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BOOK

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NLUO
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MESSAGE FROM THE VICE-CHANCELLOR

We are pleased to offer to you the fourth edition of the Human Rights Law Journal, NLUO.

The human rights corpus, taken as a whole, as a document of ideals and values, particularly the positive law of human rights, requires the construction of States to reflect the structures and values of governance that derive from liberalist ideals, especially the contemporary variations of liberal democracy practised in western democracies. Viewed from this perspective, the human rights regime has serious implications for questions of cultural diversity, the sovereignty of States, and the universality of human rights. In light of the same, the Human Rights Law Journal focusses on legal research in the field of human rights. For this issue of Human Rights Law Journal we have received contributions from law professors, students and research scholars.

I hope and wish the human rights issues discussed in this journal will initiate further academic discussion on human rights. The journal will indeed widen the horizon of legal discourse with respect to the dynamic diaspora of human rights.

I congratulate the editorial team of Human Rights Law Journal, NLUO for bringing out this issue.

Prof. (Dr.) Srikrishna Deva Rao
Vice-Chancellor
National Law University Odisha, Cuttack

EDITORIAL NOTE

"The evolution of the human rights movement clearly illustrates humanity's ongoing struggle toward creating a better world"

—Robert Alan Silverstein

The quintessence of human development is to achieve the sagacity of the human soul to the paradigmatic ideals that serve the individual and the society simultaneously furthering the principle of "*lokah samastah sukhino bhavantu*" i.e. a just social order where every person is happy and free, where the thoughts, words and actions of his own life contribute to the happiness and freedom of all. Expressing knowledge and research in its undefiled pristine form is the most potent way of enlightening the mankind.

It is in the furtherance of this ideal that National Law University Odisha, Cuttack went ahead with the idea of initiating the Human Rights Law Journal, so as to provide a platform for contemporaneous and pertinent disquisition on human rights issues. This journal is an attempt to encourage contextualised discourse on the grave and contemporary issues in the human rights paradigm.

In this context, the present issue of the journal, the fourth volume has focussed on a diverse range of topics that extend to non-traditional sample spaces of human rights research such as the interplay of human rights, democracy and the rule of law; the juxtaposition of gender justice with human rights; human rights of tribes and indigenous people; human rights and racial discrimination. Further general themes such as the expansion of the horizons of human rights in the 21st century and human rights and financial inclusion were also prescribed by the Board.

The fourth volume is published in consultation with the Editorial Committee consisting of the faculties of National Law University Odisha, Editorial Advisory Board consisting of distinguished experts on the subject of Human Rights and the Student Editorial Board. The Board strives to maintain highest echelons of jurisprudential and normative research, coupled with a vision to encourage scholarly and informed discussions and debates on the subject of Human Rights.

ARTICLES

The article by Prof. Aruna Sri Lakshmi titled "Trafficking of Women and Children: Vulnerability Compounded by Discrimination" deals with trafficking of women and children in the present international and national legal framework. The author has discussed in detail various judicial and legislative responses undertaken in India against the evil of human trafficking. She has highlighted the important features of the proposed the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 as a means to curb the menace.

The article "Right to Health and Healthcare Facilities: An Unrecognised Right among the Tribes (A Case of Malda District: West Bengal, India)" is an empirical research conducted by Dr Arpita Ghosh, wherein she draws our attention to the plight of tribals living in the Malda District of West Bengal. She discusses the pressing issue of the lack of access to basic civic amenities, healthcare facilities and the dearth of healthcare infrastructure in the remote villages which disproportionately affects the overall well-being of the tribals.

Ms Charvi Kumar, in her article titled, "Making a Case for Reproductive Choice Through Civil and Political Rights: An International and Comparative Analysis", does a deep dive into the highly contested topic of the reproductive rights of women, and makes a compelling case that the reproductive rights of a woman are intrinsically linked to her right to equality, right to privacy and most importantly her right to life and liberty, within the framework of international law.

The article by Mr Rajat Solanki and Ms Nidhi Chauhan titled "A Perspective on Access to Financial Services as a Human Right" puts the economic and financial stability at a whole different perspective. Focussing on legal services as well as basic fundamental rights along with the assessment of various international norms and their applicability in India, the paper tries to create a co-relation between the economic and self-impendency that is required for an individual and the nation to grow. The authors have made an attempt to identify a "right" with respect to access to financial services. Further, in light of the existing legal regime, they have tried to escalate such a "right of access to financial services" as a human right. They have also highlighted certain challenges that such an exercise of making "access to financial services", a right would face. However, the authors have argued that the primary duty is cast on the Government to enforce this right of an individual. They have also discussed various

international legal instruments that provide scope for such a right to flourish. For instance, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international instrument that provides for right of access to financial services for women.

The article by Ms Navya Singh titled "Insensitivity of Judiciary in Rape Cases: Marriage Helping in Acquittals" is a unique paper, especially in the wake of the gender justice movement prevalent now. Abominable atrocities like rape have been severely condemned and the perpetrators have been accordingly punished. However, this paper identifies a unique problem which would perplex the reader in various dimensions. It attempts to analyse the phenomenon which leads to dilution of sentences or as in some cases, acquittal. It notes the various instances where rape victims have decided to marry the perpetrator, in which case the court bypasses the general penal provisions and acquits the accused. This paper also highlights controversial cases where comments like, "sometimes a feeble no, means yes" have been made in context of rape which not only represents the insensitivity of the judiciary but also provokes the reader to question its increasing legitimisation. It also analyses the reason why the victims agree to marry the accused which again points towards factors like lack of speedy and fair trial, societal pressure, media trial, etc. which enriches the thought provoking literature. It not only brings in the universal human rights perspective and conventions like International Covenant on Civil and Political Rights (ICCPR) but also highlights the Indian legal perspective as in the right to live with dignity and right against torture. The uniqueness of this paper lies in its wholesome approach i.e. sociological, legal and predominant contemporary value. While such literature identifies the tip of the iceberg and initiates a debate it is the duty of the readers and the stakeholders of the society to further engage in this topic and eliminate it from our society which claims to be equal, fair and civilised.

The paper entitled "Need for Paradigm Shift for Gender Neutrality and Gender Justice" by Ms Neha Jain and Mr Sambhav Jain takes a divergent perspective of gender neutrality in India and points out to certain loopholes which are potent enough to undermine the very objective of gender neutrality. It elaborates the need for a paradigm shift towards gender neutrality and its implementation in the law as well. Not only does this paper analyses the patriarchal background but also ventures into the evolution of gender identities which further crystallises its stance. Judicial intervention in creation of laws which emancipate women from

age-old suppression have been elucidated but at the same time it notes the methodology in which the same provisions are being misused which again calls for gender neutral provisions. It also delves into landmark judgments like *Joseph Shine* v. *Union of India*, (2019) 9 SCC 39 and *Navtej Singh Johar* v. *Union of India*, (2018) 10 SCC 1 where further extrapolations of the arguments have been justified. The paper provides an interesting perspective when it suggests moving beyond the artificial dichotomy of the binary nature of gender and directs towards an inclusive approach. Feminism and gender neutrality have also been linked in order to give the arguments a holistic perspective. The most critical aspect of this paper lies in portraying the fact that the judiciary in an attempt to emancipate women from the shackles of patriarchy has created biased provisions which adversely affects the other gender through "legal terrorism" and misuse of the provisions which aim to create a gender neutral society.

The article by Ms Apala Goswami and Ms Rashmi Shukla, entitled "India's Indigenous People and Their Collective Human Rights" tries to study how India is adopting international human rights standards to protect her indigenous human heritage. It discusses the concept of protection of the indigenous and tribal rights that are essentially linked with the advent of the "Third Generation of Human Rights". An insight into the plight of indigenous people and contemporary measures taken worldwide to address it has been discussed. An exhaustive study of the relevant measures and efforts that are taken in India to protect the rights of indigenous people is done in this article. Towards the end, the article deals with the legislative history and recent legislative as well as judicial developments in the field of protection of rights of tribes and indigenous people in India. Overall the article provides a detailed insight into the trends and challenges faced by the indigenous people worldwide, critically examines those trends and tries to provide a solution for the said problem.

CASE COMMENTS

The case comment by Mr Kumar Satyam, a student of National Law School of India University, Bangalore provides a critical and analytical insight on the transgender rights and the issues that the community faces even after the *NALSA judgment*. The paper titled "Transgender Jurisprudence — NALSA and Beyond" is a work well-written and uniquely explained. The idea of transcendental freedom and the presence of the same in the current society especially when it comes to the *NALSA judgment* and the years beyond it have been clearly put forth by the author. The author has

left little room for any doubts as he has tried to cover almost all the human rights aspects, including civil and criminal.

The second case comment by Mr Nauman Beig and Ms Tanvi Mate, students of ILS Law College, Pune on the recent Madras High Court judgment of *Arunkumar* v. *Inspector General of Registration*, AIR 2019 Mad 265 which is an insight on the marriage laws and how difficult it is for a transgender couple to marry in a country where personal laws are archaic and society rigid and slow to accept development. The paper is a study of the existence of inherent imbalance in the power structure and dynamics of the genders of which the worst sufferers are the gender minorities.

BOOK REVIEW

The book review by Mr Sudeep Sudhakaran of the latest book authored by Jason Stanley provides an insight regarding the relevance of the book *How Fascism Works: The Politics of Us and Them* in the human rights discourse. It discusses as to how the book is of prominence in order to understand how fascism works in contemporary politics. It discusses how fascism can be understood to be developing in the modern politics. How to understand present day far-right upsurge in the context of historical fascism is the fundamental research question this book offers. It shows how the writer creates a distinction between fascist State and fascist politics. The review describes how the book contemplates the possibility of fascism in its inherent and its modern form intruding into the liberal democratic regime with the advent of far-right politics can undermine the importance of human rights in the contemporary world. The review also points out how possible criticisms that can be raised against this book because of its lack of coherent explanation of the economic factors that led to the rise of fascist politics. Overall this book review provides a great insight into the book and critically examines how it deals with the idea of modern fascism and its effect on human rights.

The Editorial Board is privileged to have received contributions from scholars across disciplines not only limited to law for its fourth volume. As Einstein said that "*the important thing is to never stop questioning*" and the only way knowledge can fruitfully grow and develop is through discussion, deliberation, and debate; our fourth volume of Human Rights Law Journal, NLUO is an attempt to revere this zeal of inquest and the aptitude of critical reasoning which has been vividly exhibited by our

contributing scholars and students. Our endeavour through this volume of the Human Rights Law Journal was to imbibe opinions on diverse areas of human rights and to replenish the void in academic jurisprudence regarding contemporary human rights issues.

As it is said that "*no one can play a symphony, it takes a whole orchestra to play it*", there is immense hard work of many people behind the coming of this illustrious journal. I extend my gratitude to Prof. Srikrishan Deva Rao for his vision and leadership in conceptualising and realising the Human Rights Law Journal. I am thankful to Prof. (Dr) Yogesh Pratap Singh for his active interest and guidance. I sincerely thank Prof. (Dr) Sheela Rai for her indispensable mentoring and invaluable insight during the course of bringing out this journal. I whole- heartedly appreciate and acknowledge the contribution and cooperation of the members of the peer review Editorial Board, Mr Abhay Kumar, Ms Divya Singh, Ms Sonal Singh and Ms Nikita Pattajoshi. I extend my appreciation to the student editors, Mr Akash, Ms Ananmika, Mr Jyotirmoy and Mr Priyadarshee for the hard work put in by them. Without the cooperation and assistance of the above people, this journal would not have been a reality.

We hope to continue in our endeavours to engage with legal scholars in strengthening the existing framework of human rights law and policy under the ambit of National Law University's Human Rights Law Journal in days to come.

We look forward to your valuable feedback that shall enable us to develop the future editions. We are hopeful that with your support and goodwill, we will be able to achieve our effort with greater vigour and greater support.

With much enthusiasm and pride, we present to you the fourth volume of Human Rights Law Journal, NLUO.

Dr Priyanka Anand
Editor-in-Chief

TRAFFICKING OF WOMEN AND CHILDREN: VULNERABILITY COMPOUNDED BY DISCRIMINATION

A. Aruna Sri Lakshmi[*]

ABSTRACT

Human trafficking is a social concern in today's era and it relates to every segment of the society. From social need to social evil, trafficking passed through many stages of human rights violations. It culminated into a socio-economic crime and of late has become an organised crime. Trading with human life has been the greed of exploitative group of offenders. Despite the existing legislations such as the Immoral Traffic (Prevention) Act, 1956; Child Marriage Restraint Act, 1929; Bonded Labour System (Abolition) Act, 1976; Juvenile Justice (Care and Protection of Children) Act, 2015; Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 and the Transplantation of Human Organs Act, 1994 the evil is persisting and the challenges are still affecting the dignity of person. Women and children in particular have been the worst victims of trafficking. This paper focuses on the aspect of human trafficking of women and children and examines the reasons of trafficking. It discusses the national and international concerns, the judicial response and further delves into highlighting the important features of the proposed the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018.

1. INTRODUCTION

Human trafficking has a history coterminous with that of society and has existed in various forms in almost all civilisations and cultures. It is a trade that exploits the vulnerability of human beings, especially women and children, in complete violation of their human rights, and makes them objects of financial transactions through the use of force, duress, whether for the purpose of sex, labour, slavery or servitude. In today's globalised

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climate of human rights, the world community has taken a unanimous stand condemning this gross human rights violation and exhorted Governments to take effective action against it.[1]

Trafficking of women and children for sexual exploitation is the most lucrative trade or business after arms and narcotics. India happens to be a source destination and transit route for trafficking of women and children[2]. Trafficking of women and children is done for the purposes of prostitution, of bonded labour, sexual exploitation, pornography, removal of organs, begging, etc.

Certain offences under the Indian Penal Code, 1860, (such as procuration of minor girls, importation of girls, selling of girls for prostitution, buying of girls for prostitution, etc.) as well as offences under special and local laws (SLL) [for instance, Immoral Traffic (Prevention) Act, 1956; Child Marriage Restraint Act, 1929; Bonded Labour System (Abolition) Act, 1976; Juvenile Justice (Care and Protection of Children) Act, 2000, Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, Transplantation of Human Organs Act, 1994, etc.] deal with certain aspects of human trafficking.[3]

2. STATISTICAL DATA FOR THE OFFENCE OF HUMAN TRAFFICKING

Facts and the figures of the National Crime Records Bureau[4] indicate that:

Almost 20,000 women and children were victims of human trafficking in India in 2016. The Ministry of Women and Child Development informed Parliament that 19,223 women and children were trafficked last year against 15,448 in 2015, with the highest number of victims recorded in the eastern State of West Bengal.

1. Judicial Handbook on Combating of Trafficking of Women, Children of Women and Children for Commercial Sexual Exploitation, UNICEF Ministry of Women and Child Development. <https://www.unodc.org/documents/human- trafficking/India_Training_material/Handbook_for_Law_Enforcement_Agencies_in_India.pdf> accessed on 1-7- 2019
2. *Ibid.* at p. 4.
3. Children in India 2012 – A Statistical Appraisal, Social Statistics Division, Central Statistics Office, Ministry of Statistics and Programme Implementation, Government of India. <http://mospi.nic.in/sites/default/files/publication_reports/Children_in_India_2012-rev.pdf> accessed 4-6-2019.
4. National Crime Records Bureau 2016. <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf> accessed 5-6-2019.

The 2016 data from the National Crime Records Bureau showed that almost equal numbers of women and children were trafficked.

Figures showed that there were 9104 trafficked children last year, a 27 per cent increase from the previous year. The number of women trafficked rose by 22 per cent to 10,119 in 2016.

West Bengal, which shares a porous border with poorer neighbours Bangladesh and Nepal and is a known human trafficking hub for that reason, registered more than one-third of the total number of victims in 2016.

Rajasthan recorded the second highest number of trafficked children in 2016, while the western State of Maharashtra, where India's business capital Mumbai is located, showed the second highest number of trafficked women.

3. "TRAFFICKING" DEFINED

The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002 defines "trafficking" and "trafficker" and "trafficking in persons" as:

"Trafficking" means the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.[5]

"Traffickers" means persons, agencies or institutions engaged in any form of trafficking.[6]

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of apposition of a vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of the organs.[7]

5. SAARC Convention, Art. I(3).
6. SAARC Convention, Art. I(4).
7. SAARC Convention, Art. I(5).

The dynamics of trafficking includes deceit, material inducements, force or coercion, threats, abuse of authority and a bleak hope regarding future. The impact of such trafficking, victimises and violates human rights of women and children due to their vulnerability. To name such violations, women and children are subject to physical violence and sexual abuse and are held under coercion against their will; they are forced to work in construction sites and paid with low wages or no wages and kept in debt bondage, forced to work for extremely long hours in inhuman working conditions, restricted to access to health and medical facilities, subject to humiliation, organ trade health risks, unwanted pregnancies, abortions gynaecological diseases, face harassment from the police and prosecution and deprived of education and basic needs of life.

4. REASONS FOR HUMAN TRAFFICKING

This is a moot question to be addressed and pondered upon. Peculiarly, a human being traffics another human being and subjects him to victimisation as less than a human unlike animals. It is appropriate to mention that the animal kingdom if to illustrate about trafficking, adopt certain norms to exploit other animals and has the ethics of exploiting other animals for a reason or in a season due to need but not greed. However, when man exploits another, a question raises i.e. is it on account of vulnerability, or due poverty or less fortunate in monetary terms, or greed for money or suppression of a particular class, discrimination, or treating human beings as unequals? Trafficking in women who till recent times was considered only for sexual exploitation has acquired new dimensions by the process of globalisation. Trafficking is not carried for varied other purposes such as domestic service, begging, organ trade, forced labour in hazardous industries, marriage, slavery, etc. Trafficking women is an issue of human rights, manifestation of persistent gender inequality and the inferior status of women. Every practice to which the victims of trafficking are subjected to is a blatant and cruel form of violence of their human rights.[8] In the 21st century when men claim themselves to be civilised as stated by Roscoe Pound in his theory of social engineering and that men in civilised society ought not to behave in a particular way proves to be a myth in the context of women and children. Their vulnerability under pinning discrimination is reflected glaringly in the acts committed on them.

8. Justice G. Rohini keynote address in the UGC National Seminar on Gender Justice and Human Rights: New Challenges February 5th-6th 2010, 2012 AUJL special issue on Gender Justice and Human Rights 5.

5. NATIONAL AND INTERNATIONAL PERSPECTIVE

The national and international concerns to protect women and children from gross violations are reflected through the constitution, conventions, treaties, protocols. The constitutional commitment in India to prohibit trafficking flows from Article 23[9] Article 21[10] which prohibit trafficking in human beings and forced labour and under Article 51-A(*e*)[11] and Articles 14 and 15. Article 14 encompasses general equality and Article 15 envisages specific equality focussing on non-discrimination and empowers the State to make special provisions for women and children.[12] Article 23 protects the individual and the private citizens it imposes positive obligation on the State to take steps to abolish evils of trafficking in human beings and beggars. It is the fundamental right of every person to have right to life, dignity, liberty and not to be trafficked.

The Universal Declaration of Human Rights, 1948 under Article 7 recognises that "all are equal before the law and are entitled without any discrimination to equal protection of the law". It implies that both these expressions aim at establishing what is called as equality of status in the Preamble of the Constitution which implies equal and complete justice.

The Trafficking Protocol or UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children is an important protocol. It is also called as Palermo Protocol. It is a protocol to the United Nations Convention against Transnational Organised Crime. The protocol was adopted by the United Nations General Assembly in 2000 and entered into force on 25-12-2003. The protocol commits ratifying States

9. Art. 23. *Prohibition of traffic in human beings and forced labour.*—(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them – The Constitution of India, Art. 23.

10. Art. 21. *Protection of life and personal liberty.*—No person shall be deprived of his (life or personal liberty) except according to the procedure established by law –The Constitution of India, 1950, Art. 21.

11. Art. 51-A(*e*).— To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women – The Constitution of India, 1950, Art. 51(*e*).

12. Constitution of India, Art. 15(3).

to prevent and combat trafficking in persons, protecting and assisting victims of trafficking and promoting cooperation among States in order to meet those objectives. It envisages that the consent of victim of trafficking is irrelevant.

As of September 2017, it has been ratified by 171 parties. The United Nations Office on Drugs and Crime (UNODC) is instrumental for implementing the protocol. It offers practical help to States with drafting laws, creating comprehensive national anti-trafficking strategies, and assisting with resources to implement them.

SAARC Convention is another regional convention which aims at preventing and combating trafficking in women and children and has been signed by India on 5-1-2002. It is significant because it recognises the need for extra-territorial application of jurisdiction and extradition laws. The prohibition of forced prostitution and commercial sexual exploitation of women have been incorporated in other instruments like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[13]

The Convention on the Rights of the Child, 1989 reflects its commitments with regard to children and mandates the States: "States parties shall undertake to protect the child from abuse. For these purposes States parties shall in particular take all appropriate measures to prevent the inducement of or coercion of a child to engage in any lawful sexual activity; the exploitative use of children in prostitution or other unlawful sexual practices; the exploitative use of children in pornographic performances and material."[14]

Article 35 of Convention on the Rights of the Child, 1989 further states that: "States parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose in any form." The prohibition on trafficking and exploitation of children is further expanded through the International Labour Organisation Convention on the Worst Forms of Child Labour, 2000.

Thus, "right to life" being a fundamental right enshrined in the Constitution of India, impliedly states that no Indian citizen can be

13. Art. 6. All State Parties shall take all appropriate measures, including legislations, to suppress all forms trafficking in women – CEDAW, Art. 6.
14. Convention on the Rights of the Child, 1989, Art. 34.

trafficked. In consonance with the above contributions in the form of international conventions, Parliament of India introduced legislation, namely, the Immoral Traffic (Prevention) Act, 1956 which directly deals with the offence of human trafficking and various provisions of the Penal Code, 1860.

6. CATEGORISATION OF CRIMES AGAINST CHILDREN

The offences in which children are victimised and abused can be categorised under two broad sections: Penal Code (IPC) and special and local laws (SLL). Trafficking primarily being an offence under the Penal Code, 1860, the author has cited a list of particular offences under the said Code which either expressly or impliedly deal with human trafficking and its illegal consequences. They are as follows: murder[15], foeticide and infanticide[16], abetment to commit suicide by children[17], exposure and abandonment of children by parents or others[18], kidnapping and abduction which includes: (*i*) kidnapping for exporting[19]: (*ii*) kidnapping from lawful guardianship[20]: (*iii*) kidnapping for ransom[21]: (*iv*) kidnapping for begging[22]: (*v*) kidnapping to compel for marriage[23]: (*vi*) kidnapping for slavery, etc.[24]: and (*vii*) kidnapping or abducting child under 10 years of age for stealing from its person[25], procuration of minor girls (for inducement to force or seduce to illicit intercourse)[26], selling of girls for prostitution[27], buying of girls for prostitution[28] and lastly, rape[29].

Furthermore, the specific legislations under the category of special and local laws are Immoral Traffic (Prevention) Act, 1956 (where minors are abused in prostitution); Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, and Prohibition of Child Marriage Act, 2006. All

15. Penal Code, 1860, S. 302.
16. Penal Code, 1860, Ss. 315-16.
17. Penal Code, 1860, S. 305.
18. Penal Code, 1860, S. 317.
19. Penal Code, 1860, S. 360.
20. Penal Code, 1860, S. 361.
21. Penal Code, 1860, S. 364-A.
22. Penal Code, 1860, S. 363-A.
23. Penal Code, 1860, S. 366.
24. Penal Code, 1860, S. 367.
25. Penal Code, 1860, S. 369.
26. Penal Code, 1860, S. 366 -A.
27. Penal Code, 1860, S. 372.
28. Penal Code, 1860, S. 373.
29. Penal Code, 1860, S. 376.

these laws operate independently, which have their own enforcement machinery and prescribe penalties for the related offences.

7. JUDICIAL RESPONSE TO HUMAN TRAFFICKING

The judiciary has actively intervened in protecting the dignity and liberty of the people who have been trafficked in varied forms. The instances of trafficking discussed under illustrate the proactive role played by the judiciary in protecting the trafficked persons.

7.1. Child Prostitution — *Vishal Jeet* v. *Union of India*[30]

In this case, the Supreme Court while putting on record the growing exploitation of young women and children for prostitution and trafficking reported that in spite of the stringent and rehabilitative provisions of law under various Acts, it cannot be said that the desired result has been achieved. The Supreme Court ordered for an objective multi-dimensional study and a searching investigation into the matter relating to the causes and effects of this evil and requiring most rational measures to weed out the vices of illicit trafficking. Apart from legal action, it directed the Government to ensure care protection, development, treatment and rehabilitation of victims of commercial sexual exploitation. Both the Central and the State Governments would have an obligation to safeguard the interest and welfare of the children and girls of this country and have to evaluate various measures and implement them in the right direction. The Court after bestowing deep and anxious consideration on this matter laid down guidelines for formation of Advisory Committee in all States and Central Government to oversee and prepare programme for combating trafficking. It stated that "all the State Governments and the Governments of Union Territories should direct their law-enforcing authorities concerned to take appropriate and speedy action under the existing laws in eradicating child prostitution without giving room for any complaint of remissness or culpable indifference. The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones consisting of the Secretary of the Social Welfare Department or Board, the Secretary of the Law Department, sociologists, criminologists, members of the women's organisations, members of Indian Council of Child Welfare and Indian Council of Social Welfare as well as the members of various voluntary social organisations and associations, etc. The main

30. (1990) 3 SCC 318 : AIR 1990 SC 1412.

objects of the Advisory Committee should be to make suggestions for measures to be taken in eradicating the child prostitution, and the social welfare programmes to be implemented for care, protection, treatment, development and rehabilitation of young fallen victims, namely, the children and girls rescued either from the brothel houses or from the vices of prostitution. All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors. The Union Government should set up a committee of its own in the line the main object of which is to evolve welfare programmes to be implemented on the national level for the care, protection, rehabilitation, etc. of the young fallen victims, namely, the children and girls and to make suggestions of amendments to the existing laws or for enactment of any new law, if so warranted for the prevention of sexual exploitation of children". "The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees. The Advisory Committee can also go deep into devadasi system and jogin tradition and give their valuable advice and suggestions as to what best the Government could do in that regard."

7.2. Women Caught in Prostitution — *Gaurav Jain* v. *Union of India*[31]

Clearly stating the violation of right to life of trafficked victims, the Supreme Court ordered the Union Government to form a committee to frame the National Plan of Action and to implement it in mission mode. The Supreme Court ordered to constitute a committee to make an in-depth study into these problems and evolve such suitable schemes for rehabilitation of trafficked women and children. A permanent Committee of Secretaries was formed to review the progress of the implementation on annual basis, and to take such other steps as may be expedient in the effective implementation of the schemes. The court taking a proactive view believed and hoped that the directions would relieve the human problem by rehabilitation of the unfortunate fallen women caught in the trap of prostitution; their children would be brought into the mainstream of the social order; these directions would enable them to avail of the equality of opportunity and of status, with dignity of person which are the arch of the Constitution.

31. (1997) 8 SCC 114.

7.3. Child in Need of Care and Protection — *Prerana* v. *State of Maharashtra*[32]

The Bombay High Court while examining the court process for child victims of trafficking gave following guidelines to ensure that the child in need of care and protection must be dealt with bearing in mind the possibility of their reformation and rehabilitation. The Court held that:

No Magistrate can exercise jurisdiction over any person under 18 years of age whether that person is a juvenile in conflict with law or a child in need of care and protection, as defined by Sections 2(1) and (*d*) of the Juvenile Justice (Care and Protection of Children) Act, 2000. At the first possible instance, the Magistrates must take steps to ascertain the age of a person who seems to be under 18 years of age. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a juvenile in conflict with law, or to the Child Welfare Committee if such a person is a child in need of care and protection.

A Magistrate before whom persons rescued under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place are produced, should, under Section 17(2) of the said Act, have their ages ascertained the very first time they are produced before him. When such a person is found to be under 18 years of age, the Magistrate must transfer the case to the Juvenile Justice Board if such person is a juvenile in conflict with law, or to the Child Welfare Committee if such person is a child in need of care and protection.

Any juvenile rescued from a brothel under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place should only be released after an inquiry has been completed by the probation officer.

The said juvenile should be released only to the care and custody of a parent/guardian after such parent/guardian has been found fit by the Child Welfare Committee to have the care and custody of the rescued juvenile.

If the parent or guardian is found unfit to have the care and custody of the rescued juvenile, the procedure laid down under the Juvenile Justice (Care and Protection of Children) Act, 2000 should be followed for the rehabilitation of the rescued child.

32. 2002 SCC OnLine Bom 984 : (2003) 2 Mah LJ 105.

No advocate can appear before the Child Welfare Committee on behalf of a juvenile produced before the Child Welfare Committee after being rescued under the Immoral Traffic (Prevention) Act, 1956 or found soliciting in a public place. Only the parents or guardian of such juvenile should be permitted to make representations before the Child Welfare Committee through themselves or through an advocate appointed for such purpose.

An advocate appearing for a pimp or brothel-keeper is barred from appearing in the same case for the victims rescued under the Immoral Traffic (Prevention) Act, 1956."

7.4. Sexual Abuse — *Munni* v. *State of Maharashtra*[33]

It was observed that the menace of sexual abuse by immoral trafficking of children to force them somehow to enter in the business of prostitution is an age-old phenomenon and needs to be tackled by Central as well as State Government with utmost care and precaution. Poverty, illiteracy or helplessness of parents may make the minor girl vulnerable to sexual abuse or exploitation. Protecting children against any perceived or real danger or risk to their life, their personhood and childhood is necessary. It is about reducing their vulnerability to any kind of harm or harmful situations. It is also about protecting children against social, psychological and emotional insecurity and distress. It must ensure that no child falls out of the social security and safety net and those who do, receive necessary care and protection to be brought back into the safety net by child-friendly measures.

7.5. Trafficking of a Child by the Brothel-Keeper — *Geeta Kancha Tamang* v. *State of Maharashtra*[34]

This case involves trafficking of a child by the brothel-keeper. Here the Supreme Court while denying the release of a woman trafficker, on mercy grounds, who had served 14 months imprisonment the Court stated that trafficking in persons is prohibited under Article 23 of the Constitution of India. It is, therefore, the fundamental right of every Indian citizen not to be trafficked.

33. 2011 SCC OnLine Bom 725.
34. 2009 SCC OnLine Bom 1835.

7.6. Trafficking of Children in Circuses — *Bachpan Bachao Andolan* v. *Union of India*[35]

Through a writ petition concerning the exploitation and trafficking of children in circuses the Supreme Court directed the formation of special scheme for rehabilitation of children rescued from circuses. The Court laid down the following actions which need to be taken by the State: In order to implement the fundamental right of the children under Article 21-A it is imperative that the Central Government must issue suitable notifications prohibiting the employment of children in circuses within two months from today. Raids should be conducted in all the circuses to liberate the children and check the violation of fundamental rights of the children. The rescued children should be kept in the care and protective homes till they attain the age of 18 years. Proper scheme of rehabilitation of rescued children from circuses should be framed.

