

ROLE OF JUDICIAL ACTIVISM IN SAFEGUARDING THE RIGHTS OF WOMEN IN INDIA

Dr. Mohan Singh Saggi,
Assistant Professor,
Baba Farid Law College, Faridkot.
Email: drmssaggi@gmail.com

Judiciary in India has played a very significant role for the protection of rights of the people. The constitution has assigned an active role to the judiciary for the protection of fundamental rights and liberties of the people of India. The traditional role of the Judge was to act as an impartial arbitrator. But now, he actively participates in the debate by supporting one side or the other and this process has been popularly designated as judicial activism.

In the recent years, the Supreme Court of India has played a proactive role in realizing the human rights of women in India by laying stress on the concept of gender equality, gender equity and gender empowerment. To ensure fairness, measures must often be put in place to compensate for the historical and social disadvantages that prevented women and men from operating on equal footing.

Presently, judicial activism has touched almost each and every aspect of life ranges from human rights issues to environmental protection. The Judicial activism has considered a number of wrongs such as, ban on smoking in public places; protection of prisoners against inhuman treatment in jails; rape of working women, their rehabilitation and compensation; child prostitution; child labor; protection of children from sexual abuse; protection of ecology and environment pollution and the like.

The present paper is a modest attempt to explore the role of judicial activism in safeguarding the rights of women in India.

As the term judicial activism has not been defined anywhere in the Constitution of India or in any Indian statute, many Indian jurists have made an attempt to define the term 'judicial activism'. In the words of Justice J.S. Verma, "Judicial activism must necessarily mean the active process of implementation of the rule of law essential for the preservation of a functional democracy."¹ Former Chief Justice of India A.M. Ahmadi defined judicial activism, "as a necessary adjunct of the judicial function since the protection of public interest as opposed to private interest happens to be its main concern."²

In simple words, judicial activism is a sharp weapon with judicious teeth which has kept the authorities at the helm of affairs on toes to discharge their functions in the rightful and dutiful manner.

1.0 Judicial Activism and Rights of Women

There is no denying the fact that since ancient times when women had been compared to goddesses in our country, ironically, they have been treated like rags. Although there is a huge difference the way women were looked at 67 years ago and today. But the atrocities against women are still rising rampantly and they still are deprived of certain rights which they deserve as men.

Though constituting half the population of the world and often referred to as the 'better half of man', women throughout history have had the worst deal at the hands of the society. There are various provisions in the Constitution as well as other laws to prevent atrocities against women and gender inequality. However, these legislations remained only on papers and nothing concrete could be done till the time the judiciary became active and decided to remove all atrocities against women by implementing the prevailing legislations. There are numerous cases where the Supreme Court has interpreted laws in favor of women, some are cited here:

2.0 Gender Equality and Uniform Civil Code

Article 44 of the Constitution of India envisages a uniform civil code for all citizens throughout the territory of India. However, women in India under Hindu, Muslim and Christian personal laws continue to suffer discrimination and inequalities in their personal matters of marriage, divorce, inheritance and

succession. Indian women continue to clamor for a uniform gender code to enjoy equality and justice irrespective of the community to which they belong.³ It is unfortunate that till today, the ideal of uniform civil code under Article 44 is yet to be achieved. Towards the implementation of a uniform civil code, positive efforts have been made by the Supreme Court which were reflected in its various pronouncements from time to time.

In *Mohammad Ahmed Khan v. Shah Bano Begum* (AIR 1995 SC 1531: (1995) 3 SCC 635) popularly known as the *Shah Bano Case*, the Supreme Court acknowledged that “it was a matter of regret that Article 44 of our Constitution had remained a dead letter.” The Court held that a Muslim woman would be entitled to maintenance under Sec 125 of Cr. P C if the amount received by her as ‘dower’ under personal law is not sufficient for her sustenance. The Muslim fundamentalists considered the judgment as a direct interference in their personal law. The Supreme Court’s reliance on Article 44 in upholding the right of maintenance. The Central government fearing that annoyance of Muslims would cause detriment to the party in the forthcoming election to a state legislature enacted a new law—The Muslim Women’s (Protection of Rights on Divorce) Act, 1986 to exclude the Muslim divorcees from the purview of Sec. 125 of Cr. P C. ⁴ The activists have rightly denounced that it “was doubtless a retrograde step.” ⁵ The *Shah Bano* ruling pointed how the Court’s step forward towards a uniform civil code was pulled back by the legislature in the name of vote – bank politics.

