

# **Role of Courts in upholding Gender Justice**

# **Understanding gender and discrimination**



# What is sex and what is gender?

- Sex is the biological term that represents the genetic and physical identity of the person. It is meant to signify that one is either a male or a female.(maleness and femaleness)
- Gender is defined as the socially learned behaviors and expectations that are associated with men and women (masculinity and femininity)



# Difference between sex and gender

SEX	GENDER
Sex is biological	Gender is socio cultural
Sex is constant globally i.e., the biological factors of men and women all over the world are same	The attitude, expectations and demands of society and culture change from place to place, and community to community.
Differences in sex are made by nature	Differences are created by the society.
The sex cannot be changed in normal circumstances, as it is natural.	Gender can be changed as it is created by the society.



# **Classify the statements as sex or gender**

- **Women are better at caring for children than men**
- **Women breast feed babies**
- **Postmortem is done by male doctors**
- **Male voice break at puberty**
- **Women menstruate and also under go menopause**
- **Men are soldiers, because they are brave and can use weapons to fight**
- **Body hair is ok for men, but women have to remove it**
- **Women's illnesses are mostly psychosomatic**



# **What all are determined by gender?**

- **Work, roles, responsibilities**
- **Dress**
- **Qualities**
- **Behavior and attitude**
- **Mobility**
- **Spaces**
- **Dreams and aspirations**
- **Access to Health care, nutrition, food**
- **Access to resources**



# Some Experiences

- “I heard my family was unhappy when I was born. They wanted a boy”
- “.....Our mother and we sisters had to make do with whatever is left over within the family”
- “My father thought it was not necessary for us girls to go to school”
- “My brothers can come back at any time but I have to be home before dark”
- “Marriage alliance that came for me asked for Rs 5 Lacs as dowry. My father told me this is rate for their son who is a doctor”
- “My father often used to beat my mother”
- “The whole family was against my taking up a job”.
- “I was molested while walking on the street, I screamed but no one came to my rescue”
- “I was working late and my manager send me a text message with pornographic material”
- “Both me and my husband work and earn money but I only have to do all the household work”



# Understanding discrimination

**Gender is a social construct**

**Norms, expectations, behaviors, roles for men and women  
in society are prescribed**

Women have less access to  
productive resources, assets,  
decision-making, mobility

Unequal power  
relations  
between men  
and women

Subordinate  
status for  
women making  
them vulnerable

Unequal  
treatment,  
discrimination,  
denial of rights  
in education  
health  
inheritance etc.

All forms of discrimination to  
maintain imbalance



# **Constitutional and legal provisions empowering women**



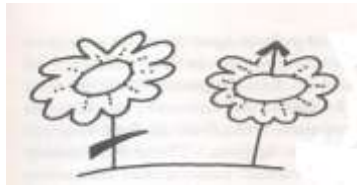
# Why Gender Justice?

## **Constitution promise:**

- Equality of status and equality of opportunity to all citizens. Social, economic and political justice to all citizens
- Fundamental Rights- Equality before law and equal protection of Law. Prohibition of discrimination on the basis of sex. All citizens to lead a life of dignity.
- States to take affirmative action and protective discrimination to alleviate women from exclusion in politics, education, public employment.
- DPSP- Equal pay for equal work. Just and humane conditions of work.
- Fundamental Duties- Renounce practices derogatory to women

## **India signatory to International Conventions and treaties**

- CEDAW
- ICPD Program of Action
- Beijing Platform for Action



# Constitutional provisions for empowering women

- **Article 14** - Equality before law and equal protection of law.
- **Article 15(1)** - No discrimination on grounds of sex.
- **Article 15(3)** - State to make affirmative discrimination in favor of women.
- **Article 16** - Equality of opportunity in matters of employment
- **Article 21** – Right to life and personal liberty
- **Article 23(1)** - Traffic in human beings and forced labor prohibited
- **Article 39 (a)** - State to secure for men and women equally the right to and adequate means of livelihood
- **Article 39(d)** - State to secure equal pay for equal work for Indian men and women.
- **Article 42** - State shall make provision for securing just and humane conditions of work and maternity relief
- **Article 51A (e)** - Renounce practices derogatory to the dignity of women
- **Article 243 D and T** - One third seats in Panchayats and Nagarpallikas reserved for women.



