Application of CEDAW by the Indian Judiciary: Proactive Role in Enabling the Progress of Women's Rights in India

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ABSTRACT

Women's Rights are Human Right's', a slogan was officially raised in the Vienna Conference on Human Rights, where India stood as one of the member states to ratify the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). It reaffirmed that women were "an inalienable, integral and indivisible part of universal human rights", bringing to the fore the worth of the lives and dignity of women. For ages in India, there have been abuses done to women in the name of culture or religion, which are hidden by the sanctity of the so-called private sphere. Especially, the practice of cultural relativism by the Indian legislature does neither venerate nor embolden the universality of human rights. However, subsequent to the Vishaka's landmark judgment, judicial activism is holding accountable the perpetrators of such human rights violations, who had enjoyed the immunity for ages, by inserting the rights of women and gender equality at a higher pedestal and by questioning the validity and legitimacy of certain rampant patriarchal personal laws, with the help of both domestic and international laws. Henceforth, in this paper, the author aims to elucidate that though cultural relativism impedes the advancement of women's rights, the judgement in the case of and similar cases to the Vishaka evidently prove that the Indian judiciary goes the other way around by proactively using international law to strengthen women's rights through the harmonious application of CEDAW and the domestic fundamental laws.

Keywords: *Judicial Activism, Women's Rights, Vishaka Judgement, CEDAW, Cultural Relativism.*

In the year 1997, on the auspicious eve of 13th August, the Supreme Court of India laid down a remarkable judgment in the history of the Indian Judiciary, under the case of *Vishaka*[2], by playing a proactive role in enforcing certain guidelines to protect women against sexual harassment at the workplace using both the fundamental rights and DPSPs[3] (domestic laws) in

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[2] Vishaka & Ors vs. State of Rajasthan & Ors, (1997) 6 SCC 241 (India).
[3] DPSP stands for the Directive Principle of State Policy.

 [ISSN 2581-5369]

consonance with the international convention (CEDAW). This was one of the significant moments in the history of lawmaking, as the judiciary through its activism observed misogynist comportment of sexually harassing women at workplaces and scrapped it down, especially through enforcing an international convention. Here, the domestic courts serve as agents towards the international legal orders for their enforceability, though it is done through their own domestic explication in order to serve their national concerns.[4] India is one such domestic country, an original member of the United Nations and one of the staunch supporters of human rights, which has signed and ratified almost all the human rights treaties and declarations. The International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), is one of such human rights treaties which was ratified by the Government of India on July 9, 1993. During the ratification, in the Vienna Conference on Human Rights, a slogan was officially raised – 'Women's Rights are Human Right's', stating that they were "an inalienable, integral and indivisible part of universal human rights" [5], which implied the fact that women were supposed to be treated as full human beings equal to men, deserving the same dignity, respect and opportunity. For ages in India, there have been abuses done to women in the name of culture or religion, which are hidden by the sanctity of the so-called private sphere.[6] But apparently, judicial activism is holding accountable the perpetrators of such human rights violations, who had enjoyed the immunity for ages, with the help of both domestic and international laws. Hence, this paper elucidates that though cultural relativism impedes the advancement of women's rights, the judgement in the case of and similar cases to *Vishaka* [7] evidently prove that the Indian judiciary goes the other way around by proactively using international law to strengthen women's rights through the harmonious application of CEDAW and the domestic fundamental laws.

The key idea behind ratifying such treaties in the first place lies under "socialization". It is due to this that the member states internalize these norms to the extent that they endorse these human rights covenants, even though they might not be their supporters. The decision of the state assenting to the treaty is significantly affected by the members of that treaty. This results in globalization at a larger level, where judges and courts at the national level start engaging in colloquies with each other, particularly looking at their developments, opinions, decisions, and controversial judgments. This creates an equivalent type of transnational judicial dialogue of

[4]Christopher McCrudden, *Why Do National Court Judges Refer to Human Rights Treaties? A Comparative International Law Analysis of CEDAW,* 109 A. J. INT. LAW. 534, 536 (2015).
[5] Jo Lynn. Southard, *Protection of Women's Human Rights under the Convention on the Elimination of All Forms of Discrimination Against Women,* 8 P. INT. LAW REV. 1, 19 (1996).
[6] G. V. Mahesh Nath, *Women Rights are Human Rights: A Legal Study in Indian Perspective*, SSRN 1, 8 (2020).
[7] Vishaka, *supra* note 2.