8. THE TRAFFICKING OF PERSONS (PREVENTION, PROTECTION AND REHABILITATION) BILL, 2018

An initiative to tackle the serious problem of trafficking of women and children is moved by the Women and Child Development Ministry which introduced the Bill on the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 which awaits to become an Act. The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018, initiated by the Women and Child Development Ministry, is currently with a group of ministers that has already been introduced and passed in the Lok Sabha and at present is waiting for its final view on the matter. Salient features of the Bill are as follows:

The main objective behind bringing this law is investigation of all the types of human trafficking, rescue of the trafficked victims, protection and then their rehabilitation.

The various forms of trafficking identified under this Bill, including bonded labour, sexual exploitation, pornography, removal of organs and begging, has proposed severe punishment for those engaging in the heinous crime.

It proposes a 10-year punishment for those engaging in "aggravated forms of trafficking" while seeking life imprisonment for repeat offenders.

35. (2010) 12 SCC 180.

It proposes the establishment of a national anti-trafficking bureau, which shall be entrusted with the gamut of issues aimed at controlling and tackling the menace under various forms. These include coordination, monitoring and surveillance of illegal movement of persons and their prevention. The bureau will also be entrusted with increasing cooperation and coordination with authorities concerned and organisations in foreign countries for strengthening operational and long-term intelligence for investigation of trafficking cases, and driving in mutual legal assistance.

The Bill speaks about "aggravated forms of trafficking" offences such as forced labour, or bonded labour, by using violence, intimidation, inducement, promise of payment of money, deception or coercion. Also, it mentions trafficking after administering any narcotic drug or psychotropic substance or alcohol, or for the purpose of marriage or under the pretext of marriage. The aggravated form also includes trafficking for the purpose of begging or forcing those who are mentally ill or are pregnant. Whoever commits the offence of aggravated form of trafficking of a person shall be punished with rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to life imprisonment and shall be liable to fine that shall not be less than Rs 1 lakh, the Bill proposes.

9. ROLE OF DISTRICT ADMINISTRATION IN PREVENTING AND COMBATING HUMAN TRAFFICKING

Under the Immoral Traffic (Prevention) Act, 1956 under district administration has the power to direct and take all such necessary measures for the rescue of any person trafficked and likely to be trafficked. After rescue, they also take the initiative to ensure protection, post-care and attention of such rescued persons. Furthermore, they have been empowered to close down or evict the places of exploitation, which is an important step in the law for eradicating human trafficking. Besides the above law, the Code of Criminal Procedure and other preventive detention laws even provide powers to the District Magistrate for taking deterrent action against the likely exploiters and habitual predators. The above authorities have powers under several special and local laws, to take action to rescue any child labour or any person trafficked for labour or person subjected to hazardous labour. Mentioning about another legislation i.e. the Bonded Labour System (Abolition) Act, 1976, the above authority has been given numerous powers and responsibilities for the identification, release and rehabilitation of the bonded persons. They even take all necessary measures to eradicate the prevalence of bonded labour

and any form of forced labour. Besides that, there shall be a constitution of the Vigilance Committee headed by the District Magistrate at the district level and the Sub-Divisional Magistrate at the sub-divisional level to enforce the laws relating to it. In brief, the authority concerned shall take an appropriate action and also keep a record of the happenings from getting an FIR registered, to investigation being conducted and the beginning of the case proceedings. Lastly, along with taking the initiative of rehabilitating and providing socio-economic assistance to the victims through various policies and schemes, proper steps are also being taken to spread awareness amongst all with the help of the Government and NGOs working in this field.

10. CHALLENGES

Even though there are numerous international conventions, national legislations and judicial pronouncements for curbing human trafficking and its related issues, there are still certain regular setbacks acting as challenges. The fight against human trafficking is not a straightforward process. The first and foremost thing as a global problem is with the erosion of border barriers, improved cross-border communications, globalisation, and technological advancements and so on which led to inadvertently facilitation of human trafficking. Adding more to this, the population size and cultural diversity of India, with illiteracy and poverty governing the Indian majority has led to more people becoming vulnerable to this business. The non-implementation of adequate and stringent laws is also one of the major challenges, like the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 which has been pending since a year. The anti-trafficking movement is innovative, so also the traffickers. Moreover, the victims were reluctant to present themselves before the court under the fear of having a sexual history publicly scrutinised. Lastly, talking about the enforcement agencies, they always remained ineffective, inefficient and indifferent in tackling human trafficking whether it is during the rescue of the victims, protection of the victims, or their recovery, rehabilitation and reintegration.

11. CONCLUSION

It is evident that women and children have been mainly considered as the objects of and for exploitation due to their vulnerability. The discrimination exhibited against them due to varied reasons is an aggravating factor. The Government of India has been making strides to address the human trafficking problem by increasing its border security and increasing its

budget for aid to trafficking victims. Looking into the rise in the crime rate of human trafficking, opacity in the police investigation and so many recent cases of the victims being repeatedly abducted by traffickers, or they themselves running away from the government-run shelter homes or being mistreated there, these reveal that while India may have the capacity to tackle the evil, they clearly do not have the will. The Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018 under consideration should be enacted at the earliest. The Bill once passed would enable curbing the menace of trafficking as there have been stringent provisions incorporated in it. It would criminalise the aggravated forms of trafficking and establish a national anti-trafficking bureau, along with locally stationed anti-trafficking units. This Bill also includes methods to rehabilitate victims, addresses physical and mental trauma and promotes education, health and skill development. The Child Welfare Committees constituted under the Juvenile Justice (Care and Protection of Children) Act, 2015 need to be thoroughly sensitised of their role to protect the children while dealing with the cases for their care protection and treatment, development and rehabilitation of the children. Further, a proactive role should be played by the police in collecting the evidence. More judicial intervention would deter the offenders and help in preventing trafficking in persons and more particularly the women and children.

Social sensitivity is very essential to the society and whistleblowing is need of the hour to protect the rights of trafficked persons. Additionally, the Rescue Foundation, established in 2000, helps to investigate, rescue and rehabilitate victims of human trafficking in India. Rehabilitation programs include education, computer training, legal aid and counselling. As a result of the Rescue Foundation, more than 5000 victims have been rescued and more than 15,000 have been rehabilitated and repatriated. As traffickers are exploiting the power of social media to contact, recruit and sell children and women for forced labour and sexual exploitation purposes, it is important to spread awareness in schools, social media and all such public platforms for avoiding such perpetrators.

RIGHT TO HEALTH AND HEALTHCARE FACILITIES: AN UNRECOGNISED RIGHT AMONG THE TRIBES

(A CASE OF MALDA DISTRICT: WEST BENGAL, INDIA)

*Arpita Ghosh**

ABSTRACT

Health and well-being are the great concerns of our contemporary era. While studying the health situation of the tribals, it has been observed that with regard to access to and benefits from the public health system, the tribals have always remained at the receiving end of the system. The public health system has remained largely uneven and concentrated among the better endowed sections of the society. So the socially disadvantaged sections of the society have always lagged in this respect and the tribals have remained excluded. Health rights have never been accredited from a rights approach and more so for the tribals. The health infrastructure and the resources required for the running of the healthcare delivery system are poorly developed and managed in the tribal areas. The developmental projects meant for tribal development have not been holistically treated to include healthcare rights. Even after so many decades of Independence, access to health institutions and civic amenities have had very poor turnouts in the rural areas and especially the tribal dominated belts. The present paper deals with the healthcare situation and the access of the tribal families to civic amenities and healthcare facilities in Malda District of West Bengal.

1. TRIBAL HEALTH SCENARIO IN INDIA: AN OVERVIEW

The health conditions of the tribals in India show that with regard to access to and benefits from the public health system, the tribals have always remained at the receiving end of the system. The public health system has remained largely uneven and concentrated among the better

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endowed sections of the society. So the socially disadvantaged sections of the society have always lagged in this respect and the tribals have remained excluded. This is particularly true for tribal women and children. The health indicators from National Family Health Survey-2 (NFHS-2) indicate high alarming figures for the Scheduled Tribes in all respects. The table given below reflects the same.

Table 1 showing the variation in health status among different socio-economic groups

Health Indicators	Scheduled Castes	Scheduled Tribes	Others
Infant Mortality/1000	83.0	84.2	61.8
Under-5 Mortality/1000	119.3	126.6	82.6
Children Underweight (%)	53.5	55.9	41.4
Children with diarrhoea (%)	19.8	21.1	19.1
Women with anaemia (%)	56	64.9	47.6

Source: NFHS-2 (1998-1999), M/O Health and Family Welfare, Govt. of India.

The tribal communities in general and the primitive tribal groups in particular are highly prone to contracting diseases. The tribals in India have distinctive health problems depending on their habitat, difficult terrains and ecological conditions.[1]

In our country, the health issues of the tribals have not been given timely priority which has been further compounded by their poverty, illiteracy, ignorance about causes of diseases, hostile environment, blind beliefs, poor sanitation, lack of safe drinking water, lack of personal hygiene and health education. The chief causes of their diseases are chronic and poor nutritional status.[2] Maternal mortality rates and infant mortality rates are also high among the tribes due to their poor nutritional status and traditional practices of child birth. Nutritional anaemia is a serious matter of concern among women of rural and tribal areas. Some of the common diseases that affect the Indian tribes are tuberculosis, malaria, filarial, gastroenteritis, respiratory diseases, tetanus, measles, whooping cough, night blindness, skin diseases especially scabies. Moreover, tribal diets are also grossly deficient in iron, calcium, vitamin A and vitamin C, riboflavin and animal protein.[3] The tribals generally consume liquor which is another reason for their health problems.

1. S.K. Basu, *Tribal Health in India* (Manak Publishers, 1993).
2. *Ibid.*
3. *Ibid.*

Another significant problem has been persistent lack in health and medical care services in the tribal inhabited areas.[4] The tribals are mostly afflicted by the inadequate access to health services and poor health delivery system and this in many cases prevent the tribals in availing western health facilities which also further influence their already poor health seeking behaviour. Much of the health problems and dismal health conditions among tribals can be attributed to their habitat, poverty, ignorance, malnutrition, absence of safe drinking water, insanitary living conditions, lack of personal hygiene, health education and poor maternal and child health.[5]

Since Independence, many developmental projects have been implemented in and around tribal dominated areas. As a result of the implementation of such developmental projects, massive forest degradation has taken place which in turn has curbed the tradition and cultural ethos of the tribals. Tribals were primarily dependent on forest. In many ways, they are now not getting the required forest resources which have a negative impact on their health. The medicine the tribals would procure from medicinal herbs and plants to cure the local people are not easily available now. In this context, such a study would reveal the general impact of environmental and loss of vegetation on their overall lifestyle, their health particularly tribal women's health.

Conceptually, human security emphasises the protection of people from grave threats to their lives and empowerment against such social threats which include prevention and freedom from the threat of diseases. The simplest definition of security is absence of insecurity and threats. Precisely, it means to be free from both fear and want. The lives of the tribals are also not free from both fear and want given their socio-economic status. Due to this want they are deprived of many bare necessities that affect their human security including health. Human insecurity coupled with ignorance, lack of awareness, backwardness, remoteness in habitation, superstitions, lack of interaction with other communities and traditional ways of life among the tribals lead to gross human rights violation among them.

At the time of Independence, the country's healthcare infrastructure was mainly urban and clinical based. Hospitals and clinics were only equipped

4. K.N. Bhatt, *Population, Environment and Health: Emerging Issues*, (ed.), (Rawat Publications, 2008).
5. S.K. Basu (n 1).

to provide curative care to patients. Outreach of health services in rural areas was very limited. From the first five-year plan itself, the Central and State Governments made efforts to build primary, secondary and tertiary health institutions and link them through appropriate referral systems.[6]

As a comprehensive step towards building health infrastructure in the country, the National Health Policy, 1983 was adopted which reaffirmed India's commitment to "Health for All" in the context of social justice and democratisation. The main objective of the policy was the universal access to comprehensive primary healthcare services by the people of the nation at affordable rates.[7] For the achievement of this goal, the policy envisaged an integrated package of service which included:

(i) *Reorganisation of the health scenario infrastructure.*

(ii) *Major modifications in the existing system of medical education and paramedical training.*

(iii) *Integration of health-related and socio-economic sectors into health plans.*

2. WHO AND THE RIGHT TO HEALTH

The World Health Organisation (WHO) has defined health as a "state of complete, physical, mental and social well-being and not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition".[8] The Constitution of WHO which came into force on 7-4-1948 became the first international legal document to contain an explicit right to the "enjoyment of highest attainable standard of health". The definition provided by WHO also implies "health" to be a holistic issue that also includes accessibility to health institutions and healthcare facilities. There is an inextricable link between health and human rights. Respect, protect and fulfilment bound human rights obligations can be achieved by promotion and protection of health and access to healthcare facilities is a necessary precondition for this.

6. Ministry of Health and Family Welfare, Annual Report 2010.
7. Ministry of Health and Family Welfare, 2005.
8. WHO, 1997.

The prevailing health and medical system, the western system has unfortunately failed to meet the need of the world's majority. The failure of the Alma-Ata Declaration (1978) in fulfilling its objectives of achieving "Health for All" by the year 2000 gives more urgency to look for an alternative.

Health as a component of human rights has been recognised internationally in a number of United Nations instruments which include the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), Convention on the Elimination of All Forms of Discrimination Against Women (1979), Beijing Declaration and Platform for Action (1995) and so on.

3. RIGHT TO HEALTH IN THE INDIAN CONSTITUTION

The Constitution of India does not accord health and healthcare the status of rights, yet in a number of judgments of the Supreme Court right to health has been used as an extension of the right to life of Article 21 and references have been made to the international instruments. Our Constitution has also made special provisions for the Scheduled Tribes in Part XVI in Articles 330, 332, 335, 338, 339, 340 and 342. To effectively implement the various safeguards built into the Constitution and other legislations, the Constitution, under Articles 338 and 338-A, provides for two statutory commissions — the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes.

Despite these provisions the condition of the tribals in our country has remained unchanged and they have been leading a life of seclusion in terms of enjoying the benefits of development from the mainstream for generations. In developing countries, the major causes of death are infections and parasitic diseases and most of these deaths are linked with poor nutrition and an unsafe environment, particularly polluted water. In both developing and industrial countries, the threats to health security are usually greater among the poorest people in the rural areas and the indigenous people.

4. REVIEW OF LITERATURE

Several researchers and authors have also contributed substantially towards the state of tribal health in India. Prominent among them are Hasan (1967) who pointed out that various social and cultural factors

control the health situation and practices of the tribal communities. Basu (2000) indicated that the health problems among the tribals are mainly because of lack of health facilities, sanitation and access to safe drinking water. Singh (1981) pointed out that the tribal development programmes are largely plan based and target oriented and lesser attention is paid on the local needs of different ecosystems and communities and therefore, they are often not successful.

Menon (1985) noted that deforestation has a severe social and economic impact on the life of the tribal women. It has manifested into additional workload, reduced fuel and food supply, deterioration of their health condition and introduction of external values that result in their lower status.

Akram (2007) pointed out the long-standing commitment to "Health for All" and the enormous health anomalies that continue to prevail among masses. He pointed out the problems related to judicious distribution of healthcare facilities as well as the limitation in choices in maintaining sustainable health conditions in which the marginalised tribal communities are the worst victims.

It has been discussed earlier that the infant mortality rates among the Scheduled Tribes is more than other communities in India, it is nothing exceptional in West Bengal. Similarly, like the national trends in maternal mortality, child and maternal malnutrition is rampant in West Bengal also. Although health intervention from both the Central and State Government are carried out in the tribal areas, yet those are not enough to meet the deficiencies and proper access to health institutions and facilities still remains a distant dream. The tribal health in the State is also affected by their poor educational and socio-economic background of the tribals.

In this context, the present study is important to assess the state of the tribal's access to health facilities in the tribal dominated villages of one of the backward districts in West Bengal.

5. OBJECTIVES

(i) To study the access to basic civic amenities that enhances the quality of health.

(ii) To study the access to healthcare facilities among the tribals.

(iii) *To specifically study the health infrastructure among the tribals in the area under study.*

6. STUDY AREA

The present research has been undertaken towards understanding diseases pattern, access to the healthcare facilities among the tribals in Malda District of West Bengal. The study was conducted in thirty-one tribal villages in four tribal dominated blocks of the district covering seven hundred and eighty-seven (787) families from five tribal communities, namely, Santals, Malpaharis, Mundas, Koras and Oraons.

7. SAMPLE

The present study constitutes of population from Kora, Malpahari, Munda, Oraon and Santal communities. A total of 787 families from the studied blocks (viz. Old Malda, Gazole, Habibpur and Bamongola) and communities were included in the study. Of the total families there were 590 Santal families, 48 Malpahari families, 50 Munda families, 35 Kora families and 64 Oraon families. Among the families under the present study there were 3567 individuals of which 1797 were males and 1770 were females.

8. METHODS

The village people were the major source of primary data. The secondary data were collected from the block development offices and educational institutions. For collecting the primary data, general observation of the villages was made and household information collected using Preliminary Schedule Form. The Preliminary Schedule was used for the purpose of the household census. Data analysis was done with the help of statistical software, namely, SPSS V 16. In some cases, Microsoft Excel and Microsoft Word were also used. The tabulated data were then analysed with various correlates to highlight the thematic issues of the study and represented in the form of tables.

9. HEALTH SCENARIO IN THE STUDY AREA

9.1. Access to basic civic amenities

9.1.a. *Drinking water sources*

Drinking water and sanitation are the two most significant indicators that shape the quality of health. In most tribal villages, safe drinking water was inaccessible and as a result, the tribal families had to depend on unhygienic water sources. It was a very common picture in the tribal villages for the women to fetch drinking water from sources that were even up to one kilometre away from their homes. Water scarcity was a common problem of the study area. Water tables remained low in these parts due to the topographic set up. The problem of water was severe in the summer months when the water tables go deep down and the deep wells and ponds dry up. Sources of drinking water were not sufficient enough to meet the crisis. Another problem was that if a village tubewell failed to work due to some mechanical fault, the personnel concerned from the local panchayats would not turn up on time to repair it and the villagers would face tremendous problem.

The table below shows the drinking water sources of the studied communities:

Table 2 showing the community wise drinking water facility

Sources of Drinking Water	Number of Families of the Community											
	Santal		Malpahari		Kora		Munda		Oraon		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Well	293	49.7	4	8.3	19	54.3	0	0.0	18	28.1	334	42.4
Tubewell	252	42.7	44	91.7	3	8.6	49	98.0	43	67.2	391	49.7
Water Supply	45	7.6	0	0.0	13	37.1	1	2.0	3	4.7	62	7.9
Total	**590**	100.0	**48**	100.0	**35**	100.0	**50**	100.0	**64**	100.0	**787**	100.0

The above table shows that among the studied communities the Koras (54.3%), Santals (49.7%), Oraons (28.1%), Malpaharis (8.3%) and Mundas (0%) used well water for drinking and other purposes. Mundas (98%), Malpaharis (91.7%), Oraons (67.2%), Koras (8.6%), Santals (42.7%) used water from tubewells while Malpaharis (37.1%), Santals (7.6%), Oraons (4.7%), Mundas (2%) and Malpaharis (0%) used pipeline water supply.

The use of tubewell for drinking water purposes was most among the Mundas followed by the Malpaharis, Oraons, Santals and Koras. Well

water for drinking water purpose was mostly used by the Koras followed by the Santals, Oraons and Malpaharis. Pipeline water supply use was only limited to few families which included mostly Koras followed by Santals, Oraons and Mundas.

9.1.b. *Sanitation*

In some tribal areas, some sanitary programmes were undertaken but they were unsuccessful. Most of the tribal families are reluctant to use sanitary toilets because of their traditional beliefs that regard these amenities as impure.

The table below shows the sanitation facilities among the studied communities:

Table 3 showing community wise sanitation facility

Sanitation Facility	Number of Families of the Community											
	Santal		Malpahari		Kora		Munda		Oraon		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Field	494	83.7	48	100.0	19	54.3	46	92.0	56	87.5	663	84.2
Non-Sanitary	38	6.4	0	0.0	0	0.0	2	4.0	4	6.3	44	5.6
Sanitary	58	9.8	0	0.0	16	45.7	2	4.0	4	6.3	80	10.2
Total	**590**	100.0	**48**	100.0	**35**	100.0	**50**	100.0	**64**	100.0	**787**	100.0

The above table shows that among the studied communities the Malpaharis (100%), Mundas (92%), Oraons (87.5%), Santals (83.7%) and Koras (54.3%) used field while the use of sanitary toilets was maximum among Koras (45.7%) followed by Santals (9.8%), Oraons (6.3%), Mundas (4%) and Malpaharis (0%). The rest i.e. Santals (6.4%), Oraons (6.3%), Mundas (4%), Koras (0%) and Malpaharis (0%) used non-sanitary toilets.

It is seen that the use of sanitary toilets was most among the Koras followed by the Santals, Oraons and Mundas. The Malpaharis had no sanitary toilet facilities and all the families used the surrounding field or bushes as their natural toilet. The use of non-sanitary toilet facilities existed only among the Saal, Oraons and Mundas.

Thus, it is clear that the poor civic amenities in the tribal villages were another reason that compelled the tribal villagers to live an unhealthy lifestyle and fall prey to a number of diseases. The foremost among these has been the lack of safe drinking water sources that makes them susceptible to seasonal and water borne diseases. The poor tribals depend

on the tubewells and wells mainly under the supervision and maintenance of the local panchayats and block level offices for their primary source of drinking water and the villagers in some of the studied villages reportedly told that there is a substantial lack in the number of tubewells or wells in their villages and the ratio of tubewells to the number of families remain poor. As a result, the pressure is high on the village tubewells. In such situation they depend on the water of nearby ponds and ditches for drinking, bathing and washing which is extremely unhygienic. The problem aggravates when the tubewells goes out of order and the maintenance staff does not turn up for weeks or even months to repair. The crisis becomes acute in summer months when the water table goes down. Most of the wells and water bodies get dried up. The women and young tribal girls have to travel long distances to neighbouring villages to fetch water. This compels them do depend on unhygienic water sources for daily uses and drinking purposes which affect their health.

9.2. Access to healthcare facilities

Universal access to healthcare is a prerequisite for achievement of health and human rights. Access to health facilities is a matter of serious concern in the rural areas across the country and more particularly in the tribal belts. In the present study, in order to understand the accessibility of the tribal families to health institutions, the distance of the sub-centres and the primary health centres were taken into account.

The table below shows the community-wise variation while accessing the sub-centres in the studied areas:

Table 4 showing the distance of the sub-centres (community-wise) from the studied families

Distance (in km)	Number of families											
	Santal		Malpahari		Kora		Munda		Oraon		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Within 1	223	37.8	0	0.0	18	51.4	21	42.0	0	0.0	262	33.3
1-3	328	55.6	48	100.0	17	48.6	8	16.0	49	76.6	450	57.2
Above 3	39	6.6	0	0.0	0	0.0	21	42.0	15	23.4	75	9.5
Total	**590**	100.0	**48**	100.0	**35**	100.0	**50**	100.0	**64**	100.0	**787**	100.0

It is still a matter of concern as is evidenced from the above table that a total of 9.5% families among the studied communities have to access

sub-centres beyond 3 km distance and 57.2% have access to sub-centres within 1-3 km while 33.3% have access within 1 km.

As far as the community-wise variation in accessing health facilities is concerned, 37.8% Santals have access to sub-centres within 1 km distance, 55.6% have to access sub-centres between 1-3 km and 6.6% have sub-centres beyond 3 km distance.

Among the Malpaharis 0% have sub-centres within 1 km distance and beyond 3 km distance and 100% Malpahari families have sub-centres between 1-3 km distance.

Among the Koras 51.4% can access sub-centres within 1 km distance while 48.6% families have to access sub-centres between 1-3 km distance and no families have to access sub-centres beyond 3 km distance.

Among the Mundas 42% can access sub-centres within 1 km distance and 16% families have to access sub-centre facilities between 1-3 km and 42% families get access to sub-centre beyond 3 km distance.

Among the Oraons the number of families who had sub-centre access within 1 km distance was nil while 76.6% families had access to sub-centres between 1-3 km and 23.4% families had sub-centres facilities beyond 3 km.

Thus, it is seen there that among the studied communities only the Koras had the maximum access to sub-centres within 1 km distance followed by the Mundas and the Santals. No Malpahari and Munda families got access to sub-centres within 1 km distance. Most of the Malpahari families got access to sub-centres between 1-3 km distance followed by the Oraons, Santals, Koras and Mundas. The maximum number of families that had access to sub-centre facilities above 3 km distance belonged mostly to the Munda community which was followed by the Oraons and Santals. No Malpahari and Kora families had to access sub-centres above 3 km distance and they remained better privileged on this than the other communities.

The table below shows the distance covered by the studied communities while accessing the first referral health units:

Table 5 showing the distance of the primary health centres (PHCs) among the studied communities

Distance (in km)	Number of families											
	Santal		Malpahari		Kora		Munda		Oraon		Total	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Within 3	180	30.5	0	0.0	18	51.4	7	14.0	0	0.0	205	26.0
3-5	102	17.3	21	43.8	0	0.0	8	16.0	28	43.8	159	20.2
Above 5	308	52.2	27	56.3	17	48.6	35	70.0	36	56.3	423	53.7
Total	**590**	100.0	**48**	100.0	**35**	100.0	**50**	100.0	**64**	100.0	**787**	100.0

It is clear from the table above that among all the communities under study only 26% had access to primary health institutions within 3 km distance while 20.2% families had access to PHCs between 3-5 km and large section i.e. 53.7% families had PHCs beyond 5 km distance.

Among the Santals 52.2% families could get access to PHCs above 5 km distance, 30.5% families got access within 3 km and only 17.3% families got access to PHCs between 3-5 km.

Among the Malpaharis 56.3% families could get access to PHCs above 5 km distance and the rest 43.8% families accessed it between 3-5 km while there were no families who could access it within 3 km distance.

Among the Koras 51.4% families could get access to PHCs within 3 km distance while rest of the 48.6% had to access above 5 km distance and there were no families who could access PHCs between 3-5 km.

Among the Mundas 70% families had to access PHCs above 5 km distance, 16% families had to access it between 3-5 km distance and 14% families got access within 3 km distance.

Among the Oraons 56.3% families had to access PHCs above 5 km distance and the rest 43.8% families had to access it between 3-5 km while there were no families who could get access within 3 km distance.

Thus, it is evident from the above table that within 3 km distance the maximum number of families who accessed primary health centres belonged to the Kora community followed by the Santals and the Mundas while there were no Malpahari and Oraon families having PHCs within 3 km distance. The number of families who had access to PHCs between 3-5 km belonged mainly to Malpahari and Oraon community followed by the Santals and the Mundas. The Koras did not have to access PHCs

within this distance range. The number of families that had to access PHCs above 5 km distance belonged mostly to the Munda community followed by the Malpaharis, Oraons, Santals and Koras.

The tribals reported during the field study that they do not get regular medicines from the sub-centres and rural hospitals, the OPD (Outpatient Department) and emergency services are irregular as the doctors remain absent most of the time and that the behaviour of the health personnels towards the patients and their relatives is not gentle. The sub-centres in most of the villages were run in rented houses which remained in dilapidated condition. The sub-centres remained closed for most of the times and the staffs were either absent or even if they were present, it was only once or twice a week.

The ward beds and toilets for in-house admitted patients in health centres were unhealthy, unhygienic. The villagers complained that due to lack of infrastructure, absence of doctors and nurses in the Emergency section of the hospital and due to the referral tendency of the doctors they have to shift their patients at odd hours of night to the District Medical College Hospital at Malda Town located very far away from the studied blocks like Gazole, Bamongola and Habibpur, where communication facilities are unavailable.

It was learnt from interviewing the villagers that the cost of diagnosis and treatment is another reason that prevents the villagers from accessing western medicines as they do not get free medicines from the hospitals. Hence, it is difficult for them to bear the cost of medicines required for treatment due to their low socio-economic status. Moreover, there are huge amount of fake medicines in the medicine shops which cost higher than the original medicines. The ignorant villagers often fall easy prey to this unscrupulous practice.

The family welfare services provided to the mothers, children and family planning programmes have failed to reach the anticipated level of success as the staffs in the sub-centre remain absent mostly.

10. HEALTH INFRASTRUCTURE AND THE AVAILABLE RESOURCES IN THE HEALTH DELIVERY SYSTEM

Improvement in the health status of the population has been one of the major thrust areas for the social development programmes of the country. India was one of the pioneers in Health Service Planning with

special emphasis on primary healthcare. In 1946, the Health Survey and Development Committee, headed by Sir Joseph Bhore recommended establishment of well-structured and comprehensive health service with a sound primary healthcare infrastructure. This report not only provided a historical landmark in the development of public health system but also laid the blueprint of subsequent health planning and development in independent India.

Since India is the second most populous country in the world, so it has a changing socio-political-demographic and morbidity pattern that is of interest to the whole world. Despite several growth-oriented policies adopted by the Government, the widening economic, regional and gender disparities are posing challenges for the health sector. In India attention towards health has always been at the bottom of the agenda. An overview of the existing healthcare system of the district from secondary sources is presented below.

The table given below highlights the institutional structure of the healthcare system in the studied blocks:

Table 6 showing the institutional structure of the healthcare system in the studied blocks

Blocks	Hospitals	PHCs	Government Clinics	Government Dispensaries	Total Health Institutions
Old Malda	-	2	22	-	24
Gazole	1	4	50	1	56
Habibpur	1	2	42	2	47
Bamongola	1	2	23	1	27

Source: District Human Development Report, 2007.

It is learnt from the District Human Development Report, Malda (2007) that in Gazole, there are 56 health institutions in total which include 1 hospital, 4 Primary Health Centres (PHCs), 50 government clinics and 1 government dispensary. In Bamongola Block, there are total of 27 health institutions which includes 1 hospital, 2 PHCs, 23 government clinics and 1government dispensary. In Habibpur, there are total of 47 health institutions which include 1 hospital, 2 PHCs, 42 government clinics and 2 government dispensaries. In old Malda, there are only 24 health institutions in total in which 2 are PHCs and 22 government clinics. There are no hospitals and government dispensaries present in old Malda.

The healthcare infrastructure and the health manpower resources in the studied blocks is certainly inadequate when compared with the requirements of the regional population.

The table below represents the health infrastructure, health manpower resources and the health coverage in the blocks under study:

Table 7 showing the healthcare infrastructure, health manpower resources and the health coverage in the studied blocks

Blocks	Population	RH/ BPHC	PHC	S-C	Pharmacista& Lab. Asst	Total Beds	Medical Officers	Nurses	Female Health Assistants	Total Villages	Villages > 1.5 Km S-C
Bamongola	1,27,252	1	3	23	5	39	4	9	22	274	14
Habibpur	1,87,650	1	2	42	5	39	2	9	41	379	23
Gazole	2,94,715	2	3	50	8	65	4	20	49	813	50
Old Malda	1,31,255	1	2	22	4	18	4	6	25	231	40

Source: District Human Development Report, 2007.

