BLOCK 2
UNDERSTANDING LAW

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UNIT 5 CONCEPT OF LAW

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5.1 INTRODUCTION

The term 'law' brings the images of courts, lawyers, police, judges, law books etc. to one's mind. Law consists of rules, customs and practices in a society that need to be followed by all the members of the community. Laws are made by the Government. The nature of law is multidimensional. Each school of law gives one dimension. This Unit will critically discuss the category of law. It deals with the various approaches within the discipline of law. It tries to engage with the different aspects of law such as the nature of the law, positive law, natural law school, legal realism, sociological approaches to law, historical approach and critical legal studies and the present-day law.

5.2 LEARNING OUTCOMES

After reading this Unit, you will be able to:

- Define the meaning of law
- Describe the nature of law
- Distinguish between the various schools of law
- Analyse the present-day laws in a critical way

5.3 DEFINITIONS OF LAW

There are many definitions for the word "law." According to Oxford Dictionary law is "the whole system of rules that everyone in a country or society must obey." To break it down further, law is:

- Whole system of rules;
- These rules need to be obeyed
- By everyone living in a country or society

Encyclopedia Britannica defines law as, "the discipline and profession concerned with the customs, practices, and rules of conduct of a community that are recognized as binding by the community. Enforcement of the body of rules is through a controlling authority."

This definition specifies that:

- Law is both a discipline and a profession. Law is a discipline, because it is studied as a distinct course, much like History, Economics and Sociology. Law is a profession comprising of lawyers and judges, who help the people to solve their legal problems.
- Law is concerned with – customs, practices, and rules of conduct of a community. The way in which marriage is performed in a community is based on the customs and practices of that community.
- These rules are recognized as binding by the community. Binding means, the rules are mandatory and need to be followed by the community.
- The rules are enforced through a controlling authority i.e., courts, police.

Check your progress -1

Every family has certain set of rules. These rules differ from family to family. Answer these questions:

1. In your family, who sets the rules to be followed by all the members?

2. Are there separate set of rules for males and females?

3. What are the rules in your family that you feel are weird or silly or unnecessary or bad?

5.4 CASE STUDY

In Kerala, there is a temple in Sabarimala and the deity is Ayyappa Swamy. Women were not allowed into the temple because the temple deity is a "celibate male." This rule was enforced by the Temple Board. Some women groups filed a petition in the Supreme Court on the grounds that the practice is discriminatory against women. There was public debate for and against allowing women into the temple.

Consider these facts:

a. The Constitution of India guarantees non-discrimination on the basis of sex. It implies all are equal before the law and no one can be discriminated because they are women or men.

b. There is nothing in the Hindu religious texts which prohibits the entry of women into the Sabarimala temple.

c. Though the ban on the entry of women into the temple has been practiced for the last few decades, historical records show that women were earlier allowed into the temple.

Irrespective of what the Supreme Court decided in this case, answer whether women should be allowed to enter into the Sabarimala temple and give reasons for your answer.

5.4 NATURE OF LAW

How do you define the words like – friendship, honesty and love? It is defined as per one's own perceptions and experiences in life. Law is explained and understood in many different ways by different jurists, lawyers, philosophers, sociologists and political scientists. The nature of law is so broad and manifold, that no one single explanation suffices. Philosophers since the ancient times from different civilizations have given their idea of law. These ideas have been put together into two broad school of thoughts - positive and natural.

5.4.1 Positive Law

Positive law theorists like John Austin and Jeremy Bentham defines law "as it is," recognizing only the "formal sources of law." For example, legislations like The Indian Penal Code, Right to Information Act and Criminal Procedure Code are considered as law. Informal sources of law like – customs, usages and morals are not considered as law. For the positivists, the source of law should be "posited" formally.

John Austin (1790-1859) was the first professor of Jurisprudence at the University College London. The Province of Jurisprudence Determined (1832) and Lectures on Jurisprudence (1879) are his two main works. He defined law as, "the command of the sovereign, enforceable by sanctions." Due to the importance given on the "command", positive law is also known as "Command Law Theory."

Austin's definition consists mainly 3 aspects:

- Sovereign
- Command
- Sanctions

Sovereign: Sovereign means a person who is supreme and not influenced by external factors. In a monarchy, the King is the sovereign. The King cannot be questioned by any external person. The King takes his own decisions. In a functioning democracy, the people are sovereign and their will is expressed through the Parliament. In a monarchy, whatever are King says becomes the law and no one can violate those commands. In a democracy, the laws are made by the Parliament and is applicable to everyone.

Command: For Austin, command are those formal declarations issued by the King or legislations passed by the Parliament.

Sanctions: Sanctions are consequences for violating the commands or law. It could be penalties, fines or other forms of punishments. If a certain law is not followed, the Government imposes a punishment. For example, the traffic police impose a fine if a person does not wear a helmet while riding his two-wheeler. The element of punishment brings an enforcement value to the law. Sanctions are believed to have a prevention value i.e., a belief that without sanctions, violations of command will be routine which has to be prevented. Sanctions compel citizens to follow the law.

Jeremy Bentham (1748-1832) was a legal philosopher. Much of the England's law was not codified, but it was all scattered in the decisions of several courts. This body was collectively known as "common law" in England. In his famous work *A Fragment on Government* (1776), Bentham criticized the Common Law of England as being vague. Bentham said that the laws had to be systematically codified to avoid confusions. He defined law as, "an assemblage of signs declarative of a volition conceived or adopted by the sovereign of a state." Much like Austin, this definition of Bentham says that the laws are made by the sovereign.

Recap:

- The proponents of positive law are not concerned with the morals and other informal sources of law.
- Positive law is concerned only with the formal and codified/legislated sources of law. For example: Indian Penal Code.
- Positive laws are made by the sovereign of a country.

5.4.2 Natural Law School

- The main proponents of Natural law are Thomas Aquinas, Socrates, Aristotle, Cicero, John Finn. For natural law theorists' law is the law of nature, divine law and should be based on
- Reason
- Knowledge and truth
- Universal applicability
- Immutable i.e. applicable over a long period

Natural law proponents believe that law is not supreme and are subject to change if it does not appeal to reason and is not rational. When laws do not resolve the issues of the society or in fact harm certain section of society, they can be changed and improved to address the issue.

- Rational people usually "reason out" why a particular law is bad and how it can be made better.
- People who are religious rely on the "religious sources" and ask for the man-made laws to follow the rules given in the religious texts.
- People who believe in nature, look at nature to find the "perfect law" needed for a situation.

Case Studies

1. In the year 1930, Mahatma Gandhiji did "salt satyagraha," in response to the exorbitant tax imposed by the British on the salt produced in India. This tax made the trading of salt non-profitable for the Indian salt traders. Gandhiji "reasoned out" that this tax was morally bad and protested against the tax law through satyagraha.

2. In USA, there has been a long struggle and debate about abortion following which abortion is legally allowed. Even now, religious fundamentalists argue that aborting a fetus violates the law of God! These religious fundamentalists feel that the law of God is higher than the law made by man.

3. In Ireland, prior to 2018, abortion was not allowed due to religious reasons. A case in 2018 angered the public and women groups when a woman, Savitha Halappanavar died from complications during her delivery. After a lot of pressure from the citizens, Ireland finally allowed abortion from December 2018.

4. In the year 2013, the Indian State of Uttarkhand had floods and wreaked havoc. Environmentalists analysed the situation and blamed the unbridled human interference into nature as the cause for these floods. The presence of religious places in that area led to construction of too many buildings on the ecologically sensitive hills and affected the course of the naturally flowing river. Environmentalists said that nature has its own rules and these rules should not be violated.

The philosophers of Greek civilization discussed about man's reasoning abilities. Aristotle said that "man is a rational animal." According to Aristotle (384 to 322 BCE), man is distinguished from animals due to the "reasoning power" he possesses. Man-made laws have to follow the nature. Man is a part of the nature, hence the man-made laws should be based on "human reason."

During the medieval times, some Christian fathers promoted the idea of natural law by using the religious texts. Saint Thomas Aquinas is a prominent theologist who said that the laws of God could be discovered by man by applying his reasoning power.

In the Renaissance times, philosophers like Hobbes, Locke and Rousseau promoted the idea "reason" in their theories, which laid the foundation for the modern theories of natural law. In the modern times, Finnis is a prominent jurist whose idea of natural law has been appreciated. According to Finnis, the content of natural law should be made up of "basic forms of good" necessary in ordering human life. He lists out seven forms of good:

- Life
- Knowledge
- Play
- Aesthetic experience
- Sociability of friendship

- Practical reasonableness
- Religion

Recap:

1. Natural law is the standard of supreme law based on reason.
2. Natural law helps man to evaluate man made laws from a higher standard
3. Natural law provides an avenue to rebel against unjust laws.

5.4.3 Legal Realism

Legal Realism is an approach to law that considers the "real factors" to understand the nature of law. The approach by positive law theory focused on the formal rules. Whereas the natural law theory focused on the moral aspects. Legal realism suggests that that apart from the formal rules and morals, one more aspect needs to be taken into consideration and that aspect is the "human factor."

Laws are applied by humans. No matter what the rules are given in the books, the person applying those laws are judges. Judges are human beings and they have their own personal views, upbringing, influences and ideologies. These personal aspects do influence the way in which the judges apply the law while deciding the cases.

Legal Realism developed in the American legal system, where the judges play an important role in the interpretation of law and their judgments are a source of their interpretations of law. For example, the interpretations of law by two Judges of the US Supreme Court – Antonin Scalia and Ruth Bader Ginsburg in their judgments revealed their approaches to law.

Scalia had delivered several decisions that are said to be "conservative." These are some of his viewpoints based on his judgements and interviews:

1. He believed that same sex marriage was bad.
2. He opposed abortion laws
3. He supported death penalty
4. He did not support affirmative action
5. He supported gun rights for individuals

Ginsburg on the other hand, delivered several decisions that were said to be "liberal." These are some of the rights she ensured through her decisions:

1. She opposed gender discrimination in Virginia Military Institute's recruitments
2. She supported abortion rights of women
3. She supported affirmative action
4. She ruled that "invasive" searching of female students for drugs was bad in law

A corrupt person usually approaches a lawyer with the intention to escape from the law. Such a person is neither interested to know what is unethical, nor wants to know what is the law written in the law books. They are only interested to know if the judge would acquit him. Legal realism takes into consideration the existing corruption and bribery of the judges.

Justice Holmes and Justice Gray were the two pioneers of the legal realism. Both served on the Supreme Court of USA as judges. Justice Gray suggested that whatever the judges declare is the law. Justice Holmes believed in "telling it as it really is." He said that to find the truth of law, it was necessary to examine the "law in action", as opposed to the law in the books. Holmes made the famous statement of "the prophecies of what courts will do in fact, and nothing more pretentious is what I mean by law," Holmes believed that law does not work in mathematical accuracy.

Another Jurist – Jerome Frank supported the view that law does not work in mathematical accuracy. He said that "certainty of law is a myth." For example, if we approach a lawyer with a case in hand, he will tell us the chances of winning. But he cannot with all accuracy predict the outcome of a case. Many times, lawyers will tell the clients that the outcome of the case depends on the judge who would decide it!

5.4.4 Sociological approach to law

The beginning of 19th century saw many changes. There was industrialization and rapid urbanization. This resulted in communal existence, growth in population and inequalities. Health, welfare, education and economy became the concern of the welfare State. Regulation of many new sectors by the Government became necessary. The old methods of law were insufficient and did not address the concerns of the poor and the marginalized sections of the society. It brought to fore the imperative for law and society to integrate and address the concerns of the society.

Friedmann, in his book *Law in a Changing Society* discusses the paradox of whether law influences the society or the society influences the law. The answer to this question is quite nuanced and the examples below show that both influence each other.

To stem the widespread practice of the social evil of dowry, the government passed a law making it illegal to give and take dowry. This legal measure initiated through interaction with a society, although did not eliminate the practice of dowry, was instrumental in reducing its prevalence considerably. Same is true about the child marriage prohibition. These are ways in which the law and society interact and influence mutually.

Jhering, a German Jurist discussing the origins of laws and legal institutions, states, "law is an instrument for serving the needs of a society." For example, Company Law exists because it serves the needs of businesses. Jhering rightly believed that the purpose of law is to further and protect the interests of the society. Human beings have both selfish and unselfish purposes in life and law has to suppress the selfish purposes of man. For example, the selfish purpose of killing for money is prohibited by law. Law does not exist for the

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individual alone, but for the society as a whole.

There are three types of interests – individual interests, societal interests and State interests. Jhering believed that these three interests had to be balanced. For example, in India Free Speech is a Fundamental Right for the individuals. However, the State Interest allows the Government to restrict the free speech of individuals when it becomes "hate speech." When law is applied in service of social good it is necessary to reward the good and deter the bad.

