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GENDER JUSTICE
CELL



**BOOK ON 4TH NLIU
NATIONAL CONFERENCE
ON GENDER AND LAW,
2024**



**Navigating Gender Equity: Legal Frameworks and
Socio-Economic Realities in India**



***BOOK ON 4th NLIU
National Conference on
Gender and Law, 2024***



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NAVIGATING GENDER DISPARITY FROM INDIAN JUDICIARY TO LEGISLATURE

By Stuti Jadaun

ABSTRACT

The limited participation of women in the decision-making landscape of the Indian judiciary and legislative bodies instils doubts about justice and participation being complete in nature. Presently, only 14% of women are high court judges, and a mere 6% are women in the Supreme Court, which most certainly hampers the inclusion of ideal diversity required for fairness in law. Societal, maternal, and systemic guardrails inside the collegium, which usually favours men over women, are some of the causes for it. Nevertheless, women have made significant impacts in the fields of laws and policies, exemplified by, Justice Leila Seth and Justice Gita Mittal who made headway in protecting women's rights and combatting gendered violence. Furthermore, the inclusion of female judges on the bench has been reported to enhance the trust of women litigants in the legal system. The situation of gender disparity poses the need for instituting supportive initiatives such as focused training and meaningful inclusion of women into the legal system. The Women's Reservation Bill has recently been approved, which reserves 33 percent of parliamentary seats for women, an indication of commitment to achieving gender balance in the political system of India. Legislative reforms are not enough to achieve the objective of gender justice. There is also a need for change in societal attitudes to guarantee the active involvement of women in the judiciary and legal field. In addition to that, a more diverse judiciary will accurately mirror the complexities of society and improve the effectiveness of justice in India.

I. INTRODUCTION

Justice is elusive unless there is involvement of different perceptions, for it is in their diversity that societies evolve. The judiciary is an integral part of the state and therefore is charged with defending law and justice within the country. The disproportionate representation of women in Parliament reflects the biases regarding policy framing. Nevertheless, in India, the issue of gender imbalance in the legal profession as well as the political system is an issue that is quite common. Since women make up a small percentage of the judiciary, this naturally raises the issue of whether or not there is a bias about the inclusiveness and representativeness of the judicial rulings. The impact of this disproportionate pattern goes beyond the loss of public confidence in the judicial structures since it makes it onerous for the courts to effectively deal with a wide range of challenges affecting different people.



The article discusses the factors such as social norms and family obligations as well as the opaque collegium system of judicial appointments as some predictors of the underrepresentation of women in the judiciary. The specific focus is on the consequences of this gender imbalance on how judgments are made and how society views the system of justice. It also illustrates the notable works of some women judges and women litigators that have greatly impacted the process of legal reform and policy-making. It further deals with the implications of low representation of women in politics. Through the examination of various problems, it has been discussed that the gender composition of the judiciary, litigation, and Politics is necessary for promoting fairness and justice in society.

II. THE UNDERREPRESENTATION OF WOMEN IN THE JUDICIAL SYSTEM

“It is only to balance the scale of justice. It is said that the whole world is nothing but the cosmic dance of lord Shiva and one of the forms of Shiva is Ardh Nareshwar which is the lord who is half woman and the other half is man...this form of Lord Shiva represents the wholeness and completeness of human existence.”

– Justice [Bela M. Trivedi](#).

Affirming the importance of equal representation of women in the judiciary, Justice Trivedi emphasised that completeness of Justice requires both Shiv and Shakti that is men and women judges.¹ The Judiciary is an indispensable component of the democratic structure of our country, where its primary role is dispensing justice. The underrepresentation of women in such an institution is a matter of solicitude. Although the symbol of Justice is a lady, 96% of judges have been men in the apex court of India. After the retirement of Justice [Hima Kohli](#) in September 2024, the total no. of women in the Supreme Court reduced to 2 out of 33.² This disparity in the no. of men and women judges in the Supreme Court of India explicitly denotes the absence of perspectives of women in various domains. In a country where the Constitution envisions an egalitarian society, it is daunting to note that the total representation of women judges in high courts is a mere 14% and the high courts of Tripura and Meghalaya do not have women judges.³ In order to make judicial decisions just and pertinent, it is of utmost importance that there is equal representation of men and women on the bench. In December 2022, it was the last time when all women bench sat in the Supreme Court. There are only three instances when all women bench sat in the Supreme Court in the years 2013, 2018, and 2022.⁴

It is important to keep in mind that having women in the judiciary involves more than just making sure that their opinions are taken into consideration when women's concerns are

¹ LawBeat, <https://lawgical.php-dev.in/index.php/top-stories/justice-bela-m-trivedi-invokes-shiva-shakti-equal-gender-representation-judiciary>, (last visited Oct. 14, 2024).

² Supreme Court Observer, <https://www.scobserver.in/75-years-of-sc/gender-diversity-at-the-supreme-court-of-india/>, (last visited Oct. 15, 2024).

³ Supreme Court Observer, <https://www.scobserver.in/journal/representation-of-women-judges-in-high-courts-has-improved-only-by-3-percent-in-three-years-august-2024/>, (last visited Oct. 15, 2024).

⁴ India Today, <https://www.indiatoday.in/india/story/supreme-court-to-witness-all-women-bench-on-sept-5-for-first-time-in-5-years-1329586-2018-09-01>, (last visited Oct. 15, 2024).



decided. Beyond that, it entails elevating women's prominence on par with males and taking the gender viewpoint into account. The standpoint of women in the judiciary is paramount as it ensures that laws are favourable and are embraced by all the sections of the society. There have been many instances where the perspective of women judges has impacted the law-making in our country. Justice Leila Seth who served as the first women judge in the Delhi Court, made a crucial contribution to legislative changes in India. Being a member of the 15th Law Commission of India, she played a crucial role in bringing about amendments to the Hindu Succession Act⁵ which gave daughters equal rights of inheritance in Joint Family Property.

Justice Gita Mittal, as chairperson of the *Vulnerable Witness Project*, has ensured that witnesses could testify in a confidential and benignant environment without facing the accused. This indicates how gender-balanced judicial leadership paves the way for addressing practical issues.

The intervention of Justice Gyan Sudha Misra in *Laxmi v. Union of India*⁶, brought the heinous crime of acid attack the much-needed attention. The court conceded the seriousness of this violence and issued strict regulations for selling acids, among other things, and compensation to the survivors. Justice Misra's intervention reflected sensitivity towards the lived experience of women which might have been condoned in the absence of women judges on the bench. These cases reflect how the participation of women on the bench affects policymaking about gendered violence.

If there were a significant number of women judges in courts, then other women would be motivated to move to court to enforce their rights. For instance, think about a woman judge listening to a case of a woman. They will feel confident in courts while speaking about their rights. Diversity is not only required in the legislature but also the courts of our country. People from different backgrounds have different life experiences. Their decisions somehow reflect their perspectives and their way of seeing life. The inclusion of women in the judiciary will ultimately represent the views and needs of different sections of our society. This will also lead to a more balanced and comprehensive approach towards decision-making because women judges will bring their perspectives which are of utmost importance in understanding the intricacies of the society. Representation of women in courts is crucial in reposing the faith of the public in the legal system of our country.⁷

III. UNDERSTANDING THE GENDER DISPARITY IN THE JUDICIARY

Several factors contribute to the low representation of women in the judiciary. One of the reasons includes marriage and family responsibilities that deprive women of carrying out services that require long working hours and less social interaction. There are some states

⁵ Indian Kanoon, <https://indiankanoon.org/doc/685111/>, (last visited Oct. 16, 2024).

⁶ *Laxmi v. Union of India*, AIR 2015 SUPREME COURT 3662.

⁷ Kameshwar Mahto, *Status of Women in Indian Judiciary*, 6 INT'L J.L. MGMT. & HUMAN. 3550 (2023).



that provide reservations for women in judicial services but very few women reach the higher levels of judiciary due to lack of reservation and the opacity of the collegium system which is responsible for the promotion in the Judiciary. The collegium system lacks transparency and women having fewer resources and connections find it difficult to reach a significant position in the legal system of our country.

There is also a huge disparity in no. of women advocates in India as only 15% of women are advocates.⁸ More than 50% of students in law schools are girls but many of them don't practice litigation because of pressure from family.⁹ This reduces the number of women to be promoted to judges from bar to bench.

IV. WOMEN IN LITIGATION: CHALLENGES AND TRANSFORMATIONS

*Lady Justice stands tall and confident because she cannot see the level of representation women have in the legal profession through her blindfolds.*¹⁰ The dominance of men can be seen at both the Bar and Bench. The responsibility of women towards their family and society often deprives them of equal opportunities as men. There are various obligations that women need to fulfill during their lifetime which somehow hinder their career. A considerable number of women drop out of their legal practice and end their careers to proceed with societal expectations. A [survey](#) initiated by Reuters (2022) substantiates the declining participation and contribution of women in the domain, this finding gives rise to the question, why is it that even after attaining the relevant qualifications they cannot share equal opportunities in courts of law? Women in the profession face numerous hindrances because of different preconceived notions about how women are not sufficiently competent to be entrusted with judicial authority and decision-making. The answer lies in the gender bias that underestimates the capabilities possessed by women and promotes gender inequality and disparity, lacking diversity in the majority of decisions taken by the courts.

There is also a misconception that a profession like litigation requires traits such as aggression and dominance which constraints women from taking and carrying this profession. It is also very much evident that during the initial years of joining litigation, there is a lot of financial uncertainty. Women are often discouraged by their families to join litigation as it demands long working hours and a meager stipend. It also has low career growth and stability. There is also bias from clients while giving cases to female lawyers. Clients often resist giving cases to Women because they feel that women cannot not represent their case in court aggressively and competently in comparison to a man.

⁸ The Indian Express, <https://indianexpress.com/article/india/hc-judge-laments-huge-disparity-legal-profession-15-percent-practising-lawyers-women-8877994/>, (last visited Oct. 16, 2024).

⁹ The Times of India, <https://timesofindia.indiatimes.com/education/news/registration-of-female-candidates-in-clat-increases-as-more-women-get-interested-in-legal-profession/articleshow/106167700.cms>, (last visited Oct. 16, 2024).

¹⁰ The Leaflet, <https://theleaflet.in/resilience-in-robos-womens-triumphs-in-legal-practice/>, (last visited Oct. 16, 2024).



They have a notion that women are burdened by the responsibilities of family and children and they cannot fully dedicate themselves in the case. Women in the legal field find it difficult to build connections and networking which are imperative for someone joining the legal arena. It has to be noted that networking is an invaluable element of the legal profession. It not only increases the client base but also catalyses the growth of a lawyer. Women often feel uncomfortable during gatherings and get intimidated by the remarks of male lawyers in the court. Their limited participation in gatherings reduces their visibility due to which they sometimes lose potential clients. The hostile environment in the court makes the survival of women difficult and this is the reason why female students usually restrain themselves from doing internships in court which deprives them of the exposure that they need to enter the world of litigation.

There is also a preconceived notion that women usually take civil and family-related cases. But there are a multitude of women who have fought valiantly in court and won many criminal cases. Lawyer Seema Kushwaha is one such lawyer who through her legal acumen proved that women can lead and win even criminal cases. She was doing her post-graduation when the Nirbhaya incident took place which shook the entire nation. A paramedical student was gang raped and succumbed to the heinousness. Seema was deeply moved by the horrifying incident which led her to take the case as a lawyer. She officially became the lawyer of Asha Devi and fought tirelessly to ensure justice for the victim. This was her stepping stone in the legal world and it was her first case. Her unfaltering determination and perseverance reposed the faith of women in the Indian judicial system. The struggle of Seema Kushwaha was a testament to the fact that women too can achieve remarkable feats in litigation which is seen as a sector dominated by men.¹¹

Another woman legal luminary who has showcased that a woman too can lead the litigation sector is Ms. Indira Jaisingh. She became the first woman to be appointed as the Additional Solicitor General of India.¹² She had led many high-profile cases like *Gita Hariharan v. Reserve Bank of India*¹³ where she advocated for the rights of mothers in the custody of children. The Supreme Court held that the mother can also be a natural guardian of a child. Throughout her legal career, she has extensively fought for the rights of women. She is also an indispensable part of the protest against the recent brutal rape and murder case of a junior medical doctor at RG Kar Medical College and Hospital. She represented the West Bengal Junior Doctor's Forum at the Supreme Court. Her achievements in the legal field showcase the importance of women litigators in understanding and advocating the rights of deprived in the society.

Despite the remarkable achievements of women in litigation, there are myriads of misconceptions that can only be resolved through the significant participation of women in this field. The glass ceiling needs to be broken to achieve a legal system that has equal

¹¹ The Times of India, <https://timesofindia.indiatimes.com/blogs/unheardshepherd/voice-of-nirbhaya-the-story-of-lawyer-seema-kushwaha/>, (last visited Oct. 17, 2024).

¹² NDTV, <https://www.ndtv.com/india-news/who-is-indira-jaising-senior-lawyer-to-represent-bengal-doctors-in-rg-kar-case-6577137>, (last visited Oct. 17, 2024).

¹³ *Gita Hariharan v. Union Bank of India*, AIR 1999 SUPREME COURT 1149.



representation of both men and women. The government with the support of Bar and Bench can play a significant role in achieving this objective. The government can organise specially curated courses of litigation exclusively for women which could play a crucial role in building confidence in women. Law firms may give preference to women while taking legal interns for internships. Bar Association also needs to address the issue of inequitable representation of women in litigation and take effective measures to mitigate the effect. Public sector units can also ensure the participation of women in this sector by mandating equal allocation of cases to women lawyers. Recently, the Supreme Court of India embraced the new symbol of Lady Justice. The new symbol features an open-eyed Lady Justice in a saree which is a resort from the usual Western robe and the sword is replaced by the Constitution of India. The most noteworthy change is the removal of blindfolds which historically represented the unprejudiced nature of the legal system. “*Law is not blind; it sees everyone equally*”, said the Chief Justice of India D.Y. Chandrachud while emphasising the fact that the role of justice is stimulating fairness and equality. This can be seen as an affirmative action for reinforcing the idea of equal representation of women in the legal domains. The judiciary and legislative actions cannot bring a change in this patriarchal system. Society at large should also contribute to empowering women in the legal sector. Clients should not hesitate while giving cases to women advocates. Parents should also encourage their daughters to pursue litigation and provide the support that they need.

V. GENDER PARITY IN POLITICS

Politics and power go hand in hand, politics comes with power and immense responsibility. Previously, men held most of the political and decision-making power with minimal or no presence of women. A lot of things have changed with time and this disparity has slightly reduced but we are nowhere close to gender equality in power dynamics.

The endeavour for Indian independence had the notable presence of women who contributed rigorously to the struggle for freedom, which aided in the social and political transformation of India. The strenuous journey of independence was a result of the perseverance of uncountable freedom fighters. While searching for the list of leaders who took part in the freedom struggle of India, we get an elaborate list of men but the list becomes exhaustive when it comes to women freedom fighters. Moving forward to the current situation, political scenario hasn't changed much. The societal and legal development of a country indistinguishably delves into the population demographics. The [findings](#) of *The Report of the Technical Group on Population Projections for India and States 2011-2036* demonstrate the increase in the sex ratio of India. The Report indicates that India's population in 2036 is expected to be more feminine compared to the 2011 population, as reflected in the sex ratio which is projected to increase from 943 in 2011 to 952 by 2036, highlighting a positive trend in gender equality.¹⁴ The data depicts an

¹⁴ Ministry of Statistics and Programme Implementation,



increase of women in population demographics, which is expected to rise even further in the future. However, the lesser involvement of women is seen in different domains of politics and policy-making². The presence of women in different arenas of politics that deal with policy-making for the majority of people and the roleplay of women in law-making becomes crucial for liberalized incentives and policies as the problems faced by women and their perspectives that are less known to society as a whole will prospectively be resolved. Women have always played a pivotal role in the political arena but did not receive as much recognition or identification. While some prominent women leaders have attained acknowledgment and remembrance for what they have contributed, many others are deprived of it. Renowned Political figures, for instance, Indira Gandhi, Sushma Swaraj, and Jayalalitha Jayaram are widely known, but there also exist several women who made substantial impacts, to illustrate, [Renu Chakravartty](#) was a prominent member of the first Lok Sabha and played a notable role in introducing the Equal Remuneration Act in 1956, that proposed to aim equal pay for equal work, regardless of this distinguished contribution. [Rajakumari Amrit Kaur](#), a member of the first Lok Sabha majorly exerted herself in advocating for health and educational reforms. Her contributions also remain crucial but are not extensively eminent.

Delving into the contemporary Indian Political structure, the representation of women remains a momentous matter in question, provided that women compose 13.6% of total members in the Lok Sabha² and 13% in Rajya Sabha³. Legislation retains the power to make laws, regulations, and incentives for the whole mass for it becomes quite imperative to have proportionate women leaders in Parliament. The number of women present in Parliament is considerably less which holds back the possibility of a broader perspective coming into play and restricts the equitable resolution. The disparity in the participation of men and women parliamentarians is alarming, the long need for reforms in the structure was fulfilled when the women's reservation bill was passed in the parliament. The most awaited women reservation bill of India looks forward to reserving at least 33% of the seats in parliament for women⁴, including those reserved for Scheduled Castes (SCs) and Scheduled Tribes (STs). More women's participation and involvement are expected by the implementation of this bill. The need for an expanded overview and different standpoints in the parliament will be satisfied by the enhanced presence of more women. With the availability of different perspectives, the inequities of gender discrimination can be bridged⁵. This reservation bill marks a huge milestone for the Indian parliament and women's empowerment. But this is not the pioneer of reserving women's representation, government on the local level already had this provision. Women are required in the law-making bodies of the country for they come up with the experiences that they face in their daily lives. They bring their perspectives in the legislature which gets reflected in the policy making.

VI. CONCLUSION

https://www.mospi.gov.in/sites/default/files/reports_and_publication/statistical_publication/Women_Men/mw23/Population.pdf, (last visited Oct. 16, 2024).



The equal composition of the members of the judiciary enhances public trust and confidence. Justice Bela M. Trivedi emphasised the importance of our rich cultural Hindu mythological reference of Ardhanareshwar, an avatar of *Shiva* and *Shakti*, that is, the co-existence of both energies for men and women to be invited to all spheres. Still, the judiciary at contemporary times is in a set-up of patriarchal structure with the present female representation at the apex court being only 2 out of 33 and the same goes with the political landscape, where female members are at 13 percent of the total strength of parliament. The very presence of women leaders and judges has made a difference in the policy-making and delivery of justice. However, such instances are few. Women's progress in the judiciary as well as in politics continues to be affected by grave difficulties such as the opaque collegium system, family responsibilities, and societal prejudices.

Women lawyers are affected by financial insecurity and discrimination of clients, and limited networking, which in turn shrinks the chances of moving up to the ladder in the hierarchy of judiciary and advocacy. The presence of female law graduates is substantial in the legal field. However, the presence of women professionals in the legal industry is incomprehensibly disproportionate to that of men.

The discussions about equal representation in legal and political factions, shall not be limited to the two prominent genders i.e., men and women. The participation of Transgender should not be ignored. The presence of transgender in legal domains carries significant importance as this inculcates varied perceptions while serving justice and formulating policies. Joyita Mandal was the first transgender who was appointed as a judge in the Lok Adalat of West Bengal in the year 2018.¹⁵ Such cases of representation of transgender in the judiciary are few. These concerns require exigent attention from the government as well as society. There is a great need to dismantle these barriers through addressing these issues with the help of opportunities, mentorship programs, and institutional changes. An equal representation in the judiciary will not only encourage more women and other communities to pursue justice, but it will also guarantee that the decisions are made with the dignity of all citizens in mind. This will assist in creating a more just and equitable society.

AI AND DEEPPAKES: UNMASKING GENDERED VIOLENCE AND THE EROSION OF WOMEN'S RIGHTS IN THE DIGITAL ERA

¹⁵ NDTV, <https://www.ndtv.com/india-news/indias-first-transgender-judge-joyita-mandal-has-a-suggestion-and-its-to-do-with-reservation-quota-3614574>, (last visited Oct. 16, 2024).



By Ananya Gupta and Sarfaraz Alam

ABSTRACT

The manuscript "AI and Deepfake Technology: Gendered Harms and the Erosion of Women's Rights in Digital Media" investigates the harmful effects of AI, especially deepfake technology, on women in the digital realm. While AI has transformed media production, leading to growth and advancement, its misuse through deepfakes disproportionately targets women and harms their rights, leading to non-consensual exploitation, objectification, and gender-based violence. These AI-generated manipulations not only violate women's dignity but also reinforce harmful stereotypes, contribute to a pervasive culture of misogyny online, and threaten the autonomy of women's online presence. This paper critiques the unethical use of AI, particularly in terms of its impact on women's rights and dignity, and evaluates current technological and legal frameworks. It highlights the inadequacies of these frameworks in addressing the specific challenges posed by deepfake technology. Furthermore, it explores the difficulties in enforcement and accountability, exacerbating the harm caused. The paper calls for urgent legal reforms and societal changes to protect women from the escalating threats of AI-driven abuse. It emphasizes the need for more comprehensive and proactive protections to combat gendered harms in digital spaces, ensuring that women's rights are upheld in the face of emerging technologies and advancing media manipulation techniques.

INTRODUCTION

Artificial Intelligence (AI) is transforming the landscape of human interaction with technology, enabling machines to simulate cognitive tasks like decision-making and problem-solving. As AI evolves, its impact on digital media has been particularly striking. From automated content



creation to personalized recommendations, AI is not only changing how content is delivered but also how it's experienced.

One of the more intriguing yet concerning developments in this realm is the emergence of deepfake technology. Deepfakes use AI to seamlessly manipulate video or audio, creating hyper-realistic imitations of individuals, making it appear as though they've said or done things they haven't. While this technology has artistic applications—such as creating fictional characters or digitally resurrecting actors for films—it also raises complex ethical questions.

For instance, deepfakes have been used to generate political videos that blur the line between reality and fiction, contributing to the growing issue of misinformation. This juxtaposition of creativity and risk epitomizes AI's role in reshaping media content. As AI's capabilities continue to expand, so too does its potential to influence the truth, pushing us to rethink the boundaries of authenticity in the digital age. The fervor that enveloped India during its recent federal election has subsided, but there are valuable lessons for those of us monitoring the rise of AI-generated misinformation.¹⁶

In the given manuscript, the authors have focused on the detrimental impact of AI on women's rights in digital media, emphasizing the ways in which it contributes to their objectification, the resulting societal implications, and the inadequacies of legal frameworks addressing these harms. AI technologies, particularly deepfakes, have been exploited to target women disproportionately, often reducing them to objects of manipulation and non-consensual representation. This exploitation not only undermines women's dignity but also perpetuates a digital culture rife with gender-based violence and harassment.

The manuscript delves into the social ramifications of such technologies, highlighting how they reinforce harmful stereotypes and contribute to a broader culture of misogyny and silencing of women in digital spaces. Moreover, it critiques the current legal frameworks that fail to effectively protect women from these emerging forms of abuse, pointing out that existing laws are often outdated and insufficient to address the rapid evolution of AI-driven threats. Through this analysis, the authors underscore the urgent need for robust legal reforms and societal changes to mitigate the disproportionate harms AI technologies inflict on women.

UNVEILING DEEPFAKES AND AI: IMPACT AND IMPLICATIONS IN DIGITAL MEDIA

Recent practical advancements in Artificial Intelligence (AI) have had a significant impact on a range of fields, including digital media in general, with serious repercussions. AI is seen as a paradigm-changing technology due to the numerous practical applications that have been

¹⁶ *Year of elections: Lessons from India's fight against AI-generated misinformation*, WORLD ECONOMIC FORUM (October 18, 2024) <https://www.weforum.org/agenda/2024/08/deepfakes-india-tackling-ai-generated-misinformation-elections/>.



demonstrated in recent years, the majority of which are credited to a subfield of AI known as "Deep Learning".¹⁷

Deepfake AI technology works through a series of steps to create realistic fake videos or audio of people:-

- It starts with **data collection** which involves gathering multiple films, photos, and audio recordings of an individual. This data is utilised to assist the AI understand how the individual appears and sounds.
- Next, during **the training phase**, AI learns to create fake material using Generative Adversarial Networks (GANs). The generator generates phoney images or videos, and the discriminator determines whether they are real or not. This back-and-forth procedure causes the generator to improve until the content appears incredibly lifelike.
- After the AI has learned enough, it starts **synthesizing the deepfake**, meaning it creates new videos or audio that look and sound like the real person. This step matches the person's movements and expressions with what the video or audio is supposed to show.
- The final step is **rendering**, where the deepfake video or audio is polished to look even more realistic by fixing any small mistakes. GANs, which involve two competing AI systems, are key to this process—one creating the fake content and the other judging its quality.¹⁸

This step-by-step process is what makes deepfakes look so real, which is why they are both impressive and concerning in terms of potential misuse.

Over the past few years, the growth of deepfake material has been exponential, with the number of deepfakes online doubling every six months. According to DeepMedia, in 2023, roughly 500,000 video and voice deepfakes were shared on social media around the world. By 2025, we can expect to see 8 million deepfakes shared online, consistent with doubling deepfakes every six months.¹⁹

With this rise, the question that is raised is what may be the interplay of deepfakes and feminism? Since contemporary feminism, also known as "hashtag feminism", "takes place online and, at times, exclusively through social media platforms",²⁰ it is heavily susceptible to the deepfakes. It should not be forgotten that the earliest deepfake material that came featured mostly fake female celebrity pornographic films and revenge porn for ladies.

¹⁷ R. Chesney and D. Citron, *Deepfakes and the new disinformation war: The coming age of post-truth geopolitics*. Foreign Affairs, vol. 98, no. 1, pp. 147–153 (2019).

¹⁸ Vedraj, *What is Deepfake AI and Its Potential*, VALUE CODERS (October 18, 2024), <https://www.valuecoders.com/blog/ai-ml/what-is-deepfake-ai-and-its-potential/>.

¹⁹ Neill Jacobson, *Deepfakes and Their Impact on Society*, CPI OPENFOX (October 18, 2024), <https://www.openfox.com/deepfakes-and-their-impact-on-society/>.

²⁰ R. Clark, *Hope in a hashtag: the discursive activism of #WhyIStayed*, "Feminist Media Studies", 16(5), 788–804.



GENDERED HARMS AND THE OBJECTIFICATION OF WOMEN- LEADING OF EROSION OF WOMEN’S RIGHT ON DIGITAL MEDIA

The rise of deepfake technology and AI advancements has disproportionately affected women by exacerbating gender inequalities and intensifying objectification. One of the most disturbing developments is the creation and distribution of **revenge porn**, an evolution of non-consensual image sharing like nude photos and videos. With deepfake advancements, perpetrators can now generate hyper-realistic videos that not only replicate the victim’s appearance but also mimic their voices. These convincing videos are then distributed to online audiences, increasing the harm faced by victims.

A critical gendered issue of deepfakes is their role in revenge porn, where women are overwhelmingly targeted. Recent statistics indicate that one in twenty-five Americans has been a victim of revenge porn, a number expected to rise as deepfake technology becomes more accessible and produces higher-quality content²¹. These synthetic media are not just privacy violations; they serve as tools for degradation, humiliation, and control, perpetuating the objectification and commodification of women. By reinforcing harmful stereotypes, deepfake-generated revenge porn reduces women to objects of sexual exploitation.

Moreover, deepfakes manipulate women’s appearances to conform to idealized norms, which strengthens patriarchal power structures and entrenches oppressive gender roles. This misuse of AI deepens misogynistic perceptions, leaving women even more vulnerable in digital spaces. Women already face higher rates of online harassment compared to men, and the rise in easily accessible deepfakes only exacerbates this issue. Research shows that digital technologies are frequently weaponized for cyber abuse, including online stalking, impersonation, and harassment. Cyber abuse—defined as intentional harassment through electronic methods, including defamation and public disclosure of private information—manifests both directly and indirectly. Direct abuse occurs between the perpetrator and victim, often involving blackmail or revenge, while indirect abuse happens when content is posted online for larger audiences, further amplifying harm.

Sextortion, a rising issue in modern society, is worsened by deepfake technology, which enables perpetrators to fabricate explicit images or videos and threaten victims with exposure. Victims of image-based sexual abuse, including sextortion, often choose anonymity, which limits public attention to this growing issue.²²

In addition to the threat of sextortion, cyberstalking poses a severe and growing danger, particularly when deepfake technology is involved. Cyberstalking refers to the persistent, unwanted surveillance and harassment of individuals, predominantly women, in online spaces. The rise of deepfakes has made this form of abuse even more invasive and harmful. Perpetrators

²¹ A. Lenhart, M. Ybarra, and M. Price-Feeney, *Nonconsensual image sharing: One in 25 americans has been a victim of "revenge porn"*, DATA & SOCIETY RESEARCH INSTITUTE, AND CENTER FOR INNOVATIVE PUBLIC HEALTH RESEARCH (CIPHR), USA, TECH. REP (October 18, 2024), <https://datasociety.net/pubs/oh/Nonconsensual Image Sharing 2016.pdf>.

²² Roberta Liggett O'Malley, *Cyber Sextortion: An Exploratory Analysis of Different Perpetrators Engaging in a Similar Crime*, JOURNAL OF INTERPERSONAL VIOLENCE (2020).



can create hyper-realistic, non-consensual images and videos of their victims, amplifying their ability to intimidate, manipulate, and control. The anonymity afforded by digital platforms makes it difficult to trace the creators of non-consensual deepfake content, allowing perpetrators to circulate malicious material rapidly.²³ More than half of the victims don't even know their abusers, intensifying their fear, distress, and sense of powerlessness. Deepfake cyberstalking often involves fabricating explicit content to publicly shame or blackmail women, causing significant emotional and psychological harm. These synthetic images or videos can be shared widely, creating an environment where victims feel continuously unsafe and powerless.

Feminist researchers claim that cyberbullying reflects larger societal norms of gender inequality, power imbalances, and discrimination, which persist both online and offline. These standards are established in our digital relationships, with abusive behaviours arising from deeply ingrained cultural attitudes about gender roles, such as conceptions of women as inferior or subservient. Deepfake cyber abuse, in particular, has a significant influence on women's access to digital spaces and societal engagement. This causes the "silencing effect," in which fear of abuse inhibits women from engaging online, jeopardising the safety and integrity of marginalised voices in digital settings. The isolation that ensues limits their professional and social participation in digital areas, therefore reinforcing gendered power disparities that exist both in the virtual and real worlds.²⁴

The harmful effects of deepfakes extend beyond deception. Even when debunked, deepfakes inflict lasting damage by altering public perception of victims. This is particularly evident with public figures, where **illegitimate deepfakes** force undesired speech acts, leading to what researchers call **illocutionary harm**.²⁵ A notable example is Indian journalist Rana Ayyub, whose face was inserted into a pornographic video, resulting in violent threats and harassment right after she started advocating about the Kathua rape case.²⁶ Such insults undermine personal dignity and demonstrate how deepfake pornography can devastate a woman's job and personal life. The consequences are long-term, as deepfake information remains connected with victims indefinitely, jeopardising their professional chances. Employers frequently do online searches on job seekers, and the appearance of deepfake material can hurt employability, even when the victim did not assist in the development of the information.²⁷

In conclusion, deepfake technology perpetuates a culture that reinforces harmful gender stereotypes and societal power imbalances, severely undermining women's dignity, safety, and participation in both digital and societal spaces.

²³ Mekhail Mustak, Joni Saliminen and Matti Mantymäki, *Deepfakes: Deceptions, mitigations, and opportunities*, JOURNAL OF BUSINESS RESEARCH (2023).

²⁴ Nina Jankowicz, Jillian Hunchak and Alexandra Pavliuc, *Malign Creativity How Gender, Sex, And Lies Are Weaponized Against Women Online*, WILSON CENTER SCIENCE AND TECHNOLOGY INNOVATION PROGRAM (October 18, 2024), https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Report%20Malign%20Creativity%20How%20Gender%2C%20Sex%2C%20and%20Lies%20are%20Weaponized%20Against%20Women%20Online_0.pdf.

²⁵ Emily Chapman, *Unveiling the Threat- AI and Deepfakes' Impact on Women*, UNIVERSITY OF MARY WASHINGTON (October 18, 2024),

https://scholar.umw.edu/cgi/viewcontent.cgi?article=1627&context=student_research.

²⁶ Mohd. Akhtar v. The State Of Jammu And Kashmir, (2018) 5 SCC 499.

²⁷ *Id.*



ETHICAL CONCERNS SURROUNDING GENDER AND AI

The algorithms that underpin artificial intelligence are built on data, and if the data on which such algorithms are founded contain biases, then it is easy to imbibe those biases into the technology. A primary ethical dilemma occurs when gender bias, whether intentional or unintentional, is introduced in the development process of AI. In most cases, therefore, the technologies developed tend to be influenced by the assumptions, stereotypes, and viewpoints of the developers rather than a gender neutral or inclusive point of view. AI may, as was the case with [Amazon's discriminatory hiring algorithm](#), even perpetuate gender disparities at the workplace or other sectors.

According to the World Economic Forum (“WEF”), it will take another 132 years to achieve gender equality on a global scale.²⁸ According to 2019 estimates from UNESCO, only 12 percent of AI researchers are women, and they “represent only six percent of software developers and are 13 times less likely to file an ICT (information, communication, and technology) patent than men.”²⁹ These estimates makes it logical for one to draw conclusion that AI and Machine learning is going to give out results which are gender biased as the developers itself are men in majority by number, and since each and every one of us is dictated by our own preconceived notion which also include pre-existing biases based on gender.

This section discusses the problem which results in biases in AI in detail. For the better understanding of reader this section discusses five major problems. Furthermore towards the end this section discusses the tentative solution which can make the situation a little better and help us embark on the journey of achieving an inclusive Artificial Intelligence which is free from any kind of gendered bias.

Firstly, Problems with Data Collection and Representation: Bias in AI also comes from the datasets being used to train machine learning models. Where such datasets do not represent appropriately and diversely their content, or where they are drawn from environments with more underrepresentation of women or other minorities, then the AI system will be trained on information that is biased and may lead to technologies that ignore and/or exclude the experience of women, thereby perpetuating negative stereotypes against them.³⁰ Only by being conscious and representative in the collection of data can equitable treatment along gender lines be guaranteed.

Secondly, Feminization of AI and Gendered Stereotypes: An alarming feature of some AI systems is the “feminization” of certain tools, especially those intended for service work, like virtual assistants (e.g., Siri, Alexa). These technologies tend to exemplify stereotypically feminine traits, thus contributing to more archaic forms of gender roles. They are meant to be

²⁸ Bryce Bashchuk, *The Global Gender Gap Is Narrowing, But It Will Still Take 132 Years to Reach Parity*, Bloomberg (October 18, 2024), <https://www.bloomberg.com/news/articles/2023-06-21/gender-gap-report-world-economic-forum-says-it-will-take-132-years-to-reach-parity>.

²⁹ First UNESCO Recommendations to Combat Gender Bias in Applications Using Artificial Intelligence, UNESCO (Oct. 2024) <https://www.unesco.org/en/articles/first-unesco-recommendations-combat-gender-bias-applications-using-artificial-intelligence>.

³⁰ James Holdsworth, What is AI Bias?, IBM, <https://www.ibm.com/topics/ai-bias> (last visited Oct. 20, 2024).



helpful, submissive and accommodating, precisely what women were.³¹ This reinforces the social structures where women must assume support or subordinate roles, and reflects women's and men's divisions within the labour market.³²

Thirdly, Gendered Labor Division in AI Applications: Increasingly, AI technologies are used in sectors like healthcare, hospitality, and retail. These are sectors heavily affected by automation and have a high percentage of women working there. In particular, female-gendered AI is notably utilized mainly in the shape of virtual assistants. Reusing existing societal expectations, this AI, particularly virtual assistants, repeats the affective labor of scheduling, reminding, or comforting someone. This could very well be further entrenched by a gendered division of labor in both technology and society.³³

Fourthly, AI and Gender Based Violence and Harassment: Gender biases in AI can also extend to grave social issues such as Gender Based Violence and harassment. For instance, the development of feminized AI systems together with the socialization of their subservient role raises ethical questions surrounding how they should be treated. AI virtual assistants have been subjected to verbal insults and abuses by its users. It even parallels the treatment meted out to women at some instances in real life. Simultaneously, the same has been revealed under the sphere of workplace harassment on women workers in the field of AI-related workplaces like that in STEM professions among women. In both cases, stronger protections as well as stronger support mechanisms must be put in place to give a safer environment for women professionals in technology areas.³⁴

And Lastly, Lack of Accountability and Transparency in AI Governance: The biggest ethical problem is the lack of transparency and accountability in AI decision making, especially about gender bias.³⁵ Most algorithms are “black boxes,” where it is impossible to backtrack the decision-making process and pinpoint where bias gets injected into the system. Obscurity creates problems when addressing discrimination because affected people or groups leave no space for understanding or rectification of biased outcomes.³⁶ Critical AI governance frameworks that highlight the importance of transparency and accountability within human rights-based approaches will be urgently in demand to solve the problem of gender bias.

Solutions and the Demand for Inclusive AI

Various solutions have been proposed in response to the threat of gender bias in AI systems. These solutions include increasing the number of women in AI development, improving datasets with diversity, and using human-centred approaches for AI to promote more inclusive

³¹ Rebecca Stewart et al., Gendered Stereotypes and Norms: A Systematic Review of Interventions Designed to Shift Attitudes and Behaviour, Social Sci. & Med., <https://pmc.ncbi.nlm.nih.gov/articles/PMC8066375/> (last visited Oct. 20, 2024).

³² Naznin Tabassum & Bhabani Shankar Nayak, Gender Stereotypes and Their Impact on Women's Career Progressions from a Managerial Perspective, 10 Vision 131 (2021), <https://doi.org/10.1177/2277975220975513>.

³³ Hyun-Joo Lim, Gendered Division of Household Labour, in *East Asian Mothers in Britain* 201, 201-231 (Hyun-Joo Lim ed., 2018), https://doi.org/10.1007/978-3-319-75635-6_6.

³⁴ *Supra* note 17.

³⁵ Eli Amdur, 6 Critical – And Urgent – Ethics Issues With AI, Forbes (Oct. 20, 2024), <https://www.forbes.com/sites/eliamdur/2024/01/24/6-critical--and-urgent--ethics-issues-with-ai/>.

³⁶ Breaking Barriers: Strategies for Fostering Inclusivity in The Workplace, 14(2) Int'l J. Acad. Res. Bus. & Soc. Sci. (2024), <https://doi.org/10.6007/IJARBS/v14-i2/20799>.



nature.³⁷ Auditing of algorithms for discrimination and implementing the best practices in hiring processes such as implementing gender decoders can help mitigate bias.³⁸ A global regulatory framework, such as the proposed Global Digital Compact which aims for global governance of digital technology and artificial intelligence, can provide a means to guide handling gender disparities so that AI would be used as a tool for good, producing equality instead of inequalities.³⁹

Such ethical issues require the governments, technology companies, civil society, and international organizations to enforce collective action to ensure AI development abides by the principles of human rights and promotes gender equality in all applications.

CHALLENGES IN REGULATING AND DEALING WITH DEEPPAKE ABUSE

One of the most prominent challenges that seem to face those in the fight against deepfake abuse is a comprehensive legal framework in defense of the victims. This anonymity in creators of deepfakes, in collaboration with the ease of spreading content across those multiple interfaces, prevents the identification and bringing these individuals to justice.⁴⁰ The legality regarding issues of image-based abuse and deepfakes is still under development, leaving limited available options for justice against perpetrators.⁴¹ With developing technology in deepfakes, policymakers must adopt stronger legal protections and technological countermeasures to combat this form of abuse.

This anonymity in the creation and spreading of deepfakes makes it a really tough challenge for law enforcers as they try to bring culprits to justice. Deepfakes' creators use encrypted tools to mask their identities, possess accounts that prove not to belong to anyone from a given country, and platforms that operate outside any one country, making it really hard to trace back videos that are meant to be harmful.⁴² The anonymity of the internet gives such malevolent actors the freedom to play on and attack women in any way whatsoever, with no fear of punishment, so deepfakes spread widely before any legal action can be taken.⁴³

Platforms hosting deepfake content often operate under limited liability under present laws. For instance, under section 230 of the Communications Decency Act⁴⁴, online platforms generally have full liability immunity with cases of user-generated content across the U.S. So

³⁷ Luba Kassova, 8 Solutions for Mitigating Gender Bias in GenAI-Assisted News, IJNET (Mar. 4, 2024), <https://ijnet.org/en/story/8-solutions-mitigating-gender-bias-genai-assisted-news>.

³⁸ Auditing Algorithms for Discrimination, 166 U. Pa. L. Rev. Online 189 (2017).

³⁹ Global Digital Compact, U.N. Tech. Envoy, <https://www.un.org/techenvoy/global-digital-compact> (last visited Oct. 20, 2024).

⁴⁰ Saifuddin Ahmed, Adeline Wei Ting Bee, Sheryl Wei Ting Ng & Muhammad Masood, Social Media News Use Amplifies the Illusory Truth Effects of Viral Deepfakes: A Cross-National Study of Eight Countries, 44 Media Psychology (2024), <https://doi.org/10.1080/08838151.2024.2410783>.

⁴¹ Criminalising Deepfakes – The UK's New Offences Following the Online Safety Act, Herbert Smith Freehills (May 2024), <https://www.herbertsmithfreehills.com/notes/tmt/2024-05/criminalising-deepfakes-the-uks-new-offences-following-the-online-safety-act>.

⁴² YouTube Develops New Tools to Combat Deepfakes and Protect Creators' Identities, India Today (Sept. 6, 2024), <https://www.indiatoday.in/technology/news/story/youtube-develops-new-tools-to-combat-deepfakes-and-protect-creators-identities-2595023-2024-09-06>.

⁴³ Joseph Prostko, Online Anonymity: Effects, Issues, and Limitations (June 2020), <https://doi.org/10.13140/RG.2.2.20411.23841>.

⁴⁴ Communications Decency Act of 1996, 47 U.S.C. § 230 (1996).



even though major platforms hosted the deepfakes, it paradoxically upholds the law of no liability to the victim for the harm that has suffered; that immunity has made it hard to curb the spread once they go viral.⁴⁵

Once a deepfake is produced and uploaded, it may start spreading rapidly among different social sites and websites, so removing it may become almost impossible. Long after the original content has been taken down, copies of the deepfakes will continue to crop up on other sites, enabling abuse to go on forever. Victims-in particular women-suffer reputational harm, emotional distress, and harassment, with little or no legal redress.

Other than these psychological effects, victims of deepfakes can suffer long-term professional and social consequences. For instance, a lady whose nude photos appear in manufactured pornography deepfakes may suffer stigma or damage in her career, even though the whole material is fabricated.⁴⁶ The present legal systems have little redress for such a matter. As technology advances, the victim must continue to suffer through harassment without an easily apparent way of redress.

In short, curbing deepfake abuse demands legal reform as well as governments, tech platforms, and civil society coming together to agree on ethical standards and strong mechanisms for detection. Victims of deepfake abuse must enjoy greater access to justice, while worldwide legal systems must adapt to fast-moving technological change in addressing the harms caused by deepfakes.⁴⁷

TECHNOLOGY SOLUTIONS FOR COMBATING DEEPPAKES

The more advanced and accessible the technology becomes, the more the deepfakes harm deepen. The technological tools to defeat such harms include not only detection technologies that will be targeted toward identifying fake media but also authentication technologies that will indicate whether original media exists or not. These methods altogether constitute a foundation for addressing some of the concerns that have been growing about the abuse of deepfakes, namely election interference and non-consensual pornography.

Detection Technologies

Detection technologies are designed to detect deepfakes by identifying the varying aspects of the media, which in this case, may range from visual, audio, or behavioral aspects. While usual approaches would compare a manipulated media with a normal copy, detection technologies work based on AI models trained on large datasets carrying real and fake media.⁴⁸ This way, they could also identify deepfakes even if they do not access the original source. These

⁴⁵ Christoph Schmon & Haley Pedersen, Platform Liability Trends Around the Globe: Recent Noteworthy Developments, (June 1, 2022), <https://www.eff.org/deeplinks/2022/05/platform-liability-trends-around-globe-recent-noteworthy-developments>.

⁴⁶ Marie-Helen Maras & Kenji Logie, Countering the Complex, Multifaceted Nature of Nude and Sexually Explicit Deepfakes: An Augean Task?, 13 Crime Sci. 31 (2024), <https://doi.org/10.1186/s40163-024-00289-5>.

⁴⁷ Alena Birrer & Natascha Just, What We Know and Don't Know About Deepfakes: An Investigation into the State of the Research and Regulatory Landscape, Sociology, OnlineFirst (2024), <https://doi.org/10.1177/1461444824125>.

⁴⁸ Fakhar Abbas & Araz Taeihagh, Unmasking Deepfakes: A Systematic Review of Deepfake Detection and Generation Techniques Using Artificial Intelligence, Computers in Human Behavior (2024), <https://doi.org/10.1016/j.chb.2024.107895>.



technologies generally rely on machine learning with three domains on which it primarily works:

1. *Facial or Vocal Anomalies*: The AI algorithm looks for unnatural movements, facial expressions, or speech patterns that are not typical of humans. Some of the earliest deepfakes were detected based on irregular blinking and unusual facial gestures.⁴⁹ A vital caveat here is that these markers have become harder to find since the advancement of deepfake generation methods.
2. *Traces from the Deepfake Generation Process*: Even though deepfake algorithms evade highly unnatural traces, such as aberrant lighting, shadows, or pixel artifacts, traces may be used in detection systems. The specific marks that betoken manipulation, like edge rendering beyond normal levels or slight blur, may also describe synthetic media.⁵⁰
3. *Color Abnormalities*: Some detection tools search for anomalies in the color distribution on a video or image. The created fake content is located using discrepancies in skin tones, light reflection, among other effects that may be developed while creating deepfakes.⁵¹

But with all of this advancement come limitations in the form that sometimes detection technologies fall short. They are highly reliant on the quality of training data-meaning the actual performance in real life compromised by changes in lighting, video resolution, or other new techniques of deepfakes with imperfections removed that proved previously detectable.

The theory in authentication technology is verification of authenticity during content generation, ensuring any alteration or modification will be traceable. In essence, it provides a proactive alternative to detection, being able to prove the integrity of the original material. Common forms of authentication include:

1. *Watermarking*: Watermarks digitize imperceptible patterns or signals into the content at its creation time. These watermarks are preserved in the original version, but when the content is altered, it disappears.⁵² A missing watermark may trigger viewer or system alerts that possibly a deepfake is there. Some watermarking approaches, specially target making any deepfake generated using watermarked content appear very unnatural, hence providing an added layer of security.
2. *Metadata Injection*: Metadata entails information giving the characteristics about the media such as time, location, or camera settings. This can be cryptographically secured such that in cases where such metadata was either missing or tampered with, it could raise suspicion on the alteration of the media.⁵³ This information will inject into the media file will help to verify later

⁴⁹ Haposan Vincentius Manalu & Achmad Pratama Rifai, Detection of Human Emotions Through Facial Expressions Using Hybrid Convolutional Neural Network-Recurrent Neural Network Algorithm, Journal of King Saud University - Computer and Information Sciences (2024), <https://doi.org/10.1016/j.jksuci.2024.01.006>.

⁵⁰ *Id.*

⁵¹ Science & Tech Spotlight: Combating Deepfakes, GAO-24-107292 (Mar. 11, 2024), <https://www.gao.gov/products/gao-24-107292>.

⁵² Digital Watermarking and Its Types, GeeksforGeeks (Oct. 29, 2022), <https://www.geeksforgeeks.org/digital-watermarking-and-its-types/>.

⁵³ *Id.*



that it has not been altered, further making it difficult for creators of deepfakes to cover their tracks.

3. *Blockchain Technology*: Blockchain is a decentralized mechanism for storing media and related metadata such that any alteration is traceable. Media, when uploaded to a public blockchain, forms an immutable record that other people can verify its correctness. This enables individuals and organizations to compare the media they encounter with that stored within the blockchain; hence deepfakes cannot be easily missed.⁵⁴

Maturity and Limitations of Technologies

While detection and authentication technologies have really promising solutions, they still pose a challenge to real-world applications. Detection technologies struggle with challenges in deepfakes. The conditions of their training data are different from theirs. This includes lighting, resolution, or generation techniques used in coming up with a deepfake. The more that these methods of generating deepfakes develop, the more challenging the task becomes for detecting algorithms to be updated since, according to this requirement, identifiable hallmarks such as abnormal eye blinking should have been removed.⁵⁵

Notwithstanding all that, most authentication technologies, such as digital watermarks and blockchain-based methods, are already relatively well established but only recently in the infancy stages of implementing them to stop deepfakes. Authenticating services companies are still emerging, and social media has already started flagging AI-generated content, but that needs to be taken on a global level and standardized across all platforms before such solutions can work effectively.⁵⁶

1. *Hybrid Solutions*: Enhancement of the effectiveness of a system through the integration of multiple techniques of detection and authentication-Enabling AI-driven detection combined with watermarking and blockchain-based verification with layered security in which deepfakes are much harder to evade detection systems.

2. *Improved training datasets*: The updated datasets with more recent and diversified media include several lighting conditions, facial expressions, and environments. This improves the adaptation of detection models to new generation techniques of deepfakes that are designed to evade older detection mechanisms.

3. *Competition and Innovation*: Competitions and challenges, such as the 2019 deepfake detection competition, that received over 2,000 participants and produced more than 35,000 detection models, provide important windows for innovation. Competitions will drive accuracy and robustness improvements in detection tools and quicken technological advancements to combat deepfakes.

⁵⁴ Gautami Tripathi, Mohd Abdul Ahad & Gabriella Casalino, A Comprehensive Review of Blockchain Technology: Underlying Principles and Historical Background with Future Challenges, *Journal of King Saud University - Computer and Information Sciences* (2024), <https://doi.org/10.1016/j.jksuci.2024.01.005>.

⁵⁵ *Id.*

⁵⁶ Syedhasnaatabbas, Blockchain and Digital Watermarks: Safeguarding Intellectual Property, Medium (Jan. 10, 2024), <https://medium.com/@syedhasnaatabbas/blockchain-and-digital-watermarks-safeguarding-intellectual-property-a2f6bc41595a>.



In particular, an integrated approach is the need of the hour in the fight against deepfakes as it demands recognition of detection and authentication technologies. Although progress is ongoing, further innovation, collaboration among stakeholders, and improvements to the underlying technology will be necessary to address deepfakes effectively as the threat grows.

THROUGH THE LEGAL LENS

Currently, no legislation in India tackles the subject of deepfakes but a plethora of legislations can be applied to prevent misuse of AI for immoral and unlawful purposes.

RIGHT TO PRIVACY

Under the well-established *K S Puttaswamy*⁵⁷ Judgment of the Supreme Court the right to privacy has been declared a fundamental right under Art 21⁵⁸, the violation of which attracts legal consequences. According to this decision, an individual's right to privacy includes the power to exert control over the distribution of personal information, which is both necessary and imperative. This also includes the unconsented and unauthorised use of deepfakes in any way imaginable, as it has the ability to harm one's standing and infringe on their personal liberty.

Furthermore, the Digital Personal Data Protection Bill of 2022⁵⁹ clearly covers the protection of natural persons' personal data, which may be gathered online or offline and then digitised. The use of such data is confined to legitimate and consented purposes. In the event of a data breach, individuals have the right to request the correction and erasure of information obtained by a data fiduciary, who may face serious fines. The proposal also involves the establishment of a Data Protection Board, which allows consumers to file complaints if the data fiduciary fails to give a satisfactory settlement. As the Bill awaits enactment as an Act, its true impact remains to be seen. However, its scope might also include the unauthorised use of deepfakes.

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Indian law criminalises fraudulent behaviors, including identity theft and financial fraud. Committing identity theft and virtual forgery the use of deepfakes can have serious repercussions and far-reaching implications for both individuals and society at large. The use of deepfakes with the goal of pilfering an individual's identity, generating false depictions of persons, or manipulation of public sentiment can cause harm to an individual's reputation, as well as spread falsehoods. The invocation of Sections 318 (4)⁶⁰ and 336 (3) of the *Bhartiya Nyaya Sanhita, 2023*⁶¹ have the potential be warranted in this scenario. These sections allow for punishment in the instance of cheating and forgery which includes imprisonment or a fine.

⁵⁷ Justice K.S.Puttaswamy(Retd) v. Union Of India, AIR 2018 SC (SUPP) 1841.

⁵⁸ INDIA CONST. art. 21.

⁵⁹ Digital Personal Data Protection Bill, 2022.

⁶⁰ The *Bhartiya Nyaya Sanhita, 2023*, § 318 (4), No. 45, Acts of Parliament, 2023 (India).

⁶¹ The *Bhartiya Nyaya Sanhita, 2023*, § 336 (3), No. 45, Acts of Parliament, 2023 (India).



INFORMATION TECHNOLOGY LAWS

Section 66E of the Information Technology Act of 2000 ⁶²tackles deepfake-related offences including the unauthorised recording, distribution, or transmission of an individual's visual representations via mass media, which violates their right to privacy. Violations can lead to imprisonment for up to three years or a fine of ₹2 lakh. Section 66D of the IT Act ⁶³penalises individuals who utilise communication devices or computer resources to impersonate others with harmful purpose. Penalties include up to three years in prison and/or a ₹1 lakh fine. These regulations allow authorities in India to prosecute persons implicated in deepfake cybercrimes. The use of deepfakes to disseminate false information, undermine the government, or foment public unrest is a serious issue with far-reaching societal implications. False narratives can cause uncertainty and weaken public confidence, with the ability to influence political processes and manipulate public opinion. Crimes of this sort may be covered by Section 66F⁶⁴, which deals with cyberterrorism, and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2022⁶⁵. The proliferation of hate speech and libellous content using deepfakes can hurt both individuals and society by destroying reputations and creating a toxic online environment. Legal action against such offences follows the same standards.

Intermediaries that host deepfake content may also be held liable under Section 79 of the IT Act of 2000⁶⁶. This provision enables intermediaries to delete illegal content if they are contacted or receive a court order. However, in *Myspace Inc. v. Super Cassettes Industries Ltd.* (2017), the ⁶⁷court stated that intermediaries must remove copyright-infringing material on private notice, without a court order.

According to the Information Technology Rules of 2021, Social Media Intermediaries (those with a big user base) must hire specific personnel to track the origin of content and oversee the moderation of sensitive material. These guidelines also require the establishment of grievance channels to resolve consumer complaints. In November 2023, the Indian government issued a regulation mandating social media intermediaries to remove deepfake or altered films within 24 hours of receiving a complaint, following the surfacing of two deepfake videos in a single week.

PERSONALITY RIGHTS

The 'right of publicity' protects celebrities' interests by allowing them to decide how their image and identity are exploited commercially. This right entitles celebrities to restrict or seek compensation for unauthorised use or copying of their face features, voice, signature expressions, trademark poses, and other distinguishing qualities. While no particular legislation

⁶² The Information Technology Act, 2000, § 66E, No. 21, Acts of Parliament, 2000 (India).

⁶³ The Information Technology Act, 2000, § 66D, No. 21, Acts of Parliament, 2000 (India).

⁶⁴ The Information Technology Act, 2000, § 66F, No. 21, Acts of Parliament, 2000 (India).

⁶⁵ The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

⁶⁶ The Information Technology Act, 2000, § 79, No. 21, Acts of Parliament, 2000 (India).

⁶⁷ *Myspace Inc. v. Super Cassettes Industries Ltd.* (2017) 236 DLT 478 (DB).



governing the right to publicity exists in India, courts have recognised it as a legally enforceable right through judicial opinions. It is considered an extension of the right to privacy given by Articles 19⁶⁸ and 21 of the Indian Constitution⁶⁹.

In a famous case, the Delhi High Court ruled that persons have exclusive rights to publicity, which includes control of their name, qualities, autograph, or voice (*ICC Development (International) Ltd v. Arvee Enterprises* 2003).⁷⁰ This is a personal right, which means that only the individual concerned can benefit monetarily from it. Furthermore, it is transferable, allowing it to be passed down to lawful heirs after the individual's death.

Unauthorized use of a celebrity's persona, image, or likeness constitutes a violation of their right to publicity, and such misuse can be legally challenged. For instance, the use of a celebrity's image or voice in deepfakes would infringe upon their right to privacy, making it a potential ground for legal action.

COPYRIGHT LAWS

When someone uses copyrighted material without permission to create deepfakes, copyright holders are entitled to take legal action against the infringer. The Indian Copyright Act of 1957, specifically Section 51,⁷¹ establishes penalties for copyright infractions and expressly prohibits unauthorised use of another person's material, particularly if it is owned exclusively. Deepfakes, which entail altering or manipulating existing photographs and movies without permission, can violate the copyright holder's exclusive right to reproduce their material if a significant percentage is reproduced.

Deepfakes can also be regarded as derivative works because they are frequently based on previously published works. According to copyright law, the right to create derivative works is solely retained by the copyright owner. Therefore, generating and distributing deepfakes without permission would not only be unauthorised replication, but also an infringement of the copyright owner's exclusive rights.

NEED FOR LEGISLATION

There this exists a need for proper legislations to curb the adverse effects of deepfakes and AI which have been growing with time. India can create a thorough and successful strategy to address deepfakes by borrowing inspiration from other countries, such as the United States. US federal State lawmakers have taken different initiatives to address the issue of deepfakes is mostly focused on legislation and regulation. initiatives. The Malicious Deep Fake Prohibition Act⁷² was introduced in the United States Senate in 2019. This measure attempted to criminalise the creation. The distribution of deepfake content with the purpose to deceive. public, especially during elections. Furthermore, the IOGAN Act, 2020,⁷³ suggested forming a task force within the Department of Homeland Security to investigate deepfake technology and devise methods to limit its negative consequences. In 2023, the DEEPFAKES Accountability

⁶⁸ INDIA CONST. art. 19.

⁶⁹ INDIA CONST. art. 21.

⁷⁰ *ICC Development (International) Ltd. v. Arvee Enterprises And Anr.* (2004) 1 Raj 10.

⁷¹ The Copyright Act, 1957, § 51, No. 14, Acts of Parliament, 1957 (India).

⁷² Malicious Deep Fake Prohibition Act, S. 3805, 115th Cong. (2018).

⁷³ Identifying Outputs Of Generative Adversarial Networks Act, S. 2904, 116th Cong. (2020).



Act was introduced in the United States House of Representatives. This bill intends to protect national security from the hazards posed by deepfake technology while also providing legal remedies for victims of malicious deepfakes.

CONCLUSION

The article emphasises that deepfakes harmed women disproportionately, aggravating such existing gendered inequalities. Deepfakes, especially in the form of non-consensual and sexually explicit content, have rapidly evolved as a very potent tool for objectification and harassment. It is not only damaging to emotional and psychological levels but also to their careers, and it permanently scars the victims-these are impacts that most women who suffer from such abuse will have to live with for life. The scale of harm grows from the fact that once the technology becomes more affordable and refined, particularly in the application of deepfakes to degrade, silence, and control women in the private and public spheres.

This makes the seriousness of the problem even more, because so far, the existing legal systems are not good enough to meet the challenges deepfakes present. While adding the element of anonymity of the creator is creating troubles for the victims in their struggle for justice or the perpetrator being brought to book, the global nature of digital platforms is such that it is impossible to restrict and associate the identities directly. Even a wise law like Section 230 of the U.S. Legal reforms and technological measures need to be implemented now, even though Communications Decency Act would provide the venues of immunity based on user-generated content; therefore it became quite difficult for the victims to fight back against the deepfake proliferation.

Technological solutions such as AI-based detection tools, blockchain, and digital watermarks promise much but are in infancy. Solution still needs to be buttressed through further innovation and international co-operation. More importantly, rectifying the deep-seated biases in the development of AI technology is crucial to ensure that future technologies may not prove harmful by stereotyping women along undesirable lines. This power to bring into existence ethical AI systems entirely relies on the collective efforts of governments, tech companies, and civil societies, as such systems require investment in machinery that sustains gender equality and prevents exploitation of women in digital spaces.

UNDERSTANDING GENDER RESPONSIVE BUDGET FOR WOMEN-LED ENTERPRISES



By Divya

I. INTRODUCTION

With the help of regional and international multilateral institutions, India and many other developing nations have carried out structural reforms. These have included improvements to economic policy, trade and reforms in regulation, investments in physical and human infrastructure, and more. Through improved utilization of forces for manufacturing and higher productivity growth, structural transformation leads to stronger economic growth and the creation of jobs.

In recent years, policy reforms have placed a greater emphasis on gender equity. India serves as a useful case study when analyzing the connections between structural change and gender parity because it is both a pioneer in encouraging women to hold public office and a trailblazer in addressing gender-related workplace challenges. India's women's economic involvement and opportunities are lower than those of 127 out of the 146 nations examined, according to UN Global Gender Gap data from 2023.⁷⁴

Through an enterprise survey from more than 900 districts, the many determinants of economic growth in India were examined via a gender lens. Businesses offer a small-scale perspective on India's structural change and growth drivers.⁷⁵ The majority of women-owned businesses in India are still found in low-wage sectors, and this trend has only become worse over time. Data indicates a significant inverse correlation between the percentage of female-led units in the unorganized manufacturing sector and average industry earnings.⁷⁶ Although it is not as significant as it is in the manufacturing sector, there is still a negative correlation in the services sector between the percentage of female-owned units and average industry earnings.

II. GENDER BASED ECONOMIC DEVELOPMENT

The evolution of economic development is intrinsically gendered, and disparities in wealth based on gender pose significant obstacles to shared prosperity. The growing influence of women in society over the last century has been a major factor in the development of the economy. This development has taken many forms, including the elimination of societal and political obstacles that hinder women from entering the workforce, as well as a decrease in discriminatory practices in the workplace, in terms of pay and education, and in management styles that keep gifted women out of positions of leadership.

Women's empowerment is considered essential for their meaningful engagement in entrepreneurship and their eventual emancipation from poverty. The outcomes also show up at the household level. Women are still disproportionately underrepresented in society, and their accomplishments are frequently hidden from view and ignored. Women are growing more self-assured and aggressive as a result of having access to monetary services and the gradual transfer

⁷⁴ World Economic Forum, *Global Gender Gap Report 2023* (World Economic Forum 2023).

⁷⁵ Ejaz Ghani and others, *Will Market Competition Trump Gender Discrimination in India* (World Bank Policy Research Working Paper No 7612, 2016).

⁷⁶ Ibid.



of wealth to impoverished women. In India, "self-employment" is the primary focus of discussions on entrepreneurship.

The demographic of businesses has shifted as a result of the rise in women-owned businesses. The government has developed measures that prioritize women due to their noteworthy contribution to the nation's economic development. The growth of entrepreneurship, which ultimately promotes employment and reduces poverty, depends on a number of factors, including innovation, entrepreneurship education and awareness, government assistance initiatives, social entrepreneurship, and women's involvement.

With the growth in women-run enterprises, there has been a change in the business demographic. Women-centric policies have been formulated by the government as a result of their significant participation in the economic growth of the country. Innovation, entrepreneurship training and awareness, government support programme, social entrepreneurship and women's participation are key for the development of entrepreneurship which eventually stimulates employment and alleviates poverty. More crucially, a woman-run business's ability to survive and expand is greatly influenced by her family history and cultural background. Women's entrepreneurial capacity and disabilities are always the result of complex factors, and efforts to empower women only in one area may not go very far in releasing them from socioeconomic dependence.

III. MSMES AND WOMEN ENTREPRENEURS

There are 63 million micro, small, and medium-sized businesses (MSMEs) in India, with about 20% being owned by women and employing between 22 and 27 million people. In the Mastercard Index of Women Entrepreneurs, India came in at number 57 out of 65 nations.⁷⁷ According to estimates, India might generate over thirty million women-owned enterprises and 150–170 million employments by encouraging women to start their own businesses.

In India, of the 432 million women of working age, only 19% engage in formal, paid employment. According to the Global Entrepreneurship Monitor (GEM), women's rates of early-stage entrepreneurship (TEA) are frequently higher in low-income nations. In contrast, the average TEA rate for women in India is a mere 2.6%. According to a GEM survey, women entrepreneurs in the country mentioned the lack of jobs as a major driving force behind starting a business rather than the chance to expand and make money. The annual report from the Ministry of Micro, Small, and Medium Enterprises (MoMSME) states that the percentage of women-owned businesses in rural areas is somewhat higher than in urban areas (18.42%), at 22.24%.

Large gender gaps exist in the employment offered by the MSME industry. There are 76% men and 24% women working for it. There were 110.98 million workers in the MSME sector as of 2021; 84.46 million (76%) of them were men, and just 26.49 million (24%) were women.

⁷⁷ Mastercard, The Mastercard Index of Women Entrepreneurs (Mastercard 2022).



Comparing to the urban sector (12.74 million), the proportion of women employees in micro, small, and is higher in rural areas (13.75 million).⁷⁸

Over 99% of MSMEs operate within the micro sector. In India, one-person microenterprises account for the majority of women-owned businesses. Merely 17% of women-owned businesses employ people, and 95% of them run their businesses with fewer than six employees.⁷⁹ The percentage of women-led firms falls as the overall size of the business increases.

About 110 million people are employed by India's MSME sector, which accounts for 30% of the country's GDP.⁸⁰ About 89% of women-owned businesses in India are year-round operators, 9% are seasonal in nature and the remaining 2% are sporadic operators that are neither seasonal nor perpetual.⁸¹ According to a recent report by the Standing Committee on Finance, there is a credit shortfall of INR 20-25 trillion in the MSME sector.⁸² According to Global Entrepreneurship Monitor (GEM), compared to their male counterparts, women in the Republic of Korea and India seemed to have the most difficulty obtaining company finance. The absence of visible assets and collateral, restricted means of demonstrating trustworthiness, and preconceived notions that discourage funding to women-led businesses make it difficult for women-owned MSMEs to obtain finance.⁸³

Due to the fact that the majority of women-owned firms are small, informal, home-based enterprises, they have little experience in the market and marketing techniques. In order to operate their firm and attain the necessary growth for the organisation, female entrepreneurs must overcome obstacles related to mobility and logistics, time constraints and unpaid caregiving, as well as safety and security concerns.⁸⁴ Because of their low level of literacy and limited access to smartphones and the Internet, they also lag behind in terms of technical and digital abilities. The SAFE Framework developed by MSC contributes to our understanding of the main factors causing India's female entrepreneurship rates to stagnate.⁸⁵

IV. GENDER RESPONSIVE BUDGETING

Gender Budgeting is a tool for gender mainstreaming. It uses the Budget as an entry point to apply a gender lens to the entire policy process.

Finance is a methodology to assist governments to integrate. Budget a gender perspective into the budget as the key national plan for public expenditure. The national budget impacts women's lives in several ways. It can, for example, directly promote women's development

⁷⁸ World Bank, 'Labor Force Participation Rate, Female (% of Female Population Ages 15+) – India' (2021) <https://data.worldbank.org/indicator/SL.TLF.CACT.FE.ZS?locations=IN> accessed 11 March 2024.

⁷⁹ Global Entrepreneurship Monitor, *Women's Entrepreneurship 2020/21: Thriving Through Crisis* (GEM 2021).

⁸⁰ National Sample Survey Office, *NSS 73rd Round (2015–16)* (Government of India 2016).

⁸¹ Ibid.

⁸² Ministry of Micro, Small and Medium Enterprises, *Annual Report 2021–22* (Government of India 2022).

⁸³ Ministry of Statistics and Programme Implementation, *All India Report of the Sixth Economic Census* (Government of India 2016).

⁸⁴ India Brand Equity Foundation, 'MSME Sector: Imperative to Lift Indian Economy' <https://www.ibef.org/blogs/msme-sector-imperative-to-liftindianeconomy> accessed 11 March 2024.

⁸⁵ Ministry of Statistics and Programme Implementation, *All India Report of the Sixth Economic Census* (Government of India 2016).



when funds are allocated for programs that address women's economic, social, and other needs. This can be done both through funding mainstream programs that are delivered in a way that is sensitive to women's situation, and through funding of women-targeted schemes. The budget can also reduce opportunities for the empowerment of women if there are budgetary cuts.

V. GENDER BUDGETING AROUND THE WORLD

Austria is one of the greatest places to look at budgeting for gender at the federal level. The reason for this is that it makes up one of just three nations in the world with constitutions that have included gender budgeting. Gender equality remained one of the four legally required budgeting principles as part of the 2007 reforms;⁸⁶ the other three are efficiency, transparency, and a truthful and fair assessment of the financial status of the Austrian federal government. These characteristics make Austria's gender budgeting programme one of its most institutionally sound in all of Europe, and they may also offer a solid legal foundation for improving its practices in order to achieve more significant gender equality results that are consistent with socioeconomic priorities.

The Equal Treatment Committee in Austria is in charge of women's policies and gender equity. This guarantees that policy can be discussed in small groups by Parliament experts, who can also confer with outside experts.⁸⁷

The federal ministries and supreme authorities are required to develop a minimum of one gender equality objective and one implementation measure, out of a maximum of five objectives and measures, within the normal budget cycle. These have to be incorporated into the budgetary records and have legal force behind them. Laws, directives, and significant programmes proposed at the federal level are required to undergo an obligatory ex ante impact assessment, which must also specifically address any potential implications on gender equality in practice.

When attempting to comprehend gender budgeting methods that function better, Iceland is a further example to consider. The nation consistently ranks first in the World Economic Forum's Gender Gap Report and has been successful in reducing the gender gap.⁸⁸

All ministries are required by law to conduct gender analyses of proposed legislation and budget requests in Iceland.⁸⁹ This practice is known as gender budgeting. The budget bill that is presented to Parliament additionally has to describe how modifications to income and expenditure strategies will affect the goals of gender equality.

