

MNLU, Nagpur Contemporary Law Review

Special issue on “Gender Justice- Breaking Stereotypes,
Discriminations and Prejudices”



Shruti Goyal - *Analyzing the Reality of Special Fast Courts for Trial of Offenses Under the Pocsso Act*

Vipan Kumar - *Gender Diversity in Corporate Boards: Myths and Reality*

Renu Rana, S. Anantharamakrishnan and S. Kalavathi - *Women Working in Indian Information Technology (IT) Sector: Issues and Challenges from Socio-Legal Perspective*

Adithya A. Variath and Riya Kadam - *India and Queering International Law: How International Legal Theory is 'Orienting' the 'Disoriented' Domestic Queer Jurisprudence in India*

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Muskan Agarwal - *Social Enforcement of Laws Pertaining to the Lgbtq Community*

Dhruv Vatsyayan - *Women, Armed Forces and Feminist Constitutionalism*

Niharika Ravi - *Re-Interpreting "Rainbow Capitalism" Within the Present Paradigm of Corporate Social Responsibility: A Study of Gender-Based (Un) Employability of Gender Non-Binary Persons in India as Against Best Policy Practices Elsewhere*

Yukta Chordia - *Gender Roles and Gender Stereotypes: Analysing the Participation of Men*

Akansha Agarwal and Avidha Shukla - *Redefining The 'Legal Sex' for the Contemporary World*

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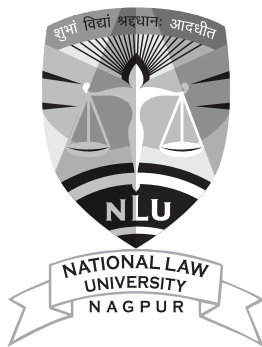
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Special Issue on
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A Biannual Faculty Peer Reviewed Journal
of

**MAHARASHTRA NATIONAL LAW UNIVERSITY
NAGPUR**

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MESSAGE FROM THE PATRON

Since its inception in 2016, Maharashtra National Law University, Nagpur has been the frontrunner in advocating socio-legal causes across various platforms through teaching and research. The Centre for Gender Justice Studies was established in 2016, with a vision to tackle the evolving regime of protection of the rights and freedom of different readers. The of the worked to genders. The Centre has tirelessly worked towards achieving these goals, which can be reflected through the various activities conducted in the past like seminars, conferences and publication of its newsletter.

Gender sensitization is a very sensitive subject that requires public understanding, particularly among the working class. Education is one of the most powerful transformation agents. Instilling good concepts about gender problems in young brains would enable them to not discriminate against other genders and to be sensitive to their needs.

The Constitution of India has prescribed a bundle of rights to the people which protects them from being discriminated on the ground of sex in particular amongst others. Even though these rights have been in existence for over seven decades, the ground reality is grim for certain communities. Gender inequality is completely intertwined and reflected everywhere in our lives through family, textbooks, movies, media and so on. There is persistent gender inequality in terms of access to nutrition, health, education, technology, employment under-representation in top bureaucracy, political and other positions of power and authority, and economic participation and empowerment. Further, the constant discrimination, abuse and violence faced by the LGBTQIA+ community is a deplorable situation in our country which is considered to be one of the richest in terms of its cultural heritage and diversity.

The two-day National Seminar on ‘Gender Justice-Breaking Stereotypes, Discriminations and Prejudices’ organized by the Centre for Gender Justice Studies, the University aims to augment the dialogue on the emerging areas of gender discrimination prevailing in society and the ways in which these issues can be handled. My best wishes to the entire organizing team of the Seminar. Looking forward to some thought-provoking deliberations in the program.


Vijender Kumar

MESSAGE FROM THE EDITOR

The Centre for Gender Justice Studies is extremely honoured to bestow the research articles of the participants of the “National Seminar on Gender Justice-Breaking Stereotypes, Discriminations and Prejudices.” Denial of self-expression is unquestionably an invitation to death. According to Dale Carnegie, “Self-expression is the dominant necessity of human nature, wherein sustenance of self-determined identity is the filament of life.” Because they are inherently indicative of the expression of one’s choice and the free-thinking process of a person, such a kind of self-expression includes an individual’s gender identity and sexual orientation. We at Maharashtra National Law University, Nagpur, fully support the protection of an individual’s gender identification and uniqueness.

Constitution of India notably carries the Fundamental Rights that guarantee basic human rights to the social stratum of all genders, concomitantly, promoting gender equality and acceptance. The National Seminar has thrived in offering a wide array of papers, submitted by academicians, legal practitioners, and human rights activists offering in-depth analysis in furtherance of the already existing legal frameworks, embedded in global and domestic legislations along with promising recommendations as a panacea to combat discrimination and advance equality. We take honour in putting forth that the National Seminar has presented a myriad of papers with an incentive of laying down prominence on the concerns of the LGBTQIA+ community, further, on pushing for gender sensitization and sexual diversity.

The Seminar discussion was centered around four sub-themes, wherein, Sub Theme-I is devoted to ‘Rethinking Sex and Gender’. Further, Sub Theme- II focuses on ‘Gender and Legal Systems’. Sub Theme-III pertains to ‘Gender and Technology’. Subsequently, Sub Theme-IV deliberates upon ‘Gender and Development’. Through the aforementioned topics, the National Seminar has tried to shed attention on the ongoing gender imbalance and to incentivize the eradication of gender stereotypes.

We are extremely grateful to the contributors and paper presenters for helping us reach the very impetus of the National Seminar. We are also grateful to the reviewers who have dedicated their valuable time in scrutinizing the papers, ergo have played a paramount role in the National Seminar. We are hopeful that the National Seminar has assayed in breaking gender stereotypes by offering a forum for deliberation and formulation of policy solutions.



Dr. Shilpa Jain

EDITORIAL

In the research paper titled “*Analysing the Reality of Special Fast Courts for Trial of Offenses Under the POCSO Act*”, the author Dr. Shruti Goyal observes and identifies the gap between the Special Courts for trial of sexual offences in case of child victims in theory and the Courts in practise. Further, the author analyzes the reality as far as setting up of Special Courts is concerned delves into the procedure followed by the special Courts, their functioning and the problems faced by judges, advocates and litigants while an offense is tried by the Special Court. The main aim of the article is to chalk out suggestions for the effective and efficient functioning of these Courts so as to champion the cause of providing safety and security to women.

In the research paper titled “*Gender Diversity in Corporate Boards: Myths and Reality*”, the author Dr. Vipin Kumar identifies that there are two conflicting views relating to gender diversity in corporate boards, existing in the literature relating to corporate law. The first view is reflected in the regulatory pushes introduced through the Companies Act 2013 and later on while an opposite view is reflected in reality highlighted by research studies and theory. These research studies give strength to findings of ‘tokenism theory’. While trying to strike a balance between two conflicting views, the author has made a humble attempt to chalk out certain arguments to justify that despite of contradictory views expressed in research studies and theory, there are justifiable reasons to support gender diversity on corporate boards.

In the research paper titled “*Women Working in Indian Information Technology (IT) Sector: Issues and Challenges from Socio-Legal Perspective*”, the authors Renu Rana, Dr. S. Anantharamkrishnan and Dr. S. Kalavathi focus on women centric issues in the Indian Information Technology (IT) sector observed in various classes of women employees in the organisational hierarchy. The study focuses on the international canvass of protection of women rights at workplace, substantiated by legislations of developed nations, including the United States, United Kingdom and Japan. Consequently, the authors evaluate the Indian legislative system in order to assess its alignment with internationally accepted standards of rights of women at workplace, thereby underlining the challenges and suggesting measures to counter such challenges to enable a progressive adaptation of women rights at workplace.

In the research paper titled “*India and Queering International Law: How International Legal Theory is ‘Orienting’ the ‘Disoriented’ Domestic Queer Jurisprudence in India*”, the authors Adithya A. Variath and Riya Kadam argue that queering domestic law extends to restructuring the sub-structures of the politics of the hetero-normative framework that manages life. This paper seeks to explore if sexuality can provide an adequate foundation for the interpretation of international law through queer theory. The authors argue that the queer perspective can bring marginalized knowledge into mainstream international law. While the third world approach to international law (TWAIL) seeks the proliferation of

diverse views, queer theory and critical legal approach to queer theory can facilitate this change by challenging the ‘normal’.

In the research paper titled “*A Socio-Legal Study on the Condition of Women Prisoners and Their Children in India*”, the author Nidhi Saroj points out the plight of the women prisoners and their children living with them in Indian Jails. Several empirical studies have been conducted to evaluate the conditions of Indian Prisons and have concluded that the prison environment is not congenial for pregnant women and children in prison; the author aims to review such studies and evaluate the existing laws in this regard.

In the research paper titled “*Gender Equality and Protection Against AI Bias*”, the author Ms. Garima Panwar aims to discuss the significant threats being posed by an AI to gender equality while juxtaposing its potential to be the major change maker in the society by challenging oppressive gender norms. It is observed that these gender-biases further stigmatizes and marginalizes women on a global scale. The author opines that there is a need for creation of a robust mechanism and a framework for gender-inclusive AI principles, guidelines and codes of ethics within the industry and gives suggestions on legislative and policy measures towards operationalizing AI and Gender Equality Principles.

In the research paper titled “*Gendered Digital Violence: A Misogynistic Attack on Digital Rights of Women*”, the authors Ms. Sakshee Sharma and Ms. Mrinmoi Chatterjee attempt to critically analyse various facets of gendered digital violence as a manifest tendency of misogynistic societies to maintain the status quo. Using cyber-violence, to exclude women from fully exercising their digital rights, and to promote their opinions and interest, greatly mirrors the approach adopted in the physical space to marginalise women by misogynistic societies. Therefore, the authors, through the analysis of a small study conducted by them, have tried to establish a direct causal link between cyber-violence and the gendered digital divide and deliberate on the possible solutions to dilute such toxic practice. The article also briefly touches upon the socio-legal aspects of the cyber-victimisation of women and the subsequent belittling of the phenomenon by ‘innocent’ bystanders.

In the research paper titled “*The Quandary of Women and Drug Substance Abuse in India: Need for Gender Responsive Policies*”, the author Trisha Mittal has enunciated the issue of drug abuse in India and its impact on women considering that the women are discriminated in a patriarchal society. The author also highlights the need to develop the gender sensitive policies to resolve the issue of drug substance abuse in India. Hence, the article attempts to analyse the present legal framework on the issue and also identifies the need to understand the rehabilitation policies for such women.

In the research paper titled “*Gendered Division of Domestic Labour: A Feminist Discourse*”, the author Priti opines that most women suffer from the “superwoman-supermom” syndrome wherein, there is a constant pressure on them to deliver irrespective of their capacity, which in turn impacts their mental and physical health. The article highlights the imbalance between the unpaid care giving work done by men and women depicted through the time use survey carried

out in India and will try to understand the reasons behind such disproportionate divisions. The author also delves into the various challenges faced by women engaged in paid employment like lacunae in the infrastructural facilities at workplace, gendered bias in promotions, nature of work assigned to women among several other issues from a socio-legal and economic point of view.

In the research paper titled “*Ramifications of Gender Stereotyping in Judicial Process: A Critical Analysis*”, the author Lekshmi Priya R attempts to unveil the gender stereotype approach of Indian judiciary due to the deeply entrenched popular legal narratives. The paper also tries to unfold how judges categorize gender roles, glimpsing through their patriarchal lenses. The author has intended to analyze various judgements through a critical view point to understand how the common concepts on gender, influence the judicial decision-making process.

In the research paper titled “*Rights of Third Gender and Legal Inclusion in India: ‘An Enabling Framework’*”, the authors Saharshrachi Uma Pandey and Sahasricha Pandey critically analyse and comment on the Inheritance Laws of Transgender under the Personal Laws. The paper reviews the landmark judgement of NALSA V. UOI and also refers to the pertinent Legal Provisions of the Transgender Persons (Protection of Rights) Act 2019. The authors aim to analytically identify the International Yogyakarta Principle on the Rights of the Transgenders and discuss the status of reforms, undertaken, and analyse the modifications in furtherance to the changing times.

In the research paper titled “*Are the Laws Pertaining to the LGBTQ Community being Socially Enforced?*”, the author Muskan Agarwal attempts to analyse why the queer community is excluded from national identities, why their behaviour is regarded as anti-national, and against the Indian culture and how such behaviour by the society violates the rights of the entire LGBTQ community. The author tries to talk about in-depth the challenges the queer community still faces every day even though such relationships have been decriminalised. Further, the author also looks into the day-to-day challenges transexual people face and how difficult it is for them to access basic needs such as medical or insurance benefits.

In the research paper titled “*Women, Armed Forces and Feminist Constitutionalism*”, the author Dhruv Vatsyayan has identified how armed forces of most nations, including India, have been, and remain a male-dominated institution. The author has attempted to, while invoking the concept of feminist constitutionalism, analyze the cases of *Ministry of Defence v. Babita Puniya* and *Union of India v. Annie Nagaraja*. A thorough critique of the arguments based on gender-stereotypes contended by the Union of India has also been done. The author arrives at a conclusion that these decisions by employing the feminist methodology and asking the ‘Women Questions’, sets the course correct and shall have a lasting impact on future cases concerning gender-based discriminatory state actions.

In the research paper titled “*Re-interpreting ‘Rainbow Capitalism’ within the present paradigm of Corporate Social Responsibility: A Study of Gender-based (Un)Employability of Gender Non-Binary Persons in India as against Best Policy Practices Elsewhere*”, the author Niharika Ravi attempts to questions whether Corporate Social Responsibility can extend to become a company’s responsibility

not to undertake certain activities that may harm society, in addition to undertaking activities that shall benefit society by dedicating the 2%, as mentioned earlier, of net profits of a specific social cause. To navigate this query, this author has adopted the rainbow capitalism lens in order to ascertain whether minority communities can be both uplifted and prevented from further marginalisation simultaneously to ensure holistic social development in the country through the corporate world.

In the research paper titled “*Gender Roles and Gender Stereotypes: Analysing the Participation of Men in Homemaking and Caregiving*”, the author Yukta Chordia discusses about the Gender roles, encompassing a range of behaviours and attitudes that are generally considered acceptable, appropriate, or desirable, influence a wide range of human behavior. This article suggests and emphasizes on education, awareness projects and campaigns, increase in paternity leave and family friendly working conditions as solutions to increase the participation of men in homemaking and caregiving in India. Finally, based on the analysis of different methods applied by other nations and international organizations to increase men’s participation in homemaking and caregiving, the author explores the possibility to apply them in the Indian context.

In the research paper titled “*Redefining the ‘Legal Sex’ for the Contemporary World*”, the authors Ms. Akansha Agarwal and Ms. Avidha Shukla try to discuss and study such sensitive topics to identify the bigger problems inherent in laws that exist in our society. The paper aims to bridge the gap between the strict gender-centric laws which exist today and the perception of modern society relating to it. The authors do so by proposing a more flexible approach to the definition of ‘sex’, and how by doing so the laws can keep up with the society. Further they suggest discarding the binary definitions and incorporating a more equality-based approach.

(Editorial Committee)

ANALYZING THE REALITY OF SPECIAL FAST COURTS FOR TRIAL OF OFFENSES UNDER THE POCSO ACT

Shruti Goyal*

Abstract

The article shall identify the gap between the Special Courts for trial of sexual offences in case of child victims in theory and the Courts in practise. These Special Courts are established under the Protection of Children from Sexual Offences Act, (POCSO) 2013. Incidents of rape and sexual abuse against children shake the conscience of the society. In order to deter such crimes, strict punishment is prescribed under the POCSO Act. The Act provides not only for the establishment of special courts but also provides for following up special procedures for dealing with offenses under the Act. In order to ensure speedy trial, the Act prescribes a timeline of two months for completion of investigation and six months for trial of offences. However, a large number of cases are pending trial across the country. In 2019, the Supreme Court suo motto took cognizance of the alarming rise in the number of cases reported where sexual offences were committed against child victims. The Court thereafter directed that an exclusive/Designated special Court be set up in every district where there are more than 100 cases of POCSO Act. Thereafter initiatives have been taken up by different state government and union territories for establishment of these Courts. This article shall analyze the reality as far as setting up of Special Courts is concerned. The article shall delve into the procedure followed by the special Courts, their functioning and the problems faced by judges, advocates and litigants while an offense is tried by the Special Court. The guiding aim of the article is to chalk out suggestions for the effective and efficient functioning of these Courts so as to champion the cause of providing safety and security to women.

Keywords: POCSO, Sexual Offences, Special Fast Court.

Introduction

India is home to a large child population.¹ It houses 444 million children, that is, more than 40% of India's population constitutes children who are below 18 years of age.² Incidents of rape and sexual abuse against children shake the conscience of society. The subject of child sexual abuse is shrouded in secrecy and there is a

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1 PTI, "India has World's Largest Youth Population: UN Report", THE ECONOMIC TIMES, November 18, 2014 <https://economictimes.indiatimes.com/news/politics-and-nation/india-has-worlds-largest-youth-population-un-report/articleshow/45190294.cms?from=mdr>, (visited on October 1, 2021).

2 UNICEF, "General Country Profile", 2019, <https://www.unicef.org/rosa/media/10566/file/India.pdf>, (visited on October 2, 2021).

conspiracy of silence around the entire subject.³ In fact, till the end of the last century, there was a well-entrenched belief that there is no child abuse in India and certainly there is no child sexual abuse in the country.⁴ It is a scandal that such child sexual abuse was not recognised as a problem and the existing laws were considered adequate to address the cries of sexually abused children.⁵ According to a study conducted by the Government of India, every second child in the country has been abused at some point in time.⁶

The Protection of Children from Sexual Offences Act 2012 was markedly brought into force on November 14, 2012, i.e., the Children's Day, to provide justice to children. The Act was brought into force to address the serious issue of the sexual abuse of children which has plagued our society and reached endemic proportions. The Act has been amended in 2019 to make the provisions more stringent. The amendments came into force on August 16, 2019. The Government has also notified POCSO Rules, 2020.⁷ The purpose of the POCSO Act is to protect "child" from sexual abuse. 'Child' means any person below the age of 18 years.⁸ The Act aims to protect children from penetrative sexual assault,⁹ sexual assault,¹⁰ sexual harassment¹¹ and pornography.¹² In order to deter such crimes, strict punishment is prescribed under the POCSO Act.

One of the tools envisaged for the effective implementation of the Act was the setting up of Special Courts for the trial of offences in every district of the country.¹³ Setting up of these Courts is essential in order to ensure speedy trial of offences. The

3 TNN, "Over 53% Children Face Sexual Abuse: Survey", THE TIMES OF INDIA, April 10, 2007 <https://timesofindia.indiatimes.com/india/over-53-children-face-sexual-abuse-survey/articleshow/1881344.cms>, (visited on March 15, 2021).

4 "Guidelines for Prevention of Child Abuse", DELHI COMMISSION FOR PROTECTION OF CHILD RIGHTS, Govt. of NCT of Delhi, p.11, <https://dcpr.delhi.gov.in/child-abuse-guidelines-prevention-child-abuse>.

5 Geeta Oberoi, CHILD SEXUAL ABUSE TRIALS - LAWS, PROCEDURES AND PRECEDENTS: IN THE LIGHT OF INTERPRETATION OF POCSO ACT 2012 AS AMENDED IN 2019, 1st ed. 2020.

6 MINISTRY OF WOMEN AND CHILD DEVELOPMENT, "Study on Child Abuse: India", 2007, p. 102.

7 PTI, "Zero Tolerance on Child Porn: Government Notifies New POCSO Rules", THE TIMES OF INDIA, March 13, 2020, <https://timesofindia.indiatimes.com/india/zero-tolerance-on-child-porn-govt-notifies-new-pocso-rules/articleshow/74602987.cms#:~:text=The%20Pocso%20rules%20became%20effective,other%20agency%20working%20with%20children>, (visited on November 1, 2021).

8 Section 2(1)(d) of the Protection of Children from Sexual Offences Act 2012.

9 Section 3 and 4 of the Protection of Children from Sexual Offences Act 2012.

10 Section 7 and 8 of the Protection of Children from Sexual Offences Act 2012.

11 Section 11 and 12 of the Protection of Children from Sexual Offences Act 2012.

12 Section 13 of the Protection of Children from Sexual Offences Act 2012.

13 Section 28 of the Protection of Children from Sexual Offences Act 2012.

importance of “special statute” for dealing with cases of child sexual abuse lies in “special courts” which are to be set up under the Act.¹⁴

The Act provides not only for the establishment of special courts but also provides for following up special procedures for dealing with offences under the Act. In order to ensure a speedy trial, the Act prescribes a timeline of two months for the completion of the investigation¹⁵ and six months for trial of offences.¹⁶ However, the march of justice in the case of child sexual abuse victims is marred with challenges at all levels of legal administration from unscientific investigation to an adversarial system of justice followed in courts by the prosecution and defence to the legal interpretation of various concepts under the Act. At times because of the social ethos and norms, the judges interpret the law in a chaotic manner.¹⁷

The special courts have not been able to deliver fast-track justice as perceived. The article shall identify the gap between the Special Courts for the trial of sexual offences in the case of child victims in theory and the Courts in practice. The article shall delve into the procedure followed by special Courts, their functioning and the problems faced by different functionaries coming in contact with these Special Courts. The guiding aim of the article is to chalk out suggestions for the effective and efficient functioning of these Courts so as to deter sexual abuse against children and champion the cause of providing a safe and secure environment for children.

The Magnitude of the Problem

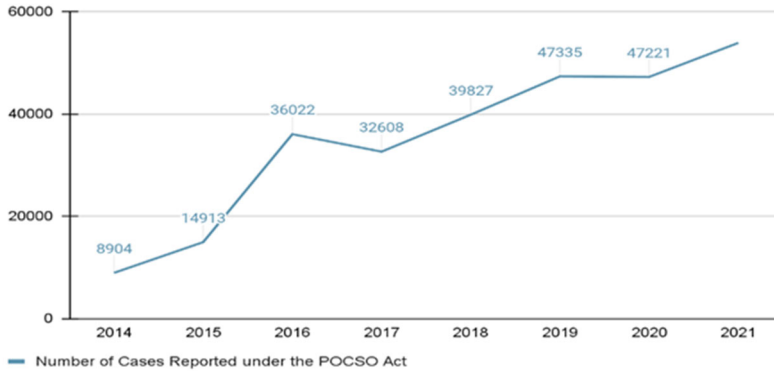
Before going into the details of special courts, it is important to see the magnitude of the problem in terms of the commission of the crime of sexual abuse against children. It is horrifying to see that the incidents of child sexual abuse in India is increasing at an alarming rate. The following graph shows the number of cases reported under the POCSO Act from 2014 to 2021. It is worthwhile pointing out that the data compiled is only of those instances where the matter was reported to the police. Instances, where the victim did not report or speak about it, is shrouded in secrecy.

14 Deepak Juyal and Ajay Setia, “*Lack of Special Courts under Protection of Children from Sexual Offences Act: A Structural Deficit*”, JOURNAL OF FAMILY MEDICINE AND PRIMARY CARE, Vol. 6 No. 4, 2018, pp. 881-882.

15 Section 35(1) of the Protection of Children from Sexual Offences Act 2012.

16 Section 35(2) of the Protection of Children from Sexual Offences Act 2012.

17 Aditya Rawat and Divyanshu Chaudhary, “*Judicial Misogyny: When ‘Preserver of Rights’ Furthers the Culture of Misogyny and ‘Rape Culture’*”, GUJARAT NATIONAL LAW UNIVERSITY LAW REVIEW, Vol. 8 No. 1, 2021, p. 73.



Source: National Crime Record Bureau, Data compiled from Crimes in India (2014-2021)

The above figure clearly depicts that there has been a constant increase in incidents of child sexual abuse over the years. In 2014, when the data was first collected for offences under POCSO Act, 8904 cases were reported. In 2015, there was a rise and 14,913 cases were reported. In 2016, there was a steep acceleration as 36,022 cases were reported. The next year there was a slight downfall when the number of cases reported was 32,608. However, this upward trend continued as 39,827 cases were reported in 2018 and 47,335 cases were reported in 2019. In 2020 there was no hike as almost the same number of incidents, that is, 47,221 cases were reported. However, in 2021 again the number swelled as 53,874 cases were reported. It is important to note that from the total crime reported against children in 2021, 38.1% of the crimes were under the POCSO Act.¹⁸ The maximum number of cases under POCSO were reported from Uttar Pradesh (7129) followed by Maharashtra (6200) and Madhya Pradesh (6070). Among the Union territories, the maximum cases were reported in Delhi (1454).¹⁹

Setting up of Special Courts under POCSO Act

The POCSO Act provides that in order to ensure speedy trial of offences under the Act, a Court of Sessions be designated as Special Court. This special court shall be designated for every district by the State Government in consultation with the Chief Justice of the High Court.²⁰ The purpose is to ensure fast track trial of cases under the POCSO Act. The State Government is under an obligation to appoint Special Public Prosecutors for the trial of cases under the Act.²¹

In addition to these designated special courts, fast-track courts have also been established for the speedy trial of POCSO cases. These special courts for speeding up the trial of sexual abuse cases were established after the Justice Verma Committee

18 “Crimes in India”, NATIONAL CRIME RECORDS BUREAU, 2021, p. 12, <https://ncrb.gov.in/en/node/3721>, (visited on April 9, 2022).

19 Ibid, p. 327.

20 Section 28 of the Protection of Children from Sexual Offences Act 2012.

21 Section 32 of the Protection of Children from Sexual Offences Act 2012.

formed in the aftermath of the Nirbhaya gang rape case²² called for the setting up of fast-track courts for fast-tracking cases of sexual abuse and violence against women. The specialisation of fast-track courts for trial of sexual assault cases is new to India. These courts have specialised funding from the central government and state government and are established alongside District and Sessions Courts to try cases of sexual assault.²³

History of Fast Track Courts in India

Delay or pendency in dealing with the cases rings the alarm bell by questioning not only the procedural inadequacies but also the assessment of the functioning of the judicial system. A magic wand cannot wipe out the burden of pendency of cases and therefore the Government of India established the machinery of fast-track courts in order to ensure access to justice to those who approach the dispute resolution forum for getting their grievance redressed. Fast Track Courts were established in India for the first time in on the recommendations of the Eleventh Finance Commission. The Courts were set up with the purpose of providing speedy trial in a time-bound manner. The first fast track court was inaugurated on 1-4-2001. The areas of priority for deciding cases by these fast-track courts were those (i) where the cases were pending in the Court of Sessions for a long time and (ii) the cases where the under trials were languishing in jail for long. These courts were initially set up for a period of five years and the funds for the same were allotted by the Central Government.²⁴

The fast-track courts continued their operation even after 5 years because it was conceived that they have been successful in achieving the purpose of providing speedy justice. The 14th Finance Commission constituted in January 2013 endorsed the proposal by the Department of Justice and further recommended that 1800 fast-track courts must be set up in India so that pendency of cases is brought down to the managerial level.²⁵ The Commission recommended, that, unlike earlier Fast Track Courts which were established for reducing the pendency of cases in sessions court and under-trials, now the Courts would aim at subject-specific disposal of cases in a fast track manner. These Courts would focus on areas where the pendency is high and the disposal rate is low. The areas identified by the Commission fell under three categories; firstly, criminal cases of heinous crimes like murder, rape, kidnapping, human trafficking, dowry deaths etc. Secondly, civil disputes where the cases were

22 In this incident, a twenty-three-year-old girl was gang raped in Delhi on 16 December 2012. This event sent shockwaves throughout the country and the international media was also taken by storm due to the alarming brutality in which the crime was committed. The victim lost her life. The Government of India appointed a Commission under Justice J.S. Verma to investigate and recommend changes to the Indian criminal justice system.

23 Vandana Peterson, “*Speeding Up Sexual Assault Trials: A Constructive Critique of India’s Fast-Track Courts*”, YALE HUMAN RIGHTS AND DEVELOPMENT LAW JOURNAL, Vol. 18, 2016, pp. 59-106.

24 “*Proposal of Department of Justice to 14th Finance Commission*”, DEPARTMENT OF JUSTICE, FINANCE COMMISSION INDIA, 2013, p. 5, <https://fincomindia.nic.in/ShowContent.aspx?uid1=3&uid2=0&uid3=0&uid4=0>.

25 Justice Verma Committee in 2013 had recommended establishment of special fast track courts for speedy trial of offences against women.

pending for more than five years and involved the issue of land acquisition and property/rent disputes. And thirdly, civil cases involving women, children, disabled, senior citizens or persons suffering from terminal ailments like HIV etc.²⁶

It is pertinent to note that there are two types of fast-track courts functioning in India for trial of POCSO cases. One is the fast-track courts exclusively for the purposes of trial of offences under the POCSO Act and the second is Fast Track Courts which deal with other cases also in addition to trial of POCSO cases. The Department of Justice in October 2019 implemented a scheme through which it has proposed that 1023 Special Fast Track Courts shall be set up in the country out of which 389 courts shall be exclusively for the trial of offences under the POCSO Act. This scheme was funded by the Central Government and was initially for a term of one year. Later on the scheme was further extended and is now approved for continuation of setting up of Fast Track Courts till March 2023. As per the latest data available till June 2022, 728 fast track courts are functional in India out of which 408 are exclusively for trial of POCSO cases. Due to lacklustre attitude in establishing special courts the pendency of cases under POCSO Act is constantly increasing.

Procedure to be Followed in Special Courts

Justice delayed is justice denied. In order to ensure speedy trial, the Act lays down a time line of thirty days within which the Special Court taking cognizance of the offence shall record evidence.²⁷ In case of any delay, the reasons are to be recorded. In order to ensure that the case reaches its logical conclusion at the earliest and there is no inevitable delay in trial of cases, the Act mandates that the trial of offences should as far as possible be completed within a period of one year from the date of taking cognizance.²⁸

There is no specific provision under the POCSO Act for committal of the case for trial, hence cognizance of the case would be taken in accordance with the provisions under section 209 of the Code of Criminal Procedure. In India, adversarial form of criminal justice is followed. However, the Special courts established under the POCSO Act shall follow a child-friendly procedure for trial. The privacy and confidentiality of the child shall be maintained by the Court during the entire judicial process.²⁹ The trial must be held in camera.³⁰ The Special Courts must ensure that the child is not called repeatedly to the court for giving his/her testimony³¹ and is provided frequent breaks during the trial.³² A family member or friend or guardian or relative should be allowed to be present in the Court during trial so that a child-friendly atmosphere is created.³³ The evidence of child is to be recorded through video conferencing or by using single visibility mirrors or curtains.³⁴

26 *Supra* n. 24.

27 Section 35(1) of the Protection of Children from Sexual Offences Act 2012.

28 Section 35(2) of the Protection of Children from Sexual Offences Act 2012.

29 *Eera v. State (NCT of Delhi)* (2017) 15 SCC 133.

30 Section 37 of the Protection of Children from Sexual Offences Act 2012.

31 Section 33(5) of the Protection of Children from Sexual Offences Act 2012.

32 Section 33(3) of the Protection of Children from Sexual Offences Act 2012.

33 Section 33(4) of the Protection of Children from Sexual Offences Act 2012.

34 *Supra* n. 29.

In order to ensure that the testimony of the child is recorded in a friendly manner, the lawyers from both sides shall hand over the questions to the Court and the court shall question the child.³⁵ It is the responsibility of the Special courts to ensure that there is neither any aggressive questioning from the child nor any character assassination of the child.³⁶ Further, the special courts are also under an obligation to ensure that the identity of the child is not revealed during investigation or trial.³⁷

An Analysis of the Working of Courts

Speedy justice is an integral part of Article 21 of the Constitution. The Government cannot turn a deaf ear or a blind eye that the courts are congested with cases and the rigours of POCSO Act demands that special courts be established and justice delivered in a time bound manner. The parameters on which the performance and functioning of special courts for trial of POCSO cases are discussed below:

Backlog of Cases

The table below shows the number of cases pending trial under the POCSO Act. The data compiled from the last five years show that the pendency is constantly increasing. In 2017 around ninety-three thousand cases were pending trial in different courts. However, by the end of, 2021 the number of cases pending trial has inflated to around two lakhs twenty thousand which is more than double. It is pertinent to note that chargesheet is filed by the police in 90% of the cases reported under POCSO Act. However, the conviction rate is low as there is conviction in only 30% of the cases.³⁸

Cases Pending trial under POCSO Act	
Year	Number of Cases
2017	93,423
2018	1,19,710
2019	1,49,872
2020	1,79,893
2021	2,21,511

Source: Data compiled from reports by NCRB

As per the Government of India, the maximum number of cases pending trial in POCSO cases is Maharashtra (27,512) followed by Odisha (12,242) and Madhya Pradesh (8947).³⁹

35 Section 33(2) of the Protection of Children from Sexual Offences Act 2012.

36 Section 33(6) of the Protection of Children from Sexual Offences Act 2012.

37 Section 33(7) of the Protection of Children from Sexual Offences Act 2012.

38 G.K. Goswami and Aditi Goswami, “*Procedural Roadmap for Handling Child Sexual Abuse under the POCSO Act, 2012*”, SUPREME COURT CASES JOURNAL, Vol. 3 No. 2, 2021, pp. 1-24.

39 Department of Justice, “*Scheme on Fast Track Courts for Expeditious Disposal of Cases of Rape and Protection of Children Against Sexual Offences Act 2019*”, MINISTRY OF LAW AND JUSTICE, GOVERNMENT OF INDIA, 2019, <https://doj.gov.in/fast-track-special-court-ftscs/>.

The courts are getting more and more congested. This massive pendency of cases cannot be shaved with a mechanical razor and needs some systematic effort on the part of the government and judiciary so that the confidence and credibility of people in the judicial system are retained.

Timeline for Trial

The cases under the Act are to be tried and disposed off within a year from the date of taking cognizance.⁴⁰ however, almost two-third of cases under the POCSO Act are pending trial for more than one year.⁴¹ The table below shows pendency in years⁴²:

Years of Pendency	Percentage of Cases
Pending for more than 4 years	8%
Pending for 3-4 years	10%
Pending for 2-3 years	17%
Pending for 1-2 years	28%
Pending for less than 1 year	37%

It is clear that in spite of having a timeline of one year, a vast majority of cases have long pendency. According to a recent study, the average number of days for conducting trial of POCSO cases is 667.⁴³ The major reason for delay in trial is lack of awareness and the dedication to meet the deadlines coupled with the problem of inadequacies of the court.⁴⁴

Establishment of Special Courts

There are 766 districts in India.⁴⁵ The statutory mandate of setting up special courts in every district has not been followed. Even the fast-track Courts that were envisaged were 1023 as per the 14th Finance Commission recommendation. However, only 728 courts have been set so far.⁴⁶ As far as special fast-track courts especially for the trial of POCSO cases is concerned, the sanctioned strength was 389 whereas 408 courts have been set up.

The Supreme Court at different point of time has issued directions for setting up of Special Courts. A three-judge bench of the Supreme Court in the case of *Alakh*

40 Section 35(2) of the Protection of Children from Sexual Offences Act 2012.

41 *Alarming Rise in the Number of Reported Child Rape Incidents* In re, (2020) 7 SCC 112.

42 *Alarming Rise in the Number of Reported Child Rape Incidents* In re, (2020) 7 SCC 108.

43 Gajendra Kumar Goswamy, "Role of Forensics in Strengthening Child Rights under the POCSO Act 2012", Department of Forensic Science, GUJARAT FORENSIC SCIENCES UNIVERSITY, 2020, Shodhganga@INFLIBNET: Role of forensics in strengthening child rights under the POCSO Act 2012.

44 *Alarming Rise in the Number of Reported Child Rape Incidents* In re, (2020) 7 SCC 112.

45 <http://districts.nic.in/>.

46 Department of Justice, "Fast Track Special Courts (FTSCs)", MINISTRY OF LAW AND JUSTICE, GOVERNMENT OF INDIA, 2019, <https://doj.gov.in/fast-track-special-court-ftscs/#:~:text=1572.86%20Cr.>

Alok Srivastava v. UOI,⁴⁷ in 2018 issued directions that Special Courts be established for trial of offences under the POCSO Act. The High Courts shall ensure that the cases registered under the POCSO Act are tried and disposed of by the Special Courts. The Supreme Court also directed that the Special Courts, as conceived, be established, if not already done, and be assigned the responsibility to deal with the cases under the POCSO Act.

In *Re, Alarming Rise in the Number of Reported Child Rape Incidents*,⁴⁸ the Supreme Court took suo motto cognizance of the increasing number of cases under the POCSO Act. On the basis of the report filed by different states, the Court observed that 25% of the total cases are pending in Uttar Pradesh and they are pending for more than a year. In order to ensure speedy trial, the Court issued directions for setting up of exclusive POCSO Courts. The Court held that the reason for setting up exclusive Pocsos Courts is that the abused children need to be dealt with great sensitivity and empathy. They cannot be dealt with like or along with other litigants and victims in courts. The apex Court laid down the criteria that in States and UT's other than UP and West Bengal, at least one and two exclusive POCSO Court should be set up in judicial districts where the pendency is more than 100 and 300 cases, respectively. For the State of Uttar Pradesh and the State of West Bengal, the Court laid the following criteria: (i) One exclusive Pocsos Court in districts with up to 300 Pocsos cases pending; (ii) two exclusive Pocsos Courts in districts with 301 to 600 Pocsos cases pending; (iii) three exclusive Pocsos Courts in districts with 601 to 1000 Pocsos cases pending; and (iv) four exclusive Pocsos Courts in districts with 1000 or more Pocsos cases pending.

It is pertinent to mention that even the setting up of fast-track courts does not warrant that cases will be disposed of expeditiously. This is because Uttar Pradesh where the maximum number of fast-track courts were established to speed up the trial of all cases was the worst performer among all states with a whooping 4.05 lakh cases pending.⁴⁹

Funding

There is no separate data available as to funding of fast-track courts for POCSO cases. As per the information available, Fast Track Courts were sanctioned a budget of 502.9 crores by the Eleventh Finance Commission. This fund was released by the Central Government and onus was placed on the states to utilise these funds for establishing FTC. The first FTC were to be functional from 2001-2005. Owing to the success of FTC for delivering justice in a time bound manner, the Central Government accorded approval for continuing functioning of fast-track courts for a further period of five years, till 31.3.2010 and for the purpose of same a budget of 509 crores was sanctioned.⁵⁰ In 2010 the scheme of FTC was further extended for a

47 (2018) 17 SCC 291.

48 (2020) 7 SCC 112.

49 'Starred Question No 74' (Lok Sabha Questions, Ministry of Law and Justice, answered on 26 June, 2019. This figure is for all cases tried by Fast Track Courts and not only for POCSO cases.

50 G.S. Bajpai, "*Fast Track Courts in India Promise and Performance*", SATYAM LAW INTERNATIONAL 1st ed., 2022, p. 11.

year and it was decided that no funding would be provided by the centre after that. However, a plea against the same was raised before the Supreme Court.⁵¹ From 2001-2011, in total 1091.9 crores were approved for sanction to FTC's. However, the actual amount released was around 870 crores.⁵² The special fast track courts are devoted resources on ad-hoc basis. The sword of drying up of funds and the future of Fast track courts is a Damocles sword.

Special Procedure

There is no special legislation to specify the special procedure to be followed by the special courts in order to ensure speedy justice.⁵³ The special courts demonstrate a business-as-usual approach to the task of justice. There are no separate manuals, guides, handbooks or case management systems for these special courts. Though it is perceived that special courts have special funds and better infrastructure, yet they resemble the existing court system.⁵⁴ These fast-track courts were established quickly by recycling the existing machinery and framework.

Special Cases

Most of the Special Courts deal with all types of cases. As a result, the cases are not dealt efficiently and effectively in a manner which is envisaged under the provisions of the Act. Also, at times fast track courts are given unrealistic targets to finish. Thus, the adage 'Justice delayed is justice denied and justice hurried is justice buried'.

Forensic Lab Reports

In cases of sexual assault, forensic evidence plays a very important role. However, there is no timeline for the submission of forensic samples to these labs. According to the data compiled before the Supreme Court, in 7% of cases it took more than a year for the police to deposit samples to forensic labs.⁵⁵ At the same time, there is no timeline for submission of reports by the forensic laboratories though piecemeal measures are taken by certain labs. For example, special teams of six officers were constituted by FSL, Delhi to concentrate on evidence pertaining to POCSO cases.⁵⁶ Delay in filing of forensic reports is one of the major reasons for the delay in conducting trial of sexual assault cases.

51 *Brij Mohan Lal v. Union of India* (2012) 6 SCC 502.

52 'Unstarred Question No 1476' (Lok Sabha Questions, MINISTRY OF LAW AND JUSTICE, answered on November 27, 2019).

53 Jayna Kothari and Aparna Ravi, "*The Myth Of Speedy And Substantive Justice: A Study Of The Special Fast Track Courts For Sexual Assault And Child Sexual Abuse Cases In Karnataka*", CENTRE FOR LAW & RESEARCH POLICY, June 21, 2016, https://issuu.com/centreforlawandpolicyresearch7/docs/fast-track-courts-report-final_1_.

54 Rukimini S., "*As Funds Dry Up, Fast-Track Courts Close Down*", THE HINDU, August 17, 2014, <https://www.thehindu.com/news/national/As-funds-dry-up-fast-track-courts-close-down/article60444413.ece>.

55 *Supra* n. 44.

56 Hemani Bhandari, "*Forensic Laboratory Constitutes Special Team For POCSO Cases*", THE HINDU, September 25, 2019, <https://www.thehindu.com/news/cities/>

Specially Trained Judges

An analysis of the current situation shows that the judges appointed in the Special Courts for fast-tracking the POCSO cases are neither subject experts nor they are especially trained to deal with such cases. The majority of them have very less experience⁵⁷ or were otherwise involved in mainstream judicial work. The specially designated courts are given trial of POCSO cases in addition to their regular work.

Day To Day Trial

Though there is mandate of recording evidence within 30 days from the date of taking cognizance and in case of delay reasons are to be recorded, but in reality adjournments are granted and the cases are pending at the evidence stage beyond a period of one year.⁵⁸ In 20% of the cases investigation is not completed within a year.⁵⁹ The Supreme Court has asked High Courts to instruct trial courts not to grant adjournments during trial of POCSO cases.⁶⁰ The apex court also recommended that a Committee of three judges of the concerned High Court must be formed in order to monitor and regulate the trial of POCSO cases.⁶¹

Witnesses

POCSO Act provides that the trial of POCSO cases should be conducted in-camera⁶² and the statements of the child may be recorded through video conferencing or using screens.⁶³ In case of child sexual abuse cases, owing to the nature of the case, witnesses are more vulnerable to threat and intimidation. In order to encourage the vulnerable victim to give his statement before the Court, the Supreme Court of India has from time to time issued directions to make the court environment more conducive.⁶⁴

Delhi has established special centres for recording evidence of vulnerable witnesses with all necessary safeguards to encourage the vulnerable witness to depose before the court.⁶⁵ The Supreme Court of India has issued directions for setting up special centres for the examination of vulnerable witnesses in criminal

Delhi/forensic-laboratory-constitutes-special-team-for-pocso-cases/article29503397.ece.

57 G.S. Bajpai, FAST TRACK COURTS IN INDIA PROMISE AND PERFORMANCE, 1st ed., 2022, p. 115.

58 *Alakh Alok Srivastava v. Union of India* (2018) 17 SCC 291.

59 *Supra* n. 44.

60 India News, “Supreme Court Asks High Courts To Fast-Track Trial Under POCSO Act”, THE TIMES OF INDIA, May 1, 2018, <https://timesofindia.indiatimes.com/india/supreme-court-asks-high-courts-to-fast-track-trial-under-pocso-act/articleshow/63985000.cms>, (visited on November 15, 2021).

61 *Supra* n. 44.

62 Section 37 of the Protection of Children from Sexual Offences Act 2012.

63 Section 36(2) of the Protection of Children from Sexual Offences Act 2012.

64 *Sakshi v. Union of India* (2004) 5 SCC 518; *State of Punjab v. Gurmit Singh* (1996) 2 SCC 384.

65 DELHI DISTRICT COURTS VULNERABLE WITNESS DEPOSITION COMPLEX, <https://delhicourts.nic.in/VWDC.html>.

cases in all districts in due course of time.⁶⁶ These centres have been set up in Delhi, Orissa,⁶⁷ West Bengal etc. The apex Court in January 2022 directed that a scheme for the Vulnerable Witness Deposition Centre be notified in all states within a period of two months. Subsequently, many states like Uttar Pradesh,⁶⁸ Tripura,⁶⁹ Bihar,⁷⁰ and MP⁷¹ have framed guidelines for the setting up of these centres.

Perception Of Stakeholders

In order to understand the dynamics and performance of special courts for trial of POCSO cases, the perception of stakeholders who are dealt under the system play a significant role. According to a study, majority of judges working in Fast Track Courts are of the opinion that there is lack of directions from the High Court on working of fast-track procedures and that there is no National Court Management system especially applicable to fast-track courts. Majority of the judges are not satisfied with the role played by prosecutors. There are no special procedures for fast tracking forensic lab reports which results in delay as no time limit is prescribed. The study showcases that around 38% of the judges think that day-to-day proceedings do not take place in Fast Track Courts. The study points out that according to judges, the main reason for delay in the disposal of cases is the inefficiency of various stakeholders and the main solution to the problem of slow performance of Fast Track Courts is the appointment of more permanent staff.⁷²

The study points out that the main reason for the delay in trial according to advocates is the frequent adjournments granted by the court as the adjournments sought are given and the non-availability of adequate number of judges. They also

66 *State of Maharashtra v. Bandu* (2018) 11 SCC 163.

67 Express News Service, “Vulnerable Witness Deposition Centres Have Key Role in Ensuring Justice: Orissa HC Chief Justice”, THE NEW INDIAN EXPRESS, May 15, 2022, <https://www.newindianexpress.com/states/odisha/2022/may/15/vulnerable-witness-deposition-centreshavekey-role-in-ensuring-justice-orissa-hc-chief-justice-2453809.html>, (visited on October 12, 2022).

68 Vulnerable Witnesses Deposition Centre Scheme, 2022. Notification dated 11 April 2022 issued by High Court of Judicature at Allahabad, https://districts.ecourts.gov.in/sites/default/files/VWDCS%20Notification_0.pdf.

69 Vulnerable Witnesses Deposition Centre Scheme, 2022. Notification dated 20 May 2022 issued by High Court of Tripura, [https://thc.nic.in/Tripura%20State%20Lagislation%20Schemes/Vulnerable%20Witnesses%20Deposition%20Centres%20Scheme%20\(VWDC\).pdf](https://thc.nic.in/Tripura%20State%20Lagislation%20Schemes/Vulnerable%20Witnesses%20Deposition%20Centres%20Scheme%20(VWDC).pdf).

70 Guidelines for Recording of Evidence of Vulnerable Witnesses, Notification dated August 5, 2022, Patna High Court, <https://patnahighcourt.gov.in/getfile/NjM2NA==VXnK8zBIWCo=>.

71 Guidelines for Recording of Evidence of Vulnerable Witnesses in Criminal Matters, Notification dated October 3, 2022, Madhya Pradesh High Court, [https://mphc.gov.in/PDF/web_pdf/CI/Notification%20No.%20C-979%20and%20Endt.%20No.%20C-980%20dated%2010.3.2022%20\(VWDC_Scheme_Guidelines\).pdf](https://mphc.gov.in/PDF/web_pdf/CI/Notification%20No.%20C-979%20and%20Endt.%20No.%20C-980%20dated%2010.3.2022%20(VWDC_Scheme_Guidelines).pdf).

72 *Supra* n. 57, p. 116.

cited the problems that victims do not have access to Fast Track Court's and there is lack of security of victims and witnesses.⁷³

As for litigants, the main reason for approaching Fast Track Courts was the expectation of an early trial. They are not aware of the legal aid available and majority of them believed there is no regular day to day hearing along with adjournments resulting in a denial of speedy trial. They suggested that more judges should be appointed.⁷⁴

Success of a legal institution depends upon its response to meet legislative targets in particular a social goal in general. The current state of affairs shows that the stakeholders who are associated with the trial of POCSO cases are facing many difficulties and are not able to appreciate much laudable goals as anticipated.

Conclusion and Suggestions

Sexual violence against children can be combated by the "special" courts as they can play a pivotal role in deterring such type of crime. However, the current scenario showcases that these courts have been set up with minimal logistic and legislative backing. The Courts have failed to deliver any lasting impression. An integral part of modern-day constitutional democracies is the faith of people in the administration of justice. Due to lacklustre attitude of the government in setting up Special Courts and ensuring that special procedure is followed by them while conducting trial has resulted in heavy backlog of cases and delay in trial as the Courts have not been able to deliver justice in a time bound manner as envisaged under the Act. These fast-track courts were established quickly by recycling the existing machinery and framework.

The lack of effective legislation for the working of special courts results in gaps in day-to-day functioning of these courts. In order to imbibe the best qualities of judging, training plays a very important role. Special training to judges for dealing with the cases under the POCSO Act shall not only improve the knowledge of the judges but also lead to professional excellence and pave way for attitudinal changes. It is pertinent to note that no special training is being provided to the judges for dealing cases under the POCSO Act. Specialised judicial training will not only enhance the confidence of judges but shall also help them in delivering quality justice in time bound manner.⁷⁵ In order to ensure consistency, credibility, accessibility and viability of these special courts it is suggested that the judges and the staff of these court should be sensitised so that there are normative changes and the special courts become an instrument of social change. Special training of judges and staff will ensure that the procedure of trial is child friendly, non-hostile. The specially trained judges will relate better to the intricacies and nuances of heinous crime of child sexual assault. The judges of these courts should be monitored on a continuous basis and allotted workload which is achievable. They should not be saddled with

73 *Ibid.*

74 *Id.*, p. 116.

75 Humayun R. Khan and Falak Butool, "Impact of Judicial Training on Judicial Work Culture in District Courts: A Case Study of Uttar Pradesh", *JOURNAL OF THE INDIAN LAW INSTITUTE*, Vol. 59, 2017, pp. 187- 199.

unrealistic goals. The special courts must ensure fast track justice and adjournments should not be granted as a matter of routine. The courts must ensure day-to-day recording of evidence so that the trial reaches its logical conclusion within the stipulated time frame. Fast-track courts should work towards individualised justice for victims. While the criminal justice system primarily worked towards punishing the offender, but in cases of child sexual assault, specialised courts must focus to address the needs of a child who is facing the trauma of sexual abuse as an aftermath of crime and relive it during trial proceedings. The government should ensure availability of funds and infrastructure for the courts and cannot shy away from this responsibility as it is their ultimate obligation to ensure that there is deterrence for sexual crimes committed against children. Thus, the special courts are not accompanied by any special administration, special infrastructure, trained judges or special procedure. These courts suffer with the same structural difficulties which are faced by regular courts. Therefore, their working is no different from the regular courts.

In order to maintain the trust of people in the institution of justice, an important requirement is the delivery of qualitative and timely justice. The Government is under an obligation to constitute a sufficient number of courts⁷⁶ so that the machinery provided for the administration of justice is adequate and efficacious. The need of the hour is the different functionaries of the criminal justice system must develop a scientific temper towards these offences and be committed to doing justice in spirit. It is the responsibility of the Legislature not only to construct law in an unambiguous manner but also to ensure that the desired legislative intent is achieved by providing operative tools which ensure effective execution.⁷⁷ In order to ensure that the intent with which the legislation was passed is fructified at the ground level, the special courts should be established at the earliest and manuals should be drafted so that the special procedure mentioned in the Act is implemented in the true sense and the law becomes a blueprint for social change.

76 *Purshottam Manohar Kamone v. State of Maharashtra* (2001) 4 Mah LJ 320.

77 G.K. Goswami and Aditi Goswami, “*Skin to Skin*” Touch for Defining Child Sexual Assault: Interpretational Vagaries of the POCSO Provisions”, SUPREME COURT CASES JOURNAL, Vol. 3 No. 2, 2022, pp. 16-31.

GENDER DIVERSITY IN CORPORATE BOARDS: MYTHS AND REALITY

Vipan Kumar*

Abstract

The focus of this article is to balance out the two conflicting views relating to gender diversity in corporate boards, existing in the literature relating to corporate law. The first view is reflected in the regulatory pushes introduced through the Companies Act, 2013 (Act of 2013) and later on, by Securities and Exchange Board of India (SEBI) that clearly indicate an enthusiasm to increase gender diversity in an effective manner on corporate boards. The Act of 2013 introduced the concept of women director for certain specified companies that was followed by regulatory changes from SEBI to mandate independent women directors for certain specified companies. These changes give strength to a commitment for regulatory push towards gender diversity. An opposite view is reflected in reality highlighted by research studies and theory. The research studies conducted in relation to gender diversity suggest no relationship between gender diversity on corporate boards and financial achievements of a company. Some other research studies and reported cases highlight the problems faced by women on board. These research studies give strength to findings of tokenism theory. While trying to strike a balance between two conflicting views, the author has made a humble attempt to chalk out certain arguments to justify that despite of contradictory views expressed in research studies and theory, there are justifiable reasons to support gender diversity on corporate boards.

Keywords: Gender Diversity, Board Structure, Women Director

Introduction

The focus of this article is to balance out the two conflicting views relating to gender diversity in corporate boards, existing in the literature relating to corporate law. The first view is reflected in the mandatory actions taken by Indian Parliament through the *Companies Act 2013*¹ and later on, by Securities and Exchange Board of India (SEBI) through the Securities Law², and voluntary actions taken by companies for improving gender diversity. This view clearly indicates an enthusiasm of the legislature, SEBI and the companies to increase gender diversity effectively on corporate boards. The *Act of 2013* introduced the concept of women director for specified companies that was followed by regulatory changes from SEBI to mandate independent women directors for prescribed companies. These changes give strength to commitment on the part of legislature and SEBI towards gender diversity. In the recent past, even the companies are also changing their policies to attract gender

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1 Section 149 of the Companies Act 2013.

2 Regulation 17 of the SEBI (Listing Obligations and Disclosures Requirements) Regulations 2015.

diversity on their organisations that gives strength to commitment to promote gender diversity.

An opposite view is reflected in reality, highlighted by research studies and theory³. The research studies conducted in relation to gender diversity suggest no relationship between gender diversity on corporate boards and financial achievements of a company. Some other research studies and reported cases highlight the problems faced by women on board. These research studies give strength to findings of tokenism theory.

In this article, while trying to strike a balance between two conflicting views, the author has made a humble attempt to chalk out certain arguments to justify that despite contradictory views expressed in research studies and theory, there are prudent reasons to support gender diversity on corporate boards. The article is divided into four parts. The first part is introductory. Second and third parts deal with the conflicting views, respectively. The last part is the concluding that attempts to strike a balance between the conflicting views.

Voluntary and Mandatory Push for Gender Diversity

In this part, the enthusiasm shown by companies, legislature and SEBI towards building gender diversity in corporates is discussed. The first sub-part highlights the strategies and practices taken up by the corporates voluntarily to build a culture for gender diversity. The second sub-part highlights the legislative developments pushing the corporates toward gender diversity on a mandatory basis. The third sub-part discusses the regulatory changes by SEBI.

Strategies and Practices Adopted by Corporates on Voluntary Basis

Corporates keep on improving Diversity, Equity and Inclusion (DE&I) in their organisations. Out of 984 global leaders surveyed by Russell Reynolds Associates in Global Leadership Monitor research (2022), nearly 17% pointed that their compensation is tied to DE&I impact⁴. Tying compensation to DE&I increases accountability of executives of a company. Thus, there is an increasing sensitization towards DE&I in corporates.