Jurist Ehrlich from Austria contributed to the "impact of laws on society." He believed that formal sources of law give inadequate picture of society. There is divergence in the law as it has existed in the books and as it is applied in the society. He proposed the idea of "living law", which is the law as it works in the society. To discover the living law, one has to go beyond the formal sources and check the judicial decisions, modern business documents and observe the people's behaviour.

Roscoe Pound, a professor from Harvard Law School gave importance to take into account "social facts." He said that it was necessary to make social investigations before making the laws. France in the year 2010 passed a law banning veils, burkhas and dresses covering entire body. This law faced opposition from citizens and international bodies as being discriminatory towards women and certain religions. In India, the Farm Laws passed in 2020 without consultation with the farmers has resulted in widespread protests from the farmers.

5.4.5 Historical approach

Historical approach to law deals with the importance of using historical experiences for making laws. Savigny is credited with making prime contributions to this approach. Savigny, an expert in Roman Law was a professor at the University of Berlin in Germany. When there were complex legal problems, the lawyers and law makers looked to Roman Law for solutions. Roman Law was well developed in the ancient and medieval times, particularly the law of possession.

Savigny was not in favor of legal reforms without taking into consideration the history. He made the famous statement, "the nature of any particular system of law, was a reflection of the spirit of the people who evolved it." Savigny believed that the laws of a nation could be seen in the "spirit of the people" and it was manifest in the customary rules. Law grew with people and nation. He was of the opinion that customs were more important than the legislations.

Savigny's idea of giving history and customs more importance was criticized by many because he tried to transplant the thousand-year-old Roman Law to Germany. It is difficult to ascertain historical facts with precision. If Savigny's ideas were to be implemented literally, old customs will gain importance in law even if they are discriminatory making social reformsdifficult. For example, slavery was a custom followed throughout history, and if laws were based in history of slavery would have continued.

5.4.6 Critical Legal Studies (CLS)

Critical Legal Studies (CLS) is a relatively new approach in Jurisprudence. It had its birth during 1970s in Harvard Law School of America. CLS is considered to be a radical approach to law. CLS is critical of the old beliefs of law. It questions the natural order of things. The chief exponents of critical legal studies are: Robert Gordon, Peter Gabel, Mark Kelman,

Clare Dalton, Duncan Kennedy, R.M. Unger.

CLS puts forward critical ideas contrary to conventional beliefs in law. It is understood for example that the judiciary is an institution independent of legislative and generally politics. CLS however affirms that law is influenced by politics. The anti-conversion laws passed in states of Rajasthan, Madhya Pradesh and Gujarat, the Supreme Court decision on the Babri mosque dispute in 2019, the decision of the Karnataka high court upholding the ban on wearing hijab in schools, are examples of politics influencing laws and judiciary.

On paper the constitution guarantees equality before law but CLS exposes biases of law. Despite equality of law, it does not in fact achieve the objective of equality. For example, the law provides for any person accused of a crime to be let out on bail. However, while this rule applies to all, it is not so in reality. Posting of bail requires money or property. Consequently, many poor people and women who cannot afford the bail money are languishing in jails.

CLS explores the role of capitalism, meta narratives, patriarchy and conception of race to how and who law serves. CLS suggests that the ideals of capitalism are built into the legal system which are the root cause of legal biases against the poor that leaves them without protection of law. For example, the contract law assumes that there is free consent while making contracts. However, in reality many workers who sign contract of employment have no choice, but to agree to the wages dictated by the employers. Consequently, CLS conclude that the “free choice and free market” promise of capitalism is a sham.

Patriarchy in the society is more powerful and the inability of the legal system to tackle patriarchy results in discrimination and inequality. There are several patriarchal elements found in the laws. Women are unable to enforce property laws, do not have equal rights to property in law, counselling cells of family courts counsel women to stay in abusive marriages for the sake of the family, women face many hurdles to get justice to their complaints of domestic and sexual violence. These critiques of patriarchy have emerged from CLS. CLS encourages a critical look at the law and examine whether the laws really serve the most vulnerable in the society.

5.5 LET US SUM UP

The concept of law is varied and multidimensional. These variations are captured well by the various schools of legal thought. Natural law focuses on the ethical aspects of law. Positive law focuses on the law books and formal sources of law. Legal realism looks at the court and judges for knowing the real law. Sociological approach to law is all about the interaction of law with

social issues. Historical approach deals with the importance of historical facts in making the present-day laws. CLS helps us to think critically about the existing laws. Every approach of legal thought has shortcomings. All these approaches however provide the wholesome picture on the nature of law.

5.6 UNIT END QUESTIONS

1. Define the word law.
2. What is the meaning of "superior law" as per natural law school?
3. How do judges influence the law?
4. What is the role of society in the making of laws?
5. Is the promise of equality in law real?

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UNIT 6 UNDERSTANDING INDIAN LEGAL SYSTEM

Structure

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6.8 Let Us Sum Up

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6.11 Suggested Readings

6.1 INTRODUCTION

In the previous unit, you have read about the 'Concept of Law'. In this unit, you will study about 'Understanding Indian Legal System'. As you know a well a well-functioning legal system is the cornerstone of any modern nation state. A legal system is defined as, "a procedure or process for interpreting and enforcing the law." Every modern nation that is well evolved politically has a legal system. Irrespective of whether a country is democratic, autocratic, theocratic or monarchical – it has a legal system that helps the rulers to govern the country. The legal systems of autocratic countries differ significantly from that of democratic countries. In an autocracy, the word of the autocrat becomes the law. In a democracy, the will of the people be expressed through the parliament becomes the law. A legal system generally consists of a Constitution, court system with different jurisdictions, laws, legal professionals and administrative machinery. The Constitution of India delineates the framework of the legal system. In this Unit, we shall study the constituents of the Indian legal system and understand how they work.

6.2 LEARNING OUTCOMES

After studying this Unit, you shall be able to:

- Define a legal system
- Describe the constituents of a legal system
- Explain the features of the Indian Constitution
- Distinguish the different types of laws and
- Explain the Indian judicial system

6.3 CONSTITUTION OF INDIA

When a new nation is created, the founders go through the exercise of laying down the rules and laws that will form the framework for the governance. Such a document is called the constitution. Though primarily a legal document because it sets out the rights of the citizens and the responsibilities of the state, the constitution also states the aspirations of the people and provides directives on the fulfillment of these aspirations. A Constitution lays down the legal framework that guides the State in its governance of the country. It is a document from which rights, duties and responsibilities flows to the citizens and from the state. In monarchies and autocracies, the ruler is supreme. In a democracy, the Constitution is supreme. A Constitution is often referred to as the “supreme law of the land.”

The Indian Constitution consists of the principles on which the country is governed. The state cannot pass legislation contrary to the provisions of the Constitution. The Indian Constitution lays down the division of powers between the various branches of the Government and the way in which the political system is organized. The Constitution puts limits on the powers of the Government and guarantees certain rights to the people. The Indian Constitution was adopted in 1950.

6.3.1 Making of the Indian Constitution

Prior to independence in 1947, most of Indian territory was ruled by the British. Independence was gained following the freedom movement in India and the political pressure in England. Leaving the country overnight would have left the whole country in utter chaos. Hence, the British had consultations with various Indian leaders for several years about the future plans. In accordance with the Cabinet Mission Plan, elections were held for the “Constituent Assembly” in the year 1946. This Constituent Assembly was a temporary body that was in charge of governing India and was also in charge of framing a Constitution. The future India was to be governed as per the new Constitution.Initially, the number of members of constituent assembly were 389. After partition, some of the members went to Pakistan and the number came down to 299 out of which 229 members elected from 12 Indian Provinces and 70 were nominated from 29princely states.

The first meeting of the Constituent Assembly was held on December 9, 1946. The task of drafting the Constitution was done by the various committees. The recommendations of each committee were put before the entire Assembly for a debate and then finalized. It took around 3 years to conclude the drafting of the Constitution. On November 26, 1949, the Constitution of India was passed and adopted by the assembly. On January

26, 1950, the Constitution came into force after which India became a republic and was no more a British colony ruled by a monarchy

There were 284 members in the Constituent Assembly who signed the Constitution of India. Dr. B. R. Ambedkar is the active member who discussed and debated for the longest period of time, going by the number of words he spoke. Ambedkar was also the Chairman of the drafting committee and had a huge task of putting together the gigantic aspirations of members into a text form that would stand the test of times. The proceedings of the Constituent Assembly are published by the Government of India and if one goes through the 12 volumes of the debates, it is clear that Ambedkar is indeed the chief architect of the Indian Constitution. Apart from Ambedkar, members like H.V. Kamath, Naziruddin Ahmad, T.T. Krishnamachari, Alladi Krishnaswamy Ayyar, K.M. Munshi and N. Gopalaswamy Ayyangar are the significant members who shaped the Indian Constitution.

6.3.2 Salient Features of Indian Constitution

The following are the salient features of the Indian Constitution:

- **Written Constitution**: Indian Constitution is a written Constitution. Unlike countries like United Kingdom, most modern democratic countries have a written constitution.
- **Federal**: Indian Constitution specifies provisions that suggest India is a federal state. There is Union Government which has control over the whole territory. And there are Governments in every state having control only within their respective states. The Union Government is vested with powers of important matters like defence, finance, heavy industries and so on. The powers are distributed between the Union and the State Governments. During emergency times, the Indian governance system turns into unitary form. Hence, some legal scholars refer Indian Constitution as being "quasi-federal".
- **Democratic Republic**: Indian Constitution declares India to be a democratic republic. It signifies that governance in India is by the people, for the people and of the people through their elected representatives.
- **Secular State**: The Indian Constitution declares India to be a secular state. It signifies that the Indian state has no religion. This is in recognition of the fact that people of India follow various and several religion and religious traditions. The Constitution guarantees freedom to practise and preach any religion. India being a secular state, the state is required to maintain distance from all religions.
- **Separation of Powers**: Indian governance system has three independent pillars of governance – legislature (law making), executive (enforces and administers the laws) and judiciary (reviews and interprets the laws). The legislative power is vested in the Union Parliament and State Assemblies. The executive power is vested in the President and the State Governors. The Judicial power is vested in the Supreme Court and the High Courts.

- **Independent Judiciary**: The Indian Constitution establishes an independent judicial system. The judges are appointed on the basis of qualification and experience. The removal of judges is not easy, even in cases of misconduct. The orders of the court are to be followed sincerely by the other branches. Hence, the Judiciary is independent and protects the Constitutional values.
- **Judicial Review**: Judicial review entails that the laws made by the legislature and executive can be questioned before the judiciary (courts). The judiciary has the power to "review" these laws. If the laws are found to be against the Constitutional values, then such laws can be declared as "unconstitutional" by the higher courts.

Check Your Progress -1

1) *Write silent features of Indian Constitution*

6.3.3 Overview of the Indian Constitution

The Indian Constitution is one of the longest Constitutions in the world. The Indian Constitution is divided into several parts and each part deals with a certain aspect of governance. The important parts of the Constitution are listed below:

- Preamble is the declaration found in the beginning of the Constitution and contains the founding principles and values that forms the basis for the rest of the provisions in the constitutions.
- Part I deals with the "Union and its territory" containing aspects like creation of new states and alteration of boundaries of states.
- Part II deals with provisions regarding citizenship. A separate chapter is dedicated to the citizenship issues arising out of the difficulties posed by India-Pakistan partition.
- Part III is an important part which deals with the Fundamental Rights guaranteed to the citizens. Right to equality, freedom of speech and expression. Right to life and personal liberty and right to religion are some of the important rights listed in this part.
- Part IV deals with the Directive Principles of State Policy. These are guidelines for states to follow while making its policies. For example, Article 42 envisages that "maternity benefits" should be given to women employees.
- Part IVA lays down certain duties upon the citizens. For example, the citizens are expected to respect the values of the Constitution and national flag.
- Part V deals with the working of 3 pillars of the Union, namely – the Union Executive, the legislature i.e., Parliament and the Judiciary - Supreme Court.
- Part VI deals with the working of State Legislature, State executive, High Courts and the subordinate courts.

- Part VIII deals with the administration of the Union territories like Pondicherry and Delhi.
- Part IX deals with the organisation of village panchayats. Part IX A deals with the city municipalities. Part IXB deals with the cooperative societies.
- Part X deals with the scheduled and tribal areas, especially in the North Eastern part of India. These tribal areas are given autonomous power of internal administration.
- Part XI deals with the administrative and legislative relationship between the Union and the States.
- The other parts of the Constitution deal with aspects like election commission, public service commissions and tribunals.
- There are "schedules" towards the end of the Constitutional text which are also a part of the Constitution. These schedules contain some detailed information and lists.

