

11 RMLNLUJ (2019) 34

## Patriarchal Judiciary as Harbinger of Gender Justice in India

PATRIARCHAL JUDICIARY AS HARBINGER OF GENDER JUSTICE IN INDIA

by

**Samreen Hussain\***

## ABSTRACT

*This paper tries to present a discursive analysis of judicial decisions and attitudes on the contours of sex discrimination through an examination of reported judgments of the honourable Apex Court and different high courts over the last seven decades after the independence. This analysis is in itself neither exhaustive nor it covers the broad spectrum of gender discrimination, but tries to point out problem area as well as the inherent bias and underlying patriarchy in the highest courts of justice.*

Keywords: Patriarchal Judiciary, Apex Courts, Discrimination at Workplace, Equality, CEDAW

## I. INTRODUCTION

The courts in India had end number of times, owing to the deeply ingrained and layered patriarchal set up, reinforced the masculine values



Page: 35

and endocentric morality, while ignoring the legal and constitutional mandates for disbursement of justice- its primary duty and concern.

Patriarchy can be witnessed in and out of courtrooms as well as judicial decisions. The discrimination is not only with respect to representation of women at the highest level<sup>1</sup> but during the everyday practices of the courts as well as while rendering decisions with respect to women and ancillary issues and concerns. The male dominated court<sup>2</sup> often if not hostile is ignorant to the women troubles and apprehension.<sup>3</sup> According to Advocate Shalu Nigam "The analysis of everyday proceedings in the misogynist court rooms reveals the manner in which sexism operates and is reinforced, post-mortemmed and reiterated in daily decisions, orders, conversation, jest, reasoning and assumptions based on ideology that subjugate women despite of the fact that the Constitution of India guarantees affirmative provisions in favour of women."<sup>4</sup>

In general to regard Court rooms as Temples of Justice is a misnomer. They are simply the interpretator and implementator of law and constitutional values. India by following the adversarial system of justice, the judge is required to behave like an umpire- fair, just, impartial and neutral, as he is obligated to deliver the justice and pass orders on the basis of documents, evidence, testimonies and relevant information submitted before him/her by the parties.

But we tend to forget that judges are also mere mortals with their own subjectivities, understandings, ideologies and set of biases. Furthermore the adversarial system is based on the concept of pitting one against the other and whoever is able to convince the judge wins the case. The more money and power means a better lawyer and resources. So at times it does work against the needy, vulnerable and the poor.<sup>5</sup> The judges sitting at the top concerns with the evidence and

the document, they look at everything from the lens of black



Page: 36

or white, forgetting that the human emotions, egos, triumphs, fears etc. cannot be compartmentalized.

Therefore a judge looks a person's individual subject matter from his/her subjective prism in accordance to the material produced in front of him/her. Thus the courtrooms cannot be regarded as neutral space, and free from biases. The courtroom itself has a persona and works like a bureaucratic machine with its pitfalls. To add to this, the judges presiding over may presume himself to be a benefactor, providing justice and remedy to the needy and proceeds in the manner of having a special place and position. Thus, it is seen that it has become common for the courts to use the "subjective moral traditions and patriarchal lens to adjudicate matter"<sup>6</sup>, especially in cases where the issue relates to women rights or there is a women litigator.

The court in these situations becomes the moral guardian and custodian of traditional norms and cultural sensitivities. The women rights are seen from the prism of her relationship to men- daughter, mother, wife, sister and her role and position in the popular culture and society. The decisions are based not on the rule of law and constitutional morals but collective consciousness of society and societal norms and morals.

Thus while reading the case laws, the considerations are not the ratio or the judgment of the cases but an attempt has been made to understand the process and points of deliberation and contestation by the parties from the sociological lens and jurisprudential understanding of the problems and vulnerabilities associated with gender discrimination in India. By this analysis the position rights and vulnerabilities of women is understood through the discussion and not just on the question whether the judgment is calling for 'women emancipation'.

As Kalpana Kannibaran<sup>7</sup> points out that in general we follow the legal reasoning on non-discrimination as provided in the 'oft-repeated" refrain in Article 15<sup>8</sup> jurisprudence on the sex-discrimination. The article 15(1) of the



Page: 37

constitution provides that a person cannot be discriminated on the account of the sex alone. But when the sex is accompanied with other factors like "social norms"<sup>9</sup>, separate conditions of services,<sup>10</sup> or the like it does not fall in the purview of discrimination based on sex alone. Thus giving it a very limited interpretation and scope and reducing the reading of a constitutional fragment to mere words. Whereas the interpretation of Art. 15(3) which is a special provision for women and children is "tossed around in the courts in ways that are very telling of the orientation of the judicial mind as to the location of women in the public domain."

