Gender Justice and New Strides in Familial Jurisprudence: A Socio-legal Dilemma

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It might sound intriguing to enquire whether or not the expression “woman” continues to bear the same meaning as is etymologically ascribed to it? This appears to be one of the major issues of familial jurisprudence. As correct it may be that we are already familiar with the story of woman in her classical contours, yet we can ill afford to neglect examining her position in totality even in contemporary times, that too, ranging from her infancy to elderly. In the aggregate, many questions are thrown for investigation, namely: Why should the name of the woman continue missing from the epigraph of the cultural tapestry despite her ungrudging contribution towards the growth of human civilisation from the period of Greeks down to the period of renaissance? Why is it that man continues to devise different techniques to avenge the Eve’s daughter on diverse pretexts, as even in modern times as the sufferings of women appear to have only changed the form not the content? Why do women, notwithstanding the sufferings inflicted on her, continue to rub their shoulders with men in their bid to construct the majestic civilisation? They are deliberate in their endeavour, though they know a priori that the cost of association with man is much high yet they do not mind to stifle their souls and bruise their bodies in return for the same Or it has been because woman is much farsighted that owing to her emancipation it has been her belief that some day a new dawn shall break upon man and the shackles shall automatically fall down and hence continue the march with men pace to pace. These are some of the questions that need to be answered by sociologists, lawmen, nay alone by the jurists. The same is not untimely to

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inquire, as the changes are taking place in contemporary society on account of modernisation that possess more sociological under-currents than legal under-currents. It may not further amount to overstating the facts that the modern society labours under tremendous stress and strain tearing apart the group solidarity and traditional values besides inflicting trouble at some cost like breaking down the age old institutions both political and social. The net outcome of this institutional breakdown has paved the way for imposition of new institutional patterns and assigning of new roles. All these issues taken together constitute the *raison d'etre* for the present study so that the direction of familial jurisprudence is correctly mapped and presented to the readers for their own analysis.

**Conventional Trends**

All the legal systems emphasising on monogamy convincingly deny independent personality to the female rather she continues to be painted on social screen as an adjunct of father, brother or husband whatever may be the case. The very fact that woman has never been the master of her fate since she could not choose a husband of her own choice attest to it. For example, under Hindu Law, *Gandarwa* form of marriage was discarded for being unacceptable because the parties could by their mutual consent in disregard to the opinion of elders enter into marriage. Her husband, under the common law doctrine of coverture absorbed her personality in its totality. The man intelligently achieved his objective of subjugation of woman both at formal and informal institutional levels. In the name of being crowned as the queen of the household on marriage she is virtually reduced to slavery. Man for his own reasons decorated

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4. The leftists were jolting the female from slumber where they openly came out against the condition of women and observed: "The modern individual family is founded on the open or concealed slavery of wife". For details *(f.n. contd. on next page)*
woman with head-gears and decorated her with diamonds and pearls. He dressed her in lion’s skins to add to her grandeur. As such woman did not mind falling prey to man’s bluff and ungrudgingly accepted to be treated not more than a chattel thus to be owned and controlled by man so when he liked he would cast her away or abandon her when he desired. She fell prey to cajoling and accepted indissolubility of marriage as her fait accompli which ultimately multiplied her miseries. Although she was retrospectively venerated as the fountain of fortune, yet in most cases she continues to be denied even the proprietary rights. For example under

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5. What can explain position of woman as a chattel better than the provision for restitution of conjugal rights continuing to exist on the statute books of most of the states of the world? In India, notwithstanding the fact that restitution is available to both the parties to the marriage but the wife in essence is victim of this remedy because she is made to join the matrimonial home of her husband. For example, see, The Hindu Marriage Act, 1955, S. 9. In this regard, it is surprising to note that the Indian judiciary has fallen prey to the conventional influences and has resorted to negative activism that too in the teeth of constitutional promises and guarantees. For example, in Harminder Kour v. Harmander Singh, A.I.R. 1984 Delhi 86, Delhi High Court did not hesitate to describe S.9 of the Act as cool provision of law, and argued that introducing Constitution in matrimonial home would amount to “introducing a bull into the China shop”. The Supreme Court without assessing the negative impact of the judgement in general arrived at the same conclusion in Saroj Rani v. Sudershana, 1984 S.C. 1562, where it perceived S.9 as defence mechanism aimed at protecting the matrimonial home and all that has been achieved in its name.

6. In monogamous system of marriage like among Catholic Christians, the wife has historically been a sufferer. In the name of sacrosanct essence of marriage she has to tolerate even abusive, impotent and lunatic husband. For example, see Jorden Diengrah v. S.M Chopra, A.I.R. 1985 S.C. 935.

7. In 1986 and 1990 the Hindu Succession Act was amended and entitling thereby daughters to the same property rights as being enjoyed by the sons in the coparcenary property. In the same vein Muslim inheritance law discriminates a daughter by awarding her only half of her brothers, share in the property. For monetary transactions also the rules of evidence operate

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Hindu Law (Mitakshra School) woman can not be a coparcener and hence her proprietary rights to the ancestral property are negatived. The unrestricted freedom of testation is still used as a device to disinherit women heirs.

The cumulative denial of rights both civil and political finally boiled down to reducing the women merely to an object of entertainment to man. But instead of venerating the loyalty and affection of women the man exploited it to her disadvantage thereby projecting her in worst personal forms and in art she has not been carved in pleasing postures that befit the personality of woman either at home or in the society. Like a spider, man has woven the cobweb around woman with exactness and dexterity that it has difficult for woman to tear it away and rehabilitate her own self. This picture gradually got engraved on the societal screen in the name of culture, making any change in it impossible. Since the literate, in order to rejuvenate people's moorings, have consistently been writing about the classically beaten themes gearing around woman albeit culture. This has been true about the so-called civilised west since its literature is more discriminatory in as much as two women witnesses are required so as to be equal to testimony of one man. The condition of women under Christian and Parsi laws is no way better than their counter parts under other laws mentioned above.

8. Notwithstanding the loyalty and wisdom to reconcile with man in the interest of sweet home and society at large she is being projected as foolish, untrustworthy, selfish in nature and wicked. For example, see W.J.Criag (Ed.) Complete Works of William Shakespeare (1959); see also Sigmund Freud, Three Essays on Sexuality, Vol.7, London (1953), p.219.

9. In art, woman is always shown naked as if something important is missing from her body. This kind of treatment of a female is not only hurting but derogatory as well. For example, see Otto Weininger, who shared much with Freud summarises his own perception of the people in his times with respect to femininity. "Any absolute nude female figure in art in life leaves an impression of something wanting, and incompleteness which is incompatible... The signs that appeal to a woman are signs of a developed sexuality...." See Otto Weininger, Sex and Character (1906), pp. 236 - 241.

reflective of the double standards that have been conveniently followed by man to the disappointment of woman.

