



INDIAN COURT AND GENDER STEREOTYPING: CHALLENGES AND SUGGESTIONS

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Abstract

The attainment of justice by women is a challenging endeavour due to the presence of patriarchal, cultural, and caste norms. The notion of "compromise" is prevalent in the judicial system, including cases of sexual assault. Despite the existence of comprehensive substantive and procedural aspects of law, the constitutional commitment to equality remains an elusive aspiration for women. In India, various intersectional factors such as tradition, caste, religion, and culture have been identified as obstacles in the pursuit of justice for women. Gender bias is a prevalent issue within the criminal justice system. The present study utilises pivotal legal cases to illustrate the partialities demonstrated by courts in cases pertaining to sexual assault and rape.

The present study will additionally draw upon feminist theories to underscore the imperative for legal frameworks to comprehend the entrenched historical and socio-political underpinnings that underlie gender-related concerns. The conclusion of the paper provides recommendations for eliminating gender bias within the judicial system. In order to achieve gender justice, it is imperative that the law functions as a transformative tool. It is imperative for legal professionals, including lawyers and judges, to remain impartial and avoid being swayed by personal biases or prejudices. Furthermore, they must exhibit social sensitivity when adjudicating cases involving crimes perpetrated against women.

Keywords: gender justice; intersectionality; patriarchy; sexual crimes

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Introduction

Gender justice pertains to the equitable treatment of both males and females within the context of the criminal justice system. The authors assert that women are frequently deprived of justice due to the patriarchal perspective of lawmakers and justice dispensers, who are unable to perceive beyond the conventional gender roles ascribed to women. According to Justice K. Ramaswamy, women have historically faced discrimination and persist in experiencing it silently even in contemporary times. Despite being in the twenty-first century, the situation for women remains largely unchanged. The high incidence of domestic violence, sexual abuse, human trafficking, child marriage, and dowry deaths serves as a stark reminder that the constitutional rights and privileges afforded to women in India remain elusive for a significant proportion of the female population. According to Kannabiran (2012), in societies that are patriarchal in nature, women are frequently perceived as the individuals responsible for generating, reproducing, and disseminating culture and a novel social structure (p. 317). The advancement of women is frequently impeded by social, cultural, and religious norms. In her publication titled "Sex and Social Justice," Martha Nussbaum makes reference to the inherent worthiness of all individuals, regardless of gender, and emphasises the importance of laws and social institutions in recognising and upholding this dignity (Nussbaum, 1999, p. 5). Frequently, the institutions that are expected to safeguard women are observed to be perpetuating disparities. This paper employs the doctrinal method to examine significant case laws over a 40-year period (1979-2021) in order to comprehend the prejudiced character of verdicts, observations, and directives issued by the trial and Apex courts in relation to various forms of sexual offences perpetrated against women. It is imperative to promptly rectify this situation in order to establish gender equity.

The influence of patriarchy on cultural norms and legal systems.

Simone de Beauvoir, a renowned French philosopher and feminist, astutely observed that the state of being a woman is not an innate characteristic, but rather a socially constructed identity (Bordo, 2015). This assertion highlights the role of the socio-cultural context in relegating women to a subordinate status. Despite the sustained efforts of feminist movements and the notable advancements made by women in diverse domains, the Indian judiciary has yet to fully acknowledge the gravity of matters pertaining to

crimes and injustices perpetrated against women. In her publication entitled "Recovering Subversion: Feminist Politics Beyond the Law," Nivedita Menon highlights the prevalent discrimination against women in legal systems, wherein legal agents tend to construe laws in a patriarchal manner (Menon, 2004, p. 4). As per her assertion, despite the legal mandate of equal treatment for all individuals, the implementation of such laws often overlooks the systemic disadvantages faced by women in social, cultural, and economic spheres, relative to their male counterparts. Martha Nussbaum argues that judges must consider the "asymmetry of positions" when addressing matters pertaining to women, as stated in Carr V (1994). Therefore, it is common for the legal system and the government to overlook the subjective experiences of women in regards to oppression and abuse. In her essay entitled "Dominance, Suppression and the Law," Nandita Haksar asserts that legal reforms alone are insufficient in addressing gender injustice and providing assistance to women in distress, unless they are accompanied by a comprehensive socio-political and cultural comprehension of the underlying reasons. This viewpoint is supported by Sarkar (1995), who emphasises the importance of a holistic approach to addressing gender inequality. Robin West, in her book entitled "Caring for Justice," proposes a model of legal argumentation and judging that accords equal significance to both justice and care. She argues that the legal system, legal theory, and culture that are founded on patriarchy are involved in the perpetuation of harm against women.

Therefore, it is common for courts to not give adequate consideration to matters pertaining to sexual assault of women, as stated by NYU (1999, 97).

According to Debiprasad Chattopadhyaya's work titled "Lokayata: A Study in Ancient Indian Materialism," it is accurate to state that the interpreting mind is not a blank slate, nor is it solely a computational device or an electronic brain. The mind is inevitably impacted by a set of beliefs and customs. (Chattopadhyaya, 1959, xi-xii). Judges, being human, are susceptible to interpreting laws through a variety of factors beyond legal facts, as evidenced by the examples examined in this paper. Courts are often subject to biases such as scepticism towards women, accusations of women misusing the legal system, and difficulty in accurately assessing the gravity of a crime.