The application of constitutional right comes with the important question as how to demarcate or draw a line between differentiations/classification and discrimination. When a particular provision is providing for classification and when it leads to discrimination? The courts were faced with this question in the initial years itself; as in *Mahadev Jiew v. B.B. Sen*<sup>11</sup> the question was with regard to application of order 25 of CPC, which laid down the procedures to be followed in the cases of money suit. It was

provided under sub-rule 3 that the courts were empowered to ask for money security from the Plaintiff, in cases where it was a woman if she doesn't have sufficient immovable property in India and in cases of male where he is not a resident of India and does not possess sufficient immovable property. The provision was challenged to be discriminatory as infringing Article 15 of the constitution. But the court refused to acknowledge as discrimination as held that it was based on propriety consideration and not sex alone. The court said "possession of sufficient immovable property in India is not a consideration bearing on sex at all."<sup>12</sup>



Page: 38

Another interesting observation was made by Jammu & Kashmir High Court<sup>13</sup> where while upholding the validity of order 5 rule 15 of CPC which required the summons to be only served to the adult male member of the family in absence of the defendant. The court observed:

"The function of females in the Indian society is that of housewives. Until recently it was in exceptional cases that women took part in any other activity than those of housewives. Females were mostly illiterates and some of them Parda Nashin. The legislature enacting this rule had in mind the special condition of Indian society and therefore enjoined upon the male members and did not regard service on female as sufficient."<sup>14</sup>

The courts held that this provision is not discriminatory nor it puts her in disadvantageous position, but is basically to exonerate her from all responsibilities taking into notice the social norms and conditions of the society.<sup>15</sup>

Thus in the initial years the reasoning was that for the purpose of establishing discriminatory provision it is essential to establish that it was only because of the reason of sex alone. As the Apex court in the first Air Hostess case- *Nergesh Meerza*<sup>16</sup> where the question was raised with regard to parity of remunerations between air hostesses and flight pursers (male counterparts), the Court Held:

"These two posts had different Modes of recruitment, promotional Avenues, salaries, allowances...etc., the air hostesses form an absolutely separate category from that of the assistant flight pursers and, hence, there is no discrimination on account of sex but classification owing to different service conditions."<sup>17</sup>

Thus by different decisions the court made it amply clear that the sex coupled with propriety rights, social conditions, service condition etc shall negate the presence of discrimination.

Another Interesting case centring on classification and discrimination was when the Calcutta High Court<sup>18</sup> held that



Page: 39

"segregating women and men students, retaining the more established and reputed facility for men and asking women students to travel back and forth between women college and the co-educational institution for men, did not constitute discrimination on ground of sex alone, because it was sex coupled with application of a scheme for women students, which covered development of women college as a step towards the advancement of female education...."

Here the court created special institution for men which barred the entry of women on the pretext that they have made women colleges, which falls under "special provision for women" under Article 15(3). The court further stated that this cannot be termed as discrimination as "Article 15(3) of the Indian Constitution, however, provides for only special provision being made for the benefit of women and does not require that absolutely identical facilities as those enjoyed by males in similar matters must be afforded to women also"

Thus ironically this scheme was regarded as not discrimination but providing "special provisions for women". In the same line another striking judgment came from the Madras High Court,<sup>19</sup> where due to the shortage of higher education colleges for women, institutions which were open to male students opened their doors for female students too. The University of Madras at this time on recommendation of the University Commission report barred the entry of the female student without the express permission from the syndicate on account of "that these institutions that had predominantly male presence lacked the atmosphere of freedom for their natural development".<sup>20</sup>

The court upheld the argument given by the university that they were state aided and not state funded hence are not covered under the definition of state, therefore they cannot be held liable for discrimination. The court further stated that there is no bar on the female students but on the colleges which are unable to provide sufficient facilities in accordance with the regulation. Hence it will be a "hostile environment" for female student. The remedy provided was not creating a friendly environment but exclusion of women to make them safe.

Thus we can see that the distinction between the classification and discrimination on the basis of sex has always been a very worrisome condition. The Article 15(3) was a constitutional right given to women to improve their condition has somehow now become a tool for positive discrimination, which works in favour of women, but it is a double edge sword. On one hand it intend to improve the condition of women, but on the other hand it makes them dependent and their legitimate claims are set aside on the ground that it is a reasonable classification.



The jurisprudence of sex discrimination in context of relationship is expressed primarily in two ways- first is the spousal relationship-with regard to- marriage, adultery, maintenance, divorce, property, restitution etc and other is in the context of employment where women are discriminated and denied entitlements which accrues to an employee. It is important to understand both the perception of judiciary towards women- when at home (personal space) as well as outside (public space), to bring the deep-rooted patriarchal approach in the lowest to the highest judiciary.

## II. CASES OF DISCRIMINATION AT WORKPLACE

It is important to analyse and discuss the work-place discrimination jurisprudence developed by the judiciary in the last quarter of century, as it helps in understanding the attitude of judiciary towards gender discrimination at work place with regard to the equal pay for equal work, equality in treatment or empowering through special provisions. I have specifically taken those cases where though the judgment is laudable and had struck down discriminatory provisions, the language employed reinforces patriarchy infused societal norms and rules.

Thus though the honourable Supreme Court struck down the discriminatory

provisions in civil services<sup>21</sup> the issue of marriage/children remained pivotal to the definition of womanhood and by and large a disabling factor in women entitlement to justice and remedies at work. The woman is locked into the stereotypical role a nurturing mother and subservient wife, who bears the complete responsibility of child-rearing to household, hence prescribing a behaviour norms and morals on which her efficiency is measured.

*Nergesh Meerza*<sup>22</sup> is a telling case. In a case of employment rules of Air Hostesses, the requirement of 4 years ban on marriage was regarded to be reasonable by stating:

"(This) is by all standard a very sound and salutary provision. Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20-23 years, she become fully mature and there is every chance of such marriage proving success, all things being equal. ..."

