Editorial

Monday, July 8, 2019

Wishes of common man

The tussle for power amongst the representatives of the people of Manipur is increasingly threatening to slow down the already trudging pace of progress in the state. While the gripe of dissidents are understandable, their future prospects and political advancements depending to a large extent on the delivery of the reported assurance by the Chief Minister to reshuffle the portfolio at the mid-point of the term of the present Government. What is at stake is not just the position and the power, but the accompanying financial benefits and responsibilities which have sadly come to be viewed more as personal sanctions to be used as per their whims and fancies.

The plethora of problems staring the State Government in the eye is on the brink of being sidelined, while the assembly session which is scheduled to begin in a couple of days is in danger of being disrupted. It goes without saying that the assembly session, which is held to discuss and deliberate on the development activities being carried out in the state, to draw up future course of action and also to review works and progress of the government will have to bear the brunt of the misunderstanding, and subsequently the state stands to suffer.

Notwithstanding the politicking that goes on behind closed doors, from the point of view of a common man, there is a perceptible sense of the Chief Minister starting to lose his grip on the control as manifested in the haphazard activities being drawn up which has been evoking responses contrary to expectations. There has not been a proper and strict allocation of responsibilities, nor have there been the necessary steps of admonishing concerned ministers who have failed to deliver on the tasks assigned to them.

The protracted issues of non performing departments failing to furnish utilization certificates for projects for which huge amounts have been sanctioned have continued to plague the state, and yet there still lacks any visible signs of efforts to rectify the issues. The process of periodically evaluating the performance of the ministers and officials should be made a part of the governance process.

Building up a transparent system of governance is the only way to go, and for that to happen, those in power should take the initiative and lead by example. We should shed the divisive mentality and embrace inclusive progress. The people have the right and the prerogative to understand the workings of the government. Keeping a psychological and physical boundary between the ruler and the ruled can work for only so long. The real power of these rulers lies with the people, and to try and sideline the issues that are troubling the public is bound to backfire, sooner or later.

Nagaland BJP targets enrollment of 2.5 lakh new members

Agency
Kohima July 8,

The Bharatiya Janata Party (BJP) has set a new target of recruiting 2.5 lakh new members in Nagaland.

The State already has 1.18 lakh members.

The saffron brigade has launched a massive state-wide recruitment drive as per the directive of the central leadership from Saturday.

The Nagaland unit of BJP on Saturday formally launched a two-month long Sangathan Parv Membership Drive 2019 in Kohima in the presence of Union Minister of State for Steel Faggan Singh Kulaste.

According to the BJP, one phone or SIM card can enroll up to four members. Paper slip enrollments will continue alongside electronic enrollment.

Anyone can now register themselves as a primary member of the BJP by giving a miss call to 8980808080.

This will generate a series of verification for old and new enrollments and will finally confirm and update the party membership.

Addresing the gathering, the union minister said that people have started to repose more faith on the party.

Speaking on the occasion, BJP Nagaland state unit president and Minister of Higher and Technical Education, Temjen Imna Along, requested the ministers and advisors to strengthen the party in their respective mandals and register encouraging membership in each and every booth level of the mandals.

He said that membership drive will strengthen the top party leadership.

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Judicial Aberrations on Gender Issues Are Worrisome

Courtesy The Wire
By : Faizan Mustafa

In the last two years, no other topic has received as much attention in the country as the issue of the discriminatory nature of archaic triple divorce under Muslim personal law. Television anchors devoted hundreds of hours discussing this, though the Supreme Court itself eventually noted that the practice of triple divorce was on the decline and was today being practiced only by a minuscule minority of Hanafi Muslims.

We are celebrating yet another International Women's Day today and our Supreme Court in a historic verdict has decided the much awaited case of Hadiya. The court, in a bold and progressive decision, has restored her marriage and overturned the highly regressive and legally erroneous judgment of the Kerala high court. This is the best gift which our highest court could give to our women on International Women's Day. But there are several other orders of our courts which are problematic.

The experience of females has not been really included in our laws and in seven decades of our independence we have had only six women judges in the highest court, which does have a bearing on gender justice. The lone female judge was not included even in *Shayara Bano* (2017) on the multi-religious bench. Justice Markanday Katju in *D. Velasamy* (2010) had termed a second Hindu wife as 'mistress' and 'keep', and thus not entitled to maintenance. But in 2011, another bench which included a female judge, Justice Gyan Sudha Mishra, opined that a deserted wife is entitled to marriage regardless of validity of her marriage.

Many feminists and civil libertarians do believe that there is some semblance of a U-turn by the judiciary in general and the Supreme Court in particular on women's issues as in a number of cases judgements of high courts in favour of women were reversed by the apex court. Let us discuss some of these problematic decisions of our courts.

After the commencement of the Constitution, Indian courts tried to use the newly granted right to equality to promote gender justice. But cases of early decades will show that courts adopted a 'protective approach', and considering women as weak and in need of protection used Article 15(3) to uphold special provisions in favour of women.

