

# Gender Stereotypes in Judiciary: Decisions in the Shadow of Sexism

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## ABSTRACT

*Inequalities that exist between men and women explain the sexism that prevails in society. To overcome sexism in society it has to be dismantled but it manifests both overtly and covertly among every stratum of people and can even be seen in the judiciary. It is also notorious that judges, judicial officers and lawyers negotiate sexism on an everyday basis. In the judiciary, it is expected that judges do not depend upon stereotypical decision-making and rather engage in challenging and dismissing detrimental stereotypes. Damaging stereotypical thinking may not do justice to the objective and impartial application of law thereby leading to discrimination and segregation. Are judges gender-neutral? This paper tries to shed light on domains where sexism is seen in the judiciary.*

**Keywords:** *Gender Stereotypes, judicial decision-making, sexism in the judiciary*

## INTRODUCTION

Perceptions related to the central role that men as well as women perform in their society are linked to sexism. The assumptions related to sexism usually manifest themselves as gender stereotypes. It can rank one gender as superior over another and can result in unconscious bias. It can also be seen that sexist language is overt in conversations but is ignored mostly by people as most of them are not aware of it as sexist. Generally, people use male-gendered generics which are words such as ‘he, man, chairman or mankind’ to signify both genders. These male-gendered words tend to strengthen gender stereotypes (Chew & Chew, 2007). Raising issues on the use of sexist language may even be criticized as trivial things as people usually do not find it very sensitive.

According to Sapir-Whorf's hypotheses, the perception of reality is also moulded by how individuals talk or communicate (Perlovsky, 2009). Because the generic statements of ‘man’ create an image of man and thus individuals

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mould thinking based on it. Examples of gender generic language are ‘chairman, mailman, and fireman’ which gives an impression that it’s all operated by men. This gives women a secondary status than men (DeJesus, Umscheid & Gelman, 2021). Over the years this paved the way for gender-neutral language (Sarrasin, Gabriel & Gyax, 2012) and the measures to develop ‘gender-neutral language’ are demonstrated in the writings of three editions of ‘Legal Writing Style’ (Law Institute, 2022). In the 1961 edition gendered and sexist language was used as instructions for lawyers and more precise writing emerged in 1980- the second edition of Legal Writing Style and further gender-neutral language emerged in 2018 third edition (Ware, 2020). Recently in 2003, Supreme court has released Handbook on Combating Gender Stereotypes and has given proper guidelines on discarding earlier used terms related to sexism and gender stereotypes (Handbook on Combatting Stereotypes, 2023).

Students of law learn the technical language related to the law from the referral casebooks and are filled with constitutional rights framed in language that excludes women (Rose, 2010). Changes from this that have happened over the years can be seen in modern legal writings, texts and style manuals avoiding the gendered generics (Ware, 2020). To have ‘gender-neutral language’ masculine as well as feminine nouns and pronouns which were indicated for men and women were primarily dodged. This was followed in the ‘The Dictionary of Occupational Titles’ released by the U.S Department of Labour which provided ample examples such as referring to ‘fisherman’ as ‘fisher’, ‘workman’ as ‘worker’, ‘repairman’ as ‘appliance repairer’ and so on (Benator, 2005; Dictionary of occupational titles, n.d). The Marylebone Cricket Club which is in London have formally renamed the term ‘batsman’ as ‘batter’ which is a gender-neutral term.

Nevertheless, educated groups of people in the present world use male-gendered generics in their day-to-day conversations and writings. Male-gendered generics are examples of subtle sexism. It is widely used in the legal world even today after so many reformations. Language reflects our perception and male-gendered generics shape our perception and are associated with gender-related attitudes (Perlovsky, 2009). A very minority of people understand that sexist language exists in classrooms, courtrooms, and newspapers and is engraved as well as encrypted on shrines, laws and inscriptions (Chew & Kelley-Chew, 2007).

Law during earlier years reflected patriarchal societal laws and can be seen as men- centric (Rifkin, 1980). Courts in India are proactive against

discrimination and contribute to improving the living conditions of women as they believe that women also deserve sexual freedom and not subordination (Fredman, 2012). Courts very strongly support this and sexual harassment issues were taken cognizance of and provided safety measures through issuing Vishaka guidelines and later on the POSH Act (Saluja, Gosain & Mahajan, 2020). Over time when there were voices against paternalism and paved the way for gender neutral laws it was supported by feminist jurisprudence which works against subordination and promotes gender equality. The legal world also can be looked up in the eyes of feminist jurisprudence (Smith, 2010). Misogynism and gender inequalities were taking place even in Supreme court during these years. To mention, in the year 2019 there were issues of sexual harassment raised by junior court officer against the CJI Ranjan Gogoi. Followed by the allegation the Supreme court secretary denied the allegation without proper investigation and left the complainants allegations unaddressed and victimized. In the process of inquiry, the final verdict highlighted the loopholes in judiciary and gender prism.