3 Katherine Hall, “*Theory, Gender and Corporate Law*”, LEGAL EDUCATION REVIEW, Vol. 9, 1998, p. 31; J Dodds Streeton, “*Feminist Perspectives on the Law of Insolvency*”, ADELAIDE LAW REVIEW, Vol. 6, 1994, p. 1; Aaron A. Dhir, “*Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*”, QUEENS LAW JOURNAL, Vol. 35 No. 2, 2010, p. 569; Barbara Black, “*Stalled: Gender Diversity on Corporate Boards*”, UNIVERSITY OF DAYTON LAW REVIEW, Vol. 37, 2011, p. 7; and Frank Carrigan, “*The Gender Twist and Corporate Rule*”, JAMES COOK UNIVERSITY LAW REVIEW, Vol. 20, 2013, p. 47.

4 Tina Shah Paikeday and Russell Reynolds Associates, “*Making it Count: Accountability is Needed to Fast-Track DE&I*”, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, September 27, 2022, <https://corpgov.law.harvard.edu/2022/09/27/making-it-count-accountability-is-needed-to-fast-track-dei/#more-149683>, (visited on 10 October 2022).

The term ‘Diversity’ as used in DE&I is a broader concept that refers to, inter alia, gender, ethnicity, social, economic and cultural diversity. Within this DE&I ‘Gender Diversity’ refers to co-existence of both men and women in the organisation⁵. The companies around the world are also increasing their adaptability to promote gender diversity, specifically. At this juncture, it is worthwhile to note the following 12 strategies⁶ given by 12 Forbes Coaches Council members to build gender equality in company’s culture:

- I. *Turn Flexible Policies Focused on Equity into Action*: According to this strategy, flexible policies focussed more on equity rather than equality can help people manage their personal lives. This will help in attracting and retaining diverse talent and promote equity. It’s all about realizing that everyone has their own schedule and expectations, and corporates should offer choices and flexibility.
- II. *Seek Out Gender-Diverse Candidates*: A company should have diverse candidates: men, women and also transgender, for all open positions. The interview process should be transparent enough to identify and select the best candidates based on merit.
- III. *Avoiding Implicit Bias and Gender Discrimination*: The company executives should be trained and educated to avoid any implicit bias or gender discrimination that may show up in corporate culture. For example, Pinterest, a tech company, had to settle a gender discrimination case after paying \$ 22.5 Million to its former COO who claimed that she was terminated after she raised concerns of disparate pay; sexist and demeaning comments; and for being outspoken about gender diversity at workplace⁷. This settlement could have been avoided if the company executives were sensitized about gender issues.
- IV. *Studying the Work of Gender Intelligence Group*: Gender Intelligence Group has developed systems, training, books and resources for organisations of different sizes on gender sensitization. Studying work of this group can help corporates in developing soft skills for achieving gender equality in company’s culture.
- V. *Complete a Gender Pay Gap Analysis*: This strategy aims to assess the gaps in gender pay within the organisation, both at leadership position and in the

5 Labelle C. Francoeur and B. Sinclair-Desgagné, “*Gender Diversity in Corporate Governance and Top Management*”, JOURNAL OF BUSINESS ETHICS, Vol. 81 No. 1, 2008, p. 83.

6 Forbes Coaches Council, “*12 Strategies to Build Real Gender Equality into A Company’s DNA*”, FORBES, <https://www.forbes.com/sites/forbescoachescouncil/2021/03/08/12-strategies-to-build-real-gender-equality-into-a-companys-dna/?sh=3000535e6f6a>, (visited on October 11, 2022).

7 Douglas Wigdor, “*Trial Lawyer David Lowe Reflects on His Historic \$22.5 Million Gender Discrimination Settlement with Pinterest*”, FORBES, December 21, 2020, <https://www.forbes.com/sites/douglaswigdor/2020/12/21/trial-lawyer-david-lowe-reflects-on-his-historic-225-million-gender-discrimination-settlement-with-pinterest/?sh=6b9df5303402>, (visited on October 10, 2022).

workforce. If any gaps are found, then the gaps must be rectified to remove any disparity in pay. The believers of this strategy feel that a gender diversity culture shall flourish only when the organisation reflects gender equality in pay, both at leadership position and in the workforce.

- VI. *Participation of Employees in Unconscious Bias Training*: The purpose of making all the employees to participate in unconscious bias training is to make them aware about the blind spots. This help in promoting a more inclusive culture in the organisation.
- VII. *Making Gender Equality a Consistent Part of the Conversation*: Gender equality should not be a one-and-done training. To have a complete weaving of gender diversity in corporate culture, gender equality should be made a part of everything in the organisation. Gender equality should become a part of every conversation taking place to create a culture.
- VIII. *Fact-Check Your Assumptions to Break Old Thought Patterns*: This strategy believes that the culture of an organisation is the sum of its experiences, and assumptions are derived from them. There is a constant need for revisiting the assumptions based on facts. This will help the companies in breaking old ways of thinking, and they will benefit from gender diversity, age, ethnic and neurodiversity.
- IX. *Enabling Truly Equal Opportunities for All Genders*: Corporates should provide equal opportunities to the best candidates without having any regard to gender. A culture that favours one gender should not be tolerated. Providing equal opportunity to all genders is a key to build gender equality within a given workspace.
- X. *Promote More Women into Leadership*: This strategy believes that if an organisation is focussing on gender equality but if its leadership is primarily male, then there is a disconnect between what is in theory and what is in practice. Having diverse leadership is a must for building gender diversity in corporate culture.
- XI. *Know The Difference Between Equality and Equity*: Equality has certain assumptions that the things are same. This assumption is not true and differentiates equality from equity. For example, even if women are working at the same level in an office as their male partner, still they are sharing more workload at home. Thus, we need to create environments that provide for parity amongst males and females, and not just access to equal opportunities. This can be done by minimising difference between roles played by males and females at home and at office.
- XII. *Look Closely at Your Diversity Data*: Personal hunches and feelings are not an appropriate starting point. The corporates should analyse data on regular basis to get the real picture as data never lie. Reliance should be placed on data to find potential gender pay gaps and potential gaps in leadership roles.

The 12 strategies mentioned above can assist the corporates in building a Company's DNA for gender diversity. The companies can adopt practices in

accordance with these strategies. In India, some of the practices adopted by top companies for promoting gender diversity can be enumerated as follows⁸:

- I. *Maternity Leave with Pay*: 26 weeks in case of birth and 12 weeks in adoption and surrogacy cases;
- II. *Crèche Facility*: It is a supervised child care facility in the organisation for providing support to employees;
- III. *Infertility Treatment Benefits*: Companies are extending health insurance benefits to cover infertility treatment;
- IV. *Breastfeeding Rooms*: Construction and maintenance of separate and safe breastfeeding rooms in the organisation;
- V. *POSH Training*: On-site training for Prevention of Sexual Harassment (POSH) at workplace to create a safe environment for all genders;
- VI. *Coaching and Consultancy*: Some companies have started peer level coaching and consultancy to help the women in navigating their career, e.g., Ascend by HCL;
- VII. *Training and Sensitization Programs*: Companies are conducting regular training programs for sensitizing the managers towards gender diversity and unconscious bias;
- VIII. *Menstrual Leaves*: 10 days paid absence during one year for menstrual leave;
- IX. *Career Comeback Program*: Such programs allow women to make a comeback after a career break due to personal reasons.

All the above-mentioned strategies proposed by Forbes Coaches Council members and actual practices adopted by Indian corporates are self-motivated and voluntary in nature. Such strategies present the vision of corporates worldwide, and the practices adopted by companies present their seriousness towards gender diversity. Thus, enthusiasm to build a gender diversity culture is not only driven by legislative amendments, but also self-motivated by the corporates.

Legislative Developments Pushing Towards Gender Diversity on Mandatory Basis

In 2012, the women's presence in company's board was barely 5%⁹. The *Companies Act*, 2013 realised the importance of board composition and made suitable changes as compared to the *Companies Act*, 1956. One of the key changes made by the *Companies Act*, 2013 was mandating at least one-woman director on board for certain specified companies.

8 Guneev Puri, "Top Indian Companies That Promote Gender Diversity in the Workplace", NAUKRI BLOG, <https://www.naukri.com/blog/top-indian-companies-that-promote-gender-diversity-at-workplace>, (visited on October 10, 2022).

9 R. Bhattacharyya, "Gender Diversity on Boards Improves, But More Ground Needs to Be Covered", ECONOMIC TIMES, February 19, 2018, p. 6, <https://economictimes.indiatimes.com/news/company/corporate-trends/gender-diversity-on-boards-improves-but-more-ground-needs-to-be-covered-experts/articleshow/62988324.cms>, (visited on October 10, 2022).

Section 149 of the *Act of 2013* provides that every company shall have a board of director consisting of individuals as directors, and the prescribed class or classes of companies shall have at least one-woman director. The classes of companies, that must have a woman director, have been prescribed as follows:

- I. Every listed public company; or
- II. Unlisted public company having paid-share capital of one hundred crore rupees or more; or
- III. Unlisted public company having turnover of three hundred crores or more.

The prescribed companies can comply with appointment of at least one-woman director during the registration process or within six months of the incorporation. As any other director, a woman director must have a Director Identification Number (DIN) after filing the prescribed forms. Further, she must file consent with Registrar of Companies (RoC) within 30 days of her appointment.

Any intermittent vacancy arising in the position of woman director for any reason like resignation, removal, retirement etc. must be filled within three months or before the next board meeting. If the woman director remains absent for more than three months, then the board should appoint an alternative woman director to fall within the provisions of the Act. If there are two or more women directors, a vacancy arising in one position cannot be treated as an intermittent vacancy, as the board still have one woman director. The board can appoint an alternative woman director, even if it is having at least one-woman director.

Any violation in complying with the provisions relating to woman director is strictly viewed and faces a monetary penalty under the *Companies Act, 2013*. The company and every officer of the company who is in default is liable to pay a penalty of rupees fifty thousand. In case of continuing default, the company and every officer of the company who is in default is liable to penalty of rupees five hundred for each day of default. The maximum penalty, including the penalty on continuing basis, is capped at rupees three lakhs for company and rupees one lakh for every officer in default¹⁰.

Regulatory Changes Pushed by SEBI

In 2015, SEBI promulgated SEBI (Listing Obligation and Disclosure Requirements) Regulations, 2015 [LODR regulations] that mandated appointment of at least one-woman director on listed entities¹¹. On 5 October 2017, the committee on corporate governance under chairmanship of Uday Kotak, gave its report that recommended at least one independent woman director in board of every listed company. Thus, the committee proposed changing of women director criteria in LODR regulations to independent woman director. SEBI partially adopted the recommendation of the committee on corporate governance. The LODR regulations

¹⁰ Section 172 of the Companies Act 2013.

¹¹ Regulation 17 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015.

were amended to mandate at least one-woman director in the board of top 500 listed entities by 1 April 2019 and in the board of top 1000 listed entities by 1 April 2020¹².

Analysis of Voluntary and Mandatory Push for Gender Diversity

After going through the voluntary actions taken by companies, and mandatory push made through the *Companies Act*, 2013 and LODR regulations, it appears that everyone is presuming enhanced abilities of the board by gender diversity. It seems excellent judgements can flow by diverse contributions from board members¹³. A research study¹⁴ reveals that “countries that promote representation in other areas are more likely to implement gender quotas for corporate board” and it seems to be true in Indian context.

Views Reflected in Research Studies and Reported Cases

In this part, the opposite view reflected in research studies, theory and reported cases has been discussed. The first sub-part deals with general issues relating to women directors as highlighted in research studies. The second sub-part iterates a case on gender bias in Murugappa group. The third sub-part highlights two case studies on liability of women who are appointed just for fulfilling the requirement of law.

General Issues Relating to Women Directors

Despite sincere efforts made by corporates, legislators and regulator, there are opposite views reflected in research studies and reported cases. N Balasubramaniam and Nirmal Mohanty (2015)¹⁵, have enumerated five issues relating to gender diversity in corporate boards:

- I. *Demand Related Issues*: Lack of awareness relating to benefits of gender diversity on board and expectation of prior board experience adversely impacts demand of women directors;
- II. *Supply Related Issues*: A general perception regarding shortage of qualified and independent women director prevails due to reasons like family commitments and lack of desired skill sets for board. This gives rise to supply related issues for women directors.
- III. *Independence of Women Directors*: A vast majority of Indian companies are family/promoter driven. Most of the time, women directors appointed to the board are family members or relatives of the promoters, and lack independence.

12 SEBI (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018, w.e.f. 1-4-2019.

13 L.J. Trautman, “*Corporate Boardroom Diversity: Why Are We Still Talking About This*”, SCHOLAR, Vol. 17, 2015, p. 219.

14 Aguilera S. Terjesen and R. Lorenz, “*Legislating a Woman’s Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors*”, JOURNAL OF BUSINESS ETHICS, Vol. 128 No. 2, 2015, p. 233.

15 N. Balasubramaniam and Nirmal Mohanty, “*Gender diversity on Boards*”, NSE’s QUARTERLY BRIEFING, 2015, No. 10.

Thus, appointing non-independent women directors by the promoters may dilute the purpose of statutory provisions.

- IV. *Critical Mass*: Reference to percentage/proportion of the board with regard to appointment of women directors seems to be less logical than absolute numbers of women directors. There are studies that have revealed that companies with three or more women directors out-performed in comparison to less than three women directors¹⁶. Another study has shown that the financial returns to firms having above median representation were more than firms having below median representation¹⁷. Having just one-woman director as prescribed by law may not produce the desired performance or outcome¹⁸. It results in equating the position of a woman director as a ‘Trophy Director’¹⁹.
- V. *Women Directors’ Perception*: In a discussion conducted by the Economic Times, Women’s forum cited a study conducted by Harvard Business School and the Women Corporate Directors (WCD) foundation that shows, 39% of the women believed their gender was a significant factor to attain their board appointments. However, the women themselves perceive that their position as a director should not be owed to gender or some quota²⁰. Rather, it should be linked to the value they add and expertise they bring to the board. Thus, it requires that the women while on board should speak more intelligently about money and their resume should be at par with other members of the board²¹.

Some research study has shown that there are a smaller number of women talent pools in India, and they are not at all present in high profile companies. Indian Express, in a survey, reported that 14 out of top 500 companies listed on NSE had no women on board.

Gender Bias - A Case Study

Gender bias remains another issue for attaining gender diversity on board. As per the reports published in Business Standard²², Valli Arunachalam, from

16 A.M. Konrad et al., “*Critical Mass: The Impact of Three or More Women on Corporate Boards*”, ORGANISATIONAL DYNAMICS, Vol. 37 No. 2, 2008, p. 145.

17 K.R. Ahern and A.K. Dittmar, “*The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*”, THE QUARTERLY JOURNAL OF ECONOMICS, Vol. 127 No. 1, 2012, p. 137.

18 B.N. Balasubramanian, “*Glass Ceilings and Oak-Paneled Walls-Women on Corporate Boards*”, PRIME DATABASE ANNUAL DIRECTORY, 2011.

19 G. Ladegard and B. Elstad, “*Women on Corporate Boards: Key Influencers or Tokens?*”, JOURNAL OF MANAGEMENT AND GOVERNANCE, Vol. 16 No. 4, 2011, p. 1.

20 Vasanthi Srinivasan and Rejie George, “*Building the Women Directorship Pipe line in India: An Exploratory Study*”, COMMUNITY BUSINESS, http://www.communitybusiness.org/images/cb/publications/2010/WOB_India.pdf, (visited on October 10, 2022).

21 V. Mahalakshmi and P. R. Narayana, “*Corporate Governance and the Presence of Women Director on Boards*”, JOURNAL OF BUSINESS AND MANAGEMENT, Vol. 19 No. 1, 2017, p. 59.

22 T.E. Narasimhan, “*Arunachalam Moves NCLT Over Denial of Board Seat: Next Hearing April 23*”, BUSINESS STANDARD, 11 March 2021, p. 3, <https://www.business->

Murugappa group approached National Company Law Tribunal alleging oppression and mismanagement on the grounds that she was denied directorship in the firm due to gender bias. She alleged that Ambadi Investments (AIL) a part of Murugappa group is a family owned and promoters' centric firm, and they have a gender bias against women getting into family business.

Murugappa group is considered as one of India's leading business conglomerates and has an approximate value of 38,000 crores. AIL is a part of the business conglomerate and considered as one of the flagship companies of this group. AIL is registered with Reserve Bank of India as a Systemically Important Non-Deposit Accepting Core Investment Company (CIC). All the shareholders of AIL are largely uncles and cousins of Valli Arunachalam. Arunachalam's father, M V Murugappa, is the only family member who does not have a male legal heir.

As per the allegations made by Arunachalam, she has been battling for the right to be recognised as her father's successor in AIL since his death. However, the Murugappa family have denied a berth of AIL's board to her as well as her sister. She had also made two proposals before the other branches of Murugappa group family to either give her or her sister a berth on the board, or buy her family's 8.21 percent stake in AIL at a fair value.

It may be noticed, that nearly 91.36 percent of the shareholders voted against the resolution for appointment of Arunachalam as director of AIL. Thus, when the issue is finally taken up by NCLT, then the order may be otherwise as the Tribunal is going to pronounce its findings on the basis of provisions existing in the *Companies Act, 2013*. And as per the existing provisions, the Tribunal may not be obliged to give finding on gender issue or gender bias. Rather, the tribunal may decide on the maintainability of the petition first and then on the existence of any grounds for oppression and mismanagement.

Liability of Woman Director

It is well established that many times women are appointed on board just to fulfil the requirements of law. For example, mandatory appointment due to Section 149 of the *Companies Act, 2013*, or may be to fulfil the minimum requirements of 2/3 directors in private/public company. These women may have been appointed merely as trophy directors; however, they are still directors for all purposes, and they may become liable for actions for which they have no knowledge as their male counterparts were actually managing the entire business. In this background, two reported cases having similar facts and originating from same jurisdiction assumes importance:

- I. *Metal Manufacturers v. Lewis*: In this case²³, Mrs. Lewis against whom a recovery suit was brought in capacity of director for the debts owed by the company, alleged that her appointment was done merely to fulfil the requirement of law. She was a home-maker looking after her children and her husband,

standard.com/article/companies/aranachalam-moves-nclt-over-denial-of-board-seat-next-hearing-on-april-23-121031100013_1.html, (visited on July 27, 2021).

23 *Metal Manufacturers v. Lewis* (1988) 6 ACLC 725.

whereas her husband was looking after the entire business under his control. Her husband had assumed the entire authority and did not consult her for carrying out business operations. She took a plea under Section 556(2)(a) of the *Companies (New South Wales) Code* that the debt was incurred without her express or implied authority or consent. The court ruled in her favour.

- II. *Statewise Tobacco Services Ltd v. Morley*: In this case²⁴, Mrs. Morley who was similarly placed as Mrs. Lewis was unsuccessful in building a defence under Section 556(2)(a) of the *Companies (New South Wales) Code* that the debt was incurred without her express or implied authority or consent. The court ruled against her on similar facts. The facts were, a recovery suit was brought against Mrs. Morley as a director on behalf of a company in which she was a director. Mrs. Morley alleged that her husband was looking after the entire business operations, and he had assumed authority. He never contacted or consulted her in business matters, and she was totally unaware about the debts of the company. The court refused to accept the contentions of Mrs. Morley.

Both the cases present a vulnerable position of women directors who are appointed merely for fulfilling the requirements of law. Mrs. Lewis case highlights the subordinate position of women in family business and raises various matters of concern with regard to corporate law. Mrs. Morley case highlights how a woman director can be held liable even when she is working without any knowledge.

Conclusion

After going through the steps taken by companies, legislators and regulators for promoting gender diversity on one hand, and opposite views expressed in theory and reported cases, it becomes quite evident to strike out a balance between the two opposing views. The author most humbly submits, that the opposite views expressed in theory and reported cases may be taken as views supplementing the steps taken by companies, legislators and regulator. The critical analysis done in theory and observations made in reported cases assists and influence the policymakers to make necessary amendments to existing legislation and regulations. For example, when the theorists highlighted that women directors appointed by the companies are merely family members and non-independent directors, the regulator reacted by amending the LODR regulations.

The opposing views in theory and observations made in cases nowhere suggest that promoting gender diversity is a bane, and it should not be encouraged or recognised. Rather, the theorists make suggestions for improving the situation and making gender diversity more meaningful. For example, the research studies which highlight that appointing one woman director does not serve any purpose ends up suggesting appointment of a greater number of women directors.

On the other hand, the voluntary and mandatory actions taken by companies, legislators and regulator should be not considered as sufficient. They are just the steps taken in the right direction. Hence, a strong reliance should be placed on empirical research taken up by researchers on promoting gender diversity while

24 *Statewise Tobacco Services Ltd v. Morley* (1992) 8 ACSR 305.

framing policies and amending existing laws. For example, due to the mandatory provision of section 149, the share of women director rose from merely 5% to 13% within 8 years, however, even this 13% is not enough to bring an effective gender diversity in corporate boards. Be it as it may, we can conclude that the number of female directors on the board is showing an increasing trend. Particularly, the mindset of old boys club in companies is slowly changing.

WOMEN WORKING IN INDIAN INFORMATION TECHNOLOGY (IT) SECTOR: ISSUES AND CHALLENGES FROM SOCIO-LEGAL PERSPECTIVE

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Abstract

The history of patriarchy in human civilization is evident and instances of discrimination and violence against women have been well recorded in history. While there have been considerable attempts by domestic institutions and international organizations to eliminate the deep-rooted biases transcended across generations by the pedigree of patriarchy, reflections of exploitation of women can be observed even in contemporary era enveloped by modernization. Such instances reflect the scope of progress needed in contemporary laws to enable an apt environment for women. As many sovereign nations have attempted to reduce discrimination against women by enacting laws aimed at securing women's rights, women can be seen to increasingly step out of their home-maker role to compete a professional world with full of opportunities. Whilst such actions are indicative of appreciable progress, there is enormous scope of establishing a conducive ambiance facilitating the career challenges of women at workplace. While the Indian Information Technology (IT) sector is fraught with opportunities for women, there is an existence of evident and subtle reflections of exploitation against women. The paper focuses on women centric issues in the Indian Information Technology (IT) sector observed in various classes of women employees in the organisational hierarchy. Including the issues of late working hours, pay disparity, forced redundancy, unrealistic productive targets, exploitation and the undeniable presence of a 'glass ceiling' to obstruct the growth of women, the present study focuses on the international canvass of protection of women rights at workplace, substantiated by legislations of developed nations, including the United States, United Kingdom and Japan. Consequently, the study aims to evaluate the Indian legislative system including the Occupational Safety, Health, and Working Conditions Code 2020 in order to assess its alignment with internationally accepted standards of rights of women at workplace, thereby underlining the challenges and suggesting measures to counter such challenges to enable a progressive adaptation of women rights at workplace.

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Keywords: Women Rights, Discrimination, Exploitation, IT Sector, Legislation, International Organizations.

Introduction

As India progresses towards development with leaps and bounds, the pace of advancement in technology, rationality, argumentativeness, and innovation is easily perceivable. However, there are some intrinsic attributes associated with the cultural history of the nation that still crop up as dark tainted vices, deep rooted in the social instincts of the Indian civilization.

One of such instilled attributes is discrimination against women. While it is evident that India is giving way too many global corporate women leaders, the common strata of women in the Indian corporate world still continues to survive in a state of subtle uncertainties and unexpressed fears concerning work security and financial stability. While the national policies can be evidently observed to attract many women employees in the IT sector, most of them fail to sustain a long-term career in the concerned space, and end up quitting soon.¹ Research shows that women have more refined mental capabilities than most men. Women leadership, and inclusion of women on the board of directors of companies have evidently led to the expansion of many global companies². It has been found out that women have a knack for relations, and their empathetic attributes provide considerable stability to the board³. A woman is capable of providing diverse opinions in the decision-making process of a company, and women leadership has proven to lead corporates to many unexplored areas, thereby leading to their expansion. Despite the evident capability of women to lead at the forefront, as per reports, women in the IT industry in India are predominantly employed in cloud computing and data management, fields that require less intellectual and more management skills. Further, lack of equal opportunities in the workplace, and disparity in comparison with their male counterparts continue to exist as incidents that are openly reported and known.⁴ Women attrition rates continue to remind the scope that remains, in order to address gender disparity and its associated vices.

1 Sharda Singh et al., “*Women Workforce Attrition Dynamics in Indian IT/ITES, Sector*”, THE QUALITATIVE REPORT, Vol. 22 No. 5, 2017, pp. 1211-1226, https://www.researchgate.net/publication/311510804_Women_workforce_attrition_dynamics_in_Indian_ITITES_sector.

2 Erica Hersh, “*Why Diversity Matters: Women on Boards of Directors*”, HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH, 2016, <https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/>, (visited on August 16, 2021).

3 Alison M. Konrad and Vicki W. Kramer, “*How Many Women Do Boards Need?*” HARVARD BUSINESS REVIEW 2006, <https://hbr.org/2006/12/how-many-women-do-boards-need>, (visited on September 1, 2021).

4 Rucha Kulkarni, “*Women in technology: Key trends from Skillsoft’s India Report*”, PEOPLE MATTERS, March 31, 2022, <https://www.peplematters.in/article/culture/women-in-technology-key-trends-from-skillsofts-india-report-33399>, (visited on April 11, 2022).

Further, as the level of seniority increases, the percentage of women occupying such positions decreases.⁵ Male centric focus of the general ambience in workplaces is increasingly becoming the center of concern as women thrust themselves in the male dominant corporate world. Women continue to face such issues which are at times subtle, while at other times explicit enough to call for regulatory intervention in the Indian legal framework.

Issues Faced by Women Working in The IT Sector

Women working in the Indian Information Technology (IT) sector face a range of issues and challenges, particularly when it comes to discrimination, harassment, and lack of representation in leadership positions. These issues are not unique to the IT sector, but are rather symptomatic of the broader societal attitudes towards working women in India. One of the most significant issues faced by women in the IT sector is discrimination. This can take many forms, including unequal pay, lack of promotions, and exclusion from certain projects or assignments. Research has shown that women in the IT sector are often paid less than their male counterparts, even when they have the same qualifications and experience. This is particularly true for women in leadership positions, who are often paid significantly less than their male counterparts. Additionally, women in the IT sector may be passed over for promotions or given less challenging assignments, which can make it difficult for them to advance in their careers.⁶

Another major issue faced by women in the IT sector is harassment. This can take many forms, including sexual harassment, verbal abuse, and bullying. Research has shown that women in the IT sector are particularly vulnerable to harassment, particularly when working in male-dominated teams or environments. This can make it difficult for women to feel safe and respected in the workplace, which can negatively impact their performance and overall well-being.⁷ A lack of representation in leadership positions is also a significant issue faced by women in the IT sector. Research has shown that women are underrepresented in leadership positions in the IT sector, particularly in the upper echelons of management. This lack of representation can make it difficult for women to advocate for their own interests and can perpetuate discrimination and harassment in the workplace.⁸ These issues are not unique to the Indian IT sector, but are rather symptomatic of the broader societal attitudes towards working women in India. Cultural and societal attitudes towards working women can make it difficult for them to succeed in the workplace, particularly in male-dominated industries like IT. This can include

5 Arnika Thakur, “Only 11% Women in Senior Roles in Corporate Sector: Report”, FORTUNE INDIA, December 12, 2019, <https://www.fortuneindia.com/enterprise/only-11-women-in-senior-roles-in-corporate-sector-report/103879>, (visited on March 12, 2022) .

6 S.R. Rajeshwari, “Women in Indian IT Industry: Issues and Challenges”, JOURNAL OF INDIAN RESEARCH, Vol. 2 No. 3, 2014.

7 R.S. Laxmi, “Gender Inequalities in Indian IT Industry: A Study of Women Professionals”, JOURNAL OF INDIAN BUSINESS RESEARCH, Vol. 9 No. 2, 2017.

8 K.R. Suresh, “Gender Inequalities in the Indian IT Industry: A Study of Women’s Career Progression”, INTERNATIONAL JOURNAL OF GENDER, SCIENCE AND TECHNOLOGY, Vol. 10 No. 3, 2018.

attitudes towards women's roles and responsibilities, as well as perceptions of women's competence and ability. Hence, these issues are being faced by Women working in the IT Sector of India and it is essential to address these issues to ensure a safe working environment.

Societal Attitudes towards Working Women in IT Sector

Societal attitudes and stereotypes towards women in the Information Technology (IT) sector play a significant role in shaping the experiences and challenges faced by women in the workplace. Gender bias and discrimination in the industry can limit the career progression and opportunities available to women, leading to a lack of representation and advancement in leadership positions. One of the major issues faced by women in the IT sector is the stereotype that the field is male-dominated and not suitable for women. This stereotype can lead to a lack of female representation in the industry and can discourage women from pursuing careers in IT.⁹ Additionally, societal attitudes towards working mothers can also make it difficult for women to balance their professional and personal responsibilities, leading to a high rate of women leaving the industry or not reaching leadership positions. Such attitudes and stereotypes can also lead to a lack of support and resources for women in the workplace, such as mentorship and networking opportunities.

Another issue faced by women in the IT sector is the prevalence of sexual harassment and discrimination in the workplace. A lack of understanding and acceptance of the problem, along with a lack of effective complaint mechanisms and legal protections, can make it difficult for women to speak up and seek justice in such cases.¹⁰ This can create a hostile work environment for women and can lead to a lack of representation and advancement in leadership positions. Moreover, women often face discrimination in terms of pay and job opportunities, and are often passed over for promotions and leadership positions in favor of their male colleagues, even though they possess the same qualifications and experience. To address these issues, it is important for society to change its attitudes and stereotypes towards women in the IT sector. This can be achieved through education and awareness campaigns, as well as through the representation and empowerment of women in the industry.¹¹ Companies can also play a role in this by promoting diversity and inclusion in their hiring and promotion practices, as well as by implementing effective complaint mechanisms and policies to address harassment and discrimination. Additionally, the government can also play a role by enforcing existing laws and regulations to protect

9 R. Nandhini, "Exploring the Challenges Faced by Women in IT Sector in India", JOURNAL OF INDIAN ACADEMY OF APPLIED PSYCHOLOGY, Vol. 42 No. 1, 2016.

10 R.S. Laxmi, "Gender Diversity in Indian IT Industry: A Study of Women Professionals", JOURNAL OF HUMAN RESOURCE AND SUSTAINABILITY STUDIES, Vol. 7 No. 2, 2019.

11 S.M.R.S. Suresh, "Gender Diversity and Inclusion in Indian IT Industry: Challenges and Strategies", INTERNATIONAL JOURNAL OF INFORMATION TECHNOLOGY AND BUSINESS MANAGEMENT, Vol. 22 No. 1, 2018.

women in the workplace and by implementing new policies and programs to support and empower women in the IT sector.

Furthermore, it is important for society to recognize and value the contributions of women in the IT sector, and to acknowledge the unique challenges and barriers that they face. This can be achieved through initiatives such as mentorship programs, networking opportunities and professional development programs specifically designed for women in the IT sector. Such initiatives can help to build a supportive community for women in the industry, and can help to break down the barriers and stereotypes that have traditionally held women back. In conclusion, societal attitudes and stereotypes towards women in the IT sector are a significant barrier to the representation and advancement of women in the industry. It is important for society, companies and government to take proactive steps to change these attitudes and stereotypes, and to provide support and resources to empower women in the IT sector. Only then, can we create a more equitable and inclusive workplace for women in the IT sector, where they can fully realize their potential and contribute to the growth and success of the industry. In order to further understand this issue, we shall also look into the legal framework both internationally and domestically.

International Framework for Employment of Women in Corporate Sector

As women's rights are a universal concept, international organizations act as necessary inspirations of a contemporarily suited legislation to enable such ambience for women at workplace. International organizations, conventions and treaties make a strong case for equal pay for equal work, equality between genders and elimination of discrimination against women. International Labor Organization, and international conventions such as the Universal Declaration of Human Rights¹², International Covenant on Civil and Political Rights¹³, International Covenant on Economic, Social and Cultural Rights¹⁴, Convention for Elimination of All Forms of Discrimination Against Women and other international conventions elimination of discrimination against women expressly bar any practice of implicit or explicit discrimination against women at workplace. Under the Convention for Elimination of All Forms of Discrimination Against Women, states have an obligation to ensure equality of opportunity to both men and women. Presence of anti-discriminatory legal regime favoring the existence of women at workplace, facilitating the drafting of anti-discriminatory legislations, abolishing discriminatory practices, and ensuring protection of women rights are the core tenets of the Convention for Elimination of All Forms of Discrimination Against Women¹⁵.

12 Preamble to the Universal Declaration of Human Rights, GENERAL ASSEMBLY RESOLUTION 217 A, 1948.

13 Articles 2, 3, 26 of the International Covenant on Civil and Political Rights, UNITED NATIONS GENERAL ASSEMBLY RESOLUTION 2200A, 1966.

14 Articles 2, 3, 7 of the International Covenant on Economic, Social and Cultural Rights 2200A, 1966.

15 Preamble, Article 2 of the Convention for Elimination of All Forms of Discrimination Against Women.

The International Covenant on Economic, Social and Cultural Rights¹⁶ and Convention for Elimination of All Forms of Discrimination Against Women¹⁷ also call for elimination of economic, social, political and cultural discrimination against women. The international legal regime concerning laws favoring protection of women at workplace provides a progressive context to women rights. While there are nations that have inculcated a strong legal and regulatory regime favoring women at workplace, India is yet to find its foot in enabling such strong protection to its women citizenry.

Jurisdictions Active in Protection of Women at Workplace

The World Bank, in the year 2022 released a report concerning the sustenance of women at workplaces of all the nation-states, inclusive of varying parameters to identify the degree of comfort which women have at the workplace., based on eight indicators comprising of mobility, workplace, pay, marriage, parenthood, entrepreneurship, assets and pension.¹⁸ The parameters claim to represent a comprehensive evaluation mechanism to evaluate the workplace environment for any woman.

Mobility represents the degree of freedom of women at workplace, to move freely and avail rights such as the “*right to obtain a passport*”, right to have social networks, right against isolation in work environment etc., while “*workplace*” relates to the affinity of a place for women, including the general work environment, and factors that influence the decision of a woman to choose a specific workplace over others, such as a safe working culture devoid of threats of discrimination and exploitation, infrastructural facilities etc. “*Parenthood*” as another parameter in the report explicates a woman’s life at workplace before and after child birth, including parental leaves, maternity leaves etc. “*Entrepreneurship*” as another indicator in the report describes about the degree of obstructions that a women can face while she decides to have her own corporate startup. Gender biases in credit facilities, private equity etc. have been covered in this performance indicator of the report. “*Assets*” as another parameter evaluates the differences in ownership of property amongst genders, while “*pension*” as an indicator reflects a woman’s financial stability after she chooses to opt out of work.

As per the World Bank, Belgium, Canada, Denmark, France, Greece, Iceland, Ireland, Latvia, Luxembourg, Portugal, Spain and Sweden are the states that have enabled maximum protection to women in a corporate setup. The identified nations have the most advanced systems in place to facilitate the sustenance and development of women at workplace based on the specified performance indicators. Considering Canada, the commitment to gender-based equality is clearly reflected by the statutes

16 International Covenant on Economic, Social and Cultural Rights, United Nations General Assembly Resolution 2200A, 1966.

17 Convention for Elimination of All Forms of Discrimination Against Women, General Assembly Resolution 34/180, 1979.

18 Report on “*Women, Business and Law*”, WORLD BANK GROUP, 2023, <https://openknowledge.worldbank.org/server/api/core/bitstreams/b60c615b-09e7-46e4-84c1-bd5f4ab88903/content>.

and policies. The Canadian Human Rights Act¹⁹, Canadian Charter of Rights and Freedoms²⁰, Pay Equity Act²¹, Employment Equity Act²², Canadian Gender Budgeting Act²³ and the Canadian Labor Code²⁴, all aim at enabling a conducive environment for women at workplace. The Canadian Human Rights Act propagates gender equality in all spheres, including equality of opportunity in terms of employment. Non-discrimination and preclusion of exploitation are the most imperative legal provisions that find place in the Act. Further, the Employment Equity Act and Pay Equity Act specifically aim at achieving equality at workplace for women, with particular emphasis on equality in remuneration. The Canadian Human Rights Commission the enforcement of the concerned Acts. Further, the Canadian Department for Women and Gender Equality Act takes care of the implementation of non-discrimination and registers the cases of exploitation against women. Moreover, Canada's Gender Budgeting Act specifically mandates for financial allocations to include the issues being faced by the diverse genders across the nation, with specific reference to gender equality. The Canadian Labor Code allows for parental leave, maternity leave, reassignment of tasks during maternity and leaves based on critical illness. Canadian government also measures the progress of its legislations through periodic performance indicators, to give way to efficiency of its all-inclusive and dynamic legislations.

As many states have attempted to reduce discrimination against women by enacting laws aimed at securing women's rights, women can be seen to increasingly step out of their home-maker role to embrace a professional world full of opportunities. Such actions are indicative of appreciable progress. However, there is enormous scope of establishing a conducive ambience facilitating the career trajectory of women at workplace. Considering the scenario with respect to women at workplace in the developed nations, there are specific legislations that aim at enabling an ambience of security for women at workplace. Japan's Promotion of Women's Participation and Career Advancement in the Workplace Act²⁵ is aimed at ensuring the protection of women at workplace and preclusion of any kind of discrimination and exploitation against women. The legislation aims at enabling equality of opportunity for women in terms of employment, and facilitating pay parity. Further, the concept of "indirect discrimination" has been recognized in the Act, where incidents of "de-facto discrimination" have also been addressed. The Act also prohibits the criterions that appear gender neutral, however, their purpose might lead to discrimination. Parameters such as physical strength, ability to keep-up with multiple transfers etc. have been discouraged by the legislation, as these inevitably keep men at a higher pedestal than women. Pregnancy, childbirth, etc. have been identified as primary reasons for halt in women's career trajectory, and have been

19 The Canadian Human Rights Act 1985.

20 Canadian Charter of Rights and Freedoms 1982.

21 Pay Equity Act 2018.

22 Employment Equity Act 1995.

23 Canadian Gender Budgeting Act 2018.

24 Canadian Labor Code 1985.

25 Japan's Promotion of Women's Participation and Career Advancement in the Workplace Act 2015.

precluded as parameters restraining women from being recruited or promoted. Further, the Act is aimed at preventing exploitation of women (sexual and otherwise) at workplace, thereby enabling an environment of safety and security for women. Other affirmative action's such as provisions enabling career advancement of women, in addition to adopting measures aimed at augmenting the participation of women at workplace.

Considering United States, there is a series of Act aimed at ensuring the representation of women at workplace, where such Acts aim at ensuring equality of opportunity²⁶, pay parity²⁷, prohibition of discrimination (sexual and otherwise)²⁸, family and health benefits²⁹, apt conditions of work for women at workplace³⁰ etc. Further, specific states have specialized laws aimed at affirmative actions that aim at augmenting the participation of women at workplace throughout the United States. The position in United Kingdom can also be observed to make continuously increasing space for women at workplace. The Equality Act³¹, which was introduced with an intent to de-root discrimination against women at workplace appears to be an effective set of systematized principles aimed at the cause. The Act covers pay disparity, allows for paid parental leave, and aims at facilitating an environment for sustenance of women at workplace. The Act also addresses instances of sexual harassment at workplace, and aims to resolve the same through a systematic process. The state is also on its way to draft a specialized legislation exclusively aimed at addressing sexual harassment at workplace.

Legislative Canvas Regarding Women at Workplace in India

The Indian legislative canvas concerning labor laws has been recently revamped, where the nation is in the process of implementing its four labor codes titled Code on Social Security, 2020³², Occupational Health and Working Conditions Code, 2020³³, Code on Wages, 2019³⁴ and Industrial Relations Code, 2019³⁵. The Social Security Code avails maternity benefit to women, and precludes employment of women within six weeks of delivery, medical termination of pregnancy or miscarriage. Further, maternity benefit of 26 weeks is availed to women, where in case of two or more surviving children, the paid leave is reduced to 12 weeks. Further, if the work is such that it can be undertaken by working from home, then even after the leave, a work from home system can be chosen by women employees. In cases of medical termination of pregnancy and miscarriage, women are entitled to six weeks of paid leave. Further, women under the Code are entitled to a month of leave for any illnesses arising out of pregnancy. Further, the Code precludes a

26 Title VII of the Civil Rights Act 1964.

27 Equal Pay Act 1963.

28 *Supra* n. 14.

29 Labor Standards Law 1947.

30 The Whistleblower Protection Act 2004.

31 Basic Law for a Gender Equal Society 1999.

32 Code on Social Security 2020.

33 Occupational Health and Working Conditions Code 2020.

34 Code on Wages 2019.

35 The Industrial Relations Code 2019.

woman's termination of work during pregnancy. Creche facilities have also been availed by the Code.

Considering equal pay, the Code on Wages operates as an overriding legislation, barring any kind of discrimination in payment to men and women. Further, the Occupational Health and Working Conditions Code aims to provide better working conditions for women, in terms of presence of separate washing and resting facilities for women at every workplace.

Further, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013³⁶ aims to address all the instances of sexual harassment of women at workplace in a systematic manner, by way of a grievance redressal committee and its appellate body. While the labor codes in addition to India's sexual harassment policy appear to be significant. However, as per the performance Indicators in the World Bank's Report, India has a long way to go in terms of achieving the overall comfort for women at workplace. Credit facilities to women, affirmative actions aimed at including women's participation in the workforce, pension schemes for women, industrial job -parity are factors where India needs to improve its laws to give way to a conducive environment for women at workplace.

Further, the Vishakha guidelines, issued by the Supreme Court of India in 1997 in the case of *Vishaka v. State of Rajasthan*³⁷, were a landmark development in addressing sexual harassment in the workplace. The guidelines were established in response to a case of sexual harassment in the workplace, and were the first legal framework for preventing and addressing such harassment in India. The guidelines set out a number of measures for employers to implement in order to prevent and address sexual harassment, including the formation of internal committees to investigate complaints and the imposition of penalties for non-compliance. These guidelines laid the foundation for the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 which was passed by the Indian parliament and codified the Vishakha guidelines into law. This act applies to all workplaces, including the private sector and unorganized sector, and provides for the constitution of Internal Complaints Committee at the workplace, and the establishment of Local Complaints Committee at the district level. This act provided a stronger legal framework and more robust enforcement mechanisms for addressing and preventing sexual harassment in the Indian workplace.

Conclusion

In conclusion, this paper has examined the various issues faced by women working in the Indian Information Technology (IT) sector, including discrimination, harassment, and lack of representation in leadership positions. These issues are not unique to the IT sector, but are rather symptomatic of the broader societal attitudes towards working women in India. The cultural and societal attitudes towards working women can make it difficult for them to succeed in the workplace, particularly in

36 Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

37 (1997) 6 SCC 241.

male-dominated industries like IT. The paper also highlighted the societal attitudes towards working women in the Indian IT sector and the impact that it has on their experiences in the workplace. This includes the perception of women's roles and responsibilities, as well as perceptions of women's competence and ability. Furthermore, the paper discussed the international framework for the employment of women in the corporate sector and the jurisdictions that are actively protecting women at the workplace. Additionally, the paper explored the legislative canvas regarding women at the workplace in India, including the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013, which was passed by the Indian parliament, which codified the Vishakha guidelines into law and expanded upon them. This act applies to all workplaces, including the private sector and unorganized sector, and provides for the constitution of Internal Complaints Committee at the workplace, and the establishment of Local Complaints Committee at the district level.

Despite these efforts, many women in the IT sector continue to face discrimination, harassment, and lack of representation in leadership positions. To address these issues, it is crucial to continue to raise awareness about the challenges faced by women in the IT sector and to advocate for policies and initiatives that promote gender diversity and inclusion in the workplace. This includes the need for better enforcement of existing laws, and development of new policies and programs that address the specific needs and challenges faced by women in the IT sector. Overall, this paper highlights the need for a multifaceted approach to addressing the issues faced by women working in the Indian IT sector. This includes a need for societal attitudes to change, better enforcement of laws, and initiatives that promote gender diversity and inclusion and international cooperation in this regard. By addressing these issues, we can create a more inclusive and equitable workplace for women in the IT sector and pave the way for greater gender equality in the broader Indian workforce.

INDIA AND QUEERING INTERNATIONAL LAW: HOW INTERNATIONAL LEGAL THEORY IS 'ORIENTING' THE 'DISORIENTED' DOMESTIC QUEER JURISPRUDENCE IN INDIA

Adithya A. Variath* and Riya Kadam[♠]

Abstract

India's quest for legal reforms in the last few years was enriched with interventions from the critical legal studies approach adopted by the Indian judiciary. The bridging of the continuing gap between post-colonial theory and liberal approach in the domestic circuits has led to the withering away of anti-queer societal traditions. The culture-of-control-oriented has shaped Indian society. This was not a result of a transformation of societal norms but also the influence of international legal theory on domestic jurisprudence. In the landmark case of Navtej Singh Johar v. Union of India, the Supreme Court of India unanimously struck down a colonial-era ban on gay sex by decriminalizing homosexuality. The judgement is rich with references to international conventions and comparative constitutional interpretations. This paper argues that queering domestic law extends to restructuring the sub-structures of the politics of the hetero-normative framework. This paper seeks to explore foundation of sexuality for the interpretation of international law through queer theory. The authors argue that the queer perspective can bring marginalized knowledge into mainstream international law. While the third world approach to international law (TWAIL) seeks the proliferation of diverse views, queer theory and critical legal approach to queer theory can facilitate this change by challenging the 'normal'.

Keywords: Queer, International Legal Theory, Homosexuality, Heteronormative Behavior, Decriminalization

Introduction

“[C]uriosity is always transgressive, always a sign of the rejection of the known as inadequate, incorrect, even uninteresting.”¹

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1 Barbara M. Benedict, CURIOSITY: A CULTURAL HISTORY OF EARLY MODERN INQUIRY, 1st ed. 2001, p. 2.

The institution of international law as a system of governance correlates the notions of how a Sovereign State responds to the people, actions and truth.² The doubts raised against international law in previous centuries emanate from the intransigence of the methodology adopted in studying national laws. Lassa Oppenheim argues that “definitions drawn up primarily in terms of internal (or municipal) law of states may be unnecessarily restrictive when applied to rules obtaining in other kinds of community.”³ Different interpretations of international law have led to the evolution of different approaches to international law jurisprudence.⁴ In the discourse of international law, gender and sexual rights have cultivated little academic dialogue. There is a need to use the spectrum of international legal theory to analyse the role of gender and sexuality in the working of the global order. “Law and sexuality” as “an academic discipline is meaningful when explored through the lens of transnational law and legal scholarship.”⁵

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- 2 Samantha Besson, “Sovereignty, *International Law and Democracy*”, THE EUROPEAN JOURNAL OF INTERNATIONAL LAW, Vol. 22 No. 2, 2011, pp. 373-387.
 - 3 Lassa Oppenheim and Hersch Lauterpacht, INTERNATIONAL LAW: A TREATISE, 8th ed. 1955.
 - 4 Jeffrey L. Dunoff and Mark A. Pollack (eds.), INTERNATIONAL LEGAL THEORY: FOUNDATION AND FRONTIER, 2022, pp. 37-130; Hilary Charlesworth et al., “*Feminist Approaches to International Law*”, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 85, 1991, p. 613; Karen Engel et al., “*Feminist Approaches to International Law*”, PUBLIC LAW RESEARCH PAPER, No. 716, 2021, pp. 174-196; Chris Thornhill, A SOCIOLOGY OF TRANSNATIONAL CONSTITUTIONS: SOCIAL FOUNDATIONS OF THE POST-NATIONAL LEGAL STRUCTURE, 2016; “*Basic Approaches to the Teaching of International Law*”, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 66, 1972, p.136; Richard A. Falk, “*New Approaches to the Study of International Law*”, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 61, 1967, p. 477; Rauber Jochen, “*On Communitarian and Constitutional Approaches to International Law*”, LEIDEN JOURNAL OF INTERNATIONAL LAW, Vol. 26, 2013, p. 201; Ignacio de la Rasilla, INTERNATIONAL LAW AND HISTORY: MODERN INTERFACES, 1st ed. 2021, pp. 41-74, 152-182.
 - 5 Peer Zumbansen, THE OXFORD HANDBOOK OF TRANSNATIONAL LAW, 1st ed. 2021, pp. 727-746; Michael Gagarin and David Cohen (eds.), THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW, 1st ed. 2005, pp. 236-253; Susan Moller Okin, “*Sexual Difference, Feminism, and the Law*”, LSI, Vol. 16, 1991, p. 553; Susan L. Mann, GENDER AND SEXUALITY IN MODERN CHINESE HISTORY, 1st ed. 2011, pp. 66-80; Rosemary Auchmuty, “*Feminist Approaches to Sexuality and Law Scholarship*”, LEGAL INFORMATION MANAGEMENT, Vol. 15, 2015, p. 4; Helen Meenan (ed.), EQUALITY LAW IN AN ENLARGED EUROPEAN UNION: UNDERSTANDING THE ARTICLE 13 DIRECTIVES, 1st ed. 2007, pp. 313-341; Brenda Cossman, “*Gender Performance, Sexual Subjects and International Law*”, CJLJ, Vol. 15, 2002, p. 281; Mark E. Wojcik, “*Sexual Orientation and Gender Identity Under International Law*”, Proceedings of the ASIL Annual Meeting, Vol. 110, 2016, p. 21; Wolfgang Schomburg and Ines Peterson, “*Genuine Consent to Sexual Violence Under International Criminal Law*”, AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 101, 2007, p. 121; Ayela M. Gross, “*Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law*”, LEIDEN JOURNAL OF INTERNATIONAL LAW, Vol. 21, 2008, p. 235; Anne-Marie de Brouwer et al. (eds.),

Escaping one's individuality and identity through suppressing their self-expression is a common lifestyle choice in India. India has had a long and torturous culture of normalising discrimination and subjugating the natural identity of a human being. In *National Legal Services Authority v. Union of India*, the Court "interpreting the status of identity of the transgenders, referring to series of judgments and relevant International Covenants", opined that "gender identity is one of the most fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person".⁶ In a third-world country like India, queer communities experience more severe forms of violence.⁷ In India, 'queerness' is not recognised publicly due to the social stigma associated with it. Studies on post-coloniality and queer theory have not worked on solving the problematic constructs of queer law.⁸

India has for long criminalised homosexuality. Section 377 of the Indian Penal Code 1860 made consensual sexual intercourse between same-sex people as an "unnatural offence" which is "against the order of nature".⁹ The act was made criminal with a punishment upto 10 years imprisonment.¹⁰ India's liberal democratic constitutional structure criminalised it when democracies around the globe are decriminalizing homosexuality.¹¹ Ironically, India's constitutional culture was built on the edifice of Articles 14, 19 and 21 that guarantees the right to equality, the right to expression and the right to life, the golden triangle that failed to protect gender

SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME: INTERDISCIPLINARY APPROACHES, 1st ed. 2013, pp. 211-242; Bérénice K. Schramm et al., "Doing Queer in the Everyday of Academia: Reflections on Queering a Conference in International Law", AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. 116, 2022, p. 16.

- 6 *National Legal Services Authority (NALSA) v. Union of India* AIR 2014 SC 1863.
- 7 Achim Hildebrandt et al., "The Missing Link? Modernization, Tolerance, and Legislation on Homosexuality", Political Research Quarterly, Vol. 72, 2019, pp. 539-553; Aeyal Gross, "Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?", PROCEEDINGS OF THE ANNUAL MEETING, Vol. 101, 2007, pp. 129-132; Susie Jolly, "'Queering' Development: Exploring the Links between Same-Sex Sexualities, Gender, and Development", GENDER AND DEVELOPMENT, Vol. 8 No. 1, 2000, pp. 78-88.
- 8 Siobhan B Somerville (ed.), THE CAMBRIDGE COMPANION TO QUEER STUDIES, 1st ed. 2020, pp. 142-155; Leanne Dawson (ed.), EDINBURGH GERMAN YEARBOOK 10: QUEERING GERMAN CULTURE, 1st ed. 2018, pp. 109-196; Chantal Zabus, OUT IN AFRICA: SAME-SEX DESIRE IN SUB-SAHARAN LITERATURES AND CULTURES, 1st ed. 2013, pp. 160-207.
- 9 Section 377 of the Indian Penal Code 1860 states "Unnatural offences- Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine".
- 10 *Ibid.*
- 11 Jylisa Renea Doney, "Majority Tyranny or Minority Power? Impact of Direct Democracy on Same-Sex Relationship Rights", UNDERGRADUATE HONORS CAPSTONE PROJECTS, 2011, p. 77; David Gilboa, "Same-Sex Marriage in a Liberal Democracy: Between Rejection and Recognition", PUBLIC AFFAIRS QUARTERLY, Vol. 23 No. 3, 2009, pp. 245-260.

distinctiveness.¹² This lack of holistic protection made the queer community subordinate to the authority of coercive state control.

The criminal penal code of India became a weapon of suppression and oppression. This criminalisation was also a result of the public morality of the orthodox mentality of the masses. The test of ‘penal-ness’ made their sexual choice a crime.¹³ In the constitutional structure of India, there is a need to normalise progressive interpretation of the Constitution which can foster the progressive realization of rights for gender in the general and queer community in specific. The perplexity in this is to analyse what impacted the Supreme Court to change the foundation of the interpretation from public morality to constitutional morality. The author argues in this piece that international legal theory has a dynamic impact on how India’s legal structure de-structuralised Section 377 and many other legislations that deal with the issues of gender. The development of international recognition of the queer community also impacted domestic jurisprudence in India.

Queering International Law: Trickleing Down Conscience to Domestic Jurisprudence

The history of the legal battle to decriminalise consensual sexual acts dates back to 2001. In 2001, Naz Foundation Trust challenged Section 377 in the High Court of Delhi.¹⁴ The case was dismissed citing a lack of *locus standi* of the Naz Foundation to decriminalise Section 377. Against this order, an appeal was filed to the Supreme Court. The Supreme Court directed the High Court of Delhi to re-hear the case. It ultimately led to the decriminalization of consensual sexual acts between adults. However, in 2012 the Supreme Court overturned the decision of the High Court of Delhi and recommended that Parliament address the matter.¹⁵ The Court held that “a minuscule fraction of the country’s population constitutes lesbians, gays, bisexuals or transgenders and that the High Court had erroneously relied upon international precedents in its anxiety to protect the so-called rights of the LGBT community.”

On September 6, 2018 in *Navtej Singh Johar v. Union of India thr. Secretary Ministry of Law and Justice*,¹⁶ the court struck down Section 377 of the Indian Penal Code. The judgement heavily relied on International Covenants and other international documents. India has not negotiated or signed any intergovernmental international treaties or agreed to human rights treaties on the issue of LGBTs.

12 Ann C. McGinley and Nicole Porter (eds.), *FEMINIST JUDGEMENTS: REWRITTEN EMPLOYMENT DISCRIMINATION OPINIONS*, 1st ed. 2020, pp. 266-333; Suraj Jacob, “*Gender and Legislative Performance in India*”, *POLITICS & GENDER*, Vol. 10, 2014, p. 236; Kenneth Bo Nielsen and Anne Waldrop, “*Women and Gender in a Changing India*”, Kenneth Bo Nielsen and Anne Waldrop (eds.), *WOMEN, GENDER AND EVERYDAY SOCIAL TRANSFORMATION IN INDIA: A REVISIONARY HISTORY*, 1st ed. 2014; “*Globalization and the Emerging Gender Issues in India*,” Subhadra Mitra Channa, *GENDER IN SOUTH ASIA: SOCIAL IMAGINATION AND CONSTRUCTED REALITIES*, 1st ed. 2013.

