

Constitutional Feminism and Judicial Patriarchy: Ideology versus Reality

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Abstract

Constitution of India manifests the importance of constitutional feminism in the chapters of fundamental rights and directive principles of state policy. The preamble to the constitution also mentions about justice to all including women. There are three organs of the state namely legislature, executive and judiciary. Each organ with specific responsibility has been assigned a common task to uphold the principles of constitutional feminism and constitutional morality.

Though 70 years has elapsed but the plight of crime against women in India has not been improved despite efforts taken by all three organs of the state. Though penal laws like IPC contains specific provision to deal with sexual offences against women, yet these provisions are not able to fetch justice in true sense to the victim of sexual offences against women. Some authorities, like judiciary, law enforcing agencies and law making authority are to work in a co-operative manner to uphold constitutional feminism but the real picture is far from reality. It happens due to several reasons including mental attitude of officials of executive, judiciary and elected representatives of legislature. The present study tries to reflect how, despite law, courts and police personnel sexual offences against women have been increasing at an alarming rate in India because of several reasons including mental attitude of interpreters of legal provisions in India thus it is reflecting ideology versus reality.

Keywords: Feminism, Patriarchy, Discrimination, Gender, Constitutional Edifice, Affirmative Action.

Introduction

Objective of the Study

Constitutional feminism and sexual offence against women in India are much debated and discussed by scholars of social and juridical sciences. Though India has a comprehensive constitution covering the provisions of fundamental rights and directives principles of state policy including the rights of women, yet the role of law enforcing agencies, legislature and judiciary is not up to the expectations of the constitution framers. The present study seeks to analyze the provisions of law relating to sexual offences against women and the working of judiciary in real sense. It also reflects how the judges of higher judiciary owing to judicial patriarchy have shown apathetic attitude towards constitutional feminism despite sufficient legal provisions to arrest the evil of sexual offences against women in India.

Constitution of India is the Supreme Law of the land. It has been drafted taking into consideration the aspirations of people of India including women who constitute almost half of the population in the country. The framers of the constitution have made separate chapters as III & IV for fundamental rights and directives principles of state policy respectively. These two chapters are 'Magna Carta' of Indian constitution upholding justice, liberty, equality and fraternity among people. Justice, as per the preamble includes social, economic and political justice which are secured through various provisions of fundamental law of the land. Several articles like 14 & 15 (3) talk about Gender Justice and constitutional feminism in India.

Constitution has made ample provisions for upholding feminism and it has done a magnificent job in ensuring gender justice. The preamble to the constitution, inter alia, assures justice, social, economic and political, equality of status and opportunity and dignity of the individual. It recognizes women as a class by itself and allows making of laws and reservation policy favoring them specially. Several articles make express provisions in



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favour of women. It also prohibits all types of discrimination against women and lays a solid ground for securing equal opportunity to women in all walks of life including education, employment and participation.

The elimination of gender based discrimination is one of the fundamentals of the constitution edifice of India. Infact the constitution empowers the state to take measures of positive discrimination in favour of women for naturalizing the cumulative discriminations and deprivations which women face. Article 14 of the Constitution of India ensures to women the right to equality and Article 15 (1) specifically prohibits discrimination on the basis of Sex and Article 15(3) provides for affirmative and positive action in favour of women by empowering the state to make special laws for them.

Article 16 of the Constitution provides for equality of opportunity to all in the matters relating to public employment or appointment to any office and specifically forbids 'inter-alia on the ground of sex. Those articles are all justiciable and form the basis of our legal-constitutional edifice.

The natural obligation to renounce practices derogatory to the dignity of women has been included under Article 51A as fundamental duty. In Chapter IV, the directive principles of state policy direct the state to protect the human rights of women including right to equal pay for equal work, the right to health and work in hygienic conditions, right to maternity benefits and respect for international conventions. These provisions provide solid base and material to build the corpus of constitutional feminism in India. The Equal Remuneration Act, 1976, the Maternity Benefit Act, 1961, the Prenatal Diagnostic Techniques (Regulation and Prevention of misuse) Act, 1994 the Dowry Prohibition Act, 1961 and the Immoral Traffic (Prevention) Act, 1956 are some of the legislations which owe their existence to above mentioned provisions of the Indian constitution.

Although the principles under chapter IV are not strictly justiciable, the Supreme Court of India being a constitutional court, through judicial activism, has infused dynamism into non-justiciable provisions and made them as justiciable. So, now-a-days there is no huge difference between provisions of fundamental rights and that of directive principles, both are complementary and supplementary of each other.

The 73rd and 74th Amendments (1993) to the Indian constitution have served as a major break through towards enhancing the women's participation in democratic process. There amendments provide for reservation of 33.33 percent of elected seats for woman at different levels of local government in both rural and urban areas. There is also a one-third reservation for women in the posts of chairperson in local bodies. This is infact widened the scope of women's representation in legislature in days to come.