But the second provision on bar on the pregnancy shocked the conscience of the Court and held:



Page: 41

"It seems to us that the termination of the services of an Air Hostess under such circumstances is not only callous and cruel but an open insult to Indian womanhood the most cherished and sacrosanct institution. We are constrained to observe that such course of action is extremely detestable and abhorrent to the notions of civilized society... and is therefore clearly violative of Article 14 of the Constitution."<sup>23</sup>

Though it further added that a rule should be suitably amended as to terminate the services on the third pregnancy of the AH if two children are living as it will promote the health as well as ideals of family planning so as to save the nation from plague of over-population.

In this case the problem is not only the discrimination meted out the male and female employee but also the attitude of the judiciary where it's completely fine for it to snatch away a women autonomy with regard to marriage in larger interest but bar on pregnancy is wrong not because it is discriminatory per se but as an "insult to Indian womanhood". The primary duty of Indian women is to procreate, and how that can be curtailed. It shook the moral conscience of the court.

As Lucinda Finley has rightly said "Language matters. Law matters. Legal language matters.

I make these three statements not to offer a clever syllogism, but to bluntly put that it is an imperative task for feminist jurisprudence and for feminist lawyers-for anyone concerned about what the impact of law has been, and will be, on the realization and meanings of justice, equality, security, and autonomy for women-to turn critical attention to the nature of legal reasoning and the language by which it is expressed."<sup>24</sup>

Thus even the decisions which are in favour of women are so worded that they not only promote gender stereotyping but also ascribe role of women in the household as well as society. It actually glorifies and promotes the sexual division of labour.

Furthermore, when the question relates to parity in pays of male and female employee the courts were quick to uphold that "since the two posts- Air Hostesses and Flight Pursers had different mode of recruitment, promotional avenues, salaries, allowances ... etc., the air hostesses formed an absolutely separate category from the

assistant flight pursers, and hence the discrimination



Page: 42

was not on account of sex alone but different service conditions.”<sup>25</sup> Again when the question of parity between the air hostesses and their male counterpart with regard to age of retirement was challenged, the Supreme Court negated the claim again on the same ground of different service conditions.<sup>26</sup> Though in the case of *Anuj Garg*<sup>27</sup> the stereotyping sex-role had been questioned by the honourable court. Thus we see contradictory lines of reasoning on the same issues, namely, discrimination based on the sex.

It has been noticed that motherhood, pregnancy, menstruation, childbirth and marriage are a major constituents of the identity of women in paid work and determination of their worth for a male employer. For example in *Neera Mathur v. LIC*<sup>28</sup> and *another*<sup>29</sup>, while applying for a position in LIC, a women has to divulge following information: “name of the husband, occupation, number of children, last date of menstrual period, whether periods are regular and painless, whether pregnant at the time of applying, number of conceptions, date of last delivery, abortion or miscarriage if any.” All these information have no bearing on her competency and are completely irrelevant, aside from being downright humiliating. Even if the intention of the LIC was to have a healthy workforce, the information's were neither indicative of ill-health or morbidity. But the courts didn't think it to be invasive or humiliating but basically constituents of modesty. The court observed:

“The Modesty and self-respect may perhaps preclude the disclosure of such personal problems whether menstrual period are regular or painless etc... if the purpose of the declaration is to deny the maternity leave and benefits to a lady candidate who is pregnant at the time of entering the service (the legality of which we express no opinion) the corporation could subject her to medical examination, including pregnancy test”

The court did not take into considerations the answering these questions is no more painful or “embarrassing” or humiliating than having to go through



Page: 43

pregnancy test before appointment.<sup>30</sup> The court was unable to see the blatant discrimination meted out to the women on the account of her sex.

Furthermore the courts oft-repeated view on gender division of labour reinforces the view that women are good for important childcare functions<sup>31</sup> whereas the men are better suited for arduous work. An interesting example is that though Supreme Court in *Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa*<sup>32</sup> upheld that women stenographers are entitled to same remuneration as their male counterparts, it further went out to observe

“men do work like loading, unloading, carrying and lifting heavier things which women cannot do. In such cases there cannot be discrimination on the ground of sex. Discrimination arises only where men and women doing same or similar work are paid differently”

This linking of masculinity “with the inherent capability of doing arduous work” and regarding with its existence that women are incapable of such work. Furthermore what

constitute same or similar works?<sup>33</sup> When there is no system in place to assess the nature of work. There has been situation where men and women perform similar work, but are paid differently<sup>34</sup> and the duties perform by men are taken to be difficult and arduous and is compensated with better salaries and working conditions.

The courts' obsessions with defining women's role in society have a very adverse effect on her overall development and place in the society. For example, in a question where section 66(1)(b)<sup>35</sup> of the Factories Act, 1948 was challenged for being unfairly discriminatory to women, the Court<sup>36</sup> rejected saying that "it is undoubtedly true that according to the traditional view, all that a woman needed to know was the four walls of her house... today, things have changed. Yet, the very nature of their commitments to family and social



Page: 44

environment requires that they cannot be entrusted with all those duties which men may perform..."

Thus even when deciding her capabilities and competency, the question is not with regard to her qualifications, expertise or experience but decided on the basis of her gender role as ascribed by the society on account of her sex. The court not for once thought that family, children, commitment are also important for a man. The reason is very simple, he belongs outside the house, his masculinity means he is entitled to everything, he is not stooped but women restricted for their safety. The courts need to deliberate and redefine the sex and its context as completely different from the gender. This not only affects women in the sphere of work and employment but have direct implication on her personal and conjugal relationship.

