Judicial Meanderings in Patriarchal Thickets: Litigating Sex Discrimination in India

KALPANA KANNABIRAN

This essay spotlights judicial twists on the issue of sex discrimination over the last six decades through an examination of reported cases from the high courts and the Supreme Court of India. These cases by themselves do not exhaust the field of non-discrimination, but point to one site where there have been protracted deliberations. This sociological reading looks at the ethnographic detail that texts present, the process and points of deliberation and contestation among petitioners, respondents and courts, and the multiple implications of jurisprudential resolution for gender-based discrimination. It follows the plural threads of reasoning with respect to women's status, position, vulnerabilities and rights, and attempts to understand their ideological underpinnings.

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Kalpana Kannabiran (*kalpana.kannabiran@gmail.com*) is with Asmita Resource Centre for Women, Secunderabad, and a member of the Expert Group on the Equal Opportunity Commission.

> The so-called "objective" interpretation is as much "subjective" in this sense as "constructive" interpretation. The mind that interprets is not a *tabula rasa*; neither is it just a calculating machine or an electronic brain. The interpreter is a thinking being and as such he will have to interpret with a mind having a system of beliefs and from a standpoint which he happens to occupy at the time of the interpretive activity (Chattopadhyaya 1978: xi-xii).

This essay will attempt to present judicial meanderings on the issue of sex discrimination over the last six decades through an examination of reported cases from the high courts and the Supreme Court, with the limited aim of unpacking the deliberations on non-discrimination in courts in India. These cases by themselves do not exhaust the field, and broad concerns of non-discrimination, but point to one site where there have been protracted deliberations. In reading case law, however, rather than focus on the ratio (or the final decision), which is the way in which legal reasoning on non-discrimination would be pieced together, this is a sociological reading that looks at the ethnographic detail that texts present, the process and points of deliberation and contestation among petitioners, respondents (most often the state) and courts, and the multiple implications of jurisprudential resolution for gender-based discrimination. The idea is to follow the plural threads of reasoning with respect to women's status, position, vulnerabilities and rights and understand their ideological underpinnings, not merely trace the march of ratios towards the judicial achievement of emancipation for women.

The first thread in legal reasoning on non-discrimination that we will follow is expressed through an oft-repeated refrain in Article 15 jurisprudence on sex discrimination, which is that a particular claim is not on grounds of sex alone. By this argument, when sex combines with property,[1] social norms,[2] "different conditions of service"[3] and the like, the very fact that it is expressed in combination removes it from the purview of Article 15 (1). This exemplifies the disaggregative norm of interpretation that bases itself on a reductionist reading of the constitutional fragment "on grounds *only* of sex, caste, language, place of birth or any of them".[4]

The second thread in constitutional reasoning consists in the understatement of discrimination as classification or differentiation. This works sometimes to the immediate advantage of women, sometimes not, but the interpretive reduction (whatever the immediate outcome) has philosophical implications in terms of our understanding of discrimination.

The third thread explores the scope and purpose of Article 15 (3) – the creation of special provisions for women and children. This provision has been tossed around in courts in ways that are very

telling of the orientation of the judicial mind as to the location of women in the public domain.

To anticipate my argument, on the surface, interpretation is of course only a question of law. However, a closer and more careful reading will demonstrate that both fact and law intermesh with notional elements that are embedded in a patriarchal system, which puts in place an ideological apparatus for the juridical understanding of sex-based discrimination.[5]

1 Differentiation, Classification and Discrimination

How does one draw a line between differentiation, classification and discrimination? The first question that came up for resolution before the courts had two parts – both of which continued to shadow the enunciation of non-discrimination on grounds of sex for several decades, echoes of which are audible even now. Order 25 of the Civil Procedure Code (CPC) lays down the procedure to be followed by courts in the case of money suits. Under sub Rule 3 of Rule 1, the court has the power to demand monetary security from the plaintiff, if the plaintiff happens to be a woman and does not possess sufficient immovable property in India. On the other hand, the rule requires male plaintiffs to give monetary security only if they are resident outside India and do not have sufficient immovable property in India.[6] Was this provision an infringement of the right against discrimination, Article 15(1)? Was it void under Article 13(1)? Or, could it be argued that it was covered by Special Provisions under Article 15 (3)?

In *Mahadeb Jiew*, the court did not hold that there was no discrimination. But it said that since proprietary considerations were superadded to sex, it did not constitute discrimination on grounds of sex alone, observing that "possession of sufficient immovable property in India is not a consideration bearing on sex at all".[7]

The next step in this reasoning led to the argument that the introduction of a scheme segregating women and men students, retaining the more established and reputed facility for men students and asking women students to travel back and forth between the women's college and the "co-educational" institution for men, did not constitute discrimination on grounds of sex alone, because it was sex coupled with the application of a scheme for women students, "which covered development of women's college as a step towards the advancement of female education …".[8] This, even though it obstructed women's entry into an institution and thereby validated the creation of "special institutions" for men contrary to the constitutional framework. Paradoxically, this also brought the scheme within the meaning of "special provisions for women" under Article 15 (3), and not under "discrimination".

Differentiation that is invidious and amounts to discrimination can even come through apparently benign legislation like the Court of Wards Act. A comparison between the provisions of Section 8 (1) (b) and 8 (1) (d) of the Uttar Pradesh Court of Wards Act clearly revealed that there was discrimination against women. Clause 8 (1) (d) left it to the discretion of the government to declare a female proprietor unfit to manage her estate without any rules being laid down to determine what constituted incapacity to manage the estate. She was not allowed to represent her case before the declaration was made. In the case of a man, not only did the law require that certain conditions be fulfilled before he could be declared unfit to manage his estate, but also that he be given the fullest opportunity to have his objection heard. The state of Uttar Pradesh, in defence of this provision argued,

> All differentiation is not discrimination and it is open to the state to classify citizens into categories provided that the classification is reasonable and based on intelligible indicia. Since it is a well known fact that women generally are not such competent managers of property as men and are much more liable to be led astray, therefore, for the purpose of management of property, they may be legitimately put in a class by themselves.

The Allahabad High Court, rejecting this argument, stated that the denial of the right of representation to women and the absence in Section 8 (1) (b) of the Courts of Wards Act of any rules similar to those in Section 8 (1) (d) could not but be regarded as "hostile" to women. The differentiation, it was held, attracted Article 15 protections, because it was based solely on the sex of the proprietor.[9]

Where there was a shortfall of institutions offering higher education to women alone, institutions that were hitherto open only to male students began opening their doors to the increasing number of women students. At this time, Madras University acted on a University Commission Report on the situation of women in co-educational institutions, which stated that life for them in these institutions that had a predominantly male presence lacked the "atmosphere of freedom necessary for their natural development". As a remedial measure and to ensure discipline, women students were barred entry without express permission of the Syndicate. In justification of its decision to regulate the entry of girl students, the university argued – an argument that the court upheld, that it was not state-maintained and only state-aided, and therefore did not come within the meaning of the state. Further, in a twisted reasoning, the court held that there were no regulations refusing admission to women students – "those regulations are addressed to colleges and it is the colleges that are refused permission to admit women when they do not provide sufficient facilities". Although the fact of "hostile environments" was recognised explicitly as early as 1954, the remedy was the exclusion of women from these environments as a measure of "discipline".[10]

Order 5 Rule 15 of the CPC provides that when defendents cannot be found and there is no agent empowered to accept service of summons, the service may be made on an adult male of his family.[11] The court held that the provision of Order 5 Rule 15 does not put women in a disadvantageous position but rather exonerates them from the responsibility of fastening notice of service as service on the other members of the family. Justifying its decision, the court observed,

> The function of females in Indian society is that of housewives. Until recently it was in exceptional cases that women took part in any other activity than those of housewives. Females were mostly illiterate and some of them *parda nashin*. The legislature while enacting this rule had in mind the special conditions of the Indian society and therefore enjoined upon the male members and did not regard service on females as sufficient.[12]

The distinction between classification/differentiation and discrimination based on sex has always been a troublesome one. The government of Bihar created two sex-segregated branches in a cadre and issued promotion orders to each separately, which resulted in the superseding of women with seniority. The court held that this violated the protections enshrined in Articles 14 and 16.[13] As late as 1979, it was found that the cadre strength of women doctors in

government service was only one-fifth of the total cadre strength of government doctors in Bihar. The state, with a view to address the needs of female patients decided to "earmark" and "allot" 125 seats for women in medical colleges. This, it was argued, was not reservation but a mere identification or classification of a "source" from which those seats were to be filled. The object, the state asserted and the court concurred, was to fulfil the "needs of lady patients in the state",[14] not to make special provisions for women to access medical education. Although, in effect, upholding the validity of reservation, the reasoning of the court understated its importance by foregrounding the "needs of patients", and identifying women, not as a class that has not had equality of opportunity in medical education, but as a "source" through which a public need will be fulfilled. This reasoning resulted in a displacement of "special provisions" under Article 15 (3) from being a constitutional right of women to positive discrimination to the more diffuse need for creation of medical facilities for women generally.[15] While these are both necessary, they belong to different classes of action. Rendering them interchangeable through interpretation has far-reaching consequences for the jurisprudence on non-discrimination based on sex.

