

**INTERNATIONAL JOURNAL OF LEGAL ENFORCEMENT**

**ISSN: 2582 8894|UIA: AA1003/2020**



**Volume 1 Issue 2**

**|June 2021|**

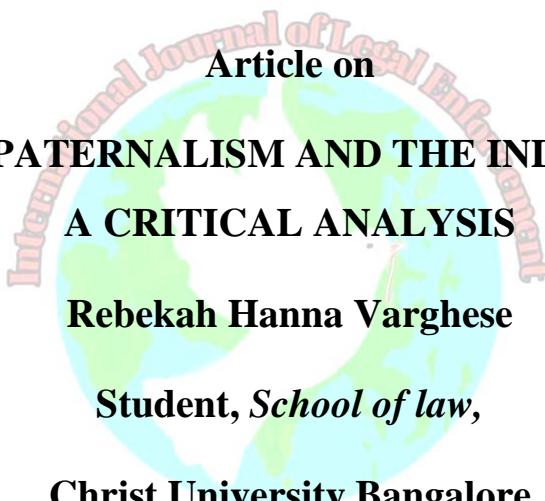
**Website: [www.internationaljournaloflegalenforcement-iile.com](http://www.internationaljournaloflegalenforcement-iile.com)**

**Email: [editorialboard.iile@gmail.com](mailto:editorialboard.iile@gmail.com)**

## **About Us**

International Journal of Legal Enforcement is an online peer review journal dedicated to express views on legal and socio legal aspects. This platform also shall ignite the initiative of the young students. We do not charge any publication charge for online publications. We process to bring out the analysis and thoughts of every socio legal and legal matters from the young powerful minds. With this thought we hereby present you, International Journal of Legal Enforcement.

**“Dharma is to protect the Needy”**



Article on

**PATRIARCHY, PATERNALISM AND THE INDIAN JUDICIARY:  
A CRITICAL ANALYSIS**

**Rebekah Hanna Varghese**

**Student, *School of law,***

**Christ University Bangalore**

### **Abstract**

This paper focuses on how the Indian judiciary often perpetuates gender inequality by adopting patriarchal and paternalistic approaches. Judicial decisions have a substantial impact on public opinion and attitudes. Considering this the courts in India must disassociate itself from regressive socio-cultural norms and focus on Gender justice. A critical analysis of several judgements has revealed that courts often engage in such problematic approaches that indicate an indifference and lack of understanding of the gender implications of its reasoning. By creating room for misogynistic social notions in the legal system Indian courts have in several instances subjected women to discrimination. Women have endured such discrimination in the form of character assassination in cases related to sexual assault, victim blaming and subordination in the relationships, among others. Paternalistic approaches undermine their autonomy and competence to make decisions in their self-interest. The paper discusses the juxtaposition of paternalistic and protectionist approaches and how courts in the guise of the other often engages in intervention and reasoning which depicts that perception they have of women and their capabilities. The 'weaker sex' perception the courts have restricts women from exercising their free will and liberty. State intervention into private matters such as marriage under a 'protectionist approach' illustrates this. 'Benevolent sexism' only further depicts this perception by providing women undue protection from their own decisions. Such approaches that perpetuate gender inequality must be avoided and the judiciary should work towards a more progressive understanding of what gender equality entails, recognize norms that discriminate by virtue of sex and rely on reasoning that has legal backing.