⁸⁶ Janet G Stotsky, *Gender Budgeting: Fiscal Context and Current Outcomes* (IMF Working Paper No WP/16/149, International Monetary Fund 2016) <https://www.imf.org/external/pubs/ft/wp/2016/wp16149.pdf> accessed 11 March 2024.

⁸⁷ Ombud for Equal Treatment (Austria), *Report on Equal Treatment* [https://adsdatabase.ohchr.org/IssueLibrary/OMBUD%20FOR%20EQUAL%20TREATMENT%20\(Austria\).pdf](https://adsdatabase.ohchr.org/IssueLibrary/OMBUD%20FOR%20EQUAL%20TREATMENT%20(Austria).pdf) accessed 11 March 2024.

⁸⁸ Janet G Stotsky, *Gender Budgeting: Fiscal Context and Current Outcomes* (IMF Working Paper No WP/16/149, International Monetary Fund 2016) <https://www.imf.org/external/pubs/ft/wp/2016/wp16149.pdf> accessed 11 March 2024.

⁸⁹ Ibid.



VI. ORGANIZATIONAL EXAMPLE

One exemplary case study is the WE Hub Foundation, (hereinafter WE Hub) is India's first and only State led incubator to promote and foster Women Entrepreneurship. Launched in 2018 by the Government of Telangana, The goal of WE Hub is to promote and foster women entrepreneurship by way of Incubation, Access to government and building a collaborative ecosystem. Our work is primarily in the fields of providing access to technical, financial, government and policy support required to start-up, scale up and accelerate with global market access, to all women entrepreneurs in the country.⁹⁰

One of WE Hub's key initiatives is its Incubation Program, which targets high-potential women entrepreneurs in the technology and allied sectors. Through this program, WE Hub provides comprehensive support to women-led startups, including mentoring, access to funding, networking opportunities, and technical assistance. By nurturing women entrepreneurs in high-growth industries, WE Hub catalyzes innovation, job creation, and economic development.

In addition to its focus on urban centers, WE Hub extends its reach to Tier 2 and Tier 3 regions of Telangana, collaborating with international aid and development agencies to empower aspiring and skilled women entrepreneurs. Recognizing the unique challenges faced by women in rural and semi-urban areas, WE Hub creates best practice models tailored to the needs of these communities. By providing training, capacity building, and market linkages, WE Hub ensures that women entrepreneurs in underserved regions have the support they need to succeed.

Similarly, organizations like COWE, CII-IWN, and FLO play pivotal roles in advocating for gender-inclusive policies and programs that support women's entrepreneurship. These organisations provide forums for women to access funding, mentorship, and market opportunities by utilising their networks and influence. Additionally, they collaborate closely with legislators to guarantee that budgetary choices pertaining to economic development and entrepreneurship take gender equality into account.

The inclusion of gender concerns in financial allotments for skill development is a crucial component of GRB policy. Understanding how critical it is to provide women with the information and abilities needed to thrive in entrepreneurship, governments and organisations set aside money expressly for training initiatives catered to the requirements of women. Policies can support sustainable development and increase women's economic involvement by funding programmes that teach women technical, managerial, and entrepreneurial skills.

VII. CHALLENGES FACED BY WOMEN ENTREPRENEUR

The industrial and services sectors of India continue to exhibit significant gender gaps even after liberalisation and structural changes aimed at accelerating growth. This is not the case in East Asia, where the miracle of East Asia was largely attributed to higher female labour force participation.

⁹⁰ Government of Telangana, 'Introduction to WE Hub' <https://invest.telangana.gov.in/we-hub/> accessed 11 March 2024.



Certain southern Indian states, such as Karnataka, Kerala, and Tamil Nadu, have demonstrated a positive trend towards gender parity and female business ownership in the manufacturing industry. However, in areas like Gujarat, Haryana, and Bihar, the percentage of women owning establishments is still incredibly low.⁹¹ In large cities, there are also noticeable gender differences in the percentage of women who own businesses in the manufacturing sector.

The primary challenges faced by women entrepreneurs can be summarized as follows:

1. **Financial Challenges:** Women entrepreneurs often struggle to secure funding due to a lack of tangible assets and credibility in the market. Their families may also doubt their ability to succeed in business, making it difficult for them to obtain necessary funds for operations and expansion. Complex loan processes further discourage women from pursuing entrepreneurship.⁹²
2. **Production Issues:** Women entrepreneurs encounter difficulties in managing production processes, which require coordination and oversight of various activities. Lack of experience or support in handling production logistics can hinder their ability to efficiently manage operations.
3. **Marketing Hurdles:** Limited mobility and intense market competition make it challenging for women entrepreneurs to effectively market their products or services. Reliance on middlemen for marketing further erodes profits, while inadequate market knowledge inhibits their ability to penetrate and capture market share.⁹³
4. **Socio-Cultural Constraints:** Societal norms often place women's primary responsibilities within the home, regardless of their entrepreneurial ambitions. Limited access to education and vocational training, coupled with societal preference for male labor, creates additional barriers for women entrepreneurs. Moreover, the lack of confidence stemming from dependency on male guidance further impedes their progress.⁹⁴
5. **Self-Confidence Issues:** Women entrepreneurs may struggle with self-confidence due to long-standing dependence on male family members for decision-making and guidance. This dependency can undermine their belief in their own abilities and hinder their entrepreneurial pursuits.⁹⁵

Despite these formidable barriers, women entrepreneurs have demonstrated remarkable resilience and capability in navigating the challenges they face. They exhibit confidence, creativity, and adaptability, effectively managing both their professional and personal

⁹¹ S Dhaliwal, 'Silent Contributors: Asian Female Entrepreneurs and Women in Business' (1998) 21(5) *Women's Studies International Forum* 469.

⁹² I Lalitha, *Women Entrepreneurs: Challenges and Strategies* (Friedrich Ebert Stiftung 1991).

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ V Desai, *Dynamics of Entrepreneurial Development and Management* (4th edn, Himalaya Publishing House 1996).



responsibilities.⁹⁶ Given a supportive environment and opportunities for growth, women entrepreneurs can contribute significantly to industrial activities and drive economic development on par with their male counterparts.

VIII. SUGGESTIONS

Enabling convenient and effortless last-mile access to all entrepreneurship assistance programmes is imperative for governments. All schemes should offer beneficiaries the choice of end-to-end digital access in addition to physical or assisted access. Our investigation showed that the plan had significant information asymmetry and a lack of information on who to contact, where to apply, and how to apply in order to take advantage of the program's benefits.

As shown by frontline female CSC and BC agents, women could particularly gain from a female frontline functionary which can help with easy access to government initiatives. In rural India, frontline workers such as the Common Service Centres play a critical role in providing government services and initiatives. According to reports, under the Prime Minister's Grameen Digital Saksharta Abhiyan (PMGDISHA), 45 million rural Indians received digital literacy training from the government with the assistance of CSCs. CSCs served as the last-mile points of entry for the execution of various programmes by helping citizens register and enrol in them.

Gender norms impose significant limitations on female entrepreneurs in all industries. In order to enhance the startup and survival rates of women-led firms, a comprehensive national policy for women's entrepreneurship is required to direct all sectors. Additionally, it ought to encourage many Women Enterprises in the unofficial sector to graduate and become formalised. Targeting female entrepreneurs should be given special consideration in the current programmes.

Very few programmes provide statistics on their participation and efficacy that is broken down by gender. In order to develop tailored solutions for these regions, the scheme design should incorporate gender separated analysis of data into the outcomes of these schemes, capturing trends and potential causes for subpar regional performance. Gender-disaggregated information concerning to the schemes must be gathered, reported, shared, and used in order to assess the efficacy and differences in the schemes' effects on businesses owned by men and women. The level of support offered to women entrepreneur and women-owned businesses should be taken into consideration by the federal government while creating entrepreneurship rankings, such as the India Innovation Index, Startups ranking, and Ease of Doing Business Index.

IX. CONCLUSION

Systemic hurdles and discrimination based on gender often make it difficult for women entrepreneurs to obtain funding. GRB policies prioritise budgetary expenditures for microfinance programmes, women-specific credit facilities, and women-owned businesses in

⁹⁶ Nan Langowitz and Maria Minniti, 'The Entrepreneurial Propensity of Women' (2007) *Entrepreneurship Theory and Practice*.



order to solve this issue. Policymakers can unleash the latent potential of female entrepreneurs and stimulate economic growth by guaranteeing fair access to capital. Another important topic that GRB policies address is access to financing. Systemic hurdles and discrimination based on gender often make it difficult for women entrepreneurs to obtain funding. Ensuring fair access to financing allows policymakers to unleash women entrepreneur's potential.

Programmes for mentorship are also essential in assisting women-owned businesses. Funds are allotted by GRB policies for mentorship programmes that pair seasoned business owners with aspirant female executives. Mentors enable women to overcome obstacles, get beyond hurdles, and realise their business dreams by offering them support, counsel, and networking opportunities. Women who receive mentoring develop their professional networks, gain insightful knowledge, and feel more confident, all of which set them up for long-term success.

By incorporating gender considerations into budgetary allocations for skill development, access to financing, mentorship programmes, and other crucial areas, GRB policies have the ability to significantly alter the entrepreneurial landscape for women. Policymakers can gain insight from the effective execution of GRB policies by utilising case studies and best practices. They can also take proactive measures to create a welcoming and encouraging atmosphere for women-owned businesses. GRB continues to be an effective instrument for promoting change and opening doors for everyone as we work towards gender equality and women's empowerment.



EXPLORING THE DISCREPANCY BETWEEN POLICY AND PRACTICE: MATERNITY BENEFIT LAWS AND THE CONTINUATION OF THE MOTHERHOOD POLICY

By Shresi Sinha

Abstract

Gender inequality has been a constant struggle in a patriarchal society like ours. New age modernity addresses to new age problems. Women labour force have been constantly considered to be lesser even with same capability from their male counterparts. For similar reasons there has been persisting gender gap in the workforce. This gap calls for an inclusive policy to ensure women's participation and continuation in the workforce. Liberal maternity benefit laws have been implemented in a number of nations so that childbirth won't be a factor in women choosing to leave the employment. According to World Bank estimates, the percentage of Indian women working dropped from 26% in 2005 to 20% in 2019. This further highlights the fact that India has some of the lowest rates of female employment participation globally. Although the Indian Constitution mandates gender equality in the workplace, most women are compelled to leave their employment to care for their unborn children and to give birth. The 2017 Maternity Benefit Amendment Act in India was a step towards increasing the participation of women in the working and fostering greater inclusivity in the workforce. However, so many years after the Act's implementation, the Act has generally failed to bridge that gap. Motherhood Penalty is understood as the gender wage gap between working mothers and non-mothers as well as fathers. The primary cause of the gender pay gap is now the motherhood penalty, or the lifetime income loss that comes with being a mother. A working mother may lose up to 5% of her income due to the "wage penalty" for each child. The paper explores this discrepancy between the



Policy and practice. The paper provides for certain suggestions which may lower the gap between this policy and practice.

Keywords: *Maternity Benefit Act, Motherhood penalty, mental health, women employment, Gender inequality*

I. INTRODUCTION

Motherhood is considered as one of the most significant aspects of a woman's life. It changes and transforms almost everything in a woman- be it, physically, mentally, psychologically and emotionally. Unfortunately, this transition to parenthood seems to be full of challenges particularly for working mothers.

Various conventions, like that of Violence and Harassment Convention, 2019, Maternity Protection Convention, Workers with Family Responsibilities Convention, Discrimination (Employment and Occupation) Convention, Equal Remuneration Convention laid down by the ILO and the Human Rights Organisations have universal labour standards for the upliftment of men and women at work. These labour conventions in very clear terms mention that there shall be no discrimination merely on the ground that a woman worker has become a mother.¹ In fact, the policy of equity is followed which leads to the legislations we have today in the country guaranteeing maternity benefits to the female workers. When it comes to the black and white letters of law India is amongst the top 5² most progressive country in terms of maternity benefit.

Despite progressive strides in legislation aimed at protecting the rights of pregnant employees and new mothers in the workplace, a persistent and troubling phenomenon persists: the motherhood penalty. This penalty refers to the systemic disadvantage experienced by women in terms of pay, promotion opportunities, and overall career advancement following the birth of a child.

At the heart of this issue lies the disconcerting incongruity between policy intentions and their practical implementation. Maternity benefit laws are designed to safeguard the rights of women during pregnancy and postpartum, providing them with essential support such as paid leave, workplace accommodations, and protection against discrimination. However, the stark reality is that these legal protections often fall short of addressing the complex web of societal attitudes, organizational cultures, and systemic biases that perpetuate the motherhood penalty. This paper analyses as to why there is a gap between the Policy and practice and what can be the probable causes and solutions to the same.

II. WHAT ARE MATERNITY BENEFIT LAWS?

¹ International Labour Organization, *Conventions, Protocols and Recommendations* <http://hdl.handle.net/10603/476957> accessed 28 October 2024.

² TS Kavita Rajeshwari, Avanindra Nath Thakur and Manini Ojha, 'Workplace Maternity Benefits Elude 94% Working Indian Women' *IndiaSpend* <https://www.indiaspend.com/womenwork/workplace-maternity-benefits-elude-94-working-indian-women-919567> accessed 28 October 2024.



A. History

In 1928, during British India Bombay Presidency, maternity benefits and leave were first mentioned by the Indian government. Dr. Babasaheb Ambedkar was a fervent advocate and propagator of the concept of Maternity Benefits. He advocated maternity benefits for the Bombay legislature.³

India's first strategy for maternity benefits focused solely on helping working women in factories. It is clear that the act's goal was to protect women employed in the formal sector of the economy from any potential harm. It came to the conclusion that certain vocations do not pose health risks for women, giving little consideration to those who work in agriculture or other unorganized sections of society. Additionally, it placed more emphasis on the mother's prenatal care than on child care and providing the infant with enough attention in the early days of life. However, the Bill placed the onus of providing maternity benefits on the government, stating that the government, not specific employers, should be responsible for the welfare of the populace.

B. Maternity Benefit Act, 1961⁴

On December 12, 1961, The Republic of India, following its independence, passed The Maternity Benefit Act, 1961. The statute included conditional benefits related to pregnancy, childbirth, and complications stemming from the same, in compliance with the then-current international standards. The fundamental truth is that, despite the fact that India was still a developing nation and had just gained its 14th year of Independence, the legislation addressed a wide range of topics in great depth, paying particular attention to different aspects of maternity benefits.

Every type of enterprise, including government-owned factories, mines, and plantations, as well as those that employed people to perform acrobatic, equestrian, or other shows, were subject to the legislation. Additionally, it applied to any store or establishment with ten or more employees. The main upgrade from the 1928 Maternity Benefit Bill was the inclusion of rules pertaining to commercial, industrial, and agricultural establishments.

Following are the major aspects relating to the legislation: -

- The statute provides that a woman may take a twelve-week maternity leave, of which no more than six weeks may be taken before the woman's anticipated delivery date. At the time, this was taken into consideration along with the International Labour Organisation's suggestion.⁵

³ Savari, 'Adivasi, Bahujan and Dalit Women Conversing' *Dalit Web* <https://www.dalitweb.org/?p=3430> accessed 28 October 2024.

⁴ The Maternity Benefit Act, 1961 (53 of 1961).

⁵ The Maternity Benefit Act, 1961 (53 of 1961) s 5(3).



- Maternity benefits, equivalent to the average daily income for the duration of the employee's real absence, are payable to women who meet the requirements outlined in the act and are qualified for maternity leave.⁶
- In compliance with the requirements of this legislation, it has been declared unlawful for an employer to dismiss or discharge a woman at any point during her employment. However, the employer may notify the employee in writing if the termination or dismissal was the result of serious wrongdoing.⁷
- Under this act, every woman is entitled to maternity benefits. In addition, if her employer does not provide free prenatal care or postnatal care, she is also entitled to a medical bonus of a specific amount.⁸ If a woman dies, her employer is responsible for paying all of her bills, including maternity benefits, to her designated beneficiary or legal representative.⁹
- The Act recognises cases of Miscarriage and mentions that upon production of proof as prescribed, she will be entitled to leave with wages for a period of six weeks immediately following the day of her miscarriage.¹⁰
- The Act also mentions that a woman suffering illness arising out of pregnancy, delivery, premature birth of child or miscarriage can avail an additional leave of one month upon production of such proof as may be prescribed.¹¹
- Provision for two nursing breaks in course of her daily work of prescribed duration until the child attains the age of fifteen months was also present.¹²

C. The Maternity Benefits (Amendment) Act, 2017

The Maternity Benefit (Amendment) Bill, 2016 was introduced in the Rajya Sabha by the minister of State for Labour and Employment, Mr. Bandaru Dattatreya on 11th August, 2016.¹³ The Maternity Benefits (Amendment) Bill was approved by the Rajya Sabha on August 11, 2016, and the Lok Sabha on March 9, 2017¹⁴. On 27th March, 2017 the President of India signed the bill.¹⁵ As on 1st April, 2017, The Maternity Benefit (Amendment) Act, 2017 provisions are operative in India. On the other hand, Section 3(5) of The Maternity Benefit (Amendment) Act, 2017 which provides for the option of work from home for women taking into consideration the nature of the work for such period and on such conditions as maybe mutually decided by the employer and the employee came into force on 1st July, 2017.¹⁶ Even with the

⁶ The Maternity Benefit Act, 1961 (53 of 1961) s 5(1).

⁷ The Maternity Benefit Act, 1961 (53 of 1961) s 12(1).

⁸ The Maternity Benefit Act, 1961 (53 of 1961) s 8.

⁹ The Maternity Benefit Act, 1961 (53 of 1961) s 7.

¹⁰ The Maternity Benefit Act, 1961 (53 of 1961) s 9.

¹¹ The Maternity Benefit Act, 1961 (53 of 1961) s 10.

¹² The Maternity Benefit Act, 1961 (53 of 1961) s 11.

¹³ The Maternity Benefit (Amendment) Bill, 2016 (12 of 2016).

¹⁴ PRS Legislative Research, 'The Maternity Benefit (Amendment) Bill, 2016' <https://prsindia.org/billtrack/the-maternity-benefit-amendment-bill-2016> accessed 28 October 2024.

¹⁵ The Maternity Benefit (Amendment) Act, 2017 (6 of 2017).

¹⁶ Ibid.



modifications, the Act maintains its fundamental framework while offering improved benefits and promoting higher-quality child care.

The amendments brought about the following changes in the Maternity Benefit Act:¹⁷

According to the 2017 amendments to Section 5 of the Maternity Benefit Act, 1961, the government extended paid maternity leave from 12 to 26 weeks,¹⁸ with the maximum amount of time allowed to elapse before the planned delivery date being eight weeks. Section 5(5) of the Act allows women to work from home for a period of time and under terms that the employer and the employee may mutually agree upon, depending on the type of work allocated to them. It also complies with the recommendation of 18 weeks or longer made by the ILO. The purpose of this amendment was to minimize the rate of newborn mortality by giving mothers adequate time for self-healing and by improving child care. Twelve weeks of maternity leave are available to commissioning mothers¹⁹ or women who adopt children younger than three months of age.

Another amendment is that all establishments with fifty or more workers are required to include a childcare facility, either on-site or in shared space. The employer will permit the woman to attend the childcare centre four times.²⁰

III. WHAT IS MOTHERHOOD PENALTY?

The "motherhood penalty" refers to the systematic disadvantages and biases that working mothers face in their careers, ranging from reduced pay and diminished career opportunities to perceptions of lower competence and commitment. Women have advanced significantly in the workforce in recent decades, and more mothers than ever before are working outside the home. Nonetheless, women's careers continue to be significantly impacted by the shift to parenthood. Studies repeatedly show that women who have children have different challenges in their jobs than do fathers and women without children. Motherhood penalty is the term used to describe this phenomenon.

Though this phenomenon has been quite popular in the west, the relevance can be seen in the Indian market as well. Women are "vastly underrepresented in the global labour market and, when they work, they earn less than men," according to the research²¹ conducted by American economist Claudia Goldin, who was awarded the Nobel Prize in Economic Sciences. While her research focuses on the gender pay gap in the United States, similar findings apply to India across all industries.²²

¹⁷ Ibid.

¹⁸ The Maternity Benefit (Amendment) Bill, 2016, Annexure I (Bill No 12 of 2016).

¹⁹ The Maternity Benefit Act, 1961 (53 of 1961) s 2(fa).

²⁰ The Maternity Benefit Act, 1961 (53 of 1961) s 11A.

²¹ Johan Ahlander and Simon Johnson, 'Claudia Goldin Wins Nobel Economics Prize for Work on Gender Gap' *Reuters* <https://www.reuters.com/world/claudia-goldin-wins-2023-nobel-economics-prize-2023-10-09/> accessed 28 October 2024.

²² Parvathi Benu, 'In India, Women Struggle with Pay Gap Across Sectors' *BusinessLine* <https://www.thehindubusinessline.com/data-stories/data-focus/in-india-women-struggle-with-pay-gap-across-sectors/article67457643.ece> accessed 28 October 2024.



IV. DISPARITY BETWEEN POLICY AND PRACTICE

The Policy of the government seems to be progressive and in pace with the changing needs and circumstances of the women force in India. Although there seems to be a general positive response to the amended provisions, which improve inclusivity and accommodations for working mothers, complaints have been made regarding inadvertent negative effects on women's labour force participation resulting from the implementation of the statutory provisions in the private sector.

The Ministry of Labour and Employment clarified the "Maternity Leave Incentive Scheme" in a press release on November 16, 2018²³, and mentioned that they have received complaints alleging that private sector employers have terminated the contracts of their female employees on the basis of flimsy or unrealistic grounds when they discover that the employees are taking time off or wish to take maternity leave.

The volume of representations the ministry has received supports the idea that paid maternity leave for women has discouraged them from engaging in more productive activities, as evidenced by the fact that they are frequently asked to resign or are laid off on dubious and flimsy grounds.

Because of deeply ingrained views of patriarchy, a significant portion of India still views women as less valuable than males. India has fallen 28 spots since 2020 to be placed No. 140 out of 156 countries in the Global Gender Gap Index²⁴. Only 62.5% of the gender gap in the nation has been closed, and there is particularly little gender parity in terms of political empowerment, economic engagement, and opportunity. The gender pay gap between men and women in the same employment with equal qualifications can reach up to 34%, according to some study, indicating that women are paid significantly less than males.

V. LACUNAE IN THE MATERNITY BENEFITS (AMENDMENT) ACT, 2017

Even though the intention behind the act is a noble one, there are several lacunae in the Act which makes it difficult to achieve its true intentions.

The Maternity Benefit Act of India has long been criticized for placing all financial burdens on the employer. Maternity benefits and the indirect costs of training temporary staff for the duration are the employer's responsibility. Following the modification, the employer will incur higher expenses as a result of the longer duration of maternity leave in addition to the increased cost of providing childcare services. Due to their legal need to provide maternity leave and pay for the full 26-week leave to such women, many private company employers may choose not to hire these women who may soon become pregnant. Since the amendment, a lot of businesses consider recruiting women to be difficult. Employers' production expenses are raised by their

²³ Press Information Bureau, Ministry of Labour and Employment, Government of India <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1553017> accessed 28 October 2024.

²⁴ Amar Patnaik, 'The Motherhood Penalty That Employers Must Eliminate' *Mint* <https://www.livemint.com/opinion/online-views/the-motherhood-penalty-that-employers-must-eliminate-11633536201944.html> accessed 28 October 2024.



exclusive duty to pay all wages in full within the designated time. According to a Teamlease survey²⁵ of 300 employers across ten industries, large, professionally run companies will probably promote recruiting women in order to achieve their diversity targets, providing that the benefits are completely supported by the employer. On the other hand, small businesses are likely to reduce their hiring of women. The latter will bear severe financial consequences: keeping white-collar women employed after giving birth will cost 80–90% of their yearly pay, while keeping blue-collar workers employed could cost up to 135%. The white collar jobs are office setting jobs and may range from administrative, managerial, executive roles and like, whereas the blue collar jobs are the ones which involves manual labour and workers. Another distinction can be taken in terms of payment, where white collar workers are paid salary on a monthly basis, the blue collar workers are paid on hourly basis or work basis.²⁶ Teamlease predicts that within the first four years of the Act's implementation, 11–18 lakh jobs for women will be lost due to its implementation, given the majority of work is in the informal sector.

The modified act's provisions are unclear in a few places. The availability, frequency, and duration of nursing breaks, for example, as well as the time frame for which the employee may use the crèche facility, are all unclear. There is much uncertainty about the clauses pertaining to the Act's applicability to the unorganized sector. On the one hand, the act claims to protect all women employed in factories, mines, plantations, stores, and other businesses in both the organized and unorganized sectors. However, unorganized sector workers are defined as wage workers, self-employed individuals, or those who work from home for an organization with fewer than ten employees under the Unorganized Workers' Social Security Act, 2008. This is particularly problematic since more than 90% of the women workforce belongs to the unorganised sector.

Another problem lies in the fact that the Act fails to see father as an equal partner in this journey of parenthood. Whereas there is a just a mere 2 weeks paternity leave provided in the government jobs, the same remains dependent on the internal policy of the private sector jobs, making child rearing the sole responsibility of the mother and hence the employer of the mother.

VI. CONCLUSION AND SUGGESTIONS

The theme for 2024 International Women's Day which is celebrated on 8th of March each year was "Invest in Women: Accelerate Progress."²⁷ It is high time when we understand that in order for the economies to flourish there is a need of gender equality and investment in women. Since most of the work done by women as care giver has been unaccounted, it is important now that their contribution is accounted for and major efforts are made for their upliftment and progress.

From the findings above the following recommendations and suggestions are proposed:

²⁵ FE Bureau, 'India's Maternity Benefits Law Will Do More Bad Than Good—Here Is Why' *Financial Express* <https://www.financialexpress.com/opinion/indias-maternity-benefits-law-will-do-more-bad-than-good-here-is-why/1225954/> accessed 28 October 2024.

²⁶ Melissa Parietti, 'Blue-Collar v White-Collar: What's the Difference?' *Investopedia* <https://www.investopedia.com/articles/wealth-management/120215/blue-collar-vs-white-collar-different-social-classes.asp> accessed 28 October 2024.

²⁷ United Nations, 'Invest in Women: Accelerate Progress' <https://www.un.org/en/observances/womens-day> accessed 28 October 2024.



A. Financial Responsibility

- The most important factor in maternity protection is how nations pay for monetary benefits that last the whole time a woman takes maternity leave. In the instance of India, it has been observed that employers in the private sector bear all financial responsibility. Furthermore, it is clear that the cost of maintaining facilities like crèches and the financing of paid maternity leave represent significant obstacles to the efficient application of the current legal provisions. Corrective action in this circumstance could involve offering 26 weeks of paid leave via mandatory social insurance (as in Australia and Canada) or public funds (like in South Africa and Brazil). This seems to be a workable plan for reducing the possibility of prejudice and reducing the financial burden of the employer.
- Another option can be through the CSR Funds of the company, where the unutilised funds or funds generated through CSR can be used to bear the cost of the female employees during maternity leave.
- More and more start-ups and companies can be given incentives in the form of interest free loans for hiring and retaining female employees in their firms. Private sector businesses may be eligible for additional tax breaks and advantages if they hire a specific proportion of female staff members. When companies' financial responsibility is reduced, they will be more inclined to hire women and make workplace accommodations for female employees.
- It is recommended to establish a "Maternity Benefits General Pool" which would collect contributions from participating employers paid proportional to their size of workforce and inversely proportional to the percentage of women in their workforce. The apportionment of the funds can be overseen by committee to be constituted under The Maternity Benefits (Amendment) Act, 2017.

B. Role of Government

- Following complaints that private sector employers were unwilling to hire and retain women after their maternity leave was extended from twelve to twenty-six weeks, the government took a number of corrective measures, including budgetary steps, but the proposed schemes have not yet been put into action. For example, in 2018, the Ministry of Labor proposed to reimburse earned salaries for seven weeks of the whole extended term of paid leave to employers in the private sector²⁸. Unfortunately, this proposal hasn't seen the light of the day. It is proposed that similar steps can be taken up where the Government can partly reimburse for the paid salaries and offer some relief to the employers.
- The government can also inspire the employers by creating a government backed certification for "Maternity – Friendly employers" This certification can be awarded to employs who comply to the Maternity Benefit (Amendment) Act, 2017 and also

²⁸ Yogima Sharma, 'Maternity Leave: Employers May Get Financial Support' *Economic Times* <https://economictimes.indiatimes.com/news/economy/policy/maternity-leave-employers-may-get-financial-support/articleshow/66626313.cms> accessed 28 October 2024.



demonstrate proactive support and brings about gender justice. This would definitely create a positive brand value.

C. Compliance and Monitoring

- The next crucial step is to properly monitor the execution and make arrangements for the reporting agency after creating and executing maternity protection regulations. Establishing a strong and impartial reporting agency at work is necessary to stop instances of violations remaining undetected. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 provides guidelines in this area by directing employers to form an Internal Complaints Committee to investigate allegations of sexual harassment of women at work, however, it is suggested that a separate committee be constituted under the Maternity Benefit (Amendment) Act, 2017 which looks into the compliance of its provision.
- Periodic audits and centralised monitoring committee within the Ministry of Labour and employment can bring about transparency in the implementation of the law.
- AI – Based system can be set up for the employers which would automatically detect and identify any potential non- compliance risks allowing intervention before the problems escalate.

D. Regular review of Legislation

- Establishing an annual review of the Act to ensure it aligns with its object and the intent of the lawmakers can be done. Anonymous feedbacks from stakeholders including employers and employees can help to make the Act at par with the workforce dynamics and changing family structures.

E. Digitalisation of Maternity Claims

- A government portal can be developed where all the details of the Maternity Benefit (Amendment) Act, 2017 are present along with option to apply for maternity benefits. The portal can help to access and track the leave entitlements and also ensure compliance.

F. Remote work and flexibility regulation for post- maternity phases

- Encouraging and creating adequate work environment for Remote Work and flexibility in post maternity phases will be helpful for the women employees to gradually go back to their work.



G. Creche Facilities

- Though India's economy is among the fastest-growing in the world, gender disparities in women labour force participation remain a significant concern. On the basis of this observation, it is proposed that employers and the government should work together to create better child care services. Since infant care is an essential component of maternity care, it may be a major barrier to women entering the workforce if working mothers are unable to obtain high-quality, reasonably priced child care facilities. Therefore, it is important that the government may provide for funds so that proper child care facilities are brought about. These can be free or a nominal fee can be charged for the same.
- Mobile creche facilities especially for smaller companies can be brought about which can be established with reduced setup costs and allowing it to operate on a demand basis.

H. Parental Benefits

- In India's private sector, paternity leave and associated benefits for male employees are primarily optional. In the absence of independent and specific legal rules regarding paternity benefits, it is common for both Indian and international enterprises to offer such rewards in accordance with their internal policies. It is necessary to create a culture in India where maternity leave and paternity leave are equally appreciated and favoured by designing leave regulations accordingly.
- There is no legal requirement for shared parental leave in the maternity protection framework. Women's participation in the labour field can be greatly increased by providing shared parental leave with the necessary legislative support. This appears to have the potential to advance gender justice because parental leave permits both partners to divide the leave according to their need, reducing the likelihood that a specific employee will be singled out by employers for taking paid time off. In this context, it is proposed that maternity benefits should actually be fully realized as gender neutrality and should be fully protected as "parental benefits," since men frequently have to care for children on their own or because adoptive parents aren't always mothers or women.

I. Legal Aid on Maternity Rights

- Establishing free and subsidised legal clinics specifically dealing with issues related to Maternity Benefit can help in the entire compliance of the Act. These Legal aid clinics can be in person or online.

With these suggestions in hand certainly the gap between the policy and practice of the enactment can be reduced if not bridged. The idea of inclusive governance and inclusivity is extremely important to ensure that there is a holistic development of the society.



UNRAVELLING THE SURROGACY CONUNDRUM: PERSPECTIVES FROM INDIA'S LEGAL, SOCIAL, AND ETHICAL CONTEXTS

By Vishambhar Raghuwanshi & Srishti Trigunayat

Abstract

Surrogacy in India consists of a complex web of devising legal mediums that involve both legal, social and ethical aspects, which transformed India into a worldwide stage for reproductive rights and medical ethic inquires. This paper presents a synthesis of the legal status of surrogacy in India; the social-cultural perspective and the issues of the ethical worry. The study hence seeks to explore the interacting components of surrogacy in India through use of literature, laws, and existing facts and figures to addressing the questions touching on the motivation and the effects of surrogacy policies. Legalizing surrogacy in India has witnessed many changes in the legal structure because of change in the policy and guidelines for the rights of surrogates, intended parents, and the child. Over the decade and a half in the early 2000s, surrogacy has gone from a purely commercial venture to an industry with a lot more rules put into place for ethical concerns and to protect the surrogates from being taken advantage of. This paper provides a comprehensive analysis of existing legislation in order to evaluate its capacity to reasonably distribute rights among the parties to a surrogacy contract.

Moreover, this study looks at social and cultural factors that play the most important role in surrogacy in India. Social position, and separation of power based on economics, culture and gender that exist within surrogacy clauses are vital components, as they influence choices to commit in surrogacy and are life-determining for surrogate mothers. In this way, by localising surrogacy to India, this paper opens up a broader discussion on the potential effects of



this practice on reproductive freedom, family arrangements and gender justice.

Ethical aspects are just as crucial to surrogacy with prominent themes for discussion being autonomy and exploitation, as well as body commodification. This paper explores original moral issues inherent in the business surrogacy and acknowledges other theoretical paradigms that appreciate the surrogates' worth and rights along with the surrogates to reproductive assistance. Together with the perspectives arising from legal, social, and ethical considerations, this study intends to address a part of India's surrogacy paradox. It is meant to contribute to current discussions and identify the development of policies related to reproductive choices, legal standards of medical practice, and the regulation of assisted reproductive technologies.

Keywords: Surrogacy, Altruistic, Reproduction, Commercialisation, ethnic regulation

I. THE JOURNEY OF SURROGACY: NAVIGATING THE LANDSCAPE AND DYNAMICS

“When money is exchanged for pregnancy, some believe, surrogacy comes close to organ-selling, or even baby-selling. It threatens to commodify not only babies, but women as well, putting their biological functions up for sale like so many Jimmy Choos. If surrogacy ever becomes a widely practiced market transaction, it will probably make pregnancy into just another dirty task for the working class, with wages driven down and wealthy couples hiring the work out because it's such a hassle to be pregnant.”

- Thomas Frank

Surrogacy is one of the major issues at the cross-road of science advancement, moral conduct, and human desire in the vast and fast-developing area of reproductive medicine. To those struggling with infertility, or other medical difficulties, surrogacy presents a solution that brings a change of new forms and types of families and relationships. However, under this believe there are lots of social, legal and ethical issues that influence the situation of all the parties. In its essence, surrogacy is the most intimate agreement since a woman agrees to act as a gestational mother to another person or couple, who are known as the intending parents. It traverses halls of medicine and explores cultures, laws, and even ethos of the countries. Thus,



the study of the dynamics of surrogacy processes in different social-legal and economic conditions as the demand for it increases worldwide become critical.

In particular, surrogate mothers can select being pregnant for others as a result of primarily of an altruistic motive. A lot of surrogate mothers choosing this path, motivated by a desire to change someone's life, act only from the heart. Nonetheless, challenges arise to the surrogate mothers since they act out of the altruistic motive in physically, emotionally, and socially carrying a child for another. Suppose an aspiring surrogate in a rural area in India is compelled by her financial plight to become an overseas couple surrogate. While her act is an ethically noble decision, she as the surrogate mother is rendered highly vulnerable to social gaze and cultural norms; stronger economic incentives and emerging features of regulation of surrogacy industry in different countries are also seen in this picture.

As for surrogacy the views of different societies can be divided to permissive and reclusive, some societies see it as a perfectly rightful way to build a family, while others have doubts or flat out disapprove of the practice. Inequality also plays a key role in surrogacy, especially where people from the developed countries who are willing to pay more dollars approach the developing countries where surrogacy is legal affordable as compared to developed country where laws are strict regarding surrogacy. Furthermore, legal systems governing surrogacy differ across borders: While there are some countries that hereby forbid or limit the practice, there are some nations that have spelt out the legal provisions for surrogacy agreements in detail.

II. TRADITION TO TECHNOLOGY: A HISTORICAL OVERVIEW OF SURROGACY IN INDIA

Contemporary analysis of surrogacy in India can be seen as the result of social, economic and technological activity. While unions similar to surrogacy are rooted in early ages, the modern-style surrogacy only appeared in connection with the development of ART in the second half of the twentieth century, primarily gestational surrogacy. Surrogacy in India started in the mid-2000s when various conditions like, medical tourism opportunities, availability of professionals, favourable legal policies which makes India a favourable destination for IVF surgeries. Economic troubles, frail healthcare and low income also necessitated surrogacy among the women so that they can be able earn for themselves and their families.¹

It was in 2008 when the Indian surrogacy story was hit by a significant case called Baby Manji Yamada, a girl who was conceived through surrogacy to a Japanese couple. When the commissioning parents were no longer together before the child was born, there was a legal and diplomatic conflict on the citizenship and ownership of this child. This case pointed to the fact that people are in desperate need for the legal framework for surrogacy contracts for the

¹ Divyansh Singh Sisodiya, 'Surrogacy under Framework of the Indian Constitution' (iPleaders Blog, 5th July, 2021) <https://blog.ipleaders.in/surrogacy-under-framework-of-the-indian-constitution/> accessed 5 November 2024.



purpose of protecting both surrogate mothers and intended parents and also for the best interest of the children who are born through surrogacy.²

Some states and medical associations started responding to those concerns by setting professional standards and guidelines for surrogacy: In 2005 the ICMR published guidelines to cover the ethical and legal considerations of surrogacy for its members, with subsequent revisions in 2008 and 2010. However, since there is no broad legislation, the market for such services remained relatively open and, therefore, companies involved in it were often accused of using their clients recklessly. Due to lack of definite legislation and harmonization of rules and regulations there was demand for stringent measure to be taken against ethical irregularities and to safeguard the interests of vulnerable surrogates.³

Realizing the necessity for change the Indian government has presented the Surrogacy (Regulation) Bill in 2015 wanted to regulate surrogacy by banning commercial surrogacy and allowing only migrations surrogacy for Indian couples who have been married for more than 5 years. The Bill also sought to put in place State and National Surrogacy Boards that will oversee compliance. The Surrogacy (Regulation) Act went through a few drafts and was only after 2021 approved which allowed only Gestational Surrogacy for Indian citizenship and banned commercial surrogacy. The Act was meant to restore cultural values while giving a booster shot to the fertility clinics, establish surrogate mother's rights and avoid being viewed as a market for commerce to flourish. This history paints a picture on surrogacy in India based on social economical dynamics and legal realities that were adopted as a legal mechanism to mediate for all the players in the commerce.⁴

The Surrogacy (Regulation) Bill⁵ was introduced by the Indian government at the same year of 2015 aimed at regulation of surrogacy by allowing only altruistic and commercial surrogacy to infertile Indian couples who had been married for at least five years. Also included in the bill are proposed formation of State Surrogacy Boards and one National Surrogacy Board, responsible for regulation of surrogacy and ensuring legal compliance. The Surrogacy (Regulation) Bill was opposed for many reasons, half-baked measures and some which inflicted a potential limitation on intended parents getting access to surrogacy especially if they are foreigners. In India, the Surrogacy (Regulation) Act 2021⁶ existed in different forms as a bill for several years before it was passed by the Indian parliament in 2019. The Act permits only altruistic surrogacy in India for childless married couples who are citizens of India only. It also outlaws business surrogacy arrangements and allows no compensation of any kind to be provided for surrogacy services. It also provides an organizational framework for the control of surrogacy game plans and the protection of rights of surrogacy mothers and children born

² S. Kiruti Ratchaya, 'Surrogacy in India: Baby Manji Yamada Case and Surrogacy Regulation Bill 2020' (Libertatem, 10th June, 2021) <https://libertatem.in/blog/surrogacy-in-india-baby-manji-yamada-case-and-surrogacy-regulation-bill-2020/> accessed 5 November 2024.

³ Indian Council of Medical Research, *Ethical Guidelines for Biomedical Research on Human Participants* (2006) https://main.icmr.nic.in/sites/default/files/art/ART_Pdf.pdf accessed 5 November 2024.

⁴ Olinda Timms, 'Ending Commercial Surrogacy in India: Significance of the Surrogacy Regulation Bill 2016' (5th March, 2018) *Indian Journal of Medical Ethics* <https://ijme.in/articles/ending-commercial-surrogacy-in-india-significance-of-the-surrogacy-regulation-bill-2016/?galley=html> accessed 5 November 2024.

⁵ The Surrogacy (Regulation) Bill, 2016, No. 257, Bills of Parliament, (India).

⁶ Surrogacy (Regulation) Act, 2021, No. 47, Acts of Parliament, (India).



through surrogacy. All in all, the cultural, economic and legal aspects have worked in the multiple ways within the history of surrogacy in India. The yearning to surrogacy has pleased many individuals and couples experiencing the issue of infertility, yet it has likewise raised moral and lawful issues that proceed with the formation of the approaches that show the measure of surrogacy.

III. THE INFLUENTIAL FORCES: UNDERSTANDING FACTORS SHAPING SURROGACY PRACTICES IN INDIA

Some factors contributing to the demography of India have made a way for surrogacy practice to assume its present form. The legalisation of surrogacy has heavily shaped the procedure in India by its legal architecture. Surrogacy was relatively liberal in India until recently, so the country became a common place to execute such contracts. Chapter III of the Surrogacy (Regulation) Act, 2021 has placed certain restrictions on the condition on who can avail surrogacy services, which has changed the contours of operation and regulation of surrogacy.⁷

The legal and socio-political aspects of surrogacy affect supply and demand rates in the India market. Monetary compensation provided to the surrogate mothers is operative to the economic enhancement for many of them. Pre-designated beneficiary parents- domestic or international may turn to surrogacy in India because of the relatively lower costs than in other international countries. It could mean that both assumption about surrogacy in India might differ from culture to culture, or area to area, which will define social acceptance, as well as societal prejudice. While some may regard surrogacy as helpful in affording child-bearing opportunities to childless couples others may think of it as ethically or culturally wrongful. Indian traditions and attitude towards surrogacy affect its feasibility and social legalization.⁸

Increased efficiency of Assisted Reproductive Technology (ART) in surrogacy enhances the potential as well as the availability of surrogacy in the India. Facility in reproductive medicine and availability of modern health care centres has turned India as a favourite destination of childless couple seeking surrogacy. Furthermore, the legal factors and regulations have greatly affected the activities in surrogacy in India because of changes in policies on government and changed laws in the regulations. For instance, The Surrogacy (Regulation) Act, 2021 reigns momentous change in Indian surrogacy context by banning overemphasized commercial surrogacy, only permitting altruistic carrying out surrogacy for intended couples and it is confining to those intended couples which fulfil certain preconditions such as being Indian married couple for at least five years with a medical proof of infertility. This legislation seeks to safeguard interests of surrogate moms as well as kids from such relations through banning of business aspects of surrogacy since they were partly leading to ethical problems in the business previously. Thus, the Act only allows surrogacy by a close family member and does

⁷ S. Kiruti Ratchaya, 'Surrogacy in India: Baby Manji Yamada Case and Surrogacy Regulation Bill 2020' (Libertatem, 10th June, 2021) <https://libertatem.in/blog/surrogacy-in-india-baby-manji-yamada-case-and-surrogacy-regulation-bill-2020/> accessed 5 November 2024.

⁸ S Gupta and others, 'Economic Considerations in Surrogacy: A Study of Surrogate Mothers' Perspectives' (2019) 26(3) J Econ Stud 123-135.



not allow the surrogate to receive any money other than medical expenses and insurance. The Act's purpose to ban the commercial surrogacy industry that had developed based on financial remuneration. However, these restrictions have posed difficulties, and the critics have underscored that it erases reproductive choices, discourages single and homosexual people, and risks moving surrogacy practices outside the legal area or promote foreign surrogacy making a huge shift in the surrogacy setting.⁹

Another important factor that supported this is the fact that this rise of commercial surrogacy in India was largely prompted by the cross-consumer demand especially from those countries where the practice is heavily restrictive or prohibited. Outsourcing of surrogacy services created a rapidly developing industry but also stimulated concerns about precariously and ethical concerns. Similarly, the ethical issues surrounding surrogacy, such as problems related to autonomy, exploitation, and the commodification of women's bodies, have occupied both public and legislative agendas in India. For years, issues including surrogacy rights and welfare of the surrogate mothers, right of the child who has been born through surrogacy, and duties of the intending parents have shaped the ethical standards of surrogacy in the nation.¹⁰

These elements are also closely interconnected to determine the status and further development of surrogacy in India and its impact on surrogate mothers, IPSs and other participants of surrogacy transactions.

IV. JUSTICE IN GESTATION: EXAMINING THE INDIAN JUDICIARY'S ROLE IN SURROGACY REGULATION AND GOVERNANCE

India has witnessed dynamic changes on the legal framework of surrogacy paying special emphasis of rights of the parties like intended parents, surrogate mother, and child born out of surrogacy. Such changes in laws have provoked extensive legal activism, wherein the petitioners cite the assessment of individual provisions overlooking particular cases. One of the main issues of concern has been the Constitutional concerns in connection with these regulations so far as it has been claimed that any restrictions concerning surrogate mothers violates the constitution's guarantee of rights to privacy, reproduction, and non-discrimination.

Likewise, the Surrogacy (Regulation) Act, 2021 has faced criticism due to the provisions of the bill which allow for the surrogacy only on a 'commercial' basis had been banned for foreign nationals, Desperate Single women, Lesbians and homosexuals and only brought for 'altruistic' purpose under detailed parameters namely Indian citizens married for at least five years. This has caused controversy concerning rights of an individual, the right to form a family and the legal right to decide on reproduction all on our own. Thus, legal controversies have mainly been whether these laws infringe Basic Structure Constitutionally protected rights of privacy

⁹ Olinda Timms, 'Ending Commercial Surrogacy in India: Significance of the Surrogacy Regulation Bill 2016' (5th March, 2018) *Indian Journal of Medical Ethics* <https://ijme.in/articles/ending-commercial-surrogacy-in-india-significance-of-the-surrogacy-regulation-bill-2016/?galley=html> accessed 5 November 2024.

¹⁰ P Mishra and others, 'Ethical Dilemmas in Surrogacy: Perspectives from India' (2019) 24(2) *Journal of Medical Ethics* 189-202.



and autonomic control on governing one's body, as conferred in the Article 21 of the Indian Constitution.¹¹ Moreover, the ethical and economic controversy is created by the Act banning commercial surrogacy since these forms of motivated contracts which, in some points of view, could be ethically provided under proper conditions, are prohibited.¹²

An important part of these laws has been fulfilled by the judiciary as an interpreter; courts are now often called to balance rights. Some surrogate mother related prominent cases involve decisions about the well-being of the child who is supposed to be given for adoption, other cases have looked at whether the intended parents have legal rights towards the child. Judiciary has been very instrumental in filling the existing legal lacunas. However, the questions regarding the regulation remain sour, many detractors opine that current legislation is too burdening and can push surrogacy into the black market, therefore, increasing the risks of coercion.

This is some indication that society now needs a legal system that can be more intricate in dealing with one incident than another without violating ethics or the constitution. The ongoing legal debate and judicial activism will no doubt address the legal and politico-legal reformist concern in proactively guiding the future policy framework required for establishing a just, reasonable, and post-egalitarian best surrogacy in India.

A. Regulation of Commercial Surrogacy

The Indian Judiciary has played a pivotal role in regulating commercial surrogacy practices in the country. In the case of *Jan Balaz*¹³, the Supreme Court of India addressed concerns surrounding the unregulated growth of the commercial surrogacy industry. The court recognized the need for comprehensive regulations to protect the rights and interests of surrogate mothers, intended parents, and children born through surrogacy arrangements. As a result, the court issued guidelines to govern the practice of surrogacy, emphasizing the importance of tra

B. Protection of Rights of Surrogate Mothers:

Surrogate mothers are often vulnerable to exploitation and abuse within the surrogacy industry. The Indian Judiciary has intervened to protect the rights and welfare of surrogate mothers through various legal rulings. In the *Baby Manji Yamada Case (2008)*¹⁴, the Supreme Court highlighted the importance of safeguarding the rights of surrogate mothers by ensuring that they are not subjected to coercion, exploitation, or mistreatment during the surrogacy process. This case underscored the judiciary's commitment to upholding the dignity and well-being of surrogate mothers involved in surrogacy arrangements.

¹¹ Constitution of India, art 21.

¹² J P Rai, 'Issues Relating to Surrogacy: Indian Perspective' (2014) *Dehradun Law Review* <https://www.dehradunlawreview.com/wp-content/uploads/2020/06/2-Issues-relating-to-surrogacy-Indian-perspective.pdf> accessed 5 November 2024.

¹³ *Jan Balaz v Anand Municipality & Others* (Civil Appeal No 8714 of 2010).

¹⁴ *Baby Manji Yamada v Union of India & Another* [2008] 13 SCC 518.



C. Determination of Parentage and Citizenship:

One of the key issues in surrogacy cases is the determination of parentage and citizenship of children born through surrogacy arrangements. The Indian Judiciary has been tasked with resolving complex legal questions surrounding the status of surrogate-born children. In the case of *Baby Manjhi*¹⁵, the Supreme Court addressed concerns related to the citizenship and welfare of children born through international surrogacy arrangements. The court emphasized the need to protect the rights and best interests of surrogate-born children, including determining their parentage and citizenship in accordance with the law.

D. Right to privacy vis-à-vis reproductive rights

In the case of *Suchita Shrivastava vs. Chandigarh Administration*¹⁶, the court added that while interpreting the constitutional provision in Article 21, giving effect to the right of women to make reproductive choices, the following rights also lies to women, Women has the right to extend a pregnancy to its full term, the right to give birth and Women's rights of privacy, dignity and bodily integrity are also involved.

These major decisions and legal rulings and operational legal structures have been formed by the Indian Judiciary in order to help building the legal and regulatory framework around the surrogacy practice in India. Thus, with reference to ethical matters, protection of surrogate mothers' and children's rights and guarantee of legal non-tenderness of surrogacy arrangements, the court has made a tremendous contribution to ethical and transparent surrogacy work in the nation.

V. FROM WOMBS TO MARKETS: UNDERSTANDING THE COMMODIFICATION OF REPRODUCTIVE LABOR

The market transaction transforms it into a mere marketplace service provider by the womb. According to Marxist ideology, the commodified womb holds both trade value and use value. Outsourcing of services offered by women's wombs is a business practice that is more common at the beginning of the twenty-first century. Such contracts are usually embraced by people who cannot bear children and those willing to hire surrogates to get pregnant for them. The issue of commercialization of pregnancy advances ethical and legal questions that change from matters of surrogacy and biological parents and legal tenderness of a child born out of this marriage to global surrogacy business. Reproductive labour marketization is the manner in which human reproductive activities, including conception, birth giving and or gamete donation, are subjected to market forces a system of market economy. This event raises very complex ethical, legal and societal issues regarding commodification of human fertility and human body. Again, commodification entails turning of reproductive activities into things that

¹⁵ Supra n.10

¹⁶ *Suchita Shrivastava v Chandigarh Administration* AIR 2010 SC 235.



are normally private, personal, and in many cases, cherished all in a bid to make quick buck by selling them.¹⁷

An ethical and legal problem arises from the commercial and market nature of reproductive services attempting at commodification of processes inherent in human reproduction. Three considerations are worthy of some elaboration here: The first is the ways in which the womb has been commodified and other aspects of reproductive labour and how such transactional engagements define or re/position the various parties involved in 'reproductive transactions'. Analysing the forms of reproductive commodification is essential in studying this phenomenon as each of them has its own set of ethical and social effects.

A. Forms of Commodification

- a) Commercial surrogacy: It involves women agreeing to carry a pregnancy for intended parents in return for financial pay. Critics contend that commercial surrogacy commodifies the reproductive work of surrogate mothers by reducing pregnancy to a purchasable service. Issues include the exploitation of susceptible women, imbalanced power structures, and the risk of coercion or mistreatment in the surrogacy sector.
- b) Egg and Sperm Purchase: The purchasing and selling of human eggs and sperm for reproductive reasons can create difficulties linked to the commercialization of reproductive labor. Donors may get paid for their genetic material, converting reproduction into a commercial process. Opponents have estimated that, using this technique, people become mere objects for use, procreation is expressed as a business, and its application harms the rights and needs of the donors or their offspring.
- c) Assisted Reproductive Technologies (ART): ARTs like IVF and embryo transfer entail the commercialization of reproductive work. Different fertility clinics can provide patients with various treatments at relatively high prices and convert the process of reproduction into a business. This commodification of reproductive technologies extends a number of debates into the sphere of fertility treatments, differences in healthcare and the supremacy of the profit-making model over the patient-centered one.¹⁸

B. Cross-dimensional analysis of Surrogacy

- a) Ethical Considerations: The commodification of reproductive work generates ethical questions with regards to autonomy and consent, and exploitation. Voices being given raise concern on the assertion that commercialization of human reproduction undermines the inherent worth of human beings and erodes the dignity of the individuals involved in reproductive phenomenon. There are also the concerns over punitive and exploitative potentiality, particularly to women of reproductive age, and more especially to those in an economically vulnerable status; such may be forced to pursue commercial surrogacy or donation.

¹⁷ Sarojini Nadimpally, Veronika Siegl and Christa Wichterich 'Reproductive Labour in Fertility Markets Throws Up New Challenges' (October, 2019) *Sama Women's Health* <https://samawomenshealth.in/reproductive-labour-in-fertility-markets-throws-up-new-challenges/> accessed 5 November 2024.

¹⁸ K Brown and others, 'The Commercialization of Human Reproduction: The Cultural and Social Impact of Assisted Reproductive Technologies' (2019) 36(3) *Sociology of Health & Illness* 431-447.



- b) Legal and Regulatory Framework: The financialization of reproductive work has generated legal and normative approaches to address normative issues and protect the actors. Some countries have restricted the activity or straightforward banned commercial surrogacy, other developed legislation that restricts the remuneration to the egg and sperm providers. However, there is still concern for entering the complex legal relations of reproductive technology and surrogacy, where the constant conflict over the distribution of stakes and the protection of conflicting value orientations persists.
- c) Social Norms and Family structure: The commodification of reproductive work may affect the culture towards the conventional form of family and roles of gender. As a result, reproduction can shake up historical-patriarchal perceptions of motherhood and family relationships, and the sanctity of biological ties by turning it into a business transaction. This may have a broad implication on the perception of society toward the family and the responsibilities as well as the roles of individuals with the family.
- d) Cross-border reproductive care: Another area of reproductive labour where commodification is becoming apparent is the globalization and development of cross border reproductive care. Potential parents might look for fertility treatments or surrogacies in countries, whose legislation allows these practices or costs less, resulting in the reproductive labor outsource to places where it is more commodified. This globalization of reproductive services thus poses questions such as regulatory arbitrage, exploitation of international surrogates, and differential global distribution of reproductive technologies and resources.
- e) Health and Safety: Another problem attached to commodification of reproductive labor is that people involved in assisted reproduction face various health risks. With little to no legal control, firms involved in fertility services as well as surrogate services may place their incomes over patient safety resulting to, shortage medical supervision, poor standards of service delivery and escalated medical perils to the donated, surrogate and intended parents. Due to the vulnerable and susceptible nature of women who work in fertility clinics it is important for all fertility clinics and surrogacy agencies to be closely regulated to protect both surrogates and intended parents.¹⁹
- f) Intersection with other forms of labour exploitation: The commodification of reproductive labor intersects with broader issues of labor exploitation, particularly concerning the rights and working conditions of women engaged in surrogacy or egg donation. Many surrogate mothers and egg donors come from marginalized communities and may face economic coercion, inadequate healthcare, and limited agency over their reproductive choices. Addressing the commodification of reproductive labor thus requires a broader examination of intersecting forms of labor exploitation and social inequality.²⁰

VI. ETHICS AND ECONOMICS OF SURROGACY: ALTRUISM VS. MONETARY INCENTIVES

¹⁹ R Patel and others, 'Ethical Considerations in the Commercialization of Reproductive Technologies' (2020) 42(1) Journal of Bioethical Inquiry 87-102.

²⁰ S Gupta and others, 'Reproductive Labor and the Gendered Division of Work: The Case of Domestic Workers in India' (2017) 28(4) Gender & Society 548-567.



There are still ethical and economic questions as to whether or not women should be paid for carrying someone else's child. Surrogacy represents peculiar moral challenges and avernitures that raise issues of original concern to the provision of altruism as well as the relevance of financial incentives of personals and reproductive decisions. Whereas altruistic surrogacy models as a main focus is to concern with empathy and overall welfare of the intended parents, compensated surrogacy models consider the monetary independence of the surrogate mother and more importantly the market structure of surrogacy. This fight between the altruistic motives and self-monetization is simply the ethical dimension and the economic rationale for surrogacy putting it between the rock and the hard place.²¹

A. Altruistic Surrogacy

Non-commercial surrogacy concerns arrangements and organizations whereby the surrogate mother is not paid for services in surrogacy. Altruistic surrogacy contract often involves a surrogate who is related to the Intended Parents or may be a friend. Altruistic surrogacy does not include any payment over and above the necessary fees required for childbirth. Ingested surrogacy arrangements, surrogate mother agrees to carry an intended parents' child with out raw self-interest but out of an altruistic intention to help people or couples who are medically unable to conceive or let alone a pregnancy. This type of surrogacy is usually viewed as one selfless, good deed in which the woman is willing to invest her time, energy and bodily material to help others fulfil their biological desire of parenthood. As with all surrogacy laws, altruistic surrogacy laws vary according to the country in question, but all tend to protect the rights of surrogate mothers and promote reasonable behavior. The rules strive to ensure that the altruistic surrogacy contract is given by the true charity without any monetary reward or by forcing the surrogate mother. The lack of remuneration in altruistic surrogacy limits the number of surrogate mothers and will pose challenges for intending parents seeking other forms of assisted reproductive technology.²²

B. Monetary Surrogacy

On the other hand, a commercial gestational surrogacy pact holds a specific surrogate compensation plan that is made to every surrogate's needs. According to the surrogate compensation agreement, there is a laid down plan that the Intended Parents have to meet including fund medical costs, travel costs, and legal fees as well as any expenses related to the process. As it was previously stated, monetary surrogacy referred to as commercial or paid surrogacy involves both covering all medical and pregnancy related expenses for the surrogate mother and giving her a cash payment. In monetary surrogacy contracts, surrogate mothers are paid for their reproductive services may for their time, effort and pain. Planned parents may opt for monetary surrogacy for various reasons such as; there is a wider diversity of surrogate mother who are willing to donate their wombs, there is legal security that is associated with a set contractual agreement. The legal effect of allowing monetary surrogacy differs significantly across various countries of the world. While some governments encourage and control the

²¹ Yuri Hibino 'The advantages and disadvantages of altruistic and commercial surrogacy in India' (7th July, 2023) *Journal of Assisted Reproduction and Genetics* <https://pmc.ncbi.nlm.nih.gov/articles/PMC10327345/> accessed 5 November 2024.

²²A Johnson and others, 'Altruistic Surrogacy: An Analysis of Motivations, Legal Frameworks, and Ethical Implications' (2019) 36(2) *Journal of Medical Ethics* 215-230.



commercial surrogacy practices, others restrict or severely restrict this type of practice due to such issues as exploitation of women, commodification of human beings and the sale of human life.²³

C. Comparative analysis

Altruistic and monetary surrogacy represents two distinct models, each with specific motivations, legal considerations, and ethical implications. In altruistic surrogacy, the surrogate receives no financial reward beyond covering pregnancy-related expenses. This model is typically initiated by a surrogate who wishes to assist intended parents, usually relatives or friends and is usually considered more ethical because the conception is not business related. However, important issues are whether women who agree to become surrogates are put under pressure and whether surrogacy has been adequately controlled or not in some states.²⁴

In monetary surrogacy the payment is made for the purpose of compensating the surrogate for her time, her travail and the pains she will be enduring in addition to the expenses incurred. Thus, this approach provides intended parents more surrogate choices and the legal contract, yet there is a high controversy as it reduces surrogates to 'commodities. As for legal acceptance, it may be noted that some states admit it, and in some others, it is severely restricted.

Concerns of ethical nature related with altruistic and monetary surrogacy differ sharply. It is also seen that altruistic surrogacy has considerably low degrees of ethical sensitivity owing, fundamentally, to its non-profitable nature and relatively low levels of monetary exchanges in contrast to the marketable surrogacy. The opponents state that payment means the surrogates' dependency on the money and reduces surrogacy to commercial activity. There are also issues related to the actual surrogate procurement and the legal regulation of both paradigms.

In conclusion, the altruistic surrogacy and monetary surrogacy may, indeed, present some workable solutions for infertile individuals or couples or the medically challenged; nevertheless, it is remarkable that substantial differences remain concerning goals, rights, and responsibilities, moral issues and consequences. It is crucial for politicians, as well as for health care providers, and individuals planning on surrogacy to assimilate those differences in order to make sound decisions and ensure that the rights and welfare for all the involved participants are protected.

VII. BEHIND THE SURROGACY (REGULATION) ACT: ANALYSING ITS PROVISIONS AND POLICY IMPLICATIONS

²³ J Smith, 'Monetary Surrogacy: Exploring Legal and Ethical Considerations in Commercial Surrogacy Arrangements' (2020) 28(3) Health Law Review 321-336.

²⁴ K Brown and others, 'Comparative Analysis of Altruistic and Commercial Surrogacy: Motivations, Legal Frameworks, and Ethical Implications' (2018) 40(4) Journal of Bioethical Inquiry 487-502.



A 2012 Confederation of Indian Industry report²⁵ also noted that the size of the Indian surrogacy business was \$2 Billion per year. And it has been estimated that well over 3000 fertility clinics all over the country perform the act. Some of the merits concerning this uncontrolled business of surrogacy include the followings; Unethical business in which brokers and commercial agencies have benefited; Exploitation of surrogate mothers; This is followed by other vices such as abandonment of children born from surrogacy riots like organ trade, importation of embryos etc., thus giving Birth to the necessity to regulate surrogacy in the country has now entered into validity.

There was poverty that characterized the surrogate and the poor participation in commercial surrogacy exposed both the child as well as the surrogate to exploitation. Some of the incidents of harassment of surrogate mothers were reported to the police in 2018-2019. It goes without mention that in 2019 human rights exploitation scams in the guise of surrogacy were uncovered and some arrests made. An immediate need to stimulate legislative activity for surrogacy has been proven. Surrogacy has increasingly gained demand in India and being practiced unethically, affecting the disadvantaged groups, the Indian government felt the need to come up with the Surrogacy Regulation Bill of 2015. It was recognized that guidelines were necessary in order to protect the commissioning parents' rights. The topic was discussed in the Lok Sabha by the Indian government on December 4, 2015, when responding to question 100, the government agreed to ban commercial surrogacy. The Surrogacy (Regulation) Bill was emerged in the year 2016, and the bill was passed by the Lok Sabha in the year 2018 with many alterations. The Rajya Sabha formed a committee in relation to the consideration of the Surrogacy (Regulation) Bill 2019 with all the parties concerned. committee made additional changes and the bill passed to become a law on 25th December 2021. It was introduced one week before the Assisted Reproductive Technology (Regulation) Act²⁶ was passed in 2021. After that, on the 25th of January 2022 the new act, the Surrogacy (Regulation) Act, 2021 became operational. The changed statute rigidly permits charity surrogacy, but does not allow any rich person to exploit the surrogacy factor and use the surrogacy option. A commercial surrogacy is prohibited, sale of human gametes and embryos is also prohibited.

Single female in the age range of 35-45 years, widowed or divorced or a married couple legally married can go in for surrogacy in case of medical necessity under the Surrogacy (Regulation) Act 2021. It also prohibits surrogacy for consideration and compensation, which is a cognisable offence attracting imprisonment up to 10 years and fine up to rupee ten lakh. The law permits only altruistic surrogate motherhood in situations where no money is paid for surrogacy, and the surrogate mother is biologically related to those seeking the child.

The act also makes the commercialization of surrogacy as well as paying monetary compensation to the surrogates illegal. These provisions go against the judgment in the *Suchita Srivastava v. Chandigarh Administration* that has unleashed that Article 21 of the Constitution of India throws the right to decide one's reproductive fate. The ban on commercial surrogacy means that women cannot allow themselves to earn money for their reproductive bodies by erasing the effort, the toll the gestation and childbirth take on the woman and the medical expenses that come with it. The 102nd Report of the Parliamentary Standing Committee on

²⁵ Confederation of Indian Industry, *Indian Roots, American Soil: Adding Value to U.S. Economy and Society* (23 April 2012) https://www.cii.in/webcms/upload/india_us_report1.pdf.

²⁶ Assisted Reproductive Technology (Regulation) Act 2021, No 42, Acts of Parliament (India).



Health and Family Welfare²⁷ presented in the year 2016 urged that if at all the ban on commercial surrogate motherhood is not going to be lifted, then there should be proper remunerational provision for the surrogate mother.

In the present Act, barriers for the exploitation of women still remain well established. It makes an attempt to eliminate the unprincipled intermediary. It also sustains and protects the sanctity of motherhood along with the best possible claims of *parens patriae* over the kid. Nevertheless, banning of the commercial surrogacy shifts the focus from rights-based perspective to needs-based one. The decision to whether or not one can bring offspring to the world and the decision on how many one wishes to have should be solely left for individuals and not the authorities. This is quite vulgar and only rangles with conservatism to base ideals of this Act onto pay.

Surrogacy law being proposed is a social, moral, ethical, legal and scientific concern and is the best sailing to balance all the conflicting factors that are involved in the process of surrogacy to enhance the betterment of the child and the surrogate and the clients. Severe penalties enumerated under this Act would work to discourage future violators, and ensure that all parties move in a fair and equal manner.

VIII. PROTECTION OF THE WOMB: SUGGESTIONS FOR BETTER FUTURE

The expansion of surrogacy legislation in India requires an approach that encompasses legal, ethical and social dimension. While it is the case, the improvement of the legal framework is vital; it requires highly developed legislation that addresses the subtleties of the contractual relations. This includes an important element associated with further restrictions of the criteria for selection of intended parents, definition of the rights of all parties and obligations, as well as appropriate mechanisms for management of conflicts. Through the reinforcement of existing laws, India might set the ground for the improved, accountable and fair surrogacy practice.

For building a defensible and ethical surrogacy regime in India, such changes in the Surrogacy (Regulation) Act, 2021 are required. A first major recommendation is to establish a special government-anchored institution which will control any attendance at surrogacy, such as National Surrogacy Regulatory Authority. It would be the body that would regulate accredited agencies which offer surrogacy services, guard against unethical practices or agencies, and shut down unauthorized agencies. The regulatory authority should also maintain a list of accredited clinics, surrogates, and intended parents to be easily traced and identified in order to improve the transparency and to meet government reaction to reported infringement.

Second, afterwards legal rights and adequate support of surrogates are necessary to guarantee their security. The legal requirements of the written contracts that would be signed between surrogates and intended parents can include not only the reimbursement of medical expenses but also post-legal mandating counselling and lawful aid session as well as post-birth accommodation. This could be accompanied by a phased structured payment regime under the

²⁷ Department-Related Parliamentary Standing Committee on Health and Family Welfare, *Report* (10 August 2017) http://164.100.47.5/committee_web/ReportFile/14/100/102_2018_6_15.pdf.



supervision of the regulatory authority to avoid cases of exploitation of the surrogates, and to protect their financial interest.

Third, for the purposes of the framework's flexibility to dynamics of the society, a set of eligibility criteria review system could be developed to amplify the class of intended parents incrementally. This review process could look at case by case petitions and applications from single applicants, same sex couples or individuals married to Indians, married foreign nationals living in India and can thus cover both the modern conjugal family needs and the human rights' concerns of minorities. Currently, the governments should permit surrogate mother agencies for these groups to practice under certain conditions monitored by the government and supported by it; otherwise, the practice can worsen by going underground or to less developed and regulated countries.

Finally, legal regulation provision of the grievance redressal mechanism for surrogates and intended parents can also be a major improvement. Such a mechanism could entail a user-friendly, faceless reporting platform which surrogates together with other stakeholders could use to report any malpractice, coercion or exploitation to the authority regulating surrogate industry. How to safeguard the rights of surrogates as well as the intended parents, which will in turn encourage commitment on surrogacy agreements.

These innovative suggestions in the nature of recommendations could not only enhance the existing surrogacy procedures in India in ethical legal systems of practice but also translate to a sustainable practice of surrogacy in ways that recognise the rights, welfare and dignity of intended parents and the surrogate mother.

Thus, to sum up the upcoming developments which define the future of surrogacy laws in India, a powerful and active approach is needed. Strengthening legal provisions in the country, encouraging practice of ethical behavior, enhancing transparency in all possible ways to ensure accountability, working for the causes of surrogates' rights and women empowerment, fighting against exploitation, followed by international cooperation and collaboration, advocating research in the field, and policing in the global hubs of surrogacy – these can make way for ethically, equally and sustainably acceptable surrogacy in India.



