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Upholding Women's Right through Litigation*

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* The views expressed in this paper are those of the author and do not necessarily represent those of the United Nations.

Why is litigation considered a strategic tool for upholding women's rights? Socio-cultural values not only treats women differently, but also influences policy making initiatives thereby creating different legal standards for men and women. As a result, many countries of the world continue to have discriminatory legal provisions, instances of which can be seen in denial of right to inheritance of property for women whether married or unmarried, denial of right to confer citizenship on equal terms with men, discrimination in child custody, and also laws that legitimize bigamy/poligamy by men. Beyond the apparent discrimination against women under laws and policies, various forms of violence are yet to be even recognized as crimes. On the contrary, where rights are recognized there is often lack of access to justice or lack in *de facto* realization of rights as prescribed under CEDAW.

Individual identity of women as citizens is often not granted formal recognition as women are always considered as subjects to be given away or go away from their natal families and birthplace. Rights are therefore created where the women go, mainly on the basis of marital status and on the notion of dependence. In such situations the creation of rights continues to find basis in public/ private dichotomy, pushing women and their issues behind the curtains of family and so-called "familial privacy". Even in instances where the state promotes gender neutral law, if the effect of such law results in disparity and enhances the disadvantaged position of women, what would one do in such circumstances?

Often at times advocacy is seen as a tool for ensuring proper implementation of law or for reforming discriminatory laws. However, if there is resistance towards amending discriminatory laws; if despite the presence of some political leaders in favour of change, there is insurgency for years leading to political instability; if the parliament that is responsible for formulation of laws is dissolved and remains absent for several years; if the root cause of insurgency is not addressed; if there is unequal distribution of benefits amongst men and women and almost no access or control over resources, if inter-sectionality of identities amongst women has not been recognized or taken into consideration and women continue to dwell in society with unbalanced power relationships, what would one do in those circumstances?

Even in parliament, if there is tyranny of majoritarian rule where the mindset of such majority is prejudiced and political leaders mostly being loyal to vote fail to challenge discriminatory and stereo-typed cultural practices and values, what would you do?

Even where there is law, but laws are not enforced; where institutions for implementation do not exist or the mechanism remains weak; where resource allocation towards realizing women's right to life of women is almost nil, then what would one do?

If you are living with terrorism or imperialism, with fundamentalism, in poverty, and in gender inequality, what will you do?

Yes, many of our countries are party to various international human rights instruments and 187 countries are party to CEDAW. Infact, all the countries of South Asia are parties to CEDAW. All governments have also committed to the Beijing Platform of Action (BPFA) and it's outcome document on Millennium Development Goals. All governments of such South Asian countries have committed to eliminate all forms of discrimination against women.

Constitutions of all countries of the region guarantee non-discrimination and equality. All such constitutions contain provisions for writ jurisdiction and provisions for judicial review. Courts of the region have been seen to have made best efforts in maintaining separation of power, upholding rule of law and strengthening democratic values. They not only play critical roles in protecting fundamental rights guaranteed by constitutions of their respective countries, but also in expanding the ambit of such rights through judicial interpretation based on internationally accepted principles thereby effectively translating and embedding treaty jurisprudence into national jurisdiction. Demonstrable examples of such judicial activism can be seen through several cases in countries such as India, Nepal and Bangladesh.

In India, the case of *Vishakha v. State of Rajasthan (AIR 1997 SC 3011)* was used to argue for the recognition of sexual harassment at the workplace and provide legal protection against the same. Although the immediate cause for filing of the PIL was the gang rape of a social activist in a village of Rajasthan, this case is the first comprehensive attempt at analyzing the issue of rights of working women against violence and harassment in workplaces. This PIL was brought to the Supreme Court with the aim of exploring suitable methods for the realization of gender equality in the work places and to bring about changes in the realities of violence against women at workplaces through judicial processes in the absence of legislation to this effect. The Supreme Court in upholding women's rights to gender equality, to work with dignity and to a working environment safe and protected from sexual harassment or abuse stated "*International conventions and norms, consistent with the spirit of the fundamental rights, can be read into those rights for interpreting them in the larger context to promote the objects of the Constitution – In the absence of domestic law on the particular aspect, these conventions and norms as ratified by India can be relied on by the Supreme Court to formulate guidelines for enforcement of fundamental rights*". Subsequently having considered the provisions under the Beijing Statement of Principles of the Independence of the Judiciary, 1995; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and the Protection of Human Rights Act, 1993, clarified issues relating to judicial activism and formulated a set of guidelines to prevent and investigate future incidents of sexual harassment till such time that a formal legislation is enacted by the parliament.

