VOLUME 2 | ISSUE 3 FEBRUARY 2022 ISSN: 2582-7340

VOLUME 2 | ISSUE 3

INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

TRAJECTORY OF CASES TO DETERMINE WHAT ARE THE EMPLOYMENT OPPORTUNITIES FOR WOMEN IN THE PUBLIC SPHERE

- Anushka Rohilla[1]

ABSTRACT

Until now, the value of the work that women undertake or the services that they provide has not been adequately recognized. Because India is such a complex society, there is no single generalization that can be applied to all of the country's diverse geographical, religious, social, and economic groups. Nonetheless, some general conditions that Indian women face have an impact on their economic engagement. This research will largely focus on the progression of five major instances, which provide a comprehensive picture of how courts have construed various statutes to expand or contract the horizon of public employment options for women through time. An investigation of article 14 and its various interpretations will be conducted to assess the legitimacy of the circumstances restricting women's ability to work outside the home. The main purpose of the research paper is to examine the logic used by courts in making various decisions, as well as to establish the status of women in Indian culture and the career prospects available to them. The study will also look at the definition and concept of equality, as well as its positive and negative aspects, as well as the Rule of Law, to better understand the court rulings in various cases. This study will not only present a full timeline of all five instances but will also examine the judges' interpretations and reasoning.

INTRODUCTION

In India, gender equality has long been a difficult topic. Women and the third gender are always struggling and fighting in this patriarchal culture. Gender norms in the workplace exacerbate gender discrimination and create issues for third gender and women. The trajectory here examines how courts' interpretations have changed through time, as well as how the patriarchal

[1] Student at National Law University, Jodhpur

© 2022 International Journal of Advanced Legal Research

mindset of judges in the courts has undergone major transformations in light of various interpretations of Articles 14 and 15, and they have interpreted provisions of various legislations in such a way as to place a responsibility on the state to ensure that women feel safe and secure to work outside their four walls at any time and in any place.

1. EQUALITY UNDER ARTICLE 14

i. ARTICLE 14 STATES

Article 14 ensures Equality before Law and Equal Protection of Law to everyone within the territory of India. Article 15 prohibits the state from discriminating based on sex, race, religion, etc.2 Article 14 is the genus and Article 15 forms its species, therefore they are commonly dealt with together in cases of discrimination.

It is declared in Article 14 that 'the State shall not deny to any person equality before the law or equal protection of law within the territory of India.' 3Equality before the law and equal protection of the law is enshrined in the constitution. They attempt to achieve equality of status while guaranteeing fundamental rights. Although the two expressions appear to be identical, they do not have the same meaning.

- EQUALITY BEFORE LAW

  This is a negative concept and ensures that there is no special privilege in favour of one person, all are subject to ordinary law of land, and no person, of whatever rank and condition, is above the law. It says that the application of laws is to all the subjects equally irrespective of their positions' differences and hence, is a broader concept.

- **Origin** –

  The term has its origin in Britain and implies an absence of some special privileges. This can be by the reason of birth, religion, sex, caste, etc, and by the ordinary law in favour of persons and all the equal subjects of classes.4

- **Exceptions to this –**

  But this concept is not absolute as there are exceptions.

  - Example 1 –Making a law applicable to a single entity. Suppose there is an industry A which is about to be nationalized and hence, a law is made in its regard. Now, this Industry can be treated singularly only if circumstances are

[2] The Constitution of India, 1950, Art 15
[3] The Constitution of India, 1950, Art 14
[4] Diva Rai, 'Reasonable Classification and its Validity under Article 14' (*iPleaders,* 22 May, 2019) < https://blog.ipleaders.in/reasonable-classification-and-its-validity-under-article-14/ > accessed 6 December, 2021

© 2022 International Journal of Advanced Legal Research

such as given above. Here, there is a demarcation of those bodies being nationalized, and a law is made in their favour.

- Example 2 - The President of India is elected by the electoral college but the process[5], qualifications, [6]are contained in the Constitution and additional arrangements to be made by the parliament. Presidential and vice-presidential acts [7]and rules came into existence dealing with their appointments specifically and not treating them at par with other ordinary people or other officials. The President's role in the parliamentary form of Government is nominal and hence, he/she enjoys immunity as the highest official.
- Other examples can be - foreign diplomats enjoying immunity from the country's judicial process; Art. 361 extending immunity to the President of India and the State Governors[8]; public officers and judges also enjoying some protection, and some special groups and interests, like the trade unions, having been accorded special privileges by law.[9]

- **AV Dicey** – ***Rule of law*** arises from this concept and is a part of constitutionalism which intends to control the government (created to serve the people's interests) – rule of law says that if you are the government, you have to abide by laws, no one is above law – he categorized the rule of law to 3 points –

1. **Supremacy of law** - no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.
2. **Equality before law** - not only that with us no man is above the law but that here every man whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals
3. **The predominance of legal spirit** – We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (for example the right to personal liberty, or the right of public meeting) are with us the

[5] The Constitution of India, 1950, Art 55, Art 55 (3); Subodh Asthana, 'Election of President of India' (*iPleaders,* 5 August 2019) < https://blog.ipleaders.in/president-elections-india/ > accessed 6 December, 2021
[6] The Constitution of India, 1950, Art 58; Ibid
[7] The Presidential and Vice-Presidential Election Acts 1952
[8] The Constitution of India, 1950, Art 361; The Constitution of India, 1950, Art 361(A)
[9] The Trade Unions Act 1926; Rebecca Furtado, 'What Every Indian Needs to Know About Trade Union Related Laws in India' (*iPleaders*, 16 February, 2017) < https://blog.ipleaders.in/what-every-indian-needs-to-know-about-trade-union-related-laws-in-india/ > accessed 6 December, 2021

© 2022 International Journal of Advanced Legal Research

result of judicial decisions determining the rights of private persons in particular cases brought before the courts; when the constitution is with us, there are legal principles/judicial decisions which uphold constitutional principles which are applied in private disputes for adjudication, to those situations and when the same principle that is pre-determined is applied, a precedent is established, setting the idea of equality.[10]

- **The basic features of the Equality Before Law under Rule of Law provides for**

  a. Law does not recognize any special rights for any individual or group of individuals.
  b. Law does not recognize any distinction between one individual and the other based on religion, race, sex, etc.
  c. None is punished without proper trial.
  d. All will be tried by the same court under the same law.
  e. The rule of law does not give scope to absolute and arbitrary powers to the executive.[11]

The idea of abstaining from creating any distinction between persons while applying ordinary laws in Article 14 draws great similarity to the features advocated under Rule of Law by AV Dicey

ii. EQUAL PROTECTION OF LAW

Overlapping with equality before the law, equal protection of laws is not a very distinct but a positive concept. This doesn't mean that every law should have universal application within the country irrespective of differences of circumstances rather it means that application of same laws alike and without discrimination to people who are similarly situated/circumstanced. There is no unnecessary discrimination but only wherever necessary. This concept is narrower than equality before the law as casts a positive obligation on the state while at the same time similarly placing the people to treat them similarly.

