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GENDER, HUMAN RIGHTS AND LAW

Volume - 9

Edited by:
Prof. (Dr.) Sarasu Esther Thomas

CENTRE FOR WOMEN AND THE LAW
NATIONAL LAW SCHOOL OF INDIA UNIVERSITY

Gender, Human Rights and Law

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CONTENTS

EDITOR'S NOTE

I welcome you to the 9th volume of Gender, Human Rights and Law. Compared to the other volumes, this Volume is probably the most diverse. While other volumes carried contributions from academics, professionals, and law students, this is not true of this volume. In this volume many of contributors are from the field of public policy.

These contributions have ranged from areas of History, Sociology, Anthropology and also areas of Law. This Volume therefore brings in much diversity in the areas of study as well as in perspectives that has been compiled in this document.

Gender morality is explored in "The Hindu Widow" by Ananya Hassan Satish as well as rights of sex workers by Himani Chauhan Areas of family law are explored through succession laws, Muslim personal law reforms and conflict of laws dimensions. All the family law papers rely upon international standards. I refer to the papers of Mugdha Mohapatra, Prannv Dhawan, Vignesh R in this case.

Labour issues continue to be very important. Janhavi Shah looks at the care economy of ASHA workers and Niveditha G D asks the Woman's question in the work related to the Census and Lekhsmi J H explores Women in Leadership.

Current day debates are looked at in Bhawna Bhushan's piece on Rohingya women and Sheetal Shinde's writing on LGBTQ+ rights articulation in India post Navtej Singh Johar

This Volume reaches us in the midst of the COVID 19 pandemic. We have seen two waves and a third wave is expected. In this context looking at the right to education and assessing missing gender gaps in education in the COVID 19 era by Ankitha Rao assumes special significance.

I would like to thank all the contributors for their work in writing and editing the pieces. I would like to acknowledge the assistance of

Ashwini C, Secretarial Assistant at the Centre for Women and the Law and Pushpa S, Consultant Editor for their work which ensured that this Volume was completed.

We welcome feedback on the issue, hope that it is interesting reading for those who come across it, and encourage contributions to future volumes.

Prof. (Dr.) Sarasu Esther Thomas
Coordinator, Centre for Women and the Law

NOTES ON CONTRIBUTORS

Ananya H S

Ananya is a final year student at National Law School of India University, Bangalore. She is passionate about the intersection between gender and the law, and has worked keenly with the Legal Services Clinic, NLSIU and the NLS Feminist Alliance on related causes. She hopes to study this intersection further through a masters degree, and work with focused groups working on furthering these causes.

K Ankitha Rao

Ankitha is a post-graduate student of Public Policy at National Law School of India University. She has pursued a major in Literary and Cultural Studies from FLAME University, Pune, and is passionate about working in the social impact space. Her areas of interests include education, women and child development, and livelihoods.

Bhawna Bhushan

Bhawna is a final year student of Masters in Public Policy, NLSIU. Her areas of interest lie in gender studies, intellectual property rights and human rights and law. She would like to become a social entrepreneur at some stage of her life.

Himani Chouhan

Himani is a postgraduate student pursuing Public Policy at National Law School of India University, Bengaluru. Having completed her graduation in Political Science and Economics from Miranda House, University of Delhi in 2018, Himani joined the Teach For India Fellowship and worked in a government school in South Delhi for two years. Her areas of interests include education, women and child rights, and livelihood & governance.

Janhavi Shah

Janhavi is currently pursuing a Master's degree in Public Policy from the National Law School of India University, Bangalore. She completed her graduation in B.A. History Honours from the Lady Shri Ram College, Delhi University and joined NSIU right after that. She is interested in gender justice, ecological justice, environmental education and urban planning and governance and aims to pursue further research in some of these fields.

Lekshmi J H

Lekshmi is a public policy student and an electrical engineer, aspiring to work in the public policy and governance arena. She is hoping to use the experience gained in working with both the corporate sector and in government and, also, use the interdisciplinary perspective developed while preparing for the UPSC Civil Services Examination to aid her in developing sustainable and productive policy solutions.

Mugdha Mohapatra

Mugdha is a 5th year student enrolled in the B.A.L.L.B. programme at NLSIU. She has a keen interest in feminist legal theory and the need for feminist reasoning in personal laws. She wishes to work in the sphere of policy research to further an interdisciplinary understanding of the impact of laws on marginalised groups.

Nivedita G D

Nivedita pursued her Bachelor's Degree in Economics with a specialisation in Development and Sustainability from Azim Premji University, Bangalore. Various courses in the undergraduate programme, like Feminist Economics, Political Economy, Labour and Development, have taught her to look at how ideologies influence theoretical conceptions in the field of economics and how that, in turn, can have policy consequences.

Currently, she is a policy fellow at Reap Benefit and Project Statecraft, where she works on various urban local governance issues in Bangalore. Broadly, her policy interest areas include urban governance and

employment, workers' rights and community health.

Prannv Dhawan

Prannv is a final-year law student at NLSIU, Bangalore. Besides serving as the Deputy Editor-in-Chief of the *National Law School of India Review* and as Founding Editor of the *Law School Policy Review*, he has co-edited a special volume of *Gender, Human Rights and Law* about the gendered consequences of the COVID-19 pandemic on intersectionally vulnerable minorities. He was the Joint Convener of the Law and Society Committee and the Council for International Relations and International Law at NLSIU in 2019-20. He serves as a legal researcher with the Social Rights Research Group at the International Association of Constitutional Law and the Columbia University Global Freedom of Expression Initiative.

When he is not travelling, reading or humming Sufi music, he is writing opinion pieces for national and international publications like the Indian Express, the Economic and Political Weekly, the Frontline and The Diplomat, amongst others.

He can be contacted at prannvdhawan@nls.ac.in/+917619191176

Sheetal Shinde

Sheetal has completed her LLB from M. S. Law College, Cuttack, Utkal University and was adjudged the University Topper in Law for the year 2019-20, securing four gold medals. She was the winner of the Seervai Gold Medal Essay Competition conducted by NLSIU Bengaluru in the year 2017. She, also, was the winner of the Gary B. Born essay competition in International Arbitration conducted by IJAL in the year 2018. Currently, she is pursuing her LLM in the Human Rights stream at NLSIU, Bengaluru. Her area of research includes gender studies and child rights.

Vignesh R

Vignesh is currently enrolled in the final year of the B.A. LL.B (Hons) Course at the National Law School of India University, Bangalore. He has pursued a diverse set of activities in law school by being part of the Student Bar Association and playing for the University Cricket team, and representing the University at various debate and international

moot court competitions. His areas of research interest include Private International Law, Constitutional Law, Commercial Laws, Intellectual Property Rights, and Arbitration. He believes that the law is one of the most important means of delivering social justice and creating tangible political change. By becoming a lawyer, he hopes to be able to work towards ensuring this.

He can be contacted at vigneshramakrishnan23@gmail.com.

THE HINDU WIDOW

Ananya Hassan Satish

Abstract

The existing legal framework regulating the rights of widows, while being effective in theory, has had a complex real-life impact on its target demographic. This paper examines the past and present social and legal status of widows in order to analyse the impact of the changes brought about by the legal reform movement which began in 1856. While much of the perceived evils and prima facie discrimination against widows have been eradicated through the enactment of laws, a large number of extra-legal norms which hamper its implementation are still prevalent among various communities. This paper therefore argues that the function of law as an instrument to alter human behavior has not been adequately achieved in this sphere and a change in social consciousness is required to bring about de facto equality.

Introduction

"Widow" is a term used to describe a woman whose husband passed away while she was still married to him, and has not remarried ever since, and "widower" is used to describe males in a similar situation.[1] In India, there were 9,729 widowed males and 34,290 widowed females as of 2011.[2] This disparity is seen across all age groups, and the number of widowed men is significantly lower than the number of widowed women. This can be attributed to the higher rate of remarriage among widowed men, among other factors.[3] A widower has greater liberty with

1 Marty Chen and Jean Dreze, 'Recent Research on Widows in India: Workshop and Conference Report' [1995] Economic and Political Weekly 2435.

2 http://censusindia.gov.in/Census_And_You/age_structure_and_marital_status.aspx accessed 29 July 2018.

3 'More Indian men remarry than women' (Livemint, 7 July 2016) <https://www.

respect to remarriage than his female equivalent, along with more wide-ranging property rights, opportunities for employment and so on.[4] This issue is not a new one; as such patriarchal norms have been in place since time immemorial. Starting from the Vedas and the Manusmriti, to the Hindu Code Bill, oppression in various forms has always been in place.

The unfortunate loss of a spouse is a period of intense trauma. This is compounded for a woman as she has additional challenges to face. In a society with a well ingrained bias against widows, the problem is more than psychological or financial. Widows have to deal with a society that is apathetic, a law that is ambiguous and traditions that are discriminatory and, worse, punitive. Widows form a significant proportion of our population and these issues need to be addressed. The need is clear, and the State needs to recognise and react. The aim of this paper is to analyse and critique the current provisions in law made available to Hindu widows in light of past practices and propose changes to be made, if any, with respect to implementation. The scope of this paper is limited to Hindu widows in the Indian context.

This paper has been divided into three chapters. The first section describes the past social, as well as legal status of the Hindu widow. References to the Vedas, Manusmriti, Dharma Shastras and so on have been made in order to determine the same. The second section begins with the first legal reform initiated towards securing rights for the widows – The Hindu Widows Remarriage Act, 1856 – and moves on to the current family law provisions available to widows, with an analysis as to whether they are empowering, whether they place any fetters on the widow's agency and so on. The concluding section has the paper looking into the influence of extra-legal norms on people and proposing a few suggestions to move towards de jure equality.

Past Social and Legal Status of Widows

The Dharma Sutras and the Dharma Shastras, which are purported to be the Brahmanical prescriptive texts, claim that widowhood is a result

livemint.com/Politics/QSxPeMsexmgw5s09lgArrN/More-Indian-men-remarry-than-women.html> accessed 5 November 2019.

4 Chen and Dreze (n 1) 2446.

of "*purva karma*" or past actions and is a punishment for sins of a past life.[5] In the Manusmriti, a life of chastity is prescribed for a widowed woman. She was prohibited from making any effort to decorate herself, as it was only meant for her husband's eyes. As a result, the lawmakers preferred her being unmarried after the death of her husband. She was to remain celibate, eat one meal a day from a bronze vessel only, remain detached from anger, laziness and bad company, and so on. She was denied all luxuries of life. Manu especially opposed widow remarriage, because there is no declaration regarding widow remarriage in the procedure of marriage. A maiden could be "given" through marriage only once, as the Vedic mantras of the *Panigrahana* samskara applied to maidens only.[6]

Sati, which was a widely prevalent custom in the Indian society, was a funeral custom in which a widow would either immolate herself on the funeral pyre of her husband or be buried alive with her husband, whether voluntary or not.[7] The Brahmana literature, which came into existence in the period between 1500 BC and 700 BC, makes no mention of the practice of sati. It was the period between 700 and 1100 AD that witnessed a rise in the number of people practising sati. The spread of the practice increased over time, with discrepancies in different territories depending on the prescriptions of the ruler at the time. The number had almost peaked by the time the British began intervening at the dawn of the 19th century.[8] The process of Sanskritisation spread the practice to the lower castes as well.

During the Rig Vedic period, between 1500 BC and 1100 BC, the practice of Sati that was followed was only a "mimetic ceremony,"[9] in which the widow lay on the funeral pyre of her husband, but was raised from it by a male relative before the fire was lit. The remarriage of widows was accepted, but it was to happen with the deceased husband's

5 Uma Chakravarti, 'Gender, Caste and Labour: Ideological and Material Structure of Widowhood' [1995] Economic and Political Weekly 2248.

6 R.M. Das, *Women in Manu's Philosophy* (ABS Publications 1993) 109.

7 The Commission of Sati (Prevention) Act 1987, s 2(c).

8 A.S. Altekar, *The Position of Women in Hindu Civilization* (2nd Edn, Motilal Banarsidass 1987) 117.

9 A ceremony which seeks to imitate or reproduce the original rituals of the parent ceremony.

brother, be it elder or younger.[10] This form of marriage became the base for the Niyoga[11] system which came about much later. The practice of Niyoga became prevalent because its goal was to ensure the birth of more male children, and this was achieved by exercising control over the widow's reproductive rights.[12]

The reasons why the Vedic Aryans resorted to the practice of remarriage or levirate[13] over burning was because they were a minority in India, and they required the systems of levirate and remarriage to increase their population, thereby ensuring political domination. The Vedic texts allowed only maintenance to the widows, and did not recognise their right to inherit the husband's property. Widows who remarried could not even inherit property, and the influence this ancient law has had on modern law making is very evident.[14]

In India, the majority of widows were robbed of the most basic human rights, irrespective of ethnicity, race, creed, caste, class and educational backgrounds. Widowhood, to adult and child widows alike, means social exclusion, torture, starvation and physical or sexual abuse at the hands of male relatives.[15] It is significant to note that the practice of widow remarriage, however, was practiced and accepted among the "inferior castes," which not only included the untouchable castes, but a number of peasant castes as well.[16] The widows were treated differently compared to the rest of the family and were not permitted to do a lot of things. They must be dressed in an "unappealing" manner – their clothes must never

10 Romila Thapar, *Sati: A Historical Anthology* (Oxford University Press, 2007) 452.

11 Niyoga is a custom in which if a woman's husband passed away before she had any male children, a widow is permitted to have sexual relations with a designated male surrogate, usually her deceased husband's brother, till she has given birth to one or more male children.

12 P Thomas, *Indian Women Through the Ages* (Asia Publishing House, New York, 1964) 17.

13 Levirate marriage is a type of marriage in which the widow of a man is obliged to marry her brother in law.

14 Altekar (n 7) 151.

15 A. Anji, and K. Velumani, 'Contemporary Social Position of Widowhood among Rural and Urban Area Special Reference to Dindigul District' [2013] International Journal of Advancements in Research & Technology 69.

16 Prem Chowdhry, 'An Alternative to the Sati Model: Perceptions of a Social Reality in Folklore' [1990] Asian Folklore Studies 259.

be coloured and should normally be white, their ornaments should be broken at the time of death of the husband, and their hair should be shaved off. Widows were not permitted to be present at any social or religious events, restricting their rights in the public sphere as well.[17]

The sexuality of a widow had to be controlled through "proper" means. A Hindu woman, of whatever form or kind, was ultimately someone who could breed effectively, and thus her reproductive capabilities could be utilised in order to produce a Hindu child. It was stated in clear terms that the loss of a Hindu widow was not merely a loss of one person, but also of much more. The declining numbers and the fear associated with the same was a factor which shaped the widow remarriage discourse as well.[18]

Beginning of Reform Movements and Current Legal Position

Pandit Ishwar Chandra Vidyasagar and a few others organised agitations against the unfair ban that existed on widow remarriage, and as a result, The Hindu Widows' Remarriage Act was enacted by the British Indian government in 1856. Before the law was enacted, widows were prohibited from remarrying. Even if a widow did get remarried, children born out of such marriage were deemed to be illegitimate. This problem, especially affecting child widows, was prevalent mostly in higher caste Hindu communities, where child marriage was practiced and widow remarriage was prohibited. A child who was perceived as being married for eternity, through a seemingly irreversible process, was reduced to an inauspicious being whose sins from a previous life had robbed her of a husband.[19]

Widow Remarriage

There are two stereotypical notions that exist in Hindu society with respect to widow remarriage. The first one is that such remarriage is completely prohibited among Hindus. The second one is that widow remarriage is widely practised. The reality lies in between these two

17 Anji and Velumani (n 14) 71.

18 Charu Gupta, 'Articulating Hindu Masculinity and Femininity: 'Shuddhi' and 'Sanghatan' Movements in United Provinces in 1920' [1998] Economic and Political Weekly 727.

19 Lucy Carroll, 'Law, Custom and Statutory Social Reform' [1983] Indian Economic and Social History Review 363.

extreme notions. Widow remarriage is prohibited mostly by the upper castes, whereas most other castes allow for widow remarriage. Some castes also practice leviratic unions, but actual remarriage outside such unions take place only under exceptional circumstances.[20]

Hindu society at large and the Indian public opinion are still not close to accepting the remarriage of a widow in the same manner as in the case of a widower getting remarried, but de jure equality has been achieved through law after decades of penalty. This step taken towards facilitating widow remarriage is an instance of the supersession of modernity and equality over the prescriptions of the Shastras, but influence of the latter still remains in some of our existing laws.[21]

The Hindu Widows' Remarriage Act

The Hindu Widows' Remarriage Act was passed in 1856, to facilitate the remarriage of widows. The intention of the legislature is very clearly portrayed to a lay reader, but when the provisions were brought under the scrutiny of the court, the judges found the language used in the statute to be "somewhat embarrassing,"[22] "somewhat ambiguous,"[23] "to some extent misleading,"[24] "not free from difficulty"[25] and "curious."[26] These criticisms of the language used in the act are substantiated by the fact that this humanely inspired piece of legislation was responsible for a significant amount of judicial controversies among the existing High Courts. Out of the various controversies that emerged, the main contention was with respect to the provisions which affected those castes that followed pre-existing customs permitting widows to remarry. The ceremonies prescribed in section 2 of the Act differed significantly from the practices observed among members of such castes.[27]

The ceremonies prescribed in section 6 of the Act differed significantly from the practices observed among members of the castes which already

20 Chitra Sinha, 'Images of Motherhood: The Hindu Code Bill Discourse' [2007] Economic and Political Weekly 49.
21 Carroll (n 17)388.
22 Akora Suth v. Boreani LR (1868) Bombay High Court 206.
23 Akora Suth v. Boreani LR (1868) Bombay High Court 203.
24 Vithu v. Govinda ILR (1896) Bombay High Court 331.
25 Vitta Tayaramma v. Chatakondu Sivayya ILR Madras High Court 1091.
26 Mst Suraj Jote Kuer v. Mst Attar Kumari ILR (1922) Patna High Court 710.
27 Carroll (n 17) 367.

had a custom of widow remarriage. The Sudra community, which was on the lower end of the social hierarchy, representing close to 80 per cent of the existing Hindu population neither practiced child marriage, nor restricted widow remarriage.[28] This community, along with others who did not have any restrictions on widow remarriage, were uniformly subjected to section 2 of the Act, which required them to forfeit all the inherited property of their deceased husband on remarriage, irrespective of whether their marriage derived legitimacy from the Act.[29] Brahmanical notions and norms of remarriage were effectively forced upon lower caste women, in effect *reducing* their freedom rather than empowering them.

The Hindu Widow Remarriage Act has not been expressly repealed, but is said to have been replaced by the Hindu Code Bill of independent India. Specifically, under the Hindu Marriage Act of 1955, section 5(i) prescribes that a marriage may be solemnised between any two Hindus provided that neither party has a spouse living. There is no question of previous marital status being a determining factor in assessing the validity of the marriage. Therefore, at present, it is not necessary for a widow who wishes to remarry to take recourse to the Widows Remarriage Act of 1856.[30]

Other Attempts

Harbilas Sharda and D.V. Deshmukh were two prominent reformers who sought to relieve the Hindu widows from their existing state of deprivation. The former was also instrumental in the enactment of the Child Marriage Restraint Act, 1929. The two reformers, in the Legislative Assembly of UP, floated bills relating to the widows' rightful share in her deceased husband's property. Sharda subsequently floated the Hindu Widows' Right of Maintenance Bill, the objective of which was to "*ameliorate the lot of widows.*"[31] Unfortunately, the Bill was never passed by the Parliament. Similar legislations have been introduced in the Houses of Parliament, like The Widows (Protection and Maintenance) Bill, 2015, The Neglected And Suffering Widows

28 Carroll (n 17) 364.
29 Carroll (n 17) 367.
30 Carroll (n 17) 388.
31 Diwan Bahadur Harbilas Sharda, 'The Hindu Widows' Right to Maintenance Bill' [1933] Legislative Assembly Debates.

(Protection And Welfare) Bill, 2015, but there has been no significant progress with respect to these either. While these reforms, being entirely male-driven, indeed had women as their *object*, it is to be examined whether they were the subject of the reforms as well. The motivating factor in such cases seems to have been to show the British that Indian culture was not as backward as they made it out to be. It seemed to be aiming at preserving indigenous culture and values, rather than truly empowering widows or women in general.

Adoption

Before the passing of the new bill, a Hindu widow could only adopt a child if she possessed express authority of her husband. That has now changed, and the widow can adopt at any time within three years after the death of her husband.[32] A suit in which the validity of adoption by a widow was questioned after the lapse of many years appeared before the courts.[33] There was no evidence relating to the circumstances under which the adoption took place or to the authority of the widow, but the child had been living with the widow for a long duration. Even in this case, the court decided that the widow was authorised to adopt.

Under the Hindu Adoption and Maintenance Act, a widow is permitted to adopt a child under section 8(c).

> **"8. Capacity of a female Hindu to take in adoption-** *Any female Hindu-(c) who is not married, or if married, whose marriage has been dissolved or whose husband is dead or has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, has the capacity to take a son or daughter in adoption."*[34]

The restrictions placed on a woman who desires to adopt a child under clauses (a) and (b) are almost standard in the sense that most legislations requiring decision making also mandate them. Widows, specifically, are allowed to adopt under clause (c) of the section. The section does not mandate any express authority whatsoever, thus giving the woman full

32 B. E. H. F., 'Social Reform in India: The Hindu Code Bill' [1952] The World Today 123.

33 Fateh Chand v. Rup Chand ILR (1916) Allahabad High Court 446.

34 Hindu Adoption and Maintenance Act 1956, s 8 (c).

freedom to choose. The new adoption guidelines were introduced in India in 2015, and since then the number of single women registering with the Central Adoption Resource Authority has increased.[35]

Maintenance

The restrictions imposed on widows with respect to ownership, residence, employment and remarriage put widows in a situation of extreme dependence on external sources for economic support. Due to the absence of a state established social security mechanism or support from the family and community, maintenance became a very important source of income for widows. Hindu widows were at a great disadvantage because of the ambiguous nature of the colonial remarriage law. The Act of 1856 had made it compulsory for a Hindu widow to surrender any right of inheritance or maintenance over her deceased husband's property. This provision was, therefore, used by many families to deny such rights to the widow on remarriage, disregarding customary laws which permitted her to retain the property.[36]

Now, section 19 of the Hindu Adoptions and Maintenance Act, 1956, provides for the maintenance of a widowed Hindu woman. The maintenance under this section is to be given by the father-in-law to his widowed daughter-in-law. Such maintenance is provided only in the case of the daughter-in-law being unable to maintain herself out of her own earnings, or the estates of her husband, parents, children and herself.[37] While the provision is, in principle, claiming to help the widow, in practice, it provides multiple opportunities for the father-in-law to default. Out of the sources listed in the provision, a woman is likely to obtain support from at least one such estate, thereby losing her entitlement under section 19. Even if she is unable to maintain herself out of those sources, a remote connection could be established before a court, proving to be disadvantageous for the woman.

35 Moushumi Das Gupta, 'More single women coming forward to adopt children in India, shows data' <https://www.hindustantimes.com/india-news/more-single-women-coming-forward-to-adopt-children-in-india-shows-data/story-dgcvnQJoPFvkl6kqgC2bTK.html> accessed on 29 July 2018.

36 Chen and Dreze (n 1)2442.

37 Hindu Adoption and Maintenance Act 1956, s 19.

Effect of Extra-legal Norms and Suggestions

While there are a significant number of legal schemes and legislations in the recent times which pertain to the granting of rights that were denied to widows earlier, their situation is far from ideal. Social stigma associated with widowhood is still widely prevalent, and the social or extra-legal norms being perpetrated through various means is inhibiting usage of legal norms and provisions. There are many unique features of the relationship between legal and extra-legal norms, out of which two are most prominent. *First*, since legal norms tend to provide legitimacy to extra-legal norms, the latter also tend to strive towards legal recognition, as well as inclusion in the legal framework. *Second*, when an extra-legal norm is widely pervasive, the legal norm that is present becomes less important.[38]

Even today in rural India, most communities follow their own norms and customs, rather than the law that currently prevails. There exists a dominant custom of joint patrilineal possession, according to which widows are entitled to claim property rights over their husband's share of ancestral land if they do not have adult sons and can claim maintenance rights only if they have adult sons, which is not in accordance with the law. In most cases concerning a Hindu widow's right to maintenance or inheritance, the Court looked into the economic conditions, other responsibilities and duties relating to the spouse's heirs or the deceased husband's family. This process was, however, highly subjective, and the widow was left at the mercy of her deceased husband's relatives. The courts did even penalise the relatives for any defaults arising with respect to payment of maintenance to the widow, as a result of which her living conditions deteriorated further.[39] This becomes a roadblock for implementation of policies and schemes that benefit vulnerable sections of the society as well.

There have been several instances in which widows have been denied of their basic rights of equality, equal protection, property, adequate standards of living, marriage and so on. They have sometimes been absolutely barred from communicating with their children, who are

38 Barbara Stark, 'Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law' [2001] California Law Review 1479.

39 Bina Agarwal, 'Widows versus Daughters or Widows as Daughters? Property, Land and Economic Security in Rural India' [1998] Modern Asian Studies 1.

raised, trained and educated by other members of the family. Such deprivation makes their lives miserable.[40] While the purpose of having laws in place is to alter human behaviour, the effect is not always achieved. Such extra-legal norms which have been so deeply rooted in society cannot be countered with the mere introduction of legal norms. They require a change in social consciousness, or even provisions penalising such behaviour, as has been brought out in the past with the Commission of Sati (Prevention) Act, among others.

Suggestions

Awareness of the existing laws should be promoted among women more aggressively, and they should be provided with some assistance in acquiring and enforcing their legal rights under Article 39A. The gap between the theory and practice of the law should be discussed, and methods to reduce the same should also be propounded. Women have internalised the notion of property rights being a male right. The reasons for the same must be looked into, and efforts must be made to correct the notion. The promotion of property rights among women can be encouraged by giving them a share of property upon marriage. This will help the community realise the entitlement the woman has towards the property. Widow abuse is a serious issue, and penal provisions must be introduced to counter it. There are certain tactics being used by elements of the society to deprive widows of their rights. A welfare board must ideally be constituted to come up with measures to provide and promote welfare, protection and maintenance of widows and their children. The Welfare Board could comprise of elected members of the local body, as well as representatives who are widows themselves, and can be constituted in every district. The functions of the same could broadly include the introduction of measures for the protection, maintenance and welfare of widows and any dependent children, the maintenance of a district-wise register of widows, and verification of antecedents of the widows listed in the register in order to assess her need for assistance in any manner. The Board, with assistance from the respective state governments, could also arrange for subsistence allowance in case the widow is infirm and destitute or has one or more dependent children, residential accommodation free of cost wherever necessary by setting up homes for widows, free education (including technical education)

40 Agarwal (n 36) 4.

to the dependent children of the widows and could provide gainful employment opportunities, and vocational training wherever required. Most homes for destitute widows are in deplorable conditions. They are also vulnerable to attacks by external sexual predators. The need of the hour is shelter that allows mobility, care and comfort without any fear of oppression or scope for exploitation.

Conclusion

Widows have generally been at the receiving end of society almost throughout history. While discrimination has not been universal, it has been widely practiced. The reason for this has varied - from protecting them, utilising them for siring progenies, encouraging immolation to save honour and to prevent family property from getting divided. The end result has been a perception that these practices are the normal course for society to follow.

The winds of change started blowing in 1856. Post-independence, these efforts picked up speed. Widows are now more likely to get a share of property, are entitled to maintenance and are allowed to remarry. But at a micro level, on a daily basis, a vast majority face hostility, exploitation and an unending battle to live a life of dignity. If they do not have an independent source of income, life can be challenging.

The social and legal status of widows in the past was governed by a set of Brahmanical prescriptive texts, wherein widowhood was described as a punishment for past sins, and widows were therefore expected to live a chaste life. There were restrictions placed on their clothing, hair, attendance at public events, and most importantly, on their sexuality, which was an important factor in the shaping of the remarriage discourse. With time, the practices that widows were supposed to adhere to also saw multiples changes. There was a shift from Sati, to a form of marriage similar to the Niyoga system, and to the practice of levirate marriages among the Vedic Aryans. However, the widows who remarried were only allowed maintenance, but were not allowed to inherit property.

The enactment of the Hindu Widows' Remarriage Act in 1856 was the first to attempt to codify the law in this regard and formally legalise and facilitate the remarriage of widows. While a cursory reading of

the statute portrays the legislative intent broadly, the provisions of the Act adversely affected the castes which previously permitted widow remarriage by forcing Brahmanical notions of remarriage uniformly across communities. Similar laws dealing with widow welfare have been introduced in the parliament, the most recent one being in 2015. The problem with all these laws is that the reforms have all been male driven, effectively preserving existing power structures without truly prioritising the interests of widows. Restrictions on the freedom of widows were not only placed in terms of remarriage, but also with respect to maintenance and adoption. Legislative changes have been made in both areas, for the better and for worse.

An examination of the practical impact of changes made to the legal framework reveals that the presence and persistence of extra-legal norms are prejudicial to the intended positive effect of the above mentioned changes. Communities tend to follow local customs and courts tend to be subjective in the application of the law. Institutional changes ought to be made in order to offset this asymmetry in the application of law, and awareness as regards the existing laws as well as these changes must be raised.

The State needs to be proactive in recognising the ordeals of 8% of the female population. A combined approach is required. Financial assistance when deserved, and legal assistance when essential, must be made available. The judiciary needs to be more empathetic when dealing with these litigations. Being widowed is a tragedy. What follows should not compound that.

Bibliography

Articles

1. Agarwal B, 'Widows versus Daughters or Widows as Daughters? Property, Land and Economic Security in Rural India' [1998] Modern Asian Studies

2. Anji A and Velumani K, 'Contemporary Social Position of Widowhood among Rural and Urban Area Special Reference to Dindigul District' [2013] International Journal of Advancements in Research & Technology

3. B. E. H. F., 'Social Reform in India: The Hindu Code Bill' [1952] The World Today

4. Carroll L, 'Law, Custom and Statutory Social Reform' [1983] Indian Economic and Social History Review

5. Chakravarti U, 'Gender, Caste and Labour: Ideological and Material Structure of Widowhood' [1995] Economic and Political Weekly

6. Chen M and Dreze J, 'Recent Research on Widows in India: Workshop and Conference Report' [1995] Economic and Political Weekly

7. Chowdhry P, 'An Alternative to the Sati Model: Perceptions of a Social Reality in Folklore' [1990] Asian Folklore Studies 259.

8. Gupta C, 'Articulating Hindu Masculinity and Femininity: 'Shuddhi' and 'Sanghatan' Movements in United Provinces in 1920' [1998] Economic and Political Weekly

9. Sinha C, 'Images of Motherhood: The Hindu Code Bill Discourse' [2007] Economic and Political Weekly

10. Stark B, 'Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law' [2001] California Law Review

Books

1. Altekar A.S., *The Position of Women in Hindu Civilization* (2nd Edn, Motilal Banarsidass 1987)

2. Das R.M., *Women in Manu's Philosophy* (ABS Publications 1993)

3. Thapar R, *Sati: A Historical Anthology* (Oxford University Press, 2007)

4. Thomas P, *Indian Women Through the Ages* (Asia Publishing House, New York, 1964)

Online Sources

1. Moushumi Das Gupta, 'More single women coming forward to adopt children in India, shows data' <https://www.hindustantimes.com/india-news/more-single-women-coming-forward-to-adopt-

children-in-india-shows-data/story-dgcvnQJoPFvkl6kqgC2bTK.html> accessed on 29 July 2018.

2. http://censusindia.gov.in/Census_And_You/age_structure_and_marital_status.aspx accessed 29 July 2018.

A VIRUS AND THE VIOLATION OF THE RIGHT TO EDUCATION ASSESSING GENDER GAPS IN EDUCATION IN THE COVID-19 ERA

K. Ankitha Rao

Abstract

The lockdowns following the spread of the COVID-19 virus in India led to mass closures of educational institutions. Schools were the first to close and the last to reopen. The 18 months of the pandemic witnessed a new realm of education, as most institutions shifted to digital platforms. Unfortunately, this trend beckons questions regarding availability and accessibility, especially among public and low-income private schools, which statistically have accommodated students from marginalised backgrounds. The paper, through a deductive analysis, argues that the mass school closures are in violation of children's fundamental right to education. This violation has been graver among girls who have borne the burden of domestic duties and prejudices. By analysing the current state of education through lens of accessibility and availability, the paper harbours the pertinent question - will our girls be missing as the country recovers from the pandemic?

Introduction

March 2020 with the rising caution on increasing COVID-19 cases spurred a lot of anxious activity in the country. The first plan of action fearing the health of millions was to shut down educational institutions nationwide. This was soon followed by the now normalised, new realm of online education, as most public schools, private schools and universities shifted to digital platforms to deliver education. However,

public schools and low-financed schools were unable to ensure the same levels of reach. The system suffered from issues of access, adaptability and household burdens faced by children with the lockdown protocols constraining their movement outside their homes. While there was due consideration regarding problems in accessing groceries, healthcare and livelihoods with state and civil society organisations working hard to ensure they were rectified, education was termed as a non-essential service. A year and a half into the pandemic, education is still buriedunder the same label. Through this paper, I argue that the mass school closures and stopping educational services is in violation of children's fundamental Right to Education. In addition, I argue that this violation has been graver among girls and has lasting, potentially irreversible effects on girls' education in the country if left unchecked. Therefore, any evaluation of education during the pandemic needs to don a gendered lens.

The paper probes how the COVID-19 pandemic has exacerbated the existing socio-economic fractures in society, concerning girls' education. Further, it seeks to understand how the government's response to education during the pandemic has been in adherence or violation of the fundamental right to education of children.

Research Methodology

The paper makes use of secondary research for its discussion in the form of academic research papers, international organisation reports, and journalistic interrogations. It deductively analyses the status of right to education from the initial broad presumption that the impact of inequalities, lack of availability and access in education during the pandemic is unequally borne by girl students.

Reviewing India's domestic and international legal commitments on RTE

Education, with its widely discussed scope and importance, does not often find its space in the realm of human rights discussion. The necessity of education is side-lined in households, too, by matters of survival prominence such as food and shelter. Why then is the discussion on education and the implication of its lack, thereof, pertinent? Some answers to this question may be probed from the decisions of the

constituent assembly. The adoption of universal adult franchise in the constitution highlighted caveats of the large poor and illiterate population with few property owners. It was thus recognised that on empowering the whole adult population to vote, it was necessary to ramp up education on similar universality (Rao, 2008). However, the inclination towards the same was vested only within Article 45 of the directive principles of state policy. It stated,

> *"Provision for free and compulsory education for children. – The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."* [1]

Despite the constituent assembly's attention towards the need for state efforts to be directed towards education, there still remained wide gaps among children who were enrolled in formal schooling systems and those that remained out of schools, as was recognised even in the Right to Education Bill 2005 (Rao, 2008). Here, it is important to note that it took 55 years for a legislative framework to be developed to promote education as a right.

