EQUALITY, GENDER AND CONSTITUTIONAL LAW IN INDIA: A DOCTRINAL ANALYSIS

The Thesis submitted to Jawaharlal Nehru University
in partial fulfillment of the requirements
for the award of the Degree of

DOCTOR OF PHILOSOPHY

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2017

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28th August 2017

DECLARATION

I, **Rajesh Kumar,** do hereby declare that the thesis entitled, **"Equality, Gender and Constitutional Law in India: A Doctrinal Analysis"**submitted by me is the result of the research work undertaken by me and is being submitted in partial fulfillment of the requirements for the award of the degree of **Doctor of Philosophy (Ph.D)** of Jawaharlal Nehru University, New Delhi under the guidance and supervision of Dr. Pratiksha Baxi. This is my original work. I further declare that this dissertation has not been submitted either in partial or in whole for any other degree or diploma of this University or of any other University or Institution.

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Acknowledgements

I have worked for six long years under the outstanding guidance and supervision of Dr. Pratiksha Baxi, and what I could say with conviction about her, when I am finishing my thesis, is that to be a human being like her is a rarity. Her capacity and quality of being considerate, helpful and cooperative is indeed extraordinary and beyond the describability of language. I am deeply indebted to her for all her support, both academic and moral, which I have received over the stretch of the past six years, and I thank her profusely for all this.

I am particularly thankful to Ghazala Jamil, an Assistant Professor in the Centre for the Study of Law and Governance who provided me with outstanding and quality help and assistance at the fag end of this research. I am deeply indebted to her excellent kindness. I would also like to extend my gratitude to all the other faculty members at the Centre for extending their support to me.

I would also like to thank Mary Abraham, a research scholar at the Centre. Throughout my educational career, as a blind student, I have of course been helped by numerous students who read out books, newspapers and magazines to me and record my study material on cassettes. All of them despite their engaging and captivating nicety and goodwill had one flaw: that whenever they were busy, they told me that they would not be able to help me on that day or any further as the case may be. Mary is an exception to the experience. Despite being extremely

busy, she never said that she would not be able to help me with my thesis, not even when she had been travelling and was out of station. On the contrary, whenever I called her up, she reminded me about what all I was still supposed to send to her for work. She accepted to help in assignments with thanks, exuding energetic commitment anchored in an engaging gracefulness. It was all despite the fact that none of us knows each other in person. I thank her for her outstanding goodwill and support in this research.

I would like to thank Manpreet Dhillon, a research scholar in the Centre for the Study of Law and Governance, for presiding over the submission of my thesis with utmost dexterity, just as if he was submitting his own. He was all the time with me in this process. I am deeply indebted to his gracious kindness.

At times, research ushers in moments of depression and anxiety. Whenever I confronted such moments, I could always approach Naimitya Sharma, a friend and classmate of mine, who exceptionally sees the silver lining in the darkest cloud. I thank him for all the counselling he provided to me during this research.

I was superbly helped by Madhavi Shukla, Nikita Audichya and Swastee Ranjan, all research scholars in the Centre for the Study of Law and Governance, in preparing the first draft of this thesis. I thank them all for their outstanding support and cooperation.

Books, papers and articles are backbones of any kind of research. I have, in this regard, been particularly helped by Avinash Shahi, a research scholar in the Centre for the Study of Law and Governance, Shivam Agrawal, a research scholar in the Zakir Hussain Center for Educational Studies at Jawaharlal Nehru University, Mohd. Misbahul, a former research scholar at Jawaharlal Nehru

University, Anjan Chamuah, a research scholar at Jawaharlal Nehru University, Suchintan Reddy, a research scholar in the Centre for Political Study at Jawaharlal Nehru University, Pankaj Singh Kushwaha, a research scholar in the Centre for European Studies at Jawaharlal Nehru University and Shrey Shahi, a research scholar in the Centre for Historical Study at Jawaharlal Nehru University. I thank them all for their impressive and outstanding support for sharing and arranging readings for me during this research. I have also been assisted by Mohd. Arif, a former student at Jawaharlal Nehru University in putting together the first draft of bibliography. It was Zaheer Khan, a research scholar in the Centre for West Asian Studies at Jawaharlal Nehru University, who oversaw the printing of the first draft of this thesis. Shameem Akhtar, a student at Jawaharlal Nehru University lent me his internet user ID, whenever I needed it for searching material for this research. I thank them all for their genial and outstanding help and support extended to me during the writing of this thesis. While doing this research, I was completely confined to my room and the only window available to me to have connect with the outside world was the mess hall. I thank all students with whom I had genial, engaging, prolific and profound interactions and conversations with impressive quality during meals. I also thank those who served me meals in the mess hall for the seven-year long stay at the university.

Finally, I would like to thank the Library staff for their cooperation and help.

Rajesh Kumar

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Chapter I

Introduction

At the core of this research lies the academic enquiry of gender equality in the context of India's constitutional law and its allied doctrinal principles, as Constitutionalism that we put to use today is "everywhere notoriously phallocentric" (Baxi 2005: 551). For this thesis, I begin with the proposition that women are discriminated at the foundational level of law, that is to say, at the level of constitutionalism and its allied doctrinal elements. According to Catharine A. MacKinnon, feminist jurisprudence is 'an examination of the relationship between law and society from the point of view of all women' (MacKinnon cited in Wishik 1985: 64). This thesis, therefore, shall mainly proceed under the illumination of feminist jurisprudence. As part of my enquiry, I shall, for general purpose and guidance, unless the context warrants otherwise, keep in view the broad and inclusive definition of law set out in Article 13 in Clause 3 of the Constitution of India. The definition is neither encapsulative nor establishing in nature as to what substance and spirit law contains as a concept. On the contrary, it is constitutive, informing what law consists of including “any Ordinance, order, by law, rule, regulation, notification, custom or usages” (Ministry of Law and Justice, GOI 2007: 6). Its constitutive elements allow us the opportunity of not only studying India as a horizontal jurisdiction, meaning the current jurisdiction, but also permits us to peruse through its vertical jurisdictions, that is, the past jurisdictions, particularly by way of “custom” and “usages” on its own definitional merits. Indira Jaising (2013: 239), a feminist and senior advocate in the Supreme Court of India however indicates that customs and usages are constitutive components of the constitutional definition of law. She further adds that the higher judiciary in the country is yet to strike down any such customs and usage as unconstitutional on the grounds of being pernicious and unwholesome for the life of women in general. It is possible for the law, if it so chooses, to

deliberate in an activist capacity and declare as unconstitutional all those customs, usages, tradition and practices that dwarf, diminish and cripple women's ability to aspire to full and equal membership of their respective communities.

As a matter of fact, we quite often cite legal knowledge and precedents from ancient jurisdictions to adjudicate disputes in our current court rooms. Recently, for example, the Madras High Court told a husband that to expect his wife to earn is in conflict with and in breach of the Hindu religion[1]. Irrespective of the nature of the dispute, such a sweeping observation, even when made in favour of the vulnerable party, is irrelevant and unnecessary. Disputes among litigating parties can be addressed even without recourse to such sweeping observations. However, such statements, whether a part of a written order or as obiter are constitutive of a discourse on women's rights; and allow us an insight into how the judiciary re-entrenches or even re-constitutes gendered inequalities. In another example, the Himachal Pradesh High Court while granting bail to a rape accused observed that:

> ...But then it is ultimately the woman herself who is the protector of her own body and therefore, her prime responsibility to ensure that in the relationship, protects her own dignity and modesty. A woman is not expected to throw herself to a man and indulge him in promiscuity thereby becoming a source of hilarity. It is for her to maintain her purity, chastity and virtues.[2]

It was perfectly alright to grant bail to the accused, but this observation was completely irrelevant and unwarranted in the context of the woman involved.

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[1] Imranullah Mohd S. "Expecting wife to earn is against Hindu philosophy: Madras High Court bench" July 14, 2016**.** Accessed on July 6, 2017. http://www.thehindu.com/news/cities/Madurai/Expecting-wife-to-earn-is-against-Hindu-philosophy-Madras-High-Court-bench/article14488537.ece

[2] Hindustan Times: accessed on: http://www.hindustantimes.com/punjab/onus-on-woman-to-protect-dignity-himachal-pradesh-hc/story-mUSVJ9K7fPOeyI2bO2BlIM.html).

Being a divorcee, factors like “purity” and “chastity” could not be logically inferred in her case. And even if it could be, it is none of the court's business to comment on irrelevant and non-germane matters to the dispute and controversy. Yet the observation goes along the line of what it did.

Lately, the *All India Muslim Personal Law Board* filed a petition with the Supreme Court of India, where matters pertaining to Muslim personal law such as triple *Talaq* is subjudice, praying that the apex court avoids interfering with the personal laws of the Muslim community. The Board puts across every argument as ‘to do so is in breach of the constitution’. The constitutional validity of the 1986 Act has been affirmed upon by the apex court. The previous case law makes it effectively impossible to even touch upon the Muslim Personal Law. Similar right is permissible to other communities, particularly from Nagaland and Mizoram, under the constitutional guarantee. The Board exhausted every argument defending Islam and the personal law, the latter presumed as emanating from the former. It however, did not say anything in relation to the torture, cruelty and oppression that visit Muslim women in the garb of personal law and religion. The petition betrays a wish to retaining the status quo, of not willing to take even the slightest initiative to reform the condition of Muslim women. The board is deeply and solely committed to the cause of religion or to invoking Islamic jurisdiction against half of humanity, that is, women. Having seen this, Mohd. Asim, a television journalist, said that the *All India Muslim Personal Law Board* is a "Jurassic Park”[3], which prompts to hang on to some of the most outdated and medieval customs and practices. In short, I would, along the way, argue and point out in this research that modern law acquiesces to accepting an incarcerating, limiting and oppressive understanding of its preceding jurisdictions in the context of women. While doing so, I will assume that in the absence of such

[3] Asim, Mohd. April 18, 2016. “Ban Triple Talaq, Declare Muslim Personal Law Board Illegal.” *NDTV Blog.* Accessed June 6, 2017. http://www.ndtv.com/blog/ban-triple-talaq-declare-muslim-personal-law-board-illegal-1396658

acquiescence, women would not stand subjugated. Law in its acquiescence becomes backward looking.

Though contemporary constitutionalism, on the face of it, delineates "structures, forms, and apparatuses of governance and modes of legitimation of power" (Baxi 2005: 540), it is not merely limited to governance. On a deeper level, constitutionalism constitutes, in fact, "contested sites for ideas and practices concerning justice, rights, development, and individual (*sic*) associational autonomy. In other words, constitutionalism does not symbolize inert uniformity and conformity. In actuality, it is even argued that "law is the potential site of struggle" (Dhavan 2003: 150) for justice. For instance, Wendy Brown argues that the emphasis on rights discourse does not necessarily imply and represent a corresponding increase in equality. Rights rooted in formalism operate in an acontextual, acultural and ahistorical environment (Brown cited in Dobrowolsky & Hart 2003: 13). In other words, rights tend to distance themselves from admitting and recognizing socio-political, historical and cultural context (Brown cited in Dobrowolsky & Hart al. 2003: 13). The effect of this phenomenon is that rights under the pretext of universal application often produce more "inequalities in societies" (Brown cited in Dobrowolsky & Hart 2003: 13) particularly where people are unequally situated. It is even argued that at times, the power status quo in societies is further entrenched by the agency of rights (Brown cited in Dobrowolsky & Hart 2003: 13).

Helen Erving underlines the point that even if the country's constitution may appear neutral, it still "impacts disparately or differently with respect to gender" (2008: 1). It is thus important to examine how a particular constitution frames women's membership within its jurisdiction. The country's constitution typifies the supreme law of the land. It is the top and the greatest source of law in a country. Encapsulating the spirit of contemporary law, Rajeev Dhavan remarked

that law as an institution "conjures a world of its own and seeks to capture the 'real' world in its own image" (2003: 149). In other words, the purport of which is that law is endowed and saturated with enormous power. It was even observed by Smart that law can "redefine the truth of events" (2002: 165). It can assign personhood to statues and corporation. It can even limit and restrict personhood of human beings (Dhavan 2003: 149). According to Scattola, law as an institution excludes all other disciplines of knowledge from its orbit right down to jurisprudence, bestowing formal identity upon law (2009: 2).

Rifkin has even noted that law is so powerful that it acts to conceal and masks the real social questions (1997: 23). She has put it thus: "The power of law is that by framing the issues as questions of law, claims of right, precedents and problems of constitutional interpretation, the effect is to divert potential public consciousness from an awareness of the deeper roots of the expressed dissatisfaction and anger" (Rifkin 1997: 23). In other words, anger and dissatisfaction is addressed under the gloss of problems of constitutional interpretation, questions of law, claims of right and precedents. Thus, in other words, law is suffused with enormous power, including the power to enshroud the real discontent. However, the nature of this power is male, that is to say, law as an institution is deeply and historically anchored in male power paradigm (Rifkin 1997: 23), which still qualifies and persists as a legitimate mechanism for resolving social conflict (Rifkin 1997: 23). According to MacKinnon, law typifies a "site of force and cloak" (1989: 237), which implies that force undergirds legitimacy and legitimacy, in turn, camouflages force. In other words, she argues: "Liberal legalism is thus a medium for making male dominance both invisible and legitimate" (1989: 237).

As a result of this, feminist discourse seeks to challenge this male power paradigm and male dominance, as it creates serious power imbalances or

disparities between the sexes. In fact, The Editors' note of the first volume of the *Harvard Women's Law Journal* edited by the undergraduate students of Harvard Law School offered the comment: "when the law first distinguished between men and women, distributing rights and responsibilities on the basis of sex, the law took on a different meaning for women. It is now necessary to examine the origins and impact of this different treatment and to develop a feminist jurisprudence" (cited in Batlan 2003). A near total exclusion of women from social and public life furnishes a clear proof that law as an institution can be "an instrument for the subordination of groups" (Karst 1989: 2***).*** Thus, law as a paradigm of power is on the feminist agenda. It is required to be challenged for ending male dominance in society (Smart 2002: 164-5; Rifkin 1997: 23).

Along with power, as I have pointed out above, justice is yet another crucial and equally central aspect of contemporary law. The craving for justice results when an individual experiences "a real or an imagined instance of injustice" (Mohanty 2011: 1), which, in consequence, produces "the desire for change in the situation towards a better one" (Mohanty 2011: 1). According to Dhavan, the ideology of law emphatically professes link with justice (2003: 149). It is, in fact, often claimed that Law as an institution is committed to justice (2003: 151). However, Scattola makes the point that law with its accompanying doctrines in the modern legal philosophy is understood as an "independent part of human knowledge" (Scattola 2009: 2). The basis of this independence is rooted in its formal character - which underpins the idea that the reference point of law is not substantively relatable to justice. But it is formal reflecting how the "content of justice" is administered and worked out with strict punctiliousness (Scattola 2009: 2). Menon even argues that law is incapable to pursue justice, particularly social justice, as injustice is located and entrenched in unequal dynamics of power, which have juridical origins. Law, in fact, further consolidates and resediments power relations in society, upholding dominant values (Menon 1999: 262-3). Along with it, law is committed to "certainty and exactitude" (Menon 1999: 263).

Once the meaning of rights is certain and fixed, their ability and potential of being emancipatory and liberatory disappears (Menon 1999: 263). According to MacKinnon, however, justice embedded in law reflects the male point of view (1989: 188).

The notion of justice, which is founded in the contemporary constitutionalism and also entrenched in Part III of the India's Constitution, is referred to as formal equality. It comes from the United States. Peggy Reeves Sanday (2007) shares her personal encounter with rape, laying bare the inadequacies of the formal notion of justice from the stand point of women. She says:

> One day when he saw me at our church gym, this boy invited me to play basketball with him and his friends. During this activity, which seemed to me innocent, his friends got me into a corner. The leader in the group, who was the oldest and biggest, the one the other boys looked up to, took the ball and approached me menacingly, as if I was the basket. Terrified by the looks on the faces of the boys and the stillness in the room, I ducked under their outstretched arms and ran, without looking back, all the way home …When I saw the faces of those boys in the gym illuminated by the setting sun as they turned menacingly toward me, reaching out, pinning me against the wall wanting to have their way, the American dream of equality and freedom was smashed in my psyche (Sanday 2007: 17-19).

This incident suggests that the species of equality that America prided on was insufficient to live up to the requirement of women. It was falling short of having to grant full and equal membership of American political community to its women.

At the core of this species of equality lies the principle of 'likes being treated alike'. Being blind to all other considerations, the main and principle impulse it contains is the cold, clinical and uniform application of a sense of equality on all its candidates, irrespective of their background and context. The purpose of

formal equality is to treat its candidates with a sense of equality. Another thing that lies at its core is the idea of 'classification', because as per its thesis, the likes are required to be separated from the unlikes. For this purpose, formal equality takes classification. It is an extremely dicey matter as to when the classification done would amount to invidious discrimination. Moreover formal equality does not aspire to lift or bring people to a condition of equality. Upon that particular project, the formal equality is a promiseless force that even gives an impression of perpetuating status quoist instincts and impulses. It is not a medium that is capable to rely upon for securing full and equal membership of women in India's political community.

As part of this thesis, I shall therefore seek to propose another species of equality for gender justice. Substantive equality is the form of equality that is based and premised upon the idea that everything that it takes to remove historical injustice is required to be done in the context of subverted and subordinated social groups to bring them to the condition of equality. It carries an activist impulse within itself to constantly work to reduce inequalities by equipping people with capabilities that could help them fight their historical subversion and subordination. I shall propose and advocate substantive equality as an approach in the context of gender justice and equality. The reason behind such proposal is that women as a community have been subverted, subordinated and oppressed historically to the point of exclusion. Secondly, since patriarchal and masculine systems have been in place over a period of time, the workings of the world have never been reflected upon from the perspective of women. The outcomes of this are that there are areas where they do not enjoy the support of the existing system to live their lives at their fullest. The notion of substantive equality holds the promise that it could help design the world in women's image.

1. Gender

Gender is one of the central concepts of feminist discourse, which seeks to make it irrelevant. The notion of gender signifies and denotes ascription and assignment of social roles to people in the specific context of their biological sex (Hall 2006: 102). In other words, the notion of gender indicates and encompasses a systematic application and deployment of societal, cultural and religious normative contents to the identities of individuals in the context of biological sex. The biological difference assumes and presupposes men and women for distinctly separate socializations. It implies that gender identity of men and women takes place, gets shaped and determined on the societal anvil in relation to their biological sexual identity. Katherine M Franke describes it as: “Sex is regarded as a product of nature, while gender is understood as a function of culture” (1995:1).

Stets points out, for instance, that "one's gender identity refers to the degree to which persons see themselves as masculine or feminine given what it means to be a man or woman in society" (Stets and Burke 2005). Thus, the gender identity, the determinative fact of being masculine or feminine, is rooted in social meanings and definition. However, this definition appears problematic so far as it implies that gender is just limited to seeing themselves as persons in one or the other block. As a matter of fact, society makes them see and submit to those social meanings and definitions collectively created over a period of time by its influential members. Not submitting and acquiescing to the same is not available as an option. According to Hall, the contemporary gender theory has its genesis in the analytical examination of the "differential valuations of women's and men's social roles" (Hall 2006: 102) and it seeks to illuminate how sexuality has variously been valued, defined, prescribed across the world cultures, social groups and time periods (Hall 2006: 102).

Thus, the creation of gender identity is not an outcome of exercise of free choice or personal autonomy. It emerges from a systematic application and deployment of social codes to sexual identities of persons. Ridgeway and Smith-Lovin (1999) indicate towards this aspect when they state that gender is not only a matter of how we see ourselves on the gender calculus. It is far too wide and profound, encompassing a systematic employing of social practices and cultural meanings that eventually commit people, men and women, to inequality on the basis of perceived distinctions and differences (cited in Joshua 2016). Clare Chambers states encapsulating the aspect: "gender refers to those differences that are imposed only by social norms, such as the norm that baby girls should wear pink and baby boys should wear blue, or the norm that women should be kind and emotional, whereas men should be tough and rational" (Chambers 2008: 270). Thus, society raises its sexual members as men and women, by stereotyping. It raises them not on how they are common but how they are different from each other. The point of division, not unity, is a relevant fact in this analysis. Songe-Moller (2002) pointed out that the Platonic tradition of philosophy was such where the particular strain was on dualistic and hierarchic propensities and attitude.

Reality was imagined and expressed in binary opposites such as, for instance, unity versus plurality, immortality versus mortality, unchangeability versus change and so on, and the salient feature of this process of imagining and conceptualization of the reality was that the first term of the pair, that is, 'unity', for example, is ideal and desirable, while the second, that is, 'plurality' is inferior and worthy of being rejected and discarded (Songe-Moller 2002: xv). Clearly in the time-honored phrase "men and women", the men occurring in the phrase are superior and women inferior on the criterion. It could be understood, for the illustrative purpose, as the first powerful and decisive move on the epistemic landscape in the direction of creating invidious gender difference between men and women, which would eventually result in laying down the groundwork for

stereotypical and formulaic normative code of sexes. Origins of gender lie in this kind of understanding. Let us therefore see how gender is understood in the contemporary scholarship.

Erving Goffman examines gender particularly limiting it to its iconography, how it emerges and is conventionalized in a routine fashion through ritualistic interactional displays in social situations (Goffman 1979: 1-2). What it means is that gender is performed at the ocular and auditory level. Thus, in order to show how gender is performed in everyday life, he imagines the whole world as a stage upon which all individuals as actors engage in daily interactions (West & Zimmerman 1987: 130). What becomes illustrated is that the actors strongly tend to display their gender in relation to the culturally and socially accepted and approved sets of guidelines pertaining to their respective normative sex category. Owing to this, Goffman states defining gender that "if gender be defined as the culturally established correlates of sex (whether in consequence of biology or learning), then gender display refers to conventionalized portrayals of these correlates (Goffman 1976: 1; Smith 2016). The iconography that comes into being suggests that people consciously espouse and play their own gender roles based on their sex category. Encapsulating the underlying deeper reality of this iconography, he says "take it that the function of ceremony reaches in two directions, the affirmation of basic social arrangements and the presentation of ultimate doctrines about man and the world" (Goffman 1976: 1). The point he possibly underscores is that this iconography upholds the existing basic social arrangements and masculinist doctrines of the world by placing and advancing them in spotlight through depictional portrayals and presentations. West and Zimmerman, however, pointed out that Goffman's perspective, gender as display, had pushed the same, that is to say, the gender, to the margins of interactions (West & Zimmerman 1987: 127) absenting its impact in wide range of daily activities. It is not so that gender as an identity becomes visible here and there in occasionally scheduled interactional performances (West & Zimmerman, 1987:

130). In their view, “gender doing” recurs across wider landscape of everyday social interactions.

As a matter of fact, they had written a landmark article (Deutsch 2007: 126; Johnson 2008: 229) in 1987 on gender advancing the same as an "accomplishment embedded in everyday interaction" (West and Zimmerman 1987). They argued that people were called to account for their gender in everyday social interactions and they lived up to these calling to account (Johnson 2008: 229). Men and women, the authors point out, take part in what they call "doing gender" and their, of men and women, competence is hostage to producing gender (West and Zimmerman 1976: 126). They have to do it. They cannot help it. "Doing gender" or the production of gender definitionally encompasses a "complex of socially guided perceptual, interactional, and micro political activities that cast particular pursuits as expressions of masculine and feminine natures.” (West and Zimmerman 1987: 126) This definitional content informs us that the production of gender is social interaction driven and it is a matter of perceptual, micropolitical and interactional activities that determine the character, whether they are feminine or masculine, of the pursuits undertaken by men and women as members of society. In brief, "doing gender" underpins a "routine, methodical, and recurring accomplishment" (West & Zimmerman 1987: 126). Further, according to them, sex, gender and sex category as concepts were distinct to each other. This distinction is crucial to having to grasp the notion of gender. While defining sex, they place central focus on the socially agreed biological distinction of men and women. According to them, what sex denotes is a "determination made through the application of socially agreed upon biological criteria for classifying persons as females or males. What it tells is that the criterion of distinction is biological, particularly underscoring the difference of genitalia at birth or chromosomal typing prior to birth. This criterion of distinction is furthermore required to be socially agreed upon and the application of it is for the purpose of distinguishing men and women from one another. This biological

criterion introduces members to sex categories as the first rung of the ladder where, then, the respective designation in the category is further established, harnessed and cemented through, what they describe as, the "socially required identificatory displays". Distinguishing sex and sex category, they point out that the membership in one or the other sex category can be achieved and accomplished even without having to meet its socially laid out biological criteria. In other words, certain men could establish and sustain their sex category in relation to female sex category and certain women could do the vice versa, the other way round, disregarding the mandate of their biological determinatives. So sex and sex category are distinct. What about gender? According to the authors, gender is "the activity of managing situated conduct in light of normative conceptions of attitudes and activities appropriate for one's sex category". What it implicitly underpins is that the notion of gender encompasses conscious and constant endeavour to qualify oneself for ones appropriate sex category in relation to the normative and preexisting requirement of the said category. So gender, in one sense, could also be understood as a claim to one’s sex category and in another accomplishment achieved by those members. This perspective of theirs certainly widened the arena where the gender as a concept was practiced. It, however, created two specific problems. First, their perspective became synonymous with "gender persistence" (Deutsch 2007: 106) and second, it created an "inevitability of inequality" (Deutsch 2007: 106). Though their perspective was having a "revolutionary potential" (Deutsch 2007), it was generally understood to mean that gender as a recurring phenomenon was spread too far and wide throughout the canvas of social interactions, owing to which it was not possible to be altered, as the fact of recurrence and pervasiveness pointed towards naturalness of gender. The perspective raised the spectre of hopelessness and disappointment (Deutsch 2007: 108).

Judith Butler, who disagrees with the idea of "gender doing", makes the point that even if gender is some kind of "doing" on some account, it is erroneous to call it

"doing". It is better to describe it, as she put it: "a practice of improvisation within a scene of constraint" (Butler 2004:1). The implication of which is that no one does one's gender alone. It is done with, and for, someone. It is possible that the one for whom it is being done is imaginary. On the face of it, it may appear that the gender that we have is authored and determined by us only. But the fact is that the criteria and parameters within which we do gender are located outside of us from the outset. The said criteria and parameters are actually located in "sociality", which is not authored and scripted by a single individual. It is an outcome of ensemble social collectivity.

According to Risman, the notion of "doing gender" ought to be employed carefully, particularly because the history of its usage in actual practice has been of "misuse" (Risman 2009: 81), as it swallows the feminist critique of gender as a concept. Secondly, the notion and language of "doing gender" have gone so far and wide that it feels of having been tautology. Instead what she proposes is to focus on "undoing gender", the idea of how men and women together are currently destroying gender. It is crucial to record and collect evidence of this phenomenon (Risman 2009: 81).

Ridgeway (2009) argues that gender constitutes a "primary cultural frame" that coordinates the behavior of people as individuals and even becomes a tool for organizing social relations. She argues that it is not possible to grasp how contemporary gendered social order accepts change and how it resists the same till the time we recognize how gender as a concept coordinates behavior and organizes social relations in the background (Ridgeway 2009: 145). According to her, we all depend on social relations for accomplishing valued goals in our life. They cannot pop into being on their own without some common basis of relatability to one another as human beings, that is to say, we are required to have common and shared knowledge that is capable of coordinating our relations. Cultural knowledge offers that interface. We all share it together. It therefore

comes handy to act as an abstract bridge that makes our relatability possible. Even within this cultural knowledge, she says, a particular kind of knowledge is of utility. All of it despite enjoying universalistic familiarity could not serve the purpose. What kind of shared and common cultural knowledge is required to be had? Ridgeway says that it ought to be the knowledge of showing a "shared way of categorizing and defining "who" self and other are in the situation" (Ridgeway 2009: 147). The basis of categorizing and defining, she carries on, is "contrast" and "difference" (Ridgeway 2009). A is like this because A is different from B; that kind of categorizing and defining. This notion of contrast couched in cultural knowledge is even applied to social groups to categorize and define them along the culturally laid down criteria of difference. These cultural difference systems or categories ought to be simple so that people could employ that difference as an interface among themselves for coordination and organizing their social relations (Ridgeway 2009: 147). Among three-four such categories, gender and sex is one. She points out that male-female is one of the society's primary distinctions. This distinction is, in fact, employed for coordinating and organizing social relations in our social intercourse faster than any other cultural criterion of differentiation if we discount race and age. Sex or gender distinction is so great that it elides revelations of later distinctions or identities, such as boss or employees, of people as individuals. This initial categorizing by sex never quite goes away from our consciousness of them or ourselves in relation to them. Thus, Ridgeway asserts: "we frame and are framed by gender literally before we know it" (2009: 148).

Smith and Smith (2016) point out that though acceptability of gender non-conformism particularly in policy, judicial decisions and laws is gradually rising, hostile attitude among people at individual levels towards those who express their gender, disregarding established norms, in unpopular, non-conventional and non-traditional ways could still be noticed. According to them, gender which pervades every aspect of our everyday life acts as a force that divides people as individuals.

It is however required to be realised that gender identity of people as individuals is a "complex and nuanced part of their overall self-concept".

Does gender promote inequality? Answering this question, Risman (2009) points out that from the perspective of feminism, gender represents a socially constructed structure that created inequality between men and women. It, as a concept, has been deployed "in the service of inequality" (2009: 84). Kathy Davis describes the difference between male and female sexes as the "greatest human division" (Davis et al 2006: 1) across the contemporary social order. It is so because culture and knowledge production in society are "gendered" (Davis et al 2006: 2). Gendering denotes "division of people into two differentiated groups (Davis et al 2006 2). This binary, overriding individuals differences and aligning with other social categorizations such as race, religion, age, economic class and sexual orientations, eventually results in hierarchical social order of "dominance and subordination" (Davis et al 2006: 2). Thus, the characterization she makes of gender is "Gender is a system of power in that it privileges some men and disadvantages most women. Gender is constructed and maintained by both the dominants and the oppressed because both ascribe to its values in personality and identity formation and in appropriate masculine and feminine behavior. Gender is hegemonic, in that, many of its foundational assumptions and ubiquitous processes are invisible, unquestioned, and unexamined" (Davis et al 2006: 2). Webster (2006) points out that it is a documented fact that women across different societies throughout the history have been victims of subordination and inequality vis-a-vis men. This inequality arising from patriarchal social order is reflective in both, qualitative and quantitative indicators of life of women, who face invidious and adverse gender discrimination in terms of social status, wage and wealth differentials and unequal sexual power relations. The scale in all these scenarios is tipped in favor of male sex (Webster 2006: 104) creating what he describes in the context of Jamaica as a "second-tier status of women" (Webster 2006: 104). Similarly, Peramanyer (2010) points out that gender inequality over the period of

time has been endemic and it is required to be remedied, owing to which the indices to measure gender inequality are currently receiving considerable attention. Though some progress has been made to remove formal gender inequalities in industrialized countries, the same persist in a graver form in developing nations (Shachar and Hirschl 2007: 257).

2. Patriarchy

Patriarchy is a term that is most commonly and frequently put to use in feminist circles to indicate masculine domination and power over women (Waters 1989: 193; Joseph 1996: 14). Underlining the point further, Sydie states that "(t)he concept of patriarchy as the 'rule of men' over women and as a universal form of domination has had considerable use in feminist theory" (Sydie 1994: 51). The term encapsulates and constitutes one of the core conceptual tenets of feminist jurisprudence (Barnett 1997: 123), mainly owing to the firm belief and realization among feminist jurists and scholars that male control and domination in society serves as a nightmarish souvenir of "female exclusion and powerlessness." (Barnett 1997: 123) Maria Mies points out that patriarchy as a term represents a full spectrum of exploitative and oppressive relations attending even to historical context (Mies 1987 cited in Waters 1989 194; Patnaik & Patnaik 1993: 66).

Patriarchy as a tool of analysis arose because it was believed by feminists that the existing social theory was inadequate to explain all pervasive subversion and subordination of women in society, as they were deeply steeped in the points of view of men. Mostly, this subordination within the existing theoretical framework was often explained away by suggesting that it was either the nature or the social necessity that had causally been responsible for this social relegation and

subversion of women. What was not accounted for in these social theories, however, was the unequal power between sexes, exploitation, socio-structural processes at work that brought women to a socially relegated condition (Acker 1989). For examining this, patriarchy provided a useful framework (Joseph 1996: 14). Thus, patriarchy as a concept in feminist discourse constitutes an enquiry into the underlying principles of oppression of women (Beechey 1979: 66). In actual terms, feminists of different hues and persuasions, according to Beechey, have come to seize upon this concept of patriarchy in pursuit of finding and locating an "explanation of feelings of oppression and subordination" (Beechey 1979: 66) among women. It is further committed to illuminating and addressing the "question of the real basis of the subordination of women" (Beechey 1979: 66).

What does Patriarchy mean? Patriarchy encapsulates a social system that is characterized by the headship of father, and men in particular hold and control over women and children. It further represents the family, community or society based upon the primacy of men. Patriarchy is a Greek term which means "the rule of the father" (Chowdhury 2009: 600). Thus, in terms of etymology, patriarchy literally denotes, "a structure of rulership in which power is distributed unequally in favour of fathers" (Waters 1989: 193). Lexicographically, American Heritage Dictionary furnishes two entries explaining its meaning. First, it is a "social system in which the father is the head of the family and men have authority over women and children" and second, it is a "family, community, or society based on this system or governed by men" (American Heritage Dictionary 2000: see entry 1 and 2 on patriarchy). Historically, points out Lerner, that patriarchy represented a social order where a family or a tribe was headed either by father or the eldest male figure of the said communities (Lerner cited in Glenn Collins April 28, 1986, available at http://www.nytimes.com/1986/04/28/style/patriarchy-is-it-invention-or-inevitable.html).

A pertinent example of this can be witnessed in the Roman Family, which was under an all encompassing authority (*manus*) of the paterfamilias (head of the family), who, be it father or husband or anyone else, was always to be a male figure (Bunson 2002: 593). About this family head, professor Fustel de Coulanges has observed that "The father is not only the strong man, the protector who has power to command obedience; he is the priest, he is heir to the hearth, the continuator of the ancestors, the depository of the mysterious rites of worship, and of the sacred formulas of prayer. The whole religion resides in him" (cited in Rodman 1944: 249). Enormous ability on part of the paterfamilias to wield monocratic authority from masculine standpoint excluded and eliminated women from all public life and committed them to 'legal servitude' mastered by her husband, paterfamilias and unquantifiable and indeterminate community of men (Bunsom 2002: 593). However, the basic terminological sense of patriarchy in the contemporary world stands extended to underpinning and relaying the idea of domination and governance done by men (Lerner cited in Glenn Collins April 28, 1986, available at: http://www.nytimes.com/1986/04/28/style/patriarchy-is-it-invention-or-inevitable.html).

According to Max Weber**,** patriarchalism is the most rudimentary and incipient form of domination. It is the " situation where, within a group (household) which is usually organized on both an economic and a kinship basis, a particular individual governs who is designated by a definite rule of inheritance" (Weber 1978 cited in Sydie 1994: 56). It further denotes 'the authority of the father, the husband, the senior of the house, the sib elder over the members of the household and sib' (Weber cited in Sydie 1994: 56). The domination and authority of the patriarch was located in traditions, customs and patrimony (Sydie 1994: 56). Weberian perspective on patriarchy in contemporary feminist discourse, however, is largely overlooked and ignored, because it is understood in feminist discourse that his particularistic notion of patriarchy is not relevant for contemporary feminism (Sydie 1994: 51), as Weber was an apologist and justifier of this

patriarchalism. According to him, the inequality between sexes was natural and inevitable (Sydie 1994: 54). Power was understood by him as "essentially an arrangement among men" (Sydie 1994: 54). Thus, it was, "the access to power and domination by men" (Sydie 1994: 54). , regarded as "natural, inevitable or simply right" (Sydie 1994: 54). Furthermore, the substance of his notion of power was located in being dominative. Definitionally, power consists of the "probability that one actor within a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests" (Weber cited in Sydie 1994: 56). Owing to this, the Weberian notion of patriarchalism found little enthusiasm in feminist circles, as it could not live up to women's cause.

Patriarchy is defined by Sylvia Walby as "a system of social structures, and practices in which men dominate, oppress and exploit women" (Walby 1989: 214). Throwing further illumination upon this definitional content, she explains that patriarchy particularly consists of six structures, namely: the patriarchal relations in the state, patriarchal mode of production, the patriarchal relations in paid work, patriarchal relations in sexuality, male violence and patriarchal relations in cultural institutions (Walby 1989: 214; Walby 1990: 177; Soman 2009: 255-56; Chowdhury 2009: 602). She further makes the point that patriarchy as a concept is crucial to grasp the full-spectrum of women's societal subversion and oppression. "The concept and theory of patriarchy is essential to capture the depth, pervasiveness and interconnectedness of different aspects of women's subordination, and can be developed in such a way as to take account of the different forms of gender inequality (Walby 1990: 3). According to Walby, patriarchy can be divided into two distinct parts (1989: 228). First, private patriarchy and second, public patriarchy. The site of private patriarchy is the household where women have to live their life under male authority and domination of an individual patriarch (Soman 2009: 255; Choudhury 2009: 602). It places women under relative exclusion from the social sphere (Walby 1989:

228). Thus, it stays forbidden for women to take part in public life under the categorization (Soman 2009: 255; Choudhury 2009: 602). So far as public patriarchy is concerned, it operates in the public sphere, where women's participation in public sphere such as labour market and politics is certainly allowed and permissible, but what makes the realm patriarchal is that women remain deprived of wealth, status, power and prestige despite their participation in this public sphere (Soman 2009: 255; Choudhury 2009: 602). Or as Walby put it: "Public patriarchy does not exclude women from certain sites, but rather subordinates women in all of them" (Walby 1989: 228).

Kate Millett states that patriarchy is "male domination of females" (Millett 2000: xi). It is a rule of men over women (2000: 25). She argues that the domination of women by men, what she describes as sexual dominion, constitutes "perhaps the most pervasive ideology of our culture" (Millett 2000: 25). It is so because our contemporary society has anchorage in patriarchy (Millett 2000: 25). The attestation of this patriarchal nature of social order can be witnessed in the fact, argues Millett, that all avenues of power – coercive force of the police, military, industry, technology, universities, science, political office, and finance – within the society are located in the hands of men (Millett 2000: 25). They command and preside over every avenue of power within the given society in an actual effect. Thus, the social order we live in is patriarchal in its elemental nature and character. Patriarchy was neither a matter of chance nor the result of violent revolution. From humanity's beginnings, their biological advantage has enabled the males to affirm their status as sole and sovereign subjects… woman's place in society is always that which men assign to her; at no time has she ever imposed her own law" (Beauvoir 1956: 102).

Patriarchy, says Gerda Lerner, is the "manifestation and institutionalization of male dominance over women and children in the family and the extension of male

dominance over women in society in general" (Lerner 1986: 239 cited in Farrelly 2011: 2). The origins of male domination and female subordination are located in history and the deep and remote past (Lerner 1986: 6 and 212). Patriarchy has gradually but constantly developed over 2500 years (Lerner 1986: 8 and 212), where women have had to put up with systematic and methodical exclusion from the particular arena of creating "symbol systems, philosophies, science, and law" (Lerner 1986: 5). Another aspect of this subordination was the total control of women's sexuality by men of dominant and privileged classes (Lerner cited in Chakravarti 1993: 579). Lerner further points out that men and women had gone through the experience of exclusion on different grounds such as class, but no man ever, she says, had to face exclusion on the ground of sex. Whereas, in contrast to this, all women have been victims of systematic exclusion on the basis of their sex alone (Lerner 1986: 5). Despite women having played a vital role in the making of history, they were still obliterated from the historical landscape (Lerner 1986: 5). She states, underpinning the point, that: "(t)he existence of women's history has been obscured and neglected by patriarchal thought" (Lerner 1986). Often, the patriarchal reasoning which is offered to justify this ostracism and exclusion of women at the epistemic level, and otherwise, is that women are deeply programmed to nurturance and emotionalism, as opposed to having a neck for abstract thoughts and reflections. Owing to this, women could not make any headway in advanced level of thinking (Lerner 1986: 6). Lerner points out that this is not correct. The actual reason, she says, is that "one cannot think universals when one's self is excluded from the generic" (Lerner 1986: 225) and what is regrettable is that the social cost of this exclusion of women from the abstract thought arena has never been quantified (Lerner 1986: 225).

Patriarchy has been defined by Rifkin from the standpoint of law. While doing so, she has stated that patriarchy is an "any kind of group organization in which males hold dominant power and determine what part females shall and shall not play, and in which capabilities assigned to women are relegated generally to the

mystical and aesthetic and excluded from the practical and political realms, these realms being regarded as separate and mutually exclusive" (Rifkin 1989: 83).

Thus, the subordination of women was deepened and institutionalized by the law and law codes. Beauvoir (1956) argues that as time progressed and reached the period where the tradition of laws being laid down in writing began, patriarchy became definitively well-established, as men themselves had written down codes of laws placing women in a subordinate position (Beauvoir 1956: 104). For instance, Laws made by Solon did not provide any right to women and Roman Code placed her under guardianship. Canon law treated women as the “devil’s doorway”. And the Quran was hateful of them (Beauvoir 1956: 105). The legitimation and expression of patriarchy that took place happened through ancient law codes, scriptures, religious texts along with ritual structures and social customs and practices (Patnaik & Patnaik 1993: 66). This is how the patriarchal nature of social order is maintained and held in place. Furthermore, patriarchy is not something which is uniformly monolithic in all societies in terms of its characteristic features. It can vary from one society to another in that regard (Patnaik & Patnaik 1993: 66).

Now the question is, how does India hold up vis-a-vis the gender and patriarchy discourse? This curiosity is important in the light of two particular considerations. First, among some women members of the Constituent Assembly, there had been a perception that there was some period in the history of India when they had enjoyed equality at par with men. For instance, Hansa Mehta had remarked during Constituent Assembly Debates (CAD in short) on December 19, 1946 that: "The average woman in this country has suffered now for centuries from inequalities heaped upon her by laws, customs and practices of people who have fallen from the heights of that civilisation of which we are all so proud" (Selected Speeches of Women Members of Constituent Assembly 2012: 67). The implication it holds, as I have already suggested, is that there was some period in the history of India,

when women did not face the burden of gender and patriarchy, emanating from laws, customs and practices. Similarly, Renuka Ray on July 18, 1947 had observed during the CAD that: "Through the centuries of our decadence, subjection and degradation, the position of women too has gone down until she has gradually lost all her rights both in law and in society" (Selected Speeches of Women Members of Constituent Assembly 2012: 93). What is implicit within it is that the process of deprival of women's position and their rights in the society was gradual. Before this process of deprivation went into motion, women had equal rights and position in the society where gender inequality, male dominance and patriarchy was irrelevant. On the other hand, the other consideration, which makes the enquiry important is that it was a perception among some of the male constituent assembly members that it was uncalled for to meddle in the personal laws of religious communities, because the act of this recklessness, pointed out Naziruddin Ahmad and Mahboob Ali Baig Sahib Bahadur during the CAD on November 23, 1948, was neither pursued by Muslim rulers and nor by the British Raj during their long periods of reigns respectively. Owing to this, it is inadvisable to venture into the unchartered waters of personal laws (CAD November 23 1948, available from http://parliamentofindia.nic.in/ls/debates/vol7p11.htm). Thus, I would like to take a historical overview of the Indian jurisdiction in the context of gender and patriarchy, which I have already discussed above.

3. Ancient India

The ancient social order in early India, points out Uma Chakravarti, was patriarchal in nature, as it was based on gender hierarchy. According to her, gender and caste hierarchy had been the "organizing principles" (Chakravarti 1993: 579) of this brahmanical order and the general subversion and subordination of women was severe, particularly owing to the involvement and

complicity of religious traditions as tools and media of this social relegation of women. Hinduism as a religion legally permits an extreme level of social stratification within which women as a sex group had to face “humiliating conditions of existence" (Chakravarti 1993: 579).

In other words, the period was dominated by brahmanical religion or what is now known as Hinduism. John D Mayne points out that the pedigree of jurisprudence the Hindu law carries is the oldest in the world and did not fall into irrelevance at the passage of considerable time (Mayne cited in Menon 1975: 209). According to Hindu jurists, Menon suggests that law was nothing but "(a) collection of human practices or customs based upon principles of morality and natural justice, accepted by the general consensus of society at a particular time" (Menon 1975: 209).

Davis (2010), however, has defined the notion of the Hindu classical law, which is “a variegated grouping of local legal systems that had different rules and procedures of law but that were united by a common jurisprudence or legal theory represented by Dharmasastra" (Davis jr. 2010, 13). According to him, the Hindu jurisprudence and legal theory is almost out and out or exclusively limited to dharmasastras, which, eventually, come to constitute the source books of Hindu jurisprudence (Davis jr. 2010, 13). Central to the texts of dharmasastras is the idea of ‘dharma’. Lexicographically, this term, which is so pivotally and umbilically connected to hinduism in India, captures an idea of an obligation with respect to caste, social custom, civil and sacred law (American Heritage dictionary, 2000, entry on dharma). P.V. Kane, defining the term from the dharmasastric point of view however states that, "the privileges, duties and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of one of the castes, as a person in a particular stage of life.” (Kane cited in Davis 2010: 16). The definition proposed by Kane clearly suggests, among other things, that

the notion of dharma residing in dharmasastras is quite patriarchal, where man is the bearer of all privileges, obligations, duties and standards.

Thus, the dharmasastras, the texts of Hindu jurisprudence or jurisprudence of religion in India, have comprehended and captured these privileges, obligations, duties and standards from the masculine perspective, or the point of view of men. According to him, man has always been the ideal subject of all religious, legal and jurisprudential reflections since the ancient time. It is important to be aware and conscious about “downright misogynistic attitude” of the authors while reading these texts, particularly with regard to the condition and role of women (Davis jr. 2010).

The subordinated position of women in the ancient social order was, in actuality, based on "law books" (Sharma 2009: 113). According to BR Ambedkar, Manu, one of the ancient law givers, for instance, was not even tender to women and the rules he made for them sprang from this invidious opinion that women were lowly, inferior creatures. “Manu can hardly be said to be more tender to women than he was to the Shudra. He starts with a low opinion of women” (Ambedkar, Writings and speeches vol. 3 2014: 313). In Manu Smriti, *The Laws of Manu*, the following account is found about women.

It is in women's nature to seduce a man in this world and they could put not only the foolish one off the path in this world but also the wise and learned one by lulling him into the slavery of desire and anger. To do this, women do not even involve themselves in the game of concerns like whether the man in question is handsome or ugley and old or young. This is enough for their surrender and submission that the creature in question is a man. Being handsome or ugley is none of their concern. Particularly pursuant to this reason, Manu informs, wise

men do not drop their guard in the company of women and further exhorts them not to sit with his daughter, sister or even mother in lonely places, as the instinct to sensual pleasure and gratification is strong enough and even capable to overpower learned and wise men (The Laws of Manu no date: II.213, II.214, II.215 and IX.14).

Secondly, Manu further expounds that no matter how much vigil and supervision over women one exercises and maintains in this world, they, because of their natural heartlessness, fickleness in temper and passion for men, become disloyal even to their husband (The Laws of Manu no date: IX.15).

Despite being in the knowledge of the fact that no vigil over women works, Manu still exhorts men to most strenuously guard and supervise them, as the creator has created their disposition in such a manner wherein he invested women with frivolities like love of their bed, seat and ornament and further endowed and filled them in abundance with impure desires, malice, wrath, bad conduct and dishonesty (The Laws of Manu no date: IX.16 and IX.17). It is because of this that the strictest vigil over women is required and warranted. Guarding against their evil inclinations – however insignificant and trifling they may be – is so important that not being able to do it or failing in exercising supervision may bring upon sorrow to the families in question. It is the paramount duty of all castes cutting across all divisions, even of the weak husbands, that they necessarily guard their wives (The Laws of Manu no date: IX.5 and IX.6). So far as the wife was concerned, it was her supreme, persistent and permanent duty that to whomever she had been handed over to in marriage by her father or brother, she must necessarily “obey as long as he lives and when he is dead, she must not insult his memory" (The Laws of Manu no date: V.151). The argument that the husband is a destitute, indulging in sexual gratification elsewhere or bereft of all good qualities, is of no avail or consequence as he is necessarily to be worshipped as a god by his ‘faithful wife’ under all circumstances (The Laws of Manu no date

V.154), because to his wife, the husband, near or far, good or bad, in this world or the next, is always a source of happiness (The Laws of Manu no date: V.153). Thus the worship of him as a god is necessary and the wife who lives to this ideal shall stand rewarded in the form of being exalted in heaven (The Laws of Manu no date: V155). Here on earth, she, however, should be good in her domestic affairs and economical in her expenditure. That is an ideal wife and an ideal woman under Manu's code (The Laws of Manu no date: V.150). This time, keeping her full lifespan in his view, Manu inform women that your father protects you in childhood, husband in youth and son in old age (The Laws of Manu no date: IX.3). In another shift, he prescribes that she, in her childhood, must stay in the subjection of her father; in her youth, in the subjection of her husband and in the old age – particularly when her husband is dead – in the subjection of her son. She is neither worthy nor fit for independence (The Laws of Manu no date: V.148). Being even direct and forthright and telling her as to what she must not actively pursue and do, he continues that she must neither seek separation from her father, nor from her husband and nor from her son, because if she does so, it makes her and her husband's family contemptible. Thus, the right to divorce to the wife was not permissible and available under Manu's code of law (The Laws of Manu no date: V.149 and IX.45). Once a woman was married, the separation, particularly on the initiative of the wife was out of question. So far as the husband was concerned, he was at liberty to get rid of her at his will and pleasure, either by sale or repudiation. However, even both of these modes could not take away, or end, husband's control over his sold and repudiated wife (The Laws of Manu no date: IX.46).

The implication of this is, as Ambedkar put it: "A wife, sold or repudiated by her husband, can never become the legitimate wife of another who may have bought or received her after she was repudiated" (Ambedkar writings and speeches vol. 3 2014: 315). According to him, it was the utmost monstrosity on the part of Manu, who had no regard for the considerations of justness and unjustness of his laws.

His obsession was merely to take away the freedom women had (Ambedkar writings and speeches vol. 3 2014: 315).

Furthermore, even Manu's code provides that the wife does not hold the right to property. Any wealth she earns or acquires belongs to her husband (The Laws of Manu no date: IX146). In the event or the situation of being widowed, she is only entitled to maintenance, not the right over property. She could be beaten up with a split bamboo stick if found committing any mistake (The Laws of Manu no date: VIII.299). She was not permitted to study the Vedas. She could perform Sanskaras necessary to her, but those were to be performed without vedic mantras being chanted along with them. This right, the right to study Vedas and chanting vedic mantras, was not available to her, because she was a woman, a living and direct representation of 'untruth (The Laws of Manu no date: II.66 and IX.18). It was also not permissible for a woman to carry out daily sacrifices given in the Vedas and if she did, Manu declares that she would go to hell (The Laws of Manu no date: XI.36 and XI.37). In order to render any attempt on the part of a woman to perform any such sacrifice nugatory, Manu forbids Brahmins to eat food at the sacrifice done by a woman under the veneer of reason that god will not accept sacrifices performed by women, as they are inauspicious from the outset. It is therefore important on the part of women not to perform them at all (The Laws of Manu no date: IV.205 and IV.206). It was impermissible under the code for women to have free will, freedom of thought or a desire to have intellectual pursuits. On top of it all, Manu favoured strict punitive action if Hindu law or Dharma was breached. In this regard, he laid down the 'Penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep, so the wise have recognized punishment itself as a form of dharma' (cited in Menon 1975: 210). In short, the dharma was "protected by danda" (Thapar 1978: 30), which literally stands for "rod" or "staff" in English.

Thus, disobedience of the Hindu law or Dharma was not possible. The women had to live their lives under total and absolute male dominance. She might have to suffer corporal punishment from her husband. She did not have any right to divorce. She did not have property rights either. She was not a full co-participant in the religious life of the Hindu community. She, all in all, was compelled to spend her whole life in an environment, which was "strongly patriarchal" (Thapar 1978: 30). In actuality, the objective of these laws was, as Ambedkar put it: "(w)omen are not to be free under any circumstances" (Ambedkar writings and speeches vol. 3 2014: 314**).** They had to live their life in an out-and-out male subjection in every fine detail. Even the general picture that emerges from Kautilya's Arthasastra corroborates the thoroughly patriarchal and hierarchical nature of the ancient Indian social order (McClish and Olivelle 2012: lxii). Any sensitivity being reflective towards women was in keeping with the dominant patriarchal system, conforming to social attitudes and propensities (McClish and Olivelle 2012: 52).