11. RESULTS AND DISCUSSION

The tribals reported during the field study that they do not get regular medicines from the sub-centres and rural hospitals, the OPD (Outpatient Department) and Emergency services are irregular as the doctors remain absent most of the times, the behaviour of the health personnels towards the patients and their relatives is not gentle. The sub-centres in most of the villages were run in rented houses which remained in dilapidated condition. The sub-centres remained closed for most of the times and the staffs were either absent or even if they were present, it was only once or twice a week.

The ward beds and toilets for in-house admitted patients in health centres were unhealthy, unhygienic. The villagers complained that due to lack of infrastructure, absence of doctors and nurses in the emergency section of the hospital and due to the referral tendency of the doctors they have to shift their patients at odd hours of night to the District Medical College Hospital at Malda Town located very far away from the studied blocks like Gazole, Bamongola and Habibpur, where communication facilities are unavailable.

It was learnt from interviewing the villagers that the cost of diagnosis and treatment is another reason that pervades the villagers from accessing western medicines as they do not get free medicines from the hospitals. Hence it is difficult for them to bear the cost of medicines required for treatment due to their low socio-economic status. Moreover, there are huge amount of fake medicines in the medicine shops which cost higher than the original medicines. The ignorant villagers often fall easy prey to this unscrupulous practice.

The family welfare services provided to the mothers, children and family planning programmes have failed to reach the anticipated level of success as the staffs in the sub-centre remain absent mostly.

Drinking water and sanitation are the two most significant indicators that shape the quality of health. In most tribal villages, safe drinking water was inaccessible and as a result, the tribal families had to depend on unhygienic water sources. It was a very common picture in the tribal villages for the women to fetch drinking water from sources that were even up to one kilometre away from their homes. Water scarcity was a common problem of the study area. Water table remained low in these parts due to the topographic set up. The problem of water was severe in the summer months when the water tables go deep down and the deep wells and ponds dry up. Sources of drinking water were not sufficient enough to meet the crisis. Another problem was that if a village tubewell failed to work due to some mechanical fault, the concerned personnel from the local panchayats did not turn up on time to repair it and the villagers faced tremendous problem. Most of the tribal families are reluctant to use sanitary toilets because of their traditional beliefs that regard these amenities as impure. In some tribal areas some sanitary programmes were undertaken but they were unsuccessful.

12. CONCLUSION

Tribal health scenario is basically different from their counterpart in the non-tribal fold. Tribal suffer more than the non-tribal areas in respect of health and health services. Generally, access to healthcare among the tribals is limited due to many factors which include poverty and lack of awareness among them.

Communication problems still remain in the remote villages which always hamper the timely accessibility of modern healthcare. Irregular attendance of medical staffs at village level health services is an impediment to

the availability of healthcare which is badly needed by this poor tribal population.

Health personnels are not adequate to cater to the service of tribals who mostly live in relatively remote areas. Lack of goodwill and insensitivity on the part of a section of health staffs and doctors along with poor and inadequate health service remain as a major barrier in the proper outreach of health rights among the public in general and the studied communities in particular. It was noticed during visits to the rural hospitals that some doctors were busy with their private practice and devoted major time and effort for that rather than attending patients in the hospitals. Some doctors also remained absent in the hospital during duty hours and remained busy attending private patients in staff quarters and charged high fees from the patients which included patients from poor tribal families. During such situation if the villagers opt for private nursing homes going beyond their capacity, the private nursing homes refuse treatment or admission for critical patients and patients with low socio-economic backgrounds thinking that they would not be able to pay off medical charges. These create delay in proper treatment at right time for critical patients and have to accept harsh realities in the delivery of health services and the health conditions either worsen or they have to go untreated.

It was also learnt from the patients and the villagers that while getting admission in Malda Medical College and Hospital they have to pay heavy amount to the local agents/brokers. Moreover, beds can be booked by special recommendations and influence of political leaders and the general public have to suffer for this. Reportedly, the behaviour of the nurses at duty in the wards, emergency department and outdoor services are inhuman and negligent in their duties and responsibilities. Since the nurses are permanent employees of the State Government, they are not committed in their work and keep themselves busy in gossip while behaving rudely with the families of the patients. They do not even care for any higher instructions and live under the protective umbrella of their employees' union. The only work they do is that of maintaining official records of the patient while untrained and unrecognised sweepers and other Group D staffs carry out duties at the operation theatre, stitching, giving injections and other duties. Patients' parties have to engage special private caretakers for the patients. Even the hospital authorities are well aware about this practice and some of the officials who wanted to keep their name and designation confidential also admitted about the malpractices going around.

As they are very poor, they expect the medicine from primary health centre at nominal prices or free of cost which is neither provided nor available in the health centre. Inadequate supply of medicine and infrastructure is very much absent and it aggravates the situation of healthcare in proper time of need. Tribals on the one side are illiterate and non-aware about the health problems but at the same time apathy of the local governmental support cannot also be ruled out.

After analysis of the above situation it can be pointed out that to improve the accessibility of the tribals to healthcare facilities the actual medical services in the rural areas needs to be improved along with the infrastructural development. The referral systems at all the levels should be thoroughly revamped and properly developed so that the tribals receive proper treatment at the proper time. Basic amenities like safe drinking water and sanitation facilities also need to be improved for better health.

MAKING A CASE FOR REPRODUCTIVE CHOICE THROUGH CIVIL AND POLITICAL RIGHTS: AN INTERNATIONAL AND COMPARATIVE ANALYSIS

*Charvi Kumar**

ABSTRACT

This article will attempt to delineate the contours of a possible woman's reproductive rights regime under the international law on civil and political rights. The umbrella of "reproductive rights" encompasses two important, interrelated aspects. The first is linked to the autonomy of the woman in choosing to continue or terminate her pregnancy. "Reproductive choice" belongs to a category of rights that are defined as negative or decisional rights. The second right revolves around the woman's access to prenatal and postnatal care and lowered risk of maternal mortality, termed as her right to reproductive health. This right belongs to the larger category of positive rights. Reproductive rights exist at the intersection of the two. Properly implemented, they will ensure that the State has performed its duty of easing restrictions and ensuring access to safe services. And, combined, the two categories of rights can create a robust reproductive rights regime that is healthy as well as egalitarian. While there exist no specific rules of international law that explicitly guarantee reproductive rights, it can be argued that the existing human rights regime does, indeed, protect women's reproductive rights, albeit in a "roundabout" way. This paper will put together the pieces of the larger puzzle that constitutes the woman's dignity, autonomy, and safety when it comes to the matters of her womb. In doing so, it will analyse the most important civil and political rights under international law which helps guarantee women's reproductive agency or reproductive autonomy.

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1. INTRODUCTION

The right to choose to continue or terminate a pregnancy has been a matter of debate from the beginning of the twentieth century, starting in the West and slowly filtering through to the rest of the world, including India. This right broadly encompasses social, economic and civil rights. Internationally, there exists no explicit protection for women who seek to pursue or avoid reproduction. While many conventions and customs exist under the international human rights regime that may protect reproductive rights in a roundabout way, there exists no specific law to deal with matters of reproductive rights. General recommendations, international conferences, and decisions of human rights bodies do attempt to protect these rights, but they are considered "soft law" and no State is bound to abide by them. As Lance Gable states, the recognition of these rights under international law has been "sporadic, piecemeal, and indirect".[1] This compounds the existing weaknesses in the very framework of international law, which relies solely on States" consent and mostly depends upon peer pressure and disapproval as enforcement mechanisms. An already weak system of enforcement is thus weakened further by the lack of clear rules.

The ramifications of this can be severe. Women and young girls, already stripped of their sexual agency in the patriarchal structures of most cultures, find that they also have no control over the number, timing, and even gender [2] of the children they give birth. This, combined with an extremely lackadaisical approach to antenatal and postnatal healthcare, results in dire circumstances, including permanent, irreversible damage to the mother's health, maternal mortality, lower participation in the labour force and consequently greater marginalisation and misogyny in the society, and a lack of participation in decisions relating to their personal and political lives.

1. Lance Gable, "Reproductive Health as a Human Right" (2010) 60 (4) Case Western Reserve Law Review 957, 959.
2. An issue common in many patriarchal Asian countries is that of female foeticide. Women are often pressured to undergo sex-selective abortions in favour of male births, leading to an alarmingly distorted sex ratio. See Working Group on the Girl Child, "A Girl's Right to Live: Female Foeticide and Girl Infanticide" <https://wilpf.org/wp-content/uploads/2014/07/2007_A_Girls_Right_to_Live.pdf> accessed 6-6-2019; Kallie Szczepanski, "Female Infanticide in Asia" <https://www.thoughtco.com/female-infanticide-in-asia-195450> accessed 6-6-2019.

Despite the fact that the international community's efforts to protect certain aspects of reproductive rights have been haphazard and disjointed, there is some hope. The bones of a skeleton structure supporting women's reproductive rights may be joined together through the widely recognised international human rights such as: protecting a pregnant woman's health and life, her right to equality, her right to found a family and limit it to a desirable number of progeny, her right to education, her right to work, her freedom from the degrading treatment of carrying an unviable pregnancy to term, her dignity in not giving birth to a child that is a product of rape, or simply her privacy and bodily integrity. These existing Conventions under the contemporary international human rights regime, together, weave the rich tapestry of international framework, protecting and ensuring respect for women's control over their bodies and destinies.

Given that the list of human rights that form the cornerstone of the woman's "right to choose" to continue or end her pregnancy within "reasonable" limits is inexhaustive, the present article will delve into certain specific civil and political rights. The most notable international civil and political rights that have helped create some semblance of a reproductive rights regime include the right to life and liberty as well as the right to equality. There also exist certain other important provisions under international conventions. This paper will thus examine predominant civil and political rights on the issue. It will also critically analyse the scope of these laws and their limitations, by turning the spotlight onto the experiences of women in specific countries for a broader, comparative analysis of the challenges and victories faced by women when it comes to their autonomy over their own body.

The hypotheses that the paper will seek to prove are, firstly, that reproductive choice and agency are a part of international civil and political rights, and secondly, that the international human rights regime has failed to protect these rights of women.

2. THE RIGHT TO LIFE AND LIBERTY

The right to life has been one of the most prominent rights of the Universal Declaration of Human Rights,[3] when it had been a knee-jerk reaction to the holocaust and similar atrocities committed upon persons in the early

3. Universal Declaration of Human Rights 1948, Art. 3.

twentieth century.[4] Since then, of course, it has been interpreted and expanded to mean many other things, both internationally and in domestic jurisdictions. In the International Covenant on Civil and Political Rights 1966 (hereinafter "ICCPR"), which serves as the first binding international treaty on civil and political rights, Article 6 recognises every person's "inherent right to life". In addition to featuring in numerous international instruments, the right to life also enjoys the status of customary international law,[5] thereby binding even those States who have not ratified the treaty. The right to personal liberty has sometimes been clubbed with the right to life,[6] or mentioned in a separate article.[7]

The right to life is encouraged to be interpreted widely. Internationally, the Human Rights Committee, the official treaty body established by the ICCPR, has made extensive statements regarding the right to life. In a general comment, the Committee referred to the right to life as the "supreme human right".[8] It emphasised that the right to life must not be interpreted restrictively; rather, it encouraged States to "adopt positive measures" in order to safeguard this right.[9] When clubbed with the right to liberty, the case for making safe abortions accessible to women is strengthened.

This idea has been adopted by quite a few States. A good example is that of the broad interpretations of Article 21 of the Indian Constitution by the Supreme Court.[10] Indeed, in the landmark case of *Suchita Srivastava* v. *Chandigarh Admn.*,[11] the Supreme Court of India declared that the right to "personal liberty" under Article 21 included a woman's right to make reproductive choices — from the first step (deciding to engage in sexual activity) to the last step of choosing to continue or terminate a pregnancy.

4. Peter Danchin, Article 3: "Everyone has the Right to Life, Liberty and Security of Person" <http://ccnmtl.columbia.edu/projects/mmt/udhr/article_3.html> accessed 12-6-2019.
5. Nigel S. Rodley, "Integrity of the Person" in Daniel Moeckli et al., (eds.), *International Human Rights Law* (1st edn., Oxford University Press 2014) 185.
6. Danchin (n 4).
7. Art. 9 of the International Covenant on Civil and Political Rights 1966, for example, says that "everyone has the right to liberty and security of person".
8. *See* Human Rights Committee, General Comment 6, HRI/GEN/1/Rev.9 (Vol. 1) 176, para. 1.
9. *Ibid.*, para 5.
10. Anup Surendranath, "Life and Personal Liberty" in Sujith Chaudhary, et al., *The Oxford Handbook of the Indian Constitution* (1st edn., Oxford University Press 2016).
11. (2009) 9 SCC 1.

It is not just that, however. If the right to liberty may be interpreted extremely narrowly, it may only mean freedom from arbitrary arrest, etc. The same is not true of the right to life. Even understanding it purely as a negative right (the obligation of the State to respect the right to life and refrain from any action which may result in the arbitrary death of a person) will allow it to protect women in the direst circumstances. Thus, this human right is perhaps the most fundamental argument for granting a woman the right to an abortion.

It is easy to see how even the narrowest definition of the right to life can be used to protect at least a modicum of reproductive choice. Save for 26 countries,[12] even the most restrictive regimes of the world allow doctors to terminate pregnancies where the mother's life is threatened.[13] This notion rests on an almost universal acceptance of the principle that, when faced with the tough choice of saving the life of either the mother or the baby during or before childbirth, doctors usually save the mother. Nonetheless, regimes with a strong integration between the state and the church do not always subscribe to this point of view. Certain countries absolutely prohibit abortion, even where the mother might lose her life if the pregnancy were to continue, cruelly stripping away the humanity and personhood of a pregnant woman, trading the life of a human being who has lived through a million experiences, loved deeply, and been loved in return, with that of one who has not even breathed in a gulp of air yet.

The idea stems from the treatment of a foetus as a living entity from the very beginning of the pregnancy. While most modern States forbid abortion only after a certain point of time in the pregnancy, when the foetus has developed sufficiently, there are some States that differ. Most prominent are Latin American States, which lay a strong emphasis on the right to life of the foetus. The American Convention on Human Rights, for example, states that the right to life shall be protected, "from the moment of conception".[14] Thus, right at the time when the foetus is a clump of a few cells and not even called a "foetus", its life becomes as valuable as that of its mother.

12. "Countries Where Abortion is Illegal 2019" <http://worldpopulationreview.com/countries/countries-where-abortion-is-illegal/> accessed 11-6-2019.
13. For the latest information on each country's stance on abortion, *see* "The World's Abortion Laws" <https://reproductiverights.org/worldabortionlaws?category[294]=294> accessed 11-6-2019.
14. American Convention on Human Rights 1969, Art. 4(1).

The situation in El Salvador serves as a cautionary reminder of the ramifications of such type of thinking. It criminalises "crimes related to the life of a human in formation" in its Criminal Code of 1997, and punishes everyone from the mother, to the doctor, pharmacist or other professional, and any person who may have monetarily or otherwise aided the abortion.[15] In all the provisions of the Code, there is no mention of any exception to even save the life of the mother.[16] This is especially worrisome given the fact that the country has one of the highest incidents of gang-related violence in the world. Sexual slavery and gang rapes of women and children are rampant and often go unpunished, meaning that women, often very young girls, have no control over their sexual or reproductive health.[17] The minors and young women who do get pregnant as a result of consensual intercourse also become so unintentionally, as there is no awareness regarding safe sex practices. With the Roman Catholic Church blocking all attempts to provide formal sex education to minors at a national level, El Salvador has one of the highest rates of teen pregnancy in the world, leading to multiple complications during pregnancy, many of them resulting in death.[18] The woes of pregnant women do not end there; even a miscarriage or a stillbirth may lead to an incarceration without proper trial. Thus, the woman not only has to grieve the passing away of a child she wanted to keep, she also has to spend up to 50 years in prison for no fault of hers, separated from her children who did survive their birth but are now rendered motherless.[19]

15. Chapter II, Arts. 133-137. The unofficial translation of the Code <https://reproductiverights.org/world-abortion-laws/el-salvadors-abortion-provisions#english> accessed 17-6-2019.
16. Amnesty International, "On the Brink of Death: Violence against Women and the Abortion Ban in El Salvador" <https://www.amnestyusa.org/wp-content/uploads/2017/04/on_the_brink_of_death.pdf> accessed 17-6-2019.
17. Human Rights Watch, "El Salvador: Events of 2018" <https://www.hrw.org/world-report/2019/country-chapters/el-salvador> accessed 14-6-2019.
18. Anastasia Moloney, "Incest, Lack of Sex Education Drive Teen Pregnancies in El Salvador" Reuters (3-5- 2016) <https://www.reuters.com/article/el-salvador-teens-pregnancy/incest-lack-of-sex-education-drive-teen-pregnancies-in-el-salvador-idINKCN0XT1TI> accessed 14-6-2019.
19. Anna-Catherine Brigidia, "Women Serving Decades-Long Prison Terms for Abortion in El Salvador Hope Change is Coming" *The Washington Post* (27-9-2018) <https://www.washingtonpost.com/world/the_americas/women-serving-decades-long-prison-terms-for-abortion-in-el-salvador-hope-change-is-coming/2018/09/26/0048119e-a62c-11e8-ad6f-080770deddc2_story.html?noredirect=on&utm_term=.aa16a80b51aa> accessed 14-6-2019.

3. THE RIGHT TO EQUALITY

Similar to the right to life dealt with in the previous section, the right to equality has scope to be interpreted in an extremely wide manner – encompassing not just civil and political rights (the traditionally "negative" rights) but also broad economic and social rights (the so-called "positive rights") within its ambit.[20] The right to equality features prominently not just in domestic jurisdictions, but also in international instruments. Article 3 of the ICCPR intones that all men and women have an "equal right to the enjoyment of all civil and political rights set forth in the present Convention". The arguments put forth by feminists when it comes to the "right to choose" rely heavily on the concept of equality of the genders, thus aligning their views with this particular international human right.

The idea that a woman should be in control of her pregnancy stems from her very lack of sexual agency, as pointed out by noted feminist author, Catharine MacKinnon.[21] MacKinnon notes that, often times, in the present patriarchal structure, the very act of engaging in sexual intercourse is not equal for both men and women. In societies where women are encouraged to shy away from sexual intercourse, where it must always happen at the instance of the man, all intercourse will result from sexually aggressive behaviour (to at least some degree) from the man. The woman, the passive recipient of this behaviour, then has little control over it. The matter of consent is also murky. Except for in cases of assault, who can prove the lack of consent? As the degree of intimacy increases – if the man is her friend, her boyfriend, her fiancé, her husband – the matter of conviction will be entirely up to the Judge's individual perception of the situation.[22]

An accurate example of her assessment resonates in the words of Justice Ashutosh Kumar in *Mahmood Farooqui* v. *State (NCT of Delhi)*,[23] wherein he says:

20. For an overview on how the right to equality can plug gaps in existing laws on economic and social rights, *see* S. Fredman, "Providing Equality: Substantive Equality and the Positive Duty to Provide" (2005) 21 South African Journal on Human Rights 163. For those interested in the limits to using substantive equality to protect these rights, *see* Charvi Kumar, "The Need for Economic and Social Rights Despite Strong Equality Provisions in Domestic Constitutions" (2015) 1(5) International Journal of Economics and Socio-Legal Sciences
21. Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (9th edn., Harvard University Press 1994) 93-103.
22. *Ibid.*
23. 2017 SCC Online Del 6378.

"Instances of woman behaviour are not unknown *that a feeble 'no' may mean a 'yes'*. If the parties are strangers, the same theory may not be applied … But same would not be the situation when parties are known to each other, are persons of letters and are intellectually/academically proficient, and if, in the past, there have been physical contacts. In such cases, *it would be really difficult to decipher whether little or no resistance and a feeble 'no', was actually a denial of consent.*" (emphasis added)

The words of Justice Ashutosh Kumar are especially extraordinary as the trial court had already declared the prosecutrix to be a stellar witness, and her statement, backed by documentary evidence, established the fact that she had repeatedly attempted to stop the accused from undressing her and told him to stop before the accused pinned her down, at which point she ceased to resist due to fear of being physically hurt. The judgment effectively narrowed down the provisions relating to rape of the Criminal Law (Amendment Act) 2013 by categorically acquitting the accused by adding all sorts of conditions to the word "no". The judgment was then upheld by a Division Bench of the Supreme Court and praised as one being "extremely well decided".[24]

This is not a trend seen in India alone. It has been observed in countries that are generally hailed as being extremely progressive, such as the UK[25] as well as the US.[26] It is not just the consent that is questioned, but also the clothes the woman was wearing, the amount of alcohol she drinks, or her general "character" as determined by her prior sexual activity, consensual or not.[27] This culture of dismissing and shaming the rape victim has led to a perpetuation of silence,[28] from the 20th century when awareness of

24. Amit Anand Choudhary, "Mahmood Farooqui Rape Acquittal 'Extremely Well Decided', Says Supreme Court, Dismissing Appeal Against Earlier Verdict", *The Times of India*, 19-1-2018, <https://timesofindia.indiatimes.com/india/mahmood-farooqui-rape-acquittal-extremely-well-decided-says-supreme-court-dismissing-appeal-against-earlier-verdict/articleshow/62566322> 11-6-2019.
25. Alexandra Topping and Caelainn Barr, "Revealed: Less than a Third of Young Men Prosecuted for Rape are Convicted" *The Guardian* (23-9-2018) <https://www.theguardian.com/society/2018/sep/23/revealed-less-than-a-third-of-young-men-prosecuted-for-are-convicted> accessed 11-6-2019.
26. Reinherz Law Offices, "Why Date Rape Cases are Difficult to Prosecute" <https://reinherzlaw.com/date-rape-cases-difficult-prosecute/> accessed 11-6-2019.
27. Theresa L. Lennon, et al., "Is Clothing Probative of Attitude or Intent – Implications for Rape and Sexual Harassment Cases" (1993) 11(2) Law and Inequality: A Journal of Theory and Practice 391-415.
28. Christine Ro, "Why Most Rape Victims Never Acknowledge What Happened" *BBC Future* (6 November 2018) <www.bbc.com/future/story/

rape was low, to today, despite the perceived increase in education and acceptance.[29] Lois Pineau has focussed on this issue and asserted that the very concept of "reasonableness" is viewed from the point of view of the man (the male Judge or the male accused) and not the woman, leading to "unscrupulous victimisation" of the victim.[30] The stereotypes and mythology surrounding rape and the legal procedure themselves have fallen prey to this bias, creating an idea that the rape victim must have perhaps wanted it and coyly accepted the man's advances despite outward protestations. Pineau suggested a heavy overhaul of the system and the very concept of "reasonableness" to be fairer to the woman, to see the reasonability and emphasis of her "no" from her point of view, not the man's.[31] Nevertheless, 30 years later, this has still not been achieved in most countries of the world.

Thus, in cases where intercourse cannot be prevented, and where pregnancy may ultimately occur without the woman's consent or will, she will suffer even more. MacKinnon sums up her argument thus: it is necessary for the woman to have recourse to an abortion, if need be, as after all, she may not be able to control the process and act through which she became pregnant, but she should be able to control the outcome, in order for it to continue to give her parity in the patriarchal society.[32]

It is not just the issue of equality in matters of biology. Gender also has a "social" component. There has been a historical division of labour between men and women. The former go out into the world and gain economic independence and, with it, personal power. The latter are encouraged or outright forced by society to stay at home. In the words of Jessie Hohmann:

"In contradiction to the presence and visibility of the street dweller, the essential homelessness of women is concealed … in cases where the relationship between the woman and man on whom she relies for her place

20181102-why-dont-rape-and-sexual-assault-victims-come-forward> accessed 11-6-2019.

29. Mary Koss and Alexandra Rutherford, "What We Knew About Date Rape Then, and What We Know Now: Women have Long Been Reluctant to Report Their Assaults" *The Atlantic* (26-9-2018) <https://www.theatlantic.com/ideas/archive/2018/09/what-surveys-dating-back-decades-reveal-about-date-rape/571330> accessed 11-6-2019.
30. Lois Pineau, "Date Rape: A Feminist Analysis" (1989) 8(2) Law and Philosophy 217-243.
31. *Ibid.*
32. MacKinnon (n 21).

in the home breaks down in fact or in law, the woman may be rendered literally homeless."[33]

This "essential homelessness" deprives women of a source of livelihood, and with it, the independence and strength which allow them to stand up against domestic violence and marital rape.[34] Even when women do have jobs, they have to do the lion's share when it comes to household chores and caring, raising, and nurturing children. Contrary to popular belief, this is not a trend that plagues the third world or undemocratic nations alone; it has been observed consistently in the so-called progressive democracies of the West.[35] In fact, worrying new research indicates that women now spend more time on household chores and childrearing than they did in the 1960s, when a majority of them were unemployed homemakers.[36] Women not only have to put their careers on a backseat, effectively perpetuating the wage gap, but even when they end up being the main breadwinners and earn more than their spouses, it leads to their spouses doing even less work around the house, according to some troubling studies.[37]

In this way, by having access to abortions, women can relieve themselves of unwanted burdens that they alone would have to carry.[38] Rosalind Petchesky has criticised both these reasons. She has criticised the social reason, on the ground that it reinforces traditional roles and "lets men and society neatly off the hook" i.e. that it removes the burden of caring for and nurturing children from men and transfers the burden solely upon women. Thus, where the father may be praised for changing a single diaper, a mother may be called a bad parent for not giving her undivided attention to her child. By arguing that women alone must bear the burden of bearing and rearing children, the notions that men and State

33. Jessie Hohman, *The Right to Housing: Law, Concepts, Possibilities* (1st edn., Hart Publishing 2013) 156.
34. Giulia Paglione, "Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing" (2006) 28(1) Human Rights Quarterly 120-147.
35. Julia Carpenter, "Millennial Women are Working More. But They're Still Doing Most of the Housework" *CNN Business* (26-12-2018) <https://edition.cnn.com/2018/12/26/success/millennial-women-income/index.html > accessed 12-6-2019.
36. Kim Parker, "Modern Parenthood" (Pew Research Centre, 2013) 27-32 <https://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/03/FINAL_modern_parenthood_03-2013.pdf> accessed 12-6-2019.
37. Oliver Burkeman, "Dirty Secret: Why is There Still a Housework Gender Gap?" *The Guardian* (17 February 2018) <https://www.theguardian.com/inequality/2018/feb/17/dirty-secret-why-housework-gender-gap> accessed 12-6-2019.
38. Rosalind Pollack Petchesky, *Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom* (Northeastern University Press 1985).

institutions play a limited role are strengthened. Petchesky also criticises the biological reason on the ground that, even if the woman has the right to choose, she may be powerless to choose what she actually wants, given her environmental conditions or the duress of her family and State.[39] This can be observed in the laws on abortion in countries such as Saudi Arabia, where the woman requires the consent of her husband – who is considered her legal guardian even if she's an adult – before she is allowed to proceed with the termination of the pregnancy.[40]

4. OTHER IMPORTANT CIVIL AND POLITICAL RIGHTS

While the right to life and liberty as well as the right to equality play an important role in the dialogue surrounding reproductive rights, there are other important provisions of the ICCPR which have allowed women a modicum of dignity and choice when it comes to continuing or ending their pregnancies.

The right to privacy, set forth in Article 7 of the ICCPR, has been a powerful tool in the past to ensure at least the bare minimum that the State would not interfere in a woman's choice to end her pregnancy. A striking example of using privacy as a foundational right to grant women the freedom of choice is the landmark case of *Roe* v. *Wade*,[41] wherein a woman impregnated as a result of gang rape moved the Supreme Court of the United States to legalise abortion so that the horrific incident would not lead to a lifetime of painful remembrance and suffering. The court wherein the declared that the constitutional right of "due process" would include the right to privacy of a woman to have the liberty to choose whether or not to have an abortion.[42] The right to privacy was also cited as one of the constitutional provisions from whence the right to terminate a pregnancy or to continue it flowed by the Indian Supreme Court in *Suchita Srivastava* v. *Chandigarh Admn.*[43] Interestingly, this case had decided this even before the actual landmark "Privacy judgment" and was even referred to by Justice Chandrachud, when speaking for the majority decision of the court.[44]

39. *Ibid.*
40. "Seeking an Abortion in the Arab World" <https://www.womenonweb.org/en/page/17562/seeking-an-abortion-in-the-arab-world> accessed 16-6-2019.
41. 1973 SCC OnLine US SC 20 : 35 L Ed 2d 147 : 410 US 113 (1973).
42. *Ibid.*
43. Suchita (n 11).
44. *K.S. Puttaswamy* v. *Union of India*, (2017) 10 SCC 1.

Of course, the right to privacy is weak in allowing women to actually obtain abortions in government-funded safe healthcare institutions. In countries where rape might be one of the very few grounds that a woman can use to abort her foetus, it might lead to prohibitive situations where she is unable to prove that the rape happened, as has been discussed earlier in this article. In the UK, it has been conclusively proven that "rape myths" prevent the prosecution of many rapists as they are known to the woman.[45]

A growing body of cases is reinterpreting the right to freedom from cruel, inhuman or degrading treatment, set forth in Article 7 of the ICCPR, to include the right to abortion. This is proven by the landmark decision of the Human Rights Committee in *K.L.* v. *Peru*,[46] where the State of Peru, one of the infamous Latin American countries that severely prohibit the right to abortion, failed to provide abortion to a pregnant minor whose foetus had no skull and would therefore not be able to survive, additionally endangering her life. She was forced to give birth and breastfeed the baby for four days before it died, causing her to spiral into extreme depression and scarring her for life. Awarding compensation to the victim on the grounds of the violation of her right to life, privacy and her right to be free from cruel, inhuman and degrading treatment, the Committee also ordered the State to take necessary measures so as to avoid a repeat of this incident.[47] It is also pertinent to mention the case of *R.R.* v. *Poland*.[48] Here, the European Court of Human Rights held that a lack of timely access to diagnostic screenings and subsequent abortion was both a violation of the right to privacy and the right to be free from inhuman and degrading treatment.

Another aspect to reproductive agency is Article 24 of the ICCPR, which requires States to make special measures for the protection of minors. Young girls under the age of 18 are in particular need of having control over their bodies. This was recognised in *K.L.* v. *Peru* by the Human Rights Committee.[49] If dealing with pregnancy that results in rape is difficult for an adult woman, it will be doubly so for a teenager or child. The startling cases of a young 10-year-old child who had been impregnated

45. Genevieve F. Waterhouse, et al., "Myths and Legends: The Reality of Rape Offences Reported to A UK Police Force" (2016) 8(1) The European Journal of Psychology Applied to Legal Context 1-10.
46. CCPR/C/85/D/1153/2003, Communication No. 1153/2003.
47. *Ibid.*
48. ECtHr, Application No. 27617/04 (26-5-2011) <https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-104911%22]}> accessed 27-10-2018.
49. *Peru* (n 46).

by her uncles proved this fact. The child had to be told that there was a stone in her stomach which would be removed through operation. Forced to undergo a "high risk" pregnancy owing to the Supreme Court's refusal to allow her an abortion, she gave birth and went home, unaware that she was even a mother, while her daughter was put up for abortion at her parents' request.[50] The situation might be further complicated if the minor wishes to abort her pregnancy without her legal guardian finding out. Cases of honour killing of pregnant daughters in certain regions of India serve to cement this fact.[51]

5. CONCLUSION

It is quite clear that there exists a skeletal framework in the international human rights regime that obliges States to respect and protect the human right of reproductive agency and choice. The civil and political rights used to pave the way for a solid reproductive rights regime include not just prominent rights such as the right to life and liberty and the right to equality; certain other rights, while not at first glance seemingly related to the right to choose to terminate a pregnancy, nevertheless have been interpreted to include this right within their ambit, e.g., the right to privacy, the freedom from cruel, degrading and inhuman treatment, and the right of minors to special measures for their protection.