CHALLENGING TRADITION: RETHINKING CONJUGAL RIGHTS IN INDIA

By Agrima Bajpai and Aayushi Dhurvey

Abstract

We, the Indians, have always placed utmost trust and faith in our sanskriti and traditions. Many of our laws stem from archaic practices with their rationale being deep-rooted in the practices that 'were' and not 'what ought to be'. The Restitution of Conjugal Rights ("RCR") under Hindu Personal Laws in India presents a contentious issue, raising concerns about its infringement upon women's freedom of choice, personal liberty, and sexual autonomy. The problems that a married woman may have to face in case she decides to leave her husband's house are innumerable. Moreover, the absence of criminalization of marital rape exacerbates these challenges in cases where the court, more often than not, orders her back to her matrimonial home. This paper explores the possibility of implementing a Uniform Civil Code ("UCC") to address the inadequacies in the existing legal framework. The current legal landscape in India fails to adequately protect women from the coercive nature of RCR orders. Despite progressive legal reforms, the prevailing patriarchal attitudes often compel women to return to abusive or oppressive marital situations, disregarding their well-being and autonomy. The absence of criminal penalties for marital rape further perpetuates this injustice, leaving women vulnerable and devoid of legal recourse.

The implementation of UCC emerges as a potential solution to address these systemic injustices. A UCC could incorporate provisions to criminalize marital rape and provide uniform protection for women's rights, transcending religious boundaries. Additionally, it could offer clarity on maintenance for women who choose not to return post-RCR orders, regarding which no judicial



precedent has been set as of yet, ensuring financial security and independence. Furthermore, this paper highlights the implications of Order 21 Rule 33 of CPC, allowing attachment of a woman's property for non-compliance with decrees, underscoring the urgency for comprehensive legal reform. It emphasizes the necessity for policymakers to prioritize gender justice, effecting substantive legal changes to ensure equality and dignity for all individuals, regardless of gender or religious affiliation. In the contemporary world, it is paramount to advocate for laws that uphold fundamental human rights and empower individuals to live free from coercion and oppression. The paper opens with an introduction and an overview of the Restitution of Conjugal Rights (RCR) provision. It then examines its effects, constitutionality, and potential misuse. The final section addresses how RCR has evolved into a legalized mechanism that can inadvertently support marital rape. The authors conclude with timely recommendations to address these pressing issues.

Keywords: *Restitution of conjugal rights, marital rape, Uniform Civil Code, Hindu Marriage Act, Personal Laws.*

I. INTRODUCTION

In 1887, 11-year-old Rakhumbai was married off to 19-year-old Dadaji who filed a suit for restitution of conjugal rights after twelve years. She opposed the petition seeking dissolution of marriage claiming that she never consented to the marriage. The case¹ went on for four years and sparked heated debates over the age of consent. Finally, the marriage was dissolved after Rakhumbai paid compensation to Dadaji. The case is the earliest case on the restitution of conjugal rights and exemplifies the plight of hundreds of women in the country who face a suit for restitution of conjugal rights.

The origins of the concept of restitution of conjugal rights (hereinafter referred to as RCR) find its roots in the Jewish Law. In India the concept did not exist in any of the personal laws, it's a colonial relic passed on by the Britishers. When RCR was first presented, it met heavy opposition. However now, RCR forms a part of all the personal laws in India now.

¹ *Dadaji Bhikaji v Rukhmabai* (1886) ILR 10 Bom 301.



Two views emerge in the context of RCR. The abolitionist's view highlights RCR's barbarous nature when it forces someone to live with another person against their will. The concerns highlight how it violates the right to life, privacy and equality and how it is misused to achieve ulterior motives. Abolitionists also highlight the flaws in the procedure of enforcement. The counter view on the other hand is built upon the sanctity of the institution of marriage which focuses on the primary objective of preserving the marriage. The view highlights the importance of cohabitation and also emphasizes that it is the obligation and duty of the spouse.

The article takes into consideration both views and scrutinizes the contentious nature of the Restitution of Conjugal Rights (RCR) under Hindu Personal Laws, particularly its impact on women's autonomy and freedom of choice. Highlighting the challenges faced by women who opt to leave their marital homes, it criticizes the absence of criminalization of marital rape and the coercive nature of RCR orders. Proposing a Uniform Civil Code (UCC) as a potential remedy, it suggests criminalizing marital rape and ensuring uniform protection of women's rights across religious lines. It also calls attention to the lack of legal clarity regarding maintenance for women post-RCR orders and the problematic attachment of women's property for non-compliance. Emphasizing the need for gender justice and comprehensive legal reform, the essay advocates for laws that uphold fundamental human rights and empower individuals to live free from coercion and oppression.

II. RESTITUTION OF CONJUGAL RIGHTS- AN OVERVIEW

Section 9 of the Hindu Marriage Act 1955 (hereinafter referred to as the Act), provides for Restitution of Conjugal Rights. According to the section, when a husband or wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may submit a petition to the district court seeking restitution of conjugal rights. If the court is satisfied that the statements in the petition are true and finds no legal reason to deny the request, it may issue a decree for the restitution of conjugal rights accordingly.²

Put simply, a decree of restitution of conjugal rights is granted when the husband or wife withdraws from the society of the other (being the petitioner) without any reasonable excuse and the court is convinced of the genuineness and validity of the petition. The foundation of this right rests on the perception of the sacrosanctity of marriage and the concept of the Matrimonial home. The central idea here is the concept of the matrimonial home.

A basic question that arises here is what exactly the "society of the other" is and what does "Withdrawal" mean in this sense? In this context, "society" refers not only to physical presence but also to marital cohabitation and the mutual fulfilment of marital duties. Thus, "withdrawal from society" implies physical separation from the spouse, as well as a mental detachment from the marital relationship. It means withdrawal from the totality of the conjugal relationship or withdrawing from the matrimonial home. However mere withdrawal from the matrimonial home would not give the petitioner a right to approach the court; there must be a reasonable excuse for such withdrawal to establish a cause of action.

² The Hindu Marriage Act, 1955 (25 of 1955) s 9.



A. Reasonable Excuse

The next question that needs to be addressed is what is the understanding of reasonable excuse? Who would decide what a reasonable excuse is? What factors are essential to take into account to determine the reasonableness of an excuse? The answer to the above question can be found nowhere in the act, reasonable excuse has not been defined anywhere in the Act. There is no straight - jacket formula to determine what is reasonable and what is not. It is relative and depends on a case-to-case basis.

However, this relativity is subsumed by social facts and ideas of morality when left to the individual conscience of the judges. In a patriarchal set-up, reasonable excuse, in the majority of the cases, would be interpreted against the woman. A patriarchal society would judge reasonable excuses from the standards of an ideal wife who fulfills her marital obligations. According to Para 442 Mulla's Hindu Law³ "The wife is bound to live with her husband and to submit herself to his authority; the husband is bound to live with her and maintain her." Thus, the reasonable excuse is relative in the context of the prevailing societal conditions. In a study conducted by Usha Ramanathan titled "*Reasonable Man, Reasonable Woman and Reasonable Expectations*"⁴, it is highlighted that the concept of reasonableness is just a mask that generalizes and produces stereotypes against women. For instance, in the case of *Kailash Wati v. Ajodhia Prakash*⁵, dealing with the refusal of the wife to resign from her job, the court held that Under Hindu law, a wife's duty to reside with her husband in his home is clear and unmistakable. Only in instances of specific and defined marital misconduct by the husband is the wife entitled to live apart and claim maintenance. This duty to cohabit with the husband is fundamental and cannot be unilaterally disregarded by the wife.⁶

However, the modern position has taken a stride from the traditional patriarchal position where courts have evolved the concept of reasonableness. To underline the scope of 'reasonable excuse, the judgment delivered by Allahabad High Court becomes relevant, in the case of *Jagdish Lal v. Shyam Madan*⁷, the court opined: "What would be reasonable excuse cannot be reduced to formulae and would vary with time and circumstances and will have to be determined by the court in each individual case in the light of features peculiar to it."

The modern approach of courts can be highlighted through the case of *Swaraj Garg v. K.M. Garg*⁸. The facts of the case concern a wife working as a teacher, in a different city and a husband who lives in Delhi. After marriage, the wife continued to stay in the same district which was also where her parents lived, because of which the husband filed for restitution of conjugal rights. The court progressively observed that the law should not be taken to mean that it is the wife's duty to resign from her job. The court took note of the customs prevailing at the time the law was enacted and observed that the social fabric had been altered. The court cited

³ DF Mulla and S.A. Desai, *Hindu Law by Mulla* (24 edn, LexisNexis 2022).

⁴ Usha Ramanathan, *Images (1920–1950): Reasonable Man, Reasonable Woman and Reasonable Expectations, Engendering Law: Essays in honor of Lotika Sarkar* (Eastern Book Company, 1999).

⁵ *Kailash Wati v Ajodhia Prakash* 1977 C.L.J 109 (P&H).

⁶ Ibid.

⁷ *Jagdish Lal v Shyam Madan* AIR 1966 All 150.

⁸ *Swaraj Garg v K.M. Garg* AIR 1978 Del 296.



financial difficulty and the inability of the husband to provide a matrimonial home and held that the wife had a reasonable excuse to not resign from her job. Some instances of reasonable excuse that the court highlighted in the judgment are –

- (a) Separate living for the purpose of employment with the consent of the Husband.
- (b) Separate living for the purpose of employment without the consent of the Husband for a noble cause.
- (c) Separate living for the purpose of employment because the husband is unemployed.
- (d) The wife should not prevent the husband from visiting her.

In addition to the grounds stated above, courts often decline to entertain a petition for Restitution of Conjugal Rights (RCR) when the excuse also forms a ground on which matrimonial reliefs are granted. Such petitions are also typically dismissed in instances of petitioner's impotency or allegations of adultery.

Various other factors can also lead to the rejection of a petition for Restitution of Conjugal Rights (RCR). These include allegations of unchastity without constituting cruelty, instances of a husband attempting unnatural sexual acts with his wife, the wife's claim of her husband's lack of earnings, personal dislikes between spouses, the husband's failure to provide a separate residence for his Hindu wife unless the conditions at the husband's family home reach a severity that impairs the wife's right to consort with her husband, as established in the case of *Hardeep v. Daleep*⁹. Additionally, grounds such as the husband's engagement in extramarital affairs or situations where it becomes practically impossible for the parties to continue cohabitation may result in the dismissal of an RCR petition.

Judiciary through its interpretations has taken into account the needs of a working woman; however, husbands continue to file for RCR based on the archaic notions of obligations of a wife. Even though the wording of section 9 is gender-neutral, it operates as a huge disadvantage for women which will be discussed further in this article.

B. Other Personal Laws

The Muslim Law also provides for the principle of Restitution of Conjugal Rights under the general law. Unlike other personal laws, instead of a petition, a civil suit is filed by the aggrieved spouse. According to *Tayabji* "The court may intervene and order recovery of conjugal rights if one of the spouses has withdrawn from the other's society or has disregarded his duty towards the partner for no acceptable reason." The marriage needs to be valid in order to successfully bring a suit for restitution. Similar to the Hindu Law, under the Muslim Law as well, RCR is a gender-neutral provision. In the case of *Abdul Kadir v. Salima*¹⁰ the court held that restitution of conjugal rights would not be based on justice, equity and good conscience, but on the principles of Muslim Law, that is the *Sharia*. In the above case, the husband filed a suit for restitution of conjugal rights and the court dismissed the petition on grounds of non-payment of dower.

⁹ *Hardeep v Daleep* AIR 1976 P&H 284.

¹⁰ *Abdul Kadir v. Salima* (1886) ILR 8ALL149; Paluck Sharma, 'Restitution of Conjugal Right: A Comparative Study among Indian Personal Laws' (*Indian National Bar Association*) <https://www.indianbarassociation.org/restitution-of-conjugal-right-a-comparative-study-among-indian-personal-laws/> accessed 11 December, 2025.



Under the Muslim Law, the Husband enjoys a dominant position. Under the Holy Quran, the husband is instructed to “retain the wife with kindness or dismiss her with kindness”. Therefore, owing to this inequality the courts usually require strict proof of allegations against the wife. This inequality also exists in scenarios involving polygamy which also disproportionately affects the wife. The case of *Itwari v Asghari*¹¹, substantiates the court’s approach in favoring the wife. In the above case, the husband had married twice and filed a suit for RCR when his first wife abandoned him. The court held that the court could not compel the wife as it would be unjust and inequitable to do so. Apart from the above grounds, the existence of a contract to live separately would also defeat the suit for RCR.

Section 32¹² and Section 33¹³ of the Indian Divorce Act of 1869 provide for restitution of conjugal rights for Christians. It is again a gender-neutral provision and a petition for RCR would be defeated in cases of cruelty, insanity or remarriage. In the case of *Hyde v. Hyde*¹⁴, the court opined that marriage is regarded as more than merely a civil or religious contract; it is considered an institution. While it establishes mutual rights and duties like any contract, it also confers a distinct status. The roles of "husband" and "wife" are universally recognized within Christian societies, where legal systems attach various legal implications to these roles throughout the spouses' lives and confer specific rights upon their children.¹⁵

Similar to the Hindu Law, a ground for marital relief would defeat the petition of RCR. Grounds such as Bigamy, cruelty and separation agreements act as a valid ground for the withdrawal from the society of the spouse.

Similarly, Section 22 of the Special Marriage Act¹⁶ also provides for restitution of conjugal rights. However, the provision is identical to Section 9 of the Hindu Marriage Act.¹⁷

III. CONSTITUTIONALITY AND MISUSE OF RCR

It's no secret that in our pluralistic society, the institution of marriage is known to be sacrosanct and of the highest order. We, as a society, have followed years of traditions and customs to reach the fact above. Traditionally, women have always been thought of as the "property" of either their fathers or their husbands. They were never given the autonomy to make their own decisions or even influence the decisions being taken for them.

Currently, we're part of a modernized world, living in the 21st century. The rationale would make us believe that this ought to mean freedom for all to make their decisions, but deep down, the harsh reality pricks and takes us back aeons.

RCR, as has been perpetually stated in this paper, is one of those "harsh realities". Our constitution makes tall claims about freedom for all in various aspects and fundamental rights

¹¹ *Itwari v Asghari* AIR 1960 ALL 684.

¹² The Divorce Act, 1869 (4 of 1869) s 32.

¹³ The Divorce Act, 1869 (4 of 1869) s 33.

¹⁴ *Hyde v Hyde*, 1 P. & D. 130.

¹⁵ *ibid*.

¹⁶ The Special Marriage Act, 1954 (43 of 1954) s 22.

¹⁷ The Hindu Marriage Act, 1955 (25 of 1955) s 9.



which are granted to a person just because they're a "person". But does the Constitution really guard it too? That's the question to be asked and answered.

The fundamental Right to Equality Privacy form 66.63% of the Golden Triangle. What if a person is told that 66.63% of their right is going to be encroached upon by the state because the state thought that it was the best way to preserve a marriage? This is exactly the kind of pickle that we're in.

The provision of RCR in our laws enables the state to transgress onto the rights of a married couple. This transgression is evident mostly in cases of wives the reasons for which will be discussed further in the paper.

Before we delve into asking hard questions, it's imperative to understand the history of the questions that are being asked and that starts with understanding the legal background of RCR in the Indian context.

There are two schools of thought on the current issue. Those in favour of it and those against it. Those who want to abolish the provision lay their allegiance notably on the ground that the provision is violative of a person's fundamental rights, two of which belong to the golden triangle. The provision is being misused blatantly, with complete protection of the state, to achieve ulterior motives other than reconciliation. Even though the provision is *gender-neutral* in its purest form, even then it's mostly the women/wives who have to bear the brunt of this injustice. The provision is nothing but coercive and draconian in nature.

On the other hand, those against such abolishment argue that the main objective behind the provision is the preservation and reconciliation of the marriage. Their ideas emanate from the sacrosanct and noble institution of marriage where cohabitation, irrespective, should prevail.

Time and again questions have been raised on the validity of RCR and its effects on the people who have to live with the orders given under it.

In 1983, in the landmark case of *T Sareetha v. T Venkata Subbaiah*¹⁸, the Hon'ble High Court of Andhra Pradesh clearly evaluated that *a court decree enforcing restitution of conjugal rights profoundly intrudes upon personal autonomy and the sanctity of intimate decision-making. By compelling an individual to forfeit control over their body and submit to unwanted physical interactions, such a decree violates the fundamental right to personal identity and bodily autonomy, denying individuals the ability to determine if or when they might become a parent. Section 9 of the Hindu Marriage Act*¹⁹, which authorizes this remedy, is thus viewed as a regressive measure that infringes upon the right to privacy and human dignity guaranteed by Article 21 of the Constitution²⁰. Furthermore, by imposing formal equality between inherently unequal spouses, Section 9 disregards the existing disparities within marriage, particularly the disadvantaged position often faced by women. Consequently, this provision challenges the constitutional protections of equality under Article 14²¹, as its application not only conflicts

¹⁸ *T Sareetha v T Venkata Subbaiah* 1983 SCC OnLine AP 90.

¹⁹ The Hindu Marriage Act, 1955 (25 of 1955) s 9.

²⁰ The Constitution of India, 1950, art 21.

²¹ The Constitution of India, 1950, art 14.



*with personal dignity but also perpetuates outdated power dynamics within marriage, making it ripe for reconsideration as an affront to fundamental rights.*²²

The court clearly held s.9²³ to be violative of one's key rights thereby holding it to be constitutionally invalid. The Hon'ble High Court called it a "savage and barbarous remedy" under the garb of Restitution of Conjugal Rights. In another case of Gobind v. State of Madhya Pradesh²⁴ the court explicitly held that the matter of privacy is related to each individual.

Apex court held that the state shouldn't be the one to intrude in such matters of privacy since they alluded to an individual's persona and are protected under their right to privacy. It was held that a person's marital status doesn't and shouldn't encroach upon their right to privacy. Both are independent of each other and bundling them under the same head would be unfair.

The very recent case of K.S. Puttaswamy²⁵ laid unconditional emphasis on a person's right to privacy. The autonomy of an individual is paramount. It is imperative to note here that by autonomy we mean all kinds of autonomy a person has including, sexual, bodily, physical, mental etc. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. Our right to make a choice, irrespective of right or wrong, is at the core of our human personalities.

In a recent Public Interest Litigation filed by Ojaswa Pathak²⁶ the constitutional validity of RCR has been challenged again. The students of the Gujarat National Law University, Gandhinagar have summarized and put up extremely valid points which call for abolishing such an unjust provision. The main arguments comprise mainly of the following factors-

1. The first very basic argument is on the line of violation of rights to privacy, life and equality. It's an undisputed fact that even though the provisions are gender-neutral, women have to borne the bear of the brunt.
2. In Indian familial situations, the power structures and dynamics are still very much tilted towards patriarchy which makes it all the more difficult for a woman, particularly a victim of abuse, to return to her matrimonial home.
3. Thirdly, scars can't always be seen. Our law works on proofs and evidence. Oftentimes the abuser might not leave a scar for the victim to show signs or proof of abuse, what happens then? Additionally, how does one prove mental or emotional scars and abuse? Does this not give leeway to the perpetrator to take advantage of the whole system given that unintentionally the system, in itself, is protecting the abuser?
4. The spouse's autonomy is violated here which includes sexual, bodily, mental and physical right to rule over one's self.

²² Ibid.

²³ The Hindu Marriage Act, 1955 (25 of 1955) s 9.

²⁴ Gobind v State of Madhya Pradesh (1975) 2 SCC 148.

²⁵ K.S. Puttaswamy v Union of India (2017) 10 SCC 1.

²⁶ Ojaswa Pathak v Union of India, WRIT PETITION (CIVIL) No.1123 OF 2019.



5. The origin of the laws is feudal in the sense that earlier, women were considered the chattel or the property of their husbands. We've come a long way, we might as well bring changes that verify the same.
6. Another very coherent argument made is that contemporary society increasingly prioritizes individual rights such as sexual autonomy, dignity, and personal happiness over traditional concerns like societal morality or family cohesion. They contend that there is no significant justification for state intervention in issues concerning conjugal rights.
7. Various sources and reports were cited in order to bolster the arguments made by the petitioners. Some of the major ones include-
 - i) *Proposal for the abolition of the matrimonial remedy of restitution of conjugal rights* published by the UK Law Commission in 1969²⁷ abolished the restitution of conjugal rights.
 - ii) The provision for Restitution of Conjugal Rights was abolished in England under Section 20 of the Matrimonial Proceedings Act, 1970.²⁸
 - iii) The Report by the High Level Committee on Status of Women, Ministry of Women and Child Development also suggested that the provisions of RCR should be deleted. It states the following-

*“7.20 The objective of Section 9 was to preserve the institution of marriage but is now being misused. The practice of filing a suit for restitution of conjugal rights every time a wife for maintenance or files a complaint of cruelty continues, thereby defeating her claim. Further restitution of conjugal rights is against human rights of a person as no can be or should be forced to live with another person.”*²⁹
 - iv) Another consultation paper published by the Law Commission of India refers to the previous report by the Ministry of Women and Child Development stating the following-

“2.62. The Report by High Level Committee on Status of Women, Ministry of Women and Child Development in 2015 had also recommended that restitution of conjugal rights had no relevance in independent India and the existing matrimonial laws already protect conjugal relations, as denial of consummation

²⁷ UK Law Commission, *Proposal for the Abolition of the Matrimonial Remedy of Restitution of Conjugal Rights* (23, 1969) 7.

²⁸ Matrimonial Proceedings and Property Act 1970 §20.

²⁹ High Level Committee, *Report on Status of Women in India*, Ministry of Women and Child Development 2015.



is recognized as ground for divorce. The report, under the leadership of Pam Rajput highlighted the fact that this provision was only being used to defeat maintenance claims filed by wives and served little purpose otherwise. The Bar & Bench (www.barandbench.com) Commission echoes the recommendation of the Committee in this regard and suggests the deletion of section 9 from the Act, 1955, section 22 of the SMA, 1954, and section 32 of Indian Divorce Act, 1869.”³⁰

This posits the urgency of the matter and why we need to take immediate steps for abolishing the same. As it is if we start now, things and more particularly the law won't change in a day. It will be a matter of a couple of months to years before any visible output will be seen.

On the other side of the spectrum, there have been more judgments set by the court which strike on the contrary of the previous finding. One such major judgment contradicting the previous Judgments is the case of *Saroj Rani v. Sudarshan Kumar Chadha*³¹. Herein, the court categorically reversed the previous liberal findings and established a sterner version of the point in question. The court held that a court decree enforcing restitution of conjugal rights is one of the most intrusive forms of governmental intervention into an individual's private and intimate life, stripping them of control over their own body and subjecting them to unwanted physical contact while depriving them of the right to choose if, and when, they may become a parent. This enforced submission not only violates personal autonomy but also disregards an individual's right to make intimate, private decisions. Section 9 of the Hindu Marriage Act, which authorizes this remedy, is increasingly seen as a violation of the right to privacy and dignity guaranteed under Article 21 of the Indian Constitution. Moreover, by failing to account for the inherent power imbalances in marital relationships—particularly disadvantaging women—it conflicts with the equality guarantee under Article 14. Thus, Section 9 is widely criticized as an outdated provision incompatible with the evolving understanding of human rights and constitutional protections.³²

In the case of *Harvender Kaur v. Harmender Singh*³³ the court was of the opinion that there's nothing coercive about the provision of RCR. Additionally, in the privacy of a home and married life, neither Article 21 nor Article 14 hold a place. The principles of constitutional law find no place or solace for that matter in the domestic code. The Delhi High Court held a different perspective from T. Sareetha regarding the purpose of Section 9 of the Hindu Marriage Act (HMA). According to the court, *this section wasn't intended to enforce conjugal relations but rather aimed at facilitating reconciliation between spouses. The court notably remarked that integrating principles of Constitutional law into marital affairs would disrupt marital privacy, likening it to introducing a disruptive force into a delicate situation. Essentially, the judges in Harvinder Kaur emphasized the importance of preserving marital privacy over an individual's right to make decisions autonomously within the marriage.*

³⁰ Law Commission of India, *Consultation Paper on Reform of Family Law* (2018) Para 2.62.

³¹ *Saroj Rani v Sudarshan Kumar Chadha* (1984) 4 SCC 90.

³² *ibid.*

³³ *Harvender Kaur v Harmender Singh* AIR 1984 Delhi 66.



This elucidates how the prior approach of looking at things from a bird's eye view was switched with a narrower approach. It's evident how the powers afforded by the provision can be misused easily without even making it a big deal. The only recourse available is divorce which would then have to be dealt with its own set of rules and procedures.

The Restitution of Conjugal Rights (RCR) provision in Indian matrimonial law has sparked debates due to its potential for misuse and infringement upon fundamental rights. While proponents argue it preserves marriages and facilitates reconciliation, critics highlight its coercive nature, especially detrimental to one party, often the wife.

RCR attempts to enforce cohabitation between estranged spouses, aiming to preserve marriage. However, it's often misused for dominance or manipulation, particularly in patriarchal settings. This coercion violates individual autonomy and privacy, especially troubling in cases of abuse.

Moreover, the legal framework lacks adequate safeguards, placing a heavy burden of proof on the aggrieved party. This makes it challenging to escape unwanted or abusive marriages.

In conclusion, while RCR may have been conceived with the noble intention of preserving marriages, its practical application can often result in infringement upon individual rights and liberties. The potential for its misuse, particularly in perpetuating gender-based inequalities and enabling abusive behavior, underscores the need for a critical reevaluation of its relevance in modern society.

IV. EFFECTS OF RCR

The effects of an RCR decree mean the execution that follows post order. The Code of Civil Procedure, 1908 covers the same under Order XXI Rules 32 and 33.³⁴ The Rules have been presented hereunder-

“Order XXI Rule 32- Decree for specific performance for restitution of conjugal rights, or for an injunction provides for enforcing decrees requiring specific performance, restitution of conjugal rights, or injunctions. If a party intentionally disobeys such a decree after having the opportunity to comply, the court may enforce it by attaching their property or, in some cases, detaining them in civil prison. For corporate entities, the court may attach company property or detain principal officers if necessary.

If the property remains attached for six months without compliance, the decree-holder can request its sale, allowing the court to compensate them from the proceeds while returning any surplus to the judgment-debtor. However, if the judgment-debtor eventually complies, pays related costs, or if no sale is requested within six months, the attachment ends. Alternatively, for specific performance or injunctions, the court may permit the decree-holder or a designated person to fulfill the act required, with expenses recoverable from the judgment-debtor.

³⁴ The Code of Civil Procedure, 1908 (5 of 1908) Ord XXI r 33; 32.



This rule strikes a balance, providing strong enforcement tools like property attachment and detention but allowing opportunities for compliance, ensuring fair execution while respecting personal rights.³⁵

“Order 21 Rule 33 CPC: Discretion of Court in executing decrees for restitution of conjugal rights provides the court with discretion in enforcing decrees for restitution of conjugal rights, allowing a more flexible approach than the strict measures in Rule 32. Under this provision, if a decree for restitution is passed against a husband and he fails to comply, the court may order him to make periodic payments to the decree-holder (the spouse seeking enforcement). The court can require that these payments be secured, ensuring reliable financial support. Additionally, the court retains authority to modify the order, whether by adjusting the payment frequency, altering the amount, or temporarily suspending payments, according to what is fair in the circumstances. Payments ordered under this rule are treated like a decree for money payment, making them easier to enforce.

This rule’s flexibility allows the court to respect personal autonomy, providing a means for the decree-holder to receive compensation without coercing physical cohabitation. It balances the decree-holder's rights with an approach that upholds individual freedoms, marking a shift toward a more humane enforcement of conjugal rights decrees.³⁶

On a conjoint reading of both we realize that attachment of property is a valid effect in cases of non-compliance with RCR orders. If one obeys the decree then no attachment shall come in force. There is no provision of civil imprisonment in the sections. However, the story doesn’t end here. S.13(1-A) (ii) of HMA, 1955³⁷ allows either spouse to petition for divorce if, after a decree for restitution of conjugal rights has been granted, the couple has not resumed cohabitation for at least one year. This provision applies to marriages conducted both before and after the Act came into force. If, following a court-ordered decree for restitution, one or both parties do not comply and no reconciliation occurs, either party may seek to dissolve the marriage by filing for divorce based on this prolonged period of non-cohabitation.

This section acknowledges that, in some cases, a decree for restitution of conjugal rights does not lead to actual resumption of married life, effectively allowing the aggrieved spouse to pursue divorce as an alternative. By incorporating a time frame of one year, this provision provides a reasonable window for reconciliation, yet also recognizes the futility of forcing cohabitation indefinitely. Thus, it respects individual autonomy while providing a legal avenue for dissolving a marriage that has, for all practical purposes, ceased to exist in spirit and function. A decree holder cannot compel the judgment debtor to cohabit with them as part of the execution of a decree for restitution of conjugal rights. The decree holder's only recourse in case the spouse does not comply with the decree is to wait for one year after the decree is passed and then file for divorce. Non-compliance with the order does not constitute contempt of court.

³⁵ The Code of Civil Procedure, 1908 (5 of 1908) Ord XXI r 32.

³⁶ The Code of Civil Procedure, 1908 (5 of 1908) Ord XXI, r 33.

³⁷ The Hindu Marriage Act, 1955 (25 of 1955) s 13 (1-A) (ii).



According to clause (ii) of subsection (1A) of Section 13 of the Hindu Marriage Act, either party to the marriage can file for divorce if there has been no resumption of conjugal rights for at least one year after the decree is passed. However, the court must ensure that the petitioner is not disqualified from this right due to any reasons specified in Section 23 of the Act.³⁸

After obtaining a decree for restitution of conjugal rights under Section 9 of the Act, the husband cannot seek relief under Section 13(1A) if he fails to comply with the decree and mistreats the wife, leading to her departure from the matrimonial home. There are conflicting judicial opinions regarding the application of Section 23(1)(a)³⁹ of the Act in such cases. Failure to comply with the decree for restitution of conjugal rights by either spouse would not constitute 'wrong' as defined in Section 23(1)(a) of the Act. When filing a petition under this provision, neither the judgment debtor nor the decree holder's conduct after the decree is relevant. However, in divorce proceedings, the court may consider the conduct of both parties not previously addressed in the proceedings leading to the decree.

It is argued that Section 13(1A) of the Hindu Marriage Act applies equally to both spouses, without distinguishing between them. Any interpretation suggesting otherwise would imply an intention by the legislature beyond what was intended when adding subsection (1A) to Section 13. When the wording of a law is straightforward and clear, Section 13(1)(a) should not limit the effect of Section 13(1A). On one hand, Section 13(1A) provides that either spouse may file for divorce if cohabitation has not resumed for at least one year following such a decree. This straightforward language suggests that the legislature intended to give both parties equal access to this divorce ground, without one spouse needing to prove fault on the part of the other.

However, tension arises when interpreting this alongside other provisions like Section 13(1)(a), which allows for divorce on grounds of cruelty, desertion, or other forms of marital misconduct. Section 13(1A) makes no such fault-based requirement and allows for a "no-fault" divorce based solely on the failure to resume cohabitation. In cases where a decree was mutually agreed upon but one spouse later decides not to comply, the other spouse can seek a divorce simply based on that non-compliance.

This raises critical questions about fairness: should a spouse who actively defies the restitution decree be able to use their own non-compliance as grounds for divorce? Or should such a provision be interpreted to prevent a spouse from benefiting from their own refusal to cohabit? The clear language of Section 13(1A)⁴⁰ implies that it serves as a failsafe—enabling either party to dissolve the marriage if the relationship remains unreconciled, regardless of the cause. However, critics argue that it could encourage misuse by allowing one spouse to secure a divorce through non-cooperation. Thus, this section reflects a legal balancing act between upholding the option of divorce when marital life has irretrievably broken down and preventing the unfair exploitation of procedural mechanisms.

³⁸ The Hindu Marriage Act, 1955 (25 of 1955) s 23.

³⁹ The Hindu Marriage Act, 1955 (25 of 1955) s 23 (1) (a).

⁴⁰ The Hindu Marriage Act, 1955 (25 of 1955) s 13 (1-A) (ii).



The court says that a harmonious construction shall be made in order to ascertain the wrong but where do we draw the line?

In the case of *Dharmendra v. Usha Kumar*⁴¹ the court opined that in order to be ‘wrong’ within the meaning of Sec. 23 (1)(a) the conduct alleged has to be something more than a mere disinclination to agree to an offer to reunion; it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. So to say, if the decree-holder for restitution of conjugal rights (RCR) remains content and does not pursue the judgment debtor nor initiate execution proceedings, believing or expecting that it is now the responsibility of the judgment debtor to seek reconciliation, they cannot be deemed to have committed a wrong under Section 23(1)(a).

However, if upon the expiration of the statutory period, the decree-holder seeks a divorce on the grounds of non-restitution, the court cannot deny divorce to them.

In situations where the decree holder's actions prevent the judgment debtor from seeking reconciliation, such behavior constitutes a wrong under Section 23(1)(a) and disqualifies the decree holder from obtaining a divorce.

Therefore, it’s a really sticky arena when it comes to granting a divorce on grounds considered wrong enough and making a couple cohabit. A lot of times the woman might not have any property to attach with, what happens then? Harmonious construction of the two contradictory sections is left up to the legal wisdom of the courts and it is imperative that injustice, which happens more often than not, is limited to the minimum.

V. RCR- A LEGALIZED MECHANISM FOR PROMOTING MARITAL RAPE

Marriage as an institution has undergone changes in the current time. The idea of marriage, however, has always been inherently linked to the right to have sexual intercourse. Sexual intercourse within a marital domain has many facets in the perception of society; it acts as a right and obligation simultaneously. Therefore, sexual intercourse is central to the idea of marriage. In primitive times, infact, marriage acted as a mechanism to display exclusive possession over a woman and her sexual autonomy. The importance of intercourse is furthered by the fact that denial of sexual intercourse or a spouse’s impotency is also a ground for dissolution of marriage.

As highlighted above marriage as an institution in primitive societies was based on establishing exclusive ownership of the wife as women were taken to be a property devoid of rights of their own. Consent of a wife did not matter. This can be highlighted by the marriage decree of Rome “[O]bliged married women, as having no other refuge, to conform themselves entirely to the temper of their husbands and the husband to rule their wives as necessary and inseparable

⁴¹ *Dharmendra v Usha Kumar* (1977) 4 SCC 12.



possessions”⁴². This obligation also takes the form of submitting themselves to have sexual intercourse on husband’s will.

It is true that in modern society this idea is converted in the form of monogamy where exclusivity of sexual relations is mutual and equal. Bodily autonomy and rights of women are also duly recognized and consent is the key for any sort of sexual relations.

However, the legal system still enforces the archaic notions through the Marital Rape Exception (MRE) which dissolves the idea of consent in a marriage. The statement given by *Sir Mathew Hale* substantiates this point. According to him: “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract, the wife hath given up herself in this kind unto the husband which she cannot retract.”⁴³ This view is still condoned in India and marriage is treated to be an ‘irrevocable consent to sexual intercourse’. Many countries have criminalized marital rape however India still lags behind holding on to the ideals of the institution of marriage. Historically speaking Rape as a concept was introduced to protect a man’s property (woman) from being defiled by another man and thus the idea of man himself being guilty of raping his wife was distant. This premise is evident under Section 375⁴⁴ of the Indian Penal Code. The exception to Section 375 says:

“Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape”

In the case of *Independent Thought v. Union of India*⁴⁵ this age was increased to 18 years and the court held that intercourse with a woman below the age of eighteen years would amount to rape.

However, for women above the age of 18 years the only resort is a civil remedy under the Domestic Violence act.^{46,47} In the above backdrop where Marital Rape is not illegal, the provision of RCR has become a mechanism for legalized Rape. It disproportionately affects women and violates their bodily autonomy when the court forces a woman to live with the husband. It forces cohabitation, in many cases women would face violence and cruelty for leaving in the first place. She would be subjected to marital rape with no remedy to avail. Marital Rape is not a ground for divorce and thus the wife is inevitably subjected to rape.

In the case of *Saroj Rani v. Sudarshan Kumar Chadha*⁴⁸ the court held that the decree of restitution of conjugal right is not granted to force a woman to engage in sexual relations. The court was ignorant of the practical problem that marital rape is not illegal and after the grant of RCR even if the husband forces himself on the woman, he would face no criminal charges for the same. So even if the purpose of RCR is not the promotion of marital rape, it is always

⁴² Jewel Chanda, Marital Rape versus Conjugal Right (Legal Services India) <https://www.legalservicesindia.com/article/466/Marital-Rape-versus-Conjugal-Right.html> accessed 11 December, 2025.

⁴³ *ibid.*

⁴⁴ The Indian Penal Code, 1860 (45 of 1860) s 375.

⁴⁵ *Independent thought v Union of India* (2017) 10 SCC 800.

⁴⁶ The Protection of Women from Domestic Violence Act, 2005 (43 of 2005)

⁴⁷ The Protection of Women from Domestic Violence Act 2005(43 of 2005) s 12.

⁴⁸ *Saroj Rani v Sudarshan Kumar Chadha* AIR 1984 SC 1562.



justifying it on some level. After all the whole notion of restitution of conjugal rights is dependent upon the institution of marriage of which sexual cohabitation is the central theme.

This point is further substantiated by the fact that according to the National Family Health Survey (2019-21)⁴⁹, “Among married women aged 18-49 who have ever experienced sexual violence, 83 per cent report their current husband and 13 per cent report a former husband as perpetrator.” Moreover, when the Delhi High Court was deciding on the criminalization of marital rape⁵⁰, the mere fact that there was a protest on twitter by men to counter the possible deletion of marital rape exemption is self-explanatory of the bigger problem we are dealing with.

Thus, in the fight for equality, the provision of restitution of conjugal rights coupled with marital rape exemption taken together act as shackles pulling women down. This calls for the removal of the marital rape exemption and also forces us to rethink the concept of restitution of conjugal rights. It is rightly said by Justice Shakder that:

“a married woman’s right to bring the offending husband to justice needs to be recognised.... Defying women has no meaning if they are not empowered. It is time that all stakeholders bite the bullet. It would be tragic if a married woman’s call for justice is not heard even after 162 years, since the enactment of IPC”⁵¹

VI. WAY FORWARD

So, what’s the way forward? We propound abolishment of RCR but how do we implement it? We’ve already seen the numerous ways in which this provision can be misused. We also looked at cases wherein a grant of divorce may or may not be an option even though the abuse was committed.

The primary recommendation is to repeal the provision of Restitution of Conjugal Rights (RCR), as it is unjust, violative, and infringes on personal privacy. However, recent developments in family law, including the potential implementation of a Uniform Civil Code (UCC), cannot be ignored. The UCC could serve as a framework for consolidating personal laws, and while changes to the Hindu Marriage Act are urgently needed, such reforms may prove ineffective if not incorporated into the UCC. The UCC presents a crucial opportunity to eliminate the outdated provision of RCR.

The recently implemented UCC in the state of Uttarakhand seems to be a missed opportunity. Provisions of Marital Rape, RCR and all the other provisions which are unilaterally tilted have again been incorporated in the new laws and haven’t been removed or even modified for that matter. Therefore, when a new Uniform Civil Code or UCC is in the pipeline to be implemented

⁴⁹ Ministry of Health and Family Welfare, ‘National Family Health Survey (NFHS-5) 2019-21’ (2021) https://main.mohfw.gov.in/sites/default/files/NFHS-5_Phase-II_0.pdf accessed 11 December, 2025.

⁵⁰ *RIT Foundation v Union of India*, 2022 SCC Online Del 1404.

⁵¹ *ibid*.



the provision of RCR should be done away with. We understand that the implementation of UCC in a country as diverse as India might come with its own set of issues; however, we aren't here to discuss those.

Case in point, the implementation of UCC might be riddled with its own set of issues but what we're proposing is that with regards to the provisions of family law, RCR should be scrapped on grounds of it being unjust and discriminatory. No person deserves to be coerced under the garb of being "legally ruled". The state has no business in poking its nose between a married couple. A person has a right to live the way they want. They get to decide who they want to cohabit with. Yes, we understand the intention of the state and judiciary to preserve the sanctity of marriage, but can it ever really be justified when done coercively? It's a pertinent question to be asked and answered. In this paper, we've provided the answer as to why it's an issue.

Another thing that needs to be done away with is the provision of marital rape. Just because two people marry each other, and get bound in a sanctimonious bond, it doesn't mean that they relinquish their right over themselves or their own bodies. When a woman is forced by court to live with her husband in an abusive home, it makes her all the more vulnerable to actions like these. Moreover, as previously stated, more of than not, these actions cannot be proved efficiently in a court of law thereby layering one injustice on top of another.

Therefore, it's imperative that all the suggestions, reasons, defences and problems be taken into account in order to frame a comprehensive and robust law.

VII. CONCLUSION

In conclusion, the concept of Restitution of Conjugal Rights, enshrined in various personal laws, reflects traditional notions of marital duty and obligation. While the law is ostensibly gender-neutral, its application often reflects patriarchal biases, particularly in assessing what constitutes a "reasonable excuse". The effects of RCR, including attachment of property upon non-compliance, raise concerns about individual autonomy and privacy. Moreover, the interplay between RCR and divorce provisions adds complexity to legal proceedings, highlighting the need for a nuanced approach that balances marital reconciliation with the protection of individual rights.

The provisions of the Restitution of Conjugal Rights (RCR) and Marital Rape Exception (MRE) together perpetuate inequality and injustice, particularly against women. RCR, often used coercively, forces women into situations where they may face marital rape with no legal recourse. The existence of MRE further exacerbates this problem by denying married women the right to refuse sexual intercourse. To move forward, both RCR and MRE should be abolished. Implementing these changes may require revisiting family laws, such as through the adoption of a Uniform Civil Code, ensuring that individuals' rights and autonomy are upheld within the institution of marriage.



SEXUAL OFFENCES UNDER THE BHARATIYA NYAYA SANHITA, 2023: A CRITIQUE

By Preety Anand and Sunishth Goyal

Abstract

The nature of sexual offenses has undergone significant changes since the initial codification and conceptualisation of penal laws. The judiciary, notably in the Mathura Rape case, provided clarifications on the meaning of "Consent." Furthermore, in 2013, the substantial criminal law amendments brought about reforms in sexual offenses by broadening the definition of rape and introducing new offenses, including sexual harassment, voyeurism, stalking, and more.

Last year, the longstanding penal legislation of India, the Indian Penal Code, 1860, has been substituted with the Bharatiya Nyaya Sanhita, 2023. One of the objectives of the new legislation was to advance gender neutrality. As a result, the definition of the term 'gender' has been broadened to encompass all individuals, including men, women, and transgender persons. Moreover, a couple of offenses, such as voyeurism and assaulting someone with the intent to disrobe, have been rendered gender-neutral from the perspective of the perpetrator.

The law relating to sexual offenses ideally aims to provide effective protection against all forms of sexual assault, regardless of one's gender identity, age, or community. In the present social context, where the Supreme Court in Navtej Singh Johar v Union of India, 2018, recognized homosexuality by way of decriminalising consensual sexual acts, there is a pressing need to re-evaluate the dynamics of the victim-perpetrator relationship. It is crucial to note that the absolute deletion of the content under Section 377 of the Indian Penal Code, 1860 under the new law has inadvertently left men and transgender individuals without any legal recourse against sexual assault. Furthermore, the retention of the marital rape exemption clause reflects an archaic understanding of sexual relations within marriage, founded on the notion of irrevocable consent and the challenges associated with obtaining proof of consent in marital intercourse. This aspect highlights the necessity for a nuanced examination of laws surrounding sexual offenses, particularly within the evolving social and legal landscape. This article critically examines the alterations introduced by the new



law, whether through modification, addition, or deletion in the realm of sexual offences in the light of contemporary needs of the society.

Keywords: *Bharatiya Nyaya Sanhita, Sexual Offences, Gender*

I. INTRODUCTION: A ROAD TO GENDER NEUTRALITY

One of the desired major shifts of the new criminal laws has been the emphasis upon gender neutrality in several of the erstwhile provisions of the *Indian Penal Code, 1860* (hereinafter referred to as the IPC). Primarily by expanding the definition of the term 'gender' to be inclusive of male, female and transgender, the *Bharatiya Nyaya Sanhita, 2023* (hereinafter referred to as the BNS) has enlarged its scope of applicability in terms of individuals who can seek recourse as well as those who can be prosecuted¹. Inclusion of transgenders within the ambit of gender is a welcoming step that would not require the members of the transgender community to recognise themselves as either a man or a woman for the purpose of availing recourse under the criminal law. Under the IPC, Section 8 omitted the inclusion of transgender persons². However, the criminal justice system through the golden rule of interpretation of statutes could and to a great extent have considered the meaning of the term gender to be inclusive of transgender persons as the intention of legislature can be deciphered that the IPC was meant for all human beings. Now, with the BNS shedding clarity on the meaning of 'Gender', a simple literal interpretation shall be enough to not leave the transgender persons beyond the scope of being victims. In a way, this represents an advancement in laws aimed at safeguarding women, acknowledging the evolving nature of gender-based violence within the dynamic shifts in societal structures.

However, the vulnerability, exploitation, victimization and sufferings of the transgender community has been well known but BNS fails to address the same. The reasoning can be accorded to the fact there is a special law in place for protecting the transgenders.³ Unfortunately, offenses and penalties under the Act encompass compelling or enticing a transgender person into forced or bonded labour, excluding them from public places, coercing them to leave their residence, and causing harm or endangering their life, safety, health, or well-being. The punishable act includes physical, sexual, verbal, emotional, and economic abuse. Violators may face imprisonment ranging from six months to two years, along with a fine for any or all of these offences.⁴

The legislature's approach of lumping together various forms of harassment and violence against transgender individuals is evidently flawed. This strategy diminishes the severity of the violence they endure and subjects them to a substandard treatment despite the fact that they are quite vulnerable and often fall prey to sexual offences.

¹ Section 2 Clause (10) of BNS defines 'gender' as inclusive of male, female or transgender.

² Section 8 of IPC defines 'Gender' as inclusive of only male or female.

³ The Transgender Persons (Protection of Rights) Act, 2019.

⁴ *ibid* §18.



II. AN ATTEMPT TO HARMONISE AGE LIMIT ACROSS OFFENCES UNDER BNS

The ‘age of majority’ in India has been expressed to be different for different purposes over the period of time. For instance, as per the Constitution of India voting rights are given on attainment of the age of 18 whereas the recent bill introduced in the parliament for the escalation in the age of marriage to 21 for all⁵ seems to be placed on a pedestal that the concept of majority is not uniform. The BNS defines ‘child’ to mean any person below the age of 18 years.⁶

Under the IPC, the potential victim of kidnapping can be a minor girl or a boy under 18 years and 16 years of age respectively.⁷ Decoding the intent of the legislature, it appears that the discrepancy in the age for girls and boys was on account of the socio-political set-up of the country in the 19th century. However, BNS addresses the discrepancy and stows it to 18 years irrespective of the gender.⁸ Similarly, erstwhile law only concerned itself with procuring minor girl children⁹ for illicit intercourse but the new law makes no such distinction based on the gender of the children.¹⁰

Although BNS retains the marital rape exemption clause, in the light of the judicial pronouncement in *Independent Thought v. Union of India*,¹¹ the age bar under the clause has finally been raised to 18 years in the text of law.¹²

III. RAPE LEFT UNTOUCHED UNDER BNS

But this is still a partial victory as not all the offences are made completely gender neutral. One of the most jarring omissions where this is present are the rape provisions. Gender neutrality is lacking on two distinct fronts here namely, perpetrator centric and victim centric gender neutrality. Therefore, the current rape law as it stands even after the introduction of BNS is only geared towards the protection of women victims by the offence perpetrated by male offenders. Thus, no woman can commit a rape or related sexual offence as similarly no male or even a transgender can be a victim of the said offences. While it is agreeable that a majority of such offences are usually where rape is committed upon a woman by a man but it doesn’t mean that the converse can never occur. Similarly, such rape committed by women upon other women or by men upon transgender victims is also left out of the rape law provisions in BNS.

In fact, only on one occasion was the Apex Court confronted with a dilemma wherein the liability of a woman co-accused in a gang rape case was put to test. Answering the reference

⁵ The Prohibition of Child Marriage (Amendment) Bill, 2021 seeks to increase the minimum age of marriage for females to 21 years.

⁶ The Bharatiya Nyaya Sanhita, 2023, §2(3).

⁷ The Indian Penal Code, 1860, § 361.

⁸ The Bharatiya Nyaya Sanhita, 2023, § 137(1)(b).

⁹ The Indian Penal Code, 1860, § 366A.

¹⁰ The Bharatiya Nyaya Sanhita, 2023, § 96.

¹¹ *Independent Thought v. Union of India*, [2017] 10 SCC 800.

¹² The Bharatiya Nyaya Sanhita, 2023, § 63 Exception 2.



in the negative, the Hon'ble Supreme Court in 2006 declined the contention by categorically stating that a woman can never be a rapist¹³. This verdict even refused to answer whether such a woman can be affixed appropriate liability under the 'abetment' provisions. One could argue that such a narrow interpretation of rape could be justified when the underlying foundation behind it was also corresponding to a narrow vision of 'penile-vaginal' intercourse or penetration¹⁴ to constitute rape. This interpretation has been categorically reiterated and recognised by the courts across the country. In fact, in a case, *Sakshi v Union of India*, the Apex Court refused to read in a more expansive interpretation expanding the contours of the section beyond the traditional interpretation being followed since 1860¹⁵.

Sodomy or other forms of sexual attacks against women was usually left to the recourse of Section 377 (discussed later in the paper). However, all this changed after the 2013 Amendment to the Criminal Law after the infamous Nirbhaya gang rape incident which saw heinous methods to commit the crime beyond the traditional penile-vaginal intercourse. The erstwhile Section 375 of IPC (after the 2013 amendment) which has been incorporated as the Section 63 of BNS has included any object or organ including mouth to be used or inserted in any organ or orifice of a woman to constitute the offence of rape. Since the focus has indeed shifted from the traditional interpretation of rape, even sodomy or other unnatural acts against women has come within the ambit of Section 375 of IPC or Section 63 of BNS now. But this should also mean that there is no need for the perpetrator to be a male and the victim to be just a female. In this light, post 2013 the Apex Court decision from 2006¹⁶ where a woman was not declared as a rapist would need reconsideration.

IV. EXCLUSION OF FORCED SODOMY AND BESTIALITY FROM THE SCOPE OF THE BNS

A significant change which has been affected by the introduction of BNS is the outright removal of a parallel clause as corresponding to Section 377 of IPC. While on first glance it seems like a welcome news as it would be seen as a progressive outcome since it would be in line with the Supreme Court's jurisprudence which recognised same-sex relationships. However, this seems to be either a very naïve or simplistic understanding of *Navej Singh Johar vs. Union of India*¹⁷, or an outright violation of the said verdict. While the locus of petitioner's arguments revolved around the abolition of Section 377, the court never struck down the entire section *in toto*. This is because most people generally conflate the most popular use case or application of the section (i.e., criminalising homosexuality) with the entire scope of the section.

Since the initial legislation of IPC and thus the concerned Section was brought in the backdrop of Victorian morality, homosexuality was sought to be criminalised. As per this ideology, the

¹³ *Priya Patel v. State of Madhya Pradesh*, [2006] 6 SCC 263.

¹⁴ Explanation of Section 375 of IPC prior to 2013 Criminal Law Amendment or 'Nirbhaya amendment'.

¹⁵ *Sakshi v. Union of India*, AIR [2004] SC 3566.

¹⁶ *Supra* Note 13.

¹⁷ *Navej Singh Johar v. Union of India*, [2018] 7 S.C.R. 379.



only legitimate purpose of intercourse is for procreation¹⁸. Anything beyond that would theoretically be 'against the order of nature'. This term has been prone to a lot of abuse. In a particular case, Hon'ble Gujarat High Court¹⁹ has even termed 'oral sex' as against the law. As per some scholars, this interpretation could be stretched to include even 'sex with a condom'²⁰. Such an artificial distinction was thus prone to a lot of ambiguous constructions and abuse. As noted above, rape till 2013²¹ has only been construed as 'penile-vaginal' intercourse, even sodomy against women was covered under Section 377 of IPC. But after this deletion the other categories of potential victims i.e., males and transgenders might have a remedy merely in simple hurt or probably criminal force. One could argue that by the non-existence of such provisions such as sections 375 or 377 of IPC in the current penal framework, reporting of such crimes would also be much more difficult.

While the colonial heritage of Section 377 is undisputed, it could be argued that a wholesale deletion might not improve the matter. In fact, even Manu Smriti which preceded the IPC has also referenced homosexuality as a punishable crime. Similarly, it is the need of the hour for better awareness programmes to completely remove the stigma against homosexuality.

This specific deletion of Section 377 was also strongly and repeatedly objected to by the Parliamentary Standing Committee on Home Affairs which was tasked with studying the changes in new criminal laws²². The committee felt that this deletion would lead to a situation where men being raped by men would have no effective legal remedy at all²³. When homosexuality was sought to be decriminalised in the UK, there was a massive deliberation specifically on these issues in the form of the famed '*Wolfenden Committee Report*.' India could have avoided this problem (deletion of 377 or lack of complete gender neutrality in rape law) and benefitted from such an exercise where every single such change to the law was subject to such thorough scrutiny.

In a way this scrapping of Section 377 is ideal wherein this artificial distinction of 'intercourse against the order of nature' was finally discarded in BNS. But nonetheless this legislative vacuum should be immediately plugged by introducing relevant provisions to address sexual crimes against men and transgenders as well as introducing a separate provision encompassing both animal cruelty and bestiality.

V. OTHER SEXUAL OFFENCES UNDER BNS

An interesting change can also be seen in some of the other related Sections as well. In 2013, IPC saw the introduction of four new provisions from 354A to D. These provisions are related to 'stalking'²⁴, 'voyeurism'²⁵, 'sexual harassment'²⁶, and 'disrobing a woman'²⁷. These original provisions, much like the law on rape, were all intended to be committed by male preparators

¹⁸ *Khanu v. Emperor*, AIR [1925] Sind 286.

¹⁹ *Lohana Vasantlal Devchand v. The State*, AIR [1968] Guj 252.

²⁰ *Shamnad Basheer, Sroyon Mukherjee & Karthy Nair, Section 377 and the 'Order of Nature': Nurturing 'Indeterminacy' in the Law?* 2 NUJS L. REV. 433, 436 [2009].

²¹ *Lohana Vasantlal Devchand v. The State*, AIR [1968] Guj 252.

²² Two Hundred Forty Sixth Report on The Bharatiya Nyaya Sanhita, 2023. Department-Related Parliamentary Standing Committee on Home Affairs (Presented to Rajya Sabha On 4th December, 2023). Refer page 9.

²³ *Id.* at Pages 51-52.

²⁴ The Indian Penal Code, 1860, §354D.

²⁵ The Indian Penal Code, 1860, §354C.

²⁶ The Indian Penal Code, 1860, §354A.

²⁷ The Indian Penal Code, 1860, §354B.



against women victims as they specifically began with the term ‘any man’ committing the specified offence on a ‘woman’. But under BNS there has been a change where two of these four provisions namely disrobing a woman²⁸ and voyeurism²⁹ have changed the beginning of the provision from ‘man’ to ‘whoever’ signifying that as far as these two provisions are concerned, they have been made gender neutral on part of the perpetrator. However, the other two provisions of stalking³⁰ and harassment³¹ remain the same wherein the perpetrator has to be a male. Thus, it is puzzling that for four similar provisions introduced at the same time, why were only two cherry-picked to be changed while the other two were not. An incident from Chandigarh University in September 2022 can perhaps be labelled as the first time where the offence of voyeurism was most prominently brought into the public consciousness. This issue was further aggravated by the fact that one of the prime accused was a female student who captured other female student’s private images and videos. This prompted discussions amongst legal fraternity whether the law as it currently stood would be able to accurately capture the liability of that particular female co-accused. Is this change in BNS perhaps a reflection of such deliberations? No one can be certain but it is regrettable that when a comprehensive legislative overhaul is proposed, we are still acting symptomatically by only bringing piecemeal reforms.

VI. A CONTEMPORARY OFFENCE AS SEXUAL RELATIONS ON THE PRETEXT OF FALSE PROMISES OF MARRIAGE OR EMPLOYMENT: REDEFINING CONSENT

Sexual intercourse on pretext of marriage or employment has been given the colour of a new offence under BNS.³² Under the IPC, consent obtained on false promise to marry is not a valid consent as per section 90 of the code.³³ Sexual intercourse on pretext of marriage would constitute the offence of rape on combined reading of section 375 and section 90 of the IPC. In 2019, the Supreme Court called attention to the difference between ‘false promise’ and ‘breach of promise’. The former connotes that the intention of the maker of the promise at the time was not to abide by it from the very beginning whereas the latter means non-fulfilment of promise on account of something. The clear line of distinction is the intention of the maker on keeping the promise.³⁴ In simple words, a false promise solely is means to engage in sexual activity, with no genuine intention of fulfilling it whereas breach of promise connotes promise of marriage was indeed made, but for some reason, it was not fulfilled. Change of heart, unforeseen circumstances etc. can all be possible reasons behind such non-fulfilment. Interestingly, under BNS the term “deceitful means” shall include the false promise of employment or promotion, inducement or marrying after suppressing identity. This newly created sexual offence has a broader ambit.

²⁸ The Bharatiya Nyaya Sanhita, 2023, §76.

²⁹ The Bharatiya Nyaya Sanhita, 2023, §77.

³⁰ The Bharatiya Nyaya Sanhita, 2023, §78.

³¹ The Bharatiya Nyaya Sanhita, 2023, §75.

³² The Bharatiya Nyaya Sanhita, 2023, §69.

³³ The Indian Penal Code, 1860, §90.

³⁴ *Pramod Suryabhan Pawar vs. The State of Maharashtra*, AIR [2019] SC 4010.



In a way it may be viewed as a positive step forward since it accumulates focus on sexual intercourse on account of misconception, misrepresentation, false promises, etc which is rampantly reported these days. Certainly, crafting a specific offense like this can indeed serve to raise awareness and facilitate enforcement. To establish these instances as rape is not easy. This might be devised on the belief that degree of *mens rea* involved in such cases appear to be much less than that in cases of rape and therefore, creation of new offence altogether is better in all respect such as spreading knowledge about the components of crime, reporting of the crime, establishing the guilt, etc. However, the authors believe that this is majorly based on the perceived faulty notion of consent. Consent based on false assurance is equivalent to no consent and hence, there was no need to curate a new sexual offence specifically targeting instances where sexual activity occurs under false pretences of marriage or employment as the existing laws addressing rape already cover situations where consent is obtained through deception.

VII. CONCLUSION

The BNS in essence hasn't brought about a significant overhaul in the regime of sexual offenses. Instead, it has made minor adjustments to certain provisions. The outdated notion of rape solely as penile-vaginal intercourse could have been corrected. The legislative intent that drove the decision to make offenses like voyeurism gender-neutral from the perpetrator's perspective is unclear but the authors attribute it to recent cases over the past decade. A reform of this magnitude was anticipated to address societal needs more comprehensively.

It's unfortunate to observe that the transgender community remains without any dedicated legal safeguards, despite being recognized as marginalized and vulnerable. Special legislation is the sole recourse available to them which, as discussed before, trivialises the violence against the community. Even with over 150 years having passed since the codification of the IPC, revisions to criminal law have neglected to provide protection for this group. No rationale can justify Parliament's failure to address the needs of this marginalized community.

Men can indeed be victims of sexual offences too. Unfortunately, BNS does not address the need to protect men from such sexual aggression. When viewing sexual offences, the victim-perpetrator model need not be heterosexual as such. After section 377 of the IPC being partially struck in as much as it criminalised consensual sexual activities between two consenting adults, we also need to broaden the horizon of both victim and perpetrator of sexual violence. While historically there has been a focus on female victims of rape, it is important to recognize that men can also be subjected to sexual violence. The societal perception of rape has often been gendered, leading to a lack of visibility and acknowledgment of male victims.³⁵ In addition to this, the BNS does not have a provision parallel to Section 377 of the IPC. This is an added disadvantage devised majorly on the gender inequality theory³⁶. According to this theory, rape is a tool for social coercion within patriarchal societies. It proposes that rape, along with the

³⁵ Lee Ellis & Charles Beattie, *The Feminist Explanation for Rape: An Empirical Test*, 19 THE JOURNAL OF SEX RESEARCH 74–93 (1983).

³⁶ Larry Baron & Murray A. Straus, *Four theories of rape: A macrosociological analysis*, 34 Social Problems 467–489 (1987).



fear of it, allows men to exert power, will and dominance over women and maintain the gender stratification. This understanding of sexual violence gives rise to the belief that men and women do not experience rape similarly as an act of “violence and humiliation”.³⁷

³⁷ Cindy Struckman-Johnson & Peter B. Anderson, *Opening the Debate on a Taboo Topic: Male Rape [Review of Male Victims of Sexual Assault, by G. C. Mezey & M. B. King]*, 30 THE JOURNAL OF SEX RESEARCH, 181–183 (1993).



BALANCING ACTS: THE BHARATIYA NYAYA SANHITA'S STRIVE FOR GENDER JUSTICE, YET STUMBLING ON THE TIGHTROPE

By S. Naina and Tarjani Singh

Abstract

The Bharatiya Nyaya Sanhita, 2023 (BNS) officially emerged as a transformative legal framework in India, receiving the presidential assent on December 25, 2023. This legislative overhaul, after nearly 150 years, marks a significant departure from the colonial-era laws, aiming to streamline provisions related to offenses and penalties. The BNS places a heightened focus on addressing crimes against women and children, as well as offenses against the State, introducing innovative measures such as community service as a punishment for petty offenses. It paints an intricate landscape for gender equality in India. While the bill introduces commendable measures to foster inclusivity, its impact on gender equality reveals a nuanced interplay of progressive and regressive elements.

The paper discusses the recognition of the third gender in Section 2(10), aligning with the Transgender Persons (Protection of Rights) Act, 2019. This reflects a commitment to accommodating diverse gender identities. Additionally, the BNS introduces gender-neutral language for victims of sexual harassment, signalling a positive move towards equality. However, the legislation falters in crucial aspects related to sexual offenses. The resurrection of the offense of adultery, previously deemed unconstitutional, adds another layer to the gender dynamics within the legal framework. Critics argue that historical biases may resurface, disproportionately impacting women. Furthermore, Section 69 introduces complexities in addressing sexual intercourse through deceitful means without adopting a gender-neutral approach, potentially resulting in unequal treatment in legal proceedings.

While the BNS broadens its scope to encompass economic offenses and organized crimes, its selective gender neutrality for sexual offenses, coupled



with the reintroduction of adultery provisions, raises questions about the legislation's commitment to overall gender equality. The widening of the definition of "gender" to include transgender persons is a positive step. However, the bill's failure to adopt a comprehensive gender-neutral approach in addressing sexual offenses and its maintenance of patriarchal exceptions in marital relationships underscore the need for continued scrutiny and potential amendments.

The paper signifies progress in recognizing the third gender and takes positive steps in certain aspects of gender neutrality. Nevertheless, its shortcomings in addressing sexual offenses and the reintroduction of adultery provisions highlight the necessity for a more inclusive and equitable approach to gender justice in India.

Keywords: *Bharatiya Nyaya Sanhita, Gender equality, Third gender recognition, Sexual offenses, Adultery reintroduction*

I. INTRODUCTION

In an unprecedented move within the Indian legislative landscape, the Union Home Ministry has ushered in a transformative era by enforcing three groundbreaking criminal laws, effective from July 1¹. The Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Adhiniyam (BSA) have been introduced to replace the longstanding Indian Penal Code (IPC), Code of Criminal Procedure (CrPC), and Indian Evidence Act, respectively². This legislative overhaul, initiated with the bills' introduction in the Lok Sabha on August 11, 2023, and subsequent rigorous scrutiny by a parliamentary committee, signifies a significant departure from colonial-era legislations. Passed by both houses of Parliament on December 20 and December 21, respectively, and receiving the President's assent in December 2023, these laws mark a pivotal moment in India's legal history³.

The introduction of these codes not only represents a shift towards indigenous and contextually relevant legal frameworks but also brings forth both opportunities and challenges for legal

¹ The Economic Times, 'New Criminal Laws to come into force from July 1: Govt notification' (*The Economic Times*, February 24, 2024) < <https://economictimes.indiatimes.com/news/india/three-new-criminal-laws-to-come-into-force-from-july-1-2024-govt-notification/articleshow/107964978.cms?from=mdr> > accessed 8 March 2024.

² Century Law Firm, 'Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, and Bharatiya Sakshya Bills: An Analysis of the Reform of Indian Justice System' (*Century Law Firm*) < <https://www.centurylawfirm.in/blog/bharatiya-nyaya-sanhita-bharatiya-nagarik-suraksha-sanhita-and-bharatiya-sakshya-bills-an-analysis-of-the-reform-of-indian-justice-system/> > accessed 8 March 2024.

³ Pritam Kumar Sinha, 'Transformative Shift in Indian Criminal Justice: The Introduction of Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, and Bharatiya Sakshya Adhiniyam' (*Medium*, 24 Feb 2024) < <https://medium.com/@pritamkumarsinha/transformative-shift-in-indian-criminal-justice-the-introduction-of-bharatiya-nyaya-sanhita-6fc4c3a0985c> > accessed 8 March 2024.



professionals, law enforcement agencies, and the judiciary⁴. The reform is poised to enhance the clarity, applicability, and execution of criminal laws, aligning with global standards and contemporary legal principles. While posing immediate challenges in terms of implementation and adaptation, the legislative changes promise long-term benefits in terms of legal modernization and reform, with a focus on achieving a more responsive, efficient, and just criminal justice system⁵. The government's dynamic and responsive approach to addressing public feedback during the legislative process underscores a commitment to a more equitable legal system, reflecting evolving societal values and demands. As India embarks on this transformative journey, the focus remains on the effective integration and application of these new laws⁶.

II. THE TRANSFORMATIVE LANDSCAPE OF BNS

A. Departure from Colonial-era laws

The transformative landscape of the Bharatiya Nyaya Sanhita (BNS) marks a departure from India's colonial-era laws, echoing the sentiments expressed by K. Hanumanthaiah in 1949. Recent legislative initiatives led by Prime Minister Modi and Home Minister Amit Shah underscore a significant shift from the historical continuity criticized by Hanumanthaiah. The introduction of the BNS, alongside the Bharatiya Nagrik Suraksha Sanhita (BNSS) and Bharatiya Sakshya Bill 2023, signifies a commitment to modernizing the criminal justice system in response to the changing dynamics of society and technology⁷.

These reforms prioritize citizen-centric legal frameworks, gender neutrality, and digital transformation, emphasizing a move from punitive to justice-centric approaches⁸. The legislative overhaul reflects political willpower and aligns with India's zero-tolerance policy towards crime and terrorism. Positioned within the vision of 'Naya Bharat,' these changes signify a harmonious blend of traditional and contemporary legal principles, steering away from the shadows of the "English Band" towards a more inclusive and progressive legal framework in the country⁹.

⁴ PRS Legislative Research, 'The Bhartiya Nyaya Sanhita, 2023' (*PRS Legislative Research*, 11 August 2023) <<https://prsindia.org/billtrack/the-bharatiya-nyaya-sanhita-2023>> accessed 8 March 2024.

⁵ Apurva Vishwanath, 'Indian Penal Code to Nyaya Sanhita: What's new, what is out, what changes' (*The Indian Express*, 22 December 2023) <<https://indianexpress.com/article/explained/explained-law/indian-penal-code-to-nyaya-sanhita-whats-new-what-is-out-what-changes-9078213/>> accessed 8 March 2024.

⁶ Editor, 'Key Highlights of the three new criminal laws introduced in 2023' (*SCC Blog*, 31 December, 2023) <<https://www.scconline.com/blog/post/2023/12/31/key-highlights-of-the-three-new-criminal-laws-introduced-in-2023/>> accessed 8 March 2024.

⁷ Anushka Pandey, Preeti Dash, Mrinal Satish, 'Bharatiya Nyaya Sanhita: Decolonising or Reinforcing Colonial Ideas?' (*The National Law School of India University Blog*, 25 January 2024) <<https://www.nls.ac.in/blog/bharatiya-nyaya-sanhita-decolonising-or-reinforcing-colonial-ideas/>> accessed 8 March 2024.

⁸ Mint, 'Our criminal laws must uphold gender justice' (*Livemint*, 16 August 2023) <<https://www.livemint.com/opinion/online-views/our-criminal-laws-must-uphold-gender-justice-11692196956479.html>> accessed 8 March 2024.

⁹ Vloghd portal, 'Transformative shift in India's criminal justice system' (*Vlog HD*, 2 January 2024) <<https://vloghd.com/transformative-shift-in-indias-criminal-justice-system/>> accessed 8 March 2024.



III. GENDER EQUALITY/ INEQUALITY IN BNS

A. Recognition of the third gender (Section 2(10))

The Bhartiya Nyaya Sanhita (BNS) takes a progressive step towards gender inclusivity by explicitly recognizing the third gender in Section 2(10). According to this provision, the pronoun “**he**” and its derivatives are applicable to any person, irrespective of their assigned gender at birth, encompassing males, females, and transgender individuals. The BNS aligns its definition of transgender with the Transgender Persons (Protection of Rights) Act, 2019, as outlined in clause (k). Here, a “**transgender person**” is defined as someone whose gender identity diverges from the one assigned at birth, encompassing trans-men, trans-women, individuals with intersex variations, genderqueer persons, and those with socio-cultural identities such as kinner, hijra, aravani, and jogta. By acknowledging and incorporating this comprehensive definition, the Bhartiya Nyaya Sanhita not only recognizes the existence of the third gender but also lays the foundation for gender equality.

B. Gender-neutral revisions in BNS: Overhauling IPC Sections 354B and 354C for inclusive legal framework

In an effort to promote gender equality, the Bhartiya Nyaya Sanhita (BNS) has taken significant strides by amending Clauses 75 and 76, which replace Sections 354B and 354C of the Indian Penal Code (IPC)¹⁰. The original IPC provisions employed **gendered language**, explicitly designating the perpetrator as a man and the victim as a woman in offenses related to criminal force and voyeurism. Notably, the amendments introduced by the BNS have embraced **gender-neutral language** regarding the perpetrator, allowing any gender to be recognized as a potential wrongdoer. This marks a crucial shift toward inclusivity, challenging stereotypical assumptions about the gender of offenders.

