
THE ROLE OF SUPREME COURT IN SHAPING GENDER JUSTICE: AN ANALYTICAL STUDY

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ABSTRACT

Gender justice is not just a moral concept in India but rather a constitutional commitment which cannot be overlooked at any cost. India is a country which has a history of portraying humanism and equality among all genders through its rich cultural heritage. This can be proven by the fact that one of the forms of lord shiva that is *Ardhanarishvara* is duly worshiped in India. However, during the medieval period and in the early years after independence the Indian society remained much discriminatory towards women and the LGBT community largely due to patriarchal norms. The instances of gender bias and discrimination is still prevalent in many parts of India. This paper aims to analyse that how the Apex Court of India has significantly worked towards enforcement of gender justice and has to its best stood with the constitutional commitment of India. This paper is basically divided into various phases starting from early judicial responses after independence to the phase of major acknowledgement of gender rights (1990 Onwards), and further to the transformative phase after 2000. Each phase of this paper analyses through the various landmark judgements given by the Apex Court that apart from the worldwide debates related to gender justice, the judiciary has consistently reinforced the principle that gender justice is integral to the rule of law in India.

Keywords: Gender Justice, Apex Court, LGBT, Article, section, gender rights, After 2000

Introduction

The Indian society has come a long way after independence. We are becoming the fastest developing economy and recent estimates according to the IMF's World Economic Outlook show that we have surpassed Japan to claim the 4th largest economy in the world. But there are various other issues which if not addressed properly may lead to continued marginalization of vulnerable groups ultimately undermining the inclusive development. Gender Justice is one such aspect.

What is Gender Justice?

Gender justice is a concept which means full realization of rights and opportunities of all genders in all aspects. It tries to prevent any kind of discrimination based on gender not just that of women but also other gender minorities like LGBT. The concept of gender justice is not just about giving them equal access to education but also ensuring their participation in the decision-making process. The Indian society has one of the major gender biasness in the world as according to the world economic forum's gender gap report India ranked 129th out of 146 nations a two-place dropdown from its 2023 position.

We need to understand that gender justice is not just a concept but also a constitutional commitment. Article 14 of the Indian constitution talks about equality before law and equal protection of laws, whereas Article 15 of the constitution of India prohibits discrimination of any sort based on the religion, race, caste, sex, or place of birth. It also empowers the state to make special provisions for women.¹ Article 16 of the constitution of India ensures equality of opportunity in matters of public employment.² Article 39 of the Indian constitution clearly lays down that it is the duty of the state to ensure equal pay for equal work.³

We have entered into the Amrit Kaal and are moving forward with full enthusiasm to compete with the world and eliminate all our ill societal effects. In this fast-moving Journey it's extremely important to understand the role of one of the most important pillars of Indian democracy in determining gender justice and that is Judiciary.

¹ INDIA CONST. art 14 & 15

² INDIA CONST..art 16

³ INDIA CONST. art 39

Early Judicial responses to gender justice in independent India.

The Supreme Court in the case of *Tukaram and Anr v State of Maharashtra* somehow reflected a patriarchal mindset towards society by acquitting the accused and it termed passive submission as consent and it ignored the fact that Mathura the victim was a minor and she might have consented to the police constable in fear and without her will.⁴ The case somehow sparked national protest and led to the legal reforms in India. This case was considered as Nirbhaya case of its time not because justice was done but because it exposed justice so blatantly that it led to the change in system.

Reforms done after this case.

This judgement showed that the system has many flaws and desirable changes are necessary. This judgement led to the enactment of criminal reforms 1983. Following changes were made.

Section 114A was added to the evidence Act:

If a woman says she didn't consent in a custodial rape, the court must presume she didn't. The presumption shifted to that of not having consent in custodial cases.

It also added various other provisions to the penal code like:

Section 376(2): introduced to address cases like *Tukaram* where the victim was under some authority.

Section 376A: punishment for causing death or resulting in the vegetative state of the victim

Section 376B: sexual intercourse by husband upon his wife during separation.

Section 376C: sexual intercourse by person in authority

Section 376D: Gang rape

Although the Supreme Court could not be blamed for giving the verdict in the favour of the accused as it is the duty of the courts to decide a case according to the statute and evidences present before them and not on its own. Also, the general practice in criminal law is that the

⁴ *Tukaram and Anr. v State of Maharashtra* AIR 1979 SC 185

prosecution needs to prove a case beyond the reasonable doubt which was not done in this case. Also, the absence of technologies like DNA made the situation difficult to assess at that time.