6.3.4 Fundamental Rights and Directive Principles

The British colonial rule curbed freedoms of Indians for more than 200 years. Even some of the contemporary Indian rulers had exploited the people of India. With the introduction of modern education, Indians realized the importance of liberty and various freedoms necessary for the overall development of the individuals. Indians wanted an assurance that in the future, their freedoms had to be guaranteed and preserved. The Part III of the Constitution consists of several "Fundamental Rights" – the values that are necessary for the survival and overall development of human life. For example, Article 19 guarantees "freedom of speech and expression." Every person aspires to express herself through various means. An artist expresses it through her art, a musician expresses through her songs, a writer expresses her joy and agony through her writings. If people are deprived of this right to speak and express, a healthy society cannot be formed.

To understand the importance of these freedoms, we need to compare it with the situation in certain autocratic countries where these freedoms are not given. During November 2019, several doctors and scientists in Wuhan (China) alerted the authorities that a strange disease was prevalent among the people. The Chinese government shut these doctors and booked cases against the reporters who reported these events. The Chinese authorities even went to the extent of "under reporting" the number of deaths. The result of curbs on all these forms of free speech is that, the Covid-19 virus had soon spread to many other countries. Had there been robust free speech in China, this catastrophe could have been nipped in the bud.

Six broad Fundamental Rights have been guaranteed in Part III. They are:

- Right to Equality (Articles 14, 15, 16, 17 and 18)
- Right to Freedom (Articles 19, 20, 21, 21A and 22)
- Right against Exploitation (Articles 23, and 24)
- Right to Freedom of Religion (Articles 25, 26, 27, and 28)

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- Cultural and Educational Rights (Articles 29 and 30)
- Right to Constitutional Remedies (Article 32)

Article 14 & 15 guarantees right to equality, equality before law and guarantees of non-discrimination. It means all are equal and no one can be discriminated on the basis of caste, class, sex, religion etc. It also means all are equal before law i.e., all persons will be equal before the law unless otherwise stated in the constitution or laws. The exceptions are usually in the nature of affirmative action in favor of vulnerable sections of society towards the goal of achieving the effect of equality in the society.

For example, if the Government advertises for the post of clerical staff and stipulates a bachelor's degree as the qualification to apply for the job, a person who does not have a degree cannot say that he is being discriminated. Because, there is a reason why a distinction is made between the candidates having a bachelor's degree and those who do not have this qualification. The bachelor's degree education is required if one has to carry out the functions of a clerical staff.

Let us take another hypothetical example. If the Government advertises for the post of clerical staff, but makes it mandatory that the candidates should be of fair complexion, such a distinction would be a violation of right to equality.

In Bollywood film industry, a practice that was followed for a long time was that the makeup artists would be all male members and hair stylists were to be female members. A male member was not allowed to become a hair stylist and a female member was not allowed to become a makeup artist. Charu Khurana – a makeup artist trained in the USA, was not given the membership of the makeup artists association. She fought the case till the Supreme Court. In November, 2014, the Supreme Court of India passed a judgement that dividing the profession of makeup and hair dressing on the basis of sex was discriminatory and violated Article 14. After this decision, female makeup artists are allowed to work in Bollywood. A similar legal fight is in the process for recruiting women in the Army for higher positions.

Right to equality is to be read with Article 15 which prohibits discrimination on the basis of religion, race, caste, sex or place of birth. The ancient practice of caste-based system of untouchability is abolished through Article 17. Even titles are abolished through Article 18. Article 19 guarantees Freedom of Speech, Freedom of Association, Freedom of Trade and Freedom of Movement. These freedoms are not absolute and are curbed in certain situations. The Right to Life and Personal Liberty is guaranteed under Article 21. In relation to the Right to Life, certain protections are given to persons when they are arrested and convicted for offences. These rights give a protection against the high handedness of the State and police system. Right to Education was made a fundamental right under Article 21A from the year 2002. Under Article 23, trafficking in human beings and forced labor are prohibited. Under Article 24, the employment of children in factories is prohibited.

Freedom of Religion is a fundamental right guaranteed to both individuals and groups. Individuals has the freedom to practice and preachtheir religion. However, social realities in India show that practice of one's religion has violated other fundamental rights of other individuals or groups. Most religions often have forms of discriminatory practices, particularly against women and such practices violate right to equality under Article 14. The women's struggle for entry into religious places is a classic example where the religious rights clash with the gender equality.

Of all the rights in the section on Fundamental Rights, the "Right to Constitutional Remedies" is an important one. If any person's fundamental right is violated, Article 32 gives that person the right to approach the Supreme Court to enforce her rights. Without this right, the guarantee of fundamental rights would be hollow promises. By the virtue of Article 32 and Public Interest Litigations (PIL), several injustices in the society have been corrected.

The Directive Principles of State Policy (DPSP) are discussed in the Part IV of the Indian Constitution. Directive principles consists of certain socio-economic rights like – welfare of the people, right to livelihood, equal wages for both the genders, distribution of material resources for common good, free legal aid, maternity relief and uniform civil code. Article 37 states that the rights contained in this part cannot be enforced through the courts. Given the economic nature of these rights, it is practically difficult and cumbersome to enforce these rights through the courts. However, Article 37 encourages the Governments to apply these principles in their policies and promote them. For example, the Government introduced the Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS) programme to provide adequate livelihood and employment to the rural masses. Free legal aid is being provided through the Legal Services Authority. Initially, the principles in this part were said to be not enforceable through the courts, but many of these rights have been recognised as fundamental rights by the Supreme Court.

6.3.5 Parliament

India has federal governance system and follows the parliamentary form of government. Federal system means that there is a Union Government at the Centre and State Governments in every state. The Union Parliament is situated in New Delhi, while the State Assemblies are situated in the capital cities of the respective states. The Union parliament is bicameral i.e., there are two houses. The lower house is known as the Lok Sabha and the representatives to this house are directly elected by the people. There is one representative for every 15 to 30 lakh voters. Lok Sabha constituencies are larger than State Assembly constituencies. Lok Sabha is chaired by the Speaker. The party or the coalition having majority seats in the Lok Sabha forms the Government at the Union. The majority members choose one among them as the Prime Minister. The Prime Minister along with the "cabinet" takes important decisions for the country. Lok Sabha has 543 seats as on May, 2021.

The upper house is also known as “Rajya Sabha”. The members to Rajya Sabha are elected indirectly through nominations. Of the 245 members (as on May, 2021), 233 are elected from the state legislatures and union territories through a process known as “single transférable vote”. The remaining 12 members are appointed by the President from the field of art, literature, science and social services and other disciplines.

The law-making process in India is distributed between the Union Parliament and the State Legislatures. By the virtue of Article 246, three lists of subject matters have been made, namely – Union List, State List and Concurrent List. The Union List consists of matters of national importance like defence, atomic energy, war, citizenship and so on. Laws relating to these subjects can be made only by the Union Parliament. As State List has subjects like agriculture, health, law and order and so on. Laws relating to these subjects can be made by the State Assemblies for their respective states. Laws relating to the subjects in the Concurrent List can be made both by the Union Parliament and State Assemblies.

Union Parliament first introduces a proposed new law or an amendment as a “bill”. Such a bill, when passed through the Lok Sabha and then by Rajya Sabha become an “Act”. Acts come into force once assented by the President. The procedure relating to the passing of laws in the Union Parliament are given in the Articles 107 to 117. The laws made by the Union Parliaments are referred as “Central Acts” and are applicable across the whole of India.

6.3.6 State Assemblies

There are State Assemblies (also referred as State Legislatures) in each state. Some State Assemblies like Karnataka have two houses, while some like Jharkhand have a single house. The members of the State Assemblies are called as “Members of Legislative Assembly”. These members are elected directly by the people. The Assembly constituencies are smaller than Parliamentary constituencies. The number of members in each state’s assembly varies on the basis of population and geography. The State Assemblies make pass bills and get the assent of the Governor. The law-making procedure of the State Assemblies are given under Articles 196 to 207. The laws made by the State Assemblies are applicable only within the territory of that State.

6.4 LAWS

There are different types of laws made by the Union Parliament and State Assemblies. Parliament makes laws on subjects that are important and are applicable across the states. Laws in India are in the written form and are called as “Acts” or “Code”. On every important subject, there is an Act. Laws can be grouped into different categories. Indian Penal Code, Evidence Act and Criminal Procedure Code are the three laws that are applicable to the criminal cases. Civil Procedure Code is applicable to civil cases. There are “labor laws” that deal with issues like industrial disputes, payment of wages, bonus, safety in factory, maternity benefits etc. These laws adhere to the broad principales set out in the constitution.

6.5 JUDICIAL SYSTEM

The Indian Judiciary through is high courts and the Supreme Court reviews and interprets the laws passed by the legislature. Supreme Court is also the final appellate court in the judiciary. When there is controversy about any aspects of law, the superior courts "interpret" the laws. When laws violate Constitutional values, these can be challenged in the high courts, which either uphold or declare it to be unconstitutional after hearing all parties.

The Judicial system in the Constitution consists of:

- Union Judiciary (Supreme Court)
- High Courts in the States
- Subordinate Courts

Articles 124 to 147 deal with the establishment of Supreme Court, appointment of the Judges and the powers of the Supreme Court. The Supreme Court is the highest court in India. If the state violates Fundamental Rights, one can approach the Supreme Court directly. Decision of the High Courts can be appealed at the Supreme Court for the final verdict. Supreme Court has administrative control over all the High Courts in the States including the subordinate courts. The decisions given by the Supreme Court are binding on all the High Courts and subordinate courts. The Supreme Court has the power to make orders against any executive authority.

Articles 214 to 231 deal with the establishment of High Courts in the States, appointment of judges and the powers of High Courts. Generally, each State has a High Court. In some situations, several states and union territories have a single High Court. The decisions of High Court are binding on the subordinate courts within the same state. High Courts have the power to issue 5 types of writs for protecting the rights of the people. Article 226 gives powers to the High Courts to decide on case of violation of Fundamental Rights.

The subordinate courts are established in each district of the state. The structure, hierarchy and number of courts in the subordinate courts level vary from place to place. Usually, matters are distributed between civil courts and sessions courts. Sessions courts take up criminal cases. The fundamental difference between High Courts, Supreme Court and subordinate courts is that – High Courts and Supreme Court have the power to interpret the law and declare them invalid. The subordinate courts only have the power to apply the law to the cases and give a decision. The subordinate courts do not have the power to declare a law as invalid. The subordinate courts are also bound to follow the decisions of the higher courts.

6.6 LAWYERS

Lawyers are an integral part of the legal system in India. The Advocates Act, 1961 comprehensively regulates the legal profession in India. A Bar Council of India is established for the whole of India, which has a say in the legal education and lays down the requirements to enroll a law graduate as an

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advocate. The Bar Council of India conducts "All India Bar Examination" and only those law graduates who pass the exam are allowed to appear in the courts. There are State Bar Councils in each state and look after the welfare of the advocates.

According to the Advocates Act, every advocate has a duty to take up the case that comes before her. The advocates are supposed to maintain high level of service and integrity to their clients. The communications made by the clients to the advocates are considered to be confidential. Every person has the right to be represented by an advocate. This right cannot be denied. Advocates help people to enforce their rights in the courts and get protection from the arbitrary arrest and detention of the state.

6.7 ADMINISTRATIVE MACHINERY

The executive branch of the State is vested with the duty to administer and executive the laws and policies of the Government in power. The executive branch does not have its own independence. It takes the orders from the Government. The executive branch at the Union is headed by the President. The President takes decision on the aid and advice of the cabinet. At the State level, the Governor is the head of the executive. The Governor acts on the aid and advice of the State Cabinet. However, in reality, there are instances where the Governors of the state take orders from the Union Cabinet.

Both at the Union as well as State level, there are various "departments" which handle a specific area of administration. Each department is controlled by a minister. The minister has several officials under her to assist in the administration. At the district level, there is a District Collector (DC) who is in charge of the overall administration of the district and all rural areas within that district. Deputy Collectors of all districts are controlled by the State Cabinet. The officials in the executive are also bound by the Constitutional principles.

Check Your Progress: 2

1) *Download a copy of the Indian Constitution from the internet and read the "Preamble". Search the dictionary and write down the meaning of the following words:*

   a. *Sovereign:* ………………………………………………………………………

   b. *Socialist:* ……………………………………………………………………..

   c. *Democratic:* ………………………………………………………………..

   d. *Republic:* ……………………………………………………………………..

   e. *Justice :* ………………………………………………………………………

   f. *Equality:* ………………………………………………………………........

   g. *Liberty:* ………………………………………………………………………

   h. *Fraternity:* …………………………………………………………………..

   i. *Dignity:* ……………………………………………………………………..

