SEXISM IN LAW AND JUSTICE

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Sexism in law and justice is a mere reflection of sexism in life. Despite constitutional provisions guaranteeing gender equality, even judicial decisions and processes are fraught with deep rooted gender bias. Replete with legal case illustrations, this article exposes the sexist bias in judgements, which he says are extremely "subtle and sophisticated" and they constitute the hidden nuances of the patriarchal order of which the judges are products.

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The legal systems all over the world have displayed a bias in favour of men and against women. This was natural because the laws presupposed the subordinate status of the woman. Therefore, for a long time did we not hear that in law, "he" includes "she"?¹ In legislations, women came in only in sex related offences such as rape, seduction, adultery or where property relations were defined. Most often women were excluded from inheritance. Conjugal fidelity was often expected from women and not from men, who were free to marry more than one wife. Woman was and is even now considered as a property of man. Even though the Hindu Succession Act of 1956 promises equal share to daughters in the self acquired property of a Hindu, it retained the coparcenary system for the ancestral property, under which only the sons could have a share by birth. Even some of the modern laws providing for ceilings on agricultural land per family refuse to include unmarried daughters as part of a family for the purpose of determining the ceiling limit.² Such examples can be many.

The sex bias need not always be against woman. Sometimes it acts in her favour. A good example is the law of maintenance under Section 125 of the Code of Criminal Procedure which imposes liability on the husband to provide maintenance to the wife who is either divorced or not living with him or during coverture. Inspite of the fact that the Constitution of India, clearly guarantees the right to equality before the law and equal protection of law (Art. 15(1)) and prohibits discrimination on the ground of sex (Art. 15(2)), women continue to be the victims of male prejudice inherent in the working of the various legal/political processes. How else could we explain why a rule that ‘an IAS probationer who got married must resign her job’ could survive till as late as in 1978, until it was struck down by the Supreme Court?³

Legislative provisions concerning women fall into following categories:

(a) those which deal with specific sex related problems such as rape or harassment of women under Section 498A of the IPC  
(b) those which deal with property relations like the law of inheritance or the law of maintenance  
(c) those which guarantee certain special facilities like maternity benefits or protection against hazardous work or work during night, provision for creches etc.  
(d) those which guarantee equal rights to women e.g., The Equal Remuneration Act, 1976  
(e) those which provide for affirmative action, e.g., provision for reservation of seats for women in zilla parishads or municipal bodies or panchayats. In some of the new legislations women have been given preference for appointment as member of the tribunals. The Family Courts
Act, 1984 provides that in selecting persons for appointment as Judges, "preference shall be given to women", the Consumer Protection Act which provides for a three tier system of grievance redressal provides that the District Forum shall consist of one lady social worker, the State Commission shall consist of at least one woman among the two members and the National Commission shall consist of at least one woman among 4 members to be appointed, who shall be persons of ability, integrity and standing and possessing adequate knowledge of or experience of problems relating to economics, law, commerce etc.

In recent years, under the pressure of the women's groups, various legislations were made. The Dowry Prohibition Act, 1962 which prohibits the taking of dowry was amended in 1984 to provide greater teeth to it. The Criminal Law Amendment Act, 1983 was enacted specially to make changes in the law of rape. A minimum punishment of 10 years' imprisonment has now been prescribed for those guilty of custodial rape or rape of pregnant woman or rape of a girl below 12 years of age. In the case of custodial rape, absence of consent on the part of the rape victim will now be presumed. Therefore, now the accused in cases of custodial rape has to prove that the victim consented, unlike in cases of rape where the prosecution is required to prove that the sexual intercourse took place without the consent of the victim.

However, in spite of all good legislations, gender discrimination and injustices continue to occur. This is mainly because, those who enforce the laws or interpret them do not always fully share the philosophy of gender equality. In fact, Baxi feels that unless the patriarchal ideology buried in the idiom of equality of sexes is understood and rejected, much of the endeavour to use the Constitution and the law will merely result in the reinforcing of that very ideology (Baxi, 1984).

It is generally believed that judges merely interpret the laws and there is a myth that they interpret strictly according to pre-determined rules. But, the legal realists have exploded this myth and asserted that the judges make law and in doing so are not uninfluenced by their social philosophy and predilections. Justice Cardozo rightly said: "the great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by" (1966 :186).

