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# A CRITICAL EXAMINATION OF JUDICIAL STEREOTYPING AND GENDER BIAS IN INDIAN COURTS

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## ABSTRACT

The doctrine of natural justice demands for unprejudiced and independent judiciary, a judicial exercise of power that is free from any "fear or favour" and maintain this cardinal prudence and guarantee that a judge is totally liberated from all outside influences so as to keep up the sacredness of the institution of judiciary.

Though the judge in a case is given the sole power to form an opinion as to the weight-age allocated to a particular piece of evidence and decide upon the combined efforts of all the evidence placed before it and make an adjudication as to innocence and guilt of the accused but this opinion does not mean the "subjective satisfaction" but entrustment of such wide power on the judge to decide the fate of any case, carries with it the duty to act judicially, i.e., the judge is required to conduct the inquiry "in a manner consistent with natural justice, to consider all relevant matters to ignore irrelevant matters and to reach a conclusion without bias and prejudice<sup>1</sup>".

Albeit most Judges endeavor steadily to keep away from inclination in settling on their choices and solidly accept that their decisions are liberated from incidental influences, subconscious factors like religion, caste identity and so on, may in some cases lead a judge to make a factual determination on unjust grounds. One such bias of gender has been critically examined in this paper, to decipher how unprejudiced judges are while deciding the cases in Indian judiciary.

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<sup>1</sup> Kraipak, Bias and administrative Power, JOURNAL OF INDIAN LAW INSTITUTE 13 (3) (1971)362

“Judges play – at all levels – a vital role as teachers and thought leaders. It is their role to be impartial in words and action, at all times. If they falter, especially in gender related crimes, they imperil fairness and inflict great cruelty in the casual blindness to the despair of the survivors”<sup>2</sup>

Judges are supposed to carry out their judicial duties without fear or favour, ill will or malice. Some variations of these words are found in the oaths of office administered to judges, from the Chief Justice of India to the judicial magistrate. Each case before them is unique and has to be decided on its own merits. However, it is not uncommon to see allegations of bias against Indian judges on the basis of caste, religion, gender and other such criteria. In other words, judges are nuanced decision makers who bring their preferences and experiences to bear on what are sometimes difficult questions lacking objectively correct answers<sup>3</sup>

One such bias which is often seen in the judgments of Indian courts is the “Gender Bias”. Stereotyped thinking about the nature and roles of different genders, myths and misconceptions about their social and economic realities are very prevalent in the Indian justice system. In the courts these aspects of gender bias distort decision making and compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, and sometimes the re-victimization of complainants. Often judges adopt rigid standards about what they consider to be appropriate behavior for women and penalize those who do not conform to these stereotypes.

The courtroom manifestations of gender bias are witnessed most frequently in areas of family law, criminal law with respect to the treatment of the victims of crimes such as domestic violence and rape. The literature on the topic is replete with accounts of cases in which judges blame the victim for inviting the violence while forgiving the offender. The constitution of our country protects us all against discrimination based on “sex” yet the judiciary is full of instances where the judges have perpetuated gender stereotypes. Like in the case of *Sri Rakesh B v. State of Karnataka*, where Justice S. Dixit while addressing the petition by the accused for anticipatory bail, had passed the order in favor of the accused and granted him anticipatory bail. The relevant extract from the judgment as follows: “the version of the complainant that she had been to Indraprastha Hotel for dinner and that the petitioner having consumed drinks came and sat in the car, even if is assumed to be true, there is no explanation offered for not

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<sup>2</sup> *Aparna Bhat and others v State of Madhya Pradesh and others* LL 2021 SC 168

<sup>3</sup> As suggested by Frank (1930)

alerting the police or the public about the conduct of the petitioner; thus there are sufficient grounds to admit the petitioner to Advance Bail nothing is mentioned by the complainant as to why she went to her office at night i.e., 11.00 p.m.; she has also not objected to consuming drinks with the petitioner and allowing him to stay with her till morning; the explanation offered by the complainant that after the perpetration of the act she was tired and fell asleep, is unbecoming of an Indian woman; that is not the way our women react when they are ravished”.

