"Women: An Object of Socio-Legal Grafting"

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ABSTRACT

Judicial Activism has not been palatable to many but there is no denial that it has brought about a paradigmatic change from 'rule-specific laws' to 'rights- specific laws' thereby successfully advancing human rights jurisprudence. Exemplifying this sensitively aggressive side of the courts and the judges are a series of dynamic judgements and positive actions which have enabled the dominated and oppressed to break the fetters of immanence, and made transcendence, at least legally accessible to them. This article is an effort to highlight the role of judges as social engineers taking strides towards gender justice. But the author maintains that a structural renaissance is required to bring about gender equity and make empowerment consequential.

Keywords : *Domination, judicial activism, oppression, power, transcendence*

Introduction

Under the garb of patriarchy, everyday life of women is throttling, limping forward, and bleeding with the pain of generations deep wounds. Sociologically speaking, it is believed that gender roles, unlike sex, are mutable, that is, they can be changed. But the plight of majority of women, in India, has been and continues to be immutable, unchanging, a status quo. They are denied an access to the 'elitist' choices of life like education, employment, property and opportunity to participate in social and political life, on an equal footing with men. The Global Gender Gap Index[1] (GGGI) while ranking countries on the size of their gender gap between women and men placed India in the bottom ranks in the regional rankings.

Speaking from a sociological perspective, the social practices undermining the education of women (female literacy rate according to the 2011 census is 65.46 percent whereas male literacy rate is 82.14 percent)[2], their non-involvement in economically lucrative processes (women occupy only 9 percent of senior managerial positions)[3], lack of protection in the informal sector (females constitute more than 90 percent of the total marginalised workers)[4], female foeticide (sex ratio being 940 females for every 1,000 males), the practices of child marriage, dowry harassment, dowry death (one in every four hours) increasing number of rape (five in every three hours) and molestations (ten in every three hours) have all been mechanisms to oppress women and thereby denying them transcendence.

This cultural denial is neither legally enshrined nor has it been spiritually ordained but it is the 'responsible' few who, claiming to be the guards of the patriarchal structures, have declared it to be so. This has led to an undeniable difference in the collective as well as the individual life of the two genders. In this article, their "*differentness*"[5] in terms of their different social credits and social liabilities has been traced to their differing accessibility to 'power'.

The classical understanding of power as given by Max Weber[6] is the ability of a person to exercise his will on the other, despite resistance. Iris Marion Young , widens the horizons of this understanding and visualizes power/domination not merely as an individual imposing his will on the other but rather as a structural condition which prevents women from participating in actions which are 'remunerative whether materially or non-materially'. This domination through the pedals of

denial is primarily to project her as a controllable and submissive being that can be easily oppressed.

Young views power as a relation and Foucault[7] claims that power exits only in action. Since no relation is static, it can be said that power must be understood dynamically, as existing in ongoing processes or interactions. In the current article, through various empirical cases taken primarily from the directory of the Supreme Court and the High Courts, the focus is on the dynamics of interactions between, women, socio-cultural arrangements and, the Courts and judges in India.

The divide between the public and private sphere and allocation of the former to men and the latter to women has rendered women invisible not only in the social hemisphere but also the legal hemisphere[8]. Aristotle's view that male is more en suite to rule than female[9] or Bacon's proposition that 'the husband hath by law the power and dominion over the wife, and may mildly beat her'[10], reveal upon domination as a form of gender injustice.

Simone de Beauvoir[11], theorizes male domination by diagnosing the situation of women relying on the distinction between 'being for-itself' and 'being in-itself'. This is similar to the Marxian understanding of 'class for-itself' and 'class in-itself'. To assert against the owners of the means of production (i.e. the 'Haves'), the non-owners (i.e. the 'Haves Not'), according to Marx, have to stand collectively as a 'class for-itself'. It is only through a collective class struggle, Marx argued, that one can do away with the oppression and domination subjected to as a mere 'class in-itself'.

On familiar lines, Beauvoir understands 'being for-itself' as the self-conscious subjectivity that is capable of freedom and transcendence while 'being in-itself' is the un-self-conscious things that are incapable of freedom and caught up in 'immanence'. She argues that whereas men have assumed the status of the transcendent subject, women have been relegated to the status of the 'immanent other'. "*She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the subject, he is the Absolute – she is the other*"[12].

In fact, the situation of women is marked by a basic 'tension between transcendence and immanence'. As self conscious human beings, they are capable of transcendence, but at the same time they are compelled into immanence by cultural and social conditions that deny them this transcendence.

Gender injustice is not just located in 'domination' but also in 'oppression'[13]. This oppression creates an environment which obstructs and mutes their communicative and learning abilities. This silent acceptance of the perpetual denial becomes a part of their everyday, typified life and any deviation from this submission is silenced through the existing structural arrangements. Thus where and when there is an individual consciousness departing from the typified feminine comportment, there stands in opposition, a more powerful socio-cultural consciousness to snub the rising 'deviated' consciousness.