The legal profession is dominated by men. It was only in recent years that women became judges of the higher courts. We have one woman judge on the Supreme Court and a couple more in the High Courts. The judicial attitude towards women's problems has been ranging from orthodox to liberal. But even the most liberal of the justices have not been entirely free from patriarchal bias. In rape cases, the courts have always given maximum benefit of the doubt to the accused. Since woman's consent is a defence in a rape case, the accused often tries to show that the woman was of easy virtue. But why do judges presume that a woman of easy virtue must give consent to be raped? Even a prostitute has a right, should have a right, to decide whether and with whom she should sleep. How can her being a prostitute lead to the presumption that she consented to the sexual intercourse? The judge's moral opinion about the woman's character influences his judgement about the guilt of the accused. Would the evidence that the male accused was a womaniser lead to the conclusion that he must have committed rape? Obviously not. There the courts would expect evidence about rape independently of the character of the accused. In a rape case, the defence counsel's strategy is to unnerve the complainant by asking obscene questions, suggesting sex scandals. The entire court syndrome is so hostile to the rape victim and so much dominated by the patriarchal ideal type of a good woman, that every rape victim is looked down upon as a woman of easy virtue. That deters women from complaining against rape.

In the Mathura case, the Judges of the Supreme Court were very much prejudiced by the fact that
Mathura, a tribal girl, had eloped with her boy friend and that the medical evidence proved that she had had premarital sex. From this the Judges concluded that she was a liar and that she could not be trusted, and therefore, there was no rape. This judicial attitude was severely criticised by Upendra Baxi, Lotika Sarkar, Raghurib Kelkar and Vasudha Dhagamwar in their letter to the Chief Justice of India (Baxi et al., 1979). In Suman Rani, which was decided under the amended law of rape and which provided higher punishment for custodial rape, the Supreme Court reduced the punishment given by the High Court from 10 years to 5 years. Section 376, Clause (2) of the IPC clearly provides that where a police officer commits rape in a police station, he shall be punished with rigorous imprisonment, which shall not be less than 10 years. However, the court may award lesser punishment "for adequate and special reasons". The Supreme Court, while reducing the punishment pointed out that, the "adequate and special reasons" were as follows: (a) the peculiar facts and circumstances of the case; (b) the conduct of the victim.

The court was guided by the fact that the rape victim took time to report the rape to the police and also that she was known to be a woman of easy virtue. Although the court on a review petition said that the woman's character did not matter, there could be no other explanation for the reduction of the sentence (Rao, 1992). Where offences against women are concerned, moral conviction of the male judges do come into the picture. Vasudha Dhagamwar shows us that not only in cases of rape but even in cases of murder, the courts show sympathy to the males accused who claim to have committed such acts out of the anger caused by the woman's alleged infidelity (Dhagamwar, 1992).

In cases on maintenance, generally it is observed that the judges are not willing to award high sums as maintenance. Even though the maximum amount that can also be given as maintenance under Section 125 of the CRPC is Rs. 500/-, actual sums awarded are much less and are rarely proportionate to the income of the husband. (Sagade, 1992; Law Commission Report, 1991).

According to a study (Gadbois, 1968) the Judges who have occupied positions in the High Courts and the Supreme Court have invariably come from the higher castes and classes of India. The same class and caste composition prevailed in the subordinate judiciary until recently and even now has survived to a great extent in our view. This class is exposed to liberalism and is generally willing to give as much liberty and equality to women as is compatible with the patriarchal order. We therefore find contradictions in their judicial disposition. A subtle male chauvinism is to be seen in almost all judicial decision making. The judges are either (a) patronising and self righteous; or (b) condescending towards women or women issues. They seem to hold fast to the traditional ideal type of a woman and would be willing to concede chivalry to women. In rare cases the bias is in favour of women and against male superiority. In rape cases, we see mostly the discrimination against the rape victim emanating from the male value judgement regarding sex morality. This is to be seen also in cases involving murder of women committed by husbands on account of sex jealousies (Dhagamwar, 1992). On the other hand, we see a patronising bias in some judges who are willing to believe the testimony of the rape victim and even go to the extent of saying that a bashful woman would not make false allegations of rape. Krishna Iyer observed:

> The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbablise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, has corroborative value. Her complaint to her parents and the presence of blood on her clothes are also testimony which warrants credence.

