



POST- STRUCTURAL AND FEMINIST LEGAL THEORY OF LAW

Rohini

Ph.D. student in the Department of Political science, University of Delhi.

ABSTRACT

The feminist legal studies discuss the complex role of the law in the subordination of women and also in removing the oppression of women. Law is accepted as a place of liberation of women from exploitation as well as a precursor to social change. It is assumed that law is a place where the disadvantaged people get liberation from exploitation. Law is a means of justice which is impartial and a panacea for all legal obstacles. It is a source of social and political change. It stabilizes society and is helpful in maintaining a just society in which exploitation has no place. It is accepted that law is an instrument of 'social engineering'. There are some questions that need to be discussed as how can one say that law is a place of exploitation or emancipation? In which way, we should perceive the law and why? The instrumentalist vision of law should be challenged so that the subordinate identities and roles of the women could be redefined. Such redefinition of the roles and identities should not be based on protectionist approach but on equality approach. Therefore, we should adopt the post-structuralist approach. It does not deny the importance of law but it argues that law should be reconceptualised questioning the subordinate roles and identities of the women so as to reform it in a better way. The Feminist Legal theory has redefined the role of law within the private domain of the family and public domain of the civil society, so that the women could get equal rights within and outside the family.



Key issues-Women's right, Law, gender justice, gender equality, gender difference

INTRODUCTION :

The Feminist Legal theory has redefined the role of law within the private domain of the family and public domain of the civil society. We should focus on how do women perceive justice and how do law and legal discourses make women as subordinate subjects?ⁱ It also relates to the postmodernism philosophy as its notion of the self-knowledge and truth is problematic to the Enlightenment theory. As, the feminist theory also discloses the constructed truth. There are some issues we need to emphasize as we should analyze the feminist perspective within and out of the society in which we live. In what way the social world effects our lives? We should consider on the way in which we perceive the power or knowledge relations and try to find out the solution so we could have more equitable world. We should analyze the social relations and deconstruct the male – dominant viewpoints on the social relation.ⁱⁱ

We should deconstruct its agenda and explain the exploitative nature of law. We can say that the feminist legal studies are helpful in deconstructing the agenda of patriarchy. There are various perspectives on woman and law, for example, protectionism, equality and patriarchy. The underlying concept of the protectionist approach is women are weaker than so, they need protection. The scholars who supported this approach are influenced by an essentialist views on the gender difference.ⁱⁱⁱ This approach as the patriarchal system views women as biologically as weak, humble and indecisive. The women are defined as weak inferior, indecisive, selfless within the framework of patriarchy. As Atray says that the women can be only dignified in the role of wife,

she should take the responsibility and perform all duties, which are defined by the patriarchy^{iv}. So according to this approach, the role of law should protect women. Law views women different from man as it is essential for her protection. It never considers on the subordinate position of women within family. As they view they are indecisive and weak so they need protection. Such provision of subordination is accepted as natural and inevitable.

Unlike protectionist approach, equality approach views the legal provisions related to women in personal laws to criminal law and labour law are discriminating and considers that these laws are problematic for getting gender justice as these law does not treat women equally. So, this approach emphasizes that the law should remove barriers so that women could be treated equally.^v The equality approach is important for defining the relationship between law and women. Formal approach to equality says that man and woman are equal. We should give equal legal and political rights to women. By doing this, it discriminates with women socially. We can say that formal approach to equality neglects the difference between man and woman.^{vi} Here it is notable that legal rights are based on the concept of the formal equality which accepts the idea of sameness. It does not bridge up the gap between legal rights and gender equality. The formal equality is not sufficient to give equal space and status to women in society. The concept of formal equality creates a tussle between law and gender equality.^{vii}

