

GENDER JUSTICE AND THE JUDICIARY: EMERGING CONSTITUTIONAL DISCOURSES IN INDIA

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Abstract

It is impossible to live without and beyond one's 'gender' today, for it comes in the package with your sex. Therefore, gender justice, is all encompassing of the gendered experiences that are a part of life in a society for everyone, and is meant to liberate people from them if they're unjust. Since women happen to be one of the prominent minorities in India, and globally seen as a vulnerable group, gender justice is usually understood in terms of being just to them, sometimes at the cost of others. One of the key agents of social transformation have been courts in India. However, out of all the transformations, they have been a part of, their true participation in the matters requiring gender justice has been quite disconcerted. Even in the cases where the courts have upheld gender justice to be intrinsic to the constitutional culture of India, the adjudication on the same has not rendered effective results for us. Author cannot possibly write about all walks of life where women still await 'justice', but this piece is a cursory glance on how there is a dissonance between understanding of constitution among court and people, even today. This comes at a time where the Supreme Court's decision on instant triple talaq has been praised globally, but whether it does or does not do gender justice, remains a question. Not only this, gender disparity remains an issue in both lower and higher judiciary even today. In addition, the issue of gender justice has always taken a back seat when it comes to religious freedom. In this backdrop, therefore, I will try to test two key assumptions in the light of various decisions of the courts in the country, over the years. Author's key hypotheses for this piece are; the Supreme Court's attitude towards women and their constitutional rights has been more paternalistic than empowering. Second, there is a visible disconnect between the constitutional, judicial and people's idea of gender justice.

Keywords: Gender Justice, Women Empowerment, Human Rights, Judicial Activism

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Constitutions live outside of the courts, too.¹ Their meanings for the citizenry, the government and the judiciary determine the constitutional culture of that society. For long, the Supreme Court has identified the constitutional culture of India to include protection of minorities' rights and human rights in general.² The court's history has been this struggle of constitutional adjudication based on enunciation of higher principles and the need for providing immediate reliefs to people. A superficial inquiry gives an impression that there is, possibly, a direct dialogue between the courts and the affected in most cases, with a lot more connection than the government might have with the people, with courts usually being the first recourse on any demand. However, over the years, the judiciary's understanding of the people and their issues has been vehemently challenged. In that case, is it the court's interpretation of constitution, that shapes the constitutional culture; or people draw their own meanings out of the

text of the constitution and the decisions to give that culture a meaning?³

In this piece, I would deal with one of the most contested issues of constitution adjudication, gender justice, through decisions of the court. Author wish to analyze the judiciary's approach in cases pertaining to gender issues, and its own understanding of these issues that is reflected in its decisions. There is no doubt that judges tend to have a certain class of ideas, depending on their own perceptions shaped by the social forces they are exposed to.⁴ However, probably, the art of judging includes rising above these pre-conceived ideas and making adjudication meaningful for whom it is meant.

Right to equality

Article 14 and 15 of the Indian Constitution provide for equality and equal protection of laws, respectively, for everyone, and prohibit discrimination against anyone on the basis of religion, race, caste, sex or place of birth. For the purpose of this essay, the scope of

¹ Siegel, Reva B., "Text in Contest: Gender and the Constitution from a Social Movement Perspective" Faculty Scholarship Series. Paper 1107 (2001). Available at http://digitalcommons.law.yale.edu/fss_papers/1107. Last visited on 30-Mar-18.

² K. Puttaswamy vs. Union of India (2017): SCC Online, SC, 996

³ Surpa, 1.