Cases related to domestic violence are often characterised by the presence of moralist assumptions and gender stereotyping, which can significantly influence judicial reasoning. Women have frequently experienced discrimination under customary laws.

It is widely acknowledged that societal moral standards can evolve into legal rights or even become codified as laws. According to Romila Thapar, the perception of women within a society is influenced by the manner in which a tradition is adopted. Uma Chakravarti posits that within Hindu society, the archetypal figure of Sita embodies the epitome of femininity for both genders. This idealised representation, transmitted across generations, upholds the values of exemplary matrimony, female purity, and fidelity, thereby reinforcing the image of the ideal woman within a patriarchal framework. In various legends and myths, women are frequently depicted as embodying the pinnacle of endurance and resilience in the face of suffering. The denial of a woman's right to a dignified life is frequently justified in the name of tradition and culture. Throughout the ages, Sita has served as the archetype of a pativrata, or the quintessential wife, within familial contexts. Throughout history, the relevance and significance of women's bodies and their experiences have been consistently disregarded. Frequently, long-standing traditions result in women themselves accepting and promoting their subordinate position. The cultural environment plays a significant role in shaping the identity of women.

Presently, the societal standing of women is determined by prevailing public morality. Regrettably, courts frequently conform to the prevailing norms without scrutinising them, even in instances of sexual assault. In her publication entitled "Tools of Justice," Kannabiran discusses the lack of constitutional legitimacy for the efficiency rules pertaining to women. This is in contrast to the constitutional provision under Article 335 of the Constitution of India, 1950, which applies to scheduled castes and scheduled tribes. The aforementioned concepts are not based on objective criteria, but rather on the regulations governing relationships or the interplay between sexuality and other unspecified factors that embody the unspoken fundamental assumption of patriarchy. Women's abilities are evaluated subjectively, persistently, and without any legal or rational basis, as stated by Kannabiran (2012, p. 356).

This statement illustrates the complicity of courts in the discriminatory practises against women perpetuated by the state. According to Bordo (2015), Simon de Beauvoir elucidates that despite the legal recognition of women's rights in theory, deeply ingrained traditions hinder their complete manifestation. As per her assertion, a significant portion of these discriminatory practises are legitimised under the guise of religion, thereby deterring any potential opposition. In her essay titled "Seeing like a Feminist," Nivedita Menon discusses the societal preference for "masculine" traits over "feminine" ones, and notes that individuals who deviate from this norm are subject to ongoing disciplinary measures (Menon, 2004, p. 7). Crenshaw's intersectional theory elucidates the interconnection between race, class, caste, and religious community, and their significance in comprehending specific concerns pertaining to women (Crenshaw, 2017, p. 11). The authors of this paper strongly assert that Judges must consider these factors when rendering verdicts on matters pertaining to violence against women.

In her scholarly work titled "Jurisprudence and Gender" (1988), Robin West asserts that the prevailing legal theory is fundamentally masculine in its conception of selfhood, and consequently, it fails to acknowledge and safeguard women's experiences and protect them from the unique harms they encounter (West, 1988, p. 2, 60). In her book titled "Law and Gender Inequality," Flavia Agnes elucidates the manifestation of gender-based discrimination in family laws, which have undergone a patriarchal evolution. According to Agnes (1999), women are responsible for upholding the sanctity of their social class, caste, and lineage, which is frequently enforced through stringent regulation of their sexual behaviour (p. 203). Frequently, instances of rape go unreported due to religiously constructed norms that associate rape with impurity. The family laws in India impose significant limitations on women's decision-making abilities in regards to divorce, child custody, and related matters. The realisation of women's rights is contingent upon various socio-political, economic, and religious factors, which are frequently overlooked by the judiciary.

Potential presence of misogyny within the Indian court system

The institutionalisation of gender stereotyping occurs when the State enacts and sustains such practises through its legal and policy frameworks. It is imperative to raise awareness about the issue of stereotyping in relation to laws, as it has adverse effects on women by constraining them within cultural norms and penalising them for

transgressions (Cook & Cusack, 2010). The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), ratified in 1979, mandates that the State implement suitable measures to address gender stereotyping. According to Article 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), it is incumbent upon States to make necessary adjustments to cultural and social norms that perpetuate gender-based stereotypes. There have been occurrences in which the legal system has conferred a subordinate position to women in comparison to men, predicated on prejudices and preconceived notions during the interpretation of the law. Regrettably, these principles are solely documented within legal and statutory literature and are scarcely implemented in practical application. The Indian judiciary is widely regarded as a key proponent of justice and a significant driving force in the promotion and enforcement of human rights. Regrettably, a significant disparity exists in the dispensation of justice concerning matters pertaining to women's concerns, particularly at the District and High Court levels. In cases of rape and sexual crimes, courts have been observed to prioritise the character and behaviour of victims over legal facts. This emphasis on the perceived propriety of victims is often based on societal expectations of "cultured" women. The following cases will provide evidence to support this claim.