It is similarly to be observed in decisions condoning the murder committed by a woman out of sex
jealousy of another woman claiming to share her bed. Both the biases are expressed in a subtle and sophisticated manner, because the judges expressing them come from a class which has had enough intellectual exposure to accept without any hesitation the value of gender equality. But accepting is one thing and "internalising" is another. The biases which we see in judgements are very subtle and constitute the hidden nuances of the patriarchal order of which the judges are products. Perhaps one may find such sophistication less as one goes down to the level of the subordinate judiciary.

It is well known that, after the Parliament passed the Hindu Marriage Act 1955, no Hindu could enter into a valid marriage with a woman if his first wife was alive and not divorced. However, sociologically all of us know that people have been taking second or even third wife with impunity. The court in Bhaurao's case held that in order to constitute a second marriage for the purpose of bigamy under the IPC, it should have been validly solemnised. This means that all steps of sapta padi (seven steps) must be taken. Such an interpretation came as a tool in the hands of those who wanted to establish marital relations with another woman while their first wife was alive or undivorced. They could purposely keep a flaw in the second marriage with a view to avoiding criminal liability for the offence of bigamy. However, when such a woman asked for maintenance on the ground of abandonment or cruelty on the part of such husband, the court turned round and said that her marriage with the man being void, she was not entitled to any maintenance.

Could the courts not have adopted a sociologically more realistic policy of giving maintenance to a Hindu woman, who was duped into a polygamous marriage because of various compulsions including her own ignorance about the law? Since there are no registers of marriages available for easy inspection and many marriages are not registered, how is a woman or her relations to know that the man whom she is marrying is not already married? Since such information is not readily available or chances of misinformation are great, why should she suffer because of such marriage? On one hand, such marriage is not a marriage so as to make the husband liable under Criminal Law and on the other hand, it is also no marriage for the purpose of her entitlement to maintenance. The man benefits both ways (Sagade, 1989). Could one not expect an activist interpretation by the Supreme Court of India in the year 1988, when it had already given many landmark judgements in respect of Bonded labour or Contract labour during previous years? We have examples of such an activist interpretation in Bai Tahira and Shah Banoo where the Supreme Court extended the benefit of maintenance to a Muslim divorcee whose meher was not sufficient to provide for her sustenance.

In Sowmitri Vishnu v. India, Section 497 of the IPC which defines the offence of adultery was under attack on constitutional grounds. Here, the paramour of a woman whose husband had prosecuted her for adultery, filed a writ petition in the Supreme Court alleging that Section 497 of the IPC under which he was being prosecuted was violative of the Constitution, as it discriminated between a man who had sexual relations with an unmarried woman and a man who had sexual relations with a married woman. Section 497 made adultery an offence only in the case of a person who had sexual relations with a married woman. The section is devised on the feudal concept that a married woman is the property of the husband. Therefore, any illicit relationship with a married woman is an offence against the husband who alone can prosecute the wrongdoer. A married man having sex with an unmarried woman or an unmarried man having sex with an unmarried woman, a divorcee or a widow is not an offence. Adultery is also a ground for divorce in matrimonial law but there, it includes essentially all acts of conjugal infidelity. If the husband has sex with an unmarried woman, it is adultery for the purpose of matrimonial law and is a ground for divorce. But it is not an
offence under Section 497 of the IPC. The challenge to constitutionality was therefore, quite valid because the section was based on a most outmoded notion of woman's place in society. It was clearly a case of discrimination on the ground of sex forbidden by clause (2) of Art. 15 of the Constitution and not protected by clause (3) of that Article. Clause (2) of Art. 15 forbids the state to discriminate on the ground of sex. Clause (3) permits the state to make special provisions for women and children.

The counsel who appeared on behalf of the petitioner argued that Section 497 conferred upon the husband, the right to prosecute the adulterer but it did not confer any right upon the wife to prosecute the woman with whom the husband had committed adultery and did not confer any right on the wife to prosecute the husband who had committed adultery with another woman. According to her, Section 497 was a flagrant instance of gender discrimination. It was based on a kind of "romantic paternalism" which stemmed from the assumption that women like chattels, were the property of men.

Why should only the man be held guilty of adultery and not the woman also? While dealing with this, Chief Justice Chandrachud patronisingly said: "It is commonly accepted that it is the man who is the seducer and not the woman."