13 *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.

14 *Naz Foundation v. Govt. of NCT of Delhi* 160 DLT 277.

15 *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1.

16 AIR 2018 SC 4321.

However, in the international sphere, the right to live with dignity received legitimation as a human right with the Universal Declaration of Human Rights (“UDHR”) in 1948. The development of queer jurisprudence across the world shows different patterns, many of which may have a “disproportionate impact upon a particular class”.¹⁷

The Naz foundation judgement of 2009 similarly discussed provisions from international human rights documents, including the UDHR, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights of 1953 (“ECHR”), all of which placed great emphasis on the significance of individuals’ right to privacy, family, home, and correspondence. International law prohibits signatories from arbitrary interference with these aspects of every individual’s private life and forbids any attacks on the honour or reputation of persons. The UDHR recognises the right of individuals to seek remedy and protection of the law in the event of such interference or attack. Privacy has been defined by Warren and Brandeis as “the right to be let alone.”¹⁸

Indian domestic law does not have an equivalent provision which directly protects citizens’ right to privacy. However, the Supreme Court has recognised the right to privacy under Article 19 and Article 21 of the Constitution.¹⁹ This right to privacy includes the right to develop interpersonal relationships without interference by the State or any other third party. Section 377 contravened the right of LGBTQ+ persons to develop such interpersonal relationships, thus depriving them of the dignity and personhood afforded to those falling into acceptable heteronormative structures. This deprived them of the right to life. The stark contrasts in the degree of privacy provided to cisgender, heterosexual individuals, when compared with the lack of privateness in the personal affairs of persons belonging to the LGBTQ+ community, exhibited a deep chasm which infringed their rights under Article 14 and Article 15 of the Constitution.²⁰

The domestic law of India is yet to act against the ‘indirect discrimination’ and bias faced by the queer community. References to which can be drawn to Europe. For example, Directive 2006/54/EC of the European Parliament defines ‘indirect discrimination’ as

*“Where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.”*²¹

17 Adam Isaiah Green, “*Queer Theory and Sociology: Locating the Subject and the Self in Sexuality Studies*”, *SOCIOLOGICAL THEORY*, Vol. 25 No. 1, 2007, pp. 26-45.

18 Samuel D. Warren and Louis D. Brandeis, “*The Right to Privacy*”, *HARVARD LAW REVIEW*, Vol. 4 No. 5, 1890, pp. 193-220.

19 *R. Rajagopal v. State of Tamil Nadu* AIR 1995 SC 264.

20 *Supra* n. 14.

21 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and in matters of employment and occupation.

Indirect discrimination includes harassment based on any prohibited grounds which violate the dignity of the individual or create a hostile, intimidating or degrading environment.²² The judiciary attempted to fill this gap by bringing in the perspective of the right to life and right into health to queer theory.²³ The Constitution of India has recognised the right to health under the prism of right to life. The right to health is recognised in international agreements which India has ratified, most importantly, the International Covenant on Economic, Social and Cultural Rights 1966 (“ICESCR”). The ICESCR places emphasis on the principles of non-discrimination and equal treatment in access to healthcare. It forbids discriminatory practices on the grounds of sex, health status (including HIV and AIDS), sexual orientation and socio-political status.²⁴ There a voluntary responsibility on the signatories to adopt and impose measures tailored to eliminate health-related discrimination through legislation. This gives impetus to the parliament to introduce or amend provisions eliminating health-related discrimination existing in special as well as general legislations which govern the rights of LGBTQ and other gender non-conforming individuals. The role of the legislature becomes especially pertinent against the backdrop of a shortage of socially supporting mechanisms to reach vulnerable, often queer, individuals living with AIDS/HIV in the country. It has been recognised that “the stigma, discrimination and criminalisation faced by men who have sex with men, gay men and transgender people are major barriers to universal access to HIV prevention and treatment.”²⁵

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- 22 Declaration of Principles on Equality 2008 - The Equal Rights Trust; Erica Howard, “Indirect Discrimination, Reasonable Accommodation and Religion”; Daniël Cuypers and Jogchum Vrielink (eds.), EQUAL IS NOT ENOUGH, Vol. 3 2016 PAGE NUMBER MISSING; Chloe J. Wallace, “*European Integration and Legal Culture: Indirect Sex Discrimination in the French Legal System*”, Legal Studies Vol. 19, 1999, p. 397; TK Hervey, “*Justification for Indirect Sex Discrimination in Employment: European Community and United Kingdom Law Compared*”, CLQ, Vol. 40, 1991, p. 807; Sara Mills, LANGUAGE AND SEXISM, 1st ed. 2008, pp.124-153; Russell West-Pavlov (ed.), THE GLOBAL SOUTH AND LITERATURE, 1st ed. 2018, pp. 185-197.
- 23 *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* (1996) 4 SCC 37.
- 24 Katherine Warburton and Stephen M. Stahl (eds.), DECRIMINALISING MENTAL ILLNESS, 1st ed. 2021, pp. 338-360; Caroline S Clauss-Ehlers (ed.), THE CAMBRIDGE HANDBOOK OF COMMUNITY PSYCHOLOGY: INTERDISCIPLINARY AND CONTEXTUAL PERSPECTIVES, 1st ed. 2021, pp. 590-620; Victoria Clarke, Sonja J. Ellis, Elizabeth Peel and Damien W. Riggs, LESBIAN, GAY, BISEXUAL, TRANS AND QUEER PSYCHOLOGY: AN INTRODUCTION, 1st ed. 2010, pp. 52-78; Victoria Clarke, Sonja J. Ellis, Elizabeth Peel and Damien W. Riggs, LESBIAN, GAY, BISEXUAL, TRANS AND QUEER PSYCHOLOGY: AN INTRODUCTION, 1st ed. 2010, pp. 79-148; Victoria Clarke, Sonja J. Ellis, Elizabeth Peel and Damien W. Riggs, LESBIAN, GAY, BISEXUAL, TRANS AND QUEER PSYCHOLOGY: AN INTRODUCTION, 1st ed. 2010, pp. 1-78; Carly Thomsen, “*The Post-Raciality and Post-Spatiality of Calls for LGBTQ and Disability Visibility*”, HYPATIA, Vol. 30, 2015, p. 149.
- 25 Delhi Declaration of Collaboration, 2006; John G. Francis and Leslie P. Francis, “*HIV Treatment as Prevention: Not an Argument for Continuing Criminalisation of HIV Transmission*”, INTERNATIONAL JOURNAL OF LAW IN CONTEXT, Vol. 9, 2013, p. 520; Victoria Clarke, Sonja J. Ellis, Elizabeth Peel and Damien W. Riggs, LESBIAN,

Article 25 of the UDHR recognizes the right to health as follows: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.” Reading the constitutional mandate of India under Article 253, the parliament can honour the internationally recognized rules and principles through legislative recognition. Several international agreements that India has signed require it to guarantee “the rights to equality before the law, equal protection of the law and freedom from discrimination, implicitly if not explicitly”.²⁶ In this context, in the famous *NALSA case*, “while dealing with the rights of transgender persons, the court recognised ‘Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity’”.²⁷

With the institutionalisation of international law, there are established traditions of applying queer theory to the law even though its application remains concerning. There is a need to recognise the right to recognition before the law that determines “each person’s self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.”²⁸ Another fundamental challenge before international law for recognising the right to sexual recognition and identity lies in addressing the tensions between globalisation and the diversification of identities.²⁹

There is a dearth of effective international consensus on issues like same-sex marriage and related matters. One common ground that can be raised to build the foundation LGBTQ rights is the International Covenant on Civil and Political Rights (“ICCPR”). In *Toonen v. Australia*, UNHRC declared ‘sexual orientation’ as a protected ground under the ICCPR.³⁰ However, In the case of *Joslin v. New Zealand*, the UN Human Rights Committee interpreting Article 23 of ICCPR subjugated Article 26’s non-discrimination requirements held that “New Zealand had not

GAY, BISEXUAL, TRANS AND QUEER PSYCHOLOGY: AN INTRODUCTION, 1st ed. 2010, pp. 79-148.

26 International Convention on the Elimination of All Forms of Racial Discrimination 1965; Equality Bill 2021: Takes a New Step in Addressing Discrimination, Recognising Intersectionality & Promoting Equality, Centre For Law And Policy Research, January 8, 2021.

27 *Supra* n. 6.

28 *Ibid.*

29 Dennis Altman, “*Sexuality and Globalisation*”, *Agenda: Empowering Women for Gender Equity*, Vol. 2, 2004, pp. 22-28; Brenda Cossman, “*Gender Performance, Sexual Subjects and International Law*”, *CANADIAN JOURNAL OF LAW AND JURISPRUDENCE*, Vol. 15, 2002, p. 281; Mark E. Wojcik, “*Sexual Orientation and Gender Identity Under International Law*” *PROCEEDINGS OF THE ASIL ANNUAL MEETING*, Vol. 110, 2016, p. 21; Ayela M. Gross, “*Sex, Love, and Marriage: Questioning Gender and Sexuality Rights in International Law*”, *LEIDEN JOURNAL OF INTERNATIONAL LAW*, Vol. 21, 2008, p. 235; Ayela M. Gross, “*Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?*” *PROCEEDINGS OF THE ASIL ANNUAL MEETING*, Vol. 101, 2007, p. 129.

30 *Toonen v. Australia* Communication No. 488/1992 U.N. Doc CCPR/C/50/D/488/1992 (1994).

infracted the ICCPR by refusing to provide recognition to same-sex marriages”.³¹ The UNHRC observed, “Use of the term ‘men and women’, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.”³²

The ICCPR recognises the right to equality and states that, “the law shall prohibit any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social region, property, birth or other status”. The Court relied on this provision in the Naz Foundation case and recognised sexual orientation as a ground analogous to sex. The Court further relied on judgements of the Human Rights Committee, as well as judgements of Canadian and South African courts, which identified that such grounds are a basis for judgement based on stereotypes, and not on merit.³³ Any discrimination on the grounds of sexual orientation is not permitted under Article 15 of the Constitution, including the prohibition on discrimination against one citizen by another for access to public spaces. Post-colonial states like India have to take ownership to decriminalise it as it is emerging as a more contentious issue. Collectively, these substructures form a part of a new global governance regime.

Contextualising Queer Theory in INDIA

Some third-world literature erroneously mentions the LGBTQ community as a product of westernization.³⁴ Post the judgment that read down Section 377, there are significant changes in the way the courts approach issues related to the queer community. However, the Indian legal system is highly dependent on the institutionalism of constitutional structures. Indeed, the judgement has opened doors to more conversations about the queer community, but the social acceptance and rights and privileges of the community have yet to see a significant impact on the ground. For example, the police have not been sensitised, the expression of sexuality is still a sin/taboo to several households and it is still considered a disease by doctors. The right to gender identity would remain an idea or a philosophy until the institutions that recognise the right are silent about its actuality.³⁵

31 *Juliet Joslin v. New Zealand* Communication No. 902/1999 U.N. Doc. A/57/40 at 214 (2002).

32 *Ibid.*

33 *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994); See also *Vriend v. Alberta* (1998) 1 S.C.R. 493; See also *Corbiere v. Canada* [1999] 2 S.C.R. 203; *Prinsloo v. Van Der Linde* 1997 (3) SA 1012 (CC).

34 Rahul Rao, *OUT OF TIME: THE QUEER POLITICS OF POST COLONIALITY*, 1st ed. 2020.

35 Andreas von Arnould et al., (eds.), *THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC*, 1st ed. 2020, pp. 191-214; Katharina Boele-Woelki and Angelika Fuchs (eds.), *SAME-SEX RELATIONSHIPS AND BEYOND: GENDER MATTERS IN THE EU*, 3rd ed. 2017, pp. 161-248; Giovanna Gilleri, “*Abandoning Gender ‘Identity’*”, *AMERICAN JOURNAL OF INTERNATIONAL LAW*, Vol. 116, 2022, p. 27.

A glaring example of the gap between the principles and policies advocated by judicial proceedings, and their practical implementation is the longstanding subjugation of transgender individuals and communities in India. The Criminal Tribes Act of 1871 was enacted during the British Colonial rule to criminalise Hijras in India, justified by their unsubstantiated belief that these communities were “addicted to the systemic commission of non-bailable offences.”³⁶ The criminalisation was based solely on their identity and their role as a member of the community or tribe. Hijras, and eunuchs after the 1897 amendment, had restrictions imposed on their movements and were required to report to the police.³⁷ After the amendment, eunuchs were monitored closely, and registers containing their names and residences were maintained by the local police if they were “reasonably suspected of kidnapping or castrating children or of committing offences under Section 377 of the IPC.”³⁸

While the *NALSA case* of 2014 recognised transgender people as a third gender, theoretically providing them legal recognition and protection, their constitutional right to self-determination and privacy continued to be threatened by Section 377 of the IPC. Where the threat posed by Section 377 was alleviated after the *Navtej Singh Johar case* of 2018, the Transgender Persons (Protection of Rights) Act 2019 reinforced harmful societal preconceptions and displayed a general lack of sensitivity towards the experiences of transgender and gender non-conforming individuals. Several provisions in the Transgender Persons Protection Act are vague, arbitrary, violative of fundamental rights, and not in conformity with the principles adopted by the Supreme Court in the *NALSA case*. The Act takes away a transgender individual’s right to self-identity and autonomy and threatens the traditional alternative family structures of the transgender community.³⁹ The incessant influence of colonial ideas is patently visible.

A similar situation was observed in the case of homosexual conduct. Section 377 of the Indian Penal Code meant to punish sodomy and other homosexual acts, was first introduced in India under Colonial rule. It was born out of 19th Century Western, Judeo-Christian sexual norms followed in Victorian England. In England, while sodomy between consenting adult males was decriminalized in 1967, the set of rules they imposed criminalising “corrupt” homosexual conduct were further institutionalized in majority of their colonies and in some cases, their neighbouring uncolonized states through regional influence. While Section 377 was violative of Article 14, Article 19 and Article 21 of the Indian Constitution, the deeply embedded

36 The Criminal Tribes Act 1871; Anastasia Piliavsky, “The ‘Criminal Tribe’ in India before the British”, *COMPARATIVE STUDIES IN SOCIETY AND HISTORY*, Vol. 57, 2015, p. 323; Jessica Hinchy, “Gender, Family, and the Policing of the ‘Criminal Tribes’ in Nineteenth-Century North India” *MODERN ASIAN STUDIES*, Vol. 54, 2020, p. 1669; Andrew J. Major, “State and Criminal Tribes in Colonial Punjab: Surveillance, Control and Reclamation of the ‘Dangerous Classes’” *MODERN ASIAN STUDIES*, Vol. 33, 1999, p. 657.

37 Jessica Hinchy, *GOVERNING GENDER AND SEXUALITY IN COLONIAL INDIA: THE HIJRA, C. 1850-1900*, 1st ed. 2019.

38 *Ibid.*

39 The Transgender Persons (Protection of Rights) Act 2019.

heteronormative moral code within Indian society ensured that homosexuality remained a crime until 2018. The repercussions of following draconian colonial laws and morality have been decades of dehumanisation of an entire section of the population, and a lack of basic rights and social facilities made available to them. This exposes a need to move past imposed colonial-era morality in laws governing queer and other gender-based acts through legislative measures and requisite judicial activism.⁴⁰

In *Navej Singh Johar v. Union of India*, Justice D.Y. Chandrachud observed, “The Constitution brought about a transfer of political power. But it reflects above all, a vision of a society governed by justice. Individual liberty is its soul. The constitutional vision of justice accommodates differences of culture, ideology and orientation.”⁴¹ He further delves into the philosophy of the Indian Constitution and adds:

“The stability of its foundation lies in its effort to protect diversity in all its facets: in the beliefs, ideas and ways of living of her citizens. Democratic as it is, our Constitution does not demand conformity. Nor does it contemplate the mainstreaming of culture. It nurtures dissent as the safety valve for societal conflict. Our ability to recognise others who are different is a sign of our own evolution. We miss the symbols of a compassionate and humane society only at our peril.”⁴²

Sexuality is an important vector along with other constitutional ideas. Alternative ideas of normative order, including the legality of sexuality, have to be constituted. When articulating a queer perspective, there is also a need to recognise the inequalities in social and economic justice. In the Indian context, homophobic and transphobic discrimination impacts on social and economic inequalities can be neutralised by legislative enactments.

Conclusion

The Indian academic debates have tended to ignore issues around sexual politics. International law’s approaches can bring about a restructuring of this model. Bedford and Jakobsen argue, “Within academia, conversations about poverty, structural adjustment, and neoliberalism have occurred largely apart from research on sexual rights, the emergence of ‘global gay’ identity, sex tourism, trafficking, and sex work”.⁴³ Sexual orientation implicates some obligations on the state. Recognising the sexual identity of the community interlinks two jural correlatives, the duty of the state not to discriminate, and the right of the community to be protected for their true fulfilment to same-sex relationships. Academia can play a major role in reshaping the anti-queer culture, like “law schools can incorporate the dynamic interaction between domestic decision-making, foreign jurisprudence, and the international legal

40 Alok Gupta, THIS ALIEN LEGACY: THE ORIGINS OF ‘SODOMY’ LAWS IN BRITISH COLONIALISM”, 1st ed. 2008.

41 *Supra* n. 13.

42 *Ibid.*

43 Kim Brooks and Robert Leckey (eds.), QUEER THEORY: LAW, CULTURE, EMPIRE, 1st ed. 2010, p. 25.

system and critical perspectives on each into their curricula.”⁴⁴ Outside academia, the law must be severely quarantined from morality, like Section 377, a majoritarian view of right and wrong was legitimately imposed upon a minority. This majoritarian approach of the legal system must not be jurisprudentially and democratically permitted.

As observed by the Supreme Court in reading down Section 377, “At the core of the concept of identity lies self-determination, the realization of one’s own abilities visualizing the opportunities and rejection of external views with a clear conscience that is in accord with constitutional norms and values or principles that are, to put in a capsule, constitutionally permissible.” By restructuring the taxonomies of international legal theory, queer curiosity can open new realms of critical legal studies, which can be equitable and inclusionary. In the global world disorder, where there is a crisis, both at the domestic and individual levels, there is a need to build a legal framework that can foster solidarity.

The influence of international law on domestic courts and liberal interpretations of constitutional doctrines is witnessing an unprecedented phase, especially in third-world countries. The orientation of queering international law is creating certainty for LGBTQA+ communities amid uncertainties. From a critical theory perspective, international law can be seen as a conspiracy that reinforces unequal relations of power. There is a need to have an international legal framework that can challenge the entrenched inequalities and limitations rather than normalising and exploiting them. Like the feminist approaches that exposed the inequalities and lack of intersectionality of the global governance framework, a postcolonial queer curiosity can create order in the international legal system.

44 Peer Zumbansen, *THE OXFORD HANDBOOK OF TRANSNATIONAL LAWS*, 1st ed. 2021, pp. 727-746.

A SOCIO-LEGAL STUDY ON THE CONDITION OF WOMEN PRISONERS AND THEIR CHILDREN IN INDIA

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Abstract

The Hon'ble Supreme Court in R.D. Upadhyay v. State of Andhra Pradesh highlighted the plight of the women prisoners and their children living with them in Indian Jails. It issued guidelines for protecting and promoting the various rights and interests of children living in prisons with their mothers to ensure the holistic development of these children. The issues identified by the Apex Court are concerning the health of pregnant women prisoners, challenges faced in giving birth in prison, and facilitating the nutritional, recreational health, and educational needs of the children living in prison with their mothers. Several empirical studies have been conducted to evaluate the conditions of Indian Prisons and have concluded that the prison environment is not congenial for pregnant women and children in prison; the paper aims to review such studies and evaluate the existing laws in this regard.

Keywords: Women-prisoners, Juvenile Justice, Welfare laws, Reformatory Justice, Article 15(3).

Introduction

The rate of incarceration of women has increased significantly in recent times, which has highlighted the importance of addressing the gender-specific requirements for female prisoners in the criminal justice system of India. The issues complexity further increases and is observed in sociological influence of maternal incarceration on the child's development. This paper presents the different aspects of women prisoners in India with a special emphasis on the incarcerated mothers and their impact on the children living with them inside the prison facilities.

An Overview of Incarcerated Individuals in the Indian Criminal Justice System

India's criminal justice system is based on the principles of the rule of law, democracy, and the basic human rights of individuals. The criminal justice objectives primarily revolve around crime prevention and control, maintaining public order and peace, and ensuring the protection of individuals' rights and basic entitlements of the offenders and prisoners.¹ In India's criminal justice system, the objective of punishment for offenders can be categorized as punitive and rehabilitative. However, it is observed that the rehabilitative objective is often overshadowed by challenges

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1 R. Thilagaraj, "Criminal Justice System in India", HANDBOOK OF ASIAN CRIMINOLOGY, Doi:10.1007/978-1-4614-5218-8_13, 2013, pp. 199-211.

such as overcrowding in Indian prisons.² A significant challenge in this respect is posed by undertrial prisoners, who constitute most of the prison population. Several legislative and judicial interventions have been undertaken to prevent overcrowding by undertrial prisoners. However, there remains a disproportionate influence on the socio-economic conditions, especially on the vulnerable sections of society.³ To achieve the rehabilitative objective, most Indian prisons have incorporated different forms of labor to facilitate the correction of incarcerated individuals and, thus, help in their subsequent reintegration into mainstream society post their incarceration. Over time the concept of prison labor has evolved into vocational training and prison workshops.⁴ Prison labor has been a predominant practice in the Indian criminal justice system for a long time. Several committees were set up to address the inhumane prison reforms, namely, the Prison Discipline Committee (1836), the Commission of Jail Manual and Discipline (1864), the Calcutta Conference (1877), etc. Post-independence several other committees highlighted the need for Vocational training as an improvisation for prison labor to achieve the rehabilitative objectives of the Indian criminal justice system, namely, the Justice Mulla Committee (1983) the Justice Krishna Iyer Committee (1987).⁵ Overcrowding in Indian prisons further contributes to many problems in Indian jails. The most prominent issues are the health challenges observed in an increased risk of diseases among the prisoners, combined with poor hygienic and sanitary conditions. With the emergence of the pandemic, the risk of diseases has further aggravated which has been highlighted by the Supreme court of India which recommended the formation of the High-Powered Committee (HPC).⁶ An exciting aspect pointed out about the prison population in India is that they represent the most marginalized sections of the society that suffer from significant socio-economic challenges. Along with serious health issues, most of the prisons in India face other challenges in the form of homicide, suicide, drug abuse, and other violent behavioral aspects of incarcerated individuals.⁷ It is, however, the incarcerated parents that remain a subject of significant concern for the Indian criminal justice system, especially in terms of the complex psychosocial challenges it poses for the incarcerated parent and their children. The children of these incarcerated parents can be categorized as the children who live with their

2 Aparna Chandra and Keerthana Medarametla, “*Bail and Incarceration: The State of Undertrial Prisoners in India*”, Shruti Vidyasagr et al., APPROACHES TO JUSTICE IN INDIA, 1st ed. 2017.

3 M.H. Bhutta and M. Siddique, “*Situation of Prisons in India and Pakistan: Shared Legacy, Same Challenges*”, SOUTH ASIAN STUDIES, Vol. 27 No.1, 2012, pp. 171-181.

4 Lior Gideon and Hung-En Sung, RETHINKING CORRECTIONS: REHABILITATION, REENTRY, AND REINTEGRATION, 1st ed., 2011, pp. 399-407.

5 Vineetha Sivakumar and Vijay Raghavan, “*Vocational Training in Indian Prisons*”, ECONOMIC AND POLITICAL WEEKLY, Vol. 53 No. 16, 2018, pp. 36-41.

6 2021 SCC OnLine SC 376.

7 Sunil D. Kumar et al., “*Health Status of the Prisoners in a Central Jail of South India*”, INDIAN JOURNAL OF PSYCHOLOGICAL MEDICINE, Vol. 35 No.4, 2013, pp. 373-377.

mothers and those who are left outside due to their parent's incarceration.⁸ An acutely neglected aspect in this context is the psychosocial health challenges of the children whose either or both parents have been incarcerated, primarily resulting from their increased exposure to the criminal justice system. The most alarming aspect, however, remains the absence of data in India about the quantification of the children left outside as a result of parental incarceration.⁹ Despite the rehabilitative approach of India's criminal justice system, in cases of parents' incarceration, the child's development is significantly impacted. The consequence of incarceration is not only borne by the incarcerated parent but also their children. The impact of parental incarceration can be observed to be different based on paternal and maternal incarceration.¹⁰ In cases of maternal incarceration, these children can further be categorized as those born inside the prison to their incarcerated mothers or those below the age of six years and accompany their mothers to the prison facilities upon their incarceration. While proximity to their mother at a tender age provides them with emotional support to some extent, the Indian prison environment is certainly not conducive to their holistic development.¹¹ To understand this issue, much deeper insight is required for understanding the general status of women prisoners in India and their challenges.

Incarceration of Women in the Indian Criminal Justice System

The aspect of incarceration of women in India has been scarcely addressed, although the social consequences of incarceration of females are much more prominent than that of men. Moreover, in recent times it has been observed that incidences of female criminality and the number of female offenders has significantly increased.¹² The incarceration of women for crimes that are violent in nature, has also been observed to be significantly disproportionate. This is often attributed to the intersectional differences, in terms of inequalities in aspects such as gender, class, and caste. Although the number of women prisoners in various prisons across India remains lower than the number of male prisoners, there is still a need to delve deeper into the challenges faced by female prisoners.¹³ The poor sanitary conditions in Indian prisons contribute to many health issues among women prisoners. The situation worsens in the case of pregnant prisoners, especially in the absence of adequate prenatal and post-natal care, posing a risk to the mother's and

8 G. Sharma, "*Being A Prisoner's Child: Effects of Parents' Imprisonment on The Child*", DEPARTMENT OF SOCIAL WORK, 2013.

9 Neelam Sukhramani and Shivangi Gupta, "*Children of Incarcerated Parents*", INDIAN PEDIATRICS, Vol. 57, 2020, pp. 199-203.

10 Insha Ashraf and Saima Farhad, "*Children's Experiences of Parental Incarceration*", PALGRAVE HANDBOOK OF GLOBAL SOCIAL PROBLEMS, 1st ed. 2022, pp. 1-12.

11 Abhishek Bhardwaj, "*The Grim Reality of Child Support and Child Incarceration in India*", INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES, Vol. 4 No. 3, 2021, p. 4575.

12 Vidyadhar S. Naganahalli, WOMEN PRISONERS: A PSYCHO-SOCIAL DIAGNOSIS, 1st ed., 2014.

13 Suvarna Cherukuri et al., "*Between Life and Death: Women in an Indian State Prison*", FEMINIST CRIMINOLOGY, Vol. 4 No. 3, 2009, pp. 252-274.

infant's health and life.¹⁴ A significant concern observed in the case of women prisoners is the suicide rate which is nine times the rate observed in the general women population. While these incidences of suicide are attributed to the increased stress levels and leads to psychological concerns in female inmates, several suicide prevention programs have been introduced in Indian prisons that are targeted at the inmate in the custodial settings.¹⁵ The National Human Rights Commission also pointed out that the rise in the suicide rate among women prisoners in Indian jails can be attributed to the prison environment, which is a facilitating factor for prison suicides. Another major factor is the crisis that reflects in the psychiatric problems among the inmates that often result from the guilt of the offense, prevailing mental or physical illnesses, or even difficulty in enduring the situation.¹⁶ A concerning aspect of the incarceration of women in the Indian criminal justice system is that when they are incarcerated, they often tend to become submissive. This attitude of women prisoners is attributed to the fear caused by the anticipation of any harm by the prison authorities, which further refrain from reporting such abuse immediately. These incidences of sexual victimization and custodial violence not only impede the rehabilitative objectives of the Indian criminal justice system but also challenge the effective reintegration of women prisoners into mainstream society by traumatizing them. This torture of women prisoners often transcends the custodial barriers and extends to their families, leading to physical and psychological harassment.¹⁷ Another perspective of women prisoners can be drawn from the denial of the choice of consumed food and the ability to cook themselves inside the prison facilities. This denial by the state often results in negative health consequences among the prisoners. Similar consequences are also observed in incarcerated mothers and their children living with them.¹⁸ It has also been observed that the women in Indian prisons significantly lack self-care abilities, negatively impacting their health and transcending their children living with them. These prisoners often resort to physical activities to keep themselves occupied as a coping mechanism.¹⁹ The challenges faced by women prisoners in India are multifaceted and become even more complex for incarcerated mothers and their children. However, specific legal provisions have been enacted for their protection and care.

14 Samra Anwer and A.K. Bhartiya, "Imprisoned Women: A Gender Striving Behind the Prison Gates" THE SOCIAL ION, Vol. 7 No. 1, 2018, pp. 30-37.

15 Guru s. Gowda et al., "Suicide in Indian Prisons", THE LANCET PSYCHIATRY, Vol. 8 No. 8, 2021.

16 N.S. Sawant, "Suicide in Indian Prisoners", ANNALS OF INDIAN PSYCHIATRY, Vol. 2 No. 1, 2018, p. 1.

17 S. Khan, "The Culture of Sexual Victimization and Custodial Violence Inside the Indian Prisons: A Critique", INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES, Vol. 4 No. 6, 2021, p. 1124.

18 Debolina Chatterjee and Suhita Chatterjee, "Food in Captivity: Experiences of Women in Indian Prisons", THE PRISON JOURNAL, Vol. 98 No. 1, 2018, pp. 40-59.

19 Debolina Chatterjee et al., "Exploring Self-Care Abilities Among Women in Prisons of West Bengal, India", INTERNATIONAL JOURNAL OF PRISONER HEALTH, Vol. 16 No. 2, 2019, pp. 185-198.

Legal Aspects of Incarceration of Women and Their Children

When it comes to the provisions governing the legal aspects of women incarcerated in the Indian criminal justice system, several laws and legislations govern the various aspects of incarceration. The pieces of national legislation that enunciate the rules of incarceration are the Indian Penal Code (1860), the Prison Act (1894), the Prisoner's Act (1900), the Identification of Prisoner's Act (1920), the Exchange of Prisoner's Act (1948), the Transfer of Prisoner's Act (1950), the Prisoner (Attendance in Court) Act (1955), the Probation of Offenders Act (1958), the Code of Criminal Procedure (1973), the Repatriation of Prisoner's Act (2003), and the Model Prison Manual (2016).²⁰ In the context of Prison suicides, the Supreme Court of India had highlighted it as a vicarious liability of the state which enunciated it being the protector of the inmates in the Indian prisons. This falls in line with the right to life and personal liberty, which falls under the fundamental right enunciated in Article 21 of the Constitution of India and highlights the responsibility of the state to provide security and protection for female inmates in Indian prisons.²¹ The basic rights of female prisoners in India derive from Articles 21 and 22 of the Indian Constitution. These rights are in coherence with several provisions of ICCPR (1966), which enunciate the right to humanity and dignity of the prisoners and the right to access different treatments based on the different stages of incarceration, along with the right to free legal aid and fair hearing.²² Other articles in the Indian constitution provide for the legal protection of women inmates, namely, Articles 14, 15(3), 19(1), 20, 21, 22, 25(1), 32, 226, 39A, 42, and 43. Along similar lines, the importance of a comprehensive legal service program and the right to free legal aid was highlighted by Justice Bhagwati in *Hussainara Khatoon v. Home Secretary, State Of Bihar* 1979.²³ In *Smt. Nilabati Behera Alias Lalit v. State Of Orissa*²⁴ It was also held that any form of voluntary and grievous hurt caused to extort any form of information from the individual that amounts to custodial violence is strictly prohibited and subject to rigorous imprisonment and fine. This provides for the protection of female inmates from any violence that might occur inside the prison facilities. When it comes to incarcerated mothers and their children, the Supreme Court of India has laid out a judgment that the jail environment is not congenial for the child's overall development, and there is a need to prioritize the child's best interest and provide the living arrangement for the younger children, who are below six years of age, with their mothers inside the prison facilities. This is in coherence with the All-India

20 Kiran R. Naik, "Women in Prisons India", INTERNATIONAL JOURNAL OF RESEARCH AND ANALYTICAL REVIEWS, Vol. 6 No. 2, 2019, pp. 178-236.

21 Neena Sawant, "Suicide in Indian Prisoners", ANNALS OF INDIAN PSYCHIATRY, Vol. 2 No. 1, 2018, p. 1.

22 International Covenant on Civil and Political Rights 1966, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>, (visited on August 18, 2021).

23 *Hussainara Khatoon v. Home Secretary, State of Bihar* AIR 1979 SC 1369; 1979 SCR (3) 532.

24 *Nilabati Behera. v. State of Orissa* AIR 1993 SC 1960; 1993 SCR (2) 581.

Committee on Jail Reforms Report²⁵, which provided for the caregiving facilities of the children and their distinguished treatment from their undertrial or convicted mothers, which included a healthy and hygienic diet and sanitary conditions along with prenatal and post-natal care of the pregnant women giving birth inside the prison facilities and their children. Provisions for creches and nurseries were also highlighted inside the judicial facilities to ensure a healthy developmental environment for the children of incarcerated mothers.²⁶ Several other international instruments enunciate the protection of the children of incarcerated mothers, namely, the African Charter on the Rights and Welfare of the Child (1990), The United Nations Committee on the Rights of the Child (1989), Salvador Declaration of the 12th U.N. Crime Congress (2010), the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children (2010).²⁷ International legislations like the Bangkok Rules on Women Offenders (2010), Kyiv Declaration on Women's Health in Prison (2008), Beijing convention Sep (1995), etc., further enunciate provisions for women prisoners for their and well their children's well-being and protection.²⁸ Further, provisions like the PCMA, RTE act, POCSO act, Criminal law amendment act, and Juvenile Justice Act, along with the 93rd constitutional amendment, provide for the education and training of children in need of care and protection, which includes the children of incarcerated parents.²⁹ However, the most important legislation in this respect remains the Juvenile Justice (Care and Protection of Children) Act, of 2015.³⁰ It provides for the involvement of the district judge, the authority of the Child Protection Committee, and the Child Welfare Committee for the welfare of the children in need of care and protection. Although it does not explicitly mention the children of incarcerated parents, it includes them as children in need of care and protection. It provides for their privacy, confidentiality, non-discrimination, dignity, and safety. The J.J. Act 2015 also provides for Observation Homes, Special Homes, Children's homes, Shelter Homes, Foster Care, Adoption, and sponsorship, along with the provision for Special Juvenile Police for their welfare.³¹ Several legal provisions are available

25 "All India Committee on Jail Reforms (1980-83)", MINISTRY OF HOME AFFAIRS, <https://www.mha.gov.in/MHA1/PrisonReforms/NewPDF/Mulla%20Committee%20implementation%20of%20recommendations%20-Vol%20I.pdf>.

26 G. Sharma, "Being A Prisoner's Child: Effects of Parents' Imprisonment on The Child", DEPARTMENT OF SOCIAL WORK, 2013.

27 Laurel Townhead, "Briefing Paper: Children of Incarcerated Parents International Standards and Guidance" QUAKER UNITED NATIONS OFFICE, 2015.

28 Pearly Paul and Intezar Khan, "Incarcerated Motherhood Under the Purview of Policies, Prison Reforms and Reintegration" INDIAN JOURNAL OF CRIMINOLOGY, Vol. 46-47, 2018-19, p. 106.

29 Asha Bajpai, CHILD RIGHTS IN INDIA: LAW, POLICY, AND PRACTICE, 3rd ed. 2017.

30 Devina Srivastava and Pradeep Kumar Singh, "Legal Protection of Children of Incarcerated Parents: A Modern-Day Necessity" INTERNATIONAL JOURNAL OF LAW AND LEGAL JURISPRUDENCE STUDIES, Vol. 3 No. 3, 2016, pp. 50-86.

31 Randhir Singh Ranta, "Rights of Children of Incarcerated Parents: A Constitutional Perspective", JOURNAL OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH, Vol. 5 No. 3, 2018, pp. 618-626.

domestically and internationally for the protection of incarcerated mothers and their children. However, their effectiveness is determined based on the social outcomes of this neglected category.

Sociological Aspects of Incarceration of Women and Their Children

The Indian criminal justice system significantly lacks a gender-specific perspective of the needs of women prisoners. In the absence of gender-specific healthcare facilities, incarcerated mothers and their children are often subjected to severe health concerns and, simultaneously, implement the rehabilitation of incarcerated mothers, especially pregnant women nursing mothers and the development of their children.³² The impact of paternal and maternal incarceration is significantly different among their children, primarily because mothers are their primary caregivers. Maternal incarceration puts their children in a disadvantaged position which facilitates the development of behavioral problems, and these children are subsequently subjected to social marginalization.³³ In the case of the children living inside the prisons with their incarcerated mothers, despite them being relatively closer to their primary caregivers, it is often observed that they are vulnerable to developmental challenges which are attributed to the inadequacy of basic facilities and the lack of a healthy environment inside the judicial facilities.³⁴ Unlike paternal incarceration, maternal incarceration often affects children's social, emotional, and psychological development. An interesting explanation for this is the elimination of other stress factors like domestic violence or economic deprivation resulting from maternal incarceration.³⁵ From the perspective of the incarcerated mother, it is observed that they face many challenges in their integration into mainstream society, which revolve around familial and societal negligence, difficulty in acquiring job opportunities, social stigma, and psychological conditions.³⁶ The incarcerated mothers often experience high frustration and struggle to maintain their relationship and attachment with their children amidst recurrent separation incidents. This is attributed to protecting their children and having them at the mercy of the system.³⁷ From the academic perspective, maternal incarceration plays a significant

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- 32 Anil S. Kumar and T. Manikanta, "*Problems of Women Prisoners and Their Children*", INDIAN SOCIAL SCIENCE JOURNAL, Vol. 1 No. 2, 2012, p. 44.
- 33 Christopher Wildeman and Kristin Turney, "*Positive, Negative, Or Null? The Effects of Maternal Incarceration on Children's Behavioral Problems*", DEMOGRAPHY, Vol. 51 No. 3, 2014, pp. 1041-1068.
- 34 Jack P. Shonkoff and Andrew S. Garner, Committee on Psychosocial Aspects of Child and Family Health, Committee on Early Childhood, Adoption, and Dependent Care, and Section on Developmental and Behavioral Pediatrics, PEDIATRICS, Vol. 129 No.1, 2011.
- 35 Kristin Turney and Christopher Wildeman, "*Detrimental for Some? Heterogeneous Effects of Maternal Incarceration on Child Wellbeing*", CRIMINOLOGY AND PUBLIC POLICY, Vol. 14 No. 1, 2015, pp. 125-156.
- 36 Anuja Abraham and M. Priyamvada, "*Will Society Let Female Offenders to Lead a Normal Life? A Study on the Perception of Police towards the Challenges in Reintegration of Female Offenders*", THE INDIAN POLICE JOURNAL, Vol. 66 No. 4, 2019, pp. 46-59.
- 37 Cathrine Fowler et al., "*Maternal Incarceration: Impact on Parent-Child Relationships*", JOURNAL OF CHILD HEALTH CARE, Vol. 26 No. 1, 2022, pp. 82-95.

role in lowering teacher expectations in terms of their children's academic outcomes. Further, while maternal incarceration is often detrimental to the academic scores of adolescents, in some cases, there is no significant effect on the test scores of children and instead contributes to lowering the risk of detention for them.³⁸ The impact of maternal incarceration is most observed in the emotional development of their children. However, it requires further exploration in the Indian context.

Research Gap

The subject of incarceration is significantly complex and requires a sensitive approach to understanding it. Several studies have explored the status of incarcerated individuals in the criminal justice system of India. It was observed that despite several legislative provisions, there is still a persisting gap in their implementation as there are continued instances of violence and ill-treatment of prisoners in Indian prisons. There is also a significant gap in exploring the female perspective of prisoner needs and implementing the same in reform policies. There is also a dearth of studies exploring the challenges women prisoners face in smaller prisons face.

Further, when it comes to legislative provisions, there is a significant need to develop exclusive policies to address the challenges faced by female prisons in Indian prisons to protect their rights and entitlements. Moreover, the concept of incarceration of mothers remains significantly unexplored in the Indian context. There is a dearth of studies exploring the implication of maternal incarceration on incarcerated mothers and their children. There is also a significant gap in assessing the effectiveness of implementing the various reformatory measures that have been undertaken to reintegrate incarcerated mothers and their children. Finally, there is a significant gap in the consequences of maternal incarceration on the developmental aspects of children in the Indian context, which need to be explored urgently and comprehensively.

Conclusion

The present paper reviewed several studies that previously explored the various aspects of the incarceration of women in India, with a special focus on maternal incarceration and its impact on their children. It is concluded in this paper that there are several legislative provisions in India, especially constitutional provisions like Articles 14, 15(3), 19(1), etc., and legal provisions like the Indian Penal Code (1860), the Code of Criminal Procedure (1973), the Model Prison Manual (2016), etc. that elaborately enunciate on the rights and entitlements of the women prisoners in India. With the increasing number of female prisoners in Indian prisons, the Supreme Court of India has time and again provided reforms to address the gender-based needs of women prisoners, even though the implementation of the same is still pending. A more complex aspect of the incarceration of women is observed in terms of maternal incarceration and the developmental aspects of the children living with them inside the prisons. Although several legislative provisions are provided for the protection of these children, namely, the PCMA, RTE Act, POCSO Act, Criminal law

38 John Hagan and Holly Foster, "Intergenerational Educational Effects of Mass Imprisonment in America", *SOCIOLOGY OF EDUCATION*, Vol. 85 No. 3, 2012, pp. 259-286.

amendment Act, and Juvenile Justice Act, the infrastructural inadequacies in Indian prisons impede their development and require urgent attention.

Further, it is observed that maternal incarceration does not have any major effect on the developmental outcomes of their children. However, incarceration-related attributes, such as the increased exposure of the children to the non-conducive developmental environment of Indian prisons, often contribute to behavioral problems in their children. Finally, it is concluded that there is an urgent need to address the complex issue of maternal incarceration and its implication on the development of their children in India to facilitate societal sensitization to prevent any incidences of stigmatization or marginalization of the incarcerated women and their children. This ensures the efficiency of the rehabilitative objectives of India's criminal justice system.

GENDER EQUALITY AND PROTECTION AGAINST AI BIAS

Garima Panwar*

Abstract

In this internet era, Artificial Intelligence (AI) has been often considered as one of the major contributors for meeting the social good and the sustainable development goal of gender equality. However, while imitating a human being, AI often unveils its dark side in form of biases through search engines, hiring algorithms and voice assistants. Recently Google's cloud image recognition service, labelled men and women on the basis of their physical appearance. In 2015, one of the Amazon's AI-powered recruitment software was found to be discriminatory against women candidates. An AI system reflects both intentional biases i.e., inherent in the developer of the algorithm and unintentional biases that includes stereotyping, confirming to the existing bias. It is observed that these gender-biases further stigmatizes and marginalizes women on a global scale. The paper aims to discuss the significant threats being posed by an AI to gender equality while juxtaposing its potential to be the major change maker in the society by challenging oppressive gender norms. The Indian Constitution has protected the citizens from any kind of inequality and discrimination faced due to the act/omission of a human, however it is evident that AI often tend to discriminate on the basis of sex. Even though various legislation such as Indian Penal Code 1860, POSH Act 2013, Information Technology Act 2000 etc are enacted with the State's objective to protect these vulnerable classes against violence and biases. However, it fails to capture the gender-based biases and algorithmic discrimination in the context of AI. AI can be complementary to people's lives provided an ethics-based approach that eliminates discrimination and inequality; promotes fairness, accountability and transparency; while ensuring that the most vulnerable sections of society are protected. Therefore, there is a need for creation of a robust mechanism and a framework for gender-inclusive AI principles, guidelines and codes of ethics within the industry. The paper furthers to objective to comparatively analyse the laws in EU to adopt good practices for development of a framework for the 'feminists internet principles' in India. The article will conclude with suggestions on legislative and policy measures towards operationalizing AI and Gender Equality Principles.

Keywords: Artificial Intelligence, AI Bias, Gender equality, Feminists Internet Principles.

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Introduction

Artificial intelligence (AI) has now become a vital part of human ecosystem. Artificial Intelligence has made a contributes towards social good with technologies such as machine learning, natural language processing, deep learning etc.¹ The word Artificial Intelligence is often comprehended as an intelligent system which relies on specified processing, works in real time and acquire knowledge from the experiences.² However, due to its nascent stage, it cannot be limited within the boundaries of legal scope and definition.

In order to enhance governance and effective enforcement of existing laws applicable to AI, European Union has proposed for an Artificial Intelligence Act, 2021.³ As per this legislation, the definition of AI should be as neutral to cover those technologies which are yet to be developed in future.⁴ Indian government recognised the need drafting a framework for regulation of issues relating to AI through its NITI Ayog Report; wherein it emphasised that there is a need for a *#ResponsibleAI*.⁵

When the Pegasus spyware threats were publicly revealed, it was observed in the UN discussions that AI technologies can have catastrophic and negative impact on human rights.⁶ United Nations Human Rights Office of High Commissioner, pursuant to its Council Resolution 2019, published a report that analysed the effect of AI on an individual's fundamental and human rights such as right to privacy, right against discrimination, freedom of movement, freedom of speech and expression etc.⁷

With the diffusion of this technology in every sphere of a human life, AI is often perceived to be both inhibitor and enabler of almost all the Sustainable Development

1 Michael Chu et al., “*Applying Artificial Intelligence for Social Good*”, MCKINSEY GLOBAL INSTITUTE, November 28, 2018, pp. 1-52, <https://www.mckinsey.com/featured-insights/artificial-intelligence/applying-artificial-intelligence-for-social-good>.

2 Kirsh D, “*Foundations of AI: The Big Issues*”, ARTIFICIAL INTELLIGENCE ELSEVIER, Vol. 47 No. (1-3), 1991, pp.3-30.

3 Proposal for a Regulation of The European Parliament and Of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) And Amending Certain Union Legislative Acts 2021.

4 Article 3(1) of the AI Act 2021 defined “‘*artificial intelligence system*’ as a software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with”.

5 “*Discussion Paper on National Strategy for Artificial Intelligence #AIforAll*”, NITI AAYOG, 2018, <https://indiaai.gov.in/research-reports/national-strategy-for-artificial-intelligence>., (visited on July 7, 2021)

6 “*Pegasus: Human Rights-Complaint Laws Needed to Regulate Spyware*”, UN NEWS, July 19, 2021, <https://news.un.org/en/story/2021/07/1096142>, (visited on July 29, 2021).

7 Human Rights Council Resolution 42/15 adopted on September 26, 2019 (A/HRC/RES/42/15).

Goals (SDGs).⁸ As per a study published in ‘The Nature’, AI has the potential to aid in attainment of 79 % of the SDGs⁹

On one side, the developers have showcased the positive usage and impact of AI on social good; whereas on the other, AI can be seen as challenging the human rights.¹⁰ However, while imitating a human being, it often unveils its dark side in form of biases through search engines, hiring algorithms and voice assistants. Therefore, there is a need for balancing the technological developments and human rights protection.¹¹

The Part I of this firstly understand the protection of Human Rights of women and the concept of gender equality. It further examines the international framework for protection of women rights and the threats posed by the technological advancement in digital domain to such vulnerable group. Further, Part II discusses about the gender justice and AI bias. It highlights upon various instances of AI bias and its impact on amplifying the existing gender-based discrimination in the society. In Part III, the author will be analysing the action plan for ensuring Gender Equality. These plans would broadly include adoption of HRIA Guidelines by the companies, formulating AI ethical guidelines, and developing framework of feminist internet principles. Lastly, on the basis of the recommendations given in the previous part., the author will be providing for conclusion of the paper for protecting against AI’s gender- based bias.

Protection of Human Rights and Gender Equality

“One is not born women but rather become one”

-Simone de Beauvoir¹²

Male and Female are considered as two gender binaries of the societies, who are vested with certain subjective roles, responsibilities and privileges.¹³ This categorization is mainly a performative category of gender normative based on the

8 Shivam Gupta et al., “Assessing Whether Artificial Intelligence Is an Enabler or An Inhibitor of Sustainability at Indicator Level” TRANSPORTATION ENGINEERING ELSEVIER, Vol. 4, 2021, pp, 1-7.

9 “The Alliance Between Artificial Intelligence and Sustainable Development”, SUSTAINABILITY FOR ALL, ACCIONA, https://www.activesustainability.com/sustainable-development/the-alliance-between-artificial-intelligence-and-sustainable-development/?_adin=02021864894, (visited on August 11, 2021).

10 Risse, Mathias “Human Rights and Artificial Intelligence: An Urgently Needed Agenda”, HKS FACULTY RESEARCH WORKING PAPER SERIES, RWP18-015, 2018, p.1.

11 “Artificial Intelligence and Human Rights”, COMMISSIONER OF HUMAN RIGHTS, COUNCIL OF EUROPE, <https://www.coe.int/en/web/commissioner/thematic-work/artificial-intelligence>, (visited on August 11, 2021).

12 Simone de Beauvoir, THE SECOND SEX. IN CLASSIC AND CONTEMPORARY READINGS IN SOCIOLOGY, 3rd ed. 2015, pp. 118-123.

13 Vanessa E. Munro, THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY, 2nd ed. 2016, pp.

limited social expressions of prevailing concepts.¹⁴ While men are perceived to be the bread earner on the other hand women are mostly related to the household chores. Women are often presumed to be vulnerable and an inferior gender requiring ‘special protections’ from superior gender.¹⁵ In early International Laws, women were rather considered as an object for legal protection than a subject entitled to the legal rights.¹⁶

While drafting of Universal Declaration of Human Rights (UDHR), The Chairperson Ms. Eleanor Roosevelt along with others anchored for emancipation of women in political and economic arena contributed towards the inclusion of women’s rights. As a result of this UDHR, bestowed all men and women equal rights for promotion of social progress and better standards of life.¹⁷ Every person is entitled to all rights and freedoms set forth in UDHR without distinction on the basis of sex.¹⁸ There shall also be no arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.¹⁹ The year 1976 – 1985 was even declared as the UN Decade for Women.²⁰

Post UDHR, two other international frameworks i.e., Convention on the Elimination of All Forms of Discrimination against Women, 1981 (CEDAW),²¹ and the Beijing Declaration and Platform for Action, 1995²², highlighted the role of gender equality as a basic human right.²³

While women have been granted economic, social, cultural and political rights under various International Covenants, CEDAW re-emphasised on the need to end ‘sex’ based discrimination negatively impacting the enforcement of equality of rights. It also imposed an obligation upon both macro and micro level i.e., State and

14 Judith Butler, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY, 3rd ed. 1990, pp.

15 *Supra* n. 13.

16 *For example*, as per ILO MPC Convention, 3 1919, it was recommended that certain employments are dangerous to women and are disruptive of their domestic responsibilities.

17 Preamble of Universal Declaration of Human Rights 1948.

18 Article 2 of Universal Declaration of Human Rights 1948.

19 Article 12 of Universal Declaration of Human Rights 1948.

20 “*World Conference of the United Nations Decade for Women*”, WOMEN AND GENDER EQUALITY, 1980, Copenhagen, Denmark, <https://www.un.org/en/conferences/women/copenhagen1980>, (visited on August 28, 2021).

21 Resolution 34/180, Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly 18 December 18, 1979.

22 Beijing Declaration and Platform for Action 1995.

23 “*United Nations Entity for Gender Equality and The Empowerment of Women*”, FOURTH WORLD CONFERENCE ON WOMEN, PLATFORM FOR ACTION AND THE BEIJING DECLARATION, <https://www.un.org/womenwatch/daw/beijing/platform/>, (visited on September 1, 2021).

any institution respectively to ensure equal standards and equality of opportunity and treatment to women.²⁴

The Beijing Declaration, in reference to the rights of women, witnessed a shift from using the term from ‘sex’ to ‘gender’. The justification for such a change was to change the restrictive approach of classifying between men and women on the basis of their biological based differences between men and women. It re-emphasised upon the UDHR’s principle that the human rights to women are inalienable and indivisible. In order to achieve sustainable development, it is necessary to realise that both men and women share power and responsibility, and their achievements and activities should not be bound by the biological differences. The socially construed gender roles deny women of the decision-making power resulting into lack of access to education, employment, and self-sufficiency.²⁵ India has acceded to both the international covenants.

In 2010, UN created UN Women to further the goal of gender equality and women empowerment. Their strategic priorities include women’s equal participation in governance systems and to be a harbinger for building sustainable humanitarian action for protection of human rights of women.²⁶

Therefore, all the international conventions and declarations provided for the responsibility of every sovereign nation to formulate such laws and policies to promote advancement of women at all levels. The countries should ensure sufficient allocation of resources to enable women to acquire knowledge and skills for creating a productive social and educational ecosystem.²⁷

In the age where data is the new oil, it becomes a responsibility of the State actors to actively participate in the protection of its citizen especially the vulnerable groups against the probable threats posed due to misuse of data. There is a lack of adherence to UDHR and also gap in the existing international framework for mitigating the gender divide on the digital domain through AI.

Gender Justice and AI Bias

Cyberspace can be both emancipatory and dominating platform for women. With the advent of fourth industrial revolution, there is a paradigm shift from analogue to digital technologies varying from Internet of Things (IoT) to Artificial Intelligence, Cloud Computing etc. AI can both reduce and scale up existing bias. These biases often travel from the human coders to the machine while designing an AI system.²⁸ The concept of bias is inherently linked to the concept of fairness.²⁹

24 Article 4 of Convention on the Elimination of All Forms of Discrimination Against Women.

25 Mission Statement of Beijing Declaration and Platform for Action 1995.

26 UN Women Strategic Plan 2022-2025.

27 Strategic Objectives and Action, Chapter IV, Mission Statement, Beijing Declaration and Platform for Action 1995.

28 Benjamin L. W. Sobel, “*Artificial Intelligence’s Fair Use Crisis*”, THE COLUMBIA JOURNAL OF LAW AND ARTS, Vol. 41 No.1, 2017, pp. 1-53.

29 Notes from the AI frontier: Tackling bias in AI (and in humans), McKinsey Global Institute, 2019.

While imitating a human being, AI often unveils its dark side in form of biases through search engines, hiring algorithms and voice assistants.

AI can help enhance the lives of people and in theory also reduce bias, on the contrary it can also perpetuate and scale up the bias.³⁰ Biases also penetrate during designing of AI systems and often take decisions on behalf of both private and public bodies.³¹ It may also involve a systematic discrimination targeting certain individuals or groups on the basis of gender, race, language, religion, physical characteristics etc.³²

Recently Google's cloud image recognition service, labelled men and women on the basis of their physical appearance. While the tags applied to men were of 'official' and 'business-person' on the other hand women were recognised with tags such as 'smile' and 'blonde'.³³ In 2015, one of the Amazon's AI-powered recruitment software was found to be discriminatory against women candidates.³⁴

An AI system reflects both intentional biases i.e., inherent in the developer of the algorithm and unintentional biases that includes stereotyping, confirming to the existing bias.³⁵ These gender-biases further stigmatizes and marginalizes women on a global scale. AI perpetuates the existing gender stereotypes which are generally considered the forte of a particular gender. Another example can be the Google Image Search result of 'Army Personnel' would reveal photographs of men fighting. A counter example would be a Google Image Search of 'Nurse' where the majority representation would be of women.³⁶

As a consequences of continuous biases women are often deprived opportunities such as higher education, employment, access to benefits, etc. It also socially stigmatizes women and creates a prejudiced impression about them. AI also tends to unconsciously increase the biases and stereotypes, leading to negative influence to

30 *Supra* n. 28.

31 "Trustworthy AI", IBM, <https://www.research.ibm.com/5-in-5/ai-and-bias/>, visited on (September 4, 2021).

