

JUDICIAL ACTIVISM IN THE CAUSE OF GENDER JUSTICE

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Human liberty is not for politicians to debate but for judges to decide; and here, the importance of access jurisprudence is obvious. Cappelletti's classic statement on access to court bears quotation.

“The right of effective access to Justice has emerged with the new social rights. Indeed it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system effective access to justice can thus be seen as the most basic requirement the most basic ‘human right’ of a system which purports to guarantee legal rights.

As the court moved toward a more humane system of administration of justice, the philosophy of self-restraint looked less attractive as it left much liberty at the mercy of the executive and legislative branches and more so in the new era when the political arms of governance were proving either reactionary or resistant to libertarian, egalitarian and humanitarian impulses. This transition of the court took the shape of judicial activism, where the court apart from deciding upon a case or controversy also began issuing directions to the political wings of administration as to the course of conduct to be adopted in upholding the rights of the people. ‘Apart from deciding upon the merits in the case, an activist judge also enunciates upon the wider questions of law involved in the dispute. Another meaning given to activism is that the court becomes a principal legislator in the governmental process, and if its decisions pronounce it fit to assume this role, such activity is labeled as judicial activism. Attitudes toward judicial activism and judicial restraint depend on values concerning the appropriateness of judicial activity in general.

The judge today is called upon to perform multifarious functions. He is no longer an arbitrator who decides upon individual disputes by explaining the letter of the law as it occurs in the traditional adversarial system. Cardozo in his book, *Judicial Process*, sees him as an interpreter of the constitution which gives him an opportunity to canvass the full panoply of

his valve system, a legislator making law and a pace setter for future action. It is this definition of a judge's function that laid the foundation for judicial activism and explained the parameters of this new function.

The judge here is asked to evolve law in consonance with the changing needs and aspirations of the society and to serve the cause of social justice. The justification for casting an extra burden on the Judiciary is caused by the nature of democratic debate in the country. To trust that popular institutions will take care of constitution and the consistency of the laws, especially in a nascent democracy like India with a 'written constitution, is keeping ourselves blind-fold to the problem of working the constitution, and the problems that arise in adapting it to the needs of the masses of population who are affected the most, and yet participate the least in making laws consistent with their lives.'

Recognizing this logical dilemma Justice Bhagwati observes; "Judicial Activism is now a central feature of every political system that rests adjudicatory power in a free and independent judiciary". He further added that judges should use this power for realization of a willed result. On each occasion when they do so they are expected to provide justifying reasons which must satisfy not only themselves but also critics and jurists, may the society itself for what they decided.

Social activism is the most challenging task facing the modern judiciary today, particularly in the developing countries such as India where issues of poverty, exploitation, differentialism, gender discrimination, gender based violence are constantly knocking the judiciary's doors, the judges cannot turn away pleading legal formalism or lack of capacity from deciding such issues and still claim that coverts stand for all citizens.

Thus the greater demand that requirement of constitutionalism makes on judges belonging to these countries is of securing social Justice through their every act of exercise of judicial power. In the Indian context, the translation of the import of directive principles of state policy into the Fundamental Rights is a good example of the judicial understanding to the problems of discrimination based on sex. The Supreme Court has emphasized in *Randhir Singh versus Union of India*¹, referring to Art. 39 (d), that the principle of "equal pay for

¹ AIR 1982 SC 879

equal work” is not an abstract doctrine but one of substance. Though the principle is not expressly declared by the constitution to be a fundamental Right yet it may be deduced by construing Articles 14 and 16 in the light of Art 39 (d). A specific example of the Court addressing itself to the problem of gender-based discrimination can be seen in the case of C. B. Muthamma versus Union of India². Here a service rule requiring a female employee to obtain written permission of the government before solemnization of her marriage and denial of her right to be appointed on the ground that she was a married woman was found to be discriminatory. The Court observed “we do not mean to universalize or dogmatize that men and women are equal in all occupations and all situations and do not exclude the need to pragmatise where the requirements of particular employment, the sensitivities of sex or the peculiarities of societal sectors or the handicaps of either sex may compel selectivity. But save where the differentiation is demonstrable, the rule of equality must govern”.

Activism brought not just policy results, which are random in political direction, but it seems consistently liberal or at least consistent with that branch of reformist, middle-class liberalism descended from the progressive era at the turn of the century. The reason being an enlightenment which has shaped judicial views of the good society, a fashion so similar to their own judgement. Contemporary judicial activism reflects attitudes closely related to those of the reformist, in particular 1) hostility to pluralist, party-dominated political process and 2) a demand for rationality in public policy. A reflection of this attitude can be found in the apex court’s judgement in Government of Andhra Pradesh versus P.B. Vijay Kumar³ that the reservation to an extent of 30% made in the state services by the government to the women candidates is valid. The division bench emphatically declared that the power conferred upon the state by Article 15(3) is wide enough to cover the entire range of state activity including employment under the state.