6.8 LET US SUM UP

Thus, in this unit you have read about the framework of Indian legal system and how it is founded in the Indian Constitution. How certain Fundamental Rights are guaranteed by the Indian Constitution. In case, if a law violates the Constitutional values, it can be questioned before the courts. It also tells us that how India has a three-tier judicial system. In the interest of people, how the courts protect the rights of the people. At the same time, the advocates aid the people to navigate through the legal process and protect their rights

6.9 UNIT END QUESTIONS

1. Write a note on the process of making of Indian Constitution
2. What are the salient features of Indian Constitution?
3. Discuss the various Fundamental Rights guaranteed by the Indian Constitution.
4. Explain the law-making process by Union Parliament and State Assemblies.
5. Describe the organisation of Judicial system in India.

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UNIT 7 ROLE OF THE LAW IN SOCIETY

Structure

7.1 Introduction

7.2 Learning Outcomes

7.3 Basic Premises

7.4 Social Theoretical Dominions on Society and Law

7.4.1 Indian Society and Legal Transition.

7.5 Understanding Legal Transformation

7.6 Let Us Sum Up

7.7 Unit End Questions

7.8 References

7.9 Suggested Readings

7.1 INTRODUCTION

Societal transformation is influenced by the changing nature of the customs. It also impacts the law in the context of modern political institutions. Intersections of law and society are complex in nature. Intellectual traditions across the globe have probed these complex connections in the shifts related to society, laws and customs. This unit attempts to explore some of those rudimentary, social sciences based, interdisciplinary, conceptual readings on the interlinkages between society and law. You will learn about the fundamental debates on sociology of law. It also analyzes the sociological and social theoretical engagement relations on societal-legal relations. At the same time, it maps theinterlinkages of societal and legal transformations. Thus, the unit deals with the debates on sociology of law.

7.2 LEARNING OUTCOMES

After studying this Unit, you shall be able to:

- Learn fundamental debates on sociology of law.
- Know the debates around the disciplines, sociology and law.
- Learn the sociological and social theoretical articulations on society and law
- Engage with the perspectives on societal and legal transformations

7.3 BASIC PREMISES

Relations of society and law needs to be understood within the larger context social science approaches and perspectives based on humanities. Interdisciplinary understanding is deployed by scholars to map the complex linkages between society and legal transitions. Sociology of law produced important readings related to the connection between societal changes and

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emergence of legal cultures. Before delving into the specificities of sociology of law, historical understanding of sociology of law will help understand the diverse interpretations and its background related to social and political churning in relation to the production of legal knowledge.

Sociology of law is considered as an important sub-discipline within the grand intellectual culture of hegemonic sociology. Italian philosopher, Dionzio Anzilotti introduced this category in the year 1892.There are different interpretations regarding the definitional understanding of the sub field "sociology of law." For Javier Trevino, legal sociology is "an academic specialty within the general discipline of sociology that attempts to explain the relationship between law and society, the social organization of the legal institution (order or system) ,the social interactions of all who come in contact with the legal institution and its representatives (police, lawyers, judges and legislators) and the meaning that people give to their legal reality."(Trevino, 2001) Sociology of law thus produce the context based and empirically rich accounts of law. Sociologists who belong to the sub-field of sociology of law read law as a social construct and attempted to delineate the nuanced connections between society and law.

Historically, sociology of law is considered an offshoot of the "sociological movement" within the discipline "law" in the background of post-second world war United States. Law is therefore read as a social phenomenon and sociology of law engages with the legal knowledge and sociological knowledge. Sociologists study how the intersections between society and law get reflected in the political and social transformations. There are different opinions related to the connections and conceptual departures related to sociology and law. Broadly, both sociology and law reflect on the larger fields that determine individual, societal expectations, communities and law. Sociology of law is knowledge emerged in response to transforming, social and political currents. The critique is that sociology of law confines itself to the theoretical realm in the field of dominant sociology and does not explore law as an evolutionary dimension of various societies across the globe.

Sociology of law, for Georges Gurvitch, "is that part of the sociology of human spirit which studies the full social reality of law, beginning with its tangible and external observable expressions in effective collective behaviors (crystallized organizations, customary practices and traditions or behavioral innovations) and in the material basis." (Gurvitch, 1942:61) It deals with "external symbols or legal procedures and internal meanings." (Brett,1944) Law therefore is theorized as a social system. Sociologists specialized in the field of sociology of law explore "social character of law". Sociologists thus examine the various facets that determine legitimacy, legislation, judiciary, culture of legal profession etc.

There are different readings related to the emergence and transformation of law in sociology in particular and social theory in general. Law, for Karl Marx, is very much integral to bourgeoisie state. Ruling classes are analyzed central in the production of legal concepts. "Retributive" legal systems, for Emil Durkheim, are very much related to the mechanically solidarity-based society. Durkheim analyzed law in the organic solidarity-based societies as

"restitutive" in its modalities. Such accounts read law as a social fact. Max Weber analyzed the limited facet of juridical view that has problems in assessing the impact of law over the society.

One of the central concerns of sociology of law is whether it can pave way to social engineering through transcending the hiatus created by "law in books" and "law in action". It attempts to map when a norm is transformed into law, whether it will be recognized by the political institutions or not. It queries whether the state engages with it in systematic manner or not. Sociologists considered sociology of law as a means to overcome the inherent problems within various laws that act as hindrance to dynamic operations of various societal aspects.

According to Max Weber, "When we speak of "law", "legal order" and "legal professions", close attention must be paid to the distinction between the legal and the sociological points of view." (Weber, 1992:1). Lon Fuller further analyzed that "By speaking of law and society we may forget that law is itself a part of society." (Fuller,1968:5). Modern and postmodern readings within the sociology of law engage with the various, theoretical and empirical discourse in the field of social sciences.

Check Your Progress:1

1.*Write about emergence of sociology of law in your own words.*

2. Write Marx's and Weber's perspectives on law and society?

7.4 SOCIAL THEORETICAL DOMINIONS ON SOCIETY AND LAW

Social theory of law departs from the foundational understanding of sociology in particular and social sciences in general. Social theoretical perspectives on law delineates legal doctrine. "...social theory has its roots in legal theory, and the agendas of classical social theory are tied up with jurisprudence. Contemporary social theory is struggling with many of the same issues as contemporary legal theory is, but now with the differentiation of disciplines, each field is more likely to go it alone. If legal theorists and social theorists followed the development in each other's disciplines more closely we might avoid some blind alleys that the other discipline has already discovered, and we might learn something in the justifications that would otherwise go unnoticed." (Scheppele,1994:401)

Legal doctrine encompasses laws, procedures, principle, normative-conceptual stakes and values. It addresses questions like - what constitutes the notion of "legal" to different aspects of life and practices? A doctrine becomes legal "when it is created, interpreted or enforced in certain socially established ways, through the recognized procedures and agencies". It is noted that western legal frameworks are hegemonic and thus non-western legal approaches have to be understood differently. Culture of the law needs

to be studied as well. Societal and political context of legal development is central to the understanding of the contestations between the national and global, legal developments.

Globalization has drastically changed the enclosures that determine law and global-local society. (Halliday and Pavel, 2006:447-470). Scholars such Walden Bello analyzed the changing global scenario in the context of deglobalization (Bello,2005). Globalization is pivotal in erasing the various boundaries that differentiate various states across the globe. Law becomes the weapon of the neoliberal nation-state in the capitalistic phase and it supports such state in engaging with the social and political crisis driven by the withdrawal of social security. Social theorists have studied how such neoliberal liberal, political institutions in the capitalistic era regulate the upsurge of the social movements that protest against the repressive, neoliberal forms of capital.

7.4.1 Indian Society and Legal Transition

Colonial and postcolonial legal transformations have impacted India in different ways. The change in law since traditional India to modern India through the conduit of colonialism determine the nature of law and society in India (Baxi, 2009). Scholars of legal transformation have probed the nuances of these transitions. Colonialism is valorized in certain writings of scholars such as that of Anil Seal(Seal,1068). Modernity is analyzed as an offshoot of colonialism that have impacted the majority of the people in positive fashion. However, there are scholars who argue that colonialism still exists in multiple ways in the legal changes that happened in the post-independent India.

Check Your Progress:2

1. *Write on the interlinkages of social theory, society and law.*
2. *Write a short note on Indian society and its relation to legal transition.*

7.5 UNDERSTANDING LEGAL TRANSFORMATION

Genealogy of the pre-colonial, colonial and postcolonial construction of law is embedded in the conflictual realm that exists between Indian conventional laws and juridical texts. Construction based on the binary opposition such as native/foreign operates quite differently in such articulations. Questions of mapping the nature of law become so tedious that "those of us who have learned humility will have given up the attempt to define law." (Radin, 1938:1145) On definitions of law, it is observed that "nothing concise enough to be recognized as a definition could provide satisfactory answer." (Hart, 1961:16). Law thus becomes difficult to be defined. (Deva, 2009:1).

Understanding law in the context of the west therefore is read in the backdrop of institutions like "modern centralized state and its instrumentalities" and

such scholastic manoeuvres lack the conceptual acumen to unfold the "non-modern social systems such as those of peasant civilisation as tribes." (Deva, 2009:1-2). Some of social science approaches therefore reduced the ambit of law "by defining the forces of law in terms of central authority, courts, codes and constables, we must come to the conclusion that law needs no enforcement in primitive community and is followed spontaneously." (Malinowski cited in Deva, 2009:2). Cardozo emphasized that, "The normative element, The regularity element, Courts and the enforcement thus is central to such understanding of law. (Cardozo, cited in Deva, 2009). Therefore, the social codes reproduce the spaces and practices of values and norms and its impact on society. Social codes are categorized through its group over the manners, etiquettes, customs etc. Each social code is operationalized through sanctions. Social spaces are constrained through social institutions. Social boycotting and isolation are central to the langue of the power structures. Categorization of the penal cultures through the constructions of primitive and modern have to be analyzed in distinct fashion. Protean nature of the "law is the structured and crystallized form of norms and values that are really enforced but remain hidden from the public eye" (Deva,2009:2-3).

Understanding of social legislation is judged through its impact on personal laws and how it is received in highly, retrogressive social-political spaces. Complexities of such are not so easy transitions which have tried to capture through the epistemic/ approaches praxis-oriented hiatus via positioning paradox between "law in books" and "law in action". Scholars therefore return to the quandaries related to legal knowledge. How dominant social scientific understanding captures these nuances related to law?

Sociological understanding of law "still has no clearly defined boundaries. Its various exponents are not in agreement as to its subjects, or the problem of requiring solution, or its relation with the other branches of the study of law." (Gurvitch cited in Deva, 2009:3) Jurists of analytical school such as Austin observed that law was the command of sovereign and 'juridical empiricist school' justified the "unwritten and flexible law". These schools therefore opposed the efforts that deepened the understanding related to law and societal mechanisms. (Deva, 2009:3-4).

History of the social science understanding reveals that there was criticism against categorizing discipline within social sciences like that of sociological understanding on law. However, doctrinal and non-doctrinal methodological dilemmas can be explored through the transformation of juridical thinking and its approach towards sociological jurisprudence. Ehrlich asserted that "at the present as well as any other time, the center of legal development not lies in legislation, nor in juristic science, nor in judicial decision but in society itself." (Ehrlich, cited in Deva, 2009:4) Among the significant interventions from India is by Upendra Baxi who states - "at almost every point in …survey, we have lamented the paucity of sociological research into legal processes and institutions." (Baxi cited in Deva, 2009:7). Scholars in India re-articulated the question of elitist, social closure of law by arguing that "their anticipatory socialization and reference group behavior make them

prone to think and act in the same way as the well-to-do people." (Deva, 2009:8).

Cynicism related to the modern legal institutions among the people has provoked scholars to think whether "the degree of success of implementation of laws and efficiency of the functioning of legal system in India do not seem to have been studied systematically and adequately by the sociologists so far. Nor has the impact of social legislation empirically." (Deva, 2009:9) Deva further observed that "establishing a meaningful and efficient communication network between the legislation and the judiciary and the public also is an essential task in which work in the field of sociology of law can contribute a great deal." Some of the social science understanding therefore emphasized the inclusion of sociology of law in the field of legal reform. (Deva, 2009:9:14)

Post-colonial India "does not seem to have appreciably from what it was during British rule. The foundation of this legal system were laid around 1860 when such basic laws as the Civil Procedure Code, the Criminal Procedure Code and the Law of Evidence were put in place."(Deva, 2009:9,22) Some of the proclivities of the Fourteenth Report of the Law Commission pointed out the deficiency in the legal system (Fourteenth Report of the Law Commission, cited in Deva, 2009:22) It reports that people in India are generally ignorant about basic laws, legal system and procedures. Moreover, the court language is not understood by the majority of the people. Technical aspects are emphasized in the cases than the substantive facets of the disputes. Lawyers and touts are more inclined towards protraction of litigation than the settlement of the disputes. Innocent people are oppressed by the dominant sections through their appropriation of the court realms and further it led to the diffidence among people. Majority among the citizens cannot afford legal services. Other issues related to excessive litigation, backlog of pending cases, undetected nature of cases related to perjury and forgery (Fourteenth Report of the Law Commission cited in Deva, 2009:22).

