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## A LEGAL STUDY ON PERSONAL LAWS IN INDIA WITH RESPECT TO WOMEN'S PROPERTY RIGHTS

Roshan Kumar Gupta<sup>1</sup> & Dr. Jayanta Ghosh<sup>2</sup>

<sup>1</sup>Research Scholar, Faculty of Legal Studies, Arunachal University of Studies, Email: roshankrgupta1991@gmail.com

<sup>2</sup>Head and Research Fellow, Centre for Regulatory Studies, Governance and Public Policy, The West Bengal, Kolkata, National University of Juridical Sciences Email: jayanta.crsgrp@nujs.edu

### Abstract

*The main motive behind this research is to legally study on "Personal Laws in India with respect to Women's Property Rights". It is most significant to highlight the necessity of gender-sensitive social protection programs that pay attention to Personal Laws in India with Respect to Women's Property Rights. It creates an impact by emphasising how numerous cultural, economic & social factors influence the relationship between domestic violence & property ownership, and warns against using a one-size-fits-all strategy to domestic violence prevention. An attempt has been made to identify and determine the share of females under various legal systems, so as to undergo through the problems and challenges faced by women in India. By doing so, a research gap has been furnished to domesticate the intricate law of inheritance, allowing members of a given culture to quickly determine the shares of females. Therefore, to overcome with this research gap, certain objectives has been finalized such as to learn more about women's knowledge of their property rights; determine the extent to which various religious groups in India use legal acts to protect women's property rights; recommend Acts be amended as needed to eliminate gender prejudice in women's property rights inheritance; and make recommendations for the formulation of policy effectively & execution that will lead to gender equality. The current researcher used a completely doctrinal research approach to complete the research assignment. The recapitulation is made in this study, and a feeble but honest attempt is made to offer some methods for women's empowerment, emancipation from the equality of rights in inheritance & gender bias system. This research aids in revealing the dynamics of challenges relating to the property rights of women in order to build better programs that respect property rights of women's while increasing social fairness. At the social, individual, & communal levels, the study attempts to document and explore the complex conversation of reasons and explanations that breach women's entitlement to community & land property rights. Thus, the apex courts' and different high courts' judicial rulings have been thoroughly addressed in this study, and appropriate corrective measures have been proposed.*

**Keywords:** Personal Laws, gender-sensitive, religious groups, policy, women's empowerment, judicial rulings.

## **Introduction**

India is a diverse country in terms of tradition, religion, culture, & race. Personal law governs each religious community<sup>1</sup>. Even within religious communities, there exist sub-groups with their own property rights and local customs and conventions.

A woman's other titles include impoverished, deprived, discriminated, desolated, forsaken & despaired. On one hand, she is revered, adored, & even worshipped, and she is elevated to the highest social standing; on the other hand, she is mistreated, humiliated, degraded & brutalized. All of these torments are caused by economic inequity & monetary reliance. Men and women are often seen as two distinct components of society, and neither can fully realise their creative potential without the assistance of others. Since the dawn of time, they have been the victims of flagrant injustice. Despite the fact that we have entered the new millennium, the women's status has so far not improved due to prejudices & historic biases towards that part of society that has been excluded from mainstream society through no fault of their own.

Discrimination is caused by societal attitudinal biases, not by a lack of adequate legislation. Material and substantial changes to laws have been made from time to time, resulting in radical transformations, such as recent enactments that spell out equality & dignity of women to global standards. Despite this, inequality in the area of property rights, as well as many others, persists, and women still own only one percent of immovable property in their own names<sup>2</sup>.

The issue of women's dignity and gender inequality has emerged as one of the most pressing worldwide issues as the new millennium approaches. Gender inequity exists and is perpetuated in the modern welfare state, which is a blemish and disgrace. It is a social blight, an embarrassment to the entire human species, and a disease that threatens humanity's backbone. The growth of fair sex has a significant impact on the human world's future. The welfare of a country's women, who make up a significant portion of the world's population, is inexorably related to its fate.

The global system has recently begun to judge a country's progress not just in terms of economic or military might, or the splendor of its public structures & capital cities, but also in

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<sup>1</sup> Jain, P. (2005). Balancing minority rights and gender justice: The impact of protecting multiculturalism on women's rights in India. *Berkeley J. Int'l L.*, 23, 201.

<sup>2</sup> Agarwal, B. (2003). Gender and land rights revisited: Exploring new prospects via the state, family and market. *Journal of agrarian change*, 3(1-2), 184-224.

terms of its people's human development. In this context, gender discrimination has remained a major impediment to human growth in all countries, particularly in the developing world. The right to property of women is both a serious human rights issue and a profoundly emotional one<sup>3</sup>.

Property rights for Indian women, like those of women in other countries, have evolved as a result of a long-running battle between conservative and progressive forces. And, like women's property rights elsewhere, Indian women's property rights are unfair & unequal : despite progress over the last century, Indian women still enjoy fewer property rights than men, in terms of both quantity and quality.

Property rights for women's in India are distinctive in that, along with many other personal rights, they are highly divided within themselves. India has yet to enact a standard civil code despite the fact that it is home to a wide range of religions. As a result, in many ways, each religious group is still ruled by its own personal rules, including property rights. Even within religious groupings, there are sub-groups as well as norms & local customs of their own property rights<sup>4</sup>.

Thus, Sikhs, Hindus, Jains & Buddhists, are controlled by a single code of property rights written only in 1956, whereas Christianity are regulated by a different code, and neither Sunnis nor Shias have defined their property rights. When it comes to the property rights of tribal women inclusion of all religions and states are nonetheless bound by tribal conventions and standards. To make things a bit more complicated, the Indian Constitution empowers both state and central governments to enact succession laws. As a result, states can enact their own versions of property laws inside every personal law, which several have already done.<sup>5</sup> As per the outcomes, property rights of women's in India are not governed by a single authority. The property rights of Indian women are influenced by their religion or religious school, whether they are married or unmarried, where they come from the country, even if they are non-tribal or tribal, and other variables.

### **Caste as a Tool in the Denial of Property Rights**

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<sup>3</sup> Nussbaum, M. (2000). Women's capabilities and social justice. *Journal of human development*, 1(2), 219-247.

<sup>4</sup> MAZUMDAR, S., & GUPTA, A. (2011). Gender Issues and Land Rights under Hindu Personal Law in India. *Centre for Social Justice, Ahmedabad, India*.

<sup>5</sup> Young, E. A. (2007). The constitution outside the constitution. *Yale LJ*, 117, 408.

Gender inequality has been at the heart of all political, cultural identities, & social, according to sociological and anthropological research<sup>6</sup>. The 'moral' & 'ideological' pedestal for the roles & status of women in Indian culture is provided by religious literature. The foundation of Hinduism is the caste system, which is based on the concepts of contaminated & pure ideas.

In a caste-based society, endogamous marriages or marriages have been imposed specifically within the caste circle to keep caste integrity intact as women are considered the gatekeepers of caste as they have reproductive power. To accomplish this, women were placed under the authority of men in every field <sup>7</sup>so that they could not make their own decisions.

Due to the violability of caste standards, several procedures, such as ex-communication, have been implemented to protect caste Hindu purity. However, such mechanisms are patriarchal discriminatory practices in which a woman is excommunicated from her paternal varna and loses her former caste benefits if she marries a man from lower varna than hers. However, if a man marries a woman who is less Varna than himself (but not fewer than two degrees), he will not be dis-fellow shipped from his Varna privileges and will continue to enjoy them <sup>8</sup>. The rights of women over immovable or movable property, such as land (which is a major source of support and independence), were refused, as if they had property rights or absolute rights on property in such a patriarchal structure based caste system, where property can be given to someone else after her marriage (even to a man from another caste if she marries), because women are controlled by the patriarchal structure. As a result, gender inequality is a basic premise in Indian society.

### **Women in Ancient period**

Since ancient times, women's legal right to inherit has been restricted. Women were awarded Stridhan property in ancient law, but only for the purpose of supporting themselves, their sons, and their daughters-in-law, and only in the absence of their husbands <sup>9</sup>.According to Kautilya's Arthashastra, when a woman lives a virtuous life after the death of her husband, she will inherit his endowments & ornaments, and if the marriage is arranged a second time by her father-in-law, she can inherit her father-in-law's & take what the spouse has given you. She will have to

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<sup>6</sup>Cornwall, A., & Lindisfarne, N. (2016). *Dislocating masculinity: gender, power and anthropology* (pp. 27-61). Routledge.

<sup>7</sup>Ambedkar, B. R. (2013). *Castes in India: Their mechanism, genesis and development*. New Delhi, India: Critical Quest.

<sup>8</sup>Rege, S. (2013). *Against the madness of Manu: B. R. Ambedkar's writings against the Brahmanical patriarchy*. New Delhi, India: Navayana Publishing Pvt. Ltd.

<sup>9</sup>Shamsastry, R. (1915). *Kautilya's Arthshastra*. Retrieved from <http://192.168.0.32:8080/jspui/123456789/80>

give up everything given by the spouse and father-in-law if she decides to marry someone other than the choice of her father in law. If she divorces, the right to inherit the in laws property<sup>10</sup>.

As a result, a woman's maintenance rights were limited in ancient times. In order to continue using that property for sustenance, she had to give up her autonomy with regard to marriage, divorce and other issues, which are still prevalent today. The patriarchal outlook of the society is responsible for the exclusion of women's succession. The latter believes that because men are the lineage's major bearers, property should only pass to them when women marry into a different family (or lineage). As a result, property was protected by maintaining masculine control over it.

Ambedkar stated in *The Rise and Fall of Hindu Women* that women were equated with the Shudras in the framework followed by Brahmanis, all of whom were deprived with basic human rights to property, knowledge, renunciation & self-respect. In Hinduism, it is said that this is the "one road to salvation." This Aryan law was broken by Buddha, who paved the path for women's freedom of movement. However, the victory of Brahmanism over Buddhism eventually drove the women & shudras down once again, as it produced a caste system with hierarchical inequality<sup>11</sup>. 'A woman shall have no property, and whatever is acquired by her belongs to one by whom she is controlled,' Manu combines a woman in such a slave-like position relative to property. She could look after her husband's property after he died, but she had no legal claim to it<sup>12</sup>.

## **Women's Property Rights in India: A Historical Overview**

### **Women's Property Rights & Vedic Period**

During the Vedic period, women were revered as goddesses and cherished. The only disadvantage she had was that she did not have the inherit rights. The unmarried daughter and the married daughter without a brother were to inherit according to Vedic literature. The widow was not given an inherited right in the property of her husband, but she was eligible to accede to her husband's wealth as a childless widow<sup>13</sup>.

### **Women's Property Rights & Medieval Period**

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<sup>10</sup>Ibid

<sup>11</sup> Ambedkar, B. R. (2013). *Castes in India: Their mechanism, genesis and development*. New Delhi, India: Critical Quest.

<sup>12</sup>Ibid

<sup>13</sup> Carroll, L. (1983). Law, custom, and statutory social reform: the Hindu Widows' Remarriage Act of 1856. *The Indian Economic & Social History Review*, 20(4), 363-388.

When Sati, child marriages, and a restriction on widow remarriages were part of social life throughout the medieval period, the Indian woman's status in society deteriorated. Purdah practice was introduced into Indian civilization by Muslim invaders. The Jauhar was a form of dance popular among Rajasthani Rajputs. Polygamy was common among Hindu Kashatriya rulers, in particular. During this time, women lacked property rights.

**Women's Property Rights & Smriti Period:** The mother, widow, & daughter were specifically named as heirs during the smriti period. Only in the absence of male heirs could they inherit a man's property.

**Property of women under Hindu Law:**

- 1) Stridhan
- 2) Non-stridhan

Under Hindu, there were two school of thoughts/laws.

- a) Mitakshara
- b) Dayabhaga<sup>14</sup>

**Mitakshara Law**

The son is given the right and interest in the family's property at birth under this law. On the basis of birth in the family, a son, a grandson, and a great-grandson, according to this school, form a class of coparceners. According to Mitakshara legislation, no woman can be a coparcenary. The property of a joint family is transferred within the coparcenary under the Mitakshara system by the survivor. This indicates that the share of each live male in the family either reduces or grows with the birth or death of each male in the family. If a father and his two sons form a coparcenary, each of them will own one-third of the property. If the family has another son, each male's portion is reduced to one-fourth. The Benares, Mithila & Bengal sub-schools of Mitakshara acknowledged just five female relatives as being entitled to inheritance prior to the Hindu Inheritance Laws (Amendment) Act 1929<sup>15</sup>:

- 1) widow,
- 2) daughter,
- 3) mother

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<sup>14</sup> Pal, A. (2016). The Evolution and Transformation of Women's Rights in India. Available at SSRN 3516474.

<sup>15</sup> Rankin, G. (1945). Hindu Law To-Day. *J. Comp. Legis. & Int'l L.* 3d ser., 27, 1.

- 4) paternal grandmother, and
- 5) paternal great-grand mother

### **Dayabhaga Law**

Neither sons nor daughters are coparceners at birth, and thus have no claim to the family estate while the father is alive<sup>16</sup>. They are inherited as common tenants, however, when he dies. It is a unique aspect of the Dayabhag school that daughters receive an equal portion of the property as their brothers, and they cannot compel the father to divide the land during his lifetime or later gift or sell it without his approval. If one of the male heirs dies, his heirs, including women like his wife and daughter, will become members of the joint property, representing him rather than acting independently.

### **Women's Rights to property**

In principle, a woman might own property in ancient times, but in practise, her right to dispose of it was limited in comparison to men's, the latter being deemed necessary by the patriarchal system to prevent her from becoming too independent and neglecting her marital duties and home management. Prior to 1937, there was no codified law, hence this was the case.

**a) The Hindu Women's Right to Property Act, 1937** was enacted as a result of widespread dissatisfaction with the state of women's property rights in India<sup>17</sup>. A widow was entitled to a limited interest in her husband's property, referred to as the Hindu widow's estate, under the aforementioned Act.

**The Act was amended in 1938** to exclude the widow from any interest in agricultural land.

### **b) Hindu Succession Act, 1956**

The 1956 Hindu Succession Act was the first to establish a comprehensive succession system for Hindus, Buddhists, Jains, & Sikhs, as well as to eliminate gender inequities in property rights. It only applies to intestate succession and to Hindu converts and their children. The offspring (married or unmarried son or daughter), widow, mother, of the intestate each receive an equal portion of the estate. In the case of testamentary succession, it has no application.

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<sup>16</sup> Carroll, L. (1991). Daughter's right of inheritance in India: A perspective on the problem of dowry. *Modern Asian Studies*, 25(4), 791-809.

<sup>17</sup>BASU, M. (1996). Impact of Hindu Code on Indian Women. *World Affairs: The Journal of International Issues*, 5(1), 46-62.

Inheritance, partition, maintenance, arrears of support, gift, prescription, or property, purchase, obtained by her, the Act grants the woman all rights, such as unrestricted property disposal rights, in any property - mobile or immovable. Stridhan, which comprises garments, jewelry, property, and wedding presents, received from her funds, is included in the property acquired in her own skill, in any other way.

**c) Amendments**

**After the Hindu Succession (Amendment) Act, 2005 Section 6**

In a major decision in September 2005, the Supreme Court of India determined that Indian women have the same right to property as men, allowing daughters to inherit family property alongside male relatives. As a result of this Act, there is no longer any distinction between male and female inheritors. Female heirs [daughters] can now claim a share of the ancestral estate.

**Section 6 of this Amendment Act (2005)**

It ensures that females and males members of an united Hindu family have equal rights to coparcenary property<sup>18</sup>. The daughter is a coparcener and is allowed to be part of the family property as if she were a son. The new Section-6 does not apply to the following two exceptions:

- a) In which the disposal or alienation, along with any partition, occurred prior to December 20, 2004.
- b) a testamentary transfer of the property done prior to December 20, 2004.

**d) Property Rights of Women under Muslim Law<sup>19</sup>**

According to a literal interpretation of the Quran, women have significantly more property rights than is commonly recognised. Insaaf, ehsaan, rehem, and Ilma are the four essential values emphasised in the Quran. Many Islamic regimes, such as Tunisia, have passed legislation against this liberalism, claiming that it lays an undue burden on men.

**Dowry**

The dowry, as well as any interest earned in cash, belongs to the Muslim woman. If the investment is done through dowry money, the women retain all gains and are under no legal

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<sup>18</sup>Gakul, K. (2013). Hindu Women's Property Rights under Hindu Succession Law: Past and present. *The Clarion-International Multidisciplinary Journal*, 2(2), 149-156.

<sup>19</sup>NAIK, T. (2021). Women's Succession Rights under Muslim Law.

obligation to share them with the her partner. To put it another way, dowry is the bedrock of all the property rights of a women.

### **Muslim Women's Property Rights<sup>20</sup>**

If anything, Islam's gender divisions favour men. All of the responsibilities belong to the husband. According to the law, the spouse is responsible for the home, children, and any elderly parents. None of these things are required of a lady, a wife. Her funds are solely hers. The money never truly belongs to the man, but rather to his extended family. Under Islamic law, these rights aim to liberate women, but they also tie males to support their families.

According to Dr. Nahid Angha, a woman can buy and sell in the market, run a business and get all her contributed assets which includes dowry. Since a woman has complete control over the money and wealth of her dowry, Islam cannot legislate against her without contradicting itself in the concern of any other property.

**Shares of Property Under Muslim Law:**"Allah commands you regarding your children. For the male a share equivalent to that of two females."

\*A son can inherit an equivalent portion of two daughters, a full brother (germane) has chances to inherit twice as the sister, the inheriting portion can be twice of son's daughter for son's son.

\*\*If (there are) women (daughters) more than two, then for them two thirds of the inheritance; and if there is only one then it is half."

\*The woman's portion is established by the notion that twice the proportion as daughters can be inherited by son as per laws in Muslim.

### **e) Property Rights for Christian Women in India:**

- A widow woman who belongs to Christianity is eligible for 2/3 of her husband's property under the Indian Succession Act of 1925.
- The surplus property is divided equally among the children.
- Offsprings of predeceased daughter & son inherit a portion from the property of their parents.

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<sup>20</sup>Aslam, A., & Kazmi, S. (2009). Muslim Women and Property Rights. *Economic Affairs*, 29(2), 10-15.