Another instance of this activist behavior on the part of the Judiciary is explicit in the decision of the Supreme Court in Sarala Mudgal versus Union of India⁴. The Division Bench strongly advocates the introduction of the Uniform Civil Code. While holding that conversion of a Hindu male to Islam only for the purpose of contracting bigamous marriages circumvents 8.494 IPC, the court pointed out the injustice meted out to the legally wedded wife and held

² AIR 1979 SC 1868

³ AIR 1995 SC 1648

⁴ AIR 1995 SC 1531

that such incidents can be avoided by introducing uniform civil code which would help further the cause of gender justice.

Only courts can engage in successful social engineering. Indian constitution has formalized this discourse on law-making by the judiciary. Granville Austin says that the judiciary was to be the arm of social revolution, upholding the quality that Indians had longed for in the colonial days but had not gained. The courts were also idealized because, as guardians of the constitution, they would be the expression of the new law created by Indians for India. The efficacy and the utility of laws in the ultimate analysis depend on the Judge who interprets and administers it. It is, therefore, necessary, if we want to achieve the goals set out in the constitution that the judges must become an equal participant in this task of socio-economic reconstruction.

Through activism the court enters into a conversation with the political branches and embraces its partnership. As the judiciary stands above the political fray it provides the officials with a detached non-populist perspective.

Justice is the supreme political virtue. Judicial creativity is essentially required by the philosophy and sociology of the constitution under which the Supreme Court acts with a crusading zeal as a vehicle of and a constructive partner in a continuing social revolution. The desirability of an activist approach cannot be over-emphasized in India for it has brought out the skeletons in the cupboard of the administration and those in authority feel no compunction in abusing their power for noxious purposes and hiding them from public gaze. Fixing State's responsibility to pay compensation for "Government Lawlessness"⁵ and laying down standards for deciding the quantum of compensation are all reflections of the activist tendency adopted by the court. In fact in *Neelabati Behra v. State of Orissa*⁶ the court has said that to compensation is an acknowledged right under Article 21 of the Constitution. The concept of compensatory jurisdiction has been extended to new heights in *Bodhisattwa Gautama v. State of West Bengal*⁷. Here the court awarded interim compensation to a rape victim during the pendency of the criminal case. The court in its judgement observed that it has the jurisdiction to enforce Fundamental Rights even against private bodies and individuals. It further observed that the

⁵Rudal Shah V/s State of Bihar AIR 1983 SC 1086.

⁶Neelabati Behra V/s State of Orissa AIR 1993 SC 1960

⁷Bodhisattwa Gautam V/s Subhra Chakraborty (1996) 1 SCC 490

court can itself take cognizance of the matter and proceed suo motto. The court made a lengthy discourse on the offence of rape and said that it is a crime against the entire society and hence violates of the basic human rights under Arts 14 and 21. Throughout the judgement, the strong conviction of the court to do justice to innocent women victimized by fraudulent men and also a Victim-oriented criminal jurisprudence are well demonstrated.

A far reaching example of judicial activism and law-making can be seen in the judgement in the case of Vishakha versus State of Rajasthan⁸ on sexual harassment. Speaking through Varma C.J., the Supreme Court laid down a number of guidelines to remedy the legislative vacuum. In the instant case the court refused to the convention on elimination of all forms of Discrimination against women, and also to the violation of Gender Equality Under Arts 14, 15 and personal liberty under Art 21. The judgement highlighted the clauses in the convention that should find place in an ideal law aimed at tackling the problem. The Supreme Court has demonstrated extreme sensitivity while coming to the rescue of the working women.

In yet another translation of the provisions of CEDAW, the court gave a new thrust to the right of women in India to eliminate gender based discrimination particularly in respect of property so as to attain economic empowerment⁹. Every time the judges interpret contract, property, rights, due process, liberty, they necessarily exact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The court thus has to take positive view of its creative function by declaring its View on how the spirit and philosophy of constitution can be given effect in specific areas like socio economic justice, right to life and livelihood and gender sensitization to mention a few.

This Court in Vishaka v. State of Rajasthan [(1997) 6 SCC 241] dealt with incident of sexual harassment of a woman at work place which resulted in violation of fundamental right of gender equality and the right to life and liberty and laid down that in absence of legislation, it must be viewed along with the role of judiciary envisaged in the Beijing **Statement** of Principles of independence of Judiciary in the Law Asia region. The decision has laid down the guidelines and prescribed the norms to be strictly observed in all work places until suitable legislation is enacted to occupy the field. In the present case also, there is no legislation or rules providing for giving necessary information to the voters¹⁰.

⁸(1997) 6 SCC 241.

⁹C.M. Mudaliar V/s Idol of Sri Swaminathswami Thirukoil (1996) 8 SCC 525.

¹⁰ Union of India V/s As & Soacniotthieorn on 2 May 2002.