It is further noted that "A pernicious feature that has come to the fore in the post-independence era is that of enacting too many laws and subjecting them to numerous amendments from time to time. This has created a thick jungle of laws that it is difficult for anyone to find his way. (Deva, 2009:22) For the marginalised sections of society, "social legislation seems to remain primarily symbolic and ritualistic. It is doubtful whether it has been successful in reaching its objectives." (Deva, 2009:23). Land reform laws, for instance, suffers from weakness. (Baxi cited in Deva 2009:23). Justice V.R. Krishna Iyer observed that "we must not only tighten our nuts and bolts and press the accelerator but redesign the project to replace a ramshackle machine. The renovation and re-organization of the judicial-set up involves the sophistication of the machine incorporating modern advances in technical knowledge, so that delay killing devices may harmonies with better functional performance, the humanization of the system may find application in judicial process." (Iyer cited in Deva, 2009:25). Former President K.R.Narayanan observed that "a reform that can be undertaken is to simplify the legal procedures involving litigation and the disposal of cases. Law's

delays are proverbial and it is in this field that reforms are urgently needed not only to reduce the mounting cost of litigation but to see that justice is not denied to people." (Narayanan cited in Deva, 2009:26). Decline in sound legal culture is due to "lack of political will, flexibilities, loop holes' which are becoming impediments for the effective deployment of legal institutions and practices. (Deva, 2009:28).

Looking into questions like what happens when the legal system shifts from colonial era to that of post-colonial India? Does it cause any behavioral and attitudinal shift towards the law? Baxi analyses the manner in which exclusion of the people operates because of their lack of knowledge about the law. Revivalists and modernists are compared in order to understand the nuances of their approach towards law. Some of the quandaries that haunted them is about the nature of the law and its inclinations towards peasants and religious questions in the Indian context. Another issue discussed was the continuation of connections between British Indian legal system and Indian legal system. Baxi analyzed that the anxieties of the hegemonic sections related to legal transitions is related to vested interests of those in dominant, power structures. Dependence/autonomy were explored as colonial baggage on relation to such transitions. Culture of protest and disobedience, according to Baxi, were central to the legal constructions. It is further observed that top to down model is part of the British Indian legal system (Austinian type) and it created its own trajectories. Thus, "law-making remains, more or less, the exclusive prerogative of a small cross section of elites. This necessarily affects both the quality of the law enacted and its social communication, diffusion, acceptance and effectivity. It also reinforces the highly centralized system of power." (Baxi, 2009:49).

Indian intelligentsia could not engage with this transition in constructive fashion. For Baxi, "Even the neo-Gandhian thought, including Sarvodaya school has not moved beyond the inspiring but programmatically sterile grandiose conceptions of lokshakti (people's power) and lokniti (people oriented-politics)." (Baxi, 2009:49-50). Their incompetence thus strengthened the colonial rationale that "only enlightened groups should have a say in the (legal) process." (Baxi, 2009:50). Thus "Indian legal system also follows the colonial model of reactive mobilization of the law rather than the proactive mobilization. In the former (British Indian legal system), the citizen is left to initiate the legal process by filing the complaint; in the latter the state agencies initiate the legal process. Laws that attack certain segments of the social structure in the title of justice and equity obviously need proactive mobilization." (Baxi, 2009:50-51) According to Baxi, "access to law means not just access to courts as the lawyers generally think about it. It means, in a broader and socially more relevant sense, access to law makers, to dispensers of legal services (legal profession) and to normative and institutional information concerning the legal system." In addition to that "in all these dimensions of access value, we find that the ILS is based on rather clear violation of democratic legality." (Baxi, 2009:51) Therefore, "one major way in which Indian legal system violates the principles of democratic legality is that information concerning the norms of law is not accessible easily even to those who are affected by the law." (Baxi, 2009:51) Baxi observed that

"normative law is virtually inaccessible to the most underprivileged and vulnerable groups in Indian society. Legal illiteracy of the beneficiaries of the law thus contributes to its ineffectiveness." (Baxi, 2009:53)

Citizen's access to legal services thus is analyzed in relation to their consciousness about the legal levels and substantive intervention. Profit oriented approach of the lawyers is analyzed as continuity of the colonial insistences related to exorbitant court fess. (Baxi, 2009:45-59) J.Duncan M.Derrett demonstrated the struggles of the British administration and their tedious engagements with the orthodox realm of shastras. (Derrett,cited in Deva,2009) Rights related to revenue matters impacted the diverse group of colonizers. It resulted in "the intellectual gap between judgements delivered in the high courts, where some judges were English barristers standing, and the country vakils who were supposed to advise their clients according to them was, and to a large extent remains, marked."(Baxi, 2009:63). It is further observed that "judicial hierarchy was developing, a striking dichotomy emerged between court law popular law, interacting components we have already observed for somewhat earlier period." (Baxi, 2009:63). Derret explored the dominant, Brahminic culture that impacted the administration. It noted that "the Hindu system gave everyone his place in every possible contingency; individuality was not prized, disobedience was anathema; functions were fixed by the caste system; and sources of pressure (outside the wild and barely Hinduized tribes) were many."(Baxi, 2009:63) Cooption of the dominant castes and the interplay of homogeneity and heterogeneity of communities connected law were explored by Derrett and it is linked to the misunderstanding of the law from the outside and the indigenous understanding.

Derrett also unfolded how these legal transitions resulted in the gradual decay of the personal laws. Psychological hiatus created through the perceptions of foreign and native law is also analyzed in this context. Gradually, it resulted in the confluence of English type laws and personal laws. Legal authority of Shastras was central to such legal transformation. It also led to the clash between textual laws and non-textual, customs. (Derrett, 2009:60-72). Economic life is also analyzed as something that needs to be understood through sociology of law. (Swedberg, 2003:1-37) It is pointed out that sociological research on law and economy should concentrate on social networks and regulation and the notion of social that impinge law and economy can be studied through that kind of an understanding unlike the Weberian take on law and society. (Cotterrell, 2013:49-67). On the other hand, James S Coleman suggested "theory of purpose action" as central to social theory and through methodical individualism and denial of holism and further argued for a shift of social theory and research from "individual actions to that of macro social functioning." (Coleman, 1986:1309-1335).

Sovereignty is also being questioned in the age of the new, global institutions and "world peace through law." (Gessner, 1995 :85-96). Colonialism and postcolonialism have become the key words of contemporary scholarship on society and law. Eurocentric approaches are being criticized through the schools such as Third World Approaches to International Law. Imperialism

and larger questions of immigration/emigration have also become part of current socio-legal debates. It is also critiqued that "...the more sociologists of law -like any other empirical scientists-ignore the demands of "pure science" in order to produce "socially relevant" results, the more funding they will get for their research but less they will contribute to theoretical progress, and hence to only really "thing" a science can bring forth." (Griffiths, 2017:125). At the same time, "...fields of social-scientific studies of law and the fraught relationship between law and anthropology, it seems that a proliferation of fields and blurring disciplinary boundaries has resulted in a situation bearing striking similarity with situations of legal pluralism." (Anders, 2015:420).

7.6 LET US SUM UP

This unit introduces the learner to the fundamental debates on the intersections related to the disciplines such as sociology and law in order to explain the relations between society and law. It also provides a fundamental understanding about the sociological, social theoretical and interdisciplinary readings that reflect on society, customs and laws. Nature of the legal transformation is discussed through such disciplinary perspectives. Broadly, it helps understanding of law and society in the light of the pioneering theoretical traditions that examined society and law.

7.7 UNIT END QUESTIONS

1. Discuss the debates on emergence of sociology of law.
2. Critically evaluate the social theory in the context of society and law.
3. Write an essay on legal changes in India.

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UNIT 8 WOMEN’S MOVEMENTS AND ITS ENGAGEMENT WITH LAW

Structure

8.1 Introduction
8.2 Learning Outcomes
8.3 Background
8.4 History of the Women's Movements and its Engagement with Law
8.5 Women, Citizenship and Law
8.6 Debates within the Movement on the Efficacy of Legal Reform: Is Law Enough?
8.7 Legal Reform: The Case of the Domestic Violence Act
8.8 Let Us Sum It Up
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8.11 Suggested Readings

8.1 INTRODUCTION

The women's movements in India have consistently posed challenges to the established patriarchal institutions and dominant meanings of masculinity/ femininity. Within these efforts, the law has always been a major arena of struggle. Feminist interventions in law have been at various levels, viz. to critique the underlying patriarchal assumptions which frame existing laws; to unpack the myriad ways in which law operates and through legal campaigns to extend rights and implement existing laws. In this unit, you will learn about the different perspectives towards law in the women's movement. It will explain the history of women's movements and its engagements with law. Thus, it will acquire you with the debates within the movement about efficacy of law as a tool for gender justice. How laws have the emancipatory potential for securing women's rights.

8.2 LEARNING OUTCOMES

After studying this Unit, you should be able to:

- Learn the different perspectives towards law in the women's movement
- Know the history of women's movements engagements with law
- Engage with the debates within the movement about efficacy of law as a tool for gender justice
- Critically analyze the emancipatory potential of law for securing women's rights

8.3 BACKGROUND

Feminists have often posed the question: is law a subversive site? Since colonial times, which is to say for more than 150 years now, feminists as well as others interested in the question of social change have turned to law as a means to secure their goals. However, despite the long and intense engagement with law, at some level, so little seems to have changed. Does this then have to do with the inherent conservatism in law? Is it one of the many discourses that reinforce inequalities in society? Does the law have inherent limitations or have women's movements not adequately exploited its potential for social transformation. By tracing the contours of the women's movements' engagement with law to find answers to these questions.

Feminist engagements with the law are mapped on two levels. On the one hand, work drawing from feminist jurisprudence that has highlighted the contradictory nature of how law is implicated in the oppression of women is examined. It includes uncovering the ideological assumptions that inform the legal regulation of women. It has been argued that legal discourse which constructs women primarily as wives and mothers, as passive and weak and therefore requiring protection, in short, the way law constructs women as gendered subjects needs to be analyzed and understood in order to use law for feminist aims. However, law is also the site on which these assumptions have been challenged and recast, primarily through the efforts of those interested in social transformation. This view of law then, argues for re-conceptualizing law as a site of contestation and meaning-making and as a site of discursive struggle, where competing understandings and visions of women are debated and discussed.

On the other hand, the different campaigns and interventions by the women's movement to engender the legal terrain as well as bring about changes in laws and legislation through the various legal campaigns of the movement is explored. It includes looking at the debates within the women's movements on whether there has been too much reliance on law as a means for securing the goals of the movement. In other words, whether women's movements have become statist. In the next section, we will learn about history of women’s movement and its engagement with law.

8.4 HISTORY OF THE WOMEN'S MOVEMENTS AND ITS ENGAGEMENT WITH LAW

Since colonial time, the demand for legal rights has been a cornerstone of the women's movement. Some of the earliest attempts to address the issue of women's rights have been to bring about laws to ban violent practices towards women, like Sati. In a sense, these attempts have been successful, in so far as this has meant the enactment of several laws, which have both prohibited violent practices towards women, as well as removed discriminatory provisions that stopped women from accessing resources and rights in equal measure. Laws banning the practice of widow immolation, of removing the restrictions over widow remarriage, raising the age of consent were all seen to be progressive measures for 'reforming' Indian women's

lives. However, feminist research has shown us how this was a much more complex process than what meets the eye. First of all, the experiences of only a select class of women, namely the upper caste Hindu women were taken to stand in for the experiences of all women and laws were framed accordingly. This meant that often women from other communities lost out on their customary rights when the law was framed in a homogenous way. The second important point is that a careful consideration of these debates illustrates that actually what was being debated was not the question of women's rights, but rather questions about what constituted 'authentic' Indian tradition and women became the site on which the competing logics of colonialism and nationalism played out. However, feminist historians like Tanika Sarkar (2000) writing about the debate on the age of consent in Bengal, argued that with all its limitations, the debate on social reform had positive implications for women's rights, at least for elite and middle-class women. The liberal conception of rights, which has often been criticized for its limited nature, had a different trajectory in colonial India. Sarkar (2000) has shown how the law became a site for the emergence of a conception of women as rights-bearing individuals. Unlike earlier where it was subsumed under the authority of the community that which identified women as the essence of community identity and therefore subject to internal self-regulation of the community. In many ways, the language of social reform in 19th Century India, even with its limitations, provided the means for mitigating the arbitrary mastery claimed by men, who had been denied rights in the public sphere, over women in the private sphere. In this context, a notion of something that appeared like rights, started to emerge in women's private lives, long before they came to be articulated in the public and political realms.