Analysis of Sexual Offences against Women under Indian Penal Code, 1860 and Justice Verma Committee's Report
Rape

It is a heinous crime against human body particularly against women. In rape, not only it gives bodily injury to a female but her conscience also dies. Rape is defined as a crime where a male commits or, attempts to have sexual intercourse forcibly on the female. Rape is rape, whether committed by a stranger or a date rape or by the husband. As far as consent is concerned, the consent of female is sometime irrelevant to constitute the crime of rape.

Section 375 of IPC deals with rape. This provision contains following essentials:

1. Sexual contact or intercourse with a women and
2. This act of contact should occur without her consent.

In certain circumstances, the rapist can obtain consent by applying force, threat, coercion, undue influence or under intoxication.

Rape is infact a heinous crime which distorts the women's sexuality, restricting her movement, violates the human rights, violates victim's privacy, personal integrity and to a large extent causes a serious physical, mental and psychological damage. The female feels guilty for being exposed, badly humiliated and traumatized.

While any reform or affirmative action on the part of Government has been always a welcome step to this ever increasing problem, but it is required to be dealt with deep rooted traditions of patriarchy misogyny and repressive attitudes that prevail across all classes of Indian society. While the reasons for rape in villages and tribal areas are attributed to caste, honour, family wars and repressive attitudes in rural areas, India's big cities are also grappling with women entering the public space. If this the rape instances in India are analyzed, it is found that it is the most reprehensible atrocity against a woman. The crime of rape can be regarded as the highest torture inflicted upon virginity, youth, motherhood and womanhood itself. Rape is not only an act of monstrosity against woman victim herself but also a crime against the entire society that also attaches a social stigma to her. It is the crudest and sure mode of entirely dangerous to destroy her personality, self confidence and self respect and throwing her into deep emotional crisis. Rape is therefore, the most hated crimes against the very basic human right and violative of the women's most fundamental right, namely the right to life guaranteed under Article 21.

Another danger in India is that, Indian law does not differentiate between major and minor rape. Rape cultures are nourished by norms, attitudes and practice that trivialize, tolerate or even condone violence against women. They are further normalized if there is impunity for perpetrators either due to lack of effective legal mechanism or apathy to prosecuting crimes against women.

Women who are victims of Sexual offences are some time reluctant to report the matter to the law enforcing agencies because of the embarrassment of discussing the details with male policemen and also the very fear of painful humiliation of being a witness in the court. They get scared and become confused when in the strange environment of the court room,

they are to conduct themselves in a manner foreign to their custom and under a restraint not conducive to clear and coherent thought or free expression.

The brutal gang rape and assault of a 23-year-old paramedical student in Delhi on December, 16th, 2012 has put a spotlight on crime against women in the country. There had been widespread protests and emotional outbursts spontaneously erupted across the country with general public demanding safety and protection of women, a change in the attitude towards women and a change of archaic gender laws and speedy justice to bring rapists to book. Some protesters has demanded the death penalty for rapists. Though, justice Verma committee including Justice Leila Seth and Gopal Subramaniam was constituted after the incident to make recommendations for amendments to the criminal law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against woman. The committee submitted its report on January, 23, 2013.

The committee made recommendations on laws related to rape, sexual harassment, trafficking and child sexual abuse, medical examination of victims, police, electoral and educational reforms. The key recommendations of the committee are as under:-
Rape

The Committee recommended that the gradation of Sexual offences should be retained in the Indian penal code; 1860 (IPC). It was of the view that rape and sexual assault are not merely crimes of passion but an expression of power. Rape should be retained as a separate offence and it should not be limited to penetration of the Vagina, mouth or anus. Non-consensual penetration of a sexual nature should be included in the definition of rape.

The IPC differentiates between rape within marriage and outside marriage. Under the IPC, Sexual intercourse without consent is prohibited. However, an exception to the offence of rape exists in relation to un-consented sexual intercourse by a husband upon a wife. The committee recommended that the exception to marital rape should be removed marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consents to the sexual activity, the relationship between the victim and the accused should not be relevant. The panel has not recommended death penalty for rapists. It suggests that the punishment for rape should be rigorous imprisonment or, Rigorous Imprisonment for seven years to life. It recommends that punishment for causing death or a "persistent vegetative state" should be RI for a term not be less than 20 years, but may be for life also, which means the rest of the persons life. As regards gang rape, it suggests should be death with punishment of not less than 20 years, which may also extend to life imprisonment.

