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## **UNIT 8 WOMEN'S MOVEMENTS AND ITS ENGAGEMENT WITH LAW**

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### **8.1 INTRODUCTION**

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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.

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### **8.2 LEARNING OUTCOMES**

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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

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## 8.3 BACKGROUND

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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.

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

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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 cohabit with him. This case became a highly debated and discussed case, with Rakhmabai stating that she did not want to cohabit 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-trial ordered Rakhmabai to cohabit 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?*

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## **8.5 WOMEN, CITIZENSHIP AND LAW**

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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 its 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.

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

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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

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?*

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## **8.6 LEGAL REFORM: THE CASE OF THE DOMESTIC VIOLENCE ACT**

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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

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.

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## 8.7 LET US SUM IT UP

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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.

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## 8.8 UNIT END EXERCISES

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- 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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