Another manifestly central aspect of this brahmanical patriarchy was a longing and yearning for the son. The Arthasastra notes that a husband could wait for 12 years at the most in the expectation of a son, and if his wife still continued to give birth to girl child, the husband could arrange another marriage to gratify his desire of having a male offspring (McClish and Olivelle2 012: 83). It was permitted by the Dharmasastras that in pursuit of having a son, the wife ought to have sexual intercourse with the brother of her husband if she could not beget a son from her own husband or if the husband was no more or she was abandoned by him (McClish and Olivelle 2012: 82; Sharma 2009: 120). According to Sharma, even in a situation where the husband could not beget children, it was lawful that the reproduction of children could be had via the younger brother of the husband or kinsmen or villagers or brahmana (Sharma 2009: 120).

Black even suggests pursuant to Upanishads, the ancient Indian texts, that women were only vital for brahmins as wives and child bearers, and their role even within this reproductive space was highlighted in such a manner that the duty of women was to give birth to a male child, because a male offspring was essential for a brahmin man to enjoy immortality in the next world (Black 2007: 17-18). It is clearly provided in these texts as to how to name a male child, whereas in the case of female child, these texts are silent. Black argues on the basis of this that this situation brings out the male bias of Upanishads (Black 2007 140-141). In other words, it is evident from these texts that woman is created "by, from, and for men" (Black 2007: 137).

MacKinnon (1989: 215) has pointed out that women lack speech under male dominance. Black demonstrates in the ancient Indian context how it happens. While the presence of women in Upanishadic dialogues is an unambiguous fact, what is important to lay attention on is that their voice as female speakers is curtailed and suppressed taking it to be bearing little authority (Black 2007: 135). Women speak, says Black, but their speech does not carry the same weightage as that of men (Black 2007: 135). A dialogue takes place between Gargi and Yajnavalkya in Brihadaranyaka Upanishad. In response to a question by Gargi, Yajnavalkya answered her in a threatening manner, "Gargi, do not ask too many questions, or your head will shatter apart" (cited in Black 2007: 150).

Out of this fear lest women learn more, the teachings in Upanishads privilege men (Black 2007: 136). Moreover, Sharma (1983) has further noted how the systematic exclusion of women from the epistemic space was carried out and how epistemic male supremacy was methodically constructed and retained. Satapatha Brahmana calls upon teachers that while teaching pravarjya, they should not look at woman because she is an untruth (Sharma 1983: 46). The Pdraskara Grhyasutra also stipulates to avoid women being seen after the Samavartana ceremony (a

kind of ceremony at the completion of education). The Baudhayana Dharmasutra, goes on to say that students while performing rites for success should not talk to women. It is provided in the Brahma Purana that belongs to the Gupta period that the ceremonies of bathing and muttering of prayers in conformity with Vedic method and procedure were permissible to first and top three varnas but to women, such performance was prohibited – they could not perform them in conformity with Vedic methods. As per the laws of Brahmanas, it was also impermissible to women to perform fire sacrifices. They could perform other ceremonies but it was to be done without mantras (Sharma 1983: 46-7). This is a clear illustration how gendering in society was carried out excluding women from epistemic and educational arena. Romila Thapar has pointed out that though the marginal and limited education to the upper caste women was permitted, the purpose of this education was not at all to encourage women to take part in dialogues or discussion. Neither was it intended to make them expert in any area (Thapar 2002: 303-4).

Property was another area in which the excrescence of patriarchy and male dominance was at its zenith, turning women themselves into commodities. Sharma (1983) argues that the state came into being in ancient India particularly on the ground that private property and women had required protection, and since at many places in the ancient Indian literature, references of property and women appeared together, it is reasonable to conclude, says Sharma, that this had transformed women into chattels (Sharma 1983: 43). They now could be given away and loaned out as articles of property. It is a typical patriarchal deal and treatment based on private property. Particularly pursuant to this attitude, that they lacked the power of consideration, Brahmanical law did not devolve any ownership and proprietary rights upon women, and the idea of *Stridhan* that is found in Brahminical law is extremely limited to jewelry, gifts or things of similar description (Sharma 1983, 43). According to Thapar, stridhan did not make any difference to the "general status of the woman" (2002: 263), as it was nothing but

a collection of movable wealth, as opposed to the stock of immovable and consolidated property (Thapar 2002: 263), which could have been able to devolve status upon women. Thus, the right to property to women was limited (Thapar 2002: 304).

Sati[4] was yet another practice that makes India's remote past patriarchal to the extremity. The earliest historical evidence, says Thapar, for this pernicious practice comes from the AD 510 inscriptions at Eran where the practice has been commemorated (Thapar 2002: 304). K.M Shrimali has pointed out that this practice had begun arising in the age of Lord Buddha (Shrimali cited in Sharma 2009: 112). According to Sharma, the practice of Sati alone constitutes a measure to demonstrate as to how much patriarchal dominance had existed in the ancient Indian social order. The practice of Sati indicates, states Sharma, "so much of patriarchal dominance that the wife was compelled to accompany her husband even after his death" (Sharma 2009: 112).

From the above account, it is evident that ancient Indian social order was deeply gendered and patriarchal. It was put by Sharma thus: "Gender discrimination loomed large and that generally women were placed in a position of utter subjection" (Sharma 2009: 116). The condition of women in ancient India, says Romila Thapar, constitutes a "commentary on society" (Thapar 2002: 30), as they were an integral part of the social process, not any separate and distinct category within that social order. She states that: "There is a growing understanding of the implications of patriarchy, not only in determining gender relations, but also as a condition of society" (Thapar 2002: 30). Patriarchy asserts itself in the form of social norms, religious beliefs and women's work (Thapar 2002: 30). Thus, as an upshot, this view, that there was some golden period in the history of India where

[4] The practice of the self-immolation of the widow on the funeral pyre of her husband

women were equal to men is not well supported by the academic and historical enquiry (Forbes 2008: 15-16; Thapar 2002 29-30; Sharma 2009; 115-116).

4. Medieval India

During medieval India, Delhi sultanate was one of the most significant jurisdictions. Satish Chandra has described it as an "independent entity" from the standpoint of the legal jurisdiction (Chandra 2003: 264-265). However, the Hindu social order had witnessed little change. The source of their law was still the ancient Indian brahmanical authorities based on patriarchal and casteist ideas that sought to unrelentingly condemn the "unworthy members of the order" (Chandra 2003: 172-173). Particularly in the context of women, Chandra points out that there was little change in their condition. They had to spend their life in conformity to the old diktats of the Hindu patriarchal order. Early marriage and absolute devotion to the husband were among the things that were prescribed for them. Widow burning (Sati) was in practice with horrifying and blood-curdling public spectacles. Widow remarriage was particularly prohibited for upper caste women. It was permissible for a widow to inherit her husband's property provided that it was not joint property and that the husband was a male heir. She could dispose it off at her will. Chandra thus states that, "it would appear that the property rights of women improved in the Hindu law" (Chandra 2003: 173). Women during the period had to live their life in seclusion or in the privacy of their household. It was further exacerbated with the adoption of the practice of *purdah*. The Turks and the Arabs who invaded and ruled India had brought the practice of purdah to the country with themselves. It spread far and wide requiring upper class women in general to cover and veil their face in the presence of strangers while protecting them from the public and the male gaze. This practice of purdah was adopted by those who had thought that they were respectable and high class people. Thus the practice soon became a sign of respectability and a

proof of belonging to high class society during the period. It is also pointed out that the adoption of this practice was further necessitated by the warfare happening during the Sultanate, as women were always treated and understood to be the prizes of victory in warfare. The practice of purdah, says Chandra, "affected women adversely, and made them even more dependent on men" (Chandra 2003: 173). This practice was in vogue during the Mughal empire as well. Women had to stay behind the purdah curtain. The era was termed the "age of secluded women" by Percivil Spear (Spear 2001: 26). Rizvi stated that the practice of purdah was "strictly observed" (Rizvi 2002) among elite muslims of the time during the medieval period. Likewise, upper caste governing Hindus had imitated Muslims and kept their women in home (Rizvi 2002). A fuller account of the work of patriarchy during this period however is outside the purview of this work.

5. Colonial India

Inching towards India's modern times, I will now survey in some detail whether the colonial jurisdiction was gendered and patriarchal and how English rule had dealt with the gender and patriarchal trappings that the Indian women received from the preceding jurisdictions, which we have already discussed in the outgone pages. James Mill, who had written the *History of British India*, had remarked having been through the Laws of Manu, religious texts, travel accounts and accounts of missionaries: "nothing can exceed the habitual contempt which the Hindus entertain for their women ... They are held, accordingly, in extreme degradation' (Mill cited in Forbes 2008: 13). Thus, before I turn my attention to India in toto, I will first focus on Britain, briefly reviewing the attitude and outlook of English men towards English women in their own society. It will be useful for us to see the state of affairs in India in a better light.

English rule in India is described as an "all-male British Raj" (Sorabji 2010: ix), as the British Empire always bore an appearance of having been a deeply masculine enterprise (Levine 2004: 1; Levine 2007: 142). The characteristic feature of white men stiffly corseted in sport and hunting clothes and richly exhibiting their official regalia was a part of this masculine spectacle (Levine 2004: 1). The perception in Britain had been that the Empire was the site of adventure and "masculine proving" (Levine 2007: 142) and English women had little role to play in this imperial enterprise. According to Eliza Riedi, Britain was averse to English women interfering in imperial project and politics, because they were thought to be having no capabilities to understand "complexities of imperial rule" (Riedi 2002: 596-597). Along with it, the perception was that the women did not even have the physical force that was vital to maintain imperial rule. Thus, English women in India had to restrict themselves only to the 'womanly' work of local government" (Riedi 2002: 597).

However, Mary Procida (2001), writing about the 20th century British India argues that though the formal exclusion of English and Anglo- Indian women from masculine imperial arena was certainly in place, the availability of guns and fire arms enabled them to defend British India against militants, particularly during 1920s and 1930s with the informal blessings of their husbands. Their ability to use guns was spotted when women took part in recreational hunting sports. This gun-wielding ability became a medium for women to become the participants in the imperial administration, though it did not wipe out fundamental gender distinctions (Procida 2001). Be that as it may, within this notion of empire, women were only incidental. Men were the creatures who overwhelmingly and predominantly commanded the field committing women to an invisibility in this enterprise (Levine 2007: 142).

Another consideration that served as a reason to keep women away from the imperial project was that English women in colonies may fall into prostitution, lowering the honour and prestige of the empire. Charlotte Macdonald illustrated how it happened for instance. The women who traveled alone from Britain to colonies, particularly to South Island in New Zealand during 1860s were monitored for their moral character and behavior. The implication that lay at its core was that single woman traveling or immigrating to colonies was likely to fall to prostitution (cited in Coleborne 2012: at 82). On the ship during voyage, the women travelling alone were even subjected to policing in order to monitor her moral and sexual behavior so that the honour and prestige of the Empire may not be tarnished, owing to the conduct of its women.

This impulse of honour and prestige is apparently linked to Victorian Morality, named after Queen Victoria, whose reign had ranged from 1837 to 1901. What does Victorian morality encompass? Foucault has reported its account in the following manner. Sexuality had carefully been reduced to home, or rather, to be precise, to the bedroom, where it was to be put to use for procreative purposes by a legitimate married couple, who, in actual effect, "imposed itself as the model, enforced the norm, safeguarded the truth, and reserved the right to speak while retaining the principle of secrecy" (Foucault 1978: 3). Thus, it is argued that sex as a subject was reduced to considerable obscurity. In addition, a notion of verbal decency consists in the sanitization of speech. Proper demeanour becomes reflected in avoiding bodily and physical contact with one another (Foucault 1978: 3). Publicizing of sexuality may attract penalty. It is something which is not worthy of being heard. In short, sex is "driven out, denied, and reduced to silence. Not only did it not exist, it had no right to exist and would be made to disappear upon its least manifestation—whether in acts or in words" (Foucault 1978: 4).

Thus, notions of womanhood and femininity in Victorian England was rooted in this kind of environment, eventually disemboguing into respectable morality, reflecting in modesty, humility, tenderness, emotionalism, self-sacrifice and

serviceableness of women. (Yang 2002). It was further required by the Victorian morality that women should have love for religion and god, self-respect, marriage, no sex prior to or outside wedlock, cleanliness, care and tenderness for children and husband (Tennert 1988: 113). Women were virtually treated as the angels-of-the-house (Yang 2002). Qualities in them like aggressiveness, sense of independence, sense of wit were downplayed and not promoted by Victorian men. They were not considered well-suited to having exposure to the harsh life and the competitive working world outside their home, which was identified as the sphere of their power, whatever they could use and wield. The quality of self-abnegation in Victorian woman with regard to her home and family, was, as a matter of fact, rated as a supremely important one. She was supposed to maintain good reproductive capabilities to populate her domestic sphere with young ones. Restraint and innocence in sexual expression, however, was taken to be a valued and superior quality in her, who was required to be an example of purity for her husband, for whom, by way of having a stronger sexual urge and impulse, it was not unnatural in indulging promiscuous sexual activity (Yang 2002: 24-26). In other words, "(t)he major thrust of the Victorian ideal of womanhood centered on enacting her proper role within the domestic sphere" (Yang 2002: 26), giving rise to a public-private dichotomy.

It is pointed out by Sinha (2001) that actually, one of the characteristic features of Victorian society in England was to maintain strict a dichotomy of the public-private sphere. Public sphere as meant for men, while the private was reserved for women. Conceptually, the former represented masculinity and the latter, femininity. Secondly, access to the first was generally denied and prohibited to women in almost all effectiveness. For example, English women in Britain had, if there was any, extremely limited, nominal and marginal access to clubs. That, too, was permissible in a specialized environment. For them, separate rooms in clubs called hen rooms were created. Or their entry was possible when chaperoned by

the husband. Thus, clubs in Britain were living examples of gendered, sexist and masculinist institutions (Sinha 2001: 496-497).

This dichotomy was not limited only to homes and clubs. Its ramifications were far wider than this. Elaine Showalter has suggested that special care in mental asylums, including their kitchens and even mortuaries was accorded to having the policy of "strict segregation of sexes" (Showalter 1980: 163). Despite this separation, inequality in these asylums between sexes was rampant. For instance, the food provided to women inmates was considerably less than what was allotted to male inmates and furthermore, women in these facilities were subjected to more careful surveillance than their male counterparts (Showalter 1980: 165). Similarly, in the cricket matches that were arranged among patients and between patients and medical students, the female patients could only watch them from 'fenced-off enclosures' (Showalter 1980: 167). "Chaperonage, restriction of movement, limited occupation, sexlessness, and constant subjugation to authority were 'normal' lives of women than of men (Showalter 1980: 168).

Furthermore, Barrow (2015) has argued that even trains were regarded as sites of danger for women traveling alone in them, as the railway carriage had created and constituted hybrid spaces bringing and placing strangers together in intimate, home-like situations jostling, touching and brushing against each other. Particularly owing to this, it was depicted in the Victorian Press that journey by women on their own, unchaperoned and unescorted in trains could give rise to incidents of rapes. The fascination of the Press to cover sexual violence on railway coaches was first for erotic purpose and second, as Barrows argues, aimed at the fears people had about increasing the freedom of women in British society, as journey by railway had considerably altered and weakened the concept of private-public division of English life. At the core of this coverage was the desire

to regulate the movement of women, protecting them from the supposed perils of the hybrid space brought into being by the railways (Barow 2015).

This restrictive view of life that flowed in the second half of the 19th century came into being owing to the triumph of respectability, especially in the middle class. The patronage to respectable morality was offered by having stricter legal codes that submerged libertinism in English Society (Fisher 1993). Thus, the perception about middle class young women in Victorian period grew that they lived a circumscribed and dull life (Logan 2011: 485-486) behind the four walls of their home. According to Assael, moral purity organizations had wanted to make popular culture prudish and sanitized in cities. This phenomenon was particularly prominent in having control and regulation over sexuality (Assael 2006: 744-745).

What does the above account point out to? It points out that the English society on gender calculus at that time was rooted in a deep masculinist orientation. It created a wide cleavage between men and women. It commandeered women's agency almost in full measure, in order to fit them in men's image. They had to master the Victorian normative code of respectability. They could not move around independently. Once autonomy is lost either to normative codes or to any other consideration, thoroughly and fully, men or women, members not having personal autonomy to take decisions cannot be said to be enjoying equality. Now under such a scenario, when their own society is deeply gendered, the question is whether the British rule could promote and ensure full and equal membership of native women in British India.

Anindyo Roy, who studied British colonial project in India in the particular context of literature, points out that the notion of civility was "an implicit component" (Roy 2005:1) in this imperial enterprise, especially during the 19th

and early 20th century. This English notion was rooted in "normative code of imperial Britishness" (Roy 2005: 1) and the characteristic feature of this civility was that it was capable of controlling and excluding people in subtler ways. This normative code was a relevant and applicatory force in the particular context of gender, class and nationality. It was understood during the 19th century that civility, as by definition, was a crucial and inalienable aspect of "'gentlemanly' character" (Roy 2005: 6).

David Omissi pointed out that no regime could last long if it begins to treat its people as "a single undifferentiated mass'" (Omissi cited in Levine 2000). So a notion of differentiation was critical in maintaining the colonial rule in India. Impelled by this notion of differentiation, the population of women was categorized into respectable and unrespectable women in the particular context of prostitution, though there was no legal definition of prostitution available by the application of which it could be known with absolute certitude that the woman being described as the prostitute was the one. As a matter of fact, in this context, the appropriateness and suitability of description was located in the rejection or acceptance of the described, not in the view of the describer (Levine 2000). In fact, during the late 19th and early 20th century, British Raj had come to rely heavily upon systematic information produced by official social science, known as 'blue book sociology', called so owing to its blue color jackets, for such differentiational purposes.

According to Wald (2009), laws and controls placed on prostitution in India since the 18th century by the British Raj had targeted Indian women who were engaged in sex work by particularly characterizing them as ‘prostitutes’ (Wald 2009: 5-6). It started happening since 1813 to be precise. This typecasting adversely affected the women sex workers, critically depleting and denting their dignity as being human persons. Prior to laws of this ilk, sex work in India was not identified as

criminal or stigmatized as immoral. It was tolerable in India with little “venomous distaste” (Wald 2009: 6). The identity that women sex workers were bestowed upon was the outcome of East India Company's doctors who failed to control venereal diseases among European soldiers (Wald 2009: 5). Eventually, the process of stigmatization and criminalization of women sex workers began so as to be able to arrest venereal diseases among soldiers. Rather than having soldiers blamed for transmitting venereal diseases, it was the women engaged in sex work who were treated as "habitual spreaders of venereal diseases" (Wald 2009: 6) by the regulations in place at the beginning of the 19th century.

This kind of treatment was not limited to women only. Other gender identities were also victims of it. One of the starkest examples of this situation has been provided by Hinchy (2014) who did a case study on the transgender eunuch (Hijra) community during colonial India. She has stated that the masculinized British rule had attempted to erase visible existence and presence of eunuchs as a socio-cultural and gender identity by denying their performances in public spaces in cross and feminine dresses, particularly because it was obscene and morally contagious and repugnant in the masculinist understanding. The provisions in the Criminal Tribes Act were enacted in 1871 for the purpose of control and surveillance of Hijra performances in public spaces (Hinchy 2014: 274-277).

Of course, the colonial state had always wanted to promote Victorian morality. It becomes clear even from the provisions on the sexual offences in the Indian Penal Code of 1860. According to Faizan Mustafa, these penal provisions reveal "patriarchal values and Victorian morality". Section 497 allows "sole proprietary rights" to the husband over the sexuality over his wife, while not enacting the same absolute right for the wife to secure her husband's sexuality (Mustafa March

8, 2016)[5]. Victorian uneasiness with homosexuality had also been criminalized in the Indian Penal Code (Kozlowska December 12, 2013)[6].

In spite of this, according to Arup Kumar Sen (1998), the notion of Victorian morality often stood violated among workers in colonial India, particularly with regard to sexual practices. Male and female workers in industrial neighborhoods had lived together without being married to each other. For women in particular, this kind of life was a mix bag. On the one hand, it had allowed a certain degree of agency and choice to women, and on the other, it brought forth a spectacle of disaster to them. However, what comes clear, Sen argues, is that the notion of Victorian morality and privacy was "grossly inadequate" to maintain vigil and discipline in the matter of male-female sexual practices, as quite often, instances of intercourse without wedlock had been taking place. As a matter of fact, Sen (1998) has stated that the idea of family was inappropriate to be advanced in the case of industrial workers.

Personal law was another aspect of the colonial rule, which perpetuated male domination over women (Newbigin 2009: 86 and 88). Ambedkar had pointed out while responding to the debate with respect to personal laws in the Constituent Assembly on November 23, 1948 that the entire country was already practically under civil law except the little tiny patch of marriage and succession, which were still governed by personal laws of different religious communities (CAD, November 23, 1948). KM Munshi had even observed that the bestowal of equality upon women would become impossible if this view was adhered to that personal law of succession and inheritance was part and parcel of religion (CAD, November 23, 1948).

[5] Mustafa March 8, 2016[5] available from http://indianexpress.com/article/opinion/columns/indian-penal-change/

[6] Kozlowska December 12, 2013 available from http://foreignpolicy.com/2013/12/12/how-victorian-morality-still-screws-over-gays-in-india/

However, prior to the onset of the colonial rule in India, the social, religious and political landscape that had existed here was pluralistic, fragmentary and heterogeneous. This fragmentary scenario was noticeable in terms of tribal, cast, religious, sects, and family identities and communities. (Chitnis 2007: 1316). It was customary law that had regulated the life of each community individually, as pre-colonial India had lacked the notion of legality and law in the modern sense. The implication of this, as I have already pointed out, was that rather than having any judicial system that applied to all cutting across community distinctions, each community had its own adjudicatory mechanism to settle disputes reducing it to insularity (Chitnis 2007: 1316). According to the revisionist view, the colonial state had preferred to perpetuate this ancient legacy and heritage of customary law. Thus, the relationship between early colonial rule and the ancient regime was characterized by "deep continuities" (Abram 2011), rather than transformation. The reason to perpetuate legacy was located in the apprehension that not doing so or the introduction of English variants could irk and resent native subjects, giving rise to a backlash against imperial rule. Thus, it was fear, according to the said perspective, that froze the hands of the British to try them at transformation.

Consider for instance, the case of the practice of Sati. Though there was considerable debate about Sati in the late 18th and early 19th century, points out Lata Mani, it failed to reflect the actual suffering of the practice of widow-burning at all levels of this discourse. The debate was framed in extremely narrow terms suggesting that this issue was an expression of conflicting point of views in the context of tradition and modernity. This perception was hinged upon the fact that women in this discourse were on the margins and the patriarchal forces, colonialist and indigenous, both spheres collusively together, denied all agency to women to shape and determine this discourse placing the actual concerns of suffering in the spotlight. Their voice was absent in this contestation. According to Lata Mani, colonial administrators, as a matter of fact, had converted Sati into

an object of knowledge by identifying it with the Hindu religion and scriptures. The outcome of which was that the debate happening was limited to the point whether the actual ban of Sati was possible. Driven by the belief that Sati was a ritual deeply rooted in Brahmanical religion, British officials had run into the thicket of Brahmanical legal texts, the Dharma Sastras, as interpreted by Pandita, to resolve the issue (Mani 1993).

Even the Regulations of 1812, which were introduced to prohibit the practice of widow self-immolation (sati) in Bengal Presidency, were not rooted straightforward in the conviction that the practice of widow self-immolation was out and out wrong. What was, in fact done, was that the prohibition was premised on the particular kind of shastric interpretation provided by the pandits at that time. Pursuant to this, the practice of widow self-immolation was 'legal and illegal' and 'voluntary' and 'coerced' (Sangari and Vaid 1993: 15). The corollary of this classification was that the practice of widow self-immolation was not wrong in its entirety. Some of it was voluntary and legal as per ancient Hindu law. Serving as bestowing legitimacy upon the inhuman practice, that was the general message of those regulations. The impact this legitimacy had produced was that the number of actual incidents of widow self-immolation had increased between 1812 and 1816, owing to the widespread perception that the practice had the government's approval and permission. Only a measly ten out of 400 reported incidents were found to be illegal (Sangari and Vaid 1993: 15). Though this evil practice was abolished by Lord William Bentinck in 1829 throughout the jurisdiction of British India, the category of 'voluntary sati' (suicide) was brought back almost a decade later by the Amendment in the Indian Penal Code (Sangari and Vaid 1993: 15). It was accepted in Sati Regulation XVII A. D. 1829 of the Bengal Code that the steps taken to curb and discourage this evil practice thus far had failed to live up to the purpose. Thus, abolition was only the way left out, and accordingly, it was resorted to. The practice was declared as "illegal homicide" (Singh 2004: 117-118). According to the said regulation, the practice "is revolting

to the feelings of human nature"[7]. However what was interesting was that the Regulation had sought to mollify and pacify the Hindu religious community, despite knowing that the practice was offending and revolting to the most delicate core of human nature. The regulation stated that, "it is nowhere enjoined by the religion of the Hindus as an imperative duty; on the contrary a life of purity and retirement on the part of the widow is more especially and preferably inculcated, and by a vast majority of that people throughout India the practice is not kept up, nor observed"[8].

However, with the onset of English rule, the notion of civilizing native people came into being and during the Victorian period, it was in its verdurous and fiercest intensity. When the British crown had acquired the direct control of the Indian colonial state in 1858, the British Authorities and Indian elite and influential people, both, had wanted to place the colonial state under their legal control and legitimacy. But eventually, in the process of political bargaining, the British rule had left family matters generally to the jurisdiction of the indigenous and prevailing customary and canonical law of different dominant religions (Chitnis 2007: 1317). At the core of this phenomenon was the understanding that the Indian society was "driven by religion and their own description of its glorious past" (Chitnis 2007: 1318). The status of women during the 19th century had grown extremely relegated, owing to the preponderance of religious ritualism and brahmanical mentality. Enforced widowhood, institution of Sati and practice of child marriage had been in prevalence (Pradhan 2013: 222).

According to Kumkum Sangari and Sudesh Vaid, the colonial state in India was complicit to devolve legitimacy upon practices and traditions that engendered and worsened gender difference (cited in Mohanty 1990: at 20). The earliest formal beginning of this complicity can be witnessed in the Judicial Regulation of 21

[7] Available at https://en.wikipedia.org/wiki/Bengal_Sati_Regulation,_1829
[8] Available at: https://en.wikipedia.org/wiki/Bengal_Sati_Regulation,_1829

August of 1772, where it was explicitly provided that 'in all suits regarding inheritance, marriage, caste and order, religious usages or institutions, the laws of the Koran with respect to the Mohammedans and those of the Shastra with respect to the Gentoos shall be in variably adhered to' (cited in Singh 2004: 129-30).

Similarly, it was also promised as part of the Government of India Act, 1858, which had brought the country under the direct rule of the British crown queen Victoria, that native people shall have the "right to enjoy equal and impartial protection under the law, with due regard paid to ancient rights, usages, and customs" (Skuy 1998: 515; Kolsky 2010: 4). Giving effect to the said enactment, Queen Victoria had issued a Proclamation on November 1st, 1858 in which it declared that "We declare it to be Our Royal Will and Pleasure that none be in any wise favored, none molested or disquieted by reason of their Religious Faith or Observances ; but that all shall alike enjoy the equal and impartial protection of the Law." (the Queen in Council to the Princes, Chiefs, and People of India November 1st, 1858)[9] Thus, it was made abundantly explicit by the royal Proclamation that the British government would not meddle in the social, cultural and religious life of the native people of India (Pradhan 2013: 217).

The commitments of non-interference in the realm of religious customs and traditions had emboldened conservative forces. Consider the case of Rukhmabai, who was matriculate, was married off by her father at the age of 11 to a man who was consumptive and illiterate. Rukhmabai had refused to join her husband at his matrimonial home after the death of her father on the ground that her marriage had taken place without her consent as a child. The case was filed for the restitution of conjugal rights by the man. Rukmabai won the case. The colonial state was threatened with public protest if Rukhmabai was not restituted to her husband as per the Hindu Law. According to Bal Gangadhar Tilak, Rukhmabai

[9] Proclamation; also available at: https://en.wikisource.org/wiki/Queen_Victoria%27s_Proclamation)

had been corrupted by education and her conduct was in defiance of the Hindu Shastras. The man was persuaded not to give up. The money was raised by the conservative forces to appeal the matter further. Under the pressure of these forces, she had lost this time and was ordered either to live with the man or go to the jail (Forbes 2008: 69; Chakravarti 1993: 73-5). Tilak was happy with this decision. According to him, the colonial state had now been "upholding the *dharmasastras" (Forbes 2008: 69).*

At this, Rukhmabai had written to her friend Pandita Ramabai, another prominent Indian women rights activist in the latter half of the 19th century:

> The learned and civilized judges ... are determined to enforce, in this enlightened age, the inhuman laws enacted in barbaric times, four thousand years ago … There is no hope for women in India, whether they be under Hindu rule or British rule ... The hard-hearted mothers-in-law will now be greatly strengthened and will induce their sons to sue the wives in British courts since they are now fully assured that under no circumstances can the British government act adversely to the Hindu law (Cited in Chakravarti 1993: 74-5).

Deeply bruised and offended by the verdict of the court (Forbes 2008: 69), Pandita Ramabai in turn had remarked that

> (t)aught by the experience of the past, we are not at all surprised at this decision of the Bombay court. Our only wonder is that a defenceless woman like Rukmabai dared to raise her voice in the face of the powerful Hindu law, the mighty British government, the one hundred and twenty nine million men and three hundred and thirty million gods of the Hindus, all ... having conspired together to crush her to nothing ness. We cannot blame the English government for not defending a helpless woman; it is only fulfilling its agreement made with the male population of India. (Cited in Chakravarti 1993: 74-5).

Particularly when women had an opportunity of escaping from their husband, imperial officials often did not support their cause, owing to which they would often not succeed in legally challenging their nuptial ties that had acted as an

encumbering and constraining force upon them. In fact, this struggle of allowing more autonomy and letitude to women and other subordinated social groups and keeping traditional and hierarchical social order intact was noticeable in British India. As fresh and new opportunities for women arose, the legal system in place "often closed them down" (Merry 2010: 1068). According to Chitnis, the battle of a conflicting vision of colonial state and indigenous conservative forces was "fought on the backs of Indian women" (Chitnis 2007: 1318). In this regard, Rukhmabai's case provides a clear illustration on how the religious and cultural fundamentalists along with the colonial state could force "women to submit to the most onerous of patriarchal customs" (Forbes 2008: 69). The colonial state had been persuaded to raise the age of marriage or sexual intercourse for girls from 10 to 12 in 1881 by social reformers (Sarkar 2000: 601). The raising of the age of marriage or sexual intercourse for girls from 10 to 12 was opposed by these forces in 1880's on the ground that it was an interference in their social customs and traditions and mode of living. Tilak had for instance, argued that when the British government was enacting the Age of Consent Act, 1891 to raise the age of consent for women for sexual intercourse from 10 to 12, it was an assault on the Indian culture and traditions and Hindu religion (Chakravarti 1993: 76-7).

In contrast to this fundamentalism, benightedness and obscurantism, however, the Parsi community in India was the one community which had rejected imperial conservative interventions in its personal sphere with respect to women (Sharafi 2014: 127). The law of coverture, for example, had been discarded by the community, where husband and wife, according to the coverture, were one person. As a result of this, the property belonging to the wife upon her death was the personal property of the husband as per the English law. Likewise, the English law of primogeniture that permitted only the eldest son to inherit the property of his father was rejected by Parsis in favor of letting all male children inherit an equal share with the eldest son (Sharafi 2014: 128). Women, including widows and daughters, were granted "larger and larger shares" (Sharafi 2014: 129) by

Parsi intestate statute in the succession. According to Jesse Palsetia, "(g)ender was a central site of conflict between English and Parsi legal values" (cited in Sharafi 2014: at 129), particularly because English law had not always been leading on the path to "equality between the sexes (Sharafi 2014: 129).

Be that as it may, the promises made by the colonial government in 1772 and 1858 to respect ancient rights, usages, customs and practices by permitting their application in the personal affairs of different religious communities had, in actuality, produced furious contestations between the colonial state and different groups of indigenous people. The outcome of the deployment of Hindu and Muslim law, however, had scriptural authorities revived and resurrected (Rohit De 2016: chap 2). Tanika Sarkar, in fact, makes the argument that "Rights were conjugated from messy encounters between scriptural law and the Anglo-American legal system, rather than through some form of systematic political thinking" (Sarkar cited in Rohit De 2016). Both, according to Kumkum Sangari and Sudesh Vaid, modernity and tradition, served as conveyers and purveyors of patriarchal ideology in British India (Sangari and Vaid 1993: 17). In other words, as Ayesha Jalal explained in an interview, “(w)hen the colonial state began intervening in the legal domain, it was not as if modern colonial laws were all against tradition. In fact, tradition defined those laws because the colonial state had to navigate the tradition with the elite's help” (Jalal, April 13, 2017)[10]. This way, many traditional things became entrenched in the name of modernity, including patriarchy.

This entrenchment had happened through the codification of personal laws in 1860. As per this codificatory process, the basis of the authority of the personal laws was shifted from opinion to texts. Now it became written law, effectively

[10] Ayesha Jalal, April 13, 2017. interview available at http://herald.dawn.com/news/1153717/jinnah-did-not-want-partition-ayesha-jalal

laying down the foundations of the notion of personal law in India. In ultimate effect, personal law remained based on religious and social practices, customs and traditions (Newbigin 2009: 86). No sweeping change was brought about by this formalization. As usual, the male patriarch dominated women in families (Newbigin 2009: 88).

In the context of the Hindu Code Bill, Dr. B. Pattabhi Sitaramayya had on April 9, 1948, remarked in the Constituent Assembly, while aptly encapsulating and summarizing the attitude of Britishers towards personal laws in India that,

> (t)hey were afraid to touch the customs of this country with the longest pole. They were afraid of any interference with the socio-religious structure which was a delicate structure almost like a chemical balance and bore the repercussions of the smallest change coming from abroad and from adventitious sources. They were afraid that such repercussions would be ruinous to the stability of their empire in this country and therefore, they adopted the plausible and seemingly reasonable altitude of not interfering with the religion or the custom of the land (Ambedkar, Writings and Speeches. Vol. 14: 13).

Thus the colonial state was always fearful of backlash from the indigenous conservative elements (Merry 2010: 1068). Even the colonial judiciary had also been following in the footsteps of the government in terms of being overly circumspect about religion and customs. Sitaramayya had further observed that,

> (t)he Judges of the High Courts always helped to register the custom as it had existed for long centuries behind, and never registered a change in the custom as marking a progress in society. Thus custom became petrified and when custom became petrified, progress became impeded altogether, and for a hundred and fifty years our society has not been able to make any progress (Ambedkar, Writings and Speeches. Vol. 14: 13).

From the above account, it is evident that the Indian past has been complicitous and deeply implicated in the relegation and subordination of women. This past is thoroughly gendered and patriarchal. Male dominance determined what and what not the women were permitted to do in every aspect of life. In actuality, preceding

social orders were premised on the idea of keeping women under total subjugation. Women were removed from public sphere and public visibility. It was done systematically. From ancient time, the lives of women were regimented at micro-level, in every small aspect of life. Education, dignity and personhood were snatched away from them. They had to reproduce male children, who could help their fathers secure a place in heaven. They had to immolate themselves on the pyre of their husband. They had to live their life behind purdah. They had to stay in the private sphere. They had to obediently follow all moral and religious codes that the men laid down for them. In short, the Indian past was deeply gendered and patriarchal.

Anindyo Roy says: "Interdisciplinary work necessarily depends on taking a risk" (2005: 33). What kind of risk? It was explained by Parama Roy, who remarked that this peril is 'of never being erudite enough to satisfy the demands of all disciplines that one is using, addressing, and inhabiting' (Parama Roy quoted in Roy 2005: 33). This monograph is situated within interdisciplinary tradition of enquiry, rendering it necessary to straddle across different branches of knowledge. I shall particularly employ literature for this enquiry from law, sociology, political science, political philosophy and history. For law, I shall study literature on constitutional law and jurisprudence. I shall read the relevant debates of the Constituent Assembly of India. I shall also read the judgments of the Supreme Court of India in particular. However, wherever it is necessary to read the judgments of High Courts, I shall unhesitatingly peruse through them. For instance, for Pre-natal and Pre-conception Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (PC and PNDT Act), I shall read judgments from High Courts, as not too many judgments are available from the Supreme Court in this particular area as of now. I shall also read judgments from foreign jurisdictions, mainly of the Canadian Supreme Court. For political philosophy, I shall rely upon scholarly works. Wherever historical context is required, I shall use scholarly

history texts. Further, I shall also use journalistic literature coming from newspapers, magazines and websites for this academic enquiry.

The other central aspect of this research is located in the fact that this enquiry shall take place under the illumination of feminist jurisprudence and feminism. What it implies is that on the one hand, I shall read literature on feminist jurisprudence and feminism for the research and on the other, even the literature from other disciplines that I will read shall be read under the focus and illumination of feminist jurisprudence and feminism. In short, the test of the validity of things for this enquiry is not what is established, normalized, common and popular. Proclivity towards alternativity is well wired in this thesis. In other words, it is thoroughly governed by feminist jurisprudence and feminist understanding.

The objective of this enquiry is to study the question of gender equality that invites considerable attention in our own time. In other words, as I have already pointed out above, the central focus of this thesis is to probe and illuminate the interstices of this academic curiosity, whether women are discriminated in constitutional law and its allied doctrinal conceptualizations. The enquiry of this nature will help devise more useful ways to enhance gender equality across India.

In the context of soaring interest into citizenship study, Heater (2004) said that despite immense literature being generated in the area of citizenship, there was still no book on it that could offer glimpses into its history till the time he himself wrote one (Heater 2004: iv). This, according to him, was what distinguished his book from the rest. In the context of my enquiry, I would echo what he said which is that, I have not come across, as of yet, any text that combines eclecticism of India's constitutional equality law, constituent assembly debates, feminist

jurisprudence and feminism in the context of gender study with respect to India. On that point, I believe, it is different.

The first chapter of this research, that is, the current one, is introductory in nature. It is committed to providing a general overview of what I will do in this research and how I will do what I have set out for this enquiry. Specifically, I have discussed two central concepts of feminist jurisprudence and feminism in this introductory chapter, that is to say, gender and patriarchy. Both of these concepts impel to reflect upon the existing legal order -- as to what is the nature of law and how it is implicated in the relegation and subordination of women. Under the focus of these key concepts of feminist discourse, I have, thereafter, reviewed our Indian past in some detail. I have argued here that the position of women was in a deeply relegated and subverted condition during the preceding jurisdictions of the Indian past, particularly because of gendered and patriarchal social order.

In the next chapter, I shall principally focus on how feminism and feminist jurisprudence has been challenging the mainstream law. I shall argue that the notion of justice that is embedded in mainstream law is required to be radically remedied, recognizing, accommodating and incorporating women's experience at par with men in its practical, normative and jurisprudential space, in all respects. In this chapter, I shall focus on three interrelated themes in particular – feminism, feminist jurisprudence and the notion of justice, that is to say, the notion of equality in contemporary constitutional order. I shall demonstrate and argue here that the notion of formal equality is inadequate for sex equality and gender justice. Alternatively, I will thereafter discuss substantive notion of equality, which I will eventually argue, is much more accommodative and roomier for sex equality and gender justice. For the demonstration, I will take an overview of the Canadian jurisdiction where substantive equality is in force.

The notion of formal and substantive equality which I have pursued in the third chapter, shall continue in the following chapter as well. This discussion will be pursued with respect to the Indian constitutional law, where I shall read court judgments for the purpose. However, along with the pursuance of the formal and substantive equality on the plane of India's constitutional law and its accompanying principles, I shall also peruse through the Constituent Assembly Debates in the context of sex equality and gender justice. What I will argue in this chapter is that women are unequal and discriminated creatures in this realm of constitutional law, principally owing to the fact that women's voice did not have settling effect in designing the India's Constitution, as women were only 15 in number (Agnihotri 2012: V) out of 299 members in the Constituent Assembly[11]. For instance, the demand of women members in the Constituent Assembly to make personal laws justiciable was rejected and disregarded. Today the demand for the reservation for women at different levels like legislatures is afoot, in the Constituent Assembly, every woman member had to say that she did not want positive discrimination. Agnihotri put it thus: "none of the women Members ever supported measures like positive discrimination or separate electorate on gender ... line" (2012: VI). This kind of dominant meta-narrative was ostensibly put in motion and circulation across the country where women prior to talking about the substantive issue had to say they did not want reservation. Secondly, the equality entrenched in the Constitution was interpreted by the judiciary in the formalistic tradition, which further compounded the situation with respect to sex equality and gender justice.

Prior to conclusion, in the last chapter of this research, I shall focus on the scourge of sex selective abortion in India, as it appears that it is manifestly the most miasmatic performance of patriarchy and epitomizes the saga of discrimination against women. Parents have long nurtured the desire of determining the sex of their prospective offspring. On reflections, it even appears

[11] Some facts of Constituent Assembly available from http://www.parliamentofindia.nic.in/ls/debates/facts.htm

that in principle, there ought not to be any objection in nurturing such desires, as it is a decision that belongs to the private and personal space of the begetter and birth giver. They should be free to make choices they wish to make with regard to their issues in this particular domain. However, difficulty arises particularly when this private aspiration is exercised in a manner in which the exercise of choice on historical, social, cultural and patriarchal factors by the parents, raises the spectre of discrimination against female sex. It is crucial to be heedful that when the choice favouring a particular sex is predetermined in every way by patriarchal persuasions, is there any merit in arguing that the power to decide such matters falls in the private sphere of people? History suggests that throughout the world there has been an overwhelming desire by default in favour of having male offspring. The same history bears witness to all sorts of misdeeds that have been perpetrated in securing that end. To claim a right of choice in relation to the said social and historical project appears as a right to reject and eliminate female offspring. On the face of it, it sounds ethically questionable and problematic. About its moral repugnance, for example, Powledge stated, “I do not want to rest my argument there. I want to argue that we should not choose the sexes of our children because to do so is one of the most stupendously sexist acts in which it is possible to engage. It is the original sexist sin” (1981:196). In this chapter, I shall take up sex selective abortions with particular reference to India for my academic inquiry and argue that this practice constitutes discrimination against women. As we have seen above that social, legal and systemic order is pervasively gendered and patriarchal. According to Millett, women have been under the "long government" (Millett 2000: 123-4) of men, where Law as an institution has played a significant role in peddling male authority (Rifkin 1980: 84). In the chapter to follow, I will pursue the theme how this male dominance is being questioned and challenged in legal arena.

Chapter II

Feminist Jurisprudence and Equality

1. Introduction

For the greater part, the previous chapter was devoted to studying and examining two key concepts of feminist discourse, that is, gender and patriarchy in the particular context of India. The purpose of this enquiry was to demonstrate and eventually argue that the Indian past jurisdictionally was gendered and patriarchal in the light of these two central concepts of feminist discourse. This chapter, on the other hand, is completely devoted to enquire how law as an institution along with its central concepts and allied trappings, which developed over centuries and millennia altogether under the total overhang of male experience, is now being challenged all over the world by feminism and feminist jurisprudence. The principal reason for this challenge is fundamentally located in this reality that law as an institution has played a role in the subordination of women (Jackson 2009: 323). Owing to this and even to this date, there persists a "stark gap between formal commitments to the equal rights and responsibilities of men and women and against discrimination and subordination based on sex and the gendered realities of women's lives" (Grossman & McClain 2009: 1). According to Grossman, as a matter of fact, gender exists as an obtrusive "category in society, politics, and *law*" (Grossman 2009: 3, emphasis mine). In other words, law as an institution is thoroughly gendered (Finley 1997: 176). It is the educated, privileged, empowered and influential men who have shaped, defined and eventually interpreted law in conformity with their own understandings. In other words, law, as it exists today, exists in men's image (Finley 1997: 176), where maleness or masculinity is the norm for everything. Man is the norm for equality,

self-defence, for reasonableness, for legal reasoning, for reality and for the legal language put to use in the arena; his situation forms the norms for rest and all else (Finley 1997: 176-77). According to Finley (1997), law as an institution is out-and-out patriarchal (Finley 1997: 176). Patriarchy – which is a manifestation of male power, dominance and control over women - as has been pointed out in the preceding pages, serves as a powerful representation of "female exclusion and powerlessness" (Barnett 1997: 123). Yet the patriarchal social order, as Bronislow Malinowski has suggested, is the norm across all societies (Malinowski cited in Barnett 1997: 123). It is, in fact, forcefully argued in feminist discourse that patriarchy, in actuality, is the "governing archetype" (Rhode 1989: 60) throughout the world. And particularly owing to dominance, patriarchy is one of the central concepts in feminist jurisprudence (Barnett 1997: 123), where it is believed that incremental reform in law cannot lift and remove this male chokehold (Rhode 1989: 60).

In this chapter, among other complementarities, I shall primarily enquire how feminism and feminist jurisprudence has been challenging mainstream law. I shall argue that the notion of justice that is embedded in mainstream law is required to be radically remedied - recognizing, accommodating and incorporating women's experience at par with men in its practical, normative and jurisprudential space. The first section is dedicated towards the discussion of feminism, as feminism provides the medium for championing and advancing the women's cause and the feminist project in all effectiveness. The second section, which is focused particularly on feminist jurisprudence, seeks to demonstrate that law as it exists constitutes representation of the male point of view, thus becoming problematic for the contemporary generation of women. Some feminist scholars seek to sideline law altogether, while others want to engage with it at all levels, from pedagogy to constitution-making, to enactment and to practice and so on. In other words, these scholars propose an engagement at all levels. Thereafter, I pick up one of the most important concepts embedded in law, that is, its notion of justice

or the notion of equality. I have discussed it in four sections in a row, the first of which is dedicated for formal equality. In the second, I have set out a feminist critique of formal equality. The last two sections are devoted towards substantive equality, an alternative conception of justice. The first section of this is around the conceptual discussion of the concept. And the last section of this chapter solely focuses on Canada, the first jurisdiction where substantive equality was formally adopted.

2. Feminism

What is Feminism? Estelle Freedman, while pointing towards the historically ever changing character of feminism as a concept, was confronted with a similar curiosity. "Is there any coherence to *feminism* as a term? Can we define it in a way that will embrace its variety of adherents and ideas?" (Freedman 2002). Thus, there seems to be no watertight and absolutely determinate meaning of feminism as a term and concept. It is ever evolving into different adherences.

Yet, the principle theme of feminism is the championing of the rights of women (Walters 2005: 2). The term feminism has been derived from the French word '*feminisme'* which was coined by the utopian socialist Charles Fourier. However, the first recorded usage of feminism as a term in English language dates back to the 1890s, when it was put to use to " indicate support for women's equal legal and political rights with men" (Mendus 1995: 270 271). On a definitional plane, it is defined lexicographically by the American Heritage dictionary as "Belief in the social, political, and economic equality of the sexes" and the "movement organized around this belief" (American Heritage dictionary 2000: entry on feminism). The key idea embedded in the definition is the equality of sexes for which movements may be taken up so as to reach this equality. But, this is only a

lexicographical signification and connotation of the concept, lacking in any scholarly and academic credence. On a scholarly plane, Mendus defined it as

> … a term with many nuances of meaning. In a narrow sense, it refers to attempts to attain equal legal and political rights for women, while in its broadest sense, it refers to any theory which sees the relationship between the sexes as one of inequality, subordination, or oppression, and which aims to identify and remedy the sources of that oppression (Mendus 1995: 270 271).

Thus, according to Mendus, in a parochial sense, feminism is an endeavour to seek equal legal and political rights for women, while in its most comprehensive sense, feminism identifies itself with seeing sex relations entrenched in subordination, oppression and inequality and it seeks to remedy the said social pathologies. Estelle Freedman (2002) defines it as "a belief that women and men are inherently of equal worth. Because most societies privilege men as a group, social movements are necessary to achieve equality between women and men, with the understanding that gender always intersects with other social hierarchies." (Freedman 2002: 7; Nicholson 2008: 140). The definition carries four elements in it namely: male privilege, equal worth, intersecting hierarchies and social movements (Freedman 2002: 7). Friedman (2002) points out that while the term ‘equality’ presupposes that historical male experience is the norm that women have to live up to, the term equal worth (in place of equality) is a relatively better term to capture what women aspire to attain for themselves, particularly because it holds conventional female tasks such as child bearing and child care in good regard, and at par with the tasks performed by men. Along with it, women's different experiences can transformatively enrich political life. (Freedman 2002: 7). Thus, equal worth as an expression and concept is relatively better placed than equality.

On the other hand, privilege, according to Friedman (2002), encompasses "greater social value placed on male children" (Freedman 2002: 7). For instance, it becomes reflected when parents harbor and nurse a strong longing for male

children across cultures. Social movements do not only mean to take to streets; it also means "enrolling in a women's studies class or engaging in artistic or literary creativity that fosters social change" (Freedman 2002: 7-8). Intersecting hierarchies imply that women as a social identity are a diverse social group, some of whom are privileged and others are not. What is required is that while building feminism, women are sensitive to all kinds of social hierarchies within the community (of women) or outside it (Freedman 2002: 8).

Another aspect of feminism, as I have indicated above, is that it is extremely diverse and eclectic in nature. There is no single monolithic feminism. It is available in different typologies such as French feminism, liberal feminism and Marxist feminism (Jackson 2010: 1) and this list is only illustrative and not exhaustive. It is underpinned by different cultural, political and philosophical traditions such as socialism, liberalism, Marxism, critical race theory and American critical legal study (Conaghan 2000: 357). Bell put its diversity thus that should Feminism be regarded as a theory, it would represent a "diverse and contradictory body of knowledge" (Bell 1993: 14). Karlekar, while underscoring its diverse nature felt that the words "Feminist, feminism, gender studies are used interchangeably without any reference to their social or geographic context. None of these categories is internally, intellectually, or even in terms of action, united and homogeneous" (Karlekar 1995: 1464). This is no different in the area of law as the "(f)eminist ship within and beyond law is expressive of significant diversity" (Conaghan 2000: 357). Likewise, its agenda and project is also a matter of contestation. There are some who believe that feminism is a vanguard to challenge the masculine world view characterized by values and norms created by men in their own image. For others, it is a platform to demand distinct treatment for women by asserting their difference instead of asserting their sameness to men. (Jackson 2010: 1).

Thus, according to Bartlett (1999), it is then possible to say that feminism is replete with myriad overlapping tensions with having no single and monolithic set of commitments to pursue certain kind of reform agenda to redress social relegation of women as sex, but there is certainly an open and clear commitment in place to identify how law circumstances women into disadvantage. It is further committed to propose changes to eliminate those disadvantages. To that, feminism is absolutely committed (Bartlett 1999: 475). In addition to this, Bartlett points out that feminism acts upon this common hypothesis that 'women have been, and still are, wrongly treated (or thought about, or regarded, or valued), and that this should be remedied,' (cited in Bartlett 1999: 475).

Though the agenda and project of feminism where it seeks justice for women in all aspects of life is evident from the above account, Barnett (1998) argues that the objective of the feminist movement is to secure “true equality” for women by unmasking the gender-based discrimination existing within liberalism, without presenting a challenge to the ideology itself. It seeks to ensure discontinuance of laws and practices that relegate women to the private sphere. She further states that the feminist movement is not merely limited to demanding of the right to vote, equal remuneration, right to own property, right to equal education, right to profession etc. It has, in fact, extended to all walks of life (Barnet 1998: 124). Women certainly want to enjoy equality and equal treatment vis-a-vis men, but what they further want is that their difference must not be put to use to produce a sense of inequality. Thus, a neutralization of the negative consequences of women's difference is equally necessary and a legitimate objective within the feminist discourse (Bartlett 1999: 499). Feminism further wants to improve gender equity and the elimination of traditional gender roles (Bartlett 1999). However, there are two themes upon which feminism specially expends its attention, namely, sexuality and power. It is argued that women's sexuality has been an object of being denied, policed and exploited. It is because of this that sexuality is regarded as the central site of their oppression (Bell 1993: 5).

Feminist discourse treats heterosexuality and masculinity as socially constructed realities. Power is yet another central theme that feminism focuses on. The purpose of this focus is to expose, explore and change how men exercise their power over women in the guise of their masculinity (Bell 1993: 5).

