BLOCK 5
WOMEN AND JUSTICE SYSTEM

UNIT 15 CRIMINAL JUSTICE SYSTEM

Structure

15.1 INTRODUCTION

Crimes are serious wrongs committed in a society. Certain wrongs are serious due to the type of harm done. For example – assault, murder, robbery and rape are serious wrongs and are classified as crimes. Criminal justice system in India consists of the police, prosecution and the courts. Women are vulnerable to violence in the patriarchal society. It becomes important to understand how the criminal justice system works. The unit explains the structure and functions of the criminal justice system and how it works in the society.

15.2 LEARNING OUTCOMES

After reading this Unit, you are able to:

- Learn about the relationship between law, police and courts.
- Know the concept of crime and criminal law and various criminal provisions of IPC and CrPC.
- Gain the knowledge regarding cognizable and non-cognizable offences
- Understand categories of criminal courts in India and stages in criminal proceeding bailable and non bailable offences.

15.3 LAW, POLICE AND THE COURTS

The Judiciary, in India, today is an extension of the British Legal System. The Judicial system has been granted a number of powers and functions by the Indian Constitution. One of the duties of courts is not to be influenced by the legislative or the executive and conduct its function in impartial ways. As

India has a written constitution, courts have an additional function of safeguarding the supremacy of the Constitution by interpreting and applying its provisions and limiting the functioning of all authorities within the constitutional framework.

The Supreme Court is the apex body, followed by 24 High Courts, which in turn supervise and govern numerous District Courts. Article 129 of the Constitution of India makes the Supreme Court a 'court of record' and confers all the powers of such a court including the power to punish for its contempt as well as of its subordinate courts. Article 141 of the Constitution of India provides that the law declared by the Supreme Court is binding on all courts.

Along with the court system, there is an establishment of the police. Police are a body of officers that are assigned with the aim to enforce the law and maintain the safety of life and property. The police do not have the power to punish a culprit. It can hand over the accused to the court. It is the court which tries the person and decides whether the accused is guilty or innocent. Thus, the police and the court together work on imparting justice to all and maintaining law and order in the society. This body of officers are governed by the Police Act, 1861. The Police Act, 1861 describes the structure and function of the police in general. The Police Force is an instrument for the prevention and detection of crime. The overall administration of the police in a state is vested with the Inspector General of Police who is in charge of the overall administration of the state police force. However, the administration of police in every district is vest in the District Superintendent of Police under the general control and direction of the District Magistrate. The police officers are given a wide range of powers in the investigation and prevention of crime. The police as well as courts work hand in hand for maintaining peace and justice in the society.

15.4 CRIMINAL LAWS

The law of crimes has been as old as civilization itself. Wherever people organized themselves into groups or associations there was a need to regulate the behavior of the members of that group. And there lies the necessity of devising some ways and means to curb such tendencies in the society that lead to violation of its rules. In all organized society certain acts are forbidden. In some cases, the punishment might be some monetary compensation, in others the state shall impose certain penalties upon the wrongdoer with the object of preserving peace in the society and promoting good behavior towards each other and the community. The main problem in such cases is to determine which acts are forbidden and which are not.

Generally, the concept of crime has been dependent on public opinion. As in the case of other laws, criminal law is a mirror of public opinion. To understand law and crime separately it would be difficult. Law is a command of the sovereign and the crime is said to be an act which is forbidden by law and against the moral sentiments of the society. An act to be a crime, it must be one done in violation of law and at the same time it should be opposed to the moral sentiments of the society. Morals are a varying concept as it goes

changing with the change in the necessities of the society of the times. Moral values vary from country to country and from time to time. Thus, it becomes difficult to define the nature of crime. It is analyzed that "crime is behaviour in violation of a criminal law. No matter, how immoral, reprehensible or indecent an act may be, it is not a criminal act unless it is outlawed by the state" (Sutherland,Donald and David,2013:4).It is also observed that "In the conventional view,a crime is an offence against the state, while the tort is an offence against the individual. A particular act may be regarded as an offence against an individual and the state, and it is either a tort or a crime or both, depending on the way it is handled" (Sutherland,Donald and David,2013:6).There multiple interpretations related to the nature of the crime.

The basis of criminal law is that there are certain standards of behavior of moral principles which society requires to be observed, and the breach of them is an offence not merely against the person who is injured but against the society as a whole. A crime even if it is addressed to a single person is a threat to the entire society. The function of criminal law is to preserve public order and decency to protect citizens from what is offensive or injurious and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are young, weak in body or mind, inexperienced or in a state of physical, official or economic dependence. The law does not wish to intervene nor is its function to intervene in the private lives of its citizens or to enforce a particular behavior on its citizens. The law will intervene only if it is against the public good. Criminal law does not just protect the individual but the society and community at large. The law while performing its function not only protects the individual from injury, annoyance and exploitation, the law must also protect the institution and the community of ideas, political and moral, without which people can't live together.

The laws that govern criminal law in India are the Indian Penal Code, 1860 and Criminal Procedure Code, 1974. Law is divided into substantive and procedural. Substantive law deals with the rights, definitions and obligations and procedural law deals with the process of how the substantive law can be enforced. In criminal law the Indian Penal Code is the substantive one and the Criminal Procedure Code is the procedural one. Former deals with various definitions and rights and the latter the procedure to do so.

Indian Penal Code, 1860 is a very comprehensive code that covers all the substantive aspects of criminal law. The IPC was drafted by Thomas Babington Macaulay in the 1830s. Since then, it has been amended several times and also supplemented by other provisions of criminal nature. Even though it is a very comprehensive code in addition to its various penal statutes governing various offences have been created. The Indian Penal Code, 1860 divided into 23 chapters comprising 511 sections. The code starts with an introduction and the territorial limits of the code.

Some of the important ones are:

Chapter I contains introduction

Chapter II General exceptions

Chapter III Punishments

Chapter VI General Exceptions

Chapter V Abetment

Chapter VA Criminal Conspiracy

Chapter VI Offences against the state

Chapter VII Offences relating to the Army, Navy and Air Force

Chapter VIII Offence against Public Tranquility

Chapter IX Offences relating to Public Servants

Chapter XIV Offences affecting public health, safety, convenience, decency and morals

Chapter XV Offences relating to religion

Chapter XVI and XVII Offences affecting human body and property

Chapter XX Offences relating to marriage

Chapter XXI Defamation

There have been many amendments to the code even then the code is universally acknowledged as a cogently drafted code ahead of its time. Modern crimes involving various technologies can easily fit into the provisions of the code mainly because of the broadness of the code's drafting.

The procedural code i.e., the Criminal Procedure Code is intended to provide a mechanism for the enforcement of criminal law. Without proper procedural law, the substantive criminal law which defines offences and provides punishment for them would be almost worthless. Because in the absence of the enforcement structure, the threat of the punishment mentioned in the IPC would go vain. Thus, the CrPC is meant to be complementary to criminal law and has been designed to ensure the process of its administration. The main objective is to create a machinery for the detection of crime, arrest of suspected criminals, collection of evidence etc. It aims to strike a balance between the individual rights as well as the ability of the officers to maintain peace and justice.

The offences are classified as cognizable and non cognizable for general understanding of this code. The CrPC has not given any test to define cognizable or non-cognizable offences. The First Schedule of CrPC, however, indicates that all offences punishable with imprisonment for not less than three years are taken as serious offences and are treated as cognizable and can be arrested without warrant. Offences such as murder, robbery, dacoity, rape and kidnapping are cognizable offences. Other offences where the police officer has no authority to arrest without warrant are termed as non cognizable.

In CrPC there is a mention of bail and non-bailable offences. The objective of arrest is to ensure the attendance of an accused person at trial. The bail is at the discretion of the judges. CrPC has classified all offences into 'bailable' and 'non-bailable' offences. Read with Section 2(a) of the CrPC, it can be generally stated that all serious offences, i.e., offences punishable with

imprisonment for three years or more have been considered as non-bailable offences. This general rule can be suitably modified according to specific needs. If a person accused of a bailable offence is arrested or detained without warrant he/she has a right to be released on bail (Section 436 of Cr P.C). But if the offence is non-bailable that does not mean that the person accused of such offence shall not be released on bail. In such a case bail is not a matter of right, but only a privilege to be granted at the discretion of the court. The power to cancel bail has been given to the court and not to a police officer. The court which granted the bail can alone cancel it. CrPC mentions the mechanism to arrest an accused, procedure for investigation, trial procedure etc.

Check Your Progress-1

1. *Write your understanding on the relationship of Law, Police and the Courts in India.*

15.5 CRIMINAL COURTS

The constitution as well as other statutes provides powers and jurisdiction to try and punish the accused in various courts in India.

1) Supreme Court - The Constitution establishes the Supreme court and defines its jurisdiction and powers. It also provides various provisions for appeal, revision and transfer in the interest of justice.

2) High court - The High Court has the jurisdiction over the entire state in which it is present. The law also provides jurisdiction over the courts of judicial magistrates to ensure for the speedy and proper disposal of cases. The law also provides the High court the power to prevent the abuse of the process of any court, or to secure the ends of justice.

3) Sessions Court - The state establishes a sessions court for every session division. The court is presided over by a Judge appointed by the High Court of that particular state. The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judge to exercise jurisdiction in the sessions court.

4) Courts of Judicial Magistrate - In every district the state government after consultation with the High court, establishes Courts of Judicial Magistrate of the First Class and Second Class as it may consider necessary. It might also establish Special Courts of Judicial Magistrates of the first class or the second class to try any particular case or a particular class of cases. The High court is required to appoint a Judicial Magistrate of First Class to be the chief Judicial Magistrate of the

district. His main function is to guide, supervise and control other judicial magistrates.

5) Courts of Metropolitan Magistrate - In every metropolitan area, the state government after consultation with the High court establishes Courts of Metropolitan Magistrate at such places it deems fit. In every metropolitan area, the High court may appoint a metropolitan magistrate as chief metropolitan magistrate. It might also appoint Additional CMM.

6) Special Judicial or Metropolitan Magistrates - In any district or metropolitan area, the High court on the request of the government may confer upon any government servant or retired government servant all or any of the powers of a Judicial Magistrate or a Metropolitan Magistrate as the case may be in respect of particular cases or a particular class of cases. Such a government servant must possess such qualifications or experience in relation to legal affairs as mentioned by the High court.

7) Court of Executive Magistrate - The judicial magistrate and Metropolitan Magistrate are under the control of the High Court while the Executive Magistrate are kept under the control of the State Government. In every district and in every metropolitan area, the state government may appoint an executive magistrate and shall appoint one of them to be the District Magistrate; it may also appoint an additional district magistrate and for subdivision a sub divisional magistrate.

15.6 TRIAL PROCEDURE

The primary object of criminal procedure is to ensure a fair trial to every person accused of a crime. The principles of basic and universally accepted human rights are followed. The trial provides the accused person an opportunity to present his side of the case. Innocence until proven guilty is followed. In criminal cases even if an individual is harmed the state considers it as a threat to the society at large. Hence a prosecutor representing the state would accuse the defendant of the commission of the alleged crime. India follows an adversarial system as such recognizes equal rights and opportunities to both the parties to present their cases.

Before the process of trial is followed there are two othersi.e., investigation and inquiry. The first stage is investigating where the main duty of the investigating officer is to collect evidence for the purpose of inquiry or trial. Investigation is a preliminary step conducted after filing of First Information Report in the police station. The main objective is to set criminal law in motion. FIR can be filed in the police station under whose jurisdiction the crime has occurred. Investigation basically includes ascertaining the facts and circumstances of the case. It includes collecting evidence, inspection of the place of crime, discovery of any article or object related to the crime, arresting and interrogating the suspected person etc.

Once the investigation is complete the matter is brought before the magistrate or the concerned court. Inquiry is the second stage where the Magistrate determines whether the case should be dismissed or brought before the trial.

According to Section 2 (g) of the CrPC, "inquiry" means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court. It is a proceeding before the Magistrate before the framing of charges which does not result in conviction.

