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# Breaking the Stereotype: Supreme Court and Gendered Presumptions in India

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## ABSTRACT

*Speaking on 'Women for Justice' Justice Ayesha Malik from Pakistan rightly observed that, 'Including women in the judiciary is not simply about ensuring that 'her' perception is relevant to resolving cases about women. It is about integrating the gender perspective and giving equal visibility to women.'*

*As she stated it is not always a woman standing for and by a woman and this perception is most suited to the Indian Judiciary which despite having a very low representation of women in the judiciary has emerged as the flag bearer of women's rights and gender parity. This article is an attempt to revisit some of the landmark judgments by the Supreme Court of India where the judiciary dared to question the age-old presumptions on the relationship between law and women and legal jurisprudence based on such presumptions.*

**Keywords:** Representation, Judiciary, Gender, Right.

Talking about the perception of women in India, India comes across as a country that is highly diverse, and multicultural and a country that has been the birthplace of multiple religions and cultures. Hence, defining women in a set pattern in India is highly difficult and improper. Recognizing the diversity of women in India in the year 1994 the UNHRC, Permanent Mission of India stated that,

*'It is not easy to talk in general terms about the socio-economic or legal status of women in India because women cut across a number of socio-economic, cultural, and religious groups in the country and enjoy status depending upon the section or group to which these women belong. We, therefore, have women who are highly educated, well trained, commanding respect in society, and occupying positions of authority. At the other end of the spectrum, we have women who are illiterate and poor.'*<sup>2</sup>

Thus, the perception of women in India demands a deeper analysis. India with 28 States (organized on a linguistic basis)<sup>3</sup> and 8 UTs, 22 official languages, more than 6 religions, and

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<sup>2</sup> Canada: Immigration and Refugee Board of Canada, *Human Rights Briefs: Women in India*, 1 October 1995, available at: <https://www.refworld.org/docid/3ae6a8394.html> [accessed 20 December 2023]

<sup>3</sup> The State Reorganisation Act was enacted on 31 August, 1956 in order to reorganise States in India on linguistic basis.

being the birthplace of many religions is highly diverse and multicultural. Although it is difficult to hold such diversity together at the same time it also brings in the benefits of diverse opinions which help in challenging the age-old patterns or beliefs about society and various components in it one such component being WOMEN. Recently, the Supreme Court of India in its handbook listed the harmful stereotypes and has tried to mitigate the consequences of the same by changing the perception behind such stereotypes. The Court compiled a glossary of words to be avoided by the judges and lawyers in writing judgments or in filing cases before the courts. With the 'Handbook on Combating Gender Stereotypes' the Court had replaced some commonly used words with more positive and productive terms such as 'housewife' would be called a 'homemaker', 'affair' to be termed as 'relationship outside marriage', 'prostitute' to be replaced with 'sex worker'. The Hon'ble Chief Justice Chandrachud provided that the book aims to identify, understand, and combat stereotypes about women which may affect the judgments.<sup>4</sup> The book has taken off the unnecessary load of stereotyped ethics and morality from the shoulders of women as it simply used the word 'WOMAN' for a 'career woman', 'chaste woman', 'harlot', and the fallen woman. Also, a 'wife' is simply a 'WIFE', and words like dutiful wife/ faithful wife/ good wife/ obedient wife no longer find a way in the petitions and judgments. A husband could afford to be a husband *stricto* senso without being judged on the parameters on which the wife was being judged.<sup>5</sup>

The Indian women and the Apex Court have been constantly struggling to change the perception of women in India and their unmissable role in constructing society. The general belief about women being concerned about gender issues specifically was completely contradicted by the contribution of women litigants in India. Live-in-relationship in India of late have gained enough attention from the judiciary and even though live-in-relationship have no specific laws the women litigants made it possible for the judges to stretch the ambit of existing laws and consider the live-in-relation as well within the protected walls of marital rights. In the year 2006 the Supreme Court while examining the case of inter-caste marriage held that this is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes.<sup>6</sup> In the same case, the Court also observed that a live-in relationship between two consenting adults of heterogenic sex does not amount to any offence (with the obvious exception of 'adultery'). This freedom of choice has not only been recognized in a marital relationship, but the Court has extended the same to the live-in-relationship as well by holding