Young[14] believes that oppression voices itself through five mouths: Exploitation, Marginalization, Powerlessness, Cultural imperialism and Violence. Each of these five forms of oppression, have been, in this article, viewed within the dynamics of the Indian socio-cultural arrangements vis-à-vis women. The aim is not to reveal the already visible scars but to highlight the role of Courts and judges in lessening the pain inflicted on women by the socio-cultural arrangements.

Though the Constitution of India has been a fundamental device in building insulation around the otherwise dominating and oppressive social structure but the formal inauguration of the structural renovation, in India, through socio-legal engineering began with freshness of 'judicial

activism' ushered in by Justice P.N. Bhagwati along with Justice Krishna Iyer thereby making justice available to all. Since then, there is no denial that the area of judicial intervention has been steadily expanding. This has led to the protection as well as the expansion of women's rights much away from the margins of cultural fetters. The basic intention behind this activism was to advance human rights jurisprudence. The realization and public declaration that the judiciary is accountable to the people set forth a precedent whereby the judges invested the law with new meaning, heading towards gender justice, away from the conventional dynamics of power. The spirit behind such engineering can be visualised in the judgement[15], delivered way back in 1982, where rights of the poor workers engaged in the various Asiad projects were undermined and while passing the judgement, "social justice" was recognised as "the signature tune of our Constitution".

But just as domination and oppression cannot be visualised as individual episodes but rather as a creation of ages of institutional structures, so must the efforts towards social justice. Isolated efforts in this direction will not be a match for the years of deep rooted deprivation, domination, oppression and forced dependency.

This article highlights some of the firm and the cautious steps taken by the Courts and the judges in the vein of socioeconomic transformations, enabling a paradigmatic change from 'Rule-specific laws' to 'Rights-specific laws'. Social reformation today is all about destroying "*the absurd and corrupt institutions*"[16] and building "*up positive institutions of undoubted usefulness and purity*".[17]

The author strongly opines that gender justice, as a dimension of social justice, can continue to prosper only when seen as liberation from constraint, flowering changes within the people. The focal idea being a change from within the social structure, a rethinking with dynamic dimensions and a revisit to the relational dimensions of power is required. Keeping this in mind, the discussion below highlights the dynamic dimensions exposing the whip of restraint exercised on women by the socio-cultural arrangements and the fundamentals of transcendence offered by the Courts and the judges, under the garb of judicial activism, thereby liberating them.

Exploitation as a form of oppression

Young opines that injustices of exploitation cannot be done away with by redistribution of goods till the time the structural relations stamped by the social structure, between the two genders, remain unaltered. Such structural relations sculpted in asymmetry, bulge on unlimited number of recorded and unrecorded occasions. One such recorded occasion is in ***Smt. Bimla Rani & Others v. Appellate Authority Equal Remuneration Act***[18], where the High Court of Delhi held that India being one of the signatories to the Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, the principle of equal remuneration for work of equal value[19] may be applied through legislative means.

In this case, the petitioners were females, working as 'packers' since six years. In 1984, they were regularized but were given a pay-scale lower than their male counterparts. On being questioned, the dissimilar nature of the work was shown to be the justification for a difference in the pay-scales. The contention of the employer was that all the females were working as 'Packing Cleaners' while the males as 'Packers'.

But on the basis of evidence it was concluded that the claim of the female petitioners was justified. Though the educational qualifications of 'Packers' and 'Packing Cleaners' were different but the nature of their work continued to be the same. After regularisation, under the garb of different designations, the two were given different pay-scales. In other words, the petitioners were discriminated only on grounds of sex.

The Court firmly established the constitutional basis[20] for the claim of the petitioners. Apart from the above mentioned Convention as the statutory basis for the claim, reference was also made to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), which came into effect in December 1979[21].

Exploitation has fearlessly established itself not merely in the overlooked private domains of employment but also in the accountable public domains too. In ***Municipal Corporation of Delhi v. Female Workers (Muster Roll) & others***[22] the slant of exploitation was by denying maternity leave to female workers (muster roll), engaged by the Municipal Corporation of Delhi (MCD), on the ground that their services were not regularised.

Though nothing contained in the Maternity Benefit Act, 1961, entitles only regular women employees to benefit of maternity leave and not to those who are engaged on daily basis but the provisions of the Act had not been applied to the MCD. The Industrial Tribunal argued that the lacuna in the Act could be removed by the State governments by issuing the necessary notification under the proviso to Section 2[23] of the Act.

The Supreme Court, in its efforts to eradicate the exploitation, interpreted the activities undertaken by the MCD, such as construction work, repair work, digging of trenches, as falling within the definition of "industry". It was decided that the dispute between the workmen or, for that matter, those employed on muster roll for carrying on these activities, on the one hand and the MCD on the other, would be tackled as an industrial dispute in the light of the various statutory provisions of the Industrial Law, one of which is the Maternity Benefit Act, 1961.