Even in this era, discrimination pushes women behind and those who are equally efficient as men are in a disadvantaged position (Reuter, 2005). Feminist jurisprudence mainly stresses that gender is human made whereas sex is not so (Barnett, 2013). Over the years, there were changes in the discrimination against women as lawmakers and judiciary have tried to wipe out gender bias and significant changes were brought about once the gender-neutral law evolved. It is noteworthy that the judiciary was been proactive in eradicating gender discrimination. Even when gender-neutral laws and eradication measures are going on sexism is not out of judiciary (Rachlinski & Wistrich, 2021). This paper tries to portray the different perspectives where sexism is reflected in the judiciary.

## **DEVELOPMENT OF GENDER BIAS**

Looking at the historical perspective it can be observed that men are glorified in the olden times. These led to misuse of power and they started overpowering the womankind thereby considering women as lesser. Over the years the male-centered past has imbibed stereotypical thinking in the thoughts of generations in concepts of human nature, gender potential and social arrangements. Not only these but the cognitive, linguistic, judgement and construction of the legal aspects are also masculine-centered. This automatically reinforces the male values and prioritizes their priorities (Ware, 2020).

Also, the prejudice exhibited toward one gender over another or gender bias is frequent today. This is imbibed in us through culture, upbringing and personal experiences. Males as well as females are no exception to this as ‘doctor’ or ‘engineer’ is assumed as male for a large majority of the time and ‘teacher’ is assumed to be female most of the time. Women lawyers face more hurdles than men in terms (Brooks, 2021; Durant, 2004) of how their demeanor is. When the same demeanor is exhibited by males, they are judged differently than women. Angry and frustrated male advocates are often considered assertive whereas women are considered temperamental and irrational in the same instance (Dispenza, Watson, Chung & Brack, 2012).

Even though the legal system has made noteworthy steps in addressing gender bias it is still affecting both genders in one way or another. Women must be energized to rise above the biases, implicit and actual by honing their styles.

## **JUDGES AND GENDER BIAS**

Judges are expected to be impartial, independent and disengaged by the judicial conduct all over the world. These attributes are designed with the expectation to ensure the law is applied neutrally. The judge is also an individual who has values, life experiences, ethnicity and other factors (Handbook on Combating Gender Stereotypes, 2023; Turner, 2009). These factors are important in molding a person and shaping their perspective. So, when a judge ascends the bench, their perspective is not left behind. It is unrealistic to ask a judge to leave their acculturation at home or self at home. Gender is also an important aspect of acculturation and it continues to influence throughout their lives (Smith, 1994).

Judges are critical in settling disputes and every party approaching the court deserves a fair hearing. Judges thus ensuring justice for them are praiseworthy. However, then judges are from different backgrounds besides people entering the court are also from varying backgrounds (Smith, 1994). The judge will not always have the same background as that of litigants also sometimes the judge may have the same viewpoint as that of the litigant (Voorhoeve, 2023). The judge’s upbringing and that of the defendants may be different and it can have an impact (Smith & Levinson, 2011). Therefore, a judge needs to be aware of point of view as it is the initial step towards understanding others' points of view.

It is a fact that once an individual forms a perspective, they frame all the opinions based on that opinion. Culture might have trained individuals to form

such perspectives. judges as individuals also might have formed perspectives in a particular way and it might be difficult for them to assume another's point of view (Mikkelson, 1998). Also, there are influences of dominant groups over submissive groups and hypothetically if the judge is from a dominant group and the litigant from a submissive group then it can have an influence. And so, it's important to understand the social relations and reasoning as well as to be impartial and egalitarian approaches to be followed (Lahav, 2012). Gender bias is prohibited in judicial conduct, even though gender discrimination occurs, it sometimes happens for the benefit of women. Sexism is rooted in the belief of humans with women being perceived as entitled to do certain duties and are also glorified thereafter. For example, women are stereotyped for their natural reproduction where they are entitled to look after children. Men are considered less capable than women in taking care of children and thus women are considered to have privilege for custody in court. Judges consider women in custody cases and women benefit in court this way even when it is the case of sexism.