Trial is the third stage where a person's guilt or innocence is determined. The accused person is presumed to be innocent unless his guilt is proven beyond reasonable doubt. Presumption of innocence is a very cardinal principle in the Indian Criminal justice system. The principles of fair trial are a very necessary condition. To ensure that each and every person is ensured with a fair trial the states as well as courts make numerous attempts. Free legal aid is one such initiative where the state provides legal services to people to ensure that there is justice. The court plays a more active and positive role than that of a degree in the combat between the prosecutor and the accused.

Criminal cases are classified into warrant cases and summons cases depending upon the gravity of the offences to which they relate. A warrant case is the one which relates to offences punishable with death, imprisonment for life or imprisonment for a term exceeding two years. The CrPC provides for two types of procedure for a trial of warrant cases by a Magistrate, triable by a Magistrate viz, those instituted upon a police report and those instituted upon complaints. With respect to the former, it provides for the magistrate to discharge the accused upon consideration of the police report and documents if there is no legal basis for the case. In the latter the Magistrate hears the prosecution and takes the evidence. If no case is established then the accused is discharged. If the accused is not discharged the Magistrate would hold trial after framing of the charges.

A summons case means a case which is not so severely punished as warrant cases, which implies cases where the offences are punishable with imprisonment less than two years. In summons cases it is not necessary to frame charges. The court gives substance of the accusation which is called notice to the accused when the person appears in pursuance of the summons. The court has a power to convert a summons case into a warrant case if it deems fit in the interest of justice. Such a classification is very necessary to determine which type of trial procedure needs to be adopted in a particular case. The High court may empower Magistrate of First Class to try certain offences in a summary way. In a summary trial, no sentence of imprisonment for a term exceeding three months can be passed in any conviction. The particulars of summary trial are entered in the record of the court. In every case tried summarily in which the accused does not plead guilty, the Magistrate records the substance of the evidence and a judgement containing a brief statement of the reasons for the finding.

A criminal trial has the following distinct stages:

1) Framing of charge: Framing the charges and issuing of notices indicates the beginning of a trial. At this stage the judge is required to sit and weigh the evidence presented for the purpose of finding out whether there is a prima facie case against the accused. If the evidence presented before discloses the commission of offence, the court shall frame the

charges and proceed with the trial. On the other hand, if there is no sufficient evidence then the court discharges the accused and also mentions the reasons for doing so. Once the charges are framed it is read out in the court in front of the accused and asked whether he pleads guilty of the offence charged.

2) Recording of prosecution evidence: After the charge is framed, the prosecution is asked to examine the witnesses before the court. The statement of the witness is taken under oath. This is called an examination in chief. The accused also has a right to cross examine the witnesses presented. And the same right is also given to the prosecution.

3) Statement of accused: The court has powers to examine the accused at any stage of inquiry or trial for the purpose of eliciting any explanation against incriminating circumstances appearing before it. However, it is mandatory for the court to question the accused after examining the evidence of prosecution if it incriminates the accused. The purpose of examination is to give the accused a reasonable opportunity to explain the incriminating facts and circumstances in the case.

4) Defense Witness: If after taking the evidence for the prosecution, examining the accused and hearing the prosecution and defense the judge considers that there is no evidence that the accused has committed the offence the court might order for the acquittal. The accused may produce witnesses who may be willing to depose in support of the defense. The accused is also a competent witness under oath. The accused may also apply for the issue of process for compelling attendance of any witness or production of any document. The evidence presented can be cross examined by the prosecution. The burden of proof is on the prosecution to prove that the accused has committed the crime beyond reasonable doubt.

5) Final arguments: This is the final stage of the trial. The provisions of CrPC provide that when examination of the witnesses for the defense if any is complete the prosecutor shall sum up the prosecution case and the accused is entitled to reply.

6) Judgement: After the conclusion of arguments by the prosecution and defense, the judge pronounces his judgement in the trial. If after hearing both the parties the judge considers that the prosecution could not prove the guilt of the accused beyond reasonable doubt the judge orders for acquittal. If the prosecution is successful in proving the guilt the judge shall hear the accused on the question of the appropriate sentence.

Questions related to women and criminal justice system raise various questions related to society, gender and criminal justice systems.

Check Your Progress-2

1. Write your understanding about Criminal Laws in India.

15.7 WOMEN AND CRIMINAL JUSTICE SYSTEM

CEDAW Committee, gender-based discrimination is based on gender stereotypes, stigma, harmful and patriarchal cultural norms and gender-based violence, all of which has affected the women's ability to gain access to justice. While women are generally related to criminal justice as victims of crime but in recent times they are also featured as accused and prisoners of crime. The role of women in the criminal justice system can be seen in two aspects: the first one as victims and the second is the involvement of women in crime.

In the first case, violence against women including domestic or intimate violence, sexual assault and other crimes which include - sexual harassment, stalking etc. has been recognized as a persistent problem with severe consequences for the victims and their family as well as society at large. While the various forms of violence separate, there exists a very strong relationship among them. Many of the crimes committed against women are by someone known to them. It might be harassment, rape or assault.

The second part where the women are the offenders there exists discriminatory practices throughout the world. There exists a very strong link between the violence against women and violence by women. There is much evidence that shows that exposure to extreme, traumatic events can cause or contribute to borderline disorder, antisocial personality disorder, substance abuse and post traumatic stress disorder which are directly relevant to violent behavior by women. In some cases, it is seen that when the women are accused of killing a male family member or a partner there has been a history of domestic and sexual violence from them.

The criminal justice system has been historically dominated and designed by men for men which means that the policies fail to consider the woman's point of view. There have been many stages where there was injustice against women either as an accused or a victim.

- In the case of framing of statutes, the unique experiences of women are not considered.
- In many parts of the world women still suffer from Illiteracy and lack of awareness of their legal rights and may also be at risk of sexual or other forms of violence from either the state officials or other accused.
- In the stage of investigation most police officers are male and are not trained to deal with sensitive interrogation techniques.
- Illiterate women are more susceptible to coercion.

- The woman at the pretrial stage may suffer serious trauma and there might be even instances where there might be no legal representation.
- In the post-trialstage, the women are subjected to stigmatization either by the family or the society at large.
- Female prisoners are at a high risk of getting sexually assaulted in the prison system.
- There is a lack of care and hygiene for women who are imprisoned, especially those who are pregnant.

These conditions can be changed either by challenging the age-old practices followed both in the implementation as well as framing of the laws.

15.8 LET US SUM UP

The unit dealt with the Constitution that provides a wide number of powers and functions to Supreme Court. It informs us about the police officials are governed by Police Act. It tells us about the Inspector General of Police is in charge of overall administration of the state police. The concept of crime is largely dependent on public opinion. The IPC is a substantive law and CrPC is a procedural one. The unit therefore apprise the establishment of various courts for the implementation of justice. Thus, we learnt about the three stages in criminal proceedings- Investigation, Inquiry and Trial. The wide range of discriminatory practices against the women as a victim as well as an accused are discussed in the unit.

15.9 UNIT END QUESTIONS

1) What is the relationship between police and courts?
2) Write a note on the salient features of Indian Penal Code and Criminal Procedure Code.
3) Discuss the structure of criminal courts in India.
4) What are the various the discriminatory practices against women?

15.10 REFERENCES

- Criminal Courts(NCERT textbook)
- Research on Women and Girls in the Justice System: Plenary Papers of the 1999 Conference on Criminal Justice Research and Evaluation - Enhancing Policy and Practice through Research, Volume 3 - National Institute of Justice, US Department of Justice
- Sutherland,Edwin H,Donald R.Cressey and David F Luckenbill(2013) *Principles of Criminology*,Delhi:Universal Law Publishing Co.Pvt.Ltd
- UNODC: The Doha declaration: Promoting a culture of Lawfulness

15.11 SUGGESTED READINGS

- Criminal Courts (NCERT textbook)
- Research on Women and Girls in the Justice System: Plenary Papers of the 1999 Conference on Criminal Justice Research and Evaluation - Enhancing Policy and Practice through Research, Volume 3 - National Institute of Justice, US Department of Justice
- Sutherland,Edwin H,Donald R.Cressey and David F Luckenbill(2013) *Principles of Criminology*,Delhi:Universal Law Publishing Co.Pvt.Ltd
- UNODC: The Doha declaration: Promoting a culture of Lawfulness

UNIT 16 ACCESS TO JUSTICE

Structure

16.1 INTRODUCTION

Category of justice is interpreted in multiple ways. This unit discusses about the larger questions related to the access to justice. Before discussing the access to justice, one needs to engage with the perspectives on justice. The idea of justice has undergone different changes. Society and its transition from customs to that of modern laws have also played a major role in determining the nature of justice. However, the justice becomes a complicated idea due to the coexistence of customs and modern laws. Political formations and social movements across the globe have been defining the idea of justice in its own ways. One needs to know the rudimentary and definitional perspectives related to justice. This unit will try to explore some of the core issues related to the idea of justice. The question of access to justice for whom. At the same time, the unit address on gender and its relation with access to justice.

16.2 LEARNING OUTCOMES

After studying this Unit, you are able to:

- Learn about idea of justice;
- Explore the relationship between people and access justice;
- Engage with the category of gender and access to Justice.

16.3 IDEA OF JUSTICE

The etymological understanding of justice is equally important like that of its epistemological underpinnings. In other words, the meaning and knowledge related to justice need to be understood in this context. Justice refers to the fair treatment of the people. Laws based on the principles of justice

differentiate the character of nation-states. Demands for equal rights and justice are central to unjust political systems. Injustice is conquered through the meaningful clamor and struggle for the justice. Criminal justice systems across the globe subject the people to diverse forms of punishment. Basic literary understanding of the idea of justice discusses about the people who pervert the course of the justice. Diverse social groups across the globe are controlled for their willful efforts to obstruct the justice.

Scholars from the field of psychology usually discuss about the "just world hypothesis". It exposes us to the false and commonsensical belief that characterizes the world as fair in nature. It is falsely believed that those who indulge in good deeds are rewarded and those who indulge in the bad are punished and so on. What is the consequence of this belief? Such belief seeks refuge in the argument that says that the people who are unlucky are suffering due to their fates. Basically, such false belief justifies certain kind of fatalism. For instance, a person who had to face burglary is criticized as a person of careless behaviour. Some of the fundamental debates on victimology explain this kind of conceptual dilemmas in nuanced fashion. Psychologists who analyzed the "just world hypothesis' read it as result of the "illusion of control". The idea of "illusion of control" was first noted and explained by the psychologist, Melvin J Learner from Canada. His article published in the *Journal of Personality and Social Psychology* in the year 1965(Colman,2009:399-400)

Social scientists have probed the term in systematic fashion. The idea of justice is central to ethical theory. It is also seriously discussed in the field of political philosophy. Justice is usually read with the idea of equity. It is also connected to impartiality. From the time of great philosophers such as Aristotle, the idea of justice is categorised into different forms. For example, distributive justice deals with the debates related to "who should get what". Corrective or communicative justice explores how individuals are treated in social transactions. Questions related to punishing a particular person for offence is discussed in the context of the corrective or communicative justice. On the contrary, the idea of distributive justice is very much integral to social philosophy and "policy as social justice". American philosopher, J Rawls in his classic, *A Theory of Justice* foregrounded the modern theory of distributive justice. It is observed that Rawls simultaneously justified individualism and equality. Rawls argued that "All social values-liberty and opportunity, income and wealth and the bases of self-respect -are to be distributed equally unless an unequal distribution of any, or all, or all these values is to everyone's' advantage" (Rawls,1971:62). It also leads us to the conceptual premise that there are tensions exist between personal liberties and social justice. There are scholars who focused on liberties in the context of justice. Robert Nozick is one among those scholars. His work, *Anarchy, State and Utopia* (1974) asserted that private property, individual rights and self-determination have to be guarded in the ideas and practices related to social justice. Nozick asserted the minimal role of state can be defended, if it does not create obstacles for the individual interests related to persona and freedoms. There are conceptual dilemmas related to the idea of equal treatment of all people. It has raised important questions such as who should

be treated equal and so on. The old principle of *lex tallionis* (an eye for an eye) as considered as the fundamental premise of justice. However, the current legal institutions consider correction and rehabilitation as the central to social justice. It is also discussed that it is difficult to define the notion of justice. It is also criticized that one cannot achieve justice in easy manner. Justice is also part of legitimacy. Some of the governments therefore are critical to the notion of justice (Abercrombie, Stephan and Bryan,200:188-199)

Western theories have been exploring the possibilities of well-ordered societies through the theories of justice. Modern theories of justice are influenced by liberalism. The key characteristics of such theories share the following values

a) "conditions of equality between persons acting within just institutions"

b) "societies that are well ordered in that they share a public sense of justice but not necessarily under conditions of social harmony"

c) "the procedures of public justice are formulated and universally accepted by those who agree to exercise their liberties within these procedural limits"

d) "individuals are educated to develop a sense of justice such that they possess a moral and rational disposition which helps them to consider a just society as a value, to know the laws which govern them, and possess the understanding necessary to their full and free participation in such a system'(Dhillon,2001:197).

