

A Road to Equality: The Relationship between Law and Women in India

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Abstract

The Supreme Court relies on formal equality theory. Still, since the Constitution mentions "special" provisions for women and other historically disenfranchised groups, the Court has adopted a substantive equality model that recognizes differences between men and women and enhances the unequal consequences of those differences. But laws have been androcentric since its existence. It took so many years of the judiciary to reflect on women's issues reveal women's negation from the law's ambit. This paper argues that law can become a tool of empowerment as well as an obstruction for women. To put the women's issues on the front, it is necessary to represent the women's community who have specialized knowledge of circumstances that may help interpret a case. A contextual understanding of any event is essential for bringing in a feminist judgment. Laws are generally based on common knowledge, which is structured through social norms. A contextual understanding of law reveals how a particular rule is inapplicable in every sphere of judgment. Laws reflect society, and since it involves spaces of patriarchal notions, women have often been reluctant to raise their voices in such areas. The process of the court procedures, filing a case, etc., involves a tedious and monetary aspect, which has led many women to stay outside India's legal arena.

Keywords- *Feminist judgement, Empowerment, Contextual understanding, Government, Law*

INTRODUCTION

In contemporary times, it is imperative to analyse the relationship between law and women. We have witnessed the different cases of women and few women through ages, but with time, one can notice the change. Henceforth it is necessary to reformulate the definition of judgement, which might pave the way for the Indian legal system. The colonial history gives us an impression of the struggle women had to represent themselves in a

space surrounded by the male gaze and patriarchal notions. Hence, to understand the relationship, one needs to trace back the Indian legal system's trajectory and how laws have been constructed to maintain the status quo. Tracing through various contemporary legal decisions, this paper puts up the background and analysis of each case and further elaborates on the challenges. A new method of looking at the legal choices and events

has to be invented to shape India's legal system's new face, representing marginalized communities.

The Colonial History of Women in the Field of Law

Regina Guha applied to be enrolled as a pleader of the Court of the District Judge of Alipore after completing her MA in 1913 and a Bachelor of Laws in 1916 from Calcutta University. In Britain, only three years ago, Gwyneth Bebb, along with Karin Costelloe, Maud Ingram, and Frances Nettlefold, applied to the Law Society to appear for the preliminary examination to become solicitors after pursuing law. But the Law Society barred them, stating that as women; they would not qualify to become solicitors in the first place. But they challenged this decision, *Bebb vs. Law Society*, arguing that 'women' were 'persons' within the meaning of the Solicitor's Act 1843. A few years later, however, their plea was heard and enacted.

In India, a similar trajectory followed as the legal profession was in the public domain, and the men were quite reluctant to allow the ladies in. The hindrance could be reflected in 'person cases' (like *Bebb vs. Law Society* and *Bradwell vs. Illinois*) where judges proposed that women were not 'persons' to enter the legal profession, even though the legislation would use a gender-neutral 'person' instead of a gender-specific 'he' or 'him.' Regina Guha's application was heard but concluded that only men are entitled to be admitted as pleaders. Guha's arguments were similar to those rejected in *Bebb vs. Law Society*. She contended that under the General Clauses Act, the rules under the Legal Practitioners Act, though, refer to men but include women. But in response to this argument, it was stated that a case of a lady being allowed to

practice in the Indian courts was never witnessed when the Legal Practitioners Act was passed. The Court held that the General Clauses Act was not meant to affect the existing law and practice regarding legal practitioners' admission. It thus paid followed the general trajectory of the 'person cases.'

In another five years, Sudhanshubala Hazra initiated the second 'person case' in India, which would lead to a series of remarkable events. In 1917, Hazra applied to Calcutta University, wanting to appear as a private candidate in the preliminary examination of law, which was to be held in 1918. The application was transferred to Patna University, which refused to give her permission to appear for the Bachelor of Law examination due to the attendance. Her insistence and her identity as a Bengali led her to appear as a private candidate in the preliminary law examination of Calcutta University. In 1921, after receiving a B.A. degree in law from Calcutta University, she enrolled as a pleader in the Patna district court. But this brought in stiff opposition from the Vakil's Association of the Patna high court who had staged a protest and also became a site of amazement for the audience where they were curious to see the "lady Bachelor-of-Law from Orissa" who had applied to the High Court to be enrolled as a pleader.

The Patna high court judges delivered the decision on November 28, 1921, reiterating Regina Guha's case. It was declared that under the provisions of the General Clauses Act of 1868 and 1897, a woman, although fully qualified, was not entitled under the Legal Practitioners' Act to act as a pleader because of her sex as she was not a 'person.'

With the Patna high court judgment, an effort to amend the Legal Practitioners' Act began. Through Madhusudan Das and Sudhanshubala's sister Sailabala Das's efforts, the legal profession's gates to women seemed to be opening. Das collaborated with Hari Singh Gour, a lawyer, social reformer, and a member of the Central Legislative Assembly and was keen to amend it. In February 1922, Gour introduced a resolution to remove sex-based exclusion in the legal profession. He argued that the removal of sex disqualification would not be complete unless the house rejects the Statute book, which hinders the female folk from the practice of law. The Legal Practitioners (Women) Act was finally passed in 1923, stating that "no woman shall, by reason only of her sex, be disqualified from being admitted or enrolled as a legal practitioner or from practicing as such."