# **Legal provisions for empowering women**

- Immoral Traffic (Prevention) Act, 1956
- Maternity Benefit Act, 1961 (Amended in 1995)
- Dowry Prohibition Act, 1961
- Medical Termination of Pregnancy Act, 1971
- Equal Remuneration Act, 1976
- Pre conception and Pre natal Diagnostic Techniques- Prohibition of sex selection Act, 1994 (Amended in 2003)
- Prohibition of Child Marriage Act, 2006
- Indecent Representation of Women (Prohibition) Act, 1986
- Protection of Women from Domestic Violence Act, 2005
- Sexual harassment of women at workplace Act, 2013



# Gender discrimination to Gender Justice

- Hon. Supreme Court has played a pivotal role to ensure gender justice by not only upholding laws that treat women favorably but also interpreting laws in a manner to extend complete protection to women.
- Judgements have recognized in letter and spirit women's right to equal opportunities, legal guardianship, prevention from sexual harassment at workplace, broadened understanding of sexual violence, challenged religious practices like triple talaq, etc

# **How Courts have upheld rights of women in relation to service rules**

## **P. B. Vijay Kumar vs. Government of Andhra Pradesh** **1995 AIR 1648,1995 SCC (4) 520**

Petitioner challenged Rule 22A(2) of AP state and subordinate service rules - *“In matters of direct recruitment to posts for which women and men are equally suited , other things being equal, preference shall be given to women and they shall be selected to an extent of at least 30% of posts in each category of OC, BC, SC, ST”* as being violative of Articles 14 and 16 of Indian Constitution

Apex Court upheld affirmative action and reservation of jobs for women in public employment by observing that an important limb of gender equality is creating job opportunities for women. The SC held that “this concept of protective discrimination needs to be woven throughout the web and fabric of its decisions ....To say that under Article 15(3) job opportunities for women cannot be created would be to cut the very root of the underlined inspiration behind this Article. To make special provisions for women in respect of employment or posts under the State is an integral part of Article 15(3). This power is not whittled down in any manner by Article 16”

## **Nargesh Meerza vs. Air India**

### **1981 AIR 1829, 1982 SCR (1) 438**

In this case an air hostess of Air India challenged the service rules of Air India where air hostesses were barred from getting married within period of four years from date of joining. Rules also said that air hostesses shall loose their jobs if they become pregnant and will retire at the age of 35.

Court declared the said rules as unreasonable and Constitutionally void by holding that “whether the woman after bearing children would continue in service or would find it difficult to look after her children is her personal matter” ..... the provisions according to which services of the air hostess would stand terminated on first pregnancy is not only manifestly unreasonable and arbitrary but contains quality of unfairness and exhibits naked despotism and therefore clearly violative of Article 14 of the Constitution....”



# Neera Mathur Vs Life Insurance Corporation of India

## 1992 AIR 392, 1991 SCR Supl. (2) 146

In this case the petitioner was terminated from service during the probation period without giving notice as she had applied for maternity leave. The Corporation held that she had been terminated on two accounts. One that her service was not satisfactory and two, she had not given accurate details in her declaration before taking up the job. These details included information regarding her last menstrual period, whether her periods are painful, number of conceptions and deliveries till date, etc.

Court held that details required in the declaration are embarrassing and humiliating. Self respect may perhaps preclude the disclosure of such personal details like whether her menstrual period is regular or painless, the number of conceptions taken place; how many have gone full term etc. The Corporation should delete such columns in the declaration. If the purpose of the declaration is to deny the maternity leave and benefits to a lady candidate who is pregnant at the time of entering the service (the legality of which we express no opinion since not challenged), the Corporation could subject her to medical examination including the pregnancy test.