It is further analyzed that postmodern theories of justice accept some of the premises of the modern theoretical constructions of justice. However, they share skepticism towards the modern theories of justice. Post modern theories of justice believe that modern theories justice exhibits ideal constructions of realities. Modern theories of justice are theoretical and they are detached from the empirical dimensions of practice. Post modern theories explore such aspects through the "role of language in the theory of practice of justice". Broadly, postmodern theorists such as Jean -Francois Lyotard demonstrated the power and knowledge dimensions of justice through the dominant and subjugated sections. It is further noted that modern theories of justice focus on shared public values. They focus on the multiplicity of truth and various possibilities/readings/ interpretations around the idea of justice than a homogenous, defined, modern conception of justice. Thus, it becomes a herculean task to ponder what is "just" and what is "unjust". Thus, postmodern conceptions of the idea of justice seek to analyze the justice in the context of multiplicity. It is further explained that institutional practices related to justice operate via language. It is observed that postmodern theory does not discard 'the possibility of justice". It is doubtful of the modern understanding of justice due to "its skepticism arises from careful attention to concrete heterogenous pragmatics". Postmodern criticism of modern theories of justice are influences by the Immanuel Kant's ideas of totality, universality and equality. Attention to multiplicity is certainly an obligation in the postmodern critiques to the modern constructions of justice"

(Dhillon,2001:197-198).The next sections probes the debates on the people and access to justice.

Check Your Progress-1

1) Write your understanding on idea of justice.

16.4 PEOPLE AND ACCESS JUSTICE

Social stratification and law impact the justice of the people. It also challenges the efficiency of the legal system of any country. Whether the people across diverse societal strata are getting justice or not? One of the central questions that raised is why certain sections of the people are not getting the justice?

Scholars have enquired how poor people suffer from the legal systems. According to Paul Prettitore, access to justice needs to be discussed in any debates on justice. It is observed that legal institutions may emphasize on the access. But it is not practiced in proper manner. Practice is based on opportunities and resources. Access, for Prettitore, is grounded in opportunities and resources. It is further blocked by poverty, race, lack of property and low educational levels in the case of the ordinary sections of the society. It is further analysed that it orders to measure the access, one has to analyze the experiences of the various sections and their experiences connected with legal needs. How various sections in the society are experiencing the law? When one explores the social differences, it exposes the nuances of the "access-to-whom". It is further noted that scholars analyse the details of the household incomes and their experience related to the law and access (The Hague Institute for the Innovation of Law, cited in Prettitore,2022). The study indicates various issues related to the access and law. It raised serious queries to the question of the delayed justice and to the idea of the justice itself. It is observed that low-income households are more vulnerable to legal problems. Legal problems negatively affect the low-income households. In the context of the development, equal access to justice is widely discussed in the context of Sustainable Development Goal 16.3. According to Prettitore, the hiatus that exist in the case of the access to justice may negatively impact the various sections of the society (Prettitore,2022).The next section analyses the questions of racial minorities and their access to justice.

Racial Minorities and Access to Justice

It is further studied that the levels of access to justice varies among the most vulnerable sections in the society. According to Sara Sternberg Green, it is important to examine the interlinkages between the race, class and access to

civil justice. It is observed that people from the poor and minority groups face various kinds of civil legal problems. It is explored that if the experiences of the marginalised sections are negative with the civil legal machinery, it also hampers the legal process and justice. It further detaches themselves from the legal institutions. They are again alienated from the legal systems (Greene,2016). Black Lives Matter and justice movements of Afro-Americans, for Frimpong, have challenged the inhuman nature of the racial discrimination and the struggles for justice of the racially suppressed groups. George Floyd's murder has created major discussions related to the racially oppressed people's quest for the justice.Rashwan Ray observed that "George Floyd is the twenty first century's Emmet Till, a moment similar to (his) murder in 1955 (and) by his mother having the foresight and also the bravery to show his decomposed body in the casket(Ray, Cited in Frimpong,2020).Ray also argued that "...the nation's legacy of slavery continues to be the foundational epicenter of racial discrimination against blacks and minorities"(Ray, Cited in Frimpong,2022).Disparities and victimization of the people from the racial minorities are very much part of the perspectives on the access to justice. Gender too play a vital role in the access to justice. The following section deals with the gender and access to justice.

Check Your Progress-2

1) Write your critique on the debates related to access to justice.

16.5 GENDER AND ACCESS TO JUSTICE.

The term, sex refers to the biological division. The term gender, refers to the social construction of the relations between man and women. It creates society-based division based on masculinity and femininity (Oakley,1972). Judith Butler has analyzed the natural character of the gendered behaviour. It is learned performance related to gender behaviour (Butler,1999). Gender and access to justice are the recurrent themes in the context of society and law.

Social movements across the world played a central role in the social change across the globe. In order to understand the nuances of the shift from the social control to social change, one has to revisit some of the historical junctures that foregrounded the questions of gender and legal reform. According to Sharyn L. Roach Anleu, women's movement and feminists intervened in the significant arena of law to transform the status of women. It is also considered as a struggle for the equality. Initially, women's movement and feminists indulged in the issues of women related to education, property rights, right to vote and training for professions. Feminist groups in the 18th century England emerged to secure the equality across sexes. It was also to

attain the rights for women. It is noted that feminism in the 1960s focused on the reform of law in the case of rape, domestic violence, employment and family (Anleau,2000:183). For instance, there are diverse ideological groups and practices within the rubric of feminism. However, the diversity among the feminists have analyzed it as something that contribute to wilderness. Elaine Showalter analyzed the diversity among the various groups related to feminist criticism as its wilderness and strength (Showalter,1981). There are various debates on the impact of feminism across the disciplines and social/political movements. According to Sharyn L. Roach Anleu, there are differences among the various feminist organizations in the context of gender equality. Anleu mentions about the peculiar character of some feminist organizations in the context of the United States. It is observed that one of the fundamental emphasis of feminists and civil rights activists has been on the courts. In other words, women's rights litigation deploys test cases and *amicus curiae* briefs to foreground the larger view of the women's questions. They have been arguing that the questions of the women should be presented strongly in front of the court. Political lobbying in Britain, Canada and Australia plays a vital role in the legislation related to the women's issues. Feminist groups within the policy regime play a central role in bringing out the voices of women (Anleu,2000:183). Scholars across the globe have studied about the legal transformations made by women's movements. Narratives of the struggles of women's movement also show the impediments of women related to the access to justice. According to Nicholas Pedriana, "Legal frames and legal framing processes offer a unique analytic framework for exploring the link between social movements and social change because law is simultaneously a collective action frame and collective action goal" (Pedriana, Cited in Anleu,2000:184).

Perspectives on law and feminist organizations explore the aim and nature of such organizations. According to Sharyn Anleu, one of the aims of the feminist organizations is to reform laws that address the experiences of women. They also aim to implement the law in the private and domestic domain. There are complexities related to the laws that address the issues of women. Feminist organizations are also aware about the potentials and pitfalls of law in the backdrop of the gender justice. It is observed that some feminists read the dependence of law as self-defeating in nature (Anleau,2000:184). There are critiques to too much reliance on law and its creation of more legal premises. It may reduce the significance of nonlegal terrains (Smart and Thornton, Cited in Anleau,2000:184). The reduction of nonlegal factors raise different questions related to the shift of the focus from the core issues related to women to the instrumentalities related to law. At the same time, legal quandaries related to women are also questioned as something that ignores the men. For instance, demands of women's movement for equal employment opportunities are critiqued for its ambiguities related to gender and law (Anleau,2000:184-185). At the same time, while agreeing on the gravity of the early feminists' demand for legal rights, contemporary scholars are becoming critical of the thin line between the demand for legal rights and rhetoric (Smart,cited in Anleu,2000:185).

It is important to revisit some of the perspective's rights discourse and

women in the backdrop to the debates on gender and access to law. According to Anleau, substantive and prevalent gender inequality prevent women from understanding about their formal rights. The notion of rights is contested as well. There are equal status and conflicts related to various laws within the legal discourse. It is observed that abortion debates happen in the midst of the women's rights versus those of the embryo and the fetus. It is further observed that legal rights need an individual or a group in order to raise a complaint and to start legal proceedings (Anleu,2000:185). It is also critiqued that opposition groups easily appropriate the discourse of the rights. It is overed that "...in 1982, the *Charter of Rights and Freesoms*, which guarantees equal rights, was entrenched in the Canadian Constitution and heralded as a political victory both by and for the women's movement. However, some of the first equality cases to come before the courts consisted of attempts by male defendants to invoke the guarantees of sex equality in order to invalidate statutory rape provisions of the criminal law" (Fudge,cited in Anleu,2000:185).It is also analyzed that claiming rights provide collective identity to women. It empowers them to seriously intervene in the public policy discourse. Assertions based on public nature of rights are considered as vital to the private nature of the discrimination of the women (Schneider, cited in Anleu,2000:185). Rights approach, for Villimore, also initiates social change in the local and personal life of women (Villimore,cited in Anleu,2000:185).

One of the areas that woman faces the issues of law is that of employment. Discrimination on the basis of gender has raised lot of questions to the law and legal practitioners. According to Anleu, Equal pay and work discrimination are addressed by the feminists in the context of legal transformation and industrial relations systems. Women are receiving lower pay due to the gendered, societal stigmas. Anleu discusses how women are terminated from the jobs after the marriage and child bearing. Their commitment to career is less valued than that of men(Hakim,cited in Anleu,2000:185).However women have struggled to reduce the wage gap between men and women(Burstein, cited in Anleu,2000:185).The negation of choices of women and burden from the family-work also raise serious questions related to women and law(Crimpton and LeFeuvre,cited in Anleu ,2000:185).The constrains embedded in the society impact the work of the women(Ginn, Cited in Anleu,2000:185).

Gaps in the wage between men and women also demonstrates the quandaries exist between employment law, gender discrimination and collective-bargaining agreements. One of the central questions related to access to law and women also is the irony between bargaining power, wage labour and patriarchal trade unions. Construction of the male as the bread winner and women as the dependent on men still exists across the globe. The bias and discrimination on those lines provoke scholars to reflect on the idea of family wage and related oppression of the women. Family wage is the amount of the amount of an average, male worker to help himself, his wife and children. According to Anleu, this bias based on family income thus demonstrate the pressures and responsibilities of male and women workers in the context of family and (patriarchal) work places. It is noted that United Kingdom's Equal

Pay Act 1970 ensured "equal pay for like work, not work of equal value, and abolished male and female rates for the same job. Equal pay for work of equal value was limited to jobs that had been evaluated by the employers" (Atkins and Hoggett, Cited in Anleu,2000:186). According to Anleu,pay gap in the case of women is more based on the pay gap based on devaluing women's job than the pay gap based discrimination(Anleu,2000:187). It is observed that "...comparable worth arguments have been used in Australia, but with little success. In 1985, a union of nurses lodged an application via the ACTU before the Australian Conciliation and Arbitration Commission as part of a broad strategy to reduce structural inequality between the men and women in the labour market by addressing the traditional undervaluation of women's work. The nurses argued that pay increases were justified in accordance with the principle of equal pay for work of equal value and incorporated in the notion of comparable worth. The commission pointing out that comparable worth meant different things in different countries and it was inappropriate to adopt the US model, rejected the use of the term, maintaining that it would be confusing and inappropriate to equate with the 1972 principle of equal pay for work of equal value" (Hunter,cited in Anleu,2000:187). Scholars like Anleu cites this fact to show the paradoxes that exist in the context of gender and access to law.