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<sup>4</sup> Refer to the 'Handbook on Combating Gender Stereotypes, Supreme Court of India', at [https://main.sci.gov.in/pdf/LU/04092023\\_070741.pdf](https://main.sci.gov.in/pdf/LU/04092023_070741.pdf)

<sup>5</sup> *Ibid.*, Refer pages 7-8

<sup>6</sup> Lata Singh v. State of UP, AIR 2006 SC 2522

such relationship as not illegal or immoral. In the year 2010 the Supreme Court held that,.....*[W]hile there can be no doubt that in India, marriage is an important social institution, we must also keep our minds open to the fact that there are certain individuals or groups who do not hold the same view. To be sure, there are some indigenous groups within our country wherein sexual relations outside the marital setting are accepted as a normal occurrence. Even in the societal mainstream, there are a significant number of people who see nothing wrong in engaging in premarital sex. Notions of social morality are inherently subjective, and the criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. Morality and Criminality are not co-extensive.*<sup>7</sup> The Court had to go into the details of morality and criminality owing to a controversy that sparked in the state of Tamil Nadu after the interview of renowned actress Khushboo in Tamil Nadu for which she faced public backlash and criminal complaints in the state of Tamil Nadu. In her interview, she talked about the sexual choice of women.<sup>8</sup> As time went by the Supreme Court elevated the status of live-in from consensual relationship to the look-a-like of marriage. The year 2015 saw the extension of the existing legal protection of marriage to live-in-relations as well. The Apex Court while dealing with the question of maintenance under section 125 CrPC emphasized on the social purpose of this provision by referring to the cases of *Vimala (K) v. Veeraswamy* [(1991) 2 SCC 375] and *Savitaben Somabhat Bhatiya v. State of Gujarat and others* [AIR 2005 SC 1809] and held that the provision was created to prevent vagrancy and destitute. In the present case since the petitioner was not married and section 125 CrPC uses the word 'Wife' the Court had to investigate other statutes for better understanding the marital relationship. The Court then referred to the Domestic Violence Act, 2005 held that aggrieved person includes a person who is in a domestic relationship under section 2(a) and further considered the definition of 'shared household' under section 2(s) as a household where the person aggrieved lives or at any stage has lived in a domestic relationship. Accordingly, the Court held that the expression 'domestic relationship' includes not only the relationship of marriage but also a relationship 'in the nature of marriage'.<sup>9</sup> After the *D Velusamy* case, many live-in-relationship cases had been decided under the existing framework of law for a legally wedded wife and protections under

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<sup>7</sup> *S. Khushboo vs Kanniammal & Anr*, 2010 (5) SCC 600, para 29

<sup>8</sup> In her interview the actress was only emphasising the freedom and cautions to be taken considering health implications. She said, "According to me, sex is not only concerned with the body; but also concerned with the conscious. I could not understand matters such as changing boyfriends every week. When a girl is committed to her boyfriend, she can tell her parents and go out with him. When their daughter is having a serious relationship, the parents should allow the same. Our society should come out of the thinking that at the time of the marriage, the girls should be with virginity. None of the educated men will expect that the girl whom they are marrying should be with virginity. But when having sexual relationships the girls should protect themselves from conceiving and getting venereal diseases." Refer *S. Khushboo vs Kanniammal & Anr*, 2010 (5) SCC 600, para 3

<sup>9</sup> *D. Velusamy v. D. Patchaiammal*, (2010)10 SCC 469, para 20

maintenance law<sup>10</sup>, under the Domestic Violence Act, 2005 and other marriage rights have been well accorded to her. Thus, in a fundamental transformation of society involving institutions like marriage women petitioners and the Apex Court, both emerged as a team in the protection of choice of companionship beyond institutional bounds.

