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CONSTRUCTION OF WOMAN IN LAW WITH SPECIAL REFERENCE TO CRIMINAL LAW

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Abstract

Article 15(3) of the Indian Constitution reflects the recognition that women needed special protection of law for securing their right to equality. However, this paper argues that the manner in which equality has been sought to be achieved by adopting and paternalistic approaches cannot ensure substantive equality to women till the patriarchal notions underlying the same are unearthed. This paper analyses many laws, with special focus on criminal law to present on whom the gender-neutral as well as gendered laws have patriarchal underpinnings. For ensuring substantive equality to all humans it is essential to address the patriarchal mindset and reexamining who are men and shifting the discourse from discrimination and violence against women and other vulnerable groups to perpetrators of violence and patriarchal thinking which justifies such discrimination and violence in the society.

I Introduction

WHEN ASSESED why law is needed in society, a range of answers come forward. Law is an instrument of social change; it is an instrument of empowerment; it maintains law and order; it regulates people's behavior to ensure security and prosperity of persons. Occasionally it is seen as an instrument of oppression and harassment of the weaker by the powerful. However, the Supreme Court in *Harvinder Kaur's* case[1] observed that allowing law in the family sphere is like allowing 'a bull in a china shop', that is to say, that law will destroy everything precious in the family. The common experience of bull by ordinary people is uncontrollable and unpredictable bovine which attacks people at will[2] but that is not how law is construed as an instrument of social engineering, justice, and change.

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1 AIR 1984 Delhi 66.

2 In astrological literature bull is described as a massive creature which is unpredictable and appears to have bouts of aggressive rage directed at whoever is unlucky enough to find itself in its path, *available at*:https://www.sunsigns.org/bull-animal-totem-symbolism-meanings/(last visited on Feb. 10, 2021).

The family space is primarily considered to be the domain where women reside and *ought to* reside though men govern that space in the hierarchical and patriarchal structure of family. By comparing law in family sphere to a bull in china shop and thereby denying its entry in the family sphere, what is being protected by this approach is not the tender relationships of love and affection but the hierarchy and patriarchy and denial of protection to women (children, elderly, disabled, *i.e.,* everyone who is less powerful) against the oppression and violence by the patriarchal men in the family.

One is hard pressed to understand why hierarchical relationship which result in lot of oppression and violence against women is acceptable within the family and why law must not be permitted to enter that sphere to bring about equality and safety to women while equality, liberty, and safety from violence is uppermost concern in the public sphere?

Hence, it is essential to inquire the roots of such thinking, ideology, and laws that have given rise to the belief that law which is created for good for all people for most of the time will function like a bull in the family sphere.

Despite the description of law as a bull in china shop, it is no more contentious that women do face a lot of discrimination, oppression, and violence in our society and within their own families. Many changes have been introduced in the law to address issues of discrimination primarily on the ground of sex or gender in the public as well private sphere. Today the words sex and gender are no more limited to the binaries of women and men and include the transgender persons also. However, this paper is limited to construction of 'woman in law' leading to their discrimination and continued violence against them, with special focus on criminal laws in India.

The simplistic understanding of the distinction between sex and gender has been that sex is a biological description of a body and gender is a social construct based on the expected behavior and roles for men and women. It is assumed that biological body is neutral, is a clean slate, and men and women acquire their sense of what is appropriate due to their socialization in their formative years. The easy solution to deal with violence and discrimination against women is, therefore, to change the laws, generate awareness and promote gender neutral roles and behavior.

However, feminist critique of existing knowledge in different fields has shown that the problem runs deep. The feminist writers have examined the issues of women's subordination from four different angles of sex/gender division, private public dichotomy, patriarchy, and difference and equality.[3] It has been pointed out that women's body is categorized as inferior, passive, and care provider. Therefore, the appropriate place for her is in the family sphere. This paper examines the following four critical

3 See, Heywood, *Feminism in Political Ideology: An Introduction* 252-265 (2004).

aspects to understand how discrimination against women has been justified and incorporated in law:

i. Role of biological bodies in law;

ii. Construct of woman in criminal law;

iii. Incorporation and reinforcement of patriarchal structures in law; and

iv. Women's experiences and offences against women.

II Role of biological bodies in law

Discrimination is writ large in the manner in which the male and female body are characterized in political and psychological theories and literature which has greatly influenced the construction of women in law. In turn, the law continues to focus on male body and experiences of men to frame the laws.

Moira Gatens in her critique of sex/gender division has shown how the female body itself is considered to be inferior to that of the male body.[4] Menstruation in the female body is associated with shame because it is believed that there is shame involved in one's inability to control body fluids. Her role is described as passive by reference to the egg being stationery but not focusing on its unique character of picking only one sperm out of millions. Similarly, the vagina is also construed as a whole or absence of an organ rather than focusing on its function of enveloping the penis.[5] While menstruation is essential for human reproduction and should have been a celebration of womanhood, it has been rendered into a matter of shame and embarrassment for women thus making them 'untouchables during those days' when they must not pray, go to the temple, get into the kitchen, or touch things in the house.

The male body has not been scrutinized to assert that it contains useless features. For example, the male body grows facial hair on attaining puberty. The moustache and beard have no function or importance, is not required for reproduction, and has no use for the society as well. However, this useless growth on the male body is not characterized as a malfunction in the male body. Instead, it is celebrated as the symbol of manhood. It has also been considered as the privilege of the superior men resulting in denial of this privilege to *Dalit* men who may be subjected to harassment and violence for sporting a moustache.[6] Moustache and beard has been integrated in the

4 Moira Gatens, "A Critiques of the Sex/Gender Distinction" in A. Phillips (ed.) *Feminism and Subjectivity* 139-154.

5 *Ibid.*

6 Ashish Chauhan, "Gujarat, Dalit Beaten for Sporting Mustache" *Times of India*, Dec. 8, 2019, *available at*: https://timesofindia.indiatimes.com/city/ahmedabad/dalit-beaten-for-sporting-moustache/articleshow/72420943.cms (last visited on Feb. 13, 2020).

folklore and many idioms and proverbs have been created around these.[7] It is used even to hold competitions measuring its length and grooming.[8]

It is apparent from the above that it is not the role played by a body feature that determines the status of the body but whether that feature belongs to the male or female body.