It is this articulation of women as a distinct subject, both against the claims of men and the claims of the community, that allowed for someone like Rakhmabai to argue that she would not return to a husband who she did not think was compatible.

Read about the debate around lifting the ban over widow remarriage and the aftermath of the passing of the law allowing widow remarriages. Refer to Prem Chowdhry's work to read why Jat women in colonial India preferred to be labeled 'adulterous' than admit that they have remarried.

Case Study : In 1885, Dadaji Bhikaji filed a case of "Restitution of Conjugal Rights", asking that his wife, Rakhmabai be forced to cohabitate with him. This case became a highly debated and discussed case, with Rakhmabai stating that she did not want to o-habit with a man she had been married to as a child and who was not a compatible match. The first court judgement judged in her favor, but a re-trail ordered Rakhmabai to co-habit with her husband or face prison. Rakhmabai defiantly refused to cohabit with her husband, choosing to go to jail instead. She did not however have to when an out-of-court settlement was reached. This case led to a lot of debate around issues like Hindu versus British law, whether reform should be brought from within the community or through the use of law as external pressure, whether ancient 'customs' should be preserved and whether there was any possibility for an individual's autonomy, especially a woman in the context of conjugality.

While women's movements have differences with the state in terms of the efficacy and extent of the law, what is undeniable is that the law has been reformed in response to the political demands of the movement. It also influences the drafting of the Constitution of India which enshrines the principles of equality, including gender equality. Thus, the focus of women's movements' engagements with law has been to focus on the gap between the equality that exists on the formal level and the persistence inequality in the substantive sense.

Check your Progress -1

1) *What were the limitations of the social reform movement with respect to bringing about changes in law?*

8.5 WOMEN, CITIZENSHIP AND LAW

The relationship of women and law was altered with the formation of the Indian Nation-State and the people of India giving themselves a constitution premised on equality and universal citizenship. Through articles like Article 14, the Constitution guaranteed equality of rights for all its citizens. However, though formally women were given the status as equal citizens with men, the substantive equality was far from achieved. The complexity of the relationship between women, citizenship and law can be discerned from two critical events in the immediate aftermath of independence: namely the recovery of 'abducted' women and the debate around the Hindu Code Bill (HCB).

The creation of the Indian Nation-State was accompanied by the trauma of the partition. The simultaneous creation of the two nations of India and Pakistan saw one of the largest exchanges of population in history. While the story of the mass migration and the violence that followed is well-known, the story of the rescue and recovery programme of abducted women taken up by the State is important. The violence of partition was particularly gendered, with the abduction, kidnapping and sexual violence against women being wide-spread. However, while the violence perpetrated by the men of other communities on women was highlighted and remembered, feminist work has shown how violence wrought on women by their own families and communities (forcing them to commit suicide, killing them, bartering them in return of safe passage for the rest of the family etc) for preserving the 'honor' of women and their communities has been forgotten and rendered invisible.

Once the Indian and Pakistani nations came into being, the first agreement that they came to was the "recovery" of abducted and kidnapped women and "restoring" them to their rightful nation. In actual terms, the Indian state interpreted this to mean the recovery and restoration of Hindu (and Sikh) women married to Muslim men, living in Pakistan. However, while the women had to be recovered, the children (if they had any) were not seen as Indians and therefore had to be left behind.

While the histories of the women 'rescued' and those involved in these programmes are fascinating and poignant, the important point to note here is that as far as women were concerned, they were not given the same agency to choose their citizenship as had been extended to men. It was the religious community women belonged to that finally decided their fate and their nationality, rather than the choice they might have wanted to make. Thus, the idea that women were "national" property and the State was to stand-in for the family and community as the public patriarch, who would restore women to the private patriarchal authority was at the core of the building of the Nation-State. It is important to note that this was achieved through an Act passed by the Parliament, thus, it amounts to an official position of the State vis-a-vis it's women citizens.

The other important critical event in this regard was the debate around the Hindu Code Bill. The HCB which sought to bring the "private" Hindu family under an egalitarian code was an attempt by Dr. Ambedkar to fundamentally democratize the Hindu family. The Bill was opposed widely by the orthodox and traditionalist elements within the constituent assembly, who saw the bestowing of equal rights on women as a danger to the Hindu family system as it existed. The bitter debate over the HCB was centered around the right to divorce, of equal property rights for women and the abolition of bigamy. Women's organizations in post-independence India actively organized to support Dr. Ambedkar and push for the passing of the Hindu Code Bill. The HCB could not be tabled due to the immense opposition it faced, and Dr. Ambedkar resigned as law minister in protest. It was finally passed after being broken down in smaller parts and by diluting some of its most radical provisions.

However, what is important to note in this is the debate is the way the HCB tried to center a republican idea of citizenship for women, which saw them as independent individual citizens and was not predicated on their belonging to a community/ group and the way this idea came to be eroded in the subsequent reworking of the bill.

Thus, these two events help us to understand the complexity of women's relationship to the state, how they are not seen to be direct citizens with an unmediated relationship, but rather as persons whose citizenship is mediated through community.

8.6 DEBATES WITHIN THE MOVEMENT ON THE EFFICACY OF LEGAL REFORM: IS LAW ENOUGH?

The relationship between the women's movement and the state has been a complex one and law reform has been one of its most productive and contentious sites. Formal policies and programmes have attempted to project the postcolonial state as the primary agent of development and change (Gupta and Sharma 2006; Ray and Katzenstein 2005) and as the protector and promoter of the well-being of the marginalized, including women. The women's movement, along with many other social movements and

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organizations has demanded affirmative action from the state and sought protection of the interests of the marginalized. They have done so expecting that the state may and ought to possess the resources and opportunities required for bringing about change that the movements themselves might not be in a position to do (Agnihotri and Parliwala 1993). This has been starkly visible in the use of legal amendments as a major strategy by the women's movement, as also the attendant critiques of the 'statism' of the movement (Agnes 1992).

The women’s movement in India has had an ambiguous relationship with the State. On the one hand, the movement has been critical of the state for its patriarchal bias. On the other, it has also relied on the state to make amendments and provisions for bringing about gender equality. All the major campaigns of the movement, whether against rape, dowry deaths, domestic violence, sex selective abortions or for land rights, rights of deserted women, for the uniform civil code, have included an engagement with the state and demands for changes in laws and legal provisions by the state. This strategy of the movement has yielded some successes- as in amendments in the law on rape and prevention of dowry deaths, a new civil law on domestic violence, judicial judgements and subsequently a new law on the issue of sexual harassment at the workplace, a law regulating pre-natal diagnostic techniques etc. However, there has always been a tension between the movement and law and despite its pre-eminent legal strategies, there has been a strong sense within the movement of ambivalence and skepticism about the law’s capacity to effect real changes (Kapur and Cossman 1996). At the same time, there was also a certain amount of optimism regarding the relation between legal and social action; a sense of hope that legislative and judicial changes had been preceded by mass campaigns of protest (Jaising 1988).

Flavia Agnes (1992) argues that the legal reform campaigns taken up by the movement have been inadequate and narrow. This is because, either amendments that have been made are inadequate or have not been properly implemented. She argues that what has been seen as the success of the movement, in terms of getting the state to pass new laws on a range of gender-related violence, has actually been the state’s strategy to co-opt feminist agenda. Through an analysis of rape cases that came to court, after the amendments in the rape laws were made, she shows that conviction rates reduced after the amendments. She argues that in the face of apparent acceptance by the state of the importance of women’s issues, the women’s movement relaxed its own vigilance and did not continue to consistently focus on campaign politics as well as on monitoring the implementation of the reformed laws. As a result, judgements continued to go against women and were premised on conservative visions of womanhood. She also points out that this acceptance was an eye-wash so that more fundamental issues like economic restructuring or property rights were not taken up by the movement. She argues that addressing issues of violence through the strategy of legal amendments was convenient for the state, as it did not require the state to bring about any fundamental changes in social structures and relations.

We can see how this criticism is relevant even today, if we look at the verdict of the Goa court in the Tarun Tejpal case. This case came up in the context of amendments in the law on sexual violence, after the Nirbhaya case. These amendments brought about a very important change that the movement had been pushing for a long time, namely that the law must address the problem as a problem of sexual assault, focusing on the right to dignity and autonomy of the woman, rather than the narrow focus on pe

no-vaginal penetration and "purity" that the traditional definition of rape entails. Thus, these amendments cover a range of sexual violence, including digital penetration, stalking etc. Despite these changes in the law, if one examines the judgement in the case, the judge placed importance on the 'character' of the complainant to conclude that "she did not behave like a victim" and acquitted the accused. Thus, one can see that the hegemonic definitions of womanhood continue to inform the law and its outcomes.

From another vantage point, Kishwar (1988) argues that the women's movement in India by making law reform pre-eminent has addressed only the state and in the process made the draconian state more powerful. According to her, the movement should have resorted to moral persuasion and addressed the community. For her, making legal amendments the major strategy of change is problematic, because law in India is a colonial legacy, of a colonial state that used law to civilize a 'barbarian' native. She therefore equates the strategy of legal reform to a colonial legacy and argues that the women's movement has remained westernized in its outlook, using borrowed vocabulary and that the movement is alienated from the larger mass of Indian women. Thus, in Kishwar's estimation, the women's movement has been heavily dependent on a westernized understanding and on strategies that stem from a colonial legacy.

Menon (1995) points out that law reforms were a part of colonial modernity, where law was seen to have an emancipatory potential, however she also points out the repercussions of having a standardized, universal law. In her estimation then, feminist justice is impossible within the framework of law. Gandhi and Shah have pointed to the importance of legal reform for short-term redressal of issues. While legal reform is certainly not enough, it is an important step in the process of addressing issues, because it enables issues to be named, it provides a language through which issues can be articulated. They argue that while the demand for legal amendments was a part of the campaigns of the movement against issues of violence, the most important thrust of the movement was on articulating that violence against women that might happen in the private sphere is a political issue, an issue of the movement (Gandhi and Shah).

While the women's movement has been addressing the state, it has not done so exclusively. Apart from the state, the women's movement has challenged the institution of family as tradition (Agnihotri and Parliwala,1988). Though the movement might have addressed the state, the terrain on which women's rights were fought was custom, family and religion. By bringing it out into the public, those issues which were thought to be private matters, the women's movement fundamentally challenged the institution of family and demanded that families also become democratic. The movement showed how the family was a site of oppression and private only in appearance, since its structures are shaped by wider structures in society. Even when the overt focus of the campaigns might seem to have been on legal reform, as in the

case of the anti-rape campaign, the movement challenged the meanings given to sexual violence in the patriarchal set-up through its articulations (Vishwanath,1997). It challenged the notion that women's bodies are the sites of honor. The women's movement articulated a new notion of rape, where sexual violence was seen not as an issue of women's sexuality, but rather as an issue of power. So, the thrust of the movement apart from seeking legal intervention on the issue of rape, was to encourage women to know their body and sexuality, through the knowledge of which societal constructs would become apparent to them. The movement showed how the power was not so much in the actual act of rape, but in the concept of rape. Thus, a major contribution of the movement has been to name issues of women, to produce a new language through which gender issues could be articulated in their own right.

There has been continuing debate within the movement about the efficacy of legal reform as a strategy. Lawyers and practitioners like Agnes have shown how many legal reforms like more severe punishment for rapists has in fact been counter-productive in the face of a continuance of patriarchal assumptions within the criminal justice system and also owing to the inability of the women's movement to continue its vigilance in monitoring the implementation of the reformed laws (Agnes 1992). The women's movement's experience with the law over the past twenty years, its ineffective and often ambivalent nature, has lowered the expectations of expeditious and adequate justice. According to Ritu Menon, 'this does not mean that we discontinue working for legal change in order to claim women's rights- by no means; it does mean that we look beyond the law to effect even minimal change' (2005).

Check Your Progress 2

1) *Why was law reform and engagement with law seen as important by the women's movement?*

8.6 LEGAL REFORM: THE CASE OF THE DOMESTIC VIOLENCE ACT

As we saw in the preceding section, though there has consistently been a debate within the movement on the question of legal reform, it has been a constant strategy. Women's groups and organizations have played an extremely important role in pushing for changes in law and policies acting as advocacy and pressure groups. They have undertaken studies of existing laws and policies, pointing out lacunae and engaging with the state to bring about changes in policies and laws. A good example of this would be the law around domestic violence and the campaign by women's groups and organizations for the same.