- **Origin** –

[10] Alok Kumar Yadav, 'Rule of Law' [2017] 4 (3) International Journal of Law and Legal Jurisprudence Studies < http://ijlljs.in/wp-content/uploads/2017/08/Rule_of_Law.pdf > accessed 8th December, 2021

[11] Preethi Ramanujan, 'Development of the Rule of Law' (Legal Service India E-Journal < https://www.legalserviceindia.com/legal/article-85-development-of-the-rule-of-law.html > accessed 8th December, 2021

© 2022 International Journal of Advanced Legal Research

The term has its origin from America and aims at equal treatment in identical situations. In other words, the country's President or Prime Minister should be treated in the same way as any other citizen in terms of the law, with no special advantages,12 so, all the examples in exceptions seen above under the equality before law concept fail to apply here.

- **14 guarantee equal protection of laws and they are:**

a. This does not imply that the laws must be general or that they must apply to everyone, implying that the same law must apply to everyone.

b. It does not evaluate achievement or similar conditions. Different classes have different needs that necessitate different approaches.

c. Different rules for different places and lawful control policies adopting laws are in the best interest of the state for safety and security.

d. Inequality would result from the same treatment in unequal contexts.13

- **Application of this concept -**

Article 16 [14]- Equality of opportunity in matters of public employment. Article 16 is one of the species of Article 14 which forms the genus. It works on the fundamentals of equality and hence has an inherent application of Article 14 in its provisions. After analyzing the two subclauses, the observations we can make are –

Article 16 (2) – "No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State[15]."

Sub clause 2[16] is based on the concept of Equality before Law to maintain the essence of ***equal opportunity; it prevents the state from discriminating against individuals on numerous grounds***. It caters to people of many religions, races, and genders.... while providing an opportunity for public employment on an equal footing

Article 16 (4) – "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class

[12] *Supra Note 2, at 2*
[13] *Supra Note 2, at 2*
[14] The Constitution of India, 1950, Art 16
[15] The Constitution of India, 1950, Art 16(2)
[16] *Ibid*

© 2022 International Journal of Advanced Legal Research

of citizens which, in the opinion of the State, is not adequately represented in the services under the State"[17]

Sub clause 4[18] is based on the concept of Equal Protection of Law because it places an ***explicit responsibility on the state to provide conditions that allow backward classes to participate in public employment in the same way that others do.*** It serves as an exceptional provision in this case because it treats persons from such classes differently than other people and allows for special treatment because these classes are not situated in the same way as the country's other non-backward classes. They are un-equals in the eyes of the law, and the law allows un-equals to be treated differently.

As a result, we conclude that the state's application of Article 14 is a mix of preventative measures and affirmative action. When no one is placed in the same position, it is the responsibility of the law to ensure that everyone is placed in the same position to compete with everyone, and therefore strives towards real equality. It is built on the principle of equity rather than equality. Using these factors as a guide, Indian courts have devised two methods to evaluate if state classification passes the Article 14 test.

iii. TWO-PRONGED TEST UNDER ARTICLE 14 (REASONABLE CLASSIFICATION TEST)

The equal protection of laws guaranteed by Article 14 propounds that from the different nature of society there should be different laws in different places. Thus, what Article 14 forbids is class legislation but it does not forbid reasonable classification. Article 14 applies where equals are treated differently without any reasonable basis. Class legislation is that which makes improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number all of whom stand in the same relation to the privilege granted such that between whom and the persons not so favoured no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privilege. This test was first laid down in the State of West Bengal v. Anwar Ali 19case and then affirmed in Ram Krishna 20and Saurabh Choudhary v. UOI[21]

[17] The Constitution of India, 1950, Art 16(4)
[18] *Ibid*
[19] State of West Bengal v. Anwar Ali Sarkar 1952 AIR 75, 1952 SCR 284

© 2022 International Journal of Advanced Legal Research

A. **Test of Intelligible Differentia** – There has to be an intelligible differentia between the persons or the things which form part of the group to which law applies and those people who are left out of the group. This means that there has to be a valid and defined reason behind keeping certain individuals from a particular classification.
B. **Test of Rational Nexus** – once it has been proved that there is, a valid reason, then it has to be proved that there is a reasonable nexus between the reason behind the classification (basis) and the objective that is sought to be achieved through such classification

Example - Taxation is based on income slabs, which means that not everyone pays the same amount of tax. However, this does not contradict Article 14 because the classification was founded on the rationale that India is economically heterogeneous, and hence not everyone can afford to pay the same amount of tax. It must be tailored to each individual's capabilities. It also has a link to the state's goal of classifying persons based on their potential earnings for the sake of national progress and well-being.

Case laws to exemplify this Reasonable Classification Test -

A. STATE OF WEST BENGAL v. ANWAR ALI SARKAR, 1951 – [22]

FACTS OF THE CASE - Section 5 of The West Bengal Special Courts Act, 1950 which allowed Special Courts to try certain criminal offenses according to the directions of the State Government in the name of the speedier trial was challenged as being violative of Article 14.23
JUDGEMENT OF THE CASE - The Supreme Court invalidated the Section as being violative of Article 14. Even though courts had been following the reasonability criterion, in this case, it laid down two principles for satisfying classification under Article 14 –

a. The classification test must be founded on intelligible differentia which distinguishes those that are grouped from others who are left out of the group
b. The differentia must have a rational relation to the object sought to be achieved by the Act.

---

[20] Shri Ram Krishna Dalmia v. Shri Justice S.R. Tendolkar 1958 AIR 538, 1959 SCR 279
[21] Dr. Saurabh Choudhary v. Union of India AIR 2004 SC 2212
[22] *Supra Note 14, at 7*
[23] Vaibhav Sharma, 'Brief Case Analysis of State of West Bengal v. Anwar Ali Sarkar' (*Lawyers Club India*, 19 December, 2016) < https://www.lawyersclubindia.com/articles/brief-case-analysis-of-state-of-west-bengal-v-anwar-ali-sarkar-7754.asp > accessed 8th December, 2021

© 2022 International Journal of Advanced Legal Research

Justice Harris CJ using the Reasonable Classification Test observed that although the need for a speedier trial than what is possible under the procedure by ***Civil Procedure Code*** [24]might form the basis of reasonable classification, it vests in the State government an absolute and arbitrary power to refer to special courts for trial of "any case" as it may deem fit. It did not establish any norms or guidelines for the classification of such offenses, which could result in a large number of classifications even if they do not last a long time. Every categorization must have a ***precise basis and explanation under Article 14, but the requirement of a swift trial was too broad and uncertain a criterion in this case. When the state, using its arbitrary power, decides to designate a certain kind or category of offense and thereby goes against equality, the link with its goal may be damaged***.[25]

B. RAM KRISHNA DALMIA v. SR TENDOLKAR 1958 – [26]

FACTS OF THE CASE - Section 1(3) of the Commissions of Inquiry Act, 1952 was challenged based on Article 14. A notification based on the section could be delivered by the executive to constitute a commission of inquiry to probe into the affairs of certain companies which the govt. believed to be fraught with irregularities. The petitioners contended that this amounted to discrimination as it singled out these companies from the rest of the companies and hence violated Article 14.