Deconstructing the Law

The gendering of citizenship draws attention to the way the state constructs "women"- primarily in their difference from men by formulating laws and policies specific to them, but also by differentiating among them: thus, women may be "different" in law and policy according to their different religious identities, or in terms of categories of "good" and "bad" (housewives and prostitutes), standard and deviant (the "deviant" consisting of the needy, insane, mentally disabled, or "criminal" populations), working and nonworking, child and adult. The construction of "women" in these ways - both as a unitary category and as a differentiated one - is primarily the state's work in its governmental function. But equally, though within a different schema of political identity, the rights of "citizenship" propel women into an equal and "same" identity with men and

with other women, which is necessarily contradictory in its effects. Feminist consciousness of the limitations of progressive laws in the books, when not backed up by implementation or by the judgments of an enlightened judiciary, has grown acute. Those progressive and correct laws are a necessary minimal assurance of women's wellbeing and status is not questioned. But on the matter of pressing for additional legislation specifically geared toward women's issues like sexual harassment, sati, rape, pornography and obscenity, prostitution, domestic violence, and dowry, there is an increasing consensus that it's detrimental. Feminists are dubious about the stringent actions or punishment on the offenders hence fearful that conviction rates would decline further or that such laws would serve as a pretext for the state's arbitrary use of power. Feminists also fear that a "uniform" law, even if enforced on behalf of women, say in property rights, would seriously undermine customary practices in many parts of the country, for example, among tribal communities, some of which may have an already existing and operative structure and practice of gender egalitarianism or, more importantly, which face a threat to their community identities and culture from both the state and the mainstream/majority community. These criticisms of legal-reform struggles, it can be retorted, view feminist efforts around the law too narrowly since they discount other kinds of effects, those related to the process of these struggles rather than their ends, such as raised consciousness and awareness of legal rights among the women involved, the diffusive impact of the publicity (in the media and elsewhere) generated by such demands (even if in the form of hostility), and the value of lessons learned from political experience. Much important

feminist legal-theoretical work in India thoughtfully explores the limits and possibilities of law's potential for female emancipation, especially around the question of equality, rehearsing the familiar paradox of demanding that the law both privilege women's difference and overlook it in different contexts, according to the ends of real and substantial justice.

The Indian judiciary in the current times has taken steps in making equal space for women in the ambit of the law. We further need to delve deeper into how these judgments make women equal citizens and how their future legal battle would turn up.

In the current few years, Supreme Court and the High Court have taken the initiative of uplifting women's rights by deciding on intersections between discrimination and religious freedom. In the Haji Ali case (August 26, 2016), The Bombay High Court's decision regarding allowing women to enter the dargah's sanctum sanctorum, was in some ways, the first of the many progressive judgments. (Dr. Noorjehan Safia Niaz and Others vs. the State of Maharashtra and Others 2016). Since Haji Ali Dargah Trust was a public charitable trust, the Bombay High Court opined that it was open to all. The Court was against the practice of disallowing women from entering into the sanctum sanctorum, which was a violation of Article 14 (equality before law), Article 15, and Article 25 of the Constitution. While the Haji Ali Dargah Trust appealed against the Supreme Court's decision, they soon conceded (Rajgopal 2016).

On August 22, 2017 (the "triple talaq" case), the Supreme Court struck down the practice of talaq-e-biddat for being violative of Article 14 of the

Constitution (Shayara Bano v Union of India and Others 2017). The Court declared the practice to be arbitrary as it is instant and permanent. It leaves no room for reconciliation between the husband and wife, allowing a man to end a marital tie whimsically. The verdict was celebrated as it concluded countless Muslim women's struggle against the oppressive practice that had long been considered "good in law though bad in theology" (Shayara Bano v Union of India and Others 2017; Wire 2017).

On September 28, 2018 (the "Sabarimala" case) as well, the Supreme Court found the temple's method of not allowing women of menstrual age as being violative of their fundamental right under Article 25, which "equally" entitles everyone to freely practice religion (Indian Young Lawyers Association and Others vs. The State of Kerala and Others 2018). The Court held that the right under Article 25 shouldn't be specific to any gender. Justice D Y Chandrachud pointed out due to notions of "purity and pollution" associated with menstruation; the practice of untouchability shouldn't be practiced under Article 17.

In the case of Hadiya (formerly Akhila Ashokan) or the "love jihad" case, the Supreme Court supported the decision of a twenty-four-year-old woman to convert to Islam and marry a man of her choosing (ShafinJahan v Asokhan K M and Others 2018). The Court criticized the Kerala High Court's paternalistic approach when declaring her marriage with a Muslim man as null and void. The Court noted that an individual's constitutional freedoms could not be taken away due to patriarchal social norms, as had been done by the High Court when rendering a decision in favor of

the petitioner (Hadiya's father) was upheld by the Court.

