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Inclusivity in Law: Multidisciplinary Perspectives

Inclusivity in Law: Multidisciplinary Perspectives

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FOREWORD

A just and fair world includes everyone, accommodates people on the fringes, and ensures equal protection to all. An inclusive society is a just society.

Inclusivity in law is an area of both desire and debate. While some progress has been made, much needs to be done in order to create a just legal system. Inclusivity in law requires greater participation from across disciplines; we need environmentalists, linguists, educators, medical experts, economists, political theorists, social activists, and artists to share their knowledge and expertise for a legal system that is truly inclusive.

The law plays an important role in promoting diversity, equality and inclusion, but can also be seen as a source of inequality and division. What does it mean to look at diversity and inclusion from a legal perspective? How can teaching and the study of law contribute to a more inclusive society?

All laws can be made inclusive by providing an umbrella of protection to all, particularly the most marginalized. We need to devote time for reflections aimed at bringing forth multidisciplinary perspectives to make laws more applicable, creative, innovative, and thus - just, fair and reasonable.

It is the duty of institutions to foster inclusion and address exclusionary practices. In this regard, the conference sought to offer a road map to ensure inclusivity in law by facilitating a common platform for members of the legal fraternity and all its allied fields. This book has been the outcome of this endeavor.

I would like to take this opportunity to laud the unstinting efforts of the institution, the organizing faculty, and the student-editorial body, and extend my heartiest wishes for all future endeavors of the institution.

Shri. Shalin S. Divatia

Mentor, SVKM's Pravin Gandhi College of Law, Mumbai

INTRODUCTION

At SVKM's Pravin Gandhi College of Law, we always strive to create an inclusive spirit in the minds of the students, thereby creating students that achieve academic excellence and become responsible citizens. The annual national conference organized by the college is designed to achieve that objective. The theme of this year's conference is – Inclusivity in Law: Multidisciplinary Perspectives.

Inclusivity as a concept includes acceptance and respect for each individual and celebrating individual differences. A truly democratic society assumes inclusion. Inclusivity, within the ambit of law, would ensure not only equal opportunities for all citizens in a democracy, but would also incorporate, traditional approaches and contemporary developments. Legislators must embrace, question, analyse, evaluate, revisit and refine various areas of research ranging from classical knowledge of justice to positivists philosophy of law making, to a range of modern area of inquiries. A just, fair, and progressive legal framework would thus include, from time to time, areas of human knowledge that have hitherto been unearthed.

Any discourse on inclusivity in law, must engage with interdisciplinary ideas, founding philosophies, theories, and pragmatic knowledge foreground path-breaking discussions and deliberations. The Conference aims to engage with political theories, medical research and practice, social theories, emerging areas of technology, literary theories, changing social structures and world order, evolution of new rights and obligations customary practices, and international conventions. The discussions made during the course of the conference have provided an interwoven and intricate thematic edifice for ensuring inclusivity in law. Such an edifice has lent the conference its valuable proceedings. The papers published in the book present to a conscientious and curious citizen a deep understanding of true democracy, through a well-thought-out exposition on the notion of inclusivity.

Dr. Navasikha Duara

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Inclusivity for Persons with Disabilities and Inclusivity in Education

DISABILITY AND INCLUSION: EVOLUTION AND ASSESSMENT OF DISABILITY LAWS IN INDIA

- Hoonar Hooda¹

ABSTRACT

Disability is considered to be a major factor in the analysis of various aspects of inclusiveness and has been studied as a significant element in understanding the cases of oppression and disempowerment emanating from lack of inclusiveness for disabled population. Disability has played a compounding role in exclusion of people belonging to the sections of population marginalized due to poverty, gender, caste or community. This paper studies the evolution of disability laws in India and also makes a critical assessment of these laws to bring out the issues which have been addressed in these laws and those which still need attention. The paper discusses at large, the two major disability laws in India - Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and Rights of Persons with Disability (RPWD) Act, 2016 highlighting the factors behind the enactment of laws for the disabled and presenting a comparative discussion regarding the main provisions that these laws lay down.

There have also been discrepancies in the disability measurement in India which in itself is an aspect which needs attention as any law targeting inclusiveness of a section of population must be based on the proportion of that section in the overall population to ensure that these laws get a fair implementation.

The disability rights movement in India started during 1970s but it was manifested in staggered voices rather than a structured or well-founded movement, and it was only in the 1980s that the movement gained momentum. The first law enacted in India for ensuring that the rights of persons who suffer from disabilities are protected, was the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PWD Act 1995). PWD Act of 1995 was a landmark in the journey undertaken by evolving disability laws in India as previous to this Act, there had been no statute directly addressing disability as a basis for discrimination occurring in India.

The United Nations adopted the Convention on the Rights of Persons with Disabilities in 2006 which India also signed and ratified in 2007. Indian Government, taking cognizance of being the UNCRPD signatory, enacted the RPWD Act 2016 taking the broader view of disability rights. There has been an evident lack of comprehensive studies undertaken for investigating into the various social aspects of the RPWD Act, issues in its effective implementation and various aspects of disability rights that need attention in the interpretation and enforcement of this Act. This paper attempts to fill this gap existing in the prior literature. The paper besides exploring the implementation issues, also argues that providing an environment of inclusiveness cannot be achieved only by enforcement of laws, it alongside requires a social movement for developing the knowledge, understanding and positive attitude among all

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participants in the socio-economic framework to come together and aid in the effective implementation of the law.

Keywords: RPWD Act, Disability Law, India

Introduction

The Preamble to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), 2006 defines disability in the following words: “Disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.”² According to World Health Organization (WHO), Disability is “an umbrella term, covering impairments, activity limitations, and participation restrictions. Impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations.”³

WHO estimates state that approximately 15 percent of the world population which translates to more than a billion in India suffer from some or the other type of disability. As per data from the Census conducted in 2011 in India, there were 26.8 million persons who had some disability, but these numbers are always contested as the number depends on the definition which is given to disability.

Till the passing of Rights of Persons with Disability Act 2016, the definition of disability in India was very narrow and hence the 2011 census figures are not considered to be representative of actual disability numbers in India. Disability is viewed as being a major factor in the analysis of various aspects of inclusiveness and has been studied as a significant element in developing an insight regarding the cases of oppression and disempowerment emanating from lack of inclusiveness for disabled population.⁴

Disability has been responsible for a compounding role in exclusion of people coming from sections of population marginalized due to poverty, gender, caste or community.⁵ Discrepancies have been noticed in the disability measurement methods used in India⁶ which in itself is an aspect which needs attention as any law targeting inclusiveness of a section of population must take cognizance of the proportion of that section as part of overall population for devising ways of ensuring that the laws are implemented in a fair manner.

This paper studies the evolution of disability laws in India and also makes a critical assessment of these laws to bring out the issues which have been addressed in these laws and those which still need attention.

Disability Rights Movement in India

The disability rights movement in India started during 1970s but it was manifested in staggered voices rather than a structured or well-founded movement, and it was only in the 1980s that the movement

² United Nations, Preamble pt. (e), *Convention on the Rights of Persons with Disabilities and Optional Protocol*, 1, 1-2 (2006).

³ World Health Organization, available at: <http://www.who.int/topics/disabilities/en/>

⁴ Catherine J. Kudlick, *Disability History: Why We Need Another “Other”*, 108 (3) AM. HIST. REV. 763, p. 781-783 (2003).

⁵ Jane Buckingham, *Writing Histories of Disability in India: Strategies of inclusion*, 26(4) DISAB. SOC., p. 419-420 (2011).

⁶ Roger Jeffery and Nidhi Singal, *Measuring Disability in India*, EPW, p. 22-24 (2008).

gained momentum.^{7, 8} India has been a conservative society when it comes to the issue of addressing disability and the persons affected with disability were not welcomed in the mainstream even during 1970-80. This led to their marginalization and various types of injustice were prevalent towards such persons. Though in the contemporary phase, things were changing more rapidly in the western part of the globe as the movement for disability rights had gained momentum by that time in these countries. However, the movement there too was of a struggle for equality and inclusivity.

India saw this awareness coming very slowly and few individual voices for the disability rights had started taking the stage. Indian society viewed people having some disability as subjects for charity and not one to be accorded equality and the demand for rights was not organized into any structured movement because of which it lacked the force to persuade political leadership towards a concrete action on law and policy for the rights of persons with disability. There was no leader of the movement of disability rights unlike the women rights and caste rights movements. The persons with disability had to find support in family or few charitable Non-Governmental Organisations (NGOs) with no resort to judicial system for their rights.

The movement gained strength with the emergence of the well-known activist, Baba Amte, who worked relentlessly for the wellbeing and rehabilitation of persons suffering from leprosy. He became a prominent figure and gained media attention which helped in generating sensitiveness among people towards the cause of people with disabilities. This led many people to realize the importance of a movement for the rights of the disabled and thus the movement started gaining volunteers who could strengthen the movement.

A watershed moment arrived with the United Nations announcing 1982-1993 as The Decade of Disabled Persons. With this, the focus of the complete discussion around disability shifted from a charity perspective to a development perspective. Governments and civil societies across the globe started becoming sensitized towards the need for genuine empowerment of persons with disabilities and along with this, also came the recognition of medical assistance for the persons with disability to reduce their suffering and make their lives converge with normal life through medical treatments and equipment along with technical help.

The impact of UN announcement was felt in India too and the Government of India established The Rehabilitation Council of India (RCI) in 1986. RCI was entrusted with the responsibility of regulating the education and training aimed at the rehabilitation of the persons with disabilities. In the succeeding year, 1987, the first law related to mental disability was passed in India.

Narrow Vision of Initial Disability Laws

The increased momentum of the Disability Rights Movement in India and the United Nations announcement of The Decade of Disabled Persons (1982-1993) led to the first law being enacted in India which had a focus on mental health. This was obviously not a law for rights of the disabled, but at the least gave a direction to the thinking towards recognizing a form of disability arising from mental health issues. The Rehabilitation Council of India established in 1986 was also made a statutory body in 1992.

⁷ Martand Jha, *The History of India's Disability Rights Movement*, THE DIPLOMAT, December 21, 2016, available at: <https://thediplomat.com/2016/12/the-history-of-indias-disability-rights-movement/>.

⁸ Nilika Mehrotra, *Disability Rights Movements in India: Politics and Practice*, EPW, 65, p. 65-67 (2011).

But both these legislations exhibited a narrow vision of the rights of disabled and of the issue of disability itself.

The Mental Health Act, 1987

This Act aimed at consolidating and amending the provisions concerning the treatment and care of persons who were suffering from mental illness and to provide for their guardianship and institutionalization. It was not a law which enforced any rights or legal capacity of the persons with mental disability and therefore cannot be termed as an anti-discrimination law protecting the interests of the mentally disabled. The Mental Health Care Act, 2017 which has a broader scope in terms of rights of the mentally disabled during care delivery superseded the Mental Health Act 1987.

The Rehabilitation Council of India Act, 1992

The Rehabilitation Council of India (RCI) was set up as a registered society in 1986. The RCI Act was enacted in September 1992 to convert RCI into a statutory body for regulating and standardizing the training of professionals to be involved in rehabilitation of persons with disabilities and to provide for the maintenance of a Central Rehabilitation Register. The RCI Act has provisions for punitive measures to be taken if any unqualified person delivers services to persons with disability. The Rehabilitation Council of India issues guidelines regarding the various policy parameters concerning the education and training in the area of rehabilitation of disabled persons and all institutions involved in such training or education have to seek recognition from RCI. This provision is made to ensure that all the norms related to education and training for rehabilitation of persons with disabilities are complied with. The RCI Act was amended in 2000 to include a broader base of provisions. But again, this act is focussed only on the welfare aspect through rehabilitation and ignores any legal rights for the persons with disabilities.

Persons with Disabilities Act, 1995 – Backdrop, Provisions & Issues

As the movement of disability rights kept gaining momentum across the world and in India, a growing demand for a full-fledged, comprehensive and powerful legislation for protection of the socio-economic rights of persons with disabilities started gaining ground. As disability was a subject under State List, the centre did not have the power to legislate disability law despite acknowledging its importance. However, when India signed the Proclamation of Equality and Full Participation of People with Disabilities in the Asian and Pacific Region, the central government got the power to enact a law for effecting this proclamation under Article 253 of the Constitution.

The first law enacted to protect the rights of persons with disabilities in India was the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (PWD Act 1995). The PWD Act was a landmark in the evolution of disability laws in India as previous to this Act, there had been no statute directly addressing the issue of discrimination based on disability in India. Even the Articles 14, 15 and 16 of the Constitution of India which protect equality of all citizens did not mention disability to be considered as a ground of ensuring non-discrimination.⁹

The PWD Act was enforced in February 1996. This act was a significant milestone in the path towards protection of the rights of disabled and giving them access to equal opportunities thereby ensuring that

⁹ Jayna Kothari, *The Future of Disability Law In India: A Critical Analysis of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995*, p. 4-5 (Oxford University Press 2012).

they may participate fully in the journey of nation building using their capabilities. The PWD Act was the first statute in India which addressed the socio-economic rights of the disabled. The provisions of this act comprised of preventive as well as facilitating and promotional aspects of education, employment and empowerment of persons with disability.

However, the PWD Act, 1995, considered only seven forms of "Disability" namely, Blindness; Low vision; Leprosy-cured; Hearing impairment; Locomotor disability; Mental Retardation; and Mental illness. This constrained the purview of this act and many issues in adjudication started arising due to the nature of disability and its medical diagnosis as required by the PWD Act. This narrow definition of disability left out many who were not able to carry out their life activities due to other illnesses such as schizophrenia or AIDS.

The PWD Act placed great onus on the public sector to ensure education and employment for the persons with disability by provisions of reservation but the private sector was left out from the ambit of this law. With private sector growing in all fields of economic and social activities after liberalization of the economy, this was considered as a serious flaw in this Act to not encompass the private sector for providing equal support in education, employment and care of the persons with disability.

Apart from this, another issue of gravity was that the provisions of this law were not fully understood by many and level of awareness among the disabled persons was also found to be low by researchers.^{10,11}

There were different litigation cases and divergent judgements which called for a revisit to the definition of disability under the PWD Act 1995 and the provisions of the Act.^{12, 13} These issues made this law ineffective in bringing about the desired inclusion of the persons with disability into the mainstream.

The National Trust for The Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 – Effort To Fill The Gap

The criticisms of PWD Act 1995 related to ineffective implementation and lack of requisite knowledge among stakeholders became evident soon. To have a centralized body take care of the welfare of persons with severe mental disabilities and other multiple disabilities, the Indian Government legislated the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. The trust functions with the objective of providing complete care to persons with mental retardation and cerebral palsy. The trust also manages and protects the bequeathed property of such persons.

RIGHTS OF PERSONS WITH DISABILITIES (RPWD) ACT 2016 AND THE ROAD AHEAD

The United Nations adopted the Convention on the Rights of Persons with Disabilities (UNCRPD) in 2006 which India also signed and ratified in 2007. With this the thought of incorporating the UNCRPD

¹⁰ Hem Raj Pal, *et. al.*, Issues Related to Disability in India: A Focus Group Study, 13(5) NAT. MED. J. IND., p. 237-241 (2000).

¹¹ Sindhu Vijayakumar and U. Singh, *PWD Act: Awareness Among Beneficiaries and Members of Rehabilitation Team*, 15 IJPMR, p. 12-16 (2004).

¹² Renu Addlakha and Saptarshi Mandal, *Disability Law in India: Paradigm Shift or Evolving Discourse?*, EPW, p. 62-68 (2009).

¹³ Saptarshi Mandal, *Adjudicating Disability: Some Emerging Questions*, EPW, p. 22-25 (2010).

view of disability and rights of disabled persons into the Indian disability law became prominent.¹⁴ Indian Government, taking cognizance of being the UNCRPD signatory, enacted the RPWD Act 2016 in accordance with the broader view of disability rights.¹⁵ This Act replaced the PWD Act, 1995. The RPWD Act 2016 encompasses a broad definition of Disability considering it to be a concept which evolves with time and is dynamic. The RPWD Act covers twenty-one types of disabilities as opposed to just seven covered under the PWD Act 1995. Considering disability to be evolving concept, this Act gives the power of adding more types of disabilities as and when considered necessary. The RPWD Act covers Blindness, Low-vision, Leprosy Cured persons, Hearing Impairment, Locomotor Disability, Dwarfism, Intellectual Disability, Mental Illness, Autism, Cerebral Palsy, Muscular Dystrophy, Chronic Neurological conditions, Specific Learning Disabilities, Multiple Sclerosis, Speech and Language disability, Thalassemia, Haemophilia, Sickle Cell disease, Multiple Disabilities, Acid Attack victims, and Parkinson's disease which makes the scope of this law far broader than the PWD Act and thus aligning with the UNCRPD and demands of the disability rights movement in India. Another aim of the RPWD Act is to put in place adequate institutional infrastructure to cater effectively to the requirements of the persons with disabilities. It also mandates Special Courts to be set up in every district to deal with the cases of violation of rights of persons with disabilities. Apart from the provision of setting up of a national level fund for the persons with disabilities, this Act also entrusts the State Governments with the responsibility of constituting district-level committees and setting up a welfare fund for the persons with disabilities.

Overall, the RPWD Act 2016 is a commendable step in the direction of bringing about inclusivity for the persons with disability. With its broad scope of definition of “disability” and extending of the provisions to the private sector along with the public sector for providing adequate support, facilities and above all equal opportunities to the persons with disabilities, this Act is a landmark legislation in the history of disability laws in India.

However, there are many implementation issues that need attention. The medical diagnosis required for the various types of disabilities makes the procedures complicated for the persons with disabilities and many a times, this serves as a deterrent for seeking support from the system. There are not enough trained medical practitioners and support staff to cater to the divergent needs of persons with disabilities. Apart from the medical aspects, there are social and psychological aspects that need to be taken into consideration for effective implementation of this Act. Various studies which have focused on the human rights aspect of the disability issues in India have discovered that in most parts of Indian society, the persons with disabilities are treated as subjects who are recipients of charity and their rights are not effectively enforced by law for ensuring their inclusion into the mainstream.^{16, 17, 18} This points out to the impending need of sensitization drives and awareness programs to be conducted by the Government with

¹⁴ Janet E. Lord & Michael Ashley Stein, *The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities*, 83 (4) WASH. L. REV., 449, p. 477-479 (2008).

¹⁵ Jayna Kothari, *The UN convention on rights of persons with disabilities: an engine for law reform in India*, EPW, p. 65-66 (2010).

¹⁶ Lidwin Felix Dias, *Disability and Human Rights—An Indian Context*, 35(2) SOC. DEV. ISS., 35, 45-49 (2013).

¹⁷ Tushti Chopra, *Expanding the horizons of disability law in India: a study from a human rights perspective*, 41(4) J. L. MED. & ETH., 807, p. 812-815 (2013).

¹⁸ Shabana Anees, *Disability in India: The Role of Gender, Family, and Religion*, 45(2) J. APP. REHAB. COUNS., 32, p. 32-38 (2014).

support from private sector philanthropists to bring about a change in social attitude of the people towards the persons with disabilities.

CONCLUSION

The disability rights movement in India has seen a long journey and the struggle to bring about inclusion of persons with disability has been tireless. This movement coupled with the efforts of the international organizations have brought about a substantial evolution in the laws related to disability in India with the Rights of Persons with Disabilities Act 2016 being a landmark legislation. What needs to follow is a well-planned strategy for implementation of this Act based on not only the legal statutes or medical technicalities but on the socio-economic fabric of the country with the Government, Private Sector and Volunteers from among the people joining hands for effectively ensuring the inclusivity for the persons with disabilities.