[27]

JUDGEMENT OF THE CASE - Relying on the Reasonable Classification Test, the court found that classifying some corporations but not others was appropriate since it was based on allegations that these companies had engaged in improper business practices based on papers submitted to the government. The act's goal was to investigate a specific subject of public interest, therefore distinguishing these corporations with a negative track record was critical for

[24] Civil Procedure Code, 1908; The Constitution of India, 1950, Art 21

[25] *Ibid*; State of West Bengal v. Anwar Ali Sarkar (*Indian Kanoon*) < https://indiankanoon.org/doc/1270239/ > accessed 8th December, 2021

[26] *Supra Note 15, at 7*

[27] Ramya Singh, 'Case Analysis: Ram Krishna Dalmia v. Justice Tendolkar' (*Pro bono India*) < https://probono-india.in/Indian-Society/Paper/293_CASE%20ANALYSIS%20BY%20RAMYA%20SINGH%20GROUP%202%20(2).docx> accessed 9th December, 2021

© 2022 International Journal of Advanced Legal Research

the state and has a fair connection to the delegated section's goal. As a result, it did not violate Article 14[28]

C. DS NAKARA v. UOI 1982 – 29

FACTS - Petitioners had retired in 1972 and in 1979, under the liberalized pension scheme which was aimed at ensuring the cause of pensioners all over the country, a new statute was enacted where pension was increased and was made available to the only ones who retired after the 1979 but not to those who were retired before the above-mentioned date.

ISSUE - Whether differential treatment to pensioners related to the date of retirement contained the element of discrimination liable to be declared unconstitutional as being violative of Article 14?30

JUDGEMENT – The order was violative of Article 14. The court determined that all pensioners form a class and that when the State decided to liberalize the pension scheme to expand social security in old age to government employees, it could not give the benefits of liberalization only to those who retired after a certain date and deny them to those who retired before that date.

This classification, which divided the class into two subgroups based on retirement age, hadn't any intelligible principle and was both arbitrary and unreasonable. Since the state's goal in liberalizing the pension was to increase retired people's economic capacity in light of the cost-of-living index's constant rise and the rupee's declining purchasing power, it can't be said that it was only necessary for those who would retire after the specified date but not for those who had already retired. ***As a result, it lacked the criterion of plausible connection with the order's goal***.[31]

The order was found to violate Article 14 because it failed to meet the twin criteria of comprehensible differentia and reasonable connection.

iv. TEST OF ARBITRARINESS

This test is used alongside the Reasonable Classification test and works on the principle of striking down any form of Arbitrariness in State Action. Arbitrariness is the quality of

[28] *Ibid*; 'Ram Krishna Dalmia v. Justice Tendolkar' (*Indian Kanoon*) < https://indiankanoon.org/doc/685234/ > accessed 9th December, 2021

[29] DS Nakara v. Union of India 1983 AIR 130, 1983 SCR (2) 165

[30] Larika Khandelwal, 'DS Nakara v. Union of India' (*Indian Law Portal,* 18 July, 2020) < https://indianlawportal.co.in/d-s-nakara-v-union-of-india/ > accessed 9th December, 2021

[31] *Supra Note 29, at 9;* 'DS Nakara v. Union of India' (*Indian Kanoon*) <*https://indiankanoon.org/doc/1416283/* > accessed 9th December, 2021

© 2022 International Journal of Advanced Legal Research

being ***“determined by chance, whim, or impulse, and not by necessity, reason, or principle”***. The fact that Art. 14 incorporates "a safeguard against arbitrariness" on the part of the Administration is a fascinating facet of Art. 14 that the Indian courts have developed through time. If the government acts arbitrarily, Article 14 kicks in and invalidates the action.

Why was this test developed? And the relevant case laws -

A. LACHHMANDAS v. STATE OF PUNJAB 1969 – [32]

The court highlighted the excessive reliance of courts on the Reasonable Classification test and how it suffers from the possibility of misuse. “***The doctrine of classification is only a subsidiary rule evolved by courts to give content to Article 14. Over-emphasis on the doctrine of classification or an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the article of its glorious content***. That process would inevitably end in substituting the doctrine of classification for the doctrine of equality.”

Another rationale for developing this criterion was that in many circumstances, a state action might be acceptable and have a connection to the goal, but it would also include features of uncontrolled discretion and authority given to the state while enforcing that designation.

The Reasonable Classification test was insufficient to address a situation in which authorities were granted broad or unrestricted discretion to pick and choose whom to treat differently by stating clearly the legislative strategy for accomplishing other legislative goals in the act itself. [33]

B. EP ROYAPPA v. STATE OF TAMIL NADU 1973[34]

FACTS - The petitioner was an IAS in TN and although the position of the Chief Secretary was vacant, a junior cadre officer to that of the petitioner was appointed to that position. The petitioner challenged the constitutionality of his transfer from the post of the Chief Secretary to officer on special duty on grounds of Article 14.[35]

---

[32] Lachhman das v. State of Punjab 1963 AIR 222, 1963 SCR (2) 353

[33] Lachhman das v. State of Punjab (*Indian Kanoon*) < https://indiankanoon.org/doc/459058/ > accessed 9th December, 2021

[34] EP Royappa v. State of Tamil Nadu 1974 AIR 555, 1974 SCR (2) 348

[35] Sejal Jain, ‘EP Royappa v. State of Tamil Nadu’ (*Indian Legal Solution*) < https://indianlegalsolution.com/e-p-royappa-v-state-of-tamil-nadu/ > accessed 10th December, 2021

© 2022 International Journal of Advanced Legal Research

JUDGEMENT - ***Justice Bhagwati*** in this case gave us the concept of anti-arbitrariness concerning adjudging what classifications violate Article 14. He remarked –

"Equality is a dynamic concept with many aspects and it cannot be "cribbed, cabined and confined" within the traditional and doctrinaire limits. From the positivistic point of view, equality is antithetic to arbitrariness. Equality and arbitrariness are sworn, enemies. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14."

Therefore, the classification test has a ***component of non-arbitrariness that permits the assessment of state action to make sure that it's non-arbitrary from the purpose of view of equality***.[36]

Hence, the Court held that the transfer was not arbitrary. So long as the transfer is made on account of the exigencies of administration and is not from a higher post to a lower post with discriminatory preference, it would be valid and not open to attack under Article 14.

Even though this new doctrine has provided a new ground for review under Article 14, there are still ***various disputes surrounding this new dimension of equality, particularly in the area of legislative review***. Arbitrariness is not the same as unreasonableness in strict terms. It's okay to be arbitrary on occasion. Other times, being unreasonable without being arbitrary is possible. A judgment is reasonable if it is supported by sufficient genuine and relevant arguments. Only when there is no valid reason to choose one option over the other is a choice between two or more possibilities arbitrary. A choice made for legitimate but illegitimate motives, or insufficient reasons, is not always arbitrary.

