

LOTIKA SARKAR ESSAY COMPETITION FOR LAW STUDENTS, 2006

**WHY FEMINIST JURISPRUDENCE SHOULD BE A  
COMPULSORY COURSE IN LAW SCHOOL**

DETAILS OF ENTRANT

Identification

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***ABSTRACT***

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**TITLE**

“OF CAMERA PHONES AND COMPULSORY COURSES: THE NEED FOR FEMINIST JURISPRUDENCE”

**SYNOPSIS**

In this essay, the author attempts to bring out the crying need for introducing Feminist Jurisprudence as part of compulsory law school curriculum against the backdrop of an interaction between a young law student and her Professor. The author explores the content of feminist jurisprudence at the outset, through an exposition of the various schools of feminist theory. In the next section of the essay, the author attempts to establish that feminist theory is an integral part of Jurisprudence and should therefore, not be isolated from the same. This is followed by an analysis of the nature of legal education in India and an inquiry into what law school education is ideally expected to provide in the twenty first century. The author argues that an understanding of feminist jurisprudence is indispensable if these ideals are to be achieved.

**WORD COUNT**

**1732** [Inclusive of footnotes]

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***OF CAMERA PHONES AND COMPULSORY COURSES:  
THE NEED FOR FEMINIST JURISPRUDENCE***

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Diya is a student of the fourth year at a premier national law university in India. This semester, Jurisprudence is being offered as a compulsory course to fourth year students and is being conducted by Mr. Chandra, one of the most distinguished and well-respected lecturers on campus. During yesterday's Jurisprudence class, as Diya took frantic notes, trying to keep up with another of Mr. Chandra's typically engaging lectures (this time on Professor H.L.A Hart and the "open texture of law"), she noticed that a male classmate sitting just ahead was repeatedly aiming his camera phone at her from various angles, as she crouched over her desk, scribbling away. In the course of the next half hour, she came to the inescapable conclusion that Male Classmate was indeed capturing images of uncomfortable parts of her anatomy, and at the end of the class, Diya brought the same to the notice of her lecturer.

Mr. Chandra had a reputation for being particularly intolerant about inattentive students and classroom indiscipline. Therefore, it was not surprising when he reported the incident to higher authorities and recommended that stern disciplinary action be initiated against the student in question. In addition, he ensured that a Rule was passed in the University with immediate effect, banning the use of cellular phones within the classroom. While students appeared largely unperturbed about the camera-phone incident itself, there was an uproar in the student body, however, regarding the enforcement of this new Rule. Diya wondered why there was no similar outrage against the idea of a woman being photographed without her knowledge or consent in a supposedly "safe" place like a classroom and why, while students were animatedly discussing the 'Constitutionality' of this new Rule, there was no similar debate regarding the legal implications of such an incident—for instance, violation of the right to privacy.

## What is Feminist Jurisprudence?

Diya had spent a significant part of the previous semester trying to keep up with assigned readings for her optional course on Gender and Law and had, in the process, managed to acquire a rudimentary understanding of basic feminist theory. The origins of ‘Feminism’ or feminist thought, she had learnt, could be traced as far back as 1792, to the publication of *A Vindication of the Rights of Woman* by Mary Wollstonecraft, although the term ‘feminism’ itself did not appear until 1871, when it was used for the first time in a French medical text<sup>1</sup>.

The early feminists, often identified as the Enlightenment Feminists, were responding to the revolutionary fervour of the Age of Reason and the Liberal legal values put forward by the (male) thinkers of the time, such as equality, liberty and the theory of natural rights. The early Liberal Feminists, rooted in the natural rights tradition, sought to apply the same values to ameliorate the plight of women, arguing that women, as citizens and “persons”, were equally entitled to the rights that men declared were humanity’s inheritance.<sup>2</sup> The Declaration of Sentiments issued at the Seneca Falls Convention in 1848 echoed this demand and marked the beginning of the suffragist movement and ‘first wave’ feminism, which culminated in the passing of the Nineteenth Amendment to the American Constitution granting women the right to vote in 1920. Liberal feminists believed in the universality and neutrality of law and therefore, advocated affirmative action and the reform of discriminatory laws to achieve substantive equality. Their endeavour was to bring about social change through effective legislation that would remove the legal obstacles that had historically inhibited women’s full participation in the public sphere.

However, while the Liberal feminist’s engagement with law did bear some fruit—securing universal suffrage, equal remuneration and the like—formal legal equality was

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<sup>1</sup> However, the word was used in a context completely different from its present meaning—first to denote the development of feminine sexual organs and characteristics in men and in the following year, was adopted by Alexandre Dumas in *l’homme femme* to describe a virilization of women that led them to commit adultery; Freedman, J., *FEMINISM 2* (2002)

<sup>2</sup> Donovan, J., *FEMINIST THEORY: THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM* pp.17-23 (1985)

not enough to eradicate the subordination of women. A disenchantment with the law began to creep into feminist thought and gave birth to what is known as ‘second wave’ or Radical Feminism around the mid-1960’s, wherein law itself came to be viewed as an instrument of patriarchal oppression. Radical feminism argues that the reference point in relation to which the law is shaped is the male norm, the male experience and male domination and serves as an institution that continues to shape and sustain unequal power relations.<sup>3</sup> While Liberal feminists tended to concentrate on public issues, the “Rads”, as they came to be called, examined the effect of patriarchy in the private lives of women and engaged principally with issues such as rape, domestic violence and battering, sexual harassment and pornography. Radical feminism discards the claim of law as objective and universal, and embraces subjectivity in legal analysis—acknowledging unapologetically, that it is involved, interested and looks at matters “from the inside”.<sup>4</sup> Feminism thus emerged as a ‘standpoint jurisprudence’. Catharine Mackinnon, a leading Radical feminist who propounded the dominance model to explain oppression of the female, asserted that unless women’s experience is critically defined and communicated, the form and content of the law and the patriarchy it represents will continue to prevail.<sup>5</sup>