It is also important to recognise that this is a doubled-edged weapon. Women's claims against discrimination in one set of cases have been defeated on grounds that the impugned action is a classification, and by that token not discriminatory. In yet another set of cases, classification is the medium through which special provisions and reservations for women are brought in. When evaluating whether or not a particular method of differentiation is discriminatory, it is therefore, important to ascertain whether that method will either lead to or reinforce existing hierarchies and concentrations of power. To the extent that they reflect and correspond with systems of social inequality, differentiation and classification may be the source of discrimination.[16]

2 Equality in Relationship

The question of sex discrimination in the context of relationships is expressed in the jurisprudence on sex discrimination in two ways. First, in the context of spousal or filial relationship – in relation to adultery, bigamy, restitution, privacy, divorce, maintenance, property, and guardianship, to name but a few; and second, in the context of employment where a relationship is "represented" in specific ways that discriminate against women, denying them entitlements that in the normal course would accrue to all employees. From the first set of cases, I will pick three issues rather arbitrarily, and reflect on their implications for an understanding of the ways in which courts have constructed conjugality and equality in relationships.[17]

Spousal relationship presents a very serious problem. The discussion on bigamy in an early case frames the issue of discrimination based on sex almost unconsciously, pointing to the social bases of jurisprudence, marriage providing the most illustrative space for unpacking the social context. The discussion on the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, centred on whether it was discriminatory to penalise Hindus for bigamous marriages while Muslims were allowed to be polygamous. The argument justifying the practice of bigamy was,

> A Hindu marries not only for association with his mate, but in order to perpetuate his family by the birth of sons. It is only when a son is born to a Hindu male that he secures spiritual benefit by having someone who can offer oblations to his own shade when he is dead and to the shades of his ancestors and that there is no heavenly region for a sonless man. The institution of polygamy is based upon the necessity of a Hindu obtaining a son for the sake of religious efficacy.[18]

The court inserted women into this context, reinforcing it even while holding that bigamy was not permissible.

> Hindu marriage is a sacrament and not a contract and the sentimental love and devotion of a Hindu wife for her husband is well known. Legislature may well have thought that it would be futile to make the offence of Hindu bigamy punishable at the instance of the wife because Hindu wives may not come forward with any complaint at all.[19]

The *Sareetha* case in Andhra Pradesh 20 years later, on the restitution of conjugal rights marked a turn in the judicial discourse on conjugality, a turn that was not sustained in subsequent cases.[20] Examining the validity of Section 9 of the Hindu Marriage Act, the Andhra Pradesh High Court observed with exceptional sensitivity, "A court decree enforcing restitution…constitutes the starkest form of governmental invasion of personal identity". Although theoretically this section applied to men and women equally, and by that token satisfied the equality test, the court observed, "Bare equality of treatment regardless of the inequality of realities was neither justice nor homage to constitutional principles". On the face of it, the court's rejection of the right to restitution seems to be located within the framework of the right to privacy, bodily integrity and dignity (Nussbaum 2005: 192-97). While these are indeed the signposts, what the court seems to forewarn itself against is the danger of judicial complicity in marital rape – "to coerce the unwilling party through judicial process to have sex against that person's consent" – and interrogates the claim for restitution from that vantage point.

There was, however, a double somersault by the courts after *Sareetha* that rolled back the advance this interpretation represented on the place of consent and choice in marriage. With reference to restitution itself, in a context where marital rape can neither be named nor is a part of the offence of rape under the Indian Penal Code (IPC), it became possible for the Delhi High Court to assert that the introduction of the "cold principles of Constitutional Law" into the home was like "introducing a bull in a china shop" and "will have the effect of weakening the marriage bond",[21] a view that found reiteration in the otherwise commendable report of the Law Commission as late as 2000.[22] This is one facet of the turnabout on *Sareetha*.

Decisions on the law on adultery that followed close on the heels of the *Sareetha* judgment point us to another facet of the turnaround. Section 497 of the IPC says,

> Adultery: Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment … In such case the wife shall not be punishable as an abettor. [23]

When the constitutional validity of this section was challenged on the grounds that it does not confer similar rights of prosecution on the husband and the wife and penalises extramarital relationships arbitrarily, the Supreme Court upheld the validity of this archaic section saying that "merely because the section does not define

adultery to include cases where a husband has sexual relations with an unmarried woman it cannot be declared unconstitutional", going on to observe that women are treated like chattel within marriage and that it is men who are the seducers, not women. This view, because it emanates from the crest of justice, the Supreme Court, is the "constitutional interpretation". It is a fact that women are treated like chattel within marriage in a patriarchal system. If that is not desirable (as the Supreme Court seems to be saying), one way of removing women from the position of chattel is to reformulate the definition and implications of extramarital relationships, tying it to notions of consent, choice and dissolution of marriage – in other words, to use interpretation to step out of patriarchal confines. Instead, the court regrets the fact that women are chattel within marriage and yet locks them firmly into the position of chattel by substituting constitutional morality with codes of public morality,[24] which allow one man to prosecute another for having a relationship with his wife. And a wife cannot prosecute her husband, her lover or her lover's wife, because within this framework, as chattel she is denied agency.[25] The reduction of women to chattel and the denial of agency are also evident in that a married woman under the law is not guilty of adultery if she has obtained the consent of her husband.[26] The unequal position of husband and wife with respect to adultery under the Indian Divorce Act, 1869, was held by the Madras High Court as a valid classification since a woman could bear offspring who would under the law be treated as legitimate children of the husband, while a man "cannot bear a child" if he commits adultery.[27] Biology, by this token, is destiny.

The absence of a holistic understanding of discrimination in conjugal relationships and the disaggregated application of the law in this sphere is an expression of the strategy of jurisprudential dissociation. The court either subscribes to the wisdom of these provisions, as above, or asserts that it is of little consequence, since the court is "the arbiter merely of the constitutionality of the law".[28] This strategy of jurisprudential dissociation is a critical tool in the ideological condonation of gender-based discrimination – embodying the interlocking of, to use Upendra Baxi's delineation, c2 (constitutional interpretation) and c3 ("the discursive sites for justification … of practices and performances of governance") (2004: 55). This strategy also expresses itself through the method of disaggregation where the social formation of gender-based discrimination is sliced into different parts that are viewed as independent entities that have no bearing on each other.

It was not only Hindu wives who found themselves in an unequal position. What merits serious reflection is the emergence of a radical, even strident, voice in the judiciary willing to look at conjugal relations in the context of the Constitution in relation to Christian[29] and Muslim[30] women. With reference to Hindu women, however, the equivocation and quick resort to scriptural/textual/dominant cultural prescriptions of subordination and acquiescence of the ideal Hindu wife present a stark contrast. This doublespeak in relation to Indian women merits serious consideration, particularly because there is a radical voice with a long history within the Hindu community as well, one that speaks to a different notion of constitutional morality, the *Sareetha* case echoing Rukmabai's struggle against the restitution of conjugal rights a century earlier (Chakravarti 1989: 73-74; Sarkar 2001: 194).

3 Discrimination at the Workplace

Jurisprudence on discrimination against women in the workplace focused on equal treatment, equal pay for equal work, special provisions and an enunciation of the efficiency rules and the relationship rules.

