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## **UNIT 10 PATRIARCHY IN LAW**

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### **10.1 INTRODUCTION**

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This unit informs how laws contribute in both strengthening as well as challenging patriarchy in/from our lives. Doing so clarifies that while patriarchy produces the relations that define the law and society, it is also being simultaneously being reproduced by the forces of the law and society. The Unit will address the following questions: what defines the conceptual and theoretical realm of patriarchy in our legal system; what forces help retaining patriarchy in our laws; how does patriarchy manifest itself both explicitly and implicitly through our laws; and finally, how can the Constitution of India be deployed to challenge patriarchy from our laws?

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### **10.2 LEARNING OUTCOMES**

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After studying this Unit, you are able to:

- Know the conceptual and theoretical realms of patriarchy in Law;
- Understand the impact of patriarchy on different social groups, especially women;
- Identify the ways in which patriarchy operates through the Law;
- Comprehend some of the major judicial approaches taken in response to patriarchy;
- Learn the constitutional methods to challenge patriarchy in law;

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### **10.3 CONCEPTUAL AND THEORETICAL REALMS OF PATRIARCHY IN LAW**

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Why women disadvantaged are compared to men? Has this inequality been reduced in recent years? What difference, if any, does the increase in women's employment make to the other areas of women's lives? Is the sexual double standard a thing of the past? Are contemporary forms of femininity as restricting as those of the past? Is it useful to talk of femininity as if it had one form?(Walby:1990:1)

These questions raised by British sociologist Sylvia Walby in 1989 have not lost their relevance today. At the very least, they hold true on the face of the contemporary Indian society and politics. Following adoption of the Constitution of India, in theory, women can no longer be denied equality in all spheres of public life. Following Walby's second question, one might wonder whether sex-based inequalities have reduced in India in the last seven decades. The answer is disappointing.

According to the United Nations Development Programme's Gender Inequality Index (GII), India ranks at 131 among the 189 countries (Gender Inequality Index, UNDP, see: <http://hdr.undp.org/en/content/gender-inequality-index-gii>).

GII is an inequality index that measures gender gaps in three different dimensions: reproductive health (mainly with indicators of maternal mortality ratio and adolescent birth rate); empowerment (female-to-male ratio with high school education and their representation in legislative bodies); and, female labor market participation compared with males (See Gender Inequality Index). Clearly, India's poor performance in the global rankings show that gender inequality is ubiquitous in some of the most significant spheres of life. This raises an overarching question, - how to address gender inequality in India? That is, what conditions (re)produce gender inequality in our lives; how are men as well as women differentially affected by gender inequality; which actors (e.g., state, media, political leadership, civil society, family and community, *et.al.*) in what ways contribute to its seamless sustenance; how/can 'law' be deployed to act as a transformative tool to assuage gender inequality from our lives?

In a nutshell, the attempt is to understand the link between gender inequality and patriarchy. But first one has to understand 'patriarchy' as a concept in order to grapple with the reasons that constitute gender inequality. In other words, conceptually and theoretically, does 'patriarchy' offer a standalone set of tools to address gender inequality, or is it important to merge/deploy it with other concepts such as Brahmanism, capitalism, bureaucracy, heterosexism, etc.?

Sociologist Michael Ryan defines 'patriarchy' as "the seemingly ubiquitous system of sex-based oppression" that operates in all spheres of society (Ryan:2004:555-557). This sex-based oppression presents a power-differential between the two sexes that mainly affects women as "it allows men to dominate and control" (Ryan:2004:555-557) them. Etymologically, and to a great extent culturally, patriarchy owes its origin from the Greek word *patriarkhēs* that translates into 'ruling father.' The dictionary defines it as a "social organization marked by the supremacy of the father in the clan or family, the legal dependence of wives and children, and the reckoning of descent and inheritance in the male line" (Merriam-Webster Dictionary <https://www.merriam-webster.com/dictionary/patriarchy>).