32 Batya Friedman and Helen Nissenbaum, "Bias in Computer Systems", ACM TRANSACTIONS ON INFORMATION SYSTEMS, Vol. 14 No. 3, 1996, pp. 330-347.

33 Morgan Klaus Scheuerman et al., "How Computers See Gender: An Evaluation of Gender Classification in Commercial Facial Analysis Services", ASSOCIATION FOR COMPUTING MACHINERY, Vol. 3 No. CSCW, 2019, pp.1-33.

34 Julien Lauret, "Amazon's Sexist AI Recruiting Tool: How Did It Go so Wrong?", BECOMING HUMAN: ARTIFICIAL INTELLIGENCE MAGAZINE, August 16, 2019, <https://becominghuman.ai/amazons-sexist-ai-recruiting-tool-how-did-it-go-so-wrong-e3d14816d98e>, (visited on August 19, 2021).

35 Betsy Anne Williams et al., "How Algorithms Discriminate Based on Data They Lack: Challenges, Solutions, And Policy Implications", JOURNAL OF INFORMATION POLICY, Vol. 8 No. 1, 2018, pp.78-115.

36 Garima Panwar and Raj Verma, "Ethical, Legal and Regulatory Framework for the Use of Artificial Intelligence in Autonomous Vehicles", TEST ENGINEERING & MANAGEMENT, Vol. 8, 2019, pp 1280- 1291, <http://www.testmagazine.biz/index.php/testmagazine/article/view/181>, (visited on October 11, 2021).

the unguided population leading to social defragmentation.³⁷ It has been observed in many studies that most of the labour force employed in creating technologies are male leading to a gender biased technology stereotype.³⁸ The gendered norms have also impacted the participation of women in STEM fields.³⁹ The digital skills gap can further lead to the encoding of gender biases in technology.⁴⁰

Additionally, the existing power structure entailing the masculinity often restricts women any opportunities in the digital domain.⁴¹ For instance, In Saudi Arabia it is believed that woman need male guardian.⁴² These guardians often use the Absher, an e-service mobile application, for tracking women's movement and saving a record of their travel.⁴³ Such an app is directly in contravention to UN Guiding Principles,⁴⁴ which instils a duty upon the businesses to undertake due diligence in order to assess the actual and potential adverse impact on human rights due to their business activities. The business should aim to prevent or mitigate adverse human rights impacts that are directly linked to their operations.⁴⁵

The Constitution of India has protected the citizens from any kind of inequality⁴⁶ and discrimination⁴⁷ faced due to the act/omission of a human, however it is evident that AI often tend to discriminate on the basis of sex. Even though various legislation such as Indian Penal Code 1860, Sexual Harassment of Women at Work Place (Prevention, Prohibition and Redressal) Act, 2013,⁴⁸ Information Technology Act 2000 etc. are enacted with the State's objective to protect these vulnerable classes

37 "How to Stop AI From Reinforcing Biases", ACCENTURE, August 02, 2019, <https://www.accenture.com/us-en/insights/artificial-intelligence/stop-ai-reinforcing-biases>, (visited on October 11, 2021).

38 Wendy Faulkner, "The Technology Question in Feminism: A View from Feminist Technology Studies", WOMEN'S STUDIES INTERNATIONAL FORUM, Vol. 24 No. 1, 2001, pp.79-95.

39 Alison T Wynn and Shelley J Correll, "Puncturing the Pipeline: Do Technology Companies Alienate Women in Recruiting Sessions?", SOCIAL STUDIES OF SCIENCE, SAGE JOURNALS, Vol. 48 No. 1, 2018, pp.149-164.

40 Judy Wajcman et al., "The Digital Revolution: Implications for Gender Equality and Women's Rights 25 Years After BEIJING", UN WOMEN, 2020, pp. 1-38.

41 "OECD Regulatory Policy Outlook 2018", October 10, 2018, <https://doi.org/10.1787/9789264303072-en>, (visited on September 2, 2021).

42 Danielle Robertson and Mena Ayazi, "How Women Are Using Technology to Advance Gender Equality and Peace", UNITED STATES INSTITUTE OF PEACE, <https://www.usip.org/publications/2019/07/how-women-are-using-technology-advance-gender-equality-and-peace>, (visited on October 23, 2021).

43 "Saudi Arabia's Absher App: Controlling Women's Travel While Offering Government Services", HUMAN WATCH DOG, May 6, 2019, <https://www.hrw.org/news/2019/05/06/saudi-arabias-absher-app-controlling-womens-travel-while-offering-government>, (visited on October 23, 2021).

44 Guiding Principles on Business and Human Rights, United Nations 2011.

45 *Ibid*, Guideline Number 13(b).

46 Article 14 of Constitution of India.

47 Article 15 of Constitution of India.

48 This legislation was enacted in order to comply with the CEDAW Guidelines, 1979 and also in furtherance to the guidelines laid down by Hon'ble Supreme court of India in *Vishaka v. State of Rajasthan* (1997) 6 SCC 241).

against violence and biases. However, it fails to capture the gender-based biases and algorithmic discrimination in the context of AI.

Thus, it can be summarised that the AI field is as “bias in, bias out”⁴⁹ and can even widen the gender divide. The existing legal systems are unable to protect the harms caused by AI in general and digital technologies in particular. Even though the technologies cannot be presumed to be autonomous and gender neutral. However, technologies should be used as a tool to re-configure the women’s individuality, necessities and preferences.

Action Plan for Gender Equality *vis-à-vis* AI Ethics

Gender equality is a stand-alone principle and AI should increase the visibility and contributes towards women empowerment.⁵⁰ Technology is neither inherently patriarchal nor unambiguously liberating.⁵¹ The gender based digital exclusion leads to digital skills gap and eventually resulting into the encoding of gender biases in technology.⁵² To further the international objective to protect human rights of women, the countries should adopt such measures to ensure equal and increased participation of women in every sector. The combined objective of both private and public entity should be to develop equal skills amongst women for promoting gender balance and for reducing the digital gender gap.

The gender inequalities emanate from numerous social, economic, political and cultural barriers.⁵³ In order to leverage the digital technology for advancement of gender equality, following multi-party actions can be undertaken:

1. *Adoption of Human Rights Impact Assessment (HRIA) guidelines:*

The HRIA guidelines, is an integral part of UN Guiding Principles on Business and Human Rights (UNGPR), 2011.⁵⁴ In context of businesses, is a five staged process to identify, understand, assess and address the adverse impact of business activities on human rights.⁵⁵ In addition to this the developers and the employer/companies should ensure the compliance of the these guidelines and adoption of this assessment to mitigate and communicate how their development

49 Jessi Hempel, “*Fei-Fei Li’s Quest to Make AI Better for Humanity*”, WIRED, November 13, 2018, <https://www.wired.com/story/fei-fei-li-artificial-intelligence-humanity/>, (visited on November 15, 2021).

50 “*Artificial intelligence and Gender Equality: Key Findings of UNESCO’s Global Dialogue*”, UNESCO, GEN/2020/AI/2 REV, UNESCO DIGITAL LIBRARY, 2020.

51 Judy Wajcman, “*Feminist Theories of Technology*”, CAMBRIDGE JOURNAL OF ECONOMICS Vol. 34 No. 1, 2010, pp. 143-152.

52 Judy Wajcman et al., “*The Digital Revolution: Implications for Gender Equality and Women’s Rights 25 Years After BEIJING*”, UN WOMEN, Vol. No. 36, 2020, pp. 1-38.

53 Seema Jayachandran, “*The Roots of Gender Inequality in Developing Countries*”, ANNUAL REVIEW OF ECONOMICS, Vol. 7 No. 1, 2015, pp. 63-88.

54 Nora Götzmann et al., “*Human Rights Impact Assessment Guidance And Toolbox*”, THE DANISH INSTITUTE FOR HUMAN RIGHTS, 2016, (visited on October 25, 2021).

55 “*Introduction To Human Rights Impact Assessment*”, THE DANISH INSTITUTE FOR HUMAN RIGHTS, <https://www.humanrights.dk/tools/human-rights-impact-assessment-guidance-toolbox/introduction-human-rights-impact-assessment>, (visited on October 25, 2021).

of an AI is impacting the Human rights. In order to adopt the Guildines of UNGP, The Ministry of Corporate Affairs, India formulated a Zero Draft of India's National Action Plan, 2018⁵⁶ which also contained an objective to further gender equality in a company. The government should implement this action plan and make it mandatory for all the companies to execute the HRIA Guildines.

2. *Creating of FAT Framework (Fairness, Accountability and Transparency) and AI Ethics*

The data-driven decision-making results in re-enforcement of the biases of an individual. Time and again many countries have emphasised on framing of ethical guidelines for Artificial Intelligence. Even the Union Network International (UNI) Global Union under it's Principle 3 has included that AI system should be made to serve People and planet by remaining compatible to the principles of human dignity and gender diversity.⁵⁷ Make AI Serve People and Planet:

These guidelines broadly include three major factors namely, Fairness, Accountability and Transparency for building a human-centric trustworthy AI. It is required to identify the in-built biases and assess their impact.⁵⁸ In addition to this the Montreal Declaration for a responsible AI, 2017 emphasised on the developing of an ethical framework for development and deployment of an AI without any hierarchy or differences between any group of persons.⁵⁹

The first principle of Fairness inculcates that an AI should respect the diversity without any discrimination. It should rather be instrumental in increasing the societal fairness in terms of equal access by balancing the competing interests and objectives.⁶⁰ There can be development of tools similar to IBM's open-source toolkit, 'AI Fairness 360' which detects biases with an objective to examine, report and mitigate discrimination and bias.⁶¹ In addition to this there can be 'gender scripts' which can be embedded in apps of educational nature.

The Second principle of accountability debates around the liability in case of infringement of rights due to negligence of an AI system. The biggest hurdle in this regard is the black box problem which makes it difficult to trace whether the act of an AI was a result of an embedded data or it was unexpected. This principle will ensure auditability and also minimisation of the negative impact of an AI

56 "National Action Plan on Business and Human Rights Zero Draft", MINISTRY OF CORPORATE AFFAIRS, December 10, 2018, https://www.mca.gov.in/Ministry/pdf/ZeroDraft_11032020.pdf, (visited on November 15, 2021).

57 "Top 10 Principles for Ethical Artificial Intelligence", THE FUTURE WORLD OF WORK, UN GLOBAL UNION, 2017, pp. 1-10.

58 *Supra* n. 5.

59 Montreal Declaration for a responsible Artificial Declaration 2017.

60 "Ethics Guidelines for Trustworthy AI", HIGH-LEVEL EXPERT GROUP ON ARTIFICIAL INTELLIGENCE: EUROPEAN COMMISSION, 2019, p.6.

61 Kush R. Varshney, "AI, Introducing AI Fairness 360", IBM, September 19, 2018, <https://www.ibm.com/blogs/research/2018/09/ai-fairness-360/>, (visited on October 26, 2021).

system. It will also provide adequate redressal against the unjust adverse act against the vulnerable persons/groups.

Lastly, the third principle of Transparency demands an onus upon the developers of an AI to develop a rule-based AI systems in order to trace down how the input data was gathered and selected, and how it occurred. The feminists' approaches challenge the neo-liberal order and the lack of transparency in AI systems.⁶² Therefore, a transparent AI principle would also involve an explainability of a particular outcome at any stage of training and development of an AI. Another key aspect of this principle is communication to the third party, users and general public about the characteristics, limitations and shortcomings of the AI system.⁶³

In addition to the broad principles states above, an AI system should be developed in such a manner that it considers life and dignity of a human being especially women. It should also be helpful in preventing and protecting against any harm caused to them especially in the digital domain.

3. *Policy framework at National, State and Zonal level to eradicate the digital divide*

The need of the hour is to inculcate amongst women digital literacy. The government at all levels, i.e., national, state and zonal, should aim to tackle the gender data gap which is primarily due to the divide between men and women. The government should formulate such guidelines which would protect the data privacy of women. In lines with European Union's GDPR,⁶⁴ India introduced Personal Data Protection Bill, 2019. However, the same was withdrawn in August, 2022 which leaves the Right to Privacy to be protected as a fundamental right.⁶⁵

The central Government through its initiative of 'Beti Bachao Beti Padhao' campaign⁶⁶ aimed to educate citizens about the existing gender bias. The government should research, reinvest, reassess and redesign the scheme to eradicate the gender divide. This scheme should also encourage for education and participation of women in STEM fields. It should also increase the digital literacy and access to resources for use and applicability of AI.

4. *Development of a Uniform Human Resource Policies*

There should be a development of uniform Human Resource policies for both the men and women for allowing equal access. This will ensure women's equal

62 "Artificial Intelligence and Gender Equality: Key Findings of UNESCO's Global Dialogue", UNESCO, GEN/2020/AI/2 REV, UNESCO DIGITAL LIBRARY, 2020.

63 *Supra* n. 60.

64 "EU General Data Protection Regulation (GDPR)", OFFICIAL JOURNAL OF THE EUROPEAN UNION, 2016, Regulation (EU) 2016/679.

65 *K.S. Puttaswamy. v. Union of India (2017) 10 SCC 1.*

66 "Beti Bachao Beti Padhao", INDIAN BRAND EQUITY FOUNDATION, DEPARTMENT OF COMMERCE, Ministry of Commerce and Industry, Government of India, <https://www.ibef.org/government-schemes/beti-bachao-beti-padhao>, (visited on November 26, 2021).

participation and development of a gender-inclusive labour market policies.⁶⁷ The gender equality and empowerment of women involves the usage of ‘enabling technologies, in particular ICTs’.⁶⁸ Thus, there is a need to identify the gender disparities in use and access of the ICT. This will involve synergies and links between socio-economic and technological barriers which accounts for a digital gap. The adoption of good practices to address the digital gender gap would ensure women empowerment.⁶⁹

5. *Adoption of Feminist Internet Principles*

The Association for Progressive Communications (APC) in their objective to create a just and sustainable world created ‘feminist internet principles’. This dismantles patriarchy and integrates gender with five clusters i.e., access, movements, economy, expression and embodiment.⁷⁰

These principles highlight that the internet governance should diffuse the male centric- ownership of the power. There should be free and open-source software tools for promoting and sharing knowledge about the same. The internet principles should be such that it addresses issue of online harassment and technology related gender-based violence. It also claims that internet should be used to amplify women’s narrative and promoting women’s human rights defenders.⁷¹

Therefore, there should be development of a coherent policy framework for promoting women on technology development landscape. Such participation could be only possible by exploring the intersection between law, technology and gender justice.

Conclusion

Therefore, from the above discussions, it can be concluded that technology is always gender neutral. The gender-based stereotypes of human beings which are existing the real penetrates through its coders into an AI system. It was observed through instances such as Google’s cloud image recognition service or Amazon’s AI powered recruitment that an AI adapts and amplifies the existing biasness towards women as an inferior gender. Many studies have also proven that women remain largely under-represented in the STEM field therefore there should be an adequate gender representation of developers of AI, for mitigating the data bias.

There is a need for a greater awareness relating AI’s gender-based bias in order to enhance stakeholder participation in AI governance. The stakeholders relating to

67 *Supra* n. 52.

68 Goal 5 of the UN Sustainable Development Goals 2015.

69 Konstantina Davaki, “*The Underlying Causes of The Digital Gender Gap and Possible Solutions for Enhanced Digital Inclusion of Women and Girls*”, FEMM: WOMEN’S RIGHTS AND GENDER EQUALITY, POLICY DEPARTMENT FOR CITIZEN RIGHTS AND CONSTITUTIONAL AFFAIRS, 2018, pp 1-55.

70 “*Feminist Principles of the Internet*”, <https://feministinternet.org/en/page/about>, (visited on December 11, 2021).

71 “*Feminist Principles of the Internet*”, FEMINIST INTERNET, BROCHURE, August 26, 2016, https://feministinternet.org/sites/default/files/FPI_brochure.pdf, (visited on December 11, 2021).

development of an AI would include: at the micro level the coders, the employer companies, the users and the investors; and at the Macro level law makers at the national and international domain. The state and non- state actors should come together and develop a human right based and gender responsive AI ethical frameworks incorporative of the feminist internet principles.

The need of the hour is to overcome these biases, by executing the action plan discussed in the paper for benefiting bringing gender justice and equality. These action plans can be further studied and viability reports can be undertaken to devolve additional measures to ensure positive implications of AI.

GENDERED DIGITAL VIOLENCE: A MISOGYNISTIC ATTACK ON DIGITAL RIGHTS OF WOMEN

Sakshee Sharma* and Mrinmoi Chatterjee[▲]

Abstract

As the civilisation advanced into the twenty-first century, internet has increasingly acquired a ubiquitous character. With the internet pervading almost all aspects of a human life, the internet has now become one important element required for our 'meaningful existence'. However, despite the United Nations declaring 'equal digital rights' interwoven in the modern human rights framework, it is seen that not every-one has the equal right to access and use the internet. Minorities in general and gender minorities in particular have witnessed the greatest burden of the 'digital divide'. This gendered digital gap, which leaves women marginalised, even in the virtual space is not just a technological problem, but, as will be proved by the researcher, has its roots in the deep-rooted misogyny found in almost all cultures. Misogynistic attitudes have fast diffused from offline to online spaces, and over the years have stemmed gendered cyber-violence. Digital violence against women, unfailingly appears in reports of every major institution, as a prime reason for the existence of digital gap. The present article is an endeavour of the researchers to discuss various facets of gendered digital violence as a manifest tendency of misogynistic societies. Using cyber-violence, to exclude women from fully exercising their digital rights, to promote their opinions and interest, greatly mirrors the approach adopted in the physical space to marginalise women by misogynistic societies. Therefore, the researchers, through the analysis of a small study conducted by them, would like to establish a direct causal link between cyber-violence and gendered digital divide, and would like to deliberate on the possible solutions to dilute such toxic practice. The article would also briefly touch upon the socio-legal aspects of cyber-victimisation of women and the subsequent belittling of the phenomenon by the 'innocent by-standers'.

Keywords: Gender, Digital-divide, Cyber-violence, Misogyny, Victimisation.

Introduction

What's bred in the bones will come out in the flesh, now can be read as "whats bred in the bone will come out in physical and virtual flesh"¹

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1 SHAHEEN SHERIFF, CYBER BULLYING: ISSUES AND SOLUTIONS FOR THE SCHOOL, CLASSROOM AND THE HOME, 1st ed. 2008, p. 92.

There is no denying, that with the advent of the era of internet, the world has undergone a complete transformation. The Information and Communication Technology sector, businesses and services, entertainment industry, education and health industry, and any other sector imaginable, has accepted this welcome change with open arms. This transgression from the physical world to the cyberworld has given way to a faster, easier and compact approach towards various aspects of a person's life. When looked at from the gender perspective, it is interesting to note the online experiences of girls from India and Japan. According to McMillin and Gregson, cyberspace and in particular, social networking sites have provided an opportunity to these women to develop their own independent identities that are quite different from the traditional domestic roles expected from them in their societies. These identities, developed on the cyberspace, are significantly more confident, as they are less likely to come in conflict with the stereotypical views of their family and society members. In the current times, it is not possible to overlook the liberating role of social networking sites, which are being used by girls and women in India.²

However, not everything is good and noble about this revolution. The society, it seems, has failed to realize, the full potential of the internet, in creating a virtual egalitarian space. The dark side of internet is the facilitation of traditional crimes and exponential increase in the number of new crimes committed entirely on the cyberspace. In particular, life of women of all ages and milieu, has become insecure because of the rising incidents of cyber-crimes, especially the ones targeting a women because of their gender.³ Such gender based violence against women has exponentially intensified through new forms of social shaming, which disregards all boundaries, physical as well as of human decency.⁴ Empirical data associated with United Nation 2015 report, clearly exhibits that 73% of women and girls have been a victim of some form of digital violence. The report also indicates towards a systematic gender based violent pattern, where women are 27 times more likely to be victims of online abuse as compared to men and 61% of online abusers are male.⁵ In the same report, the UN has raised concerns regarding building up of a cyber environment that is conducive of a global pandemic of digital violence, causing irreversible damage for women, and in turn negatively impacting our societies in general.⁶

The various forms of online abuses, may it be cyber-bullying or cyber sexual harassment including rape threats, doctored photographs, doxxing, or cyber stalking or any other form of online violence, are found to disproportionately affect "traditionally subordinated groups" which majorly include women, children and

2 *Ibid*, p. 98.

3 Debarati Halder and Jaishanker Karuppanan, *CYBER CRIME AND THE VICTIMISATION OF WOMEN: LAWS, RIGHTS AND REGULATIONS*, 1st ed. 2012.

4 Srijan Sandip Mandal, "*Digital Misogyny as Hate Speech: Exploring Legal Implication*", NATIONAL DIALOGUE ON GENDER-BASED CYBER VIOLENCE, 2018.

5 "*How Can We Empower Women Through Digital Literacy Training and Skills Building?*", WORKING GROUP ON BROADBAND AND GENDER, BROADBAND COMMISSION FOR SUSTAINABLE DEVELOPMENT, 2015.

6 *Ibid*.

minorities.⁷ Even though the exact extent of harassment of women online is difficult to estimate as women tend to underreport such instances due to shame and embarrassment⁸. One study suggests that approximately 40% of the female internet users have experienced cyber harassment.⁹ A survey conducted by Norton, a cybersecurity solutions firm reveals that 8 out of 10 women in India have been subjected to some form of online harassment, whereas almost 41% of the women have faced sexual harassment on the web.¹⁰

The online harassment that women face in this 21st century is an extension of the pattern of continuous overlooking, and trivialization of behaviors that are harmful to women's physical and mental health. Not only does this sinister online behavior directed especially towards women, inflict physical and mental harm but also contribute in entrenching male hierarchy online.¹¹ The phenomenon of ignoring and underestimating the harassment of women, whether physical, sexual or mental, find roots in the misogynist character of many societies world-wide. In India, for the longest time, sexual harassment of women in the workplace was nothing more than a price that women were expected to pay for joining the workforce and trying to compete with men. The refusal by the society for the longest time, to accept sexual harassment at work place as a harmful and degrading practice conveyed and strengthened the misogynist tradition of accepting and tolerating the abusive behaviour towards women. It was not until 1997 in the *Vishakha v. State of Rajasthan*¹², that the Supreme Court took the issue seriously and observed that the Government needs to come up with a legislation in order to make workplaces safer for working women. The fact that after *Vishakha*¹³, it took 16 years for The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act to see the light of the day, itself tells us the tale of extreme obliviousness of the Government towards the issue. Not just the Indian society but societies worldwide have witnessed this trivialization in various forms. In the USA, no term even existed to describe sexual harassment of women in the workplace until the 1970s¹⁴. This attitude of refusing to accept and acknowledge the harms that specifically affect the

7 Danielle Keats Citron, "Cyber Civil Rights", BOSTON UNIVERSITY LAW REVIEW, Vol. 89 No. 61, 2009, p. 67.

8 Louise Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, JOURNAL OF SOCIAL SCIENCES, Vol. 51 No. 1, 1995, pp. 119-121.

9 Azy Barak, *Sexual Harassment on the Internet*, SOCIAL SCIENCE COMPUTER REVIEW, Vol. 23 No. 1, 2005, p. 81.

10 Yuthika Bhargav, "8 Out of 10 Indians Have Faced Online Harassment", THE HINDU, October 5, 2017, <https://www.thehindu.com/news/national/8-out-of-10-indians-have-faced-online-harassment/article19798215.ece>, (visited on October 1, 2022).

11 Danielle Keates Citron, "Law's Expressive Value in Combating Cyber Gender Harassment", MICHIGAN LAW REVIEW, Vol. 108 No. 3, 2009, p. 375.

12 *Vishakha v. State of Rajasthan* (1997) 6 SCC 241.

13 *Ibid.*

14 *Supra* n. 11, p. 376.

women has a much deeper meaning and that is, abusive behavior towards women is acceptable and should be tolerated.¹⁵

A similar pattern of discounting the gravity and enormity of the cyber harassment is being noticed in many societies in the east as well as the west. Much like sexual harassment was tolerated by projecting it as an expected ramification of women stepping into the male dominated professional world, many commentators believe that the women who benefit from the internet have assumed the risks of its *Wild West* norms.¹⁶ Philosopher Kate Manne in her exceptional book, titled ‘Down Girl: The Logic of Misogyny’ contributes to this discourse by explaining, that the manifestation in reaction towards a woman, of any form of latent or dormant forms of misogyny, is to punish the woman who fails to live up to patriarchal standards by attempting to ‘encroach’ upon male entitlement.

Here, it is pertinent to mention that the misogynistic online discourse against women does not end with the hushing of the voices of the victims, but it is just an initial point in the entire continuum of hateful and intolerant behavior towards females on cyber space. At one of the far extremes of this continuum lies many conservative and right-wing user communities spewing hateful discourses of misogyny. One such community is *Ilhe* which is well known as a ‘base camp’ for offensive words and posts using terms as *samilhan*, Korean for “women must be beaten every three days.”¹⁷

Citron cites, that most of the incidents of cyber harassment are dismissed as harmless locker-room talk and juvenile pranks. However, one cannot refute the severe consequences of such ‘juvenile pranks’, when cases like ‘bois locker room’ Instagram case come into light.¹⁸ The case involved exchange of chats objectifying minor girls, sharing of lewd photographs and planning illegal acts such as rape of minor girls, by the members of an Instagram group. What is even more concerning is the fact that after the police started the investigation and the original group was shut down, another Instagram group popped up by the name “boislockerroom 2.0”, and the profile read “Let’s start this again. But this time join the group with fake accounts so that no one can expose you.”¹⁹ This exposes the extent of incorrigibility of the miscreants who are not only condoning such acts of cyber-violence against women, but are also actively crawling in the cyberspace with new and innovative ways of remaining undetected in future. Pavan Duggal, an expert in cybercrime states, “The Locker Room case is just the tip of the iceberg. There are thousands of

15 *Ibid.*

16 *Supra* n. 11, p. 375.

17 Jacqueline Ryan Vickery and Tracy Everbach (eds.), *MEDIATING MISOGYNY: GENDER, TECHNOLOGY AND HARASSMENT*, 1st ed. 2018.

18 Kriti Bhalla, “Instagram ‘Bois Locker Room’ Case Tests India’s Chat Privacy, Social Media Safe Harbour Laws”, *INC42*, May 9, 2020, <https://inc42.com/buzz/instagram-bois-locker-room-case-tests-indias-chat-privacy-social-media-safe-harbour-laws/>, (visited on October 2, 2022).

19 *Ibid.*

chat rooms openly discussing sex in India. But the saddest part is no one will ever get down to the bottom of such scandals”.²⁰

Gendered Digital Violence: A Tentacle of Misogyny in Cyberspace

Historically, efforts to restrict women within domestic and private sphere, have always been an essential characteristic of every patriarchal society. Denial of right to vote, to attain education, right to safe work space, right to property and archaic rituals of purdah and dowry are only a few means, why which societies have tried to contain the women autonomy and their presence in the public decisions and affairs. Today, in the age of internet, the cyberspace has also become a public sphere, where the public gather to communicate and where strangers interact with those who are different from them.

Kate Manne has brilliantly defined misogyny as, “social systems or environments, where women face hostility and hatred because they’re women in a man’s world - a historical patriarchy.” She asserts that misogyny and sexism while being distinct from each other, are the working parts of the same system. According to her, while the justification for the ideology regarding inferior status of women to men, is rooted in sexism, misogyny is the weapon used to assert that ideology. And thus, often times, whenever the status quo of established patriarchy is challenged, misogynistic forces tend to attack violently.²¹ Thus, the latter is an enforcement strategy of the former which operates as a coercive strategy to make women acquiesce to patriarchal norms of unequal power.

On a closer look into the whole phenomenon of digital violence against women, it indicates that online abuse becomes an extension of longstanding patterns of deep-rooted misogyny and sexism whenever; (1) Women occupy positions of power; (2) Speak up against their unequal treatment in the society; (3) draw attention towards the systematic injustices that flow from patriarchal set up; (4) assert their right to occupy and participate in public spaces.²²

‘Gendered digital violence’, ‘gendered cyber harassment’ and ‘gendered cyberhate’, interchangeably used in this article refer to a range of violent and harassing acts targeted against women in the cyberspace because they are women. To name a few, these acts would include, textual and image-based injury to reputation, gendered hate speech, rape threats, doxing, cyber sexual harassment, cyber stalking, unauthorised distribution of sexual material, etc. It is through such acts that the misogynistic forces in patriarchal societies tend to police the cyberspace, whenever, women’s digital presence threatens the dominance of males over the internet as a public space.²³ It needs to be emphasised here that similar policing is exercised to silence the voices of other marginalised sections (religious, political, cultural and sexual minorities) of the society as well, which are again viewed as a threat to the dogmatic status quo. It can therefore be premised that in cases where a woman is a double or a triple minority on account of her religion or political

20 *Supra* n. 18.

21 Kate Manne, *DOWN GIRL: THE LOGIC OF MISOGYNY*, 1st ed. 2019.

22 *Supra* n. 17, p. 44.

23 *Supra* n. 4, p. 2.

ideology, the violence against the target has the potential to escalate in manifolds. In July 2021, an app called Sulli Deals was discovered by Twitter users. The app had the tagline Sulli deal of the day and published photographs of Muslim women without their consent. The victims were primarily activists and well-known women in their particular spheres of work. In January 2022, a similar app called Bulli Bai was found on an open-source platform GitHub. The app used photographs of hundreds of Muslim women without their consent for a virtual auction. Pursuant to police action, one Niraj Bishnoi aged 21 years was arrested for the ‘Bulli Bai’ app as its maker and another person named Omkareshwar Thakur aged 25 was arrested for masterminding ‘Sulli Deals’ website. While these are some of the recent cases of horrifying proportions of cyberviolence against women, this is just the tip of the iceberg.²⁴

Misogyny, Digital Violence and The Utopian Freedom of Speech

The researcher conducted a study, with a sample of one hundred women of Delhi NCR region. The respondents were approached online and the responses were collected via structured questionnaire. The aim of the study was to collect data that could throw light on the impact of the cyber abuse on the women, and to understand the effects of such victimization on their internet usage pattern. In the survey, the results revealed that, 50% women faced cyber abuse at the hands of a male perpetrator, 2% reported being harassed by female perpetrator and 48% reported that the gender of the perpetrator was unknown to them. This indicates the extremely skewed ratio of female to male perpetrators and simultaneously point towards greater propensity of males to indulge in digital violence.

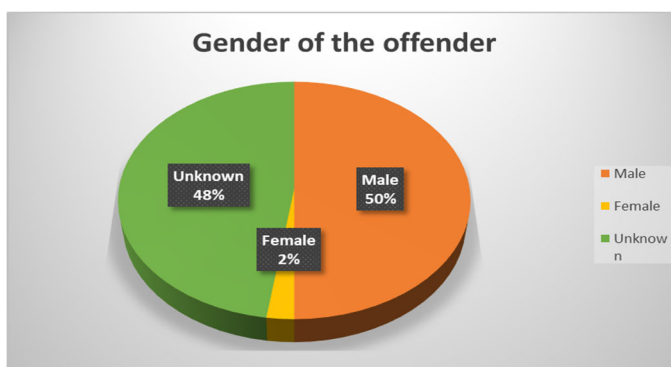


Fig. 1

The study was aimed primarily, to understand the effects of the digital violence on the women’s exercise of their digital rights pertaining to freedom of free speech and right of presence to 29% women resorted to cutting back on the hours they spent

24 Anand Mohan J., “‘Sulli Deals’ Case Accused Denied Bail, Court Says Can’t Ignore ‘Severity and Gravity of His Acts’”, THE INDIAN EXPRESS, January 17, 2022, <https://indianexpress.com/article/cities/delhi/sulli-deals-case-accused-denied-bail-court-says-cant-ignore-severity-and-gravity-of-his-acts-7726405/>, (visited on March 12, 2022).

online, in order to minimise their exposure to violence emerging from digital misogyny. Additionally, 24% of the women victims, did end up choosing the option that was being forced upon through the digital attacks, i.e., to refrain or stop from posting their views on online platforms. Both combined 53%, i.e., more than half the women victims of digital violence were pushed back into forfeiting their right to digital presence or to freely express themselves digitally (Fig. 2). This marginalization does not only culminate into violation of civil rights, but also into violation of economic rights.

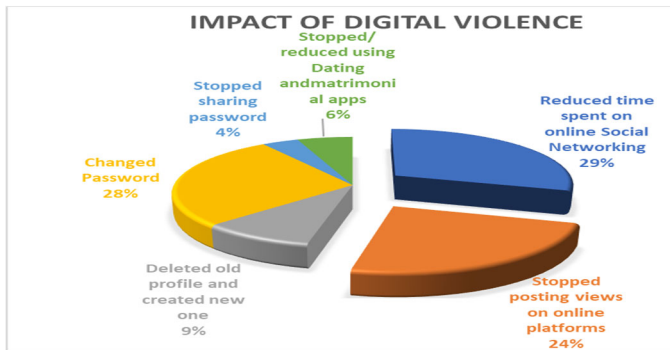


Fig. 2

The findings of the current study, regarding the defence mechanism used by women, after their online victimisation, are consistent with the Amnesty International study which found that 32% women who were the victims of digital misogyny, “Stopped posting content that expressed their opinion on certain issues”.²⁵ This course of action stems from various socio-psychological concerns that are faced by the victims of cyber abuse and digital violence. The statistical data obtained in a 2017, Amnesty International study, conducted in eight countries, indicates that many victims of such digital violence, become vulnerable to various emotional and mental ill effects. It reports that 41% of such women victims feared for their physical safety, 63% faced trouble sleeping, 55% experienced panic attacks, stress, or anxiety, 61% reported loss of self-esteem and confidence, and 76% changed the way in which they used social media.²⁶

In this context, testimony of Ms. Rega Jha, Editor, BuzzFeed India, is perfect to elucidate the mental and emotional harm, that a victim of digital violence has to endure. Her arduous journey through the fictitious lanes of the cyber world, crowded with cyber mob, ready to hurl abuse at her, began with an innocuous joke she wrote on twitter on 15th February 2015 during a cricket match between India and Pakistan. The tweet read, “its so sad that no matter who wins, Pakistanis will continue to be way hotter than us and we will continue to be their ugly neighbours”. What followed was a bombardment of vicious and indignant responses on her twitter account, which vilified her brutally. Some of these messages went as far as suggesting that her actions warrant her to be ‘dragged around in public’ and ‘be raped’. Despite her almost immediately posting an apology tweet, and removing the ‘offensive’ tweet,

25 *Supra* n. 4, p. 6.

26 *Supra* n. 4, p. 4.

the flooding of such horrifying and violent messages did not stop for days. Recalling the incident today, Ms. Jha in her testimony, admits, that the incident certainly had a silencing effect on her. Being called a slut and a bitch who deserves to be dragged around, and be raped, takes a toll and becomes emotionally taxing at some point. According to her, facing such violent indignation, inadvertently resulted into her reserving her speech on twitter, without her making a conscious effort.²⁷

The third finding of the study relates to the reporting of such cyber abuse by the victims to the appropriate authority. It was revealed that 56% of the women did not report the incident of their victimization to anyone and only 14% reported it to the police authorities. This suggests a very bleak state of affairs, as without proper reporting of the abuse, the legal apparatus cannot be expected to effectively function. In order to explore the reasons for such low reporting of these crimes, the study provided for a set of commonly assumed reasons of non-reporting of crimes and asked the respondents to choose the reasons which prompted them to not approach the legal authorities. The result was not so surprising, 54% of the women admitted to not reporting the crime, as they hoped that it would cease on its own. It is proposed, that this unfortunate but often adopted response towards cyber victimization is no different from any other form of gendered victimization. The misogynistic forces in the society also try to ascertain that women should not only not raise their voice against any abuse, but also be satisfied by merely hoping the abuse stops (Fig.3).

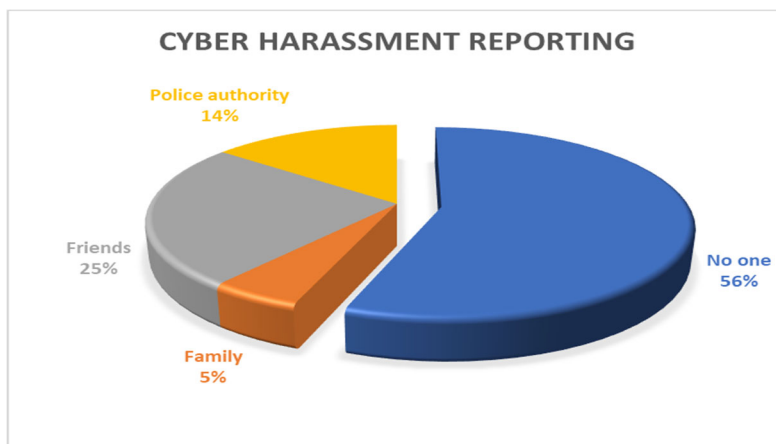


Fig. 3

It is the unfortunate reality that in the 21st century when personal freedoms and liberties are the most widely accepted human rights standards, many women are forced to opt out of the cyberspace, reduce their online presence and activities, or assume pseudonyms that does not reveal their sexual identity, to protect themselves from potential online harassment. The cyberspace which was supposed to be a

27 “*Online Harassment: A Form of Censorship*”, SFLC, November 19, 2016, [https://sflc.in/online-harassment-a-form-of-censorship-release-of-report-and-panel-discussion-november-22-new-delhi/#:-:text=Whereas%20online%20speech%20platforms%20like,hinder%20the%20efficient%20utilization%20of,\(visited%20on%20September%2011,%202021\).](https://sflc.in/online-harassment-a-form-of-censorship-release-of-report-and-panel-discussion-november-22-new-delhi/#:-:text=Whereas%20online%20speech%20platforms%20like,hinder%20the%20efficient%20utilization%20of,(visited%20on%20September%2011,%202021).)

“genderless utopia”²⁸, has transmuted into a space which breeds inequality in terms of gender.²⁹ And for those who try to raise their voices against the insidious and toxic cyber-space environment, they are met with the classic lambasting by misogynist cyber-mob, and are asked to “get out of the kitchen, if they can’t handle the heat”³⁰ In India, such gendered digital marginalization is not only violative of the constitutional right to freedom of speech and expression under Article 19(1)(a), but also infringes the constitutional right to equality under Article 15(2). What we fail to understand is that by brushing off every claim of online harassment brought forward by women, we are forcing the victims to capitulate to the abusive norm of the cyber lifestyle.

Conclusion and Suggestions

It is pretty evident that online misogyny is an extension of offline misogyny and thus is equally potent to cause serious societal corrosion by perpetrating gender inequality and discrimination into the cyberspace. Borderless and all-pervasive character of internet has made women all across the world a potential victim to cyber violence and harassment. However, women in the more traditional and conservative eastern societies such as India are at a higher risk of being a victim of online misogyny and resultant abuse of any nature, on account of inefficient legal protection. The online victimization of the women belonging to comparatively more conservative societies, is uniquely different from the one faced by their western counterpart.³¹

Haldar and Jaishankar after evaluating the Indian scenario of ever increasing cyber victimization of women claim, “The issues of women’s rights in cyber space could be contributed largely to the sluggish modes of the governments in executing the gender equality and gender justice promises made by the States in the form of fundamental rights”³² Their report too, like Citron’s, confirm with the postulation that societies have continued to look at cyber harassment as “less important sexual harassment.”³³ It is important here to explore the crucial role of law in combating cyber harassment with a two-pronged approach. Firstly, cyber harassment needs to be understood as an extension of gender discrimination and injustice, which needs not to be trivialized but dealt with the same concern as any other form of traditional sexual abuse and harassment. Secondly, the existing cyber laws and complaint mechanism need to be reviewed from a perspective of female narrative and be amended to do away with the social obstacles that cause non reporting of incidents of gendered cyber harassment.

28 Shani Orgard, “*The Transformative Potential of Online Communication: The Case of Breast Cancer Patients’ Internet Spaces*”, FEMINIST MEDIA STUDIES, Vol. 5 No. 2, 2007, <https://doi.org/10.1080/14680770500111980>.

29 *Supra* n. 17, p. 153

30 Emma Jane, MISOGYNY ONLINE: A SHORT (AND BRUTISH) HISTORY, 1st ed. 2017.

31 *Supra* n. 3, p. 20.

32 *Ibid.*, p. 56.

33 *Supra* n. 3, p. 10.

Citron, most rightly suggests that as law's expressive value has acted as an instrument of gradual change in the norms of the society, relating to workplace sexual harassment and domestic violence, it can also be instrumental in changing the norms of acceptable behavior and conduct in cyberspace.³⁴ In this context, it can be argued that the absence of any universally accepted legal definition of misogyny, results into a void in the legal systems, where it becomes difficult to declare certain misogynistic conducts as criminal. It is imperative to capture misogyny, online and offline, withing the legal framework. Therefore, it is suggested, that efforts should be put into coming up with legal measures which are modelled to overcome the impediments that can be presented by the existing environment. This can be achieved by creating new crimes, specifically arising from online misogyny, that can capture all forms of digital violence. Additionally, the existing measures should be made more robust while keeping in mind the unique application of patriarchal norms to the cyber space, in order to make access to internet equal to all.

34 *Supra* n. 11, p. 377.

THE QUANDARY OF WOMEN AND DRUG SUBSTANCE ABUSE IN INDIA: NEED FOR GENDER RESPONSIVE POLICIES

Trisha Mittal*

“Drugs take you to hell, disguised as heaven.” - Donald Lyn Frost

Abstract

The menace of drug abuse has threatened millions of lives amongst different populations of the world. However, most of the epidemiological research drug surveys have viewed drug abuse as a male centric issue. The perceived notion and ignorance of women as drug abusers is further pronounced in Indian socio-cultural context, where women are treated as ‘doubly marginalised’, due to their socially accepted gendered role in a patriarchal set up as well as their traditional role as a family nurturer. However, non-acceptance that women can also be equally vulnerable to drug abuse, should not be misconstrued as non-existence of the problem of drug abuse amongst women. According to National Survey on Extent and Pattern of Substance Use conducted in 2018, around 40 Lakh women falling in the age group of 10-75 years, use cannabis and 20 lakh use Opioids. Despite such a significant number, there is scant literature which gives adequate insights into gender-specific etiological factors and discuss need for gender sensitive policies to address the unique issues faced by women, due to difference in sex based on biology and gendered based role in society. The paper seeks to explore several reasons for rising problem of drug abuse amongst women from two perspectives: burden on women non drug users with abusing partners or family members and various issues concerning women, who themselves consume drugs and eventually get involved in illegal business of drug distribution and production. The paper will also highlight related issues of drug addiction amongst women, dire financial needs to sustain their habit leading to their involvement in sex trade and other criminal activities. Lastly, the paper will analyse the present legislative framework, policies and schemes related to treatment facilities and rehabilitation of women drug addicts in India. The paper will attempt to identify the gaps, and outline the necessity of state intervention along with the role of multi-stakeholders in delineating gender sensitive approach towards the quintessential problem and impact of drug abuse amongst vulnerable population of women.

Keywords: Women, Drug Abuse, Gender Sensitive Policies, Treatment and Rehabilitation.

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Introduction

Drug substance abuse and their disorder is a serious threat, to most of the countries of the world. The devastating problems posed by drug substance abuse has not left no nation immune. Over the years, usage of drugs and their abuse has been increasing at an alarming rate. According to a latest United Nations Office on Drugs and Crime's 2022 report, around 284 million people aged 15-64 used drugs worldwide in 2020, a 26 per cent increase over the previous decade. Young people are using more drugs, with use levels today in many countries higher than with the previous generation.¹ The situation is no different in India. According to National Crime Records Bureau (NCRB) in its annual report titled 'Crime in India', the number of cases of drug possession for personal use and trafficking registered under NDPS Act has increased by 25% in 2017 and 2018 as compared to previous three years from 2014 to 2016.² The cases registered in 2019, saw a further increase with 72,000 more cases registered in 2019, which increased the crime rate up to 5.4% as compared to previous years. However, persistent drug abuse is most likely to result in developing the habit of drug addiction.

Addiction is a chronic, recurring illness which is characterised by obsessive drug seeking and usage, even when doing so has negative effects. Drug addiction is considered as a 'brain disorder' as prolonged usage may result in changes in physical and psychological abnormalities of brain.³ It should be treated as any other disease and they can last a lifetime or even result in death if untreated. Unfortunately, despite such serious consequences of addressing the issue of drug addiction as a disease it has largely been treated as predominantly a male phenomenon. However, drug addiction knows no gender and just like many other problems, drug addiction impacts different sex and genders differently. Sex is defined by the National Institutes of Health Office of Research on Women's Health⁴ as "*multidimensional biological construct based on anatomy, physiology, genetics, and hormones*", whereas gender is defined as "*a multidimensional construct that encompasses gender identity and expression, as well as social and cultural expectations about status, characteristics, and behaviour as they are associated with certain sex traits*". It has also been observed by various health research studies how differences in sex and gender can affect a person's susceptibility to illness, perception of symptoms, and response to treatment.⁵

1 "World Drug Report, 2022", UNITED NATIONS OFFICE ON DRUG AND CRIME, UNITED NATIONS PUBLICATION, 2022, https://www.unodc.org/res/wdr2022/MS/WDR22_Booklet_1.pdf

2 Bharath Kancharla, "Data: Number Of Cases Booked Under NDPS Act Increased By More Than 25% In 2017 & 2018", FACTLY, September 16, 2020, <https://factly.in/data-number-of-cases-booked-under-ndps-act-increased-by-more-than-25-in-2017-2018/>

3 Nora D. Volkow, "Drugs, Brains, and Behaviour: The Science of Addiction", NATIONAL INSTITUTE ON DRUG ABUSE, 2016, pp. 1-36.

4 "Sex and Gender, What Are Sex & Gender? And Why Do They Matter in Health Research?", THE NATIONAL INSTITUTES OF HEALTH OFFICE OF RESEARCH ON WOMEN'S HEALTH, <https://orwh.od.nih.gov/sex-gender>.

5 S.L. Klein and K.L. Flanagan, "Sex differences in Immune Responses", NATURE REVIEWS IMMUNOLOGY JOURNAL, Vol. 16, 2016, pp. 626-638.

While interpreting the above definitions, it can be observed that drug substance abuse is treated as a disease and will have different impact on sex and genders based on their anatomical, genetic and cultural differences. The focus of this research paper is to study the inter-relationship between drug substance abuse amongst women, understanding the reasons/causes of initiation of drug abuse amongst women, its impact on women and need for gender responsive policies of treatment and rehabilitation.

Epidemiological Surveys Acknowledging the Issue of Drug Abuse Amongst Women in India

Substance abuse has not left women untouched, even though issue of drug substance abuse has been addressed significantly in the past years, it has not been studied so much so from a gender perspective.⁶ Women have traditionally been seen as someone who upholds moral principles and adheres to societal norms. They are likely to be more stigmatised than men and drug substance abuse amongst women has been seen as an act of 'double deviance' as violating the societal expectations of 'female virtues as well as socially accepted behaviour' as also deviating from the traditional gender role of care-giver and nurturer.⁷ This stigmatisation has been one of the biggest reasons and explanations for lack of research focusing on drug abuse and addiction.

However, even though most of the research surveys have highlighted men report four times more prevalence than women, but epidemiological surveys from 1970s-1990s suggested that the gap had narrowed.⁸ According to the National Studies conducted in the 1980s, just 0.1 to 1.3% of women used other drugs, compared to 3.2% of women who used alcohol⁹. According to the epidemiological studies conducted in early 1990s, taking a sample size of around 4000-30,000 women, it found that, 6-8% women in their lifetime never used drugs.¹⁰ However, a survey conducted for North-Eastern States found that 14% women use heroine which represented a big number.¹¹ In the year 1985, a comprehensive drug law in India

6 Mahek Nankani, "Not Just Men, Indian Women Also at Risk of Drug Addiction but Studies Barely Focus on Them", NEWS 18, May 19, 2022, <https://www.news18.com/news/opinion/not-just-men-indian-women-also-at-risk-of-drug-addiction-but-studies-barely-focus-on-them-5198749.html>, (visited on September 4, 2022).

7 "Women and Drug Abuse: The Problems in India", MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT AND UNITED NATIONS INTERNATIONAL DRUG CONTROL PROGRAMME, REGIONAL OFFICE FOR SOUTH ASIA, 2002, New Delhi, <https://www.unodc.org/pdf/india/Women%20Book-6-5-03.pdf>.

8 F.A. Wagner and James C. Anthony, "Male-female Differences in The Risk of Progression from First Use to Dependence Upon Cannabis, Cocaine, And Alcohol", DRUG AND ALCOHOL DEPENDENCE JOURNAL, Vol. 86, 2007, pp. 191-198.

9 Mohan D and N. Desai, "A Survey on Drug Dependence in the Community, Urban Megapolise, New Delhi", INDIAN COUNCIL OF MEDICAL RESEARCH, 1993.

10 Sadia Habib, "Drug Addiction Among Women: A Growing Problem", INTERNATIONAL JOURNAL OF RESEARCH AND ANALYTICAL REVIEWS, Vol. 5 No. 3, 2018, pp. 637-640.

11 *Ibid.*

known as the Narcotic Drugs and Psychotropic Substances Act 1985 was passed which criminalised drug trade, trafficking and drug consumption. Despite the passing of this law, various studies documented a substantial increase in usage of drugs amongst women especially in metropolitan cities like Mumbai, Delhi and Kolkata.¹²

One of the most prominent Rapid Assessment Survey (RAS study) known as National Survey on the extent, pattern, and trends of Drug Abuse in India (2001), conducted by Ministry of Social Justice and Empowerment in 2001 in collaboration with United Nations Office on Drugs and Crime, Regional Office for South Asia, published two studies, “Burden on Women due to Drug Abuse by Family Members” and ‘Substance Abuse among Women’.¹³ The survey found that the most commonly abused substances were heroin, alcohol, cannabis, and analgesics. 75 substance users from Mumbai, Delhi, and Aizwal were interviewed and it revealed that high rates of opioid and alcohol use in substance-using women, with an alarming 40% of women reporting lifetime injection drug usage.¹⁴

These studies gave an insight into the rise of drug abuse issue amongst and how over the years it has increased amongst women at an alarming rate. In 2017, according to the Nation Crime Record Bureau (NCRB) report, Rajasthan had the highest death rate due to drug abuse. According to the census conducted in 2018, a total of 875 people lost their lives for the same reason, and again the deaths were maximum in the state of Rajasthan. Drug overdose is not an infrequent incidence in India nowadays. Youngsters, including women, are more prone to addictions such as alcohol, psychedelic substances, smoking, cannabis and many more.

The current scenario can be depicted in a recent report titled ‘Magnitude of Substance Use in India,’ published by Ministry of Social Justice and Empowerment in 2019¹⁵, which conducted a National Survey on Extent and Pattern of Substance Abuse in India found that about 90 Lakh women in the age group of 10-75 years use alcohol, 40 Lakh use Cannabis and 20 Lakh use Opioids. Thus, it can be observed from the above-mentioned epidemiological surveys that even though research studies have inferred the substance abuse as more prevalent amongst men, however, a blind eye cannot be turned against the trends of drug substance abuse amongst women as a rising issue. Only when it is acknowledged as a phenomenon occurring in women as well, then only it will be studied from the lens of gender differences in causes, impact and need for specifically tailored treatment for women drug abusers.

12 Rakesh Lal et al., “*Substance Use in Women: Current Status and Future Directions*”, INDIAN JOURNAL OF PSYCHIATRY, Vol. 57 No. 2, 2015, pp. 75-85.

13 Pratima Murthy and Rajat Ray, “*Women And Drug Abuse : The Problem In India*”, UNITED NATIONS OFFICE ON DRUGS AND CRIME, REGIONAL OFFICE FOR SOUTH ASIA AND MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, GOVERNMENT OF INDIA, NEW DELHI, 2002, <https://www.unodc.org/pdf/india/Women%20Book-6-5-03.pdf>.

14 *Ibid.*

15 “*Magnitude of Substance Use in India*” (2019), MINISTRY OF SOCIAL JUSTICE AND EMPOWERMENT, p. 18, http://socialjustice.nic.in/writereaddata/UploadFile/Magnitude_Substance_Use_India_REPORT.pdf.

Factors of Initiation of Drug Abuse Amongst Women

There is lack of research and dearth of literature on gendered differences in analysing the causes and consequences of drug addiction amongst women.¹⁶ Like many other problems, substance addiction has diverse effects on men and women. Although there has been a lot of discussion and action in recent years to address the issue, gender has not been taken into consideration. Despite still being the minority of drug users worldwide, women tend to take drugs more frequently than males do and develop drug use disorders more quickly. There are many factors which can be traced to the occurring of drug substance abuse amongst women:

Adverse Childhood Experiences

Studies have revealed that exposure to drug substance abuse among women have been observed from early childhood or adolescent age. One of the important factors responsible for initiation of drug abuse as a response amongst women is sexual, physical or mental abuse faced by women in their childhood.¹⁷ In one of the significant studies conducted by Fernández- Montalvo and López-Goñi JJ in their study¹⁸ found that different forms of childhood ill treatment and adversity, may result in developing post-traumatic stress disorder (PTSD), when children resort to drugs and other substances as refuge to relieve their symptoms. Another study showed that, as between boys and girls, boys who have faced childhood abuse externalise their behaviour through anger and aggression, while girls internalise their behaviour by developing anxiety, depression and often resorting to drug abuse as self-medication.¹⁹ In India, the study conducted in women in North East²⁰ found that, more than 43% women have faced sexual abuse or physical violence in their childhood and has established the link between childhood abuse and development of addictive behaviour in later stages of life.

Biological Factors

The reasons can be numerous such as to combat stress through the usage of drugs. Some of the studies have concluded that women who consume drug results in

16 Ellen Tuchman, “*Women and Addiction: The Importance of Gender Issues in Substance Abuse Research*”, JOURNAL OF ADDICTIVE DISEASES, Vol. 29 No. 2, pp. 127-138

17 D.J. Rohsenow DJ et al., “*Molested as Children: A Hidden Contribution to Substance Abuse*”, JOURNAL OF SUBSTANCE ABUSE TREATMENT, Vol 5. No. 1, 1988, pp. 13-18.

18 Fernández-Montalvo J and López-Goñi JJ, “*Psychological, Physical, And Sexual Abuse in Addicted Patients Who Undergo Treatment*”, JOURNAL OF INTERPERSONAL VIOLENCE, Vol. 30 No. 8, 2015, pp. 1279-1298.

19 Elizabeth A. Evans et al. “*Gender Differences in the Effects of Childhood Adversity on Alcohol, Drug, and Polysubstance-Related Disorders*”, SOCIAL PSYCHIATRY AND PSYCHIATRIC EPIDEMIOLOGY JOURNAL, Vol. 52 No. 7, 2017, pp. 901-912.