- If the woman is not having any children then she will be provided with Rs.5,000 plus half of the remaining property once that amount has been deducted.
- The property share is also applicable for the child carried by mother in her womb.
- A Christian woman is the exclusive owner of any money she earns. The power to take off these were not available with anyone else.
- She has the legal authority to bequeath or gift her own money, jewellery, and other belongings to whoever she chooses.
- Even if a father of Christian woman's spends money on presents at her wedding, she still has a right to a piece of her father's property.

### **Property Rights of Christian Women in India: The Laws:**

- Christians in Goa are regulated by the civil law of Portugal.
- Christian Succession Act 1921 and Travancore Christian Act 1916 regulate Travancore & Cochin areas.
- The areas such as Himachal Pradesh, Haryana & Punjab were regulated by Customary laws
- Indian Succession Act

### **Intestate succession among Christians**

The rules governing intestate succession among Christians would only apply if a decedent hadn't yet left a will, an instrument of gift, or a deed of settlement. The principles of succession stated under sections 29 to 49 of Part V of the Indian Succession Act, 1925 would come into effect if the aforementioned documents were not available. However, if the dead left a will, the general legislation found in sections 57 to 391 would apply.

### **Objectives**

- The study's goal is to learn more about women's knowledge of their property rights.
- Determine the extent to which various religious groups in Tamil Nadu use legal acts to protect women's property rights.
- To recommend Acts be amended as needed to eliminate gender prejudice in women's property rights inheritance.
- Make recommendations for the formulation of policy effectively & execution that will lead to gender equality.

## Methodology

The current researcher used a completely doctrinal research approach to complete the research assignment. All relevant texts, statutes, & case laws on inheritance have been studied thoroughly and critically. A comprehensive comparative chart of female shares under Hindu, Muslim, Parsi & Christian laws has been attempted.

Various books on the issue, reports relating to case laws, articles published in various periodicals, encyclopaedias, reports of various commissions on the subject, and applicable statutes are among the research materials for the current thesis. Articles from national dailies, journals & magazines, were also consulted and incorporated into the thesis when applicable. Wherever necessary, relevant texts from the Hadith, Holy Quran, Vedas, Dharmashastras, as well as the words of eminent scholars, have been included.

## Findings

The outcomes of this study highlight the necessity of gender-sensitive social protection programs that pay attention to Personal Laws in India with Respect to Women's Property Rights. The study also emphasises how numerous cultural, economic & social factors influence the relationship between domestic violence & property ownership, and warns against using a one-size-fits-all strategy to domestic violence prevention. This research aids in revealing the dynamics of challenges relating to the property rights of women in order to build better programs that respect property rights of women's while increasing social fairness. At the social, individual, & communal levels, the project attempts to document and explore the complex conversation of reasons and explanations that breach women's entitlement to community & land property rights.

## Analysis

The rights of women to possess, control & inherit property are largely governed by accepted social norms & values, as well as domestic decision-making and distribution processes (Rutherford, 1996).<sup>21</sup> The continuance of traditional labour divisions, in which women perform heavy duties like gathering fuel & water, adds to huge number of women's who works in rural areas informally (Cheryl & Doss, 2011).<sup>22</sup> Whereas excluding women from land control and transfer, as well as process of decision-making, has resulted in a drop in sustainable

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<sup>21</sup>Rutherford, Malcolm (1996): *Institutions in Economics The Old and the New Institutionalism*, Cambridge University Press, Cambridge, (Paperback).

<sup>22</sup>Bomuhangi, A., Doss, C., & Meinzen-Dick, R. (2011). *Who owns the land?: perspectives from rural Ugandans and implications for land acquisitions* (No. 1136). International Food Policy Research Institute (IFPRI).

development, in addition to increasing vulnerability and lowering status (Bina & Agarwal, 2002)<sup>22</sup>. The rights of women must be explicitly considered in planning development, and women must be forced to take part in policy creation and execution (Moock, 1976 & Meinzen-Dick, 1997)<sup>23</sup> and others. Gender equality can often lead to economic equality. Registration of land and land reform at a lowest cost, has been found to lead to higher views of tenure security for both men and women (Holden and Tewodros, 2008)<sup>24</sup>. The presence of women's names on land certificates contributed to the impression that women would be allowed to keep the land following their husband's death or divorce. Women's participation in land-related decision-making has grown. By identifying the assumption that women are entitled to an uneven resource sharing, and many other forms of discrimination learnt as children, and accepted women's own judgement. Their family and their place within it and it was described that how property resources are divided between men and women. Therefore, it was analyzed that this research was extended to women's land rights, which is against the concept of "perceived interest" response (Papanek, 1990)<sup>25</sup> Hence, it was analyzed that women's commitment to harmful practises is not the consequence of acceptance of discrimination, and that they fight it in a variety of hidden ways Agarwal, 1994.<sup>26</sup> But it has been pointed out that "... whatever be the spirit of law and custom, women fail in general to obtain rights to ownership of (or control over) land", & despite the fact that women were considered as formal legal owners, the land was managed by men, accordingly, "depriving women not only of headship in a formal sense, but of much else" (Krishnaji, 1992).<sup>27</sup> The primary objective of Indian society's inheritance regulations was to maintain property, specifically property related to lands, with male heirs (Sen, 1990). In reality, interpersonal and inter allocations are rooted in patriarchal, which is defined by patrilineal, patrilocal (or virilocal) conventions that govern women's and men's economic and non-economic responsibilities. Women's rights are mediated by family relationships and strongly ingrained notions that women must sacrifice among them, interests, as well as what comprises the well-being inside their families. Thus, at the social, individual,

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<sup>23</sup>Meinzen-Dick, R. S., Brown, L. R., Feldstein, H. S., & Quisumbing, A. R. (1997). Gender, property rights, and natural resources. *World development*, 25(8), 1303-1315.

<sup>24</sup> Holden, S., & Tefera, T. (2008). From being property of men to becoming equal owners? Early impacts of land registration and certification on women in southern Ethiopia. *Unpublished report for UNHABITAT*.

<sup>25</sup> Papanek, H. (1990). To each less than she needs, from each more than she can do: Allocations, entitlements and value. In I. Tinker (Ed.), *Persistent inequalities: Women and world development* (pp. 162–181). New York/Oxford: Oxford University Press.

<sup>26</sup> Agarwal, B. (1994). Gender and command over property: A critical gap in economic analysis and policy in South Asia. *World development*, 22(10), 1455-1478.

<sup>27</sup>Krishnaji, N (1992): Poverty and Sex Ratio: Data and Speculations in *Pauperising Agriculture Studies in Agrarian Change and Demographic Structure*, Oxford University Press and Sameeksha Trust, Bombay, pp 199-217.

& communal levels, the study attempts to document and explore the complex conversation of reasons and explanations that breach women's entitlement to community & land property rights. As a result, the apex courts' and different high courts' judicial rulings have been thoroughly addressed in this study, and appropriate corrective measures have been proposed.

## MARITAL RAPE: A LEGALISED OFFENCE

Dristi Baranwal

Narsee Monjee Institute of Management Studies, Bengaluru, email:  
baranwaldristi@gmail.com

### Abstract

*Marital rape in India is considered as an exception under section 375 of the Indian Penal Code. On the contrary, this section considers rape as a crime. Since, our society considers women as a property of their husbands' and this has always been the notion of the patriarchal culture. The division of labour in patriarchal family represents that wife are not given much importance since they are not the bread winner of the family. In turn, this permits men to exercise power on their wives. However, the action of the husbands is not the result of the power but an imbalance in power. Nonetheless, women in the era of digital age are more than capable to give consent, be aware of the implications of their actions, can reason well, and are self-dependent. This study examines the reasons as to why the marital rape must be considered a grave criminal offence. and why there is need for revision in the current laws. An effort has been put to explain the legislative systems and the initiatives taken by the Courts and the MPs to change the current law.*

**Keywords:** Marital rape, Fundamental rights, Equality, Consent, Marriage.

### Introduction

In the eighteenth century, Justice Hale asserted: "Husband cannot be guilty of rape committed by himself upon his lawful wife."<sup>1</sup> Apparently, he was suggesting, the consent of the wife for carnal relationship is surmised to be given. The belief of Justice Hale did not represent merely his perspective but also from the way the eighteenth-century society was perceived. Since, at that time women were supposed to be subservient to their husbands.

Moreover, the description of rape given in Black Law's Dictionary represents the view of Justice Hale. The dictionary interpret rape as "unlawful sexual intercourse committed by a man with a woman not his wife through force and against her will."<sup>2</sup> If we dissect this explanation into two parts then the former part expounds when a man actively engages in a sexual relation which he and his wife share in absence of her consent will amount to rape. However, the latter part does not consider non- consensual sexual relationship with wife as rape. Even the laws in

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<sup>1</sup> 1 Matthew Hale, The History of the Pleas of the Crown (Payne 1800).

<sup>2</sup> Bryan A. Garner, Black's Law Dictionary 1374 (West 2009).

India concurs with the belief held in eighteenth century. As stated in section 375 of the Indian Penal Code (IPC), rape is “sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation, or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case, if she is under 18 years of age.”<sup>3</sup> The section covers every aspect as to what constitutes rape. However, it does not mention anything describes a husband and wife engaging in non- consensual sexual activity.

According to the explanation provided in section 375 of the IPC<sup>4</sup>, “Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.”<sup>5</sup> The word consent is not merely word, it empowers individuals to elect those things which they want. However, in the explanation of the aforementioned section nowhere is specified that the consent of married woman is immaterial. Although, the notion of presumed consent is unnatural since the legal ramifications of marriage do not represent the product of mutual agreements reached between the parties.<sup>6</sup> According to the second exception of section 375 — Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.<sup>7</sup> On analysing the second exception we can infer that where the wife is below 15 years, rape occurs when a husband forces his wife to participate in sexual behaviour against her will. However, in the event when she is older than 15, her consent would be irrelevant.

### **Genesis of Law Not Considering Marital Rape as an Offence**

Later, in the eighteenth century the Commentaries on Laws of England by Blackstone were in the same vein of the comments made by Justice Hale. According to Blackstone: “by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything.”<sup>8</sup> With this statement, Blackstone wanted to convey to the society that husband and wife are treated as an

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<sup>3</sup> The Indian Penal Code, 1860, § 375, No. 45, Acts of Imperial Legislative Council, 1860 (India).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> Rape within Marriage, 40 (London: HMSO 1990), <https://www.lawcom.gov.uk/app/uploads/2015/06/cp116-Rape-within-Marriage.pdf>

<sup>7</sup> *Ibid.*

<sup>8</sup> William Blackstone, Commentaries on the Laws of England (Oxford, Clarendon Press 1765- 1769).

one unit after marriage. Also, the presence of a woman's will no longer be a reality after marriage and she is expected to be pliant and dutiful towards her husband.

Blackstone's commentary is reflected in the Doctrine of Coverture<sup>9</sup>. As per this principle, wedded pair were considered as a single entity. However, it did not allow women to have their own property. And the most cold-hearted precept was that couples could not sue each other for crimes committed against one another. Crimes like rape, assault, robbery, etc. were not indictable if it was committed by a spouse to his/ her counterpart.

The government in the British era was responsible for the creation of the Indian Penal Code (IPC). Their frame of reference was the doctrine of coverture, and as a side effect, it did not acknowledge the rights that belong to a married woman. The result of this combination was that the rape within the context of a marriage was given the status of an exception under section 375 of the Indian Penal Code.<sup>10</sup>

### **Disparate Perspectives of Courts on Marital Rape**

In the case of *RIT Foundation v UOI*<sup>11</sup>, the division bench of the court gave decision which were poles apart. Justice Ravi Shukdhher opined that the marital rape should be criminalised and it should not be considered as an exception under section 375 of the IPC. On the contrary, Justice C. Hari Shankar refused to support the initiative to make marital rape a felony, stating that the legislature should make any changes to the legislation because the subject requires investigation into a number of different angles, particularly societal, historical, and political, to be taken into consideration.<sup>12</sup>

In *Sakshi v UOI*<sup>13</sup>, the court rather than extending the connotation of the word "rape," denied to accept a more liberal comprehension of the expression "sexual intercourse." Additionally, according to former Indian Chief Justice Dipak Misra, the act of committing a felony against a wife should not be made a crime in India since doing so would lead to chaos in Indian society.<sup>14</sup>

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<sup>9</sup> Jone Johnson Lewis, *Law of Coverture*, ThoughtCo. (Feb. 24, 2019), Law of Coverture (thoughtco.com)

<sup>10</sup> *Supra n. 3*.

<sup>11</sup> *RIT Foundation v UOI*, 2022 LiveLaw (Del) 433.

<sup>12</sup> Soibam Rocky Singh, Jagriti Chandra, *Delhi HC delivers split verdict on marital rape*, The Hindu (May 11, 2022, 01: 29 AM), <https://www.thehindu.com/news/cities/Delhi/delhi-high-court-delivers-split-verdict-on-marital-rape/article65403832.ece>

<sup>13</sup> *Sakshi v UOI*, AIR 2004 SC 3566.

<sup>14</sup> *Marital rape needn't be an offence*, The Times of India (April 9, 2019, 12: 40 PM), Dipak Misra: Marital rape needn't be an offence: Ex-Chief Justice of India Dipak Misra | Bengaluru News - Times of India (indiatimes.com)

In *Nimeshbhai Bharatbhai Desai vs State of Gujarat*<sup>15</sup>, Justice Pardiwala emphasized: “A large population of women has faced the brunt of the non-criminalisation of the practice... Marital rape ought to be a crime and not a concept... It has long been time to jettison the notion of ‘implied consent’ in marriage. The law must uphold the bodily autonomy of all women, irrespective of their marital status.”<sup>16</sup> According to Justice Pardiwala, the concept of ‘implied consent’ in marriage should be abandoned and law should allow every woman to form choices for their body. Marital rape as an exception is prejudicial for married women and it’s high-time that marital rape should be criminalised.

In *Independent Thought v UOI*<sup>17</sup>, the Supreme Court was of the view: “Marriage is not institutional but personal – nothing can destroy the ‘institution’ of marriage except a statute that makes marriage illegal and punishable.”<sup>18</sup> In India, marriages are considered to be a sacrosanct relationship between a husband and a wife. However, this conservative viewpoint should be altered and marriage should be considered as a personal relationship. Moreover, marital rape should be considered as inimical to marriage.

### **Reports by Committee and Data on Sexual Violence**

In report of the Justice Verma Committee, it has been proposed that the exemption for rape committed against a spouse be removed. There is no bearing on the investigation into whether or not the victim agreed to the sexual intercourse on the nature of the relationship that exists between the suspect and the victim. It is possible that the perpetrator and complainant are married or otherwise involved in a relationship will not be considered for reducing the term of imprisonment.<sup>19</sup> The findings highlighted the fact that marital rape should not be recognized as less serious than rape solely due to the nature of their current relationship. The study continued on its path to emphasise the importance of educating and orienting society at large, and particularly judiciary and law enforcement agencies, regarding marital rape.<sup>20</sup>

As per the data of National Crime Records Bureau (NCRB), 2021<sup>21</sup>, most of the charges that were filed under the Indian Penal Code for crimes perpetrated towards women were submitted

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<sup>15</sup> *Nimeshbhai Bharatbhai Desai vs State of Gujarat*, at [www.livelaw.in](http://www.livelaw.in)

<sup>16</sup> *Ibid.*

<sup>17</sup> *Independent Thought v UOI*, [2017] 10 SCC 800.

<sup>18</sup> *Ibid.*

<sup>19</sup> Justice Verma, Report of the Committee on Amendments to Criminal Law (January 23, 2013).

<sup>20</sup> Indumathi S, *Marriage- A Licence to Rape*, 10 International Journal of Creative Research Thoughts 871, 880 (2022), <https://ijert.org/papers/IJCRT2202341.pdf>

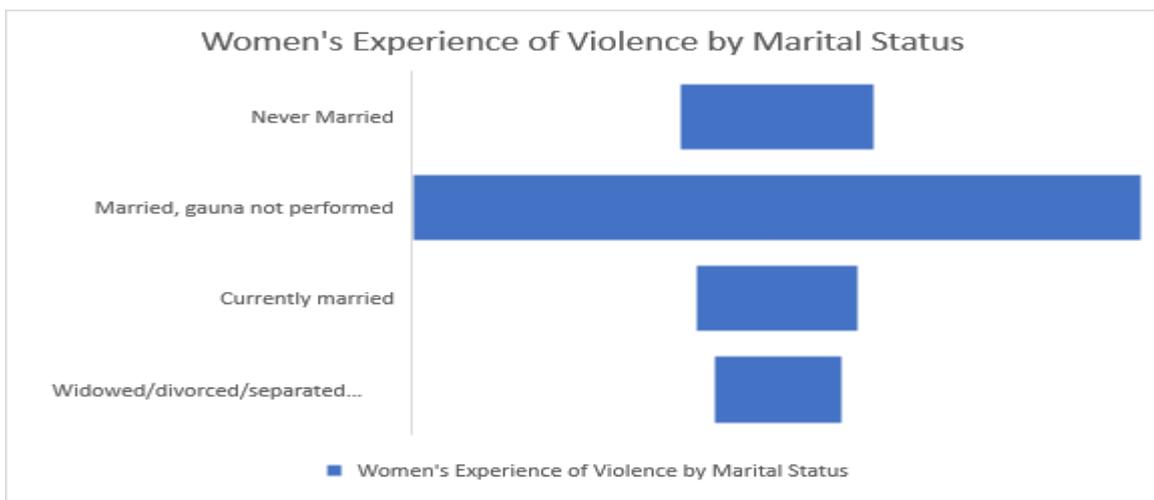
<sup>21</sup> Government of India, Crime in India, 2019 (Ministry of Home Affairs, 2019).

below the column named “Cruelty by Husband or His Relatives.”<sup>22</sup> However, it is not explicitly mentioned but this column may include marital rape with other kinds of cruelty.

On comparing the data of NFHS- 4 and NFHS- 3, we can observe that the number of spousal violence remains same.<sup>23</sup> Women who are married but their *gauna* are not carried out experience violence the most.<sup>24</sup> Again, spousal violence may include marital rape. Owing to the fact that rape within a marriage is not a criminal offence in India, a separate data on marital rape is not collected. And this is also a major drawback for not considering marital rape as an offence.