Firstly, it is unnecessary to address the facts of the case while addressing a petition for an anticipatory bail by the accused. It must also be taken into consideration that when such unnecessary references are made to the facts of the case, it gives an impression of appraisal of facts. And it is a well established principle that the court granting anticipatory bail should leave it to the regular court to deal with the matter on an appreciation of evidence placed before it after the investigation has made progress or the charge sheet is submitted.<sup>4</sup>

Secondly, Justice Dixit based the decision on his ideology of how an “*Indian woman*” would react in a particular situation. Judges do often make up a story of what should follow in an *ideal* situation if a certain act happens, just in order to check the genuineness of the victim’s version. However, Justice Dixit went too ahead with stereotyping women and was adamant to not believe that it is very much possible for a helpless victim to fall asleep after such a heinous act is committed against her. It is sad that even after significant changes that have been made especially after Mathura Case<sup>5</sup>, to do away with the laws that reinforce rape myths, courts have continued to incorporate sexual stereotypes in its judgments and base their decision on preconceived notions of an Indian woman.

For them an Indian woman should be like “Sita”. Which takes me to another such judgment, where in a divorce petition filed by the husband on grounds that his wife is unwilling to relocate to his new place of work, the Bombay High Court said that “women must be like Goddess Sita, who should follow her husband Lord Ram even during his isolation in forest” i.e. a woman must follow her husband wherever he goes. In today’s context, this would mean that a wife should leave her job and unquestioningly accompany her husband to another city. Even if it is an aberration on the Judge’s behalf, such statements are sadly not uncommon. The judiciary has been complicit in perpetuating patriarchal codes of conduct and imposing them

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<sup>4</sup> *Salauddin Abdulsamad Shaikh v. State of Maharashtra* (1996) 1 SCC 667

<sup>5</sup> *Tuka Ram And Anr v. State Of Maharashtra* 1979 SCR (1) 810

on women in a variety of cases. In multiple cases of divorce, the Courts have quoted appalling statements such as, “A wife should be minister in purpose, slave in duty, Lakshmi in appearance, Earth in patience, mother in love and prostitute in bed. In another case of *Sudhansu Sekhar Sahoo v. State of Orissa*<sup>6</sup> the judges did not believe the victim and acquitted the accused by quoting: “Ms. X asserted that she was a virgin till the alleged incident, but the medical evidence supported by her physical features revealed that she was habituated to sex. All these factors cast a serious doubt on the prosecution case. On a consideration of the broad probabilities of the case, we feel that various factors cast a serious doubt about the genuineness of the case of Ms. X that she had been forcibly ravished by the appellant. The appellant is certainly entitled to the benefit of doubt”.

It is pertinent to note here that in 2003, Section 155(4) of the Indian Evidence Act which made the immoral character or the sexual history of the victim relevant in deciding a rape case was repealed. In 2018, the Supreme Court of India had stated that even if it is assumed that the victim is a sex worker, it still does not give the right to the accused to rape.<sup>7</sup> And further in the year 2013 section 53A was added to make evidence of character or previous sexual experience irrelevant in the cases of sexual offences. Now the question comes that when this very fact is irrelevant then why it is being even considered by the judge for deciding the case as according to section 165 of Indian Evidence Act judgment must be based upon relevant facts that are duly proved. Now if someone argues that though this fact is irrelevant but it can be admissible and can be used to impeach the credit of the prosecutrix under section 155 of IEA as we know that generally all admissible facts have to be relevant but section 155 is an exception to it but in that case also, this piece of evidence is not falling under any of the three categories of that section and therefore this very provision which was added to the evidence act to do away with the stereotypical notions has been undermined in this judgment. Similarly in **Raja & Ors v. State of Karnataka**<sup>8</sup>) In this case, again, orthodox beliefs of the judges come into light. In this order, judges based their decision of acquittal of all the accused on the basis of discrepancies in the facts as told by the victim from time to time and made certain remarks which were completely unnecessary and which portrayed a stern personal ideology of the judges. The judge while pronouncing the order, firstly, questioned the victim’s acts during the ordeal saying that her actions were submissive and gave an idea of a consensual act which was in his words “*not at*