Woman and Scriptural / Secular Literature

True it may be that woman has irrespective of geographical frontiers been projected in unpalatable language but why is it that at the same she has been portrayed in form of goddess in different cultures in general and under Greek culture in particular. We may not be certain as to the point in time when the west reduced the woman to the status of a vassal to man but can it be traced to the distortions read in the scriptural literature would certainly invite attention. For example in the most ancient literature namely, Vedas woman is not painted only in the best of apparels but even the choicest expressions like sakhi, grihya laxmi and ardhangini are used to describe the woman in her diverse capacities. Even Manu is reported to have ordained: yatre nari yastu pujantey tatri ramantey devata, i.e., where women are honoured the gods rejoice. The grafting of Shiva on Shakhti has had the similar connotations. The scriptural literature describes her further as a source of spiritual solace to her husband. The imprints of this philosophy has found its due place in the great religious epics like Ramayana and Mahabharta that speak about the strength and high dignity of woman as ardhangini, i.e., equal half of man. The Europeans appear to have been more influenced by the Greek philosophy than that of Indian or Confucian religious social thought. Greeks were the people who put afloat the theory of fall of Adam and put the blame for his sufferings on Eve. The Christian world without any explanation picked

up Greek threads and wove a theory of their own to justify the subservient position of women. This theory was a great affront to the teachings and personality of the Christ, who despite having never married was never contemptuous towards women. All this has fallen on deaf ears of the legal sociologists. The mixing of Greek philosophy with the Christian thought produced its own results to the disadvantage of women in the aggregate.\footnote{15} Woman continues to be subservient, though being worshiped in the classroom besides in the Bench and Bar in her frame being blind folded goddess of justice.\footnote{16} May be because the Christian world got more mixed with the Greek thought which attributed the fall of Adam to Eve than respectively to the benign exhortations of the Old and the New Testaments.\footnote{17} In the former, female was surprisingly venerated beyond expectations of the times since it exhorts that a female in case her parents left no male issue behind, might claim the whole of the ancestral property.\footnote{18} To this should be added the exhortation in New Testament that “husband and wife are one flesh”\footnote{19} that was further supplemented with one more Biblical postulate like—What God has put together let the man not put asunder\footnote{20}. Though the two are distinct and different in context and subject matter, the same are said to deal with the institution of marriage. The literature on the other hand wove a different theory of marriage around these axioms. Whereas under the Hindu jurisprudence \textit{Sruti}s emphasised on upholding the dignity of women, the writers in Judaism and Christianity exploited the scriptural literature to the disadvantage of femininity. For example, a strange image was painted by the genius of the times like Shakespeare who projected women in wicked nature, as and when he discusses transvestism.\footnote{21} John Pope added a new meaning to this where

\begin{enumerate}
\item \textit{Ibid.}
\item \textit{Supra} n.14.
\item Muhammed Ata' ur Rehman, \textit{Jesus— A Prophet of Islam}, Karachi, Pakistan.
\item See M.H. Kidwai, \textit{supra} n.14.
\item Matthew, XIX : 5-6; \textit{Saint Mark, X:} 8
\item \textit{Ibid.}
\item W. J. Craig, \textit{supra} n.10.
\end{enumerate}
he described a woman as fickle minded, dissimulate and hypocrite. He did not betray his conscience when he observed that women sedulously practise coquetry as in his opinion the pretension and levity are their common characteristics. This seems to have been aimed at impoverishing the psychological being of the woman and prepare her to accept what the man, not the God intended to write in her fate. Once again Milton who won applause because of his work *Paradise Lost* appears to have put divine seal on his theme where he attributed the fall of Adam albeit the misery of man to the ill advice of Eve in the Garden of Eden. This was not a device that he devised to punish woman. As it happened that no sooner was female psychologically impoverished, new techniques were devised to keep the memory of people afresh that the woman was the cause of fall of Adam. In this, the Theatre seems to have played an important and measurable role. For example the Biblical postulate already quoted simply emphasises that marriage should be based on free consent of the parties so that, love and affection, tranquillity and peace, agreement and compatibility than disagreement, conflict, hate, disrespect and mistrust, be the guiding factors behind the union of body and souls where these facts of marriage disappear it did not emphasise on indissolubility. This message was conveyed to the people without any default as if they were the true followers of Christianity. As Shakespeare makes Portia to speak:

"By all vows of love and that great vow, which did incorporate and make us one; that you unfold to me yourself, your half..."

In the same vein he makes Hamlet to declare:

"My mother: father and mother are a husband and wife and husband and wife is one flesh..."

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22. For further details, see Alexandar Pope, *The Rape of the Lock* (1976).
The message that Shakespeare intended to convey in conformity with the human sentiment seems not to have reached to the laity. It seems to have instead sent wrong signal to the English society in particular and to the Christendom in general namely that the kind of marriage cherished by the Lord was one of the indissoluble nature. As such the main purpose, if at all we assume that he desired to awake emotive forces favourable to the cause of women in marriage was defeated. This strengthened the notion that was already put in circulation in the name of Biblical exhortation: "What the God has put together let not the man put asunder." They appreciated the least that this axiom was meant to protect the child in womb rather than encouraging broken marriages and denial of divorce where love, affection, trust and faith disappears and the lawyer prepares to enter the matrimonial home. The most august institution lost its soul to the disappoint of its author, the same way as happened to it elsewhere. Thus what happened to women in Christianity, the same was her condition under all other faiths.

Femininity: A Sociological Nightmare

Woman had yet to assimilate the desserts of her struggle against masculinity which man had exhibited in the form of stringent laws designed to regulate the female conduct, that new dimensions of her misery appeared complicating her struggle against inequities. As such her struggle both against man and societal attitudes has become unending. The gumption has paid him, since the very inception of social organisation man appears to have prepared a frizzy frame to encase woman, irrespective of her status as a daughter, sister or wife and hold her tight. The laws so the social taboos if any, favourable to woman failed hitherto, to take cognisance of her misery because societal conditions were structured to favour man

27. This appears to be the view taken by the House of Commons where it rejected the "asunder proposal" floated by the group of Bishops against the irretrievable breakdown theory in 1969. For details, see House of Commons Debates, Vol.784, col. 2030, 12th June 1977; see also R. Phillip, Putting Asunder: A History of Divorce in Western Society, Cambridge (1988).
rather than woman. This condition did not change even after marriage because in her matrimonial home she looked on herself as a vanquished and disarmed soldier bound by the dictates of the victor albeit husband in order to protect the so called masculine culture. This condition had not changed for the better that industrialisation together with technological developments lending to modernisation generated pressure on her in the contemporary society. One of the major effects of great sociological significance has been that traditional value system and group solidarity suffered severe stress and strain, as such, challenging the traditional institutional constructs, thereby raising the apprehension of its getting torn apart at a great troublesome cost. It is not out of place to mention that on account of tireless effort of women organisations in Europe and the West the otherwise criminal male behaviour, which was for a long time under the carpet, has become visible on the sleeves of man. It is officially acknowledged now that because of the forces of disorientation let loose by man, woman has retrospectively been buried both in body and spirit. Though what has come to limelight is merely a tip of the iceberg, yet it is sufficient to send shrills down the spine of people in general. Despite this, woman has long waited a new dawn to break open but still it remains a hope against hope, because she continues to experience rootless and lonely existence in the world at large, and continues to be a stranger in her own home and an alien in her matrimonial home. Where the whole misery of hers' is epitomised it throws a question : is this not a state of anomie a woman is pushed into? The same assumes lot more credence where the position of woman is synthesised in the developed economies. Though, least suggestive that the developed economies are problem free, but the difference is one of priority and the degrees only. Does it mean that economic development is at the root of this anomie that is imposed on the society by man whose sole target has historically been the woman? Or the very masculine culture is at the roots. This is because in the words of Emile Durkheim:

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28. See supra n.1.
"It is not true that human activity can be released from all restraint.... Its nature and method of manifestation depend not only on itself but on other beings, who consequently restrain and regulate it..."

What are these other beings to which in the course of time woman gets exposed to face the humiliation and disgrace that finally ends up in misery and gruesome violence against her both in the home and outside? But all things remaining the same in 21st century there appears a failure of norms right in the nose of the culture that has retrospectively been masculine. With the legislation on lesbian and homosexual marriages and the innovation of cohabitees unions, it remains to be explained that what kind of family and society is in the offing? The biological divide that has been the criterion of traditional family has slowly but definitely been losing its meaning. The day is not far away when this criterion might sound irrelevant and pass like a shibboleth down the history of familial jurisprudence. At the same it is not easy to remain oblivious to the growing trends and demands of the society. At present more emphasis is laid on the need to recognise not only the rights of the cohabitees but also that of spouses. Does this show that the revival of the institutions of antiquity is being promoted in the name of modernisation or individualism.