Another area where women Petitioners were able to change the perception of choice of livelihood and protection relating to the same notwithstanding the norms of morality, preset by the society was prostitution. In many countries, prostitution is legal and has set regulatory norms which reduces the risk of women in prostitution.<sup>11</sup> These countries have not only accorded legal status to prostitution but have also framed detailed legislations for their protection for instance in Canada under the Protection of Communities and Exploited Persons Act, of 2014 it is legal for a sex worker to communicate and advertise to sell sex and own sex services but not in an area where a minor could reasonably be expected to be present, such as schools, playgrounds etc. Similarly, in Germany, sex services are legal, organized, and taxed. Germany also allows advertisement and hiring through HR companies.<sup>12</sup> It has also passed the Prostitution Protection Act, of 2016. India has permitted limited legality to prostitution and has recognized the same as a profession. In India Immoral Traffic Prevention Act of 1986 regulates the rights of sex workers. However, the Act fails to differentiate between a consenting sex worker and a trafficked one. In the year 2011, the Supreme Court recognized the right to dignity for sex workers and constituted a committee to investigate three aspects of sex workers. *Firstly*, prevention of trafficking, *secondly*, rehabilitation of sex workers who wish to leave sex work, *lastly*, and most importantly, *conditions conducive for sex workers who wish to continue working as sex workers with dignity*. With the last mandate for the committee, the Supreme Court not only considered sex work as a profession but also investigated the working conditions for the stakeholders.<sup>13</sup> Pending the legislation in this regard the Court invoked its authority under Art 142 and passed directions that included –

- Sex workers' entitlement to equal protection of the law and hence participation with consent would not face criminal action for an adult sex worker.
- Police must take sexual and other offences against sex workers seriously.

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<sup>10</sup> Refer Payal Sharma v. N. Talwar (2018), Delhi High Court

<sup>11</sup> The countries where prostitution is legalized include – Germany, Australia (varies from one state territory to another), Canada Colombia, Bangladesh, Denmark, Netherlands, Belgium, New Zealand, France, Greece, Mexico etc.

<sup>12</sup> Refer Countries Where Prostitution Is Legal 2024, World Population Review, available at <https://worldpopulationreview.com/country-rankings/countries-where-prostitution-is-legal>

<sup>13</sup> For the detail order refer the case Budhadev Karmaskar v. The State of West Bengal & Ors, Date of order 19<sup>th</sup> May 2022, available at [https://www.livelaw.in/pdf\\_upload/37388200752035996order19-may-2022-419223.pdf](https://www.livelaw.in/pdf_upload/37388200752035996order19-may-2022-419223.pdf)

- Any sex worker who is a victim of sexual assault should be provided with all facilities available to a survivor of sexual assault, including immediate medical assistance, by Section 357C of the Code of Criminal Procedure, 1973 read with “Guidelines and Protocols: Medico-legal care for survivor/victims of sexual violence”, Ministry of Health and Family Welfare (March 2014).
- Voluntary sex work is not illegal and hence during raids on brothels, sex workers should not be arrested and harassed.
- Police should be sensitized towards the fact that sex workers equally enjoy human rights and hence biased attitudes should end.
- The Government must involve sex workers and their representatives in decision-making.
- The Press Council of India should come out with guidelines on preventing media from revealing the identity of sex workers.
- No mother should be separated from her child only because she is a sex trade.

The judgment largely melted the taboo against women for being involved in the sex trade. Also, the recognition of the sex trade as a profession curtailed multiple institutional atrocities against women in the sex trade.

Another area where the role of the Supreme Court has been laudable is its changed stand on the offense of adultery under sections 497 and 498 of the IPC. Women have been treated as objects in India for a very long time. The law on adultery was the manifestation of the same where a consenting woman was not punished for having a relationship outside the marriage, but the male counterpart was on the ground that the woman is the property of her husband, and any breach is an offence against the husband. In the case of Joseph Shine<sup>14</sup> the Supreme Court held that, *‘Individual dignity has a sanctified realm in a civilized society. The civility of a civilization earns warmth and respect when it respects more the individuality of a woman.’* The Court further quoted the observations of John Stuart Mill as, *‘the legal subordination of one sex to another – is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a system of perfect equality, admitting no power and privilege on the one side, nor disability on the other* (John Stuart Mill, 1869).

