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EFFICACY OF SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION, AND REDRESSAL) ACT, 2013: A Critical Analysis

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EFFICACY OF SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION, AND REDRESSAL) ACT, 2013: A Critical Analysis

Aayush Raj*

[Abstract: *This paper critically analyses the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013. Firstly, it takes up the problems of interpretation based on the linguistic scheme of the legislation. The paper argues that there is an overlap between the understanding of misconduct and harassment on the one hand and sexual harassment on the other, which assigns them identical connotations. Second, the Act is examined vis-à-vis the Indian social milieu and its demographic realities, taking cues from socially progressive ideas propagated by legislation and its (mis)use. The intuitive argument is that the misuse does not make the Act a bad law but creates a possibility of misuse because of the linguistic ambiguities. Third, the Act is tested at the anvil of Fuller's eight characteristics that render 'inner morality' for a law and in that, three characteristics are specially focused – clarity (emanating from the first and second aspect of analysis), non-impossibility, and congruency. Fourth, the paper evaluates the provisions of the Act from feminist perspectives and how the law represents a perfect picture of, what J.S. Mill might have called it, 'legal subjection' of feminine. In a social order highly governed by the law, the paper visualises points of improvements and reform in the law where interventions need to be made for infusing feminist ethics. Finally, this paper concludes by identifying desirable improvements in the legislation.*]

I

Introduction

'The issue of sexual harassment has variety of connotations. Its evaluation may sometimes depend upon the sensitivity of the person concerned and also whether the perception of the harassed individual was known to the one against whom the accusing finger is pointed. Each case will have to be decided on its own merits. Whether the perception of the victim is conveyed to the accused would be very material in a case falling in the realm of oversensitivity. In that, it would not be open to him thereafter to defend himself by projecting

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> *that he had not sexually harassed the person concerned, because in his understanding the alleged action was unoffending'.*
>
> Justice J.S. Khehar, Supreme Court of India
> *in Additional District and Sessions Judge 'X' v. Registrar General, High Court of Madhya Pradesh and Others*[1]

This article analyses the provision of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 (Act of 2013), *viz.* - Clause (v), Sub-Section (n), Section (2) which defines sexual harassment read with Clause (v), Sub-section (2), Section (3), which reprimands humiliating treatment likely to affect her health and safety. The argument of this paper is that these provisions are subjective. These provisions are not clear with respect to what is demanded of human conduct. It is pertinent to note that harassment, specifically sexual harassment, as a concept needs to be understood and distinguished from sensitive or subjective elements that might affect behavioural patterns of human beings.[2] Law must not impose such a huge burden upon the subject that there is impediment to any possible human interactions.

Apart from this, another argument for assessing this legislation is a deeper psycho-social phenomenon represented by the dichotomic classification between males and females represented by the *legal subjection of women*. The two arguments together bring to fore a third possibility where such laws can be misused. It is pertinent to note the lived realities of women, their plight represented in various writings and commentaries,[3] and the historical wrongs they have faced. However, this paper does

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1 (2015) 4 SCC 91.

2 *See generally*, Kenneth M. York, *Defining Sexual Harassment in Workplaces: A Policy-Capturing Approach* 32(4) THE ACADEMY OF MANAGEMENT JOURNAL 830 (1989) *available at*: https://www.researchgate.net/profile/Kenneth-York/publication/269488985_Defining_sexual_harassment_in_workplaces_A_policy-capturing_approach/links/568bdf8b08ae129fb5cb8d29/Defining-sexual-harassment-in-workplaces-A-policy-capturing-approach.pdf (last visited Jun. 16, 2024); Timothy Riley, *et al.*, *The Factorial Survey: An Approach to Defining Sexual Harassment on Campus* 38(4) JOURNAL OF SOCIAL ISSUES 99 (1982); Edmund Wall, *The Definition of Sexual Harassment* 5(4) PUBLIC AFFAIRS QUARTERLY 371 (1991); Jan Crosthwaite & Graham Priest, *The definition of sexual harassment* 74(1) AUSTRALIAN JOURNAL OF PHILOSOPHY 66 (1994); K.A. Lonsway, L.M. Cortina, & V.J. Magley, *Sexual Harassment Mythology: Definition, Conceptualization, and Measurement* 58 SEX ROLES 599 (2008) *available at*: https://doi.org/10.1007/s11199-007-9367-1 (last visited Jun. 16, 2024); Barbara A. Gutek, *Understanding Sexual Harassment at Work* 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335 (1992); D. Ayling, *Defining workplace harassment: Who is the bully?* Paper presented at the New Zealand Applied Business Education 2002 Conference, Christchurch (2002, September) *available at*: http://www.nzabe.ac.nz/conferences/2002/www.cce.ac.nz/conferences/pages/page2ade.html (last visited Jun. 16, 2024); Iddo Landau, *On the definition of sexual harassment* 77(2) AUSTRALIAN JOURNAL OF PHILOSOPHY 216 (1999); Barbara A. Gutek, *How Subjective Is Sexual Harassment? An Examination of Rater Effects* 17(4) BASIC AND APPLIED PSYCHOLOGY 447 (1995); Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions* 13 HARV. WOMEN'S L.J. 35 (1990).

3 Flavia Agnes, *Protective Legislations: Myth of Misuse*, 30(16) EPW 865 (1995).

not merely move on the premise of misuse of law by women but to showcase the level of nonchalance in formulating laws which have such far reaching impacts. The first section introduces the summary of the essay. The second section sketches the provisions of law with analytical exposition. The third section raises some preliminary highlights of the essay. The fourth section investigates the POSH Act, 2013 from the lens of Fuller's Inner Morality of Law. The fifth section discusses the relationship between feminism, gender, and law. The sixth section proposes to embrace feminist values, humanistic ethics, and gender-neutral drafting in law. The last section concludes the essay with some critical insights and summation.

II

Hermeneutical Unfolding of the Legal Texts

The provisions of the POSH Act, 2023, referred to above, read thus:

> Section 2: Definitions. –[4]
> …
> (n) 'sexual harassment' includes any one or more of the following unwelcome acts or behavior (whether directly or by implication) namely:—
> (i) physical contact…
> …
> (v) any other unwelcome physical, verbal or non-verbal conduct of sexual nature.
> Section 3: Prevention of sexual harassment.—[5]
> (1) …
> (2) The following circumstances, among other circumstances, if it occurs, or is present in relation to or connected with any act or behavior of sexual harassment may amount to sexual harassment:—
> (i) …
> (ii) …
> (iii) …
> (iv) …
> (v) humiliating treatment likely to affect her health or safety.

The two provisions, and in that, the first is expansive in its widest sense. The clause fifth of the definition clause includes within its scope - any other unwelcome physical, verbal or non-verbal conduct. Further, the opening words use the phrase - whether directly or by implication. There are few questions which arise in the use of such words and phrases - first, the definition or the concept of 'unwelcome' and

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[4] Sexual Harassment of Women at Workplace (Prevention, Prohibition, And Redressal) Act, 2013, S. 2: Definitions. (Hereinafter referred to as the POSH Act, 2013)

[5] POSH Act, 2013, S.3.

use of the prefix 'any';[6] second the use of terms - verbal or non-verbal;[7] Third, the use of the phrase 'directly or by implication', in such expansive scope, what is the limitation of indirect implication?

The sub-clause fifthly of the clause (2) of section (3) raises more important questions - what is humiliating treatment; what is the standard devised to assess humiliating treatment; and supposing that the humiliating treatment is to be understood from the perspective of the victim, then what is the standard of affecting the health of the victim. There is an important variable in determining this question – the intensity of sensitivity of a person. If the impact of any verbal or non-verbal communication is to be assessed from the victim's perspective, how is any person supposed to assess the level of intensity of one's statements in due course of conversation or later by the court. Alternatively, a more nuanced question arises, that is, the reading of this provision with the expansive definition and the possibility of using this law as a weapon. As a corollary, what also needs investigation is, if we are fostering a work environment, where there should be promotion of creativity sans any fear of harassment or do we shift the onus from the fear faced by the females to the males. In the guise of finding a solution, it appears that the law has raised more questions and red flags.

The conjoint reading of the phrase – 'any other unwelcome' with 'verbal or non-verbal', makes it impossible for any human, and in the context of the Act of 2013,

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[6] Konstantin Dmitrievich Goncharenko, Alexander Ardalionovich Taradanov, and Anastasia Aleksandrovna Gizatulina, *Concept and Structure of Tolerance (Experience of Theoretical Research)*, XXIII INTERNATIONAL CONFERENCE CULTURE, PERSONALITY, SOCIETY IN THE CONDITIONS OF DIGITALIZATION: METHODOLOGY AND EXPERIENCE OF EMPIRICAL RESEARCH CONFERENCE (2020) *available at*: https://elar.urfu.ru/bitstream/10995/122422/1/2518-668X_2021_11.pdf (last visited Jun. 16, 2024); Michael R. Williams & Aaron P. Jackson, *A New Definition of Tolerance* 37(1) ISSUES IN RELIGION AND PSYCHOTHERAPY (2015) *available at*: https://scholarsarchive.byu.edu/irp/vol37/iss1/2 (last visited Jun. 16, 2024); Giacomo Corneo & Olivier Jeanne, *A Theory of Tolerance* (March 2007) CESifo Working Paper Series No. 1941 *available at*: https://ssrn.com/abstract=976576 (last visited Jun. 16, 2024). Tolerance as an idea has subjective and psycho-social elements to itself. In terms of community standards, unwelcome behaviour must be seen in an assimilative sense. Unwelcoming behaviour and offensive behaviour are two different concepts and must be distinguished and this distinction must be necessarily reflected into the legislature. In view of this the judiciary, thus, has the burden of interpreting this phrase in light of individual tolerance and cases. And on the other hand, the legislature might eliminate these two over-expansive provisions because determining what is unwelcome and whose standard of unwelcomeness is to be considered is a burden both left to the judiciary and the subject who are governed by this law in India.