Debates around sex discrimination laws also reveal the issues related to the access to law. It is also observed that minorities and women face discriminations instead of the affirmative action based on the order of the court (Anleu,2000:188). What is the field and scope of sex discrimination laws? It is important to discuss the debates on sex discrimination laws in the milieu of access and law. Discrimination on the grounds of sex, pregnancy, marital status and sexuality are challenged through sex discrimination laws. For example, Title VII of the 1964 Civil Rights Acts forbids discrimination on the grounds of the sex of the individual (also race, colour, religion or national origin). Britain passed peculiar sex discrimination legislation in the year 1975.Australia passed specific sex discrimination legislation in the year 1984(Anleu,2000:187). There are still debates and conflicts related to the legal questions connected to abortion, pregnancy leave, maternity leave, parenting leave etc. throughout the world.Question of sexual harassment also raise various issues for the women.The following section analyses the issues related sexual harassment and the women's search for justice.

16.6 SEXUAL HARASSMENT AND CHALLENGES BEFORE WOMEN

Debates around "Me too movement" has brought the debates on sexual harassment in the contemporary legal discourse. According to Anleu, Catherine Mackinnon played an important role in the debates on sexual harassment. Mackinnon addressed the relations of sexual harassment and sex discrimination. It is argued that "sexual harassment of women at work is sex discrimination in employment "(Mackinnon,cited in Anleu,2000:191). India witnessed lot of debates on the case, Vishaka and others v/s State of Rajasthan that deals with the sexual harassment at the work place. Sexual

harassment at work place is also addressed in the context of the diverse social sections and their access related to law. In addition to women, sexual minorities across the world are facing various stigmas and legal challenges. Homophobia has become central to heterosexual world. Queer communities are struggling against the dominant legal perspectives and its conservatism around the notion of sexuality. It is observed that "The Supreme Court of India ('Supreme Court') in its landmark judgment National Legal Services Authority of India vs. Union Of India(NALSA) recognized fundamental rights of transgender persons arising out of Article 14 ('right to equality'), Article 15 ('prohibition of discrimination'), Article 16 ('equality of opportunity in public appointment'), Article 19 (right to freedom of speech and expression') and Article 21 ('right to life with dignity') of the Constitution of India. This was followed by its judgment in Navtej Johar vs. Union of India ('Navtej Johar') which decriminalized consensual sexual relationships between adults of the same gender by reading down section 377 of the Indian Penal Code, 1860 "('IPC') (Vidhi Centre for Legal Policy's Report).Question of sexual harassment at work place is being discussed in the context of various, social stratifications.

16.7 LET US SUM UP

The unit deals with idea of justice and its multiple interpretations. It discusses about the larger questions related to the access to justice. It probes how denial of justice happen in the everyday life of certain sections. Thus, it engages with the perspectives on justice by engaging with the perspectives of various scholars. The idea of justice has undergone diverse changes. The societal transformation and its transition from customs to that of modern laws have also played a major role in determining the nature of justice in the world. Thus, we studied that justice also becomes a complicated idea due to the coexistence of customs and modern laws. The political formations and social movements across the globe have been defining the idea of justice in their own ways. This unit also explored some of the core issues related to the idea of justice and the complex process-access to justice. Significantly, the unit addresses the relationship between gender and its access to justice.

16.8 UNIT END QUESTIONS

1) Critically evaluate the debates on access to justice?

2) Disuses the relationship between gender and access to justice in the context of contemporary society.

3) Do you agree that access to justice is for privileged people or not? Justify your answer with suitable examples.

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UNIT 17 WOMEN LAWYERS

Structure

17.1 INTRODUCTION

In this unit, we are going to study about the gendered-social spaces of women lawyers. It probes how gender relations determine the legal profession. It shows that there are power relations based on gender that impact the culture of legal professions. It polarizes the profession based on the authority and power related to dominant and subordinate gender identities. There are various intersections of law with diverse social stratifications in addition to gender as well. This unit explores the fundamental debates related to social and political spaces that decide the professional lives of women lawyers. Before studying the issues related to gender and women lawyers, one should have basic understanding about the legal profession. Usually, every profession is viewed through the traditional societal understanding of the professions. Such popular understanding about a profession is not objective in nature. The unit discusses about some of the main perspectives on the social nature of the legal profession.

17.2 LEARNING OUTCOMES

After reading this Unit, you will be able to:

- Explain the debates on the nature of legal profession
- Articulate the fundamental issues related to gender and legal profession
- Describe the various aspects related to women legal academics and practitioner
- Analyse the changing nature of legal profession in the backdrop of gendered understandings on law

17.3 PERSPECTIVES ON THE SOCIAL CHARACTER OF PROFESSIONS

Classical theorists such as Max Weber and Talcott Parsons emphasized on the "reflective function" and "occupational roles" related to legal profession (Weber and Parsons, cited in Liu,2013:671). Alex Tocquville described legal profession as a profession of lawyers related to "America's Aristocracy" (Toqueville, cited in Lou, 2013:671). According to Sida Liu, legal profession is analyzed in the context of processual theory of legal profession. It is different from the sociological understanding of profession that analyses social structure of the bar. Processual theory of legal profession, for Liu, focusses on legal profession as a social process that transforms according to time and space (Liu,2013:670-671). The following are the core aspects of the social process of the legal system; (a) "diagnostic struggles over legal expertise" (b) "boundary work over professional jurisdictions" (c) "migration across geographical areas and status hierarchies" (d) "exchange between profession and the change" (Liu, 2013:671).

In addition to this classification, there are three approaches that study legal professions. One of the approaches, for Liu, probes legal profession through social structure and its modes within the social system (Liu,2013:671). It is further observed that "Following this structural-functionalist perspective, Heins and Laumann (1982), in their seminal analysis of the social structure of the Chicago Bar in 1975, argued that the structural differentiation of the legal profession closely corresponds to the differentiation of lawyer's client types. Lawyers serving corporations occupy distinct structural positions within the professions from those serving individual clients in terms of social origins, values and prestige. Consequently, the bar is divided into two hemispheres (i.e., corporate and personal) with little mobility between them" (Heinz and Laumann, Cited in Liu,2013:671). Structural approach analyses legal profession through "neo-Marxian and neo-Weberian theories of market monopoly and social closure". It is also known as market control theory (Liu,2013:671-672). It explores the nuances of market control and whether any collective shifts happened in the social levels. It examines how various dimensions of legal profession gain monopoly related to the market of legal services and further it led to the necessity for legal professions (Liu, 2017:672). Interactional theories emphasize on the social interactions of the lawyers at their realms of work. It is central to some of the earlier trends in Critical Legal Studies. It is focused on the micro-dimensions of the legal professions than the larger structures that determine the legal profession (Liu, 2017:672). Another stream within interactionist approaches is influenced by the Chicago School of Sociology and its focus is on the "social interaction of professions". It is called as "jurisdictional conflict". It is observed that "Inter professional competition" is central to the coexistence of professions in peculiar, ecological system" (Liu,2017:672). Another approach named Collective action approach emphasizes on lawyers' collective interventions. It analyses how lawyers are able to influence other, social spheres and politics. There are three variations related to collective lawyer approach. They are classified as cause lawyering, political lawyering and elite

reproduction. It is analyzed that "cause lawyering scholarship ...claims to breach the boundary between the political and the professional by destabilizing the conventional understanding of lawyership". It is further noted that "cause lawyers challenge the prevailing distribution of values and resources in the society, and they do so not as a matter of technical competence, but as a matter of personal engagement". It is studied that "The definition of politics used in this theory is fluid, elastic and almost equivalent to any form of moral activism" (Sarat and Scheingold, cited in Liu,2017:672). It is further noted that "The political lawyering theory, in contrast, relies on a narrow definition of politics. It connects lawyers' political mobilization strictly to political liberalism, defined as the moderate state, civil society and citizenship" (Halliday and Karpik, cited in Liu,2017:672-673). Lawyers, as per theory, is *homopolitics* on addition to *homoeconomics.* It connected the struggles related to knowledge and politics of the lawyers. Elite legal production is also discussed in some of the types of collective action approach and it discusses how legal elites are being reproduced in the context of the deployment of legal capital in the economic and political realms (Dezalay and Garth, cited in Lou,2017:673). One of the central aspects related to this approach is about the "agency" of the lawyer (Lou,2017:673). However, there are issues of gender and power in the sphere of legal professions. The following section deals with some of the important perspectives on the gendered dimensions of legal professions.

Check Your Progress-1

1. Write your understanding on the nature of legal profession.

17.4 GENDER AND LEGAL PROFESSION

Categories of sex and gender needs to be understood before studying the nuances of gender and legal profession. Sex is a category that explains the biological cleave in to the male and female. Scholars such as Ann Oakley analyzed how gender act as the social and parallel, hierarchical categorization of masculinity and femininity (Oakley, cited in John,2014:422). Gender is a social construct that determines the man-women relations in society. It is also creating stereotypes related to masculinity and femininity. Gender and related unequal division of labor also impact the social and professional mobility of women. Traditional understanding of gender has also changed over a period of time. Different disciplinary approaches grounded in humanities and social sciences have created new perspectives on the category of gender. Social construction of gender works as an integral part of the societal and political systems (Scott,2014). These perspectives help us to understand how power equations of the legal profession through the ideology of gender.

Sociologists have analyzed how gender inequality works in the realm of management. They deployed the category of glass ceiling to refer to the impediments that stand against the professional mobility of women. It is argued that opportunities of women to enter into the higher positions in the organizations are systematically suppressed by the patriarchal-social system of the organization. These are the intangible and subtle patriarchal tendencies that block the upward mobility of the women professionals. Gendered stereotypes often limit the growth of women professionals (Abercrombie, Stephen Hall and Bryan S Turner2000:207-208). Representation of women in the legal profession and the constraints related to women's access to law remain a major question in the debates on gender and law.

Exclusive nature of elitism is part of the legal profession (Smigel,1964). It is observed that question of gender equality in profession is problematic in nature. Daughters of the privileged sections, for Epstein, were excluded from their brother's wall street firms. It is further argued that gender impacts class in the context of the legal profession (Epstein, cited in Serron and Frank,1996:190).

There are diverse aspects to the interpretations related to the profession of women lawyers. According to Carrie Menkel-Meadow, the entry of the women into legal profession can be analyzed as part of the feminization of the legal profession. It can be also queried whether such entry feminize the legal profession in real sense or not. It is further argued that it can only be assured when the real feminine qualities are ingrained in the legal profession. Whether the advent of women lawyers really challenge the male domain of the legal or not? Feminization of the legal profession, for Carrie Menkel-Meadow, has to bring out humanism and end all forms of discrimination on the basis of gender in the legal profession.

Women lawyers in India have to work in a mixed context of modernity and conservatism. It is important to know how patriarchy looks at the legal profession in the Indian context. According to Saurab Kumar Mishra, men are dominant in the conventional, legal professional scenario in India. Even after the struggles of women to enter into the legal profession, dearth of women lawyers can be seen in the twenty first century. It is noted that globalization driven legal professional scenario has provided spaces for the entry of women lawyers. It has challenged the traditional medieval approach towards the professional mobility of women. It is suggested that the harassment of women lawyers need to be curbed through laws and punishment. It is also observed that families are not able to accept women in the legal profession. Therefore, professional and financial stability of the women lawyers have to be addressed in a serious manner (Mishra,2015)

Some scholars have explored the space of court while discussing the problems of women lawyers. According to Pratiksha Baxi, women lawyers who are part of rape trials have to undergo sarcasm and mockery by the (male) lawyers. Women lawyers have to face sexist comments during the trials. It is also due to the court's nature as "male space "(Baxi, 2014: xxxiv-xxv). There are diverse and interesting observations on the social mobility and related impediments in the lives of the women lawyers. According to

Swethaa Ballakrishnen, post-liberalization India has witnessed the emergence of women lawyers who have studied from prestigious Indian law schools. Proliferation of sophisticated law firms and recruitment irrespective of gendered identities demonstrate the nature of legal work forces as well. It is also noted that women lawyers are equal to the male lawyers in the case of client attention, promotion and pay. Ballakrishnen also discusses about the dearth of research on women in higher position and the increase in the feminization of the contemporary character of work (Ballakrishnen,2013:1261-1264). However, Louise Marie Roth has demonstrated the gender differences in the earnings of women professionals even after the regulation of diverse forms of segregation (Roth, Cited in Ballakrishnen,2013,1264) According to Sweta Ballakrishnen, family back ground and educational level are responsible for the success of the women lawyer. It happens at the individual level. At the interactional level, women lawyers are able to create networks with superiors, clients, peers and subordinates. There are issues that happen at the institutional level as well (Ballakrishnen, 2013:1266). It is also noted that clients look for trust and quality in the women lawyers. At the same time, it is also observed that lawyers do not count the factor of gender discrimination in legal profession. It is also observed that the question of gender comes in the case of bonus and promotion. It is also noted that social stratification based on race, class and related dominant identities also privilege certain women lawyers over other women lawyers. Marriage and children also impact the professional lives of women lawyers. Women are forced to coexist with familial duties and work load. There are stereotypes related to women lawyers. Such stereotypes are ingrained in the gender relations at the work places (Ballakrishnen,2013:1266-1286).