The famous slogan of the French Revolution, *"Liberté, égalité, fraternité"* (liberty, equality, brotherhood), may be redefined as *liberté, égalité, sororité* (liberty, equality, sisterhood) to indicate the rising tide of women's rights globally. Nevertheless, a lot of work remains to be done in this area. As established through a study of the laws of the world, there are still several countries which criminalise abortions *in toto*, even where the very life of the mother might be threatened. Even countries where the threat to life of the mother allows abortions, the woman's dignity, privacy, and bodily integrity may be violated due to other abortion restrictions. She may be forced to give birth to a child with rape, or a seriously malformed foetus, sometimes so malformed that it will not survive extrauterine life altogether. Forced to bear the largest share of the burden

50. "10-Year-Old Rape Victim Delivers Baby, Put under Observation" *The Tribune* (17-8-2017) <https://www.tribuneindia.com/news/chandigarh/10-year-old-rape-victim-delivers-baby-put-under-observation/453088.html> accessed 17-6-2019.
51. Yagnesh Bharat Mehta, "Man Held for Honour Killing of Minor Pregnant Daughter" *The Times of India* (7-7- 2017) <http://timesofindia.indiatimes.com/articleshow/59482820.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 17-6-2019.

when it comes to childrearing, women might find themselves shackled to the home against their will, even in situations where their husbands are abusive. The situation becomes more severe in patriarchal countries where women already face innumerable socioeconomic and political challenges, hampering their rights and capabilities and diminishing their dignity. Minors are in an especially vulnerable position when it comes to terminating their pregnancies, given the higher chance of the pregnancy being a result of child sexual abuse, the higher health risks owing to their underdeveloped bodies, the higher chances of lasting mental trauma, and their absolute lack of any say or agency in the matter of their own bodies.

In conclusion, the aforementioned skeletal structure of civil and political rights is far from sufficient to protect and guarantee these reproductive rights, even when understood in their most restrictive sense (the right to at least choose whether to continue or terminate the pregnancy). A huge obstacle to granting women these crucial rights and bringing them on par with men is the lack of a strong system of international law, which cedes way to state sovereignty even in cases of severe human rights abuses. On top of this, cultural relativism and religious considerations only serve to compound the issue. While work is being done by treaty bodies to rectify the situation and clarify and emphasise on these reproductive rights, their "soft law" status undercuts the authoritative nature of their decisions and recommendations. It is thus the need of the hour to expand upon these rights and make them crystal clear while also working with international NGOs, UN bodies, *etc.* to encourage (and sometimes pressure) States into abandoning their totalitarian stand when it comes to abortion.

A PERSPECTIVE ON ACCESS TO FINANCIAL SERVICES AS A HUMAN RIGHT

Rajat Solanki & Nidhi Chauhan***

"Every poor person must be allowed a fair chance to improve his/her economic condition. This can be easily done by ensuring his/her right to credit. If the existing financial institutions fail to ensure that right, it is the obligation of the State and the world community to help find alternative financial institutions which will guarantee this fundamental human right. This is basic for the economic emancipation of the poor, in general, and poor women, in particular."

—Muhammad Yunus

ABSTRACT

The concept of financial inclusion implies that the basic financial services are provided at affordable costs to all persons needing such services. The access to basic financial services has been recognised as a basic right.[1] Access to financial services refers to the opportunity for a person to access services like savings, deposit, credit, insurance and investment. Now, access to financial services is considered as a mode of achieving social and economic development. The Indian Constitution refers to social and economic rights of the people of India but, as such, it does not refer to access to financial services. In this paper, the authors have analysed the concept of right with respect to access to financial services. Further, the authors have examined the efforts made for ensuring access to financial services. The recognition of access to financial services as a human right is analysed in the light of the present legal framework. The challenges to access to financial services have been identified. Moreover, the authors have discussed recent steps taken by the Government to increase financial inclusion in India. Several reforms have been suggested in the concluding part.

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1. Awarded Nobel Peace Prize for Founding Grameen Bank in Bangladesh. Emily Lee, "Financial Inclusion: A Challenge to the New Paradigm of Financial Technology, Regulatory Technology and Anti-Money Laundering Law" (2017) Journal of Business Law 473.

1. INTRODUCTION

The concept of financial inclusion implies that the basic financial services are provided at affordable costs to all persons needing such services. The access to basic financial services has been recognised as a basic right.[2] Now, access to financial services is considered as a mode of achieving social and economic development. In general, the access to financial services denotes the opportunity to member of public to access financial services like savings, credit, deposit, investment and insurance. The access to financial services is very low in developing countries. Worldwide, around 170 crores adults are not having access to financial services.[3] As far as India is concerned, around 20 crores adults are not having access to financial services. The Indian Government's schemes have given extraordinary thrust to the accessibility to financial services. For instance, the "Pradhan Mantri Jan Dhan Yojana" (PMJDY) pushed for opening of bank accounts, and now 80 per cent of the adult population have a bank account.[4] Even then, in 2019, a large population in India is not having bank accounts.

Finance is essential for economic development of the country and financial institutions play an important role in the same. Access to finance has a direct relation with the right to development as finance is at core of social welfare. The access to financial services is rarely associated with the human rights. Moreover, in absence of a statutory law, it is not easy to declare that access to financial services is a human right. The Indian Constitution provides for the social and economic rights of the people of India but it does not specifically deal with the access to financial services under it. It is also not clear that who will have the duty to ensure that the members of public get their right of access to financial services. The State has to provide the access to financial services and it has to ensure that

2. *Ibid.*

3. Asli Demirguc-Kunt, Leora Klapper, Dorothe Singer, Saniya, Ansar, Jake Hess, "The Global Findex Database 2017: Measuring Financial Inclusion and the Fintech Revolution" (World Bank Group 2018) <https://openknowledge.worldbank.org/handle/10986/29510> accessed 1-6-2019.

4. *Ibid.*

these services are provided by the institution according to a law which should follow a right-based approach. The compliance is not guaranteed once law has been enacted. So, there must be provisions under the law promoting compliance and facilitating enforcement.

Historically, only grain farmers and merchants had the access of financial services in the form of loans. Later, the financial services were extended to the acceptance of deposits and exchange of money. After Industrial Revolution, the banking services extended across the globe and laws were made to control the banking sector. However, the recognition of a right was not given to these financial services. There was no mandate given to the banks to offer banking services to the members of public. The business of banking was owned and controlled privately and Governments had no major role to play in the banking sector. These privately owned banks controlled the market to operate in their favour for their own commercial interests. The financial services were not considered as right of the customers by the banking companies nor were these banks concerned about the development of the customers and economy.[5] There were not sufficient mechanisms to ensure that the members of public had access to financial services. The Government made attempts to change the structure of banking sector which was concentrated among few big business houses. The formal banking services started in India during the last decade of the 18th century. The banking sector grew substantially during the 19th and 20th century. However, the post office savings banks' was major source of banking services in India. The trend in banking services was followed in other financial services such as insurance and securities.

2. THE CONCEPT OF RIGHT & ACCESS TO FINANCIAL SERVICES

If there is requirement of a right to access to financial services to the members of public, then the duty has to be imposed on somebody to make sure that the right is enjoyed by them. It implies that there must be clarity as to who is imposed with the duty to ensure that the people enjoy the right to access financial services. It may be the Government or the financial institutions. However, in fact, there is no specific institution mandated with the duty to ensure that right to access to financial services is enjoyed to the full extent. Earlier, the banks, while dealing with the public, used to impose their own rules and exploited them in order to achieve their

5. M.N. Rothbard, *A History of Money and Banking in the United States: Colonial Era to World War II* (Ludwig Von Mises Institute 2002) 259.

objectives. Now, the Government has started playing important role in the regulation of the financial services sector. However, the role of the Government is limited to only ensuring that the statutory requirements are complied with. The Government, usually, does not use its regulatory role to enforce the rights.

In spite of the fact that there is no person on whom the duty is imposed to provide access to financial services, it can be regarded as a human right. Later, this right can be protected by enacting laws. The Government should have a duty to ensure that right to access of financial services is observed by the members of the public.

Development is a keytool in ensuring that the freedoms are fully enjoyed.[6] Access to financial services is at the core of economic development and is a key to achieve freedom. The issue of gender discrimination has to be discussed, when we are looking at the access to financial services from the perspective of human rights. The gender discrimination was existing when it comes to access to financial services. The financial services were more accessible by men as compared to women. However, as a human right, access to financial services should be enjoyed by both men and women without any discrimination. Usually, the discrimination in access to financial services resulted due to lack of employment, economic independence, etc. and dependence on the men for financial support. Earlier, the financial institutions were also reluctant to offer financial services to females.

3. ENSURING ACCESS TO FINANCIAL SERVICES

Internationally, a number of measures have been taken to ensure that there is increase in accessibility to financial services by the members of public. However, the access to financial services is not *per se* defined as a human right. In order to ensure that the access to financial services increases, micro-finance institutions were introduced in the financial sector. The introduction of micro-finance institutions helped in eradicating poverty by providing financial services to the poor.[7] The problem of lack of access to financial services gained extensive recognition due to advent

6. Amartya Sen, *Development as Freedom* (Oxford University Press 1999) 2.
7. Jennifer Lindsay, *Microfinance — Developing Paths to Self-Sufficiency: An Evaluation of the Effectiveness of Microfinance Institutions* (Indiana University SPEA 2010) 5.

of micro-finance institutions.[8] They have transformed the access to financial services by offering wide range of financial services. However, formalisation and commercialisation of microfinance sector has adversely affected it, and now they operate more or less as banks.

Research has shown that, in spite of the international efforts to ensure access to financial services, not all the members of public without access to financial services are in that position due to services being inaccessible to them. Such members of public are those who voluntarily decide not to access financial services despite of easy availability. In India, a research conducted in the year 2005 revealed that sixty-two per cent of the population did not required financial services.[9] However, over a period of time, India has shown tremendous growth in providing accessibility to even those who were initially reluctant to access financial services by providing incentives in the form of subsidies, etc.

Interestingly, in order to increase accessibility of financial services, mobile banking services were started. Mobile banking services have been effective as the customers can avail various services of the bank without going to the bank. Mobile money transfer services have enabled fast and secure access to financial services. As a large number of people use mobile phones, it has become easier and effective to provide access to financial services. The initiatives of Indian Government for the access to the financial services have been discussed in the later part this paper.

4. RECOGNITION OF ACCESS TO FINANCIAL SERVICES AS A HUMAN RIGHT

In its Preamble, the Universal Declaration of Human Rights provides that "every individual, and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education, to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...". Further, in Article 29, the Declaration provides that "in the enjoyment of one's rights and freedoms, one will be subject to such limitations by law that are necessary for the purpose

8. Asian Development Bank, Finance for the Poor: Microfinance Development Strategy (ADB 2000) 10.
9. Anjali Kumar, "Measuring Financial Access Through Users' Surveys, Core Concepts, Questions and Indicator" (2005) Paper prepared for the Joint World Bank/DFID/Finmark Trust Technical Workshop, "Defining Indicators of Financial Access", Washington DC and London, 2005.

of ensuring recognition and respect for the rights of others". Ironically, the access to financial services is not considered as a human right under the Declaration. However, the phrase "every organ of society" has been interpreted so as to include banks and financial institutions.[10]

On the other hand, the United Nations Declaration on the Rights of Indigenous Peoples provides that "Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration."[11] When it comes to recognition of access to financial services as a right at the international level, this provision has come to the closest. However, this provision only deals with financial and technical assistance.

Moreover, the Convention on the Elimination of All Forms of Discrimination Against Women is an international instrument providing for financial inclusion for women. The Convention requires that "all State parties take appropriate measures to eliminate discrimination against women in the areas of economic and social life to ensure that both men and women have equal rights to access bank loans, mortgages and other forms of financial credit".[12] The Convention provides that right of access to financial services has to be enjoyed equally by both men and women.

In the Indian Constitution, the social and economic rights of the people of India are enshrined in the Part IV dealing with Directive Principles of State Policy. However, there is no explicit mention of financial services in that part. Moreover, there is no provision under the Constitution which recognises that access to financial services as a right. Nevertheless, an interpretation may be given that the access to financial services is enshrined in the right to life guaranteed under Article 21 of the Constitution.

The Reserve Bank of India Act, 1934 established Reserve Bank of India ("RBI") which is mandated to regulate the banking sector and to a certain extent financial services sector as well. Additionally, the Banking Regulation Act, 1949 provides that "no company shall carry on banking business in India unless it holds a licence issued in that behalf by Reserve Bank and any such licence may be issued subject to such conditions as

10. Njaramba Gichuki, "Access to Financial Services: A Human Rights Perspective" (2015) East African Law Journal 165.
11. United Nations Declaration on the Rights of Indigenous Peoples, Art. 39.
12. Convention on the Elimination of all Forms of Discrimination against Women, Art. 13(*b*).

Reserve Bank may think fit to impose". Such a law has made conditions favourable for persons accessing banking services. It makes the public aware of the fact that the RBI must have given the licence to a banking company only after satisfying itself that issuance of licence will be in the interest of the public. Since licence being a mandatory requirement ensures that the money accepted by the banks as deposits are safe. Such assurance brings the confidence in the minds of members of the public and thereby increases the accessibility to financial services offered by the banks to the public. There is, as such, no law in India containing express provisions that access to financial services is human right and it is one of the major problems with the financial inclusion.

5. ACCESS TO FINANCIAL SERVICES VIS-À-VIS HUMAN RIGHTS: CHALLENGES

The access to financial services as a human right has a number of challenges to face. There is no law recognising it as a human right. In general, the international instruments only deal with the social and economic rights. The Universal Declaration of Human Rights provides that "every member of society is entitled to the realisation of economic, social and cultural rights".[13] However, the social and economic rights may be stretched in order to include access to financial services. Moreover, it has been regarded that all organs of society under the Declaration includes financial service providers and that they have the human rights obligation to provide financial services to the members of the public.[14] The challenge in India is also the same that there is no specific law that deals with access to financial services under the social and economic right provided by the Constitution.

The implementation of a right to access to financial services without any express legal provision is challenging. The law must expressly provide, for the access to financial services to be deemed as a human right, the person who is under the obligation to ensure that the right to access to financial services is enjoyed by the members of the public.[15] In absence of a specific person for ensuring access to financial services, the financial institutions may deny members of public to access the financial services

13. Universal Declaration of Human Rights, Art. 22.
14. Adam McBeth, "Every Organ of Society: The Responsibility of Non-State Actors for the Realisation of Human Rights"(2008) Social Science Research Network 5.
15. W. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 Yale Law Journal 710.

and escape as there is no law imposing duty on them. Although, there is no express provision in the law, the Government ensures that public has the access to financial services.

The lack of sufficient infrastructure is also considered as a challenge for access to financial services to be considered as human rights.[16] The members of public are denied financial services in India, if they do not have required documents such as Aadhar card, PAN card. For availing certain kinds of financial services like Public Provident Fund Account, there is mandatory requirement that the person should have an Aadhar card. This kind of requirement discriminates against those who do not have Aadhar card as well as those who do not want to have Aadhar card. Such discrimination weakens the concept of access to financial services as human right.

6. FINANCIAL INCLUSION IN INDIA

Financial inclusion is a process of making formal financial services accessible and affordable to all.[17] Financial services include services for credit, savings, insurance and payment facilities. The financial inclusion enables a person to access necessary financial services in an appropriate form. The inaccessibility to financial services is present mainly in poorer members of the society.[18] There are several factors responsible for inaccessibility, namely, (*a*) charges are very high for accessing services, (*b*) financial institutions do not exist in the area, (*c*) some of the population refusing to access services, (*d*) restricted access to the financial institution, (*e*) services failing to meet the demands.[19] The Committee on Financial Inclusion headed by C. Rangarajan defined financial inclusion as "the process of access to financial services and timely and adequate credit needed by vulnerable groups such as weaker sections and low income

16. Njaramba Gichuki, "Access to Financial Services: A Human Rights Perspective" (2015) East African Law Journal 165.
17. Rajaram Dasgupta, "Two Approaches to Financial Inclusion" (2009) 44 Economic and Political Weekly 41.
18. Molyneux, Philip, "What are the Specific Economic Gains from Improved Financial Incusion? A Tentative Methodology for Estimating These Gains" in Luisa Anderloni, Maria Debora Braga and Emanuele Maria Carluccio (eds.), *New Frontiers in Banking Services: Emerging Needs and Tailored Products for Untapped Markets* (Springer 2007).
19. Luisa Anderloni and Emanuele M. Carluccio, "Access to Bank Accounts and Payment Services" in Luisa Anderloni, Maria Debora Braga and Emanuele Maria Carluccio (eds.), *New Frontiers in Banking Services: Emerging Needs and Tailored Products for Untapped Markets* (Springer 2007).

groups at an affordable cost". On the other hand, the Committee headed by Raghuram Rajan looked at financial inclusion from the perspective of savings. It stated that "the most important financial services for the poor are vulnerability reducing instruments. These include savings, remittances, insurances and pension needs".

Basically, financial inclusion endeavours to deal with the restrictions excluding members of public for accessing financial services. It does so by providing accessibility at affordable costs. Research has shown that higher levels of financial inclusion has increased the growth rates and reduced income inequality in many countries.[20] Therefore, financial inclusion should be an important part of social and economic development programme. The Government has taken measures for reducing the obstacles to access to financial services and providing banking services closer to the public.

The RBI's mandate of "Priority Sector Lending" to the banks ensures that there is flow of adequate credit to the vulnerable sectors of the economy. The priority sector includes agriculture, export, education, housing and others. Substantial growth has been registered in terms of number of rural banks over past couple of years. India Post Payments Banks also focusses on catering to the needs of rural population. Moreover, the RBI has issued licences to Small Finance Banks and Payment Banks to undertake basic banking activities for the unorganised sector as well as for those who are not getting access to banking services. The Lead Bank Scheme was revamped in order to ensure economic development. For effective implementation of financial inclusion, it is important to improve financial literacy.

The flagship scheme of Government "Pradhan Mantri Jan Dhan Yojana" (PMJDY) gave a major push to financial inclusion. Under this scheme, there was addition of significant number of bank accounts owing to no minimum balance requirements. It is a successful initiative of the Government where the financial services are extended to the poorer section of the population. The research has shown that access to savings bank account have many positive consequences such as increase in

20. Asli Demirguc-Kunt, Leora Klapper and Dorothe Singer, "Financial Inclusion and Inclusive Growth: A Review of Recent Empirical Evidence" (2017) World Bank Policy Research Working Paper No. WPS 8040 <http://documents.worldbank.org/curated/en/403611493134249446/Financial-inclusion-and-inclusive-growth-a-review-of-recent-empirical-evidence> accessed 23-7-2019.

savings, consumption and women empowerment.[21] In order to increase credit availability and outreach, the Government brought "Pradhan Mantri Mudra Yojana" (PMMY) scheme. Under this scheme, credit was given to small and micro-enterprises. The credit up to the extent of Rs 10 lakhs is classified as Mudra Loans. The Government has taken several initiatives to provide access to insurance services to the public. "Ayushman Bharat" scheme aims to provide a health cover of up to Rs 5 lakhs to vulnerable families. The penetration of health insurance in India is expected to get a push from this scheme. Moreover, the crop insurance scheme "Pradhan Mantri Fasal Bima Yojana" (PMFBY) sponsored by the Government is expected to benefit more than 48 million farmers.[22] The Government has also launched another health insurance scheme, namely, "Pradhan Mantri Jan Arogya Yojana" (PMJAY) for providing cover to more than 50 crore poor and vulnerable persons. The beneficiary under PMJAY will get benefits of cashless hospitalisation. As far as pension is concerned, the Government started "Atal Pension Yojana" (APY) which mainly focusses on unorganised sector. The Government has guaranteed the pension under this scheme on the basis of the contributions made by the subscribers. APY is an important step of the Government towards India being a pensioned society. The instant payment system "United Payments Interface" (UPI) has facilitated interbank transactions and brought financial services of seamless transfers and bill settlement to the public who does not have access to the bank branches.

7. CONCLUSION

The financial services are at the core of all human activities, and therefore, there is an urgent need to recognise the access to financial services as a human right. The access to financial services is vital for economic empowerment so that other rights can be significantly enjoyed. The Government can provide social security by offering financial services. There is requirement for improvement in the infrastructure for providing financial services and increasing accessibility. The Government has taken a number of initiatives to improve access to financial services. But, a large population in India is not having access to financial services.

21. Shamika Ravi, Accelerating Financial Inclusion in India Brookings India Report (March 2019) https://www.brookings.edu/wp-content/uploads/2019/03/Accelerating-Financial-Inclusion.pdf> accessed 10-7-2019.
22. *Ibid.*

The access to financial services is highest in urban areas because the financial institutions are mainly inclined to open there branches in those locations where there business will increase. The improvement in basic infrastructure will attract the investors as well as financial institutions. If the Government provides concessions and subsidies to the financial institutions for doing business in remote areas, then probably the accessibility to financial services will increase in the remote parts of the country. The Digital India initiative of the Government has tremendously increased the access to financial services and improved the efficiency of the financial institutions in offering service.

The financial institutions must be under an obligation to make sure that the financially disadvantaged members of the public are able to access financial services. Although the RBI is ably regulating the financial services, there is a requirement of bringing a law for governing new services being offered by these institutions in order to reduce fraud related matters. There is a need of educating the public on advantages of using modern methods of accessing financial services.

The enacting of laws and policies will ensure that accessibility to financial services by the public increases. There should be no discrimination and the financial inclusion across gender has to be improved. There is a requirement that advocates of economic rights focus more on public and bring methods for ensuring access to financial services by the members of the public. Financial inclusion for all can be ensured by meeting the needs of customers and protecting their interests. The law should be enacted mandating access to financial services as human right and ensuring the enjoyment of this right by imposing duty on financial institutions.

Access to financial services is critical to reduction of poverty and for realisation of other basic rights. It should be considered as a right due to its contribution in the economic development. Absence of a law declaring access to financial services as a human right prevents addressing issues relating financial services in India. In the current times, working without financial services has become almost impossible. Being an important part of the society, financial services must be considered as a human right. It is only after accessing the financial services that the disadvantaged members of the public may get other freedoms and human rights. Therefore, the financial inclusion can be extended to all members of the public only by enacting legislation in this regard. A law recognising access to financial services as a right will contribute to the growth and development of the economy, and will stop exploitation of members of public by the financial service providers. It is also required that the members of the public should be informed and educated with respect to the advantages of accessing financial services, otherwise the objective of financial inclusion will be futile.

India has made several attempts aiming the improvement in the financial lives of the people by market interventions such as implementation of several schemes and reforms. In recent years, India has seen a lot of development and innovations in financial inclusion. Access to financial services in India has substantially increased due to implementation of various reforms and schemes. Access to banking services has played an important role in improving the financial lives of the people. However, there are certain areas in India where financial services are inaccessible even now. Moreover, there is requirement of expanding the focus from banking services to insurance, pensions and credit.

INDIA'S INDIGENOUS PEOPLE AND THEIR COLLECTIVE HUMAN RIGHTS

Apala Goswami[*] *& Rashmi Shukla*[**]

ABSTRACT

The present paper tries to study how India is adopting international human rights standards to protect her indigenous human heritage. The concept of protection of the indigenous and tribal rights is essentially linked with the advent of the "Third Generation of Human Rights". This generation gives us the concept of rights which are neither a group right nor an individual right but "collective right" as it requires collective effort of mass to ensure the same. From this collective right we arrived at the rights of indigenous peoples, that is, their right of survival as a distinct group.

The first part of the paper studies the tribal profile of India, while the second part deals with the plight of indigenous and aboriginal people worldwide. Later in third part the concept of collective rights of indigenous population and international instruments to protect the same has been discussed. The fourth part is concerned with how India has adopted the concept as such, the fifth part provides the list of major legislation. The last part contains the critical analysis of the India's indigenous rights protection including the some landmark cases.

1. INTRODUCTION - INDIAN TRIBAL PROFILE

The vast territory of Indian Subcontinent has the most diverse and large-scale indigenous population as compared to any country in the world.[1] We must, before going into the details of the "Human Rights" discourse of "indigenous peoples" rights, first know the definition of and the difference between the terms "Indigenous" and "Tribe".

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1. R.C. Verma, *Indian Tribes: Through the Ages*, (Third Revised Reprint, Publication Division, Ministry of Information and Broadcasting, Government of India 2017)

The ILO Convention of 1989[2] gives the following definition;

"Tribe" here means *"whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations."*[3]

Whereas the title "Indigenous" is based on "account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."[4]

The ILO Convention of 1957 also has the definition of "semi-tribal" and it is defined to include *"groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the national community."*[5] This Convention was criticised for having an assimilative approach as such a later Convention of 1989 was adopted. In United Nation the definition of the indigenous population was laid down by José Martínez Cobo, which is;

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."[6]

2. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (Entry into force: 5-9-1991).
3. *Ibid* Art. 1(1)(*a*).
4. *Ibid* Art. 1(1)(*b*).
5. Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957 (Entry into force: 2-6-1959).
6. UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations* (1986) LN Doc. E/CN.4/Sub.2/1986/7/Add. 4, para 379 (José Martínez Cobo, Special Rapporteur).

It is interesting to note that while the definition of "tribe" has in essence the concept of distinguishing culture and traditions, the indigenous populations are defined with respect to their ancestral roots in the land where they belong alongside of having distinct social, cultural and political institutions. But in India the two terms are used in a synonymous manner.

In India the tribal profile is not symmetrical, there exists a vast diversity and for the sake of convenience we can categorise them into three subheads, that is, Negritos, Mongoloids and Mediterranean.[7]

The earliest inhabitants of our land are the Negritos. Although they have almost disappeared but few of them can be located in the tribals of Andaman and Nicobar Islands that is the Great Andamanese, Sentinelese, Onges and Jarawas. They are also found in few tribes of Kerala such as Kadars, Irulars and Paniyan tribes. In the Himalayan region the Mongoloids are found mainly in Assam, Meghalaya, Nagaland, Manipur, etc. While Mediterranean are popularly known by their linguistic name, that is, Dravidian. They are mainly found in central and Southern India, Tamil, Telugu, Malayalam and Kannada languages being their modern leading representatives.[8]

This diverse population not only contributes to our national heritage they are also indispensable part of our diverse cultural legacy, hence the protection of these indigenous populations are needed to be treated as one of the primary concern of the nation as a whole.

So as we have discussed what the tribal or indigenous profile of India is, we would discuss their protective measures. The protection to these people was first ensured by the two conventions of International Labour Organisation, that is, Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957 and Convention concerning Indigenous and Tribal peoples in Independent Countries, 1989. These Conventions mainly aimed to provide safeguard to the tribal people from being forced labourers. Later on the Human Rights Commission appointed the Working Group on Indigenous Peoples in 1982, which started drafting the "Declaration on the Rights of Indigenous Peoples", and it was finally adopted in 2007 in the General Assembly.

7. R.C. Verma (n 1).
8. *Ibid.*

1.1. The Plight of the Indigenous Peoples

The indigenous population has suffered the worst mainly due to colonial expansion. The origin can be traced in the colonisation of the Indian community of America in the hands of the European colonisers.[9] The indigenous community of the world at large is separated by not only geography but also culturally, socially and historically but they are in the same plane when it comes to colonial exploitation. As such the large scale uprooting, deprivation of their land sovereignty, and genocide lead to massive reduction in the population of the tribes.[10] Those who survived had to resist a massive assimilative force, and constant attempt to bring them into the mainstream. The *Doctrine of Terra Nullius*[11] *became the main weapon in the hands of the colonisers to remove the aboriginal peoples from their land.*

In Johnson v. *William M'Intosh* (1823), the Court observed:

"Discovery of the territory occupied by the Indian tribes in the new world gave to the discovering European nation an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest."[12]

Tee-Hit-Ton Indians v. *United States*[13], is another example where the Supreme Court justified taking away of indigenous land or property without the payment of just compensation as in the opinion of the court the aboriginals' proprietary rights are not protected under the Constitution.

It was Hugo Grotius, known to be the Father of Modern International Law, who discarded the concept of invading indigenous land as it is contrary

9. Abdullah Al Faruque and Najnin Begum, "Conceptualising Indigenous Peoples' Rights: An Emerging New Category of Third-Generation Rights" (2004) 5 Asia-Pacific Journal on Human Rights and the Law 1.
10. Douglas Sanders, "The Re-Emergence of Indigenous Questions in International Law" (1983) 3 Canadian Human Rights Yearbook 4.
11. It means "nobody's land". The tribal concept of landholding is that they do not have the concept of individual ownership but they view land as a community resource just like air, water, sunlight, which cannot be possessed by any individual alone.
12. 1823 SCC OnLine US SC 17 : 5 L Ed 681 : 8 Wheat 543 : 21 US 543, 587 (1823).
13. 1955 SCC OnLine US SC 11 : 99 L Ed 314 : 348 US 272 (1955), quoted in Human Rights of Indigenous Peoples, second progress report, prepared by Mrs Erica-Irene A. Daes, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fifty-first session, Item 7 of the provisional agenda, E/CN.4/Sub.2/1999/18. 11.

to the *Doctrine of Natural Law*.[14] The International Court of Justice held that the *Doctrine of Terra Nullius* cannot be applied to take away the indigenous lands in the *Western Sahara case*.[15]

Coming back to Indian Scenario, the East India Company tried to invade the tribal territories of the land as they were and still happen to be the most resourceful part of the territory.[16] The Battle of Aberdeen 1859 was a battle of bows and arrows against the most sophisticated guns and bullets. The native tribes in the Andaman territory fought the war to protect their land from being encroached by the foreigners.[17] Prior to it, when the British tried to invade East India, they witnessed a heroic tribal uprising in 1818 with the Bhil movement in Khandesh territory[18], Kol and Mappila Movement (1831 and 1836 respectively), Santhal movement of 1855, Birsa Munda's revolt in 1899 for the Munda tribe etc. to safeguard their ancestral land from the foreign rule.[19] As such the British Government later on stopped trying to penetrate those territories and listed them as the "Scheduled Areas".[20]

Post World War II global scenario was such that it paved the way for realisation of the legitimate rights of the indigenous peoples. The adoption of the United Nations Charter and willingness to reaffirm faith in fundamental human rights lead the way towards greater protection for the tribes. With the gradual growth in the concept of human rights the rights of the indigenous community found place in its Third Generation.