Education as having similar weight as of a fundamental right was first recognised in *Mohini Jain v State of Karnataka 1992*.[2] The Supreme Court ruled that interpreting articles 21, 38, clauses (a) and (b) of articles 39, 41 and 45 together[*], it is evident that the constituent assembly intended to made it obligatory for the state to provide education for its citizens. It stated, "The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education."[#]. Following a similar thread, *J.P. Unnikrishnan v. State of A.P.*[3], which was chaired by a larger panel, confirmed that the right to education flowed from article 21 concerning Right to Life. However, the panel limited this observation to children until they complete the age of 14 (Rao, 2008). Subsequent to the judgement of the Supreme Court, the parliament responded through Constitution (86th Amendment) Act,

1 Art (45) Part IV. The Constitution of India
2 1992 AIR 1858. *Mohini Jain v State of Karnataka*
3 1993 (1) SCC 645, 765 para 226

2002, by inserting 21(A) which stated that the state would provide "free and compulsory education to all children" between the ages of 6 to 14, making the Right to Education a fundamental right.[2] In 2009, the Right to Education (RTE) Act was enacted, which comprehensively provided for free and compulsory education for all children between the ages of 6-14. The Act was the first legislation in the world that made the Government responsible for ensuring enrolment and attendance.

While India's domestic commitment to ensuring education has been provided above, its international commitments are equally important, since they obligated the drafting of domestic laws (Sur, 2004). India is a signatory and has ratified the following conventions:

International Convention on Economic, Social and Cultural Rights (ICESCR) 1976: Article 13 of the Convention states that State Parties "recognise the right of everyone to education." Further, 13(2a) articulates that primary education will be compulsory and free for all.

The Convention on the Rights of the Child (CRC) 1990: The convention obligates all State Parties to identify children as right-holders while promising right to education (and compulsory and free primary education) under Article 28. The convention through Article 29.1 (d) recognised women's right to education, explicitly. It makes girl children's right to education non-derogatory, highlighting its fundamental nature.

The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) 1979: The convention under Article 10 (a) lays focus on equality in education by articulating elimination of stereotypical gender roles and the need to secure similar conditions of access at all levels.

The above international commitments, in addition to the growing demands for the realisation of universal education domestically, have led to noticeable developments in the education sector over the last two decades. However, a significant proportion of children still remain out of schools, or in schools suffering from low educational outcomes.

Gender parity in education in India

The RTE act has been successful on several fronts. Limiting my discussion to the scope of this paper, I shall only shed light on the

gendered aspects of its development. Primarily, the act was successful in bringing the girls back to schools. The 2018 Annual Status of Education Report (ASER) stated that 4.1% girls between the ages 11-14 were out of school, in contrast to 10.3% of girls in 2016. These figures stood at 13.5% in 2018 against over 20% in 2008 for the age group 15-16. The Act was also able to address issues pertaining to school facilities which hindered girls' ability to attend schools, such as the lack of toilets (TIME, 2019).

The increase in enrolment rates at primary levels, however, face a decline as they grow older. Enrolment rates for girls in secondary schools is 52.57%, while it drops further to 31.42% for higher secondary schools (National Institute of Educational Planning and Administration, 2018). Gendered education outcomes are also compromised by persistent drop-outs, or low attendance. *Children in India 2018,* a report released by the Ministry of Statistics and Programme Implementation stated that over 30% of girl students drop out of schools by IXth standard. This statement appears ironical as the same report also states that the Gender Parity Index[4] (GPI) had tilted in favour of girls since it showed an upward trend to 1.03 for primary schooling and 1.10 for upper primary schooling in 2015-16, as opposed to 0.94 and 0.88, respectively, for the year 2005-2006. This is mainly because GPI only takes into account enrolment rates and ignores drop-out rates, attendance levels and any mention of retention levels. NSS 71st round data mentioned in the report shows that the gross attendance ratio of girls enrolled in primary to higher secondary schools were 88% as compared to 91% of boys in both urban and rural areas.

These statistics are representative of the persisting gender prejudices in society. Patriarchal attitudes seep deeply into educational decisions and affect girls' education through three main fronts: Unequal domestic labour, safety, and son preference. Parental attitudes still unfortunately perceive girls as being "transient members of families on their journey to marriage" (Burra, 2001), while boys are seen as the pillar of livelihood support for the parents. The focus then shifts to socialising girls to address the domestic needs of the maternal house

4 The GPI is a measure that calculates the ratio of gross enrolment rates of females to that of males at a particular level of education.

first and, then, the marital house. A 2019 study report by Child Rights and You (CRY) showed that 65% of girls who participated in the study discontinued their education due to the requirement of "female labour" at home (Singh, 2019). It is also observed that insistence on marriage constrains girls' education. Studies have found that girls who stayed in schools for longer were likely to marry late and were more aware of their rights (Kannabiran, Mishra, & Raju, 2017). Therefore, it is evident that stereotypes such as household labour being the responsibility of girls or women in the family negatively impacts girls' education.

Safety remains another prevalent reason for school drop-outs. Reports have shown that there have been reports of sexual harassment or discrediting of girls within schools (Vacha Kishori Project Team, 2002). This issue is exacerbated by parental anxiety regarding their daughters having to travel long distances for schools, and the hostility they may face by community members. Another prominent and significantly discussed factor is that of son preference. The first wave of ASER 2020 data showed that more girls were enrolled in government schools than boys. Private schools, however, displayed high enrolment of boys as compared to girls (ASER Centre, 2020). A similar trend was noticed by the Vacha Kishori Project Team in 2002, and the reasons were reported to be large expenses that were incurred due to sending the sons to private schools or tuitions. Some other reasons included the relative lack of importance given by parents to girls' education and, also, the need to be closer home and imbibe cultural traditions.

Therefore, while the RTE act has been successful in the last decade on increasing gross enrolment rates, it has not been as successful in tackling socio-cultural attitudes that impede girls' access to education. These factors are further aggravated by government school closures,[5] consolidation and liberalisation, among other reasons (Bhatt, 2020).

Learning during a Pandemic: Implications of schools' closure on girl's education

The discourse on the weakening foundations of upper/primary education is not new. However, the recent experience with the

5 A 2015 parliamentary question to the Ministry of Human Resource Development revealed that 2173 schools were forced shut as of August 2015. Read more at https://nisaindia.org/sites/default/files/school-closure-report.pdf

COVID-19 pandemic runs the risk of exacerbating the inequalities as well as weakening public educational institutions. The brunt of this will be borne by girls. Schools have been shut for over a year now, with brief stints of reopening which saw paltry attendance. Government interventions on education during the pandemic have been minimal at best.

In this section, I'll be approaching my analysis on implications of the pandemic on education from two areas: the supply-side and the demand-side. The United Nations Special Rapporteur proposed the 4 A's as an analytical framework: Availability, Accessibility, Acceptability and Adaptability (Wilson, n.d.). For the purpose of my discussion, I'll be focusing largely on Availability and Accessibility.

Supply-side interventions include, but are not limited to, presence of schools, provision of teaching materials, and training/hiring of teachers. **Demand-side interventions** refer to the variables that constrain girls' ability or their inclination towards attending schools. Since the quantity and quality of these interventions pre-pandemic are currently out of the scope of this section, I will be mainly focusing on the post-pandemic landscape and limiting my discussion to availability and accessibility.

Availability (Supply-side): Although schools have physically shut down, education has shifted to the online realm. While private schools are currently running live classes on platforms such as Zoom, Google Meet or WhatsApp, Government schooling systems have taken the broadcast TV route. Governments in some states have also introduced remote learning circles, where teachers visited small groups of students and conducted classes in open community spaces. *Vidyagama*[6] in Karnataka is an example of such interventions. However, these interventions probe questions of accessibility, as it neccessitates for access to community spaces and digital gadgets such as TVs, Smart phones or Computers.

Accessibility: The first wave of COVID-19 and the shift of learning to online formats posed several challenges on the accessibility front. ASER 2020 (table below) first wave reports show that around 38% of surveyed households did not have access to smart phones and 39% did not have televisions at home.

6 *Vidyagama* was interrupted briefly due to rising COVID cases among teachers

Household Resource	% Children					
	ASER 2018			ASER 2020		
	Govt	Pvt	Govt & Pvt	Govt	Pvt	Govt & Pvt
Smartphone	29.6	49.9	36.5	56.4	74.2	61.8
TV	54.8	72.5	60.7	56.0	71.9	60.8
Motorised Vehicle	39.1	62.5	46.9	43.5	64.7	49.9

Table 1: % Enrolled children with selected assets available at home. By school type and asset type

Source: ASER 2020

Pre-pandemic estimates illustrate an even more dreary picture. As per the 2017-18 National Sample Survey on Household Social Consumption on Education in India, only 23.8 per cent households had internet access. Further, a 2020 NITI Aayog report showed that 13 per cent of household were yet to be connected to an electricity grid (Bhalla, 2021). In addition to the availability of digital gadgets or network connections, rising financial constraints due to loss of livelihoods or wage cuts, have made it harder to be able to afford these services. Therefore, there exists a wide digital divide in the accessibility of education during the pandemic. It is also pertinent that this digital divide is highly gendered. A survey by Centre for Catalysing Change shows that there is severe disparity in access to digital devices (displayed in graph below).

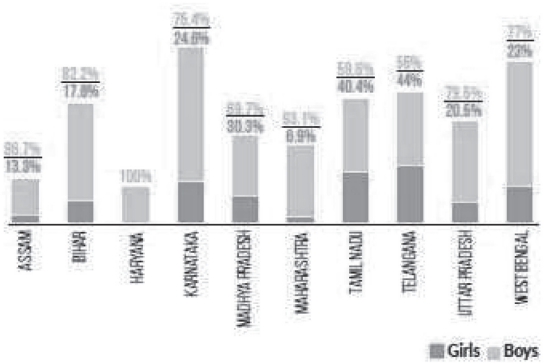


Figure 1: Survey of households to evaluate access to digital devices (Sample sizes differ across states)

Source: Centre for Catalyzing Change 2021

The graph above shows that the highest gap in access existed in Haryana, with Maharashtra coming second. Karnataka has the lowest gap. Of the families surveyed, 81 per cent cited financial constraints as a reason for low access. Interestingly, 611 girls who participated in the survey mentioned parents "protective nature" referring to reasons such as "phones not being safe" or the potential for misuse, as reason for not having access to digital devices (Centre for Catalyzing Change, 2021).

Availability of opportunities on the demand side to avail education is largely impacted by societal attitudes and the increasing burden on female care labour. It is predicted that globally 10 million girls will drop out at the secondary level of which a majority might be from India. Families' inability to pay for school expenses due to job losses or high medical expenses can be attributed to the potential high dropouts. A lot of girls may also cross the upper age limit for free education under RTE post the pandemic. This might lead to added costs if girls want to continue their education.

Further, increasing demands on the time and labour of girls, too, is a factor. As discussed in the previous section, domestic care work was a prevalent reason for discontinuing education. Return of family members from urban spaces due to lockdowns or increasing health care risks might require girls to undertake household chores rather than focus on education. A Centre for Budget and Policy Studies found that 71% of girls spent more time on household care work and chores, as compared to 38% of boys (Hussain, 2020).

Two other factors that concern the ecosystem of girl's safety and education are a rise in child marriages and the lingering shadow pandemic. A Lancet paper reported that globally around 5,00,000 girls were at the risk of child marriages in the year 2020-21 alone. India too is facing a frightening risk of increase in child marriages. Women and Child Development Department data has suggested around a 19% increase in child marriages. Telangana alone saw a 27 per cent increase in child marriages (averted through intervention) (Gupta, 2021). However, this paints a grim picture of the actual lack of country-level data to determine how many child marriages have actually happened. ChildLine India alone has reported a "17% increase in distress calls

related to early marriage of girls" in the year 2020 (BBC, 2020).

The shadow pandemic refers to the rise in domestic violence cases during the COVID-19 pandemic. The National Commission for Women registered a 2.5 increase in complaints in the month of April 2020. It received 1477 complaints just between 25th March and 31st May (Taskin, 2021). Domestic violence is known to impact children of the household adversely – physically, as well as mentally. However, it is also important to note that domestic abuse of children, especially girls, is highly unaccounted for. This could be lack of access to devices to gather help or living in closed spaces with their abusers. CEO of Arpan, an NGO focusing on alleviating child- sexual abuse, opined in a webinar that she was confident that there is an increase in child abuse cases. However, due to the constraints of the pandemic, they are not reported.

Steps towards recovery: Will our girls be missing?

As the country steps towards relieving its restrictions post the second COVID-19 wave, progressively, a question still remains on how the Government of India, along with state governments, approach the skewed gender implications of the COVID-19 protocols. UN bodies and Human Rights Watch have constantly warned its State Parties on the deep repercussions the pandemic will have on women and girls, and it has recommended pro-active strategies to address the problems that they'd face. However, Government interventions during the pandemic in India have not adequately addressed the gender question.

The Union Government's gender budget was cut down by 26%. While traditional gendered schemes, such as PM Awas Yojana, Samagra Shiksha, National Rural Livelihood Mission received half of its total allocation, new pivotal areas such as "social protection, digital literacy, skill training and domestic violence, that emerged in the wake of COVID-19, only received 2% of allocations" (Nikore, Malhotra, & Mahant, 2021). The celebrated women's day budget of the Karnataka government did not frame adequate measures to address the grave impacts of the pandemic on women. However, it did provide for subsidised loans, while remaining completely silent on girls in education (PTI, 2021).

While derogations of human rights are allowed in specific cases of lawful emergencies, the Right to Life is an inalienable right. Right to Education then, flowing from Right to Life, is a non-derogatory right in every sense. Mass school closures without adequate steps to address inequality of access to education, and a recognised drop in learning, thwarts the very basic premise of universalised education. Lack of cognisance on part of the government to address education as an essential service, despite being a year a half into the pandemic, is set to do more harm than good. As the discussion in the paper highlights, the impact of inequality is skewed towards girls, making this a violation of one's fundamental right to education, as well as a breach of all of India's international legal commitments.

Violation of Right to Education does not end with the pandemic. The effects it has triggered with drop outs and low academic retention is bound to show its imprint in the labour market, as well as the personal sphere. Among girls specifically, absence of education is proved to harm realisation of other human rights such as Right to Liberty, Right against Discrimination, as well as Right to Expression. Education was envisioned as the key out of the maze of dependency, poverty and lack of agency. Lack of attention to education during the pandemic will, therefore, lead to a cycle of human rights violations that will persist over the next few years or, even, a decade.

Some possible measures the Government of India could undertake to proactively tackle the violation of millions of citizens' right to education are:

(i) Identifying education as an essential service and workers in education, including teachers, community facilitators, as frontline workers. Priority vaccination for all workers in education and measures to speed up vaccination process for children, too, is pivotal.

(ii) Planning authority for reopening of schools or remote delivery of education should be decentralised. Measures should be taken, keeping in mind local interventions happening parallelly on the healthcare front.

(iii) Means to access digital education overcoming barriers of gender and financial levels should be addressed proactively and not just as slow, philanthropic activities.

(iv) Sensitisation of frontline workers (Police, ASHA workers, etc) to domestic abuse and capacity building to identify and rehabilitate victims of abuse.

(v) Sustained and growing investments in public health, education, and child protection.

Government interventions also need to focus on the softer social side through awareness campaigns as well as sensitisation drives. By side-lining, educational impact addressed reactively will undo multiple strides the country has taken in the field of education. It will also uncover unprecedented challenges in a country that is already stretched for resources.

NOTES:

* Article 1 refers to an individual's constitutional Right to Life. It states that "No person shall be deprived of his life or personal liberty except according to the procedure established by law." Article 38 obligates the State to "secure a social order for the promotion of welfare of the people." Article 39 (a) directs the state to secure that "the citizens, men and women equally, have the right to an adequate means to livelihood" and 39 (b) states that "the ownership and control of the material resources of the community are so distributed as best to subserve the common good." Article 41 discusses the right to work, to education and to public assistance in certain cases.

The Act also amended article 45 to refer to the provision of early childhood care and education and 51(A) of Fundamental Duties, by shifting responsibility to the parent or guardian to ensure opportunities for education for their child.

Bibliography:

ASER. (2019). *Annual Status of Education Report (Rural) 2018.* New Delhi: ASER Centre.

ASER Centre. (2020). *ASER 2020 Wave 1 (Rural) findings - India.* New Delhi: ASER Centre. Retrieved from http://img.asercentre.org/docs/ASER%202021/ASER%202020%20wave%201%20-%20v2/nationalfindings.pdf

BBC. (2020, September 18). *India's Covid crisis sees rise in child marriage and trafficking*. Retrieved from BBC: https://www.bbc.com/news/world-asia-india-54186709#product-navigation-more-menu

Bhalla, V. (2021, April 9). *Education, a casualty in the pandemic violating rights of students*. Retrieved from The Leaflet: https://www.theleaflet.in/education-a-casualty-in-the-pandemic-violating-rights-of-students/

Bhatt, N. (2020, September 02). *Examining India's new education policy through a gender lens*. Retrieved from devex: https://www.devex.com/news/examining-india-s-new-education-policy-through-a-gender-lens-98007

Burra, N. (2001, February). Girl Child Labour in India. *Economic and Political Weekly, 36*(5). Retrieved from http://www.epw.in.eresources.nls.ac.in/journal/2001/05-06/special-articles/cultural-stereotypes-and-household-behaviour.html

Centre for Catalyzing Change. (2021). *Bridging the Digital Divide for Girls in India.* Centre for Catalyzing Change.

Gupta, R. (2021, April 10). *Covid pandemic led to 27% rise in child marriages*. Retrieved from The Indian Express: https://www.newindianexpress.com/states/telangana/2021/apr/10/covid-pandemicled-to-27-rise-in-child-marriages-2288264.html

Hussain, F. (2020, November 27). *Bengaluru: Girls spending more time on chores than lessons; report*. Retrieved from The Times of India: https://timesofindia.indiatimes.com/city/bengaluru/bengaluru-girls-spending-more-time-on-chores-than-lessons-report/articleshow/79438391.cms

Kannabiran, K., Mishra, S., & Raju, S. (2017). Investigating the causes for low female age at marriage: The case of Telangana and Andhra Pradesh. *Economic and Political Weekly, 52*(18).

Ministry of Statistics and Programme Implementation. (2018). *Children in India 2019: A Statistical Appraisal.* New Dellhi: Ministry of Statistics and Programme Implementation.

National Institute of Educational Planning and Administration. (2018). *U-DISE FLASH STATISTICS 2016-17*. New Delhi: Ministry of Human Resource Development.

Nikore, M., Malhotra, G., & Mahant, T. (2021, February 08). *India cut its gender budget outlay by 26% despite Covid-19's disproportionate impact on women*. Retrieved from Scroll: https://scroll.in/article/986181/india-cut-its-gender-budget-outlay-by-26-despite-covid-19s-disproportionate-impact-on-women

PTI. (2021, March 08). *Karnataka government's gift on Women's Day: Six-months child care leave for employees*. Retrieved from Economic Times: https://economictimes.indiatimes.com/news/politics-and-nation/karnataka-governments-gift-on-womens-day-six-months-child-care-leave-for-employees/articleshow/81391360.cms?from=mdr

Rao, P. (2008, October- December). Fundamental Right to Education. *Journal of the Indian Law Institute, 50*(4), 585-592. Retrieved June 2021, from https://www.jstor.org/stable/43952178

Singh, A. (2019, March 8). *Marriage, Household Chores, Biggest Deterrent in Girls' Education*. Retrieved from NDTV: https://www.ndtv.com/education/womens-day-marriage-household-chores-biggest-deterrent-in-girls-education-in-four-states-in-india-2004738

Sur, M. (2004). Women's Right to Education- A Narrative on International Law. *Indian Journal of Gender Studies*. doi:https://doi.org/10.1177%2F097152150401100301

Taskin, B. (2021, February 9). *Increased work, domestic abuse - how Covid lockdown was especially hard on women in India*. Retrieved

from The Print: https://theprint.in/india/increased-work-domestic-abuse-how-covid-lockdown-was-especially-hard-on-women-in-india/601328/

TIME. (2019, June 27). *School Has Been a Right for Girls in India Since 2009. So Why Aren't They Going?* Retrieved from TIME: https://time.com/5614642/india-girls-education/

Vacha Kishori Project Team. (2002). Pre-adolescent girls in Municipal Schools in Mumbai. *Review of Women's Studies*.

Wilson, D. (n.d.). *Human Rights: Promoting gender equality in and through education*. Retrieved from OHCHR: https://www.ohchr.org/Documents/HRBodies/CEDAW/WomensRightEducation/DuncanWilson.pdf

ANALYSING HUMAN RIGHTS CRISIS OF ROHINGYA WOMEN AND POLICY RECOMMENDATIONS

Bhawna Bhushan

Abstract

'In 2015, UN Secretary Ban Ki-Moon stressed the deepening humanitarian crisis involving the Rohingya people of Myanmar lacking human security. The plight of the Rohingya Muslim particularly women are enduring an ongoing genocide and humanitarian crimes like rape, violence, killings and campaigns of terrors by the military and officials.

The humanitarian crisis orchestrated by government officials with more than 750,000 people fleeing the state of Rakhine, Rohingya are left to take refugee shelter in the neighbouring states making them vulnerable to sexual abuse, torture, forced labour and even death.'

1. Introduction: Origins of Rohingya Crisis

The word 'Rohingya' is a historical name for Muslim Arakanese. Rohingya community belongs to the most persecuted Muslim Community of the Rakhine state of Myanmar. Myanmar is a majority- Buddhist state, with a fraction of the population that is Muslim and the other belonging to Hindu descent. Burma, a part of British India then and now called Myanmar, was conquered by Britain in 1824 until 1948. During this brief period, Muslims from Bengal entered Burma as migrant workers, tripling the

Muslim population of the state. Britain[1] promised Burma an independent state for their help in World War II. With the failure in getting an independent state, Burmese people resented the Muslim Migrant population as they saw it as an incursion of uninvited workers. It is also interesting to note that the word 'Rohingya' was not acknowledged by the government of Myanmar. The government of Myanmar excluded the Rohingya community from the list of 135 official ethnic groups.[2] The main argument put forward by the Ne Win government in favour of exclusion of the refugees shaped that only the citizens who have settled in the state before 1948 constitute the citizens of the state.

Events like 'Operation Nagamin[3]' also contributed to the loss of documents by the inter-agency teams of inspectors owned by the Rohingyas in 1978, which led to the mass movement of the Rohingya community.

Violence in the State of Rakhine which was orchestrated by the military in August 2017 has intensified the situation of the Rohingyas. The U.N. has described the violence against the Rohingya community as a 'textbook example of ethnic cleansing,' displacing more than 700,000 Rohingya Muslims out of the state without citizenship, human rights, with shortage of food, potable water, access to medical supplies, shelter and other basic amenities. This massive displacement and violence have also tilted towards the Islamic Extremism happening in the current world. According to UNHCR, huge exodus of 7,42,000 Rohingyas that began after the violence that broke out in Rakhine drove the refugees to seek shelter in neighbouring states. It is also to be noted that the majority of the refugees constitute the gender of women.

2. Methodology

Due to crimes and atrocities conducted by the military and security councils in the state of Rohingya, more than 700,000 million Rohingya fled the neighbouring countries. However, the crimes and atrocities

1 Human Rights Watch,1996; Zarni & Cowley, 2014

2 The parliamentary government (before 1962, the civilian government, headed by Prime Minister U. Nu, a social democratic politician) listed 144 ethnic groups in Burma.

3 Operation Dragon King, known officially in English as Operation Nagamin, was a military operation carried out by the Tatmadaw and immigration officials in northern Arakan, Burma, during the socialist rule of Ne Win.

against the Rohingya community have only intensified in the wake of the crisis. This paper analyses the major determinants responsible for the gender-based violence against the Rohingya Women (especially in the context of crimes conducted by the military and the role of government orchestrating the atrocities) and, also, the 1982 Citizenship Law that has played a major role in facilitating the crimes against the Rohingyas. The paper uses the secondary data of the state of Rakhine to analyse the situation and finally recommends the policy interventions and recommendations that assist in de-intensifying the situation. The data available is limited due to the onset of the Coronavirus pandemic and the stateless identity of Rohingya Muslims, government interventions and border issues. The data is also analysed with a qualitative aspect to come to a conclusive recommendation.

3. 1982 Citizenship Law

The theoretical constructions of citizenship[4] encompass four primary dimensions: legal status, rights, (political) participation, and belongingness. Myanmar's 1982 Citizenship Law has been widely criticized for its discriminatory and genocidal policy targeting the Muslim population of the state. The Citizenship Law created multiple categories of citizenship and narrowed the grounds as to how an individual can acquire citizenship. The law distinguished between the three types of citizens:

- Citizens (Pink Card)
  a. Citizens by birth
  b. Others
- Associate citizens (Blue Card)
- Naturalized citizens (Green Card)

To be a naturalized citizen, a child must acquire citizenship by descent from citizen parents or prove and provide 'conclusive evidence' that his/her ancestors entered the country and resided before 1948. 'After the law came into effect, Ne Win made a public speech where he exclusively mentioned the real reason for implementing such discriminatory law using the words such as, 'pure blooded nationals' should be citizens, while the others become 'associate citizens' or 'naturalized citizens.'

4 Bosniak (2000) and Bloemraad, Korteweg, & Yurdakul (2008)

The 1982 Burma Citizenship Law disseminated after the mass return of refugees who fled in 1978. Rohingyas were also not subjected to any laws such as The Foreigner Act,[5] the Registration of Foreigners Act,[6] and the Registration of Foreigners Rules, 1948. Section 44 of the Act states that the person must be eighteen years of age or older, be able to speak the national language, be of good moral character and of sound mind. Ironically, even after having a substantial history that goes back to the eighteenth century, Burmese law did not recognize the ethnic minority as one of their own.

This exclusivity also resulted in restriction on the movement, education or holding of a public office. The Burmese Citizenship also denies citizenship to the children born to 'non-Burmese' people (who are considered as non-residents).

This citizenship model was criticized by the UNHCR for stateless persons, urging the government (SPDC) to review the citizenship law, making no efforts to review the legal obstacles or addressing the problem. The UNHCR community responded to the problems negatively at the global level. The Human Rights Watch has also urged the Burmese government to repeal the 1982 Citizenship Law following the recommendations of the U.N. Special Rapporteur which suggested granting Rohingyas full citizenship.

4. The Plight of Rohingya Women

4.1 a) Analysis of the major determinants in the state of Rakhine directly or indirectly impacting the lives of women

The following data is analysed through Rapid Gender Analysis[7] (RGA) using the tools and approaches of the Gender Analysis Framework. It is to be noted that the research was undertaken by CARE Insights, a

5 Indian Act III,1846

6 Burma Act VII

7 Gender analysis is the systematic attempt to identify key issues contributing to gender inequalities, many of which also contribute to poor development outcomes. This process explores how gendered power relations give rise to discrimination, subordination and exclusion in society, particularly when overlaid across other areas of marginalization due to class, ethnicity, caste, age, disability status, sexuality, etc.

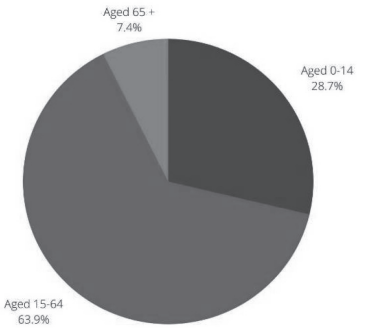
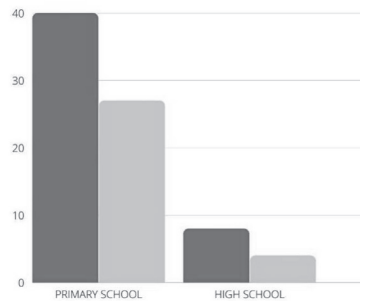


Figure 2 shows the age distribution of Rohingya Women in Rakhine

development and policy research tank, in the months of January 2020 to February 2020. The data was further updated in June 2020. Due to the Coronavirus pandemic, researchers found it difficult to conduct a comprehensive research. The primary data that has been analysed is limited due to security concerns, lack of access to refugees by military and security forces, etc. The members of certain communities were not allowed to self-identify using a name, since they did not hold any citizenship and were not recognized by the government.

According to the 2014 Myanmar Population and Housing Census,[8] the total population of Rakhine State which represents 6.2 per cent of the population of Myanmar has been estimated to be at 2,098,807 persons, with 989,702 male and 1,109,105 females. More than 60 percent of women lie under the age bracket of 15-64 making them most vulnerable of the atrocities. It is to be noted that 83% of the population of the state of Rakhine lives in rural demographics. The data also suggests that there has been a steep decline in the education of children from primary to secondary school with less than five percent of women enrolled in high schools.



The crisis of Rohingyas' ethnic cleansing disproportionately impacts girls, women and marginalized Rohingya refugee population organizations (primarily based on gender, age, marital status, intercourse

8 https://reliefweb.int/report/myanmar/2014-myanmar-population-and-housing-census-union-report-census-report-volume-2-enmy#:~:text=The%202014%20Myanmar%20Population%20and%20Housing%20Census%20(2014%20MPHC)%20was,on%20a%20de%20facto%20basis.&text=It%20contains%20detailed%20information%20on,Union%20and%20State%2FRegion%20level.

of historical past household head, mental and bodily disabilities, sexual orientation and gender identity) with the aid of reinforcing, perpetuating and exacerbating pre-existing, chronic gender inequalities, gender-primarily based violence and discrimination. According to Daily Star, a Bangladeshi newspaper, as many as 14,740 orphans have been identified indicating the inclination to turn to negative coping mechanisms to mitigate economic and food insecurity involving selling their assets, participating in the illegal drug trade or engaging in sexual transactions leading to the sex trafficking of women and children.

4.1. b) The following table represents the various determinants which have directly and indirectly affected the life of Rohingya Women.

Determinants	Data (as in the state of Rakhine)	Sources
Formal Labour	58.8% of all people who are of working age (15-64) were in the labour force. The proportion of males in the formal labour force is (83.2%) Proportion of females (38.1%).	The 2014 Myanmar Population and Housing Census[1]
Education	84.7% of the people (92.2% men and 78.7% women) in Rakhine state are literate	The 2014 Rakhine Census
Number of girls in school	the total 141,948 Rohingya students in Rakhine, only 52,697 are female, with major disparities being reported at lower and upper secondary levels	The 2014 Rakhine Census

Sanitation	40% of the population in Rakhine has access to improved water in both the dry and rainy seasons. 31.8% of all households in Rakhine have toilets	Central Statistical Organization (CSO), UNDP and WB (2018) "Myanmar Living Conditions Survey 2017: Key Indicators Report," Nay Pyi Taw and Yangon, Myanmar: Ministry of Planning and Finance, UNDP and WB
Availability of and accessibility to essential health and protection services	53.3% of ill or injured individuals seeking treatment at medical facilities, including at those run by NGOs	The United Nations Development Programme. "Myanmar Living Conditions Survey 2017: Socio-Economic Report"[2]
Participation of Women in Workforce (Division of Labour)	Nationally, 41% of women are underemployed and only 53.7% of women participate in the labour force compared to 85.2% of men.	The CARE Rapid Gender Analysis of Myanmar
Gender based violence	17% of women	Violence Against Women and Girls (VAWG) (Official figure)
Maternal mortality	15%	Gender in Humanitarian Action Workstream. Gender Profile for Humanitarian Action: Rakhine, Kachin and Northern Shan, Myanmar. Volume 2, issued March 2020

4. 2 (a) Role of Government

The cause of most atrocities that happen around the borders is due to conflicts between nations, religions and for geopolitical reasons. They use rape and sexual violence as a dominant tactical tool to set their dominance in the region, causing crimes like genocides, wartime rapes and sexual abuse and violence. In cases amounting to wartime rape,

UN Security Council Resolution 2467[9] has failed to provide justice and accountability in the state of Myanmar. The government led by Aung San Suu Kyi has also failed to act in the following instances. For any state to function effectively, the principles of justice involving social, economic and political liberty reflect on the governance of that government and its role in providing minorities with human rights. According to the Fact-Finding Mission[10] by the United Nations Human Rights Council (HRC), in a 2018 report, the State of Myanmar is liable for conducting genocide against the people of the Rohingya Community. The report also opines that under the leadership of Aung San Suu Kyi, the government has been actively concealing the crimes that are happening at the border.

The Buddhist Women's Special Marriage Law[11] was passed by Burma's two houses of parliament, sitting in a joint session in 2015. This law is exceptionally discriminatory, allowing the state to take action against the individual rights concerning choices in the area of marriage, family planning, religious conversion, etc., of Buddhist women with non-Buddhist men. This law also restricts the number of children to two. This Special Marriage Act also contravenes Burma's treaty obligations under the International Covenant on Civil and Political Rights.[12] Myanmar has, also, not criminalized rape in the marriage act. The International Criminal Tribunal[13] also held that sexual mutilation, separation of the sexes and prohibition of marriages, and deliberately impregnating a woman by a man or a group all constitute as acts of genocide

Myanmar is a party to the Convention on the Elimination of Discrimination against Women (CEDAW),[14] prohibiting sexual and gender-based violence against women and girls. Myanmar is under the obligation to prevent and provide for reparations if any sexual and gender-based violence has been conducted within its borders. It must

9 https://www.securitycouncilreport.org/un-documents/document/s-res-2467.php

10 https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx

11 https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=103620&p_classification=01

12 https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

13 https://research.un.org/en/docs/law/courts

14 https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx

also investigate, prosecute and punish the offenders. As a state party, Myanmar has only partially incorporated the content of CEDAW in its domestic law, raising concerns by CEDAW about the absence of an effective guarantee of substantive equality.

According to the Registration of Foreigners Act and Rules 1940,[15] the Burmese government requires Rohingya villagers to obtain a travel permit from their local State Peace and Development Council[16] to cross the boundaries. The Universal Declaration of Human Rights,[17] Article 13, states that any person who is lawfully in the territory of the state should enjoy the freedom of movement and residence. The same has been enshrined in the International Covenant on Civil and Political Rights.

4.2. (b) The Role of Military

Myanmar's military officials and security forces called Tatmadaw have used rape and sexual violence as a predominant component against the Rohingya Muslim women. There has been little to less accountability, since the government has played an immense role in hiding the facts, and the available data has been from the Fact-Finding Missions by the UN and the on-ground NGOs working in Rakhine. Most atrocities of sexual violence have been conducted by the men in power, contradicting Myanmar's military and the government which reassured that it will shelter the refugees.