In pursuit of this project and goal, Barnett (1997) suggests reading Mary Wollstoncraft, who was one of the earliest feminists, and John Stuart and his wife Harriet Mill to know about the feminist striving and the quest for women's equality (Barnett 1997: vi). Wollstonecraft had, as a matter of fact, written 'A vindication of the Rights of Woman' in 1792, which is still considered to be a cornerstone of feminist movement and activism of women across the world. She had written this monograph in response to a pamphlet on national education by Talleyrand Perigord (1754 – 1838), the Late Bishop of Autun, whose ideas on female education Wollstoncraft (1792) found to be quite bizarre and unhelpful. Wollstoncraft dedicated the volume to him with the following words. "Weigh what I have advanced respecting the rights of woman and national education; and I call with the firm tone of humanity. For my arguments, sir, are dictated by a disinterested spirit: I plead for my sex, not for myself (Wollstonecraft 1792: dedication letter). She further stated that she wanted "to see woman placed in a station in which she would advance, instead of retarding" (Wollstonecraft 1792: dedication letter).

Similarly, John Stuart Mill 1806-1873 was an English philosopher who rejected the very principle of women being in a subordinate position to men. He declared that it was wrong to have a principle that places one sex in legal subordination to the other, as it was a chief obstacle to "human improvement" (Mill 1999: 1; Smith 2001: 181). He further proposed and advocated an alternative principle of "perfect equality, where no privileges and power shall as such be assigned to a particular sex and disabilities and liabilities to the other. According to him, both men as well as women, will share power and privileges and liabilities and disabilities equally,

cutting across sex distinctions (Mill 1999: 1). Mill was deeply convinced that liberty and freedom lay at the core of human existence, ensuring its well being and viewed from that standpoint, the life of women, that of the half of the humanity, was in subjection (Mukherjee 2006: 330). Their lives were curtailed by the prejudices and biases of the society, where they lacked an ability to develop their potential.

As a political ideology, the concept of feminism is deeply linked and soldered with women's movement and women's studies throughout the world (Ghosal 2005: 793). India is no different in this regard. Women's movement in India, points out Uma Chakravarti, particularly since the 1980s, has played a vital role in the development of a "decisive feminist perspective" (Chakravarti 2012 and 2013: 134) in the arena of social sciences, giving rise to a good flurry of women writings across the country (Chakravarti 2012 and 2013: 134). However Ghosal makes the point that so far as the feminist consciousness in India is concerned; this is traceable since the colonial period (Ghosal 2005: 793). Particularly during the 19th century, this consciousness was focused on widow remarriage, abolition of Sati, outlawing of child marriage and dissemination of education among women (Ghosal 2005: 794).

This feminist consciousness became particularly reflected in women's "passionate desire to learn" (Forbes 2008: 32). During the 19th century in a gendered and patriarchal social environment, women were despised for even holding a piece of paper in the name of reading and learning (Forbes 2008: 32). Despite being completely immersed in the household work and attending to 12 kids, Rassundari Devi, for instance, had learned how to read and write in the first decade of the 19th century (Forbes 2008: 32). Haimabati Sen, from 1866 to 1932, was another woman who had taught herself to read and write under this patriarchal meta-narrative that if women educate themselves, they would become widows (Forbes

2008 32-33).

Pandita Ramabai, one of the legendary Indian social reformers, was an outspoken supporter of women's education in the second half of the 19 century. Born in 1858 in a high caste Brahmin family, she was forbidden by ancient Hindu law to read the Vedas and allied Vedic literature. However, be that as it may, her father had taught Ramabai and her mother how to read and write. Hearing the recitation of Vedas being made by her father and brother at home, she had learned them by heart rehearsing it all in her head.

Later on, she went to England to receive medical education in 1883 (Burton 1995: 29). She had converted herself into Christianity too. She was deeply impressed with English women (Burton 1995: 30). But soon, she had become deeply disillusioned losing her enchantment with both Christianity as well as English women – with Christianity because of the "Anglican Church hierarchy over doctrinal matters" (Burton 1995: 30) and with English women because their sole commitment was for the cause of Western women, not to the cause of colonized women (Burton 1995: 30).

Thus, the activism of women and feminists during the eighteenth and nineteenth centuries was important and premised on the notion that “it was advocacy of the idea that all human beings are by nature free, equal, and endowed with the same inalienable rights.” (Hunter 2008: 1) Pursuant to this, the struggle to challenge the legally harnessed perception of inferiority of women was launched and carried out.

Bringing out the contemporary significance of feminism, Cramer (1995) states that, “Feminism has surpassed Marxism as the most prestigious radical version of the theme of "perspective” (Cramer 1995: 270). According to him, even those who are engaged in chronicling the past and history writing would agree that at this point of time, and in the current world order, almost nothing but the rise of feminism has succeeded in shifting the “prevailing terms” of engagement in the contemporary debates on issues. He says that even those who are deeply critical to feminist thought cannot deny its influence and “multifaceted thriving” (Cramer 1995: 265). Its thriving, he argues, particularly comes from the impressive attacks it made pursuant to “gender-based domination and the intellectual sparks and flashes issued from these attacks (Cramer 1995: 265). It is thus significant to remain committed and stick to flourishing of feminist theoretical projects, he says. Thus feminism is one of the most powerful ways in which gender equality can be secured.

3. Law and Feminist Jurisprudence

After having discussed feminism, I shall focus in this section on what it places under its scrutiny and attack, and how it has been developing an alternative discourse of understanding. However, this enquiry is limited to law in the sense that it will predominantly cover how feminist legal understanding has been presenting a challenge to the mainstream understanding of law and jurisprudence. There are specifically two interconnected themes on which I will focus upon - first, how and why law as an institution is problematic under the feminist lens and second, how feminism is seeking a revision of the established legal, particularly constitutional order, in relation to women's issues and requirements.

Law as an institution itself is under feminist attack, because it is argued to be a masculinist (Baer 1999: 39) and patriarchal institution (Henderson 1991, 412), which is exclusionary not only for women but also for others as well at the 'foundational' level itself (Bottomley 1996: 1). 'Foundational' here denotes "a Beginning: that which makes possible what follows and upon which what follows can be securely based" (Bottomley 1996: 1). Thus, law as an institution is exclusionary at this very first rung, where the activity related to choice, selection and exclusion happens and is carried out (Bottomley 1996: 1). Feminist theorists and scholars seek to expose this foundational underside of law to the excluded (Bottomley 1996: 1), as it is rooted in masculine biases and prejudices that eventually make the legal reality patriarchal and gendered, particularly from the standpoint of women (Baer 1999: 39).

Moreover, law does not only exclude human identities, it even excludes and resists alternative knowledge and understanding as well. Menon (2004) who is committed to championing the cause of "fundamental social transformation" (Menon 2004: 1) argues that contemporary constitutionalism that is in place and that seeks to protect and safeguard every member of the political community is impervious and exclusionary in nature and operates at the epistemic level, particularly because for the purpose, it seeks to give effect to "universal norms" (Menon 2004: 1) that sideline and de-legitimize competing and alternative "world view and value system(s)" (Menon 2004: 1). Quoting Professor Upendra Baxi, she says that much of what the contemporary constitutionalism consists of and reflects was determined in the early days of colonialism and imperialism, the era of early modernity. It still carries and retains its impulse for "violent social exclusion" and in the context of epistemology, it recognizes only its own unitary and central ethics rejecting and discarding alternative understanding and knowledge that could confront and compete with constitutionalism (Menon 2004: 1).

Likewise, Henderson who believes and identifies with the position that men have defined and controlled law as an institution, practice and source of meaning in the contemporary and modern State, is convinced that the character and content of law, legal and judicial reasoning and legislative attitudes, all have been shaped and determined by masculinist and patriarchal thoughts and assumptions (Henderson 1991: 412). There is no better term, Henderson suggests, than patriarchy that is capable enough to accurately capture men's cultural, economic, political and physical domination and subordination and devaluation of women (Henderson 1991: 412). He states, "Under patriarchy, men are the model and the embodiment of the fully human; to maintain their status and power, men are entitled to exercise both subtle and violent control over women. Patriarchy is both a belief and a practice, thought and action (Henderson 1991: 412).

In other words, law as an institution is understood to be synonymous with having women-unfriendly posture as the entire landscape of legal understanding and law is deeply soaked and steeped in a masculine understanding. This character and posture of law was even attested and recorded by Dante Alighieri who had stated about it: '*law is the proportion between man and man* in relation to things and people' (Padovani et al 2007: xi, emphasis is mine). As per this, law is the 'proportion' and that 'proportion' is primarily applicable in the context of men in relation to their things and people. In other words, not having any explicit reference of women within it, this proportion in the form of law conspicuously indicates towards defining and determining the substantive relationship and the balance primarily among men as having equal moral worth.

It was pointed out by Pufendorf that "families cannot be understood without marital laws" (Pufendorf 1994: 199). However, it is quite ardently and legitimately argued in contemporary times that law as an institution controls and regulates the sexuality of women and this regulating happens particularly through

matrimonial law and paternal rights. It also criminalizes fornication, adultery, abortion and prostitution leaving law as a site for struggle against the subordination of women (Henderson 1991: 412). .

The 18th century English jurist Blackstone's "Commentaries on the Laws of England" offer a classic illustration on the point, the matrimonial law and the position of women. He declared women amid their legal disabilities as being "So great a favourite is the female sex of the laws of England" (Blackstone 1766, 434). It is pertinent to set forth his position in some detail, as his Commentaries on the Laws of England is his seminal work, which is still regarded as the magnum opus of his life and even today, after 250 years, is put to use as an authoritative reference point to interpret laws in different countries, including India (Prest 2009, v-vi preface).

Blackstone (1765), as a matter of fact, devotes chapter 15 of the first volume of his magnum opus to Marriage and Divorce involving man and woman (Sokol 2009, 91). It begins with the assertion that marriage includes 'reciprocal duties of husband and wife', which he gathered from the idea of 'baron and feme', the concept and prevalent among his forefathers and predecessors and that is premised on the notion that husband is the wife's lord, not an equal partner. The wife lives under his baronship, protection, influence and lordship (Blackstone 1765, 429-30; Alschuler 1996: 26).

This is, as a matter of fact, formally called the doctrine of coverture where the legal status of a married woman was governed by this doctrine (Sokol 2009: 105). Blackstone set it out in concise, precise and elegant language. "Once married, a woman's legal status changed from *feme sole* to *feme covert*, with significant consequences. She could no longer enter into contracts, or sue or be sued in her

own name; her personal property was vested absolutely in her husband, and he had a life interest in all her real property. Her liability in criminal law was also affected" (Blackstone 1765: 430; Sokol 2009: 105; Alschuler 1996: 25; Nagel 2016: 110).

Marriage puts 'the very being' and 'legal existence' of a woman in suspension or, it becomes incorporated and consolidated into the personal being and existence of the husband, leaving and declaring the husband and wife one person in law (Blackstone 1765, 430; Alschuler 2016: 110). Despite the suspension of her personal being and accepting the lordship of her husband, she is entitled only to the necessities from him and nothing beyond it (Blackstone 1765, 430). Whereas, the husband is entitled to correct his wife, just as he does his servants and children. He could use chastisement for this end, though he is prohibited to resort to violence against his wife. (Blackstone 1766: 431-33). According to Blackstone, in lieu of her protection and benefit, this is what the wife has to put up with for her own good. In his own words: "T H E S E are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favourite is the female sex of the laws of England" (Blackstone 1766: 434).

However, the wife, according to Blackstone's doctrine was 'civilly dead' (Nagel 2016: 110). She could not contract even to spend her own money. She owned no personal property, not even her own clothes and jewellery. She could not lodge a suit in a court of law even for injury to her own person. She could not draw up her will. She enjoyed no power over her own children. Her husband could chastise or restrain her. As far as the acts of crime were concerned, she was liable for them in her personal capacity. About their (wives') condition , Heater (2004) further pointed out: "Even in liberal states with a common law tradition, down to the

nineteenth century, married women were rendered civically non-persons by the device of 'coverture': they were subsumed into the legal identity of their husbands, who 'covered' them - and owned their property" (Heater 2004: 120; Alschuler 2016: 110).

How and why did this relegation of women happen? According to Posner, Blackstone (1766) had traditional and conventional views about women (Posner 1976). However, Fenberg (1948) argues that the legal discrimination that women face today started from the 17th century when Sir Edward Coke (1552-1634) and Sir William Blackstone (1723-1780) began to misstate the laws in England. Coke did it because of his personal biases and Blackstone out of his imperfect knowledge of law and too much reliance on his predecessor, Coke.

The impact of Blackstone's commentaries was not merely limited to England. The situation of women was no different even in the United States, as the source of legal understanding was the English law and jurisprudence (Sullivan 2007: 1). American women, for example, were part of the legal personhood of their husband, that is to say, in the eyes of law, the husband and wife were a single person, a single entity. Women did not command any legal personhood independent of their husband and thus lacked an ability to own property, execute contracts, keep earnings and enjoy influence over her family. Sullivan (2007) argues that though the Common Law governed the private sphere, the private sphere, as a matter of fact, was crucial for maintaining public law, and thus the subjugation of women was important to maintain and protect constitutional order (Sullivan 2007: 2; Fenberg 1948). The subjugation of American wife was put by Fenberg thus: “She was her husband's slave, dependent upon his whims, without appeal to any court- and penniless.” (Fenberg 1948: 8).

The subjugation occurred because, as argued Sullivan (2007), the American Constitution was politically interpreted in the early decades of the 19th century against a background of political and social oppression. This gave a bad reputation to the Constitution and its interpretations, as this helped the government retain status quo in the society with regard to race, sex and class (Sullivan 2007: 1). This did not sit well with women, because their political and legal identity was defined by the Common Law rules that oppressed and repressed them.

However, on the other hand, Karst (1989) argues that society teaches women in thousand ways to live up to the image of womanhood (Karst 1989: 106). They are expected to be dumb, helpless, submissive, lacking in credibility, inferior, deferential, narcissistic, followers, self-abnegating and childlike (Karst 1989: 106). This social portrayal of a woman results in non-participation in public life, denial of respect and responsibility in the social discourse. It also results in robbing her of her true individuality. Pursuant to this, Karst (1989) argues that the social definition of a woman has been constructed around the needs of men and the public order subordinates women so as to allow men to use women for their own purpose and utility (Karst 1989: 107). Historically, it is often law as a public institution that is put to use to control women for the purpose of men in the society, as laws exist on everything such as marriage, marital property, divorce, illegitimate children, abortion, rape, prostitution, contraception and responsibility for children. Even private methods such as discrimination in employment and sexual harassment at workplace have also been put to use to keep women confined and within limit (Karst 1989: 110).

In the context of this relegation, subordination and subjugation of American women, a convention on women's rights was held in Seneca in 1848 to end such discrimination against women and secure equal citizenship for them. The

declaration that was issued at the end of the convention demanded the right to vote for women, revision of laws on marriage and property and elimination of discrimination at the workplace. The Declaration of Independence that goes off with the words 'all men are created equal' was reworked to 'men and women are created equal (Karst 1989: 111-112). Referring to an American Supreme Court decision in which a regulation that denied hiring of women as guards in prisons was challenged, Karst (1989) argues that even though formal equality had been granted to women, the judges were still in the old frame of mind where they regarded women as vulnerable beings, incapable of doing what men could do, as the court upheld the validity of the regulation, denying relief to the petitioner (Karst 1989: 111).

As far as India is concerned, I have talked about the colonial jurisdiction in the preceding chapter and I will discuss the contemporary one in the chapters to follow. I, however, wish to point out the following. Indira Jaising (2013) argues that colonial laws and "inherited jurisprudence" that remained in force in independent India to govern her people had "devastating consequences", particularly for women. According to her, woman as an individual in India has little value. Her claim upon the Indian state to correct all that drives her into a condition of worthlessness has become entangled in the crisscross of religious groups.

For instance, as far as the condition of the Hindu woman as a wife in wedlock is concerned, it is argued that she enters into it in perpetuity, till death, because in Hinduism, marriage is a sacrament, not a contract as it happens to be in other faiths. 'According to Indian culture and tradition,' said Chandra Shailani in Lok Sabha in 1976, 'marriage is a sacred and eternal bond. When a man and a woman enter into marriage, our culture and civilisation tells them that only death can separate the two' (cited in Gangoli 2007: at 37).

The codified law on Hindu marriage has respected such glorified view of Indian culture, tradition and civilization without attending to the fact that it could become a factor that could enormously contribute to the oppression of women. The Hindu Marriage Act, 1955 lays down in Section 9 the ideal of wedlock, that is, neither of the spouse should withdraw from each other's "society" without a "reasonable excuse", and if it so happens, the court is there to grant relief to the aggrieved party. It (the court) is empowered to commit the erring spouse back to the society of the relief seeking spouse.

The cultural and civilizational heritage that we take special and particular delight and pride in is even further promoted by the judiciary. In *Smt. Tirath Kaur* v. *Kirpal Singh* (1964)[12], the court held that, "Under the Hindu law, a wife's duty to her husband is to submit herself obediently to his authority, and to remain under his roof and protection. She is not, therefore, entitled to separate residence and maintenance, unless she proves that by reason of his misconduct, or by his refusal to maintain her in his own place of residence, or for any justifying clause, she is compelled to stay away. It is not possible to accede to the contention that because the wife's work compels her to live away, and she is not willing to resign from her job, the husband should content himself by visiting his wife whenever he wishes to live with her, or co-habit with her, or by her coming to live with him occasionally" (cited in Gangoli 2007: 58).

Furthermore, the Indian Penal Code of 1860, the colonial piece of legislation seeks to keep sexuality within the precinct of wedlock by criminalizing and penalizing adultery and espousing and promoting the patriarchal project of chastity and virginity with regard to women in particular. Section 497 of the said

[12] *Smt. Tirath Kaur* v *Kirpal Singh* (AIR 1964 Punj 28)

Code serves this role. Gangoli (2007) states about the provision that the principle that has been drafted into the said Section exemplifies brahminical patriarchy, where the connection on the man to the wife of another amounts to adultery. It is not zeroed in on fidelity only. The Section even takes away the agency of women with regard to sexuality, commodifying and placing them under the control of husbands (Gangoli 2007: 61).

What this time honoured pride and stance of law with regard to women conceives of them is that a woman is a creeper or a servile creature having no right to her independent existence. Particularly because of this, the feminist strand of jurisprudence argues that law is a patriarchal institution with a particular proclivity of being conservative, that promotes and protects male interests. This masculine tilt of law is a matter of deep concern among feminists who ardently and passionately champion the radical change and even the complete annihilation, if necessary, of such legal systems that hold them in subordination.

In fact, it is often suggested that law as an institution is not useful for gender justice and sex equality (Smart 2002: 2). Carole Smart (2002) argues that law as an institution is a “signifier of masculine power” (Smart 2002: 2) and there is a linkage between law and masculine culture, which is why law is “so deaf” (Smart 2002: 2) to the core feminist critique and concerns being taken on board. According to her, it serves as a tool to exclude the knowledge and experience of women upon whom it, though, exercises power. Referring to it as "malevolent" (Smart 2002: 2), she prompts women not to overlook and ignore law but to make it an object and target of attack. In the process, they will not only hit the law; but along with it, they will hit much of the masculine wherewithal and paraphernalia that comes with it (Smart 2002: 2).

In order to end male domination or patriarchy, Henderson (1991) argues that there is a need for 'dismantling its legal form' that keeps it in place and even perpetuates, produces and reproduces this patriarchal phenomenon further down across the society (Henderson 1991: 412). Thus, those seeking annihilation of legal edifice that harnesses patriarchy must fight against its social, economic and political manifestations and the feat is to be accomplished with or without the help of law (Henderson 1991: 412). .

Likewise, pursuant to Foucault's thoughts, Nivedita Menon (2004) argues that law holds a limited potential and promise to bring about an equitable and just social order and so also the emancipation of women, particularly because the sex injustice that has ensued across the society has originated from unequal power relations between sexes and the existing juridical order can only correct power relations to the extent to which it recognizes, perpetuates and harnesses unequal power structures. Not much beyond that, and that does not qualify for gender justice. That is too limited a capacity of law to live up to the cause of women's or the feminist project, as the regulating and controlling of women that is happening in today's scenario has not only been happening through the power of existing juridical order; much of it is being performed by that which lies outside the formal legal system and even state apparatus – techniques, normalization and controls – which constitute contemporary "forms of power" and not only oppress but also produce and regulate identity. As a matter of fact, law ultimately becomes a technique in facilitating all what is incarcerating and unjust to women. Since the commitment of law is to regulate in particular, it, by that reason, amounts to normalizing, because what it seeks to regulate, it also seeks to normalize, fix and universalize.

Thus, according to Menon (2004), law operates as a mechanism that disables the "ethical vision of feminism". She argues that: "more starkly put, our attempts to

transform power relations through the law tend rather to resediment them and to reassert dominant values." (Menon 2004: 204-205). The existing legal space, she further argues, is a site where different and disparate notions of rights exist and clash and compete against each other, but law in its ajudicatory capacity rejects them all in preference to the one to premise its view that lives up to and comports with the dominant norms that prevail at the time. It seeks to establish uniformity and eliminate ambiguities. In that particular sense, law as an institution diminishes ability and vitality – in her own words the "ethical impulse" - of subordinate groups to demand and secure justice for themselves. It is because of this, she states that, "The overwhelming legitimacy accorded to the legal discourse makes it impossible to engage with it except on its own terms." She further states that this makes it clear that "Feminists as well as other social movements may have reached the limits of the emancipatory potential of the language of rights which gives us an entry point into the realm of law" (Menon 2004: 208).

The preceding account makes it clear that law by itself is on the anvil, under the incessant hammer blown by feminists owing to its gendered and patriarchal nature and its miserable capacity to incorporate the female sex within its conceptual as well as practical architecture. Because of this, the proposals not to use law to fight gender discrimination remain afloat in feminist discourse. However, within this discourse too, there is an overwhelming feeling, the total eclipse over law in feminist politics is not possible. What is required to be done instead is that it must be engaged and challenged as a system of knowledge (Smart 2002). Feminist engagement with law is important, particularly because feminist pedagogy upon traditional law can only be done when we are prepared to engage with it (Barnett 1997: vi-vii). I shall henceforth enquire how this engagement of feminism with law has been happening.

There have been three stages, Binion pointed out in the American context in 1991, of the evolution of feminist jurisprudence over the last 20 years. The first phase was characterized by the demand for gender neutrality in public policies. The second one was focused on scrutinizing the impact of public policies on women as a social class. And the Third one was characterized by the demand of including women's values and experience in the constitutional jurisprudence (Binion 1991: 208-209). According to Binion (1991), the third stage of the evolution had sharpely differed from its preceding counterparts, the first and the second stages, in the sense that this feminist jurisprudential endeavour was quite energetically committed to women's rights and the central thrust was on the aspect that to the extent to which women were different from men in their needs, values and experience, that difference must be recognized in all private and public institutions including law as an institution. Thus, another equally salient feature of the stage in question was its broad commitment to integrating women into law and legal system (Binion 1991: 210).

Feminism was important in law in order to ensure the identification of the “remaining legal disabilities” (Barnett 1997: vi) women confront in the course of their life and campaign for eradication of those disabilities and limiting conditions so as to make sure that women are able to live their life at par with men in all respects. Equally important is the fact as to how law as an institution reflects, theorizes and even perpetuates gender based inequalities across the board (Barnett 1997: vi-vii). She further pointed out that feminist jurisprudence has now matured so much particularly with the revitalization of interest in law as a medium to remove legal disabilities of women that it is no longer possible to regard “feminist legal scholarship” as a “minority interest" (Barnett 1997: vi-vii). Thus according to her, now, at the moment, feminism is a mainstream discipline. The engagement of the same with law is essential to challenge and fight against the legal disabilities of women (Barnett 1997: vi-vii). Conaghan (2000) makes the point that there is hardly any area with regard to academics which remains untouched

from feminist legal challenge, no matter how masculine the area was (Conaghan 2000: 352). Even the feminist jurisprudential scholarship has successfully been competing with other theories of jurisprudence for having in place distinguished academic journals (Conaghan 2000: 352). What role does legal feminism play in law? Specifically, feminist jurisprudence seeks to unravel the gendered nature of law. It wants to bring the complicity of law in subordination and disadvantage of women to the fore so as to ensure social and political transformation. Most importantly, it ardently seeks to critically challenge "traditional understandings of the social, legal, cultural, and epistemological order" (Conaghan 2000: 359).

It was further thought on the part of legal feminists that it was crucial to take part in the constitutional making process in order to challenge masculine understanding and effectively and ardently promote women's agenda. “Constitutionalism is sweeping the world”, points out Susan H. Williams (2009). According to her, there were as many as 110 countries who lately were engaged either drafting their first constitutions or revising and overhauling the old ones (Williams 2009: 1). As a result of this unprecedented flurry, the demands on part of people arose under the stewardship of women for inclusion in the constitution-making process itself (Dobrowolsky & Hart 2003: 1). One of the central features of this phenomenon and process is that gender as a core issue was in the spotlight (Williams 2009: 1).

Initially, some of the feminists had doubts in the capacity of constitutionalism being able to help the cause of women, particularly with respect to equality, states Dobrowolsky (2003), but when the debate and process about reforming the existing or writing new constitutions started, women considered it appropriate to take part in this process impelled by the force of the reason that the “constitutions matter and they matter fundamentally”. Their participation in this process was also vitally important from the standpoint that their fullest agency as a collectivity

of women cannot stand represented to their satisfaction in any other way except by their own participation in this process. This was something that offered an opportunity to women to rework identities, ideas, institutions at the definitional and foundational level to their satisfaction, relieving the hardship faced by women since ages. According to Dobrowolsky (2003), constitutions are the texts of "great consequences", as they represent the country's highest ideals and principles and lay down the basic and fundamental framework that would eventually govern the country. It is therefore that constitution-making is a momentous phenomenon, which could not be lost sight of under the overhang of being skeptical about the constitutions themselves (Dobrowolsky & Hart 2003: 2).

It has been pointed out by Irving (2008) that it makes no difference whether the Constitution of a country is apparently neutral, particularly when gender is in the context; as she puts it, it impacts women: "disparately and differently" (Irving 2008 : 1). It is therefore important to have gender equity and agency as the central criterion of the process of constitutional design and architecture and at the core of which must lie the question that the consent of women, all the women as members of constitutional community, the community to which the constitution being considered would apply, is essentially required for its legitimacy. Thus gender equity and agency is the main plank upon which Irving wants constitutions being designed (Irving 2008: 1-2).

Williams (2009), however, makes the point that it is considerably useful for gender equality to pick up in a particular country, and that in its constitution, the positive as well as negative rights should be drafted. The first would enable citizens to have access to necessary resources and services that could help them fight their condition situated in penury and injustice. The latter would serve as a shield against arbitrary interference in the lives of individuals. Positive rights are specifically important for women, because they are economically poorer than men

worldwide. It is important to have such rights being written in the constitution (Williams 2009: 8). The application of negative rights under constitution is such that they can only be invoked against arbitrary governmental action or interference, not against private action or interference of individuals or entities. Williams is of the opinion that there are situations in life where the facility of negative rights is required to deal with private interference. It is therefore extremely important for gender equality being realized that negative rights should also encompass private interference under certain situations, because women face enormous discrimination being perpetrated by private employers and violence being inflicted by family members. In both situations, women do not have sufficient legal remedies to fight and fend off such private interference in their lives (Williams 2009: 9). It is thus required on the part of constitutional designers to plug off this unguarded area with necessary constitutional interventions.

As a result, Dobrowolsky (2009) argues that it is "doubly important" to have constitutional politics on part of women, especially because it is going to take a long time to reach the constitutionalism that should promote justice for women. It is because of this that it is important to engage with constitutional politics, and in the short run, it would serve as a momentous achievement and safeguard if women are able to keep country's constitutionalism open to constant questioning, criticism, dialogue, and reception of new understandings. According to her, this is precisely the "democratic constitutionalism" that accepts that all citizens should be treated with respect and dignity (Dobrowolsky & Hart 2003: 19).

Likewise, it was also felt that engagement with law at the judicial level was equally crucial for the purpose of gender equality. It has been pointed out by Baines (2004) that enormous litigating in courts on the part of women with regard to gender issues across the contemporary world is taking place. What lies in the centre of this occurrence is the desire that the existing constitutions and

constitutional law must recognize and promote women's rights. Conditions such as employment and civic rights, political participation, matrimonial and familial autonomy, freedom from discrimination, that dwarf and diminish the ability of women to be at par with men are being challenged and agitated before the judiciary throughout the world so as to make sure that the sexist injustice that persists from ages could be corrected and remedied. According to her, this is an opportune time to agitate and litigate gender issues before the judiciary, particularly because feminist scholarship has been able to engage with law as an institution for quite a long time, producing a good repertoire of feminist jurisprudence and legal theorizing that could contribute to gender issues being litigated in the court rooms. Second, the process of women's constitutional rights being recognized had started during the 20th century. This process should continue in its most effective current even during the 21st century that also makes it an opportune and relevant time to engage law for gender justice through the litigative process (Baines et al 2004: 1-3). The endeavour will be tough particularly because there is a considerable gap as to which facts judges and feminists rely to reach a particular decision in a given context. In the same manner, they differ in terms of their goals, usage of terminology and process of reasoning with regard to gender equality. It is because of this particularly, says Baines, that the "challenge is complex" ahead (Baines et al. 2004: 3). She, however, believes it is important to stitch a relationship between feminist theorizing and constitutional reasoning in a piecemeal way instead of forcing it down the throat in one go. Equally important is to place the focus on the feminist constitutional programme that respects some degree of flexibility (Baines et al 2004: 4).

Thus, law is the part of the problem rather than the solution for gender equality. One realization explicitly makes it conspicuous that it cannot ever be part of the solution. The other is a bit sanguine and has been challenging its male assumption to achieve gender justice. Narrowing down my discussion to the single theme as

an illustration in this regard, I shall examine formal equality in the section to follow, one of the most important norms of mainstream law, demonstrating how deficient it is for social justice.

4. Formal Equality

Justice is understood to be rooted in this normative foundation that it is committed to "achieving a fair distribution of benefits and burdens" (Brown 2009: 5; Rawls 200: 47). However, Nussbaum (2006) argues that most of the theories of justice available today have "culpably" been unconcerned and apathetical to the demand of gender and sex equality, and so also to the hurdles that exist in the path and pursuit of that equality (Nusbaum 2006: 1). This is quite a telling statement on how inadequate theories of justice have been in the context of women in particular. Against this assertion, I wish to study and examine a notion of justice lately popular in our contemporary legal sphere and arena. Catharine A. MacKinnon (2006) has stated that the equality approach which, at the moment, dominates the world's legal and constitutional sphere, comes from the West and it prompts to treat likes alike and unlikes unlike (MacKinnon 2006: 181). In contemporary discourse, it is referred to as formal equality. Deployment of this notion in the justice process, it is often pointed out, is capable to define justice (Lyons 1966: 146). Before I proceed further, however, it is important to know what formal equality denotes. This notion of justice, as I have pointed out, comes from Aristotle who had believed that those who are "radically unequal are not the primary subject of justice" (Johnston 2011: 63). His notion of justice was mainly operative and applicable in the context of men who were free and had been relatively equal to one another (Johnston 2011: 63). In his treatise 'Politics', Aristotle had pithily summarized and stated his idea of justice thus: "what is equal appears just, and is so; but not to all; only among those who are equals: and what is unequal appears just, and is so; but not to all, only amongst those who are unequals" (Book III.IX).

This is the Aristotelian notion of justice. What does it mean? The question is important, as this notion of justice, as I have pointed out above, informs our contemporary legal sphere. It was, in fact, pointed out by Sidgwick that this species of equality is conceptually implicit in law (cited in Rawls 1999: 51), which becomes expressed in the rule of law. In this incarnation, that is to say, in the incarnation of rule of law, the formal justice or equality is interpreted and understood in terms of "adherence to principle, or as some have said, obedience to system" (Rawls 1999: 51).

This, of course, brings an important aspect of formal equality to the fore. But it does not shed light as to what this Aristotelian principle of formal justice holds within its conceptual and doctrinal precincts. That enquiry is important, among other things, for the purpose of generally understanding and seeing who are the subject matters of equality and who stand excluded from this Aristotelian pantheon of justice and upon what criterion.

Formal equality encapsulates and represents a formula (Pojman 1995: 1-2) which, as he puts it is "Treat like cases alike, different cases differently" (Pojman 1995). Within this notion, the idea of categorization is implicit, which in other words means that this concept of equality operates in a category of equals. Shin, in a succinct manner, puts it thus: "Formal equality demands only that like cases be treated alike under *some* consistently applied criterion of likeness" (Shin 2009: 151). In other words, the formula underpins the idea of the equality of treatment among likes on the basis of some kind of likeness criterion. The criterion of likeness is required to be located in the consistent application. Thus, the concept of formal equality encompasses treating "similar cases similarly" (Lyons 1967: 146). It was further put by Graycar (2008) thus: "The principle that likes should be treated alike is usually according to established norms" (Graycar 2008: 107).

In short, equality of treatment among likes is required to be rooted in conformity with the 'established norms'.

MacKinnon (2006) puts formalistic equality thus: "Equality means treating likes alike and unlikes unlike. What is implicit within it is that the two must not be muddled together. The implication it holds, MacKinnon carries on, is that as per this notion, the classification of people is of paramount importance and what is prohibited is unreasonable and arbitrary treatment among the members of the same group and if the treatment of this description takes place, it breaches the formal notion of equality. Similarly, it can classify certain people on the basis of some difference in a group and permit a particular kind of treatment. That would also amount to being equality under this principle (MacKinnon 2006).

That's the idea of justice under the notion of the formal and Aristotelian equality. But the equally allied question is as to what, then, undergirds the idea of inequality and injustice under this notion. The answer in short is that the injustice results under the notion particularly when equals are treated unequally and also when unequals are treated equally' (Pojman 1995: 1). In other words, it is crucial to bear in mind that if A and B are equal in some respect, this formulaic criterion requires that both A and B should be treated alike as far as that respect is concerned. Giving them different treatment in the respect would be unjust. When this formula is put to use in the context of distributive justice, it requires that those who are equals should be given equal share and those who happen to be unequal are supposed to be given unequal share. Take it whichever way, the equality of treatment among equals is its crucial and salient feature. This equality of treatment is embedded in the concept on the reasoning that "justice inheres in consistency" (Fredman 2011: 2), that likes should be treated alike **(**Williams 2009: 9). Thus, this formulaic equality lays down "giving equals equal shares and unequals unequal shares. “Treat like cases alike, different cases differently"

(Pojman 1995: 1). In other words, this notion of equality hinges and thrives upon this logic that fairness, impartiality, neutrality and being appropriate are crucial components of equality. It is required under the concept that irrelevant consideration must not corrupt its analytical discourse and proposes procedures being put in place that treat every individual in the same and equal manner (McGann 2006: 12).

The above description makes it clear that the notion of formal equality is premised on the imperative that likes should be treated alike and unlike unlike. According to Aristotle, this approach leads to justice. However, the verdict of the American Supreme Court in *Plessy* v. *Ferguson* (1896)[13] does not support this assertion. Having obtained a ticket for travel, Plessy entered the passenger train in Louisiana and occupied the vacant seat in a coach which was reserved for the passengers of white race. He was asked by the conductor to take the seat reserved for black passengers, vacating the current berth meant for his white counterparts. The petitioner refused to comply to the order. Upon this, he was taken down from the train and jailed. The Constitutionality of the Louisiana enactment that permitted the action in question was challenged on the ground that it was violative of the 13th (the abolition of slavery) and 14th (the American equal protection Clause) Amendments of the American Constitution. The dispute reached the country's top Court. The Court said that the legislation that only underpinned legal distinction, which was founded in the color of the two races, had no propensity to wreck and devastate the equality of two races. Thus the Louisiana law did not constitute violation of the 13th Amendment of the American Constitution.

So far as the 14th Amendment was concerned, the Court acknowledged that the aim of the said Amendment was of course to bring absolute equality of two races before the law into force. The Court, however, refused to accept that law as an

[13] *Plessy* v. *Ferguson*,163 US 537 (1896)

institution could achieve this end by having enforced equality. The Court said continuing further: "But, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either" (*Id.*: p.163). From this, there are two things that become apparent. First, according to the Court, distinction founded in skin color was permissible under the equal protection Clause and second, social and political equality were two distinct things. The equal protection Clause could target the latter, but not the former.

The enforced separation, Plessy argued, heaped a sense of inferiority and humiliation upon the colored race. Responding to this, the Court said: "the colored race chooses to put that construction upon it" (*Id.*: p.163). This problem had nothing to do with the law in dispute, the court further added. Thus the doctrine of separate but equal accommodation enshrined in the enactment was upheld by the American top Constitutional Court.

The reading of Plessy v. Ferguson [14] makes the like-unlike criterion and categorization embedded in formal equality imagine not as a source of justice but a source of injustice. Justice Harlan who gave his dissenting opinion captured it well when he pointed out that it was incorrect to assert that the purpose of the law in dispute was merely to lay down a rule that would apply to white and black citizens alike, and not discriminate against either race. Justice Harlan observed: "Everyone knows that the statute in question had its origin in the purpose not so much to exclude white persons from railroad cars occupied by blacks as much as to exclude colored people from coaches occupied by or assigned to white persons" (Plessy case 1896).

[14] *Plessy* v. *Ferguson,*163 US 537 (1896)

Even at the present juncture, in contemporary time, this understanding of equality has severely been put under criticism, as it fails to redress historical injustices, oppression and subordination suffered by social groups throughout the world. For instance, as Swidorski (2003) points out in the American context itself that the notion of formal equality refuses to recognize and acknowledge the "historical and particular specificity of the lived experiences" (Swidorski 2003: 112). Bedi (2010) explains it better. Suppose there is a law that permits discrimination in favour of black people, the formal equality in the United States requires strict judicial scrutiny, particularly because the law in question raises the initial presumption of being invalid ab initio, as the discrimination on the basis of race in the country stands outlawed. What it holds is that The American judiciary strictly applies the notion of formal equality dispassionately in the context of White and Black people with equal and clinical detachment. The formal equality criterion does not recommend and projects itself to know whether the social group against whom the concept is applied is in minority or majority (Bedi 2010: 545-546). Thus the point that becomes conspicuous is that the principle of formal equality is generally poised against knowing historical injustice, discrimination, oppression and subordination. Icy application of this notion in the context of subordinated social groups makes it uninviting concept of equality.

Thus, a formal conception of equality establishes initial conditions of equality at the very first rung of the society (Anagnostou 2013: 134-135). Thereafter, it proceeds to treat men and women alike (Anagnostou 2013: 135). Preferential treatment on the ground of sex is not an agreeable proposal under the concept (Anagnostou 2013: 136). It is because of this, Anagnostou points out that the application of similar and equal treatment may further worsen the gender divide and social disparities (Anagnostou 2013: 135). I shall here take up the feminist critique of the formal equality in brief, which I will further pursue in the next section along with substantive equality.

5. Feminist Critique of Formal Equality

Hunter (2008) states that "(f)ormal equality expresses the Aristotelian principle that likes should be treated alike, and requires that everyone in the same circumstances be treated according to their individual merits, *without regard to sex* or other 'irrelevant' characteristics" (Hunter 2008: 4, emphasis mine). From this, what becomes tentatively apparent is that the Aristotelian equality is 'without regard to sex'. It appears that it is a proposition of doubtful merit. Aristotle did not include women in his notion of citizenship (Heater 2004: 121), his other pantheon of equality, and neither did he consider them worthy of his notion of justice. Jonston (2011) states that "(t)he concept of justice in Aristotle's theory applies primarily to a set of relations among men who are free and relatively equal to one another" (Johnston 2011: 63). It constitutes a clear indication that the Aristotelian principle of justice, that is, formal equality, has complete and absolute regard for the male sex. Likewise, it is also evident that there was little to no regard for the female sex in the Aristotelian conception of justice. In other words, Aristotelian principle of justice appears to be situated in a superfluous consciousness of sex identity.

MacKinnon (2006) has put it powerfully from the feminist perspective. According to her, the formal model of equality began to take roots when women were not treated equal to men, the latter who excluded women from all public life – voting, public offices, gainful employment - confining them to the home. Thus, the understanding of formal equality, by the force of its own context, was not premised on the idea of equality of sexes. Women were thus never a part of the imaginings of formal or Aristotelian model of equality, rendering it a severely inadequate framework for the pursuit of gender equality in particular (MacKinnon 2006: 181-184).

Neutrality is often understood to be embedded and wired in the formal notion of equality. For instance, Helen Irving (2008) points out that the notion of formal equality that is often found embedded in gender equality provisions of constitutions, promises the same opportunities, rights and conditions to women as what it promises to men. Thus, it holds men and women alike in its dealing, offering to both sexes equal and same treatment (Irving 2008: 2). Countering views of this nature, Barnet (1998) argues that it is problematic, because it is not correct to assume that equal treatment would necessarily benefit all; all may even suffer as a result of formal equality based on equal treatment (Barnet 1998: 117-118). In fact, Anatole France once stated, "... to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread (cited in Fredman 2011: at 1). Upon this, Fredman commented that, "Anatole France graphically depicts in the above quotation, a law which appears equal on its face bears far more heavily on the poor than the rich" (Fredman 2011: 2). Thus Barnet (1998) argues that it is the "biggest fraud" of liberalism that men and women are equal or "equally equal. According to her, the assumption is fallacious, as only the male voice within the society is still respected. She states that this phenomenon is visible nowhere else but in the legal system. (Barnet 1998: 124).

Secondly, even if formal equality has been bestowed upon women, it does not mean that sex and gender justice and equality has been reached and achieved. Factors still exist that make it unattainable for women. Karst (1989), for example, argues that though women have attained formal equality, there are a great number of social features that render this formal equality meaningless in the context of women, as the social barriers that deny equality of women are beyond the direct reach of formal equality (Karst 1989: 104-105). In the particular context of India, it is explained with an appropriate pertinence by Indira Jaising, a prominent lawyer in the country. She points out that "(t)he Indian supreme court in private

sphere is persistently unwilling to step in and veto down personal laws that make women unequal and perpetuate and institutionalize discrimination against them within the said space (Jaising 2013: 242). Jaising says that till date, the Supreme Court has not struck down any legislation that is related to personal law in a constitutional challenge. In such a situation, what it does is to "dodge the constitutional question of discrimination inside the four walls of the family" (Jaising 2013: 239)."Additionally, as and when the necessity arose to balance fundamental rights and personal laws or freedom of religion in the context of sex, equality and gender justice, religion has prevailed over Fundamental Rights thus far (Jaising 2013: 239).

MacKinnon (2006) is also deeply critical of the formal notion of equality and brings it under scathing attack. She says it is unidirectional and conceptually and otherwise inadequate to attend to the full range of inequalities faced by women (MacKinnon 2006: 181). They face rape, prostitution, sexual harassment, domestic violence, unemployment so on and so forth, "with equality law standing there on the sidelines." (MacKinnon 2006: 182) The formal model of equality does not treat and recognize such incidents as examples that constitute and reflect women's unequal position in the sex hierarchy and society. Most societies regard such incidents as regrettable and even criminal but not something that exemplify women being unequal (MacKinnon 2006: 183-184). The aspect of hierarchical sex relation is further illustrated in the Indian context by Nivedita Menon (2012) who gives a graphic example of how women may experience a relative powerlessness in the existing state of affairs. She states that any woman reader of her book is likely to be in a stronger position in comparison to working class men, or if high caste, as compared to men of lower castes. But she herself feels powerless particularly on two grounds. First, when she is sexually attacked by any man regardless of caste or class and second, when she compares herself and her choice and autonomy with the men of her own class. Menon argues that hierarchical social formation around gender is the key to maintain social order

(Menon 2012: viii).

Thus, gender inequality is not a matter of equality of treatment or deployment of neutral principles over sex identities. Neither is it a matter of whether women are the same as men or different from them. It is a matter of hierarchy. It is a matter of unequal power between sexes, men and women. MacKinnon says, for instance, that she keeps reflecting "all the time about power" (MacKinnon 1987: 3), as gender inequality, in actuality, is "more an inequality of power than a differentiation" (MacKinnon 1989: 218; also see MacKinnon 1987: 8), that is to say, it is a "social status based on who is permitted to do what to whom" (MacKinnon 1987: 8), as opposed to the understanding that this inequality originates from the fact that women are different from men. She, in fact, makes the point that men are also equally different from women. According to her, the difference is nothing but "velvet glove on the iron fist of domination" (MacKinnon 1989: 219). It is a ruse. It is a stratagem in male supremacy, where differences, she says, are "defined by power" (MacKinnon 1989: 219).

The central feature of this male domination and power was expressed by Stoltenberg (2004). He argues that not only the arbiter of the worth, knowledge, and identity of man is man but also that of entire humanity cutting across sexes, and points out the oddity that although the men during their infancy and boyhood are raised and brought up by women, they do not consider women worthy of having to offer any assessment about their worth, knowledge and identity. Man goes to man for his self-worth, knowledge and identity being adjudged, conferred and validated. That is straight away masculinity, a male cultural norm rooted particularly in power, privilege, prestige and prerogative (Stoltenberg 2004: 41). It is not correct, he says, that the male power in culture is an outcome of natural biological impulse for aggression on the part of men. This male power, he believes on the contrary, is an outcome, as he describes it: “masculinist genital

functioning is an expression of male power in the culture." (Stoltenberg 2004: 41) What is implicit in it is that the functioning of male sexual organ is governed by the male power that permeates and pervades the culture. Masculinity thus is nothing but purely a learned behavior taught, validated and revalidated every moment by patriarchal social order (Stoltenberg 2004: 41). It is interesting, he points out, that before men know and learn sexual intercourse, they are in the grip of the fact that they belong to the "Supreme" gender holding power, privilege and prestige. This fact becomes reflected during the moments of physical intimacy where male power and privilege is on full display preferring "genital operability" to "authentic sensations" (Stoltenberg 2004: 42-43).

Thus, as MacKinnon put it" Gender is a power system" (1987: 14), within which women enjoy less power (1987: 14). Whereas along with respectibility, education, speech and money, men also have access to women for sexual purpose in this male supremacy (1987: 14). On top of it all, MacKinnon argues, employing the western context that "White men have retained even monopoly over the meaning of principle of equality and its interpretation in his own hands to affirm and perpetuate his own white and male cultural values as standards in the society (MacKinnon 1987: 63). For instance, she points out that regrettably, the notion of formal equality at its operation is a medium that helps maintain status quo in hierarchical social order, where particularly those who are elite and influential, and just as different from subordinated groups as the latter from the former, yet they do not face discriminatory treatment on the basis of their difference in pursuit of subordination free and egalitarian social order (MacKinnon 2006: 187).

Now the question arises, can the concept of formal equality wipe away grave power imbalance in sex and gender relations? For instance, Kapur and Cossman (1993) begin with the analysis of the principles that are put to use to interpret constitutional provisions on equality by courts and reach the conclusion that

similarly situated test, a test of interpretation that seeks to treat likes alike and unlikes unlike, is inadequate and deficient to eliminate discrimination against women in the society, because the test is only targeted at ruling out discrimination only among those who are similarly situated and circumstanced, not among those who are dissimilarly or unequally situated and circumstanced in the social discourse (Kapur & Crossman 1993: 41), which is ridden with gender power imbalance. Kaufman summed it up thus: "So long as society remains riddled with power disparities between men and women, and so long as patriarchy remains deeply embedded in the culture, formal equality theory will fail to achieve gender justice" (Kaufman 2006: 618). In the section to follow, henceforth, I shall discuss an alternative conception of equality, which is somewhat tilted in favour of being result-oriented, instead of being clung and latched on to doctrinal standards and principles. It is understood to be roomier and more accommodative for the project of gender justice and equality.

6. Substantive Equality

Substantive equality constitutes yet another expression of justice. It is, as Kaufman puts it, a "very different theory of equality" (2006: 560), when compared with its formal counterpart. It is not obsessed with the like-unlike criterion. The passion of substantive equality is to go behind the 'facade of similarities and differences' (*Quebec* v. *A*, 2013: para. 217 [15]). From the perspective of gender justice, the main concern and commitment of substantive equality is to recognize differences between two sexes, that is, men and women. Pursuant to this enquiry, the substantive equality demands that the "unequal consequences of those differences" (Kaufman 2006: 560) must be redressed and remedied. It is quite a recent and contemporary principle in the theoretical and

[15] *Quebec (Attorney General)* v. *A*, 2013 SCC 5

doctrinal repertoire of justice and in the lexicon of equality jurisprudence. (Baines 2005: 77).

It is obscure and little known as to when, how and where this principle of substantive equality as a phrase originated. However, the first reference of the phrase, possibly, may be the one, which was made in January 1985, by Professor Jill Vickers, a political scientist, at the National Symposium on Equality Rights in Canada. She had employed it arguing that substantive equality had been presenting a considerable challenge to liberalism. It was, thereafter, put to use by Professor Mary Jane Mossman in a research paper and it also came to be used in a book titled as *Charterwatch,* which was a paper collection of presentations over the year 1984-85 and published in 1986 as a book. The phrase was also employed by Colleen Sheppard, Peter Rogers and Sheila Noonan in their papers. But none of these scholars disclosed as to what was the source of this phraseology (Baines 2005: 78). Baines, however, points out that it is likely that substantive equality as a term and concept of justice may have had its origin in the American equal protection literature, as the conversation about the substantive equal protection in 1949 was audible in the United States (Baines 2005: 78). Anyway, this concept of justice was not adopted by the American judiciary despite having had the early academic engagement with the principle of substantive equality. Contemporary American jurisprudence hardly has any discourse and history of substantive equality (Baines 2005: 79). Currently, the notion of substantive equality can be found in the Canadian, South African and Indian jurisdictions (Baines 2005: 79).

Be that as it may, the important and crucial question is as to what substantive equality consists of and how it holds itself better over formal equality. There is no water tight definition of this concept. However, Graycar (2008), defining substantive jurisprudence, had said that: “a jurisprudence that recognizes structural differences and disadvantages between groups, and requires that the experience of non-dominant groups be incorporated into the formulation of legal

norms, in order to overcome disadvantages and produce substantively fair results" (Graycar 2008: 107). Thus the concept of substantive equality, according to Graycar, is located in the recognition at the jurisprudential level that the structural disadvantages and differences exist and persist among different groups in society. There are some groups who are influential and dominant and there are some groups who are disadvantaged and non-dominant. Particularly, experience of those who are disadvantaged and non-dominant is required to be absorbed and assimilated into the formulation of legal norms. The purpose of doing so is to frustrate and thwart the disadvantages, producing substantively just and fair outcomes for the subordinated social groups. I shall focus in brief upon two aspects of the above definition, that is, structural discrimination and disadvantage and the second, legal norms.

The important element embedded in this definition is structural disadvantage. This discrimination is "built into the nature of formally gender-neutral institutions and cultural practices" (Williams 2009: 57). Hidden in neutrality, this discrimination constitutes a systematic disadvantage for women (Williams 2009: 59). Particularly from the constitutional perspective, Williams points out that structural issues encompass: First, the division of power vertically (i.e., federalism and local government) and second, horizontally (presidentialism v. parliamentarism). Third, the power and composition of the judiciary. Fourth, states of emergency. Fifth, the electoral system. And sixth, the role of the military (Williams 2009: 6). According to her, at times, it is possible that a specific structural choice is preferable to others from the standpoint of gender equality. For instance, she points out that women perform better in proportional representation electoral systems as compared to the first-past-post electoral system (Williams 2009: 5).

Likewise James Hodgson and Debra Kelley (2002), calling it systemic discrimination, state that structural discrimination occurs when there is an invidious and adverse impact of the inherent and connatural social, political, cultural and economic customs and the customs of organizations upon historically disadvantaged social groups, who confront prohibition and denial of "full societal participation and consideration" (Hodgson & Kelly 2002: 5) on account of this disabling impact. They define this invidious discrimination as the ″differential and unequal treatment of a group, deeply embedded in social, economic, and political institutions" (Hodgson & Kelly 2002: 5). This discrimination results particularly from "structure and functioning of public institutions and policies" (Hodgson & Kelly 2002: 5). Discrimination of this nature, they argue, hits and inflicts disadvantaged social groups with inequality of opportunity and condition, which is produced and accumulated over the period of time, that is, over the successive generations. The recognition and detection of the existence of this discrimination in social order is hard and difficult particularly because it has "latent application and practice within our social, economic, and political apparatuses" (Hodgson & Kelly 2002: 5). Even those who are victims of systemic discrimination cannot identify it with ease. It could mostly be spotted with trained eyes with minutely examining and surveying the macro picture so as to be able to locate those social, political and economic barriers that may have been operating to adversely affect and immiserate social conditions and circumstances at the micro level of the society. Another aspect of this discrimination is that it causes the exclusion of people from equal participation and access in and to particular institutions on the ground of gender, religion, race, class and ethnicity. At its worst, this systemic exclusion may assume the form where the "interaction of the various spheres of social life" would happen particularly in order to maintain and retain an "overall pattern of oppression" (Hodgson & Kelly 2002: 5).