However, an incongruity persists in the BNS amendments, as the gender of the victim continues to be rigidly specified as a woman. This partial move towards gender neutrality underscores existing shortcomings within the legislation. While recognizing the agency of individuals of any gender to commit offenses, the BNS could further enhance its commitment to gender equality by extending this neutrality to victims as well¹¹. Addressing this incongruity would signify a more comprehensive and progressive approach to justice, aligning with the broader principles of equality and non-discrimination.

C. Positive signals towards equality

The Bhartiya Nyaya Sanhita (BNS) demonstrates a commendable commitment to gender equality through Clause 94, which replaces Section 366A of the Indian Penal Code (IPC), specifically addressing child procurement. In stark contrast to the IPC provision, where the victim is explicitly designated as a female child, BNS adopts a fully gender-neutral stance, emphasizing the equal vulnerability of all children, regardless of gender. This progressive

¹⁰ Taxmann, '[Comparative Study] Bharatiya Nyaya Sanhita 2023 (BNS) & Indian Penal Code 1860 (IPC)' (Taxmann, 8 January 2024) <<https://www.taxmann.com/post/blog/comparative-study-bharatiya-nyaya-sanhita-bns-indian-penal-code-ipc>> accessed 8 March 2024.

¹¹ Sharmita Kar, 'BNS 2023: Amid Provisions for Women's Safety, Gender Equality Finds No Mention' (Outlook, 17 September 2023) <<https://www.outlookindia.com/national/bns-2023-amid-provisions-for-women-s-safety-gender-equality-finds-no-mention-news-318696>> accessed 8 March 2024.



approach eliminates gender-based stereotypes and ensures that legal protection extends uniformly to all young individuals, irrespective of their gender identity.

By maintaining gender neutrality for both offenders and victims in cases of child procurement, BNS not only rectifies a disparity present in the original IPC but also sets a precedent for an inclusive legal framework that prioritizes the rights and protection of all children without discrimination. This exemplifies the BNS's commitment to fostering a society where gender equality is not only acknowledged but actively implemented in its legal provisions, particularly in sensitive matters related to the welfare of children.

D. Lack of gender neutrality in Section 63 of BNS

Section 63 of the Bhartiya Nyaya Sanhita Bill, 2023, displays a clear lack of gender neutrality in its definition of rape. The provision specifically outlines rape as a crime committed by a man against a woman, specifying acts of penetration without the woman's consent¹². This exclusive language perpetuates bias by completely disregarding the possibility of a man being a victim of rape. The section and the entire Bill exhibit a gender bias favouring females, as they solely depict men as potential perpetrators and women as the sole victims of rape¹³. The failure to make this section gender-neutral and the absence of provisions for unnatural offenses overlook the potential scenarios where a male could be a victim, either by another male or a female. This omission introduces ambiguity for authorities in determining the appropriate chargesheet and legal proceedings, particularly in cases involving women as offenders.

Despite the rising issue of males being victims of rape, the new Bill falls short of addressing this concern and overlooks the rights of male victims¹⁴. The recommendations of the 172nd Indian Law Commission in 2000 emphasized framing rape laws in a gender-neutral manner, a suggestion that has been neglected. The repeal of Section 377 of the Indian Penal Code, which previously served as a safeguard against gender-biased rape provisions, has left the current criminal laws entirely favouring females. This bias is a violation of Article 14 of the Constitution of India, which guarantees the right to equality for every citizen¹⁵. The Bhartiya Nyaya Sanhita Bill, 2023 places the male community in a perplexing situation by lacking provisions for rape committed against them, either by another male or a female, thus regressing in safeguarding the rights of adult males against sexual exploitation and rape¹⁶.

IV. BNS BILL OMISSION OF SECTION 377: UNRAVELLING GENDER INEQUALITY IN SEXUAL OFFENSE PROTECTION

The *Navtej Singh Johar judgment*¹⁷, delivered by the Supreme Court of India in 2018, was a landmark decision that decriminalized consensual sex between adults of all genders and sexual orientations. Prior to this judgment, Section 377 of the Indian Penal Code criminalized

¹² Bhartiya Nyaya Sanhita Bill, 2023 s 63.

¹³ Kanchan Jodha, 'Gender Biased Rape Laws in India' (2021) 4 Int'l JL Mgmt & Human 1928.

¹⁴ Michael D. A. Freeman, 'But if You Can't Rape Your Wife, Whom Can You Rape: The Marital Rape Exemption Reexamine' (1981) 15 Fam LQ 1.

¹⁵ The Constitution of India, art 14.

¹⁶ Tarun Arora, 'Sexuality, Law and Constitution beyond Gender Binary in India: Judicial Approach' (2020) 11 Indian JL & Just 1.

¹⁷ *Navtej Singh Johar v Union Of India* (2017) 9 SCC 1.



“unnatural offenses,” including same-sex relations. The court, in its ruling, recognized the right to privacy and individual autonomy, affirming that consensual sexual acts between adults in private should not be subject to criminal prosecution¹⁸.

The omission of Section 377 in the new Bharatiya Nyaya Sanhita (BNS) raises concerns about gender inequality due to its failure to address sexual offenses comprehensively. Section 377 not only criminalized same-sex relations but also included provisions related to non-consensual sexual acts. By omitting this section in the BNS, the legal framework loses a crucial element of protection against sexual offenses, particularly for men and transgender individuals¹⁹.

The gender inequality arises from the fact that the new bill lacks a specific provision to criminalize sexual offenses against men and transgender individuals. While existing laws cover sexual violence against women, the omission of a similar provision for other genders leaves a significant gap in legal protection. This omission sends a message that crimes of a sexual nature against men and transgender persons are not accorded the same legal significance as those against women²⁰.

The absence of a legal framework addressing sexual offenses without the reinstatement of Section 377 perpetuates gender inequality by failing to provide equal protection under the law for all individuals, regardless of their gender or sexual identity. Achieving gender equality requires comprehensive legal measures that recognize and address the diverse forms of sexual violence and uphold the principle that every individual deserves protection against such offenses.

A. Absence of Provision for Homosexuals & Necrophilia

The reintroduction of the Bharatiya Nyaya Sanhita (BNS) Bill in 2023, aimed at replacing the Indian Penal Code (IPC), has sparked significant debate due to the exclusion of Section 377. This section, criminalizing non-consensual sex among adults of all genders and orientations, as well as sexual offenses against animals, has been omitted from the new Bill. Critics argue that this deletion creates a legal gap in protecting adult males and transgender individuals against sexual violence. The absence of a specific provision addressing rape against men and transgender persons leaves them without statutory safeguards. While the law currently covers sexual violence against women, the proposed BNS fails to extend this protection universally²¹. Activists emphasize the need for a new provision within rape laws to criminalize sexual offenses against all individuals, regardless of gender. The patriarchal moral perspective, where

¹⁸ Srija Singh & Anant Gupta, ‘Beyond Decriminalization: The Ripple Effects of Section 377 Repeal on India's Criminal Justice System’ (*Manupatra Articles*, 16 February, 2024) <<https://articles.manupatra.com/article-details/Beyond-Decriminalization-The-Ripple-Effects-of-Section-377-Repeal-on-India-s-Criminal-Justice-System>> accessed 8 March 2024.

¹⁹ Sukanya Shaji, ‘New criminal law Bill omits Section 377: How this impacts men and trans persons’ (*The News Minute*, 14 December 2023) <<https://www.thenewsminute.com/news/new-criminal-law-bill-omits-section-377-how-this-impacts-men-and-trans-persons>> accessed 8 March 2024.

²⁰ Kanav Narayan Sahgal, ‘The BNS: A missed opportunity for gender inclusivity and LGBTQ+ rights’ (*Deccan Herald*, 21 September 2023) <<https://www.deccanherald.com/opinion/the-bns-a-missed-opportunity-for-gender-inclusivity-and-lgbtq-rights-2694568>> accessed 8 March 2024.

²¹ Nivedita Ghosh, ‘Transformative Constitutionalism and Rights of Homosexuals in India and South Africa: A Comparative Study’ (2021) 3 CMR Univ J Contemp Legal Aff 166.



the severity of rape is often linked to societal perceptions, poses a challenge in changing the deeply ingrained social morality²².

The recent criminal law reform, embodied in the BNS Bill, gives rise to significant concerns regarding gender inequality by overlooking provisions for homosexuals and failing to criminalize necrophilia. While the Bill deals with sexual offenses against both living females and males, it neglects to recognize the vulnerability of deceased individuals and the specific circumstances surrounding their exploitation. This omission results in a clear disparity in justice, particularly in cases of necrophilia, where the absence of legal avenues leaves victims without recourse and offenders without punishment. Furthermore, the exclusion of provisions for same-sex intercourse under Section 377 worsens gender inequality, denying protection to male victims of rape or sexual exploitation²³. The disregard for the rights and legal remedies for homosexuals and victims of necrophilia undermines the core principles of equality and justice within the Indian criminal law system as outlined in the new Bill²⁴.

The omission of Section 377 suggests a lack of consideration for the gravity of violations against men and transgender persons, reinforcing the message that such crimes are not deemed worthy of severe legal consequences. The call for sensitization and accountability within law enforcement agencies is highlighted, underscoring the importance of not only modifying laws but also ensuring accessibility and remedies for those in need²⁵.

V. CRITIQUES AND CONTROVERSIES

A. Complexities in Addressing Sexual Offenses

Addressing sexual offenses within the legal framework is a complex endeavour, particularly concerning the gender-neutral approach and patriarchal exceptions prevalent in marital relationships. With the introduction of new bills like the (BNS), there is an opportunity to critically examine and potentially reform existing laws to better promote gender equality and ensure justice for survivors of sexual violence.

B. Section 69 and Lack of Gender-Neutral Approach

The Section 69 of the Bhartiya Nyaya Sanhita (BNS) has garnered attention due to its lack of a gender-neutral approach. Historically, legal provisions relating to sexual offenses often used gender-specific language, perpetuating stereotypes and excluding certain groups from legal protections. While progress has been made in recent years to adopt more inclusive language, Section 69 of the Bhartiya Nyaya Sanhita (BNS) may still fall short in addressing the diverse

²² Anvesha Pipariya, 'Contradictory Laws on Gender and Sexuality in India - With Homosexuals Now Singled out as a Threat' (2018) 3 *Supremo Amicus* 108.

²³ Sujit Choudhry, 'Living Originalism in India: Our Law and Comparative Constitutional Law' (2013) 25 *Yale JL & Human L.*

²⁴ Varnika Singh, 'Bharatiya Nyaya Sanhita Bill, 2023 contains no provision on sexual violence against animals' (*The Leaflet*, September 11, 2023) <<https://theleaflet.in/bharatiya-nyaya-sanhita-bill-2023-contains-no-provision-on-sexual-violence-against-animals/>> accessed 10 March 2024.

²⁵ Devashish, 'Socio-Legal Future of Transgender Persons in India' (2021) 4 *Int'l JL Mgmt & Human* 3664.



experiences of survivors, irrespective of gender identity or expression²⁶. This presents a challenge in ensuring equal access to justice and support services for all individuals affected by sexual violence.

C. Patriarchal Exceptions in Marital Relationships

Furthermore, talking about patriarchal exceptions within marital relationships pose significant implications for gender equality. Traditionally, legal frameworks have granted certain privileges to spouses, creating a power dynamic that can perpetuate inequality and undermine the autonomy of individuals, particularly women. In the context of sexual offenses, marital rape is a glaring example of how existing laws may fail to adequately protect survivors within intimate partnerships. Despite widespread recognition of the harmful impact of marital rape, many jurisdictions, including India, continue to maintain exemptions or lesser penalties for such offenses when committed by a spouse.

The implications of patriarchal exceptions in marital relationships extend beyond legal protections to broader societal attitudes and norms.²⁷ By reinforcing the notion of marital privilege and spousal immunity, these exceptions contribute to the normalization of gender-based violence and perpetuate harmful stereotypes about gender roles and relationships. Moreover, they undermine efforts to challenge entrenched power structures and promote genuine gender equality both within the legal system and in society at large.

D. Implications for Gender Equality

The introduction of the Bhartiya Nyaya Sanhita (BNS) provides an opportunity to address these complexities and advance gender equality in the realm of sexual offenses. By incorporating a gender-neutral approach in its provisions and eliminating patriarchal exceptions within marital relationships, the BNS can signal a commitment to upholding the rights and dignity of all individuals, regardless of gender or marital status. This may involve revising existing laws, enhancing legal protections for survivors, and promoting awareness and education initiatives to challenge discriminatory attitudes and behaviours.²⁸

One complexity arises from the need to ensure that revised statutes effectively address the multifaceted nature of sexual offenses. These offenses often involve power dynamics, consent issues, and varying degrees of harm inflicted on victims. Therefore, it is essential to craft legislation that accurately captures the nuances of such offenses and provides adequate protection to survivors.

Moreover, the intersectionality of identity factors such as race, ethnicity, socioeconomic status, and sexual orientation further complicates efforts to address sexual offenses equitably. Legal frameworks must be sensitive to the diverse experiences and vulnerabilities of different

²⁶ Aamir Khan, 'How Section 69 of the Bharatiya Nyaya Sanhita proposes to criminalise sex on false promise of marriage' (*Bar & Bench*, 18 Aug 2023) <<https://www-barandbench-com.eu1.proxy.openathens.net/news/law-policy/how-section-69-of-the-bharatiya-nyaya-sanhita-proposes-to-criminalise-sex-on-false-promise-of-marriage>> accessed 09 March 2024.

²⁷ Live Law News Network, 'Criminalise Adultery in Gender Neutral Manner in New Penal Code, Recommends Parliamentary Panel' (*Live Law*, 13 November 2023) <Criminalise Adultery in Gender Neutral Manner in New Penal Code, Recommends Parliamentary Panel (livelaw.in)> accessed 8 March 2024.

²⁸ Swati Agrawal, 'Bharatiya Nyaya Sanhita, 2023' (*Mondaq*, 23 December 2023) <<https://www.mondaq.com/india/crime/1405764/bharatiya-nyaya-sanhita-2023>> accessed 05 March 2024.



communities, ensuring that marginalized groups are not disproportionately impacted by sexual violence or discriminatory practices within the criminal justice system.

To concluded this point, while revising statutes like Sections 354B and 354C of the IPC represents a step towards addressing sexual offenses, it is crucial to navigate the complexities inherent in this process. By crafting legislation that is responsive to the needs of survivors, respects the rights of the accused, challenges societal norms, and acknowledges intersecting identities, legal reforms can contribute to creating a more just and equitable society.

VI. BALANCING ACTS IN BHARATIYA NYAYA SANHITA

A. The Overall Significance of the Legislative Overhaul

The paper outlines the reasons behind the overhaul of legislation and why it was necessary change for upcoming future. To discuss the gaps or issues in the previous legal system that the Bharatiya Nyaya Sanhita aims to address to gender neutrality. This section should highlight the expected improvements and modernizations brought by the BNS, as well as its anticipated impact on the legal landscape. In this section, you can provide historical context and describe the origins and evolution of the Bharatiya Nyaya Sanhita which replaced Indian Penal Code, 1860. This may include the socio-cultural connected with the aspects gender neutral and political factors making the laws to connected all the sectors of the society, that influenced its inception, previous laws, and legal frameworks that it may have replaced or built upon, and the key individuals or groups involved in its creation²⁹.

B. Shortcomings and Areas for Improvement

Enumerate the primary objectives and goals of the Bharatiya Nyaya Sanhita. What are the key areas of focus, and what changes or reforms does the Bharatiya Nyaya Sanhita intend to bring about? This could include themes such as improving access to justice, increasing transparency and accountability, enhancing the protection of rights, and fostering social and economic progress³⁰.

The positive steps towards gender justice in the aspects of Bharatiya Nyaya Sanhita. In this section, the paper highlights the strides made towards achieving the gender justice. This can include legislative reforms aimed at promoting gender equality, initiatives to combat gender-based violence in the case offenses of Adultery, efforts to enhance women's representation in decision-making roles, and policies to address gender disparities in education, employment, and healthcare. It's important to acknowledge advancements such as the implementation of gender-sensitive laws, the establishment of support services for survivors of gender-based violence, and campaigns promoting gender mainstreaming in various sectors. Additionally,

²⁹ Satyendra Wankhade & Neha Joshi, 'Bharatiya Nyaya Sanhita, 2023: New and repealed provisions, drafting errors and more' (*Bar and Bench*, 15 Aug 2023) <<https://www-barandbench-com.eu1.proxy.openathens.net/news/bharatiya-nyaya-sanhita-2023-changes-and-highlights>> accessed 09 March 2024.

³⁰ Press Trust of India, 'Bharatiya Nyaya Sanhita Bill allows using draconian police powers: Sibal' (*Business Standard*, 11 March 2023) <https://www.business-standard.com/politics/bharatiya-nyaya-sanhita-bill-allows-using-draconian-police-powers-sibal-123081200180_1.html> accessed 07 March 2024.



recognizing the contributions of feminist movements and advocacy groups in pushing for gender justice is crucial.

There are also certain shortcomings and areas for improvement in the bills to be look upon. We discuss the challenges and gaps that persist in achieving gender justice. This could involve analysing disparities in legal protections and enforcement, gaps in access to resources and opportunities for women, systemic biases and discrimination, cultural norms perpetuating gender stereotypes, and institutional barriers hindering gender equality. Identifying shortcomings in existing policies and practices is essential for addressing root causes and developing targeted interventions. Examples might include insufficient implementation of gender-sensitive laws, inadequate support for marginalized groups within the gender spectrum, and persistent gender pay gaps in the workforce.

C. The Need for Continued Scrutiny and Potential Amendments

This section emphasizes the ongoing nature of the quest for gender justice and the necessity for vigilance in monitoring progress and adapting strategies accordingly. It involves advocating for continuous scrutiny of existing policies and practices to ensure they remain effective and responsive to evolving challenges. This may entail calls for amendments to laws and policies to address emerging issues, feedback mechanisms for impacted communities to voice their concerns, and mechanisms for accountability and transparency in decision-making processes.

The vague definitions in organized crime sections, potential jurisdictional issues, and overlap with existing statutes like UAPA. To emphasis on clarity in definitions, addressing jurisdictional issues, and potential revisions to ensure effectiveness and fairness in enforcement. Additionally, highlighting the importance of intersectionality in addressing overlapping forms of discrimination based on gender, race, class, sexuality, and other factors is crucial in this context³¹. A Positive Steps towards Gender Justice by removal of archaic and discriminatory laws such as Section 377 and adultery. By addressing these sections comprehensively, we can provide a balanced assessment of the current state of gender justice, acknowledging achievements while also identifying areas for improvement and emphasizing the ongoing need for scrutiny and adaptation³².

VII. CONCLUSION

The Bharatiya Nyaya Sanhita (BNS) heralds a new era in India's legal landscape, aiming to modernize and reform criminal laws while addressing longstanding issues of gender inequality and injustice. This legislative overhaul, initiated with the passage of three groundbreaking bills, represents a significant departure from colonial-era laws, signalling a commitment to a more inclusive and equitable legal framework³³.

³¹ Syed Muqhtadir Hussain, 'Legal Rights of Homosexuals and the Aspect of Morality (Philosophy & Law)' (2022) 4 Indian JL & Legal Rsch 1.

³² Devarupa Bhattacharyya, 'Legitimizing Same Sex Marriages in India: An Urge for Advancement' (2021) 4 Int'l JL Mgmt & Human 1831.

³³ Sunishth Goyal, 'An Exhaustive Comparative Analysis of Code of Criminal Procedure, 1973 and Bharatiya Nagarik Suraksha Sanhita, 2023' (*Bar & Bench*, 20 Aug 2023) <<https://www-barandbench-com.eu1.proxy.openathens.net/columns/comparative-analysis-of-code-of-criminal-procedure-1973-and-bharatiya-nagarik-suraksha-sanhita-2023>> accessed 1 March 2024.



The introduction of Bill has commendable measures to foster gender equality, such as recognizing the third gender and incorporating gender-neutral language in certain provisions. By explicitly acknowledging the existence of transgender individuals and embracing gender neutrality in legal language, the BNS lays the foundation for a more inclusive and just society³⁴. Additionally, amendments to IPC sections related to sexual offenses demonstrate a step towards gender equality, albeit with some inconsistencies and shortcomings. One of the notable achievements of the BNS is the recognition of the third gender, aligning with the Transgender Persons (Protection of Rights) Act, 2019. By explicitly acknowledging diverse gender identities and incorporating a comprehensive definition of transgender persons, the BNS sets a precedent for gender inclusivity and equality³⁵. Additionally, the introduction of gender-neutral language for victims of sexual harassment represents a positive move towards fostering equality and challenging gender stereotypes³⁶.

However, the Bharatiya Nyaya Sanhita falls short in crucial aspects related to sexual offenses. The resurrection of the offense of adultery, previously deemed unconstitutional, raises concerns about reinforcing historical biases and disproportionately impacting women. Moreover, Section 69 introduces complexities in addressing sexual intercourse through deceitful means without adopting a gender-neutral approach, potentially resulting in unequal treatment in legal proceedings.

While the bill broadens its scope to encompass economic offenses and organized crimes, its selective gender neutrality for sexual offenses and the reintroduction of adultery provisions raises questions about its commitment to overall gender equality. The bill's failure to adopt a comprehensive gender-neutral approach in addressing sexual offenses and its maintenance of patriarchal exceptions in marital relationships underscore the need for continued scrutiny and potential amendments³⁷.

However, the legislation falls short in crucial aspects related to sexual offenses and marital relationships. The omission of Section 377 raises concerns about the protection of sexual minorities, while the reintroduction of adultery provisions perpetuates patriarchal norms and biases³⁸. Furthermore, patriarchal exceptions within marital relationships continue to undermine gender equality, highlighting the need for continued scrutiny and potential amendments. Despite these challenges, the BNS signifies progress in recognizing and addressing gender inequality within the legal framework. By removing archaic and discriminatory laws, the BNS sets a precedent for a more inclusive and equitable approach to gender justice³⁹. However, there remains a call for a more comprehensive and proactive strategy to ensure the full realization of gender equality.

To be concluded, the Bharatiya Nyaya Sanhita represents a transformative step towards gender justice in India. While it introduces significant reforms and advancements, there is still work

³⁴ Priya Nandan, 'Gender-Neutral Laws in India' (2022) 5 Int'l JL Mgmt & Human 2370.

³⁵ Geetika Dev, 'Gender Equality: Is It a Concern for Men?' (2023) 5 Indian JL & Legal Rsch 1.

³⁶ Devashish, 'Socio-Legal Future of Transgender Persons in India' (2021) 4 Int'l JL Mgmt & Human 3664.

³⁷ Rachit Sharma, 'Rights of LGBTQ in India and the Struggle for Societal Acceptance' (2021) 4 Int'l JL Mgmt & Human 18.

³⁸ Jameson Garland, 'Equality and Protection for Gender Identity and Characteristics' (2022) 68 Scandinavian Stud L 187.

³⁹ Sonal Rangnekar & Kabir Duggal, 'Decriminalisation of Homosexuality in India' (2004) 3 Law Rev Gov't LC 145.



to be done to address existing gaps and challenges. By remaining vigilant, advocating for change, and prioritizing inclusivity and equity, India can continue its journey towards a more just and gender-equal society.⁴⁰

⁴⁰ Tanya Singh & Kush Kakkar, 'LGBTQIA+ Civil Rights in India' (2021) 2 Jus Corpus LJ 632.



NOTHING NEW FOR HER IN THE NEW CODE

By Dr. Shatakshi Anand & Ms. Akanksha

Abstract

Criminal law amendment has brought about changes in the criminal law machinery of the country. The previously existing Indian Penal Code has been replaced by the Bhartiya Nyaya Sanhita (BNS). The new BNS in its statement of objects and reasons mentions that the offences against women would be given precedence. Chapter 5 of the BNS discusses the offences against women and children. This chapter consolidates the scattered sections relating to women, which has been placed in the beginning of the code. This is the only change which have been brought about. The provisions relating to women, which were present in the Indian Penal Code have been mentioned in the BNS verbatim. No change can be seen in the language of the act as well. The present paper aims to analyse all the provisions which exist in the BNS as well as IPC regarding the offences against women. A detailed study of the provisions of the new law will be done along with their comparative analysis. The paper also aims to understanding the implication of the new law for the welfare of women and what the government needs to do more in order to prevent the offences against the women. The scope of paper would be limited to the offences against women to make sure that the analyses is streamlined and focused.

KEYWORDS: Gender equality, Offences against women, Gender Justice, Marital Rape, Bhartiya Nyaya Sanhita.

I. INTRODUCTION

“We cannot all succeed when half of us are held back.”

It is believed that for the growth of a country, the development of women is crucial. If half of us are held back then only half the efforts are being put towards growth and development. In India, the evolution of the position of women is worth having a look at. It has changed from being called the “golden age” during the Vedic Era to imposition of innumerable restrictions during the medieval times.¹ One thing which is clear is that, position of women has always been insignificant and deplorable as compared to that of men in the country because of the deep-rooted patriarchy. This has also resulted in the ever-growing crimes against women, whether it’s Mathura rape case² of 1972 or Nirbhaya rape case of 2013³, not much has changed. The newspaper is still filled with news of crimes against women, of all age.

¹ Mamta Rao, *Law Relating to Women and Children* (4th ed., EBC, 2019) 45.

² *Tuka Ram v State of Maharashtra* [1979] AIR 185.

³ *Mukesh v State for NCT of Delhi*, [2017] 6 SCC 1.



The Indian constitution ensures Equality under Article 14⁴, where everyone will get equality before law and equal protection of law. Despite this, the framers of the constitution recognized the special position of women in the country and allowed protective and positive discrimination for them. The principle of protective discrimination is primarily visible under article 15(3) of the Indian Constitution⁵, where the state has been enabled to make special laws for women and children in order to protect them.

According to a study conducted by Thompson Reuters in 2018⁶, India came on the number one place as being the most dangerous country in the world for women due to high risk of sexual violence against them. Countries like Afghanistan and Syria came on the 2nd and the 3rd position. So shocking that a country where women are worshipped as goddesses is also the most dangerous place in the world, worse than places with war conditions.

Plenty of laws are made for the protection of women like the Domestic Violence Act 2005, Indecent Representation of Women Act 1986, Dowry Prohibition Act 1961. But as the time changes the laws need to change as well so that the effectiveness and relevancy of the laws remain intact. Leading laws governing the crimes in the country were Indian Penal Code, 1861 (IPC), Code of Criminal Procedure, 1973 (CrPC) and Indian Evidence Act, 1872 (IEA). In 2023, the parliament passed the criminal law amendment bills, enforced from 1st July 2024. Through these laws, the old laws will be replaced. IPC will be replaced by Bhartiya Nyaya Sanhita (BNS). As the old criminal laws were drafted in the colonial era and paid more attention on giving penalty rather than providing justice, a need was felt to bring about a new criminal law structure in the country to match the present landscape of the Indian society.

In the statement of object and reason of the BNS it has been mentioned that the crimes against women and children would be given precedence. Therefore, it is noteworthy to analyse what the laws have to offer for women. It is also important to check whether the changes are relevant and effective to deal with the challenges that the nation is presently facing with respect to women. A comparative analysis will be done of the provisions of Indian penal code relating to women and the changes which have been brought about in the new Bhartiya Nyaya Sanhita.

II. MAJOR CHANGES FOR HER

Section 2 has provided a definition of “gender”. In its attempt to make it all inclusive the pronoun “he” shall include male, female and transgender also. Recognizing the legal status of transgender also is a commendable step incorporated by BNS.

The concept of adding criminality to sex on the pretext of marriage was in great discussion for a prolonged period. The Supreme Court had multiple judgments on this issue but it was not resolved. The New Code should be credited for inserting a Section 69 which includes sexual intercourse by deceitful means. “Deceitful means includes inducement, false promise of employment, promotion, or marriage, and marrying by suppressing identity.”⁷

⁴ The Constitution of India, art 14.

⁵ The Constitution of India, art 15 (3).

⁶ Belinda Goldsmith and Meka Beresford, ‘India most dangerous country for women with sexual violence rife - global poll’ (Reuters, 26 June, 2018) <https://www.reuters.com/article/idUSKBN1JM075/> accessed 14 February 2024.

⁷ Bharatiya Nyaya Sanhita 2023, s 69.



All gang rape cases are now treated equally severely by the law, regardless of the victim's age. Death sentence is stipulated under Section 70(2) of the BNS for the gang rape of a woman who is younger than eighteen. The law has now been made in conformity with provisions of the POCSO Act.

The punishment for rape has also been made more stringent. While Section 64(2) punishes aggravated types of rape with ten years to life imprisonment for the balance of a person's natural life, Section 64(1) punishes rape accused with ten years to life imprisonment. The section has very explicitly clarified the meaning of life imprisonment without leaving any scope for misinterpretation.

The code has done away with the difference between age of marriage and age of consent. Earlier by the 2013 and 2018 criminal amendment act, the age of giving consent was made to eighteen years and even mutual sexual intercourse would be considered to be a rape if the woman was under 18 years. But for a husband he could never be charged for rape if the wife was above fifteen years of age. The new code has aligned the law with POCSO and now even the age of consent for wives has been raised to eighteen years.

By adding Section 73, the Parliament has tried to protect the identity of the rape victim by providing punishment for printing or publishing any matter relating to Court proceedings without permission of sexual offences against women and further strengthen the protection against leaking out her identity.

Voyeurism and Disrobing had been added as an offence after 2013 criminal amendment act but earlier under Section 354B and 354C of Indian Penal Code only a man could have been prosecuted for disrobing a woman or for doing voyeurism but now under 75 and 76 of BNS the even a woman can be the wrongdoer and can be prosecuted for offending another woman.

III. COMPARISON OF THE PROVISIONS OF BHARTIYA NYAYA SANHITA AND INDIAN PENAL CODE

In order to understand the changes that have been brought about in the new law and their effectiveness, it is essential to do a section wise analysis of the offences relating to women given in the BNS and the IPC.

A. Section 63: Rape

The previous Section 375 of Indian Penal code has been copied verbatim in the new code. Rape has neither been made gender neutral nor has the exception 2 been removed. The Supreme Court judgment of *Independent Thought v. UOI*⁸ has been incorporated in the exception 2, where a husband can be charged with rape of his wife if she is under the age of 18 years. Earlier the age was 15 but the new code has raised the age.

B. Section 65: Punishment for rape in certain cases

⁸ *Independent Thought v. Union of India* [2017] AIR SC 4904.



By the 2018 amendment to IPC, a new clause (3) was added to Section 376 which dealt with punishment for rape. This clause dealt with rape of child under 16 years of age. Similarly, by the 2018 amendment another Section 376AB was added which punished rape on woman under 12 years of age. Both the clause and section have been merged to form Section 65 of BNS. For committing rape on a girl under 16 years of age the maximum punishment can be life imprisonment whereas for committing rape on a girl under 12 years of age, even death penalty can be granted. This is however not a new provision but just a carry forward from IPC.

C. Section 69: Sexual Intercourse by employing deceitful means, etc

Whoever with deceitful means or without the intention to marry makes promises of marriage and performs sexual intercourse with a woman shall be punished under this section. This section though explanation has also included that deceitful means shall also apply when false promise of employment or promotion is made. The punishment may extend up to ten years for the same and also fine. This is a new addition by BNS which was not there in the previous code.

D. Section 70: Gang Rape

This new section has not done away with the previous section 376DA, 376DB. The earlier sections bifurcated between gang rape of woman under twelve years and under sixteen years. Now, clause (2) of Section 70 has merged all of them and now it directly deals with gang rape of a woman under eighteen years of age which shall be punishable by imprisonment for life or with death.

E. Section 73: Printing or publishing any matter relating to court proceeding without permission

Earlier what was prohibited was to publish the name or identity of the person against whom rape was alleged to be committed but the new law has retained this section and additionally added another section which prohibits the printing or publishing of any court proceeding regarding rape and related offences without the previous permission of court. This act would be punishable for a maximum of two years.

F. Section 75: Sexual Harassment

Earlier Section 354A dealt with sexual harassment and its punishment. The same has been replicated here just the title of the section has been altered a little. There is no change in punishment.

G. Section 76: Assault or use of criminal force to woman with intent to disrobe

This section was earlier a part of Section 354B, however the new section has incorporated a major change, earlier the wording was “any man who assaults....”, the new act has replaced the term “any man” with “whoever assaults....”. The implication of this amendment is that now the offender can be male or a female. Now even a woman can be prosecuted for disrobing another woman.

H. Section 77: Voyeurism



This section was earlier found in Section 354C of IPC. Just like the offence of disrobing, a similar change has been found in the new Section 77. Even a woman can be prosecuted for watching or capturing the images of a woman engaging in private acts. The wording “any man” has been replaced with “whoever”.

I. Section 82: Marrying again during the lifetime of husband and wife

This offence and the punishment thereto were initially provided in two sections, i.e. Section 494 and Section 495 IPC under the Chapter 20 titled as *Offences Relating to Marriage*. The change which has been brought about is that these two provisions have been combined and finds the mention in one single section, which is Section 82 of the BNS.

Section 494 discusses about the offence of Bigamy conducted with the knowledge of the wife of the second marriage. Section 495 discusses about the offence of bigamy conducted without the knowledge of the wife of second marriage. The only implication of the new law is that both the offences have been covered in a single section.

J. Section 85: Husband or relative of husband of a woman subjecting her to cruelty

This offence and the punishment thereto were initially mentioned under Section 498A, under Chapter XXA titled *Of Cruelty by Husband or Relatives of Husband* in the IPC. In BNS the provision finds mention under Section 85.

A change which can be observed is that previously the Section 498A contained the provision contained in Section 85 of BNS as well as the definition of “Cruelty” which now has been explained under Section 86 of the BNS.

K. Section 86: Cruelty defined

This provision defines the term cruelty. In the old law, there was no separate section for the same but the definition of cruelty formed part of the *Explanation* of Section 498A. In BNS this definition has been explained in Section 86.

L. Section 88: Causing miscarriage

This provision and the punishment thereto were previously mentioned in section 312 of IPC placed under chapter titled, *Offences against human body*. In the BNS the provision has been mentioned under Section 88. One change that can be seen is that in IPC, the subhead under which provisions regarding offences relating to miscarriage are mentioned is “*Of the causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the concealment of Births*”, however in the BNS the subhead has been changed to “*Of causing miscarriage, etc.*”

Effect: There is no implication of the new law as the language is identical of both the provisions. The IPC was made at a colonial time, the position of women in the society at that time was different and it has substantially changed.

The new law has failed to provide agency to women regarding their reproductive rights. Women still would be punished in case she wants herself to miscarry.



IV. CRITICAL ANALYSIS

Has Bharat become safer for woman as compared to India? The Indian Penal code has been refurbished to make the laws more comprehensive, unambiguous and abreast with the latest developments but what path breaking impact it has made to the female population of India? Despite several committee recommendations,⁹ the position of woman in the National Crime Records Bureau (NCRB) data on crime against woman, almost remains the same even today. The Bhartiya Nyaya Sanhita, 2023 has just arranged the scattered provisions of crimes against women into one single chapter but it does not have any visible impact on the status of crime against woman. Chapter V of the new Act has been termed as Of Offences Against Woman and Children. It starts from Section 63 and extends till Section 99 of BNS. The chapter begins with a section on Rape.

Merely by placing women related offence earlier in the act the government has not done any remarkable step. This move is been applauded for giving priority to gender related offences but just because it comes first doesn't mean it shall be treated first. The attitude of the society in general and police and judiciary in particular needs to be changed. Then only effective results could be seen.

The new Section 69 will soon become a hoarding block of cases. Indian courts have up till now made a distinction between situations in which the man meant to marry the woman but was unable to do so for "legitimate reasons," and circumstances in which the vow to marry was false from the start.¹⁰ The earlier act was not punishable but the later was. However, the new section does not distinguish between the two. This section is also a reinstitution of patriarchy and too much stress on virginity and its relation to dignity. An otherwise mutual act would become a punishable offence if what lured the woman was not provided to her. The inclusion of employment and promotion has reduced the woman to a certain low. Consensual sex would be punishable if the promise of marriage is not fulfilled but a forceful, without consent sexual intercourse would not amount to rape if the perpetrator is the husband.

Although the phrases "rape" and "marriage" seem to be incompatible, with the former denoting violence and the latter representing love and unity, it has been demonstrated over time that they can work in tandem to cause upsetting outcomes. Criminalising marital rape remained a difficult issue for all nations even after this realisation. Developed nations like the United Kingdom and the United States, or developing nations like Nepal and Bhutan. India has not yet made marital rape a crime.

Over 95% of married Indian women who experienced sexual abuse named their husbands or ex-husbands as the culprit, according to data from NFHS-5(2019–21)¹¹. In the case of *Independent Thought v Union of India*¹², it was decided that the institution of marriage could not be awarded a status higher than right to life. When a woman is raped, she is deprived of her right to life. The court while deciding this case, did not mention that stranger could only commit rape. The court did not hold that when husband commits rape, it does not amount to

⁹ Justice Verma Committee Report, 2013, Paras 34-37.

¹⁰ Zubeida Hamid, 'What happens under the proposed new law if you break a promise to marry, ?' *The Hindu* (India, 09 October).

¹¹ Ministry of health and Family welfare, *National Family Health Survey 5* (2019-2021).

¹² *Independent Thought v Union of India* [2017] AIR SC 4904.



violation of right to life. Thus, if we apply the principle of this law to our present case, it can be said that exception 2 to Section 375 that gives an immunity to husband from prosecution of rape despite the amount of force, brutality, is simply violating the right to life of a woman. The court very emphatically however stated that the court had its limited powers with regard to its jurisdiction. The court can never amend the law, it can only interpret the law. Despite rape being violative of Article 14, 15 and 21, the court could not declare marital rape as crime with regard to married woman. The court suggested that it is only the parliament which can bring about a law regarding marital rape.

In a significant ruling in *X v The Principal Secretary, Health and Family Welfare Department*¹³, Govt. of the NCT of Delhi, the Supreme Court acknowledged married women's ability to request a termination on the ground of marital rape. The court ruled that even a married woman could become the victim of rape or sexual assault by her spouse in order to end their pregnancy. The court stated that a woman who becomes pregnant against her will cannot be forced to bear the child if her husband is the one who caused it, but it declined to address the constitutionality of marital rape exception clause. Therefore, under the Medical Termination of Pregnancy Act, 1971, wives have been granted this right as marital rape is regarded as rape. Once again, the Supreme Court refrained itself from declaring marital rape as a crime and asked the legislature to look into the matter.

Despite indications from Supreme Court and recommendation from various committees, the BNS failed to incorporate marital rape as a crime. The country had its anticipation that finally parliament would end the age old sexual subjugation and recognize the sexual autonomy of woman. But it was of no avail. The parliament could have created a new section, deleted the exception but none of these happened leaving her status same as before. She has all equal rights in the world but inside the four walls of the house, she is an inferior and the male still enjoys blanket protection from being prosecuted for committing rape against her wife.

Under Section 294 of BNS, the provision regarding publication of any obscene content punishable with the imprisonment for 2 years and imprisonment for 5 lakh rupees and in case of second conviction, the punishment is graver. However, it will not be wrong to say that the Indian laws, whether we talk about IPC, IT Act, IDRWA¹⁴ or the BNS, have failed in preventing the publication of obscene content on the internet. The BNS through section 294 punishes it, but it is the exact language of the old Section 294 of IPC. Presently, there are a lot of acts online, which is unfathomable and way beyond the scope of present law. Despite having laws to protect publication of obscene content, apps like “Onlyfans” still exists very actively in India.

Another provision which needs reconsideration is Section 69. As has been explained above, it criminalises sex which has been performed on deceitful grounds. This sexual act completely takes away the sexual autonomy of women. It portrays women to be perpetual victims with whom an act, to which they have consented to, has been performed. The act of sex has been given so much importance for women, making it almost feel like if it is done, they would become unchaste or impure according to the standard of the society. Also, the section has failed

¹³ *X v The Principal Secretary, Health and Family Welfare Department* [2022] SCC OnLine SC 1321.

¹⁴ Indecent Representation of Women Act, 1986.



to mention about the consent of the women. The implication of the provision is such that even if the consent of women was not based on the false promise of marriage and if it is proved that there were deceitful means used, in that case the sexual intercourse between the parties would be punishable under Section 69.

Moreover, Section 377 of Indian Penal Code which dealt with Unnatural Offences has also been removed by the BNS. Earlier if the husband forced the wife for oral or anal sex, she could have prosecuted him under Section 377. "There is no reason why a wife cannot initiate a proceeding against her husband under Section 377, IPC for unnatural sex," the Gujarat High Court ruled in *Nimeshbhai Bharatbhai Desai v State of Gujarat*¹⁵. In numerous cases, the Supreme Court has reaffirmed the previously stated fact that Section 377 will be fully applicable in situations where the husband has coerced his wife into having sex with him. Now with the deletion of this section, this available remedy with the wife has also been taken away.

V. CONCLUSION

It is highly appreciated that the government has started its efforts to change the age-old colonial law and make the laws according to the contemporary needs of the society but still the journey is long for the women folk. A lot has changed but a lot more needs to be changed.

The IPC drafted by Lord Macaulay was a meticulous piece of legislation with the sections resembling almost perfection. Most of it is still relevant even today but the position of woman in the society has evolved over the years and thus the nature of crime against her has also changed. New offences have been created, more stringent punishment has been prescribed, a new chapter is carved out but women still are waiting to see a new day where crime against them has been reduced, where here fundamental rights are protected and most importantly her autonomy is respected.

¹⁵ *Nimeshbhai Bharatbhai Desai v State of Gujarat* (2017) R/CR.MA 26957.



PAYING THE PREMIUM: GENDER DISCRIMINATION WITH RESPECT TO PINK TAX IN INDIA

By Khushi Kafre

Abstract

*This research delves into the phenomenon of the “pink tax” in India, where women often pay more for products and services marketed towards them compared to their male counterparts. The authors explore the underlying forces of **gender stereotypes and societal expectations** that fuel this price discrepancy. Examining marketing strategies, they reveal how gendered perceptions are exploited to justify these price differences, creating a system that reinforces existing inequalities. Furthermore, the authors analyse the **cultural factors** influencing women’s willingness to pay a premium for products marketed as feminine, considering aspects like social pressure and limited choice.*

*The analysis then shifts to the legal landscape in India, assessing the current **legislation regarding gender-based price discrimination**. By highlighting the limitations of existing laws, **policy recommendations** are proposed, aimed at achieving greater gender equity in the marketplace. These recommendations may include stricter regulations on price parity, targeted awareness campaigns, and promoting alternative product choices that challenge traditional gender norms.*

Ultimately, the paper aims to shed light on the interplay of social, cultural, and economic factors that contribute to the pink tax in India. By advocating for legislative and market-based solutions, the authors hope to pave the way for a more equitable consumer experience for all genders.

KEYWORDS: *Pink tax, gender discrimination, gender stereotypes.*

I. INTRODUCTION

The colour pink is frequently utilised in branding, products, and marketing that targets women, since it has traditionally been connected to femininity. Deeply ingrained in culture, this relationship is shaped by historical trends, marketing tactics, and society conventions. Pink has been used to represent traits that are frequently stereotypically associated with women, such as softness, nurturing, and sensitivity, in anything from baby garments to cosmetics.



But the colour pink is also associated with women in more negative contexts, as the idea of the “pink tax.” The phenomenon known as the “pink tax” occurs when goods marketed towards women are more expensive than comparable goods marketed towards males, even though they serve essentially the same purpose or are of comparable quality.¹ Toys, clothes, and personal care items are just a few of the consumer goods that have this price difference. For instance, even though the sole distinction can be in the product’s or the packaging’s colour, razors targeted towards women may be more expensive than those targeted towards men.

The practice of gender-based pricing takes two forms. First, products marketed to female consumers are sold at prices higher than nearly homogenous products marketed to male consumers due to producers’ profit-maximizing strategies (whether intentional or not) based on psychology, shopping behaviour, preferences, and market trends. The term “Pink Tax” does not refer to a literal tax in this sense. Because of the uniformity between the two product categories, women are largely unaware of the existence of the “Pink Tax” in economic marketplaces, which encourages this practice. Second, the value-added tax (VAT) or sales tax applied to goods or services used only by women raises the cost of those items and services and makes them less affordable for some people.² Most people call this the “Tampon Tax,” which is a tax the government levies on tampons and other feminine hygiene items that are used for biological and medical reasons.

Enshrined in the United Nations resolution “2030 Agenda,” the fifth Sustainable Development Goal³ highlights the importance of women’s empowerment and gender equality. Similarly, the Indian Constitution’s Article 14 guarantees equality before the law, while Articles 15 and 16 prohibit discrimination on the basis of any of the following: religion, race, caste, sex, place of birth, or any combination of these. Gender prejudices and disparities are reflected in and perpetuated by the pink tax. It implies that, just by virtue of being marketed to women, goods associated with women are inherently more valuable or deserving of a higher price. For women, this pricing disparity may have serious financial ramifications. It also exacerbates economic inequality and adds to the broader gender wage gap.

II. WHY PINK TAX EXISTS?

Over the last ten years, there has been a surge in awareness regarding the pink tax, and both individual consumers and women’s organisations have voiced their opposition to this practice. Why no one bats an eyelash while paying pink tax is a problem and this issue is particularly severe in developing countries like India because of the several significant difficulties that women face on a daily basis, such as safety in public places.

This is undoubtedly a gospel truth, but there is also a reason why such a patriarchal practise persists: it preys on women’s fears and the idea that beauty is the most important quality in our society. The founder of Mohh, Pritika Singh, claims that women are disproportionately

¹ Bharat Kumar R and Prathyusha S, ‘Pink Tax: The Quantum Leap for Gender Equality’ (2023) 12 IJSR 1080.

² Svasti Pant, ‘UnPinking Discrimination: Exploring the Pink Tax and its Implications’ (2021) 1 IJPSL 1354.

³ ‘The 17 Goals | Sustainable Development’ (*United Nations*) <https://sdgs.un.org/goals> accessed 12 March 2024.



impacted by the gender tax, which is imposed on goods that women frequently buy. “The whole marketing gambit for a lot of organisations has been to make women feel inferior and emphasise normal, natural things as anxieties,” she stated.⁴ The irony is that the men who manage these businesses have been instrumental in advancing the notion of “an ideal woman” in terms of status and appearance. This is the true issue. Here, institutional patriarchy comes into play.

It is a common misconception that women are “high-maintenance” and “very fussy” shoppers. This was brought up by Whoppl’s founder and CEO, Ramya Ramachandran. Their “sensitive” skin makes them believe that the products marketed to them are exquisite and of the best calibre. Consequently, women perceive these price differences as acceptable. “As though the idea of challenging it never even occurs,” she went on.⁵ Not only that, but stores have also been shown to intentionally separate similar products with different prices so that shoppers are unable to compare the prices. This supports the theory that women’s presence has been purposefully concealed to minimise their earnings.

A. Gender Marketing

Gender marketing is a very helpful instrument in the pink tax promotion process as it clearly discriminates against some products depending on a person’s gender. The term “gender marketing” is a marketing approach that looks at the behaviours of a target gender and use techniques to appeal to them. Although gender marketing has its uses, it may also be divisive because it is perceived to reinforce gender stereotypes. Gender displays are utilised in this kind of marketing to highlight the differences between the roles of the two genders. This kind of marketing is used in a variety of businesses; in fact, it is so prevalent that some individuals argue marketers are fixated on emphasising gender norms.

Gender stereotypes are hurled at us from every angle from the moment we are born. It is essentially dictated to boys and girls what colours, toys, and even clothes they should find appealing. Boys are expected to prefer blue and play with vehicles and trucks, for instance, whereas girls are expected to favour pink and play with dolls and princesses. The practice of gender stereotyping persists into adolescence and adulthood, not just in young children. Teenage boys and men, for example, are expected to be interested in athletics, whilst teenage girls and women are expected to enjoy shopping more.

Many contend that viewers are being taught different social cues by the carefully constructed pictures used in advertisements. In fact, it is thought that even the most subdued images can significantly influence the attitudes and aspirations of people who see them. Furthermore, it has been said that gender relations are taught via advertising. The idea of masculinity and femininity—that is, the idea that men should be masculine and women should be feminine—are among the gender roles that are propagated through marketing. With the exception of a few tiny niche industries, there is relatively little room in gender marketing to stray from or reverse these positions.

⁴ Svasti Pant, ‘UnPinking Discrimination: Exploring the Pink Tax and its Implications’ (2021) 1 IJPSL 1354.

⁵ Bharat Kumar R and Prathyusha S, ‘Pink Tax: The Quantum Leap for Gender Equality’ (2023) 12 IJSR 1080.



Women are typically portrayed as feminine in marketing. Women are often portrayed in advertisements with and for women as they are throwing their hair back, applying makeup, caressing objects, speaking softly, in a difficult situation, in an intimate setting, confused, seductive, playful, acting carelessly, etc. These behaviours place women in roles that suggest they are weak or obedient.

B. Differences in Production

Products intended for women will have higher prices if more expensive materials are employed in their production. Services are also covered by this. A woman's haircut will cost more than a man's, for instance, if the former requires more expertise and time.⁶ In a similar vein, it may be argued that the differences in build, cut, and design between men's and women's apparel result in different production costs. The primary reason for price disparities may be the type of material used, as women's apparel is typically constructed with a more expensive blend of fabrics, while many men's shirts only have one. Furthermore, the way an item is cut—men typically wear straight-cut clothes, whereas women wear fitting cuts—may lead to greater fabric waste, which would be more expensive.

C. Price Discrimination

Differentiating prices for the same commodity or service is known as price discrimination. For instance, children's admission prices to museums and amusement parks are occasionally less than those of adults. There are instances where it is free for kids under a specific age. Prices are discriminated against by industries in an effort to boost profits. Price discrimination may also be motivated by a customer's age, place of residence, product preference, or income. Boundless Economics⁷, Businesses do not resist from imposing a surcharge, known as the "pink tax," when they believe that women would be prepared to pay more for a good or service. Stated differently, the perception is that women exhibit lower price sensitivity.

D. Profit making motive

The demands on businesses to integrate social responsibility into all aspects of their operations—including hiring, marketing, advertising, and production—have grown during the last several years. Due to this, businesses are now implementing eco-friendly practices, paying greater attention to the requirements of their workers, and taking a position in favour of social causes. Nonetheless, many businesses still have profit maximisation as their exclusive goal today. Vice president of the Brennan School of Justice at NYU School of Law Jennifer Weiss-Wolf ascribed the existence of the pink tax to capitalists who said, "If you can make money off of it, you should."⁸

⁶ Horwitz S, 'Is There Really a Pink Tax? Steven Horwitz' (*Foundation for Economic Education*, 13 May 2015) <https://fee.org/articles/is-there-really-a-pink-tax/> accessed 12 March 2024.

⁷ 'Price Discrimination: Boundless Economics' (*Course Sidekick*) <https://www.coursesidekick.com/economics/study-guides/boundless-economics/price-discrimination> accessed 12 March 2024.

⁸ Wakeman J, 'The Real Cost of Pink Tax' (*Healthline*, 6 August 2020) <https://www.healthline.com/health/the-real-cost-of-pink-tax> accessed 12 March 2024.



E. Gender-based tariffs

When determining the price of a final product that will be sold in the domestic market, the cost of import is also included if the input or raw material for making the product is imported from another nation. In certain instances, especially when it comes to apparel, women's clothing imports are more expensive than those of men's clothing. According to the Joint Economic Committee of the United States Congress (2016), the average tax rate on garment imports into the US for women is higher than the tax rate on clothing imports for males. The rates are 15.1% and 11.9%, respectively. According to the US International Trade Commission, 86% of US garment imports were categorised by gender in 2014.⁹

III. HOW IT AFFECTS WOMEN?

The pay disparity is real. Males already have the majority of the purchasing power in the market because of their higher earnings, but women pay more for goods and services that are promoted based on their gender and earn less than men, exacerbating the income disparity. Rebranding products with the notion that women prefer “feminine” hues like pink or purple and fragrant scents in personal care items only works to disadvantage women in terms of society and the economy. Businesses are able to overcharge women for the identical things that men use because of this biased marketing approach.

While the gender wage gap reduces women's incomes, the pink tax causes them to incur higher expenses. When combined, the two significantly lower women's purchasing power, increasing their economic vulnerability. Women of colour have fared worse than white males when it comes to the gender wage gap, earning significantly less. Reduced compensation indicates less disposable income, which influences consumers' preferences in the marketplace, particularly for those in lower-paying professions. For women, lower income and greater expenses create a lose-lose scenario. This demonstrates the true costs associated with being a female shopper. Gender socialisation is the cause of the pricing gap between men and women, which further disadvantages women who are already marginalised in society due to the large salary discrepancy.

The pink tax also contributes to the perpetuation of gender stereotypes and the belief that goods marketed to women should be feminine. Cultural norms that restrict women's chances and make it more difficult for them to be regarded seriously in fields where males predominate may be strengthened by this.

IV. RECOGNITION OF PINK TAX IN INDIA

Pads, tampons, and menstruation cups are among the products that are subject to a tax known as the GST on sanitary products. These things are taxable at a higher rate than other necessities

⁹ Abnett K, 'Why Fashion's "pink Tax" Means Women Pay More' (*The Business of Fashion*, 24 October 2023) <https://www.businessoffashion.com/articles/luxury/why-fashions-pink-tax-means-women-pay-more/> accessed 12 March 2024.



in many countries because they are regarded as luxury goods. This results in these products being more expensive and harder for women to obtain, especially those with modest incomes.

The categorization of products and services according to tax rate slabs was the main focus when the GST was first launched as a replacement for the previous tax system. Other items were placed in different rate slabs, with the exception of those that were exempt from taxation due to socioeconomic factors and factors of importance (such as water, the majority of agricultural produce, contraceptives, etc.).

In 2017, a public interest litigation, **Shetty Women Welfare Foundation v. Union of India**,¹⁰ was filed by an NGO seeking exemption of GST on sanitary pads. It stated that only 12% of Indian women are able to purchase pads, meaning that 88% of women and girls cannot afford this essential sanitary item. Therefore, the exemption ought to be granted in order to increase the number of sanitary napkins available to the impoverished and lower middle-class population.

July 2018 saw the removal of the GST on sanitary napkins, but prior to this action by the federal government, another Public Interest Litigation, **Zarmina Israr Khan v. Union of India & Anr**¹¹ was filed in the Delhi High Court, contesting the tax's implementation as unconstitutional.

In both the petitions, it was contended by the petitioners that the tax on sanitary napkins is violative of Article 21 and Article 15(1) because it makes it more difficult for women to obtain a necessary item related to their general and reproductive health and as women are the ones who use sanitary napkins in the end, it solely affects them. It was also contended that, under the system, sanitary napkins were classified alongside toys, leather goods, roasted coffee, cell phones, and processed foods.¹² There is a lack of gender-inclusive priority when a crucial and necessary sanitary product is categorised with items that are not necessary for survival.

The effort against the 12–14% GST imposed on banned sanitary napkins and other women's hygiene items brought gendered pricing to the attention of the public for the first time in India. Contraceptives are still free of tax and are seen as necessities; however, women's sanitary products were subject to a "tampon tax" because they were viewed as extravagance rather than necessities. "Protests against this were conducted widely on social media, particularly on Twitter, with the hashtag #LahuKaLagaan, which stands for "tax on blood." More than 4,00,000 people signed online petitions against it, including those from politicians, comedians, actors, and activists."¹³ As a result, the government repealed the "tampon tax" in 2018. While the "tampon tax" campaign in India has contributed to some awareness-raising, pink tax is still mostly unrecognised in the marketplace. While numerous global social media campaigns, such as #GenderPricing and #AxThePinkTax, have raised awareness of it, their influence is still very small.

¹⁰ *Shetty Women Welfare Foundation v Union of India* 2018 SCC OnLine Bom 1692.

¹¹ *Zarmina Israr Khan v Union of India & Anr* W.P. (c) No. 6034/2017.

¹² *ibid.*

¹³ Bharat Kumar R and Prathyusha S, 'Pink Tax: The Quantum Leap for Gender Equality' (2023) 12 IJSR 1080.



V. RESPONSE TOWARD PINK TAX AROUND THE GLOBE

Extra tax on feminine hygiene products is also a pink tax. Many governments have done away with such excess tax on feminine hygiene products. Kenya eliminated the menstrual product value-added tax in 2004. It did this to become the first nation to do away with the tampon tax. Canada removed its national goods and services tax on menstruation products in 2015.

In 2018, a law eliminating the 10% goods and services tax on feminine hygiene products was passed by the Australian government.¹⁴ The 5% tax on menstruation products was eliminated by Columbia and the sales tax of 12% on menstruation products was eliminated by the Indian government in the same year.¹⁵

In 2020, the United Kingdom declared in January 2021 that the value-added tax of 5% on menstruation products would be eliminated¹⁶. Germany reclassified sanitary products as “normal goods” instead of “luxury goods,” and lowered the tax on them from 19% to 7%.¹⁷

The Pink Tax Repeal Act was passed by the United States and it forbids product producers or service providers from charging different rates for basically equivalent goods and services depending on the gender of the target customer. The Act states that,

“Two consumer products are substantially similar if there are no substantial differences in the materials used in the product, the intended uses of the product, and the functional design and features of the product. If, for example, the only difference between the two products is the colour, they are substantially similar. Two services are substantially similar if there is no substantial difference in the amount of time to provide the services, the difficulty in providing the services, or the cost of providing the services.”¹⁸

VI. THE WAY AHEAD

Many governments have acknowledged the gender discrimination caused due to pink tax. However, it is the need of the hour that steps are taken in order to minimise or abolish such tax. Apart from a law regulating such tax, following can be done:

1. Awareness: Awareness of this issue is crucial, as it allows people to become informed and educated about the disparities in pricing between products marketed to men and

¹⁴ ‘Removing GST on Feminine Hygiene Products’ (*Home – Parliament of Australia*, 29 November 2018) https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2018/November/Removing_GST_on_feminine_hygiene_products accessed 12 March 2024.

¹⁵ *ibid*.

¹⁶ ‘Budget 2020: Chancellor Plans to Finally End Tampon Tax’ (*The Guardian*, 6 March 2020) <https://www.theguardian.com/uk-news/2020/mar/06/budget-2020-chancellor-plans-to-finally-end-tampon-tax> accessed 12 March 2024.

¹⁷ ‘Germany Scraps “luxury” Tampon Tax’ (*The Independent*, 8 November 2019) <https://www.independent.co.uk/life-style/women/germany-tampon-tax-luxury-items-scrapped-petition-a9195601.html> accessed 12 March 2024.

¹⁸ (*Legislation - congress.gov*) <https://www.congress.gov/115/bills/hr4547/BILLS-115hr4547enr.pdf> accessed 12 March 2024.



women. Discussions and debates are also important in addressing the Pink Tax, as they can identify ways to reduce or eliminate gender-based price discrimination.

2. **Role of Consumer Groups and Consumer Courts:** Consumer groups and campaigns play a crucial role in addressing the Pink Tax by advocating for policies and regulations that protect consumers from the Pink Tax. These may include working with policymakers to pass laws that require companies to disclose pricing information or advocating for regulations that prohibit gender-based price discrimination.¹⁹ Consumer courts are legal institutions that specialize in resolving disputes between consumers and businesses, and they have the power to order companies to stop engaging in unfair pricing practices and provide compensation to consumers who have been affected by these practices
3. **Gender neutral products:** Unisex or gender-neutral products are items designed to be used or worn by people of any gender identity and are typically designed to be inclusive and accessible to all consumers.²⁰ Examples of gender-neutral products include clothing items such as t-shirts, hoodies, jeans, and sneakers, as well as personal care products such as shampoo, body wash, and deodorant. Some companies have also begun to offer gender-neutral versions of traditionally gendered products, such as razors and shaving cream.
4. **Conducting surveys:** Conducting more surveys on the Pink Tax can help increase our understanding of the issue and provide more information on the specific products and industries where gender-based price discrimination is occurring. By analysing the results of these surveys, researchers can identify patterns and trends related to the Pink Tax, such as which industries and product categories are most affected and which demographic groups are most impacted by gender-based price discrimination. Information gathered by way of surveys could be useful for advocacy groups and policymakers working to raise awareness about the economic impact of the Pink Tax and for businesses and marketers looking to better understand their consumers' perceptions and behaviours related to pricing and savings.

VII. CONCLUSION

Pink tax is a common phenomenon in both goods and service industries, including dry cleaning, apparel, and personal care. The same applies to children's products, which include anything from toys and stationery to clothes and accessories. The gendered marketing of goods and services, particularly through changes to packaging, is what keeps the pink tax alive.

Similar products that don't need to be distinguished to meet a certain gender are commonly categorised according to a gender. This is done in order to maximise the seller's profit from the extra cash paid for the more costly item (sometimes referred to as the "pink tax"). In recent years, companies have endeavoured to eliminate the pink tax and increase consumer consciousness on the matter, having realised its discriminatory nature. Publicising instances of

¹⁹ Barari, Neha & Makhija, Ritu & Das, Joyce & Sharma, Madhvi & Sivasanker, Amrita, 'Pink Tax: A Price Discrimination With Unfortunate Females' (2023).

²⁰ Bharat Kumar R and Prathyusha S, 'Pink Tax: The Quantum Leap for Gender Equality' (2023) 12 IJSR 1080.



products and services offered by companies that apply the pink tax is an essential part of the awareness-raising effort for the charge. Customers of these companies are more inclined to support the pink tax movement and demand justice when they learn about the gender-based discrimination in pricing that they have personally witnessed.

Talk about the pink tax always includes the tax paid on menstrual supplies, or the tampon tax. What distinguishes the latter from the former is that it is a legally recognised tax in the real sense. Tampon tax regulations are therefore easier for the government to establish and modify. Several countries, including Kenya, Australia, and India, have eliminated the tax on feminine hygiene products in the past. There aren't many official regulations or norms regarding the pink tax, with the exception of a few US states. Businesses need to create transparent pricing strategies and take responsibility for their actions. Removing the pink tax will enhance gender equality.



ASSESSING EQUALITY AND GENDER REPRESENTATION

By Anavi Jain & Eresh Harpalani

Abstract

Board of Directors are the heart and soul of a company. They are responsible for the highest- level decision making and governance. In order to safeguard the shareholder's interest, a pool of virtuous and creditable Board of Directors is imperative to the organization.

Historically, leadership positions have been dominated by men owing to societal norms and cultural barriers and this has resulted in an entrenched bias that promotes gender equality. Further, women are often expected to cater to family responsibilities which impacts their ability to grow in their career. This calls for stricter legislations that pave the way for more women to lead large companies and drive positive change in the corporate world.

So far in India, the Companies Act, 2013 by virtue of section 149 mandates the appointment of at least 1 women director on the board. Likewise, Listing Agreement of SEBI mandates a woman director in boardroom for a listed company. Even various countries internationally, like Malaysia, have mandatory quotas for women representation. Further, EU has also fixed a mandatory quota for representation of women on corporate boards and has fixed goals to be achieved by the year 2026. But even after a decade of the implementation of these provisions, the idea still seems to be far from reality.

This paper will embark on a comprehensive analysis of equal gender representation in the boardroom. It will delve into the understanding and implementation of these provisions both, in India, as well as countries abroad. Further, an empirical study of the data from the Ministry of Corporate Affairs ("MCA") will be done to determine the extent of the compliance to such provisions by various companies. In addition, the authors aim to educate people about the importance of equal gender representation and breaking the glass ceiling in boardrooms.

Keywords: *Women directors, Board of Directors, Equal Representation, Motherhood Penalty, Glass Ceiling*



I. INTRODUCTION

Women are the fairer sex and that is the primary identity given to them by society. The orthodox and stereotypes consider them to excel within the realms of their household and it was for ages that women were considered unfit for business and entrepreneurial ventures. It was to their discredit that they were often not given the opportunity or the scope of refining their business skills, either. Times are changing and so are the otherwise male dominated boardrooms. About 48% of the world's entire population consists of women and this section of the society, who were once idolized, are now often looked down upon as mere house-runners in the family. The 21st century marks an imperative shift towards a much more inclusive society of equal gender representation and women lead this pack by being the 'all-round characterised masterplan.'¹

Social and cultural shifts in the society are empowering women to take a more proactive role both, at home, and in the corporate world. This shift marks them as an imperative resource in the workplace as well as the leader of the pack at home.² Zia Mody, one of the leading corporate lawyers in India, is perhaps the best example of a woman who has successfully aced managing both, her work and home. Another brilliant leader at work is Falguni Nayar, the founder and CEO of Nykaa, who has managed to build India's first unicorn startup headed by a woman. However, this imperative resource to the society goes unnoticed in the corporate sector as more opportunities are often given to men over women, who are instead given debilitating remarks of refinement in their work when it comes to promotions.

Predominantly, it has been men who have controlled businesses with very little to negligible role of women in it. This has led to a situation where there is dearth of female leaders in businesses which in turn creates a real paucity of efficient and qualified "women candidates" to be selected for the role of directorship.³ The corporate sector of India still emphasises meritocracy and bleats about lack of skilled and qualified women.⁴

The deep-rooted primitive thinking of males who dominate corporate boardrooms are one of the major reasons why there is under-representation of women. This practice is not just limited to India but to the entire world where it can be seen through the different lenses of under-representation, glass ceiling or motherhood penalty. This problem cannot be tackled through protests or a movement on an individual level and this is where the legislation needs to take a step towards equity in the boardroom.

Section 149(1) of the Companies Act, 2013⁵ mandates certain classes of companies to have at least 1 woman director. This step by the legislature marks a positive step towards equality in

¹ P Rona, 'A Study of Women on Board of Directors of Indian Companies' (2020) 3 IJLMH 1004.

² McCarty Kilian, Claire, Dawn Hukai, and C. Elizabeth McCarty, 'Building diversity in the pipeline to corporate leadership' (2005) 2 JMD 157.

³ Rachel Orbach, 'Bringing Talent Off the Bench and into the Game: The Underrepresentation of Women in the Boardroom' (2017) 2 FJCFL 203.

⁴ Lissa Lamkin Broome, 'The Corporate Boardroom: Still a male club' (2007) 33 JCL 665.

⁵ The Companies Act, 2013 (18 of 2013) s 149(1).



the boardroom as it enables women to have a compulsory seat on the table previously dominated by an ‘old-boys network’.⁶

Destroying the very purpose of the legislation, many companies appoint only a single women director to evade the punitive penalties of the government. This is done so that the companies can comply with the statutory provisions but also maintain a status quo on the male-dominated boardroom. Further, many companies only hire a woman on the boardroom in an advisory role to comply with the regulations and this can be done by either hiring a dummy director or hiring a friend or family member to comply with such rules.⁷

This research paper aims to provide an insight into assessing the gender gap in boardrooms and why this has been stagnant even after provisions that provide for a mandate have been passed. Further, the paper delves into the social aspect of gender bias and how having diversity in the boardroom can bring about a positive change in the environment of business which lacks in India. Be it at the household level or in the business sector, women have always faced backlash when it comes to getting equal pay for their work to that of men. Thus, to tackle all these issues, this paper has dealt with the legislative provisions enacted by the Legislature of India that make having women directors a mandate.

Further, the paper indulges in the empirical study of the data of women directors in different companies both in India and abroad. Additionally, the authors have presented both qualitative and quantitative suggestions which are aimed at improving the status of women in boardrooms. Ultimately, the authors conclude with a hope towards a more gender inclusive and diverse boardroom.

II. GENDER PERSPECTIVES STRAIGHT FROM THE BOARDROOM

A. Issue of Gender Bias

Be it an Indian household or the public domain, a muddle that, till date, haunts our society is the problem of gender bias of discrimination against women. The issue becomes graver when it comes to the corporate sector. Corporate India or “India Inc” as it has been called by the pink newspapers, has seldom been a beacon of equal opportunities as well as social affirmation when it comes to women. Despite the Indian Constitution advocating for employment equality, the corporate sector frequently overlooks these principles.⁸ If one takes a superficial look into the top-level management of Indian companies, a strong bias is reflected against women.⁹

In the current scenario, it is extremely challenging for women to pave their way to the top of the corporate ladder; to secure a seat in the boardroom. The harsh reality surfaces when women do attain these positions, and are initially met with acclaim, but as they express their perspectives with fervour and flair and contribute to discussions, a significant backlash

⁶ Gagandeep Singh, ‘Corporate Governance: An Insight into the Imposition and Implementation of Gender Diversity on Indian Boards’ (2020) 13 IJCG 100.

⁷ López-Cabarcos, M. Ángeles, Marcos Vizcaíno-González and M. Luisa López-Pérez, ‘Gender diversity on boards: Determinants that underlie the proposals for female directors’ (2023) 190 TFSC 122417.

⁸ The Constitution of India, 1950, Art. 16.

⁹ ‘Bringing Women on Board: Corporate India is wrong to drag its feet on appointment of women directors’ (2015) 8(50) EPW.



follows a stark reminder that their role often dwindles to a mere checkbox for governance, limiting their impact to a signatory authority.¹⁰

Behind worldwide economic and social development lies a woman whose contribution is, at most times, unacknowledged. [The Global Gender Gap Report, 2023](#) prepared by the World Economic Forum revealed that out of 146 countries, India stood at 127th which was an improvement from the year 2022 where India stood at 135th. While it was also deduced that India had resolved the issue of overall gender gap up to 64.3%, the same report also highlighted that India was still behind in “economic participation and opportunity” as only 36.7% parity has been achieved as of now. Statistics from World Economic Forum’s report also show that only in 17.10% companies in India, women preside over the boardroom.¹¹

The changing perception has led to an improvement in the position of women. 250 companies were surveyed and the results indicated a growing [representation of women in leadership positions in India](#) for the year 2022. While [women as CEOs](#) stood at 55%, which was double of the global average which was only 24%, they also navigated their way to the positions of CFO and CIO, their share being 35% and 9% respectively. That being said, the presence of women at the top executive level is still not at par when compared to men’s position in the senior management roles.

