DIALECTICS OF LAW AND THE STATUS OF INDIAN WOMEN: A Sociological Study

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DECLARATION

This dissertation entitled, Dialectics of Law and the Status of Indian Women : A Sociological Study, submitted by Indu Prakash Singh for the Master of Philosophy degree has not been previously submitted for any other degree of this or any other University. We recommend that this dissertation be placed before the examiners for evaluation.

(Prof. T.K. Oommen)
C H A I R M A N

(Prof. Yogendra Singh)
S U P E R V I S O R

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C O N T E N T S

LIST OF ILLUSTRATIONS

CHAPTER I

INTRODUCTION

"One is not born, rather becomes a woman. No biological psychological or economic fate determines the figure that the human female presents in society; it is civilization as a whole that produces this creature, intermediate between male and eunuch, which is described as feminine".[1]

Women in different societies, manifest a homogeneous trait — that of a non-entity.[2] What more evidence do we need to prove this than the United Nations Report, which says:

> Women constitute half the world's population, perform nearly two-thirds of its work hours, receive one-tenth of the world's income, and own less than one-hundredth of the world's property.[3]

In fact, in the words we use in our conversation, women are a subsumed identity merged into a larger whole — Man.[4]

Thus humanity is male and man defines woman not in herself but as relative to him; she is not regarded as an autonomous being. She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the subject, he is the Absolute — she is the other.[5] This

cultural, ideological, mythological, literatural, social, psychological educational, political, economic and legal oppression of women, we call, 'femme-genderocide' — a process of perpetrating and perpetuating social differentiation (genderization - a process of ossifying social differentiation based on gender) by apotheosizing and elevating masculinity, and degrading, relegating and annihilating feminity. It is because of this, that "the 'specialisation' of men's and women's roles is seen less in terms of complementarity and more in terms of inequality and exploitation."[6]

The Problem

Statement of Problem

The present work endeavours, to present not a synoptic view[7] of all the realms of women's oppression, but a panoramic view of the domain of law — hence the rubric of the present thesis, reads, "Dialectics of Law and the Status of Indian Women."

The dialectics of law and the status of Indian women has to be seen in the historical dimension (besides many other dimensions). In the early history of every nation religion came to be closely associated with the growth of law, for the simple reason that men feared God before they gave authority to kings. Divine sanction, rather than kingly edicts, was more powerful in enforcing such laws. That is how the code of Manu came into being. It is a compilation by the priestly

class and it is ascribed to a mythical sage, Manu to give it a religious sanction. The Islamic legal system, too, had a similar origin.[8]

As will be shown, law has been a potent tool wielded by men to make women toe the line of patriarchy. This was there earlier during the days of Manu, the visage of which still remains. The laws of shastras imposed many disabilities on women. Manu enunciated the perpetual tutelage in the following terms:[9]

> "Her father protects [her] in childhood, her husband protects [her] in youth, and her sons protect her in old age; a woman is never fit for independence."

Furthermore the incapacity of women to inherit under the Hindu law is attributed to the statement of Baudayana which says : "Women are devoid of the senses and incompetent to inherit." The dialectics of law, here (the case of inheritance) lies in the fact that inspite of this general disability to inherit specified female heirs were given the right to inherit by virtue of special texts. In the Bengal (Dayabhaga) school of Hindu law, and in the Benares and Mithila sub-schools of Mitakshara law[10] only five female relations could succeed as heirs to males. They were (a) widow, (b) daughter, (c) mother, (d) father's mother, and (e) father's father's mother. To this list by virtue of the Hindu inheritance (Amendment) Act, 1929, three more female heirs were added, viz., daughter, daughter's daughter, and sister. The Madras school recognized a larger number of female heirs (including those enumerated above) and the Bombay school a still larger number as possessing

capacity to inherit. Even in these cases, the rights of female heirs were less than male heirs, for whenever a female heir succeeded as heir to a male she took a limited estate (in the nature of a life estate) known as a Hindu-woman's estate.[11]

The Hindu women's Rights to Property Act, 1937, made a number of changes in the laws of inheritance, most notably, the principle of survivorship in the Mitakshara law was modified for the benefit of the widow, although again, in all cases covered by the Act, she had only a limited estate and not an absolute estate. The Hindu succession Act, 1956, introduced revolutionary changes. The limited estate of women was abolished. The mother, widow and daughters of the deceased are made Primary heirs along with the sons.[12]

However, the problem relating to the disinheritance of female heirs arises because when the legislature gave rights to female heirs under the Hindu Succession Act, it gave equally unrestrained power of testation to a deceased to disinherit them. But there is an even more acute problem regarding equal rights of inheritance as between male and female heirs of the same degree. The Mitakshara joint-family system which governs the vast majority of Hindus is retained in principle. The Rau Committee appointed by the Government to suggest reforms in the Hindu law recommended its abolition. Kane, expressed his agreement with the recommendations.[13] The major characteristic of the Mitakshara coparcenary is the existence of the right by birth under which a son is entitled to an equal share with the

father in ancestral properties (as only a son can be a coparcener). One result of the retention of the Mitakshara system is the great disparity in the shares of the male and female heirs of the same degrees, or rather between the sons and daughters in coparcenary properties.[14] It is equally important to notice that there is no impediment to a person converting his self- acq-uired property into joint-family property[15] (all this have been dealt with in the fifth chapter).

The present dissertation is aware of such dialectics in many more legislations, but would not trace it from its origins to the present day (as in the case of inheritance rights). As in the case of inheritance rights so also in other rights protected by respective legislations the same dialectics can be noticed. Which while bringing many changes, eludes many more, being reduced to running errands for His Majesty.

The present thesis aims, then, not at understanding the dialectics of law and the status of Indian women since, its inception, rather it delimits its focus to the post-constitution era, with intermittent references to the pre-constitution period.

Selection and Exposition of Problem

The present study, which is based on secondary sources, has been taken up, for the reason, among various others, that not enough work has been done in this area. Women studies in India, at the moment, are di-lating on working women, women's movement, rural women, tribal women, mofussil and urban women (see bibliography) etc.

Besides this, the most important reason which propelled the present dissertation, is a very interesting observation made by Bryan S. Turner.[16] Turner, notes, that "A comprehensive system of institutionalized patriarchy no longer exists in the majority of industrial capitalist societies, where the legal, political, religious and economic restraints on women have been largely dismantled. The collapse of patriarchy has left behind it widespread patrism which is a culture of discriminatory, prejudicial and paternalistic beliefs about the inferiority of women."[17]

Turner further writes," The implication of my argument is that patrism is expanding precisely because of the institutional shrinkage of patriarchy, which has left men in a contracting power position. Men as a whole can no longer depend on the law to buttress their dominance within the public and private spheres. Institutionalized patriarchy has crumbled along with the traditional family unit and the patristic attitude of men towards women becomes more prejudicial and defensive precisely because women are now often equipped with a powerful ideological critique of traditional patriarchy. Sexual conflict is now more pronounced as a result of defensive patrism and offensive feminism in a period where the institutionalized supports for sexual division of labour are in a state of advanced decay."[18]

The present thesis, happens to go contrary to Turner's observations. Turner, tries to confine his

observations to the industrial capitalist societies. But that too, makes his arguments untenable and chimerical as institutionalized patriarchy instead of having crumbled stands emboldened, throughout the world. "Patrism is expanding" not because 'of the institutional shrinkage of patriarchy, which has left men in a contracting power position', but because of the expansion of patriarchy, which has left women in an even more contracting power position not only in social and political but also in economic domain.[19] His arguments then are not only not tenable for the societies, which he has in mind but also for our society and the similar like us.

What intrigues us the most — and this happens to be the concern of the present work — is, his (Turner's) assertion that 'men as a whole can no longer depend on the law to buttress their dominance within the public and private spheres'. Why do they (men) need to depend on law, when even till this day the root of the roots of the dialectics of law lies in "man — his ethos, ambience, mores and norms."[20]

The problem with Turner's observations is that, such observations are being made in the Indian context also. "We abolished sati in 1829; we abolished child marriages; we soon after enacted a widow remarriage law; we gave women the right to property and the right to divorce; we raised the age of marriage. Women now go to schools, colleges, take up jobs; they are protected by labour laws like maternity benefit Act, Equal Remuneration Act. They can vote in elections, contest in elections," is what the important dignitaries would enumerate as achievements towards the emancipation of women.[21]

But in reality we still find our women oppressed by the fetters of machismo — thus making all the formal manumission impotent.[22] Thus the institutionalized supports for sexual division of labour are not in a state of advanced decay, rather they are in a state of advanced aggrandizement.

"The hypocrisy of Indian society is nowhere better demonstrated than in its attitude towards women. While our constitution and ['lacunose'[23] and 'obsolete'[24]] laws grant women equal rights and opportunities... Women's struggle for a better social or economic deal have been suppressed by the state... — since the state and the police are committed to protecting and maintaining the status quo — and frustrated by the judiciary."[25] It is with this awareness, Justice Krishna Iyer, observes, that "our administration with its trinity of instrumentalities [Parliament, Judiciary and Executive] still lives in the medieval ages...."[26] In keeping with the tenor of the foregoing observation, Upendra Bazi, notes among other structural antinomies and contradictions in the Indian Legal System (ILS), that "... the constitution and the law have generally strong redistributive thrust; the orientation of the major institutions of the ILS is towards maintenance and even aggravation of the status quo. The legal institutions generally decelerate and even prevent the inherent dynamism of constitutional aspirations...."[27]

Therefore the law relating to women in India requires drastic alterations. Though there has been considerable legislation in regard to women during the post — constitution

era — this happens to be the focus of the present dissertation, which keeps moving to and fro —, in reality the position of women today is not very different from the pre- constitution days. The equality clause [28] in the constitution has made little or no impact on the social and economic life of women in India — this manifests the adaptive role of the legal system i.e. "where law [here constitution] initiates changes which are not yet accepted or expected by the members of society at large. The legal system would in this case generate needs for adaptive changes in the society."[29] A woman continues to be a dependant — economically, socially, and even psychologically. Her status is that of a daughter, wife or mother and she seldom feels an individual in her own, right. Legislation enacted during the last two decades is out of reach for most women because, by and large, they have neither the mental awareness nor the financial resources to take advantage of these beneficent provisions.[30]

Formally, legislation then may be made for degenderizing the inveterate genderization processes. But what is effected of it, is rather expediting the process of patriarchization. That is why regarding woman's legal status, Beauvoir says, "Almost nowhere is her legal status the same as man's and frequently it is much to her disadvantage. Even when her rights are legally recognized in the abstract, long - standing custom prevents their full expression in the mores "[31] — this happens to be one aspect of the dialectics of law.

Moreover, the experience of being a woman is not the same as the experience of being a man. It is necessary to make

this simple point time and again because of the tendency of law and law — makers to ignore it. For this reason, even today law is reflected in male rather than female eyes.[32]

The law, then can obviously be a part of the patriarchized process of social construction. This Gandhi too observed and said "woman has been suppressed under custom a law for which man was responsible and in shaping which she had no hand.... It is upto man to see that they enable them to realize their full status and play their parts as equals of men."[33] An exhortation, too shares the same spirit and comprehension, when it says, "They [Women] should and they will rebel against the status quo. But will it be justified on men's part to let women struggle against the social boulders put up by us ? We men, have to join in removing them. In this process we will not only be emancipating them but ourselves also from male chauvinism."[34]

The law has done as much as any other social institution to define and promote the separate spheres of activity appropriate to men and women. Equally, however, law can be part of the process of breaking that construction down. It can liberate women from their separate sphere.[35] But behind this tenuous veneer of formal and abstract equality lay the structural inequality produced by the relegation of most married women to their separate spheres. Sometimes the law lags behind changes in the actual experience of the women and men involved — this constitutes the third category (c) of

Yogendra Singh's paradigm[36] (e.g., the importance given to the personal law in India, which governs different communities) sometimes it assumes changes which have not yet taken place i.e., it is far ahead of times — this represents the second category (B) of Yogendra Singh's paradigm[37] (e.g., the chapter on legislative dialectics would show that the passage of the Hindu code Bill was impeded among others, by the leaders who swore allegiance to Gandhi, as it seemed to bring cataclysmic changes, by pulverizing the "masculine patriarchal values and norms "[38] and its structure); and sometimes it does both at once. All this boils down to say that the law is inconsistent in its approach to women[39] — all this highlight further dimensions of the dialectics of law.

Furthermore, though the sinews of law may be tightened with all the legalities of reality, the praxiological experience has shown not the rigid and 'impartial ' law but a protean and pliable law, which is eternally prepared to genuflect to the male principle (notwithstanding exceptions). That is why the formidable array of legislations promulgated (a chronology of such legislations is given in the Appendix) to protect women, have seen, the subjection, subordination and subjugation of women, withstand the test of time.

Dialectics of Law

All legal systems embody and manifest antinomies and contradictions in their normative, institutional and cultural dimensions. These arise not just from the opposition between legal rationality and substantive justice, a feature which

is fairly universal to law. Rather, the legal systems of post-colonial societies manifest certain distinctive antinomies and contradictions. These are inevitably built into the 'original position' of Constitution-makers in an ex-colonial context. They have to choose between historical continuity and revolutionary breaks with the past. Problems arise when clear choices are avoided in favour of constitutional eclecticism. The Indian Constitution is a case in point. Normatively, the Constitution envisages a revolutionary break with the past. It projects a vision of the desired social order based on the values of equality, fraternity, liberty, dignity, and justice. But in all vital matters of the architecture of the legal and administrative institutions of the state (including law-making, law enforcement, and adjudication) the Indian Legal System retains considerable continuity with its colonial past.[40]

The present study does not confine itself to the structural antinomies only, but rather it takes in its ambit also, the spatio-temporal, inter-personal and intra-personal dialectics in relation to women. Further - more, the dialectics of law is discerned as within law (i.e. the Indian Legal System) and in relation to law — thus dialectics over here is understood not only in structural but also in phenomenological sense. In the former category we can subsume the following aspects :

(i) Dialectics between the procedural generality or legal formality or legislation and the substantive

justice or litigation. In short, "the legislative process is, on the whole, one that tends to encourage broad appears to abstract goals, the litigation by constrast is one which tends to emphasize the hardship and cost to the individual of the pursuit of those goals;"[41]

(ii) Dialectics between the constitution and law;

(iii) Dialectics between the formulation of bills and its enactment;

(iv) Dialectics between the processes of promulgation and justiciation;

(v) Dialectics between the promulgation and implementation processes ; and

(vi) Dialectics between the adjudication and execution (enforcement) processes.

Dialectics of law takes place also because of forces outside law, which it tries to encapsulate, but nevertheless this dialectics is in relation to law; and they are the following :

(i) Dialectics between Law or ideology and the times or idiom, i.e. as has been shown earlier, sometimes the law lags behind charges in the actual experience of men and women involved while sometimes it is far ahead of times;[42]

(ii) Dialectics between Law and life. "The remedies (by law should focus) on life's agonies, not on

declaratory decrees."[43] "A culture not of confrontation [which in fact is the case] but of confluence of legal justice and people's justice is the highway to a social justice state"[44]. "Where law resists change, stability is the casualty ...;"[45].

(iii) Dialectics between the great and the little traditions. "The little tradition remains far more localised both in time and space. It is generally blithely unaware of the great tradition. Just as the people who follow the little tradition can be and often are unaware of the great tradition, so are they of the statutory laws;"[46]

(iv) Dialectics between the civil law and the canonical law. For instance, "Christians today present the classic instance of a progressive community ruled by retrogressive laws. The irony is that whilst civil law slumbers in blissful antiquity (the Indian Divorce Act, 1869, has accomplished the incredible feat of resisting change for 116 years), canonical law has been modernised to keep step with contemporary needs. The real tragedy, right now is that civil law, which recognises sacramental Church weddings as valid, considers Church annulments - awarded by the self same Church - as void in law. What then is the status of a couple whose union has been annulled by the Church ? 'They are at once married and unmarried', says Kenneth Phillips, an ardent reformist. 'They are married in the eyes of the law but not married in the eyes

of the Church and Christian society'."[47] Here, to our surprise, we find secular forces retrogressive as compared to religious forces. This of course is not so with Muslim and Hindu fundamentlism.

(v) Dialectics between law and the customary practices. For instance, even till this day child marriages and dowry extortion cases are rampant;

(vi) Dialectics between different personal laws. There is "the likelihood of inter-personal conflict of laws, if different systems continue to exist."[48] Further, "the confused cacophony of clashing family laws are as much an insult to men as they are to women;"[49]

(vii) Dialectics between law and the male ethos. As noted earlier, the root of the roots of the dialectics of law, lies in "man - his ethos, ambience, mores and norms;"[50]

(viii) Dialectics between law and its lacunosity. As observed later, among various roots of the dialectics of law happens to be also, the lacunosities which seems to have beleaguered most of the legislations protecting women; and

(ix) Dialectics between the progressive and retrogressive elements. A detailed study of this has been done throughout the present work, but specifically in the chapter on legislative dialectics. This aspect of dialectics manifests the hypocrisy of the modernists (progressivists) who tend to get nostalgic about the

> 'auld lang syne'. On paper they are idealists and humanists but in the austere face of reality become expedient. In such an event the balance tilts in favour of the retrogressive elements, as many progressivists in their hearts have a niche for such elements and proclivities. But still what challenges this patriarchized retrogressive citadel are the progressivists, though few, who happen to be potent enough to impugn the status quo.

It is in this milieu that "Women [have] extended their struggles on the legal front and conducted many battles to change laws or force the administration to effectively implement the laws."[51] The today's progressive realm is not just confined to men but rather it has opened itself to the feminists, who have made it clear that "Indian Women are developing a new sensitivity and consciousness which will no longer tolerate the suffocating, familial, institutional, political, and cultural norms which place them in a humiliating subject status. This sensitivity may not be able to express itself in a clearly articulated, intellectual, logical form, but it is manifesting itself as a deep undercurrent of ferment which is slowly acquiring a higher voltage and in acting as a powerful force in the nethermost depthe of society."[52]

All the preceding facets, aspects and dimensions of the dialectics of law have been strewn throughout the present thesis. This has to be kept in mind - even if a mention of this has not

been made explicitly in the later sections and chapters - to avoid peregrination in blind alleys. The dialectics of law, leads in the ultimate analysis to, and is also goaded by, "Dialectical realism (which) compulsively tells us that if social institutions designed with defined goals, at the performance level prove to be a functional futility... they must be re-tuned to the new times lest they be consigned to the museum of history ...." [53]

Before trying to fathom the impact on the status of Indian Women, of the dialectics of law it would be proper to clarify some theories, concepts and issues - they guide the present study - , which try to grapple with women's problem.

Feminist Theories of Women's Oppression

Feminist theoretical work has been concentrated on the production and refinement of explanations of why women are oppressed. The theories , here are thus essentially causal, sometimes monocausal, theories. Their prime concern is with establishing the cause (s) of oppression as the necessary first step in removing it. Each of them is concerned with 'gender' because each challenge the 'biology is destiny' argument, although some do so only indirectly.

All feminists agree that women at present have lower status than men; that women are discriminated against socially economically, politically and legally, and that this state of affairs is unjustified and must be changed. They differ in their analysis of :

(i) the origins of women's inferior status;

(ii) why the lower status has persisted ; and

(iii) what changes are necessary to end sexism.[54]

Within the women's movement the three major ideological positions are those of :

(i) the socialist feminists (Juliet Mitchell,[55] Sheila Rowbotham[56], and Zillah R. Eisenstein[57], the Indian counterpart (Organizationally speaking) being National Federation of Indian Women (NFIW), Self Employed Women's Association (SEWA), and Association of Men Against Violence Against Women (AMAVAW)[58] this association is actually espoused to radico - socialist position.);

(ii) the radical feminists (Shulasmith Firestone[59], S. Brownmiller[60], M. Daly[61] and Kate Millet[62]. Madhu Kishwar and Ruth Vanita[63], and Saheli would be the Indian counterpart of it.); and

(iii) the moderate or women's rights feminists (Betty Friedan,[64] Germaine Greer[65], and Ann Oakley[66]; the Indian counterpart of it is Mahila Dakshita Samiti (MDS)).

Socialist Feminism

Socialist feminists, following Engels, see the Oppression of women as stemming from the class system. Engels presented a historical process of how private property originated in an otherwise egalitarian order, the economic unit which became the family, how the status of women was

transformed from that of free and equal productive members of society to one of subordinate and dependent wives and wards — the second sex[67], and how this passage from the matriarchate to the patriarchate brought about the "world - historical defeat of the female sex."[68]

Mitchell, emphasizes that in analyzing the position of women at a given point in time, reproduction, sex and the socialization of children as well as production must be considered.[69] The contemporary bourgeois family can be seen as a triptych of sexual, reproductive and socializatory functions (the women's world) embraced by production (the man's world) — precisely a structure which in the final instance is determined by the economy. Mitchell calls for changes in all four factors that determine women's position. While economic demands are more basic , the other elements must not be neglected. Furthermore, strategy will sometimes dictate emphasizing one or another of the non-economic elements over the economic.[70]

Peter Aaby, argues that the subordination of women is a necessary prerequisite to the origin of private property. As a corollary to Aaby's hypothesis, Nanda and Mangalagiri, add that the abolition of private ownership cannot thus bring about expected changes in the subjugated status of women. Patriarchy, then, and the corresponding gender relations based on power and control, instensifies with the advent of 'private property' but its origins are more 'intimate and distant.'[71]

Unlike earlier socialists, socialist feminists do not

believe that socialism will automatically free woman. The position of women in the Soviet Union, China and Cuba[72], while much improved from that of pre-revolutionary days, is still not equal to that of men, it is this awareness which has gone into making socialist feminists more practical and rooted in reality. Thus, women must make sure, through their struggle that the revolution, is a socialist feminist one, they observe. Further, women must maintain their independent struggle for liberation but must not fall into the trap of believing that men perse are the enemy. No segment of society which has been subjected to oppression can delegate the leadership and promotion of their fight for freedom to other forces-even though other forces can act as their allies[73]. During the course of the struggle men can and must be re-educated.

Radical Feminism

A common thread in this group of theories is their distinctive interpretation of 'oppression' and 'responsibility'. 'Oppression' involves both the idea and the threat of sexual force as a means of keeping women 'in line'. Power is identified as the knowledge that force exists and will be used if necessary; but for as long as power is effective power then force need exist only at the level of threat.[74]

Radical feminism focuses on sexual power. It also sees men as responsible for women's oppression. It argues women are oppresed by men in the sense that although it may not be the majority of men who 'work' the system of oppression, nevertheless by not actively opposing it the rest of men support it and so permit it to continue. Some men may

indeed oppose women's oppression in a variety of ways, but until all men as a group do so the argument remains valid.[75]

Radical feminists first made use of the concept patriarchy to understand sexual division of labour and society. According to them, there exists a patriarchal organization in society determined essentially by a male hierarchical order, that enjoys both economic and political power. It is the patriarchal organization, not class structure that defines women's position in power hierarchy. Manifested through male force and control, the patriarchal system preserves itself through marriage and the family. Patriarchy then, is a sexual system of power, rooted in biology, i.e., in the women's reproductive role rather than in economics or history. There is therefore a departure of the use of class as an economic category to its use as a sexual category.[76]

Firestone, as noted earlier, presented the idea of 'sex class' where woman and man stood as two opposing classes. Capitalism was thus replaced with patriarchy as the oppressive system. Thus, "instead of seeing a historical formulation of women's oppression we are presented with biological determinism."[77] Moreover, such a reductionist position makes out of men to be the natural enemies of women, as observed earlier.

All radical feminists agree, that the oppression of women is the first and most basic case of domination by one group over another. "Male supremacy [patriarchy] is the oldest, most basic form of domination. All other forms of exploitation

and oppression (racism, capitalism, and imperialism etc.) are extensions of male supremacy: Men dominate women and few men dominate the rest."[78]

The problem then, is the sex class system through which women have been relegated to being breeders and have been excluded from the creation of and any real participation in culture. "Radical feminism recognizes the oppression of women as a fundamental political oppression wherein women are categorized as an inferior class based upon their sex."[79]

The function of sexism is primarily psychological, not economic. According to the New York Radical Feminists, the purpose of male chauvinism is primarily to obtain psychological ego satisfaction and only secondarily does this manifest itself in economic relationships. For this reason they do not believe that capitalism, or any other economic system, is the cause of female oppression, nor do they believe that female oppression will disappear as a result of a purely economic revolution. The political oppression of women has its own class dynamic; and the dynamic must be understood in terms previously called 'non-political' — namely the politics of the ego. Man establishes his 'manhood' in direct proportion to his ability to have his ego override woman's — this has been noted by Beauvoir also[80] — and derives his strength and self - esteem through this process.[81]

For Firestone, the first division of labour - that between man and woman - contained power component, from this developed the exploitative economic class system. Therefore, according to

Firestone, "current leftist analysis is outdated and superficial because this analysis does not relate the structure of economic class system to its origins in the sexual class system, the model for all other exploitative systems and thus the tapeworm that must be eliminated first by any true revolution."[82]

While not all radical feminists would subscribe to Firestone's exclusive biological explanation, all would agree that all past and present societies are patriarchies. Men institutionalized their domination over woman via social structures such as family and religion. "The oppression of women is manifested in particular institutions, constructed and maintained to keep women in their place. Among these are the institutions of marriage, motherhood, and love (the family unit is incorporated by [these])."[83] To free women, these institutions and the sexist ideology that they foster must be destoryed. Revolution not reform is needed.

Radical feminists and socialist feminists then differ over the origins and the present function of women's oppression. Socialist feminists see the origins in the institution of private property and the division of society into classes; radical feminists emphasize female biology — particularly the women's reproductive role. Sexism, according to the radical feminists, primarily serves a psychological function for man. Socialist feminists, in contrast, see sexism as primarily serving an economic function for the capitalists.

Radical feminists, see patriarchy as the defining characteristic of a society, which is cross-

cultural and cross-national, existing differently in different societies through institutionalization of sexual hierarchy;[84] for socialist feminists the defining characteristic is capitalism. Socialist feminists see a socialist revolution as a necessary but not sufficient condition for a non-sexist society. Participation by active, committed socialist feminists in the revolutionary struggle and in the new society will ensure the demise of sexism. Radical feminists believe that a feminist revolution against patriarchy will destroy sexism and also institute socialism. The two groups ideals of the good society then, do not differ greatly.

Socialist feminist and most radical feminists believe in androgyny[85] to be a major defining characteristics of the good society. With the destruction of gender - roles both males and females would be free to develop and express the full range of valued human traits. Creativity, independence (transcendence as accentuated by Beauvoir), nurturance, and sensitivity would be considered desirable characteristics in all human beings. Liberation consists not in women 'becoming' men but in both male and female being free to become truly human. In a good society both men and would be different from what they are in our society. Personality differences among people would still exist but they would not be related to sex. This is the point which Beauvoir too emphasizes, contrary to Marx, when she notes, "the contradictions will never be resolved; ... mutually recognizing each other as subject each will yet remain for the other an other".[86] In fact the inter-personal relation of 'I and

IT' will transmogrify to 'I and Thou' in Buberian terms. And this is what in reference to phenomenological paradigmatic solution to women's oppression is called, 'Dialectical Egalitarianism'[87] — this in fact forms a part of the general theoretical template of the present thesis, which will be dealt with in the next chapter.

Moderate Feminism

Moderate feminists start from liberal principles - that all people are created equal and that there should be equal opportunity for all. They see that these principles have not been applied to women and demand that henceforth they should be. This group of theories is often criticised for failing to provide any explanation of women's oppression. This is because 'causal explanation' is usually defined as necessarily including an historical dimension. However, a clear, although in a narrow sense 'ahistorical', exposition of the causal origins of women's oppression is contained within them. The notion of 'socialisation' provides the central explanation of the perpetuation of oppression. Within its constituent practices children learn prescribed and proscribed social roles, including those pertaining to gender, and these are later enacted in social life. Of course this notion of 'origins' is different from that found in the first and second group of theories, for it locates a different kind of 'past' in which origins are to be found , focusing on pre-birth, pre-infancy and infancy.[88]

Moderates, do not carry their critique of motherhood and

the family to the same basic level as the radical feminists do, but they agree that as now constituted, the institution of family is oppressive. Friedan says, that as long as women are relegated to being mothers and mothers only, "motherhood is a bane and a curse"[89]. When women are free to be, equal human beings, the family will no longer be oppressive. Moreover, other life- styles will also be available for those who prefer them.[90]

While moderates are increasingly using the term 'revolution', they do not mean it literally. A non-sexist society can be attained by working through the present system. Many may hope that an accumulation of reform will transform society, but radical restructuring, such as that envisioned by the socialist or radical feminists is not considered necessary. They are, then often accused by their more radical sisters of demanding 'let us in', not 'set us free'.

Like socialist feminists and radical feminists, moderates believe in androgyny-that each person should be free to develop his or her humanity, independent of what is now labelled masculine or feminine. In a good society valued human traits such as independence (now labelled masculine) and tenderness (now labelled feminine) would be characteristic of both men and women. The moderates ideal society, then is an androgynous and socially just society.

Radico-Socialist Feminism

This happens to be an upcoming feminist theory. The present

study has all the affinities for radico-socialist feminism. This position derives its strength from the merits of both the radical feminism and socialist feminism and does away with the flaws of both. It believes in adrogyny as a major defining characteristic of the good society, which is the ideal of all the theories presented here. It agrees with the radical feminists that patriarchy is the root cause of women's oppression. Therefore, what is needed is not only a feminist revolution (as socialist feminists believe) but a feminist revolution against patriarchy, which will destroy sexism (genderism) and also institute socialism. Thus what is called for is a degenderized socialism and not socialism per se.

Against radical feminism, radico-socialist feminism, takes men not as enemies, but as an existent like women who too have to be emancipated from their genderist anchorage.[91] Against socialist feminism this view, envisages the end of women's oppression not with the institution of socialism but that of depatriarchized socialism.

The foregoing observations epitomize the precipitating factors involved in women's movement in general and feminism in particular - which has gone too deep into the making of the present thesis, in fact it happens to be the cornerstone of the present work.

II

In this section, some concepts and issues, which weave the present study will be clarified. This will be followed by dialectics of times and ideas and a preview of the chapters to follow.

Discrimination, Exploitation and Oppression

'Discrimination' is the singling out of women, both individually and as a group, for unequal and inferior treatment from legal, civil and social rights and possibilities available to men. Here the focus is on the 'equal rights' aspect of feminist analysis. Included here are all legal disadvantages experienced by women by virtue of being women. It focuses on actual practices rather than solely the formal rights that exist, although women's exclusion from these is also and obviously a matter of concern.[1] The present thesis , indubitably concentrates on the 'equal rights' provided under the Indian Constitution to women and endeavours to pin point areas where the laws propelled by our Constitution falls incessantly short of it. This is so because, such laws follow the extant parallel 'constitution' of the patriarchal society of ours. Moreover, the governmental trinity (Parliament, Executive, and Judiciary) till this day (exceptions notwithstanding) have not been able to extricate itself from its patriarchal moorings.

It should also not be forgotten that discrimination which is meted out to women in the legal realm, happens to be

a manifestation of patriarchal ambience. This reveals the fact that the Indian legal system (like many other systems) is being manoeuvred to perpetuate patriarchy. Thus, the legal mechanism instead of obliterating women's oppression is perpetrating it by either conniving at it or overlooking it.

'Exploitation' involves the utilisation of discriminatory practices against women, both individually and as a group, in order to obtain disproportionate economic gains for other groups or categories of people. It concentrates primarily on paid employment, but it also includes home work and unpaid forms of work such as housework. Thus the notion of 'gain' here is a broad one and relates to the total workings of the economic system (for example, by relating the role of housework to the workings of the economy more generally).[2]

'Oppression' is inclusive of exploitation but reflects a more complex reality. Woman's oppression occurs from her exploitation as a wage - labourer but also occurs from the relations that define her existence in the patriarchal sexual hierarchy - as mother, domestic labourer and consumer. Oppression reflects the hierarchical relations of the sexual division of labour and society.[3] Oppression involves the use of coercion, force and tyranny in order forcibly to constrain women, both individually and as a group. It includes sexual harassment, rape, sexual murder, torture and more everyday acts of violence in the form of batterings. Acts of oppression are acts of social

and sexual terrorism in which women's actual and possible behaviours, both as individuals and as members of a group, are policed by the threat and practice of force.

In practice, the kind of separation between dimensions of women's situation that appears above - for heuristic reasons - is not possible. One instance will demonstrate what is meant here. Sexual harassment at work involes oppression; it also involves exploitation, as women's responses can be used to keep them economically as well as socially subservient to the sexually harassing male. As a consequence it can also involve a denial of social and legal and sometimes civil rights as well.[5]

Sex Vis-a-Vis Gender

Sex (male/female) is a physical distinction; gender (masculine/feminine) is social and cultural. Social factors are crucial contributors to existing differences in opportunities, rewards, and limitations of men and women. It is through social processes, including socialization, but most importantly through the effects of social institutions —a social institution is a cluster of norms, values, and behavior patterns which are related to a particular set of human goals'[6]— such as the economic and political systems, that gender roles are shaped and reshaped throughout the life cycle.[7] Using the term gender role, rather than sex role, deemphasizes the bilogical aspects of being a female or a male and focuses on the social aspects.[8] Gender role, then is the sum of attitudes and behaviours, rights and responsibilities socially linked to one's physical sex.[9]

Although masculine or feminine gender is usually associated with male or female, this then is not an absolute coorelation. Oakley,[10] has helped to clarify the important distinction between biological sex and the enormous range of distinctions made in the name of gender.[11] The division of labour between men and women, it is argued, in different societies is based exclusively on gender roles rather than sex roles, determined by culture ('nurture') rather than biology ('nature'). Virtually, all human behaviour is learned behaviour. It has been argued by Geertz[12], that people (whom he calls 'man') are unique in that they are not highly programmed and do not perform actions basic to survival through intrinsic processes, but need to learn. Geertz believes, that 'man is an animal suspended in the webs of significance he himself has spun,"[13] that is why feminists discern women's oppression as embedded in, and emanating from "man-his ethos , ambience, mores and norms."[14] Thus culture is of crucial importance in, among other things, determining the role of gender.

Gender, in short then, is together with age, a widely used means by which societies make some form of division of labour, a process of specialization which is an important tool of efficiency in any productive system. Margaret Mead, who did pioneering work in revealing the wide range of psychological and cultural traits which can be attached to masculine and feminine gender- roles, found that important characteristics of women in one culture were often those of men in another[15]. She concludes from her field work:

> 'Primitive materials, therefore, give no support to the theory that there is a natural connexion between conditions of human gestation and appropriate cultural practices.'[16]

In his study of pre-capitalist social formations, Meillassoux[17] explains the transformation from sex to gender in the reproductive mechanisms of agricultural societies. Such a process transforms the biological differences between the sexes to social institutions based on relationships of super-ordination and subordination gender. Thus gender consequently entails power and control in society. Contrary to the Radical feminist position that it rests on sexual differences between men and women, gender is social, but hierarchical ordering of institutions into strongly classified worlds of the male and the female. Just as class remains the organizational basis of capitalism similarly gender constitutes the hierarchical principle of patriarchy.[18] Thus the material basis of patriarchy has to be sought in the emergence of gender. It may be argued against Engels[19] that gender precedes class and the institution of private property.[20]

Therefore the 'nurture' (gender) analysis argues that inequalities between men and women have social bases and social origins, not 'natural' or biological ones, and even that how we ordinarily understand 'nature' and 'biology' is itself a social construction which changes over time. This is the position of 'social constructionism', which is opposed to

'biological essentialism'[21]. In fact Goffman[22] examines various features by which 'gender' is pictorially constructed in a range of media advertisements.