⁴ Lord Scrutton, as quoted in Andrew Byrnes, Kirstine Adams, Gender equality and the judiciary: using international human rights standards to promote the human rights of women and the girl-child at the national level: papers and statements from the

Caribbean Regional Judicial Colloquium, Georgetown, Guyana (1999). Available at https://books.google.co.in/books?id=T_mwv51x3FIC&pg=PA7&lpq=PA7&dq=Gender+equality+and+the+judiciary:+using+international+human+rights+standards+to+promote+the+human+rights+of+women+and+the+girl-child+at+the+national+level:+papers+and+statements+from+the+Caribbean+Regional+Judicial+Colloquium&source=bl&ots=H5uvtrHkZn&sig=8JT9xfguevF398FtzCQOZC9wxBY&hl=en&sa=X&ved=0ahUKEwjxs4nl_JvaAhXDPI8KHTsXCi4Q6AEILTAB. Last visited on 30-Mar-18.

equality has to be narrowed down to just one, *equality of sexes*. While the constitution does not use the word ‘gender’, the interpretation of it by the court has been secretly or overtly, a gendered one. Alternatively, does it even matter if the constitution mentions ‘sex’, ‘gender’ or ‘women’?⁵ The problem of this disconnect between equality as a constitutional value and its interpretation by the judiciary lies in the distinction between formal and substantive equality. Formal equality is all about treating people similarly situated in the same manner, regardless of inherent differences between them; and their disadvantaged position historically or socially.⁶ The effect of this has been that, even after seventy odd years of independence, equality has remained as abstract as it was, when it was put into the constitution. More roughly, formal equality is closely connected to the ‘sameness’ approach. Substantive equality, on the other hand presupposes the presence of social and historical factors that are too many to be discounted. Based on this, the approach while adjudicating on equality could be either outcome driven, value driven, seen in terms of fairness and equality of opportunity.⁷ As

far as women are concerned, the Constitution does depart from the formal equality concept and provides for protective discrimination for women, in the backdrop of them being a historically disadvantaged group. But, is that all substantive equality all about? Eileen Kaufman in *Women and Law* lauds the Indian Supreme Court for safeguarding the constitutionally guaranteed protective discrimination rights of the women, in turn upholding the substantive equality. While making claims such as the problem of stereotyping and religious rights subverting the rights of women, she says that the protectionist view of the court has brought women out of the clutches of age-old discriminatory practices.⁸ Here, Kaufman fails to tell us as to what she really means by substantive equality; whether it has to be seen in terms of the outcomes, or the constitutional values it seeks to preserve. As far as the values-oriented approach is concerned, we have enough data that the Indian judiciary’s approach is not quite principle-based all the time; its style is necessarily that of providing remedies on a

⁵ Catherine Mackinnon, Book review for Gender of Constitutional Jurisprudence, *International Journal of Constitutional Law*, Volume 5, Issue 3, 1 July 2007, pp. 557–563. Available at <https://doi.org/10.1093/icon/mom014>. Last visited on 31-Mar-18.

⁶ Ibid.

⁷ Catherine Barnard and Bob Hepple, Substantive Equality, *The Cambridge Law Journal*, Vol. 59, No. 3 (Nov., 2000), pp. 562-585, Cambridge University

Press on behalf of Editorial Committee of the Cambridge Law Journal. Available on <http://www.jstor.org/stable/4508714>. Last visited on 01-Apr-18.

⁸ Eileen Kaufman, ‘Women and Law: A comparative analysis of the United States and the Indian Supreme Courts’ Equality Jurisprudence’ 34 *Georgetown Journal of International and Comparative Law*, (2006). Available at <http://digitalcommons.law.uga.edu/gjicl/vol34/iss3/2>. Last visited on 31-Mar-18.

case-to-case basis.⁹ She appreciates the need for a formal equality too, which in the present context, has been quite deficient in dealing with gender justice issues, with the Shayara Bano judgement being delivered and criticized for a number of reasons. On the other hand, feminists like Mackinnon question this very paradigm, the basis of which was the inherent inequality between men and women, not necessarily socially constructed.¹⁰ Wendy Williams suggests that since this difference in sex is a pre-condition for the application of anti-discriminatory law for the protection of women, it both challenges and reinforces this male-female classification.¹¹ Although, time and again the Supreme Court has realized the problems with the formal equality principle¹², and its activism has definitely made a difference in the position of women in India, there's little

evidence that women in India, indeed *feel* equal to men.