The net result is that wool is woven around the eyes of a woman by praise of their role as a mother and by comparing them to goddesses, but stigmatizing menstruation without which no reproduction can happen; confining them to the boundaries of homes as their appropriate place; burdening them with the role of natural carer but without any recognition of its contribution for their personal economic benefit or in calculating the gross domestic product (GDP) of the country. Law continues to be amended time and again without addressing the basic construction of women and their bodies as inferior. No wonder that nothing changes on the ground in the life of women.

III Construction of women in law

Many discourses with students on human rights asked them to draw a human being and they will draw a man or a woman with standard features distinguishing them being the hair, clothes and curves in the body. Some smart ones among them draw 'straw man' trying not to identify its sex. Probe them a little more by asking if human beings are without their sex and they feel non-pulsed. It is taken for granted that when we talk about human beings as we are talking about all human beings but in fact underlying image is that of the male body as being the norm to depict human beings.

The male body is the standard for making the law is made clear by focusing on the well celebrated example of maternity leave to women. Is the Maternity Benefits Act, 1961 a statute falling under article 14 or article 15(3) of the Constitution? There comes the answer, it is a law falling within the ambit of article 15(3) which enables the state to make special laws for women. It means that women's bodies are special as they become pregnant while the normal bodies of human beings, that is, male bodies, do not. Could the law have been drafted in gender neutral terms and provided that all human beings, when they become pregnant, shall be entitled to take maternity leave for the period as specified. This language will fall straight within the scope of article 14 and without any different result. Not all women need maternity leave, and they do not need it all the time. It is taken when they become pregnant which is the natural function of female bodies. If their bodies are normal human bodies, then there is nothing special that

7 Hindi language of full of idioms referring to mustache and beard. For example, *moonchh pe taav dena, moonch neechi hona, chor ki dadhi mein tinka.*

8 See, for ten best moustache competitions, *available at*: https://www.realbeardedmen.com/blogs/news/worlds-10-best-beard-competitions (last visited on Feb. 10, 2021).

they are being given by maternity leave that may be at the cost of men. Special law in article 15(3) has to be that law which gives something to women but not to men even though it can be used by men too. Unless the male body is taken as the standard human body there is no way that one can justify that the Maternity Benefits Act is a special legislation under article 15(3) of the Constitution.

Maternity leave may also be examined in juxtaposition with paternal leave and childcare leave. Men are entitled to take paternal leave up to 15 days on the birth of their child. Women can take childcare leave up to two years till their child becomes 18 years of age. It clearly shows the skewed burden put on women because of their bodies but which has no relationship with the rearing of children after their birth and specially after they are wean away from breast feeding. While women need maternity leave to recoup physically from child-birth in addition to breast feed the new born baby, there is no biological reason for them to discharge all other responsibilities of child care like cleaning, schooling, and bringing them up till the age of 18 years. The state by law has provided that men can discharge all their parental responsibilities towards their new born babies within 15 days but women must continue to discharge those responsibilities till their children attain the age of 18 years. Just because the female body gives birth to a child, should the male whose sperm contributed in the conception of that baby, has continued responsibility the same approach is reinforced in case of adoption leave. It may be availed only by women if the adopted infant is younger than three months old. Men are not seen to have any role in the upbringing and care of the young adopted infant even though till recently married women were not even permitted to adopt a child. Even when women go to work, they may take their babies with them and take care of them while doing their office work but men do not have to worry about their children at all at work as creche are required to be established only where there are women employees beyond the specified number.

On examining article 15(3) of the Constitution a little more. It enables the state to make special laws not only for women but also for children. What is the rationale to have children in the same clause? Children are usually distinguished from adults by reference to some statutory cut off age for purposes of law like elections, juvenile justice, labor, marriage, driving license and so on. The law assumes lack of mental capacity of different level in children by reference to their age and gives them certain benefits or imposes restrictions because of it. Surely women do not lack mental maturity to have been clubbed with children for this reason. It may also be noted that 'age' is not included in article 15(1) which prohibits discrimination on the basis of "religion, race, caste, sex, place of birth or any of them." And indeed, when the state has prescribed various retirement age in different professions, it has not been seen as violative of the right to equality as guaranteed by article 14 of the Constitution. 'Age-ism' in retirement policy has not been challenged in India so far, as age is not specifically included among

the grounds on which discrimination is prohibited in article 15(1). So surely, the state could have made special laws for children below the specified cut off age even if they were not mentioned in article 15(3) without violating the principle of equality.

The state has chosen different cut off ages for male and female children for purposes of marriage till date, and in juvenile justice from 1960 to 2000 and nobody has challenged that even though the different ages are chosen for girls and boys on the basis of sex and without any data of the different age being 'beneficial' to girls. As article 15(3) permits only beneficial legislation' for children it is important to find out how girls marrying at the age of 18 years benefit with a lower cut off age in comparison to boys how may marry only on attaining 21 years of age? In juvenile justice, the higher cut off for girls results on restriction of movement for them in comparison to boys.[9]

It may also be noted that during the Constituent Assembly debates, there was no focus on children before the corresponding clause was added to the draft Constitution. While discussion was based on the special issues faced by women but when the clause was introduced it had children along with women. No eyebrows were raised, and no discussion was held on why children should be part of this clause. Children were perhaps seen as an essential and integral category of women Is it only because women alone have the biological capacity to produce them or is it because they alone are required to take care of them or are women like children? The Constituent Assembly debates provide no answer to any of these questions, but examination of further constitutional provisions show that women find mention in other articles also in the context of provision of care and protection to them.[10] And surely women and children are to be taken care of by the same Ministry of Women and Child Development.