In another liberal interpretation of Article 44 in *Sarala Mudgal v. Union of India*, (1995) 3 SCC 635.) the Apex Court saw the implementation of Article 44 as imperative for both protection of the oppressed and promotion of national unity and integrity. The judgment in *Sarala Mudgal* has aroused the hope that the evil of gender oppression in the Indian society will soon be removed.

Fortunately in its subsequent decisions the Court had clarified that its decision in *Sarala Mudgal* was only an obiter dicta and not legally binding on the Government. In *Ahmedabad Women’s Action Group (AWAG) v. Union of India*, the Supreme Court gave a reserved judgment and held that the matter of removal of gender discrimination in personal laws “involves issues of state policies with which the Court will not ordinarily have any concern.” ⁶

The judicial pronouncements seem to encourage the implementation of the constitutional philosophy of uniform civil code under Article 44. A uniform civil code is vital for the protection of the oppressed, promotion of national unity and solidarity for safeguarding the human rights of women in India irrespective of the religious community they belong and moreover, to bring the national laws in conformity with the legally binding provisions of international law in the form of various international human rights instruments already ratified by India. ⁷

3.0 Gender Equality in Public Employment

Issues concerning discrimination against women in the area of public employment were examined as to whether they violated the constitutional mandates of equality enshrined in Articles 14, 15 and 16 of the Constitution of India.

C.B. Muthamma v. Union of India, AIR 1979 SC 1868 8 (2) was the first instance to raise the issue of gender discrimination during the post-emergency period. *C.B. Muthamma*, a senior member of the Indian Foreign Services challenged Rule 18 (4) debaring married women the right to be appointed to that service and Rule 8 (2) requiring the woman appointed to the service to obtain written permission from the government before her marriage of the Indian Foreign Services (Recruitment Seniority and Promotion) Rules, 1961 as violation of her right to equality under Articles 14, 15 and 16 of the Constitution. These rules were however, not applicable to the men. The Supreme Court upheld the contentions and declared both the impugned Regulations as discriminatory against women and a blatant disregard of Articles 14, 15, and 16 of the Constitution. A few years later, the issue of gender discrimination in the domain of public employment again came up before a three judge Bench of the Supreme Court in *Air India v. Nargeesh Meerza*. (AIR 1981 SC 1829). It, however, was an instance where the Court adopted a mechanical approach to eliminate gender discrimination in public employment.

Neera Mathur v. Life Insurance Corporation (AIR 1992 SC 392) was an instance where the Supreme Court addressed the issue of gender discrimination not on the basis of Article 14 but on the basis of Article 21 to address the issue of the right to privacy and dignity of working women.

Towards the late 1990's the gender issues that came up before the Court started shifting from non-discrimination to a conducive working environment at workplaces. The coming into force in 1996 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has gained an impetus to the realization of full equality and true dignity of women in society.⁸

The ratification of CEDAW in 1993 has placed an additional bonus upon Supreme Court to eliminate all forms of discrimination against women. The Court used CEDAW to reformulate the concept of 'gender equality' in a gender biased Indian society.⁹

Vishakha v. State of Rajasthan (AIR 1997 SC 3011: (1997) 6 SCC 241) was an instance of a much more liberal view of gender equality formulated on the lines of CEDAW. In *Vishakha*, Chief Justice R.S. Verma observed that sexual harassment of a working woman at the workplace was not only contrary to gender equality guaranteed by Article 14 but it also offended a woman's right to be gainfully employed guaranteed by Article 19 (1) (g) of the Constitution and the right to privacy guaranteed under Article 21 of the Constitution. The *Vishakha* judgment is significant at a symbolic level for its validation of the problem of sexual harassment and recognition of the fact that it is an experience many women are almost routinely subjected to in the workplace.¹⁰

Apparel Export Promotion Council v. A.K. Chopra (AIR 1999 SC 625) is the first case in which the Supreme Court applied the law laid down in the case of *Vishakha's* case. The Court held that each attempt of sexual harassment of female at the place of work results in violation of the fundamental right to gender equality in Article 14 and the right to life and liberty in Article 21 of the Constitution. As such the courts are under a constitutional obligation to protect and preserve those fundamental rights.¹¹

With these judgments, some headway was made towards achieving gender equality in the employment of women in public domain. Despite that discrimination against women continued both in private as well as public domain of employment.

4.0 Gender Justice and Adultery

Although the Court's liberal approach to the issue of gender discrimination in case of employment proved beneficial for women. But the Court's protectionist attitude towards women relating to the penal provisions of adultery cannot always be considered as women oriented. This is evident from an examination of some judgements of the Supreme Court which though appear protective but were in fact anti women and reflected archaic Victorian values.