SOURCE- NFHS-4



SOURCE- NFHS-4

<sup>22</sup> *Ibid.*

<sup>23</sup> International Institute for Population Sciences, National Family Health Survey, 2015- 16 (December, 2017).

<sup>24</sup> *Ibid.*

## Marital Rape- An Infringement of Fundamental Rights

The marital rape exception reinforces the colonial idea that women are possessions and as a result, it violates several of the fundamental human rights and protections for women outlined in the Constitution of India.<sup>25</sup>

### *i. Article 14 and 15*

As per the Indian Constitution, everyone is equal before law and discrimination is strictly proscribed on the basis of sex, religion, caste, and creed. If Article 14<sup>26</sup> is read with the exception provided under Section 375 of the IPC<sup>27</sup>, then it can be reasonably concluded that married women are not being treated equally. Also, there is a gender bias that leads to discrimination against married women.

As per the Article 15 and 16 of CEDAW<sup>28</sup>, to which India is a signatory, in the eyes of the law, there should be no difference between men and women. Additionally, in a marriage, women and men possess equal protection under the law.

### *ii. Article 19*

Article 19 (1)(a)<sup>29</sup> of the Indian Constitution ensures every citizen the right to freely express. This right may also include the authority and freedom to make her own sexual choices. And not giving married women the right to consent is in violation of Article 19<sup>30</sup>.

### *iii. Article 21*

In the case *Bodhisattwa Gautam v Subhra Chakraborty*<sup>31</sup>, the Court propounded: “Rape is a crime against basic human rights and is also violative of the victim’s most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21.”<sup>32</sup> The Court reasoned that rape is a violation against fundamental human rights, thus if a husband rapes his wife, it also undermines her right to life as a married woman.

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<sup>25</sup> Vidhik Kumar, *Marriage or License to Rape? A Socio- Legal Analysis of Marital Rape in India*, 6 DIGNITY 1, 8 (2021) <https://digitalcommons.uri.edu/dignity/vol6/iss3/6/>

<sup>26</sup> INDIA CONST. art. 14

<sup>27</sup> *Supra n. 3*

<sup>28</sup> Convention on the Elimination of All Forms of Discrimination against Women, 1979, arts. 15, 16.

<sup>29</sup> INDIA CONST. art. 19.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Bodhisattwa Gautam v Subhra Chakraborty*, 1996 AIR 922.

<sup>32</sup> *Ibid.*

In *T. Sareetha v T. Venkata Subbaiah*<sup>33</sup>, it has been acknowledged that the right to privacy is an unrestricted right of an individual and is not rendered null and void upon the formation of a marital relationship.<sup>34</sup>

### **Position in UK**

In *R v Clarence*<sup>35</sup>, Hawkins J emphasised: “The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed on her by law.”<sup>36</sup> When it comes to the stipulations of the marriage contract, wives have no say in the matter. It is the duty of wife to have sexual intercourse with her husband even if she has not concurred to the act.

It was only during the latter part of the 19th century that people began to question whether or not it was legal for a husband to keep his wife confined in order to exercise his right to partnership.<sup>37</sup> Leaders and authors like John Stuart Mill and Bertrand Russell were some of the significant persons who campaigned to declare marital rape an offence in the United Kingdom in the first feminist wave.<sup>38</sup> “The personal is political” became the feminist credo which served as the core premise upon which the anti-rape campaign was incorporated.

In the seminal case known as *R v R*<sup>39</sup>, which was decided in October 1991, the court of England officially acknowledged marital rape as a punishable offense. In this case Lord Lane asserted: “The idea that a wife consents in advance to her husband having sexual intercourse with her whatever her state of health or however proper her objections, is no longer acceptable.”<sup>40</sup> It is not viable to assume that a wife will give her husband unconditional permission to have sexual relations with her regardless of her wellbeing or even the validity of her protests.

### **Suggestions**

In order to ensure the protection of a woman's fundamental rights, the legislative body ought to do away with laws that treat rape and marital rape in different ways. If rape within a marriage can be regarded a valid reason for dissolving a marriage, then it should also be considered a

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<sup>33</sup> *T. Sareetha v T. Venkata Subbaiah*, AIR 1983 AP 356.

<sup>34</sup> *Supra* n. 25.

<sup>35</sup> *R v Clarence*, (1888) 22 QBD 23.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Re Cochrane* (1840) 8 Dow PC 630.

<sup>38</sup> Julie Bindel, *The long fight to criminalise rape in marriage*, ALJAZEERA (June 15, 2021), <https://www.aljazeera.com/features/2021/6/15/the-long-road-to-criminalising-rape-within-marriage>

<sup>39</sup> *R v R*, [1992] 1 AC 599.

<sup>40</sup> *Ibid.*

serious crime committed against women. In the Indian Constitution, Article 15<sup>41</sup> stipulates that there must be laws in place to safeguard the interests of children and women. And it is past time to eliminate the exemption for marital rape and the term 'rape' be blended with the term 'marital rape.' In today's modern culture, women are educated, independent, and capable of making the proper decisions for themselves. In addition, legislation must make laws which empower women and permit them to claim their physical autonomy.

In order to bring the frequency of rape cases down, rape within marriage should be treated as a severe crime and stricter sentences had to be handed out. The Justice Verma Committee<sup>42</sup> has made several recommendations, and the legislature ought to take them into consideration. Instead of lapsing the bills proposed by the Member of Parliaments like Women's Sexual, Reproductive and Menstrual Rights Bill, 2018<sup>43</sup> was set in motion by Dr. Shashi Tharoor. However, the rights of men should also be taken into account by the legislation. Consequently, laws should be developed that are gender-neutral.

### **Critical Analysis**

Once George Bernard Shaw mentioned, 'Unless, the law of marriage was first made human, it could never become divine.' Marriage legislation should be drafted to guarantee that both partners are treated fairly. This is the standard in most countries, including India, when it comes to family law issues including divorce, child support, custody, and property rights.<sup>44</sup>

In *State of Maharashtra and Anr vs Madhukar Narayan Mardikar*,<sup>45</sup> the Supreme Court had made the vehement remark: "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also, it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law."<sup>46</sup> The right to privacy of a woman should be protected regardless of her position in the society. No one could assault a woman's body without her consent. If her fundamental rights are being violated, she deserves the same legal protection as anyone else.

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<sup>41</sup> INDIA CONST. art. 15.

<sup>42</sup> *Supra* n. 17.

<sup>43</sup> Rupali Pruthi, *Bill to make marital rape a crime introduced in Lok Sabha*, Jagran Josh (January 3, 2019, 05:36 PM), *Bill to make marital rape a crime introduced in Lok Sabha* (jagranjosh.com)

<sup>44</sup> *Supra* n. 20.

<sup>45</sup> *State of Maharashtra and Anr v Madhukar Narayan Mardikar*, AIR 1991 SC 207.

<sup>46</sup> *Ibid.*

It might be contended that marital rape is just as unlawful as murder, culpable homicide, or rape. It turns a person into a lifeless body who constantly anticipates getting hurt. Medical research demonstrates that marital rape has serious and persistent effects on women.<sup>47</sup>

Legislators need to know that protecting the respect of married women is vital to preserve the integrity of the Constitution. By not holding offenders of marital rape legally accountable, the lack of criminal law safeguards has led to the normalisation of this kind of sexual abuse and has kept the crime concealed from the general public.<sup>48</sup>

## **Conclusion**

The Brahmanical patriarchal system is the source of misogyny. Several men assume that it is their divine right to inflict mental anguish and anxiety on women by casting a cloud of dread over their daily life.<sup>49</sup> In *Voluntary Health Ass. Of Punjab vs Union of India & Ors*<sup>50</sup>, the Court contended: “women have to be regarded as equal partners in the lives of men and it has to be borne in mind that they have equal role in the society, that is, in thinking, participating, and leadership.”<sup>51</sup> The Supreme Court’s view on gender equality is praiseworthy as it will aid in forming laws which will cater equality in society. Furthermore, the perspective of the Court conveys that how women are in modern society and they should also be considered as an equal participant in the decision- making process.

The exception for marital rape is not only an antiquated and obsolete statute. In fact, it protects a substantial number of men from sexual assault charges and the notion that they are rapists. Large majority of their wives discover that they possess no legitimate or politically permissible right to deny unwanted intercourse. Consequently, the question of marital rape affects not only those women who are prepared to admit that their husbands have coerced them to engage in sexual contact not less than one, but ultimately every woman.<sup>52</sup> India is rife with contradictions for a nation that prides itself on being on the road to prosperity.<sup>53</sup>

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<sup>47</sup> Shikha Chhibbar, Policy Brief Series 1 (TOAEP 2016), <https://www.toaep.org/pbs-pdf/52-chhibbar#:~:text=8%20In%20the%20case%20of,to%20seven%20years%20with%20fine>

<sup>48</sup> *Ibid.*

<sup>49</sup> Jean Chapman, *Violence against Women in Democratic India: Let's Talk Misogyny*, 42 *Social Scientist* 49, 61 (2014), <https://www.jstor.org/stable/24372976>

<sup>50</sup> *Voluntary Health Ass. Of Punjab vs Union of India & Ors*, (2016) 10 SCC 265.

<sup>51</sup> *Ibid.*

<sup>52</sup> Diana E. H. Russell, *Rape in Marriage* (Indiana University Press, 1990).

<sup>53</sup> *Supra* n. 44.

It is past time that we advance the fight over marital rape by taking some kind of action. Even the UN Committee on the Elimination of Discrimination against Women<sup>54</sup> in 2007 suggested that the denotation of rape in the IPC should be widened to more accurately depict the realities of female sexual assault and also the exemption for rape committed against a spouse ought to be done away with from section 375 of the IPC.<sup>55</sup> The fact that a woman is married should not be an excuse for denying her basic liberties. The legislation should not refrain from designating marital rape as an offence just because consent is difficult to prove in marriage. Authorities have either granted legal protection for marital rape or abstained from designating it an offense on the basis that marital relationship is a sacred, non-interfering domain.<sup>56</sup>

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<sup>54</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *UN Committee on the Elimination of Discrimination against Women: Concluding Comments, India* (February 2, 2007), <https://www.refworld.org/docid/45f90a982.html>

<sup>55</sup> *Ibid.*

<sup>56</sup> *Supra* n. 25.

## LOCATING WOMEN IN CORPORATE GOVERNANCE LANDSCAPE

Rupal Nayal

LL.M., National Law University Delhi, email: rupal.nayal21@nludelhi.ac.in

### Abstract

*The research paper will provide a fusion of women into the domain of corporate governance concretized through provisions regulating the appointment of women on corporate boards across various jurisdictions. This would be accompanied by discussions regarding possible concerns and the current level of implementation of the provisions with respect to India. The author makes an attempt to sketch out a possible relationship between women directors and improved corporate governance practices & subsequent results measured not only through firm performance but also other considerations. The paper concludes that different kinds of provisions turn out to be effective in various jurisdictions without any straitjacket formula. The level of implementation in India is found to be tokenistic. A positive co relation of women directors and better corporate governance has been outlined to a certain extent. The paper ends with recommendations that deal with improved enforcement of the regulations.*

**Keywords:** Director, Corporate Governance, regulations, performance, board

### Introduction

Women Director Regulations are usually advanced on the premises of either social case which is based on equality & diversity and the business case which is rooted in economic considerations. The social case was derived from the assertion that there was a moral obligation on the corporate community to play a part in redressing the injustices from the discriminatory conduct and thereby to promote diversity. On the other hand, business case seeks to pursue diversification because diverse boards will lead to more profitable, especially in the recent times when there has been an increase in the purchasing power of women.<sup>1</sup>

This was a subject of debate between A.A Berle and Merrick Dodd. While the former was of the view that corporate powers were a repository of trust solely for shareholders, the latter asserted that the public opinion which is the driving force for law making indicated that business corporation ought to be seen as an economic organization with a twin purpose of profit making along with social service.<sup>2</sup> It is this approach which gives legitimacy to the social case

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<sup>1</sup> Aaron A Dhir, Challenging Boardroom Homogeneity Corporate Law, Governance, and Diversity (2015)

<sup>2</sup> A. A. Berle, Jr., "Corporate Powers as Powers in Trust", 44 The Harvard Law Review Association 7, 1049-1074 (1931)

for women directors since the corporation being born pursuant to government sanction has to act in the interest of general welfare as an extension.<sup>3</sup> The way there is divergence in corporate governance models of various countries, their measures regulating women on Boards may also be colored with that.

### **Soft Regulations**

These regulations majorly involve disclosure-based provisions implying a “comply or explain” approach.

#### **Australia**

The government issued its Corporate Governance code in 2010 comprising of recommendations for pursuing gender diversity. The public companies that were listed on the stock exchange of the company were required to embrace and publicly disclose their policy regarding gender diversity, they had to institute assessable goals for achieving the latter as well as the progress towards attaining them which had to be done in each annual report. This has to be accompanied by the disclosure over the proportion of women that were employed in the company in the roles of senior executives. The assortment of expertise and diversity which the board ought to attain has to be disclosed.<sup>4</sup> In 2019 it was recommended that the board of a listed firm ought to consider gender diversity as a relevant factor in the process of succession planning. It has asked for more detailed disclosures about the participation of women relative to men in senior leadership positions than the floor level provided in the recommendation.<sup>5</sup> In a recent report, it was found that as on February 2022, 34.5% women are occupying ASX 200 boards.<sup>6</sup>

#### **United Kingdom**

In UK it was the Davies Report which recommended all the chairmen in FTSE 350 companies ought to provide a percentage of women that they seek to have on boards by 2013 and 2015. It sought FTSE 100 to achieve the goal of at least 25% representation of women by 2015. The quoted companies were supposed to disclose the proportion of women present on their boards each year. Executive search firms were asked to establish a Voluntary Code of Conduct which ought to provide the best practices for search conducive to gender diversity. It also recommended training & mentoring opportunities and called for women from outside the

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<sup>3</sup>*Infra* note 53.

<sup>4</sup>Corporate Governance Principles and Recommendations Amendments 2nd Edition 2010 ASX Corporate Governance Council

<sup>5</sup> Corporate Governance Principles and Recommendations 4th Edition February 2019

<sup>6</sup> Gender Diversity Progress Report December 2021 to February 2022

corporate background.<sup>7</sup> In 2018 the Corporate Code was amended wherein it provided that the annual report had to present the procedure for a nomination committee along with an approach to succession planning receptive to gender diversity.<sup>8</sup> In 2022, Listing Rules were introduced which requires the boards to make specific declaration about meeting the diversity targets. This includes broadening the reporting standards so as to touch upon the diversity policies of key committees.<sup>9</sup> As per FTSE Women Leaders Review, UK ranks second in the list for representation of women in Boards with nearly 40% of positions being occupied by women.<sup>10</sup>

## **USA**

Nasdaq had filed a proposal with SEC delineating rules, requiring the companies with five or fewer board members to one appoint one diverse board member or explain in case this is not complied with. New companies were given an extended timeline while companies faltering due to vacancy are to be given grace period. In accordance with this, Rule 5605(f) has been introduced which requires the listed companies to have a Board comprising of minimum 2 diverse directors which includes a self-identified woman director and other identifying as minority that has been unrepresented or belongs to LGBTQ+.<sup>11</sup>

California was one of the first few states which has had such regulations in place since 2018 in the form of SB 826. As per the rule, the public companies listed and headquartered in the state had to have a minimum of 2 out of 5 directors as female and at least 3 if directors were more than 6. However, in a major setback to diversity advocates in May 2022, in *Crest v. Padilla*<sup>12</sup>, the statute was struck down as unconstitutional as it seemed to go against the Equal Protection Clause. The Court found men and women to be similarly situated and was not convinced with the evidence of state on the strict scrutiny test. It is imperative to mention that in the days prior to the law, women holding directorship were merely 15% which had almost tripled by 2019.<sup>13</sup>

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<sup>7</sup>Lord Davies of Abersoch, Women on boards February 2011

<sup>8</sup> The UK Corporate Governance Code July 2018

<sup>9</sup> Diversity and inclusion on company boards and executive management Policy Statement PS22/3 April 2022

<sup>10</sup> FTSE Women Leaders Review Achieving Gender Balance February 2022

<sup>11</sup><https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf>, February 18, 2022 Last Visited 10<sup>th</sup> May 2022

<sup>12</sup> *Crest et al vs Padilla* 20 STCV 37513

<sup>13</sup> <https://www.jdsupra.com/legalnews/california-to-appeal-decision-striking-2176953> Last Visited 10<sup>th</sup> May 2022

## **Quota Approach**

The laws adopting quota approach embrace a more explicit form for advancing female representation on Board. These quotas may either be voluntary or compulsory, varying as per the sanctions that have been imposed in case of non-compliance.<sup>14</sup>

### **Norway**

It was the first country in the world to introduce rules on gender representation in 2003, public listed companies were required to have women on at least 40% seats of the Board.<sup>15</sup> While this was voluntary, due to low level of compliance, in 2005 the country came up mandatory quota. It provided representation of both sexes proportionately with the number of Board Directors in general.<sup>16</sup> As of 2021 42.5% of boards in public companies have women are under women.<sup>17</sup> The success is attributed to hard sanctions according to which non-compliance can lead to forced dissolution. The Registrar has the authority to refuse to register a company which fails to meet the minimum required criteria.<sup>18</sup>

### **India**

57<sup>th</sup> Report of the Standing Committee of Lok Sabha introduced an enabling provision through which it was hoped that it would let the companies become an instrument for giving salience to women in the domain of corporate governance. It was seen to be in line with the policy of the government to embolden the measures to ensure participation of women in every major decision-making level of the society. It proposed appointment of minimum one-woman director to be made compulsory for a prescribed class of companies.<sup>19</sup> This was given shape in Section 149(1) of the Companies Act 2013<sup>20</sup>. Companies (Appointment and Qualification of Directors) Rules 2014<sup>21</sup> appended to the provision specified the class of companies that were to follow this provision i.e. every listed and public company whose either paid up capital was up to Rs.100 crore or its turnover was about Rs.300 Crore. In addition to this in case of any

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<sup>14</sup> Francisco Bravo-Urquiza and Nuria Reguera-Alvarado, Gender and Corporate Governance (2019)

<sup>15</sup> Ot.prp. No. 97 (2002-2003)

<sup>16</sup> Norwegian Parliament, Norwegian Public Limited Liability Companies Act

<sup>17</sup> Board and management in limited companies <https://www.ssb.no/en/virksomheter-foretak-og-regnskap/eierskap-og-roller/statistikk/styre-og-leiing-i-aksjeselskap> Last visited 11<sup>th</sup> May 2022

<sup>18</sup> Aagoth Storvik And Mari Teigen, Women on Board The Norwegian Experience, Available at <https://library.fes.de/pdf-files/id/ipa/07309.pdf> Last visited 11<sup>th</sup> May 2022

<sup>19</sup> Standing Committee On Finance (2011-2012) Fifteenth Lok Sabha Ministry of Corporate Affairs The Companies Bill, 2011 Fifty-Seventh Report

<sup>20</sup> The Companies Act, 2013, § 149(1) The Gazette of India

<sup>21</sup> Companies (Appointment and Qualification of Directors) Rules 2014 § 3

vacancy that is created, a new woman director has to be appointed either before the next board meeting of the company takes place or within a time period of 3 months.