INDIA'S TRYST WITH INCLUSIVE EDUCATION: PRE-EXISTING LAWS AND THE NATIONAL EDUCATION

- Milind Rajratnam¹ and Anusha Maurya²

“Being disabled should not mean being disqualified from having access to every aspect of life.” - Emma Thompson³

ABSTRACT

Inclusive education is an attempt to ensure that diverse learners, i.e., normal children as well as those with disabilities, get education together under the same roof, regardless of their strengths and limitations. It is essential for the upliftment of children with disabilities as they are often excluded from the educational system and hardly advance beyond elementary education.⁴ According to the 76th round of the National Sample Survey, only 48.8% of disabled people are literate, and only 62.9% of them between the age of 3 to 35 years have ever attended a regular school.⁵

In this regard, right to education is a critical component of ensuring equal rights and social inclusion for children with disabilities. Before 2002, the objective of universalizing primary education was recognized only as a Directive Principle of State Policy under the Indian Constitution (hereinafter “Constitution”). However, in 2002, it was recognized as a fundamental right under Article 21A of the Constitution consequently, the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter “RTE Act”) was enacted, which reinforced this right and provided the manner in which it is to be implemented. The RTE Act stipulates that every child has the right to free and compulsory elementary education, while explicitly defining and including children with disabilities.

Moreover, in 2016, the Rights of Persons with Disabilities Act (hereinafter “RPWD Act”) was passed, which gave statutory boost to inclusive education and also comprehensively defined it. It imposed an obligation on the government to undertake measures to ensure inclusive education.⁶ However, despite the evolution of new legal standards, numerous discrepancies exist between the RPWD Act and the RTE Act, resulting in a non-uniform and contradictory framework for inclusive education. Recently, the government has rolled out the National Education Policy, 2020 (hereinafter “NEP”), which attempts to

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³ Emma Thompson, 2007, My Quotes: Quote Fancy, available at: <https://quotefancy.com/quote/1443565/Emma-Thompson-Being-disabled-should-not-mean-being-disqualified-from-having-access-to>.

⁴ Gupta Veera, 2020, *Educational Planning: Dropout of CWSN and SLD children in India*, IAFOR Journal of the Social Sciences, available at: iafor.org/archives/journals/iafor-journal-of-social-sciences/10.22492.ijss.2.2.05.pdf.

⁵ Goyal Divya, 2020, *Assessing the level of inclusive education at the school level in India*, Observer Research Foundation, available at: <https://www.orfonline.org/expert-speak/assessing-the-level-of-inclusive-education-at-the-school-level-in-india/>.

⁶ The Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016), s. 2(m).

address this ambiguity by acknowledging various models of schooling.⁷ However, some provisions of the NEP are highly controversial and contradicts the spirit of inclusive education envisioned by the RPWD Act.

Against this backdrop, this paper firstly highlights the importance and need for inclusive education in India, then it analyses the contemporary developments vis-à-vis inclusive education in the Indian education framework. Following that, it highlights the concerns with the existing Indian education framework and how it is inefficient at securing the interests of CWDs. Thereafter, it critically analyses the provisions in the existing legislations and the NEP that talk about inclusive education and recommends certain reforms to the same. It concludes by recommending a balanced approach that will help in the better integration of CWD into the mainstream education system as well as certain measures for the better implementation of existing inclusive education policy in India.

Keywords – Inclusive education, Children with Disabilities, National Education Policy 2020.

INCLUSIVE EDUCATION AND ITS SIGNIFICANCE

Inclusive education is a strategy for enhancing the involvement of students belonging to diverse categories, including those with disabilities. In nearly every nation, inclusive education has emerged as one of the highly debated topics in the realm of education. The concept of inclusive education was originally endorsed in 1994 at the “World Conference on Special Needs Education: Access and Quality” (Salamanca, Spain)⁸ and was reaffirmed in 2000 at the World Education Forum (Dakar, Senegal).⁹ The Salamanca declaration urged countries to embrace the concept of inclusive education as a matter of policy and give greatest priority to making inclusive education systems. The concept was further reinforced by the UN’s Standard Rules on Equalization of Opportunities for Persons with Disability Proclaiming Participation and Equality for All.¹⁰

Inclusive education is not a uniquely Indian concept. It was appropriated from renowned international discourses, and it gained recognition in India after the 1990s.¹¹ Initially, inclusive education was confined to ‘special education’ or inclusion of Children with Difficulties (hereinafter referred to as “CWD”), but this has expanded in recent years. However, India continues to lack a widely accepted ‘functional definition’ and shared understanding of the concept of ‘Inclusive Education’.¹² This is mainly because the government and other stakeholders have not made a concerted effort to the meaning, significance and

⁷ Minz Sonajharia, et. al., *A Critical Analysis of the National Education Policy 2020*, 2020, Theological Research and Communication Institute, available at: <https://traci.in/2020/09/a-critical-analysis-of-the-national-education-policy-2020/>.

⁸ Centre for Studies on Inclusive Education, *The UNESCO Salamanca Statement*, 2020, available at: <http://www.csie.org.uk/inclusion/unesco-salamanca.shtml>.

⁹ World Education Forum In Dakar, *UN Meetings Coverage and Press Releases*, 2000, available at: <https://www.un.org/press/en/2000/20000411.soc4543.doc.html>.

¹⁰ Department of Economic and Social Affairs Disability, *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, 1994, United Nations, available at: <https://www.un.org/development/desa/disabilities/standard-rules-on-the-equalization-of-opportunities-for-persons-with-disabilities.html>.

¹¹ Nidhi Singal, *Inclusive Education in India: International concept, national interpretation: International Journal of Disability Development and Education*, 2006, available at: https://www.researchgate.net/publication/263155914_Inclusive_Education_in_India_International_concept_national_interpretation.

¹² Nidhi Singal, *An Ecosystemic Approach for Understanding Inclusive Education: An Indian Case Study*, 2006, European Journal of Psychology of Education, available at: https://www.jstor.org/stable/23421605?seq=1#metadata_info_tab_contents.

application of inclusive education in India. This is also why expressions of inclusive education are often grouped along with broader concepts such as equity, access, etc.¹³ According to some widely recognized definitions, inclusive education entails adopting a “a holistic approach to education reform and thus altering the education system’s attitude towards exclusion”.¹⁴

In India, inclusive education for CWDs has been plagued by dearth of data, policy inconsistencies, and an absence of adequate evaluation of performance and quality, all of which have resulted in non-targeted interventions and significant implementation gaps. Although the RTE Act¹⁵, RPWD Act¹⁶, Sarva Shiksha Abhiyan¹⁷ and the recent NEP 2020¹⁸ recognize the right to inclusive education for CWDs, there are certain ambiguities vis-à-vis a uniform framework for inclusive education in India. Additionally, the policy and legislative commitment to inclusive education is not in consonance with international obligations like the UN Convention on the Rights of Persons with Disabilities, which was ratified by India in 2007.¹⁹

Therefore, against this backdrop, this paper delves into the contemporary issues surrounding inclusive education in India. It critically evaluates the laws and policies relating to the same and dissects the concerns associated with them that make them inefficient at securing the interests of CWDs. It also discusses the provisions of the NEP 2020 on inclusive education and recommends certain reforms to the same. It concludes by recommending a progressive yet balanced approach for the better integration of CWD into the mainstream education system, so that their rights may also be secured.

LAWS AND POLICIES ON INCLUSIVE EDUCATION IN INDIA

In 1987, the National Council of Educational Research and Training (NCERT) collaborated with United Nations Children's Fund (UNICEF) to launch Project Integrated Education for Disabled Children (PIED) in India, with the goal of integrating CWDs into mainstream schools.²⁰ The concept of inclusive education has evolved over the last few decades to include not just CWDs, but also all categories of students who may be disadvantaged. This broader view has paved the way for the development of the National Curriculum Framework (NCF-2005), which emphasizes the importance of integrating and retaining all children in school through a programme that reaffirms each child’s value and empowers them with dignity and the confidence to learn.²¹

In the 1980s, the then Government of India’s Ministry of Welfare recognized the critical need for an organization to regulate and oversee human resource development programmes in the area of disability rehabilitation. As a result, the National Education Policy, 1986 (hereinafter “NEP 1986”) and the

¹³ Pooja Pandey, *The New Education Policy and Inclusive Education Framework in India*, 2020, available at: <http://rsrr.in/2020/09/29/new-education-policy-inclusive-education-india/>.

¹⁴ Anne M. Hayes and Jennae Bulat, *Disabilities Inclusive Education Systems and Policies Guide for Low- and Middle-Income Countries: Research Triangle Park*, 2017, available at: <https://www.ncbi.nlm.nih.gov/books/NBK554622/>.

¹⁵ Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

¹⁶ The Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016).

¹⁷ Ministry of Human Resources and Development, Sarva Shiksha Abhiyan 2001, available at: <http://ssa.nic.in>.

¹⁸ National Education Policy, 2020.

¹⁹ Convention on the Rights of Persons with Disabilities and Optional Protocol, 2006.

²⁰ K Sanjeev, *Inclusive Education in India*, 2007, available at:

<https://corescholar.libraries.wright.edu/cgi/viewcontent.cgi?article=1086&context=ejie>.

²¹ National Curriculum Framework 2005, available at: <https://ncert.nic.in/pdf/nc-framework/nf2005-english.pdf>.

Programme of Action (1992) was formulated, which signalled the need for integrating CWDs with other groups of children.²²

In addition, the Preamble to the Constitution of India unequivocally proclaims that everyone has the right to equality of status and of opportunity.²³ Further, Article 41 of the Constitution guarantees the right to education, work and public aid in certain circumstances, including disability²⁴, while Article 45 commits to providing free and compulsory education to all children up to the age of 14 years.²⁵ On the basis of this, the Parliament has also passed the 86th amendment to the Constitution, which inserted Article 21A recognizing universal primary education as a fundamental right of all children aged 6-14 years.²⁶ Besides, its preamble clarifies that the term “all” under the Act covers CWDs as well.

In furtherance of this constitutional mandate, the government enacted the RTE Act, which reinforced this right and established the way in which it would be implemented.²⁷ The RTE Act establishes that all children have the right to a free and compulsory primary education, explicitly including children ‘disadvantaged groups’ within its ambit.²⁸ Here, the broad definition of ‘children belonging to disadvantaged groups’ includes CWDs.²⁹ Besides, the RTE Act also recognises a separate category under CWDs, i.e., ‘children with severe disability’.³⁰

Moreover, considering the growing debate on the rights of disabled persons, the parliament enacted the RPWD Act in the year 2016.³¹ It was a welcome step towards ensuring the rights of CWDs. It replaced the Persons with Disabilities (PWD) Act, 1995, and is more progressive in its approach. A significant change under the RPWD Act, which has enormous implications for formal schools, is the incorporation of 21 distinct kinds of disabilities, which is 14 more than those mentioned under the PWD Act.³² For the very first time, children with specific learning disabilities, speech and language disabilities, and autism can qualify for inclusive education.³³

With the passage of the RPWD Act in 2016, ‘inclusive education’ became a statutory guarantee, signalling a significant change away from an exclusively special education-focused approach to a more inclusive approach. It provided the right to free education in special or neighbourhood schools for children with benchmark disabilities, i.e., having at least 40% of a specific impairment.³⁴

One of the major highlights of the year 2020 has been the release of the long-awaited NEP 2020, which came after a three decade wait. Among the many aspects of the NEP that have garnered public attention,

²² Pro Bono and Legal Aid Clinic on Education & Legal Services Committee, *Inclusivity vis-à-vis National Education Policy 2020*, 2020, National Law University, Delhi Press, available at: <https://nludelhi.ac.in/download/publication/Inclusivity%20vis%20a%20vis%20NEP%202020.pdf>.

²³ The Constitution of India, 1950.

²⁴ The Constitution of India, art. 41.

²⁵ The Constitution of India, art. 45.

²⁶ The Constitution of India, art. 21A.

²⁷ Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

²⁸ Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009), s. 2(d).

²⁹ Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

³⁰ Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009), s. 2(o).

³¹ The Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016).

³² Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016), s. 31.

³³ Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016), s. 31.

³⁴ A. Balakrishnan, K. Kulkarni, S. Moirangthem, *et. al.*, *The rights of persons with disabilities Act 2016: Mental Health Implications*, 2019, Indian Journal of Psychological Medicine, available at: doi: 10.4103/IJPSYM.IJPSYM_364_18.

one has been the concept of inclusive education. Previously, the NEP 1986 divided the emphasis of inclusive education into several categories of disadvantaged groups and devoted entire sections to their concerns. They are primarily concerned with religious minorities, caste-based minorities, religious minorities, gender equality, handicapped children and rural-based learners.³⁵ At the time, the emphasis was mainly on providing quality education and guaranteeing universal access to a diverse group of learners. A notably unique feature of the NEP 1986 was its emphasis on many subtle categories of marginalization. It took into account not only traditional marginalized groups, but also the relatively newer and less discussed groups like migrant children, children from economically poor urban slum communities, working children, children of agricultural labourers and construction workers.³⁶ However, despite such a nuanced approach, the implementation strategies of NEP 1986 failed to adequately account for these dividing lines, leaving out critical categories such as ‘children in need of care and protection’ and ‘children in conflict with law’.

On the other hand, the NEP 2020, has departed from the conventional categorizations of the disadvantaged and, to a degree, acknowledged the interconnectivity and multidimensionality of these sites of exclusion zones. The policymakers have progressed beyond the narrow view of categorizing these groups separately and noticed that some groups are severely underrepresented in current educational systems. To meet their unique educational requirements, the NEP 2020 combined socio-cultural identities, gender identities, geographical identities, socio-economic conditions and disabilities to form a new social group called Socially and Economically Disadvantaged groups (SEDGs).³⁷ The primary aim of the policy is to foster inclusiveness of these groups. This is a significant divergence from past patterns. However, there is always a risk of subjectivity while defining who the SEDGs are for. This clubbing of categories will always result in some groups getting more or less attention than others, and it will also risk overlooking community-specific needs and idiosyncrasies.

The NEP 2020 also seeks to hire special educators in all school complexes to ensure more inclusive teaching pedagogy. Children with benchmark disabilities will be permitted to choose home-schooling and will be supplied with competent home-schooling educators to ensure that they continue to study and obtain the finest educational facilities possible. Additionally, instructors will be taught to recognize children with learning difficulties early on and to assist them in succeeding in school and maintaining their mental health. However, the NEP 2020 seems to be utopian and too ambitious in this regard. It fails to realize that not only a majority of instructors are unprepared for such tasks, but also a majority of schools in India are severely understaffed.³⁸

Interestingly, the policy does not specify or explain how it intends to develop accessible alternate home-schooling methods. For example, according to a recent assessment conducted by the Delhi Child Rights Commission, up to 60% of schools claimed to have no pupils with disabilities, while another 28%

³⁵ Pooja Pandey, *The New Education Policy and Inclusive Education Framework in India*, 2020, available at: <http://rsrr.in/2020/09/29/new-education-policy-inclusive-education-india/>.

³⁶ Pooja Pandey, *The New Education Policy and Inclusive Education Framework in India*, Vidhi Centre for Legal Policy, available at: <https://vidhilegalpolicy.in/blog/the-new-education-policy-and-inclusive-education-framework-in-india-2/>.

³⁷ Niranjana Sahoo, *Equitable and Inclusive Vision in the National Educational Policy 2020: A Critique*, 2020, ORF [Online], available at: <https://www.orfonline.org/expert-speak/equitable-and-inclusive-vision-in-the-nep-2020/>.

³⁸ TNN Group, *India has 3 times more schools than China, but they are a mess*, 2019, Times of India, available at: <https://timesofindia.indiatimes.com/india/india-has-3-times-more-schools-than-china-but-they-are-a-mess/articleshow/68616961.cms>.

reported having less than 1%.³⁹ It demonstrates that individuals with impairments are more likely to experience poor socio-economic consequences than those without disabilities. The NEP 2020 makes no mention of how it would ensure that these people will have equitable access to schooling and education. Besides that, it does not explain what changes to the curriculum would be necessary to ensure that CWDs do not feel excluded in today's highly competitive educational settings.

LEGISLATIVE HURDLES IN THE INCLUSION OF CWD

Indian culture is inherently touted as a culture of inclusiveness and diversity. The diverse ethnic and religious population residing in this country is deemed a cultural asset of India but unfortunately this inclusiveness seems to wither away when it comes to educational inclusiveness of Persons with disabilities. The legislative frameworks prima facie seems to have assuage this problem of inclusiveness but in effect these laws seem to be ineffective and being “integrational” under the disguise of being “inclusive”. To cater to this problem of inclusiveness, the Indian Government in 2020 came up with the idea of NEP 2020 which aimed at revamping the 34-year-old education system. The NEP 2020 aimed at ensuring the inclusion and equal participation of children with disabilities in educational institutions, but the problem still seems to be unresolved due to existing inherent inconsistencies.

Impractical legal approach

The NEP 2020 is harbingered as an all-inclusive policy for disabled communities but unfortunately the policy is vitiated by utopian beliefs. The policy aims to introduce the concept of home-schooling⁴⁰ and to ameliorate the existing educational system by employing special educators⁴¹ & establishing more special schools. But ironically, the idea of home-schooling and special schools under the garb of inclusivity subtly aims to exclude the disabled community from the educational inclusion and questions the educational worthiness of CWD.

The concept of ‘special schools’ and ‘special educators’ is also problematic as there is no comprehensive mechanism to monitor and regulate them. Specifically, with regard to special educators there is no provision made to provide a feasible mode of certification and renewing of license so that they can contribute to the overall development of a child without any additional financial burden and exertion.⁴² Also, there is no provision to give special incentives to special educators than the ordinary teachers, or to attract people towards pursuing career of special educators, which creates a huge gap between demand & supply aspect of special educator services.

Further, the educational inclusiveness envisaged by the RPWD Act under Section 2(m)⁴³ aims to treat disabled students at par with ordinary students which is only possible if we bring them on equal pedestal to compete with ordinary students, but no provision has been incorporated in either of the Act or policy to

³⁹ Jason Miks and John McIlwaine, *Keeping the world's children learning through COVID-19: United Nations Children's Fund*, 2020, available at: <https://www.unicef.org/coronavirus/keeping-worlds-children-learning-through-covid-19>.

⁴⁰ Ministry of Human Resource Development, Government of India, *National Education Policy 2020*, available at: https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf, 6.12.

⁴¹ Ministry of Human Resource Development, Government of India, *National Education Policy 2020*, available at: https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf, 6.12.

⁴² Gauransh Gaur & Aniket Panchal, *National Education Policy, 2020: Fallout from equitable and inclusive education for Children with Disabilities*, 2021, *Inclusivity vis-a-vis National Education Policy 2020*, 21-28, Dr. Bharti Kumar, available at: <https://nludelhi.ac.in/download/publication/Inclusivity%20vis%20a%20vis%20NEP%202020.pdf>.

⁴³ Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016), s. 2(m).

ensure such equality. But the decision of legislature to include CWD under the wide amplitude of definition of “children belonging to disadvantaged group” mentioned under Section 2 (d)⁴⁴ RTE has debilitated the vigour of the RTE Act with respect to educational inclusion.

The RTE Act mandates private aided schools to reserve 25% of their seats⁴⁵ for students belonging to weaker sections but there exists no separate provision for providing such equitable benefits to CWD, which is a sine qua non in order to provide equal opportunity to CWD in the educational system. The outcome of such provision is that it gives a scope to private unaided and specified schools to arbitrarily choose between CWD and other children belonging to disadvantage group which indirectly leads to preference of ordinary students over disable students, as economically, entertaining disable students require more resource investment as compared to students coming from disadvantageous sector.

This absence of proper reservation and clubbing of "children with disability" within the definition of "disadvantaged group" has resulted in both an over-classification and under-classification.⁴⁶ There is a lack of synchronization between the main legislations that govern inclusive education in India. For instance, even though the RPWD Act makes inclusive education a statutory guarantee, contrastingly the RTE does not even define inclusive education.⁴⁷ These conflictual provisions have exacerbated the problems faced by disabled in educational institutions and plummeted the probability of CWDs participating in the educational sector.

Lack of disable-friendly infrastructure

Like previous governmental policies and laws, the NEP reiterates and motivates educational institutions to come forward and create inclusive infrastructural facilities⁴⁸ but contrastingly, no such development is witnessed even after 7 decades of independence. According to study conducted in 78th Round of NSSO it was found that there are only 21.8% of disables⁴⁹ who receive or reap benefit of aid proffered by the government. One of the chief reasons for such poor installation of benefits is poor infrastructural facilities.

In order to claim the benefit of governmental schemes, the law mandates People with Disabilities (hereinafter “PWD”) to obtain a certificate of disability which in itself is a cumbersome task. In order to obtain that certificate, the beneficiary has to undergo various medical tests which have to be conducted only at certain government recognized hospitals which is quite time taking and arduous. Currently in India, only 28.8% of the PWD have a certificate of disability⁵⁰ and are entitled to claim benefits under government welfare schemes for PWD.