The 'Sameness' model of equality gives women equal legal recognition as men have. It rejects the legal relevance of their difference and emphasize that women should be recognized as gender neutral legal person. The feminist legal theory should recognize the unequal position of women and must protect gender difference as an essential issue for the analysis of the family laws.^{viii} On the other hand, the substantive approach to equality says that women are socially discriminated. The formal equality assumes that political and legal rights are enough to make women equal. It forgets that the acts of social and cultural discrimination make them unable to use their political and legal rights properly. So, according to the substantive approach to equality, we should give them special rights properly.^{ix} The protectionist approach argues that women are weaker than men. For this reason, women need protections. Therefore, law should play as a protector. The equality approach says that man and woman are equal and we should give equal political and legal rights. It says that it is true that law is a place of emancipation but there are some laws, which are discriminating in nature. For example, the discriminating nature of the personal laws of all communities makes the women as disadvantaged groups instead of giving them equal legal and political rights. Here it can be said that there are some laws that obstruct the process of making woman liberated from exploitation.^x

It does not consider the role of law not social change, subordination of woman, beyond the discriminating. So, this approach will be beneficial to achieve gender justice in a substantial way in South Asia. As liberal feminist says the gender equality can be achieved by the reformation of the law. As we know that the liberal feminist is based on the liberal theory of individuality and equality. The Liberal feminism views woman as individual. So, it argues for equal rights should be given to women as men have. The language of law should be expressed in the term of gender equality so that women could not face any kind of discrimination but such approach do not consider to protect women's rights along with her gender difference.

This approach argues that the law should treat women equally by giving them equal opportunities. So, we can say that the liberal feminist has given a different view to facilitate to legal regulation. But there are some limitations of this approach, as we find this approach only appeals for equal treatment of the individual in law and views the legal rights of women in the context of individuality, but in this context it forgets the economic, social and cultural aspect of discrimination against women as the individualistic rights of women will not be proper to protect her from these discriminations. We need to have deep insight into the patriarchal arrangements and structure of exploitations.^{xi}

So we can say that the liberal feminist approach unable to identify the root cause of exploitation or subordination position of woman in society due to the acceptance of the notion of equality as sameness. Such conception of sameness ignores essentialities of the protection of the different characteristic of women. So there should be an approach which views the importance of woman difference and tries to achieve gender justice with gender difference. It discusses the role of law without mentioning the structures of oppression. Mere a removing the discrimination and improving of the women's position will not be coherent to achieve gender justice unless, we do not understand the underlying structure of oppression and the role of law in the subordination of woman.

The third approach defines law as an instrument of patriarchal oppressions. It is the patriarchal basis of law that becomes a hurdle for gender justice. It emphasizes on the need of discussion on the legal regulation of sexuality and violence. The law is based on the patriarchal values, so it justifies patriarchal oppression against women. As, its interpretations show patriarchal social relation, which make women as disadvantage class. As Supriya says that gender inequality is the outcome of an autonomous system of patriarchy. This approach views laws as 'an instrument of patriarchy.' It has identified the sites of exploitation of women within law, how does the law justify male dominance and their dominant norms?^{xii} We should remove the exploitative nature of the biased laws so that laws could be assumed as a place of liberation for women. The patriarchal biases of laws should be removed by the third approach.^{xiii}

But there are some limitations of this approach as this approach views women only as victim not as agents of resistance and change. It only defines the system of patriarchy as a historical, decontextualize and universalism. It views the issue of gender injustice as an independent entity does not relate to other terms of oppression which strengthen the gender injustice. For this reason, this approach analyses the nature of gender oppression in one-dimension, unable to

view it as the outcome of multidimensional factors. But on the other hand, Dominance feminist perspective on law has defined that how does the structure of law and legal discourse present women's oppression?^{xiv} So, we can say that we need to perceive the notion of gender justice from the postcolonial perspective and also analyses the role of right and legal discourse for gender justice in a contextual way.

