

THE PATRIARCHAL SYSTEM: A FLAW IN INDIAN LEGAL JURISPRUDENCE

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**ABSTRACT**

*Patriarchy system, is a system which is known as on name of male dominance and domination over females who are weaker, and can't compete with them physically, a term which defines a system of male dominance and female subordination, in our culture and history this system is practiced from ancient period to till now, which is totally normal for our culture. This paper shows a critically analysis on patriarchal system, in India. Through legal theory or by the philosophy of law. The paper will analysis and evaluate the historical foundation of the patriarchy, the legislative framework which was designed and approved by parliament to deal with it and promotes equality, and the role of judiciary in demolishing the patriarchy norms and structure, case analysis such as- Shah Bano vs Union of India [1985], Vishaka vs. State of Rajasthan, [1997], Joseph Shine vs. Union of India [2018], and Vineeta Sharma vs. Rakesh Sharma [2020]. This paper will show how court have at time of reinforcement but also challenged patriarchy system at the same time.*

*These cases will help us to understand the judgement of court against dominance of male, helps to identify the struggle of those females who are the victims of male dominance. There are some comparative insights from feminist legal theory which is also considered. The paper concludes end of patriarchy system, there is not only need of better and fair laws, but also a progressive approaches which consider the variety problems and struggles people face in Modern era of our country (like gender, caste, class, and race), along with strong and proper enforcement of those laws which state an equal status of life to all without any unnecessary exceptions*

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## INTRODUCTION

The evolution of civilization leads to the development of social structure. One of those social structures were Patriarchal social system. Patriarchy system means. Patriarchy system or structure can be social, cultural, historical, legal or can be all of the them, a system where men practice or exercise dominance over inferior women or over any other gender which are inferior according to them. The term of patriarchy is a Greek word patriarkhes which means rule of father, which describe a male authority in a family, in simple words it means a family where all decision were taken by head of family which can be any elder male member, such as grandfather, father or elder son is father. As time passes or over the time the concept of male authority transforms into domination at larger scale, like in society and culture. men's start making their own laws which shows clear dominance against women. The concept of male dominance gets evolved by the daily work of males which gives them superiority complex and the structure became a male dominant one is superior and by which a mentality of having an authority and freedom of those genders who are inferior from them came in more practice. In legal studies, patriarchy has been described as the structural bias within law and institution related to it.

As legal scholars such as Catharine MacKinnon and Carol Smart argue. "The law mostly shows the perspective of male, showing male norms as universal while minimizing women's perspective and struggle"<sup>2</sup>

In India, the bias is mostly evident in family law, property law and criminal laws, where women were treated and particularly as assumed as an inferior to men from history to present, women have been never seen as independent individuals in the eyes of law.

Despite of constitutional promise in Article {14,19,21} which says equality people still carry a mindset of patriarchal structure, which resulted that women right are often subordinated to cultural and religious practice, women are bounded by their religion and norms<sup>3</sup>

### 1. Pros: -

- Clear social structure: provides specified roles and hierarchies, which many argue that it brings stability to family and community life.
- Economic concentration: men's have historically had a greater access to resource and

<sup>2</sup> Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard Univ. Press 1989).

<sup>3</sup> *India Const.* arts. 14, 15, 16.

property, which give me a quite good experience, which creates a centralized control and better understanding of wealth and decision-making.

- Preservation of tradition: patriarchy usually align with cultural norms and tradition, which creates a sense of continuity

## 2. Cons of patriarchy system: -

- Gender inequality: restricts women's right in education, work, possession of ancestor's property, and political and defence participation.
- Suppression of potential: limits the talent and contribution because half of the population is not participating, which holds back social and economic progress.
- Violence and abuse: it creates power imbalance which leads to domestic violence and harassment or exploitation of women.