The Mathura rape case

The origin of insensitive and appalling rape verdicts can be traced back to the *Tukaram v. the State of Maharashtra* (1979) case, wherein the Supreme Court exonerated the accused police officer by discrediting the victim's testimony as "a shocking liar" that was "riddled with falsehood and improbabilities" (*Tukaram v. the State of Maharashtra*, 1979). The Court asserted that there exists a significant distinction between sexual intercourse and rape. The underage victim was subjected to character assassination, wherein it was alleged that she had engaged in consensual sexual activity with one of the accused and that the police officer had groped her due to her purported habituation to sexual intercourse.

Moreover, in light of the absence of physical harm on the girl's person, it is inconclusive whether she had been subjected to or was experiencing any form of coercion or apprehension. The court held the belief that the aforementioned act would warrant an inference of "passive submission" as

per the *Tukaram v. the State of Maharashtra* case in 1979.

The redressal of rape cases in India through the means of marriage and mediation

Despite numerous criminal reforms and the passage of more than four decades since *Tukaram's* egregious statements, Indian courts have yet to fully uphold principles of gender equality. In contemporary Indian Courts, the constitutional principle of equality as enshrined in Article 14 (1950) is regarded as a mere articulation of freedom, lacking in provisions for safeguarding against discrimination or violations of bodily integrity.

Despite being a fundamental principle, the Judiciary has failed to uphold the values and directives pertaining to gender equality and women's rights. The statement made by Former Chief Justice S.A. Bobde on March 1, 2021, wherein he inquired of a government employee seeking protection from arrest in a rape case whether he would be willing to marry the survivor as a settlement, carries a tone of derision towards the justice system itself. This incident has been documented in the case of *Mohit Subhash Chavan v. State of Maharashtra* in 2021. It is challenging to comprehend why the court would consider marriage as a remedy for rape cases in any circumstance. Furthermore, it has been revealed that the individual accused of rape and the mother of the victim had previously attempted to resolve the issue privately through a mutual agreement. As per the legal case of *Mohit Subhash Chavan v. State of Maharashtra* in 2021, it was previously determined that the individual accused of rape would enter into matrimony with the victim once she reaches the age of 18. The Court in the case of *Mohit Subhash Chavan v. State of Maharashtra* (2021) noted that the accused ought to have exercised caution and deliberation prior to engaging in the acts of seduction and rape against the minor victim.

The act of seduction is characterised by the absence of coercion and intimidation, whereas rape is unequivocally defined by the presence of either one of these elements. The juxtaposition of seduction and rape, with the proposed resolution of marriage as a solution, raises a significant inquiry into the fundamental principles of justice. Furthermore, the issue of the young girl's consent regarding the possibility of marrying her rapist was considered inconsequential in this particular instance.

The statement made by the former Chief Justice of India in relation to the case of Mohit Subhash Chavan v. State of Maharashtra in 2021 was met with significant public backlash and criticism. A notable concern highlighted in the aforementioned statement pertains to the perception of marriage as a resolution to instances of rape perpetrated against minors within Indian society and the judicial system (Pandey, 2021). Furthermore, the act of marrying the perpetrator of rape to the victim can be perceived as a form of perpetual victimisation, as it subjects the victim to a lifetime of abuse and torment by the offender. This notion is exemplified in the legal case of Mohit Subhash Chavan v. State of Maharashtra in 2021. The statement made by Justice Bobde has the potential to provide a detrimental interpretation of the concept of "consent" in cases of rape and its potential avenues for resolution.

According to Jesudasan (2016), in the year 2015, the Madras High Court provided bail to a perpetrator who was charged with the sexual assault of a 15-year-old female. Furthermore, the court referred the case to a Mediation Centre. The objective of this mediation was to facilitate the union between the perpetrator and the individual who experienced sexual assault. The irony lies in the fact that in India, the act of rape may be absolved if followed by marriage, while instances of rape occurring after marriage may not necessarily result in punishment. Moreover, the notion of an ideal rape survivor is constructed as a caricature that conforms to masculine expectations of her actions, reactions, behaviour, and sleeping patterns.

The non-consensual sexual act committed by a spouse i.e. marital rape

The Former Chief Justice of India made a contentious statement regarding accusations of rape within the context of cohabitation between partners. Justice Bobde made a statement regarding a scenario in which a man and a woman cohabit and present themselves as a couple, despite insincerity. He questioned whether sexual intercourse between them could be classified as rape, even if the man were to behave brutally and commit various wrongdoings. (Roy, 2020). The vocal endorsement of marital rape by a high-ranking Judiciary official is indicative of the presence of misogynistic inclinations within the Court system. It is noteworthy that India is among the 36 nations where spousal rape is not considered a criminal offence (Makkar, 2019). The Indian judiciary has disregarded the patriarchal interpretation of what may constitute a

violation of women's bodily integrity and the definition of consent. The notion of perceiving sexual relations within the confines of marriage as an ongoing and uninterrupted agreement may stem from a harmful mentality that normalises the infliction of pain by intimate partners, as posited by Makkar (2019).

Depiction of a rape victim in a satirical or exaggerated manner

The patriarchal system has historically exerted an influence on the code of conduct and behaviour expected of individuals who have experienced rape. The Indian judiciary not only adheres to a constructed notion of the expected behaviour of a rape victim prior to and following the incident, but it has also issued several rulings based on this guidebook of "victim-like" conduct. An in-depth analysis of several heinous rape cases in India, wherein the accused was acquitted on the grounds of "insufficient evidence", sheds light on the distorted interpretation of corroborative evidence during trial proceedings. This interpretation is based on the victim's pre- and post-rape experiences and mental state. The callous interpretations have resulted in a weakening of the judicial definition of a "rape victim."

