"THE NEED OF FEMINIST JURISPRUDENCE IN THE DECISION OF HARDIK PURI V. THE STATE OF HARYANA"

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The judgment that I have decided to re-write is that of *Hardik Sikri v. State of Haryana,* also popularly known as the *Jindal Rape Case.* As a student in the college and someone well aware of its surrounding, I found the judgment to be appalling and extremely backward thinking. With the rise in feminism in India, the jurisprudent lens has shifted course in the 21st century and now ranges from having a vast school of thought like feminist jurisprudence and queer jurisprudence. As a discourse of this and given the new innovation of judgment review and judgment re-writing, my paper attempts to critically examine a misogynistic judgment from a feminist lens.

In the said case, the victim filed a case against the accused under section 376, 120-B, 506 of IPC as well as section 67 of the I.T Act. The allegations on the said accused and his friends were that of raping the victim and blackmailing her via WhatsApp messages in order to get her to have sex with them under duress and blackmail. According to the victim, ever since she had taken admission in the university she had indulged in forced physical activity with Hardik Sikri after which she broke up with him. Even after the break-up the accused continued to blackmail the victim by threatening to circulate her nude images which had been previously shared by the victim via WhatsApp. Threatened by the blackmailing and because of the fear of having her personal images and private life leaked, the victim had to forcefully submit into having sexual relations with the accused and his two friends soon after which the victim filed an FIR against the accused. The appellants in this case (Hardik Sikri and his two friends) vehemently argued that the testimony of the victim did not reveal that she was being subjected to a traumatic blackmail, rather that she was willing and complaint in her reciprocation. After hearing both sides of the story, the court suspended the sentence of the three appellants and granted them bail on the grounds that they will seek counselling from a psychiatrist.

I am in complete disagreement with the judgment, not only because the court granted the accused bail but also because the reasons they gave for furnishing such a bail was purely on patriarchal grounds followed by essentially "victim shaming "the girl in this case. Apart from this, there are numerous sexist comments made

by the Haryana court in this judgement, such as, "A perusal of the statement of the victim as also her cross-examination reveals a promiscuous relationship and sexual encounters with all the three accused persons over a period of time and at no stage did she ever make any attempt to reveal her mental state to either the authorities in the college or to her parents or her friends." [1] Further, the court not only questioned the victim's allegations but went on to call her "promiscuous" and questioned her chastity. The court also questioned the lifestyle of the victim on the grounds that condoms and cigarettes were found in her room while conducting investigation. The court from its findings came to the conclusion that since the victim was physically active and indulged in smoking and drinking, she depicted an, "immature but nefarious world of youngsters unable to comprehend the worth of a relationship based on respect and understanding. The entire crass sequence actually is reflective of a degenerative mind-set the youth breeding denigrating relationships mired in drugs, alcohol, casual sexual escapades and a promiscuous and voyeuristic world."[2]

The Supreme Court in its final judgment, upheld the decision of the Punjab and Haryana High Court. This goes on to show the innate patriarchal thought that lies behind such sexist judgments where the accused is granted bail and the victim is "victim shamed" and subjected to character assassination based on her lifestyle and habits. This is what I will be critiquing from a radical feminist perspective while making an attempt to re-write this judgment. While doing so, my main focus will be on Catherine MacKinnon, a radical feminist, who is also a lawyer and academician in the legal field. She is most famous for her work in law to clamp down sexual harassment and pornography. I will therefore be using her critiques and work on Sex Based theory of Rape to bring out the loopholes in the mentioned judgment. Lastly, I will conclude by using Feminist Legal Theory alongside the works of Indian feminist, Rajeshwari Sunder Rajan.

Radical feminists believe that oppression of women is primarily located in the sexual domination by men in the society. With that being said, Radical Feminist Theory is considered by many law students as the most feminist legal theory because of the manner in which the radical feminists have systematically exposed male dominant perspectives in general law. [3] Catherine MacKinnon, one of the

[1] *Hardik Sikri v. State of Haryana,* 2017 SCC OnLine P&H 2806, (Supreme Court of India), (2017)

[2] *Hardik Sikri v. State of Haryana,* 2017 SCC OnLine P&H 2806, (Supreme Court of India), (2017)