20 M. Suresh Kumar et al., “*Women Who Use Drugs in North East India*”, UNITED NATIONS OFFICE ON DRUGS AND CRIME, REGIONAL OFFICE FOR SOUTH ASIA, PROJECT RAS/H13: PREVENTION OF TRANSMISSION OF HIV AMONGST DRUG USERS IN SAARC COUNTRIES, 2015, https://www.unodc.org/documents/southasia/publications/research-studies/FINAL_REPORT.pdf.

weak neuroendocrine stress response.²¹ The hypothalamic pituitary-adrenocortical dis regulation is the major cause to the vulnerability of women towards drugs and other substances use. This biological factor plays a vital rule in women's body to consume drug.²²

Social and Environmental Factors

Women have earlier been associated with more traditional roles than those who are financially independent and career-driven. Over the years, changing lifestyles, increased stress, peer group influences, need to adapt to modernist trends have also been identified as important factors in initiation of drug abuse amongst women.²³ Other social and environmental factors like socio-economic status, poverty, unemployment, lower levels of education have also been attributed as important factors that trigger chronic stress as well as affected mental health made women more vulnerable to resort to drug usage as temporary reprieve.²⁴ According to an empirical study conducted in North-Eastern States in India, 73% of women who are drug addicts are uneducated. A study by The United Nations Office on Drugs and Crime (UNODC), in Afghanistan found strong inter-relationship between poverty, unemployment and drug use especially amongst women as compared to men.²⁵

Drug Use in Family or Partners and Gender Based Violence

Many studies have observed that, one of the most significant factors responsible for initiation of drugs in women are, drug use in family and relationship with male partners who use drugs and are in a position to dominate women if they are the main providers for their family. They compel them to use drugs and make them feel dependent once women develop drug dependence.²⁶ The UNODC Report on 'Women and Drug Abuse: The Problem in India' pointed out through its another sub-report '*Burden on Women due to Drug Abuse by Family Members*'²⁸, found that almost half of the women in their sample are often subjected to domestic violence and sexual abuse by drug using partner. Women are afraid of approaching the police as they fear from their drug using partner being arrested. An empirical study

21 *Supra* n. 10.

22 Fox HC et al., "Altered Levels of Sex and Stress Steroid Hormones Assessed Daily Over A 28 - Day Cycle in Early Abstinent Cocaine - Dependents Female", PSYCHOPHARMACOLOGY [BERL] JOURNAL, Vol. 195 No. 4, 2008, pp. 527-36.

23 *Supra* n. 13.

24 "World Drug Report 2018, Booklet no. 5: Women and Drugs: Drug Use, Drug Supply and Their Consequences", THE UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2018, https://www.unodc.org/wdr2018/prelaunch/WDR18_Booklet_5_WOMEN.pdf.

25 "Impacts Of Drug Use On Users And Their Families In Afghanistan", THE UNITED NATIONS OFFICE ON DRUGS AND CRIME, April 2014, https://www.unodc.org/documents/data-and-analysis/Studies/Impacts_Study_2014_web.pdf.

26 *Supra* n. 20

27 *Supra* n. 24.

28 *Supra* n. 13.

conducted in Delhi²⁹, also found that, women who have drug abusing partners feel isolated and neglected and start indulging themselves in drugs in order to fulfil their need of intimacy and companionship from their partners. Another crucial factor that has been observed in many qualitative studies in United States is that, prevalence of gender-based violence in women using drugs is 2-5 times higher than in non-drug using women.³⁰ Women's continuous encounter with sexual and physical assault may also result in increasing the risk of developing post-traumatic stress disorder or other mental health issues. After being initiated into the habit of drug use, women might do so again, as a form of self-medication and a way to cope with the mental and physical suffering brought on by experiencing intimate relationship violence.³¹

Gender Differences and Its Impact of Drug Abuse Amongst Women

It has been observed through various studies that drug substance abuse impacts the modus in which genders react and respond to such drugs. Biological, epidemiological, psychological as well as social position are some of the important differences amongst men and women that have led to many research studies analysing the unique issues faced by women.

Biological Differences and its Impact

The main differences in women include hormonal differences, especially elements such as pharmacokinetics, sensitivity to gonadal hormones and differences in metabolism rates.³² According to recent evidence³³, oestrogen, a hormone produced by the female gonadal, may encourage drug misuse in women. For instance, in women, administration of cocaine and amphetamine during high oestrogen phase of the menstrual cycle is related with improved positive subjective assessments. In addition, oestrogen injection enhances drug use and makes it easier to start, escalate, and resume cocaine-seeking behaviour in animal studies.

Response to Different Stages of Addiction

Women also react differently than men at different stages of addiction. There are five stages of addiction namely; Acquisition, Escalation, Maintenance, Withdrawal,

29 Vartika Sharma et al., "*Women and Substance Use: A Qualitative Study on Sexual and Reproductive Health of Women Who Use Drugs in Delhi, India*", *BMJ OPEN JOURNAL*, Vol. 7 No. 11, 2017, pp. 1-8.

30 Louisa Gilbert, "*Targeting the Substance Abuse, Violence and AIDS Syndemic Among Women and Girls: A Global Review of Epidemiology and Integrated Interventions*", *JOURNAL OF ACQUIRED IMMUNE DEFICIENCY SYNDROME*, Vol. 69 No. 2, 2015, pp. 118-127.

31 *Supra* n. 24.

32 Clairmont Griffith and Bernice La France, "*Difference Between Men and Women in Drug Use Disorders*", *FORTUNE JOURNALS, ARCHIVES OF CLINICAL AND MEDICAL CASE REPORTS*, Vol. 3 No. 1, 2019, pp. 27-32.

33 Justin J Anker and Marilyn E Carroll, "*Females Are More Vulnerable to Drug Abuse Than Males: Evidence from Preclinical Studies and The Role of Ovarian Hormones*", *BIOLOGICAL BASIS OF SEX DIFFERENCES IN PSYCHOPHARMACOLOGY BOOK, CURRENT TOPICS IN BEHAVIOURAL NEUROSCIENCES BOOK SERIES*, Vol. 8, 2020, pp. 73-96.

Relapse.³⁴ Women are more likely than men to have a more satisfying reaction to substances, during the acquisition stage of the drug use process. Research studies also suggested³⁵ that as compared to men, women consume more drugs during the escalation period, increasing their risk of addiction. Males, on the other hand, experience a slower progression toward drug or alcohol addiction. In the third step, as compared to men, women typically stabilise at high medication doses. The negative impacts are also far more severe in women. Contrarily, men typically stabilise gradually. In the last two stages of withdrawal, and relapse, it is shown that, women tend to exhibit greater withdrawal symptoms and have higher chances of relapse as compared to men.³⁶

Physical and Mental Health Impact

The consumption of such substances not only affect the body physically, but also leads to mental distress. The mental health of people is a cause of concern in India. Many psychiatrists have analysed that India is passing through a tough phase of declining mental health. The consumption of alcohol may lead to 200 types of diseases in a human body.³⁷ Studies have also shown that, in comparison to men, women with substance use disorders experience higher rates of psychiatric symptoms or disorders that have been diagnosed, most frequently anxiety, depression (although gender differences in rates of depression among people with substance use disorders are smaller than among the general population), borderline personality disorder, and eating disorders).³⁸ While talking about the female anatomy, these substances cause adverse harm to female fertility and also complications during pregnancy such as low birth weight, premature deliveries and neonatal abstinence syndrome.³⁹

One of the most significant physical health impacts of drug abuse among women is higher vulnerability than men to contracting HIV and other blood infections. The main reasons include gender power imbalance where drug using male partners subject women to physical and sexual violence while compelling them to inject drugs with the same needle and indulge in unprotected sex.⁴⁰ Empirical studies in India,

34 *Supra* n. 32.

35 Aimee Campbell et al., “Gender Differences in Demographic and Clinical Characteristics of Patients with Opioid Use Disorder Entering: A Comparative Effectiveness Medication Trial”, *THE AMERICAN JOURNAL OF ADDICTIONS*, Vol. 27 No. 6, 2018, pp. 465-470.

36 *Supra* n. 32.

37 Shalini Singh and Yatan Pal Singh Balhara, “A Review of Indian Research on Co-occurring Psychiatric Disorders and Alcohol Use Disorders”, *INDIAN JOURNAL OF PSYCHOLOGICAL MEDICINE*, Vol. 38 No. 1, 2016, pp. 10-19.

38 “Substance Abuse Treatment and Care for Women: Case Studies and Lessons Learned”, The United Nations Office on Drugs and Crime (UNODC), 2004, https://www.unodc.org/pdf/report_2004-08-30_1.pdf.

39 *Supra* n. 24.

40 Steffanie A. Strathdee et al., “Sex Differences in Risk Factors for HIV Seroconversion Among Injection Drug Users: A 10-Year Perspective”, *ARCHIVES OF INTERNAL MEDICINE JOURNAL*, Vol. 161 No. 10, 2001, pp. 1281-1288.

have also shown a positive co-relation between drug substance abuse and higher risk of HIV infections based on unsafe injecting practises and unequal gender dynamics.⁴¹

Another significant impact on women is a vulnerable population of sex workers. Women who often develop the habit of drug addiction will often indulge in sex work as means to earn income to sustain their habit. As a result, women face two-fold risk of entering into sex work and drug abuse, both illegal in India.⁴²

Legal Framework for Drug Substance Abuse in India

India is a signatory to various international conventions such as Single Convention on Narcotic Drugs 1961, Convention on Psychotropic Substances 1971 and Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 which regulated the use, consumption and illicit trafficking of psychotropic substances.⁴³ Article 14(4) of the 1988 Convention⁴⁴, recognised the health and social consequences of drug use and focussed on measures for treatment and rehabilitation as an alternative.

In fulfilment of its obligations under Article 253⁴⁵, The Narcotic Drug and Psychotropic Substances Act 1985 was passed in India. (hereinafter referred as 'NDPS Act 1985'). The Act criminalises drug users 'consumption' under Section 27⁴⁶ and 'possession' but does not distinguish between possession for the purpose of

41 Anju Agnihotri Chaba, "Punjab: Pilot Project To Rehabilitate Women Drug Addicts Launched In Kapurthala", THE INDIAN EXPRESS, February 17, 2019, <https://indianexpress.com/article/cities/chandigarh/pilot-project-to-rehabilitate-women-drug-addicts-launched-in-kapurthala-5587766/>, (visited on August 2, 2022).

42 *Supra* n. 29.

43 Preamble of the Narcotic Drug and Psychotropic Substances Act 1985 and Section 2(ix), definition of International Conventions.

44 Article 14(4) of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 states "*The Parties shall adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with a view to reducing human suffering and eliminating financial incentives for illicit traffic. These measures may be based, inter alia, on the recommendations of the United Nations, specialized agencies of the United Nations such as the World Health Organization, and other competent international organizations, and on the Comprehensive Multidisciplinary Outline adopted by the International Conference on Drug Abuse and Illicit Trafficking, held in 1987, as it pertains to governmental and non-governmental agencies and private efforts in the fields of prevention, treatment and rehabilitation. The Parties may enter into bilateral or multilateral agreements or arrangements aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances.*"

45 Article 253 of the Constitution of India states "*Legislation for giving effect to international agreements - "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.*"

46 Section 27 the Narcotic Drug and Psychotropic Substances Act 1985 states "*Punishment for consumption of any narcotic drug or psychotropic substance.-Whoever consumes any narcotic drug or psychotropic substance shall be punishable,- (a) where the narcotic*

drug consumption, possession for drug peddling, transportation and drug trafficking. Further, the ‘prohibitionist’ narrative is reflected in various strict liability provisions such as reverse onus of proof on offenders regarding proving ‘intent’ or ‘motive’ under Section 35⁴⁷ and Section 54⁴⁸ of the Act and strict bail and custody provisions⁴⁹. However, the conventions did not cover specific provisions focusing attention on the issue of drug substance abuse amongst women and neither the rehabilitation aspects highlighted gender differences and need to tackle the issue from the lens of gender responsive policies.

Legislative and Judicial Response for Treatment, Rehabilitation and Re-integration of Drug Substance Abuse Victims in India: Addressing Special Needs for Women

While the trajectory of The NDPS Act 1985, traced through various amendments and parliamentary debates seems to be tilted more towards deterrence. The statistics discussed in the first part of the paper showed a constant increase in the number of drug users, thus giving an indication, that the deterrent provisions have neither been effective in reducing number of addictions, nor have reduced number of traffickers. However, in order to balance the harsh provisions especially for drug addicts, The

drug or psychotropic substance consumed is cocaine, morphine, diacetyl-morphine or any other narcotic drug or any psychotropic substance as may be specified in this behalf by the Central Government by notification in the Official Gazette, with rigorous imprisonment for a term which may extend to one year, or with fine which may extend to twenty thousand rupees, or with both; and (b) where the narcotic drug or psychotropic substance consumed is other than those specified in or under clause (a), with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both.]”

- 47 Section 35 of the Narcotic Drug and Psychotropic Substances Act 1985 states “*Presumption of culpable mental state. - (1) In any prosecution for an offence under this Act, which requires a culpable mental state of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution. Explanation. - In this section “culpable mental state” includes intention, motive, knowledge of a fact and belief in, or reason to believe, a fact. (2) For the purpose of this section, a fact is said to be proved only when the court believes it to exist beyond a reasonable doubt and not merely when its existence is established by a preponderance of probability.*”
- 48 Section 54 of the Narcotic Drug and Psychotropic Substances Act 1985 states “*Presumption from possession of illicit articles. - In trials under this Act, it may be presumed, unless and until the contrary is proved, that the accused has committed an offence under this Act in respect of—(a) any narcotic drug or psychotropic substance or controlled substance; (b) any opium poppy, cannabis plant or coca plant growing on any land which he has cultivated; (c) any apparatus specially designed or any group of utensils specially adopted for the manufacture of any narcotic drug or psychotropic substance or controlled substance; or (d) any materials which have undergone any process towards the manufacture of a narcotic drug or psychotropic substance or controlled substance, or any residue left of the materials from which any narcotic drug or psychotropic substance or controlled substance has been manufactured, for the possession of which he fails to account satisfactorily.*”
- 49 Section 37 of Narcotic Drugs and Psychotropic Substances Act 1985.

Act also has provisions like 2(a) which defines addict, Section 7A which provides for allocating funds for rehabilitation from National Funds, Section 39⁵⁰ and Section 64 A⁵¹ which provides for probation and immunity to addicts from prosecution for consumption involving small quantity of drugs, if they voluntarily agree to undergo medical treatment for de-addiction. However, such provisions have remained silent on including vulnerable groups like women, children and other genders, which fails to address their specific needs and issues.

In order to further the objective of providing a comprehensive policy for treatment and rehabilitation as envisaged under Section 71⁵² of the Act and National Policy on Narcotic Drugs and Psychotropic Substances⁵³, different Departments/Ministries have been allocated different roles. While the Ministry of Social Justice and Empowerment is considered as the primary agency for regulating

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- 50 Section 39 of Narcotic Drugs and Psychotropic Substances Act 1985 states “*Power of court to release certain offenders on probation.-(1) When any addict is found guilty of an offence punishable under Section 27 [or for offences relating to small quantity of any narcotic drug or psychotropic substance] and if the court by which he is found guilty is of the opinion, regard being had to the age, character, antecedents or physical or mental condition of the offender, that it is expedient so to do, then, notwithstanding anything contained in this Act or any other law for the time being in force, the court may, instead of sentencing him at once to any imprisonment, with his consent, direct that he be released for undergoing medical treatment for de-toxification or de-addiction from a hospital or an institution maintained or recognised by Government and on his entering into a bond in the form prescribed by the Central Government, with or without sureties, to appear and furnish before the court within a period not exceeding one year, a report regarding the result of his medical treatment and, in the meantime, to abstain from the commission of any offence under Chapter IV*”.
- 51 Section 64-A of Narcotic Drugs and Psychotropic Substances Act 1985 states “*Immunity from prosecution to addicts volunteering for treatment.-Any addict, who is charged with an offence punishable under Section 27 or with offences involving small quantity of narcotic drugs or psychotropic substances, who voluntarily seeks to undergo medical treatment for de-addiction from a hospital or an institution maintained or recognised by the Government or a local authority and undergoes such treatment shall not be liable to prosecution under Section 27 or under any other section for offences involving small quantity of narcotic drugs or psychotropic substances: Provided that the said immunity from prosecution may be withdrawn if the addict does not undergo the complete treatment for de-addiction.*”
- 52 Section 71 of Narcotic Drugs and Psychotropic Substances Act 1985 states “*Power of Government to establish centres for identification, treatment, etc., of addicts and for supply of narcotic drugs and psychotropic substances.-(1) [The Government may establish, recognise or approve as many centres as it thinks fit for identification, treatment, management], education, after-care, rehabilitation, social re-integration of addicts and for supply, subject to such conditions and in such manner as may be prescribed, by the concerned Government of any narcotic drugs and psychotropic substances to the addicts registered with the Government and to others where such supply is a medical necessity.*”
- 53 “*National Policy on Narcotic Drugs and Psychotropic Substances 2012*”, DEPARTMENT OF SOCIAL JUSTICE AND EMPOWERMENT, <http://cbn.nic.in/html/NationalPolicyEnglish.pdf>, (visited on January 1, 2022).

various schemes and national action plan⁵⁴ for Drug Demand Reduction with the objective of creating awareness about ill-effects of substance abuse and provide for a range of guidelines for community based services for counselling, de-addiction and rehabilitation of persons with substance abuse disorder, the supply reduction falls under the aegis of Ministry of Home Affairs, Finance and State Governments.⁵⁵

The National Action Plan of 2020, provides two specific guidelines related to women drug substance abuse, one is related to specialised training programmes for those dealing with vulnerable groups like women addicts with co-morbidity issues, pregnant mothers and addressing their special needs. The other guideline is related to establishing de-addiction centres for women focussing especially on their special needs.

Despite such provisions and schemes, there is a lack of research and response to understanding the multiple barriers women face in accessing treatment and need for more gender responsive policies for rehabilitation of women drug addicts. This statement can be supported by a recent response given by Minister of State for Social Justice and Empowerment, A. Narayanaswamy, in reply to a question from Congress MP Shashi Tharoor. Mr. Tharoor requested for details on women rehabilitation centers in India to which the Minister responded that there are only four drug de-addiction centers for women - two in Manipur and one each in Mizoram and Karnataka which are supported by the Department of Social Justice and Empowerment.⁵⁶ While the recent survey of 2019⁵⁷ has pointed out that an estimated over 57.4 lakh women aged between 10-75 are dealing with substance abuse in India, the official number of de-addiction centers for women, as stated by the Minister, paints a very grim image of where we stand today, in dealing with appropriate response to the issue of women drug substance abuse. Most of the policies have been gender blind towards special needs for women and acknowledging their differences in response to drug substance abuse.

Even judicial response to such a grave issue has been very lukewarm. Only recently, in a recent landmark decision, the Supreme Court addressed a Public Interest Litigation, filed in *Bachpan Bachao Andolan v. Union of India*⁵⁸ by NGO Bachpan Bachao Andolan for seeking national action plan for children's victims of drug substance abuse. The Court passed a slew of directions for conducting a national

54 “National Action Plan for Drug Demand Reduction (NAPDDR) (2018-2025)”, DEPARTMENT OF SOCIAL JUSTICE AND EMPOWERMENT, https://socialjustice.gov.in/writereaddata/UploadFile/Scheme_for_NAPDDR.pdf, (visited on January 1, 2022).

55 “National Action Plan for Drug Demand Reduction (NAPDDR), *Nasha Mukht Bharat Abhiyaan (NMBA): Annual Action Plan (2021-22) for 272 Most Affected Districts*”, DEPARTMENT OF SOCIAL JUSTICE AND EMPOWERMENT, <https://grants-msje.gov.in/display-napddr-action-plan>, (visited on January 1, 2022).

56 Abhinay Lakshman, “Only Four De-addiction Centres for Women in India: Minister”, THE HINDU, December 21, 2021, <https://www.thehindu.com/news/national/only-four-de-addiction-centres-for-women-in-india-minister/article66285261.ece>, (visited on October 1, 2022).

57 *Supra* n. 15.

58 (2017) 1 SCC 653

survey and creating a database for identifying child's victims of drug abuse and also ordered opening of specialized rehabilitation centers for children. While this judgment is a laudatory initiative by the Court, however, a similar approach and directions focusing on special needs for women victims of drug abuse would have contributed immensely to the present state of affairs in this regard.

Access to Treatment and Barriers Faced by Women: Need for Gender Responsive Polices

As discussed in the previous parts of the paper, there are various gender differences in factors responsible for initiation of drug usage amongst women and unique health consequences faced by women, this calls for a closer scrutiny into recognising varied barriers faced by women at different stages of treatment and need for gender specific treatment measures for women. Western studies have shown, as compared to men, very low proportion of women access drug treatment facilities.⁵⁹ In India, various studies conducted between 1989-1991 in cities of Delhi, Lucknow and Jodhpur, found that only 1-3% women seek treatment as against men.⁶⁰ According to a recent article reported by the Tribune, only 3% of women addicts in Punjab have enrolled themselves for any treatment or rehabilitation facilities in Punjab.⁶¹ These number indicate certain serious systemic, structural, personal and social barriers that women might face in taking a rational decision to enrol themselves for treatment services.

Structural barriers include lack of facilities for women with children, lack of childcare facilities, lack of pre-natal and post-natal care for pregnant mothers, fear of getting caught in legal issues and losing custody of child, fear of safety and security, location and schedule issues especially for those who have children etc.⁶² Other difficulties include social and cultural barriers such as stigma as well as lack of support from family and society at large to acknowledge the issue of drug abuse, lack of awareness about treatment as an alternative, low level of education, burden of responsibilities at home etc. This results in under-representation of women in the statistics evaluated for drug abuse as women remain a hidden population.⁶³ It has been suggested by a growing body of evidence that, the sooner the issue of drug abuse is looked at from a gender specific lens, the better policies can be framed in accordance with gender specific needs and can ultimately result in better retention and improved treatment outcomes.

59 *Supra* n. 12.

60 *Supra* n. 13.

61 Vishav Bharti, "Just 3% Women Addicts In Punjab Enrolled For Treatment, Says Health Department", THE TRIBUNE, January 25, 2023, <https://www.tribuneindia.com/news/punjab/just-3-women-addicts-enrolled-for-treatment-says-health-dept-389096>, (visited on March 5, 2023).

62 Andrew O'Hagan and Marnie Wilson, "Women and Substance Abuse: Gender-Specific Social, Biological and Psychological Differences and Treatment Considerations", FORENSIC RESEARCH & CRIMINOLOGY INTERNATIONAL JOURNAL, Vol. 6 No. 2, 2018, pp. 90-98.

63 *Supra* n. 12.

Conclusion And Suggestions

Women have traditionally taken the role as main care-provider for family and the society has considered her role as a mother, daughter and wife as dutiful and responsible. The paper has dealt with the changing roles that women have assumed over period of time with changing lifestyles and therefore considered as deviant. The paper has also dealt with various gender differences and consequences that are unique to women while introduced with the issue of drug substance abuse. It is acknowledgement and recognition of such differences, which calls for gender responsive interventions from both policy perspective and societal attitude towards such issues. In order to fully comprehend the disease of drug addiction, there is also a need to move away from a simply individual, single-cause linear model and toward a multi-cause interaction model focussing on ‘gender’ as its focal point.

India, is however lagging behind in terms of treating and rehabilitating its female drug users in a gender-sensitive manner. A vast bulk of de-addiction facilities focus on male users and majority of treatment facilities have male staff who are not trained to deal with women drug abuse. This has been indicated in the poor state of affairs as reflected in the report Ministry of Social Justice and Empowerment which highlighted that only three of the country's 398 detention facilities, have female inmates.⁶⁴

There needs to be a systemic overhaul in the policies that address the issue of substance abuse amongst women. There are significant recommendations that can be suggested for effectively tackling the issue of drug substance abuse amongst women.

- The legislative changes should include gender, as an ‘inclusive factor’ in the provisions for probation, rehabilitation and treatment in the present NDPS Act, 1985. The current Section 39⁶⁵ providing for probation has other factors like age, character, mental condition, but does not include sex or gender as another determining ground for probation procedure. Other than this section, the entire NDPS Act, 1985 seems to be gender blind, and once the legislature makes appropriate amendments, acknowledging ‘gender’ as an inclusive factor, it will pave the way for various policy changes that are much needed to provide impetus to this issue.
- The policy making through various schemes and programmes by the relevant central ministries⁶⁶ entrusted with different roles and responsibilities for addressing drug substance abuse, should focus on establishing treatment facilities only for women, incorporating women’s needs in the aspect of design, structure, organisation, location, trained female staff, specific treatment programmes especially designed for women. While the present 2020 Scheme on Drug Demand Reduction⁶⁷ does provide for recommendation on establishing

64 *Supra* n. 15.

65 *Supra* n. 50.

66 *Supra* n. 54, 55.

67 *Supra* n. 55.

centres for women addicts and training of staff, however, this should be implemented in each state through their own policies and appropriate funds should be allocated for this purpose.

- Treatment facilities should also be made accessible to women, through special helpline numbers, acceptance of children in treatment programmes, additional child care services, tie-ups with schools for education for children should also be a priority, as this is one of the major barriers for women to access treatment services. Treatment facilities should also have specially trained staff for pregnant drug users, with expertise in pre-natal and post-natal care after pregnancy.
- Various awareness programmes should be conducted by relevant ministries at both national and state level targeting women at various stages including public and private schools, colleges, workplaces, government organisations etc. to educate women about the health consequences of drug abuse and encourage them to open up about this issue if anyone is keeping silent due to social stigma. Government at both levels should provide funding schemes for media programmes, Non-Government Organisations and other self-help groups, working for spreading information and awareness about this issue.
- Central and State Government should devise special surveys to collect data at both national and state level related to women who use drugs, as it will give an insight into the magnitude, pattern of substance use and related adverse consequences. Without understanding these aspects, it will be difficult to specially design and effectively implement rehabilitation programmes focussing on special needs of women drug addicts.
- As one of the most significant health consequences faced by women drug abusers are reproductive health problems such as HIV/AIDS, there is a need to set up community based, women centric centres, which can act as a 'one-stop-shop' providing for a comprehensive package of health services including, visit to the gynaecologist, opioid substitution therapy, detoxification and rehabilitation services. Majority of women, who enter into treatment programmes, have undergone physical and mental abuse as a result of which they suffer from anxiety disorders, depression and other mental conditions. This requires gender sensitive training for counsellors, enrolled at treatment facilities to design special programmes for sensitively dealing with such women undergoing grave physical and mental distress.
- As a part of rehabilitation programmes, re-integration is an essential element of restorative justice. Both Central and State Government should devise programmes and provide adequate funding to schemes that provide vocational skills training, economic programmes like micro-credit co-operative schemes, government loans for small businesses and providing alternative livelihood for women indulged in cultivation and supply of illegal drugs.

The above given recommendations, takes into consideration all the three aspects of restorative justice, i.e., treatment, rehabilitation and re-integration. The quintessential purpose of rehabilitation process is to help women in reclaiming control over their lives, to understand their causes for entering into substance abuse

and harmful consequences on their health and family life as well as resolve to seek treatment without fear of being judged or stigmatised by society and rebuild healthy relationship with their families, children and communities.

GENDERED DIVISION OF DOMESTIC LABOUR: A FEMINIST DISCOURSE

Priti*

Abstract

Women's rights on motherhood and reproduction have been at the core of several feminist discourses over the years. The burden that is placed on women, especially mothers to act in accordance to the gender stereotypes prevalent in the society results in glaring discriminations against them. Several researches and time use surveys around the globe have found that women, on an average spend twice the more time compared to men in performing unpaid care work. These gendered patterns which cut across geographical, race and class factors compel women to spend a majority of their day in fulfilling their familial expectations and reproductive roles. In addition, unlike men, for women engaged in paid employment the situation is worse, as they have to conform to the dual expectations set forth by the household as well as their employer. Most women suffer from the "superwoman-supermom" syndrome wherein, there is a constant pressure on them to deliver irrespective of their capacity, which in turn impacts their mental and physical health. This article will highlight the imbalance between the unpaid care giving work done by men and women depicted through the time use survey carried out in India and will try to understand the reasons behind such disproportionate divisions. The article will also delve into the various challenges faced by women engaged in paid employment like lacunae in the infrastructural facilities at workplace, gendered bias in promotions, nature of work assigned to women among several other issues from a socio-legal and economic point of view.

Keywords: Domestic Labour, Gender, Motherhood, Reproductive Capacities, Stereotype.

Introduction

The Bombay High Court in September 2021 delivered a noteworthy judgement in the case of *Abhinav Kohli v. State of Maharashtra and Ms. Shweta Tiwari*¹ which was filed by Mr. Abhinav Kohli, father of a minor five-year-old boy seeking his custody. It was argued by Mr. Kohli that Ms. Tiwari was extremely occupied with her professional commitments due to which she was not in a position to take care of the child. The bench comprising of Justice S. S. Shinde and Justice N. J. Jamadar, rejected the father's plea for the custody of his son by observing that the work commitment of a mother would not render her incapable or unsuitable for exercising

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1 2021 SCC OnLine Bom 1406.

her motherly duties². The court further observed that the professional commitment of a parent cannot be construed unfavorably against them and it cannot be the sole criteria for disturbing the custody of the child. Though, the impugned judgement is a welcome move, it highlights the glaring discriminations and burdens that are placed on women, especially mothers to conform to the gender stereotypes prevailing in the society. Women devote majority of their time in fulfilling their reproductive and familial responsibilities, irrespective of whether they are engaged in paid employment or not³.

This asymmetry of gender roles is the result of discriminatory social institutions and typecasts enforced by the society which leads to infringement of women's rights and hinders their empowerment. These have also been highly contested issues as a result of which several feminists have expressed varying notions about them. For example, the white feminists have demonstrated a sense of loss and betrayal by their mothers whom they viewed as being complicit in their own oppression whereas women of color on the other hand developed a keen sense of respect for their mothers as they struggled to provide for their family's survival by being a part of the workforce as well as taking care of the household⁴. In India, an analogy can be drawn between the higher and lower caste women. It may be said that the women belonging to the higher castes have been responsible to an extent for contributing to the traditional patriarchy in the society while maintaining the caste hegemony⁵ as they were constantly engaged in domestic labour and bearing children which was hardly ever valued or accounted for. Whereas women belonging to the lower caste had to tend to domestic chores apart from working in fields and engaging in menial scavenging jobs to sustain their families⁶.

Physiologically, women are equipped to bear children unlike men. A deep-rooted biological stoicism which has been interpreted by the patriarchal society for its own benefits places a huge importance on the fact that all women are only to bear children and that motherhood comes naturally to them. *Simone de Beauvoir*⁷ in her seminal book, *The Second Sex* states that women are made to see motherhood as the essence of their life and the fulfillment of their destiny. According to *de Beauvoir*,

2 *Ibid.*

3 NSS REPORT: TIME USE IN INDIA- 2019 (JANUARY - DECEMBER 2019), MINISTRY OF STATISTICS & PROGRAMME IMPLEMENTATION, September 29, 2020, <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1660028>, (visited on October 6, 2022).

4 Emma Gross, "Motherhood in Feminist Theory", *AFFILIA JOURNAL OF WOMEN AND SOCIAL WORK*, Vol. 13 No. 3, 1998, p. 269.

5 Uma Chakravarti, "Conceptualising Brahmanical Patriarchy in Early India - Gender, Caste, Class and State", *ECONOMIC AND POLITICAL WEEKLY*, Vol. 28 No. 14, 1993, p. 2.

6 Arpita Dey and Dipendu Das, "Motherhood in India: Myths, Theories and Literature", *RESEARCH JOURNAL OF ENGLISH LANGUAGE AND LITERATURE*, Vol. 8 No. 3, 2020, p. 68.

7 French philosopher and a feminist activist. Most notable works include "The Second Sex", and "Ethics of Ambiguity".

the decision to become a mother, is never performed in complete liberty⁸. These observations make us question the very stereotypical notions surrounding motherhood.

In India, 20.3 per cent women are a part of the workforce which is among the worst in South Asia⁹. Further, between 2004-2011, it was reported that 20 million women dropped out of jobs¹⁰. Although there are very few entry points for women into paid employment, the exit gates are many like marriage, pregnancy, child care, elderly care, and unsupportive work environment and so on¹¹. The asymmetry between men and women in the unpaid care work often forces women to compromise on various personal and professional fronts. They are often obligated to take up part time employment or low paying jobs in order to meet their familial responsibilities.

It is not necessary that female earners or breadwinners get the same economic independence when compared to their male counter-part. In the current patriarchal set-up, it is usually the men who are breadwinners and women the care givers¹². Due to this, the key decision-making position of the household is also occupied by the men. Moreover, issues like need for pay parity, halt in career growth, hiring of help for child care services, the extra burden of household chores has an impact on the family dynamics as well as employment. Other pertinent questions to ponder upon are whether women truly enjoy these alpha roles of earning and providing for the family and what are the impacts of these new assumed roles on their relationships at home?

A child is completely dependent on the mother during their infancy for their existence and wellbeing. Mothers are the primary care givers; the same cannot be said about men¹³. The way women are prepared for motherhood, the men are not prepared for fatherhood in the same way because the family unit doesn't function that way¹⁴. Their main role is to provide for the necessities of the mother and the child. In the recent times, the role of men, especially fathers have evolved and they have started sharing more parental responsibilities and contributing to the household chores but even then, primarily the burden of unpaid care giving is carried by women disproportionately.

According to the Time Use Survey 2019, conducted by the Ministry of Statistics and Programme Implementation, women spend six hours on unpaid domestic chores

8 Gerda Neyer and Laura Bernardi, "*Feminist Perspectives on Motherhood and Reproduction*", HISTORICAL SOCIAL RESEARCH, Vol. 36 No. 2, 2011, p. 165.

9 "*Labour force, female (% of total labour force)- India*", THE WORLD BANK, <https://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS?locations=IN>, (visited on October 8, 2022).

10 "*Predicament of Returning Mothers - Research Report*", ASHOKA UNIVERSITY, April 25, 2018, <https://www.ashoka.edu.in/predicament-of-returning-mothers-research-report/>, (visited on October 8, 2022).

11 *Ibid.*

12 *Supra* n. 7.

13 Zinia Mitra (ed.), THE CONCEPT OF MOTHERHOOD IN INDIA: MYTHS, THEORIES AND REALITIES, 1st ed. 2020, p. 45.

14 *Supra* n. 7.

in comparison to one and half hours spent by men¹⁵. This includes carrying out activities like cleaning, cooking, taking care of children and elderly and so on. Though these works may be lauded by the family and society or one might get some emotional satisfaction, it generally comes at the cost of foregoing wage earning and other opportunities.

Sl. No	Gender	Rural	Urban	Average Total
1	Male	2.78	1.83	4.61
2	Female	6.21	5.61	11.82

Table 1.1

The table shows the hours spent daily by males and females in rural and urban areas on household maintenance, management, taking care of children, sick disabled and elderly within the household¹⁶.

This article is an attempt to further encourage a much-required discourse on motherhood and its implications on women's personal and professional lives. It aims to deconstruct the biological motherhood from its social connotations by analysing the different feminist approaches towards motherhood and unpaid care giving work. The article highlights the huge imbalance between the unpaid care giving work done by men and women depicted through the time use survey carried out in India by the Ministry of Statistics and Program Implementation and tries to understand the reason behind such disproportionate division. The article also delves into the various challenges faced by mothers engaged in paid employment in the country. The article concludes that despite the recent judicial interventions, motherhood, reproduction and unequal unpaid care work continues to stay absent from the state policy agendas. The article aims to understand the reasons behind the existing inequalities and suggest ways to tackle them.

Feminist Discourse on Motherhood

Motherhood as an issue has split the feminist movements globally. On one hand feminists have staked their claims for rights based on motherhood because majority of the women tend to embrace motherhood at some point of their lives. On the other hand, other feminists have felt that motherhood has been one of the key factors that has led to the discrimination of women¹⁷. Up until mid-1980's the feminists took a critical approach against motherhood and believed that through rejection of motherhood they can claim equality and rise above subordination. It is often believed that only mothers are the ideal and preferred care takers of the children. In the early nineteenth century, there was an underlying assumption that mothers are best suited for child rearing. During those times, the attitude toward mothering was quite different from today. At that time, harsh and corporally punitive methods were used

15 NSS Report: Time Use in India- 2019 (January–December 2019), MINISTRY OF STATISTICS & PROGRAMME IMPLEMENTATION, September 29, 2020, <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1660028>, p 3.

16 *Ibid.*

17 *Supra* n. 5.

to bring up the child.¹⁸ There was a shift in the perspective during the twentieth century, as children were being valued as human beings and given individual identity. They were supposed to be tended by care and given lots of attention.¹⁹

Carole Pateman²⁰, in her book “*The sexual contract*”, discusses how the contract theory has continued to affirm the patriarchy through various methods of contractual submission of women to men stemming out of a power imbalance through systemic sexism. She further discusses how the social contract led to the men becoming equal members of the society but it led to the relegation of women to motherhood and childbearing forming the core of women’s nature. She equates this condition with that of a sexual contract between men and women which leads to the surrender of women’s bodies and children to men and society. Several feminist researches have demonstrated that the linkage between motherhood and nature was constructed historically, socially, legally and politically. The fact that motherhood was innate to women was refuted by the feminists. The association of maternity with woman’s nature leads to the conflation of biological and social motherhood thereby denying motherhood to be in the nature of work. It is considered to be “care work” as it appears as the natural responsibility of women which is supposed to be performed out of “natural” love²¹.

Understanding the Motherhood Penalty and its Various Connotations - The “Superwoman-Supermom” Syndrome

A woman’s status in the society reaches new heights on attaining motherhood. The centrality of motherhood revolves on how well a woman can adapt into this role and fulfill her maternal duties in the best possible way. Sara Ruddick²² advanced a theory on motherhood which is a “practice grounded in thought.” She insisted that even though mothering is biologically associated to women, certain aspects to it must be taken up by the men. It is important to demystify and de-gender the mothering ideologies to consider other possibilities resulting in changing the patriarchal constructs.

The idea of intensive mothering²³ is extremely demanding on women with respect to their time and emotions²⁴. Almost all the mothers who engage in intensive mothering feel guilty whenever they leave their children in the care of others or alone. Their achievement in other domains of their lives like paid employment or having meaningful relationships with others, are usually undermined by the lingering inconsistencies about the ethics of their choices and competence of their motherly duties. The mothers often tend to question their methods of mothering which leads

18 *Supra* n. 7.

19 Emma Gross, “*Motherhood in Feminist Theory*”, *AFFILIA JOURNAL OF WOMEN AND SOCIAL WORK*, Vol. 13 No. 3, 1998, p. 269.

20 A British feminist and political theorist, member of British Academy.

21 Carole Pateman, *THE SEXUAL CONTRACT*, 1st ed. 1998, p. 112.

22 Sara Ruddick, feminist philosopher, French Philosopher and a feminist activist. Most notable work “*Maternal Thinking: Toward a politics of Peace*”.

23 Dedicating oneself to the needs of the child without taking care of themselves at all, it is child centric, labour intensive and financially expensive.

24 *Supra* n. 5.

to the development of self-insufficiency amongst them. “Is this the best I can do for my child?”, “Am I doing the right thing?”, “What if my child grows up and doesn’t meet the standard set by the society?” and so on. There is a constant pressure on a mother to perform and deliver from her family, friends and the society. It is as if the individuality of a woman comes to an end once she becomes a mother. Her entire life becomes centered around the child. The post-modern feminists argue that the women need to be esteemed for having their individual needs, aspirations and desires. Womanhood has typically required women to sacrifice their own lives for their children and husbands. Any other alternative to the same is considered to either be morally reprehensible or not viable. Due to the societal constructs and pressure women are compelled to do more work than they can, which results in poor mental and physical health which further manifests in different ways²⁵.

In today’s fast paced lifestyle majority of the women have been caught up in the “superwomen-supermom” syndrome. These women constantly strive to achieve everything perfectly and never keep themselves as a priority. They mostly lack the time and energy to self-indulge and even when they do, it is surrounded by a constant guilt and thoughts of selfishness. Usually, the goals set by such women are of unusually high standards and beyond reason. Women tend to measure their self-worth entirely on the basis of fulfilling such goals and tangible accomplishments²⁶.

In majority of the cultures around the world, girls from a young age are taught to help their mothers with the household chores and this continues even after they grow up and become a part of the workforce. They continue to carry the dual responsibilities of the household as well as the professional work. There is a certain amount of hesitance from women to seek support from relatives or friends because they fear people would judge them. There is a need to deconstruct this syndrome by busting the myths like nothing can ever get done if not done by women or the fact that the woman of the house is responsible for taking care of everyone at her home. Due to the lack of policies for affordable child care and paid family leaves, these extra works done by the women leave them completely burnt out.

Ms. Pogrebin²⁷ observes that if we want to live in a democratic society, the beginning of the same should happen from the home. Our families should be democratic families, otherwise the hierarchy will be built-in and the same would be the outcome. It is important that we raise the child in a democratic family in which

25 Emma Gross, “*Motherhood in Feminist Theory*”, *AFFILIA JOURNAL OF WOMEN AND SOCIAL WORK*, Vol. 13 No. 3, 1998, p. 271.

26 Nicole L. Oliver, “*The Supermom Syndrome: An Intervention Against the Need to Be King of the Mothering Mountain*”, *SCHOOL OF COMMUNICATION & CULTURE ROYAL ROADS UNIVERSITY*, p. 22, <https://www.viurrspace.ca/server/api/core/bitstreams/b273238f-7778-4b3f-b78f-43a9420415d8/content>, (visited on October 6, 2022).

27 Founding editor of “Ms. Magazine” and author to several books on gender issues.

both the parents create a work-life balance and contribute to the development of their children. It will help in fostering the idea of equality in the children²⁸.

Issues Concerning Unpaid Care Giving and at-Home Responsibilities

Women are expected to conform to the perfect standards set by the society at each and every level. They must be perfect daughters, sisters, partners, daughter-in-law's, employees and last but not the least mothers. The problems of these stereotypical and unreasonable standards set by the society clearly depict the disturbing situation which exists across the world. In India, culturally the families come together to support the upbringing of the children. However, with the popularity of nuclear family in the present times, the system of joint family seems to have been fading away. Without cooperation from the family members, women at large and women engaged in paid employment are left with extra burden of work. Due to this, many women drop out of their paid jobs fully or take a sabbatical from it to focus on the upbringing of the children, with the intention to resume work after few months after the passage of their child's infancy but for many of such women job resumptions do not materialize at all. Even if they do resume their jobs, it is usually part-time so that they can devote more time on taking care of the child. At times women sacrifice and tend to take up low paying jobs because their peers would have moved forward when they were sitting back at home and taking care of their children.

The treatment given to unpaid care giving work done by women or mothers at home needs to be changed. Women slog day in and out to take care of the household, children, sick and elderly without any break. The reason behind women engaging in unpaid domestic work range from cultural, social and religious constraints to choices made due to failure of alternatives to career where there is low opportunity cost of unpaid work in the market. For mothers engaged in paid employment, there is the dual responsibility and pressure of taking care of the household and their job. Of course, having parents, in-laws or domestic help around helps but still the time spent by women in care giving is four times to that spent by men in the household in India and almost twice globally²⁹. Even when family hires domestic help for taking care of the household chores, the extra unpaid work falls on the women itself and hardly shared by men. It is true that the family dynamics have seen a gradual change in the recent past and men have increased their participation in the household chores but still there is a long way to go.

In 2015, Ariel India came up with an ad campaign *#ShareTheLoad*. The campaign was launched to address the issue of inequality existing within the Indian households pertaining to the unbalanced division of household chores between men and women. The award-winning campaign proved to touch a chord with several people which led to over 1.5 million men in India pledging to share the load. Ariel

28 Lisa Selin Davis, "It's 2021. Why Is 'Supermom' Still Around?" THE NEW YORK TIMES, June 4, 2021, <https://www.nytimes.com/2021/06/04/us/supermom-work-family-kids.html>, (visited on December 8, 2022).

29 NSS Report: Time Use in India- 2019 (January–December 2019), MINISTRY OF STATISTICS & PROGRAMME IMPLEMENTATION, <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1660028>, p 3.

continued this campaign over the years by improvising on the content and promoting that it's high time men whether husbands, fathers or sons take the responsibility of the household chores like laundry and share the load of their partners. The campaign also promoted the idea that we should raise our sons like we have been raising our daughters so that the future generations are more equal³⁰.

There are several costs attached to unpaid care giving in a family. The entire debate around un-paid work can be better understood by understanding the economics behind it. If the hours of unpaid work rendered by women are considered, it can lead to a major contribution to the GDP of a country. For example, in the United States, a study was conducted by the Mckinsey Global Institute and it was found that if women participated in the global economy on an equal basis with men, it would add \$28 trillion to the annual global GDP of the US by 2025³¹. Therefore, there is need to recognize the unpaid care work as valuable work and bring out changes in the state policies to accommodate the domestic work rendered by women at their homes.

The Workplace Challenges Faced by Working Mothers

There is a need to clarify the usage and meaning of the term “working woman/mother”. There is no such thing as a woman or a mother who doesn't work. But there surely are women and mothers who aren't paid for their domestic labour. The work done by women may be unpaid, underpaid, underappreciated or invisible but they have always worked³². Apart from adding to the national economy working women also play a vital role in improving the well- being of their individual families. According to 2011 census³³, there has been an 8% increase in women wage earners in India with states like Karnataka and Maharashtra going as high as 14%³⁴. This emerging trend of more and more females leading in running their households financially has both cultural and economic implications. A majority of these women face varied forms of challenges at home and work due to the twin roles played by them. Often nothing they do is enough either at home or at their respective workplaces. The situation is clearly deplorable for women employed in the un-organized sector because they hardly have access to decent pay, benefits and perks enjoyed which their counterparts enjoy in the organized sector.

30 “*Share the Load*”, ARIEL INDIA, <https://www.ariel.in/en-in/share-the-load>, (visited on September 28, 2022).

31 Jonathan Woetzel et. al. “*How Advancing Women's Equality Can Add \$12 Trillion to Global Growth*”, MCKINSEY AND COMPANY, September 1, 2015, <https://www.mckinsey.com/featured-insights/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth>, (visited on September 25, 2022).

32 Caroline Perez, *INVISIBLE WOMEN: EXPOSING DATA BIAS IN A WORLD DESIGNED FOR MEN*, 1st ed., 2019, p. 103.

33 Sher Verick, “*Women's Labour Force Participation in India: Why is it so Low?*”, https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/genericdocument/wcms_342357.pdf, (visited on October 5, 2022).

34 Participation in economy, http://mospi.nic.in/sites/default/files/reports_and_publication/statistical_publication/social_statistics/WM16Chapter4.pdf, p. 61.

A survey conducted by the Genpact Centre for Women's Leadership, a wing of the Asoka University, it was revealed that 50% of working women in the country leave their paid jobs to take care of their children at the age of 30. Only 27% out of that return and even among those who do manage to return, 48 % drop out within four months of rejoining the workforce.³⁵ Further only 16% of these women advance in their careers post their return while majority of them are either stuck at the same position and pay or join with lesser pay post motherhood³⁶. These are probably the classic examples of the motherhood penalty. Motherhood penalty is a term used to describe a phenomenon by which women's pay decreases once they become mothers³⁷.

A working mother takes care of her child, family and household along with maintaining a job. Working women can be divided into two categories- one who work from home for financial gain and second who go to their place of work leaving their child/children behind. For single parents especially, single mothers the challenges are even harder. They have the extra responsibilities of carrying out the entire financial expenses by themselves. There are certain notions against working women in the society as women working for paid employment especially after having children are always required to choose between family and career.

A working mother especially the one who enjoys the fortune of being able to handle her work and life balance enjoys the stimulation, growth and financial independence that come with the job. She is able to put use of her education and skills and contributes to the family income which leads to a better standard of living. As it's said that motherhood makes a women complete but financial independence gives her the true sense of fulfillment.

In India, paid maternity leaves up to twenty-six weeks is given under the Maternity Benefit Act, 1961³⁸ to women working in the organized sector, which is the third highest in the world³⁹. But for most women twenty-six weeks are not enough to return to work. Apart from this the lack of infrastructural support at workplace like crèche or daycare facilities forces many women to drop out of their jobs. India provides the third highest⁴⁰ paid maternity leaves in the world. Maternity leaves of twelve weeks are also offered to women for adopting babies below three months. Further women who already have two or more children, the paid maternity leave is only for twelve weeks. Also leave up to six weeks is granted to women who have suffered miscarriage. This law is applicable only to those companies/institutions where there are more than ten employees. Other facilities like provision of crèche by

35 Ashoka University, "Predicament of Returning Mothers", Research Report <https://www.ashoka.edu.in/predicament-of-returning-mothers-research-report/>, (visited on October 8, 2022).

36 *Ibid.*

37 Maitreyi Bordia Das and Ieva Žumbytė, "*The Motherhood Penalty and Female Employment in Urban India*", Policy Research Working Paper 8004, WORLD BANK GROUP, p. 12

38 An amendment to the impugned Act, in the year 2017 increased the paid maternity leave from 12 weeks to 26 weeks.

39 Section 5 of the Maternity Benefit Act 1961.

40 Canada and Norway occupy the first and second position respectively.

the employer if the number of employees exceed fifty and further facilitating and allowing at least four nursing breaks to the employee for visiting the crèche have also been provided under the impugned legislation. Even though India is one of the leading nations in terms of providing the maternity benefits the reality suggests that a very minuscule percentage of women i.e., one percent only benefit from the law. Majority of the women are employed in the un-organized, informal sector or in organizations which employ less than 10 employees to which the law is not applicable.

In the year 2017, Tech giant, Apple Inc., inaugurated its much talked about, a dream project of Steve Jobs, its new office sprawling over 150 acres built at a cost of five billion dollars over a period of eight years in California⁴¹. The state-of-the-art office designed to look like a spaceship boasted of a wellness centre, gym, spa, yoga centre, dental and medical centers and many more luxurious amenities except, a day care. This was severely criticized by the feminists and working mothers. According to them, the lack of a day care facility clearly showed the company's lack of valuing a work life balance. Further, the fact that a multi-billion-dollar company sitting at the heart of Silicon Valley overlooks at such an important feature clearly shows the importance that is given to working mothers and their needs.

As women, we are encouraged to educate ourselves, excel in our jobs and ultimately attain motherhood as we are constantly judged by the stereotypical norms imposed on us by the society. The lack of employment policies in favour of working mothers often force them to leave their jobs and choose family over career, as the primary responsibility of taking care of the child and family falls on the shoulders of them. It's quite a sad picture to imagine that a majority of the companies do not provide for the infrastructure support necessary for making work place a truly holistic centre for their women employees. It is a reality that these roles impact women adversely than men. There is a need to recognize the lack of basic facilities and fix them in order for women to actually thrive at home and especially at workplace.

Apart from infrastructural requirements, other issues like the workplace bias with regard to allocation of work, timings and other benefits post motherhood. Usually, parenthood changes the way in which both women and men are viewed in terms of expected work focus, efficiency and expectations of dependability and working long hours. It has also been noticed that there are higher chances of existence of bias against mothers irrespective of the fact whether they are students, married, single or working. This has been termed as the Maternal Wall.⁴²

Women have come a long way from purely being care givers to being a part of labour force. Their roles have also seen a dramatic change over the years. From staying at home and involving themselves in mostly precarious work involving un skilled labour to moving towards more professional and skillful jobs. But still a larger

41 Shara Tibken, "Apple's New Campus Has Just About Everything, Except Day Care", CNET, May 18, 2017, <https://www.cnet.com/news/apples-campus-apple-park-spaceship-has-just-about-everything-except-daycare/>, (visited September 29, 2022).

42 Joan C. Williams, "The Maternal Wall", HARVARD BUSINESS REVIEW, <https://hbr.org/2004/10/the-maternal-wall>, (visited on October 19, 2022).

question looms, are women actually considered as equal intellectuals and offered jobs based purely on merits?

Due to the COVID pandemic everyone's lives were affected. People lost their family and friends and the entire work dynamics changed. The world moved online and so have the white-collar jobs. But for most women, it has been no less than a nightmare. With no domestic help, caretakers or cooks, the added child care, cleaning and cooking managing the work impacted the personal and professional lives of millions of women around the globe.

Judicial Approach on Unpaid Care Work and Its Importance

The Hon'ble Supreme Court of India in few judgements has tried to highlight the issues pertaining to unpaid care work rendered by women. In *Lata Wadhwa v. State of Bihar*⁴³, the SC while awarding compensation to the family of the deceased which included housewives who were injured in fire, attempted to estimate the value of services rendered by them to the house and decided to award a sum of Rs 3,500 as maintenance by fixing Rs 36,000 as the annual income for wives aged between 34 to 59 and Rs 20,000 annually for wives above the age of 59. In *Malay Kumar Ganguly v. Dr. Sukumar Mukherjee*⁴⁴ and others the SC held that every housewife contributes to the house hold and it is capable of being measured on monetary terms although the emotional aspect of it cannot be measured. In *Kirti v. Oriental Insurance Company*⁴⁵ the Supreme Court of India emphasized on the importance of non-financial contribution of wife in a household and observed that it is imperative that the home makers be given recognition of their hard work, labour and sacrifices in furtherance to our International obligations and Constitutional values thereby ensuring social and economic equality.⁴⁶ The Hon'ble court in this case increased the compensation from Rs 22 lakhs awarded by the Delhi High Court to Rs. 33 lakhs in lieu of the death of the deceased, who was a housewife.

Usually in cases involving insurance claims, the judges look into the aspect of opportunity cost⁴⁷ of a woman's decision to stay and home and engage in the domestic chores, minimum wages of skilled and unskilled workers along with their educational qualification and surviving children if any. But, as remarkable as these judgements are a major fallacy about them is the fact that these judgements have calculated the worth of the home maker not during their life time but after their death. The Indian law doesn't recognize the community property model⁴⁸ of property division and follows the separate property model under which the property is retained by the spouse in whose name the property has been registered.

43 AIR 2001 SC 3218.

44 2009 (10) SCALE 675.

45 2021 SCC Online SC 3.

46 Justice Ramana in the impugned judgement.

47 Opportunity cost is the benefit given up by engaging in an activity relative to engaging in an alternative activity. Women tend to engage in unpaid care work by letting go off, of paid work opportunities.

48 Under the community property model, the assets acquired by the spouses during the subsistence of their marriage is equally divided between them upon divorce irrespective of their financial contribution in buying them.

Conclusion and Suggestions

The responsibility of unpaid care work must be shared by men and women equitably. It should not only be the job of the women of the house to take care of all the domestic chores. Family as a unit should deviate from the existing patriarchal set up to being more inclusive and sensitive about the needs of women especially mothers. A change must also be reflected at the society level which must take into consideration several sacrifices made by women and appreciate and value them by not being judgmental about the choices made by a woman. Further, there is a need to bring out some changes in the workplace by ensuring there is access to secure infrastructure facilities like day care and creche to support working mothers. It is the duty⁴⁹ of the state to provide adequate facilities which must reflect through the state policy agendas. There are other important issues that must also be tackled for example the lack of pay parity between men and women or hiring women for less skillful jobs or discriminating against women with respect to the nature of the work.

Certain activities like trip-chaining are very common among women and especially mothers⁵⁰. Usually, mothers drop their child to school on the way to work or take the elderly for medical care or buy groceries on the way home. Women mostly use public transport to commute when compared to men who drive themselves around. Therefore, the public transport facilities must be such that it helps them to finish these ancillary works and report to work on time. A working mother juggles several roles all through the day along with dealing the stress of family and work.

Another way to address the issues relating to the asymmetrical division of unpaid care work between men and women could be providing men longer and paid paternity leaves. It is imperative to provide paid paternity leaves as it sets the foundation for more egalitarian parenting arrangements. Working women upon giving birth utilize the paid maternity leave for taking care of their child however the same cannot be said true for new fathers. There are few private companies that offer paid paternal leave of up to one month but there seems to be reluctance among men to avail such leaves. The reasons could be the fear of getting stigmatized by their peers and losing out on opportunities. Often the discussion or debate revolving parental leave is focused on women or maternity leaves; this leads to reinforcement of stereotypes of women as primary caregivers which in turn reinforces the gender discrimination at workplace.