The Supreme Court invoked the constitutional mandate of Article 15 (3) to defend its protective attitude towards the penal provisions relating to adultery. The challenge to these provisions have come from the adulterer as being discriminatory against men and also from the adulterer's wife for not being able to prosecute her husband as being discriminatory against women as the following cases illustrate. The Court adopted a paternalistic approach towards women in their involvement to the offence of adultery.

Yusuf Abdul Aziz v. State of Bombay (AIR 1954 SC 321) was the first instance when the penal provision of Sec 497 of IPC was challenged as violative of Articles 14 and 15 of the Constitution. Yusuf Abdul contended that Sec. 497 of IPC violates the right to equality on the ground of sex since it punishes only the men in the offence of adultery and exempts women from punishment though women may be equally guilty. The Court relied upon the mandate of Article 15 (3) to uphold this provision.

In *Sowmitri Vishnu v. Union of India* (AIR 1985 SC 1618) the validity of Sec 497 of IPC was once again challenged before a three judge Bench of the Supreme Court. Sowmitri Vishnu contended that Sec. 497 of IPC recognizes only the right of the husband of the adulteress as an aggrieved party but does not confer similar rights upon the wife of the adulterer. "It was contended that such a provision was flagrant instance of gender discrimination and 'male chauvinism.'¹²

Subsequently in another similar instance in *Revathi v. Union of India* (AIR 1988 SC 835) the Supreme Court held that Sec. 198 (2) of the Criminal Procedure Code (Cr. P C) which gives the husband of an adulteress the right to prosecute the adulterer but does not award similar rights to the wife of the adulterer is not discriminatory. Thus, the Court validated the provisions as enjoying a constitutional mandate under Article 15 (3) of the Constitution.

The Constitution of India forbids discrimination on the grounds of sex but permits protective discrimination on the grounds of gender. Such protective discrimination may not always be women-oriented. Whenever the Court finds so, it must strike it down as being against equality. "There cannot be reasonable classification on the grounds of gender as classification on the basis of gender is per se unreasonable."¹³

Gender jurisprudence has emerged in India due to pro-active steps taken by the judiciary in this regard. The Court has laid down elaborate guidelines to prevent sexual harassment of women at workplaces.¹⁴

5.0 Miscellaneous Cases

5.1 Right to Maintenance

Vaddeboyina Tulasamma v. Vaddeboyina Shesha Reddi, 1977 SCR(3)261 the Supreme Court in this case highlighted the Hindu female's right to maintenance as a tangible right against property which flows from the spiritual relationship between the husband and wife. The three judge bench held that Section 14(1) of the Hindu Succession Act, 1956 must be liberally construed in favor of the females so as to advance the object of the Act. This section makes female Hindu a full owner of a property, instead of a limited owner.

5.2 Christian Women's Right to Property

In the case of Mrs. Mary Roy etc. v. State of Kerala & Ors, 1986 AIR SC 1011 the Supreme Court held that Christian women are entitled to have an equal share in their father's property. Till then, Christian women in Kerala were governed by the provisions under the 1916 Travancore-Kochi Christian Succession Act. Under this Act, daughter can inherit only one fourth of the share of the sons in her father's property. The Bench gave a liberal interpretation that benefitted the Christian women in Kerala and brought them within the ambit of the Indian Succession Act, 1921. Better still, the ruling granted equal rights to Christian women with retrospective effect.

5.3 Prostitute is a Woman

What if she is a prostitute, she is a woman and human being too: Budhadev Karmaskar State of West Bengal (LC-2011-SC-CRL-Feb 14) In this case, a sex worker was brutally murdered by appellant Buddhadev. The incident was witnessed by four persons, Abida, Maya, Asha and Parvati. The Apex Court in its division bench strongly recommended to prepare schemes for rehabilitation all over the country for physically and sexually abused women commonly known as prostitutes as we are of the view that the prostitutes also have a right to live with dignity under Article 21 of the Constitution of India since they are also human beings and their problems also need to be addressed. Not only this, but the bench acted quite actively and gave the directions to Central and State government to prepare schemes for giving technical/vocational training to sex workers and sexually abused women in all cities in India. The schemes should mention in detail who will give the technical/vocational training and in what manner they can be rehabilitated and settled by offering them employment.

Generally, our society views prostitutes as women of low character but, refuse to look at their situation from their perspective. The bench in this case must be appreciated not just for recognizing their right under Article 21 and directing the state and central governments to act for their welfare but also, to understand their perspective and impoverished situation. They are equally woman and equally human. It is that it was obvious that appellant would be punished because the eyewitnesses were there but, the message and directions it gave truly are an account of judicial activism.