**Keywords:** Gender Equality, Patriarchy, Paternalism, Autonomy, Benevolent Sexism

## Introduction

The Indian society is one which is infamous for upholding many regressive socio-cultural norms that discriminate against women. Due to this its imperative that the legal system restricts the role of such norms in legal scenarios and work towards overturning them. The Indian courts have faced considerable criticism from those committed to the cause of women empowerment, that they have been unable to display an adequate understanding or sensitivity towards a social issue as important as gender justice. Article 15 of the Indian constitution states that no person shall be discriminated against on the basis of 'only sex' but in several instances, the judiciary has given undue consideration to misogynistic values of the society without bearing in mind the gender implications that they may have. The perception in such cases appears to be that as women are the 'weaker sex' or inferior sex it is reasonable for them to experience a level of scrutiny or additional protection that men don't. This paper critically analysis such instances by broadly classifying the discriminatory approaches of the judiciary into two, patriarchal and paternalistic and attempts to explain how they perpetuate gender inequality. The first section explores cases where the judiciary measures women against the patriarchal concept of an 'Ideal woman' while determining whether her legal rights in the respective cases have been violated. This includes decisions of courts in sexual abuse cases wherein the chastity and moral character of the victim is examined, family law cases in which the woman's identity is restricted to her role in familial equations. How patriarchal ideologies prevent courts from recognizing instances of discrimination in the workplace is also addressed. The second section deals with paternalistic approaches of the judiciary and how it undermines the competency of women to exercise autonomy in the different spheres of their lives. In custody cases, women are sometimes offered undue protection based on the gender roles they are presumed to perform. In criminal cases as well as other offences women are seen to be less of a threat to society than men and even in case of proved, willing participation in an offence the court has provided them with the defence of inherently (by virtue of sex) not having the ability to act prudently thus innocently falling prey to such involvement. How this benevolent sexism could discriminate against men is also briefly discussed.

## Patriarchy and the judiciary

Patriarchy and the judiciary have gone hand in hand in several instances of legal reasoning and interpretation. For a country such as India which has historically served the interest of women poorly, the legal system must operate in a manner that propagates gender equality. Despite this in several instances, the functioning of the courts in India have been such that disseminates and substantiates the age-old patriarchal norms of the Indian society.

Cases of rape and sexual assault are where this approach of the court is most prominent.  
<sup>1</sup>Recently the court in a case stated that the act of a woman of having fallen asleep after being raped was “unbecoming of a woman” and that this wasn’t how Indian women react to being ravished. Now, the conduct of a victim of any offence after the respective violation of legal rights is, arguably, relevant and cannot be completely dismissed. <sup>2</sup>Rape, however, is an offence that has not only physical but also extreme, varying psychological impact on the victim and in such a case the biological reaction of such an individual’s body is purely unpredictable. Additionally, even if there is no medical explanation for the woman having fallen asleep, the legal relevance of the court making such observations is questionable. The language adopted by courts when it comes to rape trials is also a derogatory and depicts the visceral regard given to the misogynistic attitudes prevalent in society. <sup>3</sup>In *Deepak Gulati V State of Haryana*, the court has stated that “rape reduces women to mere animals and shakes the very core of their life” the connotation here is an example of the many ways in which the judiciary considers rape as an attack over the morality of a woman. Paradoxically such observations of the courts which they believe will give offences of rape their due attention, in addition to doing so may cause more harm. <sup>4</sup>Radical feminist jurisprudence perceives rape as a “pillar of patriarchy” and for courts to conform to the idea that women whose sexuality has been violated, are indeed stripped of their personhood simply confirms this perception. Of course, rape is a brutal crime, that can deeply affect an individual however to make a public observation that it makes a woman less so, is once again counter-effective and makes no real contribution to the goal of gender justice. The aspect of character assassination in a sexual assault trial ensues greater debate on what the understanding of the Indian courts are when it comes to the sensitive topic of sexual assault and how little this understanding has evolved. Although section 54 of the Indian Evidence Act,

<sup>1</sup> Rakesh v state of Karnataka, Criminal Petition No. 2427 of 2020

<sup>2</sup> Lindsay Gorman, “Rape as Torture: Application of the U.S. Torture Statute to the Physical and Psychological Consequences of Rape and Sexual Violence on Victims”, 6 Stanford law school: Law and policy lab (2016)

<sup>3</sup> (2013) 7 SCC 675

<sup>4</sup> Feminist Perspectives on Rape, available at : <https://plato.stanford.edu/entries/feminism-rape/>