Women in the Constitution are apparently constructed as weak and vulnerable and need of care and support. Consequently, the laws that have been made specifically for women are paternal in nature. Paternalism by its nature vests more power in the parent figure leaving the women at the mercy and good will of the paternal figure. Till the law begins to recognize women as different but equal and normal human beings, changes in the law will continue to be cosmetic in nature without going to the root of the issue of discrimination against women. However, in India we have still not achieved even

9 For example, Indian Penal Code, 1860, s. 363 prescribed 18 years for girls and 16 years for boys as the cut off age below which their consent was not relevant for purposes of kidnapping before the same age of 18 was provided by the amendments in the law by the Criminal Law Amendment Act, 2013. Similarly, girls below the age of 18 years and boys below the age of 16 years were defined as children for the purposes of juvenile justice beginning with the Children Act, 1960 till a uniform age of 18 years was chosen by the Juvenile Justice Act, 2000 as per the internationally accepted definition under the Convention on the Rights of the Child. As a result, girls were kept under state control and supervision for a longer period. See, Ved Kumari, "Constitutionality of Sex/Based Definition of `Juvenile' Under the Juvenile Justice Act, 1986" 13 *Delhi Law Review* 95 (1991).

10 For example, Constitution of India, 1950, art. 39, cl.(a) (d) and (e).

normative equality with the exclusion of personal laws from the realm of chapter III of the Constitution dealing with fundamental rights. Even though many strides have been made in bringing equality to Hindu women, the remnants of patriarchal norms continue to exist, for example, the Hindu father continues to be the natural guardian, *Githa Hariharan*[11] notwithstanding. Equal rights to women in matter of marriage, divorce, adoption, maintenance, inheritance, or succession remains a far cry for women belonging to other religions. The Hindu women have been increasingly granted rights in property but daughters' rights in agricultural ancestral property still remains a contentious issue even at the normative level of equality. Substantively, very few women are actually able to exercise their rights over ancestral property. Subordinate legislations continue to exclude married women from many benefits like compassionate employment in government scheme. It is only recently that the High Court of Madhya Pradesh held that married women were also entitled to get compassionate job on their father's death.[12]

All the provisions and interpretations indicate how construction of women's bodies as inferior, seeing women's appropriate place within the four walls of the house because of the biological function of giving birth and their role as carers has percolated the legal provisions, the mind set and interpretations resulting in granting a secondary status to women even at the normative level.

IV Women in criminal law

Reviewing the construction of women in criminal law section 10 of the Indian Penal Code, 1860 (IPC) provides that, "The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age. It is apparent from this section that the IPC does not follows the nuanced distinction between male human and man, and female human being and woman while feminist understanding is that we are born as male or female human beings and we grow up to become man and woman fulfilling the socially expected norms and conduct. Despite this overlap in the usage of male/female and man/woman, the criminal law does construct women differently in different provisions in IPC and other special criminal laws. One needs to examine the social context and the experiences of women to understand how women's abilities and capacities are seen differently depending on their relationship with men. Women are constructed same as men in certain provisions but in their capacity as the wife, daughter, mother and victim of sexual offences, they are not seen same as men or fully developed human being capable of taking responsibilities or subject of unmanageable pressures due to their secondary status in the patriarchal families and societal structures.

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11 *Githa Hariharan* v. *Reserve Bank of India,* AIR 1999 SC 1149 decided by the Supreme Court on Feb. 17, 1999 holding that 'after father' is not limited to after the death of father but the mother will be the natural guardian if the father is not the primary career.

12 *Savitri Kumari* v. *The Chairman/Managing Director*, decided on Nov. 19, 2020, *available at*: https://indiankanoon.org/doc/22972483/(last visited on Feb. 20, 2021).

Same as men

The provisions relating to the offence of bigamy, the defense of grave and sudden provocation in case of murder and the general exception provision relating to private defense are couched in gender neutral terms and apply to both men and women placed in similar situation. However, when these provisions are examined in depth in the context of the ground reality and in practical terms, it is found that they all protect men as women would be found rarely in those situations.

Bigamy provides punishment to 'whoever' marries again while having a husband or wife. The purpose of this gender neutral offence apparently is to ensure that people observe monogamy in their married life. However, it overlooks the fact that monogamy was introduced to prevent polygamy – men marrying more than one woman which was seen as normal. Woman marrying more than one man was neither the norm nor the problem. Hence, in fact, the offence would have made more men liable than women. The judges promptly came to the rescue of such men by reading the word 'validly' in section 494, IPC. Section 494 reads, "Marrying again during lifetime of husband or wife — Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment…."

The Supreme Court in *Bhaurao Shankar Lokhande* v. *State of Maharashtra*[13] held that the word 'marries' has to be read as meaning 'marries validly' and unless the second marriage has been performed with due ceremonies, the section is not attracted. The men by this interpretation have been given double benefits. For example, a Hindu man may marry the second woman with exchange of garlands in a temple before all his relatives and friends and declares to the whole world that she is his wife, and they live as husband and wife. Still he cannot be prosecuted for bigamy as the second marriage has not been solemnized with *saptapadi*. The courts have not said that he need to come to the court with clean hands, and he cannot take a stand in the court contrary to what he has been professing to the whole world. He is also not obligated to maintain this woman and can leave her at will. It was open to the judges to include all such situations within the ambit of the section if they wanted to promote monogamy. However, by introducing the legal technicality of validity of marriage rather than taking cognizance of social recognition of their union as marriage, the very purpose of law has been frustrated providing a loophole to men to escape any punishment despite having as many women as wives as they want as long as they do not 'marry validly'. It also hoodwinks the second woman who considers herself to be married to the man and hence, entitled to maintenance and inheritance on the death of the husband but will have no such rights in law. The courts in some cases have granted maintenance to such women due to the long period of cohabitation believing them to he the lawful wife, but that does not

13 AIR 1965 SC 1564.

create any legal right in those women and they need to approach the court for any such relief.

Similarly, as per exception 1 to section 300, IPC, 'whoever' causes death whilst deprived of the power of self control due to sudden and grave provocation is to be held guilty of culpable homicide not amounting to murder and not for murder. Most of the cases in which this defense is raised are the cases where a man lost his self control suddenly discovering the illicit relationship of his wife, sister, daughter, or mother. *Nanavati*[14] is a well-known case on this point where the accused claimed loss of self control due to sudden and grave provocation by the mere confession of adultery by his wife. Women, on the other hand, rarely lose their self-control when they find their husband, son, brother, or father in similar situation of illicit relationship. Katherine Donovan in her article[15] has noted that it was after 274 years of the defense of grave and sudden provocation being introduced first in English law that the court recognized that women may also loose self control and be entitled to the same defense.