The Protection of Women from the Domestic Violence Act (henceforth DV act) came into existence in 2006. It is an important piece of legislation because it makes domestic violence a legally recognized category while also

providing for a series of civil remedies to the survivor of domestic violence. As pointed out by Jaising (2009) it is also significant for its application of the principles of constitutional law to the realm of the 'private'/domestic, which has long been resisted. The law came about, as a result of a sustained campaign for over a decade, but also has its roots in a longer engagement by the women's movement around the question of violence against women.

In the 1970s, the women's movement first brought forth the question of violence within the domestic/ intimate realm, through a focus initially on what came to be called 'dowry deaths'. The movement underlined that violence within the private/intimate space cannot be seen as personal tragedy and had to be seen as a political issue, part of a larger structure of unequal gender relationships. It was through this campaign that two important amendments 304B (dealing with dowry murders) and 498A (which addressed cruelty to the wife by husband/ relatives) were introduced in the Indian Penal Code. Under Article 498A, cruelty was made a cognizable, non-bailable offence. However, once the cases came to court, it became clear that there were several problems with the section. First, it focused on married women, leaving violence faced by unmarried/ old women within the home invisible; second, the definition of cruelty left out a spectrum of everyday, sexual, emotional violence out of the ambit of law. The law only recognized cruelty when the woman could prove that she had been forced to contemplate suicide or hurt herself and also when it could be proven as recurring. This made the law rather limited in terms of its application.

The women's movement realized that criminal law was severely limited in terms of addressing the survivors' needs of shelter, livelihood etc. It criminalized the individual man, but also rendered the State largely unaccountable for the violence faced by its women citizens (Jaising 2009). The existing civil remedies were often ineffective or not comprehensive enough for use in case of domestic violence. It was all these considerations that led to recognition of a need for a new comprehensive law on domestic violence, which would address these lacunae and provide for effective civil remedies for the survivor. Thus began a long campaign for the DV act. The Lawyers' Collective, a New Delhi based NGO was asked to prepare a draft by the National Commission of Women (NCW). The draft went through many changes and modifications, in consultation with different stakeholders including the state, before it was tabled in the legislature. The bill sought to widen the definition of domestic violence to cover the entire spectrum of violence faced by women within the private/domestic sphere, it sought to redefine the domestic relationship as going beyond the marital to include even marriage-like arrangements and adoption, thus bringing a range of violence women faced within the realm of the private under the ambit of law. It also sought to give the women right to residence in the shared home, even though the property might not be in her name. The bill also made provisions for appointment of protection officers solely for the implementation of the act and provided a range of civil remedies and injunctions to the survivor. There were many debates around the bill, especially on the issue of whether it should be made gender-neutral and whether women can be made respondents. Women's groups and organizations kept working on advocacy

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efforts, including submissions to the joint parliamentary committee and other fora to push for the bill and it was finally passed in 2006.

Women's groups have been at the forefront of follow-up work after the enactment of the bill into law to monitor the implementation, pushing for appointment of protection officers, and coming up with monitoring and evaluation reports to push for better and more effective implementation. Studies indicate that while the DV act has the potential to be extremely useful, its effectiveness for survivors of violence is constrained by the patriarchal frameworks through which courts and other law enforcement agencies operate, where the family is seen as a unit worthy of being maintained and preserved at all costs. The ability of women's organizations to push for a feminist agenda within institutional settings faces this major hurdle.

This is one case study of a 'successful' feminist intervention where they were able to bring about a new legislation, but this is also a story that is indicative of the terrain of law reform, women's movements and the State.

8.7 LET US SUM IT UP

This unit traces the long journey that 'women' have had to traverse to be recognized as 'rights-bearing' individuals and the different strategies and pathways used by the women's movement to secure legal rights for women. The unit also traced the debate within the women's movement on the efficacy of law, and whether it can truly be considered as a subversive site when it came to questions of gender equality. However, it is important to note critiques of the law and of society from the perspective of violence against women, including by representatives of the state such as the police. The movement critiqued colonial and postcolonial laws for their unsuspected biases and made several attempts to correct them. We know that despite these changes in the law, justice seems elusive, because the institutions through which these laws are to be implemented, continue to functioning from caste-class-gender biases. In order to achieve gender equality, law is not enough, but it is definitely the first step. While societal change takes a long time to come, it is important to try legislating equality into reality. Engaging with law is thus, is as much about the changes in the letter of the law as well as in its spirit.

8.8 UNIT END EXERCISES

- Do you think law is a useful tool for achieving gender justice?
- Discuss the various campaigns by women's movements for amending legal provisions. Give one example of a successful campaign.
- How is the relationship between women, state and citizenship complicated?
- Trace historically the engagement of the women's movement with the state for legal reform.

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UNIT 9 STRATEGIC USES OF LAW BY GROUPS

Structure

9.1 Introduction

9.2 Learning Outcomes

9.3 Background

9.4 Understanding the Discourse on Sex and Sexuality

9.5 Law, Citizenship and Being Queer

9.6 Law and Queer Movement

9.7 Let Us Sum It Up

9.9 Unit End Exercises

9.10 References

9.11 Suggested Readings

9.1 INTRODUCTION

This unit explains the struggles of marginalized queer people of India with regard to social and legal rights. As an acutely excluded group, there is dearth of literature on the queer community and its engagement with law, more specifically legal control over exercising sexual choices. What follow is a critical review of law's engagement with queer politics and the homophobic essence of law. The first section reviews the importance of re-examining meaning of equality, discrimination and justice. The second section reviews the engagement of queer question from the colonial to post-colonial period. The third section discusses the Naz foundation case to illustrate law's engagement with the queer question.

9.2 LEARNING OUTCOMES

After studying this Unit, you shall be able to:

- Map the broader discourse on sexuality
- Review of how homosexuality has been understood historically
- Understanding the struggle by queer groups for legal reform

9.3 BACKGROUND

Colonial and post-colonial India always had a rich tradition of aggressive assertions of antagonistic perspectives on several issues. While building a secular, democratic nation state, these diverse perspectives / ideas of developing a multicultural ethos formed the very basis of the Indian constitution. Kannabiran (2012) asserts Indian constitution has given space to challenge the hegemonic idea of justice through resisting the existing power structures and keeping the practice of argumentation alive. However, the

context in which this idea of equality and justice was introduced had its own internal contradictions rooted in colonial and precolonial social order of India. Different groups were not only diverse, but also unequal as emphasized by Dr. Ambedkar, and such inequality is often translated to restricting access of those lower in the hierarchy to freedom, equality and justice. To address such eventualities, it is important that the Constitution, law and civil society take conscious efforts to address these inequalities and introduce concrete provisions to dismantle the structures which perpetuate and consolidate the hegemony of those in power.

The understanding of law, justice, equality and citizenship has been challenged by many discourses, movements and legal battles. The legal discourse on equality, justice, rights and citizenship therefore routinely engaged with heterogeneity and intersectionality. The law always has a complicated relationship with those seeking justice, equality and citizenship rights exposing the limits of law and its potential to bring about transformations in the society. This is crucial as citizens of India are also part of different groups such as women, disabled, the marginalized caste groups, the transgender person, the tribals (notified and de-notified, and nomadic), the minorities and those who do reject compulsory heteronormative world (Kannabiran 2012).

The review of different struggles, legal battles and reforms in the post-independent India highlights that though the constitution of India guarantees equality for all, unequal hierarchies are most evident in accessing citizenship rights. Contemporary India continues to witness different forms of exclusion and formal / social disentitlement that reveal how the legal system, in much the same manner like the social structures, also upholds existing power structures of patriarchy, caste, heteronormativity etc. However, a review of struggles against different forms of discrimination, violence and violation of fundamental human rights, and constant engagement with the law and judiciary also emphasizes the importance of constitutional guarantee for equality and its potential for social transformation and elimination of all forms of discrimination. Kannabiran (2012) discusses the importance to have a comprehensive legal definition of discrimination and also how it intersects with ideas regarding equality and liberty especially personal liberty.

The predominance of caste, patriarchy and heteronormative ideology, increasing dominance of majoritarian groups in the post-independent India poses various challenges for Indian legal system to translate formal equality into substantive equality. Post-independent India continues to witness the marginalization, exclusion of voices of marginalized powerless groups and brutal suppression of the rights of those who are posing inconvenient questions to the state and the dominant group. To understand this phenomenon, it is important to review a few critical events in post-independent India.

The unprecedented violence during partition in 1947 was the context in which ideas related to freedom, equality and justice were framed. The newly formed nation of India was dealing with arrested development and a sense of insecurity about the geographical boundaries, and at the same time nursed the

aspiration to build India based on modern, secular and democratic values. Chaudhuri (1999) therefore underlines that any inquiry in post independent India need to start with its colonial experience because India's journey to modernity, state and the idea of citizenship originate there. The historical past is a complicated part of modern nationalist consciousness (Chaudhuri, 1999). Feminist scholars such as Kannabiran (2012), Sundar Rajan (2003), Chaudhuri (1999) argue that the women's question needs to be understood in the context of the modern democratic project of building the Indian nation state along with retainment of old social order and privileges of the dominant groups. On the one hand, the attempt was to confer a liberal idea of liberty, autonomy and freedom; and on the other, the attempt was to negotiate with established power structures of caste, patriarchy and ideology of family (essentially patriarchal and heterosexual in nature).

The nature of the Indian state varies across time and space, and consequently its responses to the demands for inclusion, justice and freedom by those who were marginalized, excluded and who are fighting for the freedom also varies. In post-independent India of 1970s, different marginalized groups challenged the state and reminded it about its commitment to social justice and the promise of equality and liberty to all its citizens. By 1980s, India also witnessed the sustained visibility of the lower caste persons who were earlier considered as untouchables, minorities and woman who raised issues of caste-based violence, religion-based violence, gender-based violence and issues related to sexuality. This period also witnessed the secular upsurge of caste groups, rise of communalism and of Hindu majoritarianism (Thomas Blom Hansen,2015). The latter proved a major setback to the establishment and strengthening of the secular democratic state. Amid this, law /legal mechanism had crucial role to play in cases of caste, religion, gender and community-based violence. The review of these cases of violence against women, minorities and lower caste person point out the discomfort of dominant groups in sharing the spaces with lower caste persons, minorities, women and others who were excluded.

9.4 UNDERSTANDING THE DISCOURSE ON SEX AND SEXUALITY

To put the discussion on homosexuality, queer politics and legal perspective in its context, it is important to understand the larger discourse on sex and sexuality and take historical review of sexuality. Several authors Kannabiran and Khanna argue that what has been understood as normal / normative or given / natural changed according to the time, space and context. Kannabiran argues the need to scrutinize the constitutional category of 'sex' in the context of histories of sex and sexualities. Before talking about sex in binary fashion, the need is to engage with diverse ways of expressing or articulating sexuality and explain mechanisms of power through which ideas about normal / normative are established.

The debate around sexuality in general and homosexuality in particular has existed for some time in the international sphere and in the context of socio-cultural context of a particular society. This chapter discusses how sexuality

has been discussed in the Indian context.

In Ancient times, the binary between sexes did not exist, but slowly more importance was accorded to sexual potency and virility. The emergence of heteronormativity as the norm is also connected to the issue of reproduction, and family became an important institution furthering this norm. The norms, values and practices which were inculcated through family play an important role in normalizing the notions related to what is 'normal', 'natural', 'appropriate' and 'prohibited' in the case of sexuality. Thus, any transgression of rules related to sexuality is seen as transgressing the norms and values prescribed by the family and it was considered as an insult to the honor of the family and notions of chastity and purity. Thus, family defines norms and practices related to sexuality especially, what is normative and legitimate, what is appropriate and non-appropriate, as well as what is desirable and what is to be penalized. Thus, heterosexuality becomes the norm, heterosexual parenting become the norm making non-heterosexual / transgender parenting inappropriate in the society, which is then criminalized in the legal framework (Kannabiran 2022). Religious scriptures also delegitimizes transgender or queer people as unnatural and ungodly, which strengthen their social and cultural exclusion and the legal aggression against them.

Family becomes an important site of bio-politics. As underlined by Foucault, it achieves the subjugation of bodies and the control of population. Menon (2007) argues that debates around law constructs sexuality in a very peculiar way causing non-normative sexualities and non-heterosexual family arrangements to be systematically disciplined into more rigidly redefined normative forms.

Discourses around the family, law and nationalism in India in the late nineteenth and early twentieth centuries, throw up the multitudinous ways in which the values of modernity were tied to certain articulations of sexuality. (Menon 2007). The next section undertakes a review of the queer perspective on law to understand how sexuality is an inevitable part of discourse on nation, community and family. It shows how different structures work towards reinstating the power of the dominant group.