Consequently, a direction was issued to extend the benefits of the Act to such muster roll female employees who were in continuous service for three years or more and who fulfilled the conditions set out in Section 5[24] of the Act. The Court stated dexterously that the act "*aims to provide all these facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peacefully, undeterred by the fear, of being victimised for forced absence during the pre or post-natal period*".

Marginalization as a form of oppression

The second expression of oppression is marginalization. Through this, the whole identity and existence of women is wiped out from useful participation in social, economic, cultural, and political life. They become victims of denial and deprivation. It is this form of victimization that calls for rescue, unfortunately through the portals of a helpless and unavoidable cry for dependency. This dependency is swapped with their distinctive identities, respect and social dignity.

Marginalization is quite often justified through the patriarchal structures imposed through Personal Laws. This is possible because the Right to Maintenance, Custody and Spousal Rights and the Right to Property are a function of the personal laws. Such institutionalised persecution of women, through marginalization, comes flooding in the case of ***Mohd. Ahmed Khan v. Shah Bano Begum and others***[26]**,** where domination and oppression gushed through the male created religious veins. Unfortunately the responsible political segment of the society had also succumbed to the oppressive structure, because of which, a mother of five children, who was divorced in 1978, was initially denied alimony by way of passing the Muslim Women (Protection of Rights on Divorce) Act, 1986[27] which diluted the Supreme Court's secular judgement denying Muslim women, the right to alimony. The liability of the husband to pay the maintenance was restricted only to the period of *iddat*.

But the wave of judicial activism created tides when the Supreme Court in ***Daniel Latifi v Union of***

India[28] read the Muslim Women (Protection of Rights on Divorce) Act in the touchstone of Articles 14 and 15 of the Indian Constitution. It was minutely observed that section 3(1) (a) of the Act states that "a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband". The Court, by way of its interpretative skills, held that the use of word "within" and not "for" makes it clear that this provision and maintenance extends not just for the *iddat* period but for the entire life of the divorced wife until she remarries.

Another similar pledge to do away with marginalization and to restore the right to dignified living was in ***Gita Hariharan v. RBI.***[29] Initially the right to intestate succession automatically conferred only upon the sons of the deceased. In the above mentioned case, the Supreme Court construed the Guardianship legislation in the radiance of Articles 14 and 15 of the Constitution of India, to the effect that the mother was entitled to be the natural guardian even during the life time of the father, despite the fact that the statutes had relegated the woman to a secondary position.

Yet another instance of wiping out the institutionalized marginalization is the case of the ***State of Jammu and Kashmir v. Dr. Susheela Sawhney***[30]. Here the matter debated was whether the daughter of a permanent resident of the State of Jammu and Kashmir (J&K)[31], on marrying a non-permanent resident, loses her status as a permanent resident of the State or not.

This is of significance in terms of gender injustice not only because the identity of a female has always required the spinal column of a male to stand but also because the loss of status as a permanent resident in J&K, disentitles a person in respect to acquisition of immovable property in the State, in respect of employment in the State, the right to scholarship and such other forms of aid as the State government may provide.

The focus of the debate and the sensitivity of the interpretation require that the reader is made aware of the strife. This was Note III[32], under the definition of the term 'State Subject', sanctioned by His Highness the Maharaja Bahadur[33] which read as follows: "*The wife or a widow of a state subject of any class shall acquire the status of her husband as state subject of the same class as her husband so long as she resides in the state and does not leave the state for permanent residence outside the state*."

In this case the focus was a female state subject who had entered into a matrimonial alliance with a person who was not a state subject. The State, upholding the patriarchal sentiments, submitted that since a woman's citizenship depends upon the citizenship of her husband, the original citizenship of a girl, on marriage, ceases to exist, (unless it is retained in accordance with the special procedure provided under law). This stand, nurtured by the socio-cultural arrangements, crushed the individual existence of women and deprived them of any identity independent of the male backing.

To justify this stand, the State sought assistance not from the notification in question but on the broad principles of International Law. The Supreme Court, taking upon itself to enforce the basic rights of the 'vulnerable' women, by progressive interpretation and positive action, argued that "*if shelter is to be taken only behind the International Law, then convention on the Nationality of Married Woman which stands ratified by the General Assembly, Resolution 1040 (XI)*[34] *cannot be ignored*". The Convention, according to Karen Kinnear,[35] "*allows women to adopt the nationality of their husbands, if they desire, but does not require it…. The contracting states agree that neither marriage nor the dissolution of marriage "between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife" (Art.1)*".