### **SEXISM USED IN DEFENCE OF GUARDING WOMEN**

According to Glick and Fiske, (1996), hostile sexism is “antipathy toward women who are viewed as usurping men’s power”. Benevolent sexism on the other hand is “a subjectively favourable, chivalrous ideology that offers protection and affection to women who embrace conventional roles”. Hostile sexism leads to negative attitudes towards women. Benevolent sexism involves the subjective attitude that women are inferior to men (Barnes et. al. 2018). Structural inequalities among men and women can be seen in both benevolent and hostile sexism (Cassese & Holman 2016). Benevolent sexism also stems from implicit and explicit stereotypical thinking that creates damaging consequences for females (Mellisa & Breger, 2019).

Benevolent sexism implies that the stereotypical characters credited to womenfolk generate rewards for women in some situations and trouble in some other situations (Dardenne, Dumont, & Bollier, 2007). There are certain beliefs which are common that women make better parents (Ellemers, 2018) are examples of benevolent sexism. This stereotypical thinking that women make better parents benefits female litigants in family courts in child custody cases. The drawback or disadvantage of this thinking is that those with this belief also believe that the proper role of women is parenting and consequently will have difficulties in hiring them for jobs and promoting them. These kinds of impacts will be happening in child custody and sentencing decisions

(Ware, 2020). As judges might also have the belief that women make better parents this may sway judges as well as make them decide accordingly. For example, Roxann Sharma vs Arun Sharma led to a landmark judgement which was pronounced by Supreme court in legal battle of child custody case. It was ruled by Supreme court that a child who is under five years of age will remain with mother. Courts adhere to the notion that fathers are less capable of giving emotional support and stability to their children. There is bias against men in child custody battles and it causes mental agony to them when fathers are capable enough to look after the kid. These beliefs are due to the schema formed earlier in life about sexism.

Irrespective of women's benefits or losses gender creates an influence as both benevolent and hostile sexism belong to dual sides of a coin (Hammond, Milojev, Huang, & Sibley, 2018). In several situations, justice is found not to be gender neutral and it is observed that gender matters to judges. As law affords judge's discretion there are chances that judges are influenced by benevolent sexism (Jacobi & Schweers, 2017).

## **STEREOTYPES AND DECISION-MAKING**

Gender stereotype is having a generalized view or preconceptions of attributes or characteristics which are to be performed by men and women. When gender stereotype tries to withhold one's capacity to advance in their personal and professional life it is considered damaging (Ellemers, 2018). When inferences are made according to gender and related attitudes it will amount to prejudicial in judiciary. For example, stereotypical thinking related to gender influences the rights of women in matters related to sexual as well as reproductive health (Ware, 2020). When the rights of women are denied and violated this affects them. These come from the deeply rooted social system that existed and concepts related to patriarchy glue them.

In 2023, Supreme Court released a handbook on handling gender stereotypes as they recognize the stigma and disparities that exist. Judges may make decisions according to the personal beliefs they carry rather than facts and standards. They can penalize a victim based on their preconceived beliefs which are not by law. These kinds of rulings and decision-making are against the legal system and each individual has the right to have an impartial judgement on their case (Handbook on Combating Gender Stereotypes, 2023). In the handbook it highlights certain terms earlier used in court language shall be replaced with new terms which is gender neutral. It also calls attention on multiple levels of prejudice in legal language. For example, certain alternate

language is suggested in the book instead of stereotype promoting language which are ‘woman’ instead of career woman’, ‘home maker’ instead of ‘house wife’, ‘relationship outside of marriage’ instead of ‘affair’ and so on.

There are several forms of stereotypes and those associated with reproduction are related to sexuality, pregnancy and motherhood. There is a general notion that women and adolescent girls are emotionally weak and are not capable of making coherent decisions. Consequently, elderly male members make decisions for them. Information related to sexuality and reproduction is not properly given in the concept that teenage girls misuse them. It is also stereotypical thinking that married women shouldn’t use contraceptive pills are also popular thinking. Women who seek contraception are promiscuous and they are expected to be chaste. There are also other stereotypical thoughts about women in which people think women who are disabled are incompetent in parenting and trans people are deviant (Ware, 2020).

There are also stereotypes related to family and its relations. Of that major one is that arranged marriages are more supported than love marriages. In India, especially it is considered arranged marriages offer stability and protection as well as it is seen that parents often support it. Consequences of love marriage are usually carried on by the couple alone. It is also considered that divorces are higher in love marriages as compared to arranged marriage and very less number of people opt love marriage due to various reasons like religious disputes, cultural differences etc. If involved in unsanctioned romantic relationships it leads in some places to honor killings in India. Likewise, disparate ages in the case of marrying are justified. Men are justified when they do not take care of children as they are considered irresponsible and not capable of connecting to their children. Another thinking is that men are supposed to protect women.