Punishment for other Sexual Offences

The committee recognizes the need to curb all forms of sexual offences and recommends-Voyeurism be punished with upto seven years in jail; stalking or attempts to contact a person repeatedly

through any means by up to three years. Acid attacks would be punished by up to seven years if imprisonment; trafficking will be punished with Rigorous Imprisonment for seven to ten years.

Registering Complaints and Medical Examinations

Every complaint of rape must be registered by the police and civil society should perform its duty to report any case of rape coming to its knowledge. Any office who fails to register a case of rape reported to him or attempts to about its investigation, commits an offence which shall be punishable as prescribed. The protocols for medical examination of victims of sexual assault have also been suggested. Such protocol passed, professional medical examination is imperative for uniform practice and implementation.

Marriages to be Registered

As a primary recommendation, all marriages in India (irrespective of the personal laws under which such marriage are solemnized) should mandatorily be registered in the presence of a magistrate. The magistrate will ensure that the marriage has been solemnized without any demand for dowry having been made and that it has taken place with the full and free consent of both partners.

Sexual Assault

The committee recommended that non-penetrative forms of sexual contact should be regarded as sexual assault. The offence of sexual assault should be defined to as to include all forms of non-consensual non- penetrative touching of a sexual nature. The sexual nature of an act should be determined on the basis of the circumstances. Sexual gratification as a motive for the act should not be prerequisite for proving the offence. The offence should be punishable with five years of imprisonment, or fine, or both. Use of criminal force to disrobe a woman should be punishment with 3 to 7 years of imprisonment.

Verbal Sexual Assault

The committee has suggested that use of words , acts or gestures that create an unwelcome threat of a sexual nature should be termed as sexual assault and be punishable for one year imprisonment or fine or both. At present, section 509 of IPC deals with this type of offence.

Sexual Harassment

The key recommendations made by the committee on the Sexual Harassment of women at work place (prevention, prohibition and Redressed) Bill are as under :-

1. Domestic workers should be included within the purview of the Bill.
2. Under the Bill, the complainant and respondent are required to attempt for conciliation at first.
3. The Bill requires the employers to institute an internal complaints committee to which complaints must be filed. Such an internal committee defeats the purpose of the Bill and instead, there should be an Employment Tribunal to receive and adjudicate all complaints.

Amendments to the Code of Criminal Procedure

Since the possibility of Sexual assault on men, as well as homosexual, transgender and trans

sexual rape, is a reality, the committee recommends that the proposed Criminal Law Amendment 2012 has to be cognizant of the same. It also suggested that a special procedure for protecting persons with disabilities from rape, and requisite procedures for access to justice for such persons was an urgent need.

Bills of Rights of Women

A separate Bill of Rights for women that entitles a woman a life of dignity have security and will ensure that a woman shall have the right to have complete sexual autonomy including with respect to her relationship

Acid Attack

The Committee opined that the offence should not be clubbed under the provisions of grievous hurt which is punishable with 7 years imprisonment under the IPC. It noted that the offence was addressed in the Criminal Laws Amendment Bill, 2012 that the Central and State Governments should create a corpus to compensate victims of crimes against women.

Offences against Women in Conflict Areas

The committee has recommended that the requirement of sanction of Central Government for prosecution of armed forces personnel should be specifically excluded when a sexual offence is alleged. It also recommended posting of special commissioners for women's safety in conflict areas.

Trafficking

The Committee recommended that the provision of the IPC on slavery be amended to criminalize trafficking by threat, force or inducement. It also recommended criminalizing employment of a trafficked person. The juvenile and women protective homes should be placed under the legal guardianship of High Courts and steps should be taken to reintegrate the victims into society.

Child Sexual Abuse

The committee has recommended that the terms 'harm' and 'health' be defined under the Juvenile Justice Act, 2000 to include Mental and Physical harm and health, respectively of Juvenile.

Punishment for Crimes against Women

The committee rejected the proposal for chemical castration as it fails to treat the social foundations of rape. It opined that death penalty should not be awarded for the offence of rape as there was considerable evidence that death penalty was not deterrent to serious crimes. It recommended life imprisonment for rape.

Medical Examination of a Rape Victim

The committee has recommended the discontinuation of the two finger test which is conducted to determine the laxity of the vaginal muscles.

Police Reforms

The Committee gave emphasis on police reform in the areas of placing able officers at high levels of police force, reviewing of existing appointment to ensure the moral vision of officers. It also recommended that law enforcement agencies do not become tools at the hands of political masters. As

per the recommendations of the committee certain steps to reform police administration are required to be taken in the following ways:

1. Establishment of State Security Commissions headed by Chief Minister or Home Minister of State.
2. Laying down broad policy guidelines for police personnel.
3. Constitution of Police Establishment Board to look after the matters of all transfers, postings and promotions of Officers.
4. Director General of Police (DGP) and Inspector General of Police (IGP) should have a minimum tenure of two years.