Such historical description of male supremacy on matters of family and inheritance and the transcendence of this system as the main organizing force in the society has led to a seemingly simplistic and distorted depiction of

human history (Lerner: 1986:238-239). She believes patriarchy operates in more complicated ways at multiple levels in our society, and any attempt to simplistically define it as a system restricted to the family (where the eldest male member dominates others as the Head, or where property is passed-on exclusively through the male-lineage), or in public life (where the divine rights of the King make him the universal patriarch of the nation and the ultimate decider of his subject's fate) leads to distortion of the history (Lerner:1986:238-239). She sees such narrow depiction of patriarchy as an under-utilization of this useful concept, especially, in the wake of democratization of modern nation states as patriarchy has found new ways to manifest itself in more complicated ways (Lerner:1986:238-39). The problem with a narrow conception of patriarchy is that with the advent of the constitutional recognition of right to equality it seems as if "patriarchy began in classical antiquity and ended in the nineteenth century with the granting of civil rights to women and married women in particular." (Lerner:1986:238-39). Thus, Lerner argues for the following broader approach to understand patriarchy:

*Patriarchy* in its wider definition means the manifestation and institutionalization of male dominance over women and children in the family and the extension of male dominance over women in society in general. It implies that men hold power in all the important institutions of society and that women are deprived of access to such power. It does *not* imply that women are either totally powerless or totally deprived of rights, influence, and resources (Lerner:1986:238-39).

Interestingly, various feminist scholars representing diverse ideological locations have used patriarchy in different ways to further their politics of gender equality. Liberal feminists emphasize on patriarchy's false notion of 'natural' and stress on naturalism as a result of social construction. They do not claim that any one sex is in anyway better than the other, rather their emphasis is on having an equal society with men and women morally capable of sharing all the responsibilities equally. However, they seek to "use the state and appeal to the public's sense of moral reason to undo the system of sex inequality inherently pervasive under patriarchy" (Ryan:2004, *supra* note 4 at 556). This liberal approach is critiqued as displaying distorted notions of equality and individualism. Socialist feminists see gender inequality as a result of class division/hierarchy in society. They see capitalism as a perpetuator of patriarchy, along with all other forms of oppression. They problematize the ownership of private property, a hallmark of capitalist societies as a historical reason for the control and ownership of women and children as men's chattels. This analysis seems true as the normative structure of society *qua* the state and its laws have sustained the patrilineal succession of family property through various religious personal laws (Parashar,2009:103-112.). Similarly, the law vests upon the father, the control and guardianship and custody of minor children, as it continues to undervalue women's unpaid labor within home or in agriculture. In this sense, capitalism and patriarchy act as mutually inseparable and reinforcing systems of control (Ryan: 2004, *supra* note 4 at 556) that thrives by retaining the sexual division between public (for men) and private spaces (for women). It is because of the

public/private divide that women's labor at home (or in agriculture) remains unrewarded/unpaid as compared to men; and workplaces continue to remain hostile and unfavourable to women (with prevalence of sexual harassment, unfair wages, lack of maternity benefit)-thereby keep women at home where they could be easily exploited. The patriarchal system of labor division not only helps minimize the production cost by maximizing the capitalist's profit, but it also helps retain the class divide by keeping the working class (mostly men) enslaved by capitalist interests.

Radical feminists on the other hand, take a broader approach to conceptualize patriarchy. For them, patriarchy operates both, through physical/emotional methods of inflicting control and harm over women and the more systemic ideological/epistemic forms of violence. The latter category is interesting as it draws upon linking the gendered nature of physical and emotional forms of violence with entire knowledge systems such as science, law, culture and religion, etc. For example, devaluing household labor, motherhood, pregnancy is deeply normalized through 'objective' justifications of biology, medicine and psychology; or law viewing sex-work as morally wrong undermining its value as a form of labor. Similarly, other physical/emotional forms of violence such as rape, female genital mutilation, forced abortion, or the female's sexual autonomy, in general is controlled by more systemic forms of ideologically sustained knowledge systems of religion, culture and law. This shows the systemic complicity of multiple state (legislatures, bureaucracy, police, courts, etc.) and non-state actors (like families, schools, media, medical/psychiatric fraternity, etc.) in maintaining the control over the female bodies. They also emphasize on female complicity in retaining patriarchy that results from an inter-generational pervasiveness of the ideological governance of women's thinking.