Check your Progress 1

1) *Discuss the arguments of Maitrayee Chaudhuri and Kalpana Kannabiran, on women's movement in your own words.*

9.5 LAW, CITIZENSHIP AND BEING QUEER

Tracing the history of queer / same sex love / queer perspective is difficult because historically, homosexuality has not only been invisiblised, but same sex traditions have been dismissed to assert heterosexuality as a norm. There have been recent attempts to recover the voices / stories about same sex love which have highlighted the oppression and exclusion of voices of individuals expressing different sexual orientation. In this regard the anthology published by Ruth Vanita and Salim Kidwai titled *'Same Sex Love' that* provides a

glimpse of history of same sex love is a first organized effort to document the issue historically. The anthology highlights that non-heterosexual people struggled against both the compulsory heteronormativity and homophobia. The pre and post-colonial period witnessed several such struggles which can be mapped through literature and agitations that took place over the period.

Narrain and Gupta (2011) points out that a review of mythology, literature and history shows that the silences, misinformation and the distortion of the queer part of India's past did not go unquestioned, but there is nevertheless a less engagement with or less work on engagement of the queer community with law. The review of law and queer people need to focus on two aspects - the impact of law on queer group and how have they agitated against it. There is thus a need to understand the legal journey from colonial period because major laws which have criminalized homosexuality have than its roots in a colonial period. The codification and writing of law began in the colonial period. Feminist historians have documented how in this process of codification, practices of dominant groups were codified into law and made applicable to all. Thus, roots of homophobia in the legal measures were largely drawn from dominant practices and a review of the colonial period is necessary to understand how heteronormativity became the norm and how the queer community was excluded from social and legal discourses.

Narrain and Gupta (2011) asserts the difficulty to document the resistance by the queer community to the heteronormativity established in the legal provisions and about their struggles as it is intertwined with resistance to social and cultural aspects. The first task therefore is documentation of how homophobia prevalent in dominant practices was inserted in the law. It will employ different methods and methodologies of reading the law and understanding it from the queer point of view. The difficulty in engaging in such an exercise is because of a complete absence of documentation of queer perspective in the colonial period that continued in postcolonial period. In post-colonial India, queer politics became visible post 1990s with a discussion on compulsory heterosexuality. Queer groups began asserting their sexual identities and critique the homophobia prevalent in the society. They mobilised queer people to assert their choice and make society conscious of injustice against homosexuals through different campaigns that aimed at legal, social and cultural transformation. The ignorance / hatred / suspicion about same sex issues was so deep rooted that queer movement needed strategies that involved struggle with the state, judiciary and society. The next section reviews legal battle waged by the queer movement and its social and political implications, particularly a review of the section 377 and writ petition filed by the Naz foundation, that outlines legal struggle and complexity of the issue.

9.6 LAW AND QUEER MOVEMENT

The colonial ssection of Indian Penal Code (IPC) 377 criminalises same sex love but the silence about the injustice of it continues through-out the post-independent India underlining the continued exclusion of queer voices. In ancient India, Rigveda / Manusmriti considers homosexuality as a

transgression and was punishable. The colonial period codification of law completely prohibited and criminalized homosexuality. Section 377, laws related to criminalizing tribes or laws on recovery of abducted women without their consent are some of the examples of marginalisation and exclusion of homosexuals, tribals and women respectively. These laws were introduced to civilise/ modernise the subcontinent, protect the 'honour' or prohibit what is considered as 'abnormal' in the name of public morality and prohibiting obscenity. Same sex love thus came to be criminalized and heteronormative sexual order enforced as 'natural'/'normal' bringing new notions of acceptable and non-acceptable norms related to sexuality.

These provisions strengthened colonial states' authority over its citizens and mark populations that did not fit in the existing norms as criminal and classify them under the medico-legal category of ''physiologically perverse'. Though labelling citizens expressing desires other than heterosexual were forbidden in the courts, there was no consideration of consent or of age of the individual involved while dealing with such cases. The irony is in the fact that citizens are otherwise free to express their opinion, to choose and defend their acts as adults but in some cases such as women abducted and recovered at the time of partition and people professing sexuality other than heterosexual were treated by law as 'minors' incapable of making and defending their choices. Gupta (2012) calls this a moral proclamation singling out certain people about whom there are some preconceived notions and prejudiced and undermining their citizenship rights guaranteed by the constitution.

In 1825, the first law commission of India was established under the chairmanship of Macaulay who drafted the Indian Penal Code. There was clearly some discomfort to talk about the same sex love or what is noted as sodomy and was therefore avoided. There was a belief that discussing it will cause more harm to the society and have degenerative effect on the moral of the society without helping in drafting the law. It was against this background that in 1860 the draft of the Indian penal code was finalized in which same sex love / sodomy was termed 'unnatural offences.' It became a basis for defining the offence of 'sodomy' (Gupta). Till 2018, section 377 was used ruthlessly against homosexuals by homophobic institutions such as police and judiciary.

Section 377: Unnatural offences—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine.

Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Gupta (2012) summaries queer activists problems with the section 377 as follows:

1. There is no clarity about what is the meaning of - 'the order of nature'.

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2. No distinction has been made between consensual and non-consensual sex. Thus, not trying to treat consensual sex differently and leniently while taking decisions.

3. The same punishment has been given to consensual and non-consensual same sex but due to lack of records there is no way to check the difference in the punishment given, which enhances the possibility of intensifying the punishment.

As underlined by queer activist, these laws, apart from punishing homosexuals also strengthens the exclusion of homosexuals. It leaves homosexuals dealing with many micro level impacts - such as feelings of insecurity and being maligned in society as transgressors / criminals which increases their vulnerability and makes it difficult for them to express their identity in the larger society. Thus, the effect of section 377 is graver than only punishing those who are transgressing the boundaries, it affects how society looks at /understand homosexuality and non-heteronormative sexualities. Queer scholars suggests that colonial era section 377 became more an instrument of social control and served as a tool for society and state to keep homosexuals under surveillance.

The resistance to and movement against section 377 was fueled by the injustice of the law that supports cultural discrimination against non-heteronormative sexualities and endorses intolerance and violence committed in intimate spaces of the family in the garb of maintenance of social order and public morality. The next section reviews efforts at reforms in section 377.

Check Your Progress 2

1) *Explain the relationship of law and citizenship*

9.7 STORY OF REFORM OF THE SECTION 377

The struggle against the section 377 is placed in the larger context of reforms in sexual assault laws of section 375 / 76 (Puri 2011). The Mathura rape case in late 1980s led to a nationwide campaign initiated by women's movement with two demands - justice for Mathura and reform in the rape law. The campaign was successful in bringing reform to the existing rape law on the one hand and on the other, it pushed the women's movement to seriously engage with the issue of sexuality. An unanticipated impact of this campaign was that it brought the issue of sexuality / sexual abuse in public discussions. The reforms suggested by the women's movement had a larger goal; they highlighted that while looking at rape, it is important to understand rape beyond physical harm or social stigma and have located it in the discourse on bodily integrity and autonomy of women.

After a long struggle, major reforms were made in the rape law. Not all reforms suggested by the women's group were accepted but the 2013 amendment to the criminal laws related to rape went beyond forced peno-vaginal definition of rape. However, discussing sexual assault away from a moral framework is a continuous task for the women's group. The history of

struggle by the women's movement on this issue is long and therefore not explored in this section. However, it is important to note the relatedness in the campaign against rape law and against the section 377 to understand the context of discourse on sexuality and how state, judiciary and civil society in different ways strengthen patriarchal, homophobic ideas about purity/ natural / unnatural/ normal / abnormal.

The struggle against the section 377 was primarily confined to legal reform. In 1992, AIDS Bhedbhav Virodhi Andolan filed a petition before the Parliament's Petition committee to repeal section 377, but no member from the Parliament came forward to present it and was therefore never tabled. In the 1993 draft for the reform in rape law, repeal of section 377 was included. The most recent is the Naz writ (Civil Writ Petition No. 7455 of 2001) which was filled in the Delhi High Court. (Puri 2011)

Following is the legal trajectory of the section 377 in post-independent India:

- In July 2009 some aspects of the section 377 with respect to gay sex were struck down as unconstitutional by the Delhi High court. Ironically this judgement was overturned by the Supreme Court on 11th December 2013 in Suresh Kumar Koushal vs, Naz foundation case on the grounds that repealing of law can only be done by the Parliament.
- On 6th February 2016, a five-member constitutional bench was appointed to review the petition filed by the Naz Foundation and others. Finally in 2018, after decades of activism and socio-legal battle, applying section 377 of the Indian Penal Code to private consensual sex between consenting adults was ruled as unconstitutional by India's Supreme court decriminalising homosexual activity.

Queer academicians and activists continue to highlight the complexities in the struggle against Section 377 particularly the institutionalized violence against queers in family and judiciary insisting for justice for those who are victims of the sexual assault. Because the review of section 377 and proposed demand to repeal was also paying attention to the fact that while addressing problems with the section 377 there is a need to have some law which will address the sexual assault committed on boys as they cannot be addressed under rape law as section 377 is needed as the definition of section 375 is only applicable to heteronormative relations.

Thus, the Naz writ was not demanding that the section 377 need to be deleted, the problem which was identified by the queer groups reviewing the section 377 is that how by legal definition section 377 is relevant to the all-unnatural sexual practices regardless of heterosexual or same sex sexual relations. However, while in implementation it was more often used to penalize same sex sexual subjects, this as Puri (2016) argues made this section an impending threat to same-sex sexual subjects. In addition, section 377 promotes social stigma which also gives excess authority to police and as pointed out by the Naz writ it is important that constitutional validity of the section 377 needed to be challenged because it violated fundamental rights which are guaranteed by the state such as Article 14 (Equality before Law), Article 15 (Prohibition of Sex Discrimination, argued to include) and Article

19 (Fundamental liberties) and Article 21 (Right to Life and Privacy). As writ underlined that sexual relations are very private and intimate part of the individual's life which is jeopardized in case of same sex subjects.

An important aspect that queers activists/scholars in the Naz Foundation petition highlighted that 'living with dignity' was read into in the light of Right to Life, Right to Full Personhood and to be true to the core identity of a person. Baxi (2012) explains that full personhood requires that intimate relations need to be outside the gaze of the sovereign and right to privacy is essential to live with dignity. Naz petition successfully argued how IPC imposes collective humiliation and allows brutal exercise of force by the police and demanded that State and judiciary that is constitutionally required to uphold citizens' right to dignity and life does not reinforce social and cultural prejudice and discrimination.

A queer perspective on law can inform political engagement, the process of legal change and the way legal history is perceived. A queer perspective thus encompasses both, a different form of political engagement and different ways of reading the history of laws controlling desire and sexuality. It is a call to recover lost voices through a re-reading of the law from the viewpoint of the queer subaltern and paying attention to new voices that have emerged in the process of political engagement.

9.8 LET US SUM UP

In this unit you learn about the campaigns for law reform on provisions of IPC criminalizing homosexuality were not limited to a struggle for the right to choose in matters of same sex love, but to be able to live a life of dignity without fear of arrest, detention and harassment. No country can defend its anti-sodomy laws on the basis of cultural, moral or religious arguments if they otherwise commit themselves to human rights. Criminalization of consensual sex between adults goes against the core of human rights and dignity. In the debates and mobilizing for the reforms in the section 375/376 and 377, it seemed as if there is a split along the lines of women's issues versus queer issues. There were other debates, agreements and disagreements about which issue needs urgent attention and also whom these organisations are addressing. Puri (2012) explains that despite this split between queer and women's movement, there were numerous organizations who have mobilized against both section 375/6 and 377 like Saheli, PRISM, LABIA, SAPPHO and many others have tried to bridge queer and women's issues. The overall response by the media, social movement activist was positive to repealing of the section 377 was good. Naz foundation petition did receive hostile reactions from the orthodox groups, religious leader and organizations who find it unacceptable. It indicates that battle is not over yet and highlights the need to create awareness about it, fight against the prevalent stigma and prejudice against same or alternate sex subjects. There is also a need to further complicate discourse on sexuality by underlining how it intersect with caste, gender and other hierarchies. Queer scholar and activists highlight that queer or homosexual is not a homogenous category. They are also divided in different class, caste and gender groups which impacts their struggle to assert

their identity and also the privileges which they are deprived off or enjoy.

9. 9 UNIT END QUESTIONS

1) Write a note on significance of reading down of section377 is significant step in furthering the queer politics in India.
2) Why queer struggle was for reading down of the section 377 and not for the striking down it.
3) How queer struggle to legitimize same sex love throws light on state's control over sex and desire of its citizens.

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