⁴⁴ Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009), s. 2(d).

⁴⁵ Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009), s. 12(1)(c).

⁴⁶ Pramod Arora v. Hon’ble Lt. Governor of Delhi, (2014) SCC OnLine Del 1402, p. 46.

⁴⁷ Kadambari Agarwal, *Why 75% of India’s Disabled Kids Never Attend a School in their Lifetime*, 2020, available at: <https://theprint.in/opinion/un-report-75-india-disabled-kids-never-attend-school-in-lifetime/423440/>.

⁴⁸ Government of India, Ministry of Statistics and Programme Implementation National Statistical Office: Social Statistics Division (2021) *Persons with Disabilities (Divyangjan) in India - A Statistical Profile: 2021* (NSO India). available at: https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf 5.9.

⁴⁹ *Supra*, p. 40.

⁵⁰ *Ibid*

As per data released by the Indian Government, 26.6% of people belonging to PWD category never attended the school and 12.1% of PWD students never completed their education.⁵¹ This data highlights the blatant shortcoming pervading in our education system. Indian schools, whether aided or unaided, lack disable friendly physical and educational infrastructure. Currently, as per Unified District Information System for Education (UDISE), 2015-16, 61.83% of elementary schools are having ramps and 23.08% schools have been provided with CWD friendly toilets.⁵² But contrastingly, not even 1% of India's 789 universities, 37,204 colleges and 11,443 stand-alone higher education institutions are disabled-friendly.⁵³ Due to the presence of poor infrastructural facilities, most of the CWD are forced to opt for an education under open schools⁵⁴ rather than ordinary schools and colleges.

Thus, the RTE Act, the RPWD Act and the NEP, 2020 have imbibed the idea of educational inclusiveness but the problem vests at the lack of implementation. Additionally, the lack of accountability on the part of the State has exaggerated this problem of implementation thereby, reducing these legislative imperatives into a sheer piece of paper.

Absence of localized grievance redressal mechanism

Creating an all-inclusive framework is not only the moral or legal obligation of the State but also a constitutional obligation envisaged under Article 41 and 46 of Indian Constitution.⁵⁵ However, under the plethora of legal enactments aimed to bolster disable inclusive education, interestingly, none of them provides for any grievance redressal mechanism in case a disabled person faces any discrimination or ill-treatment by the educational institutions. The sole remedy available to treat the malady is to take legal recourse under special courts⁵⁶ created under RPWD Act, 2016 which itself is deemed unfavourable owing to the protracted litigation tendencies prevalent in the Indian judicial system.

What is needed to remedy this problem is to create something analogous to internal complaint mechanism which can deal with such allegation of discrimination and ill-treatment at an administrative level which will serve two-pronged purpose firstly, it will assuage the burden of judiciary and secondly, it will provide remedies to disabled persons in a more accessible manner.

The problem of hostility & invisibility

The RTE, RPWD and NEP cumulatively pledge to guarantee an absolute access to free education to all till the age of eighteen years in an appropriate environment, but ordinarily an "appropriate environment"⁵⁷ is often absent. The miniscule proportion of CWD who make it to the educational sector are often subjected to hostility and invisibility. The educational curriculum that is prevalent in the current education system teaches students to be "empathetic" or be "aloof" towards persons with disability rather

⁵¹ Supra note 48, p. 245.

⁵² Press Information Bureau, *Disabled Friendly Infrastructure in Schools and College*, 2018, available at: <https://pib.gov.in/newsite/PrintRelease.aspx?relid=175311>.

⁵³ Hindustan Times, *With not even one percent being disabled-friendly, colleges are difficult to access for many*, 2017, available at: <https://www.hindustantimes.com/editorials/with-not-even-one-per-cent-being-disabled-friendly-colleges-are-difficult-to-access-for-many/story-zfemcOhIWQhxiAVT1YNwWK.html>.

⁵⁴ India Today Web Desk, *75% of students with disabilities don't attend school in India: UNESCO*, 2019, available at: <https://www.indiatoday.in/education-today/news/story/unesco-report-says-75-5-year-old-children-with-disabilities-don-t-attend-schools-in-india-1561722-2019-07-04>.

⁵⁵ The Constitution of India, 1950.

⁵⁶ The Rights of Persons with Disabilities Act, 2016 (Act 49 of 2016), s. 84.

⁵⁷ Pramod Arora v. Hon'ble Lt. Governor of Delhi, (2014) SCC OnLine Del 1402.

than treating them “inclusive” of student fraternity. Due to such a hostile environment in educational institutions, the CWD is often neglected and isolated.

The problem of invisibility goes a step further and considers the CWD non-existent in student fraternity and blatantly ignores the problem faced by the CWD category. The only solution to this problem is by inculcating disable inclusive traits amongst people which can be achieved best by including disable-inclusive education as part of school curriculum.

CONCLUSION AND RECOMMENDATIONS

The problem of inclusivity of CWDs in the mainstream is a global challenge and requires a concerted and amalgamated effort from every individual. Governments across the globe have passed a catena of legislation to cater this problem but subtly these laws have continued to promote the flawed idea of “integration” under the garb of “inclusiveness”. The current legal jurisprudence of educational inclusiveness pervading in India is a bit complicated and needs exigent assuaging in order to cater the educational backwardness of the CWD sector.

Existing Indian legal enactments (i.e., RTE and RPWD) have proved to be statutorily benevolent for the CWD, but in reality, the provisions have not been of any help due to inherent irreconcilable inconsistencies between the two enactments. Therefore, to fill up these lacunae the NEP was enacted which nonetheless has brought up various educational techniques to ensure barrier free education but still the problem continues to exist.

In order to cater to the existing discrepancies certain changes in current implementation strategies are required like:

- Certain percentage of reservation should be provided to CWD under the RTE Act, 2005 within the 25% existing slab reserved for children from weaker sections of society. Such ascertained seats for CWD will ensure that schools are not arbitrarily discriminating CWD from other students applying under category of children from weaker section. Simultaneously, CWD will be able to ameliorate their educational & social backwardness by getting proper representation in the educational field which will ensure an “inclusive future”.
- Special schools and home-schooling systems should be brought under governmental control in order to ensure proper functioning, regulation and funding. These schools should be based on a model of rehabilitative homes where the environment is more amicable, and welfare oriented rather than being competition oriented.
- The field of Special educators should be properly regulated, and more-and-more incentives should be introduced to attract the people to pursue the field. Since NEP aims to bring in NIOS education as an equivalent alternative to ordinary schooling, NIOS modules should be modified and should be made according to the disability of the children rather than having a distinct module for all CWDs.
- Government should ease the process of granting certificates of disability by creating a permanent disabilities committee in each Community Healthcare Center (CHC's) which can play a key role in easy grant of certificates and will spread awareness about the governmental schemes launched for PWD.

- Presence of disable accessible infrastructure should be made a pre-condition for granting affiliation of educational institutions. And institutions which have been previously approved should be given a set deadline for complying with disable friendly infrastructure norms.
- Localized grievance cell for CWD should be created in each educational institution which will deal the issues concerning allegations of discrimination and ill-treatment done with CWD. Also, provision should be made for compulsory deployment of a child counsellor in every educational institution.

Summarily speaking, the NEP has brought in quite new facets of disabled inclusive education but the problem vests with methods of implementation. The laxity of authorities coupled with social ostracization had exacerbated the developmental status of the CWD. Thus, it is the need of the hour to assimilate the CWD into mainstream, otherwise the aim of a unified and progressive nation will remain a utopian concept.

NATIONAL EDUCATION POLICY 2020: IMPLEMENTING RPWD ACT 2016 FOR ENSURING INCLUSIVE EDUCATION

- Sushumna Uniyal¹

ABSTRACT

The efforts and advocacy for bringing inclusivity in education have been going on throughout the world since a long time. Since the UNESCO Salamanca Conference held in 1994, there have been various initiatives in different countries to cater to the idea of bringing inclusivity in education for all disabled children. Moving further, the United Nations adopted the Convention on the Rights of Persons with Disabilities in 2006. India also became a signatory to the Convention and ratified it in 2007. Indian parliament enacted the Rights of Persons with Disability (RPWD) Act 2016 which envisages equal access to education for children with disability as well as equal access to higher education for persons with disability by laying down the very important foundation of an education system where the students with or without disability could learn together in the same institutional structure.

This paper analyses the National Education Policy 2020 issued by the Indian Government recently and brings out the significant provisions in this policy which will facilitate the implementation of the RPWD Act 2016 in terms of inclusivity of students with disability into the mainstream education system. The paper also contrasts the Universal Access to Education through Right to Education Act 2009 with the provisions of National Education Policy 2020 in line with RPWD Act 2016 and describes the role of NEP 2020 in bringing about inclusivity in education for persons with disability.

Many researchers while studying the various issues involved in the effective implementation of special education laws and policies in different countries have also investigated the link between law and policy. There have been studies exploring the understanding of these laws among teachers and also on the attitude of teachers, family and school administration towards the students with disability. Research in this field in India has been limited but significant with studies on the development of laws, policy and implementation.

There is a dearth of studies in India which study the link between the disability law and education policy to establish the role of education policy in implementation of the special education in accordance with the Rights of Persons with Disability Act 2016. With the National Education Policy 2020 being up for implementation, this paper is timely in understanding the perspective of the education policy in line with disability law in India and analyze the issues, challenges and opportunities which are pertinent to be studied in this context.

This paper studies the correlation between RPWD Act 2016 and NEP 2020 under the following major heads: i) Learning Environment, ii) Special Educators, iii) Resources, iv) Type of Schooling, v) Adult and Higher Education, and, vi) Technology for Special Education. The paper establishes the focus of NEP

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2020 on implementing the RPWD Act 2016 in the area of education in the country and making education equitable and inclusive for children as well as adults with disability. It also discusses the critical issues in the implementation of the provisions related to special education and seeks to discuss the path towards effective implementation of special education provisions in NEP 2020 for bringing about inclusive education for persons with disability in accordance with RPWD Act 2016.

Keywords: *Disability Law, National Education Policy, Inclusive Education*

INTRODUCTION

Inclusive education is believed to be the cornerstone of an inclusive socio-economic order as education empowers the marginalized and helps them enter the mainstream. The efforts and advocacy for bringing inclusivity in education have been going on across the world since a long time. Apart from inclusivity in terms of economic status and gender, a major aspect of inclusive education is the inclusion of persons with disability in the mainstream education system. The term ‘disability’ has evolved in meaning over time with the evolution of socio-political thought leading to the evolution in disability laws across the world. Since the UNESCO Salamanca Conference held in 1994, there have been various initiatives in different countries to cater to the idea of bringing inclusivity in education for all disabled children.²

Indian Government also passed the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act (PWD Act) in the year 1995³ which for the first time recognized disability as a ground for ensuring non-discrimination and provided for rights to children with disabilities to free books, scholarship, uniform and other facilities along with guidelines to enhance quality of special schools, trained teachers and non-formal education for ensuring that the disabled children get access to education. But, overall, the PWD Act 1995 did not have an effective implementation criteria or timelines which resulted in its failure to provide for inclusive education for disabled children. One major point of criticism for this law was that it did not have any robust provision for making an educational environment such that disabled children could study with children without any disability.

Moving further, the United Nations adopted the Convention on the Rights of Persons with Disabilities in 2006. India also became a signatory to the Convention and ratified it in 2007. Indian parliament enacted the Rights of Persons with Disability (RPWD) Act 2016⁴ which envisages equal access to education for children with disability as well as equal access to higher education for persons with disability by laying down a very important foundation for an education system where the students with or without disability could learn together in the same institutional structure. According to this Act, “inclusive education” means “a system of education wherein students with and without disability learn together and the system of teaching and learning is suitably adapted to meet the learning needs of different types of students with disabilities”.⁵

This paper analyses the National Education Policy 2020 issued by the Indian Government recently and brings out the significant provisions in this policy which will facilitate the implementation of the RPWD Act 2016 in terms of inclusivity of students with disability into the mainstream education system. The

² Mel Ainscow et al., Editorial: The Salamanca Statement: 25 Years On, 23, INT. J. INCL. ED. 671, 671-673

³ Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, (Act 1 of 1996)

⁴ The Rights of Persons with Disability Act, 2016, (Act 49 of 2016).

⁵ The Rights of Persons with Disability Act, 2016, (Act 49 of 2016).

paper also contrasts the Universal Access to Education through Right to Education Act 2009 with the provisions of National Education Policy 2020 in line with RPWD Act 2016 and describes the role of NEP 2020 in bringing about inclusivity in education for persons with disability. It also discusses the critical issues in implementation of the provisions related to special education and seeks to discuss the path towards effective implementation of special education provisions in NEP 2020 for bringing about inclusive education for persons with disability in accordance with RPWD Act 2016.

LITERATURE REVIEW

There is an established link in theory between law and policy. Government policies reflect the implementation intentions of the Government in terms of laws that are aimed at bringing about inclusivity and social justice. Many researchers have studied the special education laws and policies in different countries and investigated the link between law and policy. Rothstein & Johnson in the year 2009 give a comprehensive overview of the major federal laws dealing with the education of disabled children along with their judicial interpretations and the policy related implications.⁶ Russak in the year 2016 studied the language policy and inclusion laws for special needs children in Israel and examined how effective are the inclusion practices in such classes with special needs students learning English as a foreign language.⁷ Sanches-Ferreira and others in 2013 studied the International Classification of Functioning, Disability and Health (ICF) in Portuguese education law and assessed how it is used in guiding the eligibility policy in special education and also the effectiveness of this system in practice.⁸

There are other studies which examine the various issues in the effective implementation of the special education laws. Francisco and others in the year 2020 presented a review of historical trends in special education in the United States and the laws dealing with the same through key constructs. They found that there are both positive as well as negative aspects. They also concluded that the lack of clear definition of inclusion and the standards for inclusion in the laws have been the major cause of implementation issues along with the absence of a clear definition for least restrictive environment mentioned in these laws. They also argued that the stakeholders do not have the requisite knowledge regarding the provisions of special education laws which leads to a weak implementation of inclusion policies.⁹ Beyenea and others in 2020, conducted semi structured interviews of visually impaired students and individuals working at the disability centre of Hawassa University in Ethiopia and tried to identify how the country specific anti-discrimination laws affect the access to education and educational resources in persons with disability. They conducted a thematic analysis of the interview responses using the ICF based framework and discussed how the diverse background of the learners, lack of alternative forms of educational resources, lack of institutional policy guidelines for bridging the law – practice gap and digital divide were the factors leading to accessibility issues.¹⁰ Kritzer in the year 2012 compared the special education law and its implementation in China and United States through a survey to evaluate the

⁶ Laura F. Rothstein and Scott F. Johnson, *Special Education Law*, p. 31-45 (Sage 2009).

⁷ Susie Russak, *Do Inclusion Practices for Pupils with Special Educational Needs in the English as A Foreign Language Class in Israel Reflect Inclusion Laws and Language Policy Requirements?*, 20 (11) INT. J. INCL. ED., 1196, 1188-1203 (2016).

⁸ Manuela Sanches-Ferreira, et. al., *Portugal's Special Education Law: Implementing the International Classification of Functioning, Disability and Health in Policy and Practice*, 35(10) DISAB. REHAB., 870, 868-873(2013).

⁹ Marian P. B. Francisco, et al., *Inclusion and Special Education*, 10(9) EDU. SCI., 238, 239-240 (2020).

¹⁰ Wondwossen M. Beyenea, et. al., *Inclusion, Access, and Accessibility of Educational Resources in Higher Education Institutions: Exploring the Ethiopian Context*, INT. J. INC. EDU, 1-17 (2020).

support that the educators in these countries have access to for teaching children with disabilities and found that progress in China has been far behind that of U.S.¹¹

There have been studies focused on exploring the understanding of these laws among teachers. O'Connor and others in 2016 studied the knowledge of special education laws of the United States among school teachers by administering a survey to assess the familiarity, knowledge, and training level of these teachers related to the provisions of special education law and found that teachers lacked some essential knowledge and lacked in-depth understanding of these laws.¹² Studies have also been conducted on the behavioural aspects of the various stakeholders in the system like the family, the teachers and the schools towards the students with disability. Combs and others in 2010 investigated the attitude of physical education teachers in the inclusion of children with special needs in their classes and identified the positive and negative attitudinal factors of teachers that lead to differentiated outcome of physical education for children with special needs.¹³ Stough in 2003 discussed the special education system of Costa Rica which has extended the expertise in provision of special education through four models of educational services spanning across trainers, support staff and institutions.¹⁴ Byrd in 2010 investigated the various challenges faced by families of disabled children in India when they go for the care and education of these children and presents the case of a private special school which not only provides quality academics to disabled students but also imparts skills for making them job ready. This paper highlighted the challenges for Indian special education and teacher preparation and provided direction for positive action to deal with these challenges.¹⁵ Research in this field in India has been limited but significant with studies on the development of laws, policy and implementation. Karmakar & Saxena in 2015 examined how international policies have shaped the Indian policies and laws regarding education for children with disabilities and argues that there are multiple and diverse contextual factors including physical, socio-cultural and economic ones which lead to specific requirements to be catered to for education of children with special needs.¹⁶ Singal in 2016 analysed the development of strategy and policy in the field of education of children with disabilities in the context of India and Pakistan drawing from the analysis of various policies, programmes and empirical findings in this regard in the two countries.¹⁷ In her further research of 2019, she presents a critical analysis of the impact of national policies and programmes on the classroom provision for children with disabilities in India. This study explores the policy efforts towards inclusive education for children with disabilities through the concepts of redistribution, recognition and representation. The study concluded that efforts in the direction of improving the quality of teaching and learning for children with special needs are lacking the required rigour but nevertheless, India has made progress in its vision of inclusive education.¹⁸

¹¹ Jeffrey B. Kritzer, *Comparing Special Education in the United States and China*, 27(2) INT. J. SP. ED., 52, 52-56 (2012).

¹² Evelyn A. O'Connor, *et. al.*, *Teachers' Knowledge of Special Education Laws: What Do They Know?*, 13(1) INSIGHT. LEARN. DISAB., 7, 7-18 (2016).

¹³ Sue Combs, *et. al.*, *Elementary Physical Education Teachers' Attitudes towards the Inclusion of Children with Special Needs: A Qualitative Investigation*, 25(1) INT. J. SP. ED., 114, 114-125 (2010)

¹⁴ Laura M. Stough, *Special Education and Severe Disabilities in Costa Rica: Developing Inclusion in A Developing Country*, 28(1) RES. PRACT. PERS. SEV. DISAB., 7, 7-15 (2003).

¹⁵ Stephen Byrd, *India, Families, and a Special School*, 6(3) TEACH. EXCEP. CHILD. PL., 3, 3 (2010).

¹⁶ Sangeeta Karmakar and Vandana Saxena, *Critical Analysis of Education Policies and Acts Related to People with Disability in India*, 41(1) J. IND. ED., 5, 5-18 (2015).

¹⁷ Nidhi Singal, *Education of Children with Disabilities in India and Pakistan: Critical Analysis of Developments in the Last 15 Years*, 46(1) PROSP., 171, 173-183 (2016).

¹⁸ Nidhi Singal, *Challenges and Opportunities in Efforts Towards Inclusive Education: Reflections from India*, 23(7-8) INT. J. INCL. ED., 827-840 (2019).

RIGHTS OF PERSONS WITH DISABILITY (RPWD) ACT 2016 AND NATIONAL EDUCATION POLICY (NEP) 2020 – INTERTWINED FOR INCLUSIVE EDUCATION

The passing of Rights of Persons with Disability Act 2016 was considered as a landmark step in the disability rights movement in India. This Act recognized many types of disabilities which were previously ignored in law and also provided for the definition of inclusive education as the one where students with disability could learn with those without disability. It was thus a significant step in bringing about inclusivity for the persons with disability in terms of education. The National Education Policy 2020 has given due recognition to the provisions of RPWD Act 2016 related to inclusive education and has focused on implementing them in an effective manner, though few challenges still remain to be addressed. The intertwining aspects of the RPWD Act 2016 and NEP 2020 have been discussed in the following sections to bring out the salient features of NEP 2020 which are directed towards the implementation of RPWD Act 2016. The challenges and issues in implementation are also discussed.