[3] Readings and class notes

leading radical feminist, challenges the view that, since men have defined women as different, women can never achieve equality. And since men control the women in society, the issue is ultimately one of power. [4] This shows the dualism in which the society has sexualized everything as either "masculine" or "feminine". This is also seen in the above-mentioned judgment where the appellate court has considered habits such as smoking, drinking and being sexually active as innately masculine traits which the victim should not have engaged in because she is a woman. Since the victim did indulge in such activities, she was considered promiscuous and not feminine in her characteristic. MacKinnon thus suggests "redefining woman in seeking to explain and understand the world from her perspective". In doing so, she suggests, "asking the woman question" when looking at a legal theory or statute before coming to a conclusion. [5] This was clearly not considered in the said judgment since there are various instances where the court said that the victim's testimony was not sufficient enough to show that there were instances of mental torture or blackmail or that the victim was disturbed mentally since she did not mention what she was going through to the college authorities. To critique this, I would say that the court should have seen this from the woman's perspective and asked themselves, the "woman's question" as suggested by McKinnon. A woman, specially someone who is being blackmailed by her own ex-boyfriend (as seen in this case) is likely to be in a completely different mental framework than how a usual rape victim would be, something the Punjab and Haryana court did not take into consideration in its judgment. Someone who is being subjected to forced physical relations under duress might not be in a mental framework to speak about it. Further, in the given case, the victim was under the fear of having her personal information such as nude images being circulated, which is probably why she did not feel comfortable with reporting what was happening to her instantaneously to the concerned authority, therefore it was not correct for the court to conclude that she did not possess any signs of blackmail or threat without taking into consideration the victims perspective. Secondly, the victim in this situation was a junior to the alleged appellants, which made them have power over her in college by virtue of being a senior which is probably why she was hesitant to complain in the first place. Instead of taking all this into consideration, the court concluded her silence to mean that she was not

[4] Feminist. In McCann and Kim (Eds) *Feminist Theory Reader*. New York: Routledge (2003).

[5] Feminist. In McCann and Kim (Eds) *Feminist Theory Reader*. New York: Routledge (2003).

threatened enough while taking her testimony into consideration instead of looking at it from a woman's' perspective and understanding.

Various feminists believe that since law is a social institution that reflects the mores of society, it is bound to be sexist at various instances since the society in itself is sexist and norm driven. Feminists therefore believe that legal doctrine is not objective, neutral and coherent in the way the law is often presented to be. If a feminine judge is to examine the social construction of how gendered law is, it will reveal hidden sexism embodied in ideas of what is 'natural' to women and men. By this, feminists try and show solidarity with those who are treated unfavorably by the legal system because they failed to meet the stereotypical behavior expected of them. [6]

Catherine MacKinnon, a radical feminist, believes that the idea of male domination is sexualized, because of which a man's power over that of a woman is conceived to be sexual power. She also believes that there is sexism, embedded in our language as well, where man is an active subject and woman is a passive object.[7] In her recent book- Are Women Human, MacKinnon suggests that rape law enshrines rapists' point of view. [8] The reason she gives for this is that most legislators and judges are men and that rape laws were created by men long back when women did not even have the right to vote. So, what MacKinnon tries to imply is that men who wrote the law were members of a group who rape and who do it for reasons they share in common, namely masculinity and their identification with such masculine norms and in particular being that group of the society that initiate sex and who socially experience themselves as being affirmed by aggressive initiation of sexual interaction. Finley and Davis feel that since privileged white men have populated law, shaped it in their own image and instated their personal experience as universal, neutral and objective, masculine norms are glorified within the legal system. [9] We can see that in various instances such as – Reasonable Man's test, Self Defense Doctrine, self-interested actor of contract law etc. Therefore,

[6] Margaret Davis and Vanessa Munro, "Feminist Legal Theory" in The Ashgate Research Companion to Feminist Legal Theory

[7] Feminist. In McCann and Kim (Eds) *Feminist Theory Reader*. New York: Routledge (2003).

[8] Stuart Jeffries, 'Are Women Human- an Interview with Catherine MacKinnon', The Gaurdian (New York, 12th April, 2006)

[9] Margaret Davis and Vanessa Munro, "Feminist Legal Theory" in The Ashgate Research Companion to Feminist Legal Theory

giving legal persons a masculine flavor continues to make it difficult for women to be a person in law separate from masculine norms.