interpreting the international law through each other's understanding, setting the international standard. There might be limitations to such inter-judicial cooperation but often to interpret such ambiguous treaty terms they turn towards the jurisprudence of diverse foreign states, creating a global network of some set norms which are anticipated to be fulfilled by the associate states. For instance, in Australia, CEDAW plays a crucial role in determining the constitutionality of federal sex discrimination legislation.[8] But at times there are numerous objections to such foreign law which lies under the idea of cultural specificity.[9] A dilemma arises while accepting and implementing such international human rights because of the ideological conflicts of universalism and cultural relativism in a country like India, which is specially confined within traditional practices and cultural beliefs. Due to this, recommendations put forth by members of international organizations under the treaties, based on sexual orientation, gender identity and women's rights, are solely 'noted' by the Indian government and remain unenforced. For instance, recommendations have been made to eliminate gender-based prejudices, prohibit harmful and discriminatory practices towards women (even under personal laws), integrate a gender perspective and equal representation, control honour killings and dowry deaths, etc. To which Indian legislature has responded by- the bill regarding women's representation in the parliament has been pending since 2008; no amendments to the Indian Penal Code for defining honour killings and sanctions under it; another proposed bill of 2011, on freedom of matrimonial alliance, is pending. The Indian legislature excuses on the basis that it suffers a stumbling block due to the policy of non-interference in personal affairs and laws of any community.[10] Meanwhile, the Indian politicians are seen maltreating this policy by engaging in divisive politics to accumulate votes from various castes, religious communities, and minorities. Hence, there is no denying the fact that this practice of cultural relativism through Indian legislature has been detrimental to both the life and dignity of women and does neither venerate nor embolden the universality of human rights.

Though the Indian legislature treads cautiously under the pretext of cultural relativism, it is the Indian judiciary that plays a proactive role in adopting and implementing such international norms and certifying the attainment of gender equality. The judiciary has attempted to move beyond this cultural relativist approach by inserting the rights of women and gender equality

[8] McCrudden, *supra* note 4, at 547.
[9] Gautam Swarup, *Why Indian Judges Would Rather Be Originalist: Debunking Practices of Comparative Constitutional Law in India*, 5 IND. J. CONST. L. 55, 70 (2012).
[10] Bhumika Nanda, *India and the United Nations Human Rights Council: Gender at a Crossroads*, 10 J. G. LAW REV. 269, 277 (2019).

 [ISSN 2581-5369]

at a higher pedestal and by questioning the validity and legitimacy of certain rampant patriarchal personal laws. This declaration can be proved through the copious judgments passed by the Indian Judiciary in the court of law, with the assistance of the CEDAW convention, starting from the most renowned *Vishaka* case. Under this case, the judges took up the duty to "fill the legislative vacuum" and "participate in the grand constitutional visions".[11] A PIL was filed against a brutal gang-rape of a social worker in Rajasthan under Article 32 of the Constitution for the protection of the fundamental rights of working women ("The Vishaka case" 1997). During this, the court observed that the Parliament had neither enacted a law nor issued any executive orders to provide a safe working environment for women. Hence, the judiciary with the power invested in them through Article 32[12] and Article 142[13], issued guidelines guaranteeing gender equality and the right to work with human dignity, by borrowing certain articles from the international convention of CEDAW, which were harmoniously applicable with the fundamental rights under Articles 14,15,19(1)(g) and 21 of the Constitution.[14] This judgment brought in all the cases of harassment within the purview of fundamental rights. Additionally, spotlighted and inhibited the internalized sexist behaviour predominant in the society, where the victim was disbelieved or blamed for 'provoking' men. The definition of sexual harassment by courts treated it as a form dispersed through hundreds of different acts that vacillated between the definable and open-ended.[15] The field of interpretation was kept wide-open to recognize not only overt but also subtle acts, such as sexist jokes and eve-teasing which were considered 'normal' and 'acceptable' in such patriarchal societies.

After precisely 20 years, on the same legitimate approaches of the *Vishaka* case, the history repeated itself by passing out of another remarkable judgment, in the famously acknowledged *Shayara Bano* case[16], which scrapped another age-old patriarchal personal law and practice by upholding the fundamental rights of women in harmony with the CEDAW. In this case, the unfair practice, under the Sharia law, of *talaq-e-biddat* or triple talak[17], wherein a Muslim man

[11] Shubhankar Dam, *Lawmaking beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analyzing the Legitimacy of the Nature of Judicial Lawmaking in India's Constitutional Dynamic)*, 13 T. J INT. & COMP. LAW 109, 126 (2005).

