What is equality? Investigating sex equality under law through a feminist jurisprudential lens

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In this paper I aim to analyse conceptions of sex equality under law, and its discontents through a feminist jurisprudential lens. I firstly lay down the core ideas of feminist jurisprudence and then proceed to use that framework to analyse and discuss various Indian cases that involve a question of sex discrimination. Finally I trace the development of court's reasoning in sex discrimination cases from a *separate sphere* theory approach to a *transformative* understanding of equality.[2]

Introduction to feminist jurisprudence

From Austin's command theory that argues that Law is whatever the sovereign commands with a threat of sanction, to HLA Hart's positive law theory that argues for separation of law and morality[3] - the understanding of law has constantly been challenged. But no school of thought has challenged the very essence of '*the law*' as much feminist jurisprudence has. The inability of law as a social tool to account for and accommodate female experience is at the core of this feminist enquiry.

There are no set definition of what is feminist jurisprudence, however there is an underlying commitment to question the inherent assumptions of the law. Catherine Mackinnon defines it as *"an examination of the relationship between law and society from the point of view of all women".*[4] The starting point of all feminist inquiry in law is to argue that objective reality is a myth.[5] Feminist scholars argue that there is no such thing is an objective or un-gendered reality, the world around us and the institutions we have built (such as law) are premised on a male understanding of the world. The reasoning, logic and truth are all weapons used by men to institute rules, procedures, and traditions in a way that benefit men over women. The notion of

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[2] Bhatia, Gautam, *Sex Discrimination and the Anti-Stereotyping Principle: Anuj Garg vs. Hotel Association of India* (September 3, 2017). Available at SSRN: https://ssrn.com/abstract=3031374 or http://dx.doi.org/10.2139/ssrn.3031374.
[3] H.L.A Hart, The concept of Law (1st ed. 1961).
[4] Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs, University of Chicago Press journals 635-658 (1983).
[5] Anna scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 The Yale Law Journal 1373-1403 (1986).

objective, non-situated[6] universal reality irrespective of whether believed by men or women is a by-product of exposition of the male's dominant point of view. Thus law is a tool of social organisation based on domination.

Scholars argue that male is a social and political concept rather than a mere biological criteria.[7] The standard of rationality, objectivity and universality even if not most men's inherent outlook appears as subconsciously rational to them. Women are forced to define their own reality and existence in terms of such male reality. The male reality is systemic and hegemonic. The conceptions of what counts as truth is produced by those with power which in turn while cloaking itself in a myth of normativity and objectivity serves as a tool to distort world views and power relations in the interest of men.[8]

Thus the feminist jurisprudential analysis of law is to ask the feminist questions.[9] The core of feminist jurisprudential enquiry is shared by Critical Legal Studies in so far as both try to uncover the way in which institutions and norms such as law *legitimises, distributes* and *preserves* power in the interest of a particular section of society while marginalising the others. Feminist jurisprudence is involved in seeing, describing and analysing the harms of a patriarchal system of laws and to imagine a non-patriarchal world for women. However scholars have argued that since male-ness is a deeply entrenched epistemological concept that binds all genders, it is important to deconstruct the male vision episteme and ways of enquiry. Male centric legal scholarship is to law what law is to patriarchy, each reinforces the other. To be true to the vision of feminist jurisprudence, not only does one have to ask the right questions, but also limit the distortion of female experience.[10] Feminist vision means understanding and implementing female experiences and methods of analysis and acknowledging that personal is political. It is important to note that feminist jurisprudence is not limited to formal inclusivity in the sense of being inclusive as one goes on (a pattern that sex discrimination law displays, something we will discuss later), but is inherently built on a politics of inclusion. It accounts for the lost narratives and methods of enquiry that may have been lost in the male analysis of

[6] Emily Jackson, *Catherine MacKinnon and Feminist Jurisprudence: A Critical Appraisal*, 19 J.L. & Soc'y 195-213 (1992).
[7] Supra Note 4.
[8] Id.
[9] Heather Ruth Wishik, *To Question Everything: The Inquiries of Feminist Jurisprudence*, 1 BERKELEY WOMEN's L.J. 64-77 (1985).
[10] Id.