Reproductive rights

One area where gender essentialism¹³ is most felt is the reproductive rights of the women, whether it's abortion, surrogacy or anything else. Perhaps, right to life and liberty¹⁴ itself comes with gendered limitations. Even though the courts deny it, the focus is still more on childbirth than the idea of autonomy, a constitutional value. From Nargesh Mirza¹⁵, to Shanti Devi's case¹⁶, the story of adjudication on reproductive rights of women has been that of a constant tussle between women and the courts. Even though Nargesh Mirza happens to be a celebrated case, it really just ended up perpetuating the archaic stereotype of women being solely responsible for rearing children and a subtle indication that they are the reasons for the problem of "*population explosion*"¹⁷. In

⁹ Pratap Bhanu Mehta, *Indian Supreme Court and the Art of Democratic Positioning*, *Unstable Constitutionalism, Law and Politics in South Asia*, Mark Tushnet, Madhav Khosla, Cambridge University Press, pp. 233-260. Available at <https://doi.org/10.1017/CBO9781107706446.008>. Last visited on 01-Apr-18.

¹⁰ Catharine A. MacKinnon, *Sex equality under the Constitution of India: Problems, prospects, and "personal laws"*, *International Journal of Constitutional Law*, Volume 4, Issue 2, 1 April 2006, Pages 181–202, <https://doi.org/10.1093/icon/mol001>. Mackinnon's arguments in this piece are so profound that it is not possible to discuss them in this essay, completely. She explains why inequality is not inferred in the gender violence cases, but merely as matters of sex differences, where formal equality maintains this inequality of sexes in the society.

¹¹ P. Ishwara Bhat, *Notions of gender justice in feminist jurisprudence*, *Constitutional Policy and*

Development towards Gender Justice, Law and Social Transformation, p. 518. Also, see Wendy Williams, "First Generation", *University of Chicago Law Review*, 99, pp. 105-106 (1989).

¹² *E.P. Royappa v. State of Tamil Nadu*, A.I.R. 1974. Justice Iyer and Justice Bhagwati observed that there are issues beyond this "traditional and doctrinaire" conception of equality.

¹³ By gender essentialism, here, I mean the essence of femininity understood in terms of motherhood, particularly.

¹⁴ Article 21, Constitution of India.

¹⁵ *AIR India vs. Nargesh Mirza* (1981) AIR 1829.

¹⁶ *Laxmi Mandal v. Deen Dayal Harinagar Hospital & Ors.* (2010) INDLHC 2983.

¹⁷ The court's exact words were- "Having taken the AH in service and after having utilized her services for four years to terminate her service by the Management if she becomes pregnant amounts to compelling the **poor AH not to have any**

addition, shortly after this ‘progressive judgement’, the court allowed a cruelty petition filed by a husband on the grounds that women had no right to abort their child without her husband’s consent as he had a “*legitimate craving to have a child*”. Right there, gender roles got furthered strengthened, even while justice appears to have been delivered. This divide of public and private sphere of the law, selectively entered into by the courts has always been hypocritical.¹⁸ Here and there, today, courts do talk about how it is totally a woman’s call on pregnancy, even though women who wish to abort children beyond the 20 weeks’ time, often run to the apex court with their pleas, to seek ‘permission’ for abortion.¹⁹ As far as reproductive rights are concerned, the constitution is quite implicit about them, the courts have tried to give these rights certain shape through their judgements²⁰; while amongst majority of women in the country,

reproductive choice is still very much an alien concept.

Courts and the gender roles

There is an argument that this protectionist mode of the judiciary only lasted until a few years after the commencement of the constitution.²¹ Ratna Kapur argues that the differential treatment of the law for women is seen as protectionist, rather than discriminatory, or more so, protection of women’s “*natural roles*” in the family.²² The deviation of the courts from true gender justice²³ is too noticeable to be overlooked. Over the last few years, the high courts and the Supreme Court got various opportunities to give gender justice a real recognition through the matters before them. For instance, in *Narendra vs. K Meena*,²⁴ the Supreme Court opined that it was a wife’s duty to live with her in-laws, and hence it was cruelty against the husband who was forced

children and thus interfere with and divert the ordinary course of human nature. The termination of the services of an AH under such circumstances is not only a callous and cruel act but an **open insult to Indian womanhood the most sacrosanct and cherished institution.**”

¹⁸ Susan B., editor. *Challenging the Public/Private Divide: Feminism, Law, and Public Policy*. University of Toronto Press, 1997. JSTOR, Available at www.jstor.org/stable/10.3138/9781442672819. Last visited on 01-Apr-18.