Speaking of the systematic nature of ideological/epistemic forms of patriarchy, historian Uma Chakravarti analyses the links between caste, class, sex and state in what she calls as 'Brahminical Patriarchy (Chakravarti: 1993:579-585). In her analysis of ancient Hindu texts, Chakravarti argues that purity of women is central to Brahminical patriarchy, as purity of caste is contingent upon it (Chakravarti,1993:579). She uses the Brahminical condemnation of hypogamy (inter-caste marriages) to demonstrate how upper-caste woman have always been an "object of moral panic" (Chakravarti,1993:580) amongst the men in their caste. Women are considered "gateways—literally, points of entrance into the caste system" (Chakravarti, 1993:579) for lower-caste men to pollute the neat order of the upper-caste (perhaps through inter-caste marriage). Thus, upper-caste women are institutionally prevented from sexually/emotionally/socially engaging with lower-caste men (and, vice-versa), and this is achieved by severely restricting women's autonomy, movement by means of ideology, economic dependency, class privileges, and/or through pre-pubescent/forced marriages (Chakravarti,1993:579-580). The issue of inter-caste marriages/intimacy is not an isolated social problem restricted to the ancient Brahminical society, it is important to acknowledge that such issues have seeped through the medieval and colonial periods into shaping our politics in the contemporary times as well.

Sadly, much of the feminist scholarship (except radical feminism) on patriarchy has focused on the heterosexual female experiences by making invisible/ignoring the non-heterosexual lived experiences *vis-à-vis* patriarchy. In this context, heterosexism operates alongside patriarchy in LGBT+ experiences. You can refer unit 5 of Book 3 for more information. Since, 1990s, many queer theorists have challenged this uncritical acceptance of heterosexism that have informed the women's movement in the 80s and have argued in favor of broadening the conceptual realms of patriarchy by including other marginalized experiences that arise from multiple intersectional forms of domination and oppression (Butler: 1996:161-211).

In the next section, key historical moments from the constitutional history of India that led to the making of constitutional rights for the people is highlighted. It helps understand the ways in which constitutional methods can be deployed to address the challenges posed by patriarchy. Court judgements are used to explain the ways in which ordinary people have mobilized constitutional methods to challenge patriarchy.

#### ***Check Your Progress 1***

- 1) *Define patriarchy.*
- 2) *What do you mean by 'Brahminical patriarchy'?*

### **10.4 CONSTITUTIONALISM AS A PROJECT TO CHALLENGE PATRIARCHY IN LAW**

Social historian ,Satish Saberwal examining the working of the constitution of India noted that "the tumbler can be seen to be both half full and half empty" ( Saberwal: 2005,1). By 'working of the constitution', Saberwal refers to the deep inroads or alterations that the constitution has been able to make in the cultures of governance in the post-colonial context. Since the idea of having a constitution and having a culture of working constitutionality are considered conceptually and consequentially different, it is important to distinguish the two. The former emphasizes rather narrowly on the constitutional text much separated from the politics and social culture within which it operates, whereas, the latter is concerned besides the text, also with the context, scheme and purpose in/with which the text is located/operates. An immediate consequence of the former is to accord the constitutional project with an objective and "radically reductive treatment" (Bhargava,2004:4)whereas, the latter reads the "constitution as a moral document, as embodying an ethical vision" ((Bhargava:2008:4) or the future. It is in this latter sense, that the project of challenging patriarchy as a broader and ongoing (unfinished) constitutional goal is discussed in this section.

Since India has a functioning constitution from 1950(Constitution of India, Article 397) the former is not an issue but the latter is. What is needed therefore is ongoing engagement at the governmental and individual levels with the ethical and moral vision of the constitutional project towards finding out constitutional choices and alternatives within this space. Saberwal comments on this aspect of working of the Indian constitution and argues that the constitutional project of undoing/redefining certain otherwise normalized

cultural practices of the society (including patriarchy, untouchability, etc.) is partly unfinished. In the context of understanding the working of the constitution to undo patriarchy, one must understand the trajectories of this working at two levels: (1) the constitutional debates that culminated into the explicit text of the Fundamental Rights (FR) and Directive Principles of State Policy (DPSP), and (2) the judicial responses on interpreting this constitutional text in the (dis)interests of women.