For example, the Wolfenden Committee Report, in England, appears to have constructed a new pathway for the homosexuals and lesbians, for it lays down:

"The homosexual behaviour among the consenting adults in private should no longer be criminal offence (para-16) ... which we believe to be decisive namely the importance, which the society and the law ought to give to individual freedom of choice and action in matters of private morality and hence a new postulate public/private divide has been put afloat."

31. Sheikh M. H. Kidwai, supra n.12.
As a result, the very society in the West appears to have been virtually sexualised. In this regard Professor Katherine's views are inspiring. All the same it does not become clear whether she satirically describes male as hetero-sexual dyad only to highlight male sexual behaviour in its essence or she intends to lament that biological differentiation would continue to subsist as the basis of marriage. Whatever be the case, it is undeniable that in the name of individualism new trends and developments taking place in the West are likely not only to change the meaning of marriage but the same may impose a change on the etymology of the expression 'wife'. This becomes clear from the empiricism in this area. Why to feel proud of adopt cohabitees in the place of wife is not clear. As a result of this, between 1971-1991 the number of marriages in U.K has fallen by not less than 24 percent. It is no wonder that as a result of this shift, the percentage of cohabitees who are generally non-married men and women in their mid twenties is on gradual increase. This proves the correctness of the data since 32 percent of children born in England, it was established empirically, were from unmarried parents and one in five mothers with dependent children were lone mothers.

The sexualisation of society has shot up, and 90 percent in teenage between 16-19 have confessed having engaged in sexual activities. This apart, gay and lesbian marriages are no longer an abomination or deemed to be opposed to general policy of law. Then is it not a kind of sociological nightmare we stand face to face in the contemporary times? Where do we go from here is a million dollar question thrown to sociologists and jurists

36. Ibid.
38. See Family Law Act, 1996, S. 3 which recognises the right of cohabitees at par with spouses for the purpose of protection of their rights.
and laity awaits to know—the definition of woman? This has surfaced on account of changing of roles in contemporary society and it is likely to be the last nail in the coffin of social engineering where jurists like Roscopolound emphasised on the protection of institution of marriage.\(^{39}\) Apparently the variables like chromosomal sex, gonadal sex, hormonal sex, genitals assigned sex determine the biological divide.\(^{40}\) But it is undisputed that no one particular theory has hitherto emerged that could either justify to preclude the classification or replace it. It is therefore legal compulsion if not necessity to hold to the biological divide or follow the essentialist view which the court appreciated in Corbet's case\(^{41}\) which revolved around sex-conversion, and laid emphasis on consummation of marriage not on gender identity or its social appearance. Within this premise the man and woman were projected as closed categories. What the Court ruled was never a swing but all the same some ripples were caused in the stagnant waters of familial jurisprudence. Academicians interested in feminine cause began to pull up their socks to discover an alternate theory that is more logical and would replace biological divide albeit penetration rules. These rules are only marriage specific, where as the general effects namely legal and social bias, which begins to flow from the time of registration of the baby within either category was touched the least. The most confusing situation arises in particular in the cases of transvestism that confounds the confusion on account of error in sex classification at the time of registration.\(^{42}\) Article 8 of the European Human Rights Convention lays emphasis on the right of respect for private life, which is endorsed and explained further by the European Human Rights Court, not to mean just a right to live without publicity. For 'it comprises also to certain degree the right to establish relationship with other human beings especially in the

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42. *Ibid*.
emotional field for the development and fulfilment of one’s personality. The Court was moved in the instant case because trans-sexual was asked to carry travel documents of identity manifestly incompatible with personal appearance. The court was certainly inspired by the state practice that lays emphasis on cluster concept approach where persons are classified according to appearance and the gender they are pleased to choose and not the other way round. It appears that the Court was moved by the views of Martens, J., who in fact put forward the cluster concept model in the dissenting judgement. In Cossey v. U.K., the Court observed that human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that seems fit his personality the best. A trans-sexual does use only those very rights. Additionally, the case of lesbians become somewhat confusing because it does not fulfil the criterion of the essentialist model that revolves around biological divide and penetration rule. This case may be well recognised under the cluster concept but still it is not free from problems. The latter may be as such viable alternative to essentialist approach, but at the same it may contradict the domestic legislation as and when it is juxtaposed with some of the aspects of laws dealing with crime, social security, employment and sex discrimination.

These are not the only issues which concern the western society. This list may get multiplied as and when it receives recognition from the developing societies. The problem is not only one of changing the orientation of the sex laws but resolving the issues that stem from the reorientation of laws. For example, it may be difficult to explain rape vis a vis an active lesbian or passive homosexual or trans-sexual prostitute who can’t be punished for hetro-sexual soliciting. All the same, it may finally cause abandonment of the cluster concept theory in favour of essentialist theory. This would become necessary because it is impossible to explain rape, adultery, or prostitution in a form other than the one that

44. Series A, No: 184.
revolves around biological divide. It is correct that industrialisation together with technological development has brought about prosperity and fortune to mankind, but the pressure it has generated on conventional institutions is more alarming in magnitude. Marriage that gives birth to the primary institution of social organisation namely family is generally being obliterated. It seems because the conditions like prohibited degrees, adultery and fornication, lesbianism, homosexuality and the like sound out-dated and out of tune. The same is written off as worn out truth, no matter, that in the yester years it worked well to regularise the institution of marriage albeit family thus served well both to the individual and the state. But why this U-turn in behaviour at personal level? Is it because the morality that travelled inward with the advent of analytical positivism appears to have vanished and lost in the positivist abyss so much so it is hard to determine the criterion that may be said to be the basis of public interest and/or public policy?

The individualism is stretched by pseudo individualists beyond the imaginable parameters making it very difficult to see where does the state interest lie in protecting the people from the consequences of their personal relationships. Since an activity undertaken either in public or in private leaves behind something in the form of its effects, only explicable in abstract terms but which can not be always quantified—still all this is legalised in the name of sexual pleasure only—why? However some might for the sake of realism even question the desirability of the state to grant licenses for such relationships. This has to be judged on the basis whether or not such an activity ameliorate or obliterate the interest of the state. Those who plead that an individual should be left free in this area forget that modern state continues to be positivist in frame. Notwithstanding the dilution of the sovereignty and rigour of law, the vibrant heart that throbs in its chest is still positivist and can not be transplanted easily with

46. Supra n.10, p. 443.
But the answers in any case cannot be deferred because of developed/developing or oriental/occidental divide. The phenomenon like these have existed in one form or other at all the times in the recorded history of mankind but in contemporary times it has become an important issue liable to acceptance or rejection thus bringing conventional familial jurisprudence under pressure. The same have to accommodate new trends without itself undergoing any change until that the traditional approach is the only alternative available to address the problems. It is undeniable that traditional approach to law was developed at a time when women were alien to legal profession or judiciary, or their number was only nominal, were not legal subjects at all, they could not vote as citizens, or their opportunities for paid work were narrowly confined. It is under these circumstances the law was evolved and not much could be expected from it as being rooted in male psychology.

However, long before a solution might emerge to the contemporary legal issues it has to be clearly elucidated that the law as a symbol of sovereignty is the epitome of people’s will. But whose will? What does it mean that sovereignty belongs to people? Should not the female who constitute half of the world’s population be included within it? This augmented for two reasons: first, though the women generally possess right to vote and exercise it equally yet they are un-represented or under represented. This is supported by the fact that sovereign institutions like Parliament etc., which matter in the law making are filled with male representatives mainly and legal systems bear male orientation. The laws generally possess masculine nature and continue to protect male interest

47. Ibid.
49. For example until 1920 American women were denied even right to vote though the same was granted to blacks in 1870.
rather than catering to female conditions. This points to the fact that women should be in law making processes, because without their representation law only imposes lopsided solutions that ultimately promotes gender bias.

