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JUDICIAL ACTIVISM AND WOMEN'S RIGHTS IN INDIA: BETWEEN CONSTITUTIONAL PROMISE AND STRUCTURAL PATRIARCHY

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ABSTRACT

India's constitutional architecture offers women an impressive catalogue of rights — equality before the law, non-discrimination, dignity, and personal liberty. Yet the distance between constitutional text and lived reality has historically been vast. This article argues that judicial activism has served as an indispensable, if imperfect, bridge across that gap. Through a critical examination of landmark Supreme Court decisions — from *Vishaka v. State of Rajasthan* (1997) to *Joseph Shine v. Union of India* (2018) — the article demonstrates how the judiciary has functioned as a site of feminist norm-generation when the legislature and executive have faltered. It simultaneously interrogates the structural limitations of this reliance: the democratic deficit of counter-majoritarian judicial law making, inconsistent enforcement, the marginalisation of substantive equality, and the conspicuous silence of courts on issues such as marital rape and intersectional discrimination. Drawing on feminist legal theory (Fineman, 2005; Agnes, 1999), comparative constitutional law, and empirical literature (Bhuwania, 2017; Mehta, 2007), the article contends that judicial activism is a necessary but insufficient condition for gender justice. Durable equality demands a triangulated effort among the judiciary, legislature, civil society, and the state.

Keywords: Judicial Activism; Women's Rights; Gender Equality; Feminist Legal Theory; Public Interest Litigation; Constitutional Interpretation; Substantive Equality; Personal Laws.

I. INTRODUCTION

The Indian Constitution is, on its face, one of the most gender-sensitive founding documents in the world. Articles 14 and 15 guarantee equality and prohibit sex-based discrimination; Article 21 has been expansively construed to encompass dignity, autonomy, and reproductive liberty; Directive Principles in Articles 39 and 42 mandate equal pay and

humane working conditions. Yet a persistent gap has obtained between this textual generosity and the material conditions of Indian women's lives. Patriarchal social structures, under-enforcement of protective legislation, and a legislature historically susceptible to majoritarian or communal pressure have together ensured that constitutional promises remained, for millions of women, aspirational rather than operative (Agnes, 1999; Jaising, 2000).

Into this gap, the Indian judiciary — particularly the Supreme Court — has stepped with increasing boldness since the Emergency period of 1975–1977. Judicial activism, understood as the willingness of courts to strike down executive or legislative action, fill normative lacunae, and issue affirmative remedial directions, has generated a body of gender jurisprudence that has reshaped the legal landscape of India. From the workplace harassment guidelines in *Vishaka v. State of Rajasthan* (AIR 1997 SC 3011) to the abolition of triple talaq in *Shayara Bano v. Union of India* ((2017) 9 SCC 1), courts have done what parliaments would not or could not.

This article critically examines that contribution. Part II situates judicial activism in theoretical context, engaging with feminist legal theory. Part III provides a historical overview of gender jurisprudence in India. Part IV analyses landmark rulings in depth, exposing both their transformative potential and their doctrinal limitations. Part V examines the structural criticisms of judicial activism as a vehicle for gender justice. Part VI proposes a reform agenda. The article concludes by arguing that judicial activism is a necessary but constitutionally precarious foundation for women's rights, and that the project of gender equality ultimately requires institutional plurality (Mehta, 2007; Baxi, 1985).

II. THEORETICAL FRAMEWORK: JUDICIAL ACTIVISM AND FEMINIST LEGAL THEORY

A. Judicial Activism — Concept and Contours

The phrase 'judicial activism' was coined by the American historian Arthur M. Schlesinger Jr. to describe the disposition of certain judges to give effect to their own policy preferences rather than defer to the legislature (Schlesinger, 1947). In academic discourse, the term has acquired a more neutral meaning: an activist court is one more willing to invalidate legislative or executive action. In the Indian constitutional context, activism has an additional, constructive dimension — the power to issue directions that fill normative vacuums left by legislative inaction, exercised frequently under Articles 32 and 226 (Baxi, 1985).

The legitimacy of judicial activism has been extensively debated. Critics invoke the

counter-majoritarian difficulty: unelected judges displacing democratically accountable legislators. Defenders respond that the judiciary's function is to protect constitutional rights against majoritarian erosion, and that where the legislature has systematically excluded or ignored a constituency — as has historically been the case with women — judicial intervention acquires heightened democratic justification (Mehta, 2007).