According to the Fact-Finding report,[18] which interviewed 52 Rohingya women of which 29 were rape survivors, it described the in-depth experience of the brutal actions of the security forces which forcefully raped and assaulted women during the major attacks.

15 https://www.burmalibrary.org/docs09/Registration_of_Foreigners_Act-1940.pdf

16 The State Peace and Development Council was the official name of the military government of Burma, which seized power under the rule of Saw Maung in 1988.

17 The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, the Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A) as a common standard of achievements for all peoples and all nations.

18 https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx

The attacks intensified during the violent attacks and before major military intervention.[19] Women do not hold powerful positions in government or the military. The direct correlation between gender inequality and gender violence also makes Myanmar prone to gender-based violence.

According to the Mission, the evidence of violence by the military was not limited to the state of Rakhine, but was stretched to the states of Shan and Kachin[20] which had the majority of the military camps, checkpoints and bases. The military patrols took place in and around the villages, intruding on civilian life. The sexual violence committed against women and girls is not condemned by the authorities, contributing to the widespread nature of sexual violence in highly militarized areas of Myanmar. The Mission observed similar patterns of military misconduct where military officials abduct women and girls, often for forced labour. The victims are subjected to rape, murder, gang rape, attempted rape and other forms of sexual violence and humiliation in forests and military bases. The report also stressed the real-life experiences of sex slavery, often conducted by senior officials.

> *"The General told me that, if I did not let myself be raped, he would get the other soldiers to rape me as well. He raped me every night for about 5 to 7 days."*

The women who are often entangled in atrocities such as rape are not allowed to bathe or sleep with other captives, denying them access to basic human facilities like clean drinking water or a safe place to rest or shelter, causing mental and physical trauma. The officials and soldiers take chances to rape different women at different time intervals.

19 Three waves of violence occurred: from 8 June to August 2012, in October 2012 and again in 2013. The two waves of gross violations of human rights in 2012 and 2016, along with the perpetuation of anti-Rohingya laws and policies, laid the groundwork for the Tatmadaw to act with total impunity in perpetrating sexual and gender-based violence during the "clearance operations" that began on 25 August, 2017.

20 Thousands of civilians have been displaced. Over 106,500 people have been living in 169 camps in Kachin and Shan since 2011, 36 per cent of them in contested areas and areas controlled by EAOs, to which United Nations agencies are denied access.

According to the Mission's investigation reports and consolidated experiences by various organizations who are working on the ground, they have observed military forces, officials and local men in uniforms have been constantly using sexual violence since 2011, which has intensified over the years. The actions of the military and state constitute extreme violations of international human rights, deprivation of life, sexual slavery, torture and other inhuman atrocities against the minority community.

Myanmar has treaty obligations under CEDAW on all forms of discrimination against women. It is also a part of the Convention on the Rights of Child where the state must prohibit the actions of sexual violence against girls. Under the International Covenant on Economic, Social and Cultural Rights, Myanmar also failed to provide the right to adequate living conditions, health and work. Therefore, it can be concluded that by violating all the treaties, the authorities violated their duty beneath the Vienna Convention on the Law of Treaties.[21]

5. Policy Recommendations

Myanmar's mistreatment of Rohingyas, even though on occasion surfacing in public, have persevered as a mystery sideshow, which has perpetuated into a brutal device of human trafficking and prevented the Rohingyas—currently, the maximum brutalized ethnic minority in Asia—from attaining political asylum abroad. The 1951 Refugee Convention and its 1967 Protocol are the key legal documents that recognize the term refugees. Myanmar is not a part of the 1951 Refugee Convention and, thus, the government doesn't have to follow any obligations to the committee. This makes the protection of Rohingya Refugees extremely volatile.

The global community, which includes Human Rights Watch and International Criminal Courtroom (ICC), protects human rights. The International Criminal Court, established under the Rome Statute, prosecutes and punishes culprits responsible for crimes against humanity. Myanmar is not a State Party under the Rome Statute. However, Articles 13(b) and (c) permits the ICC to exercise its jurisdiction over the states who have not signed the agreement.

21 Vienna Convention on the Law of Treaties 1969 https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

International Court of Justice (ICJ) is a political and legal impactful international body that can immediately constitute a forum for open and comprehensive consideration for the ongoing instances of human rights violation in the state of Rakhine. The intervention of the ICJ in the matters of the Rohingya crisis can negatively impact the foreign investors and affect the business of the state. This will urge the government to act accordingly, concerning the ground of atrocities that are being conducted in the state. The following actions will cause the government to act immediately, and Myanmar will be obligated to respond immediately. Looking at the matters, the following policy recommendations with respect to the study are listed below:

- The UNSC members need to be active, politically involved in seeking justice for the Rohingyas, since it does not fall under the jurisdiction of the obligations of the Rome Statute. The UNSC big five members should proactively seek help through ICC as a long-term solution that the world community can consider to end the atrocities against human rights.
- The skewed distribution of resources has often led the marginalized community, Rohingya, prejudiced within the society. The government and officials often conclude the violence is conducted due to the skewed resources, blaming Rohingyas and calling them 'Muslim terrorists' to divert the international attention. It is very important to demilitarize the ethnic regions particularly, and to invest in development and infrastructure. There is a dire need for legal reforms to ensure an end to the discrimination on the grounds of ethnicity and religion.
- The government needs to steer clear of the discriminatory distinction between the 'citizens,' 'associate citizens' and 'naturalized citizens' by amending the articles of the 1982 Citizenship Law.[22]
- The Government needs to provide support to the most vulnerable

22 This would involve: deleting Articles 30(c) and 53(c), which permit the President or Union Government to restrict the rights of 'associate' and 'naturalized citizens'; amend existing laws that make distinctions based on citizenship status; amending Articles 7 and 43 on transmission of citizenship; and deleting Articles 35 and 58, which provide additional grounds for deprivation of 'associate' and 'naturalized citizenship.'

amongst the most affected population, by establishing prioritization criteria, especially for women and adolescent girls, single women, women-headed households, pregnant and disabled women, etc., for food assistance and nutrition requirements. Also, construction of well-lit, gender-segregated washroom facilities and basic facilities which are safe and accessible for all ages, genders and diversities.

- Establishing and safeguarding women to practice safe sex and safe access to sexual and reproductive health services.
- Decentralizing powers to NGOs working on the ground and organizations to overlook and establish interventions to protect refugees of all genders from all types of gender violence, especially conducted by the officials.
- Stand from international communities such as ASEAN and RCEP to take a strong stand against the violence conducted by the Government and military officials, urging the government to take steps to improve the condition of the refugees. A special clause to accept the refugees from the Rohingya Community and offer humanitarian assistance by bordering nations.
- Introducing a right to the naturalization of citizenship after a fixed period of residence in the state. This will urge the government to reduce statelessness and open a way to acquire citizenship.
- Establishment of multi-purpose support centres to address women's and children's protection as one-stop service centres which act like service segments, providing facilities via spreading awareness and educating women on sanitation and hygiene, nutrition, health, etc.
- Identify and provide for job opportunities by providing skill education and investing in the human capital of the border state.

Bibliography

'"All of My Body Was Pain"'. *Human Rights Watch*, 16 Nov. 2017, https://www.hrw.org/report/2017/11/16/all-my-body-was-pain/sexual-violence-against-rohingya-women-and-girls-burma

Can the ICC Bring Justice to Myanmar? https://www.lowyinstitute.org/the-interpreter/can-icc-bring-justice-myanmar

Davies, Sara E., and Jacqui True. 'The Politics of Counting and Reporting Conflict-Related Sexual and Gender-Based Violence: The Case of Myanmar'. International Feminist Journal of Politics, vol. 19, no. 1, Jan. 2017, pp. 4–21. DOI.org (Crossref), doi:10.1080/14616742.2017.1282321.

'Genocide Is an Act of State, and Demands a Response by Other States.' Rohingya Today, https://www.rohingyatoday.com,https://www.rohingyatoday.com/en/genocide-act-state-and-demands-response-other-states.

Home | International Court of Justice. https://www.icj-cij.org/en

Myanmar - Buddhist Women Special Marriage Law (Pyidaungsu Hluttaw Law No. 50/2015). https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=103620&p_classification=01

'Myanmar Living Conditions Survey 2017: Socio-Economic Report | UNDP in Myanmar'. UNDP, https://www.mm.undp.org/content/myanmar/en/home/library/poverty/mlcs-2017-socio-economic-report.html

OHCHR | International Covenant on Civil and Political Rights. https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

OHCHR | MyanmarFFM Independent International Fact-Finding Mission on Myanmar. https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx

---. https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx

S/RES/2467 : UN Documents : Security Council Report. https://www.securitycouncilreport.org/un-documents/document/s-res-2467.php

'The 2014 Myanmar Population and Housing Census - The Union Report - Census Report Volume 2 [EN/MY] – Myanmar.' ReliefWeb, https://reliefweb.int/report/myanmar/2014-myanmar-population-and-housing-census-union-report-census-report-volume-2-enmy

'---'. ReliefWeb, https://reliefweb.int/report/myanmar/2014-myanmar-population-and-housing-census-union-report-census-report-volume-2-enmy

United Nations - Office of Legal Affairs. https://legal.un.org/ola/

OHCHR | MyanmarFFM Independent International Fact-Finding Mission on Myanmar. https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx

'Genocide Is an Act of State and Demands a Response by Other States'. Rohingya Today, https://www.rohingyatoday.com,https://www.rohingyatoday.com/en/genocide-act-state-and-demands-response-other-states

(Footnotes)

1 https://reliefweb.int/report/myanmar/2014-myanmar-population-and-housing-census-union-report-census-report-volume-2-enmy

2 https://www.mm.undp.org/content/myanmar/en/home/library/poverty/mlcs-2017-socio-economic-report.html

A CONFLICT OF AGENCY AND MORALITY: ACKNOWLEDGING THE RIGHT OF SEX WORKERS TO NOT BE RESCUED

Himani Chouhan

Abstract

Sex work, often known to be the oldest profession in the world, has had a long history in India. Finding its earliest mentions in the Hindu religious texts, the profession has expanded and evolved, with more than 8 Lakh sex workers in the country today. A tabooed profession, sex work has not been directly outlawed but is constricted by several convoluted legal regulations. Immoral Traffic (Prevention) Act 1956's definition of sex work reflects an absence of acknowledgement of women's agency, thereby indicating that the letter of the law is laced with heavy morality. The current legalities surrounding sex work pave way for raid and rescue operations conducted on brothels, where women are often rescued with the use of force and are sent to rehabilitation centres against their will. The rehabilitation centres are no safe haven for women and do not provide the opportunity or space for reintegration of sex workers in society. The paper sheds light on the legal understanding of the profession of sex work being rooted in the patriarchal understanding of virtue and female morality, having evolved from abolitionism. It also highlights the dangers of forced raid and rescue programs in India and advocates the sex workers' right to not be rescued against their will as a fundamental and human right.

Introduction

Sex work or prostitution is often referred to as one of the oldest professions in the world. Within India, the profession has a long history that could be traced back to the Hindu religious texts.[1] Practice of sex work has evolved over the years and according to the National Aids Control Program, there are more than 8 lakh sex workers in the country today. A majority of these women operate from localities designated for this profession. Sonagachi in Kolkata, Kamatipura in Mumbai, GB road in Delhi, Meerjang in Prayagraj and Reshampura in Gwalior are just some of the many such areas in the prominent cities of India. It is common knowledge that sex work is a tabooed profession in India, being weighed down by the heavy shackles of morality. Women engaging in sex work are either viewed as 'loose,' of ill character or are perceived as victims of the crimes of trafficking and sexual exploitation. This view reflects the common perception of women having no agency over their sexuality. Overtly sexual women are, therefore, considered morally corrupt. This 'either a victim or a whore' mentality is not just socially prevalent, but also finds its way into our legal structures and their functioning.

Indian Penal Code does not directly illegalize sex work. However, it does twist the arm indirectly by classifying several activities associated with the profession as illegal. These include, but are not limited to, soliciting in public, owning a brothel, pimping, arranging a sex worker for a customer.[2] Sex work in India is governed by the Immoral Traffic (Prevention) Act (ITPA) 1956. ITPA defines prostitution as "sexual exploitation or abuse of persons for commercial purposes," thereby implying that prostitution is an exploitative activity forced upon women who have no say or choice to opt out. While this is true for a section of women engaged in sex work, there are women that opt for sex work as a profession out of their own free will or due to a lack of better alternatives. Resultant are several raid and rescue operations conducted on brothels where women are often rescued with the use of force and are sent to rehabilitation centres. These rescue operations also

1 Sukumari Bhattacharji, 'Prostitution in Ancient India,' [1987] Social Scientist 15(2)

2 Immoral Traffic (Prevention) Act 1956, s 2, s 4,s 5, s 8.

work as 'moral cleanse' for the localities where sex workers operate, herding everyone out irrespective of their consent. The rehabilitation centres have failed to be the safe havens that they often claim to be. 'Rescued' women are kept in unfavorable physical conditions with little to no focus on skill building or facilitating their safe transition into society. Moreover, instances of physical and sexual abuse are also not uncommon in these facilities.

The questions that, then, arise are as to how this legal understanding of prostitution has taken shape and how is it violative of women's freedom and fundamental rights? This paper aims to shed light on the narrow understanding of sex work as exploitation, tracing its theoretical roots in abolitionism. It also highlights the dangers of forced raid and rescue programs in India and claims that the sex workers have the right to not be rescued against their will and that its violation is a violation of their human rights.

Research Methodology

This section explains the methodology adopted in this paper to answer the research questions.

Research Questions

- What are some moral undertones in the current legal understanding of sex work in India and how do they violate the rights of sex workers?
- How are forced 'raid, rescue and rehabilitate' programs violative of fundamental rights and human rights of sex workers?

Research Objectives

- Trace the roots of the narrow conception of sex work as trafficking and highlight its impact on the current laws related to sex work.
- Highlight the consequences of the forced raid, rescue, and rehabilitate programs and suggest amendments to current legal frameworks to protect the rights of the sex workers.

Research Design

- The research is purely qualitative and relies on secondary data in the form of academic papers, publications from rights-based organizations, newspaper reports, and surveys.

The research employs deductive reasoning.

History of the Anti-Trafficking Movement

The beginning of the anti-trafficking movement is often associated with the United Nations 'Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, introduced in 2000. Although the UN TIP protocol is one of the milestones of modern international legislation against trafficking, the history of anti-trafficking laws goes back to the late nineteenth century. The Anti-white slavery movement in Europe aimed to prevent the trafficking of white women for prostitution. Much like the modern discourse on trafficking and sex work, the movement was based on the conception of docile white women being exploited by minacious foreign men. The agreements and legislations that stemmed from this movement were focused on border control. This associated slavery with criminal or immigration law and ignored the crucial structural factors that pushed women into poverty, leaving them vulnerable to slavery.[3]

Neo-abolitionism of the 1960s, aimed at rescuing victims of 'modern day slavery,' also influences the legalities of sex work in India. Neo-abolitionists' view of sex work was heavily influenced by the anti-white slavery discourse. Their belief that all sex work is coerced and the women are victims of this coercion points towards a lack of agency of women in sex.[4] Feminists, such as Catherine MacKinnon, identify with this line of thought. They believe that women have no real choice in prostitution as the institution itself is a product of male dominance that views women as commodities to be consumed. According to

3 Laura Lammasniemi, 'White-Slavery: The Origins of Anti-Trafficking Movement' (*Open Democracy,* 6 November 2017) 'White slavery': the origins of the anti-trafficking movement | openDemocracy(Accessed on7 May 2021)

4 Aziza Ahmad and Meena Seshu, 'We Have the Right not to be Rescued: when Anti-Trafficking Programmes Undermine The Health and Well Being of Sex Workers' [2012] Northeastern Public Law and Theory Faculty Research Papers Series, pp 152-159

these radical feminists, women claiming to be voluntarily choosing this profession have a 'false consciousness' and cannot identify their own oppression.[5] However, abolitionists weren't a homogenous group composed solely of the radical feminists. Other conservative groups viewed sex work as unethical and a departure from traditional values. Neo-abolitionists, however, were united by their goal of complete abolition of sex work.[6] The current legislations regulating trafficking and sex trade in India appear to be borrowing from this understanding of trafficking and sex work, often considering the two synonymous.

Feminist Response to Prostitution in India

Anti-prostitution movements in India are congruent with those of the first world nations. Added to them is the conservative understanding of Indian women as tame, submissive, and reluctant to compromise their 'honor.' As Geetanjali Gangoli explains, feminists in India have reacted to prostitution in three ways. These are 'silence, as hurt and violence, and as a potential choice and liberation.' In this paper, we focus on the latter two reactions. The neo-abolitionists' view of prostitution identifies it with hurt and violence. There are several women's organizations and NGOs working in India that are influenced by this neo-abolitionist tendency. The organizations often club child and adult prostitution under the same umbrella, thereby infantilizing women and negating their consent by extending the understanding of child prostitution and trafficking to adult women as well. They firmly believe that women have no actual choice and are forced to take up this work due to extreme poverty. Another common misconception amongst the more orthodox groups is that voluntarily opting for sex work is a Western idea and Indian women could never opt for it until forced.[7]

Another significant aspect of the strand of Indian feminism advocating for the abolition of sex work is its differing treatment of two potential sites of violence for women, namely family and prostitution.[8] Indian

5 Janie A. Chuang, 'Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy' [2010]158(6) University Of Pennsylvania Law Review 1164

6 Ibid 1165-1166

7 Dr. Geetanjali Gangoli, 'Silence, Hurt, and Choice: Attitudes to Prostitution in India and the West' [2000] Asia Research Centre Working Paper 06, p12

8 Ibid 15-16

feminists have not only challenged prostitution for being a site of violence for women but also disrupting the sacred unit of the family. In doing so, they rely on the traditional understanding of family as the primary unit of identity and largely ignore the family's role in systematic physical and social oppression of women. While feminists have taken up issues of domestic violence and the rights of married women, there has not been much emphasis on abolishing the institution of marriage on account of being patriarchal, oppressive, and, dangerous for women. This has led to what Gangoli calls the 'co-option of feminist interventions,' specifically targeting sex work and sex workers and overlooking similar patterns of violence and exploitation in traditional institutions.

Morality of Laws: Analyzing Domestic and International Legal Frameworks

In 2000**,** the UN General Assembly adopted the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in persons. The protocol finally came into force in 2003. The document was intended to bring concurrence on the issue of trafficking internationally, so each country could introduce domestic legislation to prevent trafficking, aligning with the broader international objectives. Trafficking is defined by the UN to encompass "recruitment, transportation, transfer, harbouring or receipt of persons." Section (b) of Article 3 further states that the consent of the victim is irrelevant if it has been obtained through any means listed in section (a). This list of means includes, among other things, "giving or receiving of payments or benefits to achieve the consent of a person." This provision implies that irrespective of whether the said victim had willingly accepted monetary compensation from someone in exchange for providing their services as a sex worker, the person offering the money shall be penalized. The underlying assumption here is that the victim in most scenarios consents due to certain socio-economic circumstances such as poverty and lack of better opportunities to sustain themselves and their families.[9] Thus, while overriding consent, priority is being given to values such as dignity and protection. This implies a clear moral bias against sex work, with it being considered an undignified profession. Furthermore, a distinction must be made

9 UNODC, *The Role of Consent in Trafficking in Persons Protocol* 2014

between degradation and criminal offense.[10] While sex work may be degrading for women because of the exploitation they experience in its practice, degradation is a reality of several other exploitative employments. Thus, secerning sex work from all other professions and criminalizing it further substantiates the moral biases related to women's chastity and purity.

The Indian government passed the Suppression of Immoral Trafficking Act (SITA) 1956, amended in 1986 as The Immoral Traffic (Prevention) Act. By placing the word 'immoral' before 'traffic,' the act makes it amply clear that the primary concern remains the morality of the act and not its being a criminal offense.[11] Section 17(2) of the act invalidates the consent of adult women by stating that the magistrate could order the family, husband, or guardian of the rescued person to 'take charge' of the person. In many cases, women engage in sex work without the knowledge of their families to provide financial support. In other cases, they do so to live independently away from their families. The 'charge' is often handed to the family member or guardian with a condition that the woman would stay away from sex work in the future. Thus, adult women are infantilized and morally policed under the pretext of protection. Section 10A of the act states that any woman found guilty of offenses under Section 7 and 8, which include 'Prostitution in or in the vicinity of public places' and 'Seducing or soliciting for purpose of prostitution' respectively, could be detained in a 'corrective institution' for up to 5 years. Here, no distinction is sought between trafficked women and women practicing out of their own will. This, thus, becomes, as Lucinda Finlay calls it, a victimless crime with the woman as the culprit.[12]

The Act criminalizes activities associated with sex work, such as soliciting in public, running a brothel, practicing prostitution within two hundred meters of a public place, living with a prostitute, or arranging these services. In doing so, it lays down a landmine for women engaging in this profession and makes them highly susceptible

10 Gangoli (n7)11

11 SANGRAM, *Raided: How Anti-Trafficking Strategies Increase Sex Workers' Vulnerabilities to exploitative Practices* (2018) p20

12 Lucinda M. Finley, 'Breaking Women's Silence in Law: The Dilemma of The Gendered Nature of Legal Reasoning' [1989] p895

to being arrested on grounds of violation of any of the above-mentioned activities. Arbitrary arrests and harassment at the hands of authorities responsible for law enforcement are common. These provisions view sex work as 'public nuisance' and attempt to prevent it from disturbing the sanctity of the mainstream society. In doing so, it indirectly imposes a moral quarantine over those engaged in this profession by making it illegal to carry out prostitution within two hundred miles of a public place (Section 7). Almost all prominent cities of India have localities informally dubbed as 'red light districts' where most sex-oriented businesses are concentrated. These localities may not be physically remote but are socially isolated, eventually isolating and marginalizing the sex workers. Sex workers' groups have long been advocating for doing away with all such restrictions. World charter for Prostitutes' Rights adopted in Amsterdam in 1985 puts forward a demand for lifting spatial restrictions on the practice of prostitution. It demanded the liberty for prostitutes to reside and operate from any locality.

Dangers of Anti-Trafficking Programs

Raid, rescue, and rehabilitation programs are conducted in red-light districts across the country to rescue trafficked women. Several national and international non-governmental organizations collaborate with the state machinery to execute these programs. The idea behind raid and rescue programs is to free women and underage girls trapped in the nexus of sex-trade. However, these raids do more harm than good for consenting adult sex workers. Following are some of the important aspects to look at in order to understand the impact of raid and rescue programs:

Violence and abuse: Women who are forcefully rescued are often subjected to abuse and humiliation by the police. Police raids are marked with an utter disregard for the consent of these women. A study conducted by Sampada Grameen Mahila Sanstha (SANGRAM) found out that out of the 243 women rescued in a raid, 193 were the ones who had voluntarily opted for sex work, and less than one percent of the total women were minors. Many a time, sex workers are coerced out of their settlements with the use of force. They are coerced to provide sexual favors to the officials in return for their release or as a security for not being arrested. Laws biased against sex workers further prevent them

from accessing legal help, making them vulnerable to exploitation at the hands of their 'rescuers.'[13]

Health risks: Sex workers as a group are most vulnerable to HIV in India. HIV prevention projects being run at the local level are often disrupted by raid and rescue programs. Sex workers' collectives staying and operating together initiate small-scale programs to increase awareness within their community and encourage the use of condoms. As a group, the collectives can identify the violent clients and prevent them from entering their premises. Frequent raids force the sex workers to lay low and operate in secret. This often forces them to compromise on their sexual safety. Additionally, collectives living together monitor the use of condoms and encourage testing. The community takes care of the sex workers that test HIV positive. Furthermore, forcefully rescued workers are kept in remand homes, correction centres, and prisons for long periods. This makes it difficult for HIV prevention programs to reach them for testing.[14]

Failure in rehabilitating: As an outcome of the relief and rehabilitation programs, sex workers end up in correctional facilities and rehabilitation homes. These correctional homes are usually cramped spaces with restrictions on movement. Not only do they undermine the liberty and freedom of these women, but they also fail to deliver on the promise of the better life they claim to offer. There are little to no programs for upskilling and training of sex workers. The alternative career options suggested by these centres are more often than not extremely ill-paying and insufficient for sustenance. The most commonly suggested options are working as contractual cleaning employees, sewing, basket weaving and papad making. In some cases, marriage is provided as an option for rescued sex workers in rehabilitation centres. Physical and sexual abuse in correctional facilities is not uncommon. Authorities force women to provide sexual favours to them in exchange for the basic necessities. At the time of raid and rescue, several sex workers are charged with offences under ITPA and get tangled up in court proceedings. These proceedings pose financial burdens on these already out-of-job women, who then have to rely on loans. Due to lack of access to formal bank

13 SANGRAM (n11) p20

14 Ahmad and Seshu (n3) p161-164

loans, they end up borrowing informally at hefty interest rates, sliding down into the swamp of poverty and debt. The loan providers are usually people from their own community who, upon the release of these workers, force them to work for them in exchange for the money loaned.[15]

Protecting the Rights of Sex Workers

Human rights are the rights bestowed upon the citizens of the world by virtue of their being human. These are guarantees that need to be protected and upheld by all states for all individuals. The concept of human rights is rooted in the idea of dignity. Every human person has a right to lead a life of dignity, and that would be made possible only if these rights are upheld. Human rights listed in UDHR[16] include, among other rights, freedom of movement, residence, and right to work, right against unfair detainment, right to privacy and right to trial. Sex workers in India face violations of these human rights on an everyday basis and, especially, during forced raid and rescue programs. Raids are commonly followed by illegal detainment and abuse. 'Buy and bust' operations conducted by the police without the consent of the sex workers violate their privacy. Sex workers hardly have access to proper legal assistance, which takes away their right to fair trial. There's a clear congruence between human rights under UDHR and the fundamental rights under the Constitution of India. Domestically, by virtue of being citizens of this nation, the Constitution of India confers upon them the Right to Freedom. Article 19 lists several freedoms. 19(1) bestows upon the citizens the right to form associations, the right to reside and settle in any part of the territory of India and, most importantly, the right to practise the profession of their choice. Confining them in red light zones, deterring them from practicing sex work by posing indirect legal impediments, and accusing sex workers' collectives of advocating a foreign agenda in exchange for foreign aid, all violate these fundamental rights of the sex workers. Violations of the human rights of sex workers are overlooked, because the moral judgment attached to their identity as prostitutes overshadows that of being citizens. This moral judgment dehumanizes sex workers and makes them even more vulnerable to

15 SANGRAM (n11) p21
16 Universal Declaration of Human Rights 1948

being oppressed. Therefore, it is crucial to bring amendments in laws related to sex work and trafficking to uphold the human rights and fundamental rights of sex workers.

Rehabilitation is not a realistic choice in a third-world nation.[17] Lack of employment opportunities makes it difficult for sex workers to be absorbed in other professions. Many a time, their background in sex work deters people from hiring them. Lack of education and required skills makes it difficult for them to find work suitable for them. The stigma attached to sex workers hinders their integration in to mainstream society which views them as morally corrupt. If the ultimate goal is welfare of women engaged in sex work, then focus must be on decriminalizing practices related to sex work and acknowledging sex work as a legitimate profession. Necessary amendments must be made in ITPA to define trafficking in terms of the iminality of the act and clearly distinguish it from consensual sex work for adults. Consent of adult sex workers must be acknowledged in the law, and they must be recognized as a legitimate workers' group. Regulating sex work and ensuring safety and security to sex workers would empower them socially as well as financially. Rules ensuring better access to healthcare, bank schemes, and legal support to sex workers must be put in place. In the long run, these measures are likely to have a greater impact on altering the structural conditions that limit women's choices. Most importantly, the process of amendments must be participatory and must take in the recommendations of the sex workers' collectives.

Conclusion

The debate around the consent and choice of sex workers has been going on for a long time. In this regard, it is necessary to understand the validity of this choice. In response to the argument of radical feminists that this choice is not real, sex workers' groups have responded claiming that their choice of profession is as real and valid as that of individuals choosing any other exploitative profession. Individuals performing hard labour in unsafe conditions, those forced to do manual scavenging, all are forced to make this choice due to socio-economic vulnerabilities, caste and class factors, and lack of opportunities. Women in Indian society are given little to no real choice even in marriages. Singling out prostitution

17 Gangoli (n7) p20-22

and questioning the validity of their choice, thus, clearly reflects the bias against the profession based on a conservative understanding of women's sexuality and their lack of agency.[18] A majority of women enter into this profession owing to economic reasons. Widespread poverty, huge income gaps, and unavailability of alternate opportunities make this choice relatively more attractive for some women. Anti-trafficking laws and those advocating for the abolition of sex work overlook these structural factors and end up focusing on 'saving' women in a similar fashion as the anti-white slavery movements did.

It must be understood that sex workers are not a permanent, stagnant group of women. Women would continue to join sex work for as long as they do not have relatively better alternatives. Resources must be directed towards altering the structural conditions that restrict the choices and opportunities of all poor and marginalized individuals, and not just sex workers. Programs for poverty alleviation, free education, and job security must be implemented to bring a sustainable bottom-up transformation. It is measures such as these and not targeted raid, rescue, and rehabilitation programs driven by 'saviour' complex that would ensure a life of dignity for all. Having said that, it must be acknowledged that a woman's free will to engage in work may not always be an outcome of socio-economic conditions, and its defense must not be limited to the lack of alternatives argument. Sexual autonomy and agency of women must not be dependent on terms and conditions. Women are the sole 'incharge' of their bodies and their sexuality, and they should have the freedom to explore, express, and utilize it in whichever way they deem fit.

Bibliography

Articles

1. Ahmad A and Seshu M, *We Have the Right not to be Rescued: when Anti-Trafficking Programmes Undermine The Health and Well Being of Sex Workers,* Northeastern Public Law and Theory Faculty Research Papers Series, 102, (2012)

2. Bhattacharji Sukumari, *Prostitution in Ancient India*, Social Scientist 15(2) (1987)

18 Ibid p17-23

3. Chuang A. Janie, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy,* University Of Pennsylvania Law Review 158 (6) (2010)

4. Finley Lucinda, *Breaking Women's Silence in Law: The Dilemma of The Gendered Nature of Legal Reasonin*g (1989)

5. Gangoli Geetanjali, *Silence, Hurt, and Choice: Attitudes to Prostitution in India and the West*, Asia Research Centre Working Paper 06, (2000)

Blogs/ E-Newspapers

1. Lammasneimi Laura, *White Slavery and the Origins of Anti-Trafficking Movement,* Open Democracy (2017)

2. Pai Arthi, Seshu Meena, Murthy Lakshmi, *'In its Haste to Rescue Sex Workers,'Anti-Trafficking' is increasing their Vulnerability'* EPW 2018

Domestic Statutes

1. Immoral Traffic (Prevention) Act 1956

2. The Constitution of India, 1950

Reports

1. SANGRAM, *Raided: How Anti-Trafficking Strategies Increase Sex Workers' Vulnerabilities to exploitative Practices* (2018)

UN Docs

1. Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

2. The Role of Consent in Trafficking in Persons Protocol 2014, United Nations Office on Drug and Crime.

3. Universal Declaration of Human Rights, 1948

WOMEN AND THEIR LABOUR SOME PERSPECTIVES ON THE CARE ECONOMY OF ASHA WORKERS

Janhavi Shah

Abstract

This paper seeks to understand the place of women's labour in the care economy and critique it from a Marxist-feminist perspective. It analyses the impact of exclusion of ASHA workers from important labour laws, like the social security code, and compares it to the standards set by the International Labor Organisation. It also explores the relationship between development and gender and how the goals of smart economics do not always conflate with those of women empowerment. Women's participation in the workforce is only one superficial indication of 'emancipation of women from the private realm of the household, and the neoliberal economy has its ways of exploiting the labour of women; it undervalues the work done by women while maintaining a false narrative of incorporating women into the development process.

Research Question and Methodology

Using secondary analysis of theoretical texts, this paper aims to answer the relationship of gender and development while keeping women's labour as the focus.

Caring about the Care Economy

The most conspicuous sectors where this trend has been recorded are healthcare and education. A 2019 study by the WHO shows that women

make up about 70% of the workers in the health sector globally.[1] In India, even though women are employed in high numbers in the health sector (38% of health workers are female), very few women end up in allopathic, ayurvedic and pharmaceutical practices, and a high number of them end up as nurses and midwives (83.4% of nurses/midwives are female). The Report of the Mid-Term Appraisal of the Eleventh Plan by the Planning Commission (PC 2007-12) showed that the overall shortage of female health workers and midwives was low at around 12.43% in 2008 as compared to 54.3% in male health workers. This points towards a trend of recruiting female health workers, mostly because they are easier to let go of and are not considered part of the formal economy. Their work is very systematically undervalued on a structural level in society which removes accountability from individual employers who pay them meagre salaries for the arduous work they do. It is not surprising that two-thirds of all care workers are women who dedicate themselves to underpaid and undervalued labour amid inadequate perks and lack of respect, working 3.2 times more than men. This acts like a whirlpool consuming a major percentage of women workers into the informal care economy, impeding their movement towards formal sector jobs.[2]

As of 2010, 7.49 lakh ASHA workers have been recruited, but these women do not fall in the category of formal workers and receive an honorarium in the name of salary for their 'contribution.' The ASHA women are volunteers, and not workers, receiving incentive-based payments ranging from 15 rupees (for preparing malaria slide), 100-300 rupees (for maintaining the village health register) to 1000 rupees (for DOTs provider). They receive a monthly payment of 4000 rupees for performing a fixed, officially prescribed number of tasks; however, this payment is almost always excessively delayed using the pretext of several reasons. These women also end up doing more work than assigned to them, with no acknowledgement of their extra hours of work since it was all 'voluntary' in the first place. Multiple survey reports have confirmed the invaluable contribution ASHA workers

1 Inamdar and Jain 2021
2 Kuriakose and Iyer 2019

have made for rural India,[3] boasting a 55% institutional delivery rate in Bihar, Madhya Pradesh, Odisha, Rajasthan and Uttar Pradesh.

Smart Economics: The Win-Win Formula is a Failure

Governments and businesses all around the world have been focusing on incorporating women into the process of development for multiple reasons: instead of being progressive, to overcome poverty and hunger and achieve the millennial development goals. "Investing" in women is considered to be a smart choice for developing countries; countries with greater gender equality in employment and education were likely to report high growth rates and human development,[4] although the reverse relationship was far weaker and inconsistent. Women matter in the project of economic development, as was said by the managing director of the World Bank.[5] There exists a win-win synergy between gender equality and high economic development which is the driving force behind incorporating more and more women in the development processes across countries. But, this collective approach to 'enable' women to challenge the structural problems has been undermined by the analysis of what 'women empowerment' really is. I believe, the current approach converges with some goals of women empowerment but does not have that as its central goal. It is an instrumental approach, using women to do the work of development while overlooking the real impact of the process of structural change that it employs. It also co-opts the discourse on gender equality, side-lining the experiences of women. A case in point is the 'Girl effect,' an initiative by Nike to promote 'investment' in girls because they will save the world. By this logic, if women were not as useful as claims out there deem them to be, they would not get the investments they are getting now. This exposes the male privilege further; while men can practice all of their rights unhindered and use their entitlements without any consequent obligations, women have to prove their worth to the state and the community in order to avail any privileges or get investments.