Learning Environment for Equitable Access

The RPWD Act defines a "barrier" as “any factor including communicational, cultural, economic, environmental, institutional, political, social, attitudinal or structural factors which hampers the full and effective participation of persons with disabilities in society”¹⁹

The National Education Policy 2020 has made various provisions to ensure that such barriers are eliminated from the education system and full participation of persons with disability is encouraged through a conducive learning environment. NEP 2020 envisages a facilitating environment in schools with adequate and safe infrastructure, which includes provision of proper toilets, clean drinking water, power supply, computers, internet, libraries, sports, etc. to all schools. This is crucial for ensuring an effective and inclusive learning environment for children with disabilities. NEP 2020 duly recognizes the significant role of enabling mechanisms for providing equal opportunities to Children with Special Needs (CWSN) or Divyang, as available to other children who do not have disabilities. The policy envisions an effective role of one-on-one teaching, peer tutoring and open schooling for achieving this goal. It also lays emphasis on adequate and suitable infrastructure along with use of innovative technological interventions to ensure access to education for children with disabilities.

NEP 2020 has kept the inclusion and equal participation of children with disabilities in Early Childhood Care and Education (ECCE) and school education on the highest priority agenda. The policy reiterates the provisions of RPWD Act 2016 and aims at ensuring full participation of children with disabilities in the regular education system from schooling to higher education. NEP 2020 is in congruence with the provisions laid down in the RPWD Act 2016²⁰ and tries to incorporate all the recommendations of RPWD Act with respect to school education. Not only does the NEP 2020 focus on institutional infrastructure for enabling participation of children with disabilities, but it goes beyond and provides for consultation by National Council of Educational Research and Training (NCERT) with expert bodies such as National Institutes of Department of Empowerment of Persons with Disability while preparing the National Curriculum Framework. This is a welcoming step for bringing inclusivity in education for children with disabilities.

¹⁹ The Rights of Persons with Disability Act, 2016, (Act 49 of 2016).

²⁰ The Rights of Persons with Disability Act, 2016, (Act 49 of 2016), ss. 16, 17 and 31.

Special Educators

The RPWD Act 2016 lays down several specific measures for facilitating special education.²¹ These measures include assessment of the special needs of children with disability and to provide the necessary support for maximizing their academic as well as social development. For this, RPWD Act makes provisions for preparation and training of teachers and trainers who are well equipped to assess the needs of children with disability and provide them education in the pedagogical modules that are most appropriate for them. NEP 2020 addresses these aspects in detail and provides for teacher education, preparation, and service conditions which are required for developing educators for children with disabilities. These comprise of short-term specialization courses on teaching children with disabilities and modules on teaching children with disabilities incorporated within existing programs like Bachelor of Education (B.Ed.).²² In-service training for the teachers will also include modules on safety, health and environment in schools for sensitizing the teachers to the requirements of children with special needs as per NEP 2020.

However, the success of the policy in this aspect will depend upon the availability of teacher educators who can train the trainers. The policy does not prescribe regularizing special educators as teachers, but views special education as a specialization for general teachers. If the special educators are hired to train the general teachers on a contractual basis only, the long-term commitment and consistency in such trainings would be missing and may affect the effectiveness of these trainings.

Resources

The RPWD Act 2016, Section 17 entrusts the governments and local authorities at different levels to ensure that educational institutions are enabled for providing inclusive education to children with disabilities in accordance with Section 16 of the Act. This entails providing various resources to these institutions which have been recognized in the National Education Policy 2020 which aims to ensure that any challenges of resources are addressed by State/UT governments by grouping or rationalizing schools through innovative mechanisms. This intervention is expected to ensure that every school has an adequate number of counselors/trained teachers for all subjects apart from having infrastructural resources such as libraries, labs, playgrounds, etc. This is aimed at creating a sense of community among teachers and students of various backgrounds and is considered to become effective in developing cooperation and support across schools for special education of children with disabilities.

Type of Schooling

Children with disabilities have diverse needs. While few children may be better in the inclusive environment of a general school while studying with children without disabilities, others may be more comfortable in studying in special schools. There may be others who have certain disabilities which make it difficult for them to go out for schools and thus they might need home schooling. The 2012 Amendment to the Right to Education Act (RTE) lays down provisions for enrollment of children with disabilities in schools in their neighborhood and also acknowledges the children with severe disabilities who are unable to go to schools by offering them the option of home-based education. RPWD Act 2016, deals with this issue differently and recognizes the right of children with benchmark disabilities to opt for

²¹ The Rights of Persons with Disability Act, 2016, Acts of Parliament, 2016 (Act 49 of 2016), s. 17.

²² Ministry of Education, Government of India, National Education Policy 2020, Part I, Section 5

enrolling in either the neighbourhood schools or in the special schools as per their choice. Thus, while the RTE is silent on the issue of special schools, the RPWD does not offer guidance on home-based education.

The NEP 2020 resolves this discrepancy in the two laws by a clear manifestation of all three forms of schooling options that are available for children with disabilities, that is, the neighbourhood schools, special schools, and home-based education. This gives more freedom to the parents of children with disabilities to choose the most appropriate form of schooling for their children based on their specific needs and conditions. However, there are issues that need to be addressed in terms of the regulation of special schools and more so in case of home-based schooling. Though The NEP 2020 provides for the audit of home-based schools as per the provisions of the RPWD Act 2016, there are challenges of identification of children who need home based education and also the challenge of finding suitable special educators who have the ability to adapt their teaching methods to the home environment of the learners. Apart from this, there is also a lack of well-defined curriculum and assessment strategy for home-based education. The provisions of special education in the RPWD Act 2016 are centered around creating a system for providing inclusive education through accessible buildings and classrooms and individualized support but these provisions cannot be clearly ensured in home-based education.

In accordance with the RPWD Act 2016, the NEP 2020 includes special schools as an option for children with benchmark disabilities. But special schools are not recognized as regular schools till now and hence are not governed by the norms of regulation which apply to regular schools. The guidelines regarding quality of teaching, curriculum design, evaluation and certification structure and even regarding infrastructure are lacking for special schools. For effective implementation of the schooling options provided, detailed norms based on expert opinions must be put in place.

Adult and Higher Education

The National Education Policy takes into account the provisions of RPWD Act regarding adult and higher education too. It provides for enhanced access, equity, and inclusion of persons with disability into higher education mainstream and also provides for encouragement of adult education and lifelong learning measures. The role of public education has been envisioned to be very prominent by establishment of multidisciplinary universities of outstanding stature which will have all resources and facilities for special education too. It also encourages scholarships by private/philanthropic universities; online education, Open Distance Learning (ODL); and ensures that all infrastructural facilities and learning materials are available to learners with disabilities.

All Higher Education Institutions (HEI) are required to ensure that all buildings and facilities are wheelchair-accessible and disabled-friendly. The single regulatory body for higher education envisaged in the NEP is the National Higher Education Regulation Commission (NHERC) which will be entrusted with the adjudication in case of any complaints or grievances from stakeholders and others arising out of the information placed in public domain. Online feedback from randomly selected students including differently abled students from each HEI will be taken at regular intervals to ensure effective compliance and also take inputs for further improvement.

For adult education and life-long learning, the NEP aims at strengthening and modernizing the schools, colleges, universities and public libraries for ensuring adequate availability of books that cater to the

needs and interests of all students, including persons with disabilities and other differently abled persons of all ages.

Technology for Special Education

Technology is a great enabler of inclusivity. Innovative teaching learning content focused on special needs of learners with disabilities are aimed to be developed under NEP 2020 for bringing about inclusive education. A rich variety of educational software are proposed to be developed for students and teachers at all levels and their availability to all trainers and learners needs to be ensured by the government and local authorities. All such software will be made available in all major Indian languages which will facilitate the participation of students with disability even if they are not part of mainstream schools running in English medium of instruction. Teaching-learning e-content developed by various reputed institutions will be uploaded onto the Digital Infrastructure for School Education (DIKSHA)²³ platform for easy access to all learners. Extensive use of technology in teaching and learning and removing language barriers is expected to result in increased access to education for students with disabilities as envisaged in the RPWD Act 2016.

CONCLUSION

There is a strong link between law and policy and a rightly motivated policy can lead to the effective implementation of law. National Education Policy 2020 is a significant step in the direction of ensuring effective implementation of the special education provisions of the Rights of Persons with Disability Act 2016. All aspects of the RPWD Act 2016 have been given due weightage by the policy makers in the Ministry of Education while drafting the National Education Policy and the focus of this policy on inclusive education is well articulated in its various provisions. The implementation of the policy however, is challenging due to the diverse needs of the persons with disability in terms of their socio-economic, cultural and physical conditions. Creating a pool of trained workforce to effectively deliver the special education with empathy and understanding of the provisions of law and policy is imperative and must be accorded the utmost priority.

Further empirical research can be conducted for assessing the implementation of NEP 2020 in terms of special education for persons with disability. Survey of educators and management of schools and colleges can provide insights regarding the effectiveness of the provisions of NEP2020 for the students with disabilities. Research on awareness and attitude of stakeholders in the special education ecosystem can provide further gap analysis and ways to plug in these gaps from a socio-psychological perspective can be studied. Effectiveness of training for teachers to create special educators also needs to be monitored with time and shortcomings that arise need to be rectified. The judicial system also needs to be made more effective for dealing with cases related to special education provisions. With concerted efforts in all these directions, the aim of NEP 2020 and RPWD Act, 2016 are expected to be achieved for the quality as well as accessibility of special education in the country.

²³ Digital Infrastructure for School Education (DIKSHA), available at: <https://diksha.gov.in/>

GENDER INCLUSIVITY

GENDER INCLUSIVITY AND FINANCIAL INCLUSIVENESS OF WOMEN IN CREDIT CO-OPERATIVE SECTOR AND LEGISLATIVE SUPPORT: AN ANALYSIS

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ABSTRACT

The term “inclusiveness” refers to the virtue of being inclusive. The very sense of being inclusive is denied by the society to women at large, who are far from the resources and therefore deprived from the fruits of freedom, liberty and democracy. In modern times, civilized society is governed by the laws and regulations. Legislatures are responsible to ensure the equality of opportunities to the people. The law changes as society is dynamic. In a divergent society, equality is difficult to achieve. Especially gender inequality is the major issue in the economic development of the country. The credit co-operative sector is one of the sectors where the participation and representation of women is marginal. The almost large strata of population i.e. women, cannot participate in economic development because of their household responsibility, lack of education, cultural hindrances and so on. However, the laws are expected to be as inclusive as possible when it comes to women’s participation and representation in the credit cooperative societies. The objective of this article is to study the inclusiveness of laws in the credit co-operative sector. The 97th amendment and The Maharashtra Co-operative Act, 1960 are ensuring the autonomy of the cooperatives. For the autonomous attribution of the institute, democratic governance and equality is the precondition. Constitutional mandate is bound to follow. The initiative of the legislatures for betterment of women empowerment in credit co-operative is the need of the hour. No one should be left behind in the journey of achievement of equality, especially the women in the credit cooperative sector.

Keywords: Gender Inclusivity, Financial inclusiveness, credit co-operatives, Legislative support

INTRODUCTION

“A cooperative is an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise” is the definition laid down by the International Co-operative Alliance. The 97th Amendment Act³ ensures the autonomy of the cooperatives. Cooperatives as business enterprises possess some basic interests such as ownership and control, but these interests are directly vested in the hands of the user. Therefore, they follow certain broad values other than those associated purely with profit making. Need for profitability is balanced by the needs of the members and the wider interest of the community. The values universally recognized as cornerstones of cooperative are self-help, democracy, equality, equity and solidarity. Voluntary and open membership, democratic control, economic

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³Singh, M., V. N. Shukla’s *Constitution of India*, Thirteenth Edition, 2015, EBC Publishing(P) Ltd, Lucknow.

participation, autonomy, training and information and concern for community are the overarching features by which the cooperatives put their values into practice. The goal of a legislative framework is to achieve justice, equality and freedom which the preamble of the Indian constitution exemplifies. Accordingly, policies are framed for the beneficiaries who are underprivileged and marginalized.

The women at the negotiating table made a difference. Especially by promoting language of the important provisions of meaningful and inclusive participation of women. It is time for women to be empowered. To know that their voices count and that they count.’⁴

In order to have democratic governance in a cooperative, inclusion is required. The democratic concept of one member, one vote applies. However, women, who make up half of the population in society, have a tough time accessing resources and opportunities. With the help of legislative support, women's marginalized participation and representation in the Credit Cooperative sector will be expanded. To make it meaningful, the inclusivity of law must be broadened.

WOMEN PARTICIPATION IN CREDIT CO-OPERATIVES

Co-operatives are having potential for poverty reduction, social integration and employment generation. Hence cooperative philosophy is proved as a value based business model. However, the access to co-operatives are far away and not within the reach of women. Due to limited access to education, training, socio-economic status, household responsibility, women cannot access the resources and are unable to grab the opportunities. The social status of women is secondary. The sex ratio is disproportionate. Women folk is deprived of the access to resources as compared to male part of the society.

‘Women constitute almost 50% of the world’s population but India has shown disproportionate sex ratio whereby female’s population has been comparatively lower than males. As far as their social status is concerned, they are not treated as equal to men in all the places. In the Western societies, women have got equal rights and status with men in all walks of life. But gender disabilities and discriminations are found in India even today. The paradoxical situation has such that she was sometimes concerned as Goddess and at other times merely as slave.’⁵ These are the hurdles for the inclusivity of women in the development process. The credit co-operative sector has potential to enhance the status of women. However to involve in the economic progress the hurdles in the path of women empowerment need to remove.

In the developing world, cultural and religious factors often hinder women’s participation. Issues such as women’s inside role, discretion, fearing to speak in public, the tradition of men negotiating and handling financial matters, illiteracy, and social pressures make it difficult for women to play an active and visible public role in cooperatives.’⁶ It is necessary to study the barriers for the effective participation of the women in the credit co-operative sector.

⁴Jasmin Nario-Galace, Co-Convener, Women Engaged in Action on United Nations (UN) Security Council Resolution 1325.

⁵Dr.Shettar, R., *A Study on issues and challenges of women empowerment in India*, 2015, E-ISSN-2278-487X, Vol.17, No.4, pp 13-19.

⁶Dessalew Asratie, *The Socio –Economic Role of Savings And Credit Co-operatives In Promoting Gender Equality: The Case Of Estie Woreda Ethiopia*, Vol. 6, Iss. 1, ISSN 2222-2839, 2014.

BARRIERS FOR EFFECTIVE PARTICIPATION AND REPRESENTATION OF WOMEN IN CREDIT CO-OPERATIVE SECTOR

Due to the social and economic standing, women have a difficult time accessing available resources and obtaining chances in the credit cooperative sector, such as participation in meetings, voting, leadership, and managing roles. Furthermore, the bylaws are anti-women, and the supportive provisions are insufficient to ensure their participation and representation and legislators and regulators are unaware of complexities of gender issues. Lack of knowledge, legal illiteracy regarding the credit cooperative structure and cooperative movement, as well as unfamiliarity with banking transactions, online banking, and banking laws, are all obstacles to women's effective participation and representation in the credit cooperative sector.

FINANCIAL INCLUSIVENESS OF WOMEN IN CREDIT CO-OPERATIVES

Financial inclusion may be defined as the process of ensuring access to financial services and timely and adequate credit where needed by vulnerable groups such as weaker sections, especially women. "A society can be called financially inclusive only when all the segments of the society have accessible, timely and adequate sources of formal credit and financial services. Access to finance is especially important to the poor and marginalised sections of the society as it aids them to process a sustainable living and alleviates them from poverty.

GENDER INCLUSIVITY

Gender inclusivity involves reviewing and restructuring processes to encourage and provide equal opportunities to each gender. Gender equity means the equivalence in life for women and men, recognizing their needs and interests, and redistribution of power and resources. Gender Equality recognizes that women and men have different needs, preferences, and interests and that may necessitate different treatment of men and women. Restructuring of policies and programs to take account of men and women's different realities and interests is the urgent need to achieve gender equality. The policy document is not only the piece of paper but it must manifest the aspirations of women as human being. Therefore it is rightly stated that, 'It is worth examining the content of policies, not just the language, before deciding whether equity or an equality approach is being followed. Gender equity goals are seen as being more political than gender equality goals, and hence are generally less accepted in mainstream development agencies. We talk about poverty across societies, and no-one raises any problems. We talk about gender subordination across societies, and people cry about cultural imperialism.'⁷

"Gender inclusion is a concept that transcends mere equality. It's the notion that all services, opportunities and establishments are open to all people and that male and female stereotypes do not define societal roles and expectations. Gender Inclusivity in the Indian laws has been enshrined in its Constitution, the very document that provides that basis and guidance for governance in a democracy. The concept of gender inclusivity in India is inextricable from the workings of the democratic principles we have adopted. While we are still a long way from achieving what can be termed as equality in the sphere of gender, the fact that the Constitution provided a foundational basis to the gender inclusivity in the Indian laws has helped us sustain a struggle for levelling the field en masse and has paved the way for enactment

⁷Reeves H. and Baden S., *Gender and Development: Concepts and Definitions*, 2000, available at: <http://www.ids.ac.uk/bridge/>, Institute of Development Studies ISBN 1858643813.

of legislations that were passed in the years following 1950. The Indian State has in the years following Independence enacted various laws that provide for equal rights, help counter the results that have arisen from social discrimination and provide support to women."⁸ The attempt by the legislatures to achieve equality has paved the path of freedom, liberty and equality for the women.

ANALYSIS AND INTERPRETATION

Financial inclusion is nothing but to freehold access to financial services. For example- credit, investments, savings, insurance, pension schemes, future planning, disaster management funds and so on. Financial literacy is one of the important aspects of financial inclusion. This is the new and most important aspect for women or gender inclusivity in the credit co-operative sector. The member training in that regard is the need of an hour. The Reserve Bank of India initiated a national program with the help of different National Agencies. However it appears that the reach of women to these services is far away. Many studies have been done for the enhancement of participation and representation of women in credit co-operative sectors. These studies endorse the reasons like social, economic, political, cultural, educational barriers. There is a need to have legislative support to increase the greater access for women's financial inclusiveness.

LEGAL SCENARIO

The Constitution provides fundamental rights to every citizen of India. Article 14 provides for equality before law, or for the equal protection of laws. Equality before the law means that the state shall not discriminate between two citizens- every person is the same in the eyes of the law. On the other hand, equal protection of law enables the State to undertake positive discrimination in order to bring all citizens on an equal footing. It gives the state freedom to make the special provisions for disadvantaged sections of the society, which include affirmative action. Article 15(1) explicitly prohibits any discrimination on the basis of sex, it states 'The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them'. This does not prevent the State from taking affirmative action in favour of women. Under Article 15(3), the state is provided with the power to make special provision for women and children. Article 16 provides for equality of opportunity of all in matters relating to public employment or appointment to any office, it specifically forbids discrimination on the ground of sex. Article 16 (2) reads ' No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect or, any employment or office under the State.

1. In Part III of the constitution, fundamental rights, Art.19 (c) after words "or unions" the words "Cooperative Societies" is added. Article 19(1) (c) right to form a co-operative society is now a fundamental right.
2. Article 39 provides for securing the right to an equal means of livelihood for both men and women and that both men and women have the right to equal pay.
3. Article 42 provides for securing just and humane conditions of work and maternity relief for the women.

⁸Sharma R., Advocate, *Gender Inclusivity In The Indian Laws*, 2020, Legal Service India e -journal.

4. In Part IV a new Article 43B is inserted, which says: The state shall endeavour to promote voluntary formation, autonomous functioning, democratic control and professional management of the co-operative societies.

