

JUDICIAL CONSTRUCTION OF GENDER IDENTITY

by

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ABSTRACT

In the Indian legal system, earlier the doctrine of judicial construction of identity was known for its use w.r.t. juristic persons like government, deities, charities, etc., but with the SC's landmark judgment in *NALSA vs. UOI* (2014) we observed the extended application of this doctrine making the term 'gender' more inclusive by officially introducing the identity of '3rd gender'. The focus of the studies would be the legal position of all the genders considering their social, economic and historical standing within the insights provided by the Indian Judiciary through its pronouncements which will create an understanding of evolution of status of genders in India during different phases of history and at present. It is a noted fact that since independence women's safety and welfare has been given constitutional importance and judiciary's efforts in making these safeguards effective are steps toward the achievement of gender equality. Similarly now these safeguards are now being extended to 3rd gender and LGBTQ+ community as well. Though we still stand far behind our goal of gender equality but with the surfacing of cases of false allegations of rape or domestic violence against men or sexual harassment of men, compels the society to think that are we being too bias or too focused to a specific gender at the cost of the others. Here, we intend discuss about the modern issues faced by men in today's society which are either not taken account of or arising because of the extreme biasness towards other gender and how judiciary has been well able to maintain a balance between the principle of gender equality and preventing gender divide.

Keywords: *3rd gender, gender equality, judicial pronouncements, gender bias.*

INTRODUCTION

Being the human nature, we all have expectation and desires, living in a ideal society is one of them. Despite having such aspirations and social consciousness, every society experiences some kinds of biases and discriminations. Gender Discrimination can be said to be one that kind of discrimination which starts from the smallest unit of the society i.e. family but is also visible across the international borders and international platforms. Here, the Gender Discrimination is not only limited to the biases faced by the females alone.

Just like any other major developing economies of the world India, since its independence been working on reforming its political, economic and social institutions. Being one of the 4 pillars of Democracy, in the journey of these reforms, the India has Judiciary has proved to be the embodiment of social reformer, settler of dispute and defender of citizen's right, over the years of its functioning possibly by using its power of judicial construction i.e. interpretation of law which also helps in creation of juridical persons and defining, expanding and reshaping the character and social standing of natural persons.

But some questions arises is how deep rooted is this discrimination within our Society? Has there been any improvements in the conditions of the ignored or suppressed gender groups? Are we focusing too much on one gender group which is ultimately affecting the interest of the other groups of the society? Do we need to change our approach to deal with gender discrimination as per the changing/ evolving scenarios?

DEFINITION/ CONCEPTS

- **Sex & Gender-** Sex of a person is the one which is designated to a child at the time of its birth based on their physical attribute.

Gender is an identity that one identifies with as regards to sexual preference. In other words, it is learnt roles, norms and expectations on the basis of one's sex. It varies in different societies.

Though biological roots cannot be denied, sexual desires and responses are shaped by the society which inc. one's way of living i.e. type of dress to be worn, patterns of speech, food to be taken, to marry, etc.

- **Gender gap:** Differences between men and women in levels of achievement or access. E.g. pay disparity, access to education. These differentials may result from customary

practices, religious biases, social assumption, myths or taboos, among others.(Meity, 2023)

- **Gender discrimination:** Where one gender is favoured and the other becomes disadvantaged e.g. sex selective abortion.(Meity, 2023)
- **Transgender:** Generally it is used as an umbrella term for persons whose gender identity, gender expression or behavior does not conform to their biological sex. It includes a wide range of identities and experiences, including but not limited to pre-operative, post-operative and non-operative transsexual people:
- those persons who do not want to be identified with their sex assigned at birth, which include Hijras/Eunuchs.
For better understanding- Hijras are not men by virtue of anatomy appearance and psychologically. Since Hijras do not have reproduction capacities as either men or women, they are neither men nor women and claim to be an institutional - "third gender". Among Hijras, there can be emasculated (castrated, nirvana) men; non-emasculated men (not castrated/akva/akka) and inter - sexed per sons (hermaphrodites).
- persons who intend to undergo Sex Re-Assignment Surgery (SRS) or have undergone SRS to align their biological sex with their gender identity in order to become male or female. They are generally called transsexual persons.
- persons who like to cross-dress in clothing of opposite gender, i.e . transvestites. (Meity, 2023)

*For the purpose of this chapter, '3rd gender community' will include all genders other than male and females.

GENDER EQUALITY IN INDIA

India is among those few countries in the world which is known for its vivid cultural diversity with various religions, ethnicities, languages, traditions coexisting. But similar to any other society even in India we witness inter-sectional conflicts and discrimination.