Women lawyers approach the issues related to women in empathetic manner. For instance, Indian Federation of Women Lawyers has intervened in serious legal interventions related to women. For instance, legal transformations related to dowry and related problems testify to the significance of the actions of women lawyers (Sitaraman,1999). According to Shalu Nigam, fragile masculinity exists in the androcentric courts. It is argued that the majority of men lawyers look at the issues of women through their masculine approach. In addition to that the question of the gender-based violence is also ingrained in “the language of the protection of women as daughters, wives or mothers”. In other words, there is typical, patronizing way of addressing the women in patriarchal, legal spaces. Such language of addressing women symbolizes control over the women. It does not address the individual space of the women as the one who can raise their own issues in their own language of self dignity. The women therefore are addressed as one who becomes “good women or an ideal victim” (Nigam,2022:254). Culture plays in the context of the gender and work forces. According to, Swethaa Ballakrishnen, gender socialization affects the entry and development of women professionals. Cultural contexts impact the socialization of the professional women (Bellakrishnen,2018).However, it is important to explore the trajectories of scholarship and activism in the context of women and law.

Check Your Progress-2

1. Write about the story of women lawyer that you have read in any newspaper /articles/ magazines.

17.5 WOMEN AND LAW: TRAJECTORIES OF SCHOLARSHIP AND ACTIVISM

Legal profession in the International and national contexts have its own theoretical complexities. There are empirical differences related to the understanding of the professional space of women lawyers. One of the central questions that is quite raised is about women's engagement with the law (Kannabiran, 2017) India witnessed remarkable struggles of some of the eminent women lawyers. According to Ashwin Kunal Singh, Adinaryana and Jayantiabi, the entry of Cornelia Sorabji into the legal profession left an indelible mark in the history of women lawyers from India. Her entry into the High Court in Allahabad in the year 1921 needs to be discussed to understand the various shades of the lives of women lawyers. Passing of Legal Practitioners '(Women) Act (1923) challenged the ban on the women's entry to the legal profession. The revolutionary act provided the rights to practice as advocates in the court of laws. Entry of Cornelia Sorabji led to the Passing of Legal Practioners '(Women) Act. Justice M Fathima Beevi is considered as one of the pioneering women judges in India. She was appointed as the Judge of Supereme Court of India in 1989. She was also the first Muslim woman judge of the apex court of India. She fought for the rights of women and marginalised sections (Singh, Adinarayana and Jayantibai, 2019:148: National Resource Centre for Women).

Another legal luminary Chief Justice Sujata Vasant Manohar is also one of the important figures in the history of women lawyers in India. She was invited as one of the five women judges across the globe to establish a tribunal for recording evidence and giving findings at the World Women's Congress for a Healthy Planet held at Miami, U.S.A. in November 1991, held for foregrounding Women's Action Agenda 21. She was also a signatory to Declaration of Miami. She was one of the three delegates chosen by the Government of India to participate in the International Conference of Law, Social Development and Social Welfare held at West Berlin in 1988 under the leadership of the International Council of Social Work. Chief Justice Sujata Vasant Manohar was also on the Special Group of Family Law. She was the First Chairperson of the Board of Visitors, Judicial Officers Training Institute at Nagpur. Chief Justice Sujata Vasant Manohar was also Chairperson of the Committee of Judges established by the Bombay High Court to create Family Courts in Maharashtra (The Bombay High Court,1994). It is argued that emergence of Indian legal thought and

scholarship can be traced through mapping the genealogy of early women legal academics and can be compared to the current women legal academics. It is analyzed that patriarchal structure within the law schools often does not allow critical thinking of women legal academics. On the contrary, they are able to come with serious scholarship through social science schools, professional approaches and research groups (Ballakrishnen and Samuel,2021). Lotika Sircar, renowned jurist and academic is considered as one of the pioneering scholars in the women's movement in India. Sircar noted that patriarchy, feminism, gender was not used in legal classrooms (Sircar, cited in Ballakrishnen and Samuel,2021:2). According to Ballakrishnen and Samuel, it led to the depoliticization of the legal scholarship and further led to the suppression of critical women oriented, feminist academic approaches. Vasuda Dhagamwar, the renowned legal scholar-activist founded the Multiple Action Research Group (MARG). MARG, a nongovernmental organization played a vital role in the legal awareness, public interest law and advocacy. Scholars like Lotika analysed that those who created egalitarian spaces within/out the legal academy need to be mapped in every respect. Lotika Sircar, Vasudha Dhagamwar, Upendra Baxi and Raghunath Kelkar were the signatories in the open letter to the Supreme Court of India and asked for a change in the legislation in the *Mathura* case, related to the custodial gang-rape of a 16-year-old tribal girl. It is observed that male signatories are much discussed than the female signatories (Ballakrishnen and Samuel,2021:1n) It is also argued that the writings of the women are absent in the prescribed chapters in the mandatory courses (Ballakrishnen and Samuel,2021:2n). It further observed that students prefer liberal feminist positions than the radical feminist positions due to inherent patriarchal institutional legal academic structure (Ballakrishnen and Samuel,2021:3n). Women-law academics find lots of issues in introducing diverse concepts and courses related to gender, rape etc. However, legal scholars such as Ratna Kapur, Amita Danda, Kamala Sankaran, Kalpana Kanabiran etc created spaces for radical academic-gender based engagements in the legal academic space. Contemporary legal scholars, for Ballakrishnen and Samuel, such as Chinmayi Arun and Aparna Chandra are also contributing interesting works in the field of media, internet governance, reforms related criminal justice system and so on. Women lawyer-scholars were central in building the institutions such as Centre for Women's Development Studies in the year 1974. This needs to be understood in the backdrop of the "legal equality doctrine" like *Towards Equality Report (*Ballakrishnen and Samuel,2021:8). Legal scholars such as Flavia Agnes and Usha Ramanathan also have contributed to the legal scholarship in India (Ballakrishnen and Samuel, 2021:1-13).

17.6 LET US SUM UP

In this unit, we have studied about the nature of the legal profession. We have also discussed the ways in which women lawyers are being looked within the field of patriarchal legal, professional spaces. It explores the relations of social forces that determine the issues related to women lawyers. It also analyses some of the experiences of the women lawyers related to law and

practices. Broadly, it reflects on the gendered nature of the legal profession and its impact on women lawyers. Thus, it engages with the gendered questions of the field of law.

17.7 UNIT END QUESTIONS

1) Evaluate the debates on nature of legal profession.
2) Discuss the relations of gender and field of law in the context of women lawyers.
3) Explain the contemporary scenario of women lawyers in the light of the perspectives on gender, law and women lawyers.

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UNIT 18 JUDICIAL REFORMS

Structure

18.1 INTRODUCTION

The word "law" has various interpretations. Consequently, the expression legal reform also needs to be pinned down. There are three layers in legal reform. First, there is an element of statutory law reform and there are three clear elements to statutory law reform – removing old and dysfunctional elements in legislation, unification and harmonization, and reducing state intervention. Second, legal reform has to have an administrative law reform component, meaning the subordinate legislation in the form of rules, orders, regulations and instructions from ministries and government departments. Often, constraints to efficient decision-making come through administrative law rather than through statutory law. Finally, the third element of legal reform is what may be called judicial reforms, though faster dispute resolution.

Despite the problem being recognised judicial reforms has often remained outside substantial liberalisation initiatives. Within judicial reforms, one can detect at least four strands in proposed reforms. First, there is the question of judicial strength, through non-judicial staff. This is a supply-side solution that is the most commonly cited reason for court congestion and delays. However, this is also linked to vacancies and the judicial appointment and promotion process, as judicial workforce planning. Second, there is a set of reforms linked to improving judicial efficiency and court productivity, through education/training, better court administration in non-judicial functions and improved case and case-flow management, facilitated by infrastructure improvements. This too is a supply-side solution. Third, as a sub-strand to number two, information and communication technology (ICT) can specifically be used to enhance productivity. Fourth, the demand for adjudication can be reduced through alternative channels of dispute resolution (mediation, conciliation, arbitration) and reducing the government's contribution in civil litigation.

18.2 LEARNING OUTCOME

After reading this unit, you are able to;

- Know the concept of judicial reforms.
- Learn cases pending in the Indian courts and the impact it is causing.
- Understand the scope of judicial reforms and the importance of police in the legal reforms.

18.3 POLICE REFORMS

Police are a very important part of the justice system. They are responsible for maintaining public order and safety. They are also responsible for enforcement of the law and prevention, detection and investigation of criminal activities. Police officers are recruited through a very stringent process.

Police forces of the various states are governed by their state laws and regulations. Some states have modelled their laws on the basis of a central law, the Police Act. States also have their police manuals detailing how police of the state are organised, their roles and responsibilities, records that must be maintained, etc. The state government is responsible for the functioning and maintaining of the police system.

Police reforms aim to transform the values, culture, policies and practices of police organizations. It envisages police to perform their duties with respect for democratic values, human rights and the rule of law. Police reforms aim to transform the values, culture, policies and practices of police organizations. It envisages police to perform their duties with respect for democratic values, human rights and the rule of law.

On 22nd September 2006, the Supreme Court of India delivered its landmark judgment in the famous Prakash Singh case, mandating country-wide police reform and issuing seven crucial directives to immediately start the implementation process.

The seven directives provide practical mechanisms to kick-start reform. They make up a scheme which if implemented holistically will correct the common ills that create poor police performance and unaccountable law enforcement today.

Directive One:

Constitute a State Security Commission (SSC) to:

i) Ensure that the state government does not exercise unwarranted influence or pressure on the police

ii) Lay down broad policy guideline and

iii) Evaluate the performance of the state police

Directive Two:

Ensure that the DGP is appointed through merit based transparent process and secure a minimum tenure of two years

Directive Three:

Ensure that other police officers on operational duties (including Superintendents of Police in-charge of a district and Station House Officers in-charge of a police station) are also provided a minimum tenure of two years

Directive Four:

Separate the investigation and law and order functions of the police

Directive Five:

Set up a Police Establishment Board (PEB) to decide transfers, postings, promotions and other service-related matters of police officers of and below the rank of Deputy Superintendent of Police and make recommendations on postings and transfers above the rank of Deputy Superintendent of Police

Directive Six:

Set up a Police Complaints Authority (PCA) at state level to inquire into public complaints against police officers of and above the rank of Deputy Superintendent of Police in cases of serious misconduct, including custodial death, grievous hurt, or rape in police custody and at district levels to inquire into public complaints against the police personnel below the rank of

Deputy Superintendent of Police in cases of serious misconduct

Directive Seven:

Set up a National Security Commission (NSC) at the union level to prepare a panel for selection and placement of Chiefs of the Central Police Organisations (CPO) with a minimum tenure of two years.

The National Police Commission in its 8th and concluding report of 1981, submitted a new Police Bill for India. Thereafter in 2005 the Ministry of Home Affairs constituted the Police Act Drafting Committee (PADC) to draft a Model Police Bill for India. Very shortly after The Supreme Court delivered its judgment and the PADC submitted its draft Model Police Bill, 2006 to the Home Ministry. This draft bill was also circulated among all state governments. The Model Police Bill complements the Supreme Court judgment in that it provides the detailed nuts and bolts through which the directions of the Supreme Court can be most effectively implemented.