An important thread in Article 15 jurisprudence on the workplace has to do with what I call the "efficiency rules" and the "relationship rules". The Indian Railways found that women employees are less susceptible to improper influence, were more patient and courteous, and less corrupt than male employees and decided to reserve clerical posts in reservation offices for women with a view to increase efficiency.[31] But this view of women's efficiency in paid work, encouraging women and essentialising femininity in one stroke, although problematic, is rare in the discourse on women in paid work. The airlines, for instance, were very different. Air India and Indian Airlines wanted their hostesses to be young, "attractive", underweight and unmarried; if they married, pregnancy was barred. By this argument, a narrowly prescribed, normative physical appearance against which women were measured in literal terms ("medical fitness"), was throughout their period of service the precondition of efficiency, which was achieved through an interlocking of bodily measurements with active disparity in material conditions of service based on sex.[32]

Although there have been major decisions that have struck down discriminatory provisions in the civil services,[33] and there was recognition at one level that "our struggle for national freedom was also a battle against woman's thralldom",[34] the centrality of marriage to the definition of womanhood remains a disabling factor in women's entitlements to justice and remedies at work. While locking women into stereotypes of the nurturing mother and the acquiescent wife who bear sole responsibility for housework and childcare and prescribing behavioural norms that curtail their mobility outside the home, these very stereotypes are transported through jurisprudence into the workplace to limit women's access to equal opportunity and equal treatment.

3.1 The Efficiency Rules

Where sex-disaggregated data shows an overwhelming number of male offenders in comparison to women offenders, should women with the requisite service be promoted as jail superintendents of men's jails?[35] In the case of *Mrs R S Singh*, the Punjab and Haryana High Court was dealing with an order by the governor prohibiting women from employment in men's jails except as clerks and matrons. While Mrs R S Singh was eligible for appointment as superintendent of jail, her name did not figure among the superintendents on the gradation list in March 1966, and records of her employment carried a note that she was not encadred with the superintendents. In general, she had been considered unfit for appointment in a men's jail where hardened and ribald prisoners were confined.[36]

Women employed in these institutions, in this view, are potential victims of male crime, specifically male sexual crime, a possibility that even the prison cannot offer women protection against.

> It needs no great imagination to visualise the awkward and even hazardous position of a woman acting as a warden or other jail official who has to personally ensure and maintain discipline over habitual male criminals.

> Necessarily the inmates of these jails have a large majority of hardened and ribald criminals guilty of heinous crimes of violence and sex … The difficulties which even male Wardens and other jail officials experience in handling this motley and even dangerous assemblage are too clear to need elaboration. A woman performing these duties in a men's jail would be even in a more hazardous predicament.[37]

Assuming the position of absolute neutrality, the court posed the question in reverse. Would it be acceptable to employ men in all-women institutions? In prisons, educational institutions, and the like? Clearly no. So it is concluded that it was absolutely reasonable to differentiate classes according to sex for purposes of employment.[38] The reasons for both arrangements are not similar but identical, namely, whether you speak of men in custody or a man in authority, the state cannot assure good conduct. The solution therefore is to confine or exclude women as the case may be. The justification, however, is in the efficiency rule.

> One of the paramount considerations for the public service must be the efficiency of its employees. The State must select and appoint persons most suitable to discharge the duties of a particular job which they are to hold … It is evident that where disparities of either sex, patently add to or detract from, the capacity or suitability to hold a particular post or posts, then the state would be entitled to take this factor into consideration in conjunction with others.[39]

By a predictable elision, the best possible incumbents become the most suitable persons, and sex is seen not alone but in conjunction with propriety, decency, morals and decorum. That sex is a ground for discrimination only because it always acts in conjunction with propriety, decency, morals and decorum is lost in this deliberation. Each of these terms is defined in a manner that the presence of one or more of these attributes "exonerates" women from citizenship (the *purdah nashin* wife), and their absence disqualifies them from citizenship (the prostitute).

The fact of women's dual responsibilities at home and work, and the orientation of employers towards notions of gender-appropriate behaviour where women are concerned – even where the state is the employer – lead to the extension of the efficiency argument to defeat women's claims to equality at work. Take, for instance, a police department denying women typists promotion "on public grounds", "due to the peculiar nature of the work of the stenographers of the department (touring along with the officers and working at odd hours)";[40] or the Indian army resisting the posting of a lady officer as officer-in-charge of its legal cell on the grounds that the legal officer would be required to attend the courts everyday, have to travel at odd hours in the morning and evening, and handle courts martial and other "sensitive" courts of inquiry. The fair trade-off for the army was "in case the lady officer is to be posted to the station she may be adjusted as an additional officer".[41] In both these cases, the court upheld the claim of the women against the state but with a certain measure of unease. In the first case, holding that "whatever be the ultimate reason behind the order, and however 'laudable' it may be", that would not remove "the effect of the order [which] involves an infringement" of her fundamental right under Article 16 (1);[42] in the second, that a "married lady officer with a child cannot be considered to be a 'lame duck' incapable of discharging her duties efficiently".[43]

3.2 The Relationship Rules

A school board in Tamil Nadu passed a resolution that "the service of the teacher will be terminated with three months notice when she gets married for the following reasons (i) When she takes maternity leave, the small children's education will be affected without teacher for three months…" Clearly, although there was no specific mention of women teachers, it was a sex-specific rule and was struck down as violative of Articles 13, 14, 16 and 21 because it discriminated against teachers who chose to get married and who were not Christian.[44] Similarly, as late as the 1990s, the Municipal Corporation of Delhi, in a written statement filed before the Industrial Tribunal, pleaded that the provisions under the Maternity Benefit Act, 1961 or the Central Civil Services (Leave) Rules were not applicable to female workers engaged on a muster roll because they were all only on daily wages. The corporation also contended that they were not entitled to any benefit under the Employees' State Insurance Act, 1948. Most of the women employed by the corporation were employed on a casual daily-wage basis for years on end, and engaged in hard physical labour with no protections in place because they were designated as casual labour.[45] This plea of the corporation was worth noting in the light of the fact that India is a signatory of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which explicitly speaks of the rights of women in employment. The effect of this decision, however, is also the protection of the right to reproductive choice and the right to relationships, both of which are extremely contested areas of women's autonomy in contexts of discrimination.

Nergesh Meerza is a telling case.[46] In a case of public employment, the employer's requirement of a four-year bar on marriage was retained as being reasonable and salutary, since generally airhostesses joined service at 19, and the regulation permits them to marry at 23.

> [This] is by all standards a very sound and salutary provision. Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal…[47]

The second provision on the termination of service on first pregnancy, the court found, shocked its conscience.

> It seems to us that the termination of the services of an AH [air hostess] under such circumstances is not only callous and cruel act but an open insult to Indian womanhood – the most cherished and sacrosanct institution. We are constrained to observe that such a course of action is extremely detestable and abhorrent to the notions of a civilised society … and is therefore clearly violative of Article 14 of the Constitution.[48]

However, it said,

> The rule could be suitably amended so as to terminate the services of an AH on third pregnancy provided two children are alive which would be salutary and reasonable for two reasons. In the first place, the provision preventing third pregnancy with two existing children would be in the larger interest of the health of the AH concerned as also for the good upbringing of the children. Secondly, … a bar of third pregnancy where two children are already there [would be acceptable] because when the entire world is faced with the problem of population explosion it will…be…absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of overpopulation…[49]

Condemning the stress on their "appearance, youth, glamour and charm", the Supreme Court observed that since "a woman in our country occupies a very high and respected position in the society as a mother, a wife, a companion and a social worker such observations disclose an element of unfavourable bias against the fair sex which is palpably unreasonable and smacks of pure official arbitrariness".[50] In a case that involves women's entitlements as workers, there is a jurisprudential dissociation the court effects between the claim and the claimant. The embodiment of the claimant in essentialist, non-material terms creates a crisis of dissonance in the legitimate material claim because, after all, the profane must not be allowed to disrupt the harmony of the sacred. And what greater profanity is there than equality? Further, for women – even women in public employment – there is no separation between the home and the world, and any claim to privacy is null and void. This construction elevates deeply discriminatory cultural stereotypes above constitutionalism in a country where Tarabai Shinde's *Stree Purusha Tulana* (*A Comparison between Women and Men*) inaugurated women's struggles against their reification and subjugation more than a century ago (Shinde 1882, 1994).