LEGISLATIVE ENACTMENTS

The only provision for women in The Maharashtra Co-operative Societies Act,⁹ 1960 is 73-C, refers to reservation of women in co-operative societies. “There shall be two seats reserved for women on the committee of each society consisting as members and having members from such class or category of person, to represent the women members, may be elected, co-opted or nominated.” In practice mostly female directors are nominated. These nominations are many times partial and arbitrary. In fact gender equality will achieve by half equal and for this equal enough, it must be enhanced up to 50%. Asia-Pacific Co-operative Ministers Conference⁸ resolution adopted 30 to 50% representation of women in committees, bodies, councils and all other higher-level co-operative structures. The 97th Amendment Act, provides, “Reservation of Only 2 seats from 21 boards of directors means only 9.52% women may be able to participate in the management of the cooperative society”. Accordingly, the Maharashtra Co-operative Societies Amendment Act, 2013 made provision in 73C for reservation of women. We adopted 50% of women reservation ideologically in Panchayat Raj and for local Government. The analogy can be extended to the credit co-operative sector. To enhance the effective participation and quality representation of women in committee legislative support is essential. The available literature endorses the inability of women to access the resources of credit co-operatives, simultaneously urges for a reservation policy for better participation and performance of women in the credit co-operative sector. The recommendation of 33% to 50% of women reservation in the credit co-operative sector is valid and legitimate, but does not have legislative support for this purpose.

The court has always been guided by the Latin maxim *boni judicis est ampliare jurisdictionem* that law must keep pace with society to retain its relevance, for if the society moves but law remains static, it shall be bad for both. In order to create a civil society in which respect for human dignity is the corner-stone of its functioning, the Supreme Court has zealously protected the human rights of individuals. The court has given a liberal interpretation to article 21 of the constitution by giving it more content, meaning and purpose.

While the legislations are gender neutral but the access to the resources, safeguards and protection of laws, are not within reach of women. There is a need to change the psyche of the people in the society which is male dominated. There is definitely a change we observed. The increasing number of women participation and representation in the credit co-operative sector resulted in the increasing status of women in their family as well as in their community.

CONCLUSIONS AND SUGGESTIONS

The credit co-operative sector will be driven by technology. Digitalization will become main stream. Customer focused, oriented technology will result in profitability or productive credit Co-operative Society. However women cannot have that much access. The barriers for accessing the financial services and day to day evolving technology, women are left far behind in credit co-operatives. Democratic

⁹Sunil Dighe, The Maharashtra Co-operative Societies Act 1960, published by Snow White, 2015.

member control is one of the co-operative principles which have to come in practice. Available Reservation is less than 10% i.e. to only for committee members. Lack of education, Less Access to resources, need of opportunity are the hurdles for participation of women in the credit co-operative sector. Participation in the decision making process is one of the important dimensions of democracy. Existing constitutional and legal provisions are inadequate for participation and representation of women. There is a need for constitutional mandate and accordingly a piece of legislation is to be passed for participation and representation of female members. 33% to 50% of women reservation is raising demand for all types of co-operatives. Especially for the social and economic empowerment of women.

A Special Drive for awareness and training needs to be organised by the credit co-operatives. Increase the membership of women as members and especially for management committee members up to 50%. Inculcate the leadership quality by giving trainings. Unless and until 50 % women are not participating as members, no society shall be registered. Section 9 of The Maharashtra Co-operative Societies' Act, 1960–Registration can be amended in this regard. Need for Constitutional mandate for 50% reservation of women in credit co-operative sector. Accordingly, the state can make laws. Analogy of 73rd and 74th amendment be applied for enhancement of participation of women in credit co-operative sector. Sensitization of co-operative leaders, legislators, regulators to know the complexities of gender issues. Need to have rational disaggregated data of women participation and performance. Set indicators for equality regarding the management in credit co-operatives. Good governance of credit co-operative society led by women is to be highlighted and awarded. High technical quality training is delivered to members, as mandatory provision of the constitution. Deploy scheme and program for effective participation and performance of women as committee members. It has to be reflected in legislation and constitutional mandate. Further, the specific legislative support is needed to enhance the number of female members in the credit co-operative sector.

INCLUSION FORMALITIES AND EXCLUSION REALITIES OF SAME SEX COUPLES WITH REGARD TO THEIR MARRIAGE RIGHTS

- Archana Prakash¹

ABSTRACT

Homosexuality refers to a behavioural pattern of emotional, romantic or sexual attraction between the members of a same sex or gender. Even though the attitude is considered biological, the same sex couples continue to face deep and pervasive discrimination even in the matter of their consensual sexual conducts until 2018. In the historical year of 2018, a five- judge bench of the Honourable Supreme Court of India unanimously held that Section 377 of the Indian Penal Code 1860, insofar as it considered in the matter of sexual conduct in between consenting adults in private was unconstitutional.² The judgement was just a beginning in recognising the very private rights of homosexuals. There exists a long way to move ahead to realise the social inclusion of same sex couples in the midst of their desire to have a legalised married relationship. Denying some people the option to choose the partner of his/her choice, which is fundamental, creates a second class of citizens within this democratic framework, which is not suitable for a country that proudly holds the largest constitution in the world. The present research aims to show that the inclusion formalities which currently the country holds is actually far from realizing its true aim, that is the social inclusion of homosexuals, which in turn infringe their rights guaranteed under Article 14, 15, 19 and 21 of the Indian Constitution. Denying the right to get married is also a violation to the international laws, treaties and conventions. For the purpose of better analysis of the topic, a personal interview with the targeted group was held. For more information, the research relied on court rulings, parliament acts, international laws and news reports. The goal of the research is to highlight the need to address the exclusion realities of same sex couples with regard to their marriage rights, and to ensure their social inclusion.

Keywords: Homosexuals, Inclusion, Exclusion, Marriage

INTRODUCTION

Homosexuals are those people who are sexually or romantically attracted to the people of their same sex and homosexuality is the sexual interest in and attraction to members of one's own sex. In a study, a team led by Brendan Zietsch of the University of Queensland, Australia, mined several massive genome data banks including that of the UK Biobank to know about the sexual fantasies and the degree to which the 4,77,000 participants who have ever had sex with someone of the same sex, identified as gay or straight. When the researchers looked at the overall genetic similarity of individuals who at least once had a same-

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² Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

sex experience, genetics seemed to account for between 8 and 25 percent of the behaviour. The rest was presumably a result of environmental or other biological influences.³ Therefore, it should be admitted that homosexuality is not a crime or offence and it is just a pattern of the loving attraction in between the people of the same sex.

Homosexual couples in India faced pervasive discrimination even in the matter of their consensual sexual conducts until 2018. In that historical year a five- judge bench composed of Dipak Misra, CJI, Rohinton Fali Nariman, J, A. M. Khanwilkar, J, D. Y. Chandrachud, J and Indu Malhotra J of the Honourable Supreme Court of India in the case of *Navtej Singh Johar v. Union of India*, unanimously held that Section 377 of the Indian Penal Code 1860, insofar as it considered in the matter of sexual conduct in between consenting adults in private, was unconstitutional.⁴ Justice Indu Malhotra, the junior most and the only woman judge of the constitutional bench who dealt with the case expressed her opinion with the words “History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries”.⁵ The judgement was just a beginning in recognising the very private rights of homosexuals. There exists a long way to move ahead in order to realise their social inclusion in the fuller sense.

Sexual life is quiet a private affair of a person and if law pertaining in the country puts some restrictions on it, that law should be critically evaluated. The Great Britain, the country that actually wrote the Indian Penal Code in the year 1860, legalised consensual homosexual acts in the year 1967 through the Sexual Offences Act 1967 of the UK Parliament. However, India lagged far behind and it happened only in 2018. Now it is high time to move to the next phase, that is to give the right to marriage, which is largely demanded by the same sex couples all over India to get a legal outlook to their relationship. It could create a sense of belonging in them and gradually the societal mind-set would also change.

Therefore, to achieve the inclusion of the same sex couples into the mainstream, it is necessary to have some amendments in the existing laws. Some new laws are also necessary to wipe out the idea that the same sex couples are mere strangers to law. All the laws and acts that matter to them should be framed and amended only after consultations with the members of this respective group. Moreover, it is the need of the hour to find new feasible ways ahead that, in turn, provide to the overall social integration of the natural homosexual people to the mainstream.

RECOGNITION OF SAME SEX MARRIAGES: AN URGENT NEED

The Indian Constitution declares India a Sovereign, Socialist, Secular, Democratic, Republic and guarantees all its citizens Justice, Liberty, Equality and Fraternity.⁶ From this respective statement, it is clear that all the constitutional rights are guaranteed to all the citizens of India irrespective of their caste, creed, religion, sex or place of birth. Same sex couples are not an exception to this statement depicted in the fundamental law of the land. Therefore, they are also entitled to enjoy the same with full realization

³Sara Reardon, *Massive Study Finds No Single Genetic Cause of Same-Sex Sexual Behaviour*, Scientific American, 2019, available at: <https://www.scientificamerican.com/article/massive-study-finds-no-single-genetic-cause-of-same-sex-sexual-behavior/#>.

⁴Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

⁵Ushinor Majumdar, *History Owes an Apology: Justice Indu Malhotra on Section 377*, OUTLOOK, 2018, available at: <https://www.outlookindia.com/website/story/history-owes-an-apology-justice-indu-malhotra-on-section-377/316160>.

⁶The Constitution of India, Preamble.

of their identity. In this background, denying the right to choose the partner of their choice is like showing disrespect to the Constitution, and it is a violation of the same.

A person's sexuality or sexual orientation determines towards whom they do or do not feel sexual or other attraction. Typically, the attraction is sexual or romantic. There are many sexual orientations and people with one or more may find that their orientation changes over time: Alloromantic, allosexual, androsexual, aromantic, asexual, autoromantic, autosexual, alicurious, airomantic, isexual, demiromantic, demisexual, gay, gynosexual, gynosexual, heteroromantic, heterosexual, homoromantic, homosexual, lesbian, monosexual, multisexual, pansexual, panromantic, polysexual, queer, skoliosexual, spectra sexual etc. are some types of sexualities, and it is not an abnormal thing.⁷ Marriage is not like a license to have sexual intercourse. In addition, the institution of marriage is not working to keep the population rate at a pace. The concept of traditional marriage has transformed and marriage as always being between one man and one woman is inaccurate now.⁸ Therefore, if a person wants a union with another one from the same sex or gender, there is no wrong at all as the purpose of marriage is not just limited to the realm of procreation.

As of now, two consenting adults of any sexual identities can have a 'social marriage; but in order to make it legal, same sex couples do face hurdles, and they don't have any right for the same. The law doesn't allow them for the registration of marriage, inheritance, succession, adoption, maintenance of the spouse and children, guardianship etc. among others. There are various rights arising out of a marital tie which includes medical and health benefits, tax benefits, parental rights, social security benefits on the death of the spouse etc. which is highly restricted to homosexual couples because of the current legal framework. So, change is an urgent need to realise their social inclusion and it just began with the 2018 judgement.

HOMOSEXUALITY: THROUGH THE AGES

Homosexuality is a normal part of adult sexuality and it is not a new thing. The Hindu Khajuraho temples are famous for their kind of sculptures that contain several depictions of homosexuality that acknowledges that people engaged in homosexual acts. Besides, Valmiki Ramayana portrays the incident where Hanuman saw the intimate scene of a Rakshasa woman lovingly kissing another woman. It is also widely believed that Lord Ayyappa was born out of Lord Shiva and Lord Mahavishnu, when Mahavishnu changed to Mohini.

Apart from these, Ramayana tells another interesting tale that Lord Shiva appeared in the dreams of the widowed queens of a king named Dilip who died without leaving an heir and told them that if they are ready to love each other, they would have a child. The queens did the same and one of them got pregnant. The Mahabharata also has an interesting story about Shikhandini, the feminine warrior of the time, who was raised as a prince and even got married to a woman. Manusmriti, the very popular law code, provides for punishment to homosexual men and women. In Kautilya's Arthashastra too there are mentions

⁷ Veronica Zambon, *What are the different types of Sexualities?* Medical News Today, 2019, available at: <https://www.medicalnewstoday.com/articles/types-of-sexuality>.

⁸ The Editors of the Encyclopaedia Britannica, *Obergwell v. Hordes*, Encyclopaedia Britannica, 2015, available at: <https://www.britannica.com/event/Obergefell-v-Hodges>.

regarding homosexuality.⁹ Even though this much of mentions acknowledges the existence of homosexuality in those days, it was only in the year 2018, that the consensual sexual intercourse in between them became decriminalised. Now, they desire to have a legal marriage, not a social one alone and there is no ground for not allowing the same. If marriage is only for procreation, infertile couples or couples who do not wish to have children would also be prevented from marriage. So, such arguments have no base in modern society.

SAME SEX MARRIAGES FROM THE CONSTITUTIONAL POINT OF VIEW

Part III of the Constitution gives a set of fundamental rights. These rights are very important in the sense that it gives protection to all the citizens irrespective of their caste, creed, religion, gender, place of birth etc.¹⁰ In fact, this particular part III of the constitution reflects the true spirit of democracy because it is enforceable through the court of law. But, LGBTQI in India had faced violation of their fundamental rights on a large scale until 2018, and still there exist long ways for them to move ahead to enjoy the rights in the complete sense.

The right to marry is integral to the right to life under Article 21 of the Indian Constitution.¹¹ The right to marriage is also strongly stated under Human Rights Charter within the realm of the right to start a family. The right to marry is a universal right and it is available to everyone irrespective of their gender and without subject to the consent of anyone else other than the persons involved. On 5 February 2018, the Supreme Court ruled, in a case involving caste councils interfering in marriages, that "no one, either individually or collectively, has the right to interfere in a marriage between two consenting adults."¹² So, when there is a restriction on the right to marry it seems to be an infringement on the fundamental rights enshrined in part III of the Indian Constitution.

In March 2018, the Supreme Court, in the case of *Shakti Vahini v. Union of India*,¹³ held that when two adults decide to marry out of their own interest, they choose their path, and it's their will, they have the right to do so and any attack on the said right is a constitutional violation. An adult has the fundamental right to marry a person of their choice. Thus, while jointly reading of *Shakti Vahini* case and *Navtej Singh Johar v. Union of India*,¹⁴ the September 2018 ruling decriminalising consensual sex in private, could definitely lead to the recognition of same-sex unions within the marital tie too.

Article 14 of the Indian constitution guarantees equality before law and equal protection of law.¹⁵ Here, equality acts as a symbol which depicts the full enjoyment of rights. When somebody gets the rights and somebody is denied the same, it becomes a clear violation of fundamental rights under article 14 of the constitution. If all others have the right to marry the person of his/ her choice and homosexuals are denied the same, there exists an inequality and it should be resolved. If the intelligible differentia and rational

⁹India Today Web Desk, *Homosexuality in Ancient India: 10 instances*, India Today, 2018, available at: <https://www.indiatoday.in/india/story/10-instances-of-homosexuality-among-lgbts-in-ancient-india-1281446-2018-07-10>.

¹⁰ The Constitution of India, PART III.

¹¹Antim Amlan, *Right to Marry in India: An Analysis of Hadiya Case*, MYADVO, 2018, available at: <https://www.myadvo.in/blog/right-to-marry-in-india-hadiya-case/>.

¹² Anusha Sony, *Supreme Court on Khap panchayats: When two adults marry, no third party can interfere*, India Today, 2018, available at: <https://www.indiatoday.in/india/story/supreme-court-on-khap-panchayats-when-two-adults-marry-no-third-party-can-interfere-1162088-2018-02-05>.

¹³*Shakti Vahini v. Union of India* (2018) 7 SCC 192.

¹⁴*Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

¹⁵ The Constitution of India, Part III.

nexus are considered, they should gain more rights, as they are treated strangers when compared to others. Similarly, Article 15 of the Indian constitution prohibits all kinds of gender bias and gender-based discrimination.¹⁶ The State is not expected to discriminate any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them. Even after having these rights in the constitution, homosexuals still face direct and indirect restrictions upon their rights, including their marriage rights.

Discriminating the individuals on the basis of sexual orientation amounts to the violation of Article 14 and 15 of the constitution. Each one has a gender expression including the sexual expression and just based on their rightful expression if any kinds of discrimination take place it violates the fundamental right to expression under Art. 19(1) (a). Protection of sexual orientation is at the core of the fundamental rights, and that rights of homosexuals along with the others are real and founded on constitutional principles and they are not an exception.¹⁷

Right to marry is an inherent right in the liberty of a person and prohibits the states from depriving the same. The right to marry is actually guaranteed by equality provision, which restricts the state from denying the same, because there is a close connection between the concept of liberty, the freedom to choose the partner and equality, that freedom should be applied equally. As far as marriage is fundamental, it should apply with equal force to same sex couples too like that of others. This fact should compel a free and independent judiciary like that of India to highlight that same-sex couples may exercise the fundamental right to marry.¹⁸ Article 21 of the Indian Constitution gives everyone the right to choose, the right to privacy, the right to autonomy etc. which is very fundamental and which cannot be restricted. So, the denial of marriage rights of homosexuals amounts to an utter violation of the rights enshrined in part III of the Indian constitution.

Article 21 of the Indian constitution guarantees Right to life and Personal Liberty. The right to life depicted here does not define mere animal existence; but to live with dignity. If someone has the right to choose the partner to live with, and some others are denied the same, that will obviously affect their dignified existence. Recently, the Supreme Court held in *Shakti Vahini v. Union of India and others*¹⁹ that the right to marry a person of one's choice is a fundamental right under Article 21, 19(1)(a) and 14 of the Constitution of India. Freedom of speech and expression coupled with life and personal liberty highlights the right to choose a life partner. There is, therefore, no reason for not allowing this right to marry to the homosexual couples apart from blind prejudice and lack of understanding of the homosexual community.²⁰

SAME SEX MARRIAGES AND SPECIAL MARRIAGE ACT 1954

Marriage is a transformative act from the point of view of both the partners involved in the union. Inspired from a piece of legislation proposed during the late 19th century, the Special Marriage Act 1954 came into effect with provision for civil marriage for people of India and all Indian nationals in foreign countries, irrespective of religion or faith followed by the parties. The soul object behind the Act is that

¹⁶ The Constitution of India, Part III.

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

¹⁸ The Editors of the Encyclopaedia Britannica, *Obergwell v. Hordes*, Encyclopaedia Britannica, 2015, available at: <https://www.britannica.com/event/Obergefell-v-Hodges>.

¹⁹ Shakti Vahini v. Union of India, (2018) 7 SCC 192.

²⁰ Editors of Kanoonirai, *Right to Choose Life Partner is a Fundamental Right*, Kanoonirai, <https://www.kanoonirai.com/every-person-has-right-to-choose-his-life-partner-of-his-own-choice/>.

people from different religious backgrounds can come together in the bond of marriage.²¹ While considering some provisions of the Act, it can be summarized as gender neutral to some extent.

Sections 4 to 14 of Chapter II of the Special Marriage Act deals with solemnization of Special Marriages. Section 4 (C) says that the male has completed the age of 21 years and the female the age of 18 years can be married under the act. The said part is not putting any restrictions upon the marriage between two homosexuals. Further, Section 4 (c) which sets out the age of marriage uses the article “the” before male and female and not the article “a”. Unlike the article “a”, the article “the” is applied generally and not specifically. Hence, it can be interpreted as “all males”, who intend to marry a person of same gender or opposite gender under this Act should be 21 years of age and “all females” who intend to marry a person of same gender or opposite gender under this Act should be 18 years of age. Apart from that, the Act uses some other words like “either party”, “the party” or “the parties” in Sections 8, 11 and 12 of Chapter II of the Act. And the words “any person” or “a person” used in Sections 20, 21 and 21-A of Chapter IV of the Act all together shows that the legislature used gender-neutral words instead of gender-specific words to provide legal framework to same-sex couples intending to marry to take the benefit of this Act. So same sex marriage is possible under the said Act in the very first look itself.²²

Though Special Marriage Act 1954 does not exclude homosexual unions from its ambit expressly, the Act carries a heterosexual undertone in its language as it actually shows marriage as a tie between a male and a female or between a bride and a bridegroom.²³ That undertone should be changed to realise the inclusion of those people who have suffered ignominy and ostracism through centuries up to certain extent.

RECOGNITION OF SAME SEX MARRIAGES: INTERNATIONAL DIMENSIONS

Directive Principles of State Policies (DPSP) are the guidelines to be kept in mind while making laws and policies. Even though it is non-justiciable, it is expected to give effect as time passes and as the situation demands. Article 51 of the Constitution, which belongs to the DPSP, promotes international peace and security. It highlights respect for international law and treaty obligations. Article 16 of the Universal Declaration of Human Rights (UDHR) guarantees men and women of full age without any limitation due to race, nationality or religion have the right to marry and start a family.²⁴ Here, it is not said that the marriage should be between men and women. It gives freedom to choose or to select. Disrespect to such a very basic right is not a good sign for a democratic country like that of India, which belongs to the UN, from the very beginning of the UN itself.