Rape myths are characterised by partiality and stereotyping, which result in erroneous beliefs regarding rape, rape victims, and perpetrators. The judiciary peruses the victim's testimony to ascertain the details of the rape incident and subsequently renders a verdict that elucidates the expected reaction of an average woman in such a situation. In most cases, courts adopt a prescriptive approach by mandating specific behaviours for women in the aftermath of a rape. The interpretation of rape cases through a traditional perspective of sexual relations among mutually consenting adults undermines a range of experiences. An example of a scenario is when a female individual provides authorization for a particular sexual activity, but withholds consent for a subsequent one (Makkar, 2019). The labelling of women as "promiscuous," "socialite," "loose," "easy-going," and "low morale" by the courts is also condemned. The accused is assumed to have believed that the woman was "up for it," as per Kotiswaran (2001).

The phenomenon of categorising rape victims according to pre-existing notions of conduct, as noted by Kotiswaran (2001), has been reflected in a significant number of witness accounts presented during legal proceedings. Due to these particular traits, the individual who has been

victimised must exert significant effort and perseverance in order to resist the situation, ultimately succumbing to it. The burden of proof lies with the victim to establish that she resisted and did not provide consent. This must be apparent in her trial testimony. Notwithstanding India's legal abandonment of the resistance requirement in favour of the consent criterion recommended by the Justice Verma Committee Report in 2013, the impact of misconceptions and stereotypes on rape adjudication persists, as noted by Satish (2016).

The manual of the ideal victim is flawed

In 1983, the Supreme Court of India instituted a set of guidelines to assess the veracity of a rape victim's testimony, as per the case of *Bharvada Gohinbhai Hirjibhai v. State of Gujarat*. Paradoxically, despite the passage of fifty years, the concept of creating a stereotypical victim of rape has remained largely unaltered. The Goa Trial Court acquitted the suspect in the *Tarun Tejpal v. State of Goa* (2019) case based on the assessment that the images of the victim that were disclosed appeared to convey a sense of happiness and lack of disturbance, and that there was no evidence of behaviour indicative of rape, as reported by Pandey (2021). The defendant faced charges of sexual assault against a former female colleague within the confines of a lift located in a luxury hotel situated in Goa. The recent Tejpal judgement highlights the flawed victim manual employed by the Indian Court, particularly in regards to the expectations placed upon victims in response to rape. The State of Goa, through its legal representatives, has lodged an appeal against the verdict in the case of *State of Goa, Thr. CID CB. v. Tarunjit Tejpal*, 2021. The appeal contends that the lower court failed to comprehend the post-traumatic conduct of a rape victim and that the utilisation of her prior sexual history and educational background as a legal prejudice against her is not a just approach. Additionally, the government contended that the accused was not held to the same standard of conduct, suggesting that the lower court's assessment of violence against women was influenced by patriarchal attitudes (Tejpal case, 2021).

In numerous instances and evaluations concerning sexual assault or rape, there exists a consistent emphasis on the response and conduct of the victim subsequent to the assault, as opposed to the appropriate dispensation of justice. In June 2020, Justice Krishna S. Dikshita of the Karnataka High Court granted bail to the accused in the *Rakesh B v. State of Karnataka* (2020) case. During the

proceedings, the judge made a remark that the rape survivor did not exhibit the expected behaviour of a victim and that it was inappropriate for an Indian woman to sleep after experiencing rape. In 2017, the Punjab and Haryana High Court's division bench, consisting of Justice Mahesh Grover and Justice Raj Shekhar Atri, released three gang-rape convicts on bail, citing the victim's statement as being frivolous and disturbing. The victim, who was a student at OP Jindal Global University in Sonapat, was subjected to blackmail and gang rape.

In the case of *Vikas Garg v. State of Haryana* in 2017, the court determined that the victim's statement was attributed to a "misadventure" that arose from a promiscuous demeanour and a voyeuristic mindset.

In the case of *Mahmood Farooqui v. NCT of Delhi* (2017), the victim alleged that the co-director of *Peepli Live* (a 2010 Bollywood movie), Mahmoud Farooqi, had sexually assaulted her while under the influence of alcohol. The victim reported that Farooqi disregarded her repeated refusals and proceeded to engage in non-consensual sexual activity. Farooqi was ultimately acquitted of the charges. According to Safi (2017), the Delhi High Court remarked that the accused had erroneously interpreted a feeble "no" as a "yes". Comments of this nature can potentially obscure the clarity of the concept of consent in India, a nation where women are already grappling with the pervasive issue of sexual violence, widespread street harassment, and deeply ingrained patriarchal beliefs regarding sexuality (Safi, 2017).