Motherhood, pregnancy, childbirth, menstruation and marriage are for the male employer the principal constituents of the identity of women in paid work and determinants of their worth. For courts, these are the constituents of "modesty". The Life Insurance Corporation (LIC) required women candidates to state the following: husband's name in full and occupation; number of children; whether menstrual periods have always been regular and painless; number of conceptions; date of last menstruation; whether pregnant at the time of applying; date of last delivery; and abortion or miscarriage, if any. All completely irrelevant to a woman's employment or capacity or competence at work. If the LIC intended to map the possibilities for a healthy workforce, neither pregnancy nor childbirth, nor menstruation is indicative of ill health or morbidity. Answering these questions is no more painful or "embarrassing" or "humiliating" than having to go through a pregnancy test before appointment. The court however, thought differently.

> The modesty and self-respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless … etc … If the purpose of the declaration is to deny the maternity leave and benefits to a lady candidate who is pregnant at the time of entering the service [the legality of which we express no opinion since not challenged], the Corporation could subject her to medical examination, including the pregnancy test.[51]

Jurisprudential dissociation (evident in the parenthetical remark) converges with the status quo yet again.

More on the relationship rule. In 2002, the Indian army had 9,80,000 active troops, along with an Army Reserve of 8,00,000. In 1994, it was reported that there were 200 women in the armed forces.[52] Barring a couple in combat positions, all the rest were in the military nursing service. The military nursing service had evolved rules in the interests of the efficiency of the service, that after marriage, a person could remain in service only if she justified her continuance by showing extra efficiency in the years preceding her marriage. In 1988, Indira Kumari Kartiayoni a Lt Nursing Officer in the military nursing service got married after obtaining the requisite permission. However, after her marriage, her service was discontinued because she had failed to demonstrate "extra efficiency" in the two years before marriage. The Supreme Court ruled that the appellant be given the opportunity to prove her efficiency in the two years subsequent to marriage and be discontinued if found inefficient.[53] What is the measure of that extra efficiency? But most important of all, an unjust rule was upheld and also the setting of different standards for women that work to their disadvantage as a class. The decision itself gave immediate temporary reprieve without displacing the arbitrariness of the rule in any manner whatsoever. For the women in the corps, however, it is not marriage that is the issue but sexual harassment and too little meaningful, engaging work (Goel et al 2000: 140-42). And this is not the experience of women in the corps alone.

The efficiency rules for women do not draw their legitimacy from the Constitution as in the case of scheduled castes (SCs) and scheduled tribes (STs) under Article 335.[54] They are instead grounded in relationship rules or in the nexus between sex and "other factors" that, as Kannabiran suggests, represent patriarchy's inarticulate major premise – the capabilities of women are to be assessed subjectively without respite and without any constitutional basis or justification.[55] Parekh and Pantham echo this view when they say, "Politically enforced norms or principles of social organisation are rooted in the archaeologies of social knowledge, which serve as pre-theoretical or pre-articulate frames of our notions of political rationality, justice, truth, rights, democracy and moral beliefs" (1987: 9).

3.3 Equal Treatment

In the second airhostesses case, *Yeshaswinee Merchant*, the Supreme Court negated the claim of equal treatment with respect to age at retirement and salary structure, upholding the early retirement of women employed as airhostesses in Air India, a public sector undertaking.[56] Justifying its decision, the court drew on its own observation in an earlier case that "there cannot be any cut and dry formula for fixing the age of retirement" and that this "would always depend on a proper assessment of the relevant factors and may conceivably vary from case to case". Four years later, in 2007, the Supreme Court upheld women's claims to equal treatment and equality of opportunity, questioning sex-role stereotyping, and the application of the *parens patriae* principle by the state to deny women access to equal treatment vis-a-vis employment opportunities in the hospitality sector.[57] The airhostesses decision continues to validate unequal treatment even while women begin to access equal opportunity and treatment in restaurants and bars as a result of *Anuj Garg*. This is a second aspect of jurisprudential dissociation – the possibility of the simultaneous operation of contradictory lines of reasoning on the same issue, namely, discrimination based on sex.

Another important dimension of equal treatment is equal pay for equal work. Although this principle is not expressly declared as a fundamental right in the Constitution, it is deducible from Articles 14, 16 and 39 (d).[58] The Orissa government issued a circular to the effect that women would be preferred for appointment as primary school teachers, irrespective of their position on the merit list. In pursuance of this, the chairman of the selection board directed the employment exchange to forward only the names of women candidates, and specified that where suitable women candidates were not found, the posts be kept vacant until

such candidates were found. This was challenged by an unregistered association of unemployed trained male matriculates and intermediates of the district of Keonjhar. Drawing on the Report of the Committee on the Status of Women in India, *Towards Equality*, the court, while acknowledging the disadvantaged position that women were in, and asserting the need for special provisions and preferential treatment, also observed that the action of the chairman of the selection board directing the employment exchange to sponsor only the names of women was unjustifiable, as also his decision to keep seats vacant if suitable women were not available because it would amount to "100% reservation".[59]

The Special Rules for the Kerala Last Grade Service enumerates several categories of posts in that service. Rule 5 of the special rules deals with appointment to various categories. The note along with rule 5 read "in view of the arduous and special nature of duties and responsibilities attached to the posts specified in the table below, only male candidates shall be eligible for appointment under this rule to the said posts – peon, watchmen, duffadar, cleaner-cum-conductor, gatekeeper, court keeper, process server, messenger, village man, chainman, maistry, plumber". This note underwent changes from time to time so as to exclude women from more and more categories. In place of 12, at the time the case was heard, 25 categories were included as inaccessible to women and four more had been proposed.[60] While directing the Kerala Public Service Commission to appoint the petitioners in the next two vacancies that arose, the court "alert[ed] the state and union government to the need for attention to affirmative action in the area of sex discrimination".[61]

The frequent violation of women's right to equality by the state and the need for courts to step in time and again to rectify this point to the normalisation of discrimination against women in the public domain. The need for the court to state explicitly "the distribution of state largesse cannot be made in violation of right to equality",[62] or again, "the Government should be a model employer. Socialism being the goal of our Constitution since forty-second amendment, …discrimination/exploitation [by the government with respect to public employment] has to be condemned",[63] is telling. Equally eloquent is the absence of a clearly identifiable judicial understanding of what sex discrimination is despite the concern and constitutional commitment of courts to rule against it.

4 Special Provisions

Upholding the right of women to reservation in 1953, the High Court of Bombay asserted that the "Government may well take the view that women are very necessary in local authorities because the point of view of women must be placed before the councillors before they decide any question affecting the Municipality".[64] The judges held,

> The proper way to construe Article 15 (3) is that whereas under 15 (1) discrimination in favour of men on ground of sex is not permissible, by reason of Article 15 (3) discrimination in favour of women is permissible, and when the state does discriminate in favour of women, it does not offend against Article 15 (1).[65]

The same question, deliberated on in the case of *Km Sharada Mishra*,[66] introduced an additional twist in the interpretation of Article 15 (3). Reservation exclusively for men, even if they are dependents of ex-army personnel, is violative of Article 14. There can be reservation for dependents – male and female; and an additional reservation (or a earmarking of a part of the larger quota) for female dependents under Article 15 (3).[67] However, the court's ruling introduced the reasoning of "double advantage".[68]

The construction of "special provisions" under Article 15 (3) does not make this contingent on the degree to which women gain space under Article 14. Whether or not women in particular institutions succeed in securing a space comparable to men, special provisions to increase their access aim at redressing the macro processes of discrimination that women are subjected to, and exist alongside the fulfilment of Article 14.[69] The only proviso that might possibly be read into this scheme is that when the mind of the community becomes enlightened and women achieve equality of status and opportunity, Article 15 (3) will become redundant and may be removed through a constitutional amendment. As long as it remains part of the Constitution, however, the provision can scarcely be read down through the introduction of arguments like "double advantage". In effect, what this argument accomplishes is the denial of space in the open category to women and the validation of reservation for men (declared unconstitutional and ultra vires of Article 14 in the same judgment) without explicitly stating it. In 1995, the Supreme Court restored this right to women in *State of AP vs P B Vijayakumar*, where it held that while 30% of posts in the said categories could be reserved for women, it was also open for women to compete for posts in other categories on an equal basis with men.[70]