A third school of feminist thought that emerged was Cultural Feminism, which, like Radical Feminism, emphasises the difference between the sexes. However, unlike the Radicals, who highlight the negative aspect of this difference and view it as the basis for discrimination and sexual objectification, Cultural Feminists emphasise the positive aspect, celebrating women’s distinctiveness and argue that law should value and embody these characteristics of empathy, nurture and connectedness. Carol Gilligan, in her seminal work *In a Different Voice* (1982) believes that women bring to social reality a distinctive voice and a moral conviction, “the ethic of care”, which is relational, based on the values of connectedness, subjective emotion and non-violence. She distinguishes this from the masculine mode, “the ethic of justice”, which relies on alternate values of

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<sup>3</sup> Mackinnon, C.A, FEMINISM UNMODIFIED (1987) quoted in Gupta, K., WOMEN, LAW AND PUBLIC OPINION 48 (2001)

<sup>4</sup> Scales, A.C., *The Emergence of a Feminist Jurisprudence: An Essay* (1986) 95 YALE LAW JOURNAL 1373 quoted in Freeman, LLOYD’S INTRODUCTION TO JURISPRUDENCE 1137 (2001)

<sup>5</sup> Supra n.3

objectivity, rationality and emotional distance. Cultural feminists stress the need to include women in decision making institutions to ensure the balance of interests and more peaceful outcomes.<sup>6</sup>

Thinking back to yesterday's classroom incident, Diya could clearly contextualise it as an instance of sexual 'objectification' of the woman, which a Radical feminist would view as degrading and therefore, a source of oppression. She felt that had her class a basic understanding of Feminist theory, they would have perhaps been able to appreciate the underpinnings of patriarchy and power play inherent in our daily lives that the incident brought out.

### Is it Jurisprudence?

Later that afternoon, when Diya went to Mr. Chandra's office to submit an assignment, she shared her views on the subject and asked her teacher why Feminist Jurisprudence was not a part of the Jurisprudence course he was offering their class. Mr. Chandra explained that Jurisprudence, in his opinion, was about the nature of law, about what law *is*. Feminism, on the other hand, was about challenging the structure and substance of the law—it was about changing attitudes and by doing this, bringing about changes in the law as it exists. Jurisprudence is the study of the sources of law, natural law and positive law, the interaction between law and morals and so on. It was apparent to him therefore, that although socially relevant, Feminism did not come within the ambit of 'Jurisprudence' at all! Feminism was politics and could perhaps be considered part of sociology, but not Jurisprudence.

Diya pondered this for awhile. Her readings on Feminist theory in the previous semester had led her to contemplate what part law plays in society, and that was Jurisprudence, surely? In addition, the Critical Legal Studies movement that they had studied as a part of the compulsory Jurisprudence course seemed to share considerable common ground. Both Feminism and Critical Legal Studies share a common scepticism about the alleged

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<sup>6</sup> Gilligan, C., IN A DIFFERENT VOICE (1982) quoted in Gupta, K., WOMEN, LAW AND PUBLIC OPINION 48 (2001)

neutrality of the law, both challenge the purported separation of law from politics as well as the existing distributions of power. CLS merely presented oppression and discrimination from the abstract and predominantly male point of view. The CLS movement looks down on the oppressed from a purely academic position, while the starting point for Feminism is that of the oppressed themselves.<sup>7</sup> It seemed absurd to accept CLS as an integral part of contemporary Jurisprudence, while excluding Feminist Theory from the same. In fact, if Feminism was discarded from the purview of Jurisprudence, logically, one should eliminate every theory that has dealt with the interactions between law and society—including Marxism, Realism and certainly the New Critics.

### Why a compulsory course?

The primary object of legal education in any case, Diya went on, was to develop the critical abilities of students and to sensitise them to the assumptions on which law is based. The objective of law school education is not to impose viewpoints upon students, but to enable students to examine the basis of arguments such that it may facilitate the formulation of individual views.<sup>8</sup> By studying theories that have challenged the conventional understanding and knowledge of the law, students would be better equipped to critique the law they are exposed to and must work with. Students would be encouraged to take responsibility for the views they hold and defend their choices as conducive to creating a just social system.

Mr. Chandra seemed unusually quiet after Diya had articulated her opinion. She knew she had made the point she had intended to. And as she left Mr. Chandra's office that evening, she hoped that when Jurisprudence was offered as a compulsory course the following year, Feminist Jurisprudence would be a part of the curriculum.

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<sup>7</sup> Riddall, J.G., JURISPRUDENCE 275 (1999)

<sup>8</sup> Dhanda, A. & Parashar, A. (Ed.), ENGENDERING LAW: ESSAYS IN HONOUR OF PROF. LOTIKA SARKAR 105 (1999)



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