states that the character of a party to a case is irrelevant, unless it's a proof of good character, however the Indian courts seem to have self-imposed the function of classifying and stereotyping the character of a victim of sexual assault.<sup>5</sup> The supreme court, recently, accused a prosecutrix of being “*perverse*” and having a “*promiscuous attitude and voyeuristic mind*” due to their discovery of certain facts regarding her sexual and social conduct. Certain courts have also developed their own interpretation of consent and conditions for whether or not there was ‘adequate resistance’ on the part of victim when being assaulted. <sup>6</sup>For instance, the Delhi High Court observed that a “*feeble no*” did not qualify as not giving consent. Admittedly consent is a challenging aspect to determine but such interpretation of consent as being strictly attitudinal or performative poses as another challenge in the understanding of the judiciary of the very concept of rape. Consent when it comes to offences of sexual abuse cannot be perceived as something which can be indicated only physically or only mentally, it is a fluid concept that requires appropriate judicial interpretation as per that particular legal instance.<sup>7</sup>In another case, the same court pointed out that the responsibility of protecting their chastity is on the women themselves and this was how ‘good women’ behaved. <sup>8</sup>Even minors are not exempted from this patriarchal scrutiny, the supreme court declared a minor girl to be of ‘easy virtue’ when it was inferred from the medical report that she was habituated to sexual intercourse. The analysis of a court on where a victim of sexual assault stands on the spectrum of modesty established by the society has shown to have a considerable impact on these and many other such cases. Such norms are viewed by these courts as having adequate legal backing for formulating objective and rational, legal reasoning required for a judgement. The victims of sexual assault are assigned predetermined roles and based on this “*gendered performance*” they are deemed to be worthy of justice.

Another sphere of life where women face discrimination that violates their right to equality is at the workplace. Despite various policy and legislation related efforts, women continue to experience discrimination owing to their sex and here too there have been lapses in judgement by the judiciary, that have indicated a certain indifference to the goal of gender justice. <sup>9</sup>In *Air India V. Nergesh Meerza & Ors* the constitutional validity of the employment regulations of Air India in that they were violative of article 14 and 16 of the constitution. The

<sup>5</sup> *Vikas Garg & Others V State of Haryana* 2017, (4) RCR (CRIMINAL) 924

<sup>6</sup> *Mahmood Farooqui Vs. State (Govt. of NCT of Delhi)*, 2017 (4) RCR (Criminal) 491

<sup>7</sup> *Arif iqbal Imar V State*, (2009) 164 DLT 157

<sup>8</sup> *Musauddin v state of assam*, (2009) 14 SCC 541

<sup>9</sup> (1981) 4 SCC 335

concern was regarding the regulations as per which women had to retire at the age of 35, much lower than the age for men, or at marriage (if it took place four years within joining service) or first pregnancy whichever was earlier, while men were not subjected to any such conditions. The court however only partly modified the regulations and went on to state that the differentiation between air Hostesses and air Flight pursuers was a case of reasonable classification. Though the argument of the respondents that both air hostesses and flight pursuers had different functions was rejected by the court, this still failed to convince it that in this case, as stated in article 15, the discrimination was only owing to the sex of the employees and no other factors which in itself negates the possibility of this being a reasonable classification. It cannot be denied that women and men have patent differences in physicality and this may necessitate certain differentiation on the basis of sex such as in<sup>10</sup> *Mrs R.S Singh V state of Punjab* where the court upheld a rule prohibiting women from being appointed in men's jails excepts as matrons and clerks, based on the due consideration needed to be given to decency and public morality. Such classification is justified as a court cannot function only with the view to prioritise gender equality. It is just as essential to uphold the inherent values that society possesses which makes it civilised and orderly. This decision is ,however, completely different from the approach taken in the air India case where gender justice was disregarded.<sup>11</sup> The High court, in a decision later overturned by the supreme court, refused to interfere with the termination of an employee after her maternity leave despite termination evidently being due to her pregnancy, as was clear from the corporation's selection process which required prospective female employees to disclose private medical information relating to pregnancy, and menstruation which apart from being irrelevant to the actual employment capacity was also a violation of privacy under the guise of employment terms.. In the workplace women are subjected to classification and discrimination by employers who cannot distinguish between a woman's role in society as per cultural norms and in an establishment as an employee, the judiciary needs to strive to identify and rectify the many ways in which this is done.