On September 27, 2018 (the "Adultery" case), where the constitutionality of the procedural provisions concerning adultery was challenged, and the Court found the provisions unconstitutional (*Joseph Shine v Union of India* 2018). The Court highlighted that in the garb of protectionism, the impugned provisions led to women's subordination, reflecting an evolving understanding of gender justice. Further, regardless of marital status, a woman's sexual autonomy as a constitutionally guaranteed freedom was upheld by the Court.

A mixed or diversified opinion of the judges, coming through different rationales, becomes problematic. In the triple talaq case, the Court held the practice unconstitutional by a slim majority of three out of five judges. A detailed reading of the three judges' opinions, arguably the "majority opinion," shows that the judges hardly spoke in a familiar voice while invalidating triple talaq. While Justice R F Nariman and Justice Uday Umesh Lalit found the procedure to be unconstitutional and violating Article 14, Justice Kurian Joseph focused on how an Islamic, for instance, which is contrary, could not enjoy constitutional protection (Mandal 2017; *Shayara Bano v Union of India and Others* 2017). Similar cases of inconsistency in the opinions that together constitute the "majority opinion" can be found in the Sabarimala case and the Adultery case. The judges' inability to speak as one becomes critical when one attempts to distill the ratio decidendi (the reasoning that forms a particular decision). The ratio decidendi is the principle that a case establishes. It means that the lower courts, smaller

benches of the same Court, are bound to follow the principle while deciding on future cases with similar facts. The judges' varying rationales in concluding make it challenging to understand that the Court has laid down the principle. This lack of clear policies is likely to make it difficult for future litigants to place faith in these landmark decisions in pursuing their legal battles against discriminatory practices. While it is certainly worth celebrating the judiciary's broadly progressive approach, it is merely one source of "law" in the country. Worth equal attention are the initiatives, both legislative and otherwise, taken by governments in championing the cause of women's rights.

Challenges

The Indian legal industry has witnessed a growth in the legal firms post-liberalization. The "professional" hierarchal structure in law firms, international clients, and an emphasis on rankings and branding has reinforced a consideration of meritocracy. But women lawyers are hardly witnessed in the upper echelons of the legal system. Maternity leave was a significant constraint in advancing 75% of women working in law firms, 43% working in companies, and 52% in litigation. More than 20% of women in law firms meant losing out on promotion despite deserving it. Women lawyers are subjected to gender biases and discriminatory practices, which refer to women being allocated unchallenging work, being forced to be content with lesser remuneration than their male counterparts, and denying benefits and promotions in corporate jobs. Most corporate organizations are indifferent towards maternity policies and do not recognize women's upliftment in this field.

In litigation, women don't have the standard 12 weeks of maternity leave, given the structure of court practice. But the practice offers them greater flexibility.

Questions about personal lives are often remarked on the women lawyers. While these questions pertaining are illegal in the United Kingdom under the Equality Act 2010, there are no such regulations or guidelines in India. The work field's absence often puts a question mark on her professional journey due to maternity leave and emerges unspoken disapproval. Along with harassment, women are subjected to verbal abuse during a case or are discriminated against just because they are women.

Changes to be made

In a feminist judgment project undertaken in the U.K. in 2010, it was found that in the case of a feminist judge, the narrative is different and more accommodating, which is why India needs not just more women judges but also more gender-sensitive ones. Legal professionals more as practitioners of human rights, and that gender should feature more in legal courses in India. A gender-neutral perspective regarding the judgments is essential in building an environment for equality. The hiatus in the remuneration should be zeroed down, moreover provisions of healthcare and medical facilities should be provided. A change in the current situation under globalization, neoliberalism can be seen; still, India's legal system has been slow in following up with the developments, especially concerning women's issues.

The recent decisions have helped women in the country fight to establish an equal status for themselves. The courts have paved the way for

future legal challenges against discriminatory practices by obliterating the oppressive methods for treating women as subordinate citizens, whether in women's religious freedoms or otherwise. The National Crime Records Bureau continues to reveal shockingly high crime rates against women. Until the things written on the paper are turned into practice, women won't realize their potential as equal citizens.

CONCLUSION

The paper revolves around the evolution of the relationship between law and women, whereby it brings in the national and international perspectives as well. In the current time, the major decisions regarding women have been taken by the Court, but these have been done under the garb of a protecting figure which tries to emancipate the women without much representation of women at the decision-making level. Each of the cases mentioned above had brought mixed reactions from the citizens, and the various political outfits whereby the agency was the woman to decide for herself was denied. The recent decisions have helped women in the country fight to establish an equal status for themselves. The courts have paved the way for future legal challenges against discriminatory practices by obliterating the oppressive practices for treating women as subordinate citizens, whether in women's religious freedoms or otherwise. The National Crime Records Bureau continues to reveal shockingly high crime rates against women. Unless the things written on the paper are turned into practice, women won't realize their potential as equal citizens. The changing dynamics of the society in the current times require the law to be reformulated, revisited and reinvented.

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