Special provisions, while initially set into motion to redress the gender imbalance in employment and education because they address the need to create space for women, often use arguments that construct femininity as their rationale. While one side of this is the argument that women are not suited for "difficult, arduous work", the other side is that women tend to be more honest, diligent, patient and courteous.[71] Where the creation of special provisions was challenged as being discriminatory against men, the court held that it was the state's prerogative to introduce classification through policy measures that were aimed at restoring gender equity, and such classification could not be considered discriminatory.[72] However, this matter of state prerogative, while essentially a corrective to realise the constitutional commitment to equality and eliminate discrimination and exclusion, has also been used arbitrarily, with women being treated as mere passive recipients or objects of state largesse or protection. This trend inverts the social justice intent of Article 15 (3), operationalising it in terms of the very discrimination it sets out to eliminate.[73]

5 Speaking of the Gender Division of Labour

The gender division of labour inflects the litigation on non-discrimination, particularly with reference to paid work. Reservations of up to 50% were allowed to women on the lowest rungs of the labour ladder, in this instance, scavenging, with the court justifying its "expansive" view with the observation that women provide better sweeper and scavenger services than men do.[74] Women also perform important childcare functions, which need to be recognised adequately by the state. Take the case of "school mothers" in the employ of the Tripura government. The children are picked up from their homes and dropped back by the school

mothers, who also attend to the emotional and physical needs of the children – all between the ages of three and six – and manage the school nutrition programme, besides assisting the social education worker. They perform a very important and necessary function, the court found, but they were not adequately compensated for their work.[75]

And yet, in *Messrs Mackinnon Mackenzie and Company Limited vs Audrey D'Costa and Another*, the Supreme Court, while upholding the decision of the Bombay High Court on women stenographers' entitlement to equal remuneration for work of the same or similar nature, went on to observe,

> Men do work like loading, unloading, carrying and lifting heavier things which women cannot do. In such cases there cannot be any discrimination on the ground of sex. Discrimination arises only where men and women doing the same or similar kind of work are paid differently.[76]

An oft-repeated view of the court that links masculinity with the inherent capability for "arduous" work has two coexisting and mutually reinforcing parts: one, that men perform "arduous" work, which women are by definition incapable of matching;[77] two, when men and women are seen and known to perform the same and similar work (flight duties in airlines, for instance), the duties that men perform are defined as "arduous" and compensated with longer service and fair conditions of employment, merely because these are performed by men. There is in this last instance no requirement for the employer to demonstrate, task by task, the differences in work requirements for men and women.[78]

There are other somewhat amusing, yet troubling, twists that the gender division of labour brings about in the sphere of employment with consequences for questions of constitutionality. The *Bimla Rani* case, for instance, raised the issue of equal pay for equal work. Although the employer argued that the work was dissimilar and therefore justified differential wage rates, the petitioners pointed out the case of Sujjan, "a lady who was included in the list of men workers and so was getting a higher remuneration; but when it came to be known that she was wrongly designated as a male worker, her remuneration was reduced".[79] Nursing has historically been identified as a "female" profession that draws on the nurturing, caring functions women must perform in patriarchal societies. It has been measured in terms of selflessness in "service" that can never be monetised and therefore is always undervalued in terms of wages and eulogised rhetorically. Enter the male nurse, who gets appointed as a "sister tutor", and who, by virtue of service of more than two years, becomes senior to female sister tutors. On attaining seniority, can he be denied promotion on the grounds that the post is designated "Senior Tutor (female)"? The respondent contended that in a predominantly female institution, a female sister would be more suited to the duties of a senior tutor, and that the rule regarding eligibility is not based on sex alone but on the suitability of a female candidate and the corresponding unsuitability of a male candidate for the post. The court held that to prevent a male sister tutor to be promoted to the post of senior tutor (female) on grounds that he is not female amounts to discrimination based on sex alone.[80]

Can women claim the night? Section 66 (1) (b) of the Factories Act, 1948, provides that "no woman shall be required or allowed to work in any factory except between the hours of 6 am and 7 pm". The court was unwilling to concede the claim that this provision discriminates unfairly against women.

> It is undoubtedly true that according to the traditional view, all that a woman needed to know was the four walls of her house … Today, things have changed. … Yet, the very nature of their commitment to the family and the social environment require that they cannot be entrusted with all those duties which men may be asked to perform. Normally, they are not sent to the borders to fight. Lady constables are not asked to go on patrol duty at night. Lady waitresses in hotels are not required to work during night. They may be good for managerial jobs. They may even work as waitresses up to certain hours. But, special provisions so as to ensure that they are not harassed can be and have been made. It is on account of this situation that the Constitution makers had made a provision in Article 15 (3). The Legislature was permitted to make special provision for women and children. The purpose was to protect both of them against the hazardous jobs and to save them in spheres where the Parliament considered it necessary.[81]

What is the relationship between the gender division of labour and gender hegemonies in the workplace? In *Yeshaswinee Merchant*, while the All India Cabin Crew Association supported the demand of airhostesses on parity in age at retirement, it opposed the proposal of interchangeability of duties between male and female cabin staff. On closer examination, the Bombay High Court found that the reason for this was that under the existing rules, only a male member of the cabin crew could be a flight supervisor. If interchangeability were introduced, junior male cabin crew would be under the authority of a female flight supervisor, a possibility that all men in the association opposed. The court rejected this argument asserting that "the hierarchy on board the aircraft will be based on seniority irrespective of sex",[82] a decision the Supreme Court set aside.

The Kerala High Court observation in the *Rajamma* case that "the attempt should not be to perpetuate discrimination but obliterate it"[83] marks an unusual parity between discursive frameworks and outcome. Despite these momentary glimmers, as late as 1990, advertisements for posts in the subordinate judiciary were issued explicitly barring women from applying.[84]

Finally, the celebrated *Visakha* judgment on sexual harassment in the workplace in 1997 and a spate of judgments following *Visakha* established the non-negotiability of women's right to safe working conditions, free of sexual harassment.[85] There was also, around this time, a progressive interpretation of women's vulnerability to violence that was evident in some remarkable decisions. For instance, the case where defamation was interpreted as violence and the petitioner exempted from paying court fees under a provision in the Bombay Court Fees Act 1949, which exempted women litigants from paying court fees in cases relating to maintenance, property disputes, violence and divorce.[86] However, in a later case involving the Cochin Port Trust's policy against employing women as shore *mazdoors* (workers), the court reiterated its pre-*Visakha* position that while women cannot be excluded from employment only on the ground of sex, their right may be restricted if the conditions in which they are required to work are hazardous to their health and well-being. While coming to that conclusion, the court repeated the century-old wisdom of the 1908 case of *Curt Muller vs The State of Oregon* – "protect her from the greed and passion of man" – and took note that women working at the shipping wharf, away from the main office, isolated and alone,

can be an object of violence on their person, especially at night, and that in the circumstances, the decision did not violate Articles 14 and 15 (1) of the Constitution of India.[87]

This brings us back in a sense to where we began. This extensive review of case law demonstrates troubling patterns in the jurisprudence on sex discrimination that seem to point to the inescapability from discrimination based on sex. In general, the hazards of employment for women range from "difficult" work that they are "naturally" unsuited for, like "the movement amidst moving cargo and in the midst of huge cranes, forklifts, etc, demanding quick movement of feet" [88] to the "sensitivities of sex and peculiarities of societal sectors".[89] Given this reality, courts have, with few valuable exceptions, found it expedient to choose a "pragmatic" approach rather than a "dogmatic" one in matters of equality based on sex,[90] which translates on the ground into making peace with public morality and hostile environments.

By definition, this has meant dismantling possibilities for the emergence of a constitutional morality of non-discrimination, especially based on sex but also other grounds. This is accomplished by applying principles of equality mechanically, and situating the deliberation firmly within the patriarchal paradigm, which results in conceptual contradictions in equality jurisprudence. There is a discursive and structural problem as well. Legal language in current usage and legal reasoning, apart from the bare construction of the article or section itself, singularly lacks the felicity to speak to women's lifeworlds. It is not a language that women speak, even if for the sole reason that they do not physically inhabit the bench beyond a token presence if at all. And to the extent that rights can only be expressed and realised through language and voice, the problem is fundamental and crippling.

