and to link the problem of dowry with women's property rights in the parents' homes.'\textsuperscript{46} Further attempt was also made to the fact that, the Indian state has been all too willing to pass new criminal laws to address these multiple forms of violence against women and raises questions about the wisdom of conferring such powers on the state.

Agnes is highly skeptical of this concentration of criminal law power in the state in the name of protecting women. Her skepticism is heightened by the fact that some of the laws 'which purpose to protect women from violence actually

\textsuperscript{45} Supra note 9, at p. 36.
\textsuperscript{46} Ibid, p. 37.
penalize the woman.\textsuperscript{47} As she observes, instead of empowering women, the laws strengthen the state.

The second development can be traced to the growing engagement of feminist research with the postmodernist wave of the Western academic thinking and its deconstructionist implications for a monolithic, linear strategy for women's empowerment and reflects some of the analytical complexities that arise in the context of cross cutting discourses in the field of law for gender justice.\textsuperscript{48} It is observed that, the undercurrent of tension between conflicting compulsions of contemporary research in feminist jurisprudence and feminist practice and activism in the legal arena. The arena of law is seen as a site for discursive struggles, where the dominant notions of gender, tradition and culture are challenged from a multiplicity of perspectives, including the feminist perspective. The extent to which law is made to serve as an instrument of gender justice depends to a large extent on an informed understanding of the strength and the potential weaknesses of the dominant ideology of gender and the ability to engage with tenacity and wisdom, to explore the moral and substantive weaknesses of the familial ideology in the legal arena.\textsuperscript{49}

Lastly, a relatively new area of legal discourse in the context of gender is social rights of women, such as the right to health. The current status of law on women's health. What it does not explore in depth is the whole range of issues

\textsuperscript{47} Ibid.

\textsuperscript{48} Supra note 41, p. 12.

\textsuperscript{49} For a very readable account of this position see Ratna Kapur and Brenda Cossman, Subversive Site: Feminist Engagement with Law in India,( New Delhi :Sage 1996).
that are linked with women's reproductive rights and their legal ramifications. The
Indian Penal Code does not admit of the notion of marital rape, thereby signifying
a negation of a major dimension of such rights to women. The link between this
negation and the role of the dominant familial ideology that shapes the contours
of women's substantive legal rights in the country is fairly obvious.

The rights discourse does open up new dimensions of analysis and
investigation. Social movements which aim at fighting exploitative practices may
utilize the moral strength of individual dignity to strategize the fight for gender
justice.

7.5 Gender Justice

The concept of gender justice implies a comprehensive goal and scheme
of protecting the class of subordinated gender from the exploitations and denials
inflicted by the dominant gender. In particular, it means that women must
exercise full participation in decision – making process in all walks of life, and full
participating with men in finding equitable and practical solutions to issues in the
family and society. It deviates from stereotyping of women's traditional role by
male's determination and espouses a philosophy that regards all people as
essential agents of change and views development as a process of enlarging the
choices of both sexes. It believes that women are rights-bearing, autonomous
human beings without difference from men. Iris Marion Young identifies

exploitation, marginalization, powerlessness, cultural domination and violence as the factors of gender injustice.\footnote{Iris Marion Young, \textit{Justice and the Politics of Difference} (1990) extracted in \textit{MDA Freedom, Lloyd's Introduction to Jurisprudence} 7\textsuperscript{th} ed. pp. 614-629.}

From the analysis of various shades of feminist jurisprudence it can be gathered that the problem of gender injustice is a deep-rooted social malady arising from power imbalance that occurred due to conversion of factors of difference into instruments of dominance by males. Undoing the dominance can elevate ethical content of the legal system. Discarding the public/private dichotomy in order to empower women in both the spheres becomes essential. Accordingly, it said, “since the problem is domination, the solution is not only the absence of discrimination, but the presence of power. Equality requires not only equal opportunity to pursue male-dominated roles, but also equal power to create female defined roles, or to create androgynous roles men and women have an equal interest in filling.”\footnote{Will Kymlicka, ‘Sexual Equality and Discrimination : Difference v. Dominance’ in John Arthur, (ed.) \textit{Morality and Moral Controversies}, (New Jersey: Prentice Hall, 1999) 454 at 457.} Raising the women question and arousing women consciousness are to be the initial strategies while a comprehensive approach of gender equality, anti-subordination and fair relationship centering around women should spearhead gender justice.\footnote{For elaboration of feminist methodology see Katherine T. Bartlett, \textit{Feminist Legal Methods} (1990) 103, \textit{Harv. L. Rev.} 829; also see Ngaaire Naffine, ‘In Praise of Legal Feminism’ \textit{Journal of Legal Studies}, 71.
7.5.1 Gender justice and judiciary

Admitted laws alone cannot make justice available to citizens in a society. Seeking equality in an unequal society is a task demanding concerted action on the part of the individuals, the community, government and the judiciary on a continuing basis. This is what women as a class must realize in their struggle for equal justice in the democratic republic of India.