In the month of December 2000, despite opposition from the country's Christian Democratic Party, a legislation was passed which expanded the definition of marriage to include people of the same sex in Netherland, which became the first country to legalize the same sex marriage. Later the countries like that of Belgium (2003), Spain (2005), Canada (2005), South Africa (2006), Norway (2009), Sweden (2009),

²¹ India Today Web Desk, *What is Special Marriage Act, all you need to know?* India Today, 2021, available at: <https://www.indiatoday.in/information/story/what-is-special-marriage-act-all-you-need-to-know-1776395-2021-03-06>.

²² Dormann Dalal, *Scope of same sex marriages and gender neutrality of the Special Marriage Act*, The Leaflet, 2020, available at: <https://www.theleaflet.in/scope-of-same-sex-marriages-and-gender-neutrality-of-the-special-marriage-act-part-i>.

²³ Nishanth Sirohi, *LGBTQ: Petition for marriage Equality filed in Kerala High Court*, The Leaflet, 2020, available at: <https://theleaflet.in/lgbtq-petition-for-marriage-equality-filed-in-kerala-high-court-2/>.

²⁴ Universal Declaration of Human Rights, Article 16 .

Portugal (2010), Iceland (2010), Argentina (2010), Denmark (2012), Brazil (2013), France (2013), Uruguay (2013), New Zealand (2013), Ireland (2015), Columbia (2016), Finland (2017), Austria (2019) etc. legalized same sex marriages. On 17 May 2019, the Taiwan legislature passed a bill legalizing same sex marriage, which made Taiwan the first country in Asia to do so.²⁵ As far as India is concerned, it is the largest democracy in the world, and it is the country that holds the lengthiest constitution, and guarantees so many rights to the people. The same India is blind in recognising the union of homosexual couples is not a good sign that suits 21st century.

In the largest study of its type in the world, the researchers of the University of Melbourne under the leadership of the lead researcher Dr. Simon Crouch, surveyed 315 same-sex parents and 500 children. The research interestingly found that children raised by same-sex partners scored around 6 per cent higher than the general population on measures of physical and mental health and family cohesion. Same sex couples are not bothered about the traditional notions of family life like that of gender roles, and that itself helped them to lead a harmonious and peaceful life.²⁶ Who can mould a child better is entirely depended upon the way the parents are socialised. The stereotype that a child moulded by same sex parents would not be fair and that would affect the mental growth of the child cannot be considered as a valid point because an estimated 4.5% of all Indian households are run by single mothers, says a UN report.²⁷ If same sex couples are not good to mould a child, then how the idea of a single parent can be justified?

There is a wide demand from the LGBTQI community to legalise same sex marriages because they are well aware that marriage automatically grants legal and financial privileges to couples and very importantly marriage provides social benefits such as societal recognition which is directly linked to the social inclusion of those persons who are considered as strangers to law. Article 23 of the International Covenant on Civil and Political Rights (ICCPR) places an obligation on nations to protect the right to marry. ICCPR also highlights the right of men and women of marriageable age to marry and to found a family shall be recognized. Because according to ICCPR, the family is a fundamental unit of society and when states and society fail to recognize same sex marriage, those states are trying to treat same sex couples unequally due to the automatic advantages associated to other couples upon marriage.²⁸

Sexual harassment of women at workplace (Prevention, Prohibition & Redressal) Act 2013 is actually a broadened version of the Vishaka guidelines. It has a backing of Committee on the Elimination of Discrimination against Women, an international treaty adopted in 1979. Even though it is not mandatory to respect international treaties as it is highlighted in the part of DPSP only if it ensures justice and equality to the people in a way or another giving effect to the same will be appreciable. And a democratic

²⁵ Josie Green, 29 *Countries Where Same Sex Marriage is Officially Legal*, USA Today, 2019, available at: <https://www.usatoday.com/story/money/2019/06/13/countries-where-same-sex-marriage-is-officially-legal/39514623/>.

²⁶ Editor, *Children raised by same-sex couples healthier and happier research suggests*, 2014, available at: https://www.abc.net.au/news/2014-07-05/children-raised-by-same-sex-couples-healthier-study-finds/5574168?utm_campaign=abc_news_web&utm_content=link&utm_medium=content_shared&utm_source=abc_news_web.

²⁷ Ambika Pandit, *Single mothers' heads 4.5 of all Indian Households*, The Times of India, 2019, available at: <https://timesofindia.indiatimes.com/india/un-report-13-million-households-in-india-where-lone-mothers-live-alone-with-children/articleshow/69949845.cms>.

²⁸ United Nations Humans Rights, International Covenant on Civil and Political Rights, Office of High Commissioners, available at: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

country like India should do the same in the matters relating to the marriage rights of same sex couples as there is no ground to oppose the same and the international perspectives do support the same.

WAY FORWARD: CONCLUSION

It's easy to fictionalize an issue when you are not aware of the many ways in which you are privileged by it - Kate Bornstein

Even after decriminalising the consensual private sexual conduct in between the homosexuals, they are still forced to come together to assert their rights enshrined in the Indian Constitution which is meant to guarantee to all without any discrimination. This means that, still they are subjected to ignorance, prejudice and sometimes hostility. This indicates that the society is still unaware about even the existence of these people and considers them as strange. In order to change this societal trend, it is essential to have more inclusion strategies to be adopted and the first and foremost should be an option to legalize their marriage which has been the large-scale demand of them for a very long time.

Nikesh Usha Pushkaran and Sonu MS, the first gay couple in the country to file a writ petition in the Kerala High Court (HC) on January 24, 2020, demanding the recognition of same-sex marriages, so that same sex couples can claim rights like adoption or inheritance along with registration. Their petition is still waiting for the reply from the state and central governments²⁹. Even after making this much of fight in the legal sphere the same sex couples are not optimistic in realising their marriage rights as because they are well aware about the way Indians still look at them. Recently the Centre has given its opinion for the petitions filed in Delhi High Court in October 2020 in which the Centre's counsel strongly stated in an affidavit that decriminalisation of Section 377 of the Indian Penal Code cannot be considered in the sense of a fundamental right for same sex couples to marry.³⁰ The centre strongly stated that the legal framework of any nation, be it by way of codified law or otherwise, evolves, based on societal values, beliefs, cultural history and many other factors and none of them favours the homo sexual marital union. This argument is of no base, and it is purely undemocratic to consider homosexuality as an unusual thing and homosexuals as mere strangers.

In the year 2011, a Haryana court stepped in to grant recognition to a same-sex marriage, involving two lesbian women who married each other by signing an affidavit before a public notary at Khedka village in Gurgaon district. In the case, the state police gave them full protection against all heavy attacks from the orthodox villagers and relatives; in fact, the court helped the couple to safeguard their relationship.³¹ It is a hard reality that even after the 2018 judgement also homosexuality is still connected with sin in the mainstream public opinion. So, social inclusion has really proved to be a daunting task. The society can only move ahead with the task of inclusion gradually, which requires the full cooperation from the society itself as a whole. For the same it should realise that homosexuality is not an abnormality, an unnatural thing or an illness. So, in my very opinion, proper education is the first and foremost necessity

²⁹ Anjana George, *We are sure court will protect our rights: Nikesh and Sonu, Gay couple*, The Times of India, 2021, available at: <https://timesofindia.indiatimes.com/city/kochi/we-are-sure-court-will-protect-our-rights-nikesh-usha-pushkaran-and-sonu-ms-gay-couple/articleshow/81231251.cms>.

³⁰ Samanwaya Routray, *Same Sex Marriages Cannot be Given Legal Sanctions: Government*, The Economic Times, 2021, available at: <https://economictimes.indiatimes.com/news/politics-and-nation/same-sex-partners-not-comparable-with-indian-concept-government/articleshow/81209328.cms>.

³¹ Prem Chaudhary, *The Agony of being Dutte Chand*, The Tribune, 2019, available at: <https://www.tribuneindia.com/news/archive/comment/the-agony-of-being-duttee-chand-781376>.

to realise social inclusion and for the same a multi-disciplinary approach has to be adopted as the matter of homosexuality has to be seen from different areas of human knowledge like that of medical/biological science, social studies, legal studies etc. It is necessary to take conscious steps in the right direction to ensure that the legal guidelines and government policies act as a perfect tool to improve the overall life of homosexuals by primarily granting them the right to have a legalized married relationship.

THE RIGHT TO IDENTITY: IMPLICATIONS ON HEALTH

A Critical Analysis of Transgender Persons Act, 2019

- Dr Dhananjay Mankar¹, Dr Pulatsya Thawait²

ABSTRACT

Transgender is an umbrella term that includes people from a broad spectrum of gender identity, gender expression and assigned sex. Historically, members of this community have faced discrimination because of being falsely categorised as mentally ill. In its ICD 11 classification of diseases, WHO has removed gender incongruence from its list of mental disorders. The transgender community forms one of the most underprivileged sections of our society. They face discrimination, violence, and neglect because most people in society don't understand them. Even though the community traces its roots in Indian Mythology like Ramayan, the current attitude toward the transgender community came with the rise of Imperial power. There is a need for robust education, law, and healthcare initiatives to alleviate this community from its marginalised state. The community hoped to get relief from these atrocities with The Transgender Persons (Protection of Rights) Act, 2019. The situation for the community hasn't changed much because of the gaps in the Act and the inability of the institutions to implement the Act in their respective areas. This paper presents the implications of the Act on the Health of the Transgender community. The Transgender Persons (Protection of Rights) Act, 2019³, is analysed through a social lens. Exploratory research based on secondary data was done to capture the intricacies of the Act and its implications on the health of the Transgender community. The efforts to improve the condition of the Transgender community in our country are incomplete without proper execution of the Act enacted for their welfare. The health inequity needs to be addressed not just through health interventions but a holistic approach toward their social, economic, and political upliftment. Transgender representation in all the sectors will ensure a sustainable improvement in their status, giving them the rights and pride to be equal citizens of India.

Keywords: Transgender, Law, Health

INTRODUCTION

Once a revered and respected part of Indian society, members of the transgender community now live marginalised lives in the shadows. They have been denied even the most basic rights awarded to citizens of our country. The community faces violence, neglect, and discrimination because of being falsely categorised as mentally ill. In its ICD 11 classification of diseases, WHO has removed gender incongruence from its list of mental disorders. With a growing body of research, it is evident that

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³ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019).

transsexualism is not a mental disorder, but the general perception and attitude towards the community persists in society⁴.

This community finds mention in various mythological and Vedic texts, for example, Ardhnarishwar form of Shiv, Shikhandi in Mahabharat, and Tritiya Prakriti in some versions of Ramayana where Ram blesses them. These texts also tell us that they were a part of society and never stigmatised or discriminated against.

Tracing the negative attitude historically, we must recognise the role of imperialism in the lives of the transgender community.

The imperialist powers brought with them rigid concepts of the gender binary. With the increase in their influence over the Indian subcontinent, beliefs and perceptions started getting appropriated in accordance with the western way of thinking. The first instance of legal discrimination came with Criminal Tribes Act (CTA) 1871. Over the years, it went through various amendments and finally, in 1924, CTA was implemented in all presidencies of Imperial India⁵. In the Act, the entire community of *hijra* persons was deemed as innately criminals, and the Government targeted all *hijras* who were involved in kidnapping and castrating children and dressed like women to dance in public places³. The criminalisation of a minority without much understanding of their culture and practices had ongoing repercussions on their well-being and can still be seen in India.

Hope for the community came in the Transgender Persons (Protection of Rights) Act 2019. But, even after the Act was passed, the situation hasn't changed much. This can be attributed to a lack of understanding about the community, resistance to change in social perception, failure to implement said reforms in institutions and most importantly, loopholes in the Act itself. For the given paper, the Act will be looked at from a social lens, and its implication on the health of the transgender community will be discussed.

DEFINING TRANSGENDER

In Chapter 1, The Act defines Transgender Person as “a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (Whether or not such person has undergone Sex Reassignment Surgery or hormone therapy or laser therapy or such other therapy), a person with intersex variations, genderqueer and person having such socio-cultural identities as *kinner*, *hijra*, *aravani* and *jogta*.”⁶

The Act groups the Intersex community with the Transgender community, which shows the lack of sensitivity with which the Act was formulated. They are separate entities with unique issues, and for an Act that will have severe implications on people's lives, it should have made better efforts to define the communities involved. With the lack of awareness in the general population, such gaps can give rise to misconceptions that will not help anyone.

⁴ Titia F. Beek, Peggy T. Cohen-Kettenis, *et. al.*, *Gender Incongruence/ Gender Dysphoria and its Classification History*, International Review of Psychiatry, 2015.

⁵ Jessica Hinchy, *Obscenity, Moral Contagion and Masculinity: Hijras in Public Space in Colonial North India*, Asian Studies Review, 2014.

⁶ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019).

DISCRIMINATION

Discrimination can be defined as barring people from accessing their rights based on their gender, caste, colour, social and economic status or sexual orientation. Stigmatisation is the primary factor for discrimination of this community. Even though the Criminal Tribes Act was outlawed in 1949⁷, India's negative social attitude towards the community has persisted. The community still faces challenges in accessing education, employment and healthcare, living marginalised lives and adding the discrimination, the chances of alleviating from their current status are slim. The Act, which is meant to give the Transgender community their rights, also fails to address discrimination effectively.

The Act in Chapter 5.12⁸ directs that no transgender person should be separated from their parents or are discriminated against in the family. But the Act fails to mention the authority responsible for ensuring proper implementation. Because of stigmatisation, transgender persons and children are often abandoned. With a lack of institutional shelter support, most end up on the streets, fending for themselves and indulging in sex work or beggary, adversely affecting their health. Drug and alcohol abuse is also prevalent in such individuals, which adds to adverse health given the limited access to the healthcare system.

Chapter 6 obligates educational institutions to provide “inclusive education”, which in Chapter 1. 2(d) of the Act⁹ is defined as a system of education wherein transgender students learn together with other students without fear of discrimination, neglect, harassment or intimidation and the system of teaching and learning is suitably adapted to meet the learning needs of such students. The definition fails to capture the essence of Inclusivity itself. The inclusion of transgender students in a class would not change social perception. It will subject the students to a hostile environment and bullying and harassment affecting their mental health. Combating stigmatisation of the community can be ensured by including them in the classroom and by creating a curriculum that is inclusive and sensitive to issues of the transgender community across all levels of education in our country. Measures to sensitise students from an early age will ensure the inculcation of values of equality and respect.

The worst example of a non-inclusive curriculum is found in medical education, where terms like “Sodomy” are still used in some books with sections like “Unnatural offences”¹⁰ describing various aspects of the LGBTQIA+ community. When curriculums aren't revised, keeping recent advances in context, they perpetuate false information, affecting mass opinion and subjecting a community to ridicule and stigma. A doctor who has been taught to believe that transsexualism is a mental disorder will not be able to make a proper diagnosis when treating a transgender patient with any ailment and, in turn, will affect the health-seeking behaviour of the community, thus creating a vicious cycle of misinformation and lack of trust which eventually adversely affects the health of the community.

One aspect of discrimination that the Act fails to recognise is the Right to Inheritance¹¹. In the absence of education and employment opportunities, inheritance may be the only option for the Transgender community for earning a livelihood. Due to the gender binary nature of Inheritance laws in India, the

⁷ Jessica Hinchy, *Obscenity, Moral Contagion and Masculinity: Hijras in Public Space in Colonial North India*, Asian Studies Review, 2014.

⁸ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019).

⁹ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019).

¹⁰ Dr K. S. Narayan Reddy, *The Essential of Forensic Medicine And Toxicology*, p. 427 (33rd ed. 2014).

¹¹ Karan Gulati and Tushar Anand, *Inheritance rights of transgender persons in India*, p. 5 NIPFP, 2021.

Transgender community is excluded from any chances to own or claim inheritance. A negative attitude towards a transgender person from a family will result in the person being an outcast, and with no claims to inheritance, they are subjected to poverty. We cannot deny the gross implications of such instances on their physical and mental health.

Thus, the Act fails to follow the landmark judgement of *NALSA Vs Union of India*, 2014¹², where the Apex Court recognised that under Article 15 and Article 16, discrimination on the ground of “sex” is explicitly prohibited and includes the Transgender community.

RECOGNITION OF IDENTITY

In the *NALSA Vs Union of India Judgement* 2014, the Apex Court under Article 21 of the Indian Constitution interpreted self-expression as an essential part of a person’s identity and to live with dignity. The court also noted that Article 14 (Right to Equality)¹³ and Article 19(1) (a)¹⁴ were framed in gender-neutral terms and must include transgender persons.

The right to Identity and Freedom of Expression thus granted are not dependent on the validation of any authority or person.

The Act, on the other hand, puts the onus of a Transgender person’s identity in the hands of the District magistrate subject to “such procedure and such form and manner, within such time”¹⁵. The Act fails to explain what “such procedures” mean. Such ambiguity in framing an important chapter shows a lack of understanding of transgender identity and disregards a person’s fundamental right to self-identity. Further, the requirement of another certificate after surgery to change gender, requiring a certificate from a Medical officer or Medical Superintendent and then get it verified by the Magistrate to change name and sex in official documents, makes a transgender person dependent on the authority just to access their Right to Identify. We must also keep in mind the lack of awareness and sensitivity in the system and society. The measures listed above in such an arbitrary language will expose the transgender individual to various levels of authority and may subject them to further harassment.

WELFARE MEASURE BY GOVERNMENT

The chapter on welfare measures puts forward the obligation of the appropriate Government to safeguard the interest of the Transgender community. However, it fails to provide guidelines for making such welfare schemes. Does the question arise what will happen when the appropriate Government does not do so? The ambiguity in all the measures suggested, given the background of insensitivity and lack of situational analysis about the condition of the transgender community, such obligations do not fructify towards welfare. The Act, to safeguard the interest of an entire community, must have proper institutional guidelines on which “appropriate governments” could take action.

The Act recommends formulating welfare schemes and programmes to promote livelihood opportunities and vocational training to promote self-employment. According to Press Information Bureau, Press

¹² National Legal Services Authority v. Union of India, AIR 2014 SC 1863.

¹³ The Constitution of India, art. 14.

¹⁴ The Constitution of India, art. 19, cl. 1(a).

¹⁵ The Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019).

Release¹⁶ dated 16 Mar 2021, only 330 members of the community have been given vocational training. An allowance of 1500/- was directly deposited to accounts of 5711 transgender persons during the COVID 19 lockdown. According to Census 2011 data, there are 4.9 lakh, Transgender persons in India, and it is fair to assume this number is highly understated. To provide training to 330 individuals and small monetary support to 5711 is a mockery of the welfare initiative.

The first welfare measure that should be taken is the proper representation of the community in all the Government systems. It is imperative to acknowledge that equal representation of all sections of society in a system helps alleviate their marginalisation. To extend reservations in an educational institution, employment opportunities and promotion in all sectors will ensure a step by step upwards movement of the Transgender Community in India.

HEALTH

The Act upholds the constitutional value of Articles 21 (Right to Life)¹⁷, 15 (Prohibition of Discrimination)¹⁸ and 16 (Right to Equality)¹⁹ by prohibiting discrimination against a transgender person in healthcare settings. Good Health is an integral part of life and must be ensured for all persons.

The Act has various provisions to safeguard the Health of the Transgender community but fails to impact it. Negative attitudes, stigmatisation because of HIV/AIDS, discrimination, lack of knowledge, and research in medical practice are significant barriers for the Transgender community to access the healthcare system.

The transgender community bears a more significant burden of HIV/AIDS globally. According to UNAIDS Global AIDS update, 2020, transgender and gender diverse people have a 13 per cent higher chance of acquiring HIV, the prevalence in transwomen is 19 times higher than in other women, and the percentage of transgender people avoid seeking HIV testing due to stigma and discrimination range from 47% to 73%²⁰. In 2017, NACO reported that 45 per cent of Transgender people living with HIV are receiving targeted HIV interventions²¹. The number is expected to improve with measures as mentioned in Chapter 5 .15(a) in the Act.