3 United Nations Population Fund assessment of the NRHM programme

4 Kabeer and Woodroffe 2013

5 Robert B. Zoellick asserts that: 'Investing in adolescent girls is precisely the catalyst poor countries need to break intergenerational poverty and to create a better distribution of income. Investing in them is not only fair, it is a smart economic move.'

There is a clear trend towards feminization of poverty and anti-poverty measures across the Global South. While women often suffer from low incomes because of poor remuneration in paid employment and other structural constraints, what is also evident is a trend towards pushing women to the frontline of alleviating poverty at the grass-roots. [6] Just incorporating women into the labour force does not equate to empowering them. Quality of work is an integral part of the way we (should) measure women's empowerment. Ensuring an improved material reality for women contributing to programs like the health mission should not only be considered while assessing the success of such programs, it should be a priority of the said programs. There is a deep detachment between gendered inputs and contributions and the rights and rewards received, which indicated a new and deeper form of exploitation of women and their labour.

ASHA Workers and the Law

International Law

India has only ratified 4 out of the 8 core conventions of The International Labor Organization which sets international labour standards and works towards promoting decent work for all men and women. ILO Social Security (Minimum Standards) Convention, 1952, (No. 102)[7] states nine components essential for maintaining minimum standards for social security of workers: medical care, unemployment benefit, employment injury benefit, old-age benefit, sickness benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit. And, while the convention provides flexibility to implement given provisions, only 59 countries have ratified it and India is not one of them.[8] According to the traditional labour law logic, as long as the law identifies an individual as an 'employee,' it does not matter whether it in the formal or the informal sector. Considering this, informal workers like ASHA workers do not meet the criteria of being "employees" and, hence, are not eligible for any protection or provision to rebalance the unequal power relations of capital and labour given to workers in a formal sector.[9] At the ILC in 2002, there was consensus that there was

6 Chant and Sweetman 2012

7 C102 Social Security (Minimum Standards) Convention, 1952

8 Sundar and Sapkal 2020

9 This power is also seen to be reducing as India embraces the neoliberal forces

no universal definition of the informal economy, but rather a broader understanding that implied informal economy to refer to "all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements […] They are operating outside the formal reach of the law; or […] although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs.[10]"[11]

In India

ASHA workers are recruited under the National Rural Health Mission (NRHM) and are chosen by and accountable to the gram panchayat[12] of every village. Although this mission was initiated by the central government, and the women selected as ASHAs are to be trained under the government of India, these workers are not considered government employees,[13] but instead are glorified as voluntary activists accountable for community health and well-being. The Supreme Court in *State of Karnataka & others v. Ameerbi & others*[14] held that Anganwadi workers do not hold any civil post and Minimum Wages Act is not applicable to them. Their remuneration is paid through incentives like 150 rupees for motivating sterilization, 50 rupees for attending monthly immunization sessions, 200 rupees for motivating and accompanying pregnant women to health centers for delivery and 400 rupees as transport cost.

But, these incentivized payments have been irregular and delayed, and these problems of delayed and irregular payments have not been resolved from before the NRHM instituted ASHA workers. Mitanin, a precursor of the role/post of ASHA, received less than 200 rupees/month on an average for 3 months during 2010.[15] However, payments varied from district to district in the State of Chhattisgarh. Asha workers have

determining labour regulations.

10 Ministry of Women and Child Development mentioned the nature of the work of anganwadi workers in ICDS scheme; it was not feasible to declare them as government employees.

11 Trebilcock 2000

12 NRHM 2005-2012

13 45th ILC Delhi

14 State of Karnataka &Ors vs Ameerbi & Ors 2008 1 SCC (L&S) 975

15 Som 2016

also consistently complained of the lengthy procedures of getting their payments: they have to get signatures from the attending anganwadi workers/ nurses and from lady health visitors (LHVs) for institutional deliveries under the Janani Suraksha Yojana (JSY), from the village sarpanch to sign a claim of incentive for 100% immunization of children in the village, From anganwadi workers to sanction travel expenses for delivery cases which were not covered in the JSY vibe and all the records had to be signed by Asha facilitators. Added to this was the humiliation at the channels of processing the payment when Asha workers had to wait for so long for such small amounts of money and had to go to different personnel to get their records approved. Delayed payment is not the only issue ASHAs face while at work; most of them are filling in for absent anganwadi workers and doing extra tasks which are not listed in the task-incentives charts and entitlements at any anganwadi centres or PHCs. The grievance redressal for Asha workers has been lax and unsatisfactory, and the task-incentive balance is skewed towards the State, exploiting women workers, while not addressing their issues or grievances systematically.[16]

The Indian law has, time and again, refused to acknowledge the exploitative nature of the relationship between Asha workers and the State, citing the 'nature' of the work to be the reason for not fixing wages and providing other benefits to these 'selfless' volunteers who are fulfilling their duties to their community. The unorganised workers Social Security Act, 2008, recognises certain Social Security schemes for the unorganised workers, like National Family Benefit Scheme, Janani Suraksha Yojna, Janshree Bime Yojna,[17] etc., for which ASHAs are also eligible, but this just increases the burden in terms of paper work and procedures for the beneficiaries. The Social Security Code 2020,[18] which consolidates nine different central laws, extends protection of welfare measures to 'unorganized workers' among others who were previously excluded. However, there is no clarity on whether "voluntary" workers, like ASHAs, fall under the category of organized or unorganized workers in the definitions provided in this code.

16 Bhatia 2014
17 Schedule II (Unorganized Workers Social Security Act 2008)
18 Social Security Code 2020

All major studies on the Asha workers have suggested some form of fixed payment/wages as a constant demand in issues taken up by these workers. And, while Asha workers were applauded for the increase in institutional delivery of healthcare services and for their unparalleled contribution during the pandemic, they have been denied social security. While there is a deeper, most structural explanation to the systematic exclusion of Asha workers from social security benefits, there is a policy flaw as well. Social protection schemes in India have not been thought out; there are so many schemes on paper with over-lapping coverage and benefits, and yet they are not reaching their target populations. Most social protection schemes end up being populist and exclusionary; this aspect is hardly taken seriously even though it is supposed to cover 90% of the total workforce in India.[19]

Marxist-Feminist Critique

Mary E. John talks about three different approaches[20] towards understanding the relationship between Marxism and feminism. The third approach, which is more complex than the first two, sees the interrelationship between Marxism and feminism while granting each some autonomy in relation to the other. This approach acknowledges that there are two systems of oppression which cannot and should not be seen in isolation from one another. It is this approach that we should keep in mind while understanding and analyzing the value of labor of women from the unorganized sector. There is a reason that in India, the female labour force is largely concentrated in the informal sector with 95% of women in the organised sector.[21] It is basically an extension of the unpaid labour that women have been doing in the realm of the household since the public and private were considered to be separate spheres. Thus, while women are increasingly becoming part of the workforce in the neoliberal economy, the value of their labour, both paid and unpaid, is not increasing. The capitalist state and the patriarchal household are both benefiting from the labour of women like the ASHAs who struggle every day to acquire the status of 'workers' to avail the benefits they should have had in the first place. The questions that we need to ask, as

19 Sundar and Sapkal 2020
20 John 2017
21 Chakrabarty 2020

Hartmann also asks in her seemingly controversial essay,[22] is about the relationship of the women and their labour to men, and who benefits from the exploitation of that labour. Evidently, the material base on which patriarchy rests lies in men's control over women's labour power and their access to resources. In the case of ASHA workers, it is the State that is controlling and assigning value to their work, while appropriating surplus labour that these workers end up doing for free. It is important to consider modes of exploitation, discrimination and exclusion that are reproduced, maintained and justified by the relations of gender, class and caste in society.

Conclusion

Women's development and empowerment have a very complex non-linear relationship that needs a nuanced understanding. In terms of development, the State has thrust on women the responsibility of bringing forth 'development' at the grassroots level in the spheres of poverty alleviation, education and healthcare. Ironically, these development programmes have not improved the material reality of those very people responsible for implementing them and have, consistently, denied such groups the status of workers which would have entitled them to security, material benefits and legal rights. This exercise of 'doing development through gender' does not contribute to women empowerment, as has been claimed by the State. The lofty ideas talked about in the 1995 Beijing Platform for Action about not marginalising the concerns of women and gender over those of development need to be internalised by the Indian State and practiced on ground. Women's rights should be promoted for their own sake and not for the progress of society or for economic growth. Gender and development discourse should recognize relational inequality and equal rights for all girls and women, irrespective of their economic contributions, and involve other social actors, especially men who can prove to be pivotal to empowering women.

An important point to consider for the ASHA workers is their association with the health system and their central role in linking health services to families at the ground level. Yet, the health system is reluctant to take full ownership of the ASHAs. After the socio economic reforms, women

22 Hartmann

in developing countries have become a major source of health care, but work with little job security and practically absent infrastructural support. With an incentive-based system of remuneration, these ASHAs are further distanced from the formal sector healthcare practices.

An analysis that takes into account job quality would most likely reveal greater inequality between men and women in the economic sphere than an analysis that focuses on labour force participation alone. This might be the first step towards assessing and improving gender justice in the context of the workplace. Treating ASHA workers as voluntary workers reiterates the practice of undervaluing women's work while confining them to the traditional roles of caregiving. It is important to fix a minimum wage for ASHA workers in order to incorporate them in the formal healthcare sector, which will not only ensure better material reality, but also dignity and agency for those women.

Bibliography

Bhatia, Kavita 2014. 'Performance-Based Incentives of the ASHA scheme stakeholder perspective' Economical and Political Weekly 2014

Chakrabarty, Anua 2020. 'Code Red: Labor, Wages, and Security' (https://www.telegraphindia.com/opinion/code-red-labour-wages-security/cid/1800437) (posted on December 12, 2020) (accessed on June 6, 2021)

Chant, Sylvia 2014. 'Exploring feminization of poverty in relation to women's work and home-based enterprise in slums of the global south' *International Journal of Gender and Entrepreneurship* 6 (3) pp. 296-316

Chant, Sylvia and Sweetman, Caroline 2012. 'Fixing Women or fixing the world? 'Smart economics,' efficiency approaches, and gender equality in development' *Gender and Development* 20 (3)

Chourasia, M.K., Raghavendra, K., Bhatt, R.M., Kumar, Dipak, Dutta and Kleinschmidt, Immo 2018. 'Involvement of *Mitanins* (female health volunteers) in active malaria surveillance, determinants and challenges in tribal populated malaria endemic villages of Chhattisgarh, India' *BMC Public Health* 18, 9 (2018)

Hartmann, Heidi 1979 'The Unhappy Marriage of Marxism and Feminism: Towards a more Progressive Union' *Sage Journals* (1979)

Inamdar, Vedika and Jain, Palak 2021. 'ASHA Workers and the Burden of Unpaid Care Work' (https://thebastion.co.in/covid-19/asha-workers-and-the-burden-of-unpaid-care-work/) (posted on January 5, 2021) (accessed on May 17, 2021)

John, Mary 2017 'The Woman Question: Reflections on Feminism and Marxism' *Economic and Political Weekly* 2017 2(52)

Kabeer, Naila and Woodroffe, Jessica. 2013 'Gender Equality must be a development priority in its own right' (https://www.theguardian.com/global-development/poverty-matters/2013/may/14/gender-equality-development-priority) (posted on May 14, 2013) (accessed on May 31, 2021)

Kuriakose, Francis and Iyer, Deepa. 2019 'Care economy uncharitable to women' (https://www.thehindubusinessline.com/opinion/columns/care-economy-uncharitable-to-women/article29619795.ece) (posted on October 8, 2019) (accessed on June 5, 2021)

Som, Mithun 2016. 'Volunteerism to Incentivisation: Changing Priorities of Mitanins Work in Chhattisgarh' *Indian Journal of Gender Studies* 23(1): 26 -42

Sundar, K.R. Shyam and Sapkal, S. Rahul 2020 'Social Security Code: Another Historic Opportunity Missed!' (https://www.theleaflet.in/social-security-code-another-historic-opportunity-missed/#) (posted on October 11, 2020) (accessed on June 4, 2021)

Swaminathan, Padmini 2015. 'The formal creation of informality and, therefore, gender injustice: Illustrations from India's social sector' *Indian Journal of Labour Economics* (2015) 58: 23-42

Trebilcock, Anne 2000. 'International Labour Standards and the Informal Economy' (https://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/publication/wcms_079133.pdf)

Upadhyaya, Himanshu 2020. 'The Missing National Social Security Funds for India's Unorganised Sector Workers' (https://thewire.in/labour/national-social-security-fund-unorganised-workers) (posted on May 28, 2020) (accessed on May 28, 2021)

WOMEN IN LEADERSHIP

Lekshmi J. H.

Abstract

In this paper, we look into the disparity in representation between men and women in public spheres. We look into the various national and international frameworks which provide for substantive equality between the genders. While we look into the reasons for such inequality, we also explore the benefits that can be achieved if a certain degree of parity between the genders is attained. We also analyse the drawbacks of the Women's Reservation Bill and propose certain policy solutions to ensure better representation.

Introduction

India is home to around 656 million women, the second highest population of women in the world. India is also characterized by a high degree of gender inequality, and it is ranked 140 among 154 countries in the Global Gender Gap Report of the WEF.[1] This makes India home to one of the largest discriminated female populations in the world. The decline in India's ranking was driven majorly by decline in political empowerment, mainly because of the significant decline in the number of women in ministerial positions from 23.1% in 2019 to 9.1% in 2021. Other significant contributors were decline in female labour force participation, percentage of women in professional and technical roles and the consistently low level of women in senior and managerial roles.

Since Independence, India has had 1 female President, 1 female Prime Minister, 8 female Supreme Court Justices, 16 female Chief Ministers and 24 Governors. This is not just the case in elected or appointed positions. Only 24% of the recruits to higher cadres of bureaucracy

1 World Economic Forum (WEF), Global Gender Gap Report (2021).

by the Union Public Service Commission in 2019 were female. These numbers are incredibly low considering the fact that over 48% of India's population is female. While 33% women's representation has been mandated in local governments by the 73rd and 74th Amendment Act, the representation of women representatives in the Parliament and State Legislatures remains at 9%.[2] The inequalities in gender are not only visible in representation aspects, but also in other indicators such as health and education attainment.

Research Question

The above realities and stark disparities on the basis of gender lead me to ask two pertinent questions. Is the reason behind gender disparity in the public sphere because of under representation or is it because of the lower preference for women in politics, both by the patriarchs in political parties and society in general? Another question which deserves to be pondered upon is whether more women in public offices or public sphere entail changes to the orientation of public policy?

Research Methodology

In order to answer the questions posed, a qualitative analysis of various theories related to the notions of equality as well as the various national and international legal rights framework were looked into. Secondary research was done, both in qualitative as well as quantitative manner, on the election data in India as well as on global parameters used to rank gender inequality. A review on the socio-economic parameters that affect the participation of women in the public sphere, as well as policy decisions that concern women, were also looked into.

Women's Participation in Public Sphere

India, like most post-colonial countries in Asia is characterized by patriarchy and subjugation of women. While there has been a significant upturn in the representation of women in the parliament from 5% in the first Lok Sabha to 14% in the current Lok Sabha, this is much lower in comparison to the world average of 22% and the population of women in the country which is around 48%. On analyzing the data

2 Association for Democratic Reforms, Women Representation among Elected Representatives, available at https://adrindia.org/sites/default/files/Women_representation_among_all_MPs_and_MLAs_English.pdf

from the Election Commission of India,[3] it can be seen that while the total number of male candidates fielded by political parties is 7334, the number of female candidates is 724. Of these 724 candidates, only 78 won the election - that is, 10.77%. The number of female candidates whose deposits were forfeited was 573, nearly 80%.

Type of Political Party	Number of Female Candidates	Won	Deposit Forfeiture
National Parties	171	58	62
State Parties	57	17	19
Registered Parties	270	1	268
Independents	226	2	224

Table 1: Table showing statistics of women candidates in 2019 General Elections (Source: ECI)

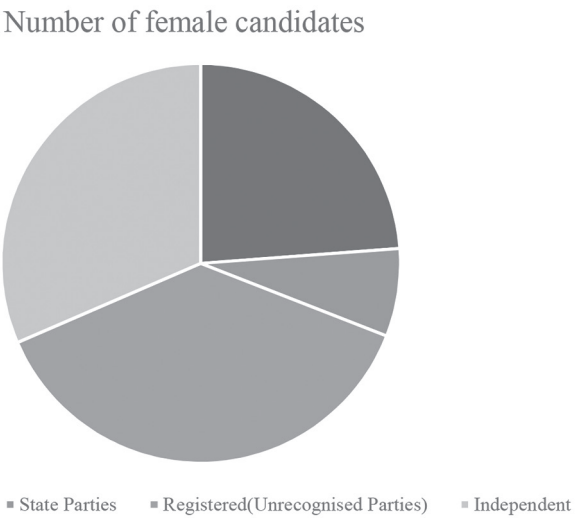


Figure 1: Chart depicting distribution of female candidates among different types of parties in the General Election2019

The high degree of under-representation of women is evident from the

3 Election Commission of India, General Election, 2019 (11 October 2019) available at https://eci.gov.in/files/category/1359-general-election-2019/page/2/

fact that the number of female candidates is a mere 9% of the total number of candidates when women form 48% of the population. The high number of women candidates losing their deposit even among the candidates fielded indicates the reluctance of society in general to accept women in the public sphere. Of the 724 female candidates in the general election, only 228 candidates were from prominent national or state parties. The rest of the candidates were either independent candidates or candidates from registered but unrecognized political parties. The degree of winnability of the candidates is also impacted by this, as candidates backed by major parties have a better chance of winning than other candidates, especially amongst the women. This shows that there is a lower preference for female candidates among major political parties.

It is seen that the majority of the female candidates supported by political parties are either relatives of prominent male politicians, from political families or film stars.[4] This is not something that has started in recent times but has been prevalent since independence. The entry of women into politics, especially in Asia, is facilitated by factors such as family ties, martyrdom of male relatives, prison experience, especially freedom fighting, and their social standing.[5] It is seen that there are only a few female leaders without influential political figures as relatives or godfathers.

The 'Pati' culture, which has been gaining prominence in India, especially since the 73rd and 74th amendment act has been observed in state politics as well. This can be seen in the case of Rabri Devi who was thrust into the position of the Bihar Chief Minister when her husband, the previous CM, was convicted in the Fodder Scam corruption case. From all the above cases, it can be seen that the representation of women in Indian politics has, to a large extent, been restricted as well as manipulated by the patriarchs in the party system.

Substantive Equality

4 Sehgal, *How woman candidates fared in the 2019 Elections*. (The Wire, 25 May, 2019), available at https://thewire.in/politics/how-women-candidates-fared-in-the-2019-elections

5 Linda K. Richter, *Exploring Theories of Female Leadership in South and Southeast Asia*. (Pacific Affairs 63(4), University of British Columbia)

The question of women's representation through reservation has been a topic of debate multiple times in India since it first made its appearance in the Constituent Assembly Debates.[6] The assembly felt it was unnecessary, as it felt that all inequalities would be corrected by democracy in due course of time and that the 'equality' of women would be undermined by this. This brings us to question of what we consider as equality; the formal equality guaranteed by the constitution, which considers everyone as equal in the political sense, emphasized by the right to vote. The feminist school often diverged from this opinion: the principle of equality should ideally grant women substantive equality which may not be provided through the conventional 'negative' rights and liberties.[7] The conventional concept of equality that all men are created equal formed the basis of representative government, while in India, in the context of suffrage, women had an equal standing, substantial equality in being represented in Parliament was absent.

Two ways of considering feminist theory of equality is that of equal treatment. While the former stems from not considering men and women as different, the latter considers the difference between men and women. Here, we should consider the argument of equality as seen in Article 14 of the Constitution of India, that the like should be treated alike and the unlike in an unlike manner. The difference between men and women usually stems from the social construct of gender[8] and the discrimination caused by the same. Thus, it can be seen that giving formal equality is not enough to provide quality in social life. Since the initial stance is that of inequality, protection given by the law is the only way to provide equality and, hence, shouldn't be considered a privilege.

Thus, the social construct which makes most institutions in the public sphere phallocentric[9] makes it necessary to have provisions which balance the scales back to equality in the substantive sense.

6 Niveditha Menon, *Elusive 'Woman': Feminism and Women's Reservation Bill* (Economic and Political Weekly 35(43/44).

7 Patricia Cain, *Feminism and Limits of Equality*, (Santa Clara University School of Laws)

8 Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*.

9 Christine A. Littleton, *Reconstructing Sexual Equality* (California Law Review 75(4))

The Rights Framework

The Constitution of India[10] in most regards has made adequate safeguards to ensure substantive equality between the dominant and suppressed sections of the society. In the case of women, this comprises of Article 15(3) which ensures that the general non-discrimination by the state does not prevent the state from making special provisions for women - Article 16(4) which ensures equality of 'opportunity' in the case of public employment and Article 46 which ensures that the educational and economic interest of weaker sections are protected by the State.

The rights available for women through various international covenants also have provisions for ensuring equal representation of women in the public sphere. Article 7 of the CEDAW mandates the state to: "take appropriate measures to eliminate **discrimination against women in political and public life** and, in particular, to ensure that women are as eligible as men to contest elections to all public bodies, that they have the 'right to participate' in contributing to government policy and its implementation."[11] On similar lines the ICCPR ensures that "every citizen shall have the right and *the* **opportunity,** without any of the distinctions mentioned in article 2 and without unreasonable restrictions […] to vote and ***to be elected*** **at genuine periodic elections** which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors."[12]

What we can infer from the above rights, as well as from the notion of substantive equality, is that formal equality available to women given by the freedom to contest elections is not adequate. The state can and should take measures to ensure that all citizens are provided equal opportunities. It can be seen that in societies riddled by inequalities, which impact women on a substantial level, and institutions which perpetuate that inequality as seen in the case of the political parties, it is essential for

10 Ministry of Law and Justice, Government of India, The Constitution of India, available at https://legislative.gov.in/sites/default/files/COI.pdf

11 United Nations, *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), available at https://www.ohchr.org/documents/professionalinterest/cedaw.pdf

12 United Nations, *International Covenant on Civil and Political Rights*, available at https://www.ohchr.org/documents/professionalinterest/ccpr.pdf

the law of the land to ensure true equality in opportunity. Despite the fact that the Women's Reservation Bill to ensure 33% reservations of seats for women in the parliament and state legislative assemblies was part of the election manifestos of most major political parties, it was not followed through. The current government has an ample majority to pass this bill on its own, but still it is not being considered. This apathy of the political parties and the low number of women being nominated by these parties clearly shows that the vested interest of the institution is against the attainment of substantive equality.

Importance of Women in Policy Making

The Medical Termination of Pregnancy Bill, 1971, which permits abortion, was opposed in the Indian Parliament by two MPs only. While outwardly this might seem as a highly progressive measure, the bill was discussed in the parliament as a measure for controlling overpopulation, and not as a matter of a woman having the right over her own body.[13] This is one of the examples which showcases the ignorance inside a parliament which is not truly representative of the country's population. This kind of ignorance and underrepresentation has resulted in perpetuation of a system that is discriminatory of one half of the country's population.

The global gender gap report shows that India is among the bottom five countries in the Health and Survival subindex, as measured by the report.[14] It was seen that the Labour Force Participation in India declined from 35% in 2004 to 25% in 2017 and has, subsequently, declined further to 22.3%. According to a study by K.P. Kannan and G. Raveendran,[15] this job loss was predominantly among women, even though there was a substantial increase in the number of jobs for women with educational attainment at the secondary level of schooling. While this indicates the shift of jobs to a higher skill level, it also shows that a majority of women are being left behind in attaining economic equality, and the predominant reason for being left behind is educational inequality. It is also seen that the impact of this is higher on

13 Menon (n 6)

14 WEF (n 1)

15 K. P. Kannan and G. Raveendran, *From Jobless to Job-loss Growth*, Economic and Political Weekly LIV (44).

socially and economically backward sections such as Muslims, SC, ST and OBC. This can be seen to be in direct conflict with the objective of Article 46 of the Constitution. This also shows how successful design and implementation of policies are required to bridge the gender gap as well as provide the access to basic rights to women.

While women are usually held back by the traditional roles of the private sphere like that of a caregiver and also by other factors such as poverty and unemployment, the pandemic has exacerbated these along with a marked increase in the incidence of domestic violence.[16] Such inequalities lead to magnification of other socio-economic inequities and, hence, we require gender-responsive policies, laws and budgets. An important factor to be considered is that while representation of women is important, it is equally or perhaps even more important to be inclusive of the diversity that exists among women, especially in a society like India. The importance of this can be seen from the fact that while the Triple Talak Bill was being debated in the parliament, none of the debaters were Muslim Women whom the policy directly affects.[17] This has also been recognized as a Sustainable Development Goal, which calls for full and equal participation of women, but here 'women' should mean all women and not just a privileged few.

Impact of Women on Policy Making

The major theory that addresses the impact of representation of women in the kind of policies enacted in legislatures is the critical mass theory propounded by Kanter. She hypothesizes that the sheer number of female representation above a certain threshold of 30% impacts the kind of policies enacted.[18] This has come into criticism over the years, as Beckwith and Cowell Meyers show that along with the percentage of representatives, other conducive factors such as the ideology of the

16 UN Women, *Covid '19 and Women's Leadership: An Effective Response to Building Back Better* (Policy Brief 18).

17 Mayuri Purkayastha*, India's parliament sees women leaders championing the politics of equality,* (June 3 2021) available at https://publicpolicyindia.com/2021/06/03/indias-parliament-sees-women-leaders-championing-the-politics-of-equality/

18 Karen Beckwith and Kimberly Cowell-Meyers, *Sheer Numbers: Critical Representation Thresholds and Women's Political Representation*, Perspectives on Politics 5(3)

party and the level of activism and demand in civil society, also, impacts policy making. This can be seen from the case of Scandinavian Countries in the 1960s and 1970s.[19] This has been substantiated by Child and Crooks who show that women's representation even in small numbers can impact policy decisions.[20] But, a stark difference with this can be seen in post-colonial societies characterized by patriarchal institutions, especially in Sub-Saharan African countries, which instituted quotas for women in parliament in pursuance of the agenda of CEDAW, the Beijing Platform for Action, ECOWAS, African Union, etc.[21]

It was seen that increase in the number of women representatives increased parliamentary contribution and debates by women. The Mozambique Parliament passed one of the most inclusive and progressive family laws since the country's formation with the increase of women's representation to 35% as MPs and 26.9% as ministers. This led to combining the religious, customary and civil laws, thereby removing patriarchal elements from the family laws. Similar cases can be seen in Tanzania, Uganda, etc.[22] An analysis of policy decisions by women representatives in the United States shows that women propose bills related to family, children and women more than men. It was also seen that female representatives are more likely to vote counter to party norms in matters concerning gender, as can be seen from the voting of Republic Congresswomen in the Family and Medical Leave Act. It was also seen that women are more likely to propose or support bills related to healthcare, education, welfare policies and African American rights.[23]

From this it is evident that the impact women have on policies goes beyond just women's interest and brings a more holistic approach to policy making. Even on neutral policy issues such as crime, women are

19 Beckwith and Cowell-Meyers(n 18)

20 Elizabeth Asiedu, Claire Branstette, Neepa Gaekwad-Babulal, Nanivazo Malokele, *The Effect of Women's Representation in Parliament and the Passing of Gender Sensitive Policies* available at https://www.aeaweb.org/conference/2018/preliminary/paper/an5yEb5h

21 Asiedu, Branstette, Gaekwad-Babulal and Malokele (n 20)

22 Asiedu, Branstette, Gaekwad-Babulal and Malokele (n 20)

23 Pamela Paxton, Sheri Kunovich and Melanie M. Hughes, *Gender in Politics*, Annual Review of Sociology 33

seen to take an approach which promotes prevention and victim's rights, while men have a more reactionary approach of instituting stricter penal measures.[24] It is seen that the leadership style followed by women is more inclusive, collective, collaborative and coaching oriented.[25] Thus, this leads to creation of policies that are not only gender responsive, but also address the general inequalities in the society irrespective of gender.

The gender inequality index (GII)[26] determines the amount of inequality between the genders based on parameters of Health, Empowerment and Labour Market. While the direct impact of increased participation of women in the public sphere only affects the parameter dealing with share of seats in the parliament, the nature of the policies pursued by female leaders, as seen above, shows an indirect impact on all parameters. This shows the participation of women in leadership leads to substantive attainment of rights for women and bridges the gap between men and women.

Concerns regarding Women's Representation Bill

Reservation of seats for women in government began with the 73rd and 74th Amendment of the Constitution. The 81st Constitutional Amendment Bill of 1996 first proposed the reservation of 33% seats for women in the parliament. This was again brought in the 84th Amendment Bill and the 85th Amendment Bill.[27] The Bill faced criticism on multiple counts, and one of the major points of contention was that introduction of a blanket 33% representation in the parliament and state legislatures can lead to creating imbalance in the diversity in parliament.[28] As seen before, the presence of women in politics in South Asia is dominated by relatives of prominent male politicians and people from forward communities. This leads to under-representation of other historically deprived communities, such as Muslims, SCs, STs, etc., due to cultural

24 Paxton, Kunovich and Hughes (n 23)
25 UN Women (n 16)
26 UNDP, Gender Inequality Index available at http://hdr.undp.org/en/content/gender-inequality-index-gii
27 Vicky Randall, *Legislative Gender Quotas and Indian Exceptionalism: The Travails of the Women's Reservation Bill*, Comparative Politics 31(1).
28 Randall(n 27)

and other reasons; thus, there was stark opposition from Dalit parties, such as BSP, especially from the female leaders.

Another criticism comes from the feminist perspective that having constituencies where women compete against each other will lead to ghettoization of women. The bill provided that such constituencies would change on a rotational basis.[29] This leads to a situation where women are not able to build their political base, as they may not be contesting in the next election. The bill was also criticized because of the fact that the bill was not a result of a demand by feminists movements or civil society for representation.[30] From the work of Beckwith and Cowell-Meyers, it is evident that for substantive representation of women and better policy decisions, a conducive civil society demand is one of the essential conditions. The last criticism we look into is the tokenization of women representatives and the reservation for women leading to women being used as proxies for their male relatives, as seen in the 'Pati' culture. While this is an aspect of concern, the performance of women in Local Self Governments where this was a major issue leads us to believe that, though initially this may be a cause of concern, over time women have adapted themselves into leadership roles.

Aspects and Fallacies Associated with Women in Leadership

Marian Lief Palley,[31] identifies certain fallacies associated with women in leadership positions which should be taken into account while considering representation of women in the public sphere. These include the aspects such as 'woman' is not a uniform group which has common interests. This can be seen from the opposition by the women in underprivileged sections of the society to the Women's Reservation Bill. Another instance is the opposition by Justice Indu Malhotra in the Sabarimala case; here it can be seen that due to the lower representation of women in the higher echelons of the Judiciary, only certain views find their way into the policy narrative which is often of the dominant groups. The second fallacy Palley talks about is the assumption that women's representation is best suited at local

29 Randall(n 27)

30 Randall(n 27)

31 Marian Lief Palley, *Women's Policy Leadership in the United States*, Political Science and Politics 34(1)

levels. Palley opines that the role of women in policy making cannot be restricted by the level of government or the areas of governance such as health or education. Palley also talks about the significance of increased women's participation in bureaucracy as well as in civil society. This will bring about more diverse opinions in policy making as well as lead to mass mobilization, thus bridging the gap between the policy design and society's need. The best example of this can be the leadership of Aruna Roy and MKSS in bringing about the rights based legislation in late 1990s and early 2000s.

Policy Recommendations

From the above analysis of the importance of women's representation in leadership positions and the impacts of the same, we can say that an increased representation is required. The following policy recommendations can be followed to ensure the same.

1. **Quota within Quota**: While representation of women is important, it is equally important to ensure the diversity in the representation of women. Hence, provisions for representation of weaker sections among women should be ensured.

2. **Parity in Political Parties**: In order to ensure participation of women and prevent tokenization, it is important to mandate a reservation system within the hierarchy of political parties. This will provide opportunities for women from the humblest background to enter into party politics.

3. **Parity in Opportunity for Political Participation**: It should be ensured that political parties field female candidates in a minimum number of seats: say, 33%. This will ensure fair competition.

4. **Parity in Bureaucracy and Judiciary**: It is important to ensure parity between men and women in bureaucracy and judiciary without compromising on standards of merit. Hence, ample opportunity should be provided to women to enter public services along with providing proactive assistance in attaining high standards, such as, assistance in learning.

While the share of women in the public sphere, such as in the Parliament and bureaucracy, is increasing, there is still a significant disparity

between representation of men and women. This has to be bridged to ensure substantive equality and not just formal equality.

Bibliography

Domestic Statutes:

1. The Constitution of India, 1950

International Statutes:

1. Convention on the Elimination of all forms of Discrimination Against Women
2. International Covenant on Civil and Political Rights

Articles:

1. Richter, L.K. Exploring Theories of Female Leadership in South and Southeast Asia. [1990-1991] Pacific Affairs 63(4), University of British Columbia)
2. Menon, N. Elusive 'Woman': Feminism and Women's Reservation Bill [2000] (Economic and Political Weekly 35(43/44).
3. Cain, P. Feminism and Limits of Equality [1989], (Santa Clara University School of Laws)
4. MacKinnon, C. A. Difference and Dominance: On Sex Discrimination.
5. Littleton, C. A. Reconstructing Sexual Equality [1987] (California Law Review 75(4))
6. Kannan, K. P. and Raveendran, G. From Jobless to Job-loss Growth [2019], Economic and Political Weekly LIV (44).
7. Beckwith, K. and Cowell-Meyers, K. Sheer Numbers: Critical Representation Thresholds and Women's Political Representation [2007], Perspectives on Politics 5(3)
8. Paxton, P., Kunovich, S. and Hughes, M. M. Gender in Politics [2007], Annual Review of Sociology 33

9. Randall, V. Legislative Gender Quotas and Indian Exceptionalism: The Travails of the Women's Reservation Bill [2006], Comparative Politics 31(1).