This was further added by the Regulation 17(1) of SEBI (LODR) Regulations, 2015<sup>22</sup> as per which a board of director was mandated to have an adequate balance of executive director and NED, out of which minimum 1 had to be a woman.

Given the structure of ownership in Indian companies dominated by families, there was an apprehension that the above provision would be complied with for name sake by filling it with any woman from the family<sup>23</sup> who might not have appropriate skills, thereby making a mockery of the law.

In this background, following the recommendations of Uday Kotak Committee<sup>24</sup>, SEBI made it compulsory for top 500 companies based on capitalization, to appoint a minimum of one woman as an Independent Director. Its ambit has now been widened by making it applicable to top 1000 companies. As on March 2019, a report found that 45 companies had defaulted on the provision of appointing women independent directors.<sup>25</sup> However, seen within Asia, India has fared better than its counterparts with women occupying 5% and 10% of executive and NED seats.<sup>26</sup>

In 2020, SEBI came out with a circular for rationalizing the fines in case of non-compliance in listing obligations and requirements related to disclosure. Non-compliance shall lead to suspension and revocation of trading for the securities that have been specified. A fine of Rs.5000 shall be levied every day of non-compliance. Subsequent to non-compliance and failure to pay the fine, the shares of the promoters shall be frozen. If such deviation goes on until two consecutive quarters, the scrip of the erring company can be relegated to Z Category which will suspend it and take away its ability of being traded intra-day.<sup>27</sup>

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<sup>22</sup> Securities And Exchange Board Of India (Listing Obligations And Disclosure Requirements) Regulations, 2015 § 17 No.Sebi/Lad-Nro/Gn/2015-16/013

<sup>23</sup> <https://www.hindustantimes.com/business/all-in-the-family-in-rush-for-directors-companies-turn-to-wives-daughters/story-GOBVAKWkyG14h5BeS6L8nO.html>, List Visited 11<sup>th</sup> May 2022

<sup>24</sup> Report of the Committee on Corporate Governance 2017

<sup>25</sup> WOMAN ID on the Board: Reluctant compliance by INDIA INC 2019, Available at [https://www.sesgovernance.com/pdf/home-reports/1557300812\\_WOMAN-ID-on-the-Board\\_Reluctant-compliance-by-INDIA-INC.pdf](https://www.sesgovernance.com/pdf/home-reports/1557300812_WOMAN-ID-on-the-Board_Reluctant-compliance-by-INDIA-INC.pdf), Last visited 12<sup>th</sup> May 2022

<sup>26</sup> The Egon Zehnder Global Diversity Report 2020

<sup>27</sup> Non-Compliance with certain Provision of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and the SOP for suspension and revocation of trading specified securities, Circular No.: SEBI/HO/CFD/CMD/CIR/P/2020/12

Since Section 149 itself, does not provide sanctions for non-compliance of the given provisions, cases of violation under it are dealt with under Section 172 of the Act, which specifies punishment for those provisions where penalty is not provided. Under this section, a company or officer contravening a provision would be liable to pay a fine of at least Rs.50000 and in case it continues, it could go up to Rs.5 lakhs. But the cases in the recent times have shown that barring some exceptions<sup>28</sup>, the companies are allowed to take benefit of the offence getting compounded. In *In Re: Icomm Tele Ltd*<sup>29</sup>, There was a delay of more than 5 months for appointment. The company defended this by contending that they were going through a corporate debt restructuring due to financial crisis. Hence the delay was attributed to obtaining various approvals and consents from various authorities. While in *Nizam Deccan Sugars Limited VS ROC* the company argued that since there was a limit on the number of directors and a restriction on its composition, they could help but be delayed in making the appointment.<sup>30</sup>

In 2020, out of 500 NIFTY companies, women occupied merely 17% of directorships. 12 out of 13 NIFTY companies which had no woman director were PSUs.<sup>31</sup> As of February 2022, women occupy only 16% of NSE 200 companies as directors. Although this figure has seen a rise from 4.5% in 2016, it seems to be just for the sake of complying with statutory requirements.<sup>32</sup>

Data has been gathered from the Annual Reports of top 10 FMCG companies on NSE regarding appointment of women directors and their placement on committees. FMCG companies were looked at since they have traditionally been focused on targeting women as consumers.

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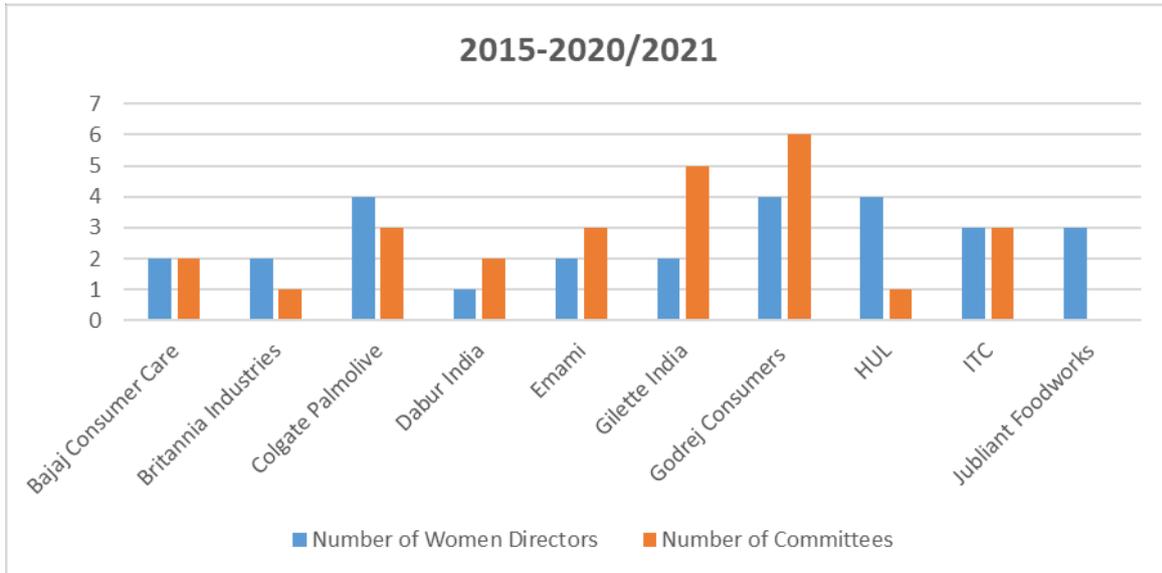
<sup>28</sup> Roc vs . M/S Gehna Precious Metals Ltd. on 10 October, 2018

<sup>29</sup> In Re Icomm Tele Limited C.A No26/621A/HDB/2016

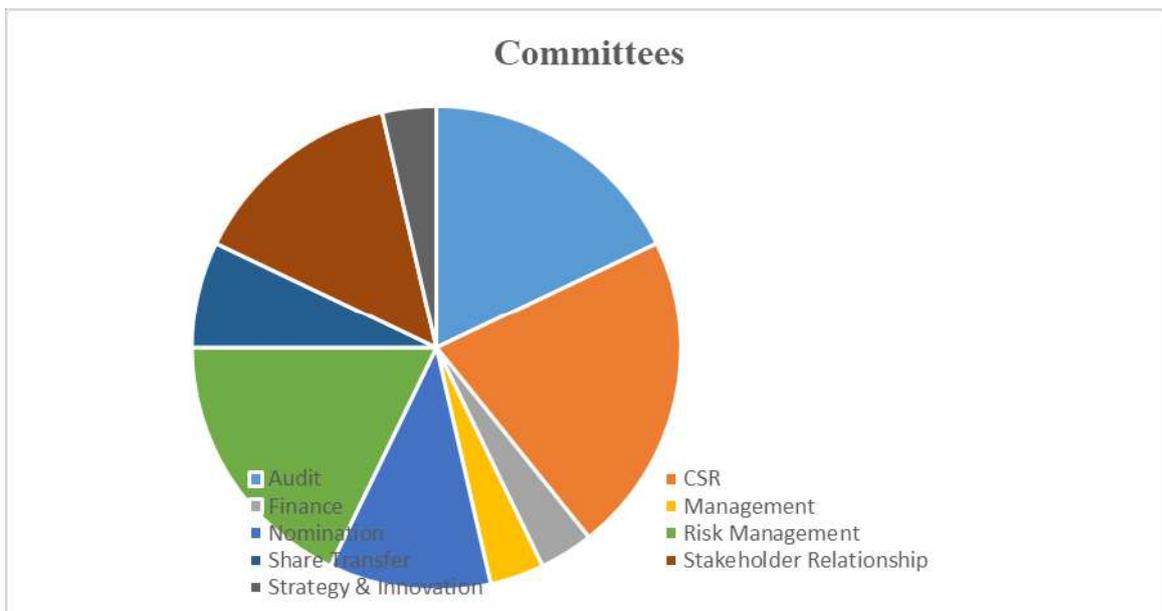
<sup>30</sup> Nizam Deccan Sugars Limited VS ROC, C.A No.25/621/HDB/2016

<sup>31</sup> Corporate India Women On Boards May 2020

<sup>32</sup> Promila Agarwal, "The Glass Ceiling: Research Report on Leadership Gender Balance in NSE 200 Companies", ESG Centre for Research and Innovation, IIM Ahmedabad



It is notable that with an exception of few, most of the companies have limited their appointments to a token amount, so as to meet the statutory compliance. The division of committees they get appointed to has been captured in the following.



Audit Committees are considered to be critical from the standpoint of responsibility especially the fiduciary duties entrusted on the board to monitor the firm's. It is refreshing to see that the capabilities of women are not being restricted to care centric domains but being extended to the field of oversight of financial management.

## Evaluating the impact

While the provisions regarding women directors are in place in a number of jurisdictions, it becomes imperative to analyze the impact of the diverse boards on various aspects of corporate governance. This could help in understanding the rationale behind such regulations. Along with this, the presence of women on boards has to be seen in the context of influence if any, that they have on factors outside the sole purpose of maximizing shareholder wealth consistent with the larger goals of feminist analysis of corporate governance.

## Firm performance

A study conducted on the impact of Norway's women director mandate in post-2003 years observed that it adversely affected the performance of the firms. This was consistent in accounting ratios such as ROA and Operating income divided by assets as well as factors used for measuring performance based on the market such as Tobin's Q & MTBR.<sup>33</sup> Taking the accounting ratios such as ROA, ROE, ROS, and GM into context, a cubic relationship has been observed between the incidence of women on boards and the firm performance. A negative relationship has been detected between a very low or huge number of women directors and the ROA whereas a positive one in the case of an intermediate number of women.<sup>34</sup>

Taking a sample from the Nifty 100 index from 2010 to 2018 with an exclusion of financial and public utility firms, it was observed that a higher amount of women on board in Indian firms could lead to better performance of the firm and could reduce its risk of bankruptcy. However, this was reliant on these women being independent, being part of a huge networking size, and possessing graduate degrees.<sup>35</sup> When the presence of females on board in India was observed in the context of ownership structure, it was detected that there was a positive influence of the former on ROA in the case of group-affiliated firms in comparison to standalone firms. It has been suggested that this can be attributed to the backup support that flows from such a group structure.<sup>36</sup> However, a study conducted on the financial performance of 41 firms that were listed on the Bombay Stock Exchange during the period of 2012-2016

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<sup>33</sup> Philip Q. Yang and Jan Riepe and Katharina Moser and Kerstin Pull and Siri A. Terjesen, "Women directors, firm performance, and firm risk: A causal perspective", 30 *The Leadership Quarterly* 5 (2019)

<sup>34</sup> Luis Rodríguez-Domínguez, Isabel-María García-Sánchez & Isabel Gallego-Álvarez, "Explanatory factors of the relationship between gender diversity and corporate performance", 33 *Eur J Law Econ*, 603–620 (2012)

<sup>35</sup> Rwan El-Khatib, "Do Women Directors Improve Firm Performance and Risk in India?", 11 *The Quarterly Journal of Finance* 2 (2021)

<sup>36</sup> Pavana Jyothi & Jayasree Mangalagiri, "Would Firm Performance Be Better with Women Directors? Evidence from India", 23 *Vision: The Journal of Business Perspective* 2 (2019)

concluded that given the insignificant number of women on board, the impact on firm performance could not be seen to be either positive or negative.<sup>37</sup>

### **Attendance behavior**

This has been considered as a significant marker of governance since the directors need to attend board meetings in order to gain relevant information that can help them in fulfilling their duties. The problems related to attendance are likely to be reduced to 0.007 in case the director is a woman, thereby 30% less likely to be involved in issues of attendance than men. Apart from this, due to women's increased likelihood of attending the meetings, they have a greater chance of being given a seat at monitoring related committees.<sup>38</sup>

### **Financial misconduct**

A firm with a female presence on the boards is less likely to be engaged in financial misconduct. Firms with gender-diverse boards have a 6.7% probability of indulging in such activities which is relatively lower than the 8.4% possibility of a board that isn't diverse. This suggests that a diverse board leads to better financial reporting. Restatements or Irregularity type restatements which could be related to financial manipulation were lesser in boards with a female presence.<sup>39</sup> It has also been observed that the presence of women directors in audit committees diminishes the possibility of getting information marred with error, non-compliance, or inadvertence.<sup>40</sup> In a sample consisting of 1484 companies, with 742 as a sample and another half as control firms, wherein the average percentage of women was 14%, evidence was found indicating that there was a negative correlation between women on boards and being in the fraud sample. Women tend to diminish the severity and frequency of frauds, especially in industries known to be male-dominated.<sup>41</sup>

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<sup>37</sup> Amit Kumar Singh, Shubham Singhania & Varda Sardana, "Do Women on Boards affect Firm's Financial Performance? Evidence from Indian IPO Firms", 13 *Australasian Accounting, Business, and Finance Journal* 2, 53-68 (2019)

<sup>38</sup> René B. Adams & Daniel Ferreira, "Women in the boardroom and their impact on governance and performance", 94 *Journal of Financial Economics*, 291-309 (2009)

<sup>39</sup> Aida Sijamic Wahid, "The Effects and the Mechanisms of Board Gender Diversity: Evidence from Financial Manipulation Journal of Business Ethics", 159 *Journal of Business Ethics* 3, 705-725 (2019)

<sup>40</sup> María Consuelo Pucheta Martínez, Inmaculada Bel-Oms & Gustau Olcina-Sempere, "Corporate governance, female directors and quality of financial information", 25 *Business Ethics: A European Review* 4, 363-385 (2016)

<sup>41</sup> Douglas Cumming, T. Y. Leung & Oliver Rui, "Gender Diversity and Securities Fraud", 58 *Academy of Management Journal* 5, 1572-1592 (2015)

## CSR disclosures & environment

Diverse boards have a "moderating effect" on the audit committee along with its independence & CSR-related disclosures thereby enhancing transparency in such processes. Women directors tend to underline the positive correlation between financial proficiency on audit committees and CSR reporting.<sup>42</sup> Corporate environmental performance can be described as a firm performance that is related to its environmental responsibility.<sup>43</sup> A female presence on Board tends to lead to improvement in the emission reduction of the firm. A board with women directors is 9% more likely than others in diminishing its environmental emissions. What makes this finding significant is that it overcame robustness checks, thereby defeating the limitations of endogeneity, and goes on to indicate causation rather than correlation.<sup>44</sup> This is further reinforced by the finding that women are more amenable to environmental innovations thereby more probable in accepting emissions reduction efforts.<sup>45</sup> Even voluntary disclosures regarding GHG are positively associated with a gender-diverse board.<sup>46</sup>

## Gendered Impact

In a sample of Fortune 1000 companies, it was observed that women in positions of leadership such as directors are linked to a lower level of gender segregation when it comes to non-leadership positions. This gives credence to the assertion that women on boards can act as agents of change which can be witnessed across the hierarchy of the organization. They even have the ability to nudge towards policies leading to gender equity.<sup>47</sup> They are also associated with organization legitimacy wherein women directors in Fortune 500 companies were found

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<sup>42</sup> María Consuelo Pucheta-Martínez, Isabel Gallego-Álvarez, Inmaculada Bel-Oms, "Corporate social and environmental disclosure as a sustainable development tool provided by board sub-committees: Do women directors play a relevant moderating role?", 30 *Business Strategy and the Environment*, Wiley Blackwell 8, 3485-3501 (2021)

<sup>43</sup> Aimei Yang & Wenlin Liu, "Corporate Environmental Responsibility and Global Online Cross-sector Alliance Network: A Cross-national Study", 12 *Environmental Communication* 1, 99-114 (2018)

<sup>44</sup> Khine Kyaw, Sirimon Treepongkaruna & Pornsit Jiraporn, "Board gender diversity and environmental emissions", *Business Strategy & the Environment* (Forthcoming 2022)

<sup>45</sup> Renata Konadu, Gabriel Sam Ahinful, Danquah Boakye & Hany Elbardan, "Board gender diversity, environmental innovation, and corporate carbon emissions," 174 *Technological Forecasting and Social Change*, 12 (2021)

<sup>46</sup> Ishmael Tingbani, Lyton Chithambo, Venancio Tauringana & Nikolaos Papanikolaou, "Board gender diversity, environmental committee, and greenhouse gas voluntary disclosures", 29 *Business Strategy and the Environment* 6 (2020)

<sup>47</sup> Kevin Stainback, Sibyl Kleiner, Sheryl Skaggs, "Women in Power: Undoing or Redoing the Gendered Organization?", 30 *Gender & Society* 1, 109-135 (2016)

to be positively linked to the number of women officers, possessing top ranking and high paying positions.<sup>48</sup>

Incidents of sexual harassment at a company not only lead to creation of unfavorable & toxic environment hindering the productivity of the employees ultimately leading to a diminished financial performance but it can also lead to reputational damages which can add fuel to the already lit fire. Based on firm level instances, it has been observed that presence of women directors can lead to a drop in incidences of sexual harassment. Even an addition of one female director can lead to a 20.71% drop.<sup>49</sup> This fits in the approach as envisaged by the stakeholder theory of corporate governance.