¹⁹ Arijit Ghosh & Nikita Khaitan, *A Womb of One’s Own: Privacy and Reproductive Rights*, *Economic and Political Weekly*, Vol. 52, Issue No. 42-43, (2017). Available at http://www.epw.in/engage/article/womb-ones-own-privacy-and-reproductive-rights?0=ip_login_no_cache%3Dfe31c699715959bf3623f58eadd986a4. Last visited on 30-Mar-18.

²⁰ In *Puttuswamy* judgement, the apex court held that right to privacy include reproductive choices as well.

²¹ Faizan Mustafa, *Judicial Aberrations on Gender Issues Are Worrisome*, *The Wire*, 08/MAR/2018. Available at <https://thewire.in/women/is-the-indian-judiciary-going-back-on-gender-justice>. Last visited on 31-Mar-18.

²² Ratna Kapur, *Gender Equality*, *The Oxford Handbook of the Indian Constitution*, p. 743.

²³ The significance of this prefix ‘true’ is that gender justice has to be achieved, devoid of all stereotypes the courts still perpetuate. It is not justice in true sense if ultimately, the courts engage with prescriptive stereotyping, likely to get more and more strengthened in the society, with each citation. The impact of such judgements is more felt in criminal cases, more so, in rape cases, which is beyond the scope of this piece, but nevertheless, a glaring example of how gender justice remains utopian to so many women.

²⁴ Decided in 2016, Civil Appeal No. 3253/2008.

to live away from his parents. The court goes on to say that after marriage, the wife's life revolves around her husband and his family, which defeats the cause of justice, and ties women to a social norm, legally. The courts have replaced this traditional social role of the fathers, 'to get their daughters married'. In Hadiya's case, recently, the Kerala High court opined that it was only parents whose "active involvement" was required to decide on issues relating to marriage of their daughter.²⁵ However, the Supreme Court came to the rescue and observed that the marital choices of an adult women cannot be challenged by us. Here, a departure from this protectionist attitude is seen, which is admirable. In another case, when the constitutionality of the Protection of Women against Domestic Violence Act was challenged, the court upheld its constitutionality by saying that women, both in marital sphere and in live-in relationships, need the protection of law. The latter need to be further protected as they are *made to enter* into such relationships by men, and the *social stigma* attaches to them and *not the men* involved.²⁶ While this protectionist attitude owes its origin to the constitution itself, yet, there is no denying the fact that the

same constitution also considers women as free-willed and autonomous beings.

There is a very interesting case as regards the 'sexual disciplining' of women is concerned. The Madras High Court, two years back, held that a divorced wife involved in sexual relationship, post-marriage, is not entitled to be maintained by the husband.²⁷ The court's reasoning made women sound like mere objects, their worth dependent on their accessibility to men, also that their right to be 'protected' transfers from one man to another. Not only this, the same court last year, while delivering a 'progressive judgment' had bashed a husband for not being able to maintain his wife, and said that a husband who fails of his duties should rather remain a bachelor. While the court seemed quite upset about the missing "gender" in "gender justice", it reinforced the socially constructed familial roles of the sexes in the society.

Transgenders

The NALSA judgement has years of struggle and activism behind it, and now ahead of it. While the court has to be lauded for identifying the *third gender*, there are inherent problems with this judgement too. First, the

also carries the obligation not to live in relationship with another man," said Justice S. Nagamuthu in a recent judgment. "If she commits breach... she will suffer disqualification from claiming maintenance... If she wants to live in relationship with another man, she may be entitled for maintenance from him and not from the former husband."