49 Article 39 (d) of the Constitution of India.

50 Caroline Perez, *INVISIBLE WOMEN: EXPOSING DATA BIAS IN A WORLD DESIGNED FOR MEN*, 1st ed., 2019, p. 54.

RAMIFICATIONS OF GENDER STEREOTYPING IN JUDICIAL PROCESS: A CRITICAL ANALYSIS

Lekshmi Priya R.*

Abstract

Dispensation of justice is the foremost function of judicial system. Impartiality is considered as the insignia of administration of justice. It is assumed that race, gender, skin colour, ethnicity and so forth never form as a constituent for decision making process. But it is perceivable that judiciary is lacking gender sensitization especially when deciding matters in which non dominating gender groups become subjects in judicial process. Judiciary which is responsible to strengthen rights of all groups of citizens by annihilating gender discrimination, often reiterates the paternalistic attitude of society through gender stereotype judgements. Courtrooms become venue for re-victimization especially during the trials of sexual assault cases owing to the want of gender sensitization among judges. The repeated misogynistic verdicts which create doubts in the mind of populace about the ideals of equality possessed by the judiciary, tampers the faith upon it. It is ascertained that the implicit biases of each judge play vital roles in decision making process. The notions about 'gender' and 'gender roles' which have been formulated from the initial stage of life may cause unconscious inclinations upon the mind of arbitrator and indeed reflect during the judicial process. Biased treatment towards non dominating gender groups when they become accused or victim or witness in the legal process, often leads to unfairness and injustice. Such prejudicial stance towards parties is against the cardinal principles of administration of justice. Judicial pronouncements that contain bigotry ratios definitely result in long lasting repercussions in the society. The paper aims at unveiling the gender stereotype approach of Indian judiciary due to the deeply entrenched popular legal narratives. It also tries to unfold how judges categorises gender roles, glimpsing through their patriarchal lenses. The paper also intends to analyse various judgements through a critical view point to understand how the common concepts on gender, influence the judicial decision-making process.

Keywords: Gender Sensitization, Non-Dominating Gender, Judicial Process.

Introduction

Judiciary is contemplated as the steward of the Constitution. It has the paramount duty to strengthen the lofty Constitutional ideals. The standpoints taken by the Indian judiciary for underpinning the equality principles are indeed laid the bricks for

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building up an egalitarian society. The judicial stipulations against the discriminatory line of actions strived to ripen the social equality in our society. Though the gender inequalities which are the consequences of antediluvian societal perceptions have challenged the judiciary, it has been sheared irrational notions by the sword of law bestowed by the Constitution. Judiciary as a major pillar of democracy has the ultimate responsibility to give adherence to the concept 'justice' in all means. Through countless judicial pronouncements, it has been strained to uplift the justice and fairness by the way of eliminating gender discrimination. However, many gender roles imbibed in the society is socially and historically constructed and reflected in the gender- based biases. A close reading and re-reading of many of the judicial decisions indicates that the social construction of gender roles and gender biases reflected in the judicial process as well. In judicial process, an analysis from the lower-court decisions show the anecdotes and obiter dicta reflects the popular gender biases. The decisions of the constitutional courts take a relatively better positions, however, this paper does a critique of the both. There are many instances we could see judiciary as flag bearer of equality, but we cannot ignore the instances of reinforcing gender roles and reiterating patriarchal social values. For example, directing sexual assault victim to tie *rakhi* to the accused¹, blaming dress of rape victim as 'provocative'², asking rape molester to marry victim³ and so forth amplify the subsisting gender stereotypes in the society. In order to ensure the people's faith in justice delivery system courts should take an extra consideration and scrutiny in their decision making of matters involving gender- justice.

This paper is germinated on the premise of Supreme Court's recent judgement in *Aparna Bhat v. State of Maharashtra*⁴ in which the Apex Court acknowledged the lack of gender sensitization of Indian judiciary. The paper analyses how a predominantly patriarchal social order, which always pretends as gender neutral, misinterpret the law and reinforce discrimination against women. The paper is divided into two parts; the former part discusses about the judicial attitude which manifests the patriarchal notions of the society and the latter part discusses the gender sensitized judgements which indicates a transformative jurisprudence. The author has espoused textual analysis method for interpreting and understanding the approach of judiciary when marginalized gender groups become subjects of judicial process.

Trespassing of Patriarchy into Justice

Judiciary is recognized as "*a body to resolve disputes according to law*"⁵. It is presumed that judiciary arrives at a decision solely on the basis of law. Anything

1 *Vikram v. State of Madhya Pradesh* 2020 SCC OnLine MP 3171.

2 *Civic Chandran @ C.V. Kuttan v. State of Kerala* 2022 SCC OnLine Dis Crt (Ker) 2.

3 Adithyan A.K. and Debayan Roy, "*Will you Marry Her? Supreme Court Asks Government Servant Charged with Repeatedly Raping Minor Girl*", BAR AND BENCH, March 1, 2021, <https://www.barandbench.com/news/litigation/will-you-marry-her-supreme-court-asks-man-charged-rape-minor-girl>, (visited on January 10, 2023).

4 2021 SCC OnLine SC 230.

5 French R., "*Judicial Activism - The Boundaries of The Judicial Role*", THE JUDICIAL REVIEW, Vol. 10, 2010, p. 2.

other than evidence and law has no role to play in the scenario of judicial process⁶. However, the conventional values on gender inequalities which are reflected in the conscious of judges sometimes turn to be the ratios of judgements⁷. This does not implicate that the judicial wing of the nation, which has been an exemplar for its commitment to Constitution is applying law in a rudimentary manner. But the reasoning behind the verdicts which contain gender stereotypes have paternalistic shades; certainly, I would like to argue that the rationale of most of the gender stereotype judgements is based on the notion of ‘romantic paternalism’. Romantic paternalism insists protection for women in every realm of life by considering them as weaker group (not able to self-guard), “*in practical effect, put, women, not on a pedestal, but in a protective cage*”⁸. When the question in hand is about a person from a non-dominating gender group (women, LGBTQAI community), judges do apply reasoning with prejudicial major premise, magnificently illustrate justifications for their inference and roam for precedents advocating their inclinations. There is no wonder that the society which is historically patriarchal, accepts and admire such observations profoundly. Because the physical structure⁹, child bearing capacity¹⁰, biological peculiarities¹¹ and so on, traditionally placed woman in a subordinate status. Owing to this secondary position, society conferred her inferior attributes which triggered gender stereotyping. Assigning roles, responsibilities, abilities, characteristics and so forth depending upon the gender group in which an individual belong is outlined as “gender stereotyping”¹². Traditionally ascribed roles and responsibilities have led to the concept that women are weak and need protection. Ancient philosopher Aristotle regarded woman as an unfit being by saying that “*female is passive and male is active*”¹³. So, the stereotyping images drawn from time immemorial brought down her in a greater way. The universally accepted inferiority suggested protectiveness from superior gender. It has been assumed that men who are inherently superior have to protect women. This discrimination in the name of protectiveness made her more and more weak in the social as well as political sphere.

6 “*Independence*”, COURTS AND TRIBUNALS JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/independence/>, (visited on September 28, 2022).

7 Timothy J. Capurso, “*How Judges Judge: Theories on Judicial Decision Making*”, UNIVERSITY OF BALTIMORE LAW FORUM, Vol. 29 No.1, 1998, p. 10.

8 *Frontiero v. Richardson* 411 U.S. 677.

9 Abeda Sultana, “*Patriarchy and Women’s Subordination: A Theoretical Analysis*”, ARTS FACULTY JOURNAL, Vol. 4, 2010-2011, pp. 2-3.

10 James Wright, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES, 2nd ed. 2015, p. 26.

11 Carol Vlassoff, “*Gender Differences in Determinants and Consequences of Health and Illness*”, JOURNAL OF HEALTH, POPULATION AND NUTRITION, Vol. 25 No. 1, 2007, p. 48.

12 UNICEF, GENDER EQUALITY: GLOSSARY OF TERMS AND CONCEPTS, November, 2017, <https://www.unicef.org/rosa/media/1761/file/Gender%20glossary%20of%20terms%20and%20concepts%20.pdf>, (visited on September 29, 2022).

13 Roberta Milliken, AMBIGUOUS LOCKS: AN ICONOLOGY OF HAIR IN MEDIEVAL ART AND LITERATURE, 1st ed. 2012, p. 18.

The things become more crucial when the authorities which are supposed to correct those outdated philosophies by upgrading gender justice reproduce popular understanding of gender binaries. Knowingly or unknowingly, this has reflected in the gender stereotype judgements. The justification of it might be the ‘protective nature’ of law which they are applying. In a very radical and sharp observation, Catharine MacKinnon pointed that “the law sees and treats women the way men see and treat women”¹⁴. Even though the legal provisions sculpted in the books seems as gender neutral and if the person who interpret has prejudice, the inference in many occasions becomes a biased one. Human reasonings are always influenced by his/her unconscious biases¹⁵ produced by the space and time they live in. So, the implicit as well as the explicit biases of adjudicator play a vital role in the decision-making process. The implicit biases on gender which transmits intergenerationally¹⁶ influences in the judicial process. Thus, a judge who fails to properly recognize the gender differences, substantially miss to reach at correct decisions even when there are appropriate legal canons for it. In such situations judiciary takes protectiveness as a camouflage to cover up their gender control.

Protective Discrimination: A Myth or Reality

A conventional symbol of marriage viz., *thali*¹⁷ has turned into significant factor in deciding cases can be ascertained from the latest judgement of Madras High Court in *C. Sivakumar v A. Srividhya*¹⁸. In this case court has given excessive weightage to the act ‘removal of thali’ in the matrimonial case and thereby arrived at an inference that removing thali amounts to mental cruelty towards husband. In this case, court has relied on the ratio of *Vallabhi v. R. Rajasabahi*¹⁹ which says:

*“It is known fact that no Hindu married woman would remove the “Thali” at any point of time during the lifetime of her husband. “Thali” around the neck of a wife is a sacred thing which symbolises the continuance of married life and it is removed only after the death of Husband. Therefore, the removal of “Thali” by the petitioner/wife can be said to be an act which reflected Mental Cruelty of highest order as it could have caused agony and hurted the sentiments of the respondent”*²⁰.

Through such a statement the judiciary has accredited the voicelessness of a gender group especially when they step into the role of a wife. Judiciary, which is expected to be the voice of voiceless turned as a patriarchic monarch and reasserted the dependent role of women. When the legislative intentions which are mostly

14 Catharine A. MacKinnon, “*Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*”, SIGNS (CHICAGO), Vol. 8, 1983, p. 644.

15 John F. Irwin and Daniel L. Real, “*Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*”, MCGEORGE LAW REVIEW, Vol. 43 No. 1, 2010, p.2.

16 An empirical study conducted by Diva Dhar, Tarun Jain and Seema Jayachandran on “Intergenerational Transmission of Gender Attitudes: Evidence from India” discloses that the attitude of children towards gender equality is highly influenced by the parental attitude towards gender.

17 Thali is an ornament worn by married woman around her neck as an insignia of marriage.

18 AIR 2022 Mad 258.

19 AIR 2017 (NOC 289) 94.

20 AIR 2017 (NOC 289) 94, p. 559.

gender insensitive is interpreted by the judges with similar insensitivity, becomes gender- discriminative in very nature.

Thus, it is apparent that the perceptions formulated culture -specifically, impact the justice dispensation²¹. In determining the acceptable common culture of a society, religions play a vital role. “*Religions have a great influence in reinforcing the idea of differential gender role for men and women*”²². In a recent observation from one of the lower courts in Kerala “*a wife should be minister in purpose, slave in duty, Lakshmi in appearance, Earth in patience, mother in love and prostitute in bed*”²³ in a divorce judgement by the adjudicating body can only be seen as a perpetuation of paternalism which also gained contributions from religions. Patronizing women in the name of their motherhood or other biological peculiarities may appear as empowerment however such patronization in reality, conceal discrimination. Such an observation unveils the masculine ruminations of judiciary. The subordination of feminine gender alleging that they are inherently weak and not equal to men is seen in the judgement in a sophisticated language. The merging concern is that the society including the stakeholders often fail to understand the danger of gender stereotyping judgements behind the smokescreen of protectiveness.

The nature of discrimination changes according to the time and space as gender is a social construct went through evolution. Hence, many of the past celebrated cases in protecting equality and the re-reading of the same is an important academic exercise in the legal studies. For example, the much-celebrated *Nergesh Meerza case*²⁴ the regulation issued by the Air India authorities regarding the retirement of air hostess “*on attaining thirty-five years age or if they marry within four years of their service or upon their first pregnancy*” was challenged. This case can be marked as a vain attempt of Supreme Court of India to escalate gender justice. Because, in spite of its analysis of the gender as well as the equality concept of law, it has utterly failed to hollow out the objectification of women lies in the stipulation of “*young and attractive air hostess*”. Now, when we re-read this judgement, it reveals the patriarchal mind set when it suggested to replace the clause pertaining to first pregnancy with “*third pregnancy*” by placing the responsibility for family planning and upbringing of children on the shoulders of woman. By saying that “*the termination of the services of an air hostess under such circumstances is not only a callous and cruel act but an open insult to Indian womanhood the most sacrosanct and cherished institution*”²⁵, the judiciary reiterated the status of women by stereotyping their womanly roles and position. The appellate judiciary itself did a gender-based reflection this later on in *Navej Singh Johar’s case* and let me discuss it in the second part of the paper.

21 Linda L. Lindsey, GENDER ROLES: A SOCIOLOGICAL PERSPECTIVE, 6th ed. 2001, p. 391.

22 Sujit Kumar Chattopadhyay, GENDER SOCIALISATION AND THE MAKING OF GENDER IN THE INDIAN CONTEXT, 1st ed. 2018, p. 212.

23 *V.V. Prabhakaran v. T. Chandramathi I* (2019) DMC 92 (DB)(Ker.).

24 *Air India v. Nergesh Meerza* AIR 1981 SC 1829.

25 *Ibid.*

Placing woman in a holy position by stating that “*a woman in our country occupies a very high and respected position in the society as a mother, a wife, a companion and a social worker*”²⁶ does not make the standing of them in any better position but definitely prompt stereotyping. Furthermore, judiciary has played a critical role in glorifying motherhood by placing mother as the sole person responsible for care taking the child. Pronouncements like “*Indian cultural and traditional practices would go to show that motherhood is an essential part of family responsibility*”²⁷ and “*Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes*”²⁸ ingeminated the traditional roles of feminine gender as well as the misconceptions about the institution of marriage over and over. Hence, it is significant to have the realization that the protective jurisprudence and relying on romantic paternalism in decision making in the judicial process reproduces ‘gender stereotyping’ and undermines the gender justice.

Sexual Violence and Gender Stereotyping

The instances of the gender stereotype approaches in the judicial process are more rampant and evident in sexual assault cases. The trials of such cases become an instance of ‘sexual objectification of women’. Sexual objectification occurs whenever a woman’s body, body parts, or sexual functions are separated out from her person, reduced to the status of mere instruments, or regarded as if they were capable of representing her”²⁹. In sexual offences, judiciary with the aid of the rape law, objectifies the gendered bodies and thereby generalize certain myths and stereotypes about victims of sexual assault. Court’s portraits on ‘how a sexual assault victim should react at the time/soon after the offence’, functions as yardstick for decision making³⁰. Acquitting accused person by pointing out that “this is not how a rape victim ought to behave”³¹ can be seen from the infamous *Mathura case*³² to the recent judgment in which Karnataka High Court stated that “after the perpetration of the act she was tired and fell asleep, is unbecoming of an Indian woman; that is not the way our women react when they are ravished”³³. The formalistic approach of

26 *Ibid.*

27 *Mini. K.T. v. Senior Divisional Manager* 2018 (1) KHC 307.

28 *Mr. X v. Hospital Z* (2003) 1 SCC 500.

29 Barbara L. Fredrickson and Tomi-Ann Roberts, “*Objectification Theory: Toward Understanding Women’s Lived Experiences and Mental Health Risks*”, *PSYCHOLOGY OF WOMEN QUARTERLY*, Vol. 21 No. 2, 1997, p. 175.

30 Mrinal Satish, *DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA*, 1st ed. 2017, p. 106.

31 *Tukaram v. State of Maharashtra* AIR 1979 SC 185.

32 *Ibid.*; in this case the allegation of the prosecution was that the both appellants have brutally raped Mathura in the police station where the appellants were employed. The accused were sentenced for imprisonment, finding that they have committed the offence of rape. But the Hon’ble Supreme Court has reversed the order of High Court and acquitted the appellants finding that there was consent from the part of prosecutrix.

33 *Rakesh v. State of Karnataka* Criminal Petition No.2427 of 2020.

judges in finding the ‘consent’ factor which is very much relevant in rape cases, is perceivable from the cases like *Suryanelli case*³⁴, *Pratap Misra’s case*³⁵ and so on.

Though the court tried to correct the misinterpretations and thereby view things through a feminist perspective several times, it has failed to overcome from its stereotype notions about gender. Patronizing comments which suggest “*body of woman is her own temple*”³⁶ extremely solidified the stereotypes. The unnecessary idealisation of womanhood by Indian courts through interlinking the values and chastity, it has generated myths and stereotypes about rape victims³⁷. Thus, it becomes inevitable for the victim to prove herself that she is a ‘typical victim’ who possesses all the values in conformity with the stereotypes³⁸. It is evident from Supreme Court of India’s observation in *Shrawan v. State of Maharashtra*³⁹ that the victim with her demeanour has impressed the court. In this judgement, the apex court has tried to support the argument of victim, against the contention of false rape accusation. But unfortunately, the language used by the Supreme Court itself was stereotypic.

Through these judgements it is evident that the judiciary is also guided by the conventional concept of considering the rape victim as an impure being. Because “*rape is an offence where the victim, rather than the offender, is socially stigmatized*”⁴⁰. Judgements of sexual assault offences points out how judiciary fail to recognize the intersectionality while going through the decision-making process. If the court had attempted to look into the intersectionality, it would not have acquitted the accused in rape case stating that the rape victim who belonged to SC/ST community “*kept quiet for six days and did not whisper a word about it to anyone*”⁴¹. The interconnectedness of caste and gender biases is very much visible here. Misogyny is not something manifested only by masculine gender; irrespective of gender identities the gender stereotypes which are deep rooted in the society have proliferated in every individual’s understanding and world view. Knowingly or unknowingly women internalize the misogynic concepts and patriarchal social values existing in this male dominated society.⁴² Thus the true reason behind why a woman judge declared “*touching a girl’s breast without skin-to-skin contact is not a graver offence*”⁴³ is nothing other than the level of internalization of sexism and

34 *Jose v. State of Kerala* 2014 Cri LJ 1917.

35 *Pratap Misra v. State of Orissa* (1977) 3 S.C.C. 41.

36 *State of M.P. v. Madanlal* 2015(7) SCC 681.

37 Mrinal Satish, DISCRETION, DISCRIMINATION AND THE RULE OF LAW: REFORMING RAPE SENTENCING IN INDIA, 1st ed. 2017, p. 43.

38 *Ibid*, p. 44.

39 2007 2 SCC (Cri) 677.

40 Rajendra Pandey, “*Rape Crimes and Victimization of Rape Victim in Free India*”, THE INDIAN JOURNAL OF SOCIAL WORK, Vol. 47 No. 2, 1986, p. 180.

41 *Jagannivasan v. State of Kerala* 1995 Supp (3) SCC 204.

42 “*Internalised Patriarchy: The Undying Seeds of Sexism in Our Minds*”, FEMINISM IN INDIA, June 7, 2019, <https://feminisminindia.com/2019/06/07/internalised-patriarchy-women/>, (visited on September 30, 2022).

43 *Satish Ragde v. State of Maharashtra* Criminal Appeal No. 161 of 2020, https://www.livelaw.in/pdf_upload/pressing-a-childs-breast-without-skin-to-skin-

misogyny. Such a judgement clearly reveals the judiciary's mechanical application of literal interpretation to the POCSO Act. It would have been accurate, if the court had tried to find out the 'mens rea' or the 'sexual intention' behind the act rather than the quantum of 'physical contact' in it⁴⁴.

Glimpse of Transformative Jurisprudence

It is inappropriate to conjecture that all judges are under the control of gender stereotypes. Of late, the changes in the gender discourses in the public sphere reflect in judicial approaches as well. Nevertheless, the Indian judicial system has produced judgements which encompasses gender stereotypes, a new trend of radical approach in the realm of gender justice is somewhat visible. The discourse on the status of marginalized gender groups when they go through judicial process, has attracted attention of international legal studies⁴⁵. Its reflection can be seen in the form of a transformative jurisprudence in Indian scenario also. Supreme Court's verdict on *Anuj Garg case*⁴⁶ which rightly observed that protective discrimination is a "double edged sword"⁴⁷ is an exemplification for transitional justice. Emancipation of women can be truly achieved only through gender sensitization among both men and women since women are also guided by the stereotypes on gender roles⁴⁸. The central role of judiciary in devising social change is functional in expunging stereotypes from the society. Through the fundamental nature of the judicial system, it is easy to restructure the stereotypic attitude of both legislature and executive limbs⁴⁹. Insertion of Section 53A⁵⁰ into the Indian Evidence Act, as a consequence of the judicial

contact-does-not-amount-to-sexual-assault-under-pocso-act-bombay-high-court-388064.pdf.

- 44 Abid Faheem and Mehreena Manzoor, "Denial of Justice: A Paradox between Bombay High Court Judgments and POCSO Act", INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES, Vol. 4 No. 1, 2021, p. 1821.
- 45 R. Stanley and Susanne Buckley-Zistel (eds.), GENDER IN TRANSITIONAL JUSTICE, 1st ed. 2012, p. 6.
- 46 *Anuj Garg v. Hotel Association of India* AIR 2008 SC 663.
- 47 *Ibid.*
- 48 Savita Mishra and Reshma Khatun, WOMEN EDUCATION IN MODERN PERSPECTIVE, 1st ed. 2017, p. 60.
- 49 "Background Paper On The Role Of The Judiciary In Addressing The Harmful Gender Stereotypes Related To Sexual And Reproductive Health And Rights: A Review Of Case Law", UNITED NATIONS HUMAN RIGHTS- OFFICE OF THE HIGH COMMISSIONER, 2018, <https://www.ohchr.org/en/publications/gender-stereotyping-and-judiciary-workshop-guide>; https://www.ohchr.org/sites/default/files/JudiciaryRoleCounterStereotypes_EN.pdf, (visited on September 30, 2022).
- 50 Section 53A of the Indian Evidence Act 1872 states that, "evidence of character or previous sexual experience not relevant in certain cases. - In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376B, section 376C, section 376D or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent".

verdict of *Narender Kumar v State (N.C.T.Of Delhi)*⁵¹ in which the apex court held that chastity of victim has no relevance in rape cases and the evidences must be appreciated by the courts with utmost sensitivity, is an instance for it. *Lillu Allius Rajesh and others v. State of Haryana*⁵² also comes under this grouping which declared that the ‘two finger test’ is violative of dignity and privacy of rape victim. As a recognition to the decision, the Union Health Ministry has published guidelines⁵³ for attending rape victims. These are the illustrations for how judicial process can favourably affect policy making and policy implementation.

Departure from the conventional way of stereotype as well as illogical reasonings and identifying certain long-standing precedents are indeed an insignia of gender sensitization. It is apparent from the disapproval expressed by Justice D.Y. Chandrachud on the gender stereotypes in judicial reasoning applied in *Nergesh Meerza case*⁵⁴. While deciding *Navtej Singh Johar v. Union of India*⁵⁵ he has observed that:

“A strong stereotype underlines the judgment. The Court did not recognize that men were not subject to the same standards with respect to marriage. It holds that the burdens of health and family planning rest solely on women. This perpetuates the notion that the obligations of raising family are those solely of the woman”⁵⁶.

*Aparna Bhat v. State of Madhya Pradesh*⁵⁷, the recent judgement of Supreme Court of India which has addressed the issue of ‘judicial stereotyping’ and need for gender sensitization among judges raises positive expectations. The judgement analyses prevailing legal narratives about gender which often constitute premises for judicial decision making. The judgement has strongly advocated for imparting training to judges to learn how to comprehend gender, especially during the judicial decision-making process. Further, the recent observation of Supreme Court in *X v. The Principal Secretary*⁵⁸, which is a landmark judgement of abortion rights in India states that ‘for the purpose of Medical Termination of Pregnancy Act, marital rape should be considered as rape’ is also a sign of progressiveness in the realm of rights of woman.

51 AIR 2012 SC 2281.

52 (2013) 14 SCC 643.

53 Rule 18 B of Guidelines & Protocols: Medico - Legal Care for Survivors/Victims of Sexual Violence, 2014 states that “*Per vaginum examination, commonly referred to by lay persons as ‘two-finger test’, must not be conducted for establishing an incident of sexual violence and no comment on the size of vaginal introitus, elasticity of the vagina or hymen or about past sexual experience or habituation to sexual intercourse should be made as it has no bearing on a case of sexual violence. No comment on shape, size, and/or elasticity of the anal opening or about previous sexual experience or habituation to anal intercourse should be made*”.

54 *Air India v. Nergesh Meerza* AIR 1981 SC 1829.

55 (2018) 10 SCC 1.

56 *Ibid.*

57 2021 SCC OnLine SC 230.

58 *X v. Health and Family Welfare Department, Govt. of NCT of Delhi* 2022 SCC OnLine SC 1321.

Conclusion

Judicial process is considered as a decisive function which warrants shrewdness. It is presumed that gender has no role in judicial process and it is gender-neutral. However, an overall analysis of the judicial verdicts in which woman becomes party, clearly indicates that judiciary often fails to properly assimilate the heterogeneity of feminine gender. Verdicts which hold paternalistic thinking as the base for its ratios, downgrades the concept of equality. In a diverse and complex society like India where judicial decisions have given much import source of delivering justice, judicial stereotyping definitely reiterate the patriarchal notions in the minds of the people. It can be ascertained that the formalistic interpretation of law helped only to see the biological differences of sexes not socially constructed gender. This resulted in the formation of gender stereotypes. Any kind of gender biased perceptions may create perilous hardships towards a just society. Though there are some flickers of hopefulness in the form of transformative construes, gender justice can be achieved only when the judges become better gender sensitized. To make the judiciary gender-sensitive, proper training as well as awareness programs should be imparted to them. Further, tutoring gender sensitization have been incorporated in the curriculum of law schools to shape good social engineers for the society.

RIGHTS OF THIRD GENDER AND LEGAL INCLUSION IN INDIA: 'AN ENABLING FRAMEWORK'

Saharshrarchi Uma Pandey* and Sahasricha Pandey[♣]

Abstract

"You're not a victim for sharing your story. You are a survivor setting the world on fire with your truth. And you never know who needs your light, your warmth, and raging courage; who would be so fortunate to have gotten to know but what's dreadfully unfortunate is; that behind every great fortune, there's a struggle." - Alex Elle

The essence of India's democratic spirit is an outcome of the prevalent, conscious and cognizant society. It is the very same society which has the tenets of principles and ethics moulded together; fostering, a sense of civic and social control, who forged the Civil Inheritance Laws, which, in the contemporary decade, can be seen at its most dreadful and foulest rostrum, at the 'Cradle of Civilizations- Bharatvarsh'. 'Trans' People in India have faced discrimination and marginalization since the very inception of the age. From being obliterated by their familial bonds to their social boycott; rights and entitlements of the Transgender People have adversely suffered. At this juncture, where the society has lost its humane temperament of sensitivity and sensibility; the least we can do as individuals, legal professionals and lawmakers; is to disburse the vested constitutional right of legal remedy and to clutch the social bias, prejudice and stereotype, providing justice, stifling their rights and dispositions. The Research Paper critically analyses and comments on the Inheritance Laws of Transgender under the Personal Laws. The Paper reviews the landmark judgement of NALSA v. UOI and also refers to the pertinent Legal Provisions of the Transgender Persons (Protection of Rights) Act, 2019. The Research also analytically identifies the International Yogyakarta Principle on the Rights of the Transgenders. The researcher's aim is to discuss the status of reforms, undertaken, and analyse the modifications in furtherance to the changing times.

Keywords: 'Trans', NALSA, Yogyakarta, Inclusion.

Introduction

"People change lots of other personal things all the time. They dyed their hair and dieted themselves to near death. They took steroids to build muscles and got nose jobs so they'd resemble their favourite movie stars. They changed names and majors and jobs and husbands and wives. They changed religions and political parties. They moved across the country or the world - even changed nationalities. Why was gender

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*the one sacred thing we weren't supposed to change? Who made that rule?"*¹

Transgender or commonly referred to as '*trans*', are such genus of personnel's; whose gender identity or expression is different from the one which is assigned to them at their birth. From the very beginning of the recorded Indian history, traces of persons belonging to the transgender community has been prevalent, be it the ancient ages or the medieval era, where, the Mughals ruled or the British, who invaded India through the weapons of trade and commerce. Furthermore, based on the Hindu folklore and manuscripts even, there are three identified and documented genders of people, which comprises of not only the Males and Females but also the '*Trans*'; the biggest irony in the modern times and the laws followed being, that the law, provide protection and varying safeguards to only the former two. Because of the same, '*trans*', have been fighting their battles with the society, lawmakers and law in itself; to be conferred the right and recognition as a normal human being; guaranteed through the safeguards delivered by law. One of such right, for which the struggle has been ongoing for quite a number of years, in the contemporary era, is the right of the '*trans*' people to inherit the property, on the demise of their family members, including parents. The paper herein, will highlight the shortcomings (which are of grave nature against the transgender community), the prevalent legislations providing for the inheritance rights, various judgements of the Indian courts and an insinuation of the exclusion and expulsion of such individuals from the right to inherit property. The paper also provides a mention of the international perspective and the rights conferred on our fellow '*trans*' community members, from a view-point of cross-border laws.

The History Of '*Trans*' People in India

The Transgender sect, though recognised from the earlier times, but has been mostly associated with a community which is socially, culturally and politically backward, vulnerable and distinct from the mainstream society. Evidence of '*Eunuchs*', who were emasculated males, from the 9th Century, has been at the forefront, who were employed as chamberlains to the King. During the Mughal Period, such persons were in profound demand and were subject to respect because they guarded and looked after the royal women quarters. The '*trans*' even held higher court positions during the Mughal occupation and were respected and adorned. They had the right over holding and acquiring property and even over collecting the revenues but unlike the other genders, they did not had a right to inherit the property from their relatives.

But, with the advent of the British in India, the right of the '*trans*' personnel's over property, livelihood and revenue collection was taken away. Though, the Kings continued under their estate of such provisions; the 'English', later on abolished the same, side-lining and derecognising the prevalence of transgender individual's. The British even brought the transgender-s under the ambit of the Criminal Tribes Act of 1871² and declared them as criminals; when on the other hand in the United States,

1 Ellen Whitlinger, PARROTFISH, 1st ed. 2007.

2 The Criminal Tribes Act 1871.

14th Amendment to Section 1 of US Constitution³ was carried out, mandating that any person cannot be deprived off of his property by any of the State laws and further promulgations; in the year, 1868.

The Britishers thus, corrupted the perspective of the society at large; resultantly, also of the micro individual orthodox families; because of which there was an identity crisis in not only the '*trans*' but also in the family members, to accept such personnel's and vest rights in them. The afore-mentioned- lack of recognition in the family spheres stood as a mountain on the way of the rights of the transgender community. Leaving aside the earlier times of orthodox and conventional character, the modern conscience and mentality of the people has also not changed and there is a de-recognition of a family member, when he/she has been found to be associated to '*trans*' identity, thus, the modern, educated and liberal society also disregards and expels such individuals. Additionally, the laws also do not identify such persons in family matters, in this case being inheritance, with their identity being, transgender. Everyone is trying to act like such person's does not exist, but they do, and a major revamp in laws is the need of the hour, to provide dignity and rights, which ironically is already vested through Article 21 of the Indian Constitution⁴, must be dealt with.

Inheritance Laws in India

The mechanism, through which the inheritance of property in India is in-toto reigned, is through the Personal Laws of each distinct religion or community. Explicitly, the texts of these laws demarcate the personnel's as Male and Female and only when (based on the current laws) the transgenders would appropriate themselves in either of the gender classification; would they be subject to the considerations of the inheritance laws.

Hindus

The Hindu Succession Act of the year 1956 governs the inheritance matters amongst the Hindus but recognizes only Males and Females as a subject of inheritance of either the joint or the self-acquired property in existence. The relations that are referred to in the Act, exclusively pertains to such persons and the status which is allocated to them for e.g., son, daughter, male, female, etc. but are limited to either of the aforementioned sex. The Act in its entire gambit does not deal with '*trans*' or any person having a different sexual orientation. Usually, in India, as soon as a person is recognized as transgender personnel, the family member alienates their relationship to the person and outcasts him/her from the rights of the household including inheritance, and thus, the person has no voice in his/her family property. The most unfortunate fact is this that the transgender individuals have to most often compromise with their sex- orientation and the way they perceive themselves as, to either a male or a female; to receive the property. The sex in such cases is determined on the basis of the sex which was assigned to them at the time of their birth i.e., to say, through their birth certificate. This practice at its very core is violative of Article 15⁵ of the Indian Constitution as it discriminates on the basis of sex and gender of a

3 14th Amendment to Section 1 of the US Constitution.

4 Article 21 of the Constitution of India.

5 Article 15 of the Constitution of India.

being. The prevalence of ‘trans’ persons did prevail at the earlier times but as their struggle for their rights and proximity and recognition through the society increased during the modern days of development, the laws must also change with such winds of time.

The term ‘sex’ does not always connote biological gender of either a male or a female but also include such persons who does not recognize and more importantly realize themselves as to be in either of the two binary compartments. In the Act, the disqualifications of a person to inherit the property, in the given case of a transgender, is highlighted through Section 28,⁶ which does not explicitly mention of any bar on any transgender person, based on their sexual orientation; more importantly the word ‘person’ is used, which might drag under its ambit any of the beings, including transgender; but still as provided, would not be barred under the law.

Therefore, disqualifying the ‘trans’ from inheriting property based on their sexual orientation has been a result of the narrow interpretation of Section 28., however, the positivists state that it was the intention of the legislature to incorporate only the Males and Females, quenching the argument of the modern world liberals.

In such sensitive case, amendments are necessarily crucial to be carried out to incorporate the ‘trans’ within the ambit of the right of inheritance of property. An amendment to the definition of a coparcener and a legal heir is pivotal. Similarly, amendment is also required in cases of the inheritance of the self-acquired property, wherein the terms, male and female is to be removed and any person legally entitled, is to be continued, which will incorporate the inheritance right of transgender people in The Hindu Succession Act, 1956.

Judicial Decisions

In the case of *Sweety (Eunuch) v. General Public*,⁷ the Himachal Pradesh High Court delivered that the Hindu Succession Act would not be applicable in the case of Transgender individuals; wherein, the matter was related to succession rights of a ‘trans’ personnel.

The court even gave the rule of ‘two fingers’, wherein, if one of the persons was recognized in their birth certificate as belonging to a particular gender compartment and the other was the fact that what the society perceived the person as.

Similarly, in another case of *I. J. Mary v. Superintendent of Police*,⁸ wherein, a woman constable was terminated from the service because her superior officer ordered her to undertake certain sex determination tests, in which, she was found to be a male; and thus, charges of concealment were put and the said carried out. When the matter went before the court, it was held that the birth certificate of the constable identified her as a female and the other fact was this that the society also perceived herself as such, which could be gazed through her sport certificates, where it was exclusively mentioned that she participated as a female and consequently won, adding to the face

6 Section 28 of the Hindu Succession Act, 1956 states “No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.”

7 AIR 2016 HP 148; ILR2016 3 HP 2140.

8 2014 (3) CTC 49.

that she psychologically recognized herself as a female only. After this, the lady was reinstated as a woman constable and the order of the state authorities was found to be invalid and void.

Christians

For Hindus, the Hindu Succession Act, 1956; is applicable, but for a person belonging to Christian denomination, the Indian Succession Act of the year 1925 stands to be affirmative; provided that the married couple register their names under the Special Marriage Act, 1954. According to Section 37 of the Indian Succession Act, 1925; if a person has died intestate- without writing a will, then in such case the property will belong to the surviving 'child' or 'children', whatever maybe the case.⁹

Herein, one must understand that, there is neither a specific person nor a status which is mentioned on whom the property would fall, leading to the fact that all the transgender would also acclaim their right under this provision as the terms 'child' and 'children' are specifically used. Thus, the liberal and modern interpretation of the said law would provide the right of inheritance after the death of the parents, to the transgender personnel as well because such person is also a biological child of someone.

A mention of Section 44 is also crucial at this juncture. The Section mentions that, if any intestate died leaving behind his mother, either a brother or sister or the children of any deceased brother or sister, then they will have a right to inherit property in equal share just like any other member. This Section incorporates the fundamentals of having a 'child' as a subject of inheritance and not specifically any person having some designated status, applying a narrow liberal mode of interpretation; to provide the transgenders with the right over inheritance.¹⁰

Additionally, Section 59, which states that, any person of sound mind may pen down a will and dispose of his property in such cases of testamentary succession.¹¹ Through this Section any transgender individual can receive the property, being legal heir to their parents and if a will is not drawn, then the aforementioned Section (37) would be applicable; providing a ray of hope to the 'trans' to inherit the property.

Thus, the liberal, modern and relaxed interpretation of these Sections of the India Succession Act, 1925 may provide the right over inheriting property of the parents

9 Section 37 of the Indian Succession Act 1925 states "*Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.*"

10 Section 44 of the Indian Succession Act 1925 states "*If the intestate's father is dead but the intestate's mother is living, and if any brother or sister and the child or children of any brother or sister who may have died in the intestate's lifetime are also living, then the mother and each living brother or sister, and the living child or children of each deceased brother or sister, shall be entitled to the property in equal shares, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate's death.*"

11 Section 59 of the Indian Succession Act 1925 states "*Every person of sound mind not being a minor may dispose of his property by will.*"

to the transgender individuals.

National Legal Service Authority v. Union of India¹²

The National Legal Services Authority in the year 2014 filed a Public Interest Litigation (PIL) in the Supreme Court of India to address the grievance; that the transgender persons face in our country regarding their non-recognition, exclusion and expulsion from the society. The first and foremost element that the Supreme Court pounded upon was the fact that the term ‘sex’ does not specifically refer to the biological characterization of a person, determined by one’s birth but in reality, refers to the lens through which an individual perceivethemselves as; the psychological and mental makeup of an individual would determine one’s gender and not just the traditional tactic of binary biological categorization as males or females. Thus, the Supreme Court herein, upheld the self-actualization process of an individual through their introspective course, raising the flag of self-identifying oneself and vesting the right to one person of determining the way the society perceive them as, in the manner they want. The Court ensured dignity and pride through the aforementioned track under Article 21¹³ of the Indian Constitution to all the transgender personnel and the discrimination that they faced in violation to Article 15 was also repented upon.

The Court even highlighted that the Constitution in its very essence and spirit is not gender specific to either of the two binary compartments but it extends to all or any of its citizens and provides them with such Fundamental rights, regardless of their gender and sex orientation.

The court said that the ‘*trans*’ are differentiated and excluded from the mainstream society and does not have equal protection in the eyes of law and ensured that Article 14 would be out rightly obeyed and kept in mind, when dealing with transgender individual’s. The court even said that under Article 19¹⁴ of the Indian Constitution, the transgender persons have the right to express their gender through words, dress, behavior, etc.

The court then subsequently ordered the Centre and the State governments to look into the issue of legal recognition of third gender as a category of people just like and similar to the mainstream individuals. Awareness Programs and welfare schemes were also pledged for. The ‘*trans*’ were also recognized as socially and educationally backward class and reservation was recommended for in the matters of public employment and education, providing justness and justice to all the citizens regardless of their gender or sexual orientation.

Transgender Persons (Protection of Rights) Act 2019¹⁵

The Bill was presented by the Minister of Social Justice Shri Gehlot in the lower house of the Parliament in the month of July which was subsequently passed in the same and even in the Rajya Sabha by the month of November. The Bill aims to empower the transgender community in primarily the spheres of social, economy and

12 AIR 2014 SC 1863.

13 Article 21 of the Constitution of India.

14 Article 19 of the Constitution of India.

15 Transgender Persons (Protection of Rights) Act 2019, <http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>.

education. The transgender community has been struggling for decades to have a codified law which would cater to the rights and safeguards that such personnel require.

The Bill provides a comprehensive system of safeguards to the transgender community and any discrimination or differentiation in any matters pertaining to education, health, employment, access to public or private office, etc. is prohibited and if such expulsion is witnessed then penal sanctions of up to two years have also been assigned.

In relation to the issue at hand, Section 13¹⁶ of the Act provides that the transgender individuals will have a right of residence in their natal families and as provided in Section 13(1), they must not be separated or alienated from their family on the ground of their sexual and gender orientation. Subsequently, the transgender also has a right under Section 13(2) which provides that they may use all the facilities of the household and that they possess maintenance rights as well.

The Bill though provides maintenance rights to the transgender personnel in their natal family but does not state any relative to the right over inheriting the property of the parents, or that they have been given a status of Class-I heir or a coparcener, hence, the Act does not cover such rights over property possessed by the transgender community members.

International Perspective

Throughout the world, transgender community faces discrimination, exclusion and expulsion from the society. Several countries like Malaysia, Kuwait and Nigeria outlaw the very existence of transgender¹⁷ and countries like India marks them as criminal tribes.¹⁸ The lack of legal representation deprives transgender of Human Rights.

In order to give them legal recognition and access to human rights various measures were taken by the UN and other international organizations. Yogyakarta principles laid down the International Human Right Law in the year 2006; after the Conference in Indonesia in relation to sexual orientation and gender.¹⁹ These principles gave transgender right to education, employment, right to property, right to exercise their choice of gender identity, etc. Principle 3 of the Yogyakarta states the Right to Recognition before Law. Principle 3A of Yogyakarta ensures the inheritance rights of transgender by enabling state to provide property rights including right to acquire through inheritance to transgender without discriminating on the ground of sexual orientation and gender identity.²⁰

16 Section 13 of the Transgender Persons (Protection of Rights) Act 2019.

17 “#Outlawed- The Love That Dare Not Speak Its Name”, HUMAN RIGHTS WATCH, http://internap.hrw.org/features/features/lgbt_laws/, (visited on November 10, 2021).

18 The Criminal Tribes Act 1871.

19 “Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity”, data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf, (visited on October 2, 2021).

20 Rupal Sharma, “Inheritance Rights of Transgender: A Cry of Humanity”, INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES, Vol.

International Covenant on Civil and Political Rights in its Article 17 states that no one shall interfere with the transgender right to privacy, family, etc. and should be given right to protection of law against such interference.²¹ The interference in the family includes the right to be taken away by not recognizing transgender as a part of the family and therefore subject to no rights arising out of family arrangements including inheritance rights.²²

Further, to state one of the landmark cases in relation to the rights and recognition provided to the ‘*trans*’, would be the Great Britain’s case, famously known as *Corbett v. Corbett*.²³ In this case, Lord Ormrod held that the basis on which the gender or the sexual orientation of a person is to be decided upon is the psychological and the mental make-up of a person as either male or female or might fall beyond the binary compartments as well. As a result, in the year 2004, the Gender Recognition Act²⁴ was passed by the country’s legislature allowing a person to claim one’s new birth certificate based on one’s psychological and mental make-up, determining one’s sex and the said person would be duly recognized with absolute gender rights.

In the NALSA judgement, a reference was also made of a Pakistani case, by Justice K.S. Radhakrishnan. In the Pakistani case of *Dr. Mohd. Aslam Khaki v. S.S.P. Rawalpindi*²⁵, it was held that the transgender community personnel are also the citizen of Pakistan and due right-based on recognition would be provided to them, just like any other individual of any binary compartment. The court provided right to life and property to all the ‘*trans*’. Thus, at the international level, the fight of the transgender individuals for their legal recognition and rights is a constant journey.

Conclusion

The transgender personnel in India have been a victim of exclusion and marginalization from the very beginning. Though, the presence of ‘*trans*’ could be traced back to the Mughal Empire, where they held the right over property and revenue; they were not treated with due dignity and respect. It was only after the coming in of the British that the conception regarding such persons was corrupted and deteriorated in totality to such a far extent that the families stopped to even recognize such personnel’s, right of inheritance is a far-dream, when the recognition at the most micro element of family is absent. Looking at the Personal Laws of Hindus, it is a hard fact to state but there is no such recognition of either such person or the status that they hold in the family, depriving, in-toto, of all or any rights enumerated in the Hindu Succession Act of 1956. Further, the Christians are

1 No. 3 2018, pp. 1-6.

21 Mayank Mahla, “*Application of Inheritance Laws on LGBTQ as Beneficiaries: A Legal Analysis*”, ACADEMIA, pp. 1-14. academia.edu/34659279/Application_of_Inheritance_Laws_on_LGBTQ_as_Beneficiaries_A_legal_Analysis, (visited on October 2, 2021).

22 *Supra* n. 12.

23 [1970] 2 All ER 33.

24 Gender Recognition Act 2004, http://www.legislation.gov.uk/ukpga/2004/7/pdfs/ukpga_20040007_en.pdf, (visited on October 3, 2021).

25 *Mohd Aslam Khaki v. S.S.P. (Operations) Rawalpindi*, <https://translaw.clpr.org.in/wp-content/uploads/2018/10/Khaki-v-Rawalpindi.pdf>.

governed by the Indian Succession Act, 1925; that though does not mention of the transgender but widening up the provisions through liberal and elastic interpretative power, that the researcher stated that the transgender would also have the right to inherit property, though the law in this Act as well does not expressly mention of any rights enumerated for the 'trans'. Further, the researcher has mentioned the international perspective towards 'trans' personnel's and highlighted the Yogyakarta Principles, forged in the year of 2006, which provides Human Rights based on one's gender and sexual orientation and expressly states that all rights including of maintenance, marriage or inheritance would be provided to the 'trans' in the same capacity as a person of either of the two binary compartments. The fight for rights and recognition has been going on in the modern-liberal world and the 'trans' were given a legal status through the NALSA verdict, however the revamp in the society is still required and is pivotal to instill any transformation in the society as a whole.

SOCIAL ENFORCEMENT OF LAWS PERTAINING TO THE LGBTQ COMMUNITY

Muskan Agarwal*

Abstract

In 2010, a gay professor at Aligarh Muslim University was forced to commit suicide when news of him engaging in consensual sex with another man was brought to the University's notice. It was then violative of his right to privacy and right to have a life of dignity. Gender and sexuality somehow are critically embedded within our society. These 'foreign' aspects are marked as modern but somehow date back to books such as Vatsyayana, composed around the 4th century BC. Homophobia and traditional gender norms are the reason why many people still chose to hide their identities. With the emergence of social media platforms, many individuals, especially those living in an urban household with access to amenities are changing their genders. Many individuals still believe that the biological or chromosomal sex which is determined by a professional is the only kind of acceptable gender. This fact brings us to notice that there must be millions of individuals who still have not been able to truly accept their identities. The reason? Societal pressure to fit in and to be regarded as 'normal', where something that is even a little bit different from the 'traditional' norms are highly shamed and stigmatized. This results in violence meted out to that individual or even the Queer community at large. Section 377 was decriminalised in the year 2018 but still many individuals are forced to hide their true selves to not be shunned by society. This paper will talk about in-depth the challenges the queer community still faces every day even though such relationships have been decriminalised. This paper would also look into the day-to-day challenges transsexual people face and how difficult it is for them to access basic needs such as medical or insurance benefits. The paper will conclude by analysing why the queer community are excluded from national identities, why their behaviour is regarded as anti-national and against the Indian culture and how such behaviour by the society violates the rights of the entire LGBTQ community.

Keywords: Homosexuality, Abuse, Heteronormativity, Stigma.

Introduction

Sexuality is critically embedded in our societies. LGBT is an initialism which stands for lesbian, gay, bisexual, and transgender while 'Q' stands for those individuals who identify as queer or are questioning their sexual identity. Queer is an umbrella term which includes sexual as well as gender non-normative identities. It has become a political identity which acts as a resistance to the traditional norms

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of heterosexuality. The growth of this community can be linked to its notion of liberalization. India's notion of queer history abounds from the figure of the 'third sex.' Section 377 before decriminalization justified violence. Non-heteronormative social behaviour was socially disapproved of because it was regarded as 'carnal intercourse against the order of nature.' When Section 377 was referred to, conversations regarding polygamy, bestiality and incest (PIB) automatically arose. Homosexuality was simultaneously referred to with the PIB argument. Looking into the previous definition of Section 377 also referred to sexual acts committed against animals. Consensual sex between two individuals of the same gender was given the same status as that bestiality.

The fight for homosexuality was and still is entirely based on love and denying that meant, denying the entire LGBTQ community of love. LGBTQ people and the conversation surrounding them, are always shunned. Bullying and harassment in the workplace and educational institutes were common cultures. Coming out to family members or society was often met with violence or conversion therapy. The same is the reasoning with people who are not comfortable with their assigned sex at birth.

Traditional gender norms are imposed upon individuals. Often a times individuals are not comfortable with their assigned gender at birth because they cannot relate to it mentally and physically. Homosexuality as a taboo was produced by the modern conscience from the 18th to the 20th century¹. Homosexuality has always been a western concept. It was a colonial imposition and a colonial ideology, which was a Victorian, Christian puritanical concept of sex. Gender identity on the other hand refers to that mental aspect, in which a particular individual's self-conception of their gender is different from their assigned gender at birth, which fluctuates from the traditional gender identities i.e., male and female. Gender identity is a behavioural and a mental aspect rather than a physical aspect because not all transsexuals undergo sex reassignment surgery.

Homosexuality and any sexual desires have always been looked down upon by society. It can be said that it has been looked down upon by three universal agencies. The primary agency is religion. The holy books of Christianity and Islam i.e., the Bible and the Quran, clearly prohibit acts of homosexuality. In Islamic states, homosexuals are stoned to death. The holy scriptures explicitly state that the sexuality of a person should only be used only for procreational purposes.

The second agency is the law. The law, as observed until recently regarded homosexual individuals as outlaws. Section 377 regarded homosexuality as an 'unnatural offence' and 'against the order of nature' which guaranteed almost 10 years of imprisonment. The third and final agency is medicine, which considered homosexuality a mental disorder. Conversion therapy is still a prevalent practice in India and is still up and running in many parts of the country². Drugs and electric

1 Julia Sandra Bernal Crespo et al., "*Foucault and Homosexuality: From Power Relation to Practice of Freedom*", ARTÍCULOS DE INVESTIGACIÓN, No. 46, 2016, pp. 111-130.

2 Rianna Price, "*LGBTQ+ Conversion Therapy In India: How It Began And Why It Persists Today*", THE CONVERSATION, July 20, 2020,

shock therapy are a few of the methods used to ‘cure’ homosexuality. AIDS was also considered to be a disease of homosexuals. Religious activities in the west considered AIDS a punishment for people indulging in sodomy. It was only in 2014 that the Indian Psychiatric Society acknowledged the fact that homosexuality is neither a disease nor a mental illness³.

History of Homosexuality and Transsexuality in India

The *Kamasutra* written by *Vatsyayana* is the oldest written Hindu text written in about the 2nd Century, which mentions the ‘third gender.’ The second chapter of the *Kamasutra* titled ‘*Purushayita*’ mentions lesbians and labels them ‘*swarinins*’ whereas gay men were referred to as ‘*kilbas*’. According to the text, women often married each other and raised children together. It is evident that homosexuality was a common phenomenon and there is even visual proof that supports the statements. Constructed in about the 12th century the Khajuraho Temple of Madhya Pradesh is the visual proof that homosexuality was very much prevalent in India until people made it a western concept. However, the social acceptability of acts of homosexuality is a debatable topic, but it must have been quite prevalent which ultimately led to carvings at the Khajuraho Temples.

Rig Veda, which is one of the most ancient Indian scriptures, famously mentions *Varuna* and *Mitra* who were regarded as the ‘same-sex couple’. Valmiki’s famous epic *Ramayana*, which was written between the 5th and 6th also mentions acts of homosexuality. Even the young boys kept by the Nawabs in their harem, as well as homosexual behaviour by the Medieval Muslims by Malik Kafur, are some pieces of evidence of same-sex relationships. The Hindu texts mentioned above also talk about the third gender commonly referred to in India as ‘hijras’. This community is the most common symbol of gender variance. However, post-colonization, this community was highly targeted by the British authorities who labelled them as a criminal tribe in 1871 and criminalized them under Section 377 of the Indian Penal Code. There have been no records of discrimination against homosexuals in India before colonial rule⁴. After the colonization of India, marginalizing queer identities had become a political agenda. Non-normative sexualities which were espoused through colonial puritanism had a major effect on the Indian national identity.

Social and Legal Acceptance Before Decriminalisation

Before decriminalisation, the LGBTQ community had to go through a lot of discrimination and violence in private as well as in the social circle. Coming out in public as a queer individual only meant inviting shame towards that individual and their entire family. It also meant living a life with no dignity. While the youth still made an effort to understand their peers, it was inherently difficult to come out within

<https://theconversation.com/amp/lgbtq-conversion-therapy-in-india-how-it-began-and-why-it-persists-today-140316> > , (visited on October 6, 2022).

3 Om Prakash Singh, “*Mental Health in Diverse India: Need for Advocacy*”, INDIAN JOURNAL OF PSYCHIATRY, Vol. 63 No. 4, 2021.

4 Ruth Vanita and Saleem Kidwai, SAME SEX LOVE IN INDIA: READING FROM LITERATURE AND HISTORY, 1st ed, 2000.

the boundaries of family and school/work without being judged. A famous example would be Professor Ramchandra Srinivas Siras. He was ‘caught’ having consensual sex with another man in 2010. He was suspended from the Aligarh Muslim University on the charges of ‘gross misconduct.’ He filed a case which he ultimately won however, Siras died in 2010. Many people believe he committed suicide but there are also contentions that he was murdered. Professor Siras’s story was one of the very few stories that were bought into the limelight because he chooses to fight injustice. But it eventually took away his life.

The treatment meted out towards the members of the LGBTQ community was different in urban and rural sectors. In the urban areas, *Aversion therapy* was introduced in India, in which electro-convulsive therapy was used to ‘correct’ homosexual behaviour. It was believed by the practitioners that such therapy would remove the fear or anxiety of the opposite sex. The recipients were electrocuted while being shown homosexual pornographic material which would make them associate it with negative feelings or rather fear homosexuality⁵.

In rural areas, homosexual men were and are faced with secret honour killings. This left the men with no other option but to run away from their homes. These individuals had no financial or monetary support. Homelessness is one such ugly aspect that forces individuals to choose their personal freedom and physical well-being over the constant abuse of their families. Homosexual women on the other hand were and still are subjected to corrective rapes by their family members⁶. Rapes are prescribed as a ‘cure’ for homosexuality which would make them associate with positive feelings towards the opposite sex.

Access to healthcare is still a challenge for this community. The members of this community have been repeatedly denied access to safe and good quality healthcare. In 2013⁷, a 22-year-old transwoman was gang-raped. The doctors did not provide first-aid but mocked her that transwomen cannot get raped. They are often rejected from hospitals because it becomes a difficult task to shift the patients either into the male or the female wards. Which ultimately leads to denying of healthcare to such individuals. Trans people fear going to the hospitals due to the homophobia that surrounds the walls of the hospitals⁸.

While discriminating against the LGBTQ community was a social norm, it was still in blatant violation of the fundamental rights of the entire LGBTQ community.

5 Rianna Price, “*LGBTQ+ Conversion Therapy In India: How It Began And Why It Persists Today*”, THE CONVERSATION, July 20, 2020, <https://theconversation.com/amp/lgbtq-conversion-therapy-in-india-how-it-began-and-why-it-persists-today-140316>>, (visited on October 6, 2022).