Thus, substantive equality seeks to put disadvantage in the spotlight in order to redress and remedy it and secure equal social order (Kapur & Crossman 1993:

41). In other words, this model of equality is 'directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political, and cultural participation in society. (Kapur and Crossman 1996 cited in Kaufman 2006 at 560). Along with it, this model of equality lays emphasis on eliminating social, economic and educational inequalities through the application of positive measures (Kapur & Crossman 1993: 41).

Likewise, this notion of equality is furthermore committed to eliminating and leveling out historically accumulated inequalities and subordination. The implication is that social groups in society are unequally placed in terms of their capabilities owing to the injustice meted out to them in the past (Hasan 2000: 91-2). Particularly in the context of women, Engel's saw historical processes as the source of gender inequality, instead of biology (Sangster 2014: 17-8; Murphy 2004: 7). Thus the injustice and inequality we witness in society today is the result of history. Substantive equality seeks to correct this malady and scourge of history by realizing ideals of equality for all of those who have historically been denied equality (Amar cited in Zietlow 2006: 165).

Hasan points out that the deployment of existing principles of equality in a scenario of historically harnessed injustice and inequality, could further exacerbate the situation, as by way of these principles, the attainment of equality of outcomes would have become an uphill task (p. 92), as the commitment of formal or liberal notion of equality is majorly located in neutral process of law or these principles (Zietlow 2006: 164-5). Conceptually, this notion of equality is meant for correcting and remedying equally and similarly situated members in a particular category. In the light of all this, I shall now briefly touch upon the second aspect of substantive equality, that is, the legal norms and standards that are put to use in contemporary equality discourse.

As I have discussed previously, contemporary equality in the legal sphere has largely evolved in Aristotelian tradition, where equality of treatment in terms of like-unlike criterion is centrally linked to the conceptual architecture of this equality (Jaising 2013: 231; Kaufman 2006: 559; Mohanty 2011: 2). However, when gender classifications were legally challenged in the courts in 1970s and 1980s, particularly in the United States, the theoretical and practical limitation of the formal model of equality became apparent (Rhode 1989: 82). At the theoretical level, this model of equality permits different treatment for those who happen to be different with regard to a valid objective and legitimate purpose. (Rhode 1989: 82; Kaufman 2006: 565). However, what remaines undefined till date is as to what constitutes "legitimate purpose". And second, neither is it numerically and conclusively determined as to how many and which of the differences would be relevant for legal distinctions upon which a class or category may rightfully come into being (Rhode 1989: 81).

In fact, there is hardly any coherent and persuasive definition that could precisely relay and convey as to what constitutes "difference" (Rhode 1989: 82). The overwhelming obsession with the concept of difference, actually, did not remedy the problems it sought to remedy. The difference in the legal sphere is manufactured and produced, employing essential and inherent distinctions rooted in culture and contingency.

Likewise, even personal properties rooted in biological sex identity have judicially been deployed to place restrictions upon employment opportunities of women on the one hand (Kaufmen 2006: 564; Rhode 1989: 82) and on the other, the same biological properties have not been roped in putting in place measures that could prevent pregnancy discrimination in the work environment (Rhode 1989; Kaufman 564-65). Thus, the deployment of these biological differences did

not happen from the women centric point of view. Though there may be some requirement of classification and differentiation, the way the concept of differences and distinctions in the legal arena has been employed shrouds and obscures disadvantage that results from the particularized application of these very differences and distinctions. For instance, all too often, the legal discourse is obsessively pervaded and preoccupied with the sameness-difference debate - whether women are just the same as men or different from them. The most problematic aspect of this debate is located in the fact that in both scenarios, men are the standard, because in order to determine the issue of sameness or difference one way or the other, the comparison would take place against men in either case.

Take for example, in the particular context of sex discrimination, this liberal variant of equality epistemologically presupposes that "sexes are by nature biologically different, therefore socially properly differentiated for some purposes" (MacKinnon 1989: 218). The direct implication of which is that the differentiation between sexes, men and women, is normally anchored in "natural, immutable, inherent, essential, just, and wonderful" (MacKinnon 1989: 218) biological criteria and parameters. So within this notion of equality, sex discrimination does not encompass women's subordination. The notion only acknowledges and recognizes in general that along the way, law and society, both, have possibly ended up in creating "some arbitrary, irrational, confining, and distorting distinctions" (MacKinnon 1989: 218). Only distinctions of this nature are understood as inequalities under this notion, which sex discrimination law seeks to target and remedy (MacKinnon 1989: 218). MacKinnon argues that this formalistic notion of equality is problematic for sex equality and gender justice, as it is, firstly, too narrow and fundamentally flawed in its conceptual project. From the feminist perspective, she argues, that gender is essentially rooted in inequality of power as compared to differentiation of sexes.

Owing to this fundamental flaw, MacKinnon, as opposed to the formal model of equality, which legitimizes and masks male dominance over women (MacKinnon 1989: 237), put across her alternative approach of gender and sex equality, which she named as the "dominance approach" (MacKinnon 1987: 40).

Within the formal equality discourse, the story to the gender differences between the two sexes is roughly proposed along the lines that: On the first day, there was a difference between sexes, the second day the division was created upon it, and the third day, the irrational domination arose upon this division (MacKinnon 1987: 35; MacKinnon 1989: 220; McIntyer 2010-2011: 89). This is, according to her, not a plausible explanation to sex inequality or male domination that exists over the female. The plausible one, under the dominance approach, she argues, is: Beginning with the very first day, the dominance over female sex, possibly by force, was achieved, on the second day, the division was created and on the third day, the well-demarcated differences between sexes were institutionalized by men, who, since then, have been resting (MacKinnon 1987: 40; McIntyer 2010-2011: 89). The dominance approach was developed having observed the particulars of women under male domination (McIntyer 2010-2011: 89), where they confront threats of rape, unequal remuneration, domestic violence, disrespected work, use in denigrading entertainment, sexual harassment, depersonalization, forced prostitution, deprivation from property ownership, sex based poverty, devaluation of women's contribution in all walks of social life, exclusion from public life, femicide, lack of reproductive autonomy, job segregation, sex tourism, misogynist 'jokes,' women trafficking, lack of credit and credibility and political marginalization (McIntyer 2010-2011: 89 and 91). The dominance approach is committed to doggedly pursue all of these particulars while going back to their source, that is to say, to "dominators and domination" (McIntyer 2010-2011: 91). The approach is hinged upon two central and crucial premises. First, relations between men and women, that is, two sexes, have been arranged and organized in a manner in which men may dominate women and in

turn, women must submit and acquiesce to this male domination. Another premise which is involved here is that this relationship between two sexes constitutes "the most fundamental social hierarchy across time and culture" (Rhode 1989: 83). This male-female hierarchical relationship is patently apparent in all interactions between the two sexes (Rhode 1989: 83).

The aim of this approach, she says, is not to put to use the concept of classification to perpetuate reality as it is. It does not aspire to create rules that maintain and harness the status quo. It is not interested either in formulating or laying down abstract norms and standards that may eventually culminate in producing firmly determinate and definite outcomes (MacKinnon 1987: 40). The dominance approach, in contrast to this, seeks to be relentlessly critical of the reality, of the status quo that exists. For the purpose, the approach employs a methodology, which prompts not to begin to accepting equality law in particular as it is. Try to fit and dovetail women's claims and concerns into and with it (McIntyer 2010-2011: 90). Always remember, women are subverted and subordinated "in and to and by" male law (McIntyer 2010-2011: 90), so one should begin with the "reality of women's lives under conditions of enforced systemic inequality" (McIntyer 2010-2011: 90). Expose and lay bare "inequality's dynamics and distributions and rationalizations", unpacking them. Determine and demonstrate how law is implicated and complicit within this inequality. Finally, once it is done, what is required is to demand that the guarantee of equality must remedy and redress these inequalities along with ensuring effective termination of "law's complicity in enabling and legitimating them" (McIntyer 2010-2011: 90). Thus the dominance approach in its project and commitment, is "more substantive, more jurisprudential than formulaic" (MacKinnon 1987: 40). I shall now move to the Canadian jurisdiction, the jurisdiction where substantive equality has been adopted, to further discuss the same in its actual practice and application.

7. Equality in Canada

I have already pointed out above that the phrase "substantive equality", first, echoed in Canada in the mid-1980s. Another allied fact is that Canada is the first country in the world, which adopted the most radical form of equality of its time, that is, substantive equality in early 1980s. I shall, therefore, now briefly focus on Canadian jurisdiction to further pursue the notion of substantive equality. In terms of legal document, The Canadian equality is enshrined in the Canadian Charter and Freedoms of 1982 [hereinafter the Charter or Canadian Charter] (Newman 2004: 2 and 8; Grabham 2002: 641; Herman 1994: 589). The specific provision which is fully dedicated for this purpose is Section 15 of the Charter (Newman 2004: 8).

The said Section reads as follows:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Subsection (1) does not preclude any law, program or activity that has as its object, the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[16]

[16] Available at: http://publications.gc.ca/collections/Collection/CH37-4-3-2002E.pdf

At the core of Section 15, what is essentially located is the concept of substantive equality (*Quebec (Attorney General) v. A*, 2013: para. 137; *Withler* v. *Canada (Attorney General)*, 2011: para. 2)[17]. On account of this section, Canada, as Beverley McLachlin put it, has increasingly been "forging its own unique jurisprudential brand" (McLachlin 2010: 492). Owing to this, Canada is, actually, understood as a classic case of substantive jurisprudence. The said Section came into effect in 1985 (Beatty 1996: 349). This Section is even understood to be "the crowning glory in the firmament of liberalism" (Herman 1994: 589).

As evident from a plain reading of the provision, Section 15 has two distinct parts (Beatty 1996: 350). The first part encapsulates the substance of equality as a right, while the second serves as a qualifier limiting the scope of the first (Beatty 1996: 350).

This Section, particularly bypassing the formalism of law, has carefully been drafted to lay down a conceptual and jurisprudential blueprint that could actualize substantive or real equality for disadvantaged groups of people, including individuals, in Canada (Grabham 2002: 642). The provision is committed to securing and actualizing substantive positive right of equality as per which the promotion of equality would take place on non-exhaustive number of grounds. It was deliberately enacted in the conceptual spirit of being open-ended so as to maintain the capacity of equality rights to effectively encounter the protean character of discrimination and to live up to the changing requirements of the future (Greschner 2001-2002: 310).

[17] *Quebec (Attorney General)* v. *A*, 2013 SCC 5; *Withler* v. *Canada (Attorney General)* 2011 SCC 12

However along with it, the Section was also populated in keeping with the contemporary times upon which discrimination is outlawed. It includes national or ethnic origin, race, sex, disability, age and color (Grabham 2002: 642), the enumerated grounds. It promises protection especially of four kinds of equalities - equality before and under the law, and the equal protection and benefit of the law (Grabham 2002 642; Beatty 1996: 350). It was enacted so comprehensively because the previous guarantee, the equality before law, enshrined in the Bill of Rights, had failed to meet the objective of equality (Grabham 2002: 642). This Section does not exemplify merely non-discrimination, it, as a matter of fact, constitutes a "general prohibition against discrimination" (Mackay 1986: 294). According to Greschner (2001), however, Section 15, in particular offers protection to people as individuals in belonging to three kinds of communities, namely: First, universal community of human beings, second, the Canadian political communities and third, identity communities or social groups (Greschner 2001-2002: 292). Thus the main purpose of the Canadian equality provision is to grant and extend a simultaneous and non-discriminatory belonging in all said communities (Greschner 2001-2002: 293-294).

Andrews v. *Law Society of British Columbia* (1989)[18] or in short, the Andrews case, was the first case after the enforcement of the Charter that set out the preliminary and foundational interpretational tone of the Canadian equality jurisprudence, residing in the Section 15 (Clancy 2004: 188; Beatty 1996: 350). It was MacKinnon who had played a vital and pivotal role in preparing and developing the arguments for the case (McIntyer 2010-2011: 90).

The dispute before the court in short was that a British subject by the name of Andrews, who had been residing on a permanent basis in Canada, had wanted to seek registration with the British Columbia bar. He met all the criteria for the

[18] *Andrews v. Law Society of British Columbia*, [1989]1 S.C.R. 143.

purpose. His request, however, was rejected on the ground that he was not a Canadian citizen. According to Mr. Andrews, the impugned action was violative of Section 15 of the Charter. Thus, the constitutional point to settle was that whether Canadian citizenship requirement to the admission of the said bar was violative of the equality guaranteed under Section 15 of the Charter (*Andrews v. Law Society of British Columbia* 1989). The apex court ruled in the case that the law which deprives a certain class of people from entering a particular profession owing to not having citizenship is violative of the conception of equality enshrined in the Section 15 of the Canadian Charter (*Id*.: 1989).

While deciding this constitutional challenge, the court had sidelined the formal Aristotelianism of equality pointing out that it is a "seriously deficient" (Beatty 1996: 351) criterion to depend on, as this test is impervious to even considering to know the nature of the law being applied (Andrews case 1989). The sole emphasis of the test is on ensuring equal treatment of laws under similarly situated pretexts.

The court said that the facility of equality must be available to non-citizens particularly because they do not have political power and are liable to become vulnerable. They do not remain in a position where they could make their interests heeded. Their equal concern and respect stand violated and ignored. It is because of this that the facility of equality guarrantee is essential in the case of non-citizens (Fredman 2011: 32).

The essence of true equality, the court said, was located in accommodating differences, where new members or groups seeking to join the community must not be required to change themselves to fit in the community's dominant image to enjoy its full and equal benefits. It is important that the community must greet

those with who want to become its part with an open heart. It must act to deepen their belonging within the community (Greschner 2001-2002: 293).

The definition of discrimination which was set out in *Andrews v. Law Society of British Columbia*, [1989] is radically different from the formal jurisprudence of equality. "Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society (*Andrews v. Law Society of British Columbia*, (1989); *Wthler* v. *Canada*, 2011: para 29). The concept embedded in this definition clearly conveys that the disadvantageous and disabling distinction rooted in personal characteristics irrespective of intentionality constitutes discrimination. (*Kahkewistahaw First Nation v Taypotat*, 2015: para. 17-18)[19]. The definition explicitly underpins the idea that injustice, inequality and disadvantage is a matter of dissimilarly and hierarchically situated categories, groups and individuals (Baines 2015: 69-73). This discrimination is divided into two categories. First, direct discrimination which results when any rule or law expressly denies any benefit or opportunity on the forbidden grounds, for example, women, black people or disabled cannot be employed in this company or office. It is a clear illustration of direct discrimination. The other is, adverse effect discrimination, which though may appear neutral on the surface, is discriminatory in actual effect. A good example of this may be the notification requiring all government employees to be in attendance in their respective offices on Christmas, the 25th of December, for the celebration of Good Governance Day. The notification may appear neutral but among Christians, it may trigger and spur a powerful sense of discrimination. Thus it constitutes an instance of "adverse effect discrimination" (*Eldridge* v. *British Columbia (Attorney General)*, 1997: para. 63-64)[20]. This understanding is

[19] *Kahkewistahaw First Nation v Taypotat*, , 2015 SCC 30
[20] *Eldridge v British Columbia (Attorney General)*, [*1997*] 3 SCR 624

thoroughly different from the American jurisprudence in Plessy v. Ferguson[21] (1896), where invidious distinction rooted in color was not found to be violating the American equality.

Furthermore, it was observed in the Andrews case (1989) that the distinction anchored in personal properties ascribed to an individual merely on the ground of association with a particular group will "rarely escape the charge of discrimination (Andrews case, 1989). In *R* v. *Turpin* (1989)[22], it was observed that not only law that creates distinction on the basis of personal properties but also the larger social, legal and political context is required to be fully engaged in determining the issue of discrimination on the basis of said properties (also see Ermineskin Indian Band and Nation v. Canada, 2009: para. 193)[23]. However, so far as the impugned law is concerned, it is important to see whether any such law, either in its impact or purpose, perpetuates disadvantage and prejudice on the ground of personal characteristics, adversely affecting those social groups or persons who are historically subordinated and subverted. Likewise, the disadvantage under Section 15 can also be asserted and alleged if the impugned law perpetuates stereotype against any group, where the stereotype in question has no basis in reality and actual circumstances (*Withler* v. *Canada (Attorney General)*, 2011: para. 35 and 36)[24].

While adjudicating the impugned distinctions, the court observed that the judiciary will not merely appreciate any such distinction in terms of equality of treatment; it will see to what adverse impact the impugned classification would produce on the complainant. The Court said that most of the enacted laws offer benefits or impose burden upon some persons and not upon others. The impact of

[21] *Plessy* v. *Ferguson,*163 US 537 (1896)
[22] *R. v. Turpin*, [*1989*] 1 S.C.R. 1296
[23] *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, [*2009*] 1 SCR 222
[24] See discussion *Withler* v. *Canada (Attorney General)*, supra

the law in question is required to be assessed and considered upon "those to whom it applies, and also upon those whom it excludes from application" (See Andrews case, *Supra*; *R* v. *Kapp,* 2008: para 15)[25]. The scrutiny in particular has to happen on whether the impugned distinction drawn by the law in question weighs disadvantageously and adversely upon the complainant's group that allegedly bears burdens, obligations, disadvantages and deprival of benefit imposed by the impugned law. This enquiry is to take place vis-a-vis those who do not bear the said hardships; on the contrary, they enjoy the benefits of the distinction in question (*Miron* v. *Trudel*, 1995)[26].

However, if there is any distinction made for the benefit of the disadvantaged social groups pursuant to the enumerated and analogous grounds given and evident in the Section, the claim to discrimination would not succeed (See *R* v. *Kapp*, 2008: para 3 and 16). For instance, in *R*. v *Hess, R*. v *Nguyen* (1990)[27], Section 146 of the Criminal Code was under judicial consideration. The said section criminalized only men, not women, who had sex with girls who were less than 14 years in age. The impugned law was challenged alleging discrimination on the forbidden grounds of sex. The Court said that only men can commit the prescribed act given their biological situation. Along with it, the important purpose of the impugned Section is to protect under aged girls from the harm of child pregnancy and premature sexual intercourse. Thus, the challenge under Section 15 of the Charter failed (also see *Miron* v. *Trudel* 1995: para. 20)[28].

Likewise, another instance of this is where a male prison inmate challenged the constitutional validity of the frisk searches and surveillance by women officers in male prison. His contention was that women inmates in their penitentiary, on the

[25] *R v Kapp*, 2008 SCC 41
[26] *Miron v. Trudel*, [1995] 2 S.C.R. 418
[27] *R.* v *Hess, R.* v *Nguyen* [1990] 2 S.C.R. 906
[28] *Miron v. Trudel*, [1995] 2 S.C.R. 418

other hand, were not subject to frisk searches by male guards. Hence it was an alleged discrimination of the equality guarantee enshrined in the Charter. The country's top Court said that the Canadian equality jurisprudence is clear: that it does not embrace the idea of identical treatment. At times, the Court said, in favour of promoting equality, the recourse of differential treatment can certainly be had. Reasons for this differential treatment can be found in sociological, historical and biological differences of two sexes. For example, as compared to men, it raises more concern if the chest area of women inmates is frisked by male officers. Likewise, women as a social group are historically and sociologically disadvantaged and victims of male violence. Frisk searches of female inmates by male officers is more threatening to women (*Weatherll* v. *Canada* 1993; *Miron* v. *Trudel*, 1995: para. 20)[29].

Thus the Canadian equality has its anchorage in the "strong remedial purpose" (*Law* v. *Canada*, 1999: para. 1)[30]. For this remedial end, as I have suggested above, what is further warranted is the context centric analysis of the discrimination claims so as to be able to overcome the difficulties and pitfalls of formal equality (*Law* v. *Canada*, 1999: para.1). The contextual approach in discrimination claims is indispensable (*Miron* v. *Trudel*, 1995: para. 22). In fact, in R v. Big (1985)[31], it was said that the Canadian Charter did not emerge in a vacuum. It has a context and it is required to be appreciated in its historical, philosophical and linguistic context. Living up to the sterile and mechanical process of classification and categorization is pointless exercise (*Miron v. Trudel*, 1995: para. 18). In effect, the larger context considerably informs and enriches the discrimination analysis.

[29] *Weatherall v Canada* (Attorney General) [*1993*] 2 S.C.R. 872
[30] *Law v Canada* (*Minister of Employment and Immigration*), [*1999*] 1 S. C. R. 497
[31] *R v Big M Drug Mart*, [*1985*] 1 SCR 295

Unlike formal equality, where remedying injustice among equals in a category is understood to be justice, the Canadian equality jurisprudence permits comparisons among differently situated persons, group or groups in order to allege discrimination. A victim of discrimination is allowed to allege against which person or group, he or she feels discriminated (*Law* v. *Canada* 1999: para 6). Thus the concept of Canadian equality is comparative, remedying injustice and inequality of hierarchically organized and arranged social relations among different social groups and people. For this purpose, the comparison between different social groups is crucial and essential. It permits to gauge and discern differential impact of the impugned law on different social groups (*Miron* v. *Trudel*, 1995). Not only does injustice and inequality exist within categories, the greater part of this injustice and inequality, in fact, exists between categories. Formal equality refuses to remedy it. Substantive equality takes on such injustice and inequality head on. Even it is committed to take special measures that could allow people to have and enjoy equal benefit of laws and government services, owing to the realization that the accrual of discrimination takes place in the absence of positive interventions on the part of the state (*Eldridge* v. *British Columbia*, 1997: para. 77). Employing positive measures for ensuring equal benefit of services offered in the context of disadvantaged social groups, in fact, constitutes a cornerstone of human right jurisprudence (*Eldridge* v. *British Columbia* 1997: para. 79). Thus, the agenda of Section 15 of the Charter is to actualize "equality in the formulation and application of the law (Andrews case 1989; *R* v. *Turpin* 1989).

At the core of the Canadian equality discourse and jurisprudence, what is located is the recognition and adoption of the idea of "equal worth and human dignity of all persons" (*Eldridge* v. *British Columbia*, 1997: para. 54; *Corbiere* v. *Canada*, 1999: para. 16)[32]. It is, thus, committed to dignity, equality, freedom and personal autonomy of all persons (*Quebec* v. *A*, 2013: para 134). Justice McIntyer puts it

[32] *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203

thus in the Andrews case: "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration (also see Dworkin 1978: 272-3).

Greschner (2001) suggests that the Section 15 was the outcome of women's movement during 1970s. They ran campaigns against sexist and restricted judicial interpretations of the equality provision engrafted and previously available in the Canadian Bill of Rights. They had wanted the equal benefit and equality under the law clauses being added to the Section 15 to cancel out the pernicious impact of formalistic jurisprudence of equality (Greschner 2001-2002: 310).

A good example of this pernicious impact was verdict in Attorney General of Canada v. Lavell (1974)[33]. Lavell was a woman whose Indian status was taken away on the ground that she had married a non-Indian man. She challenged the impugned action contending that had an Indian man married non-Indian woman, the Indian status in the case of the man could absolutely have been intact. Even his Indian status would have passed on to his non-Indian wife automatically. The Canadian Supreme Court said that All Indian men and all Indian women were two distinct categories. Each of them is separately equal before the law, as all Indian women were treated alike and all Indian men were treated alike before the law in their respective category. However, the Court agreed that it is possible that Indian women may not be equal under the law, but they were so before the law. Thus, the Court had ruled that there was no denial of equality to Lavell (Greschner 2001-2002: 213).

[33] *Canada (AG) v Lavell*, [*1974*] S.C.R. 1349

Likewise, in *Bliss* v. *Attorney General of Canada* (1979), where the provisions of the unemployment insurance Act, 1971 were challenged on the ground of sex discrimination, arguing that the impugned provisions adversely discriminated between men and pregnant women. The challenge was in the context of child birth leave and the insured pregnancy benefit (McIntyer 2010-11: 82). The country's top Court said while dismissing the sex discrimination claim: "These provisions form an integral part of a legislative scheme enacted for valid federal objectives and they are concerned with conditions from which men are excluded. Any inequality between the sexes in this area is not created by legislation but by nature" [*Bliss* v *Attorney General of Canada*, (1979)][34].

It did not go well with women. Owing to such examples of judicial interpretations, women had wanted a different equality provision that could prevent judges from taking timid interpretational stance on equality provisions (McIntyre 2010-2011: 85). For the purpose, it was decided that the new equality provision is required to be drafted in a manner in which the provision is expansively framed and goes beyond formal equality. It must encompass and actualize equality in allocations of state benefits and equality in the substance of the law. There must also be a list specifying prohibited grounds of discrimination within such equality provision. The list must be open-ended so as to render the next generation to recognize new grounds of discrimination with little difficulty (McIntyre 2010-2011: 85). Thus the present Section was an outcome of women's legal activism. A critical role by feminists was, in fact, played in the drafting and final language of Section 15 of the Canadian Charter (Greschner 2001-2002: 310 and 311), which eventually reflected its primary commitment in producing tangible justice, as opposed to merely upholding its principles in a non-contextual and dissociative environment.

[34] Bliss v. Attorney General of Canada, [1979] 1 SCR 183

8. Conclusion

The characteristic impulse of this chapter was to pursue the enquiry of how feminist jurisprudence coupled with feminism had been challenging the mainstream law. This challenge is premised particularly on these tenets that law is gendered and patriarchal by nature. The challenge becomes reflected apparently in two different ways. First, law as an institution is too rigid, impervious and masculine for embracing the women's project, so it is of little use in having too much faith in law. The second view holds that law as an institution is too powerful to ignore and disregard, because of which, it is prudent to engage it and challenge it in all its practical and conceptual bearings and manifestations so as to be able to make it women friendly. In this connection, I have discussed one of the most central concepts of law, that is, the notion of equality. Pursuant to this discussion and enquiry, what I find is that the notion of equality of the mainstream law is problematic, as it is designed and created out-and-out in men's image. Yet to claim equality, women have to live up to this image as a norm and standard of equality. Living up to it has to happen within the rigid doctrinal criteria. Not being able to live up to it makes anyone unworthy for equality. I have also discussed an alternative understanding of equality, which is substantive equality. The primary focus of which is upon redressing and remedying injustice and disadvantage among hierarchical social groups, as opposed to adhering to doctrinal criteria.

Professor Upendra Baxi (1980) states, “At this juncture of Indian political history, the judiciary and especially the Supreme Court, is increasingly seen as the only surviving assurance of fair play and justice, and even as ‘the last resort for the oppressed and the bewildered’ (Baxi 1980: x). I shall thus examine in the next chapter how India’s judiciary comprehends gender equality with further and special reference to formal and substantive equality particularly on constitutional plane as a means to endow women with full, equal and just membership in India's political community.

Chapter III

1. Introduction

In terms of their potential, Constitutions can lay down the foundation for ensuring and promoting equality within their jurisdiction (Joshi 2014: 196). The Constituent Assembly of India was tasked with the responsibility of writing and framing the Constitution for the newly independent country. Equality was recognized as a Fundamental Right of all the citizens in the Constitution (Jaising 2013: 232). With particular regard to women, historian Bipan Chandra says that the Constitution of India guarantees, what he describes as "complete equality to women" (Chandra 2000: 451-452). The meaning of which is that Indian women were endowed with voting rights in one go by the Indian state without any qualifications such as of property, education or income. For the same right, women in the West had to struggle for a long time (Chandra 2000: 452). Thus, while this equality claim is located in voting rights on the one hand, it is also located in the passage of the Hindu Marriage Act, the Hindu Succession Act, the Hindu Minority and Guardianship Act, and the Hindu Adoption and Maintenance Act in mid-1950s for the benefit of Hindu women (Chandra 2000: 452). Flavia Agnes agrees with the first argument of voting rights (Agnes 1999: 77), but is deeply critical on the second averment on the equality claim, particularly in the context of the said enactments or codified Hindu law. Her objection is that this codified law is nothing but a compilation of Hindu practices, customs, usages and convention. It is incorrect and problematic, she argues, to project this law as an outcome of any reformist enterprise (Agnes 2016). Discrimination against women, in actuality, is "sanctified by tradition" (Desai & Thakkar 2001: 122) and this discrimination has not been sufficiently challenged by the law (Desai & Thakkar 2001: 122).

It is commonly accepted that the Constitution of India is the most important touch stone against which the equality rights of women can be determined, gauged and measured in terms of their scope and range (Agnes 1999: 77), as the Indian States constitutionally guarantees equality to women (Rajan 2003). Even on the basis of the Fundamental Rights and the Directive Principles of State Policy (DPSP or Directive Principles in short), as enshrined in Part III and IV respectively, what is argued is that the nature of India's constitutional equality is substantive (Nussbaum 2005: 178).

It has also been argued that the "promising alternative", that is, picking up acceptability worldwide as a new criterion of equality already appears to be implicit in Indian Constitutional law (MacKinnon 2006: 181). However, Gurpreet Mahajan underlines the point that at the time when the Indian Constitution was being framed, only equality and discrimination of religious and linguistic groups and caste was on the agenda (Mahajan 1998: 150). Gender inequalities, though serious and crucial, were still not taken on the constitutional agenda (Mahajan 1998: 151-152). The effective outcome of recognition of equality of different religious denomination on the anvil of constitution-making was the perpetuation, regularization and institutionalization of existing social order that committed women to social relegation and subordination (Mahajan 1998: 151-152), as particularly within the personal laws of religious communities, women were already unequal especially with respect to divorce, remarriage, maintenance, inheritance and separation. All of it was already lopsided in favor of men (Mahajan 1998: 151-152). Alternatively, Upendra Baxi points out while explaining the nature of constitutionalism that: "Behind every *written* constitution lies an *unwritten* one, which enacts the conventions and usages, the protocols and accouterments of power that resist linguistic codification. Second, the unwritten often overrides that which stands elaborately written" (Baxi 2005: 540).

Owing to law being incapable of reworking power relations in society, Menon (2004) argues that law as an institution re-sediments and reasserts dominant social values, norms and said power relations (2004: 262-263). Her issue with rights as the medium of justice and equality is premised on the objection that the notion of rights in legal discourse is undergirded by the "movement towards certainty and exactitude" (Menon 2004: 263). She points out that once their meaning is fixed, they carry no emancipatory and liberatory potential. Thus law and rights, both are inadequate and of diminished use for gender justice and sex equality (Menon 2004: 263). Narain makes the point that women in postcolonial India stand excluded from the pantheon of equal citizenship, even though the constitutional equality guarantees are in place to advance the cause of sex equality (2016: 107). The reason for this exclusion is located on this bizarre curve: that on the one hand, women enjoy constitutional right to equality in the public sphere, while on the other, personal laws in private sphere remain intact, spewing and perpetuating discrimination against women. Even laws meant to protect women's rights are not enforced. The Indian state does little to promote equality and non-discrimination for women (Narain 2016: 107).

Many theories of modern constitutionalism that we presently evoke in our legal discourse came from the West and it is crucial to constantly bear in mind that this constitutionalism was, subtly, unobtrusively, linked to exclusion, repression, suppression of women and other indigenous social groups. At this juncture, in the contemporary times, authoritative theories tied to modern constitutionalism inseminated and dominated by western legal understanding tend to interpret important evaluative terms in a narrow and limited manner. They, in fact, still hold an impulse to exclude and marginalize those who have already been victims of exclusion and marginalization in our society (Bhargava 2008: 36).

The previous chapter was dedicated to the scholarly debate that questions and challenges the historically and legally harnessed subordinated position of women, which apart from leaving them unequal and subordinated, renders them to become non-members in their respective communities while passionately advocating full and equal citizenship status for women, removing all legal and other obstacles lying in the way. In the said chapter, I have discussed the notion of substantive equality at a conceptual as well as practical level as one of the approaches to pursuing the goal of full and equal membership of women in political community. I shall, in this chapter, further extend this theme of substantive equality vis-a-vis the notion of formal equality on the plane of India's constitutional law.

It is true that a reading of the constitutional provisions on equality persuades us to believe that the nature of India's equality is substantive, particularly from the standpoint of gender justice and equality. It is compared with the Canadian equality entrenched in the Canadian Charter of 1982 (see Davis 1996), which was pioneered by women and feminists and which has been discussed at length in the previous chapter. However, this persuasion is vitiated and complicated by two developments. First, as I have suggested above, gender equality was not an issue before India's Constituent Assembly, as is evident in the Canadian Charter. Second, the foundations of restricting gender justice and equality were laid down in the Constituent Assembly itself, as the equality provisions were curtailed by the insertion of the word "only" (see Nussbaum 2005; Kannabiran 2014) in the constitution-making process. It appears that this action set the direction in how to interpret sex equality provisions by the judiciary. I will therefore argue in this chapter that erasing of hierarchical gender division and inequality was ostensibly not part of the constitution-making process nor did it therefore turn out to be the full-fledged activist agenda of India's judiciary. The equality which apparently happens to be substantive has therefore largely been interpreted following formalistic parameters and understanding (see Kapur & Crossman 1999). I further wish to demonstrate that women as a gender have been unequal within the

constitutional space, particularly owing to not having much say in the constitution-making and application of formal jurisprudence in the interpretation of the constitutional equality.

This chapter carries three main sections with nested subsections. The first section focuses on constitution-making, which encompasses a background to the constitution-making process, framing of constitutional equality in the Constituent Assembly and role of women members in the context of the constitutional equality discourse that followed the making of the Constitution. The second section is devoted to constitutional equality on a judicial plane. The major theme of attention here has been the formal equality and its limited capacity of achieving gender justice and equality. The feminist critique of formal equality has also been furnished in the section to further buttress the limited promise and potential of formal equality for gender justice and equality. The third section is committed to enquiring an alternative understanding of equality, that is, substantive equality in India's constitutional law. The main focus in the section stays on constitutional provisions that seem to promote substantive equality and the court cases that demonstrate the judicial shift and orientation towards substantive equality.

2. Constitution-Making

2.1 Background

The understanding and application of equality is informed by social, political and economic conditions existing in society (*Indra Sawhney* v *Union of India*, 1993: at para 678). The history inherited by the makers of the Constitution was based on the fact that women in large number had played an active and critical role in freedom struggle (Awasthy 2006: 46) and had taken part in the movement from

the beginning of the struggle for independence (Chaterjee 2001: 39). The national freedom movement, in fact, had motivated millions of women to come out of their homes to join the struggle to secure Independence for the country (Chandra 2000: 26-27). It is also argued that the condition of women was pivotally on the agenda of social reform movement during the 19th century (Chandra 2000: 451-452). It is therefore crucial to examine whether prior to constitution-making process, the commitment to women equality in legal discourse was apparent or not. I shall therefore briefly point out here by what kind of social understanding the India's Constituent Assembly was informed of.

Bakshi argued that the desire to have equality in India is linked to the Freedom Movement (Bakshi 2000: 17). Essentially, what he says to buttress his position is that under the British Raj, it was the desire of Indians that they should enjoy the same civil rights, privileges and prerogatives that their British masters in India had been enjoying. It was demanded in the Commonwealth of India Bill, 1925, for example, that the principle of equality before the law should be put in place in India (Bakshi 2000: 17). Similarly, the concept of sex equality was introduced in the Bill, where disqualification or disability on the basis of sex was rejected in preference to sex equality. Indian people were to enjoy equal rights and access to roads, establishments and places of business and public resorts (Bakshi 2000: 17). Right to equality, he points out, citing another example, also finds mention in the report prepared by the Motilal Nehru Committee, which was set up in 1928 to determine the principles of India’s Constitution (Bakshi 2000: 17). Later on, in the Sapru Committee Report, it was said that, “what the Constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary applications of life (cited in Bakshi 2000: 17-18).

Another prominent scholar Austin (1999) states that the Objective Resolution which had been drafted by Jawaharlal Nehru in the later part of 1920s and subsequently adopted in 1946 by the Constituent Assembly had blossomed the spirit of the Constitution (Austin 1999: 5 and 71). Among other things, this Objective Resolution had declared that, “there should be 'secured to all the people ... equality of status, of opportunity, and before the law” (cited in Austin 1999 at 6). According to Austin, to codify equality under equal protection of laws into the Constitution was “truly revolutionary”, if viewed from the standpoint that India was a hierarchical and traditional country that had no recognition and regard for individual equality (Austin 1999: 7-8) and in which religion and traditions had permitted and sanctioned inequalities (Austin 1999: 14).

The description points out that equality was an issue in pre-Independence era. But the nature of this equality discourse was characterized by the idea that inequalities and disparities between colonizers and colonized must end. The audibility of sex equality is either absent or sporadic in this pursuit of equality and justice. The lack of audibility of women equality by itself is indicative that the commitment to the issue was confronted with an absence of clarity. Furthermore, absence of audibility points towards systematic and impositional deprivation and curtailment of vocality of women to their own cause. In fact, Jenkins points out that towards the closing years of British Raj in India, caste and religious identities had enjoyed a significant political priority during debates in India, while minor importance was accorded to women and their issues during the same discourses (Jenkins 2003: 19).

2.2 Framing Equality in the Constituent Assembly Debates

Before the Constituent Assembly of India, social inequity and injustice was an important agenda [35] and women in general were victims of myriad social inequalities (Awasthy 2006: 47). It is important to know whether women equality was audible in pursuit of social justice as part of constitution-making. It deserves indication in this sub-section, as sex and gender equality constitutes part of the social justice.

The principle of equality before the law and equal protection of the laws that is flattened into Article 14 was first submitted to the sub-committee on Fundamental Rights by K.M. Munshi sometime in March 1947 (Rao 1968: 179). The phrase, equality before the law, was taken from the Weimar Constitution, while the phrase, equal protection of the law came from the 14th Amendment of the US Constitution (Rao 1968: 180) that guarantees Americans equal protection of the laws. Article 14 was part of Article 15 of the draft constitution (Rao 1968: 182). The said Article read: "No person shall be deprived of his life or personal liberty except according to procedure established by law, *nor shall any person be denied equality before the law or the equal protection of the law within the territory of India"* (Rao 1968: 182, emphasis mine). The quoted Article was split into two subsequently at the revisional stage (Rao 1968: 182). The second part of the Article – nor shall any person be denied equality before the law or the equal protection of law within the territory of India – eventually became Article 14 of the Indian Constitution. There was little debate in the Constituent Assembly on this Article (Rao 1968: 182). Thus, it is clear that no debate with regard to sex equality had taken place while Article 14 was being debated, neither at the level of the Constituent Assembly nor prior to it, at the level of drafting the provision.

[35] *Indra Sawhney* v. *Union of India* AIR 1993 SC 477 at para 2

Another significant Article in this regard is Article 15. It is important because the terms sex and women, both occur in this Article. Did any debate take place about women or gender equality in the process of enacting this provision? The question is important in the light of the fact that considerable debate with respect to social justice had ensued in the process of codifying this provision.

Article 15 under the title of 'Clause 4' was debated in the Constituent Assembly for the First time on April 29, 1947. It was drafted by the Advisory Committee on Fundamental Rights appointed by the Constituent Assembly. Originally, it had two clauses with a proviso. Both clauses, first and second, are still intact with some modifications. The Article was moved by Sardar Vallabhbhai Patel in the Assembly and it ran as under:

> 4. (1) The State shall make no discrimination against any citizen on grounds of religion, race, caste or sex.
>
> (2) There shall be no discrimination against any citizen on any ground of religion, race, caste or sex in regard to--
>
> (a) access to trading establishments including public restaurants and hotels, (b) the use of wells, tanks, roads and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public:
>
> Provided that nothing contained in this clause shall prevent separate provision being made for women and children.

Originally, Article 15, which witnessed changes over the course of time, was moved for debate in this shape, and Sardar Vallabhbhai Patel at this occasion said that it was a provision that seeks to serve the cause of non-discrimination. Such provisions, he continued, were found in all the Constitutions and necessary adjustments that could suit and measure up to India's 'special conditions' have been made to it.

> Then Mahavir Tyagi posed the first formal question to the mover, that is, SardarVallabhbhai Patel "May I know one thing from the Hon'ble mover? Allay (*sic*) I know why he thought it necessary to repeat in sub-clause (2) what he has already said in subclause (1) - I mean the words - 'There shall be no discrimination against any citizen on any ground of religion, race, caste or sex..'."
>
> "It is very simple", replied Vallabhbhai Patel, "The first clause is about the State obligation; the second clause deals with many matters which have nothing to do with the State, such as public restaurants – they are not run by States; and hotels – they are not run by States. It is an entirely different idea, and therefore, it is absolutely essential (CAD Vol. III April 29, 1947).[36]

At the drafting stage of Article 15, the Sub-Committee which was entrusted with drafting the provision did not prohibit discrimination on the ground of sex in Clause 2 of the Article, that is, in the particular context of having accessibility to trading establishments, public restaurants and hotels and the use of wells, tanks and places of public resort (Rao 1968: 185). Owing to this, apprehension had lingered that discrimination could ensue against women in the transaction of accessing the aforementioned places. At this stage, Rajkumari Amrit Kaur protested against this omission, saying that it was against the "basic principle of social equality" (Rao 1968: 185). She had proposed that not only should a general prohibition against discrimination be ensured but also that a special provision exclusively for women and children should be incorporated into the Article (Rao 1968: 185). Her proposal was accepted and the Article was redrafted in conformity with her wishes (Rao 1968: 185). This is all what had happened in the context of women equality with regard to Article 15 during its drafting and debate in the Constituent Assembly.

Article 16 is yet another Article that exemplifies constitutional commitment to social justice. The term sex once again occurs in Clause two of the Article. Both the facts necessitate an enquiry on whether any debate had taken place on sex equality or the elimination of discrimination on the basis of sex, on the grounds

[36] Available at http://parliamentofindia.nic.in/ls/debates/vol3p2.htm

that the notion of sex terminologically present in the Article and the discrimination on the basis of sex is solely a women's issue leaving it to be a part of social justice.

The Debate on Clause 4 of present day Article 16 took place in Constituent Assembly on November 30, 1948 under the rubric of Article 10 clause 3 of the Draft Constitution. Lokanath Mishra who represented Orissa moved Amendment 334 to delete clause 3 of the Article altogether, because it was, according to him, 'really unnecessary'. His substantive argument, however, was that the extension of reservation in public employment to backward classes - which was an undefined and fluid expression thus far – was tantamount to putting a premium on 'backwardness and inefficiency'. The right to employment must open to all citizens. No citizen must claim, says Lokanath Misra, a portion of state employment by fundamental rights. It must go by merit, not by reservation. Thus according to him, it could certainly be an act and expression of generosity but in any event, it shall signify degraded species of generosity, not a sublime one. Damodar Swarup Seth was also of the opinion that Clause 3 should be completely deleted and expunged, as on the face of it, it might sound that the clause was just and reasonable, but in fact, this clause was wrong and erroneous in principle. According to him, reservation in favour of backward classes was a negation of 'efficiency and good government'. According to him, acceptance of such reservation would sharpen casteism and favoritism rather than discourage it. Pandit Hirday Nath Kanzru who, though, was in favour of reservation in State employment being granted to backward classes as a special protection, felt that it had to be a temporary measure. Ten years, according to him, was a proposable and prescribable duration and limit. He further felt that a review of the policy should periodically take place so as to ascertain who all are still worthy of the benefits of reservation. The expression 'backward' not being defined was not only his concern, but a common concern for many on the floor of the assembly. Dr. B.R. Ambedkar, while replying to the debate as the Chairman of the Drafting Committee said that the Committee was confronted by three particular points of

view which were adequately expressed in this House. The first view was that there must be an equality of opportunities for all citizens, which were certainly actualized by declaring and engrafting it in Clause 1 of the Article. The second view emerges and comes into picture when some members noticed the policy of reservation being constitutionalized along with the guarantee of equality of opportunities. According to them, the policy of reservation was antithetical to this guarantee of equality of opportunities. It must therefore be done away with and the arena must remain open for competition. That exemplifies an equality of opportunities for them. A sizable number of the members were not in favour of this species of equality. They felt that there were classes in the society who were historically, socially and culturally oppressed and marginalized. It was therefore necessary to provide reservation so as to ensure their adequate representation in State service, employment and administration. In this context, Dr Ambedkar said that the expression 'backward' precedes or qualifies the phrase 'class of citizens'. Should the word 'backward' as a qualifier not be there, clause 3 shall finish up clause 1, that is, the equality of opportunities. Within this tight situation, the word 'backward' resolves the problem justly and reasonably. It respects the principle of equality of opportunities and social justice, which is essential to pursue. (CAD Vol. VII, November 30, 1947).[37]

What I wish to suggest on the basis of this account is that though there had been considerable debates on social justice in the Constituent Assembly, the question of sex equality and gender justice was still conspicuously absent from the deliberations.

This was the position with regard to justiciable rights. What about Directive Principles? During the constitution-making process, or to be precise, in the Context of Directive Principles being drafted, it was the opinion of Rajkumari

[37] Available at http://parliamentofindia.nic.in/ls/debates/vol7p16m.htm

Amrit Kaur, Mrs. Hansa Mehta and M. R. Masani that the clause on uniform civil code was required to be put into Fundamental Rights making it justiciable, as the existence of personal laws based on religion was one of the factors holding India back from advancing to nationhood (Rao 1968: 325). Their opinion was confronted by the Minorities Sub-Committee which said that the application and adoption of the Clause must be voluntary in nature, as opposed to mandatory (Rao 1968: 325). Furthermore, when the Sub-committee on Fundamental Rights had submitted its draft on the Directive Principles to the Advisory Committee, B.N. Rao had struck out the clause on the freedom of marriage from the draft (Rao 1968: 326). That Clause read: "The State shall endeavour, to secure that marriage shall be based only on the mutual consent of both sexes and shall be maintained through mutual cooperation, with the equal rights of husband arid (sic) wife as a basis. The State shall also recognise that motherhood has a special claim upon its care and protection" (Rao 1968: 323). These Directive Principles thereafter were put to the Constituent Assembly for debate.

The debate on the Article 39(a) of the Constitution had taken place on November 22, 1948. The deliberations were on this bit of the Article: "The citizens, men and women equally have an adequate means of livelihood". The usage of the phrase 'men and women' in the Article did not fall well with Naziruddin Ahmad, who wanted this phrase to be deleted and expunged from the provision. His reasoning was that the masculine embraces the feminine. In his own words, "(t)he masculine, as it is well known, embraces the feminine" (CAD Vol. VII November 22, 1948).[38] Owing to this, the employment of the phrase 'men and women equally' in the Article was not needed and unnecessary and it could be dispensed with in favor of the generic or gender neutral term like 'citizen', as was done elsewhere in other provisions of the Constitution, he argued. Mahavir Tyagi had regarded the issue of keeping or dispensing the phrase merely a matter of technicality and marginality, which was required to be settled in a separate and

[38] Available at http://parliamentofindia.nic.in/ls/debates/vol7p10.htm

special committee. Professor K T Shah was another member who had moved the Resolution of dropping the phrase in question on the ground that this assumption on the part of men was wrong that they were superior to women in any way. According to him, it was not the men but the women who were somewhat superior to men. On account of this, men should not hold the patronizing attitude towards women that they (men) can give something to women. Women were already better than men. Thus, this male patronization of the female was required to be done away with, by dropping the phrase 'men and women' from the Article (CAD Vol. VII November 22, 1948).[39]

Here, what is apparently being proposed and supported is gender neutrality, the idea that the social content of sex identity ought to be irrelevant in creating and constructing equality. Foucault has pointed out that the ostensible political invisibility and neutrality of "techniques of power is what makes them so dangerous" (Foucault cited in Onion 2000 XV). Ainley opines that it is not necessarily true that the ideas of equality we hold and employ are neutral. It is possible that those ideas may have been shaped in a particular way (Ainley 1995: 274). According to MacKinnon, gender neutrality is a male norm (MacKinnon 1991: 221). Doyle makes the point that a legal measure which is superficially neutral constitutes indirect discrimination under the disparate impact model, as it produces more adverse impact on one group than another (Doyle 2007). In short, it is an overwhelming conviction among feminists that dominant norms of equality, justice, liberty, rights and autonomy constitute "more or less sublimated portrayals of a distinctively male (not a gender-neutral) mode of being (Frazer 1995: 273).

[39] Available at http://parliamentofindia.nic.in/ls/debates/vol7p10.htm

Another issue of gender equality of women was rooted in personal laws. It was argued by Rajkumari Amrit Kaur and others at the drafting level, as has already been pointed out above, that the Uniform Civil Code was required to be placed in the category of Fundamental Rights so as to qualify for being justiciable. It did not however so happen, owing to the interests of the minority. It was then put in the Directive Principles of the Constitution. The debate on the Article as Clause 35, had happened on November 23, 1948 where it was opposed by the minority members with considerable passion despite knowing the fact that the provision was only a call for an 'endeavour' on the part of the Indian state in the time to come. K.M. Munshi, however, reminded the members of the minority and the majority, who had been against the Uniform Civil Code that they had agreed to grant equal rights to women as part of the Fundamental guarantees. If they persistently remain hewed to the line that their personal laws related to inheritance and succession were inextricably rooted in their religion, then they could "never give, for instance, equality to women" (CAD Vol. VII November 23, 1948)[40], which they had agreed to. Replying to the debate, B.R. Ambedkar had pointed out that almost every aspect of the life of Indian people was taken over by civil laws. It was only a tiny corner of succession and marriage laws which had not been covered by civil and uniform laws so far (CAD Vol. VII November 23, 1948).

In short, even the conscious demand was afoot in the Constitution making process that discrimination on the grounds of sex should not be put to discussion, as it was not an issue of gender discrimination. Instead it was a problem related to women's respective communities (Benerjee 2006). It was further pointed out by Benerjee that women were conceived more as members of their community than independent individuals even when the Constitution was on anvil, as their autonomy had been appropriated by religious and personal laws, deliquescing their individual existence into their respective community (Benerjee 2006). Even Indira Jaising argues that women in India as individuals have little value and

[40] Available at http://parliamentofindia.nic.in/ls/debates/vol7p11.htm

importance. Their claims upon the Indian state are hostage to family and religious groups they belong to. In other words, women's claimability has come to be lost in the labyrinth of male dominated groups (Jaising 2013: 231). Thus, it appears a plausible case why gender discrimination as an issue in the Constituent Assembly had confronted a lack of audibility and vocality. Women were hardly ever conceived for justice, equality and rights with the necessary force of passion (Benerjee 2006).

2.3 Women in the Constituent Assembly Debates

The Constituent Assembly had 15 women members (Agnihotri 2012: V) out of 299[41], which was less than 5 percent of the total male strength. Despite the lapse of nearly seven decades of India's Constitution, there are still far too few writings on the role of women in the making of the Indian Constitution. While there has been a focus on the controversies surrounding the woman's question such as the Hindu Code Bill or the Partition, the role of women in drafting the Constitution has so far not been completely analysed. My reading of the debates suggest that women's voices in the making of the Constitution could be analyzed on the following four registers. First, the articulation of the women members in the Constituent Assembly Debates explicitly illustrates that they had a sharp and powerful realization that women had badly been relegated to a social subordination and subversion in the process of history. Second, it becomes evident from the speeches that they were seemingly against redressing this social relegation and subordination by way of reservation. In this regard, they had apparently sided with the male reception of the reality, repeating over and over again in the Constituent Assembly that they did not want reservation. From this overplayed repetition, it appears a less plausible case that it was the personal conviction of women members that the reservation as a medium of remedying

[41] Some Facts of the Constituent Assembly available at http://www.parliamentofindia.nic.in/ls/debates/facts.htm

injustice was bad; what appears to be a more plausible scenario is that the women members were intensely in the grip of the dominant meta-narrative that was created against reservations across the country by patriarchal forces, who, perhaps, wanted to hear the rejection and negation of reservation over and over again. Third, women members were ostensibly under the spell that in the remoter past, there had been a golden era when women were equal to men. Fourth, the intervention which women members made on sex equality had usually come about at the ceremonial or marginal occasions, such as, during the debate of the Objective Resolution or during the debate on the Motion to Pass the Draft Constitution. In other words, during occasions when the issue of equality was not under consideration or deliberation in an actual and substantive way. For better appreciation, I would like to set out some of the extracts of these speeches below.