Reforms in Management of Cases related to Crime against Women

1. A Rape Crisis Cell should be setup. The Cell should provide legal assistance to the victim. It should be immediately notified when an FIR in relation to sexual assault is made.
2. All police stations should have CCTV at the entrance and in the questioning room.
3. All complainant should be able to file FIRs online
4. Police officers should be duty bound to assist victims of sexual offences irrespective of the crime's jurisdiction.
5. Members of the Public who help the victims should not be treated as wrongdoers.
6. The police should be trained to deal with sexual offences appropriately.

Electrol Reforms

The Committee recommended the amendment of the Representation of People Act, 1951. Currently, the Act provides for disqualification of candidates for crimes related to terrorism, untouchably, secularism,, fairness of elections, sati and dowry. The Committee opined that filing of charge sheet and cognizance by the court was sufficient for disqualification of a candidate under the Act. It further recommended that candidates should be disqualified on the ground of committing sexual offences.

Education reforms

The committee has recommended that children's experiences should not be gendered. It has recommended that sexuality education should be imparted to children. Adult literacy programs are also necessary for gender empowerment.

Political Reforms

The committee observed that criminalization of politics should be death with strongly. It also suggested that, in the event, cognizance has been taken by a magistrate of a criminal offence; the candidate ought to be disqualified from participating in the electoral process. Any candidate who fails to disclose a charge should be disqualified subsequently. It suggested law-makers facing criminal charges, and already elected to parliament or, state legislature should vacate their seat voluntarily.

Role of Judiciary

The Judiciary has the primary responsibility of enforcing fundamental rights through constitutional and other legal remedies. The judiciary can take suo-motu cognizance of such issues being deeply

concerned with them both in the Supreme Court and High Courts. An all India strategy to deal with this issue would be advisable. The Chief Justice of India could be approached to commence appropriate proceedings on the judicial side. The Chief Justice of various High Courts may consider and make appropriate orders relating to the issues of missing children to curb the illegal trade of their trafficking etc.

In spite of having constitutional provisions, section 375 of IPC, recommendations of Justice Verma Committee and existing set-up of judicial courts, it has not been possible to render free and fair justice to the victims of rape and other sexual offences in India. The reasons are manifold. One of the important reasons is the mind set of judges sitting in higher judiciary. They are still surrounded by traditional mental setup called judicial patriarchy.

Judicial Patriarchy

The Supreme Court of India and various High Court in India are committed to uphold the concept of constitutional feminism and gender justice and these courts have, by and large, come true in the way of upholding these constitutional goals. But some recent decisions of these courts and observations made by judges have raised serious concern in the mind of common people with regard to role of higher judiciary towards upholding the ethos of constitutional feminism and gender justice. The recent observation made by the former chief justice of India, Mr. Justice S.A. Bobde, While granting bail to a government servant, accused of repeated rape and torture on a 16 year old girl child has been widely criticized though he has denied that he has suggested the girl to marry to the rape accused.

Some similar observations have been made by other judges of the various high courts and this shows their patriarchal attitude. On June 22, 2020 Justice Krishna S. Dixit of the Karnataka High Court had asked an unexpected question to a girl of 10 years age, molested by a person, that why she went to the office of the accused at night and why did she not object to consume liquors with him. The Judge expunged this controversial statement on July 2, 2020 after a hue and cry by the public. In a strange ruling,

the Nagpur Bench of the Bombay High Court, had ordered that the sentence of the 'rape convict' can be reduced if he agrees to pay Rs. 1 lakh to the victim and ultimately the poor victim girl accepted the offer. In another case, the Bombay High Court had ordered that breaking a promise of marriage is neither cheating nor rape. The Madras High Court in a case, had granted bail to a rape accused so that he could mediate with the victim but after wards the Supreme Court had to intervene to get the bail cancelled.

Similarly the order of Rajasthan High Court in Bhanwari Devi Case (1995), Judgement of Guwahati High Court (2020) granting divorce on the ground of not applying sindoor (vermillion) by a women, are required to be analyzed to ascertain the mental attitude of the Judges who are fond of following patriarchal attitude while deciding cases involving gender justice and constitutional feminism.

The real problem is that the avoidable utterances of the judges of higher judiciary in India are rooted in their mindset. These observations and statements demonstrate gender insensitivity and judicial patriarchy on the parts of judges of higher judiciary.

Conclusion

At least, it is expected that the Judges should keep control while making oral observations and questions if not the final judgements but it is better to target judicial patriarchy rather than the judges themselves because the judges are holding constitutional post and are also protected under Contempt of Courts Act, 1971, but at the same time their power to ask question too must reflect gender sensitivity and constitutional feminism and the same is anticipated from them.

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