[12] It provides the 'Right to Constitutional Remedies', affirming the right to move to the Supreme Court for enforcement of fundamental rights.

[13] Confers power upon the court to pass a decree necessary for a matter pending before it.

[14] Khagesh Gautam, *The Use of International Law in Constitutional Interpretation in the Supreme Court of India*, 55 STAN. J. INT. LAW 27, 43 (2019).

[15] Radhika Chopra, *Three Texts, One Issue*, 5 IND. J. G. STU. 116, 119 (1998).

[16] Shayara Bano v. Union of India and Ors., (2017) 9 SCC 1.

[17] The practice of *talaq-e-biddat* is said to have been around since the period of Caliph Umar, more than 1400 years ago.

could divorce his wife by speaking or writing the word talaq thrice, was challenged in the Supreme Court of India.[18] Indeed, yet again the pertinency of the international convention (CEDAW) was brought up, as the petitioner (Mrs Bano) had cited CEDAW along with the fundamental rights. Hence, the Supreme Court interpreted these basic human rights guaranteed under the Indian Constitution harmoniously with the CEDAW, as an international legal order, and held this ancient male-controlled personal law violative of women rights to gender equality, dignity, and life along with describing it as "manifestly arbitrary" and "whimsically and capriciously".[19] Numerous controversies were raised over this judgement as it had intensely interfered with cultural relativism by placing an international law comparatively at a much higher plinth to that of the personal laws.[20] Similarly, the case of *Grihakalyan v. Union of India (1991)*[21] and *Z v. The State of Bihar & Ors (2018)*[22], incorporated the provisions under Article 11 of CEDAW along with upholding the fundamental rights. The former case had upheld the grant of equal pay for equal work along with no termination of service during pregnancy and the latter had upheld that a rape victim, who is in a mentally unstable condition to bear a child, could terminate her pregnancy without spousal consent. Furthermore, under the famous *Shah Bano* case[23], the judiciary had again progressed women's rights by setting aside the Muslim personal law that verboten the maintenance to Muslim women and brought the Muslim women under the purview of section 125 Cr. P.C by awarding them maintenance even after the expiry of the period of iddat, until she remarries or becomes capable of affording herself and her children.[24] This case was filed under the fundamental rights solely and had no mention of the CEDAW. However, the judgment of a very recent case, *Rana Nahid & Ors v. Sahidul Haq Chisti (2020)*[25], dealing with precisely the same issue, had cited all three- the *Shah Bano* precedent, stipulations under CEDAW and relevant fundamental rights. Moreover, in the very controversial case of the Sabrimala temple[26], the judiciary removed the customary ban on the entry of women aged between 10-50 years. This traditional ban was based on the biological factor of womanhood (menstruating during that period) and was, therefore, violative of the fundamental rights under Articles 14, 15 and 25 and were not safeguarded under Article 26. The judges reaffirmed that since India was a party to CEDAW, it had to overcome, dismantle,

[18] All India Muslim Personal Law Board had tried justifying this husband's right to divorce under the Sharia by stating that Islam granted men a greater power in decision-making.
[19] Nanda, *supra* note 10, at 280.
[20] These are delt in the next segment of the paper.
[21] AIR 1173.
[22] 11 SCC 572.
[23] Mohd. Ahmed Khan v. Shah Bano Begum and Ors, (1985) (2) SCC 556.
[24] Nath, *supra* note 6, at 13.
[25] SCC OnLine SC 522.
[26] Indian Young Lawyers Association v. The State of Kerala, (2018) (8) SCJ 609.