Situational Womanity

One of the benefits that oppression confers upon the oppressors is that the most humble among them is made to feel superior. That is why, the most mediocre of males feels himself a demigod as compared with women.[28] Beauvoir, presents a situational analysis of women's oppression (inter-gender, i.e., man vs. women aspect). Her analysis is founded upon a broadly generous and consistent philosophy viz., Existentialism[24]— of Sartre, Heidegger and Merleau— Ponty. Thus her perspective is that of existentialist ethics, according to which every existent is at once immanence and transcendence[25].

Every subject plays his part as such specifically through exploits or projects that serve as a mode of transcendence; he achieves liberty only through a continual reaching out towards other liberties. There is no justification for present existence other then its expansion into an indefinitely open future. Every time transcendence falls back into immanence, stagnation, there is a degradation of existence into the 'en-soi' (in-itself)— the brutish life of subjection to given conditions — and of liberty into constraint and contingence. This downfall represents a moral fault if the subject consents to it; if it is inflicted upon him, it spells frustration and oppression. In both cases it is an absolute evil. Every individual concerned to justify

his existence feels that his existence involves an undefined need to transcend himself, to engage in freely chosen projects.[26]

Now, what peculiarly signalizes the situation of woman is that hse- a free and autonomous being like all human creatures-nevertheless finds herself living in a world where men compel her to assume the status of the other. They propose to stabilize her as object and to doom her to immanence since her transcendence is to be overshadowed and for ever transcended by another ego (male) which is essential and sovereign. The drama of woman lies in this conflict between the fundmental aspirations of every subject (ego) — who always regards the self as the essential — and the compulsions of a situation in which she is the inessential.[27] The present study is imbued by this awareness.

Beauvoir, thus confutes the theory of 'eternal feminine.[28] and offers the theory of, what we may call, 'situational womanity'. This perspective apprehends the eternal feminine in the totality of a woman's economic, social, and historical conditioning[29]— wherein lies the roots of 'femme-genderocide'— i.e., "in order to explain her limitations it is woman's situation that must be invoked and not a mysterious escence."[30]

The central thesis of Beauvoir - as also of the present dissertation - is that women have in general been forced to occupy a secondary place in the world in relation to man, and further that this subservient standing is not imposed of necessity by natural feminine characteristics but rather by strong environmental (patriarchal) forces of education and social

tradition and under the purposeful control of men.[31] That is why, almost nowhere is her (a woman's) legal status the same as man's, and frequently it is much to her disadvantage. In the economic sphere men and women can almost be said to make up two castes; the former hold better jobs, get higher wages and have more opportunity for success than their new competitors. In industry and politics men have a great many more positions and they monopolize important posts.[32] In the educational realm the patriarchal hidden curriculum remains untrammelled.

Legislators, priests, philosophers, writers, and scientists have striven to show that the subordinate position of woman is willed in heaven and advantageous on earth. The religions invented by men reflect this wish for domination.[33] 'Men make the gods; women worship them', Frazer has said, whether it is a race, a caste, a class, or a sex, that is reduced to a position of inferiority, the methods of justifications are the same, viz., religion, philosophy, theology, biology, experimental psychology etc.

Woman is encircled by so many vicious circles that all what remains of hers is nothing but gyrations. The first vicious circle is that when she is kept in a situation of inferiority, the fact is that she is inferior.[34] The second is, the less she exercises her freedom to understand, to grasp and discover the world about her, the less will she dare to affirm herself as subject.[35] Finally, professional inferiority reinforces desire to find a husband,[36] and it is less astounding after having known this, to see how readily a woman can give up

music, study, her profession, once she has found a husband.[37]

Therefore, if more women are primary teachers, nurses, private secretaries, or illiterate there is nothing essentialistic about them i.e., they are less represented at the top echelons of society not because they are less intelligent than men but because the situational dynamics (vortex) of patriarchal structuration produces oppressive statics, so far as women are concerned, so that they (women) eternally wallow in the swamp of patriarchy. The fault, then lies not in their stars and in their inner worlds but in the patriarchal outer world. It is for this reason that feminists refer to woman as a separate class—the present work corroborates this, while studying the status of women governed by different personal laws.

Woman as a Separate Class

The idea that women themselves constitute a class has been advocated most forcibly by those feminists who deny that woman can be fitted into traditional forms of class analysis. They therefore see women's oppression as analytically independent of economic class divisions.[38] Following Firestone[39], it can be argued that although such economic class divisions clearly exist, they are of only secondary importance and are themselves conditioned by, and dependent on, the primary sex-class division which exists between men and women. Thus, to understand women's oppression we need to explore their primary class relation vis-a-vis men, rather than their economic

class relation with regard to capital.

The social pressure on women to conform to the accepted conditons of reproduction through such institutions as heterosexuality, heterosexist marriage—as one plaint notes, "we have made marriage the only career for a woman"[40]— and motherhood, together with their associated values of love and romance, all help to compound women's position as an oppressed class. They are such a class because all women are subjected to control of their reproduction and sexuality in this way. Adrienne Rich,[41] for example, has referred to this as compulsory heterosexuality to underline its enforced nature. Other feminists have described how actual force and threat of force are used by the male class to retain control over women's sexuality and reproduction when they emphasize the significance of rape, sexual harrassment, and pornography.

The stress then is on the antagonism of the class relations between men and women, and on men as the main enemy for women. There are two important aspects to this. Firstly, even the supposedly non-sexist male cannot eschew the class privileges and power which he daily receives as a member of the oppressor class. All men participate in sex-class oppression (this generalization does not pay any head to minuscule amount of men, who have relinquished their 'sexist prerogatives' or class privileges[42]). Secondly, since the male / female relationship is intimate and private, the personal must be regarded as political and not simply as an individual experience. Thus,

the class position of women is underscored by the fact that all women share similar experiences with regard to men.

The materialist, rather than Marxist model which focuses on the domestic mode of production also sees man as the 'main enemy'. Christine Delphy[43], who is the originator of this particular view of women's class position, argues that domestic work, which all women perform, is the material foundation for a system of patriarchy where by men dominate and control women. Delphy postulates the existence of two modes of production, the industrial and the domestic. The first gives rise to capitalist exploitation. The latter gives rise to patriarchal exploitation. She refers to women's position in the family as comparable to serfdom. Marriage is a labour contract. Delphy focuses on the significance of the domestic mode of production because patriarchal exploitation in the family by men is the 'common, specific and main oppression of women'. [44] It is common because it affects all married women, specific because only women are expected to provide free domestic services for others and main because even when women are in paid employment their economic class membership derived from that work is conditioned by their patriarchal oppression. The domination of women by men in the family is conceived in class terms by Delphy because in the domestic mode of production the man and woman are respectively owner and labourer — in fact Engels, too, likened the relationship between man and woman in the family to that of the bourgeoisie and proletariat[45] — in a manner similar to the way in which the capitalist uses the worker to perform tasks for him. In addition, women together

share a common class position within this mode of production by virtue of their primary relationship to men, through marriage.[46]

While speaking in terms of woman as a separate class it is important not to undermine the fact that they have no past, no history, no religion of their own; and they have no such solidarity of work and interest as that of the proletariat. They live dispersed among the males, attached through residence, housework, economic condition, and social standing to certain men — fathers or husbands — more firmly than they are to other women. The bond that unites her to her oppressors is not comparable to any other.[47]

Furthermore, it is observed that unlike all other oppressed classes in society, women are not a distinct minority they are not a class, because they belong to every group in society. Poverty, exploitation, deprivation, oppression are common enough words, but the sources and dimensions of these are numerous and varied and affect all groups of women. The intensity differs but the cultural chains bind all of them, affect their lines, their consciousness.[48] Thus, phenomenologically speaking, the situational womanity is nothing but a corroborative of the idea of woman as a separate class.

In India, apart from various other patriarchal structural factors, the legal system happens to be a major tool in dividing women on religions grounds — as each religion has its respective personal law for the governance of its adherents. "Women form nearly 50 per cent of the population

in India, yet there is no such being as an 'Indian Women', she is either a Hindu, Muslim, Christian, Parsi or Tribal and is discriminated in law even today in matters that affect her life most intimately and deeply. The degree of discrimination depends on mere incident of birth in a particular home."[49] Despite all these variations, phenomenologically speaking, the situational womanity of Indian Women — divided, ad infinitum, by the patriarchal forces — is nothing but a corroborative of the idea of woman as a separate class.

Dialectics of Times and Ideas

It may be argued (and is being argued), if women seem satisfied with a more narrowly restricted pattern than men would be, why should we disturb this pattern? Alice S. Rossi, replies to this by observing, that there have been underprivileged groups throughout history which contained sizeable proportions of contented, uncomplaining members, whether slaves, serfs or a low status caste. But most enlightened members of both the privileged and underprivileged groups in such societies came to see that inequality not only depressed the human potential of subject groups but corrupted those in the superordinate groups — here in lies the societal dialectic. Social and personal life is impoverished for some part of many men's lives because so many of their wives live in a perpetual state of intellectual and social impoverishment.[50]

It is with such an awareness that the social reformers like R.M. Roy, Ishwarchand Vidyasagar, Dayananda Saraswati, Keshab chandra Sen, Pandita Rama Bai, Justice Mahadev Govind

Ranade, Rama Bai Ranade, Karve, Bhandarkar, Swami Vivekananda, Annie Besant, Margaret Cousins, and Mahatma Gandhi, took up the cause of women[51]. Each one of them and many more others provided force to the dialectic brought in by them and others, which sought to emancipate women by challenging the nihi-listic customs and norms --rooted in the patriarchal ideology.

It was to accomplish the tasks left by these reformers and saints and make the impervious elements amenable that the Constitution of India had laid down as a fundamental right, the equality of sexes.[52] But still the position of women today is not very different from the pre-Constitution days. "The violation of the fundamental rights of women and their dignity, guaranteed to them under the Constitution... cuts across the unity and integrity of the nation".[53] It is to fathom this that an effort has been made in the present dissertation to point out the areas where law is lagging behind the principles which have already been accepted by our Constitution - where in lies the dialectics of law.

Regarding Indian women, Ashis Nandy, observes that "To make the issues of emancipation of woman and equality of sexes primary, one needs a culture in which conjugality is central to male- female relationships. One seeks emancipation from and equality with one's husband and peers, not with one's son. If the conjugal relationship itself remains relatively peripheral, the issues of emancipation and equality must remain so too".[54] Conscientizationally speaking, Nandy instead of demystifying the image of woman ossificatorily mystifies it. He pays no need to

the fact that "... in order patriarchy can be perpetuated there is a need to hide this image of women behind a veil of ritual notions of equality and religious merit"[55] — by eulogizing notions of motherhood and 'Sati - Savitri' obeisance.

The position of the present study is, in concurrence with that of Rossi's and social reformers, further believing that "man does not stand exonerated"[56] for his sole part in perpetration and perpetuation of women's oppression. For this reason "... it is unjust to say that in every crime against a woman there is a fellow woman"[57]. This is the most decaying argument for intra-gender (woman V. Woman) oppression, which tries to exonerate the male. This is so because we are merely perceiving the surface structure of reality. Only when we reach the deep structures of reality we find not woman but man — his ethos, ambience, mores and norms — culpable. The mother-in-law and sister-in-law versus daughter-in-law phenomenon has roots not in a woman's mentality and her essential characteristics — they are illusory — but in the existing reality in which we have fixed her, where all the meanings of her life emanate not from herself but from man and his milieu."[58]

Since 'the social boulders' have been 'put up by us', 'we men, have to' work hand in hand with women in pulverizing these structures (in opposition to Hiranmay Karlekar's thesis that 'women will have to win their battle primarily on their own'[59]). The present dissertation is also guided by Swami Vivekananda's observation, "That country and that nation which did not respect

women have never become great nor will ever in the future." He took a stand for the liberation of women and equality of treatment on the basis of the Vedantic ideals that "one and the same self is present in all beings." He attributed the helplessness and dependence of woman on man, to the training given to her and asserted "when she is no longer oppressed she will become a lion."[60]

Preview of the Chapters

The second chapter, which follows the present one, provides 'the paradigmatic framework' for the present study. This paradigmatic templet is divided into two :

(i) the general framework, and

(ii) the working framework.

The third chapter, legislative dialectics : a case of the Hindu code Bill', is aimed at showing "... the hypocrisy of Indian society ..."[61], which sees to it that "... the reality of the Indian woman (be) studded with contradictions."[62]

The fourth and fifth chapters (like the third chapter, are substantive) are subsumed under the same broad title, 'women and the dialectics of law', which tries to point out the areas where law is lagging behind the principles which have already been accepted by our constitution - wherein lies the dialectics of law. The former chapter takes marriage, guardianship and adoption rights in its ambit, while the latter chapter studies discriminatory laws governing divorce, maintenance and inheritance rights.

The sixth chapter, 'dialectics of future', looks forward to what could be the demands of future. What more is needed in law? What changes are being demanded and envisaged? What should be the role of judges? These are some of the questions which it would try to answer.

The last chapter," an overview", winds up the present study. But before it does so areas for further explonations are spelt out, which the present dissertation has not been able to get into-besides sparse references — because of the delimitation of its focus.

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    (ii) the Mitakshara School, which is followed in other parts of India. Mitakshara school is divided into four sub-schools, namely, Mithila, Benares, Bombay and Madras. These sub-schools are no longer material after the passing of the Hindu succession Act, 1956. But one important feature of the distinction between the two schools still persists. Under the Bengal school, the father is regarded as the absolute owner of properties. In the Mitakshara law, the sons have a right by birth in

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CHAPTER II

THE PARADIGMATIC FRAMEWORK

The present chapter provides the paradigmatic templet for the present thesis. This paradigmatic framework is divided into two :

(i) the general paradigmatic framework[1], and

(ii) the working paradigmatic framework.[2]

The former would be just intermittently referred to, while the latter warps and wefts the present study. Still the former acts as a beacon, if the latter acts as an integrator.

I

The General Paradigmatic Framework

Perceiving the different socio-cultural milieu of Indian Society, where the intra-gender (woman vs. woman) aspect of women's oppression is as important as the inter-gender (man vs. woman) aspect for any understanding of women's situation, two paradigms have been developed. The first 'sexist dialectic' is an exposition of women's oppression and the second,' dialectical egalitarianism' is an endeavour to offer a paradigmatic solution to women's oppression.

These paradigms go beyond the feminist theories (mentioned in the first chapter) as none of these theories have dilated upon the intra-gender aspect of women's oppression and its solution. Both these paradigms are based on

the phenomenological method and orientation, which are derived from Schutz[3] and Berger and Luckmann[4] respectively.

The epoche, for Husserl[5], was the first phase of the 'reduction' in which one suspended belief in reality, overcoming the natural attitude by means of radical doubt. Common man, for Schutz, on the other hand in his natural attitude also employs a type of epoche, but what he suspends is not belief in the existing world but doubt. "What he puts in brackets", writes Schutz," is the doubt that the world and its objects might be otherwise than it appears to him. We propose to call this the epoche of the natural attitude."[6] "The great majority of people in most human societies is conservative", notes Berger, for Schutz[7]. In the words of Schutz, the social world is "taken for granted until further notice."[8] This makes it all the more clear for the present purpose, that on the continuum of the awareness of women's oppression the majority of people are at the 'anaesthetized stage' while only minuscule are at the 'conscientized stage.'

Yogendra Singh[9], remarks regarding modernization that we could understand it in terms of 'instru-mental values' and 'categorical values'. "The autonomy of categorical or moral value over the instrumental can be logically postulated", argues Yogendra Singh, "at all stages of modernization in all societies." Extending his argument, we would perceive patriarchy as categorical value — this would be maintained throughout the present work.

Furthermore, Garfinkel, makes the significant inference from his, Studies in Ethnomethodology, that when a person in society adheres to rules this is not necessarily a sign or result of his value commitment. Rather it may be "the anticipatory anxiety that prevents him from permitting a situation to develop, let alone confronting a situation, in which he has the alternative of acting or not with respect to a rule...."[10] Fear and anxiety often prevents people from testing rules, learning about them, and changing them. "Indeed the more important the rule, the greater is the likelihood that knowledge is based on avoided tests."[11] In fact this observation of, Garfinkel has critical and even revolutionary implications in that it points directly to the potential flexibility, contingency and changeability of institutions. It brings out clearly that institutions often regarded as necessary are merely those whose necessity has not been tested.[12] This is what the feminists have pointed out, when they talk of counter-institutions and obliteration of patriarchal institutions like polity, economy, legal system etc.,— i.e., patriarchized society in general.

Both the paradigms are based on the foregoing analyses and observations. In fact the paradigm of 'sexist dialectic' epitomizes, Berger and Luckmann's position that "society is a human product" while "man is a social product."[13] Reformulating this to suit our needs, we would say, the 'sexist society is a man's product', while the 'sexist self is a social product.'[14]

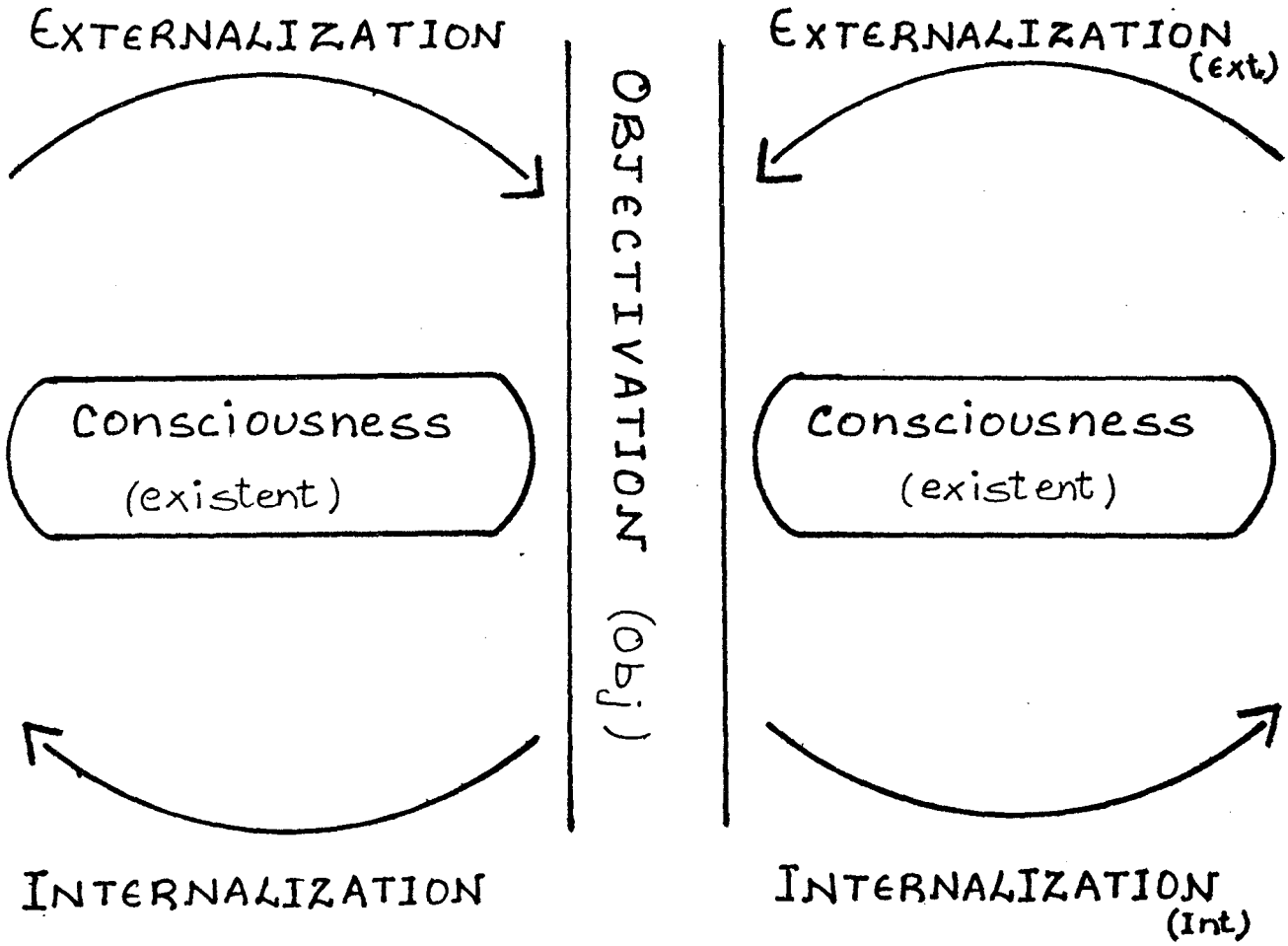
The phenomenological approach which underlies the paradigms views the relationships between the individual and society as a dialectical one:

"Society is a dialectic phenomena in that it is a human product and nothing but a human product, that yet continuously acts back upon its producer. Society is a product of man. It has no other being except that which is bestowed upon it by human activity and consciousness. There can be no social reality apart from man. Yet it may also be stated that man is a product of society. Every individual biography is an episode within the history of society, which both precedes it and survives it .... What is more, it is within society, and as a result of social processes that the individual becomes a person, that he attains and holds on to an identity and that he carries out the various projects that constitute his life...."[15]

Further.:

"Human consciousness emerges out of practical activity. Its contents, pretheoretical as well as theoretical, remain related to this activity in diverse ways. This does not mean that theoretical consciousness, or 'ideas', are to be understood as mere epiphenomena or as dependent variables determined in one-sided causation by nontheoretical, non-'ideal' processes. Rather, theories and ideas continually interact with the human activity from which they spring. In other words, the relationship between consciousness and activity is a dialectical one -activity produces ideas, which in turn produce new forms of activity. The more or less permanent constellations of activity that we know as 'societies' are, therefore, in an ongoing dialectical relationship with the 'worlds' that form cognitive and normative meaning coordinates of individual existence."[16]

Societal Dialectic



Phenomenological Societal Dialectic

ILLUSTRATION 1

The fundamental dialectic process of society consists of three moments, or steps (see illustration 1). These are :

(i) Externalization : is the ongoing outpouring of human beings into the world, both in the physical and the mental activity of men;

(ii) Objectivation: is the attainment by the product of this activity (again both physical and mental) of a reality that confronts its original producers;

(iii) Internalization: is the re-appropriation by men of the same reality transforming it once again from the structures of the objective world into structures of subjective consciousness.[17]

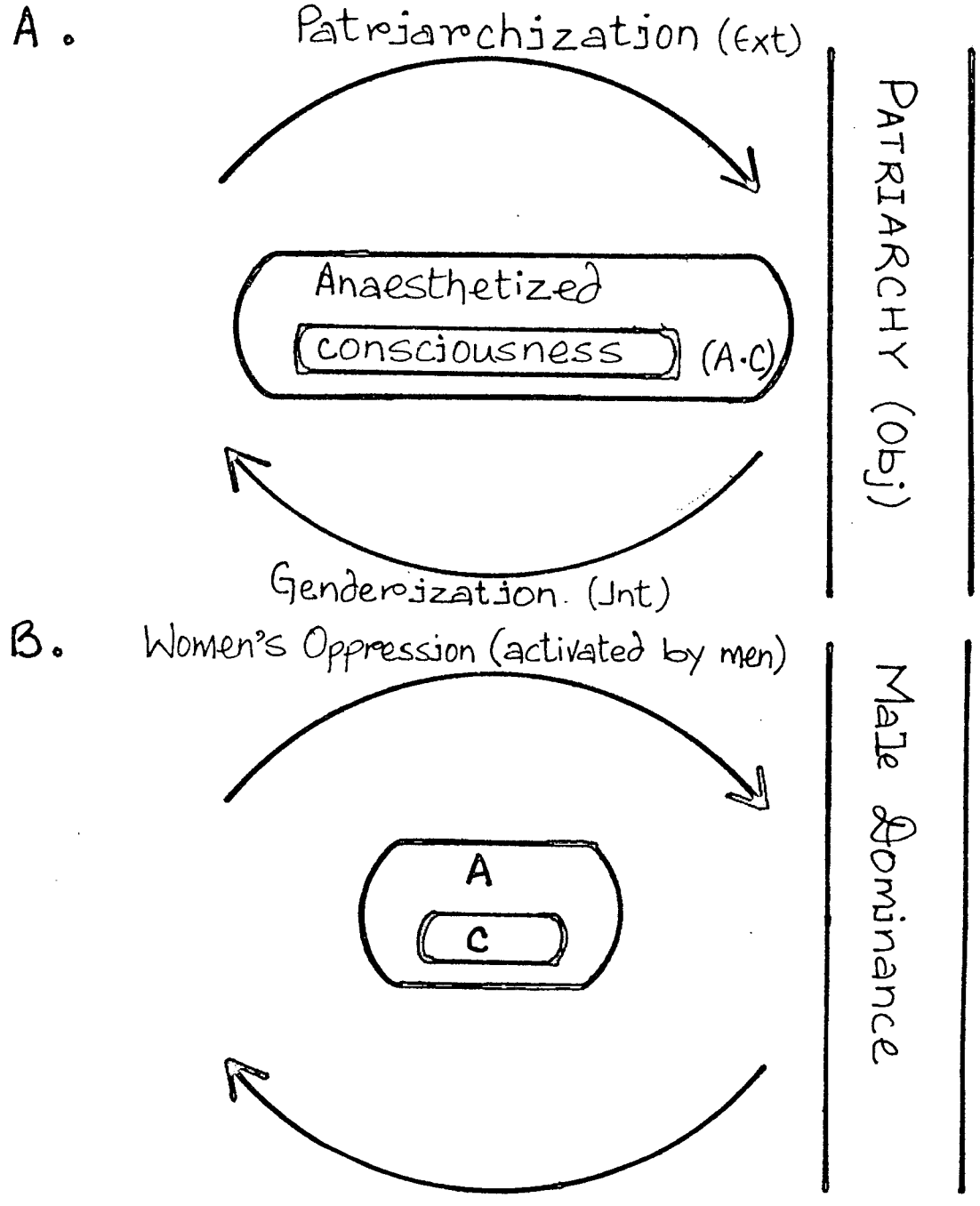
Thus "man does not have a given relationship to the world. He must on-goingly establish relationship with it."[18] In his interaction with others he creates his own meanings and constructs his own reality and thereby directs his own actions. Man also produces values and "discovers that he feels guilt when he contravenes them."[19]

Furthermore, "... truth is an existential relation between the social actor and his situation; seen phenomenologically, truth and reality are binding for the actor who is always engaged in his situation."[20] The preceding observations go into the making of succeeding paradigms.

<u>Sexist Dialectic or Dialectical Machismo or The Illusion of Female Collaboration (see illustration 2)</u>

This paradigm is called 'sexist dialectic' because all

SEXIST DIALECTIC



(i) Women's Societal Intoxication

↓

Socialization (inter-gender) → Primary (repressive)

Socialization (inter-gender) → Secondary (redemptive mechanism or potentially emancipative)

(ii) Women's Suppression (by women for men because of anaesthetized consciousness) (intra-gender)

Phenomenological Paradigmatic Exposition of Women's Oppression

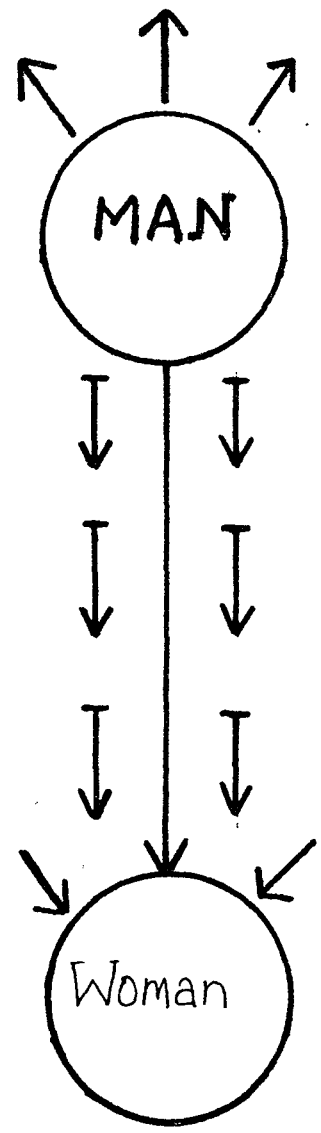
ILLUSTRATION 2

the processes lead to male dominance, i.e., all the processes are dialectically and not deterministically leading towards that. This paradigm believes, as mentioned earlier that the 'sexist society is a man's product' and so, for this "man— his ethos, ambience, mores and norms —[is] culpable."[21] Furthermore, the inherent contradictions — which leaves "the... Indian women... studded with contradictions"[22] — reinforce the perpetuation and perpetration of sexism (genderism). i.e., women's oppression — "femme - genderocide". In fact what is characteristic of this paradigm is that it perceives the sexist (genderist) consciousness as the anaesthetized consciousness (because of "psychological anaesthetisation"[23]) as the relation between man and woman (inter-gender) and woman and woman (intra-gender) is characterized by Buberian, 'I and IT' and not 'I and Thou'. Moreover it also reflects on both the inter-gender, and intra-gender aspect of women's oppression. Thus it takes note of the Indian situation, i.e., the intra-gender aspect.

It is called 'dialectical machismo' because all the processes tend to perpetuate the male dominance (machismo). It is also called 'the illusion of female collaboration' — the intra-gender aspect of oppression[24] — because women (like mother-in-laws, sister-in-laws) who themselves perpetuate atrocity against their own sex, as argued in the first chapter, do so, because of their genderist socialization, i.e., social conditioning which genuflects to patriarchy.

MANOLATERALISM

('immanently constituted transcendence')



○ : Essentialistic

↑ : Transcendence

↓ : Immanence

↧ : Manolateral (unilateral) relationship (Buberian 'I-It')

The Real MAN-Woman Relationship

ILLUSTRATION 3

Thus, for this 'man does not stand exonerated'[25], therefore blaming women also for women's oppression holds no ground. This is so because they who — here women — have been made the scapegoats, now themselves look for scapegoats — the scapegoat syndrome.

This paradigm further may be called 'manolateralism' (see illustration 3), wherein the experience of woman is 'immanently constitute transcendence'[26], i.e., inner world constitutes transcendence — transcendence is limited by immanence, for instance, a woman is thought to be weak and docile (essentialistic definitions) that is why she is taken to be unfit for being a breadwinner (transcendence). Even if she goes to work, she normally carries her home — metaphorically speaking, along with her. This places the relationship between man and woman on the metaphysics (of experience) of vertical (hierarchical) transcendence — for man — and immanence — for woman. The relationship then is manolateral, as the essences ascribed to women does not emanate from her inner world, rather it is superimposed on her by man — wherein lies the meaning of her essentialistic existence. This, then, epitomizes the real man-woman relationship.

This paradigm, then answers the anti-feminists (genderists) for whom, not only men but also women are an impediment. As we see in this paradigm the functioning of patriarchy is bolstered by the sacramental aspect of religion, polity, legal system, economy etc., i.e., society in general — where women are made victims and scapegoats, by the male- dominated society.

hence women need not be blamed for 'femme - genderocide'. It is men who do not stand exonerated because of their "chauvinism (which except few is ubiquitous) and narcissism"[27] - which acting as blinkers make them discern woman as an inanimate body of essences, immanent and not transcendent,[28] as dependent on men, never to be involved in the decision - making process and thus, they get relegated to the status of a non-entity.

The genderist society operates through the same dialectical mechanism, which involves three moments (for theoretical and operational reasons we can have an arbitrary point of its inception say, internalization). With this, then 'patriarchization' is a process of externalization; 'patriarchy' is a process of objectivation; and 'genderization' is a process of internalization (see illustration 2,A).

To expound the paradigm (see illustration 2,B) we can start from the first part of internalization (genderization) i.e., women's societal intoxication — an inter-gender aspect. Here we see that the 'psychological anaesthelization' of women occurs by the socialization process — accentuated by the moderate feminists — which consists of primary (family, educational institutions etc.) and secondary (employment etc.) processes. We see that children are not born with innate ideas (as Locke and Piaget have already shown), they rather imbibe it through the socialization process. "Socialization serves as an efficient means to impose values and norms on the individual. It is perhaps the most effective method of social control because

the individual regulates and polices his or her own behaviour."[29] All the mythologies, ideologies, etc., taught in the family and schools have genderist undertones. The very first stage of socialization, then, is inegalitarian by its patriarchally embedded discriminatory role- sets for boys and girls. Therefore girls are meek, docile, homely not because it is something innate, but because of their social conditioning which relates their sex to gender roles (women as housewives, rearing mothers, caring wives, sacrificing sisters etc.) and thereby dichotomize masculinity and feminity. Thus, internalization of the values of patriarchal system through the socialization process is a powerful way of perpetuating this system. Socialization, then into the acceptance of different opportunity structures, rights, rewards, and limitations for men and women works for the benefit of men who profit from current arrangements of economics and power.

Until and unless we do not ideologically revolutionize our educational and legal (formal) and familial (informal) socializatory institutional processes by discarding genderism (sexism) we would not be able to emancipate both men and women from their genderist moorings. It is because of their genderist anchorage that except few, most women have rather no control over their lives. Deciding whether, when, and whom to marry; dissolving a marriage; moving about spatially without restriction; regulating reproduction; and taking advantage of educational

opportunities, are some of the life options, often denied to many women.

The only redemptive mechanism at present which appears to be potentially emancipative is the process of secondary socialization, according to the paradigm. Once women enter the job market they become independent —Dasein, "being there"[30]— i.e., becoming and transcendent, because their economic status provides them with viability. Blumberg, too takes!"...as the central determinant of overall female position... the degree of female economic power relative to the males of her class or group."[31]

The career woman faces role-strain as she has to do both the housework and wage work[32], because "traditional patriarchal expectations regarding family roles have not undergone much change."[33] Still undaunted by this fact, are 90 percent women, in a study[34], who are interested in jobs. Though all of them have been brought up in the genderist ambience yet they are ready to shake and discard their yokes off, by envisaging the event of economic independence. It is this role- transition which would make them breadwinners and no more breadchewers.

Women's societal intoxication leads to women's suppression, by women for men (the intra-gender aspect of 'femme- genderocide') not only because of 'psychological anaesthetization', or anaesthetised consciousness, but also due to the scapegoat syndrome, which is a sequel to their being

appendages of men, which definitely involves abnegation. The cumulative result of all this is the mother- in-law and sister-in-law versus daughter-in-law phenomenon. Thus as noted earlier,"it is unjust to say that in every crime or injustice against a woman there is a fellow woman. This is the most decaying argument for intra-gender (woman V. woman) oppression, which tries to exonerate the male. Only when we reach the deep structures of reality, we find not woman but man- his ethos, ambience, mores and norms - culpable."[35] Moreover, Ruth Vanita observes that "every oppressed group perpetrates its own oppression. Women who oppress women increase the power of men as a group. Mother-in-law and daughter-in-law are forced to compete for the favour of a man on whom they are both dependent. If dependence disappeared, so would the competition."[36] "Let them be provided with living strength of their own, let them have the means to attack the world and wrest from it their own subsistence, and their dependence will be abolished-that of man also."[37] But man, except few,happens to be not open to such exhortations and observations and it is for this reason than 'man does not stand exonerated' for perpetrating 'femme-genderocide'. Thus all the talk about female collaboration in oppressing women is nothing but chimerical.