The Court observed that Note III, in fact, does not deal with a female state subject continuing in the State or leaving the state of J&K. Focusing on the word 'acquire', it was argued that a female descendant of the State subject, does not acquire the status but inherit it. Moreover, the devolution of property does not depend upon the status of a person. Under Hindu as well as Islamic laws, it devolves according to certain principles of inheritance and these principles do not recognize citizenship or permanent residency as their basis. The right which stands inherited can be taken away only by a process of law, and 'inheritance' under law does not constitute 'transfer'.

Distinguishing the right of inheritance, from 'acquisition', the Court stated that a woman, who acquires any property and on the date of acquisition, is a permanent resident of the State, the transfer in her favour cannot be questioned. But after her marriage with a non-permanent resident, she cannot, by way of transfer, acquire any immovable property (because she acquires her husband's status).

It was clarified that if she succeeds as a legal heir, by way of inheritance under personal law, she can hold and own such property which has fallen to her share.

Thus, to a great extent, marginalization was removed in terms of woman's right to inheritance and also, by extension, on similar grounds, in terms of employment in the State of J&K. The Court stated that a woman, who is in State employment and was a permanent resident at the time of initial employment, can continue to be in employment of the State even after her marriage with the non-permanent resident.

From the above argument it is apparent that wherever the structural arrangements have tyrannically forced themselves upon the females, the Courts and judges, through the weapon of judicial activism, have tried to engineer bridges to rescue them from this tyranny.

Discussion about inheritance and succession would be incomplete without highlighting the socio-legal engineering through the Hindu Succession (Amendment) Act, 2005. Prior to the enactment of the Hindu Succession Act, 1956, a female Hindu had only a right to maintenance from the ancestral property and the widow had limited estate which she was disentitled to part with. The Mitakshara School did not recognise a daughter as a member of the coparcenaries because of which, despite their birth in the family, they could not inherit ancestral property though males could.

In 1937, some respite was brought in by Hindu Woman's Right to Property Act (XVIII of 1937) which enabled a widow to succeed along with her son and to take a share equal to that of the son. Despite this positive move there were many limitations such as the widow's entitlement only to a limited estate in the property of the deceased with a right to claim partition. Moreover, a daughter had virtually no inheritance rights.

The Hindu Succession (Amendment) Act, 2005, cracked through the limitations imposed by structural inequalities and brought about equity between the male and the female inheritors.[36] As a consequence all daughters, including the married ones, were formally recognised as coparceners in the joint family property and were given an equal share to that of the sons, at the time of notional partition[37]. Thus, despite the socio-cultural pressures, the Court and the judges were successful in grafting out a structural arrangement standing on the roots of gender equality.

Powerlessness as a tool of oppression

The third expression of oppression also derives its legitimacy from the socially moulded and culturally endorsed structures along with the mechanisms of power which authorize a unit or a group of people to assert and compel themselves on 'the others'. Such people have unlimited and unaccountable access over 'the other'. Within this framework, woman

qualifies as 'the other', a powerless victim, without either any status or a sense of self.

This is true not only of the illiterate women but also the literate, who despite the ability, are made to become mute spectators to whatever is happening around, including to their own bodies and selves. They are denied agency. Cases where a female dared to stand up as a voice against an oppressed victim, the structures built by 'the powerful' units, taking the advantage of the loopholes in the legal bridges, try to suppress such feeble, isolated sources of power. One such case is that of ***Chairman, Railway Board and Others v. Mrs. Chandrima Das and Others,***[38] where the Supreme Court has visualised coercive imposition of power on a female, in the form of rape, not merely as a crime against an individual woman but rather as a crime against the entire society.

In this case, a practising advocate of the High Court of Calcutta had filed a petition under Article 226[39] of the Constitution of India, against the Chairman, Railway Board and other officials, claiming compensation for the victim who was a Bangladeshi national, raped by many, including the employees of the Railways at *Yatri Niwas*.

Insensitivity of the 'powerful units' is apparent from the argument against the petitioner, denying her any kind of compensation from the Railways because she was not an Indian national. It was also contended that the commission of the offence by the persons was their individual acts and therefore the Railways or the Union of India would not even be vicariously liable. It was further contended that for claiming damages, the remedy lay in the domain of Private Law and therefore no compensation could have been legally awarded by the High Court in a proceeding under Article 226.

Moreover, it was argued that the victim herself should have approached the court in the realm of Private Law and not a practising advocate who, in no way, was concerned or connected with the victim. The details of the arguments put across in the above case highlight the nature of power relations existing between the socio-cultural arrangements and women: oppressive, insensitive and negligent of the physical and the emotional scars grafted on women, in general and the rape victims, in particular.

The mission of the Courts and judges as social engineers, in this case, comes alive with a bright light blinding those who have darkened the life of such victims. The dynamics of the power relations were twisted firstly by changing the given structures through the expansion of the purview of Article 226 of the Constitution of India. The Supreme Court maintained that the Public Law remedies have earlier also been extended to the realm of torts and under Article 32[40], compensations have been awarded to the petitioners who had suffered personal injuries at the hands of the government officers.