Anja Kirsch, has noted that 60% women who were a part of her study had taken some sort of measure associated with gender equality in both formal board procedures and informal ways. Some of them warranted that a report was presented to the board with a breakdown of gender wise data of employees and sought introduction of policies ensuring wage parity. This data was given teeth by a following them with a critical discussion in the Board. The reason for such results can be attributed to two possible explanations, the first one being social identity theory according to which there is a sense of belonging to women as a social group. While it can also be due to the their own experiences in the organizational hierarchy which prompted them to work for their counterparts working at employee positions.<sup>50</sup>

However, it is worth noting that when a critical mass which might be defined as 25% or more women directors is reached, it is mostly then that women directors are more likely to make a noticeable impact on various decisions.<sup>51</sup> The efficacy of the concept of critical mass was demonstrated when it was observed that if the size of the minority group representing women is just one or two, it is not likely to have an significant impact on the organization. When compared with boards which were all-male, the results were same in terms of firm

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<sup>48</sup> Diana Bilimoria, “*The Relationship Between Women Corporate Directors and Women Corporate Officers*”, 18 *Journal of Managerial Issues* 1, 47-61 (2006)

<sup>49</sup> Shiu-Yik Au Andréanne Tremblay Leyuan You, “*Does Board Gender Diversity Reduce Workplace Sexual Harassment?*”, SSRN Electronic Journal, 2021

<sup>50</sup> Anja Kirsch, “*Revolution From Above? Female Directors’ Equality-Related Actions in Organizations*”, 61 *Business & Society* 3, 572–605 (2021)

<sup>51</sup> ? Cindy K. Harris, “*Women Directors on Public Company Boards: Does a Critical Mass Affect Leverage?*”, 29 *Business and Economics Faculty Publications* (2014)

organizational innovation. However, a positive relationship was found between the latter when there were minimum three female directors.<sup>52</sup>

### **Lurking Concerns**

Deriving from the discussion of critical mass, the issues such as tokenism may lead to adverse effects for women who are seen like that in the form of visibility, polarization, and assimilation. Visibility could make the appointed women directors bear the brunt of performance pressure as a result of being subject to perpetual scrutiny. Polarization refers to the cornering of women by their dominant peers in effect depriving them of access to important networks. Lastly, assimilation may lead to the woman being seen as a representative of her entire gender which could erase her identity as an individual board member.<sup>53</sup>

Tokenism is often attributed to the limitation of the pool problem, whereby a lack of qualified candidates throttles the board from appointing more than one woman. However, the pool problem is rooted in the usage of traditional criteria for the appointment which is often restricted to the previous experience of the board or executive level. This is exacerbated by the lack of mentoring and network opportunities similar to the ones available to men.<sup>54</sup>

Selection bias often pervades the experience of women appointed to the boards which is demonstrated when women are more likely to be appointed to committees or oversee domains that have traditionally been considered soft thereby keeping them out from areas such as finance which are apparently hard. The case remains the same regardless of whether women possess the same expertise or experience as their male counterparts.<sup>55</sup>

There is an apprehension that if women share the traditional background with their male peers, they are more likely to behave in the same way either unconsciously or in order to fit in. This will in effect negate the anticipated value creation that could have been enriched from alternative experiences or perspectives.<sup>56</sup>

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<sup>52</sup> Mariateresa Torchia Andrea Calabro` Morten Huse, “*Women Directors on Corporate Boards: From Tokenism to Critical Mass*” 102 *Journal of Business Ethics* 299-317 (2011)

<sup>53</sup> Anne Sweigart, “Women on Board for Change: The Norway Model of Boardroom Quotas as a Tool For Progress in the United States and Canada”, 32 *Northwestern Journal of International Law & Business* 4 (2012)

<sup>54</sup> Debbie A. Thomas, Bias in the Boardroom: Implicit Bias in the Selection and Treatment of Women Directors, 102 *MARQ. L. REV.* 539 (2018).

<sup>55</sup> Aaron A. Dhir, Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity, 35 *QUEEN'S L.J.* 569 (2010)

<sup>56</sup> Morten Huse, Women directors and the ‘black box’ of board behavior in *Women on Corporate Board of Directors*, Susan Vinnicombe, Val Singh, Ronald J Burke, Diana Bilimore & Morten Huse (Eds.) (2008)

Glass cliff refers to a situation whereby there is a possibility that women might be appointed to leadership positions especially when the organization is caught in a crisis situation in effect dampening their positive impact.<sup>57</sup> Thus, it becomes important that the performance of a woman as a director is judged by taking all surrounding circumstances into account.

It has to be noted that women that share the background of the current breed of directors are likely to be representative of similar privileged experiences. Thereby, in the presence of only such women who would be unable to produce heterogeneity which is critical for improving board oversight due to the same class and context as that of men could render the objective of such measures into nullity.<sup>58</sup>

### **Conclusion**

There is no objective answer to whether soft or hard regulation works best to achieve the desired objectives. While hard quotas are criticized for going too harsh on the companies, thereby interfering with the governance structure of the company. This might lead to a culture of complying for the sake of it. Soft quotas could struggle to reach the goal due to the lack of sanctions. This is because in the absence of a state intervention, most firms are not likely to pursue expansion of diversity in their boards.

However, the results in jurisdictions of both kinds of regulations have produced mixed results. From this, it can be inferred that apart from the structure of the law which enforces a particular measure, the level of implementation and the willingness to follow the spirit of the law are of utmost importance for any such regulation to be success.

While U.S had started on a good note and California had even went on to the path of expanding the concept of diversity and moving ahead from the singular concept of women, thereby embracing the intersectionality that is the core of modern day feminism, the decision of the court in *Crest v Padilla* has failed to acknowledge the progress that has happened in the period for which the law was applicable.<sup>59</sup> It turned a blind eye over the discrimination that women generally have to face in reaching those positions without regulations in the absence of influential networks thereby blocking their access to the boardrooms.

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<sup>57</sup> Michael Peregrine, <https://www.forbes.com/sites/michaelperegrine/2021/02/28/the-glass-cliff-challenge-for-corporate-governance/?sh=66dda379240e> Last Visited 10<sup>th</sup> May 2022.

<sup>58</sup> Supra Note 24

<sup>59</sup> Women Business Collaborative SPECIAL REPORT in partnership with 50/50 Women on Boards™, Women Leading Boards 2022

Coming to India, even though there has been a certain degree of progress but it can't be said that the companies are following the spirit of the law. This has to be addressed by strengthening the rigor of the current provisions and introducing newer reforms. While regulators have done their part in giving nudge to the boards into adopting woman as directors, unless institutional changes are made in the structure of functioning of the boards and in the attitudes of those who run it, a fruitful attainment of the law's objective is a far cry.

The evidence for women directors' impact on corporate governance based on firm performance is mostly inconclusive. This can be attributed to different contexts within which they were conducted, contributed to by the methodologies that may have been adopted for arriving at the results. The context is colored by the different kinds of mechanisms used to enforce the regulations, the economic status of the country, and the evolutionary maturity of the culture.

However, given the other factors pointing towards improved corporate governance and related outcomes may not be causative due to issues of endogeneity, they can be seen as co relative. Even the difference between women as mere tokens and a situation where critical mass has been reached will create difference in the results.<sup>60</sup>

As we attempt to infer the rationale behind women director regulations from the above studies, caution must be applied so as not to get mired in gender essentialism thereby reproducing the gender stereotypes.<sup>61</sup>

While the evidence does point out that appointment of women as directors may lead to the prodding of corporate governance in directions beyond the shareholder primacy model, as called for by feminist analysis, however even that is dependent on reaching a critical mass in order to be actually fruitful and noticeable. Even though the business case for appointing women on boards may not have been conclusive but diversity on boards itself is an intrinsic value. Anyway, a sole emphasis on the inclusion of women based on profitability serves to embolden the shareholder primacy deep-seated in the traditional model of governance.

Since it has been underlined that in order for women directors to be engaged in strategic decisions of the board and make a significant impact on them, reaching a critical mass is essential, it is high time that the mandate of one-woman director be increased to at least 3 women directors in order to reap the benefits of a diverse board effectively and let women

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<sup>60</sup> Supra Note 68

<sup>61</sup> Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, Women on Boards Policies in the Member States and the Effects on Corporate Governance (2021)

directors work to their full potential without being shadowed by concerns of tokenism. Out of 3, at least 2 candidates ought to be in independent category in order to prevent the family firms from being rendering the provision redundant. While SEBI has made provisions ensuring the independence but those regulations are limited to only certain class of companies. The independence of directors is a critical element in corporate governance, thus this provision needs to be broadened.

Currently, Section 149(3) doesn't provide a specific penalty for non-compliance, thus reliance is placed on either Section 172 or Section 450. If the intent is to truly diversify the board it is imperative to ensure that the provision doesn't remain a paper tiger, thus the intent has to be translated into a specific penalty for non-compliance. Enforcement can't be totally dependent on a regulatory body; the parent statute should accommodate the sanctions. This can be complemented with regulations regarding making mandatory disclosure explaining delay and provision of a specific timeline within which it will be followed.

Compounding should be done sparingly and in exceptional circumstances. In order to prevent a phenomenon whereby the same group of women occupy directorships of various companies, the limits on holding directorships may be accordingly rationalized. It has been almost ten years since the provision first came in, the pool problem shouldn't be allowed to be used as a justification anymore. Further, mandatory provisions regarding the selection criteria for being appointed on various committees to be disclosed by the companies in its Corporate Governance Report may be pursued. This could ensure that women directors aren't relegated to certain kinds of committees due to some inherent bias.

## HUMAN RIGHTS REGULATORY REGIME IN INDIA: AFTER THREE DECADES

Arpita Sinha

*Junior Research Consultant, National Human Rights Commission, New Delhi*

### Abstract

*Human rights, as the name suggests, are inherent to all human beings and are available to all by virtue of being humans. These rights form the basis of life, liberty, equality, and dignity, which has been recognized by the international community. The international community has therefore tried to strengthen the idea of establishment of national human rights institutions in its member countries. The National Human Rights Commission (NHRC) of India, which was established after the realization of the importance of a national institution for the preservation and protection of human rights by the government of India, has been in service for around three decades now. It is popularly perceived that the maiden decade of NHRC was its golden decade since it very often made the headlines, owing to its operations across the country. However, it goes unnoticed that the commission has continued to be as effective as it was at the time of its establishment with an objective to mainstream human rights into the Indian legal system through systematic dissemination of information and wisdom vis-à-vis human rights through educational enterprise, training, and research across the country; timeous disposal of complaints; and increasing effective coordination with the state commissions and the international bodies working for the preservation of human rights. This research ergo discusses the role played by NHRC in encouraging and protecting human rights, and compares the operations of the commission in its first decade and the years that follow.*

**Keywords:** Human Rights, National Human Rights Commission, India

### Introduction

The international community started recognizing the importance of national human rights institutions as early as 1946 when a proposal for their establishment was first tabled in the United Nations forum, to act as ‘agents’ of international law in the national arena.<sup>1</sup> The object behind the establishment of these institutions was to introduce vectors to transmit the norms of human rights law recognized by the international community from the global to the domestic arena. It was believed that this transmission would be carried out by strengthening education

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<sup>1</sup>Report of the Commission on Human Rights, E/38/Rev.1 (1946), 5-6; E/HR/15 (1946), seventh meeting, 8 May 1946; Anna-Elina Pohjola, "The Evolution of National Human Rights Institutions: The Role of the United Nations" (Copenhagen: Danish Institute for Human Rights, 2006), p. 85.

and encouraging substantial protection of human rights in national legislation. Domestic institutions are also capable of monitoring compliance with the treaty obligations by the government.<sup>2</sup> Additionally, such institutions were to be accessible, independent, and custodians of wide-ranging powers, thus having the potential to ensure human rights protection at an increased level.<sup>3</sup>

In this regard, a UN-sponsored meeting was convened in 1991 to discuss the status of national institutions for human rights protection by representatives of such institutions, which resulted in the adoption of a set of principles, known as the Paris principles, on the status of such national institutions.<sup>4</sup> Subsequently, the UN Commission on Human Rights in 1992<sup>5</sup> and the UN General Assembly in 1993<sup>6</sup> endorsed the Paris principles. These principles became the foundation for the establishment of national human rights institutions. In 1993, the Vienna Declaration was adopted at the Vienna World Conference on Human Rights which highlighted the significant role played by the national institutions in ensuring human rights protection, especially in disseminating relevant information, promoting education and training in human rights, offering advice to the competent authorities, and making efforts that sought to remedy human rights violation.<sup>7</sup> In 1993 itself, as a response to the Paris principles, India came up with the Protection of Human Rights Act, which established the NHRC entrusting it with a wide range of powers and functions including intervention and inquiry into the matters pertaining to human rights, making recommendations for effective implementation of laws and treaty obligations, promoting education and research on human rights, etc.<sup>8</sup>

### **Age of Activism (1994-2003)**

The National Human Rights Commission of India was established on 12<sup>th</sup> October 1993 under the Protection of Human Rights Act, 1993 (hereinafter referred to as 'act'). The act stipulates the functions and powers of the body under sections 12 and 13 respectively. Section 14 of the act further empowers the body to utilize the services of any officer or investigation agencies under the state or central government. In the exercise of the powers and functions provided in

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<sup>2</sup>16, H.O. AGARWAL, *INTERNATIONAL LAW AND HUMAN RIGHTS* 954 (Central law Publications, 2009).

<sup>3</sup> Catherine Shanahan Renshaw, *National Human Rights Institutions and Civil Society Organizations: New Dynamics of Engagement at Domestic, Regional, and International Levels*, *Global Governance*, 18 3 299-316 (2012).

<sup>4</sup>Ravinder, *Contribution of the National Human Rights Commission to Protect Human Rights in India*, 7 *INTERNATIONAL RESEARCH JOURNAL OF MANAGEMENT SOCIOLOGY AND HUMANITIES*(2016).

<sup>5</sup> Commission on Human Rights Resolution 1992/54 of 3 March 1992.

<sup>6</sup> General Assembly Resolution 48/134 of 20 December 1993.

<sup>7</sup>Catherine, *supra* note 3

<sup>8</sup>Ravinder, *supra* note 4

the act, the commission since its establishment has ceaselessly made efforts to increase human rights literacy, made recommendations for effective implementation of international obligations, intervened in matters pertaining to human rights violation, made visits to prisons, correctional institutions, hospitals, and mental health institutions to ensure the protection of the right to life, including the right to liberty, health, and freedom from torture, made efforts to promote research, and the like, which can be deduced from a collective reading of annual reports published by the commission.<sup>9</sup>

The NHRC was established amidst considerable scepticism on the part of advocates of human rights as to the efficiency of the commission in better protection of human rights. Therefore, it began its operation with a knee-jerk effort to preserve human rights by focusing major lyon the dissemination of information, increasing accessibility of the commission, and the generation of awareness.<sup>10</sup>This effort includes setting up an Information and Public Relations division, and computerization of its work to introduce a user-friendly complaint monitoring system (COMMONS)<sup>11</sup>, among others, which was further strengthened by subsequent efforts of the commission<sup>12</sup>, seeking the cooperation of and association with NGOs for education, research, training and awareness pertaining to human rights<sup>13</sup>, encouraging human rights literacy by making academic curricula of institutions inclusive of human rights as a subject<sup>14</sup>, and by making constant efforts for constitution of a research division within the commission, which finally became operational during the year 1996-97.<sup>15</sup>

It is due to the efforts of the commission to disseminate information and increase human rights literacy that there was a systematic and significant upsurge of complaints registered with the commission as a result of increased awareness among people about their human rights and freshly pounded trust in the body. The complaint docket embracing a yearly record of the number of complaints addressed to the commission has been illustrated below.<sup>16</sup>

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<sup>9</sup>Annual Reports, National Human Rights Commission, available at: <https://nhrc.nic.in/publications/annual-reports> (last visited Oct. 8, 2022)

<sup>10</sup> Annual Report 1994-95, National Human Rights Commission, available at: <https://nhrc.nic.in/sites/default/files/Annual%20Report%201994-95.pdf> (last visited Sept. 25, 2022)