5.4 Live in Relationship

In the case of Dhannulal and ors. V. Ganeshram and ors¹⁵ it was held by the division bench that continuous cohabitation of a couple together that is, 'live-in relationship' would raise the presumption of marriage unless otherwise proven. Usually, our society views the woman who lives with a man without getting married as his 'keep' or 'mistress' and looks down upon her which clearly means that she is deprived of her right to choose whether to marry or not. While it is also the societal fact that man doing this will never be condemned, the woman is seen as characterless and does not get the rights of legally-wedded wife whereas she does all her duties of a wife. Supreme Court in this case decided to take a step to change such orthodox notions and gave women their right to choose whether to marry or not.

5.5 Unwed Mothers Need Not Name The Child's Father

In the case of ABC v. The State (NCT of Delhi) SLP (Civil) No. 28367 of 2011, a DB of the Supreme Court in this latest and landmark judgement declared that now, an unwed mother is not bound to disclose the name of child's father and also, she would have all the rights as a guardian to child under guardianship rights. She need not take father's consent for guardianship rights. Not only it was necessary to protect the child from social stigma but, also to protect mother's fundamental right. It was certainly an avant-garde verdict on gender equality.

The Court emphasized that Section 6(b) of the Hindu Minority and Guardianship Act, 1956 makes specific provisions with respect to natural guardians of illegitimate children, and in this regard gives primacy to the mother over the father. Mohammedan law too accords the custody of illegitimate children to the mother and her relations. Name of father is always a myth while it is only mother whose name the person can always be sure of because she gave birth to the child. This is one of the reasons why a mother should be given primacy or at least equality to exercise guardianship rights over the child. This judgment is evident of the fact that the highest court of land is deeply indulged in empowering women because it is the key to Nation's development.

5.7 Liability of Maintenance Allowance

In the case of Mohd. Ahmed Khan v. Shah Bano Begum, 1985 SCR (3) 844, the Supreme Court gave its verdict in favor of Shah Bano and ordered maintenance from her ex-husband under Section 125 of the Criminal Procedure Code (with an upper limit of Rs. 500 per month) like any other Indian woman. The judgement was not the first granting a divorced Muslim women maintenance under Section 125. But a voluble orthodoxy deemed the verdict an attack on Islam. This was a milestone in the Muslim women's search for justice. However, the Muslim Women (Protection of Rights on Divorce) Act, 1986 had been seen as making an attempt to dilute the effects of this judgement. The Act was seen as discriminatory as it denied divorced Muslim women the right to basic maintenance which women of other faiths had recourse to under secular law.

In the case of Daniel Latifi v. Union of India , 2001(7) SCC 740 a Constitutional Bench of the Supreme Court held that liability of Muslim husband to his divorced wife arising under Section 3(1) of the Act to pay maintenance is not confined to iddat period. The Bench held that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within iddat period in terms of Section 3(1) (a) of the Act.

5.8 Protection of Women from Acid Attacks

Acid attacks on women and girls in 2013 and 2014 have been 56 and 47 in number respectively as per the statistics of acid survivors' organization. Acid attack on a women is equal to taking away her identity from her and such rampant increase in this heinous crime was leading to terror amongst women and the Supreme Court took a vital step towards the safety of women in country. In case of Laxmi v. Union of India (2014) 4 SCC 427, the Supreme Court ordered to regulate and restrict the sale of acid in order to stop acid attacks on women. The Supreme Court ruling is a welcome step received with great enthusiasm. These attacks disfigure women and most of them either suffer from mental depression, live in isolation or commit suicide.

5.9 Obscene Message on Internet

Tamil Nadu Vs Suhas Katti (2004) was the first case involving conviction under the Information Technology Act, 2000, related to the posting of obscene messages on the Internet. The case was related to the posting of obscene and defamatory messages about a divorcee woman in a Yahoo messenger group. The accused was convicted and sentenced in accordance with the aforementioned sections with fines and imprisonment. The impact of the case would be far reaching. The internet has been mis-utilised by many but the laws for it were hardly stringent. The implementation of Information Technology Act in this case would be beneficial for the public. It has set a benchmark for the people and has given them strength to lodge cases in case of harassment.