In the present case, the Court specifically observed that ordinarily criminal law proceeds based

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<sup>14</sup> Joseph Shine v. UOI, AIR 2018 SC 4898, available at [https://main.sci.gov.in/supremecourt/2020/24369/24369\\_2020\\_3\\_501\\_41473\\_Judgement\\_31-Jan-2023.pdf](https://main.sci.gov.in/supremecourt/2020/24369/24369_2020_3_501_41473_Judgement_31-Jan-2023.pdf)

on gender neutrality but in the case of adultery woman is treated as a victim and absolved from the crime whereas the male is punished but its connivance or consent of the husband is established the offence is destroyed. Such mechanism amounts to subordination of women in complete disregard of equality as conferred by the Constitution. The Court referred to the earlier judgments wherein it was specifically held that the provision on adultery treats a married woman as the property of the husband.<sup>15</sup> It is equally interesting to note that the same provision does not consider the wife of the adulterer as an aggrieved person. The Court also referred to the observation of Lord Keith in R v. R as, *'marriage in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.'*

Putting a huge emphasis on human dignity the Court declared section 497 IPC as unconstitutional and adultery no longer to be treated as an offence. All the allied provisions also became unconstitutional which laid down the procedure for complaint in adultery cases. Interestingly, in the present case, the only single judge Justice Indu Malhotra (the Hon'ble Justice although concurred but wrote a separate judgment for herself) gave a unique perspective to the issue of adultery by saying that *'the autonomy of an individual to make his or her choices concerning his/ her sexuality in the most intimate spaces of life, should be protected from public censure through criminal sanction. The autonomy of the individual to make such decisions, which are purely personal, would be repugnant to any interference by the state to act purportedly in the best interest of the individual. The Hon'ble Judge further added that 'the element of public censure, visiting the delinquent with penal consequences, and overriding individual right, would be justified only when the society is directly impacted by such conduct. In fact, a much stronger justification is required where an offence is punishable with imprisonment.'*

It would be a complete injustice not to refer at this stage to the case of X v. Principal Secretary<sup>16</sup> wherein the Apex Court went into the detail of the reproductive rights of women and expanded the definition in the MTP Act<sup>17</sup> to include unmarried women and included the marital rape cases in its scope. The Court while addressing the issue of the right to have safe medical termination of pregnancy held that, every pregnant person in India has a right to reproductive decisional autonomy, including transgenders and gender-variant persons. The Court expanded the scope of access to abortion services from 20 weeks to 24 weeks considering the changing facts and circumstances of individual women. The most valuable contribution of this judgment was the indirect inclusion of marital rape under the ambit of the MTP Act, of 1971. The Court said, *'it*

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<sup>15</sup> The Court made a reference to the case of Yusuf Abdul Aziz v. State of Bombay, 1954 SCR 930

<sup>16</sup> X v. Principal Secretary. Health and Family Welfare Department, (2022) 2022 SCC OnLine SC 1321

<sup>17</sup> Medical Termination of Pregnancy Act, 1971 as amended by the Medical Termination of Pregnancy (Amendment) Act, 2021

*is not inconceivable that married women become pregnant as a result of their husbands having 'raped' them.'* The very recognition that marital rape is a reality would go to miles in making a law against marital rape and in that backdrop the judgment is phenomenal. Moving on to the journey of legally recognizing marital rape, recently the Court has agreed to list pleas to criminalize marital rape before a three-judge Bench.<sup>18</sup> Adding to the rape cases and practices thereafter the Supreme Court also took a stand on post-rape trauma of the victim due to the primitive process of investigation and inferences drawn. In *Lillu v. State of Haryana*,<sup>19</sup> the Court took strong objection to the two-finger test which was a practice to establish habituality of the prosecutrix in sexual activity. After examining multiple cases the Court observed that even if a woman is of easy virtue, she has the right to refuse. The Court rejected the established norms of the Two-finger test for proving regular sexual activity on the part of the prosecutrix and held such inference as inhuman. Referring to the international obligation and human rights mandate under various conventions<sup>20</sup> held that,

*'...rape survivors are entitled to legal recourse that does not retraumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment...'*

Given the above observation, the Court declared that the two-finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity, and dignity.