### III. CASES OF DISCRIMINATION IN SPOUSAL AND FAMILIAL RELATIONSHIP

The discrimination within the spousal and familial relationship is more problematic as well as more apparent because of the reason of origination of family/personal laws from religion in combination with the patriarchal set up of our societies. I have taken cases from the different aspects of family law like basically the spousal relationship and its antecedents where the language of the judgment employed reinforces patriarchy infused societal norms and rules.

Spousal relationship presents a very serious problem. The discussion on marriage provides the most illustrative space for unpacking social context and frames the issues of discrimination based on sex almost unconsciously.

The most controversial part within the filial relationship is the restitution of conjugal rights,<sup>37</sup> which basically provides a remedy to a deserted spouse who isn't at fault. The first reported judgment is of the *Rukhmaba*<sup>38</sup> case a century earlier, a young girl who went against the archaic Hindu society and challenged humiliation suffered due to the principles of restitution of conjugal



Page: 45

rights, though her efforts were defeated, she paved a way for reform and what is a power of morally charged individual resistance backed by an minority public opinion.<sup>39</sup> Though earlier this remedy was available only to males, after the enactment of HMA, 1955 this provision was made gender neutral, though in essence this equality only works theoretically and most of the times this remedy is used to oppress the wife claims.<sup>40</sup> But the decision of Justice Choudhary in *T. Sareetha v. T. Venkta Subbaiah*<sup>41</sup>

changed the discourse on conjugality and he stating that this principle of RCR serves no social good and is barbarous and invasion of personal privacy thus held the section 9 of the Act to be unconstitutional. The court further observed that "although theoretically this section applies to both man and women and by that token stratify the equality test .... bare equality of treatment regardless of the inequality of realities was neither justice nor homage to constitutional principles."<sup>42</sup> But the Delhi High court in *Harvender Kaur v. Harmander Singh Choudhry*<sup>43</sup>, upheld the constitutional validity of section 9 and held that this provision promotes preservation of marriage. And as this principle applies equally to men and women, there is no question of sex discrimination. Further the court does not pay much importance to the sexual intercourse and the paradigm of consent within the marriage. Justice Chaudhary principles were located within the framework of the "right to privacy, bodily integrity and dignity".<sup>44</sup> Whereas the Justice Rohtagi asserted that "the cold principles of constitutional law cannot be introduced within the domestic sphere and it was like "introducing bull in a china shop and will have the effect of weakening the marriage bond"<sup>45</sup> he also further ordered that women to go back to her husband and preserve her marriage. The interesting fact here is that the women has earlier told to the court that she has no problem in living with her husband if he establishes separate residence; she was opposed to living a joint family which she found "irksome". According to Justice Rohtagi this was a trivial, non-issue and ordered her to live with her husband in the joint family. This clearly highlights the conventional judicial thinking about "women vis-à-vis men and marriage. This decision of Delhi High Court was further endorsed and upheld by the honourable Apex Court in *Saroj Rani v. Sudarshan Kumar Chadha*.<sup>46</sup>

Though this decision is more than thirty years old, the mind set of judiciary hasn't changed to a large extent. In 2012 Bombay High Court<sup>47</sup> decreed that 'women must be like Goddess Sita', implying that a women must follow



Page: 46

her husband wherever he goes. In this case it meant that the wife should leave her job and accompany her husband to another city. As wife's income, in general, is regarded as disposable income and merely a supplement, referred as "lipstick money". Furthermore the cohabitation is also forced while allowing restitution of conjugal rights as non-cohabitation after the decree of RCR is a ground of divorce. Thus, the absolute protection of 'conjugal rights' or the right to demand sex from one's partner in the absence of any protection against marital rape puts women in an exceptionally vulnerable position.<sup>48</sup>

Though it will be wrong to say that in last 30-35 years, there is no change in the position of women, further the SC itself has played a very active role in the women empowerment movement in India. The laudable judgment given in the cases like *Mohd. Ahmed Khan v. Shah Bano Begum*<sup>49</sup>, *Vishaka v. State of Rajasthan*<sup>50</sup>, *MCD v. Female Workers*<sup>51</sup>, *Delhi Domestic Working Women's Forum v. Union of India*<sup>52</sup>. In *Gaurav Jain v. Union of India*<sup>53</sup>, *Sakshi v. Union of India*<sup>54</sup> *Centre for Enquiry into Health & Allied Themes v. Union of India*<sup>55</sup> depicts the active role played by the judiciary to protect women from exploitation at a stage where legislations are uniformed due to lack of adequacy of enforcement machinery.

But still when it comes family and relationship the attitude of the courts have most of the time is being protective and authoritarian, considering women





Page: 47

as weak and vulnerable and in need of protection. This 'protective approach' is inherently wrong as it compromises women's agency. The courts are seen to be more interested in 'formal equality' rather than 'substantive equality'. According to Prof. Faizan Mustafa "treating men and women as exactly the same under the so-called 'sameness doctrine' was the result of our belief in 'formal equality.' 'Substantive equality' on the other side requires appreciating the differences between men and women. These differences do not make women inferior in any way but do require 'differential treatment'".<sup>56</sup> Thus the courts in the many cases though doing favour and providing justice to the women have reduced her position to a mere dependent and imbecile. Thus the judicial commitment to women's rights has fallen prey to the patriarchal mind-set etc... This has not been exclusive to any one religion<sup>57</sup> and this patriarchal attitude of the Courts unfortunately is clearly visible in the regime of spousal relationship. Even after seventy years of independence the maintenance available to the second wife is still controversial issue. In most of the cases<sup>58</sup> second wife is denied maintenance and referred to as mistress and kept<sup>59</sup>. Although in a bench comprising of a female judge, a second wife was given maintenance under section 125 of the CrPC. The Bench said "under the law a second wife whose marriage was void was not entitled for maintenance. But the law also presumes in favour of marriage and against concubinage when a man and woman have cohabited continuously for a long number of years, and when the man and woman are proved to have lived together as man and wife, the law will presume in favour of marriage"<sup>60</sup>