Unlike, other kind of societal discrimination which creates divide among families or communities or religion, gender discrimination exists within the families themselves. (Kaushal., et al, 2024)

Origin and historical background of Gender Equality in India and World

India was popular called the Golden Sparrow, not only because of its immense wealth and prosperity but also because it's advanced knowledge system and forward looking social structure.

The existence of equality among genders can be traced way back to the ancient India, starting from the Vedic period.

Hindi Mythology holds gives some of the best examples proving the ancestral existence of gender equality in Indian Culture-

- The Ardhanarishwara (Lord who is half-woman), a complete androgynous form of male and female representing deities Shiv (god) and Parvati (goddess). (Ignou,2022)
- Stories of Brihannala (Arjun living as a eunuch dance teacher in King Virat's Court). (Sucheta, 2025)
- Figures such as Gargi and Maitreyi are celebrated for their wisdom and spiritual pursuits, with Maitreyi, known for her determination to seek knowledge in exchange of her inheritance. (Kaushal., et al, 2024)

Medieval Period

We read the stories of valour of many female warriors like Rani Durgavati, Razia Sultan during the Medieval period, but yet this period is known as the 'Dark Age' for women because of imposition of extreme restriction on them for their protection from foreign invaders. (Chaujar., et al, 2016)

But a question arises, if such restrictions were imposed for protecting women from foreign invaders, then why these practices continued even when the regime changed and when India became independent.

Unlike the status of women, Hijras (3rd Gender community) played a famous role in the royal courts of the Islamic world. They rose to known positions as political advisors, administrators, generals, etc. (Michelraj, 2015)

Re-emergence of Gender Equality in India

During this period in some parts of India, there were female warriors like Rani Lakshmi Bai, who were actively participating in the struggle against the British rule but on the other hand, we also see a bizarre picture gender inequality w.r.t. women. (Ignou, 2022)

Many social reformers like Raja Ram Mohan Roy, Sir Syed Ahmed Khan came forward for the upliftment of Indian women. (Chaujar, 2016)

In the later years of Independence struggle, Indian women became the mass participant in freedom movements, peasants and trade union struggles.

But the situation became worse for the 3rd gender community, as it is believed that Britishers didn't liked such vivid displays of one's sexuality. Thus, the Colonisers did what they always do, tainting India's understanding of sexuality beyond the proscription of 'perverse' sex and also anglicised India's moral lens. (Academike, 2021)

In the late 19th century, Hijras were criminalized and denied civil rights under *Criminal Tribes Act*, 1871. Since then, the 3rd gender community experienced various forms of discrimination and injustice. Until 1990s when the first pro gay rights protests was organized in India which, only recently gained a lot of momentum.

Post- Independence

In post-independent India the gender equations were fairly better than pre- independence period due to the continued series of social and political reforms undergone after the independence.

But the path to an egalitarian society requires continuous striving as new opportunities brings new struggles and new forms of discrimination and crimes surfaces.

LEGAL JOURNEY OF GENDER EQUALITY IN INDIA-

Both legal framework and progressive judicial pronouncements have always been instrumental in promoting gender equality and supporting women and 3rd Gender group in different spheres of their life, whether be it work or family. (Kothari, 2024)

We'll discuss some of the important laws and landmark judgments which also reflect the country's struggle to balance cultural norms with modern ideas.

Constitutional Aspect

Unlike the feminists' demand in gender equality movement, 3rd gender community had to start their fight for equality from establishment of their existence.

National Legal Service Authority (NALSA) v. Union of India (UoI) (2014)-

In this case, Supreme Court (SC) had to decide whether persons who fall outside the male/female gender binary can be legally recognised as “3rd gender” persons. The Court recognised that 3rd persons were entitled to fundamental rights (FRs) to self-identify their gender under the CoI and under International law. Court also stated that 3rd gender persons shall be entitled to right u/a 14 [Right to equality]; 19 [Right to live with dignity] & 21 [Right to privacy].

For the same purpose, the Indian Parliament enacted Transgender Persons (Protection of Rights) Act, 2019.

Discrimination at work place-

- Vishaka & Ors. v/s State of Rajasthan (1997)

It is one of the earliest cases which saw widespread public anger. The formulation of Vishaka guideline by SC in 1997 was a reaction to the incident of gangrape for her attempts to stop child marriage. Later, lead to the enactment of Sexual Harassment of Women at workplace (Redressal, Prohibition & Prevention) Act, 2013.

- Anuj Garg v. Hotels Association of India (2007)-

The SC held that exclusion of women from places serving liquor is a form of ‘protective discrimination’ which ultimately leads to continuous of oppression of women and outdated stereotype. This case laid the foundation for securing substantive equality for women.