law from a situated perspective. ‘Laws speak of the male experience and portray male norms in the male voice while ignoring women‘s experiences and voices’.[11]

Therefore feminist scholars argue that the state is built upon the subordination of women. In a way male power has *become* the state, and the state is male in so far as the male centred objectivity is the norm.[12]

Feminist Enquiry & Sex equality

Having argued that law in its operation entrenches gender subordination, feminist scholars have critically questioned conceptions of equality under law and have criticised the male vision standard as the implicit measure of equality.[13]

Our notion of equality for a long time has been Aristotelian. Equality means to treat like persons alike, and unlike persons unlike. Under this conception of equality the state or sovereign has to show *some* difference between the sexes to justify disparate treatment.[14] Irrespective of the *kind* and *origin* of the differences, as long as *some* differences could be pointed out between the sexes, it would justify disparate treatment in an Aristotelian sense of equality. This lack of clarity on which grounds of differences warrant disparate treatment have become the critical point of much legal debate and discussion.

Many of the earlier court decisions regarding sex discrimination read this positivist Aristotelian idea into dogmatic notions of differences between men and women, often characterised by the *separate sphere* theory. Under this theory women were to inhabit the private sphere of the household and men were to inhabit the outer public sphere. Women were to attend to children, the household and cater to the family’s needs while the man had to go out and earn money for the family.[15] Thus such discriminatory conceptions of differences between the sexes were used by courts in earlier sex discrimination cases to argue for validity of disparate treatment since a

[11] Shampa Dev, *Gender Justice in India: A Feminist jurisprudential perspective*, 10 Tattva- Journal of Philosophy 69-88 (2018).
[12] Catherine A. Mackinnon, *Reflections on sex equality under Law*, 100 Yale. L.J. 1281-1328 (1991).
[13] Id.
[14] Supra Note 4.
[15] Danaya C. Wright, *Theorizing History: Separate Spheres, the Public/Private Binary and a new analytic for Family Law History*, (Apr. 21, 2021, 10:40), https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1666&context=facultypub.

classification based on stereotypical difference between sexes could validly imply such disparate treatment.

There are various schools of thought in feminist jurisprudence with respect to sex equality under law and much debate among them. One version of debate is *sameness versus difference*.[16] The core disagreement is with respect to the real meaning of equality. Some feminists like Ruth Bader Ginsberg have argued for 'over the board' equal treatment with no special rights. Whereas difference feminists argue for recognising and accommodating for differences between men and women and forming special laws for women that compensate them for their unique roles. Many radical feminists in response have argued that by engaging in a vocabulary of differences based on the mythical nature of objective reality and logic riddled with male vision epistemology, difference feminists in a way are conceding to the anti-feminist logic of *different and thus inferior*.

The second version of this debate is *differences versus domination*. Difference feminists also argue that since there are fundamental differences between men and women, therefore the only root of discrimination of women is a male centric approach to law and 'male laws'. Implicit in this argument is the belief that to ensure gender equality, one only needs to find the finite grounds of difference between men and women and then adjust the law accordingly. Scholars have criticised this tendency to classify and differentiate to ask for special rights by arguing that even if we employ sophisticated methods to arrive at these differences, "We only encourage the law's tendency to act upon a frozen slice of reality and in doing so, we participate in the underlying problem - the objectification of women".[17] They argue that not only do we need to accept differences as emergent and infinite but that this 'incorporationism' is built on the false belief in objectivity of law, that once these 'finite' sexist laws are removed, we can achieve gender equality. Male supremacy is not a set of random irrationalities in an otherwise perfect law but a whole hegemonic system in itself. The solution is not to look for irrationalities and disparate treatment in enough cases and eradicate them. That would be akin to treating the symptom of the problem. The solution (as domination feminists like Catherine Mackinnon argue) is to focus on how law propagates domination, disadvantage and disempowerment.[18]

[16] Judith A Baer, *Feminist Theory and The Law*, The Oxford handbook of Political Science (1st ed. 2011).
[17] Supra Note 5.
[18] Id.