Women and Masculinity of Law

This panorama opens up on a note of caution that masculine nature of law is responsible for the disappointment of women in general and hence a path-way needs to be constructed to usher in an era of dignity for women. This is a quixotic theme nevertheless efforts are under taken to achieve it without imposing a metamorphosis that would end up in hurting the male susceptibilities because, an irreversible social confusion that can be cured neither by tightening the grip of law nor by applying the principles of wisdom. The debate about the masculinity of law suggesting the overtaking of dissimilarities is found groping whether or not law should be sex neutral rather than neuter in terms of orientation and application? In the course, many groups favouring non-sexiest society that has roots in social role than biological divide have spawned. They emphasise that rating similarities is the demand of justice and further promote the idea while arguing that the things that do not conform to some neutral or masculine norm should be suppressed. It is so far so good an idea so long we remain contented with the things conforming to sex-neutral language, not that conformity with masculine norm emerging as a checkstone. The fact nevertheless remains that in patriarchal accounts, the choice for many women is between dependence on an intrusive and insensitive bureaucracy or dependence on a controlling or an abusive man. In either case it amounts to sleeping with the enemy.

50. Supra n.33, pp. 76-78.
51. Id., p 78.
The literature on political philosophy and jurisprudence amply demonstrate how the law based on masculine norm worked havoc vis a vis female interest that even from mid seventies the law continues to exclude women in many respects as full legal subjects. This is visible in most developed economies of the West rather than in the developing world where people in general lack basic necessaries of life. Many developed societies, which claim to be the champions of equality have fallen prey to the theory of male-female divide that further permeates into diverse aspects of social life like labour market and education. As a result of this, the U.S Labour Department, for example, has documented the “glass ceiling” in every business and professional sector. The institutions of learning are not even spared by this cultural rag. In the face of such contradiction to the rule of law that restrains any arbitrary action, the jurists tolerate the classification of women under one pretext or other only because it conforms to the masculine frame and being entrenched in the culture that certainly glows the masculine hue. For example, Nagine Naffine shows that this masculinity is visible in legal profession, nature of legal education and a particular style of legal argumentation appreciable both to the bench and bar.


57. Ibid. Katherine O’Donovan has discussed this topic at length. She avoids to plunge into the problem head long and get caught into the cultural and
true that rule of law revolves around equality and equality demands equal
respects for individuals the denial of it on whatsoever pretext tantamounts
to denial of the right to life. The same question has been thrown to the
prudent where it is argued that law ignores women so much that legal
definition and behaviours have male orientation.

Does it not suffice to show, as some argue, women's difficulty in
fitting into the pre-existing legal definitions with men in mind or it is the
societal failure to put the same in such expressions and terminology that
would obliterate distinction and the divide? Is it not an invisible
discrimination we are, then, talking about the contradicts of the rule of
law? Or is it only a new dimension of discrimination and should de novo
attract attention of jurists and sociologists alike? This notwithstanding,
there is a general failure of jurists to flash the light on the theme under hand,
consequently hitherto no commotion is witnessed either in legal or
sociological circles. The fact remains that emergence and persistence of
discrimination in new forms are a new challenge to the social model,
fundamental values and social justice. We need not remind sociologists
and jurists that social breakdown that takes different forms costs more
than the fight against discrimination, which thwarts the growth here by,
becoming more expensive. These people are supposed to be in knowing
the truth that investing in equality is investing in research and development,

acultural mesh but prefers to scratch the hidden silt that has accumulated
on the "women" in abstract terms, therefore she steers the ship of her ideas
through these wet lands safely by avoiding to side with either view but at
the same does not give her mind what "further measures..." she would
recommend to solve the problem. See Sexual Division in Law, London,

58. Munn v. Illinois, 94 U.S 113. In this case Field, J., summed up the essence of
right to life in the following words: "By the term life as here used something
more is meant than mere animal existence. The inhibition against its
deprivation extends to all those limbs and faculties by which life is enjoyed.
The provision equally prohibits the mutilation of the body by the amputation
of an arm or leg, or the putting out of an eye or the destruction of any other
organ of the body through which the soul communicates with outer world"

59. Supra n.33, p 75.
as it creates new wealth and contributes to the culture and humanity.\(^{60}\) However, maximum shall depend on the type of political order the people prefer to follow. In this it is generally seen that the state appears to protect male power in areas like criminal and personal laws more than in any other area. For example it is claimed that the marriage laws mainly dealing with conditions of marriage which prescribe monogamy are ostensibly in sex neutral language. It is balanced, as much, against the interests of women as that of man, yet the fact remains that monogamy in essence is culturally exploited against the interests of women. Similarly the legal rules that regulates the economic consequences of marriage also manifest the male orientation and fails to project the actual condition of female in the wage market, and in the house hold as an un-paid labourer. This ultimately registers an adverse impact on women’s ability to compete with man and comes to the utter dismay of women that the identity of women is strongly connected with motherhood and the domestic realm whereas the man’s career determines his identity.\(^{61}\) These are the illustrative situations to show that the equality is only a male cultural norm.

It is surprising that married men makes more than single man does, where as married women earn less than single woman. Most wives are earning far less than their husbands\(^{62}\) Monogamy rules on women. It is correct that monogamy rules create economic and safety incentives to women to marry and remain sexually faithful in marriage. But does it not virtually cause the subordination of women at home and diminish her ability to be a good wage earner out side the home? Is the expression “monogamy” as such sex-neutral or it is more male oriented than female specific? The monogamous expression again loses its sex-neutral character where it

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62. Joan Williams, id., p. 2229.
comes to explaining the extra marital activity of a monogamous male who may very easily escape the net of law for his promiscuity with an unmarried female. Should not this prerogative be extended to the married women? Will masculine norm condone it if the same is endorsed? Perhaps the answer in all probabilities might be in the negative.\(^6\) It is this aspect that has impressed some jurists to expose the real face of monogamy.\(^6\) Does it not amount to monogamous blackmail of women? Why should the law assume in the name of monogamy that woman is safe with the man she marries than against the man in the street? Does the law take care of monogamous wife who is subjected to cruelty for a fault or no fault of hers? In either case woman is made either to live with a violent male or sleep with a sterile male. Is monogamy still a sex neutral proposition of law?

This needs to be admitted that sex based difference is the product of legal rules that leaves behind impact on the monogamous character of marriage and hetro-sexual relations. The same rules not only encourage a “double standard” of sexual conduct for women and men but also enable men to have greater control over the terms of hetro-sexual intimacy. As such, men enjoy more powers over women in sex. In essence, it promotes masculine norm, yet rooted in primitive history of matrimony. Monogamy imposes than evolves some kind of passivity as a model of female sexual conduct.\(^6\) Thus monogamy appears to be more a cultural language that has masculine charm than being a sex neutral postulate which emphasises on similarity of sexes. Any attempt to search in it unconventional meaning or quantifying its sexual content is useless because any male cultural language in all circumstances should be presumed to be male specific. The object is achieved by choosing appropriate expressions, which admit pun and help to mask its real contours. The strategy so adopted passes

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63. For example see Indian Penal Code, Act XLV of 1860, S. 497.
65. Id., p. 1066
like an unbroken thread through the raiment of institution of marriage. For example, like monogamy the masculine cultural norm permeates even to the bedroom, as such, it is a priori assumed that woman has given consent not only to marriage but has acquiesced in obliging the husband as and when he desires to play the sex game with her. Correspondingly, she appears to have consented to assaults and injuries which she may receive if she fails to please her man.