The Judge further said that this might have undergone a transformation in recent years but then it was for the legislature to respond to such a change. He further said:

The contemplation of the law, evidently, is that the wife, who is involved in an illicit relationship with another man, is a victim and not the author of the crime. The offence of adultery, as defined in Section 497, is considered by the Legislature as an offence against the sanctity of the matrimonial home, an act which is committed by a man as it generally is. Therefore, those men who defile that sanctity are brought within the net of the law.

Where it was argued that women were no longer mere passive victims of adultery but might also actively seduce men and wreck their families, the Chief Justice said : "The alleged transformation in feminine attitudes, for good or for bad, may justly engage the attention of the law makers when the reform of penal law is undertaken."

In days where the Supreme Court has struck down several provisions of the IPC as unconstitutional,\(^\text{15}\) it is strange that the court should refrain from striking down Section 497, which was palpably discriminatory against women. Even its favourable provisions (excluding women from being the objects of prosecution) were based on a notion of gender inequality. The response of Chief Justice Chandrachud that women were inclined to be less promiscuous than men (where he says that man is often the seducer) is again based on male chauvinism. When we pay compliment to a woman, it is for being more loyal to a man which subserves the man's perception of a man-woman relationship.

In *Air India v. Nargesh Meerza*\(^\text{16}\), the service rules of the Air India International were questioned before the Supreme Court. There was a good deal of disparity between the pay scales and promotional avenues of the male cabin crew consisting of flight pursers (FP), additional flight pursers (AFP) and inflight pursers (IFP) on the one hand and the air hostesses (AH), chief air hostesses, deputy chief air hostesses, additional chief air hostesses, and chief air hostesses on the other. The two cadres of pursers and air hostesses were different in respect of qualifications,
starting salaries and the number of posts. There were, however, provisions affecting air hostesses which did not apply to men stewards who did the same type of job. An air hostesses’ service could continue up to 35 years of age or up to her marriage, if contracted within four years since recruitment or till first pregnancy.

The court upheld the provision regarding marriage within four years as a bar to future service. The regulation permitted an air hostess to marry at the age of 23 if she had joined the service at 19, which, according to the court was "a sound and salutary provision". In the opinion of Fazal Ali J, "apart from improving the health of the employee, it helps a great deal in the promotion and boosting up of our family planning programme". Secondly, if a woman married near about the age of 20 to 23 years, she became fully mature and there was every chance of such a marriage proving a success. Further, if this bar was removed, Air India International would have to incur huge expenditure or recruiting additional air hostesses either on a temporary or on an ad hoc basis to replace the working air hostesses who conceived. Any period shorter than four years according to the Court would be too short for the corporation to provide for such replacement.

We feel that any discrimination against women in the name of family planning programme ought to be avoided. If family planning programme could be the justification for a bar on the air hostesses getting married within four years, it should have equally applied to the male employees also. There was no necessity to prescribe this requirement only for the air hostesses. Further, if a bar like this could be justified on the ground that a huge expenditure would have to be incurred by the corporation for appointing additional air hostesses to work during the maternity leave of the working air hostesses, then it could apply to all women employees in general. Such an approach would nullify the principle of equality between a man and a woman. Neither family planning nor the costs of maternity leave could be the arguments to uphold the provisions, which imposed a ban on marriage by an air hostess. The Air India was not supposed to legislate for age of marriage of girls in general. Then what business did it have to impose such a ban on the air hostesses? The bar against continued employment of an air hostess after the first pregnancy was not approved by the Court. However, the Court suggested that such a bar should operate after the third pregnancy. Again we have to ask to same question : Why should such a bar exist only against the women employees?

This case shows how our public sector organisations treat their women employees. The Judges of the Supreme Court, while condemning their blatantly sexist attitude, however, do not acquit themselves well on that count. They also revealed their own hidden sexist biases.

A more blatantly sexist attitude of a leading public corporation, the Life Insurance Corporation of India came to light in Neera Mathur v. LIC. The Supreme Court was compelled to say:

> When we are moving forward to achieve the constitutional guarantee of equal rights for women the Life Insurance Corporation of India seems to be not moving beyond the status quo. The case on hand illustrates this typical attitude of the Corporation.