6 Rashmi Patel, “*Being LGBT in India: Some Home Truths*”, THE MINT, August 27, 2016, <https://www.livemint.com/Sundayapp/sAYrieZdZKEybKzhP8FDbP/Being-LGBT-in-India-Some-home-truths.html>, (visited on October 7, 2022).

7 Ashwaq Masoodi, “*Accessing Healthcare Still an Ordeal for LGBTQ in India*”, THE MINT, July 16, 2018, <https://www.livemint.com/Politics/w6C5ws5POJ7d1O590mP6mJ/Accessing-healthcare-still-an-ordeal-for-LGBTQ-in-India.html>>, (visited on October 4, 2022).

8 *Ibid.*

It violated Articles 14 (“equality before the law”⁹), 15 (“prohibition of discrimination on grounds of religion, race, caste, sex or place of birth”¹⁰), 16 (“equality of opportunity for all citizens in matters of employment under the State”¹¹), 19 (“freedom of speech and expression”¹²) and 21 (“no person shall be deprived of his life or personal liberty, except according to the procedure by law”¹³). Vilification of the members of this community had become a norm. Instead of being provided with treatment, the members were subjected to harassment, sexual abuse and condemnation for having unnatural sexual preferences. There were no anti-discriminatory laws that would guarantee safe healthcare benefits to the LGBTQ community.

It wasn’t until the *National Legal Services Authority v. Union of India* filled in the lacunae inter alia by recognising the third gender. It safeguarded their rights under Part III of the Indian constitution. It also upheld the decision of transgender people to self-identify their genders. But what may be legally acceptable is not always socially enforceable. After the judgement, the Transgender Persons (Protection of Rights) Bill, 2016 was introduced. This act gave a legal definition to transgenders. This sole act gave recognition to the LGBTQ community which was required for a long time. This act finally made discrimination meted out towards queer individuals punishable by law.

Traditional Genders: An Analysis

The traditional sex or the biological sex is one that generally refers to when one thinks about gender. It is still widely believed that only two types of prevalent sexes i.e., male and female. However, in India, a third gender had also been very much prevalent until it was stigmatized by the colonial rulers. They are referred to as the *Hijras* or the eunuchs. The biological sex refers to the unambiguous male or female which is assigned at birth and remains static until the death of that individual. However, people who are born with sometimes both sex organs or sometimes even no organs do not conform to the bedrock notion of sexual dysphoria that there are only two sexes which is recognized widely. The traditional norms of genders have powerful valances attached to them socially and legally, which ultimately leads to the unequal distribution of resources and rights. For a long period of time body dysphoria was not really given much heed. It was never socially accepted that people would change their sex. In the famous case of *Corbett v. Corbett*, it was stated by Orwin J. that there should be four criteria to determine the sex of individuals. However, psychological tests to determine a person’s gender could not be accepted.

Gender and sex refer to two different aspects. Sex refers to physical differentiation, either of a male or a female. It refers to the external anatomy of the genitalia. Gender on the other hand refers to the psychological recognition of self. It is the identity of what one mentally feels. The feeling of incongruency between sex and gender is what is known as gender dysphoria. In order to get rid of such

9 Article 14 of the Constitution of India.

10 Article 15 of the Constitution of India.

11 Article 16 of the Constitution of India.

12 Article 19 of the Constitution of India.

13 Article 21 of the Constitution of India.

incongruencies, individuals often resort to gender affirmation surgery and sex reassignment surgery. India at present does not have any laws pertaining to sex operation change. It has been silent upon this issue and no legal precedent has been developed. The new Transgender Persons (Protection of Rights) Act, 2019 mandates the government to provide health facilities to transgender individuals. The government under the Ayushman Bharat scheme extends the benefits to transgender individuals by providing healthcare insurance. It also provides financial support for Gender Affirmation Surgery. However, it is only available to those individuals who are registered under the Ministry of Social Justice and Empowerment. This is in itself a huge loop as acceptance of an application is under the discretion of the government¹⁴ and the transgender community think it is derogatory for themselves to be just registered as transgender.

It can be observed that up until very recently, transgender individuals were not given the due recognition that they deserved. The *hijras* are the ostracized members of the Indian community. They were not given jobs and could be often seen on roads either begging or dancing for money. No one indulged in a conversation with them as it was assumed that one might get cursed.

Challenges Faced by the Queer Community in The Contemporary Society

The members of the queer community lack social recognition, which bars them from accessing their rights as citizens of the country. The deep embedded homophobic attitudes combined with the lack of legal protection expose the LGBTQ community to violations of human rights. Even after the decriminalisation of Section 377, there is still a stigma attached to the terms LGBT and queer. It is still generally observed that the sexuality of a person is often assumed heteronormative which is informally known as 'straight'. This assumption of heteronormative sexuality is known as heterosexism¹⁵. Due to this, LGBT individuals face tremendous problems growing because heterosexuality is the only acceptable sexual orientation. Targeting LGBT individuals and violence towards homosexuals are still a regular occurrence. In the professional area, homosexual individuals often hide their sexual orientation due to fear of harassment or losing their jobs. Lack of de-stigmatisation in schools or educational institutes leads LGBT individuals to estrangement and mental health issues.

Internalised homophobia limits the expression of one's sexuality. Such homophobic tendencies arise due to the prevalent and accepted notion of heterosexuality. Internalised homophobia is a form of self-loathing, and self-limiting concept which leads to substance abuse. Drug abuse is a prevalent issue in the queer community. The members of this community are less likely to protect themselves

14 Kumar Divyanshu, "Transgender Indians Continue To Face Multiple Barriers To Gender Affirmation Surgery", INDIASPEND, June 29, 2022, <https://www.indiaspend.com/gendercheck/transgender-indians-continue-to-face-multiple-barriers-to-gender-affirmation-surgery-823819>, (visited on October 1, 2022).

15 Subhrajit Chatterjee, "Problems Faced by LGBT People in the Mainstream Society: Some Recommendations", International Journal of Interdisciplinary and Multidisciplinary Studies, Vol. 1 No. 5, 2014, pp. 317-331.

from HIV and STDs¹⁶. Moral, religious and most importantly political beliefs of the dominant group reinforce homophobia. Homophobia is also manifested in homophobic jokes and negative media representation. The pressure to ‘come out’ does not always work in one’s favour. The majority of the people from the queer community have to learn to cope with the stigma, discrimination and harassment because that has been the accepted norm. However, there are emerging NGOs and social groups that act as support groups.

Mental disorders are also prevalent among the members of this community because of the shame and discrimination the queer individuals have to face and not due to gender dysphoria. The members of this community also suffer from ‘minority stress¹⁷.’ It is a condition that usurps from living in hostile environments. The constant discrimination takes a toll on their mental health, which has been acknowledged in the Mental Healthcare Act, of 2017¹⁸. Discrimination in the workplace directly causes job instability, unemployment and poverty for the members of the LGBTQ community. The TREVOR¹⁹ project put forth that the transgender community is much more susceptible to suffering anxiety and depression as compared to the members of the other community. The chances of people suffering from such mental health disorders seeking out help are also comparatively less due to the general stigma that is attached to mental health disorders.

Members of the LGBTQ community still face violence at the hands of law enforcement officials. LGBTQ individuals especially transgender individuals are vulnerable to police misconduct and abuse, they are targeted and also at a greater risk of being treated inappropriately and in an abusive manner. Once imprisoned, they also face the risk of being targeted by the inhumane prison system and the inmates. Transgenders do not have any legal protection when it comes to sexual offences against them. Sexual offences are one of the main problems faced by the members of the transgender community because the perpetrators are usually men while the victims are women.

Challenges Faced by the Queer Community in The Digital Sphere

One main aspect of gender dysphoria is the need for validation from other individuals. Acknowledgement from family and peers about one’s sexuality is one of the main aspects of the members of this community. This is where digital or social

16 Subhrajit Chatterjee, “Problems Faced by LGBT People in the Mainstream Society: Some Recommendations”, *International Journal of Interdisciplinary and Multidisciplinary Studies*, Vol. 1 No. 5, 2014, pp. 317-331.

17 “Mental Health Issues LGBTQ Community Members Face In Society”, *THE ECONOMIC TIMES*, December 14, 2021, <https://economictimes.indiatimes.com/news/india/mental-health-issues-lgbtq-community-members-face-in-society/articleshow/88281953.cms?from=mdr>, (visited on September 29, 2022).

18 “Section 377 Verdict: Some of These 4,690 Cases Are No Longer Crimes”, *THE MINT*, September 7, 2018, <https://www.livemint.com/Politics/LlqSpXABN7V8mmuHGV2x0O/Section-377-verdict-These-4690-crimes-are-no-longer-crimes.html>, (visited on October 3, 2022).

19 “2022 National Survey on LGBTQ Youth Mental Health”, *THE TREVOR PROJECT*, <https://www.thetrevorproject.org/survey-2022/>, (visited on October 2, 2022).

media comes to play. With the emergence of social media, more queer individuals feel comfortable portraying their true selves on social media. Queer culture in India, is an intersection of both offline and online practices. Some individuals represent their true selves on social media while pretending or masking themselves to be heterosexual in their normal lives. *GayBombay*²⁰ was one of the first e-groups for homosexuals established in 1998. It provided support to other metropolitan cities in India to start their own e-groups and online network.

However, there is also bias present within the homosexual community itself. Taking the example of the Pink Kolkata Party, which is a closed group for homosexual males to engage socially. The main purpose of the group is to connect like-minded men however like every aspect caste and class managed to seep into it. To be a member of this group, one needs to be accepted by the members of the group who often come from privileged backgrounds. There is no place for LGBTQ members who come from the lower strata of society. Queer continues to be a part of the restricted identity for those who are economically underprivileged. There continues to be a lack of class-based diversity. Pink Kolkata Party²¹ or PKP is both an online and offline community which engages in dialogue and creates safe spaces for the queer community. However, at the same time, it fails to offer class and economic-based diversity. ‘Straight-acting’ is also a set of attributes that gay individuals portray. It refers to those actions which are ‘masculine’ or ‘manly’ as compared to gay attributes which are ‘femme’ or ‘queen’. Individuals deny but acting straight is a form of internalised homophobia. It has been argued that such straight acting in both online and offline spheres, plays the dual role of producing homophobic and anti-feminine communication among gay individuals²².

Interpretation of the Transgender Persons (Protection of Rights Bill) 2019

Transgenders are defined under part III of the Transgender Act. Under the act, individuals have the right to self-perceive their gender identity as upheld in the *NALSA v. Union of India* and reiterated in *Navtej Singh Johar v. Union of India* and *Justice K..S Puttaswamy v. Union of India*. However, to get a certificate of proof of being transgender, individuals need to procure medical proof from the chief medical officer of the place of surgery. This is an invasive method to determine gender. This is also in violation of their right to privacy. The bill lacks many provisions regarding the healthcare aspect of individuals. Mental health is a huge aspect that is uncovered by the bill. As mentioned above, the social stigma faced by the members of the LGBTQ community ultimately results in mental health issues such as depression and social anxiety²³. Healthcare workers at all levels should be sensitized toward the

20 Rohit K. Dasgupta, *DIGITAL QUEER CULTURES IN INDIA*, 1st ed, 2017.

21 *Ibid.*

22 Shinsuke Eguchi, “*Negotiating Hegemonic Masculinity: The Rhetorical Strategy of “Straight-Acting” Among Gay Men*”, *JOURNAL OF INTERCULTURAL COMMUNICATION RESEARCH*, Vol. 38 No. 3, 2010, pp. 193-209.

23 Jagruti R. Wandrekar and Advaita S. Nigudkar, “*What Do We Know About LGBTQIA+ Mental Health in India? A Review of Research From 2009 to 2019*”, *JOURNAL OF PSYCHOSEXUAL HEALTH*, Vol. 2 No. 1, 2020, pp. 26-36.

rights of transgenders. This would prevent homophobia and stigma surrounding the community.

The bill lacks any provisions when it comes to the employment generation of this community. Transgenders have always been at the lowest strata of the economic ladder. Lack of jobs and the stigma around their presence in the corporate sectors bar them from employment opportunities. This bill covers employment under Sections 9, 10, 11, and 14, which cover employment rights under different organisations. However, there is a lack of employment opportunities in this community. The bill mentions the protection of transgenders in the workplace without actually providing many employment opportunities. The government of India still bars transgender people from enlisting in the army. Sabi Giri, a transgendered woman, who was a sailor in the Indian Navy, was removed from her job because she had transitioned. Like every other field, the transgender community are also treated differently by the sports community. They are made to go through vigorous and invasive checks something that a cis-gendered male or female individual does not go through. A prime example would be the case of Santhi Soundarajan. Shanti was stripped of the silver medal she won at the Asian games held in Doha after she failed a sex verification test. She was later considered ineligible to participate in the games as a woman.

The bill has no provisions regarding the marriage of transgenders. It does not acknowledge the other forms of chosen families that coexist in Indian society. However, *Arun Kumar v. Inspector General of Registration* upheld that according to section 5 of the Hindu Marriage Act, the term 'bride' also includes transgender persons. In the case of *Shafin Jahan v. Ashokan K.M.*, it was stated that the right to marry a person of one's own choice was an important part of personal liberty under article 21 of the constitution. The bill also bars parents from separating a transgender child and had made it illegal to allow sex reassignment surgery in infants. Overall, the bill includes provisions that would help the members of the LGBTQ community, but there are still various provisions that need to be added.

Conclusion

Section 377 was decriminalised in 2018 however, the community still lacks the equality it deserves. Such individuals still do not have the right to get married or adopt children. People still look down upon them. This community is still fighting to get their rights socially enforced. The government has already done its part by decriminalising homosexuality. It is just one step but at least in the right direction. It is time for society to decriminalise it in their minds as well. Homosexual people at the end of the day just want to live a life of dignity where people do not look down on them because of who they are. After the 2014 Act, a new bill was passed known as the Transgender Persons (Protection of Rights) Act 2019. Although this act aimed to provide more protection to the LGBTQ community, it turned out to be the opposite. The act states that it would provide certification for transgenders however labelling individuals as transgenders was considered to be derogatory. It was highly criticized by the LGBTQ community for being draconian and discriminatory.

At the end of the day, the members of this community are human beings who have every right to enjoy their human rights. Our country's constitution clearly states

that the “Right to marry is an inherent right of an individual, regardless of the sexual orientation.” This would be in line with the Yogyakarta Principles²⁴ which put forth the international human rights standards in sexual orientation and gender identity. Indian societies are lagging in adopting new legislation for the betterment of the queer community. The country follows various Sustainable development goals but goal number 5, which promotes gender equality and accelerates non-discrimination against individuals based on their gender has been ignored for a long. All individuals irrespective of their sex, gender identity and sexual orientation are entitled to protection which is provided for by international human rights. It is also in line with Articles 14, 19 and 21, the golden triangle of the Indian constitution.

To grant equal recognition and equal protection to the members of the LGBTQ community, laws related to marriage, adoption, surrogacy, adultery, and even sexual offences need to be changed. It is time, members of the LGBTQ community are recognized as an innate part of society because social acceptance along with legal protection is of primary importance at the end of the day.

24 A document on human rights in the area of sexual orientation and gender identity.

WOMEN, ARMED FORCES AND FEMINIST CONSTITUTIONALISM

Dhruv Vatsyayan*

Abstract

*Gender equality, in India and across the globe, has been a battle long fought. Feminist movement, since its inception, has been a major influence in all the major disciplines of study - including law. It has been a major influence on the Indian socio-constitutional studies as well. On the other hand, armed forces of most of the nations, including India, have been, and remain a male-dominated institution. While the Indian Constitution envisages gender-equality, the Indian armed forces were oblivious to this preambular goal, until recently. The Indian Supreme Court, in *Ministry of Defence v. Babita Puniya* and *Union of India v. Annie Nagaraja*, dealt with this contentious issue. The Apex Court in both the cases ruled that the women Short Service Commission officers were to be considered for Permanent Commission, which necessitates a vertical analysis of these decisions because of their sheer impact on feminist and constitutional studies. This paper attempts to, while invoking the concept of feminist constitutionalism, analyze these cases. A thorough critique of the arguments based on gender-stereotypes contended by the Union of India has also been attempted. Lastly, the author wishes to arrive to the conclusion that these decisions by employing the feminist methodology and asking the 'Women Questions', sets the course correct and shall have a lasting impact on future cases concerning gender-based discriminatory state actions.*

Keywords: Armed Forces, Gender-Stereotypes, Gender Equality, Feminist Constitutionalism.

Introduction

The Indian Constitution, while ensuring the equality of status and opportunity to all, also provides that the Indian state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them.¹ Nonetheless, the invective nexus of the Indian state and discrimination on grounds of sex goes back to the 1950s² and continues to exist. Although mostly guised in *facially neutral actions*³ and *romantic paternalism*⁴, these state actions, often motivated by the archaic understanding of gender roles, strike at the very heart of Article 15(1), Article 14, and Article 21 of the Indian Constitution.

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1 Article 15(1) of the Constitution of India.

2 *Anjali Roy v. State of West Bengal* AIR 1952 Cal 822; *Contrary Judicial Position in Rajeshwari v. State of UP* AIR 1954 All 608.

3 *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

4 *Anuj Garg v. Hotel Assn. of India* (2008) 3 SCC 1; *Sharron A Frontiero v. Elliot L Richardson* 411 US 677 (1973).

Gender barriers and stereotypes, being a salient feature of almost all the working sectors in India, can also be found in the Indian Armed Forces as these services have always been male-dominated since their inception. These stereotypes are mostly based on unscientific assumptions that women are somewhat lesser placed than men in various psychophysiological parallelisms.⁵ Over the years, these highly misplaced assumptions have come to be a socially accepted notion. This stream of thought has given birth to a division of functions and the traditionally ascribed gender roles upon men and women.⁶ Under this scheme of things, women cannot take up such vocations and jobs that are considered *outdoorsy* and require being mentally and physically *tough*.

The primary objectives of any armed force are to attack and to defend from attack, both of which warrants the legitimized use of violence. This is seen as the sole preserve of men. Naturally, allowing women in the armed forces and in some cases, their male counterparts to receive orders from them, was always out of the question. However, the Indian Supreme Court in some of the recent cases⁷, while appreciating the transformative nature of Article 15⁸, held that such discriminatory practices cannot be allowed.

The present paper reflects upon the Apex Court decisions in *Ministry of Defence v. Babita Puniya*⁹ and *Union of India v. Annie Nagaraj*¹⁰ while engaging with the concept of feminist constitutionalism in the Indian context. In order to do so, this paper presents an elaborate history of the dispute. While highlighting the flaws in the submissions made by the appellants, a critique of the same has been attempted. However, at the very outset, it must be noted that for the purpose of this paper, ‘woman’ would mean a human female. Regardless of their sexuality. Additionally, as has been mentioned in part 3 of this paper, ‘Armed Forces’, for purpose of this paper would mean the Indian Army, Navy and the Airforce. In the concluding note, this paper highlights some of the issues and challenges pending before the constitutional courts requiring application of feminist constitutionalism and, way ahead.

Feminist Constitutionalism in India

A constitution, in India and elsewhere, is the highest law of the land and the citizens as well as the state is bound by it.¹¹ It is the fundamental law of the land¹², as no other law can be made in contrast to it. Although the term constitutionalism is elusive, yet democratic governance and rights protection are broadly accepted as its

5 Simone De Beauvoir et al., *THE SECOND SEX*, 1st ed. 2011, pp. 66-71.

6 Anupama Roy, *GENDERED CITIZENSHIP: HISTORICAL AND CONCEPTUAL EXPLORATIONS*, 1st ed. 2005, p. 74.

7 *Union of India v. Annie Nagaraj* (2020) 13 SCC 1; *Ministry of Defence v. Babita Puniya* (2020) 7 SCC 469.

8 Gautam Bhatia, *THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS*, 1st ed. 2019, pp. 13-20.

9 *Ibid.*

10 *Ibid.*

11 *Minerva Mills v. Union of India* AIR 1980 SC 1789.

12 M.P. Jain, *INDIAN CONSTITUTIONAL LAW*, 9th ed. 2021, pp. 28-29.

essential elements, and judiciaries have traditionally been regarded as its key guardian and protector.¹³ Thus, constitutionalism, by means of a just constitution abhors absolutism premised upon the rule of law.¹⁴ On the other hand, feminism is an analysis¹⁵ of the institutionalized subjugation and oppression of women for the purpose of making it a tool for change. In many of its forms, feminism seems to involve two groups of claims, one normative and the other descriptive. The normative claims concern themselves with how women ought to be viewed and treated and draw on a background conception of justice or broad moral position; the descriptive claims concern how women are, as a matter of fact, viewed and treated, alleging that they are not being treated in accordance with the standards of justice or morality invoked in the normative claims. Together the normative and descriptive claims provide reasons for working to change the way things.¹⁶ For the purpose of this present disquisition, what becomes important, is the intersection of these two distinct yet concomitant disciplines.

Although constitutionalism and feminism are two distinct areas of study, both are closely kindred as the role of the constitution to transform public and private lives cannot be ignored. Therefore, this distinction becomes significant for understanding the role of the constitution to emancipate women from the shackles of institutionalized subjugation.¹⁷ This intersection may be understood as the feminist constitutionalism.

The feminist constitutionalism, unlike the formalistic and traditional constitutionalism, warrants criticism, of the traditional assumptions of the constitutional jurisprudence. It also promotes the understanding of liberty involving the different levels of social subordination¹⁸ affecting the autonomy of the women rather than narrowing it down to mere formal freedoms like business, association and expression. Such an approach was resorted to by the Indian Supreme Court to invalidate¹⁹ section 30 of the Punjab Excise Act, 1914, a seemingly neutral and non-

13 Upendra Baxi, “*Constitutionalism as a Site of State Formative Practices*”, *CARDOZO LAW REVIEW*, Vol. 21 No. 4, 2000.

14 *Rameshwar Prasad v. Union of India* (2006) 2 SCC 1.

15 Martha Albertson Fineman, “*Feminist Legal Theory*”, *JOURNAL OF GENDER, SOCIAL POLICY AND THE LAW*, Vol. 13 No. 1, 2005, pp.13-23.

16 Noëlle McAfee and Edward N. Zalta (ed.), “*Feminist Philosophy*”, *THE STANFORD ENCYCLOPAEDIA OF PHILOSOPHY*, June 28, 2018, <https://plato.stanford.edu/archives/fall2018/entries/feminist-philosophy>, (visited on February 11, 2021).

17 Mehal Jain, “*Constitution Itself Is Feminist, Justice Chandrachud On Transformative Constitution & Feminism*”, *LIVELAW*, <https://www.livelaw.in/constitution-itself-is-feminist-justice-chandrachud-on-transformative-constitution-feminism/>, (visited on October 5, 2022).

18 Catharine A. MacKinnon, “*Sex Equality Under the Constitution of India: Problems, Prospects, and Personal Laws*”, *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW*, Vol. 4 No. 2, 2006, pp. 183-184.

19 *Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1.

discriminatory provision, because it suffered from the paradoxical understanding of sex-roles essentially premised upon the public-private distinction.²⁰

Not only it invokes the constitutional provisions to achieve feminist goals, but it does so in a way essentially feminist. In other words, it strikes at the heart of the traditionally accepted stereotypical and discriminatory practices by employing a feminist interpretation. In most of the progressive jurisdictions, it is done by asking the ‘women question’²¹ - which inquires and exposes the impact of legal rules and principles upon women. This methodology not only assures the constitutional rights of the women, but also proposes to bring and consolidate the social rights within the regime of constitutional jurisprudence.²² The decision of the High Court of Delhi in *Inspector Ravina v. Union of India*²³ employs such an interpretation to invalidate a pregnancy-based burden impeding upon denial of seniority in promotion on a lady inspector. Later, the Apex Court in *Indian Young Lawyers Assn. v. State of Kerala*,²⁴ which was a case involving temple entry rights of the women, was decided by posing various *women questions* - including the novel ‘stigmatized understanding of menstruation resulting in untouchability’²⁵ strand of argument.

It is in this context, the paper analyzes, the laws governing the entry of women in the Indian armed forces and the judicial approach of the Indian Supreme Court.

Women In the Indian Armed Forces - Road to The Apex Court Decisions

The Indian Armed Forces consists of the Army, Navy, Air Force and other paramilitary forces. Women in these forces were inducted, as recorded history tells us, for the first time in the year 1888 as under the Indian Military Nursing Services.²⁶ Nonetheless, they were always commissioned in auxiliary units and were discriminated against.

When India got independence, these forces were *Indianised* by enactment of the Army Act²⁷, Navy Act²⁸ and the Air Force Act²⁹. However, section 12 of the Army

20 *Id.* (para. 46); To understand the public-private distinction in the Indian context, Partha Chatterjee, *Colonialism, Nationalism and Colonised Women: The Contest in India*, 16 AMERICAN ETHNOLOGIST 624, (1989).

21 Katharine T. Bartlett, “*Feminist Legal Methods*”, HARVARD LAW REVIEW, Vol. 103 No. 4, 1990, pp. 837-849.

22 Beverley Baines (eds.) et al., FEMINIST CONSTITUTIONALISM: GLOBAL PERSPECTIVES, 1st ed. 2012 p. 96.

23 *Inspector (Mahila) Ravina v. Union of India* 2015 SCC OnLine Del 14619.

24 *Indian Young Lawyers Association v. State of Kerala* (2019) 11 SCC 1.

25 *Id.* (para. 347, 357 and 358); Snehil Kunwar Singh, “*Religious Practices and Evolving Jurisprudence of Article 17*”, JOURNAL OF INDIAN LAW AND SOCIETY, Vol. 8, 2017, pp. 57-68.

26 Colin Gonsalves and Usha Sikdar, “*Indian Army Must Stop Its Discrimination Against Military Nurses*”, HINDUSTAN TIMES, December 13, 2017, <https://www.hindustantimes.com/opinion/indian-army-must-stop-its-discrimination-against-military-nurses/story-VmhPT6cKj3GW3M3KjCterK.html/>, (visited on October 5, 2022).

27 The Army Act 1950.

28 The Navy Act 1957.

29 The Air Force Act 1950.

as well as the Air Force Act, renders women ineligible for the services, relevant portion of which reads as:

No female shall be eligible for enrolment or employment in the regular Army, except in such corps, department, branch or other body forming part of, or attached to any portion of, the regular Army as the Central Government may, by notification in the Official Gazette, specify in this behalf.

Moreover, section 9(2) of the Navy Act also takes away this opportunity out of the hands of the women, and has been drafted in a similar fashion, reeking of gender stereotypes. Regardless of the fact that the Constitution of India provides for sex equality³⁰, Section 12 of the Army Act, Section 12 of the Air Force Act and Section 9(2) of the Navy Act have been drafted in such a manner that denial of opportunity for women in the armed forces has been made a norm. The acceptance of women in the armed forces has been left at the *discretion* of the government, which itself, till date, remains a male-dominated sphere.

In 1992, a notification³¹ was issued by the Union Government to make the women eligible in ten specific cadres of the Army. Similarly, in 1998,³² the Union Government exercised its authority under section 9(2) of the Navy Act to make women eligible for appointment in four of its branches. On the other hand, induction of women in the Air Force was allowed by virtue of a circular issued by the Ministry of Defence on 25th November 1991³³.

The notification of 1992, which allowed induction of women in the Army, proposed for a tenure of 5 years. This was known as the Women Special Entry Scheme (*hereinafter*, WSES). Later by an amendment of 1996, this tenure was extended for upto 10 years with an option to opt out after 5 years of completion of services. Later, on 20 July 2006, the sanction of the President of India was conveyed by two circulars regarding grant of Short Service Commission (*hereinafter*, SSC) to women officers instead of WSES. This was seen as an attempt to bring parity among male and female officers. Nonetheless, para 1(g) of terms & conditions clauses of this circular envisaged that seniority of women SSC officers will be depressed for consideration for the Permanent Commission on the ground that women officers undergo a training only of 24 weeks against 48 weeks of training undertaken by male officers.³⁴ In 2008, the Ministry of Defence by its circular, allowed for the permanent commission to women officers, but that was to be given progressively and only to some specific cadres.³⁵ Additionally, the appointment of women SSC officers was restricted to staff appointments, viz. In-office appointments, limiting their career progression in a vocation like the armed forces where staff appointments are traditionally considered as a punishment or demotion. Similar disputes related to the Indian Air Force were also considered by the Delhi High Court. These issues were

30 Article 15(1) of the Constitution of India.

31 Statutory Rules and Orders -I, Gazette of India, (Notified on January 23, 1993).

32 Gazette of India, (Issued on November 28, 1998).

33 *Babita Puniya v. Union of India* 2010 SCC OnLine Del 1116.

34 *Ministry of Defence v. Babita Puniya* (2020) 7 SCC 469.

35 *Ibid*, para 20.

heard by a division bench of Delhi High Court in *Babita Puniya v. Secretary*.³⁶ The Delhi HC, providing relief to the petitioners, ordered that those Army and Air Force women officers, who opted for the permanent commission and but were not granted, were entitled for the same along with all the consequential benefits on a par with male SSC officers.³⁷ While the Indian Air Force accepted the High Court directions³⁸, the Indian Army through the Secretary, Ministry of Defence went for appeal to the Apex Court in *Ministry of Defence v. Babita Puniya*.³⁹

Similar grievances were heard by the Delhi High Court⁴⁰ and Armed Forces Tribunal⁴¹ concerning the Indian Navy. In the first case, the petitioners challenged the policy decision of not considering the women SSC officers for the grant of permanent commission even after completion of fourteen years of service. In the later one, the petitioners were aggrieved by the policy document dated 26 September 2008 as it operated prospectively and restricted the grant of permanent commission to certain cadres. The Delhi HC granted the relief in the favor of the petitioners subject to the outcome of the *Babita Puniya* judgment by the Supreme Court. On the other hand, the Armed Forces Tribunal held the policy document to be invalid to the extent that it operated prospectively and was restricted to specific cadres.⁴² Both these judgments were challenged by the Union of India before the Apex Court in *Union of India v. Annie Nagaraj*.⁴³

Babita Puniya and Annie Nagaraja - Feminist Constitutionalism in Action

The Apex Court, in both the cases, while upholding the rights of the women SSC officers, adjudicated in their favor. Since the appellant in these cases was the Union of India, the arguments put forth in both the cases were based upon the same premise, i.e., inherent natural differences in the physiology and gender-roles of men and women. Moreover, the appellants, in both the cases relied upon article 33 of the Indian Constitution.

Thus, analysis of the submissions of the parties and of the observations by the court would be three-prong - *one*, by reflecting the fallacy of the 'inherent natural differences' strand of argument argued by the UOI, *two*, that article 33 cannot impinge upon the fundamental rights of the military personnel in an omnibus fashion opposed to what appellants contended and, *three*, that the decisions in *Babita Puniya* and *Annie Nagaraja* follows the approach of feminist constitutionalism.

Inherent Natural Differences or Discriminatory Romantic Paternalism

Appellants in *Babita Puniya*, while defending the policy decisions, submitted that in light of the occupational hazards and *inherent risks* involved in the service,

36 *Supra* n. 33.

37 *Ibid*, para 62.

38 *Union of India v. Annie Nagaraja* (2020) 13 SCC 1, para 3.

39 *Supra* n. 8.

40 *Annie Nagaraja v. Union of India* 2015 SCC OnLine Del 11804.

41 *Cdr. Priya Khurana v. Union of India* 2016 SCC OnLine AFT 798.

42 *Supra* n. 37, para 7.

43 *Ibid*.

women are not posted at par with their male peers in command appointments.⁴⁴ It was also contended, that discrimination was not inflicted upon the female SSC officers, rather, the male SSC officers would be at the receiving end if parity is given as the Army would have to deal with the long maternity and child care leaves, which would *compromise* the male officers of their *legitimate due*⁴⁵ and their presence would result in disturbance of *dynamics*⁴⁶ in all male units. Moreover, while justifying the restriction of appointment of women officers only in the staff appointments, it was argued that sometimes *call of duty* demands the *sacrifice* by the personnel and their families and that female officers would find it difficult to manage owing to the *marital, domestic and maternal obligations*⁴⁷ along with the infrastructural challenges especially of habitat and hygiene⁴⁸ At last, natural physiological differences were strongly asserted to uphold the policy decisions.⁴⁹

Similar contentions were argued in Annie Nagaraja that there are various practical complications in order to allow the female SSC officers to be inducted in permanent commission; one such, as highlighted by the appellants, was the absence of toilets and other female specific facilities in the Russian-made ships.⁵⁰

It is submitted by the author that while appreciation of inherent differences is necessary for policy formation, it should not curtail the fundamental right to equality and of opportunity.⁵¹ To put it in the words of Justice Ruth Bader Ginsberg, such classifications based upon broad generalizations of capacities of male and female are contrary to the preambular goals and rather justifies the socio-economic, cultural and legal inferiority of the women.⁵²

Strong reliance by the appellants upon the traditionally ascribed gender-roles and the public-private distinction, itself is problematic in the light of the Apex Court decision in *Anuj Garg v. Hotel Assn. of India*⁵³, where a piece of legislation based upon similar logic was struck down. Moreover, the contention that women officers would find it difficult to serve the service in light of the maternal and marital obligations falls flat to the judicial observation⁵⁴ by the Supreme Court that a wife is no longer her husband's chattel.

Further, the contention that the impugned regulations and notifications were not discriminatory in nature in the light of natural physiological differences fails to take the notice of long accepted *effect-doctrine*. This doctrine contemplates that whenever a classification is sought to be made, the effect of the legislation upon the classes is

44 *Supra* n. 33, para 39.

45 *Ibid*, para 40.

46 *Ibid*, para 45.3.

47 *Ibid*, para 45.1.

48 *Ibid*, para 45.4.

49 *Ibid*, para 45.2, 46.

50 *Supra* n. 37, para 44.

51 Article 16(2) of the Constitution of India.

52 *United States v. Virginia* 518 U.S. 515 (1996).

53 *Supra* n. 16.

54 *Joseph Shine v. Union of India* (2019) 3 SCC 39.

to be considered rather than mere form of reason behind the enactment.⁵⁵ Thus, such *facially-neutral* state actions⁵⁶ perpetuating discrimination, has been rightly rendered *ultra vires* to the Indian Constitution.⁵⁷

Article 33 Of the Constitution - An Omnibus Provision?

Apart from the above-mentioned submissions made, another provision relied heavily upon by the UOI, was article 33 of the Indian Constitution. It allows the parliament to restrict, by *law*, the application of the fundamental rights as enshrined in part 3 of the Indian Constitution to the members of the armed forces.⁵⁸ Therefore, it was argued that since all the impugned regulations and notifications are made in the exercise of the powers conferred by an act of parliament, i.e. Army Act, 1950 and, Navy Act, 1957, the plea of the petitioners to grant relief on the basis of the violation of the fundamental rights was not tenable before the court.⁵⁹

Before countering the above contention, it would be pertinent to reflect upon the interpretation of article 33. If we construe the language of article 33 in its entirety, it is apparent that although the parliament, by the exercise of legislative power, may limit the application of part three of the constitution upon certain class of personnel, it is to be done for the purpose of *proper discharge of their duty* and, *to maintain a sense of discipline* in the forces.⁶⁰ There must be a nexus between the law and the above-specified conditions.⁶¹ Therefore, the impugned state actions, so far as it doesn't aim to achieve the goals specified in article 33, are not protected.

Moreover, with assimilation of substantive due process into article 21 jurisprudence⁶² of the Indian Constitution, any law taking away the fundamental rights of the citizens must be just, fair and reasonable⁶³ procedurally and substantively⁶⁴. Another important facet of this evolving jurisprudence is that *life* in article 21 is considered something more than mere animal existence⁶⁵ and dignity of an individual being a part and parcel of one's life⁶⁶ is ought to be protected by prejudiced state actions.

In the light of this judicial trend, even when a law is allowed to abrogate fundamental rights of certain individuals under article 33, such law cannot be arbitrary and based upon *socially accepted* stereotypes. Thus, protection of article 33 cannot be accorded in the present case.

55 *Rani Raj Rajeshwari Devi v. State of UP* AIR 1954 All 698.

56 *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

57 *Supra* n. 7.

58 Article 33(a) of the Constitution of India.

59 *Supra* n. 33 (para 38); *Supra* n. 37 (para 62).

60 *Lt. Col. Prithi Pal Singh Bedi v. Union of India* (1982) 3 SCC 140.

61 *Union of India v. LD Balam Singh* (2002) 9 SCC 73.

62 *Kartar Singh v. State of Punjab* (1994) 3 SCC 569.

63 *Maneka Gandhi v. UOI* (1978) 1 SCC 248.

64 *Selvi v. State of Karnataka* (2010) 7 SCC 263.

65 *Francis Coralie Mullin v. Administrator, Union Territory of Delhi* (1981) 1 SCC 608.

66 *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

A Feminist Supreme Court?

Indian jurisprudence, although replete with a plethora of judgments upholding the equality of women, the decisions in Babita Puniya and Annie Nagaraja are a strong reiteration of this often recognised constitutional tradition. In both these cases, the bench of justices DY Chandrachud and Ajay Rastogi employs the feminist methodology and, as it will be argued, reaffirm the feminist constitutionalism.

Feminist Constitutionalism, as it has been already discussed, employs an analysis where it tries to interpret the impugned provisions of law by asking the women-question & engaging with the effect-doctrine and, enquires whether the classification, if any, is based upon the fallacious traditional understanding of gender-roles and public-private distinction.

The Apex Court, before rendering the relief to the women officers, first of all highlights the patriarchal attitude and mindset as evident in the submissions by the appellant. Court, while accepting the arguments of the women officers, asserts that, these submissions and the disputed state actions are essentially based on sex stereotypes and the traditionally ascribed social roles.⁶⁷ Emphasis given upon the inherent physiological differences and underlying assumption that a command position in armed forces might prove to be *arduous*, is rendered constitutionally flawed vis-a-vis anti-discriminatory nature of articles 14, 15 and 16 of the Indian Constitution. The Apex Court also concedes the argument of the respondents that such a restriction based upon unavailability of habitat and hygiene facilities casts an unnecessary burden upon the women officers.⁶⁸ In this way, the court is clearly invoking the *women-question* approach and fathoms into the effects of these restrictions. This judgment, in pith and substance, also follows the Israel Supreme Court in *Miller v. Minister of Defense*⁶⁹ where a sweeping refusal to consider women candidates for military pilots' course was invalidated. Thus, in toto, the Hon'ble Supreme Court considers the effect of such discrimination upon the women and accepts the fact that these provisions are a hindrance in the career progression of the women SSC officers.⁷⁰

Furthermore, these decisions also try to examine whether the basis of such classification is entrenched in traditional gender-roles and answers in affirmative. The court argues that these classifications have been made relying upon the flawed notion that women are the weaker sex & their sphere is limited to the homely and marital obligations. Resultantly, such notions are constitutionally blemished.⁷¹ This analysis can be equated with the analysis adopted by the Supreme Court in *CB Muthamma v. Union of India*⁷², where a rule, that required a female foreign services officer to seek permission of the government prior to solemnization of her marriage and to resign if the government asked to, was invalidated. Similar jurisprudence was

67 *Supra* n. 33, paras 68, 69; *Supra* n. 37, paras 78, 79.

68 *Supra* n. 33, para 68.

69 *Miller v. Minister of Defense* 49(4) IsrSC 94 [1995].

70 *Supra* n. 33, para 85; *Supra* n. 37, para 101.

71 *Supra* n. 37, para 80.

72 *CB Muthamma v. Union of India* (1979) 4 SCC 260.

also adopted by the Indian Apex Court in *Air India v. Nergesh Meerza*⁷³ and much later in *Air India Cabin Crew Assn. v. Yeshaswinee Merchant*.⁷⁴ All these aforementioned decisions called out the discriminatory state actions based upon gender stereotypes.

Thus, in light of the aforesaid, it can be safely concluded that the Supreme Court judgments in Babita Puniya and Annie Nagaraja are the latest addendum in the long tradition of Indian feminist constitutionalism as they promise to shatter the shackles of stereotypes still prevalent in the armed forces.

Conclusion

While both these judgements were widely celebrated, the fight is still half won. Having said that, the change has been initiated. Recently, the Supreme Court, by an interim order, paved the way for the women to be a part of the National Defence Academy.⁷⁵ This welcome step, later, was positively received by the Army Chief.⁷⁶ Additionally, a division bench of Justices DY Chandrachud and BV Nagarathna, recently passed an order for the grant of permanent commission to 39 women officers who were found eligible.⁷⁷ Additionally, the Indian Supreme Court has recently been seen to adhere to the jurisprudence of feminist constitutionalism. The Apex Court, very recently, in *X v. Health & Family Welfare Department*⁷⁸ interpreted the Medical Termination of Pregnancy Act and Rules in way to include marital rape in the definition of rape for the purposes of the said legislation. This decision, though not in letter, but in spirit invokes the feminist constitutionalism and by asking the *women question* that married women may also form part of the class of survivors of sexual assault and rape⁷⁹ and therefore, they must also be extended the benefits of this beneficial legislation. The time is ripe for realization of the state's obligation to create an environment where the men and women are equally placed⁸⁰ and positive steps for the same should be taken.

Nonetheless, much is yet to be done for achieving the constitutional goal of gender equality. Though the Apex Court judgements should be appreciated for its transformative nature, it remained silent on the question whether the women officers can be employed in combat units. Moreover, two of the constitutionally important matters, regarding the practice of Female Genital Mutilation⁸¹ and the Sabrimala (9-Judges) reference⁸² are yet to be decided by the Apex Court. In the author's opinion,

73 *Air India v. Nergesh Meerza* (1981) 4 SCC 335.

74 *Air India Cabin Crew Assn. v. Yeshaswinee Merchant* (2003) 6 SCC 277.

75 *Kush Kalra v. Union of India* W.P.(C) No.-001416 / 2020.

76 "Welcome Women Cadets To NDA With Fair Play, Professionalism: Army Chief", NDTV, October 29, 2021, <https://www.ndtv.com/india-news/welcome-women-cadets-with-fair-play-professionalism-army-chief-naravane-to-nda-cadets-2591884>, (visited on October 6, 2022).

77 *Nilam Gorwade v. MM Narwane* W.P.(C) No. 1109/2020.

78 *X v. Health & Family Welfare Department* 2022 SCC OnLine SC 1321.

79 *Ibid*, para 74.

80 Article 39(b) of the Constitution of India.

81 *Sunita Tiwari v. Union of India* (2019) 18 SCC 719.

82 *Kantaru Rajeevaru v. Indian Young Lawyers' Association* (2020) 3 SCC 52.

both of these issues, while following the trend of employing feminist constitutionalism, must be decided while asking the *women question* and the *effect doctrine*. Then only, the constitutional goal of equality of status and opportunity to everyone irrespective of one's gender can be enforced in letter and spirit.

RE-INTERPRETING “RAINBOW CAPITALISM” WITHIN THE PRESENT PARADIGM OF CORPORATE SOCIAL RESPONSIBILITY: A STUDY OF GENDER-BASED (UN)EMPLOYABILITY OF GENDER NON-BINARY PERSONS IN INDIA AS AGAINST BEST POLICY PRACTICES ELSEWHERE

Niharika Ravi*

Abstract

Rainbow capitalism refers to the practice of using the LGBTQIA+ movement, the queer community, and its allies' inclination towards supporting the LGBTQIA+ community for partisan economic gains. The Companies Act 2013 makes it mandatory for Companies to engage in Corporate Social Responsibility practices in order to contribute to uplifting society in general and local communities in particular. It lists a set of initiatives that Companies can undertake to fulfil their Corporate Social Responsibility. This paper questions whether Corporate Social Responsibility can extend to become a company's responsibility to not undertake certain activities that may harm society, in addition to undertaking activities that shall benefit society by dedicating the aforementioned 2% of net profits of a certain social cause. To navigate this query, this paper adopts the rainbow capitalism lens in order to ascertain whether minority communities can be both, uplifted and prevented from further marginalisation simultaneously to ensure holistic social development in the country through the corporate world. In doing so, this work reinterprets the widely used term “rainbow capitalism” in an exclusionary context within business studies and observes the dichotomous relationship that countless business entities have with LGBTQIA+ welfare and exclusion of queer persons from legally regulated workplaces. To achieve the goals set forth by this study, the author records their interactions with the Founder and Managing Trustee of Sakkhi, a charitable and philanthropic organisation that stands for and works towards improving employability in the transgender community based in Chennai. The author endeavours to understand how organisations like this approach the issue of places of employment actively excluding those of non-binary genders. Having understood the practical approach taken by such organisations in India to address the active hesitancy among employers to employ transgender persons and the benevolent and passive furtherance of biases and stereotypes by them in workplaces, this work tries to navigate best practices employed by workplaces across the world to include queer persons in their workplaces in an attempt to chalk out a way forward on this front.

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Keywords: Rainbow Capitalism, Non-Binary, Corporate Social Responsibility, Stereotype.

Introduction to The Present CSR Paradigm

“For...queer persons, the legal history of section 377 is personal, and the personal is legal.”

-Rohin Bhatt¹

It has been a notion of common agreement and assent within the queer community² that landmark judgments on their rights including the *NLSA v. UOI* judgment of 2014 which recognised transgender people’s rights to self-determination and envisioned civil, social, and economic equality for the community³ and the *Navtej Singh Johar v. Union of India* judgment of 2017 which partially decriminalised Section 377 of the Indian Penal Code to allow same-sex couples to engage in sexual activities without being reprimanded by law as criminals⁴ are but stepping stones to the full and complete realisation of the LGBTQIA+ community’s rights in India. It is agreed further that judgments like those in the Sreeja case which granted a transgender woman the right to be a bride⁵ and the *S. Sushma and Seema* case which boldly prohibited conversion therapy in Tamil Nadu⁶ are stepping stones towards this goal.

This paper talks about another major aspect of the full and complete realisation of the right to equality of the LGBTQIA+ community by observing how their right to employment and equal opportunities is affected by their social status. In doing so, this paper observes how the Corporate Social Responsibility paradigm present in the Company Law jurisprudence of the country can be used as a conduit to compel corporate structures to confer equal treatment upon members of the LGBTQIA++ community. The study delves deeper into company law jurisprudence by exploring whether Corporate Social Responsibility norms, which are mostly positive obligations, can be extended and translated to a social responsibility to abstain from harmful practices like engaging in rainbow capitalism.

Corporate Social Responsibility (CSR) in Indian Company Law Jurisprudence is enshrined in Section 135 of the Companies Act, 2013 which mandates the formation of Corporate Social Responsibility Committee to ensure that the company spends at least two percent of the net profits of the company made in the three immediately preceding financial years towards CSR, focussing on local areas and the

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- 1 Rohin Bhatt, “*Re-imagining Our Queer Futures Four Years After Navtej Singh Johar*”, THE LEAFLET, September 6 2022, <https://theleaflet.in/re-imagining-our-queer-futures-four-years-after-navtej-singh-johar/>, (visited on September 11, 2022).
 - 2 Encompassing the LGBTQIA++ communities, including the communities in India whose identities are subsumed within the transgender umbrella and also persons of various other sexual (orientation) minorities.
 - 3 *National Legal Services Authority v. Union of India* AIR 2014 SC 1863.
 - 4 *Navtej Singh Johar v. Union of India* AIR 2018 SC 4321.
 - 5 *Arunkumar v. Inspector General of Registration* (2019) 4 Mad LJ 503.
 - 6 *S. Sushma v. Commissioner of Police* (2021) 5 Mad LJ 9.

areas around which it operates.⁷ Such activities relating to CSR will be recommended by the aforementioned Committee and Schedule VII of the Companies Act acts as an aid herewith, recommending a list of permitted activities for CSR. Relevant portions of Schedule VII in keeping with the objectives of this body of research are as follows:

- Promoting gender equality and empowering women
- Employment enhancing vocational skills
- Social business projects

Schedule VII is not limiting in nature for it does accommodate “such other matters as may be prescribed” thereby allowing the Committee to indulge in CSR practices outside the ambit of the Schedule. The general circular by the Ministry of Corporate Affairs clarified that CSR activities must be relatable to Schedule VII, however, the Schedule “must be interpreted liberally so as to capture the essence of the subjects enumerated in the said Schedule.”⁸ This paper explores whether the ambit of Section 135 and Schedule VII, in keeping with this liberty, can be broadened to restrict Companies from engaging in practices like rainbow capitalism and to instead engage in promoting gender equality, employing LGBTQIA+ candidates, and supporting them in lieu of the spirit of the Act to ensure that CSR initiatives are “aligned with the national priorities and enhance engagement of the corporate sector towards achieving Sustainable Development Goals (SDGs).”⁹

Both doctrinal and non-doctrinal forms of research methodology have been perused by the author to gain complete understanding of the subject matter and to further present the ideas put forth in this paper in the most effective manner. Mr. Balaji Seshadri, Founder and Managing Trustee of Sakkhi, a charitable and philanthropic organisation that stands for and works towards improving employability in the transgender community based in Chennai, was interviewed by the author to gain perspectives and identify issues relating to the corporate sector that LGBTQIA+ citizens face. His insights have been presented in the body of the work while Sakkhi’s inputs form a base for the last portion of the paper. The remainder of this paper is derived from scholarly literature that has been previously published on various online forums as the concept of rainbow capitalism is an evolving one and sparse academic work on the same is prevalent at this time.

A Short Review of Pre-Existing Literature

Rainbow capitalism, while well-established as a practice, is an evolving discipline in academic studies. The author perused works by Saniya Durgriyal and Anahita Kapoor to navigate the various intricacies of rainbow capitalism from a social and economic standpoint respectively. Much other literature that was referred to was in the form of editorials and opinion pieces on reputed news websites. With respect to the study of CSR practices in the EU, the European Commission’s Policy

7 Section 135 of the Companies Act 2013.

8 General Circular No. 21/2014, MINISTRY OF CORPORATE AFFAIRS, Government of India, June 18, 2014, https://www.mca.gov.in/Ministry/pdf/General_Circular_21_2014.pdf.

9 General Circular No. 14/2021, MINISTRY OF CORPORATE AFFAIRS, Government of India, August 25, 2021, https://www.mca.gov.in/Ministry/pdf/FAQ_CSR.pdf/.

Department for Citizens' Rights and Constitutional Affairs' report on CSR in the EU was a guiding light that led the author to review statutes, provisions, rules, and opinions by eminent jurists on matters concerning CSR in the EU. Sanchez's collation of information on companies in the EU working towards the welfare of LGBTQIA+ citizens further streamlined the research process, allowing the author to collate a list of good practices.

Primer on Rainbow Capitalism in India and the World

Gilbert Baker, an openly gay man and drag queen designed the rainbow flag in 1978, having been urged by Harvey Milk, one of the first openly gay elected officials in the U.S., to create a symbol for the gay community. This rainbow flag has symbolised the LGBTQIA+ community across the world since it was first flown at the San Francisco Gay Freedom Parade on June 25, 1978.¹⁰

In the decades since, the LGBTQIA+ Equality Movement has pervaded intersectional spheres across the globe and many in the corporate world have pledged allegiance to this movement. It is hence that many companies started re-designing their logos and promotional material with themes related to Baker's rainbow flag especially in the month of June which is celebrated as Pride Month in honour of the Stonewall riots which took place in New York City in 1969.

Rainbow Capitalism refers to the commercialisation of the aforementioned practice, wherein companies use the acceptance and allyship that the LGBTQIA+ community has gained to promote their own products for monetary gain. These companies, commodifying awareness, divorce real action from nominal activism for partisan gains¹¹ and their actions can be described as the targeted inclusion of the queer community to generate a market focussed on exploiting this inclusion.¹² An example cited by Dungriyal in a short paper on rainbow capitalism is that of British Aerospace (BAE), an arms dealer indirectly contributing to the oppression of queer persons in countries with oppressive laws by supplying arms to the oppressors of the communities, sponsored the London Pride in 2016. It is evident that BAE sponsored the Pride Event only to profit from the traction being gained by the awareness being spread in Pride Month. Another effective example cited is that of Walmart, a leading sponsor of the New York City Pride which simultaneously practices biased employment and hiring. Pharmaceutical companies like Gilead Pharmaceuticals have also come under fire for sponsoring pride events only to promote HIV prevention drugs and other targeted health care facilities.¹³

10 Nora Gonzalez, "How did the Rainbow Flag Become a Symbol of LGBTQ Pride?", ENCYCLOPAEDIA BRITANNICA, June 20, 2017, <https://www.britannica.com/story/how-did-the-rainbow-flag-become-a-symbol-of-lgbt-pride>, (visited on September 13, 2021).

11 Saniya Dungriyal, "Rainbow Capitalism", FIGSHARE, March 22, 2020, <https://doi.org/10.6084/m9.figshare.12017094.v2>.

12 Anahita Kapoor, "Market Trends and Trepidations: A Study of Rainbow Capitalism in India", INTERNATIONAL JOURNAL OF SOCIAL SCIENCE AND ECONOMIC RESEARCH, Vol. 5 No. 5, 2020, p. 1340.

13 *Supra* n. 5.

Rainbow Capitalism in India

With respect to India, Kapoor identifies the rise of rainbow capitalism, or pink capitalism, in three phases-

Phase I: The Underground Phase functioning in covert gay bars and print magazines during oppressive regimes

Phase II: The Community Building Phase which led to both, a rise in activism and opposition

Phase III: Post the Navtej Singh Johar judgment which gave the queer community newfound autonomy in many senses including economic, the integration of media culture and several subcultures is seen driven by a variety of agendas including an arbitrary belief in human rights and self-expression¹⁴

This work reflects on whether capitalist corporations' misuse of the rainbow to coerce queer and queer ally customers into buying products as a way of showing solidarity and support to a social cause is the antithesis of a company's Corporate Social Responsibility and attempts to create a pathway in which Companies can effectively extend their support to the community in a tangible fashion under the ambit of CSR.

Identifying Issues Relating to The Corporate Sector and the LGBTQIA+ Community: Interview with Sakkhi

The first step towards addressing the goals of this work in light of the fact that 92% of transgender people in India are deprived of the right to participate in any form of economic activity irrespective of qualification,¹⁵ is to determine the challenges and issues faced by the LGBTQIA+ community when it comes to the corporate sector. The author, in order to ascertain the same, spoke to Mr. Balaji Seshadri, Founder and Managing Trustee of Sakkhi, a charitable and philanthropic organisation that stands for and works towards improving employability in the transgender community based in Chennai.¹⁶

Mr. Seshadri spoke in detail about how Sakkhi puts its faith and efforts in micro, small, and medium businesses and enterprises while attempting to place its transgender patrons because large corporate organisations and MNCs may "make big promises but never deliver on them." Stating that there may not necessarily be a policy deficiency, he insisted that even though there may be regulations, including CSR obligations, in place, there is a lack of end-to-end hand-holding for employees from marginalised backgrounds and a lacuna in effective implementation of all policies, including anti-discrimination ones. He elaborated that educating employees in order to promote an inclusive workplace for persons from marginalised

14 *Supra* n. 6, p. 1340.

15 "Report: Study on Human Rights as a Third Gender", NATIONAL HUMAN RIGHTS COMMISSION, INDIA, August 20, 2018, <https://cfnhri.org/updates/study-on-human-rights-as-a-third-gender/>, (visited on September 19, 2021).

16 Sakkhi, a charitable and philanthropic organization stands for and works towards improving the employability for the transgenders community, <http://sakkhi.org/index.html>, (visited on October 1, 2021).

communities like the transgender persons being placed by Sakkhi shall be the cornerstone of progress on this front.