The Apex Court after the Tukaram case took to the constitutional commitment of gender justice and it can be seen in the case of *Air India v Nargesh Mirza*. In this case supreme court addressed the contentions of air hostesses who were subjected to discriminatory service conditions. The air hostesses were required to mandatorily retire from their service at the age of 35 or upon the first pregnancy or marrying within 4 yrs of service. The regulations for the male were different as their retirement age was 58. It was very vehemently argued by the petitioners that such differentiation of age in male pursers and female air hostesses is a direct violation of Article 15 of the constitution of India. They contended that it also violated article 14 and article 16 of the constitution of India. The respondents argued that there is a difference in the work nature of the male pursers and female air hostesses and hence it is an unequal treatment between unequals and not between equals. Hence it is not a violation of Article 14 as it is a reasonable classification under article 14. The court struck down the rule 47 which gave the managing director the sole authority to extend the period of employment. It also struck down the part of rule 46 which mandated retirement upon first pregnancy saying that it violated article 14. It held that *“it seems to us that the termination of the services if an air hostess under such circumstance is not only a callous and cruel act but an open insult to Indian womanhood, the most sacrosanct and cherished institution.”*⁵

It is to be seen here that the court did not totally nullify the regulations and it accepted even the respondent's contention that some rules are necessary pursuant to the reasonable classifications. This is how the apex court balanced between gender justice and fundamental rights under the constitution.

The phase of major acknowledgement of gender rights. (1990s Onwards)

This was the phase when the judicial conservatism turned into constitutional promise of equality. The Supreme Court in the case of *Shah Bano v. Union of India* laid down that a woman even though governed by the personal laws is entitled to regular maintenance from the husband if she is not able to maintain herself on her own. This protection of the women from the harsh conditions of divorce in their personal laws comes from the section 125 of the CrPC. The

⁵ *Air India v. Nargesh Mirza* AIR 1981 SC 1829

contention of the Apex Court was that section 125 being a procedural law is applicable to all the sects and has a secular character and thus women from all sects will be protected under this provision⁶. The court here very aptly protected the interests of the women from Muslim Community who were deprived of their maintenance rights in the name of personal laws.

The court also drew a balance between the personal laws and procedural laws as it laid down that the husband is required to give regular maintenance only if the wife is not in a condition to maintain herself.⁷

Similarly in cases like Sarla Mudgal the Apex Court again protected the interests of the women by laying down that converting to Islam religion does not automatically dissolve the first Hindu Marriage. The Supreme court held in this case that second marriage without the dissolution of first one is void and will constitute the offence of Bigamy. It is to be seen here that the court observed that the conversion was done not out of faith but to give effect to the second marriage and hence it is not valid⁸

In both these above cases that is Shah Bano case and the Sarla Mudgal case the apex court felt the need to implement the uniform civil code which is a directive to the legislature under article 44 of the constitution. It observed that to avoid situations of tussle between personal laws and procedural laws it is necessary to implement Uniform Civil Code.

Another very important case of this period is Vishakha v State of Rajasthan which strengthened the India's image of Gender Justice. The apex Court in this judgement relied on CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women), ratified by India in 1993 and held that in the absence of domestic law international treaties can be used. This case was filed before the Supreme Court because of alleged brutal gang rape of a social worker in a village of Rajasthan.⁹

The court in this case held that *“such incident results in violation of the fundamental rights Gender Equality and the Right to Life and Liberty. It is clear violation of rights under Arts 14, 15 and 21 of the constitution.”*¹⁰

⁶ Mohd Ahmad Khan v. Shah bano begum AIR 1985 SC 945

⁷ Ibid

⁸ Sarla Mudgal v union of India AIR 1995 SC 1531

⁹ Vishakha v state of Rajasthan AIR 1997 SC 3011

¹⁰ Ibid

This case totally changed the perspective of Indian society towards workplace dignity and gender equality. Supreme Court in this judgement laid down certain guidelines which became famous by the name of Vishakha guidelines and these guidelines were necessary to be followed at the work place.