This 'protective approach' is inherently wrong as it compromises women's agency. In these cases, the courts were more interested in 'formal equality' rather than 'substantive equality'. Treating men and women as exactly the same under the so- called 'sameness doctrine' was the result of our belief in 'formal equality.' 'Substantive equality' on the other side requires appreciating the differences between men and women. These differences do not make women inferior in any way but do require 'differential treatment'. There have, of course, been some highly progressive judgments as well which did try to give effect to 'substantive equality'. But lately we observe that our courts are reluctant to go forward and have rather wasted a few good opportunities to develop gender-just jurisprudence. In some cases, unfortunately, a patriarchal mindset too was clearly visible.

Justice Anil Dave and Adarsh Goel' s judgment in *Prakash v. Phulwati*,(October 16,2015) refused to give retrospective effect to a social welfare legislation, i.e, the 2005 Amendment to the Hindu Succession Act under which daughters were also for the first time recognised as coparceners. Thus, the pro-women judgment of the Karnataka high court was reversed by the apex court. The high court had given the benefit of the new amendment to the daughter as the Supreme Court itself in Geetha's case (2009) had held that any development in law will inevitably apply to pending proceedings.

Very strangely in the second part of the same judgment, Justice Goel expressed concerns about Muslim women and the discriminatory nature of Muslim Personal Law though he did accept that the matter was not in dispute before them. He also noted that the Supreme Court itself in Ahmedabad Women Action Group had held that such issues are a policy matter and are best left to the wisdom of the government, yet he went ahead and directed the registry of the court to file a piblic interest litigation on the discriminatory provisions of Muslim Personal Law. Why did the court not consider discriminatory provisions of the Hindu Succession Act, which were very much before it, i.e, a Hindu mother, Hindu wife and Hindu daughter-in-law are still not coparcener? Similarly, if there is an issueless Hindu couple, the property of the husband goes to his parents, but strangely even the property the wife goes to the husband's parents rather than her own parents. Similarly, a Hindu can deprive his/her daughter from self-acquired property through testamentary powers of will. Under Muslim Personal Law, on the other side, no heir can be deprived of his/her share and through a will, not more than one-third of property can be given to a non-heir.

Thus, the Shayara Bano case basically originated on the orders of the apex court as the court genuinely looked somewhat more concerned about Muslim women. Finally, a five-judge bench on August 22, 2017 declared by a majority of 3:2 that 'triple divorce is set aside'. The apex court did not declare triple divorce as unconstitutional but merely invalidated instant triple divorce which has not been preceded by the efforts of reconciliation. It is interesting to note that minority judges (Justice Rohinton Nariman and Justice UU Lalit) who held triple divorce unconstitutional, did not do so because women did not have a similar right to give instant triple divorce but because it was 'arbitrary'. In fact, gender justice has not been talked about at all in the judgment even though the term is mentioned nine times in the summary of arguments by the parties.

Exactly a year later, in *Narender v. K.Meena* (October 6,2016), the same bench of Justice Dave and Goel passed another strange order which came as a bolt from the blue for women. In this case, the learned judges explicitly held that under Hindu traditions, a wife on marriage is supposed to fully integrate herself with her husband's family and if she refuses to live with her in-laws, it would amount to cruelty and the husband would be entitled to divorce her under the Hindu Marriages Act. Here, too, the high court had ruled in favour of the wife. But the Supreme court, reversing the high court's order observed that "in India, generally people do not subscribe to western thought, whereupon getting married or attaining majority, the son gets separated from the family. In normal circumstances, a wife is expected to be with the family of the husband after the marriage. She becomes integral to and forms part of the family of the husband and normally without any justifiable strong reason, she would never insist that her husband should get separated from the family and live only with her."

In yet another case, the court came down heavily on a wife for trying to live separately with the husband solely for monetary considerations. Credit: Reuters

A wife is an integral part of her husband's family yet she is not a coparcener. Does that not sound strange? The court came down heavily on the wife for trying to live separately with the husband solely for monetary considerations and termed it as torture of the husband. The court also used the Indian and Hindu ethos interchangeably without realising that under Muslim Personal Law, a wife has an absolute right to demand a separate residence and if the husband cannot provide the same, a separate door so that she does not come across her in-laws.

Every hour, 39 crimes against women including four rapes are committed in India. Reported rape cases have increased by 88% over a decade. On July 27, 2017 in *Rajesh Sharma v. State of U.P*, a two judge bench of Justice Adarsh Goel & UU Lalit in yet another strange order, after noting the misuse of Section 498A of the Indian Penal Code which punishes cruelty, and low conviction rate, observed that there should be no automatic arrests on charges of cruelty and each district should have a Family Welfare Committee. While it is true that conviction rate is low, the court did not notice that it is in fact going up every year. In 2012, it was 14.4% but in 2016 it stood at 18.9%. In any case low conviction rate does not mean a case itself was entirely false. It shows that our investigation techniques and prosecution processes are in bad shape.