2. SCENARIO CONCERNING GENDER ROLE IN EMPLOYMENT -

Equality is the foundation of every individual liberty, and it is the state's responsibility to provide equal opportunities to individuals in all aspects of life. Similarly, the right to work in any profession of one's choice without discrimination is essential for an individual's development. Keeping both of these ideas in mind, the issue of gender balance in the workplace must be addressed.

The fight for workplace gender equality is about fighting mental battles and reversing situations when women have been denied their legal rights and the right to fair and equal treatment in the

[36] *Ibid*; 'EP Royappa v. State of Tamil Nadu' (*Indian Kanoon*) < https://indiankanoon.org/doc/1327287/ > accessed 10th December, 2021

© 2022 International Journal of Advanced Legal Research

workplace. Women may overcome their histories of discrimination and cultural preconceptions with the quickest of reactions based on their competence, talent, and performance on a level playing field.

3. IS CHANGE REQUIRED?

Earlier laws and cases were founded on women's situational status and included provisions aimed at giving particular needs and protective treatment to women because they were comparably weaker than men and need protection. However, as society evolves, this dynamism has resulted in a significant shift in women's status.

They don’t need protection anymore rather they want parity and equality of opportunities to utilize the best in them.

4. ARTICLE 15 AND INTERPRETATION OF WORD “SEX”

Prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth

1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them
2. A. No citizen shall, on grounds only of religion, race, caste, sex, place of birth, or any of them, be subject to any disability, liability, restriction, or condition with regard to access to shops, public restaurants, hotels, and palaces of public entertainment;
   B. or the use of wells, tanks, bathing ghats, roads, and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public
3. Nothing in this article shall prevent the State from making any special provision for women and children
4. Nothing in this article or clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or the Scheduled Castes and the Scheduled Tribes37

The word “only” in clause 138 seems to be problematic somehow because it leaves scope for indirect discrimination. It prohibits discrimination on grounds only on either of many grounds provided but the moment these grounds are coupled, State is provided a free hand to discriminate on combined categories among the individuals.

5. CASE LAWS THAT SHOW WOMEN’S STATUS IN PUBLIC EMPLOYMENT

[37] The Constitution of India, 1950, Art 15(1), Art 15(2), Art 15(3), Art 15(4)
[38] The Constitution of India, 1950, Art 15(1)

© 2022 International Journal of Advanced Legal Research

The cases exploring various dimensions of employment opportunities concerning the women and how courts in India have altered their stance and outlook could be examined using two categories of tests –

- ***Formalist approach*** – a literal interpretation of Constitutional text leaving no scope for flexibility
- ***Transformative approach*** – a comparatively more flexible approach with an imbibed spirit of Constitutionalism which supports the transformation of stereotypical society into one with modern views

The courts in India have covered an entire journey through cases evolving from the Formalist approach to the Transformative approach of Equality.

I AIR INDIA V. NERGESH MEERZA 1982[39]

In this case, the Court did not hesitate to define gender roles based on the natural differences between men and women. This remains one of the seminal judgments on the subject by the Supreme Court. It is also an analytically unsatisfactory opinion, which does not take into account the complex and reflective jurisprudence on sex discrimination.

FACTS OF THE CASE/REGULATIONS AT ISSUE –

- Certain regulations governing 2 important airlines were questioned – AIR India employees' (air hostesses and pilots) services are governed by these regulations
- How society perceives the role of women – kind of perception and mentality
- Laws reflect what kind of society we live in
- Section 46 and 47 of these regulations provide -
  a. Section 46 - Retirement age for air flight pursers (AFPs) (persons working in flight but are not female air hostesses) would be 58 and for air, hostesses would be 35 years or on their marriage within 4 years of joining the service or on their first pregnancy or whichever happened first
  b. Section 47 – managing director had the right to extend the retirement age of air hostess up to the age of 45 years [40]

ISSUES FOR CONSIDERATION –

[39] AIR India v. Nergesh Mishra 1981 AIR 1829, 1982 SCR (1) 438

[40] Dhruv Shekhar, 'A Case Note Examining the First De-Facto Case of Sexual Discrimination at the Work Place: AIR India v. Nergesh Mishra & Ors. 1981 AIR 1829' (*ipleaders* March 28, 2017) < https://blog.ipleaders.in/a-case-note-examining-the-first-de-facto-case-of-sexual-discrimination-at-the-work-place/> accessed 10th December, 2021

© 2022 International Journal of Advanced Legal Research

Whether Regulation 46 & 47 are violative of Articles 14,15, 16 of the Constitution of India and thus ultra vires in whole or part?

Whether discretionary powers as enumerated under Regulation 47 can be deemed as being excessive delegation?41

JUDGEMENT OF THE CASE –

Supreme Court upheld the Section 46 regulation saying that it permits a woman air hostess to marry at 23 if she had joined at 19 which is by all standards a very sound and salutary provision.

1) SC refused to accept the compulsory retirement "on their first pregnancy" provision as a reasonable compromise and endorsed the proposal to AIR India authorities to change the 'first pregnancy' phrase to 'third pregnancy'.
2) SC struck down the regulation empowering the Managing Director to arbitrarily increase the age of retirement of air hostess up to the age of 45 years[42]

JUSTIFICATIONS GIVEN BY THE COURT -

i. it helps in ***improving good health of the employee*** and helps a good deal in the promotion and boosting up family welfare and planning program
ii. if a woman marries near about the age of 20-23, she becomes fully mature and there is every chance of such a ***marriage proving a success, all things being equal***
iii. if the bar of marriage within 4 years of service is removed, then the corporation would have to incur huge expenses in recruiting additional air hostesses either on a temporary or an ad hoc basis to replace those working air hostesses who have conceived
iv. endorsed the proposal to AIR India authorities to change the 'first pregnancy' phrase to 'third pregnancy' to control the population
v. it would be in the ***larger interest of the health of*** the air hostesses concerned as also for the ***good upbringing of their children***
vi. when the entire world is facing the problem of ***population explosion***, it would be not only desirable but also essential for every country to see that ***family planning program*** is not only whipped up but also maintained at sufficient levels to meet the danger of over-population[43]

---

[41] *Ibid*

[42] *Supra Note 28, at 13*

[43] *Supra Note 28, at 13*

© 2022 International Journal of Advanced Legal Research

- ***This was a formalist approach*** - This type of approach involves courts understanding and applying an article ***without looking into the spirit of the article***. They ***simply and literally interpret it*** and consider discrimination only when a very hostile distinction takes place. Even here, the court is very formally and restrictively interpreting "sex" included under article 15 and is ***giving leeway to such distinction just because it is coupled with other considerations such as salary, age, etc***… but is not looking at the implication of the distinction is creating based on societal notions of what forms maternal and family responsibilities. Court held that Regulation 47 concerning the delegated power of Managing Director was unconstitutional to that extent as, under the provision, the extension of the retirement of an Air Hostess is entirely at the mercy and sweet will of the Managing Director. The conferment of such a wide and uncontrolled power on the Managing Director is violative of Article 14 on account of being arbitrary and unreasonable (violative of 2 tests discussed above)