²⁵ Supra, 13.

²⁶ Supra, 14, pp 749, 750. See also, Aruna Parmod Shah v. Union of India (2008) 102 DRJ 543.

²⁷ M.Chinna Karuppasamy vs. Kanimozhi, CRL.RC. (MD)No.142 of 2012.

Justice Nagamuthu's exact words were- "Since a man carries an obligation to maintain his divorced wife, the woman

judgement has been interpreted by courts to mean trans people from male to female *spectrum* and not vice-versa, which has a huge risk of all female to male trans people getting excluded from the benefits of the guidelines.²⁸ In addition, the inclusion of *Hijras* in the third gender, takes away from them, this right of self-determination of sex that this judgement intends to give.²⁹ Many other such communities are added to this third gender, and there is no discussion about how this right to self-determination available to everyone will function with legal certification required outside the court.³⁰ Moreover, while Justice Radhakrishnan seems to give a much more effective meaning to third gender, he then goes on to discuss the need for psychological tests on such people, which also precludes them this right to self-determination.³¹ Since the court has relied on physiological features as the yardstick to determine gender, it is really not about how one feels about oneself, hence determining an identity for himself.³²

While the judgement struggles with its inherent flaws, the implementation issue of

its guidelines are even more challenging. There are so many issues on the ground level that it needs a separate discussion altogether. These issues include the implementation of directives in on the state –level, the high-profile activists and the governments ultimately having the last word as to who is a transgender, excluding a lot of people who are even more an exploited lot unable to properly mobilize themselves. Various news portals discuss the incidents following the judgment, where while some died due to lack of immediate medical care after an accident since the doctors could not decide which ward (male or female) to use for treatment; and some had to undergo surgeries for sex change for identification, flouting the of the clear directives of the court.³³

A judgement that seemingly transformed the discourse on gender justice

The Supreme Court, last year, took a revolutionary decision, that has (or had) a great potential in resolving this age-old tension between personal laws and women rights in India. However, the court

²⁸ Aniruddha Dutta, Contradictory tendencies: The Supreme Court's NALSA judgement on transgender recognition and rights, *Journal of Indian Law and Society*, p. 226, 5(Monsoon) JILS (2015). Available at http://jils.ac.in/wp-content/uploads/2016/01/105-jils_vol-5_monsoon_2014.pdf. Last visited on 31-Mar-18.

²⁹ Ibid, p 232. See also, Imaan Semmalar, Gender Outlawed: The Supreme Court Judgment on Third Gender and its Implications, *Roundtable India*, (2014), available at <http://roundtableindia.co.in/index.php?option=>

[com_content&view=article&layout=judgment-on-third-gender-and-its-implications&catid=120&Itemid=133](#) Last visited on 31-Mar-18.

³⁰ Ibid.

³¹ Ibid

³² Ibid, p. 1.

³³ Shreya Ila Anusuya, Over Two Years after Landmark Judgment, Transgender People Are Still Struggling, *The Wire*, (2016). Available at <https://thewire.in/gender/over-two-years-after-landmark-judgment-transgender-people-are-still-struggling>. Last visited on 1-Apr-18.

invalidated instant triple *talaq*, but lost a wonderful opportunity to talk about the very issue that needed to be addressed extensively. This judgement is essentially what scholars like Waldron warn us against, on courts' overreliance on texts, and therefore missing the spirit of the matter.³⁴ The struggle has been long and troublesome, for both Shah Bano and Shayra Bano, and women who tried to constantly convince the court that they are being mistreated, in between. Also, Shayra Bano happens to be one intricate case like that of Shah Bano, the common trend in both being the absence of feminist jurisprudence. The judgment does not talk about gender discrimination, but just makes three-hundred pages cumbersome read with almost no substance on the very reasons the practice was challenged. Moreover, talking about paternalism of the court, the ex-Chief Justice of India in his dissent interpreted Quran in a manner that it declares "*men as protectors, and casts on them a duty to maintain their women*".³⁵ It is unfortunate that a judgment that is acclaimed for finally providing gender justice to so many women, takes a rather narrow view of the matter. Oddly, even after this historic decision, the debate of priorities