Further, rape was seen as a violation of the victims' right to live with human dignity, contained in Article 21.[41] Away from the dynamics of power relations manifested in oppression, the true nature of the petition was not viewed myopically as only a relief for compensation but rather as a relief for eradicating anti-social and criminal activities of various kinds at the Railway Station. Taking precedence from an earlier case[42], the Court held that “rape” amounts to the violation of the fundamental rights guaranteed to women under Article 21 of the Constitution of India.

It was further argued that the victim, though not an Indian citizen was nevertheless, entitled to all the constitutional rights available to a citizen so far as the “Right to life” was concerned. Consequently, the State was under the constitutional liability to pay compensation to her. The Court insisted that since the Yatri Niwas at various Railway Stations is a part of the commercial activity of the Union of India, thereby the employees who are deputed to run the railways and manage the establishment are, by

extension, essential components of the government machinery. If any of such employees commit an act of tort, the Union Government of which they are employees, (subject to other legal requirements being satisfied), can be held vicariously liable in damages to the person wronged by those employees.

Such pumping of security goes a long way in inducing elements of power in the powerless segments and also in encouraging the faint voices to get louder and assertive. Such judicial activism, in the long run, would definitely hammer down the hollow structures of oppression.

Cultural Imperialism as a form of oppression

Fourth face of oppression is cultural imperialism. It involves the universalization of a dominant group's experience and culture, and its establishment as the norm. Such dominant views, values and cultural products gain a greater currency because their experience is projected as an experience representative of the entire humanity. Unlike the oppressed group's interpretation of social life which finds little space for expression, the dominant culture imposes its experience and view upon the dominated. This is apparent from the case discussed below where the power exercised by the accused as well as the High Court over the female body has been condemned by the Supreme Court. ***Suchita Srivastava & Anothers. V. Chandigarh Administration***[43] is a case about the violent oppression exercised over a mentally retarded orphan in the form of rape which took place while she was an inmate at a government run welfare institution. The victim, on knowing about her pregnancy, wanted to continue with it. The Supreme Court extensively defined 'women's right to make reproductive choices' as a dimension of 'personal liberty'[44].

As per section 3(4) (b) of the Medical Termination of Pregnancy (MTP) Act, 1971, consent of a pregnant woman is an essential requirement for proceeding with the termination of pregnancy. Exceptions laid down in the section 3(4) (a) of the Act permit the termination with the consent of the guardian in case the pregnant women is below 18 years or is 'mentally ill'. Another exception is in case of medical emergency[45].

Further since the State has been recognised as the protector of the life of the prospective child, termination of a pregnancy is permitted, due to this 'compelling state interest', but only when the conditions specified in the applicable statute have been fulfilled. But under the influence of deep-rooted cultural imperialism and socially certified patriarchy, a division bench of the High Court of Punjab and Haryana, in 2009, ruled, without the victim's consent, that it was in her best interest to undergo an abortion. Overlooking the difference between the conditions of a mentally ill person and that of mental retardation and despite the favourable findings of a body of experts, the orders directing the termination of the pregnancy were passed.

The Supreme Court, standing in the way of the dominant culture, granted a stay on the orders and held the High Court responsible for invoking the doctrine of '*Parens Patriae*[46]' while exercising its writ jurisdiction. The honourable Court advised the State to respect the personal autonomy of a mentally retarded woman with regard to decisions about terminating a pregnancy, reminding it of the difference between the conditions of mental illnesses and 'mental retardation'.

It was notified that the Persons with Disability (PwD) Act, 1995,[47] recognized mental illnesses and 'mental retardation' as two different forms of disabilities. Unlike mental illness, mental retardation is understood as a 'condition of arrested or incomplete development of a mind'. The same understanding of 'mental retardation' is incorporated in the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999.[48]

The MTP Act also, in 2002 amended Section 2(b) of the Act, where the erstwhile definition of the word 'lunatic' was replaced by the definition of the expression 'mentally ill person' and the two conditions were recognised as distinct.

In the course of the judgement, it was specified that a condition of 'mental retardation' or developmental delay is gauged on the basis of parameters such as Intelligence Quotient (I.Q.) and Mental Age (M.A.) which mostly relate to academic abilities and it is quite possible for a person with a low I.Q. or M.A. to possess the social and emotional capabilities that will enable him/her to be a good parent. A developmental delay in mental intelligence, it was stated, should not be equated with mental incapacity. Therefore, it was decided that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would have not served her 'best interest'. Thus, to a great extend, releasing the victim from the shackles of cultural imperialism.

In north India the common perception is that marriage, especially sex, teaches a mentally retarded man responsibility, enabling him to vent out his suppressed emotions which are traced to be the cause behind his suppressed mental growth. But ironically, in the case of women, mental retardation is regarded as a detriment to marriage. This is where gender justice is a must to ensure social justice in various dimensions.