Similarly in Bangladesh a petition was filed under Article 102 of the Constitution of the People's Republic of Bangladesh, whereupon a Rule Nisi was issued calling upon the respondents to show cause as to why the respondents (the State) failed to adopt guidelines, or policy or enact proper legislations to address the issue of abuse of sexual harassment for protecting and safeguarding the rights of the women and girl children at work place, educational institutions/universities and other places wherever necessary which has been regularly reported in the media, public and other places. Referring to Bangladesh's obligation under CEDAW, the Declaration on the Elimination of All Forms of Violence Against Women (DEVAW) amongst other international treaties and instruments, the Court stated "*Our courts will not enforce those Covenants as treaties and conventions, even if ratified by the State, are not part of the corpus juris of the State unless those are incorporated in the municipal legislation.*" It however thereafter stated "*However, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III, particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution.*" And finally in acknowledging that equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment at the workplace and

educational institutions the Court reiterated that "*Article 25 occurring in Part II (Fundamental Principles of State Policy) of the Constitution states, amongst others, that the State shall base its international relations on the principles of respect for international law and the principles enunciated in the United Nations Charter*". Based on these principles, the Court issued sexual harassment guidelines for the whole country, which will remain in place until legislation is passed. The guidelines define sexual harassment, identify the steps required of employers and academic institutions to prevent harassment, and create a complaints procedure.

In Masilamani Mudaliar and others (Appellants) v Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and others (Respondents), ((1996) 8 SCC 525), on the question of sex discrimination in limiting enjoyment of property rights by women under the Hindu Succession Act, which was one of the personal laws in India, the Supreme Court stated that "by virtue of the Protection of Human Rights Act, the principles embodied in CEDAW and the concomitant right to development became integral parts of the Indian Constitution". The State was considered to be enjoined by virtue of Article 2(f) and other articles of CEDAW to take all appropriate measures including legislation to modify or abolish all gender-based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women. The Court also referred to the *United Nations General Assembly Declaration on the Right to Development 1986* ["the Declaration"], which recognizes that all human rights are indivisible and independent and the State is under an obligation to fulfill the same without any discrimination as to sex, race, language or religion. Although India had acceded to CEDAW with some reservations, the Supreme Court stated that Articles 2(f), 3 and 15 of CEDAW when read together with the Declaration negated the effect of such reservations. It therefore interpreted the equality provisions under the constitution in accordance with CEDAW and other international instruments, overriding the reservation made by the Indian government on account of customary and personal laws. The limitation was therefore removed in favour of upholding women's right to equal enjoyment of property.

The above-mentioned instances of CEDAW being used to expand constitutional guarantees in protecting women's rights was seen to be later extended to criminal law as well. In Fiji, the case of *State v Filipe Bechu*, (Criminal Case No. 79/94 (unreported), Magistrates Court, Levuka, 2 December 1999), considers the meaning of consent in rape cases under the Fijian *Penal Code*. In determining what constitutes consent, the Court for the first time considered the role of international conventions that protect the rights of women such as CEDAW. *In the ultimate judgement, finding the defendant guilty of rape* on the basis that the complainant had not consented to intercourse, the Court stated that women are men's equal and must not be discriminated against on the basis of gender. The Court also stated that men should be aware of the provisions of CEDAW, and that it is the State's responsibility to ensure that all forms of discrimination against women are eliminated. The role of the court is to oversee this obligation in line with Article 43(2) of the *Constitution of Fiji 1997* which states that courts must have regard to the public international law applicable to the protection of the rights as set out in the fundamental rights provisions. The Court reiterated that the belief that women were inferior to men or part of their personal property to be discarded or treated unfairly at will, is now obsolete and no longer accepted by Fijian society.

In Nepal the provisions on inheritance under the Muluki Ain 2020 (1963) that excluded daughters from inheriting property, restricted rights of married women's inheritance, treated

divorcees and widows differentially, and prescribed requirements for a widow to be chaste to her dead husband in order to qualify for inheriting his property, was challenged through the PIL of Meera Dhungana on behalf of FWLD vs. HMG, Ministry of Law and Justice, (Writ No. 3392, 2052, Decision No. 6013 of 2059, NKP 2059 Vol. 6, Page 462). In this case though recognizing the apparent discrimination, the court continued to uphold conditional recognition of women's property rights, and stated the need for a new law to be enacted allowing a comprehensive review of all aspects of family law. It however also mentioned that before the enactment of any such law, it must be taken into consideration that no disturbance is caused to the existing social structure. In the second case, the court stated outright that such (discriminatory) laws were a part of Nepal's tradition and culture as it is a Hindu state, where traditional and cultural practices and norms with a firm foundation in religion cannot be understood to be discriminatory.