Catherine MacKinnon therefore proposes that sex inequality needs to be tackled legally, or else women will continue to be raped, murdered and served up as masturbation fantasies for men. She argues that states favor an Aristotelian notion of equality whereby likes are treated as alike and unlike as unalike. [10] The point that she is trying to make here is that, this formal equality doesn't help women. Further, MacKinnon thinks consent in rape cases should be irrelevant because women are so unfree that even when a woman is shown to have given consent to sex, it is never enough to secure an acquittal. [11] The point that she is trying to make here is that when there is force or coercion between the parties, individual consent is beside the point; if someone is forced into sex, that ought to be enough. This is what the Haryana and Punjab courts failed to see in their judgment. The victim was being forced, even if there were instances where there was no physical force applied by the accused there was a feeling of being forced due to blackmail and the fear of having one's reputation tarnished and pictures leaked all throughout college. Even though the victim at one point did consent to have sexual intercourse with the accused and his friends, this consent was obtained out of duress and blackmail. Consent should have been free of coercion from all the parties involved, which was clearly not what happened in this case. The British common law approach which was applied by the Haryana and Punjab court, requires that one needs both force and absence of consent for acquittal. Firstly, as mentioned above, such a legal maxim is sexist in its conception since it was legislated and developed as a legal doctrine by men, centuries ago. Hence, it is likely to show gender inequality and lack of women's perspective. Secondly, due to this common law maxim, the judges failed to see blackmail and threat as force, trivializing force to mean only physical force. The court also failed to see consent separately from consent obtained due to coercion and by use of force. Instead of seeing force and absence of consent as two separate requirements for acquittal the court should have seen the use of force via blackmail and threats used to obtain partial consent of the victim. By not doing so, the court held the victim to be consenting into entering into a forced physical relationship with the accused and his friends which in turn vitiated the whole concept of 'free and fair consent' which is an essential doctrine used by lawyers in

[10] Stuart Jeffries, 'Are Women Human- an Interview with Catherine MacKinnon', The Gaurdian (New York, 12th April, 2006)
[11] Stuart Jeffries, 'Are Women Human- an Interview with Catherine MacKinnon', The Gaurdian (New York, 12th April, 2006)

cases of rape. Hence, the court in its judgment trivialized what was essentially a gang rape done by the three accused on the victim by forcefully getting her to consent under duress and blackmail and made it look like a consensual sexual relationship entered into by "nefarious, immature youngsters who belong to the present world of promiscuity and voyeurism". [12]

Rajeshwari Sunder Rajan, while critiquing the High Court judgment passed by Justice Prabha Sridevan in the case of National Insurance Co. v. Deepika and Ors in 2009, says that judgments considered to be favorable to women often adopt the wrong reasoning in their support for women that ends up reinforcing patriarchal assumptions.[13] Courts punish rape on the basis of it being 'a violation of a woman's honor'. The common perception that a woman's chastity has to be protected by the male members of her family such as fathers, brothers etc., turns rape in the legal understanding into an attack on the men whose property she is. Such a masculinist attitude towards female chastity explains the judicial lack of empathy for the raped woman if she is shown to have 'loose morals', such as a being a prostitute; this also explains the refusal to include marital rape as a punishable offence. Moreover, this implies that the only thing worth of value is a woman's chastity as being a reified, extrinsic attribute and stands in contrast to women's intrinsic worth, which should have based upon the work they do.[14] In the present case as well, the victims chastity was questioned and she was called promiscuous and voyeuristic in her acts based on the fact that condoms and cigarettes were found in her room. The court while using masculinist attitude to look at the victims' chastity, showed a lack of sympathy towards her as a rape victim and assumed her character to be that of having 'loose morals' instead of looking at her worth and value from any other lens except that of her honor.

According to Rajeshwari Sunder Rajan, no one denies women rights on paper, in fact, women's rights are protected in the Indian constitution. In addition, India is a signatory to the UN-sponsored CEDAW and Human Rights convention, that implies that the courts may apply such international convention. But despite such progressive laws, women still do not have an equal social standing with that of men. Sunder Rajan feels that the reason for this is the laxness of the state in enforcing the law that it has passed, the limitations of policing, a slow legal system

[12] *Hardik Sikri v. State of Haryana,* 2017 SCC OnLine P&H 2806, (Supreme Court of India), (2017)
[13] Rajeshwari Sunder Rajan, 'A Woman's Worth', Granta, (22nd May, 2015)
[14] Rajeshwari Sunder Rajan, 'A Woman's Worth', Granta, (22nd May, 2015)

and the continued existence of a heterogeneous personal law structure. [15] Such a problem is not just seen in India or other states alike which justify unequal treatment of women as a 'social evils' due to their country's illiteracy, religious superstition, communal prejudices, rural 'backwardness' etc. but also in many countries of the West, specially UK which sets the precedence for most common law countries.