Sex discrimination in the courts:

Employed with male logic and male laws in front of most likely a male judge, or a female judge who has been initiated into the male vision way of thinking about the law and thus equality, the task of reimagining and arguing for equality is full of epistemological effort. Mackinnon argues that since law is male, the notions of objectivity and neutrality that it is based on are established by the dominant male vision. She argues that the male point of view is so pervasive and near perfect that it has co-opted the idea of equality.[19] Such a system is bound to eliminate female systems of thinking and ways of seeing. Feminists challenge the very idea of a value free position standing from where justice can be dispensed in a gendered reality.

Feminist scholar Wendy Williams argues[20] three ways by which courts play an important role in debates about equality. Firstly, the way courts describe and understand equality has a larger bearing on how the society understands equality. Secondly, legal cases are often the focus of equality debates in popular culture and activism. Thirdly, such participation in cases also show us the societal perceptions with respect to ideas of equality and rights.

Closer home in India, the constitution gives us the right to equality, and equal protection of laws under articles 14 - 8, the so called equality code. More specifically article 15 lists sex as one of the prohibited grounds for discrimination. The courts in India initially engaged in what Gautam Bhatia calls [21] a *formalist* reading of equality provision. The formalist reading was characterised by a diluted scrutiny of the actual grounds of discrimination that failed to find the *real* source of discrimination. As will be elucidated later, the legal reasoning employed in such cases is characteristic of gendered vision of equality. Courts have many times been complicit in the subordination of women while not unlocking the true potential and meaning of the right against discrimination given under the constitution.[22]

Mahadeb Jiew vs B.B. Sen[23] involved the challenge to Order XXV, Rule 1 of the Code of Civil Procedure (1908). The rule allowed for security to be taken from plaintiffs in a legal proceeding in case they lost the case and were unable to provide the cost of litigation. For men, the rule only mandated security to be taken if they did not possess sufficient immovable property in

[19] Supra Note 5.
[20] Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN's Rts. L. REP. 151-174 (1992).
[21] Supra Note 2.
[22] Catherine A. Mackinnon, *Sex Equality under the constitution of India: Problems, prospects & Personal Laws*, 4 Int'l J Con Law 181-202 (2006).
[23] AIR 1951 Cal 563.

India, *and* were living out of India. For females on the other hand taking security was mandatory if they did not poses sufficient immovable property *regardless* of where they were living. The Calcutta HC engaged in a formalist reading of Article 15 i.e. it held the rule to not violate article 15(1) because the court opined that the reason of discrimination in an Aristotelian sense was sex *and* property, and not sex alone. They interpreted that since article 15(1) only prohibits discrimination on sex *alone*, existence of other grounds not based on sex (and other prohibited grounds) would make any such discrimination immune to such challenge. *R.S. Singh vs State of Punjab*[24] involved challenge to government orders disqualifying any women to be appointed to any post in men's jail (except clerk or matron). The HC held the discrimination to be valid and based its reasoning on the separate sphere theory. It stated that as long as there were 'natural differences' between the sexes, the same difference could be used to create such classification and thus discrimination.

Air India v. Nargesh Meerza[25] involved a challenge to service rules that mandated Air Hostesses to retire at 35, *or* on marriage (if they married within four years of joining the service), *or* on their first pregnancy, *whichever* occurred earlier. The court's reasoning to uphold the service rules was steeped deep in the separate sphere theory.[26] The court opined "Art. 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their *special attributes, qualities,* mode of recruitment and the like, are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination." The court observed that the provision of discharging service of AHs who married within four years did not suffer any constitutional infirmity because such rule would lead to a 'successful marriage' and good 'family planning'.

The court's reasoning in these cases displays what Mackinnon argues to be 'law's maleness in the very form of legal reasoning privileging male reality'.[27] Court in *Mahadeb, Singh & Meerza* used patriarchal notions of gender and reality to adjudicate on substantive equality. The sense of ease and obviousness in these decisions is a testament to the extent of male vision nature of law itself. The courts also did not venture into the question of whether the other in

[24] AIR 1972 P H 117.
[25] 1981 AIR 1829
[26] Supra Note 2.
[27] Supra Note 6.

sex *plus* other grounds of reasoning was in turn built on the very same notions of discrimination that article 15 was established to eliminate.[28]