B. Gender Equality And Gender Diversity

Owing to the increase in the number of sexual harassment cases at the workplace, the legislature came up with the Sexual Harassment of Women (Prevention, Prohibition and Redressal) Act, 2013. “Protection from sexual harassment” and “Right to work with dignity” is central to gender equality. An Internal Complaints Committee (“ICC”) is a requisite of this Act. The committee is to be headed by a woman employee of a senior level. Additionally, the Act mandates that the Committee should have at least 50% women members. In such circumstances, having a women director in the boardroom will prevent rooting of a hostile working environment.¹²

Company boards need diversity in order to maintain their standards of good corporate governance. A board which has diversity will be able to effectively carry out its oversight function. Along with this, it will also prevent “groupthink” which tends to arise when directors belong to similar backgrounds and experience. Consequently, the outcome is lack of a “robust challenge” in the process of decision making. Having women on board has reduced the likelihood of fraud, bribery and other corporate scandals that may lead to downfall of any business.¹³ Grant Thornton’s report of 2022 has also made the picture clear that companies having no women in senior management have faced a substantial decline from a good 38% in 2017 to a stooping low of 3% in 2022. This decline underscores the transformation, thereby making female leadership no longer an option but an inevitable reality.¹⁴

¹⁰ Galsanjigmed, Enkhzul, and Tomoki Sekiguchi, ‘Challenges women experience in leadership careers: an integrative review’ (2023) 2 Merits 380.

¹¹ *ibid*.

¹² Vaibhavi Tadwalkar and Soundarya Lahari Vedula, ‘Representation of Women on the Board of Directors under the Companies Act, 2013’ (2021) CULJ 38, 33-47.

¹³ Marie-Anne Birken and Gian Piero Cigna, ‘Gender Diversity on Boards: A Cause for Multilateral Organizations’ (2019) GGMIFI 29, 25-43.

¹⁴ Grant Thornton (n 13).



At this juncture, another important aspect that surfaces is the concept of Glass Ceiling. The notion insinuates that gender biases are stronger as one climbs up the ladder in the corporate sector, than they are at lower levels.¹⁵ A prime example of the notion of Glass Ceiling is the appointment of Sonia Syngal as the CEO of Gap Inc. which was short lived as she left the company only after 2 years. The appointment of Sonia reflects both a breakthrough for women as well as the ongoing challenges surrounding this notion. Syngal's experience underscores the rarity of women, especially women of colour, in CEO positions. To understand it simply, these are unseen barriers that hinder the advancement of women, thereby discriminating against the section who prosper from those who are left behind. One of the prime reasons given by the companies for males dominating the boards is "shortage of experienced and qualified women" at the executive level. Women have to overcome a number of social roadblocks in order to commence their careers. Such hindrances make the prospect of achieving a diverse board a distant dream. Those who make it up to the boardroom are referred to as "survivors."¹⁶

Grant Thornton's report of 2023 on "Women in business 2023: The Push for Parity" revealed that there was an overall increase of 18% from 2018 to 2022 in the share of women representation in senior management in India. But 2023 saw a slight decline from 38% in 2022 to 36%, which indicates that there is still room for improvement.¹⁷ 5% of the mid-market businesses in India do not have any women representation in senior leadership positions.¹⁸ In fact, there are still 50 companies [listed on the National Stock Exchange \(NSE\)](#) which have no women directors.

Apart from Glass Ceiling, a new obstacle has emerged for professional women which is the concept of "[Glass Escalator.](#)" Historically, women have faced a lot of difficulties before they could succeed. Initially, the doors were closed. When they pushed through these doors to make space for themselves in the senior-level management roles, they were hit by a glass ceiling. As women move upwards in the fields which are originally dominated by themselves, their male counterparts have started to effortlessly climb an unseen escalator and glide past them in order to reach straight to the top.

C. Gender Pay Disparity

Women executives present in the leading companies around the globe have overcome various hurdles like harassment at the workplace, gender-based prejudice, and absence of career advancement before they could even make it to the top. But one obstacle that is yet to be tackled is the issue of gender pay gap. The root cause of lack of women in the boardroom is the unequal financial remittance which is given to them for their work. Pay symbolises career progression and high pay connotes individual achievement and boosts self-confidence. In circumstances where men and women have equality in career and thus equal opportunity to access the boardroom, it seems illogical to have differences in factors which determine promotion, including pay. Pay is the consequence of employment-exchange relationships, that still women

¹⁵ Beile Rose Ragins, Bickley Townsend and Mary Mattis, 'Gender gap in the executive suite: CEOs and female executives report on breaking the glass ceiling' (1998) 1 AMP 38.

¹⁶ Grant Thornton (n14).

¹⁷ *ibid.*

¹⁸ *ibid.*



find themselves at a disadvantage in, in the business landscape which is primarily designed by and for male breadwinners.

Traditionally, women lacked the power to bargain for an equal share for themselves as compared to men and were often viewed as “pin money,” supplementing male wages. Although many nations have endorsed the notion of “equal pay for equal value of work,” the gender pay gap still remains persistent. [Motherhood pay gap](#) is another discriminatory practice and also becomes a barrier in promotion. As reported by [Aon’s 2023 report](#), when women reach the post of senior management in India’s tech sector, the gender pay gap is said to range from 28% to 30%. As estimated by the World Economic Forum report 2023, it will still take 131 years for the global gender gap to close, considering the current rate of progress.¹⁹ Further, the report from 2022 estimated that it will take another 100 years to close down the global gender pay gap.²⁰ Companies who believe in equal pay for women when compared to their male counterparts, have high probability of female representation in the boardroom. Additionally, those who are committed to pay equity are active contributors of dismantling gender pay disparity, thereby promoting equality and fairness.

D. Legislative Framework

The Indian legislature took a progressive step in the direction of gender equality as well as women representation in the boardroom and accordingly inserted a provision in the Companies Act, 2013. By way of the second proviso of Section 149(1)²¹, “certain class or classes of companies” are under a statutory obligation to appoint at least one woman director. For the purposes of clarity, Rule 3 of the Companies (Appointment and Qualification of Directors) Rule, 2014²² provides a list of companies who are under a mandate to follow the same. This includes

- Every listed company and every unlisted public company whose paid up share capital is Rs. 100 crore or more or their turnover is 300 crore or more;
- Even a private company who is a subsidiary of a public company might also be categorised as a public company and therefore will be subject to the provisions of Rule 3 of the Companies Rule and accordingly be under a duty to have at least one woman director in the boardroom;
- Additionally, revised Clause 49 of the Listing Agreement²³ also mandates at least one woman director in the boardroom of listed companies.

Coaxed and prodded by the Regulation 17(1) of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements), Amendment 2018,²⁴ listed entities are under an obligation to have an optimum combination of directors and one of them has to be a woman director. To make compliance more effective, Top 500 listed companies are required

¹⁹ World Economic Forum (n 11).

²⁰ *ibid*.

²¹ s 149(1) (n 5).

²² The Companies (Appointment and Qualification of Directors) Rules, 2014, G.S.R. 26(E) r 3.

²³ Listing Agreements, Clause 49 (Revised).

²⁴ SEBI (Listing Obligations and Disclosure Requirement) (Amendment) Regulations, 2018, No. SEBI/LAD-NRO/GN/2018/10 reg 17.1.



to have “at least one independent woman director” by 01 April 2019 and Top 1000 listed companies have to comply with the same by 01 April 2020.

The provision does not extend to those companies who have either listed their specified securities on the Small and Medium Enterprise Exchange or companies whose equity share capital does not exceed Rs. 10 crore and net worth does not exceed Rs. 25 crores. Initially, SEBI’s move was dealt with a great deal of “angst” for it was perceived as forcing gender equality down the corporate throat.²⁵ It evoked a very controversial aura of “reservation.” Only a few hailed this move of SEBI.

Companies who fail to comply with the said mandate are subject to a penalty provided under Section 172 of the Act.²⁶ A maximum fine of Rs. 3,00,000 can be imposed on the defaulting firm. Simultaneously, the concerned officer who was at default will also be fined up to Rs. 1,00,000. Prior to this, the offence was compoundable in nature and also attracted a fine. Companies (Amendment) Act, 2020 decriminalised the act of non-appointment of a female director. SEBI released a [circular](#) on May 03, 2018 which came into effect on September 30, 2018. Following this, the stock exchanges now have the power to levy fine and take appropriate actions against the delinquent companies who fail to comply with the requirements concerning women directors in the boardroom. Whenever any delinquent entity comes into the knowledge of the Ministry of Corporate Affairs (MCA), SEBI or stock exchanges, they proceed to take necessary actions against the concerned entity.

III. STATE OF AFFAIRS IN INDIA

Even after a decade of introduction of these provisions, the idea still seems to be far from reality. During the [budget session](#) of the 2024 held in Lok Sabha, Finance Minister Smt. Nirmala Sitaraman was asked certain questions related to the status of women directors in India which included questions pertaining to the compliance of the provisions so far and the penalty collected thereof from the companies who failed to comply with the said mandate even after a decade. The response to the question has been summarised and analysed hereinbelow.

²⁵ Bringing Women on Board: Corporate India is wrong to drag its feet on appointment of women directors (n4).

²⁶ The Companies Act, 2013 (18 of 2013) s 172.

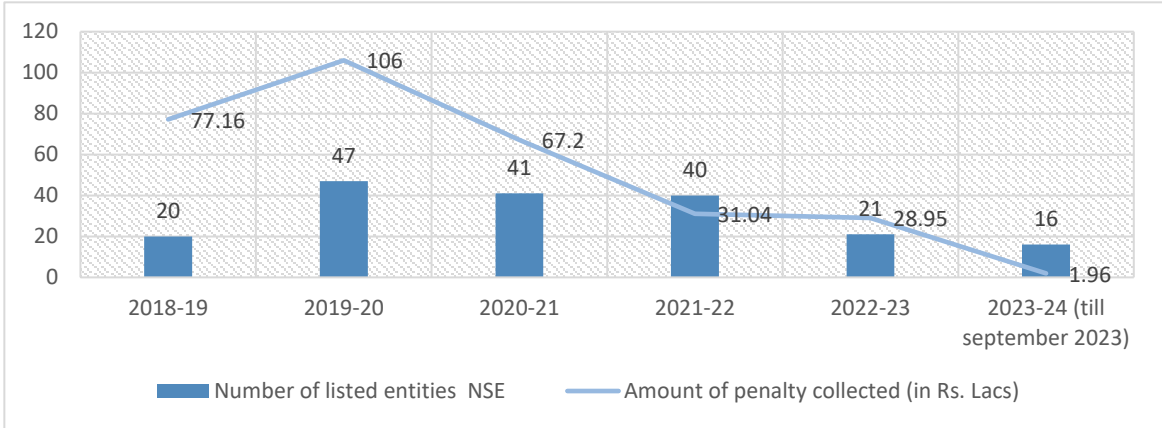


Figure 1 shows the Number of listed entities in the NSE which were penalized and the penalty collected from them

The number of companies listed with the NSE to face penalty for the non-appointment of women directors has seen a drastic decrease from financial year 2019-2020 to financial year 2023-2024. In the year 2019-2020 there was a spike in the number of companies listed with the NSE paying penalty to the MCA for non-compliance which was almost 56% higher from FY 2018-2019. The amount of penalty which was collected also increased from 77.16 lacs to 1.06 Crore in a span of one financial year. The highest penalty of 1.06 Crore was collected by the MCA in the financial year of 2019-2020 and the least amount of penalty collected was in the year 2023-2024 which was to the tune of Rs.1.96 lacs only. The number of companies on which the penalty was imposed slowly decreased in a period of five financial years. The [least number of companies](#) to be imposed with penalty and registered with NSE was 16 as seen in the financial year of 2023-2024 (Sept 2023). [Figure 1]

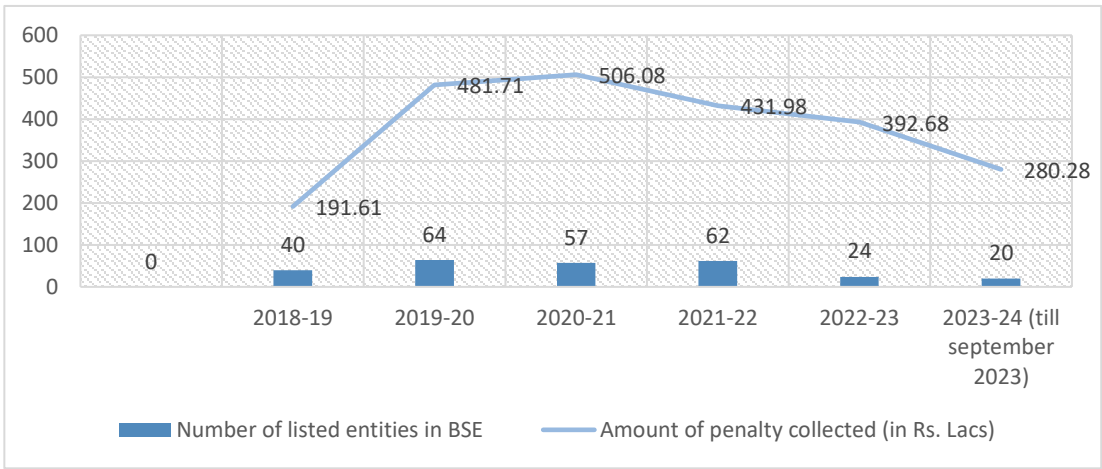


Figure 2 shows the Number of listed entities in the BSE which were penalized and the penalty collected from them



The number of companies listed with BSE to face penalty for the non-appointment of women directors saw a hike from financial year 2018-19 to 2019-20. Financial year 2019-20 recorded the maximum number of companies being penalised by SEBI which was 64. Subsequently, there was a decline in the companies being penalised from financial year 2019-20 to 2020-21. Surprisingly, there was a hike in the financial year 2021-22 with 62 companies being penalised which was the pandemic year. Post financial year 2021-22 there has been a constant decline in the number of companies being penalised. The highest penalty collected by stock exchanges was Rs. 5.06 Crores which was in the financial year 2020-21 (pandemic year) even though lesser companies (57) were penalised as compared to financial year 2019-20 (64). The lowest penalty collected was Rs. 1.91 Crore in the financial year 2018-19 where 40 companies were penalised. The number of companies on which the penalty was imposed slowly decreased in a period of six financial years but at a fluctuating rate.²⁷ [Figure 2]

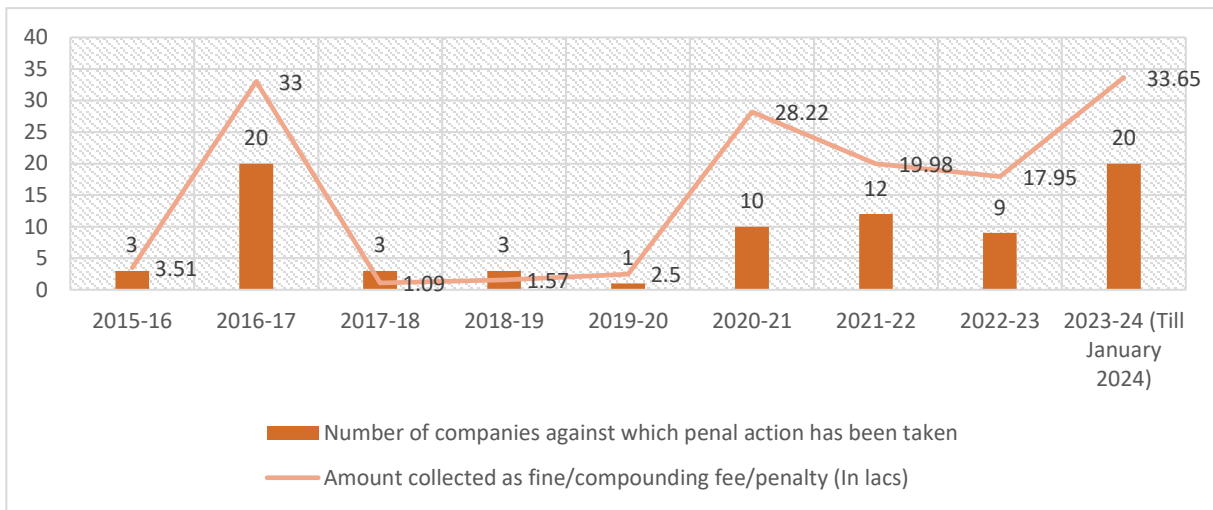


Figure 3 shows the number of companies which were penalized for not having a women director and it also shows the fine collected from them

The following data shows the number of companies which were penalised by the Ministry of Corporate Affair for not having women directors on the board and the amount was collected in the form of fine, compounding fee or penalty. The maximum number of companies penalised were 20 in the financial year 2016-17 as well as 2023-24 (Till January 2024) and the lowest being 1 which was in the year 2019-20. There was a steep decline in the number of companies penalised from financial year 2017-18 till financial year 2019-20. Post 2019-20, there has been a hike for 2 years basically FY 21 and FY 22 which were the Covid-19 pandemic years. After a decline in financial year 2022-23 there was again an increase in the number of companies penalised²⁸. The maximum penalty collected by the Ministry of Corporate Affair was Rs. 33.65 Lakhs which is in the current financial year 2023-24 (till January 2024) and the lowest being 1.09 Lakhs which was in the financial year 2017-18. [Figure 3]

²⁷ *ibid.*

²⁸ *ibid.*

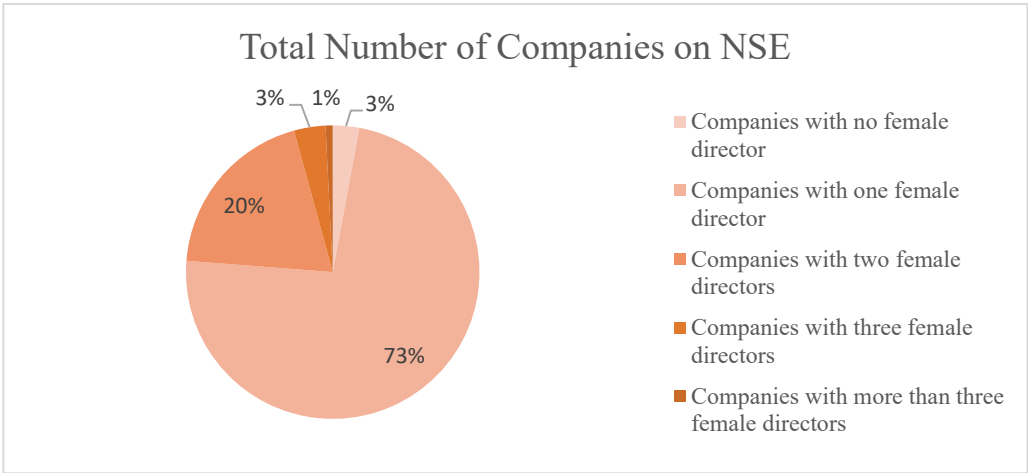


Figure 4 shows a pie chart of the Total number of Companies listed on the NSE and their status with respect to mandate of Woman Director (2019)

Companies in India have barely inducted more than the statutory limit of one woman director prescribed by the Companies Act, 2013 and other allied provisions. By the end of 2019, only 1,311 companies out of a total of 1,788 companies which were listed on the National Stock Exchange had complied with the statutory mandate. It is disheartening to note that [only 1% of the companies were progressive](#) enough to have more than three women directors in their board. [Figure 4]

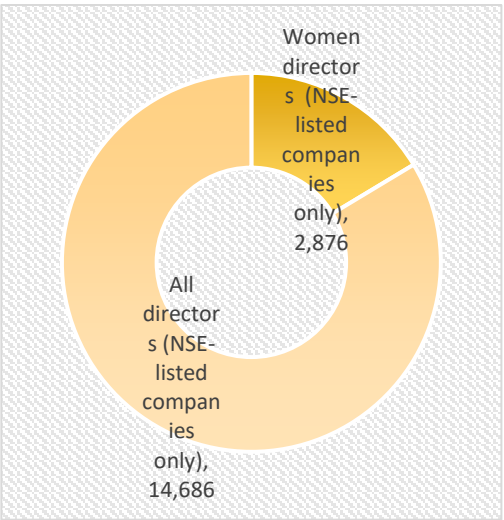


Figure 5.1 shows total number of directors and women directors in NSE-listed companies (2024)

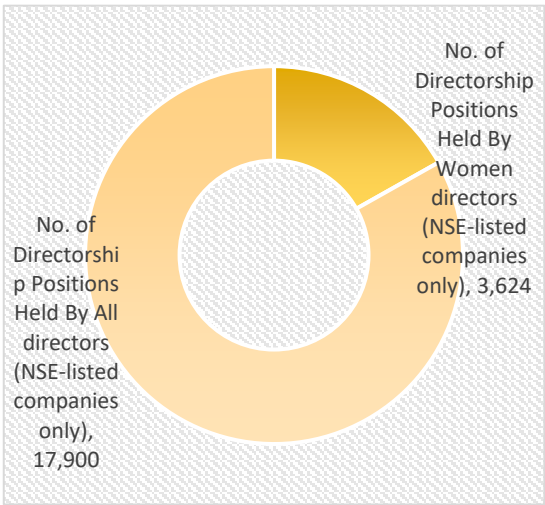


Figure 5.2 shows total number of directorship positions held and number of directorship positions held by women in NSE-listed companies (2024).

Statistics from Prime InfoBase showcase the current status of women directors (2024) when compared to the total number of directors. The data takes into consideration 2,284 NSE-listed companies as well as 183 Unlisted financial sector companies. The total number of Directors



in [NSE-listed companies](#) were 14,686. On the other hand, total number of women directors were only 2,876 which is rather a very low representation of women in the boardroom. This means only 19.58% women occupy seats in top level management, that is, in the boardroom. When a comparison is made between total number directorship positions held and women directors holding directorship position, an increase of 0.66% is seen, that is 20.24% which is not a sufficient number either. [Figure 5]

Indian Oil and ONGC are notorious for non-compliance with these mandates as they have been failing to make provisions for woman directors for the third quarter in a row. These PSUs, along with 4 other state-owned undertakings have been cumulatively [slapped with a hefty fine](#) of Rs. 32.5 lakhs for such non-compliance. ONGC have been quick in throwing the central government under the bus as they blame them for such administrative shortcomings. On the other hand, in the private sector, JM Financials and Shankar Packagings Krishna Solvecham have been under the radar for quite some time now as they were fined Rs. 4,85,000 for [non-compliance with said provisions](#). Some of the key officials were also charged separately which goes to show the emphasis the Indian government is putting to drive more woman directors into the boardroom.

IV. INTERNATIONAL PERSPECTIVE

Different world jurisdictions have ensured the presence of women in their company boardrooms by enacting suitable and strict legislations. The state of affairs in other countries is much better than that in India. The authors compare the data of Malaysia which is another developing South-Asian country with that of India. Further, they have also compared it with that of the European Union (OECD Countries) which boasts a massive increase in female representation to that of India.

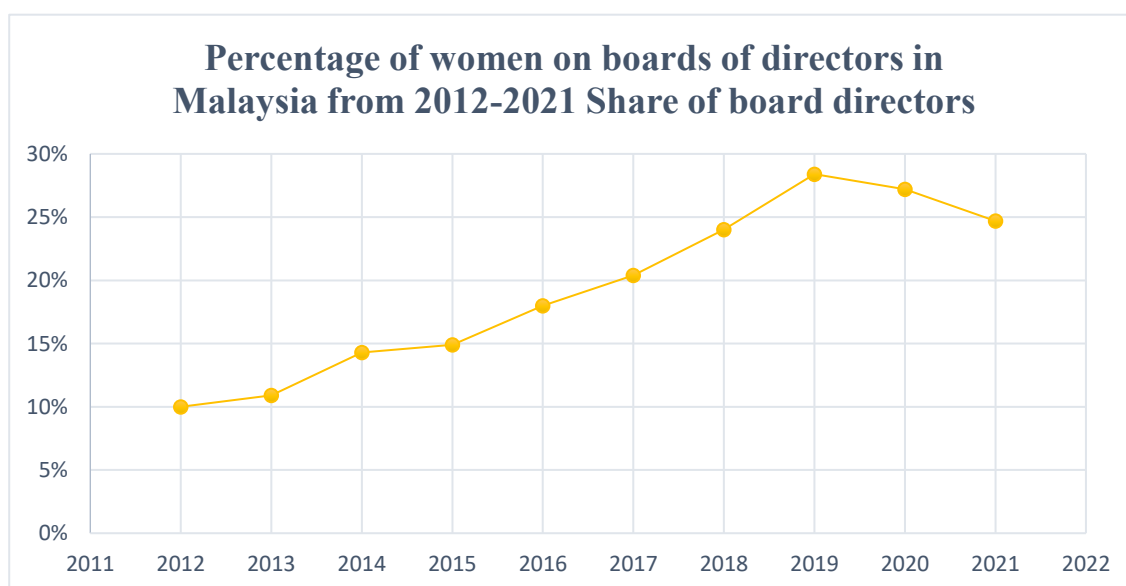


Figure 6 shows the percentage of women on the board of directors in companies in Malaysia during recent years



Malaysia is one such country where the status of women representation in the boardroom is much better than that in India. The [Malaysian Code on Corporate Governance](#) was amended in the year 2017 and stated that board of companies must comprise at least 30% women directors. Even if there are 10 directors on a board, 3 of them must be women. This quota is much higher than a mere ‘at least 1 women director’ in India and this shows their dedication towards equal gender representation and not just another compliance that has to be followed by companies.

According to the graph, there was a slow growth in women representation from the year 2011-17. This growth shot up by 5% year after year after the amendment, as companies now had to comply with more stringent measures which ultimately proved beneficial for equality in the boardroom. This growth was however, short-lengthened as with this statistic saw a dip with the onset of the COVID era but the overall growth shows a much better position than that of India. Additionally, although the code does not provide for any specific sanction in case of non-compliance with the mandate, the Malaysian Prime Minister had warned the listed companies that they would be named and shamed in case of non-compliance by 2018.²⁹ [Figure 6].

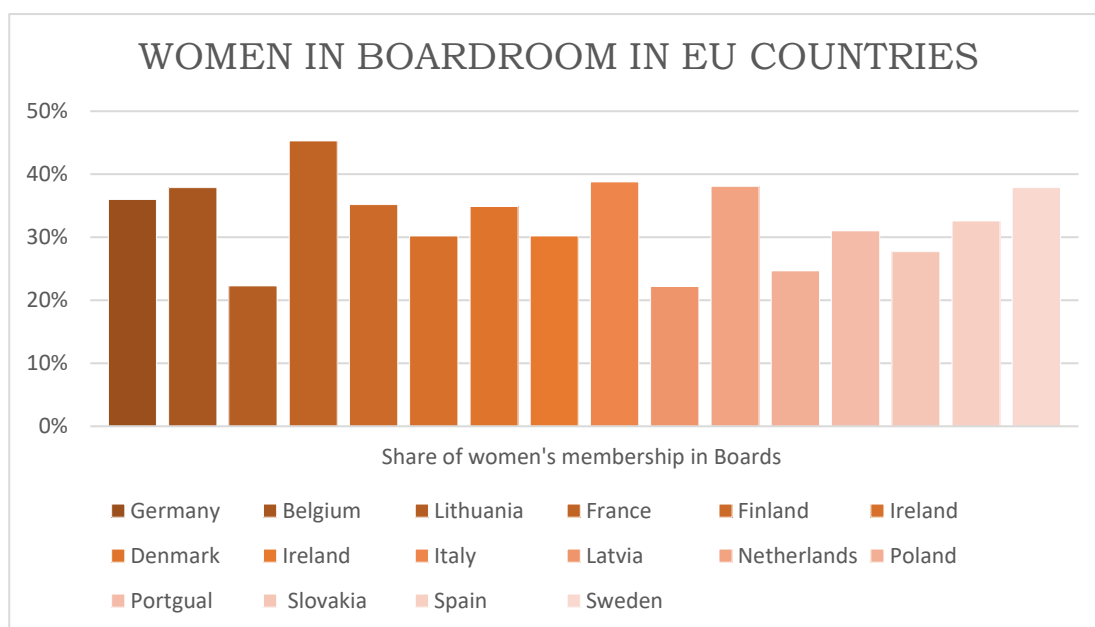


Figure 7 shows the percentage of women in boardrooms in the European Union

The European Union (EU) is a union between 27 countries. Multiple European Union (EU) member states had developed their own legislations for having a gender diverse boardroom. A proposal was submitted in November 2012 by the European Commission for imposing gender quotas and after 10 years of constant negotiations, an agreement was arrived at by all the member states which is now a mandatory requirement.

The European Union paints the best picture in this regard, with France topping the charts of any other country in the EU with a staggering 45.3% and the lowest of them all being Latvia with 22.20% women in the boardrooms. The state of affairs in the EU are much better with an

²⁹ Vivian Chen and Michelle Welsh, ‘Gender Diversity on Malaysian Corporate Boards: A Law And Social Movements Perspective’ (2022) JLS 49, 23-47.



average of 33% women in the boardroom as compared to India where the average participation is a mere 17%.³⁰

Further, the parliament has passed a resolution that every company has to comply with the rules of having 33% female directors at the executive level and 40% female directors at the non-executive level by June 2026.³¹ This resolution has been passed so that every country can be at par and provide a united front in terms of implementation of equal representation in the boardroom. [Figure 7]. This goes to show that India has a much larger task on their plate than other developing countries in this regard. India needs to adopt pro-gender and pro-women policies to tackle this issue and make a name for themselves as a leader of women's participation in the boardroom.

V. CONCLUSION

The 21st Century has witnessed a shift towards gender parity but a lot has to be done before the issue of gender inequality is completely eliminated. Various proactive measures have been taken by the government and legislature both, at the national and international level, to promote gender equality in the boardrooms. This progress is bound to vary between developed nations and developing nations. While one talks about developing nations, it would be pertinent to note that there still exists a stark difference between women representation on boards in India and Malaysia. The prime reason behind such a difference is the psyche of the legislatures of both these countries. Countries in the European Union are doing much better when it comes to gender equality as well as women representation in the boardroom.

Sugar Cosmetics acts a pioneer which paves the way for women like Vineeta Singh to act as the frontiers in this debate. The immense popularity of this brand among the masses as well as the reputation of the brand of a 'women lead enterprise' marks a shift towards gender equality.

Nita Ambani, the director of Asia's biggest philanthropic non-profit organisation, Reliance Foundation, is yet another great role model for women all around the globe. In the 2024 Miss World Beauty Pageant, she was awarded 'Beauty With a Purpose Humanitarian' award for her contribution towards social work and philanthropy.

These women are leading examples of people who have faced a lot of flak to rise up the ladder and make their presence felt in the boardroom. India is ready to take cue from foreign companies and lead by example.

Corporate structures are complex and intricate. In India, it has been noticed that, usually, only family oriented or controlled businesses allow women in key crucial positions and it is not for the 'outsiders.' Even the regulatory mechanisms have their own limitations and it is an easy way out for the companies to pay a penalty or to nominate a member who would not actively contribute or participate.

Nevertheless, there are also companies like Larsen and Toubro (L&T) which not only have incorporated women friendly workplaces by bringing them into the fold even after a career

³⁰ World Economic Forum (n11).

³¹ Directive (EU) 2022/2381 of the European Parliament and of the Council, art 5.



break but have also appointed them to key positions and eased their entries to its boardroom. The boardrooms are expected to be inclusive and the increase of women participation will provide a perspective which can cover all bases for the incorporation. India has always aped and looked up to practices followed in European countries. They even want to plan holidays in the Alps, then why not consider it as a cue and develop their mechanism to be as robust as those followed by European countries by integrating more and more females in the boardrooms. The mechanism can be made more effective by regulatory steps made compulsory by the MCA and monitored from time to time as a filing annual requirement of the companies.

[Women can bring a fresh perspective](#) to the table and have been internationally accepted as multitask masters. It can also enable them to grow their skills and contribute to the growing economy of the country. It is estimated that closing the gender gap could give the global economy a USD 7 trillion boost. India has always been inclusive and the determination of the Indian Companies could be made more resolute with the fact that the Minister for Finance of the country is a woman who has constantly worked for the thriving details of the Indian economy.

The Companies Act, 2013 by way of Section 149(1) has opened the doors for many women to pave their way towards a successful career in the corporate sector. However, this section, although being in the favour of women, has found its way to being a mere compliance rather than a guiding principle towards women equality and equal gender representation.

By the looks of it, passing a mere provision in favour of women and not working on the implementation of said provision is one of the major reasons why women suffer from a widening pay gap and discrimination across all sectors of the economy. The corporate sector can have a bigger role to play by acting as a catalyst for social change.³²

Further, the [report](#) also suggests that women are not only as capable as men while making hard business decisions but also bring with them a fresh perspective to problems that were previously tackled by an ‘old-boys network.’

- Women significantly improve **decision making** in a business especially when it comes to a Direct to Consumer (D2C) brand as they are the ones who make the consumer decisions at home. Women certainly understand the rationale of a consumer while buying a product and incorporate the same with their brand in the form of better offers, targeted marketing or building a close connection with the consumer.³³
- Women are considered to possess better **emotional intelligence** as compared to men and this is one of the reasons why they are crucial for effective leadership and management. They have the ability to understand and manage emotions in themselves and others which can lead to a better communication network between the team.
- Women who reach the top of a corporate setup are often idolized as **role models** among the female junior employees as it empowers them to be motivated and stay focused towards a pre-existing goal that has been reached by other women. This empowers the next generation of women to reach to the top.

³²Pradip Kumar Das, ‘Impact of Women Directors on Corporate Financial Performance-Indian Context’ (2019) WJSSR 329.

³³ Marilyn Clarke, ‘Advancing women's careers through leadership development programs’ (2011) 5 ER 501.



- When it comes to **brand building**, an imperative resource that signals that the company follows a commitment towards **diversity and inclusivity** is a woman. Featuring a female leader in the brand's top-level management and decision-making process can demonstrate integrity, transparency and a commitment towards ethical business practice.

In addition to the above qualitative contributions, women on boards also contribute to enhanced profits for companies.

According to the [International Labour Organization's \(ILO\) Report on Women on Boards](#), the global GDP would see a rise of about 5.8 trillion dollars by 2025 by advancing women's rights in the corporate sector. This additional boost towards the GDP is an opportunity cost which can easily be tapped into by promoting gender neutral policies that strive towards equal gender representation.

Further, in India alone, the annual growth rate of the economy would improve by 2.4% per year according to OECD³⁴. Strengthening the laws pertaining to equal representation in the boardroom could see this growth being attached to the economy without any major pitfalls that may arise due to the changes in these laws.

Section 172 of the Companies Act, 2013³⁵ provides for punishment of non-compliance of Section 149(1) of said act. Section 172 states that any company along with its employees shall be liable for fine of a minimum of Rs. 50,000 and not exceeding Rs. 3 lacs. This fine, while being a significant amount for a small company, is a very minute expense that can be written off as a 'petty' expense for companies whose net profits exceed 10 Crore Rupees. The changes should introduce a '**pro-rata**' approach to the fine where each company shall be liable to pay the fine according to their revenue and not a straight-jacketed approach of a similar fine for each company. This approach would force them to comply with the rules as it would hit them where it hurts the most, profits of the firm.

Companies that do not have any women directors get away with this penalty after paying the lumpsum fine only once and the Ministry of Corporate Affairs (MCA) is also free from their statutory duty after collection of said fine. This, however, does not improve the current standings of women representation in the boardroom as most companies capitalize on this grey area by paying the penalty only once. The ministry should introduce these changes to the laws so that this penalty is liable to be paid for failure to comply in each Financial Year which would force companies to comply with such rules and completely eliminate this loophole.

Top management should support this change with the introduction of **Career Advancement Programs (CAP)** for women which make sure that such discrimination does not go unnoticed and the 'old-boys network' comes to an end.³⁶

It is the 21st century, the century where women are seen excelling in almost every sphere of work. Yet, women are struggling for equal rights. While legislations play a crucial role and bring with them a sense of fear in the form of penalty, how far are they helping? People in the corporate sector need to understand that transformation begins internally. The idea of equality

³⁴ Prime Infobase (n40).

³⁵ s 172 (n33).

³⁶ Lisa R. Brown, 'Diversity Management, Career Planning, and Career Advancement for Women' (2020) WU 120.



must be ingrained in all spheres, like decision-making and daily practices, and not only be seen as an enforced rule. It is only when people from the corporate sector see men and women as equal and give equals recognition to their capabilities that the legislation can be of any help. The change ought to start from the ground level, like hiring practices, and move upwards by providing them with the promotion they deserve. Mentorship programs will act as a catalyst in supporting women. India still awaits that day when these laws that aim at enforcing equality will no longer be needed because of the fact that equality is no longer an exception but a standard.



ALGORITHMS AND INEQUALITY: REGULATING GENDER BIAS IN THE GIG ECONOMY

By Jasoon Chelat

Abstract

For women workers, the gig economy has been said to hold two important advantages: first, the flexible nature of work enabling them to balance between household work and employment, and second, algorithmic allocation and management of work enables opportunities without reference to gender. Women are taking part in the gig economy in greater numbers (in domestic work, beautician services, and driving and/or delivery) and there have been reported of benefits such as lower attrition rates and better productivity. However, women workers also consistently earn less than their male counterparts in gig work (8-10% lesser). Less women work in gig work for longer periods of time, and they have less access to opportunities for skill development. As such, there are unidentified biases in the structure of gig work which make it less advantageous to women workers. This paper explores the reasons for the gender pay gap in gig work through an examination of the gendered effects of incentive models in gig work, which disadvantage women workers who have limited time for continuous work, and other socio-cultural norms surrounding women's work (such as the primary responsibility of care work, and domestic chores) which affects their participation in gig work. This paper presents ways to reduce this gender bias through regulations that provide better representation of women workers' voices, including in the design and development of digital tools. In Indian labour law, the inclusion of gig workers is limited to provisions in the Social Security Code, 2020. This paper will explore how this can be expanded to include the right to collective representation for women workers to negotiate better terms for themselves.

Keywords: gig work, algorithmic discrimination, gender discrimination, equal pay, labour law.



I. INTRODUCTION

The gig economy in India has shown rapid growth, expanding to services such as housework, delivery, transport, and the beauty industry, among others. According to the Niti Aayog, the Government's public policy think tank, this trajectory is set to continue, with the estimated 77 lakh workers currently engaged in gig work expected to increase to 235 lakh workers by the year 2029-30.¹ Gig work is not only here to stay, but is also projected as the future of work: Niti Aayog's policy brief, prepared in 2022, reiterates the immense potential for job creation in the gig economy, as one of its major advantages. Recently, regulatory attention has shifted to gig work, with states such as Rajasthan enacting laws to regulate gig work, and gig and platform work being included in Central labour law such as the 'Code on Social Security, 2020'.

Gig work is also seen as an important avenue for women's participation in the labour market, outside of unpaid work in the household. This is particularly relevant considering women's participation in the labour force has shown a consistent decline in recent decades² ([with some improvement in 2022-23](#)). In India, and generally in the global south, the gig economy operates in a space similar to the informal economy, with diverse work relationships outside the ambit of formal labour regulations. Women workers make up the majority of informal workers in India, and out of the total working women, as high as 82% are informal workers.³ In contrast to countries in the West where [gig work](#) is associated mainly with new arrangements of work different from the standard, formal, regulated work, in India, gig work is similar to several other forms of informal work, with variable hours, and largely unregulated working conditions. This is also reflected in Niti Aayog's definition of gig work, where they understand platform-based gig workers, as a subset of gig work. Non-platform gig workers are generally casual labourers or own account workers, who are generally understood to be in the informal sector. This paper focuses on platform-based, or digitally mediated gig work, which consists of work such as ride-sharing, delivery, beauticians, cleaning services etc, that are arranged and managed through digital platforms.

For women workers, this form of digitally mediated gig work, as described above, has been said to hold two important advantages: first, the flexible nature of work enables them to balance between household work and employment, and second, algorithmic allocation and management of work enables opportunities without reference to gender. Since women perform most of the household work⁴ and care work within the family, it seems reasonable that they may be more inclined towards work arrangements where there is flexibility with respect to a particular workplace, hours of work and work timings. Since algorithms can, at least theoretically, be designed to ignore the gender of a worker while making decisions, they are also *perceived* to be comparatively free of gender bias. Women are taking part in the gig

¹ NITI Aayog, 'India's Booming Gig and Platform Economy', (Policy Brief, 2022) 3.

² Workforce participation of women from rural and peri-urban India has fallen to 31% in 2017 from 54% in 1987. See Kapsos, S., Silbermann, A. and Bourmpoula, E., 2014. Why is female labour force participation declining so sharply in India? ILO, Geneva, 1.

³ Bonnet, F., Vanek, J. and Chen, M., 2019. Women and men in the informal economy: A statistical brief. International Labour Office, Geneva, 20.

⁴ Ministry of Statistics & Programme Implementation, NSS Report: Time Use in India- 2019 (Report of the Time Use Survey, 2019).



economy in greater numbers (domestic work, beautician services, driving and/or delivery) and there have been reports of benefits such as lower attrition rates and better productivity. However, [women workers](#) also consistently earn less than their male counterparts in gig work (8-10% lesser). Less women work in gig work for longer periods of time, and they have less access to opportunities for skill development. As such, there are unidentified biases in the structure of gig work which make it less advantageous to women workers.

There is a growing demand for worker status for platform-based gig workers, and jurisdictions are experimenting with extending different labour law regulations to platform-based gig workers. In a landmark case, the Supreme Court in the United Kingdom held that Uber drivers were ‘workers’ under labour law.⁵ It is important to note that ‘worker’ in this case is a specific category within the UK labour law, different from ‘employee’. Thus, some platform-based gig workers in the UK may be eligible for certain rights (such as the mandated national living wage), but not others.⁶ Other countries have also tried to work with an intermediate category’ with limited rights and protections under labour law, such as the ‘[dependent contractor](#)’ in Canada, and with varying degrees of success, in Italy and Spain. The proposal for an EU Platform Work Directive⁷ and California’s AB5⁸ law use tests related to control and dependency to determine whether gig workers are eligible for protections. In India, the attempt to bring in legal protections for gig and platform workers has been so far been based on social security measures. This paper examines the extension of non-discriminatory provisions in gig work, in addition to social security, through two of the fundamental principles of labour law: minimum wages and equal pay for equal work.

This paper explores the reasons for the gender pay gap in digitally mediated gig work in three sections, which focus on women workers’ entitlements in gig and platform work, the gendered effects of gig work, and provisions that can be used to reduce gender bias in gig work. First, the position of digitally mediated gig work under the present laws (the Code on Wages, 2019, the Code on Social Security, 2020, and relevant case law relating to employment relationships) shall be examined, focusing on protective provisions against gendered discrimination at work. This is to illustrate that the exclusion of platform-based gig workers from the ambit of labour laws makes it difficult for women workers to claim basic workers’ entitlements such as minimum wages, equal pay for equal work, or wage settlements through collective bargaining. Secondly, the paper explores whether the gendered effects of lower wages can be adequately explained by incentive models in gig work, which disadvantage women workers who have limited time for continuous work, and other socio-cultural norms surrounding women’s work (such as the primary responsibility of care work, and domestic chores) which affects their participation in platform-based gig work. In the final section, the paper presents ways to reduce

⁵ *Uber BV v Aslam* [2021] UKSC 5.

⁶ *Independent Workers Union of Great Britain (Appellant) v Central Arbitration Committee and another (Respondents)* [2023] UKSC 43. Deliveroo workers, who attempted to come under the term ‘worker’ and collective bargaining rights were denied by the apex court. This however, might be limited to the specific model of contract that Deliveroo has with its riders.

⁷ European Commission, ‘Proposal for A Directive of The European Parliament and of the Council on Improving Working Conditions in Platform Work’, EC COM (2021) 762 final.

⁸ *Dynamex Operations W. v Superior Court and Charles Lee, Real Party in Interest*, 4 Cal.5th 903 (Cal. 2018)



this gender bias through regulations that provide better representation of women workers' voices, including in the design and development of digital tools.

II. CURRENT LEGAL STATUS OF GIG WORKERS

Before going into the factors in platform-based gig work that may have a discriminatory effect on women workers, it is important to examine their status within the present legal scenario. The attempt in this section is to illustrate how the exclusion of platform-based gig workers from existing labour regulations, especially those related to wages, is particularly problematic for women workers.

Currently, the only legislation that refers to platform-based gig workers is the Code on Social Security, 2020 (with the notable exception⁹ of the state-level law, the Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023). The Code on Social Security, 2020, defines 'platform work' under Section 2 (60):

"(60) "Platform work" means a work arrangement outside of a traditional employer-employee relationship in which organisations or individuals use an online platform to access other organisations or individuals to solve specific problems or to provide specific services or any such other activities which may be notified by the Central Government, in exchange for payment; ”¹⁰

The law then defines a platform worker as a person engaged in platform work. The schedule of the legislation refers to the most important areas of platform work such as ride-sharing, delivery, professional services, logistics, and *any other goods and services platform*. This definition, though worded broadly, specifically mentions that platform workers are '*outside of the traditional employer-employee relationship*'. This sets platform workers as a separate class of work or 'work arrangement', but at the same time, implicitly indicates an ambiguity in their status as 'employees'. This excludes them from legislations that may be applicable to those who are considered workers/ employees, due to the existence of an employment relationship. Issues with clarity of employment status may arise where gig workers engage in multiple jobs simultaneously and engage with multiple platforms, and the part-time and flexible nature of their engagement.

It is also important to note that the Code on Social Security, 2020, does not specifically mention 'domestic work' in the schedule of platform work, an area where there are more women workers. The Code also does not refer to domestic work directly (except under the term 'wage worker'), and there is no explicit inclusion of a private household as a 'workplace' (except in the case of the workers' home, under home-based work). This exclusion is relevant also for beautician services, which are typically rendered in private households of clients.

⁹ The Union Government has also issued guidelines called the 'Motor Vehicles Aggregators Guidelines, 2020, under the Motor Vehicles Act, 1988. The guidelines are recommendatory in nature, and refer to limits working/log-in hours of over 12 hours, algorithmic transparency, and term insurance and health insurance for gig workers. Some states (West Bengal, New Delhi) have also issued guidelines.

¹⁰ Code on Social Security, 2020, s 60.



In terms of wages, the relevant instrument is the ‘Code on Wages, 2019’. The ‘Code on Wages, 2019’, brings together the Minimum Wages Act, 1948, the Payment of Wages Act, 1936, the Payment of Bonus Act, 1965, and the Equal Remuneration Act, 1976, into one single enactment. Most importantly, it does away with the system of ‘schedules’ for the applicability of minimum wages. Under the Minimum Wages Act, 1948, the right to minimum wages is not universal, but applicable only to those employments that are listed in the Schedule to the Act. Thus, this change should ideally mean that this right would now extend to all workers. However, Section 5 of the Code, which makes this change is worded ‘*No employer shall pay to any employee wages less than the minimum rate of wages notified by the appropriate Government*’.¹¹ Section 3 of the Code, prohibits discrimination in matters related to wages on the basis of gender, and also uses the term ‘employee’.¹²

Therefore, the emphasis is on the term ‘employee’ rather than worker, and a continued emphasis on the existence of an ‘employment relationship’. If we examine the term ‘employee’ in the Code, it is defined as “*any person (other than an apprentice engaged under the Apprentices Act, 1961), employed on wages by an establishment to do any skilled, semi-skilled or unskilled, manual, operational, supervisory, managerial, administrative, technical or clerical work for hire or reward*”¹³. In Indian labour law, Courts have consistently narrowed down the definition of the terms ‘unskilled, manual, operations, supervisory, managerial, administrative, technical, or clerical’ and removed from its ambit several forms of work such as teachers¹⁴, theatre artists,¹⁵ and medical representatives¹⁶. Thus, in the absence of a specific provision, the application of the term ‘employee’ is unlikely to apply to platform workers. Unfortunately, the Code on Wages, 2019 contains no references to gig and platform workers.

There is also ambiguity in the Code in relation to the terms ‘worker’ and ‘employee’. In provisions for fixing minimum wages (Section 6(6) and Section 7) and floor wage (Section 9) the term ‘worker’ is used, instead of the employee. In the absence of an explicit inclusion, this further problematizes the ease of extension of a minimum wage right to platform workers. The Code also does not include domestic workers (where women predominate, in platform, and non-platform-based work) despite their inclusion in several state-level minimum wage notifications. This non-extension of minimum wages to gig and platform work is particularly significant for women workers. The initial justification for minimum wages for ‘sweated work’ (which found a place in the schedules, as opposed to non-scheduled employments) was that wages could not otherwise be fixed adequately due to the weak bargaining position of workers.¹⁷ Women workers in platform-based gig work are in a particularly vulnerable position as they face more barriers to collective bargaining, and lesser representation in platform collectives that do exist.

¹¹ Code on Wages, 2019, s 5.

¹² Code on Wages, 2019, s 3.

¹³ Code on Wages, 2019, s 2 (k).

¹⁴ *Ahmedabad Pvt Primary Teachers’ Association v Administrative Officer* (2004) 1 SCC 755.

¹⁵ *Bharat Bhawan Trust v Bharat Bhawan Artists’ Association* 2001 (7) SCC 630.

¹⁶ *HR Adyanthaya v Sandoz (India) Ltd* 1994 (5) SCC 737.

¹⁷ Kamala Sankaran, Towards Greater inclusivity and equality in minimum wages: The case of piece rate wages, (2022), International Labour Office. Geneva.



The Draft Rules on the Code on Wages, 2019, also retains the differentiation between ‘skilled’ and ‘unskilled’ work, which reinforces the payment of lower wages in ‘unskilled labour’ where women generally predominate.¹⁸ To be considered ‘skilled’, a worker needs to go through certified training or courses. In the next section, we will discuss how this is particularly problematic for women in platform work as i) they are engaged predominantly in domestic work, considered unskilled, and where training programs are seen to be superfluous, and (ii) training programs by platforms for women workers are inaccessible and often expensive. If platform-based gig workers were included under the ambit of minimum wage protections, the conversation on wages could have progressed to suitable guidelines which determine the norms of fixing minimum wages for such work.

A. Indian Jurisprudence on the ‘employer-employee relationship’

If we examine general labour law decisions on what constitutes an employment relationship, and whether it is inclusive of platform-based gig workers, we are met with more ambiguity. The stance taken by platforms in general that platform-based workers are ‘independent contractors’ can be argued against based on several cases that have broadened the ambit of the control test for the determination of the employment relationship. The control test, essentially examines whether the ‘employer’ exerts control over the way the work is done by the employee’. There are two elements that are relevant to this determination: whether the employer instructs the worker as to what work is to be done, but also the manner in which it is done. The extent of control determines whether an employer-employee relationship exists between them. Dharangadhara Chemical Works¹⁹ states that the element of control would depend on nature of the work, bringing in the relevance of the monitoring of workers by platform companies. Platforms regulate worker behaviour through ‘[mandatory](#)’ requirements for workers to be online for certain periods of time (in delivery work for instance, this means ‘lunch/dinner hour peaks’), log-in ‘shifts’ (sometimes over 10 hours a day), wear the company uniform, and other instructions on how to perform services etc. If workers do not meet these requirements, they lose the eligibility for incentives, a crucial component of their pay. Silver Jubilee Training House v Chief Inspector of Shops²⁰, makes it clear that multiple employers, as the case often is in platform work, does not necessarily preclude the existence of an employment relationship (*‘A servant need not be under the exclusive control of one master. He can be employed under more than one employer’*²¹). Hussainbhai v Alath Factory²² already puts down ‘economic control’ as a relevant factor for determining the relationship of employment (*‘economic control over the workers’ subsistence, skill, and continued employment’*²³). However, it is difficult to say that there has been a consistent departure from the requirement of direct control.²⁴ In 2017, the Delhi Commercial Drivers Union filed a

¹⁸ Sankaran (n 23).

¹⁹ *Dharangadhara Chemical Works Ltd. v State of Saurashtra* 1957 SCR 152.

²⁰ *Silver Jubilee Tailoring House v Chief Inspector of Shops & Establishments* (1974) 3 SCC 498.

²¹ *Ibid.*

²² 1978 4 SCC 257.

²³ *Hussainbhai, Calicut v Alath Factory Thozhilali Union* [1978] SCR (3)1073.

²⁴ Bhattacharjee (n 19).



petition in the Delhi High Court seeking employment status for those working for aggregators such as Ola and Uber, but this was later withdrawn,²⁵ without a definitive pronouncement.

Thus, the exclusion of platform workers from the ambit of labour laws puts them outside one of the most basic of labour law protections: minimum wages, and non-discrimination in employment. In India, [platforms](#) have not been able to show that workers earn more than a minimum wage, and [only a few have a minimum wage policy](#) in place. Although similar data is not available for India, in [other jurisdictions studies](#) have shown that a majority of platform-based workers earn less than minimum wages. If women workers consistently earn less in platform work, and a majority of platform workers earn less than minimum wages, it is more likely than not that the effect of these exclusions falls disproportionately on women workers.

III. JURISPRUDENCE ON ‘EQUAL PAY’ AND THE GENDER WAGE GAP IN PLATFORM-BASED GIG WORK

Examining the jurisprudence around ‘equal pay for equal work’, can help us understand what kind of pay discrimination is considered violative of the law in India. If the gender bias in platform-based gig work is outside the ambit of the mandate of equal pay as decided by the courts, then it admittedly makes the argument for its regulation under labour law weaker. Of course, it may still be argued that the principle of equal pay should then be expanded to cover new atypical work arrangements such as platform-based work. In any case, as a general principle of work law the importance of the mandate of ‘equal pay’ cannot be overestimated. It has its place in jurisdictions around the world and in international instruments such as the Universal Declaration of Human Rights, Article 7 of the International Covenant on Economic and Cultural Rights, 1966, and the ILO Convention 111 (ratified by India in September 1958). Although it has not explicitly been included in the constitution as a fundamental right, ‘equal pay for equal work’ is included Article 39 (d) as a Directive Principle, and has been read into the interpretation of fundamental rights related to equality, such as Article 14, and Article 16.²⁶

A. ‘Same work or work of a similar nature under the Code on Wages, 2019’

The most significant part of the prohibition against gender discrimination in pay is that it refers to ‘same work or work of a similar nature’. Section 2 (v) of the Code on Wages, defines ‘same work or work of a similar nature’ as that for “which the skill, effort, experience, and responsibility required are the same”, and are performed “under similar working conditions”. If there is any difference in these factors, and if they are not of ‘practical importance’ in relation to employment, then the work is still considered the same or similar work. The Code on Wages, 2019, in this regard, only provides an additional requirement of ‘experience’, which was not mandated under the erstwhile Equal Remuneration Act, 1976. This additional requirement can be problematic as women, whose rate of participation in productive work is lower than that of men, may be adversely affected because of having lesser experience overall than men. However, experience has already been considered a relevant factor in cases related to equal

²⁵ *Delhi Commercial Drivers Union v Union of India and Others* (W.P.(C) 12422/2018) in the High Court of Delhi.

²⁶ *Randhir Singh v Union of India* [1982] AIR 879.



remuneration prior to the enactment.²⁷ There has been a considerable expansion of the factors that introduce differences in the kind of work performed, and courts have reiterated that it cannot be '*reduced to a mathematical formula*'²⁸. If the classification that results in the difference in pay is 'irrational' then, it will be violative of the principle of equal pay for equal work.²⁹ Differences may arise, depending on the nature of the work, due to educational qualifications³⁰, differences in degrees of skill, or the mode of recruitment.³¹ What is important is the duties actually performed, not 'those that are theoretically possible'.³² In the case of working inconvenient times or at night, then equal pay cannot be demanded if such pay can be availed by women by working on a similar shift³³.

B. Women gig workers and the 'work of a similar nature' under the Code on Wages, 2019

It is interesting to see how these prescriptions work in platform-based gig work, with its unique payment mechanism. In platform-based gig work, automated systems determine the payments that are made to workers, and the allocation of work (which of course, then determines what money the worker makes). Datasets collected contain information about worker movement, and a varied and often obfuscated amount of personal data, which is then used to profile workers through machine learning systems.³⁴ There have been recent attempts by platform-based gig workers to get platforms to be more transparent about this data, and how it is used.³⁵ However, transparency alone may not be effective in reducing the discriminatory effects of algorithmic wage determination. Here, different wages are paid to workers, but for the same work, performed within the same time. The rationale behind the system is never fully known, or when it is known, is quickly changed, and is determined on very diffuse considerations of individual behaviour.³⁶ As we have seen above, there is no stipulation in the principle of equal pay that is applicable universally, and several relevant factors may come into play.

Although the exact contours behind the technology for the determination of wages remains obscure, research shows that the mechanism of differential pay itself may not be geared towards performance-based pay, or greater productivity of workers, or to ensure that those who work more are paid more. At least in the case of ride-sharing platforms, it has been indicated that the intention is to ensure that there are enough workers who are available to take up a job whenever needed so that differences in demand do not affect the availability of the service.³⁷ This means that the algorithm works to ensure that workers remain on the platform, even when there is no work or orders assigned to them. This ensures that when there is a request, there are enough workers already logged in on the system, and thus, greater likelihood that it will be taken up

²⁷ *State of Haryana v Charanjit Singh* AIR [1997] SC 1788.

²⁸ *Federation of All India Customs and Central Excise Stenographers (Recognized) v Union of India* [1986] 4 SCC 707.

²⁹ *Randhir Singh v Union of India & Ors* [1982] AIR 879.

³⁰ *V Markandeya and Others v State of Andhra Pradesh* [1989] 3 SCC 191.

³¹ *State of Haryana v Charanjeet Singh* AIR [1997] SC 1788.

³² *Mackinnon Mackenzie v Audrey D'Costa* [1987] 2 SCC 469.

³³ *Ibid.*

³⁴ Veena Dubal, "On algorithmic wage discrimination." [2023] Col. Law Rev 123.7 1929.

³⁵ *Uber drivers v Uber B.v C/13/687315 / HA RK 20–207*, District Court, Amsterdam (11–03-2021).

³⁶ Dubal (n 44).

³⁷ *ibid.*



by a worker. Thus, the incentive systems are designed to make sure that the time the worker is engaged in non-engaged time, or when she is logged on to the platform, but is not engaged in work, is longer. In other words, the algorithm makes the worker less productive.³⁸ It is important to note here that in the UK, where riders with Uber were given ‘worker’ status and the right to the national living wage by the Supreme Court, the judgment also ruled that the time workers are logged on to app and are willing to work, should be considered as ‘working time’³⁹. Similar provisions can be found in Indian labour law: The Code on Wages, 2019 and the Minimum Wages Act, 1948, contains provisions where if a worker has not worked for the requisite number of hours, she is still entitled to full wages if the failure is caused not by ‘unwillingness to work’ but by the ‘omission of the employer’.⁴⁰ This provision is limited to where wages are fixed by the day.

Unfortunately, similar work on the algorithmic allocation in ride-sharing platforms are not available in India (although the same apps operate here), or for services such as domestic work or beautician services in which women predominate. However, these observations are borne out by [recent reports](#) from women workers on these platforms about low jobs coming in, despite being available on the app for 12 hours. Women workers also report that if they change location, they stop receiving orders, which essentially restricts their movement from home or other workplaces. Workers also report that jobs become infrequent as they spend longer on the platform, suggesting that it is more profitable for the platform to bring in newer workers while pushing out older ones (This is true for both ride-sharing⁴¹ as well as beautician services⁴²). This goes in the opposite direction of the principle of equal pay is concerned: where greater experience is indicative of greater remuneration.

Despite the lack of data on how women workers are affected by the algorithmic determination of pay, one common feature across platforms, and jurisdictions, is that [women are generally paid](#) lesser than their male counterparts in platform-based gig work. An explanation that is given for this is that perhaps men perform better at certain kinds of work: in ride-sharing for example, higher pay for men has been attributed to men driving faster than women, and having more experience with the ride-sharing platform⁴³. Under the principle of equal pay, if the algorithm is designed to favour individual behaviour that is geared to be more beneficial towards men, while the nature of the work remains the same, then this would indicate that the setting of wages is discriminatory.

The study also insists that women working fewer hours on the platform (attributed to their greater responsibility for household work, and care work), does not affect their earnings in a significant way. Given that women earn less than men on an hourly basis, despite all other factors remaining the same, indicates that there is discrimination that is not linked to the nature of the work. This is intuitively against the ideas of equal pay for equal work, since workers of

³⁸ *ibid.*

³⁹ *Uber v Aslam* [2021] UKSC 5.

⁴⁰ The Minimum Wages Act, 1948 s 15, and Code on Wages, 2019 s 10.

⁴¹ Ghosh (n 24).

⁴² Ananya (n 51).

⁴³ Cook, Cody, et al. “The gender earnings gap in the gig economy: Evidence from over a million rideshare drivers.” [2021] *The Review of Economic Studies* 88.5 2210.



different genders are paid different wages for the same work on an hourly basis. It can also not be saved by the jurisprudence about inconvenient work timings in Indian labour law which states that women cannot claim equal pay if they refuse to work at inconvenient timings or at night, provided that “*if in fact there are women working nights on that rate too*”⁴⁴ and are able to earn the same as men. However, here, the wage setting itself is discriminatory, then this is no longer holds weight.

There is also a case to be made here about making it safer for women to work at these hours. Women workers in India have indicated that better incentives for working at odd hours and at night-time feel discriminatory since they are not able to work at those times, and often have childcare responsibilities that prevent them from doing so. In the case of formal work, prescriptions for night work require employer responsibility for safety and adequate safeguards such as availability of transport to their residence. This is of course a different issue to wages, but nonetheless important as a workers’ right to be aspired to, if platform-based gig workers are gradually brought within the ambit of different kinds of protections under labour law.

There are different kinds of platform-based work, including those who work on a fixed salary. However, the larger platforms only offer one kind of engagement: where they act as a digital intermediary between the customer and the platform worker, and deduct a commission from the worker’s pay. In the case of domestic workers, there were instances where the intermediary acted in a manner that professionalized services, by introducing mandatory contracts between the clients and the worker⁴⁵. Algorithmic wage setting, although ubiquitous in larger platforms, is not the only method of engagement of platform workers.

IV. OTHER ISSUES IN DETERMINING MINIMUM WAGES FOR ‘WOMEN’S WORK’

Although there are issues with algorithmic wage setting as mentioned above, there are other issues that affect the determination of wages in gig and platform work for women workers. Firstly, quantifying the ‘skill’ of a worker, for setting minimum wages, and secondly, lack of access to workers’ collectives in order to access opportunities for better wages, or implementation of existing minimum wage prescriptions.

A. Quantifying ‘skill’ for the determination of minimum wages

Another important factor in the determination of wages is ‘skill’. As mentioned earlier, there is a devaluation of traditional skills in labour law, especially in relation to women’s employment such as domestic work. The method of calculating minimum wages relies on the attainment of skills through certification and courses. This means that if a worker has a skill that has been acquired by doing something, it does not contribute to the value of her work, at least for the purpose of the calculation of wages.⁴⁶ Unsurprisingly, this aspect of minimum wage calculation

⁴⁴ *Mackinnon Mackenzie v Audrey D’Costa* [1987] 2 SCC 469.

⁴⁵ (In some ways, this is similar to how SEWA Kerala connected domestic workers with households: the difference being that SEWA continued to build on this relationship through different strategies that ensured worker dignity and revaluation of their work). See Devika, J., P. R. Nisha, and A. K. Rajasree. “‘A Tactful Union’ Domestic Workers’ Unionism, Politics.” [2011] *Indian Journal of Gender Studies* 18.2 185.

⁴⁶ Sankaran (n 23).



has been criticised⁴⁷, and demands have been made for useful guidelines for categorising work. Skill is also an important factor in determining whether a worker deserves equal pay. In the case of platform-based work, the Code on Social Security, 2020, also provides for upgrading the skills of workers. [The Pradhan Mantri Kaushal Vikas Yojna](#) recognises the skills associated with domestic work and beautician services, areas in gig work where women predominate. Platforms have worked with the Government (the NSDC, National Skill Development Corporation) to bring out certification for professional services. However, it is unclear whether the training provided by the platforms actually results in greater pay. Some platforms have introduced categories of workers with higher pay offered on 'upskilling', but an [examination of the criteria](#) for consideration for higher cadres requires ratings and 'no escalations' (meaning that there were no complaints raised regarding a work request) rather than any skills training or certification.

In many instances, workers must pay for the training, and this often includes purchasing material for the training services from the company owning the platform.⁴⁸ In addition to this, due to their domestic responsibilities, training programs that are longer (running into several months) are inaccessible to women. Women also find it difficult to invest in skill-based training in domestic work as they have been engaged in such work already in their own homes.

B. Workers' collectivization and its impact on wages

Perhaps one of the most important workers' rights that affects what women make through platform-based work is the lack of collectivization. Labour law literature already points to how lack of collective action leads to lower wages and non-enforcement of minimum wage stipulations⁴⁹. This right has already been weakened in formal labour by the Code on Industrial Relations Bill, 2019, and there are no provisions that extend these rights to platform-based gig workers. In practice, women are under-represented in organizations of platform-based gig workers in India.⁵⁰ There are also few unions where women are in leadership positions. Where there are informal networks (such as Whatsapp groups) women can be kept out of them because of their gender by other workers.⁵¹ This is particularly important in platform-based gig work as these informal networks are often the key to unlocking the algorithmic determination of wages. As indicated by Veena Dubal, these networks help workers avoid incorrect information provided by the platforms on the apps (such as 'fake surges', where the app indicates higher demand in certain areas).⁵² These lead to workers spending time trying to reach a particular goal such as reaching a number of orders in a particular time period or reaching a particular area where there are more profitable rides. However, on their approaching the desired outcome, the orders stop being allocated to them, or the higher rates are no longer available. In other situations, it could be that workers understand techniques for higher pay which are then shared with others. Taken together, these factors affect women in two ways. Firstly, the lack of protections for collective action, and underrepresentation in organizations means that wages

⁴⁷ Neetha, N. "Minimum wages for domestic work: Mirroring devalued housework." [2013] EPW 77.

⁴⁸ Ananya (n 51).

⁴⁹ Bhattacharjee (n 19).

⁵⁰ Ghosh (n 24).

⁵¹ *ibid.*

⁵² Dubal (n 44).



tend to be lower, and women workers cannot rely on collective demands for better wages. Secondly, informal methods by which workers attempt to acquire higher pay and avoid losses, are also not equally accessible to women.

C. Gender sensitive provisions for Worker Safety and Social Security

There are two aspects of platform-based gig work that are important in a discussion on women and platform-based gig work: safety at work, and maternity benefits. They are tangentially related to wage determination but affect women's participation in platform-based gig work in a significant way. According to a [recent report](#), a significant portion of women are concerned about safety at work, and have experienced harassment at work. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, contains several provisions to protect women at their place of work. The definition of 'workplace' under Section 2(o) of the Act not only includes formal workplaces such as factories, shopfloors, or offices, but includes '*any house or domestic dwelling*', and '*any place visited by the employee arising out of or in the course of their employment.*' As such, it includes in its ambit domestic workers and other informal workers without a designated workplace. While there are discussions in extending social security provisions to platform-based gig workers in several states, there is less interest in extending the protection of this law to platform-based gig workers, although it remains an important issue for women workers. Similarly, in discussions around social security for gig and platform workers, there is less interest in the provision of maternity benefits, which are important components of social security. This could be because platform-based gig work is not perceived as long-term employment. However, there are platform-based gig workers who work for several years in the same sector, often with the same platform. Some level of support from the State or the employer for maternity, childcare, and safer workplaces is particularly important for women workers. Better working conditions could ensure lower attrition rates, incentivize skill development and better earnings in the long-term.

V. CONCLUSION AND RECOMMENDATIONS TO RESTRICT THE GENDER PAY GAP IN PLATFORM-BASED GIG WORK

In legal terms, there are some possibilities through which gender gap in platform-based gig work can be reduced. Atypical work poses a challenge to current labour regulations, and gig and platform-based workers have rallied around the demand for 'worker' status under labour law. Speaking in terms of specific labour rights and entitlements, minimum wages, and anti-discriminatory provisions are fundamental precepts which may be extended to platform-based gig workers.⁵³ For this purpose, it is recommended that gig and platform-based workers should at least be explicitly included in labour regulations, especially the Code on Wages, 2019. Recognizing that platform-based gig workers are covered under the anti-discriminatory provisions of labour law, such as equal pay for equal work, as currently enshrined in Section 3 of the Code on Wages, 2019, will mean that task-based pay under digital algorithms can be

⁵³ This is not to say that there is no merit in including gig and platform workers under the ambit of 'worker' under labour law, and extending its protections in a comprehensive way, through sector-specific legislations, or judicial interpretations of existing labour law. This paper is limited in its scope to the gender pay gap in platform-based gig work.



examined for gender bias. Research elsewhere has already suggested that algorithmic wage determination itself is inconsistent with labour law principles. In the absence of similar data in India, there is a case to be made for a ‘no-bias’ requirement for payment systems, or that platforms need to ensure that women are not being paid less for the same work. This would require a provision in statutes related to gig work (such as the Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023, and similar efforts in other states, and Central labour legislations) that there shall be no discrimination on the basis of gender on the fixing of wage rates for tasks performed through the platform. This should be made applicable regardless of whether the wage rate is set by an algorithm or other technological tool. In addition to this, the law on wages should take into account the time that the worker is engaged and available on the platform, but has not been allocated work (in line with the landmark decision in the United Kingdom, where such time was considered ‘working time’). While setting the minimum wages for a particular kind of gig work, waiting time should also be quantified, this should translate to wage payments to the worker for this time. If quantification is difficult due to unavailability of data, then workers should be able to fall back on fixed minimum wage rates, if they have logged on to the apps for a specific time.