The key to successes achieved in upholding women's rights through subsequent litigation in Nepal was however achieved through a two-pronged approach. While on one hand, PILs were filed challenging discriminatory provisions under domestic laws, rules and policies, on the other, NGO's also initiated advocacy for the submission of the Initial Report to the Expert Committee on CEDAW that allowed the assessment of the implementation status of the Convention within the country. The Shadow Report submitted by the NGOs to the same Committee voiced concerns regarding the narrow and prejudiced interpretation of laws and provisions by the Supreme Court resulting in discrimination in women's access and enjoyment of basic rights. The Committee echoed the same concern through the Concluding Observations on Initial Report. Such constructive criticism from the international as well as national fora was seen to have resulted in considerable shift in paradigm court's interpretation and therefore in future judgments issued by the courts.

This could be witnessed through judgments issued by the Supreme Court in two subsequent PILs filed. The first one was related to discrimination in punishment for raping a prostitute, Sapana Pradhan Malla vs. HMG, Ministry of Law, Justice and Parliamentary Affairs, (Writ No.: 56 of 2058), in which the court stated that no one could be discriminated on the basis of their profession and that it was their freedom to choose the means of their livelihood. The plea of the government attorney claiming the mention of punishment, was rejected by the court on grounds that such punishment was so low that the state itself was assisting in the creation of an environment that encouraged rape and allowed rapists to be exempted from punishment, in other words an environment of impunity. It stated that such phenomenon resulted in women becoming more vulnerable for rape and therefore declared the provision unconstitutional.

The second case was on exclusion of marital rape from the definition of rape under the Muluki Ain 2020 resulting in lack of access to justice for victims of such crimes and impunity for non-state actors, Meera Dhungana on behalf of FWLD vs. HMG, Ministry of Parliamentary Affairs, Council of Ministers, Ministry of Law and Justice, Parliament (Writ No.: 55 of 2058). Here the Court stated that rape could only be understood to be rape, which was a severe form of violence against women. It stated that perpetrators of such violence could not be allowed to be exempted merely on the establishment of marital relation. The main factor in the establishment of the crime stated to be consent. If consent could not be established the act would be considered rape. In stating the above, the court issued directives to reform the law, introducing adequate provisions acknowledging marital rape as a crime. However in implementation of the court directives, the punishment was stated to be only six months of imprisonment. Another PIL was therefore filed on the ground that the punishment stated above was introduced on the basis of marital status

which amounted to discrimination. The court only recently therefore issued directives for amending the law and prescribing punishment equal to that of the crime of rape.

In all the cases mentioned above, arguments were grounded in the principle of state accountability for amending all discrimination under law by the year 2005. This was also an obligation undertaken by Nepal under paragraph 103 of the Beijing Outcome Document 2000 which in addition to prescribed measures also called upon state parties to criminalize marital rape, criminalize exploitation through prostitution and lastly recognize domestic violence as crime under domestic laws. A reminder of such obligation to the Government of Nepal can be found in judgments by the Supreme Court. It is however imperative that we lawyers continue to raise the issue of state obligation through our arguments in courts and use General Recommendations, the Beijing Platform of Action and its Outcome Document as instruments in the pleading process.

The Supreme Court of Nepal has in certain cases issued policy guidelines in maintaining confidentiality on cases related to violence against women and people living with HIV and Aids. The Court was then seen to issue guidelines in regulating dance bars as a viable and justifiable initiative, having dismissed a petition for allowing complete ban on the said forms of entertainment. More recently the Court issued a directive not to disseminate the budget allocated for widow marriage, giving recognition to voices of single women who vehemently opposed such a policy on the grounds that it caused indignity to their existence.

The Supreme Court in Nepal hasn't merely limited its role to declaring discriminatory laws and provisions *ultra vires*, but has also taken cognizance of the lack of adequate laws or non recognition of certain rights to be discrimination against women as prescribed by CEDAW. It was seen to have stated that till such time that "discrimination against women" is defined under Nepali laws, Article 1 of CEDAW will be used as a framework.

Positive interventions by the Supreme Court, as seen above, has led to the amendment of more than 100 legal provisions in the country, thereby mobilizing the executive and the legislature to follow its example and take necessary action in implementing the vision. Amendments directed by the Supreme Court were therefore ensured through the passage of the 11th Amendment of Civil Code, enactment of the Gender Equality Act 2006 (dealing with provisions relating to inheritance, marriage, divorce, child custody etc.), amendment in Army Act 2006 allowing women to join as combatants, the enactment of the Domestic Violence (Offence and Punishment) Act, 2009 and introduction of new provisions on citizenship to recognize equality in conferring citizenship to a child through the mother. In present times Anti Sexual Harassment Bill is being considered in the parliament.