[7] Is the State trying to control behavioural tendencies of human beings? Or are the employers being asked to make robots out of humans by way of control on every behavioural pattern of human beings? *See generally,* BLACK MIRROR (Zeppotron, 2011); Bauer Jessica Green, *Netflix bans workers from looking at each other for more than five seconds and asking for phone numbers in flirting crackdown*, MAILONLINE (Jun. 12, 2022) *available at* - Netflix bans workers from looking at each other for more than five seconds in flirting crackdown | Daily Mail Online (last visited Jun. 16, 2024).

the male fraternity, from looking at any woman, even in the most professional and courteous manner. The legislature seems to have not analysed the strict approach adopted by the courts in the *Vishakha Case*[8] based on the factual matrix of that case. The approach, therein, is considered to be the lowest possible pedestal for the test of harassment. Though the Court did a commendable job in formulating the guidelines in that case, the legislature in such replication seems to have adopted the scheme without substantiated thought, deliberation, or research. Further, in this context, another reference is made to the Justice Verma Committee Report of 2013 on the Criminal Law Amendment. In that Justice Verma comments that the provision of the law of sexual harassment must account for the subjective assessment of harassment by an individual and it was proposed that an explanation be appended to the definition clause reading thus.[9] However, such subjective assessments have not been adopted and the law prescribes undue burden upon the accused in matters involving conducts prohibited by the Act of 2013. This article argues for a reservation and disagreement with the approach of the Act of 2013 and it needs further deliberation.

III

Some Preliminary Highlights

In this section, some preliminary highlights are outlined to portray the overarching and undue burden of the provisions discussed in the preceding paragraphs. Here, a few examples are taken from the most inevitable social interactions and the implications they may produce.

To begin with, let us take the case of doctors, and in that the case of general physicians, who prescribe medicines to diverse groups of individuals.[10] Let us assume, for the sake of arguments, that there is a female patient or a female relative of the patient involving some health problem which involves explanation on part of the doctor of some explicit nature. The verbal conduct of the doctor discomforts the female relative and she finds the statements unwelcoming. This may appear as a rarity because of the sanctimonious relationship between patient and doctor, but the law gives ample opportunity to that patient/ relative to disrepute the doctor and bring a case thereof based on the two provisions discussed above. In this regard,

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[8] *Vishaka* v. *State of Rajasthan* AIR 1997 SC 3011.

[9] Justice J.S. Verma, *Report of the Committee on Amendments to Criminal Law* 130 (GOVERNMENT OF INDIA, 2013) *available at*: https://spuwac.in/pdf/jsvermacommittereport.pdf (last visited Jun. 16, 2024).

[10] Ashish Srivastava, *NMC directs hospitals, medical colleges to implement PoSH Act*, THE NEW INDIAN EXPRESS (Jul. 29, 2023) *available at*: https://www.newindianexpress.com/cities/delhi/2023/Jul/29/nmc-directs-hospitals-medical-colleges-toimplement-posh-act-2599777.html (last visited Oct. 07, 2024).

after five years of the legislation, it was clarified in terms of jurisprudential analysis that unwelcoming must be construed as remarks connected with the act of 'sexual exploitation'.[11]

More than fostering an environment of safety, the provisions seem to unduly burden the subjects under the legal obligations. It seems that the legislature is trying to undo the injustices against the females by immensely burdening the subjects. The question which is thus raised – Is this the appropriate manner to make good the wrongs done on the females by the society? In this context, another group of professionals who might face issues that need some preliminary discussions are teachers. The teacher has to constantly address a varied group of individuals both within and outside the classroom. With the advent of autonomous institutions and residential *deemed to be Universities* this interaction of a teacher is not confined to mere subject-oriented discussions but is widened and the scope of this discourse might enter a realm hitherto not ventured by teachers. In this helm of paradigmatic shift of the roles, it is not far-fetched to think of a situation where a teacher might use overarching comments, which can be subjected to subtle and varied interpretations. In that context, then, it is easy and open for a pupil of heightened sensitivity to misinterpret the comment in a way that might appear as constituting unwelcome acts or behaviour, whether directly or by implication,… 'verbal or non-verbal' conduct of sexual nature or any such act may amount to sexual harassment… humiliating treatment likely to affect her health or safety. Another factual matrix, in which this scenario needs to be juxtaposed, is the increasing voice against disciplining students for the choice of clothes within the University campus. This article does not moot for moral policing of students for their choices but tries to strike the right balance between use of such autonomies (*liberties and rights*) within the premises of public character such as that of University campus.[12] On that note, this article does not try to dissuade the voices against how the males characterise women and the discourse related to objectifying women based on the choice of clothes. This article is against the position that such objectification is correct. However, what needs to be kept in mind is the ground realities of the society in which we live. This raises an overarching question of the interplay between law and morality, which cannot be discussed in detail for the purpose of this article, provided the limited space.

Preliminary Impact Analysis

In this frame, there are few, other instances which need some reflection with reference to the social realities of India. The first instance is related to the issue of

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[11] *Dr. Prasad Pannian* v. *Central University of Kerala*, 2020 SCC ONLINE KER 6550.

[12] TNN, *Students claim moral policing on clothes a reality in colleges*, THE TIMES OF INDIA (Apr. 21, 2016) *available at*: https://timesofindia.indiatimes.com/city/pune/students-claim-moral-policing-on-clothes-a-reality-in-colleges/articleshow/51787019.cms (last visited Jun. 16, 2024).

sexual harassment at workplace itself. The decision by the Apex Court was given in the year 1997 and it took 16 years to formulate a legislation on the subject-matter. In the interim, the businesses were operating without the framework on prevention of sexual harassment at workplace.[13] Second, there is a significant gap between the pronouncements by the Apex Court and operationalisation of the legal norms in Indian society. The judgment on Section 66A of the Information Technology Act, 2000[14] was delivered in the year 2015 striking down the said provision. However, even after 7 years of striking the said provision down, the police use the provision to arrest persons on the *overarching* grounds thereof.[15] Third, since the decision of the Court in NALSA case,[16] the ideas around gender, sexuality, gender representation, and bodily autonomy have gained legal momentum. All these aspects of human liberty have been found in the very constitution of the human body by the Court.[17] Further, the recent decision by the Apex Court, in the case of

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[13] Paramita Chaudhari, *Sexual Harassment in the Workplace: Experiences of Women in the Health Sector*, Health and Population Innovation Fellowship Programme Working Paper, No. 1 (2006) *available at* - https://knowledgecommons.popcouncil.org/cgi/viewcontent.cgi?article=1518&context=departments_sbsr-rh (last visited Jun., 16, 2024); Indian Parliamentary Debate, Lok Sabha No. 14, Session IX (Dec. 19, 2006), Remarks of Renuka Chowdhury, *then* Minister of State of Ministry of Women and Child Development) on Unstarred Question No. - 3808.

[14] Information Technology Act, 2000, S. 66A: Punishment for sending offensive messages through communication service, etc.

[15] The Hindu Bureau, *No more prosecutions under Section 66A, says Supreme Court*, THE HINDU (Oct. 12, 2022, 10.30 PM) *available at* - https://www.thehindu.com/news/national/no-more-prosecutions-under-section-66a-says-supreme-court/article66002464.ece (last visited Jun. 16, 2024); PTI, *No Citizen Can Be Prosecuted Under Scrapped Section 66A of IT Act: SC*, THE WIRE (Oct. 12, 2022) *available at* - No Citizen Can Be Prosecuted Under Scrapped Section 66A of IT Act: SC, THE WIRE (last visited Jun. 16, 2024).

[16] *National Legal Services Authority* v. *Union of India* (2014) 5 SCC 438.

[17] *See generally*, *NALSA* v. *Union of India* (2014) 5 SCC 438. Paras: 21 & 22; Para 127 reads thus: *Oliver Wendell Holmes said: "The life of law has been logical; it has been experience". It may be added that 'the life of law is not just logic or experience. The life of law is renewable based on experience and logic, which adapted law to the new social realty'. Recognizing this fact, the aforesaid provisions of the Constitution are required to be given new and dynamic meaning with the inclusion of rights of TGs as well. … This interpretation is in consonance with new social needs. By doing so, this Court is only bridging the gap between the law and life and that is the primary role of the Court in a democracy. It only amounts to giving purposive interpretation to the aforesaid provisions of the Constitution so that it can adapt to the changes in realty. Law without purpose has no raison d'etre. The purpose of law is the evolution of a happy society. As Justice Iyer has aptly put:*
"The purpose of law is the establishment of the welfare of society "and a society whose members enjoy welfare and happiness may be described as a just society. It is a negation of justice to say that some members, some groups, some minorities, some individuals do not have welfare: on the other hand they suffer from ill-fare. So it is axiomatic that law, if it is to fulfil itself, must produce a contented, dynamic society which is at once meting out justice to its members."

Navtej Johar,[18] also showcases a progressive approach of the Court. However, what needs to be highlighted is the plight of the communities for which these interpretations have been heralded. These communities continue to face issues because the society per se is not aware about the implications of such laws.[19] This is to showcase the speed at which a society progresses and the slight impact that laws have on the psyche. It highlights a social phenomenon in India where communities bask under ignorance and therefore, even in the presence of laws that favour a community, there is a risk of marginalisation. Civil liberties and human dignity are components which are part of the law of the land[20] and are strengthened by their global recognition.[21] However, in India the progressive notions of civil liberties, though present in the legal discourse, do not percolate at the level of social practice. Further, India is a society, like many other oriental countries, heavily laden with Victorian morality.[22] The Indian social canvass has an inverse relationship with these ideas and which can be easily culled from the aftermath of the decision in the *Sabrimala* case.[23] The incidents that followed after the judgment reflect more on the overall sentimentality of the community and individual psyche driven by community norms.[24] Fourth and finally, the Act of 2013 was developed on the basis of recommendations of the Committee which was constituted for reforms in the criminal law.[25] This provides an insight into the legislative intent of the Act of 2013 with respect to its legal consequence.[26] Though, the Act of 2013 prescribes proceedings in the nature of disciplinary proceeding, it is pertinent to note that the conjoint reading of the Report and the Act, on the one hand, and legislative understanding of the objectives of the Act of 2013, on the other, reflects a criminal

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18 *Navtej Singh Johar* v. *Union of India*, AIR 2018 SC 4321.

19 UNAIDS, *India's LGBTQIA+ community notches legal wins but still faces societal hurdles to acceptance, equal rights*, UN NEWS (May 17, 2024) *available at*: https://news.un.org/en/story/2024/05/1149956 (last visited Jun. 16, 2024); Lakshya Arora, *et al.*, *Understanding discrimination against LGBTQIA+ patients in Indian hospitals using a human rights perspective: an exploratory qualitative study* 29(2) SEX REPROD. HEALTH MATTERS 2022 *available at*: https://pmc.ncbi.nlm.nih.gov/articles/PMC9423841/ (last visited Jun. 16, 2024).

20 The Constitution of India, 1950.

21 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

22 *See generally*, Michel Foucault, HISTORY OF SEXUALITY VOL. – I (1976) & Edward Said, ORIENTALISM: WESTERN CONCEPTIONS OF THE ORIENT (1978).

23 (2019) 11 SCC 1.