OBSERVATIONS ON THE JUDGEMENT –

Authors like ***Gautam Bhatia*** talked about the ***Separate Spheres theory*** [44]- The courts assumed men and women to belong to different spheres of society. It advocated that an appropriate arena of action for men is the public sphere whereas the private sphere that is home, family, and domestic life is the appropriate sphere for women. Women should not work with the same flexibility as men when it comes to public areas such as employment because they have other commitments imposed by society. ***Court has denied women equality based on orthodoxical notions of society and gender stereotypes.*** Another flaw has been that the judgment surprisingly never seeks to substantiate the additional criterion which is used alongside the distinction made on sex, to rebuke the assertion of violation of Article 16.

ANALYSIS OF THE JUDGEMENT –

A. How did the court deal with the claim of the classification not meeting the 'intelligible differentia' test (Article 14)?

In response to the question of whether the regulations violate Article 14, the court claims that Article 14 only prohibits hostile discrimination, not fair classification. The verdict reaffirms this ideologue, stating that where members of a certain class are treated differently in the public

[44] Gautam Bhatia, 'Sex Discrimination and the Constitution – XI: The Justification of Anti-Stereotyping Principle' (Indconlawphil, 31 August, 2015) < https://indconlawphil.wordpress.com/tag/anti-stereotyping/> accessed 11th December, 2021

© 2022 International Journal of Advanced Legal Research

interest to advance members of backward groups due to their special features, qualities, the form of recruitment, and the like, such treatment does not constitute discrimination. Following that, the court seeks to provide an instructive, albeit not exhaustive, set of rules for determining whether the Air Hostesses and Air Flight Pursuers forged separate classes and, by extension, determining whether Article 14 was violated. The Court classifies them into two distinct categories based on their marital status, promotional opportunities, starting salary, and entry-level qualifications45. The Court strongly rejected the arguments of Fali Nariman that the functions of the two sets of the cabin crew were different; it held that a study of the job functions detailed in the affidavit reveals that the functions of the two intersect on certain points, while different, but the distinction, if any, is one of degree rather than type.46

The Court concluded that one of the conditions for hiring AHs was that they had to be unmarried, although the AFPs did not have such a criterion, demonstrating the vicious circularity of its logic. As we've seen earlier, it's inherently unfair to treat marriage as a disqualification for women but not for males; here, the Court uses it as proof that AFPs and AHs are two distinct groups.47

B. How court dealt with the claim of the classification being arbitrary and on an unreasonable basis of sex under article 14?

To examine said aspect the Court states that while Article 16(2) purports that no discrimination should be made only on the ground of sex, however, it never prohibits the state from discriminating on the grounds of sex and other considerations (as asserted in the case of Yusuf Abdul Aziz v. The State of Bombay and Husseinbhoy Laljee48). To address this issue, the Court notes that while Article 16(2) appears to ban discrimination only based on sex, it never precludes the state from discriminating based on sex and other factors.

The Court dismisses the infringement of Article 16 on this basis. Surprisingly, the case law or the court's decision rarely goes into detail on what the new criterion was.49 Apart from remembering the elephant in the room, namely, that males were not entitled to the same marriage conditions that the Court claimed were necessary for "health and family

[45] *Supra Note 29, at 14*

[46] Vatsala Sood, 'Case Summary: AIR India v. Nergesh Mishra, AIR 1981 SC 1829' (*Legal Bites,* 14 December, 2020) < https://www.legalbites.in/case-summary-air-india-v-nargesh-meerza/ > accessed 11th December, 2021

[47] *Ibid*

[48] *Yusuf Abdul Aziz v. The State of Bombay and Husseinbhoy Laljee* 1954 AIR 321, 1954 SCR 930

[49] *Supra Note 29, at 14*

© 2022 International Journal of Advanced Legal Research

planning," one does not need to dwell on the Court's explicit stereotyping.50

C. The suggestion of ‘**third pregnancy’** criteria but no stance on ‘four-year’ criteria.

On the issue of termination of services due to first pregnancy, the court angrily opposes the respondent's statement that women post-childbirth seem to leave the job or that their husbands refuse to let them work, making it necessary to have a lower retirement age for them. As for the reasons provided by the respondents, they are situations that can occur even in the absence of children, so these claims are presumptively false. Instead, the Court calls for sweeping changes to the pregnancy clause, such as the introduction of a retirement criterion based on the birth of a third child in place of the incumbent clause. Its justification is based on a public health principle. As a result, under Article 14, the said regulation feature is judged arbitrary51.

PLETHORA OF QUESTIONS UNANSWERED –

Keeping the obvious overtures of a sexist judgment aside, which seem to be posed all over this judgment, there appear to be deep-seated problems on the question of conflict between administrative legislation and the constitution in this matter.

ISSUE 1 - For starters, when the Court seeks to debunk the violation of Article 14, the logic employed instead of examining a sex-based classification as being violative of Art.14,15,16. Instead seeks to make a distinction between the sexes based on showing the ancillary aspects such as qualification, salary, and other features which appear to be different. Thus, by creating a contorted understanding of reasonable classification, the applicability of constitutional remedies to an administrative regulation is vitiated.52

ISSUE 2 - Another anomaly emerges when the question of reasonable classification/intelligible difference is applied to the differentiation made based on sex when the issue of Article 15 and 16 violations arises. Surprisingly, the ruling never attempts to substantiate the extra criterion that is utilized with the sex differentiation to refute the accusation of a violation of Article 16. This ruling had a significant omission in this regard. Even when the judgment purports to rely on American cases, this line of convoluted reasoning is clear. Cases include Mary Ann Turner

[50] *Supra Note 32, at 16*
[51] *Supra Note 29, at 14*
[52] *Supra Note 32, at 16*

© 2022 International Journal of Advanced Legal Research

v. Department of Employment Security 53and Frontiero v. Richardson54, where the rulings were diametrically opposed to the issue at hand.55

OBSERVATION -

Overall, in the annals of Indian sex discrimination law, Nargesh Meerza is an extremely disappointing decision56. The sexist nature of the judgment is brought into full focus on multiple occasions. One such instance is when the court rejects the one child basis for retirement for air hostess and instead advocates for an amendment that introduces the option of retirement upon the birth of the third child. While the court gave this reasoning a deified outlook by colouring it with a public health basis, however, in my opinion, it only seeks to make seeks to reassert a stereotypical notion regarding gender roles. It was not only harmed by the logic it employed, but also by its position as a precedent.