 [ISSN 2581-5369]

and refrain from promoting such gender stereotypes, and the stigmatization based on menstruation was in direct contrast with the mandate of achieving substantive equality of CEDAW.[27]

Each of the above-mentioned cases resulted in an opportunity for the judiciary to interpret the domestic laws in consonance with the international human rights order, to fill up those legislative vacuums through the endorsement of universal principles into domestic laws that incorporated and reflected the concerns of women. Hence, these cases are a shred of evidence on behalf of the Indian judiciary's proactive role in stepping up to safeguard the rights of the marginalized sections of the society irrespective of hindrances offered from the cultural and religious norms of the Indian society. Inspite of such conspicuous efforts of the judiciary, there have been two major contentions raised against it. The first is that the harmonious application of international and domestic laws raises critical questions of judicial discretion in constitutional adjudication. It has been raised that the use of both foreign precedents and international law inflicts significant damage to the text of the Constitution as well as questions the judicial discretion and assigned role of the judges as the "interpreters of the constitution"[28]. This contention can be falsified on the basis that apart from the key ideas of globalization, socialization, the spread of universalistic approach towards human rights, the references to foreign jurisprudence by the courts are an attempt to introspect and distinguish between the two jurisdictions to lead to a better understanding of the own legal framework.[29] Also, the courts apply the international law obligations only after the treaties are ratified by the legislature and are in a harmonious construction with the domestic law, and if a conflict arises the latter prevails. While talking about judicial discretion and the role of judges, the constitution under certain articles itself grants them the authority – Article 32, grants power to the Court to protect and enforce basic fundamental rights; Article 141, grants authority to the Court's decision to be binding on all courts within the territory of India and Article 142, confers power upon the Courts to pass a decree or order in case of requirement in any pending matter before it.[30] Even if the constitution was to remain aloof to such international norms so as to maintain the 'sanctity' of it, then it would just turn into a rigid and inflexible set of legal orders incapable of evolving with societal changes.

The second contention raised is that the purpose of the CEDAW is defeated by the

[27] Nanda, *supra* note at 10, at 279.
[28] Swarup, *supra* note at 9, at 57.
[29] *Id.* at 70.
[30] Dam, *supra* note 11, at 127.

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reservations[31] made by countries under it, which weakens the system of implementation and makes women's rights an arena of ongoing struggle. The Indian legislature has made reservations under Articles 5 and 16 of CEDAW, both of which are related to the elimination of the customary and traditional practices, of various communities, that discriminate against women, and hence, continues to follow its practice of protecting cultural relativism by safeguarding rampant patriarchal personal laws. Though *prima facie* it appears to be so, legal scrutiny brings out that Articles 5 and 16 are included under 'declarations' and not 'reservations'. Declarations are the ones where the government promises to "abide and ensure the provisions" rather than "not to be bound" as in the case of reservations. This does not exclude the legal effect of both the provisions of the convention.[32] Apart from this, Article 2(f) of CEDAW also grants power to the courts to "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women", ultimately, fulfilling the objective of the convention. Clearly, the courts have always kept these objectives and provisions of CEDAW in mind, irrespective of the declarations, while passing out judgements favouring women's progress.

These numerous progressive efforts made by the Indian judiciary either through the scrapping of rampant patriarchal personal law or enforcing universalistic legal orders, eventually, comes down to accomplishing the ambition of espousing women's rights as human rights. As rightly said in the words of Justice Krishna Iyer,

"The fight is not for woman's status, but for [*sic*] human worth. The claim is not to end the inequality of women but to restore universal justice. The bid is not for loaves and fishes for the forsaken gender, but for cosmic harmony, which never comes till woman comes. Woman's exploitation is a reality and gender justice, a fragile myth."[33]

To annihilate this exploitation and convert this myth into a reality, our domestic courts ultimately need to abide by international standard norms as binding laws. Although the judiciary is putting in valiant efforts, there are still miles to go. As even after previewing such advanced judgements there are still cavities left to be filled, starting from very own recommendation given out by various countries under the human rights council- taking once and for all, the initiative of criminalizing marital rape without bluffing around with the age

[31] Reservations are made by states while ratifying treaties to exclude or to modify the legal effect of certain provisions of it in their application to the state.
[32] Indira Jaising & Priyadarshini Narayanan, *The Validity of Reservations and Declaration to CEDAW: The Indian Experience*, 5 IWRAW 1, 14 (2003).
[33] Nomita Aggarwal & Geeta Sekhon, *Are Women's Rights Human Rights: Myth versus Reality,* 2 PAK LAW REV. 157, 174 (2006).

barrier. Certainly, 'humanizing of women's rights' would turn into a cinch as soon as the legislative body stops enshrouding behind the excuse of cultural relativism.

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 [ISSN 2581-5369]

 DOI: https://doij.org/10.10000/IJLMH.112568

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 5 | Issue 1

2022