In State of Punjab v. Major Singh, [1966] Supp. SCR 266 it was held that if the hymen is ruptured by inserting a finger, it would not amount to rape. Lastly, it has been submitted that a writ petition under Article 32 of the Constitution would not lie for reversing earlier decisions of the Court on the supposed ground that a restrictive interpretation has been given to certain provisions of a Statute¹¹.

This Court has, held that in several cases, accepted International Conventions as enforceable when these Conventions elucidate and effectuate the fundamental rights under the Constitution. They have also been read as part of domestic law, as long as there is no inconsistency between the Convention and domestic law (See Vishaka v. State of Rajasthan [(1997) 6 SCC 241]). In Sheela Barse v. Secretary, Children's Aid Society [(1987) 3 SCC 50] which dealt with the working of an Observation Home that was maintained and managed by the Children's Aid Society, Bombay¹².

In Vishaka & Ors. v. State of Rajasthan & Ors. [(1997) 6 SCC 241], the writ petition was filed for the enforcement of the fundamental rights of working women under Articles 14, 19 and 21 of the Constitution of India with the aim of finding suitable methods for realization of the true concept of "gender equality"; and preventing sexual harassment of working women in all work places through judicial process to fill the vacuum in existing legislation. This Court while framing the guidelines and norms to be observed by the employers in work places to ensure the prevention of sexual harassment of women, inter alia, relied on the provisions in the Convention on the Elimination of All Forms of Discrimination against Women as also the general recommendations of CEDAW for construing the nature and ambit of constitutional guarantee of gender equality in our Constitution.¹³

The petitioner has brought to the Court the fact that her son has been killed by the police¹⁴. The police version that the petitioner's son was killed in an encounter was not accepted by the Deputy Collector who held the inquest and by the Member, Board of Revenue, who held the enquiry. The nature of injuries also indicates that the encounter theory does not fit in with the assault upon the petitioner's son. The assailants, it is conceded, are policemen. That they assaulted the petitioner's son in self-defence has been accepted by the Session Judge and this Court in revision has declined to interfere with the acquittal of the accused persons. Yet, the assailants are identified and it cannot be said that the earliest finding as to the aggressive acts

¹¹Sakshi V/s Union Of India on 26 May, 2004.

¹²R.D. Upadhyay V/s State of A.P. & Ors. On 13 April, 2006.

¹³Anuj Garg & Ors vs Hotel Association Of India & Ors on 6 December, 2007

¹⁴Mrs. R. Rajamani V/s State of Tamilnadu on 5th November, 2008.

of the police as recorded by the Member, board of Revenue is not such a finding which this Court should accept, or that this Court must accept the finding in this behalf as recorded by the Court of Session. On an independent assessment of the facts as aforementioned, which are not in controversy, I have no hesitation in holding that the petitioner has made out a positive case of assault upon her son by the police and that policemen alone are responsible for this death. She has lost a bread earner and she, in my opinion, is entitled to compensation. The Court shall be failing in its duty, as pointed out by the Supreme Court in the case of **Neelabati Bahera**(AIR 1993 SC 1960) supra in not ordering any compensation to the petitioner."

The directions issued by this Court¹⁵ in exercise of its jurisdiction under Article 32 read with Article 142 of the Constitution of India must be held to be in addition to the conditions contained in the permit and/or the provisions of the Act.

Regulation of motor vehicles is vested in the **State** and/or statutory authorities. Ordinarily, they should exercise their power within the four corners thereof.

Right to ply a vehicle in terms of the provisions of the Act or the Rules framed there under is a statutory right. Where a person, including a juristic person, is conferred a right to carry on business, regulation thereof should ordinarily be governed by the statute under which the permit has been granted. Although in view of several decisions of this Court and, in particular, Vishaka & Ors. V. State of Rajasthan & Ors. [(1997) 6 SCC 241], even if additional regulatory measures are laid down, the same, in our opinion, should be construed strictly.

In Vishaka and Others v. State of Rajasthan and Others this Court laid down guidelines and norms for due observance at work places and institutions to prevent sexual harassment of working women, because there was no law to prevent such sexual harassment. In the present case, we find from the additional affidavit filed on behalf of the Union of India that through various legislative measures such as the DRT Act, the SARFAESI Act, 2002, the Credit Information Companies (Regulation) Act, 2005 and through some administrative measures, the respondents are trying to reduce the number and amount of

¹⁵U.P State Road Transport V/s Assistant Commissioner of Police on 12 February,2009.

NPAs and to detect and check bank frauds in future¹⁶.

In **Vishaka v. State of Rajasthan** (1997) 6 SCC 241 this court recognized its obligation under Article 32 to provide for the enforcement of fundamental rights in areas with legislative vacuum. After detailed consideration, this Court¹⁷ held that "In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all work places or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by this Court under Article 141 of the Constitution."

¹⁶ Common Cause (A Regd. Society) V/s Union of India & Anr on 18th August, 2010.

¹⁷ Dayaram V/s Sudhir Batham & Ors. On October, 2011.