1.2. Collective Rights of Indigenous People in Human Rights discourse

The collective rights concept is essentially linked with the "Third Generation of Human Rights." The Universal Declaration of Human Rights, 1948 has been described to have mainly two generations. The

14. Hugo Grotius, *The Freedom of the Seas* (Latin and English version, Ralph D. Magoffin trans.,1608) 16-18, 21.
15. Western Sahara, Advisory Opinion, 1975 ICJ 12.
16. R.C. Verma (n 1).
17. Vishvajit Pandya, "Contacts, Images and Imagination: The Impact of a Road in the Jarwa Reserve Forest, Andaman Islands" 158(4) On the Road: The Social Impact of New Roads in Southeast Asia (2002), 799-820.
18. Shakeel Anwar, "Tribal Rebellions during the British Rule in India" (*Jagaran Josh*, 20-3-2018) <https://www.jagranjosh.com/general-knowledge/summary-of-the-tribal-rebellions-during-british-rule-in-india-1521541943-1> accessed 12-6-2019.
19. *Ibid.*
20. R.C. Verma (n 1).

part that consist of civil and political rights in known as "First Generation Rights" as because they stem from a revolutionary context of reformist movement in the Europe in the 20th Century.[21] They mainly require freedom from excessive State intervention, and imposes restriction on the powers of the State. The social and economic rights part is known as the "Second Generation Rights" which requires State intervention to implement protective measures. It has the root in the labour movements.

Before going to the third generation it is essential to note down why the term "generations" has been used and not "categories".[22] The term "category" has some essence of rigidity as such we cannot cabinet the notion of human rights, being inherently a dynamic concept, to fixed categories. On the other hand the term "generation" do not convey any hierarchy among the rights[23] but rather it enables to absorb the emerging rights.[24]

Karel Vasak was the first person to use the phrase, "Third Generation of Human Rights". In United Nations Educational, Scientific, and Cultural Organisation he served as the Legal Advisor as well as he was the former Director of Human Rights and Peace and UNESCO subsidiary.[25] He described the concept of "Third Generation Rights" as a "group of policy goals" that can be achieved only by a collective international action.

The "Third Generation of Rights" include, Right to Environment, Right to Development, Right to Peace, Right to Property over common heritage of mankind, Right to Communicate, etc.[26] According to Vasak they are "Solidarity Rights" because achievement of them is not possible without a common aim, perseverance and cumulative action.[27]

21. Stephen P. Marks, "Emerging Human Rights: A New Generation for the 1980s'" (1981) 33 Rutgers Law Review 435.
22. *Ibid.*
23. United Nations Educational, Scientific and Cultural Organisation, Working Group of the Standing Committee of International Non-Governmental Organisations, Symposium on the Study of New Human Rights: The "Rights of Solidarity"; "The Rights of Solidarity: An Attempt at Conceptual Analysis", at 2, UN DOC. SS-80/ CONF.806/6 (1980) (hereinafter "The Rights of Solidarity").
24. Jennifer A. Downs, "A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right" (1993) 3 Duke Journal of Comparative & International Law 35.
25. *Ibid.*
26. Krzysztof Drzewicki, "The Rights of Solidarity-The Third Revolution of Human Rights" (1984) 53 Nordisk Tidsskrift Int'l Ret 26.
27. Jennifer A. Downs (n 24) 351.

Now let us discuss what constitute collectives rights. It can be illustrated by an example that suppose there is a chemical plant in a village and the chemical wastes or the gases coming out of the plant is causing tremendous health hazard to a person residing in the neighbouring house. Here that person cannot claim that his "Human Right to Environment" has been curtailed. He might get some remedy because of infringement of his individual rights such as in torts. But when a situation arises that the chemical wastes are being dumped in the nearby stream and as a consequence the productivity of the agricultural field is destroyed and some disease has started to spread in that village. We can say that their human right to clean and healthy environment has been diluted.

The concept of "Collective Rights" needs to be separated from "group right" also because once the reason of discrimination is gone the formation of the group becomes redundant. For e.g. if the discrimination against the sexual minority ceases then their reason to form a group for that purpose is gone.[28] On the other hand the collective rights are continuous. The indigenous population for example demands to protect their collective existence, culture and ethnicity.[29]

The concept of collective right of indigenous population was first ensured in the African Charter as it provided for the *Right to Self-Determination*[30] *which means they are free to decide their social and political status in the country.*

Article 27 of the International Covenant on Civil and Political Rights 1966 specifically offer the rights of the minorities. It states that "persons belonging to ethnic, religious or linguistic minorities shall not be denied the right to their own culture and language as such they are free to profess and practice their religion".[31] *Convention on the Prevention and Punishment of the Crime of Genocide 1948 also provides that genocide*

28. Douglas Sanders, "Collective Rights" (1991) 13 (3) Human Rights Quarterly 368-386.
29. *Ibid.*
30. *"The African Charter on Human and Peoples Rights"*, also known as the "Banjul Charter on Human and Peoples Rights", was adopted by the "Assembly of Heads of State and Government of the Organisation of African Unity" held in Nairobi in June 1981. It came into force on 21-10-1986. See, Richard N. Kiwanuka, "The Meaning of 'People' in the African Charter on Human and Peoples' Rights" (1988) 82 American Journal of International Law 80.
31. International Covenant on Civil and Political Rights 1966, Art. 27.

is an act with the intention of destroying a national, ethnical, racial or religious group and thus punishable.[32]

But the major recognition came with the adoption of Declaration on the Rights of Indigenous Peoples 2007. The document recognised the fact that Indigenous population has suffered from historic injustice as such it enlists numerous rights including collective rights of self-determination, indigenous knowledge, freedom from act of genocides, preservation and documentation of traditional medicines, language, right of repatriation, etc.

The 9th of August has also been declared by United Nation as the "Tribal's Day" to educate the masses about the struggle of the indigenous community and need of their existence on the earth.[33] The World Bank has also taken certain measures that funds will be provided to those projects only which are not detrimental to the tribal interest.[34]

2. INDIA AND COLLECTIVE RIGHTS OF INDIGENOUS PEOPLE

"I rise to speak on behalf of millions of unknown hordes....unrecognised warriors of freedom, the original people of India who have variously been known as backward tribes, primitive tribes, criminal tribes and everything else.... You cannot teach democracy to the tribal people; you have to learn democratic ways from them. They are the most democratic people on earth."[35] The above words have been spoken by Mr Jaipal Singh.

The Tribals of India was being represented by him in the Constituent Assembly.[36] The Constitution of India lays down numerous provisions drafted with the aim of protecting the tribals. It has also adopted the same mechanism of "Scheduled Tribe" from the British Government of India Act of 1935. The legislatures have the authority make any special laws

32. Convention on the Prevention and Punishment of the Crime of Genocide 1948, Arts. 2 and 3.
33. R.C. Verma *supra* note 1, 263-264.
34. *Ibid.*
35. Speech by Jaipal Singh in Constituent Assembly; Radhika Bordia, "A *'Jungli'* in the Constituent Assembly: Jaipal Singh Munda" (NDTV, 26-1-2017) <https://www.ndtv.com/people/a-jungli-in-the-constituent-assembly-jaipal-singh-munda-1652949> accessed 12-6-2019.
36. R.C. Verma, *Indian Tribes: Through the Ages*, (Third Revised Reprint, Publication Division, Ministry of Information and Broadcasting, Government of India 2017).

providing for restorative paradigm[37] under the Principle of Reasonable Classifications of Article 14.

The term "race" in Article 15 prohibits discrimination on the basis of a person's ethnicity. Any of the tribal population having a distinct identity has the right not to be discriminated in preserving their ethnicity as well as tribal identity.[38] Article 15(4)[39], Article 15(5)[40], Articles 16(4),[41] (4-A),[42] and (4-B)[43] ensures "positive discrimination" for backward classes, castes and tribes, but it is needless to say that these provisions are of very little significance when it comes to the protection of the primitive tribes having no link with the mainstream civilisation. These affirmative actions are to be used only by those who have already accepted the modern way of living.

Article 19(1) specifically provides six kinds of freedoms and particularly against the freedom of right to movement throughout the territory of India and right to reside and settle in any part of the territory[44] a reasonable restriction exists which is in favour of the Scheduled Tribes under Article 19(5).[45] We may infer that this provision might go a long way in protecting the land, forest, health and ultimately the existence of the tribes as in accord with the international standardise demands. Apart from these it is the presence of Article 21 which has made possible the adoption of various human rights in a dynamic way. The Supreme Court of India has molded the idea of right to life and personal liberty to the extent to enable the Constitution to absorb new rights. For instance the Right to Clean Environment[46], Right to Sustainable Development,[47] Protection of

37. Andree Lawrey, "Contemporary Efforts to Guarantee Indigenous Rights under International Law" (1990) 23 Vanderbilt Journal of Transnational Law, 703, 762; "it provides that, in spite of various differences, these indigenous people endure a common set of problems. They must be provided with restorative rights as direct consequence of their exploitation by the colonisers, not only that appropriate compensation as well as acknowledgement as group should be provided for the oppression that they had suffered".
38. Constitution of India, 1950, Art. 15.
39. *Ibid.*, Art. 15(4).
40. *Ibid.*, Art. 15(5).
41. *Ibid.*, Art. 16(4).
42. *Ibid.*, Art. 16(4-A).
43. *Ibid.*, Art. 16(4-B).
44. *Ibid.*, Art. 19(1)(*d*)(*e*).
45. *Ibid.*, Art. 19(5).
46. *M.C. Mehta* v. *Union of India,* (2004) 12 SCC 118.
47. *N.D. Jayal* v. *Union of India,* (2004) 9 SCC 362.

Endangered Species,[48] etc. Besides, Article 29 too ensures Conservation of the Minority Languages, Scripts and Cultures.[49]

2.1. Major Legislations for Protection of Collective Rights

Panchayats (Extension to the Scheduled Areas) Act, 1996 (PESA 1996) is one of the main legislation that aims to redress historic injustice. The Scheduled Area and Tribal Area were deprived of having the advantage of the Part IX of the Constitution; hence the legislation was brought into effect. It is a technical extension of the Part IX to the Scheduled Areas.[50] The Act provides ultimate powers in the hands of the Gram Sabha. Approval of Gram Sabha is required for implementation of any major developmental project.[51]

PESA is a unique legislation that recognises concept of "self-governance", but there remain certain loopholes, for example, the Committee report provided that approval of the Gram Sabha was made mandatory for any development project whereas in the legislation it was diluted to consultation only. As a result ample scope of abuse of this provision rests in the hands of the State Legislature.[52]

Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 popularly known as the Forest Rights Act, 2006 or FRA of 2006. This Act also in its objectives recognised the fact of historical injustice ushered through ages on the indigenous populations. This Act aims to ensure rights over the forest to the traditional forest dwellers and scheduled tribes.

The main lacunae of the Act lies in the administrative implementation as it requires a proof of residence strictly for a period of seventy-five years that evidently goes back to the British period.[53] The problem is that there are numerous people who have resided in the British period

48. *T.N. Godavarman Thirumulpad* v. *Union of India,* (2012) 3 SCC 277.
49. These are only the main provisions, there are other Articles like, Arts. 23, 24, 25, 46, 164, 320(4), 332, 334, 243-D, 243-T, 371-A, 371-B, 371-C, 371-F, 371-G, 371-H, 335, 338, 275(1), and 339(2), etc.
50. The "Tribal Areas" are governed by the "Sixth Schedule" as such Art. 243-M made it possible to apply the Amendment in those areas.
51. Panchayats (Extension to the Scheduled Areas) Act, 1996, S. 4.
52. Mukul, "Tribal Areas: Transition to Self-Governance" (1997) 32 (18) Economic and Political Weekly, 928-929.
53. Lovleen Bhullar, "The Indian Forest Rights Act 2006: A Critical Appraisal" (2008) 4 Law Env't & Dev. J. 20

without any formal records. In such situations unless oral evidence and spot verification methods are not adopted, the purpose of the Act will be defeated as a massive chunk of the population will remain deprived while the government officers will be relying on the colonial records.[54]

The next important legislation is the Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation Act, 2013. The process of land acquisition was previously dealt under the Land Acquisition Act, 1894. It was enacted during the British era in order to facilitate taking away of resource rich lands by the colonial exploiters under the "doctrine of eminent domain".[55] Vague interpretation of "public purpose" under the said Act in the independent India continued to remain as the tool of exploitation in the hands of the bureaucrats. As such no modification or amendment was sufficient to reduce the ambiguity in the said Act.[56]

In order overcome the hurdles created by the 1894 Act Parliament enacted the new law. It ensures compensation up to 4 times in case of lands in rural areas, and up to 2 times in case urban areas. The Act has been made with retrospective effect subject to certain conditions.[57] Lands cannot be acquired in the "Scheduled Area" without prior consent of the Gram Sabha.[58] The Act also provides for time bound "Social Impact Assessment" by expert committee.[59] This Act has also been criticised as land for land is not a principle that is globally accredited. Moreover the Act fails to give clarity on the domain of "public purpose" and hence makes it liable to be abused in case of lack of accountability.[60]

The Schedule Caste and Schedule Tribes (Preservation of Atrocities) Act, 1989 when analysed through the lens of human right, is another important tool to protect the tribes from various atrocities.

54. Archana Prasad, "Survival at Stake" *Frontline* (2007), 4.
55. The doctrine provides that the State can acquire land belonging to private ownership for any public purpose; so long the existence of the public purpose can be proved beyond doubt.
56. Abhijeet Rawat and Udit Narayan, "Land Acquisition Issues in India: Overview, Critique and Pragmatic Suggestions" (2015) 9 NUALS Law Journal 56.
57. *Ibid.*
58. The Right to Fair Compensation and Transparency in Land Acquisition, Resettlement and Rehabilitation Act, 2013, S. 41.
59. *Ibid.*, Ss. 4-9.
60. K. Sukumaran, "The Saga of Land Acquisition" *The Hindu* (6-9-2013).

Lastly the Biological Diversity Act of 2002 is worth mentioning as it aims to protect the traditional knowledge inculcated by our indigenous population through the ages.

3. CONCLUSION - CRITICAL ANALYSIS

It is true that the concept of protecting the indigenous population came into picture only in the late 20th century with the advent of the "Third Generation of Human Rights". The adoption of UNDRIP[61] is a great achievement in deed though it was International Labour Organisation that acknowledged the need of protection in 50's. The indigenous peoples are special and they are not to be forced to get assimilated to the mainstream because then we will lose a special cultural and diverse part of our human heritage.

Coming to how India is ensuring the human rights of its mass scale of indigenous population, the first thing to note that though India has ratified the ILO Convention of 1957, it has not the amended Convention of 1989 which has done away with the "assimilative approach". It still has not adhered to the mandate of observing the "tribal's day".

Even the legislative measures adopted claiming to redress "the historic injustice" has become superfluous due to bad implementation.

The role of judiciary is also not without ambiguity because on one hand we have judgments like *Orissa Mining Corpn. Ltd.* v. *Ministry of Environment and Forests*[62] in which the court upheld the religious and forest rights of the tribal's as against bauxite mining permit and on the other, *Samatha* v. *State of A.P.*[63] which is also a landmark judgment that declared certain mining lease in the scheduled areas illegal.

Whereas we also have judgments like, *Narmada Bachao Andolan* v. *Union of India*[64] where the court in spite of various protest and consequent ill-effects upheld the validity of the construction of dam over river Narmada. Recently, in *Wildlife First* v. *Ministry of Forest and Environment*[65] the court ordered eviction of lakhs of forest dwellers as they were unable to show valid title deeds. It is a classic example of how a good law can be

61. United Nation Declaration on the Rights of Indigenous Peoples, 2007.
62. (2013) 6 SCC 476.
63. (1997) 8 SCC 191 : AIR 1997 SC 3297.
64. (2000) 10 SCC 664 : AIR 2000 SC 3751.
65. WP (C) No. 109 of 2008, order dated 12-9-2019 (SC) (Pending).

badly implemented, as in this case the court failed to see that how these traditional forest dwellers having no trace of education and knowledge regarding modern State Administration will have a legal document as they are residing in those lands for generations.

In the name of development we have already done much harm to the indigenous population. Their Collective Human Rights can only be ensured when sensitisation and awareness can be spread among the "civilised" population. A unique feature of human right is that it ensures right of dignified survival so does the Constitution of India. Thus protection of rights of indigenous peoples needs collective effort on the part of so called "civilised" people as well as the indigenous peoples.

NEED FOR PARADIGM SHIFT FOR GENDER NEUTRALITY & GENDER JUSTICE

Neha Jain & Sambhav Jain***

ABSTRACT

One is able to see many female-centric laws in the country for the improvement and protection of women in the country. The need for such laws came into existence due to the continuously deplorable plight of the women, in ancient patriarchal society. The prevailing societal conditions demanded special privileges to be given to the females. Provision for such enactments is expressly incorporated under Article 15(3) of the Constitution of India. However, in the present times, the situations have changed. There are rising instances of offences such as rapes against males and transgenders. Since these offences are traditionally against women, the laws also reflect this thinking due to which there is no protection provided to these new set of victims. Thus arises the need for gender-neutral laws which has Article 14 on its foundation and demands that all persons be placed on the same pedestal irrespective of the genders. This paper explores the background of gender-specific laws and elaborates on the changing circumstances. It then attempts to throw light on how gender neutrality in the laws and policies is the need of the hour so as to create a conducive environment from all persons, irrespective of gender differences. This paper advocates for real change in the way society impose and demarcate particular role to particular gender identity.

1. INTRODUCTION

Ever since the ancient times, there has been gender-based distinction. All tasks were demarcated into different compartments. It was the duty of the females to look after the household and bring up the children. Investing time, money and effort on education of females was considered to be a waste as their lives were confined to the four walls of their houses. They

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were at par with property that could be owned. On the other hand, the males were perceived as the breadearners of the household. They were supposed to do jobs and earn income for running the house. They were the masters or the head of the family and all the important decisions were taken by him.

However, with the passage of time, there has been a considerable change and shift in this ideology. The walls of division between the two genders have slowly collapsed/broken down. Earlier, any deviation from the established norm would be looked down upon. Now, it is acceptable for women to be gainfully employed, and for the men to stay at home and look after the kids. Women are no longer treated as the property of men, and the men do not have the burden of proving their "masculinity" in the traditional way. It can, thus, be said that the society is moving in the direction of gender neutrality.

Gender-neutral denotes a word or expression that cannot be taken to refer to one particular gender. This concept envisages a society free of any assumptions as to the gender of an individual. It prescribes to the idea that policies, social institutions and, most importantly, law should avoid the division of roles on the basis of the person's gender which in turn will significantly reduce the instances of sex-based discrimination. Therefore, this emphasises on the equal treatment of men and women in the social, economic and legal situation without any discrimination, which in turn will significantly reduce the instances of sex-based discrimination.

1.1. Constitutional Provisions Indicating Vision of Gender Neutrality

The Constitution of India incorporates several provisions specifically aimed at safeguarding the interests of women. However, on closer perusal, the vision of a gender-neutral society, as highlighted above, can also be witnessed in the provisions. Article 14 of the Constitution incorporates the equality principle which mandates the equal treatment of the equals. This equality is an objective test. It is not the test of intention[1]. It reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavour and every facet of human existence[2]. Article 15 specifically prohibits the discrimination "only" on the basis of religion, race, caste, sex or place of birth. Discrimination resulting on the basis of sex and

1. *M. Nagaraj* v. *Union of India*, (2006) 8 SCC 212.
2. *Navtej Singh Johar* v. *Union of India*, (2018) 1 SCC 791.

other considerations can no longer be held to be in a position supported by the intersectional understanding of how discrimination operates. This infuses Article 15 with true rigor to give it a complete constitutional dimension in prohibiting discrimination[3]. Article 21 guarantees the right to life and liberty. The horizons of this right have been broadened by various interpretations in the interest of the public. This right, therefore, recognises within its ambit the right to live with dignity and is guaranteed to all the human beings, irrespective of their sex and gender.

Therefore, the intent of recognition of a gender-neutral legal paradigm can be traced back to the time of framing of the Constitution itself. This leads one to believe that, consciously or subconsciously, the drafters of the Constitution aimed at moulding India into a gender-neutral society with the truth of all people being equal at its foundation.

2. BACKGROUND OF GENDER-SPECIFIC LAWS/ REINFORCEMENT OF GENDER STEREOTYPES

2.1. Patriarchal Society, Gender Identities and its Evolution

The word "patriarchy" literally means the *rule of the father or the "patriarch"*. Initially it was referred to describe "male-dominated family" where everyone was under the all-encompassing power of this dominant male. Now the concept of patriarchy is seen as power relationships in which men dominate women, which leads to systemic subordination of women in a number of ways, both in public and private spheres.[4] Origin of patriarchal institutions finds its foundation on the largely held traditional belief that men are born to dominate women. Aristotle in his "theories" called males active, and female passive. According to him female was "mutilated male", someone who does not have a soul. He ascribed his views on the basis that the biological inferiority of woman makes her inferior in her capacities also, her ability to reason and, therefore, her ability to make decisions. Because man is superior and woman inferior, he is born to rule and she to be ruled. He said "the courage of man is shown in commanding and of a woman in obeying."[5]

In India, dominance of males over other sexes is well entrenched in traditional, socio-cultural and religious rituals and practices. Ill practices

3. *Ibid.*
4. Abeda Sultana, "Patriarchy and Women's Subordination: A Theoretical Analysis" (The Arts Faculty Journal, 2010-2011) 2
5. Lerner, G., *The Creation of Patriarchy* (Oxford University Press: New York 1989).

like purdah, sati, female foeticide, etc. prevailed in the lives of women. "Manusmriti" placed women under dominance of men and propounded that women are duty bound to respect their husbands and worship them like almighty. Women were labelled as unfaithful and therefore men were advised to keep women under their control. In Indian patriarchal society, woman did not have her own separate identity; initially it was derived from her father, and then, after marriage, from her husband.[6]

Practice of various patriarchal institutions in ancient times has caused irreparable loss to women. It has been rightly stated by Justice K. Ramaswamy in *Madhu Kishwar* v. *State of Bihar* that

> *"Half of the Indian population too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination."*[7]

2.2. Women Empowerment and Gender Justice

Demand for equality got recognition and was widely accepted by the time the Constitution was drafted. Intergovernmental Commission on the Status on Women (CSW) met for the first time in 1947 to discuss implementation of the UN Charter at the time writing of the Indian Constitution was under way.[8] The Constitution makers were aware of the rising consensus for the demand of equality and sensitive to the atrocities faced by women in country and made special provisions for the upliftment of women. Many provisions were included in Penal Code, Criminal Procedure Code, Evidence Act for this reason and the legislature also enacted specific laws to deal with the offences that occur, for improving condition and protection of women, such as Dowry Prohibition Act, 1961, Protection of Women from Domestic Violence Act, 2005, Suppression of

6. Joshua Smith and Kristin Smith, "What it Means to do Gender Differently: Understanding Identity, Perceptions and Accomplishments in a Gendered World" (Humboldt Journal of Social Relations 2016) 64, 66.
7. (1996) 5 SCC 125.
8. Justice Manju Goel, "Gender Equality — Application of International Covenants in Domestic Spheres" (2004) 7 SCC J-23.

Immoral Traffic in Women and Girls Act, the Indecent Representation of Women (Prohibition) Act, 1986, etc.[9]

2.3. Judicial Intervention for Women

Although movement for gender equality in India is comparatively a delayed phenomenon, the women groups, aided by judicial activism, have been able to mobilise enormous pressure on the institutional establishments that promote archaic patriarchal ideas and belief system. Judiciary has played active role by purposively interpreting the laws for achieving the constitutional goal of equality. A set of stern guidelines framed by the Supreme Court in *Vishaka* v. *State of Rajasthan*[10] for preventing the cases of sexual harassment at workplaces is an epitome of judicial activism to secure just and equal society. The Court gathered feminist vision as an input for its reasoning from the Convention on Elimination of All Forms of Discrimination against Women, Directive Principles of State Policy, and under Article 15(3) of the Constitution.[11]

In the matter of protecting the interests of prostitutes, especially child prostitutes and children of prostitutes, K. Ramaswamy, J. in *Gaurav Jain*[12] for the Hon'ble Supreme Court observed that "The prostitute has always been an object and was never seen as complete human being with dignity of person; as if she had no needs of her own, individually or collectively." In *Delhi Domestic Working Women's Forum* v. *Union of India*[13], the Hon'ble Supreme Court, while examining the case of a domestic working woman who was raped, observed that the way police dealt with the victims often add to the humiliation and trauma. The Court held that the rape is an experience, which shakes the foundation of life of the victim. Its effect is long term and it permanently alters the behaviour and sense of belief of the victim. The human rights for women are, therefore, inalienable, integral and indivisible, and have equal footing with other gender groups. The full development of personality and fundamental freedoms require equal participation by women in political, social, economic and cultural life in true sense, for social and family stability and national development.

9. Ankita Yadav, "Understanding Effect of Globalisation and Gender Based Aspect of Acid Violence in India" (2015) 7 RMLNLUJ 170.
10. (1997) 6 SC 241.
11. Dr P. Ishwara Bhat, "Constitutional Feminism: An Overview" (2001) 2 SCC J-1.
12. *Gaurav Jain* v. *Union of India*, (1997) 8 SCC 114.
13. (1995) 1 SCC 14.

Therefore, in order to promote such participation female-centric provisions came into existence and were enacted.

3. CHANGING CIRCUMSTANCES IN THE MODERN ERA

As been discussed above, the status of women in the country was very low which resulted in rampant incidents of sati and widow burning throughout the country, especially in the rural and backward areas. With the passage of time and enactment of offence-specific laws, the number of such incidents did reduce. However, other offences such as cruelty, dowry deaths, acid attacks, sexual harassment and rape saw a monumental increase. Every day the newspapers are flooded with reports about such incidents, some, such as the Nirbhaya and the Kathua rape cases, being shockingly gruesome. Such incidents highlight the deplorable and continuously worsening condition of the morality and humanity of the society in general.

It was in the aftermath of such incidents that special provisions were enacted to curb these offences. Back in 1983, Section 498-A was inserted in the Penal Code, 1860, making the offence of cruelty against the woman by her husband and/or his relatives punishable, along with Section 113 of the Evidence Act, 1872, which deals with presumption as to abetment of suicide by a married woman. Section 304-B makes the offences of dowry death punishable and the burden of proof in such cases is on the defendants. The offence of rape is said to be committed by a man when he has sexual intercourse with a woman under circumstances falling under any of the six descriptions[14] mentioned in the sections. Furthermore, after the Nirbhaya rape case, the Government enacted the Criminal Law (Amendment) Act, 2013, which made a number of other offences punishable in order to protect the women, such stalking[15], voyeurism[16], and sexual harassment[17]. However, a careful perusal of these provisions leads one to the conclusion that these only protect the females/women.

It is pertinent to note that the aforementioned provisions, and more, are based on an assumption that only the females can be victims in such offences, thereby conveniently excluding the possibility of male victims. Due to the frenzy about women being victims to crimes, the assumption

14. Penal Code, 1860, S. 375.
15. Penal Code, 1860, S. 354-D.
16. Penal Code, 1860, S. 354-C.
17. Penal Code, 1860, S. 354-A.

is that only women get abused and that men are not abused and hence accused of such crimes[18].

Such gender-specific provisions make it difficult, if not impossible, for the male victims to even come forward to complain of the instances they have suffered, let alone get justice for the same. The scenario of male domination and crimes against women that once existed has now changed over the years and, at this point in time, gender-specific legislations are no longer serving the purpose for which they were enforced. They rather neglect and harm the other gender against whom false allegations and false cases are being framed. This happens simply because the laws that are in place today protect only the women against such crimes and does not equally protect the men bringing in the question of the violation of the principle of equal protection of all persons under law[19]. According to a 2010 survey, conducted by Economic Times-Synovate, "men are as vulnerable to sexual harassment as women" in India[20].

In addition to being victims of sexual assault and advances, the males have to face other challenges due to the social stigma and the general notion that only females are victims of such offences. About less than 1 in 10 male rapes are reported[21]. Even if the male victim finally gathers the courage to disclose the happenings, they are often met with ridicule. Their fight for justice is more difficult because of the prevailing social attitudes and stereotypes about men and masculinity[22]. Furthermore, in such situations, it is not necessary that the offenders are only males; they could also be females. Therefore, offences of sexual abuse cannot exclusively be

18. Rebecca Rajan, "Gender Equality and Gender Neutral Laws: The Future of Social Justice in India" (2011) Journal of Law Research 91-103 <http://ijlljs.in/wp-content/uploads/2017/12/Gender Equality and Gender Neutral Laws-The Future of Social Justice- Publication.pdf> accessed 16-6-2019.
19. Jaishankar, K. and Ronel, N., Third International Conference of the South Asian Society Criminology and Victimology (2016).
20. Devika Agarwal, "Vijay Nair Sexual Harassment Case: Rising Incidents against Men Emphasise Need for Gender-Neutral Laws in India" (Firstpost, 17-5-2017) <https:/49/www.firstpost.com/india/vijay-nair-sexual-harassment-case-rising-incidents-against-men-emphasise-need-for-gender-neutral-laws-in-india-3452286.html> accessed 16-6-2019.
21. Nicole Johnston, Male Rape Victims Left to Suffer in Silence (ABC.net.au 9 February 2001) <http://www.abc.net.au/worldtoday/stories/s244535.html> accessed 16-6-2019.
22. "Sexual Assault of Men and Boys" (Rainn) <https://www.rainn.org/articles/sexual-assault-men-and-boys> accessed 16-6-2019.

taken as a male-on-female offence[23]. Also, while most of the provisions in the Protection of Children from Sexual Offences Act are gender neutral with respect to the perpetrator, Section 3 (which criminalises "penetrative sexual assault") does not apprehend a female perpetrator.[24]

The situation is worse for the transgenders in the country. Hijras/ transgender persons who are neither male nor female still fall within the expression "person" and, hence, are entitled to legal protection of laws in all spheres of State activity[25]. Furthermore, Article 21 guarantees the protection of "personal autonomy" of the transgenders. This right includes the self-determination of the gender and self-expression[26]. This self-identified gender can be either male or female or a third gender. In the case of transgenders, they identify themselves as third gender, primarily due to lack of association with males and the lack of female genitalia and reproductive capacity.

Since the transgenders are recognised under the third gender, the binary notion of gender as reflected in the Penal Code, 1860, is insufficient to deal with the offences against LGBT community. Since times immemorial, the hijras or the transgenders have been a subject of constant ridicule and humiliation. The agonies suffered by them over the years are unimaginable[27]. A major breakthrough in the rights of transgenders was in *National Legal Services Authority* v. *Union of India*[28] which accorded formal and legal recognition to the category of third gender. However, the mere recognition of such category without subsequent amendments in the domestic legislation fail to fulfil the basic purpose with which the recognition was required to be given. As has been delineated above, the penal laws of the country follow a binary system of gender which completely neglects the third gender and shuns the possibility of them being victims. When they are not even considered as victims, their fight for justice seems impossible with no recourse.