## **JUDICIAL STEREOTYPING**

Judges may ascribe an individual’s characteristics just because of the membership in a particular social group. In this case, the judges perpetuating harmful stereotypes are not challenging the stereotyping. Generally, individuals associate men in the direction of careers and women associated with homemaking. Also, violent crimes are associated with men. These implicit biases can consequently lead to stereotypical decision-making as the same implicit biases that people associate men and women with lead them to make it difficult to believe women can also be successful entrepreneurs, politicians or top executives. Because women are strongly

associated with being a successful homemaker. This biased thinking benefits women in court but may impair women's success in other contexts. The same applies to men wherein are considered to be more prone to violent acts and thus a second alternative for parenting. These are preconceived notions of judges and can influence parental custody. Also, judges believe children are better off with stay-at-home mothers. So, judges try to retain mothers who stay at home. Fathers are less capable as caretakers are all paternalistic viewpoints. Women who might pursue new relationships and pursue jobs face retaliation in child custody and relocation disputes.

'Tender years' presumption in child custody is based on sexism and more women obtaining child custody is evidence of sexism (Roth, 1976). Research has also shown that when the father and mother seek child custody judges grant custody to mothers more often even when the circumstances of the father remain identical. A major disparity which can be seen in gender-related issues is sentencing disparities. Gender comes in the way of decision-making. Discrimination is not limited to any crimes and violent as well as nonviolent crimes are included in this. In violent crimes, benevolent sexism can be seen (Costa, Esteves, Kreimer, Struchiner & Hannikainen, 2019) as there is greater tolerance of spousal violence in benevolent sexism (Sengupta, Hammond, Deak, & Malhotra, 2022). Jain, Kaur & Jain (2020) studied the prevalence of benevolent sexism in India and found that there are high levels of it in Indian men compared to other countries. India's preference for paternalism have paved way for the prevalence of benevolent sexism especially much higher in women than men. Kishore (2023) had done an exploration in Indian women's understanding of benevolent sexism. They identified two global themes as 'being a woman' and 'sexism'. Indian roots and benevolent sexism are found to be related in a study by Mulla and Krishnan (2012).

In juvenile courts, judges might see girls in need of more supervision than boys. Among the judges themselves, male judges favouring mothers more than female judges (Artis, 2004). Judges favoured mothers over fathers and female litigants when every other characteristic was held constant (Ware, 2020). Compassion for female defendants ascends when they have children. Judges also find it rather difficult to sentence mothers than fathers (Tasca, Cho, Spohn & Rodriguez, 2019).

Expressing favour toward 'mother' is according to the norms and standards of the legal system as well as not egalitarian. Judges make determinations based on individual factors and decisions should not be made based on gender. When two parents are contesting for parental custody an identification of

which parent is more entitled to control the child has to be determined rather than not sympathetic attitude favoring mothers. Benevolent sexism in turn strengthens the stereotype of women taking care of children and not men and this may put men at a disadvantage and women at an advantage of getting custody. At the same time female litigants because of the same stereotype are put at a disadvantage when it comes to proving their professional competence. Female litigants who seem not according to the stereotypical thinking are treated more severely (Herzog & Oreg, 2008). In court cases there were instances where mothers prefer not to own the custody of the child and fathers take care of the children. In such cases women are portrayed as ‘bad woman’, ‘selfish’ or ‘career centric’. Here women actually challenged the patriarchal stereotypes.

Rachlinski and Wistrich (2021) conducted a study with 714 trial judges in which hypothetical cases were presented wherein they varied the gender of litigants. In family court cases judges favoured relocation by mothers more often than fathers in otherwise identical conditions. In criminal cases also similar trends were seen as female defendants were sentenced to prison time less than male defendants. Results indicated that there was gender stereotypical thinking among judges and sexism directed against female defendants. They found that judges sorted to benevolent sexism where women regularly experience better sentencing than men. It was very obvious in child custody disputes and criminal sentencing. From this study, it was confirmed that there was gender bias.

In sexual assault cases, judicial sexism can be seen as judges involved in victim blaming. This is regarding the requirement that the female complainants need to qualify as ‘ideal victims’ to receive judicial protection (Lewis, Hamilton, & Elmore, 2021). Ideal victim traits are chaste, respectable and moral. Even though neoliberalism in the 1980s and 1990s paved the way for a shift in the ideal victim it remained relatively constant. Even now dressing style and lifestyle of women are judged and commented on as risky women. When women travel alone, especially at night, they are considered putting themselves at risk and have a high-risk lifestyle. These kinds of thinking and actions on the part of judiciary officers demand women to be watchful of sexual assault (Gotell, 2008). Women need to be mindful of their dressing style, expressions of sexuality and proximity to men. Sometimes women are denied protection as others think women themselves made such situations. Benevolent sexism is involved there and such victims of women are portrayed as protagonists as well as precipitators of sexual assault. Benevolent sexism

is evident in some Indian politicians' statements and in 2014 Mulayam Singh Yadav said that "Boys make mistakes and should not be hanged for it". "Rapes are the outcome of interact freely with men and women" was the statement by Mamata Banerjee (Jain, Kaur, & Jain, 2020)