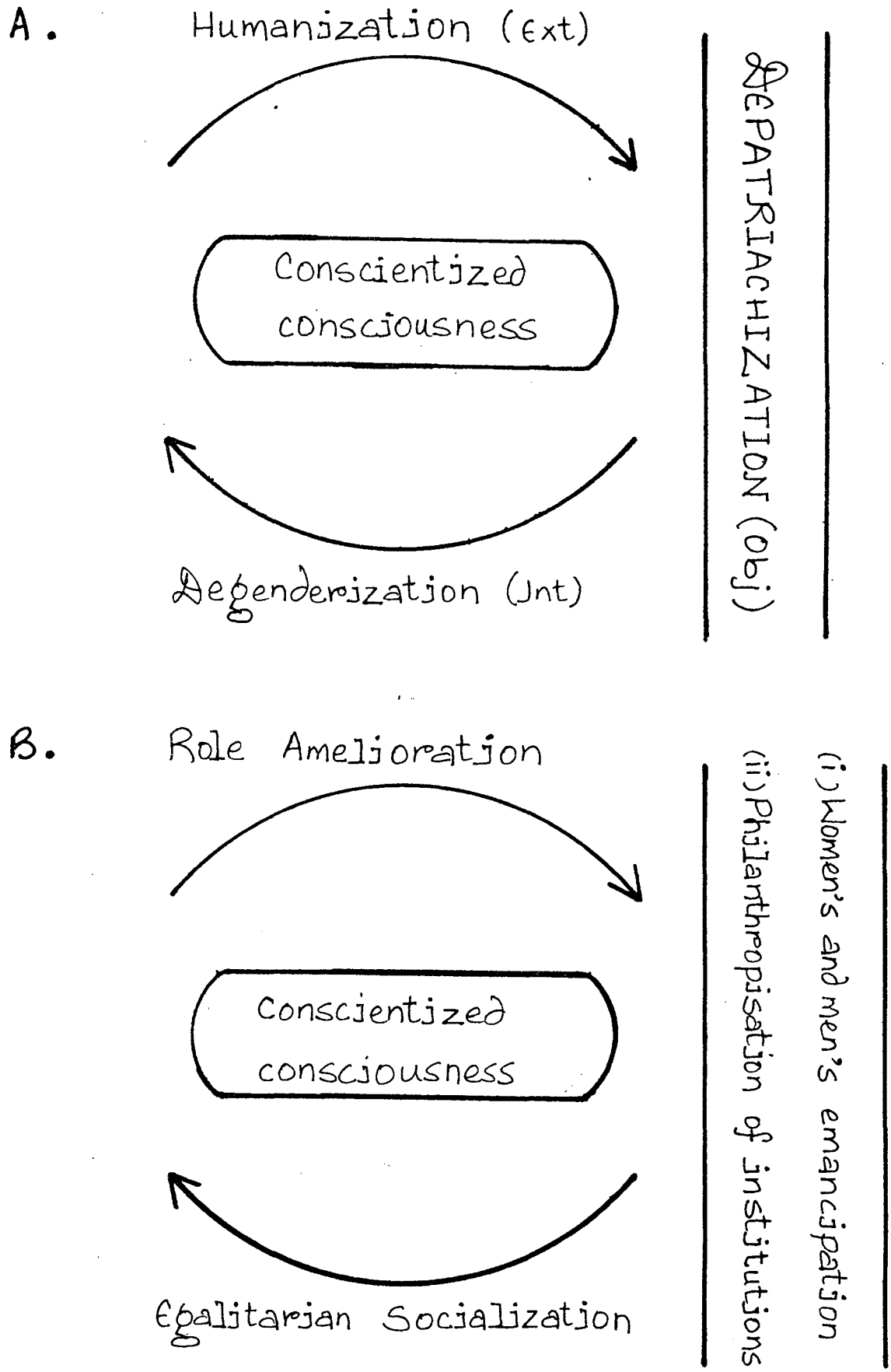
The preceding two processes of internalization leads, then, to women's oppression, activated by men - a process of externalization i.e., patriarchization; which further leads to male dominance or machismo - a process of objectivation i.e.,

patriarchy. All the institutions which are objectivated like religion, economy, polity, legal system, family, marriage etc., kowtow to its Godfather — the man-made omnipotent, omniscient and omnipresent patriarchy, which effect 'femme - genderocide'. This is maintained in opposition to Turner's observation, as mentioned in the first chapter, that "A comprehensive system of institutionalized patriarchy no longer exists."[38]

Thus we see in this whole process of 'sexist dialectic' which goes on and on, to and fro, the depiction of man as the perpetrator (though because of his own anaesthetized consciousness) and the precipitating factor on whom the onus of the oppression of women lies.

The macrocosmic genderist society (under which lies the microcosm-family etc.), which thrives on patriarchal ideology can be done away with not merely by politico-structural change through revolution. The socialist countries belie this optimism, as noted in the first chapter. What more is needed is a conscientizing revolution— a phenomenological reality — which would not only emancipate women but also men. The way it could be brought about is what the next paradigm endeavours to do. Moreover, the following paradigm because of its idealistic connotations becomes a tool on the basis of which we can measure the chasm between the real (the genderized and patriarchized society of ours) and the ideal (a degenderized and depatriarchized society), situation. This observation all through the present study acts as a beacon.

DIALECTICAL EGALITARIANISM



Phenomenological Paradigmatic Solution To Women's Oppression

ILLUSTRATION 4

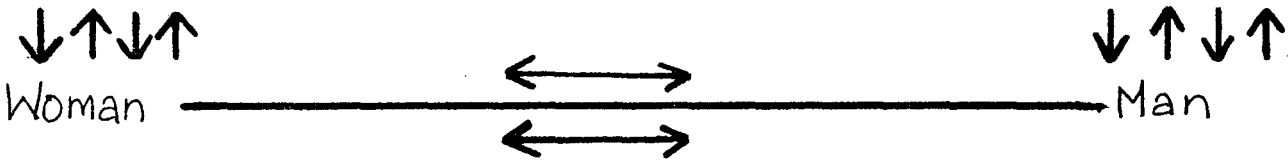
Dialectical Egalitarianism (see illustration 4)

This paradigm is called 'dialectical egalitarianism' because all the processes lead to egalitarianism and depatriarchized societal structuration. Further, since "society is a human product",[39] this paradigm is infused with this phenomenological idea and awareness and thus, believes that it can be changed (history bears a testimony to this). As noted earlier, most of the feminists believe in androgyny as a major defining characteristic of a good society. Liberation consists not in women 'becoming' men but in both male and female being free to become truly human. Beauvoir, in fact notes, that 'every existent is at once immanence and transcendence'.[40] In a degenderized society, then, which this paradigm envisages, "Every individual concerned to justify his existence feels that his existence involves an undefined need to transcend himself, to engage in freely chosen projects."[41]

This paradigm is also called 'Wo-manolateralism' (see illustration 5). Here the experience of people would be 'transcendently constituted immanence' i.e., transcendence would constitute the inner world (immanence). Once a woman is brought up in a depatriarchized ambience and allowed to choose a car-eer of her own interest, and to be what she wants to be (not as defined by others but by herself) the inner world thus constituted would be existential and not essential in nature. This would base the relationship between woman and man on the metaphysics of horizontal (equalitarian)

WO-MANOLATERALISM

(transcendently constituted immanence)



↑ : Transcendence

↓ : Immanence

↑ ↓ : Both transcendence and immanence

↔ : Wo-manolateral (bilateral) relationship
(Buberian 'I-Thou')

The Ideal Wo-man Relationship

ILLUSTRATION 5

transcendence and immanence common for both wo-man i.e., woman and man. The relationship would thus be ideal wo-man relationship, i.e., wo-manolateral.

Concurring with Beauvoir, this paradigm maintains that "... the contradictions ... will never be resolved," even in a depatriarchized socialist society, because "... mutually recognizing each other as subject, each will yet remain for the other an other."[42] What is significant in such a society is that the relationship between individuals (men and women (inter-gender), and women and women (intra-gender)) will transmogrify from the Buberian "I - It" to "I-Thou".[43] This paradigm then does not subscribe to the orthodox Marxist position."... in an authentically democratic society proclaimed by Marx, there is no place for the other."[44] which is contrary to what Beauvoir and this paradigm adhere to. But it could be said that when Marx talks of the obliteration of Otherness, he is talking in absolute terms and thus he would not disagree with the thesis of this paradigm, whereby the interactional otherness (which is reciprocal) is maintained without its oppressive undertones and overtones. Furthermore, this paradigm perceives the degenderized consciousness as conscientized consciousness. This paradigm, then agrees with Marx, that "The direct, natural, necessary relation of human creatures is the relation of man to woman [and woman to man]".[45] The dialectics, then which this paradigm refer to, is not systemic, rather it is intrapersonal and interpersonal, or intersubjective,

as it is rooted in interaction and gains no sustenance from systemic patriarchization and genderization —a process of perpetrating and perpetuating social differentiation based on gender —which would have been pulverized in a depatriarchized socialist society.

In this phenomenological paradigmatic solution to women's oppression, 'humanization' is a process of externalization; 'depatriarchization' is a process of objectivation; and 'degenderization' is a process of internalization (see illustration 4.A).

To have an egalitarian system where there is no discrimination —expounding the paradigm (see illustration 4.B) —between men and women, this process has to start with degenderist (non-sexist) internalization i.e., 'egalitarian socialization' process. There has to be no discrimination against girls. Both boys and girls have to be brought up in a degenderized, demystified, and demythologized ethos so that their androgunous (Carl Jung[46] described the anima—feminine component —and the animus— masculine component —present in us all) impressionable minds are kept uncontaminated by the pollution of genderism (sexism). Thus, both primary and secondary socialization has to be degenderist if there has to be a depatriarchized egalitarian society. This would involve not only discarding genderist undertones and overtones but also patriarchal and patristic ideologies, mythologies, discriminatory textbooks etc., and also an ongoing process of self-appraisal and analysis on the part of parents, teachers, administrators etc.

Once this has been done, this process would lead to 'role amelioration'—a process of externalization ('humanization'). In such an event, roles would no more be defined in terms of masculinity and feminity i.e., gender. With this the very roots of genderism i.e. patriarchy would be annihilated. As a sequel to this women's oppression would stand extirpated.

The metamorphosis from the genderized role-sets to the degenderized activities, would lead to 'women's and men's emancipation'—a process of objectivation (depatriarchization)—from the throes of genderist shroud of oppression. This further would lead the present process of objectivation to its logical culmination (crescendo) by the process of 'philanthropisation of both micro and macro institutions', viz., family, marriage, educational, political, economic, legal, ideological, moretial etc. Here the legal system will play a very prominent role, by not only conscientizing people, through its promulgation, adjudication and implementation activities but also being itself open to times and opening times. Law, then, would be the cynosure of a depatriarchized society. This centrality of law is so because, law which is a reflection of the normative structure, is also an independent variable. Being a conscientizing - agent in such a society the dialectics of law would help in building a new normative and substantive structure. Thus, it would act as a conscientization-multiplier, itself being sensitized to woman's cause. There would not be, then, a hiatus between promulgation and enforcement —dialectic between the processes of promulgation and implementation.

All these process are dialectical in nature both methodologically and socially, experientially and existentially i.e., phenomenologically. Here in lies the reason for calling this paradigm 'dialectical egalitarianism'. It is dialectical methodologically because it is not deterministic, as all these processes are mutually and collectively reinforcing and not mutually exclusive. Furthermore, it is dialectical socially, experientially and existentially i.e., phenomenologically because of the societal dialectic between the individual and society and the very interactional nature of human experience. Thus, as mentioned earlier, concurring with Beauvoir it is maintained that "... the contradictions ... will never be resolved"[47] — not the systemic but the interactional contradictions— whence sprouts 'dialectical egalitarianism', involving the processes of 'humanization' (externalization); 'depatriarchization' (objectivation); and 'degenderization' (internalization).

This paradigm may of course, appear to be utopian, but one has not to be oblivious of the fact, which this paradigm manifests, that for an egalitarian society which would be degenderized and depatriarchized, the processes mentioned in this paradigm are indispensable.

Overview of the General Paradigms

In passing, it may be mentioned that these paradigms are not theories. This is so becuase all the feminist theories, mentioned in the first chapter, emphasize one or the other processes of these paradigms and thereby accentuate on it because

of their ideological dispositions. Thus, both the paradigms present the problem of, and solution to, women's oppression, without professing any one feminist theory (the present study, as mentioned earlier has all the affinities for radico-socialist feminism).

The major thrust of the present study is to counterpose the ideal (the paradigm of 'dialectical egalitarianism' or 'Wo-manolateralism') with the real (the paradigm of 'sexist dialectic' or 'manolateralism'). Thus the idealistic criteria i.e. envisaging a degenderized and depatriarchized society, becomes a tool, as noted earlier, conducive to the analysis of ever widening hiatus between the ideal and the real (the genderized and ossificatorily patriarchized society of ours). Therefore, it will be seen throughout the present work, that law in India is more closer to manolateralism, notwithstanding the Constitution, which happens to be grounded in Wo-manolateralism, the ideal situation - wherein lies the dialectics of law.

The paradigm of 'sexist dialectic', then explicates women's oppression and deals with both the aspects of it, viz, interpersonal inter-gender aspect and interpersonal intra-gender aspect of oppression. The paradigm does not rule out myriad hues that women's oppression may take depending on their caste, class and multifarious primordial loyalties. But it also shows that what unifies them all is the sting which all the processes of their oppression carries. It is interesting to note on the basis of this paradigm,

which in a way spans all the "site[s] of oppression",[48] that socialist feminists reduce themselves to class and materialist determinism; radical feminists to biological and psychological determinism; and moderate feminists to cultural determinism. This paradigm is beyond the reductionist feminist theories, as it does not get itself in the marsh of determinism.

Amidst such rampant determinisms of the feminist theories lies the experiential and situational reality of women beyond deterministic analysis. Of the three processes of 'sexist dialectic' one may take salience on one occasion and other in other contexts or all in a context. Any analysis then of women's situation has to be indubitably context specific. What then is called for by this paradigm is the method of verstehen[49] for any comprehension of women's oppression, and the bottom-up procedure of viewing women's situation. What then is suggested is that "... the terms of oppression are not only dictated by history, culture, and the sexual and social division of labour. They are also profoundly shaped at the site of oppression, and by the way in which oppressors and oppressed continuously have to renegotiate, deconstruct, and re-establish their relative positions in respect to benefits and power. In the final analysis 'oppression is where you find it,' and this is almost everywhere."[50]

Like Foucault[51], who sees power as coextensive with social relationships, it is important to see women's oppression as being discoverable in a multiplicity of sites. This is what

the paradigm highlights, by going beyond the feminist theories. The present dissertation instead of discerning women's oppression in a multiplicity of sites, confines itself to one of these sites, viz., law. It tries to study not only how law discriminates but also how its lacunosity is 'utilized' to oppress women.

II

The present section provides an introduction and the working paradigmatic templet (for the present thesis) to look at law and its functioning, in order to comprehend women's situation in relation to law.

Law and Social Change

Not only is law integral to society, but as part of society, law is inherently social.[1] "The idea that law follows the same sequence of development in all societies has not been demonstrated, but it seems clear that law has become more complex whenever societies have grown more specialized."[2] If there is more or less general agreement that societal and legal complexity have gone hand in hand, beyond that there is little consensus. Particular theorists differ as to details and interpretation of the general relationship between social and legal change.

One of Max Weber's most important contributions to an understanding of law was his emphasis on the peculiarly "rational" quality of legal institutions as they developed in modern Western societies. Weber stated that the development

of law and procedure could be seen as passing through several stages ranging from "charismatic legal revelation through 'law prophets'" up to the most advanced stage, "systematic elaboration of law and professionalized administration of justice by persons who have received their legal training in a learned and formally logical manner".[3]

Weber elaborated both substantive and formal types of rationality in law. A legal system exhibits substantive rationality when it bases decisions on some general principles drawn from outside the legal system itself. The crucial characteristic of substantively rational law, in Weber's scheme, is that decisions are no longer arbitrary, but are now at least grounded in some considerations of substantive justice or even political expediency. In such a legal system, however, there is still no restraint imposed by procedural formality or by the need to maintain doctrinal consistency. This is where formal rationality in law enters the picture. It is this procedural and logical rationality that Weber termed formal.

While doctrinal or logical consistency may be a quality more sought after than achieved, procedural formality on the other hand is certainly a key feature of present day, legal institutions. The likely conflict between legal formality and substantive justice, was recognized by Weber himself[4] — this is one form of dialectics of law, mentioned already in the first chapter.

Another major sociological statement concerning law and social change was that of Durkheim[5]. Durkheim's basic thesis,

was that a society's law reflects the type of social solidarity existing within that society. According to Durkheim, there are two basic types of social cohesion or solidarity : mechanical solidarity (which he saw prevailing in relatively simple and homogeneous societies, where cohesion was ensured by close interpersonal ties and identity of aims) and organic solidarity (that which characterizes more heterogeneous and differentiated modern societies — where functional interdependence is produced by the complex division of labour) . Associated with these two forms of integration are two types of law repressive and restitutive respectively.

Durkheim notes, a development from repressive to restitutive law. With society's increased differentiation, the strong collective reaction to "offenses" becomes a less central feature of the legal system, as repressive law tends to give way to restitutive law, in which restitution to the injured person becomes a major way of settling disputes.[6]

The findings of Schwartz and Miller seem to contradict Durkheim's thesis of progression from repressive to restitutive laws. The finding here was, on the contrary, "that police [the more "repressive" institution] are found only in association with a substantial degree of division of labour .... By contrast, restitutive sanctions — damages and mediation— which Durkheim found to be associated with an increasing division of labour, are found in in many societies that lack even rudimentary specialization".[7]

The writings of Weber and Durkheim continue to illuminate the understanding of legal systems. So too does the work of Maine. Maine's "status to contract"[8] theme usefully highlighted the significant and broad social trend from homogeneous, close- knit forms of social organization to heterogeneous ones in which interpersonal relations tended to be attenuated, impersonal, and instrumental -- where legal relationships have come to be based on free agreement of the parties rather than on fixed social status. In discussing status, Maine had in mind particularly the subservient position of wives and children within the family, as well as the institutions of slavery and serfdom in general.[9] Under our present system, the individual has a tremendous range of free choice as to which particular relation-ships and transactions he wishes to enter, and it is primarily the specific details or conditions governing certain particular relationships or transactions that are fixed through regulatory legislation.[10]

It could be argued against Maine that with regard to women societies seem to have moved very little from its earlier i.e., status, moorings, notwithstanding lacunose laws.

A rather different persisting sociological effort to express legal development, as well as other social development, in terms of distinct stages of society is represented in the work work of Pitrim Sorokin. According to Sorokin, societies pass through stages in which the values he terms ideational (absolute truth, as revealed by God), sensate (reliance on

sensory experience alone), or idealistic (an intermediate, mixed category) predominate. Law, as well as other socio-cultural phenomena, is shaped according to the dominating theme of the era or stage. Since modern society is in a sensate stage, sensate law predominates. He states that law is viewed by a sensate society as :

> "Man-made, frequently, indeed as a mere instrument for the subjugation and exploitation of one group by another. Its aim is exclusively utilitarian : the safety of human life, security of property and possession, peace and order, the happiness and well-being of either society at large or of the dominating faction which enacts and enforces sensate law. Its norms are relative changeable, and conditional. Nothing eternal or sacred is implied in such a system of law. It does not attempt to regulate supersensory values or man's relationships toward them."[11]

Many sociologists would dispute Sorokin's insistence that the dominance of "sensate" values poses a severe threat to Western society's downfall, moral or even physical[12]. Nonetheless, his work underscores the significant truth that ways of viewing law in general, as well as specific content of substantive law, undoubtedly are associated with and reflect broader societal value orientations.

It is indeed true, as Sorokin noted, that modern law is generally acknowledged to be "relative, changeable, and conditional."[13] The legal order changes, both in its substance and its forms for the simple reason that it cannot remain unresponsive to changing social conditions. It is for this reason, the

development of "parental law" as Berman[14] calls it, has been noted. "Parental law" shows that aspect of law, where reliance on the judicial system is not merely for resolution of specific legal disputes but also to serve a more general function as an agent of socialization for the entire citizenry, educating the public to the major values of society and of the legal system.[15]

The Limits of Law ?

While there is little doubt that a legal system responds to broader patterns of normative and structural change, there is a great deal of controversy as to whether law can induce, rather than simply reflect, such change. In this connection frequent mention is made of the inherent limits of law — a point emphasized, in one way or another, by Bentham, Ehrlich, and Pound. This theme was also central to the theories of sociologists of the Social Darwinism school, such as Spencer and Sumner.

For Sumner, the mores always precede and take precedence over mere laws. He asserted that it is not possible to change the mores "by any artifice or device, to a great extent, or suddenly, or in any essential element; it is possible to modify them by slow and long - continued effort if the ritual is changed by minute variations "[16] Sutherland stated, "When the mores are adequate, laws are unnecessary; when the mores are inadequate, the laws are ineffective."[17] If few sociologists today would accept the social - evolutionist belief in the 'survival of the fittest folkways' or agree completely that the "stateways cannot change folkways," the assertion that law

is primarily a dependent variable (an effect, and not a cause) has nonetheless persisted. In fact Beauvoir, with regard to women's situation notes," Almost nowhere is her legal status the same as man's , and frequently it much to her disadvantage. Even when her rights are legally recognized in the abstract, long-standing custom prevents their full expression in the mores."[18] "The law and the mores did not always coincide, and between them the equilibrium was established in such a manner that woman was never concretely free." [19]

It is for this reason, it is argued,"That the effectiveness of enacted legal norms will be hampered by the absence of substantive social grounding and public support....",[20] and "... positive law "-"that collection of laws which are actually enacted and constructively adopted by the legal sovereign for observance by an organized jural society"—"succeeds if it maintains vital relations with social norms; legality fails if it conflicts with morality, and legal enforcement becomes effective when supported by social sanctions."[21] All these arguments while delineating law as a dependent variable overlook its role also as "parental law", which depicts it as an independent variable.

It is Ward, who adduces an opposing perspective on the role of law—proposing to look at law as an independent variable. He foresees a day when legislation would become:

> "a series of exhaustive experiments on the part of true scientific sociologists and sociological inventors working on the problems of social physics from the practical point of view. It will understand

> to solve not only questions of general interest to the state, ... but questions of social improvement, the amelioration of the condition of all the people, the removal of whatever privations may still remain, and the adoption of means to the positive increase of the social welfare, in short the organization of human happiness."[22]

The present study then looks at law not only as a dependent variable but also as an independent variable i.e., it views law not only as indicator of change, but also as initiator of change, and integrator of change. This is what the following paradigm manifests.

The Working Paradigmatic Framework (see illustration 6)

The relationship between law and social change may be stated in a schematic form[23] — which has been shown in illustration 6. Two crucial elements here are :

(i) the 'societal expectations and values' for change; and

(ii) the 'legal norms' for societal change.

These two factors may be related in a contingent property space. Dividing each of the two components further into two categories,"existent" and "non-existent" four types of heuristic possibilities, of relationships between social change values of a society and the normative structures of the legal system of that society, are generated.[24]

"This paradigm , though an oversimplification of reality, gives us a heuristic model to look at the problem of legal system, legitimation and social change from a sociological perspective.

LAW AND SOCIAL CHANGE

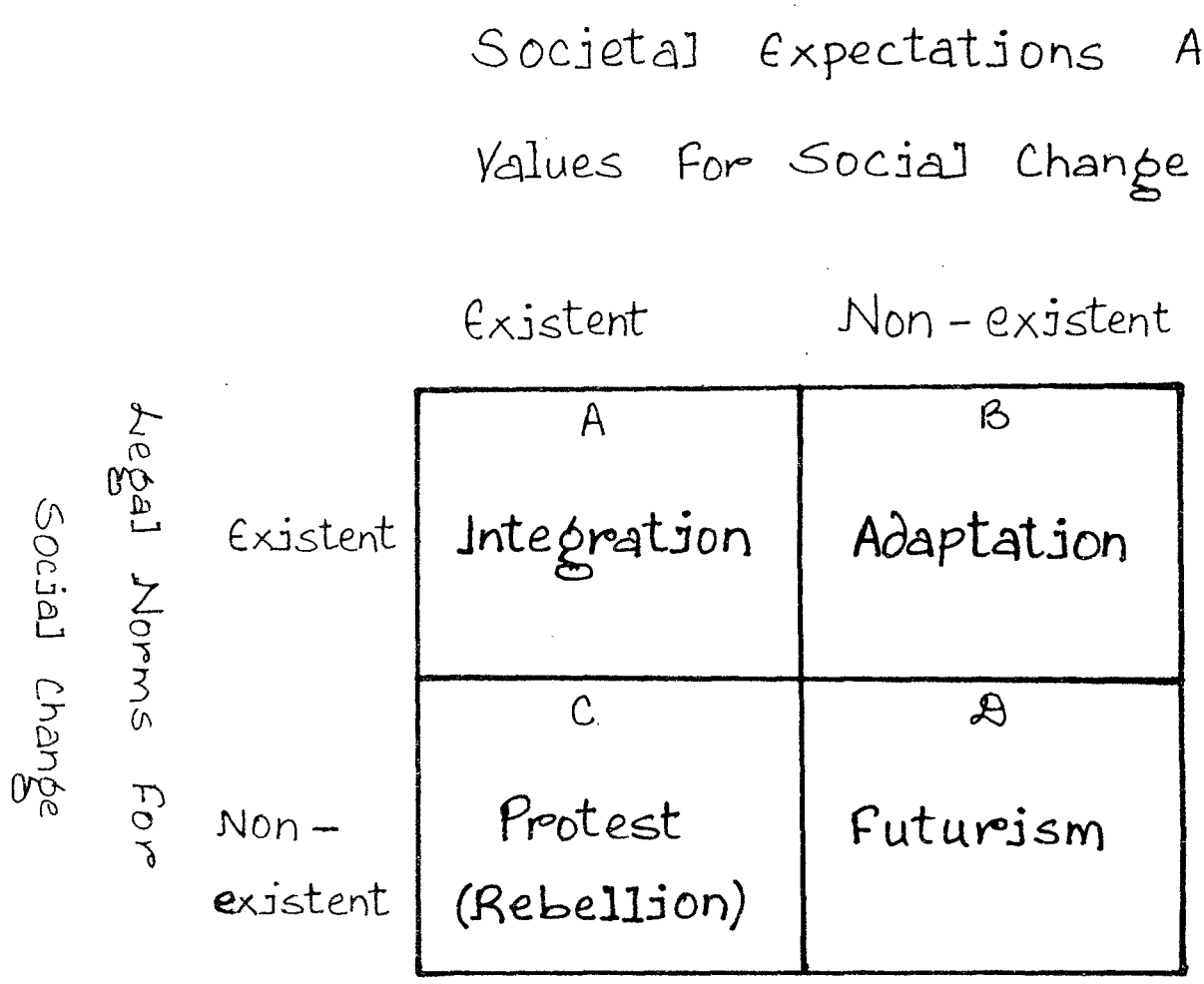


ILLUSTRATION 6

The crucial relationship is that between societal expectations for change and legitimate legal formulations for the initiation of change. In a situation where law provides for the initiation of certain forms of changes and society also expects them (situation A in the paradigm) the legitimation of the legal system would be maximum. It would be a pure case of an integrated system of society."[25] Moreover," Law serves as an indicator of social change when its role in society as an integrative mechanism has been fairly stabilised."[26]

"The second category (B), refers to those relationships between legal system and societal expectations for change where law initiates changes which are not yet accepted or expected by the members of society at large. The legal system would in this case generate needs for adaptive changes in the society."[27] "To the extent that law serves to initiate social change its integrative role gets strained because of the adaptive demands of changes in the social subsystems commensurate with the innovated legal norms, its rules and prodecures."[28] "The extent of adaptation would depend upon the nature of authority which legitimises the legal sanctions."[29]

"The problem of legitimation of the legal system assumes greater importance under the adaptive mode of relationship between law and social change. The extent to which changes initiated by the legal system contribute to adaptive changes in society would depend upon the nature of power structure, cultural system and social stratification of the society."[30] Regarding women's oppression, "The hypocrisy of authority is disheartening ., [this has been shown in the next chapter] , the preachings and per-

formance have an ugly distance between them."[31] The patriarchized cultural system of ours is still not amenable to Acts enacted to ameliorate the condition of women — that is why dowry, prostitution, child marriage, cruelty to women etc., are still rampant. The present category of this paradigm then helps us in understanding this role (i.e., adaptive) of the legal system, which normally in the case of women stands unsupported by the male- dominated society, i.e., "... man - his ethos, ambience, mores and norms."[32]

"In the third category (C), there is societally generated demand for change, either through greater innovative capacity inthe technological, cultural and social spheres or through contact with other societal or ideological system, but the legal system lags behind these social demands."[33] This is due to the "non-responsive character" "of the political elites." " In such a situation, law may tend to be conservative, without being integrative for the system."[34] Therefore, " in such cases there is a pressure for change in the legal system of which the forms range from "protest" to 'rebellion'."[35]

"The impetus for these changes may come from within the system or from outside. The limits of these changes, however, are set by the structural characteristics of the society and its national ideology. The problem of legitimation under this situation assumes a new dimension, especially when the legal system is less responsive to popular urgues or when only a small pressure group or extremist group calls for changes far reaching in the social system for which law of the land does not provide".[36]

"For societies determined to progress through the 'rule of law', the 'protest - rebellion' context of interaction [dialectic] between legal system and societal expectations and values provides bases for dynamic reponse. It also portends the possibility of the system breakdown if owing to interest-group pressures the legal system is kept in-elastic or non-responsive in nature. Here, the function of legitimation process for the legal system is not merely integrative but also innovative."[37]

This category, too, like the earlier one helps the present study in understanding the relation between dialectics of law and status of women. It is in this category that we can put many legislations (a chronology of legislations is presented in the Appendix) promulgated or amended after protests by women's organizations[38] ⇨ this is so now. In the pre-Constitution era, "the suggestions for a comprehensive reform of Hindu Law had in fact come from the reform movement and the women's movement in particular .... The clamour and Gandhi's support had resulted in the appointment of a Committee under the Chairmanship of Sir B.N. Rau in 1941"[39] ⇨ the details of this and the following legislative debates is provided in the next chapter (Legislative Dialectics).

"Be that as it may, the model of politics, conceived and practised as 'cautions crisis management', leads to neglect of 'vital areas, social groups and categories of needs that are incapable of generating dangers to the system as a whole.' They present, therefore, 'a less weighty claim to political

intervention ....' This must explain the lack of radical legislation, in areas which concern groups of people who are unable to generate credible threats to instability (women, unorganized labour, adivasis, low-caste untouchables.... prisoners, children, the mentally retarded and physically disabled)."[40]

"The fourth category (D) in our paradigm refers to futuristic situations. Both legal system and societal values and aspirations are subject to changes that are immanent but remain unanticipated by people in general. Both public values and legal norms might not exist, and may be needed for development of not only the national but global society. We have termed this category of the situation as 'futurism', but indeed it is not utopian. The futuristic changes in the legal system and societal values ... offer[s] a novel setting for the process of legitimation because its operational arena shifts largely from the national to the international society. The viable authority system under this situation is not that of a nation - state but organisations like the U.N.O."[41]

Regarding women, it could be noted that the fourth category is in harmony with the paradigm of 'Dialectical Egalitarianism' or 'Womanolateralism'. The role of international organizations like the U.N.O., has been commendable, so far as its declaration of the International Women's Decade (1975-1985) for highlighting women's problems world over, goes. "During this decade a conscious endeavour to understand the

specific problems of women and systematic efforts to create awareness of these problems by women among women in particular and citizens in general was made all over the world. A new sensitivity about the overt and subtle oppression of women has been generated."[42] After all enlightened people of each country are trying to depatriarchize their society. What can law do, so far as Indian women are concerned, in future, is the focus of the last but one chapter of the present dissertation.

The present study will also examine the adaptive and innovative roles of the legal system to comprehend the dialectics of law and its impact on the status of women. It would, then, be found that the legal system, while playing its adaptive (law as initiator) and innovative role manifests all the different forms of dialectics of law (mentioned in the first chapter, predominant among them being :

(i) Dialectics between the Constitution and Law;

(ii) Dialectics between the formulation of bills and its enactment;

(iii) Dialectics between the adjudication and the execution (enforcement processes);

(iv) Dialectics between law and life;

(v) Dialectics between the law and the male ethos;

(vi) Dialectics between the law and its lacunosity;

(vii) Dialectics between progressive and retrogressive elements;

(viii) Dialectics between the law and the customary practices; and

(ix) Dialectics between the secular and religious aspects.

The working paradigmatic templet then, Knits the entire study, keeping in mind the phenomenological fact that "society is a human product"[43]:

"The paths were there,
before we came,
but we chose the paths,
not paths us;
O pilgrim, look not, you for paths,
be a path unto Yourself."

.....

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CHAPTER III

LEGISLATIVE DIALECTICS : A Case of The Hindu Code Bill

In 1951 President Rajendra Prasad sent a note to Prime Minister Nehru expressing his unequal opposition to the Hindu Code Bill then before the Constituent Assembly which was also functioning as the Indian Parliament.[1] The bill, he wrote, envisaged "revolutionary changes".[2] It is now thirty years since the bill was passed and placed on the statute book, but if one examines it today, one cannot but feel that many more changes are needed to bring the law in conformity with the principles of social justice and equality enshrined in the Indian Constitution — following Yogendra Singh[3], we see, here , the adaptive role performed by legal system and the protest role played by societal expectations and values, respectively. Indeed, the Law Commission made some recommendations on this subject in its report on the Hindu Marriage Act, which then saw two amendments in it, in 1976 and 1978, which introduced divorce by mutual consent and raised the age of marriage for girls to 18 and boys to 21, respectively.

Have the social expectations changed so tremendously or were there other factors which led Rajendra Prasad, a disciple of Gandhi to oppose even moderate changes in the Hindu Law as it then existed? Several other Congress leaders who had pledged themselves to social equality, opposed the

Hindu Code Bill and succeeded in holding it up. The underlying principle of Hindu Law in the pre-independence era was inequality, the inferior position of the woman in all matters governing personal law like marriage, maintenance, inheritance and guardianship. There is therefore a contradiction between the protestations in favour of equality on the part of the publicmen in the pre-independence period and resistance to measures which would bring about this equality. It would therefore be useful to recapitulate the nature of Hindu law as it was in 1947, and to appraise the changes proposed in it.

In the early years, Hindu Law was unwritten, but what helped its growth was the role of custom as one of the important sources of law. Diversity of customs in a country as large as India was inevitable, and therefore, the accepted norms governing legal behaviour were not the same all over the country. The great advantage of the role assigned to custom was the facility with which socio-economic changes could be reflected in the legal norms. Because of this flexibility in the legal system, social tensions which arise, when law lags behind societal expectations, were almost totally absent in India.