SC also explained Protective discrimination (aka Romantic Paternalism)- a discriminatory rule that puts women in the cage in the name of putting them in the pedestal.

- Secretary, Ministry of Defence v. Babita Puniya (2020)-

Victory for women who were seeking to cement their role and contribution to the Indian Army through entitlement to Permanent Commissions at all posts on an equal basis as their male counterpart.

- Lt. Colonel Nitisha & Others v. UOI (2021)-

This is the case subsequent to the Permanent Commission case w.r.t. neutral fitness eligibility criteria which discriminatory to the women seeking permanent commission who already crossed the age required to meet the provided selection criteria. In this case light was drawn on the systematic discrimination existing in India.

SC was of the view that courts must step up to identify and change the structural inequalities.

Non- Discrimination on the basis of Marriage and Pregnancy

- In early cases like *Air India v. Nergeesh Meeza* (1981) and *C.B.Muthamma v/s UoI* (1979), unequal treatment on the basis of pregnancy and marital status weren't even considered as a ground for discrimination u/a 15 of the COI.
- *Rama Pandey v. Union of India and Others* (2015)-
Right of a female government employee to avail maternity leave when motherhood is attained through surrogacy.
- *Deepika Singh v. Central Administrative Tribunal* (2022) -
In this case the petitioner was denied the provisions of maternity leave as she did not fit in the popular imagination of a family. Court widened the definition of 'familial relationships' to include domestic, unmarried partnerships or queer relationships.

Sexual Harassment at workplaces

- *Apparel Export Promotion Council v. A.K. Chopra* (1997)-

The court emphasized that sexual harassment could manifest as a form of indirect discrimination, especially when it affects the female employee's work efficiency or creates a hostile work environment.

It also stated that sexual harassment is not limited to physical act, but also inc. unwelcome sexually determined conducts like requests for sexual favours, sexually coloured remarks.

- *Sanjeev Mishra v. The Disciplinary Authority and General Manager* (2021)-

Court iterated that the incidents of sexual harassment which take place virtually or during un-official hours are not exempted from the purview of the POSH Act, as long as there exists a working relationship between the parties, a complaint under POSH Act can be filed.

- *Dattatraya Motiram More v. State of Bombay* (1952)-

Court upheld the constitutionality of elected seat reservation for women in municipal election and stating it to be the legitimate exercise of State's power.

The 73rd 74th and latest 106th Constitutional Amendment Act which provides reservation for women candidates in the direct elections are the subsequent legislative step, reaffirming the idea of encouraging women's participation in politics.

Rights within Family

The legal framework for family related issues like marriage; divorce & inheritance, is complex and are subjected to civil laws and Personal Laws.

The developing jurisprudence in personal law is the proof that women are ready to undermine the suppressive religious or cultural rules from the margins to the center.

- Arunachala Gounder (Dead) by LRs v. Ponnusamy and Others (2022)-

The SC in this case reaffirmed *the equal rights to daughters in inheriting the self-acquired or family property of a male Hindu who dies intestate (without a will) and such property would devolve by inheritance and not by survivorship.*

Marriage, Maintenance and Divorce

- D. Veluswamy v. Patchiammal (2010)-

Here, the right to maintenance was expanded to include women in relationships in the nature of marriage i.e. live-in relationship).

Later, keeping in view both the increase disputes between live-in couples and sparse social acceptance and objection to Live-in relationships, Uttarakhand Govt. included the provisions defining and bringing effect to the rights of individuals involved in live-in relationship, in recently enacted Uniform Civil Code, Uttarakhand, 2024.

- Shayara Bano v. UOI (2017)-

SC declared the practice of triple talaq void which favoured Muslim men and left the women at their disposal.

- Supriyo Chakroborty v. Union of India (2023) –

SC clarified the difference between 'right to choice of partner' and 'Right to marry' w.r.t. 3rd gender group. The court stated unanimously that there was no fundamental right to marry – for heterosexual or queer couples, though are entitles to the right to choice of partner.

- Kannaian Naidu and Others v. Kamsala Ammal and Others (2023)-

The judgment emphasizes the invisible contributions of women towards the assets acquired by a couple during marriage, recognizing that non-financial support from a spouse justifies the coownership of assets acquired during the marriage.

- National Insurance Co. Ltd. and Others v. Deepika and Others (2009)-

SC, here, acknowledged the homemakers' contribution aligning with a recommendation from CEDAW (Convention on the Elimination of All Forms of Discrimination against Women) to value unpaid domestic work.