The fact of the matter is that ordinarily women react differently in such situations. On discovery of infidelity of their husband or finding other male members having illicit relationship, women surely upset but they do not go on the rampage losing their self-control and killing the subject of the affection of their men. Instead, they may cry or rebuke the man, or temporarily leave the matrimonial home, or at worst seek divorce. Sometimes, they even stand with their erring husbands like Henry Bill Clinton and wife of Shiney Ahuja. However, such reactions of women are not seen as 'human reaction' to illicit relationships of persons close to them or worthy of becoming the standard of human behavior which does not result in loss of human life. Instead the law has adopted the male reaction of aggression to the extent of killing another person in such circumstances as 'human failing' and thereby attracting some mercy from the legal system. Men were not given the signal that when half of human race does not loose self control in such circumstances and therefore, they should emulate women and learn to control themselves. This is a clear example of 'male reaction' to a certain situation being taken by law as 'human reaction' even though it costs human life excluding the woman's reactions as not being relevant for laying down the norm.

The defense of grave and sudden provocation also adopts male experiences and their responses to sudden violence as the standard of human experience and response. A person is justified to take action in private defense, even to the extent of killing the aggressor in the specified circumstances, if the follow circumstances exist:[16]

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14 AIR 1962 SC 506.

15 Katherine O'Donovan, "Defences for Battered Women Who Kill" 18(2) *Journal of Law and Society* 219 (1991).

16 Indian Penal Code, 1860, ss. 96-106.

i. There is reasonable apprehension of danger to the body or property of oneself or another;

ii. The force used to repel the danger is proportionate;

iii. There was no time to take recourse to public authorities.

This general exception conceives of a situation of danger presented suddenly posed usually by strangers to which the person responds on the spot immediately by using proportionate force to repel it. Women face sudden danger rarely compared to the long-term domestic violence they face from their intimate partners on a daily basis. With hypergamous marriages the husbands are usually older, taller, better built physically, better educated, financially better, and trained in physical violence. Wives are usually smaller in size, younger in age, less educated than their husbands, earning nothing or less than their husbands, and usually not trained for physical combat with their peers in their growing up age. Wives are very vulnerable to violence if the husband turns perpetrator instead of being the protector. World-wide figures show that one in three married women suffer from domestic violence. Domestic violence is cyclical in nature with periods of romance, building up of tension and violence. While the women continue to live with the cycle of violence interspersed with romance and violence but they cannot predict how long a period will last or when the violence will occur. What they are certain is that it can happen any time and it does happen unpredictably. In this sense, domestic violence is not sudden as women are aware that it may happen at any time. They are not well equipped physically and mentally to repel the danger posed by their husbands or to repel the violence by use of their bare hands on the spot. Doing that will lead to more violence and serious injury or death of the retaliating wife. Her complaints to relatives and authorities usually brings no long-term solution to her. The law does not take cognizance of women's anger accumulating over a period of time (slow burn syndrome) or the state of their mind of 'learned helplessness' as normal human experience. Law makes no provision to protect women when their patience and suffering reach the peak and they retaliate when the man is not fully alert. In *Kiranjit Ahluwalia*,[17] the United Kingdom Court set aside her conviction for murder for having killed her husband by throwing petrol on his when he was asleep. She was given the benefit of being a person with diminished responsibility caused by the psychological condition of slow burn syndrome. Her reaction was not considered as normal human reaction but a psychological condition while loss of self control by men is seen as normal 'human failing' and not a psychological condition.[18]

17 *R.* v. *Kiranjit Ahluwalia*, (1992) 4 All ER 889.

18 Katherine O'Donovan, Defences for Battered Women Who Kill" 18(2) *Journal of Law and Society* 219 (1991)

As wife

The status of women as wife in criminal law is just not that of an adult human being having an agency for decision making for themselves. The two clear examples of this are the exemption of non-consensual sexual intercourse with wife above the age of 18 years from the offence of rape and the (now abolished) offence of adultery in the IPC.

Forced or non-consensual sexual intercourse by the husband with wife above the age of 18 years does not constitute an offence. Exception 2 to section 375 defining rape reads, "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen[19] years of age, is not rape. It may be noted that even sexual acts have been excluded by this exception. With the amendment of section 375 in 2013, wives have been left without any legal protection even against anal, oral intercourse or penetration of their body parts by any object or fingers, *etc.* by the husband since all these acts have now been included within the definition of rape. She is not protected as an independent human being against sexual aggression of the husband even when she is living separately or has procured a decree of judicial separation.[20] Even though this latter sexual aggression attracts some punishment, it is not at par with rape of a woman other than wife. Even if the wife is in a vegetative state, she still is a wife and hence, any sexual aggression towards her by the husband remains unpunishable.

This exclusion or lesser punishment not only indicates presumption of irrevocable consent of the woman to sexual access to her husband at the time of her marriage but it also means that she lacks her capacity or ability to revoke that consent at any time for the rest of her life except in case of divorce. This exclusion is stark in view of the ruling by the Supreme Court in *Harvinder Kaur* [21] in which it held that sex is not *summum bonum* of marriage. Husband has been recognized as absolute owner of wife's sexuality not only against other persons but even over the wife's will and consent. Husband ownership over wife's sexuality and her inability to take her won independent decisions in sexual matters were further confirmed by the offence of adultery as it remained part of the IPC till very recently.

Adultery was an offence under section 497 which provided punishment for a man for having sexual intercourse with a married woman "without the consent of the husband". Only husband was considered to be the victim of the offence. Three points need to be noted in this offence. One, the purpose of law was certainly not to protect or promote fidelity in marriage because it neither made the married man liable for adulterous relationship nor did it provide the wife any criminal law remedy against such husband

19 'Fifteen' substituted with 'Eighteen' the Supreme Court in *Independent Thought* v. *Union of India*, W.P (Civil) No. 382 of 2013 decided on Oct. 11, 2017.

