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Sex Discrimination: *Anuj Garg* and the Anti-Stereotyping Principle

NO EYEBROWS WERE RAISED when, in 1914, the colonial government enacted the Punjab Excise Act—a dry-as-dust, eighty-section legislation regulating the transport and sale of liquor in Delhi. Tucked away unobtrusively in the middle of the Act was Section 30, part of a bouquet of prohibitions and penalties:

> No person who is licensed to sell any liquor or intoxicating drug for consumption … shall … employ or permit to be employed … any man under the age of 25 years or any women in any part of such premises in which such liquor or intoxicating drug is consumed by the public.[1]

It took eight decades before an eyebrow was finally raised. The constitutionality of Section 30 was challenged in 1999. The Delhi High Court held that it was discriminatory against women and struck it down. In 2008, the case proceeded to the Supreme Court (*Anuj Garg v. Hotel Association of India*).[2] The Government of Delhi contended that the law had been framed to protect women from the hazards of employment in the liquor industry. A bemused Supreme Court did not need too many words to reject this argument, noting in conclusion that the law resulted in 'invidious discrimination perpetuating sexual differences'.[3]

Striking down a law excluding women from an entire industry may seem easy.[4] *Anuj Garg*, however, was more than just that. It was the first time that the Supreme Court seriously engaged with the meaning of the constitutional imperative contained in Article 15(1): 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.' In doing so, I will argue, it initiated a jurisprudence whose impact extended far beyond the Punjab Excise Act, and which could become the foundation for a transformative constitutional vision of gender equality.[5]

I begin by excavating the sparse text of Article 15(1) of the Constitution (I) and then examine the history of Indian sex discrimination jurisprudence in the six decades leading up to *Anuj Garg* (II). This history can broadly be divided into two intellectual traditions. The first is a 'formal reading', which justifies differential treatment of men and women on the basis of presumed 'natural differences' between the sexes. It also holds that discrimination results only from conscious, hostile intentions of lawmakers. Set against this approach is the 'transformative reading', which rejects the notion of 'natural differences'. It understands discrimination as a product of social, economic, and cultural structures and institutions that create 'patterns of … exclusion'.[6] The judgement in *Anuj Garg* is the culmination of this second

tradition.

Then, in (III), I trace the roots of gendered stereotypes to a social and political consensus that divided the colonial Indian society into two 'separate spheres': a public sphere to be occupied by men, and a private sphere—representing the 'community'—that was the domain of women. I argue that this idea of separate spheres was challenged by the political movement for women's right to vote, a movement whose vision triumphed with the framing of the Constitution (IV). Consequently, *Anuj Garg* was correct in rejecting the conception of 'natural differences'. I conclude by discussing the transformative potential of the reasoning in *Anuj Garg* for sex discrimination jurisprudence in the years to come (V).

I. 'Shall not discriminate … on grounds only of … sex …'

Let us tentatively define 'discrimination' as an unequal and unjustifiable distribution of benefits and burdens between people or groups of people.[7] Immediately, however, we run into problems. For example, racial segregation in the West was defended for many years on the faulty basis that the facilities offered to whites and blacks were 'separate but equal'. Closer home, we can imagine that if the State were to provide public facilities (for example, separate public toilets) based on caste, it would be presumptively unconstitutional. On the other hand, separate toilets for men and women do not appear to raise any constitutional concerns.[8] It, therefore, seems that in some cases, the mere *act* of classification creates constitutional problems, while in other cases this is not so.[9]

Further, notice that the act of classification precedes differential allocation of benefits and burdens. Therefore, the problem is not material but expressive in at least some cases. Whatever the actual distribution of tangible or material benefits, certain kinds of classifications by their very nature communicate a *social message* of separation and segregation. This is inextricably connected with superiority and inferiority, exalting certain groups and demeaning others. When we consider sex discrimination under Article 15(1), therefore, the first question that we must ask ourselves is whether all sex-based classifications are at least presumptively discriminatory (they might still ultimately be constitutional if the State can justify them), or whether something more than mere classification is needed to make out a claim of discrimination.[10]

The word 'grounds' is equally slippery. On one reading, 'grounds' might refer to someone's subjective reasons for holding a set of beliefs, or acting in a certain way. For example, consider the question, 'What are the grounds upon which you acted?' which roughly translates to 'Why did you act in this way?' On this reading, under Article 15(1), the phrase 'on grounds only of … sex' *qualifies* the phrase 'The State shall not …' and translates into the following injunction: the grounds of sex, race, caste, etc. cannot be what *motivates* the State to discriminate against anyone.