10. Palley M. L., Women's Policy Leadership in the United States [2001], Political Science and Politics 34(1)

Other Sources:

1. World Economic Forum (WEF), Global Gender Gap Report (2021). (accessed on 4 June 2021)

2. Association for Democratic Reforms, Women Representation among Elected Representatives, https://adrindia.org/sites/default/files/Women_representation_among_all_MPs_and_MLAs_English.pdf (accessed on 4 June 2021)

3. Election Commission of India, General Election, 2019 (11 October 2019) https://eci.gov.in/files/category/1359-general-election-2019/page/2/ (accessed on 4 June 2021)

4. Sehgal, R. *How woman candidates fared in the 2019 Elections*. (The Wire, 25 May 2019), https://thewire.in/politics/how-women-candidates-fared-in-the-2019-elections(accessed on 4 June, 2021)

5. United Nations, *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW), https://www.ohchr.org/documents/professionalinterest/cedaw.pdf (accessed on 4 June, 2021)

6. UN Women, *Covid 19 and Women's Leadership: An Effective Response to Building Back Better* (Policy Brief 18).https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-covid-19-and-womens-leadership-en.pdf?la=en&vs=409 (accessed on 4 June, 2021)

7. Mayuri Purkayastha*, India's parliament sees women leaders championing the politics of equality,* (June 3 2021) https://publicpolicyindia.com/2021/06/03/indias-parliament-sees-women-leaders-championing-the-politics-of-equality/ (accessed on 4 June, 2021)

8. Elizabeth Asiedu, Claire Branstette, Neepa Gaekwad-Babulal, Nanivazo Malokele, *The Effect of Women's Representation in Parliament and the Passing of Gender Sensitive Policies* https://www.aeaweb.org/conference/2018/preliminary/paper/an5yEb5h (accessed on 4 June, 2021)

9. UNDP, Gender Inequality Index http://hdr.undp.org/en/content/gender-inequality-index-gii (accessed on 4 June, 2021)

GENDER BIAS IN SUCCESSION LAWS: ANALYSING INDIA'S COMMITMENT TO THE CEDAW

Mugdha Mohapatra

ABSTRACT

The CEDAW is a commitment undertaken by 189 countries to ensure gender equality through laws and practical measures. It envisions a global commitment to eradicate gender discrimination. Property rights, in this context, are a means through which women are subjugated and prevented from exercising independence. Financial dependence forces women to rely upon oppressive family structures. Lack of recognition of women's rights to succeed to property also dehumanizes women as objects owned by the family and not equal members of it. On the other hand, succession to the property of women reveals the patriarchal bias that property owned by women is not their own but belongs to someone else.

In this paper, these biases have been recognised in Indian succession laws and measures for possible reform have been suggested.

INTRODUCTION

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is an international convention that was adopted in 1979 by the United Nations General Assembly in order to remedy the issues of discrimination against women through laws as well as cultural practices. India ratified the convention in 1993. Since then, not only have there been attempts to give effect to the vision of this convention through legislations, but the convention has, also, been

relied upon by judges in deciding cases, for instance, in *Vishakha v. State of Rajasthan*[1] and in *Githa Hariharan v. Reserve Bank of India.*[2]

CEDAW aims to remove discrimination against women in political, social and economic spheres.[3] In this regard, a crucial area of discrimination is that of succession rights of women. Equal property and land rights are crucial for the empowerment of women, as these can reduce dependence and vulnerability on patriarchal structures. In India, succession laws are part of personal laws which are based on the religion of an individual. Codified personal laws and other customary laws often embody discriminatory practices against women with regard to succession.

This paper is divided into 3 sections. The first section deals with the convention and India's position and compliance with the broad goals of the convention. The second section analyses unequal and discriminatory practices which are against CEDAW under the Hindu Succession Act, 1956. The third section deals with the Indian Succession Act 1925 and how it can be suitably amended to comply with CEDAW.

I - CEDAW And Indian Succession Law

The adoption of CEDAW was an attempt to encourage State parties to condemn discrimination against women in all forms. Article 1 of the convention sets out the broad goal that should be achieved by state parties to ensure parity among men and women, irrespective of the marital status or age of women. Article 16(h) of the convention directs State parties to accord "The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration."[4]

In order to monitor the compliance and success achieved by State parties, they are required to submit periodic reports to the United

1 Vishakha v. State of Rajasthan AIR 1997 SC 3011.
2 Githa Hariharan v. Reserve Bank of India (1999) 2 SCC 228.
3 Aims and Objectives, Convention on the Elimination of All Forms of Discrimination against Women.
4 Article 16(h), Convention on the Elimination of All Forms of Discrimination against Women.

Nations Secretary General.[5] These reports are then considered by a committee.[6] India has submitted 5 such reports. This section will focus on an analysis of the reports and the recommendations of the committee regarding these reports.

The major hurdles in ensuring equality in succession law in India are the distribution of powers between the Centre and the State with the states retaining control over agricultural land related enactments and, secondly, the arguments related to land redistribution are focused on arguments of efficiency and do not take into account gender inequality.[7] Moreover, inheritance and matters of succession continue to be governed by religion, and the Government of India has declared that personal laws will not be interfered with unless the demand for change comes from the communities.[8] The initial report does not delve into this area of law much, apart from mentioning that acts such as the Hindu Succession Act have attempted to incorporate equality to a great degree by allowing women to inherit property.

The second and third report submitted under article 18 in 2005 offer a much more detailed account of the nature of succession laws and inequality in India. The legislations as well as judicial decisions on succession laws have been described in detail.[9]

The Hindu law on inheritance which is governed by the Hindu Succession Act 1956 made a distinction between ancestral property and self-acquired or separate property.[10] The amendment acts in the states of Maharashtra, Tamil Nadu, Karnataka and Andhra Pradesh have been mentioned. These acts allowed daughters the right to be coparceners in the same manner as sons, provided that the joint family has not partitioned or the daughter is unmarried at the time the acts came into force.[11] Although these legislations were progressive in nature,

5 Article 18, Convention on the Elimination of All Forms of Discrimination against Women.

6 Article 17, Convention on the Elimination of All Forms of Discrimination against Women.

7 Bina Agarwal, *A Field of One's Own*, (Cambridge University Press 1996).

8 *Initial Report of State Parties*, India, 2 (CEDAW/C/IND/1 1999).

9 *Second and Third Periodic Report*, India 10 (CEDAW/C/IND/2-3 2005)

10 Mulla, *Hindu Law*, 117 (LexisNexis 2013).

11 Ibid 154-160.

the provision excluding married daughters is violative of article 1 of the convention that aims to prevent discrimination based on marital status of a woman. This aspect has not been mentioned in the report or considered by the committee.

The committee that considered this report raised questions regarding the efficacy of these laws and how equal property rights were granted to women. This criticism was with regard to the tenancy laws and the provision allowing for testamentary succession which allows the exclusion of women from inheriting any property.[12] Social and cultural reasons that prevent women from exercising their rights were also noted.[13]

The committee criticised and recommended the deletion of section 32 of the Indian Succession Act. The Indian Succession act governs religions other than Hindus and Muslims. As per section 32 of the act, a bar was placed upon the right of the widow to inherit the property of her husband. This meant that the widow could not inherit distributive shares when there was a valid contract made to that effect prior to her marriage.[14] This act was amended in 2002, and this disqualification was removed.

The fourth and fifth report were submitted and considered in 2012. These reports mention the significant strides made with regard to succession laws. In 2005, the Hindu Succession Act was amended in order to allow daughters to become coparceners in the same manner as sons. Furthermore, discriminatory provisions, such as preventing female heirs from demanding a partition and preventing widows from inheriting the property of their husbands upon remarriage, have also been repealed.[15] Yet, the committee noted that in spite of legislative changes women are unable to claim their rights in property, and several discriminatory provisions continue to persist. These statutory provisions have been analysed in the following chapters.[16]

12 *Second and Third Periodic Report considered*, India 4 (CEDAW/C/IND/2-3 2005).
13 Ibid 7-8.
14 *Second and Third Periodic Report considered*, India 19 (CEDAW/C/IND/2-3 2005).
15 Section 3-6 Hindu Succession (Amendment) Act, 2005.
16 *Fourth and Fifth Periodic Report considered*, India 7 (CEDAW/C/IND/4-5 2012).

Reservations and Declarations under CEDAW

India has expressed its reservations and declarations regarding article 5 (a) and 16 (1). India has declared that the principle of non-interference in personal laws without the initiative of the concerned community will be complied with. This effectively means that with regard to succession, customary and religious laws which tend to discriminate against women continue to be followed. The committee to consider the country reports has criticised the reservations made by India regarding CEDAW, as these come in direct conflict with the goals of CEDAW.

The reservations made to these articles contradicts the goals of CEDAW, as it allows the state to discriminate against women in the sphere of personal laws and reinforces the stereotypes and presumed distinction between the socio-cultural and economic sphere.[17]

While these reservations are antithetical to the scheme of CEDAW the impact of these reservations is being increasingly diminished due to the presence of a proactive judiciary. The judiciary has often intervened in personal laws so as to ensure that the rights of women are protected. Yet, this trend has not been followed with regard to succession laws where, due to the lack of legislative action, discriminatory provisions continue to exist. An example of this can be seen in the case of *Madhu Kishwar v. State of Bihar*[18] which has been analysed in the following section.

Rights of Tribal Women v. Traditional Inheritance Law: The case of Madhu Kishwar v. State of Bihar

Most tribal women in India are governed by customary laws which determine the nature of succession and whether these women inherit any property or not. This has led to a situation where tribal women are often excluded from inheriting from their fathers and husbands the agricultural land on which they toil. The constitutionality of such provisions in the Chotanagpur Tenancy act was challenged in the case of *Madhu Kishwar v. State of Bihar*. This case is especially notable as the dissenting judgement in this case relies upon the provisions of CEDAW to declare unequal succession laws as unconstitutional.

17 Poonam Pradhan Saxena, "Succession Laws and Gender Justice," Redefining family law in India, 304 (Routledge 2008).

18 Madhu Kishwar v. State of Bihar (1996) 5 SCC 125.

As per the Chotanagpur Tenancy Act, land reclaimed from the jungle by ancestors will devolve upon the male heirs. Unmarried daughters only have a usufructory right in the property, and widows only have a life estate which reverts back to the male descendants upon the widow's death. This provision for providing widows and daughters a right of livelihood from the land is not apparent from the provisions, but is only a product of judicial decisions.

In this case, the majority judgement of the court held that the rights of male heirs remain in suspended animation until the right to livelihood of the widow and daughter is not exhausted. This decision was arrived at after the court considered that the community to which this law applied did not wish for such a change, and the court cannot step into the role of the legislature in an attempt to ensure equality in succession laws and personal laws.[19]

On the other hand, Justice K Ramaswamy in his dissenting judgement suggested that the provisions referring to male descendants be read down so as to also include female descendants. He relied upon the obligations imposed upon states under article 2(f), 3, 14 and 15 to hold that the court must interpret the section in a manner to fulfill these obligations.[20]

The case of *Madhu Kishwar* clearly reveals the dichotomy of reservations under the CEDAW and the nature of obligations that India seeks to fulfil under the CEDAW. The policy of non-interference in personal laws to ensure the protection of economic rights of women is largely incompatible with the goal of gender equality. The legislature and judiciary in India have intervened in the sphere of personal laws with regard to marriage and divorce often without initiative from the community concerned. In light of this, it may be prudent to get rid of the reservations with regard to the CEDAW.

II - Hindu Law and Compliance with CEDAW

It is evident from the country reports and the expert committee recommendations on India's compliance with CEDAW with regard to succession laws that there is a need to bring about changes in Hindu succession law to ensure parity between men and women. The three

19 Madhu Kishwar v. State of Bihar (1996) 5 SCC 125 (Justice Kuldip Singh).

20 Madhu Kishwar v. State of Bihar (1996) 5 SCC 125 (Justice Ramaswamy).

areas where legislative action is required are succession to female Hindu dying intestate, women as heirs, and the dissonance between law and practice.

Succession to Female Hindu Dying Intestate

Succession to the absolute property of a female Hindu is governed by section 14 and the rules laid down in section 15 of the Hindu Succession Act. Absolute property of a Hindu woman includes shares received upon partition, gifts received at the time of marriage, property acquired through the use of skill and exertion.[21]

As per section 15 of the Hindu Succession Act, self-acquired property would devolve upon the husband and the children of the deceased.[22] In the absence of these heirs it would devolve upon the heirs of the husband and then upon the mother and the father of the deceased. If the property is acquired through natal family, the property would devolve upon the heirs of the father.[23] Even under the provisions pertaining to succession to intestate Hindu male, agnatic heirs are preferred over cognatic heirs.

The constitutionality of the discriminatory provision under section 15 was challenged in *Sonabai Yeshwant Jadhav v. Bala Govinda Yadav*[24] and was upheld on the principle of reasonable classification under article 14. This provision has led to inequitable outcomes in several cases such as in *Omprakash v. Radhacharan.*[25] In this case, the female Hindu who died intestate was widowed within 3 months of her marriage and forced to leave her matrimonial home. After this, she gained employment and acquired some property. After her death, the heirs of her deceased husband inherited the property to the exclusion of her parents.

This different mode of devolution of the property of a female Hindu dying intestate is in violation of article 1, article 5, article 13 and article 16, as it stems from a belief that women's absolute property is often a

21 Section 14(1), Hindu Succession Act 1956.
22 Section 15 (1)(a), Hindu Succession Act, 1956.
23 Section 15(2), Hindu Succession Act, 1956.
24 SonabaiYeshwant Jadhav v. Bala Govinda Yadav AIR 1983 Bom 156.
25 Omprakash v. Radhacharan 2009 (7) SCALE 51.

gift received from their families and does not truly belong to them.[26] This is discriminatory and propagates a stereotype that women have a lesser right to property.

Women as Heirs

In 2005 the Hindu Succession Act was amended to allow women to be coparceners in the same manner as sons. Traditionally, women were not coparceners and only inherited property as class I heirs.[27] But this amendment, on the surface of it, corrects this discrimination.

The inclusion of daughters as coparceners has had an unintended consequence on the share of the widow in southern states. In southern states, upon notional partition a share is not reserved for the mother.[28] This is because the Dravida School of succession laws is followed in these states. Due to this reason, the share of the mother has diminished as compared to the other members of the family, as no share is reserved for her upon notional partition. A widow only inherits as a Class I heir and does not get a share equivalent to coparceners.

Another serious impediment faced in enforcing the right of women over property through succession is the ability of a Hindu to specify the manner of succession by way of a will under section 30 of the HSA. Under Section 30 of the Hindu Succession Act, any Hindu may dispose of separate property or ancestral property owned by him or her.[29] This provision allows for the exclusion of widows and daughters from inheriting property and these heirs can be excluded in favour of the male heirs.[30] Therefore, the daughter and the widow can be excluded from inheriting anything at all.

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26 Poonam Pradhan Saxena, "Succession Laws and Gender Justice," *Redefining family law in India*, 304 (Routledge 2008).

27 Section 6, Hindu Succession Act, 1956. (As amended in 2005)

28 Mayne, Treatise on Hindu law and usage, 137 (New Delhi Bharat Law House 1986).

29 Section 30, Hindu Succession Act, 1956.

30 Ashok Sircar and Diana Fletschner, "The Right to Inherit Isn't Working for Indian Women, Says U.N. Study", Wall Street Journal, available at: https://blogs.wsj.com/indiarealtime/2014/03/02/the-right-to-inherit-isnt-working-for-indian-women-says-u-n-study/.

In order to amend the Hindu Succession Act, states would have to seek the assent of the President, as it is a law enacted on a subject under the concurrent list. But, state legislatures are free to enact laws pertaining to land ceiling and tenancy laws.[31] The right of women to succeed to agricultural land or as coparceners is constrained by the application of tenancy laws. The tenancy laws were enacted with the aim of preventing fragmentation of agricultural landholdings. These laws were earlier protected by section 4(2) of the Hindu Succession Act, but this protection has now been removed by the 2005 amendment act.

For instance, the Uttar Pradesh Zamindari Abolition and Land Reforms Act specifies how *bhumidar* and *asami* property of males devolves by succession. These rules are different from the succession rules under the Hindu Succession Act. As per these rules, the widow of the male who dies intestate and his male heirs are preferred to unmarried daughters and married daughters. Due to this, if there are sons present, they inherit to the exclusion of the daughters.[32] Female heirs may also lose the land if they fail to cultivate it for a period of one or two years. Similar legislations are present in Delhi, Jammu and Kashmir, Himanchal Pradesh, Haryana and Punjab. In Punjab, Haryana, Himanchal Pradesh and Jammu and Kashmir, daughters and sisters are excluded.[33]

The impact of such legislations in some cases extends to all interests arising out of agricultural land. It is often seen that this discriminatory order of devolution covers various types of land, and women are denied a share in such property. Due to this, in the state of Uttar Pradesh, where 1/6th of India's population lives, agricultural land was legally heritable exclusively by males.

According to a consultation paper released by the Law Commission of India, after the deletion of section 4(2), property should devolve based upon personal law.[34] But in order to ensure clarity, such discriminatory laws should be expressly repealed.

31 Bina Agarwal, *A Field of One's Own*, (Cambridge University Press 1996).
32 Section 171 Uttar Pradesh Zamindari Abolition and Land Reforms Act.
33 Bina Agarwal, *Who sows who reaps: Women and land rights in India*, 235, (1988).
34 Law Commission of India, "Consultation Paper on Reform of Family Law in India," (August 2018).

Dissonance Between Law And Practice

Under Hindu Law, women succeed as daughters, widows, mothers and sisters. Although several rights are granted under the Hindu succession act, the enforcement of these rights is lax due to social and cultural factors. Some of these factors are -

1) Voluntary relinquishment of claims: Due to a variety of social and cultural reasons, women often give up their shares in property received through succession or as coparceners. This is often done in order to protect family relations and ensure that women preserve their connection to their natal home for ritual reasons. In most situations, women also move to different villages, so they are unable to enforce rights in family property.[35]

2) Role of village bodies and government officials: Disputes in villages are often mediated by local bodies such as panchayats. These bodies are heavily dominated by men and have a patriarchal bias, so these bodies fail to support daughters and widows in enforcing their rights in property. Government officials have also been known to refuse the registration of land in women's name.[36]

3) Violence: In order to retain control over lands and prevent anyone from contesting these rights, male members of the family often engage in violence. In some cases, religious and cultural practices are also used to defeat the rights of women. For instance, in Bihar cases of 'witch killings' by brothers have been reported.[37]

Recommendations to bring Hindu Succession Law in Conformity with CEDAW

In light of the gender discriminatory provisions which are in clear violation of CEDAW, it is suggested that the following changes should be made in order to ensure parity in succession laws.

35 Reena Patel, "Hindu Women's Property Rights in India," 1257-1279 Third World Quarterly, (2016).

36 Bina Agarwal, Structures of patriarchy state, community and household in modernizing Asia, (New Delhi Kali for women 1988).

37 Shivani Satija, *Violence Against Women*, 34 (Institute for Human Development 2013).

1. Section 15 pertaining to succession to a Hindu female dying intestate should be suitably amended and made equal to the manner of succession of a Hindu male dying intestate. In the 207th report of the law commission, a suggestion was made regarding this matter. The recommendation is that self-acquired property should devolve upon the heirs in part (b) and (c) equally.[38] This means that if a Hindu woman dies issueless her property would devolve equally upon the heirs of the husband and her mother and father. This position is an attempt to reconcile the principles of retaining property in the family to which it belongs with that of gender equality. Such a position is not necessary as the principle of retaining property in the family to which it belongs is protected by the fact that, if property is inherited from the husband or father in law, it would devolve upon the heirs of the husband. Thus, the self-acquired property of a Hindu woman dying intestate should devolve in the same manner as that of a Hindu male dying intestate.
2. Agnatic and cognatic heirs should be put in the same class.[39]
3. In order to ensure that women get equal rights of inheritance with men, there should be an upper limit placed upon the portion of property that devolves based upon testamentary succession. This will help ensure that female heirs are not excluded completely.[40]
4. In states where the Dravida School of law governs matters of inheritance and the mother does not get a share upon notional partition, provisions should be made so as to ensure that her share upon inheritance is the same as that of sons and daughters.[41]
5. State legislation on tenancy and agricultural land should be expressly repealed, so as to ensure that all agricultural land devolves based upon personal laws, where the order of devolution does not give superiority to male heirs.[42]

38 Law Commission of India, "Report on proposal to amend section 15," (2008).
39 Id.
40 Supra (n-23).
41 Supra (n-35).
42 Monica Chawla, *Gender Justice, Women and Law in India*, 56 (2006).

6. Local bodies and legal literacy programmes should be strengthened in order to improve the efficacy and implementation of inheritance laws.[43] This can be done by ensuring greater representation of women in local governance bodies and informing women of their rights over property.

III - Indian Succession Act And Compliance with CEDAW

The Indian Succession Act, 1925, is the law of succession for Christians, Parsis, Jews and people other than Hindus and Muslims in India. It governs both intestate as well as testamentary succession. The Indian Succession Act generally does not create distinctions based upon gender, but inequalities continue to persist in certain aspects.

Rights of the Widow

The widow in most cases is in a vulnerable position after the death of the husband. It is necessary to ensure that the widow and her rights are protected by succession law. The Indian Succession Act envisages two situations, one where the intestate dies leaving behind lineal descendants and another where there are no lineal descendants. If there are lineal descendants, the share of the widow is reserved as 1/3rd of the property of the intestate[44]; if there are no lineal descendants but kindred, the widow gets half of the property.[45] Only when there are no lineal descendants or designated kindred, the widow gets the entire property.[46] Only if the value of the property does not exceed Rs 5000, the widow is entitled to the entire property.[47] Due to the unrestricted right of testamentary succession, it is also possible that the widow may be left without any provision for maintenance and can be totally excluded from inheriting.[48]

43 Kirtee Singh, "Amendments to the Hindu succession act: are they enough to bring about gender equality?" Combat Law 3(5): 36–37 (2005).
44 Section 33(a), Indian Succession Act, 1925.
45 Section 33(b), Indian Succession Act, 1925.
46 Section 33(c), Indian Succession Act, 1925.
47 Section 33-A (1), Indian Succession Act, 1925.
48 Law Commission of India, "Consultation Paper on Reform of Family Law in India," (August 2018).

Rights of the Mother

These provisions govern intestate succession of a Christian man who leaves no lineal descendants. These provisions are unfair to Christian women. As per section 42, the father of a Christian man is considered a closer heir than the mother and other relatives. Thus, if the intestate dies leaving behind a widow, the father has a greater right than the mother and sisters after a share has been reserved for the widow. It is evident from section 44, 45, and 46 that the mother of the intestate has a lower right, as her share is always equal to that of the remaining brothers and sisters and their children. Only in the absence of the latter does a mother inherit in the same manner as a father.

Recommendations to bring Indian Succession Act in Conformity with CEDAW

In light of the aforementioned discrepancies in the law relating to succession under the Indian Succession Act, the following changes can help bring the same in conformity with CEDAW.

1. The widow's share should be increased from 1/3rd when there are no lineal descendants. This would ensure that dependant widows have a greater right and are protected. Provisions on statutory legacy should be increased from the meagre sum of Rs 5000.[49]

2. Sections 41- 49 of the Indian Succession Act should be suitably amended in order to make the mother and father equal heirs. In case an intestate dies leaving behind a mother and a father, both should inherit equally. Where only the mother or only the father is surviving, the surviving parent should inherit the property.[50]

3. Amendments should be made to ensure that the widow is not completely excluded from inheriting in case of testamentary succession and some provision for her maintenance is made from the property of the deceased.[51]

49 Ibid.
50 Law Commission of India, 247th Report (2014).
51 Ibid.

Parsi Law of Succession

Parsis in India are governed by special provisions under the Indian Succession Act of 1925. The law on succession for Parsis has been amended twice, once in 1939 and subsequently in 1991. According to the provisions that existed prior to 1991, property of female and male intestates devolved differently; the daughter got a lesser share as compared to the son, and the mother got a lesser share than the father. With regard to agricultural land, daughters shared equally with sons in the property if it belonged to the mother, but not in the property of the father.[52]

After the amendment in 1991, the distinction between male and female dying intestate has been removed. Now, if an intestate leaves behind children and a widow/widower, they get equal shares.[53] The widow/widower gets half the property if there are no lineal descendants or widow/widower of lineal descendant.[54] Most notably, the distinction between daughters and sons as heirs has been done away with. This law is largely in compliance with the provisions of the CEDAW.

Conclusion

The implementation of the CEDAW is entirely dependent upon the countries that have undertaken the task of implementing it. In the specific context of succession laws in India, while several significant strides have been made in order to ensure gender equality, there is still a long way to go in order to achieve this goal.

Firstly, from an analysis of the reservations and declarations to the CEDAW made by India, it is apparent that the primacy given to existing customs and religious rules is impeding the equal right of a woman to succeed to property. Courts, in this context, must make a choice in favour of women's right to property despite existing customs, in order to ensure that the commitments made under CEDAW are truly implemented. While the court omitted to do so in *Madhu Kishwar v. State of Bihar*, it is obvious that giving effect to rights under the CEDAW is not possible as evidenced by the court's decision in *Geetha*

52 Kusum, *Lectures on Family Law-II*, 123 (LexisNexis 2015).
53 Section 52, Indian Succession Act, 1925.
54 Section 54, Indian Succession Act, 1925.

Hariharan and *Vishakha.*

Secondly, the Hindu law on succession as encoded in the Hindu Succession Act is not in line with the principles of gender equality. This aspect of the HSA exists despite the progressive amendment of 2005. This amendment has also had the unintended consequence of reducing the share of mothers in property in southern states. Furthermore, the legislature has ignored the difference in succession to a female intestate and the exclusion of women by testamentary succession as well as state-wise tenancy/land reform laws. Therefore, positive amendments, such as equality for the share of the mother, succession to a female intestate, and protection of exclusion through testamentary succession, must be made in order to ensure that Hindu succession laws are in compliance with the CEDAW.

Thirdly, the Indian Succession Act gives unequal inheritance rights to widows, as her share depends on the presence of other relatives. She may also be excluded by testamentary succession. The mother of a Christian male dying intestate has an unequal right to property as opposed to the father. Her share is dependent upon the presence or absence of siblings of the intestate. This is blatantly discriminatory, and these situations should be remedied by introducing equal shares in comparison to male relatives and by preventing exclusion through testamentary succession.

The provisions of Parsi law (as encapsulated in the Indian Succession Act) ensure parity and an equal right to succession for both male and female relatives.

Thus, this paper has brought to light the various modes of gender-based discrimination in succession laws which prevent women from attaining economic independence and reinforce traditional norms that aim to reduce the independence of women, along with relevant suggestions to remedy this situation.

Bibliography

Books

1. Bina Agarwal, A Field of One's Own, (Cambridge University Press 1996).

2. Bina Agarwal, Who sows who reaps: Women and land rights in India, (1988).

3. Kusum, Lectures on Family Law-II, (LexisNexis 2015).

4. Mayne, Treatise on Hindu law and usage, (New Delhi Bharat Law House 1986).

5. Monica Chawla, Gender Justice, Women and Law in India, 56 (2006).

6. Mulla, Hindu Law, (LexisNexis 2013).

7. Poonam Pradhan Saxena, "Succession Laws and Gender Justice," Redefining family law in India, 304 (Routledge 2008).

8. Shivani Satija, Violence Against Women, (Institute for Human Development 2013).

UN REPORTS

1. Initial Report of State Parties, India, (CEDAW/C/IND/1 1999).

2. Second and Third Periodic Report, India (CEDAW/C/IND/2-3 2005).

3. Second and Third Periodic Report Considered, India (CEDAW/C/IND/2-3 2005).

4. Fourth and Fifth Periodic Report, India (CEDAW/C/IND/4-5 2012).

5. Fourth and Fifth Periodic Report considered, India (CEDAW/C/IND/4-5 2012).

LAW COMMISSION REPORTS

1. Law Commission of India, 110th Report.

2. Law Commission of India, "Report on proposal to amend section 15," (2008).

3. Law Commission of India, 247th Report (2014).

4. Law Commission of India, "Consultation Paper on Reform of Family Law in India," (August 2018).

Articles

1. Ashok Sircar and Diana Fletschner, "The Right to Inherit Isn't Working for Indian Women, Says U.N. Study," Wall Street Journal, available at: https://blogs.wsj.com/indiarealtime/2014/03/02/the-right-to-inherit-isnt-working-for-indian-women-says-u-n-study/.

2. Bina Agarwal, Structures of patriarchy state, community and household in modernizing Asia, (New Delhi Kali for women 1988).

3. Kirtee Singh, "Amendments to the Hindu succession act: are they enough to bring about gender equality?" Combat Law 3(5): 36–37 (2005).

4. Reena Patel, "Hindu Women's Property Rights in India," 1257-1279 Third World Quarterly, (2016).

ASKING THE WOMAN QUESTION: POLITICO-ECONOMIC CONSTRUCTION OF WOMEN'S WORK IN INDIAN CENSUS

Niveditha G.D

The missing of women from data or the 'invisibility' of women in data is a reflection of the subordination and undervaluation of women in society.

– Maithreyi Krishnaraj: Women's Work in Indian Census: Beginnings of Change

Abstract

The decennial census is one of the most important and elaborate statistical operations undertaken in the country, and it continues to play a pivotal role in formulation of targeted policies and programmes in the country. The census categories are political; they reflect, generate and reinforce existing social biases and stereotypes in the society which can have severe implications on the public policy discourse in the country. This study focuses on the position of women's work in the economy by tracing the evolution of statistical measures and census categories that are not only laden in socio-economic and political values, but also has overtime, led to the undervaluation and underreporting of women's work in the economy. Apart from census reports, this paper looks at theoretical arguments and the discourse in feminist economics surrounding undervaluation and measurement of women's work globally and in India. The paper concludes by looking at the law and policy discourse on domestic work and work categories, and provides the way forward for a more comprehensive view of women's work in the country.

Introduction

Patriarchy, as Mies[1] defines, is the "historical and societal dimension of women's exploitation." Such an outlook expands the scope of exploitation from being limited to the biological and sexual exploitation of women towards a definition that captures the exploitation of women as economic workers in the labour force and as housewives in the private sphere. This broader conception of patriarchy lays the groundwork for this paper which attempts to understand the undervaluation of women's work. The underlying culture of devaluation of women's work (and as being subordinate to that of men's work) leads to the proliferation of unpaid jobs for women[2] and, thus, the undervaluation of the work women actually do in the economy in terms of their enumeration as workers. At the outset, it is important to draw attention to the distinction between employment and work; while employment is only a small aspect of work which is the remunerative economic activity, a huge proportion of work is mostly unpaid, the burden of which is disproportionately borne by women.

Such is the ideological backdrop in which the undervaluation of women's work occurs in Indian censuses. It is however important to note that under-estimation of women's work in statistical operations is not unique to the Indian context. In fact, this study is motivated by Folbre's study of the evolution of the 'unproductive housewife' in the USA and UK through the census categories.[3] She maintains that censuses are far from being an ordered set of numbers that are value free; the census categories indicate an androcentric bias that led to the evolution of the category of an unproductive housewife who is no more than a dependent in the private sphere of the society. She draws an interesting ideological pattern underlying this bias the devaluation of the woman's work (in the public) was associated with the 'moral elevation' of her work in the private.[4] The census category measuring

1 Maria Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (Bloomsbury Academic 1986)

2 Lourdes Beneria, 'Conceptualising the Labour Force: The Underestimation of Women's Economic Activities' [2007] The Journal of Development Studies 10

3 Nancy Folbre, 'The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought' [1991] The University of Chicago Press 463

4 Folbre (n 3) 4.

work only tended to measure work in economic terms; thus, the question of measuring domestic activities as in any way adding to the country's national income was out of the picture.

Research Methodology

This paper adopts a qualitative approach to analysing the worker categories in Indian census to identify the patterns of exclusion of women from the worker category. The paper also heavily draws from the existing feminist economics (global and Indian) discourse that emerged as an alternative to the dominant strands of economic thought to understand how the androcentric biases in categories and definitions of work have influenced census categories. The study and analysis are wholly dependent on secondary data.

Research Questions

This paper tries to look at how the census work definition has virtually excluded the large proportion of women in the private sphere performing care, unpaid labour from being characterised as workers. In line with the methodology highlighted in the above section, this paper attempts to briefly explore the following questions:

a) Have the census categories pertaining to work evolved over time to incorporate the woman question?

b) Is there an androcentric definition of work and standards women have to adhere to in order to be looked at and characterised as workers?

Theoretical Basis for the Undervaluation of Work

An important aspect of this study is to look at how the census categories construct women's work due to biases and theoretical assumptions,, influencing how it is defined, rather than enumerating it as it is. For this purpose, I explore different theoretical discourses oon the subject matter of economics vis-à-vis women participation in economic activities that invariably contribute to the underestimation and undervaluation of their work.

The neoclassical lens. To begin with, the neoclassical assumption of the *homo economicus*, which refers to the self-interested individual

maximising their own welfare, can never apply to the woman who is always supposed to put her husband and children's welfare first. Being the dominant school of thought in economics, the neoclassical assumptions have had a huge impact on how women's contribution to the economy has been conceptualised. As with all neoclassical theories, the theoretical underpinnings of undervaluation of women's work and 'productive labour' in mainstream economics can be traced back to the pioneers in the field of economics, Smith and Marshall. Smith defined productive labour as those economic activities that added 'net value' to a 'vendible commodity' (Folbre 1991),[5] and this had a huge impact in the US census' categorisation of work.

In other words, *only* those activities that added to the physical wealth of the products for exchange (as opposed to products for self-consumption) can be counted as economic activities/productive labour. Such a conception of what productivity is, thus, ended in ended in naturally excluding services like domestic work, or the work done by women in households, because they do not add to the physical value of any commodity. Marshall played an important role in the removal of housewives as gainful workers and, also, played an important role in influencing the English census' categorisation of married women as 'dependents' or 'unoccupied.'[6] Unsurprisingly, such a definition of productive and unproductive labour continued to influence, through different labels, the census categories of work and conceptualisation of the public and the private.

Additionally, the 'unitary approach' to the household model in neoclassical economics, which is a mere extension of the *homo economicus* modelling, assumes that there is only one decision maker in the household who reflects the interests of all members and ensures optimal allocation of resources (Donni and Ponthieux 2011).[7] Needless to say, the Indian census, the unit of analysis of which is the 'household', falls into this trap of assuming that collecting data from the household's decision maker (i.e., men) is sufficient to analyse household level trends

5 Folbre (n 3) 8

6 Folbre (n 3) 11

7 Olivier Donnie and Sophie Ponthieux, 'Economic Approaches to Household Behaviour: From the Unitary Model to Collective Decisions' [2011] Travail, genre et sociétés 67

in the economy. Thus, this also has serious implications on knowing the woman's work.