20 *Supra* note 16, s. 376B.

21 *Supra* note 1.

or his paramour. Secondly, the other man was not punishable if the husband permitted him to have sex with his wife. Thirdly, the wife was not punishable for the offence. Superficially it would seem that she was at par with the husband who was also not punished for adultery but actually the wife was not at par because she could not prosecute the other woman who was having an affair with her husband while the husband could prosecute the man who was having an affair with her. Further, wife's exclusion from liability also indicated the assumption that she must have been seduced by the other man to have sex outside marriage. She herself was presumed to be incapable of giving free and valid consent. Infantilization of the married woman and husband's monopoly over her sexuality was writ large in this offence. It is only recently in 2018 in *Joseph Shine*[22] that the Supreme Court declared the offence of adultery to be unconstitutional.

As daughter

The Indian Penal Code provided a stark contrast in the age of consent by girls in case of kidnapping and sexual intercourse. While a girl below 18 years of age was presumed to be incapable to decide to run away with someone till the age of 18 years, she could validly consent to have sexual intercourse from the age of 16 years. The statute had laid down the age of 16 years in case of boys for the offence of kidnapping but it has made no mention about the age of consent to have sex in case of boys at all. If one tries to see the rationale behind this discrepancy, it leads one to the construction of male sexuality in law rather than the minor girls' ability to give consent.

Male sexuality has been constructed and is reflected in many judicial decisions and other official reports as being irrepressible, uncontrollable and unsatiable. For example, in *Raju* v. *State of Karnataka*,[23] the session judge gave the token punishment of imprisonment "till the rising of the Court and a fine of Rs.500" when the law prescribed the mandatory minimum imprisonment of seven years for rape. The high court in appeal increased it to seven years. In second appeal, the Supreme Court decreased the period of imprisonment to three years for the following 'special reasons':[24]

> But later on when she agreed to share the same room at night in the hotel the two young men became victims of sexual lust and against the consent and protest of the prosecutrix, committed rape on her. Considering the very young age of the accused persons and considering the circumstances under which there was every likelihood that they could not overcome the fit of passion and lost all sense of decency and morality and ultimately committed the offence of rape and also considering the fact that the incident had taken place long back and during the course of

22 *Joseph Shine* v *Union of India,* decided on Sep. 27, 2018.

23 AIR 1994 SC 222.

24 *Id*., para 7.

> the proceedings up to this Court, both of them had suffered disrepute and mental agony, we think that the ends of justice would be met if both the accused persons are awarded a lesser sentence.

The circumstances in which these two men found themselves were that a hapless girl they had befriended on the bus trusted them to share the same room with them, when faced with the unexpected situation of a night halt and unavailability of any other room. Instead of rebuking the men for breach of her trust, the court refers to them as 'victims of sexual lust' unable to overcome 'the fit of passion'. There is no mention of what the victim went through in the long time since the offence took place.

The Law Commission Report on the Suppression of Immoral Traffic Act makes similar references stating that[25]

> The institution of prostitution is the external manifestation of the failure of man to control his animal will within the limits set by the institution of marriage…. With the help of this institution, man has tried to tame and control his brutal instincts and impulses. In this attempt there has been a fair amount of success, but not complete and full success, because the man has not always remained satisfied with the company of his wife and sought the pleasure of the flesh by straying outside the limits of the marital wedlock, with the result that institutions like prostitution and concubinage have coexisted side by side with marriage since time immemorial. For the greater good of the family and society man has tolerated these institutions as necessary social evils.

Seen in the light of the justification given above for the institutions of prostitution and concubinage, it is apparent that the law was making more women lawfully available to men for sexual intercourse by prescribing the cut of age of 16 years for purposes of sex reinforcing the myth of male sexuality being uncontrollable, insatiable, and irrepressible. The age of consent for the purposes of freedom of movement and for sex has now been made uniform at 18 years for both boys and girls by the Juvenile Justice (Care and Protection of Children) Act 2015.[26]

However, the Protection of Children from Sexual Offences Act, 2012 is now used by the parents to prevent daughters to choose their partners not approved by them and to control their sexuality. Child for the purposes of the POCSO, Act is a person below the age of 18 years irrespective of their sex. The Act prohibits any sexual activities

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25 Law Commission of India 64th Report on the Suppression of Immoral Traffic in Women and Girls Act, 1958, at 2 (1975).

26 Juvinile Justice Act, 2015, s. 84 reads: Kidnapping and abduction of child – For the purposes of this Act, the provisions of ss. 359 to 369 of the Indian Penal Code (45 of 1860), shall *mutatis mutandis* apply to a child or a minor under the age of eighteen years and all the provisions shall be construed accordingly.

among or with children and such sexual relationships with or among children, consensual or non-consensual are punishable similarly resulting in long term of imprisonment without any exceptions. While the apparent purpose of the POCSO Act is to protect children from sexual offences, a sizable number of adolescents are booked for consensual sex among children or love cases between a minor girl and adult male. Offences under the Act are gender neutral but in line with the understanding of male sexuality as aggressive and uncontrollable and female sexuality as passive and controllable, the boys having consensual sex are routinely presented before the Juvenile Justice Board as the offender and the girls are presented before the Child Welfare Committee as the victim under the Juvenile Justice Act, 2015. This law is progressive in the sense of applying normatively to boys and girls equally and regressive as it does not recognize any agency even among 16-18 years old children even though the Juvenile Justice Act 2015 does provide for preliminary assessment of their mental capacity to be tried as adults in heinous offences. Case by case assessment could have been provided for at least children between the age 16-18 years having consensual sex specially as adolescence is marked with onset of puberty and discovery and exploration of sexual pleasure. However, the law has taken a prudish stance on sexuality and is implemented with the patriarchal notions of male and female sexuality even among young children.