The word 'grounds', however, need not only translate into 'reasons for'. It could also be understood to refer to the personal attributes of sex, caste, race, religion, and place of origin set out in the latter part of Article 15(1). On this reading, Article 15(1) does not ask us to locate the root of discrimination in the reason or motivation for State action, but asks us to focus on how an act of discrimination, in its effects, might involve one of the grounds listed under Article 15(1). For example, a hypothetical law that requires people to relinquish their employment on pregnancy might be motivated by reasons of efficiency, and would thus not be discriminatory in the first sense of the word 'grounds'. But it is also part of a broader institutional structure of workplace norms that disadvantage women from achieving parity with men.

Therefore, it can be argued to be discriminatory in the second sense of the word 'grounds'.[11] As the Canadian Supreme Court put the point, the distinction between the two approaches is a distinction between locating discrimination in the 'moral blameworthiness' of individual actors and their actions (in this case, the State) on the one hand, and on the other locating it in 'policies and practices' whose effect is discriminatory 'even if that effect is unintended and unforeseen'.[12]

This dual understanding of the word 'grounds' acquires particular salience when read alongside two words that follow: 'only' and 'sex'. Does the placement of the word 'only' after 'grounds' allow the State to get away with discriminatory action if it can demonstrate the existence of grounds additional to sex?[13] And does 'sex' itself refer only to the observable, physical distinctions between men and women, or does it also include social norms and assumptions that are often superimposed upon physical difference, and which make that physical difference *salient*?[14] For example, the fact that women can become pregnant and men cannot is a physical difference. However, that difference acquires salience only in the context of workplace regulations which, by default, require a certain number of days of attendance in the year, and therefore disadvantage pregnancies.[15]

Lastly, Article 15(1) cannot be separated from Article 15(3):

> Nothing in this article shall prevent the State from making any special provision for women and children.[16]

Textually, Article 15(3) is framed as an exception to Article 15(1), saving State action that would otherwise have violated the non-discrimination clause, as long as it is a 'special provision for women …'[17] However, does the phrase 'special provision' provide a carte blanche to the State? That seems unlikely because, structurally, Article 15(3) is nested not only within Article 15 (that deals with discrimination), but within the broader Equality Code of the Constitution (Articles 14 to 18).[18] Its purpose seems to be obvious: to allow the State to make laws removing existing social or cultural barriers that prevent women from achieving genuine equality with men in various fields.[19] Consequently, to fall within Article 15(3), State action would need to bear some relation to the above goal. What that leaves open, however, is the nature and degree to which the State might be called upon to demonstrate that relation.[20]

II. Article 15(1): The Courts and the Constitution

A. The Formalist Approach

Soon after the Constitution came into force, the High Court of Calcutta was asked to decide the scope of the sex discrimination clause. Order XXV, Rule 1 of the Code of Civil Procedure (1908) outlined the conditions under which plaintiffs in a legal proceeding could be required to furnish a security to the court. This was to guard against the eventuality that they lost the case, were ordered to pay the costs of litigation to the other party, and were unable to do so. Security could be taken from male plaintiffs in case they were residing outside India and did not possess sufficient immovable property in India. From female plaintiffs, on the other hand, security could be taken merely if they did not possess sufficient immovable property, regardless of where they were living.