In the case above, the steps taken towards empowerment asserted the need to respect women's right to privacy, dignity and bodily integrity. While defining the reproductive choices, the Supreme Court included women's right to refuse participation in sexual activity, insistence on using contraceptive measures and freedom to use birth control measures as a part of her rights. Thus legitimizing much beyond what was sanctioned to a female by the dominant culture.

Seen from the perspective of the dominant culture, in a patriarchal structure, marriage permits a man to exclusively enjoy three important rights: the conjugal, the reproductive and the domestic. But the judiciary, through positive action and progressive interpretation, unleashing the partial and biased fetters of domination and oppression, have put some control in the hands of the females too.

Violence as a form of oppression

Deep-seated sagacity of pre-eminence amongst the males along with the defencelessness and vulnerability of females have been collectively responsible for repeated acts of violence against women which has become institutional, systemic and has amounted to social practise. The ancient law given by Manu and Yajnavalkya entrusted the responsibility of protecting females upon father, husband and son at various stages of life. This was seen as the justification behind 'mild disciplines' in the interests of the woman and the family.

A lot of vulnerability of women and their availability as objects that can be dominated and oppressed upon are to do with the differentness of their physiological manifestations such as menstruation, breasts, pregnancy, etc. As per the routine everyday habituated mannerisms, it is believed that such differentness should make her embarrassed, tie her more closely to nature and thus, as discussed earlier, to immanence. As an object, silent submission to violence is regarded as very vital for maintaining one's own dignity and integrity. But at the same time, women are also subjects. This leads to a dilemma because of which they are in a conflict with themselves. They are unable to decide whether they are forcefully subjected to violence or, are the silent acceptance of violence a qualification to be recognised as a respectable member of the patriarchal structural arrangements.

Beauvoir identifies this tension between transcendence (being for-itself) and immanence (being in-itself) through feminine bodily

comportment, movement and spatial orientation. Young argues that this tension arises from "… *the fact that the woman lives her body as object as well as subject. The source of this is that patriarchal society defines woman as object, as a mere body, and that in sexist society women are in fact frequently regarded by others as objects and mere bodies*".[49]

Drawing on and extending Foucault's account of disciplinary power[50], Sandra Bartky[51] argues that disciplinary practices are gendered and such gendered discipline renders women's bodies more docile than that of men. Analyzing some of disciplinary practices that engender specifically feminine docile bodies such as dieting, limitations on gestures and mobility, and keeping one's body properly hairless, attired, ornamented and made up, Bartky expands upon Foucault's analysis of the 'panopticon'. Seen as a spatial arrangement designed to compel the inmate to surveil himself, Foucault maintains that the inmate in a panopticon is rendered "*the principle of his own subjection*".[52]

With respect to gendered disciplinary practices mentioned above, Bartky observed that "*it is women themselves who practise this discipline on and against their own bodies.....The woman who checks her make-up half a dozen times a day to see if her foundation has caked...., or who, feeling fat, monitors everything she eats, has become, just as surely as the inmate in the Panopticon, a self-policing subject, a self- committed to relentless self-surveillance. This self-surveillance is a form of obedience to patriarchy*"[53] filtering down to immanence, in fetters, 'being in-itself'.

This self-policing is nothing but a self-induced form of violence and the fourth face of oppression, which most women, both as an object and as a subject, manifestly as well as latently, subject themselves to. It is the pressure and apprehension of seclusion that compels them to this relentless self-surveillance.

Further, violence against women occurs both within the home and outside the domestic walls. It ranges from assault to deprivation of life, and from indecency to ravishing the woman's honour by rape. This form of oppression, outraging the modesty of a woman, can be as silent as an unwelcomed symbolic comment or as loud as a physical molestation.

This led the Supreme Court to reiterate the definition of 'sexual harassment' as explained in ***Vishaka v. State of Rajasthan***[54] once again in ***Apparel Export Promotion Council v. A.K. Chopra***.[55] In this case, the High Court had overlooked the settled position that in departmental proceedings, the Disciplinary Authority is the sole judge of the facts. The Supreme Court cautioned the High Court towards not directing judicial review against the decision and confining it to the examination of the decision-making process. The honourable Court waving its wand of judicial activism further insisted that in cases involving the charges of sexual harassment, the already disturbed balance of the emotions should not any further be entangled in the surface meanings of the words 'molestation' and 'assault'. The Court warned against "……insignificant discrepancies or narrow technicalities or dictionary meaning of the expression molestation".

Each incidence of sexual harassment at the workplace was directed to be seen as a violation of the Fundamental Right to gender equality, and the right to life and liberty. It was regarded incompatible with the dignity and honour of a female and was never to be compromised with. In cases of a void in domestic law, the Courts were advised to give due regards to the International Conventions and Norms thereby enabling cases on similar grounds to be dealt in the same vigour and sensitivity.