over religious practices and gender justice remain unsettled.³⁶ In addition, since the court has only held instant triple *talaq* to be invalid, Muslim men still have the autarchic right to divorce their wives over a period of a few months.³⁷ Its strange how through a progressive decision, we are very much still where we started. The problem is also that because the outcome looks fine, the people who brought this petition in the court might not even realize that it hasn't changed the status quo for women, while it looks like it has. Further, the introduction of bill to criminalize instant triple *talaq*, the state seeks to create adversaries out of estranged couples. This is reflective of the huge dissonance between the how people, courts and the state interpret the Constitution and judicial decisions.

Conclusion

The whole issue comes down to the courts being male, and not as gender-neutral as it they are thought to be.³⁸ However, the whole cause of gender justice is not predicated on what courts do, it is also dependent on state's activism and mobilization of people by autonomous and state-funded bodies to put

³⁴ Jeremy Waldron, The Core of the case against judicial review, he Yale Law Journal, vol. 115, no. 6, 2006, pp. 1346–1406. JSTOR, Available at www.jstor.org/stable/2045565. Last visited on 1-Apr-18.

³⁵ Ratna Kapur, Triple Talaq Verdict: Wherein Lies the Much Hailed Victory? The Wire, 28 Aug, 2017. Available at <https://thewire.in/gender/triple-talaq->

verdict-wherein-lies-the-much-hailed-victory. Last visited on 1-Apr-18.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Indira Jaising, Gender Justice and the Supreme Court, B.N Kripal et.al., Supreme but not Infallible, Essays in the Honour of the Supreme Court of India, Oxford University Press, (2000) pg. 315.

their claims before the state. Many scholars agree that India always has always had a fertile ground for achieving gender justice, its Constitution being so profound and explicit on equality; and its courts being activists for people. Then why is it that, while gender justice seems to be done, it is never really felt? Why is it that the courts are unable to accept homosexuality as a way of life, or see through the problems with laws like adultery and exceptions like marital rape? This kind of means that neither substantive nor formal equality alone is capable of resolving our problems. There is a need to raise these questions, probably not from a privileged perspective, but from the vantage point of communities placed in a disadvantaged position because of their gender. The fact that we need something like *ABC for a gender sensitive constitution*³⁹ says a lot about how inherently gender-sensitive, we as people are. One way to tackle this problem could be the way Ann Stewart describes, lies in the judicial

training.⁴⁰ Although author personally believe that there are certain things that cannot be taught, but the power of sensitization through practical training and good literature always goes a long way in dismantling the existing discriminatory structures. This finally takes me to verify my key hypotheses. There is hardly any doubt that even until the recent decision on triple *talaq* and in it, the court worked with paternalism and did not translate the demands of Muslim women in a manner that could be appreciated. At most, the idea of gender justice that gets reflected from a lot of the judiciary's basket of gender justice jurisprudence is that it has limits. As to the second hypothesis, as logically follows, the decisions discussed reflect the disharmony of interpretation amongst people themselves, and between courts and the people. The time now is to fix this discord, and spell out an idea of gender justice that can be accepted as well as *felt*.

³⁹ Silvia Suteu And Ibrahim Draji, *ABC for a Gender Sensitive Constitution*, Handbook For Engendering Constitution Making, Euromed Feminist Initiative IFE-EFI (2015). Available at <https://www.efi-ife.org/sites/default/files/ABC%20for%20a%20Gender%20Sensitive%20Constitution.pdf>. Last visited on 2-Apr-18.

⁴⁰ Ann Stewart, *Judicial Attitudes to Gender Justice in India: The Contribution of Judicial Training*, ICFAI Journal of Employment Law, Vol. 1, No. 2, pp. 49-66, (October 2003). Available at SSRN: <https://ssrn.com/abstract=1531148>. Last visited on 2-Apr-18.