Communities are the main beneficiaries of good policing and the main victims of bad policing – community and civil society participation in the process is essential if the police are going to be efficient, effective and accountable. State governments therefore need to publicise their initiative to redraft police legislation. This will ensure that the legislation adequately reflects the needs and aspirations of the people in relation to the police

service they want.

This can be done by various means including -

- Inviting public and civil society participation in drafting committees
- Inviting public submissions on the type of police service communities would want
- Inviting input from police at all levels about the type of service they want to be part of.
- Ensuring that draft that go before the state assemblies and Parliament is in the public domain and made available for comment under proactive disclosure provisions in section 4(1)(c) of the Right to Information Act.

Check Your Progress-1

1. Write your understanding about the police reforms

18.4 ROLE OF LAWYERS

Lawyers like police officers are the pillars of the judicial system including the courts and judges. Judicial reforms are the structure or wider picture of any country from a political or legal perspective.

Lawyers play a vital role role in reforming the judicial system. The lawyer is devoted to anyone who is experienced in the field of law in the olden times. A lawyer is a client representative or a neutral third party, a law enforcement officer and a public citizen with special responsibility for the quality of justice. Lawyers form a very important aspect in judicial reform. The lawyer's role in judicial reforms is manifold. The Indian judicial system is very adversarial in nature. The adversarial system essentially advocates a non-interventionist role by the judge who is supposed to oversee the prosecution to prove their case beyond reasonable doubt against the accused. The scope of the dispute, the evidence to be brought on record, amongst other things, is largely decided by the parties. This adversarial system pushes the courts minds to look at both the opposite views which in turn if proved beneficial to the society can be applied to the society at large.

The role of lawyers in this aspect is that they are in a unique position to support people, groups, and organizations with their legal issues and to further the public good. Public interest attorneys advocate civil campaigns for society's greater good to support those in need of legal assistance who might otherwise not be able to afford lawyers. Personal attorneys also do Bono work to help people with low incomes.

The judicial reforms can be through both political and legal systems. Legal

reforms can be done by both the lawyers and by the court.

18.5 JUDICIAL REFORMS AND TRAINING THE JUDGES

The gradual liberalisation of the Indian economy over the last two decades had profound implications for the legal system. There are around 12,000 courts – one Supreme Court, 25 High Courts, 3,150 District Level Courts, 4,816 Munsif/Magistrate Courts and 1,964 Magistrate II and equivalent Courts. As of September, 2021 there are 65,000 cases pending in the Supreme Court alone and 60 lakh cases are pending with the various High Courts. A judicial reform framework primarily needs to target District and Subordinate Courts, because these are usually the trial courts. To add to the court system, there are tribunals and other quasi-judicial forums like the Lok Adalats, Fast Track Courts, ADR mechanisms, etc.

Training is common to most assistance projects because it is required to transfer new skills, procedures, and technologies. Training has also been necessary because judicial personnel often lack the knowledge and skills for their existing jobs. Its introduction and institutionalization are often an end as well as a means of reform. Although the idea is novel even in the developed world, a modern judiciary requires training as a permanent function.

Regardless of its form, development and cultural context, a judicial training program is normally intended to improve judicial performance by:

- Preparing newly appointed judges for their duties.
- Guaranteeing greater uniformity and predictability of decisions.
- Up-dating judges in new methods, laws, and related areas of knowledge required in their work.
- Better screening methods of candidates to the judiciary.

While generally not used to this end in common law systems, successful completion of entry level training may be used to screen other judicial professionals and support staff. In reform programs, training may have additional purposes:

- To introduce new methods and practices
- To introduce new values, outlooks, and attitudes
- To identify problems which may have to be resolved by other reform interventions
- To build solidarity and a sense of common purpose.

There are still other reasons for the popularity of the training program which have little to do with any of these functions. Training may be long term or short term, full time or part time; on-site or off-site**;** voluntary or compulsory; utilize specialized trainers, outside experts, or peers; use classical lectures or more participatory methods; and focus on single occupational groups or mix them. Content may include general legal knowledge, specific legal skills,

non-legal skills and knowledge, or attitudes and values. The choice of alternatives theoretically corresponds to an objective appraisal of their relative merits, available resources and existing needs. In reality, it is often set by cultural or contextual factors, or sometimes by a failure to envision the options.

It is often forgotten that a training program is like any other development intervention. It should respond to a concrete problem, be based on a needs assessment, have specific objectives which determine actions to be taken, and be subject to periodic evaluation. One of the largest obstacles to effective program design is a premature determination of need; training is identified as a solution before the problem is adequately understood. This leads to an inadequate or inappropriate statement of objectives, complicates program design, and makes impact evaluation nearly impossible.

Training advisors and some judges turned trainers have produced a series of manuals and studies on the dynamics of learning, learning styles, practical advice for trainers, and educational strategies. Although like the needs assessments, this sometimes seems to over technical to common sense. However, much of it is useful and should be required reading for program instructors and designers.

First, even practitioners drafted into teaching courses, often display their professorial hats in the classroom. A greater familiarity with the lecture giving modality is hard to overcome, especially where it coincides with student expectations. Second, participatory, practically oriented techniques require more work from students as well as instructors. Students' lack of other basic skills, most notably an ability to read critically and analytically, or their simple failure to read assigned texts before the class, also worked against the new methods. Finally, a tendency to use a variety of instructors, often for short periods, whatever its other benefits, has impeded methodological innovation. This is especially true where the invited instructors are prominent jurists who feel no need for further lessons on how to lecture in a class. Even those who are receptive to the new methods will require more than a few hours briefing. Thus, although most programs have attempted innovative teaching techniques, observation of courses suggests that traditional methods still prevail. However, that does not mean that the efforts are abandoned, but rather it success is hardly noticed.

Concern with the inadequate impact of training programs has led to other types of methodological experimentation. Classroom training, even under the best circumstances, can be expected to have a limited and diminishing effect on behaviour. On-site training can complement or substitute for formal classroom methods. It may involve decentralizing the classroom approach or introduce a variety of less formal techniques. Most of the experiments combine training with other reform interventions. While they demonstrate a more immediate and potentially lasting impact on participants' behaviour, they are costly and difficult to replicate on a large scale.

One way of re-enforcing classroom training is the use of sequenced courses. This approach allows participants to apply their lessons on the job and bring

their questions back to the classroom. While not necessarily less expensive than long term programs, it can avoid the added cost of hiring substitutes for the officials in training. It also is less likely to overtax students' capacity to absorb new information. The obvious problems may be hard to get participants or instructors back for the next course in the series. It is not uncommon for relatively inexperienced trainers, and especially those unfamiliar with the judicial environment, to design extremely complicated schemes requiring extraordinary and probably unrealistic levels of cooperation and organization from institutional partners. One option is the use of course modules which can be taken at the students' convenience, in no particular sequence.

Whether because of self-selection or the effects of a less formal environment, the instructor/advisors tend to become members of a team, inviting discussion of ideas and relying less on their professorial authority. Different learning styles have to be respected because otherwise, practical exercises will not work in effective manner. How many of these new practices are transferred back to formal training environments is debatable.

Better definition of training objectives and improved teaching methodology increase the impact of training programs, in the sense that participants better understand and are able to apply new knowledge and skills. However, a further obstacle remains -- the continued presence of an institutional and extra-institutional environment which does not encourage new behaviours. Lack of equipment, abysmally low salaries, and promotion systems based on political and personal contacts also discourage improved behaviour. Many complaints about training failures might as well be directed at these other elements, and at the fact that training programs are usually working with a less than adequate human resource base. There is another kind of training which deserves to be mentioned, since it is also widely used – seminars or courses, usually held regionally or sub-regionally, in which a select few representatives of various institutions are invited to participate. All these methods of training enable the better performance of the persons associated either directly or indirectly to the judiciary, hence enabling reform in the judicial sphere.

Check Your Progress-2

1. *Write in brief how does training enable a judge to bring about judicial reforms*

18.6 WOMEN CENTRIC JUDICIAL REFORMS

Equal rights and right against discrimination guaranteed under the Indian Constitution for every Indian Women have been brought into effect and

facilitated through legislations. Legislation based on equality are essential in transforming the values of society, its working mechanics and perceptions, access to education, healthcare and justice for women, who form half the population of the nation.

The modern era has seen expansion of women's participation in the public sphere. More and more women have taken up their positions in the workforce and are engaged in business enterprises, banking, trade, international forums, multi-national careers like advertising and fashion, and have proved their mantle with aplomb as legislators, bureaucrats, judges, lawyers, doctors, engineers, accountants etc. Women seek powerful laws and legislations to be able to contribute as strong stakeholders in nation building.

Few of the approaches to necessary to make justice systems work for women are as follows:

- Support women's legal organizations – Where government funded legal aid is limited, women's organizations step in to provide the advice and support that women need to pursue a legal case, to put a stop to violence, to seek a divorce or claim the land that is rightfully theirs. Women's organizations have also spearheaded law reform efforts and strategic litigation cases that have transformed the landscape for women's rights nationally, regionally and internationally. These cases, including those on violence against women, sexual and reproductive health, citizenship and inheritance have enforced or clarified laws already on the books, challenged laws that should be repealed and created new laws to fill legislative gaps.
- Specialized services to reduce weakening of the justice chain – One way to reduce the downfall, especially in cases of violence against women is to invest in one-stop shops, which bring together vital services under one roof to collect forensic evidence, provide legal advice, health care and other support.
- Implement gender-sensitive law reform – Gender-sensitive law reform is the foundation for women's access to justice. Action is needed to repeal laws that explicitly discriminate against women; to extend the rule of law to protect women in the private domain, including from domestic violence; and to address the actual impact of laws on women's lives.
- Use quotas to boost the number of women legislators – In countries where women's representation in parliament increases substantially, it is often accompanied by new laws that advance women's rights. Where women have organized, sometimes across party lines, to ensure women's interests are represented, change has followed.
- Put women on the front line of law enforcement – Employing women on the front line of justice service delivery can help to increase women's access to justice. Data show that there is a correlation between the presence of women police officers and reporting of sexual assault. Despite these benefits, women's average representation in the police does not exceed 13 percent in any region of the world.

- Train judges and monitor decisions – Balanced, well-informed and unbiased judicial decision-making is an essential part of ensuring that women who go to court get justice. However, even where laws are in place to guarantee women's rights, they are not always properly or fairly applied by judges. Organizations like the International Association of Women Judges and the Indian NGO Sakshi provide judges, both women and men, with specialized training and space to discuss the challenges they face, which can help to build understanding of and commitment to gender equality.

- Increase women's access to courts – Courts and other justice forums such as truth commissions must be made more accessible to women. The only way to guarantee this is to ensure that women play a central part in defining the scope, remit and design of all post-conflict justice mechanisms. Measures that make a difference include financial assistance, childcare and transport to help women overcome the practical obstacles to their participation; psychosocial counselling, health care and other long-term support; and provision of closed session hearings to enable women to testify about sexual violence.

Following are the significant leaps of the current government in legal reforms for women:

- **The Maternity Benefit (Amendment) Act, 2017 (Maternity Amendment) –** This Amendment extends paid maternity leave for women employees with less than two surviving children to twenty-six weeks. A maximum of eight weeks can be taken before the expected delivery date and the remaining after childbirth. Women expecting their third child were also provided with the right to take twelve weeks of paid maternity leave—six weeks before childbirth and six after. There are provisions for work from home after completing twenty-six weeks of leave subject to their work profiles and the employer's consent. The Maternity Amendment also mandates establishments employing 50 or more employees to have a child care centre which is required to have prescribed facilities and amenities. Women employees have a right to visit the crèche four times a day, including during their rest interval. The crèche facility shall allow the mother to care for child even at work.