## **P. Geetha vs. Kerala Livestock Development Board W.P.(C). No. 20680 of 2014 (H)**

In this case, the petitioner who was childless got a baby through surrogacy. She applied for maternity leave to look after the baby, she was denied leave on the ground that she had neither undergone pregnancy nor given birth.

Court dismissed the argument stating that there ought not to be any discrimination of a woman as far as maternity is concerned only on the ground that she had obtained the baby through surrogacy..... Child specific statutory benefits ought to be extended to petitioner.

## **C.B. Muthamma vs. Union of India**

### **1979 AIR 1868, 1980 SCR (1) 668**

In this writ petition filed before the Apex Court, Rule 8(2) of IFS (conduct and discipline) rules, 1961 was challenged, which stated that unmarried women should take permission of Government before getting married and might be asked to resign office any time if it is found that her family life is affecting her work efficiency.

Apex Court declared that rules relating to seniority and promotion in IFS are unconstitutional and violative of Article 15. “ Discrimination against women is found in this rule... if the family and domestic commitments of a woman member of the service are likely to come in the way of efficient discharge of duties, a similar situation may well arise in the case of a male member.” SC also impressed upon Govt to overhaul all service rules and remove discriminatory practices in service laws.

# **How Courts have upheld rights of women**

## **In case of guardianship**

# Githa Hariharan vs. Reserve Bank of India and another

## AIR 1999, 2 SCC 228

Petitioner a woman filed a case for being natural guardian of her son including for the purpose of investments. Provisions of Sec 6(a) of Hindu Minority guardianship Act, 1956 and Sec 19(b) of Guardian Constitution and Wards Act are violative of Articles 14 and 15

Apex Court held that woman can be the natural guardian of a Hindu minor. Hindu woman can be named natural guardian in official documents. Interpreting Section 6 of the Hindu minority guardianship Act the Court stated “... the word ***after*** do not necessarily mean after the death of the father, on the contrary, it [means] ‘in the absence off’ be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise.”

# ABC vs. State NCT of Delhi

## 2015 SCC OnLine SC 609

Petitioner a single woman approached family Court seeking sole guardianship of her child. The Court wanted to send a notice to the father. This prompted petitioner to seek opinion of Apex Court

Apex Court held that unwed mother can be the sole guardian of her child without disclosing the identity of the father. Guardianship right of mother can be decided in the absence of father if it is seen that he never cared for the child and she had to bring up the child on her own. The Court also went on to state that when a single mother applies for a passport of her child or seeks school admission, fathers consent is required to be submitted, this reduces the mother to humiliation by putting her at the mercy of the man.... Women are entitled to recognition as legitimate guardian.

**How Courts have upheld rights of women**  
**In cases of gender biased sex selection**  
**and PCPNDT Act**

# **Vinod Soni Vs Union of India**

## **2005 Cri.L.J. Bom. 3408**

In this case petitioners challenged the Constitutional validity of the PCPNDT Act on the ground that it violates Article 21 of Constitution - the right to personal liberty of a citizen of India, guaranteed under Art. 21 of the Constitution. They felt that it should include the liberty of choosing the sex of the child.

Hon High Court held that:

- Right to bring into existence a life in future with a choice to determine the sex of that life can not in itself be a right.
- Right to personal liberty cannot include liberty of choosing sex of the child
- Right to life under Article 21 cannot include right to selection of sex, whether pre-conception or post-conception.



# Vijay Sharma Vs Union of India

## AIR 2008 BOM 29

In this writ petition Constitutional validity of PCPNDT Act was challenged on the ground that it violates the principle of equality enshrined in Article 14 of the Constitution.

Petitioners argued that couples having children of one sex should be allowed to make use of pre natal or pre conception diagnostic techniques to have a child of the opposite sex.

The High Court after elaborately dealing with the object, reasons and provisions of the Act held that:

- Sex selection is against the spirit of Law and Constitution.
- It affects the dignity of Women and undermines their importance.
- It insults and humiliates womanhood.