On this very premise, a major question may arise that what should be the definition of rape. Apparently consent to marriage does not imply that wife has consented even to the coercive sexual advances of the husband. It would result in obliterating the line that divides the lawful and unlawful sexual conduct. On the face of it, there is no difference between the imposed sexual conduct whether same be of a husband or a stranger and the voluntary one, yet the law exonerates the former and absolves him of any criminal liability while it punishes the latter. In this scenario wife suffers psychologically besides withstanding the coercive act while as law takes no notice of the “innate disinclination of the husband” that fails to please his demanding wife.66 This ought to have considered the unwillingness of the wife at parity with that of a man than changing its meaning to “nagging” and recognise the same as an irretrievable breakdown of marriage. This position has rightly been summed up where Katherine O’Donovan claims that the theory of consent to sexual intercourse so long as the marriage lasts runs counter to any idea to treat marriage partners as equals. This shows that, though the consent is only skin deep sex-neutral, yet under its skin are spread the masculine blood filled veins. This can also be seen in expressions like cruelty, which apparently is sex-neutral, yet continues to subserve the male needs and demands than serving any major female interest. Again, it is not surprising to notice that assault outside the home is punishable both as crime and tort, but inside the matrimonial home it is neither of the two. With this flowers, a new aspect of matrimonial life namely physical security. Should we allow men to flourish and enjoy liberty at the cost of dignity and autonomy of a woman within the home? It has attracted more attention because an impression is given that law spares

66. Supra n.59, p 119.
man and treats him as sovereign in the matrimonial home. The same is attested by the fact that among police officers, prosecutors and judges, assumptions persist that family violence is a "family matter." 67 This happens in most of the cases notwithstanding the fact that pompous claims are made that law does not recognise the private realm and hence the sovereignty of husband is slightly eroded and not whittled down. Beyond doubt, in contemporary times the husband who assaults his wife is treated not less than a stranger to enable the law to keep the promise. Besides, a wife can now give evidence against her husband. 68 All the same, it should be seen, as only a step towards the end because weeding out violence from the sweet home is impossible to achieve without changing the cultural psyche of people. 69

The violence in home can be neither curbed by "pro-arrest" nor "by prosecution enterprise" 70 as in vogue at present, unless measures are taken regarding female psychological empowerment. 71 This assumes


69. The violence is rooted in cultural history of family because most of the times justification for it has been “private realm” and on occasions it was let alone on “double victimisation of female” but the fact remains that the formal and informal institutions that would help to weed it out have been constructed around masculine norm, therefore, making the change of the same necessary. For example, see S. Schecher, Woman Asunders.


71. The very fact that courts have begun to recognise the importance of psychological sufferings in Nearing v. Weaver, 295, O.R. 702, 670 (1983) points at the need for putting a seal on psychological disempowerment of (f.n. contd. on next page)
importance because a general impression supported by some evidence shows that women are most unreliable prosecutrix because in the nick of time they either withdraw or fail to appear as witness in domestic violence cases which causes thereby incongruence of purpose between victim and prosecuting authorities. It is much important to investigate why the victims adopt such posture where the state is interested to rescue them. Is it because only small minority of domestic abuse cases result in significant sanctions? Or the follow up mechanism evolved to deal with domestic violence cases is generally diluting the seriousness of the offence, trivialise it, as a result victim feels disappointed with the system besides reaffirms her apprehensions about insecurity. Or there have not been proper training programmes undertaken by the state to infuse a sense of justice woven

women. The Court's resolve that failure of police to enforce restraining order against father renders such officer liable for psychological injury to mother and child, no matter it was within discretionary functions of the police. In line with this fall a series of cases like Brunov Codd, 47 N.Y 2d. 582, 393; N. E. 2d. 976 : 419 N.Y.S. 2d 901(1979), wherein the Court upheld Justifiability of suit against police, Department of Probation and Family Court for failure to enforce laws against battering men. Similarly in Barnes v. Nassau County, 12433 N.Y Sup. Ct. 1982, the Court ruled that, failure of police and County for failing to arrest battering husband when arrest warrant and temporary protective order had been issued entitles the women victim to seek damages by bringing tort actions against police. Also see Tadesco v. Alaska, N. 4, F.A - 81-593( Alaska 1981); Doe v. City of Belleville, No 81-5256(III. 1981); Sorichettiv v. City of N.Y., 95 Misc.2d-451: 408, N.Y.S, 2d 219 (1978) the Court held police to be liable for failing to act when battering husband violated restraining order. In the same vein the Court held in Baker v. N.Y., 25 A.D. 2d 770 : 269 N.Y. S. 2d 515 (1966), that municipality may be found liable for not protecting woman who had restraining order against a battering husband. This principle was taken further in a changed tone where it held that Municipality owes a special duty of care to protect women from assailant who had been put on probation. See Jones v. Herkimer, 51 Misc. 2d 130 : 272 N. Y.S. 2d 925 (Sup. Ct.966). The cumulative outcome of all these rulings points at the psychological empowerment of women at the same resulting into an effect that may be epitomised as disempowerment of agencies that are hitherto rooted in masculine culture.

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around as acceptable behavioural patterns that would inculcate an inborn
defense mechanism among the female folk and embolden them to withstand
or avert any violent situation.

These factors assume a meaning because cross-cultural comparisons
are suggestive of the fact that in the societies where women have gained
greater authority and respect, the sexual assault rates are lower. Does
this suggest that empowerment of woman is essential towards burrial of
discriminations that have bred consciously or unconsciously invisible bias
against women thereby imbuing masculinity in the legal norm? The change
in the form of law, as some argue, is insufficient to change the masculine
caracter of norms unless something more is done. Does it mean that if
we assume hypothetically that the learned scholars perhaps emphasise
that empowerment of women without offending the dignity and autonomy
of either might straighten the direction of law. This may eventually help to
restore the real meaning of “person” in the eyes of law without changing
the meaning of woman and avoid an upheaval within the periphery of
modern jurisprudence.

Women Empowerment

To be more precise, the need of the hour is that women in general
should reclaim psychological empowerment that they have on various
reasons lost to men. The same should be the prelude to her other
empowerment. Once it is achieved, the law too shall adapt to the needs
of women. The political jurists, as we are tempted to call them so, have
been tactical where they formulated the doctrines like classical liberalism
and solicited public appreciation, which they won. Even women
appreciated the argument that there should be an area where individuals
can express themselves freely without state intrusion or interference
because it was based on logic rather than social reality. Women did not

73. See Peggy R. Sanday, “Rape and the Silencing of the Feminine”, in Sylvana
Tomaselli & Roy Porter (Eds.), Rape (1986), pp. 84-85.
74. See generally A. Westin, Privacy and Freedom (1967), p 24; H. Arendt, The
Human Condition (1958), pp. 39-40; M. Gledon, State Law and Family: Law
(f.n. contd. on next page)
either anticipate or read the mind of man that the public/private divide so created may ultimately bring misfortune in the form of discrimination to women. The inevitable happened and the classical liberalism gave birth to a unique women that was never delivered by eve because the man exploited her chromosomal structure thereby impairing femininity. The creative nature was ignored, so failed the man to notice that femininity is the essence of the creation, and did not realise that women alone is the secret behind the glory of the universe. With the relegation of women to a mere mercenary or breathing machine shorn off her rights in private sphere she got reduced to a non entity in the public sphere and hence the theory of private/public divide failed. Such an action has been concomitant of exclusion of women from the political sphere, so appears woman psychologically dwarf than man and incapable of playing political roles. She would least anticipate that public/private divide would virtually result in coronation of man at the hands of jurists without any offence to democratic postulate that protects the citadels of individual and the group privacy as an undisputed prerequisites for liberal democratic societies. This lead further to projection of woman as mother rather than a rational political being that paved the way towards her subjugation rather than emancipation revolving around right to education, right to vote and all other rights involving the positions of power outside home. Apart from this, the confusions created by the classical liberalism has failed to interpret motherhood as a political construct. For example, the transformation of a woman from biological being (child bearer) to a political being (child rearer) is a part of conflict expressed by the politics of patriarchy. Does


76. N. Cott, id. at p.p. 197-206.

77. S. Okin, supra n. 75.
it not amply show that the public/private divide has in its essence contributed to the legitimisation of the political disempowerment of woman? Eisenstein, perhaps, intends to convey the same where he observes with regard to private/public divide thus:

"By refusing to intervene in the family unit to protect the rights of individual woman within that family unit, the state actively contributes to the sexist definition of woman as non-distinct from their families and thus denies women their rights as individuals." 78

The same has found expression and managed to permeate to the political ideology from time to time. The post renaissance jurists too did not succeed to weed out the sexist bias from their models, though the same were claimed to provide ideal solution to many of their socio-political maladies of their times. The discrimination managed a come-back through the back door as and when jurists entertained a 4th B.C concept emphasising that reasonable classification violated equality the least. Even in 20th century, it was held to be in concord with the rule of law, because absolute equality is nothing but utopia. 79 The classification may not be bad per se or violative of equality norm yet allowing classification of women on the ground that they are weak biologically and different from men is an affront to equality itself not only vituperative to womanhood. The classification is fraught with stigma that the woman has to live with and hence inflicting scar on her psychological being. Here from flows all that which is sufficient to strip a woman of her dignity and autonomy. The same is still adversely affected where state intervenes to promote feminine cause by simply reserving certain professions for females and closing them on males.