## HISTORICAL CONTEXT OF PATRIARCHY SYSTEM

Patriarchy system is deeply roots and practice in Indian sculptures and custom practices. An ancient mentality of male clearly says that women are less important than men or must be in control by men, which clearly shows a statement which a totally influencing promoting men's domination over female. In childhood a women should be in control by his father, in young age women should be subject towards their husband and when their husband died whom women's call lord, women's were expected to be subjected towards their son<sup>4</sup> At that period women are denied to participate in any religious rituals or having any independent property right<sup>5</sup>. These are activities clearly show how women where control by men's over and over period of time Like an object. Same in those time people think daughter just made to do household works and after a certain age, daughter should be married to another person so daughter can do work of her husband's house. Daughters were treated as servant and her owner changes after a certain time. Marriage is a major activity which shows clear dominance and practice of patriarchy system. Currently in Rajasthan father fixes daughter's wedding before her birth and in age of 10 or 12, her family perform her weeding, just to remove burden<sup>6</sup>

Marriage {Shadi} was a thought of sacred duty rather than love and feeling or journey. It's a

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<sup>4</sup> A.S. Altekar, *The Position of Women in Hindu Civilization: From Prehistoric Times to the Present Day* (Motilal Banarsidass 1962).

<sup>5</sup> Julia Leslie, ed., *Roles and Rituals for Hindu Women* (Motilal Banarsidass 1989).

<sup>6</sup> Prem Chowdhry, *The Veiled Women: Shifting Gender Equations in Rural Haryana, 1880–1990* (Oxford Univ. Press 1994).

complete reinforcing of women's life dependency from father to husband. In Hinduism, Sati a custom practice where widows are expected to put them self in fire because a mentality says that women don't have their own life without their lord. Which is huge form of patriarchy system<sup>7</sup>

### **1- Medieval India-**

In medieval India period, patriarchy system started practicing in Hindu and Islamic traditions. Women were largely involved to domestic works and roles, with confined access to education or property. Social practices such as dowry and child marriage became more flourished, restricting women's autonomy

### **2- Colonial India-**

During the British period many acts were passed by them, which were modified according to time buy the factor of inequality didn't change, in fact those changes make more stronger beliefs toward patriarchy system. By Hindu widow remarriage act British government approve widows to marriage again to restart their life but the societal terms and the custom practices and belief of that community will be still impact<sup>8</sup>. By Indian penal code, the British govt. defines about the rape and its consequences but still didn't talk about marital rape, which means a forceful intimacy between husband and wife but without consent of wife. but govt didn't write any law regarding this shameful act, just because of patriarchy mentality<sup>9</sup>. By age of consent, law addresses the age of girl's marriage and in fact increases the age of girl's marriage but still didn't mention any law regarding child marriage beliefs. In colonial time British try to change or reform laws but at the same time British please the conservative group who support the patriarchy system. Because of this act the mentality and practices of domination keep growing.<sup>10</sup>

### **3- Post- Independent India-**

The Indian constitution seeks to break the historical practices of patriarchy system by guaranteeing equality in [Article 14] prohibiting discrimination in [Article 15] and protecting the right to life and liberty [Article 21]. However, the personal laws present and followed from centuries in religion like, Hindu, Muslim, Christianity- continued to reflect patriarchy values. While some newly reform movements challenged some of their practices in family law, inheritance, and marriage law reveals the stress between constitutional ideas and social realities.

<sup>7</sup> Irawati Karve, *Kinship Organization in India* (Asia Publ'g House 1965).

<sup>8</sup> *Hindu Widows' Remarriage Act*, No. 15 of 1856, India Code.

<sup>9</sup> *Indian Penal Code*, No. 45 of 1860, India Code.

<sup>10</sup> *Age of Consent Act*, No. 10 of 1891, India Code.

## LEGISLATIVE FRAMEWORK ADDRESSING PATRIARCHY IN INDIA

### A. Constitutional Provisions: -

1. Article 14: - guarantees equality before law.
2. Article 15: - to stop discrimination on basis of sex, while permitting affirmative action for women's.
3. Article 15{3}: - allows special laws for women and children.
4. Article 21: - it says just not right to live, but also the right to live with dignity, the right to livelihood, and the right to a healthy environment equally.
5. Article 16: - provides equal opportunity in employment, {except some}.
6. Directive principles: - it encourages gender justice and equality in policies<sup>11</sup>