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<sup>6</sup> *Sudhansu Sekhar Sahoo v. State of Orissa* 2002 10 SCC 493

<sup>7</sup> *Jai Bhagwan v. State (Govt. Of N.C.T. Delhi)* SC decided on 30 October, 2018

<sup>8</sup> *Raja And Others v. State of Karnataka* (2016) 4 SCC 493

*all consistent with those of an unwilling, terrified and anguished victim of forcible intercourse, if judged by the normal human conduct.*” And this conclusion was reached by them on her deposition that “while she was ravished inside the garage and even during the intermittent breaks, she did not shout for any help.” the judge further goes on to say, that “Her post incident conduct and movements are also noticeably unusual. Instead of hurrying back home in a distressed, humiliated and a devastated state, she stayed back in and around the place of occurrence, enquired about the same from persons whom she claims to have met in the late hours of night, returned to the spot to identify the garage and even look at the broken glass bangles, discarded litter etc. According to her, she wandered around the place and as disclosed by her in her evidence, to collect information so as to teach the accused persons a lesson. Her avengeful attitude in the facts and circumstances, as disclosed by her, if true, demonstrably evinces a conduct manifested by a feeling of frustration stoked by an intense feeling of deprivation of something expected, desired or promised. Her confident movements alone past midnight, in that state are also out of the ordinary.

The judge here tries to question the victim’s story by comparing and checking it against a personal criterion of how a terrified woman ought to react after such an incident has occurred against her. It is difficult for us to believe that a woman against whom a crime is committed is ready to challenge the perpetrators and bring herself to justice. This remark and thinking not only discourages women to fight against the miscreant, but also suggests a standard way to react when they are sexually-offended. It is pertinent to note here that the law as it stands currently after Criminal Law (Amendment), 2013 requires a “voluntary unequivocal agreement” to establish consent in rape cases under Section 375 of Indian Penal Code. It is also well established by number of judgments especially after the public outrage after the Tukaram case<sup>9</sup> that mere non-resistance by the victim cannot prove consent. But it seems that virginity, as well as physical resistance is still important to prove rape. And further in *M.I. Shahdad v. Mohd Abdullah*<sup>10</sup>, the Jammu and Kashmir High Court had held that the serving of the summons only upon a male adult family member, in the absence of the defendant, was neither discriminatory against women nor put them in a disadvantageous position; rather, the provision exonerates her from all responsibilities taking into account the social norms and conditions of society. The justification given was that the function of females in Indian society is that of

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<sup>9</sup> Tuka Ram And Anr v. State Of Maharashtra 1979 SCR (1) 810

<sup>10</sup> Satish v. State Of Maharashtra (Bombay High Court, 2021)

housewives. Females were mostly illiterate and some of them *parda nashin*. If we see the provisions, according to section 64 of Criminal Procedure Code, service of summons in criminal cases shall be only on the adult male member of the family of the person summoned in case of the absence of the person summoned, whereas in a civil suit, Order V Rule 15 provide for service of summons on adult male or female member of the family in case the defendant is absent. And therefore there is discrimination between male and female in respect of service of summons in a criminal case as such it is violating Articles 14, 15 and 16 of the Constitution. In a similar case Bombay High Court had acquitted an accused from the offence of “sexual assault” under sections 7 and 8 of the Protection of Children from Sexual Offences POCSO Act. The accused had groped a child aged 12 years, yet the Bombay HC held that, “it is not the case of the prosecution that the appellant removed her top and pressed her breast. As such, there is no direct physical contact i.e. skin to skin with sexual intent without penetration”. It is pertinent to note here that The High Court of Himachal Pradesh had negated the requirement of skin-to-skin contact to invite section 7 of POCSO Act.