B. Feminist Legal Theory and Its Implications for Indian Gender Jurisprudence

Feminist legal theory offers a critical vocabulary for evaluating judicial activism on gender. Liberal feminism — the dominant strand in Indian gender jurisprudence — pursues formal equality: the removal of discriminatory classifications and the extension to women of rights already possessed by men. This strand has produced significant gains, from the Vishaka Guidelines to the decriminalisation of adultery in *Joseph Shine*. However, as Fineman (2005) argues, formal equality can be inadequate to address structural subordination.

Substantive equality, by contrast, requires the law to account for the concrete disadvantages women face and to mandate affirmative transformation. The distinction is not merely academic: a court that strikes down adultery law as violating formal equality while declining to criminalise marital rape achieves formal symmetry while leaving intact one of the most severe forms of domestic subordination (Agnes, 1999). Furthermore, intersectional analysis — the recognition that gender discrimination is compounded by caste, class, religion, and disability — is largely absent from Indian gender jurisprudence. The specific vulnerabilities of Dalit women, tribal women, or women with disabilities remain under-theorised in judicial reasoning (Jaising, 2000).

III. HISTORICAL DEVELOPMENT OF GENDER JURISPRUDENCE IN INDIA

Indian courts' engagement with gender equality predates independence. However, it was the post-Emergency transformation of the Supreme Court that catalysed modern judicial activism in favour of women. The curtailment of fundamental rights during 1975–1977 produced, paradoxically, a judiciary determined to assert its protective function. The expansive reading of Article 21 in *Maneka Gandhi v. Union of India* (AIR 1978 SC 597) — holding that the right to life encompasses the right to live with dignity — opened doctrinal space for a broad range of gender claims.

The introduction of Public Interest Litigation (PIL) in the early 1980s was equally

transformative. In *S.P. Gupta v. Union of India* (AIR 1982 SC 149), the Supreme Court relaxed the rule of locus standi to allow any public-spirited individual to move the court on behalf of those unable to do so. PIL became the primary vehicle through which women's rights organisations brought structural gender discrimination before the courts (Baxi, 1985). This opened space for landmark rulings that the legislature would not have produced independently, but also created an access inequality that persistently advantages urban, educated, middle-class petitioners over the women most exposed to violence and discrimination (Bhuwania, 2017).

A landmark early example is *Hussainara Khatoon v. State of Bihar* (AIR 1979 SC 1360), which, though not a gender case per se, established the Court's willingness to issue broad remedial directions on behalf of the most marginalised, setting the template for subsequent PIL-based gender interventions. The decades since have produced substantial gender-sensitive jurisprudence punctuated by landmark decisions on workplace harassment, personal law reform, reproductive autonomy, violence against women, and the decriminalisation of discriminatory provisions.

IV. CRITICAL ANALYSIS OF LANDMARK JUDGMENTS

A. *Vishaka v. State of Rajasthan* (AIR 1997 SC 3011): The Legislation-by-Judiciary Paradox

The circumstances giving rise to *Vishaka* were stark. Bhanwari Devi, a community worker employed by the Rajasthan government's Women's Development Programme, was gang-raped for attempting to prevent a child marriage. The case exposed the absence of any statutory framework addressing sexual harassment at the workplace. The Supreme Court issued the Vishaka Guidelines — a comprehensive set of employer obligations, including the constitution of complaints committees, awareness programmes, and protective measures — drawing expressly on India's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979) (CEDAW Committee, 2014).

The judgment represents judicial activism at its most constructive: identifying a normative lacuna, filling it with substantive content derived from international human rights law, and directing that the guidelines would operate as binding law until Parliament enacted legislation. Parliament took sixteen years to do so, enacting the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. Yet *Vishaka* also illustrates the limitations of court-generated norms. The guidelines were widely ignored in the informal and domestic sectors, precisely where working women are most vulnerable. The Internal Complaints Committee mechanism has been inconsistently implemented, and rural women

remain largely unaware of its existence (NCW, 2023). The judicial achievement was real but structurally constrained by the very socio-economic conditions that generate harassment.