The evaluation of victim conduct

The Indian judicial system is faced with challenges pertaining to the victim's emotional state and the efficacy of a hesitant denial as a means of refusal. The testimonials provided by women are often disregarded due to their perceived lack of efficacy and strength. The case of Farooqui illustrates the court's impractical demand for a victim impact evaluation, emphasising the necessity of unequivocal resistance and absence of "involvement" on the part of the victim in the act. It has been noted that a significant number of incidents of rape committed by individuals known to the victim are not reported, as there is a lack of evidence of victimisation (Bell & Wolff, 2021). The Court in the case of *Raja v. State of Karnataka* (2016) expressed the view that the behaviour exhibited by the victim during the purported ordeal was

incongruous with that of a distressed and unwilling victim of non-consensual sexual intercourse. In the aforementioned case, it was determined that this constituted admissible evidence resulting in the exoneration of the perpetrator of rape. Additionally, in *Dilip v. State of Madhya Pradesh* (2001), the Madhya Pradesh Court expressed the view that the survivor ought to have defended herself against the appellant with the ferocity of a wild animal. The court inferred from the survivor's lack of resistance that she had given her consent. Due to the imposition of arbitrary categorizations, the judicial system has established an implicit guide for victims, compelling them to conform to specific behavioural patterns. The Courts have utilised a well-entrenched cultural narrative to instill self-doubt in survivors of rape, thereby hindering their ability to recognise the perpetrating act as a criminal offence, unless it conforms to the institutionalised definition of rape. The prevalence of outdated and ideological assumptions has resulted in a significant number of rape cases in India being disregarded or unreported. It is a fact that the legal system has incentivized women to present themselves as vulnerable and powerless victims to establish their rejection of a perpetrator's sexual advances and thus establish the occurrence of rape. Consequently, the dominant patriarchal discourse invalidates the experiences of a majority of victims, leading them to disregard instances of rape as mere "errors" or figments of their imagination.

Inadequate penalties for sexual assault

There exist multiple instances in which judicial proceedings recognise the offence committed, yet dispense insignificant and inadequate remedies and penalties. In November of 2019, a juvenile individual of 15 years of age was subjected to molestation by three male individuals in the state of Bihar. The accused was instructed by the Court to offer a verbal expression of regret to the minor for a period of 15 consecutive days, followed by an 8-day period of community service at the victim's school. In the case of *Vikram v. State of Madhya Pradesh* (2018), the Madhya Pradesh High Court imposed a bail condition for the accused of rape. The condition required the accused to obtain a "Rakhi," which is a festival that celebrates the bond between a brother and sister. During this festival, the sister ties a sacred thread around the brother's wrist, symbolising lifelong protection. The court mandated that the accused obtain this Rakhi from the survivor and promise to protect her for all times to come. Thankfully, the Supreme Court recognised the

insignificance of the verdict and subsequently invalidated it. In doing so, Mathur (2021) established seven directives for lower courts to adhere to in instances of sexual assault. The aforementioned entities are:

- It is recommended that bail conditions do not mandate, require, or permit any contact between the accused and the victim. Under such circumstances, it is imperative to ensure the safeguarding of the complainant against any further instances of harassment perpetrated by the accused.
- The court shall evaluate the nature of protection required and issue suitable orders, in conjunction with a directive to the accused to refrain from contacting the victim, if the court has reason to believe that there is a possibility of the victim being subjected to harassment. The court may also seek reports from the police in response to any expressed concerns or apprehensions.
- It is imperative that the complainant is promptly notified of the grant of bail in all instances, and is provided with a copy of the bail decision within a period of 48 hours.
- The strict adherence to the Criminal Procedure Code (CrPC) is imperative in the formulation of bail conditions and orders, with the aim of avoiding the perpetuation of stereotypical or patriarchal attitudes towards women and their societal roles. The verdict granting bail should not include any discussion pertaining to the attire, behaviour, or prior "behaviour" or "morals" of the prosecutrix.
- During the process of adjudicating cases that pertain to gender-related crimes, it is imperative that the courts refrain from proposing or endorsing any proposals that may lead to compromises between the prosecutrix and the accused, such as mandating mediation or suggesting marriage. Such actions are beyond the scope of their powers and jurisdiction.
- It is imperative for judges to exhibit sensitivity consistently, with the aim of preventing any potential trauma to the prosecutrix during the legal proceedings or as a result of any verbal exchanges that may occur during the arguments.
- Judges ought to refrain from making any remarks, whether verbal or written, that could potentially erode or disrupt the confidence of the survivor in the court's fairness or neutrality.

The act of character assassination

Furthermore, the lack of empathy exhibited by judges was documented in the legal case of *Varun Hiremath v. State of NCT Delhi* (2021), wherein the counsel representing the opposing party engaged in character assassination of the victim

through the use of derogatory and baseless comments, aimed at shaming and humiliating her. Rather than exercising restraint, Justice Sanjay Khanagwal opted to align with the counsel in belittling the woman. In this context, it is evident that Justice is contravening at least two of the aforementioned principles, specifically (vi) and (vii). The question of whether legal action will be taken against the judges in question is yet to be determined. This is due to the fact that Justice Bobde, the former Chief Justice of India, has not been able to exhibit adherence to the principles he has established, as evidenced in the case of Mohit Subhash Chavan v. State of Maharashtra in 2021.