24 Thulasi K. Raj, *The aftermath of Sabrimala*, DECCAN HERALD (Mar. 08, 2019) *available at*: https://www.deccanherald.com/features/the-aftermath-of-sabarimala-722024.html (last visited Jun. 16, 2024); *India's Sabarimala: Over 2,000 arrested for blocking women from temple*, BBC (Oct. 26, 2018) *available at*: https://www.bbc.com/news/world-asia-india-45988693 (last visited Jun., 16, 2024).

25 Justice J.S. Verma, *Report of the Committee on Amendments to Criminal Law* 130 (GOVERNMENT OF INDIA, 2013) *available at*: https://spuwac.in/pdf/jsvermacommittereport.pdf (last visited Jun. 16, 2024).

26 Daniel A. Farber & Phillip P. Frickey, *Legislative Intent and Public Choice* 74 VIRGINIA L. REV. 423 (1988).

intensity in the legislation. Therefore, the Act of 2013, however silent it may be with respect to the legal consequences, the immediately perceived consequence is of criminal nature. This puts the stakes at much higher a pedestal and it therefore calls for a closer scrutiny of the Act and its impacts. The Courts have interpreted the provisions of law and the proceedings therein to constitute an inquiry under service law,[27] but the law itself is unclear to that effect. There needs to be a distinction between the laws in India and other nations. This distinction must be premised on the fact that - first, India is a rapidly developing country.[28] Second, its standing, in terms of enforcement of laws, is much lower when compared to other developed nations.[29] Third, the level of literacy is low and further the level of awareness about laws is much lower. And fourth, the cultural dichotomy manifested in the Indian legal system, *viz.*, the social pluralistic innateness on one hand and the imposed uniformity[30] on the other side of the legal system.[31] Therefore, the wordings used in the language of law must not lose sight of the social realities and making of laws which are so wide, thereby allowing individuals to exercise their rights unfettered and in dissonance with the social norms, may have cascading effects.

IV

The POSH Act, 2013 and Inner Morality of Law

Lon Fuller prescribed eight principles that together answer the question of why citizens abide by the laws of any nation. Fuller[32] delineates: generality, publicity, prospectivity, clarity, non-contradiction, non-impossibility, constancy, and congruency as the eight principles of law-making about which he conceptualized as 'inner morality of law'. When formulated on the basis of these principles, the law would be able to command obedience from citizens.

The eighth principle is a principle of wider purport and one that sets the anvil on which predictability of law and its interpretation depend. This principle is equally important in assessing the implications of the law and how judges would interpret it. There are two further important considerations that need to be discussed while

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[27] *Medha Kotwal Lele* v. *Union of India*, (2013) 1 SCC 311; *Seema Lepcha* v. *State of Sikkim*, (2013) 11 SCC 641.

[28] *Overview* in World Bank in India, WORLD BANK GROUP (Sep. 2024) *available at*: https://www.worldbank.org/en/country/india/overview#:~:text=Economic%20Outlook,8.2%20percent%20in%20FY23%2F24 (last visited Oct. 07, 2024).

[29] Doing Business Archive, *Ease of Doing Business Rankings*, WORLD BANK GROUP, *available at*: https://archive.doingbusiness.org/en/rankings (last visited Oct. 07, 2024).

[30] Chanchal K. Singh & Mritunjay Kumar, *The Uniform Civil Code Debate in India: Conceptual Predicaments, Historical Legitimacy, and Challenges to Pluralism* IV SLR 16 (2022).

[31] Edward Said, ORIENTALISM: WESTERN CONCEPTIONS OF THE ORIENT (E-book, 2016); Edward Said, CULTURE AND IMPERIALISM (1993); Upendra Baxi, THE CRISIS OF INDIAN LEGAL SYSTEM (1982).

[32] Lon L. Fuller, THE MORALITY OF LAW (1969).

dealing with these kinds of assessment of law. The first, is on the question of hermeneutics and how Fuller has argued that the hard questions are mostly answered by the judges in a more responsible manner and this responsibility is in no way mechanistic.[33] The law should be analysed hermeneutically on the basis of the judicial process and linguistic scheme which has evolved in dealing with the cases on prevention of sexual harassment at workplace. Another important consideration in this regard comes from legal sciences and the value-laden component of any law as discussed by Benjamin Cardozo in his book *The Paradoxes of Legal Science*.[34] The provision of the Act of 2013 must be assessed on these principles to test their applicability and implications in the real-world scenario.

The Unclear Prescription

The law for being moral must be clear with its prescription of the dos and don'ts. It must not vaguely prescribe and then leave it for the facts and circumstances to be assessed by courts and judges to determine whether the conduct, under question, is lawful or otherwise. The provisions of the Act of 2013 vaguely prescribe the standard of normality and violation. The protection of legislation cannot be extended as a burden upon the persons who are subjected to legal obligations. Fuller accepts that it is difficult to attain clarity in legal prescriptions through language.[35] On the basis of this acceptance, he prescribed how the difficulty can be overcome. The Act, under consideration, is unclear on two fronts – *first*, the language used and definitions thereof and *second*, whether the proceedings are of a criminal or civil nature. The use of words such as – 'any other', 'verbal or non-verbal', and 'affect the health', point towards unclear framing.

The use of the language coupled with the sensitivities associated with human life, makes the provisions and its applicability impracticable. Further, the provisions appear to be in the nature of disciplinary proceedings against the person concerned but the use of the word 'sexual' with 'harassment' point towards the nature of

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[33] Lon L. Fuller, *Positivism and Fidelity to Law - A Reply to Professor Hart* 71 HARV. L. REV. 630 (1957) at 664.

[34] Benjamin Cardozo, THE PARADOXES OF LEGAL SCIENCE (1928, 2023), *See generally* Chapter – 2: *The Meaning of Justice - Science of Values*.

[35] Lon L. Fuller, THE MORALITY OF LAW 63-64 (1969). Fuller mentions the extremities of the difficulty faced by the legislature:

'To put a high value on legislative clarity is not to condemn out of hand rules that make legal consequences depend on standards such as 'good faith' and 'due care'. Sometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law, common sense standards of judgment that have grown up in the ordinary life lived outside legislative halls.'

…

'On the other hand, it is a serious mistake-and a mistake made constantly—to assume that, though the busy legislative draftsman can find no way of converting his objective into clearly stated rules, he can always safely delegate this task to the courts or to special administrative tribunals. In fact, however, this depends on the nature of the problem with which the delegation is concerned.'

conduct laden with extreme taboo. The taboo is representative of what Foucault calls the 'repressive hypothesis' with respect to the language around sex.[36] Therefore, the Act of 2013 represents an unclear approach with respect to the provisions and legal obligations created thereunder.

Fuller prescribes the method to deal with the problems pointed above in the following line:[37] 'Sometimes the best way to achieve clarity is to take advantage of, and to incorporate into the law, common sense standards of judgement that have grown up in the ordinary life lived outside the legislative hall'. The Act of 2013 prescribes speculative and vague standards. Fuller further prescribed that in order to solve such problems one of the ways can be to delegate this task to the courts or to special administrative tribunals.[38] This is what, it may appear, that the legislature has done in formulating the Act of 2013. However, Fuller further posited a specific caveat, 'But it would be a mistake to conclude from this that all human conflicts can be neatly contained by rules derived, case by case, from the standard of fairness'.[39] The discussion in Part – III (above) points towards the need for formulating standards by the legislature with respect to the nature of the subject matter.

The Impossible Prescription

The sixth criterion, enunciated by Fuller, posits that for the law to be moral, it must not be impossible to be complied with. The language of the Act under consideration makes it, ostensibly, impossible to be complied with. The phrases – 'any other' coupled with 'non-verbal' make the entire scheme of the legislation arduous and vague. It subsequently becomes impossible to discern the limits of acts permitted and prohibited by the legislation. This impossibility does not fare well with respect to the characterisation by Fuller. Fuller elaborates two types of possible emergence of impossibilities – advertent and inadvertent.[40] The two instances that give rise to impossibilities can be further categorised and used with respect to the instances of civil liabilities and criminal liabilities. Fuller accepted the possibility where the inadvertent impossibility of compliance with law could incur liability, especially with reference to the civil liabilities. But he made another specific point of strict criminal liabilities that can emerge as a result of impossibility germinating from the law. And though he was conscious of the pernicious consequences, he argued that the legislature can be legislating in the pursuit of the criminal.[41] The scheme of the

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[36] Michel Foucault, *Introduction* in HISTORY OF SEXUALITY VOL. I, 11-12 (1990).

[37] Lon L. Fuller, THE MORALITY OF LAW 64 (1969).

[38] Lon L. Fuller, THE MORALITY OF LAW 64 (1969).

[39] *Id.*

[40] Lon L. Fuller, THE MORALITY OF LAW 70-79 (1969).

[41] Lon L. Fuller, THE MORALITY OF LAW 78 (1969). He writes:
'Their apparent injustice, he is likely to assure us, is removed by 'selective enforcement'. Though, theoretically such laws are a trap for the innocent, it is only the real villains who are pursued in practice. As for them, their being brought to justice is greatly facilitated because the

legislation may be considered to be founded on, what Fuller calls, 'presuppositions about the nature of man and the universe, presuppositions that are subject to historical change'.[42] But these presuppositions cannot be granted excessive weightage for the perils posed by such a system is synthetically posited when Fuller concluded:[43]

> *'Perhaps in time legal philosophers will cease to be preoccupied with building 'conceptual models' to represent legal phenomena, will give up their endless debates about definitions, and will turn instead to an analysis of the social processes that constitute the reality of law.'*

Let us assume a situation in which a male person of homosexual orientation is charged with the alleged offence of sexual harassment. The example poses a very unique and major concern for the male person; first, based on the social retaliation against queer community and, second, the psychological strength of persons of the queer community. With respect to the first concern, and it is a fact, that a lot of men, of homosexual orientation, do not come out to anyone owing to the concerns of social retaliation. And therefore, there is a possibility that within such expansive scope of the provisions, in order to defend the case, the person might have to reveal the orientation into the public domain. As far as the second aspect is concerned, persons belonging to the queer community, generally, feel dejected and are vulnerable to more psychological issues compared to their counterparts.[44] It is generally seen that a lot of these persons develop deep-rooted psychological issues making them susceptible to suicidal behaviour and lack of inner strength.[45] In such cases, on the basis of provisions of the Act of 2013, there is a possibility of oversensitivity affecting the accused and might lead to committing of suicide by the person. It may appear far-fetched on the face of it, but if we are talking about

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government in making out its case is relieved from having to prove intent or fault, a particularly difficult task when complicated regulatory measures are involved. When absolute liability is coupled with drastic penalties-as it often is—the position of the prosecutor is further improved.'