Another source of Hindu law lay in the works of the commentators, and here too the vastness of the country led to different parts accepting the authority of different commentators. Two major schools developed, Dayabhaga and Mitakshara, which were again divided into four sub-schools. The pre-British era thus did not have a uniform Hindu law, as the authority of different commentators as well as different customs led to great diversity.

With the coming of the British , the picture changed completely. Professing neutrality and non-interference in Hindu and Muslim Laws, which were claimed to be of divine origin, the British authorities left them untouched. According to the historian of the Indian National Congress, the British rulers were so afraid that interference may lead to repercussions which may be "ruinous to the stability of their empire in this country.... They therefore adopted the plausible and seemingly reasonable attitude of non-interference."[4] The result of this non-intervention in family law matters led to a complete stagnation, and there was no way by which the socio-economic changes could be reflected in the prevailing legal system. This stagnation was further aggravated by the attitude of the judiciary, which under the British regime, applied a very stringent test for recognizing any new custom. A custom to be recognized had to be "ancient, certain and reasonable." This attitude proved a further obstacle in adjusting law to changing requirements, and led to the comment that Hindu Law " was in a state of arrested progress in which no voices were heard, unless they came from the tomb."

Dr. B.V. Keskar, while participating in the debate on the Hindu code Bill, had stressed the point that it was primarily due to the attitude of the British rulers, that Hindu society had remained fossilized and not allowed to evolve, and even moderate changes were described as "radical and revolutionary"[5]

There is no doubt that social tensions, owing to this policy of stagnation, would have been greater, but for the

unceasing efforts of some of the social reformers. Their pin-pointing of the major social evils which plagued society of that time— such as child marriage, sati and child widows— led to some marginal legislative changes. However, even these peripheral gains ended after the revolt in 1857, when the British attitude hardened further. The social reformers, finding the obdurate attitude of the rulers to social legislation, turned their attention to the spreading of education. This they hoped, would lead the people particularly women, to realise that the laws and customs which governed them, which 'made marriage the only career for them ',[6] were outmoded and needed to be changed.

It was Gandhi who really brought about the awareness among the masses about the need for improvement in the status of women. He observed,"I am uncompromising in the matter of woman's rights". He further asserted, "In my opinion she should labour under no legal disability not suffered by man. I should treat the daughters and sons on a footing of perfect equality."[7]

What accelerated the demand for change and improvement in the legal status of the women was not only Gandhi's exhortation in favour of equality for women, but also their active participation in the national movement. This participation coupled with their great capacity for organization and sacrifice[8], led Nehru and some other leaders in the Congress, to realise that the position of the women should be improved

not merely as an ideal but as a necessity if they are to be equal partners in the fight for independence and national development.

These factors and the able championship of both lawyers and reformers saw some legislative activity again in the early twentieth century (the chronology of laws protecting women is mentioned in the Appendix). The most significant of these was the Hindu Women's Right to Property Act (Known also as the Deshmukh Act), 1937, which gave the Hindu widow some semblance of financial security. Till then the plight of the Hindu widow was pitiable. After the death of her husband she could claim no rights in the joint family and her only right was that of maintenance. This act secured to the widowed dauthter-in-law the legal right to enjoy the husband's share in the joint family property during her lifetime, and also to get a share equal to that of a son. The act did not give her the right of an owner, as she had no right to dispose of the property, but at least during her life she was no longer at the mercy of the family members. But this act made no mention of the right of the daughter, and she continued to be excluded from inheritance by the male heirs.

Piecemeal legislation was no longer sufficient to meet the growing demands for modernising the whole structure of the law, and the articulation of this came from many a strata of society and finally compelled the then Government of India to act — this falls under the third category (C) of Yogendra Singh's paradigm[9] i.e.'there [was] societally generated demand for change ... but the legal system lags behind these social demands.'[10] It

appointed a committee with B.N. Rau as the Chairman to suggest changes and also to codify and unify the law governing Hindus.

A Case Of The Hindu Code Bill

The first report of the Rau's Hindu Law Committee submitted in 1941 was opposed to piecemeal legislations and recommended a comprehensive legislation by blending the best of all the schools and sub-schools. The Report, suggested a Code "which generally speaking shall be a blend of the finest elements in the various schools of Hindu Law; a Code, finally which shall be simple in its language, capable of being translated into the vernacular and made accessible to all". In 1944, the Rau committee submitted the Draft Code. No significant steps, were, however, taken following the submission of the Draft till after our independence.

Immediately after independence, under Nehru's stewardship, the Draft code was resurrected and sent to the Ministry of Law for new suggestions. The bill after some modifications by the Ministry of Law was then referred to a select Committee in 1948 under the Chairmanship of B.R. Ambedkar, who was then the Law Minister. In the Law Minister, Nehru was fortunate in finding a person whose commitment to Hindu Code and his eagerness to see it as law was equal to his.

In introducing the Code in the Constituent Assembly, Ambedkar reiterated the aim of the Bill which was "to codify the rules of Hindu Law which are scattered in innumerable decisions of the High Courts and of the Privy Council which form a

bewildering motley to the common man." One of the most important provisions of the Code, he said, was the provision relating to "dowry" which, as then prevalent was a "scandalous affair which not only lowered the dignity of the woman but led to her being often subject to both physical and mental oppression." He pointed out that the suggestion of making this into a trust property for the girl would go a long way in improving the situation.

After the Law Minister had introduced the Bill many members welcomed it and hoped that it would not be long before it could be discussed by the House. Among the speakers was Mrs. Hansa Mehta who referred to the Bill as a revolutionary one even though "we are not quite satisfied with it, it will be a great landmark in the social history of the Hindus". Dr. Pattabhi Sitaramayya was impatient at the delay because he felt that social progress had been held up by the attitude of the judges, who would only take cognizance of a custom "as it had existed for long centuries behind and never registered a change in the custom as marking progress in society .... 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." What could have been a more auspicious beginning than the welcome that the Hindu Law Bill received when it was first referred to the Select Committee? Some of the speakers, like Begum Aizaz Rasul in welcoming the measure, however, warned the House

of the orthodox opinion which would muster strong to oppose all changes. The aim of this chapter is to show this only-the the dialectic between the modernist and the traditionalist elements in the Legislature. This dialectic happens to be not only interpersonal but also intra-personal, in the sense that the very same persons' who had framed the Constitution and provided equality to both the sexes, favoured inequality when it came to enactment. Furthermore, highlighting the structural antinomies and contradictions in the Indian legal System " (ILS), Upendra Baxi, notes, "the Constitution and the law have generally strong redistributive thrust While , the orientation of the major institutions of the ILS is towards maintenance and even aggravation of the status quo."[11] This stands substantiated by what follows.

Once, however, the Bill came back to the Constituent Assembly, the members shed all inhibitions and came out openly to oppose the passage of the Hindu code (Hindu Law Bill as it was then called)[12]

It was, however, obvious from the points raised that a large number of the members were uncertain about their strength in completely quashing the Bill, they therefore, resorted to filibustering. Eloquent speeches were made by members, who saw in the Bill an attempt at "demolition of the entire structure and fabric of Hindu Society. The very foundations not only of one pillar but of all the pillars on which the Hindu society rests are shaken."[13]

It is significant, as mentioned earlier, that the opposition came from the same body which had shortly before sat as the Constituent Assembly to draft the Constitution.

It had then without discussion either in the sub-committee set up to draft the fundamental Rights or even in Assembly itself, accepted the principles of equality between sexes and absence of discrimination on the ground of sex as part of the Fundamental Rights. The vo te face is understand ble; lip service to the concept of equality was one thing, its implementation was another. Equal matrimonial rights for the wife, freedom to put an end to an unhappy marriage, and more important, the right of a woman to inherit meant legal equality and a step towards woman's freedom from male domination. It was, therefore, inevitable that the traditionalists would muster all their resources to oppose the Bill.

But if the traditionalists mustered strong, so did the members who believed that there could be no social justice till legal inequality was removed. Some of the members, particularly the women members in their spirited replies demolished the points that were raised.

Sucheta Kripalani referred to the "boast of Hinduism that while the fundamentals remained unchanged, the Hindu social institutions have changed to suit changing circumstances. Continuous adaptability has been the strength and essence of Hinduism." Durgabai Deshmukh, emphasised the immediate need for change as the "decisions of the Privy Council on some of the intricate questions of law are widely felt to be out of accord both with ancient authority and also modern spirit. A uniform and unified Code will prove a boon to Hindu society.... To be without a Code is to be without justice." K. Santhanam

highlighted the incogruity of accepting the principles of social justice and equality, and he said:" we have removed all social inequalities in politics, we have given the women the same equal franchise as men. Why in point of inheritance and succession alone should we have any kind of stigma based on sex?.... This is really complementary to the Constitution which we have enacted...."

While some of the members welcomed and supported the Bill, there were others who opposed not only its underlying principle but every single clause. Who was a Hindu? How could Sikhs be governed by the Hindu Law? Was it proper for a Constituent Assembly meant for drafting the country's Constitution to take up such an important legislative measure. These and various other arguments were used to stall the progress of the Bill. Nehru at this stage, impatient at the slow progress, and and seeing through the game to block the Bill, intervened. While conceding the need for a full discussion before any important measure was introduced, he denounced the delaying tactics adopted by his opponents. He stated firmly : "We stand committed to the broad approach of the Bill as a whole"[14] and the Government "will stand or fall on it." Nehru was over-estimating his party's commitment to reform and under-estimating the strength of the traditionalists. Only a few Congress members came out strongly in support of the Bill.

The opposition to the Bill was not confined to the members of the Constituent Assembly. President Rajendra Prasad urged the Prime Minister to withdraw the Bill which "introduced

some very fundamental and far - reaching changes" and added that the Bill had "never been placed before the electorate and I am not aware that any propaganda has been carried on to convert the bulk of the people."[15] Nehru replied that this subject had been debated a great deal during the previous eighteen months. "Few contemplated pieces of legislation", he wrote, "have been so thoroughly thrashed out and publicly discussed as this Bill." He recognised the opposition from orthodox opinion but asked "are we to give up something that we consider right and on which so much labour has been spent, because some people object?"[16] The fact that the Government was committed to the Code did not however deter Rajendra Prasad who afirmed that the "vast majority" were opposed to the Bill and warned the Prime Minister that perseverance in the Bill would arouse bitter feelings and "will have repercussions which may affect the chances of the Congress at the next election."[17] Nehru put an end to the correspondence by replying that as the Bill" was before the Assembly, and the Cabinet had considered it on at least two, if not more occasions," there was no question of going back unless the party so directed. In order to bring the matter before the party once again, Rajendra Prasad sent a note, a copy of which he sent to Sardar Patel, in which urging caution, he wrote, that the Bill "substitutes for concepts and the reasons underlying the law, new concepts and new ideas which are not only foreign to Hindu law, but may cause disruption in every family."[18] The lack of enthusiasm on the part of leaders like Rajendra Prasad and Patel and the lukewarm attitud

of many of the members in the Constituent Assembly itself, led to the Bill being stalled over for a year. Indeed, it was only after Patel's death that the Bill was once again taken up in 1951.

When the Bill came before the House again in the fourth session, Nehru adopted the expedient of taking up only a part of it - part 2, dealing with marriage and divorce. Presumably, he felt that the succession clause, which impinged directly on the dominant male preserve, would be opposed strongly, whereas monogamy and the right of divorce would meet with less opposition. Ambedkar, who was chafing impatiently at the stalemate, readily agreed to the suggestion of the Bill being taken up piecemeal. The Prime Minister, fearing that this might be misconstrued as a compromise,[19] and be regarded as a step towards withdrawal of the Bill, explained to the House that "so far as government are concerned, we have often stated that we stand by the whole Bill. Our difficulty has been of time, and we decided to proceed with part 2 in this session and to pass it. That did not mean that we were giving up any other part and we would very much like to have the other parts passed too. But practically speaking, there is no chance of our doing that in the present session. Whenever we can avail of an opportunity, we should like to take up the other parts."[20] In his view the important thing was "passing it in this session" which was reflected in his answers to H.V. Kamath on Sept. 17: "we expect that we shall finish it within this week."[21] The hopes of the Prime Minister and the Law Minister were, however, belied. What they had failed to anticipate was opposition to

the provision regardingthe wife's right to divorce, coupled with legal impediments to polygamy, which were regarded as attacks on the bastion of male superiority. The orthodox feared that this might be the first step towards woman's emancipation.

The ding-dong battle commenced once again. Syama Prasad Mookerjee urged the Government to behave like a secular state and take courage in both hands and say that monogamy will be made applicable to all citizens of India.[22] It was a laudable suggestion, but his next proposal, that the Hindu Code should be made optional, exposed his real motive which was to scuttle the measure. The reiteration of an early claim, that Sikhs should not be governed by the Hindu Code was made by S.S. Mann and Hukum Singh. It was also argued that the concept of divorce was alien to the Hindus.

In a scathing reply, Ambedkar dealt with all the objections. As for the Sikh claim to be excluded from the Hindu Code he affirmed that the Sikhs would continue to be governed by Hindu law in matrimonial matters, as this has been laid down by the Privy Council as early as 1830.[23] To the champions of a uniform code for all the communities he was unsparing in his exposure of their hypocritical claim when he said that "some of those who until yesterday were the greatest opponents of this code and the greatest champions of the archaic Hindu law as it exists today should come forward and say that they are now prepared for an all India Code, clearly brought

out the insincerity of their demand."[24]

Going through the debates, however, one feels the lack of determination on the part of the Government. It failed to emphasise the point that monogamy had become a part of the law in some states (Madras, Bombay, Saurashtra) and divorce was practised by a larger number of people governed by the customary law, as also it was statutorily recognised in Baroda. The strong opposition even to this truncated Bill seems to have depressed Nehru. His only significant intervention occurred when some members like Krishnan and Rai and C.D. Pande were criticising Ambedkar's arguments. He intervened to say, "we have had to put put up with a series of speeches and things have been said which have hurt us very much." He, therefore, failed to understand why some members were so sensitive about criticism coming from the Law Minister.[25]

The debate continued, without making any headway and the Law Minister's disappointment was understandable. Occasionally, his replies were bitter as when, he referred to S.P. Mookerjee's unfortunate mentality... to oppose every thing that comes from Government."[26] But Ambedkar's eagerness to see even a portion of the Bill accepted was evident from the fact, that in regard to all personal criticisms he kept silent, and even said, "You may abuse me as much as possible provided you do not take much time. I am concerned more with time than with abuse."[27]

But inspite of all the efforts of the Law Minister the Bill made no headway. Opposition from within and without seems to have led the Prime Minister to decide to slow down the pace, much

to the chagrin of the Law Minister. The Bill was ultimately allowed to lapse in that session Around September 1951, even before the House was dissolved. President Rajendra Prasad in a lengthy note questioned not only the competence of the provisional Parliament to legislate on Hindu Law, but doubted the wisdom of doing so. The Code sought to "force revolutionary changes in the existing structure of Hindu society ...."[28] The President's opposition to the Bill was so vehement that he even indicated his desire to exercise his right to "examine it on its merits when it is passed by Parliament before giving assent to it."[29] In a strongly-worded letter, Prime Minister Nehru denied that the President had such a right to "go against the will of the Parliament in regard to a Bill that has been well considered by it and passed."[30] Nehru observed that the Bill which was being debated was a very moderate measure of social reform with very little, if any, of revolution about it." However the President's insistence that the Constitution conferred on him "in unequivocal terms the right to declare either that he assents to a Bill or that he withholds his assent therefrom,"[31] despite the opinions to the contrary, of Alladi Krishnaswamy Aiyar[32] and the Attorney-General M.C. Setalvad,[33] perhaps made Nehru drop the Bill. He may have decided to avoid a confrontation between the Parliament and the Government on the one hand and the President on the other. Under these circumstances the frustration of Ambedkar who resigned from the government was understandable. Four years elapsed before anything was done about the Bill. In 1955 in the changed atmosphere of the country,

and with most of the opposition muted about social legislation the long-awaited Bill was pushed through. The Bill as mentioned earlier had to be split up in parts viz.:

1. The Hindu Marriage Bill,
2. The Hindu Succession Bill,
3. The Hindu Minority and Guardianship Bill,
4. The Hindu Adoption and Maintenance Bill.

The first got enacted in 1955 and the remaining in 1956.[34] But what till this day has not seen the light of the day — which happened to one of the parts — is the joint family property Law, the draft of which was ready, which was to have been taken up, but but could not be.[35]

The final result owed largely to the determination of Nehru to give a new deal to women of India. His own thinking was ahead of his party and he had to move step by step to amend the existing laws. Nothing could have given him greater satisfaction than if he had been able to go further in the direction of improving the position of women, not only in the Hindu community but in all communities.

This chapter highlights the dialectics involved in the very process of law-making. The only satisfying fact is that some changes in direction of a depatriarchized society, has been wrought by laws—which have been promulgated with never ever a full unanimity. Still, as Justice Krishna Iyer, notes, "Dialectical realism compulsively tells us that if social institutions designed with defined goals, at the performance

level prove to be a functional futility .... they must be re-tuned to the new times lest they be consigned to the museum of history ...." [36] Herein lies the second category (B) i.e. the adaptive role of the legislature, "... where law promulgated by it initiates changes which are not yet accepted or expected by the members of society at large." [37] Here, lies the reason for legislative dialectics, which may have emerged because of another dialectics (Protest/rebellion / innovativeness i.e. the third category (C) of Yogendra Singh's paradigm) and which may bring about yet myriad dialectical contrapositions (futuristic dialectics i.e. the fourth category (D)).

The preceding observations delineate the point, which Simone de Beauvoir, makes when she notes, "Almost nowhere is her a woman's legal status the same as man's and frequently it is much to her disadvantage. Even when her rights are legally recognized in the abstract, long- standing custom prevents their full expression in the mores." [38]

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CHAPTER IV

WOMEN AND THE DIALECTICS OF LAW : A Study of Marriage, Guardianship And Adoption Rights

One of the main characteristics of modern society is a heavy reliance on law to bring about social change. This is particularly true of countries which had for centuries been under foreign rule and attained independence after a long struggle. Inequalities and exploitation, generated or intensified by colonial regimes, cannot certainly be eliminated by freedom from foreign rule only. The tasks of social reconstruction, development and nation - building all call for major changes in the social order, to achieve which legislation is one of the main instruments. It can act directly, as a norm setter, or indirectly, providing institutions which accelerate social change by making it more acceptable — this is referred to, by Yogendra Singh as the adaptive role of the legal system.[1] Like other colonial countries, independent India has also relied heavily on legislation in its effort to usher in a society where there will be no discrimination or inequality.[2]

Gandhi, observed, "woman has been suppressed under custom and law for which man was responsible and in shaping of which she had no hand.... It is up to man to see that they enable them to realize their full status and play their parts as equals of men."[3] Thus for woman's oppression "man does not stand exonerated."[4] Not being oblivious of this, by clearly emphasising

the principle of equality and removing all legal discrimination inter-alia between sexes, our leaders have shown their acceptance of the view that to achieve liberty there must be complete liberty for women and "all legislative traces of the inequality of women without exception must be removed."[5]

But legislation cannot by itself change society. To translate these rights into reality is the task of other agencies." Whatever the law may say, women's roles, rights and norms of behaviour, as also those of others towards them are still greatly influenced by cultural factors like the institutions of family, kinship groups, descent systems, religious and other cultural traditions , caste hierarchy etc."[6] It is for this reason Gandhi, noted,"... it is not legislation that will cure a popular ill: it is enlightened public opinion that can do it,"[7] and Indira Gandhi, observed," Unless society itself awakens and readjusts its values and attitudes, laws alone will not help."[8] Therefore public opinion has to be moulded to accept these abstract rights. The Parliament, the judicary & the executive have a major role to play in this. This effort has not always been forthcoming. That is why Krishna Iyer, writes, "Our administration with its trinity of instrumentalities still lives in the medieval ages...."[9] Herein lies the dialectics of law. The legislature has captured the eminence of promulgating "lacunose laws,"[10] which with that very event gets transmuted to "obsolete laws".[11] Sometimes the judiciary has interpreted new legislation strictly and failed to give effect to the principle underlying the legislation, as for example in dealing with cases of

bigamy or the right of women to work. The executive branch of the government has seldom made an effort to set up the machinery to educate the people about the socio-economic changes. The mass media used for publicity for certain measures taken by government, has been conspicuously silent about social legislation — all this emboldens the 'sexist dialectic.'

If legislation reflects the social values of a country 'the degree of women's emancipation is the natural measure of the general emancipation in any given society.' It is, therefore, necessary not only to legislate but to see that it is implemented. In the following sections (of this and the next chapter) an effort has been made to point out the areas where the law is lagging behind the principles which have already been accepted by our constitution-herein lies the dialectics of law. The present chapter takes in its ambit, marriage, guardianship and adoption rights.

I. Marriage Rights

The major issues relating to marriage that need careful attention are polygamy, effective enforcement of the provision against bigamy under the Hindu law, age of marriage, compulsory registration of marriages and dowry.

Polygamy

Full equality of sexes can hardly be possible in a legal system which permits polygamy and a social system which tolerates it. Though the institution of polygamy has prevailed

traditionally in India in the last five or more decades it is on the wane and most marriages are today monogamous.[12] The spread of Christianity with its concept of marriage 'as a union for life of one man with one woman' marked the first step towards the legal recognition of the principle of monogamy. The advanced communities in the country like the Parsees and the Brahmos opted for the principle. The Parsee Marriage and Divorce Act, 1865 provided that any marriage during the life-time of his or her, wife or husband was void.[13] The Indian Christian Marriage Act, 1872 lays down the condition that neither of the persons intending to be married shall have a wife or husband still living.[14] With the enactment of the Hindu Marriage Act, 1955, which lays down the principle of monogamy for all Hindus,[15] 88 per cent of the Indian population are legally governed by the principle of monogamy.

The only personal law, which has remained impervious to the changing trend from polygamy to monogamy, is Muslim Law. Most Muslim countries such as Turkey, Iraq, Iran, Syria, Tunisia, Indonesia, Pakistan etc. have introduced reforms of varying degrees to correct the abuse of polygamy, but no legislative effort has so far been made in India to ameliorate the hardship caused to the Muslim women by the continuance of the institution of polygamy. This rather belies Turner's assertion that "A comprehensive system of institutionalized patriarchy no longer exists .... i.e., ... the institutionalized supports for patriarchy are in a state of advanced decay"[16] (as noted earlier).

The seeming indifference on the part of the Government in

leaving only one section of the citizens to be governed by a law permitting polygamy and other inequalities was sought to be explained by the Minister for Law and Justice , Mr. Gokhale, when he said, "We believe that while we should do everything possible to build up and cultivate the consciousness for reform, the urge and the demand for the reform must come from the community itself."[17] But this criteria seems to be futile, in the event of some Muslim leaders like Shahabuddin, reiterating even till today, their argument that "we cannot change from within and you must not introduce change from without"[18] — a manolateralistic proposition.

Muslim Law regards marriage as a contract. Some jurists have advocated the adoption of a standard contract providing, inter alia, that the wife shall have the power to divorce her husband if he takes a second wife. Although this remedy is advocated for the prevention of polygamy, it will not obviously provide any substantive relief to the first wife with children, nor seriously affect the position of the husband because the second marriage would remain valid and the act of bigamy would not be legally wrong. It would also be ineffective to prevent fake conversions to Islam to evade the prohibition of bigamy under other laws.

While the desirability of reform in Muslim Law is generally acknowledged, the government has taken no steps towards changing the law for over three decades on the view that public opinion in the Muslim community did not favour a change. But this view cannot be reconciled with the declaration of equality and social justice. The Report, therefore opined that ignoring the interests

of Muslim women is a denial of social justice. The right to equality , in its view , like the right to free speech, is an individual right;[19] and therefore there can be no compromise on the basic policy of monogamy being the rule for all communities in India. Any compromise in this regard will only perpetuate the existing inequalities in the status of women.[20]

Enforcement of Provisions Against Bigamy Under The Hindu Marriage Act

While bigamy has been made an offence for the Hindus and the second marriage is void in law, such marriages are still prevalent.[21] Under the present law, only an aggrieved person can initiate proceedings for bigamy, which means the husband or the wife. In the case of the wife the complaint may be made on her behalf by one of her family members.[22] Quite often an economically dependent woman who is also uneducated has neither the knowledge nor the means to go to the court. Many of them are reluctant to appear in court and face, social criticism as brought out very clearly by Justice Sachar :

> "We also cannot shut our eyes to the practical difficulties and problems faced by an Indian girl. Instances are numerous where Indian women have gone through a literal misery of marriage for years rather than go to a court of law and expose themselves to public gaze. The attitude of the parents, and relations in most of these cases is also unsympathetic."[23]

Where social customs prevent a woman from appearing in public, the law permits some other person to make the complaint

with the permission of the court. The question to be considered is whether the right to initiate prosecution for bigamy should be extended to persons other than the girl's family in all cases, in view of the general reluctance of her family members to lodge a complaint against the son-in-law or brother-in-law. The necessity of obtaining prior permission of the court would provide adequate safeguard against undue harassment. In small towns and villages a social worker could fulfil this role admirably. In the opinion of the Report, such a provision is necessary to prevent the current wide-spread violation of a most salutary provision of the law which clearly lays down the social policy of the country.

The adoption of monogamy as a rule among the Hindus under the Hindu Marriage Act (HMA) 1955 has been criticised and an opinion has been expressed in favour of "carefully regulated bigamy." "It is that a carefully regulated bigamy i.e., popular marriages in cases of infertility, mental instability of the wife, and other cases where the good sense and humanity of the husband and his family recoils from divorcing her or annulling the marriage would not only be in accord with traditional Hindu religious sentiment and practice, but also much more realistic. Moreover, it was the opinion of Mahamahopadhyaya Dr. P.V. Kane, that polygamy should be tolerated for some classes on purely economic grounds .... It is the health and happiness of Hindus that counts, and the rash abolition of polygamy in a euphoric moment is not working out satisfactorily."[24] It is here that the HMA has had to perform an adaptive role.

Besides all this, the existing penal provision against bigamy is further defeated in a considerable number of cases because of a technical construction placed on section 17 of the HMA. The supreme court in Bhaurao vs. State of Maharashtra[25] held that the offence of bigamy was not proved unless it was established that the second marriage was celebrated with proper ceremonies and due form. This conclusion was arrived at on the basis that the section used the word 'solemnized'. Whether the interpretation put by the court will subserve the policy and purpose of the Act or the social objectives of the legislation was never in their contemplation.

The result of this interpretation is that a difficult burden is cast on the prosecution to show that the second marriage is performed with all due formalities. This burden in many cases cannot be discharged owing to the fact that second marriages during the subsistence of a prior marriage, are seldom performed with usual pomp and show. This judicial interpretation facilitates widespread evasion of law. Herein lies the dialectic "between legal formality [legislative construction] and substantive justice [judicial interpretation], recognized by Weber himself...."[26]

Aware of this, the Report recommends that the words 'solemnized' should be replaced by the words "goes through a marriage."[27] Further, an explanation should be added to the section that an omission to perform some of the essential ceremonies by parties shall not be construed to mean that the offence of bigamy was not committed, if such a ceremony of

marriage gives rise to a, de facto, relationship of husband and wife.[28]

Furthermore, even after the merger of the former French and Portuguese territories with India, the pre-merger laws have not been abrogated. Hindus in Pondicherry are governed by four systems and Christians by two systems. In Goa, Daman and Diu, polygamy is permissible among some Hindu communities. The continuation of such laws permitting polygamy, observes the Report, is contradictory to our social policy and is totally unjustified. They should therefore be immediately replaced by the Hindu Marriage Act, 1955.[29]

The preceding and the following observations show the dialectics of law-contained in the various ramifications of the legal system - which on the one hand puts man and woman on an equal footing while on the other hand it surreptitiously places "man - his ethos, ambience, mores and norms -"[30] on a pedestal, providing all the leeway for him and the ebb of equality and liberty for her. Thus the status of women has not moved far away from "'Manolateralism' to 'Ko-manolateralism'" (mentioned in the second chapter).

Age of Marriage

The disastrous effects of child marriages (e.g., Young widowhood, maternal mortality, suicide, nutritional deficiency etc.) persuaded social reformers to restrain them by legislation. The Civil Marriage Act, 1872, fixed the minimum age of marriage at 14, and attempts to prevent early consummation resulted in

various measures which gradually raised the age of consent to 13. Finally the Child Marriage Restraint Act (also called the 'Sharda Act'), 1929, fixed the minimum age for marriage for males at 18 and for females at 14(which was later amended to 15 by the HMA, 1955[31]).

While the practice of child marriage was made a penal offence for parents or those performing, conducting, or directing it and for the adult bridegroom, the validity of such marriage was left untouched. Apart from the general Act of 1929, which applied to all communities, the various personal laws also have their minimum age for marriage. There is no uniformity either in the minimum age or in the consequences of violation of the law. Only the special Marriage Act, 1954, fixes the minimum age at 21 and 18 for males and females respectively. HMA, now has been brought in line with the Act to 1954, so far as age of marriage is concerned , by the Hindu Marriage (Amendment) Act, 1978. In rest all the personal laws, a lower age is prescribed for girls and it is below 10 in all of them.

While penalizing the performance of child marriages is necessary, the benefit of such legislation is greatly offset by the fact that the marriage itself is held valid. It should be a long-term objective to amend this aspect of the law and to declare child marriages as legally void.[32] Moreover, as immediate measures to deter the practice and alleviate their consequences, it is necessary to introduce the 'option of puberty' on lines similar to that in Muslim law. The right to repudiate a child

marriage by a girl on attaining majority is provided under Muslim Law if the following facts are established:

(i) that she was given in marriage by her father or other guardian before she attained the age of 15;

(ii) that she repudiated the marriage before she attained the age of 18; and

(iii) that the marriage was not consummated.

This right to repudiate the marriage should be made available to girls in all communities, irrespective of the fact whether or not the marriage was consummated.[33]

The Parsee Marriage and Divorce Act, 1936, provides that no suit shall be brought in any court to enforce any marriage between Parsees, or any contract connected with or arising out of any such marriage, if, at the date of the institution of the suit the husband shall not have completed the age of 16 years or the wife shall not have completed the age of 14 years.[34] It is necessary to include a similar provision in the personal laws of all communities.[35]

Notwithstanding the Child Marriage Restraint Act and the amended HMA, 1978, there are large scale violations of the Act in the rural areas. Only recently 40,000 kids were married off in Rajsthan.[36] In Ajmer, the hometown of Mr. Sharda, too, the tradition continues to be observed. This shows that law at times is ahead of times, and also the schism between law and life-where the societal values have to adapt themselves to the legal norms. Herein lies the dialectic between law and life. In the present case of child marriage, thus, "unless a

law is buttressed by the community's sanction it remains a dead letter."[37] With this in view, the social-evolutionist belief that "stateways cannot change folkways",[38] sounds appealing. But this is in no way an argument for the dispensability of law, rather it accentuates on the invincibility of the mores-the moretial dilemma : "when the mores are adequate, laws are unnecessary; when the mores are inadequate, the laws are ineffective."[39]

Quo vadis? The major problem with law lies in its lacunosity. In the present case the non-cognizable character of the offence (child marriage) is a serious hindrance to the effective enforcement of this law. It is in this respect that the attempt made by Gujarat to make child marriage a cognizable offence and the provision for the appointment of a Child Marriage Prevention officer is laudable. This is a good lead; and to ensure better enforcement, it is necessary that all offences under the Child Marriage Restraint Act, 1929, should be made cognizable and Special Officers appointed to enforce its provisions.[40] Even if mores , then, are restive, since they are social, they are amenable to change. To bring this about the triune Government - Parliament, Judiciary and Executive - has to function in a perfect harmony. For this, the government has to view the women's situation from their point of view and realize that, "It (early marriage for women) can lead to premature removal from socially productive enterprise or lost opportunities."[41]

Compulsory Registration of Marriages

Compulsory registration of marriages operates as an effective check on child and bigamous marriages and also offers

reliable proof of marriage. It ensures the legitimacy and inheritance rights of children. Section 8 of the HMA, 1955, enables the State Governments to provide for compulsory registration of marriages. However it has been stated that failure to register a marriage will not affect its validity.

Registration of marriages is compulsory among Parsees and Christians and for all marriages performed under the Special Marriage Act, 1954. Section 16 of this Act which permits registration of marriages celebrated under other laws has failed to evoke much response. The ultimate object is to recognise registration as the sole and conclusive proof of marriage, irrespective of the religious rites under which it was solemnised. India has neither signed nor ratified the UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage.[42] It is therefore necessary to introduce a system of compulsory registration for all marriages.

Dowry

Technically, dowry is what is given to the son-in-law or to his parents on demand either in cash or kind. From the point of view of women's status the custom of dowry has to be looked at as constituting:

(i) What is given to the bride, and often settled beforehand and announced openly or discreetly. The gift, though given to the bride, may not be regarded exclusively her property;[43]

(ii) What is given to the bridegroom before and at marriage ; and

(iii) What is presented to the in-laws of the girl.

The settlement often includes the enormous expenses incurred on travel and entertainment of the bridegroom's party.[44]

The social dimension of this custom lies embedded in the essentialistic definitions of woman, who is always" the Other" and never "the Subject",[45] a commodity sans humanity and an economic liability. With no worth of hers "[her] fate is bound up with that of perishable things; only a free subject asserting himself as above and beyond the duration of things, can check all decay: this supreme recourse has been denied to women."[46] With this being the case dowry adds all the meaning into a woman's life; devoid if she happens to be of this (dowry) she is offered to the flames. That is why "dowry deaths of today seem to acquire the same ominous magnitude as the sati system of the last century."[47]

The Dowry Prohibition Act, 1961, passed with the ostensible purpose of curbing this evil, if not of eradicating it has signally failed to achieve its purpose. In spite of the rapid growth of this practice, there are practically no cases reported under the Act . In fact only one case was pending before the court in Kerala, in which the father had filed the complaint only because of the ill-treatment meted out to his daughter.