But, these perspectives are insufficient to discover women's vulnerabilities. So we should go beyond these perspectives. As we find social feminism and post structuralist feminism are relevant to deconstruct the exploitative agenda of law. Law is a means to establish patriarchal system. It not only establishes the patriarchal system but also justifies it on the basis of protectionist approach. It defines the roles and identities of women as 'passive, weak and subordinate'. On this basis it argues for protection of women within the patriarchal system not from the patriarchal system. We should deconstruct its agenda and explain the exploitative nature of law. The instrumentalist vision of law should be challenged so that the subordinate identities and roles of the women could be redefined. Such redefinition of the roles and identities should not be based on protectionist approach but on equality approach. Therefore, we should adopt a poststructuralist approach. It does not deny the importance of law but it argues that law should be reconceptualised questioning the subordinate roles and identities of the women so as to reform it in a better way.^{xv}

The social feminist and post structuralist feminism are relevant to deconstruct the exploitative agenda of law. The post structuralist feminism criticizes the basic trends of modernism and enlightenment. These are objectivity, rationality, subjectivity and neutrality. Here subjectivity means it rejects the enlightenment's understanding of subjectivity. It goes beyond the debate of sameness and difference. They say that we should accept the post structuralist traditions to revisit the law. The feminist legal theory says we should challenge the traditional notion of law. It has reconceptualized the notion of justice in and out of the family. Family is accepted as 'the basic and fundamental unit of society'. It is not only a place of kinship and household works but it also has a meaning all its own. Therefore, family is a 'dominant ideology' by which all matters and gender relationships are regulated. It is universal. It influences the legal regulation of the family. All norms and values are constructed and framed in the family. The formal equality is not enough to give equal rights in a proper sense. Here the question is asked should we accept only the idea of sameness for protecting women. So we should emphasize the substantive notion of equality for getting gender equality. It analyses how does the familial ideology influence the legal regulation of women? The familial ideology makes a distinction between public and private spheres and defines family as private sphere. The familial ideology influences the legal regulation of women morally and economically. We should emphasize on the deconstruction of familial ideology so that women could get equal rights within and outside of family.^{xvi}

ⁱ Flevia Agnes, *Family Law Volume ii Marriage, Divorce, and Matrimonial Litigation*, Oxford University Press, 2011 page no XXIII

ⁱⁱ Michel Foucault (Summer 1982), *The Subject and Power Critical Inquiry* pp777-779

ⁱⁱⁱ Ratna Kapur, *Challenging the Liberal Subject Law and Gender in South Asia*, page- 2-3

^{iv} Ibid page-2-4

^v Ratna Kapur, *Challenging the Liberal Subject Law and Gender in South Asia* page-4-5

^{vi} Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, Sage Publication, New Delhi, 1996, page-175

^{vii} Ibid page-173-175

^{viii} Flevia Agnes (2011), *Family Law Volume ii Marriage, Divorce, and Matrimonial Litigation*, Oxford University Press, page no XXVI

^{ix} Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India*, Sage Publication, New Delhi, 1996, page-175-176

^{xi} Ratna Kapur, *Challenging the Liberal Subject Law and Gender in South Asia* page- 5-7

^{xii} Ibid page- 7-8

^{xiii} Ibid page- 28-29

^{xiv} Ibid page-8-9

^{xv} Ibid page -12

REFERENCES

1. Ratna Kapur and Brenda Cossman (1996), *Subversive Sites : Feminist Engagements with Law in India*, SagePublication , New Delhi
2. Ratna Kapur, *Challenging the Liberal Subject Law and Gender in South Asia*
3. Flevia Agnes , *FamilyLawVolumeiiMarriage,Divorce,andMatrimonialLitigation*, Oxford University Press, 2011
Michel Foucault(Summer 1982) , *The Subject and Power Critical Inquiry*
4. Kumkum Sangari, *PoliticsofDiversity:ReligionCommunitiesandMultiplePatriarchies*. Economic and Political Weekly, Vol.30 ,No.5 (Dec.23, 995)
5. Flevia Agnes(2011) , *FamilyLawVolumeiiMarriage,Divorce,andMatrimonialLitigation*, Oxford University Press,

METHODOLOGY

Qualitative ,Archival (books and articles) and Descriptive research



Rohini

Ph.D. student in the Department of Political science, University of Delhi.