The constituent assembly drafted the constitution around a period of three years between December 1946 to December 1949. After the partition of India, as of December 1947, the assembly had 229 members elected indirectly by the 12 provincial assemblies and 70 nominated to represent the 29 Princely States (See *available at*:[https://www.constitutionofindia.net/constituent\\_assembly\\_members](https://www.constitutionofindia.net/constituent_assembly_members)). Only fifteen of these members were women<sup>1</sup> and manly from an upper-caste and upper-class Hindu backgrounds. Dakshayani Velayudhan, Begum Aiaz Rasul and Annie Mascarene were the only exceptions who were women members from the Dalit, Muslim and Christian communities

(See:<https://feminisminindia.com/2018/01/26/15-women-draft-indian-constitution/> (accessed 07-04.2021).

Unlike the social practice of 'untouchability' which was formally abolished by the constitutional text, (See Constitution of India, Article 17) 'patriarchy' wasn't explicitly abolished by any textual provision. Does it mean that the makers of the constitution refused to take a clear stand on abolition of patriarchy? Perhaps not. There is no explicit mention of its retention in the constitutional text and, in the absence of such an expressed intention during the constitutional debates; it will be unfair to presume that it was. Moreover, the constitution through its scheme of FRs and DPSPs empowers the people to change their laws. The people's power to change laws works partly through their power to vote for/against political candidates who represent their interests in the parliament and 28 state legislatures. Since, the legislative outcomes depend upon majoritarian interests (interests that manage to secure a simple majority during a legislative motion), minority interests often get quashed, as a result. To act as a check on the legislative powers, the constitution empowers the people to approach the courts to seek a review of the state actions (whether legislative or administrative) as the touchstone of their FRs. (See Constitution of India, Article 32 and 226) This power of the courts is referred as the judicial review power.

The unique thing about FRs is that these are constitutional guarantees that are enforceable against the state through judicial proceedings, i.e., if any law violates a FR, to the extent of such violation, such law shall be void (See Constitution of India, Article 13) On the contrary, DPSPs are relatively non-enforceable against the state, nonetheless they are fundamental in the governance of the country (Bhatia,2016:644-661) .Besides popular movements demanding legislative interventions in statutory frameworks, the role of the judicial branch of the state (i.e., the Supreme Court and the High

Courts) is unquestionably most significant, as the formal act of constitutional/legal interpretation is primarily determined at such forums. Following are the FRs and DPSPs that are usually deployed in judicial proceedings to challenge patriarchy in laws:

<b>Fundamental Rights</b>	
<b>Article 14</b>	<b>Equality before law.</b> —The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
<b>Article 15</b>	<b>Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.</b> —(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to— (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. (3) Nothing in this article shall prevent the State from making any special provision for women and children.
<b>Article 16</b>	<b>Equality of opportunity in matters of public employment.</b> — (2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. (4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
<b>Directive Principles of state Policy</b>	
<b>Article 39</b>	<b>Certain principles of policy to be followed by the State.</b> —The State shall, in particular, direct its policy towards securing— (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused

	and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength;
<b>Article 42</b>	<b>Provision for just and humane conditions of work and maternity relief.</b> —The State shall make provision for securing just and humane conditions of work and for maternity relief.

The aforesaid provisions merely illustrate the main constitutional guarantees against sex-based discrimination. Other FRs and DPSPs such as right to freedom of movement, (See Constitution of India, Article 19(1)(d). to express and dissent (see Constitution of India, Article 19(1)(a))., privacy, (Constitution of India, Article 21. See *Puttaswamy v. Union of India*, (2017) 10 SCC 1) autonomy of choice and personal liberty (Constitution of India, Article 15 and 21) are equally important in judicial proceedings or mass-campaigns. And since all FRs and DPSPs refer to the right-holder in gender-neutral nouns (e.g., persons, citizens) they could be deployed by the people strategically.