In *Mahadeb Jiew v. B.B. Sen*,[21] the High Court of Calcutta rejected a challenge to this provision, holding that the discrimination wrought by the provision was not on grounds of sex alone, but of sex *and*

property.[22] So, even though Order XXV, Rule 1 treated men and women who were otherwise in an identical position (non-propertied and resident in India) differently, the Court held that Article 15 barred only *'discriminations on the grounds of sex alone and on no other grounds'*.[23]

In *Mahadeb Jiew*, the Calcutta High Court did three things. First, it read the word 'only' in Article 15(1) to mean 'that and no other'. Legislation would be held not to violate Article 15(1) as long as the State could demonstrate that its discriminatory classification took into account at least one feature other than those listed under Article 15(1).[24] Second, it did not examine the legislation's effect (which was to place a burden upon non-propertied resident women but not their male counterparts), but limited itself to examining the formal basis of the legislative classification (sex + property). And third, the Court made no attempt to undertake a deeper examination into the foundations of the impugned legislation. *Why* was it the case that resident, non-propertied female plaintiffs could be required to pay security for costs, but resident, non-propertied male plaintiffs could not? The answer is clear: the law rested on assumptions or stereotypes about women's financial acumen (or lack thereof), and their (in)ability to earn and pay on demand. A formal reading of Order XXV, Rule 1 that stopped at noting that the legislative classification was drawn along sex and property simply ignored the fact that 'sex' and 'property' were not analytically distinct and separate categories. Rather, 'sex' and 'property' together advanced a legislative vision (and a legislative result) that relegated the financial capacities of women to a lesser sphere than those of men, with no other justification than the fact that they were women.

The logic of the Calcutta High Court was taken one step forward by the High Court of Punjab and Haryana in *R.S. Singh v. State of Punjab*,[25] a case challenging the governor's order disqualifying women from being appointed to any post in a men's jail (apart from clerk or matron). Rejecting a claim brought to it by a woman who had been refused appointment as the superintendent of a men's jail, the Court held that sex, along with 'other factors', could be a legitimate basis of legislative classification. These factors included:

> patent physical disparities … [differences] in the structure of body, in the functions to be performed by each, in the amount of physical strength … [in] the influence of vigorous health upon the future well-being of the race …. [in] *the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence.*[26]

Further, women's 'physical structure and the performance of maternal functions' were two 'conditions' cited that placed them at a 'disadvantage in the struggle for subsistence.' The Court held that as long as legislation was founded upon these 'natural differences' between the sexes, even if it drew a clear line privileging men over women, it could be justified. It then upheld the challenged order because 'it needs no great imagination to visualize the awkward and even the hazardous position of a woman acting as a warder or other jail official who has to personally ensure and maintain discipline over habitual male criminals'.[27] Here, the 'natural differences' that the Court outlined in the paragraph above were transformed into salient differences in the context of prison hiring. Presumably because of the disparities in physical strength, self-reliance, and so on, the State could legitimately discriminate against women in contexts where such disparities were relevant considerations.

Read together, *B.B. Sen* and *R.S. Singh* advance what Ratna Kapur calls the 'formalist reading' of Article 15(1).[28] Broadly, the formalist reading consists of three prongs. First, State-sanctioned differential treatment between men and women does not amount to 'discrimination' if it is based on 'natural differences' between men and women. These natural differences are presumed to exist between all men

and all women (or at least between enough men and enough women that the blunt instrument of law can assume them to be universal when it makes classifications). Second, the word 'grounds' is to be read as referring predominantly to the form of the legislative classification under challenge (e.g., sex + property), and not its impact. And third, the phrase 'only … of sex' in Article 15(1) is to be read to mean 'sex alone, and nothing else'.[29]

The formalist reading culminated in the three-judge bench decision of the Supreme Court in *Air India v. Nargesh Meerza*,[30] decided in 1982. *Nargesh Meerza* involved a constitutional challenge to Regulations 46 and 47 of the Air India Employees' Service Regulations. These regulations created significant disparity between the pay and promotional avenues of male in-flight cabin crew (Air Flight Pursers or AFPs) and their female counterparts (Air Hostesses or AHs). For example, while the retirement age for AFPs was fifty-eight years, AHs were compelled to retire at the age of thirty-five years, *or* on marriage (if they married within four years of joining the service), *or* on their first pregnancy, whichever occurred first. After many lengthy and complex rounds of litigation before different forums, the Supreme Court finally upheld the Regulations in part, modified them in part, and struck them down in part. The Supreme Court's judgement involved some problematic reading of service law jurisprudence, but more importantly the Court endorsed the *Sen-Singh* line of reasoning. It upheld the Regulations because the disparities were based 'on the grounds of sex coupled with other considerations'.[31] The marriage regulation, for instance, was upheld because:

> … the Regulation permits an AH to marry at the age of 23 if she has joined the service at the age of 19 which is by all standards a very sound and salutary provision. Apart from improving the health of the employee, it helps a good deal in the promotion and boosting up of our family planning programme. Secondly, if a woman marries near about the age of 20 to 23 years, she becomes fully mature and there is every chance of such a marriage proving a success, all things being equal. Thirdly … if the bar of marriage within four years of service is removed then the Corporation will have to incur huge expenditure in recruiting additional AHs either on a temporary or on ad-hoc basis to replace the working AHs if they conceive …[32]

Later in the judgement, while the Court refused to accept compulsory retirement on first pregnancy, as a 'reasonable compromise' it endorsed a proposal by Air India to amend the Regulation and replace 'first pregnancy' with 'third pregnancy', along with a series of requirements such as unpaid pregnancy leave and regular physical check-ups. This, the Court observed, was reasonable because:

> [it] would be in the larger interest of the health of the AH concerned as also for the good upbringing of the children. Secondly … when the entire world is faced with the problem of population explosion it will not only be desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained at sufficient levels so as to meet the danger of overpopulation …[33]

Read together, these two paragraphs constitute the foundation of the stereotype approach to sex discrimination, which, in turn, is based on a social vision known as the 'separate-spheres theory'. Broadly, the separate-spheres theory holds that because of certain natural differences between the sexes, while the public sphere is the appropriate arena of action for men, the private sphere—the home, the family, and domestic life—is the appropriate arena for women. In *Nargeesh Meerza*, the separate-spheres theory formed the backbone of the Court's sex discrimination analysis: differential treatment between men and women was held not to be discriminatory, and was justified by invoking 'family planning', 'successful marriage', 'upbringing of children', and 'control of population explosion', *each of which was deemed to be*

the specific responsibility of women.[34] Hence, the structure of the Regulations, aimed at achieving this by disincentivizing women from early marriage and too many pregnancies, was held to be constitutional.[35] *Nargeesh Meerza* represents, therefore, the apogee of the formalist approach to Article 15(1), combining all the elements that we have discussed above.[36]

Furthermore, this reading of Article 15(1) has also spilt over into the interpretation of Article 15(3). In *Yusuf Abdul Aziz v. State of Bombay*,[37] the constitutional validity of Section 497 of the Indian Penal Code was challenged. Under Section 497, in an extramarital affair, *only* the man could be held guilty of the offence of adultery. When this section was challenged as being discriminatory *against* men, the Supreme Court upheld it in a very short judgement, holding that since Article 15(3) authorized the State to make 'any special provisions for women',[38] a criminal provision exempting women from liability for precisely the same act that a man could be punished for was nonetheless constitutional. However, this surely cannot be right: if Article 15(3) is to be read as providing a carte blanche to the State in this fashion, then the prohibition upon 'sex discrimination' under Article 15(1) becomes redundant (the provision might as well have read,'The State shall not accord favourable treatment to men'). More importantly, however, what the Supreme Court failed to analyse was that Section 497—while ostensibly for the benefit of women—was nonetheless based upon gendered stereotypes: in this case, the stereotype that, when it comes to sexual relations, women are passive and devoid of agency, always the seduced, and never the seducers.[39] In fact, three decades later, in another challenge to the adultery provisions, the Court articulated the stereotype and accepted it as a legitimate basis for the law: 'it is commonly accepted that it is the man who is the seducer and not the woman'.[40] *Yusuf Abdul Aziz*, therefore, highlighted the important insight that Articles 15(1) and 15(3) cannot be separated. Our approach to understanding what constitutes 'discrimination on grounds only of sex' will also structure our approach towards what 'special provisions' the State can make, ostensibly for the benefit of women.