6 Conclusions

Viewed in this manner, the swings in non-discrimination jurisprudence where it concern women cease to be unexpected. B R Ambedkar anticipated this difficulty clearly when he said, "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it".[91] And "our people" includes women and men, leaders and citizens, litigants, lawyers and judges alike.[92]

There are faint glimmers of hope. The guidelines on the issue of sexual harassment in the *Visakha* case were framed from the standpoint of the situation of a working class dalit woman's vulnerability vis-à-vis the dominant castes, the police and the state or government. The purpose of the writ petition was to seek "the enforcement of fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India in view of the prevailing climate in which the violation of these rights is not uncommon".[93] The significance of this decision lies in the judicial recognition of the notion of "hostile environments" as something obstructing women's equal entry to employment – a notion that could be extended by courts to better understand the subjugation of women in patriarchal societies, which are divided along multiple, intersecting lines of caste, class, religion and gender, among others, not severally but together and in conjunction with each other.

The first step in breaking the cycle of interpretive disaggregation and dissociation is to attempt to redefine sex and its contexts in radically new terms. In the recent *Naz Foundation* judgment, the Delhi High Court deliberated on the meaning of the word "sex" in Article 15 (1). Does the term "sex" refer to attribute (gender) or performance (sexual orientation)? Through a nuanced reading of "sex" in Article 15 (1), the court held that "sexual orientation is a ground analogous to sex and discrimination on the basis of sexual orientation is not permitted by Article 15".[94]

We could take this further. Article 15 (1) of the Constitution says, "The State shall not discriminate against any citizen on grounds *only* of religion, race, caste, sex, place of birth, *or any of them*" (emphasis added). Although it is true, as Martha Nussbaum argues, that constitutional interpretation in some instances has driven a wedge between sex and gender through the use of the word "only" (2005: 180), it is necessary to re-examine this article and explore the possibility that the phrase "or any of them" has a meaning distinct from "only". While in legal usage the word "only" in this context denotes "solely" (Garner 1987: 390), and this is the way it has been interpreted by courts in India, there has been no discussion either in the Constituent Assembly or in case law on the concluding phrase of this clause, "or any of them" (Rao 1968: 182-92). The word "or" in legal usage means both "and" and "or" (Garner 1987: 394). Opening this clause out and re-examining its import points us in a different direction. Namely, the state shall not discriminate solely on the listed grounds, and on any of the listed grounds, in the singular or the plural, and on grounds of any of the listed indices with factors that do not figure in this list – factors that allude to the larger context. The specific conjunction of sex with any other factors or listed grounds that are alleged to result in discrimination based on sex must then be examined by the court. The emphasis will then shift from a mechanical reading to a substantive reading of the constitutional guarantee of non-discrimination.

In other words, the word "only" need not drive a wedge |between sex and gender if it is read harmoniously with "or any of them", because this would open the possibility for reading sex either alone or in conjunction with other factors drawn from the social context in which sex operates – whether these be religion, race, caste, language, and place of birth (each of which combines with sex to produce specific forms of discrimination) or they be the medium through which discrimination is transmitted (property, "conditions of service", decorum and modesty).

On another track, in the matter of relationship, it is useful to recall Draft Article 42, which says, "The State shall endeavour to secure that marriage shall be based only on the mutual consent of both sexes and shall be maintained through mutual cooperation, with the equal rights of husband and wife as a basis. The State shall also recognise that motherhood has a special claim on its care and protection" (Rao 1968: 325). This article, dropped from the final draft of the Constitution without a debate, nevertheless encapsulates an important aspect of constitutional morality with regard to marriage and conjugality – a notional change – that needs to be resurrected in ways that inform judicial and popular discourse on these questions. Its significance lies in that it has the potential to lift thinking out of the cycle of reification and subjugation of women that the discourse on heterosexual conjugality is trapped in even today.

In the final analysis, it is only radical constitutional interpretation rooted in constitutional morality, which is strengthened by equal representation within the judiciary at all levels along all axes, that will open up rich possibilities for an intersectional jurisprudence on non-discrimination in India as the norm.

LIST OF ABBREVIATIONS IN CASE CITATIONS

AIR – All India Reporter; All – Allahabad; AP – Andhra Pradesh; Bom – Bombay; Cal – Calcutta; CLR – Current Law Reporter; Del – Delhi; DLT – Delhi Law Times; DRJ – Delhi Reported Judgments; J&K – Jammu and Kashmir; Ker – Kerala; LAB IC – Labour Indian Cases; LIC – Labour and Industrial Cases; LLJ – Labour Law Journal; LR – Law Reporter; Mad – Madras; Ori – Orissa; Raj – Rajasthan; SC – Supreme Court; SUPP SCC – Supplements Supreme Court Cases; Supreme – Supreme Today; US – United States; WP – Writ Petition.

NOTES

1 *Sri Mahadeb Jiew and anr vs Dr B B Sen*, AIR 1951 Cal 563.

2 *M I Shahdad vs Mohd Abdullah Mir and Others*, AIR 1967 J&K 120.

3 *Air India Cabin Crew Association with Air India Officers Association and Another vs Yeshawinee Merchant and Others and Air India Limited and Others*, 2004 AIR (SC) 187.

4 Article 15 (1) of the Constitution of India.

5 In a larger ongoing project, I attempt to explore the ideological foundations and intersections between discrimination on various grounds.

6 *Sri Mahadeb Jiew and anr vs Dr B B Sen*, AIR 1951 Cal 563.

7 *Sri Mahadeb Jiew and anr* vs Dr B B Sen, AIR 1951 Cal 563.

8 *Smt Anjali Roy vs State of West Bengal*, AIR 1952 Cal 825.

9 *Rani Raj Rajeshwari vs State of UP and Others*, AIR 1954 All 608. For a decision upholding women's right to inherit property under the Mayurbhanj Lakhrai tenure and bless rulers, see *Phulmani Dibya vs State of Orissa and ors*, AIR 1974 Ori 135.

10 *The University of Madras vs Shantha Bai and Another*, AIR 1954 Mad 67. Significant to our general framework for an understanding of non-discrimination, the court on this point, interestingly enough, relied on the American decision – *Norris vs Marjor and City Council of Baltimore* 76 F supp 451 (D Md 1948) (L) – where a rule prohibiting admission of blacks in a private school which received aid from the state but was not maintained by the state, was held that it did not violate the 14th Amendment.

11 *M I Shahdad vs Mohd Abdullah Mir and Others*, AIR 1967 J&K 120.

12 *M I Shahdad vs Mohd Abdullah Mir and Others*, AIR 1967 J&K 120.

13 *Mrs Uma Sinha vs The State of Bihar*, 1975 LAB IC 637.

14 In the Court's words, "the mental aptitude and psychological background of lady patients for treatment of gynaecological diseases and also obstetric services by lady doctors cannot also be ignored for the purpose of judging the reasonableness of such earmarking". *Padmraj Samarendra and Ors vs State of Bihar and Another,* AIR 1979 Patna 266.

15 *Padmraj Samarendra and Ors vs State of* Bihar *and another,* AIR 1979 Patna 266. In *Amalendu Kumar,* where the petitioner challenged the reservation of 20% seats in medical college for girls on the ground that the total quantum of reservation exceeded 50% (scheduled castes 14%, scheduled tribes 9%, backward classes 10%, women 20% – total 53%), the court held that if women have been identified as a source of allotment and not claimants of reservation, the 20% allotment cannot be counted in with the rest of the reserved seats, and therefore the quantum of reservation stays well within the 50% watermark. *Amalendu Kumar vs The State of Bihar and Ors,* AIR 1980 Patna 1.

16 I explored this and related themes of discrimination in a rather cursory fashion in "The Need for a Jurisprudence of Women's Rights in India", Alladi Krishnaswami Memorial Lecture, 3 October 2003, Hyderabad, published in Alladi Memorial Trust, *Alladi Memorial Lectures*, 249-68.

17 A detailed discussion on rights in relationship in different religious groups will require far more space and deliberation than is possible in this essay.

18 *State of Bombay vs Narasu Appa Mali*, AIR 1952 Bom 84.

19 *State of Bombay vs Narasu Appa Mali*, AIR 1952 Bom 84. Also *Srinivas Iyer vs Saraswathi Ammal*, AIR 1952 Mad 193.

20 *T Sareetha vs T Venkata Subbaiah,* AIR 1983 AP 356.