On the occasion of the 50th anniversary of Indian Republic, the State of Andhra Pradesh passed orders remitting the various categories of prisoners in the State, who had been convicted by Civil Courts of

criminal jurisdiction for offences against laws relating to a matter to which the executive power of the State extends. But the remission of the sentence ordered was not applicable to prisoners convicted for crimes against women 'such as Sections 376[56] and 354'[57] Indian Penal Code (IPC) while being sentenced to imprisonment for life. In this background, in ***Sanaboina Satyanaryana v. Government of Andhra Pradesh***[58] it was urged before the High Court that the discrimination made against the convicts is against Article 14[59] of the Constitution of India.

In a stern reaction, the High Court rejected the plea observing that the power under Article 161[60] of the Constitution of India granted to the Governor, is purely discretionary, thus overruling any discrimination involved in it. It was clarified that the remission proposed in commemoration of the Republic was a concession to which no one had any vested right. Further, showing a gush of rigorousness against gender injustice, it was added that the two provisions of IPC, after the words "*such as*" was more by way of illustration of the excepted category of offences relating to crimes against women in general and not with an intention to be exhaustive of the same.

It was notified that the real objective behind the activist judgement was "*to ensure that those who prey on the community and violate fundamental values of mankind, society and national interest should not get undeserved benefit*". Thus despite the given oppressive and dominating socio-cultural arrangements denying social justice, the courts and judges, through judicial activism have made efforts towards gender justice.

Conclusion

Through the above discussion, efforts have been made to illustrate the metamorphosis undergone by women through legal grafting. The skill of the judge as a surgeon in interpreting the given laws and the balm of judicial activism have in togetherness gone a long way in bringing about deep-seated changes in, the life of women, the object and subject of this grafting, and by extension in the society.

The fundamentals behind this transform can be evocatively understood within the precincts of the term 'empowerment'. Yogendra Singh[61] explains the concept of empowerment as a process which enables women to "*develop the capacity for self-reliance*". The relevance of the word 'process' lies in recognising the fact that such transformations are not a revolutionary dynamics of power but rather a slow, consistent and perpetual series of efforts from within the given arrangements, aimed at bringing about changes. Empowering women through power of justice and positive actions will lead to intellectual renaissance thereby causing gradual shedding of the manacles of, exploitation, marginalization, powerlessness, cultural imperialism and oppression through violence. Empowerment, as understood by the author, is all about giving women the choice to choose, resources to control and accepting their control over given resources. It is all about "*participatory relationships*"[62]. In ***Govt. of A.P. v. P.B. Vijayakumar***,[63] the Supreme Court observed that, "*it is in order to eliminate the socio-economic backwardness of women and to empower them in a manner that would bring about effective equality between men and women that Article 15(3) is placed in Article 15*", thus justifying their protectionist approach. In fact the contest between the substantial and absolute equality, has been surge of emotions matured through the pipelines of the Courts and judges. Preamble's orientation to social justice and dignity of the individual as value goals has stimulated judiciary to elaborate women's right to dignified life. The earnestness with which this guiding principle is handled by the mainstream judicial activism can, as rightfully said by Ishwara Bhat, earn the title of "*constitutional feminism*".[64]

End Notes:

1. The Global Gender Gap Index was developed in 2006 by the World Economic Forum as a measure for gender equality. Four focal areas of measurement are: economic participation and opportunity, educational attainment, political empowerment, and health and survival. In 2011, except for its performance on the political empowerment of women (where it stood above average), India lagged far behind in the other three areas.

   Political empowerment, if looked closely, is indeed another masking of real identities and actual role playing by the invisible dominating male members of the patriarchal structure.

2. According to the 2011 census, amongst the 15 years and above, just 49.6 percent of females were literate compared to 73.6 percent of males.

3. Nandamuri, P.P. & Gowthami, C.H. (2011). *Women Leadership: Reflections from Indian Business,* in The International Journal's Research Journal of Commerce and Behavioural Sciences, Volume: 01, Number: 01, Nov – 2011: RJCBS

4. Indian Census divides the workers into two categories: "main" and "marginal" workers. Main workers include people who work for six months or more during the year, while marginal workers include those who work for a shorter period.

5. Young, I.M. (1990a). *Justice and the politics of difference.* Princeton, NJ: Princeton University.

6. Weber, M. (1978). *Economy and Society: An outline of Interpretive Sociology, trans. Ephraim Fischoff et al. Berkeley,* CA: University of California Press

7. Foucault, M. (1980). Two lectures. In Colin Gordon (Ed.), *Power/Knowledge: Selected Interviews and other writings,* 1972-1977. New York: Pantheon

8. Barnett, H. (1998). *Introduction to feminist jurisprudence,* (p.65). London: Cavendish Publishing.

9. Aristotle. (1962). *The politics,* (p.125). TA Sinclair (tr.), London: Penguin Book.

10. Francis, B. (1736). *Abridgement of the law.*

11. *Beauvoir,* Simone de. (1974). *The Second Sex.* New York: Vintage Books

12. *ibid, xxii*

13. Young, I.M. (1990a). *Justice and the politics of difference.* Princeton, NJ: Princeton University Press.

14. *ibid*

15. *People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473*

16. Sen, A.P. (2003). *Social and religious reform,* (p.73). New Delhi: Oxford University Press.

17. *ibid*

18. 113 (2004) DLT 441: (2005) IILLJ 148 Del

19. *Adopted by the International Labour Organization* on 29th June, 1951.