Alarming verdicts in cases of sexual assault against minors

In 2021, a controversial ruling was made regarding the interpretation of the definition of sexual assault of a minor under the Protection of Children from Sexual Offences (POCSO) Act of 2012. The Nagpur Bench of the Bombay High Court, through Judge Pushpa Ganiriwala, has established that sexual assault or violence requires "skin to skin contact" with sexual intent, as per the case of Satish Ragde v. State of Maharashtra in 2020. The author arrived at the conclusion that the act of groping alone does not meet the criteria for a criminal offence as outlined in section 7 of the Protection of Children from Sexual Offences (POCSO) Act of 2012. The individual who lodged the complaint in the aforementioned case was the maternal parent of the underage individual who was subjected to harm. The Supreme Court has issued a stay on the comprehensive order issued by Justice Pushpa, which has been met with significant public backlash (Rajagopal, 2021).

The request of a minor rape victim to marry the convicted Catholic priest, Robin Vadakkumchery, who had impregnated her, was denied by the Supreme Court in August 2021. The Court acceded to the priest's plea for a reduction in his sentence, on the condition of his marriage to the victim (Anand, 2021).

In 2019, Vadakkumchery was convicted of rape and impregnation of a minor under the POCSO Act 2012. At present, he is incarcerated and serving a sentence of 20 years in a correctional facility. In February 2021, the Kerala High Court denied the request for bail made by a 49-year-old former priest who sought to be released in order to marry a woman. Both Vadakkumchery and the female party lodged an appeal to the Supreme Court subsequent to the Kerala High Court's ruling. The female individual asserted her desire

to enter into matrimony with him for the purpose of conferring legal legitimacy upon the child that was conceived subsequent to the occurrence of the sexual assault. Although the request for marriage was declined, the Supreme Court ruled that the duration of the sentence should be decreased, provided that the clergyman weds the survivor upon release (Mahapatra, 2022). This verdict will serve as a blemish on cases involving rape of minors, as the legal system does not recognise the consent of individuals under the age of 16 as valid, and thus such acts cannot be considered consensual. The Supreme Court approved the proposition of utilising marriage as a resolution for cases involving the rape of a minor. The Kerala High Court Judge Gopakumar rendered a verdict in January 2022, acquitting Bishop Franco Mulakkal of rape charges. The judge cited the nun's conduct and testimonials as being "difficult to believe," according to Vishwanath (2022).

The phenomenon of systemic misogyny

Sexism and misogyny represent a pervasive problem within the Judiciary, as well as numerous other institutions.

In 2018, a study was carried out by the National Law University Delhi (Duggal, 2018) which examined 50 instances of rape that were adjudicated by the Supreme Court. Research has revealed that judges frequently hold stereotypical perceptions of individuals who have experienced rape. The study also revealed that the inclusion of a female judge in the judicial panel can lead to a significant reduction in derogatory remarks based on gender.

In order to mitigate personal biases, one may deliberate carefully when making a decision (Capurso & Timothy, 1998). A pertinent inquiry in this regard is whether the interpretation of a statute would differ if it were made by a female judge. The pertinent inquiry is whether the integration of a greater number of female judges (Hunter, 2008) will result in a transformation of the hetero-patriarchal institution into one that is equitable. Affirmative, the response is in the affirmative. This has the potential to alter the judicial approach towards matters concerning women. Benches that are designed to be inclusive of women have a higher likelihood of bringing attention to issues that affect women and introducing novel perspectives on gender roles. Additionally, such benches may provide a platform for women to express their opinions on social issues that are considered taboo, rather than solely condemning actions that are illegal.

Consequently, an increase in the number of female judges may result in a greater consideration of gender-related issues in judicial decisions. In 1995, Rupan Deol Bajaj raised a query regarding the absence of a female judge to preside over her sexual harassment case. Her legal representative, Indira Jaising, responded by stating that there were no female judges serving in the Supreme Court at that time. Over the course of twenty-five years, the Indian Apex Court has appointed a mere eight female judges, with a paltry two women having served on the top Court's collegium.

This presents a concerning matter as such ingrained bias is not typically extended to a male equivalent. Frequently, women decline such positions due to familial responsibilities and the obligation to attend to their children. There exists an implicit agreement that male coworkers exhibit less concern regarding the welfare of their offspring, and that the primary responsibility of child-rearing still falls upon women.

Additionally, it has been observed that women exhibit a tendency to decline offers to serve as judges and instead, exhibit a preference for employment in corporate law firms or in-house positions that involve litigation or transactional work (Roy, 2020).

Judiciary predisposed towards women advocates and judges

Empirical evidence supports the notion that insidious forms of discriminatory practises have infiltrated the judicial system.

As per the 2019 report submitted by the Department of Justice in the Ministry of Law to the Standing Committee of Law, it was found that male individuals currently hold the position of head in twenty-six High Courts throughout the nation. Out of the total of 1079 judges presiding over the different High courts, a mere 82 are female. Furthermore, the number of male senior advocates in the Supreme Court surpasses that of female senior advocates, with only 17 women holding the designation compared to 403 men.

According to the Delhi High Court, there are currently eight female senior designations, while 229 male individuals hold the same title. According to the 15th Report of the Parliament of India in 2006, the Bombay High Court comprises a total of 157 senior male advocates and a mere six senior female lawyers.