The petitioner has applied for a post in the LIC. She was appointed after successfully going through an interview and a medical examination and a short term training course. She was to be on probation for 6 months. She was given appointment letter dated September 25, 1989. On December 9, 1989 till March 8, 1990, she too leave. She applied for maternity leave on December 27, 1989. On February 13, 1990, the petitioner was discharged from service. She challenged the
termination of service before the High Court. The LIC pleaded that her services were not satisfactory and therefore they had to be terminated. This convinced the High Court, which rejected her petition. On appeal, it was stated that she had deliberately failed to mention that she was in the family way at the time of her appointment. It was also alleged that she had given a false declaration which every female candidate was required to file at the time of her medical examination. The questions which a female candidate was required to answer in a declaration were as follows:

(a) Are you married? — Yes/No
(b) If so, please state
   (i) Your husband's name in full and occupation.
   (ii) State the number of children, if any, and their present ages
   (iii) Have the menstrual periods always been regular and painless, and are they so now?
   (iv) How many conceptions have taken place? How many have gone full-term?
   (v) State the date of last menstruation
   (vi) Are you pregnant now?
   (vii) State the date of last delivery
   (viii) Have you had any abortion or miscarriage?

The Supreme Court observed that there was nothing on record to indicate that the petitioner's services were unsatisfactory. The Court said:

The particulars to be furnished under columns (iii) to (viii) in the declaration are indeed embarrassing if not humiliating. The modesty and self-respect may perhaps preclude the disclosure of such personal problems like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full term etc. The Corporation would do well to delete such columns in the declaration.

The Corporation obviously wanted to avoid employing pregnant women, lest it be saved the liability of giving maternity leave. It is shocking that a public sector corporation which is a part of the Indian State, adopts a policy so manifestly sexist in total derogation of the constitutional prescription of gender equality. The court advised that if the purpose was to deny the maternity leave and benefits to a lady candidate who is pregnant at the time of entering the service, (on the legality of which the court chose not to express any opinion as it had not been raised) the corporation could subject her to medical examination, including the pregnancy test. The Supreme Court ultimately revealed its own hidden bias rather crudely. The court could have clearly stated that such a policy could not be adopted by any public corporation which was "state" for the purpose of Art. 12 of the Constitution because such sex discrimination was totally forbidden by the Constitution. Should the court wait for such a declaration until the issue is raised before it in an adversary proceeding? It has several times been said by the Court, that the adversary procedure (where one has to has to deny and the court has to merely umpire) is totally unsuited to Indian conditions and it has shown its ingenuity in adding innovative inputs to mitigate the harshness of such procedures.¹⁸ What was the justification for such judicial restraint in this case? Was it not merely sexism under the guise of legalism?

Sexism in law and justice is a mere reflection of sexism in life. Although the Constitution of India visualises a society based on equality and specially provides for gender equality, gender bias is too deep rooted to go away so easily. It keeps on intruding into the decisions of authorities,
whether they be vested in male or female persons. In judicial decisions, it appears in a very subtle way. It appears even in the deliberations of the highest court, whose judges belong to higher classes/castes and claim to have accepted liberal/egalitarian thought. This merely strengthens the hypothesis that it must be much more strongly reflected at the lower levels, where even commitment on paper to these ideals are nonexistent.

NOTES

1. See Section 13 of the General Clauses Act which says that in all Central Acts and Regulations, words imparting the masculine gender shall be taken to include females.

2. See Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973. This was upheld by the Supreme Court of India in B. Bapi Raju v. A. P. AIR 1983 SC 1073.


11. PUDR v. India AIR 1982 SC 1473.


13. AIR 1985 SC 945.


15. See Mithu v. Punjab AIR 1983 SC 473. Section 303 of the IPC which provided the death sentence as the only sentence for murder committed by a person undergoing life imprisonment for murder was held to be unconstitutional. Similarly see Maruti Sripat Dubai v. Maharashtra (1986) Maharashtra Law Jour. 913 where section 309 of the IPC which make attempt to commit suicide an offence was declared unconstitutional and void by the Bombay High Court.


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**ABBREVIATIONS**

AIR — All India Reporter
IPC — Indian Penal Code
JICI — Journal of the Indian Law Institute
L & S — Law and Society Review
PUDR — Peoples Union for Democratic Rights
SCC — Supreme Court Cases