20. The concept of equality in all aspects is enshrined in *Article 14* of the Constitution of India. In particular, *Article 39(d)* provides for equal pay for equal work.

21. *Article 11* of this Convention provides, inter alia, for all States to take appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of equality of men and women, the same rights, in particular the right to equal remuneration, including benefits and to equal treatment in respect of work of equal value as well as equality of treatment in the evaluation of the quality of work.

22. *AIR 2000 SC 1274, 2000(2) ALT 34 SC*

23. Deals with the application of the Act.

24. Right to payment of maternity benefit.

25. *AIR 1985 SC 945: (1985) 2 SCC 556*

26. By the Parliament.

27. *(2001) 7 SCC 740*

28. *(1999) 2 SCC 228: AIR 1999 SC 1149*

29. *AIR 2003 JK 83: 2003 (1) JKJ 35*

30. In J&K, a citizen possesses dual rights. One is the citizenship of India and the other is the status of a State subject. The latter is peculiar to the State of J&K.

31. This falls under the sub-section 3 of the *Section 6* of the State Constitution, which provides that the expression 'State Subject of the Class I or Class II' shall have the same meaning as the State Notification No. 1-L/84 dated the 20th April, 1927, read with the State Notification No. 137 L dated 27th June, 1932.

32. Vide Private Secretary's letter No. 2354, dated the 31st January 1927 to the Revenue Member of Council.

33. It came into force in 1958.

34. Kinnear, K.L. (2011). *Women in Developing Countries: A Reference Handbook* (Contemporary World Issues). California: ABC – CLOI, LLC.

35. *Section 6* of the Act.

36. In states where the wife takes share on partition, as in Maharashtra, the widow's potential share will now equal that of the sons and daughter. But where the wife takes no share on partition, as in Tamil Naidu and Andhra Pradesh, the widow's potential share will fall below the daughter's.

37. *(2000) 2 SCC 465: (2000) 2 LRI 273: AIR 2000 SC 988: 2000 CrLJ 1473: (2000) 1 SCR 480*

38. It deals with the power of the High Court to issue certain writs.

39. The writ jurisdiction of the SC can be invoked under it for the violation of Fundamental Rights guaranteed under Part III of the Constitution. *Article 32* is referred to as the Right to *"constitutional Remedy"* for the enforcement of Fundamental rights and since this provision itself has been included in the Fundamental Rights, it cannot be denied to any person.

40. Protection of life and personal liberty.

41. Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty, *AIR 1996 SC 922: (1996) 1 SCC 490*

42. *AIR 2010 SC 235*

43. As understood under *Article 21* of the Indian Constitution.

44. *Section 5(1) of the MTP Act, 1971*

45. The inherent jurisdiction of the Courts to make decisions concerning people who are not able to take care of themselves.

46. *In sections 2(i), (q) and (r) of the Act.*

47. *Section 2(g) of the Act.*

48. Young, I.M. (1990b). *Throwing like a girl and other essays in feminist philosophy and social theory,* (p.155). Bloomington, IN: Indiana University Press.

49. Foucault, M. (1977). *Discipline and Punish: The birth of the prison, trans.* Alan Sheridan. New York: Vintage.

50. Bartky, S. (1990). *Femininity and Domination: Studies in the phenomenology of oppression.* New York: Routledge

51. Foucault, M. (1977). *Discipline and Punish: The birth of the prison,* (p.20). trans. Alan Sheridan. New York: Vintage.

52. Bartky, S. (1990). *Femininity and Domination: Studies in the phenomenology of oppression,* (p.80). New York: Routledge.

53. *(1997) 6 SCC 241*

54. *AIR 1999 SC 625*

55. Punishment for rape.

56. Assault or criminal force to women with the

intent to outrage her modesty.

57. *AIR 2003 SC 3074: 2003 (2) ALD Cri 465*

58. Equality before law.

59. Power of the governor to grant pardons, etc, and to suspend, remit or commute sentences in certain cases.

60. Singh, Y. (2000). *Culture change in India. Jaipur:* Rawat Publications.

61. *ibid*

62. *(1995) 4 SCC 520: 1995 SCC (L&S) 1056*

63. Bhat, P.I. (2001). *"Constitutional Feminism: An Overview"* (2001) 2 SCC (Jour) 1.

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