From the discussion on the nature of platform work and the determination of pay, it is clear that the differences in pay are due to structural factors, and cannot be attributed to a form of performance/productivity-based system. In addition to non-discrimination, inclusion in labour regulations would also mean that they come under a different relationship than an independent entrepreneur to the State, as well as the platform. As a category with worker status, the State or the employer/platform will be required to shoulder some responsibility for making platform-based work suitable for women workers. This could extend to not only to prevent wage discrimination, but through provisions of safety, and social security benefits catered towards women. For instance, if platforms are considered employers of women workers, it would be easier to make the case that platforms should take steps to ensure the safety of women gig workers working at night, through support mechanisms and supervision.

Platform-based gig work is said to be uniquely suited to women workers with household work and care responsibilities, due to its flexible nature. This is borne out by the fact that there has been greater participation in gig and platform work by women workers, across different sectors of platform-based-gig work. The premise is that women tend to gravitate towards such work due to the gendered imbalance in household work. It follows then that due to the extra burden of household work, other avenues of work, without this flexibility, are less accessible to women. This inaccessibility then makes gender bias in gig and platform work particularly problematic, as it indicates that women workers also have fewer alternatives, and are therefore additionally vulnerable to continuing work with lower pay.

As such, for platform-based gig work to be seen as an important avenue for women’s employment, it should also offer certain minimum protections to women workers. Discussions around such protections have focused on social security, or worker status, or internationally, on privacy and transparency of data collection. This paper argues that legislators should also include other, fundamental precepts of labour law, which guarantees minimum wages and non-discrimination on the basis of gender at work.



COMPARATIVE ANALYSIS OF INTERNATIONAL APPROACHES TO GENDER EQUALITY IN THE WORKPLACE: LESSONS LEARNED AND BEST PRACTICES FOR LEGAL REFORM

By Harshit Jaiswal & Mahima Maheshwari

Abstract

The global quest for employment parity among genders continues to present numerous and complex obstacles. To determine what policies and programs are effective and ineffective, this analysis compares and contrasts the different legal frameworks and initiatives used by different nations. Analyses from both established and emerging economies are examined, with a focus on important issues such as anti-discrimination laws, work-life balance policies, positive action initiatives, and enforcement methods. It breaks down each method's effectiveness, pointing out both its advantages and disadvantages. The analysis deals with how investments in childcare facilities, along with strong enforcement mechanisms and thorough anti-discrimination laws, have enabled developing economies to make notable progress toward eliminating the gender gap.

On the other hand, it recognizes the difficulties that certain people encounter as a result of cultural opposition, insufficient money, or a lack of data-driven decision-making. The research provides insightful legal reform insights by condensing these disparate experiences. It highlights the necessity of taking a multifaceted approach, including legal actions, campaigns for cultural change, and financial incentives. Moreover, it emphasizes the significance of data-driven policymaking, which comprises consistent data gathering and analysis to monitor advancements and pinpoint opportunities for enhancement.

Last but not least, it emphasizes the critical role that stakeholder engagement plays in promoting the meaningful involvement of businesses, women's organizations, and government agencies in the development and execution of successful policy. This comparative research provides lessons from global



efforts in workplace gender equality and acts as a road map for advocates and policymakers globally. It emphasizes how crucial it is to draw lessons from one another's experiences and pave the way for a workplace that is more inclusive and equal for all. Ultimately, this study will provide valuable insights for policymakers, employers, and advocates who aim to enhance institutional procedures and legal frameworks about gender equality in the workplace. It also intends to support evidence-based policy reforms and significant progress toward a more inclusive and equitable labor market by identifying best practices and drawing lessons from experiences across the globe.

Keywords: *Gender equality, Employment parity, Stakeholder engagement, Legal frameworks.*

I. INTRODUCTION

Gender equality in the workplace is a crucial problem that affects people, societies, and economies all around the world. Significant discrepancies still exist, notwithstanding recent progress, impeding women's growth and full involvement in the workforce. Achieving gender equality is crucial for economic growth and sustainable development in addition to being a question of human rights. Given the severity of the issue, governments, international organizations, and civil society have taken several measures to combat gender inequality in the workplace, with a primary focus being on legal change. Gender equality in the workplace is a fundamental principle that advocates for equal rights, opportunities, and treatment for individuals regardless of their gender. Despite progress made in recent decades, gender disparities persist in many workplaces worldwide, undermining the full potential of both individuals and organizations. Achieving gender equality in the workplace involves addressing various aspects, including equal pay, representation in leadership positions, access to career advancement opportunities, and the elimination of gender-based discrimination and bias. The importance of gender equality in the workplace extends beyond moral imperatives to encompass economic and social considerations. Research consistently demonstrates that diverse and inclusive workplaces are more innovative, productive, and resilient. Moreover, promoting gender equality contributes to broader societal goals of reducing poverty, fostering economic growth, and promoting social justice.

Since equity is a systemic problem, including the entire organization is necessary to bring about long-lasting change toward better gender parity in the workplace. Senior organizational leaders may put important strategies into place to start removing obstacles for women in leadership roles and assisting leaders of all genders in feeling free to be who they are at work.

Efforts to advance gender equality in the workplace require a multifaceted approach involving policy interventions, organizational practices, cultural shifts, and individual actions. Governments, employers, civil society organizations, and international bodies play critical



roles in shaping policies and initiatives aimed at promoting gender equality. Legal frameworks, such as anti-discrimination laws, gender quotas, and maternity and paternity leave policies, are essential tools for ensuring equal rights and opportunities for all genders.

In addition to legal and policy measures, creating a culture of inclusivity and diversity within organizations is paramount. This involves challenging gender stereotypes, addressing unconscious bias in recruitment and promotion processes, and fostering supportive and flexible work environments that accommodate diverse needs and life stages.

In light of the ongoing challenges and opportunities surrounding gender equality in the workplace, this research aims to explore key issues, trends, and best practices in promoting gender equality. By examining the latest research findings, policy developments, and practical initiatives, this study seeks to contribute to the advancement of gender equality agendas and the creation of more inclusive and equitable workplaces for all.

Gender equality in the workplace is a cornerstone of modern societies, embodying principles of fairness, justice, and human rights. Despite significant advancements in recent decades, persistent gender disparities continue to hinder the full participation and advancement of women in the labor market. Recognizing the urgency of addressing these challenges, governments, employers, and civil society organizations around the world have implemented various strategies and policies aimed at promoting gender equality in employment.

II. EXISTING LEGAL FRAMEWORK AND STATUS OF GENDER EQUALITY IN INDIA

India, which comes in at number 127 in the world, has reduced the gender gap by 64.3% overall. It has improved from the previous edition by eight spots and 1.4 percentage points, indicating a partial return towards its 2020 parity level of 66.8%. Currently, enrolment is equal across all educational levels in the country. The parity between Economic Participation and Opportunity is only 36.7%. Despite gains in pay and income parity, the proportion of women in technical and senior positions has dropped dramatically from the last edition. With women making up 15.1% of lawmakers, India currently has a parity of 25.3% in political empowerment, the highest percentage since the first edition was released in 2006. After more than ten years of sluggish development, the improvement in the sex ratio at birth by 1.9 percentage points to 92.7% has raised parity on the Health and Survival index (95%).¹

Anti-discrimination provisions under the Constitution of India: The Indian Constitution's provisions serve as the foundation for the movement against discrimination. Article 15² forbids the state from discriminating in several day-to-day activities, including the provision of equal job opportunities, based on religion, race, caste, sex, or place of birth. However, affirmative

¹ Global Gender Gap Report, 2023.

² The Constitution of India, Article 15.



action or positive discrimination based on differences in gender, social or economic background, or historic caste-based disadvantage is unaffected by the Constitution. Because of this, Article 15 also permits the state to establish special reservations in educational institutions for women and members of socially and educationally disadvantaged groups of individuals, such as scheduled castes and tribes.

Moreover, Article 16³ gives the state the authority to impose reservations for the appointment of certain citizens to jobs to give preference to those citizens from underprivileged backgrounds. The state is also urged by the socioeconomic rights guaranteed by Article 39 of Part IV of the Constitution to guarantee that all people, men, and women equally, have the right to adequate means of subsistence, housing, food, education, and work.⁴

Protection under the Equal Remuneration Act 1976: Concerning hiring, compensation, work transfers, and promotions, the Equal Remuneration Act of 1976 (ERA) regulates discriminatory practices against employees. It stipulates that men and women workers must receive equal compensation for doing the same or equivalent tasks, and it forbids discrimination against women in the workplace. Section 5⁵ of the ERA forbids employers from creating a recruiting procedure that discriminates against women based only on their gender. This includes the recruitment process. This particularly relates to work that is offered to males or that is comparable to it, as well as transfers and promotions.

To meet the need for equitable compensation, the ERA also forbids purposeful salary reductions. As a signatory to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), India is required to incorporate the CRPD's tenets into its legislation protecting the rights of the disabled. The Indian legislature has introduced three laws that are solely focused on the protection of the disabled in India as a means of upholding this commitment.⁶

Protection during maternity leave: The Maternity Benefits Act, 1961⁷ (MBA), which addresses the employment of pregnant women in companies and provides maternity and related benefits, was implemented to provide Article 42 of the Indian Constitution with some much-needed teeth. Women are shielded from termination while on maternity leave by the MBA.⁸

III. SIGNIFICANT CASE LAW PRECEDENTS

*A. Apparel Export Promotion Council vs. A. K. Chopra*⁹

The case of Apparel Export Promotion Council v. A.K. Chopra (1999) dealt with allegations of sexual harassment in the workplace, emphasizing the employer's responsibility to prevent and address such behavior. The central issue involved a female employee's complaint against her

³ The Constitution of India, Article 16.

⁴ The Constitution (93rd Amendment) Act, 2005.

⁵ Equal Remuneration Act of 1976.

⁶ Equal Remuneration Act 1976, S 4(2).

⁷ The Maternity Benefits Act, 1961.

⁸ Maternity Benefits Act, 1961, S 12.

⁹ 1997(42) DRJ526.



supervisor for making unwelcome sexual advances. Despite internal complaints and actions taken by the employer, the matter escalated to the courts.

The Supreme Court upheld the principle of vicarious liability, emphasizing employers' accountability for their employees' actions. It clarified that sexual harassment extends beyond physical advances to include verbal and non-verbal behaviors creating a hostile environment.

The judgment highlighted the need for proactive measures by employers to prevent sexual harassment, including well-defined policies and awareness programs. It emphasized that courts should scrutinize cases broadly, considering all relevant facts, and avoiding undue focus on technicalities. The Supreme Court overturned the High Court's ruling, affirming the decisions of the disciplinary authority to remove the respondent from service.

*B. Kishori Mohanlal Bakshi vs. Union of India (1962)*¹⁰

In this case the Supreme Court ruled that the equal pay for equal work concept could not be upheld in a court of law. But it wasn't until 1987 through Mackinnon Mackenzie's case¹¹ that it was given the credit it deserved. The claim for equal pay for male and female stenographers was at issue in this instance. The decision favored female stenographers since the court upheld equal compensation. Despite the passage of time, crises still exist. According to a survey released by the International Trade Union Confederation (ITUC) in March 2009, there was a thirty percent gender wage disparity in India in 2008. While it is true that the gender pay gap is a more pervasive issue and is being addressed, this is not the whole story. There are situations in which people of the same gender experience these kinds of compensation disparities. This is the case even when they are exerting the same amount of time and effort and performing the same type of work as their peers. Despite our best efforts, there is still no substantive legislation that has followed. In addition, elements like ignorance and consistent legal interpretations serve as roadblocks to closing the pay gap. It is critical to both raise awareness of and successfully carry out the legislative enactments to fix this issue.

C. Aureliano Fernandes v State of Goa and Ors, Supreme Court order dated 12 May 2023

Civil Appeal No. 2482 of 2014

In response to deficiencies in implementing the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (SH Act), the Supreme Court of India issued directives to enhance enforcement. These include verifying the constitution of Internal Committees (ICs) or Local Complaints Committees (LCs), ensuring information availability on respective websites, mandating similar exercises for various institutions, familiarizing committee members with their duties, and conducting regular education programs. The aim is to ensure strict adherence to the SH Act's provisions and create safer workplaces for women by addressing practical challenges in its implementation.

¹⁰ AIR 1962 SC 1139.

¹¹ 2 SCC 469.



IV. THE ESSENCE

The cases of Apparel Export Promotion Council vs. A.K. Chopra (1999), Kishori Mohanlal Bakshi vs. Union of India (1962), and Aureliano Fernandes v. State of Goa (2023) underscore critical aspects of gender equality in Indian workplaces, including protections against harassment, pay equity, and implementation of workplace safety laws.

1. Protection against Workplace Harassment: In Apparel Export Promotion Council vs. A.K. Chopra, the Supreme Court of India held employers vicariously liable for employees' actions, stressing a broad interpretation of workplace harassment that includes verbal and non-verbal conduct creating a hostile environment. This reflects a growing global trend toward holding companies accountable for ensuring safe workplaces. The judgment's emphasis on employer responsibility aligns with international approaches seen in countries like the United States and the United Kingdom, where employers are also held accountable through stringent anti-harassment policies.

2. Gender Pay Equity: The Kishori Mohanlal Bakshi vs. Union of India case highlighted early discussions on pay equity, though India struggled with enforcing "equal pay for equal work" until later cases. The persistent wage disparity reflects a need for clearer, enforceable pay equity laws a concern mirrored globally. For instance, countries like Iceland and Germany have enacted strict pay transparency laws to address this issue. These cases indicate that merely establishing pay equity principles is insufficient without robust enforcement mechanisms, a lesson that has guided international legislative reforms.

3. Implementation of Workplace Safety Legislation: In Aureliano Fernandes v. State of Goa, the Supreme Court directed better enforcement of the Sexual Harassment of Women at Workplace Act (2013), highlighting practical issues like committee constitution, awareness programs, and monitoring compliance. This case emphasizes the importance of both legal provisions and consistent enforcement a challenge that countries like Canada and Australia address by requiring regular reports and compliance audits.

Together, these cases suggest key takeaways for legal reforms aimed at gender equality: employer accountability, enforceable pay equity policies, and effective implementation mechanisms. Lessons from these cases align with best practices internationally, where proactive and transparent regulatory frameworks drive meaningful gender equality in workplaces.

V. OVERVIEW OF STATUS OF THE GENDER EQUALITY ACROSS THE GLOBE

China has attained 67.8% gender parity and is ranked 107th. This indicates a five-position drop in rank and a 0.4 percentage-point drop in score from the previous edition. China has achieved full parity in tertiary education and is at 93.5% parity in educational attainment. China has achieved 81.5% equality in the rate of labor force participation and has reduced the gender gap in economic participation and opportunity by 72.7%. Additionally, it ensures 11.4% parity in



terms of political empowerment, with 4.2% of female ministers and 24.9% of female parliamentarians. China's birth-to-sex ratio is among the lowest at 89%, which has an impact on parity levels on the subindex of Health and Survival (93.7%, 145th).¹²

The **United States of America**, ranked 43rd, has closed 74.8% of the gender gap overall. At every educational level, the country's educational achievement is almost the same, except for secondary schooling. The US has nearly caught up to 2018 on the subindex of Economic Participation and Opportunity (78%). Throughout the last two index editions, there has been a gradual increase in income parity (67.5%) but a reduction in the proportion of women in senior positions. In addition, the healthy life expectancy of men has decreased by approximately three years, and throughout the previous 10 years, women's healthy life expectancy has dropped by five years. As a result, from the 2013 edition, there has been a 0.9 percentage point decline in gender parity in Health and Survival outcomes (97%). With no female head of state and a somewhat larger percentage of female lawmakers, the nation's political empowerment parity is 24.8%.¹³

Before declining in 2021, **Indonesia's** gender parity scores were progressively rising. Indonesia (87th) continues to improve from last year's 69.7% score to nearly reach its 2020 parity goal in this edition. There is 66.6% parity on Economic Participation and Opportunity, suggesting a partial rebound to its 2020 parity target of 68.5%. To achieve parity, the percentage of women in senior official roles has decreased from 55% to 31.7% since 2020, while the percentage of women in technical workers has climbed from 40.1% to more than 50%. There has also been a minor improvement in the parity of projected earned income; nonetheless, the gap remains substantial, with women receiving just 51.9 cents for every \$1 earned by men. At 18.1% parity, the Political Empowerment subindex includes 20.7% female ministers and 21.6% female legislators. Comparing the 2022 edition to the current one, parity between health and survival (97%) and educational attainment (97.2%) is essentially maintained.¹⁴

At 72.6%, **Brazil's** parity is at its greatest level since 2006 and ranks 57th in the world. Brazil boasts the highest percentage of female cabinet appointments ever 36.7% in its history. In addition, the proportion of female lawmakers has increased by 2.9 percentage points to 17.7%. When combined, they have nearly twice the previous edition's parity level on political empowerment (26.3%). Additionally, there has been a slight improvement in the areas of opportunity and economic participation. Although there is some improvement over the 2022 edition, there is still a disparity in expected wages at 62.8%, even as parity in technical professions is maintained. On the Educational Attainment subindex (99.2%), except for primary school enrolment, there is complete gender parity in secondary education, higher education, and literacy rates.

¹² Global Gender Gap Report, 2023.

¹³ Ibid.

¹⁴ Ibid.



Nigeria is now ranked 130th, down one percentage point from 2013 at 63.7%. Since then, parity in both parliamentary and ministerial seats has declined, resulting in a drop in parity on the Political Empowerment subindex from 11.9% to 4.1%. Moreover, Educational Attainment parity is currently among the lowest in the world at 82.6%; it has been volatile recently and has not changed much over the previous ten years. Both the overall and enrollment rates for women in all educational levels have been declining. Nigeria's 96.7% parity on the subindex of survival and health can be partially explained by its perfect parity sex ratio at birth. Moreover, for the previous ten years, its Economic Participation and Opportunity score (71.5%), which places it 54th globally, has seen both gains and losses. Although there are almost 64% more women in high jobs in Nigeria than men, women only make up 50% of what men do.

Bangladesh, at 59th place internationally, has the highest gender parity in Southern Asia, with 72.2%. The trajectory of the nation is primarily defined by ongoing advancements in political empowerment. Bangladesh is ranked eighth globally on this subindex, with a parity of 55.2%. It has had a female head of state for the longest period in history 29.3 years in the last 50 years. Nonetheless, the proportion of women in legislative (20.9%) and ministerial (10%) roles is comparatively low. In terms of Health and Survival (96.2%), the sex ratio is equal at birth. But since the 2020 edition, men's life expectancy has been rising faster than women's, meaning that there is less gender parity in terms of healthy life expectancy. Bangladesh has a parity of 93.6% in educational attainment. Over the past ten years, there has been a steady increase in the percentage of men and women who read at a secondary and postsecondary level. There is still a continuing difference between the enrollment in secondary education and the literacy rate in postsecondary education, even though there is now full parity in the former. Bangladesh is among the lowest-scoring countries in the world, ranking 139th, with a 43.8% parity score on the Economic Participation and Opportunity subindex. This does, however, represent a return to 2020 parity. This recovery has been fuelled in part by improvements in the anticipated earned income since the 2021 edition, while changes in the gaps across the other metrics are less pronounced.¹⁵

Despite dropping two spots in the rankings, **Mexico**, which is rated 33rd, has a 76.5% parity. The increase from the previous edition was 0.1 percentage points. 100% parity in secondary and university enrollment and 98.4% parity in the percentage of literacy, Mexico's educational attainment is almost at subindex parity. Despite this, women continue to participate in the labor force at a lower rate than males (57.6%), and their projected earned income is just 52.3% of men's. Moreover, women make up just 38.5% of senior officials. Still, women account for nearly half of the country's technical labor force. In terms of economic participation and opportunity, Mexico, with a parity of 60.1%, ranks 110th in the world. The gender gap in the health and survival subindex grew by 0.4 percentage points (97.5%) in the 2020 edition, with men's healthy life expectancy decreasing by 1.5 years and women's by 2.4 years. There are 42.1% women ministers, parity in parliamentary seats, no female heads of state yet, and 49% parity in this edition's Political Empowerment subindex.

¹⁵ Global Gender Gap Report, 2023.



Since the 2021 tournament, **Japan's** parity has declined for the second year in a row. Currently ranked 125th with a parity of 64.7%, it has dropped 0.25 percentage points and nine ranks from the previous edition. With a political empowerment rate of 5.7%, Japan is ranked 138th in the world. Although there has never been a female head of state, there are women in 10% of parliamentary posts and 8.3% of cabinet seats. The educational attainment and health and survival subindices are roughly identical. Since the last edition, there has been a 1.1% gain in parity at estimated earned income; women make up 12.9% of senior officers and 54.2% of working-age adults. With a 56.1% Economic Participation and Opportunity Parity, Japan is ranked 123rd out of 146 nations.

The **Philippines** is ranked 16th in the world with 79.1% gender parity. This represents only a partial return to the parity level of 79.9% from 2018, even if it represents an improvement of three spots and 0.88 percentage points from the year before. By that criterion, the Philippines has improved, as seen by the 26 percent of female cabinet members. However, the difference widened in the percentage of female lawmakers (37.6% parity), which therefore decreased the Political Empowerment subindex's total parity (40.9%) by 0.7 percentage points since 2018. With a 99.9% educational attainment rate, the Philippines is practically at par. The nation has deteriorated on this subindex (96.8%) after approaching parity in Health and Survival since 2006, primarily because of a minor fall in the sex ratio at birth. Although women's income is only 71.6% of men's, the Philippines maintains perfect parity in economic involvement and opportunity for senior officers and technical workers.¹⁶

Egypt is ranked 134th with 62.6% parity. Egypt increased their percentages for the 2017 and 2021 editions (60.8%) and 63.9%), then began to decline for the 2022 and current editions (63.5%). Parity in secondary and tertiary enrolment has slightly regressed since 2021, contributing to a 3 percentage-point fall in parity on the Educational Attainment subindex. Health and survival have not changed much at 96.8% parity. Subindex parity has been boosted by 1.7 percentage points to 42% on Economic However, the share of women in senior officer positions has climbed by 6.8 percentage points (to 12.4%) and the share of women in technical roles has increased by 4.3 percentage points (to 35.1%) since the 2022 edition, contributing to an increase in participation and opportunity. Furthermore, the proportion of women in parliament is 17.5%, while the proportion of women among ministers is 18.8%.

Continuing its slow but steady progress towards gender parity, **Vietnam** ranks 72nd globally with a score of 71.1%. From the first time it was covered in 2007 (score of 68.9%), it has advanced by 2.3 percentage points. It has improved by 0.62 percentage points and 11 ranks in comparison to the previous version. When there were no female ministers included in the 2022 edition, the parity score on the Political Empowerment subindex rose from 13.5% to 16.6%. As of right now, 11.1% of ministers are women. The ratio of sexes has always been one of the worst-performing measures in Vietnam. Consequently, the nation's parity for health and

¹⁶ Global Gender Gap Report, 2023.



survival dropped by 0.4 percentage points to 94.6%, one of the lowest in the world. Vietnam has achieved parity in educational attainment at 98.5%. The proportion of women working in technical fields is likewise fully equal, and their estimated earned income is 81.4% that of males. Even though there is 88.1% parity in the labor force, only 25.6% of senior officials are female. In terms of the Economic Participation and Opportunity subindex, Vietnam is parity at 74.9% overall.¹⁷

VI. PROMINENT GENDER EQUALITY LAWS AND POLICIES IN EMPLOYMENT ACROSS NATIONS

The Constitution of the Republic of South Africa, 1996¹⁸ Section 9 Sub-Section (1) Everyone is equal before the law and has the right to equal protection and benefit from the law. Sub-section (2) Entire and equal enjoyment of all rights and freedoms is a component of equality. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. Sub-Section (3) The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. Sub-Section (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. Sub-Section (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

Croatia's Anti-Discrimination Act, 2008¹⁹ Sections 2 and 9(1) define and prohibit direct and indirect discrimination "in all its manifestations," both in the private and public sectors. Additionally, because the law creates a category of "more serious forms of discrimination," which encompasses prejudice that is multiple, repetitive, and ongoing, it goes beyond what is needed by international law. It further requires the courts to take these facts into account when determining the appropriate amount of money to fine the criminal and the amount of money to compensate the victim. Additionally, a wide range of work and working conditions are specifically covered by section 8 of the Anti-Discrimination Act²⁰, along with education, social security (which includes health insurance, pensions, social welfare, and unemployment insurance), and access to self-employment and occupation (including hiring, promotion, and selection procedures).

¹⁷ Global Gender Gap Report, 2023.

¹⁸ Republic of South Africa. Act No. 108 of 1996. Chapter 2. Bill of Rights.

¹⁹ Republic of Croatia. Official Gazette 85/08 of 9 July 2008.

²⁰ Croatia's Anti-Discrimination Act, 2008.



Australia's Sex Discrimination Act, 1984²¹ Section 30 (1) Nothing in paragraph 14(1)(a) or (b), 15(1)(a) or (b) or 16(b) [which ban discrimination] renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with a position as an employee, commission agent or contract worker, being a position about which it is a genuine occupational qualification to be a person of the opposite sex to the sex of the other person. (2) Without limiting the generality of subsection (1), it is a genuine occupational qualification, about a particular position, to be a person of a particular sex.

Canada's Employment Equity Act, 1985²² The purpose of this Act is to address the employment disadvantages that women, people of Aboriginal descent, people with disabilities, and members of visible minorities in Canada experience because of their race or color. Furthermore, it satisfies the idea of employment equity, which demands accommodations for differences and specific measures in addition to treating people equally. Ensuring that no one is denied benefits or employment opportunities for non-ability-related reasons is the aim of attaining workplace equality.

Italy's Providing for Affirmative Action to Achieve Equal Treatment of Men and Women in Employment Act, 1991²³ *Section 1*²⁴

(1) The provisions of this act are intended to promote the employment of women and to attain substantial equality between men and women at work, in particular by the adoption of measures categorized as affirmative action in favor of women, to eliminate any obstacles that, in practice, are preventing the realization of equal opportunities.

As mentioned in the subsection, affirmative action (1) is meant to specifically address the following goals: (a) eliminate discriminatory practices that impede women's ability to progress professionally, find employment, and maintain a work-life balance; (b) encourage women's career choices by offering academic and professional coaching and training; and (c) support opportunities for self-employment, management access, and occupational skills training for businesswomen;

Sub-section (c) to do away with work arrangements and systems that favor some workers over others based on their gender, prejudice them in terms of professional development, career progression, and economic and wage conditions; Sub-section (d) to encourage women to participate in activities, occupations, and roles where they are underrepresented, particularly in high-tech industries and in positions of authority; (e) to encourage improved responsibility sharing between men and women and a balance between family and work obligations, including rearranging work schedules and working conditions.

Implementation and financing of positive measures Section (1)²⁵ Enterprises, including cooperatives, partnerships, public bodies of a commercial nature, trade union associations, and

²¹ Australia. Sex Discrimination Act, 1984.

²² Canada. Bill C-62 of 1985.

²³ Italy. Act No. 125 of 10 April 1991.

²⁴ Equal Treatment of Men and Women in Employment Act, 1991.

²⁵ Ibid.



professional training centers that are involved in affirmative action projects as defined in section 1, may request from the Ministry of Labour and Social Security complete or partial reimbursement of any expenses incurred in the implementation of such projects, except those referred to in section 3.

Namibia's Affirmative Action (Employment) Act, 1998²⁶

Section 17²⁷

(1) For this Act “affirmative action” means a set of affirmative action measures designed to ensure that persons in designated groups enjoy equal employment opportunities at all levels of employment and are equitably represented in the workforce of a relevant employer.

(2) Without limiting the generality of the definition in subsection (1), an affirmative action measure referred to in that subsection includes, but is not limited to –

(a) identification and elimination of employment barriers against persons in designated groups; (c) instituting positive measures to further the employment opportunities for persons in designated groups, which may include measures such as –

(i) ensuring that existing training programs contribute to furthering the objects of this Act; (ii) establishing new training programs aimed at furthering the objects of this Act; and (iii) giving preferential treatment in employment decisions to suitably qualified persons from designated groups to ensure that such persons are equitably represented in the workforce of a relevant employer.

(3) When evaluating whether a relevant employer gives a designated group of workers positions that are properly represented, the Commission will take into account the following elements in addition to any others it considers appropriate: (a) The presence of appropriate candidates for such jobs in that designated group; and (b) The existence of applicants from specific groups who can and will participate in appropriate training courses to obtain the abilities and credentials required for such roles.

Hungary's Labour Code, 1992²⁸

Section 5²⁹

(1) A negative discrimination against employees in their employment relationship based on sex, age, nationality, race, origin, religion, political convictions, membership in an organization representing their interests or involvement in any related activities, or any other factor unrelated to their employment shall be prohibited. Discriminatory treatment arising unequivocally from the type or nature of the work shall not be considered negative discrimination.

(2) If any dispute arises concerning the violation of the prohibition of negative discrimination, the employer must produce evidence that his action did not contravene the provisions set out under subsection (1).

(3) It is mandatory for employers to give their staff members the chance to advance to more senior roles based only on their performance, seniority, vocational aptitude, and experience without any sort of discrimination.

²⁶ Republic of Namibia. Act, 1998.

²⁷ Namibia's Affirmative Action (Employment) Act, 1998.

²⁸ Hungary. Act, 1992.

²⁹ Hungary's Labour Code, 1992.



The Philippines' Act Providing for the Magna Carta of Women, 2009³⁰.

Chapter IV Section 9: Fair Access and Nondiscrimination in Training, Scholarships, and Education.

South Africa's Employment Equity Act, 1998³¹

Section 5: Removing Unfair Discrimination.
Section 6: Prohibition of Unfair Discrimination.

Hong Kong, China's Code of Practice on Employment, 1995³²

Guidelines for benefits, facilities, services, and terms and conditions of employment

- Pay parity for a comparable job.
- Position names.
- Workplace practices.
- Individual wage disparities.
- Part-time employment.
- Pay parity for comparable labor.

VII. CONVENTIONS SHAPING GENDER EQUALITY IN WORK ENVIRONMENTS

A. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):³³

- Considered the most comprehensive treaty for women's rights, CEDAW obligates states to eliminate discrimination against women in all spheres, including employment.

It guarantees women's rights to:

- Equal access to employment opportunities, including selection criteria.
- the same working conditions and equal pay for equal work.

B. International Labour Organization (ILO) Conventions³⁴:

- Through agreements that its member states have ratified, the ILO establishes global employment standards.

Several conventions address gender equality in the workplace:

³⁰ Philippines. Republic Act, 2009.

³¹ Republic of South Africa. Act, 1998.

³² Hong Kong, China. Chapter 480 of 1995. Section 69: Codes of Practice.

³³ Convention on the Elimination of All Forms of Discrimination against Women.

³⁴ ILO and gender equality.



- LO Convention No. 100 on Equal Remuneration: Promotes equal pay for men and women for work of equal value.
- ILO Convention No. 111 on Discrimination in Employment and Occupation: Prohibits discrimination based on gender in employment and training.
- ILO Convention No. 156 on Workers with Family Responsibilities: Supports measures that enable men and women to balance work and family responsibilities.
- ILO Convention No. 183 on Maternity Protection: Guarantees maternity protection, including paid leave and job security.
- ILO Convention No. 189 on Domestic Workers: Recognizes the rights of domestic workers, a sector where women are often predominant.

C. Sexual harassment

Sexual harassment is a global epidemic that dates back to the earliest periods of human civilization. Women slaves were frequently sexually harassed by their rapacious owners throughout the era of slavery. Even though the days of slavery are long gone, sexual harassment still occurs today. Sexual harassment is a problem for women on the job, in schools, and even on the streets. Based on **United Nations** and **European Union** definitions, Sexual harassment in this study is defined as unwanted sexual behavior, whether expressed orally or by actions. Of the 42,000 women in the European Union, 55% had experienced sexual harassment, according to research done in 2014 by the Agency for Fundamental Rights (FRA) of the European Union. According to the study, 87% of women in Vietnam, 79% of women in India, 77% of women in Bangladesh, and 57% of women in Cambodia have all experienced sexual harassment. Like other nations, similar issues are being faced by Malaysia. There were 267 reports of sexual harassment in Malaysia alone in 2017 (Women Aid Organization, 2018). Thirty to forty percent of women report experiencing sexual harassment at work, according to the same FRA (2014) survey.

To put an end to it, what steps have been taken is the question?

It takes courage to confront the signs of sexual harassment and the backing of people you care about, particularly when it comes to laws that prohibit it. The Human Resource Ministry's Code of Practice for the Prevention and Eradication of Sexual Harassment at Workplace, which was introduced in 1999, is not being enforced, hence it is not the intended achievement. Reviewing the policy will guarantee that it provides the best possible coverage and that its systematic procedures serve as both preventive and corrective measures. Employers in the public, private, manufacturing, small, and medium-sized business sectors should be able to use it. Since sexual harassment issues have undoubtedly also arisen in higher education institutions, many scholars are interested in learning more about them.

VIII. CHALLENGES IN ACHIEVING GENDER EQUALITY AT WORKPLACE



After analyzing various national legislation, we understood that there is a connection between the application and setting of that legislation and that gender inequality is frequently caused due to the lack of application of those laws for gender equality in the workplace.

The significant lacunas that we noticed in this study are as follows: -

- Frameworks for the objective assessment of job duties are lacking, and there is an inadequate comprehension and implementation of that standard to guarantee that women receive fair compensation for their degree of expertise.
- Setting minimum wages is a related problem that aims to solve the situation where women are overrepresented in low-paying occupations.
- The hours of labor and relaxation that should take into account the needs of women who still carry "**a triple burden**" taking care of their families, taking care of the home, and having and raising children are a cause for concern. Regarding the terms of their employment, more accommodating strategies must be used.
- The topic of sexual harassment at work is one of the main issues affecting working women's equality of treatment. Women are primarily impacted by this prevalent kind of discrimination, which is best addressed by a mix of laws and rules or regulations.
- The majority of national laws did not fully implement the notion of "equal remuneration for men and women for work of equal value." National laws continue to merely mention "equal pay for equal work" in a lot of nations. While some nations have duly incorporated the notion of "equal remuneration for work of equal value" into their legal frameworks, they have since restricted the definition of "work of equal value" to merely "equal work."

Overall, the pointers highlight the ongoing challenges faced by women in the workplace, from disparities in pay and job evaluation frameworks to the burden of balancing work and caregiving responsibilities. While progress has been made in some areas, such as addressing sexual harassment in the workplace. Governments, employers, and society at large must continue to prioritize these issues and work together to create environments where women can thrive professionally without facing discrimination or undue burdens.

IX. WAY FORWARD

1. **Advancing Pay Equity:** Ensure fair and transparent compensation practices to close gender pay gaps and uphold equitable wages across all job roles and levels.
2. **Ensuring Equal Career Advancement Opportunities:** Establish policies and practices that provide equal access to promotions, training, and career development resources, allowing all employees to reach their full potential.
3. **Strengthening Parental Leave and Family Support:** Implement comprehensive parental leave policies and family support systems to accommodate the diverse needs of working parents and caregivers, supporting a balanced work-life structure.
4. **Addressing Sexual Harassment and Gender-Based Violence:** Enforce strict measures to prevent, address, and penalize instances of sexual harassment and gender-based violence within the workplace, creating a safe and respectful environment for all.



5. **Promoting Gender Diversity in Leadership Roles:** Encourage policies and initiatives aimed at increasing the representation of women and gender-diverse individuals in leadership positions, fostering inclusive and diverse decision-making processes.
6. **Fostering Multisectoral Collaboration:** Promote cooperation among government bodies, employers, and civil society organizations to drive unified efforts toward gender equality in the workplace.
7. **Monitoring and Evaluating Progress:** Implement mechanisms for regular assessment and evaluation of gender equality initiatives to ensure continuous progress and identify areas for improvement.

These are the key points by which gender equality in the workplace can be achieved but the bigger question is “**HOW**”.

So, for this, we propose a model that we can adopt in India to promote Gender equality in the workplace.

The Australia Fair Work Act of 2009, as amended in 2012, established the Expert Panel for Annual Wage Reviews³⁵.

Operating independently and transparently, this panel's strong point is its composition, which consists of membersthree full-time and three part-time. The federal government appoints full-time members of the Australian Fair Work Tribunal, who have quasi-judicial jurisdiction; the part-timers are chosen based on their experience in business, economics, social policy, and workplace relations. Reviewing salaries every year, the panel takes into account research that has been commissioned as well as contributions from other stakeholders. Research results and submissions are all publicly available. Representatives from trade unions, social services councils, chambers of business, and government agencies form a tripartite Minimum Wage Research Group, which endorses the research conducted or commissioned by Fair Work Australia's Minimum Wages and Research Branch.

Similarly, In India government can form a committee or panel that evaluates the condition of gender equality in the workplace through a report submitted by every organization to the government. The panel should be responsible for evaluating and making sure that each organization maintains the standards as stated in laws related to gender equality in the workplace.

X. CONCLUSION

In conclusion, achieving gender equality in the workplace is a multifaceted goal that requires a blend of robust legal frameworks, institutional support, and cultural shifts. Through a comparative analysis of global approaches, this study underscores that law alone, though foundational, are insufficient without coordinated efforts that include monitoring, enforcement, and regular assessments of impact. As exemplified by progressive policies worldwide,

³⁵ Australia. Fair Work Act, 2009.



successful gender equality initiatives often integrate clear legal mandates with dedicated resources and active engagement from employers, civil society, and government agencies.

Legal reforms focused on pay equity, career advancement, parental support, and protection from harassment have emerged as crucial elements in establishing gender-equitable workplaces. However, these frameworks must be underpinned by a commitment to transparency and accountability to ensure meaningful impact. For instance, rigorous monitoring mechanisms, as seen in some international models, offer valuable insights for continuous improvement and serve as an example for other nations striving to close the gender gap. Data-driven approaches, involving consistent data collection and analysis, can guide policymakers in identifying areas of progress and ongoing challenges, fostering an environment that is adaptive to the evolving needs of the workforce.

Furthermore, this study emphasizes the importance of fostering leadership diversity and multisectoral collaboration. Involving diverse stakeholders in the decision-making process ensures that policies are inclusive and reflective of the needs of all employees. Through partnerships among government entities, private organizations, and civil society, nations can create synergistic strategies that not only enforce gender equality laws but also promote broader societal acceptance of these principles.

Ultimately, this research contributes to the growing body of literature by identifying best practices and drawing lessons from the successes and challenges faced across various national contexts. The findings highlight that while there is no one-size-fits-all solution, a comprehensive approach rooted in legal protections, institutional reforms, and societal engagement provides a pathway toward a more equitable and inclusive global labor market. As countries continue to learn from one another, this study offers a framework for continuous reflection and adaptation in the journey toward workplace gender equality.



BREAKING THE GLASS CEILING: ADDRESSING THE CHALLENGES OF MENSTRUAL LEAVE POLICY IN INDIA

By Shivechchha Singh & Vrand Rana

Abstract

The issue of gender equity and equality in the workplace has been a contentious topic, particularly highlighted by the statement of the Minister of Women and Child Development in the Rajya Sabha in late 2023,¹ Asserting that menstruation should not be considered a handicap. Throughout history, various reasons have been cited for suppressing women, hindering their financial independence, and denying them equal treatment in the workforce. This includes withholding the right to be biologically true to oneself, unequal pay, and the existence of a persistent “glass ceiling.”

This research paper takes the issue of menstrual leave in hand where the maternity leaves granted to Indian women post 14 years of independence contrast starkly with the absence of menstrual leaves even after 75 years. The researcher tries to outline and counter the much-overlooked factors while arguing against paid menstrual leave with the severity of pain and associated issues like abdominal discomfort, bloating, fatigue, mood swings, and restroom-related challenges that cater to the productivity of a woman. The research paper advocates for paid menstrual leave to be mandatory at the employer’s side and optional at the employee’s side, addressing workplace discrimination concerns and proposing a staged implementation across organized and unorganized sectors in India, following a care ethics approach. Internationally, menstrual leave is not recognized as a legal right in any present-day convention or treaty that came into force to bestow women’s rights reserved in society. Addressing the same concern globally, the paper, using the doctrinal methodology of research studies, draws insights from global models and analyses the impact of similar policies, including the Maternity Benefits Act, of 1961, and the 2017 Menstruation Benefits Bill. It studies various reports, Data statistics, and

¹Official text of Rajya Sabha debates titled ‘Menstrual Hygiene Policy’ on December 13, 2023 <<https://sansad.in/rs/debates/officials>> accessed 15 March 2024.



international implementation of paid menstrual leave brought about by countries like- Spain and Japan, to bring out the scope and outlines a comprehensive roadmap for an effective menstrual leave policy that safeguards women's financial independence.

Keywords- Menstrual leave policy, Rights, Menstruation, Maternity, women.

I. INTRODUCTION

The United Nations has designated the year 2024's theme as 'Invest in Women: Accelerate Progress' with a focus on addressing economic disparity, while the campaign theme for this year is 'Inspire Inclusion'.² In this light, this paper endeavors to debunk the misconception that feminism strives for women to become identical to men rather than seeking equality between genders. It elucidates the distinction between equality and similarity, asserting that while men and women are equal, they are not necessarily identical. It then outlines the central focus of the paper, which aims to scrutinize the national dialogue surrounding the menstrual leave policy in India and devise a strategic plan for its effective implementation. This endeavor seeks to tackle criticisms leveled against the policy and offer nuanced solutions tailored to the specific context of India.

Continuing in the same arena, it further delves into the unique challenges confronting women due to their reproductive capacities, particularly menstruation and maternity. It critiques the terminology employed in the Maternity Benefits Act of 1961,³ Positing that maternity relief should be viewed as a right rather than a discretionary benefit provided by the state. The research paper references the personal stance of the Minister of Women & Child Development who, in her statement in the Rajya Sabha, opposed menstrual leave, thereby prompting a broader critique of women's rights in India and societal norms.

Furthermore, it underscores the societal pressures imposed on women to juggle domestic obligations with professional pursuits, often resulting in their undervaluation and exploitation. It challenges the notion that women must mimic men to attain equality and interrogates the gender stereotypes propagated by mainstream media. The narrative stresses the significance of acknowledging and appreciating women's distinctive physical attributes, including their reproductive functions while confronting the hurdles they encounter in the workforce.

Additionally, it outlines the various criticisms and counter-arguments surrounding menstrual leave, encompassing debates on its necessity, potential impact on pay parity, and the specter of workplace discrimination. It advocates for a meticulous examination of these criticisms individually to facilitate a comprehensive analysis.

Finally, the paper sets the groundwork for subsequent sections of the paper, which will delve into an examination of the imperative for menstrual leave, policy deliberations, and a proposed

²United Nations Organisation, Observances, International Women's Day, (United Nations) <<https://www.un.org/en/observances/womens-day>> accessed on March 20, 2024.

³ Maternity Benefits Act, 1961.



strategic framework for implementation. It underscores the importance of confronting the societal and structural barriers impeding women's advancement in the workforce and advocates for the adoption of a responsibility-care model and the incorporation of care ethics in policy formulation.

II. THE DISCOURSE ON MENSTRUAL RELIEF

“The State shall make provision for securing just and humane conditions of work and for maternity relief.”⁴

Article 42 of the Constitution of India, being part of the Directive Principles of State policy provides for the provision of maternity relief for women which is discretionary for the State to provide for. Nevertheless, the state has provided for maternity relief by enacting the Maternity Benefits Act, of 1961, however, women have yet not been able to secure just and humane conditions of work for themselves in a wholesome manner. This is because the idea of providing just and humane conditions of work for women is not limited to providing them with maternity relief but is quite an expansive idea that pertains to all those manifestations of various difficulties that women have to face at the workplace. These difficulties include sexual harassment, discrimination in its wide & varied forms, menstrual relief, etc. For this paper, however, the discussion is limited to maternity relief.⁵

In this section of the paper, the focus will be on the national discourse on menstrual leave policy in India with the aim to understand the problems cited by the critics of it and provide solutions for the respective criticisms particular to Indian circumstances. This involves a deep analysis of the need for this policy at first and thereafter the assertion for bringing in this policy while drawing an analogy with already present women-centric laws and policies. Ultimately, it argues for a care-responsibility model as relied upon by the care-ethicist school of thought.⁶

As asserted by feminists, women are equal to men but not similar to them. This understanding of the difference between the idea of ‘similarity’ and ‘equality’ makes all arguments against the provision of menstrual relief constructed upon the fallacy of taking in ‘similarity’ in place of ‘equality’ stand defeated at the very onset. The female body owing to its reproductive capabilities faces two major interrelated phenomena that are absent in men i.e. Menstruation and Maternity. Fortunately, or more so unfortunately, they are given that needed extra care, and attention in both private and public spheres by family members and the society & state through legal mechanisms in the latter but nothing is provided for in the former wherein they have been given relief under the Maternity Benefits Act of 1961. However, the usage of the term ‘benefits’ seems problematic in the sense that it does not give an idea that maternity relief is something that is both the right of women as well as the duty of the state to provide it rather provides a generic understanding of being an advantage that the state is providing women with.

⁴ The Constitution of India, art 42.

⁵ Sharma D, ‘An Analysis of Indian Maternity Benefits Act’ SCC Online (ICLJ, 2022) 933.

⁶ Michael Boylan. (n.d.). *Care Ethics* | *Internet Encyclopedia of Philosophy*. Internet Encyclopedia of Philosophy | An encyclopedia of philosophy articles written by professional philosophers <<https://iep.utm.edu/care-ethics/>> accessed on 10 May 2024.



This notion reflects well in the habit of the male colleagues often calling maternity leave period a ‘vacation’.⁷

The statement of the honorable Minister of Women & Child Development in Rajya Sabha, as a response to the state’s position on the case of menstrual leaves had created a furor in the Parliament⁸ And had prompted a discourse on social media wherein, menstruation was labeled as ‘not being a handicap’ and that since women are now opting for more and more economic opportunities, such proposals should not be made in the parliament which denies them an equal opportunity just because they menstruate. Her opinion was later followed by a statement in an interview with the Brut India platform wherein she cited the already existing discriminatory and harassing scenario at workplaces which can further the challenges faced by women if the policy is to be implemented.⁹

Now, this “personal opinion” though given in the capacity of a member of parliament as well as a cabinet minister representing the people who have elected one, on record in the Lok Sabha, represents the classic critique of women’s rights in India and throughout the world. It, first of all, represents the very remarkable approach taken up by our patriarchal society to extract favor out of women with their consent under the garb of them being ‘strong enough’ or ‘big-hearted’ enough to tolerate that at the expense of their freedom. This case rather feels like a situation wherein, a person’s body parts are cut off one after another saying that he must be strong enough to bear the pain. Surprisingly, our society has been very successful in doing so, wherein we can still observe that domestic & household chores are performed by female members in the majority of households. This phenomenon is well-reflected in the data produced by a study, wherein women spent more than 7 times the time that men spent in unpaid domestic labor in India,¹⁰ ultimately characterizing them as informal, invisible, and unrecognized in the economy.¹¹

It reminds the author of the Father of the Constitution of India, Dr. B. R Ambedkar when he said that, Independence would merely be a power transfer from the British government to the Indian government, if the most backward sections of our society are not given social justice i.e. such independence would merely be apparent and it would be unfair to regard the same as independence in essence. Likewise, financial independence as emphasized by the wave of feminism would not ensure independence in essence unless it is coupled with just and humane

⁷Sarah Bregel, ‘Maternity Leave is not a Vacation. Working mins says too many colleagues see it that way, (2023) accessed at <<https://www.fastcompany.com/90898882/maternity-leave-is-not-a-vacation-working-moms-say-too-many-colleagues-see-it-that-way>> accessed on 28 February 2024.

⁸ The official text of Rajya Sabha debates titled ‘Menstrual Hygiene Policy’ on December 13, 2023 <<https://sansad.in/rs/debates/officials>><<https://drive.google.com/file/d/1KFNXXIv6yUtiCJXer6bFoMSY3xaQkJdb/view?usp=sharing>> accessed on 15 March 2024.

⁹Smita Prakash, Interview with Union minister Smriti Irani, (Brut India, 2023) <<https://youtu.be/773DRosg0FU?si=3j-q9kXmbj6DXYUb>> accessed on 12 March 2024.

¹⁰Addati L, Cattaneo U, Esquivel V, Valarino, ‘Care work and care jobs for the future of decent work’ INTERNATIONAL LABOR ORGANIZATION, GENEVA (2018).

¹¹ Kavita Bajeli Datt, ‘Indian women do chores 10x than men’ (2024), The Indian Express, <<https://www.newindianexpress.com/cities/delhi/2024/Mar/24/indian-women-do-domestic-chores-10x-than-men#:~:text=Delhi,Indian%20women%20do%20domestic%20chores%2010x%20than%20men,98%20minute%20to%20the%20same>> accessed on 23 March 2024.



conditions of work that acknowledge their femininity and discrimination-free work environment.

A. 'Similarity' & 'Equality'

Additionally, the idea of “Feminism” which has spread like a giant wave across the world, has come to be misinterpreted as similarizing women with men rather than that of equalizing women with men in the particular aspects where equality is needed. The effect that it had on society was that there was a rush to have an equal status of women to that of men. Everyone suddenly transitioned from female foeticide to raising their “daughters like sons”.

This idea is problematic as the underlying assumption is that to have a dignified existence, women have to become men. It ironically keeps men at a higher pedestal which women will reach only if they behave, act, and be like men. This notion is further propagated by Bollywood box office hits like “Mardaani Anthem” wherein, very paradoxically females who tend to be stronger and bold than other ordinary females of their kind, are considered to be like men which as per the common reasonable understanding of it again assumes only men to be bold and strong. Alongside, many popular television shows like ‘Madam Sir’ reflect the idea that ‘Madam’ needs to have ‘sir’ added to that, to be authoritative. The female protagonists in such screenplays dress like men, are not married mostly, and do not have kids. This ultimately rules out the possibility of women being strong on their own, it rather attributes the saree to weakness and the shirt-pant to boldness.

This idea does not even take into account the farthest possibility of women being different from men in their physical capabilities wherein, their reproductive system places them at an advantage i.e. men cannot do what women can.

The relevance of these observations to the cause of menstrual relief in this paper is that the critics argue against menstrual relief based upon their understanding that since women & men are ‘equal’, there is no need to provide women workers with extra leaves which their male counterparts are not getting. Here, the observations made in the preceding section effectively address such criticism by emphasizing the difference between ‘similarity’ and ‘equality’. Coming back to the crux, biological determinism is something that is being feared in our society, discouraging women from accepting their bodies and exercising the feminine energy that they have. They always have to fight with the notion that energy can only be masculine. The female leaders of the first war of Indian independence are celebrated as “Khoob ladi *mardani* woh to Jhansi wali Rani thi”, apparently ruling out the feminine energy of that war.

The purpose of the above discussion was to create an understanding of the circumstances in which we are advocating for a menstrual leave policy, wherein the female body has no place in the society let alone the problems associated with it getting entertained in a male-dominated workforce. In the following section, the author has engaged with an innovative reassessment of the need for menstrual leave followed by policy deliberation and a future roadmap for the same.



III. ADDRESSING THE CRITIQUE: PROVIDING SOLUTIONS TO CHALLENGES

The critique of the case for menstrual leave revolves around the following central themes-

1. Menstruation cannot be considered as a handicap as women have been working with it since ages.
2. The provision of menstrual relief is contrary to the doctrine of equal pay for equal work.
3. A gender-neutral solution could be the utilization of sick leaves by female employees as a form of menstrual relief.
4. It might cause an unnecessary financial burden for the employer.
5. It might aggravate the already existing workplace discrimination.¹²

These criticisms have been attempted to be addressed as follows-

First, the people who argue that not all females feel the same intensity of pain during their menstruation, need to understand that if 10 employees are suffering from fever, it is not necessary for all of them to have a 101-degree temperature to be given sick leaves. While not all women go through that much pain which severely hampers their productivity, majority of them go through the same which is scientifically proven and in worst-case scenarios might requires hospitalization also.¹³ Secondly and most importantly, it's not just the pain that menstruation is concerned with, rather it comes with other real challenges like abdominal or pelvic cramping, Lower back pain, Bloating, sore breasts, Food cravings, Mood swings, irritability, Headache and Fatigue. Even the basic things like walking, sitting, sneezing, or coughing can be problematic when one is constantly bleeding with the fear and anxiety of displacement of sanitary napkin and leakage (which if comes in unfortunately, is stared upon by the people around leading to extreme sense of embarrassment). Apart from that, to maintain hygiene during the so-called "impure" times, there is a need to change the sanitary napkins every 4 to 6 hours.

¹²Chopra D, 'A Demand That Could Hamper Gender Equality' (*The Hindu*, 14 February 2024) <<https://www.thehindu.com/opinion/op-ed/a-demand-that-could-hamper-gender-equality/article67845843.ece>> accessed 6 November 2024.

¹³The mean absenteeism related to a woman's period was 1.3 days per year. A total of 80.7% (n=26 438) of the respondents reported presenteeism and decreased productivity a mean of 23.2 days per year. An average productivity loss of 33% resulted in a mean of 8.9 days of total lost productivity per year due to presenteeism. Women under 21 years were more likely to report absenteeism due to menstruation-related symptoms (OR 3.3, 95% CI 3.1 to 3.6). When women called in sick due to their periods, only 20.1% (n=908) told their employer or school that their absence was due to menstrual complaints. Notably, 67.7% (n=22 154) of the participants wished they had greater flexibility in their tasks and working hours at work or school during their periods.

Schoep, M. E., Adang, E. M. M., Maas, J. W. M., De Bie, B., Aarts, J. W. M., & Nieboer, T. E. (2019). Productivity loss due to menstruation-related symptoms: a nationwide cross-sectional survey among 32 748 women. *BMJ open*, 9(6), e026186. <<https://doi.org/10.1136/bmjopen-2018-026186>> accessed on 02 June 2024.



Now, we need to remember that we are talking of this situation in the Indian context where rest-room challenges, issues of period poverty¹⁴ are an actual nightmare. India is still fighting its battle to be open-defecation-free, let alone the workplaces having separate toilets for females. This is an excerpt from a report from Subhash Nagar municipality-

“Two facilities, each with a dozen toilets — six for women and six for men — service the entire settlement, Subhash Nagar, which covers about one-tenth of a square mile and as of 2020 housed more than 9,000 people. As a result, for residents of Subhash Nagar, and millions of low-income residents across India, bathroom schedules are often dictated not by biological need, but by inadequate toilet infrastructure. Several women told Undark that they routinely hold their urine and avoid drinking liquids in an effort to reduce trips to the facilities. These behaviors lead to stomach aches and constipation, but the women said they don’t have better options. Dalvie recalled a conversation with the state’s former minister of health, a young *woman who often needed to travel for work*. The health minister would limit her water intake, knowing that the public toilets she would encounter on the road might not be adequate. This is an example of how women’s problems have been normalized in India, said Dalvie. Toilet infrastructure is not just an issue of sanitation, said Deepa Pawar, a social activist focusing on gender and youth issues in marginalized communities. “It is a much larger problem that encompasses health, gender, and social justice issues,” she said.”¹⁵

The image below displays various data dimensions of menstruation in India from the National Family Health Survey-5 making the dreadful situation of menstruating women discernible. With this, the availability of public washrooms for women who have to travel long-distances for work by local transport can be well imagined. It needs to be noted that as per the report published by the World Bank Group, women are amongst the biggest users of public transport wherein, eighty-four percent of trips taken by women for work were estimated to be by public, intermediate public, and non-motorized transport which however, are not traditionally designed keeping in mind women’s safety and their specific travel needs.¹⁶

In fact, we can talk about changing the napkins, only after we have reached the stage where all women have access to sanitary napkins. According to a study, in rural India, only 42% of adolescent women exclusively used hygienic methods, with substantial geographic disparities at the state and district levels.¹⁷

¹⁴Bangalore Mirror, ‘Menstruation Money’ (Bangalore Mirror, 31 August 2022) <<https://bangaloremirror.indiatimes.com/opinion/you/menstruation-money/articleshow/93886838.cms>> accessed 6 November 2024.

¹⁵Ruchi Kumar, *For Many Indian Women, Lack of Toilet Access Poses Health Risk*, UNDARK, (July 20,2020), <<https://undark.org/2022/07/20/for-many-indian-women-lack-of-toilet-access-poses-health-risks/>> accessed on 19 March 2024.

¹⁶World Bank Group, ‘Designing Public Transport in India That Works for All’ (*World Bank*, 8 March 2023) <<https://www.worldbank.org/en/news/feature/2023/02/09/how-to-help-ensure-safe-and-inclusive-public-spaces-and-public-transport-for-women-in-india>> accessed 02 November 2024.

¹⁷Singh, A., Chakrabarty, M., Singh, S. et al. Menstrual hygiene practices among adolescent women in rural India: a cross-sectional study. (*BMC Public Health*, 2022) 2126<<https://doi.org/10.1186/s12889-022-14622-7>> accessed on 01 April 2024.



Considering the extent of poverty in India, it is a harsh reality that menstrual hygiene products are inaccessible to most women in India owing to their availability in rural areas as well as financial constraints.

It is surprising to know that the National Multi-Dimensional Poverty Index as computed by the NITI Aayog, mentions- “The household has unimproved or no sanitation facility or it is improved but shared with other households” as the criteria under the head of Sanitation wherein, the issue of menstrual hygiene is not even touched upon.

Further, taking up the situation of the legal realm itself, a recent report published by the Centre for Research and Planning of the Supreme Court of India, titled ‘State of the Judiciary’, has brought attention to disparities in gender-specific facilities within district court complexes across the country. The report sheds light on the inadequate provision of separate toilets for women, the lack of sanitary napkin vending machines, and the absence of toilets for transgender persons. The finding says that nearly one-fifth of district court complexes lack separate toilets for women, only 6.7% of women’s toilets have sanitary napkin vending machines and existing washrooms often have broken doors and face issues of irregular water supply.¹⁸ Hence, it becomes a real challenge or rather impossibility for women to survive their menstrual cycle hygienically and healthily.

The situation of District courts above said, where the female judges themselves are facing such a difficult situation, one also needs to consider the case of a female loco-pilot in Indian Railways, where there is no farthest provision of toilet facilities in their cabin on train wherein, they have been forced to wear adult diapers owing to circumstances.¹⁹ Or for that matter, a woman employed as traffic-police, at a construction site, a bus conductor coming with an old cloth on her menstruating days having no provision to change it for 10 hours straight. The last line needs to be emphasised as the types of jobs mentioned herein, mark a departure from so-called ‘pink-collar jobs’. It very importantly reflects the legitimacy of parents’ concern when they want their daughter to be a teacher, a doctor, or a bank employee and hence, be limited to ‘pink-collar jobs’ where they have a higher probability of getting at least basic facilities thereby restricting them to certain areas of the economy, the very issue which is often brushed under the rug by Neo-liberal feminists.²⁰

Additionally, according to many critics, the provision of menstrual leave defeats the idea of Equal pay for equal work. Herein, they need to understand that women are not demanding extra pay on normal days, rather menstruation is a situation that comes naturally affording them no control over the same. If we see there can be some fault on the part of an employee claiming

¹⁸Supreme Court of India, *State of the Judiciary: A Report on Infrastructure, Budgeting, Human Resources*, (Centre for Research and Planning, 2023).

¹⁹Jose K Joseph, ‘Loco pilots work for up to nine hours without access to toilets’ *The New Indian Express* (Tamil Nadu, 04 Apr 2023) <<https://www.newindianexpress.com/states/tamil-nadu/2023/Apr/03/loco-pilots-work-for-up-to-nine-hours-without-access-to-toilets2562177.html#:~:text=Loco%20pilots%20on%20most%20of,engine%20rooms%20for%20the%20pilots>> accessed on 19 March 2024.

²⁰ Catherine Rottenberg, *How neoliberalism colonized feminism – and what you can do about it*, (May 23, 2018) <<https://theconversation.com/how-neoliberalism-colonised-feminism-and-what-you-can-do-about-it-94856>> accessed on 25 March 2024.



sick leaves for maybe not taking proper care of himself, but the paid sick leaves are never questioned, with the reason being employee “rights” and natural unproductive period in the course of a year. Additionally, neither the 5-7 sick leaves provided annually to an employee are sufficient to cover menstruation which lasts for an average of 60 days a year²¹ nor does it comply with the idea of substantive equality which reasonably differentiates between persons located in different circumstances. The doctrine of substantive equality has been upheld by the courts of law in India as well as other jurisdictions for decades.

Here, a fascinating piece of writing by Gloria Steinem, ‘If Men Were To Menstruate’ is very relevant, where she writes,²²

“Military men, ...would cite ‘MEN’struation as proof that only men could serve in the Army (you have to give blood to take blood), Men would convince women that intercourse was more pleasurable at ‘that time of the month’. She predicts, that various feminists would respond differently — ‘cultural feminists would develop a bloodless imagery, radical feminists would add that the oppression of the non-menstrual was the pattern for all other oppressions, and socialist feminists would insist that only under capitalism would men be able to monopolize menstrual blood’.”

A. The Care Ethics approach

It again reinforces the idea that the policy that favors the dominant is always considered legitimate. Nevertheless, considering the idea of a profit-centric nature of human beings and society that has been articulated by several political and economic thinkers throughout history like Adam Smith,²³ David Ricardo, Karl Marx, Max Weber, Milton Friedman, etc., the employers do not care how badly menstrual leaves are needed but rather they are concerned about the cost of labor i.e. if female labor is more expensive than male labor owing to the costs of maternity as well as menstrual leaves, they would prefer male employees over female employees. However, the most important point of this paper comes in here where we question this very idea of a state being concerned only about the public sphere of the society wherein, if we take a right-based approach, there will be a conflict of rights between the female employee i.e. her right to her bodily integrity, right to health, right to dignity, right to life, etc. and the employer’s right to extract maximum profit out of minimum investment in a competitive economy. This leads to a policy bottleneck with regard to the question of whose rights should prevail and whose shouldn’t. Also, if women are provided with their right to leave during menstruation, the employers being disincentivized to employ female labor would hire fewer women or might not even hire women at all, thereby, again depriving them of their right to work/ occupation. This juncture of legal, political, economic as well as social dilemmas can be

²¹ Hiralal Konar (ed), DC Dutta’s Textbook of Gynaecology (6th ed, 2013) 82.

²² Gloria Steinem and Bobel C, ‘Chapter- 3 / If Man Could Menstruate’ in Fahs B (ed) (2020) <<https://www.ncbi.nlm.nih.gov/books/NBK565636/>> accessed on 07 April 2024.

²³Smith Adams, *Wealth of Nations* (W. Strahan and T. Cadell, London, 1776).



solved by way of the ‘Responsibility-care model’ along with the ‘Care-ethicist’ school of thought.²⁴

The Responsibility-Care Model and the Care-Ethics School of Thought are both frameworks within ethics that emphasize the importance of relationships, empathy, and interconnectedness in moral decision-making. Herein, the authors first propose the elimination of the public-private dichotomy to ensure that some phenomena though falling under the private sphere of life of females, do not affect their lives in public in a negative sense owing to the lack of recognition of the same.²⁵

Secondly, the authors propose an approach where rather than considering society as composed of machines, we take care of the individual health, emotions, physical conditions so as to ensure long-term sustainable development of the society as put forth by the care-ethics school of thought while contrasting the Rights-justice model with the Responsibility-care model.²⁶ Herein, the differential needs of individuals are accommodated and the state has a stake in the regulation of private affairs also with an intent of ruling out any possibility of oppression/harassment of its citizens. This is a duty-based approach as opposed to the rights-based one. Therefore, in this case, the state should recognize maternity as a form of labor only, since it sustains humanity and is not only restricted to private affairs of an individual’s life. Likewise, since menstruation is also related to maternity, it must also be considered as a form of labour that women go through the whole of their life in order to bear a child once/twice in their lifetime. Also, the state as well as the fellow citizens owe a duty of care towards the women of the society under this model which thus makes it obligatory for the employers and fellow workers to cooperate for the cause of menstrual relief.

While elaborating upon the possible negative consequences if this approach is not taken up by the authorities, there would be demands from the industries where the provision of maternity relief is mandated without financial assistance for providing the same. This particularly in the Indian context, is not just a possibility but instances of it have already been observed during the passing of the Maternity Benefits (Amendment) Act, of 2017²⁷ while anticipating rising costs of women employees, the Federation of Small and Medium Enterprises had asked the government to bear additional costs²⁸. The possibility of industries explicitly demanding cost-sharing from the government would still be a better scenario than that of them silently cutting down upon the female workforce, or discriminating with them at the workplace in matters of task allocation, growth & promotion opportunities, etc., thereby making menstrual relief more of a impediment for women than a relief.

²⁴Sridhar Iyer and Myer G, ‘Feminist Reflections on Labour: The “Ethics of Care” within Maternity Laws in India’ Manupatra, <<https://articles.manupatra.com/article-details/Feminist-Reflections-on-Labour-The-Ethics-of-Care-within-Maternity-Laws-in-India>> accessed on 04 April 2024.

²⁵ Brian Gran & Daniel Béland, *Conclusion: Revisiting the Public-Private Dichotomy* (Palgrave Macmillan, London, 2008) 269 <https://doi.org/10.1057/9780230228771_13> accessed on 04 April 2024.

²⁶ *Ibid.*

²⁷ Maternity Benefits (Amendment) Act, 2017.

²⁸PTI, ‘Govt should bear the additional cost of maternity leave: MSME body’, (Indian Express, 25 August 2016) <<https://indianexpress.com/article/india/india-news-india/govt-should-bear-additional-cost-of-maternity-leave-msme-body/#:~:text=Anticipating%20rising%20cost%20of%20women%20emp>> accessed> accessed on 02 April 2024.



B. The judicial discourse & global developments

To take into consideration the juridical stance, there are enough judicial precedents that further the case of women for their right to avail menstrual leave. In *Anuj Garg v. Hotels Association of India*²⁹ (“Anuj Garg”) as well, as permitting women to be employed at places where alcohol was served was resisted for the same ‘security’ reasons. However, in all these cases, the courts held that such social realities should not be used as grounds to further disadvantage women. Rather, the court held that the State has a positive obligation to alter that reality and remedy the discrimination.³⁰ Similar effect if applied to the discourse on menstrual leave, it could be affirmed that the state in all its social realities should not further discriminate against women, rather has the obligation to create safe and secure conditioning for women working during their menstruation. The state as a welfare body should affirm that social realities are not used as another ground for stereotypes that would add to the already discriminating conditions of women in economic sectors. Further to understand the contextual relation between maternity leave and menstrual leave, one such landmark judgment is that of *United States v. Virginia*.³¹ (“Virginia”), where it was specifically held that sex should be classified on the ‘real’ differences that are pertinent to both the genders of the society, where the physical ability and capability of women to get pregnant should not reinforce women to pertinent gender stereotypes on the part of their physical differences. Similarly, the landmark case of *Vishaka & Ors. v. State of Rajasthan & Ors*³² established workplace guidelines to prevent sexual harassment. It was argued that withholding menstrual leave may force women to work in uncomfortable conditions, potentially leading to harassment and breaching their rights under Article 15. Furthermore, in *Seema v. Ashwani Kumar*,³³ the Supreme Court acknowledged women’s rights to health and hygiene as integral to their dignity. Such judicial precedents serve as a testament to how courts affirmed that ‘women’ could be treated differently considering the ‘real’ physical differences that persist in the genders however such difference could only be to an extent that it would not turn discriminately towards her and thus denying menstrual leave conflicts with safeguarding these rights during menstruation.

Further in the Indian context *Ministry of Defence v. Babita Puniya*,³⁴ Elaborates on the principle of anti-stereotyping and advocates that any policy or law that defines “inherent physiological differences between men and women” are unconstitutional because they are based on the stereotypical notions about the strength or weakness of both sexes.³⁵ This judgment too stands on some common fear of implementing policies that are gender centric, including that of menstrual leave in India. It shall also be taken into consideration that the ultimate legitimate objectives of the policy should be balanced against the goal of not

²⁹ *Anuj Garg v Hotel Assn. of India* (2008) 3 SCC 1.

³⁰ Siddhi Gupta, “Menstrual Leave - A Step Towards Substantive Equality” 7.2 NLUJ LR (2021) 166.

³¹ *United States v Virginia et al*, 1996 SCC Online US SC 74.

³² *Vishaka & Ors. v State of Rajasthan & Ors* AIR 1997 SC 3011.

³³ *Smt. Seema v Ashwani Kumar* 2006 (2) AIR BOM R 783.

³⁴ *Ministry of Defence v Babita Puniya* (2020) 7 SCC 469.

³⁵ *Babita Puniya* (n 65) [69].



reinforcing the alleged stereotype it perpetuates.³⁶ The issue of fact pertains to the continuous disadvantage faced by women in accommodating their 'real' physical differences in any economic working sector.

Henceforth, the cost of maternity leaves or menstrual relief can be paid through social insurance schemes or employer-government shared funds which will not place the whole burden on the employers only.