The correctness of the instant argument can be assessed from the fact that very early the courts in America attempted to investigate and

discover the actual purpose of discriminatory classification rather than being satisfied with the benign compensatory purpose put forth by the state in support of its survival. As such, it found that the policy of excluding the males from the school of nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman’s job. It lends credibility to the old view that women, not men should become nurses and makes an assumption that nursing is a field for women—a self fulfilling prophecy. In the same vein, the Supreme Court of United States upheld the challenge against gender discrimination and struck down the all male policy of the single sex in Virginia Military Institute. The observation of the Court in this regard is very much highly provocative as it observed that through a century plus three decades and more of that history, women did not count among voters comprising “we the people”, not until 1920 did woman earn a constitutional right to the franchise. It may certainly promote the classification on the basis of sex rather than obliterating biological divide that has been responsible for the universalisation of gender discrimination. In return, it has been one of the main reasons behind the stereotype which could not be broken despite all efforts put into by the women organisations the world over.

The equality that would result in levelling of sexes has unexpectedly become the instrument of promoting sex discriminations and has further deteriorated the psychological wellbeing of women who have failed to develop the inbuilt psychological safeguard and constellations to fight gender bias. The situation is likely to persist so long the state institutions are not thrown open to women both at vertical and horizontal levels so that she as a political individual counts in the power structure at par with men. Besides, to avoid the disappointments in psychological empowerment of women the academicians should come forward and reorganise curricula so that gender discrimination is fought at its roots. All the same it is

82. Ibid.
imprudence to expect that ad-hoc measures are sufficient to fight problems related with gender discrimination, which have roots in the history of social evolution of man. Although, the problem is universal, yet it possesses different shapes and varies in its contours from one geographical area to another.

**Indian Scenario**

It was in 16th century, when the Queen poetess Habba Khatoon of the Himalyan State—Kashmir woke up to generate awareness about the miseries and sufferings of the female folk. She laments in a lyric as to how people looked at a female on her birth in the following words:

> "Unwanted and un-craved was I born;  
> On my birth many hearts were torn.  
> Accepted all this without a groan  
> Deserted love kept me forlorn".

Her poetry revolves around female problems, which in the wholesome leave impressions of immeasurable pathos or pain finally dissolved in gender joy. She has attempted to unfold the story of woman and in the course describes the life of newly born girl child besides the daughter in-law to be not less than a tragedy of infinite issues woven around success and failure of man. She was aware of the scriptural literature that projected woman in best shades and so desired that the mind of the orient male should be sensitised so as to put him back in the scriptural frame to relieve woman of her miseries. She was not as such articulating about the condition of woman in particular but the condition of women in general. For example, the most ancient Hindu Scripture *Vedas* though accord an ideal position to female, yet the *Smiritikars* especially the *Manu Smiriti*, which exaggerates the biological differentiation to the extent of female annihilation, by and large undid the same. The latter does least favour an independent identity of woman so recommends that it is ideal for her to

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83. Translated from Kashmiri to English by this author.
remain in tutelage of father in childhood, husband in her youth, and son in her old age. He enjoined upon men to keep a strict vigil on woman as they being vulnerable to exploitative forces and she may go astray. These very patriarchal values got nourished and supplemented by the visible and invisible forces of each age that exerted constant pressures on women until she lost her independence to man. As such the condition of women in India as a victim of patriarchal order does not appear to better as compared to her sister in the West. The sufferings and pain have become her fait accompli, be she in her bridal dress or in her accouchement and the two are made to accrete.

Unlike the West, where women are managing to stand against the masculine order of the day, the story of an Indian woman is different. It is intertwined between the amniocentesis and bride burning provided she escapes from the former is consumed finally by the latter, which if she does not escape relegates her to continual physical and psychological drudgery thus mutilating her both in body and soul. The most outstanding feature that makes condition of Indian woman different from her sister in the West is the practice of amniocentesis, dowry demand, perpetual cruelty in her matrimonial home, bride burning, imposed suicides, sati, sexual assaults and the like. The list is not exhaustive but aims at showing main planks of Indian masculine order that would enable one to differentiate between the women in the West and the East. A cumulative view appears to be that beneath the glamorous value oriented oeientalist's frame lies a sub-culture of incomparable male chauvinism.

Notwithstanding the neutral language of the conditions of marriage, masculine barbarity that once existed at common law and was grafted by the British on Indian soil continues to be the heart throb of marriage in India. In West, especially in U.K., the restitution of conjugal rights was wound up for the good much after the Court observed in Russel v. Russel84 that commanding the life of man or woman under the coercive powers of State and to impose an unwilling act of sexual cohabitation on woman

84. [1897] A.C. 395, per Lord Herschell.
cannot but be regarded as that of a human beast drained of all spirituality. This paved the way for abolition of restitution of conjugal rights.\(^{85}\) On the contrary the Indian scene is disappointing because as and when efforts aimed at getting rid of this colonial legacy were made the same ended in fiasco at the hands of native presiding officers of the highest judiciary.\(^{86}\) But how long shall this sustain, is unpredictable because the psyche of Indian male has not yet changed and adherence to masculine orientation of the legal system has become a permanent feature.

Despite the fact that except Muslims, the marriage is declared a monogamous union and the language in which conditions of marriage are articulated is sex-neutral yet the inherent bias against femininity constitutes the under-current of the institution of marriage. The femininity is exploited against female in her matrimonial home more than it being exploited anywhere else. The exploitative conditions that reduce a female in western world to subservience do persist even in India as well because the cultural norm is masculine in nature. The woman has no control over her body in the conjugam being a sex object to please the husband. Although in the West, marital rape as crime implies that the noose has been tightened around conventional meaning of masculinity, yet the same is not the case because consent to marriage is deemed to be the licence for the husband to humble his wife as and when he pleases. Such an act is exempt from

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86. For example in *T. Saretha v. Venkata Subbiah*, A.I.R. 1983 A.P. 356, Justice Chaudry ruled that S.20 is violative of the fundamental rights of personal liberty and privacy. Apprehending that instant ruling may pour nassian venom over classical familial jurisprudence albeit male supremacy, Justice Rohtagi of Delhi High Court at his earnest tried in *Harvinder Kaur v. Harminder Singh*, A.I.R. 1984 Del. 66, to neutralise the impact of Justice Chaudry’s ruling and cautioned that cool provisions of constitutional law if introduced in the matrimonial home would amount to introducing a bull into the China shop. The Supreme Court felt favour with this line of thinking and without being hyperbolic in expressions plainly observed in *Saroj Rani v. Sudarshan*, A.I.R 1984 S.C.1562, that restitution of conjugal rights is a safety system aiming at protecting the institution of family.
being reckoned as statutory offence and hence does not count for anything except wife being a minor. At the same it does not cease to be the concern of those who are involved in gender studies and strive to ameliorate the condition of women. The same needs attention because women suffer psychologically and bodily where they resist advances from the husband. It does not destroy only domestic peace but is well inimical to the growth of the children and may prove harmful towards harmonious growth of personality both of the husband and wife. This apart the early seventies brought to surface a new phenomenon that was hitherto unknown but which concerned the social life of people in general and that of females in particular. Was it a kind of commercialism or else the psychological hedonism that had for over centuries by and large remained undiscovered?