Breaking away from this formalist reading, the Delhi HC in *Walter Alfred Baid vs UOI*[29] which involved a challenge to a rule that only allowed females to be senior nursing tutors, stated that 'it is difficult to accept the position that a discrimination based on sex is nevertheless not a discrimination based on sex "alone" because it is based on "other considerations" even though these other considerations have their *genesis* in the sex itself'. Thus finally realising that the sex *plus* other ground itself is steeped in discriminatory theories of differences between sexes, and thus cannot be argued to *not* be a discrimination on sex alone. *Rani Raj Rajeshwari Devi vs State of UP*[30] involved a challenge to a rule that allowed the government to declare any women 'incapable of managing their property' without any qualifications. The Court held that the form of the differences and its basis was irrelevant as long as the *effect* of such legislation was to treat identically placed men and women differently. It espoused for heightened scrutiny in sex discrimination cases to delve deeper into the real origin of the 'differences'. The court opined that no legislative classification could be based on generalized or stereotypical characteristics attributed to either men or women and based on gendered notions of reality.

Transformative constitutionalism

Anug Garg & Ors. v. Hotel Association of India & Ors.[31] involved a challenge to section 30 of the Punjab excise act, 1914 which prohibited employment of any male under 25 or *any* female in premises where liquor or intoxicating drug is consumed by the public. The court, holding the legislation unconstitutional espoused for a standard of strict scrutiny and stated that "Legislation should not be only assessed on its proposed aims but rather on the *implications* and the *effects*. The impugned legislation suffers from incurable fixations of stereotype morality and conception of sexual role". Thus the court finally in a feminist jurisprudential reading of the law understood the couched language of male vision bias inherent in law and argued for a nuanced understanding of what the effect of such classification was, and if the classification in turn was based on stereotypes and discrimination itself. When *Anuj Garg*

[28] Kalpana Kannibiran, *Judicial Meanderings in Patriarchal Thickets: Litigating sex discrimination in India*, 44 EPW 88-98 (2009).
[29] AIR 1976 Del 302.
[30] AIR 1954 All 608
[31] (2008) 3 SCC 1.

stated that 'any such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women' it was explicitly reading into our constitutional protection of equality a substantive test of equality long held by feminist scholars that holds that the real test of any sex discrimination legislation is to see 'whether the policy or practice in question integrally contributes to the maintenance of an underclass or a deprived position because of gender status'.[32] *Anuj Garg* thus laid down a very important precedent of strict scrutiny when apparently 'objective' and 'natural' notions of differences between the sexes form the basis of sex discrimination.

Gautam Bhatia argues *Anuj Garg* to be a *transformative* reading[33] of the article 15 on two counts. First because it sets the precedent that under 15(1) legislation should be tested on the institutional and systemic effects and not only on state's intended aims and goals. Second, because it set the precedent that in no way can any discrimination be allowed which is based on stereotypes about roles, capabilities and capacities of the sexes. This he argues becomes important not only because of the heightened scrutiny that accounts for the ground reality and how classifications based on discriminatory theories propagates and entrench sex subordination, but also because state is very unlikely to expressly invoke stereotypes to enact legislation which is prima facie discriminatory. To counter that *Anuj* Garg lays the foundation of strict scrutiny of such legislations that on the face may appear neutral and objective (as per the male vision bias of logic and reality itself) but end up propagating and entrenching systemic inequality of women, thus exploring a new chapter of substantive equality.

Conclusion

It is argued[34] that for equality jurisprudence to be truly transformative rather than merely 'inclusive' the understanding of substantive equality has to be rooted in understanding how 'inequality is rooted in political, social and economic cleavages between groups, rather than the result of arbitrary or irrational action'. A constitutional commitment to equality is thus also a commitment to recognise, organise and change the systemic inequalities that entrench such discrimination. Mackinnon calls the law 'Treacherous, uncertain, alien and slow', but at the same time argues that it is too powerful in its potential to be ignored by feminists. Thus a commitment to feminist jurisprudence is a commitment to epistemological and psychological

[32] Supra Note 4.
[33] Supra Note 2.
[34] Catherine Albertyn, *Substantive Equality and Transformation in South Africa*, 23 S. AFR. J. ON HUM. Rts. 253-276 (2007).

sophistication in law, and to investigate the gender bias of the law itself, to question everything. To reimagine not only how law is applied, but the law itself.