Relationships are where the regressive gender roles of women are most evident and conflicts related to familial relationships reveal this. In <sup>12</sup>*Tirath Kaur V Kirpal Singh* the court dismissed an appeal against a petition for restitution of conjugal rights. The appellant had been

---

<sup>10</sup> AIR 1972 P H 117

<sup>11</sup> Mrs. Neera Mathur V Life insurance corporation, 1992 AIR 392

<sup>12</sup> AIR 1964 Punjab 28

living separately from her husband so that she could continue working but the husband demanded that by living away from him she was withdrawing from his society and that she must leave her job to come live with him once again. Here the appellant contended that it would be unjust to disallow a spouse from engaging in employment and that women should no longer be required to conform to age-old norms which required their subordination but the court stated that a husband could not be asked: “to content himself by visiting his wife whenever he wishes to live with her”. The case is an exemplary portrayal of the perception of courts of the role of women in family equations and how her prime responsibility is towards the various relationships that the society associates her identity with. Restitution of conjugal rights in itself is violative on the rights of both men and women but especially to women as they are the vulnerable gender. Though restitution of conjugal rights was rejected in *T Sareetha V V. Venkata Subbaiah* case<sup>13</sup>, this trend was not followed by other courts which upheld it without adequate consideration to the position of vulnerability that this puts women in nor the absolute intervention of the state into the privacy of individuals that this involves. In theory, of course, all the provision necessitates is cohabitation but from a practical perspective, it is important to acknowledge how this can be misused to abuse women, considering that there isn’t a provision for marital rape in the Indian penal code either. A Similar mindset of the court that expects the subordination of women is prevalent in a <sup>14</sup>*Harjinder Singh V Rajpal* wherein the supreme court asked the respondent “to behave properly” with her husband and aged mother and to not leave the company of her husband. Such statements are also a reflection of the high regard in which the judiciary holds gender roles which require women to be subservient and nurturing. The judiciary had even failed to declare the unconstitutionality of the adultery provision in India until the recent judgement in <sup>15</sup>*Joseph Shine V Union of India*. Even though the provision treated women as chattel belonging to their husbands having no identity or autonomy, in both <sup>16</sup>*Yusuf Abdul Aziz V State of Bombay* and <sup>17</sup>*Smt. Sowmithri Vishnu V Union of India* the respective courts failed to effectively recognize this discrimination and strike it down. In the former case, the court turned to the simplistic, reasonable classification route for reasoning the verdict while not addressing the implications the provision had on women’s right to equality, while in the latter it was stated that the law views adultery as “an offence against the sanctity matrimonial home”. Although the exact terminology applied is “matrimonial home” it is

<sup>13</sup> AIR 1983 AP 356

<sup>14</sup> MANU/SCOR/50024/2017

<sup>15</sup> (2019) 3 SCC 39

<sup>16</sup> 1954 AIR 321

<sup>17</sup> 1985 AIR 1618

evident that the punishment is for the offence committed against the exclusive right of a man over his wife. The cases mentioned above reveal how relationships are to this day often understood by the judiciary with consideration to regressive socio-cultural norms. When it comes to sexual abuse, rights of women in the workplace and relationships, the notion of an 'ideal Indian woman' is a factor that contributes to the verdict of a case. Violation of the fundamental right of equality often comes second to the norms that dictate whether a woman is entitled to such a privilege and the judiciary needs to work to disassociate itself from such patriarchal strings of reasoning.

### **Paternalism and the judiciary**

Gender inequality does not only include instances when women have to endure disadvantages due to their sex but also those instances when they receive undue advantages and their liberty is restricted under the guise of a protectionist approach. Judicial paternalism towards women simply reiterates the 'weaker sex' perception but in a manner that is portrayed to be arising out of genuine concern for their welfare. Now It has to be accepted that paternalism, unlike the patriarchal approach discussed previously, is not a completely prejudicial approach.<sup>18</sup> Being based on the principle "the need to prevent self-inflicted harm is a legitimizing reason for coercive legislation" the judiciary too has the discretion to uphold state intervention with individual autonomy when it is indispensable. There, however, exists a dichotomy between legal protection and legal paternalism. While protection doesn't lead to discrimination, legal paternalism is often used by courts to uphold the patriarchal notions of the Indian society and under the pretext of protecting a woman they undermine her competence and autonomy.