B. Shayara Bano v. Union of India ((2017) 9 SCC 1): Gender Justice and Religious Personal Law

Shayara Bano challenged the constitutionality of instantaneous triple talaq (*talaq-e-biddat*), a practice permitting Muslim men to irrevocably dissolve marriage by pronouncing talaq three times in immediate succession. The Supreme Court, by a 3-2 majority, held the practice unconstitutional, finding it arbitrary and therefore violative of Article 14. The majority's reasoning — that what is manifestly arbitrary cannot be saved by Article 25 (religious freedom) — was intellectually significant, cutting through personal law exceptionalism that had long shielded discriminatory practices from constitutional scrutiny. Parliament subsequently criminalised the practice through the Muslim Women (Protection of Rights on Marriage) Act, 2019.

However, the decision attracts legitimate criticism on two fronts. First, the majority's failure to reach consensus on whether triple talaq was an 'essential religious practice' under Article 25 left the doctrinal question unresolved, creating uncertainty for future personal law challenges. Second, and more substantively, the selective application of constitutional scrutiny is striking: practices within Hindu personal law that equally subordinate women attract proportionally less judicial attention, producing an asymmetry with communal implications (Agnes, 1999). The comparison with the Sabarimala decision — *Indian Young Lawyers Association v. State of Kerala* ((2019) 11 SCC 1) — is instructive: a 4-1 majority struck down the exclusion of women from the Sabarimala temple, triggering intense community resistance and minimal enforcement, demonstrating the limits of judicial authority against organised religious sentiment.

C. Danial Latifi v. Union of India (AIR 2001 SC 3958): Interpretive Creativity and Maintenance Rights

The Shah Bano litigation of 1985 — *Mohd. Ahmed Khan v. Shah Bano Begum* (AIR 1985 SC 945) — had briefly opened maintenance rights for divorced Muslim women under Section 125 CrPC. Parliament enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986, widely interpreted as reversing the decision. In *Danial Latifi*, the Supreme Court demonstrated its capacity for purposive interpretation: rather than striking down the 1986 Act, the Court construed it to require a Muslim husband to make provision for the wife's entire

future beyond the *iddat* period, effectively restoring the maintenance rights the legislature had sought to extinguish. This exemplifies both the creativity and the fragility of judicial activism — the court preserved a discriminatory statute by reading it progressively, leaving the discriminatory framework formally intact and susceptible to future restrictive interpretation.

D. Laxmi v. Union of India ((2014) 4 SCC 427): Victims, Compensation, and the Enforcement Deficit

Laxmi, an acid attack survivor, petitioned for regulation of acid sales and mandatory compensation for survivors. The Supreme Court's directions — regulating retail sale, mandating compensation of Rs. 3 lakh, and directing medical rehabilitation — addressed a domain where both the legislature and police had been conspicuously inert. However, enforcement has been inconsistent: many states have failed to implement the compensation framework effectively, and acid remains available in rural markets with minimal restriction (NCRB, 2023). The case illustrates the systemic enforcement deficit that attenuates judicial achievements: courts can declare rights, but where the executive is disinclined or under-resourced, judicial declarations remain aspirational.

E. Joseph Shine v. Union of India (AIR 2018 SC 4891): Autonomy, Dignity, and the Unresolved Paradox of Marital Rape

By unanimously striking down Section 497 IPC (adultery), the Court went beyond formal symmetry to articulate a robust conception of women's constitutional autonomy — holding that treating women as the chattels of their husbands was incompatible with their dignity as rights-bearing persons. The decision is doctrinally significant for its explicit engagement with substantive, rather than merely formal, equality (Fineman, 2005).

Yet the parallel between Section 497 and the marital rape exception in Section 375 IPC is uncomfortable: both provisions rest on the same logic of spousal proprietary entitlement over the wife's body. The Court's decision in *Joseph Shine* creates a doctrinal foundation for striking down the marital rape exception, yet the Court has not taken that step. The Law Commission has recommended reform (Law Commission of India, 2000), and the CEDAW Committee has specifically identified this gap as a priority (CEDAW Committee, 2014), yet legislative and judicial silence persists. This is not a minor inconsistency — it represents a structural failure of gender jurisprudence to address one of the most prevalent forms of violence against women in India.