But these types of decisions are few and far between. Most of the times the deserted and divorced women face extreme depravity and difficulty in making both the ends meet. Kirti Singh in her book<sup>61</sup> observes "despite the many enactments governing the laws related to maintenance, it would not be incorrect to say that, in actuality, this right/remedy does not provide women, from any community, adequate financial support to be able to live in a manner similar to the manner in which they had lived during the subsistence of marriage. This is primarily because of the manner in which the courts have generally enforced this right." She further points out that most of the time the women receives a partly sum of money and this is primarily due to the wide discretion in awarding maintenance amount, as the most of the cases are decided



Page: 48

by judges who themselves suffer from various degree of gender bias and are not sensitized to the plight of women and children on divorce and desertion. Recently Madras High Court<sup>62</sup> gave a very disturbing judgment where the bench held that "a divorcee wanting to claim alimony from her former husband should not only refrain from marrying but also maintain discipline as she was expected to maintain during the subsistence of her marriage and not have sexual relationship with any other man."<sup>63</sup>

The court further observed "Since a man carries an obligation to maintain his divorced wife, the woman also carries the obligation not to live in relationship with other man. If she commits breach ... she will suffer disqualification from claiming maintenance. If she wants to live in relationship with other man, she may be entitled maintenance from him but not from the former husband."<sup>64</sup>

This instances shows how deeply embedded presumptions about the duties and role

of women in family and as well as in reading laws which are in essence designed for the protection of women and her wellbeing. These cases repeatedly and uniformly reiterate the importance of chastity and its implication for women.

The Supreme Court in recent decisions not just acted against the interest of women but have actually upheld the patriarchal notions of women identity in the society and family. For example in 2016 in *Narendra v. K. Meena*<sup>65</sup>, here the respondent has filed an appeal against the order of High Court for quashing divorce decree. The question involved here is not whether the respondent should have been granted divorce but the language of the court employed to grant divorce. The court in this case made very broad generalize statements with regard to the Indian society and role of wife. Justice Dave while deciding in the favour of husband observed: "It is not a common practice or desirable culture for a Hindu son in India to get separated from the parents upon getting married at the instance of the wife, especially when the son is the only earning member in the family. A son, brought up and given education by his parents, has a moral and legal obligation to take care and maintain the parents, when they become old and when they have either no income or have a meagre income. In India, generally people do not subscribe to the western thought, where, upon getting married or attaining majority, the son gets separated from the family."

The court further emphasizing at the role of the wife added "In normal circumstances, a wife is expected to be with the family of the husband after the marriage. She becomes integral to and forms part of the family of the husband



Page: 49

and normally without any justifiable strong reason; she would never insist that her husband should get separated from the family and live only with her."

Here while appreciating the facts the Apex court was within its rights to grant divorce to the respondent, but making assertion and generalization with regard to Indian culture and ethos and demonizing a wife unwilling to live with the husband's family as if she has neither identity or choice is actually retreatment of patriarchal understanding of conjugality and family life.<sup>66</sup> The strangest part of this statement is that though a wife is regarded as an integral part of the husband family and should submerge her identity with the husband identity, she cannot be a coparcener in the same family. The judges could have instead of using the words like son and pious obligation, simply said that its duty of children to take care of parents. By using gender specific connotation the Court has reinforces the view that a true place of a girl after marriage is her in-laws place and until she has strong reason she has no right to live her life as she wants to. Furthermore it is the pious obligation of son to maintain the parents but not for once they mentioned or acknowledged the duties and rights of daughter or females towards parents.

Another very strange order coming from the honourable Supreme Court was in *Rajesh Singh v. State of U.P.*<sup>67</sup>, the honourable bench observed that there is lot of misuse of Section 498A of the Penal Code, 1860 which punishes cruelty to married women, and the court reached this observation on only fact that there is low conviction rate, thus to protect the innocent husband and his family it observed that there should be no automatic arrests on charges of cruelty and each district should have a Family Welfare Committee. While it is true that conviction rate is low, the court did not notice that it is in fact going up every year. In 2012, it was 14.4% but in 2016 it stood at 18.9%.<sup>68</sup> In any case low conviction rate does not mean a case itself was entirely false. It shows that our investigation techniques and prosecution processes are in bad shape. Furthermore the bench did not refer to any concrete data as to how many false

cases are filed and did not hesitate in giving a number of directions in favour of accused — “no arrest should normally be effected till the newly constituted committee submits its report; similarly passports are not be impounded in a routine manner; personal appearance of the accused and outstation family members need not be insisted upon; bail application should be decided same day.” The only saving grace was that these directions are not to be applied in cases of physical injuries or death<sup>69</sup>



Page: 50

The court did not hesitate in giving a number of directions in favour of accused — no arrest should normally be effected till the newly constituted committee submits its report; similarly passports are not be impounded in a routine manner; personal appearance of the accused and outstation family members need not be insisted upon; bail application should be decided same day. The only saving grace was that these directions are not to be applied in cases of physical injuries or death<sup>70</sup>