# **How Courts have upheld rights of women**

## **In relation to bodily integrity**

# **Dr. Mangla Dogra and Others Vs. Anil Kumar Malhotra and Others**

## **Civil Revision No.6337 and 6017 of 2011**

In this case the husband filed a civil suit for the recovery of Rs. 30 lacs towards damages on account of mental pain, agony and harassment against the wife, her parents, brother and doctors who had conducted medical termination of pregnancy, for getting the pregnancy terminated illegally. The question before the Court was "whether the express consent of the husband is required for unwanted pregnancy to be terminated by a wife ?"

High Court had dismissed husbands plea saying termination of pregnancy was the sole prerogative of woman- Section 3(4)(b) of MTP Act

On 28<sup>th</sup> Oct 2017, a three member bench of the Hon. SC upheld the decision of the High Court and dismissed the man's petition seeking damages from his estranged wife for undergoing abortion without his consent, and ruled that an adult woman had an unimpeachable right to give birth or terminate pregnancy.

# High Court on its own motion vs. State of Maharashtra

In this PIL permission was sought for termination of pregnancy of an under-trial prisoner based on a requisition given by her. In the requisition, she has stated that she already has a baby who is five months old. The baby was suffering from convulsion / epilepsy, hernia, loose motion as well as fever. Her health was also not good and she was suffering from repeated bleeding. she was four months pregnant. In all these circumstances, it was very difficult for her to maintain and take care of her five months old baby and herself and in addition, the baby which she was expecting, hence, she requested that she be allowed to medically terminate her pregnancy.

Bombay High Court endorsed women's sole right over her own body and her consequent right to choose or not to choose motherhood and that she should be allowed to opt out of an unwanted pregnancy irrespective of the reason.

**How Courts have upheld rights of women**  
**In cases of sexual harassment at  
workplace**

# Vishaka and Ors vs. State of Rajasthan and Ors

## AIR 1997, 6 SCC 241

PIL was filed against State of Rajasthan to enforce the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India. The petition was filed by a coalition of NGOs after Bhanwari Devi, a social worker in Rajasthan was brutally gang raped for stopping a child marriage.

Apex Court held that that "Gender equality includes protection from harassment and right to work with dignity which is a universally recognized human right.... In the absence of domestic law to check the evil of sexual harassment of women at workplaces, contents of International Conventions and norms are significant for the interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein."

In this case Court defined sexual harassment and issued guidelines to prevent sexual harassment at workplace.

# Apparel Export Promotion Council vs A.K. Chopra

## AIR 1999 1 SCC 799

An accused of sexual harassment filed a writ petition in the Court challenging his removal from service.

The High Court observed that the respondent only tried to molest the complainant and did not actually succeed and due to this, the action taken against him-removal from service was not warranted.

Subsequently SC expressed that in such cases, the courts must try to look at the broader implications and not deny justice to such women based on narrow technicalities or dictionary meanings. The High Court judges must have realized that reduction of the punishment was bound to have a discouraging and demoralizing effect on working women. They would feel unsafe and intimidated in their workplaces. It held that the actions of the respondent were unbecoming of a superior officer and were immoral and indecent and hence amounted to sexual harassment of the complainant. The order of the High Court was set aside and the order of the respondent's removal from service as passed by the Discipline Committee and upheld by the Departmental Appellate Authority was restored.

# **How Courts have upheld rights of women**

## **In cases of sexual assault/rape**



# Lillu @ Rajesh and Anr vs. State of Haryana MANU/SC/0369/2013.

In this criminal appeal, accused had challenged his conviction for the offence of rape punishable under Section 376 of IPC. The conviction was recorded by the Court of Additional Session Judge, Delhi and confirmed by the High court in first appeal. The medical evidence of the doctor, who conducted two finger per vagina test, showed that hymen was completely torn. **The doctor stated the possibility of prosecutrix being habitual to sexual intercourse cannot be ruled out.**

Apex Court held that sole testimony of prosecutrix itself is enough to record a conviction, when her evidence is read in its totality and found to be worth of reliance. As prosecutrix was a minor, the question as to whether she was habituated to sexual activities or not, was held to be immaterial to determine the issue of consent. It was further held that even if the victim was previously accustomed to sexual intercourse, it cannot be the determinative question. According to apex court, even if the victim had lost her virginity earlier, it can certainly not give a license to any other person to rape her. The apex court held that “Undoubtedly the two finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity.” Medical procedures should not be carried out in a manner that constitute cruel, inhuman or degrading treatment.....