II ANUJ GARG V. HOTEL ASSOCIATION OF INDIA 2007[57]

"It is state's duty to ensure circumstances of safety which inspire confidence in women to discharge duty freely in accordance to requirements of the profession they choose to follow." These are the words of the Supreme Court in Anuj Garg v Hotel Association of India, a path-breaking judgment upholding the cause of gender justice. The court's decision transformed the conventional meaning of "protective discrimination". Instead of emphasizing the State's role in conferring a special status to women and in the process restricting their choices, it asked the State to ensure circumstances of safety that instill confidence in women to discharge their duties freely. The decision came as a ray of hope to those women who choose to walk the path of liberation emancipating themselves from the narrow confines of gender polarization.

FACTS OF THE CASE –

- The Respondent, the Hotel Association of India, along with four others filed a writ petition before the Delhi High Court questioning the validity of Section 30 of the Act which prohibited the employment of 'any woman' or "any man under the age of twenty-five years" in any part of premises where liquor or intoxicating drugs were consumed by the public.

[53] Mary Ann Turner v. Department of Employment Security 531 P.2d 870 (1975)
[54] Frontiero v. Richardson 411 U.S. 677 (1973)
[55] *Supra Note 29, at 14*
[56] *Supra Note 32, at 16*
[57] Anuj Garg v. Hotel Association of India AIR 2008 SC 663, (2008) 3 SCC 1

© 2022 International Journal of Advanced Legal Research

- The members associated with the Respondent carried on business in hotels, which served liquor not only in the bar but also in the restaurant and as part of the room service.
- The High Court declared Section 30 of the Act to be ultra vires Articles 19(1)(g), 14 and 15 of the Constitution insofar as it prohibited the employment of any woman in any part of such premises, in which liquor or intoxicating drugs were consumed by the public. The Respondent filed an appeal to question that part of the order whereby restrictions had been put on employment of any man below the age of twenty-five years.[58]

ISSUES FOR CONSIDERATION –

I. Whether the Delhi High Court judgment which declared Section 30 of the Act to be *ultra vires* ***Articles 19(1)(g), 14 and 15*** of the Constitution to the extent it prohibited the employment of any woman in any part of such premises in which liquor or intoxicating drugs were consumed by the public, should be upheld?

II. Whether a restriction on employment of a particular group of people, not a hindrance to their fundamental right to equality in matters of public employment under Article 16?

III. Does balancing safety concerns of women not conflict with the individual rights of the women if the primary aim is to protect women in employment venues is concerned under Articles 15 and 16 of the constitution?

IV. What standard of judicial scrutiny should the legislations like such, that "the aim of protective discrimination", go through?

V. Whether the state can interfere with someone's right to the profession based on "parens patriae" power?59

JUDGEMENT OF THE CASE - Maintained that though a pre-constitutional law is valid, its validity can be questioned. SC struck down it as unconstitutional due to several reasons, thus upholding HC's decision.

JUSTIFICATIONS BY THE COURT -

[58] 'Anuj Garg & Ors. vs. Hotel Association of India & Ors.' < https://privacylibrary.ccgnlud.org/case/anuj-garg-ors-vs-hotel-association-of-india-ors > accessed 12th December, 2021

[59] Anushka Bharwani, 'Anuj Garg v. Hotel Association of India & Ors.' (*Law Times Journal*, 14 November 2020) < https://lawtimesjournal.in/anuj-garg-ors-vs-hotel-association-of-india-ors/> accessed 12th December, 2021

© 2022 International Journal of Advanced Legal Research

i. judgment has a part called ***"Remark on Changing Realities"*** which propounds that the hospitality industry has grown by leaps and bounds and liquor here is served in bars and restaurants and rooms of hotels and if this is stopped, it is like denying the vista of employment to women and men

ii. The state ***must ensure circumstances of safety that inspire confidence in women to discharge duties freely under the requirements of the profession they have chosen to follow***

iii. state has a parens patriae jurisdiction to decide for people who are at a lower position when it comes to a bargain – whenever there is a necessity, the state has to act as a parent employing protective discrimination which has to be justified. The state cannot justify the prohibition to work in liquor shops to women, curtailing their right of the profession under the garb of protection. It has to ensure women's (or of others for that matter) safety in society and not degrade or subjugate them in the name of protective discrimination

The judgment sets an authority to deal with legislation that seeks ***"protective discrimination"*** stating that such legislation should go through ***"strict judicial scrutiny",*** where it should not be only assessed on its proposed aims but rather on the implications and the effects. The law in question was said to suffer from incurable fixations of stereotype morality and conception of sexual role. The test to review the protective discrimination statute was laid down as a two-step process including the legislative interference should be justified by principle and should be proportionate in measure. ***Court went for transformative reading of the article 15 and not formalist upholding that transformation is the essence of the constitution which propounds that we need anti-exclusionary and anti-stereotyping theories and principles as exclusion was never the aim of the constitution***. Here the court using this approach went beyond natural differences and considered discrimination to be a product of social and economic factors which can include exclusions of all forms and need not be coupled with other factors. The Court rightly noted that women today have entered every field and are progressing. They need the protection of equality and not by exclusion based on stereotypical notions.

ANALYSIS OF THE JUDGEMENT –

Validity of Pre-Constitutional Law

Mentioning the John Vallamattom judgment[60], it was stated that "The constitutionality of a

[60] John Vallamattom & Anr. vs Union of India (2003) 6 SCC 611

© 2022 International Journal of Advanced Legal Research

provision, it is trite, will have to be judged keeping in view the interpretative changes of the statute affected by the passage of time. Though the Act is pre-constitutional legislation and is protected by Article 372 of the Constitution[61]; the law permits questioning its validity in the backdrop of articles 14,15and 19 of the Constitution. Since the scenario has completely changed in the both domestic and international arena, the law can be declared invalid.[62]

Subject victimized in name of protection

The underlying tension between the right to work and the right to security, according to the Court, remains a challenging and tricky jurisprudential issue. Where the right to self-determination is prioritized in gender justice discussions, the security and safety needed to exercise that choice in a violence-free environment must be taken into account. Nonetheless, in the guise of protection, the current law ends up victimizing the topic, making women vulnerable to state protection in the same way as the questioned act takes away their independence. In this regard, the state's intervention in pursuing the protective goals should be reasonable to the legitimate goals. Empowering women rather than restricting their freedom would be a more viable and socially responsible approach, and it should be reflected in the state's law enforcement efforts as well. It should be the state’s duty to ensure circumstances of safety that inspire confidence in women to discharge the duty freely following the requirements of the profession they choose to follow63

Leading the Court to reconsider the doctrine of proportionality, which states that there should be a reasonable relationship of proportionality between the means used and the goal pursued, i.e., the Court should determine whether the state's legislation furthers the goal of protecting women's interests in proportion to already well-established gender norms such as autonomy, equality of opportunity, right to privacy, and so on.