Indignity and torture within the four walls of the home are neglected and rather upheld by the courts for the sake of preserving the tradition and culture. The family and relationships are given importance above the concept of the rights and the justice. The patriarchal courtrooms, thus, set boundaries to limit the autonomy, dignity and freedom of a woman and decides her place in a society, control her body and mind, regulate her sexual being, her interaction and her relationships including controlling her womb and her desires determining each and every step of her life from being an unmarried girl, to a wife, to a mother.<sup>71</sup> The courts routinely disrespect women's being, infantilize the female citizens and use the relationship matrix to adjudicate the women's claims.<sup>72</sup> As the kangaroo courts, these courts uphold the popular culture and traditional norms rather than upholding constitutional values.<sup>73</sup>

The claim that law is patriarchal does not mean that women have not been addressed or comprehended by law. Women have obviously been the subjects or contemplated targets of many laws. But it is men's understanding of women, women's nature, women's capacities, and women's experiences-women refracted through the male eye-rather than women's own definitions, that has informed law.<sup>74</sup> As Robin West said in analyzing “masculine jurisprudence:” “The distinctive values women hold, the distinctive dangers from which we suffer, and the distinctive contradictions that characterize our inner lives are not reflected in legal theory because legal theory (whatever else it's about) is about actual, real life, enacted, legislated, adjudicated law, and women have, from law's inception, lacked the power to make law protect, value, or seriously



Page: 51

regard our experience. Jurisprudence is “masculine” because jurisprudence is about the relationship between human beings and the laws we actually have, and the laws we actually have are “masculine” both in terms of their intended beneficiaries and in authorship. Women are absent from jurisprudence because women *as human beings* are absent from the law's protection: jurisprudence does not recognize us because law does not protect us.”<sup>75</sup>

#### IV. CONCLUSION

Thus for gender sensitization positive judgments need to be highlighted. The judges need to be extremely careful while making observations with regard to women empowerment and role of women in family and society. To achieve this it is required to provide the honourable members of the court with regular, relevant, and up-to-date domestic and international literature in the fields of gender- and sex-based discrimination, domestic violence, sexual assault, child abuse, and family law (child custody, alimony, child support, and parental rights) related to evidence-based best legal practices.<sup>76</sup>

\* Assistant Professor (Law), Dr. Ram Manohar Lohiya National Law University, Lucknow-226012. <samreen\_law@yahoo.com>.

<sup>1</sup> In 2018 there is only one female Judge at the Supreme Court out of 27. Till 2015 229 Judges have been appointed to the Supreme Court out of which there have been only 6 female Judges. The percentage of women Judges in the High Court is meager 10.8%. National Alliance of Women, India fourth and fifth NGO Alternative report on CEDAW New Delhi : NAWO 2015.

<sup>2</sup> From the Judge to the clerical staff, and from the advocates to the litigants, it is mostly the males who occupy dominance in terms of numbers. Minuscule number of women Judges could be found in the courtrooms and their number reduces further as one moves from lower judiciary to the higher courts.

<sup>3</sup> According to Flavia Agnes — a woman when in the courts, whether as a part of the system or as a victim is neither given respect and in most cases seen with contempt.

<sup>4</sup> Shalu Nigam “Fighting for Justice in Patriarchal Courts” (2009), the Economic and Political Weekly, 44, No. 14,

<sup>5</sup> Bhushan Prashant Misplaced Priorities and Class Bias of the Judiciary, 44(14) the Economic and Political Weekly, 32-37 (2009). The National Legal Service Authority Act directs the State to provide legal aid services to the poor and the marginalized sections of the communities. However, the quality of services provided through the District Legal Service Authorities is yet to be measured and very few independent studies have been conducted for the same.

<sup>6</sup> The Madras High Court upheld the role of woman as a homemaker and a housewife when the electricity board appealed against a decision where the lower court has granted compensation to the husband where his wife died of electrocution contending that she was a housewife with no source of income. The Court stated that “She wasn't only a dutiful wife & an affectionate mother of her two children, but also she was the finance minister of her family, she was the chef, she was the chartered accountant of the family, maintaining the income & expenses. The husband lost the company of his wife; the children lost their mother & her love & affection.” The masculine misogynist authority in the court deals the complaint of the husband of the complainant who died because of electrocution with a sympathetic approach against electricity board. See 27<sup>th</sup> June, 2017 *Times of India Network*, Tamil Nadu E-paper.

<sup>7</sup> Kamla Kannibiran, “Judicial Meanderings in Patriarchal Thicket” in Kalpana Kannibiran (ed.) *Women and Law: Critical Feminist Perspective*, 173 (Sage Publication, New Delhi, 2014).

<sup>8</sup> Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to
  - (a) access to shops, public restaurants, hotels and palaces of public entertainment; or
  - (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
- (3) Nothing in this article shall prevent the State from making any special provision for women and children.
- (4) Nothing in this article or in cl. (2) of Art. 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.
- (5) Nothing in this article or in sub-cl. G of Cl. 1 of Art. 19 shall prevent the State from making any special provisions, by law, for the advancement of any socially and educationally backward classes of citizens

and Scheduled Castes or Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in cl. (1) of Art. 30.

<sup>9</sup> *M.I. Shahdad v. Mohd. Abdullah Mir*, 1966 SCC OnLine J&K 15 : AIR 1967 J&K 120.