The Marxist-feminist lens. The Marxist-feminist analysis of women's work emerged as a result of the shortcomings in the Marxist thinking to incorporate the woman question. The political stand of Marxism with its heavy focus on class consciousness led to the subordination of women's issues, and if the problems faced by women couldn't be reduced to class issues they were treated as being divisive forces, 'petit bourgeois' or being individualistic (Wittig 1993).[8] Women (non-working) were only looked at as the wives or dependents of the men in the bourgeois or the proletariat class and, thus, prevented the identification of women as a class. It was held that sexual division of labour is rooted in the creation of economic surplus in capitalist society, and thus the emancipation of women lies in their participation in wage labour and the proletarian struggle against capitalism.[9] Thus, this led to an incomplete integration of feminism with Marxism in order to first focus on the 'larger struggle against the capital.'[10]

Hartmann calls such an intersectional approach an 'unhappy marriage' of Marxism and feminism,, not only because of the former's neglect of the latter, but also its conception of the woman's work in the private sphere. That is to say, the woman's work and role in the household is completely neglected even in the Marxist analysis of relations of production, where domestic work is considered unproductive.[11] A materialist analysis of the domestic work (unpaid care) done by women in the household will indicate that women play an immensely important role in the reproduction of the labour force and, thus, of the capitalist system itself. The reason why the capitalist system is able to keep the wages really low is because of the unpaid work done by women in

8 Wittig Monique, 'One is Not Born a Woman' in Henry Abelove, Michele Aina Barale and David M Halperin (eds), *The Lesbian and Gay Studies Reader* (Routledge 1993)

9 Karl Marx and Frederick Engels, *Marx and Engels Collected Works Vol 26: Engels 1882-1889* (Lawrence & Wishart 1990)

10 Heidi Hartmann, 'The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union' [1979] Capital and Class 1

11 Mies (n 1) 13

the household for the care and maintenance of the workforce[12]. This is why it is important to revisit Mies'[13] materialist definition of patriarchy as a historical and social set of relations,, because it allows one to understand how the institutions of patriarchy and capitalist have over time reinforced each other in the subordination and economic, social and sexual exploitation of women in the private sphere sphere and in the workforce.

While the neoclassical lens provides the basis for understanding how census categories in India continue to undervalue women's work in the domestic sphere as being unproductive, the Marxist-feminist analysis of women's work provides the theoretical basis for this paper which argues the need for a broader categorization of work in censuses, which is which is not limited to economic remuneration/addition to physical (national) wealth. In such a context, the next section explores the conception and the important changes in the census categories pertaining to work, to truly understand how women's work has been underestimated in the Indian context.

Indian Census and Work

A man or woman may be producing or making something only for the domestic consumption of the households and not for sale. Such a person is not a worker even though from his or her point of view the activity is productive.[14]

The above quotation from the 1990 census record (qtd in Bhagat) gives a fair picture of how domestic work is conceptualised in the country, and we'll see how the census categories defining work have, also, reflected, reinforced and reproduced existing social and economic stereotypes and biases about women's work.

Census, like many other attributes of the Indian administrative system, is a legacy we inherited from the colonial administration. The enumerative process was undertaken by the British government to get 'systematic

12 Hartmann (n 10) 4

13 Mies (n 1) 19

14 RB Bhagat. 'Census Categories and Gender Construction in India' (XXVth International Union for the Scientific Study of the Population International Conference, France, July 2005)

information' about aspects of the Indian demography alien to the British anthropologists. These anthropologists and officials (influenced by the British values/belief system) undertook ordered surveys to enumerate and classify the population into various groups and identities, and this process of enumeration itself led to the very construction of social and political identities in India.[15] In this sense, it is interesting to see how women's unpaid work in India has been constructed through the census categories pertaining to work.

Work Questions in the Indian Census Questionnaire

This paper started out with the understanding that the worker categories in the census tend to exclude women because of its understanding of *remunerative* work that predominantly applied to the male workers. This conception of remunerative work is largely a concept applicable to the industrialised societies characterised by wage work.[16] In agrarian economies like India, where production for self or subsistence production still comprises a predominant aspect of the economy, such a conception of work that only counts production for exchange cannot truly capture the state of working India; and, it also misses out on women, because most of these activities happen in the form of 'household duties'/domestic work.[17] Keeping in view such an analysis, it becomes pertinent to explore the questions in the census itself.

The official census website provides a detailed list of census questions that have been asked to the Indian population since 1872 which shows a clear evolution of how the idea of work has evolved over time in the country.[18] While it began with a very simple category of 'occupation,' it broadened over time to classify workers into categories like 'primary' and 'subsidiary,' and to categorise people as 'primary earners' and 'dependents.' It is important to note that over the years the government

15 Bernard Cohn. 'The Census, Social Structure and Objectification in South Asia' in (eds) *An Anthropologist among the Historians and Other Essays* (OUP 1987)

16 Maithreyi Krishnaraj. 'Women's Work in Indian Census: Beginnings of Change' [1990] EPW 2663

17 Krishnaraj (n 16) 3

18 Office of the Registrar General & Census Commissioner India, 'Census Yearwise' *Ministry of Home Affairs Government of India*<https://censusindia.gov.in/Data_Products/Library/Indian_perceptive_link/Census_Questionaires_link/questions.htm> accessed 10 May 2021

realised the shortcomings of their work categories and attempted to broaden the scope of what 'working' includes. That is, instead of merely asking the person if they are earners or not, the questions broadened to further understand what kind of work the respondent (whether dependent or otherwise) does and attempts to classify them in classes of workers. The government has also tried to change the perception of women reporting work. For instance, 1991 was a breakthrough with respect to the 'Did you work anytime at all last year' question which added a probe question 'including unpaid work on farm and family enterprises..' Such probe questions are essential not only to increase the counting of women who work but don't view themselves as workers because they don't get paid, but also to change the gender biases and stereotypes surrounding unpaid/domestic work both in the eyes of the census official undertaking the survey and the respondent.

In the 2011 census,[19] there were four important questions pertaining to the work category:

a) If the respondent worked at any point of time in the previous year. The question categorises the respondent into 'Main worker' (someone who engaged in economic activities for a period of 6 months or more); 'Marginal worker' (someone who engaged in economic activities for a period of 3 months or more, but less than 6 months); 'Non worker' (if the respondent has not worked at all). **The probe question is to ask the respondent if they also engaged in any 'unpaid work on farm, family enterprise or any other economic activity..'**

b) The next question is to assess the category of work (cultivator; agricultural labourer; household industry; other worker) of the 'main' or 'marginal' worker. Further, the census attempts to get the worker to 'describe their occupation..' **Note: This description is only for those who have been classified as 'main' or 'marginal' workers.**

19 Office of the Registrar General & Census Commissioner India, 'Census of India 2011- Household Schedule' *Ministry of Home Affairs Government of India*<https://censusindia.gov.in/2011-Schedule/Shedules/English_Household_schedule.pdf> accessed 10 May 2021

c) The next question is to arrive at a class of workers, namely 'Employer,' 'Employee,' 'Single worker,' 'Family worker.'

d) The next question only pertains to the 'marginal' or 'non-workers', to gain further information on the 'non-economic activity' they are engaged in. It attempts to categorise these workers into 'student,' '**household duties,**' 'dependent,' 'pensioner,' 'rentier,' 'beggar,' and 'others.'

It is evident from these questions that more than a century later the census continues to define and give primacy to those engaged in economically productive activities. This definition of work in the Indian census as pertaining to economic activities is a clear influence of the British notions of work which, as already noted earlier, was heavily influenced by the neoclassical traditions of looking at productive and unproductive work. For instance, workers in the private sphere of life, that is, performing domestic work are automatically being characterized as non-workers (as is clear in the last aspect of the work question). Due to cultural and social norms and institutions that continue to restrict women's movement and access to the labour market, it is evident that the above questions have invariably been unfair in considering women performing unpaid labour within the household. There seems to be no requirement for those performing 'household duties' to describe their day. This becomes important because, even if one were to go with this definition of domestic work as being unproductive, within the category of domestic work there is a need to distinguish between women who engage in economic activities and those who solely perform household duties..[20] For understanding this, it is important to look at how work is defined in the census.[21] Work is defined as engaging in any economic activity, paid or unpaid, for any length of time.[22] However,

20 Krishnaraj (n 16) 10

21 Office of the Registrar General & Census Commissioner India, 'Census of India 2011- META DATA' *Ministry of Home Affairs Government of India*<https://censusindia.gov.in/2011census/HLO/Metadata_Census_2011.pdf> accessed 10 May 2021

22 The issue here is not that unpaid work is not counted in the census; the issue is that what constitutes an economic activity is very narrow and only includes those that directly contribute to the GDP. Any attempt to understand the undervaluation of women's work must understand this distinction.

as has already been noted, this only includes work involved in the production of goods for exchange (as opposed to production of goods for self- consumption or use). The census manual inserts a caveat here to include some domestic activities for *self-consumption* like rearing animals, milk production, growing crops, etc., as economic activities.[23] But, this is very tricky, because this caveat for considering production for self-consumption as an economic activity holds only if the primary product in the production process is also produced in the household[24]. That is, production of butter, grinding of grain should be considered an economic activity, but cooking cannot be considered one, because the ingredients may not necessarily be primary products. When definitions and requirements of what work is can be so complicated, how can a simple question 'have you worked at all' suffice to understand the kind of work women do as 'housewives' in the household? As Krishnaraj writes, 'It is almost as if the criteria (*for work*) have been made on the basis of existing knowledge on male and female activity patterns..'[25] Although these categories defining domestic work apply equally to both men and women working in the private sphere, the gender biases, stereotypes and the cult of domesticity invariably leads to the undervaluation of women's work in the economy. Thus, from the above analysis, it is evident that the work category in the Indian census has an androcentric bias that automatically excludes a large proportion of women who continue to bear the brunt of unpaid care work characterised as ''domestic'' work.

Towards a Comprehensive Framework for Enumerating Work

> *... the question on work is structured in such a way that it is virtually difficult to capture women's work. On the other hand, in the census, the male member of the household generally reports women's work. As a result, we find a very low work participation of women and most of them are returned as non-workers.*[26]

23 ibid 15-17
24 Krishnaraj (n 16) 10
25 ibid 10
26 Bhagat (n 14) 11

This is paper is titled 'Asking the woman question..' This becomes important because, apart from the culture of devaluation and undervaluation of women's work that we witness, women also tend to underreport the work they do due to this very notion that their domestic work is unproductive. Additionally, as is clear from the above quote, the census does not allow the woman to answer the question about her work, because the 'head of household' is interviewed. Due to the cultural and social norms, the man of the family answers on behalf of the woman and, thus, naturally devalues the woman's work.

Therefore, when it comes to fully enumerating working women, the process is three fold. **One** is to identify and enumerate those who are engaged in economic activities, but are unpaid. This includes subsistence activities and women helping their husbands in home based production activities (but do not report themselves as workers). And, this can be corrected with probe questions, asking women to describe their work day at home, etc., in order to get an understanding of what aspect of their domestic work during the day can be accounted for as economically productive. This, again, is an attempt to fit working women into the definition of a worker as someone engaged in economically productive activities.

Second is to direct work related questions to the women, so as to reduce chances of invisibilisation of working women. This requires gender sensitisation training for the census enumerators, who are usually local anganwadi/school teachers. Even though the questions may attempt to adopt a gender-sensitive approach to work, it ultimately depends on the understandings, preconceived notions of these enumerators. Thus, it is absolutely necessary to conduct gender sensitisation sessions for the enumerators, and to to conduct public awareness programmes in the districts about the work done by women in the household, for a meaningful enumeration process. The training sessions must also be conducted by women's groups/organisations in order to ensure a robust training programme for the enumeration of unbiased indicators of work.

The **third is** more complex and needs a shift at the ideological level of what work and, in turn, economic growth constitutes. There is a need to shift the focus from economic accounting of activities as contributing to

the Gross National Product (GNP), to a non-market, non-economically productive, subsistence based contribution to the national product.[27] Only such a shift will enable us to rework the current male-centric definition of household work towards a more inclusive definition that places women at the centre of the question.

Legal Discourse Surrounding Women's Work

It is important to note that recognising the contribution of unpaid labour in the private sphere goes beyond just its material significance. The identification of 'housewives' as workers is rooted in recognising and upholding the dignity of the woman. This is especially the case when such a definition of work that undervalues housework determines the worth of a woman. To give context to this, it is useful to think about the idea of 'notional income' that is attributed to non-earners (housewives, students, dependents) in cases of compensations awarded to families of deceased in the Motor Vehicles Act. While the compensation for families that have lost an earner is calculated on the basis of their present earnings,[28] the income for a non-earning housewife is calculated as 1/3rd of the earnings of their spouse (the rationale for the same is unclear). Keeping aside the fact of how the worth of women (and men) has been reduced to monetary compensation, it is unfortunate to see how the woman's worth is dependent on the man's worth.

In this light, it is important to see the law and policy discourse surrounding this definition of women's work and worth in the Indian economy. In many instances, like in *Arun Kumar Agarwal* v. *National Insurance Co. Ltd,*[29] the court has attempted to fix the compensation not on the basis of women being important economic agents, but as someone providing 'gratuitous services with true love' to other members of the household. The court here sadly is only morally elevating the work done by women in the household without considering the economic value of the work done.[30] But, there have been attempts to move beyond this. In the most recent judgement pertaining to motor accident claims,

27 Beneria (n 2) 5

28 The compensation for the earner is calculated keeping in mind multiple variables like their age, the potential growth in profits, inflation, educational qualifications that may determine skill level, etc.

29 [2010] 9 SCC 218

30 (n 3)

Justice Ramana in *Kirti & Anr* v. *Oriental Insurance Company Ltd*[31] holds that in line with international law obligations (like Convention on the Elimination of all forms of Discrimination Against Women[32]) and giving due recognition to the 'work, labour and sacrifices' of women in the household, it is important to fix a notional income that upholds the dignity of the woman. In *National Insurance Co. Ltd.* v. *Minor Deepika,*[33] the court goes on to say that it is only because of the efforts and sacrifices of women in the household that men are able to work outside and contribute to the national income. In this light, it laid down the importance of moving away from the arbitrary '1/3rd of the husband's salary' rule towards a more comprehensive set of recommendations that either attempt to calculate compensation based on the opportunity cost of the deceased housewife based on her qualifications, etc., or fix it using the 'replacement method' that would calculate how much a paid worker (domestic worker) would be paid for performing the same work.[34]

Conclusion

This paper, through its analysis of the census work categories, has shown how the neoclassical theoretical assumptions continue to influence how the work categories capture unpaid domestic work. Analysis of the legal discourse shows how, while there has been an attempt to recognise the economic value of women's work in determining compensation for deceased housewives, we still have a long way to go to truly break the gender attitudes that continue to define how women's work is viewed and valued in the economy. Women's work in the household cannot be valued or undervalued based on what the men do outside the household. Going back to the Marxist-feminist analysis of household work, if one were to look at domestic work, then it will become impossible to define any contribution to the national product/growth without accounting for

31 [2021] SLP(C) Nos.18728-18729/18

32 CEDAW, among other issues, emphasises on the need to quantify household work and secure the economic rights of housewives by accounting it in the GNP (17th recommendation)

33 [2009] SCC Online Mad 828

34 This would be based on the minimum wages that are fixed for domestic workers by different states, which by itself is is low because of the patriarchal notions governing how work done by women is valued.

the care work and unpaid domestic duties performed by women in the household that goes into maintenance and reproduction of labour for the economy.

Bibliography and References

Arun Kumar Agarwal v. *National Insurance Co. Ltd,* (2010) 9 SCC 218.

Beneria Lourdes, 'Conceptualising the Labour Force: The Underestimation of Women's Economic Activities' [2007] The Journal of Development Studies 10..

Bhagat R.B., 'Census Categories and Gender Construction in India' (XXVth International Union for the Scientific Study of the Population International Conference, France, July 2005).

Cohn Bernard, 'The Census, Social Structure and Objectification in South Asia' in (eds) *An Anthropologist among the Historians and Other Essays* (OUP 1987).

Donni Olivier and Sophie Ponthieux, 'Economic Approaches to Household Behaviour: From the Unitary Model to Collective Decisions' [2011] Travail, genre et sociétés 67..

Folbre Nancy, 'The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought' [1991] The University of Chicago Press 463..

Hartmann I Heidi, 'The Unhappy Marriage of Marxism and Feminism: Towards a More Progressive Union' [1979] Capital and Class 1..

Kirti & Anr v. *Oriental Insurance Company Ltd,* (2021) SLP(C) Nos.18728-18729/18.

Krishnaraj Maithreyi 'Women's Work in Indian Census: Beginnings of Change' [1990] EPW 2663.

Marx, Karl and Engels, Frederick. *Marx and Engels Collected Works Vol 26: Engels 1882-1889* (Lawrence & Wishart 1990).

Mies Maria, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (Bloomsbury Academic 1986).

National Insurance Co. Ltd. v. *Minor Deepika,* (2009) SCC Online Mad 828.

Office of the Registrar General & Census Commissioner India, 'Census of India 2011- Household Schedule' *Ministry of Home Affairs Government of India*<https://censusindia.gov.in/2011-Schedule/Shedules/English_Household_schedule.pdf> accessed 10 May 2021.

Office of the Registrar General & Census Commissioner India, 'Census of India 2011- META DATA' *Ministry of Home Affairs Government of India*<https://censusindia.gov.in/2011census/HLO/Metadata_Census_2011.pdf> accessed 10 May 2021.

Office of the Registrar General & Census Commissioner India, 'Census Yearwise' *Ministry of Home Affairs Government of India*<https://censusindia.gov.in/Data_Products/Library/Indian_perceptive_link/Census_Questionaires_link/questions.htm> accessed 10 May 2021.

Wittig Monique, 'One is Not Born a Woman' in Henry Abelove, Michele Aina Barale and David M Halperin (eds), *The Lesbian and Gay Studies Reader* (Routledge 1993).

CONTEMPORARY CHALLENGES FOR MUSLIM PERSONAL LAW REFORM PROCESS

Prannv Dhawan

ABSTRACT

Indian socio-political milieu has been undergoing a burgeoning polarisation on the critical issue of gender justice in the context of Muslim Personal Law. This debate strikes at the heart of the constitutional compromises between group rights like religious freedom and autonomy, and the right to equality and dignity. However, the deeply divisive nature of the discourse on this subject has led to the marginalization of the important means of attaining personal law reform in minority communities. These means include the possibilities of internal reform through the progressive interpretation of Islamic principles. The article critically exposits the various intricacies of the Muslim Personal Reform process in the light of contemporary discourse around the criminalization of Triple Talaq. It also highlights the undesirable implications of the Muslim women's groups non-engagement and conflict amongst themselves as well as with the established Muslim Personal Law institutional mechanisms like All India Muslim Personal Law Board (AIMPLB). It suggests a holistic approach that safeguards minority rights and upholds gender justice by strengthening the pluralist Indian legal culture.

INTRODUCTION

Historically, human society has been organized in social units like family, which have been organized under patriarchal and patrilineal frameworks. These 'frameworks' have generally violated individual autonomy and dignity and have, specifically, been patriarchal and sexist

in their conceptualisation of women in these social structures. These frameworks were traditionally sanctified under the aegis of culture, ethnicity and religion. Due to ideological and social progress in the idea of family structures and increasing influence of feminist movements across the world, the State was compelled to intervene and support the need for reform.

Family law reform is a subject that involves multi-dimensioned social policy issues such as vocalisation of social justice demands by vulnerable groups like women and sexual minorities.[1] It also incorporates concerns like secularisation of the society,[2] minority heterodox interests, majoritarian control in public discourse and inclusive institutional engagement. In Indian context, the reform in family law has emerged from the multiple avenues and strategies in the backdrop of evolving nature of state power from a Victorian-colonial framework to a sovereign-democratic one.

This article attempts to analyse the family law reforms process through various strategies in the backdrop of Muslim Personal Law.[3] This article explores the historical background of reform in family law, particularly in Muslim Personal Law. This is done with reference to relevant reforms legislations and case laws, placing special emphasis on the socio-political context of the same. Following these will be sections that critically analyse the ideological positions and demands of various social movements, in terms of their feasibility and desirability. This analysis would include the various critiques of the draft Muslim Family Law Bill brought out by Bharatiya Muslim Mahila Andolan. Finally, the article proposes a new socio-political and legal framework in the context of various contemporaneous challenges and questions in this regard. It would also evaluate the recent Law Commission of India Report on 'Reform of Family Law,' especially in the context of

1 Muhammad R, "The Reform in Family Laws in the Muslim World" [1962] 1 Islamic Studies 107,130.

2 Thapar R, *Indian Society and the Secular: Essays* (Three Essays Collective 2016); Thapar Romila, "Secularisation of society is a long, historical process: Romila Thapar" *The Hindustan Times* (March 5, 2016) <https://www.hindustantimes.com/analysis/secularisation-of-society-is-a-long-historical-process-romila-thapar/story-2VuffxZoXBgoXxY2tLVKMP.html> accessed September 6, 2018.

3 Stilt K and Griffin SG, "The Strategies of Muslim Family Law Reform" [2011] SSRN Electronic Journal.

desirability of Uniform Civil Code and possible pragmatic alternatives for the same. In doing so, it comparatively analyzes the reforms movements in India with Sri Lankan Muslim women's struggle for gender justice and equality.

Contemporary Context

Reform in personal law has been a mine of contradictions that emerge from various domains like political, executive, socio-cultural orthodoxy, male elite and gender justice advocates.[4] This is especially important in the context when courts are adjudicating on matters of personal law like *nikah halala*, the Parliament has passed the Triple Talaq Bill, the Bhartiya Muslim Mahila Andolan is advocating for draft code of Muslim Family Law[5] and AIMPLB has galvanized support of 2 crore Muslim women in order to protect the sharia.[6]

In light of rising concerns about gender-unjust personal laws and the implications these have on various stakeholders, and in the aftermath of the Supreme Court's ruling on Triple Talaq ruling, the All India Muslim Personal Law Board had released strict guidelines to ensure that this 'unislamic' and 'invalid' form of divorce is totally abjured. The Government of India, in 2017, decided to introduce. The Muslim Women (Protection of Rights on Marriage) Bill, 2017 [hereinafter referred to as "the Triple Talaq Bill"]. This Bill was passed by the Parliament in July 2019 despite stiff opposition by various rights groups and political parties. This bill prohibits and criminalises Triple Talaq. This has re-opened certain questions of institutional engagement with religion-based personal laws in our secular constitutional democracy. This has assumed great pertinence especially with regard to Muslim personal law which is largely uncodified and based on custom. This article would juxtapose the questions of secularism with the challenge of making personal law systems gender just.

4 Agnes F, *Law, Justice, and Gender: Family Law and Constitutional Provisions in India* (Oxford University Press 2011); Patel R, "Only the Constitution" (*The Indian Express,* September 8, 2016) <http://indianexpress.com/article/opinion/columns/muslim-women-ideology-rights-haji-ali-dargah-islamc-traditions-3020994/> accessed September 18, 2018.

5 Draft Muslim Family Law, 2018.

6 Interview with Dr. Mrs. Asma Zehra Sahiba, Member of AIMPLB (14 September 2018).

Historical Background

It is important to recognise that in the pluralist legal and political tradition of India, due care must be ensured to the importance accorded by certain minorities to their personal law which they regard as essential to their religious as well as political existence.[7] Historically, in many Muslim-majority cultures, the *fiqh* remain very important in the area of family law. The reform process has usually been undertaken internally in Islamic law by religious scholars. These reforms have ensured effectiveness due to their palatability and acceptability to the faithful and their piecemeal approach with respect to state system. Of late, many women's rights groups are also advocating for this approach to ensure lasting reforms in discriminatory personal law.[8] Jurists have interpreted *Quranic* principles and the Prophet's normative practice (sunna) as a source of family law. Sunni jurists have also recognized *ijtihad*, a process whereby new rules could be evolved from existing ones on the basis of analogical reasoning or *qiyas*. However, scholarship suggests that ijtihad through ijma is more authoritative than through qiyas.[9] In this evolving intellectual process, jurists collectivised around learned individuals and their doctrinal results, leading to the evolution of a *madhhab* (the way followed).[10]

These strategies of re-interpretation and progress include *takhayyur* (exercising preference), i.e., preferring the interpretation of a school or minority view of jurists while multiple exist in order to suit the needs of the society. These also include *talfiq* (patching), i.e., creating an eclectic code from various interpretations and *limitation of jurisdiction* in order to restrict the scope of certain rules. These strategies have been employed in Egypt and Morocco for internal reform and progressive interpretation.[11] The efforts have primarily emphasized on restricting a husband's polygamous marriage; abjuring unilateral divorce by men; ensuring right to child custody for mothers and ensuring equitable maintenance after divorce; enhancing the minimum age and ensuring wife's agency to secure divorce.[12]

7 Ibid.

8 Zulficar, "The Islamic Marriage Contract in Egypt," in Quraishi and Vogel, eds., The Islamic Marriage Contract (2008), 242.

9 An-Naʿim, *Islamic Family Law in a Changing World: A Global Resource Book*, (2002) 12.

10 Hallaq, *The Origins and Evolution of Islamic Law*, 152.

11 Stilt, (n.3) 8,11.

12 Welchman, ed., *Women's Rights and Islamic Family Law,* (2004) 4-5.

Reform in Majoritarian Context

Perpetuation and static nature of personal law systems has come to be understood as a means of securing minority rights. This has meant that protectionism has reified both traditional culture and women's position in those frameworks, leading to stalling of the evolution of personal laws of minorities. Narendra Subramanian has noted in his book *Nation and Family: Personal Law, Cultural Pluralism and Gendered Citizenship in India* how the momentum to reform Muslim personal law slowed down post-independence.[13]

Post-independence, the secular polity of the country had to consider and resolve multiple contentions that ranged from ensuring liberal reforms in antediluvian social practices, to keeping a sensitive outlook towards minorities which felt insecure in the aftermath of Partition. Hence, the process of codification of laws heralded by the British administration was taken forward in a piecemeal manner. Significant concerns of secularism and the preservation of a multicultural political order have led to social cleavages centred on issues like non-enactment of Uniform Civil Code, Hindus' grievances that progressive rules and restrictions are enforced only on them; passage of Muslim Women's Divorce Act, 1986, to appease the conservative Muslim elite and sluggish approach towards empowering reformist views among Muslims.[14] It needs to be understood in the historical context of a deep divide in the Constituent Assembly, wherein every Muslim member opposed even the mention of Uniform Civil Code, and a compromise was reached through moderate intervention by leaders like Nehru to the effect of providing for it in the Directive Principles of State Policy.[15]

The majoritarian unrest and disquiet regarding the reforms under Hindu Code Bill led to great internal controversy within Congress, as Dr.

13 Dutta S., "Those Fighting for Muslim Women's Rights Must Stop Seeing Them as Hapless Victims" (*The Wire,* January 2, 2018) <https://thewire.in/gender/fighting-muslim-womens-rights-must-stop-seeing-hapless-victims> accessed September 18, 2018.

14 Jahagirdar R.A., 'Secularism Revisited,' The Radical Humanist, February 2015 (p. 24) and March 2015 (pp. 35-6).

15 Mustafa F., "The Progressive Way" *The Hindu* (September 18, 2018) <https://www.thehindu.com/opinion/op-ed/the-progressive-way/article24970676.ece> accessed September 18, 2018.

Rajendra Prasad opposed the reforms, characterising them as inimical to cardinal Hindu cultural beliefs.[16] his is especially important because this finally led to a watered down version of Hindu Code Bill and multiple piecemeal legislations, subsequently, that slowed down the reform in Hindu law, alienating Ambedkar who had propounded the Bill as the panacea for correcting the ills of Hindu Society.[17] The bill had sought to allow couples the option to enter into civil marriage, hence subverting the influence of religion and family and provided for same minimum age of marriage for both men and women, i.e., 21 years.[18]

The reason such reforms have been highly difficult to accomplish and continue to meet stiff opposition is because of the unique constitutional treatment of religious freedom. The Articles 25 and 26 of the Constitution of India guarantee this freedom. The intricate relationship between personal law and religion has been used as a justification for a *right to personal law* under this article.[19] However, the reality of reform process is far too complex to construct such legal propositions, as identities like custom, geography, culture and sect operate in addition to religion, in this regard.[20]

Constitutional Conundrum

This vexatious inter-relation between religious dogmatism and insistence of preservation of personal law has led to multiple constitutional conundrums that have been adjudicated by the courts at multiple occasions.[21] The constitutional challenge of balancing the fundamental right to religion with the right to equality and individual

16 Gopal S. and Iyengar Uma, *The Essential Writings of Jawaharlal Nehru*, vol. I, (Oxford University Press, New Delhi (2003) 186.

17 Godbole M., "Is India a Secular Nation?" 51(15) *Economic and Political Weekly* (2016).

18 The Hindu Code Bill, 1950, Section 6 <http://www.ambedkar.org/ambcd/64A2.%20On%20The%20Hindu%20Code%20Bill.htm?>

19 *Per* Khehar, J., Shayara Bano and others v. Union of India and others, Writ Petition (C) No. 118 of 2016, ¶137, 156, 165.

20 Law Commission of India.

21 Agarwal A, "Negotiating Family Law Reform in the Context of the Right to Freedom of Religion" (*NLS Socio Legal Review - National Law School of India University*) <http://www.sociolegalreview.com/negotiating-family-law-reform-in-the-context-of-the-right-to-freedom-of-religion/> accessed September 18, 2018.

dignity has also assumed importance in this regard. The role of the state as enabler and protector of constitutional values and social cohesion becomes relevant, as Article 25(2)(a) enables the State to legislate, *"(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice."*[22] The Indian Supreme Court has held in cases like John Vallamattom v. Union of India[23] and Sarla Mudgal v. Union of India[24] that, *"marriage and succession are matters of secular character which cannot be brought within the Article 25's ambit*."

However, the highly controversial judicially developed test of essential religious practices is in force, wherein the judiciary adjudicates and considers religious tenets to privilege protection of certain *essential* practices in a multi-cultural, eclectic and syncretic landscape of Indian traditions, cultures, custom and practice.[25] Moreover, it marks a clear departure from the progressive re-imagination of family system and framework propounded by Ambedkar.[26] However, this approach of the judiciary is supported by moderate and liberal advocates and politicians like Sr. Adv. Salman Khurshid who lays his faith in the judiciary to protect the diverse character of the Indian republic and strike a reasonable balance with considerations of gender justice.[27] While he recognises the value of internal reform and highlights certain liberal and progressive aspects of Muslim Personal Law, he maintains that realistic

22 Article 25(2)(a), The Constitution of India.

23 *John Vallamattom v. Union of India* (2003) 6 SCC 611.

24 *Sarla Mudgal v. Union of India* (1995) 3 SCC 635.

25 Bhatia G., "Essential Religious Practices" and the Rajasthan High Court's Santhara Judgment: Tracking the History of a Phrase" (*Indian Constitutional Law and Philosophy* August 19, 2015)<https://indconlawphil.wordpress.com/2015/08/19/essential-religious-practices-and-the-rajasthan-high-courts-santhara-judgment-tracking-the-history-of-a-phrase/> accessed May 10, 2017.

26 Meenakshi Sharma, "Ambedkar's Feminism: Debunking the Myths of Manu in a Quest for Gender Equality"
Contemporary Voice of Dalit (2019); Desai U, "Feminist Battles within Home: Why Ambedkar's Views on Marriage and Birth Control Are Relevant" (*TheLeaflet | An Imprint of Lawyers Collective,* September 18, 2018) <http://theleaflet.in/feminist-battles-within-home-why-ambedkars-views-on-marriage-and-birth-control-are-as-relevant-as-ever/> accessed September 19, 2018.

27 Interview with Sr. Adv. Salman Khurshid (August 17, 2018).

judicial intervention and interpretation is a far better way forward than fractious processes of sectarian polity and parliamentary decisions.

Vocalising Interests for Gender-Just Family Law

The emphasis of this section would be on social movements and their interaction with established religious institutions in context of gender justice and reforms advocacy. Bebaak Collective has done seminal work on advocating for gender justice for Muslim women.[28] Founding Member Hasina Khan decries the very fundamental premise of family law by outlining its genesis as emerging from the patriarchal and heteronormative structures that marginalise women and sexual minorities.[29] It organized a National Convention, attended by over 400 women rights activists, titled *Muslim Auraton ki Awaaz: Sadak se Sansad tak*.[30]

The Collective views the reforms as necessary and highlights need for solidarity amongst women to expand scope of educational, economic and social security, while vocalising claims from a secular, democratic government for ensuring rights to Muslim women as citizens. It disagrees with the likes of Flavia Agnes[31] and does not credit AIMPLB for making certain piecemeal moderations in its Supreme Court affidavit. It considers AIMPLB as a patriarchal organization and does not have any hope of positive engagement with the same. It does not see merit in the argument of threat to secularism and minority rights to be reason for having a conciliatory approach, because women's rights cannot be sacrificed at the altar of secularism.[32] It does not locate its crusade in the framework of religion.

The BMMA, on the other hand, believes in both the constitutional rights as well as Quranic rights of Muslims and strives for the same.

28 "Voice of Muslim Women: 'Sadak Se Sansad Tak'" (*Sabrang India February*, 25, 2016) <https://sabrangindia.in/campaigns/voice-muslim-women-sadak-se-sansad-tak> accessed September 17, 2018.

29 Interview with Ms. Hasina Khan (July 25 and August 13, 2018).

30 Cf *Sabrang* (n 37).

31 Agnes F, "Triple Talaq: The Muslim Law Board's Affidavit in the Supreme Court Has a Few Positives for Women" (*Scroll.in - Latest News, In depth news, India news, Politics news, Indian Cinema, Indian sports, Culture, Video* News, 3 January, 2017) <http://scroll.in/a/816024> accessed September 18, 2018.

32 Interview with Ms. Hasina Khan (July 25 and August 13 2018).

It has been vocal in its advocacy for a codified Muslim Family Law.[33] It has undertaken an elaborate nine-year long consultative process and came out with the Draft Muslim Family Law Bill 2018. It roots this demand in the constitutional right to equal legal protection and laments that if Hindu Law and Christian Law have been codified and amended multiple times to suit the needs of society and protect the women, Muslim law should also be codified.[34]

Noorjehan Safia Niaz, co-founder of BMMA, said, *"The draft is an attempt to bring legislative protection to Muslim women. Every community has their own marriage laws. We are also asking for one legislated law that can enable and empower us to raise our voice against unfair practices."*[35] The BMMA believes in the universal power of Allah who is *rahman and rahim*, merciful and beneficent and is embedded in the Islamic notion of *Taqwa* or *Tawhid* which encourages universal kindness and peace.[36] Muslim women are reading the Quran for themselves and interpreting it on the basis of their lived realities, hence, strengthening the struggle for reform.[37]

Ms. Hasina Khan points out that BMMA's position is problematic on multiple counts, as the draft provides for multiple rights which are not even mentioned in the Quran, such as mandatory wills or gifts in favour of daughters to ensure equitable inheritance. Instead, she believes the right approach should be to root these claims in the constitution itself

33 Rasheed Qazi and Sharma AK, "Muslim Women's Rights in India Codified Personal Laws Needed" (2016) 11(37) Economic and Political Weekly 22, 23.