F. Suchita Srivastava v. Chandigarh Administration ((2009) 9 SCC 1) and Reproductive Autonomy

Suchita Srivastava recognised that a woman's right to make reproductive choices is an integral component of personal liberty under Article 21, holding that the state cannot compel or deny abortion without the woman's free and informed consent. *Independent Thought v. Union of India* ((2017) 10 SCC 800) extended the reproductive rights framework to child marriage, striking down the exception that had excluded marital rape of girls aged 15–18 from the definition of rape. These decisions signal the Court's willingness to enter the domain of bodily autonomy. However, the Medical Termination of Pregnancy (Amendment) Act, 2021, while extending the gestational limit, has not resolved the access deficit for women in rural and peri-urban areas, where clinical infrastructure remains inadequate (NCW, 2023).

V. STRUCTURAL CRITICISMS OF JUDICIAL ACTIVISM AS A VEHICLE FOR GENDER JUSTICE

A. The Democratic Deficit and Judicial Overreach

The most fundamental objection to judicial activism as the primary engine of gender reform is constitutional: law-making is the province of the elected legislature. When courts issue directions that function as legislation — as the Vishaka Guidelines did for sixteen years — they displace legislative authority without democratic mandate (Mehta, 2007). Mehta's analysis of the Indian Supreme Court's expansive PIL jurisdiction shows that it has produced a form of judicial sovereignty that can undermine accountability. The tension is particularly acute in personal law, where judicial intervention intersects with community identity and religious freedom in ways that generate allegations of cultural imperialism, as evidenced by the backlash to both *Shayara Bano* and *Sabarimala*.

B. The Inconsistency Problem

Judicial activism in India has been markedly inconsistent. The same constitutional provisions — Articles 14, 15, and 21 — that were deployed to abolish triple talaq and decriminalise adultery have not been extended to strike down the marital rape exception, notwithstanding that it rests on the same logic of male spousal authority that *Joseph Shine* found constitutionally offensive. This inconsistency reflects the judiciary's sensitivity to political context and community resistance rather than principled constitutional analysis, producing a gender jurisprudence that advances formal equality in some domains while

preserving substantive patriarchy in others (Agnes, 1999; Jaising, 2000).

C. The Enforcement Gap

Judicial decisions require executive implementation. In India, the chain between Supreme Court direction and ground-level enforcement is long and frequently broken. National Crime Records Bureau data (NCRB, 2023) consistently reveal that conviction rates for crimes against women — including rape, domestic violence, and dowry harassment — remain alarmingly low despite robust legislative and judicial frameworks. The Protection of Women from Domestic Violence Act, 2005 — substantially shaped by judicial direction — is enforced with notorious inconsistency across states, with Protection Officers chronically under-resourced and under-trained (NCW, 2023).

D. The PIL Problem: Access, Capture, and Class Bias

PIL, the primary institutional mechanism through which gender issues reach the Supreme Court, has been cogently critiqued as a mechanism captured by elite urban civil society actors, producing jurisprudence shaped by the interests and assumptions of the educated middle class rather than the women most exposed to violence and discrimination (Bhuwania, 2017). Dalit women — who face a devastating intersection of caste-based and sex-based violence — have rarely been the subjects of successful PIL litigation before the Supreme Court. This structural access inequality means that gender jurisprudence reflects a partial and skewed account of Indian women's experience, systematically underrepresenting the most vulnerable.

E. Judicial Capacity and the Limits of Legal Solutions

Courts are equipped to adjudicate discrete legal disputes and to declare constitutional norms; they are not designed to administer social programmes, monitor policy implementation, or engage in sustained institutional reform. Judicial directions on acid attack compensation, shelter home conditions, or crèche facilities — however well-intentioned — often result in compliance theatre: formal government responses that satisfy judicial reporting requirements without producing substantive change. This limitation reflects the broader truth, articulated by Fineman (2005), that legal reform, however progressive, cannot substitute for the transformation of structural socio-economic conditions that generate gender inequality.

VI. A REFORM AGENDA FOR GENDER JUSTICE IN INDIA

A. Legislative Action to Consolidate and Extend Judicial Gains

The most urgent legislative priority is the criminalisation of marital rape. India is among a small group of countries that continue to exempt spousal rape from criminal liability. The anomaly is constitutionally untenable after *Joseph Shine* and *Suchita Srivastava*, and the Law Commission has recommended reform (Law Commission of India, 2000). Beyond marital rape, legislation should consolidate the reproductive rights framework and extend access to safe abortion services for women in rural and peri-urban areas where clinical infrastructure remains inadequate (NCW, 2023).