The case of Sudha Goel\footnote{State (Delhi Administration) v. Laxman Kumar and Indian Federation of Women Lawyers and Others, v. Smt. Shakuntala & Others, A.I.R. 1986 S.C. 202.} for the first time put the lid off the problems faced by females but pointed at the kind of behaviour exhibited by the law enforcing agencies while the deal with crime against women. The instant case is illustrative of the masculine mentality of the Indian police, doctors, and the public at large. The role of judiciary and the attitude of High Court judges who without suffering any fear of blemish exposed the exterior of their chauvinist mentality by reversing death sentence awarded by the trial court on the bride burners. The Supreme Court put the law back on rails and convicted the accused. It is not clear whether or not the Supreme Court might have on its own come out against masculine behaviour if the Women Organisations had not agitated with intensity they did. The second important fall out of this agitation came in the form of amendment to the Indian Penal Code and a separate provision namely dowry death in the form of Section 304 -B was created. Notwithstanding all this, neither the penal law was womanised nor was it made sex-neutral as such it continues to remain in masculine form. It is an affront to femininity to describe a female in male form to the same extent as it would be to address a male in a female form. Why does the Indian Penal Code, 1861
declare that the pronoun “he” and its derivatives are used of any person, whether male or female.\textsuperscript{88} The climax of male chauvinism can be deduced from the fact that for the purposes of fixing the liability to maintain the parents the courts have not hesitated to declare a female as a male.\textsuperscript{89} This is the kind of masculinity the women organisations are set on to fight.

Though because of cultural conditions much of the discriminations and crime against women remains unreported, yet it should not sound amazing to note that there is alarming proportion of crime against women which goes un-reported. In only 1996 the volume of total crime both in private and public spheres against women was recorded to be 1,15,723.\textsuperscript{90} The much alarming and heart moving appears to be the crime related to dowry. It is not ironical to argue that dowry has emerged as a phenomenon rooted in masculine culture. The practice is so deep rooted that it has managed to cross Great Atlantic and hot desserts of Middle East where Indian immigrants have settled. As the Indian immigrants continue to infest these areas with the dowry malady, the social morphology of these countries are also adversely affected.\textsuperscript{91} Back home it is likely to cripple the social

\textsuperscript{88} Indian Penal Code, 1860, S. 8.


\textsuperscript{90} For example, the recent report of the National Crime Record Bureau, 1996 has provided the crime rate as follows: Rape – the worst kind of which is the minors rape victims numbering 608 below ten years of age and 3475 between 10 and 16 years out of a total of 14,849; Dowry deaths – 5, 513; Torture – 35, 246; molestation – 28,939; Sexual Harassment – 5, 671; importation of girls – 182; Immoral Traffic Act offences – 7,706; Indecent Representation of Women (Prevention) Act, offences – 96; Dowry Prohibition Act crimes – 2, 647; For further details see S. Saraswati, “Crime Against Women: Law and Punishment” Kashmir Times, 24th Feb. 1999, p.5; see also Lalita Dhar, “Administration of Justice to the Victims of Marital Violence: Some Achievements and Failures”. 4 Kashmir University Law Journal 115 at 131(1997).

\textsuperscript{91} It is timely to note down that 3rd International Conference on “Dowry and Bride Burning in India “which took place at SOAS (England) the gruesome reality of dowry killings in Britain and U.S.A was brought to light. For details, see Werner Menski, “The Dowry Problem: Can Legal Remedies Work?”, London Law Review 129 (1997).
structure and endanger the physical and psychological wellbeing of females since violence takes diverse forms like bride burning, implosive suicides and perpetual cruelty. The causes of failure to curb such happenings are never different than those we notice in western world with respect to violence within the private realm as they call it. However, the women organisations in the country very early took note of the attitude of the police personnel and rose against the kind of justice that was delivered by the court in such heinous crimes that emanate from dowry demand. As a result of their efforts the soft justice was abandoned as Supreme Court observed:

“The investigating agency must display a live concern.... The Courts must also display greater sensitivity to criminality and avoid on all counts “soft justice.”"  

Thereafter the courts have, on occasions, hammered on the need to raise collective conscience of people against such type of crimes which are committed in the private sphere. However unlike India, the courts

92. It is highly distressing to note that the judiciary in India has exploited the expressions like soft justice to protect the masculine character of judicial system thereby succeeds to protect the interest of accused who happen to be the males in bride burning and abetment to suicide cases. For example see Brijlal v. Prem chand, A.I.R. 1989 S.C. 1661; Wazir Chand v. Haryana, (1988) (2) SCALE 1477.


95. For example, in Ashok Kumar v. State of Rajasthan, A.I.R.990 S.C. 2134, the Supreme Court observed: “Social Reformist and legal jurist may evolve a machinery for debarring such a boy from re-marriage, irrespective of the member of family who committed the crime and in violation penalise the whole family including those who participated in it i.e., social ostracism is needed to curtail the increasing malady.”
in the West have yet to develop strategy and judicial mechanism to deal with such crimes that constitute a class in them.96

The discrimination against women continues to persist in India notwithstanding the fact that the Constitution was promulgated as early as 1950 to weed out gender based discrimination of all kinds. The Constitution apparently revolves around equality but has failed to ensure that the same is meted out to women. As such their representation in political and decision making bodies is least visible. This can be attributable to the lack of any national policy on women. The constitutional provisions, judicial decisions besides the lack of political will of the successive governments attest to it. The constitutional makers seem to have had less sensitivity towards the problems faced by women. As a result the policy planners incorporated no appropriate promises in the Constitution thereby causing the neglect and apathy towards women. These infirmities become more than explicit where women are clubbed with children.97 Thus while granting special protection under the Constitution the women and children have been lined up into an unpalatable union. What made the Constitution makers so obdurate to female cause? Is it because there was no female representation in the Constituent Assembly or even if there was, was it minimal?98 Despite the fact that women constitute 48 percent of the electorate in the country their representation in the Parliament has never increased above 3 to 4 percent. Even in the Legislative Assemblies and

96. See Werner F. Menski, supra n.91, p.132.

97. Constitution of India, Art. 15(3) reads : “Nothing in this Article shall prevent the State from making any special provision for women and children.”

98. Out of 299 members of the Constituent Assembly only 14 were women. See Durgadas Basu, Introduction to the Constitution of India (3rd edn.-1964) p.18; Granville Austin, The Indian Constitution: Corner-stone of a Nation, Oxford University Press, Delhi (1976), pp. 3-25. The author discusses the composition of Constituent Assembly consisting of various communities and their political ideologies but it is disappointing that the author fails to mention anything about women members, participation. Shiv Lal, Political Legal India : The Election Archives, Vol. 5, New Delhi (1986), p. 123.
other institutions their representation varies from 6 to 10 percent. Or the framers did not dare to revolt against the masculine culture of the day and hence women welfare failed to receive a fair deal at their hands. Had they been true to women cause they might have envisaged a viable policy for the same and worked out schemes along the lines as they devised for people other than women, i.e., Scheduled Castes and Scheduled Tribes as in Article 15(4).