Later, on the basis of these guidelines the government of India enacted The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. This act gave the Vishakha Guidelines a statutory backing and extended them through a legal framework.

After 2000

The Vishakha v State of Rajasthan changed the scenario of Indian Judiciary in treating cases of sexual harassment against women. It made the judiciary cautious and more protective towards women. This becomes more truthful when cases like Nirbhaya occur which not only shook the whole country but also the world. The 2012 incident of Nirbhaya case is one of the most brutal and barbaric incidents in the history of India. The Six accused in this case not only gangraped the victim but also inserted iron rods in her private parts causing serious injury to the intestines and vulva which came out hanging, apart from this they also forced her to perform oral sex, kicked her and also, they bit her at 10 different places including the private parts.¹¹

These are those rarest of the rare cases where the judiciary gives capital punishment because the act is so brutal and unthinkable that the convicts being alive will be a threat to society and there is no scope of improvement in the convicts. The cases like these reminds us that India even after being independent for so many years still witnesses gender-based discriminations and there are continuous efforts by a section of society to dominate over women often rooted in biological and sexual differences.

The courts while deciding on the aggravating and mitigating factors clearly said that there is not even a doubt in this case that the aggravating factors totally blur the mitigating factors because the modus operandi of the case is not something a normal human being can think of. The court in this judgement held in the following words that *“the casual manner in which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the*

¹¹ Mukesh and Anr v. State For Nct Of Delhi AIR 2017 SC 2161

empowered and the attitude of perversity are bound to shock the collective conscience which knows what not to do.”¹²

The Apex Court very proactively and rightly punished the Four out of the Six accused in this case (out of the other Two, one was a juvenile and the other one committed suicide in the Tihar Jail) ensuring Gender Justice and its commitment to safeguarding the dignity and the rights of women.

It is to be noted that the Nirbhaya incident took place in 2012 and after this incident a committee named J.S. Verma committee was setup to deal with such heinous offences. Based on the recommendations of this committee the government enacted criminal law (Amendment) Act 2013. Through this act new offences were added in the Indian Penal Code, like Acid Attack, sexual harassment, Voyeurism and stalking. Definition of rape was also expanded and it included non-penile vaginal acts like penetration by objects, oral sex, etc consent was also clearly defined. This act was also called the Nirbhaya act.

It can be seen that most of the cases discussed above mostly focuses on one gender in giving justice and the reason behind this is the history of our country where women were deprived of their rights and it was mostly a patriarchal society. But there are some instances where this apex court has ruled in favour of men also. One such case is Hiral P Harosara and ors v Kusum Narottam Das. The honourable court through this judgement identified the anomaly present in the Domestic Violence Act 2005 within the section 2(q) of the Act which lays down that only male persons can be the respondent within this act. The court referred to section 3 of the act and observed that when this section defines the domestic violence it is clear that such violence is gender neutral.¹³

The court also shed light on the section 2(s) of the act and said that this section considers women as equal coparcener in the joint family and thus makes female coparcener as respondent then why should there be an anomaly in section 2(q) of the act.¹⁴ The Apex Court set aside the judgement of the Bombay High Court and held that the words “adult male” in the section 2(q) of the act will stand deleted as it does not resonate with the Article 14 of the constitution.

¹² Ibid

¹³ Hiral P Harosara v. Kusum Narottamdas Harsora AIR 2016 SC 4774

¹⁴ Ibid

When talking of gender justice, it is extremely important to talk of the rights of a third gender category apart from the male and female which is the LGBT. In India for a very long period, injustice has been done by not recognizing the rights of people from these communities and keeping them away from the mainstream society. But to achieve the desired goal of gender justice and equality it is important to recognise their rights.

The Supreme Court gave the landmark judgement of *Navtej Singh Johar v Union of India* upholding the rights of LGBT community. The Hon'ble court in this judgement held that *"In the garb of social morality, the members of the LGBT community must not be outlawed or given a step-motherly treatment of malefactor by the society. If this happens or if such a treatment to the LGBT community is allowed to persist, then the constitutional courts, which are under the obligation to protect the fundamental rights, would be failing in the discharge of their duty. A failure to do so would reduce the citizenry rights to a cipher."*¹⁵

The Apex court again broadened the scope of Article 21 of the constitution of India and laid down that Article 21 also includes right to have a union, and by union it is not necessarily marriage. The court reasoned that any act of the LGBT community towards their partners as long as it does not disturb the decency or public morality cannot be taken down by the majority perception. The supreme court also laid down that Section 377 of the Indian Penal Code is violative of Article 14 of the Indian constitution as the classification done in the code is not based on any reasonable nexus and intelligible differentia.