The debate was underway about filling up casual vacancies in the Provisional Parliament and Purnima Banerji had wanted that casual vacancies in the Constituent Assembly or the upcoming Provisional Parliament created by women should be filled up with women members. Her demand was excellent and the speech she had made moving her Amendment to this effect was reasonable from the perspective of established norms. She spoke as under:

> Sir, I am conscious of a spirit of diffidence in moving this amendment and sometimes feel that in doing so I may be opening myself to a certain amount of ridicule. But, even at that cost, I feel, I should state my case. The proviso which we are now discussing provides that in respect of the casual vacancies which are to be filled hereafter for the provisional Parliament, those belonging to the Sikh or the Muslim community will be represented by persons of that community. My amendment seeks just to stretch that same provision for women. I wish to make it quite clear that women do not want any reserved seats for themselves, but nevertheless, I suggest to the House that in respect of the number of women who are now occupying seats in the Assembly, if any of them should vacate their seats they should be filled up by women themselves. We have had casual vacancies in this House before this. Three women have retired so far. One was our late lamented Shrimati Sarojini Naidu, the second was Mrs. Vijayalakshmi Pandit and the third was Shrimati Malati Chaudhuri. Three women Members for various reasons have had

> to leave this House. Mrs. Naidu who could never be replaced both from among men and women, Mrs. Vijayalakshmi Pandit who is so very highly talented and our friend Shrimati Malati Chaudhuri - all these three women have been replaced by men Members. I do not speak in disparagement of the honourable Members who may have been returned in their places and I am sure they are worthy and fit Members of this House. But I do hold that women could have also filled those places with equal merit and they should have been invited to do so (Selected speeches of women members of Constituent Assembly 2012: 85; CAD October 11, 1949)[42].

Though her Amendment was rejected by Dr. B.R. Ambedkar saying that "the President in the exercise of his powers of rule-making will bear this fact in mind and see that certain number of women members of the Constituent Assembly or of the various parties will be brought in as members of the Provisional Parliament" (CAD Debates October 11 1949)[43], Banerji still had a supremely reasonable case in her hand. Yet a powerful sense of diffidence had surged within her before putting it forth. Fear of ridicule had crossed her mind. Sense of chagrin and embarrassment had pervaded and overpowered her conscious being. She was brought to a point where she had to inform the Constituent Assembly that she had not been asking for reservation. She had to say that she had absolute faith in the competence of the men who had filled up the vacancies created by three women. She had to take all of it in her stride in pursuit of a just demand. It is a clear illustration how an overwhelmingly masculinist and patriarchal environment and understanding had disabled the vocality of women for justice, where raising one's voice for justice took several rounds of thinking before being actually raised.

Banerji's speech was in turn responded to by H V Kamath on the floor, who was one of the male members of the Constituent Assembly. Here is what he had said in response to her speech:

[42] Available at http://parliamentofindia.nic.in/ls/debates/vol10p4.htm

[43] Available at http://parliamentofindia.nic.in/ls/debates/vol10p4.htm

> Though she has not pleaded for her own sex on the basis of special reservation, yet I feet (sic) that that is a point which may be easily conceded by this House. She went so far as to say that the seat formerly occupied by the late Shrimati Sarojini Naidu cannot perhaps be filled from among the ranks of men. I know not what she implied but I would not pick a quarrel with her on that point. As a matter of fact I would not mind, I would be quite happy, if there are more women in this House than there are today, but I do not think she should make an issue of that so far as this article is concerned. So far as the work of Government is concerned, if I heard her aright, she said that women should be given a greater chance more scope, in affairs of administration and government than they are being given today. The most common and the strongest objection so far put forward by political philosophers in this connection, that is to say as regards the capability of women for government and administration is that woman is ruled more by the heart than by the head, and where the affairs of Government are concerned, where we have to be cold and calculating in dealing with various kinds of men, women would find it rather awkward and difficult to deal with such persons and that the head may not play the part that it must play in the affairs of government. If the heart were to rule and the head to take a secondary place then it is felt by many thinking men, and thinking women too, that the affairs of government might go somewhat awry, might not fare as well as we might want them to be. (CAD Debates October 11, 1949)[44]

That is how masculine understanding operates. Let me restate that bit about which his reaction is the way it is, with the additional information that Sarojini Naidu had passed away a few months back. Banerji had said: "Mrs. Naidu who could never be replaced both from among men and women".[45] In minutes, without an iota of chagrin and embarrassment, the remark was resisted with the particular pride of having little interest for showdown with her. To a woman, the right and freedom to hold and rate another woman superior to men was being denied and curtailed here.

[44] Available at http://parliamentofindia.nic.in/ls/debates/vol10p4.htm

[45] Available at http://parliamentofindia.nic.in/ls/debates/vol10p4.htm

Moreover, Banerji had referred to both men as well as women and not merely men. Yet it had irked and offended Kamath so profoundly that he had to invoke the objections of political philosophers to defend and justify male superiority. That women are carefully being nudged to their gender roles and masculine superiority is seemingly being asserted under the scaffolding of patriarchal and gendered epistemology. Under such prospects, can anyone ask for justice? The answer is: it is very difficult. Under this masculine hulk, even the faintest echoes of justice may face disappearance.

On July 22, 1947, Sarojini Naidu had spoken on the floor of the Constituent Assembly on the disappearance of sex consciousness:

> "I am speaking here today, it is not on behalf of any community, or any creed or any sex, though women members of this House are very insistent that a woman should speak. I think that the time has come in the onward march of the world-civilisation when there should be no longer any sex consciousness or sex separation in the service of the country" (Rajya Sabha Secretariat 2012: 117)[46]

> Yet, the respectful reference of the memory of her eminence after her death, surpassing male and masculine superiority, was disagreeable and an intolerable proposition and it could have a discomforting effect on male ego. The above illustration makes it clear that men actually do not want sex and gender division to become irrelevant. This division values their superiority. Sartre had it best: "Men think themselves superior to women, but they mingle that with the notion of equality between men and women. It's very odd." (Sartre cited in MacKinnon 1987: 21).

Another aspect of women's participation in the Constituent Assembly debates, particularly in the context of sex equality was at ceremonial or marginal occasions, in the sense that influencing the outcome at that stage was not possible. Those interventions appear to be akin to merely presenting a vote of thanks to men who had been so gracious in letting women have equality in the Republic that they had been laying the foundations of. Consider the speech of Ammu

[46] Discussion regarding resolution on National Flag, C.A.D., Vol. IV, L.S.S., 22 July 1947: 760-761.

Swaminathan on November 24, 1949 during the discussion on the motion by Dr. B.R. Ambedkar for the passage of the Draft Constitution. She said that

> Equal right is a great thing and it is only fitting that it has been included in the Constitution. People outside have been saying that India did not give equal rights to her women. Now, we can say that when the Indian people themselves framed their Constitution, they have given rights to women equal with every other citizen of the country. That in itself is a great achievement and it is going to help our women not only to realise their responsibilities but to come forward and fully shoulder their responsibilities to make India a great country that she had been[47] (Rajya Sabha Secretariat 2012: 3).

In this regard, consider another speech by Begam Aziz Rasul on July 19, 1947. She had said that

> Sir, as a woman, I have very great satisfaction in the fact that no discrimination will be made on account of sex. It is in the fitness of things that such a provision should have been made in the Draft Constitution, and I am sure that women can look forward to equality of opportunity under the new Constitution (Rajya Sabha Secretariat 2012: 13)[48]

The reason I describe them as marginal speeches or interventions are that these interventions were not intended or committed to seek to influence the notion of equality. What comes clear from these interventions are that women had a sense of satisfaction at the prospect of being equal to men in the upcoming Republic. They had found this prospect so profoundly engrossing that alternative notions of justice such as reservation or resort to agitations like the Suffragette movement in England did not impress them. Be that as it may, these speeches inspite of that still make powerful portrayal of women's subordination and subversion in the society. Consider the following speeches in this regard.

[47] Discussion on the Motion by Dr. B.R. Ambedkar to pass the Draft Constitution, C.A.D., Vol. XI, L.S.S., 24 November 1949, p. 914-915

[48] Consideration of Clause 12 of the Report on the Principles of a Model Provincial Constitution regarding appointment of Ministers in Provinces, C.A.D., Vol. IV, L.S.S., 17 July 1947, p. 631-632).

Hansa Mehta spoke thus:

> I wish to offer a few remarks on that of this Resolution, the fundamental rights which affect a section of the people, namely, women.
>
> It will warm the heart of many a woman to know that free India will mean not only equality of status but equality of opportunity. It is true that a few women in the past and even today enjoy high status and have received the highest honour that any man can receive, like our friend, Mrs. Sarojini Naidu. But these women are few and far between. One swallow does not make a summer. These women do not give us a real picture of the position of Indian women in this country.
>
> The average woman in this country has suffered now for centuries from inequalities heaped upon her by laws, customs and practices of people who have fallen from the heights of that civilisation of which we are all so proud, and in praise of which Dr. Sir S. Radhakrishnan has always spoken. There are thousands of women today who are denied the ordinary human rights. They are put behind the purdah, secluded within the four walls of their homes, unable to move freely. The Indian woman has been reduced to such a state of helplessness that she has become an easy prey of those who wish to exploit the situation. In degrading women, man has degraded himself. In raising her, man will not only raise himself but raise the whole nation. Mahatma Gandhi's name has been invoked on the floor of this House. It would be ingratitude on my part if I do not acknowledge the great debt of gratitude that Indian women owe to Mahatma Gandhi for all that he has done for them. In spite of all these, we have never asked for privileges. The women's organisation to which I have the honour to belong has never asked for reserved seats, for quotas, or for separate electorates.
>
> What we have asked for is social justice, economic justice, and political justice. We have asked for that equality which can alone be the basis of mutual respect and understanding and without which real co-operation is not possible between man and woman. Women form one half of the population of this country and, therefore, men cannot go very far without the co-operation of women. This ancient land cannot attain its rightful place, its honoured place in this world without the co-operation of women. I therefore welcome this Resolution for the great promise which it holds, and I hope that the objectives embodied in the Resolution will

> not remain on paper but will be translated into reality (Rajya Sabha Secretariat 2012: 67-68)[49]

Mehta was clear that the source of women's subordination and inequality was located in social customs, practices and laws, the regulatory mechanisms of society. This process of subordination was underway for centuries, owing to which they had to live their life languishing in a secluded and private sphere, away from the public gaze and behind the purdah. According to her, an average woman in the country was in the state of helplessness, bereft of basic human rights such as free mobility. In short, she said that an average woman in India was an easy prey for those who had wanted to take advantage of their vulnerable position. Despite this powerful portrayal of women's subordination and relegation, the reservation as justice was disagreeable to her. She had wanted social, economic and political justice being administered to women instead.

As also, Renuka Ray had said that:

> We are particularly opposed to the reservation of seats for women. Ever since the start of the Womens' Movement in this country, women have been fundamentally opposed to special privileges and reservations *(hear, hear)*. Through the centuries of our decadence, subjection and degradation, the position of women too has gone down until she has gradually lost all her rights both in law and in society. Nonetheless, with the first stirrings of consciousness amongst women, there never arose any narrow suffragist movement that has been so common in so many so-called enlightened nations. Women in this country have striven for their rights, for equality of status, for justice and fairplay and most of all to be able to take their part in responsible work in the service of their country. The social backwardness of women has been sought to be exploited in the same manner as backwardness of so many sections in this country by those who wanted to deny the country its freedom.

[49] Debate over Pandit Jawaharlal Nehru's Resolution regarding Aims and Objectives, C.A.D., Vol. I, L.S.S., 19 December 1946, p. 138: p. 67-68).

Before the 1935 Act came in, the representatives of India's women made it very clear that they were against the reservation of seats or any special privileges for women. They made this clear through the All India Women's Conference. Our representatives, the three women who gave evidence before the Joint Parliamentary Committee, made it clear in unequivocal terms — (I may say that Rajkumari Amrit Kaur was one of the three women) — that we did not want reservation, but in spite of our protests, and in direct contravention to our desires, reservation of seats was brought into the 1935 Act. This Act has been so great a factor in bringing dissensions in our fold and has at last divided the country. But where the heart is strong, where there is sound judgment, no machinations can divide and the women did not allow themselves to be caught in the trap. It would be wrong to say that all the credit for our attitude goes to women. From the very start of our national awakening in this country, enlightened men have encouraged women to come forward as equal partners in the struggle for freedom and to do service for national regeneration in the different walks of life. When Mahatma Gandhi gave his call so specifically to the women of this country to take part in the national movement, all the social barriers of centuries broke down. There are no words to convey the gratitude of the women of this country to this great man — who has today brought the country to the very threshold of freedom *(hear, hear).* So, it is not only the inherent qualities of women but more particularly I should say the qualities of our men that is responsible for the fact that in our country, there has never been any strife between men and women.

When the Hindu Law Reform Bills were put in the Central Assembly, women were naturally anxious that these Bills which conceded certain rights to them should be adopted, but we found an opposition which was not so great in numerical strength but which was very formidable because of the fact that it was from a reactionary group who were the erstwhile supporters of the then Government and who were also betraying the country at every turn. The alien Government could not afford to displease them, and unless we too were willing to barter away our souls and our birthright, we could not fight that opposition.

Sir, what we have upheld so long has come to pass today. We always held that when the men who have fought and struggled for their country's freedom came to power, the rights and liberties of women too would be guaranteed. We already see the evidence of this today. No reservation of seats was required to induce the men who are today in power to select a woman as Ambassador, the second in the history of any nation. Vijayalakshmi Pandit has not been selected because she is a woman nor was sex made a bar to the appointment. It is her proven worth that has been responsible for her appointment to the high office of ambassador to a land which is admittedly one of the greatest forces in the world today. This has vindicated our position and women are indeed proud of this. I am confident that it will not be only women of exceptional ability who in

> future will be called upon to occupy positions of responsibility, but all women who are equally capable, equally able as men will be considered irrespective of sex.
>
> In the legislatures of India, we have some women, but there are few women who have come from general constituencies. I think that the psychological factor comes into play when there is reservation of seats for women. When there is reservation of seats for women, the question of their consideration for general seats, however competent they may be, does not usually arise. We feel that women will get more chances in the future to come forward and work in the free India, if the consideration is of ability alone.
>
> With these words, Sir, I should like to support this Clause which has done away once and for all with reservation of seats for women, which we consider to be an impediment to our growth and an insult to our very intelligence and capacity (Consideration of Report on the Principles of a Model Provincial Constitution, C.A.D., Vol. IV, L.S.S., 18 July 1947, pp. 668-669: 93-94).

Thus, according to Ray, women had confronted a situation where they had lost all their rights in the society as well as in the law. They, at this point of time, were in general degradation, subjection and decadence heaped upon them by the outgone centuries. The rest of her speech was spent in denying the requirement of reservation as a medium of justice. It was an insult to her. Be that as it may, women in the constituent Assembly appear to be fully aware of their subordination and relegation.

In response to Ray's speech, Sardar Vallabhbhai Patel had said that :

> Then, it has been suggested by some friend from Assam who seems to have developed a sense of inferiority complex, that Assam must always have some special treatment. It is a matter for congratulation that women have come forward to say that they do not want any special treatment. But at the same time, it is a matter of regret that men have not yet come up to that standard. Let us hope that nothing will be provided in this

> constitution which would make exception in favour of men where women object[50]

From this, particularly, there are two things that appear to be clear and obvious. Women were under an expectation in the prevailing environment at that time that they must not go for special treatment to remedy their historical subordination and injustice. In that image, they were worthy of applause and congratulation. However, raising voice for justice through special means could push them closer to the pathological realm of having been passed off as a victim of mental disorder such as an inferiority complex. In other words, women had been operating under the overhang of the patriarchal social order.

3. Equality

3.1 Formal Equality

It was pointed out in *Indra Sawhney* v.*Union of India* (1993) that equality happens to be the "single greatest craving of all human beings at all points of time". [51] '"Equality' is the essence of democracy". [52] The Preamble to the Constitution of India explicitly and elegantly arrays commitment to equality of status and of "opportunity" and "justice, social, economic and political" to all its citizens (Ministry of Law and Justice, GOI 2007: 1; see Indra Sawhney case 1992: para. 4). Owing to having this kind of justice and equality centric content, the Preamble to the Constitution was described by the Supreme Court as "glorious" in *The State of Bihar* v *Maharajadhiraja Sir Kameshwar.* [53] The reason to pre-eminently put social justice and equality in the Preamble, said the Supreme Court,

[50] Available at http://parliamentofindia.nic.in/ls/debates/vol4p5.htm
[51] *Indra Sawhney* v.*Union of India* AIR 1993 SC 477 at para 3
[52] *M.Nagaraj & Others* v *Union Of India & Others* (2006) 8 SCC 212
[53] *The State of Bihar* v *Maharajadhiraja Sir Kameshwar* (1952) 1 SCR 889

in the *Union Of India* v *Pushpa Rani and Ors.*[54], was that the framers of the Constitution were aware of the widespread inequalities in the Indian society (see para 31). According to Soorya Devi, the Preamble to the Constitution offers guidance as to how India ought to chart its way in the post independence era (Devi 2014: 346). Thus, the Preamble is an important hallmark of the Constitution of the Republic of India (Jaising 2005: 4). Provisions to actualize this commitment have been fastened into part III and IV of the Constitution. Part III holds the Fundamental Rights which are justiciable, while part IV lays down the Directive Principles of State Policy. These are non-justiciable (Jaising 2005: 4). Deva points out on the basis of these provisions that the Indian Constitution not only endows its citizens with rights of equality, it also seeks to ensure positive intervention on the part of the Indian state to remedy historical injustices, disparities and inequalities existing across the society to secure this objective of equality and social justice (Deva 2014: 346). The constitutional equality of women is located in these provisions only. In this section, I shall first discuss formal equality embedded in the equality code, that is, certain clauses of Article 14, 15 and 16 of the Constitution.

I would like to outline these Clauses here as they exist in the Constitution. Article 14 lays down that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India" (Ministry of Law and Justice, GOI 2007: 6). Article 15(1) lays down that “(t)he State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them" (Ministry of Law and Justice, GOI 2007: 7). Article 16(1) stipulates that "(t)here shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State” (Ministry of Law and Justice, GOI 2007: 7). Article 16(2) posits that "(n)o citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any

[54] *Union of India* v *Pushpa Rani and Ors.* (MANU/SC/3259/2008)

of them, be ineligible for, or discriminated against in respect of, any employment or office under the State" (Ministry of Law and Justice, GOI 2007: 7-8).

Though other clauses of the equality code may use formalistic understanding of equality, the quoted clauses of the Constitution are particularly interpreted in the light of the formalistic equality jurisprudence. Article 14 is the biggest source of formalistic understanding of India's equality jurisprudence (Jain 2010: 1216). Although Article 14 of the Indian Constitution says that the Article makes discrimination outlawed in a general sense only, it has lately come to acquire a character of being an Article of "a highly activist magnitude" (Jain 2010: 1217) on the strength of judicial interpretations. Particularly pursuant to this reason, this Article has become more important than its other counterparts. According to Jain (2010), as a matter of fact, it is the most important article among the equality provisions enshrined in the Constitution (Jain 2010: 1216). It forms a single unit having Article 15 and 16 as its constituent parts. Thus, as it goes Article 14 is the genus and its subsequent articles, Article 15 and 16, in particular, are its species. The Supreme Court has declared equality as part of the basic structure – which means that it cannot be taken away either by executive or by legislative action.

Article 14 involves two concepts in particular – equality before law and equal protection of laws. Durga Das Basu says that it is possible what they convey and relay might sound similar but as a matter of fact, both concepts hold distinct import (Basu 2001: 87). According to him, the phrase 'equality before law' that resides in the Article 14 signifies an absence of privileges that originate from the position of being dominant in some way or the other. The legalistic spirit that is animating the phrase seeks to subject all persons, irrespective of myriad privileging distinctions, to ordinary law of the land. In this particular sense, according to Basu, the concept of equality before law is "somewhat negative" (Basu 2001: 87-88). Whereas the phrase, equal protection of laws that populates Article 14 along with equality before law has a positive import, it seeks to

guarantee equal protection of laws, that is to say, it promises "equality of treatment in equal circumstances" to all persons under law. Thus both of these concepts are different in their conceptual import.

In a particular context of judges, Upendra Baxi (1980) said that it should be compulsory for judges to read decisions of the first ten years of India's higher judiciary. Taking cue from that suggestion, I shall begin the discussion of equality as understood and interpreted by the Supreme Court of India in the 1950s. For the purpose of laying bare the nature of equality embedded in the said provisions of the equality code, I shall set forth some of the earliest case laws. The reasons to do so are that these still inform our decisions in the court.

Chiranjit Lal Chowdhuri v *The Union of India*[55] is one of the earliest landmark cases that expounds upon the nature of equality enlivening article 14 of the Constitution. I shall set forth this case in some detail so as to have a full grasp of the nature of equality that we have. The case is a trend setter in Indian equality jurisprudence.

Pursuant to the case that the convergence of opinion among Justices on the point that Article 14 of the Indian Constitution corresponds to the 14th Amendment of the Constitution of the United States was absolute. Because of this particular reason along with the fact that equality was a terra incognita to India, not only in terms of historical, social and cultural value and practice but also in terms of epistemological reflections and knowledge production, considerable or nearly absolute reliance was placed on American jurisprudence and legal epistemology to expound Article 14 of the Indian Constitution (*Chiranjit Lal Chowdhuri* v *The Union of India and Ors.* at para 8, 9, 11, 31, 65, 68, 86, and 88). Justice Fazl Ali, while delivering his individual majority opinion, expounds that there can be no

[55] *Chiranjit Lal Chowdhuri* v *The Union of India* (MANU/SC/0009/1950)

doubt that what Article 14 codifies is one of the 'most valuable and important guarantees' and it cannot be permitted to be whittled down like this only (*Id.*: para. 9). To know how the 14th Amendment of the American Constitution, that is, the equal protection clause had operated, Justice Fazl Ali had placed reliance on professor Willis's scholarship on the American Protection clause in this regard. Professor Willis who informed and inspired our jurisprudence of Article 14 said that equal protection of laws had implied 'protection of equal laws'. This guarantee forbids 'class legislation'. What is, however, not forbidden under the clause is the classification, particularly based on 'reasonable grounds of distinction'. The pointed focus, Willis argued, of the equal protection clause was to treat all persons, subjected to laws in a particular jurisdiction, alike in like 'circumstances and conditions', particularly with regard to privileges and liabilities. Another important purpose that the guarantee of equal protection of laws serves is that it acts to stop the State from singling out 'any person or class of persons' as a special group or groups for hostile discrimination and hostile legislation. To this extent, the power of the State is absolutely curtailed under the equal protection clause. However, beyond this, as far as reasonable classification is concerned, the state is well within its rights, power and authority to perform classification that must be reasonable in any event. There is no use, says professor Willis, to rope in mathematical niceties or perfect equality in the arena of equal protection clause. To measure up to its requirement, the '(s)imilarity, not identity of treatment' is sufficient (*Id.*: para 8). Hence the idea of 'reasonableness' is centrally linked to the concept of equal protection of laws, about which professor Willis says that there is no particular rule that could determine as to what consists of being 'reasonable'. It is a judicial question whose determination can take place in the court of law. However, while determining the question of 'being reasonable', the court is required to heed the common knowledge and reports and history of the times. What is even more important than this is that the court is required to see as to what social and economic interest necessitates the classification and what objective that classification would achieve and serve. This is what, suggests Willis, constitutes reasonableness for the classification in the

context of equal protection of laws (*Id*.: para. 18). Persuaded by Professor Willis' exposition, Justice Fazl Ali laid down that classification that is arbitrary and lacks basis does not qualify as classification. To be 'classification' in the proper sense, what is required is that it must 'always rest upon some difference' and there must be a just and reasonable relationship to the thing about which this classification is being proposed (*Id.*: Para 9). The guarantee Article 14 creates is required to be 'closely and vigilantly guarded, says Fazl Ali, 'but, in construing it, we should not adopt a doctrinaire approach which might choke all beneficial legislation' (*Id*.: para. 21). Justice B K Mukherjea also gave his full individual majority opinion with regard to Article 14 of the Constitution. It comports with the above American jurisprudence on equal protection clause and can be read in paragraph 64 to 67 of the judgment.

Thus. Article 14 is informed by the American equality jurisprudence. This jurisprudence forbids class legislation but it permits classification if grounds of distinction are located and rooted in reasonableness and not in arbitrariness. There is no strict definition that could inform us with surgical precision as to what reasonableness consists of. Its determination is mandated to take place judicially in the light of common knowledge, history of the time and social and economic interests. Pursuant to this reasonableness, classification is permissible under this American jurisprudence on equality, which further requires that likes should be treated alike and unlikes unalike, the Aristotelian thesis of justice or equality, which has been attended in detail in the previous chapter.

Thus, the concept which is embedded in Article 14 of the Constitution is actually described as India's equality doctrine (*Satyawati Sharma* v *Union of India*, 2008: para. 14)[56]. What is essentially required is that this doctrine must inform and guide every state action such as legislative, executive and semi-judicial (Km

[56] *Satyawati Sharma* v *Union of India*, AIR 2008 SC 3148

Neelima Misra v. Harinder Kaur Paintal, 1990)[57]. However, at the core of this equality doctrine, which is formalistic in nature, is located the notion of classification or differentiation (*Government Of Andhra Pradesh* v *Vijayakumar*, 1995)[58]. What does it mean? The question is important, as there is a thin and always evanescing line between discrimination and classification. The Supreme Court said in *Ahmedabad St. Xaviers College* v *State Of Gujarat* (1974) that: "'equality in law precludes discrimination of any kind; whereas equality in fact may, involve the necessity of differential treatment in order to attain a result"'[59] This gives rise to the need of classification. Classification, observed Justice Mahajan, implies "(s)egregation in classes which have a systematic relation, usually found in common properties and characteristics" (*State Of West Bengal* v *Anwar Ali Sarkar Habib*, 1952)[60]. Justice Mahajan further continued and said that the classification is necessarily required to be rooted in a rational basis, as opposed to herding people together in an arbitrary manner.

It was, however, stated in *Kathi Raning Rawat* v *State of Saurashtra*[61] that all legislative classification, which is done, does not essentially constitute discrimination. According to the apex Court, in fact, the legislature must hold, as a matter of necessity, enormous power of classification, as it is required to lay down policy for different social groups (*Ameerunnissa Begum And Others* v *Mahboob Begum*, 1953)[62]. It was stated in *State Of Kerala & Anr* v *N M Thomas & Ors* (1975)[63] that legislature knows the needs of its people and they in turn know that discrimination it does is located in "adequate grounds" (Thomas case: supra). Thus for " making laws operating differently as regards different groups of persons in order to give effect to its policies" (Kathi Raning Rawat case: supra).

[57] *Km. Neelima Misra* v *Harinder Kaur Paintal*, 1990 AIR 1402
[58] *Government Of Andhra Pradesh* v *Vijayakumar 1995* AIR 1648 1995 SCC (4) 520
[59] *Ahmedabad St. Xaviers College* v *State Of Gujarat* 1974 AIR 1389, 1975 SCR (1) 173
[60] *State Of West Bengal* v *Anwar Ali Sarkar Habib* 1952 AIR 75, 1952 SCR 284
[61] *Kathi Raning Rawat* v *State of Saurashtra* AIR 1952 SC 123
[62] *Ameerunnissa Begum And Others* v *Mahboob Begum* 1953 AIR 91, 1953 SCR 404
[63] *State Of Kerala & Anr* v *N M Thomas & Ors* 1976 AIR 490, 1976 SCR (1) 906

The power of classification is crucial. The classification done by the state, the apex Court said, would enjoy the presumption of being justified and reasonable (Kathi Raning Rawat case: supra). In *Mahant Moti Das* v *S P Sahi*[64] (1959), what was said was that whoever alleges discrimination or the breach of constitutional guarantee has the burden to rebut this presumption before anything else, at the very first rung of alleging, by way of demonstrating that there is a clear violation of constitutional guarantee. Thus, in short, the Indian state is not barred from performing classifications. It is permissible to the state that it can enact unequal laws (Jain 2010: 1294) with enjoying a general presumption in favor of the legislative action of the state being reasonable (*Shri Ram Krishna Dalmia* v *Shri Justice S. R. Tendolkar*, (1958); *Kewal Singh* v *Lajwanti* (1980)[65]. The main purpose of this classification is to help enforce and implement the fundamental project of this equality doctrine, that is, likes are required to be treated alike and unlikes unalike. In that particular sense, this doctrine of equality reflects a commitment to equality of treatment (Jain 2010: 1220). Be that as it may, separation of likes from unalikes or equals from unequals is important under this equality doctrine. The two cannot confusedly be mixed up or muddled together (*Gauri Shanker* v *Union Of India* AIR 1995: para 7-8)[66]. It was suggested as early as 1952 in *State of West Bengal* v *Anwar Ali Sarkar* (1952)[67] that the gravamen of the Article 14 of the Constitution is located in equality of treatment (para 33). In *State Of Rajasthan* v *Khem Chand Sharma* (1992)[68], what was observed was that the doctrine of equality requires that likes should be treated alike and unlikes unalike. Not doing so violates the notion of equality residing in Article 14, that is, treating equals unequally and treating unequals equally, both constitutes a violation of the said constitutional guarantee. The purpose of this like-unlike criterion is to ensure "fair play in action" through an application of equality of

[64] *Mahant Moti Das* v *S P Sahi* 1959 AIR 942
[65] *Shri Ram Krishna Dalmia* v *Shri Justice S. R. Tendolkar* 1958 AIR 538, 1959 SCR 279 and *Kewal Singh* v *Lajwanti* AIR 1980 161
[66] *Gauri Shanker* v *Union Of India* AIR 1995 55
[67] *State of West Bengal* v *Anwar Ali Sarkar* MANU/SC/0033/1952
[68] *State Of Rajasthan* v *Khem Chand Sharma* 1992 (2) WLC 618

treatment (*Maneka Gandhi* v *Union Of India* 1978; *P K Ramachandra Iyer* v *Union Of India*, 1984)[69].

It was thus explained by Justice Mahajan that "(b)y the process of classification the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject" (State Of West Bengal v. Anwar Ali Sarkar, 1952). In other words, this doctrine of equality is targeted at remedying discriminatory treatment and injustice among equals in a particular and monolithic category (*Western UP Electric Power* v *State Of UP*, 1970; Jain 2010: 1220)[70]. "Equality is for equals, that is, who are similarly circumstanced are entitled to an equal treatment," as was stated in *Ramesh Prasad Singh* v *State of Bihar & Ors* (1978)[71].

In *K.R. Lakshman* v. *Karnataka Electricity Board*[72] (2000), the apex Court said while explaining this doctrine of equality and like-unalike criterion embedded in it that the concept of equality embedded in Article 14 promises similarity of treatment. This similarity of treatment particularly flows from the phrase 'equality before law' that resides in Article 14. It requires likes to be treated alike. In other words, among those who are similarly situated, the application and administration of law would operate and take place equally. Equality before law under the Article does not mean that things that happen to be different should be taken as being similar. if it turns out to be that equals and unequals are treated equally, it would amount to discrimination under India's equality Clause (Jain 2010: 1220). The corollary of which is that "if equals and unequals are differently treated, no discrimination at all occurs" and "if equals or persons similarly circumstanced are differently treated, a discrimination results" (*Air India* v *Nargesh Meerza*,

[69] *Maneka Gandhi* v *Union Of India* 1978 AIR 597 and *P K Ramachandra Iyer* v *Union Of India* 1984 AIR 541
[70] *Western UP Electric Power* v *State Of UP* 1968 AIR 1099
[71] *Ramesh Prasad Singh* v *State of Bihar & Ors* 1978 AIR 327
[72] K.*R. Lakshman* v. *Karnataka Electricity Board (*MANU/SC/0783/2000)

1981)[73]. Thus, the doctrine of equality comes into play only in a situation where equals have been treated as unequals and unequals equals (*Ramesh Prasad Singh* v *State of Bihar*, 1978).

What does it mean? This means that the doctrine of equality under Article 14 would go into effect when persons are similarly situated and circumstanced (Jain 2010 20). Such application is premised on the idea that all persons are not alike. Neither are they similarly situated and circumstanced. It is because of varying requirements of different classes of people that the notion of differential treatment comes into play (Jain 2010: 1220). This gives rise "to classification among different groups of persons and differentiation between such classes" (Jain 2010: 1220). On the failure in making classification, the states may lose their presumption of being justified and reasonable available to them in their legislative and executive action, as in that situation, the said action appears to be arbitrary and unreasonable (*Chiranjit Lal Chowdhuri* v *Union Of India,* 1950)[74]. That is the effect of arbitrariness and unreasonableness upon classification done by the states. Classification rooted in arbitrariness and unreasonableness is designated as discrimination. Pointing out the potential vulnerability of the concept of classification, the Supreme Court said that this notion is "(f)raught with the danger that it may produce artificial inequalities" (*State Of Jammu & Kashmir* v *Triloki Nath Khosa*, 1974)[75]. The Court further continued that "(l)et us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality." In the same judgment, Justice Krishna Iyer, who had written his opinion separately, had pointed out that the theory of classification, at its worst, could even pave way for class domination, if the temptation was not overcome to be persuaded by elitist

[73] *Air India v Nergesh Meerza* (1981) 4 SCC 335

[74] *Chiranjit Lal Chowdhuri* v *Union Of India* 1951 AIR 41
[75] *State Of Jammu & Kashmir* v *Triloki Nath Khosa* AIR 1974 SC 1

arguments, which try to convince that talent and merit is the monopoly of few who are required to be permitted to rule the roost.

Thus, what we have discussed about the doctrine of equality that we have under Article 14 and its allied provisions in the Article 15 and 16 of the Constitution is that this equality doctrine deploys the concept of classification to separate equals from unequals, as the said doctrine imagines and conceives only equals in a category as the subject matter of equality (*T. Devadasan* v *The Union Of India*, 1964)[76] and when the issue of equality among unequals arises, the doctrine absents itself from the arena of contestation on the ground that no discrimination or inequality accrues among unequals. In other words, treating unequals differently is permissible and lawful and that is why, the concept of classification is crucial under the Article 14 jurisprudence. However, with the concept of classification, there is a risk associated that it could collapse into discrimination. Justice Brewer put it thus: "The very idea of classification is that of inequality" (cited in *Mohammad Shujat, Ali & Ors.* v *Union of India & Ors*, 1974)[77]. As I have indicated above that there is a blurring line between classification and discrimination. Justice Mahajan in *The State of West Bengal* v *Anwar Ali Sarkar* (1952)[78] had stated that: "(n)o doubt, in some degree [the power of classification] is likely to produce some inequality."

It was stated in *Kewal Singh* v *Lajwanti*, 1980[79] that discrimination may ensue in different ways and the Indian State is constitutionally barred and prohibited from inflicting discrimination upon its people. What then is the notion of discrimination that the Indian state cannot employ in the guise of classification? In Kathi Raning Rawat case (supra), the Supreme Court had stated, while employing the definition as found in the Oxford dictionary that discrimination was 'to make an adverse

[76] *T. Devadasan* v *The Union Of India* 1964 AIR 179
[77] *Mohammad Shujat, Ali & Ors.* v *Union of India & Ors* 1974 AIR 1631
[78] *The State of West Bengal* v *Anwar Ali Sarkar* 1952 AIR 75
[79] *Kewal Singh* v *Lajwanti* AIR 1980 SCC 290

distinction with regard to ‘distinguish unfavourably from others'. Thus what the Court had eventually said was that discrimination carries "an element of unfavourable bias" (See Kathi Raning Rawat case, supra). Previously, in *Chiranjit Lal Chowdhuri* v *The Union of India*, it was pointed out that the notion of discrimination is rooted in singling out any person or class of persons specifically for discriminatory and hostile legislation. Thus the notion of discrimination carries an element of invidious distinctions. It comes into the picture when the classification is unreasonable. In the *State of Jammu & Kashmir* v *Triloki Nath Khosa* (1974), the Supreme Court said that: "(d)iscrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis" (also see *Dr. P. Harsha Vardhan and Others* v *Government of India*, 2014[80]). Thus, the classification in question must be reasonable, not arbitrary and irrational.

The test to determine reasonableness of classification is based on intelligible differentia which seeks to distinguish the persons or things who or which are grouped together from those who or which are left out from the group in question. It further mandates that the enquiry must be made that whether the differentia, or in other words, the discrimination, has a rational linkage to the object that is being sought or claimed to be achieved by the legislation that warrants classification of any description. If there is a rational nexus between the classification and the object of the policy laid down in the impugned legislation, rule, or regulation, it does not violate the guarantee that enlivens and thrives Article 14. (*K.R. Lakshman & Ors*. v *Karnataka Electricity Board & Ors* 2000: para 4)[81] However, as I have noted above that the ontological aspect of ‘being reasonable’ is required to be determined in accordance with the common knowledge and reports and history of the times (Chiranjit Lal case 1950: supra*).*

[80] *Dr. P. Harsha Vardhan and Others* v *Government of India* 2014, Writ Petition No.5784 of 2014, available at https://indiankanoon.org/doc/16080054/

[81] *K. R. Lakshman & Ors*. v *Karnataka Electricity Board & Ors.* MANU/SC/0783/2000

3.2 Gender Justice and Formal Equality

The Constitution of India guarantees non-discrimination on the grounds of sex, as it constitutes a forbidden ground of discrimination under Article 15 and 16. On plain reading, it becomes clear that no discrimination shall take place on the grounds of sex. Another equally plain and allied impression that gets relayed to our mind is that this guarantee will serve as a shield against discrimination in the particular case of women, as the female sex has been the victim of discrimination throughout history (Baines et al. 2004: 13). Does it work that way or is this guarantee of non-discrimination governed in a different manner, as opposed to our plain understanding.

As I have stated elsewhere in this chapter, this guarantee was restricted by B.N. Rao, the Advisor to the Constituent Assembly, by inserting the term "only" prior to the grounds of non-discrimination in Article 15 and 16 of the Constitution. I wish to examine here in brief, in the particular context of guarantee of non-discrimination on the grounds of sex, as to what is the nature of this non-discrimination.

This guarantee was prolifically discussed by the Supreme Court in *Smt. Anjali Roy* v *State Of West Bengal* (1952)[82] and had explicitly been stated that the terms 'discrimination' and 'only' (para 16) in the Article 15(1) were of "paramount importance" (para 16). Pursuant to this, the Court ruled that under Clause 1 of the Article 15, the discrimination which is outlawed is "(o)nly such discrimination as is based solely on the ground that a person ... is of a particular sex and on no other ground" (para 16). The direct and explicit implication it carries is that along with sex, discrimination rooted in other grounds including those that are forbidden like religion, caste and race given in the said Clause itself cannot be hit by Article 15

[82] *Smt. Anjali Roy* v *State Of West Bengal* AIR 1952 Cal 822

of the Constitution (para 16). It appears that the constitutional guarantee of non-discrimination on the ground of sex has been slipping behind eclipse, where it is hardly visible. Perhaps, there is no incident of discrimination, which cannot be explained away by way of alternative grounds. In this case, Justice Chakravartti had introduced and employed the expression "solely" to limit the guarantee in question. This contribution was duly acknowledged in *Pujari Narasappa* v *Shaik Hazrat* (1960)[83], where it was stated that His Lordship, Justice Chakravarthi, had used the words 'only' and 'solely'" (para 19) to lay down the limits of law on sex discrimination. In this case, yet another new expression "purely" (para. 14) was introduced to the lexicon of sex discrimination jurisprudence and Justice Hussain had put the law thus: "The use of the word 'only' connotes that discrimination that is discountenanced by the Constitution is discrimination on account of purely and solely on any of these grounds, viz., of religion, race, caste, sex . . . " (para 16; Jain 2010: 1294). According to Nussbaum, the term 'only' in Article 15 has created a division between sex and gender. The application of the term makes discrimination on the grounds of sex alone constitutionally outlawed, while leaving gender discrimination out of its purview. During 1980s in particular, verdicts were passed pursuant to this understanding (Nussbaum 2004: 180).

Air India v. Nargesh Meerza (supra) is a landmark case in the context of sex equality. In this case, there were government regulations involved which stipulated the retirement age of airhostesses who happened to be women. What was fixed was that they had to retire at the age of 35 or on being married, if matrimony happens within four years of joining the service or at first pregnancy, whichever takes place earlier. The extension of the tenure of air hostesses was possible till the age of 45, but it had to come about on a yearly basis at the discretion of managing director. This situation did not go well with the petitioner. She challenged these regulations, arguing that it was discriminatory against women, violating Articles 14, 15 and 16, the equality code of the Constitution,

[83] *Pujari Narasappa* v *Shaik Hazrat* AIR 1960 Kant 59

owing to the fact that the male cabin crew staff consisting of assistant flight pursers, flight pursers and flight supervisors were to retire at the age of 58 years. The case makes an interesting reading. The apex court having extensively discussed the doctrine of equality under Article 14 of the Constitution and having surveyed the service terms and conditions and educational qualifications of air hostesses and the other aforementioned cabin crew staff, said that air hostesses and the other cabin crew staff were in separate and different classes and unlikes can be treated differently. No constitutionally sustainable and actionable discrimination accrues among them. The categorization of air hostesses in a separate class is not rooted in their sex identity but in their service conditions and educational qualification. For a case to violate the guarantee of non-discrimination on the ground of sex must be rooted alone only in sex identity, not in anything else alongside.

However, particularly two conditions were struck down as being arbitrary under Article 14 of the Constitution by the Supreme Court. First, the condition of pregnancy and second, the provision of extension of the tenure of air hostesses by ten years, till the age of 45, at the will and discretion of the managing director. The apex Court ruled both of these service conditions as arbitrary under Article 14 of the Constitution. What is interesting, however, is that the Court did not declare them discriminatory under Article 15 and 16, violating sex equality enshrined in the Constitution. This verdict was repeated by the Supreme Court in *Air India Cabin Crew Association* v *Yeshawinee Merchant and Others and Air India Limited and Others* (2003)[84] on similar facts.

[84] *Air India Cabin Crew Association* v *Yeshawinee Merchant and Others and Air India Limited and Others* 2004 AIR (SC) 187

Personal law is another area in which women become victims of discrimination and injustice. In *Gurdial Kaur* v *Mangal Singh* (1968)[85], the dispute in short was whether the mother, who was remarried, should inherit the property of her deceased son or does it go to the distant collateral. As per the custom and usage of the time, The Punjab and Haryana High Court ruled that the property belonged to the distant collateral. The Court said that though the custom in question, which was decisive in the matter, had been abolished by the Hindu Succession Act, 1956 (para 4), the death of the deceased had taken place just prior to the said law being put into force. Thus, the application of the law could not take place in this case (para 4). It further said in the particular context of Article 15 of the Constitution that it was "too much to suggest that all heirs belonging to any sex must have the same rights of inheritance" (para 4) and the deployment of personal laws had to take place to determine the inheritance among the members of different sexes. Owing to this, the court eventually ruled that the pre-constitutional and the custom in question does not constitute violation of the guarantee of non-discrimination on the ground of sex under Article 15 of the Constitution (para 4; also see Jain 2010: 1297). In an earlier case, *State of Bombay* v *Narasu Appa Mali* (1952)[86], The Bombay High Court had ruled that personal law does not constitute discrimination on the ground of sex, as it is not definitionally part of "law" under Article 13(3) (a) of the Constitution, and since the personal law is not covered under the law's definition, it does not fall within the purview of the expression "law in force" under Article 13(1), the clause which explicitly lays down that all laws which happen to be inconsistent with the Fundamental Rights enshrined in the Constitution's Part III shall be void to the extent of their inconsistency (Ministry of Law and Justice, 2007: 28-9). The Court reasoned that had the Constitution framers wanted personal law being incorporated within the definition of law, they could very well have done it explicitly. However, within the definition of law "custom or usage having in the territory of India the force of law" occurs. About which, the Court said that there is a distinction between

[85] *Gurdial Kaur* v *Mangal Singh* AIR 1968 P H 396
[86] *State Of Bombay* v *Narasu Appa Mali* AIR 1952 BOM 84

personal law and custom and usage. Custom and usage cannot subsume personal law within its corpus. This case was upheld by the Supreme Court in *Ahmedabad Women Action Group* v *Union of India* (1997)[87]. In *Sri Krishna Singh* v *Mathura Ahir* (1980)[88], the Supreme Court said nearly reprimanding the Bombay High Court that: "(t)he learned Judge failed to appreciate that Part III of the Constitution does not touch upon the personal laws of the parties. In applying the personal laws of the parties, he could not introduce his own concepts of modern times but should have enforced the law as derived from recognised and authoritative sources of Hindu law."

3.3 Feminist Critique of Formal Equality

In principle, Gangoli acknowledges that women in India bear "a number of legal rights", such as guarantee of equality, guarantee against discrimination, guarantee of affirmative action and policy of equal pay for equal work for women. It has been provided in the Constitution of India through the agency of Fundamental Rights and Directive Principles of State Policy as enshrined in part III and IV of the Indian Constitution respectively (Gangoli 2007: 2 and 35). However, Indira Jaising (2013) argues that colonial laws, inherited jurisprudence and particularly the notion of equality borrowed from the United States that effectively apply in independent India to govern her people had "devastating consequences" (Jaising 2013: 232) owing to not being able to deal with social inequalities and discrimination in full measures.

This model of equality is still substantially informed by the jurisprudence of formal equality based on sameness and reasonable classification (Kapur et al 1993: 42). It is further undergirded by the Aristotelian dictum that premises

[87] *Ahmedabad Women Action Group* v *Union of India AIR* 1997, 3 SCC 573
[88] *Sri Krishna Singh* v *Mathura Ahir* 1980 AIR 707

equality on ‘likes alike’ and ‘unlikes unalike’ imperative (Kapur 2016; Agnes 1999: 168). For pointing out the formalistic nature of India's equality, Kapur takes a look at articles 14, 15, and 16 that construct equality thesis in the Constitution of India. Article 14 that is the hallmark of the equality thesis promises equality before law and equal protection of laws. The judiciary interprets Article 14 using the principle of reasonable classification, which rests on intelligible differentia, a concept that says the classification must be based on intelligible criteria, and there must be a rational connect between the classification and the object that is required to be secured by that classification. Once these two conditions are met, there is no discrimination within the idiom of article 14 of the constitution. This reasoning of formal equality infuses the reasoning of the article 15 and 16 of the constitution as well. Kapur argues that this model does not take social, economic and educational inequalities into account in order to reach desirable outcomes (Kapur & Crossman 1993: 43).

For instance, when equality of treatment is extended to matrimonial cases, to denote husband and wife, first the gender neutral term ‘spouse’ is invoked to shade invidious gender inequalities between men and women (Agnes 1999: 168). Doing so equalizes responsibilities and obligations of the husband and wife, as they become similarly situated in the eyes of law despite being circumstanced in unequal social, economic and cultural conditions (Agnes 1999: 168). According to Agnes, application of the concept of equality of treatment to unequally situated husband and wife in terms of socio-economic and cultural conditions would widen the gender gap (Agnes 1999: 168).

Article 15 effectively prohibits discrimination, among other things, on the grounds of sex. It also offers protective discrimination to women against men to secure sex equality in the society. However, this protective discrimination is often

informed by the model of formal equality, not by the model of substantive equality (Kapur & Crossman 1993: 43).

The claim of law that its interpretation is located in objectivity is an untenable proposition, particularly because the brain that judicially interprets law and legal norms already remains steeped in its own belief and thought system and point of views. In the process of interpretation, this brain is neither tabula rasa nor a calculating machine. Thus judicial interpretative activity that takes place takes place under the overhang of subjectivity. (Chattopadhyaya cited in Kannabiran 2014: 172-173).

Article 15(1) that enacts non-discrimination on the basis of "only of ... sex..." (Ministry of Law and Justice, GOI 2007: 7) guarantees non-discrimination on grounds only of sex and nothing else. The usage of the term ‘only’ limits the conceptual scope of this Clause. It was B.N. Rao who had inserted this term in the Clause as an advisor to the Constituent Assembly (Rao 1968: 185-187). Thus, the Clause is couched in a language and located in an interpretational jurisprudence that makes the said guarantee nearly redundant and insignificant, particularly owing to the reason that if the claim to sex discrimination goes to the judiciary in the context of discriminatory service conditions, property and social norms, the claim to discrimination is not regarded on grounds of sex (Kannabiran 2014: 173). According to Kannabiran, the "very fact that it is expressed in combination removes it from the purview of Article 15" (Kannabiran 2014: 173). The breach of the Article requires pure discrimination on grounds of sex alone (Kannabiran 2014: 173). Thus, the jurisprudence of Article 15 is located in reductionist interpretation (Kannabiran 2014: 173) pursuant to the 'only sex criterion'. In fact, Stang Dahl argued that enactments, major court verdicts and even sex discrimination legislations had rarely and hardly anything to do with women (Stang Dahl cited in Smart 1989: 24).

Linguistically, the phraseology prohibits discrimination only on the grounds of sex and nothing else. The usage of the term "only" in the Article limits the notion of equality. What it means is this that if there is any classification that is purely based on the prohibited ground, that is, sex, the said classification would amount to discrimination. But if the claim to discrimination demonstrates more than one ground for the classification, it may pass as a valid and permissible classification on other grounds, making the guarantee of the non-discrimination on the ground of sex nearly useless (Kannabiran 2014: 173-174).

4. Substantive Equality

4.1 Constitutional Provisions

I have previously written at length that substantive equality is different from its formal counterpart in the sense that it is not hostage to the like-unalike imperative for producing justice. As its primary and central object, substantive equality chooses to target disadvantage and subordination (Kapur & Crossman 1999: 200), as opposed to relentlessly pursuing the like-unalike criterion along with its connected paraphernalia. Of course, we are deeply addicted to desiring "abstract, universal, objective solutions to social ills, in the form of legal rules or doctrine" (Scales 1986: 1373). Aristotelian justice constitutes an example of that desiring. Yet the immediately preceding sections, however, demonstrate that high-level of abstraction holds exclusionary potential, putting social groups out of the pursuit of justice at the threshold itself (Kapur & Crossman 1999: 199). MacKinnon, in the particular context of women, advances an alternative conception of constitutionalism from the feminist perspective, which, among other things, would stand anchored in a "substantive equality of women both as an overarching theme in the document and as an underlying reality in the social order, in active engagement with a society recognized as unequal based on sex and gender,

necessarily in interaction with all salient inequalities" (MacKinnon 2012: X). She even points out that this kind of substantive equality appears to be entrenched in the Indian Constitutional law (MacKinnon 2006: 181). Detailed provisions for sex equality have been engrafted in the text of the Constitution. This engraftment, it is argued, puts India on the course of substantive equality (Davis 1996: 31-2).

As a matter of fact, along with the equality code, which I have discussed in the preceding section, the Directive Principles in Part IV of the Constitution are deployed for substantive equality. Though this Code is largely informed by formalistic understanding, it is also put to use for substantive outcomes at times. I have already mentioned some of its provisions in the preceding section, I shall only mention those Clauses which I have not mentioned over there in the preceding section and which demonstrate, on the face of it, the constitutional commitment towards sex equality. Clause 2 of Article 15 stipulates that : "(n)o 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 places 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" (Ministry of Law and Justice, GOI 2007: 7).

Clause 3 of Article 15 provides that "(n)othing in this article shall prevent the State from making any special provision for women and children" (Ministry of Law and Justice, GOI 2007: 7). Clause 2 of Article 16 lays down that: "(n)o citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State" (Ministry of Law and Justice, GOI 2007: 7).

I have noted above that the object of Clause 2 of Article 15 is rooted in ensuring non-discrimination in the private sphere, particularly at the places listed in the provision (see CAD Vol. III April 29, 1947).[89] The guarantee is not merely limited to the Indian state (Jain 2010: 1296. The private realm also comes within its inhibition. Even Austin (1966) has noted that Article 15 in Fundamental Rights is a guarantee that has been drafted into the Constitution not only to operate against the prejudicial and arbitrary action of the State, but designed with the particular view that this guarantee must also cover the private action of fellow citizens, which renders equality nugatory. It was therefore provided in the Article that no citizen shall face any disability, liability, and restriction in having access to shops, restaurants, wells, roads, and other public places on the pretext of his or her religion, race, caste, sex, or place of birth. Thus, the State is constitutionally required that on the one hand, it must respect negative guarantees, the guarantees that mandate non-interference on the part of State in its citizens's life, and on the other, it must discharge its positive obligation where it must protect citizen's rights from 'encroachment by society' (Austin 1966: 51). Thus according to Austin, one of the functions of the Fundamental Rights was to secure an egalitarian social order, where all citizens were equally free from State and societal coercion and restriction so as to be able to enjoy the fruits and the privileges of liberty (Austin 1966: 51).

Clause 3 of Article 15 is understood to be the greatest source of alternative understanding of equality. I will therefore deal with it in some detail. As pointed out by Kaufman, this Clause was enacted to "relieve women from 'moribund ... formal equality'" (Kaufman 2006: 588). The incorporation of this Clause in the Constitution epitomizes the philosophy that equality in true sense of the word cannot result unless affirmative action to redress historical disadvantage and

[89] Available at http://parliamentofindia.nic.in/ls/debates/vol3p2.htm

subordination is actively pursued (Kaufman 2006: 588). Article 15(3) is the Clause that categorically confers power upon the Indian State to make special provisions for women and children (*Vijay Lakshmi* v *Punjab University*, 2003)[90]. This Clause, states Indira Jaising, holds the potential "to move towards substantive equality for women and children through the use of affirmative action" (Jaising 2013: 233). As observed by the Supreme Court, the insertion of this Clause in the Constitution was governed by the social and economic disabilities and limitations that women had to suffer over centuries. The eradication of "socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women" (*Government of Andhra Pradesh* v *P.B. Vijayakumar* 1995)[91] is at the heart of this Clause.