34 Deshmane A, "'India Needs Codified Muslim Family Law'" *The Frontline* (September 15, 2017) <https://www.frontline.in/the-nation/india-needs-codified-muslim-family-law/article9834633.ece> accessed September 10, 2018.

35 Rachna, "BMMA Releases Final Draft of Muslim Family Law" (*The Hindu*, September 9, 2017) <https://www.thehindu.com/news/cities/mumbai/bmma-releases-final-draft-of-muslim-family-law/article19647152.ece> accessed September 9, 2018.

36 Niaz NS and Soman Zakia, "Seeking Justice Within Family – A National Study on Muslim Women's Views on Reforms in Muslim Personal Law" (2015) Bharatiya Muslim Mahila Andolan 68.

37 Niaz NS, "The Indian Muslim Woman's Tryst with Herself: the Genesis and Need of Bharatiya Muslim Mahila Andolan" (*NLS Socio Legal Review - National Law School of India University*) <http://www.sociolegalreview.com/the-indian-muslim-womans-tryst-with-herself-the-genesis-and-need-of-bharatiya-muslim-mahila-andolan/> accessed September 18, 2018.

and demand liberty and equal rights as equal citizens through secular legislation or code that invalidates gender unjust practices in various personal laws.[38]

BMMA has spearheaded the important study to document the lived experiences and expectations of Muslim women in India. It found that while 44% women didn't receive the mandatory payment of *Mehr* from their husband, 40% of them received only 1000 rupees as *Mehr*. Zakia Soman, co-founder of the BMMA explains, *"It is quite revealing that 95.5% poor women had not even heard of the All India Muslim Personal Law Board, yet the government and the people go by the decisions taken by these self-proclaimed leaders of the Muslim community."*[39] It also expounds on the issues of maintenance that 50% women are not even maintained during the subsistence of marriage.

However, liberal scholar of Muslim Personal Law like Prof. Faizan Mustafa points out lack of research methodology, contradictions, unsubstantiated conclusions and problematic arguments in this study. He questions the conclusion that 84% Muslim women support codification of Muslim Personal Law and are aware of codified laws in the Islamic countries, despite the low level of education amongst Muslim women.[40]

He also points out the lack of follow-up questions in the case of questions related to *halala* and lack of research into issue of polygamy while, indirectly, pointing out that only 2% of men had married for a second time, while 38% of them preferred to not remarry even after divorce. He points out that 54% who married after divorce can't be said to have committed bigamy. Dr. Asma Zehra Sahiba of AIMPLB, also, pointed out that even as per BMMA's own survey, only in one out of 117 women divorce was delivered instantaneously in absence of the wife.[41]

38 Interview with Ms. Hasina Khan (July 25 and August 13, 2018).

39 Dhar A, "Muslim Women Want Reforms in Personal Laws, Study Reveals" (*The Wire,* August 20, 2015) <https://thewire.in/gender/muslim-women-want-reforms-in-personal-laws-study-reveals> accessed September 18, 2018.

40 Mustafa Faizan, "The Debate on Triple Talaq Must be Based on Proper Research and Data" (*The Wire,* 06 November, 2016) <https://thewire.in/politics/muslim-personal-law-reforms-bmma-studies> accessed September 10, 2018.

41 Interview with Dr. Mrs. Asma Zehra Sahiba, Member of AIMPLB (14 September 2018).

In this context of varying methods and strategies utilized by social movements, it is important to understand this reform process from the standpoint of Self-Respect Movement. Muslim women activists argue that they seek to read in justice and redefine the contours and horizons of justice and freedom as autonomous members of the faith.[42] There is a need for these two approaches to understand and reinforce each other in the backdrop of the unique nature of Islamic faith and Muslim community, with respect to the Indian State.

Engagement: Way forward for REFORM

India's socio-political and legal tradition is defined by pluralism and diversity.[43] In this landscape, it is difficult to support calls for uniformity between multiple layers and dimensions of socio-cultural and religious identities. In this process of cultural accommodation, three major actors: conservatives, the state, and women's groups juxtapose each other. The evolution of political relations between these three stakeholders impacted the status of reforms process in South Korea.[44] While all three vigorously argued for their positions regarding gender hierarchy in family structures in their national context, the dynamic socio-economic development encouraged the State to consider the progressive viewpoint seriously. The increasing political influence of progressives tends to force conservatives to incrementally reform their standpoint. It is important to understand the need for cultural change and recognize the fact that a social legislation can only be effective in a favourable social context.[45]

The struggle of Muslim women, led by organizations like BMMA, Bebaak Collective and multiple others can learn from the Muslim

42 Jamaat, "Women Jamaat Articles" (*Feminist Legal Archives, January 2009,* January 1, 1970) <http://womenjamaatarticles.blogspot.com/2009_01_01_archive.html> accessed September 18, 2018.

43 Solanki G, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* (Cambridge University Press 2011),

44 Shin K-Y, "The Politics of the Family Law Reform Movement in Contemporary Korea: A Contentious Space for Gender and the Nation" (2006) 11 Journal of Korean Studies 93.

45 Hatekar Neeraj, Mathur Rajni and Rege Pallavi, "Legislating' Social Change: Strange Case of the Sarda Act" [2007] Economic and Political Weekly 16.

Personal Law Reforms Action Group in Sri Lanka.[46] Both exist in similar context, wherein an insecure and orthodox minority and a majoritarian polity hold the power to impact their destiny. There is a historical context of ethno-religious conflict and sectarian marginalisation that informs the fractious inter-community relations. Therefore, there is considerable similarity in the condition of Muslim women who are forced to navigate their interests as citizens while being under the shadow of orthodoxies and anxieties of their religious identity. However, what appears remiss in the Indian scenario is the concept of engagement. Even when the MPLAG is striving for a progressive interpretation of religious text based on justice and fairness, the Sri Lankan State is facilitating procedure for dialogue and consultation. In India, there exists deep distrust even between BMMA and Bebaak Collective.[47] The Sri Lankan institutional process also faces limitations of representation of women itself on the consultative bodies set-up to contemplate on reforms for gender justice.[48]

Individual autonomy, dignity and personhood are main aims for Muslim women struggling to liberate themselves from abusive marriages. This coincides with the constitutional vision of a just and fair social order for women. The social movements need to spearhead transformative politics that advocates for State's attempts to go beyond protection of destitute women to becoming an enabler of their freedom.[49] There is also a need for more fruitful and positive engagement between religious orthodoxy and reformist movements. In the status quo, both these entities antagonize each other to an extent that both tend to delegitimize each other's role. This is best represented in the responses of Dr. Asma and Ms. Hasina when asked about certain positive actions taken for women empowerment by these organizations, respectively.

46 "Muslim Women's Demands on Reforms to the MMDA" (*Muslim Women's Demands on reforms to the MMDA,* January 27, 2018) <https://mplreforms.com/2017/04/04/muslim-womens-demands/> accessed September 18, 2018.

47 Interview with Ms. Hasina Khan (July 25 and August 13, 2018).

48 "No MMDA Reforms Possible without Muslim Women" (*Muslim Women's Demands on reforms to the MMDA,* July 22, 2018) <https://mplreforms.com/2018/07/22/statement1/> accessed September 18, 2018.

49 Cf *Dutta,* (n.5).

For instance, instead of running Women's Shariat courts, BMMA should advocate for appointment of Women Qazis in the Shariat Courts set up by AIMPLB. Bebaak Collective should also consider engaging with the religious framework to strengthen this struggle for justice. Reforming the regressive attitude of AIMPLB is also important.[50] It should recognize that changing social scenarios demand a re-interpretation of personal law.[51] The scholarly initiative should support demands by liberal intellectuals Ziya us Salam for institutionalising *talaq-e-tafweez*, under which the husband vests in his wife the right to divorce him. This condition should be made part of the model nikahnama as it would promote equitable gender relations.[52] The AIMPLB was expected to introduce a model *nikahnama* (Islamic marriage contract) *"that would obligate grooms to vow against the use of instant triple talaq,"* but it maintained a curious silence on the key issue.[53] However, prompt guidelines by the board after the Triple Talaq verdict went on to show that, due to pressure of public opinion, the conservatives can be forced to make incremental concessions.[54]

In this context, Law Commission of India's recently released consultation paper remarks appropriately, *"The State is an enabler of rights rather than an initiator, particularly in sensitive matters such as that of religious personal laws. At this stage, one can conclude with conviction the Commission's initiative towards reform of family law is driven by civil society organisations, educational institutions, and vulnerable sections of the society themselves, rather than by legislative mandate."*[55] It correctly distinguishes the symptom from the disease by characterizing

50 Rahman AF, "Muslim Personal Law Board Must Stop Calling Arbitration Centres 'Sharia Courts'" (*The Wire,* July 16, 2018) <https://thewire.in/law/muslim-personal-law-board-must-stop-calling-arbitration-centres-as-sharia-courts> accessed September 18, 2018.

51 Cf *Agnes* (n.31).

52 Salam Z U, *Till Talaq Do Us Part: Understanding Talaq, Triple Talaq and Khula*. (Penguin Books, Delhi 2018).

53 Sajjad M, "The All India Muslim Personal Law Board Continues to Be Regressive" (*The Wire,* February 12, 2018) <https://thewire.in/religion/all-india-muslim-personal-law-board-regressive> accessed September 18, 2018.

54 All India Muslim Personal Law Board, *Guidelines and Advisory relating to Marriage and Divorce of Muslims in India* (May 16, 2017).

55 Law Commission of India, *Consultation Paper on Reform of Family Law,* (August 31, 2018) para 1.9

that patriarchal frameworks and not religion per se is the root issue.[56] While recognizing the threat of alienating communities from legal system through Uniform Civil Code, the Commission proposed that various personal laws should incorporate certain universal principles with regard to adultery, age of consent, grounds for divorce, et al.[57]

Conclusion

Pluralism in Indian legal framework is sine qua non for Indian democracy, because mere existence of differences does not imply discrimination.[58] Pluralism in this modern sense presupposes citizenship.'[59] Legal pluralism as the way forward for reform in family law should be recognized by the State.[60] T.M.A Pai Foundation v. State of Karnataka and Ors[61] reiterated that "*it is making diversity reconcile with certain universal and indisputable arguments on human rights."* As far as courts are concerned, there is need to strengthen the commitment to protect fundamental rights and strike down egregious personal laws that violate women's dignity. The various instances of judicial reluctance represented by cases like, *inter alia Gita Hariharan,*[62] *Shah Bano,*[63] *Danial Latifi*[64]*and Madhu Kishwar*[65]needs to be overcome, like in the Triple Talaq verdict and recent judicial observations criticizing essential religious practices test.[66]

56 Cf *LCI* (n.54) para 1.12.

57 Cf *LCI* (n.37) para 2.4.

58 Ansari Hamid, "Two obligatory Isms: Why Pluralism and Secularism are essential for our Democracy" [2017] 52 (31), Economic and Political Weekly.

59 Al -Azmeh Aziz, "Pluralism in Muslim Societies" – Lecture delivered on January 29, 2005, at the India International Centre (IIC), New Delhi.

60 Mustafa F, "The Progressive Way" (*The Hindu*, September 18, 2018) <https://www.thehindu.com/opinion/op-ed/the-progressive-way/article24970676.ece> accessed September 18, 2018.

61 *T.M.A Pai Foundation v. State of Karnataka and Ors* (1994) 2 SCC 195.

62 *Gita Hariharan v. Reserve Bank of India* (1999) 2 SCC 228.

63 *Mohd. Ahmed Khan v. Shah Bano Begum* (1985) 2 SCC 556.

64 *Danial Latifi v. Union of India* (2001) 7 SCC 740.

65 *Madhu Kishwar v. State of Bihar* (1996) 5 SCC 125.

66 *Men's Laws, Women's Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia*, (ed. Indira Jaising, 2005) 276 277.

In order to navigate the whole conundrum of reforms in this complicated context, the three determinants become highly important. One is the organization of critical mass of vulnerable stakeholders - the micro minority, the minority within the minority, for example *Muslim women*. The second important consideration is political will. This can be generated through pragmatic advocacy and realignment of political incentives. The third consideration is the progressive legal and judicial interpretation. It is only through the harmonized action of these forces that the individual liberty in family law structures can be realised. In this context, the social movements should also continue to increase awareness and strengthen advocacy for gender equality, justice and individual dignity in various religious and secular platforms.[67] A social dialogue is the precursor to any institutional and legal transformation. BMMA and Bebaak Collective have the historic duty to spearhead that dialogue with religious orthodoxy. The Sri Lankan movements' demands, issues and terms of engagement with institutions can be a useful tool for these groups. Ultimately, the AIMPLB and the clergy should recognize the history of liberal reform and re-interpretation based on the three internal processes and engage with these groups in a respectable manner. This is especially important to ensure modern progress of Muslim community as well as healthy contribution to the larger national discourse on gender justice.

67 Agnes F, "Minority Identity and Gender Concerns" (2001) 36(42) Economic and Political Weekly 3973 3975.

HOMONATIONALISM OR RADICAL QUEER: LGBTQ + RIGHT ARTICULATION IN INDIA POST NAVTEJ SINGH JOHAR

Shinde Sheetal Narayanrao

Abstract

Queer politics is being recast in Indian socio-political space as part of the majoritarian narrative of the nation-state - a remarkable shift from the so-called deviancy to a part of the mainstream. But, in this homo-normativization, the radical potential of the queer movement is gradually softened. Hitherto, the queer movement was spearheaded by affluent, educated urbanites, and their focal point of enquiry has been assimilation into the mainstream. So, post Navtej Johar judgment, a new queer identity has emerged, which is non-threatening, non-questioning and politically correct. Navtej Johar has obscured the years of a struggle creating a truncated history of the queer movement, bereft of the multitude of possibilities, aspirations and avenues. Today, the queer identity as a united front against majoritarian tyranny, patriarchy and androcentrism is being blurred. The article studies how queer politics is changing in India, both contextually as well as content-wise.

1. Introduction

It was the 5th of October, 2019. School of Oriental and African Studies University [SOAS] was organizing a seminar on "Resisting Fascism, building solidarities – India: Kashmir and Beyond."[1] Five masked

1 "An act of pinkwashing': LGBTQI activists allege the far-right disrupted Kashmir event in London' (*Scroll*, 22nd Oct, 2019) https://scroll.in/latest/941399/an-act-of-pinkwashing-lgbtqi-activists-allege-the-far-right-disrupted-kashmir-event-in-

men barged into the seminar, proudly displaying a rainbow flag with slogans such as "Gay for J&K" and "Art. 370 homophobic." Five months later: the date was 1st of February, 2020. Queer Azadi Mumbai organized a solidarity gathering in Azad Maidan. They were informed by the administration to limit their sloganeering to LGBTQ issues only and remain apolitical. When a student raised anti-CAA slogans, many participants were prosecuted under Indian sedition laws.[2] Both the events bore a deep similarity. These are the early examples of homonationalism in an assertion of LGBTQ rights in India —Pinkwashing in India. These two events show an attempt to justify exceptionalism masqueraded under the exhortation of LGBTQ rights - whereas the first event created artificial separation between queer identity and the Kashmiri identity, the second is an example of homonormativity, that is 'privileging set of hierarchies, social norms and expectations that cause intersectionalities among the group with one section being acceptable in the social mainstream, and others not.'[3] With the examples of these two events, this author intends to convey the fact that, queer movement in India is dangerously moving towards homonationalism, and in the process, it is losing its radical political philosophy. This has become more conspicuous post *Navtej Singh Johar v Union of India AIR 2018 SC 4321* [hereinafter "*Navtej Johar"*] wherein by recognizing the LGBTQ+ rights, the State tends to pose itself as a progressive liberal one, yet perpetuating or at least ignoring other forms of discrimination - race, caste, region, religion, etc., - as Jasbir K Puar calls (terrorist) others.[4] Hence, the queer studies, to preserve their critical radical nature, need to discern their focus and maneuver the duality of homonormativity and remain as a radical critique towards a constructive assertion of queer rights.

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london accessed 5 June, 2021

2 'Mumbai Pride: Over 50 People Charged with Sedition for Slogans Supporting Sharjeel Imam' (*The Wire*, 4th Feb 2020) https://thewire.in/law/mumbai-sedition-sharjeel-imam accessed 5 June, 2021

3 Buffy Flores, 'Everything You Need to Know About Homonormativity' (*Pride,* 12 Oct, 2017) https://www.pride.com/firstperson/2017/10/12/what-homonormativity accessed on 5 June, 2021

4 Jasbir K. Puar, *Terrorist Assemblage: homonationalism in queer times* (Duke University Press, 2007)

1.1 Research Methodology

This article is premised on the research question "whether the Homonationalism is changing the queer politics in India." This author starts with the hypothesis that LGBTQ+ movements in India are moving towards homonormativity. One of the reasons may be that the movement is spearheaded by affluent, educated urbanites and their desire for assimilation – by way of gay marriages and the right to adopt children, both of which are the standard of a normal heterosexual family. *NavtejJohar* was a milestone achievement towards the same objective. But, under the garb of inclusion, there is a reasonable apprehension that exclusionary agendas may be flagged - as a result, depoliticizing the queer and keeping it away from its radical potential. This article will test the hypothesis through a qualitative analysis of queer literature published in recent years. The article is divided into four chapters. The second chapter discusses the epistemology of homonationalism and its emergence in India post *Navtej Johar*. The chapter is divided into two subchapters: the first one discusses homonationalism and its impact in the western world, and the second subchapter discusses the trend of queer politics in India post-*NavtejJohar*. The third chapter discusses the changing nature of queer politics and the degradation of its radical content. The final chapter consists of the concluding remarks of this author.

2. Homonationalist Drive Post Navtej Johar Judgment

This article is premised upon Jasbir K Puar's concept of homonationalism and its extrapolation to the queer politics in India. At the outset, it is pertinent to mention that Puar does not claim that her theory can be transplanted to areas beyond the context of her book *Terrorist Assemblages: Homonationalism in Queer times.*[5] However, her idea provides a reasonable framework to rethink the coexistence of a state tolerance towards queer ideology at the cost of other marginalized identities - including Dalit, Adivasi, transgender people, peasant and migrant workers.[6]

5 ibid

6 Aniruddha Dutta and Raina Roy, 'Decolonizing Transgender in India: Some Reflections' (2014) *Transgender Studies Quarterly* 1, no. 3 320–37.

2.1 Homonationalism and its growing influence in the Western World

Puar's definition of homonationalism is an umbrella term for the emergence of national homosexuality. By national homosexuality, she means the discernible difference between the group that is acceptable and the group that is not acceptable in the national vision. Adopting jargons of homosexuality is 'contingent upon segregation and disqualification of racial and sexual others from national **imaginary .**'[7] Her theory rests on the principle of duality — 'acceptable' and the 'others.' The process of 'othering' lies at the heart of her theory. In the limited context, she has developed the concept as 'white gay man allegedly threatened by intolerant others of Asian origin, especially the Muslim.'[8] In her opinion, homonationalism and anti-Muslim racism in the USA emerged together and manifested together. If one de-contextualizes Puar's idea from the Western Society and moves towards generalization, the definition of homonationalism would be the movement towards the inclusion of homosexuality with hyper-nationalism, manifested through patriotic rhetoric,[9] which a group of LGBTQ+ people (or a section of 'good' queer people) accept, in return for symbolic inclusion in the nation-state. This symbolic inclusion is the state-defined norms of acceptable forms of homosexuality - a drive towards homonormativity. This homonormativity produces majoritarian discourse on 'dominant caste, race, gender and national ideals.'[10] Such a abroad-based definition makes the concept more visible in Western European countries. Kulick argues, sexual identity politics plays a major role in creating New Europe, and tolerance towards homosexuality is proffered as a justification to segregate Western European countries from others.[11] This drive towards sexual politics has become the defining norm for European-ness.

7 Puar (n 4)
8 ibid
9 Scroll (n, 1)
10 Shreshtha Das and Aijaz Ahmad Bund, 'The Homonationalist Agenda of 'Good' Queers Who Love the Nation-State' (*The Wire* ,13 Feb 2020)<https://thewire.in/lgbtqia/homonationalism-india-sedition> accessed on 5 June 2021
11 Haritaworn, Jin, Tamsila Tauqir and Esra Erdem, 'Gay Imperialism: Gender and Sexuality Discourse in the 'War on Terror' in Adi Kuntsman and Esperanza Miyake (eds) *Out of Place: Interrogating Silences in Queerness/raciality* (York: Raw Nerve Books 2008)

The relationship of homonationalism and exclusion has become the mainstream agenda of many right-wing parties in Western European countries.[12] One may wonder why, suddenly, the right-wing politics, which is universally accepted as a countermanding force to the counter-cultural revolution of the 1970s, adopted homosexuality as its favoured agenda! Today, the right-wing parties have no problem in 'mainstreaming' homosexuality. But, through this acceptance, they are not essentially acceding to the queer way of life. Rather, it is the homosexuals adjusting their way of life to the heterenormativity of nuclear family and children. The result is the same-sex relation is no longer the dominant way of the right wing's view of LGBTQ+ rights. The focus has shifted towards what Puar calls the 'others.' This exclusionary agenda is very succinctly analyzed by Lisa Duggan when she says, the new age right-wing politics is more focused on preserving the ideas of heteronormative values and institutions "while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption."[13] This 'good' queer group, in turn, produces the 'others' who are branded as homophobic and, hence, a threat to the nationalist agenda. The Western European Right-wing parties can ill afford to oppose same-sex marriage or gay rights because that will dent their political acceptance in a liberalized society. So, they adopt a form of neo-liberalist politics to promote exclusionary ideologies. As Puar rightly says, "gay friendliness" is a desirable characteristic of contemporary nations.

This new discourse hits at the core of queer studies. The new trend supports a form of homogenization of the homosexual experiences brushed in the colour of nationalism, thereby ignoring the 'personal

12 Greet Wilder makes it clear in his extreme right wing party's agenda that LGBTQ people have solace in the right-wing political set up when he says "Islam and freedom are not compatible…You see it in almost every country where it dominates. There is a total lack of freedom, civil society, rule of law, middle class; journalists, gays, apostates — they are all in trouble in those places." *Cf* Hjelmgaard, "Would-be Dutch PM: Islam Threatens Our Way of Life," USA Today, February 21, 2017, https://www.usatoday.com/story/news/world/2017/02/21/exclusive-usa-today-interview-with-dutch-anti-islam-politician-geert-wilders/98146112/ accessed June 21, 2017

13 Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism* (Duke University Press, 2002)

is political' - the core of queer politics. Though primarily western in origin, this author argues the idea of Homonationalism has started to appear in the Indian socio-political context, too.

2.2 Impact of homonationalism post *NavtejJohar*

Sircar and Jain call the homonationalist trend as 'nationalist resolution of the homosexual question.[14] They opine that homosexuality, which hitherto was considered a deviancy, gets colluded in the majoritarian narrative of the Indian Nation-State - Homosexuals not a threat to the nationhood. There has been a remarkable shift in the right-wing ideology on the question of homosexuality, from decrying its depiction in fine arts to support gay rights. This spectacular shift is premised on the homogenization of the in-groups so that a narrative can be weaved that out-groups, more specifically religious minorities, are a threat to the identity of the nation as much as they are a threat to the homosexual identity. The Homonationalism projects work in such a way that the sectional identity of homosexuals is blurred with an overt emphasis on privacy rights in the realm of domesticity, which is at best a notional inclusion in the mainstream. Yet, on the other hand, every perceived threat to a majoritarian nationalist identity is portrayed as homophobic. So, a narrative is weaved in such a manner that homosexuality is safe under right-wing protection. This narrative accords the much-needed global acceptability to the Indian State as a modern, liberal and progressive state. Such a drive towards homonationalism was reified with the *NavtejJohar* judgment.

2.2.1 Politically ambiguous position in the aftermath of *NavtejJohar*

The last decade has been a momentous period for the LGBTQ rights movement in India, yet the Government's position has largely been non-uniform. Three landmark cases: *Naz Foundation,[15] Sushil Kumar Koushal,[16] and NavtejJohar* define the contour of LGBTQ rights in India. This article limits the discussion to *NavtejJohar* alone; hence

14 Partha Chatterjee, The Nationalist Resolution of the Women's Question, in Kumkum Sangari & Sudesh Vaid (eds) *Recasting Women: Essays in Indian Colonial History* 233 (Rutgers University Press, 1999)

15 Naz Foundation v. Govt. of NCT of Delhi 160 Delhi Law Times 277

16 Suresh Kumar Koushal v Naz Foundation Civil Appeal No. 10972 of 2013

Government response in and around this time will be analyzed. India celebrated *NavtejJohar* and the decriminalization of S. 377 of IPC among consenting adults, as the section was viewed as "irrational, indefensible and manifestly arbitrary and violative of the spirit of constitution."[17] But, little did it catch the eyes of the mainstream media that India, just a year ago, had abstained from voting for the formation of UN expert on sexual orientation and gender identity, and seven months after the judgment, also, India abstained from voting on the topic of extending the mandate of the same expert.[18] Yet, the national media left no stone unturned to build and propagate the narrative of a new queerness that can coexist amicably with the concept of nationalism. The ruling dispensation has dramatically changed the subject matter of its politics around queer identity from rabid homophobia[19] to the celebration of *NavtejJohar* judgment and the LGBTQ rights - it appears to be strange moral positioning, indeed! What caused such a paradigmatic, yet sharp, **transition**? This cannot be limited to being a mere political transition; rather, this author contends that the subject matter of queer politics has undergone a complete shift—the emergence of a 'good' queer in India.

2.2.2 The majoritarian notion of good queer

Post *NavtejJohar,* there is an apparent putative progressiveness in the mainstream media in adopting and celebrating queer rights - pride marches, **Twitter accounts** smeared with rainbow colours, etc., all at a time, where there is no respite from the systemic oppression on the Adivasis, Dalits, minorities, migrant labourers and other marginalized groups! Puar's homonationalism framework and the rise of the 'good' queer may explain this phenomenon of state-market tolerance towards queerness while being intolerant to some others.[20] Despite the far-

17 Navtej Singh Johar v Union of India AIR 2018 SC 4321

18 'India abstains from voting on UN resolution to appoint LGBT rights expert' (*Firstpost* 1st July, 2016)https://www.firstpost.com/world/india-abstains-from-voting-on-un-resolution-to-appoint-lgbt-rights-expert-2867632.html accessed on 5th June, 2021

19 'BJP's Amit Malviya had tweeted against scrapping of Section 377; raised questions on inheritance, adoption laws for homosexuals' (*Firstpost* 7th Sep 2018) <https://www.firstpost.com/india/bjps-amit-malviya-had-tweeted-against-scrapping-of-section-377-raised-questions-on-inheritance-adoption-laws-for-homosexuals-5137731.html> accessed on 5th June, 2021

20 Avery Tompkins, "Asterisk," *Transgender Studies Quarterly* 1, no. 1–2 26–27;

reaching ontological significance of *NavtejJohar* judgment, Vaishnavi Prasad claims the judgment benefits affluent, upper-class gay man more than it benefits cis-women or Trans people.[21] The judgment has brought acceptability to a class of people who are, no doubt, queer. Still, their queerness is a reflected form of conformity with the majoritarian notion of morality. Queer identity has become a norm to the extent that it is non-threatening, i.e., he does not profess a political viewpoint and does not use his queer identity to voice his political opinion; he does not question the systemic failures in ensuring the right to him, and he is silent when the system comes in confrontation with a queer identity of a fellow queer person owing to his different religious or political ideology. It is a refutation of non-threatening good queer to the extent his personal is not political.

The good Indian queer is conformist in the sense that he fights for equal rights of marriage and adoption, instead of fighting against discriminatory and objectionable practices of conversion therapy, targeted violence on the queer as well as a gender insensitive workplace. The conformist good queer is yearning to remain on the right side of cisheteronormative behaviour. The good queer seeks respectability and recognition from society. For him, the societal normative space has enough spaces to adjust him in, and in turn, he can give a mascara of progressive identity to society. To achieve this end, the good queer is not bothered if such norms promote the hierarchy among the queer populace. Till the time, as Vaishnavi Prasad says, the queer narrative is controlled to suit the context of subject matter, the queer is good. A conformist queer is the epistemological antithesis of queer identity itself — yet in a homonationalism scenario, Puar claims the conformity creeps into a section of queer to come out of social exclusion and join the mainstream, and the mainstream welcomes on a strict cost-benefit analysis basis. It means, if a cisheteronormative behaviour by a section of queer is more favourable to the political system (in terms of being

Aniruddha Dutta and Raina Roy, "Decolonizing Transgender in India: Some Reflections," (2014) *Transgender Studies Quarterly* 1, no. 3–37.

21 Vaishanvi Prasad, 'The Respectable Indian Queer Unmasked' (*The Citizen is Queer*+ 28th Sept, 2020) https://www.thecitizen.in/index.php/en/NewsDetail/index/7/19424/The-Respectable-Indian-Queer-Unmasked accessed on 5th June 2021

labelled as progressive) to keep non-nationalist groups in exclusion, the political system will adopt the 'good' queer as part of the mainstream.

The post *NavtejJohar* queer politics has got itself trapped in the sex-gender duality with excessive focus on gender identity. The upper-class bias in the queer rights articulation shows the focus towards gender more than sex *per se.* The inclusion of the phrase "third gender" into the public sphere, including the legal lexicons,[22] provides a subtle spread of patriarchal hierarchy. If the Trans people are of the third gender, who is the first gender? Are the gendered categories arranged in hierarchical order, with the first gender (male?) superior to the second or third?

2.2.3 Narrative of queer identity as the national identity

If the above two subsections provide an idea as to how queer politics is insidiously being mainstreamed in India, the present subsection discusses how the 'mainstreaming' is aimed at removing the political content of queerness. If the Mumbai Pride march or SOAS were any representative examples, the system perceives that queer identity should not have any other political identity. Ina Goel correctly identifies this phenomenon, as the burden of being politically correct has affected queer politics irreversibly.[23] In this context, the purported equivalence made between Art. 370 and S. 377 of IPC needs a bit of elaboration. The abrogation of Article 370 was hailed as a progressive step for the State of Jammu and Kashmir through equal rights for woman, reservation for Dalit and Bahujan, the emancipation of minorities, etc.[24] But, gradually, this has come to be associated with justice for queer people of Jammu and Kashmir. Art. 370 did not discriminate against the queer Kashmiris anymore; neither was its abrogation a *sine qua non* for ensuring rights to the LGBTQ community there. The logic that *NavtejJohar* judgment was not applicable to the erstwhile State of Jammu and Kashmir was not legally valid either. Yet, a section of media, intelligentsia, including

22 National Legal Service Authority v Union of India AIR 2014 SC 1863

23 Ina Goel, 'Queer Politics of Representation: Ram Mandir and KinnarAkhada Controversy' (*Economic and Political Weekly,* 24th Jan, 2020) https://www.epw.in/engage/article/queer-politics-representation-ram-mandir-and accessed on 5th June, 2021

24 Anish Gawande, 'The False Link Between Article 370 and Queer Rights' (*The Wire* 6th Sep, 2019) https://thewire.in/lgbtqia/all-you-need-to-know-about-the-false-link-between-article-370-and-queer-rights accessed on 5th June, 2021

many LGBTQ activists,[25] believed and spread the narrative that Art. 370 prevented the realization of LGBTQ rights in Jammu and Kashmir, and abrogation of it was a 'win' for them. This was an attempt at Pinkwashing in India. This Pinkwashing has a deep political undertone; it divides the queer community along different cross-sections and gives acceptability to that cross-section of LGBTQ+ people with political views similar to the ruling dispensation. This cross-section of people enjoys acceptance and, hence, respectability in the mainstream. This has a necessary corollary that those who are not politically correct risk the chance of being labelled as anti LGBTQ+ themselves.

The discussion above leads to the idea that the tendency of Pinkwashing has manifested in such a manner that acceptability of the queer identity has become contingent upon being politically correct. And, the mainstream politics aims to achieve two brownie points from this narrative — justifying the politics of exclusion of certain community,[26] and secondly, striving to be recognized as a liberal nation-State by the international community despite political exclusion and political marginalization practiced at different cross-sections at a domestic level. The summation of all of these is the death of radical queer politics in India.

3. Death Of The Radical Queer In India

Political radicalism is the foundational characteristic of queer identity[27]; it is a radical critique, premised on the subject matter of gender and sexuality. For Butler, the queer politics is aimed at assembling the feminist critical studies with race and class, so that it serves as a tool to 'destabilize theoretical presumptions and foundationalist tendencies,'[28] criticizing and resisting attempts at institutionalization, identity practices, etc.[29] She constantly warns about the association of queers that would diminish their radical potential. For her, the political

25 https://twitter.com/abhijitmajumder/status/1162003384133541888?s=20

26 As Israel portrays itself as a savior of LGBTQ rights and justifies its violence over Palestinians on the pretext of Palestinian society is purportedly homophobic

27 Judith Butler, *Gender Trouble: Feminism and subversion of identity* (Routledge 1990)

28 Jacek Kornak, *Judith Butler's Queer Conceptual Politics*, (2005) Redescriptions, Vol. 18, No. 1

29 Id

deconstruction of the queer is to discover the interwoven power relations between sex, class and race and form the basis of a politics that is a 'radical contestation to contemporary democratic theory and practice.'[30] But, such radicalism of queer is under threat from inclusionary politics. Shaughnessy says the new movement of queer politics across the world is giving primacy to liberal normativity and visibility, thereby choosing inclusion over revolution.[31] A necessary corollary to this inclusion is 'accentuated state regulation on sexuality.'[32] Lisa Duggan says there had been a drive towards homonormativity in the queer politics of the USA in the aftermath of the decriminalization of sodomy. She says, instead of challenging the heterosexual institutions of marriage, family, military and workplace, the new queer politics sought formal equality and recognition.[33] The same sort of homonormativity is visible in the Indian context post *NavtejJohar,* too.

Post *NavtejJohar,* the neoliberalist drive towards homonationalism blunts the critical edge of queer politics in conforming to the societal mainstream. Oishik Sircar and Dipika Jain summarize it succinctly, "[t]he new mantra of citizenship under neoliberalism is one where every individual is told that they can be citizens with rights as long as they perform certain prescribed codes of respectable citizenship which are for their own good."[34] This creates an artificial separation between their queer struggle and the struggle of other marginalized elements. Queer politics loses its broad based revolutionary characteristics as if queer liberation can be ensured at the cost of other identities.