21 *Harvinder Kaur vs Harmander Singh Choudhry*, AIR 1984 Delhi 667.

22 The Law Commission of India, 172nd Report on Rape Laws, 2000.

23 The section enables a husband to prosecute the man with whom his wife has an extramarital relationship, it does not confer a similar right on a woman whose husband is in a relationship with a married woman, and married men entering relationships with unmarried women are left out of the circle of prosecution.

24 For a discussion on Ambedkar's formulation of constitutional morality as distinct from public morality, see the recent judgment of the Delhi High Court in *Naz Foundation vs Government of NCT of Delhi and Others,* 2009 (160) DLT 277.

25 *Sowmithri Vishnu vs Union of India,* 1985 SUPP SCC 137.

26 The absence of spousal consent, it might be argued from a "legal" point of view, points to *mens rea*, but we are looking here precisely at the ideological ramifications of legal reasoning.

27 *Dr Dwaraka Bai vs Nainan Mathews*, 1953 AIR (Mad) 792, cited in *Swapna Ghosh vs Sadananda Ghosh and Another*, 1989 AIR (Cal) 1.

28 *V Revathi vs Union of India*, (1988) 2 SCC 72. In *Naz Foundation vs Government of NCT of Delhi and Others*, 2009 (160) DLT 277, the Delhi High Court re-invents the role of the arbiter of the constitutionality of the law, making a sharp departure from the tradition of jurisprudential dissociation.

29 *Pragati Varghese vs Cyril George Varghese*, 1997 Bom LR 333.

30 *Mohammed Ahmed Khan vs Shah Bano Begum and Others,* AIR 1985 SC 945

31 *Charan Singh and Others vs Union of India,* 1979 LAB IC 633.

32 *Air India vs Nergesh Meerza and Ors*, AIR 1981 SC 1829; *Air India Cabin Crew Association with Air India Officers Association and Another vs Yeshawinee Merchant and Others and Air India Limited and Others*, 2004 AIR (SC) 187.

33 *Radha Charan Patnaik vs State of Orissa and Another*, AIR 1969 Orissa 237 (V56 C84). The Indian Administrative Service (Recruitment) Rules, 1954 excluded married women from posts included in that service on the ground that marriage brings about certain disabilities and obligations which may affect the efficiency or suitability of employment.

34 Justice Krishna Iyer in *C B Muthamma vs Union of India*, AIR 1979 SC 1868. C B Muthamma, a Foreign Service officer successfully challenged the IFS Rules, 1961, which required a woman officer to take written permission before marriage and the rule that barred married women from entering the service.

35 *Mrs R S Singh vs State of Punjab and Others,* AIR 1972 Punjab and Haryana 117.

36 (1907) 208 US 412.

37 *Mrs R S Singh vs State of Punjab and Others,* AIR 1972 Punjab and Haryana 117.

38 By 1997, recruitment rules providing that the post of principal of a women's college shall be filled by a female incumbent are invalid, unconstitutional and ultra vires the provisions of Articles 14, 15 and 16 of the Constitution. *M C Sharma (Dr) vs Punjab University*, Chandigarh, AIR 1997 P&H 87, 120.

39 A reiteration of White on public administration, which, the court said was also noticed with approval by the Supreme Court in *Sant Ram Sharma vs State of Rajasthan*, AIR 1967 SC 1910: "The principal object of a promotion system is to secure the best possible incumbents for the higher positions, while maintaining the morale of the whole organisation. The main interest to be served is the public interest, not the personal interest of members of the official group concerned".

40 *Vijayamma vs State of Kerala and Others*, 1978 (2) LLJ 323. In *Messrs Mackinnon Mackenzie and Company Limited vs Audrey D'Costa and Another,* 1987 AIR (SC) 1281, the Supreme Court upheld the decision of the Bombay High Court on women stenographers' entitlement to equal remuneration for work of a same or similar nature. In *Uttarakhand Mahila Kalyan Parishad and Ors vs State of UP,* 1993 Supp (1) SCC 480, the Supreme Court ruled that there was no justification for women teachers being paid less or having fewer promotional avenues than their male counterparts and directed the state to ensure parity between women and men teachers. In the case of *Omana Oomen vs FACT Ltd,* AIR 1991 Ker 129, the court reiterated the non-negotiability of equal treatment, and equal opportunity, alongside protective measures barring employment of women from night shifts.

41 *Capt (Mrs) Dimple Singla vs Union of* India *and Others,* 2002 (63) DRJ 216.

42 *Vijayamma vs State of Kerala and Others*, 1978 (2) LLJ 323.

43 *Capt (Mrs) Dimple Singla vs Union of* India *and Others,* 2002 (63) DRJ 216.

44 (1) *Mrs Sivanarul vs State of Tamil Nadu, Rep by Secretary, Department of Education, Madras-9;* (2) *The Director of School Education, Madras-6;* (3) *Nirmala Matriculation School, Chidambaram by Its Cor, St Valentine Mary;* (4) *Mrs Vijaya Ananda*, 1985 II LLJ 133.

45 *Municipal Corporation of Delhi vs Female Workers (Muster Roll) and Another*, 2000 AIR (SC) 1274.

46 *Air India vs Nergesh Meerza and Ors*, AIR 1981 SC 1829.

47 Ibid. Article 15 is recognition that all things are not equal.

48 Ibid.

49 Ibid.

50 Ibid. The clauses regarding retirement and first pregnancy were struck down as unconstitutional, third pregnancy termination was recommended in passing as an aside and the pleas for parity of promotional avenues with AFPs and parity with service conditions of AHs in foreign airlines rejected. The "fair sex" is a peculiarly judicial way of naming (refusing to name?) women, the other way is to call them "females".

51 *Mrs Neera Mathur vs LIC of India and Another*, 1992 LAB IC 72.

52 It has been observed by a court in some other case that reserving 50% of jobs for women would constitute a monopolisation of posts in favour of women. This rule does not apply to the monopolisation of posts in favour of men even in public employment.

53 *Lt (Mrs) Indira Kumari Kartiayoni vs The Maha Nideshak, Raksha Mantralaya, Shastra Sena Chikitsa Seva, New Delhi and Others*, AIR 1991 SC 416. *Mohini Philip vs Union of India and Others*, 1993 (2) LLJ 182 challenged the same rule successfully. Also *Lt C Reethama Joseph (Mrs) vs Union of India and Others,* 1997 (10) SCC 721, where the petitioner challenged the validity of the rules that authorised the respondent to discharge the petitioner on marriage. The court dismissed the petition and did not strike down the rule, but reserved the right of the petitioner to challenge the impugned order regarding her release before the appropriate authority and in accordance with the law.

54 In the case of the scheduled castes and tribes, the efficiency rule laid down in Article 335 reverses the equality principle embodied in reservations because the underlying assumptions of these two provisions contradict each other directly. A more detailed elaboration of this point is outside the scope of this essay.

55 K G Kannabiran. Personal communication dated 14 July 2009.

56 The Bombay High Court in *Yeshaswinee Merchant and Others vs Air India Limited and Others*, 2001 (3) CLR 815, ruled in favour of absolute parity and equality of treatment. The Supreme Court, however, set aside this decision and censured the Bombay High Court for the violation of "judicial discipline", *Air India Cabin Crew Association with Air India Officers Association and Another vs Yeshawinee Merchant and Others and Air India Limited and Others*, 2004 AIR(SC) 187, para 46.

57 *Anuj Garg and Ors vs Hotel Association of India & Ors,* (2008) 3 SCC 1.

58 *Randhir Singh vs Union of India*, 1982 Indlaw SC 108. This principle of equal pay for equal work was applied in *Chitra Paul*, with the court holding that when all "school mothers appointed by the government of Tripura performed identical work, there was no justification for fixing differential pay scales for temporary school mothers and regular school mothers. *Chitra Paul Smt and Others vs State of Tripura and 3 Others*, 1994 (1) CLR 1099.

59 *Bijoy Kumar Jena vs The State of Orissa*, 1987 LAB IC 593.

60 *A N Rajamma vs State of Kerala and Ors*, 1983 LAB IC 1388.

61 *A N Rajamma vs State of Kerala and Ors*, 1983 LAB IC 1388.