23. *Sakshi* v. *Union of India*, (2004) 5 SCC 518.
24. Protection of Children from Sexual Offences (POCSO) Act, 2012, S. 3.
25. *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438. (hereinafter *NALSA)*.
26. *Ibid.*
27. *Ibid.*
28. *Ibid.*

3.1. Increase in Discrimination and Misuse of Provisions

The need for gender-neutral laws is being increasingly felt because of the increase in the incidents of male and transgender victims and the misuse of provisions, enacted for the protection of women, by the women. Instances of misuse are not a concept of modern society; this has been happening for years. Women not only put false allegations on the men or their husbands and his relatives, but also use such provisions as a means of threat to coerce the men and relatives into doing things according to her wishes.

The provision of Section 304-B was enacted to curb the rising instance of dowry death in the country. However, rampant misuse of this provision has been seen. It was seen that an estranged wife will go to any extent to rope in as many relations of the husband as possible in a desperate effort to salvage whatever remains of an estranged marriage[29]. Furthermore, in *Balbir Singh* v. *State of Punjab*, the Hon'ble Court observed that

> *"Though the amendments introduced in the Penal Code are with the laudable object or eradicating the evil of dowry, such provisions cannot be allowed to be misused by the parents and the relatives of a psychopath wife who may have chosen to end her life for reason which may be other than cruelty. The glaring reality cannot be ignored that the ugly trend of false implications in view to harass and blackmail an innocent spouse and his relatives is fast emerging."*[30]

Parliament enacted the Protection of Women from Domestic Violence Act in 2005 for empowering and protecting the women from instances of mental, physical and emotional abuse in their homes. This legislation is also inherently gender-specific and does not recognise male victims of domestic violence. Under this Act, an aggrieved person is defined specifically as a woman[31]. The Hon'ble Supreme Court, while discussing such cases, has time and again reiterated that most of the complaints are filed in the heat of the moment over trivial issues. Many of these complaints are not bona fide and at the time of filing of the complaint, implications and consequences are not visualised[32].

29. *Jasbir Kaur* v. *State of Haryana*, 1990 (2) RCR (Cri.) 243 (P&H).
30. *Balbir Singh* v. *State of Punjab*, (1987) 1 Crimes 76.
31. Protection of Women from Domestic Violence Act, 2005, S. 2(*a*).
32. *Rajesh Sharma* v. *State of U.P.*, (2018) 10 SCC 472.

As has been mentioned earlier, under Section 375 of the Penal Code, 1860, the offence of rape can be committed only by a man against a woman. All other instances such as rape by woman of woman, woman of man, man of man, or involving transgenders are not covered under the scope of this section. For such instances, charges are framed under offences of hurt and assault for which the punishments are considerably lower. Furthermore, many cases of rape are reported by women who have consensual physical relationship with a man but when the relationship ends for one reason or the other, the women use law as a weapon for getting their demands met or even coercing the man to get married to her[33]. This defeats the very purpose of enactment of provisions and the man has no recourse to any remedy. Such false cases make a mockery of the court and institution of marriage and also inflate the statistics of rape which further deprecates our own society[34].

From the aforementioned discussion, it is evident that the provisions, originally meant for the protection of the women, are being misused by them. The Delhi Commission of Women (DCW) has come out with startling statistics showing that 53.2% of the rape cases filed between April 2013 and July 2014 in the capital were found "false"[35]. The Hon'ble Supreme Court, in *Sushil Kumar Sharma* v. *Union of India*, observed that such provisions are intended to be used as a shield and not an assassin's weapon and termed it as "legal terrorism"[36]. These false allegations not only jeopardise the lives of innocent men but also cause hardships to their families. The men and transgenders are left with no option but to remain as silent victims since there are no adequate provisions for their protection.

In the chapter dealing with conclusions and recommendations, J.S. Verma Committee has categorically stated that, "Since the possibility of sexual assault on men, as well as homosexual, transgender and transsexual rape, is a reality, the provisions have to be cognizant of the same."[37] Furthermore,

33. *Rohit Chauhan* v. *State (NCT of Delhi)*, 2013 SCC OnLine Del 2106.
34. *Bhushan Lal Khanna* v. *State (NCT of Delhi)*, 2018 SCC OnLine Del 9787.
35. 53% Rape Cases filed between April 2013 and July 2013 False: Delhi Commission of Women (DNA, 4-10-2014) <https://www.dnaindia.com/india/report-53-rape-cases-filed-between-april-2013-and-july-2013-false-delhi-commission-of-women-2023334> accessed 17-6-2019.
36. *Sushil Kumar Sharma* v. *Union of India*, (2005) 6 SCC 281.
37. Justice J.S.Verma, Justice Leila Seth and Gopal Subramaniam, Report of the Committee on Amendments to Criminal Law (23-1-2013) <http://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> accessed 17-6-2019.

it was also stated that unless the recommendations given by them were implemented urgently, it would result in the entire exercise being futile. The Committee has clearly acknowledged the existence and prevalence of male, homosexual, transgender and transsexual rape and the need for reforms in this area. However, Parliament chose to ignore this suggestion and did not provide for the same in the Criminal Law (Amendment) Act, 2013.[38]

3.2. Feminism vis-à-vis Gender Neutrality

In the year 1997, a women's rights organisation, "Sakshi", approached the Hon'ble Supreme Court with concerns regarding Section 375 of the Penal Code, 1860 which deals with the offence of rape. The Hon'ble Court issued directions to the Law Commission to prepare a report on the rape laws in the country. In furtherance of this, the Law Commission submitted its 172nd Report in 2000. One of the suggestions incorporated under this report was that the laws should be made gender neutral.

However, many female rights organisations opposed this stating that such a step would be counterproductive and anti-feminist and that rape was essentially a gender-specific offence. Here, it is important to state that this argument given by the organisations leads one to believe that those who claim to be fighting for women rights themselves do not know the meaning of feminism. Feminism, in its truest form, envisages a society where there are equal rights given to the males and females. It started off as a revolution to demand suffrage for women and it expanded to demanding equal rights for women. Now, however, this concept seems to be distorted. Many women use this word as a mask to disguise their selfish motives. Filing false allegations of domestic violence, misusing provisions meant for their protection are classic examples of mutilation of this concept.

Feminism is a fight for equal rights in the world. It demands that the opportunities and rights be given not on the basis of one's gender or sex, but on the basis of capabilities. It believes that there is no superior gender and both males and females are on the same platform. Gender-neutral laws will only help the society in moving towards completion of the goals of true feminism; it will not be counterproductive as the organisations have

38. T.K. Rajalakshmi, "Piecemeal Approach" (*Frontline* 8-3-2013) <http://www.frontline.in/social-issues/general-issues/piecemeal-approach/article4431434.ece> accessed 17-6-2019.

claimed. Gender- neutral laws will provide for an equal platform to both, the males and females, for voicing their concerns and finding recourse to their problems.

4. NEED FOR PARADIGM SOCIO-CULTURAL SHIFT

The time is ripe to make our laws gender neutral for protecting all genders by rejecting defined tradition gender identities. The shift requires overhaul of how society perceives sexual offences as male-only crimes[39] and misperceptions that exist about the "ability" of women to sexually victimise males. Formulation of gender-neutral laws is not the only requirement instead the demand is to address the sociocultural influences that dictate gender stereotype trap. It is significant to understand that there exists a distinction between sex and gender.[40] Sex is connected with biology, whereas the gender identity of men and women in any given society is socially determined through historical and cultural beliefs. Gender covers a wider spectrum of emotions and expressions that are not merely physical, but also spiritual, emotional and sexual.[41]

Laws should not only redress the needs of male or female only but also should cater to the needs of other gender identities such as LGBTQ. Limited and narrow application of the law not only contradicts founding principle of liberal democracy but also defeats the true goal of our Constitution. Gender-neutral law shall not only provide equal chance, but also provide just order in society. Laws while acknowledging the vulnerabilities of all sexes should strive for structural regimes that do not reinforce prominence of gender identities and creates power relations. Policies should focus on tolerance of assimilation of powers of all gender groups together instead of adopting a gender-specific approach; as tolerance holds vital position in liberal and mature democracies.

39. "Female Sex Offenders" (2007) Center for Sex Offender Management <http://www.csom.org/pubs/female_sex_offenders_brief.pdf> accessed 17-6-2019.
40. Shri Sudhir Vedrma and Ms Kanchan Mathur, Gender and Development: Gender Sensitization of Administrative Personnel (New Delhi: National Commission for Women, 2001) 38.
41. Gyanendra Kumar Sharma, "Rights of Transsexual Genders, The New Emerging Field of Law: A Research Paper" Uttarakhand Judicial and Legal Review <http://ujala.uk.gov.in/files/ch6.pdf> accessed 17-6-2019.

4.1. Beyond the Binary: Need to Adopt Inclusive Approach

In modern society, the heterosexual gender binary continues to maintain social differentiation and generate governing legislation. Universal functionality of society is evident from policy formulation and operation of society which denies personhood and legal recognition that inhibit transgender persons from accessing basic rights necessary for participating in socio-political life.[42] In India, there has been a lapse on part of legislature to make strides in alleviating the problems beyond this binary. A study on the human rights violations against sexual minorities in 2001 recorded harrowing accounts of sexual violence, social ostracism, police atrocities and discrimination against transgenders.[43] As far as right to life and liberty[44] is concerned, sexual orientation lies at the core of "private space", is expressed through sexual relations and ought to be viewed as a core part of individual identity and as an inalienable component of the right to life.

Justice V.R. Krishna Iyer, in *Prem Shankar Shukla* v. *Delhi Admn.*,[45] observed that human dignity is concerned with both physical and psychological integrity and is essential for empowerment. He added that this dignity is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals. The Hon'ble Supreme Court held that the "right to dignity includes expressing oneself in diverse forms ... all of which is essential for the complete development and evolution of persons."[46]

The struggle for self-determination of the distinct identity is at the core of the *National Legal Services Authority* v. *Union of India*[47], noting the need to recognise gender identity and the right of equal protection as envisaged by Part III of the Constitution of India and to remove the social exclusion of the transgender community in society, the relevance of Article 14, in

42. Akshita Pandit, "(Trans)gressing the Binary: Coalitional Self-Determination for the 'Third Gender' Framework" (2018) Socio-Legal Review <http://www.sociolegalreview.com/wp-content/uploads/2018/05/Transgressing-the-Binary-Coalitional-Self-determination-for-the-%E2%80%98Third%E2%80%A8-Gender%E2%80%99-Framework.pdf> accessed 17-6-2019.
43. Human Rights Violations against Sexual Minorities in India, (PUCL-k, Bangalore 2001) 29.
44. Constitution of India, Art. 21.
45. (1980) 3 SCC 526 : AIR 1980 SC 1535.
46. *Francis Coralie Mullin* v. *UT of Delhi*, (1981) 1 SCC 608.
47. *NALSA* (n 25).

which the equality principle is enshrined, is magnified. The term "any person" mentioned in Article 14 clearly reflects the intend of the framers of the Constitution to adopt broad approach for extending its application to male, female and third gender identities; thereby demanding gender-neutral way in formulation and implementation of laws.

The Court further recognised the right to self-determination of gender identity of transgender persons as part of the fundamental right to freedom of speech and expression, the fundamental right to life and personal liberty, and the right to equality and freedom from discrimination.[48]

Currently, transgender persons face rampant stigmatisation and abysmal treatment at the behest of society, so the responsibility falls more on the society in ameliorating the prevailing condition and bringing them into mainstream.

The verdict in *Navtej Singh Johar* v. *Union of India*[49], decriminalising the draconian colonial era Section 377 of the Penal Code, and terming the provision violative of the fundamental rights guaranteed under the Constitution is beyond doubt a turn towards a new dawn. The Constitutional Bench although delivered a unanimous verdict declaring the provision as unconstitutional, adopted varied reasoning to reach the conclusion.

Justice Dipak Misra, also speaking for Justice Khanwilkar, based his reasoning on two aspects which include the freedom to self-determine one's identity ("*I am what I am, so take me as I am*") and the freedom to choose the partner. He remarked that "*The sustenance of identity is the filament of life. It is equivalent to authoring one's own life script where freedom broadens every day. Identity is equivalent to divinity*". Justice Chandrachud placed the focus on the effect of the provision and based his reasoning on the theory of indirect discrimination which is not concerned with prima facie discriminatory effect of the law, but with the discriminatory effects of neutral-clad laws. He remarked "*We must, as a society, ask searching questions to the forms and symbols of injustice. Unless we do that, we risk becoming the cause and not just the inheritors of an unjust society*". Justice Rohinton Fali Nariman relying on *National*

48. Dipika Jain, Gauri Pillai, Surabhi Shukla and Justin Jos, "Bureaucratization of Transgender Rights: Perspective from the Ground", 2018 Socio-Legal Review 98-142.
49. (2018) 1 SCC 791.

Legal Services Authority v. *Union of India*[50] and *K.S. Puttaswamy* v. *Union of India*[51] emphasised on the importance of the right to autonomy and privacy in intimate matters. Finally, Justice Indu Malhotra based her reasoning on the idea that punishment cannot be prescribed on that basis of sexual orientation as it is violative of the basic right such as, right to freedom of expression; right to equality; right to life and other rights arising from the same such as that of privacy. "*The members of this community were compelled to live a life full of fear of reprisal and persecution. This was on account of the ignorance of the majority to recognise that homosexuality is a completely natural condition, part of a range of human sexuality. The misapplication of this provision denied them the fundamental right to equality guaranteed by Article 14. It infringed the fundamental right to non-discrimination under Article 15, and the fundamental right to live a life of dignity and privacy guaranteed by Article 21.*"–she remarked.

5. CONCLUSION: TRANSFORMATIVE CONSTITUTIONALISM

In order to effectively combat with the emerging situations, the interpretation of the laws, especially the Constitution of India, needs to undergo a huge transformation. Most laws came into existence due to the prevailing conditions at the time of their enactment in the society. However, the society and the societal conditions keep on changing with time. For example, the Penal Code is a pre-independence statute which has continued to be in existence. This statute prescribes punishments in the form of fines for a number of offences. For the offence of voluntarily causing hurt on provocation, the maximum fine that can be imposed is of Rs 500[52]. This amount may have been a substantial fine during the period in which it was enacted. However, in today's time, Rs 500 does not seem like a fitting fine. This is just one example of the many which highlights the need for amendment and adaptation of provisions of law to suit the changing needs, situations, circumstances and society in general.

The Indian Constitution is marked by a transformative vision. Its transformative potential lies in recognising its supremacy over all bodies of law and practices that claim the continuation of a past which militates against its vision of a just society. At the heart of transformative

50. *NALSA* (n 25).
51. (2017) 10 SCC 1.
52. Penal Code, 1860, S. 334.

constitutionalism, is a recognition of change[53]. Law can no longer "go it alone" but must be illuminated in the interpretative process by sociology and allied fields of knowledge[54]. In the words of Friedmann, "it would be tragic if the law were so petrified as to be unable to respond to the unending challenge of evolutionary or revolutionary changes in society."[55] Therefore, it can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself to have its space[56].

The Constitution of the country, which is the grundnorm of all laws, is a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy. Its provisions can be comprehended only by a spacious, social science approach, not by pedantic, traditional legalism.[57] The Constitution is, therefore, a living instrument with capabilities of enormous dynamism. The Constitution can live and grow on the bedrock of constitutional morality[58]. It is always profitable to remember that a Constitution is "written in blood, rather than ink.[59]"

Further, it is the duty of the court to supply vitality, blood and flesh, to balance the competing rights by interpreting the principles, to the language and words in the Constitution[60] as well as the other laws, liberally and broadly. The Supreme Court as the vehicle of transforming the nation's life should respond to the nation's needs, interpret the law with pragmatism to further public welfare to make the constitutional animations a reality and interpret the laws broadly and liberally enabling the citizens to enjoy the rights[61]. In the past, the court has travelled on the path of transformative constitutionalism and, therefore, it is absolutely inappropriate to sit in a time machine to a different era where the machine moves on the path of regression[62]. The court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration[63].

53. *Indian Young Lawyers Assn.* v. *State of Kerala*, 2018 SCC OnLine SC 1690.
54. *State of Kerala* v. *N.M. Thomas*, (1976) 2 SCC 310.
55. *Law in a Changing Society* – W. Friedmann, p. 503.
56. *Joseph Shine* v. *Union of India*, (2019) 3 SCC 39.
57. *Ibid.*
58. *Manoj Narula* v. *Union of India*, (2014) 9 SCC 1.
59. *Ibid.*
60. *Ashok Kumar Gupta* v. *State of U.P.*, (1997) 5 SCC 201.
61. *Ibid.*
62. *Joseph Shine* (n 56).
63. *Ashok Kumar Gupta* (n 60).

The rights guaranteed under Part III of the Constitution have the common thread of individual dignity running through them. There is a degree of overlap in the articles of the Constitution which recognise fundamental human freedoms and they must be construed in the widest sense possible[64]. Therefore, one particular gender's rights cannot be construed as more important than the others. This does not mean that the Government and legislation should not make laws for the protection of women, but such laws should also recognise the possibility of need for protecting the other genders also, males and transgenders. In case such provisions do not exist, these laws become susceptible to misuse.

The recent case of Karan Oberoi indicates the misuse of the current rape laws. In this case, the actor was accused of rape for falsely promising marriage to a woman. This case witnesses the overturn of the basic principle of jurisprudence i.e. one is innocent until proven guilty. Furthermore, according to the National Crime Records Bureau, a total of 38,947 rape cases were reported in India in 2016 and in 10,068 cases — about a quarter — the women claimed it was rape on the false promise of marriage[65]. This is just one of the many cases that highlight the need for urgent change in the interpretations of law.

Further, such gender-specific laws, especially for grave offences such as rape and sexual harassment, often trivialise the offence they are there to protect. It gives the freedom to the women to commit such offences and then go scot-free. In addition to this there is the contribution of the society at large as well, since any report of a man being raped is not taken seriously. In such situations, it is often assumed that men are incapable of being victims of sexual abuse and assault. It is pertinent to note here that the offence of sexual abuse of assault completely destroys a person from inside, irrespective of whether that individual is a man or woman and this fact about such offence is often ignored. Even while identifying the victims of such incidents, a binary system of gender is followed where only the women can be victims and the men are the perpetrators, without considering the transgender victims or perpetrators.

In addition to enacting a gender-neutral system of law in the country, it is important to also educate the masses about the existing reality of beyond binary gender identities. Sensitisation towards an inclusive approach of

64. *Indian Young Lawyers Assn.*(n 53).
65. "Go Gender Neutral: Karan Oberoi Case Suggests How Current Rape Laws can be Gamed" *The Times of India* (India, 21-6-2019).

acceptance rather than making the victim feel isolated should be focused in making India a conducive and safe environment for welfare of all persons irrespective of genders[66].

It is pertinent to note that while advocating for gender-neutral legal paradigm shift, this paper is not undermining the harsh reality of offences against women and need for building economic ability vis-à-vis other genders. This paper wants to say that, in this ever-changing and dynamic world, one just needs to develop mutual empathy for every person. It is certainly very important to realise that crime has no specific gender and everyone should be protected against it and prevented from indulging in any criminal activity[67]. It is about time we, as a society, stop asking the men to "Man up" and start talking instead.

66. Constitution of India, Art. 39.
67. Avrati Srivastava, "Gender-Neutral Indian Penal Code: Way for a Gender-Just Society" (2011) Legal Service India <http://www.legalservicesindia.com/article/2011/Gender-neutral-Indian-Penal-Code.html> accessed 21-6-2019.

INSENSITIVITY OF JUDICIARY IN RAPE CASES: MARRIAGE HELPING IN ACQUITTALS

Navya Singh[*]

ABSTRACT

In the Indian society, women's rights have consistently been endangered due to socio-cultural perspective which engulfed it. Thereby, anticipating that pre-dominant role is required to be taken up by the justice dispensary system in safeguarding women's rights. Rape, one of the sexual offences against women violates human rights every time it is transpired. Judiciary has bestowed greater responsibility to act with sensitivity by imposing appropriate punishment in rape cases, considering physical and mental trauma which the victim has undergone. Furthermore, it has the duty of not manifesting stereotypical attitudes while dealing with sexual offences, considering patriarchal, conservative, and orthodox which India is.

The author, through this paper has tried to analyse that how acquitting the accused in rape cases, merely due to him entering into wedlock with victim, manifests stark insensitivity of the High Courts while handling rape cases. Courts, which have been bestowed with the duty of guarding women's rights have failed in analysing not only what led the victim to take such liberal approach towards the accused but also the genuineness of the accused in marrying the victim, as it could be a deceptive step to get way from judicial proceedings rather than ensuring better life to the victim, violating the basic human rights of the victim besides jeopardising society's interests.

1. INTRODUCTION

> *"Raping a woman is more heinous crime than murder as it reduces a woman to a state of living corpse."*[1]
>
> *—L.K. Advani, Ex-Union Home Minister*

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1. K.I. Vibhute, "Victims of Rape and their Right to Live with Human Dignity and to be Compensated: Legislative and Judicial Responses in India" (1999) Journal of the Indian Law Institute 222.

Rape, one of the most heinous crimes of aggression causes not only severe physical harm but also emotional crisis by obliterating the entire psychology of a woman. The Indian Constitution under Article 21 has guaranteed "protection of life and personal dignity." Although, these fundamental rights have repeatedly been denied not only when a woman is raped but also when justice is denied to her.

The prominent novelist, Nora Ephron has appropriately quoted "Above all, be the heroine of your life, not the victim."[2] This quote has exemplified the status of women in India. In present context, India's law enforcement institutions have failed in handling cases of rape. This can be demonstrated by the report of National Crime Records Bureau published in 2016, where India recorded 106 rape cases a day.[3] Although, a large number of rape cases remain unreported largely due to lack of education, deplorable conviction rate, fear of police harassment and rape committed by perpetrator, who is the victim's spouse.

The Supreme Court in *Bodhisattwa Gautam* v. *Subhra Chakraborty*[4], *has asserted that "rape is a crime against basic human rights." Furthermore, Article 4 of 1993 Declaration on the Elimination of Violence against Women requires India, a contracting party to safeguard women against sexual violence and ensure that secondary victimisation* of women does not transpire due to lack of law enforcement practices or other interventions.[5] However, in India which has deep prejudices towards women's sexual rights, laws safeguarding rape victims have merely ended up with highly moralistic and protectionist pieces of legislations.[6]

Judiciary sporadically exhibits lack of will to get justice for rape victims mainly due to deeply entrenched misogyny and patriarchy. Indeed, this is proven by stereotype, which has been manifested by Delhi High Court in *Mahmood Farooqui* v. *State (NCT of Delhi)*[7], where it affirmed that in rape

2. Jane Shilling, "Nora Ephron: The Heroine of Her Life, Not the Victim" (*The Telegraph*, 27-6-2012). <https://www.telegraph.co.uk/culture/film/9359536/Nora-Ephron-The-heroine-of-her-life-not-the-victim.html> accessed 20-6-2019.
3. National Crime Records Bureau, Crime in India Report for 2016, <http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20%202016%20Complete%20PDF%20291117.pdf> accessed 20-6-2019.
4. (1996) 1 SCC 490.
5. UNGA Res. 48/104 (20 December 1993) UN Doc. A/RES/*48/104*.
6. Siddharth Narrain, "For an Effective Law on Rape" (*Frontline*) <https://frontline.thehindu.com/static/html/fl2023/stories/20031121003109700.htm> accessed 22-6-2019.
7. 2017 SCC OnLine Del 6378.

cases "*sometimes a feeble no, means yes*". Hence, manifesting dominance of social, cultural and sexism norms which have been embedded in justice dispensary system, thereby, opening windows for more laws but hardly more justice. This article will seek to understand the apathy which existed within Indian judicial system towards rape victims.

2. ACQUITTAL AFTER MARRYING VICTIM: INSENSTIVITY BY HIGH COURTS

One of the primary objectives of criminal law is imposition of just, proportionate, adequate and appropriate sentence.[8] As imposition of lesser sentence will be deleterious to justice system besides shaking the confidence of victims, thereby, settling disputes out of courts, which usually leads to the failure in attainment of justice. Therefore, court which is a sole repository of justice should uphold the rule of law,[9] by not letting guilty person to go unpunished, as their acquittal will multiply the occurrences of such crimes in our society.

2.1. Supreme Court: No liberal approach

In the judgment of *Shimbhu* v. *State of Haryana*[10], Supreme Court held that, rape should be considered an offence against the society and in no circumstances it should be left for parties to compromise and settle by entering into a wedlock with each other. Since, it is not always viable for courts to reach a satisfaction that the consent for compromise was deliberately given by victim.

Therefore, in order to circumvent unnecessary harassment/pressure to the victim and to ensure justice, courts must not exercise discretionary power under Article 376 on the ground of compromise reached between the parties. Legislature through Criminal Law (Amendment) Act, 2013 has deleted this provision due to expansion of crimes against women.

Moreover, compromise reached by parties must not act as special factor in lessening the sentence prescribed by statute, as courts need to exhibit sensitivity in prescribing proportionate punishment, thereby manifesting that no liberal approach must be taken while handling rape cases.

8. *Alister Anthony Pareira* v. *State of Maharashtra*, (2012) 2 SCC 648.
9. *Hardeep Singh* v. *State of Punjab*, (2014) 3 SCC 92.
10. (2014) 13 SCC 318.

Additionally, in *Gian Singh* v. *State of Punjab*[11], Supreme Court asserted that High Court while exercising its inherent powers under Article 482, must refrain from quashing criminal proceedings, if the offence is serious or grievous in nature or when the public interest is involved. Hence, abstaining High Courts from quashing criminal proceedings in rape cases.

2.2. High Courts: Stark insensitivity in rape cases

Several High Courts have been quashing criminal proceedings in rape cases despite judgments of Supreme Court in the abovementioned context, on the ground that all disputes have amicably been settled by them and accused has entered into wedlock with the victim for predominant purpose for ensuring her better life.

Kerala High Court had itself quashed at least 10 cases in 2019,[12] all by relying to *Freddy* v. *State of Kerala*[13] judgment, where the High Court asserted that when parties started sharing relationship of husband and wife, there exists no ground for contending that dignity of rape victim has been violated by promiscuous act of the accused. Furthermore, it was declared that once both the parties have entered into conjugal bond, it is erroneous to say that the offence has consequential influence on society.

However, the court had failed in taking into consideration that, not only victim's dignity which is violated with the commission of rape but also her physiological process which can barely be recuperated.

2.3. Lack of due diligence

In the landmark judgment of *State of Punjab* v. *Gurmit Singh*[14], Supreme Court held that while dealing with charges of rape, the courts must deal with utmost sensitivity and bestow a great responsibility which they are obligated to, while trying the accused of charges. Hence, manifesting the need to exercise due diligence while handling heinous crimes like rape.

11. (2012) 10 SCC 303.
12. Live Law News Network, "Rape Cases can be Quashed When Accused Married the Victim: Kerala HC" (*Live Law*, 25-5-2019) <https://www.livelaw.in/news-updates/kerala-hc-quashes-rape-case-as-accused-married-victim-145273> accessed 20-7-2019
13. 2017 SCC OnLine Ker 6637 : (2018) 1 KLD 558.
14. (1996) 2 SCC 384.

Further, India, which is a contracting party of the Convention on the Elimination of All Forms of Discrimination against Women, mentions that *due diligence* needs to be exercised in order to prevent violation of rights and punish the acts of violence.[15] While it has also been observed by Inter-American Court of Human Rights in *Maria da Penha* v. *Brazil*[16], *where it was held that State had failed in exercising due diligence, when no punishment was inflicted on perpetrator for several years, who had committed domestic violence. In present scenario, High Courts have manifested negligence* and *lack of effectiveness* in conviction[17] by acquitting person accused of rape in cases where he married the victim.

2.4. Gender inequality

In the words of the Indian ex-Prime Minister, Dr Manmohan Singh "no nation, no society, no community can hold its head high and claim to be part of the civilised world if it condones the practice of discrimination against one half of humanity represented by women".[18] Indian Constitution has recognised gender balance as its basic structure.[19] However, since time immemorial discrimination against women has been prevalent in our society. It can be highlighted by last year's #MeToo movement wherein the Indian women spoke out their experiences about sexual harassment and assault.[20] Even though the moment has spread merely in urban areas, it manifested deep defeat in the achievement of "gender"-neutral State.

This gender inequality can also be demonstrated among Judges in the High Courts, as women constitute barely 7% of the total strength of all Judges in the 25 High Courts, manifesting, why the High Courts had

15. UN Committee for the Elimination of All Forms of Discrimination against Women, "General Recommendation No 19" in "Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies" (2003) UN Doc. HRI/GEN/1/Rev.6.
16. *Maria da Penha Maia Fernandes v. Brazil,* (2001) 22 *IACHR, Report* on the Merits *No. 54/01, Case No. 12.051.*
17. *A.T.* v. *Hungary* (January 26, 2005) *Communication No. 2/2003 UN Doc.* CEDAW/C/32/D/2/2003.
18. Amelia Gentleman, "Indian Prime Minister Denounces Abortion of Females" (*The New York Times*,29-4-2008) <http://www.nytimes.com/2008/04/29/world/asia/29india.html?_r=0> accessed 20-7-2019.
19. *Suo Moto* v. *State of Rajasthan*, 2005 SCC OnLine Raj 658 : (2005) 4 WLC 163.
20. Abhrey Roy, "2018: The Year When #Me Too Shook India" (*The Economic Times*, 1-6-2019). <https://economictimes.indiatimes.com/magazines/panache/2018-the-year-when-metoo-shook-india/2018-the-year-of-metoo-in-india/slideshow/66346583.cms> accessed 20-7-2019

been demonstrating stark insensitivity in dealing with rape cases.[21] Therefore, every time a Judge quashes a criminal proceeding against a person accused of rape on irrational grounds, this androcentric society fails in considering unsurpassable trauma which has been inflicted upon the victim.

Consequently, in India, where there exists a deeply rooted patriarchy, women face miserable difficulties in coming forward with such heinous crime committed against her. Exonerating the accused merely because he marries the victim is more extenuating *putting a pressure in adroit manner.*[22] *Further, judicial system instead of acting as a machinery to reduce sexual violence against women in India, could persuade more such crimes in future. As, acquitting the accused would give message to him as well as persons like him, roaming in society to indulge in such heinous crime, as they would go unpunished*[23]*, furthermore, shaking the confidence of rape victims in justice dispensary system.*

3. WHY VICTIM DECIDES TO MARRY THE ACCUSED?

In an androcentric society like India, where women make 48.5% of India's population, there still exists high probability of woman not taking decisions for herself even though they make 48.5% of India's population.[24] One of the illustrations is, women constantly being made to accept contradictory roles which include nurturing roles of daughter, mothers, wives and daughter-in-law and stereotypical roles of fragile women.[25]

Women who are being raped mainly desire that rapist must be inflicted severe punishment for manifesting brutality, which suffocated the breath of her life. As rape not only harms the victim physically but also tarnishes her soul. *Therefore, the discretion of marrying their rapist would pose a question as to what leads a victim to take such a liberal approach.*

21. Ashutosh Sharma, "Women Account for 7 Percent of Judges in 25 High Courts: Government Tells Lok Sabha" (*National Herald*, 7-2-2019) <https://www.nationalheraldindia.com/india/women-account-for-7-percent-of-judges-in-25-high-courts-government-tells-lok-sabha> accessed 20-7-2019.
22. *State of M.P.* v. *Madanlal*, (2015) 7 SCC 681.
23. *State of U.P.* v. *Babu*, 2007 SCC OnLine All 1723 : (2007) 9 ADJ 107
24. World Economic Forum, The Global Gender Gap Report 2017 (2017).
25. Indira Sharma and others, "Hinduism, Marriage and Mental Illness", (2013) Indian Journal of Psychiatry 55(Suppl 2): S243–S249, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3705690/> accessed 20-7-2019.