Gender justice is a concept understood differently in different cultures and at different periods in history. However, with the adoption of universal standards against inequality and discrimination and the evolution of a rights-based approach in the empowerment of women, the concept is today susceptible to judicial evaluation and judicial determination. With the support of the liberal provision of the Constitution, with the aid of a series of pro-women international human rights instruments and an increasingly assertive women's movement within and outside the country. The complaint seems to be that more could have been done if the judges were so inclined. Furthermore, it is argued that the judicial system as a whole did not change enough to absorb the emerging standards of equity and equality vis-à-vis women with the result the bulk of women approaching the subordinate courts neither receive equal treatment nor are able to access the full benefit of the principle of equal justice under law.  

-----

There are possibly many in which the performance of the judiciary in relation to gender justice can be assessed. First, of course, is a review of gender-related decisions of courts on issues of family relations, criminal justice administration, labour and employment matters etc. Unfortunately in this regard the vast body of decisional law of the subordinate courts where the bulk of women ordinarily seek justice are not available for review. Though in a precedent bound system, one can expect the decisions of superior courts to be the applicable law, it is common knowledge that approaches and attitudes towards facts and evidence of individual judges can make a lot of difference in the outcome of the case despite the law being common to all. In other words, evaluation of judicial decisions on gender justice can only give a partial not necessarily the true picture of judicial performance in this regards.

A second yardstick for assessment of judicial performance in gender justice is the manner in which judges treat women in court whether they appear before them as litigants, witness, victims, lawyers or subordinate staff. This is where women experience discrimination and develop perceptions of justice/injustice in the system which build or erode their confidence in the system. Therefore, it is a critical input in the assessment of the system in respect of gender justice. There are some studies now available in this respect of gender justice not comforting to the judiciary.

55 Ibid, p. 29.
Finally, the strength in terms of position of women in the judicial establishment is indicative of how well the judiciary is disposed to the practice of gender justice.

7.6 Gender Justice and Law Enforcement

The criminal justice system is notorious for delays—abysmally low conviction rates it is a minuscule percentage that ends up in convictions. And when it comes to crime against women, the picture is ever grimmer. To the familiar weaknesses that characterize our administration—executive or judicial—is added the problem of attitudes and values of patriarchal social order which is hardly in accord with the sentiments contained in the preamble of the constitution.

This paradox of a surfeit of laws and an ineffective enforcement system has been the subject of debate for a long time. Those in charge of administration have either tried to shrug off criticism as biased or unjustified by countering with a set of statistics to focus on advances in other fields or the debate has tended to degenerate into bouts of mutual recriminations between various wings of law enforcement mechanism. The system that looks after the enforcement of laws and the delivery of justice comprises the entire spectrum that begins with the police stations or outpost in the victim's neighborhood to the highest court of land and there are numerous agencies engaged in the process of investigation. Prosecution, adjudication, rehabilitation etc. Each agency tries to blame the
other for the observed deficiencies and to absolve itself of any responsibility in the matter.\textsuperscript{56}

It is often suggested that to minimize crime against women and to provide justice to women there is the need to analyses the existing system of police, prosecution and judicial administration in all their manifestation. Such evaluation has to take into consideration among other the following issues.

The Gender – audit of existing institution structure and sub structure, for elimination of crime against women and justice to women and the way of working of these structures and its effects.

What is the priority of these institutions for curbing the crime against women. If the priority was not given by these institutions what are the reasons?

What is role played by the investigation agency and prosecution in case of crime against women.

What is the role of existing jurisprudence and law, to protect the women from violence.

In case of crime against women, whether the judiciary accorded priority to render justice to women. Whether or not judges are biased and intervene more on the side of the accused than on the side of vulnerable victims?.

Effect of male domination and patriarchal mindset of the existing structure in case of crime against women.

What is the position of custom, norms, issues etc., in law enforcement.

\textsuperscript{56} Ibid, p. 2.
Whether the existing laws, rules, procedure and regulations are gender sensitive or gender biased, while dealing with the women causes.

What are the Gender norms incase of crime against women.

There is a total absence of consensus and co-ordination between the various wings of the criminal justice system- the police, the judiciary and the prosecutors, administrators, all these issues contribute to the collapse of the system leading to harassment of the victims and denial of human rights to these women in distress.

Several judgements, especially those from the higher judiciary, have been instrumental in laying down path- breaking procedures in dealing with women's issues and establishing highly sensitive precedents in the jurisprudence of the country.