During the debate on the Dowry Prohibition Bill, one MP observed, "... I feel the whole problem will be solved — very easily and more quickly, not by legislation but by rousing social conscience. As soon as our women get economic opportunities and

economic freedom, as soon as avenues of employment and other opportunities are opened to them, as soon as they become independent of their families, possibly there would not be any occasion for this law to operate."[48] The eradication of this evil by rousing social conscience is seemingly an attractive approach. The Committee's findings, however, indicate that there is hardly any evidence of social conscience today (which could be reporting the case to the " [unhelpful] police"[49] or even of socially boycotting the family -- social censure)."[50]

An increase in economic freedom and job opportunities for women, to the extent that the practice of dowry becomes obsolete, under the existing economic conditions, will be a very long process. The educated youth is grossly insensitive to the evil and unabashedly contributes to its perpetuation. In the opinion of the Report, therefore, a stringent enforcement of the policy and purpose of the Act may serve to educate public opinion better. A very small but significant step could be taken by the Government, by declaring the taking or giving of dowry to be against the Government Servants Conduct Rules. Such a lead was given earlier to prevent bigamous marriages, and giving or taking of dowry should be similarly dealt with.[51]

The major cause for the failure of the Dowry Prohibition Act, is that an infringement of the provisions of the Act is not made a cognizable offence. That the offences under the Act should be made cognizable was in fact suggested during the

debate in Lok Sabha.[52] But the offence was not made cognizable, as it was apprehended that this might result in the harassment of citizens by the police and lead also to undue invasion of the individual's right of privacy. The Report opines that the policy of making the offence non-cognizable completely nullifies the purpose of the Act[53] as it is unrealistic to think that the father of a girl who had paid the dowry (and who alone is in a position to adduce evidence of the fact that the dowry was stipulated and given) would prefer a complaint against the interests of his daughter after her marriage. The Report, recommends therefore, that the offences, under the Act, should be made cognizable. To overcome the fears regarding harassment by the police and encroachment on the right of privacy it is suggested that the enforcement of social laws like the Dowry Prohibition Act, the Child Marriage Restraint Act, should be entrusted to a separate administration with which social workers and enlightened members of the community should be associated.[54]

II. Guardianship Rights

In dealing with the question of guardianship of a minor child, two principles should be kept in veiw — the interest and protection of the child, and parental right. It was assumed , at one time that both these principles coincided and there could never be a conflict. Today, however, there is a shift and the interest of the child is in many cases the paramount consideration that law bears in mind. Therefore, legislation protects a person who reports and often takes to the

police a child who is neglected. Such a child can be removed from parental custody and kept where his best interests would be served.[1]

In earlier years parental authority was synonymous with paternal authority and "social and legal thought rigidly adhered to the proposition that the father by his natural right is entrusted with the care and control of his children."[2] Contemporary thought reflected in legislation of various countries has shifted to regarding the child's interest as of prime consideration and parental rights as being subordinate to it. But unfortunately our law does not clearly reflect this trend. In this branch of law, perhaps more than anywhere else, the judiciary has to set the pace in changing our prevailing norms.[3] The dialectics, here as elsewhere, then has to be set in by the judiciary — which is being done by the judgements of the Supreme Court (mentioned in the later sections).

A guardian may be natural, testamentary or appointed by court. In deciding the question of guardianship two distinct things have to be taken into account, the person of the minor and his property. Often the same person is not entrusted with both. As in other spheres of family law there is no uniform law. Three distinct legal systems — personal laws — are prevalent, Hindu Law, Muslim Law, and the Guardians and Wards Act, 1890.

Hindu Law

The Hindu Minority and Guardianship Act, 1956, has codified the law but as in the uncodified law it has upheld

the superior right of the father – this manifests a very important fact, that in a manolateralistic i.e., patriarchal ambience, law gets contaminated. It lays down that a child is minor till the age of 18. The natural guardian for both boys and unmarried girls is first the father and after him the mother.[4] The prior right of the mother is recognised only to custody in the case of children below five but even this right is qualified by the word 'ordinarily.' It has however, taken away the right of the father, which he enjoyed before, of appointing a testamentary guardian and thereby depriving the mother of the right. Under the present law the father cannot resort to this device. In the case of illegitimate children, the mother has a better claim than the father.

Hindu law, however, makes no distinction between the 'person' of the minor and his property and therefore guardianship implies control over both. The Act, however, directs that in this question courts must take the 'welfare of the child'[5], as of 'paramount consideration.' It is under this principle that the judiciary has an important role to play, when there is a conflict between the paternal right and the welfare of the child. Not too late, the Supreme Court held that in special circumstances the mother could be held to be the natural guardian even when the father was alive.[6] Though the Supreme court has used words like 'may be considered' and 'Special circumstances', the Report hopes that this judgement of the highest court will guide the lower courts, and prevent them from invariably upholding the father's right, even when it is

against the interests of the child.[7] The contradictions contained in the Act, can be used by the judiciary, then to subserve mother's cause; thus what is needed is an enlightened judiciary, which by its emancipative and empathic interpretation can transmogrify the countenance of many lacunose Acts, and make a tool out of them, in order to effect,'dialectical egalitarianism'.

Muslim Law

Under Muslim Law the father's dominant position is recognised and his rights are very wide, but there is a distinction between guardianship and custody. The term guardianship is usually used with reference to the guardianship of property. This belongs preferentially to the father, in his absence, to his executor, among the Sunnis. If the father had not appointed any executor, the guardianship passes to the paternal grandfather. Among the Shias the difference is that the father is regarded as the sole guardian but after his death it is the right of the grandfather to take over the responsibility and not that of the executor. Both the schools, however agree that the father while alive is the sole guardian. The mother is not recognised as a natural guardian even after the death of the father, though she may be appointed as such under the father's will (Shias do not recognise this where the mother is a non-Muslim).

Though a mother cannot be a maternal guardian, Muslim Law recognises that she has the prime right to custody of minor children (hizanat). This right is recognised by all authorities

under Muslim Law — "The mother is of all persons best entitled to the custody of her infant children...."[8] The mother's right of custody or hizanat appears to be an absolute right and even the father cannot deprive her of it. Misconduct is the only condition which can deprive the mother of this right.

There is a difference between the Shia and Hanafi school about the age at which the right of the mother to custody terminates. In the case of a minor son, the Shia school holds that the mother's right to hizanat during the period of weaning which is over when the child has completed the age of two. The Hanafi (Sunni) school, on the other hand extends the period till the minor son has reached the age of seven. Both schools agree that the same age cannot be applied when the minor is a girl. The Shia Law upholds the mother's right till the girl reaches the age of seven and the Hanafi till she attains puberty. Both schools agree that only the mothers should have custody of a minor married girl till she attains puberty.[9]

The Muslim concept of hizanat is definitely an advance on the other legal systems, because it recognises that for a minor child the mother's care and control is more desirable — still it seeks to define woman in essentialistic terms confining her to the realm of immanence. The father, therefore, is required to pay maintenance to the mother for the child for this period.[10]

Guardians and Wards Act, 1890

The supremacy of paternal right is the keynote of the Guardians and Wards Act, which governs all communities other than Hindus and Muslims. It clearly lays down that the father's right is primary and no other person can be appointed unless the father is unfit.

However, as in the Hindu Law, the Act provided that the court must bear in mind the welfare of the child, though this is not mentioned as being of paramount consideration. In recent years, however, some of the decisions have broken away from the past attitude, looking upon the father not only as a natural guardian but as having "an inalienable right over his child;"[11] and now hold that "the welfare of the minor is the prime consideration and even the paramount right of the father should be subordinated...."[12]

In order to bridge the hiatus in the present rights, the Report recommends :[13]

(i) That the control over the person and property of a minor cannot be separated and should vest in the same person;

(ii) the question of guardianship should be determined entirely from the point of view of the child's interest and not the prior right of either parent;

(iii) the parent who does not have guardianship should have access to the child;

(iv) whatever the decision taken earlier the child's choice of guardians should be obtained when the child reaches the age of 12.

The Report[14] also supports the recommendations of the U.N. Commission on the Status of Women.[15]

(i) "Women shall have equal rights and duties with men in respect to guardianship of their minor children and the exercise of parental authority over them, including care, custody , education and maintenance;"

(ii) "Both spouses shall have equal rights and duties with regards to the administration of the property of their minor children, with the legal limitations necessary to ensure as far as possible that it is administered in the interest of the children;"

(iii) "The interest of the children shall be of paramount consideration in proceedings regarding custory of children in the event of divorce, annulment of marriage or judicial separation;"

(iv) "No discrimination shall be made between men and women with regard to decisions regarding custody of children and guardianship or other parental rights in the event of divorce, annulment of marriage or judicial separation."

III. Adoption Rights

"Adoption is the institutionalized practice through which an individual belonging by birth to one kinship group acquires new kinship ties that are socially defined as equivalent to the congenital ties. These new ties supersede the old ones either wholly or in part."[1] It is the act of a person who takes upon himself the position of a parent to a child who is not in law his own child.

The origin of the custom of adoption is lost in antiquity. It has, however, been recognised in India for centuries and is also recognised in other South Asian Countries, such as Burma and Thailand. Adoption forms the subject matter of personal law. In India the only personal law which recognises adoption in the true sense of the term is Hindu Law which regarded adoption as the taking of a son as a substitute in case there is no male issue. Here , too there is no uniform law, as there are four distinct personal laws, Hindu Law, Muslim Law, Christian Law, and Parsee Law.

Hindu Law

The law relating to adoption has been amended and codified[2] and brought in line with the principles of social justice. Previously the object of adoption was to ensure spiritual benefit by performing the last religious rites and also to continue the line. The devolution of property was regarded as of secondary importance. It was because of this basic approach to adoption that Hindu Law did not recognise the right to adopt girls as she could neither ensure spiritual benefit nor continue the line of her father.[3]

With the passing of the Hindu Adoption and Maintenance Act, 1956, the whole basis of adoption has been changed. The Act makes three clear departures from the previous law of adoption:

(i) A Hindu can now adopt either a son or a daughter, since the religious purpose has given place to the secular idea of parents wanting a child.

(ii) The husband can no longer give or take in adoption without the consent of the wife. In the case of an existing marriage,

however, the primary right continues to be of the husband. The wife's right being confined to consent only, is in a sense, continuation of the 'Superior' right of a man which has been the running theme — motif— in Hindu Law.[4]

(iii) A woman can now adopt, if she is unmarried, widowed or divorced. Similar right is conferred on a married woman if her husband has completely and finally renounced the world, has ceased to be a Hindu, or has been declared by a Court to be of unsound mind.[5]

The uncodified law did not recognise the right of a woman to adopt in her own right and even in the case of a widow, who adopted as the agent of her deceased husband, the rules differed and some schools prohibited it altogether.[6] The fundamental departure that the new Act has made, is in recognising the right of a woman to adopt in her own right and no longer as the agent of her husband (dead or alive). While the Act has certainly improved the status of women-by its adaptive role - the Report, recommends that the right of adoption should be equal for husband and wife , with the consent of the other spouse,[7] and the early enactment of The Adoption of Children Bill, 1972, which will extend the right of adoption equally to men and women of all communities, and will be a step towards a uniform secular law[8]. As mentioned, this has yet to come through.

Muslim Law

Even though Muslim Law does not recognise adoption in India previously the law had permitted this right to Hindu converts to Islam, who had enjoyed this right prior to their

conversion.[9] This customary right was, however, partially abrogated by the Shariat Act under which a Muslim could make a declaration that he and his sons would in future give up all customary rights including that of adoption and be governed by the Act.[10]

Islam never gave any special significance to an adopted son, as it does not to a natural son. Islamic religion, unlike the Hindu one, does not associate a son, or any other relative, with the performance of the last rites of a deceased Muslim whether male or female. It, therefore, does not recommend adoption of a son or a daughter for a person dying issueless, nor does it absolutely prohibit it. The Quranic verses having a bearing on adoption did not lay down a specific negative rule.[11]

Vasudha Dhagamwar, makes an interesting observation that "Sitting in Delhi or Bombay the 'national' leaders are absolutely positive that adoption is against their religious law and yet in far away Santhal Parganas, Muslims serenely adopt and give in adoption, even across religions"[12]. Here lies the dialectic between the "Great" tradition and the "Little" tradition, i.e., "there are local practices by small religious groups which are unknown to their national leaders, contrary to their religious laws."[13] The present case shows that the little tradition can be eclectic, and the great tradition, dogmatic (in interpretation and interpolation rather than in essence).

Christian and Parsee Law

The institution of adoption is not known in Christian Law in India. If Christian parents have no issue and desire

that some child takes that place, the only way open for them is to approach the court under the Guardians and Wards Act and be appointed a legal guardian.

For the Parsees, there is no law of adoption as such nor is adoption recognised by custom. However, the widow of a Parsee dying issueless can adopt a Palak on the fourth day of the deceased's death, for the ad-hoc pupose of performing certain religious rites for the deceased. This adoption is only for a limited purpose and does not confer any proprietary rights on the Palak.

Even when, there are meagre and unarticulated laws on adoption, what remains revealed, is a woman's right which lies subordinated to that of man's — a sequel to the functioning of the processes of 'sexist dialectic'. That is why, the Report, as mentioned earlier, recommends the early enactment of The Adoption of Children Bill, 1972, which seeks to extend the right of adoption equally to men and women of all communities, which will be a step towards a uniform secular law.[14]

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14. The Indian Christian Marriage Act, 1872 Sec. 60.
15. Hindu Marriage Act 1955 Sec. 5(1). Even before the Hindu Marriage Act, many of the states like Bombay (1946), Madras (1947), Saurashtra (1954) had passed their own Prevention of Hindu Bigamous Marriage Act. Madras Marumakkattayam Act, 1933 Prohibits bigamy for those who have the matrilineal family organisations and are governed by the Marumakkattayam Law.
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22. Section 198, Criminal Procedure Code (Cr PC)- proviso- Members of wife's family are father, mother, brother, sister, son or daughter, father's or mother's brother or sister.
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24. Derrett, J. Duncan 1970. A Critique of Modern Hindu Law. p. 309.
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27. Section 17, Hindu Marriage Act (HMA).
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29. Ibid., P. 111 (4.32).
30. Singh, Indu Prakash, 1985, Loc. Cit.
31. Sec. 5 (iii).
32. ICSSR. 1975. Status of Women in India - A Synopsis of the Report of the National Committee on the Status of Women. New Delhi. p.43.
33. Towards Equality, Op.Cit., p. 113 (4.68).
34. Sec. 28.
35. ICSSR, Op.Cit., P.43.
36. The Hindustan Times. April 27, 1985. 40,000 kids Married Off. New Delhi.
37. Editorial . April 29, 1985. Child Marriage. New Delhi: The Hindustan Times.
38. Schur, Op.Cit., P. 127.
39. Sutherland, E. 1966. In Sutherland, E., & Cressey, D. Principles of Criminology. Philadelphia : Lippincott. P. 11.
40. ICSSR., Op.Cit., P. 43.
41. Konowitz. 1970. Women and the Law. P.11.
42. Towards Equality, Op.Cit., P. 114 (4.72).
43. The Changes in the definition of dowry by the Supreme Court and the concept of stridhan has been dealt with in the penultimate chapter.
44. Towards Equality, Op.Cit., P.71 (3.191). Another distinction over here is important. Two major types of transfers of material wealth accompany marriage : in one the wealth travels in the opposite direction of the bride and in another it travels along with the bride in the same direction. The former is bride - price; the latter is dowry. p.69 (3.184).
45. Beauvoir, de Simone. 1984 (reprint). The Second Sex. Harmondsworth : Penguin. p.16.

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47. Singh, Indu P., 1983, Op.Cit.
48. Barua, Hem. 1959. 36 Lok Sabha Debates, Column 3476.
49. Singh, Indu P., 1985, Op.Cit.
50. Towards Equality, Op.Cit., p. 115 (4.77).
51. Ibid., (4.78).
52. Krishnan, Parvati. 1959. 36 Lok Sabha Debates, Col. 3703.
53. Even in the Dowry Prohibition (Amendment) Act, 1984, the offence remains non-cognizable.
54. Towards Equality, Op.Cit., PP.115-6(4.80).

II. Guardianship Rights

1. Children's Act, 1960.
2. Diwan, Paras. 1973. Law of Parental Control, Guardianship and Custody of Minor Children. Preface, pt.VIII.
3. Towards Equality, Op.Cit. P.126 (4.131).
4. Sec. 6.
5. Sec. 13.
6. Jija Bai vs.Pathan Khan. 1971. SC., p.315. The judgement has been referred to as "a welcome one which accords well with our social circumstances", Dewan, Op. Cit., p.94.
7. Towards Equality, Op.Cit., P.126 (4.134).
8. Fatwai Alamgiri Cited in ibid., p.127 (4.137).
9. Dewan, Op.Cit., pp. 135-7.
10. Towards Equality., Op.Cit., p.127 (4.141).
11. Abdul Aziz Khan vs. Nanhe Khan. 1927. All., p.458.
12. Baddi Reddi Bulliraju vs. Kadam Surya Rao. 1959. AP., p.678.
13. Towards Equality., Op.Cit., p.128 (4.143).
14. Ibid., (4.144).
15. 20th Session, 13th February to 6th March, 1967.

III. Adoption Rights

1. International Encyclopaedia of Social Sciences. Vol.I, P.9
2. Hindu Adoption and Maintenance Act, 1956.

3. Towards Equality, Op.Cit., P.125 (4.122).
4. Sec. 7-19 of the Act.
5. Sec. 8 of the Act.
6. The text which led to differences in interpretation was "Nor let a woman give or accept a son, unless with the assent of her lord" (Vasistha). Mulla. Principles of Hindu Law. p.625.
7. As Provided in Sec.5 of the Adoption of Children Bill, 1972. In 1976 the Joint Select Committee Presented its report to Parliament. In December 1980 a fresh Adoption Bill was introduced, but it did not go through till this day. This would have been an uniform and secular law of adoption. See Dhagamwar, Vasudha. June 25 and 26, 1985(b) Uniform civil code-I and II. New Delhi: Indian Express. P.6.
8. Towards Equality, Op.Cit., p.125 (4.129).
9. Bai Mecchai vs. Bai Hirabai, ILR. 1911. 35 Bom-264. It should be noted that Muslim Law will not recognise any customary right which is against the tenets of Islam.
10. The Muslim Personal Law (Shariat) Application Act, 1937, amended in 1943- Sec. 3(c).
11. Towards Equality, Op.Cit., P.124 (4.119).
12. Dhagamwar, Vasudha. 1985 (b). Op.Cit.
13. Ibid.
14. Towards Equality, Op.Cit., P.125 (4.129). See also note 7.

CHAPTER V

WOMEN AND THE DIALECTICS OF LAW :

A Study of Divorce, Maintenance And Inheritance Rights

The rubric of the present chapter, though the same as the earlier chapter, differs in its purview, as it endeavours to peruse, divorce, maintenance and inheritance rights. Here too as in the last chapter an effort is made to point out the areas where the law is lagging behind the principles which have already been accepted by our Constitution — herein lies the dialectics of law.

I. Divorce Rights

A monogamous marriage without the right of divorce would cause great hardship to both parties to the marriage. The concept of 'union for life' or the sacramental nature of the marriage which renders the marriage indissoluble has gradually been eroded and through legislation the right of divorce has been introduced in all legal systems in India, but the same variations and unequal treatment of sexes characterizes this branch of law also.

A survey undertaken by the census in 1961, had indicated wide acceptance of divorce by the village community and some variations of incidence among the religious communities.[1] Incidence of divorce was highest among the Muslims (6.06%), followed by Hindus (3.21%). Among the Buddhists it was 3.07%, among the Jains 1.68% and among Sikhs 0.91%. The incidence of

divorce among Christians was considerably lower (0.41%). The causes for divorce show that adultery and barreness are the commonest grounds for divorce in most of the villages studied. Extreme poverty is also found to be cause for divorce. In Rajasthan, sexual incompatibility and incapacity are recognised as grounds for divorce.[2] According to the census of 1979, there are 870,000 divorced or separated women of whom 743,200 are in rural areas and 127,500 in urban areas , the ratio being 1,630 women per 1,000 men. All this goes to show the status of women, who happen to be at the receiving end.

Hindu Law

According to traditionalists, divorce was unknown in Hindu Law. Even today divorce is not a socially accepted norm among many sections "we can take notice of the fact that even today considerable sections of the Hindu society look with disfavour on the idea of dissolving a marriage."[3]

Contrary to the general notion regarding the indissolubility of Hindu marriages, a large section of Hindus among the lower castes have traditionally practised divorce[4]. These customary forms of divorce were recognised, both socially and judicially[5]. The most usual forms are :

(a) divorce by mutual consent;

(b) by the husband ; and

(c) by deeds.[6]

Under customary law, there is no waiting period after divorce for remarriage. The other advantage of these forms

is that they save both time and money which is generally lost in litigation; but since some of these forms are against public policy or morality, a divorce under customary law may be rejected by a court.

With the enactment of the Hindu Marriage Act, 1955, — which was an uphill task, as shown in an earlier chapter— divorce became a part of the law governing all Hindus. The ground for this had already been prepared by the passing of the Hindu Women's Right to Separate Residence and Maintenance Act 1946, which inter alia, permitted the wife to separate from her husband on the ground that he had married again. Following this, some of the States took the initiative and as with monogamy, legislated to permit divorce for Hindus.[7]

Divorce Under the Hindu Marriage Act, 1955[8]

The various grounds on which a husband or a wife can obtain divorce are :

(a) living in adultery;

(b) conversion to other religion;

(c) insanity;

(d) incurable form of leprosy;

(e) venereal disease;

(f) renunciation;

(g) disappearance for seven years or more;

(h) failure to resume cohabitation for a period of two years after the decree of judicial separation;

(i) failure to comply with a decree for restitution of conjugal rights.

Two additional grounds have been bestowed to the wife :

(i) if the husband has more than one wife living; and
(ii) if he has been guilty of rape, sodomy or bestiality.[9]

Theformer has retrospective effect in the sense that when the marriages took place, i.e., before the Act, polygamy was legally permissible. This right can be exercised by either of the wives , and has obviously been provided to strengthen the social policy of monogamy. From the cases reported, it appears that many women have benefited from this provision.[10]

The interpretation of 'reasonable cause'[11] for desertion or restitution of conjugal rights as made by the judiciary is not satisfactory. Whenever conjugal rights have come into open conflict with the woman's right of equal opportunity in education or employment, the attitude of the judiciary has often been rather ambiguous. Instead of guiding the conflicting parties towards a rational adjustment to the process of social change, the judiciary has either evaded the issue or thrown its weight on the side of the traditional view of the husband's authority— a reflection of judiciary's wallowing in male ambience, with very few streaks of its manumitting itself from the fetters of machismo. Two illustrations will suffice to demonstrate this tendency :

(i) A husband's demand for his wife to resign her job as a teacher in a city away from his place of employment, to join,

was upheld by the Punjab High Court, which ruled that it was the duty of the wife to remain under the 'roof and protection and submit obediently' to the authority of the husband.[12]

(ii) In a similar case, the Allahabad High Court, while conceding the right of wife to work in cases of genuine economic necessity,[13] totally evades the issue of the individual woman's right to decide whether to work or not. The Report opines that difference in the place of work should not be regarded as a ground for a case of desertion or restitution of conjugal rights.[14]

In such a situation an enlightened judiciary can add life and blood to our Constitution by its emancipative interpretation, which stirs the dialectic and makes it more productive and progressive — i.e. wo-manolateral—so far as women's rights are concerned. The case in point is, the verdict[15] of Justice P.A. Chowdhury of Andhra Pradesh High Court, declaring the provision for restitution of conjugal rights[16] as violative of Articles 21 and 14 of the Constitution. According to the judge the remedy of restitution is "savage", "barbarous", "uncivilised" and "an engine of oppression"[17] . The verdict widens the scope of Art 21 — which guarantees right to life, personal liberty, privacy and human dignity — by acknowledging, for the first time, the right to "privacy" and "personal dignity" to judicially separated women. This means legal protection can be sought by them against "forced sex."[18]

Holding section 9 to be violative of Article 14 of the Constitution as well, the Court observed that apparently the

remedy of restitution satisfied the equality test because it is available both to the husband and wife. The question is how this works in reality. "In our social reality, this matrimonial remedy is found used almost exclusively by the husband and is rarely resorted to by the wife."[19] Such judicial comprehension, perspicuity and perspicacity goes a long way in ameliorating the status of women.

Moreover, cruelty and desertion have not been made grounds for divorce , though they are recognised as grounds for a judicial separation.[20] Uttar Pradesh has given the lead in this and amended their law to make these grounds for divorce.[21] The Report , therefore, recommends that these should be added as grounds for divorce in the HMA so that persons are not compelled to follow the present circuitous route and undergo the expense of going to court twice.[22] What is heartening is the fact that in 1976, the provision for divorce by mutual consent was included in the HMA.

Muslim Law

Under Muslim Law a husband has an absolute and unlimited right to repudiate the marriage at his will. This is known as Talaq (talaq-ul-biddat) — triple divorce. A Muslim wife has no such right to dissolve her marriage. Unwritten and traditional law tried to ameliorate her position by permitting her to seek dissolution under the following forms:

(a) Talaqi Tafwid: This is a form of delegated divorce. According to this the husband delegates his right of divorce in

a maggiage contract which may stipulate that inter alia, on his taking another wife the first wife has the right to divorce him. The courts have upheld these pre-nuptial and post-nuptial agreements as not opposed to public policy nor against the spirit of Muslim Law.[23] The Assam High Court has strengthened this right by declaring that such a power of Talaq given to the wife is irrevocable.[24]

(b) Khul : This a dissolution by an agreement between the parties to the marriage, on the wife's giving some consideration to the husband for her release from the marriage tie. The terms are a matter of bargain and usually takes the form of the wife giving up her dower.

(c) Mubarrat : This is divorce by mutual consent.[25]

According to Hanafi Law ("unfortunately a majority of the Muslims in India belong to the Hanafi sect "[26]) the inability of the husband to maintain his wife does not give her the right to dissolve the marriage. Following the Hanafi Law the courts in India had refused the wife the right to dissolve her marriage on the grounds of non-payment of maintenance. The Shaifi and the Maliki Laws, however, allowed the wife to obtain divorce on this ground.[27]

Dissolution of Muslim Marriages Act, 1939.

This act took the advantage of the law as enunciated by the Maliki and Shaifi schools [28] and recognised the right of a wife to dissolve the marriage on the following grounds[29].

(a) husband's disappearance for four years;

(b) neglect and failure to provide maintenance for two years;

(c) husband's imprisonment for seven years or more;

(d) failure to perform marital obligations for three years;

(e) impotency;

(f) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(g) Option of puberty - that she having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years; provided that marriage has not been consummated; and

(h) cruelty or any other ground recognised as valid for divorce under Muslim Law.

(i) apostasy from Islam of the husband.

Muslim Women — though not much — have benefited by the Act.[30] The provisions that have been resorted to most frequently are the option of puberty and failure to provide maintenance by the husband.[31]

Option of puberty : The courts in India have interpreted this right very liberally, often invoking the principles of equity and justice in favour of the girl.[32] They have not rigidly applied the letter of the law in regard to the time when this right could be exercised.[33] It has been held that a minor wife did not lose her right to repudiate the marriage within a reasonable time after she came to know of her right and not necessarily when she attained puberty. In such cases they

have even waived the condition of non-consummation when such consummation was by force[34] or before she attained the age of fifteen.[35]

Right of the wife to dissolve the marriage on the ground of failure to maintain : This right has been interpreted in two ways. One group of decisions basing itself on the traditional 'fault theory' has denied the right to a wife to divorce where her conduct was such as to absolve the husband from his duty to provide maintenance.[36] The other group has tended to uphold the right, irrespective of the wife's conduct.[37] These two groups of decisions clearly indicate that legislation alone cannot eliminate rigid traditionalism with its desire to preserve the status quo. Without supporting judicial interpretation, even the policy of law is negated. The decision of Justice Krishna Iyer is, therefore significant as he has focussed his observations on the right of the Muslim wife to divorce when her husband has failed to provide her maintenance for two years - herein has the dialectic of law. He supported the theory of dissolution when the marriage has broken, irrespective of the relative faults of the parties:

> "There is no merit in preserving intact the tie of marriage when the parties are not able to and fail to live within the bonds of Allah, that is to fulfil their mutual marital obligations, and there is no desecration involved in dissolving a marriage which has failed. The entire emphasis is on making the marital union a reality and when this is not possible .... the Quran enjoins a

> dissolution.... This secular and pragmatic approach on Muslim Law of divorce happily harmonizes with contemporary concepts in advanced countries."[38]

The report therefore, recommends that the right of the wife to dissolve, on the failure of the husband to maintain her , irrespective of her conduct which may be the main or contributory cause should be clearly spelt out.[39]

Muslim Law had always recognised that in some cases the wife may be able to get a divorce. To the uncodified law the Dissolution of Muslim Marriages Act has added further grounds. "But all the grounds for divorce in the case of a woman are subject to proof and judicial scruting whereas a man need not assign any reason for divorcing his wife. This is far from the requirements of equality of sexes."[40] Furthermore, the power of the husband to pronounce talaq unilaterally — "any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause."[41] The divorce may be oral or written[42] — remains , and has in no way been curtailed either judicially or through legislation. As long as this absolute and unlimited right remains, the position of the Muslim wife will remain insecure and her status cannot be raised. The Report totally disagrees[43] with the view that, with Justice Krishna Iyer's judgement[44] and her right to obtain divorce by 'Khul', a Muslim woman's rights "are brought into approximation with those of the man".[45] While the judgement is undoubtedly a great step forward, it has to be remembered that she still has to wait for two years without maintenance before

getting her release. Also, a right to buy her release, as provided in the Koran can hardly be regarded as approximating the unliateral right of the man.[46]

Legislation is the only instrument — the innovative role of it[47] — which can bring the Muslim divorce law into line with not only the needs of society but with the prevailing law in other Muslim countries. Turkey and Cyprus have completely prohibited unilateral divorce, while in Tunisia, Algeria, Iraq and Iran the husband has to apply to a court. In Pakistan legislation has restrained the freedom of the husband to divorce his wife. He has to inform the Arbitration Council which will try and bring about a reconciliation. The husband's pronouncement of 'talaq' without informing the Arbitration Council has been declared to be an offence.[48] That is why the Report, recommends immediate legislation to eliminate the unilateral right of divorce and to introduce parity of rights for both partners regarding grounds for seeking dissolution of a marriage.[49]

Christian Law

All Christians are governed by the Indian Divorce Act, 1869[50], (IDA). This Act (IDA) "... passed over a century back, is the oldest matrimonial law prevailing in India. Whereas a law passed as recently as 1955 (HMA) has been amended innumerable times in order to bring it up to date in keeping with the social climate, the IDA remains a virtual 'touch - me - not'".[51] "It is an anomaly that in an age when

we are heading towards divorce on demand and on grounds of breakdown, the IDA still clings to antiquities"[52] — being manolateral.

Under the Act both husband and wife can obtain a divorce but there is a great difference between the rights of the husband and the wife. The husband can obtain a divorce only if the wife has committed adultery. The wife can seek a divorce on the following grounds[53].

(a) husband's apostasy and marriage with another woman;
(b) incestuous adultery;
(c) bigamy with adultery;
(d) marriage with another woman with adultery;
(e) rape, sodomy or bestiality;
(f) adultery with cruelty ; and
(g) adultery with desertion.

Thus the wife has to prove two offences by the husband before she can obtain a divorce, "and more often than not she succeeds only in one; thus she gets only a judicial separation and not a divorce."[54] There is no end to the stalemate as, unlike under Hindu law or the Special Marriage Act, 1954, a decree of judicial separation can never ripen into a divorce.[55] Thus parties continue to be judicially separated for decades without a divorce.

There is no provision for divorce by mutual consent either. Recently in one case,[56] the parties, married under the Indian

Christian Marriage Act, 1872, presented a petition for divorce by mutual consent under the Special Marriage Act. They failed as the High Court (Delhi) and even the Supreme Court held that they were governed by the Indian Divorce Act which does not permit divorce by mutual consent. Thus even after long years of litigation the parties got no relief.

The law is so outdated that the need for revision has been felt for quite some time. The Government , realising the need for reform referred the matter to the Law Commission in 1960. The Commission prepared a Draft Bill. The Christian Marriage and Matrimonial causes Bill, 1960, contains almost all the grounds included for divorce under the Special Marriage Act, 1954, such as desertion, cruelty, adultery, leprosy, venereal disease, apostasy, and wilful refusal to consummate the marriage.[57] Further, either party to a marriage can also obtain a decree of judicial separation on any of the grounds mentioned for divorce. The Report , regrets that inspite of these preparatory steps, no action to enact this measure has been taken by the Government so far and recommends that no further time be lost to reform and amend this law on the lines suggested by the Law Commission.[58]

Besides this, in a recent case, nullity of marriage between a Khasi tribal woman and a man, married under the Indian Christian Marriage Act, became a matter for judicial determination.[59] It was a very hard case where the woman suffered tremendously. The husband tried to ruin her career by making false allegations against her character by writing to her boss. The court was convinced of the cruelty inflicted on her by the

husband but could grant only separation and not annulment as cruelty is a ground for separation.

On May 10, 1985, however the Supreme Court issued notice on the constitutionality of the IDA. This order was passed on the wife's petition in the afore-mentioned case. According to the judges," the time had come for Parliament to make a uniform law of marriage and divorce applicable to all people irrespective of religion or caste." They also suggested that "irretrievable breakdown of marriage and mutual consent as grounds of divorce" should be provided in all cases. A copy of the court order has been forwarded to the Union Ministry of Law and Justice for appropriate action.[60]

The remarks of the Andhra Pradesh High Court[61], are pertinent here: " It is some what strange that in second half of the 20th century a Christian wife is not in a position to get a decree for dissolution of marriage on the ground of cruelty only or adultery only. The Indian Divorce Act was modelled on the English Matrimonial Causes Act, 1857. Whereas the law has been amended in England from time to time and the petition is that ... the decree for divorce can be granted on ground of cruelty, the law in India under the Indian Divorce Act unfortunately is unchanged .... It is incongruous to allow such discriminatory provision after the coming of the Indian Constitution guaranteeing equal protection of law and prohibiting discrimination."[62]

"Hopefully the Supreme Court order will bring some results.

The marriage relationship is a bond. The law should not turn it into a bondage. Law should be for [person] and not Man for the law".[63] Furthermore "...life... is dialectical and not deterministic"[64] and is also not a blind alley, cannot then law be so? The recent decisions and interpretations of the Supreme Court and few High Courts (viz., Andhra Pradesh High Court) have provided an impetus for the dialectics of law, which aims at depatriarchizing our society by obliterating the roots of "femme- genderocide", or 'sexist dialectic,' or 'manolateralism.'

Parsee Law

The Parsees are governed by the Parsee Marriage and Divorce Act, 1936. Both the parties to the marriage can initiate divorce proceedings on the following grounds:

(a) continuous absence for seven years;
(b) non-consummation;
(c) insanity;
(d) adultery, bigamy, rape or an unnatural offence;
(e) Causing grievous hurt or venereal disease;
(f) imprisonment for seven years or more;
(g) desertion for three years;
(h) non-resumption of co-habitation following a decree of judicial separation or restitution of conjugal rights; and
(i) apostasy.

In addition to these common grounds, the wife can obtain a divorce if she has been compelled by her husband to prostitution.

The Committee recommends the inclusion of this provision in all other personal laws.[65]

Jewish Law

The Jews in India are not governed by statutory law but by their customary law. Still divorce can be obtained through the courts on grounds of adultery or cruelty. Monogamy is generally practised except in certain specified cases . Because they are a small minority, no effort has been made to codify or reform this law. It is necessary, therefore to codify and reform the Jewish law on the subject, introducing the principle of monogamy andthe normal grounds for divorce provided for in the Special Marriage Act, 1954.

Special Marriage Act, 1954.

This Act provides for a secular form of marriage which can be taken advantage of by all persons in India irrespective of their irreligiosity or religious faith. The only condition necessary for a valid marriage under this Act is that the man must be over twenty -one years of age and the woman over eighteen and neither has a spouse living at the time of marriage—which is of the form Civil Registration. Persons who marry under this Act will be governed by the provisions of the Act and not by their own personal law, with respect to their matrimonial rights and remedies. Hindus too may marry according to this Act but in this case the parties will be bound by the Indian Succession Act of 1925 and not by the Hindu Succession Act of 1956; according to the former the wife takes a greater share

in the intestate property of her husband[66] and also "there is no provision to compel a wife to pay maintenance to the husband".[67] "It is secular and fits into the framework of India being a secular democratic state."[68]

The grounds on which divorce can be obtained by either party to marriage are :

(a) adultery;
(b) desertion for a period of three years;
(c) cruelty;
(d) unsound mind for three years;
(e) leprosy, venereal disease;
(f) Continuous absence for seven years;
(g) non-resumption of co-habitation for one year following a decree of judicial separation or restitution of conjugal rights.