The perception in such cases seems to be that women are too inferior, emotional and dependent to be entrusted with the task of rational decision making.<sup>19</sup> In a recent case, the Kerala High Court held a marriage to be null and void on the ground that the bride's parents had neither given consent nor been present at the marriage. Although more serious allegations had been made by the petitioner that his daughter had been forced to convert to another religion, this was completely denied by her in court. Despite the woman's repeated admission in a court of law that she had not been forced into marriage nor religious conversion the court ignored

<sup>18</sup> Bijan Fateh-Moghadam and Thomas Gutmann, "Governing [through] Autonomy. The Moral and Legal Limits of "Soft Paternalism" ", 17 Ethical theory and moral practice 384 (2014)

<sup>19</sup> Asokan K.M V The Superintendent of police, MANU/KE/0604/2017

this fact and held a marriage between two consulting adults to be invalid. Here her liberty was restricted by undue state intervention.<sup>20</sup> J.S Mill in his work *On liberty* stated that the part of individuality that belongs to the society is that which “chiefly interests society”. The statement can be, broadly, interpreted to mean that in affairs of one’s private life that doesn’t affect the society, there is no need for the judiciary or state to intervene. This includes the decision to get married or to convert. As mentioned in the previous section of the paper, the courts had failed to recognize the voluntary involvement of a woman in, what was then, the offence of adultery and instead chose to consider her as having no capability to be held liable for her own actions. <sup>21</sup> In *state through CBI/SIT V Nalini* the dissenting judge opined that the accused woman should be exempted from the death sentence due to her inability to escape the conspiracy of the accused men because she belongs to the ‘weaker sex’. This specific case also illustrates how women are seen as less threatening to society than men. In all the above cases without explicitly stating so the court has discriminated against the women involved by subjecting their decisions to a kind of scrutiny that men do not have to encounter. The reasoning of the court seems to be based on the underlying assumption that by virtue of qualities that can be attributed to their gender, women are less capable of making decisions in their best interest, whether it be matters relating to marriage, adultery or even involvement in a criminal offence.

Paternalism is also often the route taken by courts to sustain and endorse gender roles of the Indian society. The general trend in custody cases is for the custody of a child to go to the mother.<sup>22</sup> The opinion of the court appears to be that “it’s the most natural thing for a child to be raised by the mother.”<sup>23</sup> The supreme court in a recent judgement stated that custody of a minor child would always be with mother unless there is a strong reason for the court to state otherwise. Such notions that it is comparatively more ideal for a child to be raised by a mother than the father again perpetuate the gender stereotype of all women being nurturing, ideal mothers and such an assumption may leave lesser scope for consideration of who is in a position to be a better parent. Although the court hasn’t specified what amounts to a concrete reason for the child to be raised by the father, such a precedent may not allow a wide discretion in the future while deciding a custody case. It cannot be denied that the biological relationship between a mother and child needs to be given due regard but the general stereotypes regarding

<sup>20</sup> J.S Mill, *On liberty*, 69 ( Dover publications Inc., United Kingdom, 2<sup>nd</sup> Edition, 2002)

<sup>21</sup> (1999) 5 SCC 253

<sup>22</sup> Chethana Ramatheertha V Kumar V. Jaghirdar, MANU/KA/0145/2003

<sup>23</sup> Roxann Sharma V Arun Sharma, AIR 2015 SC 2232

the maternal instincts and characteristics of women must not be given more weightage than a child's well-being. Such benevolent sexism may dissuade men from contending for custody of their children, even when such contention is justified.

<sup>24</sup>The reservation for women in clerical posts in the Indian railways was held to not be discrimination against men, however here the court failed to address that the basis on which this classification was done (the patience and courteousness of women unlike with the male employees) and its problematic nature. <sup>25</sup>Such perceptions only further “essentialised femininity”.

Endorsing gender roles via a paternalistic approach may even result in discrimination of men. Due to being perceived as the ‘superior gender’, instances where men’s rights are violated in favour of women receive less attention but the fact remains that any discrimination on the basis of ‘only sex’ is gender inequality, regardless of whether the discrimination is against men or women. The constitution provides specific provisions for women since they are in a further backward position than men but such empowerment must not be at the cost of the very principle that necessitates it. <sup>26</sup>In a case involving preference of female lecturers over male lecturers in women’s colleges, the court held that it was constitutional as this practice was the convention, however whether such a stance would be maintained by the court for a female lecturer being discriminated against for employment in a men’s college (with the same reasoning) is questionable. <sup>27</sup>In *Dattatraya Motiram v State of Bombay* it was held that while men could be discriminated against in favour of women, women could not be discriminated against in favour of men. In light of the oppression that women have been subjected to, such a precedent is necessary but such a principle must be cautiously applied to avoid unreasonable violation of men’s rights.