B. The Transformative Reading

In 1954, just three years after the judgement in *B.B. Sen*, the High Court of Allahabad was faced with a similar situation. The Uttar Pradesh Courts of Wards Act allowed the local government to declare that persons suffering from certain specific conditions, such as physical or mental 'defects', conviction for non-bailable offences, failure to discharge debts, and so on, were 'incapable of managing their property'. The Act also, however, allowed the Government to declare any woman incapable of managing her property, whether or not any of the above conditions existed. In *Rani Raj Rajeshwari Devi v. State of UP*,[41] the Act was defended on the basis that, as in *B.B. Sen*, the legislative classification was not drawn solely along the lines of sex, but along the lines of sex and property. And like *Yusuf Abdul Aziz* (which was decided the same year), it was argued that the provision was a 'benign' one, designed to protect women from unscrupulous predators of their property ('… women generally are not such competent managers of property as men and are much more liable to be led astray …'[42]).

The Allahabad High Court, however, was having none of it. It swiftly held that whatever the manner in which the legislative classification had been drawn, the fact remained that it treated (otherwise) identically placed men and women differently. In other words, if the legislation's *effect* was to treat men and women differently, its *form* (i.e., the precise character of the classification) or *reason* was irrelevant. Equally brusque was the Court's rejection of the Government's plea that because women were more liable

to be led astray, they could be treated as 'a class by themselves' for the purpose of drawing legislative distinctions:

> … evasion of the Constitution can[not] be permitted merely by calling an act classification and not discrimination … A classification which the Constitution forbids cannot possibly be said to be reasonable.[43]

This observation is crucial. The Allahabad High Court effectively rejected the argument that legislative differentiation founded upon 'natural differences' was not discrimination but only 'classification'. On the contrary, in the teeth of Article 15(1), it was not open to the State to treat men and women as separate 'classes' by themselves by attributing certain stereotypical or generalized characteristics to all men or all women (competent management of property, physical weakness, maternal functions, etc.)

The Allahabad High Court's analysis was followed by the High Court of Orissa in 1969. The Orissa Civil Service Rules allowed the state government to disqualify married women from employment if the 'efficiency of the service' required it.[44] Men were placed under no similar disqualification. The justification for this was provided in the Indian Administrative Rules, which stated that 'marriage brings about certain disabilities and obligations which may affect the efficiency or suitability for employment'.[45] Once again, the State defended its law by arguing that the legislative classification was not based 'only' on grounds of sex, but that it had a 'reasonable nexus in relation to … the maintenance of the efficiency of the service'.[46] The role played by 'sex plus physical weakness' in R.S. Singh and 'sex plus obligations of motherhood' in *Nargesh Meerza* was now played by 'sex plus efficiency'. The Orissa High Court was as swift in rejecting this line of reasoning as the Allahabad High Court had been, observing that:

> … marriage does not operate as a disqualification for appointment … in the case of men, whereas in the case of married women, by Rule 6(2), they are being excluded from appointment. Such a disqualification being thus based on sex is unconstitutional.[47]

Both the Allahabad and the Orissa High Courts intuitively grasped that what was being defended as 'sex plus another ground' was little more than stereotype-based justification of laws that discriminated against women. However, neither of those cases examined the stereotypes in any detail. A move towards this was first made by the Delhi High Court, in a case where the claim of sex discrimination was brought by a man. In *Walter Alfred Baid v. Union of India*,[48] Lady Irwin Hospital's Recruitment Rules permitted only women to be appointed as senior nursing tutors. Striking this down, the High Court held that:

> … it is difficult to accept the position that a discrimination based on sex is nevertheless not a discrimination based on sex 'alone' because it is based on 'other considerations' even though these other considerations have their genesis in the sex itself … while it is true that there are patent physical disparities between the two sexes, yet it is not possible to justify a conclusion … that all women or all men, as the case may be, would be unfit … for a particular class of work.[49]

Taking one step further along the road, the Delhi High Court correctly identified the fact that the State's 'sex plus' justification meant nothing more than assumptions about what sex entailed. The Court made it clear that existing physical differences between men and women could not be made legislatively salient in this manner. In other words, the State could not take differences between men and women that existed in some, or even most cases, and frame laws as if that difference was what *defined* the sexes. To