3.1. Lack of Fair and Speedy Trial

3.1.a. *Fair Investigation*

Indian Constitution under Article 21 renders fair trial as a part of right to life and personal liberty. The Supreme Court in *Rattiram* v. *State of M.P.*[26] mentions, fair trial as a heart of criminal jurisprudence. Every time fair trial is denied human rights are violated. It includes fair investigation, thereby obligating investigating agencies not to conduct investigation in biased manner.[27]

Therefore, every time police instead of searching the evidence to prevent the miscarriage of justice, harass the victim by questioning her integrity in cases like rape, their intolerant attitude can be manifested, hence highlighting unfairness within law enforcement agencies.

3.1.b. *Speedy trial*

Furthermore, in the landmark judgment of *Hussainara Khatoon* v. *State of Bihar*[28]*, Supreme Court held that speedy trial is an essence of criminal justice, as delay of justice is gross denial of justice. It was recognised as an essential ingredient of Article 21 of the Constitution of India. In cases like rape, High Courts must accord first priority in appeal and it should be wrapped within six months.*[29] *However, there have been delays while dispensing these heinous offences.*[30]

Therefore, not having fair investigation and speedy trial would ultimately loosen up the confidence of rape victims in justice dispensary system. Thereby, victims are induced to take such a precarious decision of marrying a rapist, with belief that, it is only a way to cease trauma which she has undergone for several years. Despite, considering additional burden this discretion could impose upon her.

26. (2012) 4 SCC 516.
27. *Nirmal Singh Kahlon* v. *State of Punjab*, (2009) 1 SCC 441.
28. *(1980) 1 SCC 98.*
29. *Salem Advocate Bar Assn.* v. *Union of India*, (2005) 6 SCC 344.
30. "Union Minister Demand Speedy Trial in 'rape' case" (*The Hindu*, 18-10-2016) <https://www.thehindu.com/news/national/other-states/Union-Ministers-demand-speedy-trial-in-%E2%80%98rape%E2%80%99-case/article14402270.ece#> accessed 20-7-2019.

3.2. Societal Pressure

The patriarchal values which have been entrenched upon Indian society, plays a paramount role in decision-making. Patriarchy has been defined as "*a system of social structures and practices in which men dominate, oppress and exploit women*".[31] In society like India where patriarchy existed, lives of women are most difficult[32] as they are being kept subordinate in number of ways. Even though, the Supreme Court passed judgment safeguarding sexual autonomy of women but societal norms are arduous to alter, as they have been deeply enrooted in minds of people. In present context there still exists glaring gender inequality in India. As per UN gender inequality index, India ranks 127th out of 160 countries, manifesting inequality existing between men and women on the basis of empowerment, reproductive health, market participation, etc.[33]

Therefore, discretion regarding whether woman who is being raped should enter into a conjugal bond with rapist is ordinarily rendered by "male" member of the family, as women are being treated as "personal property".[34] This discretion bestowed by "male" member is majorly dominated by analysing, whether this step could circumvent the shame woman brought to the family or will it amend the societal perceptions which have been vitiated due to this dreadful incident, not considering mental injuries which have been inflicted upon her. Hence, there could be pressurisation created by "male" family member or the accused upon rape victim.

3.3. Media Trial

In today's globalised world the role of the media has enhanced and this enhancement has aptly put into words by Justice Learned Hand of the United States Supreme Court, when he stated that "*The hand that rules the press, the radio, the screen and the far spread magazine, rules the country.*"[35] Media which plays a pertinent role in democratic society is

31. Sylvia Walby, *Theorizing Patriarchy*, (Basil Blackwell, Oxford, London, 2009).
32. Allan G. Johnson, *The Gender Knot: Unraveling Our Patriarchal Legacy* (Temple University Press, 1997).
33. "India Ranks 130 on 2018 Human Development Index" (United Nations in India, 14-9-2018) <https://in.one.un.org/un-press-release/india-ranks-130-2018-human-development-index/> accessed 20-6-2019.
34. Johnson (n 32).
35. Pranav Khaushal, "Journalistic Ethics (Media Trials)" (Law Corner, 17-3-2019) <https://lawcorner.in/journalistic-ethics-media-trials/> accessed 20-6-2019.

being safeguarded under Article 19(1)(*a*) but that does not bestow liberty to infringe individual fundamental rights under Article 21 of Indian Constitution, which safeguards "right to live with dignity and privacy".

The disclosure of rape victim's name or *any information which has the potential of disclosing her identity* by printing or publishing is considered to be a criminal offence under sub-section (*i*) of Section 228-A, punishable for a term which may extend to two years[36]. Although, there exists certain exceptions regarding the same but media's disclosure is not one of them.

However, media which has globalised impact has ordinarily sensationalised rape cases and disclose the name and identity of rape victims in order to increase television rate policy (TRP). Indeed, this is proven in Nirbhaya's case where media has revealed rape victim's photograph, the vicinity of her residence in South West Delhi and also aired television programme where victim's mother had revealed her name.[37] Further, there was an instance where footage had been displayed by media, blurring victim's face but disclosing the faces of her relatives, neighbours, and name of the village.[38] Thus, manifesting, how laws safeguarding the identity of victim exist only in name.

Moreover, the disclosure would also precipitate her agony as she has to bore discrimination and social ostracisation in society.[39] Therefore, discretion of marrying rapist is taken not to initiate or to shun the media publicity, which has potential of making her life more formidable by treating her like pariah.

4. DECISION OF ACQUITTAL: VIOLATES VICTIM'S HUMAN RIGHTS

In 1993, the United Nations of World Conference on Human Rights adopted Vienna Declaration and Programme of Action, which was considered as turning point in women's human rights movement.[40] As, it paved the way for integration of women rights in human rights norms.

36. Gaurav Vivek Bhatnagar, "Disclosing the Identity of Rape Victims Remains a Grey Area in the Justice System" (The Wire, 28-7-2016) <https://thewire.in/law/identity-of-rape-victims> accessed 20-6-2019.
37. *Ibid.*
38. *Nipun Saxena* v. *Union of India*, (2019) 2 SCC 703 : 2018 *SCC* OnLine *SC* 2772.
39. *Bhupinder Sharma* v. *State of H.P.*, (2003) 8 SCC 551.
40. UN News Center, "Women 2000: Sexual Violence and Armed Conflict: United Nations Response" (UN Women, April 1, 1998) <https://drive.wps.com/d/AEfmWh2SnfArwZKpvo2dFA> accessed 22-7-2019.

Women rights have got recognition starting with United Nations Charter Universal Declaration of Human Rights to Convention on the Elimination of All Forms of Discrimination against Women .

Further, in India justice dispensary system has sought to safeguard basic human rights of women in society, especially driven by patriarchy.[41] This is manifested by several landmark judgments declared by Supreme Court, safeguarding rights of women which include abolishment of tripe talaq, preserving the autonomy of women by declaring adultery as unconstitutional. However, the court has not invariably kept its prominent role in guarding women's rights. One of the illustrations is demonstrated in the discretion of Punjab and Haryana High Court in 2017, where rapists were granted bail in gang rape case, by asserting that victim had "*promiscuous attitude and voyeuristic mind*".[42] Thus, it was considered as a compelling reason to decide in favour of accused.[43] This section will highlight which human rights of rape victims are violated, when justice is denied to her, by the discretion of acquitting accused of rape cases after he married the victim.

4.1. Right to live with dignity

4.1.a. *Indian Law*

The constitutional mandate under Article 21 safeguards right to life and liberty of persons. This personal liberty also includes right to live with dignity.[44] However, this fundamental right is violated every time a woman is raped and justice is denied to her. As per landmark judgment of *Railway Board* v. *Chandrima Das*[45], Supreme Court held that, "rape is a violation of a woman's constitutional right to life with dignity as well as a violation of the Universal Declaration of Human Rights".

41. Bharat H. Desai and others, "Quest for Women's Right to Bodily Integrity: Reflection on Recent Judicial Inroads in India" (2018) Economic and Political Weekly 53.
42. HT Correspondent, "HC sees 'Promiscuity, Voyeurism' in Sonepat Rape Victim's Allegations, Grants Bail to Accused" (*Hindustan Times*, 22-9-2017) <https://www.hindustantimes.com/punjab/hc-sees-promiscuity-voyeurism-in-sonepat-rape-victim-s-allegations-grants-bail-to-convicted-students/story-jAJRQyvcJKX405UVqtqsiN.html> accessed 20-7-2019.
43. *Vikas Garg* v. *State of Haryana*, 2017 SCC OnLine P&H 2806.
44. *D.K. Basu* v. *State of W.B.*, (1997) 1 SCC 416.
45. (2000) 2 SCC 465.

Additionally, in *K.S. Puttaswamy* v. *Union of India*[46], *Supreme Court held that the "use of person's body without his/her consent invades personal privacy which is essential for maintenance of human dignity". Rape strips the victim of her dignity through trespassing the body without her consent and hurts in a more intimate way. Moreover, the act of subjugation makes it non-viable for victims to exercise physical integrity and therefore their sexual autonomy, which is their inviolable right.*[47]

4.1.b. *International law*

Right to live with dignity, liberty and security has been stipulated in the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. Furthermore, the Committee on the Elimination of Discrimination against Women also recommended that India must respect women integrity and dignity.[48] As mentioned in *Prosecutor* v. *Delalic*[49], *the core of human dignity and physical integrity of an individual get stuck away, every time rape is committed.*

It is paramount to condemn violence against the women through punishing and redressing the wrongs caused to them.[50] *In M.C.* v. *Bulgaria*[51], *the European Court of Human Rights noted that there exists a risk of leaving certain types of rapes unpunished, because it can endanger the effective protection guaranteed to sexual autonomy of persons. However, Indian judicial system has manifested abject failure in punishing rapists due to stereotypical tendencies which have been manifested in their several judgments.*

46. (2017) 10 SCC 1.
47. *Ibid.*
48. UN Committee for the Elimination of All Forms of Discrimination against Women, "General Recommendation No. 19" in "Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies" (2003) UN Doc. HRI/GEN/1/Rev.6.
49. *Delalic case* (Judgment) Case No. IT-96-21-T (16-11-1998).
50. UN Committee for the Elimination of All Forms of Discrimination against Women, "General Recommendation No. 19" in "Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies" (2003) UN Doc. HRI/GEN/1/Rev.6.
51. (2005) 40 *EHRR* 20.

4.2. Right against Torture

4.2.a. *Indian Law*

In landmark judgment of *D.K. Basu* v. *State of W.B.*[52], *Supreme Court held that any form of torture of cruel, inhuman or degrading treatment would fall within the inhibition of Article 21 of Constitution of India. As quoted by Adriana P. Bartow, "torture is a wound in the soul so painful that sometimes you can almost touch it, but it is also such intangible that there is no way to heal it".*[53] *Every time a woman is raped, grave violation of human right takes place. As, torture inflicted on her destroys the self and very foundation of stability*[54] *Therefore, in entire life she could be haunted by the recurrence of event, foreboding her to live a normal life. Offences like rape require an exemplary treatment without taking into liberal attitude*[55] *because when a woman is raped it is not only physical injury which is imposed upon her but also a deep sense of deathless damage, which is strenuous to be recovered.*

4.2.b. *International law*

Rape constitutes torture[56], as it is best understood to be as a way to demonstrate the male domination which has been prevalent in society since time immemorial and powerlessness of victims.[57] It leaves a physiological scar on victim which does not respond to the passage of time as rapidly as other forms of mental and physical violence. [58]

International Covenant on Civil and Political Rights under Article 7 includes prohibition of torture and other cruel, inhuman or degrading treatment[59], with the aim of safeguarding individual's dignity and physical and mental integrity.[60] Thereby, it manifests a duty on India to "safeguard

52. *Basu* (n 44).
53. *Ibid.*
54. A.S. Anand, J., "VIIIth International Symposium on Torture", (1999) 7 SCC J-10.
55. *State of M.P.* v. *Ghanshyam Singh*, (2003) 8 SCC 13.
56. UNCHR "Report of the Special Rapporteur on Torture" (1986) UN Doc. E/CN.4/1986/15.
57. UNCHR "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (2005) UN Doc. E/CN.4/2006/6/Add.3.
58. *Aydin* v. *Turkey*, (1998) 25 *EHRR* 251.
59. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March (1976) 999 UNTS 171 (ICCPR).
60. UNCHR "General Comment 20" in "Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies" (1992) UN Doc. HRI/GEN/1/Rev.7.

everyone through legislative and other measures as may be necessary against the acts prohibited by Article 7".[61] Furthermore, Universal Declaration of Human Rights has also stipulated prohibition of torture.[62]

In *Hajrizi Dzemajl* v. *Yugoslavia*[63], it was mentioned that lack of action by law enforcement officials to prevent torture constituted "*acquiciense*" under in the sense of Article 16, which prohibits cruel, inhuman or degrading treatment. As allowing torture to go unpunished, encourage to its repetition.[64]

Therefore, Indian courts, acting as machinery for dispensation of justice must not quash the criminal proceedings merely because accused and rape victim has entered into wedlock, considering the gravity and seriousness of an offence as, rape prompts both physical and physiological suffering, which is particularly severe and long lasting.

5. CONCLUSION

In India, there exists a deep prejudice against sexual rights of women. This can be manifested by paramount question, why the penal provisions of rape and other sexual offences are encircled around whether the woman has consented or not, instead of mainly focusing upon the *severity* of crime and *sincerity* in imposing punishment to the convicted person of such heinous crimes.

Furthermore, courts which have bestowed the duty of imposing appropriate punishment in order to reflect public abhorrence for the crime, has failed in its responsibility. Indeed, this is proven by discretion of High Courts regarding acquittal of accused in cases like rape merely due to him entering into marital relationship with the victim, thus, having potential to make lives of women including victim more vulnerable in a society like India. Moreover, the assertion of better life for victims given by High Courts while delivering judgment is fallacious, as there exists no way to ascertain that accused person has developed deterrence towards the crime or has been reformed. Therefore, it manifests probability of marital rape

61. *Ibid*
62. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art. 5.
63. Communication No. 161/1999 (2-12-2002) UN Doc. CAT/C/29/D/161/2000.
64. *Kepa Urra Guridi* v. *Spain* (17-5-2005) Communication No. 212/2002, UN Doc. CAT/C/34/D/212/2002.

which could be committed against victim. It refers to rape committed when perpetrator is victim's spouse.[65]

In India, law does not criminalise marital rape on the basis of assertion that, there should not be interference of criminal law in martial relationship of husband and wife leading to intensification of pain and physiological suffering of victims, which are non-viable to be recuperated. Therefore, there exists an urgent need to take stringent actions against crimes like rape in India. Furthermore, there exists need for widening the scope of laws regulating rape cases, which could both be in victim's as well as society's interest.

As, observed in *Prosecutor* v. *Jean-Paul Akayesu*, broad definition of rape has been adopted, "any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[66] Manifesting that laws regulating rape should not merely be encircled around penetration or physical contact and look beyond the domains to ascertain that no individuals whose rights are violated being neglected.

In order to ascertain that rights of rape victims are not violated both legislature and judiciary must act diligently. *Firstly*, courts instead of exercising its broad discretionary powers must act in consonance of law which governed rape cases. Exercising broad discretionary could harm rape victims due to India being conservative, patriarchal and orthodox society. *Secondly*, there exists a requirement of change in the mindset of legislators. As, laws need to be volatile with change in society. One of the illustrations is, an urgent requirement of law criminalising marital rape in India in order to attain equality and autonomy to married women.

Also, there exists a desire to have a society, where women are not blamed for sexual offences committed against her. Further, there must be adequate laws dealing with women, who are being victimised of such offences and adequate punishment which can manifest deterrence towards such crimes. Consequently, creating a society where women can exercise sexual autonomy and walk free without any fear.

65. Raveena Rao Kallakuru and Pradyumna Soni, "Criminalisation of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact" (2018) 11 NUJS Law Review 121.
66. *Akayesu case* (Judgment) Case No. ICTR-96-4-T (2-9-1998).

CASE COMMENT

TRANSGENDER JURISPRUDENCE – NALSA AND BEYOND

*Kumar Satyam**

ABSTRACT

The idea that a transgender body is a deviation or perversion is based on the presumption of a hetero-normative endpoint. National Legal Services Authority v. Union of India is considered as a significant development in challenging this presumption and in the legal recognition of gender variant and gender non-conforming individuals as subjects of citizenship and rights. Although the judgment seems as a breakthrough in dismantling the exclusionist approach of the sex/gender binary, I argue that the Judges seem to oscillate between the wide and narrow interpretations of the "transgender" category, and between gender self-identification and biological essentialism. The article, further, seeks to foster a more informed climate for further discussion and pursuit of transgender justice, bringing the phenomenon of dehumanisation to the forefront and illuminating the perilous condition the current state of the law creates for transgender persons despite the doctrinal infrastructure already put in place through the decision in National Legal Services Authority v. Union of India.

1. INTRODUCTION

Kant defines law as a "set of conditions under which the choices of each person can be united with the choices of others under a universal law of freedom.[1] The concept of law, autonomy and self-determination are intricately interwoven and gives expression to the idea that we can lead our lives rather than suffer them.[2] The very conception of one as a

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1. Immanuel Kant, *Metaphysical Elements of Justice: Part I of the Metaphysics of Morals*, (John Ladd translated, 2nd edn., Hackett Publishing Company 1999).
2. Dietmar Von Der Pfordten, "On the Dignity of Man in Kant" (July 2009) Philosophy 84 (329).

thinking being proves one's transcendental freedom. As Kant famously puts it, "now I assert that to every rational being having a will necessarily lend the idea of freedom, also, under which alone he acts."[3] From this intertwined nature of law and freedom emanates the idea that the right to life and equality guaranteed under the Constitution must protect the right to gender self-determination. The decision in *National Legal Services Authority* v. *Union of India*[4] sought to consolidate this idea through its unconventional jurisprudential interpretation of the rights enshrined under Articles 14, 19 and 21 with respect to sex stereotyping and gender self-determination. However, the judgment was also bristled with several ambiguities and contradictory tendencies as it conceded bodily structure of the person as the governing factor in identification of gender.

Although the *NALSA* judgment demolished medico-legal binary understandings of sex, gender and sexuality as well as a particular interrelationship of that constellation, the law still acts in the service of a self-affirming idea of the binary logic of gender.[5] At the systemic level, the law makes identity of a transgender so impossible and invisible as to be outside of the governing domain of the law. The institutionalisation of discrimination and Orwellian rhetoric in a wide range of legal statutes and adjudicative processes is quite reflective of the widespread abhorrence for transgender individuals.

The paper offers some critical insights into the nature and practices of law and discusses how the current legal scenario places the transgender community in a detrimental position. The judicial verdict in the *National Legal Services Authority* v. *Union of India* has provided significant contributions toward development of critical transgender jurisprudence in India. In this backdrop, the present comment seeks to foster a more informed climate for further discussion and pursuit of transgender justice, bringing the phenomenon of dehumanisation to the forefront and illuminating the perilous condition the current state of the law creates for transgender persons despite the doctrinal infrastructure already put in place through the decision in *National Legal Services Authority* v. *Union of India*.

3. Henry E. Allison, *Kant's Theory of Freedom* (Cambridge University Press 1990).
4. *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438, (129)..
5. (2014) 5 SCC 438, (138)..

2. *NALSA* V. *UNION OF INDIA*: THE INFLECTION POINT

The legal and jurisprudential narrative regarding the rights of transgender persons in India primarily revolves around the judgment in *National Legal Services Authority* v. *Union of India* and the developments that followed it. The ruling certainly came as an unprecedented step in destabilising hegemonic understandings of sex, gender and sexuality, thereby opening up spaces for disruption of hetero-normative culture. It conferred the right to determine one's gender identity, irrespective of the sex assigned at the time of birth, on transgender persons. The second directive, among the nine directives listed at the end of the judgment, asks the Centre and the States to grant legal recognition to self-identified gender of transgender persons, whether as male, female or third gender.[6]

Unlike the failure of the two Judges to sympathise with the counter-majoritarian demands in a constitutional democracy in *Suresh Kumar Kaushal* v. *Naz Foundation*[7], *Judges in this case acutely took care of the rights conferred under the Constitution to the marginalised section of the society.*[8] *The judgment also contradicted the de minimis* threshold adopted by *Kaushal* judgment for enforcement of fundamental rights. In contrast to outright rejection of comparative law in *Kaushal*[9], *NALSA* is replete with references to not only international principles and foreign judgments from western liberal democracies, but also India's neighbouring nations such as Pakistan and Nepal. Contrary to *Kaushal's* restricted approach in interpreting the scope of fundamental rights, *NALSA* adopts expansive interpretation of fundamental rights. The Judges observe that the notion that the State can prescribe one's personal appearance to be in accordance with the socially prevalent gender norms is inconsistent with the values of privacy, self-identity, autonomy and personal integrity.[10]

The decision confers upon the transgender persons, the right to choose one's gender identity as an integral part of one's right to lead a life with dignity under Article 21 of the Indian Constitution. The broadening recognition of the right to life's "manifold possibilities" creates room for the assertion

6. (2014) 5 SCC 438, (68).
7. (2014) 1 SCC 1.
8. Tarunabh Khaitan, "What Courts Say, What Courts do" <https://lawandotherthings.com/2014/05/nalsa-v-union-of-india-what-courts-say/> accessed 19-11-2018.
9. (2014) 1 SCC 1.
10. Chintan Chandrachud, "Constitutional Interpretation" in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds.), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016).

of an expansive claim to gender self-determination. The judgment is significant not only given the right of gender self-determination it creates, but also because of the analysis the court undertakes to determine that the posited right is indeed protected under the right to life clause. The court recognised that fundamental rights as substantive liberty rights are an evolving concept rather than a static declaration of the *status quo*.[11] The conferment of such right in support of gender self-determination serves both realist and revolutionary aims. Claiming that all people have a right to gender self-determination annihilates the existing male/female dichotomy upon which numerous social spaces and legal rights, entitlements and documents depend. A prevalence of binary gender norms may coerce the transgender person's actions and punish those refusing to confirm. The directives in the judgment does not pronounce a complete destruction of the categories "male" and "female", but it does permit their transformation and the incorporation of infinite new classification of gender apart from the categories society currently comprehends.

A detailed discussion in the judgment to prevent discrimination on the basis of "sexuality" in addition to gender suggests that the judgment could potentially serve as a strategic tool to advocate legal rights for and counteract gender/sexuality based discrimination against a wide range of LGBT persons and communities. However, seeing the judgment through the lens of jurisprudential idea of self-determination, it shows contradictory tendencies in its approach for granting the right to gender self-identification on transgender persons. Despite giving a liberal interpretation of constitutional provisions, the judgment oscillates between wide and narrow interpretations of the "transgender" category, and between gender self-identification and biological essentialism.[12]

The judgment is significant since it comes as a breakthrough in the struggle for legal recognition of transgender persons as subjects of citizenship and rights. Both the Judges emphasise on the idea of gender self-determination as an expansion of the right to life and human dignity, throughout the judgment. However, the directives contradict the apparent promise of self-determination of gender. For instance, the first directive

11. Sidharth Mohansingh Akali, *"Learning from Suresh Kumar Kaushal v. Naz Foundation through Introspection, Inclusion, and Intersectionality: Suggestion from within Indian Queer Justice Movements"*, (2016) Berkeley Journal of Gender, Law and Justice 31(1).
12. Aniruddha Dutta, "Claiming Citizenship, Contesting Civility: The Institutional LGBT Movement and the Regulation of Gender/Sexual Dissidence", (2015) Jindal Global Law Review, 4.

asserts that *hijras* are to be treated as "third gender" for the purpose of safeguarding their rights, which seems to impede their right to identify as "male" or "female".[13] Here, the Judges seem to prefer biological essentialism over self-determination. Apart from imposing third gender on *hijras*, the decision also creates a confusion regarding whether only those who identify as third gender would get the benefits of affirmative action promised by the judgment. Gender identity is defined as one's inner sense of being female, male, or some other gender.[14] The directives contradict this idea of gender identity and prefer biological essentialism over self-determination. The judgment fails to attain the balance between psychological and anatomical debate as it imposes the idea of biological essentialism over the *hijra* community. As a consequence of the directives, biological test based on the anatomical structure of the person will declare their gender as third gender even though the person is psychologically or socially female.

The judgment is replete with inconsistent views on transgender persons. Sikri, J. describes the term "transgender" in a very constricted sense, whereas Justice Radhakrishnan goes on to describe transgender as an umbrella term that includes persons whose gender identity, gender expression or behaviour does not confirm to their biological sex. While the scope of the term "transgender" is not unlimited, it is a term of self-description and cannot be subjected to a precise or succinct definition, the risk being assignment of a normative telos to an identity category that is often employed to oppose this modernist, binary logic.[15] The term fails to delineate the contours of the term "transgender" and blends all hijra and transgender people into a "third gender". In a subsequent interpretation of the judgment by the Madras High Court in *Jackuline Mary* v. *Supt. of Police*[16], *the Court interpreted it to apply only to the male to female transgender spectrum. The judgment proclaims that hijras are not men by virtue of their anatomy and they cannot be declared as women because they lack female reproductive organ. The difficulty with an approach like the one adopted in this case is that it concedes bodily structure of the person as the governing factor in identification of gender*

13. Anuvinda, P., Tiruchi Siva, "No Country for Transgenders", (2016) Economic & Political Weekly 37(3).
14. Jamison Green, *Transgender Equality: A Handbook for Activists and Policymakers* (1st edn., NCLR, 2000).
15. Isaac West, *Transforming Citizenships: Transgender Articulations of the Law* (New York University Press 2014).
16. 2014 SCC OnLine Mad 987.

and circumscribes the future legal possibilities of transgender persons who are unable to link their sex claims to the womb.

3. THE LEGAL NARRATIVE AND ABJECTION OF TRANSGENDER BODIES: CRITIQUING THE POST NALSA FRAMEWORK

The hostile and unaccommodating nature of legal discourses and adjudicative process assign a disentitled and detrimental position to the transgender persons, in spite of the doctrinal infrastructure to protect them already in place.[17] These laws operate to deny transgender bodies their entitlement to legal protection by stripping their humanity through what Butler characterises as "felicitous self-naturalisation".[18] The legal institutionalisation of violence and discrimination gives rise to a repressive discourse on transgender bodies.[19] Currently several criminal and civil laws recognise only two categories of gender i.e. man and woman. A considerable part of our daily interactions have rested on the premise that the transgender community has no legal recognition, and the existing laws legitimised the similar form of discrimination. Now that the situation has changed[20], at least in terms of doctrinal infrastructure, a discursive revisioning of the legal discourse, that maintains their status as "social outlaws", is imperative.

There are a wide range of gendered laws, both civil and criminal, that operate to the detriment of transgender persons.[21] For instance, under the criminal laws, the Penal Code, 1860 provides laws against assault on a woman with the intention of outraging her modesty, punishment for selling female minors for prostitution. Laws concerning rape, cruelty by husband or in-laws, dowry death, etc. are provided to protect the rights of women in the society that is so unjust to them. Further, there are laws such as the Criminal Procedure Code, 1973 dealing with unlawfully detained female inmates and medical examination of rape victims. Likewise, the Indecent Representation of Women (Prohibition) Act, 1986 prevents indecent representation of women in various forms of publications. Additionally,

17. *Anuvinda* (n 13).
18. Judith Butler, *Bodies that Matter: On the Discursive Limits of "Sex"* (Routledge 2011).
19. Leo Bersani, *The Freudian Body: Psychoanalysis and Art* (Columbia University Press, 1986).
20. *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438.
21. Report of the Expert Committee on the Issues relating to Transgender Persons, Ministry of Social Justice and Empowerment, 27-1-2014 http://socialjustice.nic.in/writereaddata/UploadFile/Binder2.pdf, accessed 19-11-2018.

the Protection of Women from Domestic Violence Act, 2005, protects women from any kind of domestic violence within the four walls of her marriage. All of these laws exist in a plane where the presence of a transgender is not recognised.

Similarly, civil laws such as the marriage, succession and adoption and maintenance laws recognise marriage between a man and a woman and heir to a property to be either a man or a woman. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 too provides only the women protection from any kind of harassment in workplace excluding the minority gender community. Apart from this, other miscellaneous laws like the Food Security Act, the Factories Act, etc. too do not recognise the presence of transgender as another gender identity leading to them being the deprived individuals.

To remedy this situation, the Transgender Persons Bill[22] was recently passed in the Lok Sabha as a progressive step towards including this marginalised community within the constitutional realm. The Bill proposed, however, goes against one of the most significant directives in the *NALSA* judgment which conferred upon the transgender persons, the right to decide their self-identified gender. This regressive Bill, if enacted in its current form, would take away the right to gender self-determination as certification from the District Screening Committee is required, under the currently designed Bill, to declare someone as transgender. The adulation and legitimisation of this perspective would further confer ontological credibility to the objective categories of male and female.

The Bill also does not provide any provision which distinguishes intersectional discrimination faced by transgender persons as differentiable from other kinds of discrimination experienced by those affirming to the binary understandings of gender, and thereby, no criminal sanction has been guaranteed against those who discriminate against transgender persons. The deviation from the idea of self-determination seems motivated by particular hatred reserved for transgender bodies arising from stereotypes likely based on social animus towards people who prefer self-determination over biological essentialism. The dehumanising rhetoric against transgender individuals has been reinforced through recommendation of a screening committee which would use derogatory and humiliating procedure of physical examination to ascertain the gender identity of transgender beings.

22. The Transgender Persons (Protection of Rights) Bill, 2016.

One of the complex issues, specific to the transgender communities in India, and that the cis-normative hypermasculine system fails to grasp is — the disapproval of a significant proportion of these individuals to reside with their bloodline biological relatives due to abusive treatment and vituperative attacks on their bodily autonomy within the institution of family.[23] The Bill leaves these individuals with no remedy in such instances as it prohibits the separation of transgender persons from their immediate families. It is also important to note that the Bill adopts a language of rehabilitation rather than a language of right. The issue of reservation in employment and in education has been clearly avoided. The elimination of the collectivisation of the community through eccentric proposals and a forced performance into socialising as what they are not raises serious concerns of safety, security, identification and rights.[24]

4. CONCLUSION

The dualistic thought to include certain people and exclude others has always been the *de rigueur* for law. This dualism simply gets reinforced and reified through myriad legal discourses and adjudicative procedures, when it comes to extending legal protection to the transgender persons. Transgender people are overlooked and discriminated against in multiple spheres of life from employment and housing, to healthcare and matrimonial rights and the law has institutionalised and entrenched this disdain for them. The judgment in *National Legal Services Authority* v. *Union of India*, in spite of its unconventional and liberal interpretations of the fundamental rights to confer right to gender self-determination upon individuals, painted a very specific picture in which all transgender people looked the same. The doctrinal infrastructure laid down, with certain ambiguities, in the *National Legal Services Authority* v. *Union of India* has not been brought to fruition. The principal and the most concrete solution to this hostile attitude towards transgender persons could be to educate the lawmakers and the implementing authorities about gender diversity and gender fluidity, so that it will be possible to enact laws and formulate policies without oversimplifying and distorting the gender of transgender individuals.