In the global scenario also, the countries which have implemented maternity and menstrual reliefs like Spain have a state's share in the funds required for the same.³⁷ However, in India's case, for instance, the Maternity Benefit Act 1961, states full responsibility for providing paid maternal leave to the employers where it may lead to encountering significant resource strain on the part of the employer. A similar fear is also acclaimed by the critics of the menstrual leave policy which showcases the resource strain of employers during paid menstrual leave. This further amounts to negative stereotyping the women in employing them in the workforce. Taking into consideration that such financial burden if lied solely on private individuals would amount to discrimination towards women owing to the leaves acclaimed by them. Thus, India as such could follow the pattern of Spain where the state has a share in raising the funds for the same. Running social schemes like that of Australia for the same would be beneficial for the initial stage implementation of such menstrual leave policy that would not cause the employer to discriminate or have any negative effect on economic fronts for women.

The International Labour Organization provides for a 'Maternity Protection at work report' that says, more than 120 countries at present provide for paid maternal leave. The analysis indicates that working women have made significant progress in getting maternity leave paid through social security since the first ILO maternity agreement in 1919 when just nine countries offered this benefit. By 1952, the number had risen to 40, and it now exceeds 100. Socialist schemes of raising funds are being followed by countries like Australia where the government runs Paid Parental Leave Program (PPL). It provides qualified working parents with up to 18 weeks of paid leave at the national minimum wage rate, which is presently fixed at 100%.³⁸

Henceforth, the point of criticism that menstrual leaves will, as in the 'personal opinion' of the honorable minister, disincentivize employers from hiring women stands ruled out through this model. Most importantly, it must also remind her that if women are facing or have to face, or for that matter even men or the LGBTQIA+ community illegitimate threats of harassment at the workplace because of their body type, it is the responsibility of the government to check that. However, it must be taken into consideration that all the provisions of law work in continuation and consonance with each other and not separately. When the lack of a paid menstrual leave policy is presently violating the fundamental rights of women, the same can never be triumphed by the apprehension of discrimination against female employees, rather

³⁶Unnati Ghia and Dhruva Gandhi, 'The Anti-Stereotyping Principle: A Conundrum in Comparative Constitutional Law' (*IACL-AIDC Blog*, 2020).

³⁷Pilar Garcia-Aguilera, 'Spain: Legislation introduces paid menstrual leave' (wtw, 27 February 2023) <<https://www.wtwco.com/en-in/insights/2023/02/spain-legislation-introduces-paid-menstrual-leave>>[accessed on 21 March 2024](#).

³⁸ International Labour Office, *Maternity at Work: A Review of National Legislation* (2nd ed, International Labour Organization, 2010).



such discrimination has to be checked by the state.³⁹ Further, it's the responsibility of the state to share the burden of funds required for menstrual leaves with the employers in the same manner as it takes the burden of post-retirement pensions and in fact, it has been expanded to the private sector also by way of government-beneficiary contributory model.

Lastly, one of the criticisms against menstrual relief is that there is no need for 'special' leaves for female employees when all employees are already provided with the annual or monthly paid 'sick-leaves' or 'medical-leaves'. However, what has to be noted is that a female employee gets her menstrual period every month and she has an equal possibility of falling ill.⁴⁰ As with her male colleagues so was able to avail of the sick leaves for sickness differentiated from menstrual relief. Menstruation is an additional need of female employees which can be distinguished from the need for sick- leaves.⁴¹

IV. THE POLICY-PROGRAMME

India had secured the reproductive rights of its working women in the year 1961⁴² only by, but it was a partial success due the ignorance of the need for a menstrual leave policy. Nevertheless, numerous initiatives have been undertaken by the state governments as well as the private players, wherein the Policy of menstrual leave is not a newly formulated concept, rather it has gained its root in India since its implementation policy state of Bihar in 1992 where it became India's first state to pioneer a two-day-per-month paid menstrual leave for women across all sectors, extending this benefit to female students in grade eight and above in state-recognized schools. Following Bihar's lead, recently companies and the corporate sector have also started to incorporate the concept of menstrual leave in India. Companies like- Culture Machine and Gozoop in Maharashtra introduced a one-day-per-month paid menstrual leave for female employees in 2017.⁴³ Subsequently, Matrubbhumi, a media giant in Kerala, adopted a similar policy for a portion of its female workforce. Zomato, a multinational corporation, went a step further in 2020 by introducing ten paid menstrual leaves annually for its employees.⁴⁴ These initiatives collectively caused a gradual change in corporate environment in the country.

³⁹ Mittal K and Maran N, 'Paid Menstrual Leaves: A Legal Enigma' < <https://www.rsrr.in/post/paid-menstrual-leaves-a-legal-enigma#:~:text=Protecting%20the%20rights%20of%20the,not%20exploited%20by%20their%20employers.&text=The%20biggest%20legal%20impediment%20to,the%20RSRR%20Editor%E2%80%99s%20Column%20Series> > accessed 5 March 2024.

⁴⁰ Sandra Fredman, "Reversing Roles: Bringing Men into the Frame" (2014) 10 International Journal of Law in Context 442, 444.

⁴¹ Bhoomi Aggarwal, 'Menstrual Leave: Necessity or Controversy?' (*Manupatra*, Oct 29) <<https://articles.manupatra.com/article-details/Menstrual-Leave-Necessity-or-Controversy>> accessed 05 November 2024.

⁴² Maternity Benefits Act, 1961.

⁴³ India Today Web Desk, 'These two Indian companies are offering the first day of period leaves and women couldn't be more grateful' (India Today, 2017) <<https://www.indiatoday.in/education-today/news/story/indian-companies-menstrual-leaves-1024124-2017-07-13>> accessed on March 02, 2024.

⁴⁴ J Jagannath, 'Zomato introduces 'period leave' of up to 10 days per year for employees' Livemint (8 August 2020) <<https://www.livemint.com/companies/news/zomato-introduces-period-leave-of-up-to-10-days-per-year-for-employees-11596898781696.html>> accessed 1 March 2024.



Apart from this, there have also been attempts to introduce menstrual leave bills in Parliament, but they have not been successful so far. In 2017, the Menstruation Benefits Bill was introduced, followed by the Women's Sexual, Reproductive, and Menstrual Rights Bill in 2018 introduced by Mr. Shashi Tharoor.⁴⁵ The latter one here addressed the issue of the availability of menstrual hygiene products and was good in the aspect of having a financial memorandum for the same stating the provision to be fully state-funded. The Menstrual Rights Bill, though a brilliant initiative, had two major lacunas. First, it did not expand its scope to corporate sector employees like IT companies. Secondly, it placed the whole burden of funds on the employer only, thereby posing a risk to women's employment levels.

Now, as per the World Economic Forum's Gender Gap Report 2022, India ranked 135 out of 146 countries and was behind smaller neighbors such as Sri Lanka, Bangladesh, and Nepal. Since India's female labor force participation rate is still very low, an increase in India's women workforce is inevitably important for it to become a \$7 Billion economy.⁴⁶

In the wake of this, a menstrual leave policy is an urgent requirement in order to enhance the female workforce participation wherein, women will be able to work with their body and not against it, the future roadmap for which is discussed in the section below.

V. FUTURE ROADMAP

In the context of the discussion above, we suggest a provision of 2- days per month of paid menstrual leave which will be compulsory at the side employer, but voluntary at the side employees, the funds for which will come from social insurance schemes / Public-private partnership models wherein a staged implementation must be followed moving on from educational institutions to organized sector and then towards the unorganized sector. Apart from this, since many corporate giants have been following the work-from-home culture from the onset of the COVID-19 pandemic, which according to reports has also been proven to be beneficial for them,⁴⁷ They can provide the female employees with an option for work-from-home with some incentives, which will still be better than absenteeism or an unproductive day at the desk. The regulatory task regarding this can be allocated to the bodies like National Commission for Women and the state women Commissions at the national and state levels respectively. The regulation of the menstrual leave policy for the union territories can be undertaken by NCW. Apart from this, if a need for a separate dedicated institution arises depending upon the workload, the dedicated regulatory bodies can be constituted at the state and national levels.

⁴⁵ Women's Sexual, Reproductive, and Menstrual Rights Bill, 2018.

⁴⁶ *Global Gender Gap Report 2022*. (2022). World Economic Forum. <<https://www.weforum.org/publications/global-gender-gap-report-2022/>> accessed on 23 March 2023.

⁴⁷ Divyanshi Sharma, 'Companies allowing work from home are more profitable than the ones strict about employees coming to office' *India Today* (Nov 15, 2023 09:27 IST), <<https://www.indiatoday.in/technology/news/story/companies-allowing-work-from-home-are-more-profitable-than-the-ones-strict-about-employees-coming-to-office-2462984-2023-11-15>> accessed on 02 April 2024.



The rationale behind the above-mentioned suggestions is providing women with a right to exercise their discretion in availing menstrual leaves rather than forcing them to take a day off while they might be feeling comfortable enough to work or might want to prioritize work on certain days. One challenge with regards to the same is that making menstrual leaves voluntary might give the employers an opportunity to force female employees to not avail of such leaves, maybe by threatening them with pay cuts or discrimination in chances of promotion, etc. or to lure the employees with extra payments (which would still be beneficial for the employers than affording the costs of paid 2- day leave) for not taking such leaves.

Nevertheless, in order to avoid such issues, we cannot take away the right of discretion from female employees for availing menstrual relief. However, to address this challenge, an appropriate grievance redressal forum has to be present which can be made to offer online complaint portals, thereby making the process swift and convenient. An appropriate amount of fine (as to be decided by the authorities) can be levied if any organization is found misusing the provision, thereby preventing any such activities. Moreover, a state-wide database could be maintained where private companies periodically upload information—such as quarterly reports on female employee details and menstrual leave usage—allowing for better oversight. This database could also assist in addressing other workplace issues, such as sexual harassment, by recording female employees' identities and details in private sectors with the government. For compliance by private establishments like shops or restaurants, tax incentives could be offered as a means of encouraging adherence to the policy.

VI. CONCLUSION

In conclusion, this paper highlights the challenges women face due to the lack of menstrual relief provisions as well as the potential issues that might arise even if such a policy were implemented. It underscores the nuanced difference between 'equality' and 'similarity' for men and women, advocating for a societal acknowledgment of biological determinism. The paper explores the issue of women being limited to 'pink-collar jobs' and points out the need for traditionally male-dominated fields to accommodate women's distinct needs concerning infrastructure, work environment, and leave policies.

Drawing parallels with the early provision of maternity leave, the paper critiques the selective approach society takes toward women's reproductive health, favoring policies like maternity leave that benefit family and societal continuity, while neglecting support for biological functions like menstruation that impact women on a personal level. This disparity reveals the persistence of a public-private divide, where the government overlooks the private burdens on women that, in turn, affect their public and professional lives.

The central issue of menstrual relief, that is, the potential for increased workplace discrimination, is addressed through a 'Care-Ethics' approach and a duty-based model. It argues for recognizing menstruation, like maternity, as a form of labor essential for sustaining humanity, urging citizens to support women by providing appropriate relief. However, it acknowledges that imposing this mindset universally may be challenging, especially given the



profit-driven nature of most private sector entities. To mitigate financial burdens on employers, the paper proposes public-private partnerships or social insurance schemes to fund such policies.

Given India's resource constraints, the paper advocates a phased implementation across sectors, with ongoing evaluations of public response and adjustments as needed. It emphasizes that menstrual relief is a pressing issue requiring immediate attention, regardless of financial obstacles. Thus, the paper supports a two-day voluntary menstrual leave policy, mandatory for employers to offer, along with measures such as empowering the National Commission for Women or state women's commissions to regulate the policy, introducing tax concessions for compliant employers, and establishing a new regulatory body to oversee implementation and conduct compliance audits.

Ultimately, this paper offers an advisory framework and urges legislative action to establish a supportive structure that would help women in the workforce overcome the 'glass ceiling.' The menstrual leave policy represents a critical step toward a more inclusive and equitable society. By recognizing and valuing women's unique experiences, we can foster a workplace culture that celebrates diversity, mutual respect, and empowerment. As the world advances toward gender equity, let us hold fast to the principle that everyone deserves the opportunity to thrive, regardless of gender or biological differences.



DECIPHERING GENDER DYNAMICS IN THE INDIAN GAMING LANDSCAPE: A LEGAL ANALYSIS OF THE RAMIFICATIONS OF GAMERGATE

By Dikshita Singh

Abstract

This research paper aims to investigate the gender dynamics within the global and Indian gaming landscape through a legal lens, focusing on the ramifications of the Gamergate controversy. The study delves into the socio-cultural implications of Gamergate in India and analyzes the legal framework surrounding gender representation, harassment, and discrimination in the gaming industry. By examining relevant laws, regulations, and case studies, the paper seeks to provide insights into the challenges faced by women in the Indian gaming community hindering the aim of fostering a more inclusive and equitable gaming environment.

Keywords: *Gender inclusivity, Gaming, Gamergate, Online harassment, Legal framework.*

I. INTRODUCTION

A. Background of the Indian Gaming Industry

The beginning of the online gaming sector in India traces back to the early 2000s, marked by the introduction of console and Personal Computer (**hereinafter, “PC”**) gaming, which acquainted numerous middle-income Indians with digital gaming avenues. However, the accessibility of these platforms was hindered by the high costs associated with PCs and consoles, thereby restricting consumption to a narrow customer base. Later, this scenario underwent a transformation in the mid-2000s, influenced by factors such as rampant piracy and the emergence of social media platforms. Consequently, the online community commenced exploring, acquainting with, and exchanging information about online games through diverse social media channels.

The Indian gaming industry has experienced remarkable growth and transformation over the past few decades, evolving from a niche market to a significant player on the global stage. This sudden surge has paved way for young game developers to strengthen their potential owing to the incoming investments from big tech-based companies such as Alibaba, Nazara, Tencent, Azure, etc. With a blend of traditional cultural influences, technological advancements, and a



growing youth population, India's gaming sector has become one of the fastest-growing sectors in the world.

In the past, gaming in India had strong ties with traditional forms of entertainment such as board games like Chess, Ludo, and traditional card games like Teen Patti and Rummy. These games have been deeply ingrained in Indian culture for centuries, fostering a familiarity and love for gaming among the population.

The liberalization of the Indian economy in the 1990s paved way for a significant growth in the gaming industry. Increased access to computers, internet, and other devices provided a platform for the emergence of video gaming in the country. Gaming was initially primarily limited to arcades and PCs, but with the advent of smart phones and affordable mobile data and Wi-Fi facilities, popularity of mobile gaming exploded.

The emergence of smart phones brought gaming to the masses, with millions of Indians engaging in casual gaming experiences remotely. Games like Temple Run, Candy Crush Saga, Clash of Clans, and PUBG Mobile gained massive followings in India, showcasing the country's increasing interest in gaming content. The rise of esports has been instrumental in shaping this Indian gaming landscape. Esports tournaments, such as the India Gaming Show and the ESL India Premiership, have gained significant attention and participation in the country.

The industry has also seen a surge in indigenous game development, with creation of games tailored to the Indian community. In order to cater to the diverse tastes of Indian gamers, themes like mythology, folklore, cricket, and Bollywood have been incorporated into games.

In the recent years, the Indian gaming industry continues to expand rapidly, with the help of technological innovation, increasing internet domination, and a growing acceptance of gaming as a mainstream form of entertainment. With a large population embracing gaming culture, India is expected to become a major player in the global gaming arena in the coming years.

B. Overview of Gamergate and its Global impact

Gamergate was a controversial online movement that emerged in 2014 within the gaming community, mainly on social media platforms such as Twitter and Reddit. In the initial time frame, it was seen as a debate on ethics in video game journalism. However, it quickly developed into a harassment campaign targeting women, particularly in the gaming industry.

The movement gained attraction after allegations of unethical behavior by a game developer, Zoe Quinn, and a subsequent blog post by her ex-boyfriend, mainly accusing her of trading sexual favors for positive reviews on her game. This incident came out to be a catalyst for the widespread harassment, doxing, and threats against her and other prominent women in gaming, including game developers such as Brianna Wu and Anita Sarkeesian.

While allegedly focusing on journalistic integrity, Gamergate became synonymous to misogyny, wherein its participants often engaged in sexist attacks and created a toxic online environment. This movement also pushed for discussions around sexism, representation, and inclusivity within the gaming industry.



Gamergate's impact, however also extended beyond the gaming community, initiating conversations about online harassment, the ethics of internet usage, and the role of social media platforms in moderating and screening the content. Furthermore, it also highlighted the challenges faced by women and other marginalized groups in male-dominated spaces like gaming, sparking a debate around diversity and inclusion in the industry.

It also served as an antecedent situation to larger cultural and political shifts, reflecting the broader societal tensions around gender, identity, and the power dynamics. It contributed to the divergence of online discourse and raised various questions about the responsibilities of tech companies in fighting the increasing harassment and hate speech.

The movement left a lasting impact on the gaming industry, highlighting the need for greater diversity, accountability, and empathy in the online communities. It served as a cautionary account about the probable consequences of unchecked online behavior and the importance of fostering a more inclusive and respectful digital environment.

C. Research Objectives

1. To examine the prevalence and nature of gender dynamics within the Indian gaming landscape, particularly in light of Gamergate.
2. To analyze the legal implications and ramifications of incidents like Gamergate within the Indian legal framework, including relevant laws, regulations, and precedents.
3. To investigate the impact of gender-based discrimination, harassment, and bias on the participation and representation of women in the Indian gaming industry.
4. To assess the effectiveness of existing policies, guidelines, and enforcement mechanisms in addressing gender-related issues in Indian gaming communities and platforms.

II. LITERATURE REVIEW

A. Gender representation in video games

Gender representation in video games has been a topic of significant discussions and researches, reflecting the broader societal debates about gendered norms and stereotypes in popular media. *Beasley and Standley, 2002*¹ conducted a leading study on gendered portrayal in video games, revealing persistent stereotypes and limited representations of female characters, often depicted by marginalized and hyper-sexualized avatars. Similarly, *Dill and Thill, 2007*² in their study, found that female characters in video games are frequently represented by exaggerated physical attributes and portrayed as victims or objects of rescue, supporting traditional gender roles.

¹ B Beasley and TC Standley, 'Shirts vs Skins: Clothing as an Indicator of Gender Role Stereotyping in Video Games' (2002) 5 *Mass Communication & Society* 279–293.

² KE Dill and KP Dill, 'Video Game Characters and the Socialization of Gender Roles: Young People's Perceptions Mirror Sexist Media Depictions' (2007) 57 *Sex Roles* 851–864.



Some of the recent studies have highlighted the importance of diverse representations of gender in gaming. *Consalvo, 2012*³ in his study argued that video games have the potential to challenge conventional gender norms and provide opportunities for players to explore alternative identities and experiences. Moreover, *Shaw, 2012*⁴ emphasized the significance of player intervention and customization options in shaping individual interpretations of gender within gaming contexts.

B. Gender stereotypes and discrimination in gaming culture

Gender stereotypes and discrimination in gaming culture have been subject to extensive studies in the academic literature. Research by *Dill and Thill, 2007*⁵ revealed the pervasive gender stereotypes in the video game contents where female characters are often portrayed as sexualized, submissive, and less competent than the male characters. Similarly, in studies by *Ivory, 2006*⁶ and *Taylor et al., 2009*⁷ the prevalence of gender-based harassment and discrimination in online gaming communities, perpetuating hostile environments for women and marginalized groups was highlighted.

Scholars like *Shaw, 2012*⁸ and *Consalvo, 2012*⁹ have further explored the crossroads of gender, identity, and power dynamics within the gaming culture, examining how traditional notions of masculinity and femininity shape experiences and social interactions of players. Additionally, research by *Fox and Tang, 2014*¹⁰ investigated the impact of gender stereotypes on self-perception and behavior in gaming contexts, highlighting the negative effects of internalized sexism on women's participation and performance.

C. Legal perspectives on gender-based harassment in the gaming industry

Various researches and studies on legal perspectives regarding gender-based harassment in the gaming industry examine the regulatory framework and case laws surrounding issues of discrimination and harassment. Some of the notable studies include those by *Ford and Qiu, 2019*,¹¹ which analyzes the applicability of anti-discrimination laws to online gaming platforms and virtual environments. They explore the challenges of implementing the traditional legal standards in digital spaces and propose strategies to address the gender-based harassment effectively.

³ M Consalvo, 'Confronting Toxic Gamer Culture: A Challenge for Feminist Game Studies Scholars' (2012) 1 *Ada: A Journal of Gender, New Media, and Technology*.

⁴ A Shaw, 'Do You Identify as a Gamer? Gender, Race, Sexuality, and Gamer Identity' (2012) 14 *New Media & Society* 28–44.

⁵ Dill and Thill (n 449).

⁶ J. D. Ivory, 'Still a man's game: Gender representation in online reviews of video games' (2006) *Mass Communication & Society*.

⁷ JD Ivory, 'Still a Man's Game: Gender Representation in Online Reviews of Video Games' (2006) 9 *Mass Communication & Society* 103–114; TL Taylor, J Jenson and S de Castell, 'Cheering for the Home Team: Games, Game Design, and Fan Culture' (Social Science Research Council 2009).

⁸ Shaw (n 451).

⁹ Consalvo (n 450).

¹⁰ J Fox and WY Tang, 'Sexism in Online Video Games: The Role of Conformity to Masculine Norms and Social Dominance Orientation' (2014) 33 *Computers in Human Behavior* 314–320.

¹¹ SL Ford and L Qiu, 'Legal Challenges of Gender-Based Harassment in Virtual Environments: A Critical Analysis' (2019) 11 *Journal of Gaming & Virtual Worlds* 215–232.



Works such as that by *Waksman and Lincoln, 2018*¹² further delve into the legal obligations of game developers, publishers, and platform operators in preventing and mitigating the incidents of harassment and discrimination. They discuss the potential liability of these stakeholders under various legal theories, including negligence and vicarious liability.

D. Previous studies on gender dynamics in Indian gaming

The earlier studies on gender dynamics in Indian gaming have significantly shed light on the distinct challenges and opportunities faced by women within the Indian gaming landscape. *Sriram and Bhaskar, 2018*¹³ conducted a broad study on gender representation and participation in Indian esports and highlighted the underrepresentation of female players and the prevalence of gender-based discrimination and harassment in gaming communities. Their research emphasized the need for targeted interventions to promote gender diversity and inclusivity in Indian esports.

Furthermore, *Singh and Srivastava, 2019*¹⁴ explored the role of cultural factors in shaping gender dynamics in the Indian gaming, emphasizing on the influence of societal norms and stereotypes on women's participation and experiences in gaming. They argued for a clearer understanding of gender dynamics in the Indian context, taking into account the cultural aspects.

III. GENDER DYNAMICS IN THE INDIAN GAMING LANDSCAPE

A. Profile of the Indian gaming community

The Indian gaming community has experienced rapid growth and transformation in the recent years, boosted by factors such as increased internet infiltration, smart phone purchases, and the rise of esports. To understand the profile of this diverse community, it is required to examine various demographic and behavioral factors.

Demographically, the Indian gaming community consists of a wide range of age groups, with a significant portion of young adults and teenagers. According to a report by KPMG India and the Indian Federation of Sports Gaming, around 66% of gamers in India fall within the age group of 18-24 years. This highlights the youth-centric nature of the gaming community.¹⁵ However, there is also a growing trend of older adults engaging in gaming, driven by factors such as increased leisure time and the accessibility of gaming platforms.

While gaming has traditionally been perceived as a male-dominated activity, there is evidence of increasing participation by women. A study conducted by Ernst & Young India, revealed

¹² J Waksman and M Lincoln, 'Navigating the Legal Landscape of Online Harassment in the Gaming Industry' (2018) 26 *International Journal of Law and Information Technology* 257–276.

¹³ R Sriram and N Bhaskar, 'Gender Dynamics in Indian Esports' (2018) in A Cox and others (eds), *Proceedings of the Annual Symposium on Computer-Human Interaction in Play Companion* (ACM) 431–436.

¹⁴ A Singh and P Srivastava, 'Gender Dynamics in Indian Gaming: A Cultural Perspective' (2019) in *Proceedings of the International Conference on Advances in Computing, Information and Engineering* (ICACIE) 1–5.

¹⁵ KPMG India, *Beyond the Tipping Point: A Primer on India's Evolving Gaming Ecosystem* (KPMG 2020).



that around 43% of gamers in India are female, which indicates a significant presence of women within the gaming community.¹⁶

Indian gamers exhibit diverse preferences and playing habits across various gaming platforms and genres. Mobile gaming is currently the most popular gaming platform in India, accounting for a significant portion of gaming activity. Games such as PUBG Mobile, Free Fire, and Ludo King have garnered massive followings, attracting millions of players across the country. However, PC and console gaming also enjoy a dedicated fan base, particularly among hardcore gamers and enthusiasts. The Indian gaming community displays a strong affinity for competitive gaming and esports. The increase in esports tournaments and events has contributed to the professionalization of gaming in India, with a growing number of players aspiring to compete at national and international levels. According to a report by Newzoo, India globally ranks among the top countries in terms of esports enthusiasts, highlighting the passion and enthusiasm for competitive gaming within the Indian gaming community.¹⁷

The community is characterized by its diversity, youthfulness, and evolving preferences. With increasing accessibility and mainstream acceptance, gaming has emerged as a vibrant and integral part of India's entertainment landscape, offering opportunities for social interaction, competition, and self-expression.

B. Gender disparities in game development and representation

Gender disparity in the game development and representation has been a longstanding issue within the gaming industry, reflecting the broader societal challenges related to gender inequality and discrimination. These disparities seem to be visible in various aspects of game development, including workforce demographics, representation in game content, and leadership positions within gaming companies.

One of the most significant gender disparities in game development lies in the composition of the workforce. The gaming industry has been male-dominated, with women significantly underrepresented in technical roles such as programming, game design, and engineering. According to the International Game Developers Association (IGDA) Developer Satisfaction Survey 2019, only 24% of game developers identified as female, highlighting the stark gender imbalance in the industry. This underrepresentation can be attributed with numerous factors, including systemic barriers to entry, workplace biases, and cultural stereotypes about gender roles in technology-related fields.¹⁸

Moreover, these disparities extend to the representation of women in game content. Female characters in video games are often relegated to stereotypical roles, such as damsels in distress or hyper sexualized objects of desire, which is responsible for harmful gender stereotypes and reinforcement of traditional power dynamics. Research conducted by the University of Southern California's Annenberg School for Communication and Journalism found that only

¹⁶ Ernst & Young India, *Online Gaming in India: Reaching a New Pinnacle* (EY 2019).

¹⁷ Newzoo, *Global Esports Market Report* (Newzoo 2020).

¹⁸ IGDA Foundation, *Developer Satisfaction Survey 2019* (IGDA Foundation 2019).



22.5% of primary characters in video games released between 2007 and 2016 were female, indicating a significant lack of gender diversity in game narratives.¹⁹

These differences are also evident in leadership positions within gaming companies. Women are notably underrepresented in executive roles and on corporate boards, limiting their influence and decision-making power within the industry. According to a report by the International Game Developers Association Foundation, women hold only 21% of leadership positions in the gaming industry, highlighting the persistent glass ceiling faced by female professionals.²⁰

Addressing these gender disparities in gaming community requires concerted efforts from industry stakeholders, policymakers, and advocacy groups. Initiatives aimed at promoting diversity and inclusion can help mitigate barriers to entry and create more equitable opportunities for women in the gaming industry. Furthermore, fostering a culture of respect and inclusivity within gaming communities is essential for combating sexism and discrimination and creating a more welcoming environment for all participants.

C. Challenges faced by women gamers in India

Women gamers in India face a lot of challenges that stem from deep-rooted societal norms, cultural expectations, and systemic biases within the gaming community. Despite the growing popularity of gaming in India, women often encounter barriers to full participation and enjoyment of gaming experiences.

One of the primary challenges faced by women gamers in India is the prevalence of gender-based harassment and discrimination within gaming communities. Female gamers frequently report experiencing verbal abuse, harassment, and sexist remarks while playing online games or interacting with other gamers. A study conducted by All India Gaming Federation (AIGF) found that over 60% of female gamers in India have experienced harassment or discrimination while gaming, highlighting the pervasive nature of gender-based toxicity in gaming environments.²¹

Moreover, women gamers often encounter stereotypes and misconceptions about their gaming abilities and interests. There is a prevailing stereotype that gaming is a male-dominated activity, leading to skepticism or dismissal of women's gaming skills and interests. This stereotype creates a hostile environment for women gamers, discouraging them from participating or pursuing competitive gaming opportunities.

Access to gaming spaces and resources is another significant challenge for women gamers in India. Cultural norms and family expectations may limit women's access to gaming consoles, computers, or other resources, restricting their ability to engage in gaming activities. Additionally, the lack of representation and visibility of women in gaming media and marketing campaigns can further alienate female gamers and reinforce feelings of exclusion.

¹⁹ SL Smith, MCR Burgess and J Garst, 'The Game Is a Foot: A Meta-Analysis on the Representation of Women in Video Games' (2019) 69 *Journal of Communication* 557–582.

²⁰ IGDA Foundation, *Developer Satisfaction Survey 2018* (IGDA Foundation 2018).

²¹ All India Gaming Federation, *Women in Gaming: A Comprehensive Report on Female Gamers in India* (AIGF 2021).



The underrepresentation of women in game development and esports aggravates the challenges faced by women gamers in India. The lack of diverse perspectives in game development can result in limited representation of female characters and narratives, perpetuating gender stereotypes and reinforcing gender biases within gaming content.

D. Impact of Gamergate on Indian gaming ecosystem

The impact of Gamergate on the Indian gaming ecosystem has been significant, despite the movement originating primarily in Western gaming communities. While Gamergate itself was a controversy focused on ethics in video game journalism and harassment of women in the gaming industry, its repercussions were seen globally, including within the Indian gaming community.

One of the key impacts of Gamergate on the Indian gaming ecosystem was the heightened awareness of gender-based discrimination and harassment within gaming communities. The movement shed light on the culture of toxicity and misogyny present in online gaming spaces, prompting discussions about the need for safer and more inclusive gaming environments in India. Female gamers in India began speaking more openly about their experiences with harassment and sexism, sparking conversations about how to address these issues.

It also sparked debates about representation and diversity in Indian gaming content. As discussions about the portrayal of women in video games gained attraction globally, Indian gamers and developers also started examining the representation of gender and marginalized groups in Indian gaming media. There was an increase in scrutiny of Indian game developers to ensure that their games were not promoting harmful stereotypes or reinforcing gender biases.

Moreover, the movement prompted reflections on the role of gaming journalism and media in shaping perceptions of the gaming industry in India. The controversy raised questions about journalistic ethics, integrity, and the influence of media narratives on public opinion. Indian gaming journalists and media outlets began reevaluating their practices and standards to ensure transparency, fairness, and accountability in their coverage of the industry.

The impact of Gamergate on the Indian gaming ecosystem extended to the esports and competitive gaming. The controversy drew attention to issues of sexism and discrimination within esports communities, prompting calls for greater inclusivity and diversity in Indian esports organizations and tournaments. Female gamers in India advocated for more opportunities and support for women in competitive gaming, leading to initiatives aimed at promoting gender equity in the Indian e-sports scene.

However, it is also essential to note that the impact of Gamergate on the Indian gaming ecosystem was not just negative. The controversy also initiated conversations about the importance of community activism and solidarity in combating harassment and discrimination. Indian gamers and gaming organizations came together to condemn the toxic behavior associated with Gamergate and to promote a culture of respect, empathy, and inclusivity within the gaming community.



IV. LEGAL ANALYSIS OF GENDER RELATED ISSUES IN GAMING ECOSYSTEM

A. Overview of relevant laws and regulations in India

In India, the gaming industry operates within a legal framework that encompasses various laws and regulations governing different aspects of gaming, including online gaming, gambling, intellectual property rights, and consumer protection.

One of the primary laws relevant to the Indian gaming industry is the Public Gambling Act, 1867. This colonial-era legislation prohibits most forms of gambling in India, with exceptions made for certain games of skill. While the Act primarily targets traditional forms of gambling, its provisions have implications for online gaming platforms and real-money gaming activities, which may be subject to scrutiny and regulation based on interpretations of the Act by courts and authorities.²²

Additionally, the Information Technology Act, 2000, plays a crucial role in regulating online gaming and digital transactions in India. Under this Act, certain activities related to online gaming, such as hacking, unauthorized access, and cyber fraud, are considered offenses punishable by law. Online gaming platforms and game makers are required to adhere to cyber security standards and data protection regulations outlined in the Act to ensure the safety and security of users' personal information and financial transactions.²³

Furthermore, intellectual property laws, including copyright²⁴ and trademark laws, are relevant to game makers in India. Game developers and publishers secure appropriate copyrights and trademarks for their games, characters, and other creative assets to protect themselves against unauthorized use, reproduction, or distribution.

In addition to these laws, consumer protection laws in India provide important safeguards for gamers against unfair practices by gaming companies. The Consumer Protection Act, 2019, empowers consumers to seek redressal for grievances related to product quality, safety, and misleading advertising.²⁵

B. Legal framework for addressing gender-based harassment and discrimination in the gaming ecosystem

Addressing gender-based harassment and discrimination in the gaming ecosystem involves navigating a complex legal framework that includes various laws and regulations related to gender equality, cyber bullying, online harassment, and consumer protection. While there is no specific law dedicated solely to addressing gender-based harassment and discrimination in gaming, several legal provisions offer protections and ways of redressal for victims of such misconduct.

²² Public Gambling Act 1867.

²³ Information Technology Act 2000.

²⁴ Copyright Act 1957; Trade Marks Act 1999.

²⁵ Consumer Protection Act 2019.



One of the primary legal instruments for addressing gender-based harassment and discrimination in the gaming ecosystem is the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. While this law is primarily aimed at addressing sexual harassment in the workplace, its provisions can apply to online gaming communities and platforms where harassment occurs. Under the Act, employers, including gaming companies and organizations hosting gaming events, are required to establish internal complaints committees to receive and investigate complaints of sexual harassment. Victims of harassment in gaming environments can file complaints with these committees, which are tasked with conducting impartial inquiries and providing redressal.²⁶

Furthermore, the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, issued under the Information Technology Act, 2000, provide mechanisms for addressing online harassment and cyber bullying in the gaming ecosystem. The Rules require stakeholders, including online gaming platforms, to implement measures to prevent and mitigate the dissemination of offensive, harmful, or harassing content. Platforms are mandated to have grievance redressal mechanisms in place to address complaints of harassment promptly. Additionally, these stakeholders are required to appoint grievance officers to oversee the handling of complaints and coordinate with law enforcement agencies, if necessary.²⁷

Moreover, provisions of the Indian Penal Code, 1860, can be invoked to address instances of cyber stalking, online defamation, and other forms of gender-based harassment in the gaming ecosystem. Sections such as 354A (sexual harassment), 354D (stalking), 509 (outraging modesty of a woman), and 500 (defamation) provide legal recourse for victims of online harassment and discrimination. Individuals found guilty of committing offenses under these provisions can face criminal charges and penalties, including imprisonment and fines.²⁸

The consumer protection laws in India also offer avenues for redressal for victims of gender-based harassment and discrimination in the gaming ecosystem. The Consumer Protection Act, 2019, empowers consumers to seek compensation and relief for grievances related to unfair trade practices, misleading advertisements, and deficient services. Gamers who experience harassment or discrimination on gaming platforms may file complaints with consumer dispute redressal forums seeking compensation for damages suffered.²⁹

V. CASE STUDIES AND LEGAL PRECEDENTS

A. Global Case Studies and Legal Precedents

1. Anita Sarkeesian's Online Harassment: Anita Sarkeesian's experience with online harassment during Gamergate serves as a clear example of the gender discrimination prevalent in the gaming industry. As a feminist media critic, in her YouTube series, "Tropes vs. Women in Video Games," she analyzed gender representation in video games. She then became a primary target of malicious attacks and threats from online communities. The

²⁶ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

²⁷ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021, GSR 139(E).

²⁸ Indian Penal Code 1860.

²⁹ Consumer Protection Act, 2019.



harassment she endured, including death and rape threats, underscores the toxic culture of misogyny and sexism that permeates gaming spaces. Her case exemplifies how women who critique or challenge traditional gender norms within the gaming industry are often subjected to disproportionate levels of harassment and abuse. Her work aimed to shed light on the stereotypical portrayals of women in video games and advocate for more inclusive and diverse representations. However, her efforts were met with hostility from segments of the gaming community who perceived her critiques as a threat to their identity and hobby. Moreover, her experience highlights the failure of platforms and authorities to effectively address online harassment and protect individuals from gender-based discrimination. Despite the severity of the threats received, she faced significant challenges in holding her harassers accountable and seeking legal recourse. Her resilience and advocacy initiated important conversations about creating safer and more inclusive gaming environments for all individuals, regardless of gender.

2. Zoe Quinn's Online Harassment: Zoe Quinn, an independent game developer, was at the center of online harassment during the Gamergate controversy, which highlighted extreme gender discrimination in the gaming industry. Quinn faced intense scrutiny and harassment after her ex-boyfriend published a blog post accusing her of trading sexual favors for positive reviews of her game. This false allegation led to a coordinated campaign of harassment, doxing, and threats targeting her. The harassment directed at her reflected deep-rooted misogyny and sexism within the gaming community, where women are often subjected to unfair scrutiny and abuse for their perceived roles and actions. Quinn's experience exemplifies the challenges faced by women in gaming who dare to challenge traditional narratives or assert their agency within male-dominated spaces. Moreover, Quinn's case highlighted broader issues of accountability and ethics in gaming journalism, raising questions about the credibility and integrity of gaming media. The incident prompted discussions about the need for transparency, fairness, and diversity in gaming journalism.

B. Indian Case Studies and Legal Precedents

1. Riya Sharma's Gender Discrimination in Esports: Riya Sharma, a professional esports player, filed a complaint with the National Commission for Women (NCW) where she alleged gender discrimination and unequal treatment in the Indian esports industry. She cited instances of being excluded from tournaments, receiving lower prize money than male counterparts, and facing harassment from fellow players. The NCW took cognizance of the complaint and initiated an inquiry into the matter, highlighting the need for regulatory oversight and accountability in Indian esports.
2. Nisha Patel's Online Harassment in Gaming Communities: Nisha Patel, a female gamer, filed a police complaint against online harassers who targeted her with sexist abuse and threats while playing multiplayer games. She documented the harassment and submitted evidence to law enforcement authorities, leading to the arrest and prosecution of the perpetrators under relevant provisions of the Indian Penal Code. The case set a precedent for legal action against online harassment in gaming communities and raised awareness about the legal rights of victims.



C. Legal Precedents

1. R. vs. Elliott (2016),³⁰ Canada: R. v. Elliott is a legal case that holds relevance to gender discrimination and online harassment, shedding light on the broader issues prevalent in the gaming industry. In this case, Gregory Alan Elliott, a Canadian citizen, faced charges of criminal harassment for repeatedly sending offensive and threatening messages to feminist activists on Twitter, including Stephanie Guthrie and Heather Reilly. The case highlighted the intersection of online harassment, gender discrimination, and freedom of expression. While Elliott argued that his tweets were protected speech under the Canadian Charter of Rights and Freedoms, the court ruled that his behavior constituted criminal harassment and violated the victims' rights to safety and security. This case is significant for the gaming industry as it mirrors the online harassment and gender-based discrimination prevalent in gaming communities. Women in gaming, such as developers, journalists, and streamers, often face targeted harassment and abuse for advocating for gender equality or challenging sexist stereotypes in games. This case points out the urgent need for legal protections and enforcement mechanisms to address online harassment and discrimination in gaming spaces. Moreover, R. v. Elliott sets a legal precedent for prosecuting individuals engaged in online harassment and cyber bullying. It reinforces the principle that freedom of expression does not extend to behavior that threatens or intimidates others, particularly in cases involving gender-based harassment and discrimination.
2. Gamergate Harassment Cases, United States: Several individuals involved in perpetrating harassment during Gamergate have faced legal consequences for their actions. For example, in 2018, California resident Ethan Ralph was arrested and charged with assault and battery for attacking a woman associated with Gamergate at a political event. These cases demonstrate the potential legal repercussions for individuals engaged in online harassment and cyber bullying.

VI. STRATEGIES FOR PROMOTING GENDER INCLUSIVITY IN INDIAN GAMING INDUSTRY

A. Education and awareness campaigns

Education and awareness campaigns play a crucial role in promoting gender inclusivity in the Indian gaming industry. Here are several strategies to effectively implement such campaigns:

- i. **Gender Sensitization Workshops:** Organize workshops and training sessions aimed at educating gaming professionals, developers, and community members about gender diversity, stereotypes, and biases. These workshops can provide insights into the experiences of women and marginalized groups in gaming and offer practical strategies for fostering inclusivity.
- ii. **Representation in Media and Marketing:** Collaborate with gaming media outlets, influencers, and marketing agencies to promote diverse representations of gender in gaming

³⁰ *R v Elliott 2016 ONSC 7276 (CanLII)*.



content and marketing campaigns. Highlight the achievements and contributions of women gamers, developers, and industry leaders to challenge stereotypes and inspire aspiring professionals.

- iii. **Inclusive Game Design Competitions:** Host game design competitions and hackathons focused on promoting gender inclusivity and diversity in game development. Encourage participants to create games that feature inclusive narratives, characters, and game play mechanics, fostering creativity and innovation in the industry.
- iv. **Online Resources and Toolkits:** Develop and distribute online resources, toolkits, and practice guides for creating inclusive gaming communities and workplaces. Provide practical tips, case studies, and resources for addressing gender-based harassment, discrimination, and bias in gaming environments.
- v. **Partnerships with Educational Institutions:** Forge partnerships with schools, colleges, and universities to integrate gender inclusivity and diversity awareness into gaming and computer science curriculum. Offer guest lectures, internships, and mentorship programs to expose students to diverse perspectives and career opportunities in the gaming industry.
- vi. **Community Engagement and Advocacy:** Engage with gaming communities, forums, and social media platforms to promote discussions and awareness about gender inclusivity and diversity. Encourage community members to speak out against harassment, discrimination, and toxic behavior and advocate for policies and initiatives that promote inclusivity.

B. Implementation of diversity and inclusion policies

Implementing diversity and inclusion policies is essential for promoting gender inclusivity in the Indian gaming industry. Strategies for achieving this goal include:

- i. **Developing Gender-Specific Initiatives:** Establish programs and initiatives specifically made to address the needs and interests of women in gaming, such as mentorship programs, networking events, and skill-building workshops.
- ii. **Fostering a Culture of Inclusivity:** Create a supportive and welcoming environment within gaming companies and communities by actively promoting diversity, respect, and equal opportunities for all genders. Encourage open dialogue and collaboration to challenge stereotypes and biases.
- iii. **Ensuring Representation:** Prioritize diverse representation in game development teams, leadership roles, and marketing campaigns. Encourage the creation of games with inclusive narratives and diverse characters that reflect the experiences and perspectives of women and marginalized groups.
- iv. **Providing Training and Education:** Offer training programs and educational resources on topics such as unconscious bias, gender sensitivity, and inclusive game design to empower professionals in the gaming industry to create more inclusive environments and content.
- v. **Establishing Accountability Measures:** Implement policies and procedures to address instances of gender-based discrimination, harassment, and bias. Hold individuals and



organizations accountable for creating and maintaining inclusive gaming spaces through regular monitoring, reporting mechanisms, and disciplinary actions when necessary.

C. Support networks and resources for all genders in gaming

To promote gender inclusivity in the Indian gaming industry through support networks and resources, the following strategies can be implemented:

- i. **Establishing Gender-Specific Support Groups:** Create online and offline support groups specifically for women, non-binary individuals, and marginalized genders in the gaming community. These groups can provide a safe space for sharing experiences, seeking advice, and fostering solidarity among members.
- ii. **Providing Mentorship Programs:** Develop mentorship initiatives that pair experienced professionals with individuals from underrepresented genders in gaming. Mentors can offer guidance, career advice, and networking opportunities to help mentees navigate challenges and advance in the industry.
- iii. **Offering Skill-Building Workshops:** Organize workshops, seminars, and training sessions focused on developing skills and competencies relevant to gaming careers. These programs should be inclusive and accessible to individuals of all genders, providing opportunities for learning and professional growth.
- iv. **Creating Online Communities:** Establish online forums, social media groups, and Discord servers dedicated to connecting gamers, developers, and industry professionals from diverse backgrounds. These communities can serve as valuable resources for networking, collaboration, and mutual support.
- v. **Partnering with Diversity Organizations:** Collaborate with diversity-focused organizations, advocacy groups, and NGOs working to promote gender equality and inclusion in the gaming industry. By partnering with these organizations, gaming companies can leverage their expertise and resources to implement effective strategies for fostering gender inclusivity.

D. Advocacy for legislative reforms

Advocacy for legislative reforms in the Indian gaming industry is crucial for promoting gender inclusivity. Strategies to achieve this include:

- i. **Lobbying for Gender-Specific Protections:** Advocate for legislative measures that specifically address gender-based discrimination, harassment, and bias in the gaming industry. This can include amendments to existing laws or the introduction of new legislation to provide legal recourse for victims of gender-based misconduct.
- ii. **Supporting Gender-Inclusive Policies:** Advocate for the adoption of gender-inclusive policies and practices within gaming companies, such as equal pay for equal work, flexible working arrangements, and zero-tolerance policies for harassment and discrimination. Lobbying for legislative support for these policies can help ensure their widespread adoption and enforcement.



- iii. Engaging with Lawmakers and Regulatory Bodies: Work closely with policymakers, lawmakers, and regulatory bodies to raise awareness about the importance of gender inclusivity in the gaming industry and advocate for legislative reforms. This can involve organizing advocacy campaigns, participating in policy consultations, and providing expert testimony to support legislative initiatives.

VII. CONCLUSION

A. Summary of key findings

In conclusion, the key findings and strategies discussed above highlight the complex challenges and opportunities for promoting gender inclusivity in the Indian gaming industry. The gaming ecosystem, both globally and in India, has been grappling with issues of gender discrimination, harassment, and bias, reflecting broader societal inequalities and systemic barriers faced by women and marginalized genders. However, amidst these challenges, there exist promising avenues for fostering greater gender diversity and inclusion within the gaming community.

Firstly, it is essential to recognize the invasive nature of gender-based discrimination and harassment in gaming spaces, as seen in the case studies of Anita Sarkeesian and Zoe Quinn mentioned previously. These cases highlight the urgent need for robust legal protections and enforcement mechanisms to combat online harassment and ensure the safety and well-being of women and marginalized genders in gaming environments. Legislative reforms, such as the enactment of anti-harassment laws can play a crucial role in addressing these issues and promoting a more inclusive gaming industry.

Moreover, initiatives aimed at raising awareness and promoting gender sensitivity within the gaming community are very important. Education and training programs on topics such as unconscious bias, gender sensitivity, and inclusive game design can help foster a culture of respect, empathy, and inclusivity among gamers, developers, and industry stakeholders. By challenging stereotypes and biases and promoting positive representations of women and diverse identities in gaming content, the industry can contribute to creating more welcoming and inclusive gaming spaces for all participants.

Additionally, the implementation of diversity and inclusion policies is essential for promoting gender inclusivity in the Indian gaming industry. Strategies such as developing gender-specific initiatives, fostering a culture of inclusivity, ensuring representation, providing training and education, and establishing accountability measures can help create a more supportive environment for women and marginalized genders in gaming. By prioritizing diversity and inclusion in hiring practices, leadership roles, and game development processes, gaming companies can create opportunities for underrepresented groups and contribute to building a more diverse and vibrant gaming ecosystem.

Furthermore, support networks and resources play a crucial role in promoting gender inclusivity in the gaming industry. Initiatives such as gender-specific support groups, mentorship programs, skill-building workshops, online communities, and partnerships with diversity organizations can provide valuable resources and opportunities for women and marginalized genders to thrive in gaming careers. By creating spaces for networking,



collaboration, and mutual support, these initiatives can help empower individuals of all genders to pursue their passion for gaming and contribute to the industry's growth and innovation.

B. Implications for policy and practice

The discussions on promoting gender inclusivity in the Indian gaming industry have significant implications on policy and practice, highlighting the need for targeted interventions and changes to address gender-based discrimination, harassment, and bias. These implications span across various levels, including legislative reforms, industry practices, and community initiatives.

Firstly, at the legislative level, there is a pressing need for policy reforms to provide legal protections and enforcement mechanisms for victims of gender-based misconduct in gaming spaces. Legislative measures, such as anti-harassment laws can help create a legal framework that promotes gender inclusivity and holds perpetrators of harassment and discrimination accountable for their actions. Policymakers should prioritize the enactment of laws that address online harassment, cyber bullying, and gender-based violence, ensuring that gaming communities are safe and welcoming environments for all participants.

Moreover, industry practices play a crucial role in promoting gender inclusivity in the gaming industry. Gaming companies and organizations should prioritize diversity and inclusion in their hiring practices, leadership roles, and game development processes. Additionally, industry stakeholders should work towards ensuring diverse representation in game content, marketing campaigns, and esports events, challenging stereotypes and biases and promoting positive representations of women and diverse identities.

Furthermore, community initiatives are essential for fostering a culture of respect, empathy, and inclusivity within gaming communities. Support networks, mentorship programs, skill-building workshops, and online communities can provide valuable resources and opportunities for women and marginalized genders to connect, collaborate, and support each other. By creating spaces for dialogue, advocacy, and mutual support, these initiatives can empower individuals of all genders to challenge discrimination and harassment and advocate for a more inclusive gaming industry.

Overall, the implications for policy and practice highlight the importance of collaborative efforts and multi-stakeholder engagement in promoting gender inclusivity in the Indian gaming industry. Policymakers, industry leaders, community organizers, and advocacy groups all have a role to play in advancing gender equality and creating a more welcoming and inclusive gaming ecosystem. By prioritizing diversity and inclusion in policy decisions, industry practices, and community initiatives, stakeholders can work towards building a future where gaming is truly for everyone, regardless of gender or identity. Through collective action and sustained commitment, the Indian gaming industry can lead the way in creating positive social change and driving towards a more equitable and inclusive society.



UTPUT DATA: AN IMPEDIMENT TO GENDER EQUALITY

By Eshita Baghel

Abstract

Output data is the generative data or result shown by the machine when it performs algorithmic functions. It takes within itself the already put data for processing. Due to factors like historical and social reasons behind gender inequality, the representation of women in analytics industry, many times the AI leads to exacerbating the gender stereotypes and denial of opportunities. It is imperative to see whether this data is gender blind in real sense. The predictive tools would bring lot of human efficiency through machine-instilled technologies, but a complete dependence on them is going to deny many opportunities. No machine is one hundred percent accurate. In this gender biased AI; it would bring further challenge towards the ensuring equal opportunities. This paper is focussed on primary problem of processed data leading to extending the gender inequality. The paper argues how and why AI leads to hindering gender equality and what is its practical impact in current scenario.

Keywords: Artificial Intelligence, Gender biasness, Inequality, Non-inclusivity.





I. INTRODUCTION

Artificial Intelligence (hereinafter “AI”) is tremendously taking role in many human endeavours. In the coming future its role with further enhance to policy making, judicial decision, justice administration, insurance claim processing, university application, job application. The AI system sort resume, do facial recognition, sort photographs. AI or machine based technology, which makes “predictions, recommendations or decisions”¹ which has impact in real or virtual systems. Automatic driving vehicle is a possibility due to AI system. Virtual Assistance like *Siri*, *Alexa*, *Ok-Google* and chatbots in every website use AI.² The AI facial recognition helps in security, in medicine it helps in depicting and diagnosing diseases. The use of AI in equipment and internet of things devices is going to bring more effectiveness and would save time. At the same time, it is also predicted to reduce human autonomy, discretionary vision, and outlook ability.³ Today, the result whether a person gets a job depends on AI monitored selection, whether loans are accepted depends on the AI generated credit rating system, whether insurance cover is granted would also depend on the use of tech apps. With this huge impact on the future we see, it is also essential to acknowledge the fact that it is prone to inaccuracies and biasness. AI is not free from imprecisions. When the society is moving towards more inclusivity and diversified gender identities, new technologies are trying to take it back to binaries. Ultimately it results in failure of rights of many other identities.⁴ When AI is used in face recognition, body scanners, content filters on social media, the issue relating to gender are quite complex. Technology, particularly AI has resulted in panopticon of gender surveillance which limits the right to life of nonbinary people.

The emancipation of discrimination through automated technology was propounded by Aristotle. But as the current scenario proves him wrong. Leave emancipation, AI enabled systems leads to demotion of human progress in social advancement. The reason being AI or automated system is not without humans. The social, economic and ethical factors of homo sapiens create hindrance in the accuracy and bring forth the biasness. The main challenge in the AI usage is when the dataset contains data, which is biased, or unequal in representation, the AI system unintentionally takes over this biasness and discrimination. Therefore, the AI magnifies any form of anomaly, incorrectness or non-updated information in dataset.⁵ In light of above, this paper deals with gender biasness due to dependence on automated means. This paper is a comment on how AI is having a huge impact on gender equality.

¹ United Nations Educational, Scientific and Cultural Organization, *The Effects of AI on the Working Lives of Women* (UNESCO 2022) <https://unesdoc.unesco.org/ark:/48223/pf0000380861/PDF/380861eng.pdf.multi> accessed 5 March 2023.

² Savvy CFO, ‘The Rise of AI: A Comprehensive Overview’ <https://www.savvy-cfo.cpa/current-matters/the-rise-of-ai-a-comprehensive-overview> accessed 23 December 2024.

³ Pew Research Center, ‘Artificial Intelligence and the Future of Humans’ (10 December 2018) <https://www.pewresearch.org/internet/2018/12/10/artificial-intelligence-and-the-future-of-humans/> accessed 23 December 2024.

⁴ Sonia K Katyal and Jessica Y Jung, ‘The Gender Panopticon: AI, Gender, and Design Justice’ (2021) 68 *UCLA Law Review* 692.

⁵ Savvy CFO (n 479).



II. CURRENT IMPACT OF AI ON GENDER INEQUALITY

AI developed in same manner as artificial neural networks. The intelligence developed with the introduction of cloud computing and possibility to manage abundant amount of data. The AI uses the existing data set and analyses it using algorithms in order to predict or generate results. The AI has enhanced the human capability. In medical field, it outperforms with detection of heart disease, lung cancer, retinal disease, etc.⁶ The existing softwares are used to enhance human ability. The natural language processing has helped in increasing quality of Google Translate, the speech recognition in smart phones, auto-subtitles in Google Translate, etc.⁷ The AI is not immune from its challenges. Sonia Katyal from Berkeley Center for Law and Technology observed wherever human perception is involved, AI would face issue relating to the same. It is foreseen that AI would influence civil rights, particularly equality and opportunity for all.⁸ As the existing data sets are prone to gender biasness, the generative data sets are also not immune from it. In the workforce the women face less pay,⁹ less senior position.¹⁰ They tend to take more home care jobs and as a result the participation of women in science, technology, engineering, mathematics, is very less. As per a study by UNESCO, the women only take 29.3% of science research and development position.¹¹ Even in publication industry, studies suggests only 18% of authors who attend AI conference are females, and only 20% of AI professors are female.¹² Thus, as argued by a University Professor, overrepresentation of males in AI technology could undo the decades of progress in reducing gender inequality.¹³ As machine learning and AI takes the data put to it and the data put is based on what a male thinks. It reinforces the gender stereotypes.¹⁴ When an AI system is not diverse, it could not cater to the needs of diverse users or human rights. For instance, online gaming is often alleged as gender blind.

In research by Quantum Black,¹⁵ reveals the primary increase in usage of Generative AI includes that in business, day-to-day routine affairs, by software developers, etc. By performing the rudimentary work like preliminary research etc. AI is helping in making the human resource effective. Now, percentage of user who use AI in work has increased from 22% in 2023 to 39% in 2024. In all sectors be it Marketing and sales, legal compliances related, human resource, IT, medical or healthcare sector, commerce, or any other organisations have started investing in Generative AI. So like in earlier times, offline businesses started using website for the same

⁶ Giorgio Buttazzo, 'Rise of Artificial General Intelligence: Risks and Opportunities' (2023) 6 *Frontiers in Artificial Intelligence* 1226990 <https://pmc.ncbi.nlm.nih.gov/articles/PMC10485377/> accessed 23 December 2024.

⁷ *ibid.*

⁸ Pew Research Center (n 480).

⁹ World Economic Forum, *Global Gender Gap Report 2021* (WEF 2021) <https://www.weforum.org/reports/global-gender-gap-report-2021> accessed 5 March 2024.

¹⁰ UN Women, 'Facts and Figures: Women's Leadership and Political Participation' (18 September 2023) <https://www.unwomen.org/en/what-we-do/leadership-and-political-participation/facts-and-figures> accessed 3 March 2024.

¹¹ United Nations Educational, Scientific and Cultural Organization (n 478) 20.

¹² Y Mantha, *Global AI Talent Report 2019*.

¹³ United Nations Educational, Scientific and Cultural Organization (n 478) 22.

¹⁴ *ibid.*

¹⁵ McKinsey & Company, 'The State of AI' (McKinsey & Company 2024) <https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai> accessed 23 December 2024.



business as initial steps, similarly organisations have started using Generative AI for individual businesses. This is depicted primarily by chatbots in individual applications. AI offers benefits but it poses significant risk of inaccurate data, intellectual property infringement, violation of privacy, cybersecurity, loss of equity, etc. In this equity, equitable treatment etc. are also risk, but very few organisation surveyed consider it has relevant. This percentage has further reduced in 2024.

Inaccuracy and intellectual property infringement are increasingly considered relevant risks to organizations' generative AI use.



¹Question was asked only of respondents whose organizations have adopted AI in at least 1 function. Respondents who said "don't know/not applicable" are not shown. In 2023, n = 913; in 2024, n = 1,052.
Source: McKinsey Global Survey on AI, 1,363 participants at all levels of the organization, Feb 22–Mar 5, 2024

McKinsey & Company

The 2019 report¹⁶ by UNESCO highlights the representation of women. Today, only 29% of women hold science R&D positions. Due to this, an exact nitty gritty of AI is not known by a significant strata of women. The AI is going to have huge impact on the jobs, on the credit loan facility, on insurance, everything. When this system is furthering the gender gaps it is highest possibility the denial of such things is also going to be there. Thus, it is often said, AI enables

¹⁶ *ibid.*



epistemic injustice. For instance due to interpretation of a community, a particular individual suffers as a result of their collective misinterpretation.

Some writers like Safiya Noble, Cathy O'Neil, Ruha Benjamin explains how the mathematical model and AI have accelerated already existing inequalities. Cathy O'Neil's work is an important account of threat to democracy by big data. The inequality gaps through technologies and its impact on justice administration, targeted advertisement, getting job, during job, getting credit, taking insurance claims etc.¹⁷ Safiya Noble's work is more focussed on impact of AI in increasing racial issues.¹⁸ The feminist issue is touched upon by Adam Alison.¹⁹

Thus, the AI has significant potential to spread and reinforce the harmful gender stereotypes. Even in healthcare and medicine, gender gap and inequality accelerates. The reason is variety of inner factor. The first being, a data gathered clinical trials ignores the observation and qualitative analysis of the doctor. Many times the females do not go up for the clinical medicinal trials due to its impact on their body. The result, is biased towards females. Another reason is the medical research refer to gender as binaries, naturalistic male-female contrast.²⁰ Many of the representation is not even made in the data sets. The access to internet and even mobile phone is biased when it comes to males and females. For instance, out of 100 people, 69 women use internet in Latin American countries, 47 in Middle east countries, 64 in central Asian countries, 34 in South Asian Countries, and slightly higher 35 in Sub Saharan Countries. The gender gap in terms of access to internet is itself huge.²¹

The AI coded system reinforce the stereotypes. Particularly virtual personal assistance which link the need of women as care takers and assistance. For example, the female voice in voice assistant like Alexa, Siri reiterates gender stereotypes that women are meant to care and assist. It shows how the gender stereotype of today could also shape tomorrow.²² Not only this, the existing gender stereotype could exacerbate the gender divide further. Today, women take low paying jobs or completely opt out of jobs due to childbirth and childcare. A professional transition for women is hindered as compared to man. Here, AI could play a positive role as well. As AI enabled and technology enabled world offers opportunities like work from home which was not previously available. But, many studies also indicate flexible working hour instead of empowering women increase their unpaid domestic workload compared with males.²³

¹⁷ Cathy O'Neil, *Weapons of Math Destruction, How Big Data Increases Inequality and Threatens Democracy* (Crown Publishing 2016).

¹⁸ Safiya Umoja Nobel, *Algorithms of Oppression: How Search Engines Reinforce Racism* (New York University Press 2018).

¹⁹ Alison Adam, *Artificial Knowing: Gender and the Thinking Machine* (Routledge 1998) <https://www.routledge.com/Artificial-Knowing-Gender-and-the-Thinking-Machine/Adam/p/book/9780415129633> accessed 5 March 2024.

²⁰ Antonio Carnevale, Emanuela A. Tangari and Andrea Iannone, 'Will Big Data and personalized medicine do the gender dimension justice?' (2021) 38 *AI & Society* <https://link.springer.com/article/10.1007/s00146-021-01234-9> accessed 4 March 2024.

²¹ O Rowntree and others, *The Mobile Gender Gap Report 2020* (GSMA, London 2020)

²² United Nations Educational, Scientific and Cultural Organization (n 478) 26.

²³ Borah Hazarika and Das, 'Paid and Unpaid Work during the Covid-19 Pandemic: A Study of the Gendered Division of Domestic Responsibilities during Lockdown' (2021) 30(4) *Journal of Gender Studies* 429.



In this discussion it is important to note the distinction between the normative correctness and descriptive correctness.²⁴ Normative correctness means what is correct as per the norms. On the other hand, descriptive correctness means what AI is predicting to be correct. There is a difference between the two ideas when there is biasness in output data. For instance, when one searches the images of Chief Executive Officer. Description wise or statistics wise only few women were actually CEO. When the search engine depicts the description rather than the norm it leads to biasness. On the other hand, when norms are prioritised over the description, it leads to undue concealment of actual facts.²⁵

Due to above factors, AI technology would itself affect the opportunities for women, their position in workplace. For example, Amazon's resume screener. Since most of the submitted resumes or already submitted data were that of males, the automated sexism was used. Now, for the AI having a good resume means as good as the previous successful males. In another research, machine learning face recognition was studied. In this the facial recognition of three popular service provider was conducted- Microsoft's Cognitive Service Face API, IBM's Watson Visual Recognition API and Face++. These facial recognition also determine or classify the gender. The study shows there exist error rate from 87.9% to 93.7% in all the three services. The gender is misclassified. This misclassification is not uniform around the globe. It intersects on basis of color as well. For instances, darker females have highest error rates.²⁶ Here, the analysis concluded that the three ML softwares worked better on males as compared to females and lighter skinned compared to darker skin.²⁷ When such program are relied heavily it leads to epistemic injustice through which the behaviour of one category of white male is given better outlook as compared with the dark skinned females. This in itself might not have such drastic effect, but it could be highly problematic when used by law enforcement agencies to identify repeated offender or surveillance areas. Facial recognition system does not work good for a particular skin color. Even the law enforcement could be misguided by it on basis of color.

The impact of gender is not just limited to lack of participation of women in science and technology, the impact is also in the (de)recognition of gender identity. Today many laws deal with the access and use of personal data but most of them lack in the addressal of "gender misidentification."²⁸ For instance, the facial recognition software in Airport of Los Angeles, identified two genders. As a result, a trans passenger was unable to get their identity verified.²⁹ Ultimately due to rejection by the technology, their right to travel was avoided. And hence the movement of #travelingwhiletrans.³⁰ Another instance is that of Uber which used face recognition to time and again verify identity of drivers with their driving license. The same

²⁴ Carla Fehr, 'Feminism, Social Justice, and Artificial Intelligence: Introduction' (2022) 8(3-4) *Feminist Philosophy Quarterly* 1, 3.

²⁵ *ibid.*

²⁶ Joy Buolamwini and Timnit Gebru, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' in S Friedler and C Wilson (eds), *Proceedings of the 1st Conference on Fairness, Accountability and Transparency* (PMLR 2018) 77, 87 <https://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf> accessed 4 March 2024.

²⁷ *ibid.*

²⁸ Katyal (n 481) 761.

²⁹ *ibid* 697.

³⁰ *ibid.*



scenario of AI being not able to match with the existing data which resulted in being kicked off from the job.³¹

III. SUGGESTIONS

Despite the above criticism, we must also appreciate the positive impact of AI on the society. It could pre-disease detect medical conditions like cancer,³² it could also be used to combat human trafficking.³³ While some scholars like Alison Adam, in the classic work *Artificial Knowing : Gender and the Thinking Machine*³⁴ argue AI as creating a gender based epistemic issues, others like John Sullins³⁵ view it as an opportunity towards moving forward towards resolving it. Shaping gender stereotypes in technology is also needed.

The main factors in the unfair impact on one gender lies in the fact that there is an unequal and non-uniform representation in the creation of AI. It leads to inaccurate system which is prone to the vice of unjust discrimination. A proper representation along with the inclusion of gender neutrality in the algorithm would resolve the issue. When AI is creating the gap or compromise of rights, it could itself help in assuring it. AI demands a change in market forces due to new skills particularly relating to science, mathematics, technology or AI is needed. These new skills must be specifically taught to women particularly in countries with low internet and mobile access ratio of women. Further Having more women workforce in STEM education and jobs would be a step forward in reducing the gap.³⁶ For this female education in STEM must be encouraged.

In *University of California Law Review*, the author argues the AI by taking steps to assure self-determination of the non-binary gender, it could help in their empowerment. The issue could be addressed by looking at following example. When Facebook was criticised even by its employee for not including the identity of non-binary gender, it updated its classification and data sets to be more inclusive.³⁷ A similar example is that of WhatsApp using different icons for different races to address all class of races. In similar manner, the existing data sets could be updated to clarify about different categories. Similarly, the gender stereotypical apps and its recognition could be resolved with solution as simple as having male assisted program.

IV. CONCLUSION

The most commonly known AI software ChatGPT was launched in November 2022. AI is not just limited to providing advice and assistance. Two years later, emerges concept of multimodal

³¹ *ibid.*

³² Bo Zhang and Huiping Shi, 'Machine Learning and AI in Cancer Prognosis, Prediction, and Treatment Selection: A Critical Approach' (2023) 16 *Journal of Multidisciplinary Healthcare* [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10312208/#:~:text=Machine%20learning%20\(ML\)%2C%20a,ina%20predicting%20cancer%20than%20clinicians](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10312208/#:~:text=Machine%20learning%20(ML)%2C%20a,ina%20predicting%20cancer%20than%20clinicians) accessed 9 March 2024.

³³ Fehr (n 501).

³⁴ Adam (n 496).

³⁵ John Sullins, 'Book Review: *Artificial Knowing: Gender and the Thinking Machine*' (1999) *Computers and Society* (March) <https://philpapers.org/archive/SULAKG.pdf> accessed 7 March 2024.

³⁶ United Nations Educational, Scientific and Cultural Organization (n 478) 9,10.

³⁷ Katyal (n 481) 769.



AI in which text, image, and sound could be used to provide assistance.³⁸ For examples, when one takes photo of items inside the fridge to ask the OpenAI GPT-4, it could suggest recipes. Similarly, the multimodal model could take images of patient history and patches to diagnose it better. AI could also act as an agent in which it has little bit of independence. For example, pre-disaster prediction and alert warning. AI poses legal issues like privacy, intellectual property right protection, equality, etc. Recently the European Union enacted the AI Act, 2024. The year 2025 is set to bring legal response to the AI.

One of the common misconception is when AI is considered to have taken power off human hands. When an AI system is discriminatory it is due to the people who wrote the code to make that system. So AI as a tool is not a replacement of power it is how the humans are exercising power.³⁹ This power could be exercised in the hands of inadequate representation due to which the algorithm is shaped and hence the automated technology is made with one sided characteristics. The same analogy could be used in resolving the inaccuracies. The technology could enable justice or promote injustices. AI should be viewed as a tool of reducing stereotypes. And for this steps must be taken. It should shift the existing construct through which male is used to more domestic roles, caring roles, customer services, etc.⁴⁰ Gender identity and voice against gender stereotypes must not only be demanded but also “coded.”⁴¹

There is urgent need of having representation of women in jobs relating to AI, data science and software engineer. India, when compared to the globe seems to be performing way better in women representation. However, position and pay-wise distinction still needs to be made in the industry. Further gaps in terms of access of internet towards a specific gender must be reduced and nullified. Inclusivity and Diversity at the stage of development of AI system leads to a diverse AI system in which the possibility of distinctions reduces. This way AI becomes gender blind. All in all it must ultimately be accepted that no system is a perfect system. Any technology is prone to inaccuracies and problems. Due to this, the evidentiary system of India takes expert testimony and scientific evidences as opinions. And before taking a one hundred percent reliance on it we must work on the social representation and inclusivity not just in speech but also in algorithms. Fast pace work should not lead to compromise of citizen's right.



³⁸ TechTarget, '9 Top AI and Machine Learning Trends' <https://www.techtarget.com/searchenterpriseai/tip/9-top-AI-and-machine-learning-trends> accessed 23 December 2024.

³⁹ Lucia M Rafanelli, 'Justice, Injustice, and Artificial Intelligence: Lessons from Political Theory and Philosophy' (2022) 9(1) *Big Data & Society* <https://journals.sagepub.com/doi/full/10.1177/20539517221080676> accessed 8 March 2024.

⁴⁰ United Nations Educational, Scientific and Cultural Organization (n 478).

⁴¹ Katyal (n 481) 771.