<sup>10</sup> *Air India Cabin Crew Assn. v. Yeshaswinee Merchant*, (2003) 6 SCC 277 : AIR 2004 SC 187.

<sup>11</sup> 1951 SCC OnLine Cal 182 : AIR 1951 Cal 563.

<sup>12</sup> Kalpana Kannabiran "The Need for a Jurisprudence of Women's Rights in India" in Alladi Memorial Trust, *Alladi Memorial Lectures* (Tulika Books New Delhi 2009).

<sup>13</sup> *M.I. Shahdad v. Mohd. Abdullah Mir*, 1966 SCC OnLine J&K 15 : AIR 1967 J&K 120.

<sup>14</sup> *Ibid.*

<sup>15</sup> This provision has been amended in 1976 and now uses the phrase any adult member of the family, either male or female. This again requires an amendment as now in India there is third gender too.

<sup>16</sup> *Air India v. Nergesh Meerza*, (1981) 4 SCC 335.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Anjali Roy v. State of W.B.*, 1952 SCC OnLine Cal 17 : AIR 1952 Cal 822. In this case a female student was denied admission in a co-educational institution on the ground that as a women college has been established she should take admission there. And only in scenario where the course of study is not available she may be considered for admission. The condition of women college was far from satisfactory and it lacked in all basic amenities and infrastructure.

<sup>19</sup> *University of Madras v. Shantha Bai*, 1953 SCC OnLine Mad 182 : AIR 1954 Mad 67.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Radha Charan Patnaik v. State of Orissa*, 1969 SCC OnLine Ori 165 : AIR 1969 Ori 237 and *C.B. Muthamma v. Union of India*, (1979) 4 SCC 260 : AIR 1979 SC 1868.

<sup>22</sup> *Nergesh Meerza* Supra note 16.

<sup>23</sup> *Ibid.*

<sup>24</sup> Finley, Lucinda M., "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning", *Faculty Scholarship Series*. Paper 4011 Yale Law School, (1989). *Neera Mathur v. LIC*, (1992) 1 SCC 286 : AIR 1992 SC 392 : 1992 Lab IC 72.

<sup>25</sup> *Supra* note 16.

<sup>26</sup> *Air India Cabin Crew Assn. v. Yeshaswinee Merchant*, (2003) 6 SCC 277 : AIR 2004 SC 187. A very interesting fact of this case was that while the All India Cabin Crew Association Supported the demand of air hostesses on parity in age at retirement, it opposed the proposal of interchangeability of duties between male and female cabin staff. On closer examination the Bombay High Court found that the reason for this was that under the existing rules, only a male member of the cabin crew could be a flight supervisor. If interchangeability were introduced, junior male cabin crew would be under the authority of a female flight supervisor, a possibility that all men in the association opposed. The Bombay High Court rejected this argument and held "the hierarchy on board the aircraft will be based on the seniority irrespective of the sex. The Supreme Court overruled this decision and censured the Bombay High Court for the violation of "judicial discipline".

<sup>27</sup> *Anuj Garg v. Hotel Assn. of India*, (2008) 3 SCC 1.

<sup>28</sup> (1992) 1 SCC 286 : AIR 1992 SC 392 : 1992 Lab IC 72.

<sup>29</sup> (1992) 1 SCC 286 : AIR 1992 SC 392 : 1992 Lab IC 72.

<sup>30</sup> *Supra* note 7.

<sup>31</sup> Take the example of "school mothers" in the employ of the Tripura Government. The children are picked up from their homes and dropped by the school mothers, who also attend to emotional and physical need of the children—all between the ages of three to six—and manage the school nutrition beside assorting the social education worker. They perform a very important and necessary function, the court found, but still they were not adequately compensated for their works. *Rina Dey v. State of Tripura*, 2005 SCC OnLine Gau 434 : (2007) 1

GLR 398.

<sup>32</sup> (1987) 2 SCC 469 : AIR 1987 SC 1281 : (1987) 2 SCR 659.

<sup>33</sup> S. 2(h) of the Equal Remuneration Act, 1976 defines the term as “same work or work of a similar nature means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or a woman and the differences, if any, between the skill, effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment.”

<sup>34</sup> *Supra* note 26.

<sup>35</sup> “No woman shall be required or allowed to work in factory except between the hours of 6 a.m. to 7 p.m.”

<sup>36</sup> *Leela v. State of Kerala*, 2004 SCC OnLine Ker 1 : (2004) 3 LLJ 106.

<sup>37</sup> When a spouse has withdrawn from the company of another without any reason, he or she may seek a decree directing the withdrawing party to join the other. This is provided under S. 9 of the Hindu Marriage Act, 1955 and read as: “Restitution of conjugal rights. — When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

[Explanation. —where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.]

<sup>38</sup> *Dadaji Bhikaji v. Rukhmabai*, ILR (1885) 9 Bom 529.

<sup>39</sup> See Sudhir Chandra “Enslaved Daughter” in Flavia Agnes *Women and Law in India*, (Sage Publication, 2016).

<sup>40</sup> *Ibid.*

<sup>41</sup> 1983 SCC OnLine AP 90 : AIR 1983 AP 356.

<sup>42</sup> *Ibid.*

<sup>43</sup> 1983 SCC OnLine Del 322 : AIR 1984 Del 66 : ILR (1984) 1 Del 546 : 1984 RLR 187.

<sup>44</sup> *Supra* note 39.

<sup>45</sup> *Supra* note 43.