The account of the insertion of the Clause, however, seems somewhat complicated. The following account is provided by B Shiva Rao in his magnum opus on the Indian Constitution about the insertion of the Clause, which, for the greater part, is ostensibly tied to clause 2 of Article 15 of the present day Constitution. The relevant part of which, as submitted by the Sub-committee on Fundamental Rights having studied the drafts of K.M. Munshi and B.R. Ambedkar read:

> There shall be no discrimination against any person on grounds of religion, race, caste, language or sex. In particular— (a) *there shall be-no discrimination against any person on any of the grounds aforesaid in regard to the use of wells, tanks, roads, schools and places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public* (Rao 1968: 183-4, emphasis is mine).

The controversy arose in extending general guarantee of non-discrimination on the grounds of sex, especially in the context of public goods enumerated in the

[90] *Vijay Lakshmi* v *Punjab University* (2003) 8 SCC 440
[91] *Government of Andhra Pradesh* v *PB Vijayakumar* (1995) 4 SCC 520

Clause, that is, 'wells, tanks, roads, schools and places of public resort'. The apparent substance of the controversy was that the Indian state would lose the capacity to differentiate between sexes for the particular purpose of providing separate amenities in favour of women in particular.

BN Rao's view about the quoted clause was that it would "prejudicially affect the institution of separate schools, hospitals, etc. for women" (Rao 1968: 184). His view seemingly was further supported by the Minorities Sub-Committee as well, which held that separate provision for women and children was necessary (Rao 1968: 184-5). The Sub-committee which was set up to look into the issue had eventually dropped the term "sex" from the provision altogether to break the deadlock. I have already pointed out above that this deletion was objected by RajKumari Amrit Kaur along with others, who had proposed to revive the expunged term in the Clause with an additional provision that could enable the Indian state to provide separate amenities exclusively for women. Thus, it appears that the incorporation of Clause 3 in Article 15 is largely located in merely providing separate amenities to women, not in the larger narrative of sex equality and gender justice, should we go, for a moment, by the originalist account of the Clause.

At times, separate and exclusive amenities may serve a useful purpose and women may need them. But a reading of *Sm. Anjali Roy* v *State Of West Bengal* (1952)[92] points towards two issues implicated in the idea of separate amenities. First, the amenities of this description may be lacking in quality and standard. Second, those for whom, these separate facilities are created may be coerced into using them by the state. However, mere separation may or may not aid the objective of sex equality and gender justice, it may complicate it further in the long run. Separation may be a tiny and tactical step in the direction of gender justice, but it could well prove to be a giant leap in perpetuating and retaining the

[92] *Anjali Roy* v *state of West Bengal and Others* AIR 1952 Cal 822

gendered and patriarchal social order. After all, the idea of separate facilities is mainly anchored, as it appears, in attending to the appetites of the gender division or gender system. This would lead to not a less but more gendered social order, that is to say, that it would widen gender division, as opposed to decreasing it.

As I have stated above, Paula Benergee had argued that an attempt was underway to sanitize the Constituent Assembly Debates of gender justice, leaving women's issues to their respective communities to settle. It is plausible enough that along with funding, the intention of providing separate amenities may have also been rooted in gendered and patriarchal ideas, peddled by the conservative elements of the time.

Constitutions cannot remain stuck and frozen in time. The expansive reading of the Clause by the Supreme Court may certainly be useful for gender justice. However, the approach of the judiciary to interpret the Clause is hardly uniform. Mainly, three ways can still be noted. The first, where it embraces substantive theory of equality; the second where it employs the formal theory of equality; and the third wherein the judiciary interprets conservative and women-unfriendly statutory provisions without declaring them unconstitutional, in a manner in which they live up to the constitutional mandate of citizens' equality (Kaufman 2006: 588).

Under the Clause, ‘Making of special provision’ underpins the idea of discrimination in favour of women, not against them (Kapur & Crossman 1999: 203). The expression ‘special provision’ in the Clause further encompasses reservation in job opportunities and affirmative action. The creation of job opportunities for women, observes the Supreme Court, is an important aspect of gender equality. Not doing so would amount to undermining and subverting the ‘underlying inspiration’ (*Government Of Andhra Pradesh* v *P.B. Vijayakumar* (1995) of Clause 3 of Article 15, hence the creation of employment opportunities

for women for gender equality under the Indian state is an integral part of this special authorization. Article 15(3) is capacious enough for this purpose along with other affirmative agenda for gender equality (Kaufman 2006: 589). The implication of which is that this clause is premised on the idea of raising women from subordination and relegation to gender equality in the society. (*Priyanka Sharma* v *State*, 2013[93]; Jain 2010: 1304). Majorly owing to this, it is argued that the equality residing in the Indian Constitution is committed to erasing gender disparity and division (Jain 2010: 1300). However, such special provisions can only be resorted to within reasonable limits, to the limit where the guarantee of discrimination in Clause (1) and (2) of Article 15 does not become meaningless (Jain 2010: 1301).

Two approaches in particular are put forth in connection with Article 15(3). One that it is an 'exception' to the guarantee of non-discrimination as enshrined in Article 15(1) and 15(2). In other words, the equality in this Clause does not constitutes the continuum, that is to say, it is not a contiguous extension of, what may be referred as, mainstream equality residing in Clause 1 and 2 of Article 15. Second, contrary to it, the other approach is referred as "holistic approach", the gist of which is that it is a continuous extension of the guarantee of non-discrimination engrafted in Clause 1 and 2 of the Article 15 (Kapur & Crossman 1999: 206). The former, that is, the 'exception approach' is associated with the formal jurisprudence of equality, as the difference, as we have discussed, in formal understanding does not constitute equality; it constitutes 'distinction', which, for the current purpose, may also be referred to as 'exception'. In other words, anything which deviates from the rut of formal jurisprudence on equality is cast as 'exception' to the mainstream and established discourse of equality. In that sense, Article 15(3) is interpreted as 'exception' to Clause 1 and 2 of the same Article. The earliest judicial postulation to this effect can be noted in *Sm. Anjali Roy* v *State Of West Bengal* (1952), where it was explicitly observed that

[93] *Priyanka Sharma* v *State,* S.B. Civil Writ Petition No. 16142/2012

Article 15(3) actualizes an obvious 'exception to clauses (1) and (2)' of Article 15, as it enables the Indian state to enact special provisions for women despite the fact that sex is constitutionally banned to be employed for discrimination (also see Jain 2010: 1300). Whereas in the 'holistic approach', as indicated above, there is little recognition of such a dichotomous understanding. Even the adoption and espousal of deviatory or alternative comprehension of equality is accepted and embraced as part of the overall equality discourse. Affirmative action for redressing and remedying historical discrimination does not qualify for being an 'exception' to equality; it is an important medium to materialize true equality in reality (Kaufman 2006: 589; Kapur 2016). It was observed in *Dattatraya Motiram More* v *State of Bombay* (1952)[94] that Clause (3) did not create an exception to equality in Article 15 of the Constitution; on the contrary, it was an obvious part of the same equality residing in the said Article carved out for women (see para 7). Even in *Government of Andhra Pradesh* v *P.B. Vijayakumar* (See supra 1995), the Supreme Court observed that the Clause constitutes a clear 'carving out a permissible departure' from the rigours of Article 15(1). The obvious implication of which is that on account of Clause (1) of the Article 15, the discrimination in favour of men on the basis of sex is not possible, while the same under Clause (3) of the said Article is permissible in favour of women (Dattatraya case supra), para. 7) In other words, the Indian state may effect discrimination "in favour of women against men, but it may not - discriminate in favour of men against women" (Dattatraya case supra, para 7). Thus discrimination effected in favour of women under Clause (3) does not offend Clause (1) and (2) of the Article 15. It is because of this that a holistic approach appears to be representing substantive equality (Kapur & Crossman 1999: 207). However, it is its limited character. It remains short of attending disadvantage as its central focus, as most of the time, courts are influenced by the exception approach (Kapur & Crossman 1999: 207), which is largely put to use to interpret Article 15(3) (Kapur 2016).

[94] *Dattatraya Motiram More* v *State of Bombay* AIR 1953 Bom 311

Furthermore, even the Directive Principles are put to use for gender justice. They prompt the State to necessarily shepherd and steer its policy to secure adequate means of livelihood for men and women equally, distribution of ownership and control of community's material resources for the best and optimum common good, governance of economic system in the manner in which the concentration of wealth and means of production to the common detriment does not ensue, equal pay for equal work for men and women, non-abusive work culture where health and strength of men and women and tender age of children is not exploited (see Art 39 in Ministry of Law and Justice, GOI 2007: 21-22). Article 42 further enjoins upon the State to enact provisions that could create and lay down just and humane conditions for work and maternity relief (see Art 42 in Ministry of Law and Justice, GOI 2007: 22). The aim of the Directive Principles was to usher India in an era of social revolution (Austin 1999), where people as individuals are free (Austin 1966: XIV). In other words, the Directive Principles represent "second generation socio-economic and cultural rights" (Jaising 2013: 230), which are understood to be fundamental in India's governance and deeply associated with human dignity (Jaising 2013: 230 and 235), despite the fact that they are non-justiciable.

Pursuant to these constitutional provisions, Martha C Nussbaum states that India's 'constitutional tradition' has been 'remarkably woman-friendly' (Nussbaum 2002: 97; 2005: 202). She argues that the understanding of equality that is embedded in the Indian Constitution is substantive, as against formal in nature and it has designedly been fastened into it so as to secure justice for India's large subordinated social groups that have particularly been marred by sex and caste discrimination across the country since time immemorial. Formal model of equality that requires to treat likes alike and unlikes unlike was found wanton and insufficient to measure up to the requirement of remedying pervasive and long standing sex and caste discrimination deeply entrenched in the Indian society, because it rejects affirmative action, a compensatory intervention in an instance of

discrimination and injustice (Nussbaum 2005: 178). Whereas the substantive notion of equality places special and particular emphasis of having to address discrimination and injustice in a manner in which the social groups marred by injustice and discrimination can once again be rehabilitated and restored to the natural condition of flourishing. This model of equality urges to do everything what it takes to overcome injustice and discrimination, if required to indulge in injustice against powerful and privileged groups in the society. Though substantive equality has not explicitly been defined in the text of the Constitution, Nussbaum argues on the basis of the special and particular provisions drafted in the Fundamental Rights to remedy injustice felt and borne by vulnerable sections of the society and the Directive Principles of the State Policy as enshrined in the part III and IV of the Constitution respectively that the notion of equality that is embedded in the Indian Constitution is substantive as against the formal one (Nussbaum 2005: 178).

However Ratna Kapur along with Brenda Cossman (1993) argue that despite constitutional guarantees of equality to Indian women, they still remain plagued by substantive inequalities in their lives, because even the judiciary writes its judgments using equal gender model, based on sameness or the formal understanding of equality (Kapur and Cossman 1993: 40).

The focus of substantive equality is on systemic and historical disadvantage that people as social groups are victims of. It straight away seeks to eliminate that very root structure that keeps inequalities in place. Unlike formal equality, the commitment of this trend of equality is not on offering equal treatment of laws to people. Far from it. It seeks to connect itself to how law impacts social groups (Agnes 1999: 168).

The notion of substantive equality, which at times the Indian judiciary makes use of, shifts its focus of attention from the constituent doctrinal trends of formal equality, that is, sameness and difference and places it to where it ought to be, that is, to the disadvantage that made social groups in question subverted and subordinated. The primary focus it seeks to keep on is whether laws, rules and practices that deal with subordinated and disadvantaged groups precipitate their disadvantage and oppression. That is the central enquiry of substantive equality approach. This model recognizes that the inequality is the result of historical injustice and disadvantage and it is therefore necessary to offer all the support to the disadvantaged social groups to enable them to come out of this disadvantageous situation (Kapur 2016: chap 41). Henceforth, I shall set out some of the cases mainly of the Supreme Court of India in some detail, where the tilt towards substantive equality in some degree can be noticed.

4.2 Substantive Equality and Court Cases

Ms. *Githa Hariharan* v *Reserve Bank of India* (1999)[95] is one of the landmark judgments by the Supreme Court of India from the perspective of gender justice and equality. The controversy under judicial challenge and scrutiny was a matter that could be said to be astoundingly mirroring the patriarchal nature of India's systemic order. Githa Hariharan wanted to hold 9 percent of her Relief Bonds in the name of her minor son. Instead of the boy's father, it was she, as the mother, who had wanted to act as the natural guardian to her son to manage the investment. She submitted an application in the Reserve Bank of India to this effect. The apex Bank of India returned the application with the communication that either this application is mandatorily required to be signed by the father of the son or else she must produce a certificate of guardianship from a competent authority before her application could be further processed and acted upon in

[95] *Githa Hariharan and another* v *Reserve Bank of India and another* AIR 1999, 2 SCC 228

accordance with her wishes. This gave rise to the litigation. The Constitutionality of Section 6 of the Hindu Minority and Guardianship Act, 1956, which is anchored in rank gendering and patriarchy, was challenged in India's apex court arguing that the provision callously infringes upon the dignity of women, an inherent right available to them under the Constitution of India, as it denies the right to women to act as natural guardians to their children.

The relevant part of the impugned section read:

> The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property), are-
>
> (a) in the case of a boy or an unmarried girl-the father, and after him, the mother: provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. (See section 6, at https://indiankanoon.org/doc/39958047/)

While delivering the judgment, the apex Court suggested at the outset itself that gender bias was unconstitutional, particularly because the Constitution's basic structure was pervaded by equality of status, fully destroying the basis of the said bias. The cry for gender equality and equal status of women has progressively been getting sharper with the passage of time. The Court observed that the phrase 'in the case of a boy or an unmarried girl – the father, and after him, the mother' in the impugned and quoted Section was problematic, as it reflected upon the gender bias and patriarchal expression of system in place. It stipulates that the mother could only act as the natural guardian after the father of the child. Within the expression 'after', the death of the father is implicit on literal interpretation of the impugned words.

The Court said that it is not proper to interpret the words 'after him' in the Section to mean 'after the death of the father'. The idea of guardianship is linked and connected to the concept of the welfare of the child. Once the father is unable or not interested in discharging the responsibility of welfare towards his child, this

alone is enough to render the father in the state of legal non-being for the purpose of the child and his welfare, and the mother is in the position to act as the natural guardian to her child in such a situation. The Court directed the apex bank to develop its policy in conformity with the above case law.

Nonetheless, the Hindu Minority and Guardianship Act makes it clear how law systematically produces invidious division between men and women and how it systematically prefers men over women. From a plain reading of Section 6, it becomes clear that within law's own comprehension, women are capable to become natural guardians of their kids. Yet the law denies this capability of hers to take effect during the lifetime or presence of the male figure, that is, in the presence of her husband. As per entrenched gender roles, only the mother can raise her baby, owing to which she enjoys natural guardianship over her baby till it reaches the age of five. Here apparently, special care of the male sex's comfort has been taken care of, as it observed that men cannot serve as primary caretakers of their babies, as per the established understanding. Jaising agrees that the Githa Hariharan case is indeed useful for women, who could serve as the primary guardians for their children when the father fails to attend to his duties towards his kid. But alongside, what may also be noted is that despite this progressive verdict, the Supreme Court did not strike down Section 6 which is a clear example of a gendered and patriarchal legislation (Jaising 2013: 240). In other words, the provisions remain valid on the statute. Law as it stands, it appears, is best suited to protect male interests. MacKinnon put it thus: "Law, structurally, adopts the male point of view" (MacKinnon 1989: 216).

The next case of the Delhi High Court further demonstrates how the government structure, its departments and its officials forcefully perpetuate and purvey further patriarchal understanding on flimsy grounds. The case is that of *Shalu Nigam* v

Regional Passport Office[96]. Shalu Nigam presented a petition in the Delhi High Court for the reissuance of her daughter's passport, who she had brought up on her own, without the name of her father as was being demanded by the passport authorities. She informed the court that she had divorce from her daughter's father, who abandoned his all responsibilities towards his biological child on account of the fact that she was a female child. The mother further told the court that her daughter was previously issued the passport without the name of the father being insisted upon. However, this time, the regional passport office was taking an adamant attitude with regard to re-issuing the passport. Moreover, her daughter, she said, does not carry her father's name, neither on educational certificates nor on her Aadhaar card. She argued that it was violation of her daughter's right to determine her own name and her own identity. If her daughter was forced to disclose her father's name on the application, it would amount to compelling her to change her identity particularly in relation to her mother. It was therefore, she prayed the court, important to order the passport authorities to reissue her daughter's passport without her father's name being demanded.

In its response and defense – as to why it was fixated so much on the father's name – the regional passport office said that the software installed to receive and process the application does not accept the same without the father's name. Other than this, a rule in the passport manual was also shown. The rule mandated one not to accept any application for deletion of parents' name on account of divorce in particular, because the decree of divorce severs matrimonial ties between the husband and wife and not the parents and their children, until the parents disinherit and disown their children or hand them over in adoption to someone else.

[96] *Shalu Nigam* v *Regional Passport Office* 2016 SCC OnLine Del 3023

The one judge Bench presided over by Manmohan said that in such matters, the interest of the child is of paramount importance and the single mother can lawfully be the natural guardian of her child to discharge the responsibility of welfare. As long as there is no law that compels the child to mention the name of his/her father, the passport officials cannot insist for the same being mentioned. The name of the mother is sufficient for the purpose like this one.

As far as the issue of software is concerned, the court said that it cannot be put to use to extinguish anyone's legal right. The passport department is required to modify its software suitably in order to respect the legal right of the petitioner[97].

Both the preceding cases suggest that our system is clearly based on masculine and patriarchal ideas and notions. Officials who populate offices to run the system find the shift being desired surprising and astounding. It puts them in a vortex. The impact of normalization happens to be this profound that they cannot even develop technological interventions on just principles of life. The normality suppresses much of what makes change possible.

Aristotelian equality is severely inadequate to attend to the full range of inequalities faced by women (MacKinnon 2006: 181). They face rape, prostitution, sexual harassment, domestic violence, unemployment so on and so forth, "with equality law standing there on the sidelines", says MacKinnon. The formal model of equality does not treat and recognize such incidents as examples that constitute and reflect women's unequal position in the sex hierarchy and society. Most societies regard such incidents as regrettable and even criminal but not something that exemplify women being unequal (MacKinnon 2006: 183-184).

[97] Available at http://www.livelaw.in/no-legal-requirement-insisting-upon-fathers-name-applicant-issuing-passport-delhi-hc/

In this regard, particularly in the context of rape, the apex court of India gave a landmark verdict in *Vishakha* v *State of Rajasthan* (1997)[98], recognizing incidents of rape as a violation of equality. Vishakha, a social activist was brutally gang raped in a village of Rajasthan. This horrific incident compelled the NGOs to initiate class action in the Supreme Court. A petition under Article 32 of the Constitution was presented before the court. It was said in the petition that rape constitutes a clear violation of the right to equality, right to profession and right to life enshrined in the Constitution. Speaking through J.S. Varma, the three judge Bench acknowledged the fact that there is no doubt that rape constitutes a breach of the Fundamental guarantees under Article 14, 15, 19(G) and 21 of the Constitution, undercutting and short circuiting the possibility of women being equal to men in the actual and full operational sense of the idea of sex and gender equality (also see Jaising 2013: 238). It was clearly observed in the case that "(g)ender equality includes protection from sexual harassment and right to work with dignity" (Vishakha case supra) and each incident of rape constitutes a violation of the Fundamental constitutional guarantees of "'Gender Equality' and the 'Right of Life and Liberty'" (Vishakha case supra). The amplitude of the "meaning and content of the fundamental rights" (Vishakha case supra), said the Supreme Court, was sufficient to "compass all the facets of gender equality including prevention of sexual harassment or abuse" (Vishakha case supra). Referring to the Directive Principles in the Constitution, international law, treaties, Conventions and norms, human rights law, provisions of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), The Supreme Court laid down the guidelines and norms to protect women from sexual harassment at workplaces, as sexual harassment was held to be a violation of gender equality (see Vishakha case supra; Jaising 2013: 238).

[98] *Vishakha* v *State of Rajasthan* AIR 1997 SC. 3011

Kapur (2016) states in the context of the Indian law that there are three approaches in particular to deal with gender equality. First, equality as sameness. This principle assumes men and women as equal for the purpose of law. Any rules, regulation, legislation or practice that invidiously discriminates between men and women, courts can strike down such provisions, as it exemplifies a breach of constitutional equality law. Second, equality as protectionism. This approach takes women to be naturally weak and enfeebled beings, always in the requirement of being protected. Any rules, law, legislation or practice that is discriminatory towards women does not constitute breach of equality law, merely because that is intended to protect women as a weaker sex. What follows from this is that the protectionist approach to gender equality ends up in essentializing women as difference to sameness. It allows further perpetuation of the idea and sense of women being second class and subordinated creatures. Third, compensatory approach. As per this approach, women are taken to be historically disadvantaged and subordinated. Any law or practice that seeks to remedy this gender disadvantage and injustice would be upheld as improving the status of women and would be in conformity with equality law (Kapur 2016: chap 41).

The landmark case which demonstrates this is *Anuj Garg* v *Hotel Association of India* (2007) [99] (available from https://indiankanoon.org/doc/845216/). The Constitutionality of Section 30 of Punjab Excise Act, 1914, that banned employment of women in any part of the premises where alcoholic beverages were consumed was examined by the Supreme Court (para 2). As part of its general remarks about sex equality, the court said that when the impugned Act, that is, the Punjab Excise Act, 1914 was legislated, the notion of 'equality between two sexes was unknown' (para 20). However, those who framed India's Constitution did not want this sex inequality to persist further and were committed to make sure that the concept of equality between men and women with full rigor was applicable in all walks and spheres of life. Article 14 and 15 that outlaw

[99] *Anuj Garg & Ors* v *Hotel Association of India & Ors* AIR 2008 SC 663

discrimination on the basis of sex evidence this fact. It is true that it cannot imply that classification on the basis of sex is 'wholly' impermissible under Article 14 but when it is carried out on the basis of forbidden grounds, as sex is under Clause 1 of Article 15, the burden shifts to the State as to establish how an act of impugned classification is constitutional as against the petitioner who alleges the discrimination. The judiciary, the court said, will even take note of the Directive Principles enshrined in Part IV of the Constitution while checking the constitutional validity of such anachronistic provisions of law (para 20).

Today the hospitality industry is on the rise. A lot of young people comprising boys and girls are pursuing courses related to the hospitality industry while spending huge amounts of money. The Service of alcoholic beverages is quite normal in hotels, bars and restaurants. Even the service of such drinks happens in the rooms of the occupants at the said places. Not only in these places, service of alcoholic drinks takes place even in airborne planes. Should the impugned provision of law, that is Section 30 of the Punjab Excise Act, which imposes sweeping restrictions upon women, be put into effect, all places like these shall stand barred and denied for women particularly in terms of employment (para 22-23). That is a clear case of denial of guarantee of equality to women. It is true that no citizen enjoys Fundamental Right to employment, but each and every citizen similarly situated has the Fundamental right under Article 15 and Article 16 of the Constitution to be considered for employment. Particularly in the context of women, this violates that guarantee of equality. Further, the classification under equality provisions is permissible but it must be reasonable and non-arbitrary, targeted at some object to be sought.

The other pillar upon which the justification of such arbitrary provisions of law is premised is the *parens patriae* jurisdiction of State, which as a concept signifies the State's power where it situates itself as the guardian of those who are unable to

take care of themselves. The application of *parens patriae* power, however, says the Court, is not completely out of judicial scrutiny (para 27). it is important for *parens patriae* power to be legal and reasonable and acceptable that its application is required to be rooted and grounded in objective utility instead of moralistic impulses and considerations (para 28). For the purpose, the criterion that could be put to use to reach the reasonable and objective application of the said State power in question is to see whether there is any necessity of invoking the jurisdiction and whether that invocation would adversely impact the targeted person or group of people (para 29). This is what bestows objective character upon the doctrine (para 30)

Somewhat similar to the concept of *parens patriae* is the notion of romantic paternalism, possibly another variant of it, though operating more on the societal side of life than its political one. The concept has roots in American history and encapsulates the idea that white women as wives and mothers had an absolute economic dependence upon white men. It acts through social customs, statutes and judicial opinions restricting women's educational, economic and political activities and proposing home as an arena of their activities (Smith 1999: 181).

Noting that America had a protracted and unfortunate history of sex discrimination, the US Supreme Court said about the practice of romantic paternalism in *Frontiero* v *Richardson*[100] that it puts 'women, not on a pedestal, but in a cage' (para 42). because of this, the US Supreme Court continues, that the statute books have become replete and encumbered with 'gross, stereotyped distinctions between the sexes' and finally ruled in the case that "by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment" (cited at para 42).

[100] *Frontiero* v *Richardson* 411 *U.S.* 677 (1973)

As part of its reasoning, another US case cited by the Indian Supreme Court was *Dothard* v *Rawlinson*[101]. In short, the matter was that women could not be employed as guards and correctional counsellors in the Alabama state penitentiary system, particularly because it had housed sex offenders who may further pose a threat to women employees. Justice Marshall delivered his dissenting opinion in the case in which he said that, "(t)o deprive women of job opportunities because of the threatened behavior of convicted criminals is to turn our social priorities upside down (para 43). While proposing what is required to be done to deal with situation, he said that, "(t)he proper response to inevitable attacks on both female and male guards is not to limit the employment opportunities of law abiding women who wish to contribute to their community, but to take swift and sure punitive action against the inmate offenders" (para 43).

Pursuant to this, the Indian Supreme Court said that while examining the validity of provisions like the impugned Section 30, which stands in protective role, though 'suffers from incurable fixations of stereotype morality', it is required on the part of courts to apply 'strict scrutiny' test where not only the proposed aims of the impugned provision but also its prospective impacts and implications are required to be examined and understood. In no case, says the Court, the law should perpetuate oppression and discrimination against women. Unless there is some compelling State purpose, 'heightened level of scrutiny is warranted with respect to this kind of law as part of judicial review' (para 44 and 45).

In *Abdulaziz, Cabales And Balkandali* v *United Kingdom*[102], which was decided in 1985, the European Court said that in the comtemporary time, the advancement of women's equality was a major and an important issue among member countries of Counsel of Europe and only 'very weighty reasons' can justify the

[101] *Dothard* v *Rawlinson* 433 US 321 (1977)
[102] *Abdulaziz, Cabales and Balkandali* v *The United Kingdom,* 15/1983/71/107-109

difference of treatment on the ground of sex. This holding was reiterated by the European Court of Human Rights in *Van Raalte* v *The Netherlands*[103] where it said, "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention" (para 38).

Pursuant to this, the Indian Supreme Court says that what is needed is a 'deeper judicial scrutiny' of the enactments related to women so as to ensure that 'majoritarian impulses rooted in moralistic tradition do not violate the right to autonomy (para 39).

When an employer hires someone for a job, the contract comes into picture and it is right of the citizens to enter in any contract as long as it is not expressly prohibited by law and completely against public policy. Thus Section 30 takes away the women's right to enter into contract under the Indian Contract Act 1872 (para 26).

The matter which is under consideration at the moment involves two interests or values conflicting and colliding with each other – right to employment or right to autonomy of women and women's security at the workplace. Both of them are important and both are part of the feminist enquiry, as the State's energy in both areas is required to be expended for the dignified life of women. However, State protection does not mean 'censorship' where right to employment and right to self-determination would become nugatory and nonexistent (para 32, 33 and 34). That is the role in which the impugned provision of law has been acting. In other words, Section 30 of the said Act has been victimizing women in the name of protection (para 35). The mechanism adopted or put in place for protection is

[103] *Van Raalte* v *The Netherlands* 108/1995/614/702

required to be in proportion to the legitimate aims of protection and whether the test of proportionality is reasonable would take place in the context of the 'modern democratic society' (para 35); to place curbs upon women's freedom is no wise way of protection of the same. What is required on the contrary is that the empowerment of women should be pursued with much greater vigor. Moreover, law modeling is required to be done and the State should come up with new security strategies in collaboration with employers. Thus, the Supreme Court confirmed as the Delhi High Court held, that Section 30 of the Punjab Excise Act was unconstitutional violating gender equality entrenched in the Constitution.

Recognition of pregnancy support to mother is an issue of sex equality (MacKinnon 1989: 246), because disadvantage or discrimination during pregnancy is not understood or taken to be an incident of sex inequality, particularly because pregnancy constitutes a difference between men and women and unlikes can be treated unalike (MacKinnon 2011: 262 in Jaisinged). In this regard, the case that I wish to discuss is the *Municipal Corporation of Delhi* v. *Female workers (muster roll) and Anr* (2000)[104]. This case, as such, is located in the distinction between regular female employee and the non-regular ones. In other words, the classification in question is possible to be interpreted and located in more than one ground, something which Kannabiran has pointed out.

The verdict is by the two judge Bench of the Supreme Court, which relies upon the Directive principles in Part IV of the Constitution and international law to determine and reach the operating part of the judgement, as the formalistic understanding of equality and justiciable guarantees of the Constitution were inadequate to measure up to the issue involved in the controversy.

[104] *Municipal Corporation of Delhi* v *Female workers (muster roll) and Anr* MANU/SC/0164/2000

The MCD which hired female workers on the basis of the muster roll, or in other words, daily wages where they were not in regular employment of the MCD, being corseted in all the trappings of the law and legal entitlements – did not allow the facility of maternity leave to its women workers, who served the corporation in hard and industrious circumstances and conditions regularly for years at a stretch. The facility was, though, available to their regular counterparts. Convinced by the wrongness of the situation, the matter was taken up with the labour Secretary of Delhi Administration by Delhi Municipal Workers Union which demanded maternity leave being granted to muster roll or daily wage female workers as well (See Municipal Corporation of Delhi case supra: para 1 and 6). The Labour Secretary referred the matter to the Industrial Tribunal where the cause of the female workers fructified in success. The MCD appealed the order in the Delhi High Court where their appeal was dismissed. Thus, the matter was before the Supreme Court on MCD's appeal.

Though the Bench referred to the equality provisions in Part III of the Constitution, it situated the claim of the female workers in Directive Principles, particularly pursuant to Article 39, 42 and 43 laid down in Part IV of the Constitution. Article 39 puts the State under duty to pursue certain principles that should orientate its policy to achieve the mentioned goals in the Article. Clause (A), (D) and (E) of the Article were discovered to be relevant for the case. Those clauses of Article 39 read as follows:

> (a) that the citizens, men and women equally, have the right to an adequate means of livelihood;
> (d) that there is equal pay for equal work for both men and women:
> (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength

Hence what these clauses hold is that the State should always direct its policy to secure adequate means of livelihood for both men and women, irrespective of sex

considerations. Similarly, it should also strive for equal pay for equal work for both the sexes. Furthermore, the State is under duty to protect its workers, women and children of tender age from the excesses of economic activity.

Article 42 reads: "The State shall make provisions for securing just and humane conditions of work and for maternity relief" while what Article 43 stipulated is as follows:

> The State shall endeavour to secure, by suitable legislation or economic organisation or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities and, in particular, the State shall endeavour to promote cottage industries on an individual or co-operative basis in rural areas (Article 43).[105]

These were some of the constitutional provisions that the State is required to improve the conditions of workers. However, strictly from the point of view of law, the cause of maternity leave is in Article 42 where the State is under duty to make provisions for maternity relief.

As I have previously indicated, discrimination is located in classification, which is a hallmark of a formalistic understanding of equality. Daily female wage workers and regular female workers are two distinct categories and dissimilarly situated categories cannot be treated alike. Rule of classification and treating likes alike and unlikes unalike criterion is a camouflage that is making invidious discrimination permissible and possible on the part of the executive wing of the state. This is strange that this understanding does not inform the MCD that beneath the created visible distinction on the basis of the regularity of service, this

[105] Available at https://indiankanoon.org/doc/1256023/

substratum is common in all female workers that all of them may have to go through pregnancy.

The next case that is to be discussed is also related to discrimination to employment cum profession. But this discrimination is located in the private sector where the Constitution ceases to operate and the cries of sex equality begin to become muffled and smothered. The case is of *Charu Khurana* v *Union of India* (2013)[106]. Charu Khurana was a Hollywood trained make up artist and hair stylist who had applied to the Cine Costume Make-up Artists and Hair Dressers Association (henceforth Association) for their membership card in both the categories of makeup as well as hair dressing, in order to practice her profession. The Association refused the membership card for the make-up category. While refusing, it said that it was the policy of the Association to permit men as make-up artists and women only as hair stylists. Thus, she was told that she would have to drop 'make-up artist' from her applicant form, which she did, apparently under this sort of legal coercion. Along with it, she was also required to establish that she had been living in Maharashtra for more than five years. Not having found any concrete and absolute proof in her application dossier – though she produced many – that could establish her residence in Maharashtra to their satisfaction, the Association had rejected her application. This did not fall well with Khurana. She started working without a membership card in both the categories. However, when she was found working as a make-up artist, a fine of Rs. 26,500 was imposed on her. She lodged a complaint about this with various authorities alleging that she was being deprived of her right to practise her profession in an arbitrary manner. Ultimately, the matter landed in the Supreme Court, where the question for consideration was whether a trained woman could be deprived to work in the film industry as a make-up artist merely because the Association, which was governed by the Trade Unions Act, 1926, had resorted to this kind of classification, incorporated and employed the same as clauses on its applicant

[106] *Charu Khurana* v *Union of India* (2015) 1 SCC 192

form. Another allied question – though I shall not discuss it here in detail – for consideration was whether the Association could stipulate that the person applying for membership must have proof of a five-year long residence in Maharashtra.

While delivering the verdict, the Court first had particular regard to the Directive Principles enshrined in the Constitution, where the State is under duty to expend its efforts to secure sex equality and gender justice on the reasoning that in the landmark Minerva Mill case (1789)[107], it was said that 'Fundamental Rights and the Directive Principles are the two quilts of the chariot in establishing the egalitarian social order' (cited in para 30) and in *Society for Unaided Private Schools of Rajasthan* v *Union of India and Another* (2012)[108] it was stated that the judiciary was required to interpret the Fundamental Rights in the light of the Directive Principles (para 30).

Thus, for the present case, the reference was made of Article 39(A), (D) and (E) that prompted the State to ensure adequate means of livelihood to women along with men, equal remuneration between sexes and non-abuse of health and strength of women as workers respectively (para 30). Thereafter, mention was made of the Fundamental Duties engrafted in Article 51 A. Clause (a) of the said Article requires that every citizen should, among other things, 'abide by the Constitution and respect its ideals and institutions' and Clause (e) of the same Article places the citizens under Duty to 'renounce practices derogatory to the dignity of women' (para 31-33). About this particular Clause, the Court said that, "(b)e it stated, dignity is the quintessential quality of a personality and a human frames always desires to live in the mansion of dignity, for it is a highly cherished value" (para 34). With this description, the Court reached the conclusion that a common theme runs through Part III, IV and IV-A of the Constitution. The first specifies

[107] *Minerva Mills Ltd. and Ors.* v *Union Of India and Ors* AIR 1980 SC 1789
[108] *Society for Unaided Private Schools of Rajasthan* v *Union of India and Another* (2012) 6 SCC

Fundamental Rights, the second, fundamental principles of governance and the third puts citizens under Fundamental Duties (para 31).

The Court certainly touched upon Fundamental Rights by giving reference to Articles 14, 19(g) and 21 of the Constitution, but it did not dwell here for a long time, particularly because the Association was not 'State' within the meaning of Article 12 of the Constitution – meaning that it was not amenable to the writ jurisdiction of the Constitution. Meenakshi Arora who represented the National Commission for Women marshaled the argument at this stage that the invocation of the Writ jurisdiction against the Association may not be possible, but the acceptance and ratification of its constitution and bylaws by Registrar of Trade Unions that violate and disregard any of the commands of the Constitution, Trade Union Act, 1926 and international treaties ratified by India should not take place, as they were discriminatory towards women. On judicial enquiry, it was found that a relevant bit of Clause 4 of its bylaw read as "'Membership: Membership of the Association shall comprise of Make-up men, Costume men, and Hair Dressers' (para. 44). Yes, the first two categories were not available to women and the third was not closed off for men. It was in conflict with Section 21 of the Trade Union Act. That Section permits 'any person' – it does not recognize the men-women distinction as the criterion of membership – who has completed 15 years of age to become the member of a 'registered trade union' (at para 42).

Having thus considered the matter, the Supreme Court said the impugned Clause was in contravention to the statutory provisions of the Trade Union Act. The Association cannot seek acceptance and registration of the rules that violate and run counter to the 'Constitutional values and norms', institutionalizing and perpetuating discrimination on the basis of sex (para 50). Thus Clause 4 was out of accord with the statutory provisions of the Trade Union Act and constitutional mandate, values and norms, emerging from Part II, IV and IV-A of the

Constitution and even international law. Pursuant to this, the Apex Court quashed Clause 4 of Association's bylaw along with Clause 6 that stipulated residence requirements (para 54), of which I shall not discuss beyond this, as it stands out of my academic mandate.

This case may give an impression that the Association was reasonable in its behaviour in the court when it offers the reasoning that it had been acting in bonafide interests of both the sexes, compelling them to operate in their respective domains. But the truth is contrary. It isn't. In fact, the Association has been protecting male interest by excluding women from make-up and the costume arena in a bizarre manner, without choking off the hair dresser arena for men with equal legal force. The Association with a preservative instinct on display has been fighting for the survival of men in the said branches of profession. Reasonableness apparent in the stand of the Association has been masking and glossing over what is hideously existing there – the blatant and shameless protection of male interests.

The above judicial account demonstrates that the shift towards substantive equality for gender justice and equality can be noticed in India's recent court pronouncements. The apex court put to use Directive Principles, Fundamental Duties, international law, humanright law, jurisprudence from foreign jurisdictions along with the Fundamental Rights to produce outcomes desirable for gender justice and equality. At times, it appears that the Supreme Court is even willing to attend to equality from the feminist perspective, as it did in the Vishakha case (supra), that it rose to upholding rape and sexual harassment as a violation of the constitutional guarantee of equality. It is, at times, willing to intervene in the private sphere as well create conditions for gender justice. However, the Supreme Court is reluctant to strike down personal laws that run counter to constitutional equality. In Githa Hariharan case (See discussion supra: 1999), for instance, the Supreme Court interpreted Section 6 of the Hindu

Minority and Guardianship Act, 1956 harmoniously, but it did not strike down the impugned Section.

5. Conclusion

The main curiosity which I pursued in this chapter is whether the erasure of gender division and inequality was part of India's constitutional law. I proceeded from the assumption that it was not, though the nature of India's constitutional equality provisions even from the standpoint of women may appear to be substantive. Underscoring the reality of women being absent in the constitution-making process, Mackinnon has stated that: "(w)omen have not, in general, written or agreed to constitutions. Powerful men have written them . . . as if women did not exist" (MacKinnon 2012: IX). India appears no exception to the assertion. Women had actively participated in the national movement for independence (Chandra 2000: 451-2), yet their puny incorporation into the Constituent Assembly seems a mere matter of relaying the inclusive composition of the Assembly to the world at large (Austin 2000: 12). In other words, the enquiry was located in women being unequal within the constitutional space particularly owing to not having much say in the constitution-making and interpretational space of the Constitution. Though the basis of Indian social order was always historically hierarchical, the murmurs of equality during freedom struggle could be heard in the country. References to this effect could be found in the political documentations prepared by senior and junior Nehrus in the last three decades of the struggle, which were eventually introduced by Pandit Jawaharlal Nehru in the Constituent Assembly in the form of Objective Resolution. Among the Constitution framers, a realization was present that the social history of India was the story of oppression and repression and subordination and subversion. The debates of Constituent Assembly endorse the fact of this realization. It was thus important for Constitution framers to remedy and cure this malignant malady of history. The commitment to correct this historical injustice with regards to

women, depressed classes and untouchables was essential. As I have noted above that a huge audibility and vocality of social justice was afoot in the Constituent Assembly, the issue of gender justice and equality was almost palpably absent from this social justice discourse. Even the provisions made particularly for guaranteeing non-discrimination on the ground of sex to citizens were restricted in the constitution-making as well as in the judicial process by the application of words such as "only", "solely" and "purely", narrowing the compass of gender justice. Article 15(3), holds potential for gender justice, though originally it was apparently motivated by retaining gender division than eliminating it. Constitutional provisions on equality, in fact, have largely been interpreted formalistically by the India's judiciary. The provision on the freedom of marriage had at the threshold been banished from the process of Constitution-making. Even until now, personal laws, which women members wanted to be put in the Fundamental Rights, plague the life of women. So far, no statutory personal law has been struck down by the Supreme Court, not even in the Githa Hariharan case (1999), which is one of the landmark cases for women. In short, constitution-writing appears to be laying down the "terms to which the men involved agree to hold one another" (MacKinnon 2012: IX). Constitutions, points out MacKinnon further, have mainly been interpreted by dominant men who permit debates on their own terms (MacKinnon 2012: IX). It is seemingly obvious that the Indian Constitution holds the potential to achieve justice for people. But as far as gender is concerned, right from the inception, the attempt is to camouflage, diminish and eclipse the issue of gender justice in India's Constitutional space, not only in the process of constitution-making but in the process of judicial interpretation as well. No matter how remarkable the notion of India’s Constitutional equality from the standpoint of women may be, as Nussbaum points out, the female sex is still looked down upon. The extent of this looking down upon is so much that, female sex is eliminated at the conception and foetal levels. I shall pursue this theme in the next chapter, as it constitutes the grossest and most grotesque denial and negation of femininity and womanhood

Chapter IV

Sex Selective Abortion

1. Introduction

In the preceding pages, I have conducted a probe into the notion of formal justice, the equality that serves our contemporary legal sphere. The notion, as discussed, brings in the foreground that it is, in terms of its commitment, fully devoted to remedy injustice and inequality only on like-unalike criterion among equals in a particular category or class. The implication is, at the cost of repetition, that it is limited and constricted in its conceptual imaginings, because this notion of equality does not completely respond to the phenomenon of discrimination that afflicts the world in all its intricate pervasiveness and complexity. MacKinnon points out that ever since Aristotle has created this principle of equality, no one has questioned it seriously (Mackinnon 1991: 225).

Consider, for instance, the case of femicide or sex-selective abortion, where female sex is done away with merely on the ground of gender. In fulfilling a longing for male children, history stands in witness that femicide has been happening throughout the millennia worldwide, both pre-birth and post-birth.[109] Does this constitute gendered discrimination within the notion of formal justice? Pursuant to the discussion on formal equality in the preceding chapters, I venture to point out that this is doctrinally implausible. The reason of its implausibility of not being identified as discrimination is not that femicide may not constitute discrimination in actuality. The fact is that doctrinally, formal equality does not

[109] https://www.pop.org/project/stop-sex-selective-abortion/, accessed on 1 June 2017

permit to recognize femicide as an instance of discrimination against women. Eliminating human life only on the ground of sex epistemologically constitutes discrimination against that sex, but not from the standpoint of formal equality, because for this to come into application, inequality and injustice must exist among equals. Along with it, in constitutionally crafted formal equality, other considerations would also arise. It would come up, for instance, during considerations of when or at what stage, equality to human life begins to apply. Does it also apply to the private sphere of life? In other words, the principle of formal equality compels to think of discrimination in a limited way. Something which does not fit with this particular way is not recognisable as discrimination under the concept of formal equality.

Foucault (2000) has pointed out that, in particular, there are two histories of truth. The first which he has described as an "internal history of truth", corrects itself as per its own principles of regulation. This history of truth comes into being in the light of the history of sciences. The other, designated as an "external or exterior history of truth" does not come into being pursuant to the history of sciences. On the contrary, the truth is constructed elsewhere, at other places, other than the internal principles and sciences. According to him, juridical practices constitute the most significant locus or anvil where truth is formed, producing a particular kind of knowledge and a particular kind of subjectivity. Owing to this, he suggests that it is crucial to study judicial practices and truth (Foucault 2000: 4 in Faubioned). Hence, the juridical remains a privileged site of engagement in this chapter.

India is a country which is marred by female foeticide and inflicted with a disturbed male-female sex ratio in the national population (Chandigarh Administration v. Nemo, 2009: para. 31). In this chapter, I shall, therefore, particularly focus my attention on femicide in India. The femicidal scenario exists

in India in the post constitutional order in both situations - at the post-natal stage (Patel 2007: 289; Guha 2007: XX) and at the pre-natal stage, by way of cutting-edge reproductive technology and by resorting to sex selective abortions. In this chapter, I shall deal with the latter, that is, the phenomenon of sex selective abortion. As Powledge (1981) poignantly notes, "I do not want to rest my argument there. I want to argue that we should not choose the sexes of our children because to do so is one of the most stupendously sexist acts in which it is possible to engage. It is the original sexist sin." (1981: 196) At the core of this kind of selection, for the greater part, is the longing for a son. Consider this, for instance, "A Hindu marries not merely for association with his mate, but in order to perpetuate his family by the birth of sons ... there is no heavenly region for a sonless man".[110] Viewed from this perspective, the choice is located in patriarchy.

I shall argue in this chapter that sex selective abortion constitutes discrimination, and by that very reason, it is an issue of equality. Women, for that reason alone, had been struggling for ending this discrimination. Although the Constitution of India, in Article 15(1), provides a guarantee of non-discrimination on the grounds of sex, feminists and women still had to struggle for decades for a central law to ban sex selective abortion. I argue that this was because Article 15 is predominantly governed by the formal jurisprudence of equality. The law, *Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act*, 1994 (PC and PNDT Act, henceforth) was then enacted by the Indian Parliament. The constitutional validity of the said legislation has not been challenged in the Supreme Court thus far, and if it does, it appears that it would not be able to survive scrutiny on the formal jurisprudence of equality. The law will stand constitutionally valid pursuant to Clause 3 of Article 15 of the Constitution - the Clause that allows the Indian state to make any special provision for women (Ministry of Law and Justice, GOI 2007), which was advocated by Rajkumari Amrit Kaur in the process of Constitution-making (Rao

[110] *State of Bombay* v. *Narasu Appa Mali* (AIR 1952 Bom at para 4)

1968: 185). Through this chapter, I wish to further lay thread bare that the formal equality that we have is incomplete. Feminists and women in India have been making it complete through their endeavours and activism. The issue of sex selective abortion further attests and testifies to it. The chapter is also committed to bring this activist aspect into the spotlight. Elimination of human life merely on the grounds of sex alone constitutes discrimination against that sex. This discrimination begins when the sex of a potential human life is detectable for termination and elimination.

Before I proceed, I shall endeavour to overcome two objections in the sex selection debate in the first section of the chapter. First, being in conflict with the values of democratic presumption and tolerant society, sex selection is a matter of choice making in the private sphere and second, the right to abortion is a matter of women's personal autonomy and agency. The second section will indicate in brief the longing for sex selection in the deep past and different civilizations. Henceforth, all sections are predominantly devoted to India. The third section is committed to bringing the magnitude of the problem of sex selective abortion to the fore in India. The next section discusses law-making to ban the practice of sex selective abortion. This discussion continues even in the following section with regard to central law. Then in the next section, I give a brief overview of what is provided in the law which is passed by the Parliament of India. The discussion in the last section is focussed on judicial interpretation of the enacted law. I provide an overview of court cases to unpack how the judiciary constructs the issue of sex selective abortion along with the enquiry that whether sex selective abortion constitutes discrimination.

2. Debate over Sex Selection

In this section, I will deal with two objections to sex selection being rendered impermissible. First, it is often objected on the ground that the impermissibility or the ban is against the values of democratic presumption and a tolerant society and the second objection is that efforts to curb the practice of sex selective abortion could result in an abortion restriction regime that could eventually curb the abortion rights of women in general, grievously undermining their personal autonomy and agency.

Let us recall that the Human Fertilisation and Embryology Authority (HFEA) in Britain in 2002 recommended to the British government to ban the use of sex selective technology in fertility clinics for non-medical purposes. The basis of this advice were consultations with experts of the medical, scientific, ethical, and social fields, and the views of patient groups, religious organisations and the public for this purpose were also elicited. The result of this exercise was that more than 80 percent of the people were opposed to sex selective technology being put to use for non-medical purposes. While speaking about the outcome, the Authority's chairwoman, Suzi Leather, said that at the core of this public opinion lies this moral value that "children should not be accepted or rejected according to what sex they are" (Kmietowicz 2003: 1123). For the public, a moral and family dimension in this regard is more decisive than a consumerist outlook on the matter. People treat kids as gifts and to imagine them in a consumerist frame, they believe, is a morally repugnant act on their part, she said (Kmietowicz 2003: 1123).

However, the Authority's recommendation to the British government prohibiting the application of sex selective technology in fertility clinics for non-medical purpose was criticized by John Harris (2005) who argues that the report of the

HFEA was largely informed by public opinion, which was surely and manifestly adverse to the cause of sex selection (Harris 2005: 291) and callous and oblivious to the core requirements of liberal democracy. According to him, the advice to the government was an instance of a poorly argued case, as the HFEA failed to emblazon a counter point of view in its report and neither does it have evidence to back what it has recommended. Though the HFEA was aware of the core presumption of a liberal democracy – the State cannot interfere in the private affairs of individuals as they are free to live their life in the light of their own personal values unless there is a good and sufficient reason to do so, the report of the Authority, as a matter of fact, turned this democratic presumption upside down. In its new avatar, the principle appears to have been that people as individuals in their private affairs cannot exercise liberty unless they establish substantial demonstrable benefit out of the liberty they intend to exercise. In addition, the Authority failed to resist the temptation to capitulate to the majority. Such surrender runs counter to this democratic presumption which rejects State as well as majoritarian interference in individuals' lives. According to him, the HFEA's report is nothing else but "an attempt to formalise the tyranny of the majority" (Harris 2005: 294). Most of all such recommendations are opposed to procreative autonomy, an autonomy that people enjoy since ancient times. Reproductive autonomy is undergirded by the idea that people are free to found their family in conformity with their own individual values. They can express their deeply held belief the way they wish. They can choose their lifestyle at their volition. Lastly, they hold the right to pass on their genes to the next generation as part of their procreative liberty (Harris 2005: 293). This is what reproductive autonomy comprises of and this is what the HFEA report eclipses.

However, Mcdougall (2005) disagrees with Harris and presents his counter perspective opposing sex selection. He says that there is even no reference of his approach in the HFEA report. What lies at the core of his perspective is that it is a good parental trait to willingly accept their baby with whatever sex it is conceived

of in the womb. No matter what you do to have the child of your dream, the smidgen of unpredictability in the characteristics of the child shall always be there (Mcdougall 2005: 603). So, the obligation upon parents is to embrace their baby regardless of its sex, because it is a virtuous parental trait. He calls the framework within which he situates his analysis as the "virtue ethics framework" (Mcdougall 2005: 601). According to him, parental virtue is the willing acceptance that makes possible or commits a child to a condition of flourishing regardless of its sex or other characteristics. Not being able to accept a baby's specific characteristics would adversely affect its self-esteem and its parents would not be able to enjoy it, placing the baby in a serious jeopardy (Mcdougall 2005: 603). Thus, on his "criterion of right parental action", parental act stands right if it is what the virtuous parents would do in the given circumstances (Mcdougall 2005: 601 and 602). In a situation where there is a willing acceptance of the child regardless of its sex, Mcdougall argues that sex selection would be "morally impermissible" (Mcdougall 2005 : 601 and 604), because the agent who carries out sex selection fails to act in conformity with the "parental virtue of acceptance" (Mcdougall 2005: 604).

Dickens (2002) argues that the ban on sex selection is unnecessary and oppressive as there may be a possibility where it is required in some situations. According to him, a good example of it could be a situation where parents want to balance their family in terms of having kids of both the sexes. It is desirable to permit such parents to have the kid of their wish, if they already have one or two kids of a particular sex. Here, the permissibility of sex selection is desirable and must not be regarded as sexist. He says that though the shortage of girls in the human population would increase their value, the ban on sex selection would burden women, curbing and limiting their agency, particularly in the context of abortion choices (Dickens 2002: 335-336). Thus women's agency, freedom and autonomy would stand trumped by the male and patriarchal requirement of having fifty percent women in the population.