42 Lon L. Fuller, THE MORALITY OF LAW 79 (1969).

43 Lon L. Fuller, THE MORALITY OF LAW 242 (1969).

44 J.R. Wandrekar & A.S.Nigudkar, *What Do We Know About LGBTQIA+ Mental Health in India? A Review of Research From 2009 to 2019*, 2(1) JOURNAL OF PSYCHOSEXUAL HEALTH 26 (2020); S. Saraff, T. Singh, H. Kaur, & R. Biswal, *Stigma and health of Indian LGBT population: A systematic review* 7(2) STIGMA AND HEALTH 178 (2022) *available at*: https://doi.org/10.1037/sah0000361 (last visited Oct. 07, 2024); A. J. Sharma & M.A. Subramanyam, *Psychological wellbeing of middle-aged and older queer men in India: A mixed-methods approach* 15(3) PLOS ONE 12 (2020).

45 Tyler Hatchel, Joshua R. Polanin, and Dorothy L. Espelage, *Suicidal Thoughts and Behaviors Among LGBTQ Youth: Meta-Analyses and a Systematic Review* 25(1) ARCHIVES OF SUICIDE RESEARCH 1 (2021) *available at*: https://www.tandfonline.com/doi/pdf/10.1080/13811118.2019.1663329 (last visited Oct. 07, 2024); S.K. Kar, *et al., Suicide reporting of LGBTQI+ population in India: An analysis of online media reports of the past decade* 45(1) J. PUBLIC HEALTH (OXF.) e95-e103 (2023); Amy E. Green, *et al., Cumulative minority stress and suicide risk among LGBTQ youth* 69 AM. J. COMMUNITY PSYCHOLOGY 157 (2022) *available at*: https://onlinelibrary.wiley.com/doi/pdf/10.1002/ajcp.12553 (last visited Oct. 07, 2024).

protecting the rights of the vulnerable communities and newer modes of legislative drafting, the implications of vague drafting of law cannot be lost sight of.

In another instance, let us assume the case of married men. They are also vulnerable and can be easily threatened by way of such expansive scope of the provisions. It is to be further noted that in such cases, there can be a direct effect on the married life of the person concerned and it might affect the institution of family as a whole.

The law, with its most benign motif, posits confidentiality as one of the core components of proceedings in these matters. However, in the Indian institutional arrangement, confidentiality is a myth. The Act of 2013, as far as the constitution of the Committee is concerned, prescribes members to be chosen from the institutional setup; presiding officer – a senior level woman employee, and 'not less than two members from amongst employees preferably committed to the cause of women or who have had experience in social work or have legal knowledge'.[46] The appointment of members of the Committee from amongst the employees impede the possibility of confidentiality. In India, where the professional and personal divide is blurred, confidentiality is obviously a matter of ideal vision sans the ground realities. Therefore, the law prescribes and posits the impossible in prescribing confidentiality when members are chosen from amongst the workforce. A matter that is further greyed – How is the management of any organisation to decide the inclination of members towards the cause of women? But under this law, neither the Act nor the Rules prescribes such a decision of inclination or determine any standard in this regard. Therefore, the lack of realising confidentiality fosters stigmatisation of the parties, the victim and the accused, even before any decision is taken with respect to the person concerned.

The Courts have also undertaken a contextual approach of the cases under consideration and hitherto no uniform standards has been developed by the Courts for assessing matters related to sexual harassment and the possible prescriptive behaviour.[47] Therefore, the Act of 2013, makes an impossible prescription on citizens.

The Incongruent Prescription

Fuller, further, elaborated on the ideals that make law, legally binding and not merely a coercive weapon in the hands of the State.[48] In his book, he discusses the element of congruence and makes due efforts to put into perspective this idea. A law is considered congruent if there is latent convergence of promulgated law and official action. In a distinct manner, it would not be an exaggeration to say that, law,

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[46] Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013, S. 4(2)(b).

[47] *Additional District and Sessions Judge 'X'* v. *Registrar General, High Court of Madhya Pradesh*, (2015) 4 SCC 91; *Global Health Pvt. Ltd.* v. *Local Complaints Committee*, 2019 SCC Online MP 5453.

[48] Lon L. Fuller, *Chapter – II: The Morality that Makes Law Possible* in THE MORALITY OF LAW 33 (1969).

more than being made within the confines of the bureaucratic chambers, is etched into a distinctive element while dealing with the conflicts, it tries to address, and how it is implemented by officials. There are many factors that affect the element of congruence in law making.[49]

For the purposes of our discussion, three factors are considered: 'mistaken interpretation', 'inaccessibility of law', and 'lack of insight into what is required to maintain the integrity of a legal system'. These factors are only furthered in the common law jurisdictions where the judge made laws shape and supplement the black letters of law.[50] A hypothesis needs to be posited here – owing to the ideal of congruence in law-making and the role of courts in common law jurisdictions, the draftspersons of the day take refuge in laxity while drafting a law for the black letters to be suitably interpreted by the courts.

Interpretation is one of the most crucial tasks that courts undertake. This task is burdened, further, by the doctrine of *stare decisis*. The interpretation of law is a muddled task.[51] And one must be vigilant that in promulgating laws which are capable of imposing a social stigma, the law must clearly determine, and not leave, the determination to be interpreted by the courts. The Act of 2013 has in all probabilities a stigmatising character and therefore, its drafting in the manner as it stands today, leaves much to be interpreted by the courts. Thus, the law fails to conform with the congruency principle enunciated by Lon Fuller. Additionally, in deciding cases, judges are often gripped by biases;[52] had not this been the case, the meta-narratives of the society could have never altered a law once interpreted.[53] Further, in the common law system, the role of judges is to give the principle, that can be enunciated, as the law and be applied in resembling cases in future.[54] But constantly, and specifically with respect to the Act of 2013, the matters are decided on the merits and factual circumstances of each case. This approach inhibits the

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[49] Lon L. Fuller, THE MORALITY OF LAW 81 (1969).

[50] Lon L. Fuller, THE MORALITY OF LAW 81 (1969). *See generally,* Functional School of Jurisprudence in G.W. Paton, JURISPRUDENCE 27-31 (2011).

[51] Lon L. Fuller, THE MORALITY OF LAW 85 (1969). Fuller further on the second point with some vigour by drawing the *incomplete invention* (85, 1969) analogy asserts later:
> *'...Thus, we ask after the intention of 'the legislator,' though we know there is no such being. At other times we speak of the intention of the 'the legislature,' though we know that those who voted for a statute often do so with a variety of views as to its meaning and often with no real understanding of its terms. Moving closer to individual psychology we may speak of the intention of 'the draftsman.' But again, we are in trouble. There may be a number of draftsmen, acting at different times and without any common understanding as to the exact purpose sought. Furthermore, any private and uncommunicated intention of the draftsman of a statute is properly regarded as legally irrelevant to its proper interpretation' (emphasis supplied).*

[52] Lon L. Fuller, THE MORALITY OF LAW 87 (1969).

[53] *See generally* the developments in Constitutional law of India with special reference to Article 21 of Constitution of India.

[54] Glanville Williams, LEARNING THE LAW 95 (2016).

possibility of abstract principled determination and each case being governed by its own matrices. Therefore, in such wider amplitude of reference, the interpretation of the Act becomes a never-ending process of determination on each factual basis, implying an incongruity, with respect to its implementation, based on interpretation of the wide linguistic scheme contained therein.

As a corollary to the above argument, in India, approaching the legal system, is another factor that can impede congruence in law. The correlation between financial capabilities of the persons concerned, especially a person wronged by misuse or abuse of law, and access to justice is discernible from various researches.[55] Further the elitist nature of the Indian legal system[56] is also a fact that cannot be lost sight of while assessing congruence of laws. Therefore, coupled with the fact of non-clarity, demanding the impossibility, and incongruence based on finality of the legislation by interpretation, the non-accessibility to the legal system in India, represents a very skewed picture about the Act. Its abuse is inevitable and the scheme is simply an eyewash with respect to preventing sexual harassment. Before closing this section, there is one more crucial consideration correlated with the factor of congruence in law – maintaining the integrity of the legal system. Fuller argued that in drafting a law, the legislature must not lose sight of the mischief that was committed against which the law is being drafted. This idea of proportionality with respect to the law and drafting was discussed by Jeremy Bentham.[57] As stated earlier, the law was drafted with the intent of curing the infamous and brutal incident of rape of a person who was performing her duty. This law pierces through all rational classifications and leaves the legislative intent absolutely unclear. The first question one can ask and the perplexity that authors have faced – does this law bring misconduct, harassment, and sexual harassment, all at par? The nature of offence where the law finds its genesis was a brutal rape, whereas this law proposes the minimal disciplinary proceeding that can be taken against a person accused of sexual harassment. It appears that the act of winking and groping in the workplace are somewhat at par; and this is left for interpretation.

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[55] Upendra Baxi, Access, *Development and Distributive Justice: Access Problems of the 'Rural' Population* 18(3) JILI 375, 1976; David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement* 25 AM. J. COMP. L. 492 (1977); S. Thomas, *Access to Justice in India: Managing Multiple Mechanisms in a Restrictive Practice Environment* in THE ROLE OF LAWYERS IN ACCESS TO JUSTICE: ASIAN AND COMPARATIVE PERSPECTIVES 39 (H. Whalen-Bridge, *ed.*, 2022). *See generally,* Access to Justice, UNDP Practice Note, 9/3/2004 *available at*: https://www.undp.org/sites/g/files/zskgke326/files/publications/Justice_PN_En.pdf (last visited Oct. 07, 2024).

[56] Marc Gallanter & Nick Robinson, *India's Grand Advocates: A Legal Elite Flourishing in the Era of Globalisation* 20(3) INTERNATIONAL JOURNAL OF THE LEGAL PROFESSION, HLS Program on the Legal Profession Research Paper No. 2013-5, Univ. of Wisconsin Legal Studies Research Paper No. 1240 *available at*: SSRN: https://ssrn.com/abstract=2348699 or http://dx.doi.org/10.2139/ssrn.2348699 (last visited Oct. 07, 2024).

[57] Jeremy Bentham, PRINCIPLES OF MORALS AND LEGISLATION (1869).