- **The Criminal Law Amendment Act, 2018 –** The Government has taken a firm stance on making anti rape laws more stringent by levelling the Criminal Law Amendment Act, 2018 in response to barbaric incidents of rape against girl child. Through this Amendment, firstly the quantum of punishment has been increased from a minimum of seven years to a minimum of ten years under section 376(1) of the Indian Penal Code, 1860. Secondly, punishment for rape on a woman less than sixteen years of age, where the quantum of punishment is rigorous imprisonment of a minimum twenty years which may extend to life imprisonment. Thirdly, punishment for rape on a woman less than twelve years of age, where the punishment is defined as a minimum twenty years rigorous imprisonment which may extend to imprisonment for life-or-death penalty. Moreover, Section 376DA and 376DB have been added by the

amendment which deals with punishment for gang rape on a woman less than sixteen years and twelve years respectively. The punishment in such cases has to be invariably imprisonment of life. However, for gang rape on a woman less than twelve years of age death penalty can also be awarded. The Criminal Procedure Code, 1973 has been amended to provide for speedy trial and investigation. The amendment has mandated that investigation has to mandatorily be completed within two months and the appeal in rape cases has to be disposed within six months.

- **Muslim Women (Protection of Rights on Marriage) Act, 2019 –** The Government and the apex court of India have always been dedicated to protect the rights of married Muslim women and ensure gender equality by making provision for justice for Muslim women who become homeless and destitute overnight due to practice of 'triple talaq' or 'talaq-e-biddat' or 'instant talaq' for a very long time. In view of the Supreme Court judgment in the case of Shayara Bano and others V. Union of India and others declaring 'Triple Talaq' as unconstitutional, the government of India legislated Muslim Women (Protection of Rights on Marriage) Act, 2019, declaring practice of 'triple talaq' as void and illegal. This legislation is a celebrated endeavour of the Government of India with the aim to banish the practice of 'triple talaq', which is against the spirit of constitution and most importantly is unjust and inhuman.
- **Increased Take Home Pay for Women in Formal Sector -** The Finance Ministry in the Budget of 2018 announced to incentivize employment of more women in the formal sector and to enable higher take-home wages, amendments in the Employees Provident Fund and Miscellaneous Provisions Act, 1952 was made to reduce women employees' contribution to 8% for first three years of their employment against existing rate of 12% or 10% with no change in employers' contribution. The government of India has taken big steps in reforming laws to ensure welfare, security, benefit of women and facilitate women friendly work environment with the aim to eliminate gender-based discrimination, one of the fundamentals of the Constitution of India.

18.7 LET US SUM UP

In this unit, we learnt about the Legal reforms include (1) statutory reforms i.e., removing the old laws and unifying and bringing into force new progressive laws; (2) administrative law reforms including subordinate legislation in the form of rules, orders, regulations and instructions from ministries and government departments; (3) judicial reforms, though faster dispute resolution. Police play a very important role in judicial system. Police reforms aim to transform the values, culture, policies and practices of police organizations. Lawyers play a very important role in judicial reforms. Judges are the back bone of judiciary. Their proper training would result in attaining judicial reform. Judicial reform in the women sector is gaining momentum in the present-day society. More and more women are moving out of their homes and getting into work places, holding high positions in the society and being independent. In order to encourage women participation in taking

major decisions in the society, their participation in the parliamentary sessions, police force and judiciary plays an important role particularly in upbringing the position of women in the society as well as in developing the society as a whole.

18.8 UNIT END QUESTIONS

1) Explain judicial reforms and its impact in judicial system.
2) Elucidate the importance of police in bringing about judicial reforms.
3) Determine the role of lawyers in enabling reforms in the judicial sector.
4) What are the various methodologies adopted while training a judge?

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UNIT 19 WOMEN IN CONFLICT WITH LAW

Structure

19.1 INTRODUCTION

In BGS-012, Unit-8, you have already studied about women in the institutions with reference to women prisoners. In 1960s Hindi film, called *Bandini* (the imprisoned one), the protagonist is a young woman in prison for the purported murder of the wife of a revolutionary, whom she was in love with. The film, was unique because it chronicled the lives of women in prison, an association that we still find jarring. Women's relationship with crime has often been conceptualized as victims, with women rarely associated with criminality in the popular mind. However, we see a trend in the increasing number of women encountering the criminal justice system as suspects, offenders and prisoners. Statistics show that the percentage of women in prison has grown globally at a faster rate than men. In a context, where criminal justice systems have been designed for/of/by men, the specificities of the experiences of women within it are seldom taken account of. The systems are often ill-equipped to address the gendered nature of the problems faced by women who come in conflict with law. In this context, the present unit tries to explore the broad question of women in conflict with law. Apart from understanding in brief, what are some of the processes which hinder women's access to justice, this unit will seek to understand if female offenders are treated differently, if gender has an impact on conviction and sentencing patterns and policies, is the nature of crime itself gendered, what is the gendered nature of the experience of the various aspects of the criminal justice system, from the police station to the courts, to prisons and systems of correction and probation. We will also try to complicate the understanding of women in conflict with law, by problematizing the notion of criminal and criminality, and how often those who are marginalized are more likely to be stigmatized as criminals and seen to be in conflict with law. Through an

exploration of these experiences, we will try to understand whether a more fundamental change is needed than merely reforming criminal justice system and proceedings.

19.2 LEARNING OUTCOMES

After studying the unit, you should be able to:

- Learn why it is important to think of gender as a category of analysis while thinking about the criminal justice system
- Understand the specificities of the experiences of women in conflict with law
- Engage with the possible pathways of mitigation of the gendered experiences and pathways
- Critically analyze the perspectives on women in conflict with law

19.3 UNDERSTANDING THE SPECIFICITIES OF WOMEN IN CONFLICT WITH LAW

Studies on women who are found to be in conflict with law, in terms of suspects, offenders and prisoners suggests that there are specific gendered pathways to how women come to be so, which are distinctive from men. These include for instance, histories of violence and abuse prior to the commitment of the crime, commission of crime due to coercion or influence by an abuser or a powerful person, often men; abortion or attempt to abort in countries where abortion is illegal or severely restricted etc. Studies from India (Sadiq, 2022) point out that most crimes committed by women are linked to family, either of a family member, or for the family. In the first case, their offence severs the already tenuous bond they have with families, in the latter the families are too poor, uneducated or helpless. This results in women having no family and social support and languishing in prison for extended periods of time, marked by deprivation of several humane considerations.

In addition to this, women often come in conflict with law the commission of "moral" crimes such as adultery; running away to escape violence; being held in prison for protection purposes (protective custody or detention); long periods of pretrial, immigration and/or refugee detention; and human trafficking. In these contexts, the charges against women tend to be in relation to minor and non-violent offences, which do not pose a risk to the public.

In the context of neoliberalism, where migration for work and livelihood has increasingly become a necessity for large populations, migrant and/or trafficked women come in conflict with law, especially in a context where immigration regimes in the first world are becoming more and more rigid and legal migration becoming difficult. In India, for instance, Bangladeshi women who cross into India for work and livelihoods are termed "illegal migrants" and face prison and deportation. Women in some countries also

come in conflict with law due to their sexual orientation and gender identity if diverse sexual and gender identities remain criminalized. Apart from this, women are in prison as 'political' prisoners, for their opposition to the present state regimes. In India, we have a long history of women 'political' prisoners, right from the freedom struggle to those women who opposed the imposition of the internal emergency in 1975 to the present era.

Check Your Progress-1

1) What can you say about the specificity of the women political prisoners and their experience of the prison ?

2) Write your understanding on gender,law and prisons based on any of your favourite movies or novels.

It is important to note that convicted women have been represented as essentially different from their more numerous male counter-parts. Men who commit transgressions which are seen as punishable by the state are labelled as social deviants. However masculine criminality is seen as more 'normal' than feminine criminality. This leads to a tendency to regard 'criminal' women as significantly more aberrant and more threatening to society as compared to their male counterparts. Scholars also point out that women have been routinely subjected to forms of punishment that have not been acknowledged as such, for example women have been committed to psychiatric institutions in far greater numbers than in prisons. Studies indicate that if jails and prisons have been the dominant institutions for the control of men, mental institutions serve a similar purpose for women. Deviant men are more likely to be constructed as criminal, while deviant women are more likely to be seen as insane. In other contexts, women prisoners are represented as extraordinary, grotesque and demonic, having not only committed a criminal act, but transgressed moral normative boundaries as well. The female criminal is seen to have brought dishonour to her family and community, and 'honour' becomes the framework through which even the criminal justice system perceives her (Bandopadhyay and Mehta, 2022). In the Indian context, it has been argued that women prisoners in India are caught in the invisibilization/memorialization paradox, wherein they are often seen either as extraordinarily dangerous criminals or messiahs. This construction informs regimes of women's prisons even in the contemporary period.

Thus, it becomes important to study how prisons and the state act as extensions of the family and community while dealing with women in conflict with law. One of the ways this is done is by invisiblizing women, seeing them merely as accomplices of men. This also means that when women and men are case partners, women are often given less information about the status of the case and the legal strategies to be used. Feminists have therefore argued that crimes committed by women may be seen as responses to patriarchal violence and the kinds of circumstances women face in their private sphere. It can therefore be seen as resistance to the controls imposed on them by family and society.

Whether we agree with this feminist assessment or not, it is important to note that women as much as men are entitled to access justice as a fundamental right, whether they are merely suspects, arrested or convicted for a crime. We therefore would have to review the entire structure of the criminal justice system, right from legislation to sentencing policies to prison infrastructure to policies and programmes for rehabilitation and reducing recidivism. Let us look at some of the challenges faced by women in conflict with law.

19.4 GENDERED EXPERIENCES OF THE CRIMINAL JUSTICE SYSTEM

If we begin by looking at the possibility of prevention of crime as the first step in the criminal justice system, it has been observed that crime prevention policies, often do not consider the unique experiences of women, including victimization, which might lead to criminality. Apart from this, certain laws might only criminalize women.

At the point of the first contact with the criminal justice system, women might be more vulnerable due to lower educational levels, less knowledge of law and their rights etc. Women with children are especially vulnerable in the context of arrest. Legal aid is usually not available at this point and women from poor and vulnerable backgrounds would find it difficult to navigate.

When the crime is being investigated, most investigating officers tend to be men, with little or not training in gender sensitization. In fact, in India, after cases of custodial rapes and strong protests by the women's movements, procedures were established to mandate the presence of women police officers when a woman was being arrested or interrogated. Apart from this, all suspects are vulnerable to coercion and use of force to extract confessions at this stage. Women, especially illiterate or poor women, with little or no legal help are especially vulnerable to signing coerced confessions.

Intersectionality and vulnerability of women in conflict with law: The case of Jo Anne Little

In 1974, a white, male jailer named Clarence Ali good was found dead in the cell of a missing prisoner in Beaufort County, North Carolina. This prisoner, called Jo Ann Little, was black and the only woman in the otherwise all-male jail. When she surrendered, Little argued that she had killed him in self-defense. His body was found naked from waist down and stabbed with an ice-pick he kept in his desk drawer. She had been assigned into an all-male prison with no female guards and no other female prisoners. As Davis shows, her life even before the day she murdered her jailer as he tried to sexually assault her, had been one of routine sexual exploitation. She was to be transferred into a female prison, but that never happened. She was afforded no privacy, even to go to the toilet or change her clothes as a camera was continuously trained on her cell. When she tried using sheets to block the camera's view, they were taken away from her.

Angela Davis argues that Little's gender and race identities intersected to produce a particular vulnerability for her in the prison setting. She also argues that the criminal justice system in America convicts and imprisons a disproportionate number of blacks and hispanics. In her paper, the dialectics of rape, Davis shows us how the entire perception of what amounts to rape or sexual assault is constructed through in intersection of race, class and gender. She argues that conviction in cases of rape is determined by which of the two racialized myths of rape the judge believes in: that black men are rapists or black women are 'loose'. She shows us that conviction rates are high in cases where the victim is white and the accused is black, whereas they are negligible when the victim is black and the accused is a white man. Thus, her account not only points to the linkages between social location and experience of the prison, but also of how criminality itself is understood.