Romantic Paternalism

Further, the Court referred to the notion of "romantic paternalism" by the US Supreme Court in Frontiero vs. Richardson (411 U.S. 677). This case dealt with a gender-discriminatory statute, where a female military service member had to ‘demonstrate’ her spouse’s dependency for claiming additional benefits, whereas the male counterpart was automatically entitled to

[61] The Constitution of India, 1950, Art 372
[62] *Supra Note 46, at 20*
[63] *Supra Note 46, at 20*

© 2022 International Journal of Advanced Legal Research

such benefits.

The Court maintained the strict scrutiny standard for review and repelled the administrative convenience argument holding that "by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment".64

The Court emphasized the importance of applying the "strict scrutiny test" as a rule for evaluating laws that have pronounced "protective discrimination" since they can be used as a double-edged sword. The test for "protective discrimination" would have two prongs: the first would establish whether the legislative interference is justified in principle, and the second would analyze the measures' proportionality. The Court used the test to determine if the measures aligned with "well-established gender norms such as autonomy, equality of opportunity, right to privacy, and all," and whether there is a "reasonable relationship of proportionality between the means used and the goal pursued," noting that the "imputed legislation suffers from incurable fixations of stereotype morality and conception of sexual role." The Court also referred to the doctrine of proportionality and incompatibility, used by the European Court of Human Rights (ECtHR) to deal with matters of competing public interests

the Court elaborated on the interplay of the doctrines of self-determination and individual interest, as well as the fundamental tension between autonomy and security. It noted that in feminist thought, security and protection are as much a part of gender justice discourse as the right to self-determination.[65]

Res extra commercium

Concerning the "res extra commercium" issue; it was said that hotel management is a specialized job and it would be unjust to deny jobs to young, talented, and qualified people. The doctrine, therefore, doesn't apply in this case and could only be invoked if the State adopted a policy of outright prohibition. Referring to the case of Kerala Samsthana Chethu Thozhilali Union v. State of Kerala and Others66, it was stated 'So long as the contract of employment in a particular trade is not prohibited either in terms of the statutory or constitutional scheme, the State's intervention would be unwarranted unless there exists a statutory interdict. Even to what

[64] *Supra Note 45, at 19*
[65] *Supra Note 45, at 19*
[66] *Kerala Samsthana Chethu Thozhilali Union v. State of Kerala and Others* 2007 (1) KLT 151 (SC)

© 2022 International Journal of Advanced Legal Research

extent such a legislative power can be exercised would be the subject matter of debate67

The decision establishes a framework for dealing with legislation that seeks to prevent 'protective discrimination,' stating that such legislation should be subjected to 'strict judicial scrutiny,' in which it should be judged not only on its stated goals but also on their implications and consequences. The statute in question was claimed to be plagued by intractable fixations of stereotype morality and sexual role conceptualization. The two-step process for reviewing the protection discrimination act was established, with the legislative involvement having to be justified by principle and reasonable in scope.

AA Direct and Indirect discrimination under Article 15

Through this judgment, it was established that both direct and indirect discrimination forms a part of Article 15 and the State should not rely on stereotypes to justify legislation that is prima facie discriminatory. Also, the Right to employment is not a Fundamental Right in Part III of the Constitution but Article 16 guarantees the right to be considered employment, subject to reasonable restrictions, making it a fundamental right thereof68

The Court, in its analysis, found that the result is invidious discrimination perpetrating sexual differences. Moreover, it places restrictions on a citizen's right to be considered for employment, which is a facet of the right to livelihood. The court observed that the word "only" in Article 15 is problematic as it allows indirect discrimination by employing the "sex plus" factor that is, article 15 inherently doesn't prohibit the state from discriminating on the ground of sex coupled with some other ground thus constituting the "plus" but only prohibits discrimination on basis of sex alone. Therefore, the court concluded that direct as well as indirect discrimination under this article should be prohibited to overcome this problem,

AB Parens patriae power of the State

The justification of Section 30 under the ***'parens patriae'*** power of the state was out-rightly rejected by the court stating that subject matter of doctrine can only be adjudged on two counts: in terms of its necessity and assessment of any trade-off or adverse impact if any. Also, the power is subject to constitutional challenge on the ground of the Right to Privacy and young people of India should be allowed to make their own choices and in this age of the internet, they are well aware of what is best for them.[69]

OBSERVATION -

---

[67] *Supra Note 46, at 20*
[68] *Supra Note 46, at 20*
[69] *Supra Note 46, at 20*

© 2022 International Journal of Advanced Legal Research

The case exemplifies how the essence of the Constitution lies in the dynamic and purposeful interpretation of its text, and how the constitutional Courts give it life by doing so. Dynamic Interpretation protects the Constitution's long-term viability. Constitutionalism's goal is to transform society, and dynamic interpretation allows for progressive adjustments and the realization of rights as societies grow. The rights of women, as stated correctly in the judgment, were not achieved when the legislation was enacted, and the goal of the Constitution authors in incorporating Articles 14, 15, and 16 was to ensure equality of rights between men and women, and it was the state's responsibility to ensure this. When attempting to classify people based on their gender, it should be done sensibly.

III SECRETARY, MINISTRY OF DEFENCE V. BABITA PUNIYA AND ORS.2020[70]

The legacy of Anuj Garg was furthered in Secretary, Ministry of Defence v Babita Puniya. The Court expressed the strongest displeasure at the submissions before it that reflected how polarized the society and its resultant laws are. The Court continued to express concern over how we relegate 'marriage, pregnancy, family responsibility to the status of inevitable disadvantage'. The Court enlisted the achievements of the women officers who defied all limits to serve the Indian Army. The Court expressed the strongest displeasure at the submissions before it held that laws reflected how polarized the society and its resultant laws are

FACTS OF THE CASE –

- In 2003, an advocate Babita Puniya instituted a writ petition like PIL to grant women engaged on Short Service Commissions (SSCs) in the Army seeking parity with their male counterparts in obtaining PC (Permanent Commissions).
- On 15th Feb 2019, MoD issued a circular granting PCs to SSC women in officers in eight arms or services of the Army, in addition to JAG and AEC.
- But it also stated that on the grant of PC, women officers will be employed 'in various staff appointments only'[71]

ISSUES FOR CONSIDERATION –

I Whether women appointed under SSCs can have equal opportunity in PCs like men counterparts?