In this case, a demand of dowry was made for Rs 3,000,00 and a car, which the wife's family was not able to meet. The pregnant wife was dropped at her house leading to termination of pregnancy. She was allegedly tortured as was noted by the lower court. An offence under Section 498A is non-bailable, where bail is not a matter of right but dependent on the discretion of the court. It is non-compoundable so that the victim is not pressured into compromise. And it is cognisable in that a police officer can make an arrest without a warrant from the court. Unlike Prakash v. Phulwati, the plain language of the statute and legislative intent were not a problem in this case. The court did not hesitate in giving a number of directions in favour of accused – no arrest should normally be effected till the newly constituted committee submits its report; similarly passports are not be impounded in a routine manner; personal appearance of the accused and outstation family members need not be insisted upon; bail application should be decided same day. The only saving grace was that these directions are not to be applied in cases of physical injuries or death. In a happy turn of events, on October 13, 2017, a three-judge bench of Chief Justice Dipak Mishra going beyond prayers in the case before them agreed to review Justice Goel's judgment.

Shafin Jahan and Hadiya. In Hadiya's her case some of the observations of Kerala high court were indeed shocking. Credit: Facebook/Hadiya

The initial order of the Supreme Court in Hadiya's case ordering an NIA probe was similarly shocking. In spite of court's repeated queries by the current bench of Chief Justice Dipak Mishra about the high court's powers in nullifying the marriage of two adults in exercise of writ jurisdiction and welcome order of her release from the captivity of her father, the case was unnecessarily lingering on and precious judicial time was unnecessarily wasted on a non-issue. Justice Dipak Mishra himself in Pawan Kumar V.State of H.P.(April 28,2017) in

an enlightening judgment has similarly held that "one is compelled to think and constrained to deliberate why the women in this country cannot be allowed to live in peace and lead a life that is empowered with a dignity and freedom. It has to be kept in mind that she has a right to life and *entitled to love according to her choice. She has an individual choice which has been legally recognised.* It has to be socially respected. No one can compel a woman to love. She has the absolute right to reject."(emphasis mine) Thus Hadiya too is free to make her choice. May be her choice of religion as well as spouse are totally wrong but nothing can be done about it. Rajasthan High Court in a similar matter boldly dismissed the case promptly.

Under Section 497 of Indian Penal Code (IPC), 1860, only men are punished for the offence of adultery. As a matter of fact, the first law commission of 1837 that drafted the IPC did not include adultery as a crime in the original IPC and preferred to have it only as a civil wrong. The Second Law Commission headed by Sir John Romilly did not agree with Macaulay but spared women from punishment for adultery due to their deplorable conditions because of child marriages, age gap between spouses, and polygamy which legalised husband's sexual relations with more than one woman. Thus we cannot entirely blame the drafters of IPC. They were really sympathetic to our women. It is a different story that at that time women were considered just the property of their husbands and, therefore, we see similarities between offences of theft and adultery. On January 6, 2018, the matter was referred to a five-judge bench of the Supreme Court to examine constitutionality of the adultery law as it does not punish women. We need to wait and see whether the court will simply make the adultery law gender-neutral or will strike down the provision as a whole as it impinges on the individual autonomy of consenting adults.

The Madras high court gave a strange judgement directing that "divorcees too should maintain sexual purity to claim alimony." Credit: PTI

Some of the high court's orders in the recent past have been equally shocking, showing little sensitivity to gender issues. In Hadiya's case some of the observations of Kerala high court about Hadiya's independent agency and powers of her father over her were indeed shocking. A divisional bench of the Kerala high court consisting of Justice Surendra Mohan and Justice Abraham Mathew in a shocking judgment (May 25, 2017) observed that " a girl aged 24 years is weak and vulnerable, capable of being exploited in many ways and ' her marriage

being the most important decision of her life, can be taken only with the active involvement of her parents." This judgment is the classic example of what has been termed above as 'protective approach'.

The Madras high court gave a strange judgment by directing that "divorcees too should maintain sexual purity to claim alimony." This decision not only took away freedom of choice of the divorcee but also treated her as just a sex object by observing that the man with whom she had such a relationship was maintaining her. Thus, a divorcee must maintain the same discipline that she was supposed to maintain during subsistence of marriage. In another case, the Madras high court had given bail to a rape accused so that he could mediate with the victim. The Supreme Court had to intervene to get the bail cancelled.

Let our judges prove Ishwar Chand Vidhyasagar wrong who had in 19th century talked about the plight of widows. He said 'Oh women! what sin have you committed that you were born in India'. Let today's Hadiya judgment take us forward in the direction of 'substantive equality' with due recognition of differences, preferential treatment and individual autonomy of Indian women.

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