23. Justin Jos, "Limiting Gender Variance: Critical Reflections on the Transgender Persons Bill" (2017)52 Economic & Political Weekly 2.
24. Santayan Dutta, "Where the Transgender Bill Fails" (2018) 53 Economic & Political Weekly 35.

CASE COMMENT

SOLEMNIZING LOVE THAT DARE NOT BE NAMED: COMMENT ON ARUNKUMAR & SREEJA *v.* INSPECTOR GENERAL OF REGISTRATION AND OTHERS

Nauman Beig[*] *& Tanvi Mate*[**]

ABSTRACT

A discussion on gender justice and human rights, rightly presupposes the existence of inherent imbalance in the power structure and power dynamics between genders. The most adversely affected by this imbalance are the gender minorities. People of the transgender, transsexual, intersex, eunuch, hijra and other gendered minority communities (hereinafter referred to as "transgenders" or "transpersons") are at the bottom of this hierarchy. Arunkumar v. Inspector General of Registration allowed marriage between a cis man and a transwoman and upheld the principles of self-perception and individual autonomy; mainly focusing on the inherent rights to choose one's gender identity, partner, reassignment discourse and decisions in other spheres of life.

"Sometimes to see the obvious, one needs not only physical vision in the eye but also love in the heart."[1]

1. INTRODUCTION

John Stuart Mill stated that, "The subordination of one sex over other ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other".[2] Transgenders have been systematically ostracised by the society to be forever exiled into the by-lanes of indignation, abuse and marginalisation. People of

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1. AIR 2019 Mad 265.
2. *Charu Khurana* v. *Union of India*, (2015) 1 SCC 192.

this community have sought nothing but respect and an equal humane treatment by their fellow citizenry. Transgenders have in the past, occupied important social institutions and continue to ask for their participation in them, not to devalue it but indeed out of respect that they harbour for these social institutions.

No institution is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.[3] The institution of marriage has been the most fundamental, intimate and personal to humankind that serves as the building block of our society since time immemorial, it has transcended civilisations, religions and regions. It has stood the test of time and awarded dignity to the union between two persons like no other institution ever has or could.[4]

The right to marry is older than the bill of rights.[5] Marriage is one of the vital personal rights essential to the orderly pursuit of happiness by free men[6]. The changing mindset of Indian society pertaining to different gender identities and expression has been elucidated in *Arunkumar* v. *Inspector General of Registration*[7] *(hereinafter "Arunkumar case")* in the context of their right to enter into a matrimony. The right to marry a person of one's choice is integral to the liberty and dignity guaranteed to persons under Article 21 of the Constitution of India[8] and the right of transgenders to marry has also been recognised[9] but an overriding sense of ownership remains in the larger audience of our social fabric insofar as the terms and conditions of marriage within the meaning of "normal" are concerned; even though there is no social advantage in the law for not recognising the validity of marriage of a transsexual in the sex of reassignment.[10]

It is no news that marriages in India are deeply rooted in unreasoned and unquestioned traditions and customs and are guided by the

3. *Obergefell* v. *Hodges*, 2015 SCC OnLine US SC 6 : 192 L Ed 2d 609 : 576 US _ (2015).
4. *Griswold* v. *State of Connecticut*, 1965 SCC OnLine US SC 124 : 14 L Ed 2d 510 : 381 US 479 (1965).
5. *Ibid.*
6. *Loving* v. *Commonwealth of Virginia*, 1967 SCC OnLine US SC 152 : 18 L Ed 2d 1010: 388 US 1, 12 (1967).
7. AIR 2019 Mad 265.
8. *Shafin Jahan* v. *Asokan K.M.*, (2018) 16 SCC 368.
9. *National Legal Services Authority* v. *Union of India*, (2014) 5 SCC 438.
10. *Attorney-General* v. *Otahuhu Family Court*, (1995) 1 NZLR 603.

deep-rooted discrimination that infests our society. Matrimony is no doubt a declaration of personal to public, but that declaration must remain authentic. Far too often one assumes that they not only have a right to take offence to someone's declaration of love through marriage, but also that they are entitled to have their objections be the written letter of the law. The emergence of *Arunkumar case* in the post *National Legal Services Authority* v. *Union of India*[11] *(NALSA case)* era is an aid to judicial interpretation of the expanding horizons of rights of the transgender community and the right to marry irrespective of gender orientation. The transgender community is the latest in the list of communities to come out of the dark halls of eclipse and oblivion in our discourse on constitutional rights jurisprudence in India. This path- breaking judgment upheld the fundamental rights of transpersons (2nd petitioner) to enter into a wedlock under personal laws guaranteed under Articles 14, 19(1)(*a*), 21 and 25 and directed the registration of the marriage that was solemnised between a cis male and a transwoman. The trans- community has been under the unsolicited gaze of the self-appointed custodians of morality who replace true authentic self-love and self-pride for unrealistic cis-heteronormative precepts of life. This has led to the unfortunate and in many cases harmful and irreversible medical interventions by parents on their children, born with ambiguous genitalia that do not honour the societal vision of a male/ female binary. The concept of ownership in this regard has a spillover effect to a bond that epitomises the purest and gentlest form of human relationships that can seldom be impeached; that of a parent and child.

In the *Arunkumar case* the Madurai Bench of the Madras High Court has concurred with World Health Organisation Report that calls for deferment of intersex.genital mutilation (IGM) until the intersex persons are old enough to make decisions for themselves. The *Arunkumar case* thus deals with a threefold constitutional tussle on marriage, transgender autonomy, and medical interventions on transpersons.

2. BACKGROUND OF THE CASE

2.1. Facts of the case

The second petitioner in the instant case, Sreeja was born as an intersex and assigned female sex at birth but in the school record she has been described as a male by the name Manthiramoorthy. In Aadhar card her gender has been mentioned as third gender. Sreeja however identifies

11. *NALSA* (n 9).

herself as a woman. She and Arunkumar, the first petitioner, entered into wedlock on 31-10-2018 at Arulmigu Sankara Rameshvarar Temple, Tuticorin, as per Hindu rites and customs. Both Sreeja and Arunkumar profess Hindu religion. Arunkumar is a Hindu *Kuravan*, which is a notified Scheduled Caste (SC) community. Sreeja belongs to *Saiva Vellalar* community.

The onus of promoting social integration through marriage lies with the Ambedkar Foundation under the Ministry of Social Justice and Empowerment (fifth respondent). The Village Administrative Officer had certified that this marriage was in fact performed and that it was not a bigamous one for either. When the petitioners submitted a memorandum under Rule 5(1)(*a*) of the T.N. Registration of Marriages Rules, 2009 in Form I before the Joint Registrar II, Tuticorin and District (third respondent), the third respondent refused to register the same. The petitioners filed an appeal before the District Registrar, Tuticorin and District (second respondent). The second respondent confirmed the decision of the third respondent, which led to the petitioners filing a writ petition of certiorarified mandamus before the Madurai Bench of Madras High Court. Intersex infants are made to undergo sex reassignment surgery (SRS) by their parents. Activist Gopi Shankar of Madurai complained against this to the Ministry of Health and Family Welfare, Government of Tamil Nadu (fourth respondent). The Ministry however, refused to take concrete action relying on the wisdom of the medical community in its reply to the complaint.

2.2. Legal Issues Involved

In this light, the issues[12] that arose before the Court were:

- Whether a transwoman professing Hindu religion falls within the meaning of "bride" under Section 5 of the Hindu Marriage Act, 1955?
- Whether an individual has the right to marry a person of one's choice?
- Whether a person has the individual autonomy to identify themselves with any gender of their choice?

12. The Court did not explicitly narrow down its scope by underlining specific issues; these issues are extracted from the judgment by the authors of this case comment.

- Whether a parent can consent to medical intervention for sex reassignment on their intersex child or infant?

3. ANALYSIS

Right to self-determination is an important offshoot of gender justice discourse. At the same time, right to security and protection to carry out such choice or option specifically, and the right to be in a state of violence-free existence generally, is another tenet of the same movement.[13] The decision of partner and marriage rests exclusively with the individual themselves. Neither the State nor the court can intrude into that domain.[14] Interference by the State in such matters has a serious chilling effect on the exercise of freedoms by individuals. [15]

In the *Arunkumar case* the matter before the Court relied on the central principle of privacy and marriage. The Joint Registrar of Marriage had caved into the societal disapproval of the marriage of transgenders by refusing to register her marriage. This violation was twofold; *firstly*, that the Registrar refused to acknowledge the self-identified gender of the second petitioner Sreeja; and *secondly*, that the right to marry of a transwoman was refused on the ground that the second petitioner did not fall under the definition of a "bride" within the meaning of Section 5 of the Hindu Marriage Act, 1955.

In the *NALSA case* it was upheld that an individual has the autonomy to choose their gender. Self- determination of gender is an integral part of personal autonomy and self-expression and falls within the realm of personal liberty guaranteed under Article 21 of the Constitution of India.[16] Both gender and biological attributes constitute distinct components of sex, biological characteristics include genitals, chromosomes and secondary sexual features but gender attributes include one's self-image, the deep psychological or emotional sense of sexual identity and character.[17] Moreover the choice of a partner, whether within or outside marriage, lies in the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable.[18]

13. *City of Cleburne* v. *Cleburne Living Center*, 1985 SCC OnLine US SC 191 : 87 L Ed 2d 313 : 473 US 432, 439-41 (1985).
14. *Shafin Jahan* (n 8)
15. *Ibid.*
16. *Anuj Garg* v. *Hotel Assn. of India*, (2008) 3 SCC 1.
17. *NALSA* (n 14).
18. *Shafin Jahan* (n 8).

The Court in *Arunkumar case* reaffirmed that a person who is in the third category is entitled to remain beyond the duality of male/female or opt to identify oneself as male or female. It is entirely the choice of the individual concerned.[19] Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.[20] The right to marry thus dignifies couples that wish to define themselves by their commitment to each other.[21]

The Court in *Arunkumar case* used the principle of statutory interpretation[22] to hold that the meaning of "bride" in Section 5 of the Hindu Marriage Act, 1955 cannot remain static or immutable. And that bride will have to include trans, intersex who identify as woman[23] the only consideration being how the person perceives herself. Thus, the judgment has effectively and properly applied the verdict of the *NALSA* case. The Court dwelled into details about the right to self-identification, thus implying that the application of personal laws as regards to marriage are applicable wholly consequent to adjudication of the petitioners' gender.

The laws governing marriage were of little importance, given that the conditions of marriage[24] were fulfilled between the petitioners. Non-recognition of the identity of transgender persons denies them equality before law and its equal protection, which is ensured by Article 14 of the Constitution of India. Article 14 does not restrict the word "person" and its application only to male and female and hence, transgenders fall within this ambit and are entitled to legal protection in all spheres of State activity as enjoyed by any other citizen of this country.[25] The decision taken by the Joint Registrar of Marriage and the District Registrar, Tuticorin and District in the *Arunkumar case* thus resulted in a setback of the rights and liberties guaranteed by the constitutional scheme of our country. The Constitution of India is an enabling document that invites people that are marginalised, including transgender, into the mainstream; thus it is absurd to deny transgenders the benefit of the social institution already in

19. *Arunkumar* (n 7)
20. *Obergefell* v. *Hodges* (n 3).
21. *Windsor* v. *United States*, 699 F 3d 169 (2nd Cir. 2012).
22. Justice G.P. Singh, *Principles of Statutory Interpretation* (14th edn., LexisNexis, 2016).
23. *Arunkumar* (n 7)..
24. The Hindu Marriage Act, 1955, S. 5.
25. *NALSA* (n 9).

place in the mainstream.[26] Often the State and its authorities, either due to ignorance or otherwise fail to digest the innate character and identity of such persons.[27]

Article 19(1)(*a*) includes one's right to expression of their self-identified gender illuminating the principles of autonomy, privacy, self-identity and personal integrity. Legal recognition of gender identity is, therefore, part of right to dignity, self-expression, and freedom guaranteed under our Constitution. Right to dignity has been recognised to be an essential part of the right to life and accrues to all persons on account of being human being.[28] Legal recognition of gender therefore forms the core of one's sense of being and identity.[29] Article 21 of the Constitution of India protects all aspects of life, which makes a person's life meaningful including matters of family life and sacramental institutions like marriage.

It thus seems obvious that to recognise the right to privacy with regard to other matters of family life and not with regard to the decision to enter into a relationship that is the foundation of family in our society is contradictory.[30] It is competent for any two persons who are Hindus to solemnise a ceremonial marriage under the Act[31] and all that is insisted upon for the purpose of solemnisation of the marriage is that it must be in accordance with the customary rites and ceremonies of either party to the marriage. Although intricacies of ceremonies differ within sub-groups of the Hindu religion: "The essential rites which may be said to be the requirement common to all ceremonial marriages are firstly the *invocation before the sacred fire* and secondly *saptapadi*."[32] The factual matrix of this case ascertains that both the petitioners profess Hindu religion and their right to practice Hindu religion is recognised under Article 25 of the Constitution of India. Therefore, denial of the petitioners' marriage, which was solemnised in a temple according to the essential rituals required, was against the spirit of Article 25.

26. *Arunkumar* (n 7).
27. *NALSA* (n 9).
28. *Francis Coralie Mullin* v. *Administrator, UT of Delhi*, (1981) 1 SCC 608.
29. *NALSA* (n 9).
30. *Zablocki* v. *Redhail*, 1978 SCC OnLine US SC 14 : 54 L Ed 2d 618 : 434 US 374, 384 (1978).
31. Hindu Marriage Act, 1955, S. 2.
32. Mulla, *Hindu Law* (23rd edn., LexisNexis, 2018).

Navtej Singh Johar v. *Union of India*[33], *K.S. Puttaswamy* v. *Union of India*[34] *and the NALSA case* together form the golden triangle of LGBTQ+ rights in India; much like Articles 14, 19 and 21 which form the golden triangle of rights in the Indian Constitution. These cases read together, recognise the rights to love, identity, privacy, intimacy, health among other rights. The *Arunkumar case* further advanced the right to marry and the right of individuals to self-identity in terms of gender. The right to self-identification is non-negotiable and lies within the *core zone* of an individual's privacy which is inviolable.[35] Thus it would be a creation of sensibility to consider the *Arunkumar case* as the bridge to blurring gender lines in India's marital laws. A marriage cannot be assumed to be void if one of the spouses identifies with a gender that they had not declared while entering into wedlock. Thus, it would violate yardsticks of logic to limit marriage between a "man/bridegroom" and a "woman/bride". To use a hypothetical example, if a non-binary individual identifies as a woman on the day of her marriage with a man, she would be a "bride" within the meaning of the Hindu Marriage Act, 1955. After some interval of better self-identification, if that individual understands that they no longer feel comfortable with female pronouns and would identify as a man, then nothing in law would stop them from identifying themselves as a man. This however would lead to a marriage that already exists between two men. This marriage cannot be made void or annulled by instrumentality of the State or the courts because the decision of partner (marriage) rests exclusively with the individual themselves. Neither the State nor the society can intrude into that domain.[36] To further anticipate its consequences, discriminating by not allowing marriage between partners of the same sex at marriage but allowing marriage between partners where one of them changes their gender post marriage would create unreasonable classification and would be manifestly arbitrary within the meaning of Article 14 of the Constitution.

It is in this light that the *Arunkumar case* can be construed as the gateway to declare the denial of gay marriage as unconstitutional. The fact that gender or the right to self-identify with any gender lies in a core inviolable zone of privacy[37] would require that the laws, that have assumed the male/female binary to be "normal", should be reinterpreted to accommodate

33. (2018) 10 SCC 1.
34. (2017) 10 SCC 1.
35. *Ibid.*
36. *Shafin Jahan* (n 8).
37. *K.S. Puttaswamy* (n 34); *NALSA* (n 9)

all alternative outcomes of people exercising their long stifled right. An easier alternative is of course to interpret such laws as gender-neutral and therefore remove the State from interfering or placing fetters in matters of people's gender and sexual orientation; where rights are not considered a gift from State. The *Arunkumar* judgment is modest and humble in its beginning where it calls its orders as "not breaking any new ground". It is a step towards marriage equality, illuminating the path to the mountaintop[38] where love would be unbound by unscrupulous social approval. As Chandrachud, J. opined, our choices are respected because they are ours. Social approval for intimate personal decisions is not the basis for recognising them. Indeed, the Constitution protects personal liberty from disapproving audience.[39]

Another dimension of this case revolves around the consent of children in "sex reassignment surgeries". It is not uncommon or indeed explicitly unlawful in India for parents to subject intersex children to intersex genital mutilation (IGM), as a "corrective method" for them to better resembles the genitals of the male/female binary. The consent of parents cannot be considered that of the child[40] for medical procedures[41] for it ignores the fact that the child is not owned by their parents but are individuals in their own right and shall grow to become participating citizens with their own sense of identity, religion, polity and philosophy different from that of their parents. A parent must be encouraged to feel that the birth of their intersex child is not a matter of shame or embarrassment[42], which often leads them to inadvertently take medical decisions against the best interest of their child. Article 39(*f*) of the Constitution guides the State towards a directive principle of State policy, that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

Parental coercion, *sans* wilful and informed consent of the child (person), to undergo IGM is against the letter and spirit of Part III of the Constitution, read with Article 39(*f*). In India we see parents taking

38. *See* Martin Luther King Jr. (3-4-1968). "I've Been to the Mountaintop" (Transcript). American Rhetoric, <https://www.americanrhetoric.com/speeches/mlkivebeentothemountaintop.htm> accessed 3-6-2019.
39. *Shafin Jahan* (n 8)..
40. *S. Amutha* v. *C. Manivanna Bhupathy*, 2007 SCC OnLine Mad 141 : (2007) 2 CTC 97.
41. *Arunkumar* (n 7).
42. *Ibid.*

"male oriented", obsessive decisions, which are so alien to the concept of bearing an intersex child that it leads to the failure in acknowledging a dignified independent existence of their own child and results in acts of transphobia. A person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.[43] The fact that children do not possess the ability to comprehend their civil and human rights does not conclude the dismissal of those rights.

It may not be out of place to mention here that the marriage in question between the petitioners was also an inter-caste marriage. The first petitioner belonged to a notified Scheduled Caste community and the second petitioner belonged to a general caste community. Their marriage furthers the aim of social integration and annihilation of caste as envisioned by Dr Ambedkar. The judgment therefore established that the petitioners were entitled to financial incentive under the Dr Ambedkar Scheme for Social Integration through inter-caste marriages.

4. CONCLUSION

The idea of fundamental rights and a Constitution was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.[44] The Constitution-makers gave emphasis to the fundamental right against sex discrimination by means of using gender-neutral terms such as "person", in Articles 14 and 21 and "citizen" in Article 19 and "sex" in Articles 15 and 16 so as to prevent the direct or indirect scope to treat people differently, for the reason of not being in conformity with stereotypical generalisations of binary genders.[45]

Although democracy is the appropriate process for change so long as that process does not abridge fundamental rights,[46] the laws of our country as envisaged in the Constitution, must be interpreted in the broadest and most inclusive manner, not pandering to facial neutrality[47] but *de facto* principles of equality, liberty and justice; sans discrimination

43. *NALSA* (n 9). para 22, (K.S. Radhakrishnan, J.).
44. *West Virginia Board of Education* v. *Barnette*, 1943 SCC OnLine US SC 134 : 87 L Ed 1628 : 319 US 624, 638 (1943).
45. *NALSA* (n 9).
46. *Obergefell* v. *Hodges* (n 3)
47. *Navtej Singh Johar* (n 33).

and ostracisation. The distinction between constitutional morality and social morality arises out of the spectrum of one's right to choose their sexual orientation and gender identity, which has been highlighted by the *Arunkumar case* threefold adjudication on marriage, transgender autonomy and medical interventions on transpersons.

The Court held that the second petitioner Sreeja was a "bride" within the meaning of Section 5 of the Hindu Marriage Act, 1955 because individuals have the right to marry a person of one's choice in addition to their right to individual autonomy to identify themselves with any gender of their choice. The Court directed Respondent 5 to grant financial incentive to the petitioners pursuant to the Dr Ambedkar Scheme for Social Integration. Lastly the Court directed Respondent 4 to issue a government order prohibiting performance of sex reassignment surgery (SRS) on intersex infants and children.

BOOK REVIEW

HOW FASCISM WORKS: THE POLITICS OF US AND THEM

AUTHORED BY JASON STANLEY, RANDOM HOUSE, 2018; 240 PP; RS. 536.23 (HARDCOVER); ISBN-10: 0525511830; ISBN-13: 978-0525511830

Sudeep Sudhakaran[*]

1. INTRODUCTION: THE FAR-RIGHT UPSURGES

The contemporary time has been witnessing a series of political upheavals across the globe. Perhaps as some of the political commentators have observed, we are living in a time where liberal democracy, once thought the final destination of human civilisation, is facing serious threats to its survival.[1] One among the notable features of our contemporary history is the emergence of far-right politics, often described in media as the *neo-fascist*, in various corners of the world. The surprising victory of the businessman turned politician Donald Trump in the world's oldest constitutional democracy, the United States of America, is the most notable among them. Not because it is the first in this series of far-right victories of the contemporary world, but this victory happened in a State like America which, with all its questionable actions, stood for the idea of liberal democracy.

Similar upsurges of the far right are evident in many other major democracies as well. A number of European democracies have witnessed similar far-right surges in recent past. The growing dictatorial regime of Recep Tayyip Erdogan in Turkey and far-right electoral gains in a number of European countries including Hungary, Poland, France, Spain, etc. are best examples of this phenomenon. The recent victory of Jair Bolsonaro in Brazil can be added to the list.

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1. George Eaton, "SlavojŽižek Interview: 'Trump Created a Crack in the Liberal Centrist Hegemony'" (*New Statesman America*, 9-1-2019) <https://www.newstatesman.com/culture/observations/2019/01/slavoj-i-ek-interview-trump-created-crack-liberal-centrist-hegemony> accessed 15-5-2019.

2. HOW FASCISM WORKS

Yale University professor and philosopher Jason Stanley's book *How Fascism Works: The Politics of Us and Them* is an academic insight into the working of fascism especially contemporary forms of fascism embodied in the recent far-right upsurges.[2] The significance of Stanley's timely book is in the sharp arguments it advances to decipher fascist tendencies or fascist politics, as he calls, in the otherwise considered "normal" political discourses in the modern time.

As the title denotes the book is all about fascism and the ways in which it works in the modern world. According to Stanley, there are ten notable tendencies that have been repeating in every fascist movement. Creation of a mythic glorified unreal past, repeated propagation of false and half-truths, strong anti-intellectualism, attacking reality and replacing it with unreality, creating hierarchy thus attacking universal values such as equality and dignity, building a false victimhood based upon identity, using law and order as a means of creating "the other" or the minority as criminals, sexual anxiety coupled with patriarchal notions of family, glorification of village life and animosity towards urban values and enmity towards labour movements are the ten characteristic tendencies of fascism dealt in this book.

The contribution of this book cannot be limited to one area of knowledge alone. It shares valuables insights into a number of areas including philosophy, political theory and as well as linguistics. On a deeper sense, the principal contribution of this book is in the field of contemporary politics to understand the phenomenon of far-right emergence in the liberal democracies.

Though it is a take on fascism, it will not be proper to attribute this book with any original contribution in understanding fascism. There is a great number of literature dealing with the working of fascism. Those works mainly focused on the historical fascism in the interwar period. In fact, Stanley himself is heavily using academic works such as Arendt Hannah's *The Origins of Totalitarianism* to make his case.[3]

2. Jason Stanley, *How Fascism Works: The Politics of Us and Them* (1st edn., Random House 2018).

3. Hannah Arendt, *The Origins of Totalitarianism*, Vol. 244 (Houghton Mifflin Harcourt 1973).

How to understand present day far-right upsurge in the context of historical fascism is the fundamental research question this book offers. For this, Stanley creates a distinction between fascist State and fascist politics. When we mention fascism, we usually denote to the fascist States which came into existence after world war one such as Italy under Benito Mussolini, Adolf Hitler's Germany, General Franco's Spain and other regimes created through the occupation during the second world war. But in the contemporary world, according to the author, fascism is not working through State creation or the coups installing totalitarian regimes instead of democracy as we have seen during the interwar period. Instead, the far-right parties and politicians are using the fascist methods to advance their political ambition inside the liberal democracies. They are using the very democratic and other civic rights given by these democracies to destroy it. Or in other words, they use the constitutional provisions and the mechanisms it has created such as elections to destroy the constitution itself. This is the fascist politics dealt in this book.

Stanley, though not the central argument, explains the relationship between the law as an instrument in the proliferation or advancement of fascist politics. He gives a number of examples from the contemporary world to establish this point. For example, last year Poland's Parliament passed a law making it illegal to suggest that Poland bores responsibility for any Nazi atrocities committed in its soil during the war.[4] Though the responsibility of Poland is historically established, the new far-right regime wants to erase the historical facts it does not want people to know. That is in Stanley's framework, helps them to create a glorified "mythic past". Stringent abortion laws introduced by the far-right parties in Poland and Hungary are another example of how fascist politics uses the law to advance their objectives, in this case, it is the protection of patriarchal values. Stanley further argues that the Trump administration's anti-immigrant laws also carry these fascist politics. Though not mentioned by the author, the cow politics in India and the subsequent legal measures came with it might well fit into this context.

3. LIBERAL DEMOCRACY AND HUMAN RIGHTS

The horrors of the world war experience and the brutality of the fascist regime over mankind had great influence in the shaping of human rights

4. *Stanley* (n 2), 14.

discourse.[5] The horrors of the second world war destroyed almost every modern notion about human life. The holocaust brought a black shadow on the achievements of the human race and it destroyed the species pride about being themselves.

Stanley argues, as we have seen above that the fascist politics of the contemporary period, is working within the frame of liberal democracies without ideologically adhering to its values. Liberal democracy is ideologically committed to the proposition that each and every human being has inherent dignity and is inviolable.[6] Which itself is a presupposition for human rights. To a large extent, the liberal democracies protect human rights through their national constitutions. These democracies embody rights regime into their national constitutional framework which in a way strengthen the human rights regime.[7] On the other side, national constitutions immensely contribute to the strengthening of human rights law. The contribution of US constitutional law to international human rights law is significant.[8] These rights regime at national level further interact with developing human rights framework and gets itself updated.[9] The very nature of constitutionalism which restricts the power of the politics from being the destructive force of Constitution is again fortified by the independent judiciary. It does not mean liberal democracies never violate human rights. But they are built around moral obligation towards human rights. That is almost an axiomatic proposition. Needless to say, the structure of liberal democracy and its constitution, provides a series of institutions and design choices made to protect human rights.

Human rights, unlike national laws, are closely linked with transnational commitments entered through international instruments such as UDHR,

5. Global Citizenship Commission, "The Long and Influential Life of the Universal Declaration of Human Rights" in Gordon Brown (ed.), *The Universal Declaration of Human Rights in the 21st Century*, Vol. 2 (1st edn., Open Book Publishers 2016) 29-38.
6. Michael J. Perry (ed.), "Liberal Democracy and Human Rights", *The Political Morality of Liberal Democracy* (Cambridge University Press 2009) <https://www.cambridge.org/core/books/political-morality-of-liberal-democracy/liberal-democracy-and-human-rights/1B418DDA2431033CF17AFB009EDFA169>.
7. Richard B. Lillich, "The Constitution and International Human Rights" (1989) 83 The American Journal of International Law 851.
8. *Ibid.*
9. The introduction of *Vishaka* Guidelines by Indian Supreme Court in line with Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) against sexual harassment at workplace can be taken as an example. While creating the guidelines, the national law was silent on the issue.

ICCPR, and Paris Summit, etc. This very nature of global character demands a great amount of moral and political affinity from regimes towards human rights. On the other hand, fascist regimes do not share such moral or political affinity towards human rights. Instead, it takes the direct adverse position on the matter. The spread of human rights regime was made possible because of the existence of liberal democracies who subscribed morally and politically to it. It is even argued that a section of western powers led by the USA used it as a political rallying point against USSR and socialist block to gain ideological supremacy and legitimacy during the cold war period.[10]

The far right is breaking this wheel. Interestingly not through a coup or revolution but through the very democratic process of elections. Will they completely alter the State by creating a new one? That is a speculative question only time can answer. Anyway, the possibility of such change exists. But for the moment, the far right is utilising the very democratic systems to attain power and making the same system deteriorated by working within it.

4. CONCLUSION

The approach of the author throughout the book is worth mentioning. He, unlike many political commentators, is not a mere spectator, instead, Stanley is taking a clear oppositional position against far-right politics, especially against the Trump administration in his own country. In the epilogue part of the book, he makes it clear that the forces of democracy have an inherent duty to oppose and defeat this politics. According to him they also have the duty to further strengthen the liberal democracy and its values. The language used in this book is really simple and easily comprehensible. At the same time, the author gives an ample amount of evidence in the form of academic works to substantiate his points. The quality of the materials he used is commendable. It travels around various streams of knowledge such as linguistics, psychology, history among the many.

One of the possible criticisms that can be raised against this book is its lack of coherent explanation of the economic factors that led to the rise of fascist politics. There are well-accepted arguments about the connection

10. Tony Evans, "If Democracy, Then Human Rights?" (2001) 22 Third World Quarterly 623.

between economic stagnation and the rise of far-right populism.[11] Even during the emergence of historical fascism during the mid-twentieth century, the collapse of economies fuelled its path to power. Though the writer mentions the economic stagnation in certain instances, he does not go to the extent of explaining it further.

The other problematic part is the broad categorisation of fascist politics the writer creates. In this category, he puts almost all the far-right movements and politicians together which is primarily problematic because each far-right movement has its own varying historical backgrounds and ideological positions. Their socio-cultural formations are also differing widely.

With all its limitations and possible criticisms, on the overall reading experience, I will suggest this book to any person who is concerned about his democracy and its weaknesses. As Stanley notes, even the talk of fascism itself has become outlandish or over-exaggeration in many political societies though, in reality, the threat remains very much alive. The normalisation of fascism, as the author writes, "Makes us able to tolerate what was once intolerable by making it seem as if this is the way things have always been." When more and more "walls" are created between nations and within nations, among different groups, this book is a reminder to the alarming condition. It travels throughout the world and time to tell the reader a comprehensive account of a political tendency called fascism which destroys all the values of democracy.

11. David Harvey, "The Neoliberal Project is Alive But Has Lost Its Legitimacy" (The Wire.in, 9-2-2019) <https://thewire.in/economy/david-harvey-marxist-scholar-neo-liberalism> accessed 8-4-2019.

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