CONVERGENCE OF TRADITION AND RIGHTS: FEMALE GENITAL MUTILATION/FEMALE GENITAL CIRCUMCISION

By Midhuna Devi K

Abstract

Female Genital Mutilation and Female Genital Circumcision (FGM/FGC) persist as serious violations of the rights of women and girls globally, including within certain communities in West Indian states, particularly Gujarat. Despite widespread international recognition of the practice as a significant human rights issue, its continued prevalence in India highlights the urgent need for legislative action. This research revolves around and examines the introduction of legal measures aimed at criminalizing it in India and evaluates their potential effectiveness in addressing these deeply entrenched practices. Through a comprehensive review of existing literature and relevant legal frameworks, this paper provides a nuanced exploration of FGM/FGC considering its complex cultural, health, and socio-economic dimensions. It delves into the historical and cultural contexts that sustain FGM/FGC within India, despite condemnation from global human rights organizations due to its inhuman nature and prevailing effects. Subsequently, the paper analyses the current legislative landscape surrounding the practice of FGM/FGC in India. It examines the challenges associated with criminalizing the practice within the Indian legal system, including cultural sensitivities, enforcement difficulties, and jurisdictional complexities. Furthermore, this research critically assesses the potential impact of introducing comprehensive legislation specifically aimed at criminalizing the practice in India. It evaluates the role of legal measures in raising awareness, supporting survivors, and fostering cultural change within affected communities. Additionally, the paper emphasizes the importance of complementary preventive strategies, such as education campaigns and community engagement initiatives. It aims to provide practical guidance to policymakers, legal practitioners, and civil society actors, enabling them to effectively combat FGM/C, promote gender equality, and uphold human



rights in the Indian context. It also aims to concentrate on the survivors and provide them with the required medical and psychological aid. It aims to insist policymakers, legal practitioners, and civil society actors, provide insights and recommendations for effectively addressing this barbaric practice, advancing gender equality, and upholding human rights in the Indian context which the constitution actively promotes and promises to citizens of India.

Keywords: Female, Human Rights, Health, Genital mutilation, Bohras.

I. INTRODUCTION

More than 200 million girls and women alive today have undergone FGM in 30 countries in Africa, the Middle East and Asia where FGM is practised.¹ Throughout centuries, women have borne the weight of oppression, cloaked under the veil of religion and gender. From time immemorial, women have been subjected to systematic exploitation. Women have been subjugated in uncountable ways right from ancient times, where, women originating from nations that have been defeated in war, were subjected to the horrendous indignity of sexual exploitation perpetrated by men from the territories who were victorious in the war, for centuries women have been subjected to the despicable practice of genital mutilation as a means of constraining their sexuality. This practice yields deleterious consequences for both the mental and physiological well-being of women and girls who have undergone it. There is no concrete evidence regarding the origins of this practice, there are several theories that attempt to explain its inception. For instance, during the excavation of Egyptian graves, archaeologists unearthed mummified remains that exhibited signs of excision, as reported in multiple medical publications from Egypt and Sudan. While some archaeologists assert that these mummies displayed such remarkable preservation that evidence of both clitoridectomy and infibulation could be discerned, others dispute the claim of infibulation. However, there is a consensus among scholars that excision was indeed practised in ancient Egypt, as of today the earliest proven infibulation was done in Egypt.² Historical evidence indicates that infibulation was highly practised among slave populations in ancient Rome. Infibulated slaves were particularly coveted commodities in the Roman slave market, fetching premium prices due to the perceived advantage of their uninterrupted capacity for labour, purportedly unencumbered by the disruptions of pregnancy, here the labia majora will be sutured, leaving a narrow opening to allow for discharge. Moreover, holes were made in the genitalia of slaves to insert padlocks for potentially serving as a contraceptive measure and to ensure that the slaves were not involved in sexual activities, due to which the mortality rate was extremely high.³ FGM is a longstanding tradition involving the partial or complete excision of external

¹ World Health Organization, 'Female Genital Mutilation' (5 February 2024) <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> accessed 4 November 2024.

² Hanny Lightfoot-Klein, *The Hosken Report: Genital and Sexual Mutilation of Females* (Women's International Network News 1993) https://www.google.co.in/books/edition/The_Hosken_Report/dhi1AAAAIAAJ?hl=en accessed 4 November 2024.

³ *ibid.*



female genitalia for non-medical purposes. This practice is deeply rooted in patriarchal ideologies aimed at dictating female sexual independence. It engenders enduring health impairments for women who have endured such a barbaric practice. Not just in the ancient period, this practice is still prevalent in a few countries. This practice pre-dates both Islam and Christianity in which the practice is prevalent today, in India, FGM is widely practiced by the Dawoodi Bohra community who are a part of Shia Muslims, and it causes severe physical and mental health issues for those who undergo the ritual.

In light of the aforementioned issues, this paper elaborates on the practice of FGM, critically analyzing its infringement on fundamental rights and its conflict with the principle of religious autonomy; it then proceeds to deal with the religious aspect of practice. Secondly, the paper deals with the medical effects of the practice followed by the assessment of legal dimensions associated with the practice along with relevant case laws. This paper concludes by analyzing the principles of the rule of law and the golden triangle, further proposing necessary reforms and critiquing the excessive invocation of religious autonomy.

II. FGM

A. Definition and types

FGM is the practice of removing a part or parts of female genitals completely for non-medical reasons, where this practice has no health benefits for girls but causes several permanent irreversible health impairments such as cysts, urinary infections, menstrual issues, complicated childbirth, etc. The international community recognizes FGM as a violation of the fundamental human rights of girls and women, symbolizing entrenched gender inequality and constituting an extreme manifestation of discrimination against them which is agreed upon and mentioned in the “United Nations Convention on the rights of children”.⁴ Predominantly perpetrated by traditional practitioners on minors, FGM represents a grievous affront to the rights of children. Additionally, it infringes upon an individual’s rights to health, security, and bodily integrity, contravening the prohibition of torture and cruel, inhuman, or degrading treatment, and in cases of fatalities, the right to life. According to the World Health Organisation (WHO), FGM is classified into four major types,⁵ which are:

“TYPE 1: This refers to the partial or complete removal of the clitoral glans (the external and visible portion of the clitoris, a sensitive area of the female genitals), and/or the prepuce or clitoral hood (the fold of skin surrounding the clitoral glans).

TYPE 2: This involves the partial or complete removal of the clitoral glans and the labia minora (the inner folds of the vulva), with or without the removal of the labia majora (the outer folds of skin of the vulva).

TYPE 3: Commonly known as infibulation, this procedure entails narrowing the vaginal opening by creating a seal. The seal is formed by cutting and repositioning the labia minora or

⁴ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) (1989) 1577 UNTS 3 arts 2, 19(1), 28(2).

⁵ World Health Organization (n 519).



majora, sometimes through stitching, with or without the removal of the clitoral prepuce or glans.

TYPE 4: This category encompasses all other harmful practices involving the female genitalia for non-medical reasons, such as pricking, piercing, incising, scraping, and cauterizing the genital area.”

III. FGM IN INDIA

FGM traces its origins to ancient Egypt, spanning over 2000 years, where it was reportedly inflicted upon slaves for diverse reasons. As the practice proliferated globally, the motives behind it evolved and diversified. Common motivations now include ideals of purity and emphasis on chastity. India is a country driven by culture, some of them have scientific reasons but many do not. FGM is an age-old custom done on young girls, where their clitoral hood is cut off. This practice followed by the Dawoodi Bohras is known as *khafd* or *khafz*. The Dawoodi Bohra Muslims can trace their ancestry back to the Fatimi Imams, who were direct descendants of Prophet Mohammed in Egypt. Led by their spiritual leader known as the al-dai al-mutlaq, they have been based in India for the past 450 years. Currently, the community is under the leadership of the 53rd al-Dai al-Mutlaq, Dr Syedna Mufaddal Saifuddin. With a population of approximately 1 million members, the Dawoodi Bohras are spread across more than 40 countries worldwide, where they pursue their faith and contribute to various professions.⁶ A girl at the age of 6 or 7 is taken to a woman who generally performs the ritual and gets it done, it is done in order to ‘cleanse’ a woman from her excess flesh and become ‘eligible’ for marriage. This practice is deeply entrenched in patriarchal and misogynistic ideology of suppressing a woman’s sexuality which not only curbs her sexuality as intended but ends up causing various severe health impairments. When girls undergo the ritual, anesthesia is typically not administered, leading to severe pain, and in some cases, fatalities shortly after the procedure due to infection. Bohras usually marry within their community, but if they marry outside the community, the spouse is expected to convert to the Bohra faith.⁷ Even in the absence of affiliation with the Bohra community or prior ritual involvement, circumcision is a customary prerequisite for marriage when the groom belongs to the Bohra community. In societies where FGM is prevalent, adherence to this practice is heavily influenced by social norms, whereby individuals feel compelled to conform to established customs to gain social acceptance and avoid community ostracization. FGM is often perceived as an integral aspect of female upbringing, serving to prepare girls for adulthood and marriage by exerting control over their sexuality to uphold notions of premarital chastity and marital fidelity. While some may perceive religious backing for FGM, no religious texts explicitly endorse the practice, leading to varying stances among religious leaders, with some advocating for its discontinuation.⁸ “Globally, the practice is traditionally considered necessary to raise a

⁶ The Dawoodi Bohras, ‘Rooted in Tradition, Thriving Throughout the World: Meet the Dawoodi Bohras’ (2022) <https://www.thedawoodibohras.com/about-the-bohras/> accessed 4 November 2024.

⁷ Yasmin Bootwala, ‘A Review of Female Genital Cutting (FGC) in the Dawoodi Bohra Community’ (2019) 11(3) *Current Sexual Health Reports* 220–227 <https://doi.org/10.1007/s11930-019-00213-y> accessed 4 November 2024.

⁸ Ali Gomaa, ‘The Islamic View on Female Circumcision’ (2013) 19(3) *African Journal of Urology* 123–126 <https://doi.org/10.1016/j.afju.2013.02.007> accessed 4 November 2024.



girl with characteristics of a ‘proper’ wife, given that FGM is believed to preserve virginity or to restrain sexual desire,” says Veronica Birga, Chief of Women’s Human Rights and Gender Section at the United Nations High Commissioner for Human Rights.⁹ Efforts to eradicate the practice of FGM among young girls in the Dawoodi Bohra community of India may be underway. However, there remains reluctance from their spiritual leader, who indirectly endorsed the act of *Khafd* (female circumcision) during a sermon in April 2016, at the Saifee Mosque in Bhendi Bazaar. A widely circulated four-minute audio clip from Syedna Muffadal Saifuddin’s speech on the occasion of the 51st Syedna Taher Saifuddin’s death anniversary was widely circulated at that time. The voice clip begins with the Syedna speaking in a combination of Gujarati and Urdu.

“We should keep our things strong, stay firm. Even the big sovereign states, whatever it is they say, if it makes any difference to our things, then we are not prepared to understand!” he says, and then, *“The act has to happen! If it is a man, then it is right, it can be openly done, but if it is a woman then it must be done discreetly, but then the act has to be done. Please understand what I am trying to talk about...”*¹⁰

However, later in February 2017, Syedna Fakhruddin condemned the practice perpetrated on minors and referred to it as “un-Islamic and horrific”. He made the statement in response to questions from The Wire.¹¹ He also added that the practice should be done only after a girl attains the age of majority and that too only if she consented to it.

In India, the practice of FGM is primarily observed within the Dawoodi Bohra subsect, conducted clandestinely by untrained elder women within their community. A 2018 study suggested that FGM prevalence among Bohra community daughters reached 75% of respondents in the sample. However, due to pervasive secrecy surrounding the practice within the community, official evidence or statistics are lacking.¹² Referred to as *khatna*, or “circumcision,” by the Bohras, the main justification for this cruel practice is to suppress the sexual drive of women. FGM is justified by various factors. Psychologically, it’s viewed as a means to regulate female sexuality, ensuring virginity before marriage and fidelity thereafter, while also enhancing male sexual pleasure by removing parts like the clitoris. Sociologically and culturally, it’s regarded as a rite of passage into womanhood and a prerequisite for marriage. Some communities justify it for hygiene and aesthetic purposes, believing the external genitalia to be unclean or unsightly. Additionally, religious arguments, though not supported by Islam or Christianity, are sometimes cited to validate the practice. Not all actions carried out in the name of Islam are inherently Islamic. Many practices stem from cultural traditions and may eventually be perceived as Islamic, particularly within predominantly Muslim communities. An action is deemed Islamic only if it aligns with the foundational

⁹ Devanshi Verma, ‘Raising a Proper Wife through Cutting Her Genitals’ (WION, 21 July 2017) <https://www.wionews.com/south-asia/indias-fight-against-female-genital-mutilation-17094> accessed 4 November 2024.

¹⁰ Mohua Das, ‘Bohra Cleric Urges Female Genital Mutilation?’ (*The Times of India*, 29 April 2016) <https://timesofindia.indiatimes.com/city/mumbai/bohra-cleric-urges-female-genital-mutilation/articleshow/52031699.cms> accessed 4 November 2024.

¹¹ Syedna Fakhruddin, ‘A Dawoodi Bohra Sect Leader Condemns FGM as “Un-Islamic”’ (*The Wire*) <https://thewire.in/culture/fakhruddin-fgm-khafz-dawoodi> accessed 4 November 2024.

¹² Bootwala (n 525).



sources of Islamic guidance, such as The Holy Quran, Sunnah, Qiyas, and Ijma. While male circumcision is referenced in the religious texts of Islam, there is no mention of such a practice in any of the Shariah laws concerning females. Even Al-Azhar, the Supreme Council of Islamic Research and the highest religious authority in Egypt has explicitly stated that FGM lacks any basis in core Islamic law or its derivative provisions.¹³ While male circumcision is referenced in the religious texts of Islam, there is no mention of such a practice in any of the Shariah laws concerning females.¹⁴

IV. MEDICAL SIDE EFFECTS OF FGM

The psychological impact of FGM/C is influenced by various factors, including the type of procedure, the expertise of the circumciser, and the prevailing social context during the circumcision process. The psychosocial aftermath encompasses a spectrum of outcomes, such as post-traumatic stress disorder (PTSD), anxiety disorders, panic disorders, inhibition, depression, suppression of emotions and thoughts, and occasionally, attempted suicide. Some immediate health complications include bleeding, shock, infection, septicaemia, urinary retention, injury to adjacent tissue.¹⁵ Keloid formation resulting from wound infection can complicate first intercourse and delivery, making surgery more challenging. Dermoid or inclusion cysts may arise due to epithelium inclusion during FGM, leading to substantial swelling. Menstrual problems, including dysmenorrhea and hematocolpos, may arise from vaginal occlusion, posing serious health risks and social repercussions. Fistulae and incontinence can result from injuries during FGM or obstructed labor, leading to chronic health issues. Infertility may result from irreversible damage to the reproductive organs caused by FGM-related infections or complications. This practice could be directly or indirectly linked to fistula. A Fistula could occur during FGM procedures or defibulation. It can cause prolonged obstructed labour which predisposes to obstetric fistulae. Frequent urinary tract infections often occur in individuals who have undergone infibulation. When the urethral opening is blocked due to the procedure, urine and vaginal discharge may gather, creating an ideal environment for bacteria to thrive. This accumulation can result in painful urination, impeding regular voiding and fostering bacterial growth. Additionally, recurring urethritis and urethral damage from the initial mutilation may lead to urethral strictures, worsening urinary flow and increasing the likelihood of infection. Another major and quite common effect of removing the clitoral hood is the risk of epidermoid cysts, which are cysts that are usually relatively larger unilocular and contain sebaceous fluid and sometimes it also contains small solid fragments.¹⁶

The level of sexual dissatisfaction among circumcised women depends on the types of circumcision.¹⁷ *“It is quite obvious that the mere notion of surgical interference in highly*

¹³ Absar Ahmad and Aafiya Siddique, ‘Female Genital Mutilation (FGM): The Unspoken Truth’ (ResearchGate) <https://doi.org/10.13140/RG.2.2.16471.16802> accessed 4 November 2024.

¹⁴ R Ghadially, ‘All for “Izzat”’ *Newsletter of the Women’s Global Network on Reproductive Rights* <https://pubmed.ncbi.nlm.nih.gov/12285436/> accessed 4 November 2024.

¹⁵ H Rushwan, ‘Female Genital Mutilation: A Tragedy for Women’s Reproductive Health’ (2013) 19(3) *African Journal of Urology* 130–133 <https://doi.org/10.1016/j.afju.2013.03.002> accessed 4 November 2024.

¹⁶ Claudine Marie Gayle and Janice M Rymer, ‘Female Genital Mutilation’ in *Clinical Gynecology* (2015) 102–111 <https://doi.org/10.1017/CBO9781139628938.0100> accessed 4 November 2024.

¹⁷ MH El-Defrawi and others, ‘Female Genital Mutilation and Its Psychosexual Impact’ (2001) 27(5) *Journal of Sex & Marital Therapy* 465–473 <https://doi.org/10.1080/713846810> accessed 4 November 2024.



sensitive genital organs constitutes a serious threat to the child and that the painful operation is a source of major physical as well as psychological trauma,” says Basheer.¹⁸ After circumcision, individuals may experience anxiety, nightmares accompanied by panic, and a subsequent feeling of humiliation and betrayal by their parents. Conversely, in communities where children are pressured to believe that their clitoris or genitals are dirty, dangerous, or temptations, they may feel psychological relief upon conforming to societal norms and undergoing the procedure.¹⁹ Other psychological effects can include disordered eating and sleeping habits, mood swings, impaired cognition, sleeplessness, recurring nightmares, loss of appetite, weight loss or excessive weight gain, panic attacks, difficulties in concentrating and learning, post-traumatic shock, depression, chronic pain syndrome/mobility impairment.²⁰ Government should initiate medical aid for those who have been affected by the practice, counselling shall be given in order to retrieve the mental state of the survivor. FGM serves to regulate the sexual desires of women and girls. Those who undergo circumcision experience reduced sexual urges, which in turn facilitates family formation and fidelity within marital relationships.

In India, the practice of FGM/cutting (FGM/C) has traditionally been carried out by traditional circumcisers, like, birth attendants, midwives, and barbers, typically elderly women with limited eyesight and lacking medical expertise, are relied upon to perform circumcisions. However, there is a gradual shift occurring, as proponents of *Khafd* are advocating for a transition from traditional circumcisers to medical professionals. They argue that this change is necessary to ensure safety and hygiene during the procedure. The increasing shift to the medicalization of FGM is more important to mitigate the immediate pain and the infection associated with the traditional method of performing it. Still, it fails to recognize the long-term psychological and sexual trauma associated with it, and it fails to ignore its misogynistic nature and deeply entrenched gender biased ideology.²¹ Medicalization should never be entertained because it gives a sense of relief that the practice is safe when it is done by a doctor, which in reality is not the fact. It is to be understood that medicalization does not make the practice safe to be performed.²² The necessity of surgically restoring the anatomical structures in the clitoral area is determined by the extent of tissue damage. Reconstructive consideration must account for the various functions of the female prepuce, which is consistently affected in FGM/C types I to III.²³

¹⁸ T Baasher, ‘Psychological Aspects of Female Circumcision’ (1979) 2 *WHO/EMRO Technical Publications* 71–105.

¹⁹ S Abdel-Azim, ‘Psychosocial and Sexual Aspects of Female Circumcision’ (2013) 19(3) *African Journal of Urology* 141–142 <https://doi.org/10.1016/j.afju.2012.12.005> accessed 4 November 2024.

²⁰ Gayle and Rymer (n 534).

²¹ Anika Khan, Sualeha Siddiq Shekhani and Amir Jafarey, ‘Demystifying the Practice of Khafd in the Dawoodi Bohra Community’ (2019) 4(1) *Indian Journal of Medical Ethics* 65–70 <https://doi.org/10.20529/IJME.2018.075> accessed 4 November 2024.

²² Kyoko Nakamura and others, ‘Female Genital Mutilation/Cutting’ (2023) SpringerLink (Preprint) <https://doi.org/10.1007/978-981-19-6723-8> accessed 4 November 2024.

²³ Dan Mon O’Dey, ‘Vulvar Reconstruction Following Female Genital Mutilation/Cutting (FGM/C) and Other Acquired Deformities’ (2019) <https://doi.org/10.1007/978-3-030-02168-9> accessed 4 November 2024.



V. LEGISLATIVE PROVISIONS IN INDIA

Below listed are some of the legislative provisions that *Khafd* is violative of:

A. Constitution of India

a) Article 14, 15 and 21²⁴

Women and girls undergo FGM, which is done to control their sexuality which results in long-term health complications; this inequality goes against the basic principle of article 14 because men are not subjected to such an act to constrain them of their sexuality. Performed on girls and women which makes it a violation on the grounds of sex, which makes the practice constitutionally impermissible. In *Shayara Bano v. Union of India* the Supreme Court held that the practice of triple talaq was in violation of the fundamental rights of women, and banned the same.²⁵ Similarly here the practice of FGM discriminates against women and violates their fundamental rights. Here the practice of FGM does not comply with the test of reasonableness, it is applied when any practice violates fundamental rights. The standard of reasonableness is tested from the objective of the practice, its essentiality, constitutional morality, individual rights, etc... Here the objective of the practice is arbitrary and discriminatory towards women. The apex court of India developed the Essential Religious Practices doctrine to determine whether a religious practice is entitled to constitutional protection. This doctrine was laid down in the case, *Commissioner, Hindu Religious Endowments, Madras v Shri Lakshmindra Thirtha Swamiar of Shirur Mutt*.²⁶ The practice is neither an essential nor an indispensable part of the religion, also the practice is not mandated in the religious texts and manuscripts. The practice violates the fundamental rights, public morals, and constitutional values enshrined under article 14, 15, and 21 hence the practice does not come under the purview of religious freedom. Though argued on a religious autonomy basis the practice fails to comply with the doctrine that tests the latter.

FGM violates the bodily autonomy and integrity of a female. It causes excruciating pain with no known health benefits as the practitioners claim, instead, it does cause a lot of health impairments. In many cases, it is performed on very young girls. In *Indian Young Lawyers Association v. State of Kerala*, the Supreme Court held that excluding a particular group of women from religious space is unconstitutional. It reasoned that any practice that violates the dignity of women does not come under the purview of the constitution. This ratio decidendi also sets a precedent to challenge FGM for violation of the dignity of a woman.²⁷

While assessing the legality of a religious practice, it should be ensured that such practice does not violate fundamental rights. Here, the practice is against the rule of law and is clearly in violation of the golden triangle—articles 14, 15, and 21—since it discriminates against women and young girls.

²⁴ Constitution of India arts 14, 15 and 21.

²⁵ *Shayara Bano v Union of India* (2017) 9 SCC 1.

²⁶ *Commissioner, Hindu Religious Endowments, Madras v Shri Lakshmindra Thirtha Swamiar of Shirur Mutt* 1954 SCR 1005 (SC).

²⁷ *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1.



B. POCSO Act (Protection of Children from Sexual Offences Act, 2012)²⁸

Section 3: It addresses penetrative sexual assault by any person on any child, inter alia defines it as the insertion of any object into the vagina of a girl. Sharp tools are used on a child or a woman to perform circumcision which is potential sexual exploitation and can be interpreted under this section. Section 3(b) explicitly mentions the insertion of any objects in the private part of a child that could include the cutting of the private part and can be classified as an assault.

Section 5: This section defines aggravated sexual assault if it was committed by deadly objects such as fire, corrosive or heated substance, or if it causes temporary or permanent damage to the organs or if it is committed on a child below 12 years old etc.

Though the act lacks penetration it can be well categorized as a sexual assault as the act mutilates the sexual organ of a child where she is completely unable to deliver consent. Since the act involves the rights of minors and the practice lacks specific provisions it can be very well interpreted under this act.

C. The Bharatiya Nyaya Sanhita, 2023²⁹

i. Section 114: Hurt

FGM inflicts pain as a result of which it causes lasting discomfort. Hurt also included body pain even if there is no bleeding or external injury, though in cases where FGM does not cause visible injuries, it still qualifies as 'hurt' as it led to causing pain and infection to a person.

ii. Section 116: Grievous hurt

In order to be categorized as grievous hurt the person should have been life-threatening, suffered permanent disfigurement, lasting trauma, severe injuries, or ailment. The act should have caused any of the above results. FGM often causes mutilated genitals that constitute disfigurement. This practice has led to several deaths, haemorrhages or severe infections.

By categorizing this practice under the penal provisions, it can be made punishable as it lacks an exclusive provision. This facilitates to prosecute the perpetrators.

There is no concrete legislative provision criminalizing FGM in India even though it involves inflicting grievous hurt to women and little girls. The (ICPS) Integrated Child Protection Scheme consolidates various child protection schemes of the Ministry into a unified framework, incorporating additional measures to safeguard children and prevent harm. It aims to institutionalize vital services, fortify existing structures, build capacity across all levels, establish a comprehensive database, and enhance child protection at the family and community levels. Additionally, the scheme facilitates inter-sectoral collaboration to ensure a coordinated response. Implementing a child protection data management system enables the formulation of effective intervention strategies and monitoring their impact. Ongoing evaluation and adjustments are integral to ensuring the effectiveness of the programs and structures.³⁰

²⁸ Protection of Children from Sexual Offences Act 2012 s 3.

²⁹ Bharatiya Nyaya Sanhita 2023 ss 114, 116.

³⁰ Ministry of Women and Child Development, *Integrated Child Protection Scheme (ICPS)* <https://wcd.nic.in/integrated-child-protection-scheme-ICPS> accessed 4 November 2024.



The National Policy for Children, 2013 (NPC) underscores the “State’s obligation to uphold the rights of all children, particularly those marginalized or disadvantaged, ensuring their equitable, dignified, secure, and free upbringing, free from any custom or tradition that hinders their rights. It emphasizes children’s inherent rights to health, survival, development, and protection, recognizing a safe environment as essential for realizing these rights”.³¹ The National Commission for Women asserts that empowering women and eliminating violence against them is essential for the social progress and advancement of a nation. In 2017, the commission received a petition signed by approximately eighty thousand individuals urging to end FGM in India. According to the commission, FGM constitutes a violation of an individual’s autonomy over her own body, infringing upon her fundamental rights.³² On 20th July 2018, in the Lok Sabha a question regarding the drafting of new laws for preventing and penalizing FGM was raised, for which the then Minister of State for Women and Child Virendra Kumar replied that the government does not have any plans to enact exclusive legislations for FGM, instead it shall be revoked by the existing laws in POCSO and IPC and CrPC.³³ FGM constitutes a breach of fundamental human rights. It represents a stark reflection of deeply ingrained gender disparities, inflicting severe repercussions. Notably, FGM has gained considerable traction on the international development forefront, notably under Sustainable Development Goal target 5.3, which strives to eradicate the practice entirely by 2030.³⁴ India, as a signatory to the 2030 Agenda for Sustainable Development, pledges to engage in routine international assessments of the Sustainable Development Goals (SDGs) progress.³⁵ In order to attain the SDG is it extremely essential for India to consider introducing new legislatures in order to eradicate FGM/FGC. In 2017, following a petition in the Supreme Court, the Ministry of Women and Child Development stated that there is currently no official data or study confirming the presence of FGM in India.³⁶ In the case of *Anuj Garg & Ors vs Hotel Association of India & Ors*, the court stated “It is for the court to review that the majoritarian impulses rooted in moralistic tradition do not impinge upon individual autonomy.”³⁷

³¹ V Joshi, ‘The Gazette of India’ (Ministry of Women and Child Development 2013) 1(1) <https://wcd.nic.in/sites/default/files/npcenglish08072013.pdf> accessed 4 November 2024.

³² Aakriti Sharma and Anmol Chitranshi, ‘Female Genital Mutilation: Evils of a Bygone Era’ (2019) 1(1) *Journal of University School of Law and Legal Studies* https://indraprasthalawreview.in/wp-content/uploads/2020/10/ggsipu_uslls_ILR_2020_V1-I1-24-aakriti_sharma-anmol_chitranshi.pdf accessed 4 November 2024.

³³ Ambika Pandit, ‘No New Law for Now, It Is POCSO and IPC to Curb Female Genital Mutilation’ (*The Times of India*, 30 July 2018) <https://timesofindia.indiatimes.com/india/no-new-law-for-now-it-is-pocso-and-ipc-to-curb-female-genital-mutilation/articleshow/65203182.cms> accessed 4 November 2024.

³⁴ G Carter, ‘Ending Female Genital Mutilation by Achieving SDG 5: Gender Equality’ (Joint SDG Fund 2020) <https://jointsdgfund.org/article/ending-female-genital-mutilation-achieving-sdg-5-gender-equality> accessed 4 November 2024.

³⁵ United Nations High-Level Political Forum on Sustainable Development, NITI Aayog [https://www.niti.gov.in/un-high-level-political-forum#:~:text=As%20a%20signatory%20to%20the,SDGs\)%20on%20a%20regular%20basis](https://www.niti.gov.in/un-high-level-political-forum#:~:text=As%20a%20signatory%20to%20the,SDGs)%20on%20a%20regular%20basis) accessed 4 November 2024.

³⁶ ‘I Was Crying with Unbearable Pain: Study Reveals Extent of FGM in India’ (*The Guardian*, 6 March 2018) <https://www.theguardian.com/global-development/2018/mar/06/study-reveals-fgm-india-female-genital-mutilation> accessed 4 November 2024.

³⁷ *Anuj Garg v Hotel Association of India* (2007) 8 SCC 1.



- Article 25. Freedom of conscience and free profession, practice and propagation of religion
- Article 26. Freedom to manage religious affairs.³⁸

So, even if one assumes for the sake of argument that FGM is a religious practice, such practice is not protected as it violates Articles 14, 15 and 21 which are the fundamental rights guaranteed to the citizens of India by the Constitution. Any custom that is being practiced should not extend to the purview of infringing fundamental rights, which in the current scenario; this practice is an obvious violation of women's rights to dignity, sexuality, and autonomy. Also, as per Article 25(2) a custom or a religious rite can be practiced only to the extent that it does not affect the laws of the country³⁹. And mostly circumcision is forcefully done to young girls who are not in a state to give consent. In *Sunita Tiwari v Union of India*, a PIL will be filed to ban this practice, wherein the respondent argued that *khafd* is mistaken for FGM, and that *khafd* only involves removing the hood and not mutilating the genitals (yet this practice comes under FGM TYPE I list as per WHO) and it was also pleaded that the practice is not gender biased because the males too undergo it⁴⁰, here male circumcision is argued in par with female circumcision, it is to be understood that the very essence of male circumcision is the health of the male but as far as female circumcision is concerned the health complications arising out of it is exceedingly serious⁴¹.

This practice also violates several international treaties India has ratified. Article 5 in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) expressly insists on the state modifying the social and cultural practices that are discriminatory, though the practice is not mentioned in the convention,⁴² the CEDAW committee has reported including FGM as a harmful practice that violates the rights of women also the 14th General Recommendations expressly call for the eradication of FGM and insist on enacting measures and legislation to eradicate it.⁴³

Article 24 of the Convention on the Rights of the Child (CRC) states that state should undertake measures against practices that are in violation of the mental and physical health of the children, it also states that the state shall protect the children from any form of abuse, violence or harmful practices.⁴⁴ The CRC committee has strongly condemned the practice of FGM, it has addressed the issue and called for the abolishment of the practice in General Recommendations no.18.

VI. SUGGESTIONS

A comprehensive, interdisciplinary research initiative focusing on FGM/cutting (FGM/FGC) in India is urgently required to eradicate this painful practice. The medicalization of FGM is

³⁸ Constitution of India arts 14, 15 and 21.

³⁹ Constitution of India arts 14, 15, 21 and 25(2).

⁴⁰ *Sunita Tiwari v Union of India* (Writ Petition (Civil) No 286 of 2017).

⁴¹ LJ Kouba and J Muasher, 'Female Circumcision in Africa: An Overview' (1985) 28(1) *African Studies Review* 95 <https://doi.org/10.2307/524569> accessed 4 November 2024.

⁴² Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) (1979) 1249 UNTS 13 art 5(a).

⁴³ UN Committee on the Elimination of Discrimination against Women, 'General Recommendation No 14: Female Circumcision' (1990) <https://www.refworld.org/legal/general/cedaw/1990/en/27729> accessed 4 November 2024.

⁴⁴ Convention on the Rights of the Child (n 522) art 24(3).



on the rise, with approximately one in four females (26 percent or 52 million) around the world who have experienced it having been subjected to the procedure by healthcare providers. Among adolescents aged 15 to 19 years, this proportion is even higher at 34 percent, compared to 16 percent among older women aged 45 to 49 years⁴⁵. Given the concerning trend of medicalizing FGM/FGC medical practitioners can be educated on the ill effects of this practice. Traditional circumcisers, often driven by economic reasons, should be sensitized about the harmful effects of FGM/FGC, and they shall be provided with alternative livelihood. Furthermore, the Government of India must acknowledge the existence of *Khafd* and take decisive action to eliminate it, as this traditional practice violates various international treaties and infringes upon the basic rights of women and girls enshrined in the constitution. Enacting laws alone will not end this age-old custom. Instead, the public should also be educated about its ill effects. Awareness can be made through the media. The government can spread awareness with the help of the NGOs and the Syedna.

An exclusive statute that explicitly prohibits and penalizes the practice and practitioners shall be enacted. An emergency helpline number can be created, or the existing child helpline could be used to report any such practice. Quality medical attention shall be made available at the reach of those who have undergone FGM. Medical experts such as plastic surgeons, urologists, gynaecologists, and others could be appointed by the government as a part of the procedure to facilitate treatment for the survivors. Further, psychological assistance such as Trauma Focused cognitive behavioural therapy or any other form of therapy based on the psychological state of the survivor.

VII. CONCLUSION

Although some provisions in India could be interpreted to address FGM, there are currently no specific laws criminalizing it. Diverse cultural practices in India pose unique challenges in prohibiting them though they represent a deep-rooted violation of human rights. Although India is a secular state, every citizen has the right to practice and profess his religion provided such practice freely is constitutional and doesn't encroach on the fundamental rights of others also those religious practices should not undermine the rule of law. When a practice contravenes the golden triangle of fundamental rights, it falls beyond the protective scope of the Constitution. Despite its widespread occurrence, the government has failed to adopt a definitive stance on the issue. India's failure to outlaw the practice directly contradicts the international conventions. Therefore, India must recognize FGM as a violation of fundamental rights to bodily autonomy, rather than categorizing it as a customary practice.

While it is contended that a separate statute to penalize FGM is unnecessary, it is clear that certain offenses demand targeted legislation due to the severity of the act and its societal impact. Analogous to the Dowry Prohibition Act, the Protection of Children from Sexual Offenses (POCSO) Act, and the Sexual Harassment of Women at Workplace Act, FGM warrants an exclusive legislative framework to address and deter its harm adequately lack of

⁴⁵ UNICEF, *Female Genital Mutilation: A New Generation Calls for Ending an Old Practice* (UNICEF 2022) <https://data.unicef.org/resources/female-genital-mutilation-a-new-generation-calls-for-ending-an-old-practice/> accessed 4 November 2024.



which creates a major void in the legal arsenal. Hence, the government is duty bound to implement specific laws that comprehensively criminalize this practice.



THE BECHDEL TEST AND BEYOND: UTILISING FEMINIST TOOLS TO ASSESS GENDER REPRESENTATION IN MOVIES AND TELEVISION AND EVALUATING THEIR EFFECTIVENESS AND LIMITATIONS

By Deeksha Venkatesan and Yazhini Gauthaman

Abstract

*Gender constructs and stereotyping in media have long been a primary topic of discourse of Fourth Wave Feminism but have been thrown into the limelight anew of late due to the release and success of movies such as Sandeep Reddy Vanga's *Animal*, which faced an immense amount of criticism for its portrayal of women.*

As such, at a time when the portrayal of gender roles has been shot onto the center stage of societal discourse, it is but prudent to note the Bechdel-Wallace test, developed by American cartoonist, Alice Bechdel, and her friend Liz Wallace, to measure the representation of women in fictional works, and to determine the depth of such representation. This Test simply asks one question, whether a work features at least two female characters who have a conversation about something other than a man.

Today, the Test has become a serious tool to evaluate the representation of women in movies and has led to the development of many other serious tools by academia. This paper, then, aims to evaluate the Bechdel Test and other such feminist tests, and apply a select few of these tests to real-world creative works to examine their ability to expose underlying societal issues, and also aims to explore improvements to existing tools.

As such, this paper will evaluate the strengths (including its simplicity, ease of use, and effectiveness in raising awareness) and limitations (including its oversimplification of complex issues, and its ignorance of



intersecting identities and other identities) of the Bechdel Test itself, and will also subsequently examine and evaluate other feminist tools used to evaluate creative works. Further, the research will also apply the Bechdel Test and other such tools to specific media that both pass and fail these evaluative tools.

Finally, the paper will emphasise the importance of the regular application of such tools to pave a new path towards gender inclusivity in media and will also explore improvements to existing tools and new possible frameworks for assessing gender representation, considering intersectionality and inclusivity.

Keywords: *Gender Constructs, Stereotyping, Representation, Bechdel Test, Intersectionality, Inclusivity.*

I. INTRODUCTION

Cinema, an immersive form of storytelling, has a deep impact on individual and societal perspectives and outlooks on a wide range of topics. It has and will continue to shape the world around us. Cinema being a medium that combines visual, auditory and narrative elements possesses the powerful ability to evoke emotions and convey social values. It cuts across cultures and boundaries. Cinema essentially serves as a mirror of society as filmmakers draw their stories from society.¹

Cinema and television shows' cathartic power is unparalleled. Such a powerful medium, if used correctly, could serve as a catalyst for change. However, this influential medium has not been used in an entirely positive manner. This tool, used by ill-intentioned filmmakers, could lead to detrimental effects. It indirectly becomes a medium that enforces prejudices and stereotypes, normalizes harmful behaviour and builds unrealistic expectations about all aspects of life.

Films being an integral part of an individual's upbringing, reinforce several skewed ideas. An example is the glorification of violence and aggressive behaviour in horror and action films. There are several other examples such as the contribution of films to unrealistic body standards. Such standards when watched by impressionable adolescents lead to body dissatisfaction and even eating disorders.

One main area where cinema and films have done a poor job is the representation of women. This is a double-edged sword, where on one hand they are severely underrepresented and on the other hand, when depicted, it gravely falls into the category of misrepresentation. Underrepresentation is seen in both the quality and quantity of

¹ Franklin Fearing, 'Influence of the Movies on Attitudes and Behavior' (1947) 254 *The Annals of the American Academy of Political and Social Science* 70 <https://www.jstor.org/stable/1026142> accessed 13 March 2024.



female roles in films. There is a dearth of authentic female voices.² In today's modern terms, there is a lack of '*women written by women*'. This underrepresentation is found in all aspects of filmmaking such as directing, producing, writing, editing and mainly acting.

The other edge, the misrepresentation and false narratives about women, involves poor depictions of women that often entail narrow roles that perpetuate traditional gender stereotypes. They are repeatedly reduced to only the role of a love interest, a mother or just a supportive side character. Such secondary and stereotypical representation fails to project women as anything more than an accessory to a man. Objectification and sexualisation of women perpetuate the vicious cycle of patriarchy.³

There has been progress in the representation of women in recent years, with the release of films such as *Charlie's Angels* (2019) and *Wonder Woman* (2020). However, these barely scratch the surface of patriarchy. There is a lack of collective commitment to gender equality, especially in the filmmaking realm.⁴

To gauge the extent of gender equality in films and TV shows, several tests and metrics have been developed. The Mako Mori test, Ellen Willis test, DuVernay test, Rees Davies test and the Bechdel test are a few popular ones. The Mako Mori test is inspired by the character Mako Mori from the film *Pacific Rim* (2013). The Mako Mori test is qualitative in nature, measuring the depth of the female character(s) in a particular film. The Ellen Willis test focuses on the dynamic between the male and female characters in a film. This test gauges if a female character has her own set of ambitions and interests which are not dependent or connected to the main character.⁵

The DuVernay test, derived from director Ava DuVernay's work, ascertains if the female character has meaningful relationships and interactions. This test specifically focuses on the racial diversity of female characters. The Rees Davies test has been named after the screenwriter and producer Laura Rees Davies. It not only focuses on the film as such but also on behind-the-scenes gender disparities. The main principle behind the Rees-Davies test is that the lack of diverse female voices in the creative decision-making process hampers inclusivity in narratives.⁶

Finally, the Bechdel test, named after the cartoonist Alison Bechdel, is one of the most popular and simplest assessments of gender equality in films. It also known as the Bechdel-Wallace test or Mo Movie Measure was introduced in the year 1985. It stemmed from cartoonist Alison Bechdel's comic "*Dykes to Watch Out For*". The Bechdel test gained traction in the 20th century, after its inception, due to the shocking

² Teresa de Lauretis, 'Aesthetic and Feminist Theory: Rethinking Women's Cinema' (1985) *New German Critique* 154 <https://www.jstor.org/stable/488343> accessed 13 March 2024.

³ Olivia Mackey, 'The Representation of Women in Films and the Impact It Has on 21st Century Society' (Undergraduate thesis, National College of Ireland 2021).

⁴ *ibid.*

⁵ Vicky Gagiano, 'An Analysis of Narratology in Mainstream Film through the Application of Gender Equity Critical Assessment' (MA thesis, Stellenbosch University 2019).

⁶ Cole Reilly, 'An Encouraging Evolution among the Disney Princesses? A Critical Feminist Analysis' (2016) 477 *Counterpoints* <https://www.jstor.org/stable/45157186> accessed 13 March 2024.



results it exposed. So-called modern and forward films dismally failed the seemingly basic test. It threw light on the domination of the male perspective in storytelling and narratives.

Due to its wide usage, it has become a benchmark for assessing inclusivity in front of the camera. The test consists of three simple and straightforward questions:

1. Are there at least two named women in the film?
2. Do these women have a conversation with each other?
3. Does the conversation discuss anything other than a man?⁷

If the answer to all these three questions is yes, then the movie is said to have passed the Bechdel test. If the answer to any one or more of the questions is no, then the movie fails the Bechdel test. However, the test is rudimentary and not foolproof. This paper will discuss the Bechdel test in detail, along with its advantages and disadvantages, its application, its effectiveness and suggestions to strengthen it.

This Paper, therefore, will seek to understand the nuances of underrepresentation of women in cinema, the applications of these tests, their areas of failure, and the way forward for an industry that has largely relegated women to subservient, lesser roles. This Paper will also attempt to analyse the law on the representation of women in cinema, and understand its areas of failure, as well.

II. HISTORY OF THE BECHDEL TEST

The Bechdel test, a test that seems simple to the human eye and mind, has formed the basis of several conversations and controversies regarding the film industry. But where did the Bechdel test originate and how did a casual conversation in a comic strip become a cultural barometer for gender representation?



The year was 1985. The long-running comic series, “*Dykes to Watch out For*,” by Cartoonist Alison Bechdel, which had been a staple in the underground feminist press, featured a comic strip titled “The Rule”⁸. In it, the comic depicts two queer women discussing movies. One woman states that she will only watch a movie if it meets certain rules and standards that involve female characters. The character states “The rule is, I only go to a movie if it satisfies three basic requirements. one, it has to

have at least two women in it, and secondly who talk to each other about, and finally, talk about something besides a man”.⁹

⁷ Apoorv Agarwal, ‘Key Female Characters in Film Have More to Talk about Besides Men: Automating the Bechdel Test’ (NAACL HLT Conference, Denver 2015).

⁸ Kathleen Martindale, *Un/Popular Culture: Lesbian Writing after the Sex Wars* (State University of New York Press 1997).

⁹ Alison Bechdel, *Dykes to Watch Out For* (Firebrand Books 1986).



This offhand remark said to have been made by Bechdel's friend Liz Wallace to Bechdel came to be known as the Bechdel test, or the Bechdel-Wallace test as Alison Bechdel likes to call it. Bechdel suspected that Wallace, in making this tongue-in-cheek remark, was inspired heavily by a 1929 essay by Virginia Woolf entitled "A Room of One's Own"¹⁰. In the essay, Woolf writes of her inability to recall any book she had read where two women were portrayed as friends, outside of their relationship with men.¹¹

As such, it is clear the ideas and concepts portrayed and communicated by the Bechdel Test have existed long before the specific Test itself was developed, and in that regard, is not new or evolutionary, but rather a formalised and popularised variant of a long existing idea. As a formalised variant, the Test only entered the mainstream in the early 2000s, as other variants and derivations of the Test emerged and began to be applied to media and art.

Despite its humble beginnings rooted in a tongue-in-cheek manner of evaluating movies, the Bechdel Test struck a chord with feminist film reviewers, and perhaps it is precisely its humorous nature that struck a chord with film reviewers, to begin with. It provided a simple yet effective technique to highlight women's underrepresentation in movies.

In an innumerable number of films, female characters exist primarily in relation to male characters, with their conversations being centred on romance, domesticity, and the goals of the male protagonist. The internet's development in the late 1990s and early 2000s contributed to launching the Bechdel Test into the mainstream. It was adopted by online forums and movie review websites as a method of discussing gender representation and encouraging critical thinking about the films they saw. Websites such as [Bechdeltest.com](https://bechdeltest.com) allowed viewers to rapidly determine if a film passed the test, raising debate over the test's limits and the larger problem of female representation in films.¹²

It has inspired filmmakers to produce more tales about well-rounded female characters, and it has given audiences the ability to critically analyse the films they see. The Bechdel Test influences more than just movies. It has sparked similar tests in other media, such as television series and video games,¹³ showing the scarcity of varied storylines across many platforms. The Bechdel Test's transformation from a comic strip to a cultural staple demonstrates the power of even a simple notion to inspire change.

While it is not a perfect measure of feminist content, it has undoubtedly contributed to the movement for more representation and more nuanced depictions of women in film and beyond. As the discourse around gender representation continues to grow, the

¹⁰ Alison Bechdel, 'Testy' in *Dykes to Watch Out For* (8 November 1989) <https://dykestowatchoutfor.com/testy/> accessed 12 March 2024.

¹¹ Virginia Woolf, *A Room of One's Own* (first published 1929, Penguin Classics 2020).

¹² Anonymous, 'Bechdel Test Movie List' (*Bechdel Test*) <https://bechdeltest.com/> accessed 12 March 2024.

¹³ Kishonna L Gray, *Race, Gender, and Deviance in Xbox Live: Theoretical Perspectives from the Virtual Margins* (Routledge 2014).



Bechdel test serves as a reminder of both the progress accomplished and the work that has to be done. Regardless, the Test is a beginning point, a discussion starter, and an ongoing challenge to both producers and consumers to tell and celebrate tales that reflect the whole range of human experience.

III. MERITS AND LIMITATIONS OF THE BECHDEL TEST

The Bechdel-Wallace test initially intended as a humorous conversation, has proved itself to be an important barometer for disparity in pop culture. The Bechdel test has successfully called attention to the gender disparity in films. It reinforces the basic fact that women are human beings who have ambitions and lives outside of men. It brings to the forefront the message that women too are integral parts of film plots. Prima facie, most films seem to have passed the test, but a close analysis and proper application provide humiliating results.

The first advantage of the Bechdel-Wallace test is its simplicity. It is straightforward and does not require any tools outside of the three questions. Further, it requires no expertise in the subject area of films. Anybody can utilise the Bechdel test to assess disparity in a film or TV show. The test sets a very minimal and easy to achieve standard for creators. The path to gender equality is a long one. One way to reach there is to avoid conversations that perpetuate patriarchy. This is the essence of the Wallace test. This test has facilitated a slow but steady change from the historical tendency of filmmakers to sideline women in their narratives. It has broken the frustrating trend of having only single female characters.¹⁴

The second advantage of the test pertains to the awareness it creates. The test has made filmmakers rethink the impact of their storytelling. An enormous amount of commercially successful films have failed the rudimentary test. This in turn created the need for accountability.

The test not only focuses on the presence of female characters in the film but also on the quality of the conversation. Merely talking about men reinforces the stereotype that women are puppets. Movies of the 20th century and prior had only one named female character. The presence of such tests has broken such a trend by creating awareness and demanding accountability.

Quality conversations in films between two or more women facilitate change through dialogue. It goes a long way in removing not only conscious but unconscious biases too.

The test has sparked the phenomenon among filmmakers to make a conscious effort to include meaningful conversations. The test has also led to the creation of more tests

¹⁴ Katarina Hedrén, Jyoti Mistry and Antje Schuhmann, 'Women, Use the Gaze to Change Reality' in Jyoti Mistry and Antje Schuhmann (eds), *Gaze Regimes: Film and Feminisms in Africa* (Wits University Press 2015).



such as. the Mako Mori test and the Racial Bechdel test. Overall, the Bechdel test promotes nuanced and enriching storytelling.

As the Bechdel test gained traction, it also attracted a ton of criticism and scrutiny.

Firstly, the Bechdel test is deceptively simple. While it focuses on the quality of conversation, the metric lacks depth. There are several loopholes. A meaningful conversation could involve a man, however, the Bechdel test provides no space for such a possibility. A film passing the Bechdel test does not ensure meaningful conversations. What one fails to realise is that frivolous conversations could lack the mention of a man but would still not contribute to the empowerment of women in the media. The test merely scratches the surface of gender equality but does not do much to delve into the root cause of it.

Secondly, a film failing the Bechdel test does not necessarily mean the film is ‘anti-feminist’. This could be understood better using Alfonso Cuarón’s film *Gravity* (2013). This film fails the Bechdel test. However, in no way is this film anti-feminist. The film’s plotline simply does not require a conversation between two women that does not involve a man. The female actor in this film, Sandra Bullock’s character does not lack depth merely because *Gravity* (2013) fails the Bechdel test. Hence, this is one loophole in the test. The immediate response to a film that does not pass the test is to call it anti-feminist, but this is entirely false. The test does not intend to comment on the quality of the film. Passing the test does not guarantee quality and vice versa.¹⁵

Thirdly, the test does not take into account other important factors such as race, sexuality, ethnicity and so on. Inclusivity does not end with the representation of women. Other factors also play a role in the inclusivity and quality of a film. A film may pass the test while still perpetuating racism and discrimination against the LGBTQIA+ community. None of the three questions in the text take into account marginalised communities. A mere conversation between two women is not a barometer for inclusivity.

Fourthly, the Bechdel test does not take into account the context of conversation. Some conversations, while still involving the mention of a man, could be of higher quality than a frivolous conversation not involving a man. Certain narratives and plots require certain conversations, to drive home certain messages. The Bechdel test does not allow any space for such conversations. Hence, one could argue that the test is shallow.

Fifthly, the test only takes into account what happens in front of the camera. The diversity and inclusivity in the overall creative writing process are dismissed. The broader context of the film cannot be ignored. gender composition of the creative team, including directors, writers, producers, and cinematographers and behind-the-scenes dynamics of film production are erroneously overlooked.

In a nutshell, the Bechdel test has its positives and negatives. To look on the bright side, though gender inequality is still prevalent, progress is being made. But on the other

¹⁵ Jennifer O’Meara, ‘What “The Bechdel Test” Doesn’t Tell Us: Examining Women’s Verbal and Vocal (Dis)Empowerment in Cinema’ (2016) *Feminist Media Studies* 1120.



side, while the test has sparked important conversations about gender representations in films, it has serious limitations. The test can overall be summarised as one that provides a limited lens on gender representation. The Bechdel test can be strengthened by overcoming the above listed limitations. While sticking to the simple nature of the test, it could include a few more questions focusing on the depth of the female characters, inclusivity of other factors and also female representation in the overall creative process.¹⁶

IV. APPLICATION OF THE BECHDEL TEST TO MODERN-DAY MEDIA AND CINEMA

The underlying rationale behind the Bechdel test is that women are underrepresented in films. They're rarely given significant roles that form a major aspect of the plot, or even a role of a character who speaks. In some movies, they are not even provided with names. The gross underrepresentation of women, coupled with the misrepresentation of women as people not having an identity beyond a man's plus one, is a prevalent factor in not just Indian films but in films across the globe.

After all, the idea that a woman's life is nothing but an ode to men is widely followed and more often than not, forced upon people who do not agree. There are several blockbuster movies and contemporary movies that we appreciate for their creativity, storyline and cinematography, but have we thought about the representation of women in such films? The general public, consumers of media, are so used to films predominantly being about a man, that the lack of female characters and the lack of any dialogue from the part of the female characters often go unnoticed. According to Colin Stokes's TED talk "How movies teach manhood" only 11 of the top 100 movies of 2011 had women leads.¹⁷

Hence, the use of tests like the Bechdel tests is the need of the day, at least in an informal sense, if not a formalised system. As such, the application of the test on specific examples of media would not only be an exercise useful in providing an understanding of the test and the problems it aids in exposing but would also provide a perspective on the representation of women in contemporary media. Additionally, the application of the test would also be of utility in discovering the advantages and disadvantages of the test and its application.¹⁸

¹⁶ David Garcia, Ingmar Weber and Venkata Garimella, 'Gender Asymmetries in Reality and Fiction: The Bechdel Test of Social Media' (2014) 8 *Proceedings of the International AAAI Conference on Web and Social Media* 131 <https://ojs.aaai.org/index.php/ICWSM/article/view/14522> accessed 13 March 2024.

¹⁷ Colin Stokes, 'How Movies Teach Manhood' (TED Talk, 18 January 2013) https://www.ted.com/talks/colin_stokes_how_movies_teach_manhood?language=en accessed 13 March 2024.

¹⁸ Rampravesh Rai, 'The Bechdel Test and Hindi Cinema: An Analysis of Women Empowerment Delineation' (2021) *Communicator* https://www.academia.edu/72480231/The_Bechdel_Test_and_Hindi_Cinema_An_Analysis_of_Women_Empowerment_Delineation accessed 13 March 2024..

Application of the Bechdel test to ‘Animal (2023)’



(Photo: IMDb)

In that regard, it would be an interesting and deeply utilitarian exercise to apply the Test to the Sandeep Reddy Vanga directorial, “Animal”, a movie that received severe criticism for its portrayal of gender

roles in society. As such, it would be prudent to recall the three rules of the Bechdel Test, which are:

1. There should be at least two women;
2. They should talk; and
3. They should talk about something other than a man.

The film *Animal* by Sandeep Reddy Vanga, *prima facie*, comes off as a significantly patriarchal film that can only be best described as the cinematic representation of the male ego. While the film does portray more than two women and does portray these women conversing with one another, the conversations are, much to our surprise, limited to being about the men in their lives. The men in their lives are Ranvijay, played by Ranbir Kapoor, and Balbir Singh, played by Anil Kapoor.

The scope of the conversation between the two women in the film does not extend beyond the two lead male characters. Moreover, the film has merely two female interactions. One is the conversation between Rashmika Mandhana and her mother in the film, which is about her husband Ranvijay and their marriage, and the second interaction is the one between two of the wives of the lead antagonist which again is about the antagonist. While the movie does pass the first two rules of the Bechdel test, it very clearly fails the third rule.

Therefore, the film fails to pass the Bechdel test. Additionally, it would be interesting to explore the implication of this failure on the female characters in the film. In essence, the question to be asked is what does the fact the movie fails the test, and specifically fails the third requirement of the test, tell us about the female characters in the movie? At the outset, it would only be obvious to point out that the failure of the film as a whole, regardless of which requirement it does not meet, informs the watcher or the review of the film that the female characters in the film are not truly representative of women, and represent women as one-dimensional beings whose lives revolve around men and the actions of men.



Further, beyond this analysis, it is clear from the fact that the movie specifically fails the third requirement - that is; that they talk about something other than a man - that aids us in the conclusion that the movie portrays women not as central characters, but as planets that orbit the star that is the man. As such, this is a significant indication that the movie is farcical and has been made and produced without thought or the desire for a holistic plotline.

Application of the Bechdel test to ‘What’s your Rashee? (2009)’:

What’s your Rashee, a 2009 film directed by Ashutosh Gowariker, is about a man who meets a girl from every zodiac sign to find himself a bride and help his family get out of a financial crisis. The movie consists of 12 Priyanka Chopra characters and three more female characters. Despite the number of female characters in the film, it’s quite rare to see two female characters converse in the film. In every scene that a female character is a part of, she talks about the main lead of the film, Harman Baweja. Even when two women do talk to each other in the film, it is about their significant other. The magnitude of female characters seems to not help the film pass the Bechdel test.

Application of the Bechdel test to ‘Avatar (2009)’:

Situated on the alien world of Pandora, mankind steals the world’s resources to solve an environmental catastrophe on Earth, Avatar was a sci-fi phenomenon with an obvious thematic core. Following Jake Sully’s, Sam Worthington, infiltration into the native species known as the Na’vi, the film discusses colonisation and the human race’s overall destructive arrogance. All of this raises the question of why, despite having several identified female characters, Avatar fails the Bechdel Test. While Avatar became a tremendous sensation because of its stunning visuals, it lacked significant connections between female characters since all of their talks were around Jake. It is surprising to note that such a high-grossing and critically acclaimed film such as Avatar fails to pass the basic Bechdel Test.

Application of the Bechdel test to ‘Blonde (2022)’:

Blonde, directed by Andrew Dominik, is a highly controversial film which is a biopic of Marilyn Monroe’s life. The film seemingly appears to be able to pass the Bechdel test as the film is based on the story of an extremely popular female figure in Hollywood. However, the film’s peculiar concentration on the men in Marilyn Monroe’s life, with very little spent on the other female characters in her life and only on herself was rather disappointing and baffling thereby causing the film to fail the Bechdel test. Given the film’s unusual concentration on the problematic men in Marilyn Monroe’s life, it is understandable that the film failed the test. However, it is still disappointing and upsetting.¹⁹ The major question running in the minds of the viewers after watching the film was ‘If Blonde is a feminist film, why was Marilyn Monroe abused?’ The movie failed to capture the essence of feminism. It instead puts across the message that bold and promiscuous women undergo bad experiences.

¹⁹ Karla Zorko, ‘Gender Inequality in the English-Speaking Film Industry’ (Undergraduate thesis, Josip Juraj Strossmayer University of Osijek 2018).



V. UNDERLYING SOCIAL ISSUE

The Bechdel Test, as discussed earlier, was developed into popularity primarily by cartoonist Alison Bechdel, and was used primarily to gauge and evaluate the representation of women in film, as well as the level of sexism in film. The Bechdel test, however, and the results of its applications, do not have implications solely for film, television, and other forms of media. If this were to be true, it would naturally be a logical assumption that television, film, and other forms of media are cut off and separated from the world, society, and reality in general. It is quite the opposite; media and art are manifestations of societal standards and mindsets, and media and art are capable of shaping societal mindsets. As such, the Bechdel Test is capable of identifying complex social issues through its pass/fail mechanism and is significant for this very reason.²⁰

In this regard, the primary issue that is witnessed in the media and uncovered by the Bechdel Test is the underrepresentation of women in films, television and other sources of media. The sheer lack of female presence on screen speaks magnitudes about the position of women in society, which is thereby reflected in the media since media is a reflection of what happens in society. Media is a manifestation of reality and the standards we hold ourselves and each other to in the various societies we are a part of.

While the Bechdel test cannot be treated as the definitive judgement since it merely opens the topic for discussion, the test helps in recognising the lack of female representation in films and the lack of female characters with identities and a few lines to say, apart from a man in their lives. As mentioned earlier and tested by the Bechdel test, films like *Animal* continue to be made despite the increase in awareness in society. The film seems to have female characters only to add to the “masculinity” or “alphaness” as mentioned by the main lead, and they do not have any separate identity attached to them. Their primary identity in the film is either a wife, a mother, a grandmother, a sister or a concubine.

Additionally, it is very evident in the film that every time a female character states their opinion, a male character tells them, or more appropriately, orders them to not talk, or takes it to a greater extent by shooting the wall. Not only is the film a flagbearer of the underrepresentation of women but is also seen to be the flagbearer of Patriarchy, which is an underlying social issue, especially in Indian societies and families. The main lead, Ranvijay (Ranbir Kapoor), is extremely comfortable with telling his sisters to not talk and telling them that the men they choose for themselves and only he can pick a decent guy for his sisters. He also seems to justify having an extramarital affair and cheating on his wife and cannot seem to reason with his wife’s reaction to it.

Media has the power to influence the minds of its consumers. The creation of movies such as *Animal*, which essentially glorifies toxic masculinity and mass murders, is

²⁰ Arif Rohman, ‘The Changed and Unchanged Situation in the Representation of Women in Contemporary Cinema’ (2013) 25(2) *Humaniora* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2304663 accessed 13 March 2024.



without a doubt going to shape the perspectives and views of its viewers, as well as impress upon a generation of children, incorrect values, morals, and ethics. Films that show a lack of participation from the side of the female character(s) normalise male dominance over women and the expectation of women to be quiet and submissive to their partners creates a standard in the minds of their audience for the women they would want in their lives.²¹

The logically obvious premise of women being just as capable as men, and just as intelligent, and just as capable of having characters that are holistic and non-superficial, is defeated by many movies, like *Animal*, which portrays women as beings that are incapable of having an existence outside the man. The Bechdel Test helps identify such movies on an objective basis and brings uniformity in this respect.

VI. FAILURE OF THE INDECENT REPRESENTATION OF WOMEN (PROHIBITION) ACT, 1986

The Indecent Representation of Women (Prohibition) Act, 1986²² is intended to protect women from being misrepresented in the media. The purpose of the act is to safeguard women from being depicted in a derogatory or sexually suggestive manner. While the act's goals were laudable, its success has been a source of controversy for decades. The IRWA has various flaws that limit its capacity to fulfil its stated objectives. One notable flaw is the act's dependence on subjective words. Words like "indecent" and "derogatory" lack a broadly agreed-upon meaning, resulting in inconsistent enforcement.²³

A representation that one finds insulting may be considered a creative expression by another. This uncertainty provides fertile ground for misunderstandings and arbitrary decisions.²⁴

Furthermore, the act focuses simply on the content and ignores the context in which it occurs. Under the existing structure of the statute, a satirical portrayal that criticises sexism might be perceived as indecent.

This failure to recognise context stifles artistic expression and has a chilling impact on creative endeavours that investigate difficult topics. This failure to acknowledge context stifles artistic expression and creates a chilling effect on creative endeavours that explore sensitive themes²⁵.

²¹ Claudia Sandberg, 'Feminism and Women's Cinema' in Erica Carter (ed), *The German Cinema Book* (British Film Institute 2020).

²² Indecent Representation of Women (Prohibition) Act 1986.

²³ Disha Chaudhari, 'Analysing the Indecent Representation of Women (Prohibition) Bill 2012' (*Feminism in India*, 19 February 2017) https://feminisminindia.com/2017/02/09/indecent-representation-women/#google_vignette accessed 10 November 2024.

²⁴ Shrinithi S R, 'Indecent Representation of Women in Advertisements' (Manupatra, 13 July 2022) <https://articles.manupatra.com/article-details/INDECENT-REPRESENTATION-OF-WOMEN-IN-ADVERTISEMENTS> accessed 10 November 2024.

²⁵ Adarsh Kumar, 'Study on the Hicklin Test and Its Impact on the Obscenity Laws in India' (2024) <http://dx.doi.org/10.2139/ssrn.4498153> accessed 12 November 2024.



Section 4(a)(i) of the act states that the publication has to be proven to be for the public good.²⁶ How misrepresentation of women can be justified for the public good is truly baffling. There exists no necessity to show women in a derogatory manner for the public good. The Act's enforcement track record has been unsatisfactory.

Successful prosecutions are rare, and the punishments imposed are frequently viewed as insufficient deterrents. Due to a lack of effective implementation, the legislation is mostly symbolic, failing to generate a meaningful sense of safety for women in the media.

The Act serves as a reminder of the continuous effort to ensure equal and respectful portrayal of women in the media. Moving beyond restrictive legislation based on perceived "indecent" is critical.

India requires a holistic strategy that empowers women, promotes gender equality, fosters responsible media practices, and teaches viewers the value of respectful depictions. Adopting a multi-pronged strategy, we can build a media environment that celebrates women's variety and autonomy, while also protecting them from damaging depictions.

VII. ALTERNATIVE TESTS AND POTENTIAL ENHANCEMENTS TO THE BECHDEL TEST

Mako Mori test:

The Mako Mori test is a more advanced version of the Bechdel test. It was a test coined by the fans of the film 'Pacific Rim'. This particular film failed the Bechdel test however still contained depth. This discrepancy was addressed by the inception of the Mako Mori test. It not only tests the presence of female characters but also looks for depth in their characters.²⁷

The Mako Mori test lays down the following criteria:

- The film features at least one female character.
- This character has her own narrative arc of her own that is not solely in service of supporting a male character's story.
- The character's narrative arc is meaningful and contributes to the overall plot and themes of the film.

The Mako Mori test is a more holistic version of the Bechdel test. These two can be employed simultaneously to check the representation of women in films along with the

²⁶ Indecent Representation of Women (Prohibition) Act 1986 s 4(a)(i).

²⁷ 'Mako Mori Test: A New Lens for Evaluating Female Representation in Media' (We Are Actors, 24 September 2023) <https://weareactors.com/mako-mori-test/> accessed 12 November 2024.



depth. The depth that is overlooked by the Bechdel test is covered by the Mako Mori test. The Ellen Willis test is very similar to the Mako Mori test.²⁸

DuVernay Test:

The DuVernay test checks whether a film has one or more racially diverse characters. It does not stop at the mere representation of women but goes a step further and advocates for racial representation too. The test derives its name from Ava DuVernay, a filmmaker passionate about inclusivity and diversity. The African American character or character of another minority must have a whole, realized life, not revolving around a white character. This character must not serve as a background actor for the white character's plot. One can gauge if a movie passes the DuVernay test by assessing if the racially diverse character can stand alone without the help of the white character. This test emphasizes the need for racial representation along with gender equality. It thus addresses the limitations of the Bechdel test.²⁹

The Waithe test is similar to the DuVernay test but only mandates the presence of a black woman. Here, the black woman must hold a position of power and be in a healthy relationship. The Villalobos test checks for the same, except the mandate here is the presence of a Latina character who must be educated, English-speaking and not sexualised.

Villareal Test:

The Villareal test has been named after the producer Lindsey Villareal. This peculiar test lays down what a film should not contain, instead of what it should contain. For a film to pass the Villareal test, it must not introduce a female character as

- Sexualized
- Hardened or soulless
- Matriarch (overworked and older)

The Villareal test lays down such different criteria to break away from the usual stereotypes of women shown in cinema. The female characters must defy narrow misconceptions and normalizations. In essence, the character must add something new to the film.

The Villareal test is hence more comprehensive than the Bechdel test. The problem with the Bechdel test is that it is oversimplified. Some problematic movies pass the test while other good movies fail it. It is not a standardised barometer. However, it could

²⁸ Lakshmi Kannan, 'Measuring the Feminism in Movies: Bechdel and Other Tests' (Medium, 13 October 2022) <https://medium.com/@kplakshmi.97/measuring-the-feminism-in-movies-bechdel-and-other-tests-dba1bbae1e88> accessed 12 November 2024.

²⁹ Bo Shuh, 'The "DuVernay Test" Is like the Bechdel Test, but for Race' (Good, 2 February 2016) <https://www.good.is/articles/duvernay-test-like-the-bechdel-test> accessed 12 November 2024.



still be used as a rudimentary thumb rule. The Bechdel test must be coupled with one or more tests such as the Villareal, DuVernay and/or Mako Mori test.³⁰

VIII. CONCLUSION

The discourse surrounding gender constructs and stereotyping in media has been, therefore, reignited in recent times, particularly with the release and controversy surrounding films like Sandeep Reddy Vanga's "Animal." At a time when gender roles are under intense scrutiny, the Bechdel-Wallace test has emerged as a significant tool for evaluating the representation of women in fictional works. Developed by Alison Bechdel and Liz Wallace, this test, with its simple yet powerful premise, has become instrumental in highlighting the depth of female representation in media.

This essay has delved into the strengths and limitations of the Bechdel Test, acknowledging its effectiveness in raising awareness while also recognizing its oversimplification of complex issues and its lack of consideration for intersecting identities. Furthermore, it has explored other feminist tools used to evaluate creative works, emphasising the importance of applying such tools regularly to promote gender inclusivity in media.

But are these tests sufficient? Can representation be measured with a few metrics? Can the three questions posed as part of the Bechdel Test accurately and sufficiently measure representation? Undoubtedly, the Bechdel Test is one that is almost charmingly simple and neat, presenting the answer to the question of representation in a particular firm with a neat bow - but will the problem-solving principle of Occam's Razor apply to the Test?

In our view, the problem of representation is one that is subjective in nature. While the mathematics equation of " $x + 5 = 10$ " will always result in "x" being equal to 5, this is not so when considering whether a film underrepresented women or not - there is no one definitive answer. It is a question that is incredibly subjective. One person may deem a movie as being "feminist", while another may not. As such, the task that the Bechdel Test, and other tests like it set out to carry out, is to begin with one that is replete with difficulties. One simply cannot hope to capture the attitude of an entire film with a metric. Films are, after all, a form of art. To attempt to take a work of art like Johannes Vermeer's *The Girl With a Pearl Earring* and evaluate it with a marksheet would amount to doing a disservice to the classic oil painting.

Ultimately, therefore, films, much like other works of art much be subjected to a much deeper and much more nuanced level of analysis so as to arrive at a fairer, more reasonable, and in-depth conclusion regarding the level of representation in films. The tests this Paper discusses are, doubtless, important and of immense utility in their own right, and may be used as part of these nuanced analyses aforementioned, but cannot be

³⁰ Luoying Yang, Zhou Xu and Jiebo Luo, 'Measuring Female Representation and Impact in Films over Time' (2020) 1 *ACM/IMS Transactions on Data Science* 30:1 <https://dl.acm.org/doi/10.1145/3411213> accessed 13 March 2024.



solely used satisfactorily to assess a movie or film, since fundamentally many of these metrics fail to consider the true *message and meaning* of a film.

Moving forward, it is imperative to not only continue utilising existing tools like the Bechdel Test but also to explore improvements and develop new frameworks that consider intersectionality and inclusivity, and most importantly - encourage true artistic analysis. By doing so, we can pave a new path towards a more equitable and representative media landscape, one that accurately reflects the diverse experiences and voices of all individuals, regardless of gender or other identities.