62 *Jani Bai vs State of Rajasthan and Ors,* AIR 1989 Raj 115. Also the case of *Janabai Govind Surve vs The State of Maharashtra and Others*, AIR 1991 Bom 333, where the State through the Claims Tribunal created a disability on the absolute right of a female claimant to receive and deal with the amount of compensation as she deemed fit. Or even *S Lalitha Sundari and Another vs R Kethar Nathan and Others*, 2002 AIR (Mad) 17, where positions explicitly designated for "female descendents" were filled by men, using the misconstruction that "female descendent" meant descendent in the female line and not a descendent who is female.

63 *Chitra Paul Smt and Others vs State of Tripura and 3 Others*, 1994 (1) CLR 1099.

64 *Dattatray Motiram More vs State of Bombay*, AIR 1953 Bombay 311 (Vol 40 CN 98).

65 Ibid.

66 *Km Sharada Mishra vs State of UP, Medical Education UP, Lucknow and Ors*, AIR 1993 ALL 112.

67 Fifteen seats were reserved for dependents of ex-army personnel, of which 10 were reserved for male candidates and five for female candidates in the Moti Lal Nehru Medical College, Allahabad for the MBBS course.

68 If the requisite number of women qualified in the open category, the seats reserved for women would be opened up to men as well.

69 *Shamsher Singh vs State*, AIR 1970 P&H 372, had already held that: "Only such special provisions in favour of women can be made under Article 15 (3), which is reasonable and do not all together obliterate the constitutional guarantee enshrined in Article 16 (2)".

70 *Government of AP vs P B Vijaykumar and Another,* 1995 AIR (SC) 1648. Similarly, with the cooperative societies case where it was found that the participation of women in the affairs of cooperative societies in Andhra Pradesh had been very minimal. Therefore, in response to the recommendation of the National Convention on the Involvement of Women in Cooperative Movement that one-third of the seats be reserved to the women in the management committee of cooperative societies, the government of Andhra Pradesh amended the AP Cooperative Societies Act, 1964, providing for the nomination of two women by the registrar in accordance with authorised procedure. The women so nominated would have the right to vote and otherwise to take part in the proceedings of the meetings of the committee. Although this would take the total reserved positions beyond 50%, the court ruled that the 50% rule only applied to reservations under 15 (4) and 16 (4), women's reservation falling outside this categorisation and with a validity independent of reservations in other streams. *Toguru Sudhakar Reddy and Another vs The Government of Andhra Pradesh and Ors,* AIR 1994 SC 544.

71 *Charan Singh and Ors vs Union of India and Ors*, 1979 LAB IC 633. The railway administration relied on the "The Report of the Committee on the Status of Women in India (1974) which clearly lays down the fact of backwardness of women". In *K R Gopinath Nair vs The Senior Inspector cum Spl Sales Officer of Cooperative Societies and Others, AIR 1987 Ker 167,* reasserting the importance of reservation for women and scheduled castes in cooperative societies, the court drew on the work of Emile Durkheim and Andre Beteille in explaining inequality and the idea of progress.

72 *B R Acharya and Another vs State of Gujarat and Another*, 1988 LAB IC 1465. See also *Vijay Lakshmi vs Punjab University and Others*, 2003 (8) SCC 440, where it was held to be in keeping with reasonable classification and Article 15 (3) to reserve the post of principal in a women's college for women with requisite qualifications.

73 For instance, in *Om Narayan Agarwal vs Nagar Pallika, Shahjahanpur*, AIR 1993 SC 1440, a provision in the UP Municipalities Act provided for the nomination of two women members by the state government, at the pleasure of the government, paving the way for the arbitrary replacement of women members to pre-empt crucial voting on issues concerning the Municipal Board. Or in *Vijay Lakshmi vs Punjab University and Others*, 2003 (8) SCC 440, where, ruling that reserving the post of women's college principal for women was not ultra vires of 16, the court justified the provision through recourse to "public morals", particularly given the young age at which the girls are to be taught.

74 *Rajasthan Dainik Vetan Bhogi and ors vs State of Rajasthan and Ors*, 1994 II CLR 975.

75 See also *J R Clement Regis vs State of Tamil Nadu*, 1993 II CLR 651.

76 *Messrs Mackinnon Mackenzie and Company Limited vs Audrey D'Costa and Another,* 1987 AIR (SC) 1281.

77 *A N Rajamma vs State of Kerala and Ors*, 1983 LAB IC 1388.

78 *Air India Cabin Crew Association vs Air India Officers Association and Another vs Yeshawinee Merchant and Others and Air India Limited and Others*, 2004 AIR (SC) 187. For the use of the word "arduous", see para 74.

79 *Bimla Rani and Ors vs Appellate Authority Equal Remuneration Act, 1976 and Ors,* 2005 (2) LLJ 148.

80 *Alfred Baid vs Union of India*, 1976 AIR (Del) 302.

81 *Leela vs State of Kerala*, 2004 (3) LLJ 106.

82 *Yeshaswinee Merchant and Others vs Air India Limited and Others*, 2001 (3) CLR 815.

83 *A N Rajamma vs State of Kerala and Others*, 1983 LAB IC 1388. Kerala also ruled in 1990 that merely because a job required one night shift assignment out of three, the prohibition on women working between 10 pm and 5 am (proviso to Section 66 (b) of the Factories Act) cannot be used to deny women opportunity for employment where they are otherwise qualified. *Omana Oomen vs FACT Ltd*, (1990) II CLR Kerala 42.

84 *Smt Urmila Devi vs State of UP and Another,* 1990 LAB IC 2047.

85 *Apparel Export Promotion Council vs A K Chopra*, 1999 (1) SCC 759; *Saudi Arabian Airlines vs Shehnaz Mudhatkal and Another,* 1999 (2) CLR 766; *Albert Davit Limited vs Anuradha Choudhury (Ms) and Others*, 2004 (3) LLJ 608; *Medha Kotwal Lele and Ors vs Union of India and Ors*, W P (Crl) No 173-177/ 1999 dated 26 April 2004; *Samridhi Devi vs Union of India and Others*, 2005 (125) DLT 284. See also the precursor to *Visakha, Mrs Rupan Deol Bajaj and Another vs Kanwar Pal Singh Gill and Another,* 1996 AIR (SC) 309.

86 *Mrs Usha Badri Poonawalla vs K Kurian Babu*, 2002 AIR (Bom) 292.

87 *Vanitha Avakasa Samrekshana Action Counsel and Others vs Chairman Cochin Port Trust and Others*, 2002 (35) LIC 938.

88 *A M Shaila and Another vs Chairman, Cochin Port Trust and Others* 1995 (2) LLJ 1193. In *Smt Suraj Kumari and Ors vs State of UP and Ors*, 1990 LAB IC 34, the court recognised that women face problems of security and other hardships if posted in rural areas and would additionally be cut off from their families. Even while upholding the order of the government, the court held that the women so transferred must be accommodated in urban rather than rural areas. In *Shri Dnyandeo Dattatraya Kale and Ors vs The State of Maharashtra*, 1995 (3) BCR 86, the absence of toilet facilities and police stations in rural Maharashtra was granted as a reason for a cooperative bank not appointing women at the taluka level.

89 *C B Muthamma vs Union of India*, AIR 1979 SC 1868.

90 *C B Muthamma vs Union of India*, AIR 1979 SC 1868.

91 Ambedkar quoted in *Naz Foundation vs Government of NCT of Delhi and Others*, 2009 (160) DLT 277, para 79.

92 The Indian Supreme Court has no sitting woman judge. The total number of women judges in the Supreme Court in the past 59 years has been three. There is an abysmally low representation of women in the judiciary in different jurisdictions – the proportion declining as one moves from the district level, which presents the highest figures, to the high courts (25 out of 514, or 4.86%) and then to the Supreme Court, which presents the lowest figure at 0. National Alliance of Women, *India: Second and Third NGO Alternative Report on CEDAW*, New Delhi: NAWO, 2006, 53-54.

93 *Visakha and Ors vs State of Rajasthan and Ors,* 1997 (7) Supreme 323.

94 *Naz Foundation vs Government of NCT of Delhi and Others*, 2009 (160) DLT 277, para 104. For a detailed analysis of this judgment, see Kalpana Kannabiran, "From 'Perversion' to Right to Life with Dignity", *The Hindu*, 6 July 2009.

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