As mother

In their capacity as mothers, however, all the incapacity in decision making by women vanishes and women are made equally liable for the offences involving motherhood, namely, termination of pregnancy and childcare. The offences of abortion[27] and abandoning children below the age of 12 years[28] are formulated in gender neutral terms in the IPC. No exceptions have been carved out to exclude women (mothers) from the criminal liability. Actually, the Explanation to section 312 specifically clarifies that "A woman who causes herself to miscarry, is within the meaning of this section." The underlying values seems to be that as mothers, women are supposed to do everything in their power to give birth and rear children instead of terminating their pregnancy or abandoning their children.

In their capacity as mother, women are imputed with full agency to make decisions regarding pregnancy, childbirth, or the sex of the child even though they, in fact, have no such agency in these matters being part of families which are patriarchal. Unwed mothers are subject of such social stigma that they end up abandoning their newborn babies but they are liable to be punished whether the father is traceable or identified as women are the natural guarding of illegitimate children.[29] Women giving birth to daughters do not have the same status as the mother of sons. None of these realities

27 *Supra* note 16, ss.312-316.

28 *Id*., s. 317.

29 The Hindu Minority and Guardianship Act, 1956, s. 6(b).

of women's lives are reflected in these gender-neutral offences relating to termination of pregnancy or abandonment of children.

Abortion in certain circumstances has been permitted if the conditions mentioned in the Medical Termination of Pregnancy Act are fulfilled. This law vests no right to abortion to women giving them any autonomy over their bodies. Abortion may be performed within the specified time limit with doctor's advice only in two circumstances:[30]

i. The continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

ii. There is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped.

The explanations attached to the section clarify that the anguish caused by failure of contraceptives in case of married women, and pregnancy due to rape shall be presumed to cause grave mental injury to the pregnant woman. Even though the Section does not mention that consent of the husband is required for abortion by a married woman in the circumstance mentioned above, their consent is routinely asked by doctors. It is no surprise that the Supreme Court has held that abortion by the married woman without the consent or knowledge of the husband amounts to mental cruelty and the husband is entitled to seek divorce on that ground.[31] This approach again reinforces the patriarchal mindset which cannot permit a married woman to take independent decisions regarding her own body.

It is apparent from these provisions and judicial approach that married woman in her capacity as the mother is imbued with full capacity to take criminal responsibility but in her capacity as wife, she cannot take independent decision regrading abortion. This limited provision enabling women to seek abortion is further restricted to only married women. This restriction further reinforces that the only legitimate space for women to have sex is within heterosexual marriage. If they exercise autonomy and become sexually active outside or without marriage, they have no protection of law to abort their pregnancy even if it resulted due to failure of contraceptive. The women are supposed to be in control of or able to control or required to control their 'animal desire' and lust, unlike men. The Medical Termination of Pregnancy (Amendment) Bill, 2020 passed by Lok Sabha increases the period when pregnancy may be terminated, and it also allows the unmarried women to seek termination of pregnancy for failure of contraceptives.[32] The Bill has yet to be passed by Rajya Sabha. It does not address the issue of consent of husband in case of abortion by a married woman.

30 Medical Termination of Pregnancy Act, 1961, s. 3(2)(b).

31 *Suman Kapur* v. *Sudhir Kapur*, 2008(14) SCALE 404 decided on Nov. 7, 2008.

32 The Medical Termination of Pregnancy (Amendment) Bill, 2020, *available at*: https://www.prsindia.org/billtrack/medical-termination-pregnancy-amendment-bill-2020.

Another aspect connected with pregnancy is if the pregnancy will result in the birth of a son or daughter. With the extensive son preference prevalent in India, the Pre-conception and Pre-natal Diagnostic Techniques Act, 1994 (PC and PNDT Act) was enacted primarily to prohibit sex selection either before or after conception and to regulate pre-natal diagnostic techniques to detect abnormality in the *feotus* and to prevent their misuse for the purpose of sex identification resulting in female feoticide.[33] It creates various offences for violation of its provisions and holds 'any person' who seeks determination of sex of the *feotus* of the pregnant woman criminally liable.[34] However, this Act does exclude the pregnant woman from such liability if she was compelled to undergo such test.[35] Section 24 creates a rebuttable presumption "that the pregnant woman was compelled by her husband or any other relative, as the case may be, to undergo pre-natal diagnostic technique" unless proved otherwise. However, if she takes the next step of aborting the female *feotus*, this legislation has no application and she will be subject to full criminal responsibility for violating the Medical Termination of Pregnancy Act. Hence, it can be seen that though the PC and PNDT Act does take cognizance of the family pressure on the women for identifying the sex of the *feotus*, it does not recognize that pressure when it comes to the family pressure exerted on her to abort the female *feotus*. In their capacity as mothers they are presumed to have full capacity and ability to take such difficult decisions against their family members and do everything to protect their potential offspring with their motherly instinct.

As victim?

Women as victims, especially victims of sexual and domestic violence also provide further insights in the patriarchal underpinning of the laws despite many amendments and laws on the subject. The Indian Evidence Act refers to victim of rape as 'prosecutrix'. Before section 155(4) was omitted by the Indian Evidence (Amendment) Act 2002, it made general immoral character of the prosecutrix admissible while no such evidence could be led to prove that the accused was generally of immoral character. While the Amendment Act 2002 omitted this clause, it introduced another proviso specifically stating that "in a prosecution for rape or attempt to commit rape, it shall not be permissible to put questions in the cross-examination of the prosecutrix as to her general immoral character."[36] No other victim of any other alleged offence is referred to as the prosecutor or prosecutrix. The same term is found in many judgments of the court also. Continued use of the term 'prosecutrix' to refer to the women victims of

33 Statement of Objects and Reasons for the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 (Act No. 57 of 1994) and the Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Amendment Act, 2002 (No.14 Of 2003).

34 PC and PNDT Act 1994, s. 23(3).

35 *Id.,* s. 23(4).

36 Proviso inserted after s. 146(3) in 2002.

rape suggest notional passing off of the responsibility/blame for the prosecution of the accused on the woman rather than the state. Women are continued to be blamed for being raped by reference to the clothes they wear, the manner in which they talk, or the time at which they leave or return to their homes.[37] All kinds of restrictions are suggested to women to avoid being raped from not wearing jeans to not having mobile phones. Women are given training in self defense to protect themselves when sexually assaulted. There is no restriction on the movement of men who rape or on their behaviour or conduct toward women. A woman may be subjected to rape or acid throwing if she says no to the advances made by the man and she is still seen as the one who asked for it. Women are held to be responsible not only for their own sexuality but also for controlling the sexual aggression of men.