What were the factors in making litigation an effective tool?

- Research on discriminatory laws and its impact, followed by periodic updates. Such research also helped to gather evidence of discrimination and internalize or mainstream such issues in the discourse of human rights within the country.
- Communication with stakeholders at all levels before the filing of a petition, in support of adducing evidence, for example on non-compliance of law, lack of implementation or

existence of discrimination and incidence of violence etc. This exercise strengthens the plea for law reform or for bridging the gaps and weaknesses in existing legal provisions.

- Establishing linkages of arguments with CEDAW with other human rights frameworks, BPFA and International Conference on Population and Development (ICPD), outcome documents, comparative jurisprudence from countries sharing similar judicial systems, decisions recorded by the treaty monitoring bodies in the adjudication of individual complaints, concluding observations to periodic reports submitted by state parties, and most importantly linkages with constitutional and legal framework along comparative legal analysis of established benchmarks.
- Mobilization of civil society actors and activists to strengthen the voices seeking reform.
- Forwarding arguments that are based on the recognition of rights being inter-related and inter-dependent. In certain instances a single provision of law containing guarantee of an individual right may fail to recognize cross-cutting issues and their corresponding rights. Establishing inter-linkages of such guarantees, as well as their linkages with principles of non-discrimination, substantive equality and state obligation is critical.
- Building arguments on the basis of the principle of universality to change the mindsets and establish that all rights are important and equally enjoyable by women irrespective of religion, cultural and geographical background. It would mainly establish that women cannot be treated differentially for belonging either to the "western" countries or to the "eastern" ones.
- Establishment of treaty jurisprudence within domestic jurisdictions. This initiative clarifies the relationship between international and municipal laws often through commonly heard terms such as "monism" or "dualism", as well as state obligations towards implementing international treaties and standards.
- Encouraging persons directly affected to take legal action and build their faith and confidence towards the legal and judicial systems in the country.
- Sensitization of judiciary through capacity building exercises involving judges and other court officials has often been witnessed to serve as an important strategy in gaining favourable judgments on gender issues. Such initiatives should also be extended to lawyers with special emphasis on strategic use of PILs as a tool for law reform, as well as to beneficiaries in order to create awareness on their roles in proper implementation of judgments.
- Empowerment of legal defenders. This is especially important in circumstances where lawyers or activists are confronted with accusations of destroying society, destroying social institutions such as marriage etc. It is also necessary to explain that upholding women's rights do not necessarily signify confrontations with men or denying men their basic rights. On the contrary it is an attempt to counter patriarchal values, and domination in society that may be inherent irrespective of gender.

- Constant monitoring and follow-up for the enforcement of laws and implementation of laws, and judgments is critical for the actual and substantive realization of rights.

Having stated the afore-mentioned it is important to note that law and society are complementary to each other and function in parallel. Therefore unless there is change in mindset amongst people, the achievement of a positive decision from the court is not enough in upholding rights. Ensuring rule of law and legal protection is a continuous attempt and exercise based on acceptance of change in society and the need for it's reflection in norms that regulate the society. One may state that the mere enactment of a law would not be enough if a culture of non compliance of law and impunity is encouraged or ingrained in society. I argue that the enactment or reform of law is a basic step towards recognition of rights and creating of societal norms. If laws are discriminatory or if rights are not recognized, an individual of the society may even fail to claim what is rightfully theirs. The presence of a system of legal monitoring assists us in making the state accountable for lack of justice or even lack of access to justice. In the same tenor, laws that recognize violence in private spheres are a necessity in upholding rights of women as equal citizens of a country.

Lastly, the use of litigation as a strategy has also often been seen to boomerang on advocates of women's rights. Often litigation has been used as an equally powerful tool in curtailing rights of women. Instances can be seen in cases where the Supreme Court of Nepal has clearly stated that CEDAW can be used only in instances of discrimination against women and cannot be replicated as an example in expanding other rights and guarantees under the constitution.

Yes, rights can be uphold in many ways, and litigation can be one of the main strategies. It has already been established as a tool for legal empowerment. And yet, it is important to realize that in the interest of upholding a cause and ensuring it's sustenance, strategies need to be changed keeping in mind political dynamics of the country and the best interests of the people or constituency that would be affected.