Sexual orientation is a natural phenomenon and is inherent in each individual, it is based on neurological and biological factors and any discrimination based on sexual orientation will be violative of the fundamental right of freedom of speech and expression.¹⁶ The Apex court also observed that it is the duty of the constitutional courts to interpret the constitution according to the changing times and demands of the society.

It is to be seen here that our constitution is a living and organic document and is capable of expansion and change in a progressive and pragmatic manner, the court said that if the constitution would not be interpreted in a progressive and pragmatic manner and according to the needs and demands of the society it would become a dead document of no use.

¹⁵ Navtej Singh Johar v Union Of India AIR 2018 SC 4321

¹⁶ Ibid

The Apex Court finally held that the part of section 377 of IPC which criminalized the consensual sexual acts between the adults either of same sex or different as violative of Articles 14, 15 and 21 of the Indian Constitution. Whereas it held that part of section valid which criminalised sexual acts with minor and bestiality (sexual acts with animals).

The Apex Court by giving this landmark judgement finally did the gender justice for the LGBT community which was long overdue and neglected.

In the case of *Swamithri Vishnu v Union of India* a petition was filed in the Apex Court challenging the validity of section 497 of the IPC confers upon the husband the right to prosecute the adulterer but it does not confer upon the wife to prosecute the woman with whom her husband has committed adultery.¹⁷ This was duly observed by the court in the case of *Josheph Shine V Union of India* and the court held in the following words that

*“At first blush it may appear as if it is a beneficial legislation intended to serve the interests of women but on closer examination, it would be found that provision contained in the section is a kind of romantic paternalism which stems from the assumption the women chattels are the property of men.”*¹⁸

The court opined that this provision although made for the purpose of protecting the rights of women turned out to be proving a patriarchal mindset that women are the chattels of men. The history of section 497 of IPC does not tell much good about this provision as it was observed that this section was for the benefit of men to control his sexual ownership over his wife. Also, it only punished the husband for the act of sexuality even If it was consensual and the constitution *adopts a simple principle that the state has no business to intrude into these personal matters. In so far as two individuals engage in acts based on consent, the law cannot intervene.*¹⁹

The court reasoned that if Adultery is considered to be an offence relating to marriage, then the legislature should have also penalised the sexual intercourse of a married man with that of a single woman but the same does not seems to be the case here hence it violates the Article 14

¹⁷ *Swamithri Vishnu v Union Of India* AIR 1985 SC 1618

¹⁸ *Joseph shine v Union of India* AIR 2018 SC 4898

¹⁹ *Ibid*

of the constitution. The court finally gave a landmark judgement and struck down section 497 of the Indian Constitution terming it as against the gender justice and constitutional morality.

Conclusion

From the above discussion of the cases, it can be clearly seen that Apex court in the early period after Independence was not showing much of judicial activism related to gender norms as it was binding itself to the limitations of the law. Cases like *Tukaram v State of Maharashtra* portray this notion. Subsequent decisions after this judgement began by interpreting the constitution in a more humane and progressive approach. The courts have gradually but firmly embraced constitutional morality over social orthodoxy, ensuring protection and dignity of women. Cases such as *Vishaka v State of Rajasthan* and *Nirbhaya* proved to be a turning point in the history of India's gender Justice. The judiciary has also shown willingness to strike down outdated and discriminatory provisions of the personal laws and reinterpret them with the lens of constitutional principles. The Apex court also recognised the injustices done to the LGBTQ community and went against the general notion of society by decriminalising section 377 of the IPC and held that same sex attraction between two people is not against the nature as everyone is not born same and a person cannot be punished just because he is born with different sexual nature. The court while delivering all these landmark judgements ensured that constitution is a living document and its credibility is much more than just a mere document. It is to be seen here that the courts have tried to perform their constitutional obligation with full diligence, but to ensure proper gender justice, the legislature should also take steps, and only then this goal could be achieved.