The most striking of the two arguments is that in the teeth of equality, the Constitution itself creates females as a class and promotes biological divide as the basis for classification and helps in furtherance of masculine culture. Had the women been clubbed with socially and educationally backward communities under Article 15(4) the law might have served a better purpose, for there is sufficient functional follow up mechanism available to monitor periodically the progress made by such communities in a bid to justify continuing the discriminatory legislation. Not to speak of a promise to keep the achievements under constant review as in the latter case there are no constitutional guarantees in favour of the former who surprisingly out number the Scheduled castes and Scheduled Tribes. Women continue to suffer worse than them at all visible and invisible levels of social reality. A glaring fact that needs to have been realised is that so far women continue to be educationally and economically weak they can not be psychologically strong to withstand social maladies. These factors view that the women empowerment be it at the power sharing or psychological level has remained merely a male game even in the contemporary times in India. This can further be ascertained from the fact that the male dominated Parliament has been reluctant to concede to an appropriate power sharing in the Parliament with females by amending

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100. Constitution of India, Art. 15(4) reads : “Nothing in this Article or in clause (2) of Art. 29 shall prevent the State from making any special provision for advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.”
the Representation of the People Act, 1951. This is needed to ensure that equal number of women are returned elected to Parliament than accepting 33\% reservation from the masculine Parliament by way of charity that even continues to be denied to them. This might prove a step forward towards breaking the power cluster open, provided women are assertive enough to demand what should be their legitimate share in political and decision making bodies.

**Sexual Harassment of Women at Workplace**

In 19\textsuperscript{th} Century, the movement of liberal feminism provided an analytical wedge to women facilitating their entry into some important occupations of socio-economic and administrative significance. As a result, males are reduced to minority in some occupations and still in some other professions their number has either marginally come down or has substantially decreased. More appreciable aspect has been that women have succeeded to display their submerged abilities transforming workplace from unisex affair to pluralistic show. The same has given birth to peculiar type of value conflict stemming from failure of workers both male and female to socialise in the workplace. This registers adverse effects on women workers which down sizes their efficiency and mars their psychological wellbeing and personality development.

As a matter of strategy they demand a change in the workplace rule which possesses masculine orientation and conflict with the feminist norms which is a demand quite genuine. Apart from this, women workers prefer to initiate court actions to fight the sexual harassment, which includes the discriminative and/or disruptive practices that target them at workplace. Consequent to this, the malady of sexual harassment of women at workplace has come to limelight irrespective of the fact whether or not such practices are quarantined. All the same, emotive forces against the unfavourable norms of the workplace have woken up and emerged in the public to such an extent that the theme as mentioned above has attracted attention at large scale of academicians and hence the redressal mechanism assumes importance. For the same reason there is great need to calculate, predict and assimilate the negative impact of harassment on women workers.
locked in masculine environment because the same would impair their earning abilities besides register negative impact on potential female workers who seek jobs in such professions/occupations. To grapple with the same, need has arisen to define sexual harassment and devise an adequate mechanism to combat this phenomenon. This is reflective of the need to have a comprehensive legislation which hitherto remains wanted in United States of America since Civil Rights Protection Act, 1964 as amended in 1991 and Civil Rights Title VII have been found inadequate to deal with the problem.

The Indian scene in this regard is not different. The sexual harassment at workplace for long remained under the carpet. However after the Supreme Court’s decision in *Vishaka v. State of Rajasthan*\(^{101}\), the lid was removed. Subsequent to it in a survey by SAKSHI—wherein 67 women workers from cross section of the industry in Delhi were interviewed—established that 54 percent of the workers had faced harassment of one kind or the other. In a follow up survey conducted in five metropolitan cities—Delhi, Trivandrum, Bhubaneswar, Ahmedabad, and Bangalore—the volume of harassment cases was found to be 98 percent. These were post-Vishaka developments. This is further confirmed by the recent observation made by the National Commission for Women that during 2003 it received 5160 complaints from workers who sought justice against harassment of one kind or the other. In view of the lack of legislation to regulate the conduct of workers at workplace and non-availability of policy regulations to protect the interest of women workers, the guidelines laid down by the Supreme Court is the only institutional protection which in any case is insufficient to cope with the problem. As such the plight of female workers be it in India or America is similar. It is the need of the hour to evolve a comprehensive definition of sexual harassment. This has been so because with the change in the nature of work force it is difficult to anticipate whether the norms revolving around biological divide would govern the homosexuals, lesbians and effeminate workers. It needs to be

\(^{101}\) A.I.R. 1997 S.C. 3011.
seen whether sexual harassment is merely a kind of anomie imposed on women workers because workplace dominated by masculine men has an environment of its own kind which women workers fail to adapt. It is conventional to argue that harassment at workplace is the result of giving up of stereotype roles by the women workers to which men are accustomed to at the domestic front. All these issues have come before the courts making it necessary to scan the judgements of the courts so as to record the attitude of judiciary in this regard. The conditions in India are diametrically opposed to the American conditions. The women workers here continue to remain introvert and do not come openly against such behaviours because of fear of loss of employment, fear of reprisals, social stigma etc. This may be true of urban areas. In fact the victims of harassment are the women like midwives, family planning workers, gram-sevikas, and nurses, their fault being that they struggle for bringing about social change in the rural areas—a situation that may not be heard of in the West.

**Conclusion**

The history of rise and fall of human civilisations assures us that masculinity is the summum bonum of the modern culture. The secular and scriptural literature never discriminate femininity against masculinity yet the history reveals that in the beginning of social evolution the basis of marriage was romantic sexual attraction, harmony of tastes and interests. The consent was a closed phenomenon like being vested in female but scarcely to be used by her. This was the cause of subservience and subjugation of woman to man. No sooner the free choice of man and woman in marriage was recognised and gained momentum the masculine grip began to loosen but this time with a difference. Man vigorously followed the dictum—dominate the woman peacefully if possible, forcefully if necessary. The classical liberalism was a political bluff which woman took easily because she never read in political/private divide her own subjugation and coronation of man. Though it proved a turning point in the sense that women organisations in the West fought against discrimination as a result the period between sixteenth and seventeenth century is marked with liberalisation and emancipation of woman where ‘free consent’ assumed
significance in marriage, yet it gained strength with woman’s right of suffrage being recognised. One major achievement has been that the problems relating to women began to precipitate and masculinity in all its forms was subjected to scathing criticism. Women began to see through the vicious game of man being woven around her disempowerment at all levels and hence the institutions of impoverishment became the focal point of criticism. Although the courts implicitly felt guilty of discrimination against women, yet in Reed v. Reed102 the Court in United States made an attempt to rationalise it by stating that it is an attitude rooted in ‘romantic paternalism’ which in practical terms puts woman not on a pedestal, but in a cage. The Court observed that this paternalistic attitude became so firmly rooted in our national conscience that exactly a century ago a distinguished member of this court was able to proclaim in Bradwell v. Illinois:103

“The paramount destiny and mission of woman are to fulfil the noble and benign offices of the wife and mother. This is the law of the creator.”

Within this frame the institution of marriage along with masculine norm guarding its veneration retrospectively emerged as a major front making it an uphill task for woman to dislodge. The efforts to change the masculine character of such institutions surfaced on the top of women’s agenda. It is deemed necessary to fight male dominance, which could not be achieved without changing the language and orientation of the cultural norms that shape the social institution and direct their functioning. The same could be achieved provided the masculine norms are presented in sex neutral language as a result for example, though the conditions of marriage were reduced to sex neutral language yet the objective could not be achieved because these conditions are more male specific expressions, which appear to be sex-neutral, only to mask the reality. Women were only half way in their struggle that new developments

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103. 83 U.S. (16 Wall) 130.
surfaced in the western world. Now femininity becomes mutilated since a new genius namely “cohabitees” that include lesbians and homosexuals too began to claim rights at par with spouses thereby causing confusion in the identities and roles. In either case the confusion got confounded since woman in the ultimate appears to have lost the identity resulting into undermining her dignity and integrity. This leads to her social, economic and psychological disempowerment which in the aggregate is nothing less than a sociological nightmare because it calls for a metamorphosis without indicating the probable cost which might be quite high.

Women empowerment is therefore, only a prologue to any social model aiming at correction of discrimination against women who got hitherto educated in masculine norms both in the school and in the backyard where she plays and learns the basics of social roles and their adaptation. As such woman is made to follow masculine norms of the game both in the home and outside. All this can be dispensed with only through female psychological empowerment, in particular, which means the recognition of self-determination of women. This would help women participation in decision making processes that would in the ultimate result in balancing diverse interest in the society in general and women’s rights in particular.