In the under-trial phase, women are vulnerable to sexual and other abuse in the prison. The back-log of cases in courts results in long periods of detention, awaiting trial. Jails are over-crowded, under-resourced and under-staffed leading to humiliating and degrading life, robbed of dignity for under-trial prisoners. Most often, it is prisoners coming from vulnerable and marginalized groups who remain in under-trial jails for a long time, not having access to effective legal representation and resources for bail etc. Women, especially, since they are not perceived as bread-winners and always extraneous and dispensable to the family, are especially vulnerable to languishing in jail for long periods of time, awaiting trial. Studies from India (Dhanuka, 2022), describe the extent of the vulnerability, in terms of sexual violence, impoverished lives, stigma and isolation faced by pre-trial women detainees. Scholars argue that this detention is a human rights violation and an expression of the nexus of related abuses and ill-effects, which include torture, corruption, disease and stunted economic development. Excessive pre-trial detention for women, challenges in getting bail and their estrangement from family and other support structures, once again points to the collusion between institutional spaces of care like the family and state custodial institutions like the prison. In case women are found guilty and

sentenced to prison, they undergo gendered experiences there too. Studies on female prisons throughout the world indicate that sexual abuse is an abiding, but unacknowledged form of punishment to which women prisoners are routinely subjected. Pregnant women or women with children face special challenges, with health care and educational needs of children often un-met. They face rejection from family, and as compared to male prisoners often find it challenging to reunite and be restored into their families after release. While in prison, they face difficult circumstances of over-crowded surroundings, everyday humiliation by prison staff and other difficulties.

In order to understand the gendered experience of the prison, it is important to understand the overall structure. The structure of the prison is intended to control the prisoner population. Practices like regular attendance, the classification of prisoners and their subsequent lodging accordingly, rigid routine, strict regulations over the use of space, regimentation of the body in terms of mobility and interactions are aimed at achieving this. These are geared towards maintaining a logic of order, control, discipline and punishment. Therefore, it has been argued that "space and time are thus both under surveillance" (Bandopadhyay and Mehta, 2022).

All this creates a semblance of order, wherein the "ideal" prisoner is constructed as docile, adhering to diktats and submissive. This sense of order, however, hides the extent to which violence is inimical to the maintenance of this façade. The ever-present threat of violence and its regular occurrence are used to maintain conformity among prisoners. This violence takes many forms. On the one hand, the very logic of retribution, punishment and deterrence demands that the system deal with offenders with severity and strictness. For prison staff to use physical violence and force to keep prisoners disciplined, is thus, perceived to be "normal". On the other hand, the scarcity of resources and inadequate infrastructural facilities in prisons across the world and mean a relationship of conflict and competition between the prisoners themselves, who are forced to face-off each other for laying claims over basic necessities. This situation then 'necessitates' further violence on part of the prison authorities, purportedly to maintain "peace". The routinization of strip search and cavity searches for prisoners, normalizes a highly humiliating and degrading practice under the rubric of maintaining prison 'discipline'.Apart from this, the very structure of the prison means a life of indignity for the prisoners. These issues become even more severe for women prisoners, since prisons historically have been built for men, meaning women's prisons are more crowded and have even lesser resources and infrastructure. Since prison systems are almost always under-staffed, they rely on the practice of using prisoners to keep an eye on and maintain order among other prisoners. This further legitimizes the use of force and brings into question how intersections of community, caste and class further aggravate already existing hierarchies between prisoners (Bandopadhyay and Mehta, 2022).

Spatial organization and access to space are ways of disciplining the female body within the prison. This is done primarily through making women prisoners enclosures further fortified and by practices of governing women

prisoners, who are anyways marginal to the organization of prison practice. In India, women prisoners account for around five percent of the total prison population and are therefore not present in the imagination and designing of the prison structure. In many prisons, women's barracks are often added on, as an after-thought and face severe neglect. They are often 'prison within prison', spatially a smaller area carved out from the male prison, thus, isolating female prisoners. The discourse of their "protection" takes the form of sinister and disproportionate security and surveillance. Studies from Indian prisons also suggest that while violation of rules by men prisoners is normalized, similar infractions by women are seen to be severe and antithetical to maintaining of power. While the prison staff approaches men prisoners with a certain amount of caution due to the possible moments of inversion of power, such possibilities were not seen with women prisoners.

Check your Progress 2

1) Why is it important to review the structure of the criminal justice system when thinking about women in conflict?

19.5 CRIMINAL JUSTICE REFORM: WHAT CAN BE DONE?

The unique vulnerabilities of women under-trial detainees, calls for a number of changes in law and the existing policy frameworks with respect to women's imprisonment to ensure a rights-based perspective and address the gendered particular vulnerabilities that they face (Dhanuka, 2022). Though international law provides several binding and non-binding frameworks for a more humane and rights-based perspective on women in conflict with law, much of these frameworks remain only in theory. These include measures to respond to the gender-specific needs of women as suspects, under-trials, detainees and prisoners. These include the Bangkok rules, as well as specific articles in the CEDAW among others. Therefore, there is an urgent need to bring national legislation and policies in tune with these frameworks to ensure dignified experiences of the criminal justice system for women. This could include exploring and instituting of non-custodial options for women, especially those who have children and strengthening legal aid resources to address the needs of fair legal representation for vulnerable and marginalized women.

Apart from this, bringing about changes in the legal framework making it more consistent with human rights framework would benefit women too. For instance, there is an urgent need to abolish the death penalty, to reform and rethink several sedition laws which criminalize dissent, abolish laws like the AFSPA and others, which put entire populations in a state of siege by marking them as 'disturbed' areas and giving unprecedented powers to state apparatus to deal with "emergency" situations. Institutionalization of legal aid as a constitutional right would enable everyone, including women to get fair trial and legal representation. Strengthening of constitutional bodies that keep checks on the criminal justice system and creating such bodies if they don't exist is also an important step. A reform and rethinking in these frameworks would have enabling impact on women in conflict with law as well.

The Armed Forces (Special Powers) Act (AFSPA) allows the military extra-ordinary powers for controlling the situation in "disturbed" areas, usually those seen to be affected by militancy/separatist struggles. The AFSPA allows for combing operations, search and seizure, arrest without warrant and open firing with legal immunity for the armed forces operating within 'disturbed' areas. It also gives all security personnel the power to shoot anyone merely on the basis of suspicion. Over the last three decades, almost every state of North-east India has been under AFSPA for long periods of time.

The case of Thangjam Manorama Devi illustrates why it is important to rethink and revoke laws like the AFSPA. On 11th July 2004, Manorama was arrested for being "a suspected insurgent, explosives expert and a hard-core member" of the People's Liberation Army (PLA), a banned outfit. Three hours later, she was found dead, having been sexually assaulted and shot. This incident led to wide-spread protests in Manipur, including the now-famous naked protest. 15 middle-aged women, protested naked in front of the gates of Kangla Fort, head-quarters of the 17 assam Rifles in Imphal, shouting "Indian Army, Rape Us!" Even after concerted struggle, the AFSPA was not revoked, though it was suspended in selected districts.

The presence of laws like this allows for a circumvention of due process and violation of human rights of citizens. Women are especially vulnerable to sexual violence in the contest of such extra-lawful detention and confinement. Once branded as being 'in conflict with law', women become vulnerable to the unmitigated powers of the state. The immunity granted under AFSPA has meant that security and armed personnel are not liable for any criminal act committed in the line of "duty". Women, young girls and female members of insurgents' families are often deliberately targeted by the forces in their attempt to extract information on militant activity. Sexual assault becomes a common weapon, commonly used. However, since sexual assault in the line of duty cannot be justified, the State has consistently taken the route of denying that it has occurred.

There is also a need to re-examine discriminatory laws, which might define criminality in gendered ways. This should be done both at the level of legislation and procedure. For instance, in June 2022, the US Supreme Court has overturned Roe v/s Wade which safeguarded abortion rights. This means that states in the US can now legislate to ban abortion or make it illegal to seek one, very early on in the pregnancy. At least 17 states already have a draft law in place which will be tabled now that the constitutional safeguard for abortion rights has been overturned. This would make seeking or getting an abortion illegal, beyond some extremely restrictive conditionalities. This would open the doors for many more women to be marked as criminal. These kinds of discriminatory laws therefore need to be reconsidered. This would require a massive effort from women's rights movements. Due to the stigma associated with criminality, we see that women in conflict with law have remained at the margins of women's rights and movements work. There is an urgent need therefore for women's movements to engage with issues of women in conflict with law. Experiences of administrators and those in charge of prison governance, also show that when they reflect on the existing policies, laws and practices, they also narrate experiencing a sense of powerlessness within the structure of the prison as it exists to realize any humane practices they might have envisaged. This then means that we need to rethink and redesign prisons as a whole, maybe even the need for their existence. A Conflict perspective on prisons, advocates for prison abolition, arguing that prisons do more harm than good.

Check your Progress -3

1) Why is it important to reflect on the future of prisons?

19.6 CONFLICT PERSPECTIVE ON WOMEN IN CONFLICT WITH LAW

In most societies, it is taken for granted that prisons are an inevitable part of our lives. We assume that people convicted of serious crimes, must be incarcerated or imprisoned and in countries like India, where the death penalty still stands, that those who have committed more serious and heinous crimes must be legally put to death. When we talk of prisons and of the gendered experience of the criminal justice system, most efforts are aimed at an amelioration of prison conditions, making police systems inclusive and courts more accessible. However, a radical perspective on issues of the criminal justice system advocates for prison abolition. This prison abolitionist perspective seeks to draw our attention to the large number of people living in prisons, reformatories and detention centres in the world today and how in almost all contexts, racially and ethnically marginalized populations are over-represented in prison. They push us to ask questions about the efficacy of

prisons as deterrent against crime, and whether higher rates of incarceration have any impact of lowering crime rates.

In America, anti-prison activists like Angela Davis, argue that we need to talk of a 'prison industrial complex' due to the extent to which prison building and operations has attracted vast amounts of capital, from construction industry, to food and health care provision. This increased corporate involvement is tied to the expansion of the U.S. prison system and needs to be looked at critically. It has also been argued that much of modern law is born out of the capitalist system and makes sense only in the context of accepting the principle of private property as absolute. So, theft as a crime, only makes sense in the context of a capitalist system, which values private property over all human beings' right to food or clothing for instance. Historically, as capitalism comes up, homelessness, poverty come to be coded as vagrancy and criminalized. Instead of thinking about a more just and equal society, the prison system seeks to control "unruly" populations through incarceration and imprisonment. There has therefore been a call to abolish prisons and think of other ways to address criminality.

From another context, Bandopadhyay and Mehta (2022) argue that "women prisoners articulate the feminist idea of reading the political in the personal in multiple ways: by challenging their roles in the intimate institutions, by disrupting the binaries of public and private, by telling and retelling the experiences of embodied violence in the spaces of custody and care and by using both the public and private domains to articulate a discourse of women's rights" (Bandopadhyay and Mehta, 2022:15). Thus, the future of thinking about the prison system and of women in conflict with law is to move towards prison abolition and think of radical new ways of justice, which include restorative and rehabilitative justice principles and community-based justice systems. In addition to this, it is important to rethink the notions of criminality and understanding the system which renders the poor, homeless, vulnerable and criminal.

19.7 LET US SUM IT UP

In this unit, we examined the way in which the criminal justice system is designed with men as the centre, making the experiences of women either outliers or completely overlooked. The system either treats women in conflict with law as exotic 'others' or invisibilizes their smaller numbers through a gender-neutral approach. Both these have negative implications for women, at all stages of their interaction with the system. The chapter therefore established initially how women come in conflict with law and why it is important to think of them differently. Further, we examined the gendered experience of the system and what are some of the measures that can be taken to mitigate the adverse experiences women go through.

Finally, this chapter by focusing on women political prisoners, gendered laws and a conflict perspective on prisons and incarceration, argued that it is not enough to reform the system as it stands now, we need a thorough rethinking of law and legislation, as well as systems of justice which are focused on

adversarial law, incarceration and punishment as ways to deal with crime. Thus, it argued for a new perspective on law, justice, reformation and rehabilitation.

19.8 UNIT END EXERCISES

1) Why is it important to think of women in conflict with law specifically?
2) How is the experience of the criminal justice system gendered?
3) Enlist some of the ways in which the experience of the criminal justice system can be made better for women.
4) What does the prison abolition movement argue for?

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