30 Id at 65

31 O'Shaughnessy, H. D. 2015. Homonationalism and the Death of the Radical Queer. *Inquiries Journal/Student Pulse* [Online], 7 http://www.inquiriesjournal.com/a?id=1003 accessed on 5th June, 2021

32 The call to include gay couples in the institution of marriage is a drive towards cisheteronormativity. This will bring in heightened state control in such a manner that, the state will amend existing marriage acts for them, state will decide their suitability for adoption and state will decide about the provision of divorce and child custody for the gay couples. This is a radical binary position of Butler's critical queer.

33 Lisa Duggan, *The Twilight of Equality? Neoliberalism, Cultural Politics, and the Attack on Democracy* (Boston: Beacon, 2003) at 50

34 O Sircar O and D Jain, 'New intimacies/old desires: Law, culture, and queer politics in neoliberal times'(2012) Jindal Global Law Review 4(1):1–16

Contrary to the arguments of the supporters of homonationalism, the death of radical queer adversely affects queer politics itself. LGBTQ identity in India is not limited to suave urban upper-middle-class society. As Maya Sharma opines, the queer lives outside the metros are 'un-mirrored and largely unknown'[35] - deeply hardwired in class differences, caste differences and rural-urban divide. For the vast majority of queer people in India, it is a life of struggle for survival, struggle against systemic violence, struggle against poverty, hunger, discrimination — struggle for sexual identity is not the primary concern. By acceding to the vocal LGBTQ rights activists, who are socially more privileged, a class divide is being created within the queer community itself. A conformist queer supports and even perpetuates the very inequalities that it aims to strike. So, what is the way out? The queer group lacks the political salience in a country of a hundred and half billion people to have any societal impact except for symbolic references. Hence, as Supreme Court Advocate Saurav Kirpal says, the queer needs to forge alliances with other critical movements – subaltern movements, feminist movements, etc., so that different marginalized movements coalesce to dovetail their revolutionary appeal towards a common cause of liberation.[36] And, the common denominator of all such marginalized identity struggles is the deep-seated radicalism in them. A non-radicalized homonationalist queer movement becomes an ontological paradox in itself in two senses. First, queer identity is composed of heterogeneous groups across the cross-section of society. Ignoring these intersectionalities has the propensity of creating a hierarchy among the queer. Secondly, the queer identity is a revolution against injustice. Irrespective of name, content or context, injustice is injustice, and the queer must stand up to it wherever it is—be it discrimination based on identity, discrimination based on caste or discrimination based on sex and gender. Hence, the revival of radicalism is necessary to the survival of the critical queer of Butler.

35 Maya Sharma, *Loving Women: Being Lesbian in Unprivileged India*. (Yoda Press 2015) at 6

36 Filip Noubel, 'The state of LGBTQ+ rights: 'India does not have anti-discrimination code' (*Business Standard 12th* July, 2020) https://www.business-standard.com/article/current-affairs/the-state-of-lgbtq-rights-india-does-not-have-anti-discrimination-code-120071200179_1.html accessed on 5th June, 2021

4. Conclusion

The article discusses that, like in the Western world, homonationalism is on the rise in India, causing softening of the radical potential of the queer movement. But, why did it happen? Does *NavtejJohar* have something to do with this paradigm change? Notwithstanding the fact that homonationalism is a deeply political project, legal flashpoints like *Naz Foundation* or *NALSA* or *NavtejJohar* have always been the first line of attack for the queer movement in India. In a constitutional democracy, legal battles at the Apex Court serve great purposes. But, they also tend to be "centripetal turbulence of illumination so powerful that they may blind the past, even as they spotlight the present and light up the future."[37] Primary reliance on a judicial pronouncement obscures the years of struggle, creating a narrative that fossilizes the past and valorizes the present."[38] It creates a truncated history that is bereft of the multitude of possibilities, aspirations and avenues. The queer movement in India has a rich history – it is a united front against majoritarian tyranny, patriarchy and androcentrism. Reducing it to legal flashpoints like *NavtejJohar* will be making this diverse history of struggle a blinkered one. As Sircar suggests, every radicalist should remember K. Balgopal's words: "To condemn oppression is to condemn at least a little bit of oneself"![39] It is high time the queer movement in India should adopt a self-critical approach to rescue itself from the traps of homonationalist clutches and revive the radicalism inherent in the queer philosophy.

Bibliography

Articles

1. Aniruddha Dutta and Raina Roy, "Decolonizing Transgender in India: Some Reflections," (2014) *Transgender Studies Quarterly* 1
2. Avery Tompkins, "Asterisk," *Transgender Studies Quarterly* 1
3. Jacek Kornak, 'Judith Butler's Queer Conceptual Politics,' (2005) Redescriptions, Vol. 18, No. 1

37 Puar (n, 4)

38 Oishik Sircar, 'New Queer Politics in the New India: Notes on Failure and Stuckness in a Negative Moment' (2017) Unbound Vol 11:1

39 Id

4. O Sircar O and D Jain 'New intimacies/old desires: Law, culture, and queer politics in neoliberal times' (2012) Jindal Global Law Review 4(1)

5. Oishik Sircar, 'New Queer Politics in the New India: Notes on Failure and Stuckness in a Negative Moment' (2017) Unbound Vol 11:1

Books

1. Adi Kuntsman and Esperanza Miyake (eds) *Out of Place: Interrogating Silences in Queerness/raciality* (York: Raw Nerve Books 2008)

2. Jasbir K. Puar, *Terrorist Assemblage: homonationalism in queer times* (Duke University Press, 2007)

3. Judith Butler, *Gender Trouble: Feminism and subversion of identity* (Routledge 1990)

4. Kumkum Sangari & Sudesh Vaid, (eds) *Recasting Women: Essays In Indian Colonial History* (Rutgers University Press, 1989)

5. Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism* (Duke University Press, 2002)

6. Lisa Duggan, *The Twilight of Equality? Neoliberalism, Cultural Politics, and the Attack on Democracy* (Boston: Beacon, 2003)

7. Maya Sharma *Loving Women: Being Lesbian in Unprivileged India*. (Yoda Press 2015)

Case Laws

1. National Legal Service Authority v Union of India AIR 2014 SC 1863

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

3. Naz Foundation v. Govt. of NCT of Delhi 160 Delhi Law Times 277

4. Suresh Kumar Koushal v Naz Foundation Civil Appeal No. 10972 of 2013

News Websites

1. 'BJP's Amit Malviya had tweeted against scrapping of Section 377; raised questions on inheritance, adoption laws for homosexuals' (*Firstpost* 7th Sept, 2018) <https://www.firstpost.com/india/bjps-amit-malviya-had-tweeted-against-scrapping-of-section-377-raised-questions-on-inheritance-adoption-laws-for-homosexuals-5137731.html> accessed on 5th June, 2021

2. India abstains from voting on UN resolution to appoint LGBT rights expert' (*Firstpost* 1st July, 2016) https://www.firstpost.com/world/india-abstains-from-voting-on-un-resolution-to-appoint-lgbt-rights-expert-2867632.html accessed on 5th June, 2021

3. 'Mumbai Pride: Over 50 People Charged with Sedition for Slogans Supporting Sharjeel Imam' (*The Wire*, 4th Feb, 2020) https://thewire.in/law/mumbai-sedition-sharjeel-imam accessed 5 June, 2021

4. Buffy Flores, 'Everything You Need to Know About Homonormativity' (*Pride,* 12 Oct, 2017) https://www.pride.com/firstperson/2017/10/12/what-homonormativity accessed on 5 June, 2021

Websites and Blogs

1. Filip Noubel, 'The state of LGBTQ+ rights: 'India does not have anti-discrimination code' (*Business Standard 12th* July, 2020) https://www.business-standard.com/article/current-affairs/the-state-of-lgbtq-rights-india-does-not-have-anti-discrimination-code-120071200179_1.html accessed on 5th June, 2021

2. Hjelmgaard, "Would-be Dutch PM: Islam Threatens Our Way of Life," USA Today, February 21, 2017,https://www.usatoday.com/story/news/world/2017/02/21/exclusive-usa-today-interview-with-dutch-anti-islam-politician-geert-wilders/98146112/ accessed June 21, 2017

3. Ina Goel, 'Queer Politics of Representation: Ram Mandir and KinnarAkhada Controversy '(Economic *and Political Weekly,* 24th Jan, 2020) https://www.epw.in/engage/article/queer-politics-representation-ram-mandir-and accessed on 5th June, 2021

4. O'Shaughnessy, H. D. 2015. Homonationalism and the Death of the Radical Queer. *Inquiries Journal/Student Pulse* [Online], 7 http://www.inquiriesjournal.com/a?id=1003 accessed on 5th June, 2021

5. Anish Gawande, 'The False Link Between Article 370 and Queer Rights' (*The Wire* 6th Sept, 2019) https://thewire.in/lgbtqia/all-you-need-to-know-about-the-false-link-between-article-370-and-queer-rights accessed on 5th June, 2021

6. Shreshtha Das and Aijaz Ahmad Bund, 'The Homonationalist Agenda of 'Good' Queers Who Love the Nation-State' (*The Wire*, 13 Feb, 2020) <https://thewire.in/lgbtqia/homonationalism-india-sedition> accessed on 5 June, 2021

7. 'An act of pinkwashing': LGBTQI activists allege the far-right disrupted Kashmir event in London' (*Scroll*, 22nd Oct, 2019) https://scroll.in/latest/941399/an-act-of-pinkwashing-lgbtqi-activists-allege-the-far-right-disrupted-kashmir-event-in-london accessed 5 June, 2021

8. Vaishanvi Prasad, 'The Respectable Indian Queer Unmasked' (*The Citizen is Queer*+ 28th Sept, 2020) https://www.thecitizen.in/index.php/en/NewsDetail/index/7/19424/The-Respectable-Indian-Queer-Unmasked accessed on 5th June, 2021

CONFLICT OF LAWS: EXAMINING THE CONNECTING FACTORS IN FAMILY LAW

Vignesh R

ABSTRACT

The study of Conflict of laws deals with resolving the conflict that arises out of the interaction between various legal systems. This paper examines the various problems arising out of intestate succession to movable property of individuals domiciled abroad and attempts to point out the shortcomings of the current legal framework. The interactions of people and property across different legal systems are connected by a connecting factor, and the prominent connecting factor in common law is domicile.

Through this paper, first, the law applicable to the movable property of Indians domiciled abroad will be determined. Second, the various drawbacks of domicile as a connecting factor will be pointed out and it will be discussed as to how habitual residence, addresses these drawbacks. Finally, a constitutional challenge to the concept of domicile of dependency of married women will be outlined and the discriminatory nature of this concept will be pointed out. Through this, the paper aims to highlight and address the lacunae in the current legal framework.

INTRODUCTION

The study of Conflict of laws deals with resolving the conflict that arises out of the interaction between various legal systems. The researcher through the course of this paper examines the various problems arising out of intestate succession to movable property of individuals domiciled

abroad. In this paper, the researcher makes three broad contentions. The first contention is a descriptive assertion that the law governing the intestate succession of movable property of Hindus, Muslims, Sikhs, Buddhists and Jains who are domiciled abroad are the general principles of Private International law (hereinafter "PIL") and not the Indian Succession Act. This will be justified by first examining the territorial scope of various laws and arguing that owing to the lack of extra-territoriality, common law principles will apply. The researcher then relies upon these common law principles to assert and interpret that 'personal law,' in the context of PIL, refers to the law of the domicile of a person to further substantiate the first claim.

The second contention of the researcher is a normative assertion that the connecting factor that is used in determining the law governing intestate succession of movable property should be habitual residence and not domicile. The researcher justifies this assertion by pointing out the various drawbacks of domicile, and how the use of habitual residence as the connecting factor addresses these drawbacks.

The third contention of the researcher is a constitutional challenge to the concept of domicile of dependency of married women. The researcher justifies this constitutional challenge by, first, arguing that domicile of dependency is devoid of practical considerations, and, then, enumerates the challenge by relying upon the recent shift to a rights-based jurisprudence by the Supreme Court. The researcher applies these landmark decisions to assert that legal autonomy is enshrined under Article 21, and that taking away the legal autonomy of women as a class is violative of both Article 14 and Article 21. Using these arguments, the researcher has tried to point out the inadequacies and inequalities prevailing in the law and, hence, point out the need for a consolidated framework.

The Law Applicable to Indians domiciled abroad

The Indian Succession Act, 1925, (hereinafter "ISA") is one of the few statutes which deals with PIL. S.5 of the ISA says that the movable property of a deceased will be governed by the law of domicile, and the immovable property of a deceased will be governed by the law of the situs of the property. These are general principles of PIL which

have been codified in the statute.[1] However, S.4 of the Act precludes the application of sections 5-11 to Hindus, Muslims, Sikhs, Jainas, and Buddhists. (For the purposes of this paper, "Hindus" hereinafter shall include Hindus, Sikhs, Jainas, Buddhists, other sects of Hinduism). This raises the question of what law applies to the excluded religions. Matters of succession for Hindus are governed by the Hindu Succession Act, 1956 (hereinafter "HSA"). However, unlike the Hindu Marriage Act whose title and extent of application states that it has extra-territorial application, the HSA does not have extra-territorial application. Even the ISA hints at extra-territoriality through its illustrations, wherein Indians domiciled abroad are governed by the provisions of the ISA. Owing to this reason of lack of extra-territoriality, the HSA is not equipped to deal with matters of intestate succession of Hindus domiciled abroad. At this juncture, the researcher believes it prudent to address an argument that favors the application of the ISA to matters of succession where the HSA is silent.

This argument is derived from the provisions of the Transfer of Property Act (hereinafter "TP Act"). The relevant portion of S.2 (d) reads as follows: "Nothing in the second chapter of this act shall be deemed to affect any rule of Mohammedan law." It has been interpreted in various cases that this rule has to be interpreted harmoniously with Muslim law, and in case of a conflict, Muslim law shall prevail, but does not otherwise preclude the applicability of the TP Act to Muslims. This argument is being extended to the Indian Succession Act to try and justify the applicability of the ISA to Muslims and Hindus. To further support this argument, in a judgment by the Uttarakhand High Court,[2] the High Court, despite S.4 precluding the applicability of Part 2 to Hindus, applied S.15 and 16 of ISA, which related to the issue of domicile to a Hindu woman. This is being used to justify that the ISA has been used to fill in the gaps of the HSA. However, the researcher asserts that, despite this, the argument cannot be used in the present context. The rationale behind this assertion is twofold.

1 Paruck, *The Indian Succession Act, 1925* (Justice K Kannan (ed), 11thedn, Lexis Nexis, 2015) 45.

2 Shalini Dadar v State of Uttarakhand, 2009 Indlaw UTT 831.

Firstly, there is a very significant difference in how S.2 of the TP Act is framed and how S.4 of the ISA is framed. S.2 of the TP Act simply says that the TP Act shall not intrude upon any existing rule of Mohammedan law. However, the ISA goes one step further and says, "This part **shall not** apply if the deceased was a Hindu, Mohammedan, Buddhist, Sikh or Jain." The statute very clearly and in unequivocal terms rejects the applicability of this Part to the above-mentioned religions. On applying basic principles of statutory interpretation, it becomes clear that ISA does not apply to Hindus or Muslims.[3]

Apart from the above-mentioned points, it is also clear that the ISA should not apply to Hindus, especially owing to the insertion of S.21 A of the Special Marriage Act. S.21 of the Special Marriage Act (hereinafter "SMA") provides that the property of the couples married under the SMA will be governed by the ISA. The same has been done by using a non-obstante clause which overrides S.4 of the ISA. However, the legislature later inserted S.21A which precludes the applicability of S.21 to Hindus. Hence, part two of the ISA will not apply to Hindus even if they marry under a secular legislation. The overt act of the legislature in trying to prevent the application of the ISA to Hindus makes it clear that the legislative intent is to not apply ISA to Hindus.

Secondly, with reference to the judgement of the High Court, the researcher is of the opinion that the finding of the High Court was based on an incorrect view of the law, and the same shall be elaborated further. Furthermore, with no prejudice to the previous argument, even if it is assumed that the High Court's finding was correct, the High Court justifies its finding by stating that S.15 and S.16 are applicable in this case, because they relate to general principles of domicile and do not involve any principle of succession.[4] The High Court emphasizes that the rationale behind precluding the applicability is to let matters of succession be governed by the personal laws of the parties. The researcher relies upon this very rationale of the High Court to support the previous assertion that the finding of the High Court was based on an incorrect view of law.

3 Max Radin,'Statutory Interpretation' [1930] 43 Har L Rev 863.

4 Shalini Dadar v State of Uttarakhand, 2009 Indlaw UTT 831,832.

In light of the arguments advanced above, the researcher submits that the definition of personal law of parties in the context of determining the governing law of movable property of a person who has died intestate refers to the law of the domicile of the deceased. When there's no clear stance of law taken by the statute, common law principles must be alluded to, to determine the stance of law, and not another different statute which explicitly does not apply to a certain class of people.[5] In this case, the applicable common law principles would be the general principles of PIL that have been traced as judicial precedent.[6]

In *Official Administrator v. Anba Bola Convent*,[7] according to Chief Justice Owen, personal law determines how devolution of property occurs, and further, the domicile of a person determines the personal law applicable to a person. Hence, he concluded that with regard to the movable property of a person dying intestate, the law governing the same shall be the law of the person's domicile. Since applying personal law further traces the question back to the domicile of a person, he says, applying the personal law is futile. Justice Gorman interpreted the word personal law itself to have two different meanings, depending on the context. He said in the context of applying municipal law it generally bears the context of the religious system the person belongs to, but when it comes to PIL, the personal law of the person should be interpreted as the law of the domicile. In *The Estate of Jacques Maqridis*,[8] the deceased's domicile of origin was Cyprus; however, he later acquired a domicile of choice in Egypt. According to the law of his domicile of origin, Greek law, the deceased's child and the widow will get 3/4th and 1/4th of his property, respectively. However, his brothers and sisters approached the court contesting this on the ground that Egyptian law would apply. Justice Ralford relied upon the decision by Justice Gorman and held that the interpretation of personal law in this context could only mean the law of domicile and harmonized it with the concept of PIL.

5 Chief Justice KG Balakrishnan, 'The Role of Foreign Precedent in a Country's Legal System,' [2010] NLSIR 1, 3.

6 Indian Express Newspapers v Union of India, 1985 (1) SCC 641; Kameshwar Prasad v State of Bihar, AIR 1962 SC 1166.

7 Official Administrator v Anba Bola Convent, 1900-1931 1 SLR 521.

8 In re: The Estate of Jacques Maqridis, 1932-1940 2 S.L.R 1.

It is clear from the above that the law governing the intestate succession of Mohammedans and Hindus domiciled abroad are the general principles of PIL. However, the researcher further wishes to address the argument that there is no difference between the ISA and general principles of PIL, and hence it is irrelevant which law governs the succession. Significant emphasis has been placed on the applicability of PIL over the statutory applicability of ISA, also, because the statute is outdated. While it can be contended that the statute has essentially codified principles of PIL, part two of the ISA which is relevant in this discussion, especially, has remained static over almost a century. Common law principles have, however, evolved to accommodate to an extent the changes that have taken place in society. For example, there has been a growing recognition amongst judges in applying principles of habitual residence over domicile.[9]

Common law principles, being a creation of the judges, are more dynamic than the statute, because it takes significant political will to manifest into a legislative change. Common law principles, while evolving, are generally a more accurate reflection of the prevailing standards and, hence, will be able to provide better justice to the parties involved, and hence, the researcher believes that this warrants the differentiation and the effort in determining the applicable law.

However, despite the distinctions between the common law and the ISA, there are a few problems that are common to both the ISA and the general principles of PIL. The researcher makes a normative assertion that the law governing the movable property of parties dying intestate should not be the law of the domicile, but rather the law of habitual residence.

Connecting Factors

Owing to the multiplicity of legal systems a person interacts with, it is especially difficult to determine the law applicable. Hence, connecting factors bind a person to a legal system and apply the law of that legal

9 Robert A. Leflar, 'The New Choice of Law,' [1972] 21 American Univ Law Rev 457.

system to that person, thereby maintaining uniformity.[10] There are a few different types of connecting factors: domicile, nationality, habitual residence, et al. The researcher wishes to restrict the scope of this paper to examining the differences between the connecting factors of domicile and habitual residence and supporting the assertion that the law governing intestate succession to movable property should, in fact, be habitual residence and not domicile.

Domicile as a concept is closely tied to the concept of 'home' as compared to a mere residence. This also leads to domicile being of a much more permanent nature.[11] There are three types of domiciles: domicile of origin, domicile of choice and domicile of dependency. A domicile of origin is closely tied to the concept of home. It is generally the legal system that is the most closely connected with a person. A domicile of choice is the domicile that a person acquires at some point in his/her life when he/she decides to settle down at a place different from the place of origin. A domicile of dependency is the domicile a person acquires by virtue of another person's domicile.[12] Classic examples include the domicile of children being tied to the domicile of the father and wives obtaining the domicile of their husband automatically after marriage.

Habitual Residence over Domicile

There are two primary issues associated with domicile as a connecting factor.

[1] The intent test is fraught with ambiguities

The test that's used to determine the domicile of a person depends upon the intent and actions of the person, and long residence in a place is not enough to establish the necessary intent.[13] The intent test is a two-pronged test where both *animus* and *actum* are necessary to establish domicile. The *animus* or the intent of a person should not just be a present intent to reside in the place, but rather a future intent to make the country the person's home.[14] The problems arise with the fact that

10 David F. Cavers, 'Habitual Residence: A Useful Concept', [1972] 21 American Univ Law Rev 475;
11 Whicker v Hume, [1858] 7 HL Cas 124.
12 In re: Furse, [1980] 3AllER 838
13 Winans v Attorney General, [1904] AC 287 HL
14 Inland Revenue Commission v Bullock, [1976] 1 WLR 1178.

there is no objective test to determine if the person had a future intent. The factors that are taken into consideration like "manner of man he was, main objects of his existence, sort of life he lived"[15] are extremely subjective observations that can lead to different conclusions based on the person observing. Hence, for important matters like succession which depend upon the domicile of a person, using domicile which is determined on such an inaccurate basis is problematic, because it creates a high chance that the operation of the law becomes arbitrary.

[2] Determining domicile in today's globalized world is hard

In today's globalized world it is extremely hard to decide to reside in one place permanently primarily because it is often not possible to predict where a person will be in a few years. This leads to difficulties in determining the domicile of a person, or it leads to the person retaining their domicile of origin.[16] Since it is extremely hard to determine *animus* if a person keeps moving, locating a single domicile of choice is futile. If it leads back to the domicile of origin, it leads to disparities in determining succession to the movable property, because the legal system which is closely connected to the movable property does not get to determine or govern the succession. Owing to these problems, the researcher asserts that habitual residence is the more appropriate connecting factor that ought to be used, as it addresses the above-mentioned problems while bringing in certain advantages of its own.

[A] Habitual residence is a question of fact

Habitual residence is focused on whether the person residing has a close enough connection to the legal system that issues regarding his personal status and relationships be governed by the rules of that system.[17] To determine the closest connection to a legal system, intent is a necessary requirement; however, only the present intent to reside is needed to fulfill the condition.[18] This is in stark contrast to domicile where intent to permanently make the place your home is needed. Since the former is much easier to gauge and determine and considering that the factors

15 N. Rafferty, 'Domicile: The Need for Reform'[1977]7 ManLJ207.

16 Siobhan Phelan, 'Domicile Revisited – Again,' [1995] 5 ISLR 5.

17 Pippa Rogerson, 'Habitual Residence: The New Domicile,' [2000] 49 Intl and Comp. Law Q86.

18 Nessa v Chief Adjudication Officer [1999] 1 WLR 1937.

are much more objective, determining habitual residence is primarily a question of fact and, hence, easier and more accurate.[19]

[B] The concept of habitual residence emerged in immigration focused societies

Habitual residence as a concept rose to prominence primarily because of the Hague conferences on PIL. This is because the EU then was grappling with choosing common law principles or adopting habitual residence as a new connecting factor. The EU eventually chose habitual residence as the connecting factor in both its Rome 1 and Rome 2 Regulations and the Hague Convention.[20] This is primarily because the EU is an integration of many countries, and they needed a framework which was most suited to further this integration with regard to immigration and movement of people. Hence, it can be said that in today's globalized world, it is extremely hard to tie down most people to one single concept of home, but people do reside in places for extended periods without intending to make it their home.[21] For the sake of convenience, it often makes practical sense for this legal system to govern their personal affairs simply because they reside there. Hence, habitual residence must be used as the connecting factor instead of domicile.

Domicile of Dependency

A domicile of dependency occurs when the domicile of one person is contingent upon the domicile of another. As stated earlier, classic examples for domicile of dependency include the domicile of children being tied to the domicile of the father and wives obtaining the domicile of their husband automatically after marriage. However, the researcher intends to restrict the scope of argumentation in this paper to the domicile of dependency of women immediately upon marriage, and references to domicile of dependency will mean only the above mentioned. The researcher asserts that S.15 of the Indian Succession Act, which deals

19 Anjali Iyer, 'Domicile and Habitual Residence,' [1985] 6 SingLaw Rev 115.

20 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/8.

21 EU Commission, *Habitual residence as connecting factor* (Green Paper, COM 65, 2005)P.3.

with this and the common law principle of domicile of dependency,[22] is devoid of practical considerations and hence should be scrapped**[I]**. Furthermore, they fall foul of Article 14 and Article 21 of the Indian Constitution, and hence S.15 ought to be struck down from the ISA and the common law principle should not be recognized by Courts**[II]**.

[I] Domicile of Dependency is devoid of Practical Considerations

Before further examining the reasons behind challenging the constitutionality of the domicile of dependency, it becomes prudent to examine and address the rationale and the arguments in favor of having a single domicile for both the spouses.

[1] Matrimonial duty of the spouse to cohabit with the other

One of the primary reasons why the domicile of the husband is automatically assigned to the wife is because domicile, as stated above, by its very nature refers to the intent to reside permanently in a place.[23] Hence, if the husband is choosing to reside permanently in a place, it falls upon the wife who is duty-bound to stay with him and discharge her matrimonial obligations. However, this argument fails on two counts:

First, there is no connection between cohabitation and domicile. If the wife chooses to cohabit with her husband and acquires an intent to reside in that place permanently, she will acquire the domicile, but it will be on account of her agency and choice. *Second*, it is also possible for the spouses to retain their individual domiciles despite cohabitation. This is especially true for trans-national marriages and, in today's context, where both the partners travel quite often. **Example 1:**'A' domiciled in France comes to India owing to his employment for five years and marries B, who is domiciled in India. **Example 2:** After his contract in India has concluded, both A and B decide to stay in France for some time before moving to a different country. In both examples, even if both the parties retain their original domicile, it would not affect the fact that they have continued to cohabit and fulfilled other matrimonial obligations towards each other.[24]

22 Smith v Smith, [1963] AC 280.
23 Iyer, (n 20) 117.
24 W. R. Duncan, 'The Domicile of Married Women,' [1977] 1 DublinULJ 38.

[2] Mutual rights and obligations of spouses should be determined by a single legal system

Most of the mutual rights and obligations arising out of a marriage, like rights in relation to children, rights of maintenance, etc., are not governed by the domiciles of the individuals, but rather the law of the matrimonial system as a whole.[25] For example, if two Hindus marry under the HMA and change their domicile, the right to maintenance will still be governed by the HMA.[26]

Furthermore, especially in the context of intestate succession to movable property: If 'C', who is domiciled in Germany marries 'D' who is domiciled in India, according to the domicile of dependency, even if D leaves behind movable property in India, they will be governed by German law. This is extremely inconvenient and fails to resolve the very problem the single legal system was chosen to solve. However, this is not to suggest that individual domicile is the solution to all problems; it is merely being asserted that the benefits of the single legal system exist in the individual domicile paradigm while resolving a significant number of practical drawbacks of domicile of dependency. There do exist certain issues like which law will govern the joint-movable property of the spouses. But, this can be easily solved by a few further amendments which can essentially demarcate when the matrimonial law will apply and when the law of the individual domicile ought to apply.

[II] The constitutional challenge to Domicile of Dependency

Domicile of dependency is violative of Art. 14 and Art. 21

In light of the shift to a rights-based jurisprudence by the Supreme Court, it becomes clear that discriminatory practices are being questioned and tested against the touchstone of the Constitution. The researcher contends that S.15 undermines the legal autonomy of women by not giving them an option to be able to retain their individual domicile which the provision, however, accords to men. This is violative of Art. 14 because the provision discriminates unreasonably on grounds of sex and is also violative of Art. 21 because an individual's autonomy

25 Brian Bix, 'Choice of law and Marriage: A Proposal' [2002] FLQ 255, 261.
26 Y. Narasimha Rao v. Y. Venkata Lakshmi, 1991 (3) SCC 451.

is protected and cannot be taken away because of a social institution. Reliance is placed upon CJ. Dipak Misra and J. Chandrachud's judgements in *Joseph Shine* v. *UOI.*[27] to support the above contentions. The above-mentioned judgement dealt with the constitutional challenge to S.497 of the IPC which criminalized adultery and treated women as chattel. The overall tone of the judgement itself was such that it recognized women's right to individual autonomy and elevated it to the status of a constitutional right. In particular, Chief Justice Dipak Misra refers to JS Mill's writing about the inherently unjust nature of legal subordination of women to men and calls such a thing abominable as it violates a woman's core individuality. He further emphasizes the fact that individual dignity is inviolable in a civilized society. Hence, it is clear that the autonomy of an individual is paramount. Since S.15 fails to consider this, and accords that autonomy only to men in being able to choose their domicile after marriage, S.15 falls foul of Art. 14.

To substantiate the contention under Art. 21, it becomes imperative to refer to J. Chandrachud's judgement.[28] J. Chandrachud's judgement is focused on the supremacy of an individual's autonomy over the autonomy of a social institution, and he further reads in sexual autonomy into this general individual autonomy. He explicitly holds that the autonomy of a social institution is always subordinate to an individual's right to autonomy.[29] He also emphasizes the role of the constitution to democratize relationships and, further, break down hierarchies and ensure individual dignity. Furthermore, in the "Privacy judgement,"[30] the SC also upheld the right of an individual in regulating their personal lives. In light of this, it becomes clear that the individual's general right to autonomy to regulate their personal lives has been given priority over social institutions. Hence, the researcher contends that women's autonomy in choosing to retain their original domicile or take up their husband's domicile is protected by Article 21.

27 Joseph Shine v Union of India, 2018 SCCOnline SC 1676, 1678.

28 Joseph Shine v Union of India, 2018 SCCOnline SC 1676, 1725.

29 Patriarchy and Paternalism underpinnings of Section 497 IPC (Livelaw, 27 September 2018) <https://www.livelaw.in/patriarchy-paternalism-underpinnings-of-section-497-ipc-justice-chandrachud-in-adultery-judgment-read-judgment/>

30 K.S. Puttaswamy v Union of India, 2017 SCCOnline SC 996, 1045.

As has already been pointed out, the domicile of dependency emerged as a concept primarily to preserve the institution of marriage and to instill a sense of duty as a 'good wife.' It is also clear that under the concept of domicile of dependency, women don't get to choose to retain or let go of their original domicile. Hence, it is submitted that S.15, using the institution of marriage as a social institution, seeks to establish its dominance over the autonomy of a woman in choosing her domicile. Owing to this, S.15 falls foul of Art. 21 and hence should be struck down. This constitutional challenge can be further supported by J. Nariman's judgement in *Navtej Singh Johar* v. *UOI*,[31] wherein he held that the presumption of constitutionality cannot apply to colonial laws and pre-constitutional statutes. Since the ISA is a colonial legislation, the presumption of constitutionality does not apply, which further supplements the above-mentioned arguments. However, this contention will not be explored in greater detail owing to the scope of the paper being restricted to issues of Family law.

Since both practical and principled considerations are not met by the principle of domicile of dependency, S.15 of the ISA should be struck down and the common law principle should not be recognized. However, even if the domicile of dependency is struck down, the researcher asserts that domicile as a connecting factor is plagued by multiple problems that cannot be resolved unless it is replaced with the usage of habitual residence as a connecting factor.

Conclusion

There has been a significant lack of literature and jurisprudence regarding intestate succession of movable property of individuals domiciled abroad, and the framework of law as it exists currently reflects these woeful shortcomings. Therefore, through the course of this paper, the researcher has attempted to examine the lack of consolidation and gaps in determining the applicable law, the various drawbacks of continuing to use domicile as a connecting factor, and by a critical analysis of how domicile of dependency is devoid of practical considerations and violates the fundamental rights of an individual.

31 Navtej Singh Johar v Union of India, 2018 SCCOnline SC 1350.

Having examined the lacunae in the law, it also becomes imperative to understand the way forward. In today's globalized world, Habitual residence as a connecting factor solves most of the problems emerging from the use of domicile as a connecting factor primarily owing to its prominence and emergence in immigration focused societies such as the European Union. However, this step needs to come from the legislature by way of amendment to the existing succession laws, and given the government's enthusiasm in repealing obsolete laws and putting up new laws, it is the hope that there is sufficient political will and direction to make this change.

Bibliography

Books

- Paruck, *The Indian Succession Act, 1925* (Justice K Kannan (ed), 11thedn, Lexis Nexis, 2015)

Articles

- Max Radin, 'Statutory Interpretation' [1930] 43 Har L Rev 863.
- Robert A. Leflar, 'The New Choice of Law,' [1972] 21 American Univ Law Rev 457.
- David F. Cavers, 'Habitual Residence: A Useful Concept,' [1972] 21 American Univ Law Rev 475;
- N. Rafferty, 'Domicile: The Need for Reform' [1977] 7 Man LJ207.
- Siobhan Phelan, 'Domicile Revisited – Again,' [1995] 5 ISLR 5.
- Pippa Rogerson, 'Habitual Residence: The New Domicile,' [2000] 49 Intl and Comp. Law Q 86.
- Anjali Iyer, 'Domicile and Habitual Residence,' [1985] 6 Sing Law Rev 115.
- W. R. Duncan, 'The Domicile of Married Women,' [1977] 1 Dublin ULJ 38.
- Brian Bix, 'Choice of law and Marriage: A Proposal,' [2002] FLQ 255, 261.

- Patriarchy and Paternalism underpinnings of Section 497 IPC (Livelaw, 27 September 2018)<https://www.livelaw.in/patriarchy-paternalism-underpinnings-of-section-497-ipc-justice-chandrachud-in-adultery-judgment-read-judgment/ >

Reports

- EU Commission, *Habitual residence as connecting factor* (Green Paper, COM 65, 2005) P.3

National Law School of India University
Nagarbhavi, Bangalore - 560 242