In addition to these, the wife can obtain divorce on the ground of rape, sodomy or bestiality.[69] A special feature of this act is that the parties can also dissolve the marriage by mutual consent.[70] All that the parties need do in order to obtain divorce under this provision is to present a petition tothe court that they have been living separately for a period of one year or more and that they have not been able to live together and that they have mutually agreed to dissolve the marriage.

The report recommends that mutual consent should be recognised as a ground for divorce in all personal laws — with such recommendations only the HMA was amended in 1976 and the

provision for divorce by mutual consent was introduced — so that two adults whose marriage has in fact, broken down can dissolve it honourably.[71]

The Committee further observes that two general principles should be adopted for reform of all divorce laws:

(i) there should parity of rights regarding grounds for divorce for both partners[72], and

(ii) Conversion to another religion should not be recognised as a ground for divorce as it offers an easy way of avoiding matrimonial obligations.[73]

The role of such resplendent observations and recommendations is indispensable in setting in the dialectic , which is conducive to the legal system for performing its innovative role.

II. Maintenance Rights

The obligation of the husband to maintain his wife arises not out of any contract, manifest or implied, but out of the status of the marriage. As in other branches of law, the right to maintenance forms a part of the personal law and therefore is not uniform.

Apart from the right given in the personal laws the Criminal Procedure Code enacted in 1898, provided for right of maintenance. The right of the wife and dependent children to move the court for relief against the husband or the father who neglects or refuses to maintain his dependent family members

is thus not confined to any particular religion but is given toall wives and children irrespctive of their personal laws. To this extent uniformity has been achieved in at least one aspect of family law. Considering the date of this law the obligation was, understandably, confined to only the husband or the father, with no corresponding obligation being placed on the wife or the mother.[1]

This Code has, however, been repealed and today governed we are by the New Criminal Procedure Code of 1974. In spite of the passage of 76 years, however, the new Code continues to reflect the old attitude towards women. With some modifications like extending the right to demand maintenance to indigent parents and to divorced wives, the obligation to maintain continues to be that of the man.[2] In the changed social content and particularly in view of our avowed declaration of equality, it is irrational to place the obligation only on the man. However minuscule the number may be, there are today women economically independent who can not only look after themselves but also their husbands and children. Similarly the duty to look after indigent parents cannot be restricted only to sons. As a matter of fact the exclusion of daughters from the obligation may be used as an argument to deprive them of their share in the father's property.

As the Committee believes in equal status of husband and wife and of son and daughter, it recommends amendment of the law to provide for obligation of the economically independent women[3]

(a) to maintain her dependent husband;

(b) to share with him the duty to maintain their children;

(c) to share with her brothers the duty to maintain their indigent parents;

The inclusion of the right of maintenance in the Cr PC has the great advantage of making the remedy both speedy and cheap. The underlying principle of this is to prevent starvation and vagrancy, which usually leads to the commission of crimes[4]. From this point of view, it seems unjustified to limit the total amount of maintenance for all dependent persons to Rs.500 p.m.

The Report, welcomes the extension of the right to divorced wives as the previous restriction to wives only was an obstacle to a woman wishing to free herself from a marriage which was causing her no happiness or satisfaction.[5] Besides this, an exception has been introduced [6] to deny maintenance to those divorced wives who have received a "sum of money payable under customary or personal law." This clearly excluded Muslim women who may have got the dower (mahr) at the time of dissolution. There is no scope even for judicial scrutiny to examine whether the amount paid as dower is adequate for maintenance or not. This exclusion of all divorced Muslim women defeats the purpose of the section to provide a speedy remedy to indigent women, observes the Report.[7] But in a recent judgement[8] the Supreme Court made Sec 127 (3) (b) ineffective by holding that mâhr was an obligation imposed on the husband as a mark of respect for the wife. It is not an amount in consideration of divorce. As beautifully remarked by Chief

Justice Chandrachud :"He does not divorce her as a mark of respect."[9] Therefore indigent Muslim Woman is entitled to maintenance from her husband even after divorce the Supreme Court ruled.

That the dialectic was set[10] in by such a verdict, becomes more evident by what the judgement had to say: "A beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts, because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable."[11]

Hindu Law

Unlike the right given under criminal law, where the claim of the wife depends on the husband having 'sufficient means', under Hindu Law her right is absolute and the husband cannot claim inadequate means to deny maintaining her .[12] But she loses her right if she deviates from the path of chastity. Even a single lapse from chastity may affect her right detrimentally.[13] Under criminal law, however, the right will be affected only if the wife is living in adultery at the time of her claim. Her past adultery will not affect her right but may be a factor in fixing the amount of maintenance (alimony).

The exacting standards are perhaps explained by the fact that both under the uncodified Hindu Law as well as under the present law, the Hindu Adoption and Maintenance Act, 1956, she

gets a real maintenance. According to judicial opinion "just an adequate fare with nothing for clothing, residence as also for medical attendance and treatment falls short of maintenance" and these are "minimal in a civilised society."[14]

The lacuna in limiting the obligation of maintenance to the man only has been remedied by the codified Hindu Law, i.e., the Hindu Adoption and Maintenance Act. Maintenance pendente lite (pending the suit) and even the expenses of a matrimonial suit will be borne by either husband or the wife if the other spouse has no independent income for his or her support. The same principle will also govern the payment of permanent maintenance[15] and the court will fix the amount taking the needs of the applicant into account. If necessary the court may secure the payment of this amount to the party concerned, by securing a charge on the immovable property of the respondent. Such a right will continue as long as the applicant for maintenance remains unmarried.

It is strange that while the question of maintenance as a real need and responsibility of either spouse was recognised by the Hindu Marriage Act, and the Hindu Adoption and Maintenance Act, as early as 1955 and 1956, respectively, the Criminal Procedure Code passed in 1974 should have reverted again to the 19th century concept which regards woman as only a dependent.[16]

Muslim Law

Maintenance (nafaqa) of the wife is a precept in the Quran and the highest obligation of the husband. Maintenance

includes food, clothing and lodging and is in no way dependent on the husband's means or on the wife's lack of possession of an independent income.[17] She has, however, to be accessible to the husband and obey his reasonable commands.

Under the personal Law, the court while fixing the amount, considers the rank and the circumstances of both the spouses. As already discussed, failure of the husband to maintain his wife for two-years entitles her to get a divorce.[18] Her right to maintenance lasts only as long as she remains a wife. If she is divorced she loses her right of maintenance and is only entitled to it for three months after the divorce (the period of iddat—seclusion—)or to the period of pregnancy, whichever is longer.[19] After this period she has no further claim and it is this which has created a discrimination between the Muslims and other Indian Women. The Committee recommends the removal of this discrimination and extension of right of maintenance to divorced wives.[20]

As mentioned earlier[21], the Supreme Court recently "upheld the divorcee's contention for maintenance beyond the iddah period and applied Section 125 Cr PC as the Muslim Personal Law does not admit any maintenance beyond the period of iddah. In this case the Supreme Court observed, 'There is no conf-lict between the provisions of Section 125 cr PC and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself!'"[22] Such effulgent

judgements go a long way in ensconcing the dialectics of law, which pulverizes the status quoistic relegation of the status of women.

Christian Law

The maintenance rights of a Christian wife are governed by the Indian Divorce Act, 1869. The provisions are the same as those under the Parsee Law, and the same considerations are applied in granting maintenance both alimony pendente lite as well permanent maintenance. Apart from similar provisions in the Parsee Act, there are two sections in the IDA which reinforce the guilt theory on which the Act is based but which indirectly affect maintenance rights. One gives discretion to the court to order the settlement of the wife's property for the benefit of the husband or the children if divorce has been obtained by the husband because of the wife's adultery. The other provides that if the court has decreed damages to the husband against the adulteror, it may order the settlement of the whole or part of this amount for the benefit of the children or maintenance of the wife.[23]

Parsee Law

The Parsee Marriage and Divorce Act, 1936, being a pre-independence legislation recognises only the right of the wife to maintenance-both alimony pendente lite as well as permanent alimony. In firing the quantum as permanent maintenance, the court will determine what is just bearing in mind the ability of the husband to pay, the wife's own assets and the conduct of the parties. The order will

remain in force as long as the wife remains chaste and unmarried.[24]

The right of the wife to be maintained by the husband has been regarded as being an inherent right. Therefore any contract by her giving up future rights of alimony has been regarded as contrary to the public policy.[25]

In order to minimize the hardship caused by non-payment of maintenance and to ensure certainty of payment, the Report recommends that all maintenance amounts should be deducted at the source of the employer as in the case of income-tax. Where this is not possible, arrears of maintenance should be recovered as arrears of land revenue or by distress as in the case of fines under the Cr. PC. The best solution lies in entrusting the entire question of maintenance to specialized courts like family courts which could take into consideration the incomes and degrees of financial dependence of both spouses in settling such matters.[26]

III. Inheritance Rights

As in other branches of law, the inheritance rights, too, form a part of the personal law and therefore are not uniform. This part of the present chapter takes into its purview, the right to inheritance provided in the Hindu, Muslim, Christian and Parsee Laws and its dialectics.

Hindu Law

The problem of succession cannot be understood without reference to the law of joint family — as mentioned earlier, it

is important to remember that the joint family property law, the draft of which was ready in the 50s, which was to have been taken up for enactment, has yet to see the light of the day[1]. Under the Mitakshara law, the law of succession is intimately connected with the special incidence of coparcenary properties. In coparcenary properties a son, son's son, son's son's son (son's grandson) acquire a right by birth. Thus only males can be coparceners.[2]

The salient feature of a Mitakshara coparcenary is the existence of community of interest, unity of possession and the right of survivorship among the coparceners. So long as the family is undivided , no individual coparcener can claim that he is entitled to a specific share of the joint estate. His share is liable for increase by deaths and decrease by births. The properties are managed by the Karta who is usually the eldest among the coparceners.

Though the institution of joint family was common in most parts of India, there were two major systems prevailing in the country —Mitakshara (which prevails throughout India except Bengal) and Dayabhaga (prevalent in Bengal) —which dealt differently with the property rights. Added to these two systems was the matrilocal system — Marumakkattayam law — which prevailed in some southern states. Pre-independent India, therefore had a number of different systems of succession among Hindus and in most of them, the position of the woman was one of dependence with barely any proprietary rights — a manifestation of 'sexist dialectic' — . Even where

they enjoyed some rights they had only a life interest and did not enjoy full ownership. The following legislations bear a testimony to this :

(i) The Married Women's Property Act, 1874:
This Act was one of the earliest laws which widened the scope of Stridhan. Under the Act , the separate property of woman included (a) wages and earnings of married woman in any employment, occupation or trade carried on by law; (b) money acquired through literary artistic and scientific skill; (c) all savings from and investment of such wages; and (d) a Policy of Insurance effected on her own behalf. This extension of the definition of Stridhan increased the right to own and acquire property and thereby provided an incentive to women for being engaged in remunerative outside work.[3]

(ii) The Hindu Law of Inheritance (Amendment) Act, 1929: It was applicable to persons who belonged to the Mitakshara school and to property of males not held in coparcenary and not disposed of by will.[4] This law recognized son's daughter , daughter's daughter, sister and sister's son as among the heritable Bandhus and were placed immediately after father's father and before father's brother.[4]

(iii) The Hindu Women's Right to Property Act, 1937:
This act introduced changes of a limited character

> to give relief to a widow, a widowed daughter-in-law and a widowed grand daughter-in-law.[5] Mayne aptly pointed out the advantages of the Act. According to him, this made 'Mitakshara widow succeed to the coparcenary interest of her [deceased] husband in the partable property of the Joint family and along with his male issue to his separate property and to enable a Dayabhaga widow to succeed along with the male issue in all case'.[6]
>
> As for the self acquired property of an individual, the wife, the daughter, and the mother were as usual recognized as heirs. It should, however, be noted that the property they inherited was in the nature of restricted or limited estate, for at the death, it passed on to the next heir of the male from whom she inherited.[7]

While earlier this may have been socially acceptable with socio-economic changes brought about in the 20th century this inferior position was no longer tenable — the adaptive role performed by the preceding Acts should not be overlooked, it did set in a dialectic.

As discussed earlier, the rigidity that had crept into the law because of the British policy of non-intervention had made it impossible to adapt the legal systems to change. The position, therefore could only be remedied by legislation which would reflect the socio-economic charges since our independence and at the same time fulfil

the promise of non-discrimination guaranteed in the Constitution.

With the object of bringing in uniformity and conformity with the norms of the post- Constitution period, the Hindu Succession Act was passed in 1956, though after a stiff resistance from the traditionalists (an earlier chapter has highlighted this dialectic between the progressive and conservative forces in the Parliament). This enhanced the dialectics of law but could not obliterate it as this Act too like others came to be known for its lacunosity - the root of dialectics. But the root of the roots of the dialectics of law, here, lies in "Man - his ethos, ambience, mores and norms."[8]

The Act brought in some radical and fundamental changes, the most important of which was to introduce equal rights of succession between male and female heirs, in the same category, like brother, and sister, son and daughter. It also simplified the law by abolishing the different systems prevailing under the Mitakshara and Dayabhaga Schools. The Act also extended to person in south India previously governed by the Marumakkattayam law. The hold of tradition, however, was so strong that even while introducing sweeping changes, the legislators compromised and retained in some respects the inferior position of women. By yielding to pressure, it sacrified the uniformity which had been one of the major aims in introducing this law. A close study of the Act discloses

that there are still a number of different systems governing succession.[9]

The most remarkable features of the Act, however, are the recognition of the right of women to inherit equally with men and the abolition of the life or limited estate of female heirs. The Class I heirs [10] of a man today "succeed simultaneously."[11] These heirs take the property in equal shares and as absolute owners.

The one major factor which has contributed to continuing the inequality between sons and daughters is the retention of the Mitakshara coparcenary, which is an anachronism in the present day. It has been stated times without number and by eminent scholars of Hindu Law that the right by birth and survivorship and the restrictions imposed by them on the power of alienation of coparcenary property and the deprivation of the right for succession of those who are nearer and dearer to a deceased male member than a coparcener are all outworn indicia of the ancient type of family which has become almost extinct.[12]

As mentioned, membership of it is confined only to male members. No stranger can be introduced even by agreement of a all the members and no female can be a member of a coparcenary. There are no succession rights in a coparcenary but the interest of a coparcener on his death goes to the remaining members. A number of decisions, as also

legislation in the 20th century like the Hindu Women's Right to Property Act, have made inroads in the concept of the coparcenary and in some ways it had really lost some of its important features. It would therefore have been quite feasible at the time of the 1956 Act to abolish it altogether. One point of view is that the "best solution would have been to abolish the ancient legal formula of acquistion of rights by birth and devolution by survivorship. Since the logical way was to assimilate the Mitakshara to the Dayabhaga, this could also have had the merit of equable treatment of the nearest female heirs of a coparcener and of bringing about uniformity in the law in all parts of India."[13] But there was strong opposition to this point of view and the institution was retained but an effort was made to make some provision for the nearest women members of a person i.e. class I heirs.

The compromise arrived at was that if a male member of a coparcenary dies then for the purpose of ensuring that his heirs get a share of the property, his share of the coparcenary will be demarcated, as if there had been a partition and that share will be divided among his heirs. It means that, if there is a coparcenary of a father and two sons, the share a father would have got on partition would be one-third. This will be divided among his Class I heirs. The consequence of this is that the two sons in addition to their original interest as coparceners, will get equal shares

of the father's property with the mother, grandmother, sister etc.[14] In a similar situation under the Dayabhaga system, the daughter will get an equal share with the brothers as there is no right by birth for sons. The retention of the Mitakshara coparcenary, therefore, not only brings about inequality between the same class of heirs but also continues two different systems of inheritance.

The retention of coparcenary has also meant the continuation of two rights both of which affect the rights of female heirs detrimentally. The first is the right of a coparcener to renounce his right in the coparcenary. The result of this is that on his death he will have no interest in the joint family which could be distributed among the class I heirs. This deprives the female heirs of any share. A similar result can be achieved by a father who partitions joint family property during his life time without reserving any share for himself.

The second of such characteristics is the right to convert self-acquired property to coparcenary property. The effect of this is that the share of a female heir is reduced because in the self - acquired property she would have had the right to inherit equally with the male members as Class I heirs.

Mitakshara coparcenary with its basic principle of right by birth of a male coparcener is the cause of unequal rights

between the male and female heirs, though the Act accepted in principle the equality of sexes. It should be noted that the Hindu Code Bill, 1948, as amended by the Select Committee, had in fact, suggested abolition of the right by birth.[15] Therefore, the Committee[16] recommends the abolition of the right by birth and conversion of a Mitakshara coparcenary into a Dayabhaga one - this is what B.N. Rau's Hindu Law Committee had recommended in 1944, in the Draft Code.[17] It was in keeping with all this, that in 1976, the Kerala government passed an Act abolishing the Hindu joint family.[18]

Another provision in the Hindu Succession Act, which contributes both to the lack of uniformity as well as continuation of discriminatory treatment of female heirs is the provision excluding the devolution of tenancy rights under the legislation of the States, from the scope of the Act.[19] This has led to the elimination of the beneficial effects of the Act under the land legislation in many States. Some states do not have special provisions for succession to tenurial interest. The dominant conservative groups in some states have, however, successfully excluded widows and daughters. The case in point is the legislation in Uttar Pradesh.[20]:

> When a bhumidar[21], sirdar or asami being a male dies, his interest in his holding shall devolve in accordance with the order of succession given below:

(a) the male descendant in the male line of descent in equal shares per stirpes;

(b) widow and widowed mother and widow of a predeceased male lineal descendant in the male line of descent, who have not married.

(c) Father;

(d) unmarried daughter.

The above scheme of inheritance shows that in competition with a son the widow of a deceased is not entitled to succeed. The claims of a widow and unmarried and married daughters are preceded not only by the lineal male descendants in the male line of descent, but even by their widows who have not remarried. The exclusion of the widow and the daughters cannot be justified on any principle.[22]

"It was with great concern that one learned of the amendment the Punjab Cabinet has resolved to make of the Hindu Code, depriving the daughter of her share in the inheritance of her father's (agricultural land) property. A resolution of the same effect was brought in the Vidhan Sabha of the Haryana State. If the States are allowed to tinker with the Hindu Code in this way, we shall be where we were before the codification of the Hindu Law."[23]

"Those who now wish to amend the law have no new arguments to offer for doing so. In the past, they used to trot out the danger of fragmentation of land, as if giving

daughters their share would bring about fragmentation while there would be no fragmentation if it was divided between many sons".[24] In order to achieve the social equality of women as also in the interests of uniformity the Report recommends the abolition of the exception provided in section 4(2) of the Hindu Succession Act, relating to devolution of tenancies.[25]

Another discriminatory provision in the Act is the one relating to the right of inheritance to a dwelling place. It provides that where a Hindu dies intestate and his property includes a dwelling house wholly occupied by the members of the family, then the female heirs are not entitled to claim partition of it unless the male members choose to divide their shares in the dwelling house. Females heirs are entitled to only the right of residence. Even in this there is a discrimination as this right is restricted to unmarried and widowed daughters or those deserted by or separated from their husbands. A married daughter enjoys no such right.[26] Observing that nothing justifies the invidious distinction between married and other daughters the Committee recommends the removal of this discrimination so that all daughters enjoy the same right.[27]

Like the Indian Succession Act, 1925, the Hindu Law i.e., both Mitakshara and Dayabhaga place no restriction on the power of testation. During the debates in Lok Sabha on the bill, the fear was voiced that this may lead to the rights of

a female heir being defeated. But the Law Minister had brushed aside these fears by saying, "I believe that a normal father will never do any such thing and if at all he has to do it for any reason he will surely make a provision for his daughter when he is going to deprive her of her share by will "[28] But this is an over-simplification of the question and as was pointed out during the debate in the Constituent Assembly, "an analysis of the inmates of rescue homes in this country will prove how many of these women are those who have been turned out of the joint family."[29] The Committee's own experience in many places, but particularly in Benaras, more than proves the point that there are many women who have been reduced to destitution and beggary because their families have deprived them of all support.[30] Therefore, the Report, recommends that the right of testation should be limited under the Hindu Succession Act, so as not to deprive legal heirs completely.[31]

Muslim Law

The Muslim Law of inheritance is no less inequitable. For whatever be the line of succession, the share of male heirs at every level shall be twice that of female heirs at that level[32] — a manifestation of 'manolateralism'—.

A vast majority of Muslims in India follow the Hanafi doctrines of Sunni Law and the courts presume that Muslims are governed by the Hanafi Law unless it is established to the contrary. Though there are many features in common

between the Shiah and the Sunni schools, there are differences in some respects. The Sunni Law regards the Koranic verses on inheritance as an addendum to the pre-Islamic customary law and preserves the superior position of male agnates.

The heirs related to a deceased person by blood (consanguineous relations) under the Sunni or Koranic Law are divided into three groups :

(i) Zav-il-Furuz (the sharers or the Koranic heirs);
(ii) the Asaba (agnates or 'residuaries'); and
(iii) the Zav-il-Arham (uterine relations).

The heirs who are neither sharers nor residuaries fall into the third category. The sharers take the estate first; the remaining estate (or the whole of the estate in the absence of heirs of the first kind) is taken by the residuaries. If there are no sharers and residuaries the estate goes to the uterine relations.

Where there are sons and daughters they inherit as residuaries. Thus if the deceased dies leaving a widow, son and daughter, the widow takes 1/8 as a sharer, the son takes 7/12 (2/3 of 7/8) and the daughter 7/24 (1/3 of 7/8). On the other hand, a daughter in the absence of a son takes the estate as a sharer, half the share if there is only one daughter and 2/3 if there are two or more daughters. Thus, if the deceased dies leaving father and daughter

the daughter is entitled to half the property as a sharer, the father to one-sixth as a sharer and the remaining one-third as a residuary. Therefore, if a Muslim dies leaving a daughter as his only close relative, she will not be allowed to take more than one half of his estate, the other half will go to some distant agnatic relative. Under the Shiah law the daughter would, in a similar situation, take one half as her share and the remaining half under the doctrine of radd (return)[33].

One primary principle of Muslim law. As noted earlier, which grossly discriminates against women is that under the law of inheritance, if there are male heirs and female heirs of the same degree like a son and daughter, the share of a female member is half that of the male.

Under the Hanafi law the widow, though a sharer in every case, is not entitled to take as a residuary. The share of a widow (or widows , if there are more than one) is one-eighth. If the deceased dies without leaving a child, the widow's (or widow's) share is one-fourth. The wife is not entitled to the radd. The social conditions of the present day necessitate that the measure of protection and security that a wife is entitled to, should be in no way inferior to that of any other mem-berin the family, either during the lifetime of the husband or after his death. Therefore, a widow's position in the law of succession deserves particular attention.[34] Under the Shiah law also neither

husband nor wife is entitled to the radd but if either of them is the sole surviving heir then they inherit the whole property.

Unlike Hindu and Christian Law, Muslim Law restricts a person's right of testation. A Muslim can bequeath only 1/3 of his estate. The question is whether he has the power to correct any hardship that might arise under the law of intestacy by the exercise of his testamentary power (i.e., of one-third of his estate). It is beyond cavil that such hardship arises generally in the case of female heirs. But the Hanafi law appears to be particularly rigid in not permitting any device whereby the inequities of the laws of inheritance may be rectified.[35]

The Shiah law allows a Muslim the freedom of bequest within the disposable third, and recent reforms in Egypt, Sudan and Iraq also permit this. If the rule is relaxed here, it may be possible for a husband to make a bequest to his widow or widows' which would help to make up for the inadequate share they get on intestacy.[36]

Muslim law makes no distinction between movable and immovable property and though the right of a female heir like a widow or daughter has always been recognised and they have inherited absolutely (unlike the old Hindu Law), the Committee recommends, that legislation be passed to give an equal share to the widow and the daughter along with the son as has been done in Turkey.[37]

Christian Law

The Indian Succession Act, 1925, governs Christians, Jews, Parsees, and those married under the Special Marriage Act, 1954. The rules of the Indian Succession Act, "generally recognize the equality of sexes and do not discriminate against women."[38] "A door seemed to open for a favourable change when the Indian Succession Act was introduced ... under which a widow become entitled to one third share of the husband's property, one half share when there was no issue. But this applied only to those who came under the Special Marriage Act [1923] where the couple swore to not belonging to any religion. It was even more anomalous in the case of Brahmins who were ruled according to the rulings of the orthodox Hindu Law in succession to property."[39]

The Act of 1925, confers no restriction on the power of a person to will away his property, and the protection enjoyed by a Muslim widow to a share of the estate and by the Hindu widow for maintenance is denied to other widows under this law. It is desirable, notes the Report, to place some restriction on the right of testation similar to that prevailing under Muslim law to prevent a widow from being left completely destitute.[40] Apart from this, in this Act, the wife takes a greater share in the intestate property of her husband.[41]

The amended law provides that in cases of intestate succession the widow with no lineal descendant is entitled to the whole property if its value does not exceed Rs.5,000 or

to a charge Rs.5,000 in cases where it exceeds this amount. This provision is not extended to Indian Christians, Hindus, Buddhists and Jains, succession to whose property is also governed by this Act.[42] Since this provision gives rights to childless widows, its denial to these groups cannot be justified.[43]

Furthermore,"the Punjab Laws Act, 1872, gave primacy to custom as a rule of decision. Therefore, in the former Punjab (now comprising the states of Haryana, Himachal Pradesh and Punjab) customary law is applied and not the Indian Succession Act (ISA). The customary law contain discriminating principles like the exclusion of the widow from succession and the exclusion of a daughter by collaterals. In two other territories discriminatory customary law or local statutes are applied – the former state of Travancore and Cochin, where there is a sizeable population of Christians and Pondicherry, the former French Colony."[44]

Christians in Kerala

Christians in Kerala are governed by the Travancore Christian Succession Act, 1916, and the Cochin Christian Succession Act, 1921. The Travancore-Cochin High Court,[45] held that Christians in these territories would be governed by their personal laws and not by the ISA, even after the merger of the states with the Indian Union. The personal laws of Christians are based on the notions of Hindu laws of inheritance, which discriminate against women. Under the

Travancore Christian Succession Act, a widow or mother was entitled to a life-interest only and not an absolute interest, terminable on death or remarriage. A daughter's right is limited to 'streedhanam', which is fixed at a quarter of the value of the share of a son, or Rs.5,000, whichever is less. The Committee, thus recommends immediate legislation to bring the Christian women of Kerala under the ISA.[46]

Christians of Goa and Pondicherry

In Goa, the widow is relegated to the fourth position and is entitled to only fruits and agricultural commodities.

In Pondicherry, the laws relegate a woman to an inferior position and do not regard her as full owner even in few cases where she can inherit property. Some Christian women are still governed by the Hindu customary law of inheritance based on Manu, which no longer governs even Hindu women. The Madras High Court,[47] not too late, held that under the customary law governing them a son excludes a daughter as an heir. Therefore the Report, recommends the extension of the Indian Succession Act, 1925, to these territories also.[48]

Parsee Law

For intestate succession among Parsees, the rules of devolution of property of male and female intestates differ, resulting in discrimination against daughters and mothers. The son is entitled to an equal share in the mother's property along with the daughter but the daughter is not entitled to the same right to the father's property. There

is no justification for such discrimination — rooted in the 'sexist dialectic'.

It should be pointed out that the above provisions were enacted in 1939.[49] At that time these rules conferred better rights on women than the then existing Hindu and Muslim Law. But with the passage of time, these rules have become out of step with the progressive trends in society — this is another dimension of the dialectics of law. The Parsee daughter's share remains half of that of a son as in Muslim law, but she is denied protection against disinheritance which is the beneficial feature of Muslim law.

The medley of laws which govern the right of inheritance of not only female heirs of different communities but even of female heirs in the same community require immediate measures. Broad principles like equal rights of sons and daughters and widows, and a restriction on the power of testation so that dependent members are not left completely destitute are needed immediately.[50]

But legislation cannot be an end in itself. Publicity of new legislation and educating women about their rights need to go hand in hand. Otherwise, like many other social legislations, the rights remain only on paper, and the dialectics of law fritters away, ossifying the 'indelible' relegation of the status of women — this is an allusion to the adaptive role of the legal system.[51]

During its tours the Committee found a large number of women completely ignorant about their rights of inheritance. Even when they know, they have been so conditioned — "what works in her mind is not she herself but the societal forces ...."[52] "... all the meanings of her life emanate not from herself but from man and his milieu"[53] — that many of them oppose sisters depriving their brothers of property. The survey report of the Committee, corroborates this finding, as 68.16% expressed their opinion against girls having some share with their brothers in parental property and 57.54% were against girls and boys having equal property rights. But in the absence of social security and inadequate opportunities for employment, a woman without financial security faces destitution in our country. It is true that in a country where a large section of the people are below the poverty line, measures for ownership of property will benefit only a limited section. However , for this section ownership of property will make women independent and they will undoubtedly gain in status. Besides, this will effectively check the feeling that women are a burden to the family.[54]

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22. Towards Equality, Op.Cit., p. 119(4.95).
23. Saimuddin vs. Latifunnisa. ILR. 1918 46 Cal. 141; Sadiqui vs. Ataullah. 1933 Lah. 685.
24. Saifuddin vs. Soneka. AIR 1955. ASS. 153.
25. Fyzee. 1964. Outlines of Mohammedan Law pp.142-155.
26. Sheikh, Shenaaz. December 9, 1984. A Muslims Woman Speaks Out. New Delhi : Indian Express. p.6.
27. Ali, Ammer. 1911. Mohammadan Law, Vol.2. pp.416-521.
28. The Statement of objects and reasons, Gazette of India, Part V. 1938, p.36.
29. Sec. 2 of the Act.
30. This is so because "100% rural Muslim women are unaware of Islamic laws and Shariat". Mentioned in Vazahat, Asghar. May 19,1985. Where lies the complete picture of Muslim women. New Delhi : Ravivariya Jansatta. p.1 (Our Translation).
31. Towards Equality, Op.Cit., P.120 (4.97).
32. Aziz Bano vs. Mohammad. 1925. 47 ILR All. 823 - In this case a minor Shia girl had been given in marriage by her father to a Sunni husband. She was allowed to repudiate her marriage as it was contrary to all rules of equ-ity and justice to force such a marriage onher.
33. Musammat Ayesha vs. Mohammad Yunas . 1938. Pat. 604.
34. Abdul Karim vs. Amina Bibi, 1935. 59 Bom. 426.
35. Gulam Sakina vs. F.S. A. Baksh 1950. Lah 45.
36. Rabiakhatoon vs. Mukhtar Ahmed. AIR 1966 All 548; Jamila Khatun vs. Kasim Ali AIR 1951 Nag.273; Bai Fastima vs. Mumna Miranji. AIR 1957 Bom. 453.

37. Mst. Nur Bibi vs. Pir Bux. 1950 Sind; Yusuf vs. Sauramma AIR. 1971.Kerala. 261.
38. Ibid.
39. Towards Equality, Op.Cit., p.121 (4.100).
40. Puri, Balraj. June 8, 1985. Muslim Personal Law : Questions of Reform and Uniformity be delinked. Bombay :Economic and Political Weekly, Vol. XX No.23. p. 989.
41. Mulla, D.F. Principles of Mohammedan Law. Section 308.
42. Ibid, Section 310.
43. Towards, Equality, Op.Cit., p. 121 (4.101).
44. Yusuf vs. Sauramma. AIR. 1971. Kerala.261.
45. Latifi, Danial. Outstanding decision on Muslim Personal Law.
46. Towards Equality, Op.Cit. p.121 (4.101).
47. Yogendra Singh. 1978. Legal System, Legitimation and Social Change. In Yogendra Singh. Essays on Modernization in India. New Delhi : Manohar. p.155.
48. Mahmood, Tahir (ed.) Family Law Reform in the Muslim World, pp. 272-298.
49. Towards Equality, Op.Cit., P.121 (4.103).
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51. Kusum. June 10, 1985. Christian Divorce Needs Reform. New Delhi : India Express.
52. Ibid.
53. Section 11 of the Act.
54. Kusum, Op.Cit.
55. Prafulla Kumar vs. Saroj Bala. 1980. Orissa; cited in ibid.
56. Reynold Rajamani vs. Union of India. 1982. Supreme Court.
57. 15th Report of the Law Commission of India. 1960. p.65.

58. Towards Equality, Op.Cit., P. 122 (4.106).
59. Cited in Kusum , Op.Cit.
60. Ibid.
61. Hemlata vs. Satyanarayan. 1979. AP.
62. Cited in Kusum Op.Cit.
63. Ibid.
64. Singh, Indu Prakash ; Nanda, Bikram et.al. Dec. 16, 1983. The Roots of Sati. New Delhi: Indian Express.
65. Towards Equality, Op.Cit., p. 122 (4.113).
66. Thomas, P. 1964. Indian Women Through the Ages, Bombay: Asia Publishing House. p. 370.
67. Chakravarty, Renu. The Law as it Affects Women. In Baig, Tara Ali. Women of India.
68. Sengupta, Padmini, 1974. The Story of Women of India. New Delhi : India book Co, pp. 234-5.
69. Sec. 27 of the Act.
70. Sec. 28.
71. Towards Equality . Op.Cit., p.123 (4.112).
72. Ibid., P. 124 (4.114).
73. Ibid., P. 123 (4.111).

II. MAINTENANCE RIGHTS

1. Order for maintenance of wives and children , Sec. 488 Criminal Procedure Code (Cr. PC).
2. Order for maintenance of wives, children and parents, Sec. 125 Cr. PC, 1974.
3. Towards Equality,Op.Cit., P. 129(4.148).
4. Law Commission of India, 41st Report p.303.
5. Towards Equality, Op.Cit., p.129(4.149).
6. Sec. 127 (3)(b) Cr PC 1974.
7. Towards Equality, Op.Cit. P.129(4.149).
8. Mohammed Ahmed Khan vs Shah Bano Begum. April 23, 1985. S.C.
9. Kusum. May 6, 1985. Muslim Wives: Maintenance After Divorce. New Delhi : The Hindustan Times.

10. Indian Express, April 29, 1985. Alimony for Muslim Woman : S.C. Verdict. New Delhi.
11. Indian Express, April 24, 1985, Op.Cit.
12. Mulla, D.F. 1960. Principles of Hindu Law. p.697.
13. "A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste". The Hindu Adoption and Maintenance Act, 1956, Sec. 18(3).
14. Kiranbala Shah vs. Bankim Chandra Shah. 1967. Cal.603.
15. HMA . Sec. 24 and Sec. 25.
16. Towards Equality, Op.Cit., p.130 (4.154).
17. Verma, B.R. 1971. Muslim Marriage and Dissolution. P.93.
18. See Section I of this Chapter.
19. Puri, loc. Cit.
20. Towards Equality, Op.Cit., P. 130(4.155).
21. See notes 8, 9 and 10 of this section.
22. Engineer, Asghar Ali. May 25, 1985. Divorce and Muslim Women. New Delhi : Mainstream, Vol. XXIII No.39, p.17.
23. Sec. 39 of the Act.
24. Secs. 39 & 40(1) of the Act.
25. Hirabai Bharucha vs. Pirojshah Bharucha. AIR. 1954. Bom. 537.
26. Towards Equality, Op.Cit., p. 131 (4.159 - 4.161).