But nowadays, a new misconception is rising among the young males, that is, dowry and alimony are same thing and if women are entitled to receive alimony then even male shouldn't be ashamed of receiving dowry, which is really a matter of grave concern because in making such contentions the Indian men are forgetting the very basics that dowry is all together illegal and alimony is something that is granted to women as a relief by the court.

Adoption, Guardianship and Custody

- Githa Hariharan & Another v. Reserve Bank of India & Another (1999)-

The court clarified that mothers have equal rights to act as natural guardians of their minor children, even during the father's lifetime.

- ABC v. State of NCT, Delhi (2015)-

SC affirmed the rights of unwed mothers to be the legal guardians of their children, without notifying an uninvolved father. Additionally, it highlighted the constitutional right to privacy and its relevance in cases involving personal family matters.

- Zahhad v. State of Kerala (2025)-

Kerala HC's made groundbreaking ruling which allowed Transgender Couple to be listed as Gender-Neutral "Parents" on Birth Certificate instead of being referred as Father and mother.

Domestic Violence

- Hiral P. Harsora and Ors v. Kusum Narottamdas Harsora and Another (2016)-

The Court identified the legal loophole which deprived the victim (harassed wife) from seeking protection against the women perpetrators (her in-laws) and positively affirmed that protection under IPC includes any kind of domestic violence, even when the perpetrators or abettors are women.

Though the legal safeguards for the empowerment of the women and 3rd gender groups have come a long way, but now the question of concern is-

-whether these safeguards are causing any injustice to the other section of the society i.e. Indian Men or not?

-whether this empowerment is being achieved at the cost of the basic rights of the others?

- Sushil Kumar v. Union of India (2005)-

The court observed that most of the complaints filed under the section 498A of IPC is done with a dishonest intention and for seeking vengeance. Hence, it gets important for the legislature to find out a way to curb the frivolous complaints and if the same is not done then a new 'legal terrorism' may be unleashed.

Nowadays, we frequently hear of males being subjected to domestic violence, where most of these cases goes unreported due to the fear of being ridiculed by the society or being laughed at by the colleagues. Moreover for such cases there isn't any specific remedy available to men as provided to females u/s 498A, IPC.

In many countries like United Kingdom, the provisions applicable to the offence of domestic violence are gender neutral as the act uses words such as 'Person' and 'Vulnerable Adult'.

Likewise, Indian legislature should take note of these rising issues and should come up with a solution before all the efforts of gender equality becomes a tool of injustice for other section of the society.

Sexual and Reproductive Rights

Though it is unfortunate to hear that women didn't even had liberty to take decisions w.r.t their bodies. But over the years, the landscape of sexual and reproductive rights has transformed significantly.

- Suchita Srivastava v. Chandigarh Administration (2009)-

SC held the right to reproductive choice as an essential aspect of personal liberty u/a 21 of CoI and denying a woman control over her own body would violate her right to dignity. This judgment laid the groundwork for future legal protections.

- X v. Health & Family Welfare Department (2022)-

SC while holding that a woman cannot be denied the right to a safe abortion only because she was unmarried. Further, it explained that the term “woman” includes persons other than cis-gender women and therefore should be entitled to safe medical termination services

- *X v. Principal Secretary, Health (2022)-*

Maximum time limit for abortion was further extended to 24 weeks only in certain circumstances would inc. any unmarried woman who is no longer in a relationship, where the foetus had severe anomalies, or the pregnancy threatens the life of the woman (either mentally or physically).

- *Krupa Profilers v. State of Kerala (2008)-*

Here, the court upheld the right of women to access over-the-counter emergency contraceptives.

Court not only refrained questioning of individual’s morality, it also emphasized on disseminating information on the availability and methods of contraception and spreading awareness on sexual and reproductive health.

Criminal Laws

- *Tuka Ram & Anothers v. State of Maharashtra (1979)-*

SC held that, only for the purpose of some specific cases like rape, acid attack, etc. , the burden of proof will be shifted to the accused, deviating from the original rule of ‘burden of proof’ i.e. the person who is at the outset of the suit/ complaint should prove that a wrong is done to him by the accused.

But some member of the society, now. fears that these modifications in the legal principles will hamper their interest, especially when the complaint is filed with a wrongful intent. However, these changes were the need of the hour

- *State of Maharashtra v. Madhukar Narayan Mardikar (1991)-*

The Supreme Court ruled for the first time that the past sexual history of a victim was irrelevant to the case, marking a shift towards giving full weight to the evidence of rape survivors, no matter who they were.

- *Independent Thought v. UOI (2017)-*

Section 376A of the Indian Penal Code, which did not criminalized marital rape of a girl child between 15 and 18 years old, unconstitutional. This is the landmark judgment for the protection of girl child and child brides under 18 years of age in India.