5.10 Re-opening of Dance Bars

The Supreme Court on July 16, 2015 ordered to go ahead to the reopening of Dance Bars in the state. On 15 August 2005, the Home Minister R.R. Patil announced the closing of all dance bars in the State of Maharashtra as these dance bars were degrading the moral standard of the youth. Due to the ban, 75,000 girls became unemployed, and although a rehabilitation program was prepared but due to its non- implementation many of the girls had to leave the state or had to resort to prostitution. After eight years, the Supreme Court finally struck down the ban as the Act prohibiting dancing, violated the right to carry on one's profession under Article 19 of the Constitution. The claims of the government that some dance bars lead to trafficking and prostitution may be valid, but it is true that a majority of the girls make an honest living by dancing, and taking that form of employment without proper means for rehabilitation by the government is incredibly unjust.

5.11 Two Finger Test Is Like Getting Raped Once Again

In the case of *Lillu @ Rajesh & Another vs. State Of Haryana*¹⁶ for the first time, the Supreme Court realized the agony and trauma of a rape victim who had to go through two finger test give her character certification and after analyzing through various precedents, held that it is violation of victim's right to privacy and dignity.

The Court held that: rape survivors are entitled to legal recourse that does not re-traumatize them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. Thus, in view of the above, undoubtedly, the two finger test and its interpretation violate the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, be given rise to presumption of consent."

The decision was definitely appreciable as it gave a sense of confidence and security to the rape victims. It did not grant any new right but, it stopped the violation of their right to privacy and dignity which was going on from years and years and that too was of no use in the investigation.

5.12 On Talaq

In the case of *Shamim Ara vs. State of U.P* 2002 (7) SCC 518 the Supreme Court held that the requirements of a valid talaq are:

- (i) That the talaq must be for a reasonable cause ; and
- (ii) It must be preceded by attempts of reconciliation between the husband and the wife by two arbiters- one chosen by the wife from her family and the other by the husband from his family. If their attempts fail, talaq can be affected.

5.13 Rape Victims

The Supreme Court guidelines evoked in the case of *Vishaka and others v. State of Rajasthan and others* owing to the gang rape of *Bhanwari Devi*, a social worker (Saathin) by a group of Thakurs as she attempted to stop a child marriage in their family. *Bhanwari* tried to stop *Ramkaran Gujjar's* infant daughter's marriage. On account of her efforts to stop child marriage, she was subjected to social boycott, and was gang raped by five men including *Ramkaran Gujjar* in front of her husband in September 1992. In December 1993, the High Court stated, "it is a case of gang-rape which was committed out of vengeance." A petition filed in the Supreme Court under the name 'Vishaka', asking the court to give certain directions regarding the sexual harassment that women face at the workplace. Consequently, the Supreme Court issued the *Vishaka* guidelines to prevent sexual harassment of working women on 13 August 1997.¹⁷

The judgement, in this case where the Court framed guidelines for establishing re-dressal mechanisms to tackle sexual harassment of women at workplaces. Though the decision has come under considerable criticism for encroaching into the domain of the legislature, the fact remains that till date the legislature has not enacted any law on the point. It must be remembered that meaningful social change, like any sustained transformation, demands a long-term engagement.

5.14 Amendment in Rape Laws

The *Nirbhaya Case* (2012) where 4 out of 5 rape accused received the death sentence and as a result of this case the rape law was amended to go beyond penile-vaginal intercourse. The new definition penalizes penetration of any orifice of the woman with any part of the man's body or with any object.

The aftermath was that six new fast track courts were constituted to decide rape cases at the earliest. Various laws were passed and amendments were made, which included a mandatory minimum sentence of 20 years in case of a rape as well as the widening of the definition of rape. In spite of all these changes there is still a lot that needs to be done. The marital rape is still not considered a crime is a serious issue to be addressed. Rape has been rampant in India for years. There is need to change the psychology of the people to avoid such happenings.

Om Prakash vs. Dil Bahar (2006), a rape accused could now be convicted on the sole evidence of the victim, even if medical evidence did not prove rape. Although no evidence of rape was found, the accused was given a seven-year sentence based on the statement of the victim and eyewitness.

6.0 Conclusion

The Supreme Court has understood the very fact that women empowerment is the most indispensable route to country's development and cannot be ignored except at the stake of country's deterioration. The efforts of the judiciary to break and do away with all such traditional norms that look down upon women, has given judgments to prevent violence against women and to put them equally as men in the society. In spite of all this women had always been considered as the weaker sections of the society and had been a victim. In the country of Gods and Goddesses, it is quite a famous shloka of Sanskrit that must be adhered to: 'yatra naryastu pujiyante, tatra devta ramante' meaning where women are worshipped, there God resides.

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