In the context of the HFEA report, Baldwin (2005) argues that it is required that a cautious approach with respect to sex selection for sometime ought to be pursued so as to find out whether it results in any kind of harm, sex ratio imbalance or otherwise, within that period. To be acting upon this idea, the fixed number of selection could be licenced for ten years in order to see what kind of outcomes the controlled permissibility throws up. If it results into adverse and harmful outcomes vitiating sex balance or any other pattern of societal harm, the licence policy could be changed in accordance with findings. Even if any harm of serious nature appears to be coming forth, the impact of it would be limited given the controlled permissibility of the sex selection. But it is not in the fitness of things that callously ignoring and disregarding the requirements and considerations of democratic presumption, reproductive liberty, personal autonomy of women and tolerant society, the rush for prohibitive legislation should be respected and resorted to (Baldwin 2005: 288-290).

Democratic presumption, reproductive liberty, personal autonomy of women and tolerant society, all of this is crucial to heed while taking a decision to consider the prohibition of sex selection. But the position of the HFEA was premised on diverse and eclectic views, which seemingly underlined the fact that this very idea of reproducing babies in relation to our wishes is distasteful, irreligious and morally repugnant. It may or may not be so. But in India, the situation is different. Here, sex selection has actually been happening and owing to this, the ratio of girls has been falling. This fall of female ratio in India's population constitutes the problem of discrimination against women. This places the Indian state under political obligation to end this sexist discrimination against women. Likewise, the position of John Harris is not possible and sustainable in India's context to the extent to which it should advocate that the democratic presumption is so important as to lengthen itself to let pass an occurrence of discrimination. It appears that in India's context, the application of this idea would amount to over-

stretching the concept of democratic presumption. Dickens says that the shortfall of girls would increase their value. That's a vision of the prospective value and the question is – would it be equality and justice? Increased value does not necessarily mean equality and justice.

I shall now, in brief, discuss another objection, which I have touched upon in the preceding paragraphs in an off-hand manner, that is, the reproductive choice and autonomy of women.

The Right to abortion, which is inextricably rooted and anchored in reproductive choices and autonomy (*Meera Santosh Pal* v. *Union of India*, 2017 at para. 11), is crucial for women. It is deeply linked with their personal liberty and autonomy.[111] It was explicitly pointed out in *R (Name withheld)* v. *State of Haryana*[112] that women hold inalienable and exclusive right over their reproductive capacity and over their body. This right is so personal that it cannot be shared either with family or the state, particularly in a country where child bearing is controlled by social mores. Indira Jaising characterizes this right as a right of the "historical necessity" (Jaising et al. 2007: 11) for women. While underlining the significance of reproductive choices of women, the Supreme Court observed that:

> There is no doubt that a woman's right to make reproductive choices is also a dimension of `personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive

[111] *Meera Santosh Pal v. Union of India*, Writ Petition (Civil) No.17 of 2017, Order dated 16 January 2017, Supreme Court , available at http://judis.nic.in/supremecourt/imgs1.aspx?filename=44484

[112] *R and Anr* v. *State Of Haryana & Ors*, CWP No. 6733 of 2016, Judgment dated 30 May 2016, Punjab-Haryana High Court, available at https://indiankanoon.org/doc/173069994/

> choices such as a woman's right to refuse participation in sexual activity (*Suchita Srivastava* v. *Chandigarh Administration*, 2009)[113]

Thus, the right to abortion is centrally linked to the right to privacy and therefore to personal autonomy and liberty of women. Furthermore, as I have pointed out above that the right to abortion in the patriarchal social set-up can be regarded as a redress of historical necessity, particularly because, let alone biological burdens during pregnancy, women have to confront disproportionate burdens immediately after delivery as compared to men in child rearing. They are presumed to be in a better care giver role as the society which they live in is deeply gendered. This places considerable hardship upon women, while decreasing and eroding their freedom (Jaising et al. 2007: 11). Along with it, the additional reasons that render it obligatory that women must have an unencumbered right to abortion is rooted in the reality that women do not have control over the phenomenon of being pregnant, because it could arise in different ways (Jaising 2007: 11). It could arise from rape. It could arise from the failure of any device used for preventing pregnancy to occur. It could occur in a social environment where access to safe and effective contraceptives is not available. It could occur in a social environment where poverty and lack of education among women is endemic and rampant depriving them of their ability and agency to make informed choices (Jaising et al. 2007: 11). This is what makes it necessary that right to abortion must rest with women without encumbrance (Jaising 2007: 11-12). Dworkin also argues in the American context that women hold procreative autonomy. According to him, it is wrong to believe that since this right is not explicitly inscribed in the text of the Constitution, it is not available to them. This is a misplaced objection. The provisions related to liberty and equality in the American Constitution are abstract. The right to procreative autonomy is possible to be read into those provisions.

[113] *Suchita Srivastava* v. *Chandigarh Administration*, (2009) 9 SCC 1. Also see *Suresh Kumar Koushal & Anr* v. *Naz Foundation*, Civil Appeal No.10972 of 2013 on 11 December 2013.

However, the question before us is that if abortion is being carried out by the medical profession only on the ground of sex with the sole purpose of terminating potential female life, should doctors and cutting edge reproductive technology be permitted to be used for this end? Pandey (2014) who is completely against the right to abortion being whittled down in any manner, even in the guise of sex selective abortion, argues that the misuse of cutting edge reproductive technology by doctors for the medical malpractice of sex determination must not be permitted (2014: 228).

Jaising (2007) who is in full support of the right to abortion in India's patriarchal social order argues that this right to abortion, however, must not include the right to abort the female sex. If it does, it would, in that condition, constitute discrimination against women as a class on the ground of sex. This is alone demonstrative of the fact that how little worth is ascribed to women in society. This gender centric discrimination constitutes problem in itself and warrants action against this medical mal practice on its own terms. It has nothing to do with women's autonomy and bodily integrity (Jaising et al. 2007: 12).I tend to agree at this point of time that Jaising's position is relevant upon the matter, as it favours attending the problem as it exists, rather than ignoring it under the apprehension of the right to abortion being whittled down. These are two distinct claims and both must be pursued.

India's law on termination of pregnancy appears to be, as Pandey rightly argues, conservative, as it does not allow termination of pregnancy, plainly or just merely on the demand of a pregnant woman (Pandey 2014). Consider this situation wherein a young woman at Harvard had developed pregnancy owing to a defective condom and had to go through an abortion procedure (Anonymous

2015: Pregnant at Harvard)[114]. However, in the existing Indian law, it appears that this kind of abortion would not have been possible in the case of an unmarried woman. What is required is that the law on termination of pregnancy must be made timely. Having said so, I think that sex selective abortion and right to termination of pregnancy should not be mixed in a manner where they lose out to each other. I shall now deal with the tendency to eliminate female foetus by way of sex selection. This further complicates the sex selection debate, not at all leaving it simplistic and reductionist in nature. I will point to this ancient longing in the next subsection.

3. Origins of the problem

Many civilizations that flourished across this planet throughout history had the propensity of selecting the sex of their babies (Remaley 2000: 249). The primordial forms of sex selection were comprised of infanticide or neglect (Danis 1995: 224). This tendency was tipped against women and in favour of men (Remaley 2000: 250). References of sex selection and prediction technology can be found in ancient Egyptian documents and in Chinese manuscripts which happen to be as old as 4,400 years. In order to have a male issue, the famous Greek philosopher Aristotle made the recommendation that the wife should sleep on the right side after sexual intercourse, as it was the scientific belief of the time that the development of male child would take place in the right "uterine horn" (Danis 1995: 224). Thus, according to Danis, the sex selection techniques until the 20th century were largely based upon such myths (Danis 1995: 224). In order to accomplish this goal, what may today, at this level of mental and intellectual development, be described as superstitions were put to service to determine the sex of the baby in the womb at the time of conception (Remaley 2000: 249). For having male children in particular, it was suggested to have sexual intercourse during the night when the moon was full, the weather dry, the nut harvest plentiful

[114] Available at http://www.thecrimson.com/article/2015/4/28/pregnant-at-harvard/

and a northerly wind outside. Similarly, wives were made to put on male apparel at bed time on their wedding night and asked to pinch at the right testicle of the husband before having sexual intercourse. In ancient times, men in Greece would lie down on their right side during sexual intercourse to beget a male child while the French men would tie off their left testicle during sex to produce a boy (Remaley 2000: 250). It was the Greek philosophers, however, who first recommended the tying of the left testicle prior to having sexual intercourse to beget male children (Danis 1995: 220). Similarly, and for the same purpose, a practice of putting hammer and scissors under the bed in ancient Germany and Denmark was in prevalence (Remaley 2000: 250). In addition to this, to gratify the craving for sons, the practise of abortion and infanticide was resorted to (Remaley 2000: 250).The Babylonian Talmud, a fifth century Jewish text also suggests ways as to how to choose the sex of children (Dickens 2002: 335*).*

According to the claim of Ayurvedic medical principles, the sex of a foetus in the womb does not get determined until three months of its inception and that through the application of medicine and rituals, it can be altered during the early pregnancy (Ganatra & Oomman 2002: 184).Thus, the preference for sons that is a part of many cultures across the world is an ancient and 'accepted social value' (Strange 2010: 17). This rejection of female children in preference to male counterparts either by infanticide or sex selective abortions attracts international criticism, yet it continues to disturb the gender balance in certain parts of the world. According to feminists, it is a practice that is sexist in nature and which is damaging to women (Strange 2010: 17-18).

What comes clear from this is that the desire to have male children is pretty old, crisscrossing civilizations throughout history. In the following section, I shall attempt to understand how this historical and civilisational legacy impacts our present context and era. This section would also be contextual to India and how it

is marred by sex selective abortions which disturb the male-female ratio in the Indian demography. In fact, owing to this, Remaley (2000) says that though at the moment, male preference in the West is "far weaker" than India and China, the sex ratio imbalance in these countries must act as an example of warning, as the demographic ratio of women in these countries has drastically declined, which is often described as "millions of 'missing' females" (Remaley 2000: 277-278).

4. Sex selection in India

Strange (2010) states that it is important to pursue social change and so also to have legislation that could help discontinue this sexist practice of femicide (Strange 2010: 18). Prior to discussing the legislation that could ban this sexist practice, I would like to solely focus my attention in this section upon the gravity that women as a sex community confront in the adversity of female sex ratio in national demography.

According to Leela Vasaria**,** the defeicit of women was recorded in India's population ever since the first decennial census that was carried out in 1872. This sex ratio imbalance, since then, has progressively been worsening (Vasaria 2007: 61 cited in Tulsi Patel ed; Raman 2009: 80). The enumeration of 1901 established the figure of 972 women per 1000 men, which was found to have deteriorated to 933 after the census of 2001 (Vasaria 2007: 61 in Tulsi Patel ed).Thus the declining female sex ratio in the population is a historical legacy, rooted strongly in the preference for a son (Patel, Vibhuti 2007: 288).

Barbara Miller (1981) pointed out that there was a correlative connection between the 19th century practice of killing infants with the female sex and the systematic neglect and discrimination that followed against them in the 20th century (Miller cited in Bhatnagar 2005: 130). This practice was geographically noticeable among

the higher caste population in North-West India during the 19th century, which is still under the grip of this sinister practice disrupting the male-female ratio in the country (Miller cited in Bhatnagar 2005: 130). In the region, the practice to eliminate female infants was in prevalence among high status Rajputs and Jats and low-caste Khatris, though the *Prohibition of Female Infanticide Act*, 1872 was enacted by the British Raj to ban this pernicious and misogynistic practice (Raman 2009: 62). Thus, it is pointed out that the male-female ratio we confront today is located in colonial discourse, where it was asserted even by the British reformers that elimination of the female infant was an "indigenous mode of population control" (Bhatnagar and Dube 2005: 129).

In post-colonial India, however, Bumgarner argues that sex selective abortions have created a national crisis in India in the context of gender imbalance (Bumgarner 2007: 1295-1296), as the average male-female ratios in India is one of the lowest throughout the world (Dreze and Sen 2004: 339). Prior to the advent, or until 1970, of prenatal and later on of pre-conception technology, this sex ratio imbalance was mainly ascribed to the high female mortality rate caused by the maltreatment and neglect of girls and female infantacide (Hu et al 2012: 350). Now elimination of female sex is located in the state-of-the-art reproductive technology, which has taken the recourse of eliminating the female sex even at the pre-conception level itself. A huge explosion of clinics where sex determination takes place has happened across the country. Similarly, doctors who carry out abortions after determination can be found with ease (Bumgarner 2007: 1289).

For instance, Radhika Devi in Khichripur in Delhi who already had two daughters was nervous and anxious while walking through a congested alleyway. She was going to an ultrasound facility accompanied by a healthcare worker. She was desperate to know the sex of the baby she had been carrying for the five months. "It's better if it's a boy," Devi said, her hands shaking nervously. "If it's a girl, we

will get it aborted" (Katz 2006)[115]. That is how, as Lancet magazine claims, five lakh female foetuses are aborted in India every year (Bumgarner 2007: 1289).

What is it that explains this phenomenon - where at such a large scale female foetuses are done away with. V Bhaskar states that this phenomenon is noticeable in many parts of the world, more particularly in South and East Asia that parents hold a gender biased attitude of nursing a preference and desire for sons (Bhaskar 2011: 214). Vasaria points out that this phenomenon is generally attributed to the social structure of India. It is understood that society in India is structurally patrilineal where a 'strong son preference ' is patently observable, commending and bestowing higher status upon men across the society (Vasaria 2007: 61 cited in Tulsi Patel ed).

It could be understood from the fact that particularly in North India, it is routine to mark the birth of a son with profuse celebrations and that of a daughter with a litany of imprecations and damnations. Even eunuchs who live their life by extractively collecting money on joyous occasions lay claim for a larger sum of cash or money if the issue is male. On the other hand, in the context of girls, positive and wishful acts that could induce the 'rapid death' of girls are done.

For example, Vibhuti Patel has pointed out that "India has had a tradition of killing female babies (custom of *dudhapiti)* by putting opium on the mother's nipple and feeding the baby, by suffocating her in a rug, by placing the afterbirth over the infant's face, or by simply ill-treating daughters" (Patel 2007: 288). In Dharmapuri district of Tamil Nadu, for example, girls in childhood are administered uncooked rice so as to accelerate their death. In Punjab, there is a

[115] Katz 2006 accessed on: http://www.washingtonpost.com/wp-dyn/content/article/2006/05/19/AR2006051901219.html), accessed on 1 June 2017

caste which is known as 'Kudi-maar' (girl killer). This '*intrinsic son preference'* causes a male-biased sex ratio (Bhaskar 2011: 214). Though Bumgarner acknowledges deeply entrenched patriarchal social order - the order that prefers boys to girls - as one of the factors that contribute to female foeticide, she does not limit it to only to the patriarchal social order. Her argument is that when the patriarchal social order is common all over the world, why is this malicious and sexist practice still prevalent in India? As part of her explanation, she anchors the reason in India's dowry system that makes girls less welcome in Indian families (Bumgarner 2007: 1295-1296). As a matter of fact, though the dowry system stands outlawed in the country, at the occasion of the marriage of a daughter, parents have to spend considerable money on giving dowry to their daughter despite this prohibition.

Pointing out to how this strong preference for having a son impacts the lives of girls if they get to see the light of the day in this world, Nandini Oomman and Bela Ganatra (2002) argues that where the cultural and economic value of a male child is at a premium, this son preference becomes reflected in the neglect of the girl child and differential treatment in terms of healthcare and household resources (Ganatra & Oomman 2002: 184 and 185). Hu (2012) also suggests that parental preference for having a son results in differential investment in male and female sex with women being at the receiving end (Hu et al 2012: 348). However, he argues that the liberal use of sex selective technology would enhance the outcomes and chances of women, as those parents who would choose their babies as girls would treat them well, with a less prejudiced attitude (Hu et al 2012: 348).

According to him, in the region of India in which there is an increased tendency to use prenatal sex selective technologies, the proportion of malnourished girls is less as compared to the regions where such technology is not much in use. Thus the application of sex selective innovations is helpful and useful in enhancing

outcomes for women. For Hu (2012), as the shortage of girls in the marriage and labour market increases, the parental investment in girls would correspondingly go up even among those families who neither prefer to abort female foetus nor care for their girls after birth (Hu et al 2012: 367).

However, this understanding that the shortage of women would enhance their status, says Oomman, is not based on any evidence that the scarcity of female sex in human population may turn girls into commodities increasing the chance of violence being used against them. (Oomman 2002: 186). According to Ooman and Ganatra, in fact, sex selection with the sole aim to abort the female embryo signifies a devaluation of women (Oomman & Ganatra 2002: 186). Similarly, Sabu M George argues that sex selection is a 'dangerous trend', as it signifies 'socio-cultural devaluation of women', which eventually fructifies into discrimination against women. It is therefore important to resist it (George 2002: 190).

The discussion we had makes it clear that the issue of sex selective abortion is understood to be linked to a declining female sex ratio in India's population. The reasons for this decline are located in sexism and patriarchy of the worst kind. Bumgarner (2007) points out that an elimination of the female sex is substantially located in the dowry system. It is correct that it is rooted there too. But again, the dowry system is rooted in a patriarchal system. Essentially, femicide is a creature of sexism and patriarchy where masculinity is celebrated. It is not necessary that the construction of patriarchy in every detail will be uniform throughout the world. Variations in patriarchy without losing its patriarchal substance are possible. Hu (2012) believes that a shortfall of girls in the human population would contribute to the well being of the female sex. First, this is not conclusive but only plausible. Even on plausibility, it is too dangerous to run the risk of a dipping female quotient in the human population. Contrary scholarship points out

that the deficit may spell disaster for women. I am though critical of that kind of scholarship, not because that may not be meritorious, but because of the instinct and impulse from which such scholarship originates. It appears that the scholarship prognosticating disaster for women if their ratio slides in the human population is essentially located in the analysis and appreciation of male biological requirement and concerns. It is because of this that the sex ratio balance is important. This analysis appears to be correct within today's established knowledge and epistemology. Along with it, what is also required to be acknowledged is that this understanding is rooted in adequately patriarchal and masculine normative considerations. In other words, the extension of this understanding and reasoning in the area of sex selective abortion when we know for certain that the scourge is a resultant phenomenon of patriarchal system is a questionable character. It is reason enough to protect female life particularly at gestational level that a particular kind of social order, that is, patriarchal order, has been threatening the membership of women in homo sapience community. That is, the appetites of patriarchal system are such that the satisfaction and satiation of those appetites happen by committing fundamentals of life to perilous situations and by effecting exclusions at the very basic or inceptionary levels. This is an unjust situation and the shadows of this injustice thereon become cast across the entire vista of women's life reflecting in devaluation, discrimination and inequality.

The Committee on the Status of Women in India (CSWI) released a report 'Towards Equality' in 1975 spelling out the causes of oppression and devaluation of women across the country. This report expressed concern over the sliding female sex ratio in the population. Among other things, the report also noted that a low status of women was caused by male dominated social and cultural practices and traditions that eventually make women economic liabilities. It found that much of the devaluation of women is done by the Hindu law that perpetuated discrimination against them by not allowing them to have a share in the property

owing to the dowry system and by making them leave their parental home at the time of marriage. Similarly, personal law codes of Muslims, Christians, Parsis and Jewish communities, particularly those related to inheritance, were also held to be discriminatory (Everett 1998: 316).

As the prenatal sex determination technologies, particularly amniocentesis and ultrasound ones, hit the Indian shores in late 1970s and 1980s, the requirement was felt for a law that could effectively outlaw sex selective abortion and could arrest progressively worsening gender imbalance. The Spread of the said technologies with the onset of economic liberalization became considerably wide, encompassing rural areas in its sweep (Hu 2012: 350-351). I shall discuss this aggravation of the problem and law-making in the section to follow.

5. Law-Making: Background and Maharashtra law

As soon as the amniocentesis technology was brought in government research hospitals, the protests on part of feminists against sex selection were mounted (Everett 1998: 316-317). In the beginning, in 1974 to be specific, the amniocentesis technology was being tested at the All India Institute of Medical Sciences (AIIMS), New Delhi, where 11 thousand women were engaged as volunteers for the purpose. The moment any of them came to know that they had been carrying a female foetus, they demanded for an abortion to be done (Saheli 2006).[116] From 1979, this test became available in private hospitals as well (Saheli 2006) in crass commercial flavor.

In 1982, in fact, one of the private hospitals in Punjab had put out an

[116] https://sites.google.com/site/saheliorgsite/health/our-health-campaigns , accessed on 1 June 2017

advertisement for sex selective abortion in the run-up to a male child (Everett 1998: 317). Instances of this description further sharpened the protest. The Campaign to legally prohibit sex determination under the banner of Forum Against Sex Determination and Sex Pre-selection (FASDSP) was initiated in 1985 in Maharashtra. This small Mumbai-based organization which had members who had specialized in science and feminist activism, had arranged workshops, seminars, debates, signature campaigns, parents-daughters' marches and sit-ins wherever sex determination was performed. Eventually, the FASDSP wanted the Maharashtra Government to ban sex determination by law across the State.

Sex determination was, however, banned in all government hospitals throughout the country by the Union government, and between 1977 and 1985, the Ministry of Health, Government of India had even issued three circulars – in 1977, 1982 and 1985 – to all State directors of Health Services, Regional Directors of Health, Family Welfare Officers and State Chief Secretaries, to book those who were caught to be indulging in pre-natal sex selection with the particular intention to do away with the female foetus under the Indian Penal Code, 1860. But not a single case was registered against anyone despite the circulars in place, as abortions that were carried out were passed off as unwanted pregnancy because of a failure of contraceptive device (Rai, Oct. 28, 1986: TOI). Thus these circulars did not achieve anything.

The lethal business of sex selection with the particular intention to do away with the female sex was up and running unabated throughout the country and the major centre of it was Maharashtra where this business was openly being practiced with the help of advertisements in media and the same being pasted in public places and local trains (Abortions galore as sex tests flourish, *Times of India*, 8 April 1986. p. 4). Between 1984 and 1985, a clinic in Dadar carried out almost 16 thousand abortions, particularly for the purpose of having to do away with female

foetuses. Another private hospital which provided full-fledged services in sex determination and female pregnancy termination conducted 11 thousand abortions from 1977 to 1986 (Abortions galore as sex tests flourish, *Times of India*, 8 April 1986. p. 4).

Bombay, the capital city of Maharashtra was, in fact, branded by the Times of India as the 'the national centre for sex determination tests, where as many as 15 private laboratories were said to be up and running (Abortions galore as sex tests flourish, *Times of India*, 8 April 1986. p. 4). Thus, the greatest concern with regard to sex selective abortion was at its zenith in Maharashtra. This gave rise to the necessity of having a law in place that could ban this evil.

Thus, Maharashtra's law on prohibition of sex selection, 1988 was the precursor (A Necessary Ban, *Times of India*, 6 August 1994) to the central law of 1994 that banned sex selective abortion throughout the country. Due to the activism of feminists and FASDSP, the Maharashtra government agreed to enact the law to curb malicious and pernicious practice of sex selective abortion. On 31 December 1987, the Chief Minister of Maharashtra, S.B. Chavan had announced that the Maharashtra government had decided to ban sex determination across the State by law (Everett 1998: 320). A Bill to this effect would be introduced in the State legislature for its passage, he had said. The Bill was introduced in the State Legislature as promised. Both the Houses of the Maharashtra legislature had cleared the' Maharashtra Regulation of the Use of Pre-Natal Diagnostic Techniques Bill' in the mid-April of 1988. This was then further enacted as Law on 1 May, 1988 was eventually enforced across the State (Everett 1998: 321).

Once the law was passed in Maharashtra, the move and desire that sought to prohibit the evil of sex selection through legislative action was critically

questioned. As a matter of fact, when the state Bill was passed, Dharma Kumar had written an article in *The Times of India* on December 9, 1988 arguing that it was unwise to ban sex determination and sex selective abortion and passionately appealed not to enact the central law to occupy the field of sex selective abortion. Broadly, her argument was that it was a natural feeling on the part of parents to have a son in India because of economic, cultural and ritualistic reasons, and since daughters were economic liabilities owing to having to force huge parental expenditure on their marriage, it was equally a prudent decision on the part of parents to do away with them. It was crucial to endow people with freedom and permissibility to plan out their families the way they wished to. The first limb of her argument was that law is an inadequate mechanism to curb things like sex selective abortion. She argued that just as the law on dowry failed to curb dowry from being given, so would the law on sex selective abortion fail. It was because of this that it was pointless to enact a central law that would target sex selective abortion at the national level. It was in all a futile attempt. The second argument was that women wanted the right to abort, as it was the woman's body that was used for the purpose of child birth. Thus, they must have the right to decide over abortion. Banning sex determination and sex selective abortion denies this right to women. The third argument centred around the neglect of the girl child. Girls were treated as neglected creatures in their own family. They were administered lesser and poorer food in comparison to their brothers. When daughters were taken ill, they were not even taken to the hospital for treatment. Where was the harm if the girl children were aborted at the foetal level to escape this ignominy and neglect (Kumar, Dharma Dec. 9, 1988: TOI p. 14).

Little more than a month later, Vibhuti Patel of FASDSP on January 14, 1989 wrote a passionate response in *The Times of India.* While ardently defending and championing her Forum’s cause, she said that sex determination which results in female foeticide was harmful for the society in all respects - demographic, social,

cultural and moral – and women's movement in India was fully committed since 1976 to curb this form of femicide. Not championing the cause would mean to work to make the Indian women 'endangered species', Patel argued (Patel, Sex Tests Endanger Women's Rights', *Times of India*, 14 January 1989).

It was certainly true, Patel agreed, that laws on their own were not enough to fight such pernicious sexist evils but one of the functions that the law banning sex determination would definitely discharge was that it would take away the respectability attached to sex selective abortion and the scientific technology that is put to use to carry out this lethal and immoral act. Along with it, the law would also strengthen the hands of women to bring those to book who would indulge in this practice. Furthermore, she said that to struggle to have a law is tantamount to working for social awakening. With respect to family planning, her response was that a reduction of the female sex in the human population was neither family planning nor a method of population control. Similarly, she argued that neglect and ill-treatment could not evoke the response of female sex being done away with just as you could not consider dropping bombs over shanties to get rid of poverty, malnutrition and famines. In the context of women's right to decide their pregnancy, Patel's counter argument was that Kumar's article was indicative of the latter's belief that women badly lacked their agency, freedom and autonomy in the Indian patriarchal social system to decide on their pregnancy. So, to advocate the right to decide to abort female sex on this trend of argument lacked merit (Patel January 14, 1989: TOI).

6. The Making of the Central law

Women's movement across the country certainly was jubilant after the passage of the Maharashtra law, as it gave them a sense of being victorious as an outcome in their decade-long struggle. But once sex selection and determination was

outlawed in the State, pregnant women began going into neighbouring States such as Goa and Gujarat for the purpose. New and cutting-edge pre-natal technologies were bombarding the market. Likewise, it was cumbersome to struggle to seek the passage of sex selection prohibitive legislation in each State (Saheli 2006). This laid down the groundwork for a comprehensive central legislation that would outlaw this pernicious practice of selective abortion throughout the country (Saheli 2006). The movement for the central legislation was carried out under the stewardship of Forum Against Sex Determination and Sex Pre-Selection (FASDSP).

Then, in late November of 1988, after the law that banned pre-natal sex selection in Maharashtra was passed, the FASDSP made the demand for a central legislation on pre-natal sex determination for the first time to curb the spreading menace in other states such as Goa and Gujarat. It was the belief and conviction of the Forum that a central enactment that would apply to the whole of India was going to be efficacious everywhere throughout the country to curb the menace of this sexist practice (Ban Foetal Sex Tests, Demands House, *Times of India*, 17 April 1988, p. 5, Everett 1998: 320-322). A massive signature campaign was launched across the country to garner and mobilize support for the central enactment (Saheli 2006). Other than collecting the signature, Saheli in Delhi sensitized the members of parliament about the gravity and depth of the problem (Saheli 2006).

In a function in Nagpur on 10 February 1989, the Union minister for energy, Mr Vasant Sathe decried and ridiculed Maharashtra's law that banned sex determination across the State. This ban, he remarked disparagingly, cannot be effective as people would continue to abort unwanted girls. According to him, aborting girls was not reprehensible in any manner; it would in fact increase their value as their numbers continued to decrease. Perplexed and discomfited by his utterances, the Forum straight away wrote an open letter to the then Prime

Minister of India as to when the Government would bring in the central Bill to curb sex determination (Centre Urged to Act on Sex Test Issue, *Times of India*, 17 February 1989).

Particularly in response to a question in Lok Sabha, the Minister of Health and Family Welfare Shri ML Fotedar said that the Government of India was aware of the abuse of pre-natal techniques for female foeticide. The government, he said, was actively considering a central legislation regulating pre-natal diagnostic techniques and banning the same for the purpose of sex determination.[117] The minister repeated a similar assurance in the Rajya Sabha on 27 August 1991 and said that the reason to the Bill being delayed was the frequent change of government (Bill to Ban Sex Tests Soon: Rajya Sabha, *Times of India*, 28 August 1991).

It was reported on 23 December 1990 by the leading national daily that the Government had proposed the central Bill banning sex determination on the previous day. The Bill was drawn up pursuant to the report of the committee set up by government of India. The proposed Bill had provisions such as banning of advertisements, granting licence to private hospitals for pre-natal procedures on medical reasons, prior written consent of pregnant woman, registration of medical facilities dedicated to pre-natal diagnostic techniques, and making offences related to sex determination cognizable, non-bailable and non-compoundable (Katyal Dec. 23, 1990: TOI).

On January 8, *The Times of India* reported that women groups were unhappy with provisions of the proposed central legislation. Lok Sabha member, Subhasini Ali

[117] The Central legislation for regulating pre-natal diagnostic techniques and banning the same for the purpose of sex determination – http://parliamentofindia.nic.in/ls/lsdeb/ls10/ses1/0312089102.htm

and H.P. Ravindra of the Forum met the Health Minister and submitted a letter spelling out objections to the proposed Bill. The core objection to the Bill was the government's proposal that licences should be granted to private hospitals to carry out pre-natal diagnostic techniques strictly for medical purposes only. The protesters on the other hand had been demanding that private hospitals must be completely banned from the area, as it had created havoc in Maharashtra (Women's Groups to Fight Proposed Bill, *Times of India*, 8 January 1991).

Another criticism was that the Bill wanted to punish the pregnant woman who would visit medical facilities for having done sex selective procedures. According to activists, it was a bad provision, particularly because a pregnant woman who goes to get the procedure done goes under the pressure of family and society. It was therefore unjustified to punish the pregnant woman in such patriarchal circumstances. The Bill that was proposed was the replication of Maharashtra with all its loopholes, leaving women's organizations and human rights activists perturbed (Limiting the License to Kill', *Times of India*, 13 January 1991, p. 7).

Eventually, on September 1991, the Minister of Health M.L. Fotedar had introduced the pre-natal Diagnostic Techniques (regulation and prevention of misuse) Bill, 1991 in the Lok Sabha. On the occasion, the minister said that the abuse of pre-natal techniques was discriminatory against female sex, as it severely and adversely injured and dented the dignity and status of women in the society (Bill on Sex Tests Introduced', *Times of India*, 13 September 1991).

The Bill remained in cold storage till the time when it was passed with unanimity in the Lok Sabha in the Monsoon session of 1994. During the discussion, members laid particular emphasis on meting out stringent punishment to medical professionals who indulged in this black business of female foeticide (IS

Expresses Concern over Female Feticide', *Times of India*, 26 July 1994). The Deputy Health Minister Pawan Singh Ghatowar who piloted the Bill on the floor of the House said that it would close down "sex determination shops" (IS Expresses Concern over Female Feticide', *Times of India*, 26 July 1994). The Law came into force on 1st January 1996.[118]

However, with advancement in reproductive technology, it was soon experienced that the law had not been living up to its purpose. It was reported on April 19, 2002, by *The Times of India* that Pre-natal Diagnostic Techniques (Regulation and Misuse) (PNDT) Act, 1994 would be amended particularly in order to incorporate pre-conception techniques within the statutory corpus of the existing law on the prohibition of sex determination. These techniques in the guise of in-vitro fertilization (IVF) treatment were being put to use to carry out sex detection at pre-conception stage. IVF Clinics were mushrooming throughout the country and doctors were hand in gloves to carry out such sex selection procedures (Jain April 19, 2002: Times of India p. 9).

The same newspaper reported on 1 June 2002 that the amendment Bill had been approved by the Cabinet. It was proposed in the Bill that the amended law would be called as 'Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act'. It would cover the use of ultrasound machine in its purview and authorities making search and seizures would have more teeth and power with regard to sealing premises and commissioning witnesses to punish the culprits (Cabinet Approves Tightening of Law on Sex Selection Tests', *Times of India*, 1 June 2002). Pursuant to the 2001 census, however, it was found that the male-female sex ratio particularly in the age group of zero-six years was only 927 girls per 1000 boys. This raised a concern to curb the further slide of the demographic ratio of girls. The Supreme Court directed the Union Government to bring about

[118] https://radiopaedia.org/articles/preconception-and-prenatal-diagnostic-techniques-act

an amendment in the law that banned sex selective abortions so as to incorporate the latest technologies that were put to use to detect the sex of embryo. On 20 December 2002, the Minister of State in the Ministry of Health and Family Welfare, A Raja who moved an amendment bill to the Pre-natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994 in the Lok Sabha after it was passed by the Rajya Sabha said that the Amendment Bill, would first want to change the present title of the said Act to 'Pre-conception and pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act'. The reason behind this proposal was to convey the message to the people, paramedical personnel and doctors at the first available opportunity within the text of the law that sex selection was a prohibited act across the country. Besides this, the Amendment Bill wanted to bring pre-conception sex selection within the purview of the law. The amended Act took effect in 2003.[119]

7. Brief overview of the law

The principle law on the prohibition of sex selection was enacted in 1994. It was then amended in 2002 to ban, in particular, the latest technologies that had developed over a period of time from being put to use for sex detection purposes. In its latest avatar, the preamble describes the law as an Act for the "prohibition of sex selection, before or after conception" (PC and PNDT Act 1994: preamble). So the notion of ban is applicable in both the scenarios, that is, prior to conception and post conception. The Law further seeks to prevent the misuse of pre-natal techniques "for sex determination leading to female foeticide" (PC and PNDT Act 1994: Preamble). Along with it, it also seeks to regulate the same techniques when they are to put to use in medical conditions such as genetic abnormalities,

[119] https://radiopaedia.org/articles/preconception-and-prenatal-diagnostic-techniques-act.

metabolic disorders, chromosomal abnormalities, certain congenital malformations and sex-linked disorders (PC and PNDT Act 1994: Preamble).

In order to pursue this legal project, the PC and PNDT Act 1994 places all Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics under the mandatory prohibition that no aforementioned medical facilities can carry out activities related to pre-natal diagnostic techniques, unless they possess registration under the said Act [PC and PNDT Act 1994: 3(1)]. These medical facilities are under a statutory imperative that they must display their certificate of registration in a conspicuous location at the place of their business [PC and PNDT Act 1994: s. 19(4)]. The registered medical facilities are further under the mandatory requirement to employ only those professionals who fulfil the qualifications prescribed by the Government of India, if they want to carry out these activities [PC and PNDT Act 1994: 3(2)]. Likewise, qualified professionals have been put under the mandatory prohibition that they should not carry out the activities in question at a place other than that which has been registered [PC and PNDT Act 1994: 3(1)].

The Act puts each of those working in the field of infertility, including medical specialists or team of specialists, under the prohibition that none of them will conduct sex selection, nor will any of them aid or cause the same to be done either by him/herself or by any other person. This prohibition covers men and women both, as well as any tissue, embryo, conceptus, fluid or gametes obtained from them within its purview. None of the persons or specialists in the field of infertility can carry out sex selection using the above said (PC and PNDT Act 1994: 3A). Thus, sex selection stands prohibited across the country. Further cementing and propping this prohibition, the Act puts the onus of responsibility on those who sell ultrasound and imaging machines, scanners or any other equipment that could be put to use to detect the sex of the prospective child, whereby they are forbidden to sell the described machines to any medical facility

which is not registered under this Act (PC and PNDT Act 1994: 3B). Similarly, family members are under statutory imperative, including the husband and wife, that they will not encourage or seek sex selection or offer themselves for the same in any manner [PC and PNDT Act 1994: 4(5)].

Anyone who seeks aid from any medical facility or any medical professional or any other person for sex selection or for carrying out pre-natal techniques on a pregnant woman for non-medical purposes would invite the wrath of the Act by being imprisoned for upto three years and having to pay a fine of up to 50 thousand rupees. On the offence being found to have been repeated, the said punishment gets extended to five years in jail with a fine of Rupees One lakh [PC and PNDT Act 1994: S. 23(3)]. No matter what is prescribed in the Indian Evidence Act, 1872, in an event where a pregnant woman undergoes prenatal diagnostic techniques for non-medical reasons, the presumption until displaced shall persist that the woman was compelled, either by her husband or his relative, to undergo this medical procedure. Thus, whosoever the person be will face punishment for the offence under the Act (PC and PNDT Act 1994: 24).

The general breach or contravention of any provision of the Act shall constitute a cognizable, non-bailable and non-compoundable offence which would invite imprisonment for 3 years and a fine of ten thousand rupees [PC and PNDT Act 1994: S. 23(1) and S. 27].Under this Act, however, the permissibility for pre-natal tests for medical reasons is available. To act upon this permissibility, proper written consent from pregnant women is required after the medical professional has explained everything that is related to the procedure to her, in an understandable language, before the test is actually conducted [PC and PNDT Act 1994: 5(1) (a) and (b)]. As part of this pre-natal test, no one, however, including the medical professional who is conducting the test will communicate the sex of the prospective baby by "words, signs, or in any other manner" to anyone [PC and PNDT Act 1994: 5(2)].

Section 6 straight away prohibits sex determination, either after or before pre-conception, in medical facilities as establishments by way of pre-natal techniques or ultrasonography. Similarly, no person in these facilities would be able to carry out pre-natal techniques and ultrasonography for the specific purpose of sex determination of the foetus in the question (PC and PNDT Act 1994: S. 6).In Section 22, it is laid down specifically that no advertisement in any form or manner with regard to sex selection or determination, about pre-conception or post-conception, can be issued, distributed or published neither in print nor on the internet nor in any other manner. In an event in which this prohibition is breached, the culprit will face imprisonment up to three years or fine of ten thousand rupees under the same Section.

Section 7 of this Act authorizes the Government to set up a board called the "Central Supervisory Board" at the national level headed by the Minister of Family Welfare. He or she shall be the ex officio Chairperson of the Board, which is mandated to discharge the following statutory functions:

> (i) To advise the Central Government on policy matters relating to the use of pre-natal diagnostic techniques, sex selection techniques and against their misuse;
>
> (ii) To review and monitor implementation of the Act and rules made thereunder and recommend to the Central Government changes in the said Act and rules;
>
> (iii) To create public awareness against the practice of pre-conception sex selection and pre-natal determination of the sex of the foetus leading to female foeticide;
>
> (iv) To lay down a code of conduct to be observed by persons working at Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics;
>
> (v) To oversee the performance of various bodies constituted under the Act and taken appropriate steps to ensure its proper and effective implementation;
>
> (vi) Any other functions as may be prescribed under the Act (PC and PNDT Act 1994: s. 16).

Similarly, at the level of the State and the Union Territory, the boards are known as the "State Supervisory Board and the Union Territory Supervisory Board" respectively [PC and PNDT Act 1994: s. 16(a)]. In addition, the State governments are required to set up Appropriate Authorities in States with Advisory Committees, while the Government of India is required to set up Appropriate Authorities in Union Territories with the same. These Authorities are mandated to:

> (a) Grant, suspend or cancel the registration of a Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic;
>
> (b) Enforce standards prescribed for the Genetic Counselling Centre, Genetic Laboratory and Genetic Clinic;
>
> (c) Investigate complaints of breach of the provisions of this Act or the rules made there under and take immediate action;
>
> (d) Seek and consider the advice of the Advisory Committee, for registration or cancellation or suspension of registration;
>
> (e) Take appropriate legal action against the use of any sex selection technique by any person at any place, suo motu or brought to its notice and also to initiate independent investigations in such matter;
>
> (f) Create public awareness against the practice of sex selection or pre-natal determination of sex;
>
> (g) Supervise the implementation of the provisions of the Act and rules [PC and PNDT Act 1994: S. 17(4)].

The architecture of these rules aimed to regulate the implementation of the Act – thus signalling an attempt to translate equality provisions into practice.

8. Judicial Construction of Sex Selection Law: Court Cases

In this section, I shall turn my attention to how the judiciary interpreted the law enacted under the PC and PNDT Act. The purpose to do so is to appreciate and understand as to how the issue of sex selective abortion is understood and

adjudicated in the court rooms. I begin by recalling a sting operation which was telecast by the *Rashtriya Sahara* news channel in which it was shown that a woman who was pregnant wanted her pregnancy terminated as she had been carrying a female foetus in her womb. For this purpose, she approached the Petitioner Dr. Varsha Gautam at the latter's hospital. Despite the fact that abortion for the purpose of female feticide stood outlawed across the country, the petitioner agreed to carry it out. She reportedly had conducted this unlawful business in collusion with other doctors who determined the sex of the baby and the petitioner thereon performed the abortion at her clinic, which was not registered under Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, for the purpose. Following the sting, the C.M.O. Agra lodged an FIR in Hari Parvat police station in Uttar Pradesh.[120] The petitioner moved the Allahabad High Court under Article 226 of the Constitution to get the said FIR quashed (*Id.* at para. 1).

I shall limit myself particularly to the portion related to the law on PNDT Act, disregarding the legal discussion on quashing of the FIR. One of the limbs of the petitioner's argument upon which the quashing of the FIR was sought was that the offence would fructify only when the sex selective abortion was done, not on agreeing to carry it out. Even in that situation, the offence would fall under Section 312 of the IPC, not under PNDT Act (*Id.*: para. 9).

Rejecting this contention and construction, the Court said that Section 2(o) of the PC and PNDT Act 1994 posits that: "Sex selection includes any procedure, technique, test or administration or prescription or provision of anything for the purpose of ensuring or increasing the probability that an embryo will be of a particular sex (*Id.*: para 10). Similarly, Section 3(a) of the same Act lays down, effectively prohibiting sex selection that:

[120] *Dr.Varsha Gautam W/o Dr. Rajesh Gautam* v. *State of U.P.*MANU/UP/0857/2006 at para 2

> No person, including a specialist or a team of specialists in the field of infertility, shall conduct or cause to be conducted or aid in conducting by himself or by any other person, sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them (*Id.*: para 11).

From this, the Court pronounced that the ambit of prohibition of sex selection under PC and PNDT Act 1994 was extremely wide. It has taken every human being and every procedure and technique, which has the potential to conduct sex selective abortion, in its sweep. It bans sex selection from being done, using either the tissue, embryo, conceptus, fluid or gametes. The enactment puts men and women equally under its hardship (*Id.*: para. 12). The Court further says that sex selection does not mean the determination of sex alone; it also encompasses anything done from fertilization to birth in the run-up to having the baby of a particular sex or anything done even to increase the probability of having a baby of particular sex (*Id.*: para. 14 and 15). The band width of the PNDT Act 1994 was comprehensively enlarged by the amendments introduced in this legislation in 2002 by the Parliament. The Court said pursuant to these changes that every step taken before or after conception for sex selection, and every procedure and technique stand covered within the penal purview of the PNDT Act (*Id.*: para. 16 and 17). Thus, the reach of the prohibition of sex selection is very wide and comprehensive. The petition for quashing of the FIR was hence dismissed.

Likewise, it was said in *Dr. Saraswati* v. *State of Maharashtra*[121] that the purpose of the PC and PNDT Act 1994 was to ban sex selection in both the prior and post conception scenarios. This ban is mandated to be checked by ensuring that no misuse of diagnostic techniques should take place. Thus the enactment is collaterally committed to bring medical practitioners to adhere to medical ethics (*Id*.: para. 16).

[121] *Dr. Saraswati* v. *State of Maharashtra* MANU/MH/1519/2013

Moreover, it is important under the legislation that proper and accurate paper work must be in place to avoid the wrath of this law. In *Sujit Govind Dange (Dr.) and another* v. *State of Maharashtra and others*[122], the dispute was related to the inaccuracies in records. The Bombay High Court said that any inaccuracy in records, particularly in filling out the required details in mandated forms, on the part of doctors would bring the provisions of the PC and PNDT Act 1994 in play, as any deficiency in that regard constitutes a breach of the Act (*Id.* at para. 29). The Court further said that the contention that the inaccuracy was minor was useless and "wholly misconceived", because the said Act does not recognize such distinction of major or minor. What the law in place requires is the "strict compliance of every provision of the Act and the Rules" made under it (*Id.*: para. 30). Thus, it is necessary on the part of medical professionals who carry out permissible procedures under the PC and PNDT Act 1994 that they must complete its paper work before the procedures are carried out.

Similarly in another case, *Dr. Dattatraya* v. *State of Maharashtra* [123] **,** an Appropriate Authority in Maharashtra had filed a complaint against the petitioners that they had not complied with the requirements of having to accurately and properly fill up forms of pregnant women mandated under the provisions of PC and PNDT Act 1994, before conducting the permissible procedures (*Id.*: para. 4). The petition was set up in the Bombay High Court to quash the FIR (*Id.*: para. 1) which argued that either there was no inaccuracy in the forms or even when there was one, it was insignificant (*Id.*: para. 11). The court, refusing relief, said that it was not possible to judge the magnitude of inaccuracy committed unless the matter was put to trial (*Id.*: para. 16) and as far as the level of compliance of the provisions of the PC and PNDT Act 1994 was concerned, it was strict in the light

[122] *Sujit Govind Dange (Dr.) and another* v. *State of Maharashtra and others* MANU/MH/1266/2012
[123] *Dr. Dattatraya* v. *State of Maharashtra* MANU/MH/0608/2014

of *Sujit Govind Dange* (Dr.) *and another* v. *State of Maharashtra and others* (See *supra* para 15).

As per the facts in *Dr. Manish C. Dave* v. *State of Gujarat and Anr*.[124], Competent authorities raided the premises of the petitioners in Ahmedabad, Gujarat, where sonography machines were installed for conducting diagnosis. During the raid, what was found was that the radiologists did not fill up the mandated forms accurately. The criminal complaint was lodged against the radiologists in question. They challenged this criminal complaint in the Gujarat High Court, praying that it should be quashed, as it was not, according to them, required on their part to fill up certain columns in the forms.

The Court proceeded from the assumption that the filling up or leaving certain columns blank in mandated forms is a procedural matter (*Id.*: para. 17). Inaccuracy or deficiency in the forms is only material when some offence has ensued and the same is alleged upon those deficiencies (*Id.*: at para. 15). The Court observed that if the deficiencies did not claim to have resulted in the contravention of the PC and PNDT Act 1994, the criminal complaint was bad in law (*Id.*: para 18). The Court did not heed the fact that the inaccuracy in mandated forms by itself constitutes offence under the law. It was therefore quashed by the Court without committing it to trial (*Id.*: para. 19).

It is true that sex selective abortion is a societal pathology and problem that cut short female life before birth in India, but the cutting short of the said life cannot happen without the involvement of doctors and the employment of cutting-edge state-of-the-art medical and reproductive technology. Owing to this, it is required that doctors offering services in prenatal area must maintain proper and elaborate record of their services. Equally important is to keep a record of every test done.

[124] *Dr. Manish C. Dave* v. *State of Gujarat and Anr*. MANU/GJ/7498/2007

In reality, paper or electronic trail are the mainsprings upon which the prohibition of termination of female life through sex selective abortion is hinged (Jaising et al 2007: 4).

Since there is a special emphasis in the PC and PNDT Act 1994 on curbing the misuse and abuse of reproductive technology and keeping and maintaining proper records of the usage of such technology, a large number of cases come to the higher judiciary for quashing of FIRs, as the complaints often happen to be related to inaccuracies in records. It is difficult to say anything with certitude as to how the matter stands on the basis of these judgements, particularly from the standpoint of the cause of women, as most of these matters are still under trial.

However, Indira Jasing (2007) points out that the PC and PNDT Act 1994 carries several loopholes. It provides for Genetic Counseling Centers, Genetic Clinics and Genetic Laboratories. However, what the enactment fails to do is that it does not define what "genetics" means. According to her, this is apparently a "major omission" (Jaising et al 2007: 4). Furthermore, the law makes the assumption that women with pregnancy would approach a Genetic Counseling Center as the first point of contact in prenatal care. However, this does not happen so. They visit their general physician or gynaecologist who is not covered within the ambit of this law. Additionally, at this point of time, there is hardly any requirement for regulating Genetic Laboratories and Clinics, because the ultrasound technology is so state-of-the-art that sex detection now happens non-invasively, rendering these facilities redundant. Likewise, nursing homes also offer their services in prenatal and antenatal care. Those who run them are under the impression that they do not need registration under the law for their services, as there is no reference of nursing homes in the enactment (Jaising 2007: 4-5). Thus, she appears to be pointing out that much of what happens on the ground is outside the purview of this enactment.

Writing from the perspective of medical practitioners, under the headline “Law, Heal thyself”, Ravinder Kaur argued that the compliance machinery laid down in the PC and PNDT Act 1994 treats radiologists as criminals until bribe is paid. It was difficult to live up to compliance requirements without graft being paid and radiologists being put through a harrowing time. Citing Foucault and Kafka, she says that the State's disciplinary practices eventually oppress "the honest and the powerless" (Kaur January 13, 2005: TOI p. 16). Registration requirements designed in the law can drive anyone to tears, as the maze of gleeful bureaucracy is such across the country. According to her, procedural requirements are required to be made simple (Kaur Jan. 13, 2005: TOI p. 16).

While there is no denying that the procedures laid down require some hardship, much of this however arose from the preceding medical indiscipline that did not care for respecting the age-old wisdom of Hippocrates, who had put doctors under an obligation that they would not prescribe any medicine that is capable of bringing about abortion nor would they offer any suggestion for the purpose (Nerland 1989-1990: 119). His oath reads as follows: "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to a woman a pessary to produce abortion".[125] This oath may be antiquated considering our times, as it does not recognize the ‘right’ of women to demand abortion. But from the standpoint of the medical profession, the oath is explicit that doctors were not supposed to perform abortions. They broke the oath by advertising about abortion services and actually carrying out abortions involving the female sex. So, the medical profession itself invited hardship upon it. Jaising (2007) points out that it is too innocent to believe that practitioners in the medical profession do not know that abuse and misuse of reproductive technology for sex determination and female foeticide has commonly been taking

[125] Cited in *Roe* v. *Wade*, 410 U.S. 113 (1973), available at http://caselaw.lp.findlaw.com/cgibin/getcase.pl?court=us&vol=410&invol=113, last accessed on 1 June 2017

place on a routine basis (Jaising et al 2007: 6). They are completely aware of it. Yet it continues to happen. Even women do not want abortion services to be controlled and/or regulated. Freedom of abortion is the last thing that they would like to be controlled and regulated, because this freedom is deeply linked to their autonomy, agency and empowerment.

Another aspect of the PC and PNDT Act 1994 is its poor implementation. The *Centre for Enquiry into Health and Allied Themes (CEHAT) & Others* v. *Union of India & Others*[126] was the case where the petition under Article 32 of the Constitution was filed in the Supreme Court, praying that proper implementation of the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 should be ensured. It was the verdict of a two judge Bench, which was delivered by Justice Shah. The Court said discrimination against the female sex is endemic across India and the application of advanced modern science and technology is being put to use to eliminate female foetuses, which is a morally and ethically repugnant and reprehensible practice. The sex ratio, as suggested by the 2001 census, was worsening in the age group of zero to six, especially in States like Punjab and Haryana. Yet the process of sex determination and termination of pregnancy in the case of it being a female foetus is unabated. The PNDT Act 1994 which was enacted to prohibit the practice of sex selection or determination and female foeticide, says the Court regretfully, has not been enforced properly. Non-profit organizations were compelled to knock on the Court's doors. Thus in this particular case, the Court issued various directions to the Central and State Governments and Union Territory Administrations and appropriate authorities for the proper implementation of the PNDT Act 1994. The said case, in that particular sense, is deemed to be a landmark one.