III INHERITANCE RIGHTS

1. Rajagopaul, G.R. April 11, 1985. Mitakshara Co-parcenary and Women's Rights. New Delhi : Indian Express.
2. Towards Equality, Op.Cit., p. 135 (4.183).
3. Desai, Neera. 1977 2nd ed. (1957). Women in Modern India. Bombay : Vora & Co. p. 184.
4. Ibid., P. 185.

5. Sivaramayya. B. Equality and Inequality: The Legal Framework. In Beteille, Andre (ed).1983. Equality and Inequality. Delhi : Oxford University Press. p.52.

6. Cited in Desai, Op.Cit., p.186.

7. Ibid.

8. Singh, Indu Prakash. June 14, 1985. Well done, Ratna : New Delhi : Indian Express. p.6.

9. Towards Equality, Op.Cit., P. 135 (4.187).

10. Son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son. Cited in Sivaramayya, Op.Cit., Note 57, p.68.

11. Ibid., p. 52.

12. Rajagopaul, G.R. July 12, 1983. Equal Rights for Daughters. New Delhi : Indian Express.

13. Mulla, Op.Cit., p.916 - During the debate in the Lok Sabha Mitakshara Coparcenary was described as a 'tottering' structure on account of the shattering blows delivered to it by enactments from time to time and no useful purpose will be served by retaining it. The opposition argued that though 'battered and bruised ' it could still play a useful role.

14. Sec. 6 of the Act. Hypothetical illustration of this has been given by Sivaramayya, Op.Cit., pp.52-3.

15. "No right by birth shall be recognised by any court". An amendment proposed by the Government spelt out the details more clearly as it suggested : "No Hindu shall have any right to or interest in -
(a) any property of an ancestor during his lifetime merely by reason of the fact that he is born in the family of the ancestor , or

(b) any joint family property which is founded on the rule of survivorship".

16. Towards Equality, Op.Cit., p. 136 (4.194).
17. Rajagopaul, April 11, 1985, Op.Cit.
18. Sivaramayya, Op.Cit., P.53.
19. "For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the Provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings." Sec. 4(2).
20. The Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, Sec. 171.
21. A landholder or a proporietor.
22. Towards Equality , Op.Cit., p.137 (4.199).
23. Mehta, Hansa. Save the Hindu Code. In Mehta, Hansa. 1981. Indian Woman, Delhi : Eutala & Co. p.126.
24. Ibid., P. 127.
25. Towards Equality , Op.Cit., P. 138(4.201).
26. Sec. 23 of the Act.
27. Towards Equality, Op.Cit., P. 138 (4.205).
28. Law Minister Patankar 1955. 5 Lok Sabha Debates, Col. 8379.
29. Renuka Roy, Constituent Assembly of India (Legislative) Debates. Feb. 25, 1949. 928.
30. Towards Equality, Op.Cit., P. 138 (4.206).
31. Ibid., (4.207).
32. Puri, Loc. Cit.
33. Radd is the portion which remains after the heirs have got their specific shares like 1/4, 1/3 etc. The general rule is that the radd returns to the Koranic heirs in Proportion to their shares Fyzee, Op.Cit., p.408 and p.452.
34. Towards Equality, Op.Cit., P. 139(4.212).
35. Ibid., (4.215).

36. Anderson, J.N.D. Islamic Law in Modern India. In Mahmood, Tahir, Op.Cit., p. 204.
37. Towards Equality, Op.Cit., P.140 (4.218).
38. Sivaramayya, Op.Cit., P.55.
39. Chattopadhayay, Kamladevi. 1983. Indian Women's Battle for Freedom. New Delhi : Abhinav Publications. p. 117.
40. Towards Equality, Op.Cit., P.132 (4.165).
41. Thomas, loc. Cit.
42. Sec. 33 (a) of the Act.
43. Towards Equality, Op.Cit., P. 132(4.164).
44. Sivaramayya, loc.Cit.
45. Kurian Augusty vs. Devassy Aley. AIR 1957 Trav. Coch. 1 (1956) K.L.T. 559.
46. Towards Equality, Op.Cit., P.133 (4.173).
47. Pauline Lucas vs.Jerome Pascal. AIR. 1977. Mad.270.
48. Towards Equality, Op.Cit., P.134 (4.178).
49. Act XVII of 1939. The Amending Act of 1939 was repealed in 1942 (Act XXV of 1942) and the provisions were incorporated in the Indian Succession Act of 1925.
50. Towards Equality, Op.Cit., P. 140(4.219).
51. Yogendra Singh, Op.Cit., P. 139
52. Singh, 1983, Op.Cit.
53. Singh, 1985,Op.Cit.
54. Towards Equality, Op.Cit., P.140(5.220).

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CHAPTER VI

DIALECTICS OF FUTURE

"Over the ages, the course of advance from the lesser to larger, from the human to the divine, from the finite to the infinite, from duality to unity and chaos to cosmos, has been by the dialectical process of thesis, antithesis and synthesis. The values of a time hold good as just but, with the emergence of injustice, these very norms degenerate into cagebars provoking struggle for a fresh harmony and thus a brave new world is born, often in blood, sweat and tears. Woman, an equal of man in the march of the human race, has had her ups and downs in the zigzag stream of history. Mostly, she has been a slave, a serf, a subordinate, punctuated by periods when she has been idolized, but remained a doll, the cynosure of vicious eyes and praised into the prison-house of domestic drudgery." [1]

"The lot of women in feudal societies is worse, [Wrought] with polygamy, easy divorce for men, dowry system, defacto ban on widow remarriage, sex murders and rural slavery, not to speak of other discriminatory family laws. Take our own country, the dismal dowry system flourishes not-with-standing formal legal prohibition. Immoral traffic continues despite penal laws against it. Widow remarriages are raw, though the law allows it. Working women are discriminated in wages and other conditions of service, constitutional provisions to the contrary not-with-standing. In many ways, semi-feudal India metes out a raw deal to the weaker sex." [2]

"The core of the matter is that an exploitative society cannot consent to emancipation of women and will not implement legislation in favour of women even where public pressure compels the promulgation of favourable laws. In the field of matrimonial and guardianship law, the legislative and judicial processes have not been fair to the fairer sex."[3] It is for this reason only that "The haphazard development of family law today presents a confusing jungle which is satisfactory to none excepting perhaps practising lawyers."[4] "The confused cacophony of clashing family laws are as much an insult to men as they are to women."[5] ⇨ dialectics between different personal laws.

"India has taken some substantial steps since independence to upgrade the lot of women. Legally there is complete freedom in the choice of a spouse. Likewise, the freedom to remarry and to forbid child marriage are assured. Even so, the fact is not in keeping with the law [dialectics between law and life] . While the right to vote is equal the rules of divorce are discriminatory for women of some communities"[6] — all this has been shown in the preceding chapters.

The present chapter aims not at reiterating what has been observed in the foregoing chapters. It rather endeavours to look through the spect-acles, of Wo-manolateralism and the futristic role of the legal system to forret out ways of obliterating the imbroglio, wherein women lie embedded.

The dialectics of future, then seeks to answer the question, quo vadis ? The answer provided are not idealistic, rather they emanate from the vivid ground of reality, enlightened judicial pronouncements, and recommendations of the Law Commission, Various Committees, editorials and emancipated individuals. The substantive realms which would be studied for an awareness of the Dialectics of future are - some of the observations made here, have been intermittently mentioned in the preceding chapters - : eve - teasing, matrimonial property, property rights of Hindu Women, question of reservation, stridhan and dowry, rape, Muslim Women's maintenance rights, and uniform civil code.

Eve - teasing

This has been defined as, "When a man by words either spoken or by signs and or by visible representation or by gesture does any act in public place, or signs, recites or utters any indecent words or song or ballard in or any public place to the annoyance of any woman...."[7]. In an all India survey on harassment of women[8], it was found that eve-teasing was rampant in all the metropolitan cities, except Ahmedabad.

In response to the survey, it was, noted that "The survey on harassment of women comes at a time when the crime against women has touched the apex and the morality of Indian men its nadir. How can the delinquents thinks their mothers and sisters are safe while they denigrate other women. It is not surprising to see a policeman acting as a mere spectator while women are being harassed. To curb and obiterate the

harassment of women men have to come to the fore. If one man takes the initiative to set things right others will follow. We have created criminals because we are not potent enough to resist. I hope after reading the survey all Indians will have a sense of commitment."[9]

Such coverage by the Press, helps in generating public opinion, which in ossified society like ours is indispensable for providing an impetus to the progressive elements to subserve the dialectics of law to ameliorate, the status of women. Such developments would go a long way is guiding the path of dialectics of future — which envisages a depatriarchized society i.e. the entrenchment of dialectical egalitarianism.

Further, with eve-teasing on the rise, particularly in the cosmopolitan capital November 17, 1983, will stand out as a red letter day. On this day, Metropolitan Magistrate, V.K. Jain handed out a sentence of three months rigorous imprisonment (RI) and a fine of Rs. 300 to Tavizi Yahiya for eve-teasing Anjana Mangalagiri.[10] Such verdicts too bode well for the future, and not just for the present.

To eradicate this evil Delhi Administration formulated and passed, "The Delhi Prohibition of Eve-teasing Bill, 1984."[11] Promilla Kapur, described the bill as "good and healthy step" towards curing this social evil. However, she pointed out that every law in itself cannot eradicate such types of social evils. The reason being "there are ways and means to interpret the law in our system. But nevertheless law is a necessary step towards the right direction."[12] The picture drawn by the Legal advisor to the Delhi Police too

speaks well of the bill which according to him will definitely go a long way in assisting the police in nabbing the culprits. The bill is unique in the first place because never in the past has an attempt been made to define "Eve-teasing" Besides, that the offence has been made cognizable and non-bailable.[13]

There are other people who think that the bill is a fraud on women". One such person is Nandita Haksar. She pointed out that the offence of eve-teasing in different wordings is included in IPC sections 350, 354 and 509. While punishment under those sections could amount upto three months of imprisonment together with a fine the recent Bill of the Delhi Administration had made it only one week of imprisonment. "It's in fact just an eye-wash and fraud on women", she insisted. In fact this is in conformity with the general attitude of the police which always tries to "trivialize the issue and minimise offence, specially on women," she added.[14] It is such critical insights only that points out the launosity of laws, its impotency and its obsolescence, and keeps law on the move. Future, then has to be open to such views and act to incorporate the suggestions mentioned. This happens to be an important ingredient of dialectics of future, in relation to law and status of women. Only then can we think of eradicating a social evil like, eve-teasing, which takes women as a commodity sans dignity, worth, feelings etc.

Matrimonial Property

The various personal laws in our country are uniform in recognizing the obligations of a husband to maintain his

dependent wife. The right of a wife to a moiety of the husband's property on his death is, however, not an absolute right like maintenance (except in Muslim Law), as the husband under the present system can, if he chooses, deprive his wife completely under his will. The Committee's recommendation[15] regarding restriction of the right of testation, if accepted, will change the moral duty into a legal one. But neither of these two rights recognize the wife's claim to be a part owner of the property acquired and enjoyed jointly by husband and wife during marriage.

In the socio-economic situation prevailing in our country, the contribution of the wife to the family's economy is not recognised. A large number of them participate in the family's effort to earn a livelihood as unpaid family workers. Even when they do not do so, the economic value of their effort in running the house and assuming all domestic responsibilities, thus freeing the husband for his avocation is not accepted in law, either directly or indirectly this manifest the dialectics between law and the male ethos. Most married women do not have any independent source of income, many even give up employment after marriage or do not take up a job for many years, in order to be able to devote their full time to family obligations, particularly in bringing up the children. They are, therefore, economically dependent on their husbands. In majority of cases, property, both movable and immovable, acquired during the marriage, is paid for out of the husband's earnings. If a matrimonial home is acquired, it will be registered in

the husband's name; if things are bought for the house the legal ownership will vest in the husband, as in economic terms the wife has not contributed anything. The principle of determining ownership on the basis of financial contribution is unjust and works inequitably against women.

While our personal laws recognize the right of a woman to own and dispose of her personal property without any control from the husband, the Committee's survey discloses that only 25.14% have a regular salary and 1.14% occasional wages, though 79.68% believe that a woman should work to supplement the family income. In case of divorce or separation, this large group of women without any earnings or savings of their own, will be deprived of all property which they acquired jointly. Even property which she had got at time of the marriage from the husband or his family, is denied to her in some communities. All these factors increase the dependence of the wife. The fear of both financial and social insecurity prevents her from resorting to separation or divorce even when the marriage is very unhappy.[16]

The demand for recognition of the wife's contribution in the way of house work is growing in many countries. England has passed the Matrimonial Proceedings Act in 1970 and the judicial decisions following, have emphasized the right of the wife to a share in the capital assests of the family. Lord Denning said that the wife "who looks after the home and family contributes as much to the family assests as the wife who goes out to work." He emphasized the importance of the home having been maintained by the joint efforts

of both husband and wife and therefore "when the marriage breaks down it should be regarded as the joint property of both of them, no matter in whose name it stands." [17]

It is necessary that legal recognition be given to the economic value of the contribution made by the wife through house work for purposes of determining ownership of matrimonial property, instead of continuing the archaic test of actual financial contribution. The Committee therefore recommends that on divorce or separation the wife should be entitled to at least one third of the assets acquired at the time of and during the marriage.[18] The Dialectics of future would ask for an equal share, between the spouses in the event of divorce. Law then would have to perform its innovative role by responding to popular urges -- the third category (C) of Yogendra Singh's paradigm[19] (which in fact is the working paradigmatic templet of the present dissertation).

Property Rights of Hindu Women

On March 22, 1985, the Supreme Court issued notice to the Union of India to explain why certain provisions of the Hindu Succession Act, 1956, should not be struck down as they seem to deal with female heirs differently from male heirs in relation to what is known as joint family or coparcenary property.[20] Quite recently, then, the Supreme Court has assumed the role of conscience keeper of society, which is not only good for the present but also for future i.e. dialectics of future.

It is often mistakenly assumed that the Hindu Succession Act, entitles daughters to an equal share in all ancestral property. This is, however, not the case in regard to joint family property governed by the Mitakshara system of Hindu Law. The daughter is entitled to only a share of her father's property while the son inherits both as co-partner as well as son [21] — this has already been shown in the chapter immediately preceding the present one.

Aware of the fact that "sexist society is a man's product",[22] the Hindu Succession (Andhra Pradesh Amendment) Bill, 1983, extends the principle of an equal share to daughters of ancestral property as well. The Andhra Pradesh legislation to provide for equality to daughters in the sharing of ancestral property is meant to evolve a new family culture in which sex will not be the determinant of rights and responsibilities. Its short term purpose has been described as mitigating the dowry evil on the assumption that once the daughter is assured of equal access to family property the monetary justification for dowry will be obviated. Also, economic independence is expected to strengthen women's bargaining power Vis-a-Vis men.[23]

Unfortunately some of the changes made in the legislation by the all-party select committee of the State Assembly, indicate that it has missed the spirit behind the Bill and confined itself to the letter of the proposed law. For instance, the committee recommended

deletion of two sub-clauses from the Bill one of which read : The share alloted to a female at a partition shall be held by her, subject to the terms of partition, as a full owner".[24] In other words, the share of the daughter at partition shall be her absolute property unlike the share of the son, which continues to be coparcenary property with his sons and daughter entitled to shares in it. As the purpose of the legislation is to make the daughter a coparcener and not her children, this clause was essential.

Another provision[25], stated that if a daughter having children predeceased the date of partition, the share to which she would be entitled shall be alloted to her children and in their absence to her grandchildren and to none other. It was thus made clear that so long as the daughter was alive her children would have no present interest in the joint family property. They would be alloted a share only after the death of their mother. Such children had no right to seek or enforce partition during the lifetime of their mother. This was an understandable and necessary provision for once the daughter married and became a member of another family, it was not advisable for her children to demand and enforce partition of the ancestral property held by their mother's father or brothers.[26]

Therefore, when it was laid down that the daughter shall by birth become a coparcener in her own right and in the same manner as the son, it should necessarily have

been specified that her share obtained at partition of the ancestral property shall be her absolute property. Since it is certainly not the purpose of the original Bill to expand the scope and width of the Hindu joint family beyond admitting the daughter[8] to coparcenary right on par with the son, the sub-clause dele-ted by the committee is necessary and should be restored.[27]

Instead the committee should have deleted only the rider attached to the sub-clause saying that the daughter's "absolute" right to her share of ancestral property shall be "subject to the terms of partition" as this would have given a handle to the male members of the family to enforce unequal partition on daughters. The committee seemed to have thought that the whole sub-clause was a restriction on the daughter's right and therefore suggested its deletion.[28]

It may be argued that notwithstanding the deletion of the sub-clause, daughters inheriting property by whatsoever manner, having been declared full owners under Section 14 of the Hindu Succession Act, would anyway become absolute owners of the inheritance from the father. So read, the sub-clause would be redundant. But it is doubtful if Section 14 of the Hindu Succession Act will apply to the daughter, now specifically declared a coparcener, in the same manner as the son with all liabilities and disliabilities attached to that status. Instead of leaving this issue to the courts it is better that the real intention of the reform, namely that the daughter shall be the

full owner of her share of ancestral property, be specifically stated by restoring the sub-clause minus the rider, "subject to the terms of partition.[29]

The dialectics of future in such an event would endeavour to amend such anomalies and anachronisms contained in most of our laws. The futuristic spell then has been set by the recent Supreme Court notice and the Andhra Pradesh legislation, which try to chop the very roots of Manolateralism, i.e. patriarchy.

Question of Reservation

On January 20, 1984 the Government of Andhra Pradesh amended the AP State and Subordinate Service Rules, to provide 30 percent reservation in all government jobs for women. Subsequent to this order, a Central Minister informed the Lok Sabha that reservation of government jobs for women was not possible under the existing provisions of the constitution. However, Article 15(3) of the Constitution reads :

> "Nothing in the Article shall prevent the State from making any special provision for women and children."

The constitutionality of the Goverment's order has to be viewed strictly against the scope of Article 15(3), which is an enabling provision for making any special provision in favour of women and children.[29]

The question that arises is whether the blanket reservation (by quota) ordered in the amended Rule, of at least 30 percent of direct recruitment posts for women is protected by Article 15(3) against Articles 14 and 16(1) and (2), which enjoin general equality of all persons before the law, and equality of opportunity and prohibition of discrimination against any citizen in regard to employment under the State, on grounds only of religion, race, caste, sex, descent, place of birth or residence, respectively.[30]

Unfortunately, the available case-law on the question, whether a general reservation of posts for women under the State, by way of a quota (where men and women are equally suitable), is fully covered by Article 15(3) is very limited. There has been till now, no specific ruling either by the Supreme Court or by any High Court, other than the High Court of Punjab and Haryana, in "S.S. Hukam Singh V Punjab State and Others" on this point. In this case a Full Bench of the Punjab and Haryana High Court, by a majority of 2 to 1, answered the question referred to it as follows :

"Articles 14, 15 and 16 being the constituents of a single code of constitutional guarantees supplementing each other, Article 15(3) can be invoked for construing and determining the scope of Article 16(2). And, if a particular provision squarely falls within the ambit of Article 15(3), it cannot be struck down merely because it

may also amount to discrimination solely on the ground of sex. Only such special provisions in favour of women can be made under Article 15(3), which are reasonable and do not render illusory the constitutional guarantee enshrined in Article 16(2)."[31]

The reasoning adduced in the majority judgement for the answer it gave was, in essence, that Articles 14, 15 and 16, grouped under the common caption : "Right to Equality" belong to one family. While Article 14 was the genus, Articles 15 and 16 were its species. While Article 14 guaranteed the wide, general right to equality before the law, ensuring equal treatment to all persons in similar circumstances. Article 15(1) guaranteed the general right to equality of all citizens by probibiting discrimination on ground only of religion, race, caste, sex or place of birth, and touched only one aspect of the vast scope of Article 14. In one respect Article 15 was more general than Article 16, because its operation was restricted not merely to public employment as covered by Article 16, but to the entire field of State discrimination, including public employment. The very language of Article 15(3) showed that it was a proviso to the general guarantee against discrimination contained in Article 15(1) and (2).[32] The validity of a law offending Article 14 could be upheld, if it fell within the ambit of Article 15(3) on the ground of reasonable classification.

In a way, Article 15(3) overlapped and supplanted what was stated in Article 16(1) and (2), and was a special

provision qualifying the general guarantees contained in Articles 14, 15(1) and (2), and 16(1) and (2), by adopting the principle of harmonions construction. When Article 15(3), which covered the entire field of State discrimination, allowed special provisions in favour of women, it would have been a needless tautology on the part of the Constitution - makers to repeat the same in Article 16.

Article 15(3) reflected the solicitude of the Constitution-makers for the welfare of women and children who were not getting their due share in our society. For these reasons, the majority judgment disagreed with the contention of the petitioner's counsel, who had argued that Article 15(3) could not control, or derogate from, the specific guarantee against discrimination in public employment solely on the ground of sex as contained in Article 16(2). It also disagreed with the view of D.D. Basu, in his "Commentary on the Constitution of India," that "there is no provision in Article 16 corresponding to Article 15(3). The result is that, for purposes of employment under the State, though reservation in favour of backward classes is permissible under Article 16(4), no such reservation is possible in favour of women." These views, according to the majority judgement, proceeded on too narrow a construction of Articles 14, 15 and 16, dividing them into watertight compartments.[33]

Such actions by the Government of Andhra Pradesh and interpretation of the letter of Constitution by the

High Court of Punjab and Haryana subserve the process of elevating the status of women—this reflects the dialectics between the processes of promulgation and justiciation and also between the progressive and the retrogressive elements. Such dialectics would at times figure in future also whenever law fails its mission or to answer to the call of times. Dialectics of future in the field of reservation for women would see demands for reservations in educational institutions, mainly, professional ones like engineering, medical, architecture etc. This would be so because most of these institution are still engendering genderist stereotypes, as many girls face social pressure and derision to make these fields their career. Many motivated girls, because of societal compulsions, are catapulted from childhood to womanhood and this shows in their performance Vis-a-Vis boys. Dialectics of future then will make dialectics of law responsive to the call for reservation for women, if our patriarchized society, gets embalmed by its restiveness, instead of getting degenderized and departriarchized.

Stridhan and Dowry

For some time now the Supreme Court has acquired a healthy reputation for passing judgements heavily weighted in favour of women's rights. On March 12, 1985 that reputation was amply reinforced when the court passed a landmark judgement declaring that all gifts made over to a woman at the time of her marriage remained her absolute private property till the end; and that her husband, or any other

had no right to them without her sanction.[34] Women's organisations are jubilant over this judgement, which has put virtually a new weapon in the hands of a woman rejected by her husband.[35]

Quoting from classical treatises on Hindu law, the judgement by Justices S. Murtaza Fazal Ali, S. Mukharji and A.V. Varadarajan (the last gave a dissenting judgement) noted that neither the husband, nor the son, nor the father nor the brother, has power to use or to alienate the legal property of a woman. And if any of them shall consume such property against her own consent he shall be compelled to pay its value with interest to her...."[36]

The judgement regarded appropriation of stridhan[37] by a husband or his family as a criminal offence and strongly negated earlier judgements by the Punjab and Haryana High Court that under the Hindu Marriage Act, 1955 and the Hindu Succession Act, 1956, stridhan property becomes joint property of both husband and wife after a woman enters her matrimonial home. In other words, gifts of cash, ornaments, silver, clothing -- or anything that constitutes dowry--may be entrusted by the wife to the husband to keep but he would be deemed "guilty of criminal breach of trust" if he either misappropriates or refuses to return what the court regards "as the absolute and personal property of his wife."[38]

The Supreme Court has thus brought the erring husband's action within the definition of criminal breach of trust. Section 405 of the IPC says : "Whoever being in any manner

entrusted with property or with any dominion over property, dishonestly misappropriates or converts to his own use that property — commits criminal breach of trust", and is liable to be punished under Section 406.[39]

Though hailed by Shyamala Pappu, Madhu Kishwar Subhadra Butala etc., this verdict did not pass the acid test of Rani Jethmalani. She wants the western concept of "community of property" to be introduced here — that is why the Supreme Court has not gone for enough, according to her. According to this all assests of both the husband and wife are divided equally between them after a broken marriage (this has been dealt with, earlier in this chapter under the sub-heading, matrimonial property). "The husband may be the earning member, but his wife works at home and this contributes to the common welfare," she says.[40] Such verdicts and criticisms would go a long way in ameliorating the condition of women — the aim of the dialectics of future.

The Supreme Court on August 30, 1983 held that any property or valuable security "if consented to be given on demand" would become dowry under the Dowry Prohibition Act, 1961. It was not necessary that dowry should be demanded or an agreement should be struck at the time of marriage. It was not even essential that there should be an agreement to pay money at that time. Mere demand for money at a future date would constitute an offence, the Supreme Court held.[41]

Dowry then, is firstly a banned item in law. Secondly, it is not given to the woman by one party to the other. Thirdly it is always related to marriage. Until the 1984 amendment to the Dowry Prohibition Act (DPA) it was defined as property given by one party to a marriage to the other party "in consideration" of the marriage. Now the definition includes everything given "in connection with marriage". The giver and taker of dowry and even those who abet the transaction, can be punished with fine and jail.

Even the dowry, once given, belongs to the wife. According to Section 6 of the DPA, whoever receives dowry shall transfer it to the woman within one year. Pending such transfer, he shall "hold it is trust for the benefit of the woman". Therefore a husband who refuses to transfer dowry can not only be punished under the DPA but also for breach of trust under the penal code. Under the DPA, there is a time limit of one year to make complaint. In breach of trust there is no time limit.[42]

Despite the amendment, the DPA leaves us exactly where we were before : prohibiting dowry while allowing families to present "gifts".[43] It because of such lacunas and the lack of social and moral commitment that the custom of dowry is rampant and flourishing. It is in such milieu that pioneers are needed, and Ratna happens to be one. "Kudos to Ratna for showing the right path by refusing to marry a dowry — rapacious inhuman being. Such a pioneer is needed to obliterate the patriarchal mores and norms of our society."[44]

"When our slumbering society seems to be mesmerised by the patriarchal ethos, humane and enlightened elements like Ratna wake up the sleeping masses and conscientise them. We are also to blame for the evils perpetrated against women — not merely the obsolete laws, unhelpful police, and predilections of the judges. If we don't act, others will only react and not act. Our whole ambience is such that we don't condemn and ostracise the dowry seekers. We only sympathise with the dowry victims. Our values have become so materialistic that humanistic considerations are neglected. It is time our patriarchal society mended its ways. Else there will face many more Ratnas."[45]

"Why should Ratna's 'Well-wishers' fear that she won't get a good match ? There are enlightened and emancipated men who would prefer marrying women like Ratna.... Such men and women would be the trend-setters. We have made marriage the only career for a woman. It is high time we realised it was outmoded. If one finds the right match a humanistic existence, well and good. If not, no regrets for not getting spliced."[46] Such pioneers and grasp of reality, is what the dialectics of future would beget. In fact the roots of this are immanent in the present.

What concerns most at the moment is that although a division bench of the Supreme Court included bride-burning among the "rarest of rare" cases deserving the death penalty,[47] most lower court convictions have been reversed by the higher courts. For instance, "Additional Sessions Judge S.M. Aggarwal who heard the case [Sudha Goel's] in a lower court in Delhi found the evidence strong enough to suggest

murder and sentenced her mother-in-law, husband and brother-in-law to death in May this year. Five months later, a Delhi High Court bench acquitted them. Justices R.N. Aggarwal and Malik Sharief-ud-din of the Delhi High Court observed. " The learned judge has found that the crime was calculated and pre-planned. We do not agree with the finding of the learned Additional Session Judge."[48]

"The case might now go to the Supreme Court." In the absence of a well-defined code of punishment for bride-burning, the fate the case or any case for that matter seems to depend on the personal predilections of the judge concerned.[49] This being the case, S.M. Aggarwal's judgement has a message which remains. This is that bride burning is an intolerable crime and will attract the highest penalty of capital punishment should there be conclusive proof. The S.M. Aggarwal judgement therefore remains a landmarks even though it has been struck down.[50] It is such a verdict, which at the moment stands defeated because of patriarchal pressures, moorings, that make the dialectics of future look forward to its vindication (the enlightened verdicts of the Supreme Court - quite recently - ; the Andhra Pradesh High Court - declaring the restitution of conjugal rights, Sec. 9 of the Hindu Marriage Act, "savage", "barbarons" "uncivilised" and an "engine of oppression"[51] ; the S.M. Aggarwal verdict and some more of its genre).

Rape

Rape is the most under-reported crime in this country. It is clear that laws alone will not stop this violence on women. Yet law can and should be made as strong as

possible so that judgements such as the one in the celebrated Mathura case are not possible on a purely legalistic basis.[52]

The judgement triggered strong reactions from activists and lawyers. The furore led the Government to introduce the criminal law (Amendment) Bill 1980 (which got enacted in 1983 — this would be subsumed under the third category (C) of the working paradigmatic complet.[53] Despite having before it the detailed recommendations by the 84th Law Commission Report on this issue, the Bill entailed a very weak attempt to strengthen the rape law. It was passed in 1983 with very minor changes.

The law does have a couple of positive points. The most positive is the change in the definition of "consent". In the old law only if a woman was threatened with death or injury and thus forced into sexual intercourse would the law accept that the act took place without her consent and therefore it was rape. By amending Section 375 of the Indian Penal Code (IPC) the law now states that a man is said to commit "rape" under seven descriptions. These include if the woman is forced to submit to sexual intercourse "without her free and voluntary consent", through deception, through unsoundness of mind or intoxication so that the woman has not understood the nature and consequences of that to which she gives consent or is unable to offer effective resistance. It also includes consent obtained by "putting her in fear of death or hurt or any injury or by criminal intimidation as defined in Section 503." This provision covers threats of death or injury to a third party

which would force the woman to submit to a man.

The other positive points of the law is that "custodial rape" - that is rape by any person in a position of authority - has been specifically defined and specially stringent punishment laid down for it. In the Cr. Pc. Section 327 has been amended to provide for in camera trial of cases under the rape category. Similarly a new section 114 A has been inserted in the Indian Evidence Act, 1872, to raise the presumption as to the absence of consent in certain prosecutions for rape.[54] It has also brought in a new offence called 'illicit intercourse' Sec 376 A, B and C i.e., intercourse by public servant with woman in custody, intercourse of Superintendent of jail, remand home, etc., and intercourse by manager, etc of a hospital with a patient, respectively.[55]

But inclusion of all this does not absolve the rape law for its exclusion of many of the recommendations made by the Law Commission. The foremost being that during cross-examination the victim should not be asked about her past sexual history. This provision has been used in the past to divert attention from the specifics of the crime. The unstated belief which was exploited to help the accused was that if the woman was proven to be "immoral" or to have had sexual relations with other men, then her word that she had been forced upon would be suspect. This is a case of outmoded morality dictated by a male-dominated judiciary which persists till today.[56] "Every woman has a right to her body. Even a prostitute."[57]

Further, an important suggestion of the Law Commission and also endorsed by concerned lawyers and activists regarding the provision of a minimum punishment has not been heeded by the law-makers. It has been pointed out, based on the experience of other countries, that laying down a minimum punishment - 10 years for custodial rape and seven years for other rapes according to the amended law-will merely lead to many more rapists being acquitted, as judges may feel that this is too stringent a punishment. For instance, if the provision to bring in a woman's past sexual history in the case is not removed and the woman in question happens to be a prostitute, the judges could well decide that the rapist can be pardoned and should not be punished.

On balance therefore, the law, always inadequate in any case in dealing with what is a social crime has merely brought in cosmetic changes. There are too many loopholes - one of the roots of the dialectics of law- through which the small percentage of rapists who will finally be brought before the law can escape. In such a situation, to argue that "with the new rape law, along with other crimes, blackmailing for rape will be an additional thriving vocation for women,"[58] goes much beyond the limits of absurdity. "No man", adds Ghosh, "will be safe as the onus to prove his innocence will lie with the man only. With so much of political rivalry, land disputes, family disputes and high incidence of criminality amongst women... any women may charge a man for rape. The rape

law provides for special punishment to be meted out to police offenders. The effect may be that the police, as the only agency for investigation of crimes and apprehension of offenders, will be the greatest target of female offenders who will not hesitate to involve them in false cases. Thus, another problem of the future is that of the protection of the police from such attacks."[59]

This view happens to be a mandate for manolateralism and femme-genderocide and not wo-manolateralism and thus is pernicious and reprehensible. Till this day police the dejure protectors have been defacto perpetrators, what then does make Ghosh have a presentiment, which makes him think of protecting the protectors (i.e., police) from the victims ? The dialectics of future then would necessitate, more protection for the victims by making law as strong as possible, devoid of any perforations by way of loopholes, which enervate the law into becoming a tottering structure.

Muslim Woman's Maintenance Rights

In another landmark judgement, the Supreme Court on April 23, 1985 ruled that an indigent Muslim woman is entitled to maintenance from her husband even after, divorce, under section 125 of the Criminal Procedure Code (CrPC) – the measure which was introduced as a solace to a Muslim wife who might have fallen prey to arbitrary male hegemonism.[60]

This significant judgement,[61] written by Chief Justice Y.V. Chandrachud on behalf of five-judge constitution bench has started considerable debate among the Muslim community.

It emphasised that there was no conflict between the provisions of the Cr PC and the Muslim personal law on the question of the Muslim husband's obligation to maintain divorced wife. It confirmed the legality of the right of a Muslim divorceeto maintenance earlier upheld by Allahabad High Court (1979) and Supreme Court (1980). The verdict held that the maintenance provision under the CrPC is not dependent on the religion of either spouse. Since the provision is part of the criminal law, which is applicable to all persons, and not civil law which varies according to the religion of the citizen, the Muslim husband is liable to pay maintenance to his indigent wife.

"The liability imposed by Section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to society to prevent vagrancy and destitution. That is the moral edict of the law, and morality cannot be clubbed with religion," the judgement said.

The court rejected the argument of the husband that under the personal law, he was obliged to maintain his divorced wife only during "iddat", a three-month period after talaq. Several authorities were quoted to support the husband's argument. But the judgement said that they did not refer to a divorced wife, "who is unable to maintain herself." The true position, according to the judgement, is that if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the "iddat" period. If she is unable to maintain herself, she is entitled to take recourse to Section 125 CrPC.

In a long discussion, the judges quoted verses 241 and 242 of the Koran to show that according to the Prophet, there is an obligation on Muslim husband to provide for their divorced wives Verse 241 says : "For the divorced woman a provision should be made with fairness in addition to her dower; this is a duty incumbent on the reverent". It is for this reason, it is noted "... that the Muslim personal law as stated and practised judicially deviates in a number of situations from the primary edicts of the Quran."[62]

Another argument of the husband was that under Section 127(3) (b) CrPC he was exempted from paying maintenance as he had returned to her "the whole sum which, under the personal law was applicable to the parties, was payable on such divorce." This referred to 'Mahr', an amount which the wife, is entitled to receive from the husband in consideration of the marriage in Muslim law. The husband claimed that he had returned this amount to her and therefore she was not entitled to maintenance after that.