---

[70] Secretary, Ministry of Defence v. Babita Puniya (2020) 7 SCC 469

[71] Harshit Bhimrajka, 'Secretary, Ministry of Defence v Babita Puniya & Ors.: a case study' (ipleaders, 16 August, 2020) < https://blog.ipleaders.in/secretary-ministry-defence-vs-babita-puniya-ors-case-study/> accessed 13th December, 2021

© 2022 International Journal of Advanced Legal Research

II Whether 15th February 2019 circular issued by the Ministry of Defence is arbitrary or not?[72]

JUDGEMENT OF THE CASE –

Justice Chandrachud, ***Justice Ajay Rastogi*** on the bench

1. The Court held that the Army had no justification for adopting an exclusionary approach towards women in this regard.
2. Court held that all women officers on SSC shall be considered for the grant of PC
3. The expression 'in various staff appointments only' shall not be enforced
4. The Court held that SSC women who are granted PCs will be entitled to all consequential benefits in parity with male counterparts
5. A list of directions was issued granting SSC women officers Permanent Commissions and entitled to all consequential benefits (promotion and financial).
6. Where the state and Army, as an instrumentality of the state, differentiated between men and women, the burden falls squarely on Army to justify such differentiation to be reasonable 73

ANALYSIS OF THE JUDGEMENT –

The Supreme Court bench led by ***Justice D.Y Chandrachud*** challenged the notions given by the Union and stated that they are entrenched in stereotypical assumptions of ascribed gender roles for women. Moreover, it is a clear ***violation of their fundamental rights guaranteed*** under Article 14. He said that although Article 33 did allow for restrictions on Fundamental Rights in armed forces it is also clearly mentioned that it could ***be restricted only to the extent that it was necessary to ensure the proper discharge of duty and maintenance of discipline***. The court underlined the statement - that it is a greater challenge for women officers to meet the hazards of service owing to their prolonged absence during pregnancy, motherhood, and domestic obligations towards their children and family – ***is a strong stereotype that assumes domestic obligations to rest solely on women*** [74]

CONCLUSION –

This decision ensures the women's position in the Indian Army and also prevails in gender

[72] Meghna Reddy, 'Case Analysis: Secretary, Ministry of Defence v Babita Puniya & Ors (2020) (Legal Bites, 30 June, 2021) < https://www.legalbites.in/case-analysis-defence-v-babita-puniya-2020/ > accessed 13th December, 2021

[73] *Supra Note 61, at 25*

[74] *Supra Note 60, at 25*

© 2022 International Journal of Advanced Legal Research

justice in the Army. ***It removed the blanket restrictions imposed on the women officers for holding higher rank posts***. It is rightly observed by the decision given by the bench headed by Justice Chandrachud that it is an insult to women officers and the Indian Army also when aspersion is cast on women, their potential, ability, and achievements in the army. It rejects and attacks the stereotypes that are created against women in society by saying that the private sphere, after all, is not the concerned area for women only. After this landmark order, the ***path to gender equality has certainly been remarkably heralded which shall ensure that women are no longer denied permanent commission or denied command posts!*** Even women officers in the Air Force and other streams shall benefit immensely from it as from now onwards they cannot be denied command posts nor be denied the highest post of Chief also. This judgment shall always be remembered as one of the best judgments which heralded gender equality in defense services also which includes all the services – Army, Navy, and Air Force This judgment acknowledged transformative qualities in ringing constitutional feminism.

IV. LT. COLONEL NITISHA AND ORS. V. UOI 2020[75]

One of the most significant developments post-Babita Puniya took place in Lt. Colonel Nitisha and Ors. v Union of India (2020) where the Apex Court dealt with the implementation of the Babita Puniya judgment by the Government in providing permanent commissions to eligible women Army Officers

FACTS OF THE CASE -. In this case, the validity of the requirements that had been put in place by the army to decide upon the grant of a Permanent Commission to women Short Service Commission officers as laid down in the Babita Puniya Case was challenged as being violative of Article 14.

JUDGEMENT OF THE CASE – The order listing the regulations was violative of Article 14

Unprecedently, courts acknowledged ***"indirect discrimination" and 'structural discrimination'*** as parts of Indian equality law. The Court identified how indirect and systematic discrimination was perpetrated by ***'facially neutral criteria'***. It again adopted the transformative approach while identifying how Article 14 intends to protect women, in this

[75] Lt. Colonel Nitisha and Ors. Union of India (on 25th March, 2021) WPC 1109 of 2020

© 2022 International Journal of Advanced Legal Research

instance from hidden and latent acts of discrimination. It went beyond the mere wordings of the section and understood the true protection Article 14 intends to provide. ***Justice Chandrachud*** explored the ***theoretical foundations of Indirect Discrimination and mentioned how indirect discrimination directly targets the understanding of substantive equality***.[76]

Therefore, the court concluded that to achieve substantial equality, Indirect Discrimination, even without discriminatory intent, was to be prohibited under Article 14

TREASA JOSFINE V. STATE OF KERALA 2021[77]

FACTS OF THE CASE –

Permanent post of a security officer in a company under Section 66(1)(A) of the Factories Act, 1948 during night shift made only male members eligible for the post, barring women from applying for the same.

ISSUE FOR CONSIDERATION –

I. Whether Section 66(1)(A) of the FA violative of Articles 14 and 15?

JUDGEMENT – Section was not declared unconstitutional.

ANALYSIS OF THE JUDGEMENT –

Court did not declare the section as violative of Art.14, 15, and 16, as it considered that Section 66(1)(A) was a protective section intending to protect the women against hazards of late-night works at certain places and domestic commitments of the women were also looked into as courts felt that they were relevant factors to consider.

However, the court remarked that such ***protective measures cannot be used to deny engagement to a woman who does not need the protection anymore and is eligible for the post***.

Relying on Babita Puniya to emphasize the t***ransformative essence of the society remarked that the world has moved forward and women who were relegated to the roles of homemakers during the times when the enactment had been framed have taken up much more demanding roles in society as well as in economic spheres***. Women are being engaged to work during all hours in several industries and professions requiring round-the-clock labour and have proved themselves quite capable of facing the challenges of such engagement. This cannot be used to

[76] Lt. Colonel Nitisha and Ors. Union of India (*Indian Kanoon*) < https://indiankanoon.org/doc/190567716/ > accessed 13th December, 2021

[77] Treasa Josfine v. State of Kerala (on 9 April, 2021) WPC 25092 of 2020

© 2022 International Journal of Advanced Legal Research

deny opportunity to a deserving woman. [78]

CONCLUSION –

We can note that the court here took the transformative approach but diluted it to some extent by not striking down a section denying the equality of employment to women. Rather it remarked that the section could be sustained as a protective measure but cannot be used by the state to deny consenting and deserving women their turn of employment. It noted that Articles 14 and 15 imposes upon state obligations to create conditions that enable women to work efficiently at all hours of the day.

THUS, SUMMING UP – As a result of examining the timeline of all cases involving gender equality in the workplace, we can detect a shift in the criteria employed by the courts to refute and dispel gender stereotypes and assumptions. The court began by being very rigorous and literal in its approach - using the Formalist Approach, it denied women their rightful opportunity to work – but eventually realized the substance of Article 14 and 15 utilizing the Transformative Test. This part aims to protect women not just from overt acts of discrimination, but also from society and gender norms ingrained in executive and legislative commands. By reading the spirit rather than the wording of Articles 14 and 15, this approach is the right step toward understanding equality in its essence and including all types of unfair discrimination.

---

[78] Treasa Josfine v. State of Kerala (*Indian Kanoon*) < https://indiankanoon.org/doc/34704603/ > accessed 13th December, 2021

© 2022 International Journal of Advanced Legal Research