### B. Personal Laws-

1. Hindu Succession Act 2005: - Granted daughters equal right on their parents or ancestor property. Which overturn the concept of patriarchal inheritance laws<sup>12</sup>
2. Muslim women {protection of right on marriage} act 2019: -It criminalized triple talaq, which is a part of Muslim culture and encourages males for domination, a one- sided male divorce practice<sup>13</sup>
3. Special marriage act 1954: - Provide a secular marriage framework, where lovers of any religious or culture marriage together by their own will, apart from family honor of patriarchal belief <sup>14</sup>

### C. Criminal Law-

1. Criminal law {Amendment} Act, 2013: - It expand the definition and depth of rape cases and action which includes sexual assault and harassment, following Nirbhaya case.
2. Protection of women from domestic violence Act, 2005: - recognized the physical, mental, emotional assault done by own family on women, and even economic abuses within families.
3. Dowry prohibition Act, 1961: - it criminalized receiving and giving dowry in any form. By which numbers of violence related to dowry can reduce.

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<sup>11</sup> *India Const. arts. 14, 15, 15(3), 21, 16.*

<sup>12</sup> *Hindu Succession (Amendment) Act, No. 39 of 2005, India Code.*

<sup>13</sup> *Muslim Women (Protection of Rights on Marriage) Act, No. 20 of 2019, India Code.*

<sup>14</sup> *Special Marriage Act, No. 43 of 1954, India Code.*

4. IPC section 375 Exception: - exempts marital rape, which totally reflects a patriarchal control over women's sexuality

#### **D. Workplace and Other Laws**

1. Equal remuneration Act, 1976: - it mandates all genders will be paid equally for their equal job.
2. Maternity Benefit Act, 1969: - extension of maternity leave, but again reinforces the assumption that childcare is only women's responsibility.
3. Sexual harassment of women at workplace Act, 2013: - it ensures the security and protection of women at their workplace, which makes them feel free to step in working culture<sup>15</sup>

#### **JUDICIAL DECISIONS**

The apex court held that in *Shah Bano v. Union of India*, the bench was led by Chief Justice Y.V. Chandrachud and the court ruled in favour of Shah Bano. According to section 125 of CrPC applies to all religions which says that, it is a secular provision which is meant to prevent those who have no money or home for survival. Court makes several decisions in favour of Shah Bano that day, husband's duty extends beyond iddat, which means in case of wife is unable to make a standard living or unable to take care, the husband will provide some maintenance in that case. Payment of Mehr is not sufficient to cover life time expenses in continuous inflammation. The supreme court also address uniform civil code and mention the importance of it, to reduce conflict between personal laws and promote gender equality<sup>16</sup>

Impact of judgment: -

- The ruling was a major victory for women's right in India. Especially for Muslim women.
- It triggers a strong backlash from Muslim community; the judgement interfered with their personal sharia law.
- To make these group quiet, the parliament passed the Muslim women {protection of right on divorce} act, 1986, which diluted the effect of the Shah Bano judgement

The apex court held that In *Vishakh & others v. State of Rajasthan* the bench was led by Chief Justice J.S Verma, *Sujata v. Manohar* and *B.N Kirpan*. The supreme court held that sexual

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<sup>15</sup> Workplace and Labour Law Act.

<sup>16</sup> *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556 (India).



harassment at work place is a criminal offence and it violates Article 14,15,19, and 21 of Indian constitution. 1<sup>st</sup> time the court address sexual harassment is a violation of fundamental rights. The court even issue guidelines for ensuring women safety in absence of legislation<sup>17</sup>

**Guidelines: -**

The supreme court issue some specific guidelines which are legally bind to ensure the safety of women, until parliament pass a bill for this crime.

1. Definition of sexual harassment: - which includes unwanted physical contact, demand for sexual favours, showing pornography, or any other sexual contact which is unwanted or unwilling.
2. Employer's duty: - employees or head of company, organisation or institution must prevent and stop any kind of unwanted sexual activities, and provide a health environment for female staff or employees.
3. Complaint committee: - every work place must have a mechanism which deal with complain of employees regarding any kind of discomfort, can be community which involves both male and female employees equally.
4. Awareness: - employees must spread awareness about right against sexual harassment and it is wrong to do anything against someone will.
5. Disciplinary action: - management must take strict action against culprit.