Another difficulty is with respect to the nature of the proceedings – is this a civil action or a criminal action? This question can be understood precisely by the following illustration. In a legal system, civil and criminal matters are justified on the basis of the legal consequences that can be taken. The breach of contract is civil because the law so prescribes and the action that can be taken is either compensation or the performance of the contract. Contrary to this, rape is a criminal offence because it is against the social order and the accused has to be dealt with accordingly because of the perceived threat posed by such person/acts to the society. Is the law bargaining the boundaries of two classes of legal rules? The proceedings appear to be in the nature of disciplinary which may be a result of breach of contract of an employee. However, the stigma of the word 'sexual' attached with harassment, aggravates the matters herein, thereby blurring the intended scheme of the Act and possible legal consequences thereof.[58]

V

Episodic Epilogue

Feminism, Gender, and Law

The legislation is a consequence of long-fought struggle beginning with the promulgation of *Vishakha* Guidelines[59] by the Apex Court and culminating in the passage of the legislation, albeit after 14 years. This legislation has within its heart, a call from feminists and understanding the struggles of women at the workplace. With due credit to the struggles and keeping in mind the Constitutional values enshrined under article 15,[60] there is a need for a deeper conceptual analysis of the provisions of this law. In the words of Fuller, 'there is a need for analysing the underlying social processes that have manifested itself in the form of the law'.[61]

The present circumstances are the result of some obvious manifestations; it might not be possible to trace the historical origin of the society and encumber the current with the past. But the interventions, either by way of law, or otherwise, need to dwell deeper and, thereafter, answer the questions of limitations that may be imposed by law. There is, today, a more determinative need to understand the feminism and social processes that have led to where we stand today as a society. It is only after such an understanding is developed that one can attempt to answer the

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58 *See*, Glanville Williams, TEXTBOOK OF CRIMINAL LAW 404-416 (Dennis J. Baker *ed.*, 2017).

59 *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011.

60 The Constitution of India, 1950, Art. 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

61 Lon L. Fuller, THE MORALITY OF LAW 242 (1969).

questions which are answered by laws, such as the Act under analysis, in our discussion.

Feminism and Feeling Argument

The feminist jurisprudence envisions an all-encompassing world order.[62] First, the all-encompassing vision is reflected in the shift in the social order demanded by J.S. Mill while identifying the challenges that beset the current social order:

> *'That the principle which regulates the existing social relations between two sexes - the legal subordination of one sex to the other is wrong in itself, and now one of the chief hindrances of human improvement; and it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.'*

The above excerpt point significantly towards that which has subtly shaped the social canvas as it stands today; Mill refers to the legal subordination. At a certain level this, 'legal', is reflective of the time in history when Mill was writing, the mid-19th century. By this time, the social order had been, largely (both in terms of how the order affected quantitatively and geographically), replaced by the legal order.[63] This legal order, in turn, affected the social interactions. At the epicentre of this legal order sat the sovereign with the State, which is defining, determining, deducing, and deploying, pre-emptively, the interactions that could take place. This legal order, in its turn, shaped the social order, one that was adorned with the supreme jewel of the beatified State. This beatification was a result of the law, human made legal order, that emerged in the mediaeval era.[64] The legal order, with its influence on social order, also influenced morality and further affected the interactions between the two sexes. Therefore, when Mill demanded revisiting the existing social order and shifting from one as it exists today towards another form of social order, the demand is, on the one hand, against the rudimentary and hegemonic canonisation, and on the other, against certain correlations determined, objects defined, norms deduced, and standards deployed;[65] for in such definition, determination, deduction, and deployment, lie, tenaciously, that which impedes human improvement. One may argue that the portrayal about the effects of legal order was nothing new but an extension of the social order and only inevitable.

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[62] J.S. Mill, THE SUBJECTION OF WOMEN (1869); Robin West, *Jurisprudence and Gender*, 55(1) THE UNIV. OF CHICAGO L. REV. 1 (1988); Martha Nussbaum, *Robin West, Jurisprudence and Gender: Defending a Radical Liberalism* 75(3) THE UNIV. OF CHICAGO L. REV. 985 (2008) *available at*: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5808&context=uclrev (last visited Oct. 07, 2024).

[63] Charles De Secondat Baron Montesquieu, THE SPIRIT OF LAWS (Thomas Nugent *trans.*, 1900) *available at*: https://www.google.co.in/books/edition/The_Spirit_of_the_Laws/rYBKAAAAYAAJ?hl=en&gbpv=1&printsec=frontcover (last visited Oct. 07, 2024).

[64] Edgar Bodenheimer, *Chapter - III: The Classical Era of Natural Law* in JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 31 (2022).

[65] Michel Foucault, ARCHAEOLOGY OF KNOWLEDGE 47-49 (2010).

Thus, the legal order with its beatified jewel did its due. This process may be understood in twofold manner. First, on which J.S. Mill argued at length, and only little pointing shall suffice, that which may be conceptualised as- 'the feeling argument'. One possible reason for raising the critique against this argument can be seen in light of how one may perceive my arguments about the legal and social order and their mutual effects and the deep-seated psychological feelings. Mill answered it succinctly, as he writes:[66]

> *'…The difficulty is that which exists in all cases in which there is a mass of feeling to be contended against. So long as an opinion is strongly rooted in the feelings, it gains rather than loses in stability by having a preponderating weight of argument against it. For if it were accepted as a result of argument, the refutation of the argument might shake the solidity of the conviction; but when it rests solely on feeling, the worse it fares in argumentative contest, the more persuaded its adherents are that their feeling must have some deeper ground, which the arguments do not reach; and while feeling remains, it is always throwing up fresh intrenchments of argument to repair any breach made in the old.'*

The argument presented in this paper, the immediate critique that emerges, and the feeling argument, therefore, in this case can be rearranged in the following manner - Argument: The social order, currently, is highly influenced by the legal order, formulated by the State. Critique: The social order, currently is the result of the benign work of the State. Answering the critique by Mill's technique: The critique is deeply rooted in a feeling amongst the human race and is not based on a nuanced exploration (this is the feeling argument) of human life. Therefore, it is difficult to deal with the deep-rooted feeling by way of logical argument, subsequently, making it more difficult to deal with shifts in the existing social relationship between two sexes.

Law, its Individualistic Contours, and the All-Encompassing Vision

Second, though correlated with the first, but different, is the fact of how the critique is based on ideas about the social order and life. It is generally presumed that the subordination of females to males is *ab initio ad infinitum*, and therefore, the legal order is based on this social order, hence apt. This presumptuous argument can be taken at its loggerheads on two counter facts; *first*, the flimsy foundation of this presumption and *second*, the flimsy quarters (the quarter referring to the social order constructed as a result of the legal order, considered as apt extension, discussed in the first premise) built upon such foundation.

The two counter facts are parallel and have decisive interplay, significantly, in the social order. This parallelism and interconnectedness can be traced on a conjoint reading of three thoughts represented by: *first*, Plato in his Republic[67] and the emerging social order thereof, *second*, Aristotelian idea and vision about human

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[66] J.S. Mill, THE SUBJECTION OF WOMEN 7 (2023).

[67] Plato, REPUBLIC (2007).

made law,[68] and *third*, Wendy Doniger's meticulous analysis in *Redeeming the Kamasutra*.[69] Plato's republic is often quoted, when discussing the women's position in society, since its beginnings. In terms of feminist movement, Plato is of a debatable position.[70] Without venturing into the debatable position, the idealist non-discriminatory position of Plato is considered here. This position is accounted for two reasons - *first*, because Plato's considerations about the ideal society emanated from an ideal conception of duty based order and *second*, because of the non-rigid class envisioned by him.[71] In discussing these elements, it is pertinent to note the feminine component of Plato's Statesmanship.[72] Plato's ideal State has been labelled too idealistic for practical considerations but the possibility is a matter of consideration.[73] In contextualising Plato's vision, Beere's conclusion is apt:

> *'Justice also involves the citizens actively desiring their fellow citizens to achieve the best goods that they can and acting to promote this. The reciprocal promotion of welfare is the essence, if I may use the word, of the just structure of the city and of the soul.'*[74]

This point brings home the idea that in Plato's ideal State, there is an all-encompassing vision and this is based on reciprocity. Thus, the feeling argument, apart from Mill's answer, can be answered in another manner, envisioned from the lens of all-encompassing virtue. The feeling of subjection of females to males that appears *ab initio ad infinitum* is a created whole and this creation rests on a discursive discourse.[75] The Aristotelian ideas about law and society were simultaneous and all-encompassing, rather than one imposing itself upon the other, the legal upon the social.

Aristotle, as against Plato, was a realist and he accounted for the practical considerations that must underlie any human made law, for the latter to maintain social order. But Aristotle's idea of law, as a result of belonging to the natural legal

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[68] Edgar Bodenheimer, JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF THE LAW 10-12 (2022), and Wayne Morrison, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM 41-49 (1997); *See generally*, Osho, THE BOOK OF WOMAN (2002).

[69] Wendy Doniger, REDEEMING THE KAMASUTRA (2016).

[70] Morag Buchan, WOMEN IN PLATO'S POLITICAL THEORY (1999) referred in Sarah Hutton, *Plato's Woman* 7 RES PUBLICA 195 (2001) *available at*: https://www.researchgate.net/profile/Sarah-Hutton-3/publication/226710589_Plato's_Woman/links/60a970ad92851ca9dcdad8ca/Platos-Woman.pdf (last visited Oct. 07, 2024).

[71] Max Horkheimer, CRITIQUE OF INSTRUMENTAL REASON 44 (2012).

[72] Sarah Hutton, *Plato's Woman* 7 RES PUBLICA 195 (2001) *available at*: https://www.researchgate.net/profile/Sarah-Hutton-3/publication/226710589_Plato's_Woman/links/60a970ad92851ca9dcdad8ca/Platos-Woman.pdf (last visited Oct. 07, 2024).

[73] Jonathan Beere, *The Best City in Plato's Republic: Is It Possible?* 123(2) PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 199 (2023).

[74] *Id.*, at 227.

[75] Discursive discourse is an idea borrowed from Foucauldian analysis of knowledge and its structure. This point is further elaborated in *Section VI* of this article.

philosophical discourse, was composed of a unified vision. For him, the law of the State must be of such a nature that it allows human beings to achieve their full potential, 'development occurs through the dialectic of potentiality and actuality'.[76] Aristotle's idea about the human-made law attempted at creating a social order where the human potential was achieved through State exigencies and justice was an effect.[77] This idea is crucial for understanding the nature of human-made law as envisaged back in those days, as against the process of law-making that emerged after renaissance. In the post-renaissance epoch, individualism as an ideal permeated the social order and the ideal was further perpetrated by law-making. The current social order makes strict demarcation between the two sexes and there is a constant widening of this gap. The legal order ensures the subjection.