Through paternalistic reasoning, courts convince itself of the need to provide additional protection to women against any risk to their chastity and morality. Courts give a substantial amount of consideration to its self-imposed duty to safeguard the ‘honour’ of a woman. Such an approach is evident in ‘promise to marry’ cases where victims allege that the accused persuaded them to consummate the relationship by promising to marry them in the future but

<sup>24</sup> Charan Singh V Union of India, ILR 1979 Delhi 422

<sup>25</sup> Kalpana Kannabiran, “Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India”, 44 *Economic and political weekly* 91 (2009)

<sup>26</sup> State of Kerala V Kunhipacky, (1964) KLJ 832

<sup>27</sup> AIR 1953 Bom 311

later went back on this promised which made the previous intercourse rape.<sup>28</sup> The contention is usually that as the victim only agreed to intercourse based on a misconception of fact and that this vitiates the consent. In several such cases, the courts have accepted that this consent was not valid and the perception is that the naïve woman may not have been able to resist the persistence of the accused.<sup>29</sup> In other cases, if the prosecution can prove that the accused had never intended to marry the victim then he is liable to be convicted for the offence of rape. These reasons, however, are not adequate to constitute rape. Rape is a brutal crime and although the law has evolved enough to recognize the absence of resistance or submission does not amount consent, to classify even complete voluntary participation as lack of consent could prove detrimental. Though the victims in the above cases agreed to physical intercourse based on a misconception, the act in itself remains consensual. The accused are could be justifiably made liable to be punished for the breach of promise but a conviction for rape in such scenarios would be unjust protection of women.<sup>30</sup> “The rape laws should not be used to regulate intimate relationships, especially in cases where women have agency and are entering a relationship by choice”. Despite this, the protection of these women and disregard for their accountability suggests that the judiciary believes that these women have endured the great loss of their chastity and reputation in the society and ought to receive justice. The protection here is not of the women but the regressive norms that reduce them to their sexual conduct.

The problem with the paternalism approach is that whereas patriarchy can be outright condemned, paternalism is an indispensable approach and cannot be completely done away with. There are situations when the court has to assume a protective stance in gender-related issues which can be misconstrued as discriminatory to men however this is different to the benevolent sexism that excuses the criminal conduct or decisions of women purely on the grounds of sex.<sup>31</sup> This is “A romantic paternalism that relegated women to their own separate sphere and placed them on a pedestal that turned out to be a cage.”

<sup>28</sup> State of U.P v Naushad AIR 2014 SC 384

<sup>29</sup> Anurag Soni v state of Chhattisgarh, AIR 2019 SC 1857

<sup>30</sup> G.Achyut Kumar v state of Odisha, MANU/OR/0076/2020

<sup>31</sup> Frances Olsen, “From False Paternalism to False Equality: Judicial assaults on Feminist community”, 84 *Michigan Law Review* 1520 (1986)

## **Conclusion**

Despite several landmark decisions of the Indian judiciary that takes the country closer towards the goal of gender equality, there is a long way to go before the actual realization of this goal. Patriarchy and paternalism have been used to oppress women since time immemorial and with modernization, this oppression has extended to even the more public spheres of life. Whenever there is such injustice the judiciary is the only, if not last, resort for those discriminated against. Judgements must be based on to as much of a reasonable extent as possible, strictly legal reasoning. While certain social, political and cultural factors cannot be outright excluded the court needs to be conscious of whether the inclusion of such non-legal factors is in line with the principle of natural justice, equity and good conscience. In cases, such as those discussed above, consideration has been given to norms that only further perpetuate the existing inequality between the sexes. Character assassination, discrimination in the workplace, forced subordination in relationships and restriction of autonomy of women that the courts either engage in or permit are a violation of the right to equality that the constitution guarantees. In addition to this, these socio-cultural norms often have no legal backing that justifies their consideration in the respective cases. In cases where legal paternalism and gender are both present, it is necessary to scrutinize and deduce whether the protective stance is for welfare or to force the concerned individuals to conform to gender roles. The understanding of this distinction between protection and benevolent sexism/ discrimination is imperative for courts to empower women without undermining the goal of gender equality. Judicial decisions are just as important as policy decisions and the courts in India must consciously strive towards evolved, just reasoning and verdicts that perpetuate gender equality.