However, de-criminalization of all forms of marital rape is still a debate, which now pending in *Hrishikesh Sahoo v. State of Karnataka*.

- *Joseph Shine v. Union of India (2018)*-

The Supreme Court decriminalized adultery, ruling that the law made women subservient to men within their marriages, violating their rights to equality, autonomy and dignity.

- *Navtej Singh Johar v. Union of India (2018)*-

Constitutional bench of SC interpreted that Art.21, 14, 15 and 19 of the CoI include the Fundamental Rights to Sexual Identity; Sexual Autonomy; Sexual Privacy, Choice of Partner. Sec.377, IPC does not survive the trinity test of Art. 14, 19 and 21 as far as the consensual homosexual activities were concerned, thereby declared it unconstitutional.

- *Rupan Deol Bajaj and Others v. Kanwar Pal Singh Gill and Others (1995)*-

The Supreme Court in its review petition upheld the allegations in the FIR constituting offenses under Section 354 (outraging the modesty of a woman) and 509 (insult to modesty through words or gestures), IPC. It further stated that acts violating a woman's modesty could not be trivialized under Section 95 IPC (Act causing slight harm).

- *Laxmi v. Union of India (2015)*-

This petition was filed against the denial of adequate compensation for the trauma and physical suffering undergone by the acid attack victims.

The SC directed the Union Government to consider the enactment of appropriate provisions for the proper treatment, aftercare and compensation for victims of acid attacks and for regulating the sale of acid in States and UTs.

Consequently, the UoI filed the draft Poisons Possession and Sale Rules, 2013 for that purpose.

These directions by the court acts like a life aid for the acid attack victims as acid attacks results in severe pain, permanent disfigurement, infections, psychological trauma, and even blindness or loss of limb. Acid attacks are always pre-planned, and the impact on the victim lasts a lifetime, making it one of the worst and most heinous offences.

In India, some acts of sexual harassment are gender-neutral i.e., it is punishable irrespective of the gender of the offender or the victim (e.g., obscenity). However, most offences are punishable only when the act is committed by a man against a woman like rape, sexual harassment. Though, we observe some gender neutral clause of POSCO Act and new BNS but Indian society is looking forward to the expansion of legal safeguard to Indian men against sexual offences.

In the early phases of pro-3rd gender protest, SC adopted a rigid stand which is reflected in-

- Binu Tamta and Another v. High Court of Delhi and Others (2023)-

The petitioner requested to make the Supreme Court of India (Prevention, Prohibition and Redressal) Regulations, 2013 ('Regulations') gender-neutral and provide protection to queer and transgender persons from sexual harassment based on SC's earlier decision in *NALSA v. Union of India* which entitled 3rd gender community to be brought within the scope of sexual harassment regulations.

The Court took a rigid approach in restricting the application of the Supreme Court's Regulations and refused to apply this policy to LGBTQIA+ persons.

- Malathy S.B. v. State of Karnataka (2023)-

Karnataka HC refuses to quash abetment to suicide case against manager and teammates accused of joking about their colleague's sexual orientation.

Other Constitutional Rights

- Lata Singh v. State of U.P.(2006)-

SC condemned caste-based harassment and threats against inter-caste couples, emphasizing that societal norms cannot override constitutional rights u/a 21 to marry and convert freely, rejecting paternalistic interventions by the State or family.

The above judgment advanced the right of women to choice in marriage as well as religious conversion.

The freedom to choose a life partner, now, has become a new tool to defraud women into a scam marriage and forcing them into force conversions, which is popularly called as love jihaad and pulling these women into abyss of endless sufferings.

- Sarita Choudhary v. High Court of Madhya Pradesh & Another (2025)-

The Court emphasized that merely increasing the number of female Judicial Officers is insufficient if a sensitive work environment and proper guidance are not ensured. It stated that *“gender is not a defense for poor performance, it must be factored in for holistic decision-making in certain circumstances”*

CONCLUSION

India has come a long way in its journey to establish an egalitarian society where all the genders are given the equal position and opportunities. The achievement of gender equality movement can be measured by the large public participation in campaigns like ‘Beti Bachao, Beti Padhao’, and the success of govt. schemes like Sukanya Samriddhi Yojana, Lakhpati Didi, Swadhar Greh. Alongwith old social evils, some new wrong practices like blurring difference between alimony and dowry, Love Jihaad, etc.

The best strategy to achieve gender-equal society is the multi-facet approach involves investing in creating public awareness to foster mutual respect and harmony among all sections society.

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