Wendy Doniger in the introduction to *Redeeming the Kamasutra* writes:

> *'I had hoped that making the text available, in 2002, in a contemporary translation, devoid of the prurient Orientalism that marred Sir Richard Burton's translation, would help resurrect the Kamasutra as a serious book about the sophisticated, cosmopolitan beau monde of ancient India.'*

This reflects the uniqueness of the Indian civilisation and also points towards the all-encompassing visions in the Indian mythological texts. These texts have been subjected to occidental definitions, whereby, the grand vision of these texts is lost.[78] Subsequently, what is left is a distorted reference of cherry-picked literature, completely bereft of the vision therein.[79] The crucial idea lies in the fact of the current social order which is determined on the basis of Victorian morality that is based on repressive hypothesis.[80] This social order is absolutely bereft of the reality of the Indian social order, as it was, and is governed by the legal order which has been imposed upon the Indian sub-continent by few trading miscreants.[81] There are many important contexts and all-encompassing visions that need closer scrutiny based on re-reading of the Indian texts. The current context of social order in India, driven by legal order which is further based on purely scientific technique and, where there is an imposed contradiction between mythos and logos, brings to fore, the problems

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[76] Wayne Morrison, JURISPRUDENCE: FROM THE GREEKS TO POST-MODERNISM 42 (1997).

[77] *Id.*, at 46-47.

[78] *See generally* Max Muller, INDIA: WHAT CAN IT TEACH US? A COURSE OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE (1882).

[79] *Introduction* in Swami Vivekananda, PATANJALI YOGASUTRAS 8 (2021). He writes:
'If a man is agnostic of everything but money, fame and name, he is only a fraud. Kant has proved beyond all doubt that we cannot penetrate beyond the tremendous dead wall called reason. But that is the very first idea upon which all Indian thought takes its stand, and dares to seek, and succeeds in finding something higher than reason, where alone the explanation of the present state is to be found. This is the value of the study of something that will take us beyond the world'.

[80] Michel Foucault, *Introduction* in HISTORY OF SEXUALITY VOL. I, 11-12 (1990).

[81] William Dalrymple, THE ANARCHY: THE EAST INDIA COMPANY, CORPORATE VIOLENCE, AND THE PILLAGE OF AN EMPIRE xxv (2019).

of India today and specially its literary distortion. This contradiction and the problems, thereof, have been studied by Martin Heidegger, as he writes:[82]

> *'The mythos is that appeal of foremost and radical concern to all human beings which makes man think of what appears, what is in being. Logos says the same; mythos and logos are not, as our current historians of philosophy claim, placed into opposition by philosophy as such; on the contrary, the early Greek thinkers are precisely the ones to use mythos and logos in the same sense. Mythos and logos become separated and opposed only at the point where neither mythos and logos can keep to its original nature.'*

This analysis of mythos and logos when superposed on Doniger's reading of Kamasutra points towards the distortion of the Indian knowledge system as a consequence of its 'scientisation' through epistemic practices. In Doniger's resurrection, there is a representation of feminist ideals on which the Indian mythos is based. This gives us solid ground to conclude that the current social order is a result of imperial legal order, rather than being a consequence of Indian social reality. To put into perspective – the argument raised in the first instance about the feeling and the second instance of the flimsy quarters based on the feelings are misplaced arguments about the current social order. The order in itself is imposed and not based on investigations of underlying social processes. Therefore, the 'feeling argument' (generally accepted socially and which Mill is trying to speak against) is countered on the basis of presumption and the social order resulting from such presumption.

Feminism and Humanistic Ethics: Antithesis to Power Perpetuated by Institutional Fetishism

The preceding section highlighted the presumptuous nature of the feeling argument that reflected conflicts, at the conceptual level, that has been committed upon feminism as an idea. There is another point which establishes the distortion that feminism has witnessed. Erich Fromm in his writing about human nature referred to ethics that govern social order. He distinguished two forms of ethics – authoritative and humanistic ethics.[83] The latter is a type of grand narrative which is found in feminist ethics as well, especially the kind of feminism found in Robin

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[82] Martin Heidegger, WHAT IS CALLED THINKING 10 (2004).

[83] Erich Fromm, *Chapter – II: Humanistic Ethics: The Applied Art of the Science of Living* in MAN FOR HIMSELF: AN ENQUIRY INTO THE PSYCHOLOGY OF ETHICS (1947). Fromm discusses (P. 10):
'Authoritarian ethics can be distinguished from humanistic ethics by two criteria, one formal, the other material. Formally, authoritarian ethics denies man's capacity to know what is good or bad; the norm giver is always an authority transcending the individual. Such a system is based not on reason and knowledge but on awe of the authority and on the subject's feeling of weakness and dependence; the surrender of decision making to the authority results from the latter's magic power; its decisions cannot and must not be questioned. Materially, or according to content, authoritarian ethics answers the question of what is good or bad primarily in terms of the interests of the authority, not the interests of the subject; it is exploitative, although the subject may derive considerable benefits, psychic or material, from it'.

West[84] and Martha Nussbaum.[85] For humanistic ethics to succeed, there is less or negligible glorification of institutional fetishism. The focus is social rather than being individualistic. This must not be interpreted to mean that the individual is subsumed and neglected at the cost of society, rather the individual is allowed to achieve the highest possible potential along with the society. Thus, there emerges a social canvas, where instead of individuals being admonished to conform with the social norms, each of them is permitted to explore their individuality and the society makes space for such freedom. In such individual growth, the society grows and thrives simultaneously, not singularly but pluralistically. Such growth is not merely institutionally driven but is of a diverse characteristic. Converging at the nuanced level, feminism and this kind of humanistic ethics, then prepare ground for proposing an antithesis to power. The examination of the possibility of lessons that can be drawn from such convergence is postponed here.

The reference to this kind of convergence on the one hand, fuelled by humanistic ethics, stands against institutional delimitations fuelled by authoritative ethics. The authoritative ethics leaves minimal space for individual potentialities and ensures individual conformities. Feminism is an idea based on humanism. Ethics suffers at the behest of authoritative ethics. One, then, cannot merely and in a superficial manner, understand what J.S. Mill calls, legal subjection. But one must understand this legal subjection from the perspective of the institutions by which law thrives and the wrong that is committed upon feminism as essentially liberating-all-encompassing humanistic ethics. The convergence represents the 'high ideals' that must essentially constitute the State. Here caution needs iteration – the reference is towards high ideals and not normative framework imposed from a higher point in social hierarchy. Rather than being a norm, these ideals represent a guiding vision. It would rather be precise, if I use the term 'guiding ideals', because in calling the convergence high, immediately the divergences are placed at a lower pedestal. This hierarchical placement puts itself in contradiction to the vision, the all-encompassing vision of feminist ethics. Therefore, the convergence maybe better articulated as a guiding ideal for the state, and this may also give us some context of state and formulation of laws. The world has been overburdened with split consciousness.[86] As Jung calls it, for a very long time this splitting of consciousness

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[84] Robin West, *Jurisprudence and Gender* 55(1) THE UNIV. OF CHICAGO L. REV. 1 (1988).

[85] Martha Nussbaum, *Robin West, Jurisprudence and Gender: Defending a Radical Liberalism*, 75(3) THE UNIV. OF CHICAGO L. REV. 985 (2008) *available at*: https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5808&context=uclrev (last visited Oct. 07, 2024). Nussbaum writes:
'The errors of liberal legalism have long been recognized, ever since radical feminism exposed them. Although West is closer to difference feminism than to radical feminism, her work has played its part in that recognition. What remains intact, I believe, is a liberalism that is itself radical, for it is one of the most radical demands one can make of the social world to demand of it a politics that really expresses equal respect for each and every human being'.

[86] Carl G. Jung, THE UNDISCOVERED SELF 75 (2006).

as the normative social order has been possible as a consequence of splitting the 'legal' from the 'social'. Further, in this splitting the human-made legal order influences and essentially changes the natural harmony. This then gives us another insight in view of the answer against the 'feeling argument' articulated earlier.

This shift, and the influential effect must be analysed, for the purpose of our discourse, and in a limited manner, from a Foucauldian perspective, and his methodical entourage. This entourage must be discerned from a conjoint reading of three works – *The Archaeology of Knowledge* that characterises the nature of discursive formations,[87] *Society Must be Defended* that characterises discursive tactics,[88] and *Power/ Knowledge* that characterises the traits of genealogical exploration.[89] As a whole, this entourage can further help us to understand the distortion of feminism and consequently the legal subjection of women. This Foucauldian entourage coupled with Saidean vision emerging from the writings of Edward Said's idea of the distorted, imaginary, and created Oriental, opens vistas of exploration, in the Indian context, with special reference to the ideas and ideals of feminism. Its glimpses, not in academia but otherwise and more importantly, have begun to surface.[90] This coupling of Foucauldian and Saidean thought is another form of answer to the power-laden institutions, power driven philosophy governing the society, and development of human made laws that are guiding the social order of the day.

Genealogical Excavation of Legal Subjection of Women

Let me first put, to context here, what I mean by Foucauldian entourage. Michel Foucault is often regarded, as a consequence of his limited attention to gender, albeit significant attention to sexuality, as a philosopher who left half of the world population untouched. There are replete criticisms of Foucault when seen through the lens of feminism.[91] This replete evidence is affirmative of the theme represented

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[87] Michel Foucault, THE ARCHAEOLOGY OF KNOWLEDGE 31-39 (2010).

[88] Michel Foucault, SOCIETY MUST BE DEFENDED 189-190 (2003).

[89] Michel Foucault, POWER/ KNOWLEDGE 83 (1980).

[90] *See generally*, Acharya Prashant, *जिनसे मन लगाते हैं, उन्हीं से दुख क्यों पाते हैं?|| आचार्य प्रशांत, दुर्गा सप्तशती: प्रथम चरित्र* (2023) [Why do we also receive grief from those we attach ourselves. Acharya Prashant, Durga Saptshati, Part – I], YOUTUBE (Oct. 17, 2023) *available at*: https://www.youtube.com/watch?v=Kjqbwk9398w&t=3082s (last visited Oct. 07, 2024); Acharya Prashant, *चाहते ही गए हमेशा, और चाहतों से बर्बाद हुए|| आचार्य प्रशांत, दुर्गासप्तशती द्वितीय चरित्र* (2023) [You have ever wished for, and you have been destroyed by the wishes. Acharya Prashant, Durga Saptshati, Part – II], YOUTUBE (Oct. 19, 2023) *available at*: https://www.youtube.com/watch?v=g4YXiUudXUM&t=3889s (last visited Oct. 07, 2024); Acharya Prashant, *जीवन सही जी रहे हैं कि नहीं? जाँचने के तीन तरीके|| आचार्य प्रशांत, दुर्गासप्तशती तृतीय चरित्र* (2023) [Whether you are leading a right life? Three ways to test. Acharya Prashant, Durga Saptshati, Part – III], YOUTUBE (Oct. 22, 2023) *available at*: https://www.youtube.com/watch?v=F8ySN6lWjnI&t=4721s (last visited Oct. 07, 2024).