CEDAW obligations provide a powerful external accountability mechanism (CEDAW Committee, 2014). Parliament should undertake a systematic audit of domestic law against CEDAW obligations, treating the Committee's Concluding Observations as a reform agenda rather than a diplomatic inconvenience. The legislature must also reconsider personal law reforms across all communities in a manner that is internally consistent and does not selectively apply constitutional scrutiny based on communal identity (Agnes, 1999).

B. Specialised Gender Courts and Intersectional Adjudication

Dedicated family and gender-based violence courts — adequately staffed, sensitised, and resourced — would address both the delay and the insensitivity that characterise ordinary criminal and civil courts in handling women's cases. Such courts should be mandated to apply intersectional analysis that recognises the compound disadvantage faced by Dalit, tribal, and differently abled women (Fineman, 2005; Jaising, 2000). Fast-track procedures for sexual violence and domestic violence cases, combined with improved victim support services, would reduce attrition in the criminal justice pipeline.

C. Strengthening Enforcement Infrastructure

Judicial direction without enforcement infrastructure is symbolic. Protection Officers under the Protection of Women from Domestic Violence Act, 2005, should be professionalised, adequately compensated, and subject to judicial monitoring. District Legal Services Authorities should be required to conduct regular outreach in rural areas. State compensation funds for gender-based crime victims, modelled on the acid attack compensation framework from *Laxmi v. Union of India*, should be extended, properly capitalised, and disbursed transparently (NCRB, 2023).

D. Increasing Women's Representation in the Judiciary

Women constitute less than fifteen percent of judges in the Supreme Court of India and significantly less in High Courts. This representational deficit is not merely symbolic: an empirical body of literature suggests that judicial composition affects the attentiveness of courts to gender-specific harms (Jaising, 2000). The collegium system of judicial appointments should adopt transparent gender diversity benchmarks, and gender-sensitivity training should be mandated for all judicial officers at every level of the judiciary.

E. Expanding Legal Aid and Technology-Based Access

Women in rural and marginalised communities remain effectively excluded from the justice system — not because rights do not exist, but because access does not. Free legal aid mechanisms should be strengthened and extended specifically to gender-based violence victims. Digital platforms and mobile-based complaint systems — building on the framework of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 — should be expanded to cover domestic violence, dowry harassment, and acid attacks, enabling women to seek relief without physically navigating hostile administrative environments (NCW, 2023).

VII. CONCLUSION

Judicial activism has been an indispensable, if structurally precarious, catalyst for the advancement of women's rights in India. In a polity where the legislature has been susceptible to majoritarian pressure, where executive enforcement is chronically inadequate, and where patriarchal norms are deeply entrenched, the Supreme Court's willingness to interpret the Constitution expansively and fill normative lacunae has produced real and irreversible gains for Indian women. The Vishaka Guidelines, the abolition of triple talaq, the decriminalisation of adultery, and the constitutional recognition of reproductive autonomy are achievements that might not have occurred — or would have occurred far later — without an activist judiciary (Baxi, 1985; Agnes, 1999).

Yet the analysis in this article reveals the limits of this model. Gender jurisprudence is inconsistent, reflecting political sensitivity rather than principled constitutional analysis. Enforcement is chronically weak, attenuating the practical impact of progressive decisions. The PIL mechanism, while democratising access in principle, has in practice been captured by elite constituencies, leaving the most vulnerable women at the margins of judicial attention (Bhuwania, 2017). And the continuing silence on marital rape demonstrates that judicial

activism operates within political constraints that constitutional creativity alone cannot overcome.

The project of gender equality in India cannot be delegated to the judiciary alone. It requires a legislature willing to translate judicial norms into durable statutory frameworks; an executive genuinely committed to their enforcement; civil society organisations capable of monitoring implementation; and a broader cultural transformation that renders patriarchal norms socially illegitimate rather than merely legally impermissible (Mehta, 2007; Fineman, 2005). Judicial activism can illuminate the path; it cannot walk it alone. The standard against which Indian gender jurisprudence must ultimately be measured is not the law as declared, but the lives as actually lived by the women in whose name the law is invoked. By that standard, the work remains profoundly unfinished.

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