In many ways, India's tryst with constitution-making has been a fresh start debilitating its colonial past but conscious of the deep-divisions that it inherited. Hannah Lerner exploring the "various types of incrementalist constitutional strategies" (Lerner, 2010:68) in the context of constitution-making in deeply-divided societies, notes that methods "such as avoidance of clear decisions, the use of ambivalent and vague legal language, or the inclusion of contrasting provisions in the constitution" are common (Lerner: 2010:68-88). In that sense, it is true that the constitution-makers didn't take a direct stand on the abolition of patriarchy, unlike what they did in the case of untouchability. But having done what they did, they certainly provided for a language of rights through the FRs and DPSPs so that patriarchy could be progressively dismantled through constitutional methods of either popular campaigns leading to incremental changes through legislative interventions, or judicial review power of the courts. While deliberating on the constitutional debates, two specific moments are important must: (1) the broader consensus in retaining 'sex' as a ground in the guarantee on non-discrimination—Articles 15(1)-(2), 325; and (2) a clear consensus on retaining the power of the state in making special provisions in favour of women—Article 15(3).

The FRs enshrined in Articles 15(1), 15(2), 325 on the one hand, and 15(3) on the other, aim to achieve equality for women in the society in two very different ways. The scheme of rights under the Articles 15(1) and 15(2) provide a general guarantee to all citizens against discrimination on the grounds of their 'sex'. The clause (1) provides this right against state actors (See Article 12. For more on what constitutes as 'state actors' in violation of FRs, see Ananth Padmanabhan, 'Rights: Breadth, Scope and Applicability' in Sujit Choudhary, *supra* note 32 at 581-599) (e.g., a government bank while hiring its employees cannot discriminate against its candidates on the basis of their sex). Article 325 puts the same obligation on the state in matters of preparing electoral rolls. Article 15(2) on the other hand, makes certain



private actors liable for acts of discrimination on any of the protected grounds, including sex with regard to access to shops, public restaurants, hotels, places of public entertainment or use of wells, roads, bathing ghats maintained by state funds or dedicated for public use. Despite a significantly pragmatic approach taken by the constitution makers, the scope and width of Article 15(2) remains much unexplored in the absence of much constructive judicial pronouncements. (See Rao, *Infra* note 42 at 179-210 and Singh, 2013.p.89) Such a general guarantee ensures formal equality, i.e., the law must provide equal treatment to all sexes irrespective of the social prejudices and stereotypes that only women experience in our society ( Fredman: 2011) For example, despite the political consensus in favor of reserving parliamentary seats for women, a law on the matter is critiqued on the grounds that such a move discriminates against men and violates the principle of formal equality that the state shall not discriminate against individuals on the grounds of their sex.

Similarly, despite the widespread underrepresentation of women in government jobs, seats cannot be reserved for women in public employment. Realizing such limitations of the formal equality principle enshrined in the clauses (1) and (2) of Article 15, the Minorities Sub-Committee of the constituent assembly found it necessary for the state to make separate provisions in favor of women (Rao:1968,p.185) Thus, separately under clause (3) of Article 15 the state is empowered to make special provisions in favor of women, e.g., reserving legislative seats for women in Municipalities and Panchayats( Constitution (Seventy-Third Amendment) Act, 1995 that inserted Articles 243D and 243T) or for extending the benefit of reservation in government jobs in favor of women. Thus, as an extension of the general guarantee of equal treatment (non-discrimination) to *all* irrespective of one's sex, the state can provide special treatment to *women* on the account of prevailing social barriers that only they experience solely because of their sex. Article 15(3) thus enables the state to provide substantive equality as against formal equality. The mutual resolve of the constituent assembly against patriarchy could be seen from the fact that there was hardly any resistance against the inclusion of 'sex' as a ground of non-discrimination under articles 15(1) and 15(2) as well as against the need to accord women the right to seek special treatment under Article 15(3) of the Constitution (Rao, *supra* note 42 in 179-200).

The constitution merely provides certain guiding principles for the state to direct its policies upon. It is interesting to evaluate the different paths that popular movements have taken to shape the legislative policy towards dismantling patriarchy in postcolonial India. Equally important is mapping the different interpretative trajectories that courts have taken in the (dis)interests of women—whether they have further enabled/disabled patriarchy in our laws. At the heart of this issue is the approach to equality taken by the legislature and/or the judiciary, i.e., should law's treatment of women be based on the principle of sameness or difference with men? Of course, one of the problems *inter alia* with this approach is that it sees sex/gender only through the binary of male/female—resulting in routine invisibilisation and thus, systematic erasure of the experiences of other

genders of intersex and transgender persons.