# State of UP vs. Chhotey Lal (2011) 2 SCC 550.

In this case, the victim was abducted by three persons while she was on her way to relieve herself and they unlawfully kept her in a house for some days. One of the accused forcibly had sexual intercourse with her. The victim was recovered by the police after almost 24 days. The conviction was reversed by the High Court of Allahabad on the grounds that there were no physical injuries on the body of the victim.

The Supreme Court set aside the judgment of the High Court and held that “It is wrong to assume that in all cases of intercourse with the women against will or without consent, there would be some injury on the external or internal part of the victim. The prosecutrix has clearly deposed that she was not in a position to put up any struggle as she was taken away from her village by adult males. The absence of injuries on the person of the prosecutrix is not sufficient to discredit her evidence; she was a helpless victim”

# Other landmark cases on sexual violence that upheld rights of women

- **Tukaram vs. State of Maharashtra AIR 1979 SC 185 - The Mathura Case-** Following this case, IPC was amended to include even slightest touch of the penis to the vagina as being sufficient to prove rape and further it was also stated that ejaculation and erection of the penis are not important factors to constitute rape.
- **Mukesh and ANR vs. State of NCT Delhi- The Nirbhaya case-** Amendments were introduced in all three Statutes by way of the Criminal Law Amendment Act 2013 which recognized various forms of sexual abuse, including intercourse by other objects, body parts, etc. as constituting of rape. It also introduced sexual harassment, stalking, voyeurism, disrobing as sexual offences. This Act has also for the first time defined the offence of trafficking. It also enhanced punishment.

# **How Courts have upheld rights of women**

## **In personal laws**

# Rights of Muslim women

- **Mohamad Ahmed Khan vs. Shah Bano Begum, 1985 SCR (3) 844-** Supreme Court granted Muslim women maintenance u/s 125 CrPC. This resulted in The Muslim women (Protection of rights on divorce) Act being passed in 1986
- **Shamima Farooqui vs. Shahid Khan, Criminal Appeal 564-565 of 2015-** Supreme Court stated that Muslim women could get maintenance beyond the iddat period

# Hindu succession Act

- **V. Tulasamma vs. Sesha Reddy, AIR 1997 SC 1944-** The Court interpreted Section 14 of Hindu Succession Act to give women absolute right to property. It was done by relying on the constitutional goals to render social economic justice to relieve the Hindu woman from degradation, disabilities, disadvantages and restrictions under which Hindu women have been languishing over centuries and to integrate them in National life.
- **Rashmi Kumar vs. Mahesh Kumar Bhada, AIR, 1997 2 SCC 397-** Under Hindu Law wife is the absolute owner of stridhan and can deal with it any manner she likes.....The stridhan property is not a joint property of the wife and husband. Section 27 of the Hindu Marriage Act merely provides another remedy of suit to recover from husband or person to whom stridhan was entrusted.

# Making all stakeholders responsible for gender justice

- **Dr Upendra Baxi and Ors vs. State of Uttar Pradesh, AIR 1987 SC 191**- Supreme Court issued several directions to the State Government for better administration of protective homes.
- **Sakshi vs. Union of India, AIR 2004 SC 3566** – Supreme Court passed directions to conduct trial of child sexual abuse or rape in a gender sensitive manner
- **R.D. Upadhyay vs. State of Andhra Pradesh, AIR 2006 SC 1946**- Supreme Court issued detailed guidelines for providing various facilities to women prisoners and their children

# **Krishan Lal vs. State of Haryana [ 1982 SC 1252]**

“One sensitized Judge is a far better armor against gender outrage than the long clauses of sections with all the protection writ into it.”

**Justice Krishna Iyer**