[126] *Centre for Enquiry into Health and Allied Themes* v. *Union of India* (2001) 5 SCC 577

In *Mr. Vijay Sharma and Mrs. Kirti Sharma* v. *Union of India (UOI)*[127] through the Ministry of Law and Justice and Ministry of Health and Family Welfare, a married couple who had already had two daughters wanted to enlarge their family by having yet another issue, but which they wanted to ensure prior to its birth would be male. The reason as they relayed and disported on the petition to the Bombay High Court was to enjoy the love and affection of both sons and daughters together. Additionally, their daughters would be able to enjoy 'the company of their own brother while growing up' (*Id.*: para. 3). For the gratification of this desire of theirs, the couple visited a number of clinics enquiring if they could determine the sex of the foetus once the mother had one. They were told that it was illegal to determine the sex of the foetus for this purpose. Thus, the couple challenged the Constitutional validity of the Pre Conception and Prenatal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, as stood amended till 2002 (*Id*:. para. 1), that rendered their desire of having a son illegal and unlawful. It was not their intention, the couple said that sex selection should take place as to disturb the sex balance across the society, but it must be permissible in a situation where the couple wants a kid of the opposite sex to the existing ones so as to balance their family. The permissibility of prenatal diagnostic techniques at a preconception stage, according to the petitioners, would as a matter of fact help regain sex balance if their reasoning was put to application to decide the matter (*Id.*: para. 4). The counsel of the petitioners raised many contentions in court. I shall however limit myself to what was contended particularly in the context of Article 14. According to the counsel, The Prohibition of Sex Selection Act was an arbitrary piece of legislation that failed to recognize the distinction between couples who want sex determination being done solely in order to have male children as opposed to those who already had kids of one sex and wanted a kid of the other opposite sex so as to balance their family in terms of the sex ratio. In context of couples of the latter category, the use of prenatal diagnostic techniques must be permissible and since the impugned Act bans it, the Prohibition of Sex Selection Act is arbitrary under

[127] *Mr. Vijay Sharma and Mrs. Kirti Sharma* v. *Union of India (UOI)* MANU/MH/0668/2007

Article 14 of the Constitution. Along with it, it is discriminatory under the same Article on another line of reasoning. As a matter of fact, there were two enactments, that is, the Prohibition of Sex Selection Act, 1994 and the Medical Termination of Pregnancy Act 1997 (MTP Act) from the same source, the Parliament, almost covering the same field which is under contention and challenge in this petition. The MTP Act permits pregnancy being terminated in certain situations and particularly in a situation where the unwanted pregnancy has occurred owing to the failure of 'precaution'. The reason upon which it is justified is that the unwanted pregnancy constitutes 'grave injury to the mental health of the pregnant woman'. Whereas the Prohibition of Sex Selection Act fails to gauge the extent and magnitude of the mental injury that a mother experiences, to conceive babies of only one sex pregnancy after pregnancy. This, according to the counsel, is discrimination writ large among similarly situated people - certain married couples in relation to presumptive grave mental injury could end their pregnancy while others can't, in relation to the mental injury of the same nature (*Id.*: para. 5).

Having heard the counsel, the Court said that the main point of contention and challenge was premised on the comparative understanding of two incomparable enactments differing with each other and operating in different fields. The purpose of the MTP Act, said the Court, was to secure 'avoidable wastage of the mother's health, strength and sometimes life' by having termination of pregnancy under certain compelling situations, while the purpose of the Prohibition of Sex Selection Act, as amended till 2002 is to effectively ban 'sex selection on a woman or a man or on both or on any tissue, embryo, conceptus, fluid or gametes derived from either or both of them' in the particular context of the slipping sex ratio of female in the population being a matter of grave concern before the country. On the specific contention of unwanted pregnancy being identified as the source of grave injury to the mental health of the mother on the one hand and not acknowledging one-sex conception pregnancy after pregnancy as a source of

grave injury to the mental health of the mother on the other, the Court observed that, 'We are unable to accept this submission', because to do so would mean to frustrate the purpose of the Prohibition of Sex Selection Act. It is erroneous to juxtapose a case of a mother who does not want pregnancy of a particular sex with one who wants to terminate her unwanted pregnancy that resulted from failure of the precaution used, because the recognition of mental anguish and agony in the former condition would 'encourage sex selection, and it is impermissible under the law' (*Id.*: para. 15-17). Thus, the petition was dismissed on all counts and the Constitutional validity of the Prohibition of Sex Selection Act, 1994, as amended by the Amendment Act, 2002 was upheld.

The case of *Saksham Foundation Charitable Society* v. *Union of India*[128] was another case where the constitutional validity of its provisions were challenged in the Allahabad High Court. The Constitutional validity of Section 5 and Clause (A) and Clause (B) of Section 6 of the PNDT Act, 1994 was challenged in the Allahabad High Court. The Court said in its verdict that because of sex determination, it is overwhelmingly understood that the ratio of female human population in relation to the male has been rapidly declining. This occurrence constitutes, what the Court describes, as the 'most egregious violation of human rights' in Indian society (*Id.*: para. 3), where the female sex is intentionally and deliberately destroyed in preference to the male sex. It is an expression of the patriarchal social order that makes this world lopsided for women, who are not regarded worthy for equal status. Access to economic opportunities and social participation for them is either denied or looked down upon. Within the patriarchal social order, the male sex is the standard, controlling much of what is significant. Thus, the inferiorization of female sex is so deeply impressed in the psyche of the creatures of patriarchal order that they do not hesitate even while committing female foeticides towards this end (*Id.*:para.6). While dismissing the petititon, the court further said that sex selection for the purpose of aborting or

[128] *Saksham Foundation Charitable Society* v. *Union of India* MANU/UP/2097/2014

destroying the female foetus is deeply invidious discrimination on the grounds of sex and it is prohibited in the constitutional scheme of India, particularly under Article 15, 16 and 21 (*Id.*: 10). The impugned provisions are neither arbitrary nor unreasonable, nor do they violate Article 14 of the Constitution, and the Parliament was competent to enact the law under entry 97 of List I in the 7th scheduled of the Constitution. The court further held that as a legislative policy that concerns sex determination, is would not be correct to disturb it by judicial action (*Id.*: para. 14 and 15).

9. Is it Discrimination?

It is a crucial question to enquire whether sex selective abortion solely done with the intention to get rid of female babies constitutes an issue of discrimination against women as being members of the female sex and, by that very reason, whether the said abortions would amount to being an issue of sex and gender equality. In other words, this enquiry is strictly located in the practice where female sex is eliminated at the pre-conception and pre-natal stage with the particular intent of getting rid of the female sex owing to social, cultural and historical reasons. In that particular context, sex selective abortion is referred to as a "social evil"[129]. The enquiry is not committed to the broader debate of sex selection, though I shall refer to it as a collateral academic requirement. I shall examine in this section as to how the said question is particularly dealt with in court judgements and allied legal literature.

It was pointed out in Voluntary Health Association of Punjab v. Union of India[130] by the Supreme Court that the elimination of female foetus at a large scale was an outcome of the "Indian society's discrimination towards female child" (*Id.*: para.

[129] See Para 12 in *Gagandeep and Ors* v. *District Appropriate Authority* MANU/PH/02/2015
[130] *Voluntary Health Association of Punjab* v. *Union of India* MANU/SC/0205/2013

1). Its reasons were identified to be located in the dowry system, the prejudices and social attitude towards the female sex in the country. Furthermore, the elimination is carried out by medical professionals in the full knowledge and consciousness that the purpose of this action is to get rid of babies with female sex (See Health Association case 2013 *supra*: para 1). For ending this abhorrent and widespread discrimination against the female sex, the law in Parliament was passed pursuant to the provisions of Article 15 of the Constitution (*Id.*: para 2), which guarantees non-discrimination on the basis of sex to citizens of India. In another case that pertains to sex selective abortion, the apex Court stated in an emphatic and firm voice that "The perception of any individual or group or organization or system treating a woman with inequity, indignity, inequality or any kind of discrimination is constitutionally impermissible. The historical perception has to be given a prompt burial[131]. As early as 2003, the Supreme Court in *Centre For Enquiry Into Health And ...* v. *Union Of India & Others*[132] said that discrimination, particularly against girl children, had still been prevailing in the society and the phenomenon of sex selective abortion had further exacerbated the "adversity" (*Id.*: para. 1), that is, the adversity of discrimination against female sex. This discrimination is located in deep psychic order of people where they choose male babies over female ones (*Id.*). In terms of explanation, the Court pointed out that this discrimination was entrenched and dovetailed with dowry, lack of education and confinement of women to household (I*d.*). In *Pooja Agrawal* v. *Shivbhan Singh Rathore and Ors.*[133], it was pointed out by the Madhya Pradesh High Court that sex selective abortion results in lowering the status and dignity of women (*Id.*: para. 9 and 14), the guaranteed constitutional endowments to all citizens of India.

[131] See para 34, *Voluntary Health Association of Punjab* v. *Union of India* MANU/SC/1433/2016
[132] *Centre For Enquiry Into Health And ...* v. *Union Of India & Others* AIR 2003 SC 3309
[133] *Pooja Agrawal* v. *Shivbhan Singh Rathore and Ors.* MANU/MP/0991/2005

In Mr. Vijay Sharma and Mrs. Kirti Sharma Union of India[134] where the constitutionality of the PC and PNDT Act 1994 was challenged, the Bombay High Court observed that "Society should give preference to a male child over a girl child is a matter of grave concern. Such tendency offends dignity of women. It undermines their importance. It violates woman's right to life. It violates Article 39(e) of the Constitution. It ignores Article 51A (e)." (*Id.*: para 25) It further added that "Sex selection is therefore against the spirit of the Constitution. It insults and humiliates womanhood. This is perhaps the greatest argument in favour of total ban on sex selection" (*Id.*: para 25).

Another classic case to illustrate that sex selective abortion constitutes discrimination is the *Saksham Foundation Charitable Society* v. *Union of India*[135], where the Allahabad High Court said in its verdict that because of sex determination, it is overwhelmingly understood that the ratio of female human population in relation to the male has been rapidly declining. This occurrence constitutes to what the Court describes as the 'most egregious violation of human rights' in the Indian society (*Id.*: para. 3), where female sex is intentionally and deliberately destroyed in preference to the male sex. In other words, it is an expression of the patriarchal social order that makes this world lopsided for women, who are not regarded worthy for equal status. Access to economic opportunities and social participation for them is either denied or looked down upon. Within the patriarchal social order, the male sex is the standard, controlling much of what is significant. Thus, the inferiorization of the female sex is so deeply impressed in the psyche of the creatures of patriarchal order that in order to reach this end, they do not hesitate even while committing female foeticides (*Id.*: para 6). The court, while dismissing the petition, further said that sex selection for the purpose of aborting or destroying the female foetus is deeply invidious discrimination on the ground of sex and it is prohibited in the constitutional scheme of India, particularly under Article 15, 16 and 21 (*Id.*: para

[134] *Mr. Vijay Sharma and Mrs. Kirti Sharma* v. *Union of India (UOI)* MANU/MH/0668/2007
[135] *Saksham Foundation Charitable Society* v. *Union of India* MANU/UP/2097/2014

10). Upholding the same spirit, the Gujarat High Court observed in *Amita R. Patel* v. *State of Gujarat and Anr.*[136] that a "denial to girl of her right to life is one of the heinous violation of the right committed by the society; Gender bias and deep-rooted prejudice and discrimination against the girl child and preference of male child have led to large scale female foeticide in the last decade" (*Id.*: para. 9).

Parental investment in the application of prenatal technology in aborting the female sex reflects a deeply discriminatory and sexist attitude, limiting the birth of girls in the population (Hu & Schlosser al 2012: 348). Feminist discourse argues that it is destructive for social institutions and political and cultural equality of women to have a preference for sons (Rebouche 2013). Sex selection represents gender discrimination (Pandey 2014: 228-229 in Kannabiramed), though she disfavors abortions being curbed in any manner, as it is also a vital right of women (Pandey 2014: 228-229 in Kannabiraned). Rashmi Dube Bhatnagar and Renu Dube (2005) also point out that femicide constitutes an issue of discrimination and devaluation of women, making the same a cause of inequality (Bhatnagar and Dube 2005: xii). Sex selective abortion bears the brunt of "being discriminatory against a class of women as a whole (Jaising et al 2007: 3). Further, it is a clear and ocular proof and signification of the devaluated status of women in the society they live in (Jaising et al 2007: 3). According to her, sex selection and abortion of the female sex alone only on the ground of sex constitutes discrimination against women (Jaising et al 2007: 8). "The battle against sex determination, sex selective abortions and sex selection is essentially a battle against the ideology of son preference and hence best located in the search for equality" (Jaising et al 2007: 8).Thus sex selective abortion is an instance of discrimination violating not only of constitutional guarantees of equality but also an instance of violating the entire constitutional order.

[136] *Amita R. Patel* v. *State of Gujarat and Anr.* MANU/GJ/1040/2008

The next question which is crucial with respect to sex selective abortion is how the judiciary demonstrates its concern towards this societal ailment (See Voluntary Health Association case *supra* para. 32). The judiciary often reacts with a sense of alarm over the declining ratio of female children in the population and this sense of alarm seems to be located in masculine concerns – the paucity of women in population would provoke men to indulge in violence for the obtainment of women as their sexual partners. For instance, in *Dr. Varsha Gautam W/o Dr. Rajesh Gautam* v. *State of U.P.*[137], the Allahabad High court said that:"With the female-male ratio having already declined to 933 per 1000 males, we are sitting on a virtual time bomb, which can spell social disaster" (*Id.*: para 26) across the country. In one of the latest verdicts[138], the Supreme Court said that a "(d)ecrease in the sex ratio is a sign of colossal calamity and it cannot be allowed to happen. Concrete steps have to be taken to increase the same so that invited social disasters do not befall on the society" (*Id.*: para. 34). The Court further locates the substantial wrongness of foeticide in the "very core of existence of a civilized society" (*Id.*: para. 1) and "the progress of the human race" (*Id.*: para. 1), among other things. In *Dr. Ramineni Venugopal Somaiahand and Dr. Prabhudas Solanki* v. *Maharashtra Medical Council*[139], the Bombay High Court said that the spread of sex selective technologies may give rise to what it called a "catastrophe" (*Id.*: para. 3). It was remarked in *Tej Sharma and Ors.* v. *State of Rajasthan and Ors.*[140] by the Rajasthan High Court that "An activity for sex selection has very grave social consequences, as it may result in disturbing the balance in the male female ratio" (*Id.*: para. 35).

The Supreme Court in *Voluntary Health Association of Punjab* v. *Union of India*[141] observed that all involved in female foeticide deliberately forget to

[137] *Dr.Varsha Gautam W/o Dr. Rajesh Gautam* v. *State of U.P.*MANU/UP/0857/2006
[138] *Voluntary Health Association of Punjab* v. *Union of India* MANU/SC/1433/2016
[139]*Dr. Ramineni Venugopal Somaiahand and Dr. Prabhudas Solanki* v. *Maharashtra Medical Council* MANU/MH/1403/2013
[140]*Tej Sharma and Ors.* v. State of Rajasthan *and Ors* MANU/RH/1439/2015
[141]*Voluntary Health Association of Punjab* v. *Union of India* MANU/SC/0205/2013

realize that when the foetus of a girl child is destroyed, a woman of future is crucified. To put it differently, the present generation invites the sufferings on its own and also sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems" (*Id.* para 13).

The Court further observes that "A female child, as stated earlier, becomes a woman. Its life-spark cannot be extinguished in the womb, for such an act would certainly bring disaster to the society. On such an act the collective can neither laugh today nor tomorrow. There shall be tears and tears all the way" (*Id.*: para 17). Thereon, the Court indicates what ought to be the notion of women equality: "A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society" (*Id.*: para. 20). According to the apex Court, the civilizational credential of a nation is located in the ability to respect its women. "A society that does not respect its women cannot be treated to be civilized" (*Id.*: para. 21), as the "(c)ivilization of a country is known by how it respects its women (*Id.*: para. 31).

From the ancient Indian texts, what was quoted in support was the Sanskrit Shloka to indicate this:

"*Yatranaryastupujyanteramantetatradewatah,*

atratastunapujyantesarvastatraphalahkriyah"[142],

which loosely translates as : "where woman is worshipped, there is abode of God, All the actions become unproductive in a place, where they are not treated with proper respect and dignity" (*Id.*: para. 15 and 27).

[142] *Id.*: para. 15 and 27

"*Bhartrbhratrpitrijnatiswasruswasuradevaraih,*

Bandhubhiscastriyahpujyahbhusnachhadanasnaih"[143],

which loosely translates as "women are to be respected equally on par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour" (*Id.*: para 28).

"Atulamyatratattejahsarvadevasarirajam",

Ekasthamtadabhunnarivyaptalokatrayamtvisa"[144],

which loosely translates as "The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman" (*Id.*: para. 29).

Swami Vivekanand was quoted as saying that "Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind" (*Id.*: para 21).

'Social thinkers, philosophers, dramatists, poets and writers have eulogised the female species of the human race and have always used beautiful epithets to describe her temperament and personality and have not deviated from that path even while speaking of her odd behaviour, at times' (see para. 23).

[143] *Id.*: para. 28
[144] *Id.*: para. 29

It appears that such a strong judicial reaction is located in the thesis (which was later published as a book) 'Bare Branches: The Security Implications of Asia's Surplus Male Population' by Valerie M Hudson and Andrea M Dan Boer (2004), which explicates that the demographic surplus of men in society may result in social unrest within a country and beyond it. It has been particularly argued in the context of India and China's context of poor sex ratios. The thesis is rooted in the assumption that the surplus male population in the prospect of not being able to find wives would turn to violence, disturbing the country's internal stability and peace. The governments under that scenario may have to carry out military expeditions so as to keep them occupied and utilized. Thus, the sex balance in the society for the sake of national and international stability and peace is crucial and important. According to the authors, with the advent of pre-natal and pre-conception technology in the said countries, the sex ratio is progressively worsening with the passage of time. These unmarried young men would create so much volatility in the society that the governments would fail to ignore them as the number of unmarried men would become "unprecedented in human history" says Hudson (Lee 2004: NYT).[145]

Likewise, according to the United Nations Population Fund (UNFPA), serious attention is required to be paid to the sex selective abortion debate so as to be able to tackle the problem of non-medical sex selective abortion spree underway which is skewing the sex balance in many parts of the world, because a deficit of female sex in the human population would further diminish women's liberty and freedom, leaving their rights curtailed (Strange 2010: 18).The Fund further suggested that this view was unlikely to be correct, that the shortage of female sex in the population would improve women's position across the society because under such grim prospects women would have to confront an enormous pressure for

[145] Lee NYT July 3, 2004 accessed on: http://www.nytimes.com/2004/07/03/books/engineering-more-sons-than-daughters-will-it-tip-the-scales-toward-war.html?_r=0

marriage, increased sex work, gender based violence and even trafficking (Strange 2010: 18).

What does the description above suggest? Feminist epistemologists have pointed out that something which is passed off as knowledge is a camouflaged masculinity representing and promoting the male position and interests and legitimating the subordination of women. This epistemology privileges men painting women in a relegated and inferior light due to being non-masculine creatures (Lennon et al 1994: 2). Thus, the epistemology in masculine image is "intimately tied to networks of domination and exclusion" (Lennon et al 1994: 1). The objective of theories of knowledge is located in organizing, reconstructing and explaining the past and present experience of humankind. The said theories are committed to produce qualitatively better knowledge and epistemic practises (Nelson 1995: 45). Within it, feminist epistemology seeks to launch an enquiry into conceptions and norms of gender and gendered experiences that influence the production of knowledge (Anderson 1995: 50). Thus it is a study of how gender impacts knowledge (Anderson 1995: 50). It is firmly and passionately believed and understood in feminist discourse that epistemology and conception of knowledge that is in place by itself takes part in the production of structures of inequalities in the society. Thus, the knowledge that operates and governs social relations per se is gendered (Frazer 1995: 241-242, in Honderich 2005).

Pursuant to this, it is evident that from the judicial discourse, the picture that emerges before us about sex selective abortion is that a deep decline in female ratio in the population would lead to social tensions. What does it mean? It means that the judiciary seizes the matter in a particular manner where it appears to be overwhelmingly informed with heterosexual model of sexual orientation. It apparently assumes that heterosexuality is a default and dominant sexual orientation. Absence or shortage of women would thus be calamitous. The Judiciary makes this exteriorized in the texts of the judgements in this passing

commentarial discourse. Heterosexuality is a norm which is rooted in masculinity. What I seek to point out is that even when a substantive wrong against the female sex under the patriarchal social order has been taking place by terminating it in womb, the judiciary is still locating the wrongness of sex selective abortion in masculine epistemological experience. On the face of it, this reasoning is rooted in masculine and patriarchal reception of reality. What follows from this is that a condition in which no strife for women would take place may justify elimination of female foetus. Pitting women's concern against the needs and demands of men is being patriarchal in practice.

Simone de Beauvoir pointed out that men and women did not ever share the world in equality (Beavoir 1956: 19). According to Gerda Lerner (1986), men have reduced women to marginality in history, as they did not consider the experience and contribution of women worthy enough to be recorded. They thought that their role in the society was complementary, not as central as theirs was. Their actions, their experience and their contributions were all central and important to the society and the civilization they believed in, while the actions, experiences and contributions made by women were frivolous, trifle, insignificant and inferior or somewhat on a positive note, complementary! Gerda Lerner (1986) would thus conclude by saying that the history of humankind recorded by men is partial and distorted, because it eclipses experience, contribution and action of half of the humanity. She is of the absolute clear opinion that all recorded history is a patriarchal narrative, not the history of entire humankind that had ever lived on this planet.

Yet we do not lose our enchantment with the past wisdom. Past epistemology is purveyed and projected as though it were free of injustice. Contemporary scholarship clearly points out that civilizations throughout the world did not treat

women at par with men. When civilizations are brought into arena of pursuit of equality and justice, it endorses bygone masculine and patriarchal social orders.

It is my belief, as I have already pointed out in the introductory chapter that presenting women's case for equality and justice in historical, cultural and civilizational flavour and taste is unwarranted. The past is complicit in the inequality and devaluation of women in human imaginings. The invocation of it helps the cause of patriarchal and masculine epistemology in being relevant, rather than serving the cause of women's equality.

10. Conclusion

Sex selective abortion is a practice rooted in a deeply patriarchal social order. It is discriminatory against the female sex. The notion of equality that we espouse as a doctrine, that is to say, formal equality, is inadequate and incomplete to address the concerns and provide justice to women, who are still struggling for it. This chapter was committed to enquire about the issue of sex selective abortion in the context of women's equality, which I have discussed thoroughly in the preceding chapters. What I have mainly pointed out is that the sex ratio of female sex in India's population has been declining over a period of time. This decline indicates towards the low worth that is assigned to women in the society. Feminists and women activists consider any such inferior ascription to women as a violation of sex and gender equality. This realization has resulted in bringing forth a law that could check the misuse of reproductive technologies for sex selective abortions. The Judiciary, while interpreting the PC and PNDT Act, 1994, constitutes this practice as a breach of equality now. The discussions made in this chapter make it clear that the objective of women's equality is still unreached, despite guarantees entrenched in India's Constitution to this effect. The continuous endeavour and quest for their equality and justice on the part of women is still underway.

At this juncture, substantive equality, which I have discussed in the preceding chapters, is a more accommodative alternative framework within which, the issues of sex equality and gender justice, including sex selective abortion or any other disadvantage or devaluation can be addressed in their intricacies and complexities, because within this framework, the central focus is on subordination, subversion, disadvantage and devaluation, as opposed to merely adhering to doctrines and principles as a primary consideration. The production of justice within this notion is located in redressing inter-group or inter-category injustice and inequality in contrast to the intra-group injustice and inequality.

Chapter V

Conclusion

Throughout history, women had to confront the gravest phenomenon of gender discrimination, which, it seems, left them the worst affected social group worldwide among all sufferers of discrimination. The access, for instance, to educational, economic and political opportunities was denied to women, who were even forced to put up with different forms of targeted and systematic gendered violence (Davis 1996: 31). This thesis has addressed gender equality in the context of constitutional law and its inbred doctrines, principles and notions under the focus of feminist jurisprudence. It is a project that is situated in the context of India. However, when I say "situated in the context of India", I do not hold the conception of an independent and standalone context in terms of being completely immune and unaffected from other forces or in terms of the purity of the context. To my mind, that kind of imagining and even quest is of little use for my thesis. The imagining, which is useful for me, is that India's present context consists of eclectic experiences, accruing from its deep past and foreign rule on the one hand, on the other, the influx of epistemological experience from the West in particular. In plain words, the corollary is that I conceive the Indian context in terms of different epistemic and otherwise experiences. Amid this thicket or assemblage of eclecticism, one theme along the plinth has, however, uniformly been common - the reality of grave gender division between men and women and male domination over female. The story is unvaryingly alike across different political and juridical regimes that women had to live their life under patriarchy that created grave gender division between the two sexes.

As I have already pointed out that this is captured pretty well by Rukhmabai and Pandita Ramabai in the late 19th century. Rukhmabai had noted: “The learned

and civilized judges. . . are determined to enforce, in this enlightened age, the inhuman laws enacted in barbaric times, four thousand years ago. . . There is no hope for women in India, whether they be under Hindu rule or British rule" (cited in Chakravarti 1993: 74-5). It was further endorsed by Pandita Ramabai that:

> Taught by the experience of the past, we are not at all surprised at this decision of the Bombay court. Our only wonder is that a defenceless woman like Rukmabai dared to raise her voice in the face of the powerful Hindu law, the mighty British government, the one hundred and twenty nine million men and three hundred and thirty million gods of the Hindus, all ... having conspired together to crush her to nothing ness (cited in Chakravarti 1993: 74-5).

This demonstrates the extent of subordination of women and how and what machinery was put to use to carry out this subordination. It further shows hopelessness and powerlessness of women in front of the collusion of patriarchal forces and the mighty state structure that was put to use to control and commit women to male regimented and carceral life.

The first chapter of this thesis, which is introductory in nature focuses, among other things, upon prominently discussing two central concepts of feminist jurisprudence and feminism, that is, gender and patriarchy, which are deeply and inextricably interlinked to each other, forming a conceptual whole for guiding this thesis. The discussion demonstrates that gendering encompasses and represents division of human beings into two separate social categories of male and female, based on their biological sex criteria, eventually giving rise to the gender system. Here biology was essentialised as the ground for the subordination of women. Among other characteristics, one of the salient and defining properties of this system is that women are powerless, vulnerable, subverted, subordinated, inferior, devalued, worthless, underprivileged, impoverished and without resources. That is the locale within which the category of female in the gender system is trapped and housed. While on the other hand, men are powerful, privileged and having resources and prestige and enjoy impunity within this gender system. They

exercise domination over women, spawning and producing patriarchal social order, where women's autonomy and agency is almost totally appropriated and commandeered by men, who, subtly or with force, compel them to live up to their male notions and standards. This is what gives rise to what may be described as "invidious and hierarchical gender division between men and women". In other words, the nature of this division, inequality or disparity is invidious and hierarchical, where men dominate disempowered and disadvantaged women. Since men hold such a superior position, they did not want this system to crumble apart with ease.

Bearing these central concepts of feminist jurisprudence and feminism in mind, I have, then, examined the Indian past, reviewing and surveying ancient, medieval and modern jurisdictions. The enquiry demonstrates that the Indian past under Hindus, Muslims and British was gendered and patriarchal. In what is characterized as ancient India, women had to live under the dominance of men throughout their life: during the childhood, under the control of their father and, post-marriage, under the control of their husband and after the husband was no more, under the control of their son. Women were never fit for freedom. Education was not meant for them. They were regarded as sin and doorway to hell. The situation was no different even in what is classified as the medieval period. With the advent of the English rule, no change ushered in the lives of native women even though British had the perception that the native Indian male had treated their women badly and they were backward. Yet British rule had more systematically perpetuated the same religious customs and traditions under personal laws that had constrained women for millennia. The British had been acting in cahoots with the elitist and influential male groups to keep their empire intact from any kind of backlash. This is not to suggest that there were no historically specific differences in the form and structure of patriarchy through history, rather this is to highlight the persistence of inequality and discrimination on the grounds of sex or gender through time. I do not claim to have engaged in a

detailed historical analysis, yet I gesture towards the systemic persistence of gender as a dominant category that makes women's lives devoid of equality and dignity in different contexts even today. This review was done particularly for two reasons. First, it was done to point out that the struggle of women was against this kind of gendered and patriarchal social, religious, cultural and civilizational legacy throughout the world so also in India. Second, this legacy still informs our contemporary era, where men still hold sway over women, who are relatively powerless, as against men in this gender system despite some degree of progress in the society.

Menon (2012), for instance, details women's powerlessness and male dominance in contemporary times. She states that any woman reader of her book is likely to be in a stronger position in comparison to working class men, or if high caste, as compared to the men of low caste. But she feels herself powerless particularly in two conditions. First, when she is sexually attacked by any man regardless of caste or class and second when she compares herself and her choice and autonomy with the men of her own class. Menon argues that hierarchical social formation around gender is the key to maintain social order (Menon 2012: viii). As Baines (2004: 3) also states that most of feminists believe that it is necessary to struggle against subordination of women to secure gender equality.

Thus the assumption of subversion and subordination constructed an aspect of this enquiry -- that the genealogies of subversion and subordination do not happen to be in current – in the present we just get to see and experience pathologies of the past since they happen to be in the past, and not in the near past, but in the far past. That is what the terminology and assumption of subversion and subordination suggests, giving rise to an apprehension born curiosity whether the present was a continuum of the past.

As I have already stated at the beginning that I have carried out this thesis under the focus and illumination of feminist jurisprudence and feminism, which I have discussed at length in the second chapter of this monograph. In actuality, the rise of feminism has ostensibly succeeded in shifting the “prevailing terms” (Kramer 1995: 265) of engagement in the debates on contemporary issues, leaving even Marxism behind "as the most prestigious radical version of the theme of 'perspective' (Kramer 1995: 270). It epitomizes a "new interpretive perspective on human knowledge, including in the legal sphere" (Barak-Erez 2012: 85). The extraordinary and prolific upsurge of feminism is mainly located in attacking the male dominance and "the insights produced by the attacks" (Kramer 1995: 265). It is done through raising sharp questions about what is established and normalized. In effect, one of the functions of feminism is 'to question everything' (Adrienne Rich cited in Wishik 1985: 64). The corollary of which is that feminist jurisprudence is, therefore, inextricably linked and committed to raising questions. On the legal landscape, it raises questions about everything, ranging from exposing the gendered nature of methods of jurisprudential enquiry to observing, describing, examining and analyzing the '"harms' of patriarchal law" (Wishik 1985: 66). Mere inclusion is not on the primary agenda of feminist jurisprudence. It seeks to relentlessly criticize law for its omission and biases for women's concerns and issues. Mainly, the objective of feminist jurisprudence is to engage and challenge law at its foundational and conceptual level (Littleton 1997: 61).

In chapter two, I have demonstrated that as the modern era began, more particularly in 18th, 19th and 20th centuries, this relegation and subordination of women started to be challenged and the demands were raised to endow women with civil, political and social rights that could elevate women to the pedestal of equal citizenship with men who deprived women of all their agency in the historical process. Mary Wollstonecraft was in forefront in the beginning for the rights of women. Later on, the cause was espoused and pursued by J.S. Mill along with his wife Harriet Taylor in the 19th century. In the 20th, it was championed by Simone de Beauvoir and numerous other feminists, who are still carrying it

forward in 21st century. Likewise, it was championed by Rukhmabai and Pandita Ramabai in India in its infancy. During the 21st century, feminist agenda in India is being embraced and defended by numerous women.

In feminist discourse, there is a powerful view that law as an institution is male, gendered and patriarchal. It, thus, grievously lacks capacity to address feminist project and agenda that seeks to create the world into the image of women, where they could experience and enjoy a sense of gender justice and equality at par with men, who excluded women almost from all walks and pursuits of life. Because of this, according to this view, it is pointless to rely upon law for gender justice and equality. The deployment of law as an institution cannot realize this objective for women. Even if it is put to use for some purpose on the feminist landscape, the heedfulness is important that law as an institution should become weakened and enfeebled in that process.

However, the equally important and powerful view in the feminist discourse is that it is desirable to engage with law as an institution as to secure and reap as much advantage as they could, using the institution. It is important, according to feminist scholars, that they need to committedly devote themselves from court room litigation to constitution designing process to push feminist project of gender equality and justice. It is furthermore necessary to inform law, legal philosophy and jurisprudence of feminist understanding that could help shed patriarchal character and content of the said, and Likewise the endeavour could persuasively help incorporate feminist claims and assertions of gender equality and justice within the body corpus of law as an institution.

Against this backdrop of feminist jurisprudence, I have, then, brought up theory of justice or equality for discussion. Nussbaum asserted that nearly all theories of

justice today were culpably short of meeting the objective of sex equality and gender justice, they are bereft of concern and responsiveness towards the cause. At the moment, the theory of justice that informs the contemporary legal order in general is formal equality, which hinges upon the like-unalike imperative. It is hostage to this formulaic Aristotelian criterion. It is strictly limited to guaranteeing and ensuring only equality of treatment. No further than this is it willing to go. I have demonstrated that this equality lacks the ability and capacity to provide justice and relief to the social groups who are historically and socially subverted, subordinated, and marginalized particularly women. This theme, the theme to provide justice to oppressed and disadvantaged social groups, is not conceptually wired and inscribed in the body corpus of formal equality. It serves scantily limited purpose of remedying injustice among equals in a particular category. Inter-group or inter-category inequality or injustice is not at all part of the agenda of formal equality. It is the greatest and the most serious flaw of this equality, particularly because the gravest inequality or injustice exists in the interstices and interspaces of hierarchically arranged and ordered social groups and categories. That is where precisely the concept of formal equality refuses to step in, saying that inequality and injustice does not exist among unequals and differently situated. In that role, the notion of formal equality clearly appears to be acting as a concealer of inequality and injustice than serving the ends of justice. In other words, the formal equality is ostensibly a legal ruse that carpets considerable socio-interspatial inequality and injustice, serving the interests of powerful, privileged and elite social groups. As I have noted that this notion of formal equality had arisen in the Antiquity, to be precise, in Aristotle's political philosophy, where it was conceived for men, not for women, who were not even citizens at that time. In other words, formal equality anchored in formula is a male and masculine conceptual construct. It is one of the reasons that formal equality fails to accommodate feminist agenda for gender justice and equality. It is the reason the feminist agenda does not fit well with formal notion of justice.

Thus, this time-honoured notion of formal equality deeply disappoints, as I have suggested, those the most who passionately wish to live in a milieu that respects egalitarianism. Particularly, it is because of this, this notion of equality is being attacked and challenged, necessitating an alternative conceptualization that lays special and particular emphasis to redress disadvantage, subordination and subversion of women and other victimized social groups in order to actualize and illuminate their lives with enriching and dignifying sense of equality.

What is therefore required is the imagination of the notion of justice that could remedy interspatial, inter-group and inter-category inequality and injustice that plagues and bedevils sex relations in society. Keeping this objective in mind, I have, thereafter, discussed substantive equality, which seeks to target disadvantage as a primary medium of removing sex inequality and gender injustice, rather than adhering to the formulaic appetites as a primary pursuit for gender justice and equality. In other words, at the heart of substantive equality is the recognition of structural differences and disadvantages among different social groups, some of whom are dominant and others underprivileged, powerless and non-dominant. The genuine endeavour of the substantive equality is therefore to eradicate structural differences and disadvantage that mar powerless, subordinated and underprivileged social groups. The emphasis is on incorporating the experience of such social groups into legal and judicial doctrinal normative body. The notion of substantive equality had arisen in Canada in 1980s. It was pioneered by feminist and women after they had to experience and live down conservative verdicts from the Canadian Judiciary during the immediately preceding decade. In Section 15 of the Canadian Charter of 1982, this equality was mainly entrenched. I have briefly reviewed the Canadian jurisdiction for the purpose of understanding substantive equality, which is, in that country, undergirded by the idea of equal concern and equal worth of all human persons. It is, for realizing that objective, rooted in deep commitment for redressing and remedying disadvantage and structural inequality and inequity entrenched in the

social system. Context specific analysis is permissible, where comparisons among different social groups is possible to measure and determine disadvantage and injustice, which, thereon, may require positive intervention correcting that disadvantage and injustice. In short, Canadian notion of equality espouses and embraces equality in theory and practice uniformly.

Thus in the context of sex equality and gender justice, the notion of substantive equality in preference to its formal counterpart is gradually being recognized as a legitimate feminist claim to gender equality and justice in contemporary legal arena, as it is increasingly and progressively being realized that the notion of formal equality is inadequate and insufficient to measure up to the requirement of equality and justice claims of women and other subordinated and subverted social groups. subordination generated inequality requires, among other things, special and sensitive interventions that could lift subordinated social groups to a point where they could effectively and robustly take part in an arena of life in which the presuppositions of egalitarianism and equalitarianism holds sway.

Underscoring the reality of women being absent in the constitution-making process, MacKinnon has stated: "Women have not, in general, written or agreed to constitutions. Powerful men have written them . . . as if women did not exist" (MacKinnon 2012: IX). In other words, Constitutionalism that we put to use today is "everywhere notoriously phallocentric" (Baxi 2005: 551). India appears no exception to the assertions. Women had actively participated in the national movement for independence (Chandra 2000: 451-2), yet their puny incorporation into the Constituent Assembly seems a mere matter of relaying the inclusive composition of the Assembly to the world at large (Austin 2000: 12). Even no one for more than six decades had ever cared for putting together the contribution made by the women members in the Constituent Assembly. Agnihotri (2012) has noted this total absence of interest in the women's contribution thus: "Despite a fairly large corpus of literature on the Constituent Assembly nothing throws light

on women Members and their role in framing the Constitution" (Preface: V). This demonstrates the extent of apathy towards the role of women members in the Constituent Assembly.

Of course, in the third chapter of this monograph, I have discussed at length, India's constitution from its making and the notion of justice entrenched in it. I have also furnished judicial account how this notion of justice has been interpreted by the India's apex court and higher judiciary. The constitution-making was numerically rooted in male monopoly and hegemonism. In the total strength of 299, only 15 women members were part of the India's Constituent Assembly, leaving it less than 5 percent quotient of the total. This miniscule number was despite the fact that women had participated in a big way in the India's freedom movement, particularly in the 20th century. Their contribution, however, did not reflect in having a reasonable numerical strength in the composition of the Constituent Assembly, which, in ultimate effect, was overwhelmingly male dominated body, should we go by plain arithmetic considerations. Did anyone have awareness and objection to this sexist state of affair? On December 19, Jaipal Singh, while speaking on the Objective Resolution moved by the Prime Minister Jawaharlal Nehru, remarked: "There are too many men in the Constituent Assembly. We want more women"[146] here on this platform. The point that I wish to advance is that the awareness of male dominance and injustice was palpable even when the process of constitution-making just got off. When this process was about to get over, the voice against this injustice was raised by Purnima Banerji on October 11, 1949 in the Constituent Assembly. According to Banerji, it was unjust and objectionable to fill up the vacancies left by women members with men within the Constituent Assembly. It was objectionable, she pointed out, particularly in a context where women could also fill up those vacancies with "equal merit" (Selected speeches of

[146] CAD Vol. I December 19, 1946 available from http://parliamentofindia.nic.in/ls/debates/vol1p9.htm, accessed on 11 July 2017

women members of Constituent Assembly 2012: 85). For this audacity, for having raised the voice for justice, she had to eventually put up with sexist, gendered and patriarchal diatribe on the floor of the Constituent Assembly itself, where H V Kamath had concluded pursuant to the authority of political philosophers that women were unfit for administration and governance on the criterion of head-heart dichotomy. Women, he said, were more ruled by the heart than the head. It takes head to administer and govern, as head could afford to be cold and calculating. Should the heart be permitted to rule the head, the affairs of state could go awry. In short, it is, as it appears, sexist, gendered and patriarchal conversation. What was meritorious and praiseworthy conduct on the part of the women members was the repetitive refusal for justice, that is to say, repetitive refusal for reservation in particular in this case. For instance, Renuka Ray was congratulated by Sardar Vallabhbhai Patel for rejecting the idea of reservation for women on July 18, 1947.

Another aspect of sex equality enshrined in the India's Constitution was that it was hardly ever discussed in the Constituent Assembly, though other agenda on social justice was broached at length. Amid this justice discourse, the audibility of sex equality and gender justice was conspicuously underrepresented or nearly absent. Only smattering of discussion had taken place in the context of the Directive Principles enshrined in the Part IV of the Constitution. The nature of this discussion particularly in the context of personal laws constitutes a pointer how men protects and cares for the systemic paradigm and framework within which they feel snugly and powerful.[147] Brief discussion had happened with respect to the phrase "citizens, men and women equally" in the Article 39(a) of the Constitution. Utterances that negate autonomous and independent existence and status of women were made in trying to have "men and women equally" removed" from the said phrase. Ostensibly, just like Blackstonian law of

[147] CAD Vol. VII November 23, 1948 available from http://parliamentofindia.nic.in/ls/debates/vol7p11.htm, accessed on 11 July 2017

coverture, it was, for example, underlined in the course of the debate that man embraces woman (Benerjee 2006). It was, therefore unwarranted to mention men and woman equally in the said Clause. Taking position of this description is to blatantly assert male supremacy.

For arresting and eradicating this kind of patriarchal consciousness from the society, the Sub-committee on Fundamental Rights had even proposed a provision being entrenched in the Constitution on the freedom of marriage, where the Indian state was required to promote matrimonial ties, based on mutual consent of both sexes with equal rights of husband and wife. This provision, which could enfeeble existing patriarchal social order, was struck out from the draft of the Sub-committee by B.N. Rao, blunting the process of change.

Even the personal laws that leave women completely hollowed out of their agency and autonomy were explicitly demanded by women members to be entrenched in the Constitution's Fundamental Rights so as to make them justiciable. The demand failed in the male dominated Constituent Assembly under the pressure of patriarchal and conservative religious elements, who were even thoroughly opposed to commit their male supremacist personal laws to judicial scrutiny even in an event of dispute. Until now, the Indian judiciary avoids striking down personal laws that severely impair their autonomy and agency, leaving them unequal, disadvantaged and subordinated within the gender system.

Article 15(3) of the Constitution which is particularly meant for women even appears to be enacted to retain gender division, as the provision is mainly anchored in the reasoning of providing separate amenities to women. Women members in the Assembly, however, were apparently satisfied enough for having known that the discrimination on the ground of sex was being outlawed by the

Constitution they were designing. It was being done through the equality code enshrined in the Part III of the Constitution, mainly through Article 15 and 16, which are justiciable. I have already pointed out that the process of curtailing and limiting Article 15 in particular along with the Article 16 was jumpstarted even before the adoption of the Motion to pass the Draft Constitution in the Constituent Assembly. The insertion of the word 'only' in the Clause 1 and 2 of Article 15 was carried out by B.N. Rao, the Advisor to the Constituent Assembly, unilaterally. The effect of the insertion is that the grounds given in the Article or the said clauses got narrowed. How? Consider girl hostel rules, for example, in different universities. In actuality those rules are sexist and discriminatory, as they permit young women to be caged, not young men, after certain time in the evening everyday. Yet those rules are unlikely to be struck down, as being unconstitutional, violating the fundamental guarantee of non-discrimination on the ground of sex available to citizens, because the Indian state in the court would take the position that the discrimination against women is not located in 'only' sex. The basis of discrimination or classification is anchored in safety, security and protection of women. Discrimination is forbidden only on the ground of sex, not on the ground of safety and security. The question arises, however, can young men be caged once or twice a week? After all, it is they who vitiate and threaten safety and security environment for women. The guarantee of non-discrimination in the Article 15, as I have pointed out, has further been restricted by the Supreme Court by the application of the words such as 'solely and 'purely', ostensibly following in the footsteps of B.N. Rao. The point is that to claim non-discrimination, the victim has to establish that the discrimination or classification is rooted in 'only', 'solely' and 'purely' in the constitutionally forbidden ground of sex. Doing so is extremely difficult, because there is hardly any classification that does not have multiple-groundings for the justificatory purpose in particular. In short, the classification can be justified on different and alternative grounds (see Kannabiran 2014).

The constitutional equality that we have is largely interpreted in a formalistic tradition. The extent of this tradition is so pervasive that even the notion of justice enshrined in the Constitution for the purpose of substantive outcomes is interpreted in formalistic tradition, trying to make it a bad word. Article 15(3), for instance, which permits the Indian state to enact any special provision for women and children is surrounded in controversy whether the Clause is exception to the mainstream equality or constitutes the continuous extension of the same. The general opinion is that the Clause is an exception to the mainstream equality enshrined in Clause 1 and 2 of the Article 15. This general conclusion is anchored in formalistic understanding of equality. How? As I have already discussed at length that the central thesis of formal equality is to treat likes alike and unalikes unalike. Two cannot be mixed together. The notion, therefore, conceives or encompasses redressing or remedying injustice or inequality among equals in a category. Discrimination between unequals is permissible under the notion. This is the central thesis of formal equality. This is far too limited notion to redress and remedy injustice on the actual plane of social order. When the attempts are made to splice this notion with additional ideas to improve it, formal equality resists those ideas by describing them "exception" in a patronizing and condescending manner. In other words, formal equality does not have any consception to remedy hierarchical and inter-category discrimination and injustice, which is a social reality, it is yet unwilling in its severe incompleteness to be accommodative for additional ideas that could nudge it towards being complete.

One of the presumptions that we often instinctively attribute to the constitutional provisions guaranteeing non-discrimination on the ground of sex is that they are intended to target discrimination against female sex, as on the historical landscape, women have been victims of male dominance, discrimination, subordination, marginalization and exclusion. Even the women members in the Constituent Assembly had an overwhelming feeling that the guarantee of non-discrimination would put women at equality with men within the deep-rooted

India's gender system. As I have shown that it did not turn out to be that way. As a matter of fact, the male sex is an equal co-sharer in the conceptual construct of the constitutional guarantee of the non-discrimination on the ground of sex. It is not tilted as such towards redressing gender inequality, injustice and division suffered by women. In other words, this guarantee is equally available to men and women both cutting across sexes irrespective of social, historical and political context, where women suffer relegation, subordination, subversion, inequality and injustice and men command superiority in the said respects. This guarantee is thereafter interpreted in India's judiciary employing the narrow and limited notion of justice, that is, the notion of formal equality, which had developed to redress injustice between men and men. The guarantee of non-discrimination on the ground of sex has further been, as I have noted in this monograph, curtailed in the judicial interpretative process by employing the words "only", "solely" and "purely". Gender discrimination has nearly been squeezed out of the purview of this guarantee of non-discrimination by the deployment of these terms, as the sex and gender discrimination claims must be strictly rooted in sex only. According to Nussbaum, the term "only" in the Article 15 has created division between sex and gender. The application of the term makes discrimination on the ground of sex alone constitutionally outlawed, while leaving gender discrimination out of its purview (Nussbaum 2004: 180).

However, with the rise of feminist consciousness, the constitutional guarantee against sex discrimination has lately been witnessing gradual shift towards substantive equality in the judicial interpretative process. For instance, Rape and sexual harassment was recognized in *Vishaka* v *State of Rajasthan* (1997)[148] as the violation of the Fundamental guarantee of sex equality enshrined in the Constitution. The Supreme Court deploys Fundamental guarantees, Directive Principles, Fundamental Duties enshrined in the Constitution, coupled with

[148] *Vishakha* v *State of Rajasthan* AIR 1997 SC. 3011

international law and human right law to reach the outcomes that live up to the mandate of gender justice and equality. Despite this slight shift, the higher judiciary is still reluctant to strike down personal laws as violative of the guarantee against sex discrimination. Though *Githa Hariharan* v. *Reserve Bank of India* (1999)[149] is one of the landmark cases for gender justice, the impugned Section 6 of the Hindu Minority and Guardianship Act, 1956, which is gendered and patriarchal, was not struck down as being unconstitutional. It was just harmoniously interpreted, providing relief to the petitioner with allowing the provision on the statute intact and valid.

Thus Constitution-writing appears to be laying down the "terms to which the men involved agree to hold one another" (MacKinnon 2012: IX). Constitutions, points out MacKinnon further, have mainly been interpreted by dominant men who permit debates on their own terms (MacKinnon 2012: IX). It is seemingly obvious that the Indian Constitution holds the potential to achieve justice for people. But as far as gender is concerned, right from the inception, the attempt is to camouflage, diminish and eclipse the issue of gender justice in India's Constitutional space.

However, as I have noted in preceding paragraph that with the rise in feminist consciousness, the shift in the sex and equality jurisprudence is observable, where gender equality issues are being recognized on the canvas of the said jurisprudence. Not only feminist intervention is there in the judicial space, it stretches to legislation-making as well to remove deficiencies and inadequacies of the notion of formal equality from the canvas of justice. I have noted this feminist activism in the context of India's practice of sex selective abortion, one of the serious issues of gender discrimination in India despite the constitutional guarantee of non-discrimination on the ground of sex, in the final and fourth

[149][149] *Githa Hariharan and Another* v *Reserve Bank of India and another* AIR 1999, 2 SCC 228

chapter of this thesis. I have picked up the issue to point out how inadequate the formal equality appears to be particularly from the perspective of women. The guarantee against sex discrimination is well enshrined in the India's Constitution, yet the elimination of female sex is taking place. The formal equality is anchored in such failures.

One of the serious failures of the formal equality is rooted in the fact that it lacks in motivational and transformational content, where it does not serve as a potent catalyst of social change. Even more serious concern appears to be that formal notion of equality ostensibly lacks capacity to embrace and adjudicate women specific issues in a proper manner. Neither does it inspire people much as individuals to shed their conservative views that impinge upon the lives of others, particularly women, who, as I have pointed out, have been the worst victims of the ancient and antiquated social, cultural, religious, political, historical, legal, philosophical and epistemic legacy that projects itself into our present. Consider, for example, the issue of son preference in India. It gets to us from ancient India, which I have already discussed in the opening chapter. This son preference gives rise to the epidemic of femicide and foeticide, sex selective abortion in the country. Female sex is still looked down upon in the Indian society. I deal with the issue of inferiorization and alleged worthlessness of female sex in this chapter of this monograph, particularly in the context of sex selective abortion, where femicide and elimination of female sex is committed and done in expectation and pursuit of male progeny. This dark and patriarchal phenomenon has history that informs us that female sex was looked down upon since ancient times in different civilizations, perilously committing it to the prospect of being eliminated and done away with. Unfortunately, this phenomenon of sex selection in relation to male progeny still retains life in contemporary India where female sex with the help of cutting-edge medical technology is eliminated in preference to male offsprings, arguably at large scale. Though the central law has been enacted with the efforts of feminists and women to arrest the evil, the shortfall of girl children

within the age group of zero to six is shocking, suggesting that the scourge of sex selection for having male baby is still in prevalence. Encapsulating the gravity of the practice, Powledge stated, “I do not want to rest my argument there. I want to argue that we should not choose the sexes of our children because to do so is one of the most stupendously sexist acts in which it is possible to engage. It is the original sexist sin” (Powledge 1981: 196). In my own oppinion, it is a practice that is an astounding signifier of male dominance and worthlessness of female within the social system. In other words, social customs, usages, legal norms and jurisprudential principles of past jurisdictions brought women to the point of worthlessness by commiting them to systematic process of inferiorization over the period of time. It is required by legal, legislative and judicial process and other means that this situation must be rectified so as to be able to rehabilitate and restore female sex to a condition of moral acceptance, repute, respect and flourishing. The historical and jurisdictional legacy which brought women to this pass on collective moral compass of humanity is required to be discouraged and rejected for all considerations. Equality discourse in law may play a vital role in achieving the objective.

At this point, the thesis that I would like to put forth is that the equality which was crafted in the Constituent Assembly was crafted almost without women's voice under the male dominance. In that sense, it was limited and incomplete with having been an expression of male notion of equality for the greater part. The curtailment of women's vocality was achieved by keeping negligible number of women in the Constituent Assembly. The lack of activist representation of women's agenda resulted in a reductionist interpretational tradition in the judiciary, as at the foundation of the Republic, gender discrimination did not take off as an issue. Had it taken off, even the judiciary would have been cautious and alert to the cause of gender equality and justice. At this juncture, as the feminist consciousness is rising in India, the equality which was crafted in the Constituent

Assembly is being nudged towards being women-friendly in actual practical sense.

As we have witnessed that the India's Supreme Court has invoked the comprehensive gamut of international law, treaties, convention and norms, human right law and foreign jurisdiction along with entire constitutional order including Fundamental Rights, Directive Principles and Fundamental Duties, enshrined in the Constitution for gender justice and equality. This situation points towards two things. First, India's municipal law or the constitution's fundamental guarantee of the non-discrimination on the ground of sex, on the face of it, lacks capacity for gender justice and equality. Second, even from the deployment of Directive Principles and Fundamental Duties for the purpose of gender justice and equality, what appears is that the substantive provisions of the guarantee of non-discrimination on the ground of sex in the Constitution are inadequate to live up to the goal of gender justice and equality. By this, what I wish to indicate is that I would like to frame my future theme of research roughly along these lines.

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