### **SEXIST LANGUAGE**

The profession of judges can be seen that it depends too deeply on language, and its interpretation and is critical (Handbook on Combatting Stereotypes, 2023). Sexist language is misogynistic but not everyone is aware of it and keeps using such language. Certain times it is very evident that judges too use such language and pass uncalled comments upon female litigants and lawyers. Karnataka high court had remarked that it is "unbecoming of an Indian woman to go to sleep after being raped". And the accused was sanctioned bail related to this paving for a big controversy. These kinds of statements are not rare, unfortunately. These statements come because of the stereotypical thinking that women are caregivers and men are hard workers. Kerala high court had remarked in the Hadiya case that a girl aged 24 years is vulnerable. The high court emphasized the need for parent's concern in her case for marriage as she is considered as not capable enough. Madras high court judge asked a lawyer when she wavered if she had a busy morning. Dressing style, marital status and professional success are all commented upon in court. Sexism manifests both overtly and covertly in the form of mansplaining, infantilism and downright sexual harassment. Women litigants and lawyers negotiate sexism on an everyday basis.

Gender bias in the judiciary makes headlines frequently. In the 2021 case of writer and activist Civic Chandran, the Kozhikode Sessions Court issued an order saying the pictures produced in court of the complainant were "sexually provocative" and granted bail for the accused. This observation was made by Justice S Krishnakumar and High Court intervention was demanded due to controversy. The High Court intervened and said that a woman's dress cannot give license to outrage her modesty.

These kinds of stereotypical thinking set a code that ideal victim status (Bosma, Mulder & Pemberton, 2018) has to be followed and if not adhered to it makes them less of a victim and impairs investigation due to these kinds of preconceived notions. These kinds of thinking are not at the level of judges and its layperson's point of view and neutral spaces in the courtroom is out of the question. Women are not believed properly when they do not adhere to the ideal victim status (Lewis, Hamilton & Elmore, 2021).

Supreme Court of India has published ‘Handbook on Combating Gender Stereotypes’ (2023) which deals with recognizing, considering and battling stereotypes targeted against females. In its glossary, there are gender-unjust terms and alternatives or phrases which shall be utilized by judges in their writings of judgements. The handbook is aimed not to criticize the judgements in past but to throw light on how stereotypes may be unintentionally used.

### **LITIGANT POINT OF VIEW**

Certain clients do not engage women lawyers for their cases as they do not have faith in their competence (Bogoch, 1997, Elsesser, 2018). They often look out for men. Many law firms do not take women lawyers seriously. Some consider taking women as an added burden. If a male lawyer gets aggressive it is considered valorous and at the same time, if women do the same, she’s attacked. Even in the Supreme court when there was case against CJI Gogoi, there was no proper investigation conducted in the earlier stages. Instead, the allegations by the junior court officer were denied and the complainant was not rendered justice as she was not allowed lawyer and was unaware of committee’s procedure thereby leading to the withdrawal of inhouse inquiry and supreme court disposed the case in the light of lack of evidence. This has strengthened patriarchal and misogynist stereotypes inside and outside of court rooms.

### **CONCLUSION**

Gendered words especially male gendered words reinforce gender stereotypes. It can be noted that such use of sexist language is considered insignificant and thereby woman is thought of as secondary. ‘Gender neutral language’ emerged as even in the legal world sexist languages prevailed. Language shapes our outlook on the world and gendered stereotypes shape our gender-related attitudes. Minority comprehends the importance of this and it is noteworthy that the judiciary has been active in avoiding such gender discrimination.

Still, judges may make conclusions as on their beliefs they have rather than facts and standards. They can punish a victim according to their predetermined beliefs which are not by law. These kinds of rulings and decision-making are in contrast to the legal system and every person has the right to have an unbiased verdict on their case.

Judges are trained and expected not to go by prejudice and preconceived notions but to honour their commitments. Judges are often forced into quick

and intuitive thinking and thus they need to be cheered more for deliberative thinking in the courtroom. There are several ways to cultivate deliberative thinking such as developing decision-making checklists, checking for feedback etc. It is seen that judges are swayed by influences when they make decisions. Avoiding such reliance needs training and discipline by judges.

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