[91] Shane Phelan, *Foucault and Feminism* 34(2) AMERICAN JOURNAL OF POLITICAL SCIENCE 421 (1990); Monique Deveaux, *Feminism and Empowerment: A Critical Reading of Foucault* 20(2) FEMINIST

in Foucault's writing about the females on a plain reading of the following paragraphs:

> *'Thus, it becomes clear that the principle that obligated a man to have no partner outside the couple, he formed was different in nature from that which tied a woman to an analogous obligation. In the case of the woman, it was in so far as she was under the authority of a husband, that this obligation was imposed on her'.*[92]
>
> …
>
> *'In this ethics of married life, the 'fidelity' that was recommended to the husband, is, therefore, something quite different from sexual exclusivity that marriage imposes on the wife. It has to do with maintaining the wife's status and privileges, and her pre-eminence over other women'.*[93]

The above quotes have been worded to delineate a circumspection, that in this writing, there is no reference to the question – whether Foucault was a feminist or not? Or whether Foucault's writing disregards and discredits women's empowerment, emancipation, and feminist movement? The point is a reference to the Foucauldian method and how that method can be used to accelerate achieving the guiding ideals that feminist ethics bring with itself. In that, Angela brings the point home well:[94]

> 'Foucault claimed that resistance exists wherever there is normalisation and domination. Power is never total, uniform, or smooth but shifting and unstable; if it is exerted on 'micro levels' it can be contested on micro levels; there is 'no single locus of great refusal' but a 'plurality of resistances'.'

Therefore, the reference to Foucauldian entourage is the epicentre of what follows.

Discursive Formation and 'Legal' Subjection: In *the Archaeology of Knowledge*, Foucault identified the discursive formations. This is significant for understanding the guiding ideals that emerge from feminist ethics. Foucault conceied the concept of discursive formations as:[95]

> *'Whenever one can describe, between a number of statements, such a system of dispersion, whenever, between objects, types of statements, concepts, or thematic choices, one can define a regularity, we will say, for the sake of convenience, that we are dealing with a discursive formation – thus avoiding words that are already overladen with conditions and consequences, and in any case inadequate to the task of designating, such a dispersion, such a 'science', 'ideology', 'theory', or 'domain of objectivity'.'*

STUDIES 223 (1994); Angela King, *The Prisoner of Gender: Foucault and the Disciplining of the Female Body* 5(2) JOURNAL OF INTERNATIONAL WOMEN' S STUDIES 29 (2004) *available at*: https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1532&context=jiws (last visited Oct. 07, 2024). *See generally* A. Balsamo, TECHNOLOGIES OF THE GENDERED BODY: READING CYBORG WOMEN (1996).

92 Michel Foucault, HISTORY OF SEXUALITY: VOL. II THE USE OF PLEASURE 151 (1990).

93 Michel Foucault, HISTORY OF SEXUALITY: VOL. II THE USE OF PLEASURE 165 (1990).

94 Angela King, *The Prisoner of Gender: Foucault and the Disciplining of the Female Body* 5(2) JOURNAL OF INTERNATIONAL WOMEN' S STUDIES 29 (2004) at 37 *available at*: https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1532&context=jiws (last visited Oct. 07, 2024).

95 Michel Foucault, THE ARCHAEOLOGY OF KNOWLEDGE 39 (2010).

This methodical ideation can help us understand how Foucault helps the feminist discourse. The discursive formation, against which the feminist movement is to voice, may be surmised in the following manner, simply – man is the focal point of all discourses, and automatically, the legal discourses and the concepts that build the legal system. Two anecdotes will suffice – one, context of the French Revolution and the Declaration therewith, second – the writings of legal philosophers, we will take the instance of Hobbes and his *Leviathan*. The French Revolution and the Declaration therein was titled: Declaration of the Rights of *Man* and of the Citizen (*Déclaration des droits de l'homme et du citoyen*).[96] This Declaration was representative of a unique phenomenon. The document when read as a whole represents a political association, led by a Sovereign, and participation of all *men* in that association. This document represented a choice of convenience and in that, the right to participation in association is centred around male at the exclusion of all else. One can assume that the thinkers of the time were not intending to consciously pioneer this exclusion and that they were a construct of their historicity. And one can counterargue that the *man* here is representative of women as well. However, this point is based on 'feeling argument' and it also represents a psychological lop-sidedness of the person making this argument, deeply rooted in the unconscious.[97] But from the Foucauldian point of view, the use and continuous reference to the French Revolution as representing a vantage point for realising human rights represents the discursive formation, one where the female, natural entities, animals, plants, etc. are all ousted and *man* is the only one who can participate in the political association. Therefore, in that sense, this Declaration, however benign, represents the discursive formation that keeps everything other than *man* outside the domain of discourse and if there is any iota of dispersion, it is avoided. The entire legal order and legal philosophy is based on the same phenomenon. This phenomenon is represented in the writings of the legal philosopher Thomas Hobbes in *Leviathan* where he envisioned the sovereign and the characteristics that *men* have.[98]

Another point of convenience emanating from the Declaration is – 'The security of the rights of man and of the citizen requires public military forces. These forces are, therefore, established for the good of all and not for the personal advantage of those to whom they shall be entrusted.'[99] This represents the cornerstone of institutional fetishism that underlies the discourse of men and the legal order they wish to

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[96] Declaration of the Rights of Man, National Assembly of France, August 26, 1789 *available at*: https://avalon.law.yale.edu/18th_century/rightsof.asp (last visited Oct. 07, 2024).

[97] Elsewhere Foucault, while referring to Freud, has discussed the idea of unconsciousness as a narcissistic wound to the West. *See generally*, Michel Foucault, AESTHETICS: ESSENTIAL WORKS 1954-84 (2020).

[98] Thomas Hobbes, LEVIATHAN 1651 (Project Gutenberg) *available at*: https://www.gutenberg.org/files/3207/3207-h/3207-h.htm (last visited Oct. 07, 2024).

[99] Declaration of the Rights of Man, National Assembly of France, August 26, 1789 *available at*: https://avalon.law.yale.edu/18th_century/rightsof.asp (last visited Oct. 07, 2024), Article 12.

establish; it is representative of power in the capillary form.[100] Therefore, Foucault's conception of *discursive formation* helps us understand the ousting of women and the feminist ethics from the institutions and their practices. We must, therefore, attempt at dealing with the problems, their given solutions, and the effects it is producing to understand the wrong that has been committed and countering the fact of legal subjection of females.

Discursive Tactic and 'Legal' Subjection: Michel Foucault refers to the idea of discursive tactic, he writes:

> *'What I am trying to identify, is what might, if you like, be termed a discursive tactic, a deployment of knowledge and power, which, in so far as it is a tactic, is transferable and eventually becomes the law governing the formation of a knowledge, and at the same time the general form of the political battle. So, the discourse on history is generalised, but in a tactical sense.'*

This idea can be easily understood by referring to the earlier section and discussion on Doniger, *Redeeming the Kamasutra*,[101] repressive hypothesis, Victorian Morality, and Henry Maine's notion of society – the primitive and the progressive. In this sense, Said's pointing to the temporal Oriental created by the Occidental also helps us grasp the tactic which proceeds on account of continuities and thereby delegitimises the female. As stated earlier, the Indian historical account gives us a concrete glimpse of the discursive tactic that Foucault is referring to and, in this tactic, the ideas proposed by Maine about law and society provides insights into the wrong committed upon the Indian society as a whole and the problems that emerge subsequently.

Reference here must be made to the book, *Ancient Law* by Henry Summer Maine.[102] The thrust of the argument is that when one subjects the entire history of society in terms of legal order as traced by Maine to the Foucauldian entourage, the entire piece appears to be misplaced and unidirectional. There are reasons for this and these reasons arise from multiple fronts. First, the power matrix that appears to overplay in his book. Maine writes:[103]

> *'In the Western world the plebeian or popular element in each State successfully assailed the oligarchical monopoly, and a code was nearly universally obtained early in the history of the Commonwealth. But, in the East, as I have before mentioned, the ruling aristocracies tended to become religious rather than military or political, and gained, therefore, rather than lost in power; …'*

There is undoubtedly the power that has been accumulated by certain classes. However, this analysis is merely related to juxtaposing the political and religious powers which seems relevant. But starting from that juxtaposition and reaching a

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[100] *See generally*, Michel Foucault, POWER/KNOWLEDGE (1980).
[101] Refer to *Section IV* above.
[102] Henry Summer Maine, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (1861).
[103] *Id.*, at 15 (1861).

conclusion about the societies across the world in general is a precise example of discursive tactic. In such a conclusion the discontinuities are generally not considered and the whole that appears is transferable and eventually becomes the law governing the formation of a knowledge. That has been the fate of the legal system of India. The alternative to this conclusion and the alleged stifling of Indian society has been studied in depth by authors.[104] Maine's argument that the Eastern monarch gained and the Western monarchs lost in power is without sight to the Godly King that dethroned the religious king.[105] Second, Maine appears to proceed on certain ideas about progress of society but he does not explore the question of progress itself. Of course, if a uniform unsaid assumption was made that progress refers to controlling the natural resources which have been put by God at the behest of man.[106] His theory is apt. But in the earlier section we have already referred to the lop-sidedness of that order. Further, for reference, if the progress of civilisation is as progressive and as civilised as Maine considered with respect to the Western societies, one is left wondering about the results and effects of the progress. Third, this book must be read in association with the processes and the time when it was written. This was a time when the process of legally creating colonial India was still underway. The history that was being created, the continuities which were being shown and the decisions which were being taken around this time with respect to the Indian society reflect categorically the discursive tactic. Therefore, Maine's ideas were representative of a tactic. Fourth, and finally, this should also be seen from how the discursive tactic is deployed: We will see all this being reinvested in or rearticulated around this historical knowledge and the tactics that are bound up with it.[107] Maine's work was the philological and political aspect of the overwhelming colonial project that was being undertaken. What subsequently appears at the end of the historical continuity represented by these works is the civilization becoming the *Westerners*.[108]

The legal order, the philological discourse, and the entire permeation of political power coupled with economic and social power, then perpetuate the legal subjection of women. The two approaches bring to fore the genealogical exploration, whereby women are legally subjugated as a consequence of multiple simultaneous processes, not merely at institutional level and hierarchies and scientific ties that

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[104] Wener F. Menski, HINDU LAW: BEYOND TRADITION AND MODERNITY (2008); J.D.M. Derrett, HINDU LAW: PAST AND PRESENT (1957); Wendy Doniger, REDEEMING THE KAMASUTRA (2016).