Section 498A, IPC dealing specifically with the offence of cruelty to married woman covers only such "willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman". While the National Family Health Surveys continue to mention that at least one in three married women have faced domestic violence, section 498A does not take cognizance of all kinds of domestic violence against women like a slap or taunts which are termed by the courts as 'normal wear and tear of married life'. It is only when the woman may be driven to commit suicide or suffers grave injury or danger to her life, limb or health that she can file a criminal complaint against her husband or relatives. This section provides her no protection against the day-to-day violence that she faces in her daily life in her marital home.

Another offence to deal with the problem of continuous cruelty and harassment faced by married women is dowry death but this offence is of no protection to the married woman as it operates only after she is dead.[38] The further limitations of the unnatural death occurring within seven years of marriage, and the requirement of the harassment to have occurred 'soon before her death' have created more escape routes for the husband and his relatives subjecting the married woman to harassment for dowry. The limited interpretation of what constitutes dowry has permitted the husband and his relatives to demand money under the pretext of traditional gifts.[39]

Judgments after judgments continue to show absence of substantive concerns for the women victims or misplaced sympathy for them in sexual offences against women.

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37 The latest example of the same is the statement by NCW member Chandramukhi Devi on Badaun gang rape incident "Rape could have been avoided if...", *available at*: https://www.hindustantimes.com/india-news/rape-could-have-been-avoided-if-member-of-national-commission-for-women-on-badaun-incident/story-2CuCbd6XXBJcF28A25RQrI.html.(last visited on Feb 10, 2021).

38 *Supra* note 16, 1860, s. 304B,

39 *See*, Ved Kumari, "Definition of 'Dowry' – A Continued Enigma" 61(2) *JILI* 213-228 (April-June 2019).

Gurmit Singh[40] is a well celebrated judgment of the Supreme Court for its reiteration that conviction can be held on the sole testimony of the victim in rape case and the guidelines to be followed in rape trials. On the factual matrix, after holding the accused guilty of the offence of rape and kidnapping, the court noted that the offence took place 11 years ago, the offenders were 21-24 years old at the time of offence, they have not been involved in any other offence after their acquittal by the session court ten years ago. The court further noted that "All the respondents as well as the prosecutrix by now must have got married and settled down in life." In the opinion of the Supreme Court these factors made it appropriate to impose the sentence of five years and a fine of Rs.5000 on each offender. However, the Supreme Court omitted to mention that it was a case of kidnapping and gang rape of a girl below 16 years of age on the date of offence; that the offence was punishable with minimum 10 years of imprisonment. It also surmised that the prosecutrix must have got married and settled in life without ascertaining whether in fact it did happen.

On the other hand, in *Ajahar Ali* v *State of West Bengal*,[41] the Supreme Court shows misplaced sympathy to women victim of sexual assault though showing no concern of the specific woman victim in the case. In this case the appeal by the offender against imprisonment of six months to him who was a held guilty of forcibly kissing a 16 years old girl when he himself was also 16 years old to the Supreme Court was dismissed. The incidence had taken place 18 years ago. The pleas by the appellant that the West Bengal Children Act, 1958/JJ Act 2000 applied to him; or he may be released on probation, or that he will loose his job if sent to prison were all brushed aside by the Supreme Court in the name of women victims. While confirming his sentence, the Supreme Court reasoned that serious offences were being committed against women which required that the offender must be punished; that no prejudice has been caused to him as his sentence of six months in jail was much less as the JJA provided for three years of imprisonment. The judgment shows not only ignorance of the basic scheme and provision of the JJ Act but also skewed understanding of offences against women. The facts that he was merely 16 years on the date of offence, that the offence took place 18 years ago, and the fact that sexual assault under section 354 was punishable with maximum of two years of imprisonment at that time were not considered by the court in this case. While he was sent to jail, the victim was not provided even with any symbolic compensation. What solace the individual victim may draw by six months imprisonment to the accused 18 years after the offence. She may not be even following up the matter and moved on in life. However, there is no mention of the victim or what was her stand on the matter 18 years after the incident. Analyses of consent and

40 *State of Punjab* v. *Gurmit Singh* (1996) 2 SCC 384.

41 (2013) 10 SCC 31.

sentencing in rape cases do show a varied range of understanding of offences against women.[42]

A range of offences are committed against women only because they are women. Female infanticide / Female feoticide, sati, and dowry harassment are typical examples of such offences.[43] Despite the law making them offences, these offences continue to be committed against women as either the legal provisions themselves have included loopholes in their formulation or the will to punish the offenders (men) is not there or there is no understanding of the women's experience as most of the enforcers are men with patriarchal mindset and they can relate more with the male offenders and their experiences. A range of new offences against women have been introduced in the IPC in 2013, namely, sexual harassment, stalking, voyeurism, disrobing, acid attack. However, the definition of sexual harassment has inbuilt ambiguity. While it is clear that the offender in the section can only be a man, it is not clear if women only can be the victims as only one clause refers to women.[44]

It is important to ponder on certain other aspects with regard to women victims. Why women constitute a special class of victims of offences? Is it because women are weak, or they are vulnerable, or they are not trained in self defense? The answers have to be found in the construction of masculinity rather than in the female bodies or bringing up of women. It is further assumed that women will not be victims of offences if they stay home as they are unsafe in public spaces, unlit roads, deserted areas, in the company of strangers. This assumption is belied by the fact that 94% of rapes are committed by men who are known to women and are trusted, like father, relatives, neighbours, teachers, *etc.* Many women are raped just when they have gone out to use common toilets or public places for relieving themselves.