Furthermore, the present recruitment process, which involves an entrance examination, facilitates the selection of a greater number of female judges at the initial stage of their careers in the lower judiciary. In contrast to lower courts, the procedure followed at higher courts is distinct in nature, as it relies on suggestions that may potentially diminish prospects of advancement (Vidhi Centre, 2018). According to Roy (2020), the opaque nature of the collegium system employed in the upper judiciary is indicative of bias. The appointment of female judges to the High Court is subject to a filtering process that takes into account their experience and peer approval, rather than relying solely on merit, resulting in a refined population.

As per the findings of Chandra and Hubbard (2019), it is recommended that the Indian Supreme Court increase the number of female justices appointed to High Courts. This measure would serve to broaden the available pool of candidates for the Apex Court and ultimately enhance gender diversity.

The pursuit of gender equality in India necessitates legal intervention in addition to efforts within domestic and political spheres. The lack of gender parity within the judiciary and the exclusive representation of male individuals in positions of power to veto decisions related to justice may contribute to a rise in the prevalence of misogynistic statements. In order to achieve true inclusivity, it is imperative to make a concerted effort to increase the representation of women on the Bench, ensuring that they are afforded equal opportunities at all times.

Favourable developments

In India, instances of gender-sensitive verdicts and gender-neutral courts are infrequent. However, certain recent judgements suggest a more progressive stance towards matters concerning women. The Kerala High Court's ruling in *Santhosh v. State of Kerala* (2016) held that the act of manipulating the legs and inner thighs of the victim to create stimulation constitutes rape, despite not satisfying the precise definition of penetration as outlined in Section 375(c) of the Indian Penal Code, 1860. The case of *XXX v. XXX Thr. Adv. Sri Millu Dandapani Mat* (2021) was reviewed by a division bench of the Kerala High Court, wherein the husband's appeal against divorce was rejected. The court ruled that the act of treating a wife's body as one's possession and engaging in sexual activities without her consent is tantamount to the offence of marital rape. The

Court rendered a decision affirming that spousal rape constitutes a valid basis for pursuing a dissolution of marriage. The Court noted that despite the absence of legal recognition of marital rape as a criminal offence, it is still deemed a form of cruelty that may warrant the granting of a divorce. The aforementioned rulings have now set a precedent for forthcoming legal cases and facilitated the evolution of law.

The fulfilment of constitutional provisions is contingent upon the Judiciary's revolutionary pronouncements and the provision of opportunities for increased female representation within the judicial arena.

The Constitution of India 1950 stipulates in Article 14 that the fundamental principle of India's notion of freedom, liberty, and justice is equality. As per the Constitution of India, 1950, Article 15(1) stipulates that the state is prohibited from exhibiting any form of discrimination against any citizen based on their gender. Furthermore, creating a differentiation based on this provision would constitute a violation of the constitution. The objective is to provide a respectable standard of living to individuals, as is rightfully owed to them. It is imperative that all judicial pronouncements strive towards the establishment of such a provision, which should serve as a guiding principle.

Recommendations and suggestions

In the case of *State of M.P v. Babulal* (2008), the judge expressed the opinion that a judge who is socially aware and sensitive is more effective in cases involving crimes against women than relying solely on lengthy penal provisions that contain intricate exceptions and complicated provisions. This statement encapsulates the ideal objective that the judiciary should endeavour to attain with regards to matters pertaining to women and minority groups. To ensure the efficacy of the enforcement of laws aimed at safeguarding a woman's dignity and rights, a shift in the judicial perspective is imperative. Justice Cardozo, in his work "Nature of the Judicial Process," articulates the notion that a judge's responsibility is to depersonalise the law, refraining from imposing their own subjective viewpoints and ambitions, and instead considering the perspectives and ideals of the contemporary society (Cardozo, 2010).

It is imperative for the state and legal mechanisms to proactively uphold gender equity. To attain gender justice, it is imperative to adopt an

approach to interpreting the Constitution that is grounded in the principles of constitutional morality, rather than relying on personal patriarchal beliefs. It is imperative that the law be interpreted in a manner that is free from discriminatory biases, thereby ensuring equitable dispensation of justice to women. The Constitution of India, 1950, in Article 15, clauses (1) and (2), unambiguously stipulates the state's obligation to refrain from discriminatory practises based on race, caste, gender, religion, and place of birth. The concepts of masculinity and femininity are socially constructed.

The alteration of one's perception can solely occur through the displacement of these constructs. The patriarchal world is characterised by entrenched power relations that are asymmetrical and often reinforced through the use of violence. The Constitution establishes a framework for the judiciary to pursue justice that is independent of prevailing public morality. The paper discusses several case laws that illustrate how the language used by courts is entrenched in patriarchal beliefs, perpetuating the notion that women are objects to be owned. It is imperative for courts to interpret the provisions of the law in a manner that is rebellious, particularly in cases pertaining to sexual assault against women, in order to ensure suitable recourse. The prevalence of patriarchal attitudes can impede the ability of male judges to comprehend the nuances of women's oppression and hardship, thereby impeding their capacity to render impartial judgements. Therefore, the significance of a greater representation of female judges within court systems cannot be overstated. The *Bhanwari case* (*Vishaka and Ors. v. State of Rajasthan*, 1997) provides a typical illustration of a trial court's decision in which the judge, prior to acquitting the accused, made a statement that Indian culture has not deteriorated to such an extent that an individual, who is raised in it and is an innocent, rural man, would transform into a person of immoral behaviour who disregards caste and age disparities and becomes bestial enough to assault a woman (Kannabiran, 2012, p. 398).