We must also acknowledge that HIV/AIDs is not the only health issue the community faces. Sex reassignment surgery and hormonal procedures are not provided in most healthcare setups due to a lack of knowledge and training to offer them. Financial constraints form another barrier to avail of the said services. The Act asks for the inclusion of these procedures in the comprehensive Insurance scheme. However, NHA Health benefit Packages 2.0 user guidelines Sept 2020²², which lists the procedures covered under Ayushman Bharat Scheme, on page 14 clearly states hormonal therapy or any therapy for a sex change is excluded from the Scheme. The Government has ignored its recommendation for the welfare of a marginalised community.

¹⁶ Ministry of Social Justice And Empowerment, Schemes for Welfare of Transgender Persons 2021.

¹⁷ The Constitution of India, art. 21.

¹⁸ The Constitution of India, art. 15.

¹⁹ The Constitution of India, art. 16.

²⁰ UNICEF, *HIV and Transgender and other Gender Diverse People*, Human Rights Fact Sheet Series, 2021

²¹ NACO "Annual Report 2017-2018" p. 356.

²² National Health Authority, Health Benefit Package 2.0, User Guidelines September 2020, p. 14.

A transgender person is also denied healthcare service for any ailment because they are not allowed in most hospitals. They are humiliated, rudely behaved and made to feel bad about themselves due to stigma. This negative attitude affects their health-seeking behaviour, which negatively affects the health of an entire community. Though the Act directs healthcare facilities to be non-discriminatory, access is still being denied without a mechanism to ensure enforcement of such measures. This issue requires an approach from two fronts—sensitisation of the healthcare community and a check mechanism to ensure non-discrimination.

The Medical curriculum is still ignorant of the issues of the transgender community and LGBTQIA+ community in general. The medical fraternity has a significant impact on the perception of the population. The curriculum must be revised, and additional measures to inculcate sensitivity in healthcare professionals must be ensured if we hope to address the health issues of the transgender community effectively.

NATIONAL COUNCIL FOR TRANSGENDER PERSON

National Council for Transgender Person was formed under the direction of the Act to include dignitaries from various sectors with the Union Minister-in-charge of the Ministry of Social Justice and Empowerment, Chairperson, ex officio to work towards the welfare of the Transgender community. The Council also has representation from the Transgender community from five regions of India. Looking at the functions of the Council, it is merely an advisory body with no executive power and a complex bureaucratic structure.

The Act also disregarded the NALSA vs Union of India judgement, which advised National and State commissions. The effectiveness of said Council's efforts is yet to be seen.

OFFENCES AND PENALTIES

For decades, the transgender community has been at the receiving end of mental, physical, and sexual violence. There is no official data for violence against the transgender community because almost none of the cases are reported because of fear of further harassment and abuse by the perpetrators and police personnel. The only reliable data available for Transgender violence is SAHRA Human Rights violation Report, 2019²³. The report mentions that about 9% of Crimes against gender non-conforming individuals are reported to the police. However, 72% is reported to NGOs or other organisations. 66% of the reported cases are from Trans women. The most commonly reported violations include physical assault (40% of the cases). Rape and sexual harassment together constitute almost 17% of the cases. 10% of the cases are unlawful arrests, and 7% of the reported cases are blackmail.

In light of such a high prevalence of crimes against the community, compounded with the fact that most go unnoticed or are not reported, the penalties for offences fail to draw importance.

The penalty set for the offences against the Transgender community of any nature (physical, mental, social or sexual) is no less than six months to no more than two years with a fine. This chapter is a mockery of justice to be provided to a transgender person in case of an offence. To disregard the pain and anguish of a citizen of India and set a limit so low irrespective of the crime shows the empathy and

²³ SAHRA, "*Report on Human Rights Violations*", p23, Data Highlight, 2019.

attitude of the Government. It perpetuates the notion that the Transgender community is treated as “second class citizens” and is not afforded the respect and rights equal to other citizens.

IMPLICATIONS OF THE ACT ON HEALTH OF TRANSGENDER COMMUNITY

Policies and interventions for health are made, keeping healthcare as a core determinant of Health. Although we cannot deny it is a significant factor, there is more to Health than just providing healthcare. When we have to safeguard the welfare of a marginalised and impoverished community, we must look at health from a broader perspective.

Every facet of human life directly or indirectly affects health. Referring to the WHO definition of Health, “it is a state of complete physical, mental and social well-being and not merely absence of disease or infirmity”²⁴. Looking at the Act from this broader understanding of health, every chapter in the Act tries to address the community’s health from all facets, but some gaps fail to accomplish the task.

Prohibiting discrimination would help mental, physical and social aspects of health by giving equal status to a transgender person in society, ensuring access to education, employment and healthcare, and inculcating dignity. But, the failure to mention measures by which discrimination can be dealt with is a significant gap in the Act. Programmes to sensitise society, specifically teachers, officials, healthcare providers, and putting forwards stringent laws that ensure enforcement of such measures are necessary to protect all aspects of the community's health.

Recognition of identity would give the community a sense of belonging in the country as its legal citizens and provide them access to all the rights in the Constitution. Giving the onus of their authority and other individuals further subjects them to harassment and ridicule, affecting their mental health.

Directives for Welfare measures should have been mentioned after situational analysis of the community in various aspects. The Act was a hope for a community kept from the mainstream for decades. Specific instructions for their unique needs in the society would serve the purpose of welfare but regrettably, the Act fails to do so.

The Act states that no transgender person should be separated from their household. Abandonment and mistreatment at home are the first determinants of the health of the transgender community. To grow up in a safe and secure environment is the fundamental right and need of any child. The good mental, physical and social well-being of a transgender person could be ensured by prohibiting abandonment. However, with a lack of strict action and the appropriate agency to secure it, transgender persons are left to live in poverty and resort to begging and sex work.

Financial independence has the potential to remedy all aspects of health. Lack of education and vocational skills bars the community from becoming financially independent. Though measures are suggested to train and educate the community, action on said measures was not taken, leaving the community in poverty.

SUGGESTIONS

²⁴ World Health Organization, Constitution of the World Health Organization 1946, *Bulletin of the World Health Organization*, 80 (12), p. 983 – 984, International Health Conference (2002).

The gaps in the bill can be addressed by understanding and gauging the magnitude of the issues in the community. The following suggestions will help achieve the desired goals for the community.

- A thorough situational analysis of demographics, socioeconomic and health status of the transgender community will provide the policymakers with the necessary insights required before any amendments. We cannot help a community without understanding them and their issues.
- A committee of experts who have been working with the transgender community and their rights must be consulted in making amendments for it to be inclusive.
- Curriculums across the education system must be made more inclusive of sensitising society about transgender and gender diverse identities and do away with the myths around them.
- It is crucial to sensitise the medical fraternity by making necessary changes to the medical curriculum. The syllabus must be in sync with the latest trends in psychology and gender diverse research.
- Awareness and sensitisation programs for the Government bodies, especially those who would be stakeholders in Transgender Welfare initiatives, would be an essential step as it will help the community be more comfortable accessing the services.
- The National Council of transgender people needs to be more representative of the community as the community itself is very diverse, with each group having its own set of challenges. More power should be given than just as an advisory body.

CONCLUSION

India is the largest democracy in the world. We take great pride in our journey to be one nation with a confluence of culture, languages and religion. We have shown the world, time and again, that we can bounce back from any setback and thrive together towards harmony and peace. We are at the first step of an era of growth, prosperity and knowledge. We must also protect and nurture our roots to always be humble in the face of prosperity, but whatever we have and whatever we will have must be looked at from a social welfare lens. The principle of a democracy is for all citizens to be equal. The system must look after the rights and needs of minorities; otherwise, it has failed to live up to the morals of a democratic Constitution.

An Act made with little research, neglecting the suggestions of the advisory body and set in ambiguous language, fails to protect the vulnerable community it is meant to protect. Everyone deserves to live with dignity and without fear. How does the existence of one community affect the lives of others based on thoughts and stigma, which are now baseless? We cannot be hypocritical when we want to protect our culture on the one hand but choose to ignore another part of it because popular belief doesn't allow it. There is a dissociation between what is and what should be when we look at the systems to protect the people chosen by the people.

The Transgender Persons Act 2019 had the potential to improve the lives of one of the most vulnerable sections of our society. Every chapter had the instructions to benefit all facets of human life, but it failed to provide the tools to do so. What we need now is a conscious deliberation of the condition of the community.

We have an excellent opportunity to fill the gaps in the knowledge. With Census 2021, we can have near correct estimates of transgender demography. From there, we can have a thorough situational analysis of the status of the Transgender community. A holistic approach to transgender issues will enrich our knowledge, and better policy catering to the community's unique needs could be formulated. Make a regulatory mechanism that will ensure the laws are implemented. Special programmes for social and systemic sensitivity can help alleviate the community's social status. These measures aren't herculean if we set our mind to it. It is all about the political will that must take charge of protecting the lives of citizens who power our great democracy.

A STUDY OF FEMALE PARTICIPATION IN ELECTIONS AND THE CASE FOR WOMEN RESERVATION BILL FOR POLITICAL INCLUSION IN INDIA

- Kanika Gupta¹

ABSTRACT

Women empowerment and gender inclusivity have long been on the agenda of Indian development planning with successive governments reiterating their commitment towards this aim as expressed in the various plan documents. But despite the intentions, results are far from the expected in all prominent aspects of gender inclusiveness and political inclusiveness of women is no exception. India's political empowerment index has declined by 13.5 % according to Global Gender Gap Report 2021, combined with a decrease in the number of female ministers, from 23.1% in 2019 to 9.1 % in 2021. The recent revamped and expanded cabinet of the Modi Government is a step directed towards the effort to raise women participation and has eleven women ministers, which is highest in past seventeen years. But this also raises the participation in percentage terms to only 14.1 % which still comes out to be lower than previous years.

The discussion about difference in political participation of females as compared to males, has been explained on various premises and approaches. These include situational approach relating to family responsibilities which keep women out of workforce and in turn political participation. Besides these, the political socialization and structural approach based on overrepresentation of women in demographic groups which are not politically active are also considered.² Conscious efforts are required on the part of Government to mitigate the adverse fallout of factors which inhibit the political participation of women. This is imperative because political empowerment of women is not only a political science issue, rather it has long term socio-economic impact as proven in several researches.^{3,4} Inclusiveness in general is also considered as an integral tenet of a successful democracy,⁵ and therefore women's political inclusion is a significant factor in making India truly effective as the world's largest democracy truly effective. But

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² World Economic Forum, Global Gender Gap Report 2021, Geneva, Switzerland.

³ Highest in the last 17 years: 11 women ministers in Modi's new Cabinet, ToI, July 14, 2021 <https://timesofindia.indiatimes.com/india/highest-in-the-last-17-years-11-women-ministers-in-modis-new-cabinet/articleshow/84407588.cms>

⁴ Susan Welch, Women as Political Animals? A Test of Some Explanations for Male-Female Political Participation Differences, AM. J. POL.SC. 711, 711-730 (1977).

⁵ Angela High-Pippert & John Comer. Female Empowerment: The Influence of Women Representing Women, 19.4 WOM. POL. 53, 53-66 (1998).

historically, the participation in politics by women in India has been low despite sincere thought of increasing the same was given by leaders in the past.⁶

This paper discusses the female candidates' participation in the last two Lok Sabha elections in India and attempts to bring out the difference in the gender-wise participation rates in the last two elections. It has been found that female participation rates have been significantly low as compared to male participation in Lok Sabha Elections. Along with the numbers, this paper also discusses the impact of increasing the female participation in the mainstream Indian politics by analysing the results from various researches that have been undertaken in India to assess this impact on the political as well as socio-economic parameters^{7,8,9} Finally, the case of quota for women in the Centre and State legislatures and the factors to consider Women Reservation Bill have been discussed using references from past researches on the quota debate^{10,11,12} and the experience from the local government bodies where the reservation for women is already in effect.^{13,14,15}

Keywords: Political inclusion, Women political participation, Women Reservation Bill

INTRODUCTION

Women empowerment and gender inclusivity have long been on the agenda of Indian development planning with successive Governments reiterating their commitment towards this aim as expressed in the various plan documents. But despite the intentions, results are far from the expected in most of the aspects of gender inclusiveness and political inclusiveness of women is no exception. India's political empowerment index has declined by 13.5 % according to Global Gender Gap Report 2021¹⁶, combined with a decrease in the number of women ministers, from 23.1% in 2019 to 9.1 % in 2021. The recent revamped and expanded cabinet of Modi Government is a step directed towards the effort to raise women participation and has eleven women ministers, which is highest in past seventeen years.¹⁷ But this also raises the participation in percentage terms to only 14.1 % which still comes out to be lower than previous years. Discussions and debates regarding the role of reservation for women in the legislative bodies at the state and centre have been prominent since the last two decades with the Women

⁶ David E Broockman, *Do Female Politicians Empower Women to Vote or Run for Office? A Regression Discontinuity Approach*, 34 ELEC. ST. 190, 190-204, 2014.

⁷ Michael Coppedge et al., *Two Persistent Dimensions of Democracy: Contestation and Inclusiveness*, 70(3) J. POL. 632, 632-647, 2008.

⁸ Maroju R. Chary, *Women and Political Participation in India: A Historical Perspective*, IND. J. POL. SC., 119, 119-132, 2012.

⁹ Sonia R. Bhalotra et al., *Path-Breakers: How Does Women's Political Participation Respond to Electoral Success?*, No. 7771. IZA Discussion Papers, 2013, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363272.

¹⁰ Irma Clots-Figueras, *Are Female Leaders Good for Education? Evidence from India*, AM. ECO. J.: AP. ECO. 212, 226-243, 2012.

¹¹ Syed Ejaz Ghani et al., *Can Political Empowerment Help Economic Empowerment? Women Leaders and Female Labor Force Participation in India*, World Bank Policy Research Working Paper 6675, 2013, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/16890/WPS6675.pdf?sequence=1>.

¹² Kumud Sharma, *Power and Representation: Reservation for Women in India*, 6(1) AS. J.WOM. ST. 47, 47-58, 2000.

¹³ Suman Ojha, *Reservation of Women in The Indian Parliament: Lessons from Other Countries*, IND. J. POL. SC. 471, 472-476, 2009.

¹⁴ Praveen Rai, *Women's Participation in Electoral Politics in India: Silent Feminisation*, 37(1) S. AS. RES. 58, 69-75, 2017.

¹⁵ Lori Beaman et al., *Political Reservation and Substantive Representation: Evidence from Indian Village Councils*, 7(1) INDIAN POLICY FORUM, NCAER, 159-201, 2011.

¹⁶ *Supra* note, 2

¹⁷ *Supra* note, 3

Reservation Bill being introduced in Rajya Sabha in 2008 and also passed in the upper house in 2010. But it was not taken up further after the dissolution of the 15th Lok Sabha and hence this debate has been waged even with more rigor. Women rights activists have been pressing hard for the bill to be taken up in the lower house and the dismal performance of India as a country in terms of women participation in politics and their political inclusivity has made it imperative for the leaders to rethink how to improve on this front.

POLITICAL INCLUSIVITY FOR WOMEN

The discussion about difference in political participation of females as compared with males, has been explained on various premises and approaches like political socialization, situational approach relating to family responsibilities which keep women out of workforce and in turn political participation and the structural model based on overrepresentation of women in demographic groups which are not politically active.¹⁸ Conscious efforts are required on the part of Government to mitigate the adverse fallout of factors which inhibit the political participation of women because political empowerment of women is not only a political science issue, rather it has long term socio-economic impact as proven in several researches. High-Pippert & Comer (1998) discuss the positive influence of women political representatives in increasing the progress of women empowerment.¹⁹ Similarly, Broockman (2014) using a regression discontinuity approach, found the impact of female politicians on other women's participation in elections as voters or candidates to be significant.²⁰ Inclusiveness in general is also considered as an integral tenet of a successful democracy as emphasized by Coppedge et al. (2008)²¹ and therefore women's political inclusion is a significant factor in making India truly effective as the world's largest democracy.

But historically, the participation in politics by women in India has been low despite sincere thought of increasing the same was given by leaders in the past.²² Though many women leaders fought bravely on the forefront for India's independence, and there was a bright hope when independence came that women will be recognized in Indian politics and will have an increasingly progressive share in political leadership, the reality turned out to be different. Various social and psychological factors have become a hindrance in the women political inclusivity to gain ground in India despite its rich heritage of such participation in the times of war of independence.

PARTICIPATION OF WOMEN IN 16th AND 17th LOK SABHA ELECTIONS

As earlier stated, the percentage of women candidates participating in the Elections has been low in India. With the reservation applied in local bodies for women, the participation in local government bodies elections went up but it remained low in the state legislative assembly and the Lok Sabha elections. This paper brings out an analysis of the two recent Lok Sabha Elections in terms of the participation of women and the comparative difference between the participation of females with respect to males as evident from the data sourced from Election Commission. Table 1 and Table 2 present the number of male and female

¹⁸ *Supra* note, 4

¹⁹ *Supra* note, 5

²⁰ *Supra* note, 6

²¹ *Supra* note, 7

²² *Supra* note, 8

candidates who contested for the Lok Sabha seats from different states of India and also present the difference in male-female participation in percentage terms.

It can be seen from the tables, that in most of the states, the difference in male-female participation is more than 70 % which clearly exhibits the lack of political inclusivity for women in India. The reasons behind this stark relative difference may be many and warrant a detailed analysis to be taken up in further research.

Comparing the numbers in the 2014 and 2019 elections, it can be seen that not much progress could be made during the five-year period and the difference in gender wise participation rate improved only by a meagre 2 %. This is a manifestation of the slow pace of change in the socio-political structure of India in terms of gender bias and exclusion of women from mainstream politics.

This also points to the fact that in the absence of statutory provisions for enhancing female political participation, the time that might be taken for the inclusivity to come in Indian politics for women may take ages. India is far behind the other emerging nations in gender gap when it comes to political empowerment, as has been found by the subsequent Global Gender Gap Reports published by the United Nations in the past. To change this state of affairs, India needs to legislate the Women Reservation Bill which can prove to be the launchpad for women to enter the mainstream political arena by participating in State and National level politics. The beginning may be humble like that in local bodies with female candidates from the family being nominated only to fill for the males in the family, but that will give the stage to those women who have the leadership abilities to emerge and become empowered. This can further lead to more women participating in the political field as has been found in the various researches conducted in India and other countries.

IMPACT OF WOMEN'S POLITICAL PARTICIPATION IN SOCIO-ECONOMIC DEVELOPMENT

Various research studies that have been undertaken in India to assess the impact of a higher female participation in the mainstream Indian politics on the political and socio-economic parameters.

As for the political impact of women contesting the elections and winning, a significant contribution to research is there which presents evidence from a discontinuity regression analysis conducted for state elections in India where the female contestants and their male counterparts had a close election.²³ The study found that in cases where the women contestants participated and won the election, the subsequent elections in those constituencies reflected this success in the form of more women candidates being nominated by the political parties which have a major hold in Indian politics. This increase in women candidates was large and also significant as per their analysis. The reason for this increase was two-fold. Major reason was that the women candidates who won the previous election were supported for contesting again as the probability of their winning again was considered to be high by the parties. Second reason, though not found significant statistically with very few new women entrants as candidates in subsequent elections, still holds ground as a rationale for increase in female political participation as a result of women contestants winning. This reason stems from the reduced bias among the political parties against women which led to more parties giving opportunities to female candidates in the subsequent elections. The study did not find, however, any significant increase in the turnout of female voters due to

²³ *Supra* note, 9

a woman candidate contesting or winning from the constituency. Among the social outcomes of female leaders being in the mainstream political power, the most important is the impact they can have on education and health in the country. Clots-Figueras (2012) studies the impact of women leaders on the education in a country taking India as the case for evidence.²⁴ This study presents evidence of the positive influence that female politicians have on the level of education in their constituency district. The extent of the influence as found in this study was a 6 % increase in primary education attainment probability for individuals in the urban areas where female representatives in politicians increased by 10 %. Economic impact of women politicians in India has been examined by Ghani et al. (2013) who present an analysis of the effect of political empowerment on the economic empowerment of women.²⁵ The findings from the study exhibit a positive and significant impact of the duration of exposure to female politicians on the overall female participation in the labour force stemming from both direct channels and indirect pathways. These findings point to a very pertinent argument for the increase in political participation of women as a powerful policy tool for inclusivity in the country's labour force for women. This not only will lead to welfare of women but also result in a greater supply of labour and an inclusive economic environment with increase in female labour force participation rates in India. All these studies present compelling evidence of the positive political, social and economic impact of political inclusivity for women on India as a nation and make a ground for effective policy measures to be taken for ensuring this inclusivity.