When asked if employing LGBTQIA+ persons, and specifically transgender persons should be a CSR obligation or whether it should become a norm in gender and sexuality-blind hiring, Mr. Seshadri immediately vouched for positive discrimination and affirmative action to ensure that at least 2% of posts should be reserved from gender and sexual minorities (GSMs) in this regard. He held the opinion that leaving companies to practice gender-blind hiring shall only promote biased recruitments and reserving 2% of posts shall give marginalised communities a limited but assured means for upward mobility.

He concluded by stating that members of the transgender community who he has worked with for nearly two decades do not seek employment merely for financial gains, but wish to establish a dignified social standing. He is wary of the fact that larger conglomerates only show their support for their community through PR campaigns and webinars, but do not offer equal opportunities and any efforts to push them to commit to their social responsibility of uplifting GSMs only results in the efforts “getting lost in paperwork and translation.”

CSR Law And Good Practices on Non-Discrimination of Queer Persons in Employment and Lessons from the EU

Good Practices in Companies as a Sign of Social Responsibility towards the Queer Community

In April 2021, the Kerala-based Bhima Jewellers commissioned Delhi-based advertising agency Animal to create an advertisement portraying the coming-of-age story of a transgender woman. The advertisement took the nation by storm and was applauded for representing the LGBTQIA+ community.¹⁷ In September 2021, Axis Bank commemorated the anniversary of the Navtej Singh Johar judgment by releasing ‘ComeAsYouAre’: a Charter for policies and practices for employees and customers from the LGBTQIA+ community, embracing diversity, equity and inclusion in alignment with their Environmental, Social, and Governance (ESG) commitments. They committed to the following from September 20, 2021-

- “All employees can list their partners for mediclaim benefits irrespective of gender, sex or marital status
- Employees can dress in accordance with their gender/ gender expression:
- Customers from LGBTQIA+ community will be able to list their title as ‘Mx’ in their Savings and Term Deposit Accounts*
- Customers can open a Joint Savings or Term Deposit Account with their same sex partner

¹⁷ Saumya Tewari, “*Bhima Jewellers’ Advertisement on Transwoman’s Journey Wins Netizens’ Hearts*”, LIVE MINT, April 16, 2021, <https://www.livemint.com/companies/news/bhima-jewellery-advertisement-on-transwoman-s-journey-wins-netizens-hearts-11618562263757.html>, (visited on October 2, 2021).

- Customers can add their same sex partner as a nominee in their Savings or Term Deposit Accounts”¹⁸

Tata Steel, in 2019, was named the Top Employer for LGBT+ Inclusion by India Workplace Equality Index (IWEI) in lieu of the fact that same-sex partners can avail HR benefits like “coverage for child care leave, new born parent leave, medical benefits, joint house points, employee assistance programmes, domestic travel policy, health check-ups, transfer and relocation benefits, honeymoon package and more” under TATA’s employment. TATA also launched WINGS, an LGBT employees’ resource group in 2018 and launched a diversity group MOSAIC in 2015 to facilitate hiring inclusion for GSMs, PWDs, etc. Godrej Group, Mahindra Logistics Ltd., Infosys, and LaLiT Suri Hospitality Group, among others, also have such inclusive LGBT-friendly policies for employees, all looking inward when it comes to such progress while also working outw

These are companies from India that have gone truly above and beyond with respect to the social responsibility they hold and the obligations they are expected to fulfil as major actors in society.

CSR Negative Obligations and the EU

Companies like IKEA, Accenture, and EY that are based in the EU but are global actors with arms spreading around the globe also practice diversity hiring, hence facilitating equality and inclusion of LGBT community members. It is essential to note that CSR as a positive obligation has, to some extent, been implemented in the EU, which is why this paper has inspected the actions of the aforementioned EU-based companies. Since this paper aims to measure whether CSR regulations in India, in the future, can set negative obligations on companies, this portion particularly inspects to what extent negative CSR obligations have been imposed on companies in the EU. Company law remains national law in the EU despite significant harmonisation of other areas of legislature, hence, the following portion focuses particularly on France and the Netherlands which have made strides in inculcating negative obligations through CSR in mild, yet effective forms.

France

Act n ° 2017-399 adopted on March 27, 2017 in France creates a duty of vigilance for mother companies and contracting companies in keeping with the Vigilance Act to obligate large French Companies to “develop, publish and implement appropriate measures to identify risks and prevent violations of human rights, fundamental freedoms, human health and safety, and the environment.” Since an amendment to the French Civil Code in 2019¹⁹, a French Company is also obligated to consider the “social and environmental stakes linked to its activity” and

18 “Axis Bank Announces ‘ComeAsYouAre’: A Charter of Policies and Practices for Employees and Customers from the LGBTQIA+ Community”, AXIS BANK, September 6, 2021, <https://www.axisbank.com/about-us/press-releases/axis-bank-announces-comeasyouare-a-charter-of-policies-and-practices-for-employees-and-customers-from-the-lgbtqia-community>, (visited on October 2, 2021).

19 Amended by the PACTE Law, May 22, 2019-486.

not only focus on share-holders' interests.²⁰ The amendment applies to all French Companies without exception, but encourages voluntary action.

Netherlands

The political will to tackle the issue of human rights due diligence across the supply chain emerges strongly in the Dutch Child Labour Due Diligence Law which enshrines a duty of care to prevent the supply of goods and services that have been created with the aid of child labour in Dutch Law, hence creating a negative CSR obligation, i.e., one must not trade in goods and services of the aforementioned nature. Impressively, Dutch businesses later wrote to the Ministry in support of the legal framework and called for legislations that force companies to tackle the negative impact on human rights and the environment in their supply chains. One criticism of the CSR jurisprudence in Netherlands is the lack of a standardised minimum that leaves much on the negotiation table with regards to both, contribution and profit shifting.²¹

Centralisation of CSR Due-Diligence Laws

The European Commission announced in 2018 that, “to promote corporate governance that is more conducive to sustainable investments, by Q2 2019, the Commission will carry out analytical and consultative work with relevant stakeholders to assess: (i) the possible need to require corporate boards to develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets; and (ii) the possible need to clarify the rules according to which directors are expected to act in the company’s long-term interest.”²²

The European Commission’s visions with reference to human rights, the “European Green Deal” and other related matters make the centralisation of CSR Due Diligence norms a strong aspiration for ensuring that human rights can be protected on all fronts under Company Law in the near future. EU stakeholders have affirmed that, “merely optional or voluntary provisions are not able to induce companies to respect human rights across their supply chain and subsidiaries”²³- a sentiment that can be translated to CSR practices across forms and countries, including India with rainbow capitalism and LGBTQIA+ activism.

Conclusion

This paper has inspected CSR norms relating to marginalised communities in India and the EU and has further inspected good practices by Companies in these

20 Article 1833 of the French Civil Code 1804.

21 Kletia Noti et al., “*Corporate Social Responsibility (CSR) and its Implementation into EU Company Law*”, POLICY DEPARTMENT FOR CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS, EUROPEAN PARLIAMENT, November, 2020, [https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2020\)658541](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2020)658541), (visited on June 11, 2021).

22 “*Action Plan: Financing Sustainable Growth*”, EUROPEAN COMMISSION COMMUNICATION, March 8, 2018, <https://eur-lex.europa.eu/legal-content/EN-IT/TXT/?from=EN&uri=CELEX%3A52018DC0097>, (visited on July 1, 2021).

23 *Supra* n. 19.

regions with particular relation to the LGBTQIA+ community. It has further illustrated the oncoming plague of rainbow capitalism and has, in pursuance, inspected whether negative obligations can be subsumed under CSR by studying provisions made in this regard in France and the Netherlands. The success story from the Netherlands particularly paints rainbow capitalism as anti-thesis to Corporate Social Responsibility, establishing that such practices indeed sum up to Social Irresponsibility on part of corporate entities.

Having examined rainbow capitalism against the prevailing CSR norms in India and the EU, the following findings are presented:

- That countries have, indeed, tried to impose negative obligations by way of CSR in order to protect human rights
- That in doing so, these countries have cultivated a strong political will to combat rights issues
- That Indian companies like TATA and Bhima also harbour the will to act on rights issues and strong CSR jurisprudence can only support them. Further, negative obligations that suggest that companies may not misuse discourses on human rights for partisan gain and may instead stringently use any and all PR campaigns as an extension to tangible action on CSR fronts may deter practices like rainbow capitalism
- That EU stakeholders endorse strong and binding CSR norms in order to protect human rights and the environment

Recommendations

Sakkhi has succinctly prescribed a to-do list of corporate responsibilities towards transgender persons that can be extended to the entire LGBTQIA+ community in context of this paper. Their list includes recruitment of members of the community and gainful use of their skills, ensuring their safety at the workplace including sexual harassment policies, equal pay for equal work, equal opportunities for all persons of genders, legislative and social advocacy for gender neutral washrooms, advocacy programs to create awareness among other employees, assured living wage alongside job security and permanent income, appraisal, and career growth. In addition, this paper puts forth those regulations be brought about for sustained awareness drives and campaigns for equality and inclusion and affirmative action for GSMs in the corporate sector be considered.

Way Forward

This paper advocates for companies to create a balance between the shareholder-centric approach that they have held for so long and a stakeholder-centric approach that they must consider in order to ensure that the interests of all entities even beyond the company being affected by the company's decisions be considered. While the EU is making significant strides towards this aspiration, it is clear that India still has miles to go. Section 135 and Schedule VII, being fairly new introductions, are waiting for their scope to be broadened further. It is prudent to consider imposing negative obligations, i.e., directing companies to not engage in socially and environmentally harmful practices like rainbow capitalism in the future under the

ambit of their corporate responsibility to society and to ensure that any initiatives taken up under either positive or negative CSR obligations are given end-to-end support from the CSR Committee and the Company at large.

GENDER ROLES AND GENDER STEREOTYPES: ANALYSING THE PARTICIPATION OF MEN IN HOMEMAKING AND CAREGIVING

Yukta Chordia*

Abstract

Gender roles, encompassing a range of behaviors and attitudes that are generally considered acceptable, appropriate, or desirable, influence a wide range of human behavior, often including the clothing a person chooses to wear, the profession a person pursues, the personal relationships a person enters and all of this while conveying the distinct separation between male and female duties in life. These gender roles are also present in family dynamics. The role of homemaking and caregiving was designated upon women since a long time. On the contrary, breadwinning was an activity expected of men. It has been argued that men do not increase their family participation because they perceive the work of the home as demeaning and that they enjoy their privileged position in the family, resenting and resisting any attempt to change. Men's response is not so much reluctance as ambivalence, created by several factors. These factors include but are not limited to the way they are born, the way they are taught, the way they socialize, the kind of friends they have, the way their family thinks and so on. These factors are discussed in the paper concerning society, gender socialization and the nature-nurture theory. However, the traditional view of males as breadwinners should now be challenged. Men's engagement in homemaking and caregiving is just as crucial as women's. It is the equal obligation of men and women to conduct homemaking and caregiving roles in order to preserve the balance in relationships and at work. Therefore, this paper suggests and emphasizes on education, awareness projects and campaigns, increase in paternity leave and family friendly working conditions as solutions to increase the participation of men in homemaking and caregiving in India. Finally, based on the analysis of different methods applied by other nations and international organizations to increase men's participation in homemaking and caregiving, this paper explores the possibility to apply them in the Indian context.

Keywords: Caregiving, Gender Roles, Gender Socialization, Homemaking, Nature-nurture Theory, Paternity Leave.

Introduction

When a woman is to give birth to a child, her family organizes a gender reveal party, where if the balloon sprinkles pink dust, then the child is going to be a girl and if the Balloon sprinkles blue dust, then the child is going to be a boy. People assign colors to a baby before it is even born. Colors are not the only things assigned to a

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gender; the society even assigns roles and responsibilities to girls and boys, men, and women. These roles are called gender roles defined as “expected roles that are associated with each sex group.” It could be seen that “through gender socialization, children and adolescents learn to associate activities and behaviors with specific genders and to adopt appropriate gender roles.”¹

These gender roles are also present in family dynamics. The role of homemaking was designated upon women since a long time. The homemaking activities like cooking, cleaning, grocery shopping, taking care of children and disabled people in the house, managing, and running chores and errands and keeping the home environment pleasant were expected of women. On the contrary, breadwinning was an activity expected of men. Breadwinning included going out, looking for a job and earning money. These became social norms and anybody acting out of this social and cultural construct was judged by the society. These traditional roles were not only prevalent in India but in the entire world.

Though the world is changing, gender inequalities remain deeply entrenched in every society² and the continuous efforts towards gender equality and women empowerment are accelerating the progress of women in every walk of life. Be it economic, political, social, cultural, or domestic roles, women are pursuing it all. Now, both men and women work and earn money but men’s participation in domestic or care work in India is only 27% (six years and above), while on the other hand, women’s participation is 92%.³

Indian women bore a crippling weight of neglected family and care work 20 years prior - it is the same at this point.⁴ Everywhere, women are the constant suppliers of care and consideration for relatives with constant ailments or incapacities, including the old and those with other dysfunctional behaviors. What could be the reasons behind the low participation of men in domestic work? This paper tries to answer this question through the analysis of various social institutions - schools, peers, family to highlight how the “peer and family relationships play an important role in the development of a child’s self-concept, examines its impact on how children view the roles of males and females in our society. Finally, how the perpetuation of gender biases and stereotypes often is begun in the home and then

1 Neetu A. John et al., “*Gender Socialization During Adolescence in Low- And Middle-Income Countries: Conceptualization, Influences, And Outcomes*”, INNOCENTI DISCUSSION PAPER 2, UNICEF OFFICE OF RESEARCH - INNOCENTI, 2017, https://www.unicef-irc.org/publications/pdf/IDP_2017_01.pdf.

2 Mattias Sundholm, “*UN Women: The United Nations Entity for Gender Equality and The Empowerment of Women*”, UNITED NATIONS, <https://www.un.org/youthenvoy/2013/07/un-women-the-united-nations-entity-for-gender-equality-and-the-empowerment-of-women/>, (visited on October 5, 2022).

3 Vignesh Radhakrishnan and Naresh Singaravelu, “*Data | 92% Indian Women Take Part in Unpaid Domestic Work; Only 27% Men do so*”, THE HINDU, September 30, 2020, <https://www.thehindu.com/data/92pc-indian-women-take-part-in-unpaid-domestic-work-only-27pc-men-do-so/article32729100.ece>, (visited on October 9, 2022).

4 Sunny Jose and Bheemeshwar Reddy A, “*Mind the Gap*”, THE INDIAN EXPRESS, October 25, 2020, <https://indianexpress.com/article/opinion/mind-the-gap-68830314/>, (visited on October 11, 2021).

further reinforced by the peer group.”⁵ The process of gender socialization and the Nature-Nurture theory which has been a long debate among the psychologists about the balance between two competing factors; nature (genetics) and nurture (environment), which determine an individual’s personality has also been discussed to understand the reasons behind the research topic. In the light of this analysis, this paper suggests solutions to address the discriminatory gender norms to foster collective change in the society. Similarly, by analyzing the different methods applied by other nations and international organizations to increase men’s participation in homemaking and caregiving, this paper made an attempt to relate and apply them in the Indian context.

Meaning Of Homemaking and Caregiving

Homemaking and caregiving in this research paper means the unpaid domestic and care work which includes household duties such as cooking, cleaning, water collection, grocery shopping, taking care of children, elder and disabled people in the house, managing, and running chores and errands and keeping the home environment pleasant. The crippling weight of all these activities has been borne by the women for centuries. “This work performed by the women in the household increasingly gained association with natural characteristics of ‘womanhood’ to the point that work done within the household was considered as fulfilling the ‘natural altruistic tendencies of women.’”⁶

Analysis of Social Institutions

“It has been argued that men do not increase their family participation because they perceive the work of the home as demeaning and that they enjoy their privileged position in the family, resenting and resisting any attempt to change. Men’s response is not so much reluctance as ambivalence, created by several factors.”⁷ These factors include but are not limited to the way they are born, the way they are taught, the way they socialize, the kind of friends they have, the way their family thinks and so on. The following factors are explained briefly in the following paragraphs.

Nature-Nurture Theory

The nature-nurture debate about the balance between two competing factors; nature (genetics) and nurture (environment) has been going on since several years. Nature nurture debates continue being profoundly combative in the psychology of gender regardless of the common acknowledgement that both types of causal clarifications are important. In psychological science there is a broad meaning for each of these terms where “nature refers to biological structures and processes and

5 Susan D. Witt, “*The Influence of Peers on Children’s Socialization to Gender Roles*”, EARLY CHILD DEVELOPMENT AND CARE, Vol. 162 No. 1, 2000.

6 Shrestha Das, “*Unpaid Care Work and Indian State Policy*”, NALSAR STUDENT LAW REVIEW, Vol. 9, 2016, pp. 22-23.

7 Laura Lein, “*Male Participation in Home Life: Impact of Social Supports and Breadwinner Responsibilities on the Allocation of Tasks*”, THE FAMILY COORDINATOR, Vol. 28 No. 4, 1979, pp. 489-495.

nurture refers to sociocultural influences.”⁸ As mentioned earlier, both these terms play a key role in contributing to an individual’s behavior. However, this study focuses and elaborates only on the sociocultural influences and discusses the various factors involved in them under the realm of gender socialization.

Gender Socialisation

“Gender socialization as a norm seems to be a cultural universal trait of all societies.”⁹ Even if we aren’t aware of this concept of gender socialization, we have all been a victim of it. Gender socialization is a never-ending process. It starts when we are born and continues to be a part of our life in adolescence, during adulthood and subsequently during old age. Gender socialization intensifies as we grow old and creates inequalities in various sectors and spheres of life as it shapes beliefs about gender-appropriate behavior.

A discussion paper by the UNICEF Office of research-Innocenti and the International Centre for Research on Women defines gender socialization as a “process by which individuals develop, refine and learn to ‘do’ gender through internalizing gender norms and roles as they interact with key agents of socialization, such as their family, social networks and other social institutions”.¹⁰

Traditionally, women have been the homemakers and caregivers whereas men have played the role of breadwinners which eventually created an impact on their children as the children internalize the gender roles at home and expect the same to be applicable to themselves. This is one of the reasons why men assume that breadwinning is their sole responsibility while women should be doing the domestic work.

Society

Centuries ago, Aristotle stated that man is a social animal. This means that man has always and will always live in the company of other people. “Society is a group of people related to each other through persistent relations in terms of social status, roles, and social networks. It is the mutual interaction and interrelation of individuals and groups.”¹¹ Broad generalizations about the roles of men and women are ubiquitous and ingrained in our daily lives. Their influence may be detected in a variety of objects around us. Spaces are firmly split between “masculine and feminine:” the house is associated with women, while the world outside is thought to be solely male. It makes little difference whether women participate with the outer world as employees, consumers, or citizens, or if males are involved in the family and house as dads, husbands, and decision-makers. Women’s identities are based on

8 Alice H. Eagly and Wendy Wood, “*The Nature-Nurture Debates: 25 Years of Challenges in Understanding the Psychology of Gender*”, PERSPECTIVES ON PSYCHOLOGICAL SCIENCE, Vol. 8 No. 3, 2013, pp. 340-357.

9 Alexandria Almy and Elvira Sanatullova-Allison, “*Women Are the Breadwinners and Men are the Homemakers: Gender Socialization in Culture, Society and Education*”, IAFOR JOURNAL OF CULTURAL STUDIES, Vol. 1 No. 1, 2016.

10 *Supra* n. 1.

11 K Anil Kumar, “*Concept of Society and Culture*”, EGYANKOSH, 2017, <https://egyankosh.ac.in/bitstream/123456789/41246/1/Unit-1.pdf>.

their roles as spouses, mothers, and housewives, while masculine identities are based on productive employment, public exposure, and power.¹² If a man acts out of these traditional expectations, then he can expect a comment from any of the social institutions including peers, co-workers, family, extended family and so on.

School Education

I would like to explain the effects of this social institution on men with the help of a Chapter: “Through the Looking Glass: Gender Socialisation in a Primary School” written by V. Geetha in the book: “Gender and Education in India.” According to the observations in this chapter, gender is naturalised via institutions, amongst which education is no different than home, school, and larger society. A common notion is that most children come to school with “a reasonably well-established sense of gender identity,” obtained during their socialisation processes at home, and that the school education tends to legitimise this identification.¹³ This legitimisation is facilitated by gender roles which provide instructions for “gender appropriate” behaviour for all the members working, teaching and learning within the school.

“For the school child, ‘clueing in’ to the gender code involves reading gender into the contexts of social interaction within the school. The child perceives her/his own gender identity in the institutional ‘sub-world’ of the school through the ‘gender lens’ constructed by the common-sense practices, routines and rituals of everyday school life.”¹⁴

In order to be seen as a “normal competent member” of their gender group, the children correspond to these characteristics. The gender-differentiated system of task assignment by the teachers is another means of legitimising gender roles within the school. Whether the teachers dictate it or not, the signals of the differentiated system are rapidly internalised by children.

Peer Influence

I would like to explain the effects of this social institution on men with the help of material analysis of “The Working Family Project” funded by the National Institute of Education and the National Institute of Mental Health.¹⁵ According to this study, the pressures of the society are intensely represented particularly by Men’s peer groups. Examination of the working family project materials demonstrated that men’s informal communities were considerably not the same as ladies. Although men were familiar with as many or a greater number of individuals than ladies, they knew less individuals as dear companions rather than neighbors or family members. For example, men might know individuals at work and through an organization they have work with, yet, not know neighbors or stay in touch with their family. Therefore, their companion bunches give minimal functional family help. On the

12 V. GEETHA, “*Masculinity and Femininity: Ideas Are Real*” NANDINI MANJREKAR (ed.), GENDER AND EDUCATION IN INDIA: A READER, 1st ed. 2021, pp. 32-33.

13 NANDINI MANJREKAR (ed.), GENDER AND EDUCATION IN INDIA: A READER, 2021, pp. 15-16.

14 V. Geetha, *Supra* n. 12.

15 *Supra* n. 7.

other hand, women can ask neighbors and relatives for help in childcare activities and domestic work. Men's companion groups often unequivocally ridicule or ostracize their peers for what they see as delicate or weak behavior including male inclusion in what have been traditionally women's responsibilities. Men might downsize the efforts of different men to add to home making and pressure them to spend additional time and effort at work or in the friend circle.¹⁶ This unavoidable peer pressure is therefore a major factor which drives the ambivalence of men toward domestic work and child care.

Family Expectations

There are several factors which make men think that they are supposed to perform the breadwinner role. During childbirth fathers are prone to this assumption that they need to have stable income and are supposed to look after the family finances and play the provider role. This assumption does not come from them alone, rather from the larger society to close family, everybody expects a man to provide for his wife and children. If a person is incapable of doing that due to whatever reasons, then his worth in the family is assumed to be nothing. Therefore, men think that earning a livelihood is their primary contribution to the family.

Sometimes men and women both are ready to change the allocation of responsibilities but fear the reaction of their family and society. "Numerous studies have detailed the identity challenges of young men internalizing societal and family expectations to conform to gender stereotypes as 'breadwinners,' incurring shame if they cannot live up to such expectations."¹⁷ Other times, wives tend to think that since their husbands do not have expertise in domestic work and childcare, they will mess up. This also creates reluctance in men to take up such activities.

Suggestions To Increase Men's Participation in Homemaking and Caregiving

The age-old mindset of men being the breadwinners should now be changed. The participation of men in homemaking and caregiving is as important as women's participation. To maintain the balance in relationships and work, it is the equal responsibility of men and women to perform household chores and caregiving roles. "Overseas Development Institute's research has shown that gender norms are complicated and in constant flux, while changing them can take considerable time and risks backlash. But greater exposure to new ideas and practices through formal (e.g., legislation) and informal channels (e.g., conversations, role models, the media) can lead to norm change."¹⁸ The following suggestions can help increase the participation of men in homemaking and caregiving. These suggestions are not only

16 *Ibid.*

17 G. Barker et al., "Men Who Care: A Multi-Country Qualitative Study of Men in Non-Traditional Caregiving Roles", INTERNATIONAL CENTER FOR RESEARCH ON WOMEN, March 2012, <https://bettercarenetwork.org/sites/default/files/Men%20Who%20Care%20-%20A%20Multi-Country%20Qualitative%20Study.pdf>, (visited on October 10, 2022).

18 Carmen Leon-Himmelstine, "Five Ways to Change Gender Norms In Unpaid Care And Domestic Work", THE OVERSEAS DEVELOPMENT INSTITUTE (ODI): THINK CHANGE, <https://odi.org/en/insights/five-ways-to-change-gender-norms-in-unpaid-care-and-domestic-work/>, (visited on October 5, 2022).

“aimed at deconstructing the ties which patriarchal society has created between homemaking, caregiving, and ‘womanhood’ but they will also try to ensure that domestic and care work is not thrust upon women and such work is redistributed between members of both genders.”

Education As an Agency of Change

The explanations given in the analysis of sociocultural influences seek to underline the continuities between gender socialisation within the family/community and gender socialisation through schooling. In the Chapter: “Growing Up Male,” Krishna Kumar observes that these explanations have been endorsed in the view that “the school and community should be complementary to each other in socialising the young.”¹⁹ If this principle of complementariness is accepted, there is no prospect of altering the prevailing gender roles through education, which implies there is no hope of education acting as an agency of change. Krishna Kumar believes the solution is to promote counter-socialization as the domain of the school. That is, we need not consider the school as an entity working in harmony/consonance with the community or larger society regarding gender roles. Rather, we must perceive the school in contradiction/conflict with the community’s socialisation code.

This train of thinking would lead us to consider how the school can operate as a counter-socializer in gender socialization. If the community believes in gender segregation during adolescence, the school must offer a different example by mixing the sexes. Similarly, while the wider society ethos provides stereotypical images of men and women’s duties, the school must urge that the people who work there do not act in stereotyped and stereotyping ways. If knowledge about sex is prohibited in the world outside of school; such knowledge must be available in school. If cinema and television capitalize on conservative views of women and men; school media, such as textbooks and other materials, should present pictures and symbols that stimulate the reader to see people in terms of their own quest for identity, rather than reproducing prefabricated discussions. Finally, if society expects acceptance of the existing order and its norms, the school should demand the spirit of inquiry and provide opportunities to practice it.²⁰

Awareness Projects and Campaigns

Various efforts have been taken on the international level to include men in domestic work and caregiving responsibilities.

1. One such initiative is the Global Fatherhood Campaign called MenCare. This campaign supports “Men’s involvement as non-violent fathers and caregivers”²¹.

19 Krishna Kumar, “*Growing Up Male*”, NANDINI MANJREKAR (ed.), GENDER AND EDUCATION IN INDIA: A READER, 1st ed. 2021.

20 *Ibid.*

21 *Supra* n. 17.

2. Another such initiative is Africare's Male empowerment project in Zimbabwe which is challenging behavior trends and social and gender norms by increasing male involvement in home-based care services.²²
3. Third initiative is Men who Care study. It is a quantitative study by five countries (Brazil, Chile, India, Mexico, and South Africa) which explores issues like; "what hinders Men's involvement in care work? What encourages it? Who are the men who are doing more than the average and are taking on care work as a key part of their lives? How do men understand and describe their participation in activities that have traditionally been described as female roles, both in the home and in the work setting?"
4. The fourth initiative is "Oxfam's WE-Care programme." The objective in this is to enhance "women's and girls' agency over how they spend their time," as well as boost men's and boys' engagement in unpaid care activities and promote positive gender norms surrounding UCDW (unpaid care and domestic work) in the Philippines and Zimbabwe.²³

It is important to create and foster such initiatives and projects in India to bring realization among men regarding their low participation in domestic and care work and awareness to bring about a change in this attitude. Considering India's population, literacy rate and diversity in languages and cultures, organization of such initiatives should be categorically planned and tailored to target different groups. In order to facilitate the process of creating awareness among India's diverse and large population, the following approaches can be of great help.

Use of Interactive Methods

The implementation of engaging and interactive workshops, community and household conversations, or the use of various modes of communication may stimulate reflection amongst community members and can prove to be very effective as compared to the directive messages that simply "tell people what to do." If workshops are being conducted, the implementers in these workshops should not only think about how to teach the content, but also think about actively involving every person and while doing all this, they should make sure that the people know the purpose of increasing the participation of men in homemaking and caregiving. If community or household dialogues are being conducted, then they should be done considering the different languages spoken in different regions, the amount of literacy rate of the regions, the professions that the people are involved in, and the age group being targeted.

Working and Collaborating with Role Models from the Community

Collaborating with trusted, recognized members of the community and local leaders who know how to approach diverse persons is extremely successful because they may act as role models for sharing new messages. Role models could serve as a

22 Gaëlle Ferrant et al., "Unpaid Care Work: The Missing Link in The Analysis of Gender Gaps in Labour Outcomes", ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, 2014, https://www.oecd.org/dev/development-gender/Unpaid_care_work.pdf, (visited on October 1, 2022).

23 *Supra* n. 18.

great motivation for social learning. They can influence how individuals perceive themselves and the world around them, and ultimately how they make decisions about how to spend their life.

Recurring Messages for Community Engagement

Media campaigns can be the key component which can reinforce messages from community engagement because the amount of social media usage has risen considerably since the pandemic. It should be insisted that the messages are reinforced on a regular basis, are not one-time occurrences, and are targeted to diverse target audiences (e.g., youths, elders, religious and local leaders) To stimulate community participation, content strategies such as drama/street theatre, talks, banners, flyers, training, community-based discussions, public events, and so on should be implemented to accompany media efforts.

Long-Term Change Supported by Policy Reform

Finally, programmes produce greater outcomes when they engage with the government at several levels via institutions. In the Philippines, the WE-Care initiative resulted in the engagement of institutions, which increased the awareness of unpaid care and domestic work and culminated in government-led action, including legislative reform. Thus, long-term gender role transformation will occur only when government policies include efforts to modify gender norms that place disproportionate responsibilities for domestic and care work on women and girls. A few suggestions for policy reform have been discussed below.

Paternity Leave in India

“The Central Civil Services (Leave) Rules 1972 were amended in 1999 and vide 43A, provision for paternity rule was included.”²⁴ The rule is, “*a male Government servant (including an apprentice) with less than two surviving children, may be granted Paternity Leave by an authority competent to grant leave for a period of 15 days, during the confinement of his wife for childbirth, i.e., up to 15 days before, or up to six months from the date of delivery of the child.*”²⁵

The time of 15 days given under the Indian law misses the mark regarding the paternity leave given in numerous nations of which Sweden has turned into the pioneer, empowering the dads in their nation to take entire two months leave to connect with the child. Moreover, this law is applicable to government employees only. “There is no uniformity in the paternity leave provided by the private sector. In the private sector, the paternity leave provided ranges from zero days to 12 weeks.”²⁶

Providing adequate paternity leave would not just permit the dad to bond with his child as much as the mother, yet in addition advance the likelihood that the child would grow up offering a solid relationship to two instead of only one parent. All along, the child would have the option to observe the division of parental and care responsibilities among the two genders, instead of enclosing women to the job of caregivers and men into the job of breadwinners. Consequently, the idea of “paid

24 *Supra* n. 6.

25 Section 43A of the Central Civil Services (Leave) Rules 1972.

26 *Supra* n. 6.

paternity leave in India” must be even more broadly perceived and an expansion of the time of leave should genuinely be considered in pay commission reports and different arrangements.²⁷

Family-Friendly Working Conditions and Policies

There are times when men try to participate in caregiving and domestic activities but long hours in the work environment and workload pressure will not let them do so. Due to the long hours, men miss on the significant periods of time and growth of their children. This causes a lack of strong bond between the child and the father.

“One of the only national-level policies that mentions men’s roles in families and as fathers in India is the Reproductive and Child Health Project, Ministry of Health and Family Welfare, Government of India (2004), which stated that men should be involved in child and family health. The more recent version of this policy does not mention men as allies either in women’s or children’s health.”²⁸ While on the other hand, “UNICEF’s Family friendly policies” agenda is to create the following shifts:

- “1. From ‘individual’ to ‘co-responsibility’: The work-family balance is not just an individual matter. It is the shared responsibility of governments, private sector employers and families.
2. From reducing ‘parental stress’ to ‘enhancing family wellbeing’: Family friendly policies can help to reduce parenting stress and promote wellbeing in parents. This, in turn, leads to happy families, better businesses and healthier children.”²⁹

Such policies should be implemented in Indian work sector, formal and informal. Ensuring child care facilities inside the work environment, paid leave to care for when the child is sick, access to child benefits, flexible working hours for parents, etc. are some of the applications of these policies. These policies will not only increase men’s participation in child care but also increase productivity in the work environment because being with family can relieve one’s stress and increase their motivation to work for the employer who gave them the opportunity to be with their family.

Conclusion

This paper analyzed various social institutions, namely society, school, peers, family, etc. which are responsible for the low participation of men in homemaking and caregiving, and argues that gender roles are intricate and always evolving, and that altering them might take a long time, but increased exposure to new ideas and behaviors through formal and informal channels can lead to norm change. The paper suggests education as an agency of change where if the various social institutions

27 *Ibid.*

28 *Supra* n. 17.

29 “*Redesigning the Workplace to be Family Friendly: What Governments and Businesses Can Do*”, THE UNITED NATIONS INTERNATIONAL CHILDREN’S EMERGENCY FUND, <https://www.unicef.org/early-childhood-development/family-friendly-policies>, (visited on October 6, 2021).

expect acceptance of the existing order and norms, the school should demand the spirit of inquiry and provide opportunities to practice it. The paper also suggests creating awareness through campaigns and initiatives which include the use of interactive methods, working with role models from the community, recurring messages for community engagement and all of these are suggested while keeping in mind that such initiatives should be categorically planned and tailored to target different groups. Long-term change through policy reforms like increasing the paternity leave and having family friendly working conditions has been suggested. These suggestions are not only “aimed at deconstructing the ties which patriarchal society has created between homemaking, caregiving, and ‘womanhood’ but they will also try to ensure that domestic and care work is not thrust upon women and such work is redistributed between members of both genders.”

Gloria Steinem says: “We’ve begun to raise our daughters more like sons...but few have the courage to raise our sons more like our daughters.” Now the questions that we should ask ourselves are; Does our society have the courage to raise our sons more like our daughters? Do our schools have the courage to burst the bubble of gender roles and stereotypes? Do our families have the courage to teach their sons domestic and care work since their very childhood just like they teach this work to their daughters? Does the government have the courage to bring about policy reforms which can boost the recognition of unpaid care and domestic work in India? Do we, as individuals have the courage to bring about awareness to alter these gender roles that lay disproportionate responsibility for care work on women? Until the answer to all these questions is yes, we must never stop trying.

REDEFINING THE ‘LEGAL SEX’ FOR THE CONTEMPORARY WORLD

Akansha Agarwal* and Avidha Shukla[♠]

Abstract

Most of the democratic nations aim to achieve a society which does not differentiate based on people's gender, but achieving this sense of equality will always be a work in progress. In our currently disillusioned world, which still chooses to discriminate, an impartial society can only come forth, once everyone is at par. This can only happen when governments of the world identify the oppressed and further plan to deploy policies which exclusively benefit them. This is a hurdle as gender and sexuality is a fluid concept and until a society does not begin to normalize and accept the same, affirmative actions in the form of gender mainstreaming cannot happen. The authors try to discuss and study such sensitive topics to identify the bigger problems inherent in laws that exist in our society. It aims to bridge the gap between the strict gender-centric laws which exist today and the perception of modern society relating to it. The authors do so by proposing a more flexible approach to the definition of 'sex', and how by doing so the laws can keep up with the society. It suggests discarding the binary definitions and incorporating a more equality-based approach.

Keywords: Sex, Gender, LGBTQIA+, Sex Conversion Therapy.

Introduction

Egalitarianism in simple terms can be defined as a society which is fair and just in every aspect. A society can directly be understood on the yardsticks established by the principles of egalitarianism. This exercise involves a close analysis of the treatment and attitude of the society towards men, women and every other human in between. In the paper titled, ‘The Egalitarianism of Human Rights’, author Allen Buchanan brings out the centrality of the concept of equal status of humans in International human rights and points out five aspects of how they are egalitarian in nature.¹

The first fact given by the author plays a vital role in our present understanding. It points out inherent nature of international human rights which aims at its availability to all persons.² International human rights, are inherently available to all humans without any discrimination, and its various treaties and charters propagate the same. United Nations has been instrumental when it comes to the protection and promotion of rights of the LGBTQIA+ community. The Universal Declaration of

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1 Allen Buchanan, “The Egalitarianism of Human Rights”, INTERNATIONAL JOURNAL OF SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY: ETHICS, Vol. 120 No. 4, 2010, pp. 679-710.

2 *Ibid.*

Human Rights is the very first document which talks about the inherent dignity of all human beings.³ Article 6 uses the term ‘everyone’, and Article 16 and 17 of International Covenant on Civil and Political Rights, again, has a comprehensive understanding in its terminology.⁴

A distinguished group of human rights experts had also come with the Yogyakarta principles which is one step further of what the United Nations have already proposed. It directly targets and starts the conversation of the application of international human rights law in relation to sexual orientation and gender identity. The principles given here affirm to the fact that gender identity and sexual orientation are a vital part of human dignity. These principles were motivated because there were a range of violence which had been occurring against person because of their sexual orientation and identity.⁵

The LGBTQIA+ stands for Lesbian, Gay, Bisexual, Transgenders, Queer, Intersex and Asexual, respectively. The ‘+’ sign denotes that the community is still evolving and the concept of gender identity and sexuality is not restricted.⁶ This paper tries to analyze the fluid relationship that exists between sexual orientation and gender identity to suggest a more inclusive definition of the ‘legal sex’. The question is whether a redefined concept will help the situation and help to achieve sex-based equality or whether it would trigger a completely different set of problems.

Discrimination Faced by the LGBTQIA+ Community

In spite of these international law being in place, intolerance and discrimination has been faced by the LGBTQIA+ community, in almost every country. The major reason is because of the clash that exists between religion and homosexuality. The other reason is society’s rigid understanding of gender and sex, and their belief that they always exist in consonance. Homosexuality gives a more fluid and flexible meaning to gender which collides with the roles, functions and characteristics of men and women as per the societal standards. These reasons cause serious implications in the lives of people whose gender and sex do not match.

The Indian society also has the similar kind of understanding regarding homosexuality and hence the Indian legal system had favored regressive laws and absolutely curbed the rights of the homosexual community. The most grave and saddening example of the same could be the penalization of same-sex intercourse and defining it as sexual activity ‘against the order of nature’.⁷ However, in the momentous judgement of *Navtej Singh Johar v. Union of India*, the Supreme Court

3 The Universal Declaration of Human Rights 1948.

4 International Covenant on Civil and Political Rights 1966, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>, (visited on March 1, 2022).

5 THE YOGYAKARTA PRINCIPLES, <https://yogyakartaprinciples.org/principles-en/>, (visited on March 1, 2022).

6 “Merriam Webster Dictionary”, <https://www.merriam-webster.com/>, (visited on April 11, 2022).

7 Section 377 of the Indian Penal Code 1860.

of India decriminalized homosexuality under Section 377 of the Indian Penal Code 1860.⁸

One needs to understand that while the biological difference created in the society between man and woman is simple and straightforward, the social, cultural and mental state of being a man or a woman is complex, intricate and most of the times not in consonance. Before going into the intricacies of the matter, the most important thing should be to understand the difference between sex, gender, and sexual orientation. This basic understanding becomes vital in order to realize that there are people who do not fit the heteronormative definitions of male or female and the concept that gender is binary and exists as opposite to each other is not true.

Gender Identities and Its Impact

It is significant to analyse the current situation of people with various gender identities under the legal schemes that exists and how much of their homophobic attitudes affect them. The suggestions which follow, aims to make the law mentioned more gender inclusive. However, before this, one needs to understand the variation that exist between the community itself and how the definition of 'legal sex' based on the current understanding that have gradually come up.

The American Psychological association in the year 2015 had described sex as characteristics that are biologically defined, and gender based on socially constructed features. This means that sex can be understood as a label given by medical authorities at a time of person's birth by looking at their genes, hormones or genitalia. Whereas, gender can be construed as what society as a whole, understands characteristics related to a particular sex.⁹

Gender is however different from gender identity which has a more individualist approach in nature and is based on a person's own perception and what they feel inside. A person can internally understand themselves to being a male or female or both. They can also think that they do not belong to any gender. Sexual orientation refers to a person's emotional and sexual attraction to a particular sex or gender.¹⁰

In the 1980s and early 1990s, AIDS and HIV had spread across the United States and the rest of the world, despite the fact that the disease had been around for decades. The new outbreak was called GRID (gay-related immune deficiency) by the Centers for Disease Control, stigmatizing the LGBT community as bearers of the deadly disease.¹¹ However, cases began to emerge among heterosexuals, drug users, and hemophiliacs, demonstrating that the syndrome had no bounds. The homophobia which was prevalent at that time, has lingered on even today and the laws are as such

8 (2018) 10 SCC 1.

9 "Guidelines for Psychological Practice with Transgender and Gender Nonconforming People", AMERICAN PSYCHOLOGICAL ASSOCIATION, 2015, <https://www.apa.org/practice/guidelines/transgender.pdf>, (visited on April 2, 2022).

10 *Ibid.*

11 Yara Kaas, "From the Margins to the Mainstream: AIDS Literature and the LGBT Community", Thesis Research Master Comparative Literary Studies, UTRECHT UNIVERSITY, 2014, <https://studenttheses.uu.nl/handle/20.500.12932/18047>, (visited on March 11, 2022).

which only talk about male and female gender and do not include the LGBTQIA+ community.

The Medical Termination of Pregnancy (Amendment) Act 2021, like its predecessors, is limited in its use of the word ‘women’, denying transgender people and people from other gender minorities access to the Act’s benefits. It’s crucial to remember that the transgender community in India confronts a lot of discrimination, rape, and sexual assault. If transgender or intersex persons conceive under these circumstances, they will not have the same options as a cis female. The fundamental problem under this Act has been bodily autonomy, which has been extensively debated in cases such as *Suchita Srivastava v. Chandigarh Administration*¹² and *ABC v. Union of India*.¹³

Another example is the Surrogacy (Regulation) Act, 2021 which establishes standards for ‘intending couple’ who wish to pursue surrogacy.¹⁴ The use of binary words in this legislation once again excludes the queer community, meaning that a non-binary person will not fall under the category of ‘intended pair’ and will not be able to give birth to a surrogate child, even if they are biologically capable of doing so. Similarly, statutes related to adoption, the Hindu Adoption and Maintenance Act, 1956 discriminates against homosexual couples because they do not fall into the type of ‘intending couple’ as defined by the Act, and does not fall in the binary gender spectrum.

Discrimination in Employment

The authors agree that it will be a tedious and tiresome task to change multiple legislations, especially those which are read in light of each other. However, it should be done as there is no rational basis to not let same-sex couples to adopt. The report submitted by UCLA, which was based on survey data in May, 2021, examined the past-experiences of the LGBTQIA+ community in terms of employment discrimination. The key findings of the paper were that 29.8% of the community faced discrimination in terms of being fired or not being hired at all because of their sexual orientation or gender identity at some points in their lives. Also, more than half of transgender employees (48.8 %) faced discrimination because of their LGBTQIA+ status.¹⁵

Even though, laws in relation to workplace harassment has been in the picture, there are still so many instances of the same. What is needed is a more comprehensive understanding of what a victim and the perpetrator could be in the scenario. For example, In India, the law regarding the same is only restricted to women. The Supreme Court order striking off parts of the Section 377 of the Indian Penal Code had been hailed as a pivotal point for LGBTQIA+ rights in the country after a historic

12 (2009) 9 SCC 1.

13 61 ELT 205 (1992).

14 Section 2(r) of the Surrogacy (Regulation) Act 2021.

15 Kerith J. Conron and Shoshana K. Goldberg, “*LGBT People in the US Not Protected by State Non-Discrimination Statutes*”, UCLA SCHOOL OF WILLIAMS INSTITUTE, 2020, <https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes/>, (visited on February 12, 2022).

verdict on September 6, 2018, in *Navtej Singh Johar v. Union of India*, but it has failed to translate into any change for the soldiers in Indian military.

On October 31, 2019, the Indian Army issued a statement stating that homosexuality is a criminal violation. Homosexuality is prohibited and penalized under the laws that regulate the three arms of the Indian military. According to the Ministry of Defense, homosexuality is a punishable offence which deals with officials' or troops unbecoming behavior.¹⁶ Any officer accused of homosexuality will face prosecution which deals with the punishment for any shameful, indecent, or unnatural behavior.¹⁷ According to a study, there have been cases where 5 to 6 policemen have been punished for moral turpitude without any explanation of the charges.¹⁸

The provision of sex education in public schools has a long and complicated history in the United States and other countries including India, that is fraught with controversy stemming from disagreements over what youth should be taught about sex. There are also laws and policies that limit the inclusion of LGBTQIA+ topics in sex education, either expressly or implicitly. Alabama, Arizona, Louisiana, Mississippi, Oklahoma, South Carolina, Texas, and Utah are the only states that specifically prohibit the teaching of LGBTQIA+-related subjects in schools.¹⁹

In India, given the historical mentality that the schools have demonstrated in connection to doing anything that is related to sex, it is unthinkable to think about establishing an open positive dialogue around LGBTQIA+ rights in the school setting. Furthermore, it is important to highlight those debates about sexual awareness and education among teenagers are not only ignored, but are frequently discouraged and subjected to a great deal of backlash and criticism.

When the federal government, in partnership with NCERT, National AIDS Control Organization (NACO), and UN agencies, attempted to implement the Adolescence Education Program (AEP) in all secondary and higher secondary schools with the goal of educating children in 2007, thirteen states promptly rejected it. They claimed that the AEP's explicit content, which was intended to provide comprehensive sexuality education, violated Indian culture and morals.²⁰

The only action taken by schools until recently, has been to hold discussions about good and bad touch in order to avoid child sexual abuse. As a result of the status quo, schools continue to regard homosexuality as an illness and sexual

16 Section 45 of the Army Act 1950.

17 Section 46 of the Army Act 1950.

18 Simran Bhaskar, "No Space for Homosexuality in Indian Army: A comparative study", May 25, 2020, LawLex.Org.

19 Shaynie T Duhaylungsod et al., "Attitudes Toward the LGBT: A Research Paper Presented to the Faculty of the Senior High School Department Iligan City National High School", ARTS AND SOCIAL SCIENCES JOURNAL, Vol. 9 No. 3, 2018.

20 Andrew E.P. Mitchell, "Psychological Distress in Student Nurses Undertaking an Educational Programme with Professional Registration: Their Perceived Barriers and Facilitators in Seeking Psychological Support", JOURNAL OF PSYCHIATRIC AND MENTAL HEALTH NURSING, Vol. 28 No. 4, 2018.

relationships as ‘immoral,’ reinforcing prejudices and misinformation from the past. According to a survey conducted by the United Nations Cultural Agency on 400 LGBT+ youth in India, over 60% of LGBTQIA+ youth faced bullying in middle/high school, 43% reported incidents of sexual harassment in school, 70% suffer from anxiety and depression, and shockingly, 33% drop out entirely due to bullying.²¹

The LGBTQIA+ community require a safe atmosphere in educational institutes where they are not bullied. In India, there is currently no formal anti-bullying legislation or rights-based policy in place to regulate bullying and discrimination. The policy must address homophobic and transphobic violence, including bullying, while also ensuring that all students have access to a high-quality education in nonviolent, safe, and inclusive learning settings.

Sex Conversion Therapy

Sex conversion therapy is an exercise which claims that it can cure people of homosexuality and in a way fosters on the understanding that being a homosexual is a disease. In the year 2021, the Madras High court inspired by the jurisprudence established by *NALSA v. UOI* and Navtej Singh judgment, prohibited ‘conversion therapy’.²² It was commendable of the High court to come up with this understanding, as it showcases the slow progression of the Indian society. The state of Tamil Nadu is the first state to ban this practice, and the other states should follow suit. However, Indian parents still keep sending their children for conversion therapy, so a central legislation which provides a total ban is necessary. Banning this exercise is essential because the presence of this exercise acts under the garb of medical aid, goes against the standards set by international law. It is a cruel inhuman exercise which will eventually have an impact on the physical and mental health of the patients. The treatment can sometimes include electric shocks or chemical castrations which often leaves very young children scarred for life.²³

While the courts have been in the forefront of protecting transgender people’s rights, transgenders continue to be excluded, marginalized, and victimized by the criminal justice system. In fact, civil society organizations’ documenting efforts bring to light incidents of police brutality and wrongful incarceration.

Issues and Challenges for the LGBTQI+ Community

The fact-finding and incident reports produced by the People’s Union of Civil Liberties, Alternative Law Forum, Sangama, and other transgender rights organizations paint a picture of adversarial relations between police and

21 Compilation on “THE GENDERED CONTAGION: PERSPECTIVES ON DOMESTIC VIOLENCE DURING COVID-19”, GENDER, HUMAN RIGHTS AND LAW, Vol. 7, CENTRE FOR WOMEN AND THE LAW, National Law School of India University, Bangalore, 2020.

22 *Sushma v. Commissioner of Police* (2021) 5 Mad LJ 9.

23 Bhavyata Kapoor, “India’s High Court Bans Conversion Therapy: A Much Needed Law”, JURIST, June 22, 2021, <https://www.jurist.org/commentary/2021/06/bhavyata-kapoor-india-high-court-bans-conversion-therapy/>, (visited on July 11, 2022).

transgenders.²⁴ Even though the Transgenders Persons (Protection of Rights) Act of 2019 is in place, and provides for legal avenues to the community, the Act seriously downplays the actual brutality which is faced by them. Section 377 of IPC excludes trans community, and so does this Act.

Sexual assault against transgender people is classified as a minor offence under Section 18(d) of the Act. The phrasing of this provision minimizes the seriousness of sexual offences, including (but not limited to) rape, committed against a transgender person. It is paradoxical, though, that while rape of a woman can result in life imprisonment, an assault of a comparable sort against the body and dignity of a transwoman is viewed as a minor offence.

Furthermore, it shows blatant contempt for the rights granted to the transgender community by the Supreme Court in the NALSA decision. The Court went on to say that there is a serious problem in society with regard to the portrayal of the transgender community as “lesser citizens” and insensitivity to the widespread sexual violence against its members. The goal of extending recognition to transgender people was to provide equal legal protection and to eliminate harassment, abuse, and sexual assault against them.²⁵

The crux of the problem is a deeply ingrained perception of rape as a gender-specific crime, which is exacerbated by toxic masculinity, pervasive misinformation, a lack of understanding and acceptance, and widespread transphobia in Indian society. Also, there is a myth that children are kidnapped and castrated forcibly by the society, which has a negative impact on transgender persons.²⁶ This viewpoint is reflected in the most recent law enacted to safeguard the transgender population. Section 12(1) of the Transgender Persons (Protection of Rights) Act of 2019 states that, ‘No child shall be separated from parents or immediate family on the pretext of being a transgender, except on an order of a competent court in the interest of such child’.²⁷ The ‘interest of the of the child’ is stated in the provision; however, the question remains as to who determines the child’s interest? This narrative takes away a gender fluid person’s autonomy and portrays them as having been forced to be transgender, that it is abnormal to wish to change one’s biological sex, and that one would only do so if it was forced upon them.

Imagining a situation where the above proposed policies are taken up by the government, there seems to be no guarantee that the problem can be fully cured. For example, with respect to ‘rape laws’ we come up with a new definition which includes ‘trans persons’, what will happen in a case where the perpetrator is a ‘female’, or in a case where the person has gone through ‘hormone’ therapy. This problem should not rule out the possibility of including trans people from the

24 Priyanka Chakrabarty, “*Transgender Persons and the Criminal Law System: Social Narratives Affecting Legal Systems*”, <https://www.sjcl.edu.in/pdf/priyanka.pdf>.

25 Rishabh Chabbaria and Abhigyan Tripathi, “*Transgenders and Rape Law: Is Equal Protection of Rape Law still a Pipe Dream?*”, THE LEAFLET, May 23, 2020, <https://theleaflet.in/transgenders-and-rape-law-is-equal-protection-of-law-still-a-pipe-dream/>, (visited on September 1, 2021).

26 Zia Jaffery, THE INVISIBLES: A TALE OF THE EUNUCHS OF INDIA, 1st ed. 1996.

27 Section 12(1) of the Transgender Persons (Protection of Rights) Act 2019.

definition, but what can be done is modification of the Act itself, including more stringer punishments.

With regards, to gender-neutral harassment laws, the problem will again be of establishing the crime, beyond reasonable doubt. Including every person on the spectrum would create a situation of ‘his word against mine’, if it contrasted with the current rape laws, there is a presumption of guilt on the side of the defense. Incorporation a more liberal understanding of the victim in the present situation would be a difficult and challenging task. Also, in relation to sex-education, sometimes it is difficult to teach young minds regarding the sensitive issues and how to demarcate the thin line that can exist between sexual orientation and gender identity and a person’s pre-determined sex. A mere textbook’s definition would tend to restrict these concepts, which should in an ideal situation be not. What can be done, is the creation of a safe space, and making children understand that even though there is no right or wrong method to be themselves and there should be allowed behave in their own way.

Conclusion

The main problem which persists with making policies and laws gender inclusive, is in defining the legal sex. The paper points out that gender and sexual identity is fluid, and a strict definition or interpretation of what ‘sex’ or ‘gender’ is, will act as a restriction to people who would want to explore their sexuality or gender identity. The authors realize that since it is a dynamic concept, the definitions and interpretation will keep on evolving and so for the governments to come up with gender mainstreaming policies, they will have to work in consonance with the societal standards. It will not be an easy task, and a close and effective undertaking of psycho-educative sessions will be required by law-makers and the people in power to understand the prejudices and problems faced by the LGBTQIA+ community. This will help them to come up with gender inclusive and gender mainstreamed policies and laws, in the form of affirmative actions and will eventually lead to a society which is free from any form of discrimination.

The policies and the kind of regulation will need an effective understanding of the psychology of sexual orientation and gender identity, and also, that sexuality is in fact not a choice, and it cannot be changed or corrected. In India, the constitution offers article 15 and 16, which talks about discrimination on various grounds. Both articles specifically mention the term ‘sex’, which creates the avenue of inclusion of other genders in future. However, as of now, we understand the term as males, females and transgenders. One could hope for the term ‘sex’ to be interpreted in a more purposive manner, and can also other gender fluid persons, so that they can have an equal status and fair chance at the time of their hiring.

According to the Universal Declaration of Human Rights, societal norms, customs, culture, or traditions can never be used to prevent other person from exercising their fundamental constitutional rights. Had we justified these cultures and ideas, we would have never been able to go away with cruel practices of Sati, dowry system, female infanticide and child marriage. It is time that the government lets go off its conservative approach and make tangible efforts in making laws which are more gender inclusive, paving a way for an egalitarian society. Until the

government can recognize the LGBTQIA+ community and give them equal recognition in the society, the dream of transforming the nation sustainably will be far-fetched.

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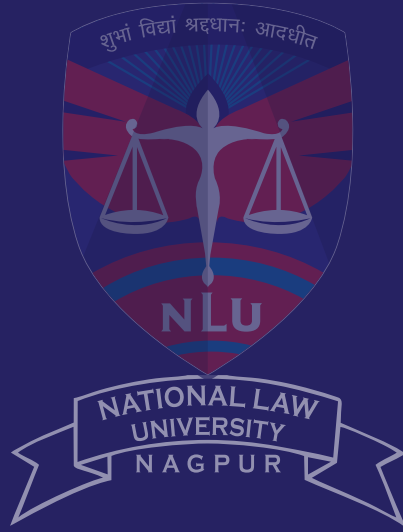
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