<sup>11</sup> *Id.* para 11.5-7

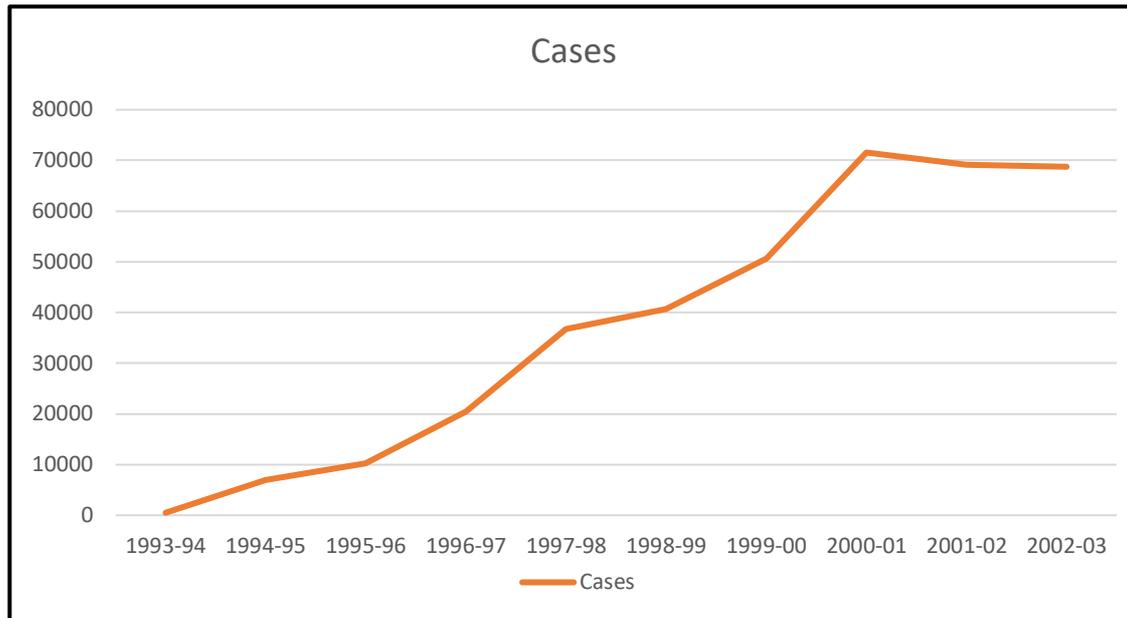
<sup>12</sup> Annual Report 1996-97, National Human Rights Commission, para 11.5, available at: <https://nhrc.nic.in/sites/default/files/Annual%20Report%201996-97.pdf> (last visited Sept. 25, 2022)

<sup>13</sup> See *Supra* note 10, para 7.3; See Annual report 1995-97, National Human Rights Commission, para 7.4, available at: <https://nhrc.nic.in/sites/default/files/Annual%20Report%201995-96.pdf> (last visited Sept. 25, 2022)

<sup>14</sup> See *Supra* note 10, para 6.1; Annual report 1995-97, National Human Rights Commission, para 7.4, available at: <https://nhrc.nic.in/sites/default/files/Annual%20Report%201995-96.pdf> (last visited Sept. 25, 2022)

<sup>15</sup> Annual Report 1996-97, National Human Rights Commission, available at: <https://nhrc.nic.in/sites/default/files/Annual%20Report%201996-97.pdf> (last visited Sept. 25, 2022)

<sup>16</sup> Annual Report 2002-03, National Human Rights Commission, available at:



This suggests that while the commission encouraged aggrieved individuals to approach with their complaints, it also sought to establish an environment that fosters due respect for human rights. Looking at the rising cases, the commission constantly advocated for decentralization and the setting up of state commissions and human rights courts.<sup>17</sup>Sensitization was another and hitherto the most emphasized focus area of the commission. To achieve this, NHRC made efforts to build interaction with the media in order to have a wider coverage of its activities.<sup>18</sup>Acknowledging the significance of media association, it recognized in its annual report that media is an “*invaluable associate in its efforts to promote and protect human rights.*”<sup>19</sup>

Significant efforts were made by the commission to improve the police-community relationship by sensitizing the police force on human rights. To achieve this, the commission continually advocated for the constitution of human rights cells in state police headquarters, and district complaint authority, and for the adoption of other such measures to improve the ‘out-reach’ of police officers in order to gain the confidence of the public. The commission even provided elaborate guidelines on the functioning of human rights cells to the State governments.<sup>20</sup>

<https://nhrc.nic.in/sites/default/files/AR02-03ENG.pdf> (last visited Sept. 27, 2022)

<sup>17</sup>See *Supra* note 10, para 10.1; Annual Report 1995-96, para 8.6, National Human Rights Commission, available at: <https://nhrc.nic.in/sites/default/files/Annual%20Report%201995-96.pdf> (last visited Sept. 26, 2022)

<sup>18</sup> See *Supra* note 10, para 6.17

<sup>19</sup>See *Supra* note 18, para 6.25

<sup>20</sup>Annual Report 2000-2001, National Human Rights Commission, available at:

However, the commission soon realized that the provisions of the act need to undergo significant amendments to create a firm impact and ensure better protection of human rights. In this regard, the commission recommended certain amendments to the act including the inclusion of the term ‘international covenant’ in the long title of the act, recognition of inquiry on the basis of a request made by the Supreme court, omission of the requirement of intimation to the state government prior to visiting any jail or other institution under the control of that state government, the inclusion of the power to obtain statements of witnesses or any other person along with summoning and examining them on oath, the inclusion of the power to transfer complaints to the state human rights commissions and entrusting the officers of the commission with investigative powers, among others.<sup>21</sup>

### **Major interventions that gathered media attention**

1. In 1995, the commission filed a public interest litigation petition in the Hon’ble Supreme Court of India, drawing its *locus standi* from article 32 of the Indian constitution, for safeguarding the interests of the *Chakma* community, which was displaced from erstwhile East Pakistan, under article 21 which provides for the right to life and liberty. As a result of this intervention, the government of Arunachal Pradesh was directed to ensure the life and personal liberty of *Chakma* refugees residing in the area. This judgment even recognized the guarantee of rights mentioned under article 21 to foreigners as well.<sup>22</sup>
2. Following a referral made by the Supreme Court to the NHRC of a case concerning the mass cremation of human bodies by Punjab police, the commission took cognizance of the same and arranged for the award of monetary compensation to the next of kin of each of the victims of the incident after holding the State accountable and responsible for the infringement of the right to life of the deceased.<sup>23</sup>
3. NHRC took *suo moto* cognizance of deaths caused due to starvation in the Koraput, Bolangie, and Kalahandi districts of Orissa in 1996 following media reports covering the incidents and appointed a special rapporteur to look into the rehabilitation and grant of relief to the residents of the region. This gets reviewed by the commission periodically.<sup>24</sup>

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<https://nhrc.nic.in/sites/default/files/Annual%20Report%202000-2001.pdf> (last visited Oct. 8, 2022)

<sup>21</sup>Annexure, Annual Report 1999-2000, National Human Rights Commission, available at: <https://nhrc.nic.in/sites/default/files/Annual%20Report%201999-2000.pdf> (last visited Oct. 8, 2022)

<sup>22</sup>National Human Rights Commission of India v. State of Arunachal Pradesh, AIR 1996 SC 1235

<sup>23</sup>Ravinder, *supra* note 4

<sup>24</sup>*Id.*

4. In 2002, the commission took *suo moto* cognizance of Gujarat communal riots based on media reports and initiated an inquiry into the incidents. The commission directed the state government to submit a report stating all the measures taken by the government to restore peace in the state. NHRC also approached the Supreme Court of India on behalf of the victims of the Gujarat riots.<sup>25</sup>
5. In 2003, the commission took *suo moto* cognizance of a case concerning terrorist attacks in Jammu & Kashmir that resulted in the deaths of ‘Vaishno Devi’ pilgrims following media reports. The commission reviewed relief and assistance provided to the Kashmiri Pandits in the migrant camps.<sup>26</sup>

### **Age of Pragmatism (2004 Onwards)**

One of the major setbacks faced by the commission during its first decade was the increasing number of pending cases over the years which became the driver for effective measures taken by the commission to dispose of the backlog of cases. The focus of the commission has continued to be on the expeditious disposal of complaints addressed to it since 2003 along with the disposal of pending cases.<sup>27</sup> A graph illustrating the ratio of cases disposed of and cases registered with the commission since 2003 is provided below.<sup>28</sup>

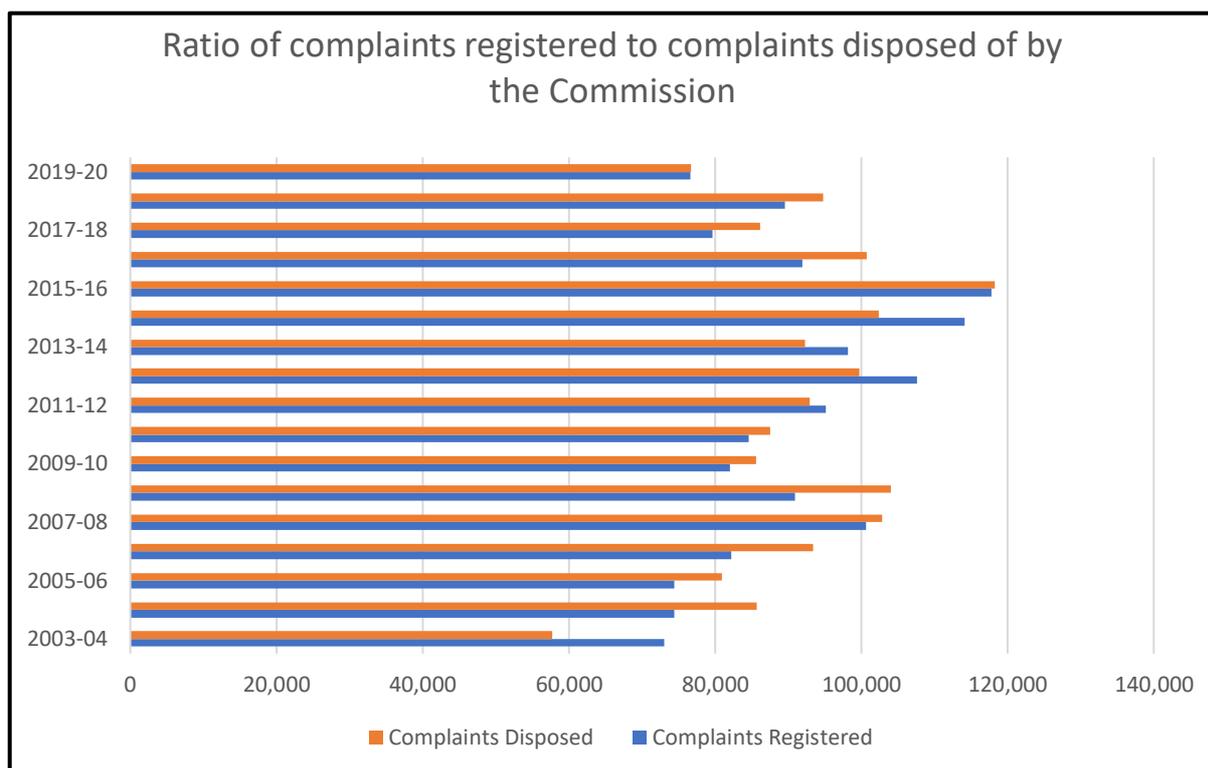
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<sup>25</sup>*Id.*

<sup>26</sup> Press release, ‘Year-end review 2003 NHRC’, available at: <https://nhrc.nic.in/press-release/year-end-review-2003-nhrc> (last visited Oct. 8, 2022)

<sup>27</sup>Annual Reports, 2002-03 onwards, National Human Rights Commissions

<sup>28</sup>Complaint Dockets, Annual reports 2003-04 to 2019-20, National Human Rights Commission



As of 2020, the statistics suggested that leaving the disposal of cases from 2011-2014, the number of cases that have been disposed of by the commission since 2003 has always outnumbered the fresh complaints registered with it. Further, the data also shows that up until 2016, there has been a gradual increment in the number of cases that were addressed to the commission, suggestive of the fact that the body continued with its efforts to increase awareness and human rights literacy.

In the last two decades, the commission has endeavoured to strengthen the research division by establishing core groups on relevant subjects including a core group on women, children, trafficking of women and children, health and mental health, persons with disability, elderly persons, bonded labour, right to food, lawyers, NGOs, environment, business and the like.<sup>29</sup> Besides core groups, the research division of the commission also works on subjects such as the rights of seafarers, SCs/STs, minorities, internally displaced persons, education, under-trial prisoners, manual scavengers, LGBTQI, local self-government, etc. The core groups and other groups of subjects conduct open house discussions and meetings with relevant stakeholders to release recommendations or advisories on any issue that falls within the brackets of the abovementioned subjects. Further, the commission also takes up research projects and assigns

<sup>29</sup>Core Groups, National Human Rights Commission, available at: <https://nhrc.nic.in/about-us/core-groups/archive> (last visited Oct. 9, 2022)

them to various academicians and researchers of relevant fields in order to further strengthen the protection of human rights by identifying ambiguities or loopholes in the present protection system and offering suggestions to cure the same.

However, despite strengthening the administrative framework of the body, limited powers of the commission as provided in the act often created hindrances to human rights protection. It is due to the relentless efforts of the commission that the act underwent amendments in 2006 and 2019 that sought to expand the powers of the commission for an effective discharge of its functions. These amendments include the omission of the precondition to intimate the state governments before making visits to prisons, correctional institutions, and the like, subject to any law in force; insertion of a provision for transfer of complaints to state human rights commission; the inclusion of power to recommend authorities to make any payment of compensation, interim relief, or damages to the complainants; the introduction of a provision empowering the commission to make regulations to carry out the provisions of the act; inclusion of provisions for state human rights commissions and human rights courts; the inclusion of a provision to increase the representation of women in the commission; among others.<sup>30</sup>

In the last two decades, the commission has constantly attempted to make legislation and policies of the government human rights sensitive. These efforts include recommendations to include rehabilitation and resettlement in the Land Acquisition Act of 1894<sup>31</sup> to make such provisions justiciable that served as a contributing factor when the provisions were finally incorporated in the revised act of 2013<sup>32</sup>; recommendations to convert *Vishakha* guidelines of the Supreme court<sup>33</sup> for the protection of women from sexual harassment at workplaces to national legislation<sup>34</sup> that led to the enactment of *The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013*; recommendations to ratify the UN convention against torture<sup>35</sup> that persuaded the government to propose the *Prevention of*

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<sup>30</sup> The Protection of Human Rights (Amendment) Act, 2006; The Protection of Human Rights (Amendment) Act, 2019

<sup>31</sup> Annual Report 2004-05, National Human Rights Commission, available at: <https://nhrc.nic.in/sites/default/files/AR04-05ENG.pdf> (last visited Oct. 9, 2022)

<sup>32</sup> Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013

<sup>33</sup> *Vishakha and others v. State of Rajasthan*, AIR 1997 SC 3011.

<sup>34</sup> See *Supra* note 16

<sup>35</sup> Press release, 'Government urged to ratify UN Convention against Torture', available at: <https://nhrc.nic.in/press-release/government-urged-ratify-un-convention-against-torture> (last visited Oct. 9, 2022)

*Torture bill* in 2010 however, there isn't any development in this regard since 2010; among many others.

In 2018, a bench comprising of Justice Dr. D. Y. Chandrachud and Yashwant Varma interpreted the meaning of 'recommend' under section 18 of the act and opined that the "commission is not merely a body to render opinions without enforcement as that would defeat the statutory object underlying the constitution of such a body".<sup>36</sup> Nevertheless, due to the lack of binding nature of the recommendations of commissions as provided under the act, the authorities continuously and very conveniently ignore the recommendations made by the body despite perpetual insistence by the body which is why a few years back, the former Chairperson of the commission, Justice H.L. Dattu, referred to the body as a 'toothless tiger'.<sup>37</sup>

### Major interventions that gathered media attention

1. In 2007, the commission took *suo moto* cognizance of the case concerning the deaths of the factory workers, who were members of a tribal community from Alirajpur, Madhya Pradesh, due to Silicosis in Gujarat following media reports. The reports claimed that these tribal labourers were exposed to silica dust without any protection while working in the factories.<sup>38</sup>
2. In 2008, the commission took cognizance of various cases of internal displacements due to infrastructural projects and made recommendations for rehabilitation and resettlement. Later provisions in this regard were incorporated in the Land Acquisition Act itself.<sup>39</sup>
3. Apart from these, the commission has continuously intervened in issues pertaining to communal violence in Jammu and Kashmir<sup>40</sup>, recommended making counterterrorism

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<sup>36</sup>State of Uttar Pradesh v. National Human Rights Commission, Writ - C No. - 15570 of 2016

<sup>37</sup>Gargi Verma, *Need more power to become a 'toothful' tiger: NHRC chief HL Dattu*, available at: <https://indianexpress.com/article/india/need-more-power-to-become-a-toothful-tiger-nhrc-chief-hl-dattu-6267161/> (last visited Oct. 9, 2022)

<sup>38</sup>Ravinder, *supra* note 4

<sup>39</sup>Press release, 'Some important interventions of NHRC', 2008, available at: <https://nhrc.nic.in/press-release/some-important-interventions-nhrc#:~:text=There%20are%20a%20number%20of,mega%20projects%2C%20disasters%20and%20conflicts> (last visited Oct. 9, 2022)

<sup>40</sup>Press release, 'NHRC takes suo-motu cognizance of terrorist killings of Kashmiri Pandits - Government of India and J&K Government asked to report', available at: <https://nhrc.nic.in/press-release/nhrc-takes-suo-motu-cognizance-terrorist-killings-kashmiri-pandits-government-india-0> (last visited Oct. 9, 2022)

laws human rights sensitive<sup>41</sup>, periodically released recommendations for the protection of manual scavengers, etc.