A similar understanding is reflected in previous judgments of the Delhi, Madhya Pradesh, and even Bombay High Courts who have held that touching or pressing the breast of a child with sexual intent will complete an offence under section 7 of the POCSO Act. Therefore, it was improper on the part of the Bombay High Court to read “skin to skin” contact as an additional requirement for establishing an offence under section 7. The Indian criminal laws fail to explicitly define “touching”, thereby leaving the scope for such interpretations, like in the present case. It is interesting to know that the judge who has authored this judgment has been in limelight due to her many controversial judgments on sexual harassment.<sup>11</sup> In another case of *Aparna Bhat and others v State of Madhya Pradesh*<sup>12</sup> the Supreme Court while setting aside a Madhya Pradesh High Court judgment which had asked a man accused of sexual assault to get a “Rakhi” tied by the victim as a condition of bail, issued a set of guidelines aimed at ensuring subordinate courts avoid passing insensitive bail orders in cases involving sexual violence.

Madhya Pradesh High Court had ordered that “The applicant along with his wife shall visit the house of the complainant with Rakhi thread/ band with a box of sweets and request the complainant to tie the Rakhi band to him with the promise to protect her to the best of his

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<sup>11</sup> Bombay High Court judge, Justice Pushpa Ganediwala had authored a slew of controversial judgments POCSO Act due to which she was not made permanent judge by the Supreme Court collegium.

<sup>12</sup> *Aparna Bhat and others v State of Madhya Pradesh and others* LL 2021 SC 168

ability for all times to come. He shall also tender Rs. 11,000/- to the complainant as a customary ritual usually offered by the brothers to sisters on such occasion and shall also seek her blessings”. And therefore, it was contended by the applicant in the case of Aparna Bhat that “this judgment is not as much about only the merits of the impugned conditions of the bail order, but is meant to address a wider canvas of (what appears to be) entrenched paternalistic and misogynistic attitudes that are regrettably reflected at times in judicial orders and judgments even while granting bail to the applicant imposed the following condition which is under challenge in this petition”.

In this case using Rakhi tying as a condition for bail is actually transforming a molester into a brother by a judicial mandate. By doing this the court is diluting and eroding the offence of sexual harassment. It is also interesting to know that the judge who had laid down such strange and patriarchal conditions for bail is the one who had denied Munawar Faruqui's<sup>13</sup> bail twice and was later granted interim bail by the Supreme Court.

It is pertinent to note that judicial stereotyping is antithetical to International Human Rights Law. The United Nations Convention on Elimination of Discrimination against Women (CEDAW) provides that appropriate steps must be taken to eliminate practices ‘based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women and that measures should be taken to address discrimination against women at all levels including judiciary. India ratified the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) in 1993, which led to the passing of various legislations conferring various rights upon women. Some of them are the Prevention of Sexual Harassment at workplace Act, Amendment to the criminal law post the Nirbhaya incident, the Equal Remuneration Act etc. All these were protected under Article 15(3) of the Indian Constitution which left scope for affirmative action for women and children. Despite changes in the law, the judicial attitude towards women has remained regressive and often prevents women from approaching the judiciary to address their grievances and it is clear from the above provisions that India through its stereotypical judicial pronouncements has failed to fulfill its obligations under International law to address institutional gender bias.

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<sup>13</sup> Munawar Faruqui is a comedian and was arrested by Madhya Pradesh police on charges that he might crack jokes to offend religious sentiments. Later the police had admitted that they had no evidence against him.

Justice **DY Chandrachud** in the case of *Navtej Johar v. Union of India*<sup>14</sup> wrote in his concurring opinion that perpetuating stereotypes about a class under Article 15(1) is a violation of that fundamental right. The relevant extract is as follows:

*“A discriminatory act will be tested against constitutional values. Discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex. If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate.”*

Conservative and progressive elements tend to coincide in judicial discourse. The Supreme Court has recently passed certain key judgments to safeguard the rights of women. It abolished triple talaq, upheld women’s autonomy, while declaring the law on adultery unconstitutional, and ruled that the bar on women’s entry to the Sabarimala temple is illegal. But the judiciary has also been a purveyor of sexist notions like the “marrying your rapist jurisprudence” by our former CJI. In a country like India, where Doctrine of Stare Decisi is followed, the words used by the judges while delivering judgments and passing orders can have a monumental effect on the future jurisprudence and therefore it is important to remove such biases from the judiciary for non-discrimination and fair trial.

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<sup>14</sup> AIR 2018 SC 4321