Sandra Walkate, in her study said that in UK, victims' advocates have often been placed with an uneasy alliance with the criminal justice system which in adverse has given responses that were more protectionist and interventionist in relation to victims and more punitive towards perpetrators. At the same time, the victim focused agenda has facilitated a growth in the regulatory power of quasi state, therapeutic institutions, which are wielded to 'protect' women whether through being compelled to comply with rules and procedures of battered women's shelters or whether required to prove oneself as 'respectable' and 'credible' witness in the criminal justice system. Even cases which make it to trial, dubious gender stereotypes are often still relied upon to discredit female complaints, tapping into the public attitude that women who fail to conform to traditional gender roles by dressing provocatively, flirting or drinking more than a moderate amount of alcohol must bear some, if not all, of the responsibility of sexual victimization. [16] This type of patriarchal thinking is seen in the case in front of us as well. The court in this case is also trying to say that the victim is equally at fault because of which the accused's sentences were also reduced. The court assumes that the victim too at one point of time gave consent to have intercourse with the accused since she uses to drink and smoke and because she was sexually active as well. By doing so, the court is trying to say that the victim is half responsible, if not all, for her sexual victimization.

In conclusion, I believe that it is important not to conceptualize rape as purely a form of violence, since doing so would eclipse its connection to conventional forms of heteronormativity and reserve the conviction that forced sex is good and acceptable. The construction of the gender hierarchy persistent in the society further establishes a male sexual desire whose domination and submission must be tackled since otherwise the boundaries between acceptable seduction and force will continue to be determined by men, for the gratification of men, risking the

[15] Rajeshwari Sunder Rajan, 'A Woman's Worth', Granta, (22nd May, 2015)
[16] Margaret Davis and Vanessa Munro, "Feminist Legal Theory" in The Ashgate Research Companion to Feminist Legal Theory

prospects for rape conviction and block the path to achieving sex equality. Following a patriarchal dominance approach while writing a judgment diminishes our capacity to fully acknowledge, understand and problematize incidences of women's violence, be it physical or mental, while marginalizing the women's perspective and its complexity. Coming to sexual assault, efforts should be made to fix attention exclusively on the conduct of the complainant in order to assess the approach and accountability of the defendant as well, by highlighting the irrelevance to consent of prior drinking, flirtatious behavior or 'provocative' attire and by instead opening up to larger critical analysis of the social and cultural norms through which sex is negotiated and communicated by the parties involved. Thus, the High Court of Haryana and Punjab should re-visit their judgement from a more feminist lens specially on the part where it character assassinated the victim based on her conduct and mannerisms which according to the court's moral compass did not comply with the society's gender biases and stereotypes. The court was wrong in victim shaming the girl involved in a case of serious blackmail only on the basis of her lifestyle which involved drinking and smoking. The image that the court held of the victim based on gender normativity and dominant patriarchal values, negated her testimony on being blackmailed and threatened which in turn reduced the sentence of the accused by implying that the victim has a role to play and that at one point of time she did partially consent to have any relationship with the accused. In my opinion, this part of the judgment needs to be revisited, the court should take into consideration the mental framework of the victim as the reason behind a late FIR instead of dismissing her claims all together. The court should also take into consideration the blackmail and threat under which consent was obtained by inflicting fear and duress in the mind of the victim instead of calling her promiscuous and partially responsible for what happened to her. Based on the above-mentioned arguments and reasoning, it is clear that the court should have been less biased and more feminist in its thinking. This also throws light on the fact that there is an increased need of having more female justices in the courts of India who are likely to be more, if not less, sympathetic towards women and the problems faced by them when it comes to such cases. With that being said, judges and lawyers need to be sensitized more, regardless of their gender and should give more feminist and less gender biased decisions, in order to attain more equality in society as well as the legal system.