The problem of women victim is further confounded by the fact of the offenders being their close family members and relatives. It is not easy for women to file complaint

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42 See, Ved Kumari and R. Barn, "Sentencing in Rape Cases: A Critical Appraisal of Judicial Decisions in India" *Journal of Indian Law Institute* (2017); R. Barn and Ved Kumari, "Sexual Violence and Criminal Justice Administration in India", 55(3) *British Journal Of Criminology* 435 (3 May 2015), *available at*: http://bjc.oxfordjournals.org/cgi/reprint/azu112?ijkey=w3Li01enAIWazIk&keytype=ref .

43 The offence of rape continues to be against women only in the IPC but penetrative sexual assault has become gender neutral under the POCSO Act. There was recognition and suggestion for inclusion of rape of men by men within the ambit of s.375, IPC by Justice Verma Committee constituted to suggest amendments in criminal law post-Nirbhaya rape case.

44 *Supra* note 16, s. 354A reads: "Sexual harassment and punishment for sexual harassment.

(1) A man committing any of the following acts-

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

against them. Even when they do so, they feel guilty or are made to feel guilty and resile from their complaints because the arrested male family member may be the sole bread earner for the whole family and the whole family suffers economically. Introduction of more serious punishment to the offenders in such circumstances may result not only in annihilation of the victim but it also make it harder for the woman to file complaint against the family member knowing the harsh consequences that will be faced by the remaining family members. The secondary status of women in society makes them very vulnerable to other societal pressures due to caste, social stigma, and family honour. The courts instead of empathizing with the women victims are beginning to prosecute them when they resile from their initial complaints. Withdrawal of complaints of domestic violence by the wife many times is understood as being a false complaint rather than acknowledging the pressures that she may have gone after filing the complaint or seeing it as her effort to return to the marital fold.

V Conclusion

The above discussion shows that it is the patriarchal notions about men and women that are at the base of discrimination and violence against women. Unless the root causes entrenched in the patriarchal thinking and private/public divide are addressed, any amendments in the laws will continue to be only of cosmetic nature. Today many strides have been made in the Hindu law making women coparceners, giving equal rights to women in ancestral property, they have been given right to adopt children but how many women actually claim or are able to claim such rights? Changing the law without addressing the structural issues is not of much use substantively for women. The continued secondary status of women as indicated by differences in survival, assigned human worth, and control over property, valued goods and services, working conditions, knowledge and information, political processes, one's body, daily lifestyles, reproductive processes cannot be solved by merely making or amending laws.[45] More substantive work is needed to ensure the women get equal opportunities for their development and growth and men are brought up to respect women as women. Patriarchal[46] structures and thinking has divided women in two categories. The first one is 'my women' – women related to men as sisters, mothers, daughters and wives. Men exercise control over this category of women in the name of their protection by restricting their movement and controlling their sexuality. The second category of 'other' women are just subject matter of lust and conquering.

All personal laws based on different religions and beliefs discriminate against women and treat them as inferior to men. Structural patriarchy and discrimination against

45 *See generally,* National Family Health Survey 5 (2019-2020), *available at*:http://rchiips.org/NFHS/NFHS-5_FCTS/NFHS-5%20State%20Factsheet%20Compendium_Phase-I.pdf.(last visited on Jan. 24, 2021).

46 For general understanding of indicators of patriarchy, see, Kamla Bhasin, *What is Patriarchy,* Kali/Women Unlimited (2004).

women in the family sphere was ingrained in the Indian legal system by the Supreme Court by holding that the word 'law' in article 13 of the Constitution did not include personal laws in *State of Bombay* v. *Narasu Appa Mali.*[47] This conclusion was reached by the Supreme Court by taking a very technical view by reference to Entry 5 of the Concurrent List which used the words personal law but the same expression was not included in article 13(1) of the Constitution. The Supreme Court reasoned that it shows that the framers were aware of personal laws but chose specifically not to include it within the ambit of article 13(1) of the Constitution. This interpretation has paved the way for continuation of patriarchal norms in framing and interpretation of laws.

However, it must be acknowledged that many legal provisions and judicial decisions have taken progressive step towards equality of women. More often these progressive steps have taken by adopting sameness or paternalistic approach. The sameness approach in the public sphere without taking cognizance of women's responsibilities in the private sphere does little to ensure equal participation of women in the public sphere. Women are continued to be viewed as home makers and subservient to their husbands. Paternalistic approach considers women weak and vulnerable rather than focusing on the patriarchal structures which renders them weak and vulnerable. It is time that we moved away from technical, sameness, or paternalistic responses to discrimination against women and recognize women as different but equal human beings entitled to respect and dignity simply for being a human being.

The discourse is changing about the meaning of who are human beings and what are their rights and obligations in law. *NALSA*[48] made a beginning by breaking away from the binary of man and woman and recognition of 'others' or 'third' as human beings and entitled to protection of law. *Arun Kumar*[49] has paved the way for making the right to marry a reality for the 'other' or 'third'. Silver lining may be seen in the recent judgment of the Supreme Court in *Kirti* v. *Oriental Insurance Company,*[50] holding housewife's contribution in the household at par with the income of the husband in determining compensation for loss of life of the wife.

However, much has not changed in the discourse about who are men in law? Or what needs to change as not to treat men as the standard for determining the standard of reasonable human being. We need to stop determining the worth of all other human beings by reference to men. It is time to recognize that construction of men and masculinity too has to undergo a sea change before substantive difference can be made by the ever-expanding boundaries of who are human beings. This discourse has to change not only in law but in all other disciplines – psychology, medicine, history,

47 AIR 1952 Bom 84.

48 *National Legal Services Authority* v. *Union of India* (2014) 1 SCC 1.

49 *Arun Kumar* v. *Inspector General*, decided on April 22, 2019 by High Court of Madras.

50 AIR 2021 SC 353.

political science, literature, etc. and institutions like religion, marriage, political structures, *etc.*, which have a profound impact on how we construct human being. The focus has to shift from violence against women to violence by men and their responsibility in causing so much harm and misery to others, denigrating the core value of human beings – of being humane to all others. The bodies of all women, men, and others are different but that cannot be the reason for treating one body as superior to another. Nature thrives on diversity. Human beings also need to celebrate diversity among human beings, recognizing the worth of each human being for what they are worth rather than by reference to men as the standard of being human.