<sup>46</sup> (1984) 4 SCC 90 : AIR 1984 SC 1562.

<sup>47</sup> *The Times of India* 8<sup>th</sup> May 2012.

<sup>48</sup> *Supra* note 7.

<sup>49</sup> (1985) 2 SCC 556 : (1985) 3 SCR 844.

<sup>50</sup> (1997) 6 SCC 241 : AIR 1997 SC 3011, the Supreme Court provided procedural guidelines to be followed in cases of sexual harassment. This resulted in passing of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

<sup>51</sup> (2000) 3 SCC 224 : AIR 2000 SC 1274, the Supreme Court extended the benefits of the Maternity Benefit Act, 1961 to the Muster Roll (Daily Wagers) female employees of Delhi Municipal Corporation. In this case, the Court directly incorporated the provisions of Art. 11 of CEDAW, 1979 into the Indian Law.

<sup>52</sup> (1995) 1 SCC 14. The Supreme Court suggested the formulation of a segment for awarding compensation to rape victims at the time of convicting the person found guilty of rape. The Court suggested that the Criminal Injuries Compensation Board or the Court should award compensation to the victims by taking into account, the pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurs as a result of rape.

<sup>53</sup> (1997) 8 SCC 114 : AIR 1997 SC 3021. The Supreme Court laid down guidelines including the necessity of counselling, cajoling, and coercing the women to retrieve from prostitution and rehabilitate them.

<sup>54</sup> (2004) 5 SCC 546 (2) : AIR 2000 SC 3479. It had recognized the inadequacies in the law relating to rape and

had suggested that the legislature should bring about the required changes and based on these recommendations Criminal Amendment Act, 2013 has been passed that came into force on February 3, 2013.

<sup>55</sup> (2003) 8 SCC 406. The Supreme Court of India played such role and monitored the implementation of the Pre-Conception and Pre-Natal Diagnostic Techniques Act and issued several beneficial directives. This petition put the issue of sex selection and sex selective abortion on fore front and as a consequence many activities have been taken up by the government and non-governmental agencies on this issue.

<sup>56</sup> Faizan Mustafa, "Judicial Aberrations on Gender Issues are Worrisome", *The Hindu*, 8<sup>th</sup> March 2017.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Savitaben Somabhai Bhatiya v. State of Gujarat*, (2005) 3 SCC 636.

<sup>59</sup> *D. Velusamy v. D. Patchaiammal*, (2010) 10 SCC 469.

<sup>60</sup> *Pyla Mutyalamma v. Pyla Suri Demudu*, (2011) 12 SCC 189. In this case the couple got married in 1974 in a temple and had three children. The husband has deserted the wife after 25 years of marriage. The A.P. High Court ordered for Rs 500 maintenance which was upheld by the Supreme Court. The Bench was headed by Justice Gyan Sudha Mishra.

<sup>61</sup> Kirti Singh *Separated and Divorced Women in India: Economic Rights and Entitlement* (Sage Publication, 2013).

<sup>62</sup> *The Hindu* 19<sup>th</sup> August 2015. All India edition (fn matter incomplete plz chk)

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> (2016) 9 SCC 455 : 2016 SCC OnLine SC 1114.

<sup>66</sup> *Supra* note 65 para 5.

<sup>67</sup> 2017 SCC 1564(plz chk).

<sup>68</sup> *Supra* note 56.

<sup>69</sup> Fortunately this judgment has been put under review by three-Judge Bench headed by CJI Deepak Mishra on 13<sup>th</sup> October 2017. *Supra* note 56.

<sup>70</sup> *Supra* note 56.

<sup>71</sup> In *S. Hanumantha Rao v. S. Ramani*, (1999) 3 SCC 620. The Supreme Court adjudicated on the wife's unwillingness to wear Mangalsutra to be treated as an evidence of mental cruelty. Also see (fn matter incomplete plz chk)

<sup>72</sup> The Kerala High Court in *Asokan K.M. v. Supt. of Police*, 2017 SCC OnLine Ker 5085, [*Hadiya (Akhila) case*] remarked that "a girl aged 24 years is weak and vulnerable, capable of being exploited in many ways and her marriage being the most important decision of her life, can be taken only with the active involvement of her parents." This judgment is the classic example of what has been termed above as 'protective approach and infantilizing the right of a women'. In this case the Kerala High Court annulled the marriage of a couple without their consent and ordered the girl to be taken by her parents. The Supreme Court though set aside the judgment of the High Court in *Shafin Jahan v. Asokan K.M.*, 2018 SCC OnLine SC 201.

<sup>73</sup> *Supra* note 52.

<sup>74</sup> Katherine Mckinnon "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence, 8 Signs" *J. Women In Cult. & Soc'y* 635 (1983).

<sup>75</sup> Robin West "Jurisprudence and Gender", 55 *U. Chi. L. Rev.* 60 (1988).

<sup>76</sup> *Gender and Judiciary: Selected Reading and Recommendation from Bosnia and Herzegovania, ADCFA*, (2014).

Disclaimer: While every effort is made to avoid any mistake or omission, this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification is being circulated on the condition and understanding that the publisher would not be liable in any manner by reason of any mistake or omission or for any action taken or omitted to be taken or advice rendered or accepted on the basis of this casenote/ headnote/ judgment/ act/ rule/ regulation/ circular/ notification. All disputes will be subject exclusively to jurisdiction of courts, tribunals and forums at Lucknow only. The authenticity of this text must be verified from the original source.