But the judgement said that 'Mahr' was an obligation imposed on the husband as a mark of respect for the wife. It is not an amount in consideration of divorce. "He does not divorce her as a mark of respect," the Chief Justice Wrote. The court regretted that a uniform code for all communities is still a constitutional goal, far from realisation. The initiative may not come from the communities themselves; it is the state which is charged with the duty to pass legislation.

"A beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts, because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable," the judgement said. But the courts can make only piecemeal attempts to bridge the gap between personal laws. Justice to all is a far more satisfactory way of dispensing justice than justice from case to case"[63]

This judgement despite being welcomed by many, was flayed by the Muslim leaders.[64] For them the Supreme Court judgement constitutes "a grave interference with the Muslim personal law", and the Supreme Court "cannot be a better interpreter of the Quran than the entire body of Muslim interpreters and jurists down the ages." They said despite assurances by the Government that it would not interfere with the Muslim Law, forces "inimical to the Muslim community shall use the judgement to secure the extinction of Islamic law and the promulgation of common civil code."[65]

It is further argued that "the Shariat is immutable and valid for all times and all societies and no human authority can touch" it[66]; and till Muslim community itself asks for it, "it is only fair that the Muslims' personal law should not be encroached upon either by legislation or by too liberal a judicial interpretation."[67] What is therefore being said is that "the courts of land must not go outside the existing answers of religious authorities

and the religious authorities themselves either cannot or will not give a new reply to the woman's age-old cry for help....."[68]

Thus the dialectic between the progressive, and the retrogressive, reactionary and fundamentalist elements would keep surfacing in the dialectics of future. What would ultimately decide, which of these two elements would prevail to the other would depend on which one is more potent. The Supreme Court judgement, and enlightened people's support to it show that the dialectics of future would strive in favour of No-manolateralism.

Uniform Civil Code

In one more of its epoch-making judgements (Shah Bano case mentioned above) the Supreme Court has expressed its regret that the constitutional directive in Article 44 for a uniform civil code[69] (UCC) has so far remained a dead letter."[70] "Women form nearly 50 percent of the population of India, yet there is no such being as an 'Indian Women', she is either a Hindu, Muslim, Christian, Parsi or tribal and is discriminated in law even today in matters that affect her life most intimately and deeply. The degree of discrimination depends on the mere incident of birth in a particular home."[71]

The confused cacophony of clashing family laws are as much an insult to men as they to women. It results in judges handing down varying interpretations of sacred texts; greedy lawyers preying upon distressed and ignorant people; and people undergoing fake conversions to escape

the consequences of their actions under their own laws. In the patriarchal scheme of things, then, women earn pride of place as victims.[72] In short, the fundamental rights guaranteed to Indian women are taken away by these family (personal) laws.

In the early history of every nation, religion came to be closely associated with the growth of law. Divine sanction, rather than kingly edicts, was more powerful in enforcing such laws. That is how the code of Manu came into being. It is a compilation by the priestly class and it is ascribed to a mythical sage Manu to give it a religions sanction. The Islamic legal system had a similar origin.[73]

When the British took over, being shrewd administrators, they followed a liberal or laissez faire policy in respect of matters which they considered to be intimately personal like marriage, divorce succession etc., although they could have codified such laws also. And so it is that we have the most sorry spectacle of special laws relating to marriage, divorce, succession etc., applicable to persons depending upon whether they are Hindus, Christians, Parsis or Muslims.[74] That is why it is observed by Justice Krishna Iyer, "If law must serve life — the life of the many millioned masses whose lot has been 'blood, toil, tears, and sweat' [here women] — the crucifixion of the Indo-Anglican system and the resurrection of an Indian - Indian system is an imperative of independence."[75]

After passing of the Hindu code Laws, (laws which have very little religious significance about them), it was felt that the other communities in India would like to have a similar look at their personal laws. The Law Commission undertook a study of the laws relating to Christians from that point of view, but for some reason or other a Bill introduced in Parliament was allowed to lapse and not revived subsequently. The Government seems to be taking the stand that the urge for reform must come from the community concerned, although this was not applied strictly in the case of Hindu Law.[76]

It is absolutely clear that personal laws even in their present limited sense, can be altered or abolished where public interest demands it. Laws can never be static. They grow with times. New situations demand new solutions — wherein lies the dialectics of law. Reason is the soul of law. When reason is dead the law is dead. What is required is a rational approach to the law, shorn of all prejudices. There are many provisions, as mentioned earlier, in our personal laws which deny equality to the sexes. Further, the existence of separate personal laws may encourage new elements (it has encouraged the Sikhs) to claim that they also should have some personal laws.[77]

It is due to this disparity that women in certain communities have to suffer in silence. The Supreme Court, which in another recent judgement gave a call for uniform code in marriage laws, finds only one solution to it : to introduce irretrievable breakdown of marriage and mutual

consent as grounds of divorce in all cases.[78] Kapila Hingorani states, that the community of property concept should be in all personal laws.[79] Besides, the Supreme Court in its clarion call has also warned that "no community is likely to bell the cat by making gratuitous concession in this regard." It is the State's duty to strive for a uniform code and it has legislative competence also.[80]

The Indian Government stands on two stools and shifts its weight from foot to foot. It is committed to the UCC (mercifully there is no deadline). But it is also committed to its promise to leave Muslim personal law alone-ever since the UCC has become identified with the Muslims it has indeed become a veritable battleground. Forgotten meanwhile, are the silent spectators who also have an interest in the subject : Christians, Parsis and Jews.[81]

Sitting in Delhi or Bombay the "national" leaders are absolutely positive that adoption is against their religious law and yet in far away Santhal Parganas Muslims serenely adopt and give in adoption, even across religions.[82] It may also be pointed out against, the critics of UCC — for whom "Islam is not a religion alone but a code of life and Muslim personal law consequently is not only law but religion. Interference with the personal law, therefore constitutes, in the Muslim eyes, an interference with religion"[83] that "The holy text [Koran] confers innumerable rights on women and treats them with utmost respect. But nowhere in practice does a woman have these rights."[84] Thus, the

Muslim Personal Law as stated and practised judicially deviates in a number of situations from the primary edicts of the Quran.[85] In such a situation to argue that the 'Muslim personal law is religion' is nothing but a gambit of obscurantism, which serves none but the patriarchal scheme of things.

Dhagamwar, makes two points, namely, that we already have a large number of laws civil and personal, which have uniform application. And that there are local practices by small religious groups which are, unknown to their national leaders, contrary to their laws.[86] In passing, it may also be mentioned that many Muslims were governed by Hindu law as the customary law prior to the passing of the Shariat Act, 1937, which goes to show that custom can always override so-called personal laws.[87]

The common code, then is the need of hour to put an end to the silent suffering (which makes women a class) which most women undergo because of the 'confused cacophony of clashing family laws'. The UCC, as Justice Krishna Iyer has put it, will be formed by "picking and choosing from many systems, so as to suit our ethos and express the genius of our culture in accordance with the times"[88] - which would be in tune with 'dialectical egalitarianism'.

The immediate ineffectiveness of such legislation (i.e., the UCC) is, however, hardly a reason for not enacting it. If one has a law one can expect it to become effective at some stage. Hindu women are beginning to stretch their wings, and to use their rights.[89] The dialectics of future, then would see the enactment of the UCC.

IX

The present section would dilate upon the proper role of a judge as only recently the Supreme Court has passed enlightened verdicts and legal aid, which are two very important ingredients of the dialectics of future.

The Proper Role of Judge

For Lord Denning "... The proper role of the judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule — or even change it — so as to do justice in the instant case before him. He need not wait for the legislature to intervene ; because that can never be of any help in the instant case. In the course of time the reasons [for the rules] may cease to be valid; but the rules remain binding. New days may bring the people into new ways of life and give them new outlooks and with these changes there may come a need for new rules of law, to control the new order and to reflect the new outlook [this would be subsumed under the third category (C) of the working paradigmatic templet [1] . The old rules must then be modified or else the itself will stagnate."[2]

This truth was observed and well stated by Sir Henry Maine nearly a hundred yearsago :

> "Social necessities and social opinions are always more or less in advance of law. We may come indefinitely near to closing of the gap between them, but it has a perpetual tendency to reopen [wherein lies the dialectics of law] . Law is

> stable; these societies we are speaking of are progressive. The greater or less happiness of a people depends on the degree of promptitude with which the gulf is narrowed."[3]

The preceding observations are made in contradistinction to the following one:

> "Our administration with its trinity of instrumentalities still lives in the medieval ages ... [There is thus a] need for judicial sensitivity and professional accountability and processual modernity."[4]

"... the Constitution envisions the court system as more than the dispenser of legal justice and goes further to make it the judicial arm of Civil Revolution.... Thus the Indian judge not merely declares but also executes, not merely guides himself by law but uses his armoury to the extent necessary to secure justice, social, economic and political, why, even interstitially legislates to spin social justice out of black letter law, and beyond it where it is silent. The people not the class to which the 'brethren' belong are the law's clientele, and courts cannot fold up when the cry for relief is heard. Law is what the judges make of it, freed from the fetters of dated tradition and bent on forward-looking compassion and quick relief. Empathy for the needy is the open sesame of Indian Justice. The democracy of remedies focuses on life's agonies, not on unravelling abstractions; on actual relief, not on declaratory decrees."[5]

The court system is the sword and the shield of the entire people.[6] A pachydermic judicature is a contra-

diction of our Constitution.[7] A cold war is on between the echelons, executive, parliamentary, and judicial, on the one hand and the Constitution and its socialist, secular, democratic beneficiaries on the other. The fight among the instrumentalities is more over share of power rather than over the rising egalitarian demands of the people[8] — this is another manifestation of the dialectics of law.

The judicial process in its operational exercises must adopt a holistic perspective and be impregnated with humane concerns lest the system be dismantled by the furious explosion of frustrations erupting out of the collapse of the rising revolution of aspirations. Let no one say Law has slain Justice. Let no inscription announce the cemetery of social justice nor declare : Here lies the Law. Rest in Peace ![9]

To mutilate rightful social justice through repressive legal injustice, is to breed mutiny by the masses through explosive illegal justice. A culture not of confrontation but of confluence of legal justice and people's justice is the highway to a social justice State. His (Justice Krishna Iyer's) final appeal is for the practice of the integral yoga of Law and Justice by the trinity of instrumentalities the Legislature, the Executive, and the Judiciary. Justice is what justice does.[10]

Indian judicial feudalists may disagree even with Lord Denning's new jurisprudence. When we are challenged

by change, readjustment, renovation, and innovation are inevitable safety - belts. The Indian judiciary has a chapter of glory if it agrees to place the gravestone on the old social order and lay the cornerstone on the new order to the extent it lies within judicial power.[11]

The judge is an activist agent of the constitutional revolution. The judges are engineers of law-in-action. Indeed, the developmental potential of judicial action and the ombudsmanic function of the court process are horizons currently beyond the perception of the robed profession. Judge power, is summoned by an expanding universe of remedial possibilities beyond the Ken of the traditional judge. We cannot be governed by voices from the grave, and precedents so dear to obscurantist and orthodox jurist are dated dogmas, no longer legal tender. To retreat from the constitutional responsibility to be legal engineer, overseer, ombudsman and sentinel on the qui vive, is judicial pusillanimity unworthy of a major instrumentality ordained to aid the revolutionary social order in which :

> "The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice , social, economic, and political, shall inform all the institutions of the national life " (Art 38(1)).[12]

Justice Krishna Iyer's conception of the Indian Justice System and judges is radical. The judge must be participating catalysts in the national process of Development whereby the people - the large human sector afflicted by harrowing varieties of handicap will enjoy justice

in its fullest meaning. Therefore we need a new justice jurisprudence, charged with the egalitarian ideology of socialistic development and dignity of personhood, turned into the living realities and social transformation of India. We need a whole range judicial techniques and non-judicial alternatives which will establish a pragmatic nexus between law and life — another dimension of the dialectics of law, mentioned in the introduction. Finally we need judicial and para - judicial cadres who will execute the testament of social justice true to the oath of office to uphold the constitution and the laws? Here comes the conscience of the rule of law — a new judicial - cum - non - judicial community with a militant commitment to make the Constitution and its Preambular Promise a legally enjoyable title - deed of rights. A new heart, a new head, a new hands which will transform the constitutional tryst from printed rhetoric to practical forensics - that is a consummation devoutly to be wished.'[13]

Theodore Roosevelt noted :

> 'In ordinary and the low sense which we attach to the word 'partisan' and 'political,' a judge of the Supreme Court should be neither. But in the higher sense, in the proper sense he is not in my judgement fitted for the position unless he is a party man, a constructive statesman, constantly keeping in mind his adherence to the principles and policies under which this has been built up and in accordance with which it must go on...'[14]

Justice Bog Observed :

"... there is much greater need for them [judges] than there was in the past, to be conversant and concerned with problems of national welfare in all departments of life. They cannot possibly be required to withdraw into shells of an artificial and isolated existence, where the mind stagnates, knowledge becomes rusty, and awareness of current problems and ways of thinking vanishes. Those who recommend such isolationism on the part of our judges forget the true needs, the right place, and the proper implications of the judicial function in our country today under the existing Constitution."[15]

Sir C.K. Allen stated :

"The previous tradition of judicial independence may be impaired, and our expectations of sound and reasonable judgement , which are not out of harmony with existing realities and best concepts of what is just and right, particularly in the socio-economic fields are not likely to be met more satisfactorily if judges are required to abstain completely from invigorating academic discussions and intellectual exercise outside their court - rooms."[16]

Judicial dynamism is not judicial imperialism[17]. In India, Montesquieian fundamentalism will freeze to death judicial activism obligated by the Constitution itself . Robed brethren should be ready to be enlisted as echelons of the justice revolution.[18] The dogmas of the quiet past are no longer adequate for the stormy present.[19] The dialectics of future would necessitate the judges performing their role as that of 'an activist agent of the constitutional revolution'." Finally, since the touchstone of truth in a

democracy is service to people, the question before the justice system is [at least pertaining to women] : Are you myth or reality ?"[20] The dialectics of future, would portray women no more as maya, but as an entity vibrating with life not in mythologies but in existential situations, which has to be seen with women's eyes, for any judicial pronouncement to have any meaning for many women's lives. Further the dialectics of future would kindle the awareness in the judges that "we need not so much law as judicial consciousness. Law must be liberated from the interpretive mess."[21] in order to manumit women from their patriarchally imposed societal hibernation — which has made man "mortally immortal" as compared to woman who is "immortally mortal" (an embodiment of 'manolatoralism').

Legal Aid

Among the groups which the Committee on legal aid[22] identifies as deserving legal aid are women also. This is so because the women in India so far do not have equal status with men (and therefore special care has to be provided for legal assistance to women).

More necessary for survival of the judicial institution which is in peril of being jettisoned, is the modernization of judicial management technology, sensitization of judicial process and personnel and diversification of flora of justice —all geared to the fulfil-ment of the constitutional objectives spelt out in the preamable. It becomes a democratic obligation to make the legal process a surer means to social justice. The major strategy to end the estrangement between the law and the lowly is

legal aid in its comprehensive coverage which is what is meant by the expressive 'juridicare'[23]

Side by side (large valleys of penury, illiteracy, social squalor), in uneasy coexistence, survives a law administration shaped by the British and enshrining values not wholly indigeneous or agreable to Indian conditions, scaring away or victimising the weak through slow-motion justice, high-priced legal service, long distance delivery centres, mystiques of legalese and lacunose laws and a processual pyramid made up of teetering tiers and sophisticated rules and tools.[24]

This socio-legal service is a summons to an-inter-professional consortium of lawyers, judges, legislators, social workers, law teachers and students with a view to make law an instrument of social justice for those who are in need. By offering legal advice and counsel in court, by educating people in their legal rights and helping to win them in practice by reducing or subsidising the cost and delay of litigation, listening to the grievances of the humble and by identifying where law lags or is injuriously obscure and suggesting suitable action through reform - oriented litigation, by championing the cause of the worker, wife, consumer, tenant, tiller, and victim of wooden officialdom, by sensitising the legal and judicial professions, by involving the community in the judicial process at certain levels and through other forward looking measures, the legal aid ensemble seeks to make the rule of law a dependable ally of the weak and a liaison between the statute book and the deprived. Law leads to order only with legal

aid. The spiritical essence of a legal aid movement consists in investing Law with a human soul.[25] The dialectics of future would embolden this movement for an even more attention and aid for women.

The preceding observations show that the dialectics of law bolstered by the dialectics of future is bound and will be harnessed to lead to the degenderization and departriarchization of our society rooted in dialectical egalitarianism or 'Wo-manolateralism' — uprooted then will stand 'sexist dialectic' or 'manolateralism,' i.e., 'femme-genderocide.'

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24. Sub-clause (b) of clause 2.

25. Sub-clause 2(ii) of Section 2.

26. Acharya, op.cit.

27. idem.

28. idem.

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The State Shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 16 : Equality of opportunity in matters of public employment
(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
(2) No 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.

31. Cited in Rao, Op.Cit.

32. Article 15 : Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.
(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall on grounds of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction ....
(3) Nothing in this article shall prevent the State from making special provision for women and children.

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CHAPTER VII

AN OVERVIEW

Throughout the present dissertation the only refrain has been that the dialectics of law has not been able to redeem women from the patriarchal "ethos, ambience, mores and norms"[1] — obviously due to the sway of patriarchal moorings, patriarchal fundamentalism, and patriarchally propelled retrogressivity.

In the present study, we have refuted the argument of Bryan S. Turner, that "A comprehensive system of institutionalized patriarchy no longer exists..."[2] And regard this argument as "Patriarchal Fallacy", i.e., the fallacy that makes one discern the demise of patriarchy, when rather it is well-entrenched, thriving, permeating and percolating to all the realms of existence; which tends to perforate the susceptibility of many a people and thereby abet the perpetration of women's oppression. Law, then is made the area of present study to understand the ramifications of patriarchy. Not-withstanding, some recent enlightened judicial pronouncements and observations, law happens to be a God that has failed in ameliorating the status of women — a constitutional aspiration.

In the first chapter, we have introduced the present study by elucidating the problem the concepts and the feminist theories. As observed here, and throughout the present thesis, most laws promulgated to protect women's rights are antithetical to the very Constitution of India. Further, the male ethos, the lacunosity which perforates the structure

of legality, the retrogressive elements, the lax implementation or enforcement, the genderist judgements, and the distinct personal laws grounded in religion, combine and form the predatory multi-pronged force, which attack woman and their rights — thus upsetting the emancipative pressures in the dialectics of law by emboldening the patriarchal forces. This patriarchal hegemony, buttressed by the legal system obliterates the very existence of women and transmogrifies them into non-entities : "the inessential"[3]. This manifests the fact that the status of Indian women is more closer to the paradigm of 'sexist dialectic', i.e., 'Manolateralism' and far away from the paradigm of 'dialectical egalitarianism', i.e., 'Wo-manolateralism'. That is why, the present thesis takes its cue from this paradigm (i.e., 'dialectical egalitarianism') and the radico-socialist feminist position—which derives its strength from the merits of both the radical feminism and socialist feminism and does away with the flaws of both —, while flaying the patriarchal establishment, rejuvenated gyratiously by the ongoing 'sexist dialectic.'

In the second chapter, an attempt is made to furnish the paradigmatic framework, in order to tie the present study. The general paradigmatic framework is guided by the phenomenological proposition that "society is a human product"[4] The paradigm of 'sexist dialectic', shows that "sexist society is a man's product", while the "sexist self is a social product." Law, being a reflection of the normative structure, generally, (which is patriarchal) is manipulated and manoeuvred to

the detriment of women. Law, thus becomes a potent tool for perpetrating and perpetuating the oppression of women. Since this patriarchal structure of our society is erected by men, it can be dismantled by Women (Women and men) — a phenomenological fact.

The way a depatriarchized society could be established is what the paradigm of 'dialectical egalitarianism' endeavours to show. It has been pointed out that in a depatriarchized and degenderized society the legal system will play a very prominent role, by not only conscientizing people, through its promulgation, adjudication and implementation activities but also being itself open to times (the innovative role) and opening times (the adaptive role). This centrality of law is so because, law which is a reflection of the normative structure, is also an independent variable. In fact, there is a hierarchy of normative values and in this we find that there are people (though minuscule) at the top of the hierarchy, in many societies, who transcend their times and are critically aware of the oppressiveness of certain values, which their society professes, adores and wallows in. It is this body of people who bestow autonomy to law. Being a conscientizing-agent in a depatriarchized society, the dialectics of law would help in building a new normative and substantive structure. Thus it would act as a conscientization-multiplier, itself being sensitized to women's cause. This susceptibility and sensitization of the legal machinery to the phenomenological reality of women, would see not an end of the dialectics of law as

it would represent the ongoing dialectics in the existence, even of a depatriarchized society.

The working paradigmatic framework, which along with the general paradigmatic framework warps and wefts the present study, has evolved to show that the innovative role of law (the third category (C) , which identifies the pressures exercised by the social reformers and women's organizations) gets transmuted to the adaptive role (the second category (B)). This is so because "Law initiates changes which are not yet accepted or expected by the members of society at large"[5]

It is for this reason that the adaptive role of the legal system takes prominence and thus, it is noted that, "In India law has a difficult role to play. In the West, generally speaking, law follows public opinion. In India, on the other hand, law should mould public opinion, remove traditional attitudes and foster new values."[6]

The third, fourth and fifth chapters are substantive, which attempt only to analyze in consonance with the concepts of the first and second chapters. In the third chapter, while analyzing the case of the Hindu Code Bill, we try to plumb the legislative dialectics between the progressivists and retrogressivists. This chapter, highlights one very dismaying and dismal phenomenon that in the type of progressivists (here the Gandhian) lay, dormant the fundamentalists. This gets revealed when the same people who drafted the Constitution, successfully

stalled the enactment of the Hindu Code Bill for many years. Which, when did see the light of the day, was reduced to a tenuous and emaciated body fragmented into many laws. The net effect of this happened to be the aggrandizement of status quo, i.e., the male hegemony. This trend percolated to many legislations promulgated in the mid-fifties – the semblance of which is retained in many of the recently enacted legislations also. The fourth chapter, is where we examine, marriage, guardianship, and adoption rights of women in constrast to men. It discovers that when law has tried to enhance and ameliorate the status of women, it has done, half-heartedly, as what it provides with one hand it usurps, it by the other-due to rampant lurking of ambiguities and lacunas.

Our focus in the fifth chapter is on, divorce, maintenance and inheritance rights of women. Here, too as in the fourth chapter, it is discovered that the law lags behind the principles, which have already been accepted by our Constitution – wherein lies the dialectics of law. Since the patriarchal forces are inimical to the elevation of the relegated status of women, such laws easily dance to the tune of patriarchy – which while enacting certain legislations provides multifarious loopholes, whereby law stands abrogated. Furthermore, it is noted in both the fourth and fifth chapters that except few recent enlightened judgements, most of the judicial verdicts have endorsed the sovereignty of the male principle or patriarchy or machismo.

In the sixth chapter, we look forward as to what could be the demands of future — wherein lies the dialectics of future. It attempts to look through the spectacles, of Wo-manolateralism and the futuristic role of the legal system to ferret out ways of obliterating the imbroglio, wherein women lie embedded. The dialectics of future, then seeks to answer the question, quo Vadis ? The answers provided are not idealistic, rather they emanate from the vivid ground of reality. This chapter concludes with the optimism that the dialectics of law bolstered by the dialectics of future is bound and will be harnessed to lead to the degenderization and depatriarchization of our society rooted in dialectical egalitarianism, i.e., 'Wo-manolateralism = uprooted then will stand 'sexist dialectic', i.e., manolateralism.

Further Observations

The dialectics of law, show then, that even some legislations which have come into being, are not as radical as they were before promulgation. Even when enacted, the residues of radical elements in such Acts, tend to get dissipated and enervated because of myriad ambiguities and lacunosities. Moreover, no sooner an Act is enacted it gets senile, because of its incorporating the obsolete clauses (the Hindu Marriage Act, 1955 is a case in point) in its fold. As a sequel to this, even a majestic law comes to nought, as it is a tree without roots, an ocean sans water and a body sans teeth. It is placed on a pedestal, worshipped in glory, apotheosized into eternity

and Platonic essences. Thus, this Avatar – Law – never gets incarnated, therefore "... What we need urgently, is human ascent, more than divine descent." Nevertheless, the dialectics of law because of the dialectics of future holds a promise in alleviating and obliterating women's oppression.

The legal reforms initiated after Independence then have not improved the lot of women. The following could be some among multifarious reasons :

(a) Ignorance of Law;
(b) Attitudinal inhibition, like fear of public opinion;
(c) Unfamiliar, formal, cumbersome legal procedures; and
(d) Incapacity to reach and use the legal mechanism.[8]

Besides, "Modern India seems to have at least two parallel legal system", [9] one for men and the other for women. For instance, despite the enlightened clauses in the Special Marriage Act, 1954 (as also in the Hindu Marriage Act), "it continues to treat the husband as the favoured beneficiary of most forms of statutory protection. The most glaring defect in these two Acts as they now stand is that they do not give an iota of legal protection to women whose husbands bring home concubines. In such cases, all that is offered to a women is the right of divorce, and the right of maintenance, but not the right of a partner. Laws ensuring male preeminence are not the best insurance for stable marriages, which ultimately, provide the foundation of a stable society."[10]

In spite of the shortcomings, the legitimacy of

law as an instrument of social change is now accepted as never before, and is also practiced, which is certainly a favourable input in making social reform legislative process as effective. Limitations of Law will have to be met with primarily by law itself, and on an emergency basis, which means atypicality, short cuts, in fact anything that helps. If the administrative and applicatory machinery of law is amplified and consciously made favourable for women, it would encourage and enable them to take advantage of the substantive law reliefs made available to them. Until and unless the legal mechanism is freed of technicalistic formalism,[11] law would remain an alien entity and its prescription beyond their reach. Reform legislation pertaining to family would benefit the image of Indian law, but will not benefit the Indian women.[12]

One suggestion in this direction, amongst various, is the substitution of the present judicial machinery by Family Courts for resolving all issues relating to family. This is so recommended because the statutory law in all matrimonial matters follows the adversary principle for giving relief, i.e., the petitioner seeking relief alleges certain facts and the respondent refutes them. In addition, most of the grounds in these statutes are based on the 'fault principle' instead of the breakdown theory. As a result, strong advocacy rather than family welfare is often the determining factor in these cases. The absence of distinction between matrimonial

cases and other civil suits leads to inordinate delay which stands in the way of conciliation and further embitters the relationship of the parties. Conciliation, which ought to be the main consideration in all family matters, is not the guiding principle in the statutes dealing with them. That is why the Committee strongly recommended the abandonment of the established adversary system for settlement of family problems, and the establishment of family courts which will adopt conciliatory methods and in-formal procedure in order to achieve socially desirable results.[13]

What dawns in the present thesis is the fact that "Laws can never be static. They grow with times. New situation demands new solutions. Reason is the soul of law. when reason is dead the law is dead."[14] It also highlights that "A change in the law ... can do little towards altering institutions that are entrenched in the value systems of a society [Yet laws can and should be made as strong as possible']. More so, when these value systems are continuously reinforced by social sanction as well as by the popular media, and have been traditionally used, as they continue to be today, by power structures as a weapon to suppress protest or deviance. A significant change can only come through the shifts in consciousness and power that result from public action."[15]

The dialectics of future - which would aim at 'Wo-manolateralism' by extirpating 'femme - gonderocide'

having moved from the anaesthetized stage ('sexist dialectic') to the conscientized stage ('dialectical egalitarianism') — and the present dissertation are guided by the succeeding observation that in the field of law, the last decade (1975 - 1985, International Women's Decade) has seen the passing the Equal Remuneration Act, 1976, , the Criminal Law (Amendment) Act, 1983, the Dowry Prohibition (Amendment) Act, 1984, and the Family Courts Act (1984). Both the dowry and rape laws were amended in the face of considerable pressure from women's groups.[16] Yet in spite of the recommendations of the 71st Law Commission and depositions by women activists from all over the country, many of the suggested changes were ignored by the government. Thus the Dowry Prohibition (Amendment) Act leaves us exactly where we were before : prohibiting dowry while allowing families to present "gifts", and the rape law, while bringing in some progressive changes, leaves out others. The failure of the implementation of the Equal Remuneration Act makes it clear yet again that enacting laws alone is not enough : Accompanying legal literacy, grassroots consciousness raising, politicisation are all tools of change.[17] This awareness is indispensable for dismantling and pulverizing the patriarchal canopy and panoply. This insight takes salience in the present circumstances because "this world, which has always belonged to the men, is still in their hands; the institutions and the values of the patriarchal civilization still survive in large part."[18]

Further Explorations

The areas which need further explorations are firstly, a more detailed diachronic study of the dialectics of law and the status of Indian women. Secondly, a phenomenological study could also be done to take notice of the dialectics between the macro institutions (like law) and micro realities (of women) — of legalities. This is all the more pertinent in the light of a serious limitation of the present thesis. Phenomenological richness is lacking in the present dissertation, as it is based on secondary sources and not primary, for its data. This snag comes in way of operationalizing the general paradigmatic framework.

Thirdly, what in fact can be examined is women's awareness of law and its accessibility. Fourthly, the nexus between the enlightened judicial pronouncements and 'preditections of the judges'[19] can be explored to discern the continuity of one coterie of judges in contradistinction to the other in giving resplendent judgements in favour of women, while the other genuflect to the male principle and sacrifice women's rights on the scaffold of patriarchy. Fifthly, a more detailed study of the Acts and its ramified impact on women's rights and their status, could be another area of exploration. Sixthly, most of the chapters of the present dissertation could as well be a bed-rock for distinct

explorations. Finally, speaking in general terms, the indispensibility, of 'feminist methodology'[20] in women's studies could as well be explored.

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APPENDIX

Chronology of Laws Protecting Women

1827 : Special Marriage Act

1829 : Prohibition of Sati Act

1850 : Mapilla Succession Act

1855 : Fatal Accidents Act

1856 : Hindu Widows Remarriage Act

1860 : Indian Penal Code (Sections 294, 312, 313, 314, 354, 361, 362, 366, 366A, 366B, 372, 373, 375 394, 493, 497, 498, 509).

1865 : Parsee Marriage and Divorce Act

1866 : Native Converts Marriage Dissolution Act

1869 : Indian Divorce Act

1872 : Indian Christian Marriage Act

Indian Evidence Act

Special Marriage Act

1874 : Married Women's Property Act

1875 : Indian Majority Act

1876 : The Bengal Muhammedan Marriages and Diverces Registration Act.

The West Bengal Muhammedan Marriages and Divorces Registration Act

1890 : Guardian and Wards Act

1891 : Age of Consent Act

1898 : Criminal Procedure Code (Sections 47, 51, 125, 160, 205, 360, 416, 437).

1908 : Civil Procedure Code

1909 : Anand Marriage Act

1916 : Travancore Christian Succession Act

1918 : Mapilla Succession Act

1921 : Ban on the tradition of Devadasis Cochin Christian Succession Act The Reforms Act

1923 : The Legal Practitioners (Women's) Amendment Act

Special Marriage Act

1925 : Age of consent (Amendment) Act

1928 : Hindu Inheritance (Removal of Disabilities)

Indian Succession Act

1929 : Child Marriage Restraint Act

Hindu Inhesitance (Amendment) Act

1930 : Kutchi Memons Act

Hindu Gains of Learning Act

1933 : Madras Marumakkattayam Act

Mysore Hindu Law (Women's Right) Act

1935 : The Assam Moslim Marriages and Divorces Act

1936 : Parsee Marriage and Divorce Act

1937 : Arya Marriage Validation Act

Hindu Women's Right to Property Act

Muslim Personal Law (Shariat)

1938 : Application Act

Inheritance Family Provisiona Act

1939 : Dissolution of Muslim Marriages Act

1943 : Muslim Personal Law (Sharat) Application (Amendment) Act

1946 : The Bombay Prevention of Hindu Bigamous Marriage Act

Hindu Women's Right to Separate Residence and Maintenance Act

1947 : The Bombay Hindu Divorce Act

The Madras Hindu Bigamy Prevention and Divorce Act

1948 : Employees State Insurance Act

Factories Act

Minimum Wages Act

1949 : Child Marriage Restraint (Amendment)Act

Indian Police Act

The Orissa Muhammedan Marriages and Divorces Registration Act

1950 : Bihar Dowry Restraint Act

Constitution of India (Articles 14, 15, 16, 23, 38, 39, 42, 44, 325, 326).

1951 : Plantations Labour Act

1952 : Christian Marriages Validation Act

Cinematograph Act

Employees, Provident Funds (and Family Pensions)Act

Inter-states Estates Act

Maternity Benefit Act (Travancore) Mines Act

Suppression of Immoral Traffic Act (Hyderabad)

1954 Dramatic Performance Act

Special Marriage Act

The Saurashtra Prevention of Hindu Bigamous Marriage Act

1955 : Citizenship Act

Hindu Marriage Act

1956 : Hindu Adoptions and Maintenance Act

Hindu Minority and Guardianship Act

Hindu Succession Act

Orphanages and Women's Homes

(Supervision and Control)Act (Delhi)

Suppression of Immoral Traffic in Women and Girls Act

Women and Children's Institutions (Control) Act

Women and Children's Institutions Licensing Act

Young Persons (Harmful Publication) Act

1957 : Devadasis Protection (Extension) Act

Supervision of Orphanages and Widow's House Act (Bihar)

1958 : Andhra Pradesh Dowry Prohibition Act

Probation of Offenders Act

1960 : Children's Act

Orphanages and Other Charitable Homes

(Supervision and Control) Act

1961 : Dowry Prohibition Act

Female Infanticide Prevention (Amendment) Act

Maternity Benefit Act

1962 : Hindu Marriage Uttar Pradesh (Sanshodhana)

Adhiniyam

1965 : Matrimonial Causes Act

1966 : Beedi and Cigar Workers (Condition of Employment) Act

1969 : Foreign Marriages Act

1970 : Contract Labour (Regulation and Abolition) Act

1971 : Married Women's Property (Extension) Act

Medical Termination of Pregnancy Act

1972 : Payment of Gratuity Act

1973 : Criminal Procedure Code Amendment

Maternity Benefit (Amendment)Act

1976 : Equal Remuneration Act

Civil Procedure Code (Amendment)Act

Marriage Laws (Amendment)Act

1977 : Jammu and Kashmir Muslim Dower Act

1978 : Hindu Marriage (Amendment) Act

1983 : Criminal Law (Amendment) Act (IPC, Sections 228A, 350A, 376A, 376B, 376C; Indian Evidence Act, Section 114A)

1984 : Dowry Prohibition (Amendment)Act

Family Courts Act

Pre-constitutional India had myriad hues of personal laws-the reason for this is any one's guess. In the post-constitutional era nothing much has changed in this regard. In this period the laws are so mentioned-here-as to show that some states took measures to protect women by laws, when such measures were yet to be taken by the Union Government. Such legal developments (dialectics of law) are conducive to elevating the plummetted status of women — though in an immanently limited way (law happens to be one amongst many other tools of change). It is complementary rather than substitutive. It is for this reason besides many others as mentioned throughout the present thesis — that the preceding Acts have failed to act (notwithstanding exceptions).

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