Gender prejudice is ubiquitous (Lakshmi,2006:573) against females in all facets of their life. In terms of historicity, the feminists argue that the females have lived under a system of male supremacy from the dawn of the civilization and continue to do so (Lerner,*supra* note 37 at 238). This system termed 'patriarchy' (Lerner:1986:238) has monopolized all facets of social thinking, public policy and economic relations, engulfing in its ideology, all its institutions and apparatuses. The dichotomy that the legislatures or courts consciously or subliminally encounter is between the formal and substantive approaches to equality of law's treatment of the two sexes. If men and women are unequally situated, then how can they be treated equally? And if, they are to be treated differently, what is the scope of the FR to equal treatment (Constitution of India, Article 14 and non-discrimination on the grounds of sex (Constitution of India, Articles 15(1), (2)). Ratna Kapur's reading of the judicial trajectories to handle this dichotomy entail three very different approaches: "protectionist, sameness, and compensatory." (Kapur, p.748 in Sujit Chaudharya & others )

The first and the third approaches assume women to be differently situated than men, however, they entail completely different results. The first approach in its treatment of difference, assumes women to be weaker and subordinate to men and pits them in need of state's protection in the name of benefiting them. Courts applying this approach justify laws that seem to naturalize the subordinate status of women resulting in essentialising womanhood by reinforcing the existing stereotypes associated with women's role in society. For example, when Air India's service rules allowed it to terminate the employment of its female cabin crew (Airhostesses) if they happen to marry within the first four years of their service, it never had the same ground for the termination of its male cabin crew (Air Flight Pursuers). The employer's differential treatment of its employees (doing the same job) based on their sex, was justified by the court in the name of it benefiting the Airhostesses. And all this while reinforcing the socially perceived differences between the two sexes without interrogating its basis or considering its impact on Airhostesses or women in general. In its judgement, the court observed:

Apart from improving the health of the employee (Airhostesses), it (the rule) helps a good in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal (*Air India v Nergesh Meerza*, AIR 1981 SC 1829 at para 68).

In doing so, the court reinforced the stereotype that howsoever hardworking and professionally successful an Airhostesses (in extension, all women in other professions) might be, her natural and inevitable destiny is to get married and prove the success of her married life by boosting up the nation's family planning programme. This way, the court in the name of benefiting women ends up essentialising them in line with the prevailing notions patriarchy that shapes our laws. In India, the courts overwhelmingly apply

the protectionist approach to equality which instead of dismantling patriarchy further reinforces it (Kapur, *supra* note 50 at 749)

The second approach assumes women to be situated *at par* with men and hence, must have the same treatment in law. Courts following this approach support gender-neutral laws. Although, this approach sounds fairer than the first one, it comes with its own set of challenges. For example, in the name of equal treatment often females are expected to conform to the male-standard of treatment. Since, this approach works on the formal notion of equality of sexes, it neither obligates the courts to investigate the historical and/or existing disadvantages experienced by women, nor the “potential disparate impact of gender neutral-legislations” (Kapur, p.748) When a husband challenged the constitutional validity of Section 24 of the Hindu Marriage Act 1955 as violating his right to equality before the law under Article 14, he contended that the 1955 Act is vague in terms of the quantum and duration of maintenance to be awarded by the court, especially when compared with the Christian Law of Indian Divorce Act 1869 where the husband is liable to pay maintenance up the value of one-fifth of his income and up to a period of three years or until the decree of nullity is confirmed by the court (see Indian Divorce Act 1869, Section 36) The court dismissed the petition by stating that Section 24 is “more reasonable and beneficial to the parties and there is no invidious discrimination or undue disability to the wife or husband.” (*P.S. Krishna Murthy vs. P.S. Umadevi*, MANU/AP/0227/1987 at para 2) Although, the verdict in this case favours the wife, it fails to acknowledge that female’s economic dependency results from the “socially constructed gender difference” (Kapur, *supra* note 50 at 751) where the burden of unpaid domestic work mostly remains on the wife.