### **Comparative Study**

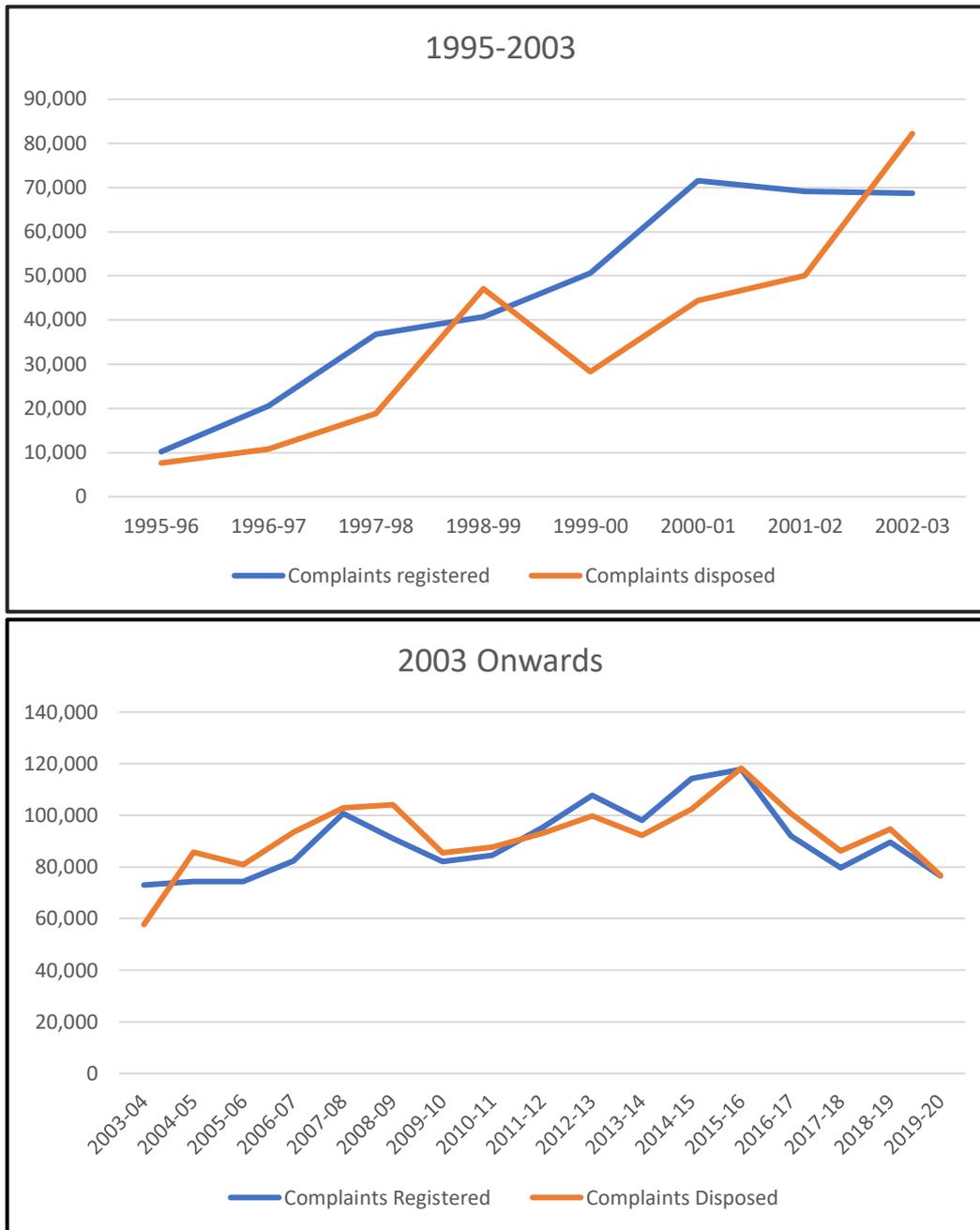
The first decade, which is very often referred to as the ‘golden decade’ of NHRC, began with efforts to increase awareness and human rights literacy in the country which was lacking when the commission was established. The body majorly focused on sensitization and drawing media attention by taking up issues that made headlines since there existed public scepticism as to the capability of the institution in ensuring human rights protection. However, in the years following the first decade, the body restricted itself more to education, research, and ensuring compliance. The research division was strengthened, recommendations and advisories were released by the commission more regularly, and the powers of the commission were expanded owing to the concerted efforts of the body and the government which resulted in recommendations for payment of compensation to the aggrieved persons and more policies directed at achieving social welfare during this period.

Since the focus of the body was predominantly on sensitization in the first decade, there existed a backlog of cases that increased over the years during the period. This became a reason for concern and a shift in focus of the body from sensitization to compliance. The graphs provided below depict the ratio of complaints addressed to the commission and the number of cases disposed of, including the backlog cases, during the two periods in question.<sup>42</sup>

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<sup>41</sup> Recommendations, Negative effects of Terrorism on the enjoyment of Human Rights, National Human Rights Commission, India

<sup>42</sup> Annual Reports, NHRC, *supra* note 9



The graph for the first decade depicts a disparity in the ratio of complaints registered to that of complaints disposed of throughout the period, which the commission overcame twice i.e., during the year 1998-99 and during 2002-03 as opposed to the graph for the second period in question i.e., 2003 onwards, which suggests that the focus of the commission throughout the period has been timeous disposal of complaints and disposal of pending complaints addressed to it.

During the first decade, NHRC sought to increase awareness, human rights literacy, and accessibility of people to the commission and took up issues that gathered limelight along with

making persistent efforts to dispose of complaints, strengthen its research division, and persuade the government to make amendments in the act for enlargement of powers of the commission. However, the focus of the body was more on the former than on the latter, which has been vice versa for the next two decades in question. Owing to this, the first decade has been referred to as the ‘age of activism’ while the next two decades, wherein the commission disposed of complaints addressed to it timeously, overcame the backlog of complaints effectively, underwent structural changes in its research division, became the reason for right-sensitive enactments and policies, and became successful in convincing the government to make amendments in the act, have been referred to as the ‘age of pragmatism’. The shift from the former to the latter was a gradual process and the periodization is taken on a tentative count, with no watertight compartmentalization to this end.

### **Conclusion**

The ‘age of activism’ of the commission contributed to the dissemination of information, human rights literacy, and awareness despite the obstacles caused by the crippling poverty and literacy rate of India, and gaining people’s trust in preserving and protecting their human rights, especially of the vulnerable strata of society by making a strong presence in the media. On the contrary, the ‘age of pragmatism’ contributed to an increase in research, an increase in the number of open house discussions, meetings, and visits leading to the frequent release of recommendations and advisories to make policies human rights sensitive. Both activism and pragmatism are a matter of policy of the commission and have contributed to betterment in human rights protection.

In order to make an impact through the discharge of its functions, the commission not just needed to make its presence felt but also gain the trust of the community. This could have only been achieved through activism, media sensitization, dissemination of information, and awareness programs. Hence, the policies of the commission initially circled activism as required by the circumstances. Once the commission became successful in establishing its mark and in gaining community support, it restricted its operations to achieve effective compliance with its functions pertaining to expeditious disposal of fresh and pending complaints, offering continuous recommendations and advisories to relevant authorities, maintaining a sturdy focus on research and education, etc. Thus, the policies after the first decade have continued to be aimed at achieving compliance or pragmatism which has become indispensable given the prevailing state of affairs.

## CARTELIZATION IN THE OTT SECTOR IN INDIA: A LEGAL PANORAMA

Sakshi Dave & Prakhar Mani Tripathi

3rd Year Student, Law Centre-2, Faculty of Law, University of Delhi, email:  
sakshi.d44@gmail.com, prakhardreams@gmail.com

### Abstract

*In this new arena of online content, Netflix Inc. and Amazon Prime Video are playing a pivotal role in getting substantial rights of major big production banners, for instance, Netflix Inc. managed to get the entire streaming rights of the banner, Red Chillies Entertainment owned by Shahrukh Khan whereas Amazon Prime Video acquired, all the exclusive streaming rights worldwide<sup>1</sup> of Salman Khan Films production. In both these cases, we can see a vertical agreement under section 3(4) of the Competition Act, 2002. Vertical agreements are not per se anti-competitive or void, only when they put a restraint on competition, they are considered void. In the present scenario, there is collusion between production houses and streaming platforms, and there is hardly any room left for other emerging OTT service providers to grow in the market.*

**Keywords:** Relevant Market, Dominant Position, Collusion, Vertical Agreements, Cartel, Over-the-Top (OTT).

### Introduction

*“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices”*

*--- Adam Smith, The Wealth of Nations. (1776)*

Cartels have existed ever since humans commenced trading. With the advent of civilization in the world, trade started to develop. Markets began to take shape and cultures spread across the globe began exchanging commodities via land and sea routes. This sowed the seeds for the growth of various traders and merchants. Eventually as the market and customer base began, traders started engaging in collusive habits to control the market and cartels started coming into shape.

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<sup>1</sup>Amazon Prime Video versus Netflix: A tale of two competitive streaming services in India (Sep. 14, 2021, 02:37 AM) <https://www.firstpost.com/entertainment/amazon-prime-video-versus-netflix-a-tale-of-two-competitive-streaming-services-in-india-3936543.html>.

Be it the Pharaoh-backed drug market of Ancient Egyptian culture<sup>2</sup> or the salt syndicates of France and Naples in the 13<sup>th</sup> century, there have been numerous instances of cartelization throughout the ancient world. Cartelization is the antithesis of competition. Through competition, the State thrives to promote innovation, new ventures, development, etc. which are beneficial for the people currently involved in trade and the new players entering the market. Cartels engage in price control, limit production or trade in goods and restrict the entry of new players in the market. The factual interpretation of cartels is based on the cartel theory having its origin in America. It was introduced in 1883 by the Australian economist Friedrich Kleinwachter.

The word Cartel has been derived from the Italian word *cartello* which means “leaf of paper” or “placard”. Lorenz Von Stein was the first person to use the word Cartel to define curtailment of competition.

In India, instances of Cartelization have been observed since ancient times. During the Colonial times, the East India Company had established a monopoly in Bengal province for Opium production. The great Indian strategist *Chanakya* in his book *Arthashastra* had penalized anti-competitive behavior and cartel formation.

Section 2(c) of the Competition Act, 2002 defines Cartel as - “cartel” as an association of producers, sellers, distributors, traders, or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services”.

So, there are three essential elements of Cartels –

1. Existence of an arrangement or understanding between the competitors.
2. Parties engaged in similar trades.
3. The agreement aimed to limit, control or attempt to control production.

The article discusses how cartel-like behavior has started shaping up in the new age of streaming service platforms and has adversely affected the free market dynamics. In this article,

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<sup>2</sup>Cocaine Mummies & the search for narcotics in historic collections (Sep. 14, 2021, 17:23 PM) <https://blogs.ucl.ac.uk/researchers-in-museums/2019/04/20/cocaine-mummies-the-search-for-narcotics-in-historic-collections/>.

we will first discuss how the rise of streaming services took place and the factors behind their growth. Post that, we will discuss how the enterprises, that have got huge financial resources started abusing their position and exhibiting Cartel comportment. In the last two points, we will discuss, what legal recourses we have in India to put an end to such malpractices initially by the use of the Competition Act, 2002, and then by going through our pristine Constitution.

### **Rise of the OTT platforms**

There was a time when people would wait for months and years for their favorite actor's movies in India since cinema back then was a star-driven business. Chronologically, the attracting factor for people towards theatre was the star, the songs, and the story coming in the end. Then the 90s and early 2000 saw the rise of private television channels in India<sup>3</sup>, which became an alternate source of entertainment for the Indian audience. Both television and theatres ran in symbiosis in providing entertainment until the data prices dropped drastically in India in the year 2016<sup>4</sup> giving way to the evolution of streaming platforms.

With the advent of the Smartphone revolution followed by the internet boom, smaller content creators who were struggling to find a space for themselves amongst the bigger producers got an opportunity to showcase their talent via streaming mediums<sup>5</sup>. No longer is the industry a star-run business, where people would watch the movie for their favorite stars. Story/Content is running the business now; movies with not-so-popular actors and banner names but with amazing storylines are reaching the audience.

With the internet boom, YouTube was the first platform to get the audience's attention given its free streaming features<sup>6</sup>, then native streaming platforms such as TVF and MX player started coming in; showcasing various domestically made web series. The Indian audience also started getting more interested in the concept of web series given they had the opportunity to choose what they wanted to watch and not depend on the mercy of television channels. Collectively,

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<sup>3</sup>Television in India (Sep. 14, 2021, 01:50 AM) <https://www.flexiprep.com/NIOS-Notes/Senior-Secondary/Mass-Communication/NIOS-Class-12-Mass-Communication-Ch-13-Television-in-India.html>.

<sup>4</sup> Mobile data price down 95%, revenue up 2.5 times in 5 years: Trai (Sep. 14, 2021, 01:54 AM) [https://www.business-standard.com/article/pti-stories/mobile-data-price-down-by-95-but-revenue-up-2-5-times-in-5-yrs-tra-119082101291\\_1.html](https://www.business-standard.com/article/pti-stories/mobile-data-price-down-by-95-but-revenue-up-2-5-times-in-5-yrs-tra-119082101291_1.html).

<sup>5</sup> How Online Platforms are Providing Opportunities to Artists (Sep. 14, 2021, 01:59 AM) <https://www.matchmytalent.com/blog/how-online-platforms-are-providing-opportunities-to-artists/>.

<sup>6</sup> How India conquered YouTube (Sep. 14, 2021, 02:01 AM) <https://www.ft.com/content/c0b08a8e-4527-11e9-b168-96a37d002cd3>.

these services started to be called OTT or Over-the-Top platforms all over the world, given they were providing streaming services to their users over the internet<sup>7</sup>

Seeing the boom in the online content industry, bigger streaming giants such as Amazon and Netflix entered the Indian market and started collaborating with Indian producers and directors to produce content domestically<sup>8</sup>. Now, the Indian audience has the opportunity to watch homegrown online content plus content from all around the world.

Earlier, OTT services were considered a smaller threat to the Indian Cinema theatres, but the Corona Lockdown of March 2020, has changed the industry drastically. With theatres remaining closed for more than a year and a half, the online content industry took a huge leap and grew by metes and bounds, and today is set to continue the expansion<sup>9</sup>.

The industry is now looked upon as an alternative to cinema theatres and is also giving tough competition to the cable television industry<sup>10</sup>. People have the opportunity to watch the best movies on their phones or television sets; stars who had a huge box office reputation are also willing to come to the OTT platforms.

### **Collusive practices by Dominant Enterprises**

The rise of big corporate entities in the market has brought with it preeminence along with competitiveness. In the wake of the Covid-19 Pandemic, sudden advances were seen in the Media and Entertainment Industry. The immediate upshift of the film industry from cinema theaters to OTT (Over-the-Top) platforms has massively affected the market in general and cinema theaters in specific. As the shift is fairly visible from the bygone theater releases to the new age of internet streaming services, the audience prefers the latter one it is more flexible for the individuals. With the rise of the new age of OTT platforms, various production companies have come up in the market providing streaming services. Today, India enjoys more than 40 OTT platforms providing online streaming services including international and

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<sup>7</sup>What is the definition of OTT (Sep. 17, 2021, 17:14 PM) <https://www.adjust.com/glossary/ott-over-the-top?>

<sup>8</sup> Netflix to Invest \$400M in Indian Content Over Two Years, CEO Reed Hastings Says (Sep. 14, 2021, 02:08 AM) <https://www.hollywoodreporter.com/tv/tv-news/netflix-invest-400m-indian-content-says-ceo-reed-hastings-1260159>.

<sup>9</sup> OTT to the top: For OTT platforms, 2020 was a time for serious growth (Sep. 14, 2021, 02:10 AM) <https://www.thehindu.com/society/ott-to-the-top-for-ott-platforms-2020-was-a-time-for-serious-growth/article33411204.ece>.

<sup>10</sup> 55% of Indians prefer OTT platforms vs 41% that still prefer DTH: MoMAGICsurvey (Sep. 14, 2021, 02:31 AM) <https://brandequity.economictimes.indiatimes.com/news/media/55-of-indians-prefer-ott-platforms-vs-41-that-still-prefer-dth-momagic-survey/70858815>.

domestic players like Amazon Prime Video, Netflix Inc., Disney Hotstar, Zee5, etc. According to a credible research firm – Price Waterhouse Coopers Global Entertainment and Media Outlook 2019-23<sup>11</sup> the OTT market is expected to grow at the rate of 21.8% CAGR, from Rs. 4,464 Cr. in 2018 to Rs. 11,976 Cr. in 2023. Simultaneously, the FICCI EY report of 2019 suggests a market growth of 24 billion by 2021. In this new arena of online content, Netflix Inc. and Amazon Prime Video are playing a pivotal role in getting substantial rights of major big production banners, for instance, Netflix Inc. managed to get the entire streaming rights of the banner, Red Chillies Entertainment owned by Shahrukh Khan whereas Amazon Prime Video acquired, all the exclusive streaming rights worldwide<sup>12</sup> of Salman Khan Films production. In both these cases, we can see a vertical agreement under section 3(4) of the Competition Act, 2002. Vertical agreements are not per se anti-competitive or void, only when they put a restraint on competition, they are considered void. In the present scenario, there is collusion between production houses and streaming platforms, and there is hardly any room left for other emerging OTT service providers to grow in the market. In the famous U.S. case of **the United States v. Paramount Pictures, Inc.**<sup>13</sup>; collusive vertical integration was observed by major film studios. The theater chains would show only those movies produced by the studios owning them, creating a de facto oligopoly in the market. A sevenfold test including clearance agreements, pooling agreements, block bookings, and joint ownership was propounded by J. William O. Douglas where clearance agreements and block bookings were seen as restrained in trade practices while pooling agreements and joint ownership were considered bona fide practices in the trade. After this case, more independent producers producing the films were seen in the market free from the interference of the majority of studios dominating them.

The advent of the enormous market players had raised the issue of cartel creation in the Indian market. Many competitive players have come forward in recent times and faced the misuse of the dominant position. With problems come solutions, so in India, the first-ever Competition statute came into force, the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. With new advancements in the market, the archaic MRTP Act was replaced with the new

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<sup>11</sup>Global Entertainment & Media Outlook: 2019-2023 (Sep. 14, 2021, 02:34 AM) [https://bestmediainfo.in/mailler/nl/nl/2019\\_Global\\_E\\_M\\_Outlook.pdf](https://bestmediainfo.in/mailler/nl/nl/2019_Global_E_M_Outlook.pdf).

<sup>12</sup>Amazon Prime Video versus Netflix: A tale of two competitive streaming services in India (Sep. 14, 2021, 02:37 AM) <https://www.firstpost.com/entertainment/amazon-prime-video-versus-netflix-a-tale-of-two-competitive-streaming-services-in-india-3936543.html>.

<sup>13</sup> William O. Douglas, *United States v. Paramount Pictures Inc.*, 334 U.S. 141, 167.

Competition Act of 2002<sup>14</sup>making some amendments to the Act through a constitutional mandate by the recommendations of the **Raghavan Committee**. The competition statute aims to prohibit all anti-competitive agreements at the vertical and horizontal level that restrict competition and are detrimental to the consumer's rights and to regulate the abusive behavior of dominant firms setting unfair and discriminatory conditions upon the consumers. In **CCI v. Coordination Committee of Artist and Technicians of W.B. Film and Television and Ors.**<sup>15</sup>, the Supreme Court while upholding the order of CCI held that the action of associations working at a horizontal level attracted the element of "Anti-Competitive Agreement" given under section 3(3) of the Competition Act, 2002 as the association caused restriction on the telecast of dubbed serial, causing an appreciable adverse effect on competition of the relevant business enterprises in the market.