[105] Ernst H. Kantorowicz, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY X (2016). He writes, 'The third is intrinsic to the book itself. The King's Two Bodies asks, precisely, about the naked emperor and his new clothes. How is it that rulers, humans like the rest of us, are able to hold sway? What kind of fictions are in place to enable some to command the allegiance, even the worship of others'.

[106] Martin Heidegger, QUESTION CONCERNING TECHNOLOGY AND OTHER ESSAYS (William Lovitt *trans.*, 1976).

[107] Michel Foucault, SOCIETY MUST BE DEFENDED 190 (2003).

[108] *Id.*, at 199.

govern the operation of State. Rather, it is partly sociological represented in the *feeling* argument, partly legal represented in the Declaration and writings of legal philosophers, partly political represented in the political association, partly economic represented in the overarching tactic represented by colonial processes, partly biological represented in the religious condemnations, partly linguistic represented in the generality of language, and partly psychological emanating from language represented in the 'narcissistic wound of the unconscious'[109] caused to the West.

In all the above analysis, an attempt is made, and this attempt is in the realm of legal order and its development. A dissociation may then appear from the discourses in the legal order and other disciplines while approaching the context that has been made herein before. But as Foucault notes, 'In that area where, in the past, history deciphered the traces left by men, it now deploys a mass of elements that have to be grouped, made relevant, placed in relation to one another to form totalities'.[110] Therefore, the legal order must not be seen as an isolated ideal and island that can be reformed without reference to the sociological that underlies it. Rather, the genealogical excavation must dwell deeper to enunciate the guiding ideals by identifying ruptures in various fields and then answer the question of how the society can be defended not as a civilisation but as a composite whole.

VI

Feminism and Gender-Neutral Drafting of Law

The preceding discussion highlights the multi-pronged approach based on social processes that can help achieve the guiding ideals based on feminist ethics. Feminism and humanistic ethics and their convergence, as delineated in this paper, might be rejected on account of being too impractical and imprecise for real life use and owing to its Platonic characterisation. Immediately, therefore, a question follows – how to realise the all-encompassing guiding ideal? This question finds relevance in the context of another idea and approach in the drafting of law which has high fecundity, but is being today, subjected to the institutional ethics and scientific compartmentalisation: gender neutral drafting. Today, there is a unanimous call for use of gender-neutral pronouns or the use of female pronouns in drafting.[111] A shift is also seen in view of use of female pronouns in legislation not

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[109] Michel Foucault, AESTHETICS: ESSENTIAL WORKS 1954-84 272 (2003).

[110] Michel Foucault, *Introduction* in THE ARCHAEOLOGY OF KNOWLEDGE 7 (2010).

[111] Special Correspondent, *Rules in LS to be gender neutral*, THE HINDU (May 18, 2016) *available at*: https://www.thehindu.com/news/national/rules-in-ls-to-be-gender-neutral/article5661555.ece (last visited Sep., 25, 2024); Ritika Jajoo & Gautam Ganesh, *A 'man's Parliament' striving for an inclusive India*, THE HINDU (Jun. 18, 2022) *available at*: https://www.thehindu.com/opinion/op-ed/a-mans-parliament-striving-for-an-inclusive-india/article65537739.ece (last visited Sep., 25,

in totality, though.[112] This is important, we started from the use of the male pronouns and have now begun to shift towards female pronouns. Logically, then, it will take us another few thousand years to realise the totality of the society and achieve the essence of gender-neutrality. The prefixing of gender makes the phraseology an oxymoron. The fundamental thrust lies in the fact that gender always exists in binary and there will always be one-gender and another. When one-gender is, as pointed earlier, subjected to the other, the feminist ethics lose any hope of realisation and what appears in this fight is the emergence of another form of power. Since, the thrust of this paper is to enunciate the convergence of feminist and humanistic ethics for resisting the domination and subjection of women, it does not entail another form of power, which would be another form of madness. We are psychologically and socially trained to perceive gender in the binary and therefore, these underpinnings that directly affect law will belie the intents of the principle.

The all-encompassing guiding ideal gives us a simpler answer with respect to what is called the gender-neutral principle. The gender-neutral drafting may now be termed as neutral-drafting. It is only in neutrality that Nussbaum's pointing to the distortion of the feminist ethics which may be rectified. This neutrality is emanating from the Indian knowledge traditions and the idea of nothingness.[113] Neutrality here represents no-value judgement, no classification and absence of binaries. However, this absence is not a negation but an embracement, of all that is, and all that can be. This idea is presented in Jung, as he discussed human nature and the idea of God as embracing all binaries.[114] However, these ideas might appear to be mythological and opposed to the *logos*, albeit, the difference is only one of creation and not of reality. But this idea of neutrality must guide the legislature.

Realising the All-Encompassing Guiding Ideals: Some Consideration and Suggestions

The first proposition that is suggested here, with special reference to commence the work on the ideals and feminist ethics, for a change in the scheme of the Act of 2013 is elimination of the prefixed 'sexual' from the phrase sexual harassment, thus focusing on all-forms of harassment that is possible in the workplace. There are two consequences of this prefixation – one, that only sexual harassment can take place at the workplace and there is no other form of harassment possible and two, any

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2024); Khushi Krishania and Yashvi Bansal, *The Gender Politics of Legal Language and Its Implications*, NLR BLOG (Jul. 03, 2024) *available at*: https://nliulawreview.nliu.ac.in/blog/the-gender-politics-of-legal-language-and-its-implications/ (last visited Sep. 25, 2024).

[112] *In a first, India uses 'she', 'her' to refer to all genders in draft law*, BUSINESS STANDARD (Nov. 19, 2022) *available at*: https://www.business-standard.com/article/current-affairs/in-a-first-india-uses-she-her-to-refer-to-all-genders-in-draft-law-122111900274_1.html (last visited Sep. 25, 2024).

[113] *See generally*, Surendranath Dasgupta, HISTORY OF INDIAN PHILOSOPHY VOL. – I: *Chapters – III, IV, V*, 138-145 (2018).

[114] Carl Jung, THE REDBOOK (Sonu Shamdasani *trans.*, 2009).

other form of harassment does not have significant implications on the life of the person concerned and it is no mischief, which needs correction. The neutrality of the term 'harassment' provides a way for realising neutrality as discussed before and this would also embrace all forms of possible harassment at the workplace. The exclusion also represents the psychological process underlying the Indian reality that these harassments do not take place in India. One may then critique – that the objective of the Act of 2013 is mistakenly read by me. But to that, a mere answer will suffice – if the objective of the Act is achieved, then only the policy vision related to sexual harassment under the Bharatiya Nyaya Sanhita (BNS), 2023 can be realised.

The second proposition is that the neutrality of harassment must proceed with neutrality of legal consequence. As noted earlier, the current scheme of legal recourse to harassment appears blurred and hazy. There are civil and criminal consequences parallelly appearing in the scheme of the legislation. In ushering the way for neutrality of consequence, the legal consequence of the action may be made disciplinary in nature, which is reflected in the overall scheme of the Act of 2013, but which is marred with incongruence and impossibilities. The disciplinary nature shall allow the persons involved first, not to be stigmatised and second, the consequences of any action therein shall be of relatively lower degree of mischief. This proceeding shall also clarify the consequences, demarcate the subject-matter jurisdiction, and shall not impede the possibility of proceeding under the BNS, 2023.[115]

The third proposition is that the organisations and institutions must allow the proceedings, procedure, and the punishments, with maximum prescription under the promulgated law, to be developed and implemented at a particular level. It must be *sui generis* rather than being one-size fits all. This will also allow pluralistic ideas of harassment to be incorporated into the scheme and will enable the relief to the victim accordingly. This will also be neutral in terms of how the legislature perceives all forms of harassment at the same pedestal but does not put one over the other. An illustration will help clear this argument better. In the organisations working as multi-national corporations, the nature of harassment can be far different from an educational institution. Mere reference to sexual harassment as only harassment at workplace, as is the case today, the multiple dimensions of harassment are not included within the ambit of the Act, and the nature of organisational work is made to fit uniformly in all categories.

The fourth and obvious proposition is that there should be use of the term 'person' instead of man and woman. The idea that only men can harass women proceed on the lop-sided view that transgenders do not, cannot, and should not work in the institutions. It also proceeds on the idea that women cannot harass women and no reflection need be made of harassment of men. The idea of person includes within its ambit all the human forms, representing thus a neutral standpoint.

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[115] Bharatiya Nyaya Sanhita, 2023, S. 75.

The fifth and last consideration is minimal procedural prescription and keeping the entire scheme simpler. A person harassed must not be subjected to tumultuous itineraries to make good any form of loss that has been caused. The procedural simplicity will make the scheme neutral in the sense that – neither the victim nor the alleged person will be unnecessarily burdened with stigma, second, the institutional charisma will not be, then, representative of power, and third, there will emerge a sense of confidence with respect to the overall approach and role of organisation in employee's life.

VII

Conclusion

What we call civilization today, in fact, that its civility has lost the vital sense of that civility, therefore the question that needs to be answered here is – what is so civilised about this civilisation today? Second, what we call the social order today is legally ordained. Do we not need laws that allow the society to change towards something relatively better and that allow individual's multi-pronged development, not mere material development? Third, as a society we have killed a lot of possibilities and this killing is a consequence of a lop-sided approach to life itself, from a position of non-neutrality and therefore a question needs to be asked – How do we make this life all-encompassing? Fourth, our women have been side-lined, objectified, labelled, and left at the behest of the men (the lop-sided men) and therefore a question must be asked – Do we continue with these labels, objectification, and side-lining or do we take a step towards attempting to question these attributes of our society? Fifth, and finally – Do we lose hope in the current, that which is so advanced in multiple ways and that which can provide solutions to problems not only scientifically but socially. A call for social capacity building and a quest for open exchange.[116] The legislature needs to be more cautious in framing such laws and with its benign motif must be vigilant of the possible abuses of the laws. The courts, alike, must be cautious in interpreting such laws and must be vigilant of the possibility of abuse of an expansive interpretation.

[116] Paul Feyerabend, SCIENCE IN A FREE SOCIETY 29 (1987).