**Importance Of the Case: -**

- First time the supreme court recognized sexual harassment as the violation of fundamental rights.
- Supreme court made international law {CEDAW} part of Indian constitution law.
- Filled a legal vacuum in India for 16 years until sexual harassment of women at work place {prevention, prohibition & redressal} act, 2013 was enacted.

**Criticism: -**

- Guidelines made by Supreme court was not followed by organisation for long period of time.
- Complaint committees often lacked independence and effectiveness
- Many sectors which are unorganised sectors were not protect by this law.

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<sup>17</sup> *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (India).

The apex court held that In *Joshep Shine v. Union of India*, the bench was led by Chief Justice Dipak Mishra, Justice R.F Nariman, Justice A.K Khan Wilkar, Justice D.Y Chandrachud, Justice Indu Malhotra. That judgment was unanimous. The court admit that section 497 of IPC as unconstitutional and struck down.<sup>18</sup>

**Key Reasoning: -**

1. Violation of equality {Article 14}:

- The law punish only man but not women which is gender-based discrimination.
- The husband's consent decided whether the act was a crime or treat women like property

2. Violation of dignity {Article 21};

- Marriage does not mean that a women will lose her autonomy.
- Treating women as an object is unconstitutional

3. Violation of non-discrimination {Article 15}:

- Protecting women by assuming, lack agency is not protecting.

4. Adultry is not crime, but a civil wrong:

- Adultery can be a grounded for divorce but can't be for criminal punishment
- Criminal law is made to protect society not to interrupt or disturb personal relationships.

The apex court held that In *Vinita Sharma v. Rakesh Sharma*, the bench was led by Arun Mishra, Justice S. Abdul Nazeer, Justice M.R Shah. The supreme court held that daughters have coparcenary rights by birth, just like sons, under section of 6 of Hindu succession act. It does not matter whether the father was alive or dead in 2005. Daughters will still have equal right to property, the 2005 amendment is retroactive in nature but not fully retrospective but it applies to all living daughters of coparceners, whether father is alive or dead. The supreme court Also mention that a daughter can demand partition of the HUF property<sup>19</sup>

**Importance of the case: -**

- A big turning point in Hindu succession law.
- It ensures economic empowerment of women through property right.

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<sup>18</sup> *Joseph Shine v. Union of India*, (2018) 2 SCC 189 (India).

<sup>19</sup> *Vinita Sharma v. Rakesh Sharma*, (2020) 9 SCC 1 (India).



- It provides strength to the constitutional vision of gender justice.
- A daughter is coparcener by birth, even though when her father died.

Key reasoning: -

- Equality under Article 14 of the constitution
- Coparcenary is a by birth right

### CONCLUSION AND SUGGESTIONS

The patriarchal system is deeply connected in roots of India legal, social and cultural order. Where constitutional guarantee and progressive judgment have shown improvement in condition of women, however this is cultural norm, which has been formulated from generation to generation, men learn this dominance by seeing their parents, elder brother and social activity. Currently the structure of patriarchy is only limited and can be address in certain remote area. Women are showing their wonderful skill and proofing that women have their own identity and own vision in life, somehow now we can say the law is not only present in written form, but now we can see its existence. Dismantling patriarchy requires a multi-dimensional approach, combine of legal, social and transformational and feminist jurisprudence. The young generation should learn to respect all without any kind of discrimination or disbelief; education and values play important role in development of mentality and personality a proper guidance will surely make everyone equal in their own eyes.

Judiciary should address and criminalize marital rape to recognize spouse autonomy. Uniform reform of personal law, there should be equal and fair right within all communities and society. There should be serious punishment for those, who rape women, girls, top fulfil their desire and show dominance. Dowry, which is a punishable offence, which is still in practise on name of gift during marriage period, judiciary should address this problem soon to demolish this practise, there are many families who lose their daughter due to this practise which shows clear dominance. Intersectional policies, addressing caste, class, sexuality-biased discrimination Proper gender sensitization in judiciary, policies, and workplace. Strength enforcement of existing laws through monitoring and accountability Education and awareness can change patriarchal mindset of youngsters.