THE CASE FOR WOMEN RESERVATION BILL

The case of quota for women in the Centre and State legislatures and the factors to consider Women Reservation Bill have been discussed in this section using references from past research on the quota debate and the experience from the local government bodies where the reservation for women is already in effect.

Sharma (2000) discusses the arguments advanced for reservation of women in the parliament and state assemblies and explores how these arguments based on equal provision of opportunities, prevention of discrimination and assurance of social justice present a strong case of feminist movement in India. This study discusses how balanced representation for females has the potential effect on a new set of priorities in development process and how it can lead to a change in the perspectives to various issues through equal opportunities to women for participating in the decision making by means of representation in the parliament, wherein the interests of women are often neglected due to majority of male parliamentarians.²⁶

Ojha (2009) presents an analysis from different countries to argue for the case of reservation for women in the Indian parliament and concludes that only by increasing numbers in the parliament would not suffice to bring the real political inclusivity for women though it can change the political face of India towards a more feminized public view.²⁷

Rai (2017) argues that with female voter turnout consistently increasing in the subsequent elections since 1995, Indian Government must take the representativeness of women and their increased participation in

²⁴ *Supra* note, 10

²⁵ *Supra* note, 9

²⁶ *Supra* note, 12

²⁷ *Supra* note, 13

the electoral activity with more seriousness and must take measures to pass the Women Reservation Bill.²⁸

CONCLUSION

India as a strong democracy needs to ensure political inclusivity for its women citizens. Research shows the positive influence that women politicians have on the economic, political and social outcomes in the society and arguments for reservation for women in the state and national legislatures are strong enough to be considered for the passing of the long pending Women Reservation Bill.

The gender inequality can be reduced by bringing more women into the political leadership. This has been proven by various research studies as mentioned in the above sections. Leadership by example is considered to be one of the most effective way of leading and therefore, if women leaders are proving themselves in the field of politics and contributing to the socio-economic development of their constituencies, it will be a significant motivating factor for other women in the country to participate in the development and progress of the country by taking various initiatives. Studies on the experience from Indian village councils and local government bodies where women reservation has already been put into effect also present evidence of the positive changes brought about by the reservation and the resultant increase in women participation in these governing bodies.^{29, 30, 31}

As with all other transformative changes, the process may be slow and may need an impetus in the form of women reservation which facilitates women in contesting elections and empower them to enter into an arena which has been predominantly male oriented. The Women Reservation Bill was passed by the Rajya Sabha in 2010 and this is evidence of the understanding among the upper house leaders at that time regarding the need for the bill to become an Act. It is time now that the bill is taken up in the Lok Sabha for debate and discussion and be considered as the first step towards building an inclusive political environment in the country for the women.

²⁸ *Supra* note, 14

²⁹ *Supra* note, 15.

³⁰ Klaus Deininger et al., *Does Female Reservation Affect Long-Term Political Outcomes? Evidence from Rural India*, 51(1) J. DEV. ST. 32, 34-42, 2015.

³¹ Richa Shanker, *Measurement of Women's Political Participation at the Local Level: India Experience*, Ministry of Statistics & Programme Implementation, India, 2014, available at: https://unstats.un.org/unsd/gender/mexico_nov2014/Session%206%20India%20paper.pdf.

**INCLUSIVITY AND
SOCIO-LEGAL ISSUES**

TRANSPARENT AND ACCOUNTABLE PROCEDURES FOR APPOINTMENT OF JUDGES FOR INCLUSIVE GROWTH OF DEMOCRACY OF INDIA

- Trapti Aggarwal¹

ABSTRACT

The members of the Constituent Assembly envisaged the judiciary as a bastion of rights and of justice. Fair and transparent appointment of judges is sine qua non for a democracy where THE rule of law is embedded. Indian Judiciary is well known for the protection of human rights, basic structure of constitution and protecting the environment etc. for their creative and positive work. But it is not possible without free and fair selection of judges. Appointment of the judge on the basis of political partisan, nepotism or other considerations other than merit cannot protect constitutional ethos. There is a long tussle on the point of appointment of judges between judiciary and executive. At the beginning the executive was prevailing, at the present time the judiciary is prevailing. A large number of cases have been decided but till now law is not certain. Due to this several posts of judges are vacant. Workload is increasing day by day. Credibility of Higher Courts is eroding day by day. Need of the day is to search for fair, accountable and transparent procedure for appointment of judges to restore the credibility of judges. The paper also seeks to search the journey of appointment of judges and conflict between judiciary and executive regarding appointment of judges. The paper tries to search for a better solution for the appointment of judges and to resolve the conflict between executive and judiciary.

Keywords- Appointment of judge, Collegium, Independent judiciary.

INTRODUCTION

“In a pluralist society judges are the essential equalizers. They serve no majority or any minority either. Their duty is to the law and to Justice. They do not bend the knee to the governments, to particular religions, to the military, to money, tabloid media, or the screaming mob. In upholding law and Justice, Judges have a vital function in a pluralist society to make sure that diversity is respected and the rights of all protected”.²

“The Collegium system has created an *imperium in imperio* (empire within an empire) within the Supreme Court”.³

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² Justice Michael Kirby and Poornima Advani, *All India Meeting of Chief-Justices of High Courts on Women Empowerment vis-d-uis Legislation and Judicial Decision*, 2021, available at:
<http://ncwapps.nic.in/pdfReports/All%20India%20Meeting%20of%20chief%20Justice.pdf>

³ Krishnandas Rajagopal, Supreme Court bank on collegium to fill judicial vacancies, *The Hindu*, 2021, available at:
<https://www.thehindu.com/news/national/supreme-court-says-no-hold-on-judicial-appointments/article7896145.ece>.

In a democracy, the role of the Judiciary is to safeguard the interests of the individual, and not to be influenced by the state. The separation of powers is not entirely in our Constitution. It provides for the distribution of powers to ensure that the organs of the Parliament do not clash with the established powers of others. The separation of powers is the basic structure of the Indian constitution.⁴ Framers of the Indian Constitution should have taken the advice of Montesquieu, who suggests that all power in one person or group of persons results in despotism. Therefore, for decentralization of power to check autocracy, he was in favour of vesting the power in three different organs of the government as the Legislature, the Executive, and the Judiciary.

The privilege to be a free and fair judiciary is a requirement of basic equity. Thoroughly considering the issue is the best method to guarantee that a judge has the proper amount of fair-mindedness. A judge who has the proper amount of unbiasedness is a vital component of the administration of equity.

Recommendation of Sapru Committee is that appointment of judges of Supreme Court should be by head of the state with consultation of Chief Justice of India and appointment of judges of high court should be with consultation of Chief Justice of Supreme Court of India and Chief justice of High Court of State and head of Unit (State).⁵ Two alternative methods for appointment of judges were suggested by the Constituent Assembly's ad hoc Committee.⁶ Unanimous opinion of the Constituent Assembly was that the Judiciary must be competent as well as independent from the executive.⁷ Dr. Bhim Rao Ambedkar was not in favour of giving veto power in the hands of the Chief Justice of Supreme Court because his opinion was that chief justice is also a human being. He had feelings like other human beings. Complete control in the hand of one person is not rationalized. On May 24, 1949, Dr. B. R. Ambedkar said that although the Chief Justice was an important and famous person, he was also a human being.⁸ Supreme Court's Judges shall be appointed by the President after consultation with the Chief Justice of India and High Court's judges as the President may deem fit.⁹ High Court's judges shall be appointed by the President after consultation with the Chief Justice of the Supreme Court of India, High Court's Chief justice and the Governor of the State.¹⁰ Since the Constitution was first drafted, various grounds have been considered for the appointment of judges. While the Law Commission of India had recommended the appointment of judges on the basis of merit, others have also criticized the same.

The independence of judiciary was further jeopardized by the appointment of Hon'ble Justice Nath Ray as the Chief Justice of India.¹¹ Many independent commentators took it as a compromise on independence of judiciary.

⁴ Kesavananda Bharati Sripadagalvaru and Ors v. State of Kerala and Anr., (AIR 1973) SC 1461.

⁵ Sapru Committee Report, Paragraph 268, available at:

<https://archive.org/stream/saprucommittee035520mbp#page/n43/mode/2up>.

⁶ Ad hoc Committee Report, Para 14, pg.no.65.

⁷ Dr. Ambedkar, Constituent Assembly Debates (Proceedings) Volume VIII, May 24, 1949, available at:

<http://164.100.47.194/Loksabha/Debates/cadebatefiles/C24051949.html>.

⁸ Constituent Assembly Debates 258, Volume VIII, No. 7 May 24, 1949, available at:

<http://164.100.47.194/Loksabha/Debates/cadebatefiles/C24051949.html>.

⁹ The Constitution of India, art. 124 cl. 2.

¹⁰ The Constitution of India, art. 217 cl. 1.

¹¹ J.N. Pandey, The Constitutional Law of India, Central Law Agency, Edn. 49, 2012.

EVOLUTION OF PROCEDURE OF JUDICIAL APPOINTMENTS IN INDIA

When the Indian Supreme Court was brought into being, the primary authority over the judicial appointments was on the executive. There was no such word distantly as “Collegium System”.

On the literal interpretation of the text, the appointment of Supreme Court judges was to be made by the President, acting on the aid and advice of the Council of Ministers, in “consultation” with the Chief Justice of India. The President could also consult other Supreme Court and High Court judges as per their discretion.¹² The role of the judiciary in the appointments process was limited to the extent of providing only the inputs and advice to the President. And such advice of the Chief Justice or any justices for the matter didn’t bind the President.

In 1993, the Court adopted “collegium system” and then in 2014, when the Parliament amended the constitution and formed National Judicial Appointment Commission (NJAC), the same was struck down and we continued with the regime of collegium system.

CONFLICT BETWEEN JUDICIARY AND EXECUTIVE REGARDING SYSTEM OF APPOINTMENTS

During the initial years of the set-up, the process of appointment was an Executive-led appointment system. Where the process would start with the recommendations by the Chief Justice which was then sent to the Minister of Law and Justice. Then if the Minister agreed with the suggested name, she, with the concurrence of the Prime Minister, would advise the President, who would make the appointment. If the Minister differed from the views of the Chief Justice, he/she might seek the views of other judges and consult with the Chief Justice on such views or suggest another name to the Chief Justice to secure his/her opinion. Ultimately, however, the Minister of Law and Justice would advise the Prime Minister and with the Prime Minister’s concurrence, would advise the President on whom to appoint.¹³

As early as 1958, the Law Commission of India argued the case for independence of the judiciary from the executive. They claimed that this system of appointment did not allow for the best talent to be appointed to the Court, and that in many cases “executive influence exerted from the highest quarters” was responsible for the appointment of some judges. The Law Commission was also critical of emphasis being placed on “communal and regional considerations” in making appointments to the Supreme Court.¹⁴

In 1981, this executive led system of appointment was challenged on the ground that it impedes judicial independence. In *Judges I case*¹⁵ petitioners that the judiciary should have an upper hand in the appointment of the judges by having the right to veto by reading “consultation” as “concurrence”. The challenge failed and the Court concluded that if there is a difference of opinion between the executive and the Chief Justice for the appointment of the judge to the Supreme Court, in such a case, the views of the executive would prevail. Therefore, the executive led system continued.

¹² The Constitution of India, art. 124.

¹³ Law Commission of India, 80th Report on the Method of Appointment of Judges.

¹⁴ Law Commission of India, 14th Report on Judicial Administration Volume 1.

¹⁵ *S. P Gupta v. Union of India*, (1982) SC 149

In 1993, the collegium led appointment system was introduced when another challenge was mounted against this provision; this time, successfully. Overturning its previous decision of *S P Gupta, In Judges II case*¹⁶ held that the ‘ultimate power’ of appointment vested in the executive was being abused, and the existing system of appointments had resulted in merit being overlooked due to interference by the executive. The Court resorted to the basic structure doctrine and held that judicial independence is part of the unamendable basic structure of the Constitution, and to protect this principle, the judiciary should have ‘primacy’ over the appointments process. The term “consultation” with the Chief Justice was now to be read as to mean that the Chief Justice had to concur in the appointment of the judge i.e. to say that Chief Justice could now veto on appointment of the judges. But this power was in turn limited by adding the caveat that the opinion of the Chief Justice was in turn not her individual opinion, but that of the Chief Justice in consultation with a collegium of the two senior-most judges of the Supreme Court, and the senior-most judge of the Supreme Court from the High Court of the candidate. If the government differed in its opinion, it could send the recommendation back to the collegium. However, if the Chief Justice reiterated the decision, the government would be bound by it.¹⁷

Thus in 1993, the Supreme Court ushered itself into a new era where the judiciary had more control over the appointment to the same institutions that they were part of. This newly created system of appointment, known as the collegium system, is the one where the Chief Justice of India and senior judges of the Supreme Court make new appointments to the Supreme Court as well as the High Courts¹⁸.

In an advisory opinion issued in 1998 (*Judges III*), the Supreme Court modified and further clarified the appointments system.¹⁹ It held that instead of the two senior most judges forming the part of the collegium for appointment to the Supreme Court, it would now comprise the Chief Justice and the four senior-most judges of the Court.

In the 1993 and the 1998 judgments, the inter-se seniority of the judges within their High Court and their all India seniority was to be given primary ground for appointment to the Supreme Court. However, other considerations, such as outstanding merit and ensuring regional and other diversity, would be grounds to depart from the seniority norm.²⁰

Then came the time when Parliament in 2014 tried to revolutionize the system by amending the Constitution.²¹ As per this amendment, a new commission was to be created consisting of the Chief Justice of India, two senior most judges of the Supreme Court after the Chief Justice of India, the Union Minister of Law and Justice, two eminent persons (nominated by a committee consisting of the Prime Minister, the Leader of Opposition in the Lok Sabha, and the Chief Justice of India). At least one of these eminent persons had to be a woman or a scheduled caste, scheduled tribe, religious minority or a member of other backward castes.²²

¹⁶ *Supreme Court Advocates on Record Association v. Union of India*, (1993) 4 SCC 441.

¹⁷ *Ibid.*

¹⁸ *Supreme Court Advocates-on Record Association v. Union of India*, (1993) 4 SCC 441.

¹⁹ *In re: Presidential Reference No. 1 of 1998*, (1998) 7 SCC 739.

²⁰ *In re Presidential Case* (1999).

²¹ The Constitution of India (99th Amendment Act).

²² *Id.*

However, in October 2015, this was held to be unconstitutional by the Supreme Court.²³ Court reasoned that the amendments were encroaching upon the judicial independence and thus the collegium system is the only way forward to maintain the sanctity of the institution.

REFORMING THE PROCEDURES OF APPOINTMENTS

To ascertain if the collegium system is the only way forward we must look at following five principles, each of which need to be taken into account, while reimagining a new process or upholding the current system for appointment of judges.

TRANSPARENCY

The most persuasive criticism of the collegium system has been the fact that the appointment of judges has been secrecy vis-à-vis right to know. The current system offers no information available to anybody outside the collegium about the process leading to the appointment of judges. The first need for a reformed system would be recognition for transparency in every stage of the appointment process. Without a transparent process of the appointment of judges, the system always lacks credibility and legitimacy in the eyes of all stakeholders within the legal system. Transparency cannot be established merely by spoken words. It is not enough to state that the members of the collegium will act in a transparent manner. As action speaks more than words, the Supreme Court needs to bring in transparency in the way justices are appointed to the institute.

DIVERSITY

The infusion of diversity should be an established norm and practice for the appointment of judges. The lack of gender diversity in the higher judiciary in India is a matter of critical concern and deserves urgent attention. Though, recent appointments of justices at the Supreme Court has been a remarkable step, for more concrete and lasting impact, the following can be adopted for a more diverse panel in higher judiciary:

1. There should be a mandatory clause that the collegium should have at least one woman judge regardless of seniority. Such a justice should be involved in all decision making for the appointment of judges to the High Courts and the Supreme Court.
2. Valiant efforts should be taken within the existing system. The existing women judges in the high courts should be promoted to being the chief justices of other high courts which can in turn fast-track the process of consideration. This will help in appointment of such justices to the Supreme Court in years to come.
3. The requirement of a certain age as to be eligible for appointment and elevation as judges of higher judiciary needs to be reconsidered. The dogma that quality will come with certain age should be disregarded.
4. The CJI may consider constituting a “Task Force for Promoting Gender Diversity in Higher Judiciary” with a minimum of 50% of women judges, lawyers and academicians as its members.

²³ Supreme Court Advocates-on-Record-Association and Ors. V. Union of India, (2016) 5 SCC 1

Such a task force can contribute in making proposals that will lead to the evolution of a gender diverse higher judiciary in India,

5. Not only the judiciary but even law schools should take some affirmative steps. They should take efforts to create a more gender diverse student body and faculty inspiring more women law students to seek careers in the judiciary.

COMPETENCE

The competence of individuals to be appointed as judges needs to be clearly established. Competency is an integral part of transparency. While the subjectivity in any aspect of selection is indeed inescapable, this should not discourage us from establishing certain threshold standards that will be taken into account for measuring competencies. There are a number of measurable standards that could be evolved for determining competencies for assessing the suitability of individuals to be appointed as judges.

INTEGRITY

One of the most significant aspects of the judiciary as an institution is the bedrock of unimpeachable integrity that is expected out of judges. While it is a general rule that the public expects that all public authorities are persons of integrity and rectitude, such an expectation is a notch higher when it comes to judiciary. Thus responsibility of the collegium becomes higher and sacrosanct while selecting individuals who will be responsible to exercise these extraordinary powers.

CONFLICT OF INTEREST

The issue of conflict of interest in the process of selection of judges needs to be addressed. Serious allegations have been fraught against the collegium with different types of alleged conflict of interest among the members of the collegium and the individuals they have selected to become judges of the High Courts and the Supreme Court. To address the same and build in confidence as to the fairness, the collegium can formulate a detailed set of rules and regulations that will govern the determination of conflict of interest among the members of the collegium who are involved in the selection of judges.

THE WAY FORWARD

The credibility of the judiciary has indeed been at stake many times but to build a perpetual public confidence as well as of the stakeholders; the institution needs to address a few central questions.

One of them is what step the judiciary should take with a view to reforming the existing collegium system. The system introduced by the Parliament was indeed a good step and wherever the judiciary felt that parliament was encroaching upon their independence, they could have struck such provisions down but instead they held it to be unconstitutional. This may lead to a conclusion that the judiciary is perhaps not ready to amend its system, which is okay if the judiciary can answer the next question. What will the Supreme Court do to ensure that the collegium system is significantly transformed with a view to infuse transparency and procedural fairness in the selection of judges to the High Courts and the Supreme Court?

CONCLUSION

How will the judiciary restore the faith of all actors in the legal system that judicial appointments will take place through a selection process that will withstand legal and constitutional scrutiny? These are questions that ought to be asked by the members of the collegium as much as by other judges of the Supreme Court as they work towards restoring the credibility of the judicial appointments.

This Conference which was held on 9th October 2021 was curated with the belief that inclusion is not just bringing people into what already exists, but true inclusion means making of a new and better space for everyone where recognizing special needs is paramount. This Conference facilitated the discourse of different topics such as inclusive education, gender inclusivity and other socio-legal issues. It also facilitated debates and initiated a dialogue to explore the conceptual foundations and practical ramifications of the different aspects of inclusivity in law.

This conference aimed towards providing a common platform for the members of the legal fraternity and all its allied fields inviting academicians, researchers, legal practitioners, etc. to offer comprehensive discourse and their valuable insights in order to lead to a greater understanding of the world around us so that one can take more informed steps in policy making and delivery of justice and equality.

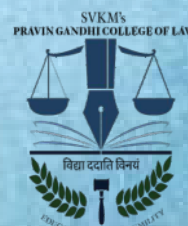
In order to achieve a legal system that is truly inclusive, a greater participation of luminaries is required from across varied disciplines such as environmentalists, linguists, educators, medical experts, economists, political theorists, social activists, artists, etc. to share their knowledge and expertise and this conference has served the same.



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