Not only the socio-political rights but women petitioners have been able to bring substantial change in succession rights through the institution of the Supreme Court. In the *Vineeta Sharma* case,<sup>21</sup> the Court was clear in saying that the substituted section 6 of the Hindu Succession Act, 1956 confers the status of a coparcener on the daughter born before or after the amendment in the same manner as the son with the same rights and liabilities. Further, the Court held that since coparcenary is by birth, the father coparcener doesn't need to be living at the time of application of amended section 6 of the Hindu Succession Act 1956. Applying a similar approach the Supreme Court held the norm of equal rights in property for the Christian woman

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<sup>18</sup> Refer, *Supreme Court agrees to list pleas to criminalise marital rape before three-judge Bench*, The Hindu, July 19, 2023, available at <https://www.thehindu.com/news/national/three-judge-bench-to-hear-pleas-relating-to-criminalisation-of-marital-rape-supreme-court/article67097000.ece>

<sup>19</sup> *Lillu @ Rajesh & Anr v. State of Haryana*, AIR 2013 SC 1784, available at <https://indiankanoon.org/doc/78844212/>

<sup>20</sup> Referred to ICCPR (International Covenant on Economic, Social and Cultural Rights 1966 and United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985

<sup>21</sup> *Vineeta Sharma v. Rakesh Sharma*, (2020) 9 SCC 1, available at [https://main.sci.gov.in/supremecourt/2018/32601/32601\\_2018\\_33\\_1501\\_23387\\_Judgement\\_11-Aug-2020.pdf](https://main.sci.gov.in/supremecourt/2018/32601/32601_2018_33_1501_23387_Judgement_11-Aug-2020.pdf)



as well.<sup>22</sup> Whenever there is an issue of personal liberty and dignity the Apex Court has come out with the most creative interpretations of the law according to protection. Specifically, when the issue is of choice, liberty, and dignity of women in India. The Apex Court has shown empathy towards women who have faced gender-based crimes which left psychological, physical, and emotional damage to the victim. It has also protected women and the perception of society against them concerning career choices and the right to equality. The year 2020 marks a fundamental change in the position of women who would opt for unconventional career choices and opportunities without affecting their gender identity. In 2020 two historic judgments were considered by the Supreme Court of India and the High Court of Kerala. In the case of Hina Haneefa the High Court of Kerala upheld the right of a transgender woman to have the right to self-determination of gender identity under the Transgender Persons (Protection of Rights) Act, 2019. In that case, a transgender woman who had undergone reassignment surgery and became a transgender-identified herself as a woman. Subsequently, she was refused admission to the Girls Division of the National Cadets Corps (NCC).<sup>23</sup> Another case that held high importance was the case of Babita Puniya. In the Babita Puniya case, the Supreme Court was asked to investigate the matter of short service commission for women in the Armed forces with the prayer to consider for a Permanent Commission equal to their male counterparts. The Court registered strong reservations against the blanket exclusion of women from Command appointments in the armed forces. The Court held that ‘*an absolute bar on women seeking criteria or command appointments would not comport with the guarantee of equality under Article 14. Implicit in the guarantee of equality is that where the action of the State does not differentiate between two classes of persons, it does not differentiate them in an unreasonable or irrational manner...[A]n absolute prohibition of women SSC officers to obtain anything but staff appointments evidently does not fulfill the purpose of granting PCs as a means of career advancement in the Army.*’<sup>24</sup> Accordingly, the Court rejected provisions of the Policy Letter by the Government of India, Ministry of Defence which restricted the right of women to only staff appointments.

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