The third approach while acknowledging the historically disadvantageous status of women sees such disadvantage as a subject of correction—women as a category that needs to be compensated, instead of being seen as a subject of state’s pity and protection (Kapur, p.748) Courts following this approach celebrate the biological differences and historical relationship (read disadvantages) between sexes, instead of simplistically protecting the prevailing status of women (in the guise of benefiting them), or judging them through the dominant male standards (in the guise of law’s gender-neutrality). For example, when the colonial-era law of Punjab Excise Act 1930 under its Section 30 prohibited employment of all male staffs below age of 25 and female staffs of all ages of a hotel from working in areas where liquor is served, the state defended the constitutionality of this law by stating that liquor being *res extra commercium* (things that are outside the purview of private commerce) only the state had the exclusive authority to deal in such commerce, thus having the right to retain the old restrictions as well (*Anuj Garg v. Hotel Association of India*, MANU/SC/8173/2007 at para 5) This right to retain the old restrictions also empowered the state to decide *which* professions are suitable for *whom*. The court rightly negated these arguments while striking down Section 30 of this Act as it recognised that such paternalistic cultures of wielding state’s authority needed a course-correction, (*Anuj Garg v. Hotel Association of India*, MANU/SC/8173/2007 at para 27-31) and it must give way for a citizen’s right to equality and the

autonomy to choose what professions are best suited to them (*Anuj Garg v. Hotel Association of India*, MANU/SC/8173/2007 at para 39-43).

Similarly, the court in *Vishaka v. State of Rajasthan* (1997) 6 SCC 241) recognised that in the absence of any legal regulations to tackle the issues of sexual harassment of women at workplaces their right to equal and fair treatment is violated. In 1992, Bhanvari Devi, a lower caste woman who was working in her village as a *sathin* in the state government's Women's Development Programme was raped by a gang of five upper-caste men (See Pandey: 2021, :<https://www.bbc.com/news/world-asia-india-39265653>). As a part of her work as a *sathin*, she tried to prevent the marriage of a nine-month-old girl from an upper caste family. Although, the law prevents marriages of children, its cases are rising alarmingly high in many parts of India. (See, Crime in India: Statistics-2019 Vol. 1 (National Crime Records Bureau, Ministry of Home Affairs, Government of India) at pg. 6 available at: <https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf>).

Following the High court's acquittal of all the five accused, *Vishaka*, a women's organisation filed a petition before the Supreme Court asking for guidelines for the employers to make their workspaces safer and free of sexual harassment. The court while recognizing the vulnerability of female employees amidst the prevailing gender inequalities in workspaces issued guidelines for employers that included *inter alia* procedures for resolution, settlement, prosecution and prevention of sexual harassment at workspaces. By doing this, the court not only ensured course-correction in law's failure to prevent instances of sexual harassment, but it also took a step forward towards dismantling the prevailing structure of inequalities that disadvantage women's equal participation in workforces. Unfortunately, the courts often tend to misunderstand such compensatory approaches to recognize gender differences tending to become somewhat protectionist of women's interests (Kapoor, *Supra* note 50 at 754-755)

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## 10.5 LET US SUM UP

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This Unit broadly discusses the ways in which patriarchy operates through the law and its impact on different social groups, especially on women. It discusses the major theoretical approaches that have theorized 'patriarchy' as a concept. This discussion informs that 'patriarchy' always operates in combination with other oppressive systems of power, such as Brahmanism, Homophobia, Capitalism, etc. It helps recognize the myriad ways in which patriarchy operates through our laws. In the next section, we explored some of the major constitutional tools (*i.e.*, the scheme of constitutional rights, mainly FRs and DPSPs) that help ordinary people to examine the impact of patriarchy in their lives. In the process, we learnt how these constitutional tools can be mobilized in courtroom battles and popular movements. An understanding of these methods helps learn the major judicial approaches in response to dealing with the challenges posed by patriarchy.

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## 10.6 UNIT END QUESTIONS

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- 1) Discuss the constitutional methods to address the challenges posed by patriarchy in law.
- 2) By using any two examples that you have learnt, illustrate the ways in which patriarchy operates through laws.
- 3) What do you understand by patriarchy? With the help of different theoretical approaches, conceptualize the notion of patriarchy.
- 4) In your opinion, what role does the constitution play in addressing the challenges posed by patriarchy.
- 5) Discuss the impact of patriarchy on women's lives.
- 6) Does patriarchy only affect women's lives? What are the other different social groups who suffer under patriarchy? Illustrate through examples.

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