The lack of a standardised Civil Code and the prevalence of personal laws based on religion can pose significant challenges for women seeking justice. The conflict between community beliefs and Court verdict was brought to the forefront in the Supreme Court ruling of the *Shah Bano case* (*Mohd. Ahmed Khan v. Shah Bano Begum*, 1985), as is clearly apparent. The divergence between societal conventions and legal prescriptions underscores the insufficiency of law

as the sole determinant of women's entitlements. Therefore, it is imperative to consider the social, cultural, and religious influences that impact a woman's existence when making determinations regarding women's rights. Additionally, there is a male-dominated presence within the criminal justice system, specifically in roles such as law enforcement, prosecution, defence, and judiciary. Increasing the proportion of women in the system is likely to enhance its responsiveness to matters pertaining to women and facilitate the eradication of gender-based bias.

The imperative to decentralise power structures within patriarchy is pressing, particularly in cases pertaining to women, if the judiciary is to uphold fairness and justice as its guiding principles. The interpretation of Article 15(3) of the Constitution of India 1950 is often subject to confusion and misrepresentation. The intended goal of social justice, as outlined in Article 15(3) of the Constitution of India in 1950, is frequently undermined. As evidenced in the examples presented within this paper, the judicial system frequently demonstrates a lack of comprehension regarding the fundamental concept of discrimination and its implications for women in terms of their entitlements and freedoms. The delivery of judgements in cases pertaining to women cannot be based on public morality, according to academic discourse.

A legal approach that is pragmatic and grounded in reasoning, while taking into account the inherent power imbalance experienced by women, has the potential to significantly advance the cause of justice for women. It is imperative that the legal system and its institutions become more attuned to gender issues. The legal system must not yield to the requests of the prevailing group. Instead, it ought to aid in safeguarding the entitlements of individuals who have been rendered powerless by prevailing factions. It is imperative for judges to balance their legal reasoning with social sensitivity.

According to Cook and Cusack (2010), the ability to make objective judgements and transcend personal biases is facilitated by the expansion of one's cognitive capacity. The act of considering various perspectives can aid in mitigating personal biases and prejudices. Increasing the number of perspectives can potentially decrease the level of subjectivity. According to Cook and Cusack (2010), the ability to expand one's mind is what enables the attainment of autonomous and unbiased judgement. It is imperative to initiate

reforms in family law that deviate from the current patriarchal foundations. The perpetuation of patriarchy is closely intertwined with economic structures. Therefore, the resolution of female oppression ought to be primarily sought within the realm of economic structures. States bear the responsibility of ensuring the well-being of women within these structures, as posited by Cook and Cusack (2010).

In the case of *Anuj Garg v. Hotel Association of India* (2008), the Court employed the "antistereotyping principle" in relation to allegations of sex discrimination, marking the first instance of such application. The Supreme Court of India, in 2018, declared that the status of the victim as a sex worker does not confer any entitlement to the accused to commit rape. In the case of *National Legal Services Authority (NALSA) v. Union of India* (2014), Justice Sikri raised concerns regarding the stereotypical categorization of binary gender. Similarly, in the case of *Secretary, Ministry of Defence v. Babita Puniya* (2020), Justice Chandrachud challenged gender roles that presuppose women to be responsible for domestic obligations. It is imperative to acknowledge that the utilisation of derogatory stereotypes by judges constitutes a type of discriminatory behaviour. As evidenced by the aforementioned cases, the act of identifying and emphasising the Court's judgements that challenge stereotypes can serve as a means of dispelling prevalent misconceptions and stereotypes.

In order for individuals to have confidence in a justice system that is impartial with respect to gender, it is imperative to consider the issue of representation within the judiciary. Professor Kate Malleson contends that while having a diverse bench may aid in mitigating gender bias, the lack thereof can significantly undermine the democratic legitimacy of an institution (Russell & Malleson, 2006). The inclusion of intersectional perspectives and promotion of diversity within a predominantly male judiciary is of great significance.

Conclusion

Misogyny is a prevalent issue in Indian society, which has deep roots in patriarchal norms. Furthermore, even the courts are not immune to this phenomenon. In instances where courts exhibit misogyny and fail to acknowledge the harm inflicted upon women, the administration of justice is compromised and becomes a mockery. In an era marked by significant advancements in

technology and science, progress towards addressing issues of female subjugation and oppression appears to be occurring at a sluggish pace. Frequently, the prolonged duration of the dispensation of justice, degrading interrogations during the legal proceedings, and antagonistic attitudes during the inquiry phase dissuade women from disclosing incidents of sexual violence and mistreatment. The judiciary assumes a pivotal role in facilitating societal progress through the issuance of impartial and unbiased judgements, devoid of personal prejudices and biases. They are unable to engage in collusion with a system that fosters a culture of impunity. The delivery of justice through the preservation of constitutional morality has the potential to significantly empower women by fostering trust in the justice system among victims of abuse. It is imperative that courts cease to view women as inferior beings.

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