In its Contemporary; U.S.A's landmark law the Sherman Antitrust Act<sup>16</sup>was passed way back in 1890 by Senator John Sherman. To strengthen the Sherman Act another anti-trust law was enacted in 1914, the Clayton Antitrust Act by the United States Congress. The aim of this Antitrust statute is, to encourage economic competitiveness and fairness amongst the market players. In the famous case of **AT&T**<sup>17</sup>(American Telephone & Telegraph Company), a highly profitable firm had gained a monopoly in the telecom sector, restricting any new player to emerge in the market, eventually, numerous charges were laid against it under the Sherman Antitrust Act and it was agreed between the U.S. Government and the firm to break the parent company into seven baby bells, to limit the bundling ability of the company spreading monopoly in the market resulting into the emergence of numerous baby bells. Similarly, the Indian streaming sector needs to be constantly in check to see whether any single entity doesn't monopolize the market.

In another case<sup>18</sup>of the United States v. Columbia Pictures, several film studios colluded together to develop a paid cable network called "Premiere", to compete with HBO. The studios decided to license films to this new platform for a nine-month exclusive window to increase

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<sup>14</sup>[https://www.cci.gov.in/sites/default/files/advocacy\\_booklet\\_document/CCI%20Basic%20Introduction\\_0.pdf](https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCI%20Basic%20Introduction_0.pdf).

<sup>15</sup>CCI v. Coordination Committee of Artist and Technicians of W.B. Film and Television and Ors, A.I.R. 2017 S.C. 1449 (India).

<sup>16</sup>Sherman Antitrust Act (Sep. 14, 2021, 02:53 AM) <https://www.investopedia.com/terms/s/sherman-antitrust-act.asp>.

<sup>17</sup>AT&T's Successful Spinoffs (Sep. 14, 2021, 02:53 AM) <https://www.investopedia.com/ask/answers/09/att-breakup-spinoff.asp>.

<sup>18</sup>The United States v. Columbia Pictures Indus., 507 F. Supp. 412, 419 (S.D.N.Y. 1980). The four studios involved in the venture were Columbia, Universal, Paramount, and Fox.

profits, the Court found that the exclusive nine-month window was a per se embargo on HBO and the agreement was found to be anti-competitive.

From the above-quoted examples, we can perceive similar collusive practices in the Indian streaming Industry<sup>19</sup>. After colluding with big production banners, premium streaming service providers like Netflix and Amazon Prime Video are free to set their prices regardless of the competition, while the independent and smaller players are helpless to put down their prices to survive in the OTT market. The setting of artificially high prices by the dominant venture participants is a sign of a cartel<sup>20</sup>.

Therefore, this sector requires government intervention in its nascent stage so that the players with bigger financial muscles do not defy the natural laws of fair competition, and the true values of fair competition remain intact.

### **The Legal Remedy Available**

*Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through.*

- **Jonathan Swift**

This quote very precisely summarizes the condition of the OTT platforms. They have become like wasps and hornets who are trying to break through the cobwebs of law. Since content streaming over the internet is a relatively new phenomenon in India, there were very few laws that regulated it. Whereas, the other two giants of the entertainment industry, Television and Films have their respective governing bodies. Television is regulated by the Telecom regulatory authority of India<sup>21</sup> Films being regulated by the Central Board of Film Certification<sup>22</sup> and any kind of anti-competitive behavior was monitored by the Competition Commission of India.

The OTT sector being completely a breakthrough in technology was completely unfettered from any kind of regulating body<sup>23</sup>. Thus, initially, the players enjoyed unfettered powerplay and scored as many runs as possible by showing unregulated and uncensored content. Post the

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<sup>19</sup>Supra Note 2 and 3.

<sup>20</sup> Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. **1276, 1301** (W.D. Okla. **1982**).

<sup>21</sup> Telecom regulatory authority of India (Sep. 14, 2021, 02:58 AM) <https://www.trai.gov.in/about-us/history>.

<sup>22</sup>About Us (Sep. 14, 2021, 2:49 AM) <https://www.cbfcindia.gov.in/main/about-us.html>.

<sup>23</sup> OTT platforms like Zee5, Netflix in talks with the Indian government for self-regulation (Sep. 14, 2021, 03:05 AM) <https://www.wionews.com/entertainment/ott-platforms-like-zee5-netflix-in-talks-with-indian-government-for-self-regulation-264724>.

pandemic; after the exponential spur of the OTT sector the Indian government became serious regarding certification in the OTT sector and released the Intermediary Guidelines and Digital Media Ethics Code Rules 2021<sup>24</sup>, regulating the content streamed online.

The fact which is being overlooked by the Government and other regulating bodies is the cartel behavior that has started to develop in the streaming industry<sup>25</sup>, by the online streaming giants. But if we look closely, the Competition Act is comprehensive enough to deal with the collusive behavior shown by the OTT cartels.

Section 3 of the Competition Act, defines Anti-competitive agreements<sup>26</sup>. The agreements referred to under (a) to (d) of Section 3(3) of the Act may pilot to a Cartel.

Sub-section (3) of Section 3 of the Competition Act<sup>27</sup> provides that the commission may investigate any alleged contravention of the act. If there is a prima facie case, the director general may order an investigation.

- **Powers of the Commission**

After the inquiry, the Commission has the authority to pass any or all of the following directions/orders-

1. Direct the enterprise concerned to modify such agreements.
2. Direct the parties to cease and not to re-enter such agreements.
3. Direct the enterprises involved to comply with such other orders as the commission may pass and adhere to the directions, including payment of a fine if any;
4. Pass any other order it deems fit.

The Competition Commission previously also dealt with cartel behavior in the Entertainment Industry. In the case of **FICCI v. United Producers & Ors**<sup>28</sup> in which the members of United Producers and Distributors Forum (UPDF) colluded not to release Hindi Films to multiplexes

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<sup>24</sup> Press Release <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1700749>.

<sup>25</sup> Cartelisation in the OTT space is dangerous: Siddharth Anand Kumar (Sep. 14, 2021, 03:09 AM) <https://www.exchange4media.com/digital-news/if-i-made-a-film-there-are-only-a-few-places-where-i-can-go-to-sell-a-film-112892.html>.

<sup>26</sup> The Competition Act, 2002, No (12 of 2003), §3 (India).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ficci - Multiplex Association Of . vs. United Producers/ Distributors*, Case No. 01 OF 2009 (India).

to pressurize them into accepting new terms and revenue sharing ratio. The report of the Director-General, in this case, found that UDPF controlled nearly all the shares in the market of the production and distribution of Hindi motion pictures that were exhibited in Multiplexes within India. This was an agreement to fix sale prices by fixing the revenue share ratio which violated Section 3(3)(a) of the Act.

With the speed with which the streaming platforms like Netflix and Amazon are increasing their market share, there may come a time in the future when these two would be the only dominant entities, and filmmakers and producers would be forced to adhere to all or any of the conditions imposed by them for licensing of movies or shows.

In another case of 2013<sup>29</sup>, Raaj Kamal Film International was a firm that had produced a film called '*Vishwaroopam*' and had planned to release the films not only in theatres but also through DTH, but Tamil Nadu Theatre Owners Association passed a resolution denying their co-operation for screening of any film. The commission in this case decided that the object of Competition law is to promote competition and consumer welfare. Technological innovation or utilization of existing technology in a more novel manner is the right of every entrepreneur. The decision of theatre owners not to exhibit this movie or any other technology, prima facie limits the market of exhibiting films for the welfare of the viewers and is anti-competitive as it limits the producer to provide the experience of a movie in the comforts of his home.

From the above-quoted examples, we can conclude that every streaming platform should have an equal opportunity in this new world of digital content, so the true values of fair competition are preserved and viewers are not deprived of their opportunity to choose from different choices available online.

- **Regulation of Abuse of Dominant Position by OTT Platforms**

Competition law per se doesn't define dominance as bad but it is the abuse of the competition which is bad. Abuse of Dominant position occurs when a group or an enterprise uses its dominant position in the marketplace to exclude or exploit others.

Abuse includes –

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<sup>29</sup>Raaj Kamal Film International v. M/S Tamil Nadu Theatre Owners, Case No. 01 of 2013 Jan. 16, 2013 (India).

- Imposing unjust conditions or price
- Exploitative Pricing
- Circumscribing production/market
- Creating hurdles to entry and applying dissimilar conditions to similar transactions.
- Using its dominant position from one relevant market to enter into, or protect other relevant markets.

If any OTT platform is found indulged in any of these scenarios, it would be abusing its dominance in the market

Section 4(1) of the Competition Act, 2002 states, that there should be no abuse of dominant position by an enterprise. Thus, what needs to be proved is the abuse of the enterprise in the relevant market. There are three stages in determining the abuse; determination of the relevant market, determination of 'dominance', and the determination of 'abuse' of that dominant position.

For our purposes, the relevant market is the Film and Television Industry of India. This market has drastically changed post the Corona lockdown, because of the closed theatres. The bigger international streaming platforms with their financial muscles have been attracting the movies of the major production houses and therefore are getting better viewership and subscription base<sup>30</sup>. Therefore, it can be concluded that international streaming platforms have become dominant in the Indian market and there always is a need to check on them to detect abuse of dominance.

There are two major methods of determining abuse of dominance

1. The ability of an enterprise to function independently of competitive forces in the relevant market. One has to check the ability to work independently of the market forces and check whether it has the power to drive the existing competitors out of the market and impose restrictions and obligations on the captive consumer<sup>31</sup>. International platforms like Netflix

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<sup>30</sup>International Brands Rise to the Top of Indian Streaming Market (Sep 14, 2021, 03:21 AM) <https://www.statista.com/chart/23009/market-share-streaming--ott--platforms-in-India/>.

<sup>31</sup>M/S. Dlf Limited v. Competition Commission of India, May 19, 2014 (India).

and Amazon are on their way to achieving this level of power in the market, given their increasing market share in the Indian streaming industry.

2. The ability of an enterprise to control its consumers or competitors or the relevant market in its support. Such a position may level up the enterprise's power where it may freely adopt any strategy suited to increase profits over the competing forces or captures consumers in such a way that discourages new competition both in terms of competing firms and products. In a famous case<sup>32</sup>, the commission has said that when a specific player in the relevant market possesses a clear comparative advantage for performance in the form of financial resources, technical capabilities, brand, goodwill, etc. it would make it difficult for the competitors to sustain their business in the market, the enterprise would be in a position to create such a state of affairs which is beneficial to itself but would be deleterious to the competitors.

Since few of the streaming platforms have gained enough financial resources and licensing deals with the leading stars, production companies, directors, writers, etc. It would not be incorrect to say that they can alter the market conditions according to their suited needs.

- **Inquiry into Abuse of Dominant Position**

The Commission has the power to enquire into the Abuse of dominance by an OTT platform. Under Section 19 of the Act, the commission may inquire into an alleged contravention of section 4(1) of the Act that lays down abuse of dominance. Some factors which the Commission would need to keep in mind while dealing with the abuse of dominance are resources, the dependence of the consumers, size, entry barriers social obligations, and cost in the relevant geographic and product market according to Section (4).

After the inquiry, the Commission has the authority to order the to discontinue and not to enter into any such abusive agreement, modification of the agreement, pass any such orders or issue such directions, etc<sup>33</sup>

- **Penal Provisions**

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<sup>32</sup>Mcx Stock Exchange Ltd. &Ors v. National Stock Exchange of India, CASE NO. 13/2009 (India).

<sup>33</sup>The Competition Act, 2002, No (12 of 2003), Acts of Parliament, 2002, §27 (India).

Section 27(b) provides for the penalty which will be imposed on the enterprises engaged in abuse of dominant position. The proviso to this section provides for the breach of section 3 or 4 by a cartel or the abuse of a dominant position. It provides that when an agreement under Section 3<sup>34</sup> or 4 has been entered into by a cartel, the Commission may impose upon such producer, seller, distributor, trader, or service provider included in that cartel, a penalty of about thrice its profit for each year of the prolongation of such agreements or 10% of the total turnover for every year for the prolongation of such agreement, whichever is higher.

### **Constitutional outlook**

Our founding forefathers envisioned a country having ample opportunities for its people. The dream was to have a free market without having any room for a monopoly. In this era of global competition, every individual has a right to carry on any business, occupation, or profession that deems fit in the public realm. Today for an individual to make ends meet has to engage in different kinds of business activities or professions to attain prestige and dignity in the eyes of society. In this regards the Constitution of India has enshrined in Part III, Article 19(1)(g) that protect and allow Indian citizen “to practice any profession or to carry on any occupation, trade or business.” Though it is a fundamental right it is not an absolute one and is subject to certain reasonable restrictions for the interest of the general public. Thus, in the exercise of the right under Article 19(1)(g) reasonable restrictions can be imposed under Article 19(6). In **P.P Enterprises and ors v. Union of India**<sup>35</sup>, it was discussed that under Article 19(1)(g) of the Indian Constitution, every citizen has a right to practice any profession or carry on any business, occupation, or trade. However, the legislature has the authority to put reasonable restrictions on the aforesaid unfettered right by making a law imposing reasonable restrictions under clause (6) of Article 19. It was held that the Court in each case has to strike a proper balance between freedom guaranteed by Article 19(1)(g) and its restrictions given in clause (6) of Article 19. Article 301 of the Indian Constitution, read along with Article 302 and 304(b), empower the Parliament to enact suitable laws to reasonably restrict freedom of trade throughout the territory of India.

In **Harnam Singh v. R.T.A Calcutta Region**<sup>36</sup>, The Supreme Court held that under the Constitution's Article 19(1)(g)<sup>37</sup> no monopoly can be guaranteed based on an individual or

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<sup>34</sup>*Ibid.*

<sup>35</sup>P.P Enterprises and ors v. Union of India, (1982) 2 S.C.C. 33 (India).

<sup>36</sup>Harnam Singh v. R.T.A Calcutta Region, A.I.R. 1954 S.C. 190 (India).

<sup>37</sup>INDIA CONST. art. 19.

association wanting to carry on an occupation. This means that if competition is allowed in the business, then the authorities should not hesitate to impose a ban on it if a monopoly is found. Article 19(1)(g) does not guarantee a monopoly to individuals to carry on any occupation but works for the betterment and welfare of its citizens practicing trade and profession. Not getting an equal opportunity to trade in the OTT sector, is a clog on the rights of the trade, commerce, and intercourse of the rights of the small-scale streaming services as provided in Article 301 of the Indian Constitution.

A.V Dicey in his concept of Rule of Law has clearly stated that the only supreme force a country can have is the Law of the land, it excludes any form of arbitrariness in the governance of the country; this principle has been enshrined in Article 14 of the Indian Constitution wherein it is stated that there would be no denial of equality before the law or equal protection of the law. If the small-scale players in the market are not protected by the antitrust authorities it would be violative of Article 14<sup>38</sup> of the Indian Constitution. Given this, the State must strive to maintain equality in every sector of governance, be it the market, public places, religious institutions, etc. Therefore, the Indian Government and the antitrust authorities must look into the matter of inequalities that are spreading in the Indian OTT market.

The directive principles of State policy serve as an inspiration to the Competition Act, specifically Articles 38<sup>39</sup> and 39<sup>40</sup> of the Indian Constitution which aims at securing a just and social market economy<sup>41</sup> for the welfare of the people. There is a requirement for more government intervention and prudence, to constantly keep the free market economies of the Entertainment Industry under surveillance so that the dominating market players hesitate before involving in any collusive agreements.

## **Conclusion**

It is not said that there is not enough legislation to deal with the cartel behavior but the lack of vigilance on the part of the competent authorities is causing the growth spur of the OTT Cartels. This new sector is still immensely untouched by the clutches of the antitrust authorities, which

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<sup>38</sup>INDIA CONST. art 14.

<sup>39</sup>INDIA CONST. art 38.

<sup>40</sup>INDIA CONST. art 39.

<sup>41</sup>COMMUNICATION FROM INDIA (Nov. 19, 1981, 08:52 AM), <https://commerce.gov.in/international-trade/india-and-world-trade-organization-wto/indian-submissions-in-wto/competition-policy/communication-from-india-3/>.

has given the people with the resources in the industry, the illusion that they can go on making huge profits by indulging in anti-competitive agreements.

The government has to devise a mechanism to constantly keep a check on the licensing of movies and shows by the production houses and as has been evident from the case of Columbia Pictures that if the dominant players in the market start exercising their influence to alter the market conditions in their favor, it is the market, the government, and the customer who are at loss.

Cartel agreements by the more powerful streaming platforms are also against our Constitutional provision of the State striving to minimize income inequalities and to secure a welfare model in which justice, social, economic, and political shall inform all the institutions of the national life<sup>42</sup>. The economy would also be adversely affected because of this cartel behavior, given the level of employment would drastically be affected if the number of players in the market is reduced to three or four, enabling the concentration of wealth in the hands of fewer enterprises. Also, a lot of artistic talent in the country needs a platform to showcase their abilities; a reduction in the number of competitive streaming platforms would deprive them of their chance or opportunity to do so. With big entities controlling the market, it is easy to fix prices causing predatory pricing in the market sphere, clearly eliminating the entry of new and smaller players to bring to light Artistic talent.

Taking advantage of their stronghold in the market, the dominating platforms also happen to defy the labor laws; engaging artists by signing unilateral contracts suited to their needs. Associations working for the actors and artists in India like CINTAA<sup>43</sup> need to be made aware of these collusive agreements so that the artists are not exploited. The producers and filmmakers also need to be warned of indulging in any such agreement which is against the free-market policies.

So, it is high time the collusion and cartelization in the OTT sector are checked and regulated. The antitrust authorities should consider the seriousness of the issue and how if not timely resolved, would lead to complete anarchy in the streaming sector.

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<sup>42</sup>INDIA CONST. art 39.

<sup>43</sup> CINTAA, <https://www.cintaa.net/>.

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KOLKATA**

**E : crsgpp@nujs.edu**

**B : <https://nujs